# APPELLATE COURT CLARIFIES SCOPE OF REQUIRED CLCPA COMPLIANCE AND CONFIRMS RIPENESS UNDER SAPA FOR CHALLENGES TO AGENCY DECLARATORY RULINGS

*Hodgson Russ Renewable Energy Alert*
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A legal challenge to a fossil fuel powered cryptocurrency mining operation in North Tonawanda was revived by the Third Department, overturning dismissal of a lawsuit filed by the Clean Air Coalition of Western New York ("CACWNY") and the Sierra Club. While the decision turned on the narrow issue of ripeness where a rehearing of a declaratory ruling had been requested, the Appellate Division's ruling against the New York State Public Service Commission ("PSC") effectively widened the scope of state agency actions requiring consideration of impacts under the State Climate Leadership and Community Protection Act ("CLCPA"). The environmental groups' challenge to the PSC's decision to allow Canadian company Digihost International, to purchase the Fortistar natural gas-fired power plant in North Tonawanda, with the goal of using the plant to support a cryptocurrency mining operation, was remanded to Albany County State Supreme Court for further proceedings.

**Factual/Administrative Background**

In early 2021, respondent Digihost International, Inc. proposed a transaction to acquire the entire interest in respondent Fortistar's North Tonawanda, LLC from respondent North Tonawanda Holdings, LLC (collectively "the crypto respondents"). This transaction would transfer a natural gas-fired cogeneration facility in the City of North Tonawanda, which Digihost sought as a power source for its proposed cryptocurrency mining operation at the cogeneration site.

In April 2021, Fortistar and Digihost petitioned the PSC seeking a declaratory ruling that the proposed transaction did not warrant further review under Public Service Law §§ 70 and 83 or, alternatively, PSC approval of the transaction by finding it in the public interest under those statutes. Petitioner Sierra Club, along with Earthjustice, filed a joint comment in response, with petitioner CACWNY filing a separate comment. These comments criticized the environmental impacts of using a gas-fired facility for cryptocurrency mining and claimed that the transaction undermined the emission reduction objectives of the New York State Climate Leadership and Community Protection Act ("CLCPA").


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In September 2022, the PSC granted Digihost and Fortistar's petition, finding that the proposed transaction did not require further PSC review (the "declaratory ruling"). The PSC also determined that the environmental concerns raised by the petitioners and others were outside of the limited scope of the proceeding. In October 2022, petitioners requested a rehearing on the topic pursuant to Public Service Law § 22 and 16 NYCRR 3.7.

**Supreme Court Action**

While this rehearing request was pending, petitioners commenced an action challenging the declaratory ruling on the basis that the PSC unlawfully ignored the requirement of sections 7(2) and (3) of the CLCPA. They argued that these sections required the PSC to consider the impact on the environment and disadvantaged communities when it reviewed the proposed transaction. Petitioners also sought a preliminary injunction from the Supreme Court enjoining the transaction pending further disposition.

The PSC, as well as the crypto respondents, separately moved pre-answer for dismissal. The PSC asserted that the declaratory ruling was not ripe for review and that the petitioners lacked standing, as they did not identify an injury-in-fact. In their motion, the crypto respondents asserted that petitioners' claim was moot due to the closing of the transaction. Petitioners opposed, but the Supreme Court ultimately granted the PSC's motion to dismiss, finding that the declaratory ruling was not ripe for review because of the pending application for a rehearing.

**Appellate Action**

Petitioners appealed the dismissal. While this appeal was pending, the PSC issued a written decision in June 2023 which denied petitioners' application for a rehearing. The Third Department considered several issues on appeal, including whether the matter was ripe at the time the Supreme Court considered the petition, and whether the appeal had been rendered moot by this subsequent determination on petitioners' request for a rehearing.

On the topic of ripeness, the court found that the declaratory ruling issued by the PSC was quasi-judicial in nature and was "accorded the [same] conclusiveness that attaches to judicial judgments" when it was issued, which rendered the ruling ripe for review when issued and not subject to change by the PSC including in response to a rehearing petition. Even though the petitioners requested that the PSC rehear the petition for a declaratory ruling at the lower court level, on appeal they argued a rehearing was not permitted by the plain language of State Administrative Procedure

Act ("SAPA") § 204. The appellate court agreed that under SAPA § 204(1), "[a] declaratory ruling shall be binding upon the agency unless it is altered or set aside by a court" by virtue of a CPLR article 78 proceeding. The court held that this provision does not permit an agency to "retroactively change a valid declaratory ruling," and only allows such changes to apply "prospectively." Because the PSC could not modify its initial ruling concerning its immediate applicability to petitioners and the crypto respondents, the rehearing petition did not render the appeal not ripe for review.

The court also disagreed with the crypto respondents' assertion that the appeal was moot because the challenged transaction had been completed and could not be unwound. The crypto respondents argued that the completion of the transaction and the degree of construction and improvement to the facilities that Digihost and Fortistar had undertaken since the declaratory ruling was issued could not be unwound without great cost. To resolve this issue, the court considered the nature of the specific relief sought by petitioners in their comments to the original petition for a declaratory ruling, which suggested the availability of potential relief short of completely unwinding the transaction. Because petitioners asked the PSC to engage in an analysis pursuant to CLCPA § 7(2), which expressly 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 [ECL] article 75," the court found that relief could potentially be granted without a total unwinding of the transaction. Because this provision of CLCPA also provides that if an inconsistency is found, the agency "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," the court pointed to the fact that such alternative relief is available.

The judgment was reversed, and the matter was remitted back to Supreme Court for further proceedings. Hodgson Russ will continue to monitor this case and other matters relating to evolving interpretations of obligations under CLCPA. If you have questions on any PSC proceedings and CLCPA compliance, please contact **John Dax**, **Daniel Spitzer**, **William McLaughlin** or a member of our **Renewable Energy Practice**.

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