



July 25, 2025

Via Email

Hon. Michelle L. Phillips, Secretary
New York State Public Service Commission
Empire State Plaza
Agency Building 3
Albany, NY 12223
secretary@dps.ny.gov

Re: Public Comment in Case No. 21-M-0238: Petition of Fortistar North Tonawanda LLC and Digihost International Inc.

Dear Secretary Phillips,

On behalf of Clean Air Coalition of Western New York, Inc. (“Clean Air”) and Sierra Club, Earthjustice respectfully submits this public comment regarding the petition and subsequent information responses by Fortistar North Tonawanda, LLC (“Fortistar”) and Digihost International Inc. (“Digihost”)¹ (collectively, “Petitioners”) to the Commission in the above-captioned matter. The Petition was most recently noticed for public comment in the May 28, 2025 edition of the New York State Register.² As discussed below, the information that Petitioners provided is insufficient for the Public Service Commission to conduct the analyses required by Sections 7(2) and 7(3) of the Climate Leadership and Community Protection Act (“CLCPA”), and therefore, the PSC cannot find at this time that the sale of the Fortistar North Tonawanda gas plant to Digihost complies with the CLCPA.

¹ As a result of corporate restructuring that occurred after the initial Petition, the power plant at issue is presently held by World Generation X LLC, which along with Digihost International is a wholly owned subsidiary of Digi Power X Inc.

² May 28, 2025 N.Y. St. Reg. PSC-21-25-00005-P, Transfer of Ownership Interests in a 55 Megawatt Natural Gas-fired Cogeneration Facility Located in North Tonawanda, NY, [https://govt.westlaw.com/nyreg/Document/I65fb6c3c3ad011f09066d370f7be0f57?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/nyreg/Document/I65fb6c3c3ad011f09066d370f7be0f57?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)).

I. The Transaction Is Inconsistent with and Will Interfere with Attainment of the CLCPA Greenhouse Gas Limits

The Transaction is inconsistent with and will interfere with attainment of the CLCPA greenhouse gas limits. As Digihost itself concedes, it has radically increased the operations of the Fortistar gas plant, far beyond the previous status quo. Before Digihost took over the gas plant, the gas plant operated for a few dozen days, at most, per year. Now Digihost has increased the plant's operation so that it runs for hundreds of days per year.³

Digihost sought PSC approval to purchase the Fortistar gas plant for the precise reason that it planned to increase the gas plant's operations, and it has indeed done so. The result is a significant *increase* in the plant's greenhouse gas emissions, while the CLCPA requires significant *reductions* in emissions. Rarely has there been a clearer case of inconsistency with the CLCPA's stated goals. In enacting the CLCPA, the Legislature made clear that this landmark climate legislation was intended to "*reduce* greenhouse gas emissions."⁴ The Climate Action Council's Scoping Plan confirms this basic requirement, urging action "to reduce emissions from fossil fuel-fired generating units to the maximum extent practicable to achieve the requirements of the Climate Act while maintaining system reliability."⁵ Increasing a gas plant's operations and emissions is straightforwardly inconsistent with that aim.

Digihost ignores all this, arguing that all that matters is that the company does not intend to seek changes to the Fortistar facility's Title V air permit. But that is completely beside the point. The question before the Commission is not whether Digihost seeks to alter a permit that is administered by a different agency, but whether Digihost seeks Commission approval for an

³ *See, e.g.*, DPS-001-5 (gas plant operated no more than 66 days a year until 2024, when Digihost ramped up operations and ran it for 237 days). And on virtually every single day the plant now operates, the gas plant has increased emissions so that Digihost may mine cryptocurrency. *See* DPS-001-6 (conceding that cryptocurrency mining occurred onsite during 236 out of 237 days it operated in 2024).

⁴ CLCPA § 1(3), 2019 N.Y. Sess. Laws Ch. 106 (S. 6599) (emphasis added).

⁵ N.Y. State Climate Action Council, Scoping Plan 228 (2022).

action that will result in increased emissions. And the facts here are beyond dispute: Digihost seeks exactly such approval. As Digihost concedes, its control of the Fortistar facility inevitably leads to increased emissions. It is therefore inconsistent with the CLCPA.

Finally, as a matter of logic, Digihost cannot reasonably claim that its increased emissions are automatically consistent with the CLCPA so long as it operates within the bounds of an existing permit. The gas plant's existing permit was issued in 2016, three years before the CLCPA was enacted and long before state law established any greenhouse gas emissions limits. No one could seriously argue that a permit ensures compliance with requirements that did not exist at the time it was issued. And to the extent that Digihost maintains that such a result is compelled by the Commission's June 23, 2023 Order Denying Petition, the logic and conclusions of that Order were rejected in the judicial decision giving rise to this re-opened proceeding.

Digihost's reliance on an air permit that the state Department of Environmental Conservation ("DEC") issued long before the gas plant increased operations to supply a power-hungry cryptocurrency mining operation is particularly misplaced in light of DEC's own decisions about precisely this scenario.⁶ As the agency has explained in denying a renewal for a similar plant, "in 2016, the Department permitted Greenidge to operate the Facility as a peaker plant that would provide electricity to the State's transmission grid during limited periods of high demand. For its first few years of use Greenidge operated the Facility as intended, but then the Facility's duration of operations and emissions increased six-fold" when the gas plant began to be used to power a cryptocurrency mining operation.⁷ As a result, DEC determined that the

⁶ Petitioners' reliance on DAR-21 is misguided for the same reason.

⁷ See State Mem. Opp'n to Pet./Compl. and Greenidge's Mot. for Prelim. Inj. at 19, *Greenidge Generation LLC v. New York State Dep't of Env't Conservation*, 223 N.Y.S.3d 846 (Sup. Ct. Yates County 2024), NYSCEF Doc. No. 97 (record citations omitted).

plant's continued operation, even within the bounds of the previous permit, was inconsistent with CLCPA § 7(2). A State Court agreed.⁸

II. Petitioners Have Failed to Provide Sufficient Justification, Mitigation Measures, or Alternatives as Required by CLCPA Section 7(2)

Because the transaction is inconsistent with and interferes with attainment of the CLCPA greenhouse gas reduction limits, in order to approve the transaction, the PSC must 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 [the] project is located.”⁹ Petitioners have not provided the PSC with the information required to support a detailed statement of justification or to identify sufficient alternatives or greenhouse gas mitigation measures. Absent specific justification evidence from Petitioners, the PSC cannot find CLCPA compliance under Section 7(2).

When asked to justify the gas plant's continued operation, Petitioners responded without specifics that the gas plant helps to ensure electric power grid reliability.¹⁰ As an initial matter, the ability for the plant to serve the grid has no bearing on the gas plant's sale to Digihost, which redirects electrical capacity to a private entity seeking to maximize profits and results in massively increased operations. Because the PSC cannot allow Digihost to control the gas plant without providing a detailed justification for the sale, Petitioners' response is insufficient.

Moreover, the continued operation of a fossil fuel plant cannot be justified solely on the general basis that it supplies electricity to the New York electricity markets, especially when use of the plant to serve on-site cryptocurrency mining likely allows Digihost to sell excess energy to

⁸ *Greenidge Generation*, 223 N.Y.S.3d at 866 (“The Final Denial expressly addressed each of the facts Greenidge raised herein and still made a finding of inconsistency (AR 2956-2960). The reasoning provided is rational, reasoned, and made with due regard.”)

⁹ CLCPA § 7(2).

¹⁰ Response to DPS-001-8.

the electrical grid more often than before it began mining cryptocurrency behind-the-meter. Fortistar is an inefficient gas plant previously used only on peak grid demand days, which now operates and emits greenhouse gases most of the time, without ramping up or down as before, to serve its behind-the-meter load. Accepting limited grid contributions as a sufficient justification for a facility whose operation is inconsistent with the CLCPA emissions limits would render the statutory mandates of the CLCPA meaningless. It would allow virtually every greenhouse gas-emitting facility to remain online, undermining the core objectives of the CLCPA and Public Service Law § 66-P.

In response to DPS’s question about alternatives, Petitioners stated that “[n]o alternatives are currently in advanced stages of planning or implementation,” but they are researching hydrogen combustion and carbon capture.¹¹ Petitioners cannot meet their burden to show that the transaction will comply with the CLCPA without providing detailed and specific plans beyond general “research.” Petitioners have also not planned for any greenhouse gas emissions mitigation measures for the duration of the permit, before 2030, or before 2040.¹² Petitioners point to controls imposed by the gas plant’s existing Title V permit and other legally binding requirements,¹³ which cannot satisfy their obligation to identify mitigation measures that “result in measurable [greenhouse gas] emission reduction or sequestration that is additional to actions already required by law or that the State is already undertaking.”¹⁴ Absent specific mitigation measures from Petitioners that are “real, additional, quantifiable, permanent, verifiable, and enforceable,” the PSC cannot find CLCPA compliance under Section 7(2).

¹¹ Response to DPS-001-13. Petitioners also state that they are exploring nuclear power including a Small Modular Reactor, but that would be an entirely new and different facility from the existing gas plant. *Id.*

¹² Response to DPS-001-17.

¹³ Response to DPS-001-21; Response to DPS-001-14.

¹⁴ DEC Policy CP-49, Climate Change and DEC Action 8 (Dec. 14, 2022), https://extapps.dec.ny.gov/docs/administration_pdf/cp492022.pdf.

