UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

HUDSON RIVER – BLACK RIVER REGULATING DISTRICT REQUEST FOR REHEARING OF PETITION FOR DECLARATORY ORDER TO TERMINATE A CONTROVERSY OR REMOVE UNCERTAINTY PURSUANT TO 18 C.F.R. §385.207

Pursuant to Section 313 of the federal power act ("FPA") 16 U.S.C. §825l, Rule 713 of the Commission's rules of practice and procedure, 18 C.F.R. §385.317 and the Upper Hudson / Sacandaga River Offer of Settlement §2.5 Dispute Resolution Project Nos. 2318-011, 12252, et. al. (filed Apr. 12, 2000) ("Settlement Agreement"), Petitioner, Hudson River – Black River Regulating District, hereby respectfully requests rehearing of the Commission's June 15, 2023 Order On Petitions For Declaratory Order in the above captioned proceeding. Specifically, the Regulating District seeks rehearing of the Commission's erroneous determination: **(1)** failing to distinguish between the headwater flow benefit received by all downstream licensees and the head, or column of water benefitting only Erie's E.J. West Plant; **(2)** failing to retain jurisdiction over the relationship linking the power and non-power functions in this unit of development; **(3)** failing to require the parties to maintain an ROA compelling Erie to compensate the Regulating District, thus unraveling the parties' long-standing negotiated exchange of value without ensuring just compensation to the harmed party; and **(4)** accepting Erie's March 6, 2023 answer to the Regulating District's February 13, 2023 answer to Erie's petition notwithstanding that the

Commission's rules of practice and procedure do not permit answers to answers. 18 C.F.R. §385.213(a)(2).

STATEMENT OF ISSUES

Pursuant to Rule 713(c) of the Commission's rules of practice and procedure (18 C.F.R. §385.317(c), the Regulating District states that the matters raised herein present the following issues:

1. Whether the Commission erred when it failed to distinguish the headwater flow benefit received by downstream licensees from the head or column of water benefitting Erie's E.J. West hydroelectric plant when it determined that FPA §10(f) provides the only mechanism under the FPA to determine compensation this adjacent project owner with a power function must provide to its contractual partner completing the unit of development without a power function.

2. Whether the Commission erred when it determined it has no authority over the relationship linking the power and non-power functions in this unit of development.

3. Whether the Commission's June 15th Order unravels the negotiated exchange of value between the parties, shielding Erie's non-performance, without ensuring just compensation to the harmed party.

4. Whether the Commission erred when it accepted Erie's March 6, 2023 answer to the Regulating District's February 13, 2023 answer to Erie's January 27, 2023 petition for declaratory order and request for expedited action.

DISCUSSION

The Commission's June 15, 2023 Order addressed two matters. It determined that §10(f) of the federal power act (FPA) (16. U.S.C. §803(f)) does not preempt payments made by Erie pursuant to a reservoir operating agreement ("ROA") and that the Regulating District must obtain Commission authorization to divert water around E.J. West in the event Erie should cease to compensate the Regulating District for the full value of the power produced by the additional head created by the Conklingville Dam.

The Order contains two assumptions. First, the Order assumes that the 'headwater flow' benefitting all downstream FERC licensees and the 'head or column of water' benefitting only Erie's E.J. West project are inseparable. This assumption provides the basis for the Commission's determination that these disparate benefits are both captured in the FPA's §10(f) headwater benefit ("HWB") assessment levied upon E.J. West.

The Order's second assumption holds that the head created by the Conklingville Dam is a project component licensed solely to the Regulating District. In fact, while each licensee retains ownership of the other portions of the unit of development included in its respective license, both licensees hold an interest in this one particular component. As evidenced by the 1928 deed referenced in the Regulating District's January 25, 2023 petition and which is an integral part of the 1927 agreement establishing the terms and conditions under which Erie's predecessor constructed E.J. West and the State constructed the dam, the Regulating District controls fifty-six seventy-firsts (56/71st) of the head impounded by the dam. Erie retained the remaining fifteen seventy-firsts (15/71st) of that head. That land transaction as implemented through the subsequent series of ROAs, including the expiring ROA between Erie and the Regulating District, links the two parts of that component forming the unit of development. Thus, while the Regulating District controls the dam and reaps the resulting HWB assessments because it is the licensed owner of that project component, it does so only because the ROA gives it control over that portion of the asset retained by Erie. This contractual link requires the Commission's continued jurisdiction over the agreement.

By disavowing jurisdiction, the Commission unjustly enriches Erie; the licensee with the development unit's power function. Before project construction, the Regulating District agreed to construct a dam which would utilize New York Power and Light Corporation's (Erie's

predecessor) fifteen (15) feet of head and the additional fifty-six (56) feet of head to be impounded. The Regulating District also agreed to remain responsible for dam safety and operational control. In exchange, the power company agreed to pay the Regulating District for the full value of the power produced by the additional head created by the Conklingville Dam. Both parties agreed to contribute part of the construction cost.

Ninety-five years later, long after the dam's construction costs were recovered, the Regulating District continues to address dam safety concerns and operate the dam and reservoir to the power company's benefit. Thanks to the Regulating District's continued performance, the power company continues to exploit the value of the project's power function. From the Commission's issuance of a license to the Regulating District in 2002 through the Commission's June 15, 2023 Order, Erie continued to pay the Regulating District a portion of the revenue generated using the additional fifty-six (56) feet of head provided by the State of New York.

The Commission, by now claiming the ROA is an off-license agreement beyond the scope of the Commission's jurisdiction, eliminates Erie's obligation under such agreement while Erie nonetheless continues to benefit from the partnership or shared venture. The Regulating District's license compels it to comply with the dam safety and operational constraints of the FPA and the Offer of Settlement, even as the Commission's Order frees Erie from its obligation to compensate the Regulating District for the very things that caused the Regulating District to enter into the agreement in the first place. As a result, compliance with the Commission's Order and license forces the Regulating District to dispose of a State-owned asset without recouping that asset's fair market value; putting the Regulating District in violation of state law providing that a public authority may only dispose of an interest in property for its fair market value. See NY Public Authorities Law §2897.

I. THE COMMISSION ERRED WHEN IT FAILED TO DISTINGUISH THE HEADWATER FLOW BENEFIT RECEIVED BY DOWNSTREAM LICENSEES FROM THE HEAD APPORTIONED BY CONTRACTUAL AGREEMENT BETWEEN ERIE AND THE REGULATING DISTRICT WHEN IT DETERMINED THAT FPA §10(F) PROVIDES THE ONLY MECHANISM UNDER THE FPA FOR AN ADJACENT PROJECT OWNER CONTROLLING THE POWER FUNCTION TO COMPENSATE ITS CONTRACTUAL PARTNER COMPLETING THE UNIT OF DEVELOPMENT WITHOUT THE BENEFIT OF A POWER FUNCTION.

a. The 1927 agreement between Erie's predecessor in interest ("New York Power and Light Corporation" or "Power Company") and the Regulating District's predecessor in interest ("Hudson River Regulating District" or "Regulating District") established the terms under which the parties undertook their respective construction projects. The 1927 agreement required New York Power and Light Corporation to construct, maintain and operate, at its sole cost, a power house. Said power house would be constructed on the power company's land adjacent to the Conklingville Dam in accordance with designs, estimates and contracts approved by the engineer of the District. The power house would utilize the power company's 15 feet of head and the additional head created by the Regulating District's Conklingville dam. The 1927 agreement required the power company to complete the power house by the time the Regulating District completed said dam. In exchange for the Regulating District constructing the 71 foot high dam which would permit the power company to utilize the power company's 15 feet of head, the power company agreed to pay annually to the Regulating District 6% of 15/71st of the $1,500,000 cost to build the dam. In addition, the power company agreed to pay 15/71st of such expenditures as may be made from year to year by the Regulating District for operating and maintaining said dam. In addition to the fee the power company agreed to pay to compensate the

Regulating District for furnishing the dam, the power company agreed to pay the Regulating District for the power produced through use of the additional head created by said dam.

b. The 1927 agreement represents the parties own negotiated solution to the issue of how a non-power function facility owner can recoup the expenses of providing the facility necessary for the power function to operate. The Commission's decision to ignore the distinction between flow and head causes it to misconstrue its authority over this contractual relationship. The additional head provided by the Dam is exactly the benefit the power company contracted with the Regulating District to provide.

c. The Commission's June 15, 2023 Order fails to distinguish between the benefit realized by the adjacent E.J. West facility and the benefit afforded each other 'downstream' facility by virtue of the Regulating District's headwater project. Each of the projects, including E.J. West, benefit from the flow released by the Regulating District from the Conklingville Dam; a benefit recovered through the FPA's §10(f) headwater benefits assessment. However, the 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. The Dam uniquely allows E.J. West to generate at a 71 foot high facility rather than the 15 foot high dam which existed prior to the Conklingville Dam's construction. The United States Court of Appeals for the Seventh Circuit recognized the distinction between a 'stabilization of flow constituting a headwater benefit' and 'water power'. The Court then further defined water power as the product of the dam's height and the rate of

flow of water. City of Kaukauna, Wis. v. FERC, 214 F3d 888 at 897-898 (U.S.C.A., 7th Cir. 2000). The Commission should recognize that same distinction in this matter; especially where the contractual relationship between the power company and the Regulating District, carried from 1927 through the expiration of the current ROA, memorializes this same distinction.

d. It is inequitable for the Commission to conflate the headwater flow benefit received by downstream licensees with the head provided by the Regulating District's Conklingville Dam. This inequity is the root cause behind the Commission's erroneous assertion that the FPA's section 10(f) charges adequately compensate the Regulating District for the value of the additional power Erie generates through use of the additional head created by the Conklingville Dam.

II. THE COMMISSION ERRED WHEN IT FAILED TO DISTINGUISH BETWEEN THE HEADWATER FLOW BENEFIT RECEIVED BY ALL DOWNSTREAM LICENSEES AND THE HEAD APPORTIONED BY CONTRACTUAL AGREEMENT BETWEEN ERIE AND THE REGULATING DISTRICT WHEN IT DETERMINED THAT IT HAS NO AUTHORITY OVER THE RELATIONSHIP LINKING THE POWER AND NON-POWER FUNCTIONS INVOLVED IN THIS UNIT OF DEVELOPMENT

a. The Commission's conflation of the headwater flow benefit and the head provided by the Regulating District's Conklingville Dam, as described above, is also the root cause behind the Commission's erroneous assertion that it has no authority over the relationship linking the power and non-power functions involved in this unit of development. During the E.J. West Project's relicensing, which commenced in 1992, the Commission determined that the GSL Project and the E.J. West Project were part of the same 'unit of development'. After Erie took control of E.J. West, the Commission determined that due to a NYS Constitutional prohibition preventing

alienation of the state land within the Adirondack Park and a 1992 amendment to FPA §21 prohibiting the use of eminent domain to acquire state park lands for hydropower purposes, a project license would be issued to the Regulating District in order that all project elements of this single unit of development be brought under license. On September 25, 2022, the same day it issued a new license to Erie and an initial license to the Regulating District, the Commission also approved the settlement agreement which included provisions related to the GSL project, the E.J. West Project and three other projects owned by Erie and located further downstream on the Sacandaga and Hudson Rivers. The settlement agreement itself is premised upon the parties' continuing contractual relationship, See settlement agreement §8.4 (*distinguishing between charges for Erie's use of head and water at E.J. West and charges for benefits to downstream hydroelectric facilities*). It is, at a minimum, inequitable for the Commission to now disavow responsibility for enforcement of that portion of the settlement agreement which forms the nexus linking the parties and enumerating the responsibilities of the holder of the unit's power function to the holder of the unit's non-power function. Through the settlement agreement's inclusion within each parties' respective license, the Commission retains jurisdiction over the ROA.

