STEVEN W. SNARR (3022)
Special Assistant Attorney General
ROBERT J. MOORE (5764)
Assistant Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0158
stevensnarr@agutah.gov
rmoore@agutah.gov
Attorneys for Utah Office of Consumer Services

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Investigation Re: Expiring Excess Generation Credits under Schedule 135	Docket No. 18-035-39 Reply Comments of the Office of Consumer Services

Pursuant to Utah Code § 54-10a-301 and Utah Admin. Code r. 746-1, the Office of Consumer Services ("Office") submits these Reply Comments in response to PacifiCorp d/b/a Rocky Mountain Power's ("Rocky Mountain Power" or "Company") November 8, 2018 Comments.

BACKGROUND

The instant docket arose out of docket 18-035-28, which concerned the acknowledgement of Rocky Mountain Power's Net Metering Report. As part of their Comments in that docket, all parties, apart from the Company, recommended that in some fashion the funds from expiring Schedule 135 net metering credits be allocated to the Utah Weatherization Assistance Program ("WAP").[1] These parties reasoned that this approach is better aligned with the understanding of

[1] Office's August 1, 2018 Initial Comments Docket 18-035-28 at pg. 5-6; Office's August 16, 2018 Reply Comments Docket 18-035-28 at pg. 2; Division of Public Utilities' ("Division") August 1, 2018 Initial Comments Docket 18-035-28 at pg. 7; Division's August 16, 2018 Reply Comments Docket 18-035-28 at pg. 3; Utah Clean Energy's ("UCE") Initial August 1, 2018 Comments Docket 18-035-28 at pg. 4; UCE's

solar advocates regarding the passage of Utah Code § 54-15-104(4) governing expired credits, i.e., that the value of expiring credits be used to provide incremental benefits to low-income customers.[2] Currently, the value of expired credits is transferred to the HELP program, which provides qualified low-income participants a credit on their electricity bills. However, the value of the credits only supplants HELP funding from a Schedule 91 surcharge and therefore provides a small benefit to all customers instead of a direct benefit to low-income customers.[3]

In its August 16, 2018 Reply Comments, Rocky Mountain Power objected to using the funds to supplement the WAP. The Company asserted that it administers its electrical weatherization program through Schedule 118 which, with some exceptions, generally limits qualified participates to households with electric space heating and/or electric water heaters.[4] Because of the low number of such households, the Schedule 118 weatherization program only uses a small fraction of the program's current funding and therefore additional funding will not provide incremental value to low-income customers.[5] In addition, "if the Company were required to change the qualifications for funding projects . . . [t]his change would be inconsistent with the current tariff and a departure from the intent of the Company's role in participating in the WAP."[6]

Instead, and in "light of the concerns that legislators and stakeholders who participated in the passage of [§ 54-15-104(4)] intended that the value from Schedule 135 credits would be used

August 16 Reply Comments Docket 18-035-28 at pg. 1-2; Utah Solar Energy Association's ("USEA") August 16, 2018 Reply Comments Docket 18-035-28 at pg. 1-2.
[2] Office's August 1, 2018 Initial Comments Docket 18-035-28 at pg. 5; Division's August 16, 2018 Reply Comments Docket 18-035-28 at pg. 1, 3-4; UCE's Initial August 1, 2018 Comments Docket 18-035-28 at pg. 4; USEA's August 16, 2018 Docket 18-035-28 Reply Comments at 2.
[3] Division's August 16, 2018 Reply Comments Docket 18-035-28 at pg. 3.
[4] Rocky Mountain Power's August 16, 2018 Reply Comments Docket 18-035-28 at pg. 4.
[5] *Id.* at pg. 3-4.
[6] *Id.*

to provide incremental benefits to low-income customers, the Company suggests that the funds could be credited to the Lend-A-Hand program."[7] A program that provides assistance to low-income customers in paying their bills to Rocky Mountain Power. In an August 30, 2018 letter decision, the Commission ruled that: "Given parties' concerns regarding funding programs not related to reducing electricity usage, the [Commission] declines to modify the current treatment of expiring credits at this time."[8]

On September 27, 2018, the Office filed a Petition for Reconsideration and on September 28, 2018, UCE filed a Petition for Review and Reconsideration. Both Petitions argued that Rocky Mountain Power misunderstood their positions and that both the Office and UCE actually argued that the funds from the expiring credits be transferred directly to the WAP administrators bypassing the Company's demand side management group and therefore bypassing the requirements of Schedule 118.[9] Accordingly, the concerns identified by Rocky Mountain Power were not implicated by the Office's and UCE's proposals.[10] On October 10, 2018, the Commission issued a Notice of Intention to Open a Separate Docket to Examine Use of Expiring Excess Generation Credits declining to act on the Petitions therefore denying the Petitions by operation of Utah Code § 54-7-15(2)(c). Instead, the Commission opened the instant docket to "adjudicate the parties' requests for a change in the treatment of expiring excess generation credits . . . ." [11]

[7] Rocky Mountain Power's August 16, 2018 Reply Comments Docket 18-035-28 at pg. 5.
[8] Correspondence from Gary L. Widerburg, Docket 18-035-28 at pg. 2.
[9] Office's September 27, 2018 Petition for Reconsideration at pg. 6; UCE's September 28, 2018 Petition for Review and Reconsideration at pg. 5.
[10] Office's September 27, 2018 Petition for Reconsideration at pg. 7-8; UCE's September 28, 2018 Petition for Review and Reconsideration at pg. 6.
[11] October 10, 2018, the Commission issued a Notice of Intention to Open a Separate Docket to Examine Use of Expiring Excess Generation Credits at pg. 2.

In the initial comments in the instant docket, both the Office and UCE again contend that the funds should be transferred directly to the WAP administrators and the Office provided additional information concerning how the WAP administrators propose to use the funds.[12] The Division took a more conservative approach in this docket and stated that while they do not oppose the use of excess credits to help low-income customer in paying utility bill or for funding energy efficiency projects, it "is not proposing or supporting any specific program at this time."[13] Rocky Mountain Power again recommended that the funds be credited to the Lend-A-Hand program and opposed transferring the funds to the administrators of the WAP.[14] However, in this round of comments, the Company primarily bases its contention on statutory construction arguments.[15] Rocky Mountain Power also asserts, alternatively, that if the funds are not allocated to the Lend-A-Hand program, the funds should continue to be used for the HELP program, even though using credits to fund this approach would not provide any incremental benefits to low-income customers.[16] In these Reply Comments, the Office primarily focuses on Rocky Mountain Power's new legal arguments.

ARGUMENT

In initial comments in the instant docket, Rocky Mountain Power takes issue with the Office's and UCE's contention that section 54-15-104(4), the statute governing the treatment of unused credits, expressly grants the Commission power to transfer the value of the excess credits to the WAP administrators as "another use" for the funds pursuant to subsection 54-15-

[12] Office's November 8, 2018 Initial Comments Docket 18-035-39 at pg. 4; UCE's November 8, 2018 Initial Comments Docket 18-035-39 at pg. 3.
[13] Division's November 8, 2018 Initial Comments Docket 18-035-39 at pg. 1.
[14] Rocky Mountain Power's November 8, 2018 Initial Comments Docket 18-035-39 at pg. 2-4.
[15] *Id.* at 4.
[16] *Id.* at 5-6.

104(4)(b).[17] Rather, the Company advances a somewhat curious legal argument construing section 54-15-104(b) as prohibiting any use of excess credit funds for any use other than for "the electrical corporation's low-income assistance programs."[18]

Section 54-15-104(4) reads:

> At the end of an annualized billing period, an electrical corporation's avoided costs value of remaining unused credits described in Subsection (3)(a) shall be granted:
> (a) to the electrical corporation's low-income assistance programs as determined by the governing authority; or
> (b) for another use as determined by the governing authority.

Essentially, Rocky Mountain Power argues that 54-15-104(4) provides that the value of excess credits can only be used for an "electrical corporation's low-income assistance program" and for no other use despite the language in section 54-15-104(4) providing that the funds can be used for an "electrical corporation's low-income assistance program . . . ; or . . . for another use . . ." Section 54-15-104(4).[19]

The Company bases this somewhat startling contention on the rule of statutory construction that provides "where two statutory standards potentially conflict with each other, 'the provision more specific in application governs over the more general provision.'" *Pugh v. Draper City,* 2005 UT 12, ¶ 10, 114 P.3d 546 (quoting *Hall v. Dep't of Corr.,* 2001 UT 34, ¶ 15, 24 P.3d 958). Specifically, Rocky Mountain Power asserts that because subsection 54-15-104(4)(a) contains the specific term "electrical corporation's low-income assistance programs" and subsection 54-15-104(4)(b) contains the more general term "another use," subsection 54-15-104(4)(a) always governs over subsection 54-15-104(b) and subsection 54-15-104(b),

[17] Office's November 8, 2018 Initial Comments at pg. 3; UCE's November 8, 2018 Initial Comments at pg. 1,4.
[18] Rocky Mountain Power's November 8, 2018 Initial Comments Docket 18-035-39 at pg. 4
[19] *Id.*

presumably, serves no purpose whatsoever.[20] Accordingly, Rocky Mountain Power alleges section 54-15-104(4) prohibits granting the funds to the WAP administrators because this approach does not grant the funds to an electrical corporation's low-income assistance program.[21]

Not only is this interpretation based on a misapplication of the rule Rocky Mountain Power relies upon, the interpretation also violates several other cannons of construction. First, the rule that specific provisions govern over general provisions only applies when the two provisions conflict, so that it is not possible to comply with one provision without violating the other. *Carter v. University of Utah Medical Center,* 2006 UT 78, ¶ 9, 150 P.3d 467 (when we are confronted with two statutory provisions that ***conflict,*** the provision more specific in application governs over the more general provisions.")(quotation marks and citation omitted)(emphasis added); *Pugh,* 2005 UT 12, ¶ 10 ("where two statutory standards potentially ***conflict*** with each other 'the provision more specific in application governs over the more general provision'")(emphasis added)(quoting *Hall,* 2001 UT 34, ¶ 15 ("when two statutory provisions ***conflict*** in their operation, the provision more specific in application governs over the more general provision.")))(emphasis added).

Moreover, when construing statutes, this Commission's "primary goal . . . is to evince 'the true intent and purpose of the Legislature [as expressed through] the plain language of the Act.'" *Carter,* 2006 UT 78, ¶ 9 (quoting *Hall,* 2001 UT 34, ¶ 15)(alterations in original). "Determining the legislative intent requires that '[the Commission] seek[s] to render all parts [of the statute] relevant and meaningful, and [the Commission] accordingly avoid[s] interpretations that will render portions of the statute superfluous or inoperative.'" *Carter,* 2006 UT 78, ¶ 9

[20] *Id.*
[21] *Id.*

(quoting *Hall,* 2001 UT 34, ¶ 15); *see also, Due South, Inc. v. Dep't of Alcoholic Beverage Control,* 2008 UT 71, ¶ 9, 150 P.3d 467 (tribunals "seek to render all parts [of the statute] relevant and meaningful, and [tribunals] accordingly avoid interpretations that will render portions of a statute superfluous or inoperative.")

Here, the plain meaning of section 54-15-104(4), particularly the term "or," simply provides the Commission with alternative choices. Providing for alternative actions does not create a conflict between statutory provisions. If this Commission transfers the funds to the WAP administrators pursuant to subsection 54-15-104(4)(b), it does not violate subsection 54-15-104(a) because the plain meaning of the term "or" in subsection 54-15-104(a) expressly grants the Commission the authority to make that decision. Thus, subsection 54-15-104(a) does not *conflict* with subsection 54-15-104(b) in a manner that would invoke the rule of construction relied upon by the Company. *See Carter,* 2006 UT 78, ¶ 9; *Pugh,* 2005 UT 12, ¶ 10; *Hall,* 2001 UT 34, ¶ 15.

Not only is the rule of construction relied upon by Rocky Mountain Power inapplicable, the Company's construction violates the rules requiring terms to be given their ordinary meaning and against interpretations that render portions of a statute superfluous or inoperative. *See Due South,* 2008 UT 71, ¶ 9; *Carter,* 2006 UT 78, ¶ 9; *Hall,* 2001 UT 34, ¶ 15. Under the Company's construction, subsection 54-15-104(4)(a) always governs over subsection 54-15-104(4)(b) impermissibly rending the ordinary language of subsection 54-15-104(b) meaningless. Indeed, the Company's approach would make it impossible for the legislature to provide the Commission with the discretion to take alternative actions or consider several factors when one action or factor is more general than another. This is an absurd result that would impact several of the statutes governing this Commission's powers and responsibilities. *See, e.g.,* Utah Code §§ 54-

17-302(3)(c)(i)-(vi); (5)(a)-(c); 54-17-402(3)(b)(i)-(ii), (7)(a)-(c) (listing actions that may be taken and factors for consideration some general and some specific).

In sum, the rule of construction relied upon by Rocky Mountain Power is inapplicable because section 54-15-104(4) does not present a case where statutory provisions conflict and the Company's interpretation renders terms of the statute superfluous. Rather than prohibiting the value of excess credits from being transferred to the WAP administrators, subsection 54-15-104(4)(b) expressly provides the Commission this authority as "another use" for the funds.

In a second statutory construction argument, Rocky Mountain Power seems to be asserting that because Utah Code § 54-7-13.6 makes a distinction between electrical corporations' low-income assistance programs and gas corporations' low-income assistance programs, section 54-15-104(4) must be read as only allowing excess credits to be used in an electrical corporation's low-income assistance programs.[22] However, as outlined above, subsection 54-15-104(4)(b) expressly allows for other uses for the funds for purposes alternative to and outside of the Company's low-income assistance programs. Accordingly, section 54-7-13.6 has no relevance to the interpretation of 54-15-104(4)(b).

Thus, Rocky Mountain Power's second statutory construction argument fares no better than its first. Clearly, the plain language of section 54-15-104(4) expressly authorizes the Commission to assign the value of the excess credits to the administrators of the WAP as "another use" of the funds as an alternative to the Company's low-income assistance programs.

In its third statutory construction argument, the Company asserts that the language of Section 54-15-104(4) is unambiguous and "clear that Expiring Excess Credits shall be used for the Company's low-income assistance programs."[23] Therefore, the rule that legislative history is

[22] *Id.*
[23] *Id.*

not to be considered when statutory language is clear and unambiguous prevents this Commission from considering the understanding of solar advocates in interpreting section 54-15-104(4). *Visitor Info. Cent. Auth. of Grand Cnty, v. Customer Serv. Div., Utah State Tax Comm'n,* 930 P.2d 1192, 1197 (Utah 1997).[24]

However, the Office never argued that the formal legislative history, such as legislative reports and floor debates, should be relied upon in interpreting the meaning of the language of the statute. Rather, the Office argued that this Commission's discretion in determining another use for the funds under subsection 54-15-104(4)(b) be informed by the desires of solar advocates and net metering customers, both at the time of the passage of the statute and now during the instant docket. This is appropriate because the issue is the disposition of the value of the credits resulting from excess generation of net metering customers. These advocates and customers have consistently supported the concept that the expired credits create additional value for low-income customers, rather than simply offsetting existing funding mechanisms.[25] In fact, this Commission has already done so. In *In the Matter of the Disposition of Remaining Unused Credits Associated with Excess Customer-Generated Electricity Provided Under Utah Code Ann. § 54-15-104(4)*, Docket 14-035-116, Order at 6 (Utah P.S.C., October 30, 2014), in

[24] It is of note that Rocky Mountain Power misapplied this rule because section 54-15-104(4) is sufficiently ambiguous to allow for consideration of legislative history. The Company's proposed construction, that the statute is "clear that Expiring Credits shall be used for the Company's low-income assistance program" is ambiguous because the Company impermissibly focuses on only a portion of the statute instead of reading the statute as a whole and harmonizing its provisions. *Oliver v. Utah Labor Comm'n,* 2017 UT 39, ¶ 21,424 P.3d 22. In fact, extremely broad language, such as "another use," can itself create an ambiguity. *State in the Interest of E.K.,* 913 P.2d 771, 773 (Utah Ct. App. 1997)(broad language created ambiguity resolved through legislative history). Moreover, subsection 54-15-104(4)(a)'s term "low income assistance program" must inform subsection 54-15-104(4)(b) or it will be impermissibly subsumed into the term "another use" and rendered meaningless. *Due South*, 2008 UT ¶ 9; *Carter,* 2006 UT 78, ¶ 9; *Hall*, 2001 UT 34, ¶ 15. However, it is not clear from the wording of the statute how this is accomplished.

[25] UCE's Initial August 1, 2018 Comments Docket 18-035-28 at pg. 4; USEA's August 16, 2018 Docket 18-035-28 Reply Comments at 2; UCE's Initial November 8, 2018 Comments Docket 18-035-39 at 1.

determining to allocate the funds to the Company's "low-income assistance programs under Schedule 91," this Commission ruled "[b]ased on UCE's request, we clarify that the Schedule 37 avoided costs value of expiring credits is to be additional (rather than offsetting) to revenue collected under Schedule 91." *Id.* at 6-7.

Although the Company argues that this language does not mean that the Commission intended that "additional revenues for the value of the Expiring Excess Credits must add incremental benefits for low income customers,"[26] the Office asserts that this is precisely what this language means. By stating that the value of the funds "be additional (rather than offsetting) to revenues collected under Schedule 91," the Commission clearly stated that the funds should add additional benefits to the recipients of the program and not simply lessen the burden of the Schedule 91 surcharge. This Order sets a precedent for the Commission's decision in this case and must not be disregarded absent new facts and reasoning. Utah Code § 63G-4-403(4)(h)(iii); *Ellis-Hall Consultants, LLC v. Pub. Serv. Comm'n*, 2016 UT 34, ¶ 31, 379 P.3d 1270. Moreover, because Rocky Mountain Power misunderstood the Order, they have not provided facts and reasoning to distinguish this Order from the issue presented in the instant case.

In sum, the Commission and all parties, including the Company in docket 18-035-28, have observed that solar advocates were supportive of the passage of 54-15-104(4) because it provided additional benefits to a low-income program.[27] Because the HELP program does not accomplish this goal, transferring the funds to the WAP as opposed to leaving them with the HELP program better aligns with the interest of the parties.

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[26] *Id.* at 6.

[27] Office's August 1, 2018 Initial Comments Docket 18-035-28 at pg. 5; Division's August 16, 2018 Reply Comments Docket 18-035-28 at pg. 1, 3-4; UCE's Initial August 1, 2018 Comments Docket 18-035-28 at pg. 4; USEA's August 16, 2018 Docket 18-035-28 Reply Comments at 2; Rocky Mountain Power's August 16, 2018 Reply Comments Docket 18-035-28 at pg. 5.

Also misplaced is Rocky Mountain Power's assertion that providing funds directly to the WAP Administrators would constitute impermissible cross-subsidization because funds from an electrical program would create some energy saving from gas heating.[28] However, cross-subsidization is a ratemaking concept regarding one group of customers paying rates that should be attributable to another group of customers. *See Re PacifiCorp,* Docket 99-035-10, 2000 WL 873337, at * 81 (Utah P.S.C. May 23, 2000). The issue here does not involve rates. It must be emphasized that these funds did not originate from rates that have been paid by any customers to Rocky Mountain Power. Rather, the issue here is how to deal with funds created by monetizing the value of energy generated by net-metering customers, but not credited to net-metering customers, used to assist customers not associated with the creation of the credits. Therefore, the issue here is more aligned with notions of charitable contributions than the allocation of rates.

Moreover, because most households use both electricity and gas there will usually be savings for both services associated with weatherization. In fact, even under the severe restriction of Schedule 118, the Company's Comments demonstrate that approved Schedule 118 weatherization services provide savings for both electrical and gas usage, including duct sealing in gas heated homes with electric cooling and providing efficient furnace electric fans for gas furnaces.[29] Therefore, both the Company's Schedule 118 weatherization program and transferring the funds to the WAP administrators result in savings from both electricity and gas usage.

Finally, it is also of note that providing funds to the WAP produces savings and conservation for many years while providing funds to help low-income customers pay utility

[28] Rocky Mountain Power's November 8, 2018 Initial Comments Docket 18-035-39 at pg. 4
[29] *Id.* at 3.

bills through the Lend-A-Hand program only produces benefits for a single payment and merely insures that the disputed funds will eventually find their way into the Company's coffers.

CONCLUSION

The value of the expiring Schedule 135 credits should be transferred to the administrators of the WAP. Rocky Mountain Power's statutory construction arguments to the contrary misstate the law. Moreover, consistent with the intentions of solar customers, this approach provides incremental benefits to low-income customers and promotes long-term conservation of energy.

Respectfully submitted, November 27, 2018.

/s/ Robert J. Moore
Robert J. Moore
Attorney for the Office of Consumer Services