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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' REPLY IN SUPPORT OF 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

[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.

Consumer Services ("OCS") hereby submits this Reply in support of its Motion to Dismiss Application or, in the Alternative, Motion for Summary Judgment Denying Application, dated February 14, 2020 (the "Motion") with respect to 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, specifically in response to the Opposition of Dominion Energy Utah to Office of Consumer Services' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, dated March 2, 2020 (the "Opposition"). In support of the Motion, OCS respectfully states as follows:

I. INTRODUCTION

DEU's Opposition—which, among other things, attributes ulterior motives to OCS and disparages its statutory arguments as mere "semantics"—provides the PSC an opportunity to reaffirm the importance of civility in written submissions to the PSC.

For the first time, DEU redefines the "IIAC Program" as a "natural gas clean air program" under Section 54-4-13.1. This constitutes an amendment of its Application after the filing of a responsive pleading without leave of the PSC in violation of Utah Admin. Code R 746-1-205(3). Accordingly, the PSC should strike and not consider this new legal argument, for which OCS was not provided reasonable notice. In any event, neither the IIAC Program nor the CHP Project—separate or taken together—are eligible under Section 54-4-13.1 because programs under that statute are limited to the transportation sector. DEU has admitted as much in its own submissions to the PSC.

Contrary to DEU's contentions, OCS has correctly stated the standard of review. At its core, this involves the PSC assuming as true the factual allegations (but not legal conclusions) in

the Application, including DEU's pre-filed testimony by incorporated reference, that may be considered without converting the Motion to one for summary judgment. By definition, this does not involve any disputed facts or OCS making factual concessions or admissions, as DEU suggests.

Based on these assumed facts, OCS has presented legal arguments based on what it believes is the best interpretation of the applicable statutes arriving at the Legislature's intent based on the ordinary meaning of the statutory language. Of course, DEU disagrees with OCS' proposed interpretations. At a high-level, the statutory interpretations DEU proposes are based on more expansive readings of the statutes, typically citing to broad dictionary definitions of individual words taken in isolation for support. In contrast, OCS has proposed more conservative interpretations based on how a reasonable person familiar with context and usage of the language would understand the ordinary meaning of key phrases, such as "research and development" and "development of communities." It is for the PSC to decide which proposed reading of the applicable statutes best fits with existing law and the intellectual and logical principles which underly it.

For the reasons set forth in the Motion and this Reply, OCS respectfully requests that the PSC grant the Motion.

II. PROCEDURAL AND RELATED MATTERS

A. CIVILITY IN WRITTEN SUBMISSIONS

DEU may disagree with the legal arguments presented in the Motion, but it does not advance DEU's cause—or the principles of civility which underlie all adjudicative proceedings—to attribute ulterior motives to OCS as DEU has done in several places throughout

its Opposition.[2] This is particularly true when the entities which filed or joined in the Motion (OCS and DPU) are agencies of the State of Utah with missions to serve the public interest.[3]

DEU need not present its counterarguments by disparaging the arguments set forth in the Motion as mere "quibbling" or "semantics" in the pejorative sense of those terms.[4] This is all the more important at the dispositive motion stage in a proceeding, when reasoned arguments are presented based on assumed facts to be applied to relevant statutes, the meaning of which is essential to the outcome. Similarly, there is plenty of room to disagree with a legal argument without repeatedly asserting the argument "makes no sense," is "illogical," or "ignores" things.[5]

Given the tone used throughout the Opposition, OCS respectfully requests that the PSC consider using its ruling on the Motion as an opportunity to emphasize the importance of civility in written submissions to the PSC.

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[2] Opposition at pp. 13-14, 21 and 32 (describing what DEU contends "the Office is really doing," "what the Office is really attempting to do," and that the Office's statutory argument "reveals the Office's underlying goal"); *see also* Utah Standards of Professionalism and Civility ("USPC") at Preamble (noting that standards should be followed "in any proceedings in this State" and at Standard 3 (providing that "[l]awyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct").

[3] *See* Section 54-10a-301 (describing powers and duties of OCS); Section 54-4a-6 (summarizing duties, powers and responsibilities of DPU).

[4] Opposition at p. 14 (indicating that "the Office quibbles" with factual matters); Opposition at pp. 30 and 32 (characterizing OCS' statutory arguments as mere "semantics"); *see also* USPC Standard 3 (providing that "[l]awyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law").

[5] Opposition at p. 32 (indicating that "the illogic of this position reveals the Office's underlying goal"); Opposition at pp. 24, 26, 31, 33, 35, and 38-39 (repeatedly remarking that OCS' position "makes no sense"); Opposition at pp. 2, 13, 18, and 30-31 (describing OCS as "ignoring" Application and/or DEU's pre-filed testimony).

B. DEU's AMENDMENT OF APPLICATION WITHOUT LEAVE

DEU argues that "the Office's Motion does not discuss, let alone challenge, the IIAC Program under [Section] 54-4-13.1. And for good reason. The IIAC Program easily qualifies as a 'natural gas clean air program.'"[6] There is a "good reason" why OCS did not discuss this issue in the Motion, but it is not the reason DEU suggests. The reason is that under a plain reading of the Application and the pre-filed testimony, DEU did not request approval of the proposed IIAC funding pursuant to Section 54-4-13.1.

In support of its contention that "[t]he Company's Application and supporting testimony seek approval of the IIAC Program under both [Sections] 54-4-13.1 and 54-20-105," DEU does not cite to any lines of pre-filed testimony.[7] A comprehensive, line-by-line review of Mr. Orton's testimony does not identify any references to the statutes under which DEU seeks approval. This is the same with respect to Dr. Kelly and Mr. Mendenhall's testimony. The only statutory reference in the DEU's pre-filed testimony is in Dr. Powell's testimony, in which he states "[t]he Company's filing respectfully requests the Commission approve the Natural Gas Clean Air project pursuant to Utah Code Ann. §§ 54-4-13.1 and 54-20-105."[8] When read in context, however, the phrase "Natural Gas Clean Air project" refers to the CHP Project, not to the other services for which DEU seeks separate IIAC funding.

In support of its contention that "[t]he Company's Application … seek[s] approval of the IIAC Program under both [Sections] 54-4-13.1 and 54-20-105," DEU cites to two places in the Application: (1) the introductory sentence on the first page and (2) the request for relief at the

[6] Opposition at pp. 15-16.
[7] *Id*. at Footnote 80.
[8] Powell Direct at page 1, lns. 17-19.

end of the Application.[9] As with DEU's pre-filed testimony, the Application uses the phrase "Natural Gas Clean Air Project" to refer to the CHP Project, not the request for IIAC funding.[10] This is significant because only Part II of the Application—the "Request for Approval of CHP Project"—refers to Section 54-4-13.1 by asserting that "the proposed CHP Project falls squarely within" the language of Section 54-4-13.1.[11] Part III of the Application—which requests "Approval of Funding to the IIAC"—makes no reference to Section 54-4-13.1.[12] Instead, through Part III of the Application, DEU contends that its request to provide funding to the IIAC satisfies Section 54-20-105(3)(a)(ii) and (vii) of the STEP Act.[13]

Thus, OCS did not have fair notice that DEU contended the proposed IIAC funding also constituted a "natural gas clean air program" under Section 54-4-13.1. *See Harper v. Evans*, 2008 UT App 165, ¶ 13, 185 P.3d 573 (concluding that "even under Utah's liberal notice pleading requirements," complaints must still give adverse party "fair notice of the nature and basis or grounds of the claim"); 61A Am. Jur. 2d Pleading § 124 (stating that "[t]he primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim is based"). Accordingly, Part II of the Opposition—through which DEU asserts, for the first time, that "[t]he IIAC Program is a 'natural gas clean air program' under [Section] 54-4-13.1"—is the functional equivalent of an amendment to the Application to raise a new statutory basis for relief.

[9] Opposition at p. 15, Footnote 80.
[10] *See* Application at p. 1 and Part II, "Request for Approval of the CHP Project," at ¶¶ 8-12.
[11] *See* Application at ¶¶ 8-12.
[12] *Compare* Application at ¶¶ 8-12 *with* Application at ¶¶ 13-16.
[13] Application at ¶¶ 13-14.

Utah Admin. Code R 746-1-205(3) governs amendments to "initial pleadings"—including the Application—and provides as follows:

> (1) A party that has filed a complete and effective complaint or initial pleading may amend the filing without leave of the Commission at any time before:
>
> (a) a responsive pleading has been filed; or
> (b) the time for filing a responsive pleading has expired.
>
> (2) If a defect in a complaint or initial pleading does not affect the substantial rights of the parties, it does not require amendment.
>
> (3) After a responsive pleading has been filed or the deadline for filing a responsive pleading has passed, a party may amend an initial pleading only with leave from the Commission.

(Emphasis added). The PSC's Administrative Procedures Act Rule defines "responsive pleading" broadly to include "(a) an answer; (b) a protest or opposition; or (c) other similar filing." Utah Admin. Code R 746-1-103(12).

Here, OCS' Motion is a responsive pleading. *See id*. Moreover, DEU's amendment is not a mere "defect in a[n] initial pleading [that] does not affect the substantial rights of the parties" within the meaning of Utah Admin. Code R 746-1-205(2). As such, after OCS filed its Motion, DEU was not permitted to amend the Application unless DEU first obtained "leave from the Commission." *See* Utah Admin. Code R 746-1-205(3).

Because DEU has not sought leave to amend, the PSC should strike and not consider any of the arguments raised in Part II of DEU's Opposition. In any event, as set forth in Part III(A) of this Reply below, even if the PSC were to consider DEU's new argument for the IIAC Program under Section 54-4-13.1 on its merits, the PSC should conclude that the IIAC Program falls outside the scope of Section 54-4-13.1 because the IIAC Program is not limited to the transportation sector.

C. STANDARD OF REVIEW ISSUES

1. To Rule on the Motion, the PSC May Assume All Factual Allegations in the Application—Including Pre-Filed Testimony—Are True.

Although presented differently, DEU essentially agrees with the standard of review articulated by OCS.[14] At the same time, DEU unnecessarily makes much of OCS' request that the PSC rule "on the face of the Application."[15] Contrary to DEU's assertions, what OCS is requesting through this short-hand reference to "the face of the Application" is that the PSC rule on the Motion based on the assumption that all of the facts alleged in the Application—including statements in pre-filed testimony incorporated by reference in the Application—are true.

DEU mischaracterizes OCS' summary of prior PSC decisions for purposes of clarifying the appropriate standard of review. For example, DEU's comment regarding the *Stephens* matter does not account for OCS' detailed explanation of how the PSC's initial motion to dismiss ruling and "subsequent procedural history of the *Stephens* docket exemplifies the PSC's fluid approach to the standard of review applicable to motions to dismiss."[16] Moreover, the PSC should not ascribe significance to DEU's distinction between "complaint" and "application" for purposes of the Motion.[17] As OCS stated in its Motion, "the PSC should treat the Application as analogous to a complaint to be reviewed under Rule 12(b)(6)."[18] The reason this is correct is that the Application is an "initial pleading" as that term is used throughout the PSC's Administrative Procedures Act rule, which is treated in parallel with a "complaint." *See* Utah Admin. Code

[14] Opposition at p. 10 (quoting same standard of review from the Net Metering Decision as that quoted by OCS at page 6 of Motion).
[15] Opposition at pp. 2, 9, 11-12, 14-15, and 38.
[16] *Compare* Opposition at p. 12 *with* Motion at p. 8, Footnotes 8-9.
[17] Opposition at p. 12-13.
[18] Motion at p. 9 (emphasis added).

R746-1-205 (referring to amendment of "complaint or initial pleading"); Utah Admin. Code R746-1-206 (same).

Of course, in order to *grant* DEU the relief sought through the Application, the PSC would be required to make findings of fact, and apply the relevant statutes to those factual findings. But that is a different question than the question presented through the Motion. By asking the PSC to rule "on the face of the Application," OCS is not asking the PSC to make such factual findings. Rather, OCS is correctly asking the PSC to assume, *for purposes of the Motion*, that the facts alleged in the Application are true. Based on this assumption—which is not, as DEU characterizes it, a concession or admission[19] by OCS in any respect—OCS believes DEU has failed to state a claim for which relief can be granted.

DEU also mischaracterizes OCS' position with respect to DEU's pre-filed testimony.[20] As OCS noted in its Motion, the PSC may consider the pre-filed testimony incorporated by reference into the Application without converting the Motion to one for summary judgment.[21] In stating that the PSC "may, but need not" consider such materials, OCS' point is that the Application *summarizes and is consistent with* the pre-filed testimony, which provides additional detail for the factual allegations in the body of the Application but generally does not impact the

[19] *See* Motion at pp. 7 and 9, Footnote 10. The PSC should not ascribe any significance to DEU's statement that "the Office ***does not dispute*** that the IIAC Program or the CHP Project is in the public interest" given the procedural posture of the Motion. *See* Opposition at p. 2 (emphasis original).
[20] *Compare* Opposition at pp. 11-13 *with* Motion at pp. 9-10.
[21] Motion at pp. 9-10. DEU incorrectly asserts that "[i]f one were following the Rules of Civil Procedure," the PSC's consideration of the documents incorporated by reference in the Application "alone would convert the motion to a motion for summary judgment." Opposition at p. 13. DEU's assertion is not consistent with the case law OCS cited in its Motion, which stands for the proposition that "[t]he rules are clear that documents attached to a complaint are incorporated into the pleadings for purposes of judicial notice and are fair game" to consider on a motion to dismiss, without triggering conversion to a motion for summary judgment. Motion at pp. 9-10; *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 10, 104 P.3d 1226.

legal analysis.[22] As stated in the Motion, if the PSC considers each line of DEU's pre-filed testimony, this does "not *cure* the deficiencies on the face of the Application," even when such testimony is assumed as true for purposes of the Motion.[23]

DEU's description of OCS' position with respect to the Motion—as "fixated" on Rule 12(b)(6)—does not address the central part of OCS' proposal regarding the standard of review.[24] Specifically, when ruling on a dispositive motion, the PSC should be "informed by the core principles of Rule 12(b)(6) and Rule 56 and recognize[], 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."[25]

Contrary to DEU's assertions, OCS' position regarding the appropriate standard of review for the Motion is fundamentally compatible with OCS' past positions that DEU cites regarding motions to dismiss before the PSC, which in any event are not controlling here.[26] For example, DEU cites a number of arguments made by OCS in opposition to a motion to dismiss regarding an application for a deferred accounting order in 2011.[27] What DEU does not cite, however, is the basic confirmation by OCS that motions to dismiss are "based solely upon the allegations set forth on the face of the complaint as well as inferences reasonably deductible, all of which are accepted as true…."[28] In any event, that docket did not contemplate the filing of

[22] *See* Motion at pp. 9-10.
[23] *See* Motion at p. 10 (emphasis original).
[24] *See* Opposition at p. 11.
[25] Motion at p. 7 (emphasis original).
[26] *See* Opposition at pp. 11-12.
[27] *Id*. (citing PSC order and OCS filing from *In the Matter of Application of the Utah Office of Consumer Services for a Deferred Accounting Order*, Docket No. 11-035-47 (Utah P.S.C.)).
[28] OCS' Response to Motion to Dismiss Application for Deferred Accounting Order for 209-2011 Bonus Depreciation, *In the Matter of Application of the Utah Office of Consumer Services for a Deferred Accounting Order*, at pp. 3 and 4-5, Docket No. 11-035-47 (Utah P.S.C. May 6, 2011).

dispositive motions in a scheduling order and involved "fact specific, regulatory disputes," both of which distinguish that docket from the procedural posture here.[29]

Finally, DEU argues that the need to distinguish factual allegations from legal assertions is "misplaced."[30] This is not correct. To be sure, DEU is correct that in ruling on the Motion, the PSC is to defer to DEU in the sense that the PSC assumes factual statements in the Application to be true.[31] OCS' point—which DEU does not dispute—is that the PSC need not grant any deference to the *legal conclusions* in DEU's Application.[32]

2. OCS Has Specifically Requested the PSC Not to Convert the Motion to One for Summary Judgment by Considering Extrinsic Evidence.

DEU's submission of the Affidavit of Michael Orton (the "Orton Affidavit") with its Opposition exemplifies why OCS styled its Motion as alternatively one for summary judgment, but *only if* the PSC were to consider extrinsic evidence in ruling on the Motion (which OCS has specifically requested the PSC *not* to do).[33]

As OCS noted in the Motion, OCS expressly requests that to rule on the Motion, the PSC not consider extrinsic evidence, which would include the newly submitted Orton Affidavit together with the technical conference materials attached as Exhibit B thereto (the "T/C PowerPoint").[34] When, in response to a motion to dismiss, the non-moving party submits extrinsic evidence, it is the *adjudicator* who determines whether to consider such material and

[29] *See id*.
[30] Opposition at p. 13.
[31] Opposition at p. 13. OCS notes that this is the same standard articulated by OCS in its Motion. *See* Motion at pp. 6-7.
[32] *Compare* Opposition at p. 13 *with* Motion at p. 9.
[33] *See* Affidavit of Michael Orton (March 2, 2020) in this docket.
[34] *See* Motion at pp. 8-9.

convert the motion to one for summary judgment. *See Oakwood Vill. LLC*, 2004 UT 101 at ¶¶ 10 and 12-15.

However, with respect to Exhibit A to the Orton Affidavit—a copy of HB 107 from the 2019 General Session—this is not extrinsic evidence and the PSC may take notice of it as a matter of law without needing to consider the Orton Affidavit to do so. It is well-established that matters of public record such as HB 107 are properly treated as part of the pleadings for purposes of ruling on a motion to dismiss. *See, e.g., BMBT, LLC v. Miller*, 2014 UT App 64, ¶ 7, 322 P.3d 1172 (concluding that "the trial court could take judicial notice" of a recorded document "as a public record and properly consider it in ruling on the motion to dismiss"). That said, and as explained in further detail below, OCS submits that the PSC need not consider HB 107 for an independent reason—because consulting legislative history is appropriate only when the statutes are ambiguous, which is not the case here. *See, e.g., World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 259 (Utah 1994) (observing that "[o]nly when we find ambiguity in the statute's plain language need we seek guidance from the legislative history").

As noted in the Motion, OCS requests that "*solely to the extent* the PSC elects to treat the Motion as one for summary judgment under Rule 56 (which … OCS requests the PSC not to do)," that "OCS be given a reasonable opportunity to present all material made pertinent to the Motion," as provided in Rule 12(b).[35] Contrary to DEU's suggestion, this more than explains why OCS did not submit evidence or seek to identify "undisputed material facts supporting its Motion," which OCS believes is not necessary given the procedural posture of this docket.[36]

[35] Motion at pp. 8-10 and 35 (emphasis original).
[36] *See* Opposition at p. 13.

Moreover, OCS has serious practical concerns about DEU's attempt to use the T/C PowerPoint as "evidence" for the PSC to consider for purposes of the Motion. It would be unreasonable for attendees to be expected to conduct a "cross-examination" of materials presented during the conference for fear that not objecting would somehow be used against the attendees at a later stage in the proceeding. In addition, a technical conference is not the appropriate forum for presenting competing arguments that presumably will be adjudicated as part of the docket. In fact, typically the PSC has reserved technical conferences for the explanation of technical issues—not presentation of argument from any side. Accordingly, the PSC should not set such a precedent by considering the T/C PowerPoint for purposes of the Motion.

In any event, even if the PSC were to consider the T/C PowerPoint (which it should not), these materials do not support DEU's positions. For example:

- In its "2019 House Bill background," DEU expressly notes that Section 54-4-13.1(4) applies to "Natural Gas Clean Air Programs in the Transportation Sector."[37] This position is in keeping with the plain language of the statute and OCS' position.[38] What it is not in keeping with, however, is DEU's position in the Opposition.[39]

- In its "Presentation Overview," DEU perfectly captures the program/project relation described by OCS in the Motion, and reinforces OCS' position as to the ordinary usage of such terms when used together.[40] In its Opposition, however, DEU takes the

[37] T/C PowerPoint at p. 3 (emphasis added). With respect to this slide, during the technical conference Mr. Orton stated as follows: "Dominion Energy Utah can pursue a broad range of air quality related projects. I really classify them into two buckets. There is a innovative utility program that captures a lot of potential projects. The specific project that we are going to talk about today [i.e., the CHP Project] really falls into that bucket. The other sector is the company could bring projects related to clean air in the transportation sector." Audio of Technical Conference held February 5, 2020, Docket No. 19-057-33 (Utah P.S.C.), *available at* https://www.youtube.com/watch?v=n80CzzZgbuM, 8:15 to 8:54 (emphasis added).
[38] *See* Section 54-4-13.1(4); Motion at pp. 13-15.
[39] Opposition at pp. 25-28.
[40] T/C PowerPoint at p. 8; Motion at pp. 17-24.

position that "characterizing the CHP-related activities as a 'project' rather than a 'program' is a distinction without a difference."[41]

- Throughout the T/C PowerPoint, DEU emphasizes the CHP Project's improved efficiency to *reduce* the total units of fuel used.[42] This reinforces OCS' legal argument based on the assumption that "the CHP Project's primary method of producing air quality benefits is to install updated equipment that uses natural gas *more efficiently*."[43] This point remains true notwithstanding DEU's emphasis in its Opposition (which OCS acknowledges in the Motion) that "during the technical conference … 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."[44]

If the PSC were to consider the Orton Affidavit and T/C PowerPoint for purposes of the Motion, this conventionally would convert the Motion to one for summary judgment, such that OCS (and all other parties) would be entitled to also submit evidence. That is not what OCS is asking the PSC to do—and it is not necessary for purposes of making the determinations (based on assumed facts) the PSC is to make for purposes of ruling on the Motion.

3. The Motion Properly Raises Issues of Statutory Interpretation Based on Assumed Facts—Not Disputed Facts.

DEU is correct when it states that OCS has requested the PSC to rule on its Motion without conducting a hearing on the evidence.[45] Indeed, this is the very purpose of "pre-trial" dispositive motions. Unfortunately, however, DEU has not accurately described OCS' request with respect to DEU's pre-filed testimony.[46] As noted above, by requesting that the PSC rule "on the face of the Application," OCS simply means that the PSC rule on the Motion based on the assumption that each of the factual allegations in the Application (including pre-filed

[41] Opposition at p. 31.
[42] T/C PowerPoint at pp. 26, 34, 39, 41 and 42.
[43] *See* Motion at p. 15 (emphasis original).
[44] *See* Opposition at p. 29 (emphasis omitted); Motion at p. 15.
[45] *See* Opposition at p. 15.
[46] *See id*.

testimony) is true. If, based on this assumption, the PSC were to conclude that DEU has failed to state a claim for which relief can be granted—as OCS contends—it would be an inefficient use of PSC resources to conduct a hearing where such pre-filed testimony is received as evidence. This is what fundamentally distinguishes the Motion at issue here from the "fact-intensive matters to be determined at hearing" as described in the Net Metering Decision.[47]

DEU contends that "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."[48] In so doing, DEU has not correctly formulated the question presented to the PSC by the Motion.

It is true that the PSC cannot *approve* the Application without making factual findings and applying those findings to the statutory requirements. That, of course, would require a hearing where DEU carries its burden of proof. Through the Motion, OCS does not ask the PSC to receive evidence or make any of these evidentiary findings. The more accurate way to describe the question presented to the PSC through the Motion is as follows: assuming every factual allegation in the Application (including all of the factual allegations in the pre-filed testimony) is true, does the Application *fail* to satisfy the statutory requirements of Sections 54-4-13.1 and 54-20-105(3)? This is precisely the sort of question that the Rule 12(b)(6)-type standard of review is designed to answer.

[47] *See* Opposition at pp. 10-11; Consolidated Order Denying Motions, *In the Matter of Investigation of the Costs and Benefits of PacifiCorp's Net Metering Program*, Docket No. 14-035-114 at p. 11 (Utah P.S.C. Feb. 23, 2017).
[48] Opposition at p. 14.

The case law to which DEU cites in support of its argument regarding "mixed questions of fact and law" does not alter OCS' formulation of the question presented.[49] Neither case involved a Rule 12(b)(6) motion where the factual allegations in the initial pleading are assumed to be true.[50] Here, for purposes of the Motion, the "factual" part of applying the facts to the statutory requirements to the "mix" comes from the assumption of the facts as alleged in the Application—including the pre-filed testimony.

Contrary to DEU's contention that "[t]he Motion routinely breaks down to disputed facts," by definition the Motion does not involve any disputed facts.[51] The PSC is to assume all of the allegations in the Application and pre-filed testimony as true. For example, DEU overstates its position with respect to whether the CHP Project involves "promoting sustainability through increasing the use of natural gas" as required under Section 54-4-13.1(3).[52] At no point in any of DEU's pre-filed testimony or the Application is there a reference to the CHP Project increasing natural gas usage. OCS' argument is based on the following assumed fact from Mr. Orton's pre-filed testimony: "the primary air quality gains would be achieved through the higher levels of efficiency of the new equipment. The CHP unit would replace

[49] *See* Opposition at p. 14, Footnote 72.
[50] *See id*.; *Town of Leeds v. Prisbrey*, 2008 UT 11, ¶ 5, 179 P.3d 757 (describing appellate court's review of findings of fact and conclusions of law after trial court conducted a TRO hearing and trial on the merits, not standard of review under Rule 12(b)(6)); *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, ¶ 29, 164 P.3d 384 (summarizing appropriate standard of review for appellate court review of administrative decision on the merits, not standard of review under Rule 12(b)(6)). Although not relevant here, OCS notes in passing that the *Martinez* decision was implicitly overruled by *Murray v. Utah Labor Comm'n*, 2013 UT 38, ¶¶ 36-38, 308 P.3d 461.
[51] *See* Opposition at pp. 14-15.
[52] *See id*.

several existing boilers and would operate at a higher level of efficiency. The CHP Unit would also produce electricity at an above-grid level of efficiency."[53]

The only pre-filed testimony remotely related to a potential increase in natural gas usage is the following sentence in Mr. Orton's testimony: "[a]dditional 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."[54] OCS accurately quoted this language in its Motion.[55] This is not a matter of "disputed facts," as DEU suggests. Indeed, for purposes of the Motion, and as OCS has repeatedly emphasized, the PSC is to assume this statement to be true. OCS' statutory argument, which it expressly raised in the Motion, is that even under these assumed facts, the proposed CHP Project falls outside the scope of Section 54-4-13.1.[56]

Similarly, DEU characterizes OCS' points about IIAC research and investigation as a factual dispute, when OCS' points assume the truth of the allegations in the Application and pre-filed testimony.[57] As described in the Motion, the PSC may assume that "if the Commission approves the CHP Project proposed here, then IIAC will work with the Customer to implement the project, including … conducting any additional research necessary for the project."[58] OCS' point is that, assuming the truth of the pre-filed testimony incorporated by reference in the Application, none of the funds for which DEU has sought approval for the CHP Project would be used to fund the IIAC's research and analysis of the CHP Project.[59] Rather, in light of Mr.

[53] Motion at p. 15, Footnote 28.
[54] *See id*. (quoting Orton Testimony at p. 3, lns. 47-53).
[55] *See id*.
[56] Motion at pp. 14-17.
[57] *See* Opposition at pp. 14-15.
[58] Motion at p. 20.
[59] Motion at p. 20.

Orton's pre-filed testimony, the PSC may assume that all work of the IIAC with respect to the CHP Project would be through the funds separately identified in Part III of the Application.[60]

Finally, in support of its argument that the Motion is based on disputed facts, DEU quotes the Motion as indicating OCS claims that the proposed IIAC funding "will not be tied to specific objectives … for which financial incentives are to be approved by the PSC."[61] While DEU may disagree with the legal argument presented by OCS, DEU is not correct when it contends that OCS' argument is based on disputed facts. DEU's use of the ellipsis omits the key point made by OCS in the Motion—that "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."[62] In support of its legal argument, OCS quotes to specific pre-filed testimony of Michael Orton which directly supports OCS' statement.[63] DEU contends that it has presented testimony "that contradicts this claim," but DEU has not attempted to explain how the portions of Mr. Orton's testimony to which OCS cites do not support OCS' position. Instead, in support of DEU's contention, DEU simply cites to Mr. Orton's testimony and Dr. Powell's testimony *in their entirety*.[64] It is ironic that in disputing OCS' legal argument that the

[60] *Id*; *see also* Orton Testimony at p. 11, lns. 236-239. This same analysis applies to DEU's argument that "the Office attempts to … characterize [the CHP Project and IIAC Program] as separate and distinct plans. Opposition at p. 15. DEU's argument does not address OCS' point—which is not a factual dispute—that DEU elected to structure Application as including two separate requests for approval, citing different statutory provisions for each and identifying different funding for each. Indeed, OCS' point is reinforced by the pre-filed testimony of Mr. Orton to which DEU cites in Footnote 75 of the Opposition regarding the "Natural Gas Air Quality Project" (*i.e.*, the CHP Project) and the proposed partnership with IIAC is described in separate parts, where the request for IIAC funding is also separated out.
[61] Opposition at p. 15.
[62] *Compare* Opposition at p. 15 *with* Motion at p. 31.
[63] Motion at p. 31, Footnote 67.
[64] Opposition at p. 15, Footnote 77.

proposed IIAC funding is not sufficiently specific, DEU has cited to the pre-filed testimony in a manner that also is not specific.

III. SUBSTANTIVE MATTERS

A. SUBSTANTIVE ARGUMENTS APPLICABLE TO BOTH IIAC PROGRAM AND CHP PROJECT

Because DEU's Opposition contends that *both* the IIAC Program and CHP Project qualify as "natural gas clean air programs" under Sections 54-4-13.1(3) and (4), this sub-part will focus on the substantive argument which applies equally to both—that Sections 54-4-13.1(3) and (4) are limited to the transportation sector.

1. Consequences of Sections 54-4-13.1(3) and (4) Being Limited to Transportation Sector

The key question for the PSC to determine is an issue of statutory interpretation, specifically whether Sections 54-4-13.1(3) and (4) should be read to be limited to the transportation sector. If, as OCS has argued, the better interpretation is that these sections are limited to the transportation sector, then there are certain necessary consequences that would follow.

First, the CHP Project, as a project that does not relate to the transportation sector, would not qualify as a "natural gas clean air program" under Sections 54-4-13.1(3) and (4).

Second, if the proposed "IIAC Program" includes projects which are not part of the transportation sector (which it does, including the CHP Project), then this would disqualify the IIAC Program from being eligible as a "natural gas clean air program" under Sections 54-4-13.1(3) and (4). This remains true under the assumption that "the plans [DEU] proposes under the IIAC program include initiatives that would use natural gas and RNG for transportation

projects, including to reduce vehicle emissions."[65] DEU is not correct when it suggests that having projects which "include" the transportation sector is *sufficient* for the IIAC Program to qualify under Sections 54-4-13.1(3) and (4).[66]

While it may be *necessary* that proposed initiatives under Sections 54-4-13.1(3) and (4) include transportation sector projects, this is not *sufficient* if the proposal includes other projects which fall outside the transportation sector.[67] First, given DEU's position in its Opposition that it is seeking approval of the CHP Project "as part of the IIAC Program," this would necessarily disqualify the IIAC Program under Sections 54-4-13.1(3) and (4).[68] Second, assuming the facts alleged in Mr. Orton's testimony as true, the proposed IIAC Program funding would not be limited to the transportation sector—the contemplated assessments in the manufacturing sector, institutional facilities, commercial buildings, landfill, food waste collection and processing facilities, and waste-water treatment facilities also would fall outside the transportation sector.[69] This would provide an independent basis for the PSC to disqualify the IIAC Program under Sections 54-4-13.1(3) and (4).

The final consequence OCS highlights relates to DEU's statement that "[Section] 54-20-105 references 'natural gas clean air programs' under [Section] 54-4-13.1 as approved to receive funding under [Section] 54-20-105(3)(d)."[70] While DEU is correct, that does not alter the proposition that *if* the proposed IIAC Program does not qualify as a "natural gas clean air

[65] *See* Opposition at p. 17.
[66] *See id*.
[67] For an example of the relationship between necessary and sufficient conditions in a different legal context, *see Hosking v. Chambers*, 2018 UT App 193, ¶ 31, 437 P.3d 454.
[68] *See* Opposition at p. 15.
[69] Orton Testimony at p. 7, lns. 146-161, and p. 8, lns. 162-172.
[70] Opposition at p. 15.

program" under Sections 54-4-13.1(3) and (4) because it is not limited to the transportation sector, *then* the proposed IIAC Program cannot receive funding as a "natural gas clean air program" under Section 54-20-105(3)(d).

2. As a Matter of Statutory Interpretation, Section 54-4-13.1(4) Unambiguously Limits "Natural Gas Clean Air Programs" to the Transportation Sector.

DEU contends that "[t]he only plausible reading [of Section 54-4-13.1] is that subsections (3) through (8) apply to sectors that include, but go beyond, the transportation sector."[71] However, DEU's proposed interpretation of Sections 54-4-13.1(3) and (4) does not provide a better explanation for why the Legislature used the words "as pertaining to the transportation sector" in the statute than OCS' proposed interpretation.

DEU first argues that "none of the elements [in Section 54-4-13.1(4)] that define a 'natural gas clean air program' include 'transport,' 'transportation,' or any hint that the legislature intended to limit clean air programs to that sector."[72] This argument is nearly identical to the argument the Utah Supreme Court addressed in *Utah Office of Consumer Servs. v. Pub. Serv. Comm'n of Utah*, 2019 UT 26, ¶ 30, 445 P.3d 464. In *Utah Office of Consumer Servs.*, the court emphasized that because the subsections in a statute were "interrelated" and "interconnected," "[t]he absence of an express reference to a general rate case in subsection (4)(a)(ii) is accordingly inconsequential." *Id*. at ¶¶ 32-34. The PSC should apply this reasoning to the present case to reject DEU's argument on the same basis.

What DEU's proposed interpretation of Sections 54-4-13.1 does not adequately account for is the opening clauses of Subsection (4) preceding the elements in (a) through (c). The

[71] Opposition at p. 26.
[72] Objection at pp. 26-27.

opening clauses of Subsection (4) makes clear that the definition of "natural gas clean air program" is "for purposes of this section, and as pertaining to the transportation sector." The phrase "for purposes of this section" means that the definition applies to the phrase as it is used in Section 54-4-13.1. By including the language "and as pertaining to the transportation sector" immediately after this phrase, the better way of reading the statute is that the definition applies—*i.e.*, "pertains to"—the transportation sector. OCS respectfully disagrees with DEU's proposed interpretation that the phrase "transportation sector" is a "conspicuous omission" from the elements in (a) through (c).[73] To the contrary, by including the language "and as pertaining to the transportation sector" preceding the colon describing the three elements in (a) through (c), OCS submits that the better, more reasonable interpretation is that "transportation sector" applies to and modifies the meaning of each of those three elements.

DEU contends that "if … the entire section concerned only the transportation sector, … then there would be no need to include the independent clause (which is set off by commas): '***and*** as pertaining to the transportation sector.'"[74] As such, DEU reasons, "the only plausible interpretation is that the phrase 'and 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."[75] Significantly, however, Section 54-4-13.1 is the only provision of the Utah Code which uses the phrase "transportation sector." Similarly, Section 54-4-13.1 and the STEP Act are the only provisions of the Utah Code which use the phrase "natural gas clean air program." As such, the Legislature would have no reason to state that the definition of "natural gas clean air program"

[73] *See* Objection at pp. 26-27.
[74] Objection at p. 27 (emphasis original).
[75] *Id.*

also "appl[lies] … to the transportation sector more generally," as DEU suggests.[76] As such, DEU's proposed reading would render the reference to the transportation sector in Section 54-4-13.1 essentially "inoperative or superfluous, void or insignificant," which is not in keeping with principles of statutory construction. *See Rapela v. Green*, 2012 UT 57, ¶ 19, 289 P.3d 428.

OCS submits that if the words "and as pertaining to the transportation sector" were not included in Section 54-4-13.1, then "natural gas clean air programs" likely would have the broad, non-sector specific meaning for which DEU contends. As such, under DEU's proposed reading the phrase "and as pertaining to the transportation sector" would *not* broaden the meaning as DEU suggests—it would be superfluous language.[77] The PSC should decline to adopt this reading, which would not be in accordance with the presumption against surplusage. *See Hertzske v. Snyder*, 2017 UT 4, ¶ 14, 390 P.3d 307 (explaining that "[t]he presumption against surplusage requires that we avoid interpreting one section of the Utah Code in a way that would render other sections unnecessary").

OCS agrees with DEU that "the inclusion of the introductory phrase [in Subsection (4)] does not render [Section] 54-4-13.1 ambiguous."[78] However, OCS notes that it is only when the PSC concludes a provision is ambiguous that it would then seek guidance from the legislative history and relevant policy considerations. *See World Peace Movement of Am.*, 879 P.2d 253, 259 (Utah 1994). Here, OCS submits that the language of Sections 54-4-13.1(3) and (4)—particularly when read in the context of the Section 54-4-13.1 as a whole—unambiguously limits "natural gas clean air programs" to "the transportation sector." Accordingly, while DEU has

[76] *See* Objection at p. 27.
[77] *See id*.
[78] Objection at p. 27.

submitted a copy of HB 107 with its Opposition, the PSC need not consider it when applying the plain meaning of an unambiguous statute. Moreover, even if the PSC were to conclude that Section 54-4-13.1 is ambiguous such that the consideration of legislative history would be appropriate, OCS submits that a review of the legislative record would not be illuminating on this particular issue.[79]

It appears that the only legislative history to which DEU cites is that HB 107 amended the title of Section 54-4-13.1 to add the words "natural gas clean air programs."[80] DEU's point is well-taken—and OCS stands corrected—that Utah case law stands for the general proposition that captions of the statute are "not part of the statute's text" and should only be consulted in the case of ambiguous statutory language, which is not the case here.[81] Nevertheless, OCS' point applies with equal force even if the PSC disregards the caption of Section 54-4-13.1. Subsections (1) and (2) of Section 54-4-13.1 are provisions specific to natural gas vehicles. Particularly given the reference to the "transportation sector" in Subsection (4)—as applicable to the other subsections of Section 54-4-13.1—it is reasonable to read Subsections (3) and (4) as also relating to natural gas vehicles in the transportation sector.

This reading is further reinforced by Section 54-4-13.1(8)'s carve-out for natural gas fueling stations in Section 54-4-13.4. This express carve-out should be interpreted to mean that natural gas fueling stations and appurtenant facilities—*i.e.*, facilities which support natural gas as an alternative fuel—would otherwise fall within the scope of Sections 54-4-13.1(3) and (4). This

[79] *See* H.B. 107 (2019), *available at* https://le.utah.gov/~2019/bills/static/HB0107.html, including bill text and hearings/debates, none of which discuss the transportation sector issue.
[80] Objection at pp. 27-28.
[81] Objection at pp. 27-28 (citing *Funk v. Utah State Tax Comm'n*, 839 P.2d 818, 820 (Utah 1992),

supports a statutory interpretation that Section 54-4-13.1(3) is designed to support the adoption and proliferation of natural gas *vehicles* and related transportation sector matters not covered by Utah Code Ann. § 54-4-13.4. Section 54-4-13.4, on the other hand, is designed to support the fueling stations and related *infrastructure* needed to support the use of natural gas as an alternative fuel.

Under DEU's proposed interpretation, Subsections (3) through (8) of Section 54-4-13.1 would have *no relationship* to subsections (1) through (2). Such a reading does not provide a reasonable explanation for why the Legislature would have decided to locate Subsections (3) through (8) in Section 54-4-13.1. Accordingly, the PSC should conclude that as a matter of statutory interpretation, Section 54-4-13.1(4) unambiguously limits "natural gas clean air programs" to the transportation sector. As noted above, regardless of whether the IIAC Program includes some transportation sector assessments, so long as the IIAC Program includes projects outside the transportation sector (as it does), this would disqualify both the IIAC Program and the CHP Project from qualifying as a "natural gas clean air program" under Sections 54-4-13.1(3) and (4).

B. PROPOSED IIAC FUNDING UNDER STEP ACT

1. Notwithstanding DEU's Opposition, OCS' Arguments Regarding "Research and Development of Other Efficiency Technologies" Stand.

OCS agrees with DEU's observation that the STEP Act does not define "research and development," such that the PSC is tasked with interpreting the language based on its ordinary meaning.[82] Where OCS respectfully disagrees with DEU's approach, however, is its citation to

[82] Opposition at p. 22.

dictionary definitions for the word "research" and separate dictionary definitions for the word "development."[83] The reason OCS disagrees with this approach is that "a reasonable person familiar with the usage and context" of the phrase "research and development" would understand that this phrase—represented in short-hand by the abbreviation "R&D"—has a specific connotation in the English language which makes it function more like a single word. *See Olsen v. Eagle Mountain City*, 2011 UT 10, ¶ 9. This point is reinforced using the same dictionaries to which DEU cites:

- Dictionary.com.[84] "research and development" (noun) - the part of a commercial company's activity concerned with applying the results of scientific research to develop new products and improve existing ones. Abbreviation: R&D

- merriam-webster.com.[85] Definition of "research and development": studies and tests that are done in order to design new or improved products. *The company has a large budget for research and development.*

OCS submits that these dictionary definitions better capture the ordinary meaning of the phrase "research and development" than the separate definitions for each word as proposed by DEU.[86] Moreover, these definitions are consistent with and reinforce the proposed interpretation OCS has set forth in the Motion.[87]

DEU mischaracterizes OCS' citation to the Utah Code's definition of "research and development" in the context of revenue and taxation.[88] OCS' point is not that the PSC is bound to apply definitions from other parts of the Utah Code, but that how the phrase "research and

[83] *See id*.
[84] *Available at* https://www.dictionary.com/browse/research-and-development.
[85] *Available at* https://www.merriam-webster.com/dictionary/research%20and%20development.
[86] *See* Opposition at p. 22.
[87] *See* Motion at pp. 32-33.
[88] *See* Opposition at p. 23.

development" is defined elsewhere in the Utah Code—particularly when it is not defined in the STEP Act—would inform how a reasonable person would understand the phrase's statutory meaning.[89] This position is reinforced by the dictionary definitions of the phrase "research and development" closely aligning with the statutory definition OCS cites in the Motion.[90]

DEU contends that even if the PSC were to consider the definition of "research and development" in Section 59-5-101(2) as persuasive authority, that the proposed IIAC Program would fall within the definition because it would involve "'inquiry' into or 'experimentation aimed at the discovery of facts, devices … or applications' of efficiency technologies."[91] OCS disagrees with DEU's interpretive argument because it conflates two different meanings of the word "application" in a way that is (1) not consistent with the grammatical structure of the definition and (2) causes its formulation to fall outside the scope of the ordinary meaning of "research and development" described above. The definition in Section 59-5-101(2)—which is consistent with the ordinary meaning of "R&D"—is aimed at the discovery of "applications" which are *things*, in the way that software application programs are things. In contrast, DEU's reformulation to "'applications' … of efficiency technologies" shifts the use of the word "application" into one of deployment—of putting something else into use—rather than conducting R&D of other efficiency technologies. As stated in the Motion, OCS believes that such an interpretation does not best reflect the ordinary meaning of "research and development" as it should be construed in Section 54-20-105(4)(a)(ii).[92]

[89] *See generally* Motion at pp. 28-29.
[90] *Compare* Motion at pp. 32-33 *with* Footnotes 84-85 above.
[91] Opposition at p. 23.
[92] Motion at pp. 32-33.

Finally, DEU argues as follows:

> [T]he IIAC Program consists of more than conducting commercial energy assessments and 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 the Application, supporting testimony, and technical conference materials.[93]

To support the factual summary in this paragraph, DEU includes Footnote 111.[94] OCS submits that if the PSC goes through each cited line of this pre-filed testimony, OCS' summary of how the proposed IIAC funding will be used is accurate—and does not constitute "research and development of other efficiency technologies" within the meaning of Section 54-20-105(4)(a)(ii).[95]

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[93] Opposition at pp. 23-24. For the reasons stated above, the PSC should not consider the technical conference materials as they are extrinsic evidence, which would convert the Motion to one for summary judgment. In any event, even if the PSC were to consider the technical conference materials, it is significant that DEU does not cite to any particular page or statement from these materials—it simply cites to a 51-page T/C PowerPoint in its entirety.

[94] *See id*.

[95] *See* Opposition at p. 24, Footnote 111. Each of DEU's citations to pre-filed testimony is addressed in turn:

- Application at pp. 3-8: These portions of the Application support OCS' position that it is accurate to summarize the proposed IIAC funding as involving the assessment and implementation of energy efficiency projects.
- Application at ¶¶ 4-5: These paragraphs describe the IIAC as "provid[ing] investigation and analysis for potential efficiency and clean air projects and, with the funding proposed here, … provid[ing] assistance in implementing projects that receive [PSC] approval." These paragraphs reinforce OCS' description of how the proposed IIAC funding is to be used based on the factual allegations assumed to be true for purposes of the Motion.
- Orton Direct at 7:157-8:165: This testimony relates to "financial incentives for future Natural Gas Air Quality projects involving RNG"—this is entirely consistent with IIAC's "assess and implement energy efficiency project" model—it does not involve R&D of other efficiency technologies for the same reason that the CHP Project does not.
- Orton Direct at 9:196-206: This testimony explains that assessments would include economics and environmental benefits. It also discusses how IIAC would play a role in implementing projects, and "research and documentation of each Commission-approved project," including analyzing how to make projects more efficient and cost effective and doing case studies of the projects "to promote the technology and potential for RNG." This

2. DEU Continues to Propose that the PSC Authorize Ratepayer Charges of Administrative Costs for Projects Before the PSC Determines Such Projects are in the Public Interest.

DEU claims that OCS "contradicts its 'research and development' argument" by arguing that "the IIAC Program does not seek to fund … 'any other technology program' under [Section] 54-20-105(3)(a)(vii), but rather seeks to fund 'the *development* of a technology program.'"[96] DEU's argument, however, is based on the incorrect assumption that "research and development of other efficiency technologies" has the same meaning as "development of a technology program"—it does not. As described above, R&D of efficiency technologies has an ordinary meaning which is narrower in scope.

DEU characterizes OCS as arguing that it would not be proper under Section 54-20-105(3)(a)(vii) "to fund the administrative costs of a program that identifies projects to implement natural gas technologies under [Section] 54-20-105(3)(c)."[97] OCS' position is different than that. OCS understands that administrative costs are part of all programs. Rather, OCS' point is that

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again is entirely consistent with how OCS has summarized the proposed use of the IIAC funding. The research is focused on deployment of technologies at projects, not "research and development of other energy efficiency technologies" themselves.

- Orton Direct at 10:226-229: "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." This also is consistent with OCS' summary and falls outside the scope of the ordinary meaning of "research and development of other efficiency technologies."
- Powell Direct at 3:55-4:60 and 4:67-74. This is testimony about the analysis to evaluate the CHP Project, including air quality benefits and the need for a financial incentive. It does not involve R&D of other efficiency technologies.
- Powell Direct at 7:133-142 and 8:151-156: This testimony relates to research on each project, project case studies, and related matters which do not constitute R&D of other efficiency technologies.

[96] Opposition at p. 24 (emphasis original).

[97] Opposition at p. 24.

under the STEP Act, the PSC may only authorize the large-scale natural gas utility to allocate STEP Act funds—including STEP funds for project administrative costs—*after* the PSC has "determin[ed] whether a project is in the public interest" under Section 54-20-105(3)(a).[98]

This would not be an issue if the sole focus of DEU's proposal for IIAC funding was "to conduct assessments to determine where natural gas technologies can best be employed, and then to monitor the use of those technologies after implementation."[99] While this is part of DEU's proposal, it does not encompass what DEU has presented to the PSC. The central feature of the Application (including all pre-filed testimony) is that STEP Act funds "will be used to analyze projects for advancement under HB 107," including by "provid[ing] evidence" necessary for the PSC to determine whether such projects are in the public interest.[100]

DEU contends that it would not be a correct interpretation of the STEP Act if "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."[101] OCS submits, however, that this is *exactly* what the STEP Act requires: the utility proposes a project to the PSC, the PSC determines whether the project satisfies the STEP Act, and only then—*i.e.*, "[u]pon commission approval"—may the utility charge ratepayers for the project, including administrative costs associated with the project.[102]

[98] Motion at pp. 33-35.
[99] *See* Opposition at p. 24.
[100] *See* Application at ¶ 14.
[101] Opposition at p. 25.
[102] *See* Section 54-20-105(3)(d).

DEU suggests that having to obtain PSC approval before using STEP Act funds for projects would not sufficiently "incentivize" utilities to pursue programs under the STEP Act.[103] But OCS submits that allocating up to $10,000,000 annually for specific sustainable transportation and energy plans for a program period of up to five years without requiring the utility to demonstrate the plan is cost-effective is sufficient incentive.[104] If DEU takes issue with this statutory requirement, this is a matter for DEU to be take up with the Legislature.

3. The PSC Should Decline DEU's Invitation to Read "Specific" Out of Section 54-20-105(3)(d).

In support of its argument that the "IIAC program is a 'specific' plan under [Section] 54-20-105(3)," DEU contends that OCS mischaracterizes the proposed IIAC funding as "merely 'analyzing projects for advancement under HB 107.'"[105] OCS' statement, however, is a direct quote from a sentence in Paragraph 14 of the Application: "[t]he IIAC funding will be used to analyze projects for advancement under HB 107, [sic] the IIAC provides significant benefit."[106]

DEU states that "[a]ccording 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, and also satisfy the particularity requirements of Utah R. Civ. P. 9(c)."[107] To make this point, DEU turns OCS' legal argument into something it is not. OCS' point in the Motion is straightforward—"the use of the term 'specific' throughout the Utah Code informs how a reasonable person would understand the term's statutory meaning."[108] Of course,

[103] Opposition at p. 25.
[104] *See* Sections 54-20-102(2)-(3), -105(3), and -105(5).
[105] Opposition at p. 18.
[106] Motion at p. 29; Application at ¶ 14.
[107] Opposition at p. 18.
[108] *See* Motion at p. 28.

in referring generally to examples of how the word "specific" is used in other provisions, OCS does not contend such provisions apply to the STEP Act.[109] Rather, OCS is providing statutory examples of the *ordinary meaning* of a word. This point also applies *by analogy* to how courts have interpreted the requirement of specificity in other procedural contexts, even when such contexts involve rules which obviously are not to be applied by the PSC here.[110]

As DEU correctly points out, the word "specific" is not defined in the STEP Act.[111] But OCS submits that this does not carry the amount of significance that DEU ascribes to it. The word "specific" is not the sort of term which would be customarily defined in legislation—it falls into the category of "common, daily, nontechnical speech."[112] This does not render the term without meaning—it is a word which must be read "in light of its linguistic, structural, and statutory context, … construed in accordance with the ordinary meaning such words have to a reasonable person familiar with the usage and context of the language in question."[113]

It is appropriate for DEU to cite to dictionaries to expound upon the ordinary meaning of the word "specific."[114] But it is a reasonable person reading the definition in a dictionary—and not the dictionary itself—who understands ordinary meaning of the word in a particular context. In other words, listing definitions from a dictionary does not provide an authoritative answer on the ordinary meaning of a word as it is used in practice.

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[109] *See id.*
[110] *See* Motion at p. 29.
[111] Opposition at p. 18.
[112] *See* Motion at p. 11; *Olsen*, 2011 UT 10 at ¶ 9.
[113] *See* Motion at p. 11; *Olsen*, 2011 UT 10 at ¶ 9.
[114] Opposition at p. 20.

In any event, the dictionary definitions to which DEU cites do not stand in stark contrast to the ordinary meaning of the word "specific" as illuminated in the Utah Code and case law applying the concept of specificity. While DEU cites to Dictionary.com and Merriam-Webster Online to list an array of different definitions in no particular order, DEU does not quote definitions from these dictionaries which support OCS' "unpacking" of the term as set forth in the Motion:

- Dictionary.com: "… explicit, definite; … precise or particular"[115]; and
- merriam-webster.com: "restricted to a particular individual, situation, relation, or effect (*a disease specific to horses*) [;] … free from ambiguity: ACCURATE (*a specific statement of faith*)."[116]

Moreover, two of the definitions which DEU quotes—"constituting or falling into a specifiable category" and "sharing or being those properties of something that allow it to be referred to a particular category"—reinforce OCS' position.[117]

As set forth in the Motion, OCS' concern is that the proposal to fund the IIAC does *not*: (i) "define the geographic area that would be covered by the proposed funding of the IIAC;" (ii) "specify the *types* of projects which would be the focus of the IIAC work," instead referring "to projects in general, non-specific terms;" (iii) "specify the criteria by which the IIAC would 'evaluate other projects' as 'suitable candidates for future applications;" (iv) focus "on any particular technology;" or (v) tie "the proposed funding of the IIAC's additional assessments [to] specific objectives regarding the type or number of projects for which financial incentives are to

[115] *Available at* https://www.dictionary.com/browse/specific.
[116] *Available at* https://www.merriam-webster.com/dictionary/specific.
[117] *See* Opposition at p. 20.

be approved by the PSC."[118] In other words, with respect to each of these factors, the proposed IIAC funding cannot be placed into particular categories. Rather, Michael Orton's pre-filed testimony (assumed as true for purposes of the Motion) is "broad, open-ended, and not focused on specific sectors or technologies"—it defies such categorization.[119] This is why DEU's Application "does not provide the PSC with sufficient information to evaluate the proposed IIAC funding under the 'public interest' factors set forth in Section 54-20-105(3)(c)."[120]

DEU contends that "while [Section] 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.'"[121] While it is true that the STEP Act does not define the term "specific," that does not render the term without meaning. Contrary to DEU's assertion that the use of the term "specific" does not "impose any specificity requirement," OCS submits that this is *precisely* what the use of the adjective "specific" in front of the defined term "sustainable transportation and energy plan" does—STEP Act funds may only be allocated to a "specific … plan."[122]

OCS agrees that under the STEP Act, the Legislature has tasked the PSC with determining whether to authorize a large-scale natural gas utility to allocate funding to a proposed "sustainable transportation and energy plan."[123] OCS further agrees that the PSC must make findings of fact and conclusions of law that the proposal (1) provides for the investigation, analysis and implementation the innovative technology programs described in Section 54-20-

[118] *See* Motion at pp. 29-32.
[119] Motion at pp. 31-32.
[120] Motion at p. 32.
[121] Opposition at pp. 18-19.
[122] *See* Opposition at pp. 18-19; Section 54-20-105(3)(d).
[123] *See* Opposition at pp. 18-19; Section 54-20-105(3).

105(a)(i) through (vii) and (2) is in the public interest.[124] OCS also agrees that when "determining whether a project is in the public interest," the STEP Act requires the PSC to consider the factors set forth in Section 54-20-105(3)(c).[125]

Where OCS respectfully takes issue with DEU's position, however, is when DEU argues that "[b]eyond the Commission's assessment under [the public interest factors set forth in Section 54-20-105(3)(c)], the statute does not require [sic] an further information for a plan to be a 'specific sustainable transportation and energy plan.'"[126] DEU's proposed reading of the STEP Act would read the word "specific" out of Section 54-20-105(3)(d), which would not be in keeping with the presumption against surplusage.[127] *See Hertzske v. Snyder*, 2017 UT 4 at ¶ 14.

In short, OCS disagrees with DEU's contention that OCS' proposed interpretation "would require the Commission to read into the statute requirements beyond those imposed by the legislature."[128] Rather, OCS submits that its proposed interpretation better accounts for the Legislature's decision to place the adjective "specific" in front of "sustainable transportation and energy plan" in Section 54-20-105(3)(d), rather than to use no adjective at all.

C. CHP PROJECT

1. CHP Project Under Section 54-4-13.1

As described above, the CHP Project does not qualify as a "natural gas clean air program" under Sections 54-4-13.1(3) and (4) because it does not involve the transportation sector. Even if Sections 54-4-13.1(3) and (4) were not expressly limited to the transportation

[124] *Id.*
[125] *See* Opposition at p. 19; Section 54-20-105(3).
[126] *See* Opposition at p. 19.
[127] *See* Opposition at pp. 18-19; Section 54-20-105(3).
[128] *See id.*

sector (which they are), there are independent grounds to disqualify the CHP Project under Sections 54-4-13.1.

a. *Assuming the Factual Allegations in the Application—Including Pre-Filed Testimony—As True, the CHP Project is a Boiler Efficiency Project, Not One to Increase the Use of Natural Gas.*

With respect to the language in Section 54-4-13.1(3) regarding "natural gas clean air programs that promote sustainability through increasing the use of natural gas," the issue the Motion presents to the PSC is straightforward. Based on the factual allegations in the Application, the PSC is to assume the following facts are true:

1. "The primary air quality gains [of the CHP Project] would be achieved through the higher levels of efficiency of the new equipment. The CHP unit would replace several existing [natural gas] boilers and would operate at a higher level of efficiency. The CHP Unit would also produce electricity at an above-grid level of efficiency. The result of more efficient equipment is less energy required to complete the same manufacturing process, while resulting in fewer generation of or combustion of byproducts."[129]

2. "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. Because the electricity is produced on site it would also increase efficiency by eliminating line loss costs."[130]

The factual statements in (1) are referred to below as the "Efficient Natural Gas Equipment Facts," and the factual statements in (2) are referred to as the "Displacing Grid Electricity Facts." The question presented is whether, under these assumed facts, the

[129] Orton Testimony at p. 2, lns. 30-46, p. 3, lns. 47-48.
[130] Orton Testimony at p. 3, lns. 49-52. Contrary to DEU's characterization, it is not apparent to OCS that the "Displacing Grid Electricity Facts" constitute "testimony in which [Mr. Orton] states that the CHP Project *will* increase the use of natural gas." *See* Opposition at p. 29.

proposed CHP Project "promotes sustainability through increasing the use of natural gas" under Section 54-4-13.1(3).

DEU argues that the Displacing Grid Electricity Facts are sufficient to put the CHP Project within the scope of Section 54-4-13.1(3) because "Section 54-4-13.1 contains no requirement that an 'increase' in natural gas consumption must be 'closely attenuated' to alternative transportation fuel."[131]

Conversely, it is OCS' position—based on assumed facts, not "misstating the facts" as DEU suggests— that as a matter of statutory interpretation, because the benefits associated with the Efficient Natural Gas Equipment Facts *significantly predominate* over the Displacing Grid Electricity Facts, the CHP Project falls outside the scope of Section 54-4-13.1(3). As set forth in the Motion, the legal arguments in support of OCS' position are that (i) "the CHP Project's method of producing air quality benefits is not to reduce emissions by <u>directly</u> substituting low-carbon natural gas for conventional fuels" and (ii) "[w]hile [the Displacing Grid Electricity Facts] 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."[132]

In ruling on this question of statutory interpretation, the PSC should not consider as evidence matters which may have been represented by IIAC during the technical conference.[133] Moreover, even if the PSC were to consider the T/C PowerPoint

[131] Opposition at p. 29.
[132] Motion at p. 15.
[133] *See* Opposition at p. 29; Motion at p. 15, Footnote 28 (indicating that "[b]ased 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

submitted by DEU with its Opposition (which it should not), OCS submits that such materials serve only to reinforce OCS' position.[134]

b. *The Program/Project Relation is Reasonable, and DEU's Opposition Reinforces the Dependence of the $13.5 Million CHP Project Upon the PSC's Separate Approval of $2.4 Million for the IIAC.*

DEU attempts to reduce OCS' point to the following argument: "[t]he Office argues that the CHP Project … is [outside the scope] of [Section] 54-4-13.1 because Dominion Energy called the activity the 'CHP Project' in the Application rather than the 'CHP Program.'"[135] OCS' position, however, is based on *substance* and not merely *form*. OCS' arguments raised through the Motion apply with equal force no matter what DEU called the CHP Project in the Application. OCS' point is that the CHP Project as proposed does not have any programmatic qualities.[136] All of those qualities would be supplied, if at all, through DEU's separate request for IIAC funding.[137]

DEU contends that since Section 54-1-13.1(4)(a) includes "an ***incentive or*** program to support the use of natural gas," "this should end the inquiry" because "the CHP Project is an incentive to support the use of natural gas."[138] DEU's point does not address Section 54-4-13.1(4)(b)—an additional subsection under which DEU seeks approval through the

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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 in this sub-part" based on the Efficient Natural Gas Equipment Facts.

[134] *See* T/C PowerPoint at p. 3 (noting that Section 54-4-13.1(4) applies to "Natural Gas Clean Air Programs in the Transportation Sector"); T/C PowerPoint at pp. 26, 34, 39, 41, and 42 (emphasizing improved efficiency by reducing the total units of fuel used).

[135] Opposition at p. 30 (emphasis added).

[136] Motion at. p. 19.

[137] Motion at p. 20.

[138] Opposition at p. 30.

Application—which, unlike subsection (a), does not include the phrase "incentive or program."[139] This is why the focus of OCS' argument is that "the CHP Project does not constitute 'a program to improve air quality' within the scope of Section 54-4-13.1(4)(b)."[140]

DEU did more than merely "define the CHP-related activities collectively as the 'CHP Project' "for ease of reference in the Application and testimony."[141] DEU separately requested $13.5 million (or a lesser confidential percentage of total project cost) to "provide[] an incentive to one of the Company's industrial customers … to replace its existing natural gas boiler with a combined heat and power unit before the end of the useful life of the boiler (the CHP Project)."[142]

DEU now focuses on "the CHP Project's role in an overarching *program* in conjunction with the IIAC."[143] DEU's own formulations confirm the reasonableness of the project/program relation as set forth in the Motion.[144] As OCS emphasizes, however, based on the pre-filed testimony, "none of the 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."[145] One of OCS' substantive

[139] *Compare id*. with Application at ¶ 8.
[140] *See id*.; Section 54-4-13.1(4)(b); Motion at p. 20. In any event, as stated in the Motion, "[e]ven if the CHP Project were characterized as an 'incentive' under Section 54-4-13.1(4)(a), … the CHP 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)."
[141] Opposition at p. 30.
[142] Application at ¶¶ 8 and 11.
[143] Opposition at p. 30 (emphasis original).
[144] *See id*.; Motion at pp. 17-21.
[145] Motion at p. 20.

concerns is that the CHP Project—as a standalone project without programmatic qualities—cannot be separately approved as a "program."[146]

2. CHP Project Under Section 54-20-105(3)

a. *The STEP Act May Reasonably Be Read Consistently with the Project/Program Relation, Which Reinforces the Intuitive Notion that a Standalone Project Does Not by Itself Constitute a "Program."*

Notwithstanding the reasonableness of the project/program relation as reflected in DEU's use of the terms in its Opposition, DEU argues "there is no real difference between the terms 'program' and 'project' under the STEP Act."[147] In support of this position, DEU suggests that by considering the meaning of these terms and how they relate to one another, OCS argues "that semantics should control" rather than "the substance and impact of proposed activities."[148]

In so doing, DEU draws a dichotomy which incorrectly assumes that treating the terms "program" and "project" as having distinct but related meanings would have no substantive impact on activities proposed under the STEP Act—it would.[149] To obtain authorization to charge ratepayers under Section 54-20-105(3)(d), it is not unreasonable to read the STEP Act to require a large-scale natural gas utility to present projects which have the management, coordination, planning, and objectives of an overarching program.[150] Contrary to DEU's suggestion, such a reading would not make it so that "almost no program or project could obtain approval" or lead to "absurd consequences."[151] Even in the context of a "magic-bullet-type"

[146] Motion at pp. 17-21.
[147] Opposition at pp. 30-31.
[148] Opposition at p. 32.
[149] *See id*.
[150] *See* Motion at pp. 17-24.
[151] *See* Opposition at pp. 3 and 32.

project, it would be rational for the Legislature to expect and require such programmatic characteristics.[152]

DEU contends that using the terms "'program' and 'project' interchangeably … is the only interpretation that gives effect to all provisions as required by the rules of statutory construction."[153] DEU's principal reason for this is the use of the term "project" in Sections 54-20-105(3)(c) and (e). But because programs are necessarily comprised of projects,[154] DEU is not correct when it contends OCS' proposed reading would somehow permit programs to be approved "without satisfying the public interest factors set forth in Section 54-20-105(3)(c)" or only require an "energy balancing account for RNG projects."[155]

To be sure, OCS acknowledges that the terms "program" and "project" may sometimes be conflated (including in the PSC's own dockets).[156] But this is not a reason to abandon how the terms ordinarily relate to one another as reflected in other parts of the Utah Code, DEU's own filings, and in common language.[157] This is particularly so when, contrary to DEU's suggestions, the proposed interpretation leads to the intuitive conclusion that projects should have the safeguards of an overarching program. In contrast, DEU's proposed interpretation would lead to the counterintuitive result that the CHP Project—which, by itself, amounts to an

[152] *See* Opposition at p. 32.
[153] Opposition at p. 35.
[154] *See* Motion at pp. 17-21 and 23. DEU takes issue with this concept based on various dictionary definitions and the lack of definition of the terms in the STEP Act. *See* Opposition at pp. 34-35. DEU's stated position, however, is in tension with its emphasis of the CHP Project "as part of the IIAC Program" throughout its Opposition. *See, e.g.*, Opposition at pp. 15, 30-31. Moreover, to the extent PSC considers it, OCS' position is consistent with how DEU uses the terms "program" and "project" throughout the T/C PowerPoint. *See* T/C PowerPoint at pp. 8 and 14-34.
[155] *See* Opposition at pp. 34-35.
[156] *See* Motion at pp. 17-19.
[157] *See* Motion at pp. 17-19 and 22-23; Opposition at pp. 15 and 30-31 and, to the extent the PSC considers it, T/C PowerPoint at pp. 8 and 14-34.

one-time equipment update at a single customer and does not include any of the IIAC services for which DEU has sought separate funding—either constitutes a "program…for the development of communities" under Section 54-20-105(3)(a)(vii) or a "technology program" within the meaning of Section 54-20-105(3)(a)(vii). On this issue, OCS believes that its proposed interpretation "best fits, even if the fit is not perfect."[158]

Through its Opposition, however, DEU now makes clear that the $13.5 million CHP Project is dependent upon PSC's approval of DEU's separate request for $2.4 million for the IIAC.[159] As described above, the problem is that DEU's proposed uses for the IIAC funding (i) do not constitute a "specific … plan" under Section 54-20-105(3)(d), (ii) do not involve the "research and development of other efficiency technologies" under Section 54-20-105(3)(a)(ii), and (iii) would improperly charge ratepayers administrative costs for projects before such projects are determined to be in the public interest as required by the STEP Act. Given the co-dependence of the CHP Project upon the proposed IIAC funding, these same problems also would disqualify the CHP Project under the STEP Act.

b. *DEU's Argument Regarding "Investigation, Analysis, and Implementation" Reinforces the Dependence of the CHP Project Upon the PSC's Separate Approval of IIAC Funding.*

DEU is not correct when it states that "[t]he Office concedes the Company's testimony states that a detailed investigation and analysis would be part of the CHP Project if it is approved."[160] DEU's argument fails to address a fundamental concern raised by OCS

[158] Motion at p. 19, Footnote 34.
[159] *See, e.g.*, Opposition at pp. 15, 30-31 and 36-37.
[160] *See* Opposition at p. 36. As noted above, DEU is not accurate when it describes any facts OCS assume to be true for purposes of the Motion as a concession by OCS.

throughout the Motion—that assuming the pre-filed testimony is true, none of the IIAC's proposed work, including its work related to the CHP Project described by Dr. Powell and Mr. Orton, can reasonably be considered part of the CHP Project.[161] DEU's multiple quotations to Dr. Powell and Dr. Orton's pre-filed testimony serve only to reinforce the dependence of the CHP Project upon DEU's separate request for IIAC funding.[162] What becomes clear from DEU's Opposition is that the CHP Project is dependent upon PSC's approval of DEU's separate request for $2.4 million for the IIAC—they sink or swim together.

Similarly, DEU is not accurate when it suggests that OCS' argument "give[s] no consideration to the Company's testimony."[163] First, the concern OCS raises in the paragraph immediately above is based on the assumption that Mr. Orton's pre-filed testimony is true.[164] Second, and independent of whether the proposed IIAC services related to the CHP Project are to be separately funded, OCS' *statutory* argument assumes as true all of the testimony to which DEU cites.[165] As stated in the Motion, "[s]ubject to the 'final numbers' that come with 'a detailed project bid and analysis' referred to in Dr. Powell's pre-filed testimony, the primary investigation and analysis—to identify the CHP Project "as a high-impact energy efficiency project'—has been funded and completed already."[166]

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[161] *See* Motion at pp. 20 and 25.
[162] *See* Opposition at pp. 36-37.
[163] *See* Opposition at p. 37.
[164] *See* Motion at p. 20 (citing Orton Testimony, p. 10, lns. 208-229 and p. 11, lns. 230-233); *see also* Orton Testimony, p. 11, lns. 236-239 (stating that "the Company is proposing to partner with and seek funds for the IIAC to perform the essential function of '…investigation, analysis, and implementation' related to Natural Gas Clean Air projects").
[165] *See* Motion at pp. 20 and 24-25.
[166] Motion at p. 25 (emphasis added).

c. *DEU's Proposed Interpretation Would Read "Development of Communities" Out of Section 54-20-105(3)(a)(iv).*

DEU contends that the installation of a CHP Unit at a single manufacturing customer—without more—constitutes a "program … for the development of communities that can reduce greenhouse gases and NOx emissions" within the meaning of Section 54-20-105(3)(a)(iv).[167] The PSC should decline DEU's invitation to read the word "communities" out of the statute.[168]

As with other places throughout its Opposition, DEU incorrectly characterizes OCS' arguments as making concessions or admissions when they do not—they appropriately assume that the factual allegations in the Application and pre-filed testimony are true.[169]

Similar to its argument regarding "research and development," DEU's argument is based on dictionary definitions of the term "development" out of context, rather than the meaning of the *phrase* "development of communities" as a reasonable person familiar with the usage and context of the language would understand it.[170] In the process, DEU mischaracterizes OCS' position on the ordinary meaning of this phrase when it describes OCS as arguing "that the legislature intended the term to be given a special meaning restricted to zoning and city planning."[171] Contrary to DEU's description, the cases to which OCS referred in the Motion simply confirm how a reasonable person would *already* understand the ordinary meaning of the phrase "development of communities."[172] That "gas utilities do not participate in zoning decisions" is beside the point, which is that to develop communities means to develop "a *group*

[167] *See* Opposition at pp. 38-40.
[168] *See* Motion at pp. 27-28.
[169] *See* Opposition at p. 38.
[170] *See id*; Motion at pp. 11 and 26-28.
[171] *See* Opposition at p. 39.
[172] *See id*.; Motion at pp. 26-27.

of persons living in the same geographical area linked together by an element of cohesiveness," rather than a single project.[173] This is why DEU's argument that "it makes no sense to define that phrase for purposes to the STEP Act as referring to zoning" is off the mark.[174] It is not a matter of "defining" a phrase "as referring to zoning," it is a matter of understanding the phrase's ordinary meaning.

Under DEU's self-described "expansive" interpretation of Section 54-20-105(3)(a)(iv), any standalone project would constitute a "program … for the development of communities that can reduce greenhouse gases and NOx emissions" so long as some vaguely defined community would stand to benefit from the project's emissions reductions.[175] OCS respectfully submits that this is not the best interpretation of Section 54-20-105(3)(a)(iv) because it conflicts with the ordinary meaning of the word "community" (*i.e.*, a group) and renders the phrase "development of communities" in the statute superfluous.[176] *See Rapela*, 2012 UT 57 at ¶ 19.

For all these reasons, the PSC should not adopt DEU's expansive interpretation, but rather should conclude that the proposed CHP Project, by itself, does not involve the "development of communities" as required by Section 54-20-105(3)(a)(iv).

[173] *See* Opposition at p. 39; Motion at p. 26 (emphasis original).
[174] *See* Opposition at p. 39.
[175] *See* Opposition at pp. 38-39 (proposing "expansive" definition of "development") and pp. 39-40.
[176] *See id.*

IV. 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;

D. striking the portions of the Opposition which contend that "[t]he IIAC Program is a natural gas clean air program' under [Section] 54-4-13.1" on the ground that they constitute an improper amendment to the Application after the filing of a responsive pleading without leave from the PSC in violation of Utah Admin. Code R 746-1-205(3);

E. to the extent the PSC considers the argument in DEU's Opposition on the merits (which the PSC should not), dismissing Parts III and VI of the Application with prejudice on the ground that the proposed IIAC funding does not constitute "natural gas clean air program" as defined in Section 54-4-13.1(4); and

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

Dated this 13th day of March, 2020

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CERTIFICATE OF SERVICE

Docket No. 19-057-33

I CERTIFY that on March 13, 2020, a true and correct copy of the Office of Consumer Services' Reply in Support of 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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