STATE OF NEW YORK
SUPREME COURT COUNT 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.

CONSOLIDATED DECISION, ORDER & JUDGMENT

Index Nos.: 900457-23 ("*Proceeding/Action 1*")
910162-23 ("*Proceeding/Action 2*")

APPEARANCES:

EARTHJUSTICE
Attorneys for Petitioners
(Dror Ladin, Jessamine De Ocampo, Hillary Aidun and Mandy DeRoche, of counsel)
48 Wall Street, 15th Floor
New York, New York 10005

PHILLIPS LYTLE, LLP
Attorneys for Digihost Intl., Inc. and Fortistar North Tonawanda, LLC
(David P. Flynn, Thomas F. Puchner and William V. Rossi, of counsel)
One Canalside, 125 Main Street
Buffalo, New York 14203

NEW YORK STATE PUBLIC SERVICE COMMISSION
ROBERT ROSENTHAL, GENERAL COUNSEL
JOHN J. SIPOS, DEPUTY GENERAL COUNSEL & SOLICITOR
(John C. Graham, of counsel)
3 Empire State Plaza
Albany, New York 12223

READ AND LANIANDO
Attorneys for North Tonawanda Holdings, LLC
(David B. Johnson and Konstantin Podolny, of counsel)
25 Eagle Street
Albany, New York 12207

Hon. Richard M. Platkin, A.J.S.C.

Pending before the Court are two combined CPLR article 78 proceedings/declaratory judgment actions brought by petitioners Clean Air Coalition of Western New York, Inc. and Sierra Club against respondents New York State Public Service Commission ("PSC"), Fortistar North Tonawanda, LLC ("Fortistar"), North Tonawanda Holdings, LLC ("NTH") and Digihost International, Inc. ("Digihost").

BACKGROUND

These consolidated matters involve NTH's transfer of its membership interest in Fortistar, the owner of a gas-fired electric generating facility ("Facility") in the City of North Tonawanda.

Digihost entered into an agreement in 2021 with NTH to purchase Fortistar for the purpose of using the Facility to generate power to mine cryptocurrency.

On April 15, 2021, Fortistar and Digihost filed a petition with the PSC ("Fortistar/Digihost Petition"), requesting a declaration that NTH's sale of Fortistar to Digihost did not require further review under PSL §§ 70 or 83. The PSC solicited public comment pursuant to the State Administrative Procedure Act, and petitioners objected to the transfer, claiming that it would undermine the emission reduction objectives of the New York State Climate Leadership and Community Protection Act (*see* L 2019, ch 106 ["CLCPA"]).

The PSC issued a declaratory ruling on September 15, 2022 granting the Fortistar/Digihost Petition (*see Proceeding/Action 1*, NYSCEF Doc No. 10; 2022 WL 4365886 ["Declaratory Ruling"]). Although "numerous commenters raise[d] significant environmental concerns" to the agency, "including emissions impacts and compliance with the CLCPA," the PSC found "these matters [to be] beyond the scope of the limited review" undertaken in a transfer subject to the "Wallkill Presumption" (2022 WL 4365886, *1).

"Under the Wallkill Presumption," the PSC explained, "regulation under PSL §§ 70 and 83 would not adhere to the transfer of ownership interests in entities upstream from a New York competitive electric generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers or the potential for the exercise of market power arising out of an upstream transfer sufficient to override the presumption" (*id.*). Having determined that the Fortistar sale implicated neither concern, the PSC declared that further review under PSL §§ 70 or 83 is not required (*see id.*).

In October 2022, petitioners sought rehearing of the Declaratory Ruling, arguing that Digihost's operation of the Facility would increase the level of greenhouse gas emissions, and the PSC failed to consider the increased emissions or their effect on disadvantaged communities in approving the transfer, in violation of CLCPA § 7.

In January 2023, while their petition for rehearing was pending before the PSC, petitioners commenced Proceeding/Action 1. The Court dismissed the petition/complaint on ripeness grounds, and petitioners appealed.

In June 2023, the PSC denied rehearing of the Declaratory Ruling (*see Proceeding/Action* 2, NYSCEF Doc No. 5; 2023 WL 4200789 ["June 2023 Order"]). The PSC "interpret[ed] the CLCPA language to cover situations where the [PSC] makes an affirmative approval and decision, including but not limited to rate cases, which may result in increased . . . emissions" (2023 WL 4200789, *4). A finding that "further regulatory review (i.e., approval) was not required under PSL §§70 and 83 . . . is not an affirmative approval and decision" (*id.* at *4-5).

