

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Petition of Fortistar North Tonawanda LLC and
Digihost International Inc. for Declaratory Ruling
Regarding Application of Sections 70 and 83 of
the New York State Public Service Law, and, in
the Alternative, Approval of the Proposed
Transaction Pursuant to Sections 70 and 83

Case 21-M-_____

**PETITION FOR DECLARATORY RULING REGARDING APPLICATION
OF SECTIONS 70 AND 83 OF THE NEW YORK STATE PUBLIC SERVICE
LAW, AND, IN THE ALTERNATIVE, APPROVAL UNDER SECTIONS 70 AND 83**

Joseph N. Williams II
In-House Counsel
Digihost Technology Inc.
1001 E. Delavan Ave.
Buffalo, NY 14215
716-570-0277
nick@digihostblockchain.com

David B. Johnson
Zachary W. Perdek
READ AND LANIADO, LLP
25 Eagle Street
Albany, NY 12207
518-465-9313
dbj@readlaniado.com
zwp@readlaniado.com

Attorney for Digihost International Inc.

*Attorneys for Fortistar North
Tonawanda LLC*

Dated: April 15, 2021

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I. INTRODUCTION

Pursuant to Part 8 of the Rules and Regulations of the New York State Public Service Commission (“Commission”), 16 NYCRR Part 8, Fortistar North Tonawanda LLC (“FNT”) and Digihost International Inc. (“Digihost”) (collectively, the “Petitioners”) hereby petition the Commission for a declaratory ruling that the proposed transfer of the upstream ownership interests in FNT requires no further review under Sections 70 and 83 of the New York Public Service Law (“PSL”). Specifically, Digihost will acquire, indirectly, all of the ownership interests of FNT (the “Transaction”)—the direct owner of a natural gas-fired cogeneration facility (the “Facility”) subject to the Commission’s lightened regulation.¹ In the alternative, the Petitioners request that the Commission approve the Transaction under PSL Sections 70 and 83 and any other statutory or regulatory provision deemed applicable.

¹ See Case 15-M-0642, *Petition of Fortistar North Tonawanda Inc. for Certificate of Public Convenience and Necessity Pursuant to Public Service Law § 81 and Petition for an Order Providing Lightened and Incidental Regulation*, Order Granting Certificates of Public Convenience and Necessity and Providing for Lightened and Incidental Regulation (Nov. 18, 2019) (“FNT Order”).

No competitive issues are raised by the Transaction nor will it cause any harm to the interests of captive utility ratepayers. The Transaction will not result in the potential to exercise either vertical or horizontal market power.

II. BACKGROUND

A. The Parties

1. FNT

FNT, a Delaware limited liability company, is the owner and operator of the Facility. FNT is wholly-owned by North Tonawanda Holdings LLC (“North Tonawanda Holdings”), which is wholly-owned by Generational Power LLC. Generational Power LLC is wholly-owned by Fortistar Projects LLC, which is wholly-owned by Fortistar LLC (“Fortistar”) except for a variable non-voting interest in Fortistar Projects LLC owned by FIP LLC. FIP LLC is a partnership owned by current and former Fortistar employees. Fortistar, a Delaware limited liability company, engages in the generation or sale of power only from, or has ownership interests only in the Facility and other electric facilities that are Qualifying Facilities, exempt wholesale generators, or foreign utility companies.

The Facility is a 55 MW natural gas-fired cogeneration facility located in North Tonawanda, New York. In the FNT Order, the Commission granted FNT certificates of public convenience and necessity (“CPCNs”) pursuant to Sections 68 and 81 of the PSL.² The Facility is interconnected with the transmission system of Niagara Mohawk Power Corporation d/b/a National Grid (“National Grid”) and sells energy, capacity, and ancillary services exclusively at wholesale. The Facility also is capable of delivering its thermal energy output through a 13,200-

² See *id.* at 16.

foot, 8-inch diameter steam pipe to a local greenhouse facility that produces vegetables, but, currently, the greenhouse facility is not purchasing thermal energy from the Facility.

2. Digihost

Digihost is a wholly owned subsidiary of Digihost Technology Inc. (“DTI”) formed for the purposes of acquiring the indirect ownership interests in FNT. DTI, a British Columbia company, is a publicly traded growth-oriented blockchain technology company primarily focused on cryptocurrency mining. Its subordinate voting shares are listed for trading on the TSX Venture Exchange under the symbol “DGHI”, and on the OTCQB under the symbol “HSSHF”. Michel Amar, a private individual, owns approximately 27% of the outstanding voting shares of DTI. No other shareholder of DTI owns more than 10% of the outstanding shares of DTI.

B. The Transaction

Pursuant to a member interest purchase agreement between North Tonawanda Holdings and Digihost, Digihost will acquire from North Tonawanda Holdings 100% of the membership interests in FNT. As a result of the Transaction, FNT will cease to be affiliated with Fortistar.

III. THE COMMISSION SHOULD DECLARE THAT THE WALLKILL PRESUMPTION APPLIES TO THE TRANSACTION AND DECLINE TO FURTHER REVIEW IT UNDER PSL § 70 AND § 83 OR, IN THE ALTERNATIVE, APPROVE IT UNDER PSL § 70 AND § 83.

PSL § 70 and § 83 impose nearly identical requirements requiring, *inter alia*, written consent of the Commission for transfer of a sufficiently controlling interest in electric and steam plants, respectively, including ownership transfer at a holding company (*i.e.*, upstream) level.³

³ See, e.g., Case 07-E-1385, *Calpine Corp. and LS Power Development*, Declaratory Ruling on Review of Stock Transfer and Acquisition Transactions (Jan. 22, 2008), at 15; Case 13-M-0028, *RED-Rochester LLC and Eastman Kodak Company - Petition for Approval to Transfer Regulated Utility Assets at Eastman Kodak Park, Approval to Transfer Certificates of Public Convenience and Necessity, for Continued Lightened and Incidental Regulation, Approval of Financing, and Authorization, to the Extent Necessary, for Submetering*, Order Approving Transfer

However, in the Wallkill Order, the Commission established a lightened regulatory regime for wholesale generators in New York under which PSL Section 70 review of changes in ownership is not required.⁴ With respect to transactions pursuant to both PSL § 70 and § 83, it was presumed in the Carr Street and Wallkill Orders that regulation would not adhere to the transfer of ownership interests in entities upstream from the parent of a New York competitive subsidiary, “unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption” (the “Wallkill Presumption”).⁵ The Commission granted FNT such lightened regulation and afforded it the Wallkill Presumption for transfers of ownership interests in its upstream parent entities.⁶

In past decisions, the Commission has determined that the Wallkill Presumption applies to transactions involving upstream changes in control of lightly regulated entities and has declined to review those transactions under PSL Sections 70 and 83 when it has determined that the transactions would not provide the petitioners with the ability to exercise horizontal or vertical market power or to harm the interests of captive New York ratepayers.⁷ As discussed more fully above, the Transaction involves a change in the ownership interests in parent entities

Subject to Conditions Providing for Lightened Ratemaking Regulation, and Making Other Findings (May 30, 2013) (“RED-Rochester Order”) (confirmed by Case 13-M-0028, *supra*, Order Confirming Prior Order and Granting Certificates of Public Convenience and Necessity (June 13, 2013)).

⁴ Case 91-E-0350, *Wallkill Generating Company, L.P.*, Order Establishing Regulatory Regime (Apr. 11, 1994) (“Wallkill Order”); *see also* Case 14-E-0195, *Bayonne Energy Center, LLC et al.*, Order Modifying Lightened Ratemaking Regulation Authorizations and Approving Financing and Declaratory Ruling on a Transfer Transaction (Aug. 15, 2014).

⁵ RED-Rochester Order at 36 (quoting Case 98-E-1670, *Carr Street Generating Station, L.P.*, Order Providing For Lightened Regulation (Apr. 23, 1999) (“Carr Street Order”); Wallkill Order at 8).

⁶ FNT Order at 10.

⁷ *See, e.g.*, Case 12-M-0351, *Dynegy Inc. and Franklin Resources, Inc.*, Declaratory Ruling on Review of a Stock Acquisition Transaction (Sept. 14, 2012); Case 09-E-0055, *Constellation Energy Nuclear Group LLC et al.*, Declaratory Ruling on Review of a Transfer Transaction (Apr. 23, 2009); Case 06-M-0210, *Constellation Energy Group, Inc. and FPL Group, Inc.*, Declaratory Ruling on Review of Ownership Interest Transfer (July 25, 2006); RED-Rochester Order at 36..

upstream from the entity owning and operating a New York competitive cogeneration facility. Petitioners request that the Commission follow its precedent, continue to afford FNT the Wallkill Presumption, and issue a declaratory ruling stating that the Commission need not further review the Transaction described herein under PSL § 70 and § 83.

The Transaction does not create the potential for the exercise of horizontal or vertical market power. Digihost, its affiliates, and Michel Amar do not own or control, directly or indirectly, any facilities for the generation, transmission, distribution, or sale of electric or thermal energy, or have substantial influence over inputs, like fuel or fuel transportation, into the production of generation supply, in the United States.

Nor will the Transaction result in any adverse impacts to captive ratepayers in New York. There will be no change in the day-to-day operations of the Facility as result of the Transaction. NAES Corporation (“NAES”), a contract operator and maintenance provider to the Facility since May 2002, will continue in a similar capacity. NAES, an Issaquah, Washington based company, is an independent services provider with extensive experience in optimizing the performance of energy facilities across the power generation, oil and gas and petrochemical industries. In addition, since May 2002, Fortistar Services LLC (“FS”), a wholly owned subsidiary of Fortistar LLC, has provided general management and administrative services to FNT. FS will continue to provide energy market and fuel procurement consulting services to Digihost.

If the Commission decides to review the Transaction pursuant to PSL § 70 and § 83, the Commission should approve the Transaction as in the public interest for the reasons discussed above.

IV. CONCLUSION

WHEREFORE, Petitioners respectfully request that the Commission issue a declaratory ruling that further review of the Transaction is not required, or, in the alternative authorize the Transaction under PSL § 70 and § 83, without condition, as in the public interest. Petitioners respectfully request that the Commission issue an order no later than its June 17, 2021 session.

Dated: April 15, 2021

Respectfully submitted,

Joseph N. Williams II
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In-House Counsel
Digihost Technology Inc.
1001 E. Delavan Ave.
Buffalo, NY 14215
716-570-0277
nick@digihostblockchain.com

Attorney for Digihost International Inc.

David B. Johnson
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VERIFICATION

I, Michel Amar as CEO, of Digihost International Inc. do hereby affirm that the contents of this document are true to the best of my knowledge and belief.

Signed: _____
Date: April 14, 2021

STATE OF Calif)
COUNTY OF Los Angeles) ss.;

On this 14th day of April, 2021, before me, the undersigned notary public, personally appeared Michel Amar proved to me through satisfactory evidence of identification, which was Calif. (state form of Driver's License identification or state that the signer is personally known to the notary), to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he)/(she) signed it voluntarily for its stated purpose.

Yolanda Thunderwolf
Notary Public
My commission expires:

