



Hudson River - Black River Regulating District

KATHY HOCHUL
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Executive Director

July 5, 2023

Mr. John Spain, Regional Engineer
Federal Energy Regulatory Commission
19 West 34th Street
Suite 400
New York, New York 10001

Re: Request for Authorization to Divert Flow – P-2318/P-12252

Regional Engineer Spain,

We interpret the Commission’s June 15, 2023 Order as equating the ‘headwater flow’ benefitting all downstream FERC licensees and the ‘head or column of water’ benefitting only Erie’s E.J. West project to conclude that hydraulic head is not a property interest that must be obtained by a downstream licensee. The Order also holds that payments made by Erie to the Regulating District under the expiring operating agreement are independent contractual obligations which are not preempted by the Federal Power Act. Finally, the Order requires the Regulating District to petition the Commission for authority to divert water around the E.J. West project. In so holding, the Order both reduces Erie’s incentive to secure an agreement and restricts the Regulating District’s authority to enforce its negotiated right to receive full value of the power produced by the additional head the State of New York provided to Erie by constructing the Conklingville Dam nearly a century ago. A petition for rehearing of the Commission’s Order will follow.

The Regulating District’s immediate concern is that Erie has elected to allow the operating agreement at Conklingville to expire. However Erie characterizes the benefit it received under the expiring agreement, the Regulating District must now provide that same benefit without compensation. New York State Public Authorities Law provides that a public authority, such as the Regulating District, may only dispose of an interest in property for its fair market value. This petition seeks permission to divert water around E.J. West to prevent the Regulating District’s continued violation of state law.

The Commission ruled that the Regulating District “must first seek Commission approval” before diverting water around E.J. West. We do so here, with a request that the Commission note the inequity rendered by the order and posits that it has amply demonstrated the Regulating District’s ability and commitment to comply with the terms of its license and the relevant terms of the settlement agreement while diverting flows around E.J. West. As noted in the Order, section 3.8 of the settlement agreement expressly provides for situations in which neither of the generating units at E.J. West are online. To date, neither Erie, nor the Commission, has taken issue with the Regulating District’s performance under this provision. Nothing in the settlement agreement or the license restricts the duration of such diversion or limits when

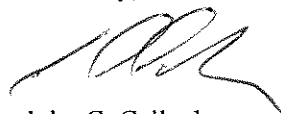
Erie can request such to take E.J. West offline. The Regulating District routinely exercises the Conklingville Dam's low level outlet "Dow" valves to ensure it is ready to comply with every such request.

As the Commission evaluates whether the change in operation would be in the public interest, let it consider the party benefitted and the parties ultimately harmed by Erie's decision to abandon its obligation to pay for the benefit the state must now provide for free. Erie controls the unit of development's power function and thus generates revenue. The Regulating District controls the non-power function aspects of the unit and thus generates no revenue from the project. In short, a private corporation is now utilizing a state asset to generate profits which will accrue to their shareholders. Yet, after having entered into a new agreement less than two decades ago to do so, Erie is now unwilling to pay the fair market value of such benefit. So, Erie benefits, at the expense of taxpayers in downstream municipalities and across the state who must cover the loss of revenue.

We also question whether the Commission's June 15, 2023 Order appropriately distinguishes between the benefit realized by the 'downstream' but 'co-located' E.J. West facility and the benefit afforded each other 'downstream' facility by virtue of the Regulating District's headwater project. Each of the downstream projects, including E.J. West, benefit from the flow released by the Regulating District at Conklingville; a benefit recovered through the FPA's section 10(f) headwater benefits assessment. But Conklingville Dam provides another, significant, benefit to E.J. West alone. None of the projects further downstream have at their disposal the column of water representing the additional liquid pressure afforded to E.J. West through the construction of the Conklingville Dam. That additional head is exactly what the power company contracted with the Regulating District to provide in 1927, and for which its successors in interest, including Erie, have continued to provide compensation continuously since that time. In fact, but for the Regulating District's agreement to construct said dam in exchange for payments from Erie and its predecessors in interest, the power company would have likely built it's E.J. West project to utilize only the 15 feet of head then in the power company's possession. It is inequitable for the Commission to simply equate Erie's headwater benefit with the head which allows E.J. West to generate at a 71-foot-high facility rather than a 15-foot-high dam.

Relying upon an example citing to the settlement agreement, the Commission's June 15th Order holds that the studies and data submitted to support licensing presumed water would flow from GSL to the E.J. West Project. However, that same settlement agreement, at section 8.4, also presumes that the Regulating District is to be reimbursed for the head used by E.J. West. This condition of reimbursement is no longer being met and, in the interest of avoiding a continued violation of New York State Public Authorities Law, the Regulating District therefore petitions the Commission to make releases prescribed by its license at the Conklingville Dam rather than through the E.J. West project.

Sincerely,



John C. Callaghan
Executive Director