

173 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

Public Service Company of Colorado

Docket No. EL20-14-001

ORDER DENYING CLARIFICATION AND ADDRESSING ARGUMENTS
RAISED ON REHEARING

(Issued October 15, 2020)

1. On March 31, 2020, the Commission granted a petition for declaratory order (Petition), filed by Xcel Energy Services Inc., on behalf of Public Service Company of Colorado (PSCo), requesting that the Commission resolve a dispute between itself and Holy Cross Electric Association, Inc. (Holy Cross) pursuant to certain transmission and power supply agreements.¹ The Commission determined that, under these agreements, PSCo is not required to provide Holy Cross with firm transmission service to deliver energy purchased by Holy Cross from certain third-party suppliers.² On April 30, 2020, Holy Cross filed a request for rehearing and conditional request for clarification of the Declaratory Order.

2. Pursuant to *Allegheny Defense Project v. FERC*,³ the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act (FPA),⁴ we are modifying the discussion in the

¹ *Pub. Serv. Co. of Colo.*, 170 FERC ¶ 61,294 (2020) (Declaratory Order).

² *Id.* P 33.

³ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁴ 16 U.S.C. § 825l(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

Declaratory Order and continue to reach the same the result in this proceeding, as discussed below.⁵

I. Background

3. The dispute in this proceeding arose after Holy Cross entered into two power purchase agreements with third-party suppliers,⁶ and requested that PSCo provide firm delivery curtailment priority transmission service to deliver that energy over the PSCo and Holy Cross integrated transmission system.⁷ Holy Cross's request was made pursuant to a grandfathered transmission service agreement with PSCo, and not pursuant to PSCo's Xcel Open Access Transmission Tariff (OATT).⁸ In its Petition, filed on December 20, 2019, PSCo requested that the Commission find that Holy Cross's requests for firm transmission service are not permitted under the Power Supply Agreement between PSCo and Holy Cross (Power Supply Agreement),⁹ the Transmission Integration and Equalization Agreement (TIE Agreement),¹⁰ and the Operating Agreement for

⁵ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Declaratory Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁶ One power purchase agreement provides for 100 MW of wind capacity and energy from the Arriba Project, while the other provides for 30 MW of solar capacity and energy from the Hunter Project. Declaratory Order, 170 FERC ¶ 61,294 at P 6.

⁷ *Id.* In its protest, Holy Cross defines the requested firm service as equivalent to the transmission curtailment priority for PSCo's designated network resources (i.e., North American Electric Reliability Corporation (NERC) curtailment priority 7-FN, the highest curtailment priority). *Id.* n.9. Consistent with the Declaratory Order, we generally refer herein to Holy Cross's requests as requests for "firm transmission service." *See id.*

⁸ *Id.* P 6 (citing Petition at 4-6, 14, 22).

⁹ The Power Supply Agreement provides that Holy Cross will purchase full requirements service from PSCo – that is, the capacity and associated energy to meet Holy Cross's total electric system requirements – but also allows Holy Cross to make economy energy purchases from third-party suppliers and to receive energy from certain other resources. Declaratory Order, 170 FERC ¶ 61,294 at P 3 (citing PSA §§ 1.13, 5.1, 5.4).

¹⁰ The TIE Agreement sets forth the terms under which PSCo and Holy Cross have agreed to operate their respective transmission facilities as a single integrated transmission system, with PSCo serving as the operator of the integrated transmission system. *Id.* P 5 (citing TIE Agreement § 3.2). The TIE Agreement specifies that each

Scheduling and Accounting for Economy Energy Purchased by Holy Cross (Operating Agreement).¹¹

4. The Commission granted the Petition, finding that, under the terms of the Power Supply Agreement, TIE Agreement, and Operating Agreement, Holy Cross is not entitled to its requested firm transmission service from PSCo.¹² The Commission concluded that Holy Cross's capacity on the integrated transmission system established under the TIE Agreement is limited to its load ratio share and that its firm transmission request to deliver energy from the Arriba and Hunter Projects is for transmission capacity in excess of this load ratio share.¹³ The Commission also noted that, if the energy purchased from the Arriba and Hunter Projects is economy energy, under the terms of the Power Supply Agreement and Operating Agreement, PSCo is not obligated to treat economy energy purchases as firm energy entitled to the highest NERC curtailment priority.¹⁴

II. Rehearing Request

5. Holy Cross argues that the TIE Agreement is governed by Colorado law, under which “written contracts that are complete and free from ambiguity will be found to express the intention of the parties and will be enforced according to their plain language.”¹⁵ Holy Cross adds that “[a] court should only admit parol evidence when the contract between the parties is so ambiguous that their intent is unclear”¹⁶ and that “a contract’s silence does not necessarily invite the introduction of parol evidence to clarify

party is entitled to its load ratio share of the capacity of the integrated transmission system. *Id.* (citing TIE Agreement § 4.2).

¹¹ The Operating Agreement establishes the procedures for scheduling and accounting for third-party economy energy received by Holy Cross through the PSCo/Holy Cross integrated transmission system pursuant to the terms of the Power Supply Agreement. Declaratory Order, 170 FERC ¶ 61,294 at P 4 (citing Operating Agreement §§ 1.1, 1.2).

¹² *Id.* P 33.

¹³ *Id.* PP 34-35.

¹⁴ *Id.* P 36.

¹⁵ Rehearing Request at 15 (citing *Ad Two, Inc. v. City and County of Denver*, 9 P.3d 373, 376 (Colo. 2000)).

¹⁶ *Id.* at 16 (quoting *Boyer v. Karakehian*, 915 P.2d 1295, 1300 (Colo. 1996) (en banc)).

intent.”¹⁷ Holy Cross claims that the Declaratory Order makes no showing that the TIE Agreement is ambiguous, such that it is necessary to resort to parol evidence to discern the intent of the parties.¹⁸ Accordingly, Holy Cross challenges the Commission’s reliance on the Power Supply Agreement and the Operating Agreement in interpreting the TIE Agreement. Holy Cross argues that the TIE Agreement is an integrated agreement that is explicitly independent and separate from the Power Supply Agreement with respect to transmission service.¹⁹ Therefore, Holy Cross contends that the Commission should not have relied on the extrinsic evidence from the Power Supply Agreement and the Operating Agreement in interpreting the TIE Agreement, even if such agreements provide “consistent additional terms.”²⁰

6. Holy Cross contends that the load ratio share capacity entitlement under the TIE Agreement cannot reasonably be construed as limited to Holy Cross’s purchases from PSCo because the “detailed and unambiguous wording” of the TIE Agreement shows that Holy Cross’s “Load Ratio Share capacity rights” are a function of its native load, and not any specific Holy Cross resource, including the Power Supply Agreement.²¹ Specifically, Holy Cross references section 1.9 of the TIE Agreement, which defines “Load Ratio Share” as “the percentage ratio derived for each Party in Accordance with Provision 6 of Appendix A of this agreement.” According to Holy Cross, Provision 6 of Appendix A in turn provides that the Holy Cross load ratio share is a percentage determined by dividing the Holy Cross peak contribution by the combined peak.²² Holy Cross also points out that Provision 6 of Appendix A concludes with the following: “This [Load Ratio Share] calculation shall be consistent for the term of this Agreement regardless of power suppliers serving Holy Cross.”²³

¹⁷ *Id.* (citing *Pub. Works Comm’n of the City of Fayetteville, North Carolina v. Carolina Power and Light Co.*, 60 FERC ¶ 61,283, at 61,958 (1992)).

¹⁸ *Id.* at 18.

¹⁹ *Id.* at 18-19 (citing TIE Agreement § 2.1).

²⁰ *Id.* at 19 (citing Col. Rev. Stat. § 4-2-202).

²¹ *Id.* at 19-20.

²² *Id.*

²³ *Id.* at 20.

7. According to Holy Cross, the Commission's precedent "does not permit rates or terms in one rate schedule to be defined by reference to another rate schedule."²⁴ Holy Cross argues that the Declaratory Order conflicts with this precedent because "the Commission's interpretation of 'Holy Cross Requirements Demands' subverts the plain language of Appendix A, inappropriately limiting that term to only Holy Cross's energy requirements served by PSCo under the Power Supply Agreement."²⁵ Holy Cross maintains that its use of the integrated transmission system to serve its load with energy from third-party suppliers is not, as the Commission held, "in excess of its load ratio share entitlement" because that same load is the very basis upon which the Load Ratio Share is calculated.²⁶

