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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Dominion Energy Utah for Approval of a Natural Gas Clean Air Project and Funding for the Intermountain Industrial Assessment Center	Docket No. 19-057-33 **OFFICE OF CONSUMER SERVICES' MOTION TO DISMISS APPLICATION OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT DENYING APPLICATION**

Pursuant to Utah Code Ann.[1] § 54-10a-301, Utah Admin. Code R746-1-101 through -801, Rule 12(b)(6) and Rule 56 of the Utah Rules of Civil Procedure, and the Scheduling Order, Notice of Technical Conference, and Notice of Hearing (the "Scheduling Order") issued on January 10, 2020 by the Public Service Commission of Utah ("PSC"), the Utah Office of Consumer Services ("OCS") hereby submits this Motion to Dismiss Application or, in the Alternative, Motion for Summary Judgment Denying Application (the "Motion") with respect to

[1] Unless otherwise noted, all section references will be to the Utah Code, and references to "Rules" will be to the Utah Rules of Civil Procedure.

the Application, dated December 31, 2019 (the "Application") filed by Questar Gas Company d/b/a Dominion Energy Utah ("DEU") in the above-captioned docket. In support of the Motion, OCS respectfully states as follows:

I. INTRODUCTION

OCS generally supports DEU and other utilities pursuing cost effective energy efficiency and conservation programs as a matter of policy. The potential air quality benefits associated with DEU's proposed "CHP Project"—providing a financial incentive for one of DEU's manufacturing customers to update its natural gas equipment to be more efficient, cogenerate heat and electricity, and treat the exhaust—are generally laudable and desirable. Similarly, OCS does not oppose the work of the University of Utah's Intermountain Industrial Assessment Center ("IIAC") in performing industrial audits to identify high-impact efficiency projects.

The issue, from OCS's perspective, is not these underlying policy objectives. Rather, the problem is that, on the face of the Application, DEU's requests for the PSC to authorize (i) the lesser of $13.5 million or a confidential percentage of the total project cost in the form of $4.5 million each year for two years for the CHP Project, with the remainder (if any) contributed in the third year and (ii) $800,000 each year for three years for the IIAC simply do not "fit" the statutes on which DEU relies. It is a "square peg, round hole" problem. This is particularly significant to OCS because the PSC's approval of the Application would result in rate increases for residential and small business customers.

The PSC should rule on the Motion on the face of the factual allegations contained in the Application based on the plain language of the applicable statutes—a method in keeping with traditional analysis under Rule 12(b)(6). Of course, Rule 12(b)(6) and related case law are only

persuasive authority. The PSC should adapt the core principles of Rule 12(b)(6) to accommodate the procedural context of a particular docket. In this case, that means treating the Application essentially as a "complaint" under Rule 12(b)(6). In the process, however, the PSC will need to "sift" through the Application to identify the well-pleaded factual allegations which the PSC is to assume to be true for purposes of the Motion. Every other statement in the Application is not entitled to such deference.

The first statute that the CHP Project does not fit is Section 54-4-13.1. The relevant portions of that statute are for "natural gas clean air programs" related to natural gas vehicles and the transportation sector—not standalone projects to replace industrial boilers.

The second statute that the CHP Project does not fit is Section 54-20-105(3)(a)—the portion of HB 107 that describes the "innovative technology programs" which count as "sustainable transportation and energy plans" that may be funded pursuant to Section 54-20-105(3)(d). As a standalone *project*, the CHP Project does not constitute a cohesive technology *program* and does not involve the "development of communities" as required for funding.

DEU's separate request for IIAC funding does not fare any better. On the face of the Application, "analyzing projects for advancement under HB 107"—DEU's primary proposed use of the IIAC funding—does not constitute a "***specific*** sustainable transportation and energy plan" as required under Section 54-20-105(3)(d). (Emphasis added). Even if it did, the IIAC's work would not involve the "research and development of other efficiency technologies," but rather conducting assessments to identify opportunities to deploy existing technologies.

Finally, the proposed IIAC funding does not constitute a "technology program." DEU has indicated that the IIAC funding will be used to provide evidence to establish the factors the

PSC is to consider in determining whether a proposed project is in the public interest. In so doing, DEU is requesting the PSC to approve a pass-through—to Utah's ratepayers—of administrative costs associated with *determining* whether HB 107 funds should be used.

For all these reasons, and as set forth in more detail below, OCS respectfully requests that the PSC GRANT the Motion.

II. PROCEDURAL BACKGROUND

1. On December 31, 2019, DEU filed its Application, together with pre-filed direct testimony of four witnesses in support of the Application.[2]

2. DEU requests PSC approval for (1) a "Natural Gas Clean Air Project" DEU refers to as the "CHP Project;"[3] and (2) funding to the IIAC to "analyze projects for advancement under HB 107."[4]

3. With respect to its first requested approval, DEU contends that the CHP Project "falls squarely within" the language in Section 54-4-13.1 as a "natural gas clean air program" within the meaning of that statute.[5] DEU separately contends that the CHP Project "also falls within the parameters of Section 54-20-101 *et seq*." (the "STEP Act"), specifically the provisions of Section 54-20-105(3)(a) describing programs for "the development of communities that can reduce greenhouse gases and NOx emissions" and "other technology programs."[6]

4. With respect to its second requested approval, DEU contends that its "request to provide funding to the IIAC is consistent with the statutory requirements," specifically the

[2] Application at ¶ 19 and p. 9.
[3] Unless otherwise defined, capitalized terms in this Motion shall have the same meaning as in DEU's Application.
[4] Application at p.1 and ¶¶ 5 and 14.
[5] Application at ¶ 8.
[6] Application at ¶ 9 (quoting Sections 54-20-105(3)(a)(iv) and (vii)).

reference to programs for "research and development of other efficiency technologies" and "other technology programs" in Section 54-20-105(3)(a).[7]

5. On January 10, 2020, the PSC issued its Scheduling Order. Among other things, the Scheduling Order provides that parties have until February 14, 2020 to file any dispositive motions.

6. OCS files this Motion with the PSC pursuant to this provision of the Scheduling Order. For the reasons set forth below, the PSC should dismiss the Application as a matter of law.

III. STANDARD OF REVIEW

1. PSC's Administrative Procedures Act Rule—Utah Admin. Code R746-1-105

The PSC has rightly observed that "[t]he PSC has no administrative rule governing the standard applicable to motions to dismiss or motions for summary judgment." *In the Matter of the Investigation of the Costs and Benefits of PacifiCorp's Net Metering Program*, Docket No. 14-035-114, Consolidated Order Denying Dispositive Motions (Utah P.S.C., Feb. 23, 2017), at p. 4 (quoting Utah Admin. R. Code 746-100-1(c), which was subsequently repealed as of March 6, 2017). This docket will be referred to as *In re Net Metering*, and this order will be referred to as the "Dispositive Motion Order." While Utah Admin. R. Code 746-100-1(c) has since been repealed, the basic principle remains substantially similar under the current rules, subject to certain express exceptions: "[t]he Utah Rules of Civil Procedure and case law interpreting these rules are persuasive authority in Commission adjudications unless otherwise provided by: (1)

[7] Application at ¶ 13 (quoting Sections 54-20-105(3)(a)(ii) and (vii)).

Title 63G, Chapter 4, Administrative Procedures Act; (2) Utah Administrative Code R746; or (3) an order of the Commission." Utah Admin. Code R746-1-105.

OCS has not identified an Order of the PSC articulating the standard of review for dispositive motions since the adoption of Utah Admin. Code R746-1-105. For purposes of developing the standard of review and the role of the Utah Rules of Civil Procedure and case law with respect to the Motion, each of these exceptions is addressed in turn below.

The OCS is not aware of any provisions of the Administrative Procedures Act or Utah Administrative Code R746 which would suggest that the PSC depart from applying the Utah Rules of Civil Procedure and related case law as persuasive authority. *See, e.g.*, Section 63G-4-102(4)(b) (enabling motions to dismiss and for summary judgment). Accordingly, the only remaining exception is Utah Admin. Code R746-1-105(3)—whether an "order of the Commission" modifies the principle that the PSC consult the Utah Rules of Civil Procedure and related case law in the context of dispositive motions.

In re Net Metering involved dispositive motions filed by eight parties—most styled as motions to dismiss, and one styled as a motion for partial summary judgment. Dispositive Motion Order at p. 4. The PSC briefly recited the basic standards under Rule 12(b)(6) and Rule 56, and ultimately *synthesized* the core aspects of dispositive motions for purposes of the motions before it: "[w]e conclude that we must evaluate the Motions to determine whether any demonstrates the movant is entitled to relief as a matter of law with all questions of fact being construed in [the non-moving party's] favor." *Id.* at p. 5.

This synthesis does not necessarily represent an "order of the Commission" not to consult the Utah Rules of Civil Procedure and related case law on dispositive motions under Utah

Admin. Code R746-1-105(3). *See id*. What the Dispositive Motion Order does represent, however, is an order of the PSC which is *informed* by the core principles underlying Rule 12(b)(6) and Rule 56 and recognizes, at the same time, that these rules should be applied in a manner which is *reasonably modified* to accommodate the particular procedural contexts the PSC encounters.

2. Applying Standard of Review to Application

In applying the standard of review, it is correct for the PSC to dismiss a docket-initiating filing when, "under the alleged facts … the pleadings present a scenario" which, as a matter of statutory interpretation, demonstrates that the filing falls outside the scope of a statute that is essential to granting the relief requested. *Bear Hollow Restoration, LLC v. Pub. Serv. Comm'n of Utah*, 2012 UT 18, ¶ 30, 274 P.3d 956.

Of course, in assuming alleged facts for purposes of a motion to dismiss for failure to state a claim, the moving party is not conceding to the truth of those facts on their merits. *See 1600 Barberry Lane 8 LLC v. Cottonwood Residential OP LP*, 2019 UT App 146, ¶ 9, 449 P.3d 949. Rather, in making such a motion, the moving party "admits the facts alleged" solely for the purpose of directing the adjudicator's inquiry to the "sufficiency of the pleadings, and not the underlying merits of the case." *Id*.

Under this standard, the adjudicator accepts "the description of facts alleged in the complaint to be true, but … need not accept extrinsic facts not pleaded nor … legal conclusions in contradiction of the pleaded facts." *Id*. The adjudicator need only consider well-pleaded facts—not conclusory assertions, statements of opinion, unwarranted deductions of fact, or

inferences which are unreasonable. *See id*.; *Osguthorpe v. Wolf Mountain Resorts, L.C.*, 2010 UT 29, ¶ 10, 232 P.3d 999; *see generally* 61A Am. Jur. 2d Pleading § 530.

In ruling on motions to dismiss, the PSC has typically cited to Rule 12(b)(6) of the Utah Rules of Civil Procedure but applied a spectrum of approaches based on the particular matter presented. On one end of the spectrum, some of the PSC's orders have more of the "look and feel" of a traditional ruling under Rule 12(b)(6) on the face of the docket-initiating pleading.[8] At the other end of the spectrum are PSC orders more akin to fact- and record-intensive summary judgment analysis under Rule 56.[9] In applying this spectrum of approaches to motions to dismiss, OCS believes the PSC is essentially "converting" a Rule 12(b)(6) motion to one for summary judgment when appropriate under the circumstances. *See id*.; Utah R. Civ. P. 12(b)(6). Such an approach is generally consistent with Utah case law, which reinforces the conclusion that it is the *adjudicator* which controls whether to convert a motion to dismiss to one for

[8] *See, e.g., In the Matter of the Formal Complaint of Rod Stephens Against Rocky Mountain Power*, Docket No. 14-035-52, Order Granting Motion to Dismiss, at p.3 (Utah P.S.C., June 30, 2014) (reasoning that "a plain reading of [an electric service regulation] justifie[d] dismissing … Complaint" based on language of regulation and admissions on the face of the complaint); *In the Matter of the Formal Complaint of Kelemon Panoussi Against Qwest Corp. d/b/a Centurylink*, Docket No. 12-049-24, Order of Dismissal at p. 4 (Utah P.S.C., Nov. 28, 2012) (dismissing formal complaint of consumer regarding number of days to remit payment based on a "plain reading" of Utah Administrative Code provision expressly stating that twenty day payment period begins "from bill date" rather than date of consumer's receipt).

[9] *See, e.g.*, Docket No. 14-035-52, Order (Nov. 4, 2014) at pp. 7-14. This subsequent procedural history of the *Stephens* docket exemplifies the PSC's fluid approach to the standard of review applicable to motions to dismiss. After the June 30, 2014, Order, the PSC granted the complainant's request for review and scheduled a hearing (in part, it appears, because the complaint could be reasonably construed to survive dismissal based on a distinction between excess "load" and excess "capacity"). Docket No. 14-035-52, Order (Nov. 4, 2014) at pp. 1 and 14. In its November 4, 2014 order, the PSC analyzed each of the elements of the claim, concluding that every element except for one was established as a matter of law based on undisputed facts in the record in a manner similar to a traditional analysis under Rule 56. *Id*. at pp. 7-14. The PSC ultimately granted the utility company's motion to dismiss after the complainant failed to file a survey to establish that a power pole was located on his property—a factual matter disputed by the utility based on evidence in the record. *Id*. at p. 15; Docket No. 14-035-52, Report and Order (Jan. 12, 2015) at p. 1. *See also In the Matter of the Formal Complaint of Mccleary Assocs., LLC Against Questar Gas Co.*, Docket No. 12-057-06, Order of Dismissal at p. 4 (Utah P.S.C., Aug. 30, 2012) for a similar example.

summary judgment by relying on documents outside the pleadings. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶¶ 12-15, 104 P.3d 1226.

Here, the PSC should treat the Application as analogous to a complaint to be reviewed under Rule 12(b)(6), rather than part of the record to be reviewed under Rule 56. In so doing, the PSC must distinguish between the Application's "well-pleaded facts" to be assumed as true for purposes of the Motion and those other matters in the Application—such as legal conclusions or conclusory assertions—to which the PSC should afford no deference. *See 1600 Barberry Lane 8 LLC*, 2019 UT App 146 at ¶ 9.[10]

The PSC should treat most of the statements in the "Background" section (Part I) of the Application as factual allegations which may be assumed as true for purposes of the Motion.[11] The PSC, however, should afford no deference to the statements in Paragraph 2 of the Application about HB 107.[12] *See* 61A Am. Jur. 2d Pleading § 530. Similarly, simply because Paragraph 5 states that "the IIAC has identified several projects [DEU] believes meet the requirements of HB 107," the PSC need not assume for purposes of the Motion that any of those projects actually satisfy those requirements.[13]

With respect to the testimony and accompanying exhibits, it is worth noting that "[t]he Company [has] incorporate[d] these attachments by reference" in the Application.[14] Thus, the PSC may, but need not, consider and rely upon such materials without needing to convert the

[10] Of course, OCS reserves all rights to dispute or otherwise contest the Application in all respects, including, without limitation, all factual allegations contained in the Application and whether the CHP Project and proposed IIAC funding are "in the public interest" as required under Section 54-20-105(3)(c), in the event of later proceedings on the Application following the PSC's ruling on the Motion.
[11] *See* Application at ¶¶ 1-7.
[12] *See* Application at ¶ 2.
[13] *See* Application at ¶ 5.
[14] Application at ¶ 19.

Motion to one for summary judgment under Rule 56.[15] *See Oakwood Vill. LLC*, 2004 UT 101, ¶¶ 12-15; Utah R. Civ. P. 12(b)(6). For purposes of the Motion, the PSC need only consider the factual allegations on the face of the Application. Nevertheless, at times this Motion cites to DEU's pre-filed testimony to demonstrate that the testimony does not *cure* the deficiencies on the face of the Application.

The PSC should not, however, afford DEU any deference with respect to many of the statements contained in the Application's "Request for Approval of the CHP Project" (Part II) or its "Request for Approval of Funding to the IIAC" (Part III) sections.[16] *See 1600 Barberry Lane 8 LLC*, 2019 UT App 146 at ¶ 9. For example, the PSC should not defer to DEU on its quotation of Section 54-4-13.1 in Paragraph 8 of the Application.[17] The PSC should similarly afford no deference to DEU's legal assertions in Parts II and III.[18]

IV. ARGUMENT

DEU contends that there are two independent grounds for the PSC to approve the CHP Project—that it is *both* (1) a "natural gas clean air program" under Section 54-4-13.1 *and* (2) a

[15] OCS's sole reason for styling the Motion in the alternative as one for summary judgment would be in the event the PSC were to consider matters "outside the pleading" as set forth in the Application. As noted above, OCS does not request that the PSC convert the Motion to one for summary judgment and believes the PSC may rule on the face of the Application. If, however, the PSC were to convert the Motion to one for summary judgment, consistent with Rule 12(b), OCS would request that "all parties … be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

[16] *See* Application at ¶¶ 8-16.

[17] *See* Application at ¶ 8 (beginning quote by stating "Utah Code Ann. § 54-4-13.1 provides," but failing to note that quoted section was from subsection (3) of that statute, and quoting definition of "natural gas clean air program" but failing to cite that defined term was from subsection (4) of that statute and omitting language which expressly states that the definition is "as pertaining to the transportation sector").

[18] *See, e.g.*, Application at ¶ 8 (asserting that CHP Project "falls squarely within" language of statute); ¶ 9 (stating CHP Project "falls within the parameters" of the statute); ¶ 13 (contending IIAC program is "consistent with … statutory requirements"); ¶ 14 (quoting statutory sections as applying to proposed IIAC funding); and ¶ 16.

"sustainable transportation and energy plan" within the meaning of the "innovative technology programs" described in Sections 54-20-105(3)(a)(i) through (vii).[19]

Separate from its requested approval of the CHP Project, DEU further requests the PSC to approve funding of the IIAC based on the contention that such funding would fall within the scope of Sections 54-20-105(3)(a)(ii) and (vii).[20]

Accordingly, for purposes of assessing the Application, the PSC is tasked with interpreting the relevant provisions of Section 54-4-13.1 and the STEP Act. When interpreting these statutes, the PSC's goal should be "to give effect to the words enacted into law by the legislature." *Utah Office of Consumer Servs. v. Pub. Serv. Comm'n of Utah*, 2019 UT 26, ¶ 30, 445 P.3d 464. In so doing, the PSC is to read the statutes "according to the plain meaning of their text," the nuances of which the Utah Supreme Court has explained as follows:

> [S]tatutory text may not be "plain" when read in isolation, but may become so in light of its linguistic, structural, and statutory context. Thus, when the words of a statute consist of "common, daily, nontechnical speech," they are construed in accordance with the ordinary meaning such words would have to a reasonable person familiar with the usage and context of the language in question.
>
> ….
>
> The fact that the statutory language may be susceptible of multiple meanings does not render it ambiguous; all but one of the meanings is ordinarily eliminated by context.

Olsen v. Eagle Mountain City, 2011 UT 10, ¶¶ 9, 12, 13, 248 P.3d 465 (internal citations and quotations omitted). Put another way, statutory text should not be read in isolation—the PSC

[19] Application at ¶¶ 8-9.
[20] Application at ¶¶ 13-14.

"must read it in context, taking into consideration surrounding terms and associated provisions." *Utah Office of Consumer Servs.*, 2019 UT 26 at ¶ 30.

For the reasons set forth below, OCS respectfully submits that a plain reading of the applicable statutes, when applied to the factual allegations in the Application, should lead the PSC to grant the Motion and dismiss the Application.

A. THE CHP PROJECT IS NOT A "NATURAL GAS CLEAN AIR PROGRAM" OR "SUSTAINABLE TRANSPORTATION AND ENERGY PLAN" FOR WHICH THE PSC MAY AUTHORIZE FUNDING UNDER SECTION 54-20-105(3)(d).

1. The PSC Should Read Section 54-4-13.1 in Context to Conclude that the CHP Project is Not a "Natural Gas Clean Air Program That Promote(s) Sustainability Through Increasing the Use of Natural Gas."

In its Application, DEU accurately quotes language from Section 54-4-13.1 regarding the PSC's authority to approve natural gas clean air programs.[21] What DEU does not do, however, is cite that the quoted language comes from Subsection (3) of that statute.[22] Similarly, in quoting certain language from the definition of "natural gas clean air program," DEU does not cite to Subsection (4) of 54-4-13.1.[23] Section 54-4-13.1 of the Utah Code provides, in relevant part, as follows:

> **54-4-13.1 Natural gas vehicle rate -- Natural gas clean air programs.**
> ….
> (3) The commission may authorize a gas corporation to establish natural gas clean air programs that promote sustainability through increasing the use of natural gas or renewable natural gas that the commission determines are in the public interest, subject to the funding limits set forth in Subsection 54-20-105(3)(d).
> (4) ***For purposes of this section, and as pertaining to the transportation sector***, "natural gas clean air program" means:

[21] *See* Application at ¶ 8.
[22] *See id*.
[23] *See id*.

(a) an incentive or program to support the use of natural gas, including renewable natural gas;

(b) a program to improve air quality through the use of natural gas or renewable natural gas; and

(c) does not include any program under Section 54-4-13.4.[24]

....

(8) A natural gas clean air program under Section 54-4-13.1 shall be considered distinct and independent of Section 54-4-13.4.

(Emphasis added).

To be sure, Subsection (3) does not contain any express limitations that a "natural gas clean air program" must relate to natural gas vehicles or the transportation sector. However, just because a subsection in a statute is not expressly limited to the topics of the other parts of the statute does not necessarily make that subsection open-ended—the subsection must be read in context. *See Utah Office of Consumer Servs.*, 2019 UT 26 at ¶¶ 29-31 (concluding that when subsection is read in context, "it becomes obvious it is meant to apply only to general rate cases"). Applying these principles to the present case, the PSC should read Section 54-4-13.1(3) in the context of the interrelated subsections of which it is a part. In so doing, OCS submits that this will lead the PSC to conclude that the CHP Project is not the kind of "natural gas clean air program" that Section 54-4-13.1 is designed to promote.

a. *The CHP Project Proposes to Replace a Boiler in a Manufacturing Facility—It Does Not Relate to Natural Gas Vehicles or the Transportation Sector*.

The interrelated subsections of Section 54-4-13.1, when read together, support the conclusion that a "natural gas clean air program" must relate to natural gas vehicles and the transportation sector. First, the title of Section 54-4-13.1 is "Natural gas vehicle rate -- Natural

[24] Section 54-4-13.4 permits a gas corporation to recover certain "expenditures for the construction, operation, and maintenance of natural gas fueling stations and appurtenant natural gas facilities." (Emphasis added).

gas clean air programs." (Emphasis added). Second, the language in Section 54-4-13.1(3) regarding "programs that promote sustainability through increasing the use of natural gas" suggests an intention by the Legislature to promote natural gas as an *alternative fuel* to improve air quality by *replacing* other conventional fuels responsible for vehicle emissions. (Emphasis added).[25] The reference in the definition of "natural gas clean air program" to "support[ing] the use of natural gas" and "improv[ing] air quality through the use of natural gas" lends further support to this "encouraging alternative fuel" interpretation. *See* Section 54-4-13.1(4)(a) and (4)(c) (Emphasis added). This conclusion is further reinforced by the express language in Section 54-4-13.1(3) that the meaning of "natural gas clean air program" is "as pertaining to the transportation sector." (Emphasis added).

In short, when Section 54-4-13.1(3) is "squared" with the other subsections in the statute—and the related statutes which form the overall statutory scheme—all roads point toward natural gas vehicles, the transportation sector, and the promotion of natural gas as an alternative fuel.

The CHP Project is very far afield from the "encouraging natural gas as alternative fuel" objectives built into the structure of Section 54-4-13.1. The Customer proposed to receive the CHP is not in the transportation sector—it is an industrial manufacturer.[26] The proposed CHP

[25] For general background which may inform how a "a reasonable person familiar with the usage and context of the language in question" would interpret this language, *see* the U.S. Department of Energy's Alternative Fuels Data Center, *available at* https://afdc.energy.gov/vehicles/natural_gas_emissions.html (accessed Jan. 24, 2020). *Olsen*, 2011 UT 10 at ¶ 9. Among other things, the Data Center notes that "[w]hen used as a vehicle fuel, natural gas can offer life cycle greenhouse gas (GHG) emissions benefits over conventional fuels, depending on vehicle type, duty cycle, and engine calibration. In addition, natural gas reduces some engine emissions…. Natural gas is increasingly used to replace gasoline in smaller applications, such as forklifts and commercial lawn equipment. Because natural gas is a low-carbon fuel, a switch to natural gas in these applications can result in reductions of hydrocarbon, CO2, NOx, and GHG emissions."

[26] Application at ¶ 5.

Project does not involve converting the Customer's vehicle fleet from conventional fuel to natural gas—it involves replacing existing industrial boilers which already use natural gas.[27] The CHP Project's method of producing air quality benefits is not to reduce emissions by directly substituting low-carbon natural gas for conventional fuels. Rather, the CHP Project's primary method of producing air quality benefits is to install updated equipment that uses natural gas *more efficiently*, with additional (though relatively minor) benefits flowing from reduced usage of the Customer's utility-supplied electricity through cogeneration and SCR equipment that treats exhaust from the boiler.[28]

For all these reasons, the PSC should read Section 54-4-13.1 in context to conclude that it is designed for natural gas vehicles and the transportation sector—not proposals like the CHP Project.

b. The CHP Project Does Not Involve "Promot[ing] Sustainability Through Increasing the Use of Natural Gas"—It Proposes to Mitigate the Impacts of a Manufacturing Customer's Existing Use of Natural Gas through Equipment Updates.

Under Section 54-4-13.1(3), the PSC may only authorize "a gas corporation to establish natural gas clean air programs ***that promote sustainability through increasing the use of***

[27] Application at ¶ 5.

[28] *See id*. For additional detail, the PSC may refer to DEU Exh. 1.0, Direct Testimony of Michael A. Orton, at p. 2, lns. 30-46, and p. 3, lns. 47-53. To be sure, and as Mr. Orton describes in his testimony, "additional air quality benefits would be achieved through the power generation by replacing a small percentage of Utah's coal-heavy electricity mix with 100% natural gas at the project site." *Id*. While this would involve a "small percentage" of substituting conventional fuel (coal) with natural gas, OCS submits that it is sufficiently attenuated to fall outside the well-defined alternative transportation fuel focus of Section 54-4-13.1. *See id*. Based on information presented during the February 5, 2020 technical conference which goes beyond the face of the Application and, therefore, is not relevant for purposes of this Motion, it may be that the CHP Project would result in the Customer using *more* natural gas than with its existing boilers, resulting in the use of *less* electricity from the electric grid. This point, however, does not impact the main point of the argument presented in this subpart, which is based on Mr. Orton's testimony that "the primary air quality gains would be achieved through the higher levels of efficiency of the new equipment. The CHP unit would replace several existing boilers and would operate at a higher level of efficiency." *See id*.

natural gas or renewable natural gas…." (Emphasis added). Thus, even if the CHP Project were a "natural gas clean air program" under Section 54-4-13.1(4) (which it is not), the PSC would also need to find that the CHP Project satisfies this additional requirement. Section 54-4-13.1(3). When interpreting this language, the PSC must presume that the Legislature "used each term advisedly" so as to "give effect to each term according to its ordinary and accepted meaning." *See Versluis v. Guar. Nat. Companies*, 842 P.2d 865, 867 (Utah 1992).

As described above, the structure and internal logic of Section 54-4-13.1 support a reading of the statute which provides a reasonable explanation as to why the Legislature did not just refer to "natural gas clean air programs" in Section 54-4-13.1(3). Instead, the Legislature decided to include the additional language about promoting sustainability *through increasing the use* of natural gas.

Here, the air quality benefits proposed to be gained through the CHP Project would not result from *increasing the use* of natural gas or renewable natural gas as required by Section 54-4-13.1(3). First, DEU notes in its Application that "the proposed CHP [P]roject does not contemplate the use of renewable natural gas."[29] Second, the CHP Project would not promote sustainability "by increasing the use of natural gas," as would be the case if, for example, the Customer were to replace its fleet with natural gas vehicles. *See* Section 54-4-13.1(3). Rather, the CHP Project would mitigate the impacts of an existing natural gas boiler by replacing several boilers with a *more efficient* CHP Unit and installing SCR equipment.[30]

For these reasons, the CHP Project falls outside the scope of Section 54-4-13.1(3).

[29] Application at ¶ 10.
[30] Application at ¶ 5. For additional detail, *see* Footnote 28 above.

c. *The CHP Project is a Standalone Project—It is Not a "Program*."

DEU contends that the CHP Project is both "an incentive or program to support the use of natural gas" under Section 54-4-13.1(4)(a) and "a program to improve air quality through the use of natural gas" under Section 54-4-13.1(4)(b).[31] As a standalone project, however, the CHP Project does not constitute a "program" for purposes of Section 54-4-13.1.

Though sometimes the concepts may be conflated, a reasonable person familiar with the usage and context of the language would recognize certain key differences between the interrelated concepts of "program" and "project." *See Olsen*, 2011 UT 10 at ¶ 9. Examples of the distinction and relation between these two concepts may be drawn from the Utah Code. For instance, Section 17-50-330(2) clarifies that a specific project is a singular part of a larger, multi-faceted program: "[a] county may not spend project-specific funds that are allocated through an authorization act for a transportation-related project that is eligible for funds apportioned to the state in support of the statewide transportation improvement program unless the specified project is included on the statewide transportation improvement program." Similarly, Sections 11-45-101 through -205 create a "loan program for energy efficiency projects." Section 11-45-101 (emphasis added). The following comparison chart[32] further illustrates the distinction:

[31] Application at ¶ 8.

[32] *See, e.g.*, Weaver, P. (2010). Understanding programs and projects—oh, there's a difference! Paper presented at PMI® Global Congress 2010—Asia Pacific, Melbourne, Victoria, Australia. Newtown Square, PA: Project Management Institute; *available at* https://www.pmi.org/learning/library/understanding-difference-programs-versus-projects-6896 (last accessed January 24, 2020); *see also* "Difference Between Project and Program," Key Differences, *available at* https://keydifferences.com/difference-between-project-and-program.html (last accessed January 24, 2020). The purpose of referring to these materials is not to depart from "common, daily, nontechnical speech," but rather to reinforce how a reasonable person familiar with context and usage would understand the concepts as already embodied in the Utah Code. *See Olsen*, 2011 UT 10 at ¶ 9; Section 17-50-330(2); Section 11-45-101.

Point of Comparison	Project	Program
Meaning	Temporary activity to bring about specific objective	A set of projects linked to one another in a sequential manner to attain combined benefits
Outlook	Short term	Long term
Units	Single	Multiple
Focus	Create specific deliverable (output)	Realize benefits from management of coordinated projects (outcome)

This relationship between "program" and "project" is reflected in the PSC's STEP Act docket for a different utility, albeit somewhat inconsistently. *See Rocky Mountain Power STEP Act Initiatives*, Docket No. 16-035-36 (Utah P.S.C.), which will be referred to as the *RMP STEP Docket*. In contrast to the Application, which requests "Approval of a Natural Gas Clean Air Project," Rocky Mountain Power initiated the *RMP STEP Docket* with an "Application to Implement Programs Authorized" by the STEP Act through which it proposed, among other things, (i) an Electric Vehicle Incentive Pilot Program, (ii) a Clean Coal Technology Program, (iii) two "Innovative Utility Program projects,"[33] (iv) a program to curtail emissions, and (v) a commercial line extension pilot program. *Id*. at p. 3 (Utah P.S.C., Sept. 12, 2016), referred to below as the "RMP Application." To be sure, while the *RMP STEP Docket* is not uniformly

[33] OCS notes the somewhat confusing use of the phrase "program projects." For the reasons explained in Part IV(A)(2)(a) below, it is notable that Section 54-20-105(1)(c)—one of the provisions on which Rocky Mountain Power relied—expressly authorizes "a battery storage or grid related project," which provides a meaningful distinction for treating such proposals differently under the STEP Act.

consistent,[34] the PSC's February 6, 2019 Order in that docket perfectly captures the program/project relationship in several places:

- describing "a $5 million [Clean Coal Technology Program, or "CCT," as] including a NOx neural network controls project and an advanced NOx control project;"
- referring to implementation of more specific programs "under the CCT;"
- summarizing request to "revise the funding levels of projects associated with the CCT;" and
- explaining request "to increase per project incentive level in" Commercial Line Extension Program.

RMP STEP Docket, Order, at pp. 1-2 (Utah P.S.C., Feb. 6, 2019) (emphasis added).

Here, the CHP Project is just that—a project. The CHP Project's focus is singular: "providing an incentive to one of [DEU]'s industrial customers … to replace its existing natural gas boiler…."[35] It does not have the programmatic qualities described above. What DEU may "expect to advance for [PSC] approval … in the future" is not what is before the PSC in the Application.[36] Through Part II of its Application, DEU has requested the PSC to approve the CHP Project as single, standalone project.

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[34] Admittedly, at times filings in the *RMP STEP Docket* appear to use the terms "program" and "project" somewhat interchangeably. *See, e.g.*, *RMP STEP Docket*, Application to Implement Programs Authorized by the Sustainable Transportation and Energy Act, at pp. 1-2 (describing "[t]he three programs the Company is seeking authorizing from the Commission to implement" as three individual projects). Of course, the *RMP STEP Docket* did not involve the interpretation of Section 54-4-13.1 or the provisions of the STEP Act on which DEU relies. Nevertheless, in interpreting the statutes at issue here, "the relevant question [is] which interpretation [of the statutes] best fits with the existing body of case law and is morally best, i.e., most consistent with the deep moral principles running through our legal system." Zygmunt Plater, *Classic Lessons from A Little Fish in A Pork Barrel-Featuring the Notorious Story of the Endangered Snail Darter and the Tva's Last Dam*, 32 Utah Envtl. L. Rev. 211, 244 n. 14 (2012) (citing Ronald Dworkin, Law's Empire, 20-30, 328-347 (1986). Completely reconciling the matter presently before the PSC with all past decisions would be an impossibly Herculean task. That is not what OCS is asking PSC to do—particularly when the program/project distinction was not previously the focus of arguments presented to the PSC. Rather, OCS submits that, in this case, the PSC should presume that the Legislature "used each term advisedly," and that there are reasonable grounds in the Utah Code, common parlance, and past decisions of the PSC to support interpreting the words "program" and "project" as having distinct but related meanings. Indeed, OCS believes that it is the interpretation that "best fits," even if the fit is not perfect. *See Versluis*, 842 P.2d at 867.

[35] *See* Application at ¶ 5.

[36] *See* Application at ¶ 10.

Similarly, "data that will be useful in pursuing other such projects" is not part of the CHP Project as proposed.[37] On the face of the Application, it may be assumed that "if the [PSC] approves the CHP [P]roject proposed here, then IIAC will … conduct[] any additional research necessary for the project," and that IIAC would use data from the CHP Project as it "evaluates other projects it independently identifies."[38] The Application, however, is not particularly clear as to whether the $4.5 million proposed annually for the CHP Project would cover any part of IIAC's work related to that project.[39] Fortunately, however, the pre-filed testimony of Michael A. Orton incorporated by reference in the Application makes clear that *all* of IIAC's work would be covered by DEU's separate request for approval of $800,000 annually.[40] In other words, none of IIAC's proposed work—including evaluation of CHP Project data, both for purposes of that project or for purposes of other projects—can reasonably be considered part of the CHP Project for which DEU has sought separate approval.

Accordingly, the CHP Project does not constitute "a program to improve air quality" within the scope of Section 54-4-13.1(4)(b). (Emphasis added). At most, the CHP Project may be characterized as an "incentive" under Section 54-4-13.1(4)(a) because it would involve DEU's offer to pay for a portion of the CHP Unit and related upgrade costs if the Customer incurs the expense to undertake the project.[41] Even if the CHP Project were characterized as an "incentive" under Section 54-4-13.1(4)(a), however, for the reasons noted above, the CHP

[37] *See* Application at ¶ 10 (referring to Direct Testimony of Michael A. Orton (DEU Exh. No. 1.0) and Kody M. Powell (DEU Exh. No. 2.0).
[38] *See* Application at ¶¶ 6-8 and 10.
[39] *See id*.
[40] Direct Testimony of Michael A. Orton (DEU Exh. No. 1.0), p. 10, lns. 208-229, p. 11., lns. 230-233.
[41] *See* Application at ¶ 11.

Project neither "pertain[s] to the transportation sector" nor "promotes sustainability through increasing the use of natural gas" as required by Sections 54-4-13.1(3) and (4).

2. The CHP Project is Not an "Innovative Technology Program" as Described in Sections 54-20-105(3)(a)(i) through (vii).

a. *As Noted Above, the CHP Project is a Project, Not a "Program*."

"Sustainable transportation and energy plan" in Section 54-20-102(3) is expressly defined to mean "programs approved by the [C]ommission," and each of the subsections of the definition refer to a specific "program" or set of "programs." (Emphasis added).[42] Specifically relevant to this Motion, Section 54-20-102(3)(d) provides that the definition of "sustainable transportation and energy plan" includes "the innovative technology programs" described in Section 54-20-105. (Emphasis added).

The relevant provision of Section 54-20-105, in turn, authorizes the PSC "to implement and fund programs" listed in seven different subsections. Section 54-20-105(3)(a) (emphasis added). Therefore, it is reasonable to read each subsection in the context of this reference. For example, although Section 54-20-105(3)(a)(i) does not expressly use the term "program," it is reasonable to read subsection (i) as describing a "program…to provide for the investigation, analysis, and implementation of…an economic development incentive rate." This same reasoning applies to subsections (ii), (iii), and (iv). To compare, subsections (vi) and (vii) each independently use the word "program" in their description (e.g., "any other technology

[42] OCS notes in passing that Section 54-20-102(3)(a) refers to "a natural gas vehicle rate or natural gas clean air program described in Section 54-4-13.1." Although it is not relevant to the Motion, it is not clear to OCS how a "natural gas vehicle rate" would fall within the scope of Section 54-20-105(3)(d) unless the natural gas vehicle rate independently satisfied either the definition of "sustainable transportation and energy plan as described in Subsections (3)(a)(i) through (vii)" (*e.g.*, as a type of "economic development incentive rate") or the definition of "natural gas clean air program as provided in Section 54-4-13.1").

program") which, although redundant, reinforces the emphasis on "programs" throughout the STEP Act.

