

143 FERC ¶ 61,109
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Linden VFT, LLC

Docket No. EL13-40-000

v.

Brookfield Energy Marketing L.P.,
and Cargill Power Markets, L.L.C.

ORDER ON COMPLAINT, OR IN THE ALTERNATIVE,
PETITION FOR DECLARATORY ORDER

(Issued May 8, 2013)

1. On January 15, 2013, pursuant to sections 206 and 306 of the Federal Power Act (FPA) and Rules 206 and 207(a)(2) of the Commission's Rules of Practice and Procedure,¹ Linden VFT, LLC (Linden VFT) filed a complaint or, in the alternative, petition for declaratory order (Petition). Specifically, Linden VFT seeks an order from the Commission requiring Brookfield Energy Marketing, L.P. (Brookfield)² and Cargill Power Markets, L.L.C. (Cargill) (collectively, TSR Customers) to: (1) reimburse Linden VFT with interest for certain unpaid costs associated with the TSR Customers' taking transmission service over the Linden VFT facility, and (2) pay Linden VFT in the future for such costs for the duration of their Transmission Scheduling Rights Purchase (TSR) Agreements.

2. The specific disputed charges at issue in this proceeding are: (1) Transmission Enhancement Charges (TECs), which relate to transmission upgrades approved as part of the PJM Regional Transmission Expansion Plan (RTEP); (2) PJM Service Administration Charges, which include, among other things, Generation Deactivation and Other Charges, which are related to construction, maintenance, operation, or upgrading of the PJM transmission system; and (3) Other Charges related to the construction, maintenance,

¹ 16 U.S.C. §§ 824e, 825e (2006); 18 C.F.R. §§ 385.206, 385.207(a)(2) (2012).

² As used in this order, the term "Brookfield" means Brookfield Energy Marketing, Inc., and its successor, Brookfield Energy Marketing, L.P.

operation, or upgrading of the transmission system and assessed by PJM to Linden VFT.³ These charges are collectively referred to as “PJM Transmission Service Costs” in this order.⁴

3. Because we find that Linden VFT has no contractual authority to charge the TSR Customers for the PJM Transmission Service Costs, the Commission denies Linden VFT’s Petition.⁵

Background

Linden VFT Facility and TSR Agreements

4. Linden VFT owns and operates a Merchant Transmission Facility (Linden Facility) that interconnects the Linden Cogeneration Facility (located in Linden, New Jersey) to the Goethals Substation (located in Staten Island, New York) through a 345 kV underground transmission line.⁶ The Linden Facility creates approximately 315 MWs of electric transfer capability between the PJM Interconnection, L.L.C. (PJM) and New York Independent System Operator balancing areas; service over this facility is provided pursuant to the PJM Tariff. The TSR Customers are power marketers active in electricity markets throughout the United States and are parties with Linden VFT to the TSR Agreements that are at issue in this proceeding.

5. On January 16, 2007, Linden VFT conducted an auction to allocate transmission scheduling rights, or “TSRs,” which are rights to transmit power through Linden VFT’s facility. The auction offered an initial allocation of 300 MWs of TSRs in 25 MW blocks to market participants for periods of three to five years.⁷ Linden VFT provided all

³ To date, PJM has not invoiced Linden VFT for this third category of charges.

⁴ The TSR Customers also pay a rate expressed in \$/kW-Month, based on the number of MWs that they win at auction. This rate is not at issue in this proceeding.

⁵ Linden VFT styled its pleading as a complaint or, in the alternative, a petition for declaratory order. It explained that it did so because it was not clear whether the Commission would have authority in a section 206 complaint proceeding to order the TSR Customers to pay Linden VFT for past and future PJM Transmission Service Costs. Given that we are denying the merits of Linden VFT’s arguments, and thus do not order any relief, we need not address whether Linden’s action is a complaint or a petition for a declaratory order.

⁶ See *Linden VFT, LLC*, 119 FERC ¶ 61,066 (2007) (*Negotiated Rate Order*).

⁷ *Negotiated Rate Order*, 119 FERC ¶ 61,066 at P 24.

auction participants with a Form of Service Agreement that contained all the non-price terms and conditions intended to apply to each successful bidder's purchase of TSRs.

6. Cargill won three 25 MW blocks of TSR capacity on the facility for a three-year period, at a specified rate in dollars per kilowatt month. Brookfield won five 25 MW blocks of TSR capacity for a five-year period, also at a specified rate in dollars per kilowatt month. Each TSR Customer subsequently entered into a TSR Agreement that specified the price to be paid, as well as the non-price terms and conditions.⁸

7. Merchant transmission providers, such as Linden VFT, can charge cost based rates, in which case the rates are governed by the rate on file that is accepted by the Commission. The Commission has also granted merchant transmission providers the right to charge for transmission service at negotiated rates, unencumbered by the traditional cost of service rate-making principles and filings usually applied to transmission service. On February 14, 2007, Linden VFT filed a request with the Commission for authority under section 205 of the FPA to sell TSRs at negotiated rates. On April 19, 2007, the Commission issued an order authorizing Linden VFT to charge negotiated rates and accepting Linden VFT's open season report of its auction that included its *pro forma* TSR Agreements.⁹

8. Prior to the execution of these contracts, the PJM Transmission Owners filed, in April 2006, a rate case under section 205 proposing to revise Schedule 12 of the PJM Tariff to allocate the costs of transmission upgrades to merchant transmission providers. While this filing was pending, Linden VFT signed the TSR Agreements with Cargill and Brookfield. On April 15, 2009 (two years after the Commission authorized Linden VFT to charge negotiated rates and accepted the *pro forma* TSR Agreements), Linden VFT filed tariff provisions (Schedule 16) setting out the terms and conditions of its service. Included in that filing was a provision stating that, in the event that any TECs under Schedule 12 of the PJM Tariff are allocated to the Linden VFT Transmission Owner, the holder of the Firm Transmission Withdrawal Rights shall pay such charges. The Commission conditionally accepted Schedule 16 on June 12, 2009.¹⁰

9. In December 2009, the TSR Customers began receiving service under the TSR Agreements, and shortly thereafter, on December 9, 2009, Linden VFT submitted an

⁸ The non-price terms and conditions of both the Cargill and Brookfield contracts are substantially the same. *Negotiated Rate Order*, 119 FERC ¶ 61,066 at P 43.

⁹ *Negotiated Rate Order*, 119 FERC ¶ 61,066 at P 24.

¹⁰ See *PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,240 (2009) (Schedule 16 Order). We note that the Commission's conditional acceptance was related to an issue not relevant to this proceeding.

invoice to each of the TSR Customers that specified their respective transmission service charges for the month of December. The invoices included, in addition to the \$/kW-month rate that is not at issue here, a separate charge that was a pass-through of the November 2009 PJM Transmission Service Costs, which were initially invoiced by PJM to Linden VFT. The TSR Customers each disputed their respective invoices, stating that they were under no obligation under the TSR Agreements or the PJM Tariff to pay the PJM Transmission Service Costs.¹¹

10. Since that time, Linden VFT and the TSR Customers have failed to reach agreement on whether the TSR Customers have a contractual obligation to pay the PJM Transmission Service Costs. Instead, pursuant to Section 4.5(c) of the TSR Agreements, the TSR Customers have been paying the disputed PJM Transmission Service Costs into an interest-bearing escrow account.

The District Court Proceeding

11. On November 14, 2012, about two months before Linden VFT filed this Petition with the Commission, the TSR Customers filed an action for declaratory judgment in the United States District Court for the Southern District of New York (District Court). This action sought a determination that the TSR Customers are not obligated to pay the costs at issue in this proceeding. Linden VFT filed a motion to dismiss with the District Court arguing, among other things, that these matters are more properly addressed by the Commission.

12. On February 27, 2013, Linden and the TSR Customers filed with the Commission a District Court order dated February 21, 2013, which stated that the “Court would benefit from an early decision by FERC concerning the matters before it in the FERC Proceeding.” On March 1, 2013, Linden VFT filed with the Commission a second order from the District Court that stayed Linden VFT’s motion to dismiss the District Court action, pending the Commission’s determination whether it will consider Linden VFT’s Petition. The order stated that, “[b]oth parties, therefore, agree that if FERC agrees to hear and resolve Linden’s complaint, this [District Court] matter should be dismissed without prejudice.” On March 12, 2013, the Commission issued an order stating that it will address the merits of Linden VFT’s Petition.¹²

¹¹ See Linden VFT Petition at Attachment B, dispute letters from TSR Customers.

¹² *Linden VFT, LLC*, 142 FERC ¶ 61,185 (2013).

The Petition

Summaries of the Parties' Arguments

Linden VFT

13. In its Petition, Linden VFT first argues that the express language of the TSR Agreement authorizes it to pass through to the TSR Customers the PJM Transmission Service Costs. Then, it asserts that the history of Schedules 12, 14, and 16 of the PJM Tariff evidence the Commission's intent to have TSR Customers pay these costs. We summarize its arguments herein.

14. Linden VFT argues that the TSR Agreements, specifically Section 3.2(b), incorporate by reference the PJM Transmission Service Costs specified in Schedules 12 and 16 of the PJM Tariff, thus making the TSR Customers responsible for these costs when passed through by Linden VFT. More specifically, Linden VFT asserts that the PJM Tariff (which specifies the three categories that together comprise the PJM Transmission Service Costs) is applicable to the TSR Agreements because Section 3.2(b) of the TSR Agreements states, in pertinent part:

Section 3.2, Buyer's [TSR Customers] Obligations.

Buyer shall:

...

(b) on and after the Commercial Operations Date through the expiration of the Term of this Agreement, *in accordance with the provisions of the RTO/ISO Tariff and Rules*, use and pay for, or nevertheless pay for if not used, the TSRs set forth in Schedule 1 . . . [Emphasis added.]

15. Linden VFT argues that "the RTO/ISO Tariff and Rules" is defined in Section 1.1 of the TSR Agreement to include the PJM Tariff, as "approved by the FERC and amended from time to time."¹³ Therefore, Linden VFT asserts, under the express terms of the TSR Agreements, the TSR Customers are responsible for payment of the PJM Transmission Service Costs as specified in Schedules 12 and 16 of the PJM Tariff, as such charges may be modified over time. Linden VFT argues that Section 3.2(b) was purposefully written very broadly to capture whatever PJM (or NYISO) costs and charges would be allocated in the future to Firm Transmission Withdrawal Rights holders.

16. In addition to the specific language of the TSR Agreements, Linden VFT also argues that the language and history of Schedules 14 and 16 of the PJM Tariff indicate that it was the intent of the Commission that the TSR Customers ultimately bear the PJM

¹³ Linden VFT Petition at 13.

Transmission Service Costs as the holders of Firm Transmission Withdrawal Rights. Linden VFT explains that Schedule 12 of the PJM Tariff addresses PJM's process for identifying and allocating the costs associated with PJM's Regional Transmission Enhancement Plan (RTEP) to transmission owners and Merchant Transmission Facilities; it is entitled "Transmission Enhancement Charges," which is one of the PJM Transmission Service Costs at issue herein.

17. In addition, Linden VFT states that Schedule 16 of the PJM Tariff, entitled "Transmission Service on the Linden VFT Facility," describes the terms and conditions under which transmission customers, including the TSR Customers, may take service over that facility. Linden VFT asserts that Section 9 of Schedule 16 delineates the TSR Customers' payment responsibilities for the PJM Transmission Service Costs. Schedule 14 is a comparable provision for transmission service over the Neptune Merchant Transmission Facility.

18. Linden VFT notes that, in an Initial Decision in a complex proceeding which addressed the allocation of RTEP costs to transmission owners (including Merchant Transmission Facilities) and their customers, (Docket Nos. ER06-456, *et al.*), the Presiding Judge specifically mentioned Neptune's Schedule 14 as an example of a way that the merchant transmission facilities could appropriately pass these costs onto their customers.¹⁴

19. Linden VFT asserts that it developed Schedule 16 using the version of Schedule 14 discussed in the Initial Decision as a model, which the Commission accepted in June 2009 and that it did so specifically to ensure that it could recover the PJM Transmission Service Costs from its own transmission customers. Linden VFT notes that the Initial Decision on Neptune's Schedule 14 was affirmed in Opinion No. 503,¹⁵ issued on November 19, 2009, that is, about two years after the TSR Agreements were executed and after the order accepting Schedule 16 (entitled "Transmission Service on the Linden VFT Facility") was issued on June 12, 2009.

The TSR Customers

20. In their answer, the TSR Customers argue that the Commission has unequivocally determined that Linden VFT is responsible for these charges and that Linden VFT is only permitted to pass through such charges if it has a contractual right to do so. The TSR Customers argue that both the applicable price and duration of the transmission

¹⁴ Linden VFT Petition at 17-18 (citing *PJM Interconnection, L.L.C.*, 124 FERC ¶ 63,022, at P 202 (2008) (Initial Decision)).

¹⁵ *PJM Interconnection, L.L.C.*, Opinion No. 503, 129 FERC ¶ 61,161 (2009), *reh'g denied*, Opinion No. 503-A, 139 FERC ¶ 61,243 (2012).

scheduling rights are set forth in Schedule 1 of the TSR Agreements, which establishes the dollar per kW month reservation rate regardless of usage.

21. The TSR Customers assert that the reference to “RTO/ISO Tariff and Rules” in Section 3.2(b) of the TSR Agreements does nothing more than establish that the TSR Customers must pay for the transmission scheduling rights for which they contracted, whether they use those rights or not, and that they must not violate any PJM Tariff provisions applicable to the use of, and payment for, those rights. The TSR Customers argue that, contrary to Linden VFT’s allegations, the only payment obligation to which Section 3.2(b) refers is payment for transmission scheduling rights, but not PJM Transmission Service Costs. The TSR Customers state that the current payment dispute has nothing to do with paying for transmission scheduling rights, as these charges are not in dispute and have been paid in accordance with the TSR Agreements.

22. The TSR Customers argue that the contract principle that “the expression or inclusion of one thing implies the exclusion of another thing” controls this proceeding.¹⁶ Therefore, the TSR Customers claim, Section 4.1 of the TSR Agreements lists all the “Payment Obligations of Buyer” under the agreements to the exclusion of other payment or reimbursement obligations now claimed by Linden VFT. The TSR Customers state that this is further illustrated by changes made by Linden VFT to the Form TSR Agreements in the 2012 auction. Specifically, the TSR Customers note that Linden VFT changed Section 4.1(b) to reflect the specific inclusion or exclusion of TECs depending on the option elected by potential bidders. Linden VFT also changed Section 4.1(d) to acknowledge Linden’s entitlement to pass-through a portion of the TECs assessed to them by PJM.¹⁷

23. The TSR Customers argue that the inclusion of this language authorizing Linden VFT to charge other customers the PJM Transmission Service Costs – and the absence of such language in their earlier TSR Agreements – demonstrates that they are not required to pay these costs.

24. The TSR Customers also argue that, contrary to Linden VFT’s statements, nothing in the language of Schedules 12 or 16 of the PJM Tariff requires them to reimburse Linden VFT for the PJM Transmission Service Costs. The TSR Customers contend that Sections 2.2 and 3.8.1 of Schedule 16 of the PJM Tariff confirms that all rates for transmission scheduling rights are established pursuant to the TSR Agreements. The TSR Customers also note that, because Sections 2.2 and 3.8 of Schedule 16 of the PJM Tariff state that payment obligations for TSRs are controlled exclusively by contract,

¹⁶ TSR Customers Answer at 14.

¹⁷ TSR Customers Answer at 14 (citing Linden VFT, Exhibit D, 2012 Form TSR Agreement).

Section 3.2(b)'s reference to the PJM Tariff cannot impose a payment obligation for transmission scheduling rights beyond the Schedule 1 rate.¹⁸

25. The TSR Customers maintain that the history of the establishment of Schedule 16 and the development of the parallel provisions in Neptune's earlier Schedule 14 confirm the fact that the PJM Tariff does not require reimbursement. The TSR Customers state that, when PJM submitted Schedule 16 for Commission approval in 2009, the TSR Customers, Conectiv Energy Supply, Inc. and Consolidated Edison Energy, Inc. requested that PJM clarify that its proposed changes would allow Linden VFT to pass through the PJM Transmission Service Costs to the TSR Customers only if their TSR Agreements permitted such a pass through. The TSR Customers contend that PJM responded to the clarification request and confirmed that Schedule 16 did not have any impact on the parties' contractual rights under their respective TSR Agreements.¹⁹

26. The TSR Customers argue not only that the language of the TSR Agreements must control, but also note that Commission policy and precedent properly place the cost responsibility for the PJM Transmission Service Costs with Linden VFT, which was confirmed by the Commission's statement in June 21, 2012 order in the Docket No. ER06-456, *et al.* proceeding that the issue of whether the TSR Customers must pay the PJM Transmission Service Costs depends on the individual circumstances of the parties' agreements.²⁰

Discussion

Preliminary Matters

27. Notice of Linden VFT's Petition was published in the *Federal Register*, 78 Fed. Reg. 4842 (2013), with interventions and protests due on or before February 5, 2013. On February 5, 2013, the TSR Customers filed an answer. The TSR Customers' answer also included a motion to dismiss Linden VFT's complaint. On February 20, 2013, Linden VFT filed an answer to the TSR Customers' answer and motion to dismiss. On February 28, 2013, TSR Customers filed an answer to Linden VFT's answer.

¹⁸ The TSR Customers further assert that Schedule 3, "Required Collateral Amount" of the TSR Agreements also supports this position because the required collateral amount is required to be equal to the amount owed under the agreement.

¹⁹ TSR Customers Answer at 18 (citing PJM Answer, filed May 20, 2009, Docket No. ER09-996-000 at 3-4).

²⁰ TSR Customers Answer at 23 (citing *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,242, at P 28 (2012) (Schedule 12 Order)).

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.213(a) (2)(2012)), prohibits answers to answers, unless otherwise permitted by the decisional authority. We will accept the answers to answers filed by TSR Customers and Linden VFT in this proceeding because they have provided information that assisted us in our decision-making process.

29. On March 15, 2013, PJM filed an untimely and unopposed motion to intervene. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214(d) (2012)), the Commission will grant PJM's unopposed, late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

Substantive Matters

30. We find that the provisions in the Cargill and Brookfield TSR Agreements govern the resolution of this proceeding. Consistent with the terms of the TSR Agreements, Linden VFT relinquished its ability to file tariff changes to revise the rates paid by its customers; Linden VFT agreed to be governed by the price terms of its contracts and thus is at risk for the recovery of any additional costs not covered by its previously signed agreements.

31. The parties and the court have requested that the Commission interpret these agreements to determine whether they contemplate Linden VFT's recovery in its rates the transmission costs allocated to it by PJM.²¹ The crux of Linden VFT's argument is that Section 3.2 of the TSR Agreements obligates the TSR Customers to pay the PJM Transmission Service Costs allocated to Linden VFT; the language in Section 3.2(b) of the TSR Agreements on which Linden VFT relies is "in accordance with RTO/ISO Tariff and Rules, [the TSR Customers must] use and pay for . . . the TSRs set forth in Schedule 1."²² It is Linden VFT's position that this reference to "the RTO/ISO Tariff and Rules"

²¹ Because this dispute involves the interpretation of Commission regulations and policy regarding negotiated rate agreements and their relationship to the PJM Tariff, we agree that the Commission has primary jurisdiction to resolve these issues. Furthermore, there is a need for uniformity of interpretation of these tariff and service agreement provisions, and resolution of the dispute over their interpretation is important to the Commission's regulatory responsibilities. *See Arkansas Louisiana Gas Co. v. Frank Hall*, 7 FERC ¶ 61,175, at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (finding that the Commission has primary jurisdiction when the Commission possesses special expertise which makes the case particularly appropriate for Commission decision, there is a need for uniformity of interpretation, and the case is important in relation to the regulatory responsibilities of the Commission).

²² Linden VFT Petition at Attachment C, TSR Agreement, Section 3.2(b).

means that the TSR Agreements create a specific obligation for the TSR Customers, pursuant to Section 9 of Schedule 16 of the PJM Tariff, to pay for the PJM Transmission Service Costs billed to Linden VFT by PJM.

32. Our review of the TSR Agreements indicates that the TSR Customers' payment obligations are contained solely in Schedule 1 of the negotiated rate agreements. The TSR Customers are at risk that the rates they negotiated and agreed to might ultimately turn out to be higher than Linden VFT's costs. Linden VFT is similarly at risk for any undercollection of costs resulting from its agreement to those negotiated rates. That is the very essence of a negotiated rate contract.²³ Therefore, we find that the reference to the "RTO/ISO Tariff and Rules" in the TSR Agreements cannot reasonably be read to create for the TSR Customers any payment obligation above the rates the parties negotiated under the TSR Agreements. While the inclusion of the phrase "in accordance with RTO/ISO Tariff and Rules" in Section 3.2(b) of the TSR Agreement obligates all parties to abide by the terms and conditions of service, such as scheduling,²⁴ in the PJM tariff, it does not expressly reserve to Linden VFT the right to file a tariff provision, such as Schedule 16, after the execution of these agreements to revise the rates under these agreements to recover unanticipated costs.²⁵

33. Indeed, as noted above, prior to the execution of the contracts at issue, the PJM Transmission Owners filed under section 205 of the FPA to allocate transmission costs to merchant transmission providers and the Commission consolidated that proceeding with

²³ See *Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1305 (D.C. Cir. 2010) ("By electing a negotiated rate, Iberdrola's predecessor in interest calculated that the bargained-for rate would offer a more profitable arrangement than the recourse rate.").

²⁴ Article 3 (which includes Section 3.2) of the TSR Agreements, "Basic Obligations," governs terms and conditions of service over the Linden facility. This article contains provisions for items like scheduling, delay damages, counter flow rights, etc.

²⁵ Schedule 16 cannot reasonably be considered to fall within the meaning of the phrase "RTO/ISO Tariff and Rule." PJM section 205 filings made on behalf of the Transmission Owners for purposes of administrative convenience, like Schedule 16, are instead more appropriately considered filings of the Transmission Owners. See PJM Tariff, 9.1 Rights of the Transmission Owners, 1.0.0. *cf. American Electric Power Serv. Corp.*, 110 FERC ¶ 61,276, at PP 9-10 (2005) (requiring PJM to file transmission owner rates as part of PJM's OATT to promote "one-stop shopping," and finding that the filing of an agreement by PJM "is not meant to imply [that PJM] has any additional responsibility for its negotiation, administration and enforcement, or that [PJM] has any additional liability in any manner with regard to the agreement").

other ongoing rate proceedings and set it for hearing.²⁶ Despite both constructive and actual knowledge of the proceeding²⁷ to allocate transmission costs to merchant transmission providers, Linden VFT chose not to include an express reservation of the right to file to recover any such costs from its customers and instead chose to take the risk that the rate it had originally negotiated was more than sufficient to cover its potential risk of exposure to transmission cost increases.²⁸

34. Further, Commission precedent does not favor the incorporation of a rate by reference to another rate schedule.²⁹ Rather, it is Commission policy, embodied in section 35.1 of our regulations, that each contract or service agreement subject to our jurisdiction clearly and specifically contain all of the rates for the services provided under that contract.³⁰ And, here, there is no indication that the parties intended something other than what the agreements on their face provide – a negotiated rate.³¹

35. Second, as the TSR Customers point out, after filing Schedule 16, Linden VFT revised the Form TSR Agreement (the *pro forma* service agreement used for customers

²⁶ See *PJM Transmission Owners*, 115 FERC ¶ 61,345 (2006).

²⁷ East Coast Power, L.L.C., the parent of Linden VFT, filed to intervene in the proceeding on August 4, 2006. Motion of East Coast Power, L.L.C. to Intervene Out-Of-Time, Docket Nos. ER06-954-000, ER06-880-000 and ER06-456-000 (Aug. 4, 2006) (noting that it is East Coast Power is developing a merchant transmission project that is pending in PJM's interconnection queue).

²⁸ Even after proposing and filing Schedule 16, Linden VFT has chosen to execute contracts under which it absorbs this same risk. See, e.g., *Linden VFT, LLC*, 140 FERC ¶ 61,244 (2012) (accepting Linden VFT's request for limited waiver of Schedule 16 in support of the TSR Auction conducted as part of Linden VFT's 2012 Open Season process); *Linden VFT, LLC*, 143 FERC ¶ 61,031 (2013) (accepting limited waiver of Schedule 16 in support of TSR Auction conducted as part of Linden VFT's 2013 Open Season process).

²⁹ E.g. *Detroit Edison Company*, 78 FERC ¶ 61,149, at 61,628 (1997) ("Section 35.1 of the Commission's regulations, 18 C.F.R. § 35.1 (1996), requires that all rates and charges be specified in the public utility's rate schedule. In implementing this requirement, the Commission consistently has rejected proposals to define rates, terms and conditions for service under one rate schedule solely by reference to a different rate schedule.").

³⁰ 18 C.F.R. § 35.1 (2012).

³¹ Cf. *supra* note 24 (explaining that Schedule 16 cannot reasonably be considered to fall within the meaning of the phrase "RTO/ISO Tariff and Rules").

who, like the TSR Customers, take transmission service from Linden VFT) to specifically reference the customer's obligation to pay the PJM Transmission Service Costs. While we acknowledge that this revision may have been in response to the ongoing dispute between Linden VFT and its customers, and by itself, is not dispositive of this dispute, the fact that Linden VFT revised the *pro forma* service agreement to clearly indicate that the customer would be responsible for the PJM Transmission Service Costs is consistent with our finding that the version of the TSR Agreements executed between Linden VFT and the TSR Customers did not expressly obligate the TSR Customers to pay the PJM Transmission Service Costs.

36. Third, we find that Section 3.2 of the TSR Agreements must be read consistently with Section 4.1, which addresses the TSR Customers' payment obligation. Section 4.1(b) makes no reference to the PJM Transmission Service Costs, or even to "RTO/ISO Tariff and Rules," but rather obligates the TSR Customers to pay Linden VFT for TSRs at the rate specified in Schedule 1. Section 4.1(b) states: "[t]he Charges for TSRs shall be an amount equal to the product of the number of Buyer's TSRs expressed in kW multiplied by the Rate set forth in Schedule 1 hereto." Schedule 1 to the TSR Agreements then specifies, for each Buyer that is a party to the TSR Agreement, the amount of capacity in blocks of 25 MW, the beginning and end dates and hours, and the Rate in \$/kW-month. Neither Section 4.1(b) nor Schedule 1 refers to the PJM Transmission Service Costs, or even uses the phrase "RTO/ISO Tariff and Rules." This, we find, further evidences that the TSR Agreements (including the reference in Section 3.2 to "RTO/ISO Tariff and Rules") on their face do not obligate the TSR Customers to pay the PJM Transmission Service Costs. In short, there is no language in the TSR Agreements that persuasively supports Linden VFT's position that the TSR Customers are contractually obligated to pay the PJM Transmission Service Costs.

37. We also reject Linden VFT's argument that the reference in Section 3.2(b) to "RTO/ISO Tariff and Rules" was deliberately drafted broadly to include costs allocated in the future because, at the time when the TSR Agreements were executed, the PJM Tariff did not allocate RTEP costs to Merchant Transmission Facilities. Under this expansive definition of "RTO/ISO Tariff and Rules," virtually any PJM charge, no matter what or in what amount, billed to Linden VFT could be passed directly to the TSR Customers. We do not find this to be a reasonable interpretation of the TSR Agreements in general, or of the reference to the PJM Tariff specifically.

38. Furthermore, even if we were to accept Linden VFT's position that Schedules 12 and 16 of the PJM Tariff are effectively incorporated by reference into the TSR Agreements (a position inconsistent with our precedent and regulations), there is nothing in these schedules that would allow us to conclude that the TSR Customers are contractually responsible for the PJM Transmission Service Costs. In fact, Section 2.2 of Schedule 16 states, in pertinent part, exactly to the contrary:

The charges applicable to the allocation of rights to a [customer] pursuant to this Section shall be determined pursuant to arrangements between the Linden VFT Transmission Owner and the [customer].

In addition, Section 3.8 of Schedule 16 states, in pertinent part:

The billing and payment of rates or charges applicable to the allocation of Firm or Non-Firm Linden VFT Tariff Reservations to the [customer] applicable to Section 2.1 shall be determined pursuant to arrangements between the Linden VFT Transmission Owner and the [customer] and not under this Tariff.

In other words, Schedule 16 of PJM's Tariff confirms that all rates for TSRs are established pursuant to the TSR Agreements. Because the ability to charge TSR Customers for the PJM Transmission Service Costs under Schedule 16 depends on the individual contracts, and we have determined that the TSR Agreements in this proceeding do not provide for such a pass-through, there is nothing in Schedule 16 to create any obligation for the TSR Customers to pay charges that are not contained in their TSR Agreements.

39. Finally, Linden VFT relies on a statement of the Presiding Judge in the Docket No. ER06-456, *et al.* proceeding describing Neptune's Schedule 14 as an example of a way that the merchant transmission providers could appropriately pass these costs onto their customers, and states that it modeled its Schedule 16 on Neptune's Schedule 14. However, Linden VFT fails to recognize that the Commission, in an order issued on June 12, 2012, in Docket No. ER06-456, *et al.*, expressly said that the Presiding Judge's statement, on which Linden VFT relies, "merely noted what Neptune did by contract."³² The Commission then went on to hold that the specific question was simply not before it:

[T]he issue of whether the TSR Agreements allow for the pass-through of RTEP costs [one component of the PJM Transmission Service Costs] and the issue of whether pass-through of RTEP costs of Merchant Transmission Facility customers [such as the TSR Customers] is consistent with the public interest are outside the scope of this proceeding. These issues may depend on the individual circumstances of each Merchant Transmission Facility's contracts with its customers.³³

Thus, the Commission expressly found that whether any customer would be responsible for paying PJM Transmission Service Costs was a matter of individual contract between

³² Schedule 12 Order, 139 FERC ¶ 61,242 at P 28.

³³ *Id.* P 29.

the customer and Merchant Transmission Facility. We have analyzed the TSR Agreements and found that they do not authorize Linden VFT to charge the TSR Customers the PJM Transmission Service Costs at issue.

The Commission orders:

Linden VFT's Petition is hereby denied, as discussed in the body of the order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.