

170 FERC ¶ 61,294
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Public Service Company of Colorado

Docket No. EL20-14-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued March 31, 2020)

1. On December 20, 2019, pursuant to Rule 207(a)(2) of the Commission's Rules of Practice and Procedure,¹ Xcel Energy Services Inc. (Xcel) filed, on behalf of Public Service Company of Colorado (PSCo), a petition for declaratory order (Petition) 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. In general, PSCo asks the Commission to find that a request by Holy Cross to PSCo for firm transmission service under these agreements for energy purchased from certain third-party suppliers is inconsistent with the agreements between them and that PSCo is not obligated to provide the requested firm transmission service under the agreements to Holy Cross. For the reasons discussed below, we grant the Petition.

I. Background

2. Prior to its relationship with PSCo, Holy Cross was a member and equity owner of Colorado-Ute Electric Association, Inc. (Colorado-Ute). After Colorado-Ute filed for bankruptcy in 1990, the bankruptcy court approved a joint plan for the acquisition and reorganization of Colorado-Ute's assets and customers. Pursuant to the reorganization, PSCo and Holy Cross each acquired certain Colorado-Ute assets and PSCo assumed responsibility for full requirements service to Holy Cross.² Subsequently, PSCo and Holy Cross entered into several agreements, described below.

3. On February 6, 1992, PSCo and Holy Cross entered into a power supply agreement (Power Supply Agreement), under which Holy Cross agrees to purchase full requirements service from PSCo – that is, the capacity and associated energy to meet

¹ 18 C.F.R. § 385.207(a)(2) (2019).

² Petition at 9-10; Holy Cross Protest at 10-11.

Holy Cross's total electric system requirements.³ The Power Supply Agreement provides that Holy Cross may make economy energy purchases from third-party suppliers in lieu of full requirements service energy purchases from PSCo.⁴ Additionally, the Power Supply Agreement provides that Holy Cross may receive energy from certain other resources.⁵

4. On March 17, 1993, PSCo and Holy Cross entered into an Operating Agreement for Scheduling and Accounting for Economy Energy Purchased by Holy Cross Electric Association (Operating Agreement), which 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.⁶

5. On December 23, 1993, PSCo and Holy Cross entered into a Transmission Integration and Equalization Agreement (TIE Agreement), under which PSCo and Holy Cross agree to operate their transmission facilities as a single integrated transmission system. The TIE Agreement sets forth the rights and responsibilities of each party with regard to the integrated transmission system. Among other things, the TIE Agreement provides that PSCo will operate the integrated transmission system,⁷ and that each party is entitled to its load ratio share of the capacity of the integrated transmission system.⁸

³ Power Supply Agreement §§ 1.13, 5.1.

⁴ *Id.* § 5.4.

⁵ *See id.* §§ 1.13 (defining full requirements service as capacity and energy to meet Holy Cross's total requirements in excess of Holy Cross's Western Preference Power, Comanche 3 Net Entitlement, purchases from qualifying facilities, Back Up Power, and economy energy purchases), 5.5 (Western Preference Power), 5.8 (Comanche 3 Net Entitlement), 5.9 (Back Up Power), 9 (Qualifying Facilities).

⁶ Operating Agreement §§ 1.1, 1.2.

⁷ TIE Agreement § 3.2.

⁸ *Id.* § 4.2. Each party is entitled to its load ratio share capacity so long as it meets its load ratio share responsibility (i.e., the obligation to contribute to and/or financially support its load ratio share of the integrated transmission system) and the use is consistent with prudent utility practice. *Id.*

II. Petition

6. PSCo explains that Holy Cross recently entered into two power purchase agreements with third-party suppliers, one for 100 MW of wind capacity and energy from the Arriba Project, and the second for 30 MW of solar capacity and energy from the Hunter Project. PSCo states that Holy Cross intends to wheel the energy across the PSCo/Holy Cross integrated transmission system and to treat the energy as economy energy under the Power Supply Agreement. PSCo asserts that Holy Cross has requested that PSCo provide firm transmission curtailment priority service to deliver the energy.⁹ PSCo notes that Holy Cross has not requested transmission service under PSCo's Xcel Open Access Transmission Tariff (OATT), but instead seeks transmission service under the TIE Agreement, which PSCo characterizes as a grandfathered transmission service agreement that predates Order No. 888.¹⁰

