

NEW YORK STATE
PUBLIC SERVICE COMMISSION

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JOINT APPLICATION of

HELIOS POWER CAPITAL, LLC,
DANSKAMMER ENERGY, LLC, and
MERCURIA ENERGY AMERICA, INC.,

for

EXPEDITED APPROVAL for the
LEASE, SALE, and OPERATION of the
DANSKAMMER ELECTRIC
GENERATING FACILITY and SITE
under LIGHTENED REGULATION
and for RELATED RELIEF

PSC Case No. 14-E-0117

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MOTION TO INTERVENE AND FOR DISCOVERY,
AND COMMENTS PURSUANT TO APRIL 23, 2014 NOTICE OF PETITION

State of New York Office of the
Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224

June 9, 2014

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
BACKGROUND	2
The Danskammer Facility	2
Regulatory Framework	4
Recent Procedural and Operating History	4
Sale to ICS NY Holdings, LLC to Demolish the Danskammer Facility	5
Sale to Helios Power Capital, LLC to Demolish the Danskammer Facility	6
Helios Power Capital, LLC Decides to Generate Power at Danskammer	8
Danskammer Energy, LLC, and Mercuria Energy America, Inc. Join With Helios Power Capital, LLC and Propose to Operate Danskammer	9
The Joint Application.....	9
Developments After the Filing of the Joint Application.....	12
DISCUSSION AND COMMENT.....	15
A. The Joint Application Does Not Provide Sufficient Information to Enable the Commission to Determine Whether the Applicants Have the Financial or Technical Resources or the Operational Experience Necessary to Rebuild and Operate the Facility	15
B. The Joint Application’s Market Power Disclosures Are Incomplete	17
C. As Currently Described in the Filings with the PSC, Open Questions Still Exist as to Whether the Applicants’ Proposed Management or Operation of Danskammer Establishes a Clear Public Benefit.....	17

TABLE OF CONTENTS

	Page
D. The Joint Application Requests the PSC to Approve Transactions Whose Terms Are Unknown But Which May Harm Ratepayers.....	20
E. The Joint Application Raises Questions About Permits that May Be Necessary to Ensure that the Danskammer Plant Complies with Environmental Laws.....	21
F. The Facility’s SPDES Permit Should Be the Subject of a Full Agency Review by DEC.....	23
G. The Joint Application Raises Questions About Possible Collateral Consequences for the Public Interest if the Application is Approved.....	23
H. The Helle Response Puts in Question the Authority of Those Purporting to Control Helios Capital in this Proceeding	24
I. The PSC Should Comply with SEQRA.....	24
J. Mercuria America and Danskammer Energy May Be Engaged in Relevant Transactions That Have Not Been Disclosed to the PSC.....	26
CONCLUSION.....	26

PRELIMINARY STATEMENT

The Attorney General is the chief legal officer of the State of New York and in that capacity brings actions and intervenes in administrative proceedings to enforce the State's laws – including consumer, environmental, and health and safety laws – enacted to protect the public interest, consumers and ratepayers. In particular, the office of the Attorney General has intervened in various proceedings before the New York State Public Service Commission (PSC or Commission) on issues involving utility rates, preparation for climate change, electric power and natural gas reliability, corporate reorganization and responsibility, as well as safety and environmental protection. Additionally, the office previously has represented the State in connection with various permits and regulatory issues concerning the power generation facilities that are the subject of this proceeding.

As discussed in the comments below, the Joint Application submitted on April 1, 2014 raises significant issues regarding the rates that consumers pay for electric power; power reliability; corporate responsibility; and public health and the environment. This office respectfully submits that it can make a material contribution to the proceeding on behalf of New York's citizens, its economy and environment. Accordingly, the office respectfully requests permission to intervene as a party to this proceeding with the ability to conduct discovery on certain issues set forth below; the office also submits comments pursuant to the PSC's April 23, 2014 notice of petition and comment period through June 9, 2014.

BACKGROUND

The Danskammer Facility

1. Originally designed and constructed in the early 1950s, the Danskammer Generating Facility (Danskammer or facility) is a six-unit power plant located on the west bank of the Hudson River at river mile 65, in the Town of Newburgh, Orange County, New York.

2. Danskammer stopped producing electric power in 2012, in part due to facility damage from Superstorm Sandy in October 2012.

3. The following chart summarizes the age, generation capacity and fuel of the facility's six electricity generating units:

Unit		In-Service Date	Summer Capacity (in megawatts)	Fuel
Danskammer	Unit 1	1951/12	61.0	#6 Fuel Oil <i>or</i> Natural Gas #2 Fuel Oil
Danskammer	Unit 2	1954/09	59.0	#6 Fuel Oil <i>or</i> Natural Gas #2 Fuel Oil
Danskammer	Unit 3	1959/10	138.0	Coal <i>or</i> Natural Gas #2 Fuel Oil
Danskammer	Unit 4	1967/09	237.0	Coal <i>or</i> Natural Gas #2 Fuel Oil
Danskammer	Unit 5	1967/01	2.5	#2 Fuel Oil
Danskammer	Unit 6	1967/01	2.5	#2 Fuel Oil

Source: 2012 ISO Gold Book, p. 33.¹

¹ An air emission permit issued by the State of New York Department of Environmental Conservation reflects that Danskammer Unit 1 and Unit 2 are capable of burning #6 fuel oil and natural gas (DEC Permit ID 3-3346-00011/00017, Condition 25, Item 25.2, Item 25.3). The same permit also states that Unit 3 and Unit 4 at one point burned "residual oil" (*id.* at Item 25.1,

4. The facility also contained the transformers and other transmission facilities needed to move electricity from the power generation units to the power grid, as well as docks, off-loading and fuel storage facilities, and conveyor devices.

5. Given that two of the facility's units (Units 3 and 4) primarily relied on coal as a fuel, the facility also has a coal ash waste disposal area containing a large volume of coal ash.

6. Because Danskammer was constructed before the passage of the 1970 federal Clean Air Act, the facility's power generating units were grandfathered from various pollution control requirements that apply to newer power plants, such as New Source Review. As a result, the facility lacks modern pollution controls that substantially reduce the emission of air pollutants that harm public health and the environment. For example, the plant lacks scrubbers, a widely-available technology that can eliminate up to 99 percent of sulfur dioxide emissions, an air pollutant that forms particulate matter that harms public health and contributes to acid rain that harms the environment.

7. When in operation, the facility's steam power trains were cooled by water drawn from the Hudson River. The facility employed a "once through" cooling process in which river water is pulled through screens that remove debris, and then sent in metal pipes to and through an enclosed "condenser" vessel. After leaving the condenser, the heated water is returned to the river and additional cool river water is drawn into the system.

8. Once-through cooling may be environmentally damaging because it can impinge and entrain aquatic biota, including fish, and discharges hot water back into the

Item 25.4). The apparent differences between ISO's report and the text of DEC's permit should be resolved before any final agency action.

source river. If unmitigated, a once-through cooling system can pose a risk of harm to the Hudson River environment. Accordingly, the State of New York Department of Environmental Conservation (or DEC) regulates cooling water intake systems in the context of its federally-authorized SPDES permit program. DEC conducted such a review in 2006. *See, e.g., Riverkeeper, Inc. v. Johnson*, 52 A.D.3d 1072 (3d Dep’t 2008), *leave denied*, 11 N.Y.3d 716 (2009).

Regulatory Framework

9. The United States Federal Energy Regulatory Commission (FERC) and the PSC have exercised jurisdiction over Danskammer’s power production and the ownership of the facility.

10. For approximately 45 years, the United States Environmental Protection Agency (EPA) or the State of New York Department of Environmental Conservation have administered programs that regulate Danskammer’s cooling water intake structures, discharges to the Hudson River, coal ash waste management and disposal, and air emissions.

Recent Procedural and Operating History

11. In 2000, FERC (Docket EC01-7-000) and the PSC (Case 96-E-0909) approved Houston-based Dynegy, Inc.’s purchase of Danskammer and its associated transmission facilities through a wholly-owned subsidiary, Dynegy Danskammer, LLC. In that same year, the PSC granted Dynegy Danskammer “lightened regulation” (Case 00-E-1643) as a merchant generating plant.

12. In 2001, FERC recognized Dynegy Danskammer as an exempt wholesale generator (Docket EG01-82-000).

13. In November 2011, Dynegy Danskammer filed for bankruptcy protection (No. 11-38,108, Bankruptcy Court S.D.N.Y.).

Sale to ICS NY Holdings, LLC to Demolish the Danskammer Facility

14. On January 3, 2013, Dynegy Danskammer notified the Commission that Superstorm Sandy damaged all six of the facility's generating units, that the plant was not economically worth fixing, and that the company had agreed to sell the facility to ICS NY Holdings, LLC (ICS Holdings), to be scrapped (Case 13-E-0012).

15. On January 29, 2013, Dynegy Danskammer requested FERC's permission to sell Danskammer to ICS Holdings (Docket EC13-70-000). In its application, Dynegy Danskammer represented that ICS Holdings was not subject to FERC jurisdiction, asked that FERC authorize the transfer of Danskammer's associated transmission facilities to ICS Holdings, and stated that ICS Holdings "intends to demolish [Danskammer Generating Station] after the Transaction is consummated" (Application p. 1, fn 3).

16. On March 11, 2013, FERC authorized Dynegy Danskammer to sell Danskammer's associated transmission facilities to ICS Holdings (Docket EC01-70-000).

17. On March 29, 2013, Dynegy Danskammer submitted to the PSC a short form environmental assessment under the State Environmental Quality Review Act (SEQRA). In that submission, Dynegy Danskammer represented that the sale and retirement of the facility would have no adverse environmental impacts (Case 13-E-0012).

18. On April 22, 2013, the PSC approved the retirement of the facility as an electric generating plant, determined that PSC approval was not required for ICS Holdings' purchase of a facility that no longer would be operated as an "electric plant,"

and issued a declaration pursuant to SEQRA that Danskammer's retirement would have no adverse environmental impacts (Case 13-E-0012). In reaching that conclusion, the PSC noted that Danskammer had been economically unprofitable, that the major Danskammer units burned coal and faced "significant environmental compliance costs," and that the plant's retirement was "irreversible" (pp. 11 – 12).

19. Approximately four months later, FERC accepted the New York Independent System Operator, Inc.'s proposed tariff revisions to establish and recognize a new capacity zone encompassing NYISO Load Zones G, H, I, and J. *New York Indep. Sys. Operator, Inc.*, 144 FERC ¶ 61,126 (2013) (August 13, 2013 Order) Docket No. ER13-1380.

20. On September 5, 2013, Dynegy Danskammer informed FERC that the sale of the facility to ICS Holdings would not proceed (Docket EC01-70-000).

Sale to Helios Power Capital, LLC to Demolish the Danskammer Facility

21. On September 9, 2013, Dynegy Danskammer, requested that FERC approve Houston-based Helios Power Capital, LLC's (Helios Capital), purchase of facility and its associated transmission facilities (Docket EX13-144-000). In its application, Dynegy Danskammer asserted that Helios Capital was not subject to FERC jurisdiction, asked that FERC authorize transfer of Danskammer's associated transmission facilities to Helios Capital, and stated that, like ICS Holdings, Helios Capital "intends to demolish [Danskammer Generating Station] after the Transaction is consummated" (p. 1, fn. 3).

22. On October 22, 2013, FERC approved the acquisition of the Danskammer facility and its associated transmission facilities (Docket EC13-144-000) by Helios

Capital. In its order, FERC noted Dynegy Danskammer’s representation that Helios Capital’s ownership of the facility and its associated transmission facilities “will not impair the effectiveness of regulations, because Helios Capital will not operate or make wholesale sales of electric energy from the Danskammer Generating Station and it will not be a public utility under Section 201(e) of the [Federal Power Act]” (pp. 2 – 3). FERC also stated that Dynegy Danskammer represented that “Helios Capital intends to demolish the Danskammer Generating Station once it acquires ownership.” (p. 1). FERC ordered Dynegy Danskammer to inform FERC of “any change in circumstances that would reflect a departure from the facts [FERC] relied upon in authorizing the [sale of Danskammer and its associated transmission to Helios Capital]” (p. 4).

23. On October 28, 2013, in a *sua sponte* emergency order, the PSC approved the purchase of Danskammer and its associated transmission facilities by Helios Capital (Case 13-E-0012). The order stated that approval was based on the representation that Danskammer would be retired. On November 1, 2013, the Bankruptcy Court approved the sale of the facility to Helios for \$3.5 million, the estimated scrap value of the plant. The PSC’s October 28 order provided Helios Capital with 45 days after the acquisition to notify the PSC that the Helios Capital had retired Danskammer. The order gave the PSC Secretary the authority to extend the due date for the retirement notice. On November 14, 2013, the PSC Commissioners affirmed the October 28 order. On December 11, 2013, the PSC published the emergency order for comment on whether the order should be made permanent.

24. On November 12, 2013, Dynege Danskammer, informed FERC that ownership of Danskammer and its associated transmission facilities had been transferred to Helios Capital on November 1, 2013 (Docket EC13-144-000).

25. On December 16, 2013, at the request of Helios Capital, the PSC Secretary extended to March 17, 2014 the time for submitting notice that Danskammer was retired.

26. On January 22, 2014, the PSC extended the October 28, 2013 emergency order until April 18, 2014 to consider whether to make the emergency order permanent (Case 13-E-0012). The PSC's order also stated that Helios Capital was subject to Section 70 of the New York State Public Service Law and that, in the event Helios Capital sought to generate power at Danskammer and dispatch that power to the grid, Helios Capital must demonstrate to the PSC "that §70 approval of its acquisition of the Danskammer facility for the purpose of operating it is warranted" (p. 6).

Helios Power Capital, LLC Decides to Generate Power at Danskammer

27. On March 13, 2014, Helios Capital informed the Commission that it wished to repair and restart Danskammer, and asked to extend the filing of a formal petition until April 1, 2014 (Case 13-E-0012). On March 14, 2014, the PSC Secretary granted the requested extension.

28. On March 28, 2014, the PSC made the October 28, 2013 order permanent. The Commission also found that Helios Capital was "in the position of owning electric plant without obtaining PSL §70 approval" (Case 13-E-0017, p. 23). Recognizing that the parties' positions had changed between October 2013 and March 2014, the PSC proposed to resolve the difference "through application of the usual criteria applicable to

transfers of ownership interests in lightly regulated generation facilities” (*id.*). The order states that SEQRA compliance (p. 24) and “environmental issues ... to the extent appropriate” (p. 20, fn 18) may be considered when Helios Capital applies for permission to operate Danskammer.

*Danskammer Energy, LLC, and Mercuria Energy America, Inc.
Join with Helios Power Capital, LLC and Propose to Operate Danskammer*

29. On April 1, 2014, Helios Capital, and two previously uninvolved entities, Danskammer Energy, LLC (Danskammer Energy), and Mercuria Energy America, Inc. (Mercuria America), filed a 24-page joint application (Joint Application) for approval of lease, sale, and operation of Danskammer and for other relief (Case 14-E-0117).

The Joint Application

30. The Joint Application consists of: (1) 15 pages of text; (2) a 4-page short environmental assessment form under the State Environmental Quality Review Act; (3) a one-page Herfindahl-Hirschman Index calculation; (4) two verification pages; and (5) two cover pages. The substantive content of the Joint Application includes the following information:

31. Parties (1 page in length) -- The Joint Application identifies three applicants but states that a fourth entity, Allen Lawrence Berry 2007 Trust (Berry Trust), is involved in some of the transactions that the PSC is asked to approve.

32. The Joint Application states that Helios Capital is a Texas limited liability company that “provides services designed to capture the value of power generation assets at any point in the course of their lifecycles,” that it “does not own, nor is it owned by or under common ownership with any entity that owns generating facilities in the New York

Control Area or in ISO-New England, Pennsylvania, or New Jersey,” and that it is a wholly-owned subsidiary of the Berry Trust (p. 5).

33. The Joint Application describes Danskammer Energy as “a special purpose entity formed under the laws of the State of Delaware for the sole purpose of acquiring and returning [Danskammer] to service as a supplier of [generating capacity].” The application identifies Danskammer Energy as a wholly-owned subsidiary of the Berry Trust, and an affiliate of Helios Capital. The Joint Application states that Danskammer Energy “does not own, nor is it owned by or under common ownership with any entity that owns generating facilities in the New York Control Area or in ISO-New England, Pennsylvania, or New Jersey Danskammer Energy” (p. 6).

34. The Joint Application identifies Mercuria America as an indirect, wholly-owned subsidiary of Mercuria Group (Mercuria Group). Mercuria Group is described as a “global trading and investment company operating in 50 countries” with over 1,000 employees trading “physical oil, energy products, and other commodities” and operating “a growing portfolio of production, logistic and storage assets.” The Joint Application states that neither Mercuria Group nor any of its subsidiaries, including Mercuria America, “owns, nor is it owned by or under common ownership with any entity that owns generating facilities in the New York Control Area or in ISO-New England, Pennsylvania, or New Jersey” (pp. 5 - 6).

35. The only information disclosed about the Berry Trust is that it owns both Helios Capital and Danskammer Energy and does not own or control any other generating facility in the New York Control Area, ISO-New England, New Jersey or Pennsylvania (p. 5).

36. Party Capacity to Operate Power Plants (½ page in length) -- The three named applicants claim “familiarity with electric generation facilities” and assert that this familiarity has enabled them to assemble a team of professionals (not identified in any way) “to assess the current condition of [Danskammer] and to undertake the repairs required to return [it] to operation.” The applicants state that they have no contractor to operate Danskammer when the plant becomes operational (p. 9).

37. Financial Resources (passing reference) -- Mercuria America’s parent Mercuria Group claims to have world-wide operations, but none of the applicants provide any information about their financial resources (or its record of compliance with regulatory obligations).

38. Market Power (3½ pages in length) -- The named applicants and the Berry Trust all claim not to own, be owned by or be under common ownership with any entity that owns generating facilities in the New York Control Area or in ISO-New England, Pennsylvania, or New Jersey. The Joint Application does not contain any statements about the applicants’ relation to generating assets in Ontario, Quebec, the Midcontinent ISO, or the PJM Interconnection outside New Jersey and Pennsylvania, all of which may influence New York power markets.

39. Environmental Issues (4½ pages in length) -- The applicants did not identify the environmental permits that are required to operate Danskammer, or state whether they have all the requisite permits. Instead, the Joint Application states that Danskammer will “remain subject at all times to the provisions of the air, water, and other environmental permits issued by NYSDEC.” The applicants stated without

explanation that environmental concerns will likely limit Danskammer's operation to "less than 900 hours a year."

40. The applicants noted that "all four Danskammer units" (presumably Units 1-4) are capable of burning natural gas and committed to using natural gas in each unit when natural gas is available.

41. The applicants stated that if called upon to run when natural gas is not available Units 1 and 2 will run on an unspecified fuel oil and Units 3 and 4 will burn coal.

42. Transactions (1 page in length) -- The Joint Application asked the PSC to approve (1) Helios Capital's immediate "ground leasing" of the facility to Danskammer Energy, (2) Danskammer Energy's acquisition of the facility "upon completion of a re-platting of the property upon which Danskammer and certain adjacent operations are located," (3) the Berry Trust's transfer of majority ownership of Danskammer Energy to Mercuria America, and (4) Danskammer Energy's repair and operation of Danskammer under lightened regulation.

43. The terms of the proposed "ground leasing," of Danskammer and transfer to Danskammer Energy are not disclosed, nor are the terms of the proposed Mercuria America's acquisition of majority interest in Danskammer Energy. Moreover, the meanings of the terms "ground lease" (pp. 2, 6, 9, 10 & 15), "re-platting" (pp. 2 & 6), and "certain adjoining operations" (pp. 2 & 6) are not disclosed.

Developments After the Filing of the Joint Application

44. On April 23, 2014, the PSC published in the State Register a notice requesting public comment on a "petition by Helios Power Capital LLC (Helios) and

others requesting approval of the transfer of ownership and operating interests “in Danskammer. The notice provide 45 days for comment, *i.e.*, until June 9, 2014.

45. On May 16, 2014, counsel for a George T. “Trey” Helle III filed a “response” that asserted that Helle has an ownership interest in Helios, that the ownership and control of Helios is the subject of litigation in the 165th District Court of Harris County, Texas, and that the Texas proceeding bore directly on the question of the authority of Helios and the Berry Trust to lease or transfer Danskammer. May 16, 2014 letter, referencing *George Helle, III v. Allen Lawrence Berry and Helios Power Capital, LLC*, Case No. 2014-10162.

46. On May 19, 2014, the applicants filed a letter in which they stated that “[c]oncern about the availability of natural gas is currently being addressed” such that in their view “it as unnecessary for Units 3 and 4 to use coal, and the Petitioners have no intention of doing so.”

47. In their May 19, 2014 letter, the applicants also stated that they had selected Consolidated Asset Management Services, LLC (“CAMS”) as the operator of Danskammer. The applicants represented that CAMS has “extensive experience in generating plant operation and maintenance, as well as asset management, having performed such services for approximately 30 power plant projects in North America” and possesses other relevant qualifications, and directed the PSC to review a website: www.camstex.com. The applicants indicated that they are finalizing agreements with CAMS for Danskammer’s operation and maintenance and “will have these agreements in place prior to or concurrent with the approval being sought from” the Commission.

48. On May 20, 2014, the applicants filed two more letters. In their first letter, the applicants asserted that the Helle proceeding in Texas has no relevance to the Commission's consideration of the Joint Application.

49. In their second May 20, 2014 letter, the applicants asked the PSC to rule on their application at the PSC's next meeting, scheduled for June 12, 2014, despite the fact that the public comment period will have only closed three days earlier, on June 9.

50. On May 27, 2014, the applicants submitted yet another letter, asserting that because they have now secured an adequate supply of natural gas, "the annual run-time limitation of 900 hours ... no longer applies to all four Units of the Danskammer Generating Facility" to address environmental compliance concerns. The letter does not unconditionally commit the owner and operator to using only natural gas to fuel all the facility's units -- of which there are six. The letter also contained a somewhat opaque statement that "Units 3 and 4 will no longer be subject to that [900 hour] constraint while fueled exclusively with natural gas," which leaves open the possibility that the units may use other fuels.

51. On June 4, 2014, Danskammer Energy filed a 114-page petition and supporting documents in FERC Docket ER14-2012-000 (FERC Petition) asking FERC for market-based rate authority to sell Danskammer's power output effective July 10, 2014, waiver of FERC's 60-day notice and certain other requirements, and blanket authority to issue securities and assume liabilities. FERC Petition at 1 – 2 & 13. In the FERC Petition, Danskammer Energy describes itself as more than 90% owned by Mercuria America and less than 10% owned by Helios Capital (*id.* at 4, fn 6), Danskammer as a "non-operational, mothballed station" (*id.* at 2), and Danskammer 3

and 4 as “natural gas- and coal-fired units” (*id.* at 4). Danskammer Energy stated that as of June 4, 2014, it “has in place” a “ground lease to [Danskammer] and underlying property” that “provides Danskammer Energy full rights to the use and eventual operation of the Facility and underlying property,” and that this ground lease includes “a purchase option” granting Danskammer Energy the right to “own the Facility and, in fee, the underlying property.” *Id.* at 4, fn 6. Danskammer Energy further related that on May 5, 2014, Mercuria America filed an application asking for FERC approval of “a transaction that will result in [Mercuria America], and [Danskammer Energy], becoming affiliated with entities subject to the Commission’s jurisdiction.” *Id.* at 6. Danskammer Energy also asked for FERC approval to “sell certain ancillary services in the markets administered by the California Independent System Operator Corporation (CAISO), ISO-New England, Inc. (ISO-NE), Midcontinent Independent System Operator, Inc. (MISO), New York Independent System Operator, Inc. (NYISO), Southwest Power Pool (SPP), and PJM Interconnection, L.L.C. (PJM).” *Id.* at 9.

DISCUSSION AND COMMENT

A. The Joint Application Does Not Provide Sufficient Information to Enable the Commission to Determine Whether the Applicants Have the Financial or Technical Resources or the Operational Experience Necessary to Rebuild and Operate the Facility.

52. The Joint Application does not establish, or even discuss, the fundamental point of whether the applicants have the financial and technical resources and operational experience needed to rebuild and operate a power plant. Helios Capital and Danskammer Energy make no financial claims or disclosures. Mercuria America supplied a conclusory assertion that its corporate parent has 1,000 employees working all over the world, but no indication that the parent is solvent, or if solvent has committed any

resources -- much less adequate resources -- to rebuilding and operating the plant safely, reliably, economically, and in an environmentally-compliant manner.

53. Public records do not supply the financial information that the applicants have not provided here. None of the applicants is publicly traded, nor are their corporate and trust parents. Even if public records could substantiate the financial capabilities of the applicants, the applicants should supply that information to the Commission in support of their application, rather than leave the PSC and other interested parties to supplement the Joint Application's deficiencies.

54. As to technical resources and operational experience, none of the applicants claims to have any experience rebuilding or operating a power plant. Instead, the Joint Application states that the applicants have hired professionals to evaluate Danskammer's condition and repair the facility, and in subsequent correspondence, the applicants state that CAMS will be hired to operate the facility.

55. The applicants' supplemental recitation in their May 19, 2014 letter that they are "finalizing agreements" with CAMS for the operation and maintenance of Danskammer fails to demonstrate that the applicants have the technical and other capabilities needed to rebuild and re-start Danskammer and to operate the plant safely, reliably, and economically in an environmentally-compliant manner, even if CAMS does. As demonstrated earlier by the failure to complete the sale of the facility to ICS Holdings, an expression of intent does not guarantee performance. Before the PSC can begin to consider CAMS' capabilities, the applicants should provide the PSC with copies of executed operational agreements with CAMS.

56. Furthermore, a reference to the CAMS website, without more, fails to show that CAMS has the ability to rebuild, re-start or operate Danskammer as the applicants' agent. The applicants must supply evidence of the extent and capabilities of the resources that CAMS (or whomever the applicants actually employ) will deploy at Danskammer.

B. The Joint Application's Market Power Disclosures Are Incomplete.

57. The applicants and the Berry Trust claim that the approvals requested from the PSC would have no effect on competition in New York power markets because the applicants and the Berry Trust have no relationship with any power plant in New York, New England and two states in the PJM Interconnection, New Jersey and Pennsylvania. This information is inadequate. New York borders Ontario and Quebec, and there are 11 other states and the District of Columbia in the PJM Interconnection. Additionally, power production and transmission in the MISO can affect New York power supplies and prices. The Joint Applicant says nothing, however, about the applicants' and the Berry Trust's involvement with these other generation and transmission areas that could affect New York's power supply and prices. Moreover, in its June 4, 2014 FERC Petition at page 9, Danskammer Energy asks for authority to sell ancillary services in the CAISO, MISO and SPP markets, but none of those markets is mentioned in the Joint Application.

C. As Currently Described in the Filings with the PSC, Open Questions Still Exist as to Whether the Applicants' Proposed Management or Operation of Danskammer Establishes a Clear Public Benefit.

58. The Joint Application states that Danskammer Energy intends to operate Danskammer as a source of installed capacity. "Managing" a power plant solely as a

source of installed capacity may indicate that the owner lacks financial interest in having the plant generate electricity and dispatching that power to the grid. In other words, it appears that from the applicants' perspective, the optimum financial outcome would be collecting payments for being ready on a peak demand days, but never actually having to respond to a request to provide energy, start the boilers, generate and deliver electricity, and comply with environmental regulations.

59. To the extent the facility is called on to generate electric power, it is difficult and impractical to manage and operate large steam boilers as “peaker” units that can be quickly activated to dispatch power to the electric grid. Coal-fired boilers, for example, require time to build the necessary heat to power their operations and to cool down after their power is no longer needed; during such start up and shut down cycles, coal boilers typically emit higher rates of air pollutants than during sustained baseload operating cycles. Even assuming that the facility is prohibited from burning coal – either by DEC as a condition of its Title V operating permit or by an order of the Commission – the use of units 3 and 4 as “peakers” would represent a departure from their historic use as baseload units. “Peaker” units are typically gas turbines, which can be brought on line much more quickly than steam units such as those at Danskammer. The applicants have not provided any information describing whether, and how, these steam generating units can be operated as “peakers” in a safe, reliable, and environmentally-sound manner.

60. Because there are several air pollution permitting obligations that are measured in terms of compliance with hourly emission rates (*e.g.*, the reasonably available control technology requirement for nitrogen oxides (“NO_x RACT”) and the national ambient air quality standard for sulfur dioxide), the applicants' representation

that they can comply with environmental requirements by limiting their operation to periods of peak demand is unfounded. At a minimum, the applicants must provide additional information to enable regulators and the public to evaluate their position.

61. The fact that the applicants apparently have reserved their ability to burn coal if there is a change in market conditions, *i.e.*, the applicants have not sought either an operating permit condition from DEC or an order from the Commission that would prohibit the burning of coal, makes it difficult to evaluate Danskammer as solely a natural gas or oil facility in order to demonstrate that restarting the plant is clearly in the public interest. This concern is reinforced by Danskammer Energy's description of Danskammer 3 and Danskammer 4 as "natural gas- and *coal-fired* units" in its June 4, 2014 FERC Petition, at page 4 (emphasis added).

62. The applicants also have not provided sufficient information on the types of fuel they intend to use as backup in the event that natural gas is not available. For example, with respect to Units 3 and 4, the 2012 NYISO Gold Book (p. 33) states that prior to Danskammer's 2012 abandonment of operation, coal was the primary fuel and that the backup fuels were natural gas and #2 fuel oil. The applicants have not identified the backup fuel for these units under their planned use of natural gas as the primary fuel. Similarly, with respect to Units 1 and 2, open questions remain. The Joint Application does not state what grade fuel oil is the backup fuel for Unit 1 or Unit 2, whether the applicants intend to use either #6 fuel oil or #2 fuel oil in these units, or which grade of oil will be the primary backup fuel if they are prepared to burn both.

63. The applicants should answer these questions about Danskammer’s status, generation availability, and fuel use before the PSC makes any decision about authorizing them to rebuild, or operate the facility as an electric generating plant.

D. The Joint Application Requests the PSC to Approve Transactions Whose Terms Are Unknown But Which May Harm Ratepayers.

64. The Joint Application asks the PSC to approve: (1) Helios Capital’s immediate “ground leasing” of the facility to Danskammer Energy; (2) Danskammer Energy’s acquisition of the facility “upon completion of a re-platting of the property upon which Danskammer and certain adjacent operations are located;” (3) the Berry Trust’s transfer of majority ownership of Danskammer Energy to Mercuria America; and (4) Danskammer Energy’s repair and operation of Danskammer under lightened regulation. But the Joint Application does not disclose the terms of either ownership transfer, the “ground lease,” how Danskammer Energy would manage the repair or the operation of Danskammer, the substance or the purpose of the “re-platting,” or the nature and significance of the “certain adjacent operations.” Although it is possible to speculate about how one or more of these undisclosed facts may or may not harm ratepayers, such questions could be resolved by a public and transparent review process.

65. Moreover, for some actions, the Joint Applicants apparently are asking the PSC for ratification rather than approval. In its June 4, 2014 FERC Petition, at page 4, fn. 6, Danskammer Energy states that as of the date that the petition was filed (a) Danskammer Energy had “in place” a “ground lease to [Danskammer] and underlying property” that “provides Danskammer Energy full rights to the use and eventual operation of the Facility and underlying property,” and that this ground lease includes “a purchase option” granting Danskammer Energy the right to “own the Facility and, in fee,

the underlying property.” Also, the Berry Trust appears to have already transferred a controlling more than 90% interest in Danskammer Energy to Mercuria America. *Id.* Executed or not, the ground lease for Danskammer and the purchase documents for Danskammer Energy are not before the PSC.

E. The Joint Application Raises Questions About Permits that May Be Necessary to Ensure that the Danskammer Plant Complies with Environmental Laws.

66. Beyond the operation and fuel issues discussed above, it is unclear whether the applicants have all the necessary and up-to-date environmental permits to operate the facility, generate electricity, safely manage and dispose of coal ash waste, and to operate the cooling water intake system and related discharges to the Hudson River. As noted above, several questions exist concerning the facility’s air emission profile and ability to comply with air pollution regulations given uncertainties about its fuel sources. The applicants must resolve these and other permitting issues with the New York State Department of Environmental Conservation before restarting and operating the facility.

67. In addition, although the applicants represented in their May 27 letter to the Commission that they can operate the facility “within the limits of their existing air permits,” the circumstances surrounding the closure of the facility in 2012 and subsequent representations to regulators concerning its permanent retirement raise the question of whether additional permitting requirements under the Clean Air Act are applicable. Specifically, under the Environmental Protection Agency’s “reactivation” policy, a mothballed facility that seeks to restart operations must undergo New Source Review permitting as a “new source” prior to resuming operations if the evidence shows that the shutdown was intended to be permanent. *In the Matter of Monroe Elec.*

Generating Plant (Petition No. 6-99-2), EPA Order Partially Granting and Partially Denying Petition for Objection to Permit, (June 11, 1999), available at: http://www.epa.gov/region7/air/title5/t5memos/ccaw_ord.pdf. Whether a shutdown should be treated as permanent is determined on a case-by-case basis considering all relevant facts. At a minimum, the representations made by Dynegy and/or Helios to the Commission, FERC, and the U.S. Bankruptcy Court during a 10-month period in 2013 regarding their intentions to permanently retire and demolish the facility, and Danskammer Energy's recent description of Danskammer as a "non-operational, mothballed station" in its June 4, 2014 FERC Petition, at 2, underscore the need for the applicants to provide additional information to enable air permitting authorities (DEC and EPA) to evaluate the applicability of the reactivation policy to the proposed restart of the Danskammer plant and any additional permitting requirements that must be satisfied prior to commencement of operation.

68. Even if it is determined that the Danskammer facility should not be treated as a "new source" under EPA's reactivation policy, the facility could separately trigger New Source Review permitting requirements as a "modification" of an existing source if the work required to return the plant to active service could reasonably be expected to increase its air pollution compared to prior levels. Preconstruction permitting is likewise required for such major modifications, and determining applicability requires evaluating whether the work (1) constitutes a non-routine physical or operational change and (2) would result in a significant net emissions increase. *See* 42 U.S.C. § 7575; 6 N.Y.C.R.R. §§ 231-6, 231-8. The applicants have not provided information that would enable

regulators to evaluate either of these prongs of the modification test to determine whether preconstruction permitting requirements apply.

F. The Facility’s SPDES Permit Should Be the Subject of a Full Agency Review by DEC.

69. Prior to its expiration on May 31, 2011, Danskammer applied for a renewal of its 2006 SPDES permit. When Danskammer was sold for “scrap” in the Dynegy bankruptcy proceeding, DEC did not finalize the draft renewal permit. Now after the passage of three (3) years since the renewal application, and post-Sandy facility impacts, the SAPA-extended SPDES permit should be the subject of a full agency review to ensure that the plant’s cooling water intake system and facility discharges comply with State and federal law. That review must include the opportunity for public notice and comment, as required by DEC regulations.

G. The Joint Application Raises Questions About Possible Collateral Consequences for the Public Interest if the Application is Approved.

70. The Joint Application refers to “re-platting” Danskammer and “certain adjacent operations” at the facility. One meaning of “re-platting” is the alteration of deeds to real property, either by combining two or more deeds into one deed for the entire area covered by the previous deeds or the division of the land covered by a deed into two or more parcels governed by separate deeds. Danskammer today includes a large coal ash waste area. This may be the “certain adjacent operations” referred to in the Joint Application. Separating the current Danskammer deed into one for the plant and another for the ash pile could be a step toward separating operational, compliance, and financial responsibility for the ash from ownership of Danskammer generating units. Separation of responsibility for the coal ash waste pile could lead to taxpayer responsibility for any waste management or cleanup costs not funded in the change of responsibility, or to

alternative uses that affect the public interest. For example, the coal ash waste site may have the potential to become a solid waste disposal facility. Whatever the applicants' intent, the PSC should ascertain what impact the proposed re-platting of Danskammer would have on the public interest.

H. The Helle Response Puts in Question the Authority of Those Purporting to Control Helios Capital in this Proceeding.

71. The Joint Application includes a verification by Allen Lawrence Berry stating that he owns the Berry Trust, and that the Berry Trust owns Helios Capital. The implication of this verification is that Mr. Berry has the authority to decide what Helios Capital does. Although not supported by a verification or other documentation, the May 16, 2014 response from Mr. Helle's counsel challenging Mr. Berry's authority to speak for Helios Capital does put in issue Mr. Berry's authority. If Helios Capital were publicly traded, Mr. Berry's authority would be easy to confirm. However, Helios Capital is not publicly traded. Because the public interest would not be served by having the management of a repaired Danskammer disrupted by a change in control, Mr. Berry should provide documentation of his authority to speak for Helios Capital.

I. The PSC Should Comply with SEQRA.

72. The State Environmental Quality Review Act (SEQRA) requires agencies to examine the possible environmental effects of a discretionary action before taking that action and to minimize negative environmental effects. Under SEQRA, the lead agency "having principal responsibility for carrying out or approving" an action regulated under the statute must determine if the action "may have a significant effect on the environment." ECL § 8-0111(6). If so, the agency must prepare a draft environmental impact statement, which is subject to comment and review before being finalized. ECL §

8-0109(5). If not, the agency's environmental review is complete after it determines the action will not have a significant environmental impact (or that the action is otherwise precluded from environmental review). Under SEQRA the standard for requiring an environmental impact statement is whether a proposed state action may have a significant impact on the environment, not whether an action is certain or likely to have an impact. ECL § 8-0109(2); *see, e.g., Onondaga Landfill Systems, Inc. v. Flacke*, 81 A.D.2d 1022, 440 N.Y.S.2d 788 (4th Dep't 1981).

73. Before ending in 2012, Danskammer's operations resulted in various solid waste, water, and air impacts, as the Commission noted in approving Dynegy's request for permanent retirement of the plant. *See* April 22, 2013 Order at 7 (finding that "the retirement of the Danskammer generating facility, which will end the burning of coal and its attendant air emissions at the site, will not result in adverse environmental impacts"). Depending on the details of re-starting facility operations, the applicants' proposal to rebuild and operate Danskammer could resume many of those impacts, and present additional impacts. Alternatively, it is conceivable that with unambiguous and enforceable operating conditions, the facility may be able to operate in a more environmentally beneficial way than it has in the past. Given the uncertainties involved with the pending application and its changing nature, it is appropriate for the PSC to conduct a SEQRA review of the proposed request. As an initial matter, it is important to ensure that the contours of the proposal and the means and methods of operating or managing the entire facility are made crystal clear and are confirmed in the administrative record. Thereafter, once the contours of the application have been fixed, the PSC should identify and take a hard look at the potential environmental impacts that

could flow from the proposal. Finally, SEQRA requires consideration of alternatives, including alternatives that might improve the environment as well as those that would do less damage than the proposed action. ECL § 8-0109.

J. Mercuria America and Danskammer Energy May Be Engaged in Relevant Transactions That Have Not Been Disclosed to the PSC

74. In its June 4, 2014 FERC Petition, at page 6, Danskammer Energy relates that on May 5, 2014, Mercuria America filed an application asking for FERC approval of “a transaction that will result in [Mercuria America] and [Danskammer Energy] becoming affiliated with entities subject to the Commission’s jurisdiction.” Whether or not the subject transaction is relevant to the PSC’s consideration of the Joint Application is unknown on the present record in this proceeding. To resolve this issue, the applicants need to describe Mercuria America’s proposed transaction, explain its relevance to the Joint Petition, and indicate whether any of the applicants or the Berry Trust is engaged in other activity or activities that may be relevant to the PSC’s consideration of the Joint Application.

CONCLUSION

At this juncture, the Office of the Attorney General does not take a position about the final outcome of the Joint Application and this proceeding. In its current form, the Joint Application does not provide information about important issues raised by the applicants’ request to rebuild and operate Danskammer as an electric generating plant. Accordingly, the Office of the Attorney General respectfully requests that the Commission authorize the office to intervene in the proceeding and to conduct discovery concerning the proposed rebuilding, re-starting and operation of Danskammer and the transactions proposed in the Joint Application. Such discovery is necessary to protect

ratepayers, the economy, and the environment by determining as quickly as possible what contribution Danskammer can make to New York's power supply without damage to the State's economy or environment.

Given the Joint Application's inadequacies, the need for discovery to address these inadequacies, and the need for the Commission to consider the comments filed in this proceeding, the applicants' suggestion that the three days between the close of the public comment period on June 9 and the Commission's meeting on June 12 provide sufficient time for the Commission and its staff to complete their review appears misplaced. Consequently, the office respectfully suggests that the Commission should defer determination of the Joint Application at this time and authorize expedited discovery on the issues set forth above.

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Respectfully submitted,

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