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. 900457-23

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS-PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Petitioners-Plaintiffs Clean Air Coalition of Western New York, Inc. ("Clean Air") and Sierra Club respectfully request that this Court issue an order to maintain the status quo while it considers their Article 78 petition. This action concerns the Public Service Commission's ("PSC") decision to allow Digihost International, Inc. ("Digihost"), a cryptocurrency mining company, to acquire a gas plant in North Tonawanda, New York. Clean Air's and Sierra Club's members live very close to the gas plant and face irreparable injuries from the pending acquisition. Because Digihost has indicated that it intends to proceed with the transaction imminently, because Petitioners-Plaintiffs are likely to succeed on the merits, and because the balance of equities supports preserving the status quo during the pendency of this litigation, this Court should preliminarily enjoin Digihost from completing its purchase of the gas plant.

BACKGROUND

I. Factual Background

The underlying action is an Article 78/Declaratory Judgment action seeking to annul a decision by the PSC allowing a cryptocurrency mining company to purchase a gas plant in North Tonawanda, New York. The Respondents-Defendants are the PSC, which made the decision to allow the purchase; Fortistar North Tonawanda LLC, ("Fortistar"), which owns and operates the gas plant; North Tonawanda Holdings, LLC, the sole owner of Fortistar; and Digihost.

Petitioners-Plaintiffs are Clean Air and Sierra Club, environmental groups with members who live in North Tonawanda. Their members include close neighbors who live and recreate within a quarter mile of the plant, *see* Verified Pet., NYSCEF No. 1 ¶¶ 17–18, 23, as well as members who live in a nearby draft disadvantaged community as defined under the Climate Leadership and Community Protection Act, *see id*. ¶¶ 14, 26, 29.

If the transaction is completed, the gas plant's operations and emissions will greatly increase. In recent years, the gas plant has barely run, and appears to have operated only on days when surges in electricity use placed increased demand on the power grid. *See* Verified Pet., NYSCEF No. 1 ¶¶ 71–72. Digihost now seeks to purchase the plant to provide power for the energy-intensive process of mining proof-of-work digital cryptocurrency, and intends to run mining computers around-the-clock. *See id*. at ¶ 89. The proposed ownership transfer will therefore turn a rarely-operating gas plant into an in-house gas plant powering a 24/7 cryptocurrency mining operation. The result would be an enormous increase in emissions of both greenhouse gases and local air pollutants as well as other environmental harms. *See id*. at ¶¶ 86–88.

On April 15, 2021, Fortistar and Digihost jointly filed a request that the PSC allow for the transfer of 100% of the ownership interest in the gas plant to Digihost. Clean Air and Sierra Club submitted comments expressing concerns over the significant increase in greenhouse gas emissions and local pollution that would occur if the PSC allowed Digihost to purchase the gas plant because Digihost plans to significantly increase the operations of the plant to power its cryptocurrency mining operations. The comments noted that these environmental impacts would be inconsistent with the greenhouse gas emissions reductions required by the Climate Leadership and Community Protection Act and would disproportionately burden disadvantaged communities in contravention of the statute. May 2021 Sierra Club Comments (Ex. 20 to Verified Pet., NYSCEF No. 29); August 2021 Clean Air Comments (Ex. 21 to Verified Pet., NYSCEF No. 30); October 2021 Sierra Club Comments (Ex. 11 to Verified Pet., NYSCEF No. 20).

On September 15, 2022, the PSC issued a Declaratory Ruling on Upstream Ownership Transfer, granting Fortistar's and Digihost's request. *See* Declaratory Ruling (Ex. 1 to Verified

Pet., NYSCEF No. 10). The PSC decided that Digihost was unable to exercise horizontal or vertical market power in the competitive wholesale electricity market, and therefore, no further review of the transaction was needed. *See id*. at 1–2. The PSC declared that "While numerous commenters raise significant environmental concerns, including emissions impacts and compliance with the [Climate Leadership and Community Protection Act], these matters are beyond the scope of the limited review undertaken in this proceeding." *Id*. at 8.

On December 2, 2022, Digihost reported that it anticipates that its acquisition of the gas plant will close in the first quarter of 2023. *See* Digihost Technology Inc., Digihost Announces Y/Y Ytd 45% Increase in Bitcoin Production and Provides Operations Update (2022), attached as Exhibit 1 to Aidun Affirmation.

II. Relevant Law

A. The Climate Leadership and Community Protection Act

In 2019, the Legislature enacted the Climate Leadership and Community Protection Act to strengthen and codify New York's statewide mandates for greenhouse gas emissions reductions. 2019 Sess. Laws of N.Y. Ch. 106 (S. 6599) (hereinafter "CLCPA"). The CLCPA mandates that by 2030 greenhouse gas emissions be reduced 40% from the level they were at in 1990, and that by 2050 emissions be reduced 85% from the 1990 level. ECL §§ 75-0107(1)(a)–(b), 75-0109(4)(a)–(b), (f).

To achieve these requirements, the Legislature ordered all state agencies—including the PSC—to evaluate each permit, license, or other administrative decision through the lens of the CLCPA. Specifically, CLCPA Section 7(2) directs that:

> In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, 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.

Should an agency determine that an agency decision or approval is inconsistent with these limits but is nonetheless justified, the agency must 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." CLCPA § 7(2).

In addition to the analysis required by Section 7(2), agencies must also analyze the effects of decisions and approvals subject to the CLCPA to ensure that their decisions "shall not disproportionately burden disadvantaged communities . . . ." CLCPA § 7(3). Agencies must affirmatively "prioritize reductions of greenhouse gas emissions and co-pollutants" in such communities. *Id*. "Co-pollutants" are non-greenhouse gas air pollutants that are also produced by greenhouse gas emission sources. ECL § 75-0101(3). The CLCPA defines disadvantaged communities as "communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households" and tasks an entity called the Climate Justice Working Group with developing criteria to identify such communities. ECL § 75-0101(5).

In March 2022, the Climate Justice Working Group issued draft criteria for disadvantaged communities and identified such communities on a draft basis until the criteria are finalized. Notice of Release for Public Comment the Draft Disadvantaged Communities Criteria and Draft List of Disadvantaged Communities (Ex. 3 to Verified Pet., NYSCEF No. 12). The requirements of Section 7 of the CLCPA entered into effect on January 1, 2020. CLCPA § 14.

B. Section 70 of the Public Service Law and the Wallkill Presumption

Section 70 of the Public Service Law (PSL § 70) 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 [PSC]." The requirement that an electric corporation seek the PSC's 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 re PSC Case No. 00-E-1585 at 5 (Ex. 6 to Verified Pet., NYSCEF No. 15) ("[T]he acquisitions of the stock in the parent [entities] amounted to the acquisition of the ownership interests in the New York operating entities.").

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 certain transactions should be governed by a lightened form of regulation. Specifically, the PSC has determined that independent power generators supplying power to other generators or resellers, rather than consumers, who operate in a competitive market and do not set the rates at which electricity is purchased, must satisfy only a lower level of scrutiny. Beginning with a pair of decisions involving Wallkill Generating Co., L.P., the PSC decided that it would "in general, treat independent power producers as competitive providers of a utility service, entitled to lightened regulation." Declaratory Ruling re PSC Case No. 91-E-0350 at 16 (Ex. 7 to Verified Pet., NYSCEF No. 16). Based on its conclusion that "Wallkill, as a competitive provider of electric services, does not require the same degree of regulatory scrutiny as is applied to monopoly suppliers," Order re PSC Case No. 91-E-0350 at 6 (Ex. 8 to Verified Pet., NYSCEF No. 17), the PSC decided that "regulatory approvals under the Public Service Law applicable to

Wallkill, while not waived, will engender reduced scrutiny appropriate to the competitive environment." Declaratory Ruling re PSC Case No. 91-E-0350, NYSCEF No. 16 at 17.

The PSC applies a reduced level of scrutiny to the transfer of competitive providers through a decision-making process that has become known as the "Wallkill presumption." Under this presumption, which the PSC applied in the decision under review, entities requesting approval of the transfer of upstream ownership interests in a competitive generator 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." Declaratory Ruling, NYSCEF No. 10 at 6. If the PSC finds that a proposed transaction satisfies the Wallkill Presumption, the agency has the discretion to issue a declaratory ruling that it will not conduct a full public interest review of the transaction, thereby allowing the transaction to proceed.

Critically, although the PSC applies its scrutiny more lightly to cases involving competitive wholesale generators, all transactions involving upstream transfer of ownership interests in such generators remain subject to the PSC's authority and decision-making. Thus, all upstream transfers of partnership interests in competitive generators "must comply with §70, by identifying new proposed owners of partnership interests, consistent with the presumption, and petitioning for approval of those transactions. Those petitions, however, will be reviewed with the reduced scrutiny described in the Wallkill Ruling." Order re PSC Case No. 91-E-0350, NYSCEF No. 17 at 10. 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 re PSC Case No. 15-G-0688 (Ex. 9 to Verified Pet., NYSCEF No. 18).

LEGAL STANDARD

A party seeking a preliminary injunction must establish "the likelihood of ultimate success on the merits, irreparable injury and a balancing of equities in its favor." *Lew Beach Co. v. Carlson*, 57 AD3d 1153, 1154 (3d Dept 2008) (quoting *Town of Elmira v. Hutchison*, 53 AD3d 939, 940 (3d Dept 2008) (alterations omitted)). "[W]here a party seeks to preserve the status quo during the pendency of an [A]rticle 78 proceeding and the remedy at law does not provide a 'full measure of relief,' a preliminary injunction is appropriate." *Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Dev. Corp.*, 70 AD2d 1021, 1022 (3d Dept 1979) (citing CPLR § 6301; *Matter of O'Reilly v. Grumet*, 308 NY 351, 358 (1955); *Matter of Policemen's Benevolent Ass'n of Westchester Cnty. v. Bd. of Trustees of the Vill. of Croton-On-Hudson*, 21 AD2d 693, 694 (2d Dept 1964)).

ARGUMENT

Clean Air and Sierra Club seek to preserve the status quo while the Court resolves this action. The Court should issue a temporary order holding Digihost's purchase of Fortistar in abeyance until such time as it can rule on the merits of this matter. Such an order is appropriate and necessary because Clean Air and Sierra Club have established a likelihood of success on the merits, their members face irreparable injury that cannot be remedied at law, and the balance of equities tips firmly in favor of maintaining the status quo—particularly because the status quo aligns with both the public interest and the Legislature's express goal of limiting further increases of greenhouse gas emissions from fossil fueled power plants.

I. Clean Air and Sierra Club are Likely to Succeed on the Merits

Clean Air and Sierra Club are likely to succeed on the merits because the PSC completely disregarded its statutory obligations under the CLCPA, and the PSC's decision to disregard the statute is not entitled to deference. The requirement of establishing a likelihood of success "does not compel a demonstration that success on the merits is practically a certitude." *Egan v. N.Y. Care Plus Ins. Co., Inc.*, 266 AD2d 600, 601 (3d Dept 1999). Instead, "a 'prima facie showing of a reasonable probability of success is sufficient.'" *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 AD3d 430, 431 (1st Dept 2016) (quoting *Weissman v. Kubasek*, 112 AD2d 1086, 1086 (2d Dept 1985) (alterations omitted)). Clean Air and Sierra Club easily clear this bar, demonstrating below and in the Memorandum of Law filed with the Verified Petition (NYSCEF No. 4) that the PSC's decision rests on a fatal legal error. In enacting the CLCPA, the Legislature instructed all state agencies—including the PSC—to account for the greenhouse gas emissions resulting from agency decisions and approvals, as well as the impacts on disadvantaged communities. The sale of a gas-fired power plant to a cryptocurrency mining company that intends to increase greenhouse gas emissions and local air pollution from the plant raises obvious issues under the CLCPA and requires that the agency account for them. That the PSC failed to follow the law here, in spite of the significant and inevitable increase in greenhouse gas emissions and local air pollution that will result from its decision and the risk to nearby disadvantaged communities, renders its ruling fundamentally flawed.

As further detailed in the Memorandum of Law filed with the Verified Petition, the plain language of the CLCPA, the Legislature's intent, and the real-world effect of the PSC's decision all compel the conclusion that the declaratory ruling under review is an "administrative approval or decision" subject to the CLCPA. First, the ordinary and commonly understood meanings of "approval" and "decision," as reflected in the dictionaries relied on by New York courts, plainly

encompass the declaratory ruling under review. *See* Mem. of Law, NYSCEF No. 4 at 13–14; *see also Yaniveth R. ex rel. Ramona S. v. LTD Realty Co*., 27 NY3d 186, 192 (2016) ("In the absence of a statutory definition, 'we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase.'") (quoting *Rosner v. Metro. Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479–480 (2001)). The PSC examined facts related to the transaction, considered law including the Public Service Law and the Wallkill Order, and rendered a ruling that approved of the transaction moving forward without further review. *See* Declaratory Ruling, NYSCEF No. 10 at 8 (determining that the transaction did not require further review after considering "the facts and considerations before the Commission"). This action satisfies the usual and commonly understood meanings of "approval" and "decision," and is squarely within the CLCPA's requirements. *See* Mem. of Law, NYSCEF No. 4 at 13–14.

Second, as the PSC has itself recognized, the Legislature intended that the requirements of the CLCPA sweep broadly. *See* Mem. of Law, NYSCEF No. 4 at 14–15. Thus, if there were any ambiguity about whether the PSC's declaratory ruling qualified as an "approval" or "decision," it would best comport with the Legislature's intent for the terms to be construed inclusively so that the PSC's ruling would be subject to the statute. As a Supreme Court recently explained in another CLCPA case, the Legislature has now "determined that New York State is currently suffering adverse effects from climate change, and that a stated legislative goal is the reduction and ultimate elimination of [greenhouse gas] emissions from anthropogenic sources . . . That gas-fired power plants are being subjected to greater scrutiny under the CLCPA is consistent with the stated goals of the legislation." *Danskammer Energy, LLC v. N.Y. State Dep't of Env't Conservation*, 76 Misc 3d 196, 251–52 (Sup Ct, Orange County 2022).

Finally, the real-world effect of the declaratory ruling is to clear the way for a transaction that will convert a rarely-operating gas-fired power plant to a continuously-operating power source for a cryptocurrency mining operation. Thus, under the logic that the PSC has itself applied to other decisions, the PSC's consideration of Digihost's and Fortistar's Petition was subject to the CLCPA. *See* Mem. of Law, NYSCEF No. 4 at 15–16.

Moreover, it is clear that if the agency had actually undertaken the required CLCPA analysis, it would have identified significant issues clouding the transaction. As detailed in the Memorandum of Law, allowing the transaction to proceed so that Digihost can increase the operations of and emissions from a gas-burning power plant is flatly inconsistent with Section 7(2) of the CLCPA, because it would frustrate efforts to reduce greenhouse gas emissions without justification. *See* Mem. of Law, NYSCEF No. 4 at 18–19. And, in light of the significant pollution burdens already borne by the disadvantaged communities surrounding the gas plant—which would worsen if the plant increases its operations and emissions—the proposed transaction raises serious concerns under Section 7(3) of the CLCPA as well. *See id*. at 19–20.

Sierra Club and Clean Air have amply demonstrated the errors in the PSC's conclusory determination not to apply the CLCPA and have established the necessary reasonable likelihood of success on the merits. The PSC's erroneous view of the law is not entitled to deference and does not undermine the likelihood of success. *See Guido v. N.Y. State Teachers' Ret. Sys.*, 94 NY2d 64, 68 (1999) ("Deference need not be accorded the agency interpretation of the statutes in this case," because "[t]he central statutory question here does not implicate 'knowledge and understanding of underlying operational practices or . . . evaluation of factual data.'" (quoting *Kurcsics v. Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 (1980)); *see also Verizon New York Inc. v. N.Y. State Pub. Serv. Comm'n*, 46 Misc 3d 858, 867 (Sup Ct, Albany County 2014), *aff'd*, 137

AD3d 66, (3d Dept 2016) ("[W]here the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency . . . In such circumstances, the judiciary need not accord any deference to the agency's determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent.").

II. A Preliminary Injunction is Necessary to Prevent Irreparable Harm to Clean Air and Sierra Club Members.

If Digihost's purchase of the gas plant is completed, a sporadically operating power plant will ramp up its operations to power round-the-clock cryptocurrency mining. In the absence of a preliminary injunction, this increase in operations will cause irreparable harm to the environment and nearby residents by emitting air toxics and other pollutants that can cause and exacerbate serious health problems. As the United States Supreme Court has long recognized, once such environmental degradation has taken place, it is effectively irreparable. *See Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable."). New York courts have likewise recognized this commonsense reality: once a harmful pollutant is introduced to an environment, its impacts are effectively irreparable. *See, e.g.*, *Lake George Ass'n v. NYS Adirondack Park Agency*, 76 Misc 3d 295, 311 (Sup Ct, Warren County 2022) (explaining that the introduction of a chemical to a lake would constitute irreparable injury if the chemical were harmful); *State of New York v. Monoco Oil Co., Inc.*, 185 Misc 2d 742, 742–43, 750 (Sup Ct, Monroe County 2000) (finding that emissions caused irreparable harm where they "interfered with the use by the public of the outdoors, school and work facilities, and their home and [had] caused deleterious health effects and discomfort").

As a result of the PSC's decision, the gas plant will increase operations and emit higher levels of air pollution including nitrogen oxides, volatile organic compounds, particulate matter, and hazardous air pollutants. *See* Verified Petition, NYSCEF No. 1 ¶¶ 86–88. It is beyond dispute that these pollutants pose significant dangers to humans. Nitrogen oxides and volatile organic compounds can create ozone, which the federal government has recognized as causing lung inflammation, damage to the airways, and more severe and frequent asthma attacks. *See Ground-level Ozone Pollution: Health Effects of Ozone Pollution*, EPA, https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution, attached as Exhibit 2 to Aidun Affirmation; *Ozone*, Am. Lung Ass'n, https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone, attached as Exhibit 3 to Aidun Affirmation. The federal government has likewise recognized the danger of exposure to particulate matter, which can lead to heart attacks, aggravated asthma, decreased lung function, and premature death. *See Particulate Matter (PM) Pollution: Health and Environmental Effects of Particulate Matter (PM)*, EPA, https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm, attached as Exhibit 4 to Aidun Affirmation. Hazardous air pollutants are those that are known to cause cancer and other serious health impacts, according to the U.S. Environmental Protection Agency, and can persist and accumulate in body tissues. *Hazardous Air Pollutants*, EPA, https://www.epa.gov/haps, attached as Exhibit 5 to Aidun Affirmation; *Hazardous Air Pollutants: Sources and Exposure*, EPA, https://www.epa.gov/haps/hazardous-air-pollutants-sources-and-exposure, attached as Exhibit 6 to Aidun Affirmation.

Clean Air and Sierra Club members will be irreparably harmed by this pollution if Digihost successfully purchases the gas plant and increases its operations. For example, Clean Air member Michael Gerace lives about a quarter mile from the gas plant and suffers from

chronic obstructive pulmonary disease. Gerace Aff., NYSCEF No. 5 ¶¶ 5, 9. The Centers for Disease Control and Prevention specifically warn that people with this disease should avoid air pollutants, but if the gas plant increases its operations, Mr. Gerace will be exposed to significantly greater air pollution in and around his home. *See National Environmental Public Health Tracking: Chronic Obstructive Pulmonary Disease (COPD*), Centers for Disease Control and Prevention, https://www.cdc.gov/nceh/tracking/topics/COPD.htm (noting that "People with COPD are more vulnerable to the effects of air pollution, and at lower levels than people without COPD. Exposure to air pollution has been linked to increases in COPD-related emergency department visits and hospitalizations."), attached as Exhibit 7 to Aidun Affirmation. Other Clean Air and Sierra Club members live in close proximity to the gas plant and face harm from its increased operations, including Clean Air member Karen Hance, who also lives about a quarter mile from the gas plant, Hance Aff., NYSCEF No. 6 ¶¶ 5, 8–9; Clean Air member Emily Root who lives about a mile from the gas plant in an area designated by the state as a draft disadvantaged community, Root Aff., NYSCEF No. 8 ¶ 5; and Erin Robinson who also lives in a draft disadvantaged community, around a mile and a half from the gas plant, Robinson Aff., NYSCEF No. 7 ¶ 5–6.

These environmental and public health harms cannot be remedied at law and justify preliminary injunctive relief.

III. The Balance of Equities Favors Avoiding Irreparable Environmental and Public Health Harms by Preserving the Status Quo.

The balance of equities tilts squarely in Clean Air and Sierra Club's favor. As discussed, if the Court declines to grant a preliminary injunction, then Clean Air and Sierra Club members will be irreparably harmed by environmental pollution. By contrast, any burden that a preliminary injunction could impose on Digihost and Fortistar would be minimal, as it merely

continues the status quo. At present, the transfer of ownership has not been completed and the plant has not begun to increase its operations. *See* Exhibit 1 to Aidun Affirmation (Dec. 2022 Digihost Operations Update). An injunction would merely maintain this status quo until the Court determines whether the PSC failed to abide by the CLCPA's requirements in approving Digihost's purchase of the gas plant. *See Ulster Home Care, Inc. v. Vacco*, 255 AD2d 73, 76 (3d Dept 1999) ("[A] preliminary injunction is intended to preserve the status quo during the pendency of the action . . . .").

Moreover, an injunction might well serve to avoid the unnecessary burden of unwinding the transaction following this Court's ruling. As Petitioners-Plaintiffs have shown, they are likely to succeed in establishing that the PSC violated the CLCPA, requiring further proceedings before the transaction could be approved, and quite possibly preventing any approval. If Digihost's purchase is nonetheless completed before the Court rules on the Article 78 petition, Digihost and Fortistar might be forced to unwind the transaction if the Petition succeeds. Holding the transaction in abeyance now, while the Court decides this matter, avoids the risk of having to undo the transaction later.

Additionally, when "ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation." *Eastview Mall, LLC v. Grace Holmes, Inc.*, 182 AD3d 1057, 1059 (4th Dept 2020) (citations omitted). This includes consideration of whether "damage will be done [to] . . . the public policy of this State" in the absence of a preliminary injunction. *Seitzman v. Hudson River Assocs.*, 126 AD2d 211, 215 (1st Dept 1987).

Here, an order declining to enjoin Digihost's purchase of the gas plant will damage New York's public policy, as codified in the CLCPA, of rapidly decreasing greenhouse gas emissions

and avoiding additional pollution burdens on disadvantaged communities. *See* CLCPA § 1(4) (establishing a statewide goal of eliminating anthropogenic greenhouse gases by 2050); *id*. § 7(3) (prohibiting agency decisions that disproportionately burden disadvantaged communities); ECL § 75-0107(1) (requiring New York to reduce greenhouse gas emissions to 60% of 1990 levels by 2030 and 15% of 1990 levels by 2050).

As the Legislature recognized in enacting the CLCPA, "[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York" in many ways. CLCPA § 1(1). The Legislature further determined 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. Actions undertaken by New York state to mitigate greenhouse gas emissions should prioritize the safety and health of disadvantaged communities." *Id*. § 1(7). New York's public policy goals of addressing those harms cannot be squared with the PSC's decision to convert a rarely-operating gas plant into an in-house gas plant powering 24/7 cryptocurrency mining. In fact, as the Department of Environmental Conservation recently recognized, an agency decision that "would be directly responsible for an increase in demand for the use of a known source of [greenhouse gas] emissions, such as at an existing facility," is precisely the type of decision that is inconsistent with the State's greenhouse gas reduction requirements. *See N.Y.S DEC, CP-49 / Climate Change and DEC Action* at 6 (2022), attached as Exhibit 8 to Aidun Affirmation[1]; *see also* Notice of Denial of Title V Air Permit, Greenidge Generation LLC – Greenidge Generating Station (June 30, 2022) at 15 (denying air permit for a gas plant to be used for cryptocurrency mining, noting that "the Facility is now creating a significant new demand for energy" and

[1] https://www.dec.ny.gov/docs/administration_pdf/cp492022.pdf.

"[t]his alone will make it more challenging for the State to meet the Statewide [greenhouse gas] emission limits and its [CLCPA] requirements."), attached as Exhibit 9 to Aidun Affirmation.[2]

The PSC's decision to allow Digihost's and Fortistar's transaction will result in increased demand for the gas plant, resulting in a dramatic increase in its greenhouse gas emissions and interfering with New York's achievement of its greenhouse gas limits. *See* Mem. of Law, NYSCEF No. 4 18–19. Additionally, as discussed above, in the absence of a preliminary injunction the gas plant will emit increased levels of local air pollution. These impacts will harm surrounding residents, including the members of Clean Air and Sierra Club, and are likely to cause or contribute to a disproportionate burden on a disadvantaged community in contravention of CLCPA Section 7(3) and New York's public policy to avoid such burdens. *See* Mem. of Law, NYSCEF No. 4 at 20.

For these reasons, and because the order Clean Air and Sierra Club seek will merely maintain the status quo, the balance of equities tips decidedly in favor of granting a preliminary injunction.

CONCLUSION

For the reasons discussed, Clean Air and Sierra Club respectfully request that the Court grant the preliminary injunction.

Dated: January 24, 2023
New York, NY

Respectfully submitted,

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[2] https://www.dec.ny.gov/permits/123728.html.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing Memorandum of Law complies with the requirements of 22 NYCRR § 202.8-b because it was prepared on a computer using Microsoft Word, and it contains 4835 words (excluding the caption, table of contents, table of authorities, signature blocks, and this certificate) as computed by Microsoft Word.

Dated: January 24, 2023
New York, NY

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