

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

CLEAN AIR COALITION OF WESTERN NEW
YORK, INC. and SIERRA CLUB,

Petitioners-Plaintiffs,

For a Judgment Under Article 78 of the Civil Practice
Law and Rules,

-against-

NEW YORK STATE PUBLIC SERVICE
COMMISSION, FORTISTAR NORTH TONAWANDA,
LLC, NORTH TONAWANDA HOLDINGS, LLC and
DIGIHOST INTERNATIONAL, INC.,

Respondents-Defendants.

Index No. _____

**VERIFIED PETITION AND
COMPLAINT**

Oral Argument Requested

Petitioners-Plaintiffs Clean Air Coalition of Western New York, Inc. (“Clean Air”) and Sierra Club, for their verified petition for judgment pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) and their complaint seeking a declaratory judgment pursuant to Section 3001 of the CPLR, by their attorneys, allege as follows:

PRELIMINARY STATEMENT

1. This case is about whether the Public Service Commission (“PSC”) unlawfully ignored the Legislature’s requirement that stage agencies consider the effects of their decisions on greenhouse gas emissions and disadvantaged communities when it allowed Digihost International, Inc. (“Digihost”), a Canadian cryptocurrency company, to acquire the ownership interests in Fortistar North Tonawanda, LLC (“Fortistar”), the owner and operator of a 55-megawatt gas plant in North Tonawanda, New York without further review.

2. This lawsuit is brought by two grassroots environmental organizations, Sierra Club and Clean Air Coalition of Western New York, whose members include many North Tonawanda residents, including close neighbors of the Fortistar gas plant.

3. The City of North Tonawanda, where the gas plant is located, is a residential community between Buffalo and Niagara Falls. While the city is surrounded by water and wildlife, it also bears the burden of significant pollution. Several communities surrounding the gas plant have been designated as draft “disadvantaged communities” under State law, and include census tracts that the state has assessed as bearing an environmental burden greater than that borne by 90% of the state.

4. While the Fortistar gas plant has operated only sporadically in recent years, Digihost seeks to acquire it to significantly increase the gas plant’s operations by using it to power Digihost’s own energy-intensive cryptocurrency mining.

5. New York’s landmark Climate Leadership and Community Protection Act (“the CLCPA”) requires all State agencies—including the PSC—to consider greenhouse gas emissions and impacts to disadvantaged communities when considering administrative approvals and decisions. If such an action would threaten the CLCPA’s greenhouse gas reduction mandates, it cannot proceed without a justification. Moreover, if such an action would disproportionately burden disadvantaged communities, it cannot proceed at all.

6. Under New York’s Public Service Law, the PSC must determine whether to approve any transfer of ownership interests in New York gas, electric, or steam corporations based on whether the transfer serves the public interest. On April 15, 2021, Digihost sought permission from the PSC to purchase Fortistar.

7. A significant increase in the Fortistar plant’s operations will result in a significant

increase in greenhouse gas emissions. A significant increase in the gas plant's operations will also result in significant increases in emissions of air pollutants that are harmful to public health such as particulate matter—which can cause heart and respiratory conditions—and air toxics—which can cause cancer—further burdening the communities near the Fortistar plant.

8. Numerous commentors—including Clean Air and Sierra Club's Atlantic Chapter (which is in charge of Sierra Club's membership in New York State)—raised concerns involving the CLCPA's legal requirements. Specifically, Digihost's plan to increase the operations of the Fortistar gas plant to power its cryptocurrency mining will interfere with the CLCPA's greenhouse gas emissions mandate, and will further burden disadvantaged communities surrounding the plant.

9. Nonetheless, the PSC decided to allow Digihost to proceed with its purchase of the gas plant without any consideration of environmental impacts. The PSC instead asserted that it need not conduct the analysis the Legislature required in the CLCPA.

10. This petition challenges the September 15, 2022 declaratory ruling by the PSC allowing the proposed purchase to proceed without further review. A copy of the declaratory ruling is attached hereto as Exhibit 1.¹

PARTIES

11. Petitioner-Plaintiff Clean Air is a nonprofit organization that develops grassroots leaders who organize their communities to work on environmental justice and public health campaigns in Western New York.

12. Clean Air has over 350 members, including over 100 members who live in North

¹ All exhibits annexed to this Verified Petition/Complaint are identified and verified in the attached Affirmation of Dror Ladin.

Tonawanda within three miles of the gas plant, some of whom live in a draft disadvantaged community.

13. Clean Air and its members oppose Digihost's purchase of the gas plant to power cryptocurrency operations because the resulting increase in air pollutants is antithetical to their efforts to protect public health and the environment in Western New York.

14. Individual members of Clean Air facing direct injury from the gas plant's increased operations on their health and wellbeing include Karen Hance, Michael Gerace, Emily Root, and Erin Robinson. Ms. Root and Dr. Robinson both live in a draft disadvantaged community under the draft criteria issued by the Climate Justice Working Group. *See* NYSERDA, New York State's Draft Disadvantaged Communities Criteria, NYSDEC, <https://climate.ny.gov/-/media/project/climate/files/LMI-dac-criteria-fact-sheet.pdf> . The state has made available a spatial dataset that defines which census tracts meet these criteria. NYSERDA, Draft Disadvantaged Communities (DAC): 2021, Data NY, <https://data.ny.gov/Energy-Environment/Draft-Disadvantaged-Communities-DAC-2021/xj7e-q8ja> (last updated Mar. 9, 2022). According to this dataset, both Ms. Root and Dr. Robinson live in a tract that meets the draft disadvantaged community criteria.

15. Karen Hance is a member of Clean Air. Hance Aff. ¶ 1.

16. Karen Hance has lived in North Tonawanda for twenty-five years and in her current house for thirteen and a half years. *Id.* ¶ 4.

17. Ms. Hance lives across the street from the gas plant and she can see it from her house. *Id.* ¶ 5.

18. Ms. Hance is so close to the gas plant that, when the gas plant is operating, she can sometimes see the plant's smoke billow down the street past her house. *Id.* ¶¶ 8–9.

19. When the gas plant is running it is also very loud, and the noise exacerbates Ms. Hance's migraines and prevents her from sleeping well. *Id.* ¶¶ 11, 14–16.

20. When the gas plant is running, Ms. Hance's ability to enjoy her property is greatly diminished. It is unpleasant to be in her yard, and although Ms. Hance was attracted to her property by the presence of woods neighboring her home, wildlife stays away when the plant is operating. *Id.* ¶ 17–18.

21. Ms. Hance is concerned that all of these impacts will worsen if Digihost purchases the gas plant because the gas plant will run continuously to power cryptocurrency mining operations, rather than sporadically as it has over the past few years. *Id.* ¶ 7.

22. Michael Gerace is a member of Clean Air. Gerace Aff. ¶ 1.

23. Mr. Gerace lives about a quarter mile from the gas plant, close enough to hear it when at home, with his wife and four children. *Id.* ¶ 5.

24. Mr. Gerace's children attend North Tonawanda schools that are close to the gas plant. He and his family like to bike and walk around North Tonawanda. He suffers from chronic obstructive pulmonary disease, and he is concerned that his condition will be exacerbated if the gas plant increases its operations. *Id.* ¶¶ 8–9.

25. Emily Root is a member of Clean Air. Root Aff. ¶ 1.

26. Ms. Root and her husband live about a mile from the gas plant. If Digihost's purchase of the gas plant goes through, they plan to leave North Tonawanda. They want to have a family, and they are worried about raising children in a city with high levels of air pollution. In July 2021, they submitted comments to the PSC expressing their concerns that allowing Digihost to purchase the gas plant would increase greenhouse gases emissions and local air pollution. *Id.* ¶¶ 5, 7, 10.

27. When the gas plant is operating, Ms. Root can see a plume coming out of the smokestack while standing on the street outside her house. She enjoys outdoors activities near the gas plant, such as working at the Botanical Garden, hiking, and bike riding, but if the gas plant were operating more frequently she would worry about breathing in harmful air pollutants. *Id.* ¶¶ 8–9.

28. Erin Robinson is a member of Clean Air. Robinson Aff. ¶ 1.

29. Dr. Robinson lives in North Tonawanda about a mile and half from the gas plant with her two sons. *Id.* ¶ 6.

30. If the Fortistar gas plant ramps up operations to mine cryptocurrency, the resulting pollution will affect Dr. Robinson’s enjoyment of her property and North Tonawanda’s outdoor spaces. Dr. Robinson suffers from allergies and worries that they could be exacerbated by air pollution from the power plant. Dr. Robinson passes the gas plant on most days. Her parents live on the other side of gas plant from her, and she spends a lot of time walking or biking to their house, and also takes her son to see his grandparents most days after school. Dr. Robinson enjoys recreational activities near the gas plant, including hiking, biking, and running in nearby conservation areas and a neighboring community. She would be less likely to engage in and enjoy those activities if the gas plant increases its operations. Dr. Robinson’s sons enjoy kayaking classes in North Tonawanda, but if the gas plant runs more frequently, she will be less likely to put them in the classes due to her concerns about air pollution. *Id.* ¶¶ 12–14, 16.

31. Dr. Robinson’s concerns about pollution affect her decisions about how and where to spend her time. She always checks air quality reports before deciding whether to go for a walk or bike ride and is less likely to go outside when the reports show bad air quality. She is also less likely to eat vegetables from her garden when she has a reason to think that there are

high local pollution levels that could affect the soil or rainwater. *Id.* ¶ 15.

32. Petitioner-Plaintiff Sierra Club is a grassroots environmental organization with more than 800,000 members across the country; the Atlantic Chapter is responsible for membership and activities in New York State.

33. Sierra Club works to promote a cleaner, healthier, and more sustainable natural environment in its members' communities.

34. Sierra Club has approximately 50,000 members in New York State, including over 80 members who live in North Tonawanda within three miles of the gas plant, some of whom live in a draft disadvantaged community.

35. Sierra Club members oppose Digihost's purchase of the gas plant because the resulting increase in greenhouse gases and other pollutants will harm the climate, local environment, and public health.

36. Individual members of Sierra Club facing direct injury from the impacts of the gas plant's increased operations on their health and wellbeing include Bonita Ryan.

37. Bonita Ryan is a member of Sierra Club. Ryan Aff. ¶1.

38. Ms. Ryan lives in North Tonawanda, about a mile and a half from the gas plant. *Id.* ¶ 5.

39. Ms. Ryan spends lots of time engaging in outdoor recreation around her neighborhood. She bikes around her community often and rows with the Buffalo Scholastic Rowing Association. Ms. Ryan worries that if the plant increases air pollution, she will be less likely to spend time outdoors and exercising. *Id.* ¶¶11–13.

40. Respondent-Defendant Public Service Commission is an executive agency of the State of New York with the powers and duties set forth in the New York Public Service Law.

These powers and duties include the regulation of electric corporations.

41. Respondent-Defendant Fortistar is a Delaware limited liability company and the owner and operator of the gas plant that is the subject of the declaratory ruling challenged by this petition. Its place of operations is 1070 Erie Avenue in North Tonawanda, New York.

42. Respondent-Defendant North Tonawanda Holdings, LLC is a Delaware limited liability company and the sole owner of Fortistar.

43. Respondent-Defendant Digihost is a Delaware corporation. Digihost is a wholly owned subsidiary of Digihost Technology, Inc. formed for the purpose of acquiring Fortistar. Digihost Technology Inc. is a publicly traded Canadian company primarily focused on cryptocurrency mining.

JURISDICTION AND VENUE

44. This Court has jurisdiction pursuant to CPLR Sections 3001, 7801, and 7803(3).

45. Petitioners-Plaintiffs timely initiated this special proceeding by properly filing their Notice of Petition, Verified Petition and Complaint, and all supporting affidavits, memorandum of law, and other exhibits on January 13, 2023.

46. Venue lies in Supreme Court, Albany County pursuant to CPLR Section 506(b)2, which provides that “a proceeding against . . . the public service commission . . . shall be commenced in the supreme court, Albany county.”

LEGAL BACKGROUND

I. The Climate Leadership and Community Protection Act

47. The New York Legislature enacted the CLCPA in 2019 to strengthen and codify statewide mandates for reducing greenhouse gas emissions. *See* 2019 Sess. Laws of N.Y. Ch. 106 (S. 6599) § 1 (hereinafter “CLCPA”).

48. In enacting the CLCPA, the Legislature found that “[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York,” including through an increase in the frequency and severity of extreme weather events, such as storms, rising sea levels that exacerbate damage from storm surges and flooding, increased average temperatures, exacerbation of air pollution, and rising incidences of infectious disease and other negative health outcomes. *Id.* § 1(1).

49. The CLCPA established a statewide goal for New York to eliminate greenhouse gas emissions from all human sources by 2050. *Id.* § 1(4).

50. The CLCPA requires that 70% of New York’s power generation come from renewable energy sources by 2030 and that 100% come from zero-emissions sources by 2040. PSL § 66-p(2). The CLCPA sets legally binding requirements that New York reduce greenhouse gas emissions to 60% of 1990 levels by 2030 and to 15% of 1990 levels by 2050. ECL § 75-0107(1).

51. Under Section 7(2) of the CLCPA, before making an administrative approval or decision, each State agency must consider whether that administrative approval or decision would be inconsistent with or interfere with these greenhouse gas reduction requirements:

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.

CLCPA § 7(2).

52. If a state agency does determine that an administrative approval or decision would be inconsistent with or interfere with the CLCPA’s greenhouse gas reduction requirements, it

must then issue “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.” *Id.*

53. In enacting the CLCPA, the Legislature also found that “[c]limate change especially heightens the vulnerability of disadvantaged communities, which bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination.” *Id.* § 1(7).

54. The CLCPA defines “disadvantaged communities” or “DACs” 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.” ECL § 75-0101(5).

55. Under the CLCPA, a new statewide entity called the Climate Justice Working Group is responsible for establishing criteria to identify disadvantaged communities. ECL § 75-0111.

56. Section 7(3) of the CLCPA prohibits State agencies from making any administrative approval or decision that would disproportionately burden disadvantaged communities:

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 not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law.
CLCPA § 7(3).

57. Section 7(3) of the CLCPA also requires State agencies to prioritize reductions of greenhouse gas emission and co-pollutants in disadvantaged communities. *Id.*

58. Under the CLCPA, co-pollutants are non-greenhouse gas air pollutants that are also emitted by sources of greenhouse gas emissions, such as power plants. ECL § 75-0101(3).

Co-pollutants include particulate matter, nitrogen oxides, volatile organic compounds, carbon monoxide, and certain air toxics.

59. In October 2021, New York State identified interim disadvantaged communities that could be used until the Climate Justice Working Group identifies the final communities that will count as “disadvantaged” for purposes of the CLCPA. NYSERDA, *Disadvantaged Communities*, NYS DEC, <https://www.nyserda.ny.gov/ny/disadvantaged-communities> (last visited Jan. 6 2022), attached hereto as Exhibit 2.

60. In March 2022, the Climate Justice Working Group issued draft criteria to identify disadvantaged communities and will continue to identify these communities on a draft basis until the criteria are finalized. *ENB Statewide Notices 3/16/2022: Notice of Release for Public Comment the Draft Disadvantaged Communities Criteria and Draft List of Disadvantaged Communities*, NYSDEC, Mar. 16, 2022, https://www.dec.ny.gov/enb/20220316_not0.html, attached hereto as Exhibit 3.

61. The PSC has relied on the draft criteria for purposes of determining whether a decision complies with Section 7(3). *See, e.g., Order Approving Amendment to Certificate of Public Convenience and Necessity*, at 5, NY PSC Case No. 22-G-0205 (Oct. 17, 2022), attached hereto as Exhibit 4; *Order Approving Amendment of Certificate of Public Convenience and Necessity*,) at 5–6, NY PSC Case No. 21-G-0051 (July 18, 2022), attached hereto as Exhibit 5.

II. The Public Service Law and The Walkkill Presumption

62. Section 70 of the Public Service Law provides in relevant part that “No gas corporation or electric corporation shall transfer or lease its franchise, works or system . . . without the written consent of the commission.”

63. The requirement that an electric corporation seek PSC approval before it may sell

its “franchise, works, or system” applies both to the direct transfer of the electric corporation’s assets, as well as to the transfer of ownership interests in corporate parents upstream from the New York operating company. *See Order on Review of Stock Transfer and Other Transactions*, at 5, NY PSC Case No. 00-E-1585 (Nov. 16, 2000) (“[T]he acquisition of the stock in the parent [entities] amounted to the acquisition of the ownership interests in the New York operating entities.”), attached hereto as Exhibit 6.

64. While entities seeking to transfer interests in an electric corporation are ordinarily required to establish that a transfer of ownership is in the public interest, the PSC has determined that independent power generators supplying wholesale power to a competitive market must satisfy only a lower level of scrutiny.

65. The PSC applies a reduced level of scrutiny to the transfer of competitive providers through a decisionmaking process that has become known as the “Wallkill presumption.” *See Declaratory Ruling on Regulatory Policies Affecting Wallkill Generating Company and Notice Soliciting Comments*, NY PSC Case No. 91-E-0350 (Aug. 21, 1991), attached hereto as Exhibit 7; *Order Establishing Regulatory Regime*, NY PSC Case No. 91-E-0350 at 10 (Apr. 11, 1994), attached hereto as Exhibit 8. Under this presumption, which the PSC applied in the decision under review, entities requesting a Section 70 transfer must establish only that “the transaction would not present an opportunity to exercise either horizontal or vertical market power, or otherwise harm the interests of captive ratepayers of fully regulated utilities.” Exhibit 1 at 6 (Declaratory Ruling).

66. If the PSC finds that a transaction satisfies the Wallkill Presumption, it can decide to issue a declaratory ruling that it will not conduct a full public interest review of the transaction, thereby allowing the transaction to proceed.

67. Critically, although the PSC applies its scrutiny more lightly, all transactions involving upstream transfer of ownership interests in wholesale generator remain subject to the PSC's authority and decisionmaking. As the PSC has described it, "meeting the Wallkill presumption is not a determination that PSL §70 jurisdiction is inapplicable to the Proposed Transaction. Instead, the presumption is a finding that, if the presumption is satisfied, a further review under §70 need not be conducted beyond that undertaken in a Declaratory Ruling." *Declaratory Ruling on a Transfer Transaction*, at 9, NY PSC Case No. 15-G-0688 (Mar. 22, 2016), attached hereto as Exhibit 9.

FACTUAL BACKGROUND

The Fortistar gas plant and the surrounding community

68. The gas plant is primarily powered by a 55-megawatt gas-fired facility. Exhibit 1 at 2 (Declaratory Ruling).

69. The gas plant is located in a residential area in the City of North Tonawanda. *See, e.g., Hance Aff.* ¶ 5.

70. The City of North Tonawanda is a residential community between Buffalo and Niagara Falls. The city is set between the Niagara River and the Erie Barge Canal. North Tonawanda is the second largest City in Niagara County, and the 15th largest city in the state, with a population of approximately 30,000 residents. *About the City of North Tonawanda*, City of North Tonawanda <https://www.northtonawanda.org/about> (last visited Dec. 23, 2022), attached hereto as Exhibit 10.

71. The gas plant currently operates infrequently and appears to run on days when surges in electricity use place peak demand on the power grid. *See Comments of Sierra Club re Case No. 21-M-0238* at 4 (Oct. 12, 2021), attached hereto as Exhibit 11.

72. In recent years, the gas plant has barely operated. In fact, it only served the electric grid for between approximately 10 and 25 days each year since 2017. *Id.*

73. The gas plant is wholly owned by Fortistar. Exhibit 1 at 2 (Declaratory Ruling).

74. In March 2021, Digihost announced that it had signed an agreement to purchase the gas plant in order to power its cryptocurrency mining operations. Exhibit 11 at 1–2 (October 2021 Sierra Club Comments); Digihost Technology Inc., *Digihost Acquires 60 MW Power Plant Increasing Hashrate Capacity to 3 EH*, GlobeNewswire, Mar. 24, 2021, <https://bit.ly/3hViNhQ>, attached hereto as Exhibit 12.

Cryptocurrency mining

75. Cryptocurrency is a digital form of currency maintained by a decentralized system. Proof-of-work cryptocurrencies' mechanism for managing the decentralized system is to require computers or mining machines to compete to solve complex mathematical puzzles, and reward the winner (the miner) with currency.

76. The cryptocurrency mining mechanism promotes an arms race: operations with the most computational power will be rewarded with the most currency. Consequently, cryptocurrency mining operations often employ thousands of mining machines, around the clock, to secure the best chances of winning. As more mining machines enter the race, the computational problem they must solve becomes harder and more complex, and the electricity required to succeed increases.

77. Over time, the electricity used by miners in these races increases. This process, in turn, generates substantial amounts of greenhouse gas emissions when such operations are powered either directly or indirectly by fossil fuels. White House Off. of Sci. and Tech. Pol'y, *Climate and Energy Implications of Crypto-Assets in the United States*, at 1–15, 21–23 (2022)

attached hereto as Exhibit 13.

78. Bitcoin mining is the predominant type of proof-of-work cryptocurrency mining. By 2021, Bitcoin mining used 133.68 terawatt hours per year of electricity globally, more than three times as much as it did at the beginning of 2019. *See* Katie Martin & Billy Nauman,, *Bitcoin’s Growing Energy Problem: ‘It’s A Dirty Currency’*, Financial Times, May 20, 2021, at pdf page 7, 11, <https://www.ft.com/content/1aecb2db-8f61-427c-a413-3b929291c8ac>, attached hereto as Exhibit 14; Brian Spegele & Caitlin Ostroff, *Bitcoin Miners Are Giving New Life to Old Fossil-Fuel Power Plants*, Wall Street Journal, May 21, 2021 <https://www.wsj.com/articles/Bitcoin-miners-are-giving-new-life-to-old-fossil-fuel-power-plants-11621594803>, attached hereto as Exhibit 15.

79. By 2021, it was estimated that Bitcoin’s annual energy will nearly match that of all data centers globally. Alex de Vries, *Bitcoin Boom: What Rising Prices Mean For The Network’s Energy Consumption*, Joule, Mar. 10, 2021, <https://doi.org/10.1016/j.joule.2021.02.006>, attached hereto as Exhibit 16.

80. The electricity used solely for mining Bitcoin is so significant that it outranks the entire energy usage of many countries. *See, e.g.*, Jon Huang, Claire O’Neill & Hiroko Tabuchi, *Bitcoin Uses More Electricity Than Many Countries. How Is That Possible?*, *N.Y. Times*, Sept. 3, 2021, <https://www.nytimes.com/interactive/2021/09/03/climate/bitcoin-carbon-footprint-electricity.html>, attached hereto as Exhibit 17; Cambridge Centre for Alternative Finance, *Cambridge Bitcoin Electricity Consumption Index*, University of Cambridge Judge Business School, <https://ccaf.io/cbeci/index/comparisons> last visited Jan. 6, 2023), attached hereto as Exhibit 18.

The PSC’s Declaratory Ruling

81. On April 15, 2021, Fortistar and Digihost jointly filed a petition with the PSC requesting a declaratory ruling under Sections 70 and 83 of the Public Service Law, authorizing Digihost to purchase Fortistar. A copy of the Petition is attached hereto as Exhibit 19.

82. On May 4, 2021, Sierra Club submitted a letter expressing concerns over the significant increase in greenhouse gas emissions that would occur if the PSC allowed Digihost to purchase the gas plant, as Digihost seeks to greatly increase the operations of the plant capacity to power its cryptocurrency mining operations. A copy of the letter is attached hereto as Exhibit 20.

83. On August 13, 2021, Clean Air submitted comments in opposition to Fortistar's and Digihost's Petition likewise raising concerns that the transaction would result in significantly increased greenhouse gas emissions and local air pollutants, interfering with the mandatory emissions reductions required by the CLCPA. A copy of the comments is attached hereto as Exhibit 21.

84. On August 26, 2021, Digihost submitted a supplement to the Joint Petition in which it acknowledged the requirements of the CLCPA and claimed it was "committed" to "align itself" with the CLCPA. A copy of the supplement is attached hereto as Exhibit 22.

85. On October 12, 2021, Sierra Club submitted additional comments to the PSC outlining the requirements of the CLCPA and the emissions impacts of proof-of-work cryptocurrency mining and asking the PSC to deny the proposed purchase. Exhibit 11 at 1.

86. Specifically, the October 12, 2021 comment letter said:

According to EPA emissions data, the [gas plant] operated infrequently over the last several years, *e.g.*, serving the grid between approximately 10 and 25 days each year since 2017. The power plant's annual emissions were as follows.

Year	Approximate Days of Operation Per Year	Approximate Average Capacity Factor	Tons of [Greenhouse Gases] Emitted Per Year
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2016	75	13%	43,406
2017	10	1.7%	5,755
2018	25	4%	12,448
2019	18	3%	9,245
2020	21	2.2%	10,981

In dismaying contrast, if the change in ownership and operation are approved, the [the gas plant] would presumably operate 24 hours per day, 7 days a week, 365 days per year, which means that the plant would meet or nearly meet its “potential emissions from the facility” of 339,068 tons of CO₂ per year – while also significantly increasing emissions of nitro[gen] oxide[s], particulate matter, carbon monoxide, and volatile organic compounds.

Exhibit 11 at 4 (footnote omitted).

87. The October 12, 2021 comment letter cited Fortistar’s pending Title V air permit renewal application, which lists the air pollutants that the gas plant emits when it is running including greenhouse gases, nitrogen oxides, particulate matter, carbon monoxide, and volatile organic compounds. The relevant pages of the permit renewal application are attached hereto as Exhibit 23.

88. Sierra Club’s October 12, 2021 comment letter noted that due to the increase in both greenhouse gas emissions and co-pollutants such as nitrogen oxides, particulate matter, carbon monoxide, and volatile organic compounds, Digihost’s purchase of the gas plant would be inconsistent with New York’s attainment of the CLCPA’s greenhouse gas reduction requirement and would disproportionately burden disadvantaged communities, and that the PSC was required to scrutinize the purchase under Sections 7(2) and (3) of the CLCPA. Exhibit 11 at 12–13.

89. The October 12, 2021 comment letter also cited the Environmental Assessment Form that Digihost submitted to the City of North Tonawanda with its application to build structures to house its computer equipment, attached hereto as Exhibit 24. Digihost represented that it planned to run its computers 24 hours per day, seven days a week, sourcing power from

the Fortistar gas plant. Exhibit 24 at 7 (Digihost Full Environmental Assessment Form).

90. On September 15, 2022, the PSC issued a declaratory ruling granting Fortistar's and Digihost's petition, allowing Digihost to purchase the gas plant. Exhibit 1.

91. Although numerous commentators flagged the CLCPA's requirements and the fact that the transaction under review raised significant questions with respect to the statute's mandatory consideration of greenhouse gas emissions reduction requirements and protections for disadvantaged communities, the PSC failed to conduct the analysis required by the CLCPA.

92. Instead, the PSC declared that "While numerous commenters raise significant environmental concerns, including emissions impacts and compliance with the CLCPA, these matters are beyond the scope of the limited review undertaken in this proceeding." Exhibit 1 at 8 (Declaratory Ruling).

93. The PSC's decision conflicts with the requirements imposed by the CLCPA, which by their terms apply to any agency consideration of "permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts." CLCPA § 7(2), (3).

94. In issuing the ruling under review, the PSC decided and approved Digihost's and Fortistar's request to proceed with their proposed transaction.

95. The PSC did not consider the effect of its decision either on greenhouse gas emissions or on the burden borne by disadvantaged communities.

