

1 17-F-0282 and 16-F-0267 Siting Board - 9-25-2020

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

5 CASE 17-F-0282 - Application of Alle-Catt Wind Energy LLC
6 for a Certificate of Environmental Compatibility and
7 Public Need Pursuant to Article 10 for a Proposed Wind
8 Energy Project, Located in Allegany, Cattaraugus, and
9 Wyoming Counties, New York, in the Towns of Arcade,
10 Centerville, Farmersville, Freedom, and Rushford.

11 CASE 16-F-0267 - Application of Atlantic Wind LLC for a
12 Certificate of Environmental Compatibility and Public Need
13 Pursuant to Article 10 for Construction of the Deer River
14 Wind Energy Project in Lewis and Jefferson Counties.

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16 Siting Board Meeting
17 Date: Friday, September 25, 2020 @ 10:30 am

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20 JOHN B. RHODES, Chair

21 LOUIS ALEXANDER, alternate of Basil Seggos, Department of
22 Environmental Conservation

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24 DR. ELIZABETH LEWIS-MICHL, alternate of Dr. Howard Zucker,
25 Department of Health

26

27 VINCENT RAVASCHIERE, alternate of Eric Gertler, Empire
28 State Development Corporation

29

30 JOHN WILLIAMS, alternate of Richard Kauffman, New York
31 State Energy Research and Development Authority

32

33 Christopher Mueller, Ad Hoc Member, Case 17-F-0282

34

35 Richard Lucas, Ad Hoc Member, Case 16-F-0267

36

37 Michael Tabolt, Ad Hoc Member, Case 16-F-0267

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2 CHAIRMAN RHODES: My name is John
3 Rhodes. I'm the Chair of the Public Service
4 Commission and Chair of this Siting Board. I'd like
5 to call this meeting of the Board on Electric
6 Generating Siting and the Environment to order. Now,
7 first could I just check that I am coming through
8 audibly?

9 SECRETARY PHILLIPS: Yes.

10 CHAIRMAN RHODES: Thank you very much.
11 Now, before we get started, I would like to note our
12 arrangements for the meeting today. In line with the
13 guidelines concerning social distancing and
14 minimizing large gatherings and in keeping with the
15 Executive Order, suspending provisions of the Open
16 Meetings Law on an emergency basis, we are conducting
17 today's meeting remotely. I'd like to remind those
18 who are participating by phone, to please mute your
19 lines, except when you are speaking. The public will
20 have the opportunity to listen to the meeting, by
21 going to the Department's webcast page and we will
22 also record and transcribe the meeting, as has been
23 our practice. These arrangements have been reviewed
24 by our general counsel and he has found that they
25 meet the requirements of the Executive Orders and

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2 that they meet my own expectations of honoring the
3 intent of the Opening Meetings Law, to the maximum
4 extent possible consistent with public health.

5 Before moving to the agenda, I would
6 like to introduce the alternates, representing the
7 permanent members of the Siting Board and this is
8 also a bit of a roll call, so when I introduce,
9 please confirm that you're here. Louis Alexander,
10 alternate of Basil Seggos, Department of
11 Environmental Conservation?

12 MR. ALEXANDER: Present.

13 CHAIRMAN RHODES: Thank you. Dr.
14 Elizabeth Lewis-Michl, alternate of Dr. Howard
15 Zucker, Department of Health.

16 DR. LEWIS-MICHL: Present.

17 CHAIRMAN RHODES: Thank you. Vincent
18 Ravaschiere, alternate for Eric Gertler, acting
19 Commissioner of New York State Department of Economic
20 Development and President and Chief Executive Officer
21 Designate Empire State Development.

22 MR. RAVASCHIERE: Present.

23 CHAIRMAN RHODES: Thank you. And,
24 John Williams, alternate of Richard Kauffman, New
25 York State Energy Research and Development Authority.

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2 MR. WILLIAMS: Present.

3 CHAIRMAN RHODES: Thank you. And, I
4 would like to introduce the Ad-hoc member of the
5 cases on today's agenda; for Case 17-F-0282,
6 Christopher Mueller.

7 MR. MUELLER: Present.

8 CHAIRMAN RHODES: Thank you and for
9 Case 16-F-0267, Richard Lucas and Mike Tabolt.

10 MR. LUCAS: Richard Lucas present.

11 MR. TABOLT: Mike Tabolt present.

12 CHAIRMAN RHODES: Mike Tabolt, thank
13 you. I'll get that right. Secretary Phillips, are
14 there any changes to the agenda?

15 SECRETARY PHILLIPS: There are no
16 changes to the agenda.

17 CHAIRMAN RHODES: Thank you very much.
18 So, let's get started and we will start with Case 17-
19 F-0282, Application of Alle-Catt Wind Energy, L.L.C.,
20 for a Certificate of Environmental Capability and
21 Public Need, Pursuant to Article 10, for a Proposed
22 Wind Energy Product, located in Allegheny,
23 Cattaraugus and Wyoming Counties, New York and in the
24 Towns of Arcade, Centerville, Farmersville, Freedom
25 and Rushford, presented by Gregg Sayre,

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2 Administrative Law Judge, Department of Public
3 Service, Dakin Lecakes, Chief Administrative Law
4 Judge, Department of Public Service, James
5 McClymonds, Chief Administrative Law Judge,
6 Department of Environmental Conservation and Robert
7 Rosenthal of General Counsel, Department of Public
8 Service are available for questions. Judge Sayre,
9 please begin.

10 A.L.J. SAYRE: Good morning Chair
11 Rhodes and members of the Siting Board. This case
12 came before the Siting Board on June 3rd of this
13 year, at which time the Board granted a Certificate
14 of Environmental Compatibility and Public Need. This
15 was a contested case, especially on the issue of the
16 application of Local Laws. Petitions for the
17 rehearing have been filed on these and several other
18 issues by the Town of Farmersville and the Coalition
19 of Concerned Citizens. The Draft Order before you,
20 denies the petitions for re-hearing.

21 The first local law issue was whether
22 the Board should have applied substantive local laws
23 in the Town of Farmersville enacted in February and
24 April, 2020. In this case, the record closed on
25 December 5th, 2019 and in the Certificate Order, the

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2 Board declined to consider or apply these laws
3 because they were enacted far too late in the
4 process.

5 If the Board had wished to consider
6 these laws, it would have required a reopening of the
7 record and quite a few steps of legal process and it
8 is far from clear that the April legislation would
9 have been the last legislation passed.

10 Although the Board in its discretion
11 might have extended the statutory period by up to six
12 months for an extra ordinary circumstances, a new
13 local law passed after a project had been under
14 consideration for several years, does not constitute
15 the kind of extra ordinary circumstances that would
16 warrant the exercise of the Board's discretion.
17 Further delay of the project for this reason, could
18 have been damaging to the project and would have
19 eliminated any level of certainty as to what level --
20 or as to what local law requirements would be
21 applied.

22 The second local law issue, is whether
23 the Board should have applied the Town of Freedoms
24 2007 substantive local law, rather than the 2019 law,
25 which the Board did apply. At the time of the

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2 hearings, the 2019 law, which superseded the 2007,
3 was in effect, although pending judicial review. The
4 Draft Order before you, rejects the proposing party's
5 arguments, that the Board should have waited for a
6 Court ruling of the 2019 law. That would have
7 unreasonably extended the process quite possibly by
8 years beyond the Board's statutory deadline and there
9 was no basis to apply the 2007 law.

10 The third local law issue before you
11 this morning, is whether under the Town of
12 Farmerville's 2019 local law, which is the law the
13 Board applied in this case, all Amish residences
14 should be treated as churches, rather than
15 residences. If treated as churches, a 2,200 foot
16 set-back for the turbines would be required. If
17 treated as residences, the set-back requirement was
18 1,500 feet. Alle-Catt's design complied with the
19 1,500 foot requirement but some turbines were
20 proposed within 2,200 feet of Amish residences.

21 The main argument by the Town of
22 Farmersville and the Coalition of Concerned Citizens,
23 was that the members of the Amish community conduct
24 all of their religious services on a rotating basis
25 in the homes of community members and that therefore,

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2 the homes are all churches. However, as the Board
3 found from the record in the June 3rd certificate to
4 order, this means that for the community in question,
5 each home hosts a three hour religious service, a
6 little less often than once every ten months, on
7 average.

8 The Board has the jurisdiction to
9 interpret local laws because otherwise, the Board
10 would be unable to statutorily require findings, as
11 to whether the project complies with applicable local
12 laws.

13 In the June 3rd Order, the Board
14 determined that this incidental use of community
15 members' homes for religious services for a few
16 hours, roughly once every ten months, did not convert
17 the homes into churches for purposes of this local
18 law. The Draft Order today concludes that the
19 parties failed to make any persuasive arguments that
20 would warrant overturning this decision.

21 The opposing parties raised a new
22 claim, that the Board's ruling that Amish family
23 homes are residences, rather than churches, violates
24 the First and Fourteenth Amendment of the United
25 States Constitution and a Federal Law called the

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2 Religious Land Use and Institutional Persons Act of
3 2000.

4 The Draft Order I'm re-hearing,
5 rejects these arguments for a number of reasons. The
6 first, the argument was not raised before the hearing
7 examiners or even on briefs on exceptions to the
8 Siting Board and was therefore waived.

9 Second, the Town and Coalition lacked
10 standing to assert these constitutional and statutory
11 claims on behalf of the Amish community because they
12 lack all of the required legal elements of a third-
13 party claim of standing. They have not proven that
14 the Amish community has suffered injury. In fact,
15 they did not establish that they have a close
16 relationship to the Amish community and they did not
17 establish that the Amish community was hindered in
18 its ability to protect its own interests.

19 Finally, even if the Board were to
20 reach the merits of the claim, the argument is
21 unsupported by the record. They claim that the Board
22 should have applied the 2,200 foot set-back for
23 churches, rather than the 1,500 foot set-back for
24 residences but there is nothing in the record
25 distinguishing between the impacts of these two

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2 distances. There is nothing showing how a 2,200 foot
3 set-back is acceptable but a 1,500 foot set-back
4 would disrupt the Amish community's religious
5 services to the point of a constitutional and
6 statutory violation.

7 The record in this case, in fact,
8 fails to support the claim of distraction of
9 religious services. As shown in the record, 16
10 households in a separate Amish community in
11 Centerville, actually signed leases with Alle-Catt.

12 Before I leave the subject of local
13 laws, you may have seen the Town of Freedom, filed a
14 new 56 page windfarm with the Board yesterday
15 afternoon. This filing is not relevant to the issues
16 before the Board today. This matter is before the
17 Board on Petitions for Rehearing and new matters are
18 irrelevant to the question of whether the Board's
19 June 3rd decision was erroneous.

20 There are three more issues before you
21 not related to local laws. First, the Coalition
22 argues that the Board must reject the project because
23 its impact on the State's energy system was only
24 modeled for its first year of operation and
25 therefore, the windfarm may not, in the long run,

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2 meet the statutory requirement that it would be a
3 beneficial addition to the State's energy system.

4 However, the Board had never required
5 multiple year modeling and the opponents are
6 essentially adding something to the Board's
7 regulations that isn't there. The Coalition argues
8 that transmission bottlenecks may reduce the clean
9 energy impact of the project in the future but the
10 Draft Order finds this is speculative and assumes
11 wrongly, that the State will do nothing in the future
12 to relieve transmission constraints.

13 The next issue raised by the
14 Coalition, is an alleged inconsistency between two
15 design requirements in the Certificate Order; one
16 that the project be designed to produce no more than
17 40 decibels of noise at night at non-participating
18 residences and a second that the project be designed
19 to produce no more than 45 decibels of noise during
20 any eight-hour period, at any time of the day or
21 night at non-participating residences. The Draft
22 Order concludes that these requirements are
23 complimentary, not contradictory and rejects the
24 proposed re-consideration of this issue.

25 The final issue raised by the

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2 Coalition, is that the Board failed to adequately
3 consider the project's impact on community character.
4 The Draft Order rejects this argument, noting that
5 the statute does not require a specific finding on
6 community character impact, that the Board fully
7 considered the impact on community character, in its
8 findings on cultural, historic and recreational
9 resources of the project area and that the Board took
10 the public comments into consideration, in weighing
11 the impacts of the project on the community at large.
12 That concludes my presentation. We are available for
13 any questions. Thank you.

14 CHAIRMAN RHODES: Thank you very much,
15 Judge Sayre. This is John Rhodes. I'll share my own
16 reactions, which is that this is a -- a very clear
17 and thoughtful presentation of a very clear and
18 thoughtful work. I am persuaded that the denial on
19 each of the petition's claims is proper and
20 appropriate, as a matter of procedure on the law and
21 regulation and record and the underlying facts and I
22 -- I -- and I'm -- and I stand by and I'm prepared to
23 affirm the Board's existing findings and approval.
24 So, I will support the recommended denial. May I go
25 down now -- go down the list of the -- my -- my

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2 fellow Board members and ask for any comments or
3 questions from them? Mr. Alexander?

4 MR. ALEXANDER: Thank you, Chair
5 Rhodes. In my judgment, the Draft Order that is
6 before us today, as well as the presentation we just
7 heard, fully addresses the arguments set forth on the
8 petitions for re-hearing and I have no questions.
9 Thank you.

10 CHAIRMAN RHODES: Thank you very much.
11 Dr. Lewis-Michl?

12 DR. LEWIS-MICHL: I have no comments
13 or questions.

14 CHAIRMAN RHODES: Thank you. Mr.
15 Ravaschiere?

16 MR. RAVASHIERE: No questions, thank
17 you.

18 CHAIRMAN RHODES: Thank you. Mr.
19 Williams?

20 MR. WILLIAMS: Thank you, no
21 questions.

22 CHAIRMAN RHODES: Thank you. Mr.
23 Mueller?

24 MR. MUELLER: No questions, thank you.

25 CHAIRMAN RHODES: Thank you very much.

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2 With that, we shall proceed to call for a vote. For
3 the record, it's John Rhodes and my vote is in favor
4 of the recommendation to -- to deny the petitions for
5 re-hearing, as just described. Mr. Alexander, how do
6 you vote?

7 MR. ALEXANDER: I also vote in favor.

8 CHAIRMAN RHODES: Thank you. Dr.

9 Lewis-Michl?

10 DR. LEWIS-MICHL: In favor.

11 CHAIRMAN RHODES: Thank you. Mr.

12 Ravaschiere?

13 MR. RAVASHIERE: In favor.

14 CHAIRMAN RHODES: Thank you. Mr.

15 Williams?

16 MR. WILLIAMS: In favor.

17 CHAIRMAN RHODES: Thank you. Mr.

18 Mueller?

19 MR. MUELLER: Not in favor.

20 CHAIRMAN RHODES: Thank you very much.

21 The matter is approved and the recommendation is
22 adopted. We will now move to the second case on our
23 agenda today, Case 16-F-0267, the Application of
24 Atlantic Wind, L.L.C., for a Certificate of
25 Environmental Capability and Public Need, Pursuant to

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2 Article 10, for construction of the Deer River Wind
3 Energy Project in Lewis and Jefferson Counties, New
4 York, again presented by Gregg Sayre, Administrative
5 Law Judge, Department of Public Service, Dan
6 Costello, Administrative Law Judge, Department of
7 Public Service, Dakin Lecakes, Chief Administrative
8 Law Judge, Department of Public Service, James
9 McClymonds, Chief Administrative Law Judge,
10 Department of Environmental Conservation and Robert
11 Rosenthal, General Counsel are available for
12 questions.

13 Judge Sayre, please begin.

14 A.L.J. SAYRE: Good morning again,
15 Chair Rhodes and members of the Siting Board. This
16 case came before the Siting Board on June 30th of
17 this year, at which time the Board granted a
18 Certificate of Environmental Compatibility and Public
19 Need. Many of the issues in this case have been
20 settled before it came to the Board, including the
21 basic standards for maximum noise level from the
22 turbines. These standards were settled at the
23 maximum noise levels that the Board had adopted in a
24 number of previous cases.

25 One of the areas that was not settled,

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2 was the post-construction, sound-testing protocol,
3 meaning the process and techniques for testing the
4 sound outputs of the turbines, after their
5 construction and during their operation, to determine
6 whether the sound levels are within the limits
7 approved by the Siting Board.

8 The post-construction compliance
9 protocol was disputed by the parties during the case
10 in a number of technical areas. The Examiners made
11 recommendations to the Board on all of these issues
12 in the recommended decision and the Board made a
13 number of adjustments to those recommendations in the
14 Certificate Order.

15 Atlantic Wind, the Developer, has
16 petitioned the Board to re-hear and reconsider two of
17 those decisions, with respect to the protocol. These
18 two issues are the only matters in this case before
19 the Board, at this time.

20 The first decision, was the Board's
21 decision to make sure sound output during periods of
22 time when the ground wind speed is greater than five
23 meters per second, which is a little more than 11
24 miles per hour. It was D.P.S. Staff's position in
25 the -- the case, that these periods should be

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2 included because if you discard all periods of ...
3 the sound from the turbines to their maximum output
4 but ... of course, tends to occur when the wind is
5 blowing the hardest. Atlantic Wind's position in the
6 case, was that these periods or relatively high wind
7 speed should not be included in measurements because
8 noise from the wind, itself, would interfere with
9 what is being measured, which is just the noise from
10 the turbines.

11 The Draft Order on re-hearing in front
12 of you, rejects Atlantic Wind's position and
13 continues to go along with D.P.S. Staff's position
14 and denies re-hearing on this issue. Atlantic Wind
15 cites a case, the Blue Stone Wind case, in which the
16 Siting Board adopted the testing protocol with the
17 exclusion that the Company wants to make here but
18 that issue it was never squarely presented to the
19 Board because it had been settled by the parties even
20 before it got to the hearing examiners in the Blue
21 Stone case. And, there have been two other cases,
22 Alle-Catt and Number Three Wind, in which the
23 protocol adopted by the Board included periods of
24 time with ground wind speeds above five meters per
25 second, which is consistent with the Draft Order

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2 before you today.

3 In this case, the issue presented to
4 the Board on June 30th, was a pretty straightforward
5 kind of issue. The experts of the two parties
6 disagree and so, the Board had to use its judgment
7 and expertise and its analysis of the record and the
8 arguments, to choose between the two competing
9 experts. The Board came down on the side of the
10 D.P.S. Staff and the Draft Order in front of you,
11 concludes that Atlantic Wind has not made a
12 convincing argument, that the Board made the wrong
13 choice.

14 Atlantic Wind makes a further
15 argument, that the problem with high ground level
16 wind speeds, will make the compliance protocol
17 unworkable. The Draft Order in front of you,
18 addresses that issue. It directs the parties to work
19 together pragmatically. In the event of
20 impracticability issues in the field, to ensure that
21 the essential goal of the compliance protocol is
22 achieved, which is to determine whether the turbines
23 running at their maximum sound output, are or are not
24 within the sound level requirements of the
25 Certificate Order.

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2 The second issue before the Siting
3 Board, at this time, involves an interpretation of
4 the sound-monitoring protocol that was adopted by the
5 Board in the Certificate Order. It appears there is
6 actually not a dispute here. Atlantic Wind offered a
7 hypothetical set of sound measurements that are set
8 out in the Draft Order, that it believed would be
9 thrown out as invalid under the compliance protocol
10 and argued that the word consecutive in the protocol,
11 would make it difficult and expensive to ever get a
12 set of valid measurements.

13 The Draft Order before you, clarifies
14 the language of the compliance protocol and with that
15 clarification, a set measurements given as an example
16 by Atlantic Wind, would be valid not invalid. As a
17 result, there does not appear to be a remaining
18 dispute on this issue. That concludes my
19 presentation and we're available for questions.
20 Thank you very much.

21 SECRETARY PHILLIPS: Chair Rhodes?

22 CHAIRMAN RHODES: Sorry, I apologize.

23 I was on mute. Thank you, Michelle. Thank you,
24 Judge Sayre again, for a -- a clear presentation and
25 the good work that went into it in this case, on some

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2 very technical and specific issues. I am persuaded
3 by the work and by your presentation, that on -- on
4 the -- the disputed matter, that your recommendation
5 is correct and that there's a matter of whether the
6 record and considerations of the Board's original
7 decision, we should stand by it and I am appreciative
8 of -- on the second non-dispute item, that the
9 clarification is a good resolution of -- of -- of the
10 question raised. So, I am going to be in favor of
11 this -- this recommendation. Once again, let me go
12 down on the roster of my fellow Board members and ask
13 them if they have any comments or questions. Mr.
14 Alexander?

15 MR. ALEXANDER: I have no question,
16 thank you.

17 CHAIRMAN RHODES: Thank you very much.
18 Dr. Lewis-Michl?

19 DR. LEWIS-MICHL: No questions.

20 CHAIRMAN RHODES: Thank you very much.
21 Mr. Ravaschiere?

22 MR. RAVASHIERE: No questions, thank
23 you.

24 CHAIRMAN RHODES: Thank you. Mr.
25 Williams?

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2 MR. WILLIAMS: Thank you, no
3 questions.

4 CHAIRMAN RHODES: Thank you. Mr.
5 Lucas?

6 MR. LUCAS: I was going to have a
7 question about the Siting Board's decision being
8 inconsistent with previous Siting Board cases but I'm
9 satisfied with the discussion that was given and --
10 so I'm good to go, thank you.

11 CHAIRMAN RHODES: Thank you and Mr.
12 Tabolt?

13 MR. TABOLT: I have no questions.

14 CHAIRMAN RHODES: Thank you very much.
15 With that, I think we are in a position to call for a
16 vote, which I now do. For the record, it's John
17 Rhodes and my own vote is in favor of the
18 recommendation to -- to deny the petitions for re-
19 hearing, as just described. Mr. Alexander, how do
20 you vote?

21 MR. ALEXANDER: I also a vote in
22 favor.

23 CHAIRMAN RHODES: Thank you. Mr. --
24 sorry, Dr. Lewis-Michl?

25 DR. LEWIS-MICHL: Thank you, I vote in

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2 favor.
3 CHAIRMAN RHODES: Thank you. Mr.
4 Ravaschiere?
5 MR. RAVASHIERE: In favor.
6 CHAIRMAN RHODES: Thank you. Mr.
7 Williams?
8 MR. WILLIAMS: In favor.
9 CHAIRMAN RHODES: Thank you. Mr.
10 Lucas?
11 MR. LUCAS: In favor.
12 CHAIRMAN RHODES: Thank you. Mr.
13 Tabolt?
14 MR. TABOLT: I am in favor.
15 CHAIRMAN RHODES: Thank you very much.
16 With that, the Order is confirmed and the
17 recommendation is adopted. Secretary Phillips, is
18 there anything further to come before us today?
19 SECRETARY PHILLIPS: There's nothing
20 further for today.
21 CHAIRMAN RHODES: With that, then let
22 me thank the Siting Board colleagues and again, I
23 especially thank the Ad-hoc members for their special
24 service and we are adjourned. Thanks all and stay
25 safe.

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2 (The meeting adjourned.)

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2 I, HOWARD HUBBARD, do hereby certify that the foregoing
3 was reported by me, in the cause, at the time and place,
4 as stated in the caption hereto, at Page 1 hereof; that
5 the foregoing typewritten transcription consisting of
6 pages 1 through 22, is a true record of all proceedings
7 had at the hearing.

8 IN WITNESS WHEREOF, I have hereunto
9 subscribed my name, this the 29TH day of September, 2020.

10

11

12 HOWARD HUBBARD, Reporter

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