The only outlier in Section 54-20-105(3)(a) is subsection (v), which refers to "a natural gas renewable energy project." (Emphasis added). At the outset, it is worth noting that DEU does *not* rely upon Section 54-20-105(3)(a)(v) in its Application, presumably because "the proposed CHP [P]roject does not contemplate the use of renewable natural gas."[43]

In any event, OCS does not believe that reading the words "program" and "project" synonymously would give best effect to the presumption the PSC is to make that the Legislature "used each term advisedly." *See Versluis*, 842 P.2d at 867. The conceptual distinction between "program" and "project" is reflected in the Utah Code and is consistent with how a reasonable person familiar with context and usage would understand these concepts already embodied in the Utah Code. *See Olsen*, 2011 UT 10 at ¶ 9; Section 17-50-330(2); Section 11-45-101. OCS submits that a better reading of Section 54-20-105(3)(a) is as follows: for a natural gas utility to propose a "sustainable energy and transportation plan as described in Subsections 3(a)(i) through (vii)," the utility *must* propose a program, subject to one exception. *See* Section 54-20-102 and Section 54-20-105. The exception is this—in the case of "a natural gas renewable energy project" described in Subsection (v), the Legislature has determined, for policy reasons, that this type of project is of sufficient importance that it may be approved on a standalone basis. *See* Section 54-20-105(3)(a)(v).[44]

[43] Application at ¶ 10.

[44] This interpretation provides an explanation for a number of "projects" previously approved in the *RMP STEP Docket* which were not "under" larger programs. For example, Rocky Mountain Power requested approval of "advanced substation metering" and "solar energy storage technology" pursuant to Section 54-20-105(1)(c), which expressly authorizes funding for "a battery storage or electric grid related project." RMP Application at pp. 20-26 (emphasis added).

Under this reading, of course, the PSC still would determine "whether a project is in the public interest" under Section 54-20-105(3)(c). It is just that, based on a contextualized reading of Section 54-20-105(3), such projects (except in the case of a "a natural gas renewable energy project") must be part of a larger program. This reading is reinforced by the plural reference to "funds allocated for projects that have been approved by the Commission" in Section 54-20-105(3)(e)(i) because, as described above, a program consists of a *set* of projects linked together by an overarching purpose. *See Olsen*, 2011 UT 10 at ¶ 9; Section 17-50-330(2); Section 11-45-101. Thus, pursuant to Section 54-20-105(4), the PSC is to review "funds allocated for projects" under Section 54-20-105(3)(e)(i) "to determine if the large scale natural gas utility made the expenditures prudently in accordance with the purposes of the program." (Emphasis added).

Here, as described in detail in Part (IV)(A)(1)(c) above, through its Application DEU has requested the PSC to approve the CHP Project as just that—a standalone project without programmatic qualities.[45] DEU has not, however, relied upon the "project exception" in Section 54-20-105(3)(a)(v) because the CHP Project, on the face of the Application, is not "a natural gas renewable energy project."[46] As a standalone project, CHP Project is neither a "program[] to provide for … the development of communities that can reduce greenhouse gases and NOx emissions" under Section 54-20-105(3)(a)(iv) nor a "technology program" within the meaning of Section 54-20-105(3)(a)(vii). (Emphasis added).

[45] *See* Application at ¶¶ 5 and 8-12.
[46] *See* Application at ¶ 10.

Accordingly, the PSC should conclude that the CHP Project does not constitute a "program" the PSC may authorize DEU to implement and fund pursuant to Section 54-20-105(3)(a).

b. *The Proposed CHP Project Does Not Involve "Investigation, Analysis, and Implementation"—It Would Only Involve Implementation of a Project.*

Under Section 54-20-105(3)(a), the PSC may only authorize programs that "provide for the investigation, analysis, and implementation of" the innovative technology programs described in subsections (i) through (vii). (Emphasis added). The use of the conjunctive word "and" instead of the disjunctive word "or" is significant—it means that a proposed program must include each element to be approved. *See Mike's Smoke, Cigar & Gifts v. St. George City*, 2017 UT App 20, ¶ 24 (explaining significance of change in statute from a "conjunctive definition" to a "disjunctive definition" to conclude statute was unambiguous and susceptible to only one plausible reading).

Here, the IIAC has *already* completed the "investigation" and "analysis" phases of the CHP Project using existing funding from DOE to conduct its assessment.[47] It may be for this reason that Company emphasizes that "[i]f the [PSC] approves the CHP [P]roject proposed here, then IIAC will work with the Customer to implement the project."[48] Indeed, this appears to be a central part of DEU's "pitch" to the PSC—that the DOE funds the IIAC's "energy assessments at manufacturing facilities," but the PSC needs to approve DEU's proposal to enable the IIAC "to become more actively engaged in the implementation of the projects" for which it conducts

[47] *See* Application at ¶ 5 (describing how CHP Project was "[t]he most beneficial project" of the "several projects" the IIAC previously identified to DEU and referring to Direct Testimony of Kody M. Powell (DEU Exh. 2.0) to present analysis of benefits for "implementation of this project").
[48] *See* Application at ¶ 6 (emphasis added).

assessments.[49] To be sure, on the face of the Application, DEU seeks to fund IIAC "to conduct substantially more assessments," but those assessments would be for *other* potential projects—not the CHP Project.[50] Subject to the "final numbers" that come with "a detailed project bid and analysis" referred to in Dr. Powell's pre-filed direct testimony, the primary investigation and analysis—to identify the CHP Project "as a high-impact energy efficiency project"—has been funded and completed already.[51]

In any event, as described in Part (IV)(A)(1)(c) above, on the face of the Application, none of IIAC's proposed work can reasonably be considered part of the CHP Project for which DEU has sought separate approval of $4.5 million annually pursuant to Part II of the Application.

[49] *See* Application at ¶ 7 (emphasis added). For additional detail, the PSC may refer to the Direct Testimony of Michael A. Orton (DEU Exh. No. 1.0), p. 6, lns. 131-134 (noting that "[t]he Company would … benefit from being able to use the 20 DOE-funded annual assessments currently being done by the IIAC as a source for future Natural Gas Air Quality projects"), and p. 10, lns. 219-225 (explaining that through proposed $800,000 funding, IIAC "would also be involved in the implementation of Commission-approved projects….")

[50] *See id*. For additional detail, the PSC may refer to the Direct Testimony of Michael A. Orton (DEU Exh. No. 1.0) at p. 6, lns. 135-138; p. 7, lns. 150-156, and p. 9, lns. 193-200.

[51] *See* Application at ¶¶ 3-6. For additional detail, the PSC may refer to (i) the Direct Testimony of Michael A. Orton (DEU Exh. No. 1.0) at p. 1, lns. 22-23 and p. 2, lns. 24-27; (ii) Direct Testimony of Kody M. Powell (DEU Exh. 2.0, at p. 4, lns. 60-74 (describing how CHP Project, as a "flagship project to commence the program," was "more carefully evaluate[d]") and p. 5, lns. 93-100 (in response to question about whether the IIAC may "provide the assessment of the customer facility," Dr. Powell indicates that "[t]he analysis that has been done is proprietary information and the result of work performed by the IIAC and a 3rd party vendor"). To be sure, Dr. Powell characterizes the CHP Project "one flagship project to commence the program," and also how a detailed "analysis" would need to be completed prior to funding of the CHP Project. OCS would note, however, that the Application is not structured to seek approval of a program "commence[d]" by the CHP Project. Moreover, in other portions of the Application, DEU characterizes the post-approval analysis as part of the CHP Project's "implementation." *See* Application at ¶ 6.

c. *The Installation of a CHP Unit at a Single Customer Does Not Involve the "Development of Communities" Within the Meaning of Section 54-20-105(3)(a)(iv).*

Other than the reference to the "development of communities that can reduce greenhouse gases and NOx emissions" in Section 54-20-105(3)(a)(iv), OCS has not identified any other instances in the Utah Code of the phrase "development of communities." (Emphasis added).

When this phrase is searched more broadly in other jurisdictions, a clear theme emerges—the phrase predominantly relates to comprehensive land use and planning where the smallest functional unit is a *group* of persons living in the same geographical area linked together by an element of cohesiveness, such as shared economic pursuits and common interests or needs. *See generally, e.g.*¸ *Weitz v. Davis*, 424 P.2d 168, 171 (Ariz. 1967) (describing purpose of zoning laws as "providing a more stable environment for the orderly development of communities") (emphasis added); *Scuri v. Bd. of Supervisors*, 134 Cal. App. 3d 400, 406, 185 Cal. Rptr. 18, 21 (Ct. App. 1982) (citing legislature's concern about "the orderly growth and development of communities" in context of city boundaries and community service priorities); (emphasis added); *Colorado State Bd. of Land Comm'rs v. Colorado Mined Land Reclamation* Bd., 809 P.2d 974, 987 (Colo. 1991) (emphasizing "the orderly growth and development of communities" in zoning context) (emphasis added); *Hydro Resources, Inc. v. U.S. E.P.A*, 608 F.3d 1131, 1167-1174 (10th Cir. 2010) (Ebel, C.J., dissenting) (summarizing use of the word "communities" throughout the law and concluding "[t]he word 'communities' in [the statute] requires consideration of the land in context," such that a parcel-by-parcel approach would "read the word 'communities' out of the statute").

In this case, the installation of a CHP Unit at a single Customer would not involve the "development of communities" within the meaning of Section 54-20-105(3)(a)(iv).[52] Admittedly, on the face of the Application, implementation of the CHP Project would reduce greenhouse gas and NOx emissions.[53] But the Application does not connect the CHP Project to the "development of communities" that can reduce such emissions. *See* Section 54-20-105(3)(a)(iv). The Application does not place the Customer in the context of the geographic community in which it is located.[54] The CHP Project also does not tie together or relate to the orderly growth of a cohesive group of persons organized together to pursue the health, safety, and welfare benefits associated with reduced greenhouse gas and NOx emissions. Rather, the CHP Project is a single, standalone project for one Customer—it is not a program for "the development of communities."

To be sure, the Application states that "the CHP [P]roject would have significant benefits for Dominion Energy customers in terms of cleaner air, more efficient use of energy, and data that will be useful in pursuing other such projects."[55] At most, however, this statement relates to a broader community *enjoying the benefits* of the CHP Project—not the development of communities. The Application contains no indication that the "other projects" which may benefit from CHP Project data are part of the same geographic community as the Customer.[56] Similarly, the Application makes no connection between DEU customers enjoying the benefits

[52] *See* Application at ¶ 5.
[53] *See id*.
[54] *See id*.
[55] *See* Application at ¶ 10.
[56] *See* Application at ¶ 10. In any event, as noted in Part (IV)(A)(1)(c) above, the use of CHP Project data for purposes of other projects does not constitute part of the CHP Project for which DEU has sought separate approval in Part II of the Application.

of the CHP Project and the development of the capacity for those customers to reduce greenhouse gas and NOx emissions.

In short, the PSC should not "read the word 'communities' out of the statute"—in this case Section 54-20-105(3)(a)(iv). *See Hydro Res., Inc.*, 608 F.3d at 1174. On the face of the Application, the proposed CHP Project does not involve the "development of communities" as required by Section 54-20-105(3)(a)(iv).

B. THE APPLICATION'S PROPOSED IIAC FUNDING IS NOT FOR A "SPECIFIC SUSTAINABLE TRANSPORTATION AND ENERGY PLAN" AS REQUIRED BY SECTION 54-20-105(3)(d).

1. "Analyzing Projects for Advancement Under HB 107" Does Not Constitute a "Specific Sustainable Transportation and Energy Plan."

Pursuant to the relevant portions of Section 54-20-105(3)(d), the PSC may authorize a large-scale natural gas utility to allocate funds only for a "***specific*** sustainable transportation and energy plan." (Emphasis added).

The use of the term "specific" throughout the Utah Code informs how a reasonable person would understand the term's statutory meaning. To be "specific," a plan must be well-defined in its scope. *See, e.g.*, Section 26-18-16(2)(b) (providing that department "may limit [Medicaid] plan amendment … to select geographic areas or specific Medicaid populations) (emphasis added). When project funding is involved, a specific plan should include "criteria for ranking and identifying projects to be funded." *See, e.g.*, Section 40-10-26 (requiring state reclamation plan to include "specific criteria for ranking and identifying projects to be funded"). Particularity—precise amounts, clear periods of time, and identifiable beneficiaries—are at the core of specific plans. *See, e.g.*, Section 53B-8a-106 (stating that "account agreement may

require an account owner to agree to invest a specific amount of money in the plan for a specific period of time for the benefit of a specific beneficiary") (emphasis added).

How courts have analyzed "specificity" and related "particularity" requirements in other contexts further informs how a reasonable person would evaluate whether a plan is "specific" as required by the Utah Code. For example, to satisfy the requirement of specificity in the pleading of statute of limitations defenses, civil pleadings must identify the statute relied upon "sufficiently clearly to identify it." *Barnard & Burk Grp., Inc. v. Labor Comm'n*, 2005 UT App 401, n. 3. Similarly, when Utah R. Civ. P. 9(c) requires certain causes of action, such as fraud or mistake, to be "stated with particularity," the claim must "specify the time, place, and content" supporting the claim. *State v. Apotex Corp*., 2012 UT 36, ¶ 26. In other words, an initiating pleading "cannot survive dismissal by pleading mere conclusory allegations—it must specify the "who, what, when, where, and how." *Id*. at ¶¶ 21 and 26.

Applying these principles to the present case, "analyzing projects for advancement under HB 107" does not constitute a "***specific*** sustainable transportation and energy plan" as required under Section 54-20-105(3)(d).[57] (Emphasis added). Other than a general reference to DEU's "service territory," the Application does not define the geographic area that would be covered by the proposed funding of the IIAC.[58] The Application also does not specify the *types* of projects which would be the focus of the IIAC's work. Rather, the Application refers to projects in general, non-specific terms:

[57] *See* Application at ¶ 14.
[58] *See* Application at ¶ 4. For additional detail, the PSC may refer to the Direct Testimony of Michael A. Orton (DEU Exh. No. 1.0) at p. 6, lns. 116-122.

- "The IIAC performs industrial audits and has a history of identifying high-impact efficiency projects …."[59]

- "The IIAC has identified several projects the Company believes meet the requirements of HB 107…."[60]

- "The IIAC has identified a number of projects that may be suitable for future applications."[61]

- [DEU] has already identified possible projects that would facilitate and expand the use of renewable natural gas. The IIAC's research and support will assist the Company in increasing the use of renewable natural gas…."[62]

These excerpts—the last bullet point in particular—are conclusory allegations, not a specific plan. Moreover, the Application does not specify criteria by which the IIAC would "evaluate other projects" as "suitable candidates for future applications."[63] In addition, the Application's reference to "possible projects that would expand the use of renewable natural gas"—a type of project entirely different from the CHP Project, which does not involve renewable natural gas—makes clear that DEU's request to fund the IIAC is not specific to any particular technology and is not limited to or focused on cogeneration.[64]

A review of the pre-filed testimony incorporated by reference in the Application reinforces the lack of specificity in DEU's proposal to fund the IIAC. For example, while Michael Orton notes that DEU "would seek to fund an additional 20 assessments annually," he

[59] Application at ¶ 3 (emphasis added).
[60] Application at ¶ 5 (emphasis added).
[61] Application at ¶ 7 (emphasis added).
[62] Application at ¶ 14 (emphasis added).
[63] *See* Application at ¶ 7.
[64] *See* Application at ¶ 14 (emphasis added).

goes on to state that "[t]hese additional assessments may be identified by the IIAC or could be found by [DEU] and referred to the IIAC for completion."[65]

There is not a specific relationship between these DEU-funded IIAC assessments that may be identified and the sorts of "financial incentives" like those presented in the DEU's Application for the CHP Project: "[w]hile many of the identified projects will be cost-effective on their own (*i.e.,* without financial incentives), the Company expects that its partnership with the IIAC will yield many new high-impact opportunities where Natural Gas Clean Air Quality incentive funds could be used to motivate companies to undertake more costly projects…."[66] In other words, the proposed funding of the IIAC's additional assessments is not tied to specific objectives regarding the type or number of projects for which financial incentives are to be approved by the PSC.[67]

In response to a question about what types of facilities would be targeted through DEU-funded IIAC assessments, Michael Orton's testimony is broad, open-ended, and not focused on specific sectors or technologies:

> Natural Gas Air Quality funds would be used to reach the majority of large-scale DEU customers and would include institutional facilities (schools, government buildings, etc.), commercial (office buildings, hotels, hospitals, etc.), and others. The Company currently has a list of potential projects it would like to have assessed by the IIAC. Those projects include a variety of technologies ranging from switching engines in heavy machinery (*e.g.* freight switcher locomotives, dump trucks, school buses) to compressed gas natural engines which produce 90% fewer NOx emissions than even the cleanest diesel engines. The Company also expects to engage the IIAC in the assessment of potential projects that could advance the development of renewable natural gas (RNG) in Utah.[68]

[65] Direct Testimony of Michael A. Orton (DEU Exh. No. 1.0) at p. 6, lns. 135-137 (emphasis added).
[66] *Id*. at p. 7, lns. 139-143 (emphasis added).
[67] *See* also Direct Testimony of Michael A. Orton (DEU Exh. No. 1.0) at p. 8, lns. 175-183 (explaining that a "high percentage" of efficiency improvements based on IIAC assessments would "continue to be completed without incentives," which will also "prove useful in identifying and advancing future … project filings and incentives").
[68] *See id*. at p. 7, lns. 147-156 (emphasis added).

Put another way, DEU has presented a general outline of potential projects which lack cohesion—not a specific plan. On the face of the Application, these possible projects may or may not be assessed by the IIAC and may or may not be targeted for PSC-approved financial incentives. As such, the proposed IIAC funding does not have the "who, what, when, where, and how" that specificity requires. *See Apotex Corp.,* 2012 UT 36 at ¶ 26. It is for this reason that DEU's Application does not provide the PSC sufficient information to evaluate the proposed IIAC funding under the "public interest" factors set forth in Section 54-20-105(3)(c) or—if the funding were to be provided—to determine if expenditures were made "in accordance with the purposes of the program" under Section 54-20-105(4).

Accordingly, through its separate request for IIAC funding, the DEU has not submitted a "***specific*** sustainable transportation and energy plan" required for PSC approval under Section 54-20-105(3)(d). (Emphasis added).

2. "Conducting Energy Assessments" at Commercial Facilities and "Becoming More Actively Involved in the Implementation of … Projects" to Improve Energy Efficiency at Such Facilities Does Not Involve "Research and Development of Other Efficiency Technologies."

Pursuant to Section 54-20-105(3)(a)(ii), the PSC may authorize "programs … to provide for the … research and development of other efficiency technologies." (Emphasis added).

The phrase "research and development" is defined elsewhere in the Utah Code. In the context of revenue and taxation, Section 59-5-101(20) defines "research and development," in relevant part, to mean "the process of inquiry or experimentation aimed at the discovery of … technologies … and the process of preparing those … technologies … for marketing." (Emphasis added).

Here, of course, Section 54-20-105(3)(a)(ii) does not authorize funding for research and development generally. Rather, Section 54-20-105(3)(a)(ii) specifically requires that the "R&D" be "of other efficiency technologies." (Emphasis added). In other words, it is not the case that Section 54-20-105(3)(a)(ii) authorizes funding for R&D merely "related to other efficiency technologies" in the sense that the R&D would *use* those technologies. Similarly, Section 54-20-105(3)(a)(ii) does not authorize R&D "of other efficiency projects" that would take efficiency technologies created through *other* R&D and *apply* the technology to a specific project.

On the face of the Application, the DEU's proposed IIAC funding is to conduct additional "energy assessments" at manufacturing facilities (and potentially other types of facilities) and implement projects identified through those assessments.[69] While this is valuable work, it does not constitute "research and development of other efficiency technologies" within the meaning of Section 54-20-105(3)(a)(ii). Section 54-20-105(3)(a)(ii) requires R&D to be for the purpose of *discovering* new and improved efficiency technologies through inquiry and experimentation. This is an altogether different task from identifying projects at which to *deploy* existing efficiency technologies, as DEU has proposed to do through Part III of its Application.

3. It Is A Stretch to Characterize DEU's Proposed IIAC Funding as a "Technology Program" *Per Se*—It is More Accurate to Describe the Proposed Funding as a Pass-Through of DEU's HB 107-Related Administrative Costs to Ratepayers.

To be sure, the reference in Section 54-20-105(3)(a)(vii) to "the investigation, analysis, and implementation of … any other technology program" is admittedly broad—a "catch-all" even. (Emphasis added). DEU will undoubtedly emphasize as much in its response to this

[69] *See* Application at ¶¶ 6-7.

Motion, as DEU has indicated in its Application that the proposed funding to IIAC "will be used to provide … a technology program."[70]

OCS questions, however, whether the PSC may accurately characterize the proposed IIAC funding as a "technology program" *per se*. In the sentences immediately following DEU's assertion that the proposed IIAC funding would be to provide a "technology program," DEU explains the specific proposed uses of the funds which DEU believes make it fall within this category.[71] According to DEU, the following specific proposed uses are what make the proposed IIAC funding a "technology program:"

> The IIAC funding will be used to analyze projects for advancement under HB 107…. In order to do so, the IIAC will provide evidence of the clean air benefits of any proposed project [and] evidence related to whether the private sector could advance the project.[72]

In other words, through Part III of its Application, DEU is requesting the PSC to allow DEU to include a portion of its HB-107 related *transaction costs* among the expenditures to be allocated pursuant to Section 54-20-105(3)(d). These are not costs to provide for a "technology program," but costs to provide for the *development* of a technology program—and the costs associated with obtaining PSC approval of as-of-yet unspecified projects.

This point is reinforced by the statement in the Application that the IIAC funding will be used to "provide evidence of the clean air benefits of any proposed project [and] evidence related to whether the private sector could advance the project."[73] The reason the IIAC would provide this evidence is that these are two of the factors the PSC is required to consider "in determining

[70] *See* Application at ¶ 14.
[71] *See* Application at ¶ 14.
[72] *See id*. (Emphasis added).
[73] *See id*. (Emphasis added).

whether a project is in the public interest" under Sections 54-20-105(3)(c)(ii) and (iii). (Emphasis added). Put another way, DEU is requesting the PSC to approve that HB 107 funds—funds to be collected from Utah's ratepayers—be used to pay for the administrative costs associated with determining whether HB 107 funds should be used.

Therefore, the PSC should conclude, on the face of the Application, that DEU's proposed IIAC funding as set forth in Part III of its Application does not provide for a "technology program" within the meaning of Section 54-20-105(3)(a)(vii).

V. CONCLUSION

For the foregoing reasons, OCS respectfully requests that the PSC GRANT the Motion and enter an Order:

A. dismissing the relief requested through Parts II and VI of the Application with prejudice on the grounds that (i) the CHP Project does not constitute a "natural gas clean air program that promote[s] sustainability through increasing the use of natural gas" under Section 54-4-13.1(3) and (ii) the CHP Project is not a "sustainable transportation and energy plan" for which the PSC may authorize funding under Section 54-20-105(3)(d);

B. dismissing Parts III and VI of the Application with prejudice on the ground that the proposed IIAC funding does not constitute a "specific sustainable transportation and energy plan" as required by Section 54-20-105(3)(d);

C. *solely to the extent* that the PSC elects to treat the Motion as one for summary judgment under Rule 56 (which, as noted above, OCS requests the PSC not to do), authorizing that OCS be given reasonable opportunity to present all material made pertinent to the Motion; and

D. providing for such other and further relief as the PSC deems just and equitable.

Dated this 14th day of February, 2020

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CERTIFICATE OF SERVICE

Docket No. 19-057-33

I CERTIFY that on February 14, 2020, a true and correct copy of the Office of Consumer Services' Motion to Dismiss Application or, in the Alternative, Motion for Summary Judgment Denying Application was served by electronic mail to the following:

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