

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Jersey Central Power & Light Company

Docket No. EL05-50-002

v.

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

ORDER DENYING REHEARING

(Issued September 21, 2006)

1. In this order, the Commission denies the request for rehearing filed 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, Respondents) of an order<sup>1</sup> setting for hearing matters relating to a contract dispute between Jersey Central Power and Light Co. (JCP&L) and Respondents. The Commission finds no basis for reconsidering its determination that it does not have sufficient basis to resolve the contractual issues summarily and that these issues should be resolved through a hearing in which both sides will have a full opportunity to litigate the issues.

**Background**

2. JCP&L and Respondents are transmission owners within PJM Interconnection, LLC (PJM). As set forth at length in an earlier order,<sup>2</sup> in 1977 JCP&L and Respondents

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<sup>1</sup> *Jersey Central Power & Light Co. v. Atlantic City Electric Co.*, 113 FERC ¶ 61,237 (2005) (December 2 Order).

<sup>2</sup> *Jersey Central Power & Light Co. v. Atlantic City Electric Co.*, 111 FERC ¶ 61,179 (2005) (May 6 Order).

entered into an agreement (the LDV Agreement) under which all five parties agreed to contribute existing transmission facilities to, and construct new transmission facilities for, the Lower Delaware Valley (LDV) System. Under the LDV Agreement, each party agreed to provide certain portions of the LDV System and make those portions available to the other parties to the LDV Agreement. The parties recognized that JCP&L might not complete its construction of the facilities it was obligated to provide under the LDV Agreement, and therefore, JCP&L's obligations under the LDV Agreement included either constructing the "Seashore Loop" group of transmission facilities, or constructing "such alternative facilities as are mutually agreeable among the signatories."<sup>3</sup> At the same time that the parties entered into the LDV Agreement, they entered into the Smithburg Substation Supply Agreement (Smithburg Agreement), which provided that, pending JCP&L's completion of its LDV obligation, JCP&L would use LDV facilities constructed by others to supply capacity and energy to its Smithburg substation, but would make fixed monthly payments to the other signatories.<sup>4</sup> In 1990, the parties entered into the LDV Supplemental Agreement, extending the term of the LDV Agreement from 2017 to 2027,<sup>5</sup> and also entered into the East Windsor Substation Supply Agreement (East Windsor Agreement), which, similarly to the Smithburg Agreement, provided that, pending completion of the facilities it was to provide under the LDV Agreement, JCP&L would make use of the LDV facilities provided by others to supply energy and capacity to its substation at East Windsor, and would make fixed monthly payments to the other signatories.<sup>6</sup>

3. On December 30, 2004, JCP&L filed a complaint with the Commission, stating that although it has not constructed the Seashore Loop, over the past 23 years it has made approximately \$67.6 million in payments to the other LDV parties under the Smithburg and East Windsor Agreements. JCP&L stated that these payments were "transmission use" payments (i.e., payments for the use of the transmission system). JCP&L asserted, therefore, that it should no longer be obligated to either make payments under the Smithburg and East Windsor Agreements, or construct the Seashore Loop pursuant to its obligation under the LDV Agreement. It therefore asked the Commission to terminate the Smithburg and East Windsor Agreements, and to eliminate JCP&L's obligation to construct the Seashore Loop under the LDV Agreement.

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<sup>3</sup> LDV Agreement, Exhibit 1 to Complaint, Schedule 4, at 1-2.

<sup>4</sup> Smithburg Agreement, Exhibit 2 to Complaint.

<sup>5</sup> LDV Supplemental Agreement, Exhibit 1 to Complaint, section I. L, at 6.

<sup>6</sup> East Windsor Agreement, Exhibit 3 to Complaint, Article III, at 4-5.

4. On May 6, 2005, the Commission denied JCP&L's complaint.<sup>7</sup> The Commission found that, contrary to JCP&L's assertions, the payments JCP&L was making to the other LDV System owners under the Smithburg and East Windsor Agreements were not transmission use payments that should be governed by the PJM OATT, but were part of an overall cost sharing agreement among all five LDV system owners, and were intended to compensate the other owners for the fact that JCP&L had failed to provide the Seashore Loop for the other four parties' use.<sup>8</sup>

5. JCP&L filed a request for rehearing or, in the alternative, motion for clarification of the May 6 Order. On December 2, 2005, the Commission issued an order granting and denying rehearing, granting clarification, and establishing settlement judge and hearing proceedings.<sup>9</sup> In that order, the Commission granted in part and denied in part JCP&L's request for rehearing and clarification. However, the Commission established settlement judge and hearing procedures to examine several questions, including: 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; and whether JCP&L's construction of facilities should be deemed alternative facilities under the LDV Agreement, which would reduce JCP&L's payment obligations under both the Smithburg and East Windsor Agreements.

### **Request for Rehearing**

6. Respondents seek rehearing of the Commission's decision to set these issues for hearing. With regard to the question of whether JCP&L can use an "impossibility" defense to excuse its payment obligations under the East Windsor Agreement, they state that the pleadings already submitted show that performance was not impossible. Respondents argue that since the execution of the LDV Agreement, JCP&L has had three choices: to build the Seashore Loop, to build alternative facilities, or to compensate Respondents for its failure to do either of those things by making payments under the terms of the Smithburg and East Windsor Agreements. Respondents cite several cases to support the proposition that "'impossibility of performance' cannot exist where a party has

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<sup>7</sup> May 6 Order.

<sup>8</sup> *Id.* at P 19-20.

<sup>9</sup> December 2 Order.

options to satisfy its contractual obligations."<sup>10</sup> Respondents also argue that JCP&L's own actions show that it could have constructed mutually agreeable alternative facilities, since in 1989, JCP&L proposed a facility which would have served as an alternative to the Seashore Loop – the Dove Mill project – which Respondents accepted, but which JCP&L ultimately did not pursue. Further, Respondents assert that JCP&L has never explained why, or produced evidence to show that, it is impossible for it to construct the Seashore Loop, or why it failed to pursue the Dove Mill project. Finally, Respondents note that, contrary to JCP&L's suggestions, PJM has never blocked JCP&L's construction of the Seashore Loop.

7. With regard to the question of whether JCP&L has already constructed alternative facilities to the Seashore Loop, Respondents argue that JCP&L has not constructed alternative facilities within the meaning of the LDV Agreement, because it failed to obtain the approval of the other LDV signatories before construction any of the facilities it now claims are alternatives to the Seashore Loop. Respondents point to the language of the LDV Agreement, which provides that JCP&L can fulfill its obligation to construct the Seashore Loop by instead constructing "such alternative facilities as are mutually agreeable among the signatories,"<sup>11</sup> and that "LDV facilities shall be designed and constructed in accordance with ratings and design criteria as approved by the [LDV] Administrative Committee."<sup>12</sup> Respondents assert that JCP&L never sought approval from the Administrative Committee prior to constructing the facilities that it now describes as alternatives to the Seashore Loop, and, as a matter of law, JCP&L's argument must therefore fail since it is inconsistent with the plain language of the LDV Agreement.

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<sup>10</sup> Respondents' January 3, 2006 petition for rehearing at 7, citing *Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926) (It is "well settled that where a contract requires the promisor to do a certain thing or to do something else, or allows him to elect between two or more modes of performance, the fact that one of the undertakings or options becomes impossible of performance does not discharge him from his obligation to render the alternative performance which has not become impossible."); *Cook v. El Paso Natural Gas Company*, 560 F.2d 978 (10th Cir. 1977) ("[W]here 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"); *Ashland Oil & Refining Co. v. Cities Service Gas Co.*, 462 F.2d 204 (10th Cir. 1972).

<sup>11</sup> LDV Agreement, Schedule 4, Revision 1.

<sup>12</sup> *Id.*

8. Respondents further assert that the Commission erred in finding that, now that PJM has become an RTO<sup>13</sup> and Respondents are able to use JCP&L's facilities by paying zonal charges, the incentives for Respondents to negotiate with JCP&L have changed. Respondents state that this argument by the Commission is inconsistent with the conclusion in the Commission's May 6 and December 2 Orders that JCP&L's payments under the Smithburg and East Windsor Agreements are cost-sharing payments, not transmission use payments, and are based not on usage of the system, but on the parties' original agreement to share the costs of the LDV system.

9. JCP&L filed an answer, and motion for leave to answer Respondents' request for rehearing. JCP&L states that other than their arguments with regard to the "incentives" issue, Respondents have not articulated any new arguments that were not made or considered previously. JCP&L further states that Respondents erroneously state that the Commission only set two issues for hearing, and that in fact, the Commission set three issues for hearing. JCP&L cites to the Commission's statement in the December 2 Order that:

Since the Commission is establishing settlement judge and hearing procedures regarding [the Smithburg and East Windsor] Agreements, the issue of whether JCP&L is entitled to credit for facilities it has constructed should be considered in the settlement and hearing process.<sup>14</sup>

JCP&L then alleges that Respondents have failed to properly compensate it for some of the specific facilities that JCP&L did build and contribute to the LDV system.

### **Discussion**

10. The Commission denies rehearing, as discussed below.

#### **A. Procedural issues**

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2006), prohibits an answer to a petition for rehearing unless otherwise ordered by the decisional authority. We will accept JCP&L's answer to Respondents' petition for rehearing because it has provided information that has assisted us in our decision-making process.

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<sup>13</sup> Pennsylvania-New Jersey-Maryland Interconnection, 81 FERC ¶ 61,257 (1997).

<sup>14</sup> JCP&L answer at 3, *citing* December 2 Order at P 60.

## B. Analysis

12. The Commission denies Respondents' request for rehearing. The Commission has broad discretion to structure its proceedings so as to resolve a controversy in the way it best sees fit,<sup>15</sup> which discretion has been upheld by the courts.<sup>16</sup> Respondents' arguments do not persuade us that these disputed matters can be resolved summarily, and we find that there are issues in dispute that are best resolved at a hearing.

13. Respondents 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. 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. Section 3.3 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, its annual payment "shall be subject to review and appropriate adjustment by the LDV Administrative Committee in accordance with Article VIII of the LDV Agreement."<sup>17</sup> In fact, Respondents' rehearing request raises a factual issue:

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<sup>15</sup> See *Ameren Energy Generating Company*, 108 FERC ¶ 61,081 at P 23, footnotes omitted (2004) ("The courts have repeatedly recognized that the Commission has broad discretion in managing its proceedings. . . . Based on the written submissions in this proceeding, we concluded that there were issues of material fact concerning the competitive effect of Applicants' filing that were best resolved through a trial-type evidentiary hearing"); *TRANSLink Development Company, LLC*, 103 FERC ¶ 61,208 at P 15 (2003) ("Duke Energy seeks rehearing of the Commission's decision to set for hearing issues of market power and market power mitigation measures for TRANSLink's emergency redispatch market. . . . We will deny Duke Energy's request for rehearing. . . . [W]e determined that including the potential to exercise market power among the issues to be addressed at that hearing was the most administratively efficient approach to address this issue").

<sup>16</sup> *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003), citing *Telecomm. Resellers Assoc. v. FCC*, 141 F.3d 1193, 1196 (D.C. Cir. 1998) (administrative agencies enjoy broad discretion to manage their own dockets); see also *City of Lafayette v. SEC*, 454 F.2d 941, 953 (D.C. Cir. 1971) ("an agency is not required to hold hearings in matters where the ultimate decision will not be enhanced or assisted by the receipt of evidence").

<sup>17</sup> East Windsor Agreement, section 3.3. 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

(continued)

whether PJM has withheld or is likely to withhold approval of the Seashore loop. We find that the question of whether an adjustment to payment obligations should be made pursuant to the terms of the contract goes beyond the scope of legal impossibility of performance, and should be decided based on the record in the hearing. Respondents retain the right at the hearing to put forward any legal arguments that they deem relevant to deciding this issue.

14. The question of whether other facilities constructed by JCP&L, which JCP&L has argued are alternatives to the Seashore Loop, is similarly a question of fact and should be considered at hearing. Respondents argue that JCP&L's position is inconsistent with the plain language of the LDV Agreement. But we are not convinced that the contract's language is so unambiguous, or that the facts under which the contract was executed have not so materially changed, that a hearing into this matter is not warranted. JCP&L has alleged that other facilities that it has constructed are electrically equivalent to the Seashore Loop and should therefore be considered "alternative facilities" within the meaning of the LDV Agreement; Respondents dispute that allegation. These are issues of disputed fact that can best be resolved through hearing. At the hearing, respondents remain free to put forth their arguments as to whether circumstances have changed sufficiently and the effect of any such changes on the contract.

15. Similarly, with respect to JCP&L's request in its Answer for clarification 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.

The Commission orders:

Respondents' request for rehearing is denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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the LDV facilities as planned on a continuing basis, a reallocation shall be made of the payments provided for in Article V."