96. The declaratory ruling allows Digihost to acquire the gas plant in North Tonawanda and use it to power computers that will operate continuously to mine proof-of-work cryptocurrency.

97. The declaratory ruling will therefore cause the gas plant to significantly increase

its operations, and as a result, increase emissions of greenhouse gases and other air pollutants.

98. On October 14, 2022, Sierra Club and Clean Air requested that the PSC rehear the petition. The PSC did not rule on the request.

FIRST CAUSE OF ACTION

(Failure to Comply with CLCPA Section 7(2))

99. Petitioners-Plaintiffs repeat and re-allege the allegations contained in each paragraph above and incorporate such allegations by reference as if set forth herein.

100. Section 7(2) of the CLCPA requires State agencies such as the PSC to consider if any administrative approval or decision is inconsistent with or would interfere with New York's attainment of greenhouse gas reduction requirements established in Article 75 of the Environmental Conservation Law.

101. The PSC nonetheless decided to allow Digihost to purchase the gas plant without considering whether its decision would be inconsistent with or would interfere with New York's attainment of greenhouse gas reduction requirements established in Article 75 of the Environmental Conservation Law.

102. The PSC's decision to allow Digihost to purchase the gas plant was made in violation of lawful procedure, was affected by an error of law, and was arbitrary and capricious.

103. The PSC's unlawful decision threatens to injure Clean Air and Sierra Club members by leading to an increase in the environmental harms they will suffer from the plant's increased operations, including the noise and air pollution harms described above.

SECOND CAUSE OF ACTION

(Failure to Comply with CLCPA Section 7(3))

104. Petitioners-Plaintiffs repeat and re-allege the allegations contained in each

paragraph above and incorporate such allegations by reference as if set forth herein.

105. Section 7(3) of the CLCPA prohibits State agencies from making administrative approvals or decisions that would disproportionately burden disadvantaged communities.

106. When the PSC decided to allow Digihost to purchase the gas plant, it was clear that the decision would result in an increase in environmental burdens, including local air pollution and noise.

107. When the PSC decided to allow Digihost to purchase the gas plant, it was clear that the gas plant is close to at least one disadvantaged community.

108. The PSC nonetheless decided to allow Digihost to purchase the gas plant without considering whether the decision would disproportionately burden a disadvantaged community.

109. The PSC's decision to allow Digihost to purchase the gas plant was made in violation of lawful procedure, was affected by an error of law, and was arbitrary and capricious.

110. The PSC's decision to allow Digihost to purchase the gas plant threatens to injure Clean Air and Sierra Club members by leading to an increase in the environmental harms they will suffer from the plant's increased operations, including the noise and air pollution harms described above.

WHEREFORE, Petitioners-Plaintiffs respectfully requests that this Court enter judgment against Respondents-Defendants pursuant to CPLR Sections 3001, 7803(1), 7803(3), and 7806 as follows:

1. Adjudging and declaring that the PSC's September 15, 2022 declaratory ruling was unlawful;
2. Vacating the PSC's September 15, 2022 declaratory ruling;
3. Granting Petitioners-Plaintiffs the costs of this action; and

4. Granting such other and further relief as the Court deems just and proper.

Dated: January 13, 2023
New York, NY

Respectfully submitted,



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*Counsel for Petitioners-Plaintiffs
Clean Air Coalition of
Western New York and
Sierra Club*

VERIFICATION

Dror Ladin, being duly sworn, states that he is the attorney for Petitioners-Plaintiffs in this action and that the foregoing verified petition is true to his own knowledge; that the grounds of his belief as to all matters not stated upon his knowledge are attached exhibits and attached affidavits by members of Petitioners-Plaintiffs; and that the reason why the verification is not made by Petitioners-Plaintiffs is that Petitioners-Plaintiffs are not in the county where the attorney has his office, there are two or more parties united in interest and pleading together and none of them acquainted with the facts is within that county, and all the material allegations of the pleading are within the personal knowledge of the attorney.


Dror Ladin

Sworn to before me January 12, 2023

MANDY DEROCHE
Notary Public, State of New York
No. 02DE6168768
Qualified in Kings County
Commission Expires June 13, 2023

