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Via Overnight Mail

June 22, 2018

Hon. Kathleen H. Burgess
Secretary
New York State Public Service Commission
Empire State Plaza
Agency Building 3
Albany, NY 12223-1350

Re: Case 18-F-_____
Danskammer Energy, LLC Public Involvement Program Plan
Town of Newburgh, Orange County, New York

Dear Secretary Burgess:

Please find enclosed the comment letter to the New York State Public Service Commission submitted on behalf of New York Communities for Change, Sierra Club, Food and Water Watch, Sane Energy Project, New York Public Interest Research Group, 350.org, Catskill Mountainkeeper, and Riverkeeper, Inc. regarding the Public Involvement Program Plan submitted on May 24, 2018 by Danskammer Energy, LLC.

Please contact Christopher Amato at camato@earthjustice.org with any questions regarding this letter.

Respectfully submitted,

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Town of Newburgh, Orange County, New York

Dear Secretary Burgess:

Earthjustice respectfully submits these comments on behalf of New York Communities for Change, Sierra Club, Food and Water Watch, Sane Energy Project, New York Public Interest Research Group, 350.org, Catskill Mountainkeeper, and Riverkeeper, Inc. regarding the Public Involvement Program Plan (“PIPP”) submitted on May 24, 2018 by Danskammer Energy, LLC (“Danskammer”). The PIPP concerns Danskammer’s proposal to construct a new major electric generating facility in the Town of Newburgh, Orange County, New York.

As discussed below, the PIPP is seriously deficient because the Study Area for the proposed project as identified by Danskammer is limited to areas within a radius of two miles from the Preliminary Project Area boundaries. *See* TRC (prepared for Danskammer Energy LLC), Public Involvement Program Plan (May 2018), 4. The Commission’s regulations make clear that the Study Area for a major facility must include all areas within a radius of at least five miles from all project components. 16 NYCRR § 1000.2(ar). In addition, Danskammer’s conclusion in the PIPP that the proposed project will not negatively impact three environmental justice areas—all of which are located within a five-mile radius of the project—is incorrect and unsupported.

I. Danskammer’s Definition of the Project Study Area Violates Commission Regulations

Danskammer acknowledges that it is proposing to “construct a major electric generating facility” on the project site. *See* Ltr. from William Reid, Chief Executive Officer, Danskammer Energy, LLC, to Hon. Kathleen Burgess, Secretary, New York State Public Service Commission (May 24, 2018), 1. The Commission’s regulations define “Study Area” as follows:

Study Area: An area generally related to the nature of the technology and the setting of the proposed site. In highly urbanized areas, the study area may be limited to a one-mile radius from the property boundaries of the facility site.

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interconnections, and alternative location sites. *For large facilities . . . the study area shall generally include the area within a radius of at least five miles from all generating facility components, interconnections and related facilities and alternative location sites.* For facilities in areas of significant resource concerns, the size of a study area shall be configured to address specific features or resource issues.

16 NYCRR § 1000.2(ar) (emphasis added).

Danskammer's limitation of the Study Area to a radius of two miles—despite the fact that its proposed new major electric generating facility clearly qualifies as a “large project”—violates this Commission regulation. In addition, Danskammer's unjustified shrinking of the Study Area arbitrarily and unlawfully excludes three environmental justice areas that are all within a five-mile radius of the project. See PIPP at 10 (identifying three environmental justice areas that are 2.63, 3.46, and 4.07 miles from the project site); see also *id.* (“There are no Potential EJ Areas within the defined Project Study Area . . .”).¹

Moreover, Danskammer's reduction of the Study Area to a two-mile radius will deprive numerous Study Area residents who live within the regulatory five-mile radius from receiving individual notice and an opportunity to join the stakeholders list. See PIPP at 8 (stating that “[a]ll Study Area residents [*i.e.*, only those within a two-mile radius] will be initially notified and be given opportunity to join the stakeholders list” (emphasis added)).

II. Danskammer's Conclusion That Environmental Justice Areas Will Not Be Impacted by the Project is Incorrect and Unsupported

Danskammer acknowledges that its proposed project will result in (as yet unspecified) emissions of a variety of harmful air pollutants, including nitrogen oxides, carbon monoxide, volatile organic compounds, and sulfur dioxide. See PIPP at 2-3. Despite the fact that Danskammer has provided no pollutant emissions calculations or air quality modeling results for the proposed project, it nevertheless concludes that “[b]ecause the [environmental justice] areas . . . are outside the Study Area, the Project will not be expected to negatively impact these areas.” *Id.* at 10. This conclusion is unwarranted.

First, as discussed above, the regulatory (five-mile radius) Study Area *does* include all three environmental justice areas identified in the PIPP. *Id.* Thus, even if one accepts Danskammer's erroneous assumption that only residents within the Study Area may be negatively impacted by its project, the three environmental justice areas (and all other residents within a five-mile radius) are located within the regulatory Study Area and may therefore be negatively impacted.

¹ The environmental justice areas were identified by Danskammer based on factors set forth by the New York State Department of Environmental Conservation (“NYSDEC”). See NYSDEC, Commissioner Policy 29, Environmental Justice and Permitting (March 19, 2003) §§ III.A.8, V.B, <http://www.dec.ny.gov/regulations/36951.html>.

Second, in the absence of emission calculations and air quality modeling results, it is at best premature and at worst misleading for Danskammer to claim that residents living further than two miles from the proposed plant will not be negatively impacted by the plant's emissions. Indeed, this claim is contrary to basic principles of air pollution regulation and the laws of meteorology and physics. *See, e.g.*, NYSDEC, Div. of Air Resources Policy 10, Guidelines on Dispersion Modeling Procedures for Air Quality Impact Analysis (May 9, 2006) § V (specifying requirements for, among other things, worst case and maximum load conditions to be analyzed, assessment of cumulative impacts from nearby sources, source and duration of baseline meteorological data, evaluation of complex terrain conditions, and extent of source receptor grids);² Clean Air Act, 42 U.S.C. 7426 (specifying procedures for abatement of interstate transport of air pollutants); *State of Connecticut v. U.S. Environmental Protection Agency*, 696 F.2d 147 (2nd Cir. 1982) (discussing the modeling of long-range transport of air pollution from power plant sources in New York to receptors in Connecticut).

For the same reason, we object to Danskammer's stated intention to arbitrarily limit its assessment of environmental impacts of the project to "lands within a two (2) mile radius of the Preliminary Project Area boundaries." PIPP at 4-5. Not only does this violate the regulatory requirement for the Study Area to include *at least* all areas within a five-mile radius of the project, 16 NYCRR § 1000.2(ar), but it is also contrary to the requirement that a Preliminary Scoping Statement describe, among other things, "the range of potential environmental and health impacts of the construction and operation of the facility and of each pollutant that will be emitted or discharged by the facility." *Id.* § 1000.5(d)(2); *see also* N.Y. Public Service Law § 164(1)(b) (requiring an applicant for a Certificate of Environmental Compatibility and Public Need to include in its application an "evaluation of the expected environmental and health impacts and safety implications of the facility, both during its construction and its operation . . ."). Significantly, neither the Public Service Law nor the Commission's implementing regulations allow the assessment of environmental impacts to be limited to the Study Area, as Danskammer erroneously assumes.

III. Conclusion

The Commission's regulations state that the purpose of a PIPP is to "provide[] a variety of effective public participation opportunities by which public concerns can be identified as early as possible throughout the various stages of the decision-making process, ensure[] communication between stakeholders and an applicant, and result[] in education of the public as to the specific proposal and the Article 10 process." 16 NYCRR § 1000.2(ah). Danskammer's arbitrary attempt to truncate the regulatory Study Area to a two-mile radius, thereby excluding three environmental justice areas and numerous other potentially affected residents from key aspects of public involvement, severely undermines the purpose of a PIPP as articulated by the Commission.

For the reasons set forth above, we request that the Commission find the PIPP to be inadequate and (i) reject Danskammer's attempt to limit the Study Area to a two-mile radius from the project site and direct that it comply with the regulatory definition to include (at least) all areas

² Available at <https://www.dec.ny.gov/chemical/8923.html>.

within a five-mile radius from the project site (subject to further expansion, as provided in the Commission's regulations, in the event significant resource concerns are identified beyond the five-mile radius); (ii) specifically direct Danskammer to include all three identified environmental justice areas as part of the Study Area; (iii) strike from the PIPP Danskammer's claim that the three identified environmental justice areas will not be negatively impacted by the project; and (iv) strike from the PIPP Danskammer's statement that environmental impact assessment will be limited to areas within a two-mile radius of the project.

Thank you for your consideration of these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher Amato". The signature is fluid and cursive, with the first name "Chris" and last name "Amato" clearly distinguishable.

Christopher Amato

C: William Reid, Chief Executive Officer, Danskammer Energy, LLC (via overnight mail)