122 FERC ¶ 61,169
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Jersey Central Power & Light Company — Docket No. EL05-50-003

v.

Atlantic City Electric Company, Delmarva Power & Light Company, PECO Energy Company and Public Service Electric and Gas Company

ORDER AFFIRMING INITIAL DECISION

(Issued February 22, 2008)

1. In this order, the Commission affirms in all respects the Initial Decision issued in this case on March 8, 2007.[1] The Commission denies the exceptions requested by Jersey Central Power & Light Company (JCP&L), and by Atlantic City Electric Company (Atlantic City), Delmarva Power & Light Company (Delmarva), PECO Energy Company (PECO) and Public Service Electric and Gas Company (PSEG) (jointly, LDV Owners).

I. **Background**

A. **Lower Delaware Valley Agreements**

2. In 1977, JCP&L and the four LDV Owners were vertically-integrated utilities in the Lower Delaware Valley (LDV). Each utility owned or planned to construct nuclear generating plants. The LDV Owners were owners of the existing Peach Bottom and Salem plants, and JCP&L intended to construct a plant at Forked River. Each company wished to integrate its generating facilities into the existing 500 kV transmission system.

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[1] *Jersey Central Power & Light Company* v. *Atlantic City Electric Company, Delmarva Power & Light Company, PECO Energy Co and Public Service Electric and Gas Company*, 118 FERC ¶ 63,027 (2007) (Initial Decision).

To accomplish this goal, the parties entered into a series of contracts (the LDV Agreements), relating to the joint LDV transmission system.

1. LDV Agreement

3. On September 13, 1977, JCP&L and the four LDV Owners signed the LDV Agreement, which was intended to extend until 2017. Under the LDV Agreement, each party agreed to provide certain portions of the LDV transmission system, and make those portions available to the other parties to the LDV Agreement without charge.[2]

4. The LDV Agreement included separate schedules setting forth the facilities that each party to the agreement would be required to provide. At the time that the parties entered into the LDV Agreement, the 500 kV facilities that the LDV Agreement required the LDV Owners to construct and make available had all been placed into service.[3] Schedule 4 required JCP&L to construct five separate facilities:

- the Forked River Switching Station;
- the New Freedom-Forked River Line from New Freedom Substation to the Forked River Switching Station;
- the Forked River-Smithburg Line from the Forked River Switching Station to the Smithburg Substation;
- the Smithburg Substation; and
- the Smithburg-Deans Line from the Smithburg Substation to the Deans Substation;

JCP&L could also meet its obligations under the LDV Agreement by constructing "such alternative facilities as are mutually agreeable among the signatories."[4]

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[2] *Jersey Central Power & Light Company* v. *Atlantic City Electric Company, Delmarva Power & Light Company, PECO Energy Co and Public Service Electric and Gas Company*, 111 FERC ¶ 61,179 at P 2-3 (2005) (Order Denying Complaint).

[3] LDV Owners Brief on Exceptions at 10.

[4] LDV Agreement, Schedule 4, at 1-2 (JCP&L “shall construct and make available the following LDV facilities or such alternative facilities as are mutually agreeable among the signatories with respect to” the Forked River Switching Station, the New Freedom-Forked River Line, and the Forked River-Smithburg Line).

5. JCP&L constructed the Smithburg-Deans Line and the Smithburg Substation, but has not constructed the three other facilities. These other facilities are known as the "Seashore Loop."[5]

2. Smithburg Agreement

6. Simultaneously with entering into the LDV Agreement, the parties also entered into the Smithburg Substation Supply Agreement (Smithburg Agreement). In that agreement the parties stated that, pending completion of all of the facilities JCP&L was required to provide under the LDV Agreement, JCP&L wished to use LDV facilities provided by the other LDV Owners to supply capacity and energy to its Smithburg substation. JCP&L agreed to make monthly payments of 1.25 percent of 25 percent of the cost of these facilities to the other parties. The Smithburg Agreement provided that when JCP&L placed in service the New Freedom-Forked River Line and the Forked River-Smithburg Line, the Smithburg Agreement would terminate and payments under it would cease.[6]

3. LDV Supplemental Agreement

7. In 1990, the parties to the LDV Agreement entered into the LDV Supplemental Agreement. They acknowledged at that time that JCP&L had cancelled its plan to construct the Forked River nuclear plant, and that the federal government and the state of New Jersey had promulgated new environmental regulations that would affect JCP&L's ability to construct the Seashore Loop. Nonetheless, the parties extended the term of the LDV Agreement until 2027, stating that they wished to amend the agreement to provide for, among other things, the accommodation of alternative routing for the Seashore Loop.[7]

4. East Windsor Agreement

8. At approximately the same time that they executed the LDV Supplemental Agreement, the LDV parties also entered into the East Windsor Substation Supply Agreement (East Windsor Agreement). The parties stated that, pending completion of the facilities JCP&L was to provide under the LDV Agreement, JCP&L wished to make use of the LDV facilities provided by others to supply energy and capacity to its substation at East Windsor. JCP&L therefore agreed to make an annual payment to the

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[5] Initial Decision at P 3-4.

[6] Smithburg Agreement, Article II, section 2.1, at 2; Article III, section 3.2, at 4.

[7] LDV Supplemental Agreement at 2-3.

other parties of $3.2 million in equal monthly installments.[8] The East Windsor Agreement and payments thereunder would terminate upon the completion by JCP&L of all the facilities it was to provide under Schedule 4 of the LDV Agreement, or the termination of the LDV Agreement. However, in the event that JCP&L had not placed those facilities in service by December 31, 2000, JCP&L's annual payment under the East Windsor Agreement could be "subject to review and appropriate adjustment by the LDV Administrative Committee,"[9] which consists of representatives of all five signatories to the LDV Agreements.

B. <u>Order Denying Complaint</u>

9. JCP&L filed the instant complaint on December 30, 2004. It stated that it has made approximately $67.6 million in payments to the other LDV parties under the Smithburg and East Windsor Agreements for the use of certain LDV facilities. These payments are predicated on JCP&L's obligation to construct the Seashore Loop. JCP&L stated that it should no longer be obligated to either make payments for transmission service under the Smithburg and East Windsor Agreements, or construct the Seashore Loop pursuant to its obligation under the LDV Agreement. It asked the Commission to terminate the Smithburg and East Windsor Agreements, and eliminate JCP&L's obligation to construct the Seashore Loop under the LDV Agreement.

10. The Commission issued its order denying the complaint on May 6, 2005. JCP&L had argued that its payments should be terminated because they were transmission payments for the use of the facilities, which should have been terminated when PJM was formed. The Commission rejected that characterization of the payments, finding that the payments made by JCP&L under the Smithburg and East Windsor Agreements were not payments for the use of the LDV Owners' transmission facilities but, rather, were payments made as part of a cost sharing agreement between the parties. The Commission stated:

> JCP&L's obligations to pay for the use of certain LDV facilities under the Smithburg and East Windsor Agreements cannot be carved out of and considered separately from the overall agreement among the five signatories to share the costs of the LDV system, as memorialized in the LDV, Smithburg and East Windsor Agreements. At the time that the parties entered into the LDV Agreement, JCP&L and the other four LDV signatories were vertically integrated utilities that needed both transmission and generation to serve their

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[8] East Windsor Agreement, Exhibit 3 to Complaint, Article II, at 3.

[9] East Windsor Agreement, Article III, at 4-5.

> customers: thus, it appears that the *quid pro quo* to each signatory, in return for the facilities and investment that it contributed to the LDV System, was the use of the transmission facilities and investment contributed by the other signatories.[10]

11. The Commission then found that, while the other four LDV Owners had fulfilled their commitments, JCP&L had failed to meet its commitment to construct the Seashore Loop facilities. Thus, the Commission stated:

> JCP&L's payments under the Smithburg and East Windsor Agreements are not simply payments for JCP&L's use of other parties' LDV facilities. Rather, those payments compensate the other LDV parties for the fact that JCP&L is using the facilities that the other parties contributed to the LDV system, while JCP&L has not completed its own required contribution to the LDV system. . . . Therefore, these payments are part of an overall cost sharing scheme, rather than being simply payments for transmission use.[11]

12. To support this position, the Commission pointed to the determination it made with regard to the LDV Agreement and a number of similar agreements (collectively, the EHV Agreements) in 1997 at the time that PJM Interconnection, L.L.C. (PJM), of which all five parties are members, was restructured from a power pool into an Independent System Operator (ISO). As a result of this transition, PJM itself, rather than its member utilities, would become the provider of transmission service over those members' facilities. In its 1997 order, the Commission addressed the question of how transactions under the EHV Agreements would comply with PJM's open access rule:

> The EHV Agreements establish the rights to specific transmission services, primarily the transmission of power from jointly owned generating units to their owners throughout the PJM Control Area. The EHV Agreements establish a cost sharing formula which, as a general matter, requires each transmission user to share in the costs of the high voltage facilities on the same basis as its usage.[12]

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[10] Order Denying Complaint at P 19.

[11] *Id.* P 20, footnote omitted, emphasis in original.

[12] *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 at 62,279 (1997) (PJM Restructuring Order).

13. In that proceeding, one party (PECO, which is one of the LDV Owners) had argued that the EHV Agreements should be terminated entirely. Other parties, however, proposed to amend the EHV Agreements to make the use of the signatories' facilities available under the PJM Open Access Transmission Tariff (OATT). Those parties argued that "most of the remaining provisions of these agreements concern the parties' cost sharing arrangements . . . [and] each of the PJM Companies installed facilities pursuant to the EHV Agreements subject to the express understanding that the other companies would contribute to, and that it would be fully compensated for, the costs of those facilities."[13]

14. For this reason, the Commission found that it was appropriate to continue the cost sharing arrangements of the EHV Agreements, rather than terminating those agreements:

> The EHV Agreements [were] intended to effect a form of joint ownership. Rather than owning all of the transmission facilities jointly, the parties agreed to own a portion of the facilities and to support the cost of facilities owned by others in a percentage equal to their use. Elimination of the support charges would relieve those that chose support payments of any further cost responsibility, while at the same time increasing the cost responsibility of those that chose construction.[14]

Thus, the Commission found in the PJM Restructuring order, it would be unreasonable to eliminate the parties' payments under the EHV Agreements.[15]

15. Relying on the PJM Restructuring Order, in this proceeding, the Commission rejected JCP&L's argument that these agreements should be abrogated as transmission agreements, concluding that "JCP&L's payments under the Smithburg and East Windsor Agreements, which are predicated on JCP&L's non-fulfillment of its construction

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[13] *Id.*

[14] *Id.* at 62,280, footnotes omitted.

[15] We note that in 2007 we again considered the question of altering the allocation of costs of facilities under all of the EHV Agreements as we ruled on the continuing justness and reasonableness of PJM's rate design, and we concluded there that we need not address that question, since we were retaining PJM's existing rate design for existing transmission facilities. *PJM Interconnection, L.L.C.*, Opinion No. 494, 119 FERC ¶ 61,063, at P 94 (2007) (Opinion No. 494), *reh'g pending*.

responsibilities under the LDV Agreement, are cost sharing payments rather than transmission use payments."[16]

16. The Commission then addressed JCP&L's argument that it should be relieved of its payment obligations under the Smithburg and East Windsor Agreements due to the impossibility of constructing the Seashore Loop. JCP&L argued that "it has become clear that the state of New Jersey will not authorize the construction of the Seashore Loop, since a portion of that loop will go directly through the environmentally sensitive Pinelands area of New Jersey." JCP&L further argued that construction of the Seashore Loop could only proceed pursuant to PJM's Regional Transmission Expansion Planning (RTEP) process, under which PJM sets the order of priority in which new projects are constructed within PJM, and that, in going through the RTEP process, PJM has not designated the Seashore Loop as a "necessary" project.[17]

17. The Commission rejected the impossibility of performance argument, finding that "[t]he agreements contemplate the possibility that the construction of the Seashore Loop could not be completed and provide options to JCP&L" in the event of non-completion of the Seashore Loop,[18] which options included making payments or constructing alternate routes. The Commission also rejected JCP&L's contention that it should be relieved of its payment obligations on the basis that it had, in fact, built alternative facilities to the Seashore Loop.[19]

18. Finally, the Commission addressed the appropriate standard of review for changes to the LDV Agreements. JCP&L had claimed that, as a transmission customer, its request to alter the terms of its contracts with the LDV Owners should be considered under the "just and reasonable" standard of the Federal Power Act (FPA). The LDV Owners, on the other hand, asserted that JCP&L's complaint should be governed by the more stringent *Mobile-Sierra* "public interest" standard,[20] under which, if two parties enter into an agreement under which they give up their right to seek contract changes, the terms of that contract can be changed only if such change is required by the "public interest." The Commission stated that it found no need to determine whether the public

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[16] Order on Complaint at P 23.

[17] *Id*. P 25.

[18] *Id*. P 27.

[19] *Id.* P 32.

[20] *See United Gas Pipe Line Co. v. Mobile Gas Service Corp*., 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co*., 350 U.S. 348 (1956).

interest standard applied here, since even under the less strict "just and reasonable" standard, JCP&L was not entitled to abrogate the agreement. The Commission stated:

> As noted above, when the Commission considered this issue in the PJM Restructuring Order, we found that the proposed revisions to a group of agreements including the LDV Agreement were "reasonable," and that the proposed amendments were "reasonable to the extent that they place the use of these facilities under the PJM Transmission Tariff" and retained the cost sharing arrangements that the Commission had found to be reasonable.
>
> JCP&L has failed to show that the charges it is paying to the other LDV signatories are unjust and unreasonable. JCP&L voluntarily entered into agreements with liquidated damages provisions that would apply in the event that JCP&L failed to fulfill its obligations under the agreements. The Commission finds no basis to overturn such a provision well after the fact based on new cost figures. The purpose of such a liquidated damages provision is that calculating future damages is uncertain and such a provision provides all the parties with certainty as to the costs of non-compliance.[21]

19. On this basis, the Commission denied JCP&L's complaint.

C. **<u>December Rehearing Order</u>**

20. On December 2, 2005, the Commission issued an order granting and denying rehearing, and setting certain questions for hearing.[22]

21. The Commission again rejected all of JCP&L's claims that it should be permitted to obtain relief from its payment obligations under the terms of the LDV Agreements themselves. It reiterated that the PJM Restructuring Order did not terminate JCP&L's obligations under these contracts. The Commission further found that the LDV Agreements established cost sharing mechanisms under which parties could choose to support the construction of facilities either through constructing the facilities themselves, or by making financial contributions to those facilities. The Commission noted that the

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[21] Order Denying Complaint at P 36-37.

[22] *Jersey Central Power & Light Company* v. *Atlantic City Electric Company, Delmarva Power & Light Company, PECO Energy Co and Public Service Electric and Gas Company*, 113 FERC ¶ 61,237 (2005) (December Rehearing Order).

PJM Restructuring Order specifically addressed the LDV Agreement, and that JCP&L had been on notice that the nature of its payments under those Agreements had been raised there.[23] The Commission then reaffirmed its holding that: (1) the Smithburg and East Windsor Agreements required JCP&L to make payments that cover some portion of the costs of the facilities built by the other signatories; (2) JCP&L's payments were in lieu of constructing facilities and those payments were therefore "cost sharing payments" within the meaning of the PJM Restructuring Order; and (3) the Commission would not terminate the agreements.[24]

22. The Commission then turned to the question of whether it had become impossible for JCP&L to construct the Seashore Loop or mutually agreeable alternative facilities. It reiterated that "the Smithburg and East Windsor Agreements expressly provided for the possibility that JCP&L would not be able to construct the Seashore Loop, and therefore provided JCP&L with another option for compliance."[25]

23. The Commission also found, however, that under section 3.3 of the East Windsor Agreement, the parties are obligated to reconsider JCP&L's payment obligations under that agreement in the event that it cannot build the required facilities. Therefore, the Commission stated it would set for hearing "the question of whether JCP&L's payment obligations under the East Windsor Agreement should be adjusted" on the basis of impossibility.[26] The Commission noted that, while this was not the case with regard to the Smithburg Agreement:

> [T]he East Windsor Agreement contains a clause requiring the parties to review and, if necessary, adjust JCP&L's payments if JCP&L does not place into service all of the facilities it is required to build by the LDV Agreement by December 31, 2000.[[27]] In the May 6 Order, the Commission

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[23] *Id*. at P 18-19.

[24] December Rehearing Order at P 21, *citing* PJM Restructuring Order at 62,279.

[25] December Rehearing Order at P 48, *citing* Order Denying Complaint at P 27.

[26] December Rehearing Order at P 56.

[27] Section 3.3 of the East Windsor Agreement provides that:

> in the event that [JCP&L] has not placed in service by December 31, 2000 the facilities it is to provide under Schedule 4 of the LDV Agreement, the annual payment in Section 2.1 and the allocation in Section 2.2 shall be subject to review and appropriate adjustment by the LDV

> noted that the LDV Committee had committed to conduct a review of that question within six months of the issuance of an order dismissing the complaint. However, the Commission has received no information that that review has been performed. Thus, the Commission is here establishing settlement judge and hearing procedures to examine whether JCP&L's assertion that it is unable to obtain approval from the state of New Jersey and PJM to construct the Seashore Loop should serve as reasonable grounds for adjusting JCP&L's payment obligations under the East Windsor Agreement, pursuant to section 3.3.[28]

24. The Commission then stated that it was also setting for hearing, "with regard to a determination of JCP&L's continuing payment obligations under both the Smithburg and East Windsor Agreements," the question of whether facilities already built by JCP&L constituted alternatives to the Seashore Loop.[29] The Commission further noted that, as a result of PJM's restructuring into an organization that would be the provider of transmission service over its members' facilities, the LDV Owners' incentive to agree that any other facilities might be acceptable alternatives to the Seashore Loop had changed:

> At the time the LDV Agreement was signed, the Agreements' provision for construction of "mutually agreeable" alternative facilities provided protection to JCP&L, because the other transmission owners had an incentive to accept facilities as reasonable alternatives in order to obtain access to those facilities as shared facilities. The restructuring of PJM, however, has eliminated an incentive for the other parties to

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> Administrative Committee in accordance with Article VIII of the LDV Agreement.

Article VIII of the LDV Agreement, in turn, provides at section 8.4 that:

> [s]hould the installation or completion of any facilities described in the attached schedules be cancelled or delayed by a signatory for any cause and the cancellation or delay of such facilities materially affects the proportional use of the LDV facilities as planned on a continuing basis, a reallocation shall be made of the payments provided for in Article V.

[28] December Rehearing Order at P 56, footnote omitted.

[29] *Id.* P 57.

> agree, since they can use any facilities by paying their zonal charges under the PJM OATT.[30]

25. The Commission found that, given this fact, a determination should be made by an impartial party as to whether facilities that JCP&L had constructed or planned to construct could qualify as reasonable alternatives to the Seashore Loop. The Commission therefore set this question for hearing. It further stated:

> In considering whether facilities are reasonable alternatives, the hearing needs to consider the effect of PJM's RTEP process on determining whether facilities are necessary, and whether, in light of those determinations, other JCP&L facilities should be found to be reasonable alternatives.[31]

D. <u>September Rehearing Order</u>

26. On September 21, 2006, the Commission denied a request for rehearing of the December Rehearing Order by the LDV Owners.[32] The LDV Owners argued that JCP&L could not demonstrate at hearing that it was entitled to an impossibility defense to excuse its payment obligations under the East Windsor Agreement, because the pleadings already showed that performance of JCP&L's contract obligations was not impossible. According to the LDV Owners, JCP&L always had the choice of either building the Seashore Loop or acceptable alternative facilities, or compensating the LDV Owners for its failure to do so by making financial payments, so it could not assert "impossibility of performance" of its contract obligations. Further, the LDV Owners stated that, contrary to JCP&L's assertion, PJM has never blocked JCP&L's construction of the Seashore Loop.[33]

27. The Commission ruled, with regard to the impossibility issue, that:

> [The LDV Owners] maintain that the issue of impossibility of performance should be resolved summarily as a matter of law because it was not strictly impossible for JCP&L to perform.

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[30] *Id*.

[31] *Id*. P 58.

[32] *Jersey Central Power & Light Company* v. *Atlantic City Electric Company, Delmarva Power & Light Company, PECO Energy Co and Public Service Electric and Gas Company*, 116 FERC ¶ 61,256 (2006) (September Rehearing Order).

[33] September Rehearing Order at P 6.

> But there is a material issue of disputed fact as to whether JCP&L could have constructed the Seashore Loop and whether it was entitled to adjustment under section 3.3 of the East Windsor Agreement.[34]

28. The Commission also found that the rehearing request was, itself, raising a question of fact: whether PJM has withheld or is likely to withhold approval of the Seashore Loop. The Commission stated that the question of whether an adjustment to payment obligations was appropriate "goes beyond the scope of legal impossibility of performance, and should be decided based on the record in the hearing,"[35] but that respondents retained the right to make, at hearing, any legal arguments that they considered relevant to deciding this issue.[36]

29. The Commission further stated that, with respect to JCP&L's request in its Answer for clarification of the scope of the hearing and whether it was entitled to credit for facilities it had already constructed, "JCP&L is free to raise this issue at the hearing for determination by the administrative law judge."[37]

E. Initial Decision

30. On March 8, 2007, the Administrative Law Judge (ALJ) issued his Initial Decision in this matter. The Initial Decision found that the primary issues set for hearing were whether: (1) JCP&L's payment obligations under the East Windsor Agreement should be reduced or terminated under Section 3.3 of that agreement as a result of its inability to build facilities, due either to impossibility or other reasons; (2) JCP&L's construction of facilities should be deemed alternative facilities under the LDV Agreement; and (3) JCP&L is entitled to credit for facilities that it has constructed.[38] The ALJ found against JCP&L in all of its claims.

31. JCP&L and the LDV Owners both filed exceptions to the Initial Decision. JCP&L raises exceptions to two rulings in the Initial Decision: impossibility, and crediting. It also asserts that, with regard to the impossibility issue, the ALJ misapplied the *Mobile-Sierra* standard. The LDV Owners raise only one exception to the Initial Decision. They

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[34] September Rehearing Order at P 13.

[35] *Id.*

[36] *Id.*

[37] *Id.* P 15.

[38] Initial Decision at P 12.

state that, assuming *arguendo* that the Comission grants JCP&L a credit, the ALJ erred in his ruling with regard to the cost allocation methodology for crediting.

II. <u>Discussion</u>

32. This case revolves around a series of contracts entered into by the parties under which each party was responsible for constructing certain facilities, and then sharing the use of those facilities with the other parties. The contracts specifically provided that in the event required facilities were not constructed, parties would make payments to substitute for their failure to construct required facilities.

33. JCP&L failed to construct its required facilities and had been making payments until 2004 when it filed a complaint contending its payment obligation should cease. In the PJM Restructuring order, and in the orders on the complaint, the Commission found that the establishment of PJM as an ISO did not operate to terminate payment obligations under these pre-existing so-called "cost sharing" agreements between the parties, because, as the Commission stated in the PJM Restructuring Order "elimination of the support charges would relieve those that chose support payments of any further cost responsibility, while at the same time increasing the cost responsibility of those that chose construction."[39]

34. However, the Commission found that two questions regarding the provisions of these parties' agreements required further fact-finding. First, the Commission set for hearing "whether JCP&L's assertion that it is unable to obtain approval . . . to construct the Seashore Loop should serve as reasonable grounds for adjusting JCP&L's payment obligations under the East Windsor Agreement, pursuant to section 3.3,"[40] since under section 3.3 of the East Windsor Agreement, if JCP&L failed to put the requisite facilities into service, its annual payments were subject to review by the Administrative Committee. Second, the Commission set for hearing the question of whether JCP&L had constructed such acceptable alternative facilities pursuant to schedule 4 of the LDV Agreement, which permitted JCP&L to substitute alternative facilities for the construction of the Seashore Loop as mutually agreed among the signatories. Because both of these provisions could have resulted in a reduction in JCP&L's payment obligation, and the circumstances under which such relief was appropriate were unclear,[41]

[39] PJM Restructuring Order at 62,280.

[40] December Rehearing Order at P 56.

[41] Both of these provisions rely on a good faith determination by the Administrative Committee. The Commission found that when contract provisions require parties to act in good faith, it may be necessary for a court, or the Commission, to ascertain whether the party invested with discretion exercised that discretion in good faith. December Rehearing Order at P 56 & n.52.

the Commission established this hearing to consider whether relief was appropriate under those provisions.

35. The ALJ found at hearing that JCP&L was not entitled to adjustments under these agreements after considering the agreements as well as extrinsic evidence of the parties' intent. JCP&L did not file exceptions to the ALJ's determination regarding the construction of alternative facilities. We affirm the ALJ's findings with respect to the remainder of the provisions.

A. Applicability of Section 3.3 of the East Windsor Agreement to Grant Relief Sought by JCP&L

36. In the December Rehearing Order, the Commission rejected JCP&L's general impossibility defense, finding that the East Windsor Agreement itself contemplates the possibility that the facilities will not be completed and, in effect, constitutes a liquidated damages provision that covers the possibility of adjustments if the Seashore Loop is not constructed. The Commission, however, recognized that section 3.3 of the East Windsor Agreement provided for possible adjustments in the event that JCP&L could not complete the facilities by December 31, 2000, and established "settlement judge and hearing procedures with respect to: whether JCP&L's payment obligations under the East Windsor Agreement should be reduced or terminated under section 3.3 of that Agreement as a result of its inability to build its facilities whether due to impossibility of performance or other reasons."[42]

1. Initial Decision

37. Schedule 3.3 of the East Windsor Agreement provides that:

> If any capital improvements, betterments, replacements, reinforcements or additions are made to the Salem-Deans line which are required by any statute or ordinance; judicial degree or order, rule, regulation, or other lawful requirement of any administrative body or which are deemed necessary by the LDV Administrative Committee that results in a 5% or more increase in the present investment value of the facilities that comprise the Salem-Deans line and associated terminal facilities ($107,109, 633), the payment that JC makes to the other signatories of this Agreement will increase to reflect this change.

[42] December Rehearing Order at P 53.

> In the event that JCP&L has not placed in service by December 31, 2000 the facilities it is to provide under Schedule 4 of the LDV Agreement, the annual payment in Section 2.1 and the allocation in Section 2.2 shall be subject to review and appropriate adjustment by the LDV Administrative Committee in accordance with Article VIII of the LDV Agreement.[43]

At hearing, JCP&L argued that this "review and appropriate adjustment" language permitted the LDV Administrative Committee to adjust its payments downward, or to terminate them altogether, in appropriate circumstances. The LDV Owners argued that, while Section 3.3 could be used to decrease JCP&L's payments, the provision was intended to adjust the payments "most likely up."[44]

38. The Initial Decision found that Section 3.3 of the East Windsor Agreement provides the authority to reduce, but not to terminate, JCP&L's payments.[45] The ALJ found that "[a]s Section 3.3 references Article VIII of the LDV Agreement, but does not specify the part of Article VIII to which it refers, this presents an ambiguity in the contract upon which the parties cannot agree."[46] To resolve this ambiguity, the ALJ relied on the statements of the LDV Owners' witness Hebson, who had participated in the negotiations leading to the execution of the East Windsor Agreement in 1990. Mr. Hebson stated that JCP&L's payments to the LDV Owners under the East Windsor Agreement were based on the projected amount of JCP&L's usage, and at that time the LDV Owners were concerned that JCP&L might increase its usage of the LDV system, and added section 3.3 to the East Windsor Agreement to ensure that they could exercise their right under section 8.4 of the LDV Agreement to adjust JCP&L's payment amounts if JCP&L increased its usage of the system. The ALJ found Mr. Hebson highly credible since he was the only witness who participated in negotiating the East Windsor Agreement, and stated that his testimony provided the most logical explanation of the parties' intent in drafting section 3.3.[47] The ALJ further concluded that Section 3.3

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[43] East Windsor Agreement, Section 3.3.

[44] Initial Decision, *citing* LDV Owners Reply Brief at 11-12.

[45] Initial Decision at P 30-31.

[46] *Id.* at P 42.

[47] *Id*. at P 44-45.

"*could* authorize a reduction in JCP&L’s payments," but that JCP&L had not provided a compelling reason as to why the payments should be reduced.[48]

2. **JCP&L's arguments on exceptions**

39. JCP&L challenges the ALJ's finding that, under section 3.3 of the East Windsor Agreement, adjustments will be made in accordance with Article VIII of the LDV Agreement. According to JCP&L, the ALJ erred in finding that the reference to Article VIII in Section 3.3 is a reference to section 8.4 of the LDV Agreement.[49] JCP&L disagrees with the ALJ’s conclusion that section 8.4 would, in fact, compel an increase, rather than a decrease, in JCP&L's payments under the East Windsor Agreement. JCP&L states that this conclusion is contrary to the plain language of the LDV Agreement, which makes clear that section 8.4 concerns adjustments to payments under Article V. JCP&L further asserts that the reference to Article VIII is, in fact, a reference to section 8.3 of that article, which provides that "the [LDV system] may be used for purposes compatible with but other than the delivery of energy and capacity from Peach Bottom, Salem and Forked River for the respective owners thereof to their underlying transmission systems . . . [and a]n appropriate allocation of payments shall be made for such additional use."[50] JCP&L argues that it does not deliver energy and capacity from Peach Bottom, Salem or the Forked River Plant, and thus its use of the LDV System is for the “other” purposes specified in Section 8.3, and that JCP&L's payments are made for this other use.[51] Thus, JCP&L states, the Commission should reverse the Initial Decision and rule that it is reasonable to modify JCP&L's payment obligations under section 3.3 of the East Windsor Agreement, on the basis of impossibility.

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[48] *Id*. P 47, emphasis added.

[49] Section 8.4 of the LDV Agreement states that:

> Should the installation or completion of any facilities described in the attached schedules be cancelled or delayed by a signatory for any cause and the cancellation or delay of such facilities materially affects the proportional use of the LDV facilities as planned on a continuing basis, a reallocation shall be made of the payments provided for in Article V.

[50] Section 8.3, LDV Agreement.

[51] JCP&L brief on exceptions at 37-38.

3. LDV Owners' Arguments Opposing Exceptions

40. The LDV Owners state that, because section 3.3 is not clear on its face, it is appropriate to look at extrinsic evidence to analyze its meaning. They point to the testimony of their witness, Mr. Hebson, who participated in negotiating the East Windsor Agreement in 1990, cited above, to show that section 3.3 was intended to protect the LDV Owners against an inadequate payment stream if JCP&L, for whatever reason, failed to fulfill its construction obligations and continued to rely on the LDV System instead.[52]

4. Commission Ruling

41. We affirm the ALJ's finding that section 3.3 of the East Windsor Agreement would permit JCP&L's payments under the East Windsor Agreement to decrease, but does not require such a reduction in the event that JCP&L has not placed these facilities into service.

42. Section 3.3 of the East Windsor Agreement provides only that in the event facilities are not constructed, the annual payments by JCP&L would be "subject to review and appropriate adjustment by the LDV Administrative Committee under Article VIII of the LDV Agreement." By its terms, we agree with the ALJ that while the Administrative Committee could reduce JCP&L's payments under this provision, there is nothing in the agreements that requires such adjustment.

43. The first paragraph of section 3.3 clearly refers to increasing JCP&L's required payments in the event of cost increases, which suggests that the provision was included to protect the other LDV owners in the event that the costs of the LDV facilities that JCP&L was using would increase. The second paragraph, the one at issue here, contemplates that if JCP&L fails to build its required facilities, further adjustments can be made. When read in connection with the first paragraph, this paragraph would suggest that JCP&L's payments might also increase in the event that it fails to build required facilities.

44. Section 3.3 states that such adjustments would be made in accordance with Article VIII of the LDV agreement, but did not specify what provision of Article VIII should be applied. The parties dispute whether the reference in section 3.3 to Article VIII of the LDV Agreement is to section 8.3 or 8.4 of the LDV Agreement. JCP&L argues that the appropriate reference is to Section 8.3, which states:

> With the prior approval of the signatories, the [LDV System] may be used for purposes compatible with but other than delivery of energy and capacity from Peach Bottom, Salem

[52] LDV Owners brief opposing exceptions at 36-37.

> and Forked River for the respective owners thereof to their underlying transmission systems, provided there is no impairment of planned reliability of the regional transmission system or existing services provided by [the LDV System]. An appropriate allocation of payments shall be made for such additional use.

45. The LDV Owners maintain that the appropriate reference is to section 8.4, which states:

> Should the installation or completion of any facilities described in the attached schedules be cancelled or delayed by a signatory for any cause and the cancellation or delay of such facilities materially affects the proportional use of the LDV facilities as planned on a continuing basis, a reallocation shall be made of the payments provided for in Article V.

46. Section 8.3 applies to usage of the LDV system beyond that originally contemplated and provides for an allocation of costs for such use. This provision, therefore, also envisions that if a party makes a greater use of the facilities than was provided for originally, that will result in a larger allocation of costs to that party. However, it says nothing about a reduced allocation for failure to build facilities. If anything, this provision would be consistent with charging JCP&L more if its use of the LDV facilities increased.

47. Section 8.4 does address the failure to complete facilities, but appears to refer only to a reallocation of costs based on differences in proportional use of the LDV facilities as a result of a cancellation or delay in building the required facilities. Thus, it too seems to contemplate a greater allocation of costs to a party that is making greater use of the LDV facilities, rather than a reduction in costs for failing to construct.

48. The ALJ concluded, and we agree, that section 3.3 of the East Windsor Agreement is ambiguous, and looked at extrinsic evidence as to the parties' intent in drafting the agreement. The ALJ found credible the testimony of Mr. Hebson, one of the principals involved in the negotiation of these agreements. Mr. Hebson testified that the reason the parties included section 3.3 of the East Windsor Agreement was not to reduce JCP&L's required payment; rather, it was to ensure that under section 8.4, JCP&L would be subject to a larger allocation of costs if it increased its proportional use of the facilities:

> The LDV Owners thus wanted to explicitly incorporate in the East Windsor Agreement the rights they enjoyed under Article VIII of the LDV Agreement to effect an appropriate adjustment in JCP&L's annual payment in the event that JCP&L continued to rely on the LDV System without

> satisfying its obligation to complete the Alternate Seashore Loop.[53]

Mr. Hebson's testimony provides a reasonable explanation of the reference to Article VIII in section 3.3 of the East Windsor agreement, and the ALJ found that JCP&L had not impeached Mr. Hebson's credibility.

49. Mr. Hebson's testimony is supported by JCP&L's own letter to the Administrative Committee in which JCP&L agrees that "whatever amount the LDC owners ultimately agree upon will continue to be paid until Jersey Central places into service its transmission system … at which time such payments will cease."[54] JCP&L did not reserve the right to discontinue payments in the event that it was unable to build the Seashore Loop. This testimony also is supported by the first paragraph of section 3.3 which provided for an increase in costs to JCP&L in the event that the costs of the Salem-Deans line increased, which suggests that the concern being addressed in this provision was with ensuring that JCP&L's payment could increase if costs changed or it failed to build its required facilities and made greater use of the LDV facilities. By contrast, JCP&L's argument that its payments under the East Windsor Agreement are made for "other uses" under section 8.3 would transform them into "transmission use payments" rather than cost sharing payments – a position that the Commission already rejected in the Order Denying Complaint. As the LDV Owners point out, JCP&L has not "provide[d] a logical explanation for why its alleged inability to comply with the construction provision in the LDV Agreement should be read into Section 3.3 as a basis for relieving JCP&L of its obligations under the separate East Windsor Agreement."[55]

50. The parties' course of conduct also supports the interpretation that section 3.3 of the East Windsor agreement was not intended to require a reduction in JCP&L's payment if it was unable to build the Seashore Loop. In 1999, after the formation of PJM, all of the parties to the LDV Agreement, including JCP&L, entered into the second addendum to the LDV Agreement with no mention of reducing JCP&L's responsibility for payment under the East Windsor Agreement.[56] And, as the ALJ found, "JCP&L has been making these payments continuously since the signing of the East Windsor Agreement contract in

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[53] Exhibit No. LDV-1 at 28.

[54] Exhibit No. LDV-18 (October 30, 1989 Letter to the Administrative Committee).

[55] LDV Owners reply brief at 12.

[56] Exhibit No. LDV-5.

1990, at which time the difficulties in constructing the Seashore Loop were well understood by all parties.[57]

51. Moreover, JCP&L argues only that it should be entitled to a reduction under section 3.3 of the East Windsor agreement based on impossibility of performance. But, as discussed in the next section, JCP&L has failed to show that its performance under the Agreements satisfies the standards for demonstrating impossibility.

52. We therefore affirm the ALJ's conclusion that JCP&L is not entitled to an adjustment to its payment obligation under section 3.3 of the East Windsor Agreement.

B. Impossibility of Performance

53. In the Commission's Order Denying Complaint, the Commission found that JCP&L could not rely on a general impossibility of performance argument, because the agreements contemplated the possibility that construction would not occur and provided remedies in the form of liquidated damages in the event that the Seashore Loop was not constructed.[58] In the December Rehearing Order, the Commission denied rehearing of the general impossibility defense with respect to the Smithburg agreement, finding that "the Smithburg Agreement specifically provided for this alternative by requiring JCP&L to pay its share of the costs of the facilities constructed by the other LDV participants in lieu of building its own facilities."[59] With respect to the East Windsor Agreement, the Commission established settlement judge and hearing procedures to examine whether "JCP&L's assertion that it is unable to obtain approval from the state of New Jersey and PJM to construct the Seashore Loop should serve as reasonable grounds for adjusting JCP&L's payment obligations under the East Windsor Agreement, pursuant to section 3.3."[60] In the September Rehearing Order the Commission again found that the parties could litigate whether JCP&L could have constructed the Seashore Loop and, therefore, whether it is entitled to an adjustment under section 3.3 of the East Windsor Agreement.[61]

54. As discussed previously, however, the ALJ found, and we concur, that inability to construct the Seashore Loop did not entitle JCP&L to a termination or reduction of its

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[57] Initial Decision at P 39.

[58] Order Denying Complaint at P 27.

[59] December Rehearing Order at P 55.

[60] *Id*. P 56.

[61] September Rehearing Order at P 13.

cost responsibility under section 3.3 of the East Windsor Agreement. The parties, however, litigated the general issue of impossibility of performance if the Commission were to find that impossibility was a basis for reduction under section 3.3 of the East Windsor Agreement.

1. Initial Decision

55. The ALJ recognized as did the Commission, that the agreements themselves cover any impossibility of performance issues. He found that the East Windsor Agreement simply states that JCP&L will make an annual payment of $3.2 million in lieu of building facilities and that such an obligation is not impossible to perform.[62]

56. The ALJ, however, considered the other arguments put forward by JCP&L and found that JCP&L failed to show that performance under these contracts was physically impossible. The ALJ concluded that JCP&L's contention must fail because JCP&L never even attempted performance; it merely asserted that it could not receive the necessary approvals.[63] He further found that JCP&L's purported difficulties in building the Seashore Loop were readily apparent at the time the project was proposed: "[i]f there ever was a case where the asserted impediment to performance was foreseeable at the time the contract was entered into, it is this one."[64] The ALJ found that JCP&L had other options under the agreement, such as building alternative facilities, and that it did not pursue such construction either:

> I conclude from the evidence that following the cancellation of the Forked River nuclear facility, JCP&L demonstrated no meaningful intent to construct the Seashore Loop, Dove Mill or any other alternative facility, nor has it demonstrated any meaningful attempt to obtain the necessary regulatory approval for any of these projects. JCP&L certainly has not shown that building the Dove Mill project is impossible. JCP&L's actions are consistent with furtherance of its own corporate interests, but to the operational detriment of the LDV Owners to the extent that JCP&L has been unwilling to perform its obligations under the contracts here at issue.

[62] Initial Decision at P 39.

[63] Initial Decision at P 59.

[64] Initial Decision at P 67.

> I, therefore, find that JCP&L has failed to prove that constructing the Seashore Loop or an alternative is factually impossible due to regulatory impediments.[65]

2. JCP&L's arguments on exceptions

57. JCP&L asserts that the ALJ erred by treating the LDV Agreement and East Windsor Agreement as separate agreements, stating that the parties consistently considered the two agreements to be part of a single arrangement, and that the ALJ's ruling conflicts with "the Commission's settled construction"[66] of the agreements, when the Commission found in the December Rehearing Order that JCP&L's payments were "part and parcel" of the cost sharing arrangement established in the LDV Agreement.[67]

58. JCP&L states that, in "treat[ing] the impossibility of permitting and constructing the Seashore Loop facilities as irrelevant to the question of whether Jersey Central's payments under Section 3.3 of the East Windsor Agreement should be terminated or reduced," the ALJ erred by ignoring the fact that the Commission set precisely this issue – i.e., whether or not construction of the Seashore Loop had become impossible – for hearing.[68] JCP&L states that, as a matter of law, the ALJ "was not free to depart . . . from the Commission's view that impossibility *was* relevant to the adjustment" of JCP&L's payment obligations, and JCP&L "did not have to explain why impossibility would justify reducing or terminating payments,"[69] because the Commission's previous ruling "clearly contemplated that if [JCP&L] were able to demonstrate actual impossibility to construct the facilities, it would be appropriate to terminate or reduce the payments,"[70]

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[65] *Id*. P 68.

[66] JCP&L brief on exceptions at 28.

[67] *Id*. at 29, *citing* December Rehearing Order at P 28. JCP&L further asserts that the two agreements constitute a single agreement as a matter of law, since the East Windsor Agreement is on file with the Commission as a supplement to the LDV Agreement, and supplements to a rate schedule constitute part of the same agreement for ratemaking purposes.

[68] JCP&L brief on exceptions at 32-33.

[69] *Id*. at 34, emphasis in original.

[70] *Id*. at 33.

and the Commission's act in setting this question for hearing has now become the law of the case.

59. JCP&L further asserts that, even though the ALJ acknowledged that JCP&L made a strong case that it would not be able to obtain the necessary regulatory approvals to construct the Seashore Loop or alternative facilities within the Pinelands, the ALJ improperly focused on whether JCP&L actually intended to construct the Seashore Loop or alternative facilities, treating the issue as being whether JCP&L's payments could be reduced or terminated if it voluntarily elected not to build the Seashore Loop, rather than whether it had become impossible for JCP&L to build those facilities. According to JCP&L, this conflation of the two questions (intent and impossibility) "effectively made the impossibility issue immaterial."[71] JCP&L also argues that the ALJ applied an incorrect burden of proof in finding that JCP&L was required to make "some concrete effort to actually perform under the contract" to demonstrate factual impossibility.[72] JCP&L argues that this burden of proof fails to give a reasonable and practical construction to the concept of impossibility, and requires JCP&L to pursue "obviously fruitless efforts" to obtain regulatory authorizations to build the facilities in order to prove that it could not, in fact, obtain such authorizations. JCP&L states that the Commission previously set forth the correct burden of proof when it stated that the question of whether JCP&L's payment obligations should be adjusted "goes beyond the scope of legal impossibility of performance, and should be decided based on the record in the hearing."[73] Thus, JCP&L argues, the Commission had a "more practical standard in mind" when it set this question for hearing, and, it states, JCP&L met that standard.[74]

60. JCP&L asserts that it could not have applied for regulatory approval from the New Jersey Pinelands Commission to build the Seashore Loop in the Pinelands, because, now that the Forked River Plant has been cancelled, it could not state in good faith in its application that there was a compelling need for those facilities, and that under relevant case law, "impracticability of performance may . . . [have] the same defensive effect as strict impossibility of performance."[75]

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[71] *Id*. at 36.

[72] Initial Decision at P 56.

[73] September Rehearing Order at P 13.

[74] JCP&L brief on exceptions at 39.

[75] *Id*. at 42, *citing* Restatement of Contracts (Second) § 454 ("impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved").

61. JCP&L further asserts that the ALJ failed to recognize that changed circumstances warrant termination of the payment obligations. JCP&L asserts that, since the purpose of the facilities covered by the LDV Agreement was to transport the output of certain nuclear plants, including the Forked River plant, the transmission facilities were tied to the parties' plans regarding the construction of those plants; absent the construction of Forked River, JCP&L could not establish an immediate need for the Seashore Loop. JCP&L states that the ALJ failed to give sufficient weight to the cancellation of the Forked River plant, thus in effect ruling that "a utility's prudent decision to cancel a nuclear plant casts doubt on its intention to fulfill contract obligations that presumed the plant would be constructed."[76]

62. JCP&L further states that the LDV and related Agreements were entered into when the parties were vertically integrated utilities with independence as to planning and expanding their own transmission systems, but now PJM operates and plans the regional transmission system. As a result, JCP&L explains that it now has less control over the planning and expansion of its transmission system than it did at the time it entered into the LDV and East Windsor Agreements. JCP&L states that, therefore, it "must attempt to comply with contractual obligations formed under very different assumptions and under very different circumstances."[77] JCP&L additionally asserts that the ALJ pays only lip service to the guidance in the Commission's December Rehearing Order that such other reasons should be considered as a basis for reducing or terminating JCP&L's payments.[78]

63. JCP&L further claims that the ALJ incorrectly relied on the fact that JCP&L did not seek to claim impossibility of performance until 2004, when, according to the ALJ, it could have done so much earlier.[79] JCP&L asserts that, in fact, it believed that its

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[76] JCP&L brief on exceptions at 43-44, *citing* Initial Decision at P 68.

[77] JCP&L brief on exceptions at 45.

[78] The ALJ found that JCP&L "has failed to provide persuasive arguments" that PJM would not have allowed construction of the Dove Mill project (a possible “alternative facility” to the Seashore Loop, preliminarily approved by the LDV Administrative Committee as such, which would also have been located in the Pinelands) to go forward, because JCP&L never actually sought permission to construct Dove Mill from PJM's RTEP Committee (Initial Decision at P 74), while at the same time noting that both PJM and a congestion study performed by the Department of Energy (DOE) recognize that there are currently congestion and reliability issues in New Jersey (*id*. at P 73). According to JCP&L, the DOE study does not show that there is congestion within the JCP&L zone, and PJM's existing RTEP plan has not found the Seashore Loop, or any similar line, to be necessary to ensure reliability (JCP&L brief on exceptions at 45-46).

[79] *See* Initial Decision at P 67:

payments under the East Windsor Agreement were for transmission use, until the Commission issued its order on May 6, 2005 denying JCP&L's complaint, and finding that the payments were cost sharing payments.

3. <u>LDV Owners' Arguments Opposing Exceptions</u>

64. The LDV Owners state, in response, that in its first ruling on JCP&L's complaint, the Commission rejected JCP&L's argument that it should be excused from its payment obligations under the Smithburg and East Windsor Agreements on the basis of its inability to obtain the necessary authorizations to construct the Seashore Loop:

> [The] agreements contemplate the possibility that the construction of the Seashore Loop could not be completed and provide options to JCP&L. . . . JCP&L had three choices. It could (a) construct the Seashore Loop, (b) construct alternative facilities, or (c) make payments to the other parties under the Smithburg and East Windsor Agreements to compensate them for the lack of the Seashore Loop.[80]

Thus, the LDV Owners argue, the Commission has already found that, even if JCP&L fails to construct the Seashore Loop, it is still able to meet its contractual obligations.

65. The LDV Owners further state that the Commission set for hearing the issue of whether JCP&L's assertion that it could not obtain necessary regulatory approvals to construct the Seashore Loop should serve as grounds for adjusting the payment obligations because it had received no information as to whether the LDV Administrative Committee, which was scheduled to review the question of whether JCP&L's payments under the East Windsor Agreement should be adjusted in accordance with section 3.3 of that agreement, had in fact performed that review.[81] Subsequently, the Commission

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> [T]he difficulties associated with constructing the Seashore Loop were apparent with the creation of the Pinelands protection area. . . . JCP&L might have argued "impossibility" at any time up until 1990 when it chose to revise the language of Schedule 4, and enter into the LDV Supplemental and East Windsor Agreements, but JCP&L did not do that. Instead, JCP&L continued making the East Windsor Agreement payments up until 2004.

[80] Order Denying Complaint at P 27, 21, *cited at* LDV Owners brief opposing exceptions at 33-34.

[81] LDV Owners brief opposing exceptions at 34, *citing* December Rehearing Order at P 56.

stated that it had set this issue for hearing because there was a material issue of disputed fact as to whether JCP&L could have constructed the Seashore Loop and whether it would be entitled to payment adjustments under section 3.3 on that basis, and that this question should be decided on the basis of record evidence.[82] Thus, the LDV Owners assert that JCP&L is in error for stating that the Commission prejudged this issue – namely, whether impossibility or other factors rendered appropriate an adjustment in JCP&L's payments.

66. The LDV Owners then argue that JCP&L has not demonstrated either legally or factually that it is impossible for it to fulfill its contract obligations. They reiterate that JCP&L has not demonstrated that it is impossible for it to continue making payments in lieu of constructing the Seashore Loop, a determination that must be made independently of the question of JCP&L's ability to actually construct the Seashore Loop. The LDV Owners note that JCP&L itself describes its payments under the East Windsor Agreement as "in every sense an alternative to building the East Windsor Loop;"[83] the LDV Owners assert that, where a party has alternatives to satisfy its contractual obligations, as a matter of law, "impossibility of performance" cannot exist.[84]

67. The LDV Owners further argue that JCP&L has not shown that construction of the Seashore Loop would be factually impossible. They cite to the testimony of their witness, Mr. Jubic, that utility projects are not entirely precluded by the legislation protecting the Pinelands, and that, in fact, a number of utility projects have been approved by the Pinelands Commission.[85] Mr. Jubic testified that, although the process

[82] September Rehearing Order at P 13.

[83] LDV Owners brief opposing exceptions at 45, *citing* JCP&L brief on exceptions at 31-32.

[84] LDV Owners brief opposing exceptions at 45, *citing Yankton Sioux Tribe* v. *United States*, 272 U.S. 351, 358 (1926) ("where promises are in the alternative, the fact that one of them is at the time, or subsequently becomes, impossible of performance does not, at least without more, relieve the promisor from performing the other"); *Cook* v. *El Paso Natural Gas Co.*, 560 F.2d 978, 982 (10th Cir. 1977) ("where there is impossibility of performance with respect to one of two alternatives, the result is not to relieve the promisor of all obligation. . . . He does not escape performance of an alternative remedy if one exists"); and *Ashland Oil & Refining Co.* v. *Cities Serv. Gas Co.*, 462 F.2d 204, 211 (10th Cir. 1972) (where a contract requires a promisor to do a certain thing, or to do something else, the impossibility of one mode of performance does not discharge the promisor from his obligation to render the alternative performance which has not become impossible).

[85] LDV Owners brief opposing exceptions at 51, *citing* Ex. LDV-45 at 5-6, 8.

required extensive adjustments to his original plan, he was able to obtain permission from the Pinelands Commission to construct Atlantic City's Cardiff-to-Cedar line through the Pinelands.[86]

68. Moreover, the LDV Owners claim, JCP&L's focus on the Seashore Loop here is a red herring, in that by the time JCP&L executed the East Windsor Agreement in 1990, it had essentially abandoned the possibility of building the Seashore Loop and was developing the Dove Mill proposal. The LDV Owners state that JCP&L originally proposed Dove Mill to the LDV Administrative Committee as an alternative to the Seashore Loop that could be a solution to the regulatory problems associated with building the Seashore Loop.[87] Subsequently, however, JCP&L cancelled the Dove Mill project, and the LDV Owners assert that JCP&L never sought to secure regulatory approvals for Dove Mill or for any other alternative to the Seashore Loop.

69. The LDV Owners also dispute JCP&L's assertion that, once the Forked River nuclear plant was cancelled, it could no longer argue in good faith to the Pinelands Commission that the Dove Mill project was needed. They point to JCP&L's statement in its 1989 request for funding to the board of its parent company GPU Energy that without the Dove Mill project, "an outage of the only present existing 500 kV import line coupled with Oyster Creek being unavailable most likely [would] result, at a minimum, in rotating blackout measures for approximately 65,000 customers, and at a maximum would result in a blackout of the entire Southern Area."[88] The LDV Owners also state that JCP&L has not made a sufficient showing as to why the PJM RTEP process and the congestion study performed by DOE are relevant to JCP&L's assertion that there exist changed circumstances relevant to JCP&L's contract obligations.[89]

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[86] LDV Owners brief opposing exceptions at 52, *citing* Tr. at 539.

[87] LDV Owners brief opposing exceptions at 53, *citing* Ex. LDV-12 at 2.

[88] LDV Owners brief opposing exceptions at 55-56, *citing* Ex. LDV-56.

[89] In response to JCP&L's assertion that the DOE study does not show the existence of congestion within the JCP&L zone, the LDV Owners point to a letter sent by PJM to the Commission on June 30, 2006, identifying a significant number of reliability criteria violations in Eastern PJM, looking forward 15 years to the year 2021. They state that all of the identified "overloaded facilities" are in New Jersey and several are either owned by JCP&L or connect to the JCP&L system. LDV Owners brief opposing exceptions at 58 n. 25, citing LDV-61 and Ex. LDV-24.

4. **Commission Ruling**

70. The Commission finds no basis to depart from its prior conclusion that impossibility does not excuse JCP&L from the obligation to continue to make payments under the East Windsor Agreement. The Commission further finds that even if section 3.3 of the East Windsor Agreement would require a reduction for impossibility of performance, JCP&L has failed to show that impossibility excuses its obligation to continue to make payments under the East Windsor Agreement.

71. Contrary to JCP&L's argument, the ALJ did examine the LDV Agreement and the East Windsor Agreement as parts of an integrated whole. All the parties recognized, at the time that they executed the LDV Supplemental Agreement in 1990, that JCP&L might not construct the Seashore Loop or acceptable alternative facilities. To address that possibility, they created a liquidated damages clause in the East Windsor Agreement: if JCP&L cannot construct all of the facilities it is obligated to construct, it may meet its obligation in another way, namely, by making cash payments. The LDV Agreement, LDV Supplemental Agreement and East Windsor Agreement work together to achieve this result. The Commission affirms the ALJ's finding that JCP&L has not made a showing that it would be impossible for it to continue to make payments under the East Windsor Agreement, a viable method of fulfilling its responsibilities under the combined LDV Agreements.[90]

72. We further affirm the ALJ’s determination that JCP&L has failed, in any event, to establish that performance under the Agreement was impossible, since it did not provide sufficient record evidence that it could not construct either the Seashore Loop or alternative facilities. Indeed, according to the ALJ, JCP&L merely asserted that it would face insurmountable legal barriers to building in the Pinelands National Reserve, but never pursued the project or sought to negotiate with the state with respect to alternate routes. As the ALJ found, the purported environmental issues that JCP&L now cite as making the project impossible, were evident at the time the project was proposed. In fact, JCP&L signed the East Windsor Agreement on April 20, 1990, fourteen days after signing the Supplemental Agreement to the LDV Agreement, which, among other things, recognized that JCP&L had cancelled its Forked River Nuclear Plant, recognized that alternatives to the Seashore Loop were being developed, and extended the contract term for another ten years. Thus, despite cancelling its nuclear plant, the very predicate for the construction of the Seashore Loop, JCP&L was still agreeing to assume the risk that it could not go forward with the construction of facilities and might be required to make payments in the event that these difficulties proved insurmountable.

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[90] *See* Initial Decision at P 53.

73. Moreover, the ALJ found that JCP&L failed to establish that it could not build an alternative facility as contemplated in the Supplemental Agreement to the LDV Agreement, such as the Dove Mill project. The ALJ found JCP&L cancelled the Dove Mill project although it failed to establish an adverse response from the Pinelands Commission or the New Jersey Board of Public Utilities.[91] As the Court of Claims stated in *Oak Adec, Inc. v. United States*:

> The [commercial impracticability] doctrine may be utilized only when the promisor has exhausted all its alternatives, when in fact it is determined that all means of performance are commercially senseless. There can be little sympathy for contractors who seek refuge behind the label of commercial senselessness (impracticability) without proof that they have made an effort to obtain performance in an alternative fashion.[92]

The Dove Mill project was projected to cost $228 million.[93] Thus, by abandoning the Dove Mill project, JCP&L made a calculated determination to substitute a $3.2 million annual payment for 50 years[94] for an immediate outlay of $228 million. Under these circumstances, we cannot find that JCP&L should now be excused from its payment obligation for impossibility of performance.

74. JCP&L further errs in asserting that the Commission's previous ruling "clearly contemplated" that if JCP&L could show that it was impossible to construct the Seashore Loop, it would be proper to terminate or reduce JCP&L's payments under the East Windsor Agreement, and so it was inappropriate for the ALJ to address the question of JCP&L's intent to build or not to build the Seashore Loop. The Commission made no such finding. The Commission merely set for hearing the question of whether, given the vagueness of section 3.3 of the East Windsor Agreement, impossibility of performance was a basis for reducing JCP&L's obligations under section 3.3 of the East Windsor agreement. As discussed earlier, the ALJ, after considering the extrinsic evidence provided at the hearing, determined that JCP&L was not entitled to reduction of its payments under section 3.3 of the East Windsor Agreement. The ALJ rejected JCP&L's argument that since the East Windsor Agreement allows for its payments to be terminated

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[91] Initial Decision, at P 66.

[92] 24 Cl. Ct. 502, 506 (Ct. Cl. 1991)

[93] *Id*.

[94] *See* LDV Supplemental Agreement, at 6, Section I. L, changing the length of the original Agreement's effectiveness from forty to fifty years.

after JCP&L completes the LDV Schedule 4 facilities, if it is impossible for it to construct these facilities, then this impossibility should excuse it from performance, and thus payment under the East Windsor Agreement. We agree with the ALJ finding that "indulging such an interpretation, however, is to misread the East Windsor Agreement and to ignore the Commission's characterization of the payments under the East Windsor Agreement as part of a cost sharing arrangement, a characterization that has gone unchallenged by any party to this proceeding."

75. As noted earlier, JCP&L had the opportunity to take into consideration the benefits it would receive, and obligations it would incur, when negotiating the LDV Agreements. Whether JCP&L's entry into the LDV Agreements and the East Windsor Agreement remains a good bargain today, after the restructuring of PJM into an ISO (and subsequently a Regional Transmission Organization (RTO)), is not at issue. The Commission, however, finds no basis to relieve JCP&L of the consequences of its own judgments.

C. Credit for Facilities Constructed by JCP&L

76. In its request for rehearing, JCP&L argued that if Jersey Central was part of the general cost-sharing obligation imposed on all the parties by the LDV Agreement, then JCP&L should be receiving a credit for the LDV facilities that it has contributed to the LDV System. In its December Rehearing Order, the Commission set for hearing the question of whether JCP&L is entitled to receive credit for the facilities that it contributed to the LDV System.[95]

1. Initial Decision

a. Credit for LDV Facilities

77. At hearing, JCP&L argued that it was entitled to a credit against its remaining payment obligations under the LDV, Smithburg and East Windsor Agreements for the

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[95] The Commission stated:

> JCP&L asks the Commission to clarify the May 6 Order to make clear that JCP&L is entitled to receive credit for the LDV facilities that it has built and contributed to the LDV System. Since the Commission is establishing settlement judge and hearing procedures regarding these Agreements, the issue of whether JCP&L is entitled to credit for facilities it has constructed should be considered in the settlement and hearing procedures.

December Rehearing Order at P 60.

$87.9 million it spent in constructing the Smithburg and East Windsor facilities. These facilities include the Smithburg-Deans Line and the Smithburg Substation, both required under Schedule 4 of the LDV Agreement, and the two transformers and the ring bus at the East Windsor Substation, which were not listed in the LDV Agreement.[96] JCP&L argued that these facilities provide an additional point of interconnection between the 500 kV and 230 kV systems of JCP&L and the LDV Owners, and that the East Windsor ring bus provides additional reliability and import capability; therefore, JCP&L asserted that it would be appropriate for the LDV Owners to credit JCP&L for the expenses incurred to construct these facilities.[97]

78. The ALJ found that there was no contractual basis for JCP&L's arguments for receiving credit under Article V and Schedule 11 for the facilities it constructed on the LDV System. He stated:

> While it is correct that the parties to the LDV Agreement share in the costs of the LDV System through a system of charges and credits, this contractual cost-sharing is reserved for Station Owners only. Article V and Schedule 11 of that Agreement are in fact the only cost-sharing provisions in any of the contracts at issue in this proceeding, and since it is not a “Station Owner,” JCP&L has no contractual right to crediting.[98]

The ALJ further noted that, in its December Rehearing Order, the Commission found that neither Article V nor Schedule 11 applies to JCP&L.[99]

79. The ALJ then stated that there was no contradiction between finding that JCP&L is not entitled to a credit based on the specific contractual cost sharing provisions of Article V and Schedule 11, and the Commission's finding in the original order on JCP&L's complaint that the collective LDV Agreements constituted a cost sharing arrangement between JCP&L and the LDV Owners. He stated:

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[96] *See* JCP&L initial brief at 57-58, citations omitted (JCP&L "installed a 500/230 kV transformer, a second 500/230 kV transformer and the 500 kV ring bus at the East Windsor substation (the 'East Windsor Facilities'). The second transformer and the ring bus were approved through the PJM RTEP process. The East Windsor Facilities . . . were not listed in the LDV Agreement as specific LDV Facilities").

[97] Initial Decision at PP 136-138.

[98] *Id.* P 140.

[99] *Id.*, *citing* December Rehearing Order at P 42-43.

> As discussed in section I.A.2 [P 40], *supra*, in characterizing the relationship between the LDV Owners and JCP&L as cost sharing arrangements in the context of the Smithburg and East Windsor Agreements, the Commission is distinguishing, and rejecting, JCP&L's argument that those contracts are transmission use agreements. What the Commission is *not* doing is inserting JCP&L into sections of the LDV Agreement that all parties agree do not apply to JCP&L.[100]

80. Thus, the ALJ found that JCP&L was not entitled to credit against its remaining payment obligations under the LDV, Smithburg and East Windsor Agreements for the $87.9 million it spent in constructing the Smithburg and East Windsor facilities.

b. Credit Relating to the Alloway Substation

81. The ALJ also addressed issues relating to the Alloway Substation. One of the LDV Owners, Atlantic City, is currently constructing the Alloway Substation, which is scheduled to go on line in 2008. The Alloway Substation was authorized pursuant to the PJM RTEP process, and PJM assigned Jersey Central's load 19 percent of the costs of that project.

82. At hearing, JCP&L asserted that it should be relieved of its payment obligations under the Smithburg and East Windsor Agreements because when the Alloway Substation goes into service, Atlantic City will be using the LDV System at Alloway "for free," while JCP&L still has payment obligations under the Smithburg and East Windsor Agreements. JCP&L argued that this disparity in treatment between its obligations under the Smithburg and East Windsor Agreements, and PJM's cost allocation methodology with regard to Alloway, results in unjust and unreasonable rates, and that it should therefore be granted relief from those payments.

83. The ALJ found that:

> JCP&L has failed to prove that the PJM cost allocation for the Alloway project is unduly discriminatory. . . . As for the assertion that PJM's allocation of the Alloway project costs is discriminatory, JCP&L's arguments amount to collateral

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[100] Initial Decision at P 141. *See id*. P 40 ("[i]ndulging [JCP&L's argument that impossibility should relieve it of its obligation to make payments under the East Windsor Agreement] is to misread the East Windsor Agreement and to ignore the Commission's characterization of the payments under the East Windsor Agreement as part of a cost sharing arrangement, a characterization that has gone unchallenged by any party to this proceeding").

> attack on the Commission's PJM Restructuring Order, and as such are beyond the scope of a complaint filed pursuant to Rule 206 of the Commission's Procedural Rules.[101]

84. The ALJ further stated that JCP&L apparently believed that the December Rehearing Order enabled it to re-open the Commission's decision not to change the cost-sharing agreements entered into prior to the PJM Restructuring Order. The ALJ found this not to be the case, stating that, to the contrary, in its order denying the complaint, the Commission had re-affirmed its ruling in the PJM Restructuring Order:

> [In the Order Denying Complaint], the Commission restated from the PJM Restructuring Order: "Elimination of the support charges would relieve those that chose support payments of any further cost responsibility, while at the same time increasing the cost responsibility of those that chose construction. We believe this would be unreasonable."[[102]] The [December Rehearing Order] left this restatement unchanged, and clarified that to the extent that the PJM Restructuring Order applies to the instant proceedings, it is only to the possible extent that it may influence the LDV Owners' willingness to agree to construction projects that JCP&L may offer as "alternative facilities," and whether this might "serve as reasonable grounds for adjusting JCP&L's payment obligations under the East Windsor Agreement, pursuant to section 3.3."[[103]] [104]

85. Thus, the ALJ found JCP&L's assertions that the Alloway cost allocation was discriminatory, and that JCP&L should therefore be relieved of its payment obligations under the East Windsor and Smithburg Agreements, to be without merit. The ALJ found that this argument had been rejected by the Commission previously in this proceeding, and, additionally, that JCP&L's argument in this regard constituted a collateral attack on the PJM Restructuring Order.[105]

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[101] Initial Decision at P 146, *citing* 18 C.F.R. § 385.206 (2007).

[102] Order on Complaint at P 22, *citing* PJM Restructuring Order at 62,280.

[103] December 2 Order at P 56.

[104] Initial Decision at P 147.

[105] *Id.* P 148.

2. JCP&L's Arguments on Exceptions

86. JCP&L states that, in its December Rehearing Order, the Commission characterized the LDV Agreements as a cost sharing arrangement, to be applied to the costs incurred by all parties to the agreements. JCP&L further stated that the Commission set for hearing the issue of whether JCP&L was entitled to credit for facilities that it had constructed. JCP&L argues that the ALJ erred in holding that JCP&L should receive no credit because: (1) as the ALJ interpreted the LDV, Smithburg and East Windsor Agreements, they did not provide a contractual basis for JCP&L's costs to be shared among the parties; and (2) JCP&L did not establish an "extra-contractual" basis for a credit to JCP&L that would reflect the increased utilization of the LDV facilities by other parties once the Alloway substation is completed.[106] JCP&L points to three errors on this question in the Initial Decision:

> First, the Initial Decision's conclusion that there was no "contractual basis" for a credit failed to apply the Commission's construction of the Agreements as a cost sharing arrangement, which established a firm contractual foundation for the proposed credit . . . [and] is flatly inconsistent with the Commission's interpretation of the Agreements. Second, the Initial Decision failed even to consider the record evidence establishing that, if Jersey Central does not receive a credit for the costs of the LDV facilities that it built, the Agreements are unduly discriminatory. This evidence, which the Initial Decision ignores, establishes an independent basis for the credit, which is required so that the cost sharing arrangement embodied in the Agreement operates in a non-discriminatory fashion. Third, the Initial Decision should have included an allowance in the credit calculation to reflect the fact that the Alloway Substation will utilize the Salem-Deans line in the same manner as the East Windsor Substation.[107]

87. JCP&L argues that the ALJ incorrectly found that the "cost sharing" set forth in Article V and Schedule 11 of the LDV Agreement is limited to Station Owners only, which JCP&L asserts is inconsistent with the Commission's finding in its December Rehearing Order.[108] JCP&L states that the Commission has, therefore, already

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[106] JCP&L brief on exceptions at 15.

[107] *Id*. at 15-16, footnotes omitted.

[108] *Id*. at 17-18, *citing* December Rehearing Order at P 44.

established a contractual basis for a credit, so that the costs of the facilities built by JCP&L should be spread among the other parties by this crediting mechanism.

88. JCP&L also asserts that the Commission has already found that JCP&L's payments under the Smithburg and East Windsor Agreements are cost sharing payments, and that the Smithburg, East Windsor and LDV Agreements constituted a single cost-sharing arrangement. Thus, JCP&L argues, the ALJ erred in finding that JCP&L is not part of this cost-sharing arrangements because it is not a Station Owner. JCP&L states that the Initial Decision is internally inconsistent because it interprets Article V and Schedule 11 of the LDV Agreement to require that JCP&L share the costs incurred by the LDV Owners as though it were a Station Owner, but then denies JCP&L reciprocal treatment on the basis that it is not a Station Owner.[109]

89. JCP&L further argues that the ALJ failed to consider evidence showing that, absent a credit for JCP&L's costs, the Agreements are unduly discriminatory. JCP&L states that the record shows that (1) JCP&L, like the LDV Owners, incurred costs to build LDV facilities, (2) the costs of JCP&L's LDV facilities were not factored into the cost-sharing arrangement created by the LDV Agreements, but (3) the costs of the LDV facilities built by the LDV Owners were. JCP&L states that it has paid roughly $252 million for the LDV facilities it built and the charges it has paid under the Smithburg and East Windsor Agreements,[110] but the LDV Owners have made no payments in contribution to any of the costs incurred by JCP&L. JCP&L considers this to be undue discrimination under section 206 of the FPA. It cites to cases finding that undue discrimination arises when similarly situated customers receive different rates, and notes that the ALJ identified no factual differences that would justify this discrimination.[111] JCP&L asserts that the Commission contemplated an arrangement under which the costs of all parties' facilities were shared on a comparable basis, and that anything less would be unduly discriminatory. Thus, according to JCP&L, the ALJ erred in not granting a credit to JCP&L.

90. JCP&L also argues that the ALJ erred by rejecting its proposal for a credit against JCP&L's payments under the East Windsor Agreement with regard to the new Alloway substation, which JCP&L proposed to take effect after Alloway goes into service.[112]

[109] JCP&L brief on exceptions at 20.

[110] *Id*. at 21-22.

[111] *Id*. at 22.

[112] As noted above, PJM determined pursuant to its RTEP process that one of the LDV Owners, Atlantic City, would be required to construct the Alloway Substation. Under the RTEP process, JCP&L's load has been assigned 19 percent of the costs of Alloway, which is scheduled to go into service in June 2008.

JCP&L argues that, under the LDV Agreements, it is required to make payments to the LDV Owners for JCP&L's use of one of the LDV facilities (the Salem-Deans line) to serve its East Windsor substation; yet, the Alloway substation will utilize the Salem-Deans line in the same manner that the East Windsor substation uses that line, but Atlantic City will not be required to make payments to the LDV Owners for the use that Atlantic City makes of that line to serve Alloway: in fact, JCP&L's load will be required to pay a percentage of the costs of constructing the Alloway substation. JCP&L asserts that this difference (i.e., that pursuant to the East Windsor Agreement JCP&L must make payments to the LDV Owners for its use of the LDV System, while parties using facilities not built pursuant to the LDV Agreements are not required to make such payments) is unduly discriminatory. Accordingly, JCP&L proposes a credit based on the Alloway substation as "a reasonable and practical means" of equalizing this inequity.[113]

3. LDV Owners' Arguments Opposing Exceptions

91. In their brief in response to exceptions, the LDV Owners state that allowing JCP&L credit for the facilities it built that were required by the LDV Agreement would eliminate JCP&L's payments to the LDV Owners under the East Windsor Agreement, and would additionally require the LDV Owners to make payments to JCP&L. Thus, according to the LDV Owners, JCP&L's argument here is an attempt to renege on its agreement to compensate the LDV Owners for the benefits that JCP&L receives under the LDV Agreements.

92. The LDV Owners further argue that JCP&L's argument regarding credits for the LDV facilities is based on the assumption that, because the Commission previously found that the LDV Agreements together comprise a single cost sharing arrangement, JCP&L is entitled to credits. The LDV Owners state that the Commission's finding that the LDV Agreements, *in toto*, are a cost-sharing arrangement does not require the LDV Owners to share JCP&L's costs of building facilities at Smithburg and East Windsor, and that the Commission has already made findings as to the way in which JCP&L's contract obligations differ from that of the LDV Owners:

> [W]hile the other four parties did make their required contributions to the LDV System, JCP&L did not contribute

[113] JCP&L brief on exceptions at 24. JCP&L also argues that, to calculate this proposed credit, the Commission should use the same "carrying charge" methodology used in the Agreements to calculate JCP&L's payments to the LDV owners, with the single change proposed by JCP&L (namely, reducing the LDV Owners' investment amounts by the costs of JCP&L's investment). JCP&L asserts that the ALJ found no fault with this methodology, and that the Commission should endorse it. JCP&L brief on exceptions at 26-27.

> the principal facility that it was obligated to provide, the Seashore Loop. JCP&L's payments under the Smithburg and East Windsor Agreements are not simply payments for JCP&L's use of other parties' LDV facilities. Rather, those payments compensate the other LDV parties for the fact that JCP&L is using the facilities that the other parties contributed to the LDV system while JCP&L has not completed its own required contribution to the LDV system. The Smithburg and East Windsor Agreements establish the *additional* share of the costs of those facilities that JCP&L must make to other LDV owners, over and above the general cost-sharing obligation imposed on all the parties by the LDV Agreement, because JCP&L chose not to construct the Seashore Loop . . . . Therefore, these payments are part of an overall cost sharing scheme.[114]

Further, the LDV Owners assert, the Commission has never found that the LDV Agreements vest in JCP&L a right to credits not otherwise specified in the agreement.

93. The LDV Owners also dispute JCP&L's criticism of the Initial Decision's finding that, since JCP&L is not a Station Owner, the cost-sharing provisions of the LDV Agreement (Article V and Schedule 11) do not apply to it. The LDV Owners point to the Commission's earlier finding on this point:

> [T]he exclusion of JCP&L from the definition of "Station Owners" does not demonstrate that the payments under the Smithburg and East Windsor Agreements were not part of the overall cost sharing arrangement in the LDV Agreement. These payments were payments to cover the costs of the other signatories until such time as JCP&L completed its required facilities, and as such were part of the integrated package of cost sharing agreements signed by the parties.[115]

94. Ultimately, the LDV Owners assert, JCP&L's arguments are founded on an incorrect interpretation of the Commission's rulings in the December and September Rehearing Orders regarding crediting. The Commission stated in the December Rehearing Order that:

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[114] Order Denying Complaint at P 20, footnote omitted, emphasis in original, *cited at* LDV Owners brief opposing exceptions at 25.

[115] December Rehearing Order at P 44, citation omitted, *cited at* LDV Owners brief opposing exceptions at 26.

> JCP&L asks the Commission to clarify the May 6 Order to make clear that JCP&L is entitled to receive credit for the LDV facilities that it has built and contributed to the LDV System. Since the Commission is establishing settlement judge and hearing procedures regarding these Agreements, the issue of whether JCP&L is entitled to credit for facilities it has constructed should be considered in the settlement and hearing procedures.[116]

Similarly, the Commission stated on rehearing, "with respect to JCP&L's request . . . as to the scope of the hearing and whether it is entitled to credit for facilities it has constructed, JCP&L is free to raise this issue at the hearing for determination by the administrative law judge."[117] The LDV Owners argue that JCP&L is interpreting these statements by the Commission as actual findings that a credit is appropriate. But in reality, they assert, the Commission simply allowed the question of a credit to be considered at hearing.

95. The LDV Owners also assert that JCP&L errs in asserting that the Initial Decision improperly failed to consider the question of whether the cost sharing arrangement embodied in the LDV Agreements is unduly discriminatory, when in fact JCP&L itself did not raise the question of "undue discrimination" with regard to the LDV Agreements before the ALJ.[118] They further argue that, contrary to JCP&L's statement that "record evidence establish[es] that, if Jersey Central does not receive a credit for the costs of the LDV facilities that it built, the Agreements are unduly discriminatory,"[119] JCP&L did not present sufficient proof of undue discrimination. The LDV Owners state that JCP&L's sole evidence of undue discrimination is that it incurred costs to build facilities to connect to the LDV System at East Windsor and Smithburg (the facilities referenced in the Smithburg and East Windsor Agreements); as discussed *supra*, the LDV Owners take the position that these facilities were built primarily to enable JCP&L to get benefits from the LDV system, and do not provide much if any benefit to the LDV Owners.[120] The LDV

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[116] December Rehearing Order at P 60.

[117] September Rehearing Order at P 15.

[118] The LDV Owners note that JCP&L did raise, and the ALJ did address, the possibility of undue discrimination with regard to the appropriateness of a credit for the Alloway Substation. LDV Owners brief opposing exceptions at 6, *citing* Initial Decision at P 142-48.

[119] JCP&L brief on exceptions at 15-16.

[120] The LDV Owners state:

> The Smithburg and East Windsor facilities built by JCP&L

Owners further assert that rate discrimination is appropriate when two parties are factually differently situated, which, they claim, is the situation here, where the "unique" benefits of access to the LDV System obtained by JCP&L under the Smithburg and East Windsor Agreements justify different treatment of JCP&L.

96. With regard to the appropriateness of granting a credit for the costs of the Alloway Substation, the LDV Owners state that Atlantic City was directed to construct the Alloway project as part of PJM's RTEP process, and that the costs of RTEP projects are allocated by PJM as part of that process. The LDV Owners assert that, although JCP&L compares Atlantic City's Alloway substation to JCP&L's East Windsor substation, the more appropriate comparison would be between Alloway and JCP&L's second transformer at the East Windsor substation, which was also constructed pursuant to the RTEP process, and which JCP&L was permitted to connect to the LDV System without charge. Thus, the LDV Owners state that in this argument, JCP&L seeks to have it both ways – seeking to obtain a credit as a result of the construction of the Alloway substation, but not acknowledging the benefits that JCP&L obtained by being able to construct the second East Windsor transformer (and thereby improve its ability to use the LDV System).

4. **<u>Commission Ruling</u>**

97. We affirm the ALJ's ruling that JCP&L is not entitled to a credit for its construction of the facilities covered by the LDV Agreement, for additional facilities JCP&L built at the East Windsor substation that are not covered by the LDV Agreement, or for the use of LDV facilities with regard to Atlantic City's construction of the Alloway Substation.

> are like the off ramps of a busy interstate highway. They permit power to flow directly into JCP&L’s system, but provide little benefit to the overall highway system, and provide little benefit to other users of the LDV System that use off ramps located elsewhere on the highway. And the off ramps leading into JCP&L’s territory are much more heavily used than the on ramps leading back to the LDV System . . . . Given the nature and enormous benefit to JCP&L of access to the LDV System, it is JCP&L, and JCP&L’s customers, that are the primary beneficiaries of the “off ramp” facilities JCP&L built.

LDV Owners brief opposing exceptions at 29.

a. Facilities Covered by the LDV Agreements

98. We find that the ALJ was correct in ruling that JCP&L should not receive a credit for its construction of the Smithburg-Deans Line and the Smithburg Substation. As the ALJ found, no provision of the agreements provide for JCP&L to receive credits for construction of these facilities. Under Schedule 4 of the original LDV Agreement, JCP&L was obliged to construct these facilities. As the Commission previously found, the *quid pro quo* that JCP&L would receive for constructing them was the ability to use the LDV facilities constructed by the other parties without payment.[121] As Mr. Hebson testified, JCP&L's obligation was to build the Seashore Loop, "which was to be its in-kind contribution to the System."[122] Even if JCP&L had built the Seashore Loop it was not entitled to the true-up mechanism of the LDV agreement, nor would it have participated in the cost sharing provisions of the LDV Agreement.[123] As Mr. Hebson explained, the facilities for which JCP&L now seeks credit were actually facilities that JCP&L built in order to obtain access to the LDV System without having made its in-kind contribution of the Seashore Loop.[124] In fact, the Smithburg Agreement specifically describes these facilities as facilities being built by JCP&L because "pending completion of the facilities it is to provide under the LDV Agreement, JC wishes to make use of LDV facilities provided by others in order to supply capacity and energy from the Deans Substation, to its 500 kv substation at Smthburg."[125] The Commission similarly described this agreement in its December order:

> The purpose of the Smithburg Agreement was to enable JCP&L to receive benefits under the LDV Agreement (i.e., access to the other signatories' facilities) even though it had not yet performed its full quid pro quo under the LDV Agreement: until JCP&L completed the Seashore Loop, it could keep the other parties whole by making monetary

[121] Order Denying Complaint at P 19 ("it appears that the *quid pro quo* to each signatory, in return for the facilities and investment that it contributed to the LDV System, was the use of the transmission facilities and investment contributed by the other signatories").

[122] Exhibit No. LDV-1 at 41.

[123] *Id*. at 42.

[124] *Id*. at 42.

[125] Smithburg Substation Supply Agreement at 1.

> payments to compensate them for its failure to provide its portion of the LDV facilities.[126]

99. The facilities for which JCP&L now requests credit were actually built by JCP&L in order to use the LDV System without having met its obligation to build the Seashore Loop. Since these facilities were to benefit JCP&L, there was, and remains, no need for an additional credit to be paid to JCP&L. As the ALJ stated, it is not necessary to "insert JCP&L into sections of the LDV Agreement that all parties agree do not apply to JCP&L."[127]

100. JCP&L in fact has recognized that it is not part of the technical “cost sharing” provisions of the LDV Agreements.[128] Its argument that others should share in the cost of these facilities is solely based on its assertion that the Commission described these facilities as “cost sharing” facilities. In our orders, we used the phrase “cost-sharing” to characterize the overall intent of these agreements, under which JCP&L was required to contribute facilities and in return would receive the right to use those facilities. As the ALJ found, our use of the term “cost sharing” was limited to a characterization of these agreements as distinguished from transmission use agreements under Commission policy.[129] However, this use of the term does not entitle JCP&L to additional credits beyond those envisioned under the agreements.

b. Additional East Windsor Facilities and Alloway Substation

101. In addition to the specific facilities covered by the LDV Agreements, JCP&L argues that it should be entitled to credits for building an additional two transformers and ring bus at the East Windsor substation, and because it makes payments to the LDV Owners for its use of the Salem-Deans line to serve its East Windsor substation, whereas Atlantic City will not make payments to the LDV Owners for its use of the Salem-Deans line to serve the Alloway substation. All of these facilities were not contemplated by the LDV Agreements, and were instead projects that were approved through the PJM RTEP process after PJM was restructured into an ISO and the five LDV parties turned control of their transmission facilities over to PJM. Under the RTEP process, PJM determines which parties will bear the costs for each new transmission facility built through that

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[126] December Rehearing Order at P 55.

[127] Initial Decision at P 141.

[128] JCP&L Request for Rehearing, at P 4 (“the methodology for calculating cost sharing charges and credits under the LDV Agreement does not apply to Jersey Central.”)

[129] Initial Decision at P 141.

process.[130] In March 1999, the parties to the LDV Agreement, including JCP&L, executed a Second Supplemental Addendum to the LDV Agreement, in which all five "signatories . . . anticipate that their system loads and generation ownership may change as a result of the introduction of retail competition in all or portions of the PJM control area" and wished therefore to amend the cost allocation provisions of the LDV Agreement in anticipation of this development,[131] and which expressly provided that the costs of investments made in order to expand the capacity of the LDV System "shall be recovered pursuant to agreements entered into pursuant to the PJM Transmission Tariff and/or the PJM Transmission Expansion Protocol."[132]

102. We find that JCP&L is not entitled to cost sharing for the facilities at East Windsor that it built under the PJM RTEP process, and for which the costs were allocated by PJM pursuant to that process. As discussed above, the parties expressly agreed in the Second Addendum that any investments made after 1999 to expand the capacity of the LDV System would be recovered pursuant to the PJM RTEP process and PJM tariff. The cost-sharing arrangements of the LDV Agreements, which were entered into prior to the restructuring of PJM and the development of PJM's RTEP process, are limited to the specific facilities listed in the LDV Agreement. The fact that the parties later built projects under the RTEP process that enhance or detract from or in some way relate to the LDV System does not retroactively make those projects a part of the specifically listed facilities that the parties agreed to cover when they entered into the LDV System in 1977, nor do they entitle parties to recovery of such investments.

103. Under the PJM RTEP process, costs are assigned to those transmission systems that benefit from the project.[133] Thus, whatever costs JCP&L has to bear with relation to the construction of its new facilities at East Windsor are related to the benefits it receives, and do not form a basis for upsetting existing agreements with respect to historical facilities and the payments to be made for those facilities. In these circumstances, we agree with the ALJ that JCP&L has not demonstrated that either PJM's allocation or the payments JCP&L are required to make are unjust and unreasonable. Thus, under the

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[130] *See generally* Schedule 12(b)(i) of the PJM OATT.

[131] Exhibit No. LDV-5 at 1.

[132] *Id.* at 4, section 4.3.

[133] *See* PJM OATT, Operating Agreement, Schedule 6, section 1.5.6(f) ("For each enhancement or expansion that is included in the recommended [RTEP] plan, the plan shall . . . designate one or more Transmission Owners or other entities to construct, own and, unless otherwise provided, finance the recommended transmission enhancement or expansion").

LDV Agreement no credit is due to JCP&L with regard to the additional two transformers and ring bus at East Windsor.

104. For the same reasons, we reject JCP&L's proposal that it receive a credit to reflect the fact that it makes payments to the LDV Owners for its use of the Salem-Deans line to serve its East Windsor substation, whereas Atlantic City does not make payments to the LDV Owners for its use of the Salem-Deans line to serve Alloway. This difference is a function of the fact that JCP&L's payments to the LDV Owners were expressly ordered under the East Windsor Agreement, as a form of liquidated damages for JCP&L's failure to construct the Seashore Loop, but the construction of the Alloway substation, and any cost allocation or credits related to that facility, are governed by PJM's RTEP process as the parties agreed in the Second Addendum. Since the parties specifically provided for the treatment of new facilities in the Second Addendum, we find no undue discrimination. Moreover, as the ALJ found, this is not the appropriate forum to determine whether the PJM RTEP process properly assigned costs for particular projects.[134] Accordingly, we affirm the ALJ and reject JCP&L's argument with regard to any crediting as a result of the Alloway substation.

D. Standard of Review

105. In the Order Denying Complaint, the Commission found no need to determine the standard of review (just and reasonable or *Mobile-Sierra* public interest), because "it concludes that under the 'just and reasonable' standard JCP&L is not entitled to abrogate the agreement."[135] The parties litigated the appropriate standard of review to be applicable to changes to the LDV contracts at issue. The issue of appropriate standard of review applies only when the Commission is determining whether to modify or change provisions of tariffs or rate schedules. The hearing dealt only with the proper interpretation of the meaning of the LDV Agreements, not with revisions or modifications to these agreements, and so there is no issue as to the appropriate standard of review with respect to modifications of those agreements.

E. Conclusion

106. JCP&L entered into the LDV Agreements to obtain access to the LDV System in return for building the Seashore Loop as part of its contribution to the joint project. These contracts provided that if JCP&L failed to make its contribution, it was subject to paying $3.2 million each year in lieu of construction. JCP&L did not construct the Seashore Loop, or alternative facilities, thereby saving the considerable construction and

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[134] Initial Decision at P 53 ("JCP&L's complaints with PJM's allocation of the Alloway project costs are beyond the scope of these proceedings").

[135] Order Denying Complaint at P 36.

other costs attendant to such projects. As determined by the ALJ, and affirmed here, the contracts did not require a reduction for JCP&L's failure to build the required or alternative facilities. We, therefore, find no basis for relieving JCP&L from the consequences of the bargain it made.[136]

The Commission orders:

The Commission affirms the ALJ's decision, and denies the exceptions sought by both parties.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[136] *Exxon Mobil Corp*. v. *FERC*, 430 F.2d 1166 (D.C. Cir. 2005) (a company is not typically entitled to be relieved of its improvident bargain).