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: 8-57360-0004/00017 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 -

GREENIDGE GENERATION LLC,
Applicant.

DEC Permit ID No.: 8-57360-0004/00017

RULING ON ISSUES

AND

PARTY STATUS

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I. INTRODUCTION

This issues ruling arises from the June 30, 2022 denial of an application before the New York State Department of Environmental Conservation (Department or DEC) for renewal of a Clean Air Act (CAA) Title V air permit sought by Greenidge Generation LLC (Greenidge or applicant).

The denial was based upon Department staff's application of the Climate Leadership and Community Protection Act (CLCPA) (L 2019, ch 106), which was passed in 2019 and went into effect January 1, 2020, with the exception of ECL 75-0115, establishing a community air monitoring program, effective October 1, 2022. The Act requires the Department to establish a statewide greenhouse gas emissions limit as a percentage of 1990 emissions, with a reduction to 60% of 1990 emissions by 2030, and to 15% of 1990 emissions by 2050. (ECL 75-0107[1].)

DEC promulgated regulations, 6 NYCRR part 496, setting forth greenhouse gas (GHG) emissions limits "from across the State and all sectors of the State economy for the years 2030 and 2050, as a percentage of 1990 emissions levels of 60 percent and 15 percent." (6 NYCRR 496.1.) The regulations set out the carbon dioxide equivalent (CO2e) value for each greenhouse gas as provided by the Intergovernmental Panel on Climate Change (IPCC) using an assessment of the Global Warming Potential of greenhouse gases over an integrated twenty-year time frame (GWP20). (*See* 6 NYCRR 496.5; 6 NYCRR 496.3[d], [e].) DEC estimated the level of statewide GHG emissions in 1990 at 409.78 million metric tons of CO2e. (*See* 6 NYCRR 496.4[a]). The statewide GHG emissions limit for 2030 is 245.87 million metric tons of CO2e. (S*ee* 6 NYCRR 496.4[b]). The statewide GHG emissions limit for 2050 is 61.47 million metric tons of CO2e. (*See id.*)

The CLCPA also requires DEC to promulgate regulations by January 1, 2024, to achieve statewide GHG emissions reductions which shall: ensure that the aggregate emissions of GHG emissions will not exceed the statewide GHG emissions limits established in the CLCPA; include legally enforceable emissions limits, performance standards, or measures or other requirements to control emissions; reflect the findings of the scoping plan prepared pursuant to the CLCPA; and include measures to reduce emissions from GHG emissions sources that have a cumulatively significant impact on statewide GHG emissions. (*See* ECL 75-0109).

II. PROCEEDINGS

A. Permit Renewal Application

On March 5, 2021, Greenidge filed an application to renew its Title V air permit 8-57360-00004/00017, effective September 7, 2016, for the continued operation of a natural gas-fired electric generating facility (facility) in the Town of Torrey, Yates County, on Seneca Lake.

The facility is a primarily natural gas-fired electric generating plant, with a generating capacity of approximately 107 megawatts (MW) with a maximum heat input of 1,117 million BTUs per hour. (*See* 2016 Title V Permit at 2, 18.) It was originally a coal-burning plant

operating as early as the 1930s. It ceased operating in 2011 and in 2012, it relinquished its Title V air permit. (*See* Denial letter dated June 30, 2022 [Denial letter] at 2.) On September 7, 2016, Greenidge received a Title V air permit to operate a natural gas-fired power plant for term of five years. (*See* Title V Air Permit, September 7, 2016.) Greenidge filed an application to renew the permit on March 5, 2021. (*See* Title V Air Permit Renewal Application, March 5, 2016.) The application requested renewal of the existing permit, with revisions limited to removal of the diesel fire pump permit conditions because the diesel fire pump has been taken out of service and removed from the facility, and minor revisions to the monitoring requirements for particulate emissions (PM-10, PM-2.5 and Particulates), which includes the use of a flowmeter for the facility to demonstrate continuous compliance with the existing PM-10, PM-2.5 and Particulates permit conditions. (*See id.*)

On May 5, 2021, the DEC Division of Environmental Permits issued a Notice of Incomplete Application (NOIA) asking that Greenidge identify each GHG emitted and calculate the facility's potential to emit GHG in tons per year and CO2e emissions for the facility using the GWP20 found in 6 NYCRR 496.5.

The NOIA requested that the CLCPA analysis include actual GHG emissions from the facility, in tons per year, for each year since 2015 and the anticipated actual GHG and CO2e emissions from the facility, based on anticipated operation of the facility, for each year of the permit term. Additionally, the NOIA requested that calculations include upstream GHG emissions associated with the generation of electricity imported into the state, or the extraction, transmission, and use of fossil fuels imported into the state, and include calculations showing the facility's projected GHG and CO2e emissions in the years 2030, 2040, and 2050.

The NOIA also pointed out that the CLCPA's GHG emissions limits require a statewide reduction in GHG emissions from 1990 levels of 40% by 2030 and 85% by 2050, and that the CLCPA requires that the energy generation sector be zero-emissions by 2040. The NOIA requested information on how the emissions from the facility will be mitigated or reduced consistent with these requirements. The NOIA asked Greenidge for an explanation if there were no feasible ways to reduce GHGs, and stated that if GHG emissions will not be consistent with the statewide GHG emissions limits of the CLCPA, then further discussion may be needed.

Department staff sent Greenidge a letter on June 30, 2021, seeking an extension of time to determine completeness and requesting additional technical information (RFAI 1). Although this request restated the information sought in the NOIA, the RFAI 1 also asked when the facility began operation of bitcoin mining at the facility, what changes were made at the plant to enable bitcoin mining, how much electricity the facility provided to the electric grid, and how much electricity was generated behind the meter since the facility started bitcoin mining.

Greenidge responded to the NOIA on August 2, 2021 (Greenidge August 2, 2021 Response), arguing that the CLCPA and 6 NYCRR part 496 did not apply to permit renewals, and also arguing that renewal of the Title V permit was consistent with statewide GHG emissions targets for the following reasons:

- Greenidge's potential CO2e emissions for 2030 (582,525.5 metric tons) comprise only 0.23% of the total statewide 2030 GHG emissions target.

- The conversion of the facility from coal to natural gas resulted in a reduction of onsite GHG emissions by more than 75% since 1990 and a reduction of the combined upstream and onsite potential emissions by 70.3% compared to 1990 emissions.
- In contrast to the facility's operations as a coal-burning plant, the current facility has eliminated oil-firing during startup and the use of oil-fired thaw pits during sub-freezing conditions.
- Greenidge has replaced lighting systems with LED lights throughout the facility.
- Greenidge's diesel-fueled fire pump has been removed from service at the facility.
- Greenidge is presently permitted to co-fire up to 19% (by weight) biomass – a green technology fuel.
- Greenidge has identified opportunities for energy savings at the facility which would result in reduced GHG and CO2e emissions.

(*See* Greenidge August 2, 2021 Response at 1-2.)

Greenidge provided a table showing that the net electric power provided to the New York Independent Service Operator (NYISO) grid had varied from 170,297 MW in 2017 to 215,588 MW in 2020. Greenidge provided 76,486 MW to the grid in the first half of 2021. During the same period, Greenidge provided 7,812 MW of electricity to blockchain technology service, also referred to as cryptocurrency mining,[1] in 2019, 132,215 MW in 2020 and 112,474 MW in the first half of 2021. (*See* Greenidge August 2, 2021 Response at 12, Table 6.) The actual CO2e emissions in metric tons during the same time period were 172,309 tons in 2017, 195,721 tons in 2018, 64,607 tons in 2019, 374,814 tons in 2020, and 195,493 tons in the first half of 2021. (*See* Greenidge August 2, 2021 Response at 10, Table 4.) There was no data linking the emissions directly with the distribution of electric power, i.e., attributing the emissions resulting from distribution to the NYISO grid and separately to cryptocurrency mining. Greenidge also provided a summary of its projected actual emissions through the permit renewal term, 2022 to 2026, projecting that its CO2e emissions would match the maximum potential-to-emit (PTE) under the permit, which was 952,958 metric tons of CO2e annually. (*See* Greenidge August 2, 2021 Response at 10, Table 5.)

Department staff issued a second Request for Additional Technical Information (RFAI 2) on August 16, 2021, requesting more detail on the prior submission and specifically requesting:

[1] The parties refer to blockchain technology service, cryptocurrency mining, crypto-mining and bitcoin mining to describe Greenidge's activities authenticating bitcoin transactions and adding those transactions to the bitcoin blockchain, or ledger. Behind-the-meter use includes cryptocurrency mining and also includes station service use, which is electricity used on site, but not necessarily for cryptocurrency mining. (*See* Greenidge August 2 Response at 12, Table 6.) Greenidge is using the proof-of work-authentication method to mine cryptocurrency, which uses considerably more energy than other methods. (*See* Staff brief at 13 n 10, citing Climate and Energy Implications of Crypto-Assets in the United States, White House Office of Science and Technology Policy, Washington, D.C. September 8, 2022; *see also* Petition at 24 and n 115.)

- An updated analysis discussing the GHG emissions associated with the current and planned operations of the facility and a discussion of alternatives and/or mitigation measures for those emissions. The RFAI 2 stated that the analysis should include projections of GHG emissions for the years 2030, 2040, and 2050.
- The current generating capacity and utilization rate of the facility and the planned future capacity and utilization rate of the facility in the analysis and a discussion of the portion of the facility's output that will be used for each mode of operation (e.g., electricity generation to the grid vs. on site consumption for cryptocurrency mining) now and in the future.
- A discussion of the method(s) the facility will use to comply with the CLCPA's zero emissions by 2040 requirement for the electricity generation sector.

(*See* RFAI 2 at 1-2.)

Greenidge responded on August 20, 2021, first objecting that it was "premature for the Department to require detailed projections of GHG emissions for the years 2030, 2040 and 2050 for a permit renewal through 2026." (Greenidge August 20, 2021 Response at 1.) Greenidge also objected that "[g]iven the absence of regulations or relevant guidance, much of the supplemental data requested in the Department's August 16, 2021 letter necessarily requires substantial speculation and professional judgment," (*id.*) and that the "CLCPA does not dictate how these emissions reductions are to be achieved in future decades." (*Id.* at 2.)

Greenidge then referred to its previously submitted August 2, 2021 Response and repeated a commitment to further improving energy efficiency and investigating and, if feasible, installing the technology to allow co-firing with green hydrogen fuels as a method to reduce and eventually eliminate GHG emissions from the facility. (*See* Greenidge August 20, 2021 Response at 1.)

Greenidge pointed to the six specific projects identified in its August 2, 2021 Response (Table 3) that it "has committed to evaluate prior to 2030," claiming "if these proposed projects prove to be successful, they have the potential to provide aggregate GHG emissions reductions from the emissions due to present operations of **41%.**" (*See* Greenidge August 20, 2021 Response at 2 [emphasis in original].)

Greenidge volunteered that: "Of course, Greenidge's commitment also applies to meeting the zero emissions requirement in § 66-p of the Public Service Law." (Greenidge August 20, 2021 Response at 2.) Greenidge also noted that it had "announced that effective June 1, 2021, its behind-the-meter operations will be entirely carbon neutral. Greenidge is purchasing voluntary carbon offsets from a portfolio of U.S. greenhouse gas reduction projects." (*Id.*)

Department staff held public hearings on the renewal request in October 2021 on the WebEx virtual conference platform and accepted and reviewed public comments on the application, described below.

Greenidge submitted a proposal on March 25, 2022, offering to agree to "a binding condition to be included in our Final Title V Air Permit that requires a 40% reduction in GHG emissions … from the current permitted level, to be achieved by the end of this permit term in

2025" and a "requirement that Greenidge be a zero-carbon emitting power generation facility by 2035." (March 25, 2022 letter from Dale Erwin to Chris Hogan [March 25, 2022 letter] at 1-2.) There was no specific method proposed to achieve these stated goals.

The DEC Division of Environmental Permits denied the renewal application on June 30, 2022, pursuant to 6 NYCRR 621.10(f). (*See* Denial letter.) The denial was based on the determination that the facility's continued operation would be inconsistent with or would interfere with the attainment of the statewide GHG emissions limits established in the CLCPA and reflected in 6 NYCRR Part 496. The Denial letter set forth the following factors supporting the decision:

> "As explained further below, this determination is based primarily on the following factors: (1) the actual GHG emissions from the Facility have drastically increased since the time of the Title V permit issuance in 2016 and since the effective date of the CLCPA in 2020; (2) this increase in GHG emissions is primarily due to the fact that Greenidge has substantially altered the primary purpose of the Facility's operation, from providing electricity to the grid in a "peaking" capacity to powering its own energy-intensive Proof-of-Work (PoW) cryptocurrency mining operations behind-the-meter; and (3) renewal of the Title V permit would allow Greenidge to continue to increase the Facility's actual GHG emissions through the increased combustion of fossil fuels, for the benefit of its own behind-the-meter operations."

(Denial letter at 8 [footnote omitted].)

Staff considered whether there was justification for the continued operation of the facility notwithstanding the finding that it would be inconsistent with or would interfere with the attainment of the statewide greenhouse gas (GHG) emissions limits. (*See* Denial letter at 16-18.) Department staff had included in the Notice of Complete Application: "At this time, the Applicant has not provided a justification for the Facility nor proposed sufficient alternatives [or] GHG mitigation measures." (Environmental Notice Bulletin [ENB] Notice of Complete Application and Hearing, dated September 8, 2021 [completion notice].) According to the Denial letter, Greenidge did "not provide the Department with any information to support a justification in the event of a finding of inconsistency, as is the case here, such as whether cryptocurrency mining operations in and of themselves could be necessary or could provide any economic or social utility for the State." (Denial letter at 16.) Although Greenidge did not provide any information regarding justification, Department staff considered whether the facility was necessary to maintain grid reliability as a justification, examining NYISO reports to determine whether there was a grid reliability need for the facility. Staff found that in 2014, Greenidge requested that NYISO study the impacts of the facility returning to service, and NYISO conducted a System Reliability Impact Study (SRIS), which indicated that there were no reliability needs for this facility. Staff also reviewed NYISO's Reliability Needs Assessment (RNA) for NYISO Zone C, in which the facility is located, and found that removal of the facility from the grid would not negatively impact grid reliability. (*See id.* at 17.)

Staff also addressed mitigation or alternatives under CLCPA § 7(2) in the Denial letter, finding that "even if sufficient justification existed for continued operation of the Facility, Greenidge failed to offer a serious plan to transition away from its current and exclusive reliance on natural gas for its cryptocurrency mining operations." (Denial letter at 18.) Staff noted that, in addition to Greenidge's refusal to use alternative renewable energy sources at the outset of the permit term, Greenidge declined to consider less energy-intensive methods of cryptocurrency mining at its facility. (*See id.*)

Staff also noted that § 7(3) of the CLCPA requires that the Department "shall not disproportionately burden disadvantaged communities" in making any permitting decision and that Greenidge did not provide any information to address the requirements of CLCPA § 7(3). (*See* Denial letter at 19.)

On July 28, 2022, Greenidge filed a hearing request on the denial pursuant to 6 NYCRR 621.10(a)(2).

The Title V permit renewal application is a Type II action under ECL article 8 (State Environmental Quality Review Act [SEQRA]) and 6 NYCRR 617.5(c)(32) and is not subject to review under SEQRA.

B. Legislative Public Comment Hearings and Written Comments

Pursuant to the completion notice published on September 8, 2021, Department staff held two virtual legislative public comment hearings on October 13, 2021 in accordance with 6 NYCRR part 621. Over one hundred people attended the hearings, with 101 persons speaking, the majority speaking against renewal of the permit.

Department staff received approximately 1,069 written comments between September 8, 2021 and November 13, 2021 pursuant to the September 8, 2021 completion notice and a supplemental notice issued on October 20, 2021. The majority of written comments were provided through various form letters requesting that Greenidge's application be denied and cited the use of fracked gas, climate change, human health, and inconsistency with the CLCPA as reasons for opposition to the application. Department staff also received a comment from the New York Public Interest Group stating that 1,007 people had signed a petition on Action Network telling DEC to stop Greenidge crypto mining and stating that they oppose the project due to the CLCPA, and providing a list of 947 names, some with individual comments. Food and Water Watch submitted 120 pages of names on a petition to the governor opposing new and other fossil fuel power plants, including the Gowanus, Astoria, Danskammer and Greenidge plants. More detailed comments in opposition were received from New York State Assemblymembers Anna Kelles, Deborah Glick, Steve Englebright, Dan Quart, and Steven Otis, State Senator James Sanders Jr., and Geneva City Council Member Ken Camera. The Environmental Protection Agency submitted a comment questioning whether the continued operation of the Greenidge facility to supply power for cryptocurrency mining operations, is consistent with either the goals of the CLCPA or the President's target of achieving a zero carbon power sector by 2035. Earthjustice, Seneca Lake Guardian, Grassroots Environmental Education, and many other groups and individuals also submitted comments in opposition to the permit renewal. These comments touched upon the following impacts and topics:

- The modification of the facility from a peaker facility to a baseload facility will significantly increase emissions including GHGs.
- The impacts on environmental justice communities and other localized impacts on air quality.
- Degradation of the pastoral nature of the region.
- The need to decarbonize the State's energy production.
- No need for more electrical capacity in the region or to integrate renewables.
- The facility is not needed for grid reliability.
- The impacts of fracked gas from other states on local air and water quality threatens the environmental and economic sustainability of this region.
- Proof of work is more energy intensive than other cryptocurrency transaction validation methods such as proof of stake, which is newer and more secure.

The Yates County Legislature, Village of Dresden Mayor William Hall, Yates County Legislator Doug Paddock, and Town of Benton Supervisor John E. Prendergast, submitted comments in support of the renewal of Greenidge's Title V permit, referring to the economic benefits the facility brings to the area including 45 high-paying jobs, the decrease in emissions since the conversion from coal, and the company's environmental record. Individuals also submitted comments in support of the permit renewal, citing the economic benefits of the facility to that region and the facility's record of environmental compliance.

After the DEC Division of Environmental Permits denied the renewal application and Greenidge requested a hearing, the Office of Hearing and Mediation Services (OHMS) issued a Notice of Public Comment Period, Legislative Public Comment Hearings, Deadline for Petitions for Party Status and Statement of Issues, and Issues Conference (combined notice), which was published in the ENB on September 21, 2022, with newspaper publication following on September 24, 2022. The combined notice advised the public that the previous written and oral comments received in 2021 would be included in the record for this proceeding and that speakers who had not spoken at the October 2021 hearings would be given priority to speak at the October 24, 2022 hearings.

The OHMS held two virtual legislative public comment hearings on October 24, 2022 pursuant to 6 NYCRR part 624 by WebEx platform. Approximately 22 people spoke at the hearings with 18 speakers opposed to renewal of the permit and four speakers supporting renewal. 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, impacts on tourism and aesthetics in the Finger Lakes region, the energy intensive nature of crypto-mining, the impacts on disadvantaged communities, and the inconsistency of the facility's operation with the CLCPA as the major reasons for their opposition. Those in favor of the permit renewal listed jobs, economic opportunities, and electric grid reliability as the state transitions to renewable energy production as the reasons for their support.

Written comments were received from September 21, 2022 to October 31, 2022 pursuant to the September 21, 2022 combined notice, with 693 items received by email and four items received by mail. The majority of written comments were provided through form letters

requesting that the denial of Greenidge's application be upheld, and citing the facility's 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 to permit renewal were received from: New York State Assemblymember Anna Kelles, Earthjustice, Seneca Lake Guardian, Grassroots Environmental Education, and the South Shore Audubon Society, among others. Those comments touched upon the many of the same issues raised the previous year and at the hearings. In addition, commenters noted that the impacts of Greenidge's importing and using fracked gas threatens the environmental and economic sustainability of the region.

Assemblymember Philip A. Palmesano submitted comments in support of the permit renewal citing the economic opportunities the facility provides and objecting to the DEC's interpretation of the CLCPA §7(2). Supporters of the Greenidge permit renewal filed a petition with four and a half pages of names listed urging reversal of the Department staff's denial of the renewal application. Commenters opposed to Department staff's decision to deny the renewal application cited the following reasons:

- The need to upgrade existing energy structure while the state transitions to renewables.
- Ensured reliability in the energy sector.
- Economic impacts to the area.
- The need to attract businesses and jobs.
- The small percentage of Greenidge's GHG emissions compared to statewide totals.
- The mitigation proposals submitted by Greenidge would reduce GHG emissions more than the law requires.

C. Issues Conference and Petition

In accordance with the combined notice, Greenidge filed a statement of issues on November 4, 2022. Greenidge's original statement of issues identified nineteen issues: twelve issues were characterized as issues of law, four issues were characterized as issues of fact and law, and three issues were characterized as issues of fact, one of which included four sub-issues. Subsequently Greenidge subsequently amended its statement of issues to include two additional issues of law (Issues 12A and 12B).

Seneca Lake Guardian, The Committee to Preserve the Finger Lakes, Fossil Free Tompkins, and Sierra Club-Atlantic Chapter (collectively, petitioners) filed a joint petition for party status on the same date. The petition supported the Department staff's denial and raised four issues:

1) DEC Correctly Denied Greenidge's Title V Permit as Greenidge's Materially Different Operations are Inconsistent with or Would Interfere with the Attainment of the Statewide Greenhouse Gas Emission Limits Established in Article 75 of the Environmental Conservation Law and the CLCPA;

2) There is No Justification for Greenidge's Operations;

3) Greenidge Has Failed to Identify Adequate Alternatives or Mitigation Measures as Required by the CLCPA; and

4) Air Pollution from the Facility Will Impact a Potential Disadvantaged Community and Potential Environmental Justice Areas and Endanger the Community Character of the Finger Lakes.

On November 22, 2022 Greenidge filed an opposition to the petition and staff filed its response to Greenidge's statement of issues. Staff indicated that they do not oppose the petitioners' petition for party status. An issues conference was convened on December 8, 2022 and continued on January 4, 2023.

I issued a letter-order on January 4, 2023 establishing a briefing schedule and identifying issues for the parties to focus on. Petitioners, in conjunction with their brief responding to Greenidge's initial brief, filed a motion for summary judgment on March 1, 2023. Greenidge filed an opposition to the motion on March 30, 2023, and petitioners filed a reply on April 14, 2023.

III. ISSUES OF LAW

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].) DEC denied Greenidge's Title V permit renewal application and Greenidge challenges the denial on multiple grounds. Any objection that relates to a legal issue whose resolution is not dependent on factual disputes will be resolved in this ruling.

Greenidge argues throughout its brief that the Department staff's determinations were arbitrary and capricious. (*See e.g.* Greenidge brief at 31-34, 36, 38, 39, 41-42, 62-63.) The arbitrary and capricious standard of review is used in judicial review of agency actions under CPLR article 78. That is not the standard of review in 6 NYCRR part 624 proceedings. (*See Danskammer Issues Ruling* at 37; *Matter of Brian Zazulka*, Decision of the Commissioner, December 27, 2004, adopting Hearing Report at 5 n 2, 23.) The standard of review at this stage is whether the Department staff acted contrary to law. (*See Matter of Berger*, Ruling, August 22, 2011 at 5 n 7 [where respondents allege that actions or determinations by staff were arbitrary and capricious, allegations were deemed to allege that the actions or determinations were contrary to law].)

In the scheduling letter-order dated January 4, 2023, I directed the parties to focus on the following issues: [2]

A. What impact does the decision in *Danskammer Energy LLC v. NYS Dept. of Envtl. Conservation*, 76 Misc 3d 196 (2022), have on this application?

[2] The issues are presented here in a different order than set out in the letter-order.

B. What relevance do the following documents, which were not yet final at the time of DEC's denial, have on the review of the denial of the renewal application on June 30, 2022:
    1. Climate Action Council Scoping Plan, issued December 19, 2022;
    2. CP-49, Climate Change and DEC Action, revised December 14, 2022;
    3. DAR-21, The Climate Leadership and Community Protection Act and Air Permit Applications, issued December 14, 2022; and
    4. Draft Disadvantaged Communities Map and list of Disadvantaged Communities, released March 9, 2022.

C. Does DEC have the authority and discretion to consider the purpose of the facility in determining whether its decision is consistent with or will interfere with the attainment of the statewide GHG emissions limits established in ECL article 75, and in providing a statement of justification if the facility is inconsistent with or will interfere with those goals?

D. Does § 7(2) of the CLCPA require DEC to consider mitigation proposals if it finds that a decision would be inconsistent with or will interfere with the attainment of the statewide GHG emissions limits established in ECL article 75, without justification for not meeting those limits?

A. Impact of Danskammer litigation

An initial issue is the impact of the decision in *Danskammer Energy LLC v. NYS Dept. of Envtl. Conservation*, 76 Misc 3d 196 (2022) on this application. Section 7(2) of the CLCPA, the basis for the Department staff's denial of the permit renewal application, provides:

> "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."

(Emphasis added.) To date the only judicial or DEC administrative decisions interpreting § 7(2) of the CLCPA concern the application of Danskammer Energy LLC to modify a Title V air permit before the DEC and to obtain a certificate of environmental compatibility and public need pursuant to Public Service Law article 10 from the Public Service Commission. (*See Danskammer Energy LLC v DEC*, 76 Misc 3d 196 [Sup Ct, Orange County 2022] [*Danskammer*

v DEC]; *Matter of Danskammer Energy Center*, Issues Ruling, April 4, 2023 [*Danskammer Issues Ruling*].) Danskammer Energy LLC filed an application with DEC for a Title V air permit proposing an approximately 536 MW repowered natural gas fired power plant. The DEC denied the Title V application based on § 7(2) of the CLCPA. Danskammer challenged the DEC determination in an Article 78 proceeding in supreme court, Orange County, while an administrative hearing process pursuant to 6 NYCRR Part 624 was pending before Administrative Law Judge (ALJ) Michael Caruso. (*See Danskammer v DEC*, 76 Misc 3d at 199-200; *Danskammer Issues Ruling* at 1-2.)

Subsequent to the court's decision and my January 4, 2023 letter-order setting forth legal issues to be briefed, ALJ Caruso issued the *Danskammer Issues Ruling* in the Danskammer administrative proceeding. The parties did not address the impact of the issues ruling, but both the court decision and the issues ruling are relevant and persuasive authority in this matter. (*See Danskammer Issues Ruling* at 37 [supreme court decision is persuasive but not binding]; *Matter of Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC*, Interim Decision of the Assistant Commissioner, August 13, 2008, at 14-15 [relying on Department administrative precedent in determining whether facility's cooling water intake structure may result in adverse environmental impact].)

Greenidge argues that the Danskammer litigation has no bearing on this permit renewal proceeding. The bases for this argument are: that the parties in *Danskammer v DEC* did not fully address the issue of whether § 7(2) granted DEC authority to deny a permit when it found that granting it would be inconsistent with the GHG emissions limits in the CLCPA; that a supreme court proceeding in Orange County has no bearing on an adjudicatory proceeding in Yates County; and that the supreme court's holding was limited to the applicability of § 7(2) to a permit modification allowing the construction and operation of a new facility and does not apply to a permit renewal application for an existing facility. (*See* Greenidge brief at 57-62.) During the issues conference, Greenidge also asserted that the supreme court decision was subject to a notice of appeal (*see* Issues Conference tr at 16), but the time to perfect the appeal has now passed and Danskammer has waived the right to appeal. (S*ee* Staff brief at 24; Issues Conference tr at 282; *see also* Greenidge Opp to Summary Judgment at 38).

Lastly, Greenidge argues that the court in *Danskammer v DEC* did not decide what it means for the Department to consider GHG emissions as part of the permit application process, including how to evaluate GHG emissions, what is required for justification, and how to consider mitigation. Greenidge claims that all of these issues are unresolved by *Danskammer v DEC* and are ripe for adjudication in this proceeding. (*See* Greenidge brief at 62.)

Staff points out that the *Danskammer v DEC* decision is the first judicial decision in New York State to interpret CLCPA §7(2), and the court held that DEC has the authority under CLCPA § 7(2) to deny a permit application. (S*ee* Staff brief at 20). Moreover, staff argues that the *Danskammer v DEC* decision clearly recognized that CLCPA § 7(2) went into immediate effect and was not contingent on the promulgation of regulations, Department guidance or policies, or actions by the Climate Action Council. (S*ee* Staff brief at 21 and n 7). Because CLCPA § 7(2) requires that DEC consider whether a decision is consistent with attainment of the statewide GHG emissions limits, it applies to the decision as to whether to issue, condition or deny a permit. (S*ee* Staff brief at 9.)

Petitioners argue that the court's ruling in *Danskammer v DEC* is persuasive inasmuch as it is "solidly grounded in statutory interpretation and public policy considerations, and the issue before the court in *Danskammer v DEC* is nearly identical to the issue in this proceeding." (Petitioners' brief at 26.)

Greenidge claims that DEC exceeded its jurisdiction by relying upon § 7(2) of the CLCPA as a basis to deny its renewal application in contravention of the plain language of the statute, and in absence of any standards or regulations promulgated in accordance with the CLCPA and the State Administrative Procedure Act. It listed this issue of law as its first issue in the Statement of Issues. Greenidge argues that because the CLCPA does not specifically include the words "deny" or "denial," the legislature did not intend to authorize any agency to deny a permit under the CLCPA. (*See* Greenidge brief at 24-25.)

Petitioners agree with Department staff that § 7(2) clearly directs that an agency deny a permit when granting it would be inconsistent with the requirements of § 7(2) of the CLCPA. (*See* Petitioners' brief at 22.)

Discussion

Danskammer argued before the supreme court, as does Greenidge here, that "although the CLCPA permits the DEC to consider the effect of a proposed use on GHG emissions, it does not authorize the DEC to deny a permit on such a basis when the application, as here, otherwise conforms with all other relevant requirements." (*Danskammer v DEC*, 76 Misc 3d at 199.) Similar to Greenidge's argument here, Danskammer claimed that DEC "established a de facto rule proscribing the development of any upgraded fossil fuel power plants like Danskammer without following proper procedural safeguards, and prior to the promulgation of rules, etc. called for under the CLCPA." (*Id.*) DEC responded that § 7(2) permits the denial of a Title V permit and that it had appropriately denied Danskammer's permit modification request. (*Id.* at 205.)

The court agreed with DEC, stating:

> "Danskammer's proposed interpretation of Section 7(2) would render it meaningless.
>
> "First, by Danskammer's proffered interpretation, the Legislature has mandated that the DEC engage in an ultimately pointless exercise; that is, the DEC must consider the goals of the CLCPA in determining whether to grant a permit, but may not deny the permit even if the proposed project does not meet the goals and cannot otherwise be justified or mitigated. The Court notes that, under such circumstances, the required review serves no practical or meaningful purpose.
>
> "Second, such an interpretation would render the Legislature's expressed mandate to reduce GHG emissions, despite its immediacy and urgency, completely toothless for years to come, and would

> relegate the DEC to essentially spectator/advisor status until such time. Such a reading is not supported by the plain language of Section 7, by the articulated goals of the CLCPA in general, or its legislative history.
>
> "Finally, as noted by the DEC, a permit granted prior to the promulgation of such further rules, etc. may extend into and beyond the promulgation of the same. If the permit does not ultimately comply with the rules, etc. as enacted, the grant of a permit would actually undermine the legislative goals.
>
> "Thus, the Court rejects Danskammer's proffered interpretation.
>
> "Rather, to give Section 7 meaning, the Court finds 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[3] the adverse effects mitigated."

(76 Misc 3d at 250 [footnote added].)

Greenidge argues that the legislative intent of the CLCPA does not support DEC's interpretation of § 7(2) and that DEC is usurping legislative authority by interpreting § 7(2) to provide for the denial of a permit or renewal application. The supreme court squarely addressed this issue in *Danskammer v DEC*:

> "Rather, the legislature, not the DEC, determined that New York State is currently suffering adverse effects from climate change, and that a stated legislative goal is the reduction and ultimate elimination of GHG emissions from anthropogenic sources. Further, the legislature expressly directed the DEC to consider such goals in determining permit applications. Thus, the DEC was not operating outside of its proper sphere of authority and balancing competing social concerns in reliance solely on its own ideas of sound public policy. Nor was it writing on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance, or acting in an area in which the legislature has repeatedly tried—and failed—to reach agreement. Nor did it apply its own expertise or technical competence

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[3] As pointed out in the *Danskammer Issues Ruling,* the statute itself reads: "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." (CLCPA § 7[2][emphasis added].) If the Department were to make a decision that is otherwise inconsistent, CLCPA section 7(2) requires that the decision is both justified **and** that the alternatives or mitigation measures are identified. (*Danskammer Issues Ruling* at 33 n 10.)

> to develop the challenged regulations. Rather, the DEC was implementing the legislature's policies as set forth in the CLCPA."

(76 Misc 3d at 251 [citation omitted].) The supreme court relied in part on the Introducer's Memorandum, which stated:

> "Sections 7 through 12 would provide for additional authority for state agencies to promulgate greenhouse gas regulations and require the Department of Environmental Conservation to consider climate change in permitting decisions."

(76 Misc 3d at 248, quoting New York Bill Jacket, 2019 S.B. 6599, Ch. 106.) The plain language of § 7(2) of the CLCPA and the legislative history support the conclusion that the Department was authorized to deny a permit under CLCPA §7(2).

Greenidge listed as Issue No. 2 in its Statement of Issues:

> "Whether NYSDEC acted in excess of jurisdiction and in error by denying Greenidge's application for a Title V renewal based on Section 7(2) prior to issuance of the Climate Action Council's Final Scoping Plan and in absence of any standards or regulations that have yet to be promulgated in accordance with State Administrative Procedures (sic) Act that would guide NYSDEC's inconsistency determination."

(Statement of Issues at 8.) Greenidge argues that its Title V renewal application cannot be found to be inconsistent with the GHG emissions limits because DEC has not yet promulgated regulations setting forth source-specific GHG emissions limits pursuant to ECL 75-0109. It claims that the inconsistency finding prior to the promulgation of regulations is arbitrary and capricious. (*See* Greenidge brief at 34-35.) However, this contention was addressed and rejected by both the supreme court and ALJ Caruso. (*Danskammer v DEC*, 76 Misc 3d at 250; *Danskammer Issues Ruling* at 38-39.) In *Danskammer v DEC*, the supreme court found that requiring the Department to forego the CLCPA analysis prior to the promulgation of further regulations could result in a permit term extending beyond the regulations, and undermining the legislative goals of the CLCPA. (76 Misc 3d at 250.) ALJ Caruso agreed, finding that the Department should not limit its consistency analysis to apply only to permits applied for after the promulgation of regulations and only for the duration of the permit term. (*See Danskammer Issues Ruling* at 38.) The emissions are not removed from the atmosphere at the end of the permit term. Simply because the permit term will expire prior to the deadlines for the GHG emissions limits does not mean the state can wait for those deadlines to act. (*See Danskammer Issues Ruling* at 38-39.) I agree that the analysis under CLCPA § 7(2) should not be limited to applications received after promulgation of the regulations required under ECL 75-0109.

Both the court decision in *Danskammer v DEC* and the *Danskammer Issues Ruling* are persuasive authority on the scope of the Department's authority under § 7(2) of the CLCPA to deny a permit, as well as a permit modification, amendment, or renewal. Greenidge's argument that its renewal application is distinguishable from the modification application in Danskammer,

simply because it is a renewal, is unavailing. A Title V permit is a delegated permit and a renewal is treated as new application under federal and Department regulations. (*See* 40 CFR 70.7[c][1][i]; 6 NYCRR 201-6.6[a][1]; 6 NYCRR 621.11[i].) Although Greenidge argues that the renewal application "sought no operational or emissions limit changes or modifications," (Greenidge Brief at 61), it has increased its actual emissions significantly since the issuance of the Title V permit in 2016 and more so since enactment of the CLCPA in 2019, from .318 metric tons in 2016 to 195,494 metric tons for the first half of 2021. (*See* August 20, 2021 Response at 6, Table 4.) Greenidge projected its actual emissions, including upstream emissions, for 2022 through 2026 would be 952,958 metric tons of CO2e per year, the maximum permitted emissions level under the permit. (*See id.* at 9.)

I find the reasoning in the judicial and administrative decisions addressing Danskammer's permit modification application to be directly applicable here. Section 7(2) of the CLCPA authorizes the Department to deny a permit or any approval if making the decision to grant the permit or approval would be inconsistent with the GHG emissions limits of CLCPA and the decision cannot otherwise be justified and mitigated. That reasoning has been adopted by the supreme court, Orange County and by this office. (S*ee Danskammer v. DEC,* 76 Misc 3d at 250, 252; *Danskammer Issues Ruling* at 23, 33.)

RULING: I conclude that the court decision in *Danskammer v DEC* and the *Danskammer Issues Ruling,* while not controlling, are persuasive authority in this matter and further conclude that the CLCPA § 7(2) authorized the Department to deny Greenidge's application to renew its Title V air permit.

B. Relevance of Draft Documents at time of Denial Decision

The January 4, 2023 letter-order directed the parties to address the relevance of the following documents, which were not yet final at the time of DEC's denial on June 30, 2022:

- Climate Action Council Scoping Plan, issued December 19, 2022;
- CP-49, Climate Change and DEC Action, revised December 14, 2022;
- DAR-21, The Climate Leadership and Community Protection Act and Air Permit Applications, issued December 14, 2022; and
- Draft Disadvantaged Communities Map and list of Disadvantaged Communities, released March 9, 2022.

Department staff claims that "Greenidge's approach to documents finalized after the denial is inconsistent. On page 20 of its brief, Greenidge notes that CP-49 and DAR-21 'were not finalized prior to the Denial, and are therefore inapplicable to this proceeding…' but on page 49 of the same brief Greenidge claims that the Scoping Plan (also not finalized prior to the Denial) and the Moratorium (also not signed into law prior to the Denial) are for some reason applicable to this proceeding." (Staff brief at 31.)

1. Climate Action Council Scoping Plan

The CLCPA created the Climate Action Council (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. (*See* ECL 75-0103.) The Council developed a draft scoping plan, issued in December 2021, outlining the recommendations for attaining the statewide GHG emissions limits, and for the reduction of emissions beyond eighty-five percent and net zero emissions in all sectors of the economy. In December 2022, the Council issued the final Scoping Plan, pursuant to ECL 75-0103(12), after a six-month public comment period, hearing testimony at eleven public hearings across the State and receiving more than 35,000 written comments. (*See* New York State Climate Action Council, *New York State Climate Action Council Scoping Plan* [December 2022], available at Scoping Plan - New York's Climate Leadership & Community Protection Act [https://climate.ny.gov/resources/scoping-plan/][last accessed August 30, 2023] [Scoping Plan] at 1.) The Scoping Plan "shall inform the State Energy Planning Board's adoption of a State Energy Plan in accordance with Section 6-104 of the Energy Law" (ECL 75-0103[11]) and be reflected in regulations promulgated by DEC to achieve statewide GHG reductions. (*See* ECL 75-0109.)

Greenidge argues that the Scoping Plan envisions a coordinated process involving multiple agencies to reduce GHG emissions, which was not the case here:

> "'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.'"

(Greenidge brief at 55, quoting Scoping Plan at 226.) This language, according to Greenidge, means that the Department cannot deny a Title V air permit without involving the Public Service Commission and the NYISO. This was identified as Issue 12B by Greenidge. (*See* Issues Conference tr at 218-220.)

Greenidge also relies on a paragraph from the Scoping Plan which refers to cryptocurrency mining centers as an example of emerging energy-intensive operations that should be monitored and evaluated. The paragraph suggests that the state should "develop policy responses needed to ensure that those industries do not interfere with meeting the statewide emissions limits or other Climate Act requirements." (Scoping Plan at 258.) Greenidge argues that this means that the Council "has now joined the Legislature in determining that at the time of the Denial, insufficient information existed to determine that behind-the-meter cryptocurrency mining cannot be permitted under Section 7(2)." (Greenidge brief at 56.)

Department staff argues that the Scoping Plan was not finalized until December 2022, six months after the denial of the renewal application, and that it cannot be applied retroactively. Department staff also argues that the decision to deny Greenidge's individual permit renewal "contains no assessment of the overall cryptocurrency mining industry" and did not rely on a Department policy or determination that behind-the-meter cryptocurrency cannot be permitted. (*See* Staff brief at 32.)

Petitioners point out that the draft Scoping Plan, which was released to the public in December 2021, prior to the denial, clearly states that "[u]ntil such time the final Scoping Plan is adopted, and the regulations required under the Climate Act to ensure compliance with the statewide emissions limits are promulgated by DEC, agencies will ensure compliance with § 7(2) by reviewing a decision's consistency with the statewide GHG emissions limits established under the Climate Act and set forth under DEC Part 496 Statewide GHG Emission Limits." (Petitioners' brief at 25, quoting N.Y. State Climate Action Council, *Draft Scoping Plan* at 153 [Dec. 30, 2021]). Therefore, petitioners argue, the Council contemplated that the Department could act under § 7(2) prior to the adoption of the final Scoping Plan.

I agree that the draft Scoping Plan further bolsters the Department staff's and Petitioners' arguments that no regulations or further plans or policies were a prerequisite to the Department exercising its authority under CLCPA § 7(2), in accord with the holdings in *Danskammer v DEC* and the *Danskammer Issues Ruling.* (*See Draft Scoping Plan* at 153.)

The final Scoping Plan was not adopted until six months after the Denial letter was issued on June 30, 2022. It was not a basis for the Department staff's denial. Although it does not have the force and effect of law, it provides guidance for Department decision makers going forward. (*See Danskammer Issues Ruling* at 9-10.)

RULING: I conclude that the Climate Action Council Scoping Plan, issued December 19, 2022, was not in effect at the time of the denial on June 30, 2022 and was not a basis of the Department's decision to deny Greenidge's renewal application. However, the Department may rely on it to provide guidance in this adjudicatory process.

2. CP-49 and DAR-21

The parties were asked to discuss the relevance of two Department policy documents, which were publicly available in draft form during the review of Greenidge's application and at the time of the denial of the application, on June 30, 2022. Both policy documents were finalized in December 2022:

- CP-49, Climate Change and DEC Action, originally issued October 10, 2010, revised December 14, 2022 (CP-49); and
- Division of Air Resources Program Policy 21 – The Climate Leadership and Community Protection Act and Air Permit Applications, issued December 14, 2022 (DAR-21).

Greenidge argues that the draft versions of CP-49 and DAR-21 do not apply to its application, because the application, completion notice, and public comment period pre-dated the finalization of those documents. (*See* Greenidge brief at 18-20.) DEC staff states that they did not rely on any of these documents as a basis for the denial and the Denial letter clearly stated that they were not yet final at the time of the decision on June 30, 2022. (*See* Staff brief at 26-27.)

However, staff argues that the documents are still relevant to the proceeding because they "demonstrate the Department's efforts to embed required CLCPA analyses into its decision-

making processes [and] demonstrate a consistent approach to interpreting and applying the CLCPA that does not unfairly target any particular facility or industry" contrary to Greenidge's contention that the review and denial was handled differently because the applicant was a cryptocurrency mining operation. (*See* Staff brief at 27.)

Petitioners agree that the draft versions of CP-49 and DAR -21 are not binding, but "may be used to afford insight into the agency's thinking about a developing regulatory program, to facilitate public involvement, and as a guide to the agency's draft and final interpretation of a regulatory program." (Petitioners' brief at 19.)

I note that DAR-21 and CP-49 specifically state that they apply to all pending permit applications to the extent feasible, including renewals. (S*ee* DAR-21 at 2; CP-49 at 5.) To the extent that these policies reflect the consistency of Department's approach to permitting under the CLCPA, they are relevant to evaluating the Department staff's decision here. Similar to the Scoping Plan, these policy documents are not statutes or regulations, they do not have the force or effect of law; but are guidance for Department staff implementing the CLCPA. (*See Danskammer Issues Ruling* at 9.)

RULING: I conclude that CP-49, Climate Change and DEC Action, revised December 14, 2022, and DAR-21, The Climate Leadership and Community Protection Act and Air Permit Applications, issued December 14, 2022, were not used as the basis of the Department's decision to deny Greenidge's renewal application. They may be relevant to show whether the Department's approach to this permit is similar to its overall implementation of the CLCPA and may be considered in this adjudication.

3. CLCPA § 7(3) and the Disadvantaged Communities Map and List

The CLCPA § 7(3) provides:

> "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."

Subdivision 5 of ECL 75-0101 defines disadvantaged communities to mean "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." In turn, ECL 75-0111 describes the criteria and process to establish the Disadvantaged Communities (DAC) list and maps. The criteria are listed in subsection (1)(c):

> "Disadvantaged communities shall be identified 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."

The process includes the establishment of the climate justice working group (CJWG), release of draft lists and maps in March 2022, and public hearings culminating in the release of the final lists and maps on March 27, 2023. (*See* ECL 75-0111[1],[2]; Climate Act: Disadvantaged Communities Criteria, available at: https://climate.ny.gov/resources/disadvantaged-communities-criteria/ [last accessed September 22, 2023] [Climate Act: Disadvantaged Communities Criteria website].)

Greenidge's position is that the draft DAC Map and list of Disadvantaged Communities, released March 9, 2022 cannot be applied to Greenidge's renewal application because they were in draft form at the time of the Department staff's decision. (*See* Greenidge brief at 20.) It notes that "[t]o the extent that the Draft Maps are found to apply to Greenidge's renewal application (which Greenidge disputes), adjudication of Section 7(3) is warranted." (Greenidge brief at 20 n 23.) Greenidge lists the applicability of the CLCPA 7(3) and the DAC maps as both an issue of law and an issue of fact.

Greenidge's Issue No. 11, presented as an issue of law, is:

> "Did NYSDEC err in finding that Greenidge failed to address Section 7(3) and the Facility's potential impact on a Disadvantaged Community where (1) the NYSDEC never requested such an analysis during the permitting process; (2) the Climate Justice Working Group only issued draft guidance to identify disadvantaged communities on March 9, 2022 and (3) no final guidance or criteria identifying disadvantaged communities has been released to date."

(Statement of Issues at 9.) Greenidge's Issue No. 19, labeled as issue of fact, also concerns the applicability of CLCPA § 7(3):

> "Assuming arguendo that the Facility is located in a Disadvantaged Community or was otherwise required to address Section 7(3) and the Facility's potential impact on a Disadvantaged Community, the Facility would not disproportionately burden a Disadvantaged Community."

(Statement of Issues at 12.)

Staff, in its response to the statement of issues, noted that it did not request information regarding the impact of renewal of the permit on a Disadvantaged Community because denial of the renewal application was necessary pursuant to the requirements of CLCPA § 7(2), due to the facility's inconsistency or interference with the statewide GHG emissions limits. (*See* Staff Response at 13.) The denial was not based on Greenidge's failure to address CLCPA § 7(3). (*See id.* at 21.) Staff avers that it is not an issue for adjudication but that "it was and remains an outstanding issue that would ultimately only need to be addressed with respect to the Title V application if the Facility is found to be in compliance with Section 7(2)." (*Id.*)

Petitioners point out that § 7(3) was enacted in 2019 before Greenidge filed its application for renewal. (*See* Petitioners' brief at 48.) Therefore, that section requires that any decision to renew the Title V permit does not "disproportionately burden disadvantaged communities." Petitioners claim that Greenidge has not met its burden on this issue, noting that 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, citing 6 NYCRR 624.9(b)(1). (*See id*. and n 208).

Discussion

Section 7(3) of the CLCPA, like §7(2), took effect on January 1, 2020. (*See Danskammer v DEC,* 76 Misc 3d at 200; CLCPA § 14, referencing L 2019, ch 735, § 2.) Because § 7(3) was in effect at the time that Greenidge filed its application to renew its Title V air permit, Greenidge must demonstrate that the permit renewal will not disproportionately impact disadvantaged communities as required by CLCPA § 7(3). The criteria for identifying a disadvantaged community were included in § 2 of the CLCPA, codified at ECL 75-0111 and set out above, *supra* at 19. That criteria was available for Greenidge to address and for Department staff to consider before the DAC maps were finalized in March 2023.

Although the Department states it did not rely on the draft DAC maps to deny the application, the Denial letter states that "the draft Disadvantaged Communities map published by the CJWG may be utilized at this time for purposes of addressing the requirements of Section 7(3) of the Climate Act." (Denial letter at 19.) Staff further stated that to "ensure compliance with the requirements of Section 7(3), the Department would need to review and assess whether the Facility's continued operation disproportionately burdens the surrounding Disadvantaged Community as well as potential efforts to prioritize reductions in GHG and co-pollutants in the community." (*Id*.) I find that the assessment should occur as part of the adjudicatory process.

As set out in the *Danskammer Issues Ruling*, "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 … regulated by DEC through a federally delegated program." (*Danskammer Issues Ruling* at 60.) Title V permitting decisions are subject to the review and analysis required by both CLCPA sections 7(2) and 7(3). (*See id*. at 59.) ALJ Caruso concluded 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)." (*Id.* at 60.)

Section 7(3) of the CLCPA requires that the Department not disproportionately burden a disadvantaged community in considering and issuing permits and other approvals and decisions. The DAC maps, now issued in final form, are relevant to determining whether the facility is located within a disadvantaged community.

RULING: I conclude that the provisions of CLCPA § 7(3) are applicable to the instant permit renewal application. Greenidge must demonstrate that the facility will be in compliance with § 7(3) and would not disproportionately burden a disadvantaged community. Accordingly, the issue of whether renewal of the Title V air permit will disproportionately burden disadvantaged communities as prohibited by § 7(3) of CLCPA will be adjudicated, and the final DAC maps are relevant to that inquiry.

C. Relevance of Facility's Purpose

The next issue I directed the parties to focus on was the extent of DEC's authority to consider the purpose of the facility in determining whether its decision is consistent with or will interfere with the attainment of the statewide GHG emissions limits established in ECL article 75, and in providing a statement of justification if the facility is inconsistent with or will interfere with those goals.

1. Authority to consider purpose in determining consistency

Greenidge argues that the purpose of the facility is irrelevant to the DEC's decision-making under CLCPA § 7(2), that it lacked notice of a primary purpose standard, and that the facility's purpose — to generate electricity — is unchanged since the initial permit was issued in 2016. (S*ee* Greenidge brief at 37-41.)

DEC staff points out that the analysis under CLCPA § 7(2) requires an understanding of why GHG emissions have increased from the facility while the amount of power provided to the grid has decreased. (*See* Staff brief at 10.) The increase in demand for electricity created by crypto-mining at the facility is the reason for the increase in actual GHG emissions at the facility. (*See* Staff brief at 12-13.) The increased demand for electricity created by crypto-mining did not exist for this facility at the time the original permit was issued. (*See id.* at 9; Staff Response to Statement of Issues at 7.) Therefore, staff argues, the shift in purpose is a consideration for the CLCPA § 7(2) analysis, although not a determining factor. (*See* Staff brief at 12.)

Petitioners disagree with Greenidge's assertion that it has not changed its primary purpose since DEC issued the original Title V permit. They note that the facility filed a Notice of Self-Certification of Exempt Wholesale Generator Status with the Federal Energy Regulatory Commission (FERC) on October 6, 2015 stating that "'Greenidge will be engaged directly and exclusively in the business of owning and operating the Facility and selling electric energy at wholesale' and '[t]he electricity produced by the Facility will be sold exclusively within the United States at wholesale.'" (Petitioners' brief at 37 and n 160.) In 2020, Greenidge filed a Notice of Cancellation of Exempt Wholesale Generator Status with FERC, notifying the federal

agency that it was no longer exclusively selling electricity wholesale. (S*ee* Petitioners' brief at 37 and n 161.)

Discussion

DEC staff and petitioners point out that crypto-mining at the facility has created an increase in demand for electricity, which has created an increase in GHG emissions to generate the electricity needed to meet that demand. Greenidge does not dispute that the use of electric power for cryptocurrency mining operations is the reason that the facility's GHG emissions have increased and will continue to increase.

The CLCPA calls for drastic reductions in GHG emissions statewide over the next several decades. Continuing to produce GHG emissions at current levels is inconsistent with those limits, and certainly increasing actual emissions is inconsistent. In order to evaluate whether the permit renewal is consistent with the CLCPA GHG emissions limits, staff need to know what the actual emissions will be. Greenidge provided that information for the duration of the permit renewal term, although it did not provide projections of GHG emissions for the years 2030, 2040 and 2050. (*See* Greenidge August 20, 2021 Response at 1-2, and 7, Table 5.) The August 20, 2021 response clearly showed that Greenidge intended to emit to its full permitted PTE, 952,958 metric tons of CO2e per year, including upstream emissions during the renewed permit term, which was a drastic increase from its actual emissions under the current permit, increasing from .318 metric tons of CO2e in 2016, to 195,493 metric tons in the first six months of 2021. (*See* Greenidge August 20, 2021 Response at 6.), Table 4.)

The increasing actual GHG emissions from the facility, and Greenidge's projections that the actual GHG emissions would continue to increase to match the maximum permitted PTE, were sufficient to establish that renewal of the facility was inconsistent with the GHG emissions goals of the CLCPA. The CLCPA goals for 2030, 2020, and 2050 are planning tools to be implemented now to reduce GHG emissions in the future. (*See Danskammer Issues Ruling* at 37.) It was not necessary to consider the purpose of the facility to determine that the GHG emissions would be increasing through the permit term and beyond.

RULING: I conclude that the primary purpose of the facility was not relevant to the determination whether the decision to renew Greenidge's Title V air permit is inconsistent with the CLCPA's GHG emissions limits. I further conclude that Department staff was correct in finding that renewal of Greenidge's Title V air permit would be inconsistent with the CLCPA's GHG emissions limits under § 7(2) of the CLCPA.

2. Authority to consider purpose in determining justification

The second prong of my question regarding the relevance of the purpose of the facility under § 7(2) of the CLCPA is whether DEC has the authority and discretion to consider the purpose of the facility in providing a statement of justification. If the Department's decision is inconsistent with or will interfere with the GHG emissions goals set forth in the CLCPA, then the Department must provide a detailed statement of justification.

Greenidge listed as its eighth issue:

> "Did NYSDEC Staff improperly apply §7(2)'s requirement that it provide a "detailed statement of justification as to why such limits/criteria may not be met" when it interpreted this as requiring an evaluation as to whether the Project is "needed" (i.e., whether the absence of the Project will result in economic, social, or environmental harm to the public)."

(Statement of Issues at 9.)

Greenidge argues that Department staff improperly substituted the need for electricity for justification, which is outside of DEC's expertise and jurisdiction. (*See* Greenidge brief at 44-45.) It claims that determining whether there is a need for the facility is not within the agency's authority and expertise, and that the legislature did not intend for permitting agencies to make such a determination of need. In particular, Greenidge claims, the Public Service Commission (PSC) is responsible for determining whether there is a need for an electric generating facility, relying on Public Service Law (PSL) § 68, which authorizes the PSC to issue certificates of public convenience and necessity for the construction of gas or electric plants. (*See* Greenidge brief at 47.) Greenidge contends that only the PSC and NYISO have the authority to retire an electric generating facility. (S*ee* Greenidge brief at 48-49.)

Greenidge also argues that "it is the manner in which GHG emissions are avoided and minimized (i.e., why they cannot further be reduced) and the potential mitigation measures that could further reduce GHG emissions, including whether they are feasible, that is required for justification." (Greenidge brief at 32.) It argues that justification should not be based on whether there is a need for a facility, but "justification is why the permitted activity or operations cannot avoid or reduce its GHG emissions further." (*Id.*)

Department staff argues that it would "likely prove impossible" to justify a decision to renew the permit without considering the purpose of the facility. (*See* Staff brief at 15.) Moreover, staff emphasizes that CLCPA § 7(2) "requires DEC to provide a detailed statement of justification as to why the Statewide GHG emissions limits may not be met – but only in the event DEC determines a permitting decision it is making would be inconsistent with or interfere with the attainment of such limits." (*Id.*) Because the decision to deny the permit renewal is consistent with the CLCPA's goals, targets, and statewide GHG emissions limits, staff concluded that § 7(2) does not require DEC to issue a detailed statement of justification. (S*ee id.*) Staff lays out the three-prong analysis flowing from §7(2):

> "CLCPA Section 7(2) has three distinct elements. First, as is relevant here for purposes of the Department Staff's review of the Application, the Department must consider whether the renewal of a Title V air permit for the Facility would be inconsistent with or will interfere with the attainment of the Statewide GHG emission limits established in ECL Article 75. Second, if the decision to renew a Title V air permit for the Facility would be inconsistent with or will interfere with the Statewide GHG emission limits, then the Department must

> also provide a detailed statement of justification for the decision to issue the permit notwithstanding the inconsistency. Third, in the event a justification is available, the Department would also have to identify alternatives or GHG mitigation measures to be required where the Facility is located."

(Staff brief at 16-17.)

Staff points out that although the CLCPA does not require a justification statement for a decision that was consistent with the CLCPA GHG emissions limits, staff did consider the need for the facility based on electric system reliability, relying on publicly available reports from the NYISO to determine whether granting a permit renewal that would be inconsistent with emissions limits could be justified based on grid reliability. (S*ee* Issues Conference tr at 91-92.) In the Denial letter, staff summarized the NYISO reports and concluded: "The removal of the Facility – with its 108 MW capacity – would therefore not cause any reliability concerns for the electric grid." (Denial letter at 17.)

Staff also argues that Greenidge did not present any justification for the project, and that Greenidge's attempt to present economic ramifications of the denial of the permit renewal cannot be introduced for the first time at this juncture. (S*ee* Staff brief at 32-34.)

Petitioners argue that because Greenidge's increased emissions are inconsistent with and interfere with attainment of statutorily-mandated emissions reduction requirements in 2030, 2040 and 2050, CLCPA § 7(2) prohibits DEC from issuing the requested permit unless Greenidge can provide "a detailed statement of justification for the continued operations of the Facility notwithstanding the inconsistency." (Petitioners' brief at 30, quoting Denial letter at 6.) They argue that Greenidge has not provided any justification for the increased emissions from the facility and that the Department staff properly relied on NYISO reports which showed there was no need for the facility to provide power to the electric grid. (*See* Petitioners' brief at 33-34.) Petitioners also respond to Greenidge's argument that DEC cannot deny renewal of a permit for an electric generating facility because it is not authorized to retire electric generation facilities, pointing out that the PSC and NYISO generator deactivation processes are not supplanted by DEC's analysis of the renewal of the Title V air permit pursuant to § 7(2) of the CLCPA. (*See* Petitioners' brief at 40-41.)

Discussion

The Department's Denial letter addressed the issue of justification:

> "[T]he Application does not provide the Department with any information to support a justification in the event of a finding of inconsistency, as is the case here, such as whether cryptocurrency mining operations in and of themselves could be necessary or could provide any economic or social utility for the State. Examples of potential justification for a project that is inconsistent with the Climate Act's Statewide GHG emission limits, such as the Facility, include that

the absence of the project will result in economic, social, or environmental harm to the public."

(Denial letter at 16.)

Although Department staff must provide a statement of justification if it is making a decision inconsistent with the CLCPA GHG emissions limits, the information to support that statement should come from the applicant. Examples of justification are:

- 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.

(*See* CP-49 at 7.)

The purpose of a facility could be relevant to the determination as to whether it is justified inasmuch as it could demonstrate that absence of a project could result in economic, social, or environmental harm to the public. If the primary purpose of the facility were still to provide power to the grid, then it could be found to impact the safety and reliability of the state's energy systems.

Department staff did not specifically request any information from Greenidge regarding justification for the renewal of the Title V Air permit notwithstanding the facility's inconsistency or interference with the GHG emissions limits (s*ee* NOIA; RFAI 2) but the completion notice published in the ENB on September 8, 2021 stated: "At this time, the Applicant has not provided a justification for the Facility nor proposed sufficient alternatives [or] GHG mitigation measures." Greenidge did not submit any documentation relevant to justification after the completion notice was issued.

Staff undertook a review of NYISO reports to determine if there was a potential justification based on a long-term need for electricity to ensure grid reliability, consistent with the example of justification provided in CP-49. In the *Danskammer Issues Ruling*, ALJ Caruso ruled that staff's "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." (*Danskammer Issues Ruling* at 35.)

This case is distinguishable from Danskammer, in that Danskammer is seeking to repower its facility to provide base load electricity to the grid, and was arguing that its electric power would displace power from facilities with higher GHG emissions. (*See Danskammer Issues Ruling* at 27-30.) The issue of grid reliability was adjudicable because it was a contested basis for denial of the Title V permit to Danskammer. (S*ee Danskammer Issues Ruling* at 49.) Greenidge, on the other hand, did not claim that its facility is needed for grid reliability but it is

claiming that the purpose of the facility – to produce electricity – is unchanged. (S*ee* Greenidge brief at 40.)[4]

The applicant bears the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the Department. (*See* 6 NYCRR 624.9[b][1].) "The same burden applies when an applicant requests a hearing after DEC has denied a permit application." (*Danskammer Issue Ruling* at 33-34, citing *Matter of Joseph P. Serth*, Decision of the Commissioner, December 19, 2012.) The burden is on Greenidge to submit information to demonstrate that a decision to renew the permit would be justified even though it is inconsistent with the CLCPA GHG emissions limits. (*See id.*) Greenidge did not provide Department staff with the minimum information it needed to find the project justified notwithstanding its inconsistency with the GHG emissions limits.

Having failed to meet that burden, Greenidge cannot now challenge the Department staff's review of NYISO reports to determine whether there was justification for renewing Greenidge's Title V permit based upon grid reliability. The purpose of the continued operation of the facility is relevant to justification, and staff examined the available information in the absence of any submission by Greenidge.

RULING: I conclude the purpose of the facility is relevant to whether a decision that is inconsistent with the GHG emissions limits of the CLCPA is justified. I further conclude DEC staff did not err in relying on publicly available NYISO reports to determine if renewal of the project could be justified, in the absence of any submission by Greenidge to justify a permit renewal inconsistent with the CLCPA GHG emissions goals.

D. Mitigation

I instructed the parties to address whether § 7(2) of the CLCPA requires DEC to consider mitigation proposals if it finds that a decision would be inconsistent with or will interfere with the attainment of the statewide GHG emissions limits established in ECL article 75, without justification for not meeting those limits.

Greenidge argues that mitigation is essential to the findings on both consistency and justification. (*See* Greenidge brief at 27-34.) Therefore, it argues that the Department must consider mitigation in its preliminary analysis of whether a project is inconsistent and whether it is justified. It takes issue with staff's purported failure to consider Greenidge's March 25, 2022 letter proposing a permit condition to reduce emissions by 40% by 2025 and to achieve zero carbon emissions by 2035. Greenidge characterizes staff's position: "that it need not consider

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[4] Although Greenidge did not provide any justification based on grid reliability for the facility in its application, it now seeks to offer expert testimony on that issue. (S*ee* Greenidge Statement of Issues, Issue No. 17, at 11.) Greenidge proposes to call Dr. Alan C. Marco, Steven Naumann and Timothy Rainey, MBA, CPA, to testify as to why the DEC's assessment of electric system reliability for Zone C was incomplete and improper. The proposed testimony will include DEC's failure to consider Ancillary and Essential Reliability Services, the resiliency benefits associated with renewing the facility's permit, and the economic harm that will directly result from the failure to renew the facility's Title V permit.

mitigation as part of its Section 7(2) analysis where it finds an inconsistency and cannot issue a statement of justification." (Greenidge brief at 27.)

In support of its argument that mitigation should be considered as part of the analysis of justification, Greenidge relies on DAR-21, which includes mitigation as a potential example of acceptable justification: "[t]he applicant will undertake efforts to mitigate the GHG emissions associated with the project[.]" (Greenidge Brief at 33; *see* DAR-21 at 6.)

DEC staff responds that it is not required to consider mitigation proposals if an inconsistent decision cannot be justified. (S*ee* Staff brief at 16.) Staff writes: "Because there was not a sufficient justification for a decision to issue the Title V air permit renewal notwithstanding its inconsistency with the Statewide GHG emissions limits, DEC Staff did not reach this final prong of the CLCPA Section 7(2) analysis." (Staff brief at 17.) Nevertheless, staff considered Greenidge's mitigation proposals and found that the measures proposed in Greenidge's March 25, 2022 letter were vague and speculative. (*Id.*)

Petitioners agree with staff that mitigation should only be considered when an inconsistent project is found to be justified (*see* Petitioners' brief at 42) and posit that any mitigation measure offered must be real, permanent, quantifiable and enforceable. Petitioners note that Greenidge has not claimed or submitted documentation showing that any of the proposed mitigation measures have been put into place since the March 2022 proposal and the measures remain speculative. (*See id.* at 43.)

Discussion

Staff's position is supported by the plain language of §7(2): **"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." (Emphasis added.) The *Danskammer* court held 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 Misc 3d at 252.)

Only if the Department is making a decision that is inconsistent with the GHG emissions goals is it required to provide a statement of justification and identify alternatives or GHG mitigation measures, and it falls to the applicant to provide the information to make those findings. Although CP-49 instructs that if there is a statement of justification, mitigation options should be included in that statement, it also directs "[i]f a justification is not available, then the Department need not reach the next stage of the CLCPA Section 7(2) analysis regarding alternatives or GHG mitigation." (CP-49 at 7.)

However, Greenidge is correct that mitigation proposals made by an applicant may be relevant to all stages of the § 7(2) analysis. If an applicant can mitigate emissions at the outset, then the decision to approve a new permit, modification, or renewal may, in theory, be consistent with the GHG goals of the CLCPA. That is not the case here. Greenidge projects actual

emissions to equal the maximum PTE level. There was no mitigation offered that would decrease or eliminate emissions at the start of the permit term.

Both CP-49 and DAR-21 refer to mitigation as a consideration in determining justification. CP-49 states that mitigation options should be included in a justification statement for a decision inconsistent with the GHG emissions limits. It lists the following, **at a minimum,** to be included in the justification statement:

- 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.

(CP-49 at 7.)

CP-49 does not, however, list mitigation as an example of justification in and of itself. If the Department were making a decision inconsistent with the GHG emissions limits, then it would need to include mitigation in the justification statement, as well as the four other items above. Other than the current level of GHG emissions, Greenidge did not submit the remainder of the information in a concrete form. It did not provide projected future GHG emissions in 2030, 2040, and 2050. (*See* Greenidge August 20, 2021 Response at 1, 7.) The only alternatives or mitigation offered were proposals to study, during the permit term, the feasibility of installing solar farms and the benefits of co-firing green hydrogen with natural gas. There was no actual alternative or mitigation offered that would occur at the outset of the permit, or even during the permit term. (S*ee* Greenidge August 2, 2021 Response at 8-9, Table 3.) Proposals to study mitigation options and alternatives during the permit term are not "real, additional, quantifiable, permanent, verifiable, and enforceable" as required by CP-49 and DAR-21. (*See* CP-49 at 8; DAR-21 at 6.) They do not result in "measurable GHG emissions reduction or sequestration." (*See id*.) Greenidge's proposals were not acceptable mitigation under the third prong, even if the Department needed to consider them.

Greenidge's reliance on the language from DAR-21 listing mitigation options to be included in a justification statement is misplaced and ignores the rest of the policy. DAR-21 follows the three-prong approach set out in § 7(2), stating that "If DEC determines that the project would be inconsistent with or would interfere with the attainment of the Statewide GHG emission limits and that there is sufficient justification for the project, then an explanation of any potential alternatives or mitigation measures must be prepared." (DAR-21 V(E) at 6; *see also Danskammer v DEC,* 76 Misc 3d at 252; *Danskammer Issues Ruling* at 33 and n 10.)

RULING: I conclude that CLCPA § 7(2) does not require DEC to consider mitigation proposals at the first stage of the CLCPA § 7(2) analysis if the mitigation proposals do not render the decision consistent with the CLCPA GHG emissions goals. Although mitigation could theoretically render a decision consistent with the CLCPA GHG emissions goals, Greenidge did not submit any proposal that would do so here.

If the decision would be inconsistent with or will interfere with the attainment of the statewide GHG limits established in ECL article 75, and if Department staff can provide a detailed statement of justification as to why such limits/criteria may not be met, then Department staff shall identify alternatives or greenhouse gas mitigation measures to be required where such project is located before making a decision that would otherwise be inconsistent with the GHG emissions limits. The burden is on the applicant to provide the information necessary to make the detailed statement of justification and to identify alternatives or mitigation. Greenidge has not met that burden.

E. Other Issues of Law in Greenidge's Statement of issues

Greenidge identified fourteen issues of law in its statement of issues and subsequent filings. Some were addressed above, and the remainder are addressed below.

1. Whether Greenidge has a property interest in a Title V permit

Greenidge identified this issue of law as Issue No. 3 in its statement of issues:

> "Whether Greenidge, as an existing facility that had been permitted since the 1930s, has a protectable property interest in a Title V permit and whether given the absence of regulations or relevant guidance NYSDEC violated Greenidge's procedural due process rights by shifting the burden of demonstrating compliance with CLCPA to the applicant."

(Statement of Issues at 8.) Greenidge did not brief this issue. DEC staff argues that "[t]o have a property interest, one must clearly possess 'more than an abstract need or desire for it' or a 'unilateral expectation of it'; instead, one must 'have a legitimate claim of entitlement to it.' Property interests do not arise in benefits that are 'wholly discretionary.' A 'protectable property interest' will therefore not 'arise in benefits that are discretionary' lest the 'discretion of the governmental agency is so narrowly circumscribed that approval of a proper application is virtually assured.'" (Staff Response at 5 [citations omitted].) Staff asserts that issuance of a Title V permit is not ministerial - the decision to issue or renew a Title V permit is subject to analysis under various statutory and regulatory schemes, including the CLCPA. (*See id.*) Staff concludes that because the decision to issue or renew a Title V permit is discretionary, the applicant has no protectable property interest. (*See id.*)

Petitioners note that Greenidge's current permit cited 6 NYCRR 201-6.4(a)(6) for the proposition that the permit does not convey property rights. (*See* Petitioners' brief at 15.) That regulation, setting forth standard conditions for Title V permits, states: "The permit does not convey any property rights of any sort, or any exclusive privilege." Petitioners also argue that a

protectable property interest does not arise in a permit that is subject to an agency's discretion, citing *Danskammer v DEC,* 76 Misc 3d at 230.

Discussion

The same issue was squarely addressed by the supreme court in *Danskammer:*

> "Here, Danskammer did not demonstrate that it had a protectable property interest in a Title V permit. That is, it did not demonstrate that it was entitled to such a permit, or that the DEC's discretion in granting the same was so narrowly circumscribed that approval of a permit was virtually assured.
>
> "Moreover, as discussed supra, the denial of the permit was not based on a de facto 'rule' promulgated by the DEC without affording Danskammer procedural due process. Rather, the DEC was fulfilling its obligations under Section 7, based on a statute enacted by the Legislature.
>
> "In sum, on the record presented, Danskammer did not demonstrate that the denial of the permit violated its constitutional right to procedural due process."

(*Danskammer v DEC,* 76 Misc 3d at 253.)

The court in *Danskammer v DEC* was also addressing a Title V permit, although the application was for a modification, not a renewal, of the permit. Other than that distinction, the analysis is similar. DEC has discretion in determining whether or not to grant a renewal application. As in *Danskammer v DEC,* approval of the renewal application was not assured in light of the enactment of the CLCPA and its application to the decision as to whether to renew the permit.

RULING: I conclude that Greenidge did not have a protectable property interest in a Title V air permit and the Department did not violate Greenidge's procedural due process rights.

2. Permit renewal v. new source

Greenidge's Issue No. 4 is:

> "Whether NYSDEC erred in its CLCPA Section 7(2) analysis to determine whether the Project is inconsistent with or will interfere with the attainment of the Statewide GHG emissions limits, by treating the Facility as a new source notwithstanding the fact it sought a permit renewal for the unchanged, existing Facility and did not seek any increase in allowable emissions."

(Statement of Issues at 8.)

Greenidge argues that the renewal application cannot possibly be inconsistent with or interfere with the statewide GHG emissions limits because it is not a new source. (*See* Greenidge brief at 40-41.) Further, Greenidge claims that "[m]aking a decision to shut down an existing facility more than seven years before a statutory emission reduction is required is facially arbitrary and capricious." (Greenidge brief at 41.)

Staff argues that the CLCPA § 7(2), by its express terms, applies to permits, licenses and other administrative approvals and licenses. Section 7(2) requires the agency to consider whether its decisions are inconsistent with the GHG emissions limits, and here the decision is whether or not to renew the permit. (*See* Staff Response at 7.) Staff also points out that the Department's Title V air permit regulations require that renewal applications will be treated as new applications (*see* 6 NYCRR 201-6.6[a][1]) consistent with the EPA requirements set forth in 40 CFR 70.7(c)(1)(i). (*See* Staff Response at 7.)

Department staff also notes that it may treat a permit renewal application as a new application if there is a material change in the scope of permitted actions or in the applicable law or regulations since the original permit was issued, pursuant to 6 NYCRR 621.11(h). Staff avers that Greenidge's change in the purpose of the facility and the enactment of the CLCPA both qualify as material changes allowing the Department to process the renewal application as a new application. (*See* Staff Response at 7 n 23.)

Petitioners also argue that pursuant to 6 NYCRR 201-6.6(a)(1), Title V air permit renewals "are subject to the same procedural and review requirements, including those for public participation and affected State and EPA review that apply to initial permit issuance" (Petitioners' brief at 16 n 67). Moreover, they point out that 6 NYCRR 621.11(i) provides that for "delegated permits, an application for permit renewal or modification will be treated as a new application under this Part." (Petitioners' brief at 16 n 68.) Thus, they argue "a renewal application such as Greenidge's Title V permit receives the same treatment as an application for a new permit." (Petitioners' brief at 16.)

Discussion

Section 7(2) of the CLCPA applies not only to the issuance of new permits, but also to "other administrative approvals and decisions" including whether to deny, amend, modify or renew a permit. The CLCPA does not intend for state agencies to let existing facilities continue to emit GHG at the same level, or in Greenidge's case, at increased actual levels, when a decision to renew a permit arises. When an administrative approval or decision is to be made on a facility's operations, whether they be new, expanded or renewed, the agency making the decision must conduct an analysis under § 7(2) for consistency with the CLCPA GHG emissions limits to ensure that the targets will be met by the statutory deadlines. In the *Danskammer Issues Ruling*, ALJ Caruso addressed a similar argument, finding that 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 Issues Ruling* at 37.)

Therefore, the fact that the facility is an existing source and that the renewal permit term would expire before the 2030 CLCPA GHG emissions limits does not render the permit renewal consistent with the CLCPA GHG emissions limit goals or remove a permit renewal application from consideration under § 7(2) of the CLCPA. Moreover, renewal of a Title V air permit is treated as a new application under the state and federal regulations. (*See* 6 NYCRR 201-6.6[a][1]; 6 NYCRR 621.11[i]; *see also* 40 CFR 70.7[c][1].)[5]

RULING: I conclude that the Department staff did not err in treating Greenidge's application as a new application under § 7(2) of the CLCPA, which is applicable to all permitting decisions, including renewals. I further conclude that Department regulations regarding Title V air permits expressly require that a renewal application be treated as a new application for a permit. (*See* 6 NYCRR 201-6.6[a][1]; 6 NYCRR 621.11[i].)

3. Statewide v. facility emissions in 1990

Greenidge's Issue No. 5 is:

> "Whether when evaluating Greenidge's consistency with CLCPA Section 7(2), NYSDEC erred for failing to apply GHG emissions standards on a state-wide basis and requiring Greenidge to achieve greater emissions[6] than contained in ECL Section 75-0107's requirement that emissions reductions are to be evaluated "as a percentage of 1990 emissions."

(Statement of Issues at 8.)

Related to Issue No. 5 is Greenidge's Issue No. 6:

> "Whether NYSDEC erred in its CLCPA Section 7(2) analysis by failing to apply ECL Section 75-0107 which makes clear that emissions reductions are to be evaluated 'as a percentage of 1990 emissions.'"

(*Id*.)

The Greenidge facility was a coal-burning facility in 1990, and the GHG emissions were substantially lower when it converted to a natural gas-fired plant. According to Greenidge, the

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[5] 40 CFR 70.7(c)(1) regarding air permits issued under the Clean Air Act, provides in pertinent part: "The program shall provide that:
(i) Permits being renewed are subject to the same procedural requirements, including those for public participation, affected State and EPA review, that apply to initial permit issuance."

[6] This appears to be a typographical error, because DEC is not requiring Greenidge to achieve "greater emissions." Apparently, the word "limits" or "reductions" is missing.

facility's potential CO2e emissions are approximately 70% lower than the actual emissions in 1990. Greenidge argues that the renewal of its permit is consistent with CLCPA's emissions limits, which are measured as a percentage of 1990 emissions levels, citing 6 NYCRR 496.1, which provides:

> "This Part adopts limits on the emissions of greenhouse gases from across the State and all sectors of the State economy for the years 2030 and 2050, as a percentage of 1990 emission levels of 60 percent and 15 percent, respectively, as established in the Climate Leadership and Community Protection Act, Chapter 106 of the Laws of 2019."

Greenidge claims that "for facilities that existed in 1990, a comparison of their GHG emissions in 1990 to present is mandated as is a finding of consistency where the facility has not only met but already exceeded the required 40% reduction by 2030." (Greenidge brief at 36.) Greenidge does not explain how this would work with facilities not in existence in 1990, other than to complain that other permittees "have not done their part." (*Id.*)

Staff responds that the relevant inquiry under § 7(2) is whether the decision at issue would interfere with statewide limits, not whether an individual facility has reduced GHG levels since 1990. (*See* Staff Response at 8.) Greenidge's proposed approach would reward facilities which had substantial GHG emissions in the past. (*Id*. at 9.)

Petitioners counter that "these limits apply collectively statewide—they do not adhere directly or proportionately to individual sources. Greenidge's interpretation is utterly nonsensical, as it would allow the worst polluters to continue polluting as of right and completely fails to account for new emission sources that have entered operation since 1990." (Petitioners' brief at 26.)

Discussion

If the regulation, 6 NYCRR 496.1, is not clear as to whether the GHG emissions for the baseline year of 1990 are to be measured on a statewide basis as opposed to a facility-by-facility basis, § 7(2) of CLCPA and the statutory definition are. The definition of "greenhouse gas emission limit" is "the maximum allowable level of **statewide** greenhouse gas emissions, in a specified year, expressed in tons of carbon dioxide equivalent, as determined by the department pursuant to this article." (ECL 75-0101[8] [emphasis added].) Section 7(2) directs the Department to consider consistency with statewide GHG limits, not with historical facility GHG emissions.

RULING: Other than inclusion in the calculation of the baseline statewide emissions levels, I conclude that the level of GHG emissions from the Greenidge coal burning facility in 1990 is not relevant to the determination of whether renewal of Greenidge's Title V permit would be "inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law" pursuant to § 7(2) of the CLCPA.

4. Greenidge's Proposal to Cease Operations by 2040

Greenidge listed as its seventh issue:

> "Assuming, but not conceding, that Greenidge must demonstrate plans for compliance with the CLCPA in 2040, was it arbitrary and capricious or otherwise unlawful for DEC to ignore the Facility's proposal to use cessation of operations to comply with the CLCPA's zero emissions by 2040 requirement for the electricity generation sector."

(Statement of Issues at 8.)

The proposal to use cessation of operations is apparently a reference to Greenidge's March 25, 2022 letter, which offered two conditions to be included in the Title V air permit:

> "A binding condition that requires a 40% reduction in GHG emissions from our current permitted level by the end of 2025 – a full five (5) years before the CLCPA's statewide target date of 2030; and
>
> "A requirement that Greenidge be a zero-carbon emitting power generation facility by 2035 - a full five (5) years before the statewide target for the electric generating sector found in Public Service Law § 66-p."

(March 25, 2022 letter at 2.)

Department staff responded that it did not ignore Greenidge's proposal but that the proposal did not render renewal of the permit consistent with the CLCPA GHG emission limits. "Nothing in the plain language of the CLCPA, including Section 7(2), supports the contention that a permit would be consistent with the Statewide GHG emission limits, or that DEC is authorized or required to approve any permit application, so long as the facility shuts down by 2040." (Staff Response at 10.) Department staff posits that, because the denial did not rely on whether Greenidge's future compliance with PSL § 66-p would be achieved through cessation of operations, this is not a relevant issue for adjudication.

Petitioners argue that both proposed conditions rely on the assumption that "all the CLCPA requires is a facility-by-facility permit condition requiring the permittee to meet the state-wide GHG emission reductions by or in advance of the required date, without any consideration of critical facilities that cannot meet the GHG reductions and thereby require additional emission reductions (or eliminations) from other less critical sources, and without any plan of implementation that can be monitored for compliance." (Petitioners' brief at 46.)

Discussion

The "CLCPA's zero emissions by 2040 requirement for the electricity generation sector" (Statement of Issues at 8) is based on Public Service Law (PSL) § 66-p. On one hand, Greenidge argues that DEC was not authorized to base the denial on that provision of the CLCPA. On the other hand, Greenidge argues that DEC acted arbitrarily and capriciously by not finding the permit renewal consistent in light of Greenidge's proposal to comply with PSL § 66-p.

Department staff did not base the June 30, 2022 denial on PSL § 66-p, as discussed below. Greenidge's proposal to comply with PSL § 66-p in the future does not alleviate the Department from its obligation to consider the consistency of a decision with the CLCPA GHG emissions limits when the decision is being made. (*See Danskammer Issues Ruling* at 37.) The proposal to shut down in 2035 or 2040 ignores the addition of substantial GHG emissions in the interim, which will remain in the atmosphere beyond the term of the permit. (*See id*.) The GHG emissions limits are targets; the state cannot meet those targets if it is headed in the opposite direction until the target deadline.

RULING: I conclude that Department staff did not err in finding the permit renewal inconsistent with the CLCPA GHG emissions limits notwithstanding Greenidge's proposal to use cessation of operations to comply with the CLCPA's zero emissions by 2040 requirement for the electricity generation sector.

5. Authority to Apply Public Service Law § 66-p

Greenidge's ninth and tenth issues in its statement of issues touch on the authority of the Department to apply or consider PSL § 66-p which was enacted as part of the CLCPA, as a basis for denial of Greenidge's renewal application.

Greenidge's ninth issue is:

> "Whether NYSDEC acted in error by employing an improper analysis for its evaluation under Section 7(2) of the CLCPA as to whether the Project is inconsistent with or will interfere with the attainment of the Statewide GHG emissions limits when it interpreted the CLCPA to require the Project to demonstrate compliance with the CLCPA's 2040 targets and goals, which are under the jurisdiction of the New York Public Service Commission."

(Statement of Issues at 9.)

Greenidge's tenth issue is:

> "Whether there is any basis for NYSDEC to conclude that the mode of operation of a regulated electric corporation governed by New York's Public Service Law, is anything other than generating electricity. Alternatively, assuming DEC was correct in determining that the Facility was a cryptocurrency mining operation, did NYSDEC

> act in error of law in evaluating the Facility's compliance with the CLCPA's zero emissions by 2040 requirement for the electricity generation sector."

(Statement of Issues at 9.)

To support its position on these related issues, Greenidge argues that DEC exceeded its authority in applying PSL § 66-p, which requires:

> "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."

PSL § 66-p(2)(a).

Regarding the issue of "whether there is any basis for DEC to conclude that the mode of operation of a regulated electric corporation governed by New York's Public Service Law, is anything other than generating electricity," staff contends that it did not make the conclusion that Greenidge was a cryptocurrency mining operation independently, but instead relied on Greenidge's own statements in its application materials and to the public at large. (*See* Staff Response at 12.) Department staff considered the change in the Facility's primary purpose from providing electric power to the grid to behind-the-meter cryptocurrency mining, and "the concomitant increase in GHG emissions, as part of its inconsistency determination under CLCPA Section 7(2)." (*Id*.)

Staff argues that DEC is "within its legal authority to consider PSL § 66-p as it relates to the analysis required by CLCPA Section 7(2). Lack of compliance with Section 66-p of the PSL, including through the generation of electricity that results in GHG emissions in 2040, would itself be inconsistent with or interfere with attainment of the Statewide GHG emission limits and, thus, relevant for DEC to consider as part of its required analysis and determination pursuant to CLCPA Section 7(2)." (*Id.* at 11 [citations omitted].)

Discussion

During the review process, DEC staff requested a discussion of "the method[s] the facility will use to comply with the CLCPA's zero emissions standards by 2040 requirement for the electricity generation sector." (RFAI 2, Item 7 at page 2.) Greenidge did not object to the question and replied that it would "comply with both CLCPA and any future Department mandate set forth in a regulation of general applicability, including the total elimination of GHG emissions by 2040. Of course, Greenidge's commitment also applies to meeting the zero emissions requirement in Section 66-p of the Public Service Law." (Greenidge August 20, 2021 Response at 2.)

Although the Denial letter includes a paragraph on PSL § 66-p and the Climate Action Council, Scoping Plan, and future regulations, these are discussed under the heading "Overall Climate Act Requirements" in addition to the Statewide GHG emissions reduction requirements. The CLCPA included enactment of PSL § 66-p, and that section is part of the overall framework of the CLCPA. Both staff and Greenidge addressed the requirements of PSL § 66-p during the review process. However, that section was not the basis for denial of the permit renewal. (*See* Denial letter at 6.) The basis for staff's denial is clearly set out: "[T]he Department hereby determines that the Facility's continued operation in its current manner **would be inconsistent with or would interfere with the attainment of the Statewide GHG emission limits established in Article 75 of the ECL and reflected in Part 496**." (June 30, 2022 Denial letter at 8 [emphasis added].)

Greenidge is correct that the CLCPA does not authorize the Department to deny a permit based on whether a facility will meet the PSL § 66-p targets. (*See Danskammer Issues Ruling* at 25-26 [no indication in CLCPA that PSL § 66-p targets provide an independent basis for DEC to deny a permit].) As in *Danskammer*, if Greenidge fails to meet the PSL § 66-p target, that would not make the permitting decision more inconsistent with the CLCPA GHG emissions goals than the increase in actual GHG emissions would. (*Id.* at 26.) However, PSL § 66-p was not the basis for the Department staff's decision to deny Greenidge's permit renewal application. The denial was explicitly based on the failure to meet the standards established under the CLCPA in article 75 of the ECL and 6 NYCRR part 496 under the CLCPA §7(2), which the Department is clearly authorized to administer.

RULING: I conclude that Department staff did not err by denying Greenidge's permit renewal application based on PSL § 66-p because the Department based the denial on the CLCPA § 7(2) and not on PSL § 66-p.

6. Appropriate baseline for GHG emissions

Greenidge's twelfth issue is:

> "Whether NYSDEC acted in error of law by employing an analysis for its evaluation under Section 7(2) of the CLCPA that failed to utilize the Facility's potential to emit (PTE) GHG as the basis for analysis of whether renewing the Facility Title V permit is inconsistent with or will interfere with the attainment of the Statewide GHG emissions limits."

(Statement of Issues at 9.)

Greenidge claims in its brief that this is an issue of fact that needs to be adjudicated, although it is listed as an issue of law in its Statement of Issues. (*Compare* Statement of Issues at 9 *with* Greenidge brief at 67-68). I conclude that the appropriate baseline for emissions for analysis under § 7(2) is a question of law.

Greenidge argues that the Department's use of GHG emissions data from 2017 through 2020 to project emissions through 2030 and beyond became "a fixed general principle that, in

essence, dictated the outcome of Greenidge's renewal application." (Greenidge brief at 67.) Staff argues that it considered all of the applicable emissions data provided by Greenidge - actual, potential and projected actual emissions. Staff points out that potential emissions are generally greater than actual emissions because potential emissions are the maximum emissions that would result from running a facility 24 hours a day for 365 days a year. (*See* Staff Response at 13-14.) Greenidge projected that its actual emissions for 2022 through 2026 would be its overall PTE, despite claiming that it would be decreasing emissions over time. (S*ee* Greenidge August 2, 2021 Response at 9, 10, Table 5.)

Petitioners point out that the emissions data[7] used by Department staff in the Denial letter was submitted by Greenidge. (Petitioners' brief at 17-18.)

Discussion

The data submitted by Greenidge established a baseline for actual emissions since 2016, which rose from .318 metric tons in 2016 to 195,494 metric tons for the first half of 2021, including upstream CO2e emissions. (*See* Greenidge August 20, 2021 Response at 6, Table 4.) Greenidge also submitted data showing that its projected actual emissions for 2022 through 2026 would be the same as the current PTE: 952,958 metric tons of CO2e per year, including upstream emissions. (*See id.* at 7.)

The CLCPA and specifically § 7(2) is intended to curtail actual emissions, as it requires consideration of "attainment of the statewide greenhouse gas emissions limits." Greenidge's increase in demand for electric power, and corresponding increase in actual emissions, is relevant to that consideration. Greenidge's actual emissions have been increasing since the permit was issued in 2016 and Greenidge projects that they will continue to increase, to equal the maximum potential to emit. (*See id.* at 6-7). The actual emissions level, including upstream emissions, is the appropriate baseline for determining whether renewal of the permit would be inconsistent with the CLCPA's GHG emissions limits. (*See Danskammer Issues Ruling* at 38 [CLCPA inconsistency review includes upstream emissions without further regulations].)

RULING: I conclude that Department staff did not err in using the facility's actual GHG emissions under the Title V permit as the baseline GHG emissions level for analysis of whether renewing the Title V permit is inconsistent with or will interfere with the attainment of the statewide GHG emissions limits under § 7(2) of the CLCPA.

[7] Petitioners argue that Greenidge has introduced "confusing new terminology, including 'actual PTE' in apparent support of this claim." (Petitioners' brief at 17.) As petitioners point out, "actual emissions" and "potential to emit" are defined terms. (*See* Petitioners' brief at 17, citing 6 NYCRR 231-4.1[b][1]; 200.1[b][l]). Actual PTE is not. Greenidge responds that the term "projected actual emissions" was a term introduced by staff in the Denial letter.

7. Impact of cryptocurrency mining moratorium legislation

Greenidge proposed a new issue of law (Issue 12A) at the issues conference on December 8, 2022:

> "Whether NYSDEC's Denial and it determinations under CLCPA Section7(2) were arbitrary and capricious based on the legislative findings that insufficient information exists regarding whether the use of electric generating facilities to provide energy for behind-the-meter cryptocurrency mining operations is inconsistent with or will interfere with the state's ability to meet the statewide greenhouse gas emission reduction goals as well as the nature and extent of the costs and benefits of such operations."

(Greenidge's Statement of Issue 12A, dated December 13, 2022.)

Greenidge relies on the Sponsor's Memorandum and the Governor's Approval Memorandum for legislation signed into law on November 22, 2022, which establishes a two-year moratorium on air permit issuance and renewal for fossil-fueled cryptocurrency mining operations that use proof-of-work authentication methods to validate blockchain transactions. (*See* L 2022, ch 628; ECL 19-0331.) The legislation directs the Department, in consultation with the Department of Public Service, to prepare a generic environmental impact statement (GEIS) on cryptocurrency mining operations that use proof-of-work authentication methods and sets forth required issues to be analyzed in the statement. (*See* L 2022, ch 628, § 3.)

Greenidge also argues that language in the Sponsor's Memorandum requiring that the state "'must determine whether growth of the Proof-of-Work authentication cryptocurrency mining industry is incompatible with our greenhouse gas emission targets established in law'" means that the Department did not have sufficient information when it denied the permit renewal. (*See* Greenidge brief at 51.) Also, because the Governor's Approval Memorandum references "the importance of creating economic opportunity in communities that have been left behind," Greenidge argues that the economic benefits of cryptocurrency mining may support a finding of justification under CLCPA § 7(2). (*See id.* at 52.)

Department staff responded that the cryptocurrency moratorium is not an appropriate issue for adjudication. First, staff argues, DEC based its determination on a case-specific determination under § 7(2) of the CLCPA, not on SEQRA. It was not a generic evaluation of the cryptocurrency industry as a whole, as contemplated by the moratorium legislation. Second, staff argues that the cryptocurrency moratorium, enacted subsequent to Greenidge's application and DEC's denial, does not apply to Greenidge's application. (*See* Staff Response to Issue 12A, dated December 16, 2021, at 1.)

Petitioners argue that the legislative findings of the cryptocurrency moratorium legislation actually support the Department's denial:

> "The continued and expanded operation of cryptocurrency mining operations running proof-of-work authentication methods to

validate blockchain transactions will greatly increase the amount of energy usage in the state of New York, and impact compliance with the Climate Leadership and Community Protection Act."

(Petitioners' Response to Issue 12A at 4, quoting A7839C § 1[e].) Petitioners further claim that Greenidge's increased and increasing emissions since the effective date of the CLCPA, January 1, 2020, are "flatly incompatible with the CLCPA" and that § 7(2) requires DEC to act on the permit renewal for this particular facility without awaiting the preparation of a generic environmental impact statement on the cryptocurrency mining industry as a whole. (*See* Petitioners' Response to Issue 12A at 5.)

Discussion

The moratorium went into effect on November 22, 2022, and applies to permit applications that are submitted after November 22, 2022. There is no question that the law does not apply to Greenidge's application, which was filed in 2021. The legislative history, according to Greenidge, supports the proposition that it is premature to deny its permit renewal before the completion of the generic environmental impact statement. This argument completely ignores the application of the CLCPA § 7(2) to any decisions made after January 1, 2020. The Department was not required to promulgate regulations required by the CPCLA prior to applying section 7 of the CLCPA to Title V applications. (*See Danskammer v DEC*, 76 Misc 3d at 231 [CLCPA "does not direct the DEC, or any other agency, to promulgate such regulations before performing the consistency analysis required under CLCPA section 7"]; *Danskammer Issues Ruling* at 38-39 [same].) Similarly, the Department is not required to prepare a GEIS under a separate law (the mining moratorium) prior to the implementation of § 7(2) of the CLCPA.

RULING: I conclude that the cryptocurrency mining moratorium law does not provide a basis to challenge or invalidate the Department staff's review and denial of Greenidge's permit renewal application. The Department is not required to prepare a GEIS pursuant to the cryptocurrency moratorium law (L 2022, ch 628, § 3) prior to implementation of § 7(2) of the CLCPA.

To the extent that other issues of law were raised by the parties, I have considered them and hold them to be without merit.

IV. ISSUES OF FACT

Greenidge listed three issues of fact and four mixed issues of fact and law in its Statement of Issues, as Issues Nos. 13-19. Petitioners contend that no issues of fact need to be adjudicated, and move for summary judgment.

A. Standards for adjudicable issues.

The Department's regulations set forth the standards for adjudicable issues requiring a hearing in 6 NYCRR 624.4(c)(1):

"[A]n issue is adjudicable if:

(i) it relates to a dispute between the department staff and the applicant over a substantial term or condition of the draft permit;
(ii) it relates to a matter cited by the department staff as a basis to deny the permit and is contested by the applicant; or
(iii) it is proposed by a potential party and is both substantive and significant."

"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." (*Danskammer Issues Ruling* at 13, citing *Matter of the Orange County Department of Public Works*, Decision of the Commissioner, January 29, 2020, at 5.) In this proceeding, the facts to be adjudicated include contested facts that are a basis to deny the permit and any factual issues proposed by petitioners that are both substantive and significant.

B. Issue No. 13: Consistency with CLCPA Targets

Greenidge's Issue No. 13, labeled as an issue of fact, is:

"Did NYSDEC err by finding that the Facility will be inconsistent with CLCPA targets, despite:

a. The Facility's current onsite and upstream potential carbon dioxide equivalent emissions are already approximately 70 percent lower than the Facility's actual emissions in 1990, the statewide criteria enacted in the CLCPA to measure statewide emissions reductions.
b. The Facility running at full permitted capacity accounts for a mere 0.3 percent of the approximately 38,000 MW of power generation capacity in the State of New York and the Facility's emission levels equate to a mere 0.2% of the statewide emissions reduction target for 2030.
c. The Facility's proposal to evaluate specific projects prior to 2030 and the Facility's preliminary determination, that if these proposed projects were to prove to be successful, they have the potential to provide aggregate GHG emissions reductions from the emissions due to present operations of 41%.
d. The Facility's inclusion on the statewide emissions inventory."

(Statement of Issues at 9-10.)

This issue is the crux of this matter: whether Department staff erred by finding that the permit renewal will be inconsistent with CLCPA targets, which is a mixed issue of fact and law.

1. 13(a): 1990 Emissions

Regarding 13(a), the Department and petitioners do not dispute that the current emissions are significantly lower than the facility's emissions in 1990 when it was a coal burning plant. (*See* Issues Conference tr at 222-223; *see also* Petitioners' brief at 6.) However, the Department and petitioners dispute the relevance of these facts. (S*ee* Staff Response at 13-14; Petitioners'

brief at 6, 27.) I agree that the 1990 GHG emissions levels of an individual facility are not relevant to the analysis under CLCPA § 7(2). (*See* Discussion of Statewide v. facility emissions in 1990, III[E][3], *supra* at 32-33.) This is not a factual issue for adjudication.

2. 13(b): Percentage of state-wide emissions

Staff also does not dispute that this individual facility's emissions are a small percentage of the statewide emissions target for 2030, as stated under 13(b). (*See* Issues Conference tr at 224). However, staff posits that the level of an individual facility's GHG emissions compared to the statewide emissions target is not relevant to the § 7(2) analysis. At the issues conference, the Department pointed out that Greenidge's interpretation would render § 7(2) meaningless if each facility were allowed to rely on the de minimis impact of its own individual emissions. (*See* Issues Conference tr at 72).

All emissions must be considered in evaluating a decision's impact on achieving the CLCPA goals. To require that only decisions that involve a certain threshold percentage of the statewide GHG emissions limits be counted toward those emissions limits would defeat the purpose of the CLCPA, which requires reductions of GHG emissions "from all anthropogenic sources" (CLCPA § 4), not just those above a certain threshold. Greenidge's interpretation, if adopted, would render the CLCPA useless against the aggregate effect of multiple small polluters. The percentage of Greenidge's emissions when compared to the statewide emissions target is neither contested nor a basis for the denial and need not be adjudicated.

3. 13(c): Greenidge's mitigation proposals

Issue 13(c) related to Greenidge's proposal to "evaluate specific projects prior to 2030 and the Facility's preliminary determination, that if these proposed projects were to prove to be successful, they have the potential to provide aggregate GHG emissions reductions from the emissions due to present operations of 41%." (Greenidge August 2, 2021 Response.) Greenidge submitted several proposals to DEC. The first set of proposals was included in the August 2, 2021 Response and included:

- installation of a variable frequency drive on the 2,000 horsepower booster exhaust fan;
- redesign of the Exhaust Gas Duct Work System;
- up to 15 MW of Solar Farm Capacity Installation;
- up to 2 MW Solar Farm Capacity Installation on the former coal pile area replacement of the catalyst in the Selective Catalytic Reduction (SCR) System; and
- study of the benefits of co-firing green hydrogen with natural gas, which was reiterated in the August 20, 2021 Response to the Request for Additional Information.

(*See* Greenidge August 2, 2021 Response at 8-9.)

A second set of proposals was included in the March 25, 2022 letter, after the completion notice and public comment period, which offered two conditions to be added to the permit:

> "A binding condition that requires a 40% reduction in GHG emissions from our current permitted level by the end of 2025 – a full five (5) years before the CLCPA's statewide target date of 2030; and
>
> "A requirement that Greenidge be a zero-carbon emitting power generation facility by 2035 - a full five (5) years before the statewide target for the electric generating sector found in Public Service Law § 66-p."

(Greenidge March 25, 2022 letter at 2.)

The Department responds that it did not ignore the mitigation proposals, but because renewal of the permit would be inconsistent with the emissions limits set forth in the CLCPA, and such an inconsistent decision could not be justified, it did not need to address the third prong of the CLPCA § 7(2) analysis to identify alternatives or GHG mitigation measures. (*See* Staff Response at 15.)

Both the Department and the petitioners point out that the proposals were vague and speculative.[8] (*See* Denial letter at 8; Department brief at 17, 30; Petitioners' brief at 43-46.) Petitioners argue that the suggestion to study the use of green hydrogen to co-fire with natural gas was nothing more than that – a mere suggestion. There was no commitment to actually implement that proposal, and the available information does not support the feasibility or efficacy of the technology. (*See* Petitioners' brief at 44-45).

In the *Danskammer Issues Ruling*, ALJ Caruso addressed Danskammer's offer to study the use of hydrogen and renewable natural gas (RNG) before the CLCPA target dates, finding that "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 emissions 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. … 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." (*Danskammer Issues Ruling* at 57.)

Mitigation measures cannot be put off until the CLCPA deadlines in 2030, 2040 and 2050. Greenidge must establish that it will implement mitigation measures that will take effect immediately to reduce its emissions. None of the proposals submitted during the application

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[8] Petitioners also argue that the proposed mitigation measures are not "real, permanent, quantifiable, verifiable, and enforceable" quoting ECL 75-0109(3)(b). This subsection requires the Department to promulgate regulations to ensure that greenhouse gas emissions reductions achieved are real, permanent, quantifiable, verifiable, and enforceable by the Department. It does not apply directly to the review of mitigation measures when evaluating a permitting decision under CLCPA section 7(2). However, those qualities are required of mitigation efforts pursuant to CP-49 and DAR-21. (*See* CP-49 at 8; DAR-21 at 6).

review period proposed to reduce emissions during the permit term and therefore are not adjudicable.

4. 13(d): Statewide emissions inventory

Greenidge could not identify the "statewide emissions inventory" referenced in Issue 13(d) at the issues conference (*see* Issues Conference tr at 226) and did not identify the inventory with more precision afterwards. (*See id;* s*ee also* January 4, 2023 letter-order.) However, Greenidge argued that its inclusion in the 1990 GHG baseline emissions in 6 NYCRR part 496 does not support the Department's finding that the permit renewal would be inconsistent with the CLCPA's GHG emissions limits. (*See* Greenidge Opp to Summary Judgment at 18.) Just as the individual facility's emissions levels in 1990 are not relevant to the determination of whether renewal of a permit is inconsistent with the CLCPA emissions limits, neither is the inclusion of that facility's emissions in the 1990 inventory. To the extent that Greenidge seeks to establish that the facility was included in that inventory to establish the 1990 baseline for GHG emissions levels, that is not relevant to the CLCPA § 7(2) determination but it is also not disputed. [9] This is not a factual issue for adjudication.

RULING: The Department did not err in finding that renewal of the permit would be inconsistent with the CLCPA's GHG emissions limits, even assuming the following allegations are true:

a) The Facility's current onsite and upstream potential carbon dioxide equivalent emissions are already approximately 70 percent lower than the Facility's actual emissions in 1990, the statewide criteria enacted in the CLCPA to measure statewide emissions reductions.
b) The Facility running at full permitted capacity accounts for a mere 0.3 percent of the approximately 38,000 MW of power generation capacity in the State of New York and the Facility's emission levels equate to a mere 0.2% of the statewide emissions reduction target for 2030.
c) The Facility's proposal to evaluate specific projects prior to 2030 and the Facility's preliminary determination, that if these proposed projects were to prove to be successful, they have the potential to provide aggregate GHG emissions reductions from the emissions due to present operations of 41%.

[9] There is no dispute that the facility existed in 1990 and that it is listed in the *Title V Emissions Inventory: Beginning 2010* prepared by the Department and available at https://data.ny.gov/Energy-Environment/Title-V-Emissions-Inventory-Beginning-2010/4ry5-tfin (last accessed September 21, 2023). The parties exchanged a draft stipulation of facts which stated that the facility was included in another inventory prepared by the Department, *Statewide Greenhouse Gas Emissions: Beginning 1990,* available at https://data.ny.gov/Energy-Environment/Statewide-Greenhouse-Gas-Emissions-Beginning-1990/5i6e-asw6 (last accessed September 21, 2023) . Greenidge did not agree to that stipulation and the document on the website does not list individual facilities.

d) The Facility's inclusion on the statewide emissions inventory.

The applicant has not raised any adjudicable issues of fact in Issue No. 13. In light of the increasing actual emissions, renewal of Greenidge's Title V air permit would be inconsistent with the CLCPA GHG emissions limits. The issue of inconsistency will not be adjudicated.

C. Issue No. 14: Change in primary purpose from "peaker" facility

Greenidge's Issue No. 14 is:

> "Whether NYSDEC erred in finding that the Facility's primary purpose changed by first erring in finding that the Facility was originally permitted as a "peaker" facility and then compounding this error by seeking to distinguish the Facility's primary purpose by considering whether the generated electricity is metered."

(Statement of Issues at 10.)

Greenidge lists this issue as an issue of fact, and proposes submitting the testimony of David Murtha, QEP, of ERM Consulting and Engineering Inc., to testify as to the scope of the original Title V permitting in 2016 and to explain why the facility's primary purpose has not changed since 2016. Greenidge has clearly stated its position that the purpose has not changed because the purpose of the permit is to allow the facility to generate electricity. (*See* Greenidge brief at 39.) It proposes to submit evidence that it provided electricity to the grid at NYISO's request during the winter of 2022-2023. (*See* Greenidge brief at 65 and n 69.)

Department staff disagrees, arguing that the facility was permitted as a "peaker" providing electric power to the grid as needed and that the Department relied on that in making its SEQR findings in 2016. The inquiry into whether the generated electricity is metered was necessary to understand the extreme increases in emissions over the term of the permit. (*See* Staff Response at 15-16.)

Petitioners argue that this issue of fact is completely irrelevant to DEC's denial of the permit, because there is no dispute as to the increased emissions at the facility since the enactment of the CLCPA. (*See* Petitioners' brief at 8.) Petitioners also argue that when DEC issued the original permit in 2016 it was understood that the facility would be operating as a peaker plant and not as a base line electric generating facility and thus its average capacity factor would be far less than its full PTE. According to petitioners, the change in Greenidge's operations from a peaker plant to a cryptocurrency mining facility resulted in actual emissions now approaching 100% of its PTE, which is a material change in the facility's purpose and operations. (*See id.* at 23 n 102.)

Discussion

During the Department staff's review of the application, Greenidge provided data showing that in 2021, the amount of electric power provided to cryptocurrency mining exceeded

the power provided to the NYISO grid. (*See* Greenidge August 2, 2021 Response at 12, Table 6.) Greenidge has not provided the information to quantify the exact amount of GHG emissions attributable to crypto-mining, but the facility's GHG emissions have increased as the facility provides more electric power to cryptocurrency mining. (*See* Greenidge August 2, 2021 Response at 12, Table 6 [showing increase in power provided to blockchain operations from 2019 to 2021]; Greenidge August 2, 2021 Response at 10, Table 4; Greenidge August 20, 2021 Response at 6, Table 4 [showing increase in GHG emissions from 2019 to 2021].)

Greenidge cannot create an adjudicable issue with bare assertions of fact. (*See Danskammer Issues Ruling* at 13; *Matter of the Orange County Department of Public Works*, Decision of the Commissioner, January 29, 2020, at 5.) The facts in the record, provided by Greenidge, support Department staff's assertion that the purpose of the facility has changed since the issuance of the permit in 2016.

RULING: Department staff did not err in finding the primary purpose of the facility had changed from a peaker facility to a facility primarily providing power to cryptocurrency mining behind the meter. The finding was reasonable and was based on the information Greenidge provided. This is not a factual issue for adjudication.

D. Issue No. 15: Capacity and Utilization Rates

Greenidge's Issue No. 15, labeled as a mixed issue of fact and law, is:

> "Whether it was arbitrary and capricious or otherwise unlawful for NYSDEC to require that Greenidge provide project future capacity and utilization rates and the portion of the Facility's output that will be used for each mode of operation (e.g., electricity generation to the grid vs. on site consumption for blockchain operations) over a thirty-year planning horizon and whether NYSDEC appropriately applied the projections that were submitted."

(Statement of Issues at 10.)

Greenidge proposes to offer David Murtha to testify as to the future capacity and utilization rates, the portion of the facility's output that will be used for each mode of operation, and why DEC did not properly apply the projections submitted. (*See id.*)

In the RFAI 2, Department staff requested:

> "Please indicate the current generating capacity and utilization rate of the facility and the planned future capacity and utilization rate of the facility in the analysis. In addition, please discuss the portion of the facility's output that will be used for each mode of operation (e.g., electricity generation to the grid vs. on site consumption for Blockchain operations) now and in the future."

(RFAI 2 at 2). Greenidge did not provide that information, stating that "[u]ntil the Department promulgates regulations, any attempt to project future utilization rates on an ad hoc basis over a thirty-year planning horizon is not realistic and has no relevance for Title V renewals or CLCPA consistency determinations." (Greenidge August 20, 2021 Response at 9.)

Department staff argues that it was not arbitrary and capricious or otherwise unlawful to request more information on a permit renewal, citing 6 NYCRR § 621.14(b). (*See* Staff Response at 17.) The request for "future capacity and utilization rates and the portion of the Facility's output that will be used for each mode of operation (e.g., electricity generation to the grid vs. on site consumption for blockchain operations) over a thirty-year planning horizon" was designed to elicit information regarding historical changes as well as future projections of GHG emissions at the facility. (*See id.)* Department staff writes:

> "These are critical factors in DEC's required determination under CLCPA Section 7(2), which hinges on consistency with Statewide GHG emission limits for the years 2030 and 2050. An increased focus on behind-the-meter cryptocurrency mining operations – at the expense of sending energy to the grid – has also led to more emissions, overall. As such, information regarding utilization rates and percentages of Facility output devoted to supplying energy to the grid versus using energy for behind-the-meter cryptocurrency mining operations is reasonably necessary in order to assess whether and to what degree emissions will increase at the Facility and, ultimately, whether continued operation of the Facility would be inconsistent with or would interfere with the attainment of the Statewide GHG emission limits established in Article 75 of the ECL."

(Staff Response at 17.)

Petitioners refute that there are any disputed facts "as to the company's existing plans to continue its 'Blockchain Technology Services' or cryptocurrency mining at the Facility for as long as it is legally able to do so." (Petitioners' brief at 11.) They also rely on 6 NYCRR 621.14 to support Department staff's request for relevant information from the applicant "that is required to comply with applicable law, regulations and rules, including the CLCPA." (*See id*.)

Discussion

The question as to whether the Department's action in requiring the information was arbitrary and capricious or otherwise unlawful is a legal question. The Department was clearly authorized to request the information under 6 NYCRR 621.14 and therefore I conclude that the Department's request was reasonable and lawful.

The denial rests on the assumption that the upward trend of the facility's actual GHG emissions will continue, up to the maximum PTE. Greenidge stated, in response to the question regarding utilization, "As Table 2 (updated above) demonstrates Greenidge's total PTE for purposes of renewal of its Title V or CLCPA consistency determinations is controlled by its physical and operational design and permit limits, not its mode of operation which has, and will,

remained unchanged." (Greenidge August 20, 2021 Response at 9At the issues conference, Greenidge challenged the request for 30 years of projections for a five-year permit, but did not dispute the increasing actual emissions levels, which it had submitted to Department staff. Staff and petitioners agreed that there was no issue of fact as to the actual and projected emissions. (*See* Issues Conference tr at 238-242.) The projected emissions for the renewal term of the permit were 952,958 metric tons of CO2e annually, the same as the PTE levels, i.e., the greatest amount allowed under the 2016 permit if the facility were operating 24 hours a day, 365 days a year. (*See* Greenidge August 20, 2021 Response at 7, Table 5.)

Greenidge claims there is an adjudicable issue of fact and seeks to present testimony on "why NYSDEC did not properly apply the projections that were submitted." That contention is a legal argument, not an issue of fact needing adjudication. Greenidge did not provide staff with the information it requested, and that information Greenidge did provide projected that its emissions would be equivalent to the maximum PTE, to be reduced by a statewide percentage as required by law in the future. (*See* Greenidge August 20, 2021 Response at 7, Table 5.) Given Greenidge's submissions, staff did not err in applying those projections.

RULING: Pursuant to 6 NYCRR 621.14, Department staff was authorized to require Greenidge to provide the current generating capacity and utilization rates of the facility, the planned future capacity and utilization rates of the facility, and the portion of the facility's output that will be used for each mode of operation (e.g., electricity generation to the grid vs. on site consumption for Blockchain operations) now and in the future. Department staff did not err in applying the limited information that Greenidge provided in the application process. This issue will not be adjudicated.

E. Issue No. 16: Meaning of significant modification

Issue No. 16 listed by Greenidge is:

> "Did NYSDEC staff improperly interpret 'significant modification' within the meaning of Draft DAR-21, in the context of an existing facility, to include anything other than a change to the emission source or a change in emissions or emission rates not allowed by the then existing permit?"

(Statement of Issues at 11.)

This issue was listed as a mixed issue of law and fact and Greenidge seeks to have David Murtha, QEP, testify regarding how federal and state regulators interpret the term "significant modification" and why DEC did not properly apply the draft DAR-21 to this application. (*See id.*) However, Greenidge also argues that the draft DAR-21 does not apply to its application, because the application, completion notice and public period pre-dated the finalization of those documents. (*See* Greenidge brief at 18.)

DEC staff responded that CLCPA § 7(2) is not limited to new or significantly modified facilities and Department regulations require that Title V renewal applications are treated the same as new facilities. The Department is required to comply with CLCPA § 7(2) as part of the

application process and permitting decision, with or without a significant modification. (*See* Staff Response at 18.)

Petitioners' position is that the draft DAR-21 was not binding on the applicant or DEC at the time of the decision and that "Greenidge's purported Issue No. 16 is not a factual dispute requiring a hearing." (Petitioners' brief at 11.)

Discussion

This issue is redundant of Greenidge's Issue No. 4.[10] Renewal of Title V air permits are treated as new applications, as discussed above. (*See* Discussion of Permit renewal v. new source, *supra,* III[E][2] at 30-32.) Therefore, it was not necessary for staff to consider the meaning of "significant modification" under DAR-21. Although Greenidge did not provide the particular language it is referring to, the final version of DAR-21 states:

> "A permit renewal that does not include a significant modification, as described in Part 201, and **would not lead to an increase in actual** or potential **GHG emissions** would in most circumstances be considered consistent with the CLCPA pending finalization of the Scoping Plan and future regulations. However, DEC staff **may require an applicant to submit a CLCPA analysis for a permit renewal to ensure the requirements of Section 7(2) are met, if the facts surrounding the project indicate that an analysis is warranted**. For the purposes of this paragraph, past actual emissions are defined as the highest 24- month average GHG emissions during the five years preceding the date the permit application was received unless another period is more representative."

(DAR-21 at page 3 [emphasis added].)

Even if Greenidge's renewal application was not treated as a new application pursuant to 6 NYCRR 201-6.6(a)(1) and 6 NYCRR 621.11(i), DAR-21 contemplates that any renewal leading to an increase in actual GHG emissions may require a CLCPA analysis. Greenidge's application established that the renewal would lead to an increase in actual GHG emissions. (*See* Greenidge August 20, 2021 Response at 6-7, Tables 4 and 5.) Therefore, it would not be deemed consistent with the CLCPA GHG emissions limits pursuant to the language quoted above. Also, when the surrounding facts indicate that a CLCPA analysis is warranted, the Department does not need to find that there was a significant modification before requiring an applicant to submit that analysis for a permit renewal.

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[10] Greenidge's Issue No. 4 is: "Whether NYSDEC erred in its CLCPA Section 7(2) analysis to determine whether the Project is inconsistent with or will interfere with the attainment of the Statewide GHG emissions limits, by treating the Facility as a new source notwithstanding the fact it sought a permit renewal for the unchanged, existing Facility and did not seek any increase in allowable emissions."

Ruling: Renewal of Title V air permits are treated as new applications regardless of whether there is a significant modification. (*See* 6 NYCRR 201-6.6[a][1]; 6 NYCRR 621.11[i].) This is not an issue for adjudication.

F. Issue No. 17: Justification

Greenidge's Issue No. 17, labeled as an issue of fact, is:

> "Assuming arguendo that NYSDEC staff properly applied Section 7(2)'s requirement that it provide a "detailed statement of justification as to why such limits/criteria may not be met," did it err when it found no need for the Facility given:
>
> a. its limited evaluation of the Facility's need focused only on electric system reliability;
> b. its inaccurate assessment of electric system reliability, particularly given its lack of expertise regarding electric system reliability;
> c. its failure to consider resiliency and other benefits associated with renewing the Facility's permit, and
> d. the significant economic harm that will directly result from the failure to renew the facility's Title V permit."

(Statement of Issues at 11.)

Greenidge proposes to offer the testimony of Dr. Alan C. Marco, Steven Raumann, and Timothy Rainey, MBA, CPA, to establish that DEC's determination that the renewal of the Title V air permit was not justified was both incomplete and inaccurate. Topics would include:

- why the DEC's assessment of electric system reliability for Zone C was incomplete and improper, including by way of example, its failure to consider Ancillary and Essential Reliability Services;
- the resiliency benefits associated with renewing the Facility's permit; and
- the economic harm that will directly result from the failure to renew the Facility's Title V permit.

(*See id.)*

Department staff responded to this issue point by point, although the issue is redundant of Greenidge's proposed Issue No. 8. As to the first point, that DEC erred when it found no need for the facility given "its limited evaluation of the Facility's need focused only on electric system reliability," Department staff reiterated that CLCPA § 7(2) does not provide the criteria to evaluate whether a project may be justified. Although the applicant had not provided justification, DEC identified electric grid reliability as a potential justification but found it lacking.

Regarding the second point, that DEC lacks expertise and was inaccurate in its assessment of electric system reliability, DEC points out the irony of Greenidge making assertions regarding electric system reliability when it is diverting most of its power to operations off the grid. Department staff also points out that it referred to publicly available documents from the agency with expertise, NYISO, to determine that there was no need for the permit to be renewed to ensure electric system reliability.

Regarding resiliency benefits, staff notes that Greenidge did not offer any information regarding resiliency benefits as justification for the permit renewal.

In response to the claim of economic harm that will directly result from the failure to renew the facility's Title V air permit, DEC staff points out that Greenidge has not distinguished between economic harm to itself as a business organization or to a wider range of economic harms. Staff notes that Greenidge has not presented information regarding economic harm of either type.

Petitioners argue that Greenidge did not provide any information to Department staff regarding justification, even after the completion notice noted that Greenidge had failed to provide justification for the permit renewal. Petitioners claim that there is no adjudicable issue of fact posed by Issue No. 17.

Discussion

In addressing Issue No. 8, I ruled that the burden is not on DEC staff to justify its decision to deny the renewal application when the decision is consistent with the CLCPA GHG emissions limits. Rather, since a decision to renew the permit would be inconsistent with those emissions limits, the responsibility is on Greenidge to submit information to demonstrate that a decision to renew the permit would be justified. (*See* Discussion of Authority to consider purpose in determining justification, III[C][2], *supra* at 22-26.)

Although Greenidge did not provide any basis for justification, staff did not specifically request it during the application process. The CLCPA was a new law and public guidance was released in draft form after Greenidge submitted its application. Greenidge may not have been able to anticipate what DEC required to establish justification without a specific request for the information, which was authorized under 6 NYCRR 621.14(b). DEC noted that there had not been justification for the renewal established when it issued the completion notice in September 2021. However, at that point in time the application was deemed complete and staff had issued a draft permit for review, so presumably staff had no further requests for information. (*See* completion notice; 6 NYCRR 621.6[e]["Applications will remain incomplete until all requested items are received by the department."].)

The CLCPA § 7(2) requires the Department to provide a statement of justification if it is making a decision inconsistent with the CLCPA GHG emissions goals. It does not require the Department to provide a statement justifying a decision that is consistent with those goals. As stated above, the burden is on Greenidge to provide justification for the renewal which would otherwise be inconsistent. Since that information was not requested during the application

process, Greenidge may present evidence of justification at the hearing, if any such evidence exists.

RULING: I find that the record needs to be developed regarding justification for renewing the Title V air permit for the facility. The Department staff did not ask for and Greenidge did not provide any basis for finding a grid reliability need or any other justification for the facility during the review process. This will be an issue for adjudication.

G. Issue No. 18: Greenidge's Mitigation Proposals

Greenidge listed Issue No. 18 as a mixed issue of law and fact:

> "What is the nature and extent of mitigation required by the CLCPA and did NYSDEC err in rejecting Greenidge's mitigation proposals, including its March 25, 2022 proffer for binding permit conditions that would (1) require a 40% reduction in GHG emissions from its current permitted level by the end of 2025 – a full five (5) years before the CLCPA's statewide target date of 2030; and (2) require that the Facility be a zero-carbon emitting power generation facility by 2035 – a full five (5) years before the statewide target for the electric generating sector found in Public Service Law § 66-p."

(Statement of Issues at 11-12.)

Greenidge claims that Department staff failed to analyze its mitigation proposals and that it is prepared to offer evidence that it can mitigate GHG emissions. (*See* Greenidge brief at 32-34.) Staff responded that "Greenidge proposed limited GHG mitigation measures at the Facility as part of the Application, but generally failed to identify adequate GHG mitigation measures or alternatives and, in any case, the Department did not need to reach this stage of the analysis given that the Facility's inconsistency is not justified." (Staff Response at 20.) Staff claims that this issue is not ripe for adjudication. (*See id.*)

Petitioners argue that there is no dispute of fact regarding Greenidge's proposals for mitigation in its March 25, 2022 letter. They also argue that the proposed permit conditions would have allowed Greenidge to increase its actual GHG emissions to emit 385,127 tons of CO2e annually every year for the next five years (not including upstream emissions) an increase from 343,046 tons emitted in 2022 (based on EPA data). (*See* Petitioners' brief at 13.)

Discussion

The issue of whether DEC erred in rejecting Greenidge's mitigation proposals was addressed above under Greenidge's Issue No. 7.[11] (*See* Discussion of mitigation, III[D], *supra* at 26-29.) The Department's decision must be consistent with the CLCPA GHG emissions limits when the decision is being made. (*See Danskammer Issues Ruling* at 37.) In the alternative, if the decision is inconsistent with the CLCPA GHG emissions limits, it must be justified and mitigated with respect to GHG emissions when the decision is being made, not at some speculative point in the future. As with *Danskammer*, a proposal to reduce emissions in the future, beyond the permit term, allows for increasing actual emissions during the term of the permit, which will remain in the atmosphere. (*See id*.) Similarly, Greenidge's proposals which promised to reduce emissions in the future, beyond the permit term, were not sufficient mitigation under § 7(2) of the CLCPA.

Regarding the issue of the nature and extent of mitigation required by the CLCPA, the language of § 7(2) provides a starting point: the Department shall "identify alternatives or greenhouse gas mitigation measures to be required where such project is located." According to CP-49 and DAR-21, mitigation efforts must be real, additional, quantifiable, permanent, verifiable, and enforceable. (*See* CP-49 at 8; DAR-21 at 6.) The *Danskammer Issues Ruling* held that, under § 7(2), "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." (*Danskammer Issues Ruling* at 57.) The proposals set forth in the August 2021 responses and the March 25, 2022 letter from Greenidge do not meet these standards.

However, just as with the failure to provide adequate information on justification, Greenidge was addressing a new law with only draft guidance available, and without the benefit of the *Danskammer Issues Ruling.* The RFAI 2 sent to Greenidge on August 16, 2021 stated: "Consistency with the CLCPA is related to emissions resulting from current and future operating conditions. Please update the analysis to discuss the GHG emissions associated with the current and planned operations of the facility and discuss **alternatives and/or mitigation measures for those emissions**. The analysis should also include projections of GHG emissions for the years 2030, 2040, and 2050." (RFAI 2 at 1 [emphasis added].) Although current emissions are mentioned, the need for the immediacy of mitigation or alternatives to commence at the start of the permit term is not emphasized. The *Danskammer Issues Ruling,* CP-49 and DAR-21 now provide staff and applicants with guidance on the need for mitigation measures that will take effect immediately and will be real, additional, quantifiable, permanent, verifiable, and enforceable.

In order to meet its burden, Greenidge should propose alternatives or mitigation which meet the standards set forth above: they must be located where the project is located, they must

[11] Issue No. 7 reads: "Issue of Law: Assuming, but not conceding, that Greenidge must demonstrate plans for compliance with the CLCPA in 2040, was it arbitrary and capricious or otherwise unlawful for NYSDEC to ignore the facility's proposal to use cessation of operations to comply with the CLCPA's zero emissions by 2040 requirement for the electricity generation sector."

be real, additional, quantifiable, permanent, verifiable, and enforceable; and they must result in the immediate lessening or the elimination of the inconsistency or interference with the GHG emissions goals of the CLCPA at the time of permit issuance.

RULING: I found above that the Department did not err in finding the permit renewal inconsistent with the CLCPA GHG emissions limits notwithstanding Greenidge's proposal to use cessation of operations to comply with the CLCPA's zero emissions by 2040 requirement for the electricity generation sector. There is no need to adjudicate proposals to occur in the future without a specific plan for alternatives or greenhouse gas mitigation measures to be required at the time of permit issuance.

Greenidge may propose alternatives or mitigation which meet the standards set forth above: they must be located where the project is located, they must be real, additional, quantifiable, permanent, verifiable, and enforceable, and they must result in the immediate lessening or the elimination of the inconsistency or interference with the GHG emissions goals of the CLCPA at the time of permit issuance. These alternatives or mitigation measures will be subject to adjudication.

V. PETITION FOR PARTY STATUS

Pursuant to 6 NYCRR 624.5(a), Greenidge and Department staff are automatically full parties to the proceeding. With respect to petitioners, the determination whether to grant a petitioner full party status is based upon:

> (1) a finding that the petitioner has filed an acceptable petition pursuant to 6 NYCRR 624.5(b)(1);
> (2) a finding that 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 an adequate environmental interest.

(S*ee* 6 NYCRR 624.5[d][1].)

A petition for party status is acceptable if it contains the following:

> "(1) Required contents of petition for party status:
> (i) fully identify the proposed party together with the name(s) of the person or persons who will act as representative of the party;
> (ii) identify petitioner's environmental interest in the proceeding;
> (iii) identify any interest relating to statutes administered by the department relevant to the project;
> (iv) identify whether the petition is for full party or amicus status;
> (v) identify the precise grounds for opposition or support.
> "(2) Additional contents required for petitions for full party status:

> (i) identify an issue for adjudication which meets the criteria [for adjudicable issues] of section 624.4(c) of this Part; and
> (ii) present an offer of proof specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue."

(6 NYCRR 624.5[b].)

As described above, an issue is adjudicable 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 it raises 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." (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." (6 NYCRR 624.4[c][3]). (*See also Danskammer Issues Ruling* at 14.)

Petitioners are three local organizations, Seneca Lake Guardian, The Committee to Preserve the Finger Lakes, and Fossil-Free Tompkins, and the Atlantic Chapter of the Sierra Club, a national environmental organization. All of these organizations have been involved in the public comment process for this permit. Seneca Lake Guardian, The Committee to Preserve the Finger Lakes and Sierra Club have engaged in litigation challenging the Department's issuance of a water permit to the facility, and the Town of Torrey Planning Board's Greenidge Site Plan approval, which authorized the installation of the crypto-mining data center. (See Petition at 5.) They have demonstrated an adequate environmental interest.

Greenidge argues that the petitioners are not entitled to party status because they cannot contribute to a substantive and significant issue, even if raised by staff and Greenidge. The petitioners propose four issues for adjudication:

> 1) Whether DEC correctly denied Greenidge's Title V Permit as Greenidge's materially different operations are inconsistent with or would interfere with the attainment of the statewide GHG limits in Article 75 of the ECL in the CLCPA;
>
> 2) Whether there is justification for Greenidge's operations;
>
> 3)Whether Greenidge has failed to identify adequate alternatives or mitigation measures as required by the CLCPA; and
>
> 4) Whether air pollution from the facility will impact a potential disadvantaged community and potential environmental justice areas and endanger the community character of the Finger Lakes.

Petitioners' first issue is resolved as an issue of law: renewal of the permit would be inconsistent or interfere with the GHG emissions limits in the CLCPA, codified in article 75 of the ECL, absent sufficient justification and mitigation or alternatives. The petitioners have

raised the issue of whether Greenidge's failure to provide sufficient information on justification, mitigation and alternatives to staff during the application process raises 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. Therefore, these issues are substantive. These issues also have the potential to result in the denial of a permit or the imposition of significant permit conditions and are therefore significant. The issues of justification and mitigation were raised by the parties, are substantive and significant, and petitioners can make a meaningful contribution to the record as to these issues.

Moreover, the failure to address whether there will be a disproportionate burden on disadvantaged communities as required by the CLCPA § 7(3) raises a substantial doubt about applicant's ability to meet that statutory criteria, requiring further inquiry. Therefore, this issue is substantive. Although it was not a basis for the denial and staff have asserted that it is not a basis for adjudication (*see* Staff Response at 13), this issue is significant pursuant to 6 NYCRR 624.4(c)(3) inasmuch as determination of the issue could result in denial, a major modification, or the imposition of significant permit conditions. This substantive and significant issue is raised for adjudication by the petitioners.

A petition for full party status is required to "present an offer of proof specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue." (6 NYCRR 624.5[b][2][ii].) Petitioners are prepared to offer testimony on all of these substantive and significant issues and submitted offers of proof on these issues.

Regarding the issue of whether there is justification for renewal of Greenidge's air permit notwithstanding the inconsistency with the CLCPA GHG emissions limits, petitioners propose to offer the expert testimony of Jason W. Hoyle, MBA, and Justin R. Barnes, M.S., of EQ Research. The EQ research witnesses will testify regarding the grid reliability need for the facility and will provide an analysis of Greenidge's power generation and market activity before and after it began mining cryptocurrency.

Petitioners argue that Greenidge has not met its burden of providing adequate mitigation or alternatives to the Department in the application process to overcome the inconsistency with the CLCPA GHG emissions limits. Petitioners claim that this failure to provide that evidence renders this an adjudicable issue, i.e., substantive and significant, under 6 NYCRR 624.4(c). (*See* Petition at 22-28.) In the event Greenidge submits evidence to support its claims that there are mitigation or alternatives that would overcome the inconsistency, petitioners are prepared to present the testimony of Elizabeth Stanton, Ph.D., and Bryndis Woods, Ph.D., of the Applied Economics Clinic on the topics of hydrogen combustion and biomass combustion. Petitioners assert that neither alternative is emissions free. These witnesses have experience in electric utility regulation, energy markets, renewable energy policy, energy efficiency, and climate policy, including alternatives to fossil fuel infrastructure. Petitioners would also offer testimony of Ranajit Sahu, Ph.D., with over 30 years of experience in environmental, mechanical, and chemical engineering regarding Greenidge's other proposed mitigation measures.

Lastly, petitioners are prepared to offer the testimony of Dr. Sahu on the burden of continued operations under the renewed permit on a disadvantaged community pursuant to § 7(3) of the CLCPA. Specifically, Dr. Sahu would testify regarding:

1. The facility's operations, equipment, and fuel use, combustion, modification, permits, pollution controls, and the impact of these factors on local air emissions;

2. The facility's air pollution, including increased energy use and pollution from cryptocurrency mining, and including possible future scenarios;

3. Modeling of the facility's emissions, including downwind concentrations of pollution; and

4. Impacts of air pollution from the facility on the community, including disadvantaged communities, potential environmental justice areas, and certain local businesses.

RULING: Petitioners have filed an acceptable petition pursuant to 6 NYCRR 624.5(b)(1); raised a substantive and significant issue; demonstrated that they can make a meaningful contribution to the record regarding substantive and significant issues raised by another party; demonstrated an adequate environmental interest; and provided an offer of proof satisfying the requirements of 6 NYCRR 624.5(b)(2)(ii). Therefore, they meet the requirements for full party status under 6 NYCRR 624.5(b). The petition for full party status filed by Seneca Lake Guardian, The Committee to Preserve the Finger Lakes, Fossil-Free Tompkins, and the Atlantic Chapter of the Sierra Club, is granted.

VI. ISSUES ADVANCING TO ADJUDICATION

As discussed above, the following issues will advance to adjudication:

1. Whether there is justification for renewal of the Title V air permit notwithstanding the inconsistency with the CLPCA GHG emissions limits. The purpose of the facility is relevant to this issue.
2. Whether there are proposed alternatives or greenhouse gas mitigation measures which, are real, additional, quantifiable, permanent, verifiable, and enforceable; are located where the project is located, and will result in the immediate lessening or the elimination of the inconsistency or interference with the GHG emissions goals of the CLCPA at the time of permit issuance.
3. Whether renewal of the Title V air permit will disproportionately burden disadvantaged communities, as prohibited by § 7(3) of CLCPA.

VII. MOTION FOR SUMMARY JUDGMENT

Petitioners move for summary judgment on the basis that there are no disputed material issues of fact. They rely on *Matter of Grout*, Ruling of Chief Administrative Law Judge on motion for summary judgment, November 23, 2015. *Matter of Grout* addressed a motion for summary judgment in an enforcement action, for which procedures are governed by 6 NYCRR part 622. This permit proceeding is governed by 6 NYCRR part 624. In *Grout,* the Chief ALJ

noted that "[a] respondent's motion for summary judgment pursuant to 6 NYCRR 622.6(c) – like a staff motion for order without hearing pursuant to 6 NYCR 622.12 – is governed by the standards applicable to summary judgment motions under Civil Practice Law and Rules (CPLR) § 3212." (*Grout* at 3.)

Greenidge opposes the motion, on the basis that such a motion is not allowed under 6 NYCRR part 624. Petitioners respond that the language in 6 NYCRR 622.6, applicable to enforcement proceedings, is identical to that in 6 NYCRR 624.6, applicable to permit hearings. However, there is no issues conference or issues ruling in an enforcement proceeding. The issues ruling has been described as: "akin to summary judgment." (*See Matter of Terry Hill South Field,* First Interim Decision of the Commissioner, [*Terry Hill*] Dec. 21, 2004, at 9-10.) "The issues conference is not an evidentiary hearing during which conflicting evidence may be weighed." (*In the Matter of the Finger Lakes LPG Storage, LLC*, Ruling of the Chief Administrative Law Judge on Issues and Party Status, September 8, 2017, at 14.)

Discussion

Here, the motion for summary judgment is superfluous because if granted, it does not grant petitioners any relief that they cannot obtain in an issues ruling. They seek summary judgment on all issues proposed for adjudication by Greenidge (*see* Petitioners' brief at 55), a remedy available in an issues ruling if no issues are found to be adjudicable. Notably, "if the ALJ determines that there are no adjudicable issues, the ALJ will direct that the hearing be canceled and that the staff continue processing the application to issue the requested permit." (6 NYCRR 624.2[c][5]). In this way, an issues ruling is similar to a ruling on a motion for summary judgment pursuant to CLPR 3212.

In summary judgment proceedings, the New York State Court of Appeals has 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. (*See Metropolitan Bank of Syracuse v. Hall*, 52 AD2d 1084 [4th Dept 1976]). "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." (CPLR 3212[b]).

The Commissioner has opined:

> "Requiring petitioners to satisfy the 'substantive and significant' standard before advancing an issue from the issues conference stage to the evidentiary phase of adjudication does not deprive petitioners of any procedural right to a hearing. Where, as here, Department staff has reviewed the data supporting a proposed order and concluded that the proposal meets applicable statutory and regulatory requirements, Part 624 procedures place the burden upon the party proposing an issue to demonstrate that the issue proposed is 'substantive and significant' (s*ee* 6 NYCRR 624.4[c][4]). The 'substantive and significant' test, and the issues conference in general, are used to determine whether any factual

issues exist requiring an evidentiary hearing. This is comparable to the purpose summary judgment serves in civil proceedings under the Civil Practice Law and Rules. **The showing that must be made to survive summary judgment, however, is significantly greater than that required at a Part 624 issues conference.**

"Unlike summary judgment, a party proposing an issue need not support its issue with evidentiary proof, nor provide such proof as would entitle the party to judgment on the merits (*see Matter of Hydra-Co. Generations, Inc.,* Interim Decision of the Commissioner, April 1, 1988, at 2). Rather, a proponent at an issues conference carries its burden with an offer of proof that raises sufficient doubt about whether applicable statutory and regulatory criteria have been met such that a reasonable person would inquire further (*see id*. at 2-3; *see also* 6 NYCRR 624.4[c][2], [3]). This threshold inquiry is less rigorous than the summary judgment standard. It follows that if summary judgment does not deprive civil litigants of due process (*see, e.g., General Inv. Co. v Interborough Rapid Transit Co.,* 235 NY 133, 141-143 [1923]; *see also* Siegel, NY Prac § 278, at 438 [3d ed]), it cannot seriously be contended that requiring petitioners in gas well spacing proceedings to meet the substantive and significant test violates their due process rights (*see Hydra-Co*., at 3)."

(*Terry Hill* at 9-10 [emphasis added].)

There was no evidentiary proof submitted with the motion for summary judgment, as required by CPLR 3212. Although this ruling has found that many of the issues raised by Greenidge need not be adjudicated at the hearing, those rulings were made under 6 NYCRR 624.4, not the summary judgment standard found in CPLR 3212.

RULING: Based on the above, the motion for summary judgment is denied**.**

VIII. 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 **October 25, 2023**. Replies are authorized, and must be **received** before 5:00 P.M. on **November 8, 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 Regional Director Dareth Glance[12] at the following address: Regional Director Dareth Glance, New York State Department of Environmental Conservation, Region 7, 5786 Widewaters Parkway, Syracuse, NY 13214-1867 and a copy sent to Deputy Commissioner for Hearings, Louis A. Alexander, 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 this ruling.

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, Regional Director Dareth Glance (dareth.glance@dec.ny.gov), and Deputy Commissioner Louis Alexander (louis.alexander@dec.ny.gov). The electronic copies are due by 5:00 P.M. on the dates specified above.

/S/
Elizabeth Phillips
Administrative Law Judge

Dated: September 22, 2023
Albany, New York

To: Attached Service List
Appendix: Issues Conference Record

[12] By memorandum dated September 19, 2022, Commissioner Basil Seggos delegated decision-making authority with respect to this matter to Dareth Glance, then Deputy Commissioner and currently Regional Director for Region 7.

APPENDIX

Greenidge Generation LLC
DEC ID: 8-5736-00004/00017
Issues Conference Record

I. 2022 Greenidge Part 624 Hearing Referral Documents (August 3, 2022)

A. Permit and Application Documents

1. Title IV and Title V Permits

    a) 2016-09-07, GGLC Title IV Permit
    b) 2016-09-07, GGLC Title V Permit (2016 Title V Permit)

B. Application Documents – Titles IV and V (DEC Nos. 8-5736-00004/00016, 17)

1. 2021-03-05, GGLLC to DEC – Titles IV and V Renewal Application
2. 2021-03-05, GGLLC to DEC – Renewal Application Email
3. 2021-03-22, GGLLC to DEC – Parent Merger Notice
4. 2021-05-03, DEC to GGLLC – Notice of Incomplete Application (NOIA)
5. 2021-05-04, BD to DEC - Agreement to Extend UPA Time Frame
6. 2021-06-30, DEC to GGLLC – Request for Additional Information and UPA Time Frame Suspension (RFAI 1)
7. 2021-07-01, GGLLC to DEC – Agreement to Extend UPA Time Frame
8. 2021-08-02, GGLLC to DEC – Response to Notice of Incomplete Application and Request for Additional Information (Greenidge August 2, 2021 Response)
9. 2021-08-15, DEC to GGLLC – Second Request for Additional Information (RFAI 2)
10. 2021-08-20, GGLLC to DEC – Response to Second Request for Additional Information (Greenidge August 20, 2021 Response)
11. 2022-01-26, GGLLC to DEC – Agreement to Extend UPA Time Frame
12. 2022-03-22, GGLLC to DEC – Agreement to Extend UPA Time Frame
13. 2022-03-25, GGLLC to DEC – Additional CLCPA Information (March 25, 2022 letter)
14. 2022-06-30, DEC to GGLLC – Notice of Title V Permit Denial (Denial letter)
15. 2022-07-28, BD to DEC – Part 624 Hearing Request

C. Public Notice Documents

1. Public Notices

    a) 2021-09-08, ENB Notice of Complete Application and Hearing

(completion notice)
b) 2021-09-10, Finger Lakes Times Newspaper Notice Affidavit
c) 2021-09-15, Chronicle Express Newspaper Notice Affidavit
d) 2021-10-20, ENB Notice Extending Comment Period

2. Draft Permit Documents

a) 2021-09-08, Draft Title IV Permit
b) 2021-09-08, Draft Title V Permit
1. 2021-09-08, Draft Air Permit General Conditions
c) 2021-09-08, Draft Air Permit Project Review Report

D. Public Comments

1. Hearing Transcripts

a) 2021-10-13, Hearing 1
b) 2021-10-13, Hearing 2

2. Written Comments – During Comment Period

a) Form Comments (letters/emails) – Subject "Deny Greenidge's Title V Air Permit" (1,009 files)
b) Form Comments (letters/emails) – Subject "Greenidge Generation Power Plant" (746 files)
c) Form Comments (letters/emails) – Subject "Save NY from Climate-Killing Cryptocurrency" (1,810 files)
d) Form Comments (letters/emails) – Subject "Seneca Lake Guardian" (59 files)

3. Petitions (3 files)
4. Non-Form Comments

a) Business (9 files)
b) Elected Officials (9 files)
c) US EPA (2 files)
d) Municipalities (2 files)
e) Non-Government Organizations (13 files)
f) Private Citizens (231 files)

5. Written Comments – Post-Comment Period

a) Form Comments (letters/emails) – Subject "Deny Greenidge's Title V Air Permit" (815 files)
b) Form Comments (letters/emails) – Subject "Save NY from Climate-Killing Cryptocurrency" (175 files)

c) Non-Form Comments (21 files)

II. OHMS

1) Notice of Public Comment Period, Legislative Public Comment Hearings, Deadline for Petitions For Party Status and Statement Of Issues, and Issues Conference, dated September 12, 2022
2) ENB Notice of Public Comment Period, Legislative Public Comment Hearings, Deadline for Petitions for Party Status and Statement of Issues, and Issues Conference, published September 21, 2022
3) Affidavit of Publication in Finger Lakes Times of Combined Notice on September 24, 2022
4) Affidavit of Publication in Chronicle Press of Combined Notice on October 12, 2022
5) October 24, 2022, 1:00 Legislative public comment hearing transcript
6) October 24, 2022. 6:00 Legislative public comment hearing transcript
7) Public comments received by October 31, 2022 (697)
8) November 1, 2022 Letter from Yvonne E. Hennessey to ALJ Elizabeth Phillips regarding adjournment of issues conference
9) November 4, 2022 Greenidge Generation LLC's Statement of Issues (Statement of Issues)
    a. Exhibit 1: SEQR FEAF Part 3- Negative Declaration for Greenidge Reactivation and SPDES Renewal/Modification, dated June 28, 2016
    b. Exhibit 2: Letter from Yvonne Hennessey to Danial Whitehead and Thomas Haley requesting hearing on denial of Greenidge renewal application for Title V Air permit, dated July 28, 2022
    c. Exhibit 3: David T. Murtha Curriculum Vitae
    d. Exhibit 4: Alan C. Marco Curriculum Vitae
    e. Exhibit 5: Steven T. Naumann Curriculum Vitae
    f. Exhibit 6: Timothy Rainey, MBA, CPA, Resume
10) November 4, 2022 Seneca Lake Guardian, The Committee to Preserve the Finger Lakes, Fossil Free Tompkins, and Sierra Club-Atlantic Chapter (petitioners) Petition for Full Party Status (Petition)
    a. Appendix A: Comments from Seneca Lake Guardian, The Committee to Preserve the Finger Lakes, Fossil Free Tompkins, and Sierra Club-Atlantic Chapter, and Earthjustice in opposition to the Draft Title V Air Permit for Greenidge Generating Station, dated November 19, 2021
    b. Appendix B: Ranajit (Ron) Sahu, PhD, CEM Curriculum Vitae
    c. Appendix C: Elizabeth A. Stanton, PhD, Curriculum Vitae
    d. Appendix D: Justin R. Barnes Curriculum Vitae
11) November 10, 2022 letter from ALJ Phillips to parties regarding issues conference schedule
12) November 22, 2022 Greenidge Generation LLC's Response to Petition for Full Party Status (Greenidge Response to Petition)

13) November 22, 2022 DEC Staff's Response to Greenidge Generation LLC's Statement of Issues and Petitioners' Petition for Party Status, dated November 22, 2022 (Staff Response)

14) December 8, 2022 Transcript of Issues Conference (Issues Conference tr 1-207)
15) December 9, 2022 letter from Greenidge regarding new issue 12A
16) December 9, 2022 letter from ALJ Phillips regarding new issue and adjournment of issues conference until December 20, 2022
17) December 13, 2022 letter from Greenidge regarding Statement of Issue 12A
18) December 16, 2022 email from Henry Tranes (DEC Staff) enclosing
    a. 2022 NY ISO Load and Capacity Data (Gold Book)
    b. 2021 NY ISO Comprehensive Reliability Plan
    c. NY ISO 2020-2021 Reliability Planning Process: Post-RNA Base Case Updates (February 23, 2021) Draft Slides
19) December 16, 2022 DEC Response to Greenidge Statement of Issue 12A
20) December 21, 2022 letter from Mandy DeRoche, Earthjustice, enclosing:
    a. Modified Permit ID 8-5736-00004/00016, effective 04/25/2019
    b. Permit ID: 8-5736-00004/00017 Permit Review Report, dated 04/30/2019
21) December 22, 2022 letter from ALJ Phillips regarding adjournment of issues conference until January 4, 2023
22) January 4, 2023 transcript of issues conference (Issues Conference tr 208-305)
23) January 4, 2023 letter from ALJ Phillips regarding briefing schedule and issues.
24) January 13, 2023 letter from Yvonne E. Hennessey to counsel, cc: ALJ Phillips regarding stipulation and Issue of Fact 13
25) January 13, 2023 letter from Jonathan Binder in response to January 13, 2023 letter from Yvonne E. Hennessey
26) January 17, 2023 email from Mandy DeRoche re stipulation of facts, enclosing January 9, 2023 Draft Stipulation of Facts (redline)
27) Emails submitted by Greenidge Generation LLC on January 26, 2023

a) "2020-10-28 Wheeler email re Title v renewal app.pdf"
From: Michael Wheeler <michael.wheeler@dec.ny.gov>
Sent: Wednesday, October 28, 2020 10:59 AM
To: David Murtha
Cc: Dale Irwin
Subject: Title V Renewal Application

b) "2020-10-28 Wheel email att-renewal app for active permit.pdf"
From: Michael Wheeler <michael.wheeler@dec.ny.gov>
Sent: Wednesday, October 28, 2020 10:59 AM
To: David Murtha
Cc: Dale Irwin
Subject: attachment
Attachments: greenidge renewal app from active permit.pdf

c) "2021-02-18 Merchant email.pdf"
From: Merchant, Kimberly (DEC) [mailto:kimberly.merchant@dec.ny.gov]
Sent: Thursday, February 18, 2021 12:09 PM
To: jpoc60@yahoo.com
Cc: Haley, Thomas P (DEC) <thomas.haley@dec.ny.gov>
Subject: Seneca Lake Inquiry

d) "2021-03-29 Wheeler email CLCPA.pdf"
From: Michael Wheeler <michael.wheeler@dec.ny.gov>
Sent: Monday, March 29, 2021 9:40 AM
To: David Murtha
Subject: CLCPA

e) "2021-03-30 Wheeler email re CLCPA.pdf"
From: Michael Wheeler <michael.wheeler@dec.ny.gov>
Sent: Tuesday, March 30, 2021 9:50 AM
To: David Murtha
Subject: RE: CLCPA
Attachments: CLCPA Permit Applications TGM.pdf; Fuel emission factors CLCPA 02.04.2021.pdf;
CLCPA 03-11-2021.pdf

f) "2021-08-20 Wheeler email re [Greenidge] Condition 11-12am.pdf"
From: Michael Wheeler <michael.wheeler@dec.ny.gov>
Sent: Monday, March 29, 2021 9:40 AM
To: David Murtha
Subject: CLCPA

g) "2021-08-20 Wheeler email re [Greenidge] Condition.pdf"
From: Michael Wheeler <michael.wheeler@dec.ny.gov>
Sent: Friday, August 20, 2021 10:50 AM
To: David Murtha
Subject: Greenidge condition

h) "2021-08-20 Wheeler email re greenidge draft permit review 2-49pm.pdf"
From: Michael Wheeler <michael.wheeler@dec.ny.gov>
Sent: Friday, August 20, 2021 2:49 PM
To: David Murtha
Subject: Re: Greenidge Draft Permit review

i) "2021-08-24 Wheeler email re working copy w att.pdf"
From: Michael Wheeler <michael.wheeler@dec.ny.gov>
Sent: Tuesday, August 24, 2021 3:23 PM
To: David Murtha
Subject: working copy
Attachments: draft part 1.pdf; 20210824 draft draft.pdf

j) "2021-08-27 Wheeler email.pdf"
From: Michael Wheeler <michael.wheeler@dec.ny.gov>
Sent: Friday, August 27, 2021 9:51 AM
To: David Murtha
Cc: Dale Irwin
Subject: 08/26 working copy

Attachments: 20210827 Greenidge permit review report.pdf; 20210826 Greenidge changes made from Ren 0 mod 1 to ren 2.docx; 20210826 Greenidge dec TV working copy.pdf; 20210826 Greenidge air TV working copy.pdf

28) Selected Danskammer Litigation documents submitted by Greenidge Generation LLC on January 26, 2023
   a) Danskammer Verified Petition and Complaint, dated December 23, 2021
   b) Danskammer Notice of Petition, dated December 23, 2021
   c) Danskammer Exhibit K- Notice of Denial, dated October 27, 2021
   d) Danskammer Petitioner-Plaintiff's Memorandum of Law in Support of its Verified Petition and Complaint, dated December 23, 2021
   e) NYSDEC Notice of Motion to Dismiss, dated March 16, 2022
   f) NYSDEC Affirmation of Jonathan A. Binder, Esq., executed March 14, 2022
   g) NYSDEC Brief in Support of Motion to Dismiss in Part and for a Stay, dated March 16, 2022
   h) Sierra Club and Orange RAPP Notice of Motion to Dismiss, dated March 16, 2022
   i) Sierra Club and Orange RAPP Memorandum of Law in Support of Motion to Dismiss, dated March 16, 2022
   j) Petitioner-Plaintiff's Memorandum of Law in Response to the Despondent-Defendants' Motion to Dismiss in Part and for a Stay and in Response to Memoranda of Law in of Proposed Amici Curiae, dated April 13, 2022
   k) NYSDEC Reply Brief in Support of Motion to Dismiss in Part and for a Stay, dated April 27, 2022
   l) Sierra Club and Orange RAPP Reply Brief in Further Support of Motion to Dismiss
   m) *Danskammer Energy, LLC. v. DEC et al*, Sup.Ct., Orange County, May 10, 2022, Onofry, J., Index NO. EF008396-2021 (denying motion of Riverkeeper, Inc and Scenic Hudson, Inc. to file amicus brief).

29) February 1, 2023 Greenidge Generation LLC's Post-Issues Conference Brief (Greenidge brief)

30) March 1, 2023 Petitioners' Post-Issues Conference Brief and Brief in Support of its Motion for Summary Judgment (Petitioners' brief)

31) March 1, 2023 DEC Staff's Post-Issues Conference Brief (Staff brief)

32) March 30, 2023 Greenidge Generation LLC's Brief in Opposition to Proposed Petitioners' Motion for Summary Judgment (Greenidge Opp to Summary Judgment)

33) April 14, 2023 Petitioners' Reply Brief in Support of their Motion for Summary Judgment, dated April 14, 2023 (Petitioner's Reply)