UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Jersey Central Power & Light Company — Docket No. EL05-50-000

v.

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

ORDER DENYING COMPLAINT

(Issued May 6, 2005)

1. In this order, the Commission denies a complaint filed by Jersey Central Power & Light Company (JCP&L) seeking relief from an agreement to share the costs of transmission facilities. This order benefits customers by ensuring that parties fulfill their contractual responsibilities with regard to the provision of transmission service.

## **BACKGROUND**

### **A. The Parties' Agreements**

#### **1. The LDV Agreement**

2. JCP&L and 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) are transmission owners within PJM Interconnection, LLC (PJM). All five companies were previously vertically-integrated utilities.

3. In 1977, JCP&L and Respondents entered into an agreement (the LDV Agreement) under which the parties agreed to construct and jointly own certain high-voltage 500 kV transmission facilities in the Lower Delaware Valley (the LDV System).[1] The purpose of the facilities covered by the LDV Agreement was to integrate certain new and existing nuclear generating plants owned by the five parties to the contract – the Peach Bottom and Salem plants owned by Respondents, and the proposed Forked River plant to be owned by JCP&L – into the existing 500 kV regional transmission system.[2] 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.[3] JCP&L's responsibility under the LDV Agreements included constructing the "Seashore Loop" (the New Freedom-Forked River Line, the Forked River-Smithburg Line, and the Forked River Switching Station),[4] or constructing "such alternative facilities as are mutually agreeable among the signatories." [5]

### 2. <u>The Smithburg Agreement</u>

4. At the same time that the parties entered into the LDV Agreement, they entered into the Smithburg Substation Supply Agreement (Smithburg Agreement). The parties stated there that, pending completion of the facilities JCP&L was required to provide under the LDV Agreement, JCP&L wished to use LDV facilities constructed by others to supply capacity and energy to its Smithburg substation.[6] For purposes of this agreement,

[1] In addition to the portions of the LDV system that are jointly owned by all parties, other portions are owned by individual parties. LDV Agreement, Exhibit 1 to Complaint, at 2; at 4, Article IV.

[2] Complaint at 4.

[3] LDV Agreement at 3, Article II. The LDV Agreement also provided for additional use of the LDV System by parties other than the five parties to the contract. *Id.* at 8, Article VIII, section 8.3.

[4] Testimony of Robert Snow (Snow Testimony), Exhibit 6 to Respondents' Answer (Answer) at 5.

[5] 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 three facilities that comprised the Seashore Loop).

[6] Smithburg Agreement, Exhibit 2 to Complaint, at 1.

the parties agreed that the allocation of use of those facilities would be 25 percent to JCP&L for supply to the Smithburg substation, and 75 percent to the other parties,[7] and JCP&L agreed to make monthly payments of 1.25 percent of 25 percent of the cost of these facilities to the other parties.[8] 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.[9]

### 3. The LDV Supplemental Agreement and East Windsor Agreement

5. The LDV Agreement was intended to last until 2017. In 1990, the parties to the LDV Agreement entered into the LDV Supplemental Agreement, extending the term of the LDV Agreement until 2027.[10] 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.[11] The parties stated that they wished to amend the agreement to provide for the cancellation of the Forked River and alternative routing for the Seashore Loop.[12]

6. At approximately the same time that they executed the LDV Supplemental Agreement, the parties also entered into the East Windsor Substation Supply Agreement (East Windsor Agreement). The parties stated that, pending completion of the facilities it 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 other parties of $3,200,000, in equal monthly installments.[13] The East Windsor Agreement and payments

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[7] Smithburg Agreement, Article I, at 2.

[8] Smithburg Agreement, Article II, section 2.1, at 2.

[9] Smithburg Agreement, Article III, section 3.2, at 4.

[10] LDV Supplemental Agreement, Exhibit 1 to Complaint, section I. L, at 6.

[11] LDV Supplemental Agreement at 2.

[12] LDV Supplemental Agreement at 3.

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

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, but 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 would be "subject to review and appropriate adjustment by the LDV Administrative Committee."[14]

## B. The 1997 PJM Restructuring Order

7. In 1997, PJM was restructured from a tight power pool to an Independent System Operator (ISO). In its order approving PJM's plan for this reorganization, the Commission considered the appropriate treatment for three "multi-lateral transmission facilities agreements" (EHV Agreements), including the LDV Agreement, and how transactions under those agreements would comply with PJM's new open access rule.[15] As the Commission described them,

> 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. The EHV Agreements include rates and terms for additional transmission services that may be requested over these facilities.[16]

8. While one party (PECO) argued that the EHV Agreements should be terminated entirely, other parties proposed to amend the EHV Agreements to make the use of those facilities available under the PJM Open Access Transmission Tariff (OATT) to all transmission customers on a not unduly discriminatory basis, and noted that "most of the

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

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

[16] *Id.*

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."[17]

9. The Commission stated in response:

> We find that it is reasonable to continue the cost sharing arrangements under the EHV Agreements rather than terminating the agreements. The EHV Agreements are 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. We believe this would be unreasonable.
>
> We also find that [the] proposed revisions to the EHV Agreements are reasonable, subject to [modifications not relevant here]. The amendments are reasonable to the extent that they place the use of these facilities under the PJM Transmission Tariff and retain the cost sharing arrangements that continue to be reasonable.[18]

### C. <u>JCP&L's Complaint</u>

10. JCP&L filed the instant complaint on December 30, 2004. It states that 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 for the use of certain LDV facilities, which payments are predicted on JCP&L's obligation under the LDV Agreement to construct the Seashore Loop. JCP&L states 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

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[17] *Id.* at 62,280.

[18] *Id.* footnotes omitted.

LDV Agreement. It therefore asks 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.[19]

11. Respondents filed an answer asserting that JCP&L should not be relieved of its obligations under the LDV, Smithburg and East Windsor Agreements, and asking the Commission to deny the complaint. They assert that JCP&L is now seeking to be relieved of its obligations under the agreements, from which it has benefited for many years, without providing a valid reason. Respondents further state that the payments being made by JCP&L are not transmission use payments, but rather are payments made pursuant to a cost sharing agreement.

12. JCP&L filed a motion to respond, and response, to Respondents' answer. Respondents seek to file a response to JCP&L's response.

## DISCUSSION

13. The Commission denies the complaint, for the reasons set forth below.

### A. Procedural issues

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept JCP&L's response to Respondents' answer because it has provided new information that assisted us in our decision-making process. Respondents' response to JCP&L's response, however, has not provided such new information, and we therefore reject it.

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[19] JCP&L's complaint was noticed in the *Federal Register* at 70 Fed. Reg. 5176 (2005), with answers, comments and motions for intervention due on January 31, 2005. Respondents filed an answer after obtaining two extensions of time to do so. No answer, comment or motion to intervene has been filed by any party other than Respondents.

## B. Complaint

15. The Commission denies JCP&L's complaint, finding no basis to overturn the agreement of the parties

### 1. Nature of JCP&L's Payments

#### a. Positions of the parties

16. JCP&L asserts that the payments it makes under the Smithburg and East Windsor Agreements are payments for the use of certain LDV facilities, rather than being intended to compensate Respondents for specific capital additions to the LDV system. JCP&L considers these payments to be, therefore, analogous to payments for transmission service. It contrasts the payments it makes under the Smithburg and East Windsor Agreements with the monthly charges and credits that it and Respondents pay and receive under the LDV Agreement, which JCP&L asserts are based directly and exclusively on the LDV investments made by those companies. JCP&L further argues that in the PJM Restructuring Order, the Commission required that all uses of the PJM transmission system should take place under PJM's OATT. JCP&L acknowledges that the Commission permitted the continuation of the cost-sharing provisions of the LDV Agreement in the PJM Restructuring Order, but asserts that the Commission did not grandfather any pre-existing transmission uses of the PJM system.

17. Respondents state that the payments made are not transmission use payments, but rather, part of a cost sharing agreement, which the PJM Restructuring Order expressly grandfathered at the time that PJM became an ISO. Respondents argue that, under the terms of the Smithburg and East Windsor Agreements, JCP&L's payments under those agreements are not based on JCP&L's actual usage of certain LDV facilities, but rather, are fixed carrying charge payments made to the other LDV signatories as compensation for the LDV investment made by those other signatories. Respondents' witness Bustard states:

> The [LDV, Smithburg and East Windsor Agreements] are . . . cost sharing agreements among transmission utilities. This type of agreement is common in the electric transmission sector since often a utility with the ability to construct a transmission facility is not the only utility that benefits from the facility. In lieu of contributing actual facilities, or until such facilities are constructed, it is common for a utility under this type of arrangement to bear a portion of the costs of the facilities that are built by another transmission provider in order to share in the costs of a new system. Contrary to JCP&L's suggestion in its Complaint, the charges under the East Windsor and

