- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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 ORDER DENYING OFFICE OF CONSUMER SERVICES' MOTION TO DISMISS APPLICATION, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT DENYING APPLICATION

ISSUED: April 27, 2020

1. Background

On December 31, 2019, Dominion Energy Utah (DEU) filed its application ("Application"), requesting the Public Service Commission approve two programs for funding pursuant to Utah Code Ann. § 54-4-13.1 ("NGCAP Statute") and Utah Code Ann. § 54-20-105 ("Innovative Program Statute").

The first program would provide "an incentive to one of [DEU's] industrial customers (the Customer) to replace its existing natural gas boiler with a combined heat and power unit." (Application at 3.) We refer to this program as "CHP." CHP would "use the heat generated from the combustion of natural gas to power the Customer's manufacturing process." (*Id.*) The electricity CHP generates "would be used to reduce the overall energy the Customer would need to draw from the electrical grid," though DEU characterizes this as a "secondary benefit." (*Id.*) CHP would also involve installation of selective catalytic reduction (SCR) equipment to reduce emissions. (*Id.*)

DEU requests the PSC authorize DEU "to incentivize the Customer" to make the CHP upgrades "by funding the lesser of $13.5 million or [a confidential percentage] of the total actual CHP [p]roject cost." (*Id.* at 6.) DEU proposes to contribute "$4.5 million each year" over three

years. (*Id.*) If approved, CHP would increase a typical GS customer's annual bill by 0.52 percent. (*Id.* at 7.)

For the second program, DEU seeks authorization to fund the University of Utah's Intermountain Industrial Assessment Center (IIAC) in the amount of $800,000 annually for, at least, the next three years. We refer to this proposed funding as the "IIAC Program." The Application states "IIAC funding will be used to analyze projects for advancement under [House Bill] 107." (*Id.*) It further states "IIAC will provide evidence of the clean air benefits of any proposed project, [and] evidence related to whether the private sector could advance the project." (*Id.*) The Application also contains general declarations, such as "[t]he IIAC's research and support will assist [DEU] in increasing the use of renewable natural gas and reducing greenhouse gas emissions …." (*Id.*)

A more detailed description of the IIAC Program is available by compiling relevant portions of the written testimony DEU filed with its Application. According to the testimony, the University's IIAC is "the result of a competitive grant program from [the U.S. Department of Energy ("DOE")]." (Direct Test. of K. Powell filed Dec. 31, 2019 at 6:121-7:123 (hereafter, "K. Powell Direct Test.") It is "not-for-profit," "technology agnostic," and its "mission is to identify the lowest cost ways to reduce energy usage and operating costs for local businesses." (*Id.* at 7:126-129.) The IIAC "operates on a $1.85M grant from the … DOE," and "[t]his funding is currently used solely for doing energy assessments at manufacturing facilities." (*Id.* at 7:134-135.) "On average, energy assessments from the IIAC result in $137,000 in annual savings recommendations per company." (Direct Test. of M. Orton filed Dec. 31, 2019 at 6:123-124 (hereafter, "M. Orton Direct Test.")

DEU asks the PSC authorize $2.4 million for the IIAC, $800,000 annually for three years. (*Id.* at 9:194-196.) DOE "funds the IIAC at $370,000 per year … to perform 20 annual assessments," and DEU "is proposing to provide matching funding to perform an additional 20 assessments annually." (*Id.* at 10:208-210.) From these assessments, "[h]igh impact projects that may require a subsidy will be [identified and] considered for an incentive." (K. Powell Direct Test. at 7:144-8:150.) DEU would then seek authorization to use STEP funds to separately fund such incentives (*e.g.*, CHP). (*Id.*)

DEU explains the "remaining $430,000 in [the IIAC Program's] proposed annual funding would be used to expand the IIAC's traditional scope of work, beyond assessments, into project and market development." (M. Orton Direct Test. at 10:213-216.) DEU envisions it might "take projects it [independently] identifies … to the IIAC for analysis" and represents the IIAC would "be involved in the implementation of [PSC]-approved projects by soliciting bids to potential contractors and then working with the selected vendor on the installation of … project equipment." (*Id.* at 10:214-11:233.) On a continuing basis, the IIAC would "monitor the performance of installed equipment" and track the long-term impact of DEU's STEP projects on Utah's air quality. (*Id*.)

DEU estimates that, if approved, the funding DEU seeks for the IIAC Program alone, *i.e.*, not inclusive of costs related to CHP, will increase the typical customer's bill by 0.09 percent annually. (Direct Test. of K. Mendenhall filed Dec. 31, 2019 at 3:72-73.)

2. Procedural Background and Standard of Review

On February 14, 2020, the Office of Consumer Services (OCS) filed a Motion to Dismiss Application, or in the Alternative, Motion for Summary Judgment Denying Application

("Motion"). The same date, the Division of Public Utilities filed a Joinder in the Motion. On March 2, 2020, DEU filed an Opposition to the Motion ("DEU's Response"). On March 13, 2020, the OCS filed a Reply in Support of the Motion ("OCS's Reply"). The parties discuss at length whether the PSC should treat the Motion as one for dismissal or summary judgment and the appropriate standard for evaluating the Motion in either case. Both parties quote the PSC's order in another docket, which we will refer to as the Net Metering Order, where the PSC concluded "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."[1] As a general principle, we affirm our conclusion there.

The distinction between motions to dismiss and for summary judgment is subtle. The underlying logic is the same with respect to both: no need exists to continue litigation because, as a matter of law, the outcome appears certain. *See Harvey v. Sanders*, 534 P.2d 905, 907 (Utah 1975) ("[T]he purpose of [allowing courts to treat motions to dismiss as motions for summary judgment] is to afford a means for the prompt and efficient administration of justice by avoiding the time, trouble[,] and expense of a trial when a trial would serve no useful purpose."). Consequently, it has not always been necessary for the PSC to be precise in distinguishing between the two forms of disposition. This is particularly true in the context of customer complaints where the PSC seeks not to burden complainants, who often do not enjoy legal representation, with an overly technical legal process. (*See* Motion at 8, n.8 (citing dockets).)

[1] *In the Matter of the Investigation of the Costs and Benefits of PacifiCorp's Net Metering Program*, Docket No. 14-035-114, (Consolidated Order Denying Dispositive Motions issued Feb. 23, 2017 at 4-5).

Nevertheless, in some proceedings, distinguishing between the motions and their respective standards for review may be more relevant.

a. The Utah Rules of Civil Procedure and Applicable Case Law

Although the PSC has no administrative rule governing the standard for evaluating motions to dismiss or for summary judgment, "[t]he Utah Rules of Civil Procedure and case law interpreting these rules are persuasive authority in [PSC] adjudications unless otherwise provided." Utah Admin. Code R746-1-105. Here, we conclude those authorities are useful and appropriate.

As a practical matter, the primary distinction between the two motions is simply whether the adjudicator may look to external evidence, outside the pleading, in assessing whether the movant is entitled to relief as a matter of law. On a motion to dismiss, the adjudicator looks only to the sufficiency of the initial pleading; it "admits the truth of the facts alleged in the [pleading] but challenges the [party's] right to relief based on those facts." *Robinson v. Robinson*, 2016 UT App 33, ¶ 17, 368 P.3d 105, 112. By contrast, on summary judgment, the adjudicator may look outside the pleading to survey the available evidence, drawing all reasonable inferences in the light most favorable to the non-movant, to determine whether any issues of fact exist to be resolved at trial or hearing. *See, e.g., Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982). Having done so, the adjudicator must grant summary judgment "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56. Where parties invoke evidence outside the pleadings on a motion to dismiss, the adjudicator – if it elects to consider the outside materials – must treat the motion as one for summary judgment. Utah R. Civ. P. 12(b); *see also Robinson* at ¶ 18

(observing failure to do so is "reversible error unless the dismissal can be justified without considering the outside documents").

In proceedings before the PSC, parties commonly file written testimony and other exhibits in tandem with their applications. The Utah Rules of Civil Procedure expressly state "[a]n exhibit to a paper is a part thereof for all purposes" and that "[s]tatements in a paper may be adopted by reference in … the same pleading or in another paper." Utah R. Civ. P. 10(c). However, the Utah Supreme Court has held "an exhibit to a pleading cannot serve the purpose of supplying necessary material averments, and the content of the exhibit is not to be taken as part of the allegations of the pleading itself." *Girard v. Appleby*, 660 P.2d 245, 248 (Utah 1983) (referencing Utah R. Civ. P. 8(a)'s requirement that a complaint shall nevertheless contain a short and plain statement of the claim). The adjudicator may, however, certainly look to attachments to the pleading in ruling on a motion to dismiss without converting the motion to summary judgment. *See, e.g., Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 10, 104 P.3d 1226, 1231 (holding that, in ruling on a motion to dismiss, "[t]he rules are clear that documents attached to a complaint are … fair game for [the] court to consider.").

b. Consistent with the Request of the OCS, the PSC Evaluates the OCS's Motion as a Motion to Dismiss; In so Doing, the PSC will Exercise Its Discretion and Look to DEU's Attached, Incorporated Testimony.

Relying on the Utah Rules of Civil Procedure and the cases discussed above as persuasive authority, we conclude the PSC may look to materials filed in connection with an initial pleading in evaluating a motion to dismiss. The PSC's exercise of its discretion to do so does not require the PSC to treat the motion as one for summary judgment. Only if the PSC looks to facts extrinsic to the pleading and any attachments or otherwise lawfully incorporated

materials, must it treat the motion as one for summary judgment, which will necessitate affording both parties an opportunity to present evidence extrinsic to the pleading.

The existence of such discretion is important because justice and administrative expediency disfavor dismissing a pleading where facts in supporting materials unambiguously show the non-movant is well poised to simply refile a version that corrects the deficiencies such that the only result of dismissal is delay and cost. Consistent with *Oakwood*, the PSC has discretion to refer to materials attached to the pleading to avoid such an outcome. We believe the existence of this discretion strikes a good balance, incenting parties that seek relief to responsibly draft their pleadings and reasonably articulate the basis for their requests but avoiding inefficient outcomes associated with too rigid an application of the rule.

Here, the OCS makes clear it does not wish for the PSC to look to facts alleged outside the Application. The OCS explains it 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)." (OCS's Reply at 11; emphasis and parenthetical in original).[2] The OCS is emphatic that "the PSC need only consider the factual allegations on the face of the Application." (Motion at 10.) The OCS explains it sometimes cites to DEU's testimony filed with the Application only "to demonstrate that the testimony does not *cure* the deficiencies on the face of the Application." (*Id.* Emphasis in original.) We understand the OCS to have been concerned that the PSC would look to the allegations in the supporting

[2] This is consistent with the OCS's explanation in its Motion. (*See* Motion at 10, n.15.)

testimony and that it intended its references to the supporting testimony to be relevant only in the event the PSC did so.

Accordingly, as the OCS has requested its Motion be reviewed under the standard applicable to a motion to dismiss, we evaluate the Application to ascertain whether, assuming the truth of all of DEU's representations therein, we can deny it as a matter of law.

As part of this evaluation, the PSC will exercise its discretion to consider representations DEU makes in the testimony attached to its pleading. Given the magnitude of the funds DEU asks to spend, the complexity of the underlying programs, and the relatively complex alternative statutory bases for the requests, DEU plainly did not intend for the Application to be evaluated in isolation from the supporting testimony, which the Application expressly "incorporates … by reference." (Application at 8.)

3. Statutory Legal Standards

The NGCAP Statute

The NGCAP Statute empowers the PSC to "authorize a gas corporation to establish natural gas clean air programs ["NGCAPS"] that promote sustainability through increasing the use of natural gas or renewable natural gas that the [PSC] determines are in the public interest, subject to the funding limits set forth in [a subsection of the Innovative Program Statute]." Utah Code Ann. § 54-4-13.1(3). The statute defines NGCAP as follows:

> (4) For purposes of this section, and as pertaining to the transportation sector, [NGCAP] 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.[3]

Id. at § 54-4-13.1(4). The conjunctive "and" preceding subpart (c) typically would indicate that all three subparts must be satisfied. However, because subpart (c) is a limitation on both (a) and (b) rather than an additional criteria, that typical construction is less clear in this instance. As we consider that lack of clarity in the context of the two key phrases from subparts (a) and (b), "support the use of" and "improve air quality through," we conclude that the more reasonable interpretation of the statute is to require both of those criteria to be satisfied.

Synthesizing the definition of NGCAP in Subsection 4 with the language in Subsection 3 that dictates the circumstances where the PSC may approve an NGCAP yields a two-pronged process for assessing a proposed NGCAP. To constitute an NGCAP, a proposal must include (a) an incentive or program to support the use of natural gas; and (b) a program to improve air quality through the use of natural gas. Utah Code Ann. § 54-4-13.1(4.) In turn, the PSC may approve an NGCAP that (i) promotes sustainability (ii) through increasing the use of natural gas (iii) that the PSC determines is in the public interest. *Id.* at § 54-4-13.1(3).

a. The Innovative Program Statute

The Innovative Program Statute empowers the PSC to "authorize a … natural gas utility to implement and fund programs that the [PSC] determines are in the public interest of … customers to provide for the investigation, analysis, and implementation of" seven varieties of projects or programs as follows: (i) economic development incentive rates; (ii) "research and

[3] Utah Code Ann. § 54-4-13.4 relates to natural gas fueling stations.

development of other efficiency technologies"; (iii) acquisition of nonresidential infrastructure behind the utility's meter; (iv) "development of communities that can reduce greenhouse gases and NOx emissions"; (v) a natural gas renewable energy project; (vi) a commercial line extension program; or (vii) "any other technology program." Utah Code Ann. § 54-20-105(3)(a). We are here concerned only with the categories numbered (ii), (iv), and (vii) because those are the categories DEU invokes in its Application.[4]

Therefore, to be eligible under the statute, a program or project must fall within one of the enumerated categories and the PSC must find the program to be in the public interest.[5] The statute enumerates the factors the PSC must consider in making the public interest determination: (i) to what extent the use of renewable natural gas is facilitated or expanded; (ii) potential air quality improvements; (iii) whether the proposal "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 benefit to ratepayers. *Id.* at § 54-20-105(3)(c).

[4] DEU argues IIAC qualifies under (ii), research and development of other technologies, CHP qualifies under (iv), development of communities that can reduce greenhouse gases and NOx emissions, and both CHP and IIAC qualify under (vii), as any other technology program.

[5] Subsection (5) of the Innovative Program Statute also contemplates the PSC may authorize "funding for a conservation, efficiency, or new technology program in addition to the programs described in this chapter if the … program is cost-effective and in the public interest." Utah Code Ann. § 54-20-105(5). Because DEU's Application seeks authorization under Subsection (3), our discussion focuses on the requirements under that portion of the statute.

The PSC "may review the expenditures" a utility makes for an approved program "in order to determine if the … utility made the expenditures prudently in accordance with the purposes of the program." *Id.* at § 54-20-105(4).

4. Discussion, Findings, and Conclusions on OCS's Motion

The OCS's Motion presents four questions as to whether DEU has pleaded facts, which when assumed to be true, demonstrate (i) CHP may be eligible for funding under the NGCAP Statute; (ii) CHP may be eligible for funding under the Innovative Program Statute; (iii) IIAC may be eligible for funding under the NGCAP Statute;[6] or (iv) IIAC may be eligible for funding under the Innovative Program Statute.

Though the issues sometimes overlap, we separately address each question below for clarity.

a. We Cannot Conclude as a Matter of Law that the IIAC Program is Ineligible for Funding under the Innovative Program Statute.

The OCS asks the PSC to summarily dispose of DEU's request to fund the IIAC Program under the Innovative Program Statute for two reasons. First, the OCS contends the IIAC Program is not a "specific" program, rendering it ineligible under Utah Code Ann. § 54-20-105(3)(d). Second, the OCS challenges, as a matter of law, DEU's claim that the IIAC Program qualifies in either the "any other technology program" or "research and development of other efficiency technologies" categories enumerated in Utah Code Ann. § 54-20-105(3)(a).

[6] We are mindful of the OCS's contention that DEU failed to properly plead IIAC's eligibility for funding under the NGCAP Statute and address it *infra* at 18-19.

i. Although reasonable minds are likely to agree that "specificity" is a desirable trait for such a program, the Innovative Program Statute does not make "specificity" an independent requirement for approval.

Quoting Subsection (3)(d), the OCS contends the PSC may authorize a program under the Innovative Program Statute "only for 'a *specific* sustainable transportation and energy plan.'" (OCS's Motion at 28 (emphasis added in original).) The OCS additionally contends the PSC cannot evaluate whether a program is in the public interest, as Subsection (3)(c) requires, or whether expenditures are ultimately made in accordance with the purposes of the program, as Subsection (4) requires, unless a program is adequately specific. (*Id.* at 32.) The OCS argues the IIAC Program lacks the requisite specificity because it does not, for example, identify the types of projects that will be the focus of its work or specify criteria by which it will evaluate projects. (OCS's Reply at 33.)

While the OCS's desire for specificity is legitimate, we do not find the OCS's reading of Subsection (3)(d) persuasive. The entirety of Subsection (3)(d) is concerned with establishing the maximum amount of funding an otherwise eligible program may receive. The language at issue states the PSC may allocate "up to $10,000,000 to a specific sustainable transportation and energy plan." Utah Code Ann. § 54-20-105(3)(d). The plain intention is to establish a funding limitation on a single, *i.e.* specific, program. Subsection (3) establishes substantive requirements for approval elsewhere. For example, Subsection (3)(a) identifies certain categories of programs that are eligible, and Subsection (3)(c) specifies the public interest factors the PSC must consider in determining whether to authorize funding.

Accordingly, we conclude Subsection (3)(d) does not impose an additional substantive requirement that a program be "specific." In so doing, we do not suggest the OCS's underlying

concerns have no merit. The OCS raises important questions about the IIAC Program, and these considerations are likely to be relevant in determining whether the IIAC Program is in the public interest. We encourage the parties to fully develop the record on these issues before hearing. However, we cannot conclude that the IIAC Program is ineligible, as a matter of law, solely because it is insufficiently specific.

ii. *Questions of fact exist as to whether the IIAC Program constitutes "research and development of other efficiency technologies" or "any other technology program."*

As discussed *supra* at 10-11, Subsection (3)(a) enumerates seven categories of programs the PSC may authorize under the Innovative Program Statute, and DEU has asserted the IIAC Program is eligible either as "research and development of other efficiency technologies," under Subsection (3)(a)(ii), or as "any other technology program," under Subsection 3(a)(vii). The OCS contends the IIAC Program cannot, on the pleaded facts and under the law, qualify under either category.

Because the statute does not define the terms it uses to describe the qualifying categories in Subsection (3)(a), the OCS's Motion presents questions of statutory interpretation, concerning what qualification in a category requires, and questions of fact, concerning whether DEU has alleged facts showing the IIAC Program qualifies in a category.

Our primary goal in interpreting the statute "is to evince the true intent and purpose of the Legislature." *State v. Martinez*, 2002 UT 80, ¶ 8, 52 P.3d 1276, 1278. "[W]e assume the legislature used each term advisedly and in accordance with its ordinary [and accepted] meaning." *Id.*; *see also Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 18, 267 P.3d

863, 868 (observing courts must "seek to read each term according to its ordinary and accepted meaning").

1. "Any other technology program" does not, by definition, preclude a program devoted to identifying other opportunities to pursue under the Innovative Program Statute.

The OCS concedes Subsection 3(a)(vii) is "admittedly broad — a 'catch-all' even." (OCS's Motion at 33.) Nevertheless, the OCS argues the IIAC Program funding DEU seeks does not qualify because it is not for a "'technology program' *per se*" but for "costs to provide for the *development* of a technology program — and the costs associated with obtaining PSC approval of as-of-yet unspecified projects." (*Id.* at 34. Emphasis in original.)

DEU embraces the OCS's characterization of Subsection 3(a)(vii) as a "catch all" but argues the OCS's "attempt to differentiate [between a technology program and the administrative costs of a program to identify technology programs] is a distinction without a difference." (DEU's Response at 24.) DEU characterizes the OCS's interpretation as requiring DEU "to independently fund all efforts to identify natural gas projects before it could apply for approval to use STEP funds for those projects." (*Id.* at 25.) DEU maintains the statute does not require DEU to do so and such an interpretation would not "incentivize utilities to pursue 'innovative utility programs'." (*Id.*) The OCS counters 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 … may the utility charge ratepayers for the project, including administrative costs associated with the project." (OCS's Reply at 30.)

As an initial matter, we recognize "technology" is, in its ordinary use, a broad term that may apply to any "practical application of knowledge."[7] However, we recognize that the public interest standard of the statute will ultimately place factual evaluation around any specific technology program. That is an evaluation for another stage of this proceeding, not a basis for a dispositive motion.

We endeavor in this order not to make any conclusions beyond those the OCS's Motion necessitates, and we offer no opinion here as to what a party must demonstrate of a program for it to qualify under Subsection (3)(a)(vii). Nonetheless, the parties may find it helpful to understand that the PSC would be reluctant, for example, to conclude a program that does nothing more than deploy pre-existing technology in a manner in which it has long been commonly employed is in the public interest, considering the statutory factors enumerated in Subsection (3)(c).

With respect to the OCS's argument, we locate nothing in the statute suggesting that "any other technology program" cannot involve, or be primarily concerned with, identifying other worthwhile opportunities to pursue under the Innovative Program Statute. Indeed, Subsection (3)(a) expressly states funding may "provide for the investigation, analysis, and implementation" of a qualifying program. We find it difficult to reconcile the Legislature's express intention to fund "investigation" of such programs with the OCS's contention that a program designed to do

[7] Merriam-Webster, *available at* merriam-webster.com/dictionary/technology (last visited April 7, 2020) (defining "technology" as "the practical application of knowledge especially in a particular area").

precisely that cannot be eligible.[8] For this reason and finding no support otherwise in the statute, we reject the OCS's argument that, by definition, a program aimed at investigating other programs to pursue cannot qualify under Subsection (3)(a)(vii).

2. We decline to attach a term of art definition that the Legislature did not utilize to the phrase "research and development of other efficiency technologies."

The OCS maintains the IIAC Program cannot qualify under Subsection (3)(a)(ii), as "research and development of other efficiency technologies" because, as DEU's filing describes it, the IIAC Program will not do "research and development" (or "R&D").

The OCS argues R&D means something distinct from the definition of "research" plus the definition of "development," explaining R&D has a "specific connotation … which makes it function more like a single word." (OCS's Reply at 26.) The OCS quotes several online dictionaries that define "R&D" as a unitary term to mean "studies and tests that are done in order to design new or improved products" or "activity concerned with applying the results of scientific research to develop new products and improve existing ones." (*Id.* (quoting merriam-webster.com and Dictionary.com).) The OCS also quotes a statutory definition from Title 59 of the Utah Code, *i.e.* the "Tax Code," that provides a definition consistent with these dictionaries.[9]

[8] We address *infra* at 22-24 the OCS's argument that a program must involve "investigation, analysis, and implementation" to qualify, which it raises in opposition to CHP's eligibility under the Innovative Program Statute.

[9] Utah Code Ann. § 59-5-101(20) ("'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."); *see also* Utah Code Ann. § 59-12-102(109) (providing verbatim definition).

DEU urges a broader interpretation, arguing the OCS falsely suggests that R&D requires "discovering new technologies." (DEU Response at 23.) Like the OCS, DEU quotes online dictionaries (the same ones, in fact) but rather than offer the definition of "R&D," DEU provides the dictionaries' separate definitions for the word "research" and the word "development." DEU then declares "under the statute, a plan may investigate and discover facts or theories to facilitate the application, advancement, improvement or proliferation of efficiency technologies." (*Id.* at 22-23.)

The Tax Code, cited by the OCS, demonstrates that the Legislature has, in some instances, specifically defined R&D as a term of art. We conclude it was an intentional decision not to do so in Subsection (3)(a)(ii).

We recognize "R&D" is commonly used to describe activity intended to develop through research something new or an improvement to something that already exists. We do not suggest that whether a proposal is "something new" or an "improvement" is not relevant to the analysis we will undertake later in this docket. It is possible we could find that a lack of innovation in a proposal supports a determination that the proposal is not in the public interest. But we do not interpret the statute in a way to make a lack of innovation a legal issue to justify dismissal of the Application. Additionally, DEU maintains in its Response that the IIAC Program "also includes research into technologies and new applications for existing technologies." (DEU's Response at 23.) This is an issue of fact for hearing.

b. We Cannot Conclude as a Matter of Law that the IIAC Program is Ineligible for Funding under the NGCAP Statute.

The OCS's Motion made no argument with respect to the IIAC Program's eligibility under the NGCAP Statute. After DEU implied in its Response that the omission reflected the OCS's inability to make a colorable argument on the issue, the OCS clarified in its Reply that it did not make the argument because "DEU did not request approval of the proposed IIAC [Program] funding pursuant to [the NGCAP Statute]." (OCS's Reply at 5.) The OCS points out that the section of the Application, "Part II," that contains the substance of DEU's requests relating to CHP expressly requests approval under both the NGCAP Statute and the Innovative Programs Statute. However, the section that contains the substance of DEU's requests relating to the IIAC Program, "Part III," refers only to the Innovative Program Statute and makes no reference to the NGCAP Statute. In asserting otherwise in its Response, DEU cited (1) the introductory sentence on the first page and (2) the request for relief at the end of the Application. Both of these references are broad requests that make clear both laws are invoked within the Application but do not explain how.

We read the Application as the OCS did. That is, we understood DEU to be requesting approval for CHP under both statutes and for the IIAC Program only under the Innovative Program Statute.

However, given that OCS was provided notice of the claim in DEU's Response, well in advance of the hearing, it has not been prejudiced. We see no advantage to declining to consider the issue on the merits.[10]

Anticipating an evaluation on the merits, the OCS argued in its Reply that the IIAC Program cannot qualify under the NGCAP Statute because it "is not limited to the transportation sector." (OCS's Reply at 7.) Reiterating an argument it also makes with respect to CHP's eligibility, the OCS contends a program must relate to the transportation sector to qualify as an NGCAP.

i. We conclude the NGCAP Statute does not require NGCAPs be related to the transportation sector.

For context, we note the NGCAP Statute is divided into eight subsections, (1) through (8). Utah Code Ann. § 54-4-13.1. The first two subsections ("NGV Subsections") relate to natural gas vehicle rates. The remaining subsections, (3) through (8) (the "NGCAP Subsections"), all relate to "natural gas clean air programs" or "NGCAPs."

In asserting NGCAPs must relate to the transportation sector, the OCS first argues that because the NGV Subsections relate to natural gas vehicle rates, the PSC must interpret the NGCAP Subsections, *i.e.* the remaining six subsections, in context to conclude the statute limits NGCAPs to the transportation sector. (OCS's Motion at 13 (citing *Utah Office of Consumer Servs. v. Pub. Serv. Comm'n of Utah*, 2019 UT 26, 445 P.3d 464 [the "*Interim Rate Case*"].)

[10] We have allowed DEU some latitude in pleading standards here. Generally, a party should seek leave to amend a pleading when the party wishes to assert a new legal theory after filing.

This argument is not persuasive. The NGV Subsections comprise only 20% of the statute's text and appear to be substantively unrelated to the remainder of the statute, which exclusively concerns NGCAPs. Additionally, the statutory text here is easily distinguishable from the *Interim Rate Case*, where the court interpreted a sandwiched subpart, numbered 4(a)(ii), in context with its surrounding subparts numbered (4)(a)(i) and (4)(a)(iii). *Interim Rate Case* at ¶¶ 30-33. Evaluating the specific language of the statute, the court concluded "[t]his language shows that each subpart of subsection 4 is interconnected." *Id*. at ¶ 33. Here, little indication exists that the Legislature intended Subsections (3) through (8), which exclusively relate to NGCAPs, to be substantively "interconnected" with the first two subsections relating to NGV rates.

Next, the OCS points to the NGCAP Statute's title "Natural gas vehicle rate – Natural gas clean air programs," but this is equally unhelpful. Where a statute is ambiguous, titles can be persuasive. However, here, the title unsurprisingly identifies the two subjects of the statute: NGV rates and NGCAPs. Nothing in the title suggests the latter is dependent on the former.

The OCS's final point in support of its interpretation refers to the introductory language in Subsection (4) that precedes the statute's definition of an NGCAP: "For purposes of this section, and as pertaining to the transportation sector, [NGCAP] means …." Utah Code Ann. § 54-4-13.1(4) (emphasis added). (Motion at 12-13.) The OCS contends NGCAPs must be limited to transportation-related projects otherwise the italicized language (the "as pertaining to" clause) is rendered meaningless in violation of the presumption against surplusage in statutory construction. (OCS's Reply at 23 (citing *Hertzske v. Snyder*, 2017 UT 4, ¶ 14, 390 P.3d 307, 313.).)

DEU disagrees, characterizing the "as pertaining to" clause as merely a "phrase preceding the definitional elements" of an NGCAP and emphasizing that the actual definition, which follows in Subsections 4(a) through 4(c), contains no reference to "transportation." (DEU Response at 27.) DEU concludes "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." (*Id.*)

We conclude that the phrase "and as pertaining to the transportation sector" expands, rather than limits, the definition of an NGCAP. Taking the plain language at face value, the clause simply confirms that the definition that follows applies both (i) "[f]or purposes of this section" and (ii) "as pertaining to the transportation sector."

Because we conclude the NGCAP Statute does not require NGCAPs relate to the transportation sector, we reject the OCS's argument that the IIAC Program fails, as a matter of law, to qualify on that basis.

c. We Cannot Conclude as a Matter of Law that CHP is Ineligible for Funding under the Innovative Program Statute

As it did with the IIAC Program, the OCS again offers two alternative arguments to summarily dispose of DEU's request to fund CHP under the Innovative Program Statute. First, the OCS argues an eligible program must involve "investigation, analysis, and implementation" pursuant to Utah Code Ann. § 54-20-105(3)(a). The OCS argues the Application demonstrates CHP entails only "implementation" and therefore is ineligible. Second, the OCS challenges, as a matter of law, DEU's claim that CHP qualifies in either the "any other technology program" or

"the development of communities that can reduce greenhouse gases and NOx emissions" categories enumerated in Utah Code Ann. § 54-20-105(3)(a)(vii) and (iv).

i. *We Conclude the Innovative Program Statute does Not Preclude Otherwise Eligible Programs Because They Involve Fewer than All of "Investigation, Analysis, and Implementation."*

The OCS argues that "[u]nder [the Innovative Program Statute], the PSC may only authorize programs that 'provide for the investigation, analysis, and implementation of'" the enumerated categories of programs. (Motion at 24. Emphasis in original.) The OCS maintains "[t]he use of the conjunctive word 'and' instead of the disjunctive word 'or' is significant" and "means that a proposed program must include each element to be approved." (*Id.*) The OCS cites a Utah Court of Appeals case that the OCS characterizes as "explaining [the] significance of [a] change in statute from a 'conjunctive definition' to a 'disjunctive definition.'" (*Id.* (citing *Mike's Smoke, Cigar & Gifts v. St. George City*, 2017 UT App 20, ¶ 24, 391 P.3d 1079, 1084).)

Relying on DEU's description of the IIAC Program in its Application, the OCS argues the "IIAC [Program] has *already* completed the 'investigation' and 'analysis' phases of [CHP] using existing funding from [the] DOE." (Motion at 24.) Therefore, the OCS concludes, CHP cannot qualify under the Innovative Program Statute because it only involves "implementation."

For its part, DEU does not rebut this argument on the law, rather DEU points to the testimony it filed with the Application to argue CHP will, in fact, involve "investigation" and "analysis." (*See* DEU's Response at 36-37.)

We conclude the parties are misreading the statute. The OCS erroneously characterizes the provision in suggesting it lists "elements." We find nothing in Subsection (3)(a) indicating the Legislature's intention to do so. It does not purport to define the programs that are eligible or

to identify elements necessary to qualify. Indeed, Subsection 3(a) does not anywhere provide "elements" essential to qualification, instead it identifies categories of eligible programs and requires the PSC to assess whether the program is in the public interest using specifically enumerated considerations. The case law the OCS cites for the proposition that the conjunction "and" means all three "elements" are required is therefore inapposite.

An alternative interpretation, consistent with the plain language and common sense, is that the Legislature intended the phrase to make clear that each of the three stages are eligible for funding. We do not think the Legislature would have been wrong to anticipate utilities' reluctance to finance the investigation and analysis of such programs solely at their shareholders' expense. By clarifying in the statute that these preliminary steps are eligible for funding, the Legislature enhanced the likelihood the contemplated programs would come to fruition.

The OCS's construction, on the other hand, leads to illogical outcomes unlikely to reflect the Legislature's intent. For example, if an interest group devoted to conservation pitched DEU a "fully cooked" plan to develop a natural gas renewable energy project that would be of objective and significant value to all stakeholders, DEU could not pursue it under the Innovative Program Statute because it would only involve "implementation" of the project. The plain language of the statute does not require such a result, and we do not believe the Legislature intended it to do so.

Therefore, acknowledging that DEU disputes the OCS's characterization of the project, we conclude CHP is not ineligible as a matter of law from receiving funding under Subsection (3)(a) to the extent it requires only "implementation" as opposed to "investigation, analysis, and implementation."

Alternatively, we also conclude that even if we were to adopt the OCS's statutory interpretation, we would not dismiss the Application on that basis because a question of fact exists relative to DEU's assertion that the CHP involves investigation and analysis.

ii. *Questions of fact exist as to whether CHP qualifies under "the development of communities that can reduce greenhouse gases and NOx emissions" or "any other technology program" categories.*

Similar to the arguments it raised on the issue against the IIAC Program, the OCS contends CHP cannot, on the pleaded facts and under the law, qualify under either of the categories on which DEU relies under Subsection (3)(a), *i.e.* "the development of communities that can reduce greenhouse gases and NOx emissions" (for brevity, sometimes the "Cleaner Communities Category") and "any other technology program." Again, the OCS's Motion presents questions of statutory interpretation, concerning what qualification in a category requires, and questions of fact, concerning whether DEU has alleged facts showing the CHP qualifies in a category.

1. CHP is not precluded, by definition and as a matter of law, from qualifying as "any other technology program" merely because it lacks sufficient "programmatic qualities."

The OCS devotes considerable space to distinguishing between "programs" and "projects," asserting that a "project is a singular part of a larger, multi-faceted program." (OCS's Motion at 17.) The statute does not define either term. However, the OCS distills "programmatic qualities" from a variety of treatises and cases, including (i) being "long term"; (ii) consisting of "multiple units"; and having an "outcome" (as opposed to an "output") that "realize[s] benefits from management of coordinated projects." (*Id.* at 18.)

Emphasizing that Subsection (3)(a)(vii) is a category for "any other technology *program*," the OCS argues CHP cannot qualify because it is a "standalone project," not a "program." (OCS's Motion at 21 (incorporating arguments made on the same point with respect to eligibility under the NGCAP Statute).

DEU responds that "[w]hen one looks [at Utah Code Ann.] § 54-20-105 … the statute interchangeably uses the words 'program' and 'project' throughout." (DEU Response at 34.) In fact, inclusive of the title, the Innovative Program Statute uses the term "program(s)" 26 times and "project(s)" 7 times. The OCS attempts to explain each instance it uses "project" and maintains these instances are not inconsistent with the distinction the OCS draws between "programs" and "projects."

We conclude we need not decide whether the Legislature intended the terms "program" and "project" to be wholly interchangeable within the statute. The OCS offers plausible arguments to support its contention to the contrary, and the distinction may be useful and important in other contexts.[11] We make no conclusions on the matter here.

The specific issue before the PSC here is whether CHP cannot, as a matter of law, qualify as "any other technology program." The statute does not offer criteria to delineate what qualifies as a "program," and even the "programmatic qualities" the OCS proposes are inexact and

[11] When rebutting essentially the same argument with respect to CHP's eligibility under the NGCAP Statute, DEU argues the OCS "is wrong to characterize the CHP-related activities as a 'standalone project'" because it is a "*project* … in an overarching *program*," the IIAC Program. (DEU's Response at 30-31.)

unquantified.[12] We are not persuaded the Legislature intended that we summarily decline a utility's request based on this fine, unarticulated distinction.

Indeed, nothing in the statute suggests that a "program" could under no conceivable circumstances involve only a single customer or a single site. Additionally, DEU emphasizes that its work with respect to CHP will be ongoing, including monitoring the performance of installed equipment and providing research and reporting relating to its effects.[13] A colorable argument could be made that DEU's commitment to continued involvement makes CHP a "program" distinguishable from a typical "project." We conclude reaching an evaluation of whether CHP is in the public interest better reflects the legislative intent than refusing to consider it based on this amorphous distinction.

2. Having denied the Motion with respect to CHP's eligibility under the Innovative Program Statute on other grounds, we decline to make a conclusion as to whether CHP may qualify under the Cleaner Communities Category.

Again emphasizing that CHP "is a single, standalone project for one [c]ustomer," the OCS argues it cannot qualify as "the development of communities that can reduce greenhouse gases and NOx emissions." (OCS's Motion at 27.)

The OCS focuses on "development of communities" and, as it did for R&D, seeks a definition of the words as a combined term. Unlike R&D, the OCS does not have recourse to a dictionary definition. Instead, the OCS cites cases that use the term "development of

[12] For example, we cannot readily say what constitutes "long term" or what constitutes a "unit" of which "multiple" should exist.

[13] This work may be done under the umbrella of the IIAC Program, but it is clear DEU intends to have continued meaningful involvement with the project underlying CHP on an ongoing basis.

communities" and argues they demonstrate a "clear theme": "the phrase predominantly relates to comprehensive land use and planning where the smallest functional unit is a *group* of persons living in the same geographical area linked together by an element of cohesiveness, such as shared economic pursuits and common interests or needs." (*Id.* at 26.)

DEU responds that the OCS's definition is "overly-restrictive and unsupported." (DEU Response at 38.) Focusing on the word "development" and citing dictionary definitions, DEU argues "'development' is an expansive word that can mean such things as growth, proliferation, evolution, expansion, advancement, progression and improvement." (*Id.* at 38-39.) DEU alleges CHP would "result in the advancement of a community in which emissions can be reduced" and would "result in the progress of a community to reduce" emissions, therefore, it qualifies as "development that can reduce" emissions. (*Id.* at 39.) The OCS, in turn, argues DEU reads the word "communities" out of the statute. (OCS's Reply at 44-45.)

Because we deny the OCS's motion concerning CHP's eligibility under the Innovative Program Statute on other grounds, we need not and do not make a conclusion on the issue here.

d. We Cannot Conclude as a Matter of Law that CHP is Ineligible for Funding Under the NGCAP Statute.

As we discussed *supra* at 9, the statute requires a two-pronged process for assessing a proposed NGCAP. To constitute an NGCAP, a proposal must include (a) an incentive or program to support the use of natural gas; and (b) a program to improve air quality through the use of natural gas. Utah Code Ann. § 54-4-13.1(4.) In turn, the PSC may approve an NGCAP that (i) promotes sustainability (ii) through increasing the use of natural gas (iii) that the PSC determines is in the public interest. *Id.* at § 54-4-13.1(3).

OCS's Motion argues CHP is ineligible for three independent reasons. First, the OCS argues CHP is ineligible because it will not promote sustainability through increased use of natural gas. Second, and similar to the argument it made with respect to CHP's eligibility under the Innovative Program Statute, the OCS argues CHP is a standalone project and therefore is not a "program or incentive" as the statute requires. Third, the OCS again argues that NGCAPs must relate to the transportation sector.

> i. *For the same or similar reasons that we reached the same or similar conclusions above, we conclude CHP is not precluded from eligibility because it does not relate to the transportation sector and that CHP is not precluded, as a matter of law, from qualifying as an NGCAP solely because it lacks sufficient "programmatic qualities."*

Having already considered and rejected, *supra* at 19-21, the OCS's argument that NGCAPs must relate to the transportation sector, we conclude CHP may be eligible for funding under the NGCAP Statute regardless of whether it relates to the transportation sector.

The OCS's argument that CHP cannot qualify as an NGCAP because it is not a "program" largely overlaps with its argument discussed and addressed *supra* at 24-26 concerning OCS's contention CHP is not a "technology program" under the Innovative Program Statute.

DEU attempts to rebuff the argument here by pointing to Utah Code Ann. § 54-1-13.1(4)(a), which requires an NGCAP, by definition, to include "an *incentive or program* to support the use of natural gas." DEU asserts the CHP is undoubtedly an "incentive," and the Legislature "did not intend the definition of [NGCAP] under the statute to be limited as the [OCS] suggests." (DEU's Response at 30.) We conclude that DEU's reading is incorrect. While the definition requires "an incentive or program to support the use of natural gas," it also and

separately requires "a program to improve air quality." (OCS Reply at 38-39 (citing Utah Code Ann. § 54-4-13.1(4)(b).)

Nevertheless, and for the same reasons we discuss *supra* at 24-26, we cannot conclude CHP may not, by definition, constitute such a program.

ii. *Though we have some concern based on the nature of CHP as described in the Application, a question of fact exists as to whether CHP will "promote sustainability through increasing the use of natural gas."*

The OCS argues that CHP, which would replace a natural gas fired boiler with a more efficient natural gas fired boiler, will not "promote sustainability through increasing the use of natural gas." (OCS's Motion at 14-15.) DEU, however, asserts that CHP "would in fact result in the Customer at issue using more natural gas than with its existing boilers."[14] (DEU Response at 29.)

In response, the OCS quotes the Application's supporting testimony, which alleges "[t]he CHP unit would replace several existing [natural gas] boilers and would operate at a higher level of efficiency, "the result of [CHP's] more efficient equipment [will be] less energy required to complete the same manufacturing process" and that only "[a]dditional air quality benefits would be achieved … by replacing a small percentage of Utah's coal-heavy electricity mix with 100% natural gas at the project site." (OCS's Reply at 36 (quoting M. Orton Direct Test.).)The OCS

[14] DEU appears to have made this point explicit at the February 5, 2020 technical conference in this docket. (*See* Motion at 15, n.28.) The OCS contends DEU did not plead this fact in the Application or its supporting testimony. However, given that the OCS was aware of the allegation, addressed it in its Motion, and therefore was not prejudiced by it, we will exercise our discretion to consider it here as though DEU had pleaded it in connection with the Application.

argues that CHP's alleged benefits associated with the more efficient boilers "significantly predominate" over those associated with displacing electricity from the grid. *(Id.* at 37.)

We have some concern about whether a project (or program) that replaces existing natural gas boilers with more efficient natural gas boilers "promotes sustainability through increasing the use of natural gas." However, the facts remain largely unquantified at this early stage, and the parties unquestionably disagree as to whether CHP will increase the use of natural gas in a manner that improves air quality. We look forward to the testimony being developed further to address this issue.

Because questions of fact exist, the PSC must deny OCS's Motion to summarily dispose of DEU's request to approve CHP under the NGCAP Statute.

5. Order

Based on the findings and conclusions we reach throughout this order, we deny OCS's Motion.

DATED at Salt Lake City, Utah, April 27, 2020.

/s/ Michael J. Hammer
Presiding Officer

Approved and confirmed April 27, 2020 as the Order of the Public Service Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
PSC Secretary
DW#313382

CERTIFICATE OF SERVICE

I CERTIFY that on April 27, 2020, a true and correct copy of the foregoing was delivered upon the following as indicated below:

By Email:

Cameron L. Sabin (cameron.sabin@stoel.com)
Stoel Rives LLP

Kelly Mendenhall (kelly.mendenhall@dominionenergy.com)
Austin Summers (austin.summers@dominionenergy.com)
Jenniffer Clark (jenniffer.clark@dominionenergy.com)
Dominion Energy Utah

Phillip J. Russell (prussell@jdrslaw.com)
Utah Association of Energy Users

Data Request Response Center (datareq@pacificorp.com)
Jana Saba (jana.saba@pacificorp.com)
Jacob A. McDermott (jacob.mcdermott@pacificorp.com)
Rocky Mountain Power

Patricia Schmid (pschmid@agutah.gov)
Justin Jetter (jjetter@agutah.gov)
Robert Moore (rmoore@agutah.gov)
Victor Copeland (vcopeland@agutah.gov)
Assistant Utah Attorneys General

Madison Galt (mgalt@utah.gov)
Division of Public Utilities

Cheryl Murray (cmurray@utah.gov)
Office of Consumer Services

_____
Administrative Assistant