

Decision No. C21-0333

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0345E

IN THE MATTER OF THE VERIFIED APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF AN ECONOMIC DEVELOPMENT RATE (EDR) PROPOSAL PURSUANT TO COLORADO HB 18-1271.

**DECISION GRANTING APPLICATION
WITH MODIFICATIONS, GRANTING MOTION TO
APPROVE SETTLEMENT AGREEMENT, AND
AUTHORIZING COMPLIANCE FILING**

Mailed Date: June 7, 2021
Adopted Date: May 19, 2021

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I. BY THE COMMISSION

A. Statement

1. In 2018, the General Assembly enacted House Bill 18-1271, the Economic Development Rate Act, *Concerning the Authorization of Economic Development Rates to be Charged by Electric Utilities to Qualifying Nonresidential Customers* (the EDR Act), codified at § 40-3-104.3, C.R.S. The EDR Act provides a process by which an investor-owned utility subject to rate regulation by the Commission may offer economic development rates (EDR rates) to a qualifying commercial or industrial customer (EDR customer) pursuant to a Commission-approved EDR Tariff.

2. On August 21, 2020, Public Service Company of Colorado (Public Service or the Company) filed an Application for Approval of an Economic Development Proposal Pursuant to House Bill 18-1271 (Application). The Application proposes an Economic Development Rate (EDR) program consistent with subsections (6) through (8) of § 40-3-104.3, C.R.S.

3. By this Decision, the Commission grants the Application, as modified by the Unopposed Partial Settlement Agreement (Settlement Agreement) reached among Public Service, Trial Staff of the Colorado Public Utilities Commission (Staff); and the Colorado Office of Consumer Counsel (OCC) (collectively, Settling Parties).

B. Background

4. The Company filed the Application pursuant to subsections (6) through (8) to § 40-3-104.3, C.R.S.

5. This is the second utility application under the EDR Act. The Commission previously approved, with modifications and for limited applicability, the proposal of Black Hills

Colorado Electric, LLC (Black Hills) to implement EDR rates. In that case of first impression, the Commission resolved several initial questions of statutory interpretation. *See* Proceeding Nos. 18A-0791E and 19A-0055E, Decision No. C19-0446, issued May 28, 2019, and Decision No. C19-0656, issued August 1, 2019. Public Service’s proposal for an EDR program significantly differs from that of Black Hills and thus raises new issues and questions under the EDR Act.

6. Public Service explains that it brings the proposal to offer EDR rates before the Commission to enhance Colorado’s competitiveness against other states, and its own competitiveness against other utilities, to attract new business. The Company states that electricity rates are one of many factors that large commercial or industrial customers may consider in deciding whether to expand or relocate business, among them infrastructure, workforce, real estate, and quality of life. According to the Company, not only are rate stability and predictability important to attracting businesses that may be evaluating competing sites, so are timely and streamlined regulatory processes that enable decisions to be made quickly.

7. Public Service explains that it works with state and local economic development experts—organizations like the Colorado Office of Economic Development and International Trade (OEDIT)—to create packages that support business objectives while also considering community fit. Through avenues like its economic development partnerships and its account managers, it has already identified prospective customers who may enroll in the EDR program, if approved by the Commission. It posits that such a program would create many benefits for Colorado, among them promoting and accelerating job growth; increasing corporate investment and tax revenues; and supporting post-pandemic economic recovery.

C. Procedural History

8. On August 21, 2020, Public Service filed the Application for approval of its economic development proposal pursuant to the EDR Act with supporting direct testimony.¹ In the filing, Public Service set forth a proposal for an EDR program and requested several approvals from the Commission regarding terms and conditions, tariffs, and procedural processes.

9. On August 24, 2020, the Commission issued notice of the Application and established a 30-day intervention period. Timely notices of intervention by right were filed by Staff and the OCC. In addition, the Colorado Energy Consumers (CEC) filed a motion to permissively intervene and Black Hills filed a motion to participate in this Proceeding as *amicus curiae*.

10. By Decision No. C20-0702-I, issued October 6, 2020, the Commission deemed the Application complete and set the matter for hearing before the Commission *en banc*.

11. By Decision No. C20-0726-I, issued October 9, 2020, the Commission granted CEC's request to intervene and Black Hills' request to participate as *amicus curiae*. Through the same decision, the Commission directed Public Service to file Supplemental Direct Testimony responding to seven questions the Commissioners identified as needing further information to create a complete and useful record for a decision in this Proceeding.

12. By Decision No. C20-0756-I, issued October 28, 2020, the Commission established the procedural schedule for this Proceeding and scheduled the evidentiary hearing for

¹ Hrg. Exh. 100 (Application); Hrg. Exh. 101 (Velasquez Horvath); Hrg. Exh. 102 (Wishart); Hrg. Exh. 103 (Cowan).

April 5 through 9, 2021. Through the same decision, the Commission extended the time for a final decision in this Proceeding by the 130 days permitted in § 40-6-109.5(1), C.R.S.

13. On December 11, 2020, Public Service filed Supplemental Direct Testimony.²

14. By Decision No. C21-0032-I, issued January 14, 2021, the Commission directed Public Service to file a second set of Supplemental Direct Testimony addressing further outstanding questions the Commission identified as warranting a response in order to complete the record and facilitate a thorough evaluation of the Company's Application.

15. On January 25, 2021, Public Service filed a second set of Supplemental Direct Testimony.³

16. On February 16, 2021, Staff⁴ and the OCC⁵ filed answer testimony.

17. On March 15, 2021, Public Service filed rebuttal testimony.⁶

18. Prior to the scheduled evidentiary hearing, on March 26, 2021, the Settling Parties filed a notice indicating they had reached, in principle, a partial settlement. The Settling Parties filed a motion requesting the Commission amend the procedural schedule to allow the settlement agreement to be filed on March 31, 2021, and supportive testimony to be filed on April 2, 2021. The Settling Parties requested the Commission vacate the first three days of the evidentiary hearing and retain the hearing days of April 8 and 9, 2021 for a limited Commission hearing on the settlement agreement and cross-examination between parties on the unresolved issue.

² Hrg. Exh. 104 (Velasquez Horvath); Hrg. Exh. 105 (Wishart); Hrg. Exh. 106 (Cowan).

³ Hrg. Exh. 107 (Wishart).

⁴ Hrg. Exh. 400, Rev. 2 (Dahlke); Hrg. Exh. 401 (Sigalla); Hrg. Exh. 402 (O'Neill).

⁵ Hrg. Exh. 300 (Fernandez).

⁶ Hrg. Exh. 108, Rev. 1 (Velasquez Horvath); Hrg. Exh. 109 (Marchino); Hrg. Exh. 110, Rev. 1 (Wishart).

19. By Decision No. C21-0194-I, issued March 31, 2021, the Commission granted, with modifications, the Settling Parties' motion to amend the procedural schedule. Through the same Decision, the Commission vacated the scheduled hearing dates and scheduled new hearing dates for April 15 and 16, 2021.

20. On March 31, 2021, the Settling Parties filed the Settlement Agreement.⁷ The Settling Parties indicated that CEC, although not a signatory, did not oppose the Settlement Agreement. The Settlement Agreement is attached to this Decision as Attachment A. The Settlement Agreement incorporates by reference an updated Standard EDR Customer Service Agreement (Hrg. Exh. 108, Att. HVH-6) and an illustrative EDR Tariff (Hrg. Exh. 110, Att. SWW-7). It further describes proposed modifications to the Company's Distribution Extension Policy, Electric Commodity Adjustment (ECA) Tariff, and Demand-Side Management Cost Adjustment (DSMCA) Tariff. The Settlement Agreement resolves all issues in the Proceeding except the issue of geographically differentiated EDR discounts. As Section XII of the Settlement Agreement reflects, the Settling Parties do not agree whether the Company can legally offer geographically differentiated EDR discounts; and if so, the appropriate basis for determining such geographical differentiation and the appropriate differentiated discount levels. The Settling Parties and CEC request the Commission resolve these non-settled issues as part of its decision in this Proceeding.

21. Also on March 31, 2021, the Settling Parties filed an Unopposed Joint Motion to Approve Partial Settlement Agreement. Through this motion, the Settling Parties request the

⁷ Although the Settlement Agreement was first submitted as an attachment to the Settling Parties' motion filed March 31, 2021, it was also filed as an attachment to the Company's settlement testimony filed April 2, 2021. This Decision refers to the settlement testimony attachment, admitted as Hrg. Exh. 111, Att. SWW-11.

Commission find the Settlement Agreement just and reasonable and in the public interest, and approve the Settlement Agreement without modification.

22. On April 2, 2021, the Settling Parties each filed testimony in support of the Settlement Agreement.⁸

23. On April 15, 2021, the Commission conducted hearings on the Settlement Agreement and the non-settled issue of geographically differentiated EDR discounts. Witnesses for Public Service, Staff, and the OCC appeared and responded to questioning from the Commission regarding the Settlement Agreement and from other parties regarding the non-settled issue of geographically differentiated EDR discounts.

24. During the evidentiary hearing, the Commission admitted into evidence, by stipulation of the Parties, the Parties' pre-filed testimony and attachments comprising Hearing Exhibit Nos. 100 through 112 (Public Service), 300 through 301 (the OCC), and 400 through 403 (Staff), in their electronic form as pre-filed by the Parties and existing in the Commission's E-filing System files.⁹ During the hearing, the Commission further admitted discovery responses moved for admission as Hearing Exhibit Nos. 404 and 405. At the conclusion of the oral testimony, the Commission closed the evidentiary record.

25. On April 27, 2021, Public Service, Staff, the OCC, and CEC filed their post-hearing statements of position.

⁸ Hrg. Exh. 111 (Wishart); Hrg. Exh. 112 (Velasquez Horvath); Hrg. Exh. 301 (Fernandez); Hrg. Exh. 403 (Dahlke).

⁹ The Commission also admitted Hrg. Exh. 500, which lists the Parties' pre-filed testimony and attachments.

26. At the May 19, 2021 Commissioners' Weekly Meeting, the Commissioners deliberated on Public Service's application, as modified by the Settlement Agreement proposed for approval, resulting in this Decision.

D. Public Service's Application as Modified by the Settlement Agreement

1. Company's Application

27. In its Application, Direct Testimony, and Supplemental Direct Testimony, Public Service proposes an EDR program comprising a Standard EDR Contract and a Non-Standard EDR Contract.

28. The Standard EDR Contract would be available to qualifying EDR customers seeking to add or expand between 3 to 20 megawatts (MW) of new load. In the course of working with a prospective EDR customer, Public Service would conduct due diligence with statewide economic development partners and Company account managers to assess their economic health and legitimacy, and would further require a commercial credit report and financial security. The EDR customer would provide an affidavit setting forth facts confirming it meets the standards in § 40-3-104.3(7)(a), C.R.S., to qualify for the EDR discount. The Company would file each Standard EDR Contract, including the affidavit of eligibility, with the Commission on a confidential basis.

29. The Company filed a Standard EDR Customer Service Agreement (Hrg. Exh. 101, Att. HVH-2) with illustrative terms and conditions for customers in the Standard EDR Contract program. EDR customers would take service under an existing commercial or industrial customer tariff—Secondary General Service (SG), Primary General Service (PG), or Transmission General Service (TG)—as well as the proposed EDR Tariff. The EDR Tariff provides discounts in the form of a base rate discount and the non-applicability of certain rate

riders. Public Service proposes a declining base rate discount depending on the length of the contract term. For a ten-year Standard EDR Contract, the discount would be 40 percent in years one through three; 30 percent in years four through five; 20 percent in years six through seven; and 10 percent in years eight through ten. The discount would apply to generation and transmission demand charges, distribution demand charges, and volumetric energy charges, where applicable, but would not apply to the monthly service and facilities charge.

30. In addition to the base rate discount, Public Service also proposed EDR customers would not pay the following rate riders: the Purchased Capacity Cost Adjustment (PCCA); the Clean Air-Clean Jobs Act Rider (CACJA); the Transmission Cost Adjustment (TCA); the General Rate Schedule Adjustment (GRSA); and the General Rate Schedule Adjustment-Energy (GRSA-E). The Company proposed EDR customers would pay the Renewable Energy Standard Adjustment (RESA) and modified versions of the ECA and the DSMCA. Public Service projects an average customer on a PG rate would receive a monthly total EDR discount of approximately 38.7 percent. Public Service also expressed openness to including Transportation Electrification Plan (TEP) charges on EDR customer bills contingent on the resolution of Proceeding No. 20A-0204E.

31. Because § 40-3-104.3(6)(b)(I), C.R.S., requires EDR rates to be above the marginal cost to serve EDR customers, Public Service describes relevant short-term and long-term marginal costs, and proposes varying treatment for them. The Company proposes to directly assess EDR customers' short-term marginal costs, which it considers to be the costs to interconnect and serve EDR customers. These costs include those incurred under Public Service's Distribution Extension Policy, modified to remove construction allowances, and Public Service's Transmission Line Extension Policy. Public Service then forecasts the

long-term marginal costs associated with customer, distribution, transmission, generation, and administrative cost categories. Under the Company's calculations, the ten-year levelized marginal cost to serve an EDR customer is approximately 3.5 cents per kWh, whereas the amount the ten-year levelized revenues EDR customers are anticipated to pay, based on its proposed EDR discounts, is approximately 4.9 cents per kWh.

32. Turning to Non-Standard EDR Contracts, Public Service proposes that they would be available case-by-case to qualifying EDR customers seeking to add or expand load over 20 MW. The rates and terms of these contracts would be individually negotiated. Public Service proposes to file a separate application for approval of a Non-Standard EDR Contract. Public Service states these large customers may have time-sensitive opportunities, so it requests the Commission complete its review of applications for approval of Non-Standard EDR Contracts within 120 days.

33. The Company anticipates large customers in the EDR program may be interested in supplying their load through renewable energy options, requiring expansion of the Company's existing voluntary renewable energy programs to cater specifically to EDR customers, as the EDR Act anticipates and allows.¹⁰ Public Service requests the Commission also complete its review of these applications within 120 days.

34. Public Service does not propose to keep separate books or to reassess marginal costs to serve EDR customers. Instead, the Company proposes: (1) in any Phase I electric rate case, costs and revenues would be combined with all other financial information to determine the overall net revenue deficiency; and (2) in Phase II, customer counts, monthly peak demands, and

¹⁰ These programs may include Solar*Rewards, Solar*Rewards Community, Windsource, and Renewable*Connect.

total sales quantities associated with EDR customers would be excluded from the class cost allocation to prevent other customer classes being allocated EDR-related costs.

35. Public Service proposes to track and report the expenses associated with this application, anticipated at \$319,990, and record them as a regulatory asset without interest until they can be presented in the Company's next Phase I electric rate case.

36. Finally, Public Service proposes to file annual EDR reports by June 1 of each year. The Company agrees to report summary information associated with EDR customers taking service under Standard and Non-Standard EDR Contracts.

2. Parties' Answer Testimony

37. The OCC and Staff submitted Answer Testimony indicating both agreement with aspects of Public Service's EDR program design and concerns about its statutory compliance and impacts on non-participating customers.

38. The OCC stated it supports economic development opportunities in Colorado that provide net economic benefits. It agreed with aspects of Public Service's program design, such as the treatment of certain riders and the proposal for annual reporting. However, it recommended the Commission consider various changes to comply with the EDR Act and to enhance protections for non-participating customers. The OCC recommended the Commission direct Public Service to revise its EDR Tariff to incorporate proposed minimum and maximum EDR rates and a marginal cost value to comply with § 40-3-104.3(6)(b)(I), C.R.S. Additionally, the OCC urged that an objective criterion is necessary to demonstrate whether electricity is a critical consideration for a prospective EDR customer consistent with § 40-3-104.3(7)(a)(I)(B), C.R.S., such as representing at least 5 percent of a company's total costs. It further specified that

incremental load associated with qualifying commercial and industrial customers should be separately metered to comply with the EDR Act.

39. In addition to statutory issues, the OCC recommended changes to the Company's program design to further guard against cross-subsidization. For example, it suggested early termination by an EDR customer should result in losing discounts relative to embedded rates from the beginning of the Standard EDR Contract. The OCC proposed that certain costs, such as bad debt attributable to EDR customers and the costs of litigating this application proceeding, should be directly assigned to EDR customers to prevent cross-subsidization. The OCC maintained that EDR customers should pay the GRSA rider and the rider associated with the TEP, as the latter was established to benefit all Public Service ratepayers, including future EDR customers. New electric riders, the OCC argued, should be recoverable from EDR customers in the future. Similarly, it recommended Public Service should bear all bankruptcy-related costs and stranded asset risk.

40. Finally, the OCC recommended the Commission direct Public Service to implement a margin-sharing mechanism in which the Company shares 10 percent of net EDR income with all standard service customers by crediting the ECA for new EDR customers over the life of each individual EDR Customer Service Agreement. The OCC thus opposed Public Service's proposal to apply revenues from EDR customers to assess revenue deficiencies in Phase I rate cases, and recommends EDR customer costs and revenues be segregated to ensure marginal costs are covered.

41. Like the OCC, Staff stated it supports economic development. It focused on the statutory requirements and overall intent of the EDR Act and proposed modifications that Staff believes would make the EDR program successful and compliant with state law.

42. Staff proposed that the effectiveness of an economic development incentive depends on whether and how it impacts a recipient's behavior. Accordingly, Staff proposed an electricity cost screen to meet the EDR Act requirement that electricity be a critical consideration, and to ensure that EDR discounts go to businesses that need them. Specifically, Staff recommended the Standard EDR Contract be offered to businesses that spend more than 5 percent of their production costs on electricity and that businesses spending less may pursue the Non-Standard EDR Contract alternative.

43. Staff further recommended modifications to the treatment of riders. First, they recommended that EDR customers should pay the GRSA and GRSA-E riders. Second, they argued that Public Service's marginal energy costs were too low, creating a risk that EDR customers would be subsidized by non-EDR customers—they therefore proposed that Public Service should modify the EDR-ECA Factor to include marginal costs based on actual system dispatch rather than simulations. Staff also suggested the EDR-ECA Factor should be applied zonally in order to capture energy price differentials due to transmission congestion and that the long-term use of combustion turbine technology to represent incremental generation capacity costs should be more thoroughly evaluated.

44. Staff further proposed consumer protection guardrails, such as prohibitions on reselling electricity and affiliate contracts. Finally, Staff opposed Public Service's proposal to determine treatment of litigation expenses for this application proceeding in the next Phase I electric rate case, and instead recommended they be attributable to EDR customers.

45. Staff raised concerns that Public Service's proposal does not require participation in voluntary renewable energy programs, but also that directing participation in such programs may financially benefit the Company. However, Staff acknowledged that incremental

EDR-associated sales were unlikely to prevent the Company from achieving emissions reduction goals or targets because of guidance adopted by the Air Quality Control Commission. At minimum, Staff recommended that Public Service be prohibited from contracting with coal resources to supply EDR load and that it be required to report on the carbon emission impacts of EDR customers. As large customers that will be receiving significant discounts, Staff suggested EDR customers be required to participate in various demand response programs or have beneficial load factors or load shapes. To ensure the program does not negatively impact decarbonization, Staff also recommended that it be capped at 100 MW.

46. Staff proposed modifications to annual reporting, including providing more data specific to individual EDR customers. Significantly, Staff also recommended this annual reporting include a reassessment of marginal costs, including a method to allocate incremental system costs between EDR and non-EDR customers. While Staff did not propose that Public Service be required to maintain separate books and records for EDR customers, it did recommend that annual reporting include a demonstration that actual EDR revenue is above the actual marginal cost to serve EDR customers.

47. Procedurally, Staff recommended that it be granted the ability to issue a Notice of Deficiency in response to a Standard EDR Contract, and it opposed a presumption of a 120-day period to resolve a Non-Standard EDR Contract application.

3. Settlement Agreement

48. The Settlement Agreement modifies several significant provisions of the Company's Application.

49. Overall, participation in the Standard EDR Contract program is capped at 130 MW of eligible demand. Public Service reserves the right to seek a waiver, variance, or

modification to the cap, with such request to be supported by an affidavit or testimony explaining the justification.

50. The Settlement Agreement also enhances eligibility requirements for Standard EDR Contract customers. A prospective Standard EDR Contract customer must attest that it forecasts the cost of electricity will constitute at least 5 percent of its operating costs for the new or expanded operations subject to the EDR discount. For expanded operations, an existing customer may attest the cost of electricity is forecasted to constitute at least 5 percent of the EDR customer's total operating costs for the facility being expanded. New load from the electrification of existing processes may qualify if the new load is separately metered and would not have occurred but for an expansion of operations.

51. In addition to meeting cost criteria, each EDR customer must meet at least one of six demand response and system benefits criteria: (1) participating in the Company's Interruptible Service Option Credit program; (2) participating in the Company's Peak Partner Rewards Program; (3) having a favorable load factor; (4) having a favorable load shape; (5) participating in a Commission-approved renewable energy program equating at least 10 percent of the customer's annual energy use; or (6) installing a battery system with storage equal to at least 10 percent of the customer's average daily load. Furthermore, Public Service commits not to contract for coal resources to serve an EDR customer's load.

52. The Settlement Agreement also modifies the base rate discount Standard EDR Contract customers may receive. Standard EDR Contract customers are eligible for base rate discounts on a declining scale, starting, for ten-year contracts, at 30 percent for years one through three, 25 percent for years four through five, 15 percent for years six through seven, and 10 percent for years eight through ten. Additionally, Public Service commits to provide

long-term marginal costs and minimum and maximum rates based on the standard SG, PG, and TG rates in the EDR Tariff and Standard EDR Contract.

53. Standard EDR Contract customers are required to contribute to the following rate riders: the RESA; the Colorado Energy Plan Adjustment; the GRSA; the GRSA-E; the Transportation Electrification Programs Adjustment; a modified “full cost” DSMCA; a modified ECA (EDR-ECA Factor); and the Clean Energy Plan Rider, once approved. These customers are not subject to the Company’s PCCA, TCA, or CACJA riders. Any future riders proposed by the Company in a Commission proceeding would be evaluated case-by-case as to their applicability to EDR customers during relevant future proceeding(s).

54. Additionally, the EDR-ECA Factor will be subject to a quarterly true-up process based on the Company’s actual marginal cost data as determined by a retroactive supply curve model. Public Service will present a more detailed implementation proposal to Staff and the OCC at a future quarterly ECA operations meeting, and those parties will also meet to discuss any methodological or implementation changes if Public Service begins to participate in an organized, regional electricity market.

55. The Settlement Agreement further provides that should a Standard EDR Contract customer terminate early, default, or otherwise fail to fulfill a contract, the customer would be subject to “claw back” requiring the customer to repay the difference between the electric bills calculated under the EDR discounts as reflected in their contract and the EDR discounts they would have received under a shorter contract term reflective of their actual time as an EDR customer.¹¹ Additionally, the Standard EDR Customer Service Agreement states, in cases of

¹¹ Hrg. Exh. 111, Att. SWW-11 (Settlement Agreement) p. 13 (citing Hrg. Exh. 108, Att. HVH-6 (Updated Standard EDR Customer Service Agreement)).

“intentional misrepresentation or fraud,” the EDR customer shall be liable for liquidated damages equal to 200 percent of the cumulative difference between the bills paid under the EDR discount and the full electric bills under the EDR customer’s base schedule (SG, PG, or TG).¹²

56. The Settling Parties agreed that Public Service is to file finalized Standard EDR Contracts on a highly confidential basis in Proceeding No. 18M-0221E or another miscellaneous proceeding within 30 days of execution. Staff will have the ability to issue a Notice of Deficiency on each contract within 20 calendar days, and the Company will have 14 calendar days to respond. Staff’s Notice of Deficiency may address disagreement with the Company’s determination of eligibility or other concerns, such as the risk that additional enrollment would materially compromise the Company’s ability to achieve carbon reduction targets. The OCC may also file comments within 20 calendar days from the filing of a Standard EDR Contract.

57. When Public Service files a Phase I electric rate case, EDR costs will be incorporated into its rate case revenue requirement calculation and EDR revenues will be treated as a revenue credit to the revenue requirement. In a Phase II electric rate case, EDR revenues are to be treated as a revenue credit to the revenue requirement and EDR customer counts, monthly peak demands, and total sales quantities are to be excluded from the class cost allocation analysis.

58. Additionally, the Company will reassess long-term marginal cost calculations either in future Phase II electric rate proceedings, or through an appropriate filing to occur at least every two years from the effective date of the most recent Phase II electric rate case. Public Service also agrees to reassess its use of combustion turbine technology in calculating incremental generation capacity costs when long-term marginal cost calculations are reassessed.

¹² Hrg. Exh. 108, Att. HVH-6 (Updated Standard EDR Contract Service Agreement) p. 4.

4. Applicable Standards

59. As set forth in subsections (6) and (7) of § 40-3-104.3, C.R.S., a proposed tariff implementing EDR rates must meet the following statutory requirements: The tariff must be available only to qualifying customers. A commercial or industrial customer may qualify if it agrees to locate operations in Colorado and add or expand at least three MW of load. The customer must demonstrate the cost of electricity is a critical consideration in its decision on whether to locate operations in Colorado and the availability of EDR rates is a substantial factor in this decision. The tariff must set a minimum and maximum EDR rate. The discounted EDR rate must not be lower than the utility's marginal cost of providing service to the EDR customer. The tariff must limit the contract term to ten years or less. Once a utility has an approved EDR Tariff, it may negotiate and enter into agreements related to EDR rates with individual customers without further Commission approval, so long as the negotiated EDR rate complies with the approved EDR Tariff and the load addition or expansion is 20 MW or less. The utility must obtain separate Commission approval for a load addition or expansion above this threshold.

60. The utility bears the burden of proof to show that its proposed EDR Tariff complies with these statutory requirements. In addition, the utility must establish the rates assessed to other customers do not subsidize the cost of providing EDR rates to EDR customers, the rates of other regulated utility operations do not increase, and non-EDR customers do not experience a rate increase due to EDR rates. The utility must establish the EDR rate falls within the parameters of § 40-3-104.3(6)(b)(I), C.R.S. That is, the rate must be lower than the otherwise applicable tariff rate in effect at the time the customer seeks to qualify, but not lower than the utility's marginal cost. Finally, the utility must demonstrate the EDR Tariff will not result in the subsidization prohibited in § 40-3-104.3(6)(c)(I), C.R.S.

61. Section 40-3-104.3(6)(c)(I), C.R.S., requires the Commission to include in any authorization under the EDR Act such terms and conditions as it deems necessary to ensure the EDR rates or charges assessed to other customers do not subsidize the cost of providing service to EDR customers by falling below the marginal cost floor in § 40-3-104.3(6)(b)(I), C.R.S., and that there is no other subsidization of the cost of providing service to EDR customers.

62. As the proponents of an order approving the Settlement Agreement, the Settling Parties bear the burden to establish by a preponderance of the evidence that the Settlement Agreement is just and reasonable and in the public interest. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1500 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

63. In determining whether to approve the Settlement Agreement as a resolution of the issues in this Proceeding, the Commission balances both its policy of encouraging settlements (*see, e.g.*, Rule 4 CCR 723-1-1408(a)) and the Commission's independent duty to determine matters that are within the public interest. *Caldwell v. Pub. Utils. Comm'n of State of Colo.*, 692 P.2d 1085, 1089 (Colo. 1984). The Commission's Rule 4 CCR 723-1-1408(b) allows the Commission to approve, deny, or require modification to any settlement as the public interest requires. The Commission considers whether the settled terms adequately address the issues raised in the proceeding and reach a result that is just and reasonable and in the public interest.

5. Findings and Conclusions

64. The Commission finds that the Settlement Agreement, as clarified at hearing and as modified in this Decision, reaches a result that is just and reasonable and in the public interest given the legally binding requirements of the EDR Act. We share some of the concerns expressed in Commissioner Gavan's dissent about the risk of providing large subsidies to

companies who may have moved to the Greater Denver Metro area independent of the EDR program. We are also similarly concerned with the potential that this program may fail to provide direct benefits to the more economically depressed and rural areas of Colorado. At the same time, however, we recognize that our fundamental role in this proceeding is to implement the EDR Act as currently drafted as best we can and in a way that is just and reasonable and in the public interest. As we discuss below, we feel that we have enabled the appropriate reporting metrics in this inaugural round for this issue to be addressed later, either by the Commission or by the Colorado General Assembly, if it does not see benefits in the areas or industries that it intended.

65. With that perspective, we support the Settlement Agreement as modified in this Decision. It includes adjustments to the Company's application that guard against cross-subsidization. It also includes both enhanced consumer protections and system benefits, and it provides appropriate opportunities to evaluate the EDR program, while retaining program design features that create predictability and stability for prospective EDR customers.

66. The Settlement Agreement incorporates several changes that establish additional guardrails against EDR customers being subsidized by non-EDR customers. First, the EDR-ECA Factor will include marginal costs based on actual system dispatch rather than simulations. Second, costs prudently incurred to prepare and litigate the application and compliance advice letter(s) will be allocated to EDR customers through the EDR-ECA Factor in a future cost recovery filing. Third, bad debt expense associated with EDR customers, including any unpaid claw-back amounts due to an early termination,¹³ will also be allocated to EDR customers through the EDR-ECA Factor. Finally, Public Service has agreed to accept the risk of stranded

¹³ Apr. 15, 2021 Hrg. Trans. (Wishart) 137:1-22.

assets attributable to EDR customers and not to seek recovery of these costs in future rate cases. At hearing, Public Service clarified this provision is intended to reflect generation and distribution costs like those in its Supplemental Direct Testimony that were incurred during the time an EDR customer is taking service under the EDR Tariff.¹⁴

67. The Settlement Agreement includes other enhancements designed to protect non-participating customers. For example, it requires that prospective Standard EDR Contract customers meet a 5 percent electricity cost threshold as part of demonstrating that the cost of electricity is a “critical consideration,” consistent with § 40-3-104.3(7)(a)(I)(B), C.R.S. It also precludes EDR customers from reselling electricity except for purposes of electric vehicle storage and potentially energy storage, and it precludes the Company from offering EDR discounts to customers in which it or its related companies have a material financial stake.

68. Procedurally, it provides the opportunity to reassess long-term marginal cost calculations, which may include the methodology for determining marginal costs and appropriate discounts as discussed at hearing,¹⁵ either in future Phase II electric rate proceedings, or through an appropriate filing to occur at least every two years from the effective date of the most recent Phase II electric rate case. This process will further guard against cross-subsidization by establishing appropriate terms and conditions for new Standard EDR Contracts where merited by changing circumstances.

69. The Settlement Agreement also establishes a 130 MW cap to the Standard EDR Contract program. Should Public Service seek a waiver, variance, or modification to the cap, we anticipate that an expansion of the program will provide an opportunity to consider appropriate

¹⁴ Apr. 15, 2021 Hrg. Trans. (Wishart) 117:20–120:1.

¹⁵ Apr. 15, 2021 Hrg. Trans. (Wishart) 114:13-20.

program design elements, such as the sufficiency of the six system benefit criteria as was discussed at hearing, particularly in light of the more detailed and useful reporting agreed-to within the Settlement Agreement.¹⁶

70. In addition to enhancing consumer protections, the Settlement Agreement provides system benefits. First, Public Service commits not to contract for coal resources to serve an EDR customer's qualifying load. Both Public Service and Staff have procedural avenues to reduce the risk that the EDR program may hinder compliance with Colorado's emission reduction goals or commitments for appropriate consideration by the Commission. Additionally, the requirement that a Standard EDR Customer must meet at least one of six criteria related to load characteristics or renewable energy sets the expectation that the EDR program should encourage load that is beneficial to the Colorado system from both an economic and environmental perspective.

71. We find that modifications or clarifications to three areas would improve terms and conditions as established by the Company's application and the Settlement Agreement. In doing so, we seek to guard against cross-subsidization and preserve the ability of future Commissions to make appropriate findings related to the EDR program.

72. First, we find the claw back proposal as reflected in the Settlement Agreement fails to sufficiently incent prospective EDR customers to accurately select their contract length when negotiating a Standard EDR Contract. This lack of incentive is concerning because a longer term comes with a higher discount. The discount rates available for differing contract terms are a key program design feature. Although the claw back provision requires an early-terminating EDR customer to repay the difference between discount levels for the original

¹⁶ Apr. 15, 2021 Hrg. Trans. (Wishart) 110:25–111:1-12, 155:16-25–156:1-9.

contract duration and the actual contract duration, there is no interest penalty, as the Company's witness acknowledged at hearing.¹⁷ Without even an interest penalty, we find that an EDR customer would effectively benefit, based on the time value of money, from signing up for a longer term than they fulfill without an appropriate safeguard to dissuade this behavior. We recognize the Standard EDR Customer Service Agreement imposes a substantial penalty for intentional misrepresentation or fraud, but we are also concerned with an EDR customer's unreasonable or irresponsible expectations, as opposed to only the risk of them engaging in fraud. To mitigate the risk of mismatched terms and discounts, we find an EDR customer that terminates before the end of the contracted term should be required to repay the difference consistent with the claw-back, but also *with interest* at the Company's cost of long-term debt. The Company should update the Standard EDR Customer Service Agreement (Hrg. Exh. 108, Att. HVH-6) accordingly. We find this modification both reflects the time value of money and more effectively incents prospective Standard EDR Contract customers to enter into a contract term commensurate with their realistic expectations for how long they will remain on the EDR Tariff.

73. Second, we find additional clarification is warranted related to the treatment of adjustments and riders due to the Commission's ongoing statutory responsibility to ensure that non-EDR customers do not subsidize EDR customers. The Settlement Agreement identifies the rate riders applicable to EDR customers and provides that any future riders proposed by the Company to be applicable to EDR customers will be evaluated case-by-case as part of relevant future Commission proceeding(s). We approve this term as reasonable and appropriate. However, the Commission is required to monitor the treatment and applicability of riders designed to

¹⁷ Apr. 15, 2021 Hrg. Trans. (Wishart) 135:19–136:18.

recover Company investment between rate cases; the Settlement Agreement cannot tie the future hands of the Commission in that ongoing role. Notwithstanding the Settling Parties' agreement, statutory requirements control and would apply in any future Commission proceedings. For example, § 40-3-104.3(6)(b)(I), C.R.S., requires that a utility's EDR rate not be lower than the utility's marginal cost, and § 40-3-104.3(6)(c)(II), C.R.S., requires the utility to establish, in a Commission proceeding related to EDRs, that the rates assessed to EDR customers do not result in prohibited subsidization by non-EDR customers. We note therefore a material change to an existing rider could warrant the same review as a new rider for its continued compliance with these requirements, which would be assessed based upon the facts presented in the record of the applicable future proceeding.

74. Finally, we make two clarifications for the Company's reporting, which was significantly modified and improved by the Settlement Agreement. Consistent with the discussion at hearing, we direct the Company to report which load and system benefit criterion or criteria each Standard EDR Customer meets both as part of the submission of each Standard EDR Contract and as part of the appropriate Annual EDR Report.¹⁸ Additionally, to enable the Commission to better understand the impact of the EDR program, we clarify that the Company should report total jobs associated with EDR customers in the appropriate Annual EDR Report, and to identify the number of jobs within Enterprise Zones and Opportunity Zones.

75. With the modifications and clarifications discussed above, the Commission finds the Company's application, as modified by the Settlement Agreement, satisfies the minimum statutory requirements of the EDR Act, and will therefore be approved. We find the Company's

¹⁸ Apr. 15, 2021 Hrg. Trans. (Velasquez Horvath) 54:3–55:5.

Application, as modified, meets the statutory requirements for eligibility and reasonably protects against prohibited subsidization.

E. Non-Settled Issue of Geographically-Differentiated EDR Discounts

76. Throughout this Proceeding, the Commission has sought to understand the policy and legal rationales for targeting EDR discounts to areas of the state most needing economic development, such as state-designated Enterprise Zones or Opportunity Zones. Regrettably, we were unable to identify a consensus as to what policy would be most appropriate and effective for this Commission to adopt, and we decline to require that Public Service target the EDR program geographically at this time.

1. Parties' Legal Positions

77. The Settling Parties do not agree as to whether the Commission has the legal authority to implement geographically-differentiated EDR discounts, and, if the Commission does have such authority, the appropriate basis for any differentiation and level of discount. The Settling Parties and CEC request the Commission address this issue as part of its decision.

78. Regarding legal authority to implement geographically-differentiated EDR discounts, Public Service and CEC contend the plain language of the EDR Act, § 40-3-104.3(6)-(8), C.R.S., does not indicate the General Assembly intended for a utility's EDR discount to be differentiated based upon any of the criteria suggested by Staff and the OCC in this Proceeding. Public Service and CEC note the plain language of the statute repeatedly references goals and requirements related to economic development "in Colorado." As they point out, this includes the definition of a "qualifying customer" in § 40-3-104.3(7)(a), C.R.S. They conclude the General Assembly could have put criteria into the statute by which geographic targeting should occur, but chose not to do so. Public Service and CEC further note the Colorado

Supreme Court, in *Mountain States Legal Foundation v. Pub. Utils. Comm'n*, 197 Colo. 56, 590 P.2d 495 (1979), has previously found §§ 40-3-106 and 40-3-102, C.R.S., prohibiting a rate preference or a difference between localities, constitute an express restriction by the General Assembly on the Commission's otherwise broad ratemaking powers.

79. Staff and the OCC disagree. They contend the EDR Act should be read as a complete exception to the prohibitions of a rate preference or difference between localities. They also argue the prohibition in § 40-3-106, C.R.S., of different rates between localities prohibits an "unreasonable" difference, not *any* difference. They suggest the Commission could still approve a reasonable variation based on the facts of the record. Finally, they suggest the Commission can move forward because the differentiated EDR discounts would be felt by only a small group of commercial or industrial ratepayers who would be required to accept a differentiation in exchange for the discounts for which they each will be eligible.

2. Parties' Policy Positions

80. Parties present various alternatives for the basis and level of geographically differentiated discounts. They express concern that Public Service is negotiating with 14 customers representing 157 MW of load, all in the Greater Denver Metro area, of which 77 percent of the prospective load is data centers.¹⁹ Staff points to economic research that concludes economic incentives represent an unnecessary subsidy as companies generally locate for reasons besides incentives, such as workforce and infrastructure. In answer testimony, both Staff and the OCC argue the Greater Denver Metro area is already competitive and desirable for new companies, and suggest that targeting incentives to other parts of Colorado is thus appropriate.

¹⁹ Hrg. Exh. 400, Rev. 2 (Dahlke Answer) p. 24.

81. Accordingly, Staff recommends limiting participation in the Standard EDR Contract to qualifying commercial or industrial customers located in counties that need economic stimulus based on comparatively higher unemployment levels. Staff suggests a metric of 125 percent of the average state unemployment value.²⁰ Staff proposes use of a five-year average (equal to 3.8 percent), or alternatively, a ten-year average (5.4 percent). Nine Colorado counties have unemployment levels exceeding 125 percent of the five-year average. Four of those counties overlap with Public Service's service territory and would be eligible for Standard EDR Contracts under Staff's proposal. A fifth county would be eligible if the Commission used a ten-year average state unemployment value instead of a five-year average.

82. The OCC, on the other hand, recommends the EDR program target qualifying commercial or industrial customers that locate in economically depressed areas of the state. It proposes the Standard EDR Contract be offered to customers locating in Enterprise Zones (EZs), which are 16 urban and rural areas designated by the Colorado OEDIT based on factors like unemployment rate, population growth rate, and per capita income.²¹ The OCC proposes, to the extent Public Service desired to contract with prospective customers in high-growth areas, it could pursue Non-Standard EDR Contracts through separate applications.

83. According to Staff and the OCC, an EDR program could be targeted to counties of high unemployment or state-designated EZs in several ways. Staff and the OCC would support a 50 percent carve-out to the 130 MW cap for qualifying commercial or industrial customers locating in targeted areas.²² They suggest the Commission could limit participation in the Standard EDR Contract to targeted areas. Alternatively, they propose the Commission could

²⁰ Hrg. Exh. 401 (Sigalla Answer) p. 13.

²¹ Hrg. Exh. 300 (Fernandez Answer) pp. 41-43.

²² *Id.*

implement different discounts for targeted versus untargeted areas. The OCC contends an adder alone is too rich and may result in cross-subsidization unless there is a corresponding reduction for untargeted areas.²³ Staff puts forward the concept of a 35 percent maximum discount for targeted areas and a 25 percent maximum discount for untargeted areas, to create a “meaningful difference” that would incentivize business development in targeted areas.²⁴

84. The Company and CEC argue, should the Commission determine it has the legal authority to require geographically-differentiated rates, it should maintain the base discount structure agreed to in the Settlement Agreement and require the Company to provide only an enhanced discount for targeted areas. The Company argues, per its marginal cost analyses, that the Commission could approve an adder of up to 10 percent (*i.e.*, from 30 percent to 40 percent) without falling afoul of cross-subsidization but it would not be appropriate to go above a discount of 40 percent.

3. Findings and Conclusions

85. The Commission expressed a strong interest throughout this Proceeding in finding appropriate ways to implement the EDR Act to promote growth in economically depressed areas and to encourage geographic diversity in its application, and believe we have broad general authority along these lines. However, we recognize the arguments from the Company and CEC cautioning that the EDR Act offers no evidence of intent, through its plain language, to geographically differentiate the benefit. Ultimately, we do not see a clear path to achieving this goal in this Proceeding, given the gravitational pull of the statute toward a statewide approach, the discordant record before us, and the Company’s reluctance to prioritize geographic diversity.

²³ Apr. 15, 2021 Hrg. Trans. (Fernandez) 226:14–227:12.

²⁴ Apr. 15, 2021 Hrg. Trans. (Dahlke) 253:7–254:21.

86. We have concerns with each of the proposals put forward by the Parties for targeting the program. For example, testimony at hearing indicated that while unemployment data is consistent and good quality, considering the proportions of those unemployed may disguise that the total number of unemployed individuals is actually higher in communities like the Greater Denver Metro area than in rural areas.²⁵ We are also concerned that such an approach could create unfair distinctions between counties that view themselves as a broader region, for example, a five-year look excludes Conejos County, which is part of the San Luis Valley. EZs, on the other hand, are designated by OEDIT to direct economic development, but the data used to create them is refreshed only every ten years. At hearing, Public Service was unable to provide information as to whether any prospective EDR customers it has identified are likely to be located in EZs.²⁶

87. Another problematic feature is the EDR Act itself specifies a 3 MW threshold for new incremental load. Testimony at hearing indicated regions outside the Greater Denver Metro area are unlikely to attract this size of load, even with a substantial discount on the price of electricity.²⁷ Furthermore, given the three MW threshold, it is unlikely that the electrical infrastructure in many areas of the state outside of the Greater Denver Metro area would be able to support the size of load that is required by the legislation, making it unlikely that it could be effectively used if limited to only these areas of the state.²⁸ As a result, even if we had a more clear legal and policy path to implement geographically-differentiated discounts in this Proceeding, we remain concerned that targeted regions in more rural areas of the state would be

²⁵ Apr. 15, 2021 Hrg. Trans. (Velasquez Horvath) 37:16–38:11; (Sigalla) 304:22–305:4.

²⁶ Apr. 15, 2021 Hrg. Trans. (Velasquez Horvath) 41:12-25.

²⁷ Apr. 15, 2021 Hrg. Trans. (Velasquez Horvath) 194:17-22.

²⁸ *See, e.g.*, Apr. 15, 2021 Hrg. Trans. (Velasquez Horvath) 85:25-86:22.

unable to attract and support the load levels contemplated by the statute. The EDR Act appears designed to enable Public Service to compete against other states, not to support distressed areas within Colorado.

88. Ultimately, we find significant the 130 MW program cap agreed to by the Settling Parties and the comprehensive data the Company has agreed to collect and report. This initial limit on the size of the program and the opportunity to collect meaningful information on its roll-out will provide a valuable opportunity for the Commission and the General Assembly to assess the success of this inaugural program and determine what adjustments may be needed in the future and if geographic targeting should play a role in future EDR approvals. As it moves forward, we encourage Public Service to seek ways to cultivate geographic and industry diversity in implementing its EDR program, but given the concerns expressed here, we do not adopt changes to the Standard EDR Contract to require geographic differentiation.

II. ORDER

A. The Commission Orders That:

1. The Unopposed Joint Motion to Approve Partial Settlement Agreement, filed on March 31, 2021, by Public Service Company of Colorado (Public Service), Trial Staff of the Colorado Public Utilities Commission, and the Colorado Office of Consumer Counsel, is granted, consistent with the discussion above.

2. Consistent with the findings, discussion, and conclusions in this Decision, the Unopposed Partial Settlement Agreement (Settlement Agreement) is approved, with modification and clarification. The Settlement Agreement is attached to this Decision as Attachment A.

3. The Application for Approval of an Economic Development Proposal Pursuant to House Bill 18-1271 (Application), filed on August 21, 2020, by Public Service, is approved as

modified by the Settlement Agreement and as modified and clarified by this Decision, consistent with the discussion above.

4. Public Service is authorized to file an advice letter compliance filing to implement the approved Economic Development Rate (EDR) tariff. Public Service shall file the compliance tariff sheets in a separate proceeding and on not less than two business days' notice. The advice letter and tariff sheets shall be filed as a new advice letter proceeding and shall comply with all applicable rules. In calculating the proposed effective date, the date the filing is received at the Commission is not included in the notice period and the entire notice period must expire prior to the effective date. The advice letter and tariff must comply in all substantive respects to this Decision in order to be filed as a compliance filing on shortened notice.

5. Consistent with the discussion above, Public Service is authorized to track, record, and defer all costs incurred to prepare and process this Application in a non-interest bearing regulatory asset account for presentation for review and recovery in a future proceeding.

6. The Commission shall initiate a new miscellaneous proceeding for purposes of filing Standard EDR Contracts, consistent with the discussion above.

7. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

8. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
May 19, 2021.**

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ERIC BLANK

MEGAN M. GILMAN

Commissioners

COMMISSIONER JOHN GAVAN DISSENTING.

Doug Dean,
Director

III. COMMISSIONER JOHN GAVAN DISSENTING

89. I am dissenting on this Decision on the grounds that flawed Economic Development Rate legislation has led to a situation where the intent of the statute has totally missed the mark in delivering economic development benefits to areas of the state that need it the most. This program will instead incentivize firms to move their operations to one of the hottest commercial real estate markets in the country. It is absurd in my view to provide a handout to firms that would take this action anyway. We are failing to guard the public good in approving

this deeply flawed program while large swaths of Colorado's rural areas suffer increasing economic distress driven by drought, aging populations, and a lack of jobs.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOHN GAVAN

Commissioner