STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on June 22, 2023

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 LLC 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.

ORDER DENYING PETITION

(Issued and Effective June 23, 2023)

BY THE COMMISSION:

INTRODUCTION

On October 14, 2022, Earthjustice, Clean Air Coalition of Western New York, Buffalo Niagara Waterkeeper, Deborah Q. Gondek, Karen Hance, and Sierra Club – Atlantic Chapter (together, Petitioners) filed a Petition for Rehearing (the Petition) of the Public Service Commission's (Commission) Declaratory Ruling that was issued on September 15, 2022.[1] The Declaratory Ruling found that no further reviews and approvals

[1] Case 21-M-0238, Fortistar North Tonawanda Inc. and Digihost International Inc., Declaratory Ruling on Upstream Transfer Transaction (issued September 15, 2022) (Declaratory Ruling).

were required under sections 70 and 83 of the Public Service Law (PSL) with regard to the proposed transfer of upstream ownership interests in Fortistar North Tonawanda LLC (Fortistar), which is the direct owner and operator of a 55 megawatt (MW) natural gas-fired cogeneration facility in North Tonawanda, New York (the Facility), to Digihost International Inc. (Digihost). The Declaratory Ruling was not an approval of the upstream transfer, nor did it opine on any party's use of the Facility.

The Petition claims that although the Declaratory Ruling found that PSL approvals were not required, the Commission was still obligated to undertake a substantive environmental analysis related to the existing Facility and make certain findings. In particular, the Petitioners assert that the Commission committed a legal error by failing to conduct analyses related to the attainment of statewide greenhouse gas (GHG) emissions limits and impacts on disadvantaged communities under sections 7(2) and 7(3) of the Climate Leadership and Community Protection Act (CLCPA), respectively.[2] Petitioners seek an interim order staying the Declaratory Ruling pending the Commission's ruling on the Petition. Petitioners further request that, if the Petition is granted, the Declaratory Ruling should be further stayed pending the completion of the CLCPA analyses required by CLCPA §§7(2) and 7(3). As discussed below, the Commission denies the Petition in its entirety.

BACKGROUND

On September 15, 2022, the Commission issued the Declaratory Ruling, finding that the proposed transfer of upstream interests in Fortistar to Digihost (the Proposed Transaction) did not require further reviews and approvals under

[2] Chapter 106 of the Laws of 2019.

PSL §§70 and 83.[3] The Commission found that Fortistar and Digihost had satisfied the presumption established in the Wallkill Order and its progeny, pursuant to which PSL §§70 and 83 regulation does not adhere to a transfer of ownership interests in parent entities upstream from affiliates owning and operating jurisdictional facilities, unless there is a potential for the exercise of vertical or horizontal market power, or a potential for harm to the interests of captive utility ratepayers of fully-regulated utilities sufficient to override the presumption (the Wallkill Presumption).[4] The Declaratory Ruling acknowledged that numerous commenters raised significant environmental concerns, including emissions impacts and compliance with the CLCPA, but stated that those matters were beyond the scope of the Declaratory Ruling, which was limited to reviewing whether the transfer of upstream ownership interests in an existing natural gas-fired cogeneration facility required further Commission review under PSL §§70 and 83. The Declaratory Ruling also expressly stated that it did not address the propriety of any permits that Fortistar and Digihost may be required to obtain from other federal, State, or local regulatory entities, where environmental impacts may be considered.

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[3] Concurrently, New York State Department of Environmental Conservation (NYSDEC) has been considering Title V Permit, 9-2912-00059/00013, for the Fortistar North Tonawanda Inc Facility. At this time, NYSDEC has not affirmatively renewed or denied the Title V permit.

[4] Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994); Case 98-E-1670, Carr Street Generation Station, L.P., Order Providing for Lightened Regulation (issued April 23, 1999). The Commission ordinarily reviews transactions implicating nuclear power reactors, nuclear waste storage facilities, trust funds, and affiliated nuclear sites.

THE PETITION

Petitioners assert that the Commission, in issuing the Declaratory Ruling, erred in law by failing to analyze the GHG emissions impacts of increased cryptocurrency mining operations at the Facility under CLCPA §7(2), or analyze the impacts on disadvantaged communities under CLCPA §7(3). According to Petitioners, the broad language of the CLCPA indicates that the CLCPA applies to the Commission's consideration of Fortistar and Digihost's request for a declaratory ruling. Petitioners argue that a declaratory ruling as to whether a transaction may proceed, and the level of scrutiny such transaction requires, constitutes an administrative "decision" subject to the CLCPA.[5] Petitioners also claim that the CLCPA covers this specific type of action (i.e., a declaratory ruling regarding an upstream transfer) because it will purportedly lead to a substantial increase in activities that will emit greenhouse gases. Petitioners maintain that, like in the context of a rate case, the key question under section 7 of the CLCPA is whether such activities would go forward in the absence of a Commission decision, and, in this case, the Commission's decision is "critical for the project to be pursued by Fortistar."[6]

Petitioners further allege that, even if there was doubt as to whether the Declaratory Ruling constituted an administrative "decision" under the CLCPA, the Commission should interpret that language "broadly," as it did in applying CLCPA

[5] Petitioners reference the Black's Law Dictionary definition of a "decision" as a "judicial or agency determination after consideration of the facts and the law." Petitioners also reference the broader, lay definition of a "decision" as "any determination arrived at after consideration."

[6] Petition, p. 13.

§7(2) to rate cases.[7] According to Petitioners, a broad construction of the CLCPA's mandate is in line with the urgent threat of climate change identified by the Legislature.

Petitioners aver that imposing additional CLCPA requirements on transactions otherwise subject to the Wallkill Presumption would not cause any undue burden for lightly regulated entities. Petitioners note that the Commission previously ruled that nuclear facilities have a greater impact on the public interest than hydro and fossil facilities, and nuclear facilities should therefore be subject to greater scrutiny. Petitioners suggest that, here, GHG-emitting facilities have a greater public interest impact than other facilities and should therefore be subject to increased scrutiny.

Further, Petitioners declare that the analyses required by the CLCPA would demonstrate that the Proposed Transaction is inconsistent with or would interfere with attainment of statewide mandates. Petitioners postulate that GHG emissions at the Facility would increase, and Fortistar and Digihost would not be able to claim reliability as a justification for the increase, and the transaction therefore cannot be "approved."[8] Petitioners also contend that the Facility is proximate to several disadvantaged communities and environmental justice areas, as defined by the New York State Department of Environmental Conservation (NYSDEC) and the federal Environmental Protection Agency.

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[7] Petition, p. 13 (citing Cases 19-G-0309, et al., National Grid NY – Gas Rates, Order Approving Joint Proposal, As Modified, And Imposing Additional Requirements (issued August 12, 2021), p. 69).

[8] Petition, p. 19.

Petitioners request that the Declaratory Ruling be stayed, pending the Commission's ruling on the Petition, to avoid irreparable harm to the environment and public interest. Similarly, Petitioners ask that, should the Commission grant the Petition, the Declaratory Ruling should be further stayed pending the outcome of rehearing and the Commission's completion of the required CLCPA analyses.

COMMENTS

Pursuant to 16 NYCRR §3.7(c), responses to the Petition were due on October 31, 2022.[9] Digihost and Fortistar filed comments in opposition to the Petition, arguing that the Declaratory Ruling was limited in scope, and the Petitioners have not argued that the Wallkill Presumption analysis itself (to which the Declaratory Ruling was necessarily limited) was in error. Digihost and Fortistar further argue that, to the extent the 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 Section 204 of the State Administrative Procedure Act (SAPA).

LEGAL AUTHORITY

The Commission's authority to grant or refuse an interested person's request for rehearing of an order is established by PSL §22 and governed by regulations implementing that statute that are contained in 16 NYCRR §3.7. Rehearing may only be sought on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination.[10]

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[9] One individual filed late comments on January 18, 2023, raising general arguments opposing cryptocurrency mining.

[10] 16 NYCRR §3.7(b).

Under SAPA §204, an agency may issue a declaratory ruling with respect to (i) the applicability to any person, property, or state of facts of any rule or statute enforceable by it, or (ii) whether any action by it should be taken pursuant to a rule. Pursuant to SAPA §204(1), declaratory rulings are binding upon the agency unless it is altered or set aside by a court, and an agency may not retroactively change a valid declaratory ruling, although it is permitted to prospectively change it.

DISCUSSION AND CONCLUSION

The Petition seeks rehearing of the Declaratory Ruling and can be considered as a request for reconsideration.[11] Whether viewed in the context of a rehearing or reconsideration request, the Commission provides further clarification of the Declaratory Ruling and addresses the merits of the Petition.

Petitioners point to CPCLA §7(2), which requires the Commission, "[i]n considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts," to "consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide [GHG] emissions limits established in article 75 of the environmental conservation law." CLCPA §7(3) includes identical prefatory language but requires that the Commission "shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law." Further, this section requires

[11] See Case 17-M-0422, National Grid Generation LLC, Letter for Appeal of Declaratory Ruling on Lease Transaction (issued January 18, 2018), p. 2 (treating an appeal of a declaratory ruling as a request for reconsideration).

the Commission to "prioritize reductions of [GHG] emissions and co-pollutants in disadvantaged communities as identified pursuant to such subdivision ...."

Petitioners' central argument is that the Declaratory Ruling was an "administrative approval and decision" within the meaning of CLCPA §§7(2) and 7(3). The Commission finds this argument to strain the language and intent of these CLCPA provisions as well as the statue's structure. We interpret the CLCPA language to cover situations where the Commission makes an affirmative approval and decision, including but not limited to rate cases, which may result in increased GHG emissions.[12] That is not the situation in the context of the underlying Declaratory Ruling, which explicitly found that further regulatory review (i.e., approval) was not required under PSL §§70 and 83. A ruling that essentially finds that PSL jurisdiction does not adhere to a state of facts (i.e., the Proposed Transaction) is not an affirmative approval and decision. Finding that Commission approval under the PSL is not required does not constitute an affirmative regulatory authorization to emit greenhouse gases.

The Commission further notes that the CLCPA clearly identifies "permits, licenses, and other administrative approvals and decisions," as well as "the execution of grants, loans, and contracts," as agency actions requiring an additional analysis of GHG emissions. The specific term "decisions" must be read in context with all those other identified agency actions involving affirmative authorizations or executions and cannot be construed as a catch-all term requiring all other Commission activities to include an analysis of GHG emissions,

[12] See, e.g., 21-G-0576, Bluebird Renewable Energy, LLC, Order Granting Certificate of Public Convenience and Necessity and Providing for Lightened Regulation (issued November 18, 2022).

as suggested by Petitioners. Accepting Petitioners' overly broad reading of the CLCPA would subject all Commission activities to a GHG emissions analysis and would lead to illogical situations, including never-ending analyses of activities that do not constitute an affirmative authorization to emit GHG to the atmosphere. For example, such a reading would require the Commission to conduct a GHG emissions analysis any time it issues a declaratory ruling interpreting a provision of the PSL and, if the analysis showed that the interpretation could conceivably encompass increased GHG emissions, no matter how remote the nexus, the Commission would have to reject that interpretation.

The Commission also recognizes the parallels between CLCPA §7 and the State Environmental Quality Review Act (SEQRA) and its implementing regulations, contained in Article 8 of the Environmental Conservation Law and 6 NYCRR Part 617, respectively, under which State agencies incorporate the consideration of environmental impacts into decision-making processes. Notably, SEQRA specifically enumerates over forty Type II actions that have been determined not to have a significant impact on the environment or are otherwise precluded from requiring a SEQRA environmental review, including where the agency is interpreting its existing codes, rules, and regulations.[13] A logical reading of the CLCPA similarly indicates that a full analysis of GHG emissions and the burdens on disadvantaged communities under CLCPA §7 is not prescribed for every agency activity, including interpretations of the agency's existing codes, rules, and regulations, and how those may apply to any "person, property, or state of facts."[14]

[13] 6 NYCRR §617.5(c)(37).

[14] 16 NYCRR §8.1(a)(1).

Here, the Commission applied its existing Wallkill Presumption precedent to the proposed upstream transfer between Fortistar and Digihost and determined that, based on the circumstances presented, PSL §§70 and 83 did not adhere to the transfer of upstream ownership interests in the Facility because the transfer did not present any market power risks, or any risk of potential financial harm to captive ratepayers.[15] In doing so, the Commission interpreted the applicability of the PSL, as well as the applicability of its existing Wallkill Presumption precedent, to this case. Conversely, the Commission did not affirmatively authorize the transaction between Fortistar and Digihost, nor did the Commission grant to Fortistar or Digihost any permit or other approval. In fact, Fortistar already has a valid Certificate of Public Convenience and Necessity, and was granted a lightened regulatory regime with respect to its ownership and operation of the Facility.[16] The Declaratory Ruling merely opined on the inapplicability of PSL §§70 and 83 to an upstream transfer of ownership interests in the Facility, and such action is not tantamount to a grant of a permit, license, or an administrative approval and decision requiring an analysis of GHG emissions and burdens on disadvantaged communities, as suggested by Petitioners.

In any event, Petitioners' concern that the Declaratory Ruling will lead to "irreparable harm to the environment and public interest" is incorrect. Importantly, the Facility about which the Petitioners are concerned is an existing generating facility that is currently operating under a

[15] This proceeding did not involve the transfer of direct ownership interests in the Facility.

[16] 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).

valid Title V air permit issued by the NYSDEC. Even if the Proposed Transaction had not occurred, the former owner could have – at any time – increased the Facility's intensity of operation up to the air emission limits of its Title V permit without any Commission action. It is the Title V permit, not any Commission-issued "permit," that governs the Facility's air emissions. The NYSDEC's consideration of whether to approve or renew the air emission permit for the Facility, moreover, is the type of administrative approval subject to CLCPA §7. Given that the existing Facility permit was issued in accordance with environmental statutes and regulations that ensure the Facility is operated in a manner that is protective of the environment, the Commission finds that the Declaratory Ruling is not inconsistent with, and will not interfere with the attainment of, the statewide GHG gas emissions limits established by the NYSDEC. Likewise, the operation of the existing Facility in accordance with applicable, existing, and valid permits will not disproportionately burden disadvantaged communities.

Petitioners seek an outcome where the Commission limits Fortistar from exercising its rights under the existing air emission permit issued by the NYSDEC for the Facility. This result is prohibited by section 8 of the CLCPA, which provides that the Commission's regulation of GHG emissions "... shall not limit the [NYSDEC's] authority to regulate and control greenhouse gas emissions pursuant to article 75 of the environmental conservation law." Imposing air emissions limits more stringent than the NYSDEC or prohibiting Fortistar from serving certain end users deemed undesirable by Petitioners would directly interfere with and limit the NYSDEC's authority to regulate the Facility's GHG emissions as part of issuing the air permit.

The Declaratory Ruling specifically explained that it did not address the propriety of any permits that Fortistar and Digihost may be required to obtain from other federal, State, or local regulatory entities, where environmental impacts may be considered. The Commission notes that the NYSDEC recently considered the emissions impacts of the natural gas-fired Greenidge generation facility in Yates County, New York, which also serves a cryptocurrency mining operation, as part of the NYSDEC's review of an application to renew that facility's Title V Permit.[17] Similarly, to the extent that there are any concerns about the Facility's emissions following the Proposed Transaction, appropriate consideration of those environmental impacts would arise when the Facility's existing and valid air permit, which is required in order for the Facility to operate, is considered for renewal by the NYSDEC.[18] As noted above, the Facility would have to operate within any limits established in that permit (if one is granted by the NYSDEC).

Finally, Petitioners have failed to otherwise identify and demonstrate any errors with the Commission's Wallkill Presumption analysis itself (i.e., the basis on which the

[17] See NYSDEC Notice of Denial of Title V Air Permit, DEC ID: 8-5736-00004/00017, Greenidge Generation LLC – Greenidge Generating Station Title V Air Permit Application (issued June 30, 2022), available at https://www.dec.ny.gov/docs/administration_pdf/greenidgefinal630.pdf (in which the NYSDEC specifically denied the renewal of the Title V Permit on the basis that a permit renewal for the Greenidge generation facility would be inconsistent with or would interfere with the attainment of statewide GHG emissions limits).

[18] An application for renewal of the Facility's NYSDEC Title V Permit (DEC ID: 9-2912-00059/00013) was filed on April 23, 2021. In the Commission's understanding, the application for renewal remains pending before the NYSDEC. See https://www.dec.ny.gov/cfmx/extapps/envapps/index.cfm?view=detail&applid=1220500.

Declaratory Ruling was issued). For all the foregoing reasons, the Commission concludes that there are no allegations in the Petition warranting rehearing or reconsideration of the Declaratory Ruling. Accordingly, the Petition is denied in its entirety.

The Commission orders:

1. The petition, filed in this proceeding by Earthjustice, Clean Air Coalition of Western New York, Buffalo Niagara Waterkeeper, Deborah Q. Gondek, Karen Hance, and Sierra Club – Atlantic Chapter on October 14, 2022, is denied, as discussed in the body of this Order.

2. This proceeding is reopened for the limited purpose of addressing the petition discussed in the body of this Order and is thereafter closed.

By the Commission,

(SIGNED) MICHELLE L. PHILLIPS
Secretary