7. PSCo requests that the Commission issue an order declaring that Holy Cross's requests for firm transmission service are inconsistent with the Power Supply Agreement, Operating Agreement, and TIE Agreement, and that PSCo is not required to provide Holy Cross with the requested firm transmission service or process the requests.¹¹ PSCo states that Article 10 of the TIE Agreement provides that disputes under it may be referred to the Commission. PSCo argues that Holy Cross's requests for firm transmission service would violate the terms of the Power Supply Agreement by treating economy energy

⁹ Petition at 19-20. PSCo asserts that firm transmission curtailment priority service is not a service described in the TIE Agreement, but that Holy Cross defines it 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.* at 19-20, 34 n.86. In its protest, Holy Cross refers to "firm delivery curtailment priority transmission service." For simplicity, in this order we generally refer to Holy Cross's requests as requests for "firm transmission service."

¹⁰ *Id.* 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).

¹¹ Petition at 1-2, 21, 43.

purchases as firm resources for transmission purposes. PSCo asserts that economy energy purchases use non-firm transmission service under the agreements between PSCo and Holy Cross and states that Holy Cross has historically used non-firm transmission service for economy energy.¹²

8. PSCo contends that the Power Supply Agreement, Operating Agreement, and TIE Agreement are interrelated and that the issue of how PSCo is required to respond to Holy Cross's firm transmission requests can only be understood with reference to all three agreements. PSCo notes that the TIE Agreement does not reference specific resources for which Holy Cross receives transmission service, use firm and non-firm terminology, mention points or receipt or delivery, or discuss how Holy Cross may modify its transmission service or submit requests to add new resources. PSCo maintains that the Power Supply Agreement contains key provisions applicable to the delivery of power to Holy Cross, including the points of receipt and Holy Cross resources that PSCo must deliver for full requirements service. PSCo also asserts that the Operating Agreement addresses how Holy Cross may schedule economy energy deliveries across the integrated transmission system.¹³

9. PSCo maintains that economy energy under the Power Supply Agreement is the same as the traditional concept of economy energy in the electric industry, which is non-firm in nature.¹⁴ PSCo argues that Holy Cross cannot label long-term power purchases with firm transmission service as economy energy under the Power Supply Agreement and that by requesting firm transmission service for economy energy Holy Cross is attempting to circumvent the full requirements service provisions in the Power Supply Agreement.¹⁵ PSCo asserts that, if it were required to provide Holy Cross firm transmission service for economy energy, it would allow Holy Cross to game the charges under the Power Supply Agreement and shift to other customers the transmission costs associated with the transmission upgrades needed to "firm up" the non-firm service.¹⁶ PSCo states that, under the Power Supply Agreement and Operating Agreement, Holy Cross is not subject to transmission or capacity charges for economy energy, which precludes PSCo from recovering the cost of transmission upgrades and reinforces the

¹² *Id.* at 20-21.

¹³ *Id.* at 21-25.

¹⁴ *Id.* at 25-26 (citing *Commonwealth Edison Co.*, 21 FERC ¶ 61,096, at 61,294 (1982); Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,666 n.178).

¹⁵ *Id.* at 26-27.

¹⁶ *Id.* at 27.

conclusion that the Power Supply Agreement does not contemplate that PSCo would provide firm transmission service for economy energy.¹⁷

10. Moreover, PSCo argues that economy energy is not a firm service because the Operating Agreement provides that economy energy can be interrupted or curtailed when: (1) there are emergency operating conditions, including transmission constraints; (2) scheduling economy energy would prevent firm power transactions; (3) scheduling economy energy would require taking a generating unit offline; or (4) scheduling economy energy would create energy in excess of the energy supplied by PSCo as requirements service.¹⁸ PSCo states that it would not be possible to grant firm priority to Holy Cross's economy energy purchases given that, pursuant to the Operating Agreement, they must be interrupted under certain conditions.¹⁹

11. Additionally, PSCo contends that, if it provided firm transmission for delivery of economy energy, that would cause Holy Cross's use of the integrated transmission system to be non-equivalent and superior to PSCo's and other network customers' use of the integrated transmission system.²⁰ PSCo asserts that this would be a departure from PSCo's and Holy Cross's prior practice of using the equivalent of NERC curtailment priority 6-NN for delivery of economy energy to Holy Cross, which is a lower priority than firm transmission service.²¹ PSCo also argues that providing firm transmission service for economy energy purchases is not consistent with the underlying prudent utility practice standard in the TIE Agreement, as the predominant electric industry standard does not allow the use of firm transmission to deliver energy from undesignated network resources.²²

12. PSCo asserts that, if it granted Holy Cross's requests for firm transmission service, it would expand the scope of the TIE Agreement to allow new uses beyond those contemplated in the Power Supply Agreement and Operating Agreement, and thereby materially change the TIE Agreement and cause it to lose its status of being a

¹⁷ *Id.* at 28-29, 31 (citing Power Supply Agreement § 5.4; Operating Agreement § 4.1).

