

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Erie Boulevard Hydropower, LP)	Docket No. EL23-__-000
Hudson River – Black River Regulating)	Project No. 2318-__
District)	Project No. 12252-__

**PETITION FOR DECLARATORY ORDER
AND REQUEST FOR EXPEDITED ACTION**

Pursuant to Rule 207(a)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”),¹ Erie Boulevard Hydropower, LP (“Erie”), licensee of the E.J. West Project No. 2318 (“E.J. West”), respectfully petitions the Commission to issue a declaratory order stating that: (1) the Federal Power Act (“FPA”) preempts the regulatory authority of the Hudson River - Black River Regulating District (“District”) to assess charges under state law to Erie for releases from the District’s Great Sacandaga Lake Project No. 12252 (“GSL Project”); and (2) the District is precluded from materially changing its operation of the GSL Project by diverting releases around E.J. West or significantly modifying the timing of GSL Project releases without prior Commission authorization.

The requested declaratory order is necessary to resolve a controversy regarding Erie’s obligation to pay the District for the benefits of the releases from the GSL Project to Erie’s operations—above and beyond the headwater benefits charges the Commission already assesses against Erie under section 10(f) of the FPA—and to remove uncertainty

¹ 18 C.F.R. § 385.207(a)(2) (2022).

with respect to the District’s ability to divert water from its facilities without Commission approval.

Erie respectfully requests the Commission to act on this petition in an expedited manner and provide for a shortened comment period to facilitate such expedited action. Specifically, Erie requests that the Commission issue a ruling on this petition by May 15, 2023, in advance of the June 30, 2023 expiration of the Reservoir Operating Agreement (“Operating Agreement”) between Erie and the District, after which the District has threatened to divert water around E.J. West. Absent Commission action prior to expiration of the Operating Agreement, the District’s diversions could prevent Erie from generating power at E.J. West, threaten public safety, and potentially impact environmental resources on the Sacandaga and Hudson Rivers. The requested May 15, 2023 issuance date is selected to allow sufficient time for the parties to negotiate necessary coordination arrangements consistent with the Commission’s order.

I. COMMUNICATIONS

Erie requests that all pleadings and correspondence regarding this petition should be sent to the persons listed below, and that such persons be placed on the official service list to be established by the Commission for this proceeding:

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II. BACKGROUND

A. FERC Licenses

The Commission's predecessor agency, the Federal Power Commission, issued an original license to Erie's predecessor in interest for the E.J. West powerhouse and generating facilities in 1963.² During the relicensing process, the Commission determined that because the District's Great Sacandaga Lake ("Sacandaga Reservoir") and Conklingville Dam are included in the "unit of development" for E.J. West, which is adjacent to the Conklingville Dam, they also must be licensed.³ As part of a settlement agreement among Erie, the District, and 27 other parties ("Settlement Agreement"), the signatories agreed that the District would pursue its own separate original license for the Sacandaga Reservoir and Conklingville Dam which would be the GSL Project, and that Erie would pursue a new license for the project works already under license as E.J. West.⁴ The settlement parties' rationale for the arrangement was that the state-owned lands that comprise the District's Sacandaga Reservoir and Conklingville Dam and would need to be included in the project boundary are forest preserve lands and lands in the Adirondack State Park for which Erie would not be able to obtain the necessary property interests.⁵ As a state agency, the District did not have that problem.

² *Niagara Mohawk Power Corp.*, 29 FPC 1290 (1963).

³ *Erie Boulevard Hydropower, L.P.*, 100 FERC ¶ 61,322 at P 5 & n.10 (2002) (referencing Letter from Dean L. Shumway, FERC, to Jerry L. Sabattis, Niagara Mohawk Power Corp., Project No. 2318-002 (issued Aug. 27, 1992)).

⁴ Offer of Settlement, Project Nos. 2318, *et al.* (filed Apr. 11, 2000) ("Settlement Agreement").

⁵ See Amendment of New License Application and Request for Waiver of Deadline for Final Amendments at 4-6, Project No. 2318 (filed Apr. 11, 2000) ("Amendment of New License Application") (included in the Settlement Agreement).

The Settlement Agreement also set forth a comprehensive plan for the District's operation of the Sacandaga Reservoir. The plan included certain maximum and minimum elevations and lake level curves intended to address the parties' goals and requirements in the basin, including flood control, flows for water quality and fish habitat, recreation, and minimizing energy losses to hydropower projects on the Sacandaga and Hudson Rivers, including E.J. West.⁶ The plan was premised on releases from the Sacandaga Reservoir moving through E.J. West.

On September 25, 2002, the Commission issued a new license to Erie for the E.J. West powerhouse and generating facilities,⁷ an original license to the District for the GSL Project—the Sacandaga Reservoir and Conklingville Dam⁸—and approved the Settlement Agreement.⁹ The E.J. West License Order and GSL License Order, and the simultaneously-issued license orders for Erie's three other projects located in the upper Hudson River Basin also addressed by the Settlement Agreement,¹⁰ incorporated the relevant provisions of the Settlement Agreement regarding project operations. They also included the Commission's standard headwater benefits license article required by section 10(f) of the FPA.¹¹ Those license articles specifically provide that if a licensee's project is directly benefitted by the construction work of another licensee on a storage

⁶ Settlement Agreement § 3.

⁷ *Erie Boulevard Hydropower, L.P.*, 100 FERC ¶ 61,322 (2002) (“E.J. West License Order”).

⁸ *Hudson River-Black River Regulating Dist.*, 100 FERC ¶ 61,319 (2002) (“GSL License Order”).

⁹ *Erie Boulevard Hydropower, L.P., et al.*, 100 FERC ¶ 61,321 (2002) (“Order on Settlement”).

¹⁰ Those projects are the Stewarts Bridge Project No. 2047, Hudson River Project No. 2482, and Feeder Dam Project No. 2554.

¹¹ For E.J. West and the GSL Project, those license articles are Article 202 (for the GSL Project) and 204 (for E.J. West) and Standard Article 11 set forth in Form L-3, Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States (Oct. 1975). The standard articles do not themselves require specific payment amounts, but reserve the Commission's authority to assess benefits if applicable.

reservoir or other headwater improvement, the licensee shall reimburse the owner of the headwater improvement for those benefits, through payment of a portion of its interest, maintenance, and depreciation costs determined to be equitable by the Commission.¹²

Prior to the FERC licensing of the GSL Project which subjected the downstream projects, including E.J. West, to headwater benefits assessments under the FPA, Erie and its predecessors compensated the District for the value provided by the District's facilities through a payment mechanism set forth in the parties' Operating Agreement.¹³ The Operating Agreement was executed in 1927 and renegotiated in 1980 before the parties entered into the current version in 2003. When the parties entered into the Settlement Agreement in 2000, they anticipated that the District would continue to be "reimbursed for operations and maintenance expenses associated with their operation of the Conklingville Dam and the Great Sacandaga Lake" through District procedures outside of the FERC licensing proceedings, pursuant to state law.¹⁴ The Settlement Agreement stated that those "benefit assessments" were composed of charges to Erie for the "use of head and water at [the District's] Conklingville Dam," and "charges for benefits to downstream facilities," including Erie's.¹⁵

The District sought rehearing of the GSL License Order, along with the E.J. West License Order and the license orders for Erie's three other projects in the upper Hudson

¹² The Commission limits headwater benefits charges to 85 percent of the value of the energy gains received by the downstream project. *See* 18 C.F.R. § 11.11(b)(5).

¹³ The District attached copies of each iteration of the Operating Agreement in its filing of November 30, 2022. Report of Dispute, Project No. 12252-000 (filed Nov. 30, 2022) ("November 30 Filing"). Because each of these is already included in the docket for E.J. West and the GSL Project, Erie is not separately attaching them here.

¹⁴ Settlement Agreement § 8.4.

¹⁵ *Id.*

River Basin, seeking clarification that FERC’s approval of the Settlement Agreement encompassed its approval of the District’s benefits assessment procedures calculated pursuant to its authority under New York State Environmental Conservation Law (“NYSECL”).¹⁶ FERC denied the request. Although it invited the District to submit an assessment for FERC approval pursuant to its headwater benefits regulations which allow parties to reach agreement on methodology for calculating benefits,¹⁷ the District did not submit the then-effective Operating Agreement (1980) nor the subsequently negotiated Operating Agreement (2003) for FERC approval of the assessment contemplated therein.

FERC then initiated a headwater benefits determination to compute the value of the District’s releases to the projects downstream of the District’s facilities. FERC issued orders in 2012 determining those headwater benefits, from 2002 (when the District’s facilities were licensed) onward, pursuant to section 10(f) of the FPA.¹⁸ Erie has been paying the District for the value of its releases from the Sacandaga Reservoir pursuant to FERC’s assessment since that time.¹⁹

B. Operating Agreement

Notwithstanding its payment of Commission-assessed headwater benefits following the completion of the Commission’s assessment in 2012, Erie has made separate payments to the District pursuant to the Operating Agreement since 1927. The

¹⁶ Request for Rehearing of Hudson River-Black River Regulating District at 4, Project Nos. 12252-001, *et al.* (filed Oct. 25, 2002).

¹⁷ *Erie Boulevard Hydropower, L.P.*, 102 FERC ¶ 61,133 at P 14 (2002).

¹⁸ *See Hudson River-Black River Regulating District, et al.*, 140 FERC ¶ 62,089 (order determining headwater benefits in the Hudson River Basin), *reh’g denied*, 141 FERC ¶ 61,227 (2012).

¹⁹ Erie challenged the amount of FERC’s assessed headwater benefits, but its challenge did not involve payments under the Operating Agreement. *See Erie Boulevard Hydropower, LP v. FERC*, 878 F.3d 258 (D.C. Cir. 2017).

1927 Operating Agreement provided for the District’s construction of the Sacandaga Reservoir and Conklingville Dam to impound the lake with a total head of 71 feet. Erie’s predecessor, in exchange, agreed to: convey certain lands to the District for the construction of the dam, reserving the then-existing 15 feet of head on the Sacandaga River and the use of water naturally flowing with the river; construct a powerhouse to generate energy from Erie’s 15 feet of head and the additional 56 feet of head created by construction of the dam; and to annually pay the District certain sums for the use of the additional 56 feet of head and for the costs of the District’s construction and annual operation and maintenance costs.²⁰ The 1927 agreement was amended several times before it was replaced by a new agreement in 1980.

The 2003 Operating Agreement replaced the 1980 version and reflected the District’s status as FERC licensee of the GSL Project. The agreement memorialized the commitment of the parties to cooperate in the operation of the Sacandaga Reservoir to maximize generation at all of Erie’s facilities in the upper Hudson River Basin.²¹ It also set forth the mutual goal of cooperation in license implementation, as provided under the licenses, Settlement Agreement, Title 21 of Article 15 of the NYSECL and in scheduling releases to account for energy market conditions, among other things.²²

Finally, the 2003 Operating Agreement updated the payment structure set forth in the 1980 agreement—and previously set forth in the 1927 agreement—requiring what the 2003 Operating Agreement referred to as an annual “water fee” or “water flow charge,”

²⁰ 1927 Agreement at 1-6 (stating that the agreement “is intended to secure for [the] District the full value of the power thus produced by said additional head after providing for the cost of development and operation thereof.”); 2003 Operating Agreement at 1.

²¹ 2003 Operating Agreement § 1.3.

²² *Id.*

for the “right to use the District’s 56 feet of head and to take into, and use in, the Plant water from the District’s dam.”²³ Although the District and Erie agreed that the payments were intended to be in addition to and not inclusive of any other charges due the District from other statutory obligations,²⁴ they also recognized the possibility, now that the GSL Project was licensed, that the payments could be deemed to be duplicative of other required payments. Specifically, the Operating Agreement provided for early termination upon a determination by any entity with jurisdiction that the fees are in lieu of or in any way inclusive of any charges, fees, and costs due the District pursuant to any statutory obligation.²⁵

Erie and the District amended the 2003 Operating Agreement in 2006 to reflect an adjustment in the “water fee,” and subsequently extended the 2003 Operating Agreement, which was set to expire June 30, 2022, until December 31, 2022. As the parties engaged in negotiations regarding an extension or replacement of the 2003 Operating Agreement beyond 2022, it became clear to Erie that the annual fees sought by the District—the District was seeking \$2.3 million annually in “water use” charges (with yearly escalation) on top of Erie’s annual \$365,100 headwater benefits payments²⁶—did not align with Erie’s appraisal of the benefits. Furthermore, regardless of whether these benefits are characterized as “water fees,” “water flow charges,” contributions to the cost of construction, operation, and maintenance of the District’s facilities, or some as-yet unquantified and unqualified benefits of the District’s facilities to Erie, Erie’s headwater

²³ *Id.* § 5.1.

²⁴ *Id.* § 5.3.

²⁵ *Id.* § 3.2.

²⁶ The Commission’s orders assessed Erie an interim charge, beginning July 1, 2009, of \$365,100. *See Hudson River – Black River Regulating Dist., et al.*, 152 FERC ¶ 62,124 at Ordering Para. (B) (2015).

benefits payments already compensate the District for the Commission’s assessed value of the releases and costs of maintaining Sacandaga Reservoir and Conklingville Dam and for any other benefit that the District purports to assess under state law. Although Erie sees the necessity of continued operational coordination, it informed the District that it will no longer agree to pay for the benefits provided by the GSL Project beyond the amount it pays annually to the District for headwater benefits assessed under section 10(f) of the FPA.²⁷

In response to Erie’s communication that it no longer wished to extend the 2003 Operating Agreement beyond its expiration, the District threatened to radically change the operation of the GSL Project by diverting all releases from the Sacandaga Reservoir around E.J. West beginning January 1, 2023.²⁸ Given Erie’s grave concerns—discussed below—about the diversion, Erie agreed to extend the 2003 Operating Agreement until June 30, 2023 to allow the parties to continue their discussions about long-term coordination of E.J. West and the GSL Project, avoid the diversion of releases, and consider next steps for redress.²⁹

III. ARGUMENT

A determination by the Commission in this proceeding—that the FPA preempts the District’s ability to assess charges under state law for the benefits provided by the District’s releases from the GSL Project—is necessary to enable Erie and the District to

²⁷ Erie’s position in this regard is reflected in communications included in the District’s November 30 Filing.

²⁸ November 30 Filing at 3 (noting the District’s intent, beginning January 1, 2023, of making releases through its outlets rather than through E.J. West).

²⁹ Informational Notice Regarding Extension of Operating Agreement with Hudson River – Black River Regulating District, Project Nos. 12252, *et al.* (filed Jan. 11, 2023).

negotiate a new arrangement that includes only operational coordination. Moreover, a determination by the Commission that the District is prohibited from making unilateral changes in its mode of operation of the GSL Project is crucial to ensuring the Commission first analyzes the impacts of any such change—including to public safety, environmental resources, and Erie’s continued ability to generate power at E.J. West and its projects downstream—following public notice and opportunity for comment.

A. The Charges Assessed By the District Are for Headwater Benefits.

FERC’s regulations define headwater benefits as “the additional electric generation at a downstream project that results from regulation of the flow of the river by the headwater, or upstream, project, usually by increasing or decreasing the release of water from a storage reservoir.”³⁰ These are the benefits that FERC is charged with assessing under section 10(f) of the FPA, which provides that when a licensed project is directly benefitted by the upstream hydropower or storage project of another licensee, the licensee must reimburse the owner of the upstream project for a portion of its interest, maintenance, and depreciation costs deemed equitable by FERC.³¹ Parties can request that FERC conduct a headwater benefits assessment, or submit a negotiated agreement for benefits payments for the Commission’s approval.³²

The District has applied a wide variety of labels to the charges it assesses Erie under the Operating Agreement: reimbursement for construction, operation and

³⁰ 18 U.S.C. § 11.10(a)(2).

³¹ 16 U.S.C. § 803(f).

³² 18 C.F.R. § 11.14. In the case of the District’s facilities, a downstream licensee petitioned FERC to establish settlement discussions, asserting that the collections the District made under the color of state law were unauthorized assessments of headwater benefits charges. Complaint Against Hudson River-Black River Regulating District Regarding Unauthorized Assessments of Headwater Benefits Charges, Project No. 12252-000 (filed July 25, 2006). As discussed below, the Commission agreed.

maintenance for the Sacandaga Reservoir and Conklingville Dam; water flow charges; water fees; water lease costs; property benefits; and property rights. Nonetheless, it is clear that the charges are for the benefits of the District's regulation of flow by its release of water from the Sacandaga Reservoir. Notwithstanding the varying descriptors the District has used to characterize the charges, the District has acknowledged that the charges are for headwater benefits. In seeking rehearing of the orders incorporating the Commission's standard headwater benefits articles into the E.J. West license and Erie's other Sacandaga River project licenses, the District stated that "Section 8.4 of the Offer of Settlement recognizes that the assessment of charges for benefits (both power and non-power related) attributable to river regulation by the GSL Project is performed by the District's Board in a process defined by Article 15, Title 21 of the [NYSECL]."³³ As noted above, section 8.4 of the Settlement Agreement states that the District's reimbursement for operations and maintenance expenses associated with the GSL Project include, among other components, "[c]harges to Erie for the E.J. West Project's use of head and water at the Regulating District's Conklingville Dam."³⁴ Thus, the District has fully acknowledged that the assessments it performs under the NYSECL pursuant to the Operating Agreement are headwater benefits. It is clear that in denying rehearing and suggesting the District file the Operating Agreement for approval, the Commission viewed the payments under the Operating Agreement as payments for headwater benefits too.³⁵ Indeed, the Commission subsequently made clear in a related proceeding,

³³ Request for Rehearing of Hudson River-Black River Regulating District at 4, Project Nos. 12252-001, *et al.* (filed Oct. 25, 2002).

³⁴ Settlement Agreement § 8.4.

³⁵ *Erie Boulevard Hydropower, L.P., et al.*, 102 FERC ¶ 61,133 at PP 13-14 (acknowledging that while

discussed below, that there is “no question” that the District’s assessment of charges under Article 15, Title 21 of the NYSECL are for headwater benefits.³⁶

The District has recently decided to call its assessments under the Operating Agreement charges for “property rights” or “property benefits.”³⁷ The District maintains that without continued payment for such property rights, Erie will be out of compliance with standard Article 5 of its license, which requires it to “acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project.”³⁸ The District’s position is not only a thinly-veiled attempt to disguise its headwater benefits assessment in an attempt to double collect, but incorrect to boot.

Erie is in full compliance with standard Article 5 of its license for E.J. West. In issuing separate licenses to Erie and the District for the E.J. West and GSL Project components, the Commission acknowledged that, for “ownership or other reasons,” it can license different parts of a complete unit of development in different licenses.³⁹ The parties to the Settlement Agreement explained that their deliberate request for separate licenses was driven by legal restrictions that prevented Erie from obtaining the necessary

the Settlement Agreement provides for benefits to be determined by the District under state law, the proposed assessments must be submitted to the Commission for approval).

³⁶ *Fourth Branch Assocs. (Mechanicville) v. Hudson River-Black River Regulating Dist.*, 117 FERC ¶ 61,321 at P 38 (2006), *order on reh’g*, 119 FERC ¶ 61,141 (2007).

³⁷ See November 30 Filing at 1, 3; Hudson River – Black River Regulating District, *Organizational and Regular Meeting*, 34:50-54:30, YouTube (Jan. 10, 2023), <https://www.youtube.com/watch?v=NH2dJ8zIr7A> (referring to the District’s assessments to Erie as charges for “property benefits” at 42:20 and 52:40).

³⁸ See E.J. West License Order at Ordering ¶ (E) (subjecting the license to the articles set forth in Form L-3, Terms and Conditions of License for Constructed Major Projects Affecting Navigable Waters of the United States); Form L-3 at Art. 5.

³⁹ E.J. West License Order at P 5 n.10 (noting that “[t]he complete unit of development must be licensed, but the Commission is not required to place all parts of the unit of development under a single license.”).

ownership rights in the District’s facilities. They informed the Commission that “while the alternative of issuing a single license to [Erie] with a requirement that it acquire a hydroelectric easement or other property interests with respect to the dam and reservoir was considered, it soon became clear that such a course of action would probably face insurmountable legal obstacles.”⁴⁰ This is because reservoir lands owned by the state are forest preserve lands that also are part of the Adirondack State Park, and under state law, the sale or lease of such lands by the state is prohibited.⁴¹

As a result, it was precisely to *avoid* the situation where Erie would be unable to obtain the necessary rights to the District’s facilities that the parties decided to segregate the unit of development into two licenses.⁴² Erie is no more required to obtain fee ownership or perpetual rights to use the District’s licensed facilities than the District is required to obtain fee ownership or perpetual rights to use Erie’s licensed facilities.

Thus, Erie will not be in violation of its license if it ceases payments for head and flow—or, as the District coins them, “property rights”—upon expiration of the Operating Agreement. Moreover, the 2003 Operating Agreement is for a limited term and pursuant to section 3.2, subject to early termination.⁴³ Payment for “property rights” under a contract that does not extend for the entire license term and that has not been approved by the Commission is not the type of arrangement that fulfills a licensee’s obligation to

⁴⁰ Amendment of New License Application at 4.

⁴¹ *Id.*

⁴² *Id.* at 4-5 & 5 n.4.

⁴³ 2003 Operating Agreement § 3.2.

obtain the right to use property necessary for a project in perpetuity in compliance with standard Article 5.⁴⁴

Standard Article 13 of the District’s license—which it maintains authorizes it to charge Erie for “property rights,”⁴⁵ is similarly inapplicable. Standard Article 13 allows for third party uses of licensed project works as may be ordered by the Commission,⁴⁶ it is not relevant to a licensee’s use of facilities that are part of a complete unit of development. The District cannot rely on standard Article 13 as a basis for assessing charges under the 2003 Operating Agreement.

B. The District’s Assessment of Charges Is Preempted by the FPA.

The FPA establishes a comprehensive federal scheme for regulating hydropower projects subject to FERC’s jurisdiction, and as a result, occupies the field of regulation.⁴⁷ Section 10(f) of the FPA vests the Commission with exclusive jurisdiction to determine the level of reimbursement for costs that an upstream licensee may demand from a downstream licensee for headwater benefits.⁴⁸ Under long-standing precedent, the FPA preempts the District’s assessment of charges to Erie.

⁴⁴ Deviations to the ownership requirements in standard Article 5 are permitted only in limited circumstances that must be approved by the Commission. *See, e.g., Menominee Co. and N.E.W. Hydro, Inc.*, 74 FERC ¶ 61,023 at pp. 61,066-67 (1996) (approving a lease running for the entire term of the license and automatically renewable for the next license term).

⁴⁵ November 30 Filing at 2.

⁴⁶ Standard Article 13 is set forth in Form L-3, Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States (Oct. 1975), which is incorporated into both the E.J. West License Order and GSL Project License Order.

⁴⁷ *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm’n*, 328 U.S. 152, 181 (1946) (“[t]he detailed provisions of the [FPA] providing for the federal plan of regulation leave no room or need for conflicting state controls.”); *California v. FERC*, 495 U.S. 490, 496 (1990); *See Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451, 456 (9th Cir. 1993) (concluding that the FPA preempts state law by occupying the field); *Town of Springfield, Vt. v. State of Vt. Envtl. Bd.*, 521 F. Supp. 243, 250 (D. Vt. 1981) (“It is not the danger of conflict but the pervasiveness of the federal scheme which dictates preemption. . .”).

⁴⁸ 16 U.S.C. § 803(f).

The Commission has already determined that the District's assessment of charges under the NYSECL are for headwater benefits, and that the District's assessment of such charges is preempted by the FPA. In 2006, the licensee of the Mechanicville Project downstream of the Sacandaga Reservoir filed a complaint with the Commission regarding the District's practice of levying charges against it, pursuant to the same provisions of the NYSECL and the same procedures referenced in the Operating Agreement.⁴⁹ The Mechanicville licensee argued that the FPA preempted the District from assessing charges outside the context of the Commission's headwater benefits program.⁵⁰ The Commission agreed, first finding that:

there is no question that the District's assessments of . . . downstream hydropower project owners are assessments for headwater benefits. The District has been assessing . . . project owners for benefits that they receive as increased energy production resulting from regulation of the reservoir; this is virtually the definition of headwater benefits.⁵¹

The Commission found that only the portion of the District's charges under state law for interest, depreciation, and maintenance was preempted, and the District could continue to charge for any costs that it did not fit into those three categories.⁵² The D.C. Circuit disagreed, however, finding that FPA preemption of the New York system for headwater benefits assessments is not limited. It concluded that enabling a "dual authority over headwater assessments, especially ones based on different methodologies,

⁴⁹ Complaint Against Hudson River-Black River Regulating District Regarding Unauthorized Assessments of Headwater Benefits Charges, Project No. 12252-000 (filed July 25, 2006).

⁵⁰ *See id.*

⁵¹ *Fourth Branch Assocs. (Mechanicville) v. Hudson River-Black River Regulating Dist.*, 117 FERC ¶ 61,321 at P 38 (2006), *order on reh'g*, 119 FERC ¶ 61,141 (2007).

⁵² The District had been levying its assessments on downstream FERC licensees pursuant to Section 15-2121 of the NYSECL, which authorizes the District to seek reimbursement of the total cost of operating and maintaining its reservoirs from public corporations and landowners that benefit from the reservoirs' regulation of flow. N.Y. Env'tl. Conserv. Law § 15-2121.

would result in a morass of issues that would undermine the congressional intent to create a comprehensive scheme of hydropower development.”⁵³ The court found it “quite naive” to assume that states would purportedly charge only for costs other than interest, maintenance, and depreciation—illustrated, the court noted, by the District’s plan to apply funds it received from another licensee—Erie, in fact—toward the District’s costs for interest, maintenance, and depreciation, so all assessments to the Mechanicville licensee theoretically would be for costs that could escape preemption.⁵⁴ The court also found that even if the cost characterization could be easily resolved, there remained a danger that states could apportion costs among downstream licensees in a way that resulted in charges in excess of the benefits received.⁵⁵

Thus, the court held that section 10(f) of the FPA preempts all headwater benefits assessments conducted under the guise of state law, and for whatever type of charge they may claim to cover.⁵⁶ The Commission should find that the District’s assessments to Erie, for the benefits of the same facilities and under the same state law as the assessments challenged by the Mechanicville licensee, are similarly preempted.

C. The District Cannot Materially Change Its Project Operations Without Prior Commission Authorization.

The District has threatened to divert releases from the Sacandaga Reservoir around E.J. West upon expiration of the Operating Agreement unless Erie continues to

⁵³ *Albany Engineering Corp. v. FERC*, 548 F.3d 1071, 1078 (D.C. Cir. 2008).

⁵⁴ *Id.* This plan alone demonstrates the District’s acknowledgment that the payments it collects from Erie are headwater benefits preempted by the FPA.

⁵⁵ *Id.* at 1078-79.

⁵⁶ *Id.* at 1079.

pay the District for releases.⁵⁷ The District’s release of all flows through the outlet structure in Conklingville Dam—specifically, through three manually-operated and rarely utilized Dow valves—rather than through E.J. West, is a fundamental change to the GSL Project’s mode of operation. It would result in steady, flat releases through the valves as opposed to the timed, controlled releases through E.J. West’s generating units upon which the Settlement Agreement and respective Sacandaga River licenses are based. Such significant modification cannot be made without prior Commission approval through a formal proceeding involving notice and opportunity for comment.

In requiring the District’s facilities to be licensed, the Commission recognized that the Sacandaga Reservoir and Conklingville Dam were integral to the generation facilities at E.J. West and necessary to “preserve[] the benefits of hydroelectric generation.”⁵⁸ As a result, the GSL Project license is based on the fact that releases from the Great Sacandaga Lake flow through the E.J. West generating facilities, and the license—along with the comprehensive Settlement Agreement separately approved by the Commission⁵⁹—specifically requires the District to operate the GSL Project in a manner that “minimiz[es] energy losses” of downstream hydropower projects.⁶⁰ This fundamental license requirement, and the Commission’s environmental analysis of the GSL Project upon which the license is based, is premised on the District’s operation of the GSL Project to pass flows through—not around—the E.J. West generating facilities.

⁵⁷ November 30 Filing at 3 (noting that the District intends to make releases through its outlets rather than through E.J. West).

⁵⁸ GSL License Order at P 3 (2002).

⁵⁹ Order on Settlement at P 15 (2002).

⁶⁰ GSL License Order at Art. 402.

This is further reflected in the recognition in the GSL Project license that the District's operating regime "affects, in addition to E.J. West and the natural resources associated with the lake, hydroelectric projects and other industrial facilities, municipalities, and natural resources downstream..."⁶¹ The Commission's environmental analysis of and license requirements for E.J. West, which are based on the project's production of an average of 70.2 gigawatt-hours of energy annually,⁶² also are premised on the District's prioritized release of flows through the E.J. West powerhouse. So are the Commission's assessments of headwater benefits to Erie at E.J. West.⁶³ Severely limiting Erie's ability to generate power at E.J. West will require a significant change to the headwater benefits payments, with substantial overpayments to be necessarily offset in future assessments.

The District's unilateral change to GSL Project operations would violate Standard License Article 3, which prohibits, without prior Commission approval, "any substantial alteration or addition . . . to any dam or other project works under the license or any substantial use of project lands and waters not authorized therein."⁶⁴ Thus, the District cannot substantially change its mode of operation without seeking prior Commission authorization and analysis of the environmental impacts of the proposed change. The threatened diversion of flows is a substantial alteration of the use of GSL Project waters with the potential for significant environmental impacts.

⁶¹ *Id.* at P 15.

⁶² E.J. West License Order at P 43 (2002).

⁶³ *See Hudson River-Black River Regulating District, et al.*, 140 FERC ¶ 62,089 (order determining headwater benefits in the Hudson River Basin), *reh'g denied*, 141 FERC ¶ 61,227 at P 14 (noting that the Commission's assessment of benefits is based on actual generation and flow data from 2002 to 2008, during which time the District released flows from the GSL Reservoir through the E.J. West powerhouse).

⁶⁴ Form L-3, 54 FPC 1817 at Art. 3 (1975).

The material change in GSL Project operations proposed by the District also ignores Standard Article 10, which requires it to coordinate the operation of the GSL Project, “electrically and hydraulically, with such other projects or power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources. . . .”⁶⁵ As the Commission has recognized, Erie and the District closely coordinate flows from Sacandaga Reservoir through Erie’s generating units to ensure compliance with the District’s directive to minimize energy losses at the downstream projects.⁶⁶ The District’s threat to divert flows around E.J. West reflects a total disregard for approved operating protocols and coordination. Although it is clearly the District’s intent to preclude Erie from generating at all, under the District’s property rights theory, Erie could use natural flows in the Sacandaga River and its 15 feet of head to generate power. However, it is not possible to precisely quantify releases equivalent to natural flows and 15 feet of head, and such releases through E.J. West in addition to releases through the District’s valves could pose serious public safety risks downstream, particularly where flooding is prevalent.

Erie also has significant concerns about the District’s ability to properly and safely regulate flow in the river through its manual operation of the valves, particularly when flow has always been precisely regulated by Erie’s generating units, which are remotely operated by trained professionals. Even if the District were to maintain flow through E.J. West, any significant change by the District to the schedule of releases

⁶⁵ *Id.* at Article 10.

⁶⁶ Order on Settlement at P 18 (noting that “Erie operates E.J. West in a limited peaking mode, using water released on a daily basis by the District from the Great Sacandaga Lake. Erie determines the timing of the releases within each 24-hour period.”).

without Erie's agreement must be pre-approved by the Commission, only upon a showing by the District that the intended change in operation is in the public interest.

The District's threatened change has the potential for significant adverse impacts to not only E.J. West, but all 13 downstream projects relying on the benefit of specific timing of flows from the Sacandaga Reservoir through E.J. West, and by extension the public, which is benefited by the efficient operation and utilization of E.J. West and such other downstream projects.⁶⁷ First, such change violates the license directive for the District to release flows to minimize energy losses. The District's diversion of flows through the Dow valves will prevent Erie from operating E.J. West safely for maximum power generation. Furthermore, steady, flat releases from the valves (as threatened by the District)—rather than timed, controlled releases from E.J. West designed to maximize clean energy generation at the projects downstream of E.J. West during periods of peak demand—is likely to have a major impact on the ability of the projects downstream of E.J. West to supply energy market demand during crucial times of the day and year for energy resources in New York. These threats also fly in the face of the State of New York's mandated clean energy policies with which the District, an agency of the State of New York charged with regulating flows from the Sacandaga Reservoir, is obligated to abide.

The extent of environmental impacts of the District's threatened operational change—and the continued ability of the downstream projects to comply with their

⁶⁷ The Commission identified 13 projects in its headwater benefits assessments that benefit from the regulation of flows from Sacandaga Reservoir. These projects are E.J. West, Stewart's Bridge (P-2047), Curtis and Palmer Falls (P-2609), Hudson River (P-2482), Feeder Dam (P-2554), South Glens Falls (P-5461), Glens Falls (P-2385), Hudson Falls (P-5276), Fort Miller (P-4226), Stillwater (P-4684), Upper Mechanicville (P-2934), Mechanicville (P-6032), and Green Island (P-13).

licenses—is unknown and must be evaluated prior to the District’s diversion of flows or material alteration of its methodology for scheduling releases.

Finally, a unilateral change by the District to the location and timing of releases from the Sacandaga Reservoir is contrary to the Settlement Agreement, which is based on the carefully crafted resource objectives and operational enhancements that the Commission incorporated into the licenses. The 29 parties to the Settlement Agreement must have the opportunity to review and approve a significant change upon which the agreement is based.

For all of these reasons, Erie urges the Commission to issue a determination that the District cannot fundamentally change the operation of the GSL Project, including by diverting, or materially altering the timing of, or methodology for timing, releases from the Sacandaga Reservoir, without comprehensive Commission analysis, opportunity to comment on the record, and Commission approval.

IV. REQUEST FOR EXPEDITED ACTION

Erie respectfully requests the Commission to act expeditiously on this request for relief, by May 15, 2023. The 2003 Operating Agreement as extended expires on June 30, 2023. The District has maintained its threat that it will begin diverting releases immediately upon expiration of the agreement. For all of the reasons described above, and to enable the parties to focus their negotiations for any new agreement solely on operational coordination, the Commission’s expeditious ruling—that the District’s assessment of benefits charges is preempted by the FPA, and that the District is precluded from diverting releases around E.J. West without prior authorization—is necessary for

the parties to properly frame their negotiations over operational coordination of E.J. West and the GSL Project.

V. CONCLUSION

For the reasons stated above, the District's assessment of benefits charges under the Operating Agreement is preempted by the FPA, and the District is prohibited from diverting or materially modifying the timing of, or methodology for timing, releases from the Sacandaga Reservoir without prior Commission authorization. Accordingly, the Commission should issue a declaratory order stating that: (1) the FPA preempts the authority of the District to assess charges under state law (the NYSECL or otherwise) for Erie's use of the District's Sacandaga Reservoir and Conklingville Dam; and (2) the District is prohibited from making fundamental operational changes at the GSL Project without prior Commission authorization. Erie further requests that the Commission expeditiously rule on this petition by May 15, 2023.

Respectfully submitted,



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DATED: January 27, 2023

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Erie Boulevard Hydropower, LP)	Docket No. EL23-__-000
Hudson River – Black River Regulating)	Project No. 2318-__
District)	Project No. 12252-__

PETITION FOR EXEMPTION IN LIEU OF FILING FEE

This Petition for Exemption in Lieu of Filing Fee, filed pursuant to the Federal Energy Regulatory Commission’s (“Commission”) rules at 18 C.F.R. § 381.302 (2021) accompanies the Petition for Declaratory Order filed by Erie Boulevard Hydropower, LP in the above-captioned case. The accompanying Petition for Declaratory Order solely concerns the preemptive effect of the Commission’s licensing authority under Part I of the Federal Power Act and the enforcement of its licenses thereunder. Thus, no filing fee need accompany the Petition for Declaratory Order. *See* 18 C.F.R. § 381.302(b).

Respectfully submitted,



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Counsel to Erie Boulevard
Hydropower, LP

DATED: January 27, 2023

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 27th day of January, 2023.

/s/ Christopher Todd _____
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