STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Denial of the Application for New York State Title V Air Permit, DEC ID: #3-3346-00011/00017 Pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), Section 621.10(f),

- of -

DANSKAMMER ENERGY CENTER,

Applicant.

DEC Permit ID No.: 3-3346-00011/00017

RULING ON ISSUES

AND

PARTY STATUS

BACKGROUND

This issues ruling arises from an application before the New York State Department of Environmental Conservation (DEC) for a Clean Air Act (CAA) Title V air permit modification sought by Danskammer Energy, LLC (Danskammer or applicant) in conjunction with Danskammer's application for a certificate of environmental compatibility and public need pursuant to article 10 of the Public Service Law (PSL). Danskammer operates the Danskammer Energy Center (facility) located in the Town of Newburgh, Orange County, New York. The existing facility operates as a natural gas fired facility with a capacity of up to 532 MW. The proposed repowered facility would be a natural gas fired combined cycle facility with a capacity of up to 600 MW and limited provisions to burn ultra-low sulfur diesel fuel as a backup fuel with approximately five days of on-site fuel oil storage.[1]

On December 3, 2019, Danskammer submitted a Title V air permit modification application to DEC. On December 11, 2019, Danskammer filed a PSL article 10 application seeking authority to repower the facility (*see Application of Danskammer Energy LLC*, Case No. 18-F-0325). Pursuant to PSL § 165(2), the presiding examiner from the Department of Public Service must issue an order identifying the issues to be addressed at the PSL article 10 hearing. Federally delegated permits issued by DEC, such as the CAA Title V permit at issue here, however, are reviewed pursuant to DEC's regulations, 6 NYCRR parts 621 (Uniform Procedures) and 624 (Permit Hearing Procedures). Accordingly, 6 NYCRR 624.4(b)(5) directs the DEC administrative law judge to rule on requests for full party status and amicus status, and to determine which issues satisfy the requirements of adjudicable issues as set forth in subdivision 624.4(c).

On January 31, 2020, DEC staff issued a Notice of Incomplete Application (NOIA) requesting additional information, including information related to the proposed facility's consistency with the Climate Leadership and Community Protection Act (CLCPA) and the statewide greenhouse gas (GHG) emissions limits established in Environmental Conservation Law (ECL) article 75. On February 10, 2020, the Chair of the Board on Electric Generation Siting and the Environment (Siting Board) issued an application deficiency letter to Danskammer. On February 18, March 20, April 21, May 29, June 23 and July 8, 2020, Danskammer provided DEC with responses to the January 31, 2020, NOIA. By separate correspondence dated July 8, 2020, Danskammer responded to the Siting Board Chair's February 10, 2020, deficiency notice.

On August 18, 2020, DEC requested that Danskammer provide additional air pollution modeling information and on September 8, 2020, DEC issued a second NOIA to Danskammer requesting additional information related to Danskammer's modeling and July 8, 2020 Supplemental Greenhouse Gas Analysis. By letter dated September 8, 2020, the Siting Board Chair issued an application deficiency letter related to consistency with the CLCPA and the use of alternative energy sources identified by Danskammer. On November 17, 2020, Danskammer

[1] A combined cycle power plant uses a gas and a steam turbine to produce electricity. Heat from the gas turbine is routed to the steam turbine allowing extra electricity to be generated and increase efficiency.

submitted additional information in response to DEC's September 8, 2020, NOIA, and the Siting Board's September 8, 2020, deficiency notice.

On January 19, 2021, DEC issued a third NOIA requesting additional information related to the CLCPA analysis. On February 8, 2021, Danskammer submitted additional information in response to the January 19, 2021, NOIA. Subsequently, Danskammer agreed to several extensions for DEC to determine whether the Title V permit application was complete. On February 26, 2021, the Chair of the Siting Board issued a notice of compliance on Danskammer's application for a certificate of environmental compatibility and public need.

On June 30, 2021, DEC issued a Notice of Complete Application (NOCA) in the Environmental Notice Bulletin (ENB) commencing the public review and comment period for the draft Air Title V Facility permit as well as the draft Title IV (Phase II Acid Rain) and State Pollution Discharge Elimination System (SPDES) permits. DEC issued a Notice of Legislative Public Comment Hearing on July 21, 2021, and an Amended Notice of Legislative Public Comment Hearing on August 11, 2021, that were posted in the ENB on those dates. I convened virtual legislative public comment hearings on August 23, 2021 at 1:00 p.m. and 6:00 p.m. and on August 25, 2021 at 1:00 p.m. and 6:00 p.m.

On October 27, 2021, DEC issued a notice of denial of the Title V permit application pursuant to 6 NYCRR 621.10(f). DEC's denial of Danskammer's Title V application was based upon DEC's determination that the project would be inconsistent with or would interfere with the attainment of the statewide greenhouse gas emission limits established in ECL article 75. DEC staff also cited the lack of short- or long-term reliability need for the project and the failure of Danskammer to identify adequate alternatives or greenhouse gas emission mitigation measures as reasons for denying the Title V permit application. DEC concluded that the project does not satisfy the requirements of the CLCPA. Danskammer submitted a request for hearing on DEC's denial dated November 23, 2021. The matter was referred to DEC's Office of Hearings and Mediation Services (OHMS) to conduct the permit proceeding pursuant to 6 NYCRR part 624.

On December 20, 2021, I convened a conference call with applicant and DEC staff to discuss the scheduling of this proceeding. Dates were discussed and agreed upon during the call. I advised the parties that I would provide a notice of public comment period, legislative public comment hearing, deadline for petitions for party status and issues conference (combined notice) for publication in the ENB and a local paper. On December 23, 2021, Danskammer commenced a Civil Practice Law and Rules (CPLR) article 78 proceeding and declaratory judgment action (article 78 proceeding) against DEC related to DEC's denial of the Title V permit. On January 7, 2022, I distributed the combined notice to applicant and DEC staff and directed applicant to arrange to have the combined notice published in a newspaper having general circulation in the area within which the proposed project is located.

At the request of applicant, a conference call was convened on January 10, 2022. During the call, Danskammer requested that this part 624 proceeding be stayed pending the outcome of the article 78 proceeding. I denied Danskammer's request without prejudice and instructed applicant to publish the notice as previously directed.

PROCEEDINGS

I caused the combined notice to be published in the ENB on January 12, 2022. Applicant published the notice in the *Mid Hudson Times* on January 13, 2022. As provided in the combined notice, I accepted oral comments received at the previous four public comment hearings as well as previous written comments into the record of this proceeding. I convened a legislative public comment hearing on February 15, 2022 and written comments were received until February 22, 2022.

Both applicant and DEC staff are mandatory parties to this proceeding (*see* 6 NYCRR 624.5[a]). In accordance with 6 NYCRR 624.5(b), and as set forth in the combined notice, any other person seeking full party status or amicus status was required to file a written petition with OHMS. I timely received the following petitions: petition of Scenic Hudson, Inc. (Scenic Hudson) for full party status; petition of Sierra Club and Orange RAPP for full party status; and petition of Riverkeeper, Inc. (Riverkeeper) for amicus status. I also received a timely statement of issues from applicant. I convened the issues conference on March 16, 2022, and at the request of the parties and petitioners the conference was adjourned and reconvened on April 20 and 21, 2022.

The Title V permit modification application is a Type II action under ECL article 8 (State Environmental Quality Review Act [SEQRA]) and 6 NYCRR 617.5(c)(44) and is not subject to review under SEQRA.

Legislative Public Comment Hearings and Written Comments

As referenced above, I convened legislative public comment hearings on August 23 and 25, 2021 (pursuant to 6 NYCRR part 621) and February 15, 2022 (pursuant to 6 NYCRR part 624) by Webex Events webinar platform for a total of five hearings. Approximately 275 people spoke at the hearings with 247 speakers opposing the project and 28 speakers supporting the project. Those opposed, including State and local elected officials, members of environmental organizations, students, and the general public, cited climate change, the need to stop burning fossil fuels for energy, the need to develop renewable energy in New York, health concerns, the impacts on disadvantaged communities, and the inconsistency of the project with the CLCPA as the major reasons for their opposition. Those in favor, predominantly represented by union labor and one local elected official, listed jobs, economic opportunities, and the need to ensure that the electric grid remains reliable as the State transitions to renewable energy production, as the reasons for their support.

Written comments were received from June 30, 2021 to September 13, 2021, pursuant to the June 30 and August 11, 2021, notices, and written comments were received from January 12, 2022 to February 22, 2022, pursuant to the January 12, 2022, combined notice. A total of 5,900 written comments were received with 5,852 commenters opposed to the project and 48 commenters in favor.[2] The majority of written comments were provided through various form letters requesting that Danskammer's application be denied, and later to uphold the denial, and

[2] I also note that, as of the date of this ruling, there are more than 13,000 comments posted in the article 10 proceeding. The vast majority of those comments are form letters and emails expressing opposition to the project (*see Application of Danskammer Energy LLC,* Case No. 18-F-0325).

cited the use of fracked gas, climate change, human health, and consistency with the CLCPA as reasons for opposition to the application. More detailed comments in opposition were received from: New York State (NYS) Assemblymember Anna Kelles, NYS Assemblymember Chris Burdick, Earthjustice, Food & Water Watch, Grassroots Environmental Education, Hudson Highlands Land Trust, Hudson River Sloop Clearwater Inc., New Paltz Climate Action Coalition, NYPIRG, Orange RAPP, Riverkeeper, Scenic Hudson, Stony Kill Foundation, the Stop Danskammer Coalition, Upper Nyack Green Committee, the Village and Town of New Paltz, and one letter signed by 20 State Senators and 22 Assembly Members. Those comments touched upon the following issues:

- The impacts of fracked gas on local air and water quality
- Danskammer's proposed project is antithetical to the State's climate goals
- Danskammer's disregard of the CLCPA
- The modification of the facility from a peaker facility to a baseload facility will significantly increase emissions including GHGs[3]
- The impacts on environmental justice communities and other localized impacts on air quality
- The need to decarbonize the State's energy production
- The alternative fuels – hydrogen and renewable natural gas (RNG) - proposed by Danskammer are not feasible due to cost, availability and technological constraints and, if used, would not eliminate GHG emissions[4]
- There is no need for more electrical capacity in the region and more capacity is not needed to integrate renewables
- Danskammer has offered no mitigation of impacts in its application
- The facility is not needed for grid reliability
- Danskammer's proposed project would lock in fossil fuel pollution in contravention of the CLCPA

The Senators and Assembly Members were especially concerned with the CLCPA consistency of the proposed air permit language. The draft Title V permit provides that the applicant can demonstrate compliance with the CLCPA by submitting GHG mitigation plans within 120 days after permit issuance (*see* Exhibit 26, Draft Title V permit, Condition 1-1, Bates No. 001243). The legislators argue that "DEC cannot issue an air permit without first determining that a facility will be consistent with the CLCPA or that any inconsistencies are adequately mitigated or justified," and therefore, allowing the mitigation plan to be submitted after permit issuance violates Section 7 of the CLCPA. Furthermore, the legislators find DEC's approach "contravenes basic principles of fairness and public process, as the public is being asked to comment on CLCPA consistency without any knowledge of the applicant's greenhouse gas mitigation plan." The legislators' comments also take issue with the mitigation strategy

[3] A peaker or peaking facility is a power plant that generally only runs when there is high demand for electricity. A baseload facility is generally operated to provide all or part of the minimum electrical demand loads and typically produces electricity at a constant rate with continuous operation.

[4] Renewal natural gas or RNG is biogas derived from the anaerobic digestion of landfill waste, municipal solid waste, animal manure, and food waste. RNG can also be derived from thermal treatment (gasification) of those biomasses.

options identified by DEC and argue that the options would do little to reduce the climate impacts of the proposed project. (*See* Correspondence from Senator Liz Krueger and Assembly Member Zohran Mamdani, *et. al.*, to Governor Kathy Hochul and Commissioner Basil Seggos, September 10, 2021.)

Written comments in support of Danskammer's application were submitted by the Supervisor of the Town of Newburgh, Alliance for Balanced Growth, Better Trained Better Built, Orange County Partnership Center of Economic Development, Armistead Mechanical Inc., Calore Media, Central Hudson Gas & Electric Corp., and L.P. Transportation, Inc. Those in support cite the following:

- Danskammer's proposal will replace an older, less environmentally friendly, peaker facility with an efficient, air-cooled facility that will not draw water from the Hudson River for cooling
- The need to upgrade existing energy structure while the State transitions to renewables
- The need for quick start energy facilities[5]
- The elimination of reliance on older energy facilities and coal fired facilities
- Savings that will be passed on to consumers
- Ensured reliability in the energy sector
- Economic impacts to the area
- Lack of battery storage for renewables
- Danskammer's commitment to using 100% green hydrogen
- Danskammer's agreement to stop plant operations by 2040 if it is unable to run on carbon free fuels
- The project is needed to attract businesses and jobs

Issues Conference

On March 9, 2022, Sierra Club and Orange RAPP requested that the issues conference be postponed because the petitioners had a deadline for submissions in the article 78 proceeding commenced by Danskammer against DEC. Danskammer also requested an extension until March 30, 2022 to respond to petitions for party status. I advised the parties and petitioners in a conference call on March 9 that I would not postpone the issues conference, which had already been publicly noticed, but would open the record and allow Sierra Club and Orange RAPP to renew their requests on the record. In addition, I granted Danskammer's request to extend the time for Danskammer to respond to the petitions, as well as DEC staff's time to respond to the petitions and Danskammer's statement of issues, until March 30, 2022.

In accordance with the January 12, 2022 combined notice, I convened the issues conference by Webex webinar on March 16, 2022, at 10 a.m. Applicant was represented by Patricia Naughton, Esq., Brenda Colella, Esq., and Danielle Mettler-LaFeir, Esq., Barclay Damon LLP. DEC staff was represented by Mark Sanza, Esq. and Kara Paulsen, Esq., Office of General Counsel. Petitioner Scenic Hudson was represented by Hayley Carlock, Esq., Director

[5] Quick start or fast start usually refers to a power plant's ability to start up from being shut down to fully operational in a short period of time.

of Environmental Advocacy and Legal Affairs, Scenic Hudson, Inc. Petitioners Sierra Club and Orange RAPP were represented by Raghu Murthy, Esq., Earthjustice. No one appeared on behalf of Riverkeeper.

Sierra Club and Orange RAPP renewed the request to adjourn the matter. The parties and petitioners agreed to reconvene the issues conference on April 20, 2022, and if necessary, April 21. I granted the request. (*See* Issues Conference Transcript, March 16, 2022 [IC Transcript 3/16] at 8-11.) In addition, I directed Danskammer and DEC staff to settle the record for this proceeding and distribute the record to the petitioners before the reconvened issues conference. (*See* IC Transcript 3/16 at 21-25.) On March 30, 2022, I timely received Danskammer's response to the petitions and DEC staff's response to Danskammer's statement of issues and petitions. On April 6, 2022, I caused a notice of reconvened issues conference to be posted in the ENB. Danskammer posted the notice on its website.

I reconvened the issues conference on April 20 and 21, 2022, at 10 a.m. Applicant was represented by Patricia Naughton, Esq., Brenda Colella, Esq. and Danielle Mettler-LaFeir, Esq., Barclay Damon LLP. DEC staff was represented by Mark Sanza, Esq. and Kara Paulsen, Esq., Office of General Counsel. Petitioner Scenic Hudson was represented by Hayley Carlock, Esq. Petitioners Sierra Club and Orange RAPP were represented by Lisa Perfetto, Esq., Raghu Murthy, Esq., and Melissa Legge, Esq., Earthjustice. Riverkeeper was represented by Christopher Bellovary, Esq., Riverkeeper, Inc.

Prior to the issues conference, Danskammer submitted the settled record consisting of 42 documents that were received into the issues conference record. A list of the documents is appended to this ruling and numbered as exhibits with Bates numbering for ease of reference. During the conference, Danskammer renewed its request to stay this proceeding pending the outcome of the article 78 proceeding. The parties and petitioners provided oral argument on the request, and the request was later denied (*see* Issues Conference Transcript, April 20, 2022 [IC Transcript 4/20] at 167-222; Issues Conference Transcript, April 21, 2022 [IC Transcript 4/21] at 171).

During the conference, Danskammer presented proposed legal and factual issues for adjudication regarding the denial of the Title V permit application. DEC staff and petitioners responded to each of the issues and arguments raised by Danskammer. In addition, petitioners Scenic Hudson and Sierra Club and Orange RAPP provided further information regarding the issues proposed in their respective petitions. Danskammer and DEC staff responded to the issues raised by petitioners. I authorized the parties to file post-issues conference briefs regarding the legal questions that were raised and reframed during the conference with the exception of Danskammer's legal question whether DEC exceeded its authority under the CLCPA by implementing a *de facto* ban on new and repowered/replacement electric generating facilities. I determined that question was beyond the scope of this proceeding and advised the parties that the question would not be joined for adjudication (*see* IC Transcript 4/21 at 161). Accordingly, six legal issues were framed for briefing as follows:

1. Whether CLCPA § 7(2) authorizes NYSDEC to deny applicant's project specific Title V permit.

2. Whether NYSDEC is authorized to apply CLCPA § 7(2) in determining whether to issue a Title V permit for a facility subject to Article 10 of the Public Service Law ("PSL").

3. Whether in the context of a CLCPA § 7(2) analysis NYSDEC exceeded its authority under the CLCPA by considering compliance with PSL Section 66-p and the electricity targets set forth therein.

4. Whether NYSDEC erred by limiting its CLCPA § 7(2) analysis to the greenhouse gas ("GHG") emissions from the individual facility being permitted, and failing to take into account the impact on statewide GHG emissions arising from operation of the facility upon permit issuance through displacement of GHG emitting sources.

5. Whether NYSDEC is authorized by CLCPA § 7(2) or otherwise to evaluate the justification for a project based upon whether it is needed to resolve a reliability deficiency in the provision of electricity to consumers in New York State.

6. Whether NYSDEC's denial of applicant's Title V permit application was irrational, arbitrary and capricious, or affected by error of law because no standards or regulations have yet been promulgated to implement CLCPA § 7(2).

On June 8, 2022, Orange County Supreme Court Justice Robert A. Onofry issued a Decision and Order in the article 78 proceeding. The Court found that the CLCPA grants DEC "the requisite authority to deny a permit when the grant of the permit would be inconsistent with or interfere with the attainment of the goals of the CLCPA, and the grant cannot otherwise be justified or the adverse effects mitigated" and dismissed the proceeding. (*Danskammer Energy, LLC v New York State Dept. of Envtl. Conservation* [*Danskammer v DEC*], 76 Misc3d 196, 250 [Sup Ct, Orange County 2022].)

At the request of DEC staff, I scheduled a procedural conference with the parties and petitioners on June 17, 2022 to discuss the impacts of the article 78 decision on the legal issues framed in this proceeding. The parties and petitioners agreed that the Court's decision directly addressed the first legal question whether CLCPA § 7(2) authorizes DEC to deny applicant's project specific Title V permit. In addition, the sixth legal question was reframed to read, whether NYSDEC's denial of applicant's Title V permit application was irrational or arbitrary and capricious because no standards or regulations have yet been promulgated to implement CLCPA § 7(2). There was disagreement among the participants regarding whether the Court's decision affected other legal issues, and I advised the parties and petitioners that arguments regarding the impact of the Court's decision on this proceeding could be included in their respective briefs.

I timely received Danskammer's initial brief on August 19, 2022, and the briefs of DEC staff, Scenic Hudson, Sierra Club and Orange RAPP, and Riverkeeper on October 7, 2022. On October 14, 2022, Danskammer requested permission to submit a reply brief to the briefs submitted by DEC staff and petitioners. By letter ruling dated October 27, 2022, I granted Danskammer's request, in part, limiting the reply brief to addressing:

1. DEC staff and petitioners' arguments that the decision in *Danskammer Energy, LLC v New York State Dept. of Envtl. Conservation* is controlling or resolved other legal questions raised in this proceeding; and

2. DEC staff's reference to the September 9, 2021 and November 18, 2021, EPA letters related to the Danskammer and Greenidge Station LLC (Greenidge) facilities, respectively, including a response to official notice being taken of the November 18, 2021 letter from EPA, pursuant to 6 NYCRR 624.9(a)(6).

Danskammer submitted its reply brief on December 2, 2022.

Climate Leadership and Community Protection Act

Relative to the discussion that follows, the CLCPA creates a framework for addressing the effects of climate change and reducing and eliminating carbon emissions across all sectors in New York State. CLCPA § 2 amended the ECL by adding a new article 75, "Climate Change". ECL article 75 provides statutory definitions and, in large part, carries out and implements the purposes of the CLCPA through the creation of the climate action council and the climate justice working group. DEC is empowered with the authority to promulgate regulations to ensure the attainment of the statewide GHG emission goals and to confer with and carry out the recommendations of the climate action council and climate justice working group through further regulations. ECL 75-0107 directs DEC to establish by regulation statewide greenhouse gas emissions limit as a percentage of 1990 emissions, and sets a goal of reducing emissions by 2030 to sixty percent of the 1990 emissions and by 2050 to fifteen percent of the 1990 emissions. DEC promulgated 6 NYCRR part 496 pursuant to ECL article 75, and the statewide greenhouse gas emission limits are set forth in 6 NYCRR 496.4 as 245.87 million metric tons of carbon dioxide equivalents (CO2e) for 2030 and 61.47 million metric tons of CO2e for 2050.[6]

CLCPA § 4 amended the PSL to add a new section 66-p. PSL § 66-p(2) establishes a renewable energy program and directs the Public Service Commission (PSC) to establish a program that ensures "(a) a minimum of seventy percent of the state wide electric generation secured by jurisdictional load serving entities to meet the electrical energy requirements of all end-use customers in New York state in two thousand thirty shall be generated by renewable energy systems; and (b) that by the year two thousand forty (collectively, the 'targets') the statewide electrical demand system will be zero emissions."

