

Decision No. C19-0656

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 18A-0791E

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IN THE MATTER OF THE VERIFIED APPLICATION OF BLACK HILLS COLORADO ELECTRIC, LLC DOING BUSINESS AS BLACK HILLS ENERGY FOR EXPEDITED APPROVAL OF ITS ECONOMIC DEVELOPMENT RATE TARIFF.

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PROCEEDING NO. 19A-0055E

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IN THE MATTER OF THE VERIFIED APPLICATION OF BLACK HILLS COLORADO ELECTRIC, LLC FOR EXPEDITED APPROVAL OF A SERVICE AGREEMENT PURSUANT TO ITS ECONOMIC DEVELOPMENT RATE TARIFF.

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**COMMISSION DECISION ADDRESSING APPLICATIONS  
FOR REHEARING, REARGUMENT, OR  
RECONSIDERATION OF DECISION NO. C19-0446**

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Mailed Date: August 1, 2019  
Adopted Date: July 25, 2019

**II. BY THE COMMISSION**

**A. Statement**

1. This Decision addresses the Applications for Rehearing, Reargument, or Reconsideration (RRR) of Decision No. C19-0446, filed on June 17, 2019, by Staff of the Public Utilities Commission (Staff) and Western Resource Advocates (WRA). Consistent with the discussion below, we grant in part, and deny in part, the applications for RRR.

2. By Decision No. C19-0446, issued May 28, 2019, in this Consolidated Proceeding Nos. 18A-0791E and 19A-0055E, the Commission approved, with modifications and for limited applicability, the Economic Development Rate Tariff (EDR Tariff) proposed by Black Hills Colorado Electric, LLC (Black Hills or the Company) to implement economic development rates

pursuant to subsections (6) through (8) of § 40-3-104.3, C.R.S. We approved the modified EDR Tariff for applicability to only customer, AX2 Data Centers (the Customer), and imposed certain conditions and requirements of Black Hills. In addition, we approved, with certain conditions and requirements, the Service Agreement negotiated between Black Hills and AX2 Data Centers pursuant to the EDR Tariff (AX2 Service Agreement).<sup>1</sup>

## **B. Background**

3. As discussed in Decision No. C19-0446, this proceeding concerns two related applications filed by Black Hills in a case of first impression under House Bill 18-1271, “Concerning the Authorization of Economic Development Rates to be Charged by Electric Utilities to Qualifying Nonresidential Customers” (the EDR Act). New subsections (6) through (8) of § 40-3-104.3, C.R.S., added by the EDR Act, provide a process by which an investor-owned utility may offer economic development rates (EDR rates) to a qualifying customer (EDR customer) pursuant to a Commission-approved economic development rate tariff (EDR tariff). Black Hills’ applications seek approval of a proposed EDR Tariff and the AX2 Service Agreement. Per Black Hills’ request, we considered the applications on an extraordinarily expedited basis.

4. In Decision No. C19-0446, we discussed at length our concerns with Black Hills’ proposals. We found the record contained little to no evidence that AX2 Data Centers is capable of bringing the contemplated project to fruition and that the Customer’s projected job, salary, and capital investment figures are accurate. We noted that Mr. Crocker admitted Black Hills had “not done a deep dive into the due diligence” of AX2 Data Centers.<sup>2</sup> He admitted he had not been to the Customer’s headquarters, did not know where it is located, or know how many people AX2

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<sup>1</sup> Commissioner Koncilja would have denied both applications. She concurred in part, and dissented in part, to the majority order.

<sup>2</sup> Apr. 3, 2019, Hrg. Tr. at 6:6-8.

employs.<sup>3</sup> Mr. Crocker admitted Black Hills relied on the Customer's representations of expected job, salary, investment, and other direct economic benefits.<sup>4</sup> Further, Black Hills acknowledged that benefits are likely short term.<sup>5</sup> We also found shortcomings in the applications' substance. Most significantly, that the EDR Tariff failed to specify a minimum and maximum EDR rate and failed to provide a definition, let alone a value, for marginal cost, and that the AX2 Service Agreement failed to specify an actual EDR rate and to provide a calculated value of marginal cost. We found these are integral provisions of the EDR Act that must be met to approve the applications.