¹⁸ *Id.* at 30-31 (citing Operating Agreement §§ 3.4, 3.5).

¹⁹ *Id.* at 31.

²⁰ *Id.* at 32.

²¹ *Id.* at 34-35.

²² *Id.* at 35.

grandfathered transmission service agreement.²³ PSCo also states that, if the Commission requires PSCo to provide the requested firm transmission service, the Commission should clarify: (1) that such service does not diminish existing customers' firm transmission service rights; (2) the appropriate study process for evaluating such service; (3) that PSCo shall recover additional transmission-related costs for such service; (4) whether the curtailment provisions in the Operating Agreement are no longer applicable or whether PSCo must follow the curtailment provisions in PSCo's OATT for network customers; (5) whether the TIE Agreement allows for higher priority economy energy than economy energy for network customers under the OATT; (6) that PSCo may curtail economy energy under the terms of the Power Supply Agreement, even if it has firm transmission service; and (7) that the TIE Agreement prohibits the use of firm transmission service for economy energy for anything other than delivering to Holy Cross's load, such as power sales.²⁴

13. PSCo requests expedited consideration of the Petition and states that it is important to expeditiously resolve the dispute given that other transmission customers' service may be affected by the outcome of the instant proceeding.²⁵

III. Notice of Filing and Responsive Pleadings

14. Notice of the Petition was published in the *Federal Register*, 84 Fed. Reg. 72,352 (Dec. 31, 2019), with interventions and protests due on or before January 21, 2020.

15. Guzman Energy, LLC, Intermountain Rural Electric Association, and Nereo GreenCapital Lux Partners filed timely motions to intervene.

16. On January 22, 2020, Holy Cross filed a motion to intervene and protest. On the same date, Holy Cross filed two additional motions, one requesting that the Commission accept its late-filed protest, and the other requesting that the Commission accept a revised version of its protest with errata corrected.

17. On February 6, 2020, Xcel filed a motion for leave to answer and answer to Holy Cross's protest.

²³ *Id.* at 35-36.

²⁴ *Id.* at 36-40.

²⁵ *Id.* at 6-7. PSCo does not request that the Commission act by a specific date.

A. Holy Cross Protest

18. Holy Cross opposes PSCo's petition for declaratory order and asks the Commission to find that Holy Cross's requests for firm transmission service are consistent with its rights under the PSCo/Holy Cross agreements and that PSCo is required to provide the requested service.²⁶

19. Holy Cross argues that a declaratory order is appropriate only where there are no disputed issues of fact, and argues there are factual issues in dispute. Holy Cross disagrees with PSCo's assertion that Holy Cross's purchases from the Arriba and Hunter Projects are requests for additional firm transmission service, and argues that the energy would displace energy otherwise provided by PSCo. Additionally, Holy Cross disagrees with PSCo's characterization of Holy Cross's purchases as non-firm economy energy that is not entitled to firm transmission service.²⁷ Holy Cross also contends that its requests for firm transmission service do not constitute a change to the TIE Agreement, and that there is no basis to modify or terminate the TIE Agreement on the grounds that it is unduly discriminatory or otherwise not in the public interest.²⁸

20. Holy Cross states that, under the TIE Agreement, PSCo and Holy Cross pay their load ratio share of supporting the integrated transmission system without regard to whether the costs are incurred primarily for the benefit of PSCo's or Holy Cross's customers. Holy Cross asserts that, in return for their load ratio share support, PSCo and Holy Cross each obtain access to the integrated transmission system.²⁹ Holy Cross contends that the TIE Agreement is more than just a transmission agreement because it creates the integrated transmission system, which allows third parties to use the integrated transmission system without incurring pancaked transmission charges.³⁰ Holy Cross maintains that, under the TIE Agreement, Holy Cross has access to the integrated transmission system on the same basis as PSCo's retail load, and that both PSCo's and Holy Cross's use of the integrated transmission system is dynamic and will change over time.³¹

²⁶ Holy Cross Protest at 1.

²⁷ *Id.* at 5-6.

²⁸ *Id.* at 6-10.

²⁹ *Id.* at 13.

³⁰ *Id.* at 15.

³¹ *Id.* at 16.

21. Holy Cross notes that the TIE Agreement provides a broad grant of entitlement for PSCo and Holy Cross to use the integrated transmission system.³² With regard to PSCo's argument that Holy Cross cannot request firm transmission service because PSCo does not use firm transmission for its economy energy purchases, Holy Cross states that its contracts with the Arriba and Hunter Projects do not give the seller the right to make discretionary interruptions of the energy, and therefore the resources meet the criteria PSCo applies to its own network resource designations.³³ Holy Cross also argues that PSCo treats its own renewable energy resources as designated network resources with firm transmission service, and that under the TIE Agreement PSCo must treat Holy Cross's renewable resources in a comparable manner.³⁴ Additionally, Holy Cross asserts that PSCo is attempting to refuse any transmission service request by a PSCo requirements customer, use its control of the integrated transmission system to solidify the market power of its merchant function, and require Holy Cross to purchase higher-cost energy from PSCo.³⁵

22. Holy Cross states that there is nothing in the Power Supply Agreement, Operating Agreement, or TIE Agreement that undermines Holy Cross's argument that the TIE Agreement entitles Holy Cross to transmission service on the integrated transmission system with the same level of firmness that PSCo provides to its use of the integrated transmission system to serve its retail loads.³⁶ Holy Cross maintains that it obtained a contractual right to purchase power from third parties as part of the transaction that required Holy Cross to support the Colorado-Ute reorganization, including Holy Cross's agreement to incur an \$18 million liability to cover PSCo obligations to unsecured creditors.³⁷ Holy Cross argues that the term economy energy in section 5.4 of the Power Supply Agreement defines Holy Cross's right to purchase energy from third party suppliers, and asserts that there is nothing in section 5.4 or the rest of the Power Supply Agreement that restricts the firmness or duration of those purchases. Holy Cross contends that while economy energy may be understood to have such limitations in other

³² *Id.* at 17 (quoting TIE Agreement § 4.2 (stating that meeting its load ratio share responsibility "entitles that Party to Load Ratio Share use of the capacity of the Integrated Transmission System in all manners, and for all purposes, transactions and services, consistent with Prudent Utility Practice"))).

³³ *Id.* at 18 (citing Beuning Aff. ¶ 10).

³⁴ *Id.* at 18-19, 22.

³⁵ *Id.* at 19-20, 25.

³⁶ *Id.* at 20.

³⁷ *Id.* at 12-13, 19.

contexts, it does not in the Power Supply Agreement.³⁸ Holy Cross also asserts that section 2.1 of the TIE Agreement states that the Power Supply Agreement “provides Holy Cross the flexibility in the future to acquire bulk power resources from suppliers other than [PSCo].”³⁹

23. In response to PSCo’s argument that Holy Cross is attempting to circumvent the full requirements service provisions in the Power Supply Agreement, Holy Cross states that, even if its load is served by third-party energy rather than energy from PSCo, Holy Cross’s load and load ratio share cost responsibility will remain unchanged.⁴⁰ Additionally, Holy Cross asserts that PSCo is prohibited from making an adverse distinction in the service it provides to its own retail and wholesale loads and the service PSCo makes available to Holy Cross.⁴¹ Holy Cross also maintains that it is not subject to additional transmission charges when making third-party purchases because the transmission costs are a function of Holy Cross’s load ratio share under the TIE Agreement.⁴² In response to PSCo’s argument that PSCo would have to bear most of the costs of transmission upgrades associated with providing firm transmission service for the Arriba and Hunter Project energy under the TIE Agreement, Holy Cross notes that it will have to pay its load ratio share of those upgrades, as it does with upgrades needed to serve PSCo’s or other customers’ loads.⁴³

24. Holy Cross argues that the Operating Agreement only applies to economy energy purchases that can be interrupted at will by the supplier. Holy Cross asserts that the Operating Agreement provisions regarding interruption of economy energy are not relevant to the firmness of Holy Cross’s energy purchases from the Arriba and Hunter Projects, which are different products.⁴⁴

³⁸ *Id.* at 20-21, 23-24.

³⁹ *Id.* at 24.

⁴⁰ *Id.* at 21, 24-25.

⁴¹ *Id.* at 22 (citing TIE Agreement §§ 2.3, 5.3, 5.4).

⁴² *Id.* at 25.

⁴³ *Id.* at 26.

⁴⁴ *Id.* at 26-27.

B. PSCo Answer

25. PSCo asserts that a petition for declaratory order is appropriate here given that the dispute is about the interpretation of contracts – specifically, whether Holy Cross is entitled under the agreements to firm transmission service on the integrated transmission system for delivery of economy energy, and whether Holy Cross’s obtaining of firm energy violates the Power Supply Agreement. PSCo maintains that the dispute does not turn on unresolved issues of material fact.⁴⁵

26. With regard to the term “economy energy,” PSCo maintains that the term is not strictly defined in the Power Supply Agreement, and that prevailing industry usage may be relevant to understanding an undefined term.⁴⁶ However, PSCo states that it is ultimately unnecessary to rely on industry usage because the Operating Agreement, which is referenced in section 5.4 of Power Supply Agreement, makes clear that economy energy is non-firm.⁴⁷

27. PSCo states that Holy Cross’s assertion that there are multiple kinds of economy energy and that the Operating Agreement is only applicable to interruptible economy energy is without support and contrary to the Operating Agreement. PSCo argues that section 5.4 of the Power Supply Agreement provides that “[p]rocedures for the scheduling of Economy Energy shall be established in a separate agreement,” which is the Operating Agreement, and that there is nothing in the Operating Agreement that limits its applicability to only a subset of economy energy transactions.⁴⁸ PSCo asserts that section 3.5 of the Operating Agreement defines economy energy purchases as subordinate in priority to other firm transactions, and therefore Holy Cross’s requests for firm transmission service for economy energy are not permitted by the Operating Agreement. PSCo also contends that, because economy energy is curtailable, the associated resources would not be eligible for designation as network resources under the OATT.⁴⁹

⁴⁵ PSCo Answer at 2.

⁴⁶ *Id.* at 3-4 (citing *TC Ravenswood, LLC v. New York Independent System Operator*, 133 FERC ¶ 61,205, at P 46 (2010) (“In the absence of a clear definition of a term in the tariff . . . the Commission will generally define the term consistent with its common industry usage.”)).

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 5-6 (quoting Power Supply Agreement § 5.4; Operating Agreement § 1.1).

⁴⁹ *Id.* at 6-7.

28. PSCo states that, under the terms of the Power Supply Agreement, Holy Cross must continue to purchase full requirements service from PSCo until the agreement is terminated or Holy Cross exercises the partial requirements service option after January 1, 2029. PSCo asserts that Holy Cross's power purchases from the Arriba and Hunter Projects reduce Holy Cross's requirements service under the Power Supply Agreement even though requirements service cannot be reduced until 2029. PSCo contends that, by treating the purchases from the Arriba and Hunter Projects as economy energy, Holy Cross is attempting to sidestep the partial requirements service option and the limited exceptions to purchasing its requirements from PSCo under the Power Supply Agreement.⁵⁰

29. In response to Holy Cross's argument that section 2.1 of the TIE Agreement states that the Power Supply Agreement provides Holy Cross flexibility in the future to acquire power from suppliers other than PSCo, PSCo asserts that this general statement does not trump the terms of the Power Supply Agreement, which require Holy Cross to purchase its full requirements from PSCo. Moreover, PSCo argues that section 2.1 of the TIE Agreement refers to the partial requirements option in the Power Supply Agreement, not economy energy.⁵¹

30. In response to Holy Cross's argument that PSCo is attempting to refuse any transmission service request by a requirements customer, PSCo asserts that this is incorrect because it processes requests for transmission service under the terms of the PSCo OATT. In response to Holy Cross's argument that it made an \$18 million payment to obtain a contractual right to purchase power from third parties, PSCo states that the fact of the payment does not demonstrate that Holy Cross is entitled to transmission service that is superior to all other users of the integrated transmission system. In response to Holy Cross's argument that PSCo is seeking to modify the terms of the TIE Agreement, PSCo maintains that it is not requesting to change the agreements but is concerned that Holy Cross is seeking to change the terms of the agreements to expand its transmission service rights.⁵²

IV. Discussion

Procedural Matters

31. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make

⁵⁰ *Id.* at 7-9.

⁵¹ *Id.* at 9-11.

⁵² *Id.* at 11-14.

the entities that filed them parties to this proceeding. We grant Holy Cross's motions to accept its late-filed protest and the errata corrections to its protest.

32. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept PSCo's answer because it has provided information that assisted us in our decision-making process.

C. Substantive Matters

33. The question raised in the Petition is whether, under the Power Supply Agreement, Operating Agreement, and TIE Agreement between PSCo and Holy Cross, Holy Cross is entitled to request firm transmission service over the PSCo/Holy Cross integrated transmission system to deliver energy from the Arriba and Hunter Projects. 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. Therefore, we grant the Petition and find that PSCo is not required to provide Holy Cross with the requested firm transmission service under their agreements.⁵³

34. Under the TIE Agreement, Holy Cross is entitled to its load ratio share use of the capacity of the integrated transmission system "for all purposes, transactions and services," so long as Holy Cross meets its load ratio share responsibility and the use is consistent with prudent utility practice.⁵⁴ Although the TIE Agreement does not limit how Holy Cross can use the capacity to which it is entitled (aside from prohibiting use that is inconsistent with prudent utility practice), Holy Cross's capacity on the integrated transmission system is limited to its load ratio share.

⁵³ We find that there are no disputed issues of material fact that prevent us from acting on the Petition. For example, we need make no factual finding as to whether Holy Cross's purchases from the Arriba and Hunter Projects are properly characterized as non-firm economy energy. Our interpretation of the agreements between the parties with respect to PSCo's obligation to provide firm transmission service under the TIE Agreement for Holy Cross's purchases of non-PSCo energy is not dependent upon the description of the firmness of Holy Cross's Arriba and Hunter Project energy purchases.

⁵⁴ TIE Agreement § 4.2.

35. Holy Cross's load ratio share is based on its requirements demands,⁵⁵ and under the Power Supply Agreement, Holy Cross is required to purchase its full requirements from PSCo, with exceptions for certain resources and for economy energy.⁵⁶ In order to provide full requirements service to Holy Cross, PSCo employs firm transmission service and makes the necessary upgrades to the integrated transmission system to serve the full requirements of Holy Cross's load. For 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 transmission system. Holy Cross, in effect, 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 from its independently-contracted generation. Therefore, because PSCo is obligated to deliver full requirements service to Holy Cross over the integrated transmission system on a firm basis, 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.

36. Holy Cross argues that it is not requesting additional firm transmission service, and instead is seeking to displace energy that PSCo is currently providing.⁵⁷ The Power Supply Agreement does allow Holy Cross to purchase economy energy from third parties in lieu of full requirements service energy purchases from PSCo.⁵⁸ However, to the extent the energy Holy Cross purchases from the Arriba and Hunter Projects is economy energy,⁵⁹ Holy Cross is not entitled to firm transmission service to deliver economy energy. Under the terms of the Power Supply Agreement and Operating Agreement,

⁵⁵ *Id.* § 1.9, app. A § 6. Specifically, Holy Cross's load ratio share is the sum of its 12 monthly peak requirements demands divided by the combined peak requirements demands of PSCo and Holy Cross. *Id.*

⁵⁶ Power Supply Agreement § 5.1.

⁵⁷ Holy Cross Protest at 5.

⁵⁸ Power Supply Agreement § 5.4.

⁵⁹ PSCo states in the Petition that "Holy Cross has informed PSCo that it intends to use the power under the two power purchase agreements as Economy Energy under the [Power Supply Agreement]." Petition at 19. In its protest, Holy Cross does not directly state whether it considers the energy purchased from the Arriba and Hunter Projects to be economy energy under the Power Supply Agreement. However, if the energy purchases from the Arriba and Hunter Projects are not economy energy, then it is not clear what, if any, basis Holy Cross would have under the Power Supply Agreement for replacing full requirements service purchases from PSCo with third-party purchases.

economy energy is subject to a number of scheduling restrictions, including that such purchases may be curtailed “when continued scheduling of Economy Energy would prevent firm power transactions” or when there are emergency operating conditions, including transmission constraints.⁶⁰ Additionally, economy energy purchases may be reduced or interrupted to avoid taking a generating unit offline or to avoid creating inadvertent energy.⁶¹ Given these scheduling restrictions, we find that economy energy under the Power Supply Agreement 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.

37. We disagree with Holy Cross’s argument that the Power Supply Agreement places no restrictions on the firmness of economy energy.⁶² Although economy energy is not explicitly defined as firm or non-firm in the Power Supply Agreement, the Power Supply Agreement states that “procedures for the scheduling of Economy Energy shall be established in a separate agreement.”⁶³ The referenced separate agreement is the Operating Agreement,⁶⁴ which provides that economy energy may be curtailed or interrupted in the situations discussed above, including when continued scheduling of economy energy would prevent firm power transactions.⁶⁵

38. We also disagree with Holy Cross’s assertion that the Operating Agreement provisions on curtailment and interruption are not relevant because they only apply to economy energy that is interruptible at will by the supplier, whereas the energy from the Arriba and Hunter Projects is not interruptible.⁶⁶ By its terms, the Operating Agreement establishes “procedures for the scheduling and accounting for, Economy Energy received by Holy Cross from third parties through the [PSCo]/Holy Cross integrated transmission

⁶⁰ Operating Agreement § 3.5.

⁶¹ Power Supply Agreement § 5.4; Operating Agreement § 3.4.

⁶² Holy Cross Protest at 20-21.

⁶³ Power Supply Agreement § 5.4.

⁶⁴ The Operating Agreement begins by referencing the Power Supply Agreement’s provision that allows Holy Cross to purchase economy energy, and then establishes the procedures for scheduling and accounting for economy energy. Operating Agreement §§ 1.1, 1.2.

⁶⁵ *Id.* § 3.5.

⁶⁶ Holy Cross Protest at 27.

system.”⁶⁷ There is no indication in this statement (or elsewhere in the agreement) that there are multiple types of economy energy and that the Operating Agreement applies only to economy energy that is interruptible at will by the supplier. Likewise, the Power Supply Agreement does not differentiate between different types of economy energy or state that the separate agreement establishing procedures for scheduling economy energy (i.e., the Operating Agreement) applies only to economy energy that is interruptible at will by the supplier.⁶⁸

39. With regard to Holy Cross’s argument that it obtained a contractual right to purchase power from third parties as part of the transaction related to the Colorado-Ute reorganization,⁶⁹ a limited contractual right to purchase power from third parties does not permit Holy Cross to request firm transmission service for more than its load ratio share entitlement under the TIE Agreement.⁷⁰ Similarly, although section 2.1 of the TIE Agreement states that the Power Supply Agreement “provides Holy Cross the flexibility in the future to acquire bulk power resources from suppliers other than [PSCo],” the specific terms and limitations set forth in the Power Supply Agreement control. As discussed above, the Power Supply Agreement, by reference to the Operating Agreement, places limitations on the scheduling of third-party economy energy purchases, as well as when and how Holy Cross can purchase energy from third parties under the partial requirements service option that becomes effective January 1, 2029. Aside from those and a few other limited exceptions,⁷¹ the Power Supply Agreement requires Holy Cross to purchase its full energy requirements from PSCo.

40. With regard to Holy Cross’s arguments related to PSCo’s obligation to provide Holy Cross use of the integrated transmission system on a comparable basis,⁷² we find

⁶⁷ Operating Agreement § 1.2.

⁶⁸ See Power Supply Agreement § 5.4.

⁶⁹ Holy Cross Protest at 12-13, 19.

⁷⁰ Holy Cross’s right to purchase power from third parties is set forth in the Power Supply Agreement, along with the specific terms and limitations associated with that right.

⁷¹ See *supra* n.5.

⁷² See Holy Cross Protest at 16 (stating that, under the TIE Agreement, “Holy Cross has access to the Integrated Transmission System on the same basis as PSCo’s retail load”), 18-19, 22 (arguing that PSCo treats its renewable resources as designated network resources with NERC curtailment priority 7-FN and that PSCo should treat Holy Cross’s renewable resources comparably), 14-15, 22 (arguing the TIE Agreement and

that 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. Holy Cross has contracted for PSCo to provide full requirements service using Holy Cross's capacity on the integrated transmission system. Accordingly, Holy Cross's requests for additional capacity in excess of its load ratio share entitlement under the TIE Agreement are not comparable to PSCo's use of its own load ratio share entitlement.

41. In the interest of clarity, this order interprets the existing agreements between the parties and nothing herein directs the parties to modify them.

The Commission orders:

PSCo's petition for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

PSCo/Holy Cross Memorandum of Agreement prohibit PSCo from making any adverse distinction in the service it makes available to Holy Cross).