> Smithburg Agreements are not based on actual use of the transmission system. Rather, the charges are based on JCP&L's agreement to bear a fixed portion of the cost of certain, defined facilities.[20]

Respondents further point to the fact that JCP&L's payment obligations under the Smithburg Agreement is set at 1.25 percent of 25 percent of the cost of the particular facilities that JCP&L will be considered to be using under the Smithburg Agreement, and thus "JCP&L's payment obligation represents a fixed amount not related to actual usage but instead [is] based on a level carrying charge approach."[21]

**b. Commission ruling**

18. The Commission finds, based on the language of the agreements among the parties, that JCP&L's payments under the Smithburg and East Windsor Agreements are payments under cost sharing agreements, rather than transmission use payments.

19. 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 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.

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[20] Testimony of John F. Bustard (Bustard Testimony), Exhibit 1 to Answer, at 4.

[21] Answer at 11-12. It would appear that the 25 percent figure used here arises from the fact that, as noted above, for purposes of this agreement, the parties agreed that the allocation of use of the facilities in issue in the Smithburg Agreement was 25 percent to JCP&L and 75 percent to the other parties, *see* Smithburg Agreement, Article I, at 2.

20. However, while the other four parties did make their required contributions to the LDV System, JCP&L did not contribute the principal facility that it was obligated to provide, the Seashore Loop.[22] 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 (or acceptable alternative facilities). Therefore, these payments are part of an overall cost sharing scheme, rather than being simply payments for transmission use.

21. As the parties proceeded through their contractual arrangements, 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. The payment option is in essence a liquidated damages provision dealing with the possibility that JCP&L would fail to fulfill its obligations under the agreement. Even assuming *arguendo* that construction of the Seashore Loop would never have been possible, JCP&L chose to enter into the Smithburg and East Windsor Agreements,[23] with their attendant payment

[22] The LDV Agreement also provides that, in the event that a party cannot construct certain facilities, it may meet its obligation by constructing alternate facilities agreed to by all the other signatories. JCP&L points to regulatory obstacles in the way of constructing the Seashore Loop, but it does not state that it could not have pursued the other signatories' agreement and constructed such alternate facilities.

[23] Indeed, JCP&L states that it made the decision to cancel construction of the Seashore Loop in the late 1980's. Complaint at 6. Yet, in 1990, JCP&L entered into the East Windsor Agreement, which committed it to make payments to the other parties "pending completion of the facilities [JCP&L] is to provide under the LDV Agreement." East Windsor Agreement, Article II, at 3.

obligations, rather than immediately constructing alternative facilities to the Seashore Loop, presumably because it viewed that as the most advantageous course of action at that time. While JCP&L now apparently believes it made a poor choice, poor business judgment is not sufficient reason to allow JCP&L to terminate its obligation under those agreements.

22. JCP&L's argument that the PJM Restructuring Order eliminated transmission use payments under the LDV Agreement is incorrect. The Commission expressly stated in that order that it was continuing the parties' cost sharing arrangements under a group of agreements including the LDV Agreement, rather than eliminating those agreements or modifying them so as to require the LDV signatories to take service under PJM's OATT. The Commission stated that fairness required this result:

> 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.* We believe this would be unreasonable.[24]

23. Thus, we conclude that JCP&L's payments under the Smithburg and East Windsor Agreements, which are predicated on JCP&L's non-fulfillment of its construction responsibilities under the LDV Agreement, are cost sharing payments rather than transmission use payments, and thus are not required to be made under the terms of PJM's OATT.

### 2. Impossibility of performance

#### a. Positions of the parties

24. JCP&L states that the LDV, Smithburg and East Windsor Agreements all make JCP&L's obligation to construct the Seashore Loop contingent on its ability to obtain necessary government authorization. JCP&L cites to language from each of those agreements stating:

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[24] PJM Restructuring Order at 62,280, footnotes omitted, emphasis added.

> If, and to the extent that, any transaction pursuant to this Agreement shall require the authorization of any governmental body, the rights and obligations of the signatories hereto shall be subject to obtaining such authorization.[25]

25. JCP&L states 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. Further, JCP&L asserts, the construction of the Seashore Loop is now subject to the PJM Regional Transmission Expansion Planning (RTEP) process, and to date PJM has not identified the Seashore Loop as necessary for either reliability or economic reasons. JCP&L asserts that, because the state of New Jersey's and PJM's actions make it impossible for JCP&L to construct the Seashore Loop, JCP&L should be released from its obligation under the LDV Agreement to construct the Seashore Loop.

26. Respondents state that, as to the East Windsor Agreement, that Agreement contemplates the possibility that JCP&L will be unable to construct the Seashore Loop or alternative facilities agreed to by the parties, and provides that, if JCP&L has not placed the Seashore Loop in service by December 31, 2000, JCP&L's payments, and allocation of costs for all LDV facilities, are "subject to review and appropriate adjustment" by the Administrative Committee of LDV owners.[26] Respondents further commit that they will undertake this review and reallocation process within six months of a Commission order dismissing the complaint.[27] Respondents assert, however, that no such review is appropriate with regard to the Smithburg Agreement, since that Agreement does not so provide.

### b. Commission ruling

27. The agreements contemplate the possibility that the construction of the Seashore Loop could not be completed and provide options to JCP&L. The agreements also provide that JCP&L could have sought the approval of the other LDV signatories to construct alternative facilities. Moreover, the payment provision is itself a liquidated damages provision that covers the possibility that the facilities would not be constructed.

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[25] Complaint at 14.

[26] Answer at 21-22, *citing to* East Windsor Agreement, section 3.3, and LDV Agreement, section 8.4.

[27] Answer at 31.

28. The East Windsor agreement further provides for review and appropriate adjustment by the LDV Administrative Committee. JCP&L states that it presented two proposals for review and reallocation to the Administrative Committee in the spring of 2004, and the Administrative Committee rejected both proposals.[28] However, the respondents commit that they will undertake such an administrative review within six months. The Commission expects that such a review will be undertaken in good faith and suggests that the parties consider using the Commission's dispute resolution services to aid them in reaching a reasonable and amicable resolution.[29]

### 3. Alternative facilities

#### a. Positions of the parties

29. JCP&L states that, under the LDV Agreement, JCP&L may either construct the Seashore Loop, or "such alternative facilities as are mutually agreeable among the signatories."[30] JCP&L states that it has built multiple improvements and additions to the LDV system, all of which were approved by the other LDV owners. JCP&L asserts that these system improvements have benefited and will continue to benefit the LDV system in multiple ways.[31] JCP&L therefore argues that it is not appropriate to continue to require JCP&L to construct the Seashore Loop or to make payments in lieu of that construction in light of the $100 million worth of alternative transmission facilities that JCP&L has constructed in the region over the past ten years. Respondents argue that the transmission facilities to which JCP&L alludes do not substitute for the Seashore Loop, and in some cases burden the system in other ways.[32]

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[28] JCP&L Response to Respondents' Answer at 14.

[29] We note, additionally, that if a party should seek in good faith to exercise its contractual right to review and redetermination of the appropriateness of reallocation of its obligations, and it concludes that its counterparties are not similarly acting in good faith, the option of filing a complaint with the Commission on that basis becomes available at that time.

[30] LDV Agreement, Schedule 4, at 1-2.

[31] Complaint at 17-18.

[32] Answer at 26-29.

**b. Commission ruling**

30. It is not necessary for the Commission to evaluate whether the new facilities built by JCP&L are genuinely "alternative facilities" to the Seashore Loop within the terms of the LDV Agreement, or whether those facilities benefit or burden the LDV system. The LDV Agreement provides that JCP&L can only meet its obligation if it provides "such alternative facilities as are mutually agreeable among the signatories."

31. JCP&L did not seek to use this provision to obtain approval for the facilities it lists in its application prior to constructing the new facilities it discusses. Indeed, JCP&L recognized the need to obtain advance approval for alternative facilities. In 1988 and 1989, JCP&L sought the approval of its Dove Mill project under the LDV agreement as a substitute for the Seashore Loop, and the LDV Administrative Committee found that Dove Mill would be "electrically equivalent" to the Seashore Loop. However, JCP&L then did not pursue the Dove Mill project further.[33] Respondents maintain that the facilities for which JCP&L did not seek prior approval are not acceptable alternatives to the Seashore Loop.

32. Since JCP&L did not seek to avail itself of the agreement's provisions for alternative facilities at the time it constructed these facilities, the Commission will not seek to retroactively determine whether these facilities should be regarded as alternatives. The parties should consider these issues as part of the review by the LDV Administrative Committee.

**4. Standard of review**

**a. Positions of the parties**

33. JCP&L claims that, since it is a transmission customer, its request to the Commission to alter the terms of the contracts between it and Respondents should be evaluated under the "just and reasonable" standard of the Federal Power Act (FPA). JCP&L notes that in an earlier case when a signatory to the LDV Agreement filed a change to that agreement without the consent of all the LDV owners, the Commission evaluated and accepted that amendment under the just and reasonable standard.[34]

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[33] Answer at 14-15.

[34] *Delmarva Power & Light Co.*, 69 FERC ¶ 61,436 (1994) (*Delmarva*).

34. With regard to whether its payments are just and reasonable, JCP&L states that under the Smithburg Agreement, it pays $893,160 annually, and under the East Windsor Agreement, it pays $3.2 million annually. JCP&L states that over the past 23 years, it has made approximately $67.6 million in transmission use payments under the two Agreements, and that, absent relief, it must continue to make payments until 2027, when the LDV Agreement expires. JCP&L asserts that it is not just and reasonable for it to be required to continue to make these payments, when it has invested over $100 million in transmission enhancements in central New Jersey since the cancellation of the Seashore Loop, and particularly given that the estimated cost of constructing the Seashore Loop was only $60 million. JCP&L further asserts that the payments it makes under the Smithburg and East Windsor Agreements have never been revised, although most of the facilities on which those charges are based have been in service for nearly 30 years. JCP&L argues that basic tenets of ratemaking policy should suggest that those charges should be reduced over time to reflect the depreciated book value of the facilities.

35. Respondents claim that this request by JCP&L to alter the terms of its contracts should be governed by the *Mobile-Sierra* "public interest" standard,[35] 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." Under *Mobile-Sierra*, the fact that an entity may lose money unless the change is permitted is not sufficient to trigger the "public interest" standard: failure to allow the change would have to "threaten[] the survival of the utility, excessively burden[] other consumers, or impose[] undue discrimination."[36] Respondents claim that the *Mobile-Sierra* public interest standard must be applied here in that, the absence of specific contract language to the contrary (as is the case here), the *Mobile-Sierra* standard applies. Respondents assert that the contract change sought by JCP&L is not justified by the public interest standard.[37]

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[35] *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).

[36] *Boston Edison Co. v. FERC*, 233 F.3d 60, 64-65 (1st Cir. 2000) (*Boston Edison*), *citing Sierra*, 350 U.S. at 355.

[37] Respondents also state that the *Delmarva* case cited by JCP&L involved a clarification of the LDV Agreement, rather than a challenge to it or request to change it, and thus is not apposite here.

**b. Commission ruling**

36. The Commission finds no need to determine whether the public interest standard applies here, since it concludes that under the "just and reasonable" standard JCP&L is not entitled to abrogate the agreement. 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.[38]

37. 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.

38. Additionally, JCP&L has made assertions with regard to the amounts that it has paid over the years, relative to the costs of the transmission facilities. But it did not show the possible damage to Respondents resulting from JCP&L's failure to construct the Seashore Loop in timely fashion. It further has not shown the extent of the benefits that it has received from its use of the LDV facilities under the Smithburg and East Windsor Agreements, or the extent of savings that JCP&L has realized from constructing neither the Seashore Loop nor facilities that would have been accepted by the other signatories as an alternative to the Seashore Loop. In these circumstances, the Commission does not find it unjust and unreasonable to continue a cost sharing liquidated damages provision included in a carefully crafted contract.

[38] PJM Restructuring Order at 62,280, footnotes omitted.

The Commission orders:

JCP&L's complaint is denied.

By the Commission. Commissioner Brownell concurring with a separate statement attached.

( S E A L )

Magalie R. Salas,
Secretary.

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FEDERAL ENERGY REGULATORY COMMISSION

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v. Docket No. EL05-50-000

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

(Issued May 6, 2005)

Nora Mead BROWNELL, Commissioner, *concurring*:

I agree with the decision to deny this complaint; however, I do so based on a different rationale than that adopted by the majority. As I have noted in numerous separate statements, judicial case law establishes that in the absence of clear contractual language allowing unilateral contract modification, the party seeking a change must meet the *Mobile-Sierra* public interest standard.[39] The LDV Agreement is, therefore, a *Mobile-Sierra* contract, and JCP&L has failed to meet the very heavy burden of justifying its requested change.

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Nora Mead Brownell

[39] *See Texaco Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998); and *Boston Edison Co. v. FERC*, 233 F.3d 60, 67 (1st Cir. 2000).