5. We noted that although the parties clearly support economic development in Black Hills' territory, intervenors conditioned their support the applications, and the very terms of the EDR Act required, that terms and conditions be imposed to ensure no prohibited subsidization would occur as a result of Black Hills offering EDR rates to AX2 Data Centers. By a 2-1 vote, we approved the AX2 Service Agreement along with a modified form of the proposed EDR Tariff, for limited application to AX2 Data Centers, and with certain conditions and requirements. We concluded that our modifications, conditions, and requirements brought the AX2 Service Agreement and EDR Tariff and into compliance with the statutory requirements and provided the necessary ratepayer protections.

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<sup>3</sup> Apr. 2, 2019, Hrg. Tr. at 257:19-260:1.

<sup>4</sup> *Id.* at 239:3-12; *id.* at 243:5-12 (Mr. Crocker explaining the Customers' figures "make sense" based on the type of customer). The direct economic benefits are outlined by the Customer in a sworn affidavit in Hrg. Exh. 104, Attachment VAC-1 to Direct Testimony of Vance A. Crocker, Proceeding No. 19A-0055E (revised to remove confidentiality designation on Apr. 23, 2019).

<sup>5</sup> Direct Testimony of Michael J. Harrington, Proceeding No. 19A-0055E at pp. 17-18 (Jan. 22, 2019) (describing Customer as "a very large load of questionable permanence" and admitting that after 10-year contracted period "there is no guarantee the Customer will remain on the Company's system").

### C. Discussion, Findings, and Conclusions

#### 1. Staff: Clarify an EDR tariff may include a definition of marginal cost rather than numeric values

6. In its RRR, Staff states it is struggling with the concept of actual values for marginal cost and standard tariff rates that could be used to establish a generic range of EDR rates, given the customer-specific nature of both marginal cost and the dollar-per-kilowatt-hour standard service tariff applicable to demand charge customers. Staff says it envisioned a tariff like Public Service Company of Colorado's flexible pricing tariff sheet, but with a definition of marginal cost to apply uniformly across scenarios. Staff states that, in the alternative, EDR rates could be filed strictly as applying to a single customer with customer-specific cap and floor rates.

7. In Decision No. C19-0446, the Commission found that to approve tariffs that set the minimum rate at or above the utility's marginal cost, the tariff must provide an actual value for marginal cost. We also found that actual values for marginal cost are needed to facilitate expedited review of future agreements under an approved EDR tariff and that approved ranges would serve as the baseline to assess necessary deviations. We found, more generally, that a quantification of or some formulation or definition of marginal cost is required for the Commission to have the information it needs to ensure the other statutory requirements are met. These include determining the terms and conditions required to ensure no prohibited subsidization occurs and to find the utility has made its required showings under the EDR Act.

8. We deny Staff's RRR. We find no grounds to revise our decision to require actual values. As this proceeding demonstrated, arriving at a definition of marginal cost that allows the Commission to make its required determinations is contentious and difficult. If parties in a future proceeding arrive at a robust definition that allows the Commission to confirm the EDR rate is at or above the utility's marginal cost, to expedite review of future agreements under the approved

tariff, and to make the Commission's other required findings, they can present that proposal for our consideration.

**2. Staff: Require Black Hills to re-file EDR Tariff annually to reflect non-zero marginal cost**

9. Staff argues that § 40-3-104.3(6), C.R.S., requires Black Hills to be provide, when known, the non-zero marginal cost it incurs to serve AX2 Data Centers. Accordingly, Staff requests that we direct Black Hills to annually update and file the EDR Tariff for AX2 Data Centers. Staff suggests these filings include the cost of serving AX2 Data Centers when such cost has been determined. Staff further suggests this cost calculation should include the actual cost of purchased energy and capacity and, citing Decision No. C19-0446, the cost of metering, billing, and any other ongoing associated administrative expense.

10. We note that Staff argued in this proceeding that the marginal cost to serve an EDR customer should be defined to include all incremental or going-forward costs to serve the customer over the contracted period. With respect to the AX2 Service Agreement, Staff questioned whether Black Hills should be entering into such a contract when it is not reasonably certain the contracted rate is above its marginal cost to serve the customer.

11. Our Decision No. C19-0446 sets a marginal cost of \$0 to serve AX2 Data Centers. This \$0 marginal cost is in relation to the costs assessed to other customers on Black Hills' system and based on the premise that AX2 Data Centers will not affect current or future rates or charges assessed to other customers. Setting the marginal cost at \$0 will help ensure that, for ratemaking, Black Hills will not include any marginal costs associated with serving AX2 Data Centers in its base rate cost of service study.

12. Because our basis for the \$0 marginal cost will not change over the contracted term of the AX2 Service Agreement, we find it unnecessary for Black Hills to re-file annually the EDR Tariff to reflect a non-zero marginal cost. In other words, our determination in Decision No. C19-0446 that the marginal cost is \$0 is also sufficient for establishing the approved EDR Tariff (for applicability to this customer) and for approving the AX2 Service Agreement, based on the record in this proceeding and the requirements in the EDR Act.

13. In addition, our determinations regarding the EDR Tariff for limited applicability to AX2 Data Centers are consistent with the requirements for an EDR tariff of general applicability or for a customer that, unlike AX2 Data Centers, is not removed from the Company's cost of service. As stated in ¶ 34 of Decision No. C19-0446 addressing §§ 40-6-104.3(6) and (7), C.R.S.: "The marginal cost floor in this subsection has no limiting time component. This accords with other provisions in the statute prohibiting subsidization, which also have no time component. Thus, to approve a specific negotiated agreement, the utility must reasonably show the EDR rate is and will continue to be at or above marginal cost over the entire term of the agreement."

14. For the foregoing reasons, we deny Staff's RRR request to require annual re-filings of the EDR Tariff with updated, non-zero marginal cost values.

15. Notwithstanding these findings, our denial of Staff's RRR request does not eliminate the need for Black Hills to annually report its actual cost to serve AX2 Data Centers. These cost calculations are needed to determine the appropriate "Customer Credit" to be shared with other customers through the Company's Energy Cost Adjustment. As discussed below in this Decision, certain measures of the actual costs incurred to serve AX2 Data Centers outside of the Company's cost of service are needed to calculate this credit to other customers.

**3. Staff: Clarify measures of marginal cost for calculating and implementing the Customer Credit**

16. Staff asks whether we directed Black Hills to calculate the difference between actual revenue and actual marginal costs to serve AX2 Data Centers for purposes of determining the Customer Credit. Staff adds that if Black Hills were to file an updated tariff to include its marginal cost to serve AX2 Data Centers when it is known, the marginal cost could be vetted, even in advance of the filing, and could form the basis for the annual net-income calculation used for the Customer Credit.

17. Consistent with our findings above, we find no grounds to direct Black Hills to re-file its EDR Tariff annually. But we agree with Staff that Black Hills must report annually the actual costs of providing service to AX2 Data Centers for purposes of determining the Customer Credit. We therefore grant Staff's RRR, in part, by clarifying that the annual reporting addressed in ¶ 99 of Decision No. C19-0446 requires a measure of the actual costs to serve AX2 Data Centers in order to calculate and implement the Customer Credit.

**4. Staff: Clarify Black Hills must remove from cost of service shared corporate and other customer-specific costs**

18. Staff seeks clarification of ¶ 90(f) of Decision No. C19-0446. Staff recognizes that our Decision states the Company must demonstrate in each base rate case during the term of the AX2 Service Agreement that the costs of metering, billing, and other ongoing associated administrative expenses have been removed from the Company's cost of service.

19. Staff argues that the record supports that service to AX2 Data Centers pursuant to the AX2 Service Agreement will also have an impact on the allocation of shared corporate costs and that such costs must also be removed from the cost of service in each base rate case.

20. We grant Staff's RRR, in part, by clarifying that ¶ 90 of Decision No. C19-0446 is not intended as a list of minimum requirements for Black Hills to demonstrate in a rate case that AX2 Data Centers has been fully removed from the cost of service. Other paragraphs in the Decision, and specifically ¶ 89, make clear that Black Hills must remove the Customer from its cost of service, a task only achieved in full if shared corporate and other customer-specific costs are not included in the Company's cost of service.

**5. WRA: Affirm Commission authority to impose additional terms and conditions when approving EDR tariffs and service agreements**

21. WRA asks that we clarify the Commission has authority to impose terms and conditions on EDR tariffs and service agreements, including limiting the contract term unless certain conditions are met to protect customers or the environment. In Decision No. C19-0446, we deferred to a future proceeding a decision on additional proposals made by WRA and other intervenors. We also found that because the EDR Act allows for contract terms up to ten years, we should deny WRA's recommendation to limit terms to three years.

22. In its RRR, WRA acknowledges that the terms and conditions required by the EDR Act are tied to subsidization. WRA argues, however, that nothing in the statute specifically limits the Commission's authority under its general powers to ensure compliance with the Public Utilities Law. WRA contends the Commission may therefore impose additional terms and conditions to ensure consistency with the Public Utilities Law. WRA suggests the Commission not restrict itself from using this authority in future proceedings, where for example, it may find it appropriate to limit a contract term unless the EDR customer is served by a renewable resource. WRA states this type of limit would incent serving customers with renewable resources, decrease the chance of long-term inconsistency with Colorado's de-carbonization goals, and mitigate risks to non-EDR customers by shortening the contract length.

23. We grant WRA's RRR, in part. We affirm that indeed the Commission has broad constitutional and statutory authority to regulate public utilities and nothing in the EDR Act specifically limits that authority or precludes it from exercising that authority when considering an EDR tariff or service agreement. We do not, however, find grounds to revise our decision to defer to future proceedings the specific intervenor proposals for additional terms and conditions, including those proposed by WRA. Nor do we find grounds to revise our decision to deny WRA's recommendation to limit the term of negotiated agreements. The record in this case of first impression was lacking in many respects and the Commission arrived at a reasonable decision on this limited record and within the requested expedited time constraints. WRA can re-raise these proposals in a future proceeding, where they will be considered on that new proceeding's record.

**6. WRA: Require Black Hills to demonstrate in RES compliance reports how increased retail sales to AX2 comply**

24. WRA suggests that we amend Decision No. C19-0446 to ensure Black Hills properly reports key performance metrics related to the AX2 Service Agreement. WRA requests that we require Black Hills to report in its annual Renewable Energy Standard (RES) Compliance Reports how the Company has met the minimum RES requirements relative to new load served under the EDR Tariff. WRA contends this will help validate that electricity sales to AX2 Data Centers remain consistent with Black Hill's state RES requirements.

25. We deny WRA's RRR request. In Decision No. C19-0446, we expressly found that sales under the AX2 Service Agreement are "retail energy sales." With this distinction, Rule 4 *Code of Colorado Regulations* 723-3-3662(a) of the Commission's Rules Regulating Electric Utilities thus already requires Black Hills to report annually on the status of its RES compliance. Further, in accordance with §§ 40-2-124(1)(c) and (h), C.R.S., RES compliance reporting relates to a utility's entire amount of retail sales and not to retail sales to each individual customer.

**7. WRA: Require Black Hills to report energy source used to serve AX2**

26. WRA requests that the Commission require Black Hills to report the type of generator (*i.e.*, energy source) used to serve the added load from AX2 Data Centers. WRA suggests such directive would increase clarity and transparency regarding EDR service to AX2 Data Centers and could help the Commission determine if the AX2 Service Agreement is consistent with Colorado's renewable energy goals.

27. We deny WRA's RRR request. As discussed above in this Decision, we already found in Decision No. C19-0446 that electricity sales under the AX2 Service Agreement are "retail energy sales" and that the existing RES compliance reporting requirements suffice to monitor the Company's RES compliance. We therefore do not find it necessary to separately require Black Hills to report the energy source used to serve the AX2 load for purposes of monitoring and determining Black Hills' compliance with state renewable energy goals.

28. Nonetheless, we acknowledge this type of reporting would allow for determination of changes to emissions associated with Black Hills' retail service to its customers and to AX2 Data Centers, specifically. WRA's request thus is an example of the distinction between the renewable energy target in the RES and a measure of progress toward a carbon reduction goal, which has not been established for Black Hills according to the record in this proceeding. We share WRA's concern that EDR service to AX2 Data Centers could result in increased emissions. But we find no grounds on this record to impose additional considerations. Therefore our approval of the AX2 Service Agreement pursuant to § 40-6-104.3(6) and (7), C.R.S., is based on the costs of service and the prohibition of subsidization.

29. Further, we note that it may turn out the information WRA seeks can be deduced from information Black Hills will provide pursuant to ¶ 99 of Decision No. C19-0446.

**III. ORDER****A. The Commission Orders That:**

1. The Application for Rehearing, Reargument, or Reconsideration to Decision No. C19-0446 filed on June 17, 2019, by Staff of the Public Utilities Commission is granted in part, and denied in part, consistent with the discussion above.

2. The Application for Rehearing, Reargument, or Reconsideration to Decision No. C19-0446 filed on June 17, 2019, by Western Resource Advocates is granted in part, and denied in part, consistent with the discussion above.

3. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
July 25, 2019.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

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JOHN GAVAN

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Commissioners

COMMISSIONER FRANCES A.  
KONCILJA NOT PARTICIPATING.