III. Petitioners Have Failed to Provide the Information and Mitigation Required Under CLCPA Section 7(3)

Under CLCPA Section 7(3), a state agency such as the PSC may not make a decision that would disproportionately burden disadvantaged communities (“DACs”). Petitioners incorrectly assert that the gas plant’s proposed use is not expected to disproportionately burden DACs because the nearest DAC is 0.86 miles away.¹⁵ Petitioners falsely claim that DEC guidance implementing CLCPA Section 7(3) provides that project proponents should only study potential air pollution impacts within half a mile of the facility.¹⁶ In reality, the guidance explains that a larger study area is appropriate if modeling shows potential project impacts beyond a half-mile.¹⁷ In other words, a half-mile is a floor, and not, as Petitioners imply,¹⁸ a ceiling. Even though DEC’s guidance provides that the study area should be “based upon modeling” that determines how far a project’s impacts might extend,¹⁹ Petitioners do not appear to have done any modeling to assess the gas plant’s potential local air quality impacts.

It is beyond cavil that air pollution from a gas plant can travel farther than 0.86 miles. In fact, DEC’s guidance specifies that “a natural gas fired power plant may impact the air quality of an adjacent or nearby disadvantaged community.”²⁰ For example, in seeking a Certificate of Environmental Compatibility and Public Need for the repowering of the Barrett Power Station, National Grid proposed assessing air pollution impacts to communities within two miles of the facility “due to the fact that the maximum and most significant air pollutant concentrations are anticipated to be within 2 miles of the facility.”²¹ Similarly, the applicant for the Danskammer

¹⁵ Response to DPS-001-24; Response to DPS-001-25.

¹⁶ Response to DPS-001-27.

¹⁷ DEC Program Policy DEP 24-1, Permitting and Disadvantaged Communities 3 (May 8, 2024), <https://dec.ny.gov/sites/default/files/2024-05/prgrmpolicy24dash1.pdf> (hereinafter “DEP 24-1”).

¹⁸ See Response to DPS-001-27.

¹⁹ DEP 24-1 at 3.

²⁰ *Id.*

²¹ Demographic and Economic Attributes at 5–6, NY PSC Case No. 13-F-0464 (Mar. 19, 2014).

Energy Project studied potential air pollution within a five-mile radius²² and Astoria Gas Turbine Power studied potential air pollution within a one-mile radius when proposing the Astoria Replacement Project.²³

Petitioners also assert that the nearest DAC “downwind” of the gas plant is approximately 18 miles away.²⁴ They provide no evidence for this claim, which is nonsensical on its face given that wind direction is not constant. Petitioners’ unsupported claim cannot form the basis for a determination that approving the transaction will not disproportionately burden DACs.

Finally, when asked to identify measures to ensure that the gas plant will not disproportionately burden DACs, Petitioners incorrectly assert that no such measures are needed, but that in any event, the gas plant’s Title V permit imposes mitigation measures.²⁵ Existing mitigation that is required by the gas plant’s air permit cannot eliminate the pollution burden imposed by the gas plant’s increase in operations, as required by CLCPA Section 7(3).²⁶ Running the gas plant more frequently inevitably leads to increased emissions of local air pollutants that can cause serious health impacts. Petitioners must assess the potential impacts of increased operations on nearby DACs and propose additional mitigation measures that achieve emissions

²² Exhibit 28: Environmental Justice at 2, NY PSC Case No. 18-F-0325 (Dec. 11, 2019).

²³ AECOM, Draft Supplemental Environmental Impact Statement, Astoria Replacement Project at 3-48—3-49 (June 2021), https://www.nrg.com/assets/documents/legal/astoria/00_2021/astoria-draft-dseis-06-30-2021.pdf.

²⁴ Response to DPS-001-24; Response to DPS-001-25.

²⁵ Response to DPS-001-28.

²⁶ See CLCPA § 7(3) (prohibiting agency decisions that would disproportionately burden DACs); DEP 24-1 at 5 (“Where a proposed project results in a determination of disproportionate burden on a disadvantaged community, the disproportionate burden analysis must include project design measures that *ensure that the project will not disproportionately burden the disadvantaged community*. . . . Any project design measures that are used to support a final determination regarding disproportionate burden should result in measurable GHG emissions reduction, co-pollutant emission reduction that is *in addition to actions already required by law or regulation*.”) (emphasis added).

reductions “at least equivalent to the increases from the project” to ensure that those DACs do not experience any disproportionate burdens.²⁷

For these reasons, Clean Air and Sierra Club respectfully submit that the PSC cannot find that Petitioners have demonstrated that the sale of a gas plant to a cryptocurrency miner that planned to (and did) increase the gas plant’s operations (and emissions) is consistent with the CLCPA, that it is justified, that no alternatives are available, that no mitigation is required, and that there is no disproportionate burden on disadvantaged communities. Therefore, the PSC cannot issue the declaratory ruling or approval under sections 70 and 83 of the Public Service Law as requested by Petitioners.

Dated: July 25, 2025
New York, NY

Respectfully Submitted,

/s/

Dror Ladin
Hillary Aidun
Jessamine De Ocampo
Mandy DeRoche
Earthjustice
48 Wall Street, 15th Fl
New York, NY 10005

²⁷ DEP 24-1 at 5.