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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 **OPPOSITION OF DOMINION ENERGY UTAH TO OFFICE OF CONSUMER SERVICES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY**

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Questar Gas Company d.b.a. Dominion Energy Utah ("Company" or "Dominion Energy") hereby submits its Opposition to the Office of Consumer Services' ("Office") Motion to Dismiss or, in the Alternative, Motion for Summary Judgment ("Motion"). As discussed below, the Motion is not well founded and should be denied.

INTRODUCTION

During the 2019 legislative session, the Utah legislature passed House Bill 107, the Sustainable Transportation and Energy Plan Act Amendments ("HB 107").[1] HB 107 expanded the Sustainable Transportation and Energy Plan Act (the "STEP Act") to encourage large-scale natural gas utilities to advance "natural gas clean air programs" and "innovative utility plans" to reduce particulate emissions and greenhouse gases, foster energy efficiency, and serve other purposes.[2]

As relevant to this docket, HB 107 amended Utah Code § 54-4-13.1 to add subsections (3) through (8), which define "natural gas clean air programs" and explain the requirements and how costs for the programs are to be handled. In addition, HB 107 amended Utah Code § 54-20-105 to include subsections (3), (4) and (6).[3] Those provisions authorize large-scale natural gas utilities, subject to Commission approval, to research, analyze and implement programs for, among other things, "the development of communities that can reduce greenhouse gases and NO_x emissions," "research and development of other efficiency technologies," and to further "any other technology program." To incentivize utilities to promote clean air and energy

[1] Application at 2, ¶ 2.
[2] *See* Sustainable Transportation and Energy Plan Act Amendments (2019 General Session), attached as Exhibit A to the Affidavit of Michael Order ("Orton Aff."); *see also* Utah Code §§ 54-4-13.1 and 54-20-105(3).
[3] *Id.*

efficiency plans, HB 107 provides that the Commission "may authorize [a] large-scale natural gas utility to allocate, on an annual basis, up to $10,000,000" towards those plans.[4]

In this docket, Dominion Energy has filed an application ("Application") and supporting testimony, seeking Commission approval of a program (the "IIAC Program") for the Company to partner with the Intermountain Industrial Assessment Center ("IIAC"), which is affiliated with the University of Utah Chemical Engineering Department, to pursue clean air and energy efficiency plans over a three-year period. The approval sought by the Company includes a request for Commission authorization to fund, in part, the first aspect of the IIAC Program: the installation of combined heat and power ("CHP") units at a large industrial manufacturing facility located within the Salt Lake nonattainment area (the "CHP Project"). The CHP Project would result in a substantial reduction in particulate emissions and greenhouse gases in that area.

In its Motion, the Office ***does not dispute*** that the IIAC Program or the CHP Project is in the public interest. They also profess that the benefits provided by the IIAC Program and the CHP Project of the Company's Application are "laudable and desirable."[5] Yet the Office nonetheless advances a host of arguments intent on challenging the Company's Application and preventing it from receiving a hearing. Each of Office's arguments is flawed.

The Office contends the Application should be dismissed because, "on the face" of the Application, Dominion Energy's requests do not "fit" within §§ 54-4-13.1 and 54-20-105(3).[6] But this argument relies on the wrong standard of review, is based on the a mischaracterization of the Application, and almost entirely ignores the Company's testimony, which was expressly incorporated into the Application and is, by rule, part of Dominion Energy's "complete filing."

[4] *Id.*
[5] *Id.*
[6] Motion at 2.

Further, many of the Office's arguments center on substantive disputes regarding the merits of the Company's positions, which is not a ground for dismissal. Such disputes should be reserved for the evidentiary hearing scheduled in this docket. In addition, the Office's arguments misconstrue the statutory framework and purposes of HB 107, and are premised on unjustified and incorrect statutory interpretations. If the Office's interpretations applied, almost no program or project could obtain approval under the applicable statutes. The Office's arguments also rely on factual misstatements and the Office's refusal to address the facts. The Commission should deny the Office's Motion and allow this proceeding to move forward to hearing.

FACTUAL BACKGROUND

A. Dominion Energy Identifies the IIAC as a Potential Partner to Develop a Program to Promote Cleaner Air and Energy Efficiency Through the Use of Natural Gas.

1. Following the passage of HB 107 in early 2019, Dominion Energy began meeting with stakeholders to discuss developing plans for using natural gas to reduce particulate emissions and greenhouse gases, and improve air quality and energy efficiency.[7] One of the early stakeholders identified was the IIAC.[8] The IIAC is affiliated with the University of Utah, currently receives funding from the United States Department of Energy ("DOE") to perform industrial assessments for companies in Dominion Energy's service territory, and has a history of identifying high-impact energy efficiency plans that, if undertaken, can reduce particulate

[7] Application at 2-3, ¶ 3.
[8] *Id.*

emissions and greenhouse gases, improve energy efficiency, and result in other benefits.[9] The University of Utah is the only assessment center that receives DOE funding in Utah.[10]

2. The DOE funding allows the IIAC to promote clean energy usage by funding investigations and analysis of technology options that can increase energy efficiency. [11] If a facility pursues the IIAC's recommendations, the IIAC then assists, where needed, in implementing the plan. However, the IIAC's DOE funding only extends to industrial assessments, and does not fund assessments in other market areas, nor does it allow the IIAC to investigate, research or pursue renewable natural gas ("RNG") ventures.[12] It also does not allow the IIAC to provide services beyond the industrial assessment work, such as, for example, in-depth air quality analyses or ongoing monitoring, research into emerging technologies, etc.[13]

B. Dominion Develops a Plan to Partner with the IIAC to Further the Aims of HB 107.

3. Based on discussions with the IIAC, Dominion, in consultation with the IIAC, developed a plan to partner with the IIAC to establish a program the parties would submit to the Commission for approval under §§ 54-4-13.1 and 54-20-105.[14] Under the program, and subject to Commission approval, Dominion would provide a set amount of Commission-approved funding to the IIAC over a three-year period.[15] The funding would allow the IIAC to broaden its work and, in return, the IIAC would provide services that would aid in the investigation, analysis and implementation of clean air or energy plans under §§ 54-4-13.1 and 54-20-105.[16] The program would be beneficial in two primary ways. "First, the Company would be able to

[9] *Id.* at 3, ¶¶ 3-4.
[10] Direct Testimony of Mike Orton at 6:130-31.
[11] Application at 3, ¶¶ 3-4.
[12] *Id.* at 4, ¶ 7; Direct Testimony of Kody Powell at 7:134-42; Orton Direct at 7:146-50.
[13] *Id.*
[14] Orton Direct at 5:108-6:156; 8:175-83.
[15] *Id.* at 5:113-6:116.
[16] *Id.*

leverage existing, effective infrastructure and local technical expertise through the IIAC" and "use the 20 DOE-funded annual assessments currently being done by the IIAC as a source for future Natural Gas Air Quality projects" at no cost to the Company or its customers.[17]

4. Second, Dominion would seek, through the program, to fund an additional 20 assessments each year through the IIAC.[18] These expanded assessments, combined with existing IIAC assessments, would then be used by the Company to identify and fund natural renewable and efficiency technology improvements that would improve air quality, but which might otherwise not satisfy internal investment guidelines.[19] In addition to conducting assessments, the partnership would provide funding for research, analysis and implementation of RNG projects.[20] As Mr. Orton explained in his direct testimony:

> [F]inancial incentives for future Natural Gas Air Quality projects involving RNG could prove to be a major market catalyst. Most landfill and waste-water treatment facilities have a focus on simply processing waste. In many cases, those facilities are required to flare or burn waste methane gas. The IIAC has investigated a handful of potential RNG projects and have found them to have longer payback periods of 10+ years. However, new programs offering renewable energy credits, coupled with a financial incentive, could change the landscape for these projects dramatically.[21]

This program, as is proposed by the Company in this docket, would also expand the services the IIAC could provide, as well as the types of facilities it could assess.[22] This expansion "would allow the IIAC to provide no-cost energy assessments to waste facilities, such as landfills, [and]

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[17] *Id.* at 6:117-20, 131-34.
[18] *Id.* at 6:135-36.
[19] *Id.* at 6:136-7:144.
[20] *Id.* at 7:157-8:165.
[21] *Id.*
[22] *Id.* at 8:167-70; Powell Direct at 7:137-42 ("The expanded program will do much more than energy assessments, including: identify and facilitate specific installation projects, conduct research on each project, develop markets in Utah for the expansion of these technologies, develop vendor relationships and streamlined processes for technology deployment, publish case studies with the details of each project, analyze the long-term impact of all projects on Utah's air quality, etc.").

food waste collection and processing facilities."[23] It would also allow the IIAC to participate in more research and promotion of existing and new technologies, including for RNG.[24]

