

1 17-F-0598 Siting Board 8-9-2022

2 NEW YORK STATE BOARD ON
3 ELECTRIC GENERATION SITING AND
4 THE ENVIRONMENT

5 CASE 17-F-0598 - Application of North Side Energy Center,
6 LLC for a Certificate of Environmental Compatibility and
7 Public Need Pursuant to Article 10 of the Public Service
8 Law for Construction and Operation of a Solar Electric
9 Generating Facility Located in the Towns of Brasher,
10 Massena, and Norfolk, St. Lawrence County.

11 SITING BOARD MEETING

12 Date: Tuesday, August 9, 2022 @ 10:30 am

13 TAMMY MITCHELL, Alternate for Rory M. Christian, Chair of
14 the New York State Public Service Commission

15 LOUIS A. ALEXANDER, Alternate for Basil Seggos,
16 Commissioner, New York State Department of Environmental
17 Conservation

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

21 VINCENT RAVASCHIERE, Alternate for Hope Knight, Acting
22 Commissioner, President & CEO-designate, New York State
23 Empire State Development

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

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2 (On the record 10:30 a.m.)

3 CHAIR MITCHELL: My name is Tammy
4 Mitchell. I'm the director of the Office of Electric
5 Gas and Water in the New York State Department of
6 Public Service. I have been designated -- designated
7 to serve as the alternate representing the chair of
8 the New York State Board on Electric Generation
9 Siting and the Environment or as it is also known,
10 the Siting Board. I call this meeting of the siting
11 board to order.

12 Before moving to the agenda I would
13 like to introduce the alternates representing the
14 permanent members of the siting board. Louis
15 Alexander, alternate representing the Commissioner of
16 the Department of Environmental Conservation. Dr.
17 Elizabeth Lewis-Michl, alternate representing the
18 Commissioner of the Department of Health. Vincent
19 Ravaschiere, alternate representing the Commissioner
20 of the New York State Department of Economic
21 Development and John Williams, alternate representing
22 the Chair of the New York State Energy Research and
23 Development Authority. Secretary Phillips, are there
24 any changes to the agenda?

25 SECRETARY PHILLIPS: There are no

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2 changes to the agenda.

3 CHAIR MITCHELL: Thank you. We will
4 begin with Case 17-F-0598, Application of the North
5 Side Energy Center, L.L.C. for a certificate of
6 environmental compatibility and public need pursuant
7 to Article 10 of the Public Service Law for
8 construction and operation of a solar electric
9 generating facility located in the Towns of Brasher,
10 Massena and Norfolk, St. Lawrence County presented by
11 Maureen Leary, Administrative Law Judge, Department
12 of Public Service.

13 Richard Sherman, Administrative Law
14 Judge, Department of Environmental Conservation,
15 Dakin Lecakes, Chief Administrative Law Judge,
16 Department of Public Service, Michele Stefanucci,
17 Chief Administrative Law Judge, Department of
18 Environmental Conservation, Jason Zehr, Chief of
19 Environmental Certification and Compliance, Office of
20 Electric Gas and Water, Department of Public Service
21 and Robert Rosenthal, general counsel are available
22 for questions. Judge, Leary, please begin.

23 A.L.J. LEARY: Thank you. Good
24 morning, Chair Mitchell and members of the siting
25 board. My name is Maureen Leary. I will forego the

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2 introductions. The gentleman to my right, Richard
3 Sherman, on behalf of the Department of Environmental
4 Conservation and I we're responsible for presiding
5 over this proceeding. I do want to -- and by the way
6 Judge Sherman was instrumental in writing the order,
7 the proposed order now before you.

8 I'd also like to recognize and thank
9 the -- the folks today in the room and on the WebEx
10 for their participation including Chief Judge
11 Lecakes, Executive Deputy Thomas Congdon, Chief of
12 Staff Jessica Waldorf of general counsel, Robert
13 Rosenthal, Article 10 Senior Advisory Counsel Heather
14 Behnke, Markets and Regulatory Economic Supervisor
15 Warren Meyers. And on behalf of the Department of
16 Environmental Conservation Chief Judge Michele
17 Stefanucci and D.E.C. Assistance Commissioner
18 Katherine Petronis. They were instrumental in
19 reviewing the issues presented in this case, the
20 difficult issues and really evaluating and spending a
21 lot of time evaluating as a team the result that is
22 currently before you in the proposed order.

23 Since the passage of Article 10, the
24 siting board has approved and issued certificates for
25 17 renewable energy projects, both wind and solar,

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2 all of which have moved New York towards clean energy
3 objectives. The siting board need not be reminded of
4 the complexity of these projects and the herculean
5 task it can be to complete project review within the
6 12 month statutory time frame set forth in Article
7 10. But that time frame has consistently been met
8 and projects have been approved with conditions that
9 serve the public interest.

10 Today, after due consideration by and
11 consultation with advisory staff, the siting board
12 has before it today a proposed order that denies
13 issuance of a certificate for the North Side Solar
14 Energy Project because the record demonstrates that
15 the project is not in the public interest.
16 Essentially, the board's denial is based on the
17 applicant's failure to demonstrate that the project
18 meets the mandatory criteria in Public Service Law
19 Section 168 3 insofar as the record fails to show
20 that the project, as proposed, minimizes and avoids
21 adverse environmental impacts to the maximum extent
22 practicable including impacts to fresh water wetlands
23 and threatened and endangered species.

24 And the project as designed complies -
25 - fails to comply with applicable and substantive

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2 requirements of state environmental laws and
3 regulations including specifically Environmental
4 Conservation Laws Article -- Environmental
5 Conservation Law Article 11 which governs the
6 protection of threatened and endangered species and
7 their habitat. And E.C.L. Article 24 which governs
8 the protection of fresh water wetlands.

9 As the siting board is aware, for it
10 to issue a certificate, Article 10 includes these
11 required findings by the siting board and they are
12 specifically set forth in the statute. And without
13 these required findings, the siting board cannot
14 conclude that the project is in the public interest.
15 This is yet a third criteria that the project fails
16 to meet.

17 The order before you is based upon an
18 extensive evidentiary record including the initially
19 filed application and subsequently filed supplemental
20 and updated application materials. There's also
21 expert testimony and exhibits, proposed certificate
22 conditions and site engineering and environmental
23 plan guidance. The party has also submitted legal
24 briefs on the issues presented that are still in
25 dispute. Despite extensive record and the briefing,

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2 the order before you finds that the record does not
3 support the issuance of a certificate.

4 I will briefly describe the project,
5 sketch the procedural background, including notice
6 and public participation, outline certain relevant
7 undisputed facts and explain the legal dispute among
8 the parties that the siting board is asked to resolve
9 in this order. I will then turn to the findings in
10 the order itself.

11 The description of the project
12 includes North Side's application for a -- to
13 construct and operate a 180 megawatt commercial scale
14 solar electric generating facility in the Towns of
15 Brasher, Massena and Norfolk all located in St.
16 Lawrence County, New York. The proposed facility
17 would -- would have included hundreds of solar rays
18 of between 15 and 18 feet in height and would cover
19 approximately 1,400 acres of a 2,200 35 acre project
20 site. It would also include several miles of access
21 roads, underground collection system lines, a
22 collection system substation parking areas, staging
23 and lay down yards and a point of interconnection
24 facility with associated components.

25 Project construction would involve

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2 clearcutting trees and vegetation, grading and
3 filling portions of the site, varying construction
4 lines, construction of a substation as well as roads,
5 parking areas and lay down yards.

6 With respect to the parties to the
7 proceeding and the procedural background, in addition
8 to the applicant, the active parties including staff
9 from the Department of Public Service, the Department
10 of Environmental Conservation, the Department of
11 Agriculture and Markets as well as the host towns of
12 Brasher, Massena and Norfolk and the County of St.
13 Lawrence.

14 Public notice and comment during the
15 Article 10 review process for this project was fair,
16 robust and open. It included public participation
17 and input from the host communities and the towns and
18 County of St. Lawrence. Both the towns and the
19 county were afforded preapplication and application
20 stage intervenor funds in order to foster their
21 participation. Both were represented ably by counsel
22 and retained a well-recognized consulting firm to
23 review the application.

24 Public notice about the project was
25 provided at significant milestones during the

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2 proceeding from the filing by the applicant of the
3 public involvement program plan to the filing at the
4 very end of the proceeding of proposed certificate
5 conditions and related settlement documents --
6 related partial settlement documents.

7 North Side's application was made
8 available to the public through the Department of
9 Public Service's document and matter management
10 system and its website through North Side's website
11 and was available in town halls and local public
12 libraries in the project area. Notices related to
13 the project were published in area newspapers
14 multiple times.

15 In October 2021 the department
16 sponsored afternoon and evening public statement
17 hearings at which speakers expressed with opposition
18 to in support of the project. These comments were
19 transcribed and are part of the record in this
20 proceeding. In addition, the public submitted eight
21 written comments expressing both support and
22 opposition.

23 In June 2020 North Side filed a
24 preliminary scoping statement and thereafter filed
25 agreed upon stipulations with the other parties that

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2 outlined the scope and methodologies of the studies
3 to be undertaken in support of the application.

4 In a February 4th, 2021 letter D.E.C.
5 provided North Side with its preliminary wetlands
6 assessment and identified extensive potential project
7 impacts to fresh water wetlands throughout the 2,235
8 acre project area. D.E.C. raised concerns regarding
9 the project's impacts on wetlands and expressly
10 requested that North Side delay filing its
11 application in order to continue discussions about
12 how these impacts would be addressed.

13 Two weeks later, however, on November
14 -- on February 19th North Side filed its application
15 without resolving the wetlands issues. In a July 9th
16 letter the siting board chair notified North Side
17 that its application complied with Article 10's
18 filing requirements. Thereafter the examiners
19 established a procedural schedule and set a date for
20 commencing an evidentiary hearing because at that
21 point the 12 month time frame had begun to tick.

22 On July 23rd, 2021 North Side filed a
23 notice of impending settlement negotiations and the
24 parties enter into -- enter into discussions over the
25 next six months. The agency parties filed testimony

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2 in November 2021 and North Side filed rebuttal
3 testimony in December. In November a partial
4 settlement among the parties was filed and includes
5 certificate conditions and a site engineering and
6 environmental plan.

7 D.P.S. and D.E.C. staff both asserted
8 objections to numerous certificate conditions related
9 to wetlands and endangered species, among other
10 things. In January 2022 a revised partial settlement
11 was filed which addressed the limited issue of North
12 Side's post certificate compliance filing of a net
13 conservation benefit plan for threatened and
14 endangered species.

15 Even after -- after the revised
16 settlement was filed, many certificate conditions
17 remained in dispute between the applicant on the one
18 hand and D.P.S. staff and D.E.C. staff on the other.
19 These disputes involved the protections that should
20 be afforded to fresh water wetlands and, in a related
21 sense, to the threatened and endangered species found
22 at the project site.

23 In February and March 2022 the parties
24 submitted briefs addressing the disputed legal
25 issues. Notably, the parties agreed that the issues

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2 in dispute were legal rather than factual in nature
3 and they waived their respective rights to cross
4 examine witnesses at an evidentiary hearing. Thus,
5 there's no factual dispute in the order before the
6 siting board today that requires resolution.

7 Here are the undisputed facts. The
8 factual context is very important and it is basically
9 what the siting board's decision turns upon.
10 Approximately 1,504 acres of 67% of the project areas
11 total 2,235 acres are fresh water wetlands that were
12 identified and delineated by the applicant itself as
13 a part of its application which in the order refers
14 to application Exhibit 22 which was updated on a
15 number of occasions.

16 Some of the delineated wetlands are
17 mapped, that is, they appear on the official state
18 fresh water wetlands maps promulgated by D.E.C.
19 pursuant to E.C.L. Article 24. Some of the other
20 wetlands, however, are not mapped but are contiguous
21 to or adjacent to mapped wetlands meet the ecological
22 criteria for wetlands and or are part of the same
23 wetlands complex. In total there are approximately
24 37 wetlands and 11 streams at the project site.

25 North Side's own experts estimated

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2 impacts to at least 507 acres of wetlands. The
3 D.E.C. wetlands and streams panel testified that its
4 onsite field investigation and inspections, quote,
5 revealed that 10 different D.E.C. mapped wetlands are
6 actually all part of the same wetland complex, end
7 quote. And that, quote, the unmapped wetlands -- I'm
8 sorry, inserted unmapped -- it is not a part of the
9 quote, the unmapped wetlands located between the
10 mapped wetlands are indistinguishable as a result of
11 their contiguity, end quote.

12 D.P.S. staff for its part asserted
13 that as a result of North Side's position to minimize
14 or avoid impacts to only mapped wetlands the record
15 lacks sufficient information on which the siting
16 board can rely in making its findings that such
17 environmental impacts have been minimized and avoided
18 to the maximum extent practicable.

19 D.P.S. staff further testified that
20 its own observations of onsite field conditions,
21 quote, cast further doubt on the reliability of the
22 applicant's calculated impacts as presented in the
23 application, end quote. North Side offered as
24 minimization and avoidance measures that unmapped
25 wetlands in, quote, areas previously disturbed by

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2 agricultural and practices and logging activities
3 were given preference for the placement of project
4 components.

5 North Side also proposed that in lieu
6 of compensatory mitigation, minimization or avoidance
7 measures, it would use, quote, best management
8 practices instead. North Side further asserted that
9 due to a, quote, multitude of siting constraints, the
10 project's layout cannot be reconfigured to further
11 avoid or minimize impacts to non-mapped wetlands, end
12 quote.

13 In addition and related to the
14 wetlands impacts, 7 threatened and endangered species
15 and 2 species of special concern protected under
16 E.C.L. Article 11 were identified, again, by the
17 applicant to be in the project area. Some were
18 identified as exhibiting essential behavior in the
19 project area. That is, they were living, nesting,
20 roosting, feeding, foraging, reproducing, et cetera.
21 This means that at least part of the project site can
22 be characterized as essential habitat for threatened
23 and endangered species.

24 The identified threatened and
25 endangered species located there or identified there

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2 include the endangered short ear owls and golden
3 eagles. The threatened species are Blandings
4 turtles, northern harriers, sedge wrens, upland
5 sandpipers and bald eagles. And the species of
6 special concern include the vesper sparrow and the
7 grasshopper sparrow.

8 I'll now turn to the legal dispute.
9 The legal dispute among the parties is very
10 straightforward and can be summarized as follows.
11 Whether impacts to delineated wetlands that are not
12 on the state's official wetlands maps must
13 nevertheless be minimized and avoided to the maximum
14 extent practicable and subject to Article 24's
15 compensatory mitigation requirement whereby the
16 applicant would be required to replace or restore
17 impact wetlands.

18 Here North Side asserted during the
19 proceeding that it had sufficiently minimized and
20 avoided mapped wetlands by siting components in areas
21 that were unmapped and that unmapped wetlands should
22 not be subject to minimization, avoidance or
23 mitigation requirements. North Side further asserted
24 that the project would no longer be economically
25 viable if the siting board imposed requirements that

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2 is avoidance, minimization or mitigation
3 requirements, to the hundreds of acres of wetlands
4 impacted by the project.

5 North Side also resisted any layout or
6 design changes and proposed no alternatives.
7 Relatedly, however, they removed 100 acres of
8 forested wetland that were under federal jurisdiction
9 in accordance with communications they had with the
10 United States Army Corps of Engineers. The siting
11 board's proposed order, with respect to the wetlands,
12 first notes the importance of this resource to the
13 state including the functions and benefits during
14 climate change.

15 This order also recognizes the lack of
16 clarity regarding the total number of acres of fresh
17 water wetlands that would be adversely impacted by
18 the project. The siting board relies on the
19 testimony of North Side's experts which conceded
20 impacts to 507 acres of wetlands. The order,
21 therefore, assumes that at least 507 acres will be
22 impacted while recognizing D.E.C.'s testimony
23 indicating that a greater number of acres would be
24 impacted.

25 The proposed order also notes that the

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2 record reflects no dispute that the wetlands
3 delineated by North Side in its own application cover
4 approximately 1,500 acres. That these delineated
5 wetlands consist of both mapped and unmapped wetlands
6 and that nearly all the wetlands are contiguous.

7 The order finds that separate and
8 apart from D.E.C.'s Article 24 authority the siting
9 board has a separate and broader authority under
10 Article 10, specifically, Public Service Law 168 3 to
11 address this project's environmental impacts and to
12 assure such impacts are minimized and avoided.

13 The order finds that the siting
14 board's Article 10 authority to require such measures
15 is not constrained by Article 24. The order before
16 you notes that the disputed legal issue regarding
17 whether unmapped wetlands should be afforded Article
18 24 protection was settled decades ago by the Court of
19 Appeals. In *Wedinger versus Goldberger*, the court
20 rejected the narrow definition of fresh water
21 wetlands that North Side argues here. That is that
22 the term applies only to mapped wetlands obviously
23 subject to D.E.C.'s regulatory authority.

24 In *Wedinger* the court held that the
25 term fresh water wetlands could not be interpreted so

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2 narrowly because to do so would ignore other relevant
3 and integrated portions of the statutory scheme and
4 the legislative purpose behind Article 24 to protect
5 this important state resource.

6 The proposed order recounts D.E.C.'s
7 historical implementation of Article 24 and cites
8 other judicial and administrative -- administrative
9 decisions that support the siting board's conclusion
10 that unmapped wetlands should be subject to
11 protection and, more importantly, to Article 10's
12 requirement for a project to minimize and avoid
13 impacts.

14 In addition, as the order before you
15 notes, the siting board has previously addressed the
16 issue of mapped and unmapped wetlands in the Alle-
17 Catt Wind Energy Article 10 proceeding. There the
18 A.L.J.'s recommended decision determined that
19 unmapped wetlands extending beyond the mapped
20 wetlands would be subject to Article 24 and to the
21 siting board's jurisdiction to require minimization
22 and avoidance measure. The siting board adopted the
23 Alle-Catt recommended decision in its June 2020 order
24 finding, quote, it is undisputed that unmapped fresh
25 water wetlands are jurisdictional wetlands entitled

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2 to the protections of Article 24.

3 It is also important to note at this
4 juncture the difference between the number of acres
5 impacted -- number of acres of impacted wetlands here
6 and the number of acres impacted in other cases that
7 have come before the siting board. In the order
8 before you, the siting board finds that impacts to
9 507 acres is unprecedented in an Article 10
10 proceeding. Indeed the siting board's approved
11 several Article 10 proceedings that have had a far
12 more limited impact to wetlands than the impacts
13 evident here.

14 For example, in the recent April 2022
15 Excelsior energy order for a solar facility, impacts
16 to wetlands proper were completely avoided by the
17 applicant and impacts to adjacent areas, that is
18 those areas within 100 feet of a wetland proper,
19 totaled only 0.31 acres. Similarly, the siting
20 board's November 2021 Trelina order recognized that
21 there were no impacts to wetlands proper and impacts
22 to adjacent areas, again, within one hundred feet,
23 totaled only 4.8 acres.

24 Finally, the siting board's August
25 2019 East Point order noted that wetland impacts were

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2 limited to only adjacent areas and totaled about .34
3 acres. Thus but qualitatively and quantitatively the
4 extent of wetland impacts in this proceeding are far
5 different than those -- than the impacts in those
6 cases.

7 Turning to the threatened and
8 endangered species, with respect to the -- those
9 impacts, the order notes that the record reflects no
10 dispute that those protected species had been
11 documented in the project area and that certain
12 species perform essential behavior there. Meaning
13 that the project area is in part habitat for these
14 species and could result -- and the project could
15 result in the taking of such species which is
16 prohibited under Article 11.

17 In the order before you, the siting
18 board determines that North Side has failed to carry
19 its burden and demonstrate that the project's adverse
20 impacts on wetlands and threatened and endangered
21 species have been minimized or avoided to the maximum
22 extent practicable and that the project as designed
23 will not -- will comply with applicable environmental
24 laws. These findings are required, as I previously
25 noted. The order determines in the absence of those

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2 findings, the siting board cannot find that the
3 project is in the public interest.

4 Of further note is that the order
5 before you makes the requisite finding under Section
6 72 of the Community Leadership and Climate Protection
7 Act or C.L.C.P.A. The order notes that the siting
8 board's denial of the certificate for this project is
9 consistent with the C.L.C.P.A., and as the siting
10 board is aware, the state is on course to achieve its
11 renewable energy and greenhouse gas reduction
12 objectives.

13 In conclusion, we recommend the siting
14 board's adoption of this proposed order denying the
15 certificate for the -- this project. This concludes
16 my presentation. We are available to respond to any
17 questions that the members of the siting board may
18 have. Thank you.

19 CHAIR MITCHELL: Thank you very much,
20 Judge Leary, for your comprehensive summary of the
21 item before us. I have no questions. Let me turn to
22 my fellow board members for any comments or
23 questions. Mr. Alexander?

24 MR. ALEXANDER: I have a couple of
25 comments first. I would also like to thank

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2 Administrative Law Judge Maureen Leary for her
3 presentation. The presentation in my view well sets
4 forth and describes matters at issue. In the weeks
5 prior to our meeting today, I have reviewed the
6 underlying record including but not limited to the
7 exhibits, the parties briefs and the panel
8 testimonies as well as our siting board's prior
9 orders.

10 This order before us in examining
11 [sic] -- in examining fresh water wetlands
12 threatened and endangered species issues as well as
13 C.L.C.P.A. consistency provides a reasoned,
14 thoughtful and thorough evaluation. In my judgement,
15 the record of this proceeding fully supports the
16 order that is before us today. Thank you.

17 CHAIR MITCHELL: Thank you. Dr.
18 Lewis-Michl?

19 DR. LEWIS-MICHL: No comments.

20 CHAIR MITCHELL: Mr. Ravaschiere?

21 MR. RAVASCHIERE: I have no questions
22 or comments.

23 CHAIR MITCHELL: Thank you. Mr.
24 Williams?

25 MR. WILLIAMS: No comments or

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2 questions.

3 CHAIR MITCHELL: I'll now call for a
4 vote. My own vote is in favor of the recommendations
5 as described. Mr. Alexander, how do you vote?

6 MR. ALEXANDER: I vote in favor.

7 CHAIR MITCHELL: Dr. Lewis-Michl?

8 DR. LEWIS-MICHL: In favor.

9 CHAIR MITCHELL: Mr. Ravaschiere?

10 MR. RAVASCHIERE: In favor.

11 CHAIR MITCHELL: And Mr. Williams?

12 MR. WILLIAMS: In favor.

13 CHAIR MITCHELL: The order is approved
14 and the recommendation is adopted. Secretary
15 Phillips, is there any further to come before us
16 today?

17 SECRETARY PHILLIPS: There's nothing
18 further.

19 CHAIR MITCHELL: Thank you. We are
20 adjourned.

21 (Off the record)
22 (The proceeding concluded at 10:55
23 a.m.)

24

25

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2 STATE OF NEW YORK

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

9 IN WITNESS WHEREOF, I have hereunto
10 subscribed my name, this the 13th day of July, 2022.

11 *Annette Lainson*

12 ANNETTE LAINSON, Reporter

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