



Project.<sup>2</sup> Specifically, the GSL Project creates 71 feet of hydraulic head<sup>3</sup> and includes: the Great Sacandaga Lake impoundment; the Conklingville Dam; an outlet structure; a spillway weir; a canal delivering water from the reservoir to the forebay; and a control house.<sup>4</sup> The GSL Project provides flood control and flows to the E.J. West Project, and does not generate power.<sup>5</sup> The E.J. West Project includes: an intake structure; penstocks; and a powerhouse containing two turbines, each connected to a generator with an authorized installed capacity of 10,000 kilowatts each.<sup>6</sup> The projects operate in a peaking mode, and, pursuant to an off-license reservoir operating agreement (ROA), Erie determines the timing of flow releases from the GSL Project within each 24-hour period.<sup>7</sup>

3. In November 1927, the District, the state agency responsible for operating and maintaining the Conklingville Dam, and New York Power and Light Corporation (Power Company), Erie's predecessor in interest, signed an agreement whereby the District would construct the Great Sacandaga Lake impoundment and Conklingville Dam on land owned by the Power Company, and the Power Company would construct, maintain, and operate facilities to generate electricity at the dam.<sup>8</sup> The Power Company agreed to convey certain lands to the District for the construction of the dam and reserved 15 feet of hydraulic head created by the dam.<sup>9</sup> In addition, the District allowed the Power Company to use the remaining 56 feet of head created by the dam for power production and the

---

<sup>2</sup> *Erie Boulevard Hydropower, L.P.*, 100 FERC ¶ 61,321, at PP 4, 15 (2002) (Settlement Order).

<sup>3</sup> Hydraulic head is a measure of liquid pressure, expressed in terms of the height of a column of water, which represents the total energy of the water. U.S. Dep't of Energy, Water Power Technologies Office, *Glossary of Hydropower Terms*, <https://www.energy.gov/eere/water/glossary-hydropower-terms>.

<sup>4</sup> Settlement Order, 100 FERC ¶ 61,321 at P 16.

<sup>5</sup> *Id.* PP 15-16.

<sup>6</sup> *Id.* P 16.

<sup>7</sup> *Id.* PP 17-18. An ROA has been in effect since the projects were first constructed. The current ROA, agreed to in 2003 and amended in 2006, expires on June 30, 2023.

<sup>8</sup> In addition to power generation, the Conklingville Dam provides flood control and other benefits to riverside communities.

<sup>9</sup> See District Petition for Declaratory Order (Jan. 25, 2023) (attachment of original agreement).

Power Company agreed to pay a portion of the cost of constructing the dam as well as to make annual payments for the cost of operating and maintaining the dam. Specifically, the Power Company agreed to pay 15/71<sup>th</sup> of the operating and maintenance costs, which represented the share of the 71 feet of head the Power Company owned.<sup>10</sup>

4. The project operated unlicensed until 1963, when the Federal Power Commission, the Commission's predecessor, issued an original license for the E.J. West Project.<sup>11</sup> The GSL Project remained unlicensed.

5. In 1992, during the relicensing proceeding of the E.J. West Project, the Commission determined that the GSL Project and E.J. West Project were part of the same "unit of development" and required that the GSL Project be licensed.<sup>12</sup> Because the GSL Project facilities are located on forest preserve lands and lands in the Adirondack State Park, Erie would have been unable to acquire those lands for the E.J. West Project.<sup>13</sup>

---

<sup>10</sup> See *id.* (attachment of deed).

<sup>11</sup> *Niagara Mohawk Corp.*, 29 FPC 1290 (1963) (issuing an original license with an effective date of April 1, 1949, the first of the month in which the Commission determined the Sacandaga River to be a navigable water).

<sup>12</sup> See Letter to Niagara Mohawk from the Director, Division of Project Review, Office of Hydropower Licensing, Docket No. P-2318-002 (Aug. 27, 1992). Section 3(11) of the FPA, 16 U.S.C. § 796(3)(11), defines a "project" as a complete unit of development, consisting of all dams, powerhouses, impoundments, water rights, and lands which are used in connection with such unit. The 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. For ownership or other reasons, the Commission can license different parts of a complete unit of development in different licenses. See *Hudson-River Black River Regulating Dist.*, 100 FERC ¶ 61,319, at P 6 n.8 (2002) (citations omitted) (District License).

<sup>13</sup> Section 21 of the FPA prohibits a licensee from using eminent domain "to acquire any lands or other property that, prior to October 24, 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law. In the case of lands or other property that are owned by a State or political subdivision and are part of or included within a public park, recreation area or wildlife refuge established under State or local law on or after October 24, 1992, no licensee may use the right of eminent domain ... to acquire such lands or property unless there has been a public hearing held in the affected community and a finding by the Commission ... that the license will not interfere or be inconsistent with the purposes for which such lands or property are owned." 16 U.S.C. § 814.

Therefore, the District requested a separate license for the GSL Project. On September 25, 2002, the Commission issued an original license for the GSL Project and a new license for the E.J. West Project, and approved an Offer of Settlement (Settlement Agreement),<sup>14</sup> which included provisions related to the GSL Project, E.J. West Project, and three other projects owned by Erie located further downstream on the Sacandaga and Hudson Rivers.<sup>15</sup>

6. The license and Settlement Agreement set forth the District's operational requirements for the GSL Project. As relevant here, Article 402 of the District's license requires that, in addition to controlling flooding on the Hudson River, the District provide base flows in the Sacandaga River; provide flows in the Hudson River to maintain water quality and fish habitat; raise and lower lake elevations to meet flow objectives specific to the fall recreation season, whitewater recreation, and the winter; and minimize energy losses to downstream hydroelectric projects via the "aggressive use of storage."<sup>16</sup>

7. As discussed above, pursuant to the ROA, Erie pays the District an annual fee for the use of the additional 56 feet of hydraulic head created by the GSL Project. In addition, Erie pays a headwater benefits charge to the District pursuant to section 10(f) of the FPA.<sup>17</sup> In October 2022, Erie informed the District that it would no longer pay for the use of the District's 56 feet of head, characterizing the charges as duplicative of Erie's

---

<sup>14</sup> *Erie Boulevard Hydropower, L.P.*, 100 FERC ¶ 61,322 (2002) (order issuing new license for the E.J. West Project) (E.J. West License); District License, 100 FERC ¶ 61,319 (order issuing original license for the GSL Project); Settlement Order, 100 FERC ¶ 61,321. Nearly 30 parties signed onto the settlement, including state and federal agencies, conservation organizations, and local recreation-oriented organizations. *Id.* P 8 n.12.

<sup>15</sup> Settlement Order, 100 FERC ¶ 61,321 at P 3. The projects, from upstream to downstream, include the Stewart's Bridge Project No. 2047; Hudson River Project No. 2482; and Feeder Dam Project No. 2554.

<sup>16</sup> See District License, 100 FERC ¶ 61,119 at art. 402.

<sup>17</sup> *Hudson River-Black River Regulating Dist.*, 140 FERC ¶ 62,089 (order determining headwater benefits in the Hudson River Basin), *reh'g denied*, 141 FERC ¶ 61,227 (2012). Headwater benefits are the benefits that a downstream project realizes as the result of the operation of an upstream facility.

headwater benefits payments, and that it did not wish to extend the operating agreement.<sup>18</sup>

8. In their petitions, Erie and the District dispute their legal obligations under the licenses. The District argues that it is not bound by its license to release water through the E.J. West Project facilities absent an ROA and that Erie is obligated to maintain a property right in the additional 56 feet of hydraulic head created by the GSL Project. Erie, on the other hand, maintains that the charges in the ROA are preempted under the FPA and that the parties' licenses and the Settlement Agreement dictate that the District cannot divert all flow around the E.J. West Project once the ROA expires.

## **II. Notice, Interventions, Comments, and Answers**

9. On February 1, 2023, the Commission issued public notice of Erie's and the District's petitions, establishing March 6, 2023, as the deadline for filing interventions, protests, and comments.<sup>19</sup> The U.S. Department of the Interior (Interior) filed a timely notice of intervention.<sup>20</sup> On February 13, 2023, the District filed an answer to Erie's petition. Erie filed an answer<sup>21</sup> and timely motion to intervene in the District's petition proceeding on March 6, 2023.<sup>22</sup>

10. Various entities, including individual property owners on Great Sacandaga Lake, filed comments supporting the District's petition. The commenters express concern about the ramifications for safety, recreation, and other functions of the lake if the

---

<sup>18</sup> The operating agreement was set to expire on December 31, 2022; however, the parties agreed to extend the agreement until June 30, 2023.

<sup>19</sup> 88 Fed. Reg. 7972 (Feb. 7, 2023).

<sup>20</sup> Under Rule 214(a) of the Commission's Rules of Practice and Procedure, Interior became a party to the proceeding upon the timely filing of the notice of intervention. 18 C.F.R. § 385.214(a) (2022).

<sup>21</sup> Erie's filing states that it is answering both the District's petition and February 13, 2023 answer to Erie's Petition. Although the Commission's Rules of Practice and Procedure do not permit answers to answers, 18 C.F.R. § 385.213(a)(2) (2022), we will accept the answer because it provides information that assists in our decision-making.

<sup>22</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. *See* 18 C.F.R. § 385.214(c)(1).

District lost annual revenue from Erie.<sup>23</sup> They also claim that it would be unfair for Erie to stop paying for the use of the District's hydraulic head, which has been the arrangement for decades,<sup>24</sup> and that Erie is attempting to shift the financial burden of maintaining the lake from private industry to the public.<sup>25</sup>

11. Four members of the New York State Legislature (Assemblymembers) note that the legislature has worked to shift the District's property tax obligations to the State of New York in order to provide financial relief to Saratoga, Warren, Washington, Rensselaer, and Albany Counties, which have borne a disproportionately large share of the GSL Project's operating expenses. Because a bill that would help finance these counties' expenses would not provide relief until 2024, the Assemblymembers argue that the Commission should deny Erie's petition, which would bring Erie back to the negotiating table and result in payments that would provide fiscal relief to county taxpayers.<sup>26</sup> Similarly, the County of Albany, New York stresses the importance of the GSL Project to flood control and echoes the Assemblymembers' concerns about county-level funding of the GSL Project.<sup>27</sup>

12. Last, the U.S. Fish and Wildlife Service (FWS) expresses concern about the potential for flow alterations resulting from this proceeding. FWS notes that it was one of many parties to the Settlement Agreement, which focused on the GSL Project's operational requirements.<sup>28</sup> FWS therefore requests that the Commission consult with it, other relevant federal and state agencies, and other stakeholders about any changes to GSL Project operations that could affect flow, downstream releases, and aquatic habitats

---

<sup>23</sup> See, e.g., David Smail Feb. 22, 2023 Comment (arguing that losing revenue would strain the District's ability to safely operate the dam and lake); Thomas Michl Mar. 6, 2023 Comment at 1-2 (arguing that Erie's payments to the District help ensure that the District can meet its license obligations, including those related to recreation and erosion control); Wendy Haugh Feb. 27, 2023 Comment (arguing that Erie would violate Article 5 of its license should it cease paying to use the District's 56 feet of head).

<sup>24</sup> See, e.g., David Rukvica Mar. 2, 2023 Comment.

<sup>25</sup> See, e.g., Diane and Gene Greco Mar. 6, 2023 Comment.

<sup>26</sup> Assemblymembers Mar. 6, 2023 Comment at 1-2.

<sup>27</sup> Albany County Mar. 8, 2023 Comment at 2.

<sup>28</sup> FWS Mar. 3, 2023 Comment at 1.

along the Sacandaga and Hudson Rivers.<sup>29</sup> The comments and answers are addressed below.

### III. Discussion

#### A. The District's Charges Pursuant to the ROA Are Not Preempted by Section 10(f) of the FPA

##### 1. Petitions and Answers

13. Erie contends that section 10(f) of the FPA preempts charges assessed by the District for releases from the GSL Project.<sup>30</sup> It states that the FPA establishes a comprehensive federal scheme for regulating hydropower projects and that section 10(f) 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.<sup>31</sup> Erie argues that the Commission has already determined that the District's assessment of headwater benefits under the New York Environmental Conservation Law (NYECL) is preempted,<sup>32</sup> and that in reviewing the Commission's finding, the U.S. Court of Appeals for D.C. Circuit (D.C. Circuit) noted that section 10(f) preempts all headwater benefits assessments conducted under the guise of state law and for whatever type of charge they may claim to cover.<sup>33</sup>

14. Erie notes that, prior to the licensing of the GSL Project, Erie and its predecessors compensated the District for the value provided by the District's facilities through a payment mechanism set forth in the ROA.<sup>34</sup> Erie states that in 2003, it and the District updated the payment structure from prior ROAs by calling the payments an annual "water fee" or "water flow charge" for the "right to use the District's 56 feet of head and

---

<sup>29</sup> *Id.*

<sup>30</sup> Erie Petition for Declaratory Order at 10-16.

<sup>31</sup> *Id.* at 14 (citing 16 U.S.C. § 803(f)).

<sup>32</sup> *Id.* at 11-12, 14-15.

<sup>33</sup> *Id.* at 15-16 (citing *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071, 1078-79 (D.C. Cir. 2008) (*Albany Engineering*)).

<sup>34</sup> *Id.* at 5.

to take into, and use in, the plant water from the District's dam."<sup>35</sup> Erie alleges that although it 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, the parties also recognized the possibility that the payments could be deemed to be duplicative of other required payments.<sup>36</sup>

15. Erie contends that regardless of how these charges are characterized, the Commission's authorized headwater benefits payments already compensate the District for the assessed value of the releases and costs of maintaining the GSL Project.<sup>37</sup> Erie asserts that section 8.4 of the Settlement Agreement recognizes that the assessment of charges for benefits attributable to river regulation by the GSL Project, including charges to Erie for the use of head, is performed by the District's Board in a process defined by New York law.<sup>38</sup> Thus, it concludes that the ROA's charges should be preempted.<sup>39</sup>

16. The District avers that the D.C. Circuit recognized that charges made pursuant to a contractual arrangement are not subject to federal preemption.<sup>40</sup> It states that, since 1925, it has relied on a New York statute to levy assessments on downstream property holders for what were later determined to be headwater benefits.<sup>41</sup> The District acknowledges that charges pursuant to the NYECL are preempted by the FPA, but states that the ROA payments are not in lieu of or included as charges previously due under that law.<sup>42</sup> It contends that the parties anticipated litigation over the NYECL charges and structured the

---

<sup>35</sup> *Id.* at 6-8. Erie argues that notwithstanding the varying descriptors the District has used to characterize the charges, the District has acknowledged that the charges are for headwater benefits. *Id.* at 10-11.

<sup>36</sup> *Id.* at 8. Erie cites the early termination provision, section 3.2 of the 2003 ROA, which provides that the agreement may be terminated 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. *Id.* at 8, 13-14.

<sup>37</sup> *Id.* at 8-9.

<sup>38</sup> *Id.* at 11.

<sup>39</sup> *See id.* at 22.

<sup>40</sup> District Answer to Petition for Declaratory Order at 3-4, 7 (Feb. 13, 2023) (District Answer).

<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.* at 3, 7, 11.

ROA so that they would not be subject to that litigation.<sup>43</sup> The District asserts that despite multiple challenges to these assessments in both Commission proceedings and state court, Erie has not, until now, alleged that the ROA's contractual obligation is a headwater benefit.<sup>44</sup>

17. Last, the District argues that Erie wrongly conflates the Settlement Agreement's treatment of the reimbursement for operation and maintenance expenses with water lease costs under the ROA.<sup>45</sup> The District notes that the Settlement Agreement acknowledges that Erie pays an additional annual water lease charge for the E.J. West Project pursuant to a contractual arrangement and that charge may be amended and is not subject to the settlement.<sup>46</sup>

18. In its answer, Erie argues that the court precedent the District cites to support its claim that the ROA is beyond the scope of preemption is not relevant because that litigation did not directly involve the ROA.<sup>47</sup> Erie states that it seeks, for the first time, a declaration that there is no distinction between payments under the ROA and charges for headwater benefits.<sup>48</sup> Erie further contends that it was previously unable to challenge those charges because under New York law, "a change in the law does not render an agreement void."<sup>49</sup> Accordingly, it states that it is not seeking to retroactively challenge previous payments or the validity of the existing ROA. Instead, Erie seeks guidance given the imminent expiration of the ROA.<sup>50</sup>

19. Next, Erie argues that as an agency of the state, the District was organized under New York law to recover its capital, maintenance, and operating costs through

---

<sup>43</sup> *Id.* at 7.

<sup>44</sup> *Id.* at 2-4.

<sup>45</sup> *Id.* at 6-7.

<sup>46</sup> *Id.*

<sup>47</sup> Erie Answer to Petition for Declaratory Order at 13 (Mar. 6, 2023) (Erie Answer to Answer).

<sup>48</sup> *Id.* at 14.

<sup>49</sup> *Id.* at 14 (quoting *Anita Founds., Inc. v. ILGWU Nat'l Ret. Fund*, 902 F.2d 185, 189 (2nd Cir. 1990)).

