

BEFORE THE
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

-----X
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.

Case 21-M-0238

Petition for Rehearing

-----X
PLEASE TAKE NOTICE, that Earthjustice, Clean Air Coalition of Western New York,
Buffalo Niagara Waterkeeper, Deborah Q. Gondek, Karen Hance, and Sierra Club – Atlantic
Chapter hereby petition the New York Public Service Commission (“Commission”) pursuant to
16 New York Code of Rules and Regulations Section 3.7 and New York State Public Service
Law Section 22 for an order granting rehearing on the Commission’s September 15, 2022
Declaratory Ruling on Upstream Transfer Transaction.

Dated: October 14, 2022
New York, NY

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TO: Service List, Case No. 21-M-0238

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**PETITION FOR REHEARING ON
COMMISSION’S SEPTEMBER 15, 2022 RULING**

TABLE OF CONTENTS

PRELIMINARY STATEMENT	4
FACTUAL BACKGROUND	5
PROCEDURAL BACKGROUND	7
STANDARD OF REVIEW	8
ARGUMENT	9
I. Rehearing Is Necessary Because the Ruling Failed to Account for a Change in Law Governing Certain Commission Decisions.	9
A. The Commission Must Include a CLCPA Analysis in Rulings Likely to Result in Increased Greenhouse Gas Emissions.	9
B. Integrating the Commission’s <i>Wallkill</i> precedent with the requirements of the CLCPA will not cause an undue burden.....	14
C. Transfer of Ownership Interest from Fortistar to Digihost Requires Additional Analysis Under Both CLCPA Sections 7(2) and 7(3).	16
1. The Transaction Would Result in a Significant Increase in Greenhouse Gas Emissions, A Result Wholly Inconsistent with Section 7(2) of the CLCPA.....	16
2. A Section 7(3) Analysis is Required Because the Transaction Has the Potential to Disproportionately Burden Disadvantaged Communities.	19
II. An Interim Order Staying the Ruling is Necessary and Appropriate.	22
CONCLUSION	24

PRELIMINARY STATEMENT

Earthjustice, Clean Air Coalition of Western New York, Buffalo Niagara Waterkeeper, Deborah Q. Gondek, Karen Hance, and Sierra Club – Atlantic Chapter (collectively “Interested Parties”) hereby petition the New York Public Service Commission (“PSC” or “Commission”) pursuant to 16 New York Code of Rules and Regulations (“NYCRR”) Section 3.7 and New York State Public Service Law (“PSL”) Section 22 for an order granting rehearing on the Commission’s September 15, 2022 Declaratory Ruling on Upstream Transfer Transaction (the “Ruling”).

The Commission committed a legal error in ruling that no further review was necessary for the transfer of upstream ownership interests in Fortistar North Tonawanda LLC (“Fortistar” or “FNT”) despite the effects of the transfer on greenhouse gas emissions, in violation of the Climate Leadership and Community Protection Act (“CLCPA”). The Commission wrongly relied on precedents that predate the CLCPA, and thereby failed to account for the Legislature’s more recent mandate that agency decisions that affect greenhouse gas emissions must be subjected to more exacting scrutiny. This legal error is particularly serious because the proposed transfer of upstream interests in Fortistar is clearly inconsistent with the requirements of Sections 7(2) and 7(3) of the CLCPA, as it will lead to increased greenhouse gas emissions and disproportionately burden disadvantaged communities. Moreover, it is clear that the proposed transaction is unnecessary for the electric grid’s reliability and that no realistic mitigation is available for the significant increase in emissions.

The Commission should grant the petition for rehearing and subject the proposed transaction to the analysis that the Legislature required in the CLCPA. To avoid irreparable harm to the environment and public interest, the Commission should further issue a stay of the erroneous declaratory ruling while it conducts the required CLCPA analysis.

FACTUAL BACKGROUND

This proceeding involves the proposed upstream ownership transfer of a gas plant (the “Facility”) located in the City of North Tonawanda in Niagara County, New York which consists of four units, one 55-megawatt (“MW”) gas and oil combustion turbine, a diesel emergency generator, a secondary diesel starting monitor, and a gas fired auxiliary boiler, with a combined rating of approximately 65 MW of nameplate capacity.

Digihost International Inc. (“Digihost”) seeks to acquire the upstream ownership assets of Fortistar, the owner of the Facility, and convert the Facility from a peaker plant with limited operations to a gas plant with significantly-increased operations to service on-site proof-of-work cryptocurrency mining operations.

Earthjustice is an environmental non-profit that advocates for promoting a shift from fossil fuels to clean energy sources and local efforts to enforce the rights of communities disproportionately burdened by pollution. Earthjustice has requested and has been granted Party Status in this proceeding. Petitioner Sierra Club-Atlantic Chapter (SC-AC) is a chapter of the grassroots non-profit membership organization Sierra Club. Sierra Club-Atlantic Chapter has a membership of approximately 50,000 members in New York State. The Sierra Club-Atlantic Chapter is working to promote a cleaner, healthier, and more sustainable natural environment in its members’ communities by replacing fossil fuel-burning electric generation with zero-emission energy. Sierra Club and its members have long advocated to mitigate the causes and impacts of climate change, and to support robust implementation of state policies—like the CLCPA—that enable a just and equitable transition to 100 percent clean energy in New York State.

Clean Air Coalition of Western New York (“Clean Air”) was founded by Western New York (“WNY”) residents concerned about the environmental health in their neighborhoods and

who demanded an active role in the decisions that impact their communities. Clean Air organizes multiple WNY communities around environmental health and justice issues and makes the WNY region a healthier and greener place to live by developing grassroots leadership, particularly among working class people and people of color, facilitating and supporting campaigns that its members lead, building and aligning shared interest to advance equity and community well-being, and by taking collective action. Clean Air has major concerns regarding the proposed use of the Facility as a natural gas-powered cryptocurrency mining operation. The property falls within their membership focus area and they share concerns with many of their members and North Tonawanda residents about the increase in air emissions and noise that would result in the refiring of the antiquated Facility.

Buffalo Niagara Waterkeeper (“BNW”) is a regional non-profit organization whose jurisdiction includes the entire Niagara River watershed. BNW’s mission is to protect and restore the water and health of their surrounding ecosystems and community. BNW is discouraged by the Public Service Commission’s action in allowing the transfer of Fortistar to Digihost. BNW believes that the action allows a private company to profit through pollution with no public benefit, is a disservice to the people of North Tonawanda and to the State’s climate reduction goals, and sets a dangerous precedent for future polluters to continue to operate for personal gain.

Deborah Q. Gondek is a North Tonawanda resident who is concerned about the proposed transaction. She is currently a board member of BNW, a member of Sierra Club, and a donor to Clean Air. She also serves as a Member of the North Tonawanda Climate Smart Communities Task Force. She resides at 257 Brentwood Drive in North Tonawanda, New York. Ms. Gondek is concerned that proof-of-work cryptocurrency mining at the Facility will harm her community

in many ways, including from noise pollution as a result of increased operations and from increased greenhouse gas emissions, electronic waste, air and water pollution that create more long-term problems.

Karen Hance is also a North Tonawanda resident who is a close neighbor of the Facility and is concerned about the proposed transaction. Ms. Hance is a student at Niagara County Community College for Horticulture, a mother, and lives and works in North Tonawanda. She resides at 1191 Sherwood Ave in North Tonawanda, in close proximity to the Facility. Ms. Hance is concerned with the increased noise and increased emissions from the Facility's proof-of-work cryptocurrency mining operations.

PROCEDURAL BACKGROUND

On April 15, 2021, Fortistar, the owner of the Facility, and Digihost jointly filed a request with the Commission for a Declaratory Ruling Regarding Application of Sections 70 and 83 of the NY PSL, and, in the Alternative, Approval Under Sections 70 and 83.

On May 4, 2021, Earthjustice and the Sierra Club-Atlantic Chapter submitted a letter expressing their concerns over the greenhouse gas ("GHG") emissions that would occur if the Facility transferred ownership to Digihost, which seeks to run the Facility at greatly increased capacity to support its proof-of-work cryptocurrency mining operations. Specifically, commenters noted that these emissions increases would not be compliant with the emissions reduction mandates required by the CLCPA and would impact local communities adversely.

On August 15 and 31, 2021, Clean Air submitted comments in opposition to FNT and Digihost's Petition.

On August 26, 2021, Digihost submitted a supplement to the Petition in which it acknowledged the requirements of the CLCPA and claimed it was “committed” to “align itself” with the CLCPA.

On August 31, 2021, BNW submitted comments on behalf of its constituents who reside in the City of North Tonawanda, as well as on behalf of those who may be impacted by the proposed project from nearby communities, opposing the transaction.

On October 12, 2021, Deborah Q. Gondek submitted comments in opposition to FNT and Digihost’s Petition.

On October 13, 2021, Earthjustice and the Sierra Club-Atlantic Chapter submitted comments to the Commission outlining the requirements of the CLCPA and the emissions impacts of proof-of-work cryptocurrency mining and asking the Commission to deny the proposed transfer.

On October 28, 2021, Digihost and Fortistar submitted a joint response to comments in the docket, alleging that increased operations are permissible under their current environmental permits. Earthjustice and the Sierra Club-Atlantic Chapter also submitted supplemental filings as reflected on the docket.

On September 15, 2022, the PSC issued a Declaratory Ruling on Upstream Ownership Transfer, granting FNT and Digihost’s request. In the Ruling, the Commission declared that no further review of the proposed ownership transfer was required due to Digihost being unable to exercise horizontal or vertical market power in the competitive wholesale electricity market.

STANDARD OF REVIEW

Pursuant to NY PSL § 22 and 16 NYCCR § 3.7, the Commission may grant a rehearing for interested persons. Rehearing may be sought on the grounds that the Commission committed

an error of law or fact or that new circumstances warrant a different determination.¹ Here, the Commission has committed an error of law by failing to ensure compliance with New York’s landmark climate law, the CLCPA.

ARGUMENT

I. Rehearing Is Necessary Because the Ruling Failed to Account for a Change in Law Governing Certain Commission Decisions.

A. The Commission Must Include a CLCPA Analysis in Rulings Likely to Result in Increased Greenhouse Gas Emissions.

The Commission is charged with regulating transfers of ownership interests in entities upstream from a New York competitive electric generation subsidiary. While the Commission has the authority to lighten certain regulatory burdens applicable to such transactions, such transfers remain subject to Commission jurisdiction, and the Commission must determine the extent of scrutiny legally required before a transfer can proceed. The Commission’s determination must follow the Legislature’s intent and comport with applicable law. Here, as described below, the applicable law includes not just the Public Service Law (PSL), but also the CLCPA.

It is settled law that Section 70 of the PSL, set forth in Article 4, pertains to transactions like the Fortistar purchase, requiring a Commission decision before such a transaction can proceed. In a series of decisions beginning with the *Wallkill* decision, the Commission has repeatedly applied Section 70 to transfers of ownership interests in entities upstream from a New York competitive electric generation subsidiary, although it has subjected such transactions to a

¹ *Proceeding on Motion of the Comm'n Regarding Strategic Use of Energy Related Data.*, No. 20-M-0082, 2022 WL 4365900, at *1 (N.Y. P.S.C. Sept. 15, 2022); *Petition of New Rochelle Home Owners Association, Order Denying Petition For Rehearing*, No. 17-W-0288, 2018 WL 1168951, at *3 (N.Y. P.S.C. Feb. 27, 2018).

lighter regulatory burden.² As the Commission has instructed, “provisions of Article 4 remain relevant in the emerging competitive market” and ensure that jurisdictional entities “provide safe and adequate service, facilities and instrumentalities, and otherwise act in the public interest.”³

The Commission has emphasized that even where lightened regulation applies, transactions are not exempt from the law or from the Commission’s jurisdiction. Thus, the Commission has consistently rejected claims by jurisdictional entities that the provisions of Article 4 simply should not apply to electric service providers like Fortistar.⁴ Instead, the Commission has looked to legislative intent to determine the scope of appropriate regulation. “In interpreting the Public Service Law, the Commission has asked what reading best carries out the Legislature’s intent and advances the public interest.”⁵ Thus, the Commission has required jurisdictional entities to “support a §70 transfer request with a demonstration that the transaction will not present the purchaser with the opportunity to exercise either horizontal or vertical market power, or otherwise harm the interests of captive ratepayers of fully regulated utilities.”⁶

As described below, by passing the CLCPA, the Legislature modified the legal requirements applicable to certain administrative decisions, specifically those that could be

² See Case 98-E-1670, *Carr Street Generation Station, L.P.*, Order Providing for Lightened Regulation (issued April 23, 1999) (Carr Street Order) at 6 (finding that “the provisions set forth in Article 4 at PSL §§66(6), 68, 69, 69-a, and 70 pertain to wholesale generators participating in the competitive market.”); see also Case 91-E-0350, *Wallkill Generating Company, L.P. – Lightened Regulation*, Order Establishing Regulatory Regime (issued April 11, 1994) (Wallkill Regulatory Order).

³ Carr Street Order at 7.

⁴ See, e.g., Case 91-E-0350, *Wallkill Generating Company, L.P.*, Declaratory Ruling on Regulatory Policies Affecting Wallkill Generating Company and Notice Soliciting Comments (issued August 21, 1991) (Wallkill Declaratory Ruling) at 9 (“Nor is there any basis for granting Wallkill’s request for exemption from regulation despite its categorization as an electric corporation.”); Carr Street Order at 7 (“Contrary to the parties’ arguments, those provisions of Article 4 remain relevant in the emerging competitive market.”).

⁵ Case 01-E-0113, *Entergy Nuclear Operations, Inc.*, et al., Order Providing For Lightened Regulation of Nuclear Generating Facilities (issued August 31, 2001) (Entergy Regulation Order) at 1.

⁶ Case 18-E-0333, *Cassadaga Wind LLC*, Declaratory Ruling on Transfer Transactions (issued July 17, 2018) (Cassadaga Wind Order) at 7.

inconsistent with or interfere with New York’s GHG emission reduction requirements.⁷ The Commission has previously recognized that different types of lightly-regulated facilities require different levels of regulatory scrutiny. For example, the Commission treats hydro and fossil-fueled facilities differently than nuclear-fueled facilities.⁸ Enactment of the CLCPA has now introduced a new type of legal requirement—and hence a new type of required scrutiny—for facilities that produce GHG emissions.

The CLCPA prohibits any decision that would be inconsistent with or interfere with the CLCPA’s GHG reduction requirements without justification, or that would disproportionately burden any Disadvantaged Community. Section 7(2) of the CLCPA provides as follows:

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.

Section 7(3) provides that:

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.

⁷ CLCPA § 7(2).

⁸ Entergy Regulation Order at 10.

To discharge its duties under the CLCPA, the Commission must therefore determine the effects of the decision under consideration: “For example, Section 7(2) requires a determination regarding whether an agency’s decision is ‘inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law.’”⁹

Both the broad language of the CLCPA and the Legislature’s intent clearly indicate that the requirements of Sections 7(2) and 7(3) apply to the Commission’s consideration of Fortistar’s and Digihost’s request for a declaratory ruling. First, a declaratory ruling as to whether a transaction may proceed, and the level of scrutiny the transaction requires, constitutes an administrative “decision.” Even under a restrictive definition that limits “decision” to legal determinations, Black’s Law Dictionary defines a “decision” as a “judicial or agency determination after consideration of the facts and the law.”¹⁰ The word’s lay definition is broader, and in ordinary usage encompasses any “determination arrived at after consideration.”¹¹ Here, the Commission examined facts related to the FNT transaction, considered law including the PSL and the *Wallkill* Order, and rendered a ruling. Under any reasonable interpretation, the Commission’s ruling constitutes an administrative “decision.”

Moreover, it is clear that the CLCPA covers this specific *type* of decision, because the decision itself directly leads to a substantial increase in activities that will emit greenhouse gases.

⁹ Cases 19-G-0309, 19-G-0310, and 18-M-0270, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of The Brooklyn Union Gas Company d/b/a National Grid NY for Gas Service, Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of KeySpan Gas East Corp. d/b/a National Grid for Gas Service, and Petition for Approval Pursuant to Public Service Law Section 113(2), of a Proposed Allocation of Certain Tax Refunds Between KeySpan Gas East Corporation d/b/a National Grid and Ratepayers*, Order Approving Joint Proposal, As Modified, And Imposing Additional Requirements (Issued August 12, 2021) (National Grid Order) at 71.

¹⁰ *Decision*, Black's Law Dictionary (11th ed. 2019).

¹¹ *Decision*, Merriam-Webster Dictionary (2022), <https://www.merriam-webster.com/dictionary/decision>.

As the Commission has explained in the rate order context, the key question under Section 7 is whether such activities would go forward in the absence of the Commission’s decision:

Although a Commission rate order approves only an overall capital expenditure plan and not the specific projects that were reviewed to provide evidentiary support for the utility’s rate recovery, absent Commission approval of that rate recovery, such projects would likely not be pursued by the utility.¹²

In other words, the key question is whether—if the Commission did not provide the relevant approval or ruling—the “projects would likely not be pursued by the utility.”¹³ Here, the Commission’s decision is absolutely critical for the project to be pursued by Fortistar; the transaction could not proceed until the Commission gave its blessing.

Even if there were any doubt about whether a Commission ruling constituted an administrative “decision” under the CLCPA, the Commission has already recognized that the statute must be interpreted broadly. As the Commission has recognized, it is “the Legislature’s intent that Section 7(2) of the CLCPA be broadly construed.”¹⁴ The Legislature made this intent plain by providing a list of examples—including “decision”—but also ensuring that the “list is preceded by the phrase ‘including, but not limited to.’”¹⁵

In addition to the clear textual requirement for including Commission rulings as administrative decisions subject to the CLCPA, a broad construction of the CLCPA’s mandate is in line with the urgent threat the Legislature identified. As a Supreme Court recently explained, “in enacting the legislation, the Legislature found that ‘[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York,’ and

¹² National Grid Order at 70.

¹³ National Grid Order at 70.

¹⁴ National Grid Order at 69. “The same analysis applies to Section 7(3) of the CLCPA, which uses virtually identical language to Section 7(2) regarding its applicability and is also supported by the same Sponsor’s Memo.” National Grid Order at 70.

¹⁵ National Grid Order at 70.

that such adverse effects would continue and worsen if GHG emissions were not reduced. That is, the Legislature identified a currently existing, urgent problem that was worsening; not a developing or potential problem that might arise if appropriate action was not taken in the future.”¹⁶ Accordingly, the Legislature required all state agencies—including the Commission—to account for greenhouse gas emissions when making administrative decisions.

The Commission erred in wholly disregarding the broad CLCPA mandate and failing to conduct any of the analysis required by Sections 7(2) and 7(3). As the Commission recognized in the first *Wallkill* order, “We cannot ignore the directives of the statute.”¹⁷

While at one time the only relevant statute might have been the Public Service Law, the Legislature has now charged the Commission (and all other agencies) with applying greater scrutiny to decisions that will affect greenhouse gas emissions. The Commission’s failure to apply the required scrutiny necessitates rehearing.

B. Integrating the Commission’s *Wallkill* precedent with the requirements of the CLCPA will not cause an undue burden.

The Commission has repeatedly demonstrated its ability to craft flexible procedures that provide for necessary oversight without undermining competition, and it can meet the CLCPA’s mandate without undermining the benefits of lightened regulation. Although jurisdictional entities have raised concerns over the years about the perceived burdens of statutory regulation,

¹⁶ *Danskammer Energy, LLC v. New York State Dep’t of Env’t Conservation*, 76 Misc. 3d 196, 249, 173 N.Y.S.3d 134, 174 (N.Y. Sup. Ct. 2022).

¹⁷ *Wallkill Declaratory Ruling* at 9; *See also Wallkill Regulatory Order* at 8 (“In other words, *Wallkill* seeks a waiver of the PSL § 70 requirement that approval of a transfer be tied to the ‘other person or corporation’ that is the transferee. Such a waiver conflicts with the statute and cannot be granted.”).

the Commission has rejected these arguments and emphasized its authority to flexibly interpret Section 70, including by choosing an appropriate level of scrutiny.¹⁸

There is ample Commission precedent for imposing additional requirements on transactions otherwise subject to the *Wallkill* presumption without undermining the benefits of lightened regulation. In the *Entergy* Regulation Order, the Commission decided that “nuclear facilities have a greater impact on the public interest than hydro and fossil facilities” and that “nuclear generators will be subject to more requirements under [the PSL] than other forms of generation.”¹⁹ The Commission has determined that nuclear facilities “have significant impacts on the communities where they are located,” justifying “a more searching inquiry . . . than would be conducted if other types of lightly-regulated generation were at issue” and requiring additional proceedings beyond the market-power analysis needed to determine whether the *Wallkill* presumption applies.²⁰

Here too, additional procedures are required in light of the Legislature’s instruction that GHG-emitting facilities have a greater public interest impact than previously recognized by the State’s statutory mandates. While many cases will not trigger the CLCPA’s procedural requirements due to the lack of increased greenhouse gas emissions, in cases like this one the Commission must add an additional analysis to its established *Wallkill* process. The Legislature has instructed that the public interest requires this scrutiny, and there is no legal basis to disregard this obligation.

¹⁸ See, e.g., Carr Order at 7 (“The parties raise concerns about the burdens associated with the application of these requirements, but the statutory provisions can be implemented in a fashion that limits the impact in a competitive market.”).

¹⁹ Case 01-E-0113, *Entergy Nuclear Operations, Inc., et al.*, Order Providing For Lightened Regulation of Nuclear Generating Facilities (issued August 31, 2001) (Entergy Regulation Order) at 9.

²⁰ Case 08-E-0077, *Entergy Nuclear Fitzpatrick LLC, et al.*, Order Establishing Further Procedures (issued May 23, 2008) at 1.

C. Transfer of Ownership Interest from Fortistar to Digihost Requires Additional Analysis Under Both CLCPA Sections 7(2) and 7(3).

