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Via E-Mail Filing

October 31, 2022

Hon. Michelle L. Phillips, Secretary to the Commission
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12233-1350

Re: 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 Public Service Law and the Alternative, Approval of the Proposed Transaction Pursuant to Sections 70 and 83, Opposition to Petition for Rehearing.

Dear Secretary Phillips:

On behalf of the Petitioners in the above referenced matter, please accept this letter in opposition to the Petition for Rehearing of the Declaratory Ruling (“Rehearing Petition” and “Declaratory Ruling,” respectively) issued in the above referenced proceeding,¹ filed on behalf of Earthjustice, Clean Air Coalition of Western New York, Buffalo Niagara Waterkeeper, Deborah Q. Gondek, Karen Hance, and the Sierra Club-Atlantic Chapter (together the “Opposition”). For the reasons set forth below, Petitioners respectfully submit that the Rehearing Petition is without merit or legal basis.

The Rehearing Petition fails to meet the standards set forth in the Public Service Commission’s regulations.² Specifically, 16 NYCRR § 3.7(b) provides that “[r]ehearing may be sought only on the grounds that the commission committed an error of law or fact or that new circumstances warrant a different determination.” The Opposition contends the Commission committed an error of law inconsistent with the Climate Leadership and Community Protection Act (“CLCPA”) in declaring that the proposed transaction does not require further regulatory review under PSL §§ 70 and 83. Petitioners respectfully submit that the Commission’s analysis of its own precedents

¹ Case 21-M-0238, *Petition of Fortistar North Tonawanda Inc. and Digihost International Inc.*, Declaratory Ruling on Upstream Transfer Transaction (Issued and Effective September 15, 2022) (“Declaratory Ruling”).

² Neither rehearing *as of right* nor a discretionary stay is available in this matter under Public Service Law (“PSL”) Section 22. Further, as explained above, the statutory standard simply has not been met. Moreover, for the reasons stated below, discretionary reconsideration also is not warranted. See PSL § 22; SAPA § 204; 16 NYCRR §§ 3.7 & 8.3; Case 17-M-0422, *National Grid Generation LLC* (2018).

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and of Opposition's CLCPA comments were not in error under the limited scope of the relief requested in the Petition for Declaratory Ruling.

The Petition for Declaratory Ruling requested the Commission declare that no further review of the proposed transaction was necessary under the well-established *Wallkill* presumption.³ In the Commission's legal analysis, it explained that when the *Wallkill* presumption applies, "regulation under PSL §§ 70 and 83 would not adhere to the transfer."⁴ The Commission further determined the *Wallkill* presumption applied because the proposed transaction "will not present an ability to exercise horizontal or vertical market power, or any potential for harm to captive utility ratepayers."⁵ In making the Declaratory Ruling, the Commission recognized that its analysis was "limited to review of the question raised in the Petition" and therefore, any other matters were "beyond the scope of the limited review undertaken in this proceeding."⁶ As the Opposition has not argued that the *Wallkill* presumption analysis to which the Declaratory Ruling was necessarily limited was in error, the Rehearing Petition is without legal basis and should be denied.

To the extent the Rehearing Petition is treated as a request for reconsideration, the Commission should deny it as being an impermissible request for a retroactive change to a declaratory ruling in violation of SAPA section 204.⁷ Further, any consideration under an interpretation that it is a request for a prospective change to a declaratory ruling should similarly be denied as having no relation to the basis upon

³ Case 21-M-0238, *Petition of Fortistar North Tonawanda LLC and Digihost International Inc., for a Declaratory Ruling Regarding Application of Section 70 and 83 of the New York Public Service Law and the Alternative, Approval of the Proposed Transaction Pursuant to Sections 70 and 83*, p. 6 (filed Apr. 15, 2021). See also, Case 91-E-0350, *Wallkill Generating Company, L.P., Order Establishing Regulatory Regime* (issued April 11, 1994) (hereinafter "*Wallkill Order*"); Case 98-E-1670, *Carr Street Generation Station, L.P., Order Providing for Lightened Regulation* (issued April 23, 1999).

⁴ Declaratory Ruling, p. 7.

⁵ *Id.*

⁶ *Id.* at p. 8.

⁷ See SAPA § 204; 16 NYCRR § 8; Case 17-M-0422, *National Grid Generation LLC, supra*. Petitioners reserve all rights regarding the deficiencies in Opposition's meritless legal claims, including but not limited to, application of the CLCPA to SAPA 204 and PSL 22, which were not amended by the CLCPA.

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which the Declaratory Ruling was issued, which solely involves analysis of market power and captive ratepayer interests.⁸

Thank you for your consideration in this matter, and please feel free to contact us should you have any questions.

Very truly yours,

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⁸ Case 17-M-0422, *National Grid Generation LLC, supra*.