The Declaratory Ruling also responded to petitioners' claim of "irreparable harm to the environment and public interest," which it dismissed as "incorrect" (*id.* at *6). The PSC observed that the Facility "is an existing generating facility . . . currently operating under a valid Title V air permit [from] the NYSDEC" (*id.*, *6). As such, "[e]ven if the [Fortistar sale] had not

occurred, [NTH] could have . . . increased the Facility's intensity of operation up to the air emission limits of its Title V permit without any [PSC] action" (*id.*).

Petitioners commenced Proceeding/Action 2 in October 2023, challenging the denial of rehearing.

On March 7, 2024, the Third Department reversed the dismissal of Proceeding/Action 1, holding that the Declaratory Ruling was ripe for review despite the pendency of petitioners' application for administrative rehearing (*see* 226 AD3d 108, 112 [3d Dept 2024]; *see also* CPLR 7801 [1]). The Third Department also held, as is pertinent here, that: (1) neither the completion of the Fortistar sale nor the PSC's order denying rehearing rendered petitioners' CPLR article 78 challenge moot; and (2) petitioners had standing to bring their claims (*see* 226 AD3d at 112-115). On remittal, the two proceedings/actions were consolidated for disposition.

Petitioners contend that the PSC erred in failing to consider: (1) whether the Fortistar sale was inconsistent, or will interfere, with the attainment of the statewide greenhouse gas emissions limits, as required by CLCPA § 7 (2); and (2) whether the Fortistar sale would disproportionately burden disadvantaged communities, as required by CLCPA § 7 (3). Petitioners seek an order and judgment (i) vacating the Declaratory Ruling and (ii) declaring that the Declaratory Ruling was unlawful. Petitioners also seek vacatur of the June 2023 Order.

ANALYSIS

"In 2019, the Legislature established the New York State Climate Leadership and Community Protection Act ['CLCPA'] . . . to address the imminent risks of climate change" (*Matter of Town of Copake v New York State Off. of Renewable Energy Siting*, 216 AD3d 93, 96 [3d Dept 2023], *appeal dismissed* 41 NY3d 990 [2024]; *see also* CLCPA § 1 [4]).

As relevant here, CLCPA § 7 (2) provides that, "[i]n considering and issuing permits, licenses, and other administrative approvals and decisions, . . . all state agencies . . . 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."

The CLCPA does not prohibit agency decisions "that are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits," but in such cases the agency "shall provide a detailed statement of justification as to why such limits/criteria may not be met . . . and identify alternatives or green-house gas mitigation measures to be required where such project is located" (*id.*).

CLCPA § 7 (3) requires state agencies "considering and issuing permits, licenses, and other administrative approvals and decisions . . . pursuant to article 75 of the environmental conservation law" to refrain from "disproportionately burden[ing] disadvantaged communities," as identified under Environmental Conservation Law ("ECL") § 75-0101 (5).

A. CLCPA § 7 (3)

Under CLCPA § 7 (3), the "disadvantaged communities" that state agencies "shall not disproportionately burden" are limited to those "identified" pursuant to ECL 75-0101 (5).

ECL 75-0101 (5), in turn, provides that "[d]isadvantaged communities" are those "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." However, the definition is limited by its terms to communities "identified pursuant to [ECL] 75-0111" (*id.*).

For its part, ECL 75-0111 establishes a "climate justice working group" within the Department of Environmental Conservation ("DEC"), directs the working group to "establish criteria to identify disadvantaged communities," and, using those criteria, identify specific disadvantaged communities (ECL 75-0111 [1] [b]-[c]). Before the criteria and list of

disadvantaged communities are finalized, however, DEC shall "publish draft criteria and a draft list of disadvantaged communities" for "public comment" (*id.* [2] [a]-[b]).

When the PSC issued its Declaratory Ruling on September 15, 2022, several communities surrounding the Facility had been designated as disadvantaged in a draft version of the criteria and list published by DEC for comment. However, the criteria and list were not finalized until March 27, 2023 (*see* Climate Justice Working Group, *Disadvantaged Communities Criteria* [Mar. 27, 2023], *available at*: https://climate.ny.gov/Resources/Disadvantaged-Communities-Criteria; *see also* Case 22-S-0659, *Proceeding on Motion of the Commn. As to the Rates, Charges, Rules & Reguls. of Consol. Edison Co. of New York, Inc. for Steam Serv. – Order Adopting Terms of a Joint Proposal*, 2023 WL 8075776, *1 n 28 [PSC Nov. 16, 2023]). Therefore, the PSC could not have erred by failing to consider the impact of the Fortistar sale on "disadvantaged communities as identified pursuant to" ECL 75-0101 (5) where, at the time of the agency action, no such communities had been identified.

Accordingly, petitioners' causes of action under CLCPA § 7 (3) are dismissed.

B. Causes of action under CLCPA § 7 (2).

Under PSL § 70, "[n]o . . . electric corporation shall transfer . . . its franchise, works or system or any part of such franchise, works or system to any other . . . corporation . . . without the written consent of the [PSC]" (PSL § 70 [1]). Similarly, under PSL § 83, "[n]o steam corporation shall transfer . . . its franchise, works or system or any part of such franchise, works or system to any other . . . corporation . . . without the [PSC's] written consent" (*id.* § 83 [1]). "The PSC may grant such approval where the transfer is shown to be in the public interest" (*Matter of Luyster Cr., LLC v New York State Pub. Serv. Commn.*, 82 AD3d 1401, 1403 [3d Dept 2011] [citations omitted], *revd on other grounds* 18 NY3d 977 [2012]; *see* 16 NYCRR 31.1).

In the *Wallkill* line of cases, the PSC adopted a regime of "lightened regulation" for "competitive provider[s] of electric services," including those upstream from competitive electric generation subsidiaries that sell electricity at wholesale, reasoning that such providers do "not require the same degree of regulatory scrutiny as is applied to monopoly suppliers" (Case 91-E-0350, *Wallkill Generating Co. - Petition on Regulation*, Order Establishing Regulatory Regime at 6 [PSC Apr. 11, 1994] ["*Wallkill II*"]).

This "lightened regulatory regime" (*id.* at 2) is achieved, in part, through application of a presumption, known as the "Wallkill Presumption" (*see id.* at 9-10; *see also* Case 91-E-0350, *Wallkill Generating Co., - Petition on Regulation, Declaratory Ruling on Regulatory Policies Affecting Wallkill Generating Company and Notice Soliciting Comments* at 8-17 [PSC Aug. 21, 1991] ["*Wallkill I*"]; *see e.g.* Case 22-E-0539, *Eight Point Wind, LLC, et al. - Declaratory Ruling on Upstream Transfer Transaction*, 2022 WL 17225883, *6 [PSC Nov. 21, 2022]).

Under the Wallkill Presumption, "regulation under PSL § 70 does not adhere to the transfer of ownership interests in entities upstream from the parents of a New York competitive electric generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption, or the potential for the exercise of market power arising out of an upstream transfer" (Case 21-E-2021, *Transmission Holdings, LLC, et al., - Declaratory Ruling on Upstream Transfer Transaction*, 2021 WL 4208767, *4 [PSC Sept. 13, 2021]; *see also Wallkill II* at 9-10).

Nonetheless, competitive providers of electric services "must still comply with applicable provisions of the [PSL]" (*Wallkill II* at 7), including the requirement that they "obtain approval for the transfer of [membership] interests in [any] project" via "a proper [PSL] § 70 application" that "seeks approval for the transfer" (*id.* at 8). Through application of the Wallkill Presumption,

however, the transfer application will be reviewed with "reduced scrutiny" and approved "unless there is a potential for [economic] harm . . . sufficient to override the presumption" (*id.* at 9-10; *see e.g.* Case 22-E-0660, *No. Three Wind LLC - Order Approving Financing and Making Other Findings*, 2023 WL 2609445, *9 [PSC Mar. 17, 2023]).

In defending the challenged administrative actions, respondents argue principally that the CLCPA applies only to "affirmative approvals," and the Declaratory Ruling determined only that jurisdiction under PSL § 70 did not "adhere" to the Fortistar sale through application of the Wallkill Presumption. In other words, respondents maintain that the PSC "merely opined on the applicability of a statute [PSL § 70] rather than granting a right or permission" (Proceeding/Action 1, NYSCEF Doc No. 118 at 12).

The Court is unconvinced by respondents' argument. Under the plain language of PSL § 70 and the PSC's own precedent, a corporation seeking to transfer ownership in entities upstream from the parents of a competitive electric generation subsidiary "must comply with [PSL] § 70, by identifying new proposed owners . . . , and petitioning for approval of those transactions" (*Wallkill II* at 10). The PSC "review[s]" the petition "with reduced scrutiny" and looks for indicia of potential economic harm (*see id.*). If no such indicia are present, the PSC presumes that further review is not required and consents to the transfer (*see id.*). And absent the PSC's written consent, the transfer would not be authorized by law (*see id.* ["Wallkill must comply with (PSL) § 70"]; *see also Wallkill I* at 13 ["(PSL) §70 is implicated and permission pursuant to that statute must be obtained"]).

Thus, despite respondents' repeated assertion that PSL § 70 does not "adhere" to the Fortistar sale under the Wallkill Presumption, the plain text of PSL § 70 obliged NTH to obtain the PSC's "written consent" to the transfer of Fortistar's membership interest. As such, the

Declaratory Ruling represents the PSC's "affirmative approval" of the transfer, notwithstanding the agency's application of an economics-based presumption that lightened the level of scrutiny.

The Court therefore concludes that the PSC's consent to the transfer, as manifested in the Declaratory Ruling, is a "permit[], license[], [or] other administrative approval[] [or] decision[]" within the meaning of CLCPA § 7 (2), and the PSC erred in declining to consider the environmental issues required under that statute in rendering the Declaratory Ruling.[1]

The PSC must consider whether the proposed transfer of Fortistar's membership interest is "inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in [ECL] article 75" (CLCPA § 7 [2]). If the PSC determines that the transfer will "be inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits," the PSC "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" (*id.*).

In ordering remittal, the Court is unpersuaded by respondents' contention that petitioners already received the consideration under the CLCPA to which they are entitled (*see* NYSCEF Doc No. 68 at 14-17; *see also* NYSCEF Doc No. 71 at 35-36).[2] This argument is predicated on language within the June 2023 Order "find[ing] 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" (2023 WL 4200789, *6).

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[1] Respondents make four other arguments that do not warrant extensive discussion. First, they argue that the CLCPA applies only to "projects," and the Fortistar sale is not a "project." To the extent that the CLCPA requires a "project" to trigger an agency's obligation to consider emissions under section 7 (2), the Facility is that "project." Second, respondents argue that the PSC's approval of the Fortistar/Digihost Petition does not fall under CLCPA § 7 (2) because it was done through issuance of a "declaratory ruling," rather than a "permit[], license[], [or] . . . administrative approval[] [or] decision." As stated above, however, the Declaratory Ruling granting the Fortistar/Digihost Petition and consenting to the transfer effectively is an "administrative approval." Finally, respondents argue that petitioners' claims are moot and that petitioners lack standing to bring their claims, but the Third Department rejected these arguments on the prior appeal (*see* 226 AD3d at 112, 114-115).

[2] References to the NYSCEF docket shall hereinafter refer to the docket of *Proceeding/Action* 2.

This purported CLCPA finding was rendered in the context of an order in which "the Commission conclude[d] that there are no allegations in the Petition warranting rehearing or reconsideration of the Declaratory Ruling" and which denied the Petition for Rehearing "in its entirety" (*id.*, *7). In other words: "The ultimate conclusion of the Declaratory Ruling was that PSL § 70 does not apply to the then-proposed transaction and the [PSC] need not conduct a CLCPA analysis," and no "alternative conclusion on either point is [] found in the June 2023 Order" that denied rehearing (NYSCEF Doc No. 71 at 35). Thus, while "[t]he PSC could have theoretically rendered the matter moot" on rehearing, it is the law of the case that the June 2023 Order "did not have that effect" (226 AD3d at 112).

Finally, there remains the issue of remedy should the PSC find that the transfer of Fortistar's membership interest is "inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in [ECL] article 75" (CLCPA § 7 [2]). On appeal, Fortistar and Digihost argued that "the completion of the transaction and the degree of construction and improvement to the facilities that Digihost and Fortistar have undertaken since the declaratory ruling was issued cannot be unwound without great cost" (226 AD3d at 113). They further observed that petitioners did not timely seek to enjoin the transfer, and "the transaction has since been completed" (*id.* at 111 n 1).

As the Third Department recognized, "[t]he substantial completion of a project may indeed render a case moot 'when the progress of the work constitutes a change in circumstances that would prevent the court from rendering a decision that would effectively determine an actual controversy'" (*id.*, quoting *Matter of Sierra Club v New York State Dept. of Envtl. Conservation*, 169 AD3d 1485, 1486 [4th Dept 2019]). However, the Third Department did not need to reach a definitive position on the issue because the CLCPA allows for "potential relief short of completely unwinding the transaction" (*id.* at 113-114).

Given that the PSC has not yet made a proper evaluation of whether the transfer was "inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits" (CLCPA § 7 [2]), together with the agency's broad discretion to allow the transfer to proceed regardless, potentially with some "mitigation measures" (*id.*), this is an issue that can and should be addressed by the agency in the first instance as it may become necessary (*see e.g. Danskammer Energy, LLC v New York State Dept. of Envtl. Conservation*, 76 Misc 3d 196, 208, 253 [Sup Ct, Orange County 2022]).

C. Causes of Action for Declaratory Relief

In a hybrid proceeding/action that alleges causes of action under Article 78 and seeks declaratory relief, "'separate procedural rules apply'" (*Matter of Ballard v New York Safety Track LLC*, 126 AD3d 1073, 1075 [3d Dept 2015], quoting *Matter of Lake St. Granite Quarry, Inc. v Town/Village of Harrison*, 106 AD3d 918, 920 [2d Dept 2013]).

If there are "no triable issues of fact" raised in an Article 78 proceeding, "[t]he court shall make a summary determination upon the pleadings, papers and admissions" (CPLR 409 [b]; *see also* CPLR 7804; *Matter of Eck v City of Kingston Zoning Bd. of Appeals*, 302 AD2d 831, 832 [3d Dept 2003]).

This summary procedure does not apply to actions seeking declaratory relief, and the resolution of those claims instead requires a formal "motion" for summary disposition (*Ballard*, 126 AD3d at 1075; *see also Matter of Muller v Zoning Bd. of Appeals Town of Lewisboro*, 192 AD3d 805, 808-809 [2d Dept 2021]). Thus, "[i]n the absence of a formalized motion requesting the summary determination of the causes of action which seek declaratory relief, it is error for a court to summarily dispose of those causes of action" (*Ballard*, 126 AD3d at 1075 [internal quotation marks, citation and brackets omitted]; *accord Parker v Town of Alexandria*, 138 AD3d

1467, 1468 [4th Dept 2016]). Here, neither party has moved for summary determination of the petitions/complaints insofar as they seek declaratory relief.

While the failure to make a formal motion ordinarily would not warrant dismissal of the declaratory portions of a hybrid case, the requests for declaratory relief here are both jurisdictionally defective,[3] and, in any event, a mere restatement of the relief requested by petitioners under CPLR article 78.

CONCLUSION

Based on the foregoing,[4] it is

ORDERED and **ADJUDGED** that petitioners' second cause of action, insofar as it challenges the Declaratory Ruling's failure to comply with CLCPA § 7 (3) under Article 78, is dismissed; it is further

ORDERED and **ADJUDGED** that petitioners' first cause of action, insofar as it challenges the Declaratory Ruling's and, by extension, the June 2023 Order's failure to comply with CLCPA § 7 (2) under Article 78, is granted; and it is further

ORDERED and **ADJUDGED** that the declaratory judgment portions of these proceedings/actions are dismissed; and finally it is

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[3] A combined CPLR article 78 proceeding/declaratory judgment action is commenced "by filing and serving a notice of petition and a summons under a single index number, along with a combined petition/verified complaint" (*Matter of Newton v Town of Middletown*, 31 AD3d 1004, 1005 [3d Dept 2006]). "The summons invokes jurisdiction for the declaratory-judgment-action component while the notice of petition performs the same function for the Article 78 aspect of the case" (Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, Book; 7B, CPLR 7804:5; *see* CPLR 304 [a]; 403 [a]). Here, petitioners failed to file and serve "a summons in addition to the notice of petition" (*Matter of New York Times Co. v City of New York Police Dept.*, 103 AD3d 405, 407 [1st Dept 2013], *lv dismissed* 21 NY3d 930 [2013], *lv denied* 22 NY3d 854 [2013]; *see also Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision*, 209 AD3d 1208, 1211 n 1 [3d Dept 2022], *affd* 42 NY3d 936 [2024]).

[4] Petitioners also seek an award of "litigation costs" (NYSCEF Doc No. 3 at 23; *see also* NYSCEF Doc No. 1, Wherefore [4]), but they fail to cite any authority for such relief. Nor do they particularize such "costs."

ORDERED and **ADJUDGED** that the Declaratory Ruling and June 2023 Order are annulled, and the Fortistar/Digihost Petition is remitted to the PSC for further proceedings not inconsistent with this Consolidated Decision, Order & Judgment.

This constitutes the Consolidated Decision, Order & Judgment of the Court, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for petitioners shall promptly serve notice of entry on all parties entitled to such notice.

Dated: Albany, New York
November 14, 2024

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

Index No. 900457-23: NYSCEF Doc Nos. 1-39, 111-112, 116-121, 123-126;
Index No. 910162-23: NYSCEF Doc Nos. 1-45, 55, 61-62, 67-71, 73-76.