

**UNITED STATE OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Erie Boulevard Hydropower, L.P.)	
Respondent,)	Project No. 2318
and)	(E.J. West)
)	
Hudson River – Black River Regulating District)	Project No. 12252
Petitioner,)	(Great Sacandaga Lake)

**PETITION FOR DECLARATORY ORDER TO TERMINATE A CONTROVERSY OR
REMOVE UNCERTAINTY PURSUANT TO 18 C.F.R. §385.207**

Pursuant 18 C.F.R. §385.207(a)(2) and the Upper Hudson / Sacandaga River Offer of Settlement §2.5 Dispute Resolution Project Nos. 2318-011, 12252, et. al. (filed Apr. 12, 2000) (“Settlement Agreement”), Petitioner, Hudson River – Black River Regulating District, hereby respectfully requests that the Federal Energy Regulatory Commission (the “Commission” or “FERC”), issue an order resolving the dispute as to whether Erie Boulevard Hydropower, L.P. (“Erie” or the “Power Company”) must continue to maintain a necessary property interest in the head created, owned and controlled by the Hudson River – Black River Regulating District (“Regulating District”) by reason of the construction of the Conklingville Dam.

I. INTRODUCTION & SUMMARY

The Great Sacandaga Lake Project (P-12252) operated by the Hudson River – Black River Regulating District and the powerhouse and generating facilities at the Conklingville Dam currently licensed to Erie as the E. J. West Project (P-2318) form a complete unit of development in New York’s Fulton and Saratoga Counties. A dispute has arisen regarding Erie’s obligation to continue to pay reasonable compensation for use of Regulating District assets; including property rights or parts thereof; specifically the additional fifty-six feet of head created by the Regulating

District's Conklingville Dam. Erie contends that continued payment for use of the Regulating District's property rights would be duplicative to the headwater benefit assessment Erie pays pursuant to section 10(f) of the federal power act¹. The Regulating District disagrees.

Erie does not own all of the head necessary to operate the E.J. West project (P-2318). The Regulating District owns fifty-six (56) feet of the seventy-one (71) feet of head supplying that project². Erie does own outright the fifteen (15) feet of head retained by Erie's predecessor in interest at the time the State of New York acquired the property for construction of Conklingville Dam. Despite having compensated the Regulating District for use of the fifty-six (56) feet of head continuously without objection or challenge since acquiring the project, Erie, in a November 21, 2022 letter, has indicated its intention to cease doing so at the conclusion of the existing reservoir operating agreement³. By letter dated, November 30, 2022, the Regulating District alerted Hon. John Spain, FERC Regional Engineer, to the dispute⁴. Subsequent to the Regulating District's letter, the parties entered into an agreement extending the reservoir operating agreement through June 30, 2023⁵. Erie alerted the Commission to this extension in a January 11, 2023 letter.⁶

As far back as 1927, Erie's predecessors recognized that they did not control all of the project components necessary to operate the E.J. West hydroelectric plant (Project 2318). In 1927 Erie's predecessor interest entered into a reservoir operating agreement with the Regulating District allowing the power company to connect to the outlet of the Conklingville Dam for the purpose of producing power from the power company's fifteen (15) feet of head and the Regulating

¹ October 13, 2022 Letter from Glick to Leslie

² March 23, 1928 Deed from NY Power & Light to SONY – Conklingville Dam (...in consideration of one dollar...and partial satisfaction of an agreement, dated November 14, 1927...)

³ November 21, 2022 Email from Glick to Leslie

⁴ November 30, 2022 Letter from Regulating District Executive Director, John Callaghan, to FERC Regional Engineer John Spain

⁵ 2022 – 12 21 2022 Fourth Amendment to ROA

⁶ 2023- 01 11 2023 Letter from Erie's Daniel Maguire, P.E. Sr. Compliance Manager New York and Minnesota

District's additional fifty-six (56) feet of head⁷. This, and subsequent operating agreements⁸, secured for the Regulating District the full value of the power thus produced by said additional head. In exchange, Erie's predecessors secured the project elements necessary to operate the E.J. West hydroelectric plant. The intent of the parties was then, and is now, that the power company would pay the Regulating District for use of this property interest and for the timing of the release of the flow impounded by the Regulating District's dam at Conklingville.

Absent an extension of the reservoir operating agreement, Erie does not control, and thus FERC is unable to bring under Erie's license, the remaining components of the unit of development. Likewise, absent an extension of the reservoir operating agreement, nothing in the Regulating District's license, nor the Offer of Settlement, compels the Regulating District to make the releases from Great Sacandaga Lake prescribed by its FERC license through the E.J. West hydroelectric plant. Erie admits as much in the last line of paragraph three of its January 11, 2023 letter; "*The District's obligations under the Reservoir Operating Agreement would prevent it from diverting releases from the Project while the extension is in place*".

⁷ 1927 - 11 14 1927 NY Power & Light ROA Conklingville See Page 2 "*Power Company Agrees...to construct...a power house...capable of using not only POWER COMPANY's said 15 feet of head, but also the additional head to be created by the District's said dam...To pay DISTRICT for the power produced from said plant by the use of DISTRICT's said additional head.*" See Also Page 3 "...*That the power produced in said plant by use of the DISTRICT's said additional head, shall be taken to be 56/71sts of the total power produced by said plant, ... 4. That this contract is intended to secure for DISTRICT the full value of the power thus produced by said additional head after providing for the cost of development and operation thereof...*".

⁸ 1939 - 01 05 1939 NY Power & Light ROA Conklingville
1949 - 09 21 1949 NY Power & Light ROA Conklingville
1971 - 12 28 1971 Nimo ROA Conklingville
1980 - 06 17 1980 Nimo ROA Conklingville
2003 - 07 01 2003 ROA with Erie Blvd Hydropower at Conklingville
2003 - 07 01 2003 ROA With Erie Exhibit A to 07 01 2003 ROA - Mutual Release
2003 - 07 01 2003 ROA With Erie Exhibit B to 07 01 2003 ROA - Stillwater Reservoir Letter Agreement
2006 - 05 19 2006 First Amendment to ROA
2021 - 06 16 2021 Second Amendment to ROA
2022 - 06 29 2022 Third Amendment to ROA
2022 - 12 21 2022 Fourth Amendment to ROA

The Commission also recognizes that Erie does not own all of the head necessary to operate the E.J. West project (P-2318). During the E.J. West project's most recent license renewal, FERC noted that Erie, as the then new owner of the E.J. West project, did not have all necessary project elements under license. Notwithstanding the series of reservoir operating agreements in place from 1927 through 2002, through which Erie's predecessors paid the Regulating District for use of the Regulating District's property right (the fifty-six feet of head) and the timing of the release of water at Conklingville, FERC required that this final component necessary for Project 2318 (E.J. West) to operate be brought under license. Due to a NYS Constitutional prohibition preventing Erie's outright purchase of the state property interest necessary to complete the E.J. West project and a 1992 amendment to section 21 of the Federal Power Act (FPA) prohibiting the use of eminent domain to acquire state park lands for hydropower purposes, FERC issued project license 12252 to the Regulating District in order that all project elements be brought under license. Even with the Regulating District newly subject to the September 25, 2002 license for Conklingville and Great Sacandaga Lake, and Erie subject to its new September 25, 2022 project license 2318 for E.J. West, Erie and the Regulating District entered the current reservoir operating agreement in July, 2003 (amended in 2006), through which Erie pays the Regulating District for an interest in the fifty-six (56) feet of the seventy-one (71) feet of head to which Erie does not otherwise hold any property rights, and for the timing of the release of the flow impounded by the Regulating District's dam. This reservoir operating agreement is now scheduled to expire on June 30, 2023.

Erie's imminent abandonment of the arrangement through which it secures use of the Regulating District's property interest will cause Erie to be in violation of its FERC license. Erie's FERC license for E.J. West, issued September 25, 2002 and as modified on February 5, 2003, demonstrates FERC's commitment to support the contractual relationship linking the two licensees

creating the single unit of development (E.J. West at Conklingville). Subsection "E" of Erie's license provides that "[T]his license is subject to the articles set forth in Form L-3, (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States,".... Article 5 thereof requires in part that "*The Licensee...shall, during the period of the license, retain possession of all project property covered by the license as issued...including...water rights....*" Likewise, the Regulating District's license, also issued on September 25, 2002, and subject to those same license conditions, contemplates that Erie will have to compensate the Regulating District for use of that project element. See condition Article 13 which provides in part that "*The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur*". In essence, neither licensee alone controls all the necessary project elements. Clearly, Erie's obligation to compensate for use of the Regulating District's property interest, is separate and distinct from Erie's obligation under its own license's Article 11 to reimburse the Regulating District for an equitable portion of the cost to construct and maintain the headwater improvement. Yet Erie continues to argue that one is duplicative of the other.

The Offer of Settlement similarly demonstrates FERC's commitment to support the contractual relationship. The Regulating District filed its original FERC license application in the context of an Offer of Settlement dated March 27, 2000. Tables established in the Offer of Settlement, which illustrate the level curves incorporated into the license, require the Regulating District to achieve several objectives including: minimizing energy losses to affected hydroelectric projects by the aggressive use of storage (see Project 12252 License Article 402(a)). Erie has cited this language to suggest it must be permitted to generate revenue even after it ceases compensating

the Regulating District for use of the Regulating District's property interest. However, Project 12252 License Article 402 subsection (j) only requires the Regulating District to make every reasonable attempt to limit releases to not exceed target maximum flows in the Hudson River below its confluence with the Sacandaga River and to limit releases from Great Sacandaga Lake below E.J. West. The Regulating District maintains that such target flows are measured below E.J. West specifically so that the Regulating District is not compelled, in the Offer of Settlement, or in the Project 12252 FERC license, to make prescribed releases through Erie's E. J. West hydroelectric plant absent an agreement through which Erie pays reasonable compensation for Erie's use of the Regulating District's property interest; namely the fifty-six (56) feet of head that Erie is not entitled to absent the agreement.

Section 2.5 of the Offer of Settlement establishes a dispute resolution procedure through which licensees shall report such disputes to FERC. As such, as Erie and the Regulating District have not resolved the disputes enumerated herein, the Regulating District petitions the Commission for assistance resolving the dispute.

The Regulating District is interested in continuing its partnership with Erie through the end of the current license term (September 2042) and beyond. The current reservoir operating agreement, representing the parties' negotiated resolution of the reasonable return due for Erie's use of the Regulating District's water rights, expires on June 30, 2023. Negotiations for a new agreement commenced June 23, 2020. In anticipation of the expiration of the current reservoir operating agreement, and in recognition of the public authority's responsibility to secure fair market value through this revenue contract, the Regulating District commissioned an appraisal to determine the value of the water rights. Two and half years later, Erie has yet to challenge the

Regulating District's appraisal or to offer their own appraisal valuing the property rights provided by the Regulating District.

II. COMMUNICATIONS

Communications regarding this Petition should be sent to:

John C. Callaghan
Executive Director
Hudson River – Black River Regulating District
575 Broadway, 3d Floor
Albany, New York 12204
(518)465-3491
jcallaghan@hrbrrd.ny.gov

Robert Leslie, Esq.
General Counsel
Hudson River – Black River Regulating District
575 Broadway, 3d Floor
Albany, New York 12204
(518) 465-3491
rleslie@hrbrrd.ny.gov

III. REQUEST FOR DISPUTE RESOLUTION

Erie erroneously contends that its continued payment for use of the Regulating District's fifty-six (56) feet of head would be duplicative of payments Erie is obligated to make for headwater benefit assessments FERC levies pursuant to section 10(f) of the federal power act. Petitioner, Hudson River – Black River Regulating District respectfully requests that FERC issue a declaratory order indicating that Erie's continued payment of the mandated headwater benefit assessment levy does not supplant Erie's obligation to compensate the Regulating District for its contribution of fifty-six (56) of head necessary for Erie to control all needed project property in order to generate at the E.J. West power plant.

- A. Erie does not own all of the head necessary to operate the E.J. West project (P-2318). A "project" is defined in Section 3(11) of the federal power act, 16 U.S.C. §796(3)(11), as "a

complete unit of development, consisting of all dams, powerhouses, impoundments, water rights, and lands which are used in connection with such unit". As described in the Project 2318 FERC license issued on September 25, 2002 to Erie, Project 2318, as currently licensed to Erie, includes: (1) an intake structure; (2) four penstocks; and (3) a powerhouse containing two 14,000 horsepower Francis turbines, each connected to a generator with a total rated capacity of 10,000 kilowatts. In addition, Erie owns fifteen (15) of the seventy-one (71) feet of head at the project site. Erie does not own, and therefore does not control, necessary project elements to include: (1) a 1,100-foot-long- and 100 foot high earth fill and concrete dam with an outlet consisting of two spillways and spillway weir (Conklingville Dam); and (2) Great Sacandaga Lake. New York State owns and the Regulating District controls the additional fifty-six (56) feet of head created by Conklingville Dam the Regulating District constructed at the project site. These project elements are owned by the State of New York, placed under the Regulating District's jurisdiction by statute (NY ECL Article 15, Title 21), and licensed by FERC to the Regulating District as project 12252.

- B. Absent an extension or renegotiation of the expiring reservoir operating agreement, a FERC order allowing Erie's use of the Regulating District's fifty-six (56) feet of head would represent a conversion of the state's property interest without just compensation.

As memorialized in the original reservoir operating agreement, dated November 14, 1927, between Erie's predecessor in interest, the New York Power and Light Corporation, and the Regulating District's predecessor in interest, the Hudson River – Regulating District, the Regulating District built the Conklingville Dam to create seventy-one (71) feet of head utilizing fifteen (15) feet of head retained by New York Power and Light Corporation and an additional fifty-six feet (56) created by the Regulating District's said Conklingville dam. As further

memorialized in said reservoir operating agreement, the power to be produced by use of the Regulating District's additional head, shall be taken to be 56/71sts of the total power produced by the E.J. West plant. Further, the reservoir operating agreement was then intended to secure for the Regulating District the full value of the power thus produced by said additional head.

The NYS Constitutional prohibition preventing Erie's outright purchase of the state property interest necessary to complete the E.J. West project and the 1992 amendment to section 21 of the Federal Power Act (FPA) prohibiting the use of eminent domain to acquire state park lands for hydropower purposes, compelled FERC to issue project license 12252 to the Regulating District in order that all project elements be brought under license. Erie should not now be afforded an opportunity to wield the resulting FERC license, with its intendent federal power act section 10(f) headwater benefits assessment requirement, to circumvent the basic principal behind the federal power act's eminent domain provisions. In essence, Erie argues that FERC transferred NYS's fifty-six feet of head to Erie by issuing a license to the Regulating District covering the very property interests for which Erie could not pay just compensation.

- C. Absent an extension or re-negotiation of the reservoir operating agreement through which Erie secures use of the fifty-six (56) feet of head owned by NYS, a property interest owned by NYS and controlled by and licensed to the Regulating District, Erie will have abandoned the arrangement through which Erie secures use of a necessary project element. As a result, Erie will be in violation of the FERC license issued for Project 2318.

Subsection "E" of Erie's FERC license for E.J. West, issued September 25, 2002 and as modified on February 5, 2003, provides that "[T]his license is subject to the articles set forth in Form L-3, (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States,"....

Article 5 thereof requires in part that *“The Licensee...shall, during the period of the license, retain possession of all project property covered by the license as issued...including...water rights....”*

Likewise, the Regulating District’s license, also issued on September 25, 2002, and subject to those same license conditions, contemplates that Erie will have to compensate the Regulating District for use of that project element. See condition Article 13 which provides in part that *“The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur”*.

IV. RELIEF

Petitioner hereby respectfully requests that the Commission issue a declaratory order determining and declaring that licensee Erie’s argument that continued payment for use of the Regulating District’s property rights would be duplicative to the headwater benefit assessment Erie pays pursuant to section 10(f) of the federal power act has no merit.

V. RESOLUTION

Pursuant to Rule 207 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.207, Petitioner requests the Commission issue a declaratory order indicating that Erie must continue to pay reasonable compensation for use of head created, owned and controlled by the Regulating District by reason of the construction of the Regulating District’s Conklingville Dam. Or in the alternative, pursuant to Rule 603 and Rule 604, 18 C.F.R. §§ 385.603 & 385.604, for the appointment of a settlement judge or an alternate dispute resolution procedure to aid in resolving this same dispute. Petitioner states that Dispute Resolution Services have not been used and no process has been agreed upon for resolving the dispute. Petitioner believes that alternate dispute

resolution (ADR) under the Commissioner's supervision could successfully resolve the dispute. Therefore, as an alternative to an immediate order, Petitioner requests Commissioner-supervised ADR, or that the Commission appoint a settlement judge or other ADR official to aid in discussion with Erie toward a negotiated settlement.

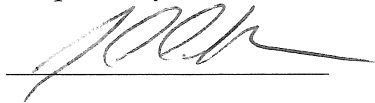
VI. SERVICE AND NOTICE

In accordance with Rule 206(c), the Petitioner has served a copy of this petition upon Erie simultaneously with its filing.

VII. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Commission: (1) determine and declare that Erie's argument that continued payment for use of the Regulating District's property rights would be duplicative to the headwater benefit assessment Erie pays pursuant to section 10(f) of the federal power act has no merit; and (2) order any additional relief deemed appropriate.

Respectfully submitted,



John C. Callaghan
Executive Director
Hudson River – Black River Regulating District

Dated: January 25, 2023

Certificate of Service

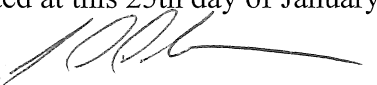
I hereby certify that I have this day served the foregoing document to each person designated below.

Via Electronic & First Class Mail:

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE, Room 1A
Washington, DC 20426
efiling@ferc.gov

Justin Glick, Esq.
Director, Senior Legal Counsel
Erie Boulevard Hydropower, L.P
200 Liberty Street, 14th Floor
New York, New York 10281
Justin.Glick@brookfieldrenewable.com

Dated at this 25th day of January, 2023



John C. Callaghan
Executive Director
Hudson River – Black River Regulating District
575 Broadway, 3d Fl.
Albany, New York 12204
jcallaghan@hrbrd.ny.gov
(518) 465-3491