

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on September 15, 2022

COMMISSIONERS PRESENT:

Rory M. Christian, Chair
Diane X. Burman
James S. Alesi
Tracey A. Edwards
John B. Howard
David J. Valesky
John B. Maggiore, dissenting

CASE 21-M-0238 - Petition of Fortistar North Tonawanda Inc. and
Digihost International Inc. for a Declaratory
Ruling Regarding Application of Section 70 and
83 of the New York State Public Service Law and
the Alternative, Approval of the Proposed
Transaction Pursuant to Sections 70 and 83.

DECLARATORY RULING ON UPSTREAM
TRANSFER TRANSACTION

(Issued and Effective September 15, 2022)

BY THE COMMISSION:

INTRODUCTION

In a joint petition filed on April 15, 2021 (the
Petition), Fortistar North Tonawanda LLC (Fortistar) and
Digihost International Inc. (Digihost and, together with
Fortistar, Petitioners) sought a declaratory ruling from the
Public Service Commission (Commission) that the proposed
transfer of upstream ownership interests in Fortistar (the
Proposed Transaction) does not require further review under
Sections 70 and 83 of the Public Service Law (PSL). As
discussed below, the Commission finds that Petitioners have
satisfied the presumption established in the Wallkill Order and

its progeny by demonstrating that the upstream transfer of ownership interests would not present an ability to exercise horizontal or vertical market power or otherwise harm captive ratepayer interests.¹ Accordingly, the Commission declares that no further review of the Proposed Transaction is required pursuant to PSL §§70 and 83.

THE PETITION

As explained in the Petition, Fortistar is a Delaware limited liability company that is the direct owner and operator of a 55 megawatt (MW) natural gas-fired cogeneration facility located in North Tonawanda, New York (the Facility). Fortistar is wholly owned by North Tonawanda Holdings LLC, which is wholly owned by Generational Power LLC. Generational Power LLC is wholly owned by Fortistar Projects LLC, which is wholly owned by Fortistar LLC except for a variable non-voting interest in Fortistar Projects LLC owned by FIP LLC. FIP LLC is described as a partnership owned by current and former Fortistar LLC employees.

The Facility is interconnected with the transmission system owned by Niagara Mohawk Power Corporation d/b/a National Grid and currently sells energy, capacity, and ancillary services exclusively at wholesale. The Facility is also capable of delivering its thermal energy output through a 13,200-foot, 8-inch diameter steam pipe to a local greenhouse facility that produces vegetables, but, currently, the greenhouse facility is not purchasing thermal energy from the Facility.

¹ Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994) (Wallkill Order); Case 98-E-1670, Carr Street Generation Station, L.P., Order Providing for Lightened Regulation (issued April 23, 1999) (Carr Street Order).

The Proposed Transaction would result in Digihost acquiring from North Tonawanda Holdings LLC all of the ownership interests in Fortistar. Digihost is a wholly owned subsidiary of Digihost Technology Inc. (DTI) and was formed for the purposes of acquiring the indirect ownership interests in Fortistar. DTI is a British Columbia company that is a publicly traded blockchain technology company primarily focused on cryptocurrency mining. Michel Amar, a private individual, owns approximately 27% of the outstanding voting shares of DTI, while no other shareholder of DTI owns more than 10% of the outstanding shares of DTI.

Petitioners note that the Commission determined to subject Fortistar to lightened regulation under the PSL.² Accordingly, Petitioners request that the Commission apply the Wallkill Presumption to the Proposed Transaction, which involves a change in the ownership interests in parent entities upstream from the entity owning and operating a New York competitive cogeneration facility, and issue a declaratory ruling stating that no further review of the Proposed Transaction is required under PSL §§70 and 83. Petitioners argue that the Proposed Transaction would not create the potential for the exercise of horizontal or vertical market power since Digihost, its affiliates, and Michel Amar do not own or control, directly or indirectly, any facilities for the generation, transmission, distribution, or sale of electric or thermal energy, or have substantial influence over inputs, like fuel or fuel transportation, into the production of generation supply, in the United States. Further, Petitioners assert that the Proposed Transaction would not result in any adverse impacts to captive

² See Case 15-M-0642, Fortistar North Tonawanda Inc., Order Granting Certificates of Public Convenience and Necessity and Providing for Lightened and Incidental Regulation (issued November 18, 2019) (Fortistar Order).

ratepayers in New York or any changes in the day-to-day operations of the Facility. According to Petitioners, operation and maintenance of the Facility would continue to be undertaken by NAES Corporation, which has performed these functions since May 2002 and has extensive experience in optimizing the performance of energy facilities. In addition, it is reported that energy market and fuel procurement consulting services would be provided to Digihost by Fortistar Services LLC, a wholly owned subsidiary of Fortistar LLC, which has provided such services to Fortistar since May 2020. In the alternative, the Petitioners request approval of the Proposed Transaction as in the public interest under PSL §§70 and 83.

PUBLIC NOTICE

Pursuant to the Commission's Rules of Procedure, 16 NYCRR §8.2(c), responses to the Petition were due within a 21-day period, which expired on May 6, 2021. Comments were also solicited pursuant to the State Administrative Procedure Act (SAPA) §202(1), in a Notice of Proposed Rulemaking (Notice) that was published in the State Register on July 14, 2021 [SAPA No. 21-M-0238SP1]. The time for submission of comments pursuant to the Notice expired on September 13, 2021. The comments received are summarized and addressed below.

COMMENTS

Sierra Club and Earthjustice filed joint comments objecting to Digihost's plan to use the electric output from the Facility for on-site "behind-the-meter" cryptocurrency production because it could undermine emission reduction objectives in the Climate Leadership and Community Protection Act (CLCPA). They also note their separate request to the New York State Department of Environmental Conservation to consider

the environmental impacts when the air permits for the Facility are renewed. Similar comments were filed separately by Grassroots Environmental Education and the New York Public Interest Research Group asking the Commission to reject the petition because cryptocurrency operations are arguably incompatible with the CLCPA and not in the public interest. New York State Assemblymember Anna Kelles also urges denial of the Proposed Transaction, arguing that the planned use of the Facility for cryptocurrency mining is contrary to the CLCPA.

Approximately 130 additional public comments were received representing a range of views both supporting and opposing the Proposed Transaction. Comments supporting the transfer to Digihost point to the economic benefits of the Facility and cryptocurrency mining, including construction and operations jobs and contribution to the tax base. Those opposed to the Proposed Transaction point to the noise, emissions, and water use impacts of the Facility and maintain that repurposing the use for energy-intensive cryptocurrency mining operations threatens efforts to address climate change and meet the objectives of the CLCPA.

In response to environmental concerns raised by commenters, Digihost indicates that it is planning to convert the Facility from natural gas to burn renewable natural gas (RNG) by the end of 2022, and to convert to hydrogen at the end of 2023. Digihost argues that such actions would make it entirely powered by zero emissions sources by 2025 to meet CLCPA goals. EnergyMark, LLC, which would serve as Digihost's RNG supplier, refutes environmental claims made by other commenters opposing plans to use RNG or hydrogen, noting the benefits of such fuels and the ability of the Facility to offset the use of coal-fired generation and provide reliability benefits. Separately, Digihost notes that the North Tonawanda Planning

Commission approved the construction of the cryptocurrency facility after undertaking an environmental review.

LEGAL AUTHORITY

Pursuant to PSL §§70 and 83, the Commission must review and approve proposed transfers of ownership interests in jurisdictional facilities and properties. These review processes have been adapted over time to accommodate lightened ratemaking regulation policies. Entities subject to lightened regulation operate in competitive markets and, therefore, must support PSL §§70 and 83 transfer requests with a demonstration under the Wallkill Presumption that the transaction would not present an opportunity to exercise either horizontal or vertical market power, or otherwise harm the interests of captive ratepayers of fully regulated utilities.³

The Commission is authorized to issue a declaratory ruling with respect to: (i) the applicability of any rule or statute enforceable by it to any person, property, or state of facts; and (ii) whether any action by it should be taken pursuant to a rule. The Commission also may decline to issue such a declaratory ruling. This authority is expressly established by State Administrative Procedure Act §204 and governed by the Commission's Rules of Procedure, contained in 16 NYCRR Part 8, implementing that statute.

Declaratory rulings involving interpretations of existing statutes, rules, or regulation are not "actions" within the meaning of the State Environmental Quality Review Act (SEQRA) and its implementing regulations and, therefore, they

³ See, e.g., Wallkill Order, p. 9; see also Carr Street Order, p. 8.

may be issued without further SEQRA review.⁴ The declaratory relief requested in the Petition falls within the ambit of the statute and regulations authorizing issuance of a declaratory ruling.

DISCUSSION AND CONCLUSION

Under the Wallkill Presumption, regulation under PSL §§70 and 83 would not adhere to the transfer of ownership interests in entities upstream from a New York competitive electric generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers or the potential for the exercise of market power arising out of an upstream transfer sufficient to override the presumption. For purposes of the Proposed Transaction, Petitioners have satisfied the Wallkill Presumption by demonstrating that the upstream transfer will not present an ability to exercise horizontal or vertical market power, or any potential for harm to captive utility ratepayers.

As noted above, Digihost, its affiliates, and Michel Amar do not own or control, directly or indirectly, any facilities for the generation, transmission, distribution, or sale of electric or thermal energy, or have substantial influence over inputs, like fuel or fuel transportation, into the production of generation supply, in the United States. Further, the Facility would continue to be privately owned and operated on a merchant basis, thereby assuming the financial risks and precluding adverse impacts on captive ratepayers in New York. Moreover, continuity in Facility functions would be preserved by retaining the companies responsible for operations

⁴ 6 NYCRR §617.5(c) (37) (defining "interpretation[s] of an existing code, rule or regulation," as Type II actions not subject to review under SEQRA).

and maintenance, and for energy market and fuel procurement consulting services.

While numerous commenters raise significant environmental concerns, including emissions impacts and compliance with the CLCPA, these matters are beyond the scope of the limited review undertaken in this proceeding. This ruling is limited to review of the question raised in the Petition regarding whether the transfer of upstream ownership interests in a natural gas-fired cogeneration facility requires further Commission review under PSL §§70 and 83. To be clear, this ruling does not address the propriety of any permits that Petitioners may be required to obtain from other federal, State, or local regulatory entities, where environmental impacts may be considered.

Based on the facts and considerations before the Commission, Petitioners have adequately demonstrated that the Proposed Transaction does not present an opportunity to exercise either horizontal or vertical market power, or a potential to harm the interests of captive New York ratepayers. Accordingly, the Proposed Transaction does not require further regulatory review under PSL §§70 and 83.⁵

⁵ See Wallkill Order; see also Case 18-E-0333, Cassadaga Wind LLC, Declaratory Ruling on Transfer Transactions (issued July 17, 2018); see also Case 17-E-0620, AP Cricket Valley Holdings I Inc., et al., Declaratory Ruling on Transfer Transaction (issued December 14, 2017).

The Commission finds and declares:

1. No further review will be conducted of the proposed transaction described in the petition filed in this proceeding and discussed in the body of this Declaratory Ruling.
2. This proceeding is closed.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary