

May 17, 2023

Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

**Re: Urgent Request to Prevent the Diversion of Reservoir Releases
Project Nos. 12252-035, 12252-036, 2318-053, and 2318-054**

Dear Secretary Bose:

On January 27, 2023, Erie Boulevard Hydropower, LP (“Erie”), licensee of the E.J. West Project No. 2318 (“E.J. West”), filed a Petition for Declaratory Order (“Petition”) requesting the Commission to declare that (1) the Federal Power Act preempts the regulatory authority of the Hudson River – Black River Regulating District (“District”) to assess charges to Erie under state law 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, which it has threatened to do by diverting releases around E.J. West or significantly modifying the timing of GSL Project releases, without prior Commission authorization.¹ Erie sought expedited action on its Petition because the District has threatened to begin diverting releases around E.J. West immediately following the June 30, 2023 expiration of the parties’ operating agreement.

Erie urges the Commission to take immediate action, pending resolution of the Petition, to prevent the District from diverting flows from the GSL Project upon expiration of the operating agreement. The District’s re-routing of releases from the Sacandaga Reservoir around rather than through E.J. West is a fundamental change to the operating regime that has been in place on the Sacandaga River for nearly 100 years. As such, the substantial alteration of the regime as threatened by the District requires prior approval and a comprehensive analysis by the Commission. As Erie explained in detail in its Petition and answer to the District’s petition for declaratory order (“Answer”),² the diversion of Sacandaga Reservoir releases around E.J. West will prevent Erie from generating power at E.J. West, threaten public safety, and impact environmental resources on the Sacandaga and Hudson Rivers. Further, such change is contrary to the E.J. West and GSL Project licenses and Commission-approved settlement agreement, to which there are 29 signatories.

¹ See Petition for Declaratory Order and Request for Expedited Action, Project Nos. 2318-054, et al. (filed Jan. 27, 2023).

² See Motion to Intervene and Answer to Petition for Declaratory Order, Project Nos. 2318-054, et al. (filed Mar. 6, 2023).

An interim ruling to prevent the District from diverting releases—pending a Commission decision on all of the issues raised in these declaratory proceedings—is critical to public safety. This is particularly true in light of the upcoming recreation season, when Erie makes flow changes twice-daily (including weekends) to provide whitewater releases beginning in June and continuing until mid-October. Erie cannot schedule and control these releases if the District diverts flows around E.J. West. For the District to provide whitewater releases consistent with the settlement agreement and GSL Project and E.J. West licenses, it would need to manually adjust the Dow valves at the Conklingville Dam at least twice per day. This will be difficult for the District to manage with precision. It also removes the public safety protection Erie currently provides through operation of E.J. West which enables it to remotely and quickly stop flow from the Sacandaga Reservoir in the event of an emergency during the whitewater release.³ In contrast, if flows are being diverted around E.J. West, the District will require significant additional time to stop or reduce flows using the manual Dow valves during an emergency event requiring slowing or cessation of flows.

Erie is not the only entity concerned with the District’s threat to abruptly and fundamentally alter the operating regime in the Sacandaga River without any analysis of the potentially detrimental effects. The U.S. Fish and Wildlife Service (“USFWS”), a signatory to the settlement agreement, also expressed concern with the flow alterations that would result from the District’s unilateral change.⁴ The USFWS flagged the potential for impacts to aquatic habitat that have not been evaluated and for which the signatories to the settlement agreement have not been consulted.⁵ Thus, in addition to seeking Commission approval for the change in flows, the District must follow the procedures set forth in the settlement agreement—namely to consult with USFWS, Erie, and the other 26 signatories—prior to implementing any change to the flow regime set forth in the agreement and GSL Project license.

Furthermore, the District will suffer no adverse impact whatsoever from maintaining the existing flow regime versus their threatened diversion of flows around E.J. West. The District will receive no additional revenues, will benefit from no savings in costs, or take on any less risk if it carried out its threat to divert flows while the Commission considers Erie’s pending Petition. In fact, such a diversion would clearly have adverse public impact through loss of E.J. West’s generation and creation of unnecessary risks around public safety and environmental impacts as described herein, and would likely require the District to incur additional labor costs to manage the Dow valves. The District’s threatened diversion is simply a pressure tactic designed to compel Erie to continue to pay additional amounts to the District for headwater benefits to E.J. West that Erie maintains through its Petition are not permitted under the Federal Power Act.

³ As Erie noted in its Answer, Erie’s ability to remotely and precisely manage control of flow through the generating units at E.J. West allowed Erie to quickly reduce downstream flow during a 2016 safety incident. If the District had been routing releases through its manually operated Dow valves at that time, a prompt response and quick reduction in flow would not have been possible. *See* Answer at 12 n. 40.

⁴ Letter from Ian Drew, U.S. Fish and Wildlife Service, to Kimberly Bose, FERC at 1, Project Nos. 2318-053, et al. (filed Mar. 2, 2023).

⁵ *Id.* at 1-2.

Given the gravity of potential impacts of the District's diversion of releases from the Sacandaga Reservoir—without any analysis or request for approval of the change—and the lack of adverse impact to the District of being required to maintain the current flow regime while the Commission resolves the pending disputes between E.J. West and the District, Erie urges the Commission to clarify that pending resolution of Erie's Petition, the District may not divert releases from the GSL Project following the June 30, 2023 expiration of the operating agreement. Alternatively, Erie renews its request for expedited action on its Petition by May 31, 2023 to enable it to exercise available remedies to prevent the District from diverting flows.

Erie appreciates the Commission's prompt attention to this matter. Please contact me with any questions.

Sincerely,



Julia S. Wood

Counsel for Erie Boulevard Hydropower, LP

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 17th day of May, 2023.

/s/ Christopher Todd _____
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