

021759-0002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

2009 MAR 12 PM 12: 22

DOCKET NO. 08A-431G

RE: IN THE MATTER OF THE APPLICATION OF BLACK HILLS/COLORADO GAS UTILITY COMPANY, L.P. D/B/A BLACK HILLS ENERGY FOR APPROVAL OF ITS GAS DEMAND SIDE MANAGEMENT (DSM) PLAN FOR CALENDAR YEARS 2009, 2010 AND 2011 AND FOR APPROVAL OF A GAS DSM COST ADJUSTMENT CLAUSE AND FOR WAIVER OF RELATED RULES.

**SETTLEMENT AGREEMENT
AND MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT**

Black Hills/Colorado Gas Utility Company, LP (“Black Hills” or the “Company”), the Trial Staff of the Colorado Public Utilities Commission (“Trial Staff”), and the Colorado Office of Consumer Counsel (“OCC”) (together referred to as the “Parties”), by and through their respective undersigned counsel, and for good and valuable consideration, herewith enter into this Settlement Agreement (“Settlement Agreement”) to resolve all disputed issues that have arisen or could have arisen in this docket regarding the Verified Application for an order: (1) approving Black Hills’ 2009 - 2011 Gas Demand-Side Management (DSM) Plan, or Energy Efficiency Plan, which set forth in detail Black Hills’ proposed Gas DSM programs, energy savings, budgets, calculation methods, and technical assumptions; (2) authorizing Black Hills to place into effect its Gas Demand-Side Management Cost Adjustment (Gas DSMCA) tariff and to implement Gas DSMCA rates; and (3) requesting waivers of related rules. The Parties submit that this Settlement Agreement results in a fair disposition of all disputed issues in this docket and that this Settlement Agreement is just and reasonable. Therefore, the Parties respectfully

request that the Commission vacate all remaining filing dates and deadlines, vacate the hearing set for March 16-17, 2009,¹ and approve this Settlement Agreement.

I. PROCEDURAL HISTORY

1. On September 29, 2008, Black Hills filed its application for an order approving its Gas DSM Plan and G-DSMCA tariffs. The Commission issued its Notice of Application Filed on September 29, 2008. Trial Staff and the OCC timely intervened and are the only other parties in this docket.

2. By Minute Order dated November 13, 2008, the Commission deemed the Application complete and assigned this matter to Administrative Law Judge Dale E. Isley for a recommended decision. A Commission decision in this docket should issue within 210 days of that date (*i.e.*, June 11, 2009), pursuant to Colo. Rev. Stat. § 40-6-109.5(2).²

3. In Decision No. R08-1244-I, issued November 26, 2008, Administrative Law Judge Isley adopted the procedural schedule in this docket, including *inter alia* various filing dates, procedural requirements, and setting a hearing for March 16 and 17, 2009.

4. Black Hills filed its direct testimony and exhibits with the Application on September 29, 2008. Pursuant to the adopted procedural schedule,³ Trial Staff and OCC filed their answer testimony and exhibits on January 30, 2009. Trial Staff filed cross-answer testimony and exhibits on February 23, 2009, and OCC filed cross-answer testimony and exhibits on March 2, 2009. Black Hills filed rebuttal testimony and exhibits on March 2, 2009.

¹ In the event the Commission wishes to hold a hearing on this Settlement Agreement, the Parties respectfully request that the hearing occur on March 16, 2009, the first day of the scheduled hearing.

² Although Black Hills filed direct testimony and exhibits with the Verified Application, it waived the 120-day decision deadline set forth in Colo. Rev. Stat. § 40-6-109.5(2).

5. During the prehearing phase of this docket, the Parties have actively exchanged information through audit requests, formal data requests, informal exchanges of information, and active settlement discussions. As a result of settlement negotiations, Black Hills, Trial Staff and the OCC have concluded a settlement of all the disputed issues in this docket. An agreement in principle to settle all disputed issues in this docket was reached by the Parties on March 9, 2009.

6. This Settlement Agreement memorializes the negotiated settlement and stipulations among the Parties. As a result of the settlement negotiations, all Parties agree, as set forth below, that all issues in dispute, or that could have been disputed in this docket, have been resolved to the satisfaction of the Parties, and that the terms and stipulations in this Settlement Agreement are fair, just and reasonable.

II. THE SETTLEMENT

1. The major disputed issue in this docket was the discount rate to be used for two purposes: First, for screening DSM programs and measures using the modified Total Resource Cost ("TRC") test for determining cost effectiveness pursuant to Rule 4754 ("DSM Cost-effectiveness Screening") and second, for calculating net economic benefits for determining the Gas DSM incentive bonus pursuant to Rule 4760 ("Gas DSM Bonus").

(a) Black Hills proposed in its direct and rebuttal testimony and exhibits that the proper discount rate to use for both DSM Cost-effectiveness Screening and determining the Gas DSM Bonus was the "societal discount rate" of 4.35%. Trial Staff asserted in its answer testimony and exhibits that the societal discount rate of 4.35% should be used for DSM Cost-effectiveness Screening, while the weighted average cost of

³ By Decision No. R09-0020-I, the due dates for answer testimony and exhibits were extended to January 30, 2009, and the date for filing rebuttal and cross-answer testimony and exhibits was extended to March 2, 2009.

capital should be used for determining the Gas DSM Bonus. In its cross-answer testimony and exhibits, Trial Staff proposed that Black Hills' after-tax weighted average cost of capital should be used for determining the Gas DSM Bonus. The OCC asserted in its answer and cross-answer testimony and exhibits that Black Hills' after-tax weighted cost of capital should be used for both DSM Cost-effectiveness Screening and determining the Gas DSM Bonus.

(b) The Parties agree that the discount rate to be used for the first year of Black Hills' Gas DSM Plan for DSM Cost-effectiveness Screening and determining the Gas DSM Bonus should be Black Hills' after-tax weighted cost of capital. The Parties agree that Black Hills' correct after-tax weighted cost of capital is 7.67%, which is derived from the overall cost of capital of 9.2% to which was the stipulated in the Settlement Agreement in Black Hills' pending gas general rate case in Dockets No. 08S-290G and 08S-430G, pre-filed as OCC Witness Dr. Schechter's Cross-answer Exhibit (PBS-1) in the instant docket.

2. The Parties agree that the Gas DSM programs in the Gas DSM Plan that pass DSM Cost-effectiveness Screening using the discount rate of 7.67% should be approved for the first year of the proposed three-year Gas DSM Plan. The Parties also agree that the low-income Gas DSM programs in the Gas DSM Plan should be approved for the first year of the proposed three-year Gas DSM Plan, even though the low-income programs do not pass DSM Cost-effectiveness Screening using the discount rate of 7.67%. The Parties agree that the following Gas DSM programs should be approved for the first year of the Gas DSM Plan:

- (a) Residential Programs:
-- Residential space and water heating;
-- Residential envelope measures retrofit; and

- Residential audits;
- (b) Non-residential Programs:
 - Small commercial audits;
 - Non-residential prescriptive rebates;
 - Non-residential custom rebates; and
 - Non-residential new construction;
- (c) Special Programs:
 - (i) Low-income programs:
 - Weatherization;
 - Affordable homes (new construction);
 - Weatherization teams;
 - (ii) School-based energy education programs.
- (d) Across-program training, marketing and administration.

3. The Parties agree that a reasonable budget for the costs of the Gas DSM programs in the first year Gas DSM Plan identified above in paragraph 2 would be \$1,345,000.

4. The Parties agree that the Gas DSM programs in the Gas DSM Plan resolved by this Settlement Agreement and approved by the Commission will be implemented by Black Hills within sixty (60) days after the effective date of the Commission's decision approving this Settlement Agreement.

5. The Parties understand that the Commission intends to commence a rule-making proceeding during 2009 to investigate the appropriate discount rate to be used prospectively by Colorado natural gas utilities for DSM Cost-effectiveness Screening and determining the Gas DSM Bonus. (See Decision Nos. C09-0016 and C09-0214 in Docket No. 08A-436G.) The Parties agree that Black Hills will file an application for approval of a two-year Gas DSM Plan, for the two year periods after the end of the first year Gas DSM Plan stipulated in this Settlement Agreement, within sixty (60) days of the effective date of rules adopted in that permanent rule-making docket. In that two-year Gas DSM Plan, for DSM Cost-effectiveness Screening and

determining the Gas DSM Bonus, Black Hills will use the prospective discount rate(s) adopted by the Commission in the rules adopted in that rule-making proceeding.

6. In its Application, Black Hills sought waivers of Gas DSM Rules 4753(h), 4752(b) and 4757, because it believed it needed waivers of those rules in order to implement its DSM Plan. Trial Staff witness Mr. Caldara stated in his answer testimony that Black Hills did not need such rule waivers, based upon Trial Staff's interpretation of those rules. (See Answer Testimony of Paul C. Caldara, pages 15-19.) The Parties agree with the interpretation of Gas DSM Rules 4753(h), 4752(b) and 4757 expressed by Trial Staff witness Mr. Caldara and that no waivers of these Gas DSM Rules is required in order for Black Hills to implement its approved Gas DSM Plan. The Parties request that, in approving this Settlement Agreement, the Commission determine that the interpretation of Gas DSM Rules 4753(h), 4752(b) and 4757 expressed by Trial Staff witness Mr. Caldara is reasonable and that no waivers of these Gas DSM Rules is required in order for Black Hills to implement its approved Gas DSM Plan.

(a) Rule 4753(h) concerns the proposed budget to achieve the DSM expenditure target and provided in part that "the budget shall be detailed for the overall DSM plan and for each program year...." Black Hills sought authority "to exercise discretion to move budgets between programs and customer segments to achieve the total portfolio level energy and demand goals incorporated in the Plan." (Black Hills' Verified Application, p. 7, paragraph 14.) Black Hills specifically requested "a permanent partial waiver of the "strict requirements" found in the above-quoted sentence of Rule 4753(h): The Parties agree Black Hills is not locked into its proposed budget for several reasons. First, Rule 4753(j) allows a utility to "spend more than the annual expenditure target established by the Commission up to twenty-five percent over the target, without being

required to submit a proposed DSM plan amendment.” The implication of Rule 4753(j) is that the utility has the authority to exercise discretion to use the increased expenditure target to achieve additional cost effective DSM. Since the utility has discretion in using the increased portion of the expenditure target under Rule 4753(j), the utility also has discretion, consistent with the Gas DSM Rules, in adjusting the approved budget in the course of managing the plan for maximum success. Second, the Commission found in Docket No. 07R-371G, Decision No. C08-9 0248, paragraph 32 (the decision adopting the final Gas DSM Rules), relating to the Savings Factor, that “while there may be some costs outside of the control of the utility, we find that the utility should be able to make the management decisions necessary to respond to such changes in costs, and that this [savings] factor will encourage sound management.” The Parties interpret this finding as an expectation of the Commission that gas utilities will manage their DSM plans, which would almost certainly affect the utility’s DSM budget, to meet the “two desired outcomes of gas DSM – maximum amounts of energy saved and cost-effective expenditure of funds in the pursuit of energy savings.”

(b) Rules 4752(b) and 4757. Rule 4752(b) requires gas utilities, beginning April 1, 2010 and each April 1st thereafter, to submit annual DSM reports, applications for bonus and DSMCA filings. The DSMCA shall take effect July 1 of each year for a period of 12 months. Rule 4757 sets forth the funding and cost recovery mechanism, the G-DSMCA, to enable utilities to recover prudently incurred gas DSM program expenses without requiring a change in their base rates for the gas sales. Black Hills sought a waiver of these rules because it believed that together they cause a misalignment between the recovery of costs through the G-DSMCA and the DSM costs under the concurrent

program year: “If the Company is not permitted to change its Gas DSMCA effective on July 1 and January 1 each year, the Company’s recovery of costs through the Gas DSMCA will be misaligned with costs under the concurrent program year.” (Black Hills’ Verified Application, p. 10, paragraph 21.) This misalignment occurs because these rules require that the G-DSMCA takes effect July 1 of each year for a period of 12 months, while the DSM programs are intended to run from calendar year to calendar year. Consequently, beginning in 2010, the cost recovery for the first six months of a DSM program will be at the previous year’s cost recovery level, likely resulting in over or under recovery and therefore reducing the chances of accurate prospective recovery of DSM program costs. (See Answer Testimony of Paul C. Caldara, page 15, lines 14 to 21.) The Parties agree that by allowing two Gas DSM filings annually, the misalignment described above will be cured, and that two Gas DSM filings annually would more accurately allow for prospective cost recovery. October 1 filings would address the coming year’s DSM program by becoming effective on January 1. April 1 filings, to be effective on July 1, would incorporate any bonus and deferred costs from the previous year’s DSM program. Rule 4757 states, “[t]he G-DSMCA allows for prospective recovery of prudently incurred costs of DSM programs within the DSM program expenditure target approved by the Commission in order to provide funding of the utility’s DSM programs....” This arrangement would be similar to G-DSMCA Tariff provisions found in Paragraph 9 of the Stipulation and Settlement Agreement, Docket No. 08A-366EG, Public Service Company of Colorado’s gas and electric DSM Application for 2009 – 2010. (See Answer Testimony of Paul C. Caldara, page 19, lines 3 to 14.)

Decision No. R08-1243 approved the Stipulation and Settlement Agreement in Docket No. 08A-366EG.

7. In its Application, Black Hills sought approval of G-DSMCA tariffs to recover the costs of its Gas DSM Plan, the Gas DSM Bonus, and a Revenue Normalization Mechanism (“RNM”) to decouple the recovery of fixed costs from variable revenues for the purpose of partially recovering lost revenues. In Decision No. R09-0059-I, ALJ Isley determined that revenues that might be lost through the implementation of a Gas DSM Plan could not be recovered through the G-DSMCA. Trial Staff witness Mr. Caldara pre-filed Exhibit PCC-3, which is a red-lined version of Black Hills’ G-DSMCA tariff that removed the RNM provisions from the G-DSMCA. The Parties agree that the revised tariffs pre-filed by Trial Staff in Exhibit PCC-3 are just and reasonable and should be approved by the Commission in this docket. Attachment A to this Settlement Agreement is a “clean” version of the revised G-DSMCA tariff in Exhibit PCC-3, which the Parties agree are just and reasonable and request that the Commission approve as Black Hills’ G-DSMCA tariff. The Parties agree that the tariff would be filed, to become effective on one-days’ notice, within ten (10) days after the effective date of Commission’s order approving of this Settlement Agreement.

III. GENERAL TERMS AND CONDITIONS

8. Through active prehearing investigation and negotiation, the Parties have reached the settlement set forth herein resolving all contested and disputed issues in this docket in a manner which the Parties agree is just and reasonable and in the public interest. This Settlement Agreement reflects the compromise and settlement of all issues raised or that could have been

raised in this docket. The Parties further agree that reaching agreement by means of negotiation and settlement rather than through litigation is in the public interest.

9. The Parties agree to present, to support, and to defend this Settlement Agreement before the Commission and in the courts. The Parties further agree, if the Commission sets a hearing on this Settlement Agreement, to present testimony and exhibits in a hearing to obtain the Commission's approval of this Settlement Agreement. If such a hearing is conducted, the Parties hereby agree that all pre-filed testimony and exhibits shall be admitted into evidence in this docket without cross-examination.

10. This Settlement Agreement shall not become effective until the issuance of a final Commission Order approving the Settlement Agreement, which Order does not contain any modifications of the terms and conditions of this Settlement Agreement that are unacceptable to either of the Parties. In the event the Commission modifies this Settlement Agreement in a manner unacceptable to any Party, that Party shall have the right to withdraw from this Settlement Agreement and proceed to hearing on the issues that may be appropriately raised by that Party in this docket. The withdrawing Party shall notify the Commission and the other Party to this Settlement Agreement by e-mail and facsimile within five (5) business days of the Commission Order that the Party is withdrawing from the Settlement Agreement and that the Party is ready to proceed to hearing; the e-mail and facsimile notice shall designate the precise issue or issues on which the Party desires to proceed to hearing (the "Hearing Notice").

11. The withdrawal of a Party shall not automatically terminate this Settlement Agreement as to any other Party. Within three (3) business days of the date of the Hearing Notice from the first withdrawing Party, all Parties shall confer to arrive at a comprehensive list of issues that shall proceed to hearing and a list of issues that remain settled as a result of the first

Party's withdrawal from this Settlement Agreement. Within five (5) business days of the date of the Hearing Notice, the Parties shall file with the Commission a formal notice containing the list of issues that shall proceed to hearing and those issues that remain settled. The Parties who proceed to hearing shall have and be entitled to exercise all rights with respect to the issues that are heard that they would have had in the absence of this Settlement Agreement.

12. Hearing shall be scheduled as soon as practicable on all of the issues designated in the formal Hearing Notice filed with the Commission. In the event that this Settlement Agreement is not approved, the negotiations or discussions undertaken in conjunction with the Settlement Agreement shall not be admissible into evidence in this or any other proceeding. In the event that this Settlement Agreement is approved with conditions that are unacceptable to any Party who subsequently withdraws, the negotiations or discussions undertaken in conjunction with the Settlement Agreement shall not be admissible into evidence in this or any other proceeding as to that withdrawing Party. However, as to Parties that do not withdraw from this Settlement Agreement, the negotiations or discussions undertaken in conjunction with the Settlement Agreement shall be admissible into evidence in any proceeding to enforce the terms of this Settlement Agreement.

13. Approval by the Commission of this Settlement Agreement shall constitute a determination that the Settlement Agreement represents a just, equitable and reasonable resolution of all issues that were or could have been contested among the Parties in this proceeding.

14. All Parties specifically agree and understand that this Settlement Agreement represents a negotiated settlement in the public interest with respect to the various matters and issues presented in this docket, for the sole purpose of the settlement of the matters agreed to in

this Settlement Agreement. No Party or person shall be deemed to have approved, accepted, agreed to, or consented to any concept, theory or principle underlying or supposed to underlie any of the matters provided for in this Settlement Agreement, other than as specifically provided for herein. Notwithstanding the resolution of the issues set forth in this Settlement Agreement, none of the methods or principles herein contained shall be deemed by the Parties to constitute a settled practice or precedent in any future proceeding.

15. This Settlement Agreement may be executed in counterparts and by facsimile copies of signatures, all of which when taken together shall constitute the entire Settlement Agreement with respect to the issues addressed by this Settlement Agreement.

CONCLUSION

For the reasons stated above, the Parties respectfully request that the Commission enter an order vacating all remaining pre-filing dates and approving this Settlement Agreement with the finding that the Commission's approval of this Settlement Agreement represents a fair, just, and reasonable resolution of all disputed issues that have arisen, or which could have arisen, in this docket and further closing this docket.

DATED this 12th day of March 2009.

Agreed on behalf of:

BLACK HILLS/COLORADO GAS
UTILITY COMPANY, LP d/b/a BLACK
HILLS ENERGY:

By:



Steven M. Jurek
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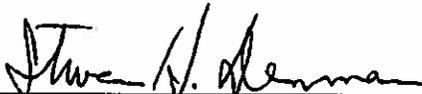
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Accepted on behalf of

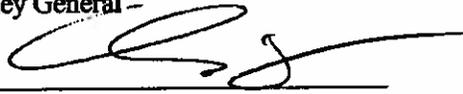
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2009 the original and four (4) copies of the foregoing **SETTLEMENT AGREEMENT AND MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT** were filed by hand delivery with:

Doug Dean, Director
Colorado Public Utilities commission
1560 Broadway, Suite 250
Denver, CO 80202

and a copy was served electronically on the following persons by email addressed to:

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A handwritten signature in black ink, appearing to read "Dale E. Isley", written over a horizontal line.

GAS DEMAND-SIDE MANAGEMENT COST ADJUSTMENT (G-DSMCA)
PRO FORMA TARIFF - GAS

2009 MAR 12 PM 4:21

I. Gas Demand-Side Management Cost Adjustment (G-DSMCA)

All sales rate schedules for natural gas service are subject to a Gas Demand-Side Management Cost Adjustment ("G-DSMCA") designed to prospectively recover prudently incurred costs of Demand-Side Management Programs ("DSM Programs") in accordance with Commission-approved Demand-Side Management Plans and Rules 4750 through 4760 of the Commission's Rules Regulating Gas Utilities and Pipeline Operators, 4 Code of Colorado Regulations 723-4 ("Gas DSM Rules"). The G-DSMCA Factor shall be separately calculated and applied to the Company's base rates schedules of residential and commercial customers. The Company shall recover the annual expenditure projected for that year over a one-year period with the G-DSMCA Factor.

II. DSM Plan Filing

The initial DSM plan filings shall cover a DSM period of two years. The subsequent DSM plan filings shall cover a DSM period of three years unless otherwise specified by the Commission. Subsequent DSM plan applications are to be filed by May 1 of the final year of the current DSM plan. Periodic DSM Plan Filings may be pursuant to the Gas DSM Rules by the Company to propose, *inter alia*, expenditure target for DSM programs.

III. Biannual G-DSMCA Filings

Effective on or after January 1, 2009, the Company shall place into effect the new G-DSMCA tariff pursuant to the Commission's final order on its initial DSM plan and application.

Beginning April 1, 2010, and each April 1st thereafter, the Company will submit its annual DSM report, application for bonus and DSMCA filing. The Company will include in its annual G-DSMCA filing all pertinent information and supporting documentation as its required by the Commission's Rules and as specifically set forth in Gas DSM Rules 4757 and 4758.

The Company shall file a request to adjust its G-DSMCA Factor either through an application or an advice letter and tariffs. Prudently incurred costs of DSM programs within the DSM program expenditure target approved by the Commission in order to provide for funding of the utility's DSM programs, as well as recovery of deferred G-DSMCA costs, plus any G-DSM bonus approved by the Commission, shall be recovered through the G-DSMCA Factor that is set on an annual basis, and collected from July 1 through June 30.

If the projected DSM program costs have changed from those used to calculate the currently effective G-DSMCA cost or if a Company's deferred G-DSMCA cost balance increases or decreases sufficiently, the Company may file an application to revise its currently effective G-DSMCA factor to reflect such changes, provided that the resulting change to the G-DSMCA factor equates to a base rate change of at least one cent (\$0.01)

per Mcf or Dth. The Company has the burden of proof to justify any interim G-DSMCA filings and the Commission has the discretion to consolidate the interim G-DSMCA filing with the next regularly scheduled annual G-DSMCA filing.

IV. Definitions

Deferred G-DSMCA Cost. Deferred G-DSMCA Cost means a rate component of the G-DSMCA Factor which is designed to amortize over the G-DSMCA Period, plus interest, the under- or over-recovered G-DSMCA Factor reflected in the Company's Account No. 186 for all applicable rate schedules of residential and commercial customers.

DSM Bonus. The amount of bonus approved by the Commission in the Company's annual DSM Bonus application, as set forth in Gas DSM Rule 4760.

Current DSM Costs. Prudently incurred costs of DSM programs within the DSM program expenditure target approved by the Commission in order to provide for funding of the Company's DSM programs.

DSM Period. DSM Period means the effective period of an approved DSM plan.

DSM Programs. DSM Program or energy efficiency program means any combination of DSM measures, information and services offered to customers to reduce natural gas usage set forth in the Company's DSM Plan Filing as approved by the Commission.

G-DSMCA Factor. The G-DSMCA Factor for each service class shall be a percentage adjustment applicable to all base rates for customers receiving service under the rate schedule for the service class. The following formula shall be used:

$$\text{G-DSMCA Factor} = \frac{(\text{current DSM Cost} + \text{DSM Bonus} + \text{Deferred DSM Cost})}{(\text{CFCST} * \text{CUSTSRV} + \text{SFCST} * \text{BASECOM})}$$

where

- CFCST is the forecast number of customers in for the next DSM Period, CUSTSRV is the monthly service charge, SFCST is forecasted gas sales quantity for the rate schedule in the next DSM Period, and BASECOM is the base commodity rate.
- The G-DSMCA Factor will also include the current G-DSM bonus plus any adjustment necessary to previously approved G-DSM bonuses.
- Deferred G-DSMCA Cost includes sub-account of deferred amounts for DSM bonus and current DSM Cost for the rate schedule.

G-DSMCA Period. The G-DSMCA shall take effect July 1 of each year for a period of 12 months.

Interest on under- or over-recovery. The amount of net interest accrued on the average monthly balance in sub-accounts of Account No. 186 (whether positive or negative), is determined by multiplying the monthly balance by an interest rate equal to the Commission-authorized after-tax weighted average costs of capital.

Prudence review and adjustment of G-DSM bonus. If the Commission finds that the actual performance varies from performance values used to calculate the DSM bonus, then an adjustment shall be made to the amount of DSM bonus award. Any true-up in DSM bonus will be implemented on a prospective basis.