CLCPA § 8 authorizes other state agencies to promulgate regulations to "contribute to achieving the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law. Provided, however, any such regulations shall not limit the department of environmental conservation's authority to regulate and control greenhouse gas emissions pursuant to article 75 of the environmental conservation law."

CLCPA § 7 "Climate change actions by state agencies" provides as follows:

[6] "'Carbon dioxide equivalent' means the amount of carbon dioxide by mass that would produce the same global warming impact as a given mass of another greenhouse gas over an integrated twenty-year time frame after emission" (ECL 75-0101[2]).

"1. All state agencies shall assess and implement strategies to reduce their greenhouse gas emissions.

"2. In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities, and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits, each agency, office, authority, or division shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located.

"3. In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, pursuant to article 75 of the environmental conservation law, all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law. All state agencies, offices, authorities, and divisions shall also prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities as identified pursuant to such subdivision 5 of section 75-0101 of the environmental conservation law."

Policies and the Scoping Plan

On December 14, 2022, after the briefing schedule in this matter closed, DEC issued a revised Commissioner's policy, CP-49, Climate Change and DEC Action, (CP-49), and DEC program policy, DAR-21, The Climate Leadership and Community Protection Act and Air Permit Applications (DAR-21). In addition, ECL 75-0103 established the Climate Action Council consisting of twenty-two members representing twelve State agencies or authorities and ten appointed at large members with expertise in issues relating to climate change mitigation or adaption representing environmental justice, labor, public health and regulated industries. Pursuant to ECL 75-0103(11) the Climate Action Council was directed to develop a scoping plan outlining the recommendations for attaining the statewide greenhouse gas emissions limits, and for the reduction of emissions beyond eighty-five percent, net zero emissions in all sectors of the economy, which shall inform the state energy planning board's adoption of a state energy plan. Furthermore, pursuant to ECL 75-0109, the findings of the scoping plan are to be reflected in regulations promulgated by DEC. On December 21, 2022, the Climate Action Council approved a final scoping plan (hereinafter Scoping Plan) by a vote of 19-3.

CP-49, DAR-21 and the Scoping Plan provide guidance for implementing the requirements of the CLCPA and ensuring climate considerations and analysis are included in permitting decisions. The Scoping Plan also includes recommendations to achieve the goals of the CLCPA. CP-49, DAR-21 and the Scoping Plan do not have the force and effect of law, but each provides guidance and recommendations for implementing and applying the CLCPA. Recognizing the staged progression of the CLCPA and ECL article 75, CP-49 directs DEC staff

to be guided by consistency with the statewide GHG emission limits expressed in 6 NYCRR part 496, the CLCPA annual GHG emissions inventory, and the policies and programs included in the Scoping Plan.

Summary of the Positions of the Parties and Petitioners

Danskammer argues that there are issues of law, and some mixed issues of law and fact, supporting Danskammer's position that DEC does not have the authority to apply CLCPA § 7(2) in its Title V permit decision in this joint (PSL article 10/DEC Title V) proceeding. Danskammer also argues that DEC exceeded its authority in denying the Title V permit, and even if DEC did not exceed its authority, DEC erred in the scope of its review and the decision was irrational or arbitrary and capricious.

DEC staff argues that it did not exceed its jurisdiction or authority and that DEC's exclusive authority to issue or deny federally delegated permits includes the related requirements under State law, including the CLCPA. DEC also asserts that it has the authority to consider other laws as those laws relate to the required CLCPA analysis. DEC staff further contends that it appropriately based its denial on those factors considered and discussed in the denial letter.

Scenic Hudson supports DEC's denial and proposes two issues for adjudication. First, Scenic Hudson asserts that approval of Danskammer's application will result in an increase in greenhouse gas emissions, which is inconsistent with and would interfere with the attainment of the statewide greenhouse gas emissions limits set forth in the CLCPA. Secondly, Scenic Hudson proposes that the Danskammer project is not needed to meet anticipated customer load, ensure electric system reliability or balance the integration of intermittent renewable energy resources.

Sierra Club and Orange RAPP also support DEC's denial and propose five issues for adjudication. For a first issue, petitioners assert that a Title V permit for Danskammer's proposed facility would be inconsistent with or would interfere with the attainment of the statewide GHG emission limits established in article 75 of the ECL. For a second proposed issue, Sierra Club and Orange RAPP assert that Danskammer cannot rely on potential future conversion to RNG and green hydrogen to demonstrate consistency with CLCPA targets or as 2040 compliance options. Sierra Club and Orange RAPP assert for a third proposed issue that Danskammer failed to demonstrate any justification for the project that would overcome its inconsistency with the CLCPA's GHG emissions reduction requirement. For a fourth proposed issue, petitioners assert that Danskammer has failed to identify adequate alternatives or GHG mitigation measures, and if DEC had reached the issue, it would have provided an additional basis to deny the permit under CLCPA § 7(2). As a fifth proposed issue, Sierra Club and Orange RAPP assert that CLCPA § 7(3) provides an independent basis for denial of the Title V permit. Petitioners argue that CLCPA § 7(3) prohibits DEC from issuing the Title V permit without a finding that the project does not disproportionately burden disadvantaged communities. Petitioners argue that many of the communities nearest to the project will qualify as disadvantaged communities protected by CLCPA § 7(3) and that the project would cause significant impacts to the surrounding disadvantaged communities, in violation of CLCPA § 7(3).

Riverkeeper seeks amicus status and proposes to provide support for DEC's denial through briefing on the legal issues regarding the CLCPA as well other legal matters that arise during the proceeding.

Danskammer opposes the petitions of Scenic Hudson and Sierra Club and Orange RAPP for full party status stating that deciding any of the legal issues in Danskammer's favor would obviate the need for an evidentiary hearing or at least narrow the issues to be adjudicated. Danskammer does not object to any of the petitioners being granted amicus status. Danskammer claims that neither of the petitions for full party status have raised issues that are substantive and significant, and asserts the petitions simply bolster DEC's position. Danskammer argues that DEC staff's "permit denial can be sustained—and further evidentiary proceedings may be appropriate—only if the CLCPA endows DEC with the authority to deny Danskammer's Title V permit. If it does not, neither the CLCPA §§ 7(2) or 7(3) issues proposed by [petitioners] can be considered substantive and significant as a matter of law, because the foundation of both—the CLCPA—does not establish statutory or regulatory criteria that can be applied by DEC to the Project." (*See* Exhibit 41, Danskammer Response to Petitions, at 11, Bates No. 001660.) Because DEC lacks authority to deny or condition the Title V permit on CLCPA grounds, according to Danskammer, the CLCPA issues proposed by petitioners are not substantive pursuant to part 624. Danskammer further argues that only the Siting Board may determine issues related to CLCPA § 7(3), and because the criteria for identifying disadvantaged communities have not been developed, CLCPA § 7(3) cannot form the basis for a permit denial or proposing a substantive and significant issue. In general, Danskammer argues that none of the proposed issues are substantive and significant and challenges the qualifications and proposed testimony of the proffered witnesses.

DEC staff has no objections to the petitions or issues proposed for adjudication by petitioners.

ISSUES RULINGS

The following addresses the proposed issues arising out of DEC staff's denial of Danskammer's Title V permit application, Danskammer's request for hearing and statement of issues, Scenic Hudson's petition for full party status, Sierra Club and Orange RAPP's joint petition for full party status, and Riverkeeper's petition for amicus party status.

Standards for Adjudicable Issues

A. DEC staff's denial

An issue will be adjudicated if it relates to a matter cited by DEC staff as a basis to deny the permit and is contested by the applicant (*see* 6 NYCRR 624.4[c][1][ii]). As noted above, DEC staff, in a letter dated October 27, 2021, denied Danskammer's Title V permit application based upon DEC's determination that the project would be inconsistent with or would interfere with the attainment of the statewide greenhouse gas emission limits established in ECL article 75. DEC further stated that Danskammer had failed to demonstrate that the project is justified because Danskammer failed to show either a short term or long term reliability need for the project, and failed to identify adequate alternatives or greenhouse gas emission mitigation

measures as further reasons for denying the Title V permit application. DEC concluded that because DEC could not satisfy the requirements of CLCPA § 7(2), it was compelled to deny the Title V permit.

DEC's denial further explains that DEC cannot issue a Title V permit to Danskammer unless the Department can ensure compliance with all requirements of CLCPA § 7. DEC staff views CLCPA § 7(2) as containing three elements that must be considered and satisfied.

> "First, as is relevant here for purposes of the Department's review of the Title V Application, the Department must consider whether a Title V permit for the Project would be inconsistent with or interfere with the attainment of the Statewide GHG emission limits established in ECL Article 75. Second, if the issuance of a Title V permit for the Project would be inconsistent with or would interfere with the Statewide GHG emission limits, then the Department must also provide a detailed statement of justification for the Project notwithstanding the inconsistency. Third, in the event a sufficient justification is available, the Department must also identify alternatives or GHG mitigation measures to be required for the Project." (Exhibit 33, NYSDEC Permit Denial Decision, October 27, 2021, at 5, Bates No. 001374.)

DEC also considered that other goals established by the CLCPA, namely the provisions of PSL § 66-p, were relevant to DEC staff's review of the Title V application and application of the CLCPA to that review. DEC concluded that "construction of a new fossil fuel-fired major electric generation facility, which would otherwise be expected to have a useful life beyond 2040, is inconsistent with the CLCPA's requirement for emission-free electricity generation by 2040" (*see id.* at 10, Bates No. 001379.)

DEC staff determined that the grant of a Title V permit for the proposed facility would result in a new source of a substantial amount of GHG emissions from both direct and upstream GHG emissions. In addition, DEC staff concluded that the proposed facility would constitute a "new and long-term utilization of fossil fuels to produce electricity without a specific plan in place to comply with the requirements of the" CLCPA. (S*ee id.* at 7, Bates No. 001376.)

Based on the application materials, DEC staff's denial discusses the GHG emissions associated with on-site combustion if the Title V permit was granted, as well as the upstream GHG emissions associated with on-site combustion of fossil fuels. DEC staff determined that the total GHG emissions from the project would be between 1.561 and 2.4231 million short tons of CO2e in 2030. DEC goes on to state, "While achieving the Statewide GHG emissions limits requires an overall reduction in GHG emissions from current levels, the Project itself would result in a substantial increase in GHG emissions from just this one single GHG emission source in 2030" and concludes based on its review of 2019 emissions data from other electric generating facilities and the projection prepared by Danskammer, that, if permitted, Danskammer would be among the highest GHG emitting electric generating facilities in the State. (S*ee id.* at 9, Bates No. 001378.)

DEC also reviewed Danskammer's analysis of the potential to use alternate fuels such as RNG and hydrogen to meet the emission free electric generation target by 2040. DEC staff

concluded that the use of RNG and hydrogen are largely speculative and aspirational due to various technological and physical restrictions associated with each fuel source, its availability and transmission. Likewise, DEC staff found Danskammer's estimation that the facility, if permitted, would displace other more polluting electric generation facilities, thereby reducing or offsetting Danskammer's projected GHG emissions, to be speculative, uncertain and dependent upon factors that are beyond the control of Danskammer. Furthermore, DEC staff concluded it could not rely upon the assumptions used by Danskammer's consultant in arriving at a net reduction in GHG emissions if the Title V permit was granted. (*See id.* at 10-12, Bates No. 001379-001381.)

DEC staff determined that Danskammer did not provide a sufficient justification for DEC to issue a Title V permit despite the proposed facility's inconsistency with the goals of the CLCPA. Therefore, DEC undertook a review of the publicly available reports and studies by the New York Independent System Operators (NYISO) related to long-term reliability needs of the State's electrical system to determine whether reliability needs could provide justification for issuing a Title V permit. DEC concluded, based on its review of those studies and reports, that the proposed facility was not needed for system reliability and, therefore, long-term reliability needs did not provide support to justify the grant of the Title V permit. (*See id.* at 12-13, Bates No. 001381-001382.)

Because DEC determined that the issuance of a Title V permit could not be justified, DEC did not address or identify alternatives or greenhouse gas mitigation measures to be required where such project is located. DEC's denial states that Danskammer had not proposed any mitigation measures pursuant to the CLCPA beyond those required by other existing regulations. (*See id.* at 14, Bates No. 001383.)

Danskammer challenges the denial arguing that DEC does not have the authority to deny the permit application based on CLCPA § 7(2) and even if DEC possessed such authority, the denial is not supported by the facts. Petitioners argue that staff's denial should be upheld and propose legal and factual issues to be adjudicated.

One purpose of the issues conference is to determine legal issues whose resolution is not dependent on facts that are in substantial dispute (*see* 6 NYCRR 624.4[b][2][iv], [5][iii]). In this matter, DEC denied the Title V permit application and Danskammer challenges the denial on several grounds. Therefore, any objection that relates to a legal issue whose resolution is not dependent on factual disputes will be resolved in this ruling.

B. Danskammer's statement of issues

Subparagraph 624.4(c)(1)(ii) of 6 NYCRR provides that an issue is adjudicable if "it relates to a matter cited by [DEC] staff as a basis for denying a permit and is contested by the applicant." An applicant must raise more than bare assertions to raise an adjudicable issue and does so by providing an offer of proof that raises sufficient doubt about whether applicable statutory and regulatory criteria have been met or whether the basis for the denial is supported by the record (*see e.g. Matter of the Orange County Department of Public Works*, Decision of the Commissioner, January 29, 2020, at 5). In this matter, applicant was required to submit a statement of issues that: (a) identifies issues for adjudication which meet the criteria of 6

NYCRR 624.4(c); (b) presents an offer of proof specifying the witness(es), each witness's qualifications, the nature of the evidence the applicant expects to present at the evidentiary hearing and the grounds upon which the assertion is made with respect to each issue; and (c) identifies whether each identified issue is an issue of fact or law (*see* Exhibit 35, ENB Notice, January 12, 2022, Bates No. 001389).

C. Petitions for party status

To be granted full party status, petitioners must, among other things, identify an issue for adjudication that meets the criteria of section 624.4(c), and present an offer of proof specifying the party's witnesses, the nature of the evidence the person expects to present, and the grounds upon which the assertion is made with respect to that issue (*see* 6 NYCRR 624.5[b][2]). The ALJ will grant a petitioner full party status based upon (1) a finding that the petitioner has filed an acceptable petition pursuant to 6 NYCRR 624.5(b)(1) and (2); (2) a finding that the petitioner has raised a substantive and significant issue or that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party; and (3) a demonstration of adequate environmental interest (*see* 6 NYCRR 624.5[d][1]).

An issue will be adjudicated if it is proposed by a potential party and the proposed issue is both substantive and significant (*see* 6 NYCRR 624.4[c][1][iii]). "An issue is substantive if there is sufficient doubt about applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry" (*see* 6 NYCRR 624.4[c][2]). An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit (*see* 6 NYCRR 624.4[c][3]).

To be granted amicus party status, an amicus petitioner must, among other things, identify the nature of the legal or policy issue to be briefed that meets the criteria of section 624.4(c), and provide a statement explaining why the proposed party is in a special position with respect to that issue (*see* 6 NYCRR 624.5[b][3]). The ALJ will grant the petitioner amicus status based upon a finding that (1) the petitioner has filed an acceptable petition; (2) the petitioner has identified a legal or policy issue which needs to be resolved by the hearing; and (3) the petitioner has a sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective may contribute materially to the record on such issue (*see* 6 NYCRR 624.5[d][2]).

In this matter, DEC staff prepared a draft Title V permit, and the application was later denied. The burden of persuasion is on the potential party to demonstrate that any proposed issue related to the Title V permit application or staff's denial is both substantive and significant (*see* 6 NYCRR 624.4[c][4]) or that the potential party can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party (*see* 6 NYCRR 624.5[d][1][ii]).

With respect to the proof offered by a potential party, its assertions cannot be conclusory or speculative, but must have a factual or scientific foundation (*see Matter of Bonded Concrete*, Interim Decision of the Commissioner, June 4, 1990, at 2; *see also Matter of Ramapo Energy Limited Partnership*, Interim Decision of the Commissioner, July 13, 2001, at 5). The petition

for party status must provide specifics on those elements of the application or proposal that are being challenged or questioned. Mere speculation is insufficient to establish that an issue is substantive and significant. Conducting an adjudicatory hearing "where 'offers of proof, at best, raise [potential] uncertainties' or where such a hearing 'would dissolve into an academic debate' is not the intent of the Department's hearing process" (*Matter of Adirondack Fish Culture Station*, Interim Decision of the Commissioner, August 19, 1999, at 8 [*citing Matter of AZKO Nobel Salt Inc., Interim Decision of the Commissioner*, January 31, 1996, at 12]).

A petition for party status should inform the ALJ, DEC staff and applicant as well as other petitioners, what issues that the petitioner is seeking to adjudicate and what is being proffered in support of the proposed issue, thereby allowing those issues to be appropriately considered and addressed. If a proposed issue or the evidence to be proffered in support of the proposed issue and the grounds upon which its assertions are made cannot be adequately explained, an issue is not raised (*see Matter of Crossroads Ventures, LLC*, Interim Decision of the Commissioner, December 29, 2006, at 8).

The Commissioner previously elaborated on the analysis to be applied when evaluating a petitioner's offer of proof in support of its petition for party status:

> "In order that the issues conference serve a worthwhile function, it is not meant to merely catalogue areas of dispute, but rather makes qualitative judgments as to the strength of the offers of proof and related arguments. With respect to the offer of proof, any assertions that a potential party makes must have a factual or scientific foundation. Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. The qualifications of the expert witnesses that a petitioner identifies may also be subject to consideration at this stage. Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff, or the record of the issues conference, among other relevant materials and submissions. In areas of Department staff expertise, its evaluation of the application and supporting documentation is important in determining the adjudicability of an issue (*see, e.g., Matter of NYC Department of Sanitation* [*Southwest Brooklyn Marine Transfer Station*], Decision of the Commissioner, May 21, 2012, at 6; *Matter of Crossroads Ventures, LLC*, Interim Decision of the Deputy Commissioner, December 29, 2006, at 6; *Matter of Mirant Bowline, LLC*, Interim Decision of the Commissioner, June 20, 2001, at 3; *Matter of Bonded Concrete, Inc.*, Interim Decision of the Commissioner, June 4, 1990, at 2)." (*Matter of Seneca Meadows, Inc.*, Interim Decision of the Commissioner, Oct. 26, 2012, at 4).

As previously noted, two petitions for full party status and one petition for amicus status were received from Scenic Hudson, Sierra Club and Orange RAPP, and Riverkeeper, respectively.

Regarding factual disputes, a part 624 issues conference is akin to summary judgment (*see Matter of Terry Hill South Field*, First Interim Decision of the Commissioner, Dec. 21, 2004, at 9-10). "Similar to summary judgment, the focus is on issue finding, not issue resolution.

As provided in the regulations, the issues conference may be used to resolve disputed issues of fact, but 'without resort to taking testimony' (6 NYCRR 624.4[b][2][ii] [emphasis added])." (*Matter of Finger Lakes LPG Storage, LLC*, Ruling of Chief Administrative Law Judge on Issues and Party Status, September 8, 2017, at 14.)

In summary judgment proceedings, the New York State Court of Appeals has repeatedly held that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A shadowy semblance of an issue, or bald conclusory assertions, even if believable, are not enough to raise a triable issue of fact (*Metropolitan Bank of Syracuse v. Hall*, 52 AD2d 1084 [4th Dept 1976]). At the issues conference stage evidentiary proof is not required, but the proponent of an issue has the burden of persuading the judge that a disputed issue of fact over the basis of DEC staff's denial of the permit exists. When DEC staff demonstrates that the permit at issue was denied because it fails to comply with the law and regulations, and staff has made a prima facie showing that the basis for denial is supported by the law, regulations and administrative record, the burden shifts to the party, including the applicant, proposing the issue to provide an offer of proof that raises sufficient doubt about whether applicable statutory and regulatory criteria have been met or, as in this instance, the basis for the denial is not supported by the law or record such that a reasonable person would inquire further (*see e.g. Matter of Terry Hill South Field*, First Interim Decision of the Commissioner, Dec. 21, 2004, at 10).

DISCUSSION

In this matter, Danskammer, DEC and petitioners agree that the issues presented in DEC staff's denial, Danskammer's statement of issues and proposed in the petitions for full and amicus party status relate solely to the CLCPA and its application to the Title V permit application. (*See* IC Transcript 4/20 at 188-190.) As noted above, five legal issues have been framed for adjudication and will be addressed first.

As previously stated, the Court in *Danskammer v DEC* found "that the plain language of the statute must be interpreted to grant the DEC the requisite authority to deny a permit when the grant of the permit would be inconsistent with or interfere with the attainment of the goals of the CLCPA, and the grant cannot otherwise be justified or the adverse effects mitigated" and held "that the Department of Environmental Conservation has authority under Section 7(2) of the Climate Leadership and Community Protection Act to deny a permit, if warranted, based upon application of the [CLCPA]." (*See Danskammer v DEC*, 76 Misc3d at 250, 256.)

Legal Questions

1. Whether NYSDEC is authorized to apply CLCPA § 7(2) in determining whether to issue a Title V permit for a facility subject to Article 10 of the Public Service Law (PSL).

Danskammer argues that DEC is prohibited from denying the Title V permit on CLCPA grounds because the facility is subject to an article 10 proceeding, which provides the Siting Board with authority over the siting of major electric generating facilities. Although PSL § 172 provides that DEC shall be the permitting agency for permits issued pursuant to federally

delegated permits, Danskammer argues that the CLCPA is independent from and not part of the Title V permitting program because the CLCPA § 7(2) is "unquestionably a creature of state law alone" and its requirements are not part of DEC's Title V regulations or program. Danskammer argues that PSL § 172 supports its position that only the Siting Board can review the anticipated environmental and health impacts associated with the construction and operation of the proposed facility, and therefore only the Siting Board may perform the consistency analysis required by CLCPA § 7(2). (*See* Danskammer Brief at 11-15.)

Danskammer also argues that PSL § 172 and its predecessor, PSL article X, establish a bright line between DEC's authority to issue federally delegated permits and the Siting Board's responsibilities pursuant to PSL article 10 and former article X. Danskammer asserts that only the Siting Board has the authority to review the project's potential environmental impacts pursuant to PSL §§ 168(2)(a) and (b) and 172(1). (*See* Danskammer Brief at 12-15.)

Secondly, Danskammer argues that DEC's Title V permitting authority does not include the authority to make consistency determinations pursuant to CLCPA § 7(2), and DEC's doing so runs afoul of the federally delegated program because neither the Clean Air Act nor the United States Environmental Protection Agency (EPA) regulations authorize a permitting authority to deny a Title V permit application based on inconsistencies with a state's climate goals or GHG reduction targets. (*See* Danskammer Brief at 15-18.)

DEC staff argues that CLCPA § 7 is an integral part of DEC's Title V air permit review process. DEC staff asserts that this legal issue was addressed and resolved in DEC's favor in *Danskammer v DEC* because the Court was fully aware of the fact that Danskammer's proposal was also subject to PSL article 10. Furthermore, DEC staff argues that it is immaterial whether the proposed facility is also subject to PSL article 10 because DEC possesses the sole authority to issue Title V air permits in the State. DEC staff further asserts that its exclusive authority to issue Title V air permits includes "attendant requirements under State law, such as the State Administrative Procedure Act (SAPA), the Uniform Procedures Act (UPA) and associated regulations, including CLCPA Section 7(2). DEC is the only appropriate agency authorized to consider whether its issuance of a Title V air permit to Danskammer was 'inconsistent with or will interfere with the attainment of the statewide greenhouse gas limits established in article 75 of the environmental conservation law.'" (*See* DEC Brief at 9.)

DEC staff argues that Danskammer's position that PSL § 172 preempts DEC's authority to apply the CLCPA to the Title V air permit lacks merit because, in part, DEC is the sole permitting agency for federally delegated permits under the federal Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act. Staff notes that the Court in *Danskammer v DEC* recognized DEC's permitting authority for the Title V air permit notwithstanding the fact that the entire proposed project is part of a joint proceeding. Because Danskammer commenced the article 78 proceeding to challenge DEC's denial of the Title V air permit application for a facility subject to PSL article 10, DEC argues it is disingenuous for Danskammer to argue that the Court's decision and order are not dispositive of this issue. (*See* DEC Brief at 10-11.)

Regarding Danskammer's position that the CLCPA is not part of DEC's delegated authority, DEC staff argues that EPA does not have the authority to "dictate whether or how the Department implements State law and requirements in its Title V Permit program." Pursuant to

40 CFR Part 70, DEC's Title V program must include certain minimum elements for the content of permit applications and permits. DEC argues that "EPA's oversight and authority are limited to ensuring states are implementing such minimum elements as described in the approved program." DEC staff points out that Title V air permits issued by DEC also include State laws and State-specific requirements above and beyond the minimum federal requirements. (*See* DEC Brief at 12.) In other words, the federal Title V elements are the floor not the ceiling.

DEC staff further argues that the UPA and its implementing regulations provide authority for DEC to deny a permit application if all statutory, including the CLCPA, or regulatory requirements are not met. Lastly, DEC staff points to the fact that in another recent DEC Title V permit application proceeding, the EPA specifically recommended that DEC review the application for consistency with the CLCPA. DEC requests that I take official notice of the EPA correspondence. (*See* DEC Brief at 12-13.) DEC also notes that the Court in *Danskammer v DEC* found, "[h]ere it is not, and cannot reasonably be denied that the [CLCPA] statutory provisions *supra* expressly require the DEC to consider the furtherance of the goals of the CLCPA in determining permit applications." (*See* DEC Brief at 13, citing *Danskammer v DEC*, 76 Misc3d at 248.)

Sierra Club and Orange RAPP likewise argue that this issue was addressed squarely by the Court because the Court held DEC had the authority to deny a permit application pursuant to CLCPA § 7(2) and did so with full awareness that Danskammer argued PSL article 10 limited DEC's authority to do so. Sierra Club and Orange RAPP also argue that PSL § 172(1) expressly provides that DEC is the permitting agency for permits issued pursuant to federally delegated programs such as the Clean Air Act. Petitioners further assert that Danskammer does not deny that a Title V air permit application is a permit determination subject to CLCPA review and analysis, therefore DEC is "obligated" to undertake the CLCPA analysis. (*See* Sierra Club and Orange RAPP Brief at 11-12.)

Sierra Club and Orange RAPP also take exception to Danskammer's "suggestion that a Title V permit is limited to federally enforceable requirements under the Clean Air Act." Petitioners argue that Title V permits include both federally enforceable and state-only requirements, and the state requirements do not need to be included in the State Implementation Plan (SIP) unless the state wants those requirements to be federally enforceable rather than just state enforceable. Petitioners argue that the federal regulations at 40 CFR Part 70 authorize this practice and recognize that Title V permits may include state requirements that are not part of a state's federally approved SIP. Petitioners assert that Danskammer misapplies the law and regulations in arguing that the CLCPA is inconsistent with the CAA. (*See* Sierra Club and Orange RAPP Brief at 12-13.)

Scenic Hudson argues that Danskammer is collaterally estopped from litigating this issue because the issue was decided in the article 78 proceeding. Scenic Hudson avers that the legal question is identical to that raised in the article 78 proceeding and that Danskammer had a full and fair opportunity to litigate the matter in that proceeding. Scenic Hudson argues that Danskammer already argued this point before the Court and the argument was clearly rejected. (*See* Scenic Hudson Brief at 11-12, citing *Danskammer v DEC*, 76 Misc3d at 233-234, 238.)

Scenic Hudson also argues that DEC was required to conduct a consistency analysis pursuant to CLCPA § 7(2), and that PSL § 172(1) recognizes DEC's authority to do so in the context of the Title V permit application. Scenic Hudson further argues that Danskammer's assertion that CLCPA § 7(2) is a stand-alone state-based permitting decision that only the Siting Board is authorized to apply in an article 10 proceeding misinterprets and misapplies the CLCPA and PSL § 172. According to Scenic Hudson, (1) the CLCPA requires a consistency analysis when a state agency "asserts its underlying permitting authority," and (2) the required consistency analysis is not a "separate 'approval, consent, permit, certificate or other condition for the construction or operation of a major electric generation facility with respect to which an application for a certificate [under Article 10] has been filed' as contemplated by PSL 172." Therefore, Scenic Hudson concludes that DEC's consistency analysis is not preempted by PSL § 172, and DEC is fully authorized to apply CLCPA § 7(2) in determining whether to issue a Title V permit in the context of an article 10 proceeding. (*See* Scenic Hudson Brief at 12-14.)

Similar to DEC and Sierra Club and Orange RAPP, Scenic Hudson argues that DEC's application of the CLCPA to the review of Danskammer's Title V air permit application does not impermissibly revise or expand the Title V program as argued by Danskammer. Scenic Hudson also points out that the federal requirements for a Title V permit are the floor not the ceiling, and DEC is authorized to adopt more stringent standards. (*See* Scenic Hudson Brief at 14-16.)

Riverkeeper does not address each of the legal questions to be briefed by the parties and petitioners, but asserts that DEC's decision to deny Danskammer's Title V air permit application is consistent with the text, legislative history and intent of the CLCPA. In addition, Riverkeeper argues that the Green Amendment to the New York State Constitution (NY Const, art I, § 19) is now relevant to DEC's decisions in this matter going forward. The Green Amendment reads, "Each person shall have a right to clean air and water, and a healthful environment." According to Riverkeeper, "the proposed Project will exacerbate climate change and increase localized air emissions, which is directly contrary to the plain language of the Green Amendment. Thus, DEC's denial is not only authorized by the Green Amendment; it is mandated by it." (*See* Riverkeeper Brief at 4-6, 8-10.)

In its reply brief, Danskammer argues that the Court in *Danskammer v DEC* did not rule on this legal issue. The fact that the Court referenced the article 10 proceeding in dicta regarding the procedural background of the case or was aware of the nature of the joint proceedings, does not rise to the level of this issue having been decided or litigated in the previous action. Therefore, Danskammer asserts collateral estoppel does not apply here because this issue was not litigated in the prior action. In addition, Danskammer argues that the EPA comment letters submitted in this matter and the Greenidge matter are not determinative or relevant to this proceeding. Because the Greenidge matter does not involve PSL article 10, and the preemption argument made by Danskammer, Danskammer argues that the EPA letter is completely irrelevant. (*See* Danskammer Reply Brief at 5-12, 17-20.)

Discussion

Danskammer maintains this question was not answered by the Court in *Danskammer v DEC* and the legal question must be answered in the negative. In the opening of its brief, Danskammer states,

> "because DEC's issuance of the Title V permit is a prerequisite to Siting Board approval under Article 10, DEC staff's denial, if upheld, would effectively preempt the Siting Board from exercising its siting authority under Article 10 of the Public Service Law. This is particularly problematic considering that the term of the Title V permit—and scope of DEC's permitting authority—is limited to a five-year period, while the Siting Board has authority to review and approve the project as a whole." (Danskammer Brief, at 1.)

Danskammer's opening statement ignores the law and is inaccurate on many levels. First, PSL article 10 fully contemplates that federally delegated permits may be denied by the DEC commissioner. PSL § 167(1)(a) expressly states that the record, recommendations and conclusions shall "provide the basis for the decision of the commissioner of environmental conservation whether or not to issue such permits." Second, the opposite is also true, DEC could approve a federally delegated permit in an article 10 proceeding and the Siting Board could deny the siting certificate application, rendering the federally delegated permit null and void (*see* PSL § 172[1]). Third, the potential that the denial of a DEC federally delegated permit may result in the denial of a siting certificate was recognized by previous Siting Boards (*see e.g. Application of Consolidated Edison Co. of New York, Inc.*, [*Application of Con Ed*] Order Concerning Interlocutory Appeals, Case No. 99-F-1314, June 22, 2001, at 13 [DEC permits are a prerequisite to certification]). Fourth, DEC Title V permits may be issued in five-year terms, but once issued, the permittee may continue to operate beyond the term of the permit, pursuant to SAPA § 401(2) and 6 NYCRR 621.11(l), so long as a timely and complete renewal permit application is submitted to DEC. It is not uncommon for permittees to operate under a SAPA extended permit for many years following the expiration of the term of the permit being renewed, often extended by lengthy technical permit review, as well as administrative adjudication and court challenges.

The scope of DEC's permitting authority is not limited to the term of a Title V permit; DEC's Title V permitting and regulatory authority extends as long as the facility continues to operate and emit air pollutants. Lastly, and perhaps more importantly, DEC regulates the construction, operation and emissions of stationary sources, including major electric generating facilities, and its jurisdiction over the facility continues well beyond the issuance of a PSL article 10 siting certificate (*see e.g.* ECL 19-0312, 6 NYCRR part 251) and beyond the term of a Title V permit should a facility fail to renew but continue to operate.

The Siting Board has no jurisdiction over or involvement in the review of a new, modification or renewal application for a federally delegated permit or the decision to grant, condition or deny such an application. Previous Siting Boards have acknowledged that DEC is the expert agency with responsibility to issue air permits and that the Board's responsibility does not include consideration of issues addressed in the DEC permitting process (*see Application of Con Ed*, Order Concerning Interlocutory Appeals, Case No. 99-F-1314, at 13-14 ["In considering environmental issues that are subsumed by DEC's air and water permits, the Board must incorporate the DEC's resolution of these questions."]).

In PSL article 10 proceedings involving DEC programs and permits that are not federally delegated, DEC staff is limited to making recommendations to the examiners and Siting Board to grant, condition or deny a siting certificate based on whether the impacts associated with what is

normally a DEC regulated activity can be avoided or mitigated to the maximum extent practicable. If necessary, DEC staff litigates the issue before the examiners.

Here, however, the Siting Board has no authority to issue, condition or deny a Title V air permit application. The sole authority to make a CLCPA determination with respect to the Title V air permit application lies with DEC, not the Siting Board. To conclude otherwise would remove the CLCPA determination from the Title V decision making process entirely and place it in the hands of a Siting Board that has no authority to issue a decision regarding a Title V permit. The *Ramapo* matter cited by Danskammer regarding the bright line between DEC federally delegated permits and the Siting Board's authority supports this conclusion. Therein the Siting Board found that nitrate emissions "from the proposed facility will be regulated by the DEC as part of its exclusive air permitting authority and no good reason has been presented explaining why separate review of the same matter by this Board is warranted" (DPS Case 98-F-1968, *Matter of Ramapo Energy Limited Partnership*, July 25, 2001, Order Concerning Interlocutory Appeals, at 17). The same holds true here where CO2 and other GHG emissions are regulated by DEC, and CLCPA § 8 confirms that DEC shall not be limited in its authority to regulate and control GHG emissions pursuant to ECL article 75. The Siting Board also recognized the full import of a DEC federally delegated permit. "The DEC Commissioner's decision is final and any permits granted by the DEC Commissioner become the sole basis for all required Board findings related to such issues, including those related to predicting the probable environmental impacts, ensuring adverse environmental impacts are minimized, and evaluating whether construction and operation of the proposed facility is in the public interest" (*id.* at 6). I find Danskammer's arguments to the contrary are not supported by the PSL, ECL, CLCPA or administrative precedent.

In addition, I note that PSL §§ 164(1)(c) and 167(1)(a) provide that DEC is the issuing authority for permits pursuant to ECL article 19 and ECL 15-1503, in addition to permits issued pursuant to federally delegated or approved authority. Although PSL § 172 does not reference ECL article 19, I conclude that DEC has the express authority to issue all air pollution control permits pursuant to its authority under ECL Article 19, and is not limited by PSL article 10 to just the federally delegated Title V permit.

Turning to Danskammer's argument that the decision in *Danskammer v DEC* does not collaterally estop this issue from being adjudicated here, I agree. In that matter, the Court held that DEC possessed "the requisite authority to deny a permit when the grant of the permit would be inconsistent with or interfere with the attainment of the goals of the CLCPA, and the grant cannot otherwise be justified or the adverse effects mitigated . . ." (*Danskammer v DEC*, 76 Misc3d at 250). Although the Court was well aware of the procedural posture of the administrative proceedings, including PSL article 10, the holding stopped short of expressly stating that DEC possessed that authority in the context of an article 10 proceeding.

The Court's decision and the CLCPA, however, are clear and establish that DEC is required to consider whether DEC's decision to issue a permit is inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in ECL article 75. It is DEC's statutory decision making authority that triggers the CLCPA review of the Title V permit, not the siting of the facility. Although the Siting Board is also required to review the certificate application through the CLCPA lens, the Siting Board's decision making authority

is limited by the PSL to all that remains outside of the federally delegated permits and DEC's ECL article 19 permitting authority, and the Board may consider DEC's permit decision as a basis for making the findings the Board is required to make under the PSL (*see e.g. Application of Con Ed*, Order Concerning Interlocutory Appeals, Case No. 99-F-1314, at 14.) Here, pursuant to PSL §§ 167 and 172, only DEC is authorized to issue a decision on a Title V permit application because it is a federally delegated permit and a permit issued pursuant to ECL article 19.

Notwithstanding the Court's silence on the application of PSL §§ 167 and 172, I conclude as a matter of law that DEC, and DEC only, possesses the authority to consider whether DEC's decision on a federally delegated permit for a proposed facility, that is also subject to PSL article 10, is inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in ECL article 75.

Danskammer's argument that the CLCPA is independent from and not part of the Title V permitting program because CLCPA § 7(2) is "unquestionably a creature of state law alone" and its requirements are not part of DEC's Title V regulations or program, and therefore DEC has no authority to apply the CLCPA in this instance, is similarly unpersuasive. As noted, DEC has the sole authority to issue permits pursuant to ECL article 19 in addition to Title V permits. As pointed out by DEC staff and petitioners, the federal Clean Air Act requirements are the floor not the ceiling. This is true of most, if not all, federally delegated or approved environmental quality programs, including DEC's regulation of stationary sources such as major electric generating facilities. Danskammer's draft Title V permit includes conditions that can be enforced by EPA and DEC and conditions that only DEC (state only enforceable conditions) can enforce because those conditions are not required by the federal regulation. For instance, DEC has regulated CO2 emissions from major electrical generating facilities since 2012 and does so with Danskammer's draft Title V permit. The CLCPA mitigation plan required by the draft permit is contained in a section of general conditions that are only enforceable by DEC (*see* ECL 19-0312, 6 NYCRR 251.3; Exhibit 26, draft Title V permit, conditions 1-52, 1-53, Bates Nos. 001242-001244, 001247, 001299-001307). The state only enforceable conditions are consistent with 42 USC §§ 7416 and 7661e and 40 CFR §§ 70.1(c) and 70.6(b), which authorize States to include additional permitting requirements and to identify those that are and are not federally enforceable.

Therefore, DEC and petitioners argue that DEC's application of the CLCPA and the statewide GHG emissions limits in reviewing and denying Danskammer's Title V application is consistent with the federally delegated Title V program. To further support its position, DEC staff argues that the EPA's comments on Danskammer's draft Title V permit did not raise any concerns regarding DEC's reviewing of the draft permit for consistency with the CLCPA or assert that EPA needed to approve the use of the CLCPA as part of the State's SIP. DEC staff also notes that EPA has not, to date, notified DEC that EPA had to approve the use of the CLCPA as part of the State's SIP.

DEC staff also argues that EPA's review and comments on the Greenidge draft Title V permit support staff's position. In EPA's November 18, 2021 comments on the Greenidge draft Title V permit, EPA referred to and recommended DEC complete its review of consistency with the CLCPA. DEC staff notes that despite the opportunity to do so, EPA did not state or take the

position that EPA needed to approve DEC's use of the CLCPA as part of the State's SIP or the Title V program.

During the issues conference and in its initial brief, Danskammer has maintained that it accepted draft permit condition 1-1, which requires the applicant to submit a site-specific greenhouse gas mitigation plan in accordance with CLCPA § 7(2) within 120 days of permit issuance (*see* IC Transcript 4/20. at 307; Danskammer Brief at 5; Exhibit 26, draft Title V permit, condition 1-1, Bates No. 001243). Danskammer was willing to accept a Title V permit conditioned upon CLCPA compliance, but now challenges DEC's authority to apply the CLCPA to the Title V permit application, arguing that only the Siting Board has the authority to apply the CLCPA in a joint proceeding such as this, and DEC impermissibly modified the State's Title V program by applying the CLCPA analysis into the Title V permit decision. As discussed above, I find neither of those contentions to be supported by the law or regulations, and the arguments run contrary to Danskammer's stated acceptance of the CLCPA draft permit condition.[7]

Ruling: I conclude as a matter of law that DEC has the authority to make consistency determinations pursuant to CLCPA § 7(2) in the context of the federally delegated Title V program, as well as ECL article 19, and the authority to deny a Title V permit application based on CLCPA § 7(2), whether or not the proposed facility is also seeking a certificate pursuant to PSL article 10. For the reasons stated above, the question of whether DEC is authorized to apply CLCPA § 7(2) in determining whether to issue a Title V permit for a facility subject to PSL article 10 is answered in the affirmative.

2. Whether in the context of a CLCPA § 7(2) analysis NYSDEC exceeded its authority under the CLCPA by considering compliance with PSL Section 66-p and the electricity targets set forth therein.

DEC's denial letter relied in part on DEC's analysis that the proposed project would be inconsistent with the 2040 zero-emissions target for the electric generation sector. DEC concluded that the continued long-term use of fossil fuels to produce electricity would be inconsistent with the statewide GHG emission limits as well as the statutory requirement that all electricity in the State be emission-free by 2040. Danskammer argues that even assuming that DEC has the authority to make a consistency determination pursuant to the CLCPA, DEC and any other State agency would be limited to the application of ECL article 75 and not the PSL § 66-p targets. In brief, Danskammer argues that agencies are not authorized to apply PSL § 66-p targets when making a consistency determination pursuant to CLCPA § 7(2). Likewise, Danskammer argues that DEC may not rely on 6 NYCRR 621.10(f) in denying a permit on PSL § 66-p grounds. For those stated reasons, Danskammer argues that DEC erred as a matter of law. (*See* Danskammer Brief at 18-23.)

DEC staff argues that the project's inconsistency with the statewide GHG emission limits is the main basis for DEC's denial, but also takes the position that lack of compliance with PSL § 66-p "would, by itself, be inconsistent with or interfere with attainment of the Statewide GHG

[7] Although Danskammer stated repeatedly that it was willing to accept the CLCPA draft permit condition, nothing would have prevented Danskammer from challenging the condition had DEC decided to grant rather than deny the permit.

emission limits and, thus, relevant for DEC to consider under its authority pursuant to CLCPA Section 7(2)." DEC staff argues that the energy sector is a significant source of GHG emissions and meeting the electricity targets of PSL § 66-p is integral to meeting the required statewide GHG emission limits. Furthermore, staff argues that Danskammer's application and supplemental materials acknowledged the need to evaluate future steps to meet the 2040 zero-emission electric generation target, but Danskammer failed to propose a plan to meet that goal except to assert that Danskammer would use hydrogen, renewable natural gas or some other fuel source not currently identifiable, or if those alternatives do not pan out, Danskammer will shut down in 2040. DEC argues that the CLCPA does not authorize or require DEC to approve a permit application so long as a facility shuts down by 2040. (*See* DEC Brief at 14-15.)

Sierra Club and Orange RAPP argue that although PSL § 66-p is implemented by the PSC, PSL § 66-p is part of the "CLCPA's GHG-reducing blueprint and fundamental to the attainment of the economy-wide GHG limits referenced in Section 7(2)." Therefore, State agencies need to consider GHG goals for the electrical sector, which accounts for thirteen percent of the statewide GHG emissions. Petitioners argue that the percentage will only increase as other sectors decarbonize and the demand for electricity grows making it more crucial that the energy sector also decarbonize as planned by the CLCPA and codified in PSL § 66-p. According to petitioners, failure to comply with the PSL § 66-p requirements would itself be inconsistent with or interfere with the attainment of the statewide GHG emission limits. (*See* Sierra Club and Orange RAPP Brief at 14-16.)

Although only the PSC has the authority to temporarily suspend or modify the requirements of PSL § 66-p, Sierra Club and Orange RAPP argue that the PSC has not done so and the zero-emission target remains in effect. Therefore, other State agencies may evaluate the extent of the GHG emissions from an electric generation project and determine whether those emissions are consistent with progress toward the zero-emissions requirement. (*See* Sierra Club and Orange RAPP Brief at 16.)

Lastly, Sierra Club and Orange RAPP argue that DEC's evaluation of the electrical generating sector zero emission goal is secondary to DEC's conclusion that the proposed project would be inconsistent with or interfere with the attainment of the statewide GHG emission limits, and therefore, not a prerequisite to DEC's determination. (*See* Sierra Club and Orange RAPP Brief at 17.)

Scenic Hudson also argues that DEC's primary reason for denying the Title V air permit application was the proposed project's inconsistency with or interference with the statewide GHG emission limit for 2030, and DEC did not need to reach PSL § 66-p to support its denial. Nonetheless, Scenic Hudson argues DEC was justified in considering whether the proposal would be inconsistent with or interfere with the energy sector goals set forth in PSL § 66-p because the energy sector goals are part of the overall statutory scheme of the CLCPA and are closely related to the overall statewide GHG emission limit goals. Given the statewide GHG emission reduction goals set for 2030 and 2050, Scenic Hudson argues that those goals require New York to eliminate sources of GHG emissions rather than adding new ones. Therefore, it was appropriate for DEC to consider the electric generation sector goals to further support the position that the project would be inconsistent with or interfere with the attainment of the statewide GHG emission limits set forth in ECL article 75. (*See* Scenic Hudson Brief at 16-19.)

Discussion

Danskammer's application materials represent that the "Project is . . . consistent with the State's long-term targets for renewable and zero emissions electricity contained in the CLCPA" (Exhibit 7, Danskammer NOIA Response, March 20, 2020, Attachment D, Exhibit 10: Consistency with Energy Planning Objectives, at 8, Bates No. 000682). DEC requested information regarding the feasibility of using RNG and Danskammer's assumption that it would result in zero on-site GHG emissions. Danskammer responded and noted that it was not proposing any specific approach to achieve consistency with the CLCPA's 2040 zero emission electrical system target. (*See e.g.* Exhibit 20, Exhibit Danskammer Response to NYSDEC September 8, 2022 NOIA, at 4, 8, Bates Nos. 001165, 001168.)

The CLCPA amended the PSL to establish a new section 66-p. PSL § 66-p, in part, requires the PSC to establish a program to require a minimum of 70% of statewide electric generation be provided by renewable energy systems by 2030 and by 2040 the statewide electrical demand system will be zero emissions (PSL § 66-p[2]). PSL § 66-p also authorizes the PSC to temporarily suspend or modify the obligations of the program, subject to due process considerations (*see* PSL § 66-p[4]). Although the express language of CLCPA § 7(2) provides that state agencies are to review their decisions for inconsistency or interference with the statewide GHG emission limits established in ECL article 75 and 6 NYCRR part 496, DEC and petitioners argue that failing to meet the targets established in PSL § 66-p in and of itself demonstrates that proposed emissions would be inconsistent with the statewide goals of ECL article 75 and 6 NYCRR part 496. In other words, the 2040 zero emissions target of PSL § 66-p should be viewed as a subset of the statewide GHG emission goals established in ECL article 75 and part 496 and should be considered in the agency's review pursuant to CLCPA § 7(2).

Though not finalized until after the briefing schedule closed, DAR-21 directs DEC staff to consider the projected future GHG and CO2e emissions for the years "2030, 2040 (for facilities in the electric generation sector), and 2050, including any proposed future emissions reduction strategies" in DEC's CLCPA analysis (*see* DAR-21, [V][C][5]). In addition, "For facilities in the electric generation sector, the analysis should discuss how the facility intends to comply with the requirement that the electric generation sector be zero emissions by 2040. This discussion should cover the feasibility and impacts from any alternative fuels or technologies that will be used by the facility to comply, and any alternatives or mitigation measures that will be implemented" (DAR-21, [V][C][7]). DAR-21 also lists a project's interference with the attainment of the zero-emissions electric generation sector by 2040 requirement as a potential cause for interference or inconsistency with the attainment of the statewide GHG emission limits set forth in 6 NYCRR part 496 (*see* DAR-21, [V][D]).

Notwithstanding DEC's directive in a policy document that the PSL § 66-p targets should be considered when reviewing a permit decision for consistency with the CLCPA, there is no indication in the CLCPA that the legislature contemplated that the PSL § 66-p targets would provide an independent basis for DEC to deny a permit. DEC and petitioners may argue that broadly applied, PSL § 66-p provides another tool in the toolbox for state agencies to consider when reviewing whether their decisions are inconsistent with or will interfere with the goals set forth in ECL article 75 and the CLCPA overall, but the legislature did not expressly state that PSL § 66-p could separately provide a basis for determining whether a permit decision is

inconsistent with or will interfere with the attainment of the statewide GHG emission limits. The express language of CLCPA § 7(2) requires agencies to determine consistency or interference with the attainment of the statewide GHG emission limits established in article 75 of the environmental conservation law. There is no reference in ECL article 75 to PSL § 66-p or its targets.

PSL § 66-p creates a program to decarbonize the electric generation sector by deploying clean energy resources with two stated targets: seventy percent of the State's electricity deriving from renewable energy by 2030 and one hundred per cent zero-emission energy by 2040 (*see* PSL § 66-p). There is no indication in the CLCPA, ECL or PSL that the program for renewable energy deployment should be considered in the CLCPA § 7(2) consistency analysis. The targets established in PSL § 66-p are largely dependent upon the permitting, buildout, and deployment of renewable energy projects. Here, petitioners are arguing, in part, that the permitting of Danskammer's repowering will interfere with the deployment of renewable energy projects. That argument, however, should be addressed in assessing whether there is justification for a project that is otherwise inconsistent with or will interfere with the attainment of the statewide GHG emission limits established in ECL article 75, or as discussed further below, whether other zero emission solutions are able to reasonably resolve an identified grid reliability need.

Here, even assuming in the broad scheme of the CLCPA that the failure to meet the PSL target of emission free electric generation by 2040 could be considered inconsistent with the attainment of the ECL article 75 GHG emission limits as argued by DEC and petitioners, it does not make it more inconsistent than the projected increase in GHG emissions already does. In other words, in this matter where DEC already determined, pursuant to CLCPA § 7(2), that the Title V permit if granted would be inconsistent or would interfere with the attainment of the statewide GHG emission goals, it is multiplicative to also say it is inconsistent with the attainment of the statewide GHG emission limits because the same GHG emissions will also prevent the State from attaining the targets of PSL § 66-p.

Turning to the parties' respective arguments on 6 NYCRR 621.10(f), I note there is no case law or Commissioner's decisions discussing the application of 6 NYCRR 621.10(f) to permitting decisions. Subdivision 621.10(f) reads, "An application for a permit may be denied for failure to meet any of the standards or criteria available under any statute or regulation pursuant to which the permit is sought, including applicable findings required by article 8 of the ECL and its implementing regulations at Part 617 of this Title, or any of the reasons set forth in section 621.13(a)(1)-(6)." Paragraph 621.13(a)(4) includes, in relevant part, any material change in applicable law or regulations. As argued by Danskammer, Danskammer did not seek a Title V permit pursuant to PSL § 66-p. The CLCPA, however, does constitute a material change in law that requires DEC to review its permitting decisions through the CLCPA lens. Accordingly, in addition to the CLCPA's directive to State agencies, I find 6 NYCRR 621.10(f) provides an additional basis for DEC to apply the CLCPA to permit decisions. I do not, however, for the purpose of this proceeding extend the reach of 6 NYCRR 621.10(f) or 621.13(a)(4) to State laws that DEC does not administer such as PSL § 66-p.

Ruling: Based on the discussion above, I conclude that PSL § 66-p does not provide an independent basis for determining whether an agency decision is inconsistent with or will interfere with the attainment of the GHG emission limits established in ECL article 75. To

the extent DEC erred in applying PSL § 66-p in its consistency analysis, I conclude that error was harmless on the record before me.

3. Whether NYSDEC erred by limiting its CLCPA § 7(2) analysis to the greenhouse gas ("GHG") emissions from the individual facility being permitted, and failing to take into account the impact on statewide GHG emissions arising from operation of the facility upon permit issuance through displacement of GHG emitting sources.

Danskammer argues that DEC refused to consider the proposed project's net reductions in statewide GHG emissions that would result from the proposed project's displacement of other higher GHG emitting electric generating sources. Because the CLCPA requires agencies to determine whether a permitting decision would be inconsistent with or interfere with the attainment of the statewide GHG emission limits, Danskammer argues that it is error not to consider whether, in this instance, the contributor to GHG emissions will cause an overall statewide reduction in GHG emissions (including from electricity and/or fossil fuels imported into the State). Danskammer also argues that the position taken by DEC in the denial letter disregards DEC's own guidance, which provides that increases and decreases in GHG emissions should be included in the consistency analysis. (*See* Danskammer Brief at 23-25, citing Division of Air Resources [DAR] Technical Guidance Memo, dated September 1, 2020.)

DEC staff argues that it did not err by limiting the CLCPA analysis to the GHG emissions from Danskammer's proposed facility because the plain language of the CLCPA limits the analysis to the proposed facility. In addition, DEC argues that Danskammer did not submit enough information for DEC to rationally evaluate whether the operation of the proposed facility would displace other GHG emitting sources. The assumptions that Danskammer relies upon are external to the project being reviewed and speculative. Altogether, DEC argues that Danskammer's projected displacement of other electric generation and GHG emission sources and offset of the direct and upstream GHG emissions from the proposed facility are at best uncertain, and do not constitute a sufficient basis to determine consistency for a new fossil-fuel fired electric generation facility. (*See* DEC Brief at 15-16.)

DEC staff further argues that Danskammer's reliance on the September 1, 2020, DAR Technical Guidance Memo is misplaced and outdated because that guidance memo has been superseded by the draft DEC program policy, DAR-21, The Climate Leadership and Community Protection Act and Air Permit Applications (finalized December 12, 2022). Furthermore, DEC argues that Danskammer misconstrues draft DAR-21 because DAR-21's reference to indirect emissions does not include changes in GHG emissions at other facilities, and DEC has not applied the draft guidance in that way. (*See* DEC Brief at 16-17.)

Sierra Club and Orange RAPP argue that CLCPA § 7(2) requires agencies to undertake a facility-level analysis and DEC was correct in determining that Danskammer failed to demonstrate that displacement of other GHG emission sources was anything more than speculative in nature. In the first instance, petitioners argue that the CLCPA does not require DEC to consider anything other than the emissions associated with the proposed project. In addition, petitioners argue that if Danskammer's displacement theory were adopted, then an agency would be required "to give Danskammer 'credit' for actions that may someday be

undertaken by third parties at other GHG emission sources." (*See* Sierra Club and Orange RAPP Brief at 17-18.)

Petitioners further argue that even if Danskammer is correct that DEC must consider displacement as part of the CLCPA § 7(2) analysis, Danskammer failed to meet its burden of proving that displacement will actually occur or reduce GHG emissions. Petitioners assert that DEC properly rejected Danskammer's displacement evidence as speculative and uncertain. (*See* Sierra Club and Orange RAPP Brief at 19-22.)

Scenic Hudson argues that CLCPA § 7(2) requires State agencies to review a specific permit application for inconsistency or interference with the statewide GHG emission limits. Therefore, it would be irrational and inappropriate for DEC to consider actions that may or may not occur at facilities that are outside the scope of the permit application being reviewed. Any projected emissions at facilities not subject to the current proceeding cannot be verified because they are external and speculative in nature, and beyond the control of Danskammer and DEC. Scenic Hudson argues that DEC did not need to determine whether the proposed facility would actually displace other sources to the extent necessary to offset Danskammer's direct and upstream GHG emissions, and "the potential displacement of other electric generation is not a sufficient basis to determine CLCPA consistency." (*See* Scenic Hudson Brief at 19-21.)

Scenic Hudson also asserts that DEC conducted an analysis of Danskammer's displacement modeling and found Danskammer's conclusions to be inconsistent and speculative, and therefore, unreliable. Danskammer failed to meet its burden that the proposed facility would displace other more polluting generation sources. (*See* Scenic Hudson Brief at 21-22.)

Discussion

Danskammer argues that nothing in CLCPA § 7(2) or ECL article 75 references any project-specific or sector specific GHG limits, and as a result State agencies are required to consider "the indirect impact of the permitting decision on the statewide GHG emissions" (Danskammer Brief at 24). Therefore, Danskammer concludes that the impact on statewide GHG emissions must include both increases and decreases in GHG emissions, and it was error for DEC not to consider Danskammer's displacement calculations. I disagree.

Nothing in the CLCPA, ECL article 75 or 6 NYCRR part 496 requires state agencies to consider whether the GHG emissions from one source will displace the GHG emissions at another source or whether there is a resulting reduction in emissions. ECL 75-0103(13)(b) requires the climate action council to develop a scoping plan that includes "measures to reduce emissions from the electricity sector by displacing fossil-fuel fired electricity with renewable electricity or energy efficiency." This is the only place in the law where displacement is considered, and notably it is displacement with a net zero result not a quid pro quo speculation that one fossil-fuel fired facility may displace a number of tons of GHG emissions from other facilities if the applicant facility is permitted to emit its own tons of GHGs.

Moreover, the legislature authorized DEC to "establish an alternative compliance mechanism to be used by sources subject to greenhouse gas emissions limits to achieve net zero emissions" within statutory parameters (*see* ECL 75-0109[4]). The alternate compliance

mechanism would include greenhouse gas emission offset projects that are to represent GHG "equivalent emissions reductions or carbon sequestration that are real, additional, verifiable, enforceable and permanent" (*see* ECL 75-0109[4][c]; *see also* DAR-21 (5)(E) at 6, ["mitigation efforts must be real, quantifiable, permanent, verifiable, and enforceable."]). Notably the legislature prohibited the electric generation sector from participating in such a mechanism (ECL 75-0109[4][f]). In other words, pursuant to ECL article 75, the electric generation sector cannot use an alternate compliance mechanism such as displacement to offset a facility's GHG emissions. Here Danskammer is not proposing an offset project, but it is arguing that the indirect impact of its proposed facility would displace other less efficient facilities and result in a reduction of statewide GHG emissions. In effect, Danskammer's displacement projections would constitute an offset beyond the control of DEC that may not be real, additional, verifiable, enforceable and permanent. I conclude that it would be contrary to the purpose and intent of CLCPA § 7(2) and ECL article 75 to consider displacement as part of the initial analysis whether a permit decision would be inconsistent with or would interfere with the attainment of the statewide GHG emission limits.

DEC staff did consider Danskammer's projected displacement of other GHG emission sources and found that Danskammer's conclusions were speculative and could not be verified. Even if allowed under ECL article 75 or as a mitigation measure contemplated by DAR-21, the potential displacement of other GHG sources that are beyond the control of Danskammer or DEC cannot be considered to meet the standard that is to be applied to all other sectors – that the reductions be "real, additional, verifiable, enforceable and permanent."[8]

Danskammer's reliance on the September 1, 2020, DAR Technical Guidance Memo is also misplaced because DAR-21, which supersedes the 2020 memo, simply provides that increases and decreases in emissions of GHGs from existing equipment should be included in the project's scope (*see* DAR-21 at 2, 3). The relevant language did not change from the draft to the final version of DAR-21, which provides,

> "It is important that each CLCPA analysis prepared to meet the requirements of Section 7(2) includes the potential GHG emissions from each portion of the project. The applicable portions of the project include any new or modified emission sources that have the potential to emit GHGs, including increases and decreases in emissions of GHGs from existing equipment. In addition, the project scope includes any upstream, downstream, and indirect emissions known to be attributable to the project, including upstream out-of-state emissions from fossil fuel production, transmission, and imported electricity." (DAR-21 [V][B] at 2-3.)

Accordingly, increases and decreases in emissions apply to emissions from existing equipment at the facility being permitted. Danskammer interprets the reference in DAR-21 to upstream, downstream, and indirect emissions known to be attributable to the project (which would be counted as direct impacts) to include speculative and uncertain displacement of other GHG emitters (indirect impacts) that neither DEC nor Danskammer control. Such an

[8] Projected displacement is based upon the assumption that a new combined cycle electric generation facility should be able to provide electricity at a lower cost and, therefore, be dispatched before other more expensive and more polluting facilities. There is no guarantee, however, that the more polluting facility will not continue to operate and provide electricity to other markets or for other behind the meter purposes.

interpretation ignores the plain meaning of the words used. Even if displacement can be considered, it more appropriately belongs in the consideration of whether the grant of a permit that is inconsistent with or will interfere with the attainment of the statewide GHG emission limits can be justified and mitigated, not in the consistency determination. Any indirect impact the permitting of the facility may have on statewide GHG emissions can only be considered after the direct impacts associated with the permit requested are measured against the stated CLCPA goals and a consistency determination for the permit decision at hand is provided.

Danskammer also cites the PSC order in *Cricket Valley* for the premise that Danskammer will displace less efficient power plants and notes that the Commission acknowledged the role that new, highly efficient generators play in limiting GHG emissions. In 2011, Cricket Valley Energy Center LLC petitioned the PSC for an Order Granting Certificate of Public Convenience and Necessity and Establishing a Lightened Regulatory Regime and requested expedited treatment. The proposed new combined cycle natural gas facility would generate approximately 1000 MW. Therein, the PSC noted that, "[a]lthough the project will be a major source of air emissions, carbon dioxide production regionwide is expected to decrease" and further stated that "carbon dioxide emissions would increase slightly in New York due to the increase of in-state generation but would decrease across the region" (*Petition of Cricket Valley Energy Center, LLC*, Order Granting Certificate of Public Convenience and Necessity and Establishing Lightened Ratemaking Regulation, Case No. 11-E-0593, February 14, 2013, at 4, 15). The slight increase in New York was projected to be in excess of one million tons per year of CO2 or an increase in CO2 emissions in New York of 2.5 per cent annually (*see Petition of Cricket Valley Energy Center, LLC*, Exhibit 6, Security Constrained Economic Analysis, Tables 3.5, 4.5).[9] The PSC's order in *Cricket Valley* was issued years before the CLCPA was passed, and the PSC did not need to review its grant of a certificate to determine whether the grant would be inconsistent with or would interfere with the attainment of the statewide GHG emission limits. Accordingly, the *Cricket Valley* matter does not provide precedent or persuasive authority for the analysis required here. Furthermore, it is unclear whether the projected displacement of other GHG emission sources has been adjudicated in the past. Cricket Valley has been providing electricity since April of 2020, and no evidence has been offered to demonstrate the projected reductions actually occurred or whether other facilities continue to produce electricity and emit the same amount of GHGs as they did before Cricket Valley went online. In other words, there has been no analysis as to whether the projected GHG reductions due to displacement are real, additional, verifiable, enforceable and permanent.

Ruling: I conclude that DEC staff's application of the CLCPA and determination that DEC was not required by law to consider displacement of other GHG emission sources by a proposed GHG emission source was not irrational or otherwise affected by an error of law nor did DEC staff abuse its discretion. I further conclude that DEC is not required to consider indirect impacts of a permit decision that are beyond the control of the applicant or DEC staff when determining whether the direct impacts of the decision are inconsistent with or will interfere with the attainment of the statewide GHG emission limits. DEC did not err by limiting its CLCPA § 7(2) analysis to GHG emissions from the individual facility being permitted.

[9] The projected emissions, reductions and increases are limited to emissions from electric generation facilities and do not include impacts on total GHG emissions in New York State.

4. Whether NYSDEC is authorized by CLCPA § 7(2) or otherwise to evaluate the justification for a project based upon whether it is needed to resolve a reliability deficiency in the provision of electricity to consumers in New York State.

Danskammer argues that DEC exceeded its authority when DEC determined that applicant had not demonstrated the proposed facility is justified because Danskammer failed to show the facility was needed for short term or long term electric grid reliability. Danskammer asserts that neither the CLCPA, PSL nor ECL authorize DEC to make any determination regarding grid reliability. Danskammer further asserts that CLCPA § 7(2) requires the permitting agency, not the applicant, to provide a detailed statement of justification for a proposed project that is inconsistent with GHG emission goals, and that the justification itself relates to the determination that the permitting decision is inconsistent or will interfere with the statewide GHG emission limits – "not a justification of the need for the project itself." Assuming the CLCPA does authorize an agency to determine whether a facility is needed in justification for the proposal, Danskammer argues that only the Siting Board is authorized to make such a determination in the context of this joint proceeding. (*See* Danskammer Brief at 27-29.)

DEC staff argues that it is authorized by the CLCPA and UPA to evaluate the justification for a project based upon whether it is needed to resolve a reliability deficiency in DEC's review of a Title V air permit application. According to DEC, the CLCPA requires DEC to provide a statement of justification but the act does not specify what criteria should be used after determining, as is the case here, that the project would be inconsistent with the statewide GHG emission goals. Therefore, DEC argues it is in the discretion of the agency to evaluate potential justifications, which in this matter would include any reliability deficiency or the provision of electricity to New Yorkers. DEC staff determined that the only potential justification for the project would be if there was need for the facility to ensure reliability in electric generation. DEC examined the need for the facility by reviewing publicly available studies and reports produced by NYISO and determined that there was no demonstrable reliability need or justification for the project. (*See* DEC Brief at 17-19.)

Sierra Club and Orange RAPP argue that the Court in *Danskammer v DEC* affirmed DEC's authority to evaluate justification whenever a project is inconsistent with or will interfere with the attainment of the CLCPA goals. The Court held "the plain language of the statute must be interpreted to grant the DEC the requisite authority to deny a permit when the grant of the permit would be inconsistent with or interfere with the attainment of the goals of the CLCPA, and the grant cannot otherwise be justified or the adverse effects mitigated" (*Danskammer v DEC*, 76 Misc3d at 250). (*See* Sierra Club and Orange RAPP Brief at 22-23.)

Petitioners argue that DEC was required to examine whether there was justification for the proposed project and was correct in doing so by examining whether Danskammer had demonstrated a reliability need for the project. Petitioners further assert that although DEC is required to draft a statement of justification, DEC relies upon the application materials to inform that analysis. Therefore, it is the applicant's burden to demonstrate a justification for the project, and here, petitioners argue Danskammer failed to meet its burden. (*See* Sierra Club and Orange RAPP Brief at 23-24.)

Petitioners further argue that DEC's review and evaluation of the NYISO reports on reliability was consistent with Danskammer's reference to NYISO's 2020 Reliability Needs Assessment. Moreover, petitioners assert that Danskammer's argument that the statement of justification is meant to support the inconsistency determination rather than an agency's decision to approve a project that is otherwise inconsistent with the CLCPA goals is contrary to the language and intent of the CLCPA. (*See* Sierra Club and Orange Rapp Brief at 24-27.)

Scenic Hudson also argues that the Court already determined that the statement of justification required by the CLCPA relates to a justification for a project that would otherwise be inconsistent with or interfere with the goals of the CLCPA. CLCPA § 7(2) "mandates that the DEC consider not only the consistency of the application with the goals of the CLCPA, but also whether, if inconsistent, the grant of a permit is nonetheless justified, and its adverse effects can be mitigated" (*Danskammer v DEC*, 76 Misc3d at 252). Scenic Hudson asserts that Danskammer's underlying arguments in the article 78 proceeding, including the argument that grid reliability is an issue for the Siting Board, were litigated and addressed in the Court's holding that DEC had the authority to deny a permit for inconsistency where it could not otherwise be justified. Therefore, Scenic Hudson argues that Danskammer should be collaterally estopped from relitigating the issue here. Scenic Hudson concludes that collateral estoppel requires a holding here that DEC is "authorized to evaluate the justification for a project based on whether it is needed to resolve a reliability deficiency." (*See* Scenic Hudson Brief at 22-25.)

Scenic Hudson further argues that Danskammer has not offered any potential justification for the proposed facility. Because the legislature chose not to limit or define justification, Scenic Hudson argues that it is reasonable for DEC to evaluate whether there is an electric system reliability need for a project. Without a justification from the applicant, DEC was required to evaluate whether any justification for the project could be gleaned from the application materials or other sources, namely the up-to-date NYISO analysis. (*See* Scenic Hudson Brief at 24-26.)

In its reply brief, Danskammer argues that the Court dismissed the fourth cause of action related to this issue because Danskammer had failed to exhaust its administrative remedies. Therefore, Danskammer argues that it is not collaterally estopped from ligating the issue in this proceeding because there was no opportunity to litigate the issue in the article 78 litigation. (*See* Danskammer Reply Brief at 12-15.)

Discussion

Danskammer's assertion that the CLCPA requires an agency to justify its determination that a permit decision is inconsistent with or will interfere with the statewide GHG emission limits is contrary to DEC's reading and application of the CLCPA and the Court's holding. CLCPA § 7(2) states in relevant part, "[w]here such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits, each agency . . . shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located." The Court held, "the plain language of the statute must be interpreted to grant the DEC the requisite authority to deny a permit when the grant of the permit would be inconsistent with or interfere with the attainment of the goals of the CLCPA, and the grant cannot otherwise be justified or the adverse effects mitigated" (*Danskammer v DEC*, 76 Misc3d

at 250 [emphasis added]).[10] Danskammer argued during the issues conference that the Court in the first instance must interpret the CLCPA (*see* IC Transcript 4/20, at 172, 186). The Court interpreted the meaning of CLCPA § 7(2), and its reading of the CLCPA is clear that it is the grant of the permit that requires justification; not justification that the decision would be inconsistent with the CLCPA goals. The Court further acknowledged that CLCPA § 7(2) "mandates that the DEC consider not only the consistency of the application with the goals of the CLCPA, but also whether, if inconsistent, the grant of a permit is nonetheless justified, and its adverse effects can be mitigated" (*Danskammer v DEC*, 76 Misc3d at 252).

Turning to the legal question posed and briefed by the parties, the Court in *Danskammer v DEC* already interpreted the statute as authorizing DEC to deny a permit based on the application of the CLCPA if the grant of the permit cannot be justified. The Court, however, did not reach the question of need as justification. The Court was clear that Danskammer had not exhausted its administrative remedies and stated, "the court does not decide the significant, fact driven substantive issues arising from the challenge to the DEC's determination that the project would be inconsistent with or interfere with the attainment of the goals of the CLCPA, and that the project was not otherwise justified. Rather, a determination on these issues is properly barred by Danskammer's failure to exhaust its administrative remedies concerning the same" (*Danskammer v DEC*, 76 Misc3d at 253).

Danskammer's position that only the Siting Board has the authority to determine whether an electric generation facility is needed in the context of the article 10 proceeding ignores the CLCPA mandate that when decisions to issue permits such as the Title V permit are deemed to be inconsistent with or will interfere with the attainment of the statewide GHG limits, then the agency must provide justification for issuing the permit. The relatively broad language used by the legislature provides agencies with the flexibility to explore different avenues for justification, alternatives and mitigation of adverse effects resulting from decisions that are inconsistent with the CLCPA GHG emission limits. Here, DEC found that Danskammer provided no justification for issuance of the permit, and although not required to, DEC staff explored grid reliability as a potential justification. DEC could have simply denied the permit on the basis that applicant provided no known justification for issuance of a permit that would allow up to 2 million tons of CO2 to be emitted annually (an increase of 1 to 1.5 million tons of CO2 per year based on projected dispatch or an increase of 1.9 million tons of CO2 annually based on potential to emit).

Danskammer's argument that it is DEC's obligation to justify a permit when issuance of the permit would be inconsistent with or interfere with the statewide GHG emission limits is unconvincing. While the CLCPA requires agencies to provide a statement of justification, agencies rely upon application materials to support their decisions. Pursuant to 624.9(b)(1), the applicant has the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the department. The same burden applies when an applicant requests a hearing after DEC has denied a permit application (*see Matter of Joseph*

[10] The Court's use of the disjunctive in its holding (*Danskammer v DEC*, 76 Misc3d at 250) is inconsistent with its further discussion and conclusion that a permit deemed inconsistent with the CLCPA's goals must be justified and the adverse effects mitigated (*id.* at 252). The use of the disjunctive would allow a permit decision that is inconsistent with the Statewide GHG emission limits to be issued as long as it is justified, but the plain language of the CLCPA requires that the decision to grant such a permit be justified in light of the fact that doing so is inconsistent with the CLCPA's goals and requires alternatives or mitigation measures to be identified.

P. Serth, Decision of the Commissioner, December 19, 2012; *Matter of Brian Zazulka*, Decision of the Commissioner, December 27, 2004; *see also Matter of the Application of Gernatt Asphalt Products, Inc.*, Ruling, February 24, 1999). In addition to ECL article 19 and DEC's air regulations, 6 NYCRR part 200 et. seq., DEC now administers CLCPA § 7, ECL article 75 and 6 NYCRR part 496. Therefore, it is applicant's burden to provide the agency with justification for the proposed project in the application materials or when asked to provide a CLCPA consistency analysis. Here, DEC determined that the addition of over a million tons of CO2 emissions per year would be inconsistent with or would interfere with the attainment of the statewide GHG emission limits, which require the reduction of GHG emissions over time for all sectors including the electric generation sector. Pursuant to CLCPA § 7(2), DEC was then required to determine whether there was justification for granting the Title V permit, notwithstanding the fact that doing so would be inconsistent with or would interfere with the stated goals. Absent a demonstration of justification by Danskammer, DEC reviewed the available public information to determine whether there was justification for granting the Title V permit in this matter, and concluded there is no demonstrated need for grid reliability.

Considering Danskammer's position that only the Siting Board has authority in an article 10 proceeding to determine whether the proposed facility is needed, it is undisputed that the Siting Board has the sole authority to issue a "certificate of environmental compatibility and public need." However, there is no administrative precedent applying the CLCPA requirements in a joint proceeding such as this one, where both agencies are required by law to make determinations related to the CLCPA – DEC in considering the Title V permit and the Siting Board in considering the siting certificate. Moreover, need as applied here pursuant to the CLCPA has a considerably different meaning than that contemplated in previous proceedings.

In the past, competition in the energy supply market was determined to be an approved procurement process, and it was argued that market forces, rather than the regulatory process, would determine the need for new generating facilities (*see* DPS Case 99-E-0084, *Petition of Sithe Energies, Inc.*, Declaratory Ruling Concerning Procurement Process, August 25, 1999; DPS Case 98-E-0096, *Petition of Athens Generating, L.P.*, Declaratory Ruling Concerning Procurement Process, April 16, 1998). Thus, if an applicant was willing to spend the money to build or repower a facility and compete in the energy market, there was an adequate demonstration of need for the facility to be granted a certificate. That need determination, however, is not a demonstration that a facility is needed for grid reliability. It is also common for the Siting Board to conclude in issuing a certificate that the proposed facility (solar, wind, natural gas) would contribute to grid reliability. That, however, is not the question before me.

Here, the legislature created a statutory scheme to meet stated GHG emission goals and reduce and eventually cease the burning of fossil fuels for the generation of electricity. Therefore, the question is not whether the proposed facility will simply contribute to grid reliability, but whether it is actually needed for grid reliability to ensure New York customers do not experience outages, service interruptions and brown outs. The question is not resolved by a market force analysis or a determination that the proposed facility would contribute to grid reliability. Most proposals would meet those relatively low thresholds. With the passage of the CLCPA and accompanying amendments to the ECL and PSL, the bar has been raised when considering the continued or increased use of fossil fuels to generate electricity. In light of the CLCPA and the aggressive goals to reduce and eliminate GHG emissions established in the

CLCPA, ECL and PSL, fossil fuel-fired electric generation facilities that are proposing to increase the facility's actual emissions up to 1.5 million tons of CO2 annually, should only be justified if there is a real, demonstrable, and quantifiable grid reliability need for the facility. Based on literature review, DEC determined that justification did not exist.

I conclude DEC can evaluate and determine whether there is a justification for a project based upon whether it is needed to resolve a grid reliability deficiency in the provision of electricity to consumers in New York State. In this proceeding, DEC's Commissioner must decide whether grid reliability need, if identified, justifies the grant of a Title V permit and its associated GHG emissions. Likewise, the Siting Board must decide whether grid reliability need, if identified, justifies the grant of a siting certificate.

Ruling: I conclude that it is applicant's burden to demonstrate that there is justification for granting a permit application that would significantly increase applicant's GHG emissions. In the absence of a justification from the applicant, I conclude DEC's review and evaluation of available NYISO reports to determine whether justification for issuing a Title V permit based upon whether the proposed facility is needed for grid reliability was rational and reasonable and authorized by the CLCPA.

5. Whether NYSDEC's denial of applicant's Title V permit application was irrational or arbitrary and capricious because no standards or regulations have yet been promulgated to implement CLCPA § 7(2).

Danskammer argues that DEC's determination that the five-year Title V permit is inconsistent with the CLCPA is inherently arbitrary and capricious and irrational. First, Danskammer asserts that DEC based its determination on the whole project and not just the Title V permit application. Second, Danskammer argues that DEC's review is limited to the five-year term of the permit, and that it is error to speculate about advancements in clean energy technology that may or may not occur by 2030, 2040 or 2050. Danskammer asserts it is arbitrary and capricious to deny a permit with a term of five years based on the conclusion that current emissions may interfere with emission limits not applicable for a decade or more in the future. (*See* Danskammer Brief at 30-31.)

Danskammer further asserts that in addition to intruding upon the Siting Board's exclusive approval authority over the entire project, that DEC's determination was rendered in the absence of any applicable standards. Although DEC is directed to promulgate regulations to ensure the aggregate GHG emissions will not exceed the limits established by ECL 75-0107, it has not done so yet. Without established standards, Danskammer argues that DEC's denial of the Title V permit application is irrational and arbitrary. (*See* Danskammer Brief at 31.)

DEC staff argues that its decision on a permit application and the corresponding CLCPA § 7(2) analysis goes beyond the permit's term and includes reasonably foreseeable implications of any decision. DEC staff notes that a facility does not simply cease to exist or stop operating at the end of a five-year term. Moreover, staff points out that the proposed facility amounts to a "new source of a substantial amount of GHG emissions, including both direct and upstream GHG emissions, and constitutes a new and long-term utilization of fossil fuels to produce

electricity without a specific plan in place to comply with the requirements of the CLCPA. Danskammer also ignores the required 2030 GHG emission reductions outlined in ECL Article 75, which is near-term. According to Danskammer, total GHG emissions from the project would be up to 2.4231 million short tons of carbon dioxide equivalent (CO2e) in 2030." (*See* DEC Brief at 19.)

DEC staff argues that the denial of Danskammer's Title V air permit application was not irrational, arbitrary and capricious, or affected by error of law because additional standards or regulations are not required to be promulgated to implement and apply CLCPA § 7(2). DEC also asserts that this legal issue was addressed and resolved in DEC's favor in the article 78 proceeding where the Court held that CLCPA § 7(2) "by its plain language, is of immediate effect" and DEC's authority is not conditioned upon the promulgation of the rules the CLCPA authorizes (*see Danskammer v DEC*, 76 Misc3d at 249). In brief, DEC argues that it is "under no obligation to promulgate rules implementing CLCPA Section 7 before engaging in the analysis" required by that section. According to DEC staff, CLCPA § 7(2) directs State entities to evaluate whether a decision would impede the State's ability to meet the GHG emission limits established by law. (*See* DEC Brief at 19-21.)

Sierra Club and Orange RAPP likewise argue that Danskammer's position on this point ignores the Court's determination that DEC possesses the authority to deny the Title V permit application based upon the application of the CLCPA without additional regulations (*see Danskammer v DEC*, 76 Misc3d at 257). Petitioners argue that CLCPA § 7(2) provides a standard for agency decision-making and once regulations are promulgated, the regulations will provide an independent basis for agency determinations. Regarding Danskammer's argument that the review should be limited to the five-year term of a Title V air permit, petitioners argue that CLCPA review should not be limited to just the term of the permit. (*See* Sierra Club and Orange RAPP Brief at 28-30.)

Scenic Hudson also argues that the Court ruled that CLCPA § 7(2) "is of immediate effect, and does limit DEC's authority thereunder until the promulgation of any rules under the CLCPA." The Court discussed this issue at length and concluded Danskammer's interpretation would render the Legislature's express mandate completely toothless for years. (Scenic Hudson Brief at 27, citing *Danskammer v DEC*, 76 Misc3d at 249.) Therefore, Scenic Hudson argues Danskammer is collaterally estopped from making the same argument here. Even if Danskammer is not estopped, Scenic Hudson argues that CLCPA § 7(2) articulates a standard for evaluating consistency as applied and expressed in DEC's denial. (*See* Scenic Hudson Brief at 27-30.)

In its reply brief, Danskammer argues that the question here is different from that addressed by the Court. Here, Danskammer asserts the question is "whether denial of a five-year Title V permit on the basis of the project's alleged inconsistency with future GHG limits was inherently irrational or arbitrary and capricious in the absence of regulations or standards applicable to the permit term" (*See* Danskammer Reply Brief at 17). Therefore, Danskammer argues that issues were not identical and Danskammer did not have a full and fair opportunity to litigate this issue in the article 78 proceeding. (*Id.)*

Discussion

The decision in *Danskammer v DEC* is persuasive but not dispositive of this issue. In the article 78 proceeding, Danskammer argued that DEC did not have the authority to deny a permit based on the CLCPA until relevant rules are promulgated. That argument was expressly rejected by the Court (*see Danskammer v DEC*, 76 Misc3d at 222, 230, 248-250). Here, Danskammer is not arguing that DEC lacked authority, it is arguing that exercising that authority without regulations in place covering the five-year term of the permit is arbitrary and capricious. To the extent the applicant suggests that the CPLR article 78 arbitrary and capricious standard applies in 6 NYCRR part 624 proceedings, I disagree. The arbitrary and capricious standard is applied by the courts when reviewing final agency decisions. Here, however, under part 624, where DEC has denied a permit application, it is the applicant's burden to establish "by a preponderance of the evidence" that the application meets all statutory and regulatory standards (*see* 6 NYCRR 624.9[c]; *see also Matter of Brian Zazulka*, Decision of the Commissioner, December 27, 2004, at 5 [fn 2] and Hearing Report, at 23). DEC staff determined that the grant of Danskammer's Title V permit would be inconsistent with or would interfere with the attainment of the statewide GHG emission limits established in ECL article 75 and that there was no justification for issuing the Title V permit. Accordingly, I review Danskammer's question for whether DEC acted contrary to the CLCPA and ECL article 75 in denying Danskammer's Title V permit. The Court in *Danskammer v DEC* already opined that the CLCPA does not limit DEC's authority until regulations are promulgated (*see Danskammer v DEC*, 76 Misc3d at 250). For the reasons that follow, I agree.

It was not contrary to law for DEC to determine, absent further regulation, that the proposed facility would constitute a new source of substantial GHG emissions that would be inconsistent with or would interfere with the attainment of the statewide GHG emission limits provided in ECL 75-0107 and 6 NYCRR 496.4. The administrative record supports that conclusion. CLCPA § 7(2), ECL article 75, 6 NYCRR part 496 and PSL § 66-p address the continuing accumulation of CO2 in the atmosphere through the application of the goals of reducing and eliminating annual GHG emissions gradually over the next twenty-seven years. The goals set for 2030, 2040 and 2050 are not stopping points or deadlines that only need to be met in the future, they are planning tools for actions that agencies take today no matter the term of the permit being considered, notwithstanding the fact that regulations will be promulgated relating to those goals.

Danskammer's attempts to conflate the issue, however, through its arguments that the permit is of a five-year term and it is error to speculate about advancements in clean energy technology that may or not occur during the term of that permit or that it is error to apply consistency with goals set for 2030, 2040 and 2050 to a five-year permit without additional regulatory standards or criteria being promulgated, are unconvincing. As discussed above, DEC Title V permits, of five-year terms, allow the permit holder to continue to operate beyond the term of the permit, pursuant to SAPA § 401(2), so long as a timely and complete renewal permit application is submitted to DEC. The result being that the permit may continue for many years beyond its term with continuing GHG emissions during those years exceeding a million short tons of CO2e emissions per year. Taking into consideration the upstream GHG emissions associated with the Title V permitted emissions the annual tonnage of GHG emissions increases.

Additionally, limiting the analysis of consistency with the CLCPA to only the term of the permit, and only if regulations are promulgated in advance, is short sighted and in contravention of the legislative intent – analysis of the consistency of an agency decision with the long term goals of reducing and eliminating GHG emissions in New York State. Danskammer appears to view those goals in a vacuum and asserts it may just shut down in 2040 if the PSL § 66-p goal requires it. That ignores the fact that this proposed facility will contribute a significant amount of CO2e emissions regardless of the term of its operation - a year, five years or fifteen. Any projected emissions are going to contribute to the existing CO2e present in the atmosphere. According to EPA, "CO2 emissions cause increases in atmospheric concentrations of CO2 that will last thousands of years," and methane "CH4 emitted today lasts about a decade on average, which is much less time than CO2. But CH4 also absorbs much more energy than CO2" and therefore has a higher global warming potential (GWP) than CO2 (*see* Understanding Global Warming Potentials, https://www.epa.gov/ghgemissions/understanding-global-warming-potentials).

I also find Danskammer's argument that DEC based its determination on the whole project and not just the Title V permit application to be unconvincing. DEC refers to the "Project" throughout its decision to deny the Title V permit, but it is clear from DEC's review and determination that the denial relates, first and foremost, to the projected stack emissions associated with the Title V permit, regulated pursuant to ECL article 19 and 6 NYCRR part 200 et. seq. Additionally, DEC reviewed the upstream GHG emissions associated with the production and transmission of the natural gas or other fossil fuel to be combusted at the facility. ECL 75-0101(13) defines "Statewide greenhouse gas emissions" as "the total annual emissions of greenhouse gases produced within the state from anthropogenic sources and greenhouse gases produced outside of the state that are associated with the generation of electricity imported into the state and the extraction and transmission of fossil fuels imported into the state. Statewide emissions shall be expressed in tons of carbon dioxide equivalents." DEC's review and determination are anchored in the projected stack emissions and upstream emissions associated with those stack emissions regardless of the terminology used in the denial letter – "project" or "Title V application." Danskammer's application materials demonstrate that annual estimated stack emissions from the facility would increase Danskammer's current actual annual emissions significantly and that the analysis of the upstream emissions associated with the stack emissions further increases the estimated emissions associated with the burning of fossil fuels. In reviewing an application for a Title V permit, DEC is required pursuant to the CLCPA and ECL article 75 to consider inconsistency with or interference with the attainment of statewide GHG emission limits, which includes review of upstream emissions. Further regulations are not required to make that initial determination.

Accordingly, DEC concluded that the grant of a Title V permit would be inconsistent with the CLCPA, ECL article 75 and 6 NYCRR part 496 (effective December 30, 2020) GHG emission goals. The fact that those goals are established for the years 2030 and 2050 does not entitle an applicant to a free pass to exacerbate the problem in the meantime or until further regulations are promulgated, regardless of the term of the permit.

Ruling: I conclude that DEC did not act contrary to law in denying Danskammer's Title V application based on the proposed project's inconsistency with the CLCPA and the attainment of the ECL article 75 statewide GHG emission limits. DEC's decision to do so

without further regulatory promulgation was consistent with, not contrary to, the plain language of the CLCPA.

Factual Issues Proposed

Because I rule against Danskammer on the substantive legal questions discussed above, a discussion and ruling on the factual issues raised by Danskammer and petitioners follows. Danskammer generally opposes the petitions of Scenic Hudson, and Sierra Club and Orange RAPP for full party status because the issues raised therein simply bolster DEC's position and do not otherwise propose substantive and significant issues. Danskammer argues that neither Scenic Hudson nor Sierra Club and Orange RAPP have raised substantive and significant issues as a matter of law because the CLCPA does not "endow DEC with authority to deny Danskammer's Title V permit." That argument has been rejected by my rulings above. Danskammer also argues that petitioners who file friendly petitions that simply bolster DEC's position should not be granted full party status. That argument requires an examination of 6 NYCRR 624.5(d)(1), which provides:

> (1) Full party status. The ALJ's ruling of entitlement to full party status will be based upon:
> (i) a finding that the petitioner has filed an acceptable petition pursuant to paragraphs (b)(1) and (2) of this section;
> (ii) a finding that the petitioner has raised a substantive and significant issue or that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party; and
> (iii) a demonstration of adequate environmental interest.

Clearly the regulation contemplates that a petitioner can be granted full party status if it is found that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party. The question remains whether the same would apply to a petitioner who can make a meaningful contribution to the record regarding an issue that is joined because it is the basis of DEC's denial of a permit and it is contested by applicant. Danskammer argues that issues cited by DEC staff as a basis to deny the permit and contested by the applicant fall outside the regulatory definition of substantive and significant issues, and asserts that the terms substantive and significant are reserved for issues proposed by a potential party. Danskammer further argues that DEC and the applicant are mandatory parties and not potential parties, therefore issues between the two regarding permit denial, although adjudicable, are not substantive and significant within the meaning of 6 NYCRR 624.5(d)(1)(ii). (*See* Exhibit 41, Danskammer Response to Petitions, at 12, Bates No. 001661.)

Danskammer's arguments overlook the plain language of subparagraph 624.5(d)(1)(ii), which does not limit the meaningful contribution to the record to issues only raised by potential parties. The provision relates to substantive and significant issues raised by "another party." A party is defined as "any person granted full party status or *amicus* status in the adjudicatory portion of the hearing according to the procedures and standards set forth in section 624.5" (6 NYCRR 624.2[w]). Pursuant to section 624.5, DEC staff and applicant are "automatically full parties" (6 NYCRR 624.5[a]). Accordingly, the reference to a substantive and significant issue

raised by another party is not a reference to a potential or mandatory party, it is a reference to a party with full party status, which automatically includes applicant and DEC staff.

Narrowly read, the regulation may support Danskammer's position that only potential parties can raise substantive and significant issues, but Danskammer's argument ignores the fact that meaningful contribution to the record is associated with an issue raised by a full party and the issue has been joined for adjudication. The purpose of the regulations related to party status is to define and narrow what issues are adjudicable before proceeding to hearing. If the applicant's properly supported, contested basis for a denial is found to be adjudicable by the ALJ pursuant to 6 NYCRR 624.4(c)(1), the issue is by operation of the regulation, substantive and significant.

As noted above, DEC staff has no objections to the petitions or issues proposed for adjudication by petitioners. I am unaware of any Commissioner's decision that has discussed this question directly. The purpose of imposing the substantive and significant standard on potential parties is to avoid adjudication of issues that have little or no chance of affecting the permit decision. If a petitioner, however, can meaningfully contribute to the record on issues that will be joined for adjudication pursuant to 6 NYCRR 624.4(c)(2), I believe a proper reading of subparagraph 624.5(d)(1)(ii) allows the grant of full party status to a petitioner who can make a meaningful contribution to the record regarding an adjudicable issue raised by another party, including adjudicable issues raised by an applicant. Such was the result in the *Matter of the Village of Kiryas Joel* where the ALJ found that a petitioner had demonstrated it could make a meaningful contribution to the record with respect to an issue raised by the applicant regarding a substantial term or condition of the permit and granted petitioner full party status (*see Matter of the Village of Kiryas Joel*, Ruling on Issues and Party Status, May 14, 2021, at 17-18; *see also Matter of United States Coast Guard*, Ruling on Issues and Party Status, November 1, 2000). When a petitioner has been unable to demonstrate, through the offer of an expert witness, that the petitioner would make a meaningful contribution to the record on an issue where all relevant information related to the issue will be developed by DEC staff and applicant, the petitioner has been denied party status (*see Matter of Whitesville Field [East Resources, Inc., Applicant]*, Ruling of the Chief Administrative Law Judge on Issues and Party Status, December 11, 2009, at 17-20).

Ruling: Danskammer's general objection to the petitions for full party status is too restrictive a reading and application of those sections of part 624 that are intended to narrow the issues for adjudication and once narrowed, ensure a complete record will be developed. I conclude that where a petitioner is able to demonstrate, with the offer of an expert witness, that petitioner will make a meaningful contribution to the record on an adjudicable contested basis for DEC's denial, that the petitioner is entitled to full party status provided the elements of paragraph 624.5(d)(1) are satisfied in the opinion of the ALJ. This is not a mere bolstering of DEC's position, but something more substantial that provides material and relevant expert opinion testimony and analysis of factual elements and arguments related to the basis for the denial that will aid in the development of a complete record and assist the decisionmaker. Accordingly, Danskammer's interpretation of the regulations is rejected, and I deny the request that the petitions of Scenic Hudson and Sierra Club and Orange RAPP for full party status be denied based on that interpretation.

Danskammer's Proposed Issues for Adjudication

In its statement of issues, Danskammer raised three factual issues for adjudication. As noted above, at the issues conference stage, part 624 states that an issue is adjudicable if "it relates to a matter cited by [DEC] staff as a basis for denying a permit and is contested by the applicant" (6 NYCRR 624.4[c][1][ii]). That does not mean, however, that the applicant can simply state that the applicant disputes the basis for denying a permit. The general rule is tempered by the standards applied in a summary judgment proceeding as discussed above, with applicant persuading the judge that a disputed issue of fact exists requiring adjudication.

1. Whether the issuance of a Title V permit would be inconsistent with or would interfere with the attainment of the statewide GHG emission limits.

Danskammer challenges DEC's determination that the "Project" is inconsistent with or will interfere with the attainment of the statewide GHG emission limits and asserts DEC's conclusions were arbitrary, capricious and not in accordance with applicable law.[11] According to Danskammer, DEC ignored facts and data in the record that demonstrate that, if permitted, the facility would result in a cumulative reduction in statewide GHG emissions. Danskammer offers witnesses who will testify: (1) that if built, the facility will be among the most efficient electric generating facilities in the state; (2) that due to displacement of other less efficient and higher emitting electric generators, that the facility would result in the cumulative reduction of statewide GHG emissions between 2025-2039, if built; and (3) as to the feasibility of transitioning the facility to RNG or green hydrogen by 2040 or shuttering the facility at that time (*see* Exhibit 37, Danskammer Statement of Issues, at 2-3, 13, Bates Nos. 001395-001396, 001406).

When first asked to provide an assessment of how the issuance of a Title V permit would be consistent with ECL article 75 GHG emission limits, Danskammer directed DEC to Exhibit 10 of its article 10 application (*see* Exhibit 6, Danskammer NOIA Response, at 2, Bates No. 000625, Attachment D, Bates Nos. 000645-000652). Therein, Danskammer asserts that the project is consistent with the 2015 State Energy Plan (SEP) because it will contribute to a cleaner grid, reduce GHG emissions and local air pollutants by displacing less efficient, higher emitting power plants, contribute to reliability and resiliency, and contribute to affordability. Danskammer's article 10 application further asserts that "the Project is consistent with State's commitment to significantly mitigate New York's greenhouse gas emissions, as it will have the immediate impact of reducing power sector CO2 emissions on a regional basis relative to an alternative without the Project by displacing output by less efficient and higher-emitting generators" (*see* Exhibit 6, Danskammer NOIA Response [February 18, 2020], Attachment D, Bates No. 000647). Danskammer also asserts that the project will support renewable energy because the repowered facility can be more flexible in its operation (*id.* Bates Nos. 000647-000648). The application also asserts that "it is technically possible for the Project to utilize or be converted to utilize alternative emissions-free fuels, such as renewable natural gas or

[11] Again, I decline to apply the CPLR article 78 arbitrary and capricious standard to the question raised. Under part 624, where the department has denied a permit application, it is the applicant's burden to establish "by a preponderance of the evidence" that the application meets all statutory and regulatory standards. *See* 6 NYCRR 624.9(c).

hydrogen fuel, if such sources or other alternative fuels become commercially and economically available in the future" (*id.* Bates No. 000651). (*See also* Exhibit 7, Danskammer NOIA Response [March 20, 2020], Bates Nos. 000656-000686.)

On July 8, 2020, Danskammer submitted a Supplemental Greenhouse Gas Analysis prepared by ICF in further support of Danskammer's position that the project is consistent with the statewide GHG emission reduction requirements and that it contributes to the achievement of electric sector targets (*see* Exhibit 13, Supplemental Greenhouse Gas Analysis of the Danskammer Energy Center, Bates Nos. 000700-000735). ICF's analysis provides the methodology used to arrive at the conclusions asserted by Danskammer that the project, if permitted, would be consistent with the CLCPA goals, including how the project would displace other less efficient, higher emitting generating facilities and result in a reduction of GHG emissions from the sector related to displacement. ICF's analysis also reviews the practicality of utilizing RNG (and to some extent hydrogen) in the future and examines RNG supplies and transmission potential. ICF also concludes that the project would contribute to system reliability and resiliency because electrical demand is anticipated to increase as the state moves to decarbonize across sectors. ICF asserts that renewable resources and storage will not be adequate to ensure a reliable reserve margin, therefore thermal resources such as the proposal must be retained as part of an adequate generation mix. Danskammer supplemented the July 8, 2020 analysis on November 17, 2020 and February 8, 2021 (*see* Exhibit 20, Danskammer Response to September 8, 2020 NOIA, Bates Nos. 001162-001177; Exhibit 23, Danskammer Response to January 19, 2021 NOIA, Bates Nos. 001227-001234).

DEC asserts that its determination that the issuance of the Title V permit would be inconsistent with the statewide GHG emission limits was based on its finding that if the facility were permitted, it would constitute a new source of a substantial amount of GHG emissions and a new and long-term utilization of fossil fuels to produce electricity, with no specific plan to comply with the CLCPA. Citing information provided in the application materials, DEC notes that total emissions from the proposed facility would be up to 2.4231 million short tons of CO2e in 2030. Even assuming Danskammer's displacement argument is credited, Danskammer initially projected that the facility would result in 274,000 additional short tons of CO2 emissions (direct and upstream) in the state. (*See* Exhibit 42, DEC Response to Statement of Issues and Petitions for Party Status, at 6, Bates No. 001778.)

Scenic Hudson, Sierra Club and Orange RAPP also argue that the permitting of the proposed facility will increase emissions that would be inconsistent with the statewide GHG emission limits. Scenic Hudson offers Devi Glick of Synapse Energy Economics to present a report and testify that, if permitted: (1) Danskammer would be a significant new source of GHG emissions that would dramatically increase emissions over the existing plant; (2) millions of more tons of CO2 will be added to statewide emissions; and (3) local emissions will increase significantly. The witness would also identify the inconsistencies in the work and modeling performed by Danskammer's consultant related to the assertion that the project would reduce emissions and also demonstrate that without the facility more renewables and storage would be built. (*See* Exhibit 39, Scenic Hudson Petition for Full Party Status, at 9-16, Bates Nos. 001460-001467.)

Sierra Club and Orange RAPP offer the testimony of Elizabeth A. Stanton, Ph.D. and Bryndis Woods, Ph.D. on this topic. The proposed testimony will: (1) detail the internal inconsistencies in Danskammer's modeling and the post-modeling adjustments made to claim there would be a decrease of statewide emissions rather than an increase; (2) demonstrate that conversion to RNG or green hydrogen will not ensure the facility is zero emissions; (3) demonstrate Danskammer's modeling does not include the costs of technical specifications for conversion to RNG or green hydrogen and Danskammer has not performed a feasibility study of conversion to green hydrogen; and (4) identify the technical and practical barriers to transporting and burning RNG and green hydrogen. (*See* Exhibit 40, Sierra Club and Orange RAPP Petition for Full Party Status, at 13-23, Bates Nos. 001487-001497.)

Danskammer argues in its response to the petitions for full party status that a determination that a Title V permit would be inconsistent with the attainment of the CLCPA goals simply because it would constitute a substantial and direct new source of GHG emission in the State is tantamount to stating the Title V permit is inconsistent as a matter of law. (*See* Exhibit 41, Danskammer Energy Response to Petitions, at 21, Bates No. 001670.)

Discussion

DEC's denial of the Title V permit is based on DEC's determination that the issuance of a permit that would significantly increase GHG emissions from the facility would be inconsistent with or interfere with the attainment of the statewide GHG emission limits. Danskammer disputes that factual determination arguing that the facility would be consistent with the CLCPA because it would be one of the most efficient generators of electricity and would reduce GHG emissions statewide by displacing other more polluting facilities. The question, however, pursuant to CLCPA § 7(2), is whether the grant of the Title V permit would be inconsistent with or would interfere with the attainment of the statewide GHG emission limits. Here, the Title V permit application calculated that there would be a potential annual increase in GHG emissions of 1,907,648 tons per year (*see* Exhibit 1, Title V/PSD Application, Table 3-4, Bates No. 000072, Table B-2, Bates No. 000252, Table B-5, Bates No. 000256). The fact that the repowered facility may be more efficient and emit fewer GHGs per megawatt hour does not change the fact that a significant increase in GHG emissions will result from the issuance of a Title V permit for this facility.

CLCPA § 7(2) requires DEC, in reviewing a Title V permit application, to consider whether the Title V permit is inconsistent with or will interfere with the attainment of the statewide GHG emission limits established in ECL article 75. Accordingly, DEC reviewed the Title V permit to determine whether the permit is inconsistent with or will interfere with the attainment of the statewide GHG emission limits. The CLCPA does not require an agency to look beyond the direct impacts of the permit at issue in making that determination. Here, according to Danskammer's estimates, the direct GHG emissions from the Danskammer Energy Center will increase from a current average of 43,000 tons per year to over 2 million tons in 2025 and over 1.5 million tons in 2030 and 2035 if a Title V permit is granted. Is that proposed increase inconsistent with or will it interfere with the attainment of the statewide GHG emission limits? DEC staff says it is and will. Danskammer's reasoning to the contrary does not answer the question required by the CLCPA in the first instance. Danskammer's arguments that the

issuance of the Title V permit would be consistent with the CLCPA belong to the second (justification) and third (alternatives or mitigation measures) prongs of the analysis, not the first.

Whether the facility, if granted a Title V permit, would: (1) result in the reduction of GHG emissions from other facilities, (2) be one of the most efficient electric generating facilities in the state, or (3) transition to RNG, hydrogen or something else, or shut down, are not and should not be part of the initial inconsistency or interference analysis. Those topics may be considered as factors supporting potential justification, alternatives, or mitigation for permitting the increased GHG emissions associated with the Title V permit application, but such factors are not part of the review of the emissions authorized by a Title V permit envisioned by the CLCPA. It is the direct emissions from the combustion of fossil fuels at the facility that are subject to the Title V permit and the upstream emissions associated with that combustion that form the basis for determining whether the grant of the permit would be inconsistent with or would interfere with the attainment of the statewide GHG emission limits. Contrary to Danskammer's assertion, I do not find that result will constitute a determination that a facility is inconsistent as a matter of law. It is one step in determining whether to issue a permit based on the facts asserted in a permit application, not the end of the agency's inquiry or applicant's burden. Furthermore, such a result is consistent with DAR-21 (*see* DAR-21, [V][D]).

Using Danskammer's approach to the CLCPA consistency determination would result in few if any findings that a permit decision is inconsistent with or will interfere with the goals of the CLCPA. The CLCPA clearly states that it is the permitting decision that must be considered, not broad statements, future considerations, or potential offsets, to determine whether the permit decision in the first instance would be inconsistent with or will interfere with the attainment of the statewide GHG emission limits. The legislature then provided further factors to be considered after an agency determined a permitting decision would be inconsistent with or would interfere with the stated goals, including justification for issuing a permit that is otherwise inconsistent with or will interfere with the stated goals, alternatives and mitigation measures. I conclude that it is the direct emissions (including the associated upstream emissions) regulated by a Title V permit that form the basis for determining whether the permit is inconsistent with or will interfere with the statewide GHG emission limits. DEC is not required to look further in conducting that initial review.

Additionally, I am not persuaded by Danskammer's offer of proof that the Title V permit for the proposed facility is consistent with or will not interfere with the attainment of the statewide GHG emission limits. To the contrary, I find that DEC staff has made a prima facie showing that the Title V permit, if granted, would be inconsistent with or will interfere with the attainment of the statewide GHG emission limits and such a determination is supported by the CLCPA, ECL article 75, 6 NYCRR part 496, and the administrative record. Accordingly, the burden shifted to Danskammer to provide an offer of proof that raises sufficient doubt about whether applicable statutory and regulatory criteria have been met or, as in this instance, the issuance of a Title V permit would not result in a significant increase in GHG emissions from the permitted facility. As discussed above, Danskammer's offer of proof does not address the significant increase in direct emissions from the facility if a Title V permit is granted.

Ruling: Danskammer failed to raise an adjudicable issue regarding DEC staff's determination that the issuance of a Title V permit would be inconsistent with or would interfere

with the attainment of the statewide GHG emission limits. DEC staff's analysis and determination are consistent with the law, regulations, and administrative record. Accordingly, this proposed issue will not advance to adjudication.

2. Assuming, but not conceding, that DEC has the authority under Section 7(2) to determine whether a Project is "inconsistent with or will interfere with" the 2040 zero-emissions target established under PSL §66-p for the electricity sector, whether NYSDEC's determination that Danskammer's plans for compliance with the 2040 zero emission electricity system target are not sufficient, and that it otherwise failed to propose alternatives or mitigation measures, was arbitrary, capricious and affected by error of law.

Danskammer asserts that it proposed a plan that included alternatives or mitigation measures, and demonstrated that the plan is consistent with the 2040 zero carbon electric system target. Danskammer offers witnesses who will testify regarding Danskammer transitioning to RNG or hydrogen, utilizing currently unidentifiable solutions, continuing to operate if authorized by PSC, or if those solutions are not feasible, ceasing operation in 2040. Danskammer claims DEC's rejection of the proposed use of RNG and hydrogen to mitigate GHG emissions because Danskammer could not demonstrate the viability of using those fuels was irrational because its current viability does not mean that the Project could not operate on green hydrogen or RNG "in 2030 or 2050 when the statewide GHG limits must be met, or by 2040 when the zero carbon emission electric system target comes into effect." Danskammer further asserts that its witness panel will testify to the projected development of RNG and hydrogen as well as the history of the development of other renewable technologies such as solar and wind, and the reality of the electric grid and what will be required to meet the CLCPA 2040 zero carbon electric system target. (*See* Exhibit 37, Danskammer Statement of Issues, at 13-14, Bates Nos. 001406-001407.)

DEC argues that its decision was not arbitrary, capricious or affected by an error of law because, even though Danskammer acknowledged the need to evaluate steps required to meet the 2040 zero emission target, Danskammer failed to propose a specific plan to meet that goal. According to DEC, Danskammer's proposed utilization of RNG, hydrogen or another currently unidentifiable solution, or if none of those come to fruition, to shutter the facility constitute vague assurances but not a plan. DEC further asserts that nothing in the CLCPA supports the contention that DEC is "authorized or required to approve any permit application so long as the facility shuts down by 2040." In addition, DEC reasserts that lack of compliance with the 2040 emission free electric generation would itself be inconsistent with or interfere with the attainment of the statewide GHG emission limits. Accordingly, DEC "denied the Title V permit because of inconsistency with the statewide GHG emission limits, and not merely because of inconsistency with 2040 zero emissions target." (*See* Exhibit 42, DEC Response to Statement of Issues and Petitions for Party Status, at 6-7, Bates Nos. 001778-001779.)

Discussion

As ruled above, PSL § 66-p does not provide an independent basis to determine consistency or interference with the attainment of the GHG emission limits established in ECL article 75. The question presented here is whether Danskammer's proposed transition to alternate fuels furthers the targets of PSL § 66-p. DEC staff determined that Danskammer's

proposed transition to alternate fuels was speculative and uncertain to occur. It is undisputed that none of Danskammer's proposed alternative fuel sources are currently feasible due to availability, transmission or other technical constraints. Moreover, any proposed transition or promise to shut down the facility does not account for years of increased direct emissions from the facility. As I noted above, the use of zero emission solutions such as renewable energy sources or RNG and green hydrogen needs to be analyzed in the context of justification and alternatives for a permit decision that is inconsistent with or will interfere with the attainment of the statewide GHG emission limits. As a result of my ruling that the grant of a Title V permit to Danskammer will be inconsistent with or will interfere with the attainment of the statewide GHG emission limits, justification for the issuance of the permit and alternatives or mitigation measures need to be examined.

The Scoping Plan discusses the question of alternatives in the electric generation sector to include alternative fuels such as green hydrogen or RNG. As stated therein,

> "Transitioning to zero-emission electricity will require addressing emissions from both baseload and peaking facilities and balancing the electricity system with integration of dispatchable and zero-emission resources as intermittent renewable energy generation penetration increases. To facilitate and enable retirement and/or repurposing (meaning use of this space for siting clean energy transition activities such as energy storage, operations and maintenance activities, training facilities, etc.) of fossil fuel-fired facilities, New York needs to continue and accelerate its deployment of new renewable generators (*e.g.* wind, solar, hydro), maintain the fleet of renewable generators it has now, upgrade its transmission and distribution system to allow for the maximum use of the renewable generators (i.e., get the power where it needs to go), improve management on the demand side of electricity use, and invest in energy storage technologies. Pursuant to existing policies and procedures, any retirement and/or repurposing of existing fossil fuel generation must be done in coordination with the PSC, the NYISO planning process, the required reviews under Section 7(2) and 7(3) of the Climate Act, and consistent with New York State Reliability Council criteria. These significant climate investments will assist with meeting the requirements of the Climate Act, while also supporting increasing New York's renewable energy supply, reducing its reliance on fossil fuels, reducing energy price volatility, increasing system resiliency, and improving power quality.
>
> "As described in more detail below as the components of Strategy E2 [Accelerate Growth of Large-Scale Renewable Energy Generation], New York should also have a detailed process in place to ensure that the fossil fuel generators are gradually and safely retired while still maintaining reliability. Studies such as the NYISO Reliability Needs Assessment and overall Comprehensive Reliability Plan will inform this process to ensure consumer energy reliability while transitioning away from fossil fuel electricity generation. <u>If a reliability need or risk is identified, zero emission solutions should be fully explored, such as storage, transmission upgrades or construction, energy efficiency, demand response, or another zero-emission, dispatchable resource. Evaluation of alternative fuels such as green hydrogen and renewable natural gas (RNG) for this strategic use should</u>

include an analysis of the air quality impacts, health impacts, and full life cycle GHG emissions impacts, in addition to avoiding localized pollution in Disadvantaged Communities.

"Only after these zero-emission and alternative fuel resources are fully analyzed and determined to not be able to reasonably solve the identified grid reliability need shall retention of existing or construction of new or repowered fossil fuel-fired generation facilities be considered. These should only be considered if the NYISO and local transmission operators confirm that the fossil fuel-fired facility is required to maintain system reliability and that need cannot reasonably be met with the alternatives listed above. Even in those cases, the fossil-fueled generation facility should assist in meeting the goals of the Climate Act, including the need to ensure safe and reliable electric service. That is, its deployment should result in one or more of the following: a greater integration of zero-emission resources, a reduction in fossil fuel generation, a significant reduction of GHG and co-pollutant emissions, a benefit to an environmental justice community, or a benefit to the electric system that addresses the identified reliability need or risk." (Final Scoping Plan, at 226-227 [emphasis added].)[12]

As previously stated, the Scoping Plan does not have the force and effect of law. I find, however, that the Scoping Plan's discussion of justification for a fossil fuel-fired electric generation facility and the alternatives to be explored is consistent with the broad language of CLCPA § 7(2) and provides guidance for its implementation that will benefit the decision maker in this proceeding. The provisions of the Scoping Plan quoted above, and the need to further develop the record in this proceeding, lead me to conclude that the parties must first provide testimony and evidence regarding whether there is a grid reliability need or risk that justifies the issuance of the Title V permit. I ruled above that it is Danskammer's burden to demonstrate that the grant of the Title V permit is justified. If such a grid reliability need is identified, then the parties must provide evidence and testimony supporting their respective positions on zero emission solutions including but not limited to the solutions identified in the Scoping Plan (*e.g.* storage, transmission upgrades or construction, energy efficiency, demand response, or another zero-emission, dispatchable resource). In order to evaluate alternative fuels such as green hydrogen and RNG, the parties must provide evidence and testimony regarding the availability and potential use of each alternative fuel as well as each fuel's potential air quality impacts, health impacts, and full life cycle GHG emissions impacts, and avoiding localized pollution in disadvantaged communities. Such a result gives effect to the provisions of the CLCPA and the work of the Climate Action Council.

Scenic Hudson, Sierra Club and Orange RAPP have proposed expert testimony addressing the lack of need for the facility for grid reliability. Scenic Hudson's proposed expert Devi Glick would testify mainly to demonstrate the facility is not needed to balance intermittent renewables or to provide baseload generation for system reliability. Ms. Glick is also proposed to testify regarding the GHG emissions from the proposed repowering, emission impacts on the

[12] Petitioners argued that the draft scoping plan provides that new or repowered fossil fuel-fired generation should only be considered as a last resort (*see* Exhibit 39, Scenic Hudson Petition for Full Party Status, at 7, Bates No. 001458; Exhibit 40, Sierra Club and Orange RAPP Petition for Full Party Status, at 18, Bates No. 001492; Draft Scoping Plan, December 30, 2021, at 155).

local community, as well as impacts on renewable energy projects. Sierra Club and Orange RAPP offer the testimony of Elizabeth A. Stanton, Ph.D. and Bryndis Woods, Ph.D. on this topic. The proposed testimony will demonstrate that conversion to RNG or green hydrogen will not ensure the facility is zero emissions; demonstrate Danskammer's modeling does not include the costs of technical specifications for conversion to RNG or green hydrogen and Danskammer has not performed a feasibility study of conversion to green hydrogen; and identify the technical and practical barriers to transporting and burning RNG and green hydrogen. The witnesses are also offered to testify regarding local and statewide electrical demand forecasts, the impact of load flexibility resources, and capacity oversupply near the proposed project.

Petitioners Scenic Hudson and Sierra Club and Orange RAPP have proposed substantive and significant issues for adjudication related to the need for the proposed repowered facility and the use of alternative fuels such as RNG and green hydrogen. The proposed issue is substantive because competing expert opinions about whether the facility can transition to RNG or green hydrogen and whether other zero emissions solutions may reasonably resolve any grid reliability need if one is identified, lead me to inquire further about the alternate fuels and other zero emission solutions. Second, the expert opinions offered by petitioners relate directly to those topics. The differing expert opinions lead me to conclude that if a grid reliability need for Danskammer's proposed facility is identified, then additional information about zero emission solutions is needed. In other words, a grid reliability need could provide justification, but only after it is determined that zero emission alternatives cannot reasonably resolve the identified need.

The proposed issue is significant because it may result in the affirmance of the denial of the Title V permit, or if the denial is overruled, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit (*see* 6 NYCRR 624.4[c][3]).

Although Scenic Hudson's proposed testimony leans heavily toward the need for the facility, I find the interrelated nature of the issues discussed above, and as discussed in the Scoping Plan, persuades me to hear from Ms. Glick on this issue as it relates to need, other zero-emission resources, and alternative fuels. I also find that petitioners can make a meaningful contribution to the record on an adjudicable issue raised by Danskammer in contesting DEC's denial of the Title V permit.

Ruling: This issue will advance to adjudication as it pertains to justification and alternatives or mitigation measures. I am convinced the issue is broader and that grid reliability need for the facility and other potential alternative energy conservation and zero emissions solutions are intertwined. Testimony, evidence and reports on the issue should examine the use of other zero-emission solutions and dispatchable resources and the use of alternative fuels such as RNG and green hydrogen.

3. Whether NYSDEC's justification/need analysis was arbitrary, capricious and not in accordance with applicable law.

Danskammer asserts that DEC's determination that there is no need or justification for the project was overly narrow as it only examined reliability of the electric system and relied on

selected NYISO reports. Danskammer offers witnesses who will demonstrate that DEC's selective reading of the NYISO reports were taken out of context and demonstrate DEC's failure to understand either the significance or limitations of the Reliability Needs Assessment (RNA) and the post-RNA base case updates it relied upon. The proposed testimony will further demonstrate that a complete analysis will establish that resources like the proposed facility are necessary to support renewables and implement the goals of the CLCPA. (*See* Exhibit 37, Danskammer Statement of Issues, at 14-15, Bates Nos. 001407-001408.)

DEC argues that CLCPA § 7(2) requires DEC to provide a detailed justification for issuing a permit when DEC has determined that the issuance of the permit would be inconsistent or would interfere with the statewide GHG emission limits. Nothing in the CLCPA requires a detailed justification for a permit being denied by DEC. In short, DEC argues it identified potential need as the only possible justification for the project, though it was not required to, and based its analysis on the referenced NYISO studies and reports that demonstrated there is no reliability need or justification for the project through 2030. (*See* Exhibit 42, DEC Response to Statement of Issues and Petitions for Party Status, at 7, Bates No. 001779.)

Petitioners Scenic Hudson and Sierra Club and Orange RAPP argue that the facility is not needed for grid reliability. As discussed above, Scenic Hudson offers Devi Glick of Synapse Energy Economic to testify that the Danskammer facility is not needed to balance renewables or provide baseload generation for grid reliability. Sierra Club and Orange RAPP offer Drs. Stanton and Woods to testify regarding electric demand and peak demand growth, the facility will not enhance reliability, and the oversupply of capacity near the proposed facility.

Discussion

I ruled above that DEC's review of the need for the facility for grid reliability was reasonable and authorized, and that in this proceeding the DEC Commissioner must decide whether grid reliability need for Danskammer's proposed facility, if identified, justifies the grant of the Title V permit. Danskammer disputes DEC's conclusion. Petitioners raise this issue as a substantive and significant issue. The proposed issue is adjudicable because it is a contested basis for denial of the Title V permit. Danskammer's offer of expert testimony on the topic raises sufficient doubt that DEC's conclusion on grid reliability is the correct one. As to the petitions of Scenic Hudson and Sierra Club and Orange RAPP, I conclude they have raised a substantive and significant issue for adjudication. The proposed issue is substantive for the following reasons. First, competing expert opinions about whether the facility is needed for grid reliability lead me to inquire further about the need for the facility. Second, the expert opinions offered by petitioners relate directly to the need for the proposed Danskammer repowered facility and not a general need for fossil fuel-fired facilities. Petitioners also propose to address the lack of need due to other facilities that are not currently dispatched to full capacity. The differing expert opinions lead me to conclude that additional information about grid reliability and need for the repowered facility is required.

The proposed issue is significant because it may result in the affirmance or overruling of the denial of the Title V permit, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit (*see* 6 NYCRR 624.4[c][3]). As demonstrated by the Scoping Plan, a grid reliability need must be identified

before further analysis is required. This is consistent with the CLCPA requirement that justification be identified. The issue of grid reliability need will include examination of whether there is justification for issuing a Title V permit that is inconsistent with or will interfere with the attainment of the statewide GHG emission limits. Considering the proffered testimony also leads me to conclude that the additional information about grid reliability need should include projections of grid reliability need over time as the goals of the CLCPA are implemented (*e.g.* current need, need in 2030, etc.).

Because I ruled above that the issuance of a Title V permit to Danskammer is inconsistent with or will interfere with the attainment of the statewide GHG emission limits, justification and alternatives or GHG mitigation measures would be required before DEC could issue the permit. On the question of justification, CP-49 is instructive and provides:

> "the justification should explain to what extent the decision is consistent with the CLCPA and its implementing regulations and, to the extent it is inconsistent, explain why the action is justified by other considerations.
>
> "The proposed justification must include, at a minimum, the following:
> - Current level of GHG emissions from the action, inclusive of the full scope of GHG emissions defined in the statute, including all the applicable GHGs and the upstream GHG emissions from imported fuels as well as reasonably foreseeable downstream and indirect emissions;
> - Projected future GHG emissions in 2030, 2040 (electricity sector), and 2050 from the action with description of the applicant's anticipated GHG emission reduction strategies;
> - Alternatives considered that do not create GHG emissions or result in less GHG emissions;
> - Description of the harm associated with the absence of the project (environmental, economic, social); and
> - Mitigation options.
>
> "Examples of acceptable justifications may include, but are not limited to, the following:
> - Demonstration that the lack of the project within the State would result in emissions leakage in excess of the emissions from the project (e.g., the facility would transfer operations to a neighboring state).
> - Absence of the project will result in economic, social, or environmental harm to the public, harm to the public health or safety, or impact the safety and reliability of the State's energy systems, and no feasible alternatives exist." (CP-49 at 6-7.)

ICF provided the current and projected future levels of GHG emissions associated with the Title V permit. ICF's analysis, however, did not describe any specific harm associated with the absence of the Danskammer proposal, but instead offered a more generic analysis associated with an overall balanced generation mix, resource adequacy requirements, and the reliability and resiliency benefits of efficient fossil fuel-fired generators. Danskammer proposes testimony, as do petitioners, that will speak to the reliability of the State's energy systems.

In addition to applicant's and petitioners' proposed issues related to need as justification, I concluded above that Danskammer's displacement argument more appropriately pertained to whether there is justification for a project that is otherwise inconsistent with or will interfere with the attainment of the statewide GHG emission limits. Danskammer offers testimony to demonstrate that due to its displacement of other less efficient and higher emitting electric generators, the permitting of its facility would result in a cumulative reduction of statewide GHG emissions over the 2025-2039 timeframe. DEC maintains that "it is at best uncertain whether the Project would actually displace other electric generation sources to the extent necessary to offset the direct and upstream GHG emissions attributable to the Project" (*see* Exhibit 42, DEC Response to Statement of Issues and Petitions for Party Status, at 4, Bates No. 001776). Sierra Club and Orange RAPP offer Drs. Stanton and Woods to demonstrate that Danskammer's analysis and modeling are incorrect and that the facility, if permitted, would not decrease emissions as projected by Danskammer (*see* Exhibit 40, Sierra Club and Orange RAPP Petition for Full Party Status, at 22-23, Bates Nos. 001496-001497).

Danskammer argues that Sierra Club and Orange RAPP misunderstand the application materials and that petitioners' proposed issue is contradicted by the record. Danskammer explains that the only difference between its July 8 and November 6, 2020 Supplemental Greenhouse Gas Analysis is that the November 6 report did not assume that the displaced New York facilities would continue to operate and export electricity to neighboring regions. (*See* Exhibit 41, Danskammer Response to Petitions, at 23-24, Bates Nos. 001672-01673.)

I agree with DEC staff that the displacement argument is speculative at best. As pointed out by petitioners, there is nothing to prevent the New York facilities that would purportedly be displaced from continuing to operate and provide electricity to other regions or serve behind the meter loads. As a result, those facilities' emissions would still be included in the statewide GHG emissions. Moreover, although this issue may be substantive, it is not significant in that indirect impacts outside the control of DEC and applicant will not result in the affirmance or overruling of the denial of the Title V permit, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit.

Ruling: As ruled above, it is applicant's burden to demonstrate there is justification for granting a Title V permit when the grant thereof is inconsistent with or will interfere with the attainment of the statewide GHG emission limits. The issue of grid reliability need will advance to adjudication. The issue of displacement will not advance to adjudication.

Scenic Hudson's Proposed Issues for Adjudication

Scenic Hudson raises two issues for adjudication as follows.

1. Approval of Danskammer's application will result in an increase in greenhouse gas emissions, which is inconsistent with and would interfere with the attainment of the statewide greenhouse gas emissions limits set forth in the Climate Leadership and Community Protection Act.

Scenic Hudson asserts that approval of Danskammer's application will result in an increase in greenhouse gas emissions, which is inconsistent with and would interfere with the attainment of the statewide greenhouse gas emissions limits set forth in the CLCPA. Scenic Hudson proffered a witness, Devi Glick of Synapse Energy Economics, to testify regarding the need for the facility, GHG emissions from the proposed project, CO2 and other pollutant emission impacts on the local community, the impacts on renewable energy projects if the facility is approved, and compliance or consistency with the CLCPA. In addition, a report would be proffered with up-to-date analysis of the impacts from the proposed facility and support for the offered testimony. (*See* Exhibit 39, Scenic Hudson Petition for Full Party Status, at 9-16, Bates Nos. 001460-001467.)

Danskammer argues that because DEC lacks authority to deny the Title V permit based on the CLCPA that petitioners cannot raise a substantive and significant issue (*see* Exhibit 41, Danskammer Response to Petitions, at 10-13, Bates Nos. 001659-01662). I rejected Danskammer's argument above and ruled that DEC does have the authority to deny the Title V permit, even in this proceeding involving PSL article 10. Accordingly, petitioners may raise substantive and significant issues.

Ruling: I ruled above that the issuance of a Title V permit to Danskammer would be inconsistent with or will interfere with the attainment of the statewide GHG emission limits and the issue will not advance to adjudication. Accordingly, Scenic Hudson's first proposed issue has been resolved by this ruling. Scenic Hudson may use the proffered testimony and evidence in support of other issues advancing to adjudication where Scenic Hudson has been granted full party status on those issues.

2. The Danskammer project is not needed to meet anticipated customer load, ensure electric system reliability or balance the integration of intermittent renewable energy resources.

Scenic Hudson asserts that the Danskammer project is not needed to meet anticipated customer load, ensure electric system reliability or balance the integration of intermittent renewable energy resources. Devi Glick is offered to demonstrate that the project is not needed to balance intermittent renewable resources and provide baseload generation to ensure system reliability, and that a combination of solar, wind and battery storage can meet projected demands with lower emissions and lower cost. (*See* Exhibit 39, Scenic Hudson Petition for Full Party Status, at 16-21, Bates Nos. 001467-001472.)

Danskammer argues that the record can be sufficiently developed without the participation of petitioners (*see* Exhibit 41, Danskammer Response to Petitions, at 10-13, Bates Nos. 001659-01662). I disagree. As ruled above, Scenic Hudson has proposed a substantive and significant issue, and Ms. Glick and Synapse Energy Economics can make a meaningful contribution to the record on the issue of need that goes beyond the review of NYISO reports conducted by DEC.

Ruling: As ruled above, this issue will advance to adjudication.

Sierra Club and Orange RAPP's Proposed Issues for Adjudication

Sierra Club and Orange RAPP propose five issues for adjudication as follows.

1. A Title V permit for Danskammer's proposed facility would be inconsistent with or would interfere with the attainment of the statewide GHG emission limits established in article 75 of the ECL.

Sierra Club and Orange RAPP offer Elizabeth A. Stanton, Ph.D. and Bryndis Woods, Ph.D. of the Applied Economics Clinic to testify regarding the forecasted decline in statewide electrical demand between 2020 and 2029 and relative negative peak demand growth in Zone G between 2021 and 2040, that there will be no headroom for new gas generation, the proposal will not enhance reliability, and that load flexibility resources including demand response and battery storage combined with renewables provide a solution to reliance on fossil fuels. The proffered witnesses would also provide an analysis of Danskammer's modeling and displacement figures. (*See* Exhibit 40, Sierra Club and Orange RAPP Petition for Full Party Status, at 13-23, Bates Nos. 001487-001497.)

Danskammer asserts that petitioners misunderstand the record and the offer of proof lacks any scientific or factual foundation. Danskammer further argues that petitioners failed to provide any proposed testimony, reports or studies prepared by the witnesses or demonstrate that the proposed witnesses have any expertise in the electric market or demand. (*See* Exhibit 41, Danskammer Response to Petitions, at 20-25, Bates Nos. 001669-01674.)

Ruling: I ruled above that the issuance of a Title V permit to Danskammer would be inconsistent with or will interfere with the attainment of the statewide GHG emission limits and the issue will not advance to adjudication. Accordingly, Sierra Club and Orange RAPP's first proposed issue has been resolved by this ruling. Sierra Club and Orange RAPP may use the proffered testimony and evidence in support of other issues advancing to adjudication where Sierra Club and Orange RAPP have been granted full party status on those issues.

2. Danskammer cannot rely on potential future conversion to RNG and hydrogen to demonstrate consistency with CLCPA targets or as 2040 compliance options.

Sierra Club and Orange RAPP offer Drs. Stanton and Woods to testify regarding the potential of conversion to RNG or green hydrogen. The proffered testimony will demonstrate why those alternative fuels will not ensure that the project is zero emissions by 2040. In addition, petitioners propose to demonstrate that Danskammer did not include costs and feasibility studies for conversion to RNG or green hydrogen, and that RNG is not a zero-emissions fuel and generates harmful co-pollutants like NOx. Additionally, the witnesses will also provide documentary support and testimony on green hydrogen, its use and technical barriers. (*See* Exhibit 40, Sierra Club and Orange RAPP Petition for Full Party Status, at 23-34, Bates Nos. 001497-001508.)

Danskammer argues that the zero emission goals are established in PSL § 66-p, and only the PSC can review this. Danskammer further argues that petitioners failed to provide any proposed testimony, reports or studies prepared by the witnesses or demonstrate that the

proposed witnesses have any expertise regarding conversion to green hydrogen or other zero emissions fuels. In addition, Danskammer argues that petitioners' offer is rebutted by the application materials related to the future feasibility of operating an electric generating facility on RNG or green hydrogen. Lastly, Danskammer argues that petitioners' proposed testimony would likely result in an academic debate on a topic not relevant to the issue of a Title V permit. (*See* Exhibit 41, Danskammer Response to Petitions, at 25-27, Bates Nos. 001674-01676.)

Discussion

I ruled above that Danskammer's Title V permit, if issued, will be inconsistent with or will interfere with the attainment of the statewide GHG emission limits. Therefore, in keeping with the CLCPA, Scoping Plan and DAR-21, an examination of whether the issuance of the Title V permit can be justified is required. In this matter, the justification turns on whether there is an identified grid reliability need for the proposed repowered Danskammer facility. If such a need is identified, then zero-emission and alternative fuel sources must be analyzed and a determination must be reached as to whether any of those sources are able to reasonably solve the identified grid reliability need. Only after that complete review is done can DEC consider issuing a Title V permit for a repowered fossil-fuel fired electric generation facility.

Here, petitioners also argue that RNG and green hydrogen cannot be relied upon to demonstrate consistency with the CLCPA targets and not just the zero-emissions by 2040 goal. Accordingly, if it is determined that Danskammer's repowered facility is needed for grid reliability, I am required in this proceeding to inquire further to determine whether zero-emissions solutions exist, such as storage, transmission upgrades or construction, energy efficiency, demand response, or another zero-emission, dispatchable resource, including alternative fuel sources such as RNG and green hydrogen. This is not only a question of the application of PSL § 66-p, but also an issue involving the question related to grid reliability need and whether other zero emissions sources and solutions are available to meet that need. Danskammer and petitioners offer differing expert opinions regarding grid reliability as well as what may sufficiently address any potentially identified grid reliability need such as conservation, storage, upgrades and renewables or RNG and green hydrogen versus a new repowered fossil fuel-fired electric generator.

Notwithstanding Danskammer's critical view of the qualifications of Drs. Stanton and Woods, as well as Ms. Glick, and Danskammer's assertion that petitioners' offer is rebutted by the supplemental application materials, I find the CVs and proposed testimony of the proffered witnesses demonstrate an expert understanding of energy markets and sources that will assist in developing a complete record. This issue, along with the issue on grid reliability need, is one that needs to be addressed in this proceeding on the Title V permit.

The proposed issue is adjudicable because it is a contested basis for denial of the Title V permit. Danskammer's offer of expert testimony on the topic raises sufficient doubt that DEC's conclusion is supported by the facts. I have already ruled above that the record needs further development on this issue. I also conclude that Sierra Club and Orange RAPP have raised a substantive and significant issue for adjudication. The proposed issue is substantive for the following reasons. First, competing expert opinions about whether RNG or green hydrogen will be available to convert the facility from its proposed use of natural gas and when that may occur

lead me to inquire further. Second, the expert opinions offered by petitioners relate directly to availability, storage, transmission, safety, anticipated emissions including upstream emissions, and utilization of RNG and green hydrogen. The differing expert opinions lead me to conclude that additional information regarding this issue is needed.

The proposed issue is significant because if a grid reliability need is identified, RNG and green hydrogen need to be analyzed along with other zero-emission solutions. That analysis may result in the affirmance of the denial of the Title V permit or the overturning of the denial and the grant of the Title V permit, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit (*see* 6 NYCRR 624.4[c][3]). As demonstrated by the Scoping Plan, if a grid reliability need is identified, then the availability of zero-emissions sources to meet that need must be explored. This is consistent with the overall CLCPA requirement that justification for an inconsistent decision be identified and alternatives or mitigation measures identified. I also conclude that Sierra Club and Orange RAPP can make a meaningful contribution to the record on this issue.

In regard to Danskammer's assertion that this issue will devolve into an academic debate, I am cognizant of the fact that the parties may simply be arguing about multiple real and hypothetical technical problems associated with the use of RNG or green hydrogen that may or may not be addressed at some point in the future. I agree, however, with the findings and conclusions of the Climate Action Council, that use of these alternative fuels as well as other zero-emissions solutions must be "fully analyzed" if a grid reliability need is identified. If the parties wish to stipulate that RNG or green hydrogen are not available in the foreseeable future to address any grid reliability need, perhaps an academic debate can be avoided.

Ruling: I ruled above that further development of the record on this issue is needed, and described the expanded parameters and focus needed to develop a complete record.

3. Danskammer failed to demonstrate any justification for the Project that would overcome its inconsistency with the CLCPA's GHG emissions reduction requirement.

Petitioners Sierra Club and Orange RAPP would provide evidence and testimony further supporting DEC's conclusion that the facility is not needed for grid reliability. Drs. Stanton and Woods are offered to testify regarding local and statewide electrical demand forecasts, the impact of load flexibility resources, and capacity oversupply near the proposed project. (*See* Exhibit 40, Sierra Club and Orange RAPP Petition for Full Party Status, at 34-41, Bates Nos. 001508-001515.)

Danskammer argues that petitioners' offer is insufficient to raise a substantive and significant issue because grid reliability is not an issue that falls within DEC's purview. Danskammer further argues that the record can be sufficiently developed without the participation of petitioners. Danskammer also argues that a demonstration of project need is not encompassed or required by CLCPA § 7(2). (*See* Exhibit 41, Danskammer Response to Petitions, at 28-30, Bates Nos. 001677-01679.)

Discussion

I ruled above that justification for the grant of a Title V permit in this matter must include a determination that there is an identified grid reliability need and whether there are other zero emissions solutions to any identified need. The proposed issue is substantive for the following reasons. First, competing expert opinions about whether the repowered facility is needed for grid reliability lead me to inquire further about the need for the facility. Second, the expert opinions offered by petitioners relate directly to forecasted grid reliability needs. The differing expert opinions lead me to conclude that additional information regarding this issue is needed.

The proposed issue is significant because grid reliability need is a threshold issue that may determine whether the denial of the Title V permit is upheld or whether a Title V permit should be issued with the potential for major modifications to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit (*see* 6 NYCRR 624.4[c][3]). As ruled above, Sierra Club and Orange RAPP can make a meaningful contribution to the record on the issue of grid reliability need that goes beyond the review of the selected NYISO reports conducted by DEC.

Ruling: I ruled above that this issue will advance to adjudication.

4. Danskammer has failed to identify adequate alternatives or GHG mitigation measures, and if DEC had reached the issue, it would have provided an additional basis to deny the permit under CLCPA § 7(2).

Although Sierra Club and Orange RAPP propose this primarily as a legal issue, Drs. Stanton and Woods are offered to testify regarding the need for renewables to meet the CLCPA mandates, the impacts of a gas generating facility, and the use of RNG and green hydrogen, if Danskammer's compliance options are considered as alternatives or mitigation measures in this proceeding. (*See* Exhibit 40, Sierra Club and Orange RAPP Petition for Full Party Status, at 42-44, Bates Nos. 001516-001518.)

Danskammer argues that petitioners are mistaken because Danskammer did offer the transition to RNG or green hydrogen, if they are determined to be zero-emission fuels, or cease operations in 2040 as alternatives or mitigation measures. Danskammer further explains that its proposed options are based upon what is "feasible today, for the simple reason that the ECL Article 75 statewide GHG emission reduction requirements do not come into effect until 2030 and 2050, and because the use of RNG or green hydrogen fuels are emerging technologies that are still being developed." Danskammer also asserts that these issues can be reviewed every five years as part of a Title V permit renewal. Danskammer argues that petitioners' offers are merely opinions expressing policy considerations, and therefore, those opinions are not adjudicable. (*See* Danskammer Response to Petitions, at 31-33, Bates Nos. 001680-001682.)

Discussion

There is disagreement between the parties and petitioners regarding what constitutes adequate alternatives and mitigation measures as well as when such alternatives or mitigation

measures must be available or occur. Fundamentally, in order for an alternative or mitigation measure to have any effect on a permit decision that is inconsistent with or will interfere with the attainment of the statewide GHG emission limits, the proposed alternative or mitigation measure must result in the lessening or the elimination of the inconsistency or interference with the goals at the time of permit issuance, not in 2030, 2040 or 2050. To do otherwise allows a facility to exacerbate the problem, that the CLCPA is trying to address, in the interim so long as the facility promises to do something different in 2030, 2040 or 2050. Danskammer's argument appears to pin its hopes on a timely convergence of the availability of zero-emission fuel sources with the goals set forth in the law. As previously discussed, those dates are not deadlines for doing something, they are planning goals and targets that can only be reached by addressing permitted GHG emissions today.

As discussed above, the issue of zero emission alternatives is joined for adjudication and the issue is dependent upon a determination that Danskammer's repowered facility is needed for grid reliability. Mitigation, however, was only discussed in the context that the draft permit required the submission of a mitigation plan after permit issuance, and the positions of DEC staff and petitioners that Danskammer has proposed no mitigation for its projected increased GHG emissions notwithstanding the plain language of the draft Title V permit.

Among the public comments on Danskammer's proposal was a letter from 42 state legislators who argue that the draft Title V permit language requiring submission of GHG mitigation plans within 120 days after permit issuance (*see* Exhibit 26, Draft Title V permit, Condition 1-1, Bates No. 001243) violates CLCPA § 7(2) because "DEC cannot issue an air permit without first determining that a facility will be consistent with the CLCPA or that any inconsistencies are adequately mitigated or justified." Furthermore, the legislators argued that DEC's approach "contravenes basic principles of fairness and public process, as the public is being asked to comment on CLCPA consistency without any knowledge of the applicant's greenhouse gas mitigation plan." (*See* Correspondence from Senator Liz Krueger and Assembly Member Zohran Mamdani, *et. al.*, to Governor Hochul and Commissioner Seggos, September 10, 2021.) Based on my discussion above, I agree with the position the Senators and Assembly Members have taken, and also recognize that the September 10, 2021 letter was a comment on the draft permit before DEC issued its denial letter. This issue, however, was not a basis for DEC's denial of the Title V permit and was not raised by Danskammer or petitioners. During the issue conference, DEC staff acknowledged the legislators' position, but did not state whether staff subscribed to that position or would revise the draft permit as a result. Because DEC found there was no justification for the permit, DEC did not reach the question of what constitutes adequate mitigation, when the mitigation must occur, or when it must be proposed aside from the draft permit condition. Danskammer claims it accepted the draft permit condition, but that claim is unconvincing because the draft permit is not being adjudicated here.

I conclude that mitigation measures, if required pursuant to CLCPA § 7(2), must be identified in the Title V permit application, and the measures must directly reduce or eliminate GHG emissions for the duration of a GHG gas emitting facility's operation, not at some future date. Otherwise, the impacts are not mitigated. I also note that in the event that DEC staff's denial of the Title V permit is overturned by the Commissioner or by a court, that the matter may be remanded to address and potentially adjudicate mitigation measures to be required.

Ruling: As ruled above, the issue related to RNG and green hydrogen as alternatives will advance to adjudication.

5. CLCPA § 7(3) provides an independent basis for denial of the Title V Permit.

Petitioners argue that CLCPA § 7(3) prohibits DEC from issuing the Title V permit without a finding that the project does not disproportionately burden disadvantaged communities. Petitioners argue that many of the communities nearest to the project will qualify as disadvantaged communities protected by CLCPA § 7(3) and that the project would cause significant impacts to the surrounding disadvantaged communities, in violation of CLCPA § 7(3). Petitioners offer Stephen Metts, GIS expert, to testify regarding the characteristics and demographics of the communities in the impact study area. Mr. Metts' proposed testimony and analysis would contradict Danskammer's analysis of the qualification of and impacts on surrounding communities. Mr. Metts would also demonstrate that Danskammer's analysis relied upon stale, incorrect data and erroneous methodological assumptions. (*See* Exhibit 40, Sierra Club and Orange RAPP Petition for Full Party Status, at 45-55, Bates Nos. 001519-001529.)

Danskammer argues that only the Siting Board has the authority to determine this issue in this joint proceeding. Danskammer also asserts that disadvantaged communities have not been defined or identified pursuant to the CLCPA, and regulations regarding the same have not been promulgated. Therefore, CLCPA § 7(3) cannot form the basis for a denial of the Title V permit. Danskammer also contends that it provided sufficient materials in its application demonstrating that the proposed facility will not have a disproportionate impact on the environmental justice communities and that petitioners' offer of proof is insufficient to raise a substantive and significant issue. (Exhibit 41, Danskammer Response to Petitions, at 13-20, Bates Nos. 001662-01669.)

DEC staff argued during the issues conference that this issue is also one for DEC to decide and cited footnote 21 of the denial letter which states, "In addition to the requirements of C.L.C.P.A Section 7(2) regarding consistency with the statewide greenhouse gas emission limits prior to issuing any Title V permit or other permit for the project. The department would also need to ensure compliance with the requirements of Section 7(3) of the climate act with respect to potential disproportionate impacts on disadvantaged communities." (*See* IC Transcript 4/20, at 425-426; Exhibit 33, NYSDEC Permit Denial Decision, October 27, 2021, at 6 [fn 21], Bates No. 001375.)

Discussion

During the issues conference, I questioned the adjudication of this issue in the part 624 proceeding because review of impacts to environmental justice communities in previous article 10 proceedings fell to the Siting Board. Pursuant to PSL § 164, DEC promulgated 6 NYCRR part 487, "Analyzing Environmental Justice [EJ] Issues in Siting of Major Electric Generating Facilities Pursuant to Public Service Law Article 10" to provide a regulatory framework for undertaking an environmental justice analysis when siting major electric generation facilities. In relevant part, section 487.6 provides that the EJ analysis "shall inform the Board's findings regarding whether the construction and operation of the proposed facility will result in or

contribute to any significant and adverse disproportionate environmental impacts, and whether the applicant will avoid, offset or minimize the impacts caused by the facility to the maximum extent practicable."

CLCPA § 7(3) provides, "In considering and issuing permits, licenses, and other administrative approvals and decisions, . . . pursuant to article 75 of the environmental conservation law, all state agencies, . . . shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law. All state agencies, . . . shall also prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities as identified pursuant to such subdivision 5 of section 75-0101 of the environmental conservation law." ECL 75-0101(5) defines disadvantaged communities as "communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households, as identified pursuant to section 75-0111 of this article."

ECL article 75 provides that DEC must ensure that activities do not result in a net increase in co-pollutant emissions or otherwise disproportionately burden disadvantaged communities and maximize additional environmental, public health, and economic benefits for the state and for disadvantaged communities (*see* ECL 75-0109[3][c], 75-0109 [4][l][iv]). DEC must also "prioritize measures to maximize net reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities . . . and encourage early action to reduce greenhouse gas emissions and co-pollutants" (*see* ECL 75-0109[3][d]). It is understood that those mandatory directives to DEC are to be promulgated in regulation. ECL 75-0111 creates a climate justice working group (CJWG) within DEC consisting of representatives from: environmental justice communities, DEC, the Department of Health, NYSERDA, and the Department of Labor. The CJWG is directed to identify disadvantaged communities based on "geographic, public health, environmental hazard, and socioeconomic criteria, which shall include but are not limited to:

> "i. areas burdened by cumulative environmental pollution and other hazards that can lead to negative public health effects;
> "ii. areas with concentrations of people that are of low income, high unemployment, high rent burden, low levels of home ownership, low levels of educational attainment, or members of groups that have historically experienced discrimination on the basis of race or ethnicity; and
> "iii. areas vulnerable to the impacts of climate change such as flooding, storm surges, and urban heat island effects." (ECL 75-0111[1][c].)

I ruled above that DEC has the authority to deny a Title V permit based on CLCPA § 7(2) in the context of an article 10 proceeding. DEC's Title V permitting decision triggers the review required both CLCPA § 7(2) and (3). It can be argued that the nexus between CLCPA § 7(3) and the Title V permit is attenuated by the fact that this is a joint proceeding where findings and determinations related to impacts on EJ communities rests in the Siting Board pursuant to PSL article 10 as articulated in 6 NYCRR part 487. However, prior article 10 proceedings that applied 6 NYCRR part 487 have all been renewable energy projects and did not involve a federally delegated Title V permit. In addition, those proceedings did not involve the agency

directives contained in the CLCPA. CLCPA § 7(3) directs DEC to review its Title V permit decision to ensure that the grant of the permit will not disproportionately burden disadvantaged communities and to prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities.

In this part 624 proceeding, it is the GHG and co-pollutant emissions associated with the grant of a Title V permit that must be examined to determine whether disadvantaged communities are disproportionately burdened by those emissions. Accordingly, in this joint proceeding it is not just a question of siting, it is also a question of emissions regulated by DEC through a federally delegated program. For the reasons discussed above, I conclude DEC has the sole authority to issue, modify, condition and deny a Title V permit based on the review required by CLCPA § 7(3). Thus, DEC's Commissioner must decide whether the grant of a Title V permit and its associated GHG and co-pollutant emissions will disproportionately burden disadvantaged communities or whether reductions in GHG and co-pollutant emissions in disadvantaged communities are being prioritized. Likewise, the Siting Board must decide whether the grant of a siting certificate will disproportionately burden disadvantaged communities.

Notwithstanding Danskammer's objections to applying CLCPA § 7(3) without further definition of disadvantaged communities or regulations in place, ECL 75-0111(1)(c) provides a baseline of criteria that must be included in identifying disadvantaged communities. I asked petitioners if Mr. Metts could provide a comparison of the analysis required by 6 NYCRR 487 and the minimum requirements of ECL 75-0111(1)(c), and determine whether that comparison would expand what is presently defined as the EJ community under part 487 and identified in Danskammer's article 10 application. Petitioners assured me that such an analysis could be provided (*see* IC Transcript 4/20, at 418-420). Petitioners Sierra Club and Orange RAPP have proposed a substantive and significant issue for adjudication related to disproportionate burdens on disadvantaged communities. The proposed issue is substantive because competing expert opinions about whether disadvantaged communities will be disproportionately burdened by the grant of a Title V permit lead me to inquire further about the extent and location of the disadvantaged communities, as defined by ECL 75-0111, and the burden placed upon them by increased GHG and co-pollutant emissions associated with the grant of a Title V permit.

The proposed issue is significant because it may result in the affirmance of the denial of the Title V permit, or if the denial is overruled, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit (*see* 6 NYCRR 624.4[c][3]).

Ruling: I conclude as a matter of law that DEC has the authority to determine whether the grant of a federally delegated Title V permit will disproportionately burden disadvantaged communities pursuant to CLCPA § 7(3), and the authority to deny a Title V permit application based on CLCPA § 7(3), whether or not the proposed facility is also seeking a certificate pursuant to PSL article 10. On March 27, 2023, the CJWG finalized the criteria for identifying disadvantaged communities and published a list of disadvantaged communities along with preliminary maps. The parties must also address the CJWG's criteria and maps in support of their respective positions on this issue. This issue will advance to adjudication.

* * *

I have considered the parties' and petitioners' remaining arguments related to the issues addressed above and conclude that those arguments are unpersuasive or have been rendered academic by this ruling.

Ruling on Petitions for Party Status

Pursuant to 6 NYCRR 624.5, the parties to any adjudicatory hearing are applicant, Department staff and those who have been granted full party status or amicus status. OHMS received petitions for full party status from the following:

1. Scenic Hudson, Inc.; and

2. Sierra Club and Orange RAPP (jointly filed).

Riverkeeper, Inc. filed a petition for amicus status.

The criteria for determining whether the ALJ should grant petitions for full party status are provided in 6 NYCRR 624.5(d)(1). Upon review of these criteria and the petitions for full party status, I find that Scenic Hudson, Inc., and Sierra Club and Orange RAPP, each filed an acceptable petition as consistent with the requirements outlined at 6 NYCRR 624.5(b)(1) and (2). Furthermore, each of the prospective intervenors has raised substantive and significant issues for adjudication as discussed above, and each prospective intervenor has demonstrated an adequate environmental interest (*see* 6 NYCRR 624.5[d][1][ii] and [iii]). Accordingly, I grant full party status, for the purpose of this administrative matter, to:

1. Scenic Hudson, Inc.; and

2. Sierra Club and Orange RAPP.

The criteria for determining whether the ALJ should grant petitions for amicus status are provided in 6 NYCRR 624.5(d)(2). Upon review of these criteria and the petition for amicus status, I find that Riverkeeper, Inc. filed an acceptable petition as consistent with the requirements outlined in 6 NYCRR 624.5(b)(1) and (3). Furthermore, Riverkeeper, Inc. has identified a legal or policy issue which needs to be resolved by the hearing and demonstrated sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective such that petitioner may contribute materially to the record on such issue (*see* 6 NYCRR 624.5[d][2][ii] and [iii]). Accordingly, I grant amicus party status to Riverkeeper, Inc.

Issues Advancing to Adjudication

As further discussed, and described above, the following issues will advance to adjudication.

- Whether there is an identified grid reliability need for the repowered Danskammer facility that provides justification for the grant of a Title V permit.
- If grid reliability need is identified, whether zero emissions solutions such as storage, transmission upgrades or construction, energy efficiency, demand response, or other zero-emission, dispatchable resources including renewable energy sources and RNG and green hydrogen fuels will solve that need.
- Whether the grant of a Title V permit will disproportionately burden disadvantaged communities.

Appeals

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis (*see* 6 NYCRR 624.8[d][2]). Any appeals must be **received** before 5:00 P.M. on Friday, May 5, 2023. Replies are authorized, and must be **received** before 5:00 P.M. on Friday, May 19, 2023. (*See* 6 NYCRR 624.6[g]; 624.8[b][1][xv].)

An original and two copies of any appeal or reply must be filed with Deputy Commissioner Katharine J. Petronis[13] at the following address: Deputy Commissioner Katharine J. Petronis, Attention: Deputy Commissioner for Hearings, Louis A. Alexander, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-1010.

Appeals should address the ALJ's rulings directly, rather than merely restate a party's contentions. New materials enclosed with any appeal or reply will **not** be considered, and will be returned. In their respective appeals and replies, the parties should reference the issues conference transcript and the participants' submissions that have been identified throughout these rulings.

In addition to the required number of hard copies of appeals and replies, each party shall file one electronic copy in portable document format (PDF) – optical character recognized (OCR) – via email to the service list, including the ALJ. The electronic copies are due by 5:00 P.M. on the dates specified above. Any extension request must be sent to Deputy Commissioner Petronis via email at: Katharine.Petronis@dec.ny.gov and must be received on or before 5:00 P.M. on Friday, April 14, 2023. Such request must be copied via email to the service list, including the ALJ.

[13] By memorandum dated January 10, 2022, Commissioner Basil Seggos delegated decision making authority with respect to the pending environmental permits in this matter to Katharine J. Petronis, Deputy Commissioner of Natural Resources.

In early June 2023, I will contact the parties and inquire whether the parties wish to commence the adjudicatory hearing on the above identified issues. Depending on the response, I will schedule a Webex conference call with the parties and the presiding examiners in the article 10 proceeding to develop a joint hearing schedule.

/s/

_____

Michael S. Caruso
Administrative Law Judge

Dated: April 4, 2023
Albany, New York

To: Attached Service List revised March 21, 2023

Attachments: Issues Conference Exhibit Chart