

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. \_\_\_\_\_

**MEMORANDUM OF LAW IN SUPPORT OF VERIFIED**  
**PETITION AND COMPLAINT**

Dror Ladin  
Mandy DeRoche  
Jessamine De Ocampo  
Hillary Aidun  
Earthjustice  
48 Wall St., 15th Floor  
New York, NY 10005  
Tel: (212) 845-7392  
dladin@earthjustice.org

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

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## **PRELIMINARY STATEMENT**

Petitioners-Plaintiffs Clean Air Coalition of Western New York, Inc. (“Clean Air”) and Sierra Club respectfully submit this memorandum of law in support of review under Article 78 of the New York Civil Practice Law and Rules (“CPLR”). This lawsuit contests the Public Service Commission’s (“PSC”) declaratory ruling allowing a proposed transaction between Fortistar North Tonawanda, LLC and Digihost, Inc. to proceed in contravention of the Climate Leadership and Community Protection Act (“the CLCPA”).

The lawsuit presents a pure question of statutory interpretation. Recognizing an urgent need to reform agency decisionmaking with respect to climate change and environmentally burdened communities, the Legislature passed a sweeping law, the CLCPA, requiring that agencies consider the implications of their approvals and decisions on greenhouse gas emissions and on underserved and vulnerable populations, which the statute identifies as “disadvantaged communities.” Yet when the PSC was presented with a request for a ruling allowing a cryptocurrency company to purchase a fossil-fuel-burning power plant so as to increase the plant’s operations, the agency refused to even consider the CLCPA and its requirements. Instead, the agency followed the identical process it had prior to the enactment of the CLCPA, disregarding the statute entirely. The agency’s failure to apply the CLCPA is particularly egregious because the transaction under review raised significant issues with respect to both greenhouse gas emissions as well as the disproportionate burdens on disadvantaged communities. This Court should correct the agency’s legal error and instruct the PSC to comply with the Legislature’s mandate.

## FACTUAL BACKGROUND

This proceeding involves the proposed purchase of the Fortistar North Tonawanda gas plant by Digihost (“the Transaction”), a Canadian cryptocurrency mining company that seeks to convert the gas plant’s operations from limited service to full-time, energy-intensive proof-of-work cryptocurrency mining. The gas plant is a 55-megawatt facility located in the City of North Tonawanda in Niagara County, New York. In recent years, this gas plant has barely operated, and appears to have operated only on days when surges in electricity use placed increased demand on the power grid. As Digihost has explained, it seeks to purchase the gas plant to provide power for cryptocurrency mining, with the intention of powering its energy-intensive miners around the clock. Exhibit 24 at 7 (Digihost Full Environmental Assessment Form).<sup>1</sup> The proposed ownership transfer will thus result in a conversion of the rarely operating gas plant to a gas plant providing in-house power to a 24/7 proof-of-work cryptocurrency mining operation. *Id.*; *see also* Exhibit 11 at 5 (October 2021 Sierra Club Comments).

Cryptocurrency is a digital form of currency. Proof-of-work cryptocurrency mining consumes tremendous amounts of energy because it relies on enormous numbers of computing machines to solve complex mathematical puzzles. The computer or “miner” that solves the puzzle first is then rewarded with cryptocurrency. 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. Over time, the electricity used by miners in these races increases substantially and this process, in turn, generates substantial amounts of greenhouse gas emissions when such operations are powered either directly or indirectly by fossil fuels. *See, e.g.*, Exhibit

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<sup>1</sup> All references to exhibits are exhibits to the Verified Petition filed together with this Memorandum of Law.

13 at 14–15, 21–23 (White House Off. of Sci. and Tech. Pol’y, Climate and Energy Implications of Crypto-Assets in the United States (2022)).

The City of North Tonawanda, where the gas plant is located, is a residential community between Buffalo and Niagara Falls. The city of over 30,000 is picturesquely set between the Niagara River and the Erie Barge Canal. While the city is surrounded by water and wildlife, it also bears the burden of significant pollution. The state has assessed several of its census tracts as more environmentally burdened than 90% of the state.

Clean Air was founded by Western New York residents who were concerned about environmental health in their neighborhoods and sought an active role in the decisions that impact their communities. Clean Air organizes multiple Western New York communities around environmental health and justice issues and supports campaigns that its members lead. Clean Air has numerous members in North Tonawanda, including Karen Hance, Erin Robinson, Michael Gerace, and Emily Root. Ms. Hance and Mr. Gerace both live about a quarter mile from the gas plant and can hear it from inside their houses when it is running, affecting their use and enjoyment of their property. Hance Aff. ¶¶ 11, 14–16; Gerace Aff. ¶ 10. One of Mr. Gerace’s children has asthma, and he himself suffers from chronic obstructive pulmonary disease, and he is concerned that those conditions will be exacerbated if the gas plant increases its operations and its air pollution. *Id.* ¶¶ 8–9. Ms. Root lives about a mile from the gas plant, in an area designated by the state as a disadvantaged community under the CLCPA. Root Aff. ¶ 5. Ms. Root plans to leave North Tonawanda if Digihost consummates its purchase of the gas plant because she does not want to raise a family in a city with high levels of air pollution. *Id.* ¶ 10. Additionally, Ms. Root 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 during those activities. *Id.* ¶¶ 8–9. Dr. Robinson also lives in a disadvantaged community, around a mile and a half from the gas plant. She enjoys hiking, biking, and running in areas near the gas plant. Robinson Aff. ¶¶ 12–14. If the gas plant increases its operations and air pollution, Dr. Robinson will be less likely to engage in and enjoy those activities. *Id.* ¶¶ 14–15.

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. Sierra Club’s Atlantic Chapter has a membership of approximately 50,000 in New York State, including numerous members in North Tonawanda. These members include Bonita Ryan, who lives near the plant and spends a lot of time biking and rowing in areas near the gas plant. Ryan Aff. ¶¶ 11–13. Ms. Ryan worries that if the plant increases air pollution, she will be less likely to spend time outdoors and exercising. *Id.* Sierra Club and its members have long advocated to mitigate the causes and impacts of climate change, and to support robust implementation of state policies—like the CLCPA—that reduce harmful emissions from fossil fuels.

Fortistar North Tonawanda, LLC (“Fortistar”) is a Delaware limited liability company that owns and operates the Fortistar gas plant, an approximately 55-megawatt gas facility located in North Tonawanda, New York.

Digihost International, Inc. (“Digihost”) is a subsidiary of Digihost Technology, Inc., a British Columbia company primarily focused on cryptocurrency mining.

On April 15, 2021, Fortistar and Digihost jointly filed a request that the PSC allow for the transfer of 100% ownership interest in the gas plant to Digihost, through a declaratory ruling

finding that no further review was necessary or through full review under the Public Service Law. Exhibit 19 (Digihost/Fortistar Joint Petition)

On May 4, 2021, Sierra Club's Atlantic Chapter submitted a letter expressing concerns over the significant increase in greenhouse gas emissions that would occur if 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. The letter noted that these emissions increases would be inconsistent with the emissions reduction mandates required by the CLCPA and would impact disproportionately burdened disadvantaged communities. Exhibit 20 (May 2021 Sierra Club Comments).

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, interfering with the mandatory emissions reductions required by the CLCPA. Exhibit 21 (August 2021 Clean Air Comments).

On August 26, 2021, Digihost submitted a supplement to the Petition in which it acknowledged the requirements of the CLCPA and claimed it was "committed" to "align itself" with the CLCPA. Exhibit 22 (August 2021 Digihost Supplement to Joint Petition).

On October 12, 2021, Sierra Club's Atlantic Chapter 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 agency to deny the proposed transfer. *See* Exhibit 11.

On October 28, 2021, Digihost and Fortistar submitted a joint response to comments, stating that increased operations are permissible under their current environmental permits. Exhibit 25 (Digihost/Fortistar Joint Response).

On September 15, 2022, the PSC issued a declaratory ruling granting Fortistar’s and Digihost’s request. *See* Exhibit 1. The PSC decided that no further review of the proposed ownership transfer was required due to Digihost being unable to exercise horizontal or vertical market power in the competitive wholesale electricity market. *See id.* at 1–2. 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.” *Id.* at 8.

On October 14, 2022, Sierra Club’s Atlantic Chapter and Clean Air requested that the PSC rehear the petition. The PSC did not rule on the request, and this Article 78 petition followed.

## LEGAL BACKGROUND

### I. The Climate Leadership and Community Protection Act

Recognizing that “[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York,” the Legislature, in 2019, enacted the CLCPA to strengthen and codify New York’s statewide mandates for emissions reductions and require the accelerated adoption of renewable energy. 2019 Sess. Laws of N.Y. Ch. 106 (S. 6599) § 1 (hereinafter “CLCPA”). The Legislature’s explicit goal in enacting the CLCPA is to mitigate the existing harms of climate change and prevent even greater harm in the future, while simultaneously ameliorating the pollution burdens borne by disadvantaged communities. *Id.* § 1(2)(a) (“The severity of current climate change and the threat of additional and more severe change will be affected by the actions undertaken by New York and other jurisdictions to reduce greenhouse gas emissions.”); *id.* § 1(7) (“Climate 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 . . .” ).

The CLCPA mandates transformative change in the fossil fuel-dominated electric sector in furtherance of the CLCPA’s broader climate mandates. Across all sectors of the economy, the CLCPA requires 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). While the Legislature permitted a longer runway for reduction of emissions in other sectors, 70% of New York’s power generation must come from renewable energy by 2030 and the state must achieve zero-emissions electricity by 2040. PSL § 66-p(2).

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 a permit inconsistent with these limits 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 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 a new 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. Exhibit 3 (Notice of Release for Public Comment the Draft Disadvantaged Communities Criteria and Draft List of Disadvantaged Communities). The PSC has relied on the draft criteria for purposes of determining whether a decision complies with Section 7(3). *See* Exhibit 4 at 8–9 (Order re PSC Case No. 22-G-0205); Exhibit 5 at 9–10 (*Order re PSC Case No. 21-G-0051*). Additionally, before the draft disadvantaged communities were identified the State had provided interim disadvantaged communities that may be used before the state finalizes the criteria. Exhibit 2 (NYSERDA Disadvantaged Communities); *see also* Exhibit 29 (Notice of Denial of Title V Air Permit: Astoria Gas Turbine Power –Astoria, Queens County (Oct. 27, 2021)) at 17 (referring to interim disadvantaged communities in determining that a power plant could have a disproportionate burden on these communities under Section 7(3) of the CLCPA).

The requirements of Section 7 of the CLCPA entered into effect on January 1, 2020.

CLCPA § 14.

## II. 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 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* Exhibit 6 at 5 (Order re PSC Case No. 00-E-1585) (“[T]he acquisitions of the stock in the parent [entities] amounted to the acquisition of the ownership interests in the New York operating entities.”). The PSC has recognized that the statute extends to partnership interests in electric corporations: “A transfer of partnership right is a transfer of partnership property, constituting a transfer of part of the works or systems of an electric corporation as defined in §70.” Exhibit 7 at 13 (Declaratory Ruling re PSC Case No. 91-E-0350). Thus, when “a partnership interest in the New York subsidiary is transferred, §70 is implicated and permission pursuant to that statute must be obtained.” *Id.*

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 the 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.” Exhibit 7 at 16 (Declaratory Ruling re PSC Case No. 91-E-0350). 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,” Exhibit 8 at 6 (Order re PSC Case No. 91-E-0350), 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; Exhibit 7 at 17 (Declaratory Ruling re PSC Case No. 91-E-0350).

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.” 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.” Exhibit 1 at 6 (Declaratory Ruling). 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 decisionmaking. 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.” Exhibit 8 at 10 (Order re PSC Case No. 91-E-0350). 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.” Exhibit 9 at 9 (Declaratory Ruling re PSC Case No. 15-G-0688).

### LEGAL STANDARD

The claim that an agency action was “arbitrarily made in disregard of the statutory language” is a claim that an agency’s “application of the statute ‘was affected by an error of law or was arbitrary and capricious’” and “is reviewable in a CPLR article 78 proceeding.” *Fulton Cnty. Econ. Dev. Corp. v. N.Y. State Authorities Budget Off.*, 100 AD3d 1335, 1336 (3d Dept 2012).

The statutory interpretation issues raised in this appeal involve matters “of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent” and, thus, “de novo review is appropriate” *Nat’l Energy Marketers Ass’n v. N.Y. State Pub. Serv. Comm’n*, 33 NY3d 336, 347 n.5 (2019) (quoting *Weingarten v. Bd of Trustees of N.Y. City Teacher’s Retirement Sys.*, 98 NY2d 575, 580 (2002)). “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.’” *Guido v. N.Y. State Teachers’ Ret. Sys.*, 94 NY2d 64, 68 (1999) (quoting *Kurcsics v. Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 (1980)).

## ARGUMENT

The Court should vacate the PSC's declaratory ruling because the agency disregarded the statutory requirement the Legislature imposed in the CLCPA and failed to conduct any of the required analysis. The PSC's decision was affected by an error of law because the agency did not recognize that the CLCPA applied to its consideration of the proposed transaction, the decision was arbitrary because the agency failed to account for any of the decisionmaking criteria required by the CLCPA, and the decision violated lawful procedure because the agency did not provide for any opportunity to consider the criteria required by the CLCPA. The sale of a gas-fired power plant to a cryptocurrency mining company that intends to increase the plant's operations raises obvious issues under the CLCPA and requires that the agency account for them. The PSC's failure to consider any of the CLCPA requirements applicable to its decision renders the declaratory ruling unlawful.

### **I. The PSC was Required to Conduct a CLCPA Analysis.**

The plain language of the CLCPA, the Legislature's intent, and the real-world effect of the PSC's decision all confirm that the declaratory judgment is an "administrative approval" or "administrative 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, clearly encompass the declaratory ruling under review. Second, the Legislature intended that the requirements of the CLCPA sweep broadly, further supporting inclusion of the PSC's ruling within the CLCPA's mandate. Finally, the real-world effect of the declaratory ruling is approval of a transaction that will convert a rarely-operating gas-fired power plant to a continuously-operating power source for a cryptocurrency mining operation. Because this PSC

decision will result in vastly increased operations for a gas-fired power plant with significantly higher greenhouse gas emissions, it required CLCPA review.

The Legislature extended the CLCPA mandate to “permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts.” CLCPA §§ 7(2), (3). While the statute does not define “other administrative approvals and decisions,” dictionary definitions confirm that the order under review is an approval or decision. *See 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 Court of Appeals has specifically turned to Merriam-Webster’s and Black’s Law Dictionary to interpret statutory terms. *See Matter of Orens v. Novello*, 99 NY2d 180, 185–186 (2002) (relying on Merriam-Webster’s and Black’s Law Dictionary to ascertain the meaning of the term “lay member” in Public Health Law § 230(6)).

Dictionary definitions confirm that the PSC’s ruling constitutes an administrative “approval.” Black’s Law Dictionary defines “approve” as “To give formal sanction to; to confirm authoritatively.” *Approve*, Black’s Law Dictionary (11th ed. 2019). Merriam-Webster similarly defines “approve” as “to accept as satisfactory” and “to give formal or official sanction.” Definition, *Approve*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/approve> (last visited Jan. 12, 2023). Here, the PSC considered the Joint Petition, and “[b]ased on the facts and considerations before the Commission,” accepted it as satisfactory, finding that “Petitioners have adequately demonstrated that the Proposed

Transaction does not present an opportunity to exercise either horizontal or vertical market power, or a potential to harm the interests of captive New York ratepayers.” Exhibit 1 at 8 (Declaratory Ruling). The PSC then gave formal sanction to the transaction: “Accordingly, the Proposed Transaction does not require further regulatory review under PSL §§70 and 83.” *Id.* By issuing a declaratory judgment to this effect, the PSC confirmed authoritatively that it will allow the transaction to proceed. *See* State Administrative Procedure Act § 204(1) (“A declaratory ruling shall be binding upon the agency unless it is altered or set aside by a court.”).

Dictionary definitions likewise confirm that the declaratory judgment was a “decision.” Black’s Law Dictionary defines a “decision” as a “judicial or agency determination after consideration of the facts and the law.” *Decision*, Black’s Law Dictionary (11th ed. 2019). The Merriam-Webster definition is broader, because in ordinary usage the term encompasses any “determination arrived at after consideration.” Definition, *Decision*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/decision> (last visited Jan. 12, 2023). Here, the PSC examined facts related to the transaction, considered law including the Public Service Law and the Wallkill Order, and rendered a ruling. *See* Exhibit 1 at 8 (Declaratory Ruling) (determining that the transaction did not require further review after considering “the facts and considerations before the Commission”).

The Legislature chose broad language in applying the CLCPA mandate to “administrative approvals and decisions,” because it recognized an urgent need to reform decisionmaking affecting greenhouse gas emissions and local pollution that can burden disadvantaged communities. The PSC has itself recognized that it is “the Legislature’s intent that Section 7(2) of the CLCPA be broadly construed,” and that “[t]he same analysis applies to Section 7(3) of the CLCPA.” Exhibit 26 at 69–70 (*Order Approving Joint Proposal, As*

*Modified, and Imposing Additional Requirements*, NY PSC Case Nos. 19-G-0309, 19-G-0310, and 18-M-0270 (Aug. 12, 2021)); *see also id.* at 70 (“Commission orders in rate cases fall within the ambit of Section 7(2)’s application to ‘other administrative approvals,’ notwithstanding the absence of a direct correlation to any item provided in the list of examples, as such list is preceded by the phrase ‘including, but not limited to.’”).

Moreover, in addition to the clear textual inclusion of administrative approvals and decisions, a broad construction of the CLCPA’s mandate is in line with the urgent threat the Legislature identified. As a Supreme Court recently explained in another CLCPA case, “in enacting the legislation, the Legislature found that ‘[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York,’ and that such adverse effects would continue and worsen if [greenhouse gas] emissions were not reduced.” *Danskammer Energy, LLC v. N.Y. State Dep’t of Env’t Conservation*, 76 Misc 3d 196, 249 (Sup. Ct, Orange County 2022). “That is, the Legislature identified a currently existing, urgent problem that was worsening, not a developing or potential problem that might arise if appropriate action was not taken in the future.” *Id.* Accordingly, the Legislature required all state agencies—including the PSC—to account for greenhouse gas emissions when making administrative decisions and determining approvals.

Finally, it is clear from the real-world effect of the PSC’s declaratory ruling that the ruling constitutes an administrative approval or decision subject to the CLCPA, because it will directly result in a greenhouse-gas-emitting project moving forward. The PSC has itself previously recognized that decisions that clear the way for potential emissions require CLCPA review, even if the emissions-producing projects are only a likely consequence of the PSC’s decision rather than the subject of the decision. As the PSC explained in the context of setting

utility rates, even approval of an overall capital expenditure plan is subject to CLCPA review

because approval of the plan paves the way for later projects that could emit greenhouse gases:

Commission orders in rate cases fall within the ambit of Section 7(2)'s application to 'other administrative approvals' notwithstanding the absence of a direct correlation to any item provided in the list of examples . . . . Although a Commission rate order approves only an overall capital expenditure plan and not the specific projects that were reviewed to provide evidentiary support for the utility's rate recovery, absent Commission approval of that rate recovery, such projects would likely not be pursued by the utility.

Exhibit 26 at 70 (National Grid Order).

In other words, the key question is whether—if the PSC did not provide the relevant approval or ruling—the “projects would likely not be pursued by the utility.” *Id.* Here, the PSC's ruling is critical: the transaction—with the attendant projected rise in plant operations and greenhouse gas emissions—could not proceed until the PSC gave its blessing. The PSC's grant of the Petition is thus an administrative approval or decision subject to the CLCPA.

There is no doubt that the PSC is fully capable of integrating the required CLCPA review into the Wallkill process, because the PSC regularly imposes additional review requirements on transactions otherwise subject to the Wallkill process based on the source of power under consideration. The PSC has previously decided that “nuclear facilities have a greater impact on the public interest than hydro and fossil facilities” and that “nuclear generators will be subject to more requirements under [the Public Service Law] than other forms of generation.” Exhibit 27 at 9–10 (*Order Providing for Lightened Regulation of Nuclear Generating Facilities*, PSC Case Nos. 01-E-0113 and 00-E-1225 (Aug. 31, 2001)). Because nuclear facilities “have significant impacts on the communities where they are located,” the PSC conducts “a more searching inquiry . . . than would be conducted if other types of lightly-regulated generation were at issue,”

and requires additional showings beyond the market-power analysis required to determine whether the Wallkill presumption applies. Exhibit 30 at 4 (*Order Establishing Further Procedures*, PSC Case No. 0 8-E-0077 (May 21, 2008)).

With enactment of the CLCPA, the Legislature has instructed that greenhouse-gas-emitting facilities have a greater impact than previously recognized by the State’s statutory mandates. 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*, 76 Misc 3d at 251–252. The PSC must now follow the Legislature’s judgment and subject gas plants to greater scrutiny than it had prior to enactment of the CLCPA. The PSC’s decision to instead rely only on its own pre-CLCPA precedents and disregard the broad CLCPA mandate was contrary to law.

## **II. An Analysis Under the CLCPA Would Have, at a Minimum, Raised Serious Concerns About Approving the Transaction.**

By enacting the CLCPA, the Legislature required the PSC to consider the impact of its approvals and decisions on New York’s emission reduction and equity mandates. The PSC has itself recognized the potential impact of cryptocurrency mining on these very mandates, testifying that it is “committed to ensuring CLCPA compliance across all sectors of the economy, including relative newcomers like cryptocurrency mining operations.” Exhibit 28 at 4 (Cryptocurrency Mining and the Climate Leadership and Community Protection Act (CLCPA): Testimony of the New York State Department of Public Service, (Oct. 27, 2021)). By refusing even to consider the greenhouse gas emissions consequences of its decision, the PSC violated the

CLCPA's requirements. As even a cursory analysis would have demonstrated—and as commentors had identified for the PSC—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. Moreover, 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.

**A. A Section 7(2) Analysis Would Have Shown That The Transaction Would Result in a Significant Increase in Greenhouse Gas Emissions Without Justification.**

Because the proposed transaction would significantly expand the plant's operations, it would greatly *increase* greenhouse gas emissions, plainly interfering with the state's mandatory emission reduction requirements. In recent years the gas plant operated only during moments of peak demand for electricity, between approximately 10 and 74 days per year. Exhibit 11 at 4 (October 2021 Sierra Club Comments). Emissions roughly tracked the operating days, so that when the plant operated for approximately 74 days it emitted approximately 7.5 times as much greenhouse gases as when it operated for only ten days. By Digihost's own account, should the gas plant's ownership be transferred to Digihost, Digihost will use the power to run its cryptocurrency mining computers 24 hours per day, seven days a week. *See* Exhibit 24 at 7 (Digihost Full Environmental Assessment Form). Such round-the-clock, year-round operation would represent an increase of nearly five times over the previous high of 74 days (almost 500%), and an increase of more than thirty-five times the more recent low of 10 days (more than 3500%). The inevitable result is an enormous increase of greenhouse gas emissions.

Moreover, the gas plant's need for increased fuel will result in further greenhouse gas emissions from natural gas extraction and transportation if its operations ramp up. The Legislature has specifically instructed that consideration of such emissions are also a required part of the Section 7(2) analysis. The CLCPA includes in the definition of statewide greenhouse gas emissions all "greenhouse gases produced outside of the state that are associated with . . . the extraction and transmission of fossil fuels imported into the state." ECL § 75-0101(13). The gas plant increasing operations will inevitably lead to an increase in fossil gas imports, thereby leading to an increase in the emissions associated with the facility.

Plainly, increasing greenhouse gas emissions is "inconsistent with or will interfere" with the CLCPA requirements of reducing greenhouse gas emissions. Should an agency approve a project that would produce such an inconsistent result, it must "provide a detailed statement of justification as to why such limits/criteria may not be met." CLCPA § 7(2). But the PSC did not attempt to identify a justification for this increase in emissions, which simply redirects electrical capacity to a private entity seeking to maximize profits. The PSC's failure to even consider justification further underlines the need for the analysis the Legislature required in the CLCPA.

**B. A Section 7(3) Analysis Would Have Shown that the Transaction Has the Potential to Disproportionately Burden Disadvantaged Communities.**

CLCPA Section 7(3) prohibits state agencies from making decisions that would disproportionately burden a disadvantaged community and requires state agencies to reduce emissions of greenhouse gases and local pollution in such communities. Yet the PSC did not consider the impacts its decision would have on the communities surrounding the gas plant, even though at least one disadvantaged community is located within two miles of the facility and even though the facility is surrounded by census tracts already recognized by the State as already having an environmental burden greater than 90% of New York census tracts. The statutorily-

required analysis, which the PSC failed to undertake, would have at the very least raised significant issues under Section 7(3) of the CLCPA.

It is clear that the PSC's decision to approve the Transaction is likely to disproportionately burden communities that Section 7(3) protects: the gas plant is less than two miles from a draft disadvantaged community and an interim disadvantaged community. As a result of the PSC's decision, the gas plant will emit higher levels of air pollution including nitrogen oxides, volatile organic compounds, particulate matter, sulfur dioxide, and Hazardous Air Pollutants, in addition to increased greenhouse gas emissions. *See* Exhibit 11 at 4 (October 2021 Sierra Club Comments); Exhibit 23 at 5–6, 30 (2021 Fortistar Title V and Title IV Permits Renewal Application). These are precisely the co-pollutants that the CLCPA seeks to reduce in disadvantaged communities, and are likely to cause or contribute to the type of disproportionate burden that the CLCPA requires state agencies to avoid. *See* ECL § 75-0101(3); CLCPA § 7(3); *see also* N.Y. State Climate Action Council, 6.2 Prioritizing Measures to Reduce Greenhouse Gas Emissions and Co-Pollutants in Disadvantaged Communities in Chapter 6: Advancing Climate Justice, Scoping Plan Full Report December 2021 at 64 (discussing the CLCPA's mandate to reduce co-pollutants including nitrogen oxides, particulate matter, and air toxics in disadvantaged communities). The PSC's failure to consider any of this represents a complete disregard of the requirement imposed by Section 7(3) of the CLCPA.

### CONCLUSION

For these reasons, Clean Air and Sierra Club request that the Court grant the Verified Petition, enter a judgment against Respondents declaring that the PSC's September 15, 2022 declaratory ruling is affected by an error of law, vacate the PSC's September 15, 2022

declaratory ruling, award Petitioners-Plaintiffs litigation costs, and any other relief the Court considers necessary and proper.

Dated: January 13, 2023  
New York, NY

Respectfully submitted,



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Dror Ladin  
Mandy DeRoche  
Jessamine De Ocampo  
Hillary Aidun  
Earthjustice  
48 Wall St., 15th Floor  
New York, NY 10005  
Tel: (212) 845-7392  
dladin@earthjustice.org

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

**CERTIFICATE OF COMPLIANCE**

The undersigned counsel certifies that the foregoing affidavit complies with the requirements of 22 NYCRR § 202.8-b because it was prepared on a computer using Microsoft Word, and it contains 5976 words (excluding the caption, signature blocks, table of contents, table of authorities, and this certificate) as computed by Microsoft Word.

Dated: January 13, 2023



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Dror Ladin  
Mandy DeRoche  
Jessamine De Ocampo  
Hillary Aidun  
Earthjustice  
48 Wall St., 15th Floor  
New York, NY 10005  
Tel: (212) 845-7392  
dladin@earthjustice.org

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