8. Holy Cross challenges the Commission's conclusion that Holy Cross's request for firm transmission service to deliver energy from the Arriba and Hunter Projects is for "transmission capacity in excess of its load ratio share entitlement under the TIE Agreement" and claims that this is incorrect for two reasons.²⁷ First, Holy Cross claims that its full requirements service from PSCo will be reduced by its economy energy purchases from Arriba or Hunter such that Holy Cross's use of its transmission capacity rights under the TIE agreement will be unchanged.²⁸ Second, Holy Cross states that PSCo is not obligated to deliver the energy from the Power Supply Agreement over the integrated transmission system, which is instead the responsibility of Holy Cross.²⁹ Holy Cross concludes that the Commission's determination that Holy Cross is not entitled to firm service for its Arriba and Hunter purchases is unsupported by the terms of the TIE Agreement and does not reflect reasoned decision-making.³⁰

9. Holy Cross argues that the curtailment provisions under the Operating Agreement describe "a possibility based on the terms of the contract between Holy Cross and the

²⁴ *Id.* at 21 (quoting *New England Power Pool*, 83 FERC ¶ 61,045, at 61,252 (1998) (*NEPOOL*)).

²⁵ *Id.*

²⁶ *Id.* (citing Declaratory Order, 170 FERC ¶ 61,294 at P 35).

²⁷ *Id.* at 22 (citing Declaratory Order, 170 FERC ¶ 61,294 at P 35).

²⁸ *Id.* See also *id.* at 23-24 (claiming that it is mathematically impossible for economy energy purchases to cause Holy Cross to exceed its TIE Agreement capacity entitlement).

²⁹ *Id.*

³⁰ *Id.*

supplying party” but does not “operate to amend the terms of the bilateral agreements between Holy Cross and its third party suppliers.”³¹ Holy Cross states that the circumstances that could trigger an economy energy curtailment are predicated on power supply merchant issues, and not on transmission delivery issues. Noting that even schedules with the highest curtailment priority are not immune from curtailment, Holy Cross maintains that the Commission’s determination that *all* economy energy purchases are ineligible for firm transmission service is “a reach too far” given that the Operating Agreement does not call for mandatory curtailments.³²

10. Holy Cross alleges that the Commission misread the Power Supply Agreement through its description of the agreement as a full requirements contract.³³ Holy Cross argues that the Power Supply Agreement is not a typical full requirements contract because the term “Full Requirements Service” is defined as capacity and associated energy “in excess of . . . Western Preference Power, the Comanche 3 Net Entitlement, any purchases from Qualifying Facilities Back-up Power Service and Economy Energy Purchases.”³⁴ Holy Cross points out that, of these five identified categories of service, all but the economy energy category are accorded firm transmission service.³⁵ Holy Cross argues that this distinction with respect to economy energy is unsupported under the Power Supply Agreement.³⁶

11. Holy Cross maintains that it is seeking to use its capacity rights under the TIE Agreement to serve its native load in the same manner that PSCo uses its capacity rights under the TIE Agreement.³⁷ Holy Cross claims that, like PSCo, it seeks the ability to serve its load with renewable energy in lieu of what may be more expensive energy from other available resources. Holy Cross argues that, by denying Holy Cross that ability, PSCo is in breach of the provision in the TIE Agreement prohibiting the parties from imposing “adverse distinctions” on one another with respect to the use of the integrated

³¹ *Id.* at 26.

³² *Id.* at 27.

³³ *Id.* at 29.

³⁴ *Id.*

³⁵ *Id.* at 30.

³⁶ *Id.*

³⁷ *Id.* at 23.

system.³⁸ In so doing, Holy Cross alleges that PSCo has violated “the golden rule of comparability,” which, according to Holy Cross, has been incorporated into the TIE agreement.³⁹

12. In Holy Cross’s view, the Declaratory Order “has been interpreted by PSCo as relieving it of any obligation to comply with Holy Cross’s request to study the [integrated transmission system] to accommodate potential new resource deliveries.”⁴⁰ Accordingly, Holy Cross contends that it is unable to arrange for power resources to replace PSCo resources when the Power Supply Agreement terminates or is converted to a partial requirements service and that the Declaratory Order “is in effect an authorization of the use of transmission market power to stifle competition.”⁴¹ Specifically, Holy Cross argues that the Declaratory Order enhances PSCo’s ability to use transmission market power to further its interests as a wholesale merchant.⁴²

13. On May 15, 2020, PSCo filed a motion for leave to answer and answer. On June 1, 2020, Holy Cross filed an answer to PSCo’s answer.

III. Discussion

A. Procedural Matters

14. Rule 713(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2020), prohibits an answer to a request for rehearing. Accordingly, we deny PSCo’s motion to answer and reject the answers filed by PSCo and Holy Cross.

³⁸ *Id.* at 30-31 (citing TIE Agreement 2.3, 5.3, and 5.4).

³⁹ *Id.* at 37 (citing *Ala. Mun. Elec. Auth. v. FERC*, 662 F.3d 571, 573 (D.C. Cir. 2011) (“FERC has distilled its comparability standard into a ‘golden rule of pricing’—a transmission owner should charge itself on the same or comparable basis that it charges others for the same service.”); *Hermiston Generating Co.*, 69 FERC ¶ 61,035, at 61,164 (1994) (“[A]n offer of comparable services is a necessary component of transmission open-access that is intended to mitigate market power.”)).

⁴⁰ *Id.* at 24.

⁴¹ *Id.* at 24-25. *See also id.* at 33.

⁴² *Id.* at 25. *See also id.* at 35-41 (discussing alleged undue discrimination and anti-competitive implications of the Declaratory Order).

B. Substantive Matters

15. We continue to find that, under the Power Supply Agreement, TIE Agreement, and Operating Agreement, PSCo is not obligated to provide firm transmission service for Holy Cross's purchases from the Arriba and Hunter Projects. As discussed below, contrary to Holy Cross's arguments on rehearing, the Commission appropriately analyzed the terms in each of these three agreements to answer the question raised in the Petition. We also continue to find unpersuasive Holy Cross's argument that the relief sought by PSCo, and granted through the Declaratory Order, precludes Holy Cross from using its rights under the TIE Agreement on a basis comparable to PSCo's use. Finally, we deny Holy Cross's conditional request for clarification that the Declaratory Order apply "only to those issues discussed in the Ordering paragraphs of the Declaratory Order, and that any other forms of relief sought by PSCo in its Petition are not granted by the Declaratory Order."⁴³

1. The Agreements Between the Parties Do not Entitle Holy Cross to Firm Transmission Service for its Third-Party Economy Energy Purchases

16. Holy Cross alleges that the Commission misapplied contract law by relying on parol evidence to interpret the TIE Agreement.⁴⁴ Holy Cross maintains that the TIE Agreement is an integrated agreement that is unambiguous and is explicitly independent and separate from the Power Supply Agreement with respect to transmission service.⁴⁵ In particular, Holy Cross contends that the Commission should not have relied on the parol evidence from the Power Supply Agreement when interpreting the term "load ratio share" under the TIE Agreement.⁴⁶ This argument is untenable. The issue in this case is whether Holy Cross is entitled to firm transmission service for certain third-party purchases, which requires an analysis of the TIE Agreement, Power Supply Agreement, and the Operating Agreement, all of which were executed to set forth the rights and obligations of the parties with respect to PSCo's assumption of responsibility to provide

⁴³ Rehearing Request at 41.

⁴⁴ *Id.* at 16-19.

⁴⁵ *Id.* at 18-19 (citing TIE Agreement § 2.1).

⁴⁶ *Id.* at 5, 19-21, Specifications of Error 1 & 2.

full requirements service to Holy Cross following the bankruptcy of Colorado-Ute Electric Association, Inc. The Commission appropriately considered the parties' rights and obligations under each agreement, without resorting to parol evidence.⁴⁷

17. As discussed in the Declaratory Order, Holy Cross's capacity on the integrated transmission system is limited to its load ratio share.⁴⁸ In interpreting the term "load ratio share" under the TIE Agreement, the Commission appropriately cited to the definition in section 1.9 of that agreement, which references the method for calculating load ratio share in Appendix A, provision 6, to conclude that Holy Cross's load ratio share is based on its requirements demands.⁴⁹ The Commission did not look to any agreement other than the TIE Agreement in interpreting the term "load ratio share"; nor did the Commission look outside the TIE Agreement to determine Holy Cross's transmission capacity entitlement under the TIE Agreement. The TIE Agreement sets forth Holy Cross's transmission capacity entitlement, but it alone does not answer the question of whether Holy Cross's request for firm transmission service to deliver power from the Arriba and Hunter Projects would be encompassed within this transmission capacity entitlement.

18. The Commission concluded, based on the terms of the Power Supply Agreement, that Holy Cross is required to purchase its full requirements from PSCo, with exceptions for certain resources and for economy energy.⁵⁰ That Holy Cross is currently required to purchase its full requirements from PSCo is based on Holy Cross's obligations under the Power Supply Agreement and is not, as Holy Cross contends, an interpretation of the term "load ratio share" under the TIE Agreement.⁵¹ Rather, given that Holy Cross's load

⁴⁷ Holy Cross's reference to case law on the parol evidence, as well as its reference to *NEPOOL*, is inapposite because, as discussed above, the Commission did not rely on parol evidence.

⁴⁸ Declaratory Order, 170 FERC ¶ 61,294 at P 34.

⁴⁹ *Id.* P 35 n.55.

⁵⁰ *Id.* P 35 (citing Power Supply Agreement § 5.1).

⁵¹ We do not dispute Holy Cross's assertion that "load ratio share" in the TIE Agreement may also relate to cost allocation for that particular agreement, nor do we find any inconsistency with the statement in Appendix A of the TIE Agreement stating: "This [Load Ratio Share] calculation be consistent for the term of this Agreement regardless of power suppliers serving Holy Cross." *See* Rehearing Request at 5, 20. The fact that the term "load ratio share" is used in the context of cost allocation does not alter our conclusion that Holy Cross's capacity on the integrated transmission system is limited to its load ratio share. *See* Declaratory Order, 170 FERC ¶ 61,294 at P 34.

ratio share of the integrated transmission system is based on its requirements demands, and it is currently required by the Power Supply Agreement to purchase its full requirements from PSCo, it necessarily follows that Holy Cross's firm transmission capacity entitlement is being used to serve the full requirements of Holy Cross's load, and that "[f]or Holy Cross to obtain firm transmission service to receive power from the Arriba and Hunter Projects, Holy Cross would require transmission capacity that is in excess of its load ratio share of the capacity of the integrated system."⁵² Accordingly, we continue to find that Holy Cross is not entitled to firm transmission service for the power from the Arriba and Hunter projects.⁵³

19. Holy Cross contends that the Commission relied on a misstatement of fact in finding that purchases from the Arriba and Hunter projects would constitute "additional firm service" rather than a displacement of energy otherwise provided from PSCo.⁵⁴ We disagree. The Commission addressed and disagreed with this argument in the Declaratory Order based on an analysis of the terms of the TIE Agreement, PSCo's full requirements obligation as set forth in the Power Supply Agreement,⁵⁵ and on the

⁵² *Id.* In reaching this conclusion, the Commission did not use the Power Supply Agreement as parol evidence to interpret the TIE Agreement. Instead, the Commission appropriately considered both agreements in answering the question raised in the Petition.

⁵³ *Id.* P 33 ("We find that the agreements do not entitle Holy Cross to the requested firm transmission service, and that Holy Cross's request for such firm transmission service is inconsistent with the terms of the agreements.").

⁵⁴ Rehearing Request at 7, 10, Specification of Error 7.

⁵⁵ Declaratory Order, 170 FERC ¶ 61,294 at P 35 (noting that Holy Cross is "asking to receive firm transmission service to obtain full requirements service from PSCo as well as additional firm transmission service to transmit the output of its independently-contracted generation"). Elsewhere in its rehearing request, Holy Cross argues that the Power Supply Agreement is "not a typical full requirements contract" because the full requirements service applies only to power "in excess of Holy Cross's Western Preference Power, the Comanche 3 Net Entitlement, any purchases from Qualifying Facilities Back-up Power Service and Economy Energy Services." Rehearing Request at 29 (citing Power Supply Agreement § 1.13). Holy Cross adds that, aside from economy energy, each of these purchase categories are entitled to firm transmission service. *Id.* at 29-30. While we take no position on these other purchase categories, as they are beyond the scope of the Petition, we continue to find that the scheduling restrictions on economy energy purchases indicate that such purchases are not entitled to firm transmission service.

scheduling restrictions of “economy energy” as described in the Operating Agreement.⁵⁶ The Power Supply Agreement obligates PSCo to stand ready to supply Holy Cross’s full requirements on a firm basis, and PSCo would not be relieved of that obligation if Holy Cross were to receive firm transmission for a generation resource over which PSCo has no control. Having opined on this issue based on an analysis of the rights and obligations in the agreements, we disagree with Holy Cross’s characterization of this issue as a disputed fact that should have been set for evidentiary hearing.⁵⁷

20. Holy Cross also alleges that the Commission relied on “unsupported parol evidence as to what constitutes economy energy rather than relying on the provisions in the related Dispatch Agreement for that decision.”⁵⁸ It is unclear from the rehearing request what is meant by the “related Dispatch Agreement,” but based on arguments presented elsewhere in its rehearing request, it appears that the “related Dispatch Agreement” refers to the Operating Agreement.⁵⁹ Holy Cross argues that, under the provisions of Operating Agreement, curtailment of economy energy is only a “possibility,” which should not preclude Holy Cross’s eligibility for firm transmission service for economy energy purchases.⁶⁰

21. We are unpersuaded both by the characterization of the Operating Agreement as parol evidence and Holy Cross’s alternative argument that the Operating Agreement does not support the Commission’s conclusions. As discussed above, PSCo’s Petition requested that the Commission determine whether Holy Cross is entitled to firm transmission service to deliver energy from the Arriba and Hunter Projects based on the terms of the Power Supply Agreement, the TIE Agreement, and the Operating Agreement. Responding to the Petition requires consideration of all three agreements, and all three agreements were executed to set forth the rights and obligations of the

⁵⁶ Declaratory Order, 170 FERC ¶ 61,294 at P 36.

⁵⁷ *See* Rehearing Request at 7, 10, Specification of Error 7.

⁵⁸ Rehearing Request at 7; *see also* Specification of Error 6 (alleging that the Commission misreads the Power Supply Agreement’s provision regarding economy energy and relies on unsupported parol evidence).

⁵⁹ In particular, Holy Cross states: “Totally apart from the issue of the legality of even looking to the Operating Agreement, which was executed prior to the TIE Agreement, as parol evidence of the intent of the parties under the TIE Agreement. . . the language of the Operating Agreement simply does not support the Commission’s sweeping conclusion that no Economy Energy resource is entitled to [firm transmission service].” Rehearing Request at 27.

⁶⁰ *Id.* at 26.

parties with respect to PSCo's assumption of responsibility to provide full requirements service to Holy Cross following the bankruptcy of Colorado-Ute Electric Association, Inc. The Commission appropriately considered the parties' rights and obligations under each agreement, without need to resort to parol evidence. Furthermore, we continue to find that, under the terms of the Power Supply Agreement and Operating Agreement, economy energy has a lower curtailment priority than firm energy, and PSCo is not obligated to treat economy energy purchases as firm energy entitled to the highest NERC curtailment priority.⁶¹

22. Despite its insistence on the impropriety of parol evidence, Holy Cross itself cites to a 1992 Memorandum of Agreement (MOA) between the parties as support for its preferred interpretation of the TIE Agreement.⁶² Preceding both the TIE Agreement and Power Supply Agreement, the MOA served to memorialize the key components of the power supply arrangement between PSCo and Holy Cross.⁶³ Holy Cross argues that "the MOA provides Holy Cross the right to firm transmission services for purchases of power supplies from third parties" but cites no specific provision in the MOA to support this claim. In its protest, Holy Cross had cited to section 12.2 of the MOA, which provides Holy Cross the right to purchase power from third parties. However, this provision of the MOA does not indicate that such purchases would be entitled to firm transmission service.⁶⁴ Moreover, the specific provisions setting forth Holy Cross's right to purchase power from third parties were agreed to in the Power Supply Agreement. These provisions include Holy Cross's right to purchase economy energy (which we have concluded is not entitled to firm transmission) and to purchase energy from third parties under the partial requirements service option that becomes effective January 1, 2029. We therefore find that, regardless of whether the MOA should be construed as relevant evidence of intent, the terms of the MOA do not support Holy Cross's argument that it is entitled to firm transmission service for its third-party economy energy purchases.

23. We are also unpersuaded by Holy Cross's contention that the Declaratory Order has subjected Holy Cross to "severe operational and anticipative consequences."⁶⁵ In Holy Cross's view, the Declaratory Order "has been interpreted by PSCo as relieving it

⁶¹ Declaratory Order, 170 FERC ¶ 61,294 at P 36. The Declaratory Order contains a comprehensive discussion for why economy energy is not entitled to firm transmission service, which we will not repeat here. *Id.* PP 37-38.

⁶² Rehearing Request at 6, Specification of Error 5.

⁶³ *See id.* at 6; PSCo February 6, 2020 Answer at 12.

⁶⁴ *See* Holy Cross January 22, 2020 Protest at 14.

⁶⁵ Rehearing Request at 9, 24, Specification of Error 4.

of any obligation to comply with Holy Cross requests to study the [integrated transmission system] to accommodate potential new resource deliveries.”⁶⁶ Based on this interpretation, Holy Cross contends that it will have difficulty arranging for power supply resources. This concern is misplaced. The Declaratory Order does not address PSCo’s obligation to study or provide for firm transmission service requests from new resources when such conversion occurs, nor is this question ripe for our review.

2. Holy Cross’s Comparability Arguments are Without Merit

24. Holy Cross argues that the Declaratory Order precludes Holy Cross from using its rights under the TIE Agreement on a basis comparable to PSCo, which, in Holy Cross’s view, results in a breach of the TIE Agreement’s requirement that there be no “adverse distinction” in such use.⁶⁷ According to Holy Cross, the TIE Agreement incorporates the Commission’s “golden rule” of comparability⁶⁸ by prohibiting either party from making adverse distinctions as to the other party’s use of the integrated transmission system.⁶⁹ This argument, along with Holy Cross’s related anti-discrimination arguments, incorrectly presumes that the TIE Agreement is the equivalent of an open access transmission tariff, which it is not. As PSCo explained in its Petition, the TIE Agreement is a grandfathered transmission service agreement that predates Order No. 888.⁷⁰

⁶⁶ *Id.* at 24.

⁶⁷ *Id.* at Specification of Errors 3 & 4, and 9-10, 23-24, 30-34 (citing TIE Agreement §§ 2.3, 5.3, and 5.4).

⁶⁸ Holy Cross describes the “golden rule of comparability” as requiring a transmission owner to charge other customers on a comparable basis to the rates charged itself and to engage in practices for other customers on a basis comparable to the practices it employs for its own transactions. *Id.* at 37 (citing *Ala. Mun. Elec. Auth. v. FERC*, 662 F.3d at 573; *Hermiston Generating Co.*, 69 FERC at 61,164).

⁶⁹ *Id.* (citing TIE Agreement §§ 5.3, 5.4).

⁷⁰ Petition at 4-6, 14, 22; *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

25. As discussed above, Holy Cross's entitlement to firm transmission service is limited by its contractual obligation under the Power Supply Agreement – which was freely negotiated between the parties – to obtain full requirements service from PSCo. As the Commission explained in the Declaratory Order, “Holy Cross's requests for firm transmission service on the integrated transmission system to receive energy other than the full requirements supplied by PSCo are not comparable to PSCo's use of the system to serve its own retail load.”⁷¹ We also find that PSCo necessarily provides transmission service to serve Holy Cross's load in a manner comparable to its retail load by virtue of the fact that, like PSCo's retail load, Holy Cross's load constitutes a native load obligation under the Power Supply Agreement.⁷² Accordingly, we disagree that PSCo has made adverse distinctions as to Holy Cross's use of the integrated transmission system that could give rise to a breach of the TIE Agreement.

3. Conditional Request for Clarification

26. We deny Holy Cross's conditional request for clarification that the Declaratory Order be “construed narrowly as applying only to those issues discussed in the Ordering paragraphs of the Declaratory Order, and that any other forms of relief sought by PSCo in its Petition are not granted by the Declaratory Order.”⁷³ We are presuming that the “ordering paragraphs” referred to by Holy Cross mean, consistent with common Commission practice, the Commission's statement at the conclusion of the Declaratory Order that “PSCo's petition for declaratory order is hereby granted, as discussed in the body of this order.”⁷⁴ The relief granted in the Declaratory Order extends to the discussion throughout the order.

⁷¹ Declaratory Order, 170 FERC ¶ 61,294 at P 40.

⁷² Elsewhere in its rehearing request, Holy Cross states that PSCo is not obligated to deliver the energy from the Power Supply Agreement over the integrated transmission system, which is instead the responsibility of Holy Cross. Rehearing Request at 22. We find that this is not a meaningful distinction. As the provider of full requirements service to Holy Cross, PSCo is responsible for supplying power to Holy Cross's loads and those loads are served using the integrated transmission system governed by the TIE Agreement.

⁷³ *Id.* at 41.

⁷⁴ Declaratory Order, 170 FERC ¶ 61,294 at ordering para.

The Commission orders:

(A) In response to Holy Cross's request for rehearing, the Declaratory Order is hereby modified and the result sustained, as discussed in the body of this order.

(B) Holy Cross's conditional request for clarification is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.