5. Under the IIAC Program, Dominion proposes to provide $800,000 in annual funding to the IIAC over a three-year period (2020, 2021, and 2022), for a total investment of $2.4 million.[25] With that funding, and in addition to providing increased assessments, the IIAC would research and analyze potential projects in terms of their economic and environmental benefits, and, if the Company determined an identified project was worthy of implementation, the Company would bring that project to the Commission for consideration and approval.[26] The IIAC's work would also include, among other things, providing detailed research and cost-benefit analyses, assisting the Company in identifying projects to be presented to the Commission, developing streamlined processes for analyzing projects, studying and documenting technology and potential advances for RNG, coordinating competitive bidding processes, implementing Commission-approved projects, monitoring the performance of installed equipment, and providing ongoing research and documentation of approved projects.[27] As Dr. Powell explained in his testimony:

> The University of Utah will promote the opportunity for Dominion customers to receive a no-cost energy assessment from the IIAC. On each assessment, the IIAC will identify energy, emissions, and cost-saving measures for companies. The IIAC will report back these recommendations to each company. High impact projects that may require a subsidy will be considered for an incentive. For each of these projects, the University of Utah will consult with Dominion Energy and will seek STEP funds to incentivize these projects. Approved projects will be overseen by the University of Utah. This includes soliciting competitive bids from

[23] Orton Direct at 8:170-72.
[24] *Id.* at 9:204-06 ("The IIAC would also document each case study to promote the technology and potential for RNG."); Powell Direct at 8:152 ("The University of Utah will remain involved in each project for its duration and will quantify the long-term air quality benefits, publish case studies, work to streamline processes for new applications, and help develop the technology market so that new applications will not require the same level of incentive.").
[25] Orton Direct at 9:194-96; *see also* Application at 4, ¶ 7.
[26] Orton Direct at 9:196-98.
[27] *Id.* at 9:199-206, 10:219-25, 226:29; Powell Direct at 7:133-42.

> vendors, verifying technological claims by each vendor, project management, and ongoing research for each project. The University of Utah will remain involved in each project for its duration and will quantify the long-term air quality benefits, publish case studies, work to streamline processes for new applications, and help develop the technology market so that new applications will not require the same level of incentive.[28]

C. The CHP Project

6. As part of the proposed IIAC Program, the IIAC has discussed a number of initiatives or plans with the Company where natural gas could be used to provide clean air benefits and innovative utility plans in line with the goals of HB 107.[29] One obviously beneficial idea the IIAC has already identified through discussions with one of the Company's current industrial customers (the "Customer") and its selected vendor is the CHP Project. It involves incentivizing the Customer to replace existing natural gas boilers with two CHP units, which would increase the Customer's usage of natural gas and render the Customer's facility far more energy efficient.[30] It also would substantially reduce the facility's emission of particulates and greenhouse gases within the Salt Lake nonattainment area.[31] The CHP Project would use the heat generated from the combustion of natural gas to power the Customer's manufacturing process and, electricity generated by the CHP unit, would be used to reduce the overall energy usage at the facility.[32] Further, the plan would incorporate the installation of scrubbing equipment to further reduce emissions that contribute to air quality problems.[33] In all, implementation at the Customer's facility would remove a significant amount of NOx and CO2 annually.[34] Due to the cost of pursuing this plan, the fact that the Customer's current equipment

[28] Powell Direct at 7:144-8:156.
[29] Application at 3, ¶ 5.
[30] *Id.*; Powell Direct at 5:93-100; Orton Direct at 2:30-3:69; Direct Testimony of Kerry Kelly at 4:75-86.
[31] *Id.*
[32] Application at 3, ¶ 5.
[33] *Id.*
[34] *Id.*

has not reached the end of its useful life, and that the current equipment meets State emissions standards, the Customer will not implement the plan without further incentives.[35] However, because implementation would provide significant air quality benefits, Dominion Energy and the IIAC believe the benefits of the project are worth pursuing.[36]

7. As part of its initial research and assessment of the CHP Project, the IIAC has had discussions with the Customer and has reviewed the selected CHP vendor's project plan, estimated project costs, and emissions reduction calculations. The IIAC considered each other option that could be replace the existing boilers before arriving at its conclusion that the CHP Project appears to be the best and lowest cost approach to reducing energy consumption and emissions at the facility.[37]

8. In this docket, the Company proposes to use HB 107 funding to incentivize the Customer to pursue the CHP Project by providing a set portion of the CHP Project cost.[38] Dominion Energy would do this by contributing a defined portion of the total project cost set forth in the Application.[39] The Company has proposed to pay the incentive in increments of $4.5 million each year for 2020 and 2021, with any additional amounts, if any, being contributed in 2022.[40]

D. The Company's Filing in This Docket, and the Office's Motion.

9. On December 31, 2019, Dominion Energy filed the Application and the direct testimony of four witnesses: Michael Orton, the Manager of Energy Efficiency for Dominion Energy;[41] Dr. Kody Powell, an Assistant Professor in the Department of Chemical Engineering

[35] *Id.*
[36] *Id.* at 6, ¶ 10.
[37] Powell Direct at 6:102-18.
[38] Application at 6, ¶ 11.
[39] *Id.*
[40] *Id.* at 6-7, ¶ 11.
[41] Orton Direct at 1:6-7.

at the University of Utah and director of the IIAC;[42] Dr. Kerry Kelly, an Assistant Professor in the Department of Chemical Engineering at the University of Utah;[43] and Kelly Mendenhall, the Director of Regulatory and Pricing for Dominion Energy.[44] The Application expressly incorporates this testimony: "The Company incorporates these attachments by reference."[45]

10. Through Dominion Energy's filing, and pursuant to §§ 54-4-13.1 and 54-20-105, the Company seeks Commission approval of the IIAC Program and the CHP Project.[46] Specifically, Dominion contends the IIAC Program and the CHP Project meet the requirements of both §§ 54-4-13.1 and 54-20-105 and should be approved under those provisions.[47]

11. On February 14, 2020, the Office filed its Motion. In it, the Office argues that the Company's Application should be dismissed or, in the alternative, that the Commission should enter summary judgment denying the Company's Application.[48] The essence of the Office's Motion is its claim that, on the face of the Application, neither the IIAC Program nor the CHP Project meets the requirements established by HB 107. As discussed in detail below, the Office's arguments apply an incorrect standard of review, rely on impossibly narrow, incorrect, and unreasonable interpretations of relevant statutes, and are not based on the facts.

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[42] Powell Direct at 1:6-8.
[43] Kelly Direct at 1:6-7.
[44] Direct Testimony of Kelly Mendenhall at 1:6-7.
[45] Application at 8, ¶ 19.
[46] *Id.* at 1, 3-8.
[47] *Id.* at 1 ("Pursuant to Utah Code Ann. §§ 54-4-13.1 and 54-20-105 . . ., Questar Gas Company dba Dominion Energy Utah . . . respectfully submits this Application to the Public service Commission (Commission) and requests approval (1) for the Natural Gas Clean Air Project described more fully below; (2) for funding to the Intermountain Industrial Assessment Center (IIAC) as more fully described below; and (3) the implementation of a balancing account as described more fully in the pre-filed Direct Testimony of Kelly B Mendenhall, DEU Exhibit 4.0."); *id.* at 8-9 ("WHEREFORE, based upon the Company's Application, testimony and exhibits, and pursuant to Utah Code Ann. §§ 54-4-13.1 and 54-20-101, *et seq.*, Dominion Energy respectfully requests that the Commission, in accordance with its authority, rules and procedure: . . . 2) Enter and Order pursuant to Utah Code Ann. §§ 54-4-13.1 and 54-20-101, *et seq.*, (a) authorizing Dominion Energy to advance the CHP Project described herein; (b) authorizing Dominion Energy to fund the IIAC, as more fully described herein . . . ."); Orton Direct at 8:179-83 ("By simply providing funding [to the IIAC], the Company will be aiding in both advancing improvements in air quality and acquiring valuable research and development that will provide useful in identifying and advancing future Natural Gas Air Quality project filings and incentives authorized by Utah Code Ann. §§ 54-4-13.1 and 54-20-105.").
[48] Motion at 1.

STANDARD OF REVIEW

As a general matter, Utah's Administrative Procedures Act ("APA") and the Commission's Administrative Procedures Act Rules ("PSC Rules") govern applications, petitions, and complaints filed with the Commission.[49] The PSC Rules provide that "[t]he Utah Rules of Civil Procedure and case law interpreting these rules are persuasive authority in Commission adjudications unless otherwise provided by [the APA, the PSC Rules], or an order of the Commission."[50]

While "[t]he PSC has no administrative rule governing the standard applicable to motions to dismiss or motions for summary judgment," and the APA does not set forth a standard, the Commission has established the standard by order: "We conclude that we must evaluate [dispositive motions] to determine whether . . . the movant is entitled to relief as a matter of law with all questions of fact being construed in [the non-movant]'s favor."[51] In determining the existence of issues of fact—and thus whether the movant is entitled to relief on a dispositive motion—the Commission appropriately considers any information accompanying the non-movant's filing.[52] At that stage the Commission ***does not*** assess the adequacy of the filing or whether it substantively satisfies an order, statute or rule. In the *Net Metering Decision*, and in response to arguments that PacifiCorp's filing did not comply with a 2015 Order, the Commission held:

> We are not prejudging the adequacy of [the non-movant]'s Request *and its supporting materials*. . . . Whether [the movant's] criticisms and others have merit and whether, if so, they are fatal to [the non-movant]'s Request are fact-intensive matters *to be determined at hearing*. The tools of discovery, adversarial

[49] Utah Code § 63G-4-101, *et seq.*; Utah Admin. Code § R746-1-101, *et seq*.
[50] Utah Admin. Code § R746-1-105.
[51] Consolidated Order Denying Dispositive Motions, *In the Matter of the Investigation of the Costs and Benefits of PacifiCorp's Net Metering Program*, Docket No. 14-035-114, at 4-5 (Utah PUC Feb. 23, 2017) ("*Net Metering Decision*").
[52] *Id.* at 11-12.

> testimony, and a thorough and developed record will assist with that determination. If parties perceive deficiencies in [the non-movant's] filing, they should use these tools, to the extent possible, to remedy them. At this juncture, however, we cannot hold without evidence and as a matter of law that [the non-movant's] Request contains substantive deficiencies that warrant summary disposition.[53]

The Office misapplies these straightforward rules. First, it asserts—without support—that the Commission 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."[54] But no provision of the PSC Rules or the APA requires the Commission to rigidly limit its review to the "face of the application" as the Office argues. Indeed, the PSC Rules include supporting testimony as part of the "complete filing" and does not limit review to just an application or petition.[55] The *Net Metering Decision* reaffirmed this point. It examined the entire record and concluded that a summary disposition prior to hearing was inappropriate.[56] The Office provides no reason why the Application in this docket should be treated differently.

Second, the Office's fixation on Rule 12(b)(6) is in stark contrast to positions the Office has previously taken. In response to a motion to dismiss filed against it under Rule 12(b)(6) in another docket, the Office argued that "applying Rule 12(b)(6) is neither workable nor appropriate" in administrative proceedings.[57] The Office further argued that motions to dismiss are contrary "to 'the rule that motions to dismiss are not ripe in an administrative adjudication presenting disputes of regulatory interpretation.'"[58] The Office also argued that requiring rigid adherence to statements in an application is not consistent with administrative procedures:

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[53] *Id.* (emphasis added).
[54] Motion at 9.
[55] PSC Rule R746-1-203.
[56] *Net Metering Decision* at 12.
[57] Order Denying Motion to Dismiss, *In the Matter of the Application of the Utah Office of Consumer Services for a Deferred Accounting Order* at 2-3, Docket No. 11-035-47 (Utah PSC June 2, 2011).
[58] *Id.*

> Administrative proceedings are usually conducted with greater flexibility and informality than judicial proceedings, even when applying the Utah Rules of Civil Procedure. "Rigid adherence to judicial procedures in administrative proceedings is generally inappropriate because it ignores basic differences between judicial and administrative procedures." *Pilcher v. State, Dept. of Soc. Services*, 663 P.2d 450, 453 (Utah 1983). "Generally, administrative pleadings are to be liberally construed and easily amended." *Id.*[59]

The Office cites to two decisions it argues confirm the Commission can and should limit its review to the face of the allegations.[60] But both decisions are inapposite. The *Stephens* matter was not decided on the face of the allegations as the Office argues. Rather, the Commission granted a request for review and ordered a hearing during which it considered both testimony and other evidence submitted by both parties before issuing a decision.[61] The second action cited was dismissed for lack of subject matter jurisdiction and failure to state a claim because (i) one of the underlying complaints concerned an issue outside of the Commission's jurisdiction; and (ii) the other complaint presented a purely legal question.[62] Both dockets concerned regulatory "complaints," not applications, neither docket turned on the factual allegations, and both were reviewed prior to Utah Admin. Code R746-100-1(c)'s repeal.[63]

The Office's 12(b)(6) analysis is also internally inconsistent. It urges the Commission to "only consider the factual allegations on the face of the Application[,]" while in the next sentence acknowledging its own reliance on Company testimony.[64] To state that position is to

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[59] Utah Office of Consumer Service's Response to Motion to Dismiss Application for Deferred Accounting Order for 2009-2011 Bonus Depreciation, *In the Matter of the Application of the Utah Office of Consumer Services for a Deferred Accounting Order*, at 3, Docket No. 11-035-47 (May 6, 2011).
[60] Motion at 8, n.8.
[61] Order, *In the Matter of the Formal Complaint of Rod Stephens Against Rocky Mountain Power*, Docket No. 14-035-52, at 1-2, 3-14 (noting that both parties submitted testimony and presented exhibits at hearing, and reviewing that evidence in light of existing regulations) (Utah PSC Nov. 4, 2014); Jan. 12, 2015 Report and Order, *In the Matter of the Formal Complaint of Rod Stephens Against Rocky Mountain Power*, Docket No. 14-035-52, at 1-2 (Utah PSC Jan. 12, 2015).
[62] Order of Dismissal, *In the Matter of the Formal Complaint of Kelemon Panoussi Against Qwest Corporation*, Docket No. 12-049-25,
[63] Motion at 5.
[64] *Id.* at 10 ("For purposes of the Motion, the PSC need only consider the factual allegations on the fact of the Application. Nevertheless, at times this Motion cites to DEU's pre-filed testimony . . . .").

defeat it. The Office repeatedly cites to the Company's testimony when it thinks that testimony helps it, but claims the Commission should ignore other testimony, *i.e.,* the testimony that hurts the Office's cause.[65] If one were following the Rules of Civil Procedure, this alone would convert the motion to a motion for summary judgment.[66]

Third, the Office's discussion on the need to distinguish between "'well-pleaded facts' to be assumed as true" and "those other matters in the Application" is misplaced.[67] The Company's Application is not a "complaint" under the PSC Rules, and, as discussed, Rule 12(b)(6) conventions regarding "well-pleaded" allegations are inapplicable.[68] The Office's assertion that the Commission should not "afford [Dominion Energy] any deference with respect to many of the statements" in the Application is also incorrect. Under the *Net Metering Decision*, the Commission construed "all questions of fact . . . in [the non-movant]'s favor."[69] Thus, on the Office's Motion, Dominion Energy gets deference, not the Office.

Finally, while the Office alternatively proposes that the Commission consider its Motion as a motion for summary judgment under Utah R. Civ. P. 56, the Office provides no evidence to contradict Dominion Energy's filing (despite having had the opportunity to do so) and made no effort to identify the undisputed material facts supporting its Motion as required if Rule 56 applied.[70] Further, the Office ignores factual statements in the Company's testimony that

[65] *Id.* at 15, 20, 24-25, 29, and 31.
[66] Utah R. Civ. P. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.).
[67] *Id.* at 9.
[68] The PSC Rules allow for the filing of a "complaint," which, under the APA or the PSC Rules, is separate from an application like the one at issue here. *See* PSC Rule R746-1-201.
[69] *Net Metering Decision* at 5.
[70] *See* Utah R. Civ. P. 54(a), (c)(1).

undermine the Motion and quibbles with factual statements, demonstrating that what the Office is really doing is raising a substantive dispute, which is not proper for a dispositive motion.

Applying the proper standard of review, the Office's Motion should be denied.

ARGUMENT

I. THE OFFICE'S ARGUMENTS CONSTITUTE SUBSTANTIVE DISPUTES NOT APPROPRIATE FOR A MOTION TO DISMISS AND RELY ON AN INCORRECT STANDARD OF REVIEW.

While the Office's arguments suffer from a number of deficiencies discussed below, all of its arguments share several common and fatal flaws. First, all of the Office's arguments are substantive arguments regarding the merits of the Company's filing, which is not an appropriate subject for a motion to dismiss. The Motion attempts to restrict the Commission's review to just the "face of the Application" and asserts that the bare allegations of the Application fail to satisfy the substantive requirements of §§ 54-4-13.1 and 54-20-105(3).[71] But the question of whether a plan or incentive satisfies the STEP Act's requirements cannot be determined at the motion to dismiss stage. It is a mixed question of fact and law, and requires the Commission to make evidentiary findings, and then apply those findings to the statutory requirements.[72]

Second and relatedly, the Motion routinely breaks down to disputed facts. The following examples are representative. The Office quibbles, for example, with whether the CHP Project will increase natural gas usage, despite acknowledging that the Company's testimony and technical conference presentation discuss that it will increase gas usage.[73] The Office also attempts to argue that the CHP Project will not involve additional research and investigation by

[71] Motion at 2, 7, 9-10.
[72] Whether a party has complied with a statute is a mixed question of fact and law. *See, e.g.*, *Town of Leeds v. Prisbrey*, 2008 UT 11, ¶ 5, 179 P.3d 757, 759 ("[W]hether the facts of a case satisfy the requirements of the Dedication Statute is a mixed question of fact and law."); *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, ¶ 29, 164 P.3d 384, 392 ("[M]ixed questions generally arise when the applicability of the legal rule turns on the combination of present facts.").
[73] Motion at 15-16.

the IIAC even though the Application and testimony state otherwise.[74] In addition, even though the Company's testimony and Application describe the CHP Project as part of the IIAC Program, the Office attempts to dispute this and characterize them as separate and distinct plans.[75] The Office also claims that the funding under the IIAC Program "will not be tied to specific objectives . . . for which financial incentives are to be approved by the PSC."[76] But Dominion Energy disagrees with this assertion, and has presented testimony that contradicts this claim.[77]

Third, the Office's arguments are all premised upon the wrong standard of review. The Office urges the Commission to strictly limit its review to the face of the Application, without reviewing the supporting testimony and without conducting a hearing on the evidence.[78] But, as discussed above, this is improper, and the Company's testimony was expressly incorporated by reference in the Application.[79]

Because each of the Office's arguments fall prey to one or more of these problems, they fail. On this basis alone the Motion can and should be denied.

II. THE IIAC PROGRAM IS A "NATURAL GAS CLEAN AIR PROGRAM" UNDER § 54-4-13.1.

The Company's Application and supporting testimony seek approval of the IIAC Program under both §§ 54-4-13.1 and 54-20-105.[80] Despite this, and the fact that § 54-20-105 references "natural gas clean air programs" under § 54-4-13.1 as approved to receive funding under § 54-20-105(3)(d), the Office's Motion does not discuss, let alone challenge, the IIAC

[74] *Id.* at 24-25; Background Facts ("Facts") ¶¶ 4-5; Orton Direct at 7:157-8:165, 9:196-206, 10:226-29; Powell Direct at 3:55-4:60, 4:67-74, 7:133-42, 8:151-56 *see also* discussion *infra* §§ III.B and IV.B.2.
[75] *See* Application at 3-4; Orton Direct at 1:15-20, 4:85-12:262; Motion at 17-20.
[76] Motion at 31.
[77] *See generally* Orton Direct and Powell Direct.
[78] Motion at 2, 7, 9-10.
[79] Application at 8, ¶ 19.
[80] *See* Application at 1, 8-9.

Program under § 54-4-13.1. And for good reason. The IIAC Program easily qualifies as a "natural gas clear air program."

HB 107 added subsections (3) through (8) to § 54-4-13.1. Subsection 3 provides that

> [t]he 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).

Subsection 4 defines (in a very general way) a "natural gas clean air program":

> For purposes of this section, and as pertaining to the transportation sector, "natural gas clean air program" means:
> (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.

Synthesized, these provisions direct that a gas utility may (i) engage in an "initiative" or "program" that promotes sustainability through the use of natural gas or RNG and improves air quality, (ii) if the Commission determines it is in the public interest, and (iii) so long as the incentive or program does not fall under § 54-4-13.4. The IIAC Program satisfies these criteria.

As explained above, in the Application, the Company's testimony, and the technical conference materials and data responses provided by the Company, the IIAC Program seeks to fund assessments, research, and analyses to identify areas of the market where the use of RNG or natural gas could be implemented to reduce particulate emissions and greenhouse gases, and increase energy efficiency.[81] Under the program, when meaningful opportunities are identified, Dominion Energy and the IIAC would bring those ideas to the Commission for approval and then monitor their performance after implementation. In compliance with § 54-4-13.1(5),

[81] Application at 2-8; Orton Direct 5:108-13:294; Powell Direct at 6:119-8:156.

Dominion Energy reviewed the IIAC Program with both the Utah Division of Public Utilities and the Office.[82]

While the Office attempts to restrict the applicability of § 54-4-13.1 to transportation-related programs, the language of the statute is not so limited, as discussed in more detail below. But regardless, the plans the Company proposes under the IIAC Program include initiatives that would use natural gas and RNG for transportation projects, including to reduce vehicle emissions.[83] As just one example, in the Company's testimony and the materials presented during the technical conference, Dominion Energy described that STEP funds would be used to reduce greenhouse gas and particulate emissions by (a) studying the impacts and cost-effectiveness of converting diesel-powered fleets to natural gas, including school buses, waste disposal vehicles, snow plows, mining vehicles, short-haul and long-haul semitrucks, and other vehicles, and (b) where conversion to natural gas is feasible, using funds to incentivize the transition to natural gas-powered engines.[84]

The IIAC Program is precisely the kind of program the legislature intended to incentivize through HB 107. The Office does not contend otherwise, and the IIAC Program is a natural gas clean air program under § 54-4-13.1. For that reason, the Motion should be denied.

III. THE IIAC PROGRAM IS A SUSTAINABLE TRANSPORTATION AND ENERGY PLAN UNDER § 54-20-105(3).

The Office appears to concede that the IIAC Program is a "program" or "plan" for purposes of § 54-20-105(3). But it contends that the IIAC Program does not satisfy three aspects of the statute. First, relying on an incorrect interpretation, the Office maintains that the program

[82] *Id*.
[83] Orton Direct at 12:251-62.
[84] *See* Orton Direct at 7:151-54; Orton Aff., Ex. B. (Technical Conference PowerPoint Presentation at slides 5, 21, 33).

is not sufficiently specific to qualify as a "specific sustainable transportation and energy plan" under § 54-20-105(3)(d).[85] Second, the Office claims that the IIAC will only be involved in "conducting energy assessments" or the implementation of natural gas-related projects, and argues that such activities do not fall within "research and development of other efficiency technologies" under § 54-20-105(3)(a)(ii).[86] And, finally, the Office contends that "it is a stretch to characterize" the IIAC Program as a "technology program" under § 54-20-105(3)(a)(vii).[87] Each of these arguments fails.

A. The IIAC Program Is a "Specific" Plan Under § 54-20-105(3).

Largely ignoring the Application and the Company's testimony, the Office argues the IIAC Program—which the Office mischaracterizes as merely "analyzing projects for advancement under HB 107"—does not constitute a "*specific* sustainable transportation and energy plan" under § 54-20-105(3) (emphasis added).[88] According to the Office, for a plan to be "specific," it must incorporate concepts from Utah's Medical Assistance Act, Utah's mining reclamation requirements, and the Utah Educational Savings Act,[89] and also satisfy the particularity requirements of Utah R. Civ. P. 9(c).[90] The Office's arguments seek to impose requirements not contained in the statute and rely on irrelevant provisions and rules.

First, while § 54-20-105(3) uses the term "specific" in one limited context, it does not impose any specificity requirement and does not even define the term "specific." Rather, the section delegates to the Commission the determination of whether a plan qualifies as a "specific

[85] Motion at 28-32.
[86] *Id.* at 32-33.
[87] *Id.* at 33-35.
[88] *Id.* at 28-29.
[89] *Id.* at 28.
[90] *Id.* at 29.

sustainable transportation energy plan."[91] Subsection 105(3)(c) provides the factors the Commission is to consider in making that determination:

> In determining whether a project is in the public interest, the commission shall consider the following factors:
>
> (i) to what extent the use of renewable natural gas is facilitated or expanded by the proposed project;
> (ii) potential air quality improvements associated with the proposed project;
> (iii) whether the proposed project could be provided by the private sector or would be viable without the proposed incentives;
> (iv) whether any proposed incentives were offered to all similarly situated potential partners and recipients; and
> (v) potential benefits to ratepayers.[92]

Beyond the Commission's assessment under this provision, the statute does not require an further information for a plan to be a "specific sustainable transportation and energy plan." Thus, the Office's interpretation would require the Commission to read into the statute requirements beyond those imposed by the legislature, which is improper.[93]

Second, the statutes and Utah R. Civ. P. 9 on which the Office relies to impute requirements into § 54-20-105(3) have nothing to do with § 54-20-105(3). For example, the provision of Utah's Medical Assistance Act cited relates to amendments to Utah's Medicare plan and has nothing whatsoever to do with the STEP Act or the definition of the term "specific."[94] The Office also cites to a Utah mining reclamation statute and a provision of the Utah Education

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[91] *See* Utah Code § 54-20-105(3)(a) ("The commission may authorize a large-scale utility to implement and fund programs ***that the commission determines are in the public interest*** of large-scale natural gas utility customers . . . ." (emphasis added)); *id.* § 54-20-105(3)(c) ("In determining whether a project is in the public interest, ***the commission shall consider the following factors*** . . . ." (emphasis added)).

[92] Utah Code § 54-20-105(3)(c).

[93] *Belnorth Petroleum Corp. v. State Tax Comm'n of Utah*, 845 P.2d 266, 271 (Utah Ct. App. 1993) ("If the [Tax] Commission wishes to determine "value at the well" in a manner other than that selected by the legislature, it must seek a statutory amendment from the legislature. It may not simply 'rewrite' the statute by interpreting it to read as it feels it should have been written."); *see also Ferro v. Utah Dep't of Commerce, Div. of Occupational & Prof'l Licensing*, 828 P.2d 507, 514 (Utah Ct. App. 1992) ("The Division may not simply impose additional requirements for psychologist licensure that are not contained within the plain meaning of the statutory language.") (citation omitted).

[94] *See* Motion at 28 (citing to Utah Code § 26-18-16(2)).

Savings Plan Act ("UEPA").[95] Those provisions address, respectively, requirements for mining reclamation projects and account agreements under the UEPA.[96] They have nothing to do with the STEP Act or the definition of the term "specific."

The Office's reliance on Utah R. Civ. P. 9 is even more perplexing. Rule 9 is a pleading rule that governs how fraud claims and certain defenses must be pled in state court complaints.[97] It has nothing to do with the term "specific" or the STEP Act, and does not even apply in Commission proceedings. Both Title 63G and R746 of the Utah Administrative Code have their own pleading standards, and they do not include a particularity requirement akin to Rule 9.[98] In short, all of the sources relied on by the Office in its argument are inapposite.

Third, if the legislature had intended the term "specific" to require something beyond a consideration of the factors in § 54-20-105(3)(c)—and there is no indication that it intended as much—it provided no definition for the term "specific." As such, under the rules of statutory construction, that term is to be given its ordinary meaning.[99] The ordinary meaning of "specific" includes a broad range of concepts such as: "having a special application, bearing, or reference,"[100] "constituting or falling into a specifiable category," "sharing or being those properties of something that allow it to be referred to a particular category," "something peculiarly adapted to a purpose or use," or "relating or applying specifically to or intended specifically for."[101] The IIAC Program would satisfy any of these definitions.

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[95] *See* Motion at 28-89 (citing to Utah Code §§ 40-10-26 and 53B-8a-106).
[96] Utah Code §§ 40-10-26 and 53B-8a-106.
[97] Utah R. Civ. P. 9.
[98] *See* Utah Admin. Code § R746-1-203(3) (providing rules for initial pleadings); Utah Code Ann. § 63G-4-201(3)(a) (same).
[99] *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 18, 267 P.3d 863, 868 ("When interpreting statutory language, we generally seek to read each term according to its ordinary and accepted meaning.") (citations omitted).
[100] *Specific, Dictionary.com*, https://www.dictionary.com/browse/specific?s=t (last visited 2/27/20).
[101] *Specific, Merriam-Webster Online*, https://www.merriam-webster.com/dictionary/specific?src=search-dict-hed (last visited 2/27/20).

Contrary to the Office's suggestion, the IIAC Program consists of more than just "analyzing projects for advancement under HB 107." As discussed above, through the Application, supporting testimony, and technical conference materials, the Company has explained the extensive range of activities that would be pursued under the IIAC Program and how the program would operate, including the goals of the program, the industries that would be targeted, what initiatives have already been identified for research, analysis, and implementation, the duties the IIAC and the Company would perform at each phase of the program, how the IIAC would be funded and in what amounts, and how approved projects would be monitored.

Given the detail provided by Dominion Energy, it appears that what the Office is really attempting to do is make it virtually impossible for the Company to obtain approval of any plan. Under the Office's interpretation, Dominion Energy would have to know every detail concerning any project that could be pursued under a plan—and even then could only propose "cohesive projects"[102]—without being able to conduct the research and analysis the statute specifically contemplates would be part of the process. The STEP Act does not require this. Rather, § 54-20-105(3)(a) contemplates programs that would start from scratch with "investigation" and "analysis" of the activities set forth in § 54-20-105(3). In other words, the statute encourages, rather than prohibits, programs that seek, as the IIAC Program does, to conduct "assessments" or research to identify projects for Commission review. The Office's interpretation to the contrary is not supported and should be disregarded.

B. The IIAC Program Incorporates "Research and Development of Other Efficiency Technologies."

The Office incorrectly contends that "conducting energy assessments" at commercial facilities and "becoming involved in the implementation of . . . projects" involving energy

[102] Motion at 32.

efficiency does not constitute "research and development of other efficiency technologies" under § 54-20-105(3)(a)(ii).[103] Setting aside the fact that the IIAC Program qualifies under several categories in § 54-20-105(3)(a), this argument suffers from the same flaws as the Office's specificity argument. It seeks to impose requirements beyond the statute and it mischaracterizes the IIAC Program.

Section 54-20-105(3)(a) states that the Commission "may authorize a large-scale natural gas utility to implement and fund programs . . . to provide for the investigation, analysis, and implementation" of various activities and purposes, including "(ii) research and development of other efficiency technologies."[104] The statute does not define the phrase "research and development of other efficiency technologies." Consequently, under the rules of statutory construction, this provision should be interpreted according to its ordinary meaning.[105]

"Research" is defined as the "systematic inquiry or investigation into a subject in order to discover facts, theories, applications, etc."[106] or a "careful or diligent search . . . studious inquiry or examination . . . [or] the collecting of information about a particular subject."[107] And the term "development" is expansive and includes proliferation, expansion, advancement, progression and improvement.[108] When these definitions are used in connection with the term "efficiency technologies," the meaning is clear: under the statute, a plan may investigate and discover facts

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[103] *Id.* at 32-33.
[104] Utah Code § 54-20-105(3)(a)(ii).
[105] *Marion Energy*, 2011 UT 50, at ¶ 18, 267 P.3d at 868.
[106] *See Research*, *Dicitionary.com*, https://www.dictionary.com/browse/research?s=t (last visited 2/28/20).
[107] *See Research*, *Merriam-Webster Online*, https://www.merriam-webster.com/dictionary/research?src=search-dict-hed (last visited 2/28/20).
[108] *See Development*, *Dicitionary.com*, https://www.dictionary.com/browse/development?s=t (last visited 2/28/20), defining "development" as "the act or process of developing; growth; progress" and identifying synonyms to include evolution, expansion, advancement, improvement, enlargement, etc.; *Development*, *Merriam-Webster-Online*, https://www.merriam-webster.com/dictionary/development?src=search-dict-hed (last visited 2/28/20), defining "development" as "the act, process, or result of developing," and identifying the following synonyms: "elaboration, evolution, expansion, growth, progress, progression."

or theories to facilitate the application, advancement, improvement or proliferation of efficiency technologies. The IIAC Program would do this. It seeks to conduct assessments to discover facts and information that would allow the Company and the IIAC to identify natural gas efficiency technologies (and applications for those technologies, whether existing or new), that could be implemented to reduce particulate and greenhouse emissions and improve efficiency.

The Office maintains that, because the legislature has not defined the phrase "research and development of other efficiency technologies," the Commission should use definition of "research and development" from Utah's Revenue and Taxation Code:

> "Research and development" means the process of inquiry or experimentation aimed at the discovery of facts, devices, technologies, or applications and the process of preparing those devices, technologies, or applications for marketing.[109]

But § 59-5-101 states that its definitions are for use "in this part," or Part 1, which is limited to the oil and gas severance tax. In any event, this definition does not help the Office. If "research and development" in § 54-20-105(3)(a)(ii) means "inquiry" into or "experimentation aimed at the discovery of facts, devices . . . or applications" of efficiency technologies, that is the same meaning discussed above. And, contrary to the Office's argument, nothing in § 54-20-105(3)—or § 59-5-101 for that matter—limits research and development to "*discovering* new technologies."[110]

In addition, the IIAC Program consists of more than conducting commercial energy assessments or implementing projects. It also includes research into technologies and new applications for existing technologies. It includes conducting research into the best technologies to achieve improved outcomes. And it certainly includes the study of technology and potential advances for RNG. All of these aims are included in what the Company has provided through

[109] Utah Code § 59-5-101(20).
[110] Motion at 33.

the Application, supporting testimony, and technical conference materials.[111] Thus, the IIAC Program includes the "research and development of other efficiency technologies" under § 54-20-105(3)(a)(ii), and the Office's argument to the contrary fails.

C. The IIAC Program Satisfies § 54-20-105(3)(a)(vii).

Contradicting its "research and development" argument addressed above, the Office argues that the IIAC Program does not seek to fund the "investigation, analysis and implementation" of "***any other technology program***" under § 54-20-105(3)(a)(vii), but rather seeks to fund "the *development* of a technology program."[112] In other words, the Office claims it would be proper under § 54-20-105(3)(a)(vii) to use STEP resources to fund a technology program, but not to fund the administrative costs of a program that identifies projects to implement natural gas technologies under § 54-20-105(3)(c).[113] The Office's attempt to differentiate these positions is a distinction without a difference and should be disregarded.

The Office readily acknowledges that "the reference in Section 54-20-105(3)(a)(vii) to . . . 'any other technology program' is admittedly broad—a 'catch all' even," yet argues that the phrase is too narrow to include the IIAC Program. This makes no sense. Section 54-20-105(3)(a)(vii) is obviously intended to encompass "any . . . technology program." Its breadth includes a technology program, like the IIAC Program, that seeks to conduct assessments to determine where natural gas technologies can best be employed to promote cleaner air and energy efficiency, and then to monitor the use of those technologies after implementation. There is nothing in § 54-20-105(3)(a)(vii) that provides otherwise. Moreover, the Office's implication that STEP funds should not be used to pay the costs to develop a technology program directly

[111] Application at 3-8; Background Facts ("Facts") ¶¶ 4-5; Orton Direct at 7:157-8:165, 9:196-206, 10:226-29; Powell Direct at 3:55-4:60, 4:67-74, 7:133-42, 8:151-56; Orton Aff., Ex. B.
[112] Motion at 34-35.
[113] *Id.* at 35.

contradicts the purposes of the STEP Act: to incentivize utilities to identify instances where natural gas can be employed to reduce particulate emissions and greenhouse gases, and then pursue those opportunities. Under the Office's interpretation, the Company would have to independently fund all efforts to identify natural gas projects before it could apply for approval to use STEP funds for those projects. That is not what the STEP Act provides, nor would that approach incentivize utilities to pursue "innovative utility programs" under § 54-20-105(3).