The Commission is “committed to ensuring CLCPA compliance across all sectors of the economy, including relative newcomers like cryptocurrency mining operations,” as the Commission affirmed in testimony last year to the Assembly Standing Committee on Environmental Conservation, Cryptocurrency Mining and the Climate Leadership and Community Protection Act.²¹ Here, however, the Commission failed to follow state statutory requirements by failing to analyze the projected effects of significantly-increased cryptocurrency mining operations at the Facility on increased emissions and local communities, as required by statute. As described below, analysis in accord with the CLCPA’s requirements would demonstrate that the proposed transaction is inconsistent with and would interfere with attainment of statewide mandates under the CLCPA.

1. The Transaction Would Result in a Significant Increase in Greenhouse Gas Emissions, A Result Wholly Inconsistent with Section 7(2) of the CLCPA.

The CLCPA mandates that New York obtain 70 percent of its power from renewable energy resources by 2030²² and achieve a zero-emissions electricity sector by 2040.²³ Across all sectors, the CLCPA limits greenhouse gas emissions to 60 percent of 1990 levels by 2030 and 15 percent of 1990 emissions by 2050.²⁴ The Legislature imposed extremely short timelines for CLCPA’s aggressive GHG emissions reduction targets in the electricity sector, including by

²¹ Testimony of the Public Service Commission, Assembly Standing Committee on Environmental Conservation, Cryptocurrency Mining and the Climate Leadership and Community Protection Act (CLCPA), (Oct. 2021) (hereafter “PSC Testimony”) at 4.

²² N.Y. Pub. Serv. L. § 66-p(2). The CLCPA also establishes specific benchmarks for the adoption of renewables, including nine gigawatts of offshore wind by 2035, six GW of solar by 2025, and three GW of energy storage by 2030. NY ECL § 75-0103(13)(e).

²³ N.Y. Pub. Serv. L. § 66-p(2).

²⁴ NY ECL § 75-0107(1).

requiring immediate reductions. Rather than a reduction, the proposed transaction would significantly *increase* GHG emissions, a result wholly inconsistent with the CLCPA.

The Facility operated infrequently over the last several years, serving the grid between approximately 10 and 74 days each year since 2016.²⁵ The Facility’s annual emissions were as follows:²⁶

Year²⁷	CO2 (tons/ year)²⁸	NOx (tons/ year)	SO2 (tons/ year)	Fuel source
2016	43,306.65	28.701	.204	Gas
2017	5,755.6	3.972	0.028	Gas
2018	12,447.85	7.735	0.063	Gas
2019	9,245.167	6.782	0.049	Gas
2020	10,981.24	6.482	.064	Gas
2021	2,845.41	2.407	.014	Gas
2022	21,238.44	12.85	.108	Gas

In contrast, the Facility’s own projections show the Facility will significantly increase its emissions if the transaction goes forward.²⁹ The chart below represents the Facilities’ own projected emissions once the transaction is completed, and reflects an enormous increase in annual emissions. Each *individual* year going forward represents nearly four times as many emissions as the previous six years *combined*.

²⁵ EPA, *Power Sector Emissions Data*, <https://www.epa.gov/airmarkets/power-sector-emissions-data>; <https://ampd.epa.gov/ampd/>.

²⁶ *Id.*

²⁷ Data for the table has been gathered from the Applicant’s emissions as listed under the EPA’s *Power Sector Emissions Data*, <https://www.epa.gov/airmarkets/power-sector-emissions-data>. Each year, the EPA compiles hours of operation, tons of CO2 emissions, NOx emissions, and other CO2e pollutants.

²⁸ EPA, *Power Sector Emissions Data*, <https://www.epa.gov/airmarkets/power-sector-emissions-data>.

²⁹ NAES, Title V and Title IV Permits Renewal Application, Fortistar North Tonawanda Cogeneration Facility (Apr. 21, 2021) at 5-4.

Year	Projected CO2e Emissions at 55% Capacity Factor (tons/year)
2022	312,916.95
2023	312,916.95
2024	312,916.95
2025	312,916.95
2026	312,916.95

There is no justification for a transaction that results in such a significant increase in GHG emissions, and Digihost and Fortistar would not be able to claim reliability as a justification. As the chart below depicts, the Facility rarely operates as a peaker, with the past seven years reaching the highest capacity factory of 17%. In the past five years, the Facility barely operated, running between 0.9% and 4% of its annual capacity. Plainly, the proposed transaction would not increase reliability because proof-of-work cryptocurrency mining behind-the-meter does not affect the Facility’s service to the grid, and in addition, the Facility barely served the grid for the last 5 years.

Year	Days of Operation ³⁰	Approx. Capacity Factor ³¹
2016	74	17.36%
2017	10	2.3%
2018	25	4.19%
2019	17	3.09%
2020	21	3.44%
2021	8	.9%
2022	40 ³²	-

³⁰ Days where the facility operated less than 3 hours were not included.

³¹ The Capacity Factor is calculated with data from the U.S. Energy Information Administration 860 and 923 forms. The annual capacity factor is a percentage measurement of actual generation in relation to potential maximum generation on an annual basis. For example, a generator with a 1-megawatt capacity operating at full capacity for a year (8,760 hours) would produce 8,760 megawatt-hours (MWh) of electricity. The generator’s annual capacity factor would be 100%. NYISO, *Power Trends 2021: New York’s Clean Energy Grid of the Future*, Glossary at 49 (2021), <https://www.nyiso.com/documents/20142/2223020/2021-Power-Trends-Report.pdf/471a65f8-4f3a-59f9-4f8c-3d9f2754d7de>.

³² As of September 30th, 2022.

Because the transaction would increase GHG emissions and no justification exists for the transaction, under Section 7(2) the transaction’s increased GHG emissions cannot be approved and the inquiry ends there.³³

2. A Section 7(3) Analysis is Required Because the Transaction Has the Potential to Disproportionately Burden Disadvantaged Communities.

CLCPA Section 7(3) prohibits agencies from issuing permits or approvals that would disproportionately burden disadvantaged communities.³⁴ The CLCPA defines disadvantaged communities as “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.”³⁵

Under CLCPA 7(3) agencies have two main mandates. First, agencies, including the PSC, must ensure that their decisions “shall not disproportionately burden disadvantaged communities” when issuing permits, licenses, and other approvals.³⁶ Second, agencies must “prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged

³³ *Danskammer*, 173 N.Y.S.3d at 213-14 (explaining agency determination that it need not reach mitigation question where no justification exists, in order affirming agency denial of permit under Section 7(2)). Even if the transaction were justified, however, Digihost’s proposed mitigation strategies are plainly insufficient. Digihost suggests the purchase of carbon offsets to help the facility reach carbon neutrality, but the CLCPA clearly prohibits the use of offsets in the electric sector. NY ECL § 75-0109(4)(f)-(i). Digihost also speculates that it might use alternative fuels such as renewable natural gas, hydrogen, or hydrogen enriched natural gas, but fails to provide any details about whether and how it could source such alternative fuels, whether it would be economic to fuel the Facility with them, or how such alternatives would achieve 100% zero emissions; *See NAES, Title V and Title IV Permits Renewal Application, Fortistar North Tonawanda Cogeneration Facility* (Apr. 21, 2021) at 5-6, 30; Digihost’s Supplement to the Petition, August 26 2021, Case No. 21-M-0238.

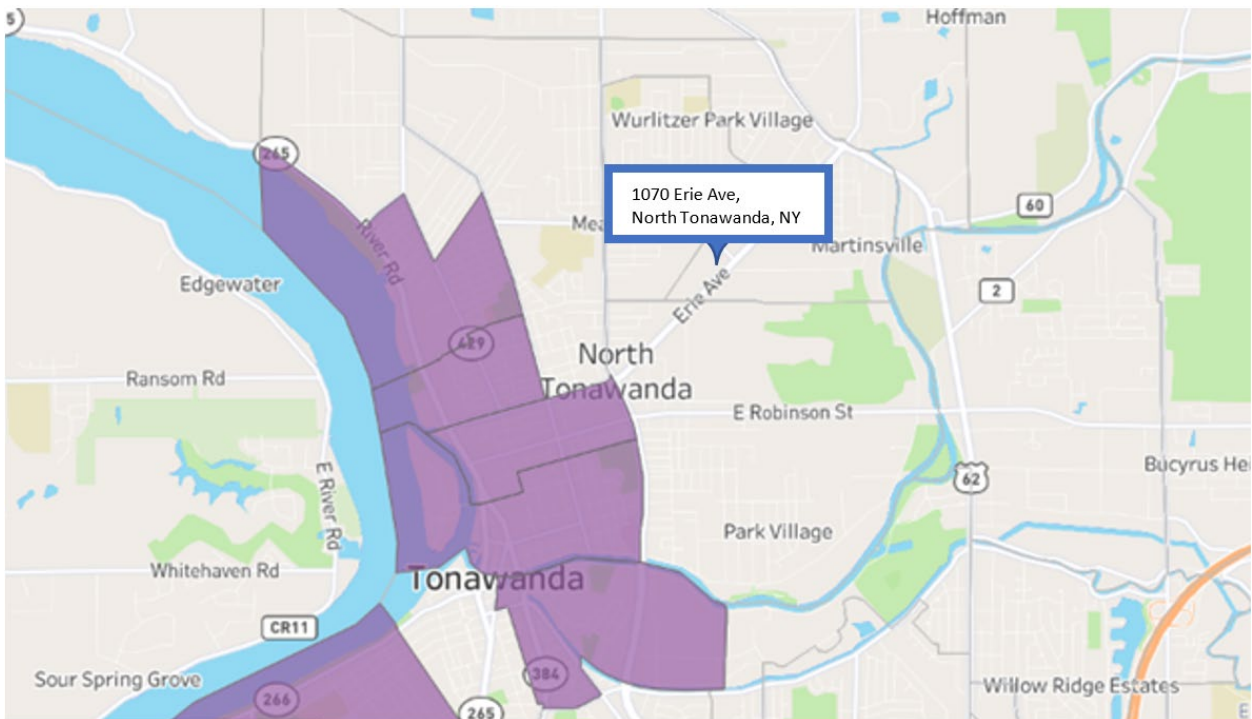
³⁴ “In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, pursuant to article 75 of the environmental conservation law, all state agencies, offices, authorities, and divisions shall not 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 GHG emissions and co-pollutants in disadvantaged communities as identified pursuant to such subdivision 5 of section 75-0101 of the environmental conservation law.” CLCPA § 7(3).

³⁵ NY ECL § 75-0101(5).

³⁶ CLCPA § 7(3).

communities.”³⁷ Here, the PSC must examine the impacts to disadvantaged communities from Digihost’s proposed activities.

It is clear that several communities that are likely protected under Section 7(3) may be impacted by the increased GHG and local air pollutants from this facility’s increased operations.³⁸ According to DEC’s Disadvantaged Community (DAC) Mapping tool, the Facility is proximate to several DEC-designated draft DACs.³⁹

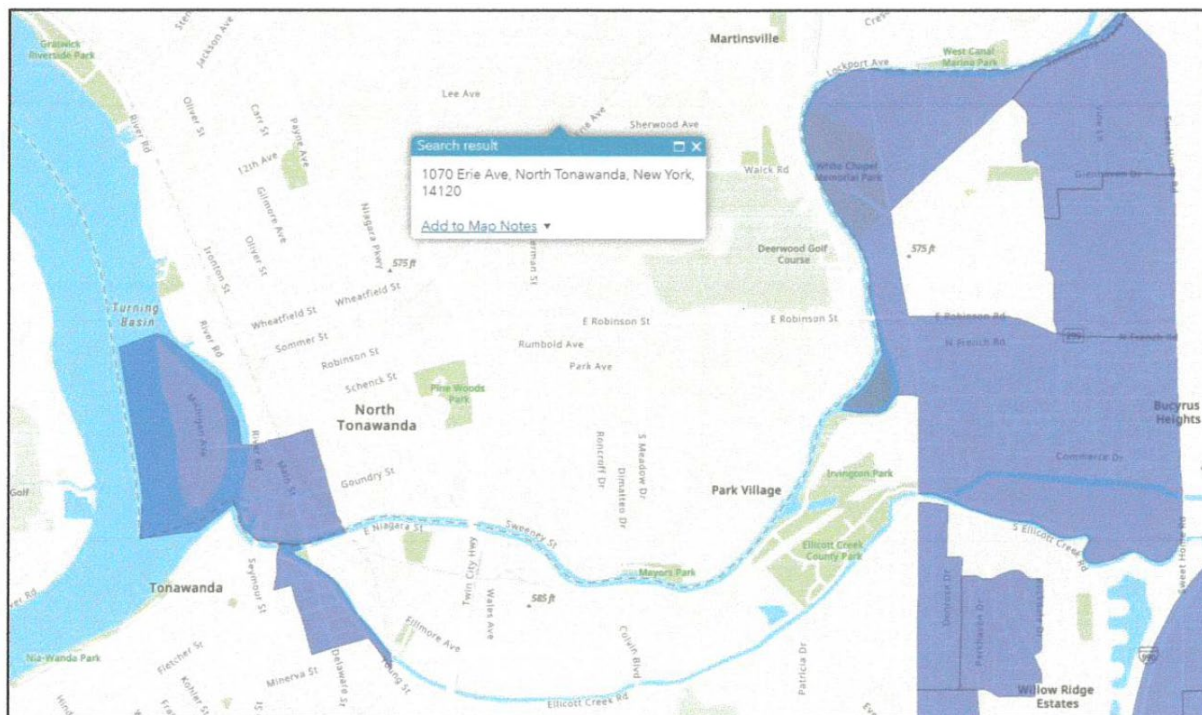


³⁷ CLCPA § 7(3).

³⁸ Fortistar itself acknowledges that the Facility has a Hazardous Air Pollutant potential of 5.48 tons/year. The Facility’s change in operations and increased emissions will add air pollutants on top of the consistently elevated air pollution in neighboring disadvantaged communities, exacerbating the disproportionate air pollution and poor health outcomes in these areas in violation of Section 7(3). NAES, *Title V and Title IV Permits Renewal Application*, Fortistar North Tonawanda Cogeneration Facility (Apr. 21, 2021) at 5-1, 5-2.

³⁹ The State’s designation of DACs is in regulatory review and incomplete. Draft Disadvantaged Communities Map, <https://climate.ny.gov/Our-Climate-Act/Disadvantaged-Communities-Criteria/Disadvantaged-Communities-Map>.

In addition to the Facility’s proximity to draft DACs, the Facility also neighbors several DEC-designated Potential Environmental Justice Area (PEJA), as depicted below.⁴⁰



Lastly, EPA’s own Environmental Justice Screening tool depicts a third potential environmental justice area close to the Facility.⁴¹ While the precise boundaries of communities that qualify for additional Section 7(3) protections remain in draft form, under any map, it is clear that a Section 7(3) analysis is required for this proceeding.

⁴⁰ Potential Environmental Justice Areas Mapping Tool, ARCGIS, <https://www.arcgis.com/apps/mapviewer/index.html?layers=02d8ba023f90403c92f5523e8f3c8208> (citing PEJA Community: 15000US360290091074; Census Block Group 15000US360290091074); *Id.* (citing PEJA Community: 15000US360630232003; Census Block Group 15000US360630232003).

⁴¹ EPA, *EJSCREEN: EPA’s Environmental Justice Screening and Mapping Tool*, <https://ejscreen.epa.gov/mapper/> (citing census state-county-tract-block group identifier 360630233001).

II. An Interim Order Staying the Ruling is Necessary and Appropriate.

The Interested Parties respectfully request that the Ruling be stayed pending the Commission's ruling on this Petition for Rehearing. The Interested Parties further request that, should the Commission grant this petition, the Ruling be further stayed pending the outcome of rehearing and the Commission's completion of the analysis required under the CLCPA Sections 7(2) and 7(3).

In the absence of a stay, the increase in operations of the Facility will cause irreparable harm to the environment and nearby residents.⁴² As detailed in Earthjustice and Sierra Club-Atlantic Chapter's October 13, 2021 comments on the Petition, Digihost's proposal will dramatically increase the Facility's emissions of GHGs and other pollutants to the detriment of the climate and public health. For example, the Facility's annual emissions were 12,448 tons of CO₂ for 2018, 9,245 tons of CO₂ for 2019, and 10,981 tons of CO₂ in 2020.⁴³ Digihost plans to emit 339,068 tons of CO₂ every year going forward, nearly four times as much in a *single year* as the previous *six years combined*.⁴⁴ Significant increases in operations to mine cryptocurrency will also increase emissions of nitrous oxide, particulate matter, carbon monoxide, and volatile organic compounds at the Facility.⁴⁵ These harmful pollutants can lead to higher mortality rates from cardiovascular disease, chronic obstructive pulmonary disease, respiratory illness, and lung

⁴² See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.”).

⁴³ EPA, *Power Sector Emissions Data*, <https://www.epa.gov/airmarkets/power-sector-emissions-data>.

⁴⁴ The Facility's current permit has no limit on CO₂ emissions. NAES, *Title V and Title IV Permits Renewal Application*, Fortistar North Tonawanda Cogeneration Facility (Apr. 21, 2021) at 5-6, 8, 30. The permit application states that the Facility's potential CO₂ emissions is estimated to be 339,067.98 tons per year, as well as large, estimated increases in several other harmful emissions and co-pollutants.

⁴⁵ NAES, *Title V and Title IV Permits Renewal Application*, Fortistar North Tonawanda Cogeneration Facility (Apr. 21, 2021) at 5-6, 30.

cancer.⁴⁶ While Digihost claims that the Facility will convert to “renewable natural gas,” or RNG, RNG is at least as environmentally harmful as fossil natural gas.⁴⁷

Nor are the Facility’s environmental impacts confined to air emissions: Digihost plans to use 500,000 gallons of water per day, which will account for approximately 12% of North Tonawanda’s current total water usage and will be discharged into a water treatment system that is aging and needs significant upgrades to be able to handle the significant increase and constant hot water discharges.⁴⁸ Additionally, as demonstrated in public comments submitted on the Petition, North Tonawanda residents and others living near the Facility are concerned about significant noise impacts.⁴⁹

Staying the Ruling would also serve the public interest by advancing New York’s statutory requirement to reduce GHG emissions. By contrast, Digihost plans to use the Facility to

⁴⁶ Maninder P.S. Thind et al., *Fine Particulate Air Pollution from Electricity Generation in the U.S.: Health Impacts by Race, Income, and Geography*, 53 *Env’t Sci. Tech.* 14,010 (2019), <https://pubs.acs.org/doi/pdf/10.1021/acs.est.9b02527>; See N.Y. State Dep’t of Health, *New York’s State Health Improvement Plan: Prevention Agenda 2019-2024*, at 72-73 (updated Sept. 2, 2021), https://www.health.ny.gov/prevention/prevention_agenda/2019-2024/docs/ship/nys_pa.pdf.

⁴⁷ NRDC, Issue Brief: *A Pipe Dream or Climate Solution? The Opportunities and Limits of Biogas and Synthetic Gas to Replace Fossil Fuels* (June 2020) at 2-3, <https://www.nrdc.org/sites/default/files/pipe-dream-climate-solution-bio-synthetic-gas-ib.pdf>; Earthjustice & Sierra Club, *Rhetoric v Reality: The Myth of “Renewable Natural Gas” for Building Decarbonization* 9 (July 2020), https://earthjustice.org/sites/default/files/feature/2020/report-decarb/Report_Building-Decarbonization-2020.pdf.

⁴⁸ City of N. Tonawanda, *Public Notice, Digihost Full Env’t Assessment Form*, at 5 (Aug. 12, 2021), https://www.northtonawanda.org/documents/legal%20notice/fortistar%20amended%20seqr_2.pdf (the City’s current usage averages 4 million gallons per day). This water will flow to the City’s wastewater treatment facility, which is in need of \$3 million in emergency repairs and \$30 million for long term repairs, which will be borne by local residents. Thomas J. Prohaska, *North Tonawanda asks for \$30 million in emergency aid to repair sewer plant*, Buffalo News (Mar. 12, 2022), https://buffalonews.com/news/local/government-and-politics/north-tonawanda-asks-for-30-million-in-emergency-aid-to-repair-sewer-plant/article_91b32598-a145-11ec-b35d-7314fe498fd0.html.

⁴⁹ See, e.g., Comments by Chris P. Root, Jim Berry, Deborah Q. Gondek, Clean Air Coalition of Western New York, Buffalo Niagara Waterkeeper in Case No. 21-M-0238, Comment Letters Nos 1, 2, 25, 34, 54, 120, 122, <https://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?Mattercaseno=21-M-0238>; See also DeRoche, M., Fisher, J., Thorpe, N., & Wachspress, M., *The Energy Bomb: How Proof-of-Work Cryptocurrency Mining Worsens the Climate Crisis and Harms Communities Now* (Sept. 2022) at 15-16, https://earthjustice.org/sites/default/files/files/2570_bitcoin_white_paper_04_nt.pdf.

mine cryptocurrency and therefore risks only delayed or lesser profits if the Ruling is stayed. This does not constitute irreparable harm.⁵⁰

Moreover, the petition for rehearing is likely to succeed because, as explained above, the Commission committed an error of law by failing to consider the Petition's potential impacts on New York's greenhouse gas reduction requirements, in violation of the CLCPA.

For these reasons Earthjustice respectfully requests a stay pending resolution of this Petition; and, if the Petition is granted, a stay pending resolution of rehearing.

CONCLUSION

Because the Commission failed to comply with its statutory mandate to apply the CLCPA to its ruling, which constituted an agency "decision", it committed legal error. The Commission should rehear this matter and stay its ruling pending the Commission's completion of the analysis required under the CLCPA Sections 7(2) and 7(3).

⁵⁰ See *Eastview Mall, LLC v. Grace Holmes, Inc.*, 122 N.Y.S.3d 848, 850 (4th Dep't 2020).

Dated: October 14, 2022
New York, New York

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