

Decision No. C19-0798

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0824G

IN THE MATTER OF THE VERIFIED JOINT APPLICATION OF BLACK HILLS GAS DISTRIBUTION, LLC AND BLACK HILLS/COLORADO GAS UTILITY COMPANY, INC. FOR A COMMISSION DECISION APPROVING A QUALITY OF SERVICE PLAN.

**DECISION ADOPTING, IN PART, AND
MODIFYING, IN PART, DECISION NO. R19-0450;
DENYING EXCEPTIONS; AND DENYING APPLICATION**

Mailed Date: September 27, 2019
Adopted Date: August 21, 2019

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I. BY THE COMMISSION**A. Statement**

1. This Decision denies the exceptions to Decision No. R19-0450 (Recommended Decision); adopts, in part, and modifies, in part, the Recommended Decision; and rejects the Joint Application for a Commission Decision Approving a Quality of Service Plan (QSP) filed on November 21, 2018 (Application) jointly by Black Hills Gas Distribution, LLC and Black Hills/Colorado Gas Utility Company, Inc. (collectively BH Colorado Gas or Company).

2. As discussed below, BH Colorado Gas's QSP filing does not include negative financial incentives and, therefore, the Application fails to meet the requirements of Decision No. R16-0058, issued January 22, 2016, in Proceeding No. 15A-0667G (2016 Decision). BH Colorado Gas must file a new application for Commission approval of a QSP that includes both performance metrics and negative financial incentives that ensure no degradation of service occurs as a result of the acquisition transaction addressed through Proceeding No. 15A-0667G. BH Colorado Gas also shall file the performance metric reports as approved in the Recommended Decision in this Proceeding until further order of this Commission.

B. Background

3. Through the 2016 Decision approving Black Hills Corporations' acquisition of the SourceGas Distribution LLC (SourceGas) utility operations in Colorado,¹ the Commission required Rocky Mountain Natural Gas LLC (RMNG) and BH Colorado Gas each to confer with Staff of the Colorado Public Utilities Commission (Staff) regarding respective QSPs for Commission approval. The application for approval of the proposed QSP for RMNG was filed in

¹ Black Hills Utility Holdings, Inc. (Black Hills Holdings), a subsidiary held by Black Hills Corporation, acquired SourceGas Holdings, LLC, which owned 100 percent of SourceGas that, in turn, owned 100 percent of SourceGas and RMNG.

Proceeding No. 18A-0823G, while the application for approval of the proposed QSP for BH Colorado Gas was filed in Proceeding No. 18A-0824G.²

4. Administrative Law Judge (ALJ) Conor Farley states in his Recommended Decision addressing the proposed QSP for BH Colorado Gas that, “due to multiple oversights by both [the Company] and Staff,” BH Colorado Gas did not provide its QSP application filings until November of 2018 – two years after the 2016 Decision issued.³ ALJ Farley also points out that the record in this proceeding “is not as fulsome as it could have been”⁴ as a result of the delay, and due to the parties’ positions. The Company takes the position that the 2016 Decision required nothing more than setting metrics for reporting, and argues that no penalties are required. Despite requests from the ALJ, the Company refused to provide evidence of the appropriate penalty⁵ levels or framework governing the administration of any form of penalty.

5. For its part, the ALJ found that Staff chose not to provide detailed evidentiary support for any portion of its preferred QSP.⁶ This includes that Staff also fails to provide appropriate negative incentive levels and administrative framework for negative incentives, despite Staff maintaining that penalties are required by the 2016 Decision. Instead, Staff requests

² Through the acquisition, RMNG and BH Colorado Gas are operated under Black Hills Holdings as jurisdictional utilities. Both proceedings were referred to ALJ Farley. With limited exceptions, the records for both Proceeding Nos. 18A-0823G and 18A-0824G are substantially similar, as are the ALJ’s determinations on each individual case.

³ Decision No. R19-0450 at ¶ 1.

⁴ *Id.* at ¶ 2.

⁵ Negative incentives include, but are not limited to penalties. For example, QSPs have historically included refunds to customers or similar reparations if quality standards are unmet, that this Commission classifies as “negative incentives.” The ALJ uses both terms in his decision. As discussed below, we purposefully require a QSP filing with the more broad term “negative incentives,” which may include, but are not limited to, penalty assessments, along with the required QSP metrics.

⁶ Recommended Decision No. R19-0450, at ¶ 3.

the Commission deny the Application and require further negotiation between the companies and Staff.

6. ALJ Farley analyzed the 2016 Decision on the key issues of whether it required QSPs to include: (1) metrics designed to ensure avoidance of service degradation or incentivize the continuous improvement of service; and (2) positive and/or negative incentives. ALJ Farley found that the decision required metrics to ensure avoidance of service degradation, but did not require continuous improvements.⁷ The ALJ further analyzed and concluded – contrary to the Company’s position – that the prior decision required negative financial incentives to ensure the companies prevented service quality degradation and avoided harm to ratepayers.⁸

7. ALJ Farley rejected Staff’s plea to deny the QSP applications and send the parties back to negotiations, particularly given the extensive delay caused by the parties already. Regarding metrics to avoid service degradation, without robust testimony from Staff on specific metrics, and given that the Company bears the burden of proof, ALJ Farley found that the Company’s proposed metrics should be adopted with only minor revision.⁹ With respect to negative incentives, the ALJ ordered the parties to confer and return to the Commission with a narrow filing regarding these negative incentives within six weeks following the Commission’s final decision in each respective case.¹⁰

8. Both Staff and the Company filed exceptions to the Recommended Decision. The parties primarily reiterate their positions that were rejected by ALJ Farley. Both parties add

⁷ *Id.*, at ¶¶ 30-32.

⁸ *Id.*, at ¶¶ 35-40.

⁹ *Id.*, at ¶¶ 42-59. Areas regarding metrics include: (1) damage prevention and emergency response time; (2) outage frequency; (3) call abandonment rate; (4) average time to answer customer calls; (5) billing accuracy; (6) on-time rate for non-emergency service calls; and (7) efficiency of service.

¹⁰ *See* Decision No. R19-0450, Proceeding No. 18A-0824G, at ordering ¶ 3; Decision No. R19-0449, Proceeding No. 18A-0823G, at ordering ¶ 3.

nothing new for the Commission to consider regarding negative financial incentives and, in the case of Staff, regarding specific metrics. Staff relies on prior settlements and points to its proposed settlement with Public Service Company of Colorado (Public Service) in Proceeding No. 18A-0918G where Staff and Public Service agreed to positive financial incentives¹¹ as support for its positions. Staff recommends that similar positive financial incentives be adopted in this case. In response, the Company argues that Staff's reliance on separate proceedings is inappropriate and that such reliance, if adopted by the Commission, is akin to improper *ad hoc* rulemaking.

C. Findings and Conclusions

9. Consistent with the discussion below, we deny the Company's Application, finding that the proposed QSP omits negative financial incentives as required by the 2016 Decision. We direct the Company to file a complete application with, at least, proposed metrics and negative financial incentives within 30 days of the Mailed Date of this Decision. In addition, the Company shall file the performance metric reports as directed in the Recommended Decision within this Proceeding until a final Commission decision issues on the subsequent QSP application.

1. Decision No. R16-0058

10. As a threshold matter, through their exceptions, both Staff and the Company take issue with ALJ Farley's Recommended Decision that interprets the 2016 Decision: (1) to require *both* metrics and negative enforcement mechanisms in the form of penalties; and (2) not to require incentives for continuous improvements.

¹¹ The ALJ ultimately rejected portions of this settlement that included positive incentives. Decision No. R19-0565, Proceeding No. 18A-0918G, issued July 3, 2019.

11. On one hand, the Company argues that ALJ Farley went too far when he interpreted the 2016 Decision to require penalties. The Company argues that the Recommended Decision is: (1) inconsistent with the plain language of the decision; (2) improperly compares the Company to QSPs developed for other utilities; (3) incorrectly interprets the QSP requirements in the 2016 Decision; and (4) establishes policies for all utilities, which it claims is akin to improper rulemaking.

12. On the other hand, Staff argues that ALJ Farley did not go far enough and also claims he “misinterprets” the 2016 Decision when the ALJ found it requires a QSP to prevent post-merger service degradation, but does not also “require” continuous improvements. Staff argues that the ALJ misinterpreted the “plain language and intent of [the 2016 Decision],”¹² in combination with the pertinent settlement agreement. Staff “concedes that it is important that no degradation of service should occur,” but states that “nothing in the plain language of [the 2016 Decision] precludes continuous improvement with respect to quality of service.”¹³ Staff then offers that the plain language of the Settlement states that the Company agreed to “strive to maintain or enhance the quality of its service to customers” as support that continuous improvement is required.¹⁴ Staff further argues that continuous improvement is consistent with Pipeline and Hazardous Materials Safety Administration (PHMSA) code requirements under Rule 4902(a) of the Rules Regulating Gas Utilities and Pipeline Operators, 4 *Code of Colorado Regulations* 723-4, and points to its settlement agreement it reached with Public Service in then-ongoing Proceeding No. 18A-0918G.

