Decision No. C23-0729

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 23A-0392EG

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IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF ITS 2024-2028 CLEAN HEAT PLAN.

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# COMMISSION DECISION DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR LEAVE TO REPLY, AND PROVIDING CERTAIN THRESHOLD LEGAL GUIDANCE

Mailed Date: October 27, 2023
Adopted Date: October 18, 2023

## I. BY THE COMMISSION

### A. Statement

1. By this Decision, the Commission denies the Joint Motion for Partial Summary Judgment (Partial Summary Judgment Motion) filed by the City of Boulder (Boulder), the Colorado Renewable Energy Society (CRES), the Colorado Solar and Storage Association (COSSA), the Natural Resources Defense Council (NRDC), Physicians for Social Responsibility Colorado (PSR-CO), Sierra Club, Solar Energy Industries Association (SEIA), Southwest Energy Efficiency Project (SWEEP), the Office of the Utility Consumer Advocate (UCA), and Western Resource Advocates (WRA) (Joint Movants) on September 6, 2023.

2. In addition, by this Decision, the Commission denies the Joint Motion for Leave to Reply to the Partial Summary Judgment Motion, filed by the Joint Movants on October 3, 2023.

3. At its October 18, 2023 Commissioners' Weekly Meeting, the Commission also established an accelerated procedural schedule to address the inclusion of certified natural gas

(CNG) and emission offsets (offsets) as proposed in Public Service's "Clean Heat Plus" portfolio for its Clean Heat Plan. The Commission addressed these matters through separate decision, issued on October 20, 2023.[1]

### B. Procedural History

4. On August 1, 2023, Public Service filed its Clean Heat Plan Application (Application), which requests that the Commission approve the Company's proposed 2024-2028 Clean Heat Plan (Clean Heat Plan).

5. By Decision No. C23-0626, issued September 19, 2023, the Commission granted requests for permissive intervention filed by the City and County of Denver (Denver), Boulder, the City of Pueblo, the County of Pueblo, Project Canary, PBC (Project Canary), Colorado Energy Consumers, Holy Cross Electric Association, Inc., Black Hills Colorado Gas, Inc., NRDC and Sierra Club (collectively, the Conservation Coalition), CRES and PSR-CO (jointly), WRA, SWEEP, Energy Outreach Colorado, COSSA and SEIA (jointly), the Chevron Rockies Business Unit, Occidental Petroleum Corporation, and Williams (collectively, the Colorado Decarbonization Coalition), Denver Pipefitters, Local 208 (Pipefitters), and Laborers' International Union of North America, Local 720 (Local 720). The Commission acknowledged the notices of intervention of right filed by Trial Staff of the Commission, UCA, and the Colorado Energy Office (CEO).

6. On September 6, 2023, the Joint Movants filed their Partial Summary Judgment Motion.

[1] Decision No. C23-0717, issued October 20, 2023.

7. On September 27, 2023, responses to the Partial Summary Judgment Motion were filed by: (1) Public Service; (2) the City of Pueblo, the Colorado Decarbonization Coalition, the County of Pueblo, Pipefitters, Local 208, and Project Canary (Pueblo *et al.*); (3) Denver; and (4) CEO and the Air Pollution Control Division (APCD or Division).

8. On October 3, 2023, the Joint Movants filed their Motion for Leave to Reply to the Partial Summary Judgment Motion (Motion for Leave to Reply).

9. On October 10, 2023, the City of Pueblo, Project Canary, and the Colorado Decarbonization Coalition (Pueblo *et al.*) filed a memorandum in opposition to the Motion for Leave to Reply.

10. On October 13, 2023, Public Service filed a response in opposition to the Motion for Leave to Reply.

11. Through Decision No. C23-0685-I, issued October 12, 2023, the Commission granted APCD's motion to participate in this Proceeding as a non-party *amicus curiae*, filed on September 20, 2023. APCD is housed within the Colorado Department of Public Health and Environment and serves as staff to the Colorado Air Quality Control Commission. By the same Decision, the Commission shortened response time to the Motion for Leave to Reply to October 13, 2023.

### C. Joint Movants' Motion for Leave to Reply

#### 1. Motion

12. On October 3, 2023, the Joint Movants filed the Motion for Leave to Reply pursuant to Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1400(e) of the Commission's Rules of Practice and Procedure. Pursuant to Commission Rules 1400(e)(I) and (IV), the Commission may

grant a party leave to file a reply if the movant demonstrates the response contains "a material misrepresentation of a fact" or "an incorrect statement or error of law." The Joint Movants argue that, in the context of responses to a summary judgment motion, a misrepresentation of the motion's legal arguments should be considered to be material, given that the summary judgment standard is whether the movant is entitled to judgment as a matter of law. The Joint Movants assert that, under Commission Rules 1400(e)(I) and (IV), a reply is warranted in this case to address material misrepresentations of fact, and incorrect statements, and errors of law contained in the Public Service and Pueblo *et al.* Responses to the Motion for Leave to Reply.

13. The Joint Movants argue that Public Service's Response misrepresents facts concerning the arguments set forth in the Partial Summary Judgment Motion in two ways. First, they claim the Company incorrectly summarizes the Joint Movants' position. The Joint Movants state they construe the Response to contend that the Joint Movants understand Senate Bill (SB) 21-264 (the Clean Heat Statute) to bar utilities from taking actions other than those enumerated in the definition of Clean Heat Resources.[2] The Joint Movants state that their position is instead that a clean heat plan can include resources that are not listed in statute as Clean Heat Resources, if they meet certain statutory criteria. Second, the Joint Movants contend that Public Service incorrectly represents that the Joint Movants try to show that CNG and offsets are types of recovered methane. The Joint Movants state that instead they make the opposite claim.[3]

14. Regarding the Pueblo *et al.* Response, the Joint Movants allege the Response makes incorrect statements and errors regarding the legal standard for a summary judgment motion. The Joint Movants claim the Response misrepresents their Partial Summary Judgment Motion as a

[2] Joint Movants' Motion for Leave to Reply, p. 3.
[3] *Id*.

request for full summary judgment, instead of for partial summary judgment, which renders the analysis of outstanding policy and factual determinations in the Response irrelevant.[4]

15. The Joint Movants also include their proposed reply. In the proposed reply, they argue the Commission should grant the Partial Summary Judgment Motion because Public Service's legal argument that the Commission can approve a clean heat plan containing any kind of emission reduction measure, from any sector of the economy, has no merit[5] because the Company misrepresents CNG and offsets as reducing emissions from the distribution of gas and the end-use combustion of gas.[6] They further argue that Public Service misrepresents their original motion, and that they did not concede that the Commission has general authority to approve CNG and offsets.[7] Finally, the Joint Movants argue that the Pueblo *et al*. Response mischaracterizes and misstates the legal standard for a motion for partial summary judgment by pointing to numerous disputed issues of material fact on other issues.[8]

**2. Responses**

**a. Pueblo *et al*.**

16. On October 10, 2023, the City of Pueblo, Project Canary, and the Colorado Decarbonization Coalition filed a memorandum in opposition to the Motion for Leave to Reply. They object that the Motion for Leave to Reply raises no new issues and presents no new evidence of the absence of any genuine issue of material fact. They rebut the contention that their Response misunderstands that the motion is for partial summary judgment and explain that their Response emphasized certain facts because the Partial Summary Judgment Motion requests such broad relief

[4] *Id*. at 4.
[5] *Id*. at 7.
[6] *Id*. at 11.
[7] *Id*. at 12.
[8] *Id*. at 13.

that it would make many of these genuine issues in the proceeding irrelevant. They also point out perceived issues with the statutory analysis presented by the Joint Movants and note that the relief requested by the Joint Movants would leave the parties with only two other options to consider.[9]

**b. Public Service**

17. On October 13, 2023, Public Service also filed a response opposing the Motion for Leave to Reply. Public Service argues that the Joint Movants use their proposed reply to point out differences in lawyers' arguments between the Partial Summary Judgment Motion and Public Service's Response and seek to impermissibly leverage those differences into permission to file a repackaging of their original motion.[10]

**3. Findings and Conclusions**

18. Under Commission Rule 1400, 4 CCR 723-1, reply briefs are not permitted unless a movant establishes: (a) a material misrepresentation of fact; (b) accident or surprise, which ordinary prudence could not have guarded against; (c) newly discovered facts or issues, material for the moving party which that party could not, with reasonable diligence, have discovered at the time the motion was filed; or (d) an incorrect statement or error of law.

19. We deny the Joint Movants' Motion for Leave to Reply, and therefore, will not take into account the arguments in the proposed reply when we consider the Partial Summary Judgment Motion. We find that leave to reply should be granted only in rare instances where there is a material misrepresentation or error of law. Here, the allegation that the Public Service and Pueblo *et al*. Responses present conflicting analyses or misunderstand the Joint Movants' argument does

[9] City of Pueblo, Project Canary, and the Colorado Decarbonization Coalition memorandum in opposition to the Motion for Leave to Reply, p. 5.
[10] Public Service Response to Motion for Leave to Respond, p. 1.

not provide compelling grounds to grant leave for a reply. Instead, we conclude that the Commission has sufficient information and arguments to rule on the Partial Summary Judgment Motion without this additional reply.

### D. Joint Movants' Partial Summary Judgment Motion

#### 1. Motion

20. The Partial Summary Judgment Motion puts forth four points: first, that there are no genuine issues of material fact; second, that the Commission cannot, as a matter of law, approve CNG and offsets in this Proceeding; third, that Public Service violated the Clean Heat Statute plan filing requirements; and fourth, that the Commission cannot approve CNG and offsets within this Application proceeding. The Joint Movants also set out what they consider the available remedies to consider after the Commission rules on the Partial Summary Judgment Motion.

21. The Joint Movants contend that it is appropriate to consider now the legal issues raised in the Partial Summary Judgment Motion because: (1) resolving these threshold legal questions now will save parties substantial time and resources litigating CNG, offsets, and other measures that parties may propose as outside the scope of the Clean Heat Statute; (2) ruling now on the Partial Summary Judgment Motion makes more sense than deferring the decision until the end of the hearing process because closing statements of position are limited in page length and parties are ordinarily not allowed responsive briefs; and (3) resolving the issue now will provide guidance regarding the permissible scope of other gas utilities' clean heat plans (which are due January 1, 2024).

### a. Claim of no genuine issue of material fact

22. The Partial Summary Judgment Motion asserts that there are no genuine issues as to any material fact relevant to determining, as a matter of law, that CNG and offsets are not properly part of a clean heat plan pursuant to the Clean Heat Statute. The Joint Movants maintain that the only material facts are: (1) this is a clean heat plan application; and (2) Public Service requests in its preferred clean heat plan portfolio approval of CNG and carbon offsets. The Joint Movants assert that no party could reasonably dispute these facts and that any disputed facts concerning the purported benefits of CNG and offsets are policy arguments that are irrelevant to the legal question.[11] Finally, the Joint Movants assert that there is no factual dispute regarding the sectors of the economy from which CNG and offsets would allegedly reduce emissions—as CNG refers to efforts intended to reduce methane emissions in the upstream oil and gas sector—and that Public Service's direct testimony plainly describes relying on offsets from sectors *outside* the gas sector, such as agriculture and forestry.[12]

### b. Claim that Commission cannot, as a matter of law, approve CNG and offsets in this Proceeding

23. The Joint Movants also assert that they meet the second prong of the summary judgment standard, which is that the moving party is entitled to a judgment as a matter of law.[13] They assert that, as a matter of law, the Clean Heat Statute does not authorize the Commission to approve a clean heat plan that includes CNG and offsets, or any other "additional measures" beyond recovered methane and measures that reduce the categories of emissions in § 40-3.2.108(3)(c) (I), C.R.S.[14] They reach this conclusion on grounds that: (1) CNG and offsets

[11] Joint Movants' Partial Summary Judgment Motion, pp. 10-11.
[12] *Id*. at 11.
[13] *Id*. at 12.
[14] *Id*. at 12.

do not directly reduce the greenhouse gas emissions from the "distribution and combustion of gas in the retail gas system"; and (2) neither CNG nor offsets can be considered recovered methane, so the indirect emission reductions cannot count towards the utility's clean heat target.

24. To the first point, the Joint Movants argue that the purpose and goal of the Clean Heat Statute is to reduce greenhouse gas emissions from the distribution and combustion of gas in the retail gas system as evidenced by the purpose statement in § 40-3.2-108(3)(a), C.R.S., and the detailed instructions for calculating the baseline and projected emissions in § 40-3.2-108(3)(c)(I)(A)–(C), C.R.S.[15] They further note that Public Service's decision to modify the Division's workbook to account for emission reductions from CNG and offsets poses practical accounting problems and results in a situation where the Company claims to reduce emissions that were not included in the baseline calculation.

25. To the second point, the Joint Movants assert that the General Assembly allows utilities to count the indirect emission reductions from recovered methane towards a clean heat target in limited circumstances, with several important limitations on the use of indirect emission reduction methods.[16] The Joint Movants claim that CNG and offsets cannot fit into this category of indirect emission reduction allowed by the Clean Heat Statute because they are not listed in the definition of recovered methane in § 40-3.2-108(2)(n), C.R.S, and the canons of statutory interpretation and legislative history support that CNG and offsets were expressly and intentionally left out by the General Assembly. Further, the Joint Movants claim, even if CNG and offsets *could* count in the categories of indirect emissions permitted under the Clean Heat Statute, the Company's preferred portfolio relies on an impermissibly large amount of reductions from these

[15] *Id*. at 13-15.
[16] *Id*. at 15-17.

indirect sources.[17] Finally, the Joint Movants contend that the Clean Heat Statute established rigorous requirements to ensure that the claimed indirect emission reductions from recovered methane are real and additional through oversight by the Air Quality Control Commission. Here, they argue, the Public Service has not identified any protocols adopted by the Air Quality Control Commission for CNG and offsets that would ensure that the associated indirect emission reductions result in actual climate benefits.[18]

### c. Claim that Public Service violated the clean heat plan filing requirements set forth in Clean Heat Statute

26. The Partial Summary Judgment Motion further claims that Public Service's preferred portfolio violates the Clean Heat Statute plan filing requirements. The Joint Movants request that the Commission rule that Public Service's Application violates:

- §§ 40-3.2-108(3)(a) and (3)(b)(I), C.R.S., by relying on reductions in emissions from activities other than the distribution and end-use combustion of gas;
- § 40-3.2-108(3)(c)(I)(A)–(C), C.R.S., and Rules 4731(d)(I)(D) and 4527(b)(I)–(III), 4 CCR 723-4, because it calculates projected emissions for its preferred portfolio by counting emission reductions other than the three categories of emissions listed in this section; and
- § 40-3.2-108(4)(c)(II), C.R.S., and Rule 4731(b)(I)(E), 4 CCR 723-4, by failing to identify a preferred option that meets applicable legal requirements.[19]

27. The Joint Movants contend that, while the Clean Heat Statute and the Commission's rules do not expressly state that the preferred portfolio must satisfy the applicable legal requirements and be approvable, that is implicit because statutes must be interpreted to avoid absurd results.

[17] *Id*. at 18, citing the limits on use of recovered methane established by § 40-3.2-108(3)(b)(II), C.R.S.
[18] *Id*. at 19-20.
[19] *Id*. at 28.

28. The Joint Movants then address certain arguments put forth by Public Service in the Direct Testimony of Mr. Ihle. The Joint Movants claim that the Commission cannot use its "general authority" to approve CNG or offsets even if the Clean Heat Statute does not authorize the Commission to approve a clean heat plan containing CNG and offsets. They argue that: (1) a Commission proceeding is limited to the issues that are properly noticed by the Commission and described in the application commencing the proceeding;[20] (2) Public Service does not explain what "general authority" permits these actions; and (3) Public Service's arguments are inconsistent because they do not explain how the Commission can approve CNG and offsets under its general authority even if they are not allowed under the Clean Heat Statute yet still count them towards a clean heat plan that would comply with the Clean Heat Statute.[21]

**d. Proposed Remedies**

29. The Joint Movants argue the Commission should grant summary judgment on this issue and rule that the Commission lacks legal authority in this Proceeding to approve CNG and offsets. In addition to making that determination, the Joint Movants propose that the Commission has several options regarding how to proceed with Public Service's Clean Heat Plan. The Joint Movants contend the Commission should instruct Public Service to identify a preferred portfolio that does not rely on, and count, indirect emission reductions from anything other than recovered methane measures meeting the requirements of the Clean Heat Statute or that the Commission order the Company to file supplemental direct testimony or an amended Application to identify a preferred portfolio that "does not have the legal defects that [Public Service's] current preferred

[20] The Joint Movants argue that the Proceeding here is limited to only Commission review and approval of the Company's Clean Heat Plan under SB 21-264. They state this is similar to the Commission's decision in Proceeding No. 10M-245E that declined to consider and approve post-2017 measures, where the proceeding was opened to consider Public Service's Clean Air Clean Jobs emission reduction plan, filed pursuant to HB 10-1365 only.

[21] Joint Movants' Partial Summary Judgment Motion, pp. 23-25.

portfolio has."[22] Alternatively, the Joint Movants posit that the Commission could order the Company to file revised versions of its direct testimony and Application that strikes all references to the Company's preferred portfolio.

### 2. Responses

#### a. Public Service

30. Public Service argues that the Partial Summary Judgment Motion lacks merit, except that the Company agrees the issue of whether it can include CNG and offsets as emission-reduction measures should be resolved now rather than during deliberations at the conclusion of this Proceeding.[23]

31. Public Service argues that the Clean Heat Statute explicitly contemplates the use of resources other than the enumerated clean heat resources, including § 40-3.2-108(4)(c)(II)(A)-(D), C.R.S. (which enumerates the portfolios to be presented); § 40-3.2-108(1)(c)(I), C.R.S. (which indicates that utilities should utilize both the enumerated resources "and other measures" to attempt to reach the targets in a cost-effective manner); and § 40-3.2-108(6)(d)(I)(A), C.R.S. (which requires the Commission to consider whether a clean heat plan achieves the clean heat targets through *maximizing* the use of clean heat resources). Public Service further notes that no language in the Clean Heat Statute prohibits the use of non-clean heat resources or specifically CNG and offsets from being used to meet the clean heat target and that the Joint Movants' arguments in the Partial Summary Judgment Motion do not address any of the statutory provisions the Company cites above.[24]

[22] *Id*. at 27.
[23] Public Service Response to Partial Summary Judgment Motion, pp. 7-8.
[24] *Id*. at 13-15.

32. Public Service also takes issue with the Joint Movants' characterization of "direct" and "indirect" emissions and the assertation that the Company had claimed CNG and offsets were types of recovered methane.[25] Public Service states the terms "direct" and "indirect" emission reduction never appear in the Clean Heat Statute and that the Company has never suggested that CNG and offsets are types of recovered methane.[26] The Company also argues that CNG and offsets "do in fact reduce emissions from gas distribution utilities, by reducing the intensity of emissions associated with gas purchased by the utility and delivered through its system or by offsetting those emissions"[27] and that its proposed emission accounting approach is "entirely logical."[28]

33. Public Service also argues that the Commission may approve the use of CNG and offsets under its general authority to regulate utilities. Further, it argues that its Application has been deemed complete and fully noticed and that the Joint Movants do not allege any prejudice due to any purported deficiency in the Application or notice given.[29]

34. Public Service concludes with a policy discussion that argues that full consideration of the Company's proposal is in the public interest. It argues that granting the Partial Summary Judgment Motion would cut off important discussion and lead to greater greenhouse gas emissions in the near- and medium-term. The Company warns this could harm consumers because the "only clean heat resource" portfolio is substantially more expensive and would slow the Company down towards meeting the 2030 target too. Finally, it argues that granting the Partial Summary Judgment Motion would lead to delays in the Proceeding and would improperly cut off debate and affect the

[25] *Id*. at 16.
[26] *Id*. at 16.
[27] *Id*. at 17.
[28] *Id*. at 18.
[29] *Id*. at 23.

rights of the intervenors who did not join the motion to address CNG, offsets, or other resources in their testimony.[30]

**b. CEO/APCD**

35. CEO/APCD argue that Public Service's proposed CNG and offsets cannot meet the definition of "clean heat resources" under § 40-3.2-108(2)(c), C.R.S., and therefore cannot be used to meet the Company's clean heat targets under § 40-3.2-108(3), C.R.S.[31] However, CEO/APCD do not agree with the Joint Movants that the Company's preferred portfolio violates SB 21-264. CEO/APCD understand the Clean Heat Statute to allow utilities to include non-clean heat resources in their clean heat plans, but these additional measures cannot be included in the emissions reduction calculations required to show compliance with a target.[32] CEO/APCD do not take a position on whether the Commission has authority to approve emission reduction measures other than recovered methane and the categories of "clean heat resources" specified in the Clean Heat Statute.

36. CEO/APCD agree with the two facts put forth in the Partial Summary Judgment Motion. They further assert that it is indisputable that: (1) neither CNG nor offsets are listed in the statutory definitions of clean heat resources or recovered methane; and (2) neither CNG nor the offsets proposed in the Company's preferred portfolio reduce carbon emissions from the combustion of gas in customer end uses or meet an approved recovered methane protocol as required for the Commission to determine additional emission reduction measures are clean heat resources.[33]

[30] *Id*. at 23-27.
[31] CEO/APCD Response to Partial Summary Judgment Motion, p. 4.
[32] *Id*. at 4-5.
[33] *Id*. at 6-7.

37. While CEO/APCD do not dispute that a clean heat plan can include additional measures, they argue that the Clean Heat Statute clearly defines both: (1) the goal of a clean heat plan as meeting the clean heat targets; and (2) the resources that can be used to achieve those targets. CEO/APCD reach this conclusion based on three statutory provisions. First, they reference that a clean heat plan must demonstrate reductions in emissions compared to a 2015 baseline. Second, they reference that a "clean heat plan" is defined as a comprehensive plan that demonstrates projected reductions in methane and carbon dioxide emissions that, together, meet the reductions required at the "lowest reasonable cost." They point out that statute defines "lowest reasonable cost" as a "reasonable-cost mix of clean heat resources that meet clean heat targets…as determined through a detailed analysis." Finally, they state that the Clean Heat Statute explicitly dictates that a gas distribution utility submitting the clean heat plan must demonstrate that the plan "will achieve a reduction of carbon dioxide and methane emissions from the distribution and end-use combustion of gas."[34]

38. CEO/APCD also argue that CNG cannot, as a matter of law, be considered a clean heat resource because: (1) it is not listed in the Clean Heat Statute; and (2) Public Service has not requested that the Commission and the Division deem CNG a clean heat resource pursuant to the procedures in § 40-3.2-108(2)(c)(VI), C.R.S. CEO/APCD reiterate concerns about double counting across industries and note that Colorado's greenhouse gas inventory is also not designed to accommodate the type of cross-sector emissions accounting that Public Service advocates for in its preferred portfolio. CEO/APCD state that reductions achieved through Air Quality Control Commission rules and additional federal actions will be counted in the industrial sector of the greenhouse gas inventory—for which the Legislature has established explicit greenhouse gas

[34] *Id*. at 9-11.

emission reduction targets—and therefore should not be given "additional credit" in a utility clean heat plan.[35]

39. Similarly, CEO/APCD contend that offsets cannot, as a matter of law, be considered a clean heat resource because offsets cannot result in a reduction in carbon emissions from the combustion of gas in customer end uses or meet a recovered methane protocol approved by the Air Quality Control Commission.[36]

40. Finally, CEO/APCD argue that it is inappropriate for the Company to modify the Division's workbook within this particular Proceeding. They maintain the Clean Heat Statute contemplates that the Division would work in consultation with the Commission to develop and revise the workbook as necessary in the future.[37]

**c. Denver**

41. Denver states that it "does not necessarily agree with all statements made by the Joint Movants" in the Partial Summary Judgment Motion but that it agrees with certain core tenants of the legal argument and indisputable facts.[38] Denver asserts that: (1) CNG and offsets are not clean heat resources; and (2) the Commission legally cannot approve "additional measures" that are not clean heat resources as part of a clean heat plan proceeding.[39] Denver also agrees that resolving this legal issue at the outset of this Proceeding is necessary to ensure procedural efficiency and clarity for the parties.

42. Denver asserts that there are actually three "undisputed material facts." It agrees with the two material facts set forth in the Partial Summary Judgment Motion and adds a third:

[35] CEO/APCD Response to Partial Summary Judgment Motion, p. 15.
[36] *Id*. at 15-16.
[37] *Id*. at 18-19.
[38] Denver Response to Partial Summary Judgment Motion, p. 3.
[39] *Id*. at 3-4.

that it is "indisputable that neither certified natural gas nor the offsets proposed by the Company reduce carbon emissions from the distribution and end-use combustion of gas or meet an approved recovered methane protocol, as required for the Commission to determine that additional emission reduction measures are Clean Heat Resources."[40]

43. Denver agrees with the legal conclusion, that the Commission cannot approve measures other than those delivering the three categories of emissions specified in statute at § 40-3.2-108(3)(c)(I)(A)–(C), C.R.S., advocated for in the Partial Summary Judgment Motion. Denver argues that, as a matter of law, CNG and offsets cannot be considered clean heat resources because neither are in the statutory definition of clean heat resource or recovered methane and because neither fall into the catch-all provision in § 40-3.2-108(2)(c)(VI), C.R.S. In support, Denver points to the statutory language stating that the "purpose of a Clean Heat Plan is to achieve Clean Heat Targets by reducing carbon dioxide and methane emissions from gas distribution utilities" and that clean heat targets and compliance with these targets must be calculated as specified in § 40-3.2-108(3)(c) C.R.S.[41] Denver also notes that that the statutory definition of clean heat resources and recovered methane do not explicitly list CNG or offsets.[42]

44. Denver also argues that the only types of resources that can contribute to compliance with clean heat targets are the statutorily-defined clean heat resources. Denver reaches this conclusion because it states the way "clean heat resources" is defined in statute encompasses *all* possible resources that could reduce emissions from the three categories specified in § 40-3.2-108(3)(c)(I)(A)–(C), C.R.S.[43] Denver states the General Assembly has not explicitly authorized the usage of any additional types of emissions reductions from "additional measures"

[40] *Id*. at 5-6.
[41] *Id*. at 7.
[42] *Id*. at 7.
[43] *Id*. at 9.

beyond those identified in the definition of "clean heat resources" to contribute toward meeting clean heat targets.

45. Finally, Denver contends that the Commission cannot approve CNG and offsets in a clean heat plan proceeding because these measures do not contribute to compliance with clean heat targets and do not serve the purpose of clean heat planning.[44] Denver allows that Public Service could consider CNG and offsets in other proceedings or for other purposes, but maintains these "additional measures" are irrelevant to the clean heat plan and should not be considered here.[45]

**d. Pueblo *et al.***

46. The Pueblo *et al*. respondents argue that the Partial Summary Judgment Motion is improperly styled as a motion for summary judgment and fails to demonstrate the absence of any genuine issue of material fact.

47. The Pueblo *et al*. respondents claim the Partial Summary Judgment Motion should not be granted because the motion fails to demonstrate that there are no genuine issues of material facts. They put forth a significant list of what they consider to be disputed material facts, including certain facts related to the Clean Heat Statute and other facts related to the Company's filing.[46] They state it is inappropriate to grant such sweeping relief at this early point in the proceeding and before full opportunity for discovery by the parties.[47] They also caution that the motion is so broadly drafted that it is difficult to anticipate its unintended consequences.[48]

[44] *Id*. at 10.
[45] *Id*.
[46] Pueblo *et al*. Response to Partial Summary Judgment Motion, pp. 6-12.
[47] *Id*. at 13.
[48] *Id*. at 15.

48. The Pueblo *et al*. respondents also argue that the Joint Movants wrongly interpret the Clean Heat Statute. They assert the Partial Summary Judgment Motion improperly expands the scope of SB 21-264 because: (1) it fails to explain why a utility is prevented from showing portfolios that include other measures; and (2) the Joint Movants improperly rely on a distinction between "direct" and "indirect" emissions that is not found in the statute. They also argue that the ultimate remedy sought through the Partial Summary Judgment Motion is now moot since the Application has been deemed complete by the Commission.[49]

### 3. Findings and Conclusions

#### a. Legal Standard

49. *Colorado Rule of Civil Procedure* 56 allows summary judgment to be entered before a hearing when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[50] The movant bears the burden of establishing the absence of any genuine issue of material fact. In determining whether summary judgment is proper, the Commission must grant the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts and resolve all doubts against the moving party.[51] Summary judgment is a drastic remedy, and is appropriate only when the moving party carries its burden and the nonmoving party fails to establish that a hearing is necessary.[52] If the movant does not satisfy its burden, summary judgment is inappropriate.[53] Partial summary

[49] *Id*. at 20.
[50] C.R.C.P. 56(c).
[51] *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999).
[52] *Id*.
[53] *See Ginter v. Palmer & Co*., 196 Colo. 203 (Colo. 1978) (reversing trial court's grant of the defendant's motion for summary judgment even though the plaintiff did not respond to the motion; citing C.R.C.P. 56(e), which states in relevant part that "[i]f there is no response, summary judgment, **if appropriate**, shall be entered" (emphasis added), in support of its holding that summary judgment was inappropriate because the defendant failed to carry its burden).

judgment does not require a movant to demonstrate that they are entitled to judgment on all issues in a proceeding, but rather that the movant is entitled to judgment on the specific issues raised in the motion.[54]

50. In deciding whether there is a genuine issue of material fact, the Commission may consider the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits.[55] In the context of summary judgment, a material fact is one that will affect the case's outcome.[56]

### b. Partial Summary Judgment Motion

#### (1) Disputed Facts

51. The Joint Movants assert that there are no genuine issues as to any material fact regarding whether the Commission may approve CNG and offsets as part of a clean heat plan. They put forth two facts they claim are material and undisputed. First, that this Proceeding was initiated by the Company filing an Application requesting approval of a Clean Heat Plan pursuant to SB 21-264, and second, that in its preferred portfolio, Public Service requests Commission approval of a Clean Heat Plan that includes CNG and offsets.[57]

52. In responses, several parties contend there are actually other undisputed relevant facts. Denver adds that it is "indisputable that neither certified natural gas nor the offsets proposed by the Company reduce carbon emissions from the distribution and end-use combustion of gas or meet an approved recovered methane protocol, as required for the Commission to determine that

[54] *Hauser v. Rose Health Care Sys.*, 857 P.2d 524, 527 (Colo. App. 1993) ("In a proper case, a trial court may grant a partial summary judgment as to the undisputed material facts and reserve the disputed facts for subsequent proceedings.") (citing *City of Westminster v. Church*, 445 P.2d 52 (Colo. 1968); C.R.C.P. 56(d)).
[55] *See* C.R.C.P. 56(c).
[56] *City of Aurora v. ACJ P'ship*, 209 P.3d 1076, 1082 (Colo. 2009).
[57] Joint Movants' Partial Summary Judgment Motion, p. 11.

additional emission reduction measures are Clean Heat Resources."[58] CEO/APCD similarly add that: (1) neither CNG nor offsets are listed in the statutory definitions of clean heat resources or recovered methane; and (2) neither CNG nor the offsets proposed in the Company's preferred portfolio reduce carbon emissions from the combustion of gas in customer end uses or meet an approved recovered methane protocol as required for the Commission to determine additional emission reduction measures are clean heat resources.[59]

53. Conversely, both the Pueblo *et al*. respondents and Public Service contend there are remaining disputed material facts. Public Service maintains that CNG and offsets "do in fact reduce emissions from gas distribution utilities, by reducing the intensity of emissions associated with gas purchased by the utility and delivered through its system or by offsetting those emissions."[60] Public Service argues that whether the Commission should approve these measures is a "fact-bound" determination that is best left until after the evidentiary hearing.[61] Similarly, the Pueblo *et al*. respondents argue that the Joint Movants fail to demonstrate the absence of any genuine issue of material fact, as required to grant summary judgment.[62]

**(2) Analysis**

54. We find the Joint Movants have not carried their burden to articulate precisely what facts are undisputed to establish the absence of any genuine issue of material fact. For this reason, we find cause to deny the Partial Summary Judgment Motion. We find the record in this Proceeding will benefit from a hearing that provides further evidence concerning the disputed issues of fact, as well as the significance of certain undisputed facts. That evidence includes:

[58] Denver Response to Partial Summary Judgment Motion, p. 6.
[59] CEO/APCD Response to Partial Summary Judgment Motion, pp. 6-7.
[60] Public Service Response to Partial Summary Judgment Motion, p. 17.
[61] *Id*.
[62] Pueblo *et al*. Response to Partial Summary Judgment Motion, p. 20.

(a) whether CNG and offsets can, or do, in fact reduce the emissions from gas distribution utilities; (b) whether Public Service's emission accounting approach considering the "intensity" of emissions comports with § 40-3.2-108(3)(c)(I)(a)-(c), C.R.S.; (c) further development in the record of the Company's proposal to include offsets, including description of from which industry the offsets will derive and explanation whether the offsets will be specific to Colorado emissions; and (d) further development in the record of other related topics that the parties believe limited testimony on may aid the Commission's deliberations on this issue.

55. Construing the record as it stands currently in the light most favorable to Public Service, we conclude that summary judgment is inappropriate at this time. We find the Joint Movants have not carried their burden to establish the absence of any genuine issue of material fact, therefore we must deny the Partial Summary Judgment Motion.

### E. Consideration of Threshold Legal Questions

56. Both the Joint Movants[63] and Public Service[64] request that the Commission resolve this threshold legal issue early in the Proceeding. Public Service states the Commission can and should "resolve now the basic legal question as to whether the Company may bring forward CNG and offsets as emission-reduction measures in this proceeding" and that doing so will provide clarity to the parties and avoid devoting substantial resources on the viability of this issue during discovery, testimony, and cross-examination as the case progresses.[65]

57. We agree that providing legal clarity now is appropriate. Resolving this threshold legal issue at the outset will focus the parties' testimony going forward on the remaining policy and legal considerations present in the filing that are unrelated to CNG and offsets. We therefore

[63] *See* Joint Movants' Partial Summary Judgment Motion, p. 4.
[64] Public Service Response to Partial Summary Judgment Motion, p. 7.
[65] *Id*. at 7-8.

provide certain applicable legal guidance in this Decision despite rejecting the Partial Summary Judgment Motion for the reasons discussed above.

### a. Findings and Conclusions

58. As a threshold matter, we find that SB 21-264 allows the Commission to approve a clean heat plan that includes non-enumerated clean heat resources.[66] The Clean Heat Statute affords the Commission the flexibility to approve a clean heat plan that includes non-enumerated clean heat resources as evidenced by several statutory provisions. First, § 40-3-2-108(4)(c)(II), C.R.S., lays out the filing requirements of a clean heat plan. It requires a utility to present several portfolios, including in (A), one that uses "clean heat resources to the maximum practicable extent" and in (B), one that uses "only clean heat resources." Further, in § 40-3-2-108(4)(d), C.R.S., the statute states that, to demonstrate compliance, a utility must "utilize clean heat resources to the maximum extent practicable and count greenhouse gas emission reductions resulting from its use of those resources." These filing requirements can be read harmoniously with the Commission approval section in § 40-3-2-108(6)(c), C.R.S., which requires the Commission, when evaluating a clean heat plan, to consider whether the plan "achieves the clean heat target through maximizing the use of clean heat resources." To read the Clean Heat Statute consistently and harmoniously,[67] we cannot ignore the repeated use of "maximum extent" and "maximizing" when referring to the use of clean heat resources; this language necessarily suggests that a plan can include something

[66] Both the Joint Movants and Public Service seem to agree that a clean heat plan can include non-enumerated clean heat resources. *See* Partial Summary Judgment Motion at 21 ("[a] Clean Heat Plan can include resources that are not listed clean heat resources only if those resources reduce the emissions that a clean heat plan must address: certain direct emissions from the distribution and end-use of retail gas systems, and indirect emissions related to recovered methane.") and Company Response at 9 ("Senate Bill 21-264 explicitly contemplates the use of resources other than the enumerated Clean Heat Resources.").

[67] We must construe the legislative scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts. *See, e.g.*, *Pineda-Liberato v. People*, 403 P.3d 160, 164 (Colo. 2017) (instructing courts "read the statutory scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts and avoiding constructions that would render any words or phrases superfluous").

"other" than clean heat resources. Further, the definition of "clean heat plan" does not refer directly to "clean heat resources" and similarly, the purpose of a clean heat plan, as described in § 40-3.2-108(3)(a), C.R.S., also does not reference clean heat resources. In sum, when taken together, the Clean Heat Statute contemplates that non-enumerated clean heat resources may be included in a clean heat plan.

59. We also find that the Clean Heat Statute affords the Commission flexibility to count the emission reduction associated with the use of non-enumerated clean heat resources, if appropriate. While the Clean Heat Statute includes important limitations on the type of emission reductions that may count towards a clean heat target and includes explicit instructions on how to calculate the applicable targets and baselines, we do not find any limiting language in the Clean Heat Statute that restricts a utility to only utilizing clean heat resources towards calculation of its compliance with a target. Instead, the Clean Heat Statute states that the purpose of a clean heat plan is to achieve clean heat targets, meaning that the emission reduction value at the plan level is the relevant analysis.[68] To illustrate using a hypothetical example put forth by Public Service,[69] if the Company proposed a novel device that captures carbon emissions from residential gas stoves as a non-enumerated resource, and that novel device does not obtain a designation as a clean heat resource pursuant to § 40-3.2-108(2)(c)(VI), C.R.S., the Company could count the emission reductions from that technology towards its clean heat target.

60. While we find that the Clean Heat Statute plainly authorizes the Commission to consider clean heat plans that use non-enumerated resources to meet a utility's clean heat target,

[68] § 40-3.2-108(3)(a), C.R.S.
[69] Public Service Response to Partial Summary Judgment Motion, pp. 20-21.

the use of other non-enumerated resources is limited by the Clean Heat Statute in several meaningful ways.

61. First, the Clean Heat Statute requires the Commission to consider whether a clean heat plan achieves the clean heat target through "maximizing the use of clean heat resources."[70] By making the choice to enumerate specific resources as "clean heat resources," the Legislature made a deliberate choice to prioritize the use of certain emission reduction avenues. This is evidenced by the Clean Heat Statute declaration section, which states that there are "significant economic development opportunities" with recovered methane and that the "development of hydrogen projects in Colorado has the potential to lower costs, contribute to economies of scale, and bring economic development opportunities."[71] Further, the Clean Heat Statute requires the Commission to consider whether the plan maximizes the use of clean heat resources, and directs utilities to demonstrate compliance with clean heat targets by "utiliz[ing] clean heat resources to the maximum extent possible" and "count greenhouse gas emission reductions resulting from the use of those resources."[72] Read in concert, the Legislature contemplated that clean heat resources get "counted" first and their use maximized before the Commission considers other non-enumerated options. Further supporting this interpretation is that the Commission can only require a utility to go beyond the clean heat target through the use of clean heat resources.[73] When read together, these provisions indicate that the Legislature defined clean heat resources because it intended to spur economic development of these technologies and intended the Commission to prioritize the use of those resources in approving clean heat plans.

[70] § 40-3.2-108(5)(d)(I)(A), C.R.S.
[71] § 40-3.2-108(1)(b), C.R.S.
[72] § 40-3.2-108(6)(d)(I)(A), C.R.S.
[73] § 40-3.2-108(6)(d)(I)(A), C.R.S.

62. Most importantly, the Clean Heat Statute directs that a clean heat plan must reduce emissions from the distribution and end use of gas.[74] Section § 40-3.2-108(3), C.R.S., explicitly and repeatedly provides that the purpose of a clean heat plan is to demonstrate that the gas distribution utility will achieve a reduction of carbon dioxide and methane emissions from the distribution and end-use combustion of gas. Further, the Clean Heat Statute explicitly describes how a utility can demonstrate compliance by calculating the baseline and projected emissions.[75] While a utility may demonstrate compliance by using non-enumerated resources, those resources, and the plan, must reduce emissions of carbon dioxide and methane emissions from the distribution and end-use combustion of gas.

63. The Clean Heat Statute is explicit that the legislation is intended to reduce emissions from Colorado gas distribution utilities, which is aligned with its sector-by-sector emission reduction legislative approach.

64. In sum, the Clean Heat Statute gives the Commission the discretion to approve a clean heat plan that includes non-enumerated resources, as long as the Commission considers whether the clean heat plan maximizes the use of clean heat resources, and the non-enumerated resources achieve a reduction of carbon dioxide and methane emissions from the distribution and end-use combustion of gas. The Commission's approval of a clean heat plan will also take into account the other considerations specified in § 40-3.2-108(6)(c), C.R.S., including whether the overall plan results in a reasonable cost to customers and whether the proposed or modified plan is in the public interest.

[74] §§ 40-3.2-108(3)(a) and (3)(b)(I), C.R.S.
[75] § 40-3.2-108(3)(c)(I)(A)–(C), C.R.S.

### b. Request for Ruling on Preferred Portfolio

65. The Joint Movants request that the Commission rule that Public Service's Application violates several statutory provisions, namely that it improperly relies on reductions in emissions from activities other than the distribution and end-use combustion of gas (in violation of §§ 40-3.2-108(3)(a) and (3)(b)(I), C.R.S.) and that it violates § 40-3.2-108(3)(c)(I)(A)–(C), C.R.S., and § 40-3.2-108(4)(c)(II), C.R.S., because it fails to identify a preferred option that meets the applicable legal requirements.[76] However, Public Service argues that its preferred portfolio complies with the Clean Heat Statute because § 40-3.2-108(3)(c), C.R.S., does not limit what can be contained in the utility's preferred portfolio.

66. The Commission finds that it cannot determine at this juncture whether the Company's Application is in violation of the emission accounting provisions in the Clean Heat Statute[77] and that further development of the factual record is necessary to make this determination. The Joint Movants contend, and we agree, that the Commission may only approve efforts that reduce emissions from the distribution and combustion of gas in the retail gas system or through recovered methane options specifically enumerated in statute. Nonetheless, the Company asserts that CNG and offsets "do in fact" reduce emissions in this manner by reducing the "intensity"[78] of the emissions associated. In light of these differing positions, we find it appropriate to afford the Company and the parties an opportunity to put forth additional evidence as to whether Public Service's approach comports with the Clean Heat Statute before we make a final determination on this issue. We find that further process on this issue will benefit the Proceeding and allow the Commission to expeditiously address this issue, as requested by the Company as well as the Joint

[76] Joint Movants' Partial Summary Judgment Motion, p. 28.
[77] *See* §§ 40-3.2-108(3)(a) and (3)(b)(I), C.R.S.
[78] Public Service Response to Partial Summary Judgment Motion, p. 17.

Movants. Through this process, we expect Public Service to explain how precisely its proposed use of CNG and offsets reduces emissions from the "distribution and end-use combustion of gas," despite the repeated references in its testimony to the upstream emission reduction impact of CNG, in particular. To that end, we scheduled by separate decision[79] a limited hearing in December 2023. We find that using an accelerated process to reach a conclusion regarding the appropriateness of the inclusion of CNG and offsets in the Company's preferred portfolio earlier in this Proceeding will facilitate an efficient resolution of this Proceeding and ensure that the final approved clean heat plan is in the public interest.

## II. ORDER

### A. It Is Ordered That:

1. The Joint Motion for Partial Summary Judgment, filed by the City of Boulder, the Colorado Renewable Energy Society, the Colorado Solar and Storage Association, Natural Resources Defense Council, Physicians for Social Responsibility Colorado, Sierra Club, Solar Energy Industries Association, Southwest Energy Efficiency Project, the Office of the Utility Consumer Advocate, and Western Resource Advocates (Joint Movants), on September 6, 2023, is denied, consistent with the discussion above.

2. The Joint Motion for Leave to Reply, filed by the Joint Movants on October 3, 2023, is denied, consistent with the discussion above.

[79] Decision No. C23-0717, issued October 20, 2023.

3. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING**
**October 18, 2023**

(S E A L)

ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ERIC BLANK

TOM PLANT

Commissioners

COMMISSIONER MEGAN M. GILMAN
CONCURRING

## III. COMMISSIONER MEGAN M. GILMAN CONCURRING

1. Considering the full Commission's interpretation that, based on the legislative language, in order to count towards a clean heat target, non-enumerated resources must reduce emissions from the distribution and end use of gas, I believe the Commission already has before it a significant amount of information in the record upon which to make the decision that the proposed CNG and offsets do not reduce emissions from the distribution and end use of gas. Public Service has included direct testimony from multiple witnesses as to the specifics and arguments for applicability of these emissions reduction sources and also had an opportunity to put forth arguments in response to the Partial Summary Judgment Motion before us, to directly rebut claims made by the Joint Movants, as to their permissible inclusion in the Company's preferred portfolio. Likewise, other parties and stakeholders also put forth responses to the Partial Summary Judgment Motion, directly addressing the permissibility of the inclusion of the CNG and offset resources at issue.

2. In describing these resources, the Company witnesses repeatedly referred to both CNG and offsets, as proposed in this plan, as being outside of the distribution and end use of gas—a threshold the Commission has determined violates the emission reduction calculation requirements found in the Clean Heat Statute. Mr. Weinberg's testimony includes a description of carbon offsets as "a reduction in emissions from carbon dioxide or other GHGs made to compensate for emissions elsewhere."[80] The actual offsets described in the Company's plan refer to forestry-related projects, an industry and sector plainly outside of the legislatively defined target area.[81] Regarding CNG, Ms. Quillian describes the emissions reductions from CNG as "upstream

[80] Hrg. Ex. 107, p. 7.
[81] Hrg. Ex. 107, p. 32.

emissions reductions"[82] and Dr. Lieb gets into greater detail while also directly indicating that the emissions reductions resulting from the use of CNG are "outside of the LDC sector."[83]

3. I found the Company's response to rebut the technical applicability challenges brought up by the Joint Movants unpersuasive. References to other, enumerated resources, which were intentionally added by the Legislature, or to the Commission's general ability to approve other programs or expenditures did not distract from the main issue of the emissions reductions being described as clearly not occurring in the boundary defined by the Legislature (*e.g.,* from the distribution and end-use combustion of natural gas).

4. While it is early in the process, I feel that resolution of this issue in the short-term is in the public interest, as well as in the interest of the parties. To that end, the Company, as well as the Joint Movants, have all argued for the Commission to address this issue at this early phase of the Proceeding. The discrete issue of the inclusion of the proposed offsets and CNG has the potential to cause a significant distraction of time and attention away from other issues as we move forwards with this Proceeding, a first of its kind filing. Given the exceedingly unlikely potential of the Company to rebut its prior testimony, and now argue that those emissions reductions do, in fact, occur in the distribution and end use of gas. I would have preferred to resolve this issue on the current record before us.

5. However, given the interest of other Commissioners, and in order to avoid delaying the litigation of this discrete issue until the end of the Proceeding next spring and risk a significant diversion of resources from all parties, I agreed with my colleague to a direct process upon which

[82] Hrg. Ex. 104, p. 26, 28.
[83] Hrg. Ex. 106, p. 15.

to garner more testimony and reach a conclusion on this issue in the short-term through a limited hearing in December 2023.

(S E A L)

ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MEGAN M. GILMAN

Commissioner