

10/27/2022 Siting Board 20-F-0043

NEW YORK STATE BOARD ON
ELECTRIC GENERATION SITING AND
THE ENVIRONMENT

CASE 20-F-0043 - Application of Garnet Energy Center, LLC
for a Certificate of Environmental Compatibility and
Public Need Pursuant to Article 10 to Construct and
Operate a Solar Generating Facility and Energy Storage
System in the Town Conquest, Cayuga County.

Siting Board Meeting

Date: Thursday, October 27, 2022 @ 11:00 am

RORY M. CHRISTIAN, Chair of the New York State Public
Service Commission

LOUIS ALEXANDER, Alternate for Basil Seggos, Commissioner,
New York State Department of Environmental Conservation

DR. ELIZABETH LEWIS-MICHL, Alternate for Mary T. Bassett,
M.D., M.P.H., Commissioner, New York State Department of
Health

IAN WELLS, Alternate for Hope Knight, Commissioner, New
York State Department of Economic Development

JOHN WILLIAMS, Alternate for Richard L. Kauffman, Chair,
New York State Energy Research and Development Authority

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2 (The meeting commenced at 11:00 a.m.)

3 CHAIRMAN CHRISTIAN: Good morning, my

4 name is Rory Christian. I am the chair for the New

5 York State Board of Electric Generation Siting and

6 the Environment or as it is known the Siting Board.

7 I call this meeting of the siting board to order.

8 Before moving to the agenda, I would like to

9 introduce the alternates representing the permanent

10 members of the siting board. When I call your name,

11 please confirm that you are present. Louis

12 Alexander, alternate representing the commissioner of

13 the Department of Environmental Conservation?

14 MR. ALEXANDER: Present.

15 CHAIRMAN CHRISTIAN: Thank you. Dr.

16 Lewis -- I'm sorry, Dr. Elizabeth Lewis-Michl,

17 alternate representing the commissioner of the

18 Department of Health?

19 Dr. LEWIS-MICHL: Present.

20 CHAIRMAN CHRISTIAN: Thank you. Ian

21 Wells, alternate representing the commissioner of the

22 New York State Department of Economic Development.

23 MR. WELLS: Present.

24 CHAIRMAN CHRISTIAN: Thank you. John

25 Williams, alternate representing the chair of the New

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2 York State Energy Research and Development Authority?

3 MR. WILLIAMS: Present.

4 CHAIRMAN CHRISTIAN: Thank you. Madam
5 Secretary, are there any changes to the agenda?

6 SECRETARY PHILLIPS: There are no
7 changes to the agenda. However, I do just want to
8 take this opportunity to remind everyone to please
9 turn on your mic when you speak and speak loudly and
10 clearly into the microphone. Thank you.

11 CHAIRMAN CHRISTIAN: Thank you, Madam
12 Secretary. We will begin with Case 20-F-0043
13 Application of the Garnet Energy Center, L.L.C. for a
14 certificate of environmental compatibility and public
15 need pursuant to Article 10 to construct and operate
16 a solar generating facility and energy storage system
17 in the Town of Conquest, Cayuga County.

18 It will be presented today by Judge
19 Maureen Leary, administrative law judge of the
20 Department of Public Service. Gregg Sayre,
21 administrative law judge of the Department of Public
22 Service, Dakin Lecakes, chief administrative law
23 judge of the Department of Public Service, Michael
24 Stefanucci, chief administrative law judge of the
25 Department of Environmental Conservation, Jason Zehr

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2 chief of environmental certification in compliance
3 office of Electric Gas and Water of the Department of
4 Public Service, and Robert Rosenthal, general counsel
5 for the Department of Public Service are available
6 for questions. Judge Leary, please begin.

7 A.L.J. LEARY: Thank you. Good
8 morning Chair Christian and members of the siting
9 board. My name is Maureen Leary and Judge Gregg
10 Sayre and I were the presiding examiners in this
11 proceeding with Michele Stefanucci who is the
12 Department of Environmental Conservation chief judge
13 in their office of hearings.

14 The order before you today grants a
15 certificate of environmental compatibility and public
16 need with conditions to Garnet Energy Center, L.L.C.
17 pursuant to Public Service Law Article 10. This
18 order represents the 18th certificate the siting
19 board has issued for a renewable energy project since
20 the passage of what is called the New Article 10.
21 This project and the other renewable energy projects
22 collectively represent a major step forward in New
23 York's efforts to achieve its clean energy objectives
24 which are now codified in the Climate Leadership and
25 Community Protection Act or C.L.C.P.A.

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2 Today, after due consideration by in
3 consultation with senior advisory staff, the siting
4 board has before it a proposed order granting Garnet
5 Energy the authority to construct and operate its
6 solar energy facility in the Town of Conquest Cayuga
7 County. This order is based on an extensive
8 evidentiary record developed during the proceeding
9 which demonstrates that the siting board can make
10 each of the required findings under Public Service
11 Law Section 168 including, first, that the proposed
12 facility represents a beneficial addition to the
13 electric generation capacity of the state.

14 Second, that the project's
15 environmental impacts have been minimized and avoided
16 to the maximum extent practicable including but not
17 limited to impacts to protected fresh water wetlands,
18 streams and waterbodies, agricultural lands, visual
19 esthetics and cultural, historic, archeological and
20 recreational resources.

21 Third, the project does not
22 disproportionately impact the local community.

23 Fourth, it is designed to comply with
24 applicable substantive requirements of state and
25 local laws and regulations.

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2 And, finally, that the facility will
3 serve the public interest. I want to provide the
4 siting board members with the road map to my
5 presentation. First I will identify the parties to
6 the proceeding. I will then briefly describe the
7 project, sketch the procedural background including
8 public and notice and comment and other
9 participation, discuss the settlement proposal
10 submitted by certain parties, outline disputed legal
11 issues that the siting board is resolving in this
12 order. And I will identify the modification to
13 certain certificate conditions that were a part of
14 the settlement proposal.

15 The parties to this proceeding
16 included Garnet Energy a subsidiary of NextEra Energy
17 Resources. Also staff from the Departments of Public
18 Service, Environmental Conservation and Agriculture
19 and Markets participated. The Town of Conquest and a
20 local citizens group known as Rural Preservation and
21 Net Conservation Benefit Coalition participated. I
22 will refer to the citizen's group as Rural
23 Preservation. And finally Eugene Moretti, an
24 individual who resides in the community in which the
25 project will be located.

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2 The extensive evidentiary record on
3 which this order is based includes the initially
4 filed June 2021 application and the subsequently
5 filed supplemental and updated application materials
6 filed in September 2021 and January 2022
7 respectively.

8 Garnet Energy and the parties also
9 filed expert testimony, exhibits, legal briefs and
10 discovery. In March 2022 Garnet Energy filed a
11 settlement proposal that contained proposed
12 certificate conditions, a site engineering and
13 environmental plan guide or SEEP guide and a
14 complaint resolution protocol. D.P.S. staff agreed
15 to the proposal as a whole, but D.E.C. staff, who
16 signed on to the proposal, objected to numerous
17 certificate conditions and SEEP guide provisions.

18 These were primarily related to
19 environmental impacts presented by the project. So
20 although D.E.C. staff agreed to certain parts of the
21 settlement, it essentially disputed Garnet's
22 position, that will sound familiar to the siting
23 board, that certain wetlands at the project site that
24 do not appear on the state's official freshwater
25 wetlands -- wetlands maps, were not subject to

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2 protection by the siting board specifically under
3 either Article 10 or Article 24 and the implementing
4 regulations that require compensatory mitigation for
5 impacts.

6 Compensatory mitigation meaning the
7 restoration or enhancement of existing impacted
8 wetlands or the creation of new wetlands if wetland
9 functions and benefits are adversely impacted or
10 destroyed. The Town of Conquest and Rural
11 Preservation and Mr. Moretti objected to the
12 settlement proposal as a whole.

13 Let me present a brief description of
14 the project. Garnet Energy's application sought
15 approval to construct and operate a 200 megawatt
16 commercial scale solar energy -- solar electric
17 generation facility with a 20 megawatt energy storage
18 system and other associated components covering
19 approximately 900 acres of a 2,288 acre project site.
20 The project includes 12.3 miles of access roads, 25.5
21 miles of underground collection system lines, a 2.7
22 acre switch yard, a collection system substation on
23 approximately half an acre and associated parking
24 areas, staging laydown yards as well as a point of
25 interconnection facility.

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2 Turning to public notice and comment
3 of the proceeding and the project, it was robust and
4 fair and open during the entire Article 10 review
5 process. It included input from the host community
6 Town of Conquest as well as area residents. The town
7 and Rural Preservation were both awarded
8 preapplication as well as application stage
9 intervenor funds which were used for the retention of
10 counsel and consulting experts who provided
11 information to the siting board during the
12 proceeding.

13 Public notice about the project was
14 provided at significant milestones beginning with
15 Garnet's filing of the public involvement program
16 plan that initiated the proceeding. D.P.S. staff
17 notably testified that the PIP plan, as it's known,
18 was followed throughout the proceeding. Garnet
19 Energy's application materials were made available to
20 the public through the Department of Public Service's
21 document and matter management system or D.M.M.
22 system. It was also available on Garnet Energy's
23 website, and in the Town of Conquest town hall and
24 local public libraries in the project area where my
25 understanding is there were hardcopies made

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2 available.

3 Garnet held several open house public
4 meetings about the project and the town also held a
5 public meeting and provided numerous public comments
6 received at that time during the project. It's worth
7 noting that the town as well as Cayuga County were
8 instrumental in requesting and having the Judge Sayre
9 and I visit the project site. Judge Sayre was with
10 the parties in August and both Cayuga County and the
11 town felt that that was critically important to the
12 siting board's consideration of the -- of the
13 project.

14 Several notices related to the project
15 also were published periodically in area newspapers.
16 On February 3rd, 2022 Judge Sayre and I oversaw
17 department sponsored afternoon and evening public
18 statement hearing at which speakers expressed
19 opposition to and support of the project. Comments
20 of the public statement hearings were transcribed and
21 form a part of the record. In all, the public
22 submitted an additional 50 written comments on the
23 D.M.M. system again expressing both support and
24 opposition to the project. In conclusion, public
25 participation was important.

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2 Turning to the relevant procedural
3 background, on March 10, 2022 the agency parties and
4 Rural Preservation and the town filed testimony
5 regarding the application on the same date the
6 settlement proposal was filed by Garnet. Garnet
7 thereafter in April filed rebuttal testimony, and on
8 May 6th we conducted an evidentiary hearing at which
9 Rural Preservation cross examined one witness,
10 namely, the Department of Agriculture and Markets
11 expert Michael Saviola.

12 Mr. Saviola testified about the
13 project's impacts on agricultural resources. In June
14 2022 the parties submitted legal briefs addressing
15 disputed legal issues notably Department of Public
16 Service staff expressed support in its brief for the
17 settlement proposal. Essentially D.E.C. staff, the
18 town and Rural Preservation disputed whether impacts
19 to wetlands and agricultural resources had been
20 minimized or avoided to the maximum extent
21 practicable -- practicable as required by Public
22 Service Law Section 168(3).

23 Turning to the disputed legal issues
24 between D.E.C. and Garnet --.

25 SECRETARY PHILLIPS: I'm sorry,

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2 Commissioner or -- is it possible we could take just
3 a short recess?

4 A.L.J. LEARY: Yes.

5 (Off the record 11:13 a.m.)

6 (On the record 11:14 a.m.)

7 A.L.J. LEARY: Turning to the disputed
8 legal issues between D.E.C. and Garnet Energy which
9 deal with wetland impacts, Garnet's application
10 identifies 45 wetlands totaling 613 acres that were
11 delineated within the 2,288.7 acre project area.
12 Garnet's updated application indicates that only 7 of
13 those wetlands appear on the official state
14 freshwater wetlands map of which only 4 wetlands and
15 adjacent areas, that is those areas within 100 feet
16 of the wetlands, will be, quote, directly impacted by
17 the project.

18 In addition, Garnet's application
19 indicates the number of federal wetlands regulated by
20 the United States Army Corps of Engineers will be
21 impacted by the project. Garnet's application does
22 not identify, however, the specific number of acres
23 of unmapped wetlands and adjacent areas that may be
24 impacted by the project. Instead, Garnet proposes to
25 submit a final calculation of wetland impacts in the

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2 compliance phase following the siting board's
3 issuance of the certificate.

4 This approach does not directly
5 comport with Article 10's requirement that the
6 project impacts be identified prior to certificate
7 issuance. See Public Service Law Section 168(2).
8 Garnet's application offers, as minimization and
9 avoidance measures for wetland impacts, the use of
10 best management practices. Again, this is not
11 recognized necessarily as an appropriate mitigation
12 measure in and of itself under Article -- E.C.L.
13 Article 24.

14 Of note was Garnet's failure in its
15 application to include with its application a
16 mitigation plan to address the unavoidable wetland
17 impacts which is required by the Article 10
18 regulations. As the order before you recounts, the
19 record lacks specificity and clarity regarding the
20 total number of acres of protected freshwater
21 wetlands that are both mapped on the official state
22 maps and unmapped that may be impacted by the
23 project.

24 Those impacts are subject to
25 minimization and avoidance measures as well as to

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2 compensatory mitigation as the siting board found in
3 the North Side Energy Case, Case 17-F-0598. Garnet's
4 application here and its legal position is due in
5 part based upon its affiliate's position in North
6 Side. Garnet argues that wetlands not appearing on
7 the state's official freshwater wetlands maps are not
8 subject to protection under Article 24 and by
9 extension to the siting board's jurisdiction.

10 As the siting board is aware, its
11 August 2022 order in North Side rejected that very
12 legal position and found that both mapped and
13 unmapped wetlands and adjacent areas are entitled to
14 protection. Notably, Garnet is an affiliate of North
15 Side. While the order before you grants a
16 certificate for the project, it rejects Garnet's
17 position consistent with the siting board's decision
18 in North Side. The order reiterates the siting
19 board's broad authority to protect the state's
20 wetlands.

21 As the siting board found in North
22 Side, several judicial and administrative decisions
23 have reached a similar determination including the
24 Court of Appeals decision in Wedinger versus
25 Goldberger which rejected Garnet's narrow reading of

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2 E.C.L. Article 24 that only mapped wetlands are
3 subject to protection. Thus, although Garnet asserts
4 that it has adequately minimized and avoided impacts
5 to the extent -- to the maximum extent practicable,
6 the order before you finds that more is required in
7 terms of minimization, avoidance and mitigation.

8 As also discussed in the order,
9 Garnet's application characterizes impacts to
10 wetlands and to several other environmental resources
11 as, quote, temporary, permanent or conversion
12 impacts. Conversion impacts falling somewhere
13 between temporary and permanent. Although the
14 Article 10 regulations call for an applicant to
15 identify temporary and permanent wetland impacts, the
16 order before you rejects this categorization of
17 impacts in the context of minimization and avoidance
18 measures.

19 As the order finds, there is no basis
20 for categorizing impacts as temporary, permanent or
21 conversion in the context of the requirement to
22 minimize and avoid such impacts to the maximum extent
23 practicable. Similarly, there is no basis for these
24 three categories in E.C.L. Article 24. As the siting
25 board is aware, the Excelsior order, Case 19-F-0299

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2 recognized that project impacts to agricultural lands
3 could be considered temporary because the land where
4 the facility is located can be returned to
5 agricultural use following the decommissioning and
6 restoration measures required by a particular
7 certificate.

8 The order before you today
9 distinguishes between those temporary impacts to
10 agricultural resources and the impacts to wetlands
11 and other environmental resources. It reaffirms the
12 concept of temporary impacts to agricultural
13 resources because of the decommissioning and
14 restoration conditions. And the -- the siting boards
15 finding in Excelsior that agricultural impacts have
16 been minimized and avoided to the maximum extent
17 practicable.

18 The order's expressed rejection of the
19 concept of temporary impacts to environmental
20 resources is based on the statutory protection
21 afforded such resources under the environmental
22 conservation law. The environmental conservation law
23 expresses prohibitions for certain activities and
24 sets forth a comprehensive permitting scheme that is
25 supplanted by Article 10 but nevertheless a

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2 substantive -- represents a substantive requirement
3 of state law.

4 So, for example, this includes the
5 prohibitions and permitting requirements in
6 Environmental Conservation Law Article 15,
7 prohibiting activities in streams and water bodies
8 and in Article 24, prohibiting activities in
9 wetlands. The agricultural and market law contains
10 no similar prohibition and lacks a similar permitting
11 scheme.

12 Turning to the certificate conditions
13 that have been modified as a part of this order,
14 those modifications or, I'm sorry, those certificate
15 conditions that have been modified are based on the
16 conditions presented in the settlement proposal and
17 include first the requirement for the certificate
18 holder to submit a wetlands restoration and
19 mitigation plan as a compliance filing. That, among
20 other things, sets forth the total number of acres of
21 mapped and unmapped wetlands and adjacent areas
22 impacted by the project. And it details appropriate
23 restoration and mitigation measures.

24 Second, modification of the
25 certificate condition that provides for the allowable

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2 construction workdays. This condition was modified
3 to eliminate construction on Sundays as requested by
4 the Town of Conquest but retains a separate condition
5 allowing such Sunday construction hours under certain
6 circumstances.

7 Third, the requirement to submit a
8 plan to relocate an existing snowmobile -- existing
9 snowmobile and hiking trails in the project area that
10 will no longer be available for recreational use.
11 Certainly these -- this not having been dealt with in
12 the certificate conditions presented a level of
13 safety concern based upon often snowmobilers
14 utilizing trails at night and not necessarily having
15 the ability to see changes in the project area where
16 the snowmobile trails are currently located.

17 Finally, the requirement to submit a
18 more detailed visual mitigation and landscaping plan
19 that addresses receptors identified in Garnet's own
20 visual impact assessment and impacts to three
21 additional residential property owners whose property
22 is adjacent to the project.

23 In closing, this order recites all of
24 the required findings necessary for the siting board
25 to reach in issuing the certificate under Public

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2 Service Law Section 168. The order also expressly
3 sets forth the requisite findings under the
4 C.L.C.P.A. Section 72 namely that the siting board's
5 issuance of the certificate is consistent with the
6 C.L.C.P.A. and will assist the state in achieving its
7 greenhouse gas reduction objectives.

8 Based on the record, we therefore
9 recommend the siting board's adoption of this order.
10 In addition to Judges Sayre and Stefanucci who I
11 would like to thank, I'd also like to acknowledge the
12 work of several members of senior advisory staff
13 including Chief Judge Dakin Lecakes, General Counsel
14 Robert Rosenthal, Article 10 Senior Advisory Counsel
15 Heather Behnke, D.E.C. Assistant Commissioner
16 Katherine Petronis and importantly D.E.C. Deputy
17 Commissioner and Siting Board Designee Louis
18 Alexander.

19 This concludes my presentation. We
20 are available to respond to any questions that the
21 members of the siting board may have. Thank you.

22 CHAIRMAN CHRISTIAN: Thank you, Judge
23 Leary and thank you to the team who worked behind
24 this order. It's clear to me from your presentation
25 today that in developing this order we follow an open

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2 and transparent process, a process through which the
3 free flow of information resulted in a healthy
4 discourse which is subsequently followed by actions
5 addressing any concerns raised. This led to
6 enhancing the benefits of this project to both the
7 public at large and the local community.

8 It's clear that this project is in the
9 public interest consistent with the C.L.C.P.A. and as
10 mentioned supports the state's efforts to reduce
11 greenhouse gas reductions. With that in mind I
12 support this item. On that turn to my fellow board
13 members for comments and questions. I'll start with
14 Mr. Alexander.

15 MR. ALEXANDER: Thank you, Mr.
16 Chairman. First, I would like to thank A.L.J. Leary
17 for her thorough presentation today. In addition, I
18 would like to thank A.L.J. Leary and the two other
19 examiners as well as D.E.C. and D.P.S. staff for
20 their work in addressing the significant
21 environmental matters at issue in this proceeding.

22 I have given particular attention to
23 the wetlands discussion and the thoughtful review
24 that appears on pages 39 to 50 of this order. I note
25 as referenced that the wetland protections are

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2 properly meant to apply to both regulated mapped
3 wetlands and the D.E.C. jurisdictional unmapped
4 wetlands. I note also this order's rejection of
5 applicant's approach with respect to temporary
6 permanent conversion impacts.

7 The requirements as summarized on
8 pages 48 to 50 of this order regarding the submission
9 of a wetlands restoration and mitigation plan, the
10 elements that will be required by the plan and the
11 review and approval process established, which are
12 more fully detailed in certificate condition 122 are,
13 in my judgement, well supported. I have reviewed the
14 other aspects of this order and have no additional
15 comments. Thank you.

16 CHAIRMAN CHRISTIAN: Thank you, Mr.
17 Alexander. I'll go to Dr. Lewis-Michl.

18 Dr. LEWIS-MICHL: No comments or
19 questions.

20 CHAIRMAN CHRISTIAN: Thank you, Dr.
21 Lewis-Michl. Now Mr. John Williams.

22 MR. WILLIAMS: Thank you. No comments
23 or questions.

24 CHAIRMAN CHRISTIAN: Thank you, Mr.
25 Williams. That said I now call for a vote.

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2 SECRETARY PHILLIPS: Sorry, Chair.

3 Chair? Excuse me. I'm sorry. Could you please call
4 on Mr. Wells for comments or questions?

5 CHAIRMAN CHRISTIAN: Oh, I'm terribly
6 sorry. Thank you. Mr. Wells, you have any comments
7 or questions?

8 MR. WELLS: No comments.

9 CHAIRMAN CHRISTIAN: Thank you. Now I
10 will call for a vote. My own vote is in favor of the
11 recommendations as described. Mr. Alexander?

12 MR. ALEXANDER: I vote in favor.

13 CHAIRMAN CHRISTIAN: Thank you. Dr.
14 Lewis-Michl?

15 Dr. LEWIS-MICHL: In favor.

16 CHAIRMAN CHRISTIAN: Thank you. Mr.
17 Wells?

18 MR. WELLS: In favor.

19 CHAIRMAN CHRISTIAN: Thank you. Mr.
20 Williams?

21 MR. WILLIAMS: In favor.

22 CHAIRMAN CHRISTIAN: Thank you. The
23 order is approved and the recommendations are
24 adopted. Madam Secretary, is there anything further
25 to come before us today?

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2 SECRETARY PHILLIPS: There is nothing
3 further today.

4 CHAIRMAN CHRISTIAN: Thank you very
5 much. And with that I adjourn today's meeting of the
6 siting board. Thank you everyone.

7 (The meeting concluded at 11:28 a.m.)

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2 STATE OF NEW YORK

3 I, DANIELLE CHRISTIAN, do hereby certify that the
4 foregoing was reported by me, in the cause, at the time
5 and place, as stated in the caption hereto, at Page 1
6 hereof; that the foregoing typewritten transcription
7 consisting of pages 1 through 23, is a true record of all
8 proceedings had at the hearing.

9 IN WITNESS WHEREOF, I have hereunto
10 subscribed my name, this the 31st day of October, 2022.

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13 DANIELLE CHRISTIAN, Reporter

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