¹² Staff’s Exceptions at p. 3.

¹³ *Id.* at p. 4.

¹⁴ *Id.* (Emphasis Omitted).

13. In response to these arguments in Staff's exceptions, the Company argues that Staff's reliance on PHMSA and settlements in other proceedings is not dispositive to conclude a Commission policy exists to require continuous improvements in the context of the Company's QSP. The Company concludes that promoting a policy of continuous improvement is best handled in a rulemaking, not an individual adjudication. Staff did not respond to the Company's exceptions.

14. We agree with ALJ Farley that the plain language of the 2016 Decision reasonably expected that, at a minimum, some form of negative incentives must be included to avoid service degradation in a QSP. The Company's position that metrics alone meet the requirements renders the QSP simply a reporting mechanism. At the same time, we agree with the ALJ that Staff's arguments that the 2016 Decision required continuous improvement must also be rejected. For the same reasoning discussed by the ALJ, the 2016 Decision simply did not contemplate continuous improvements and corresponding positive financial incentives in the context of this QSP.

15. The ALJ's arguments are well reasoned within his Recommended Decision. Regarding the crux of the dispute, we find particularly compelling that the 2016 Decision rejected as insufficient the Company's agreement merely "*to strive* to maintain or enhance the quality of its service to customers." ALJ Farley correctly points out that merely "to strive" was found "inadequate to ensure ratepayers are protected and that no degradation of service occurs as a result of the acquisition transaction."¹⁵ Instead, the 2016 Decision required a QSP as a "safeguard" necessary to ensure ratepayers would suffer no net harm due to the approved acquisition. While the 2016 Decision did not use the term "penalty, it is reasonable based on

¹⁵ Decision No. R19-0450 at ¶ 31. (Emphasis Omitted)

similar QSP proceedings, that the 2016 Decision required safeguards that did more than merely “strive” to ensure customers were not harmed. The 2016 Decision appropriately left the particulars of the enforcement mechanism open to the Company. The Company’s refusal to include any form of negative incentive to ensure metrics proposed will cause no net harm to customers is simply inconsistent with the 2016 Decision.

16. We similarly reject Staff’s claims in exceptions regarding its interpretation of the 2016 Decision. In applying the “no net harm” standard, the ALJ correctly concludes that, while the subsequent requirements must ensure ratepayers are not harmed, the acquisition does not require a “net benefit” to customers. ALJ Farley’s interpretation of the decision not to require continuous improvement is sound. Staff’s claims and reliance on PHMSA code, Commission pipeline safety rules, and certain settlements that are wholly outside of the record are unpersuasive. Staff is incorrect that the Commission has identified a policy to date that requires continuous improvement, and correlating positive incentives, within the context of QSP filings.

17. We reject the Company’s arguments in exceptions that the ALJ’s decision improperly compares the Company to other utilities, or otherwise constitutes improper rulemaking in this instance. Staff, not the ALJ, made comparisons to, and parallels between, the Company and other Colorado utilities to support its positions. The Recommended Decision does not adopt Staff’s positions. To the contrary, the ALJ analyzed and discusses the 2016 Decision and requirements specific to the Company in this instance. We uphold the ALJ’s determinations on his interpretation of the 2016 Decision, and deny the Company and Staff’s exceptions regarding the interpretation of the decision.

2. Denial of the Application Due to Deficiencies of the Record

18. We share the ALJ's concerns that both the Company and Staff failed to provide a fulsome record for consideration. Parties, including Staff, must present sufficient evidence and testimony to support their respective positions – including settlement, if any is reached – within each proceeding at issue. The Commission and its hearing officers, including the assigned ALJs, must make findings of fact and law supported by the record. Importantly, it is for the Commission, and not an individual party, to determine the public interest considerations that may be relevant. This includes adjudicated matters, but also clarification or implementation of Commission rules and policies. Procedural avenues are available if any party is unclear whether Commission policies exist, or if it needs the Commission to opine on interpretation of its rules.

19. Consistent with the ALJ's findings, we agree that, with respect to the required negative incentives, the record is simply void of facts. We find that the Company's filings are inadequate because they include absolutely no record regarding enforcement mechanisms. The ALJ identified, and Staff admits, that it did not provide any information in the record regarding incentives. Instead, through exceptions, it "directs the Commission to the Settlement Agreement between Public Service and Staff in [ongoing] Proceeding No. 18A-0918G to use as guidance...."¹⁶ Staff's direction to the Commission that it should be guided by a settlement agreement in a separate proceeding is inappropriate.

20. Because we agree with the ALJ's interpretation that the proposed QSP required metrics and negative incentives, the QSP proffered by the Company is simply inadequate and inconsistent with the 2016 Decision. Without a record from either party to rely on, we deny the Application.

¹⁶ Staff's Exceptions at p. 7.

3. Required Filings

21. In rejecting the QSP application, we require a full QSP application from the Company no later than 30 days from the Mailed Date of this Decision. The new application must include, at a minimum, the metrics and negative incentives required by the 2016 Decision.

22. We echo the ALJ's concerns that party negotiations and discussions were significantly delayed in this matter after the 2016 Decision. Specific to this proceeding, we therefore do not require that the Company necessarily negotiate with Staff in making its subsequent QSP filing. While conferral with both Staff and other potential parties is appropriate and often helpful, "negotiations" should not slow down the re-filing of an appropriate and adequate QSP application. Staff and other potential parties may make intervention pleadings. As discussed above, parties must present, in full, and in the respective record for Commission consideration, its proffered position and support.

23. In addition, we require BH Colorado Gas to file, in this Proceeding, reports on the service quality metrics adopted by the Recommended Decision. These performance metrics will be provided for reporting purposes only.¹⁷ Reporting shall continue until further Commission order regarding the required, subsequent QSP application that includes both metrics and negative incentives.

24. In requiring this reporting, we deny the Company's request in exceptions to alter its call abandonment rate metric. Because these metric reports will not be tied to negative incentives, we see no reason to revise the reporting requirements at this time. Through its subsequent application, the Company may request updated metrics to this or any other

¹⁷ For clarity, the subsequent QSP application filing may include these or other metrics.

determination with the understanding that enforcement mechanisms may apply if the service quality standards proposed are not met.

4. Candor to the Commission

25. Finally, we are concerned with a number of issues in this Proceeding raised to our attention through the Recommended Decision and pleadings in this case. In particular, we find alarming Staff Witness Gene Camp's statements reacting to a notice of compliance with the 2016 Decision filed earlier by the Company (Corrected Notice¹⁸). After discussing objections from the Company regarding Staff's discovery requests sponsored by the Company's witness Fredric Stoffel, Mr. Camp states that he was "immediately struck by the complete lack of candor displayed by Black Hills in the Corrected Notice...."¹⁹ He further stated that he found the notice "very misleading."

26. We remind Mr. Stoffel, and any future witnesses or representatives of Black Hills, that candor to this tribunal is not only expected, but it is required. *See, e.g.*, Colorado Rules of Professional Conduct, Rule 3.3. Appropriate action will be taken if future filings or representations are found to be fraudulent, false, or otherwise intentionally misleading, contrary to the duty owed this Commission, and by extension, the duty owed the Commission's Staff.

II. ORDER

A. The Commission Orders That:

1. Recommended Decision No. R19-0450, issued May 29, 2019, is adopted in part, and modified in part, consistent with the discussion above.

¹⁸ Corrected Notice of Compliance with Decision No. R16-0058 filed by BH Colorado Gas on July 15, 2016 in Proceeding No. 15A-0667G.

¹⁹ Staff Witness Gene L. Camp, Answer Testimony, p. 17.

2. The exceptions filed by Black Hills Gas Distribution, LLC and Black Hills/Colorado Gas utility Company, Inc. (collectively BH Colorado Gas) on June 18, 2019, to Decision No. R19-0450, are denied.

3. The exceptions filed by Staff of the Colorado Public Utilities Commission on June 18, 2019, to Decision No. R19-0450, are denied.

4. The Verified Application for a Commission Decision Approving a Quality of Service Plan (QSP) filed by BH Colorado Gas on November 21, 2018, is denied.

5. BH Colorado Gas shall file an Application seeking approval of a QSP, as required by Decision No. R16-0058, issued January 22, 2016, in Proceeding No. 15A-0667G, and consistent with the discussion above. The application shall be filed no later than 30 days from the Mailed Date of this Decision.

6. BH Colorado Gas shall file the performance metric reporting within this Proceeding, consistent with the service quality metrics determined in Decision No. R19-0450.

7. This Proceeding shall remain open as a repository for the performance metrics reporting, consistent with the discussion above, until subsequent decision of this Commission on BH Colorado Gas' required QSP application.

8. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the effective date of this Decision.

9. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
August 21, 2019.**

(S E A L)



ATTEST: A TRUE COPY



Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners