SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF YATES

In the Matter of the Application of

GREENIDGE GENERATION LLC,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

Petitioner-Plaintiff,

-against-

Index No.: 2024-5221

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ACTING COMMISSIONER SEAN MAHAR, In his Official Capacity as Acting Commissioner,

Respondents-Defendants,

SENECA LAKE GUARDIAN, THE COMMITTEE TO PRESERVE THE FINGER LAKES, and SIERRA CLUB,

Intervenors-Respondents.

PETITIONER-PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Petitioner-Plaintiff Greenidge Generation LLC ("Greenidge" or "Petitioner") submits this reply memorandum of law in support of its motion to preserve the status quo. The Court can (and should) preserve the status quo and, any undertaking, assuming one is required, should be nominal.

ARGUMENT

I. A PRELIMINARY INJUNCTION IS WARRANTED TO PRESERVE THE STATUS QUO

A. GREENIDGE IS LIKELY TO SUCCEED ON THE MERITS

As demonstrated in Greenidge's original papers and its papers filed contemporaneously with this reply, Greenidge has demonstrated a likelihood of success. *Cangemi v. Yeager*, 185 A.D.3d 1397, 1398 (4th Dep't 2020) ("To demonstrate a likelihood of success on the merits, it is sufficient for the moving party to make a prima facie showing of his or her right to relief, and the actual proving of the case should be left to the full hearing on the merits") (internal quotation marks and citations omitted).

The Department's denial of Greenidge's application to renew its Title V air permit is contrary to the plain language of Section 7(2). Further, even though the Department's actions here, and under Section 7(2) generally, have largely been kept behind closed doors, the limited information publicly available demonstrates the Department's arbitrary and capacious decision making in denying Greenidge's Title V renewal application. Indeed, even the Department's arguments before this Court are directly at odds with the Denial in this matter, their own adopted guidance documents, and their actions in other permitting matters. *See, generally,* Greenidge's Reply Memorandum of Law.

B. IRREPARABLE HARM WILL OCCUR ABSENT INJUNCTIVE RELIEF

Greenidge has established through multiple affidavits, that Greenidge, its employees, and the surrounding community will suffer irreparable harm if the status quo is not preserved.[1] With one limited exception,[2] Respondents do not challenge the harm established by Greenidge in its opening papers. NYSCEF Doc. 30, Point II; *see, generally,* NYSCEF Doc. 31. Instead, the Department offers only conclusory assertions that (1) the harm is not specific to Greenidge (and thus, apparently irrelevant), (2) the unrefuted economic harm to Greenidge is "generally insufficient[,]" and (3) Greenidge has not shown a reliability need. NYSCEF Doc. 97, pp. 33-34. The Department and Intervenors also – in complete contravention of the Department's basis for denying Greenidge's renewal application – maintain that Greenidge can continue to operate its cryptocurrency operations without the electric generating facility. NYSCEF Doc. 97, p. 34; NYSCEF Doc. 109, p. 13-14. The Court should reject Respondents' arguments.

First, Greenidge has demonstrated harm to itself – harm that Respondents do not contest. Indeed, if the status quo is not preserved, Greenidge will have to cease operating both the electric generating facility and the cryptocurrency operations. *See* Irwin Reply Aff., ¶¶ 6, 9, 36. Not only will this cause economic harm, it will harm Greenidge's goodwill – both of which are irreparable and relevant. While Respondents assert that economic harm is "generally" insufficient, that is not the case here.

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[1] Indeed, this is likely why, contrary to its own then-existing Part 624 regulations and precedent, the Department cancelled the adjudicatory hearing below to avoid a full hearing record establishing the need for the electric generating facility.

[2] Intervenors merely challenge the number of employees that would lose their jobs. *See* NYSECF Doc. 109, pp. 14-16 . However, as further confirmed by the Reply Affidavit of Dale Irwin, dated October 21, 2024 ("Irwin Reply Aff."), if the status quo is not preserved and the generating facility must shutter, 29 employees will lose their job.

The reason why economic harm is generally deemed insufficient is because, unlike here, economic harm usually can be compensated. *See Mangovski v. DiMarco*, 175 A.D.3d 947, 949 (4th Dep't 2019) ("[e]conomic loss, *which is compensable by money damage*s, does not constitute irreparable harm" (citing *EdCia Corp. v McCormack*, 44 A.D.3d 991, 994 [2d Dep't 2007]) (emphasis added). However, the Department has not offered to compensate Greenidge for lost revenue and other economic harm if the Denial is ultimately overturned – as we fully expect will be that case – and it is highly unlikely that Greenidge could successfully assert legal claims for monetary compensation against the Department in court. In addition to these unrecoverable economic losses, the failure to preserve the status quo would result in the loss of many highly trained, skilled workers who may not be available for rehire when this case is finally resolved. Irwin Reply Aff., ¶ 22. The costs and challenges of reconstituting Greenidge's workforce would be substantial and could have lasting impacts on Greenidge's electric generating and cryptocurrency operations. *Id*.

Further, "[t]he loss of goodwill of viable, ongoing business" constitutes irreparable harm. *P.M.W.A. Hair Stylist Inc. v. Wood*, 76 Misc. 3d 1212(A), (Sup. Ct. NY Co. 2022) (*citing Advent Software, Inc. v. SEI Global Services, Inc.*, 195 A.D.3d 498, 499 (1st Dep't 2021)); *see Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 A.D.3d 255, 272-73 (1st Dep't 2009) ("the loss of the goodwill of a viable, ongoing business" constitutes "irreparable harm warranting the grant of preliminary injunctive relief"); *FTI Consulting, Inc. v PricewaterhouseCoopers LLP*, 8 A.D.3d 145, 146 (1st Dep't 2004) (loss of goodwill constitutes irreparable harm because it is not "readily quantifiable"); *Darwish Auto Grp., LLC v. TD Bank, N.A.*, 197 N.Y.S.3d 926 (Sup. Ct., Albany Co. 2023) ("The Court has no doubt that the loss of a business, customers or goodwill may constitute irreparable harm sufficient to warrant preliminary injunctive relief."). If the status quo

is not preserved, Greenidge's goodwill will be harmed, regardless of the outcome of its Petition. *See* Irwin Reply Aff., ¶ 22.

Second, Greenidge has demonstrated harm more broadly to grid reliability and resiliency. Respondents seek to distract from the undeniable fact that the Greenidge generating facility supplies power to the grid every single day it operates. The alleged absence of "evidence" to show a reliability need is simply beside the point for this motion and evidences a complete lack of understanding of the power grid. Greenidge does not just decide to sell power to the grid when it feels like it. It must be called upon by the NYISO to do so and its approval to use behind-the-meter generation requires that it still be available to supply some or even all of its electricity to the grid as directed by NYISO on any given day, especially times of high energy demand during summer and winter. *See* Irwin Reply Aff., p. 3, n. 2. Further, as Greenidge planned to explain as part of an adjudicatory hearing – focusing only on reliability ignores, among other things, grid resiliency benefits.

Third, State Respondents and Intervenors assert that Greenidge would not be irreparably harmed if the status quo is not preserved because "Greenidge could continue computing operations without running the [electric generating facility] to power those operations. NYSCEF Doc. 97, p.34; *see also* NYSCEF Doc. 109, p. 13 ("Greenidge's cryptocurrency mining operations—its primary revenue source—may continue without the Facility's gas plant operation."). This is nonsensical and demonstrates, yet again, the arbitrary and capricious nature of the Department's decision-making. Indeed, the Denial is based, not just on an increase in greenhouse gas emissions, but more specifically on an increase in greenhouse gases due to the facility's change in "primary purpose" to power, behind the meter, its cryptocurrency operations. NYSCEF Doc. 13, p. 8. As detailed in the Denial:

> [T]he Department hereby determines that the Facility's continued operation in its current manner would be inconsistent with or would interfere with the attainment of the Statewide GHG emission limits established in Article 75 of the ECL and reflected in Part 496. As explained further below, this determination is based primarily on the following factors: (1) the actual GHG emissions from the Facility have drastically increased since the time of the Title V permit issuance in 2016 and since the effective date of the CLCPA in 2020; (2) this increase in GHG emissions is primarily due to the fact that Greenidge has substantially altered the primary purpose of the Facility's operation, from providing electricity to the grid in a "peaking" capacity to powering its own energy-intensive Proof-of-Work (PoW) cryptocurrency mining operations behind-the-meter; and (3) renewal of the Title V permit would allow Greenidge to continue to increase the Facility's actual GHG emissions through the increased combustion of fossil fuels, for the benefit of its own behind-the-meter operations. (NYSCEF Doc. 13, 8).

The Department then confirms this basis for denial in the Final Decision. NYSCEF Doc. 21, p. 23.

Not only is the Department's flip-flopping telling, it is also bereft of fact. If the generating facility cannot operate, the cryptocurrency operations also must cease operations because Greenidge is unable to immediately switch to obtaining electricity from the grid, resulting in significant harm to Greenidge, its employees, and the wider community. *See* Irwin Reply Aff., ¶ 22. Even assuming arguendo that the cryptocurrency operations could continue operating by immediately securing power from the grid, it is a fallacy to think that will result in greenhouse gas emission reductions. *See* Irwin Reply Aff., ¶ 11.

In short, Greenidge has established irreparable harm sufficient for the status quo to be preserved during the time necessary for the Court to consider and decide Greenidge's Petition.

C. THE BALANCE OF THE EQUITIES WEIGHS IN FAVOR OF GREENIDGE

In attempting to assert that a balancing of the equities tips against Greenidge, the State Respondents and Intervenors merely assert that "[t]he Legislature found that Climate Change poses a danger[.]" NYSCEF Doc. 97, p. 35;[3] NYSCEF Doc. 109, p. 19. There is no specific

[3] The State Respondents also point to their recent claims that Greenidge violated its Title V permit. This argument

prejudice identified. Indeed, given that the CLCPA's first relevant milestone for GHG emission reductions is more than five years out in 2030, they cannot.

As detailed in Greenidge's opening papers, the equities weigh in Petitioner-Plaintiff's favor because this injunction merely seeks to preserve the status quo. *See Ulster Home Care, Inc. v. Vacco*, 255 A.D.2d 73, 76 (3d Dep't 1999) (the purpose of a preliminary injunction is to preserve the status quo during the pendency of the action); *N. Fork Distribution, Inc. v. N.Y. State Cannabis Control Bd.*, 81 Misc. 3d 952, 964 (Sup. Ct. Albany Co. 2023) ("once the injunctive test has proceeded to this ultimate prong, the determination of equities does not occur in a vacuum. Rather, where the movant, as petitioners have done here, satisfies both the merits and irreparable injury prongs, the balance of the equities always tips in the movant's favor absent some greater hardship that the nonmovant would suffer should the injunction issue") (citing *New York State Off. of Victim Servs. on behalf of Sutton v Wade*, 79 Misc. 3d 254, 261 [Sup. Ct., Albany Co. 2023]). If the status quo is not preserved, Greenidge will suffer both economic and non-economic harm – neither of which is compensable. Greenidge's employees, Yates County, and the general public at large will also be harmed.

D. ANY UNDERTAKING MUST BE NOMINAL

The State Respondents suggest that the price to preserve the status quo is Greenidge must post an undertaking of over $6 million based on the alleged social cost of the estimated greenhouse gases that the facility will release during the pendency of this proceeding. NYSCEF Doc. 97, p. 2, fn 1, p. 37; *see also* NYSCEF Doc. 109, p. 21 (pointing to social cost of carbon). This is absurd

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is irrelevant to the instant proceeding. It also ignores the factual circumstances surrounding the alleged violations, the majority of which were miscommunications over recordkeeping, and conveniently omits the fact that, at the time of the State Respondents' filing, Greenidge and the Department had negotiated a revised consent order and agreed upon a significantly lower fine – a decision that Greenidge made without acknowledging fault and solely to avoid the costs of defending itself in an administrative proceeding. *See* Hennessey Reply Aff., ¶¶ 45-46, Exh. L.

on its face and certainly not "rationally related to the potential damages that [Respondents] could recover if an injunction is ultimately deemed unwarranted." NYSCEF Doc. 109, p. 21 (quoting *Cooperstown Capital, LLC v. Patton*, 60 A.D.3d 1251, 1253 (3d Dep't 2009); *see also Margolies v. Encounter, Inc.*, 42 N.Y.2d 475, 477 (1977) ("the purpose and function of an undertaking … is to reimburse the defendant for damages sustained if it is later finally determined that the preliminary injunction was erroneously granted."); CPLR 6312(b).

In the unlikely event that Greenidge ultimately must surrender it Title V permit, there are ***no*** legal theories on which Respondents could ever recover any possible damages from Greenidge. Indeed, the State Respondents do not even allege as much and their attempt to request $6,300,957.18 is preposterous on its face. *See Hofstra Univ. v. Nassau County, N.Y.*, 166 A.D.3d 863, 865 (2nd Dep't 2018) (undertaking "must not be based upon speculation and must be "rationally related to the [amount of potential] damages") (internal quotation marks and citations omitted); *compare* NYSCEF Doc. 109, p. 21 ("nearly impossible to quantify the potential damages"). Moreover, from a policy perspective, Respondents' demand for a multimillion dollar undertaking based on the alleged social cost of carbon would have a chilling effect on future meritorious efforts to hold the Department accountable for its CLCPA Section 7(2) decision-making.

Accordingly, Greenidge respectfully asks that any undertaking, if deemed necessary by the Court, should be nominal. *See Sardino v. Scholet Family Tr.*, 192 A.D.3d 1433 (3d Dep't 2021) (upholding nominal undertaking).

II. SAPA 401 PROVIDES AN INDEPENDENT BASIS TO PRESERVE THE STATUS QUO

Notwithstanding the foregoing, the Court can extend Greenidge's Title V permit independent of CPLR § 5519(c). Section 401(2) of the State Administrative Act ("SAPA")

provides that where a timely permit renewal application has been made, the permit does not expire "until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order *or a later date fixed by order of the reviewing court*[.]" This language would be rendered superfluous if a preliminary injunction and undertaking were required. Rather, the language authorizes the court to establish the date until which the permit remains SAPA-extended.[4]

Here, there is no dispute that Greenidge submitted a timely application to renew its Title V permit. A.R. 0000209. It is also not disputed that Greenidge sought review of the Denial within the applicable statute of limitations. NYSCEF Docs. 1, 2. The parties then stipulated that Greenidge's Title V permit remained valid and SAPA-extended until November 1, 2024. NYSCEF Doc. 66. Accordingly, now that the matter is pending before the Court, it is entirely appropriate that the Court fix the date on which Greenidge's Title V permit remains SAPA-extended. Given the expectation of appeals, Greenidge respectfully requests that the Court set that date as 30 days following the conclusion of any and all appeals.

[4] Tellingly, Greenidge was unable to find any factually similar cases in which a preliminary injunction motion was decided – strongly suggesting that one is not necessary and SAPA 401(2) is sufficient to allow an existing facility to continue operating under a SAPA-extended permit in the event of an administrative denial.

CONCLUSION

For the foregoing reasons and the reasons stated in the Greenidge's original moving papers, the accompanying affirmations, affidavits, and the exhibits annexed thereto, Greenidge respectfully requests that this Court grant its application to preserve the status quo, and grant any other and further relief as this Court deems just and necessary.

Dated: October 24, 2024

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

As required by Uniform Rules for Trial Courts § 202.8-b(a), I hereby certify that the accompanying Memorandum of Law, which was prepared in Times New Roman 12-point typeface, contains 2,561 words, excluding the parts of the document that are exempted by § 202.8- b. This certificate was prepared in reliance on the word-count function of the word processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: October 24, 2024 */s/ Yvonne E. Hennessey*

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