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Via Electronic Delivery

October 28, 2021

Hon. Michelle L. Phillips
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case No. 21-M-0238 – Petition of Fortistar North Tonawanda LLC and Digihost International Inc. for Declaratory Ruling Regarding Application of Sections 70 and 83 of the New York State Public Service Law, and, in the Alternative, Approval of the Proposed Transaction Pursuant to Sections 70 and 83

Dear Secretary Phillips:

On April 15, 2021, Fortistar North Tonawanda LLC (“FNT”), the direct owner of a natural gas-fired cogeneration facility (the “Facility”), and Digihost International Inc. (“Digihost”) (collectively, the “Petitioners”) petitioned the New York State Public Service Commission (“Commission”) for a declaratory ruling that the proposed transfer of the upstream ownership interests in FNT (the “Transaction”) requires no further review under New York Public Service Law (“PSL”) Sections 70 and 83, in the above-referenced case (the “Petition”). In the alternative, the Petitioners requested that the Commission approve the Transaction under PSL Sections 70 and 83.

The Petitioners hereby respond to certain related arguments made by the New York Public Interest Research Group (“NYPIRG”) and Grassroots Environmental Education (“Grassroots” and with NYPIRG, the “Opponents”) in their comments filed in opposition to the Petition.¹ The Petitioners request that the Commission exercise its discretion to accept this response in the interests of having as complete and accurate a record as possible.²

The Opponents argued that the Commission should reject the Petition because Digihost’s plan to self-supply a data center with electricity generated by the Facility to perform

¹ Case No. 21-M-0238, *Petition of Fortistar North Tonawanda LLC and Digihost International Inc.*, NYPIRG Fortistar-Digihost N Tonawanda PSC Comments (Oct. 12, 2021) (“NYPIRG Comments”); Case No 21-M-0238, *supra*, Grassroots Environmental Education Comments (Oct. 11, 2021) (“Grassroots Comments”). Public commenters submitted comments to the Commission raising similar arguments in opposition to the Petition.

² See, e.g., Case 15-E-0452, *Petition of Related Companies and Oxford Properties for Order Regarding Calculation of Contract Demand for Microgrid under Standby Service Rates*, Order Denying Petition (Feb. 22, 2017) (Commission considered unauthorized reply comments because they contributed to the record of the proceeding and were not prejudicial to either party); Case 03-E-0477, *PSEG Power Cross Hudson Corporation*, Declaratory Ruling on the Provision of Standby Service (May 22, 2003) at 2 (Commission considered unauthorized reply comments because it advanced the record in the proceeding).

cryptocurrency mining will have adverse environmental impacts and, therefore, is not in the public interest. Specifically, the opponents contended that the Facility would operate more hours than it has over the past several years, thereby increasing the Facility's greenhouse gas emissions ("GHG") and water consumption.³ The Opponents claimed that the increased GHG emissions negatively affect public health and undermine the climate goals of the Climate Leadership and Community Protection Act ("CLCPA").⁴ Finally, the Opponents asserted that use of the Facility's electricity for cryptocurrency mining "provides no public benefit."⁵

The Commission should reject Opponents' arguments because they are without merit. First, any increase in GHG emissions and water consumption resulting from the self-supply of electricity to a data center are fully compliant with the Facility's existing permits. The economics of the wholesale electricity market have caused the Facility to operate less over the past several years, thereby reducing emissions and water consumption. A new market opportunity has now presented itself that will allow the Facility to increase its production of electricity, but the anticipated production will still be less than the production as a baseload facility for which the Facility is permitted. Accepting the Opponents' arguments that the Facility should not increase its emissions and water consumption above recent levels of production would violate the Facility's rights under its permits to produce electricity.

Second, the Opponents' argument that the Commission should reject the Petition because of adverse environmental impacts ignores that the City Planning Commission of North Tonawanda performed an environmental review of the cryptocurrency mining proposal at the Facility under the State Environmental Quality Review Act ("SEQRA") and found that there will be no significant environmental impact. Digihost submitted a Full Environmental Assessment Form ("EAF") to the City Planning Commission with respect to its application for site plan review to construct structures to house computer equipment for use as a data center and electrical distribution throughout the site.⁶ The EAF indicated the air emissions and water consumption resulting from the Facility's supply of electricity to the data center. The City Planning Commission designated itself the lead agency under SEQRA, submitted the EAF for public comments, and issued a Negative Declaration after its environmental review.⁷

Pursuant to the SEQRA regulations, "[t]he determination of significance issued by the lead agency following coordinated review is binding on all other involved agencies."⁸ Thus, the

³ NYPIRG Comments at 2; Grassroots Comments at 2.

⁴ NYPRIG Comments at 2–3; Grassroots Comments at 2.

⁵ NYPIRG Comments at 2; Grassroots Comments at 2.

⁶ Fortistar Amended SEQR, North Tonawanda (Aug. 12, 2021) *available at* https://www.northtonawanda.org/documents/legal%20notice/fortistar%20amended%20seqr_2.pdf.

⁷ September 8, 2021 City Planning Commission Meeting Minutes, Town of North Tonawanda (Sept. 8, 2021), *available at* <https://www.northtonawanda.org/file-library/100179/PlanningBoard090821.pdf>.

⁸ 6 NYCRR § 617.6(b)(3)(iii). *See* Case 15-E-0516, *Petition of Greenidge Generation LLC for an Original Certificate of Public Convenience and Necessity and Lightened Regulation*, Order Denying Rehearing (Dec. 15, 2016) (ruling that the Commission must rely upon the lead agency's declaration of significance); *see also* Case 06-W-0185, *Nine Mile Point Nuclear Station, LLC and Long Island Lighting Company d/b/a Long Island Power Authority*, Order Approving Transfer of Water System (June 29, 2006) (ruling the Commission may defer to SEQRA findings made by authorized entities); Case 96-S-0054, *Saranac Power Partners, L.P.*, Order Issuing

environmental review of the cryptocurrency mining proposal is concluded, and the City Planning Commission's finding of no significant environmental impacts is binding on the Commission.

Third, the Commission should reject the Opponents' argument that Digihost's self-supply of electricity generated by the Facility for cryptocurrency mining "provides no public benefit" and therefore approval of Petition is not in the public interest because the self-supply of electricity is outside the scope of the Commission's jurisdiction under the PSL and the Commission cannot prohibit or condition it.⁹ Further, acceptance of Opponents' argument would establish bad precedent because it would open the doors to a flood of complaints that the Commission should prohibit certain consumers that complainants deem environmentally or politically undesirable from obtaining utility services. It would be discriminatory for the Commission to pick and choose which consumers should be allowed to obtain utility services and would violate the PSL's requirement that utilities "not subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."¹⁰

For the foregoing reasons, the Commission should reject the Opponents' arguments and grant the Petition as soon as possible.

Respectfully submitted,

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Certificate of Public Convenience and Necessity (Mar. 15, 1996) (ruling the Commission may defer to SEQRA findings made by authorized entities); Case 04-E-0902, *Niagara Mohawk Power Corporation, et al.*, Order Approving Transfer of Property and Extension of Electric Delivery Facilities (Dec. 22, 2004) (ruling that the Commission will rely on the town's SEQRA review and will not conduct a separate SEQRA review of the action proposed in the PSL § 70 petition).

⁹ See Case 19-E-0718, *Petition of Greenidge Generation LLC for a Declaratory Ruling Regarding Jurisdiction and Continued Application of Lightened Regulation*, Declaratory Ruling on Proposed On-Site Service (June 11, 2020) (ruling that the term "electric corporation" explicitly excludes circumstances where "electricity is generated or distributed by the producer solely on or through private property for . . . its own use or the use of its tenants and not for sale to others" and, therefore, the provision of electricity from an electric generating facility for on-site data processing is not subject to Commission regulation).

¹⁰ See PSL § 65.3.