UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

ANSWER TO PETITION FOR DECLARATORY ORDER AND REQUEST FOR EXPEDITED ACTION

Pursuant 18 C.F.R. §385.213(a)(3), Respondent, Hudson River – Black River Regulating District (the "Regulating District"), hereby respectfully responds to Petitioner, Erie Boulevard Hydropower, L.P.'s ("Erie") Petition for Declaratory Order filed with the Federal Energy Regulatory Commission (the "Commission" or "FERC"), on January 27, 2023. In addition to Respondent Regulating District's statement of disputed facts and law upon which this answer relies, Respondent also directs the Commission to, and relies upon, its Petition for Declaratory Order filed with FERC on January 25, 2023 seeking assistance resolving this same dispute.

The parties do not dispute that on November 14, 1927 the Regulating District and Erie's predecessor in interest ("NY Power & Light" or "power company") entered into a Reservoir Operating Agreement ("ROA") through which the power company agreed to construct a powerhouse capable of using not only the power company's 15 feet of head, but also the additional 56 feet of head to be created by the Regulating District's Dam and that the power company would pay the Regulating District for the power produced from such plant 56/71st of the total power produced by such plant. Further, there is no dispute that, in a March 23, 1928

deed[1], the power company conveyed to the Regulating District, in consideration of one dollar and partial satisfaction of the November 14, 1927 agreement[2], the land upon which the Regulating District ultimately built the Conklingville Dam. Neither do the parties dispute that Erie and its predecessors compensated the Regulating District through the 1927 reservoir operating agreement for use of that property interest, and subsequently through later amended and extended ROA's entered in 1939, 1949, 1971, 1980, 2003, 2021, and 2022; with the latest said agreement now set to expire on June 30, 2023[3].

There is no dispute that on September 25, 2002, the Commission issued a new license to Erie for the E.J. West powerhouse and generating facilities (Project 2318), an original license to the Regulating District for the Sacandaga Reservoir and Conklingville Dam (Project 12252), and approved the Offer of Settlement[4]. The parties do not dispute that Offer of Settlement provisions regarding project operations and the standard headwater benefits license article required by section 10(f) of the Federal Power Act ("FPA") are incorporated in both licenses.

Neither do the parties dispute that, beginning in 1925, the Regulating District relied upon New York statute to levy assessments on downstream property holders for what decades later courts determined to be headwater benefit assessments. Neither party disputes that each year from 2000 to 2005 Erie commenced litigation in two NY supreme courts challenging the NYS law-based assessments, but never once did Erie within such challenges reference the ROA nor conflate the ROA's contractual obligation with the headwater benefits assessment. Nor do the parties dispute that Erie accepted a stipulation of settlement and order executed by a state

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[1] See Footnote 2 of the Regulating District's January 25, 2023 Petition
[2] See Footnote 7 of the Regulating District's January 25, 2023 Petition
[3] See Footnotes 7 & 8 of the Regulating District's January 25, 2023 Petition
[4] Upper Hudson / Sacandaga River Offer of Settlement Project 12252, et. al, (filed April 12, 2000) ("Offer of Settlement").

supreme court justice on May 23, 2006[5] resolving all said litigation over the state law based assessments with said stipulation making no reference to, nor having any impact upon, Erie's obligation under the ROA.

The parties do not dispute that on November 28, 2008, the U.S. Court of Appeals for the District of Columbia Circuit found that that FPA section 10(f) preempted the New York statute as to all headwater benefits charges, Albany Engineering Corp, v. FERC 548 F.3d 1071 (D.C. Cir. 2008)[6]. The parties do not dispute that upon remand, FERC issued a July 31, 2012 Order Determining Headwater Benefits in the Hudson River Basin, (140 FERC ¶ 62,089) and later an August 21, 2015 Order Calculating Dates for Commencement of Headwater Benefits Assessments (152 FERC ¶ 62,124). The parties do not dispute that, after Erie's petition for re-hearing, Erie petitioned for review of said order by the U.S Court of Appeals for the District of Columbia[7]. The parties do not dispute that Erie failed to argue in its petition challenging FERC's headwater benefits determinations, nor in its brief, its reply brief to FERC's brief, or during oral argument before the U.S.C.A. D.C. Cir. in September 2017, that the payments required under the ROA are preempted by the FPA[8]. Likewise, there can be no dispute that in the first full paragraph on page 20 of the December 22, 2017 U.S. Court of Appeals for the D.C. Cir. opinion in Erie v. FERC, 878 F.3d 258 (D.C Cir. 2017), resolving over ten years of regulatory and

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[5] 2006 - 05 23 2006 Executed Stipulation of Settlement and Order.

[6] The U.S.C.A. D.C Cir. references the Regulating District's private agreement with Erie ("the ROA) but neither the Court nor the Commission on remand included it within the scope of the preemption. **See:** the first paragraph of page 13 discussing the ROA with Erie at E.J. West: "*The District's methodology is rather different. Using a 1925 benefits study under which hydropower owners pay for 95% of the District's costs, it appears to apportion them among hydropower project owners on the basis of a mixture of private settlement agreements with E.J. West and a pro rata charge based on the amount of head at the individual downstream property as a percentage of the total head on the waterway.* **See Also:** that same Court's opinion rendered nine years later upholding the Commission's headwater benefit determination orders resulting from that remand, Erie v. FERC, 878 F.3d 258 (D.C Cir. 2017), maintaining at page 20 the distinction between the ROA and Headwater Benefits Assessments.

[7] 2016 - 01 15 2016 Erie Petition to Review.

[8] Were Erie to have argued such in its petition, brief, reply brief to FERC's brief, or at oral argument, the U.S.C.A. D.C. Cir. opinion dismissing such contention would serve as an even stronger nail in coffin for Erie's argument.

judicial proceedings over the very scope of the FPA's preemption, the Court, nonetheless, acknowledged the ROA noting in essence that preemption does not disturb contractual relationships.

As such, the parties cannot dispute that Erie has consistently declined to raise the issue of the FPA's preemptive effect with respect to the ROA, nor has it challenged the appropriateness of the ROA itself, except when facing the prospect of increased costs pursuant to a new independent valuation of the benefits it is deriving.

The Regulating District does not dispute Erie's contention in the second sentence of the first paragraph on page 7 of their petition that section 1.3 of the ROA "*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*". However, the Regulating District's commitment is premised upon and therefore contingent upon the continuation of the ROA beyond its current June 30, 2023 expiration. Erie admits as much in the last line of paragraph three of its January 11, 2023 letter[9] "*The District's obligations under the Reservoir Operating Agreement would prevent it from diverting releases from the Project while the extension is in place*".

The Regulating District does dispute several factual allegations made in Erie's January 27, 2023 petition for declaratory order and request for expedited action. First and foremost, Erie erroneously contends in the first paragraph on page 4 of its petition that the Offer of Settlement's plan for the Regulating District's operation of the Sacandaga Reservoir is premised on releases from the reservoir moving through E.J. West. This is simply not true. The plan of operation as written at section 3.2 of the Offer of Settlement is premised on achieving certain objectives

[9] See Footnote 29 of Erie's Petition referencing Informational Notice Regarding Extension of Operating Agreement with Hudson River – Black River Regulating District, Project Nos. 12252, et al. (filed Jan. 11, 2023).

including: *targeted elevations during late winter; providing flows to maintain water quality and fish habitat; the enhancement of fall lake recreation; the minimization of energy losses through the aggressive use of storage; the enhancement of whitewater recreation on the Sacandaga River and providing base flows in the Sacandaga River*. Nowhere does the Offer of Settlement require that releases from the Sacandaga Reservoir be diverted through E.J. West. Quite to the contrary, the last paragraph of section 3.2 depicted on page 27 of the Offer of Settlement, reads as follows: *When flows are being released from Great Sacandaga Lake, the Regulating District will ensure that releases from Great Sacandaga Lake will allow Erie to provide a base flow and whitewater flows* ***below*** *the Stewarts Bridge Project, a minimum average daily flow* ***below*** *the confluence of the Hudson and Sacandaga Rivers, and a base flow* ***below*** *the Feeder Dam Project.*" [Emphasis added]. Note that the releases are designed to provide a base flow, whitewater flow and average daily flow 'below' points on the Sacandaga River well below the E.J. West Project. Likewise, section 3.4 of the Offer of Settlement governing operation for flow augmentation provides that "The Regulating District will allocate sufficient daily water volume releases from Great Sacandaga Lake to meet minimum average daily flow requirements on the Hudson River just ***below*** [emphasis added] the confluence with the Sacandaga River and to help meet the 1,500 cfs instantaneous Hudson River base flow requirement below Feeder Dam….". Again, the releases are designed to meet flow objectives measured well below E.J. West.

Erie continues this erroneous argument that the Regulating District is compelled to pass flows through (and not around) E.J. West in the second paragraph of subdivision 'C' under the heading "III. Argument" on page 17 of their petition. Erie cites to the minimization of energy losses to downstream hydropower projects to argue that passage of flows through E.J. West is a fundamental requirement imposed by Article 402 of the Regulating District's license. Article 402

of the Regulating District's license lists the same objectives recited above from section 3.2 of the Offer of Settlement including "*...minimizing energy loses to affected hydroelectric projects by the aggressive use of storage while maintaining other objectives;....*". 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.

In short, 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.

The Regulating District disputes Erie's claim regarding assessments charged to Erie and other downstream operators as those assessments compare to the ROA through which Erie compensates the Regulating District in order to maintain the necessary property interest in the head created, owned and controlled by the Regulating District. At page 5 of its petition, Erie cites to section 8.4 of the Offer of Settlement. In doing so, Erie conflates the settlement agreement's treatment of the reimbursement for operation and maintenance expenses associated with the Regulating District's operation of the Conklingville Dam and Great Sacandaga Lake with the ROA. By contrast, section 1.6 of the Offer of Settlement states clearly the distinction: "*The potential for reassessment and amendment of the water lease costs charged to Erie by the Regulating District for the E.J. West Project has not been addressed in this Settlement Offer*". Even more directly, Appendix A of the Offer of Settlement at subdivision A.1.7 on page A-8

provides in part "*In addition to these assessments, Erie, by contractual arrangement separate from and unrelated to the assessments, pays an additional annual charge for the E.J. West Project by virtue of its use of head created by the Regulating District's Conklingville Dam*". As demonstrated earlier in this answer, the record has been clear, and both FERC and the Courts have opined, on the distinction between headwater benefits and the ROA.

The Regulating District disputes Erie's attempt in the first full paragraph on page 8 of its petition to conflate the fee it pays pursuant to the ROA for the right to use the District's fifty-six (56) feet of head with headwater benefit assessments pertaining to construction, operation and maintenance of Regulating District facilities.

The Regulating District disputes Erie's suggestion at page 8 of its petition that the early termination clause at section 3.2 of the ROA supports Erie's contention that payments due pursuant to the ROA are in lieu of, or in any way included as, charges previously due under New York's Environmental Conservation Law. To the contrary, Erie's inclusion of that clause in the July 1, 2003 ROA, negotiated the summer after FERC approved the Offer of Settlement and issued licenses to both parties, foretold the contest resulting in the preemption of the State law based assessments. It is clear, as argued above, that FERC and the courts do not consider payments pursuant to the ROA to be in lieu of, or in any way included in, such state-law based assessments, nor the headwater benefit assessments with which such assessments were replaced.

The Regulating District disputes Erie's contention in that first full paragraph on page 8 of the Erie petition that the Regulating District proposes to extend the ROA at $2.3 million annually. The Regulating District, as a New York State public authority, is subject to New York State procurement guidelines and must advance this revenue contract to the Office of the State Comptroller and to the Office of the Attorney General for approval. In order to eventually garner

such approval, specifically relative to the fair market value requirements of New York's Public Authorities Law, the Regulating District commissioned an independent appraisal of the fifty-six (56) feet of head provided by the Regulating District at Conklingville Dam. The appraisal assumed continued operation of the project and determined the valuation to be $30,989,000 using a "sales" approach and $24,210,000 using an "income" approach. The Regulating District relied upon the lesser valued "income" approach and the corresponding annualized fee recommended by the independent consultant, $2,503,000, to propose an amendment to the water flow charge. To wit, the Regulating District proposed an extension of the ROA's term through the end of the license term in concert with an amendment to the water flow charge as follows:

> **Water Flow Charge**. Commencing July 1, 2022 and annually thereafter during the term of this Agreement, Erie shall pay, in advance, in twelve equal monthly installments to the District for the right to use the District's fifty-six (56) feet of head and to take into, and use in, the Plant water from the District's dam, the annual sum of two million five hundred three thousand dollars ($2,503,000.00) ("Water Fee"). During the term of this Agreement, the Water Fee shall increase (unless waived as provided in Section 5.2 of this Agreement) by the greater of three percent (3%) or the average of monthly percentage increases for the twelve months prior to July 1 of the 'Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items' as published by the United States Department of Labor, Bureau of Labor Statistics, on a compound basis effective as of July 1 of each calendar year ("Water Fee Increase"). The monthly installment of the Water Fee shall be payable on the 15th of each month during the term without notice or demand in immediately available funds to the District. The increase in the Water Fee for any annual period shall be waived in the circumstances set forth in Section 5.2 of this Agreement.

Certainly, the Regulating District acknowledges that the rate of compensation will be a product of negotiation, and through such negotiation Erie may provide constructive feedback on the Regulating District's independent valuation which could adjust the Regulating District's belief of what the fair market value of the asset actually is. Ultimately, to be in compliance with New York State Public Authorities Law, any contract the Regulating District enters into must include

fair market value compensation. Erie is aware of this fact, as it has entered into other "fair market value" agreements with other public authorities in New York State, like the New York State Canal Corporation.

The Regulating District disputes, for the reasons articulated above, Erie's argument at page 10 of its petition that charges due under the expiring ROA are duplicative of headwater benefits FERC determined Erie must pay.

The Regulating District disputes Erie's reading of Offer of Settlement section 8.4 at page 11 of its petition. That section maintains the distinction between charges for use of the Regulating District's fifty-six (56) feet of head and the state law based assessments the Regulating District levied upon Erie and other downstream property holders. Not only does Erie deliberately misread this passage to conflate payments for the property right with assessments to downstream beneficiaries, but Erie also erroneously cites a single October 2002 filing through which the Regulating District attempted to gain clarification regarding the role of its state law based assessments against those downstream beneficiaries. Erie did so without also pointing out that the very contention it advanced was later determined by the U.S.C.A. D.C. Cir. , **See:** Albany Engineering Corp, v. FERC 548 F.3d 1071 (D.C. Cir. 2008); FERC's July 31, 2012 Order Determining Headwater Benefits In The Hudson River Basin, (140 FERC ¶ 62,089); FERC's August 21, 2015 Order Calculating Dates For Commencement of Headwater Benefits Assessments (152 FERC ¶ 62,124); and page 20 of the December 22, 2017 U.S.C.A. D.C. Cir. opinion in Erie v. FERC, 878 F.3d 258 (D.C Cir. 2017), resolving over ten years of regulatory and judicial proceedings over the very scope of the FPA's preemption, in which the Court acknowledged the ROA noting in essence that preemption does not disturb contractual relationships.

The Regulating District disputes Erie's contention at page 12 of its petition that it has just recently starting calling the charges due under the ROA "property rights". The Regulating District has been characterizing the charge in this manner since the March 23, 1928 transfer of such property right through the deed cited in footnote 2 of the Regulating District's petition. In fact, the Regulating District and Erie's predecessors have been characterizing the consideration for such property transfer since the initial ROA entered on November 14, 1927 as cited in footnote 7 of the Regulating District's petition. Each of E.J. West's subsequent owners have similarly characterized the property transfer and the consideration therefore up to and including Erie Boulevard Hydropower, L.P. It is only in the last few months that Erie has begun asserting that it does not require a property interest above the 15/71st it already controls.

The Regulating District disputes Erie's claim at pages 12, 13 and 14 of its petition suggesting that the Regulating District's FERC license voids the need for Erie to obtain necessary rights to the Regulating District's facilities and that the ROA contract under which Erie maintained such rights is not the type of arrangement necessary for a project to remain in compliance with standard Article 5. In the context of Erie's inability to control all project elements, FERC's determination that the Regulating District must seek a license[10] impacted the Offer of Settlement negotiations. The parties' solution to the 'special circumstances'[11] included

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[10] August 27, 1992 FERC letter to Niagara Mohawk Power Corporation. See Erie Petition, Footnote 3.

[11] Offer of Settlement section 1.15 'Article XIV of the New York State Constitution' – "*The parties...agree that any arrangement...among them with respect to any...operating agreement will be consistent with Article 14, Section 1 of the New York State Constitution as well as Section 21 of the Federal Power Act. The parties further agree that there will be no transfer of real property interest in the form of fee title, lease or easement from ...the...Regulating District to Erie...for lands within the Adirondack Park or Forest Preserve for any purpose, including as a means of complying with the FPA*".
See also Offer of Settlement Appendix A, A.1.6. 'Forest Preserve' *"The interrelationship between the constitutional prohibition on transfer of State owned forest preserve land and the need to acquire rights to lands within any proposed FERC project boundary including Conklingville Dam and Great Sacandaga Lake create a unique set of circumstances as regards the licensing of those facilities."*
See Also Offer of Settlement Appendix A, A.1.7. 'Hudson River – Black River Regulating District' – Third paragraph, *"...In addition to these assessments, Erie, by contractual arrangement separate and unrelated to the*

continuation of the 1980 ROA[12]. Erie's new license application, cited in footnote 40 of Erie's petition, recites the basis for the parties' decision to petition FERC for separate licenses rather than seek to operate as co-licensees and provides: *"Accordingly, the parties to the Settlement Offer, including the Licensee and the Regulating District, concluded that under the special circumstances of this case, the issuance of separate licenses would be the most effective way to secure the objectives of the Settlement Offer while also satisfying the requirements of the FPA.* It is precisely these special circumstances through which FERC viewed the ROA to represent an acceptable deviation from the standard Article 5 ownership requirement.

Shortly after FERC approved the Offer of Settlement in September 2002, Erie and the Regulating District entered into the 2003 ROA; a renegotiation of the 1980 agreement the Regulating District had with Erie's predecessor in interest at the time FERC issued Erie's September 25, 2002 license. Clearly, the parties, and FERC, then thought that the ROA properly addressed the unusual circumstances preventing Erie from using the FPA's power of eminent domain Erie would otherwise employ to acquire the necessary property interest.

To the extent that Erie conflates payments under the ROA with assessments levied for FPA 10(f) charges, the Regulating District disputes Erie's argument at page 14 of its petition. The Regulating District does not dispute that the Regulating District's assessment of charges for headwater benefits pursuant to New York State's Environmental Conservation Law are preempted by the FPA. As noted above, the Commission and the Courts have steadfastly maintained the distinction between headwater benefits and charges under the ROA. The Regulating District and Erie's predecessors in interest did so as well. Even Erie, until twenty

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assessments, pays an additional annual charge for the E.J. West Project by virtue of use of head created by the Regulating District's Conklingville Dam...".

[12] Offer of Settlement sections 1.6, & 1.15, and Appendix A, A.1.6., & Appendix A, A.1.7.

years after FERC issued its current license and five years after FERC and the U.S.C.A. D.C. Cir. definitively established the scope of the FPA's preemption, maintained the distinction between the ROA and HWB.

The Regulating District disputes Erie's statement at page 17 of its petition that the Regulating District's release of all flows through the Conklingville Dam rather than through E.J. West is a fundamental change in the 12252 Project's mode of operation. As articulated above, and in sections 3.2 and 3.4 of the Offer of Settlement and in Article 402 of the Regulating District's license, absent an agreement with Erie compelling releases through E.J. West, the operating scheme already accounts for releases through the Dam. As the owner of fifty-six (56) feet of the seventy-one (71) feet of head utilized to generate power and, pursuant to the agreement and deed executed prior to the Dam's construction, due the full value of the power produced by such additional head (56/71st), the Regulating District would prefer Erie continue passing flow through the powerhouse. However, as releases from Great Sacandaga Lake are dictated by the level curves negotiated in the Offer of Settlement and memorialized in Erie's and the Regulating District's FERC licenses, if the Regulating District were to make releases through the Dam, Erie would be precluded from exceeding target releases prescribed by such Settlement Agreement and License Article. While the timing of such releases from GSL must have some value at Erie's downstream plants, and the passage of flow through E.J. West must also have some value to Erie, the Regulating District would still safely meet each of the operating objectives outlined in the Offer of Settlement and License Article 402 were it to make releases

through Conklingville. Likewise, the environmental impacts of diverting flows around E.J. West have been studied and addressed in the context of the Offer of Settlement.[13]

For the reasons stated above, the Regulating District respectfully requests the Commission deny Erie's petition in its entirety, but especially rule that Erie must maintain a necessary property interest in the head created, owned and controlled by the Regulating District.

Further, the Regulating District respectfully requests the Commission determine that the FPA preemption does not extend to the contractual relationship governing consideration due for the property interest conveyed in the March 23, 1928 deed and the November 14, 1927 agreement, as amended and extended referenced therein.

Finally, the Regulating District requests that the Commission deny that portion of Erie's petition contending that the Regulating District is precluded from diverting flow around Erie's powerhouse while remaining in compliance with the target releases prescribed by the Offer of Settlement and Project 12252 License Article 402.

The Regulating District has no objection to Erie's request for expedited action and would welcome timely summary disposition.

Dated at this 13th day of February, 2023

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[13] See page 7 of the Amendment of New License cited at Footnote 40 of the Erie petition "*The description of the facilities to be licensed to the Regulating District and of the environmental impacts of those facilities is already contained in the drawings and exhibits submitted with the pending license application*".

Certificate of Service

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

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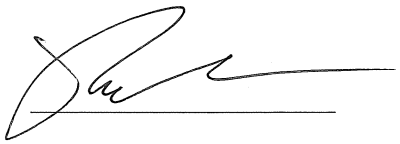
Dated at this 13th day of February, 2023



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