<sup>50</sup> *Id.* at 14-15.

assessments against entities benefitted by the construction of its dams and reservoirs.<sup>51</sup> Erie avers that the District's construction costs have long been repaid and the charges the District seeks in a renewed ROA, in addition to the Commission-approved headwater benefits charges, exceed reimbursement levels contemplated under the FPA, which preempts competing compensation schemes.<sup>52</sup>

20. Erie asserts that to the extent that expiration of the ROA could result in the District receiving insufficient compensation for headwater benefits, the District is entitled to request that the Commission reassess those headwaters benefits, and any increase in charges would be equitably allocated to benefitted hydroelectric projects, including the E.J. West Project and Erie's other downriver projects.<sup>53</sup>

## 2. Commission Determination

21. Section 10(f) of the FPA provides that, whenever a licensee directly benefits from the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require the licensee to "reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable."<sup>54</sup> Headwater benefits are determined by calculating 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."<sup>55</sup> In *Albany Engineering*, the court held that the FPA preempted a New York law authorizing the District to levy annual assessments against downstream hydropower plants licensed by the Commission to recover its capital, maintenance, and operating costs.<sup>56</sup> In a later decision, however, the D.C. Circuit noted

---

<sup>51</sup> *Id.* at 15.

<sup>52</sup> *Id.* at 15-17 (citing *Albany Eng'g*, 548 F.3d at 1071; 18 C.F.R. § 11.11(b)(5) (2022)).

<sup>53</sup> *Id.* at 17.

<sup>54</sup> 16 U.S.C. § 803(f).

<sup>55</sup> 18 C.F.R. § 11.10(a)(2) (2022).

<sup>56</sup> *Albany Eng'g*, 548 F.3d at 1079-80.

that “a federal court’s preemption decision ordinarily does not undo independent contractual obligations.”<sup>57</sup>

22. Here, Erie argues that the ROA includes state law assessments that are preempted. We disagree. The ROA is a private agreement between the District and Erie. Neither of the project licenses require the parties to enter into an agreement nor does Erie allege that it is compelled to do so under state law. Instead, the ROA is an off-license agreement beyond the scope of the Commission’s jurisdiction.<sup>58</sup> Moreover, even if the payments made by Erie under the ROA are duplicative of headwater benefits assessments, those payments are not the type that the court found were preempted in *Albany Engineering*. The ROA explicitly states that the payment is “in addition to, and does not, in any way, include, any charges, fees or costs due the District from Erie or any other Person pursuant to any statutory obligation ... .”<sup>59</sup> Further, the fact that the District is a state agency organized under state law does not render its agreement with Erie preempted. In *Erie Boulevard*, the court noted that “there is nothing in [*Albany Engineering*] that unravels the District’s contractual rights ... .”<sup>60</sup> Therefore, we find that the payments made by Erie pursuant to the ROA are independent contractual obligations and not preempted by the FPA.

---

<sup>57</sup> *Erie Boulevard Hydropower, LP v. FERC*, 878 F.3d 258, 267 (D.C. Cir. 2017) (citation omitted) (*Erie Boulevard*).

<sup>58</sup> *Settlements in Hydropower Licensing Proc. under Part I of the Fed. Power Act*, 116 FERC ¶ 61,270, at P 7 (2006). Because the ROA is not required by the license for either project or enforceable by the Commission, issues raised by the landowners and Assemblypersons related to payments made under the ROA are beyond the scope of this proceeding. We note, however, that the licensees will continue to be required to meet the terms of their licenses, including those related to safety, environmental protection, and recreation.

<sup>59</sup> District Petition for Declaratory Order at app. (2003 ROA at section 5.3).

<sup>60</sup> *Erie Boulevard*, 878 F.3d at 267.

**B. Article 5 of the License for the E.J. West Project Does Not Require Erie to Obtain a Property Right in the Hydraulic Head Created by the GSL Project**

**1. Petitions and Answers**

23. The District argues that Erie must pay for the use of the additional 56 feet of head created by GSL Project as a property right required to be obtained by Erie's license.<sup>61</sup> According to the District, in 1927, Erie's predecessor entered into an agreement that allowed it to connect to the outlet of the GSL Project for the purpose of producing power from 15 feet of head retained by Erie's predecessor and the Regulating District's 56 feet.<sup>62</sup> It states that the intent of the agreement was to pay the District for this property interest and for the timing of releases from the impoundment.<sup>63</sup>

24. The District contends that absent an operating agreement, Erie lacks control of necessary project elements in violation of Article 5 of its license.<sup>64</sup> It notes that a project is defined under the FPA as a complete unit of development, consisting of all dams, powerhouses, impoundments, water rights, and lands which are used in connection with such unit and that Erie does not control the GSL Project facilities.<sup>65</sup> The District states that, during relicensing of the E.J. West Project, the Commission recognized that Erie lacked the necessary property rights for the project and required the GSL Project to be brought under license.<sup>66</sup> The District asserts that despite the licenses being issued, the parties continued to operate pursuant to a new ROA, which compensated the District for

---

<sup>61</sup> District Petition for Declaratory Order at 1.

<sup>62</sup> *Id.* at 2-3.

<sup>63</sup> *Id.* at 3. The District notes that Erie and its predecessors in interest have compensated the District for the use of the additional head without objection since acquiring the E.J. West Project.

<sup>64</sup> Standard Article 5, which is incorporated into Erie's license, requires licensees to acquire title in fee or the right to use in perpetuity all lands and water rights necessary or appropriate for the construction, maintenance, and operation of the project. *Standardized Conditions for Inclusion in Preliminary Permits & Licenses Under Part I of the Fed. Power Act*, 54 FPC 1792, 1817 (1975) (Article 5, Form L-3); *see also* E.J. West License, 100 FERC ¶ 61,322 at ordering para. (E) (incorporating the license articles from Form L-3).

<sup>65</sup> District Petition for Declaratory Order at 7-8 (citing 16 U.S.C. § 796(11)).

<sup>66</sup> *Id.* at 4.

the property interest associated with the 56 feet of head and for the timing of releases from the impoundment.<sup>67</sup>

25. Additionally, the District argues that Article 13 of its license contemplates Erie compensating the District, as it states that “the licensee shall receive reasonable compensation for the use of its reservoir ... .”<sup>68</sup> Thus, it contends that the Erie’s obligation to compensate the District is separate from headwater benefits.<sup>69</sup>

26. The District also avers that were the Commission to allow Erie to continue to use the head, it would be a conversion of the state’s property interest without just compensation.<sup>70</sup> The District argues that Erie should not be allowed to use the GSL Project license and the FPA’s headwater benefit requirements to circumvent the principle behind the FPA’s prohibition on eminent domain over the state lands at issue here.<sup>71</sup>

27. Erie asserts that the District is wrong to characterize the charges as a property charge that would be required for Erie’s compliance with Article 5.<sup>72</sup> It states that, 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.<sup>73</sup> Erie contends that the fact that it could not acquire lands from the District precipitated the Commission to license the GSL Project to the District separately.<sup>74</sup> Erie notes that, given that the ROA is for a limited term and includes an early termination provision, it is not

---

<sup>67</sup> *Id.*

<sup>68</sup> Standard Article 13 provides that a licensee must allow reasonable uses of its reservoir or other project properties and is entitled to compensation for such uses. *Standardized Conditions for Inclusion in Preliminary Permits & Licenses Under Part I of the Fed. Power Act*, 54 FPC at 1821 (Article 13, Form L-3); District License, 100 FERC ¶ 61,319 at ordering para. (D) (incorporating the license articles from Form L-3).

<sup>69</sup> District Petition for Declaratory Order at 5.

<sup>70</sup> *Id.* at 4.

<sup>71</sup> *Id.* at 4, 8-9.

<sup>72</sup> Erie Petition for Declaratory Order at 12-13.

<sup>73</sup> *Id.* at 12 (citing E.J. West License, 100 FERC ¶ 61,322 at P 5 n.10).

<sup>74</sup> *Id.* at 12-13.

the type of agreement that would have satisfied the Commission's requirements under Article 5.<sup>75</sup>

28. Erie also argues that Article 13 of the District's license is inapplicable because that article allows for third party uses of licensed project works as may be ordered by the Commission: it is not relevant to a licensee's use of facilities that are part of a complete unit of development.<sup>76</sup>

29. In its answer, the District contends that Erie and its predecessors have, since the project was first constructed, consistently considered the ROA fees to be for a property interest and only recently has Erie alleged that it does not require such an interest in the additional head created by the GSL Project.<sup>77</sup> The District asserts that the fact that the Commission licensed the GSL Project does not obviate Erie's requirement to acquire the additional property under Article 5. It contends that the special circumstances related to having separately licensed the projects are why the Commission had viewed the ROA as acceptable for satisfying Article 5, and notes that, shortly after the issuance of the new licenses, the parties negotiated a new ROA, implying that it was necessary to meet the Article 5 obligation.<sup>78</sup>

30. In response, Erie argues that the Commission should reject the District's attempt to recategorize headwater benefit charges as property right charges.<sup>79</sup> Erie notes that head is inherently part of the reservoir and dam and that its license did not specifically require the head provided by the District's facilities to be included in the E.J. West Project.<sup>80</sup> Further, Erie states that head is not in the list of project components specified

---

<sup>75</sup> *Id.* at 13-14. See *Linweave, Inc.*, 23 FERC ¶ 61,391 (1983) (modifying a long-term lease of project property to prevent the non-licensee/lessor from controlling rights necessary to accomplish project purposes and to ensure that the licensee/lessee would possess all such rights).

<sup>76</sup> *Id.* at 14.

<sup>77</sup> District Answer at 10.

<sup>78</sup> *Id.* at 10-11.

<sup>79</sup> Erie Answer to Answer at 3.

<sup>80</sup> *Id.* at 5.

in section 3 of the FPA<sup>81</sup> and asserts that payments for head are captured through headwater benefits under section 10(f) of the FPA.<sup>82</sup>

31. Erie avers that, even if the Commission were to find that head was a property right that must be acquired by a licensee, Erie is not required to do so for the E.J. West Project. It notes that the Commission licensed the E.J. West and GSL Projects as a single unit of development because of ownership issues and Erie being unable to comply with Article 5 if the entire development was licensed to it.<sup>83</sup> Thus, each licensee retained ownership over those portions of the unit of development included in its respective license. It notes that the District is also not required to acquire property rights in any components of the E.J. West Project and contends it would be illogical for it to have to compensate the District for one component of its license, the head, but not for all the other components, such as the dam and reservoir.<sup>84</sup>

32. Next, Erie argues that the District failed to support its claim that the Commission viewed the ROA as necessary to satisfy Article 5.<sup>85</sup> It states that, in 1992, the Commission found that the District's property needed to be brought under license precisely because the ROA in effect at the time did not meet the ownership and control requirements.<sup>86</sup> Specifically, the Commission found that the agreement appeared to provide the District, a non-licensee, with overriding operational control of the dam and reservoir and was not a perpetual agreement as required, and advised that the District could become a licensee or Erie could pursue a perpetual easement that vested in Erie

---

<sup>81</sup> Section 3(11) of the FPA defines project as “a complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.” 16 U.S.C. § 796(11).

<sup>82</sup> Erie Answer to Answer at 5 n.15.

<sup>83</sup> *Id.* at 6-7.

<sup>84</sup> *Id.* at 5-7.

<sup>85</sup> *Id.* at 6.

<sup>86</sup> *Id.* at 6-7.

ownership and control of the District's property.<sup>87</sup> Erie asserts that licensing the GSL Project was specifically and consciously undertaken to resolve this issue.<sup>88</sup>

33. With respect to Article 13, Erie states that its primary purpose is to promote use of project property for water supply and that “[t]he reasonable uses encompassed by this article do not include hydroelectric development at or related to a licensed project ...” because “[s]uch development is properly [t]he subject of an application for either a separate license or an amendment of an existing license.”<sup>89</sup> Even if Article 13 applied, Erie contends that the District would have to seek prior Commission approval to collect money under the article, which it has not done.<sup>90</sup>

## 2. Commission Determination

34. Article 5 requires a licensee 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.”<sup>91</sup> Article 5 further states that the licensee “shall ... retain the possession of all project property covered by the license ..., including the project area, the project works, and all franchises, easements, water rights, and rights or occupancy and use.”<sup>92</sup>

35. The E.J. West and GSL Projects form a single unit of development and the FPA requires that every component of that development be licensed.<sup>93</sup> The FPA, however,

---

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 7.

<sup>89</sup> *Id.* at 8 (quoting *S. Cal. Edison Co.*, 16 FERC ¶ 61,178, at 61,399 (1981)).

<sup>90</sup> *Id.* at 8-9.

<sup>91</sup> *Standardized Conditions for Inclusion in Preliminary Permits & Licenses Under Part I of the Fed. Power Act*, 54 FPC at 1817 (Article 5, Form L-3).

<sup>92</sup> *Id.*

<sup>93</sup> In the Settlement Order, the Commission explained that granting the parties' licenses were “in the public interest because they comprehensively resolve several longstanding license proceedings in a manner that preserves the benefits of hydroelectric generation . . . and bring under license for the first time all components of the unit of hydropower development that includes Conklingville Dam, Great Sacandaga Lake, and the associated hydroelectric generating facilities ... .” Settlement Order, 100 FERC ¶ 61,321 at P 2.

does not require every component be under the same license.<sup>94</sup> The Commission approved a separate license for the GSL Project because Erie was unable to acquire the necessary property rights for the entire unit of development. Therefore, as described above, the project features are split between Erie's and the District's licenses.<sup>95</sup> Where project features are licensed to different entities in different licenses, Article 5 only requires the licensee to acquire property interests in those features licensed to it.<sup>96</sup> To find otherwise in this case would require Erie to acquire a property interest in the dam, reservoir, and other GSL Project features, and the District to acquire a property interest in Erie's generating equipment, neither of which actions the Commission has required. Thus, Erie is only required to own a property interest in those facilities licensed in the E.J. West Project, while the District must comply with Article 5's requirement for the GSL Project features.

36. Moreover, contrary to the District's assertion, the ROA did not resolve the property issues presented in the relicensing proceeding. As explained in Commission staff's letter, the ROA was not sufficient to show that Erie held the appropriate property rights in the project.<sup>97</sup> Instead, the property issues were resolved by issuing an original license to the District for the GSL Project.<sup>98</sup>

37. In any event, hydraulic head is not a property interest that must be obtained by a downstream licensee. It is a measure of liquid pressure, expressed in terms of the height of a column of water, which represents the total energy of the water.<sup>99</sup> Thus, the

---

<sup>94</sup> See E.J. West License, 100 FERC ¶ 61,322 at P 5 n.10.

<sup>95</sup> See *supra* PP 2, 5.

<sup>96</sup> See *Woodland Pulp LLC*, 161 FERC ¶ 61,282, at P 25 (2017) ("The Commission has held that, while all parts of a complete unit of development must be licensed, they are not necessarily required to be under the same license, for ownership or other reasons."); *Pub. Serv. Co. of Colo.*, 130 FERC ¶ 62,107, at P 3 (2010) ("[T]he Commission has the flexibility to accommodate a variety of proposed licensing arrangements, for ownership or other reasons, as long as the Commission retains sufficient authority to regulate the project under the comprehensive development standard of the FPA.").

<sup>97</sup> See Letter to Niagara Mohawk from the Director, Division of Project Review, Office of Hydropower Licensing, Docket No. P-2318-002 (filed Aug. 27, 1992).

<sup>98</sup> *Id.*

<sup>99</sup> U.S. Dep't of Energy, Water Power Technologies Office, *Glossary of Hydropower Terms*, <https://www.energy.gov/eere/water/glossary-hydropower-terms>.

hydraulic head created by a project is a result of the construction and operation of the dam and is not, as the District alleges, a separate component of the project. Section 10(f) of the FPA provides the mechanism for upstream projects to receive compensation for the energy benefits they provide, and therefore, requiring a downstream project to also purchase a property right in such benefits would be duplicative.<sup>100</sup>

38. Article 13 requires the licensee to “permit such reasonable use of its reservoir or other project properties ... in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses.”<sup>101</sup> As the Commission has explained, “reasonable uses encompassed by this article do not include hydroelectric development at or related to a licensed project.”<sup>102</sup> Therefore, contrary to the District’s assertion, Article 13 does not provide a basis for the District to recover costs associated with the head created by the GSL Project.

**C. The District is not Permitted to Divert Water Around the E.J. West Project Without Prior Commission Authorization**

**1. Petitions and Answers**

39. The District contends that nothing in its license or the Settlement Agreement prevents the District from diverting releases around the E.J. West Project.<sup>103</sup> It acknowledges that Article 402(a) of its license describes one of the project objectives as minimizing energy losses to affected hydroelectric projects, but states that Article 402(j) only requires that it meet certain target flows below the E.J. West Project.<sup>104</sup>

---

<sup>100</sup> Because the District is compensated for the energy benefits its project provides, we see no basis for its statement that Erie’s continued use of head would be a conversion of the state’s property interest without just compensation.

<sup>101</sup> *Standardized Conditions for Inclusion in Preliminary Permits & Licenses Under Part I of the Fed. Power Act*, 54 FPC at 1821 (Article 13, Form L-3).

<sup>102</sup> *S. Cal. Edison Co.*, 16 FERC at 61,399 (citations omitted).

<sup>103</sup> The District states that Erie admitted as much in a letter when it stated that “[t]he District’s obligations under the Reservoir Operating Agreement would prevent it from diverting releases from the Project while the extension is in place.” District Petition for Declaratory Order at 3 (citing Erie’s January 11, 2023 Letter).

<sup>104</sup> *Id.* at 5-6.

40. Erie contends that the District may not alter the operation of the GSL Project without prior Commission authorization.<sup>105</sup> It argues that Article 3<sup>106</sup> of the District's license requires Commission approval prior to making a substantial alteration in the project's operations, which would allow the Commission to evaluate the potential environmental impacts associated with the change and determine whether such a change is in the public interest.<sup>107</sup> Additionally, Erie contends that a change in operation is in violation of Article 10 of the license, which requires the District 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 ... ."<sup>108</sup>

41. Erie states that the Settlement Agreement, which the Commission incorporated into the licenses, set forth a comprehensive plan for the District's operation and included maximum and minimum elevations and lake level curves intended to address issues related to flood control, water quality and fish habitat, recreation, and energy losses.<sup>109</sup> According to Erie, the plan was premised on releases moving through the E.J. West Project.<sup>110</sup>

42. Specifically, Erie notes that the GSL Project license requires the District to operate the project in a manner that "minimiz[es] energy losses" of downstream hydropower projects.<sup>111</sup> Erie states that the District's threatened change has the potential for significant adverse impacts on all downstream projects relying on the benefit of the

---

<sup>105</sup> Erie Petition for Declaratory Order at 21.

<sup>106</sup> Article 3 states, in part, that "[e]xcept when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized." *Standardized Conditions for Inclusion in Preliminary Permits & Licenses Under Part I of the Fed. Power Act*, 54 FPC at 1817 (Article 3, Form L-3).

<sup>107</sup> Erie Petition for Declaratory Order at 16-18.

<sup>108</sup> *Id.* at 19 (citing *Standardized Conditions for Inclusion in Preliminary Permits & Licenses Under Part I of the Fed. Power Act*, 54 FPC at 1820 (Article 10, Form L-3)).

<sup>109</sup> *Id.* at 4.

<sup>110</sup> *Id.* at 4, 17-18.

<sup>111</sup> *Id.* at 17 (citing District License 100 FERC ¶ 61,319 at art. 402).

specific timing of flows.<sup>112</sup> It notes that controlled releases from the E.J. West Project are designed to maximize clean energy generation at the projects downstream during periods of peak demand<sup>113</sup> and that a change in operation may have a major impact on the ability of the projects downstream to supply energy during crucial times of the day and year and would conflict with New York's clean energy policies.<sup>114</sup> Erie states that it and the District closely coordinate flows through the E.J. West Project to ensure compliance with the District's directive to minimize energy losses at the downstream projects, and the District's threat to divert flows disregards the approved operating protocols and coordination.<sup>115</sup>

43. Moreover, Erie asserts that the Commission's environmental analysis of the E.J. West and GSL Projects, upon which the licenses are based, is premised on the GSL Project passing flows through the E.J. West Project generating facilities. Erie also argues that it is not clear that the District can properly and safely regulate flow in the river through its manual operation of the dam's valves, particularly when flow has always been precisely regulated by Erie's generating units, which are remotely operated by trained professionals.<sup>116</sup>

44. With respect to the 15 feet of head owned by Erie (and natural flows), Erie asserts that it is not possible to precisely quantify releases equivalent to natural flows and 15 feet of head, and such releases through the E.J. West Project in addition to releases through the District's valves could pose serious public safety risks downstream, particularly where flooding is prevalent.<sup>117</sup>

45. In its answer, the District disputes Erie's contention that the Settlement Agreement and GSL Project license were premised on releases through the E.J. West Project.<sup>118</sup> It

---

<sup>112</sup> *Id.* at 20.

<sup>113</sup> Erie asserts that the District's plan to release all flows through three manually-operated and rarely utilized valves would result in steady, flat releases through the valves as opposed to the timed, controlled releases through E.J. West's generating units. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 19-20.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 19.

<sup>118</sup> District Answer at 12-13.

contends that the environmental effects of diverting flow have already been studied and restates that the GSL Project license only requires it to maintain certain flows downstream of the E.J. West Project.<sup>119</sup>

46. In response, Erie reiterates that the flow regime envisioned by the Settlement Agreement and the licenses are based on releases flowing through the E.J. West Project.<sup>120</sup> It asserts that section 1.5 of the Settlement Agreement, for example, states that provisions of the agreement are based on “the various studies and analyses” conducted as part of the licensee’s applications for new licenses, which were based on the operating regime in place since the dam and reservoir were built.<sup>121</sup> In addition, section 3.8 of the Settlement Agreement, which sets forth base flows in the Sacandaga River, expressly provides for the situation in which neither of the generator units at the E.J. West Project are operating, suggesting that at all other times, releases are through those units.<sup>122</sup> Erie also cites to Appendix A of the Settlement Agreement, which explains “[t]he provisions of this Settlement Offer are intended to minimize the loss of peaking energy output from the E.J. West Project ... [and that] the average annual generation from the E.J. West Project will be increased.”<sup>123</sup>

47. Erie argues that this understanding is also consistent with the fact that the E.J. West and GSL Projects form a complete unit of development and is reflected in the Commission’s comprehensive development analysis of both the projects and the Commission’s assessment of headwater benefits for the basin.<sup>124</sup>

48. Erie notes that, while the District claims that it can “still safely meet each of the operating objectives” required by the Settlement Agreement and GSL Project license, it provides no indication of how it can precisely quantify releases to minimize public safety

---

<sup>119</sup> *Id.* at 4-6, 12-13.

<sup>120</sup> Erie Answer to Answer at 9-10.

<sup>121</sup> *Id.* Erie also notes that the “performance parameter results” were based on simulated results of the HEC5P model— which utilized operation of the entire Sacandaga-Upper Hudson River system from the E.J. West Project through the most downstream development—with results depicting average performance conditions over the 74-year period of simulation. *Id.* at 10.

<sup>122</sup> *Id.* at 10; *see* District License, 100 FERC ¶ 61,319 at art. 402(l).

<sup>123</sup> Erie Answer to Answer at 10 (quoting Settlement Agreement app. A § A.2.1.2.5).

<sup>124</sup> *Id.* at 11.

risks downstream, particularly when Erie retains ownership of and is entitled to utilize 15 feet of head and natural flows on the Sacandaga River.<sup>125</sup> Erie claims that its ability to control flow through the generating units at the E.J. West Project is critical to public safety.<sup>126</sup> Erie maintains that any change in the District's operating regime requires thorough analysis and prior Commission authorization with notice and opportunity for comment, to ensure that public safety and environmental resources are not compromised by the District's actions.<sup>127</sup>

## 2. Commission Determination

49. As described above, the two projects form a single unit of development whereby the GSL Project's dam, reservoir, and related facilities support the generation of electricity at the E.J. West Project. The District has failed to demonstrate how it can comply with the terms of its license, which incorporated the relevant terms of the Settlement Agreement, while diverting flows from the E.J. West Project. Article 402(a) of the GSL Project license requires the District to operate the Great Sacandaga Lake to, among other objectives, "minimiz[e] energy losses to affected hydroelectric projects by the aggressive use of storage while maintaining other objectives."<sup>128</sup> Moreover, Article 402(l) of the license directs Erie and the District to cooperate on maintaining base flows in the Sacandaga River even when the generating units are not operating, which implies that that normal operations consist of providing flows through the E.J. West Project.<sup>129</sup> The Settlement Order also notes that the downstream Stewart's Bridge

---

<sup>125</sup> *Id.* at 11-12.

<sup>126</sup> *Id.* at 12.

<sup>127</sup> *Id.* at 11-12.

<sup>128</sup> Similarly, one of the stated purposes of the Settlement Agreement is increasing average annual power production from the E.J. West Project. Settlement Agreement at app. A § 2.1.2.5 ("The provisions of this Settlement Offer are intended to minimize loss of peaking energy output from the E.J. West Project. Under the provisions of this Settlement Offer, the average annual generation from the E.J. West Project will be increased."); Erie Answer to Answer at 10.

<sup>129</sup> Art. 402(l) provides that the District and Erie "will cooperate to ensure that base flows are maintained in the Sacandaga River without violating impoundment fluctuation restrictions at the Stewart's Bridge Project" in the event that E.J. West's two turbines are not running. District License 100 FERC ¶ 61,319 at art. 402(l); see Erie Answer to Answer at 10.

Project “operates as a peaking facility in tandem with [the] E.J. West Project.”<sup>130</sup> Moreover, the District has failed to demonstrate that it can properly control flows by manually operating the GSL Project’s valves, which have only been used a few times in the recent past. The GSL Project’s valves must be assessed before they can be considered reliable for continuous use due to the valves’ age, infrequent operation, and uncertain condition.

50. In describing the GSL Project, the license order also notes that the Conklingville Dam “control[s] inflow to the E.J. West Project”<sup>131</sup> and the studies and data submitted to support licensing the projects presumed that water would flow from the GSL Project to the E.J. West Project. For example, in support of the Settlement Agreement, the parties modeled various flows scenarios for the Sacandaga and Hudson Rivers. The GSL Project’s operation was simulated using a two-reservoir model in which the most upstream reservoir (the Great Sacandaga Lake) was “modeled *as a dam with hydropower (E.J. West)* operating for one downstream control point,” at the confluence of the two rivers.<sup>132</sup> The model also noted that, after passing through the E.J. West Project “to efficiently produce energy,” all water released from the lake then passes through the Stewart’s Bridge reservoir and affects eight hydro projects further downstream.<sup>133</sup>

51. Therefore, regardless of the District’s ability to meet the operating requirements, it failed to demonstrate that diverting water from the E.J. West Project without prior Commission approval would not violate the District’s license and the Commission order approving the Settlement Agreement. Should the District seek to change its operation in a matter that is inconsistent with how the project has operated under the current license, it must first seek Commission approval to do so. Such a proceeding would allow the Commission to evaluate whether the project is capable of safely operating in different manner, whether a different operation would have impacts on the environment, and whether such operation is in the public interest.

52. Last, we note that should Erie and the District be unable to operate the projects in a cooperative manner that preserves the objectives stated in the licenses and Settlement Agreement, Article 10 of the District’s and Erie’s licenses reserves the Commission

---

<sup>130</sup> Settlement Order, 100 FERC ¶ 61,321 at P 20; *see* Settlement Agreement at app. A § 2.2.

<sup>131</sup> District License, 100 FERC ¶ 61,319 at P 15.

<sup>132</sup> Settlement Agreement at app. D, 12 (emphasis added).

<sup>133</sup> *Id.* at app. D, 13; *see* Erie Answer to Answer at 12 n.41 (explaining that Erie’s application, which included operation of the dam, reservoir, and powerhouse, “analyzed releases from Sacandaga Reservoir through E.J. West”).

Project No. 2318-053 et al.

- 24 -

authority to direct the licensees to “coordinate the operation of the project, electrically and hydraulically, ... in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.”<sup>134</sup>

The Commission orders:

(A) The District’s January 25, 2023 petition for declaratory order is granted in part and denied in part.

(B) Erie’s January 27, 2023 petition for declaratory order is granted in part and denied in part.

By the Commission.

( S E A L )

Debbie-Anne A. Reese,  
Deputy Secretary.

---

<sup>134</sup> *Standardized Conditions for Inclusion in Preliminary Permits & Licenses Under Part I of the Fed. Power Act*, 54 FPC at 1820 (Article 10, Form L-3).

Document Content(s)

P-2318-053.docx.....1