The Office's IIAC Program arguments are not supported by the language of the relevant statutes, are inconsistent with the rules of statutory construction, and are based on the Office's mischaracterizations of the IIAC Program. The Company respectfully submits that the IIAC Program qualifies for approval under both §§ 54-4-13.1 and 54-20-105.

IV. THE CHP PROJECT SHOULD BE APPROVED UNDER §§ 54-4-13.1 AND 54-20-105.

A. The CHP Project Constitutes a "Natural Gas Clean Air Program" Under § 54-4-13.1.

The Office argues that the Commission cannot approve the CHP Project under § 54-4-13.1 because the project: (i) does not "relate to natural gas vehicles and the transportation sector"; (ii) does not "increase" the use of natural gas; and (iii) constitutes a "standalone project" not a program.[114] But § 54-4-13.1 is not limited to the transportation sector, and the CHP Project would result in "increasing the use" of natural gas. And the CHP Project does not stand alone. It is part of the IIAC Program and, in any event, is a natural gas clean air program under § 54-4-13.1(4). On both the facts and the law, the Office's arguments are wrong.

[114] Motion at 12-21.

1. Section 54-4-13.1(3) is not limited to transportation-related projects.

The Office asserts that § 54-4-13.1(3) applies only to transportation programs and, therefore, claims the CHP Project does not qualify under that provision.[115] In making this argument, the Office relies primarily on one part of this section's title (which predated HB 107) and the phrase "and as pertaining to the transportation sector" in subsection (4). But this strained reading flies in the face of common sense and flouts black-letter rules of statutory construction.

The "'goal when confronted with questions of statutory interpretation is to evince the true intent and purpose of the Legislature,'" and "'[i]t is axiomatic that the best evidence of legislative intent is the plain language of the statute itself.'"[116] Judicial interpreters "look beyond the plain language only if [they] find some ambiguity."[117] In discerning any ambiguity, the judicial interpreter must "'read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.'"[118] This includes giving "effect to omissions in statutory language by presuming all omissions to be purposeful."[119] "However, 'a statute susceptible to competing interpretations may nevertheless be unambiguous if the text of the act as a whole, in light of related statutory provisions, makes all but one of those meanings implausible.'"[120]

Applying these principles, the only plausible reading of § 54-4-13.1 is that subsections (3) through (8) apply to sectors that include, but go beyond, the transportation sector. Subsection (3) introduces the term "natural gas clean air programs," and subsection (4) defines the term. Tellingly, none of the elements that define a "natural gas clean air program" include "transport,"

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[115] *Id.* at 15.
[116] *Bryner v. Cardon Outreach, LLC*, 2018 UT 52, ¶ 9, 428 P.3d 1096, 1099 (citations omitted).
[117] *State v. Burns*, 2000 UT 56, ¶ 25, 4 P.3d 795, 800 (citations omitted).
[118] *Bryner*, 2018 UT 52, ¶ 10, 428 P.3d at 1099-1100 (citations omitted).
[119] *Id.* 1099-100.
[120] *Id.* (citations omitted).

"transportation," or any hint that the legislature intended to limit clean air programs to that sector. As discussed above, conspicuous omissions matter.[121]

Further, lacking any textual support in the actual definition, the Office relies on the phrase preceding the definitional elements—"***and*** as pertaining to the transportation sector"—to support its proposed interpretation, *i.e.*, that ***only*** transportation-centric programs are eligible under § 54-4-13.1. But that is not what the statute says. Subsection (4) does not state, "[f]or purposes of this action, and ***only*** as pertaining to transportation" as the Office would like. Instead, it uses the term "and" to indicate a "connection or addition especially of items within the same class or type."[122] In other words, subsection (4) means that the definitional elements contained in § 54-4-13.1(4) apply to "this section," *i.e.*, § 54-4-13.1, ***as well as*** to the transportation sector more generally. Thus, the inclusion of the introductory phrase "and as pertaining to the transportation sector" does not render § 54-4-13.1 ambiguous, nor does it support the interpretation the Office promotes.

If in the first place, the entire section concerned only the transportation sector, as the Office contends, then there would be no need to include the independent clause (which is set off by commas): "***and*** as pertaining to the transportation sector." Because courts must assume that "the legislature used each word advisedly,"[123] the only plausible interpretation is that the phrase "and as pertaining to the transportation sector" was meant to expand, not limit, the situations to which the definition of "natural gas clean air program" would apply.

Further, the words "natural gas vehicle rate" in the title of the section, as well as the Office's references to other subsections in § 54-4-13.1, do not support the its interpretation. HB

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[121] *Marion Energy*, 2011 UT 50, ¶ 14, 267 P.3d at 866.
[122] *And*, *Merriam-Webster Online*, https://www.merriam-webster.com/dictionary/and?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited 2/28/20).
[123] *Bryner*, 2018 UT 52, ¶ 20, 428 P.3d at 1102.

107 amended the title of § 54-4-13.1 to add the words "natural gas clean air programs."[124] Previously, the title was limited to only "natural gas vehicle rate." If the legislature intended "natural gas clean air programs" to be limited to transportation programs, one would have expected the word "transportation" to be in the title. In any event, "[t]itle of a statute . . . is not part of the statute's text" and generally is not considered when a court is attempting to determine a statute's intent.[125] In addition, subsections (3) and (4)(a) do not support the Office's reading. Subsection (3) merely describes that the programs at issue should "promote sustainability through increasing the use of natural gas or renewable natural gas." There is no language that limits the intended "uses" to transportation uses. The lack of any such limitation indicates that the legislature intended natural gas clean air programs to foster the use of natural gas in whatever economic section it could be used to promote sustainability and cleaner air. The same is true of subsection 4(a). It refers to "an incentive or program to support the use of natural gas" or RNG, and contains no language limiting that support to transportation.

As a final point, contrary to the Office's claim, the CHP Project directly serves the aims of § 54-4-13.1(3)-(8). It promotes sustainability and the use of natural gas by replacing inefficient boilers with CHP technology that uses natural gas, low NO_x burners, and a selective catalytic reduction system to remove exhaust emissions, resulting in drastic reductions in CO_2 emissions, and NO_x and particulate emissions.[126] The CHP Project is precisely the kind of project the legislature intended to incentivize through HB 107.

[124] *See* Orton Aff., Ex. A.
[125] *Funk v. Utah State Tax Comm'n*, 839 P.2d 818, 820 (Utah 1992).
[126] Powell Direct at 2:36-37; 3:40-41.

2. The CHP Project will increase the use of natural gas.

Section 54-4-13.1(3) states that the Commission "may authorize a gas corporation to establish natural gas clean air programs that promote sustainability through increasing the use of natural gas." Seizing on the word "increasing," the Office asserts that the CHP Project is ineligible for approval under § 54-4-13.1(3) because it would mitigate the negative impacts of natural gas boilers, but would not increase the use of natural gas.[127] However, the Office admits almost in the same breath that this is factually incorrect.

The Office acknowledges Mr. Orton's testimony in which he states that the CHP Project *will* increase the use of natural gas.[128] The Office does not challenge this testimony. Indeed, its only rejoinder is that the *admitted increase* in natural gas usage from the CHP Project "is sufficiently attenuated to fall outside the well-defined alternative transportation fuel focus of § 54-4-13.1"[129] But that argument goes from misstating the facts to misinterpreting the statute.

Section 54-4-13.1 contains no requirement that an "increase" in natural gas consumption must be "closely attenuated" to alternative transportation fuel. And, as discussed above in Section IV(A)(1), "alternative transportation fuel" programs are not the "well-defined focus" of § 54-4-13.1. Instead, § 54-4-13.1 applies to sectors beyond transportation.

Moreover, the Office begrudgingly acknowledges that, during the technical conference in this docket, the IIAC explained that the CHP Project would in fact result in the Customer at issue using ***more*** natural gas than with its existing boilers.[130] Thus, the Office's argument that the CHP Project would not increase the use of natural gas is simply unfounded.

[127] Motion at 16.
[128] *Id.* at 16 n.28.
[129] *Id.*
[130] *Id.* at 15 n.28.

3. The CHP Project is not a standalone "project" and is a "natural gas clean air program."

The Office argues that the CHP Project—a series of activities that will annually remove from the Wasatch Front a substantial amount of NOx and CO2—is outside the range of activities the legislature intended to incentivize when enacting § 54-4-13.1 because Dominion Energy called the activity "the CHP Project" in the Application instead of the "CHP Program." Ignoring the Company's descriptions of the CHP-related activities and the actual wording of the statute, the Office argues the Commission should reject the Application based on semantics. But if the legislature intended such hand-wringing over descriptions of pollution-reducing activity, it would have spoken clearly—the legislature does not "hide elephants in mouseholes."[131]

As an initial matter, § 54-4-13.1 defines the term "natural gas clean air ***program***" as "an ***incentive or*** program to support the use of natural gas."[132] Thus, the legislature did not intend the definition of "natural gas clean air program" under the statute to be limited as the Office suggests. This should end the inquiry. The CHP Project is an incentive to support the use of natural gas.

Moreover, the Office is wrong to characterize the CHP-related activities as a "standalone project."[133] While it is true that the Company, for ease of reference in the Application and testimony, defined the CHP-related activities collectively as the "CHP Project," it did so in the context of the CHP Project's role in an overarching *program* in conjunction with the IIAC. Thus, the Company notes that the CHP Project is just the first of many expected incentives or activities, all of which the Company expects to execute in connection with the IIAC Program.[134]

[131] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).
[132] Utah Code § 54-4-13.1(4)(a) (emphasis added).
[133] Motion at 17.
[134] Application at 6.

That is, the CHP *Project* is one of the first steps in a significant, pollution-reducing, air-cleaning *program*. The Office acknowledges that the Company's testimony refers to the CHP Project as "'one flagship project to commence the program.'"[135] Thus, the CHP Project is in its own right an "incentive" and, therefore, a "natural gas clean air program," but is also part of the IIAC Program and, thus, is not a "standalone project," and the Office's attempt to make that distinction makes no legal or practical sense. In either case, it qualifies for approval.

The Office's argument also ignores the fact that, under the STEP Act, characterizing the CHP-related activities as a "project" rather than a "program" is a distinction without a difference. The Rocky Mountain Power application the Office relies on in the Motion shows that the Commission approval for high-impact, pollution-reducing activity has never turned on whether the activities were titled "projects" or "programs." For example, Rocky Mountain Power used the term "projects" and "programs" interchangeably, asking to "implement five CO2 capture and sequestration *projects*" and "two NOX emission control *projects*" under its "Application to Implement *Programs*."[136] So too with the Commission, which, in that docket, repeatedly referred to "Phase Two clean coal research *projects*" and later approved the "Phase Two STEP *programs* described above."[137] Considering this evidence, the Office's admission that "the relationship between 'program' and project'" has been applied "somewhat inconsistently,"[138] and that the terms "program" and "project" have been used "somewhat interchangeably"[139] is telling.

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[135] Motion at 25 (quoting Powell Direct at 4:60-74).
[136] Application to Implement Programs Authorized by the Sustainable Transportation and Energy Plan Act, *In the Matter of the Application of Rocky Mountain Power to Implement Programs Authorized by the Sustainable Transportation and Energy Act*, Docket No. 16-035-36, at 18-20 (Utah PUC Sept. 12, 2016) (emphases added).
[137] Phase II Report and Order, *In the Matter of the Application of Rocky Mountain Power to Implement Programs Authorized by the Sustainable Transportation and Energy Plan Act*, Docket No. 16-035-36, at 7, 13 (Utah PUC May 24, 2017).
[138] Motion at 18.
[139] *Id*. at 19 n.34.

Rather than simply acknowledging that there is no real difference between the terms "program" and "project" under the STEP Act, the Office proposes that the Commission impose, for the first time, a hard-and-fast difference between the two terms and disregard prior "inconsistencies." The Office admits that this proposal would constitute a drastic departure from the Commission's prior practice: "reconciling the matter presently before the PSC with all past decisions would be an impossibly Herculean task."[140] In other words, instead of continuing to focus on the substance and impact of proposed activities—with the recognition that parties may at times use the term "project" and "program" to describe the same activity—the Office argues that semantics should control whether an activity is approved or disapproved. The illogic of this position reveals the Office's underlying goal: to have the Commission so narrowly construe the statute that most activities could not be approved because they are standalone "projects" instead of multi-faceted "programs."

Finally, contrary to the Office's claim, the CHP Project is exactly the type of "incentive" the legislature intended to promote. The Company is trying to clean the air through the use of natural gas. It proposes to do this in connection with the IIAC Program. The CHP Project will materially reduce CO_2 pollution in the Wasatch Front annually. But according to the Office, this significant "project" is ineligible under § 54-4-13.1, while a comparatively small activity called a "program," consisting of numerous smaller "projects" would be eligible. Under the Office's proposed regime, even the highest-leverage, magic-bullet-type natural gas clean air solution would be ineligible if the activity was "short term," "temporary," or "create[d] a specific deliverable."[141] Surely the legislature did not intend such a result.[142]

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[140] *Id*.
[141] *Id.* at 18.
[142] *Utley v. Mill Man Steel, Inc.*, 2015 UT 75, ¶ 46, 357 P.3d 992, 1001 ("If statutory language lends itself to two alternative readings, we choose the reading that avoids absurd consequences."); *Encon Utah, LLC v. Fluor Ames*

B. The CHP Project Qualifies for Approval Under § 54-20-105(3).

Finally, the Office contends the CHP Project cannot be approved under § 54-20-105(3) because: (i) it is a "project" not a "program," (ii) it would not involve any "investigation" or "analysis," and (iii) it does not involve the "development of communities that can reduce" emissions.[143] But as discussed above, the CHP Project is a "natural gas clean air ***program***" under § 54-4-13.1 and the terms "project," "program," and "plan" are used interchangeably in § 54-20-105(3). Moreover, the Office is just factually wrong in asserting that the CHP Project will not involve further investigation and analysis. And, the CHP Project will promote the "development of communities" that can reduce particulate emissions and greenhouse gases.

1. The CHP Project is a "program" under § 54-20-105(3).

For the same reasons discussed in connection with § 54-4-13.1, the Office's attempt to differentiate the CHP Project from a "program" is an exercise in semantics and futility. As noted, § 54-4-13.1 defines a "natural gas clean air program" to include "an incentive to support the use of natural gas." The CHP Project clearly is that, and, therefore, is a "program" under § 54-4-13.1. Given this, it is unclear why the CHP Project would not also qualify as a "program" under § 54-20-105(3), particularly where § 54-20-105(3) does not define the term "program" and incorporates "natural gas clean air programs" under § 54-4-13.1 as authorized to be funded under § 54-20-105(3)(d). Indeed, the Office's attempt to make a distinction between "program" and "project" makes even less sense under § 54-20-105(3).

The Office notes that a "sustainable transportation and energy plan" is defined as "programs approved by the commission."[144] But this is not helpful because this simply refers

Kraemer, LLC, 2009 UT 7, ¶ 73, 210 P.3d 263, 276 ("When statutory language plausibly presents the court with two alternative readings, we prefer the reading that avoids absurd results.") (citation omitted).
[143] Motion at 12-21.
[144] *Id.* at 21.

one back to "innovative technology programs" under § 54-20-105.[145] When one looks § 54-20-105, which is the innovative technology program section, the statute interchangeably uses the words "program" and "project" throughout. For instance, subsection 3(c) of that provision, which contains the factors the Commission should consider when determining whether to approve a sustainable transportation and energy plan, repeatedly uses the word "project" ***not "program"***:

> In determining whether a ***project*** is in the public interest, the commission shall consider the following factors:
>
> (i) to what extent the use of renewable natural gas is facilitated or expanded by the proposed ***project***;
> (ii) potential air quality improvements associated with the proposed ***project***;
> (iii) whether the proposed ***project*** could be provided by the private sector or would be viable without the proposed incentives;
> (iv) whether any proposed incentives were offered to all similarly situated potential partners and recipients; and
> (v) potential benefits to ratepayers.[146]

The Office's argument that this provision only applies to "projects" not "programs"[147] would lead to an unreasonable result and, for that reason, should be rejected.[148] Under the Office's interpretation, a natural gas utility could come to the Commission with a "program" and obtain approval to receive funding for that program without satisfying the public interest factors set forth in § 54-20-105(3)(c). The utility would only have to meet the public interest requirement if and when it brought a "project" forward for approval.

The Office's explanation for this incongruity is that a program is simply a group of projects.[149] By why would that be true? The statute does not define a program as multiple

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[145] *See* Utah Code § 54-20-102(3)(d).
[146] Utah Code § 54-20-105(3)(c) (emphasis added).
[147] Motion at 23.
[148] *Utley*, 2015 UT 75, ¶ 46, 357 P.3d at 1001 (noting the Supreme Court of Utah's preference for "the reading that avoids absurd results"); *Encon Utah*, 2009 UT 7, ¶ 73, 210 P.3d at 276 (same).
[149] Motion at 23.

projects, and the ordinary definition of the term "program" does not refer to a group or set of projects.[150] Indeed, the definition of a project is a "plan or design," which is nearly identical to the definition of the word "program."[151] Further, the two statutes the Office cites have nothing to do with the STEP Act and do not define either "project" or "program."

Similarly, subsection (3)(e) states that "a large-scale utility shall establish a balancing account that includes: (i) funds allocated ***for projects*** that have been approved under Subsection (3)(a) . . . ." If, as the Office suggests, subsection 3(a) only pertains to "programs"[152]—other than subsection 3(a)(v), which it tries to explain away as an "exception"[153]—then subsection 3(e) would only require a balancing account for RNG projects, not for any of the six types of activities set forth in subsections 3(a)(i)-(vii). This tortured reading makes absolutely no sense. Why would the legislature direct a balancing account for RNG projects, but not, for example, for "economic development" incentives or "a commercial line extension program"?[154]

Rather than accepting that the statute uses the terms "program" and "project" interchangeably—which is the only interpretation that gives effect to all provisions as required by the rules of statutory construction[155]—the Office attempts to explain away the oddities that result from its proposed interpretation and the exceptions that would have to be read into the statute to make its interpretation make sense. But the Office's interpretive machinations merely

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[150] *See Program, Merriam-Webster Online*, https://www.merriam-webster.com/dictionary/program?src=search-dict-hed (last visited 2/28/20) (defining "program" to be "a plan or system under which action may be taken toward a goal"); *Program, Dictionary.com*, https://www.dictionary.com/browse/program?s=t (last visited 2/28/20) (defining the term "program" to be "plan of action to accomplish a specific end").
[151] *Compare* the definitions of "program," *supra* n.143, *with* the definition of "project," *Merriam-Webster Online,* https://www.merriam-webster.com/dictionary/project?src=search-dict-hed (last visited 2/28/20).
[152] Motion at 21.
[153] *Id.* at 22.
[154] *See* Utah Code § 54-20-105(3)(a)(i), (vi).
[155] *Reedeker v. Salisbury*, 952 P.2d 577, 585 (Utah Ct. App. 1998) (describing the "rule of statutory construction that requires a statute to be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (citations omitted).

demonstrate that its interpretation is a bridge too far. As even the Office admits, STEP proceedings have historically used the terms "program" and "project" interchangeably.[156] Section 54-20-105 does the same.

2. The CHP Project involves "investigation, analysis, and implementation."

The Office asserts that, under § 54-20-105(3)(a), the Commission can only approve a program to fund "the investigation, analysis, ***and*** implementation" of the activities set forth in § 54-20-105(3)(a)(i)-(vii).[157] In other words, it claims that the program must incorporate all three aspects to be approved. Because it erroneously claims the IIAC completed all "investigation" and "analysis" for the CHP Project, it argues the program does not qualify under § 54-20-105(3)(a). The Office is wrong.

The Office concedes the Company's testimony states that a detailed investigation and analysis would be part of the CHP Project if it is approved. For instance, it quotes Dr. Powell's testimony in which he discusses "how a detailed 'analysis' would need to be completed prior to funding the CHP Project."[158] But there is more. For instance, Dr. Powell states:

> [I]t is important to note that the above analysis on the benefits of CHP is done using averaged data for efficiencies and emissions and assumed capacities to serve as a basic representation of the technology. ***Individual projects must be much more carefully analyzed using site-specific inputs. This analysis may require several months of engineering and design effort before the numbers can be considered to be firm and reliable***.[159]

Speaking of the CHP Project, he further testifies:

> ***Prior to distributing any funds approved in this docket, a detailed project bid and analysis would be completed to obtain final numbers***. [160]

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[156] Motion at 19 n.34.
[157] *Id.* at 24.
[158] *Id.* at 25 n.51 ("To be sure, Dr. Powell characterizes the CHP Project [as] 'one flagship project to commence the program,' and also ***how a detailed 'analysis' would need to be completed prior to funding the CHP Project***.").
[159] Powell Direct at 3:55-4:60 (emphasis added).
[160] *Id.* at 4:73-74 (emphasis added).

Dr. Powell also describes that the IIAC's work will include:

> ***soliciting competitive bids from vendors***, ***verifying technological claims*** by each vendor, project management, and ***ongoing research for each project***. The University of Utah will remain involved in each project for its duration and will ***quantify the long-term air quality benefits***, ***publish case studies***, work to streamline processes for new applications, and ***help develop the technology market*** so that new applications will not require the same level of incentive. [161]

In addition, Mr. Orton further explains that additional investigation and analysis will need to occur both pre- and post-implementation:

> The IIAC would take the lead role in facilitating potential projects. This would entail ***detailed cost-benefit analysis***, ***coordinating a competitive bid process***, working with the Company, assisting with filings seeking Commission approval for incentive funds, and ***ongoing research and documentation of each Commission-approved project***. [162]
>
> . . . .
>
> Finally, the IIAC would ***continue to monitor the performance of installed equipment***. ***This work would involve frequent site visits and development of case studies to inform future projects. The IIAC would also monitor, track, and report on the long-term impact of Natural Gas Air Quality projects on Utah's air quality***. [163]

This is all of course in addition to the following statement in the Application:

> If the Commission approves the CHP project proposed here, then IIAC will work with the Customer to implement the project, including soliciting competitive bids from vendors, verifying technological claims by each vendor, managing the project ***and conducting any additional research necessary for the project***. [164]

The Office's argument is based entirely on its own incorrect characterization of the Application, giving no consideration to the Company's testimony. The CHP Project has been initially evaluated, but Dominion Energy has expressly and repeatedly indicated that additional investigation and analysis will be necessary.

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[161] *Id.* at 8:151-56 (emphasis added).
[162] Orton Direct at 9:199-202 (emphasis added).
[163] *Id.* at 10:226-29 (emphasis added).
[164] Application at 4, ¶ 6 (emphasis added).

3. The CHP Project furthers the "development of communities that can reduce greenhouse gasses and NOx emissions" consistent with § 54-20-105(3)(a)(iv).

As a final point, the Office contends that the CHP Project does not involve the "development of communities" that reduce greenhouse gases and NO_x emissions" under § 54-20-105(3)(a)(iv).[165] In making this argument, the Office states: "Admittedly, on the face of the Application, implementation of the CHP Project would reduce greenhouse gas and NO_x emissions."[166] Thus, the Office's argument concedes the CHP Project's ability to reduce greenhouse gases and NO_x emissions, and it further admits the plan will significantly improve the air in the community where the facility is located. The Office's argument centers on its claim that, despite the fact that the project will reduce particulate emissions and greenhouse gases in its community, the project does not "develop" communities that can reduce greenhouse gases:

> 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 useful in pursuing other projects." At most, however, this statement relates to a broader community *enjoying the benefits* of the CHP Project—not the development of communities.[167]

This argument makes no sense.

As with its incorrect argument that the IIAC Program does not involve "research and development of other efficiency technologies"—the Office's § 54-20-105(3)(a)(iv) argument is premised on an overly-restrictive and unsupported definition of the term "development." As discussed above, when a term or phrase in a statute has not been given a specific meaning by the legislature, that term or phrase is given its ordinary or customary meaning. The Office does not do that. The term "development" is an expansive word that can mean such things as growth,

[165] Motion at 26.
[166] *Id.* at 27.
[167] *Id.*

proliferation, evolution, expansion, advancement, progression and improvement.[168] Would the CHP Project result in the *advancement* of a community in which emissions can be reduced? Of course. Would the CHP Project result in the *progress* of a community to reduce greenhouse gas and NO_x emissions? Absolutely.

The Office does not apply any of the ordinary meanings of the word "development." Rather, it argues, without support, that the legislature intended to the term to be given a special meaning restricted to zoning and city planning.[169] But the Office admits that there is no indication that the legislature intended this, and further admits that nowhere in the Utah Code has the Utah legislature defined the phrase "development of communities" in the way the Office proposes that it should be defined.[170] Further, the Office's interpretation makes no sense in that gas utilities do not participate in zoning decisions.

The Office's argument relies on out-of-state cases, discussing other states' land use and planning statutes (not utility, environment or energy statutes), and even then, the cases relied on do not define the term "development" or the phrase "development of communities." Instead, the phrase is used by courts to refer to the purpose of zoning laws. Where the Utah legislature has not used the phrase "development of communities" in the context of planning and zoning, it makes no sense to define that phrase for purposes of the STEP Act as referring to zoning.

As with all of its proposed interpretations in the Motion, the Office's definition of "development" makes no practical or legal sense. Whether the word "community" is defined to

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[168] *See Development*, *Dicitionary.com*, https://www.dictionary.com/browse/development?s=t (last visited 2/28/20), defining "development" as "the act or process of developing; growth; progress" and identifying synonyms to include evolution, expansion, advancement, improvement, enlargement, etc.; *Development*, *Merriam-Webster-Online*, https://www.merriam-webster.com/dictionary/development?src=search-dict-hed (last visited 2/28/20), defining "development" as "the act, process, or result of developing," and identifying the following synonyms: "elaboration, evolution, expansion, growth, progress, progression."
[169] Motion at 26-27.
[170] *Id.* at 26.

mean the geographic community in which the facility is located, the industrial community writ large, or the Wasatch Front generally, the CHP Project helps to develop a community that reduces greenhouse gases and NO_x emissions. Therefore, the project qualifies under § 54-20-105(3)(a)(iv).

CONCLUSION

For the foregoing reasons, the Commission should deny the Motion and proceed to make determinations required under §§ 54-4-13.1 and 54-20-105(3).

RESPECTFULLY SUBMITTED this 2nd day of March, 2020.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing OPPOSITION OF DOMINION ENERGY UTAH TO OFFICE OF CONSUMER SERVICES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT was served upon the following persons by email on March 2, 2020:

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