III. THE COMMISSION'S JUNE 15, 2023 ORDER UNRAVELS THE NEGOTIATED EXCHANGE OF VALUE BETWEEN PARTIES, SHIELDING ERIE'S NON-PERFORMANCE, WITHOUT ENSURING JUST COMPENSATION TO THE HARMED PARTY.

a. Like any project owner, the State of New York analyzed the costs and benefits before agreeing to build the Conklingville Dam. Unlike other project owners, the State agreed to construct the dam but allow someone else to profit. How could the State

justify the commitment of State lands, the time and expense of clearing the reservoir floor, the construction of an impoundment and the commitment to operate the resulting project into the future? The 1927 agreement factored into the State's calculation. Without that contractual relationship, the State's effort would have benefitted a private merchant power company. With that agreement, continued through the subsequent series of plant owners and resultant ROAs, the State was, without interruption, appropriately reimbursed for the use of State resources for a private interest from 1927 until two weeks ago.

b. The Commission's June 15, 2023 Order alters the paradigm underlying the contract between the Regulating District, as the State's agent, and Erie. Erie is no longer obligated to fulfill its obligations under said contract in order to secure the Regulating District's performance. Rather, the Commission has asserted its role as regulator to compel the Regulating District's performance of its obligation to maintain and operate the Conklingville Dam and Great Sacandaga Reservoir. Perhaps not intending to do so, the Commission has obliterated that portion of the negotiated agreement through which Erie is obligated to share a portion of the benefit derived from the Regulating District's commitment to maintain and operate the dam for Erie's benefit.

c. Were the project owned by the federal government, relief could be found under FPA §10(e). Obviously, that avenue is not available here.

d. Assessing the impact in light of the Supreme Court's Penn Central[1] balancing framework to determine whether a regulatory taking has occurred, it is clear that the impact of the Commission's ruling is quite substantial; some might argue severe. Erie

---

[1] Penn Cent. Transp. Co. City of New York, 438 U.S. 104, 124 (1978).

paid a little over $1.5 Million per annum under the expired ROA. The Regulating District secured an appraisal setting the current value of the benefit conferred upon Erie at $2.503 Million per annum. Following the Commission's ruling, rather than extend the agreement at fair market value, Erie has allowed the ROA to expire. The degree of economic loss is the physical equivalent of a physical invasion or a physical appropriation of the Regulating District's assets. Looking to the second factor, the Regulating District's very existence is premised upon the State's investment backed expectation that the costs to maintain the dam and reservoir would be covered in perpetuity, to an extent, by payments based on the value derived from the excess power generated using the additional head created at Conklingville. In light of the Commission's Order, this is no longer the case. Finally, looking at the third factor, the Commission must assess the effectiveness of its action, here preserving hydropower generation, against the impacts of such action. The Commission's action unjustly benefits a private hydroelectric facility operator to the detriment of state and local taxpayers who ultimately must cover, dollar for dollar, the profits that will now go to Erie's shareholders.

e. The entire unit of development operated unlicensed through 1963. The dam and reservoir remained unlicensed through 2002. If the Commission's decision were issued days after completion of the dam, rather than ninety-five years later, or even if it were issued simultaneously with the Order granting the parties' respective licenses, no one could fail to see the injustice imposed by the regulatory agency upon one party to the contract to the benefit of the other party. The current Order brings that same injustice. The Regulating District remains responsible to defray the operation and

maintenance costs not covered by the imposed headwater benefits assessment. The State is no less entitled to the initial transaction's negotiated benefits than before the imposition of the license requirement and the Orders resulting therefrom.

f. The Commission should reconsider its action to seek alternative avenues of resolution which do not result in the diminishment of the Regulating District's negotiated agreement.

IV. THE COMMISSION ERRED IN ACCEPTING ERIE'S MARCH 6, 2023 ANSWER TO THE REGULATING DISTRICT'S FEBRUARY 13, 2023 ANSWER TO ERIE'S JANUARY 27, 2023 PETITION FOR DECLARATORY ORDER AND REQUEST FOR EXPEDITED ACTION NOTWITHSTANDING THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE DO NOT PERMIT ANSWERS TO ANSWERS.

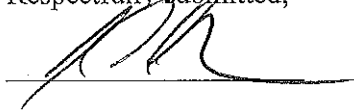
a. The Commission's rules of practice and procedure do not permit a petitioner to proofer an answer to an answer offered by a respondent to the petitioner's petition. 18 C.F.R. § 385.213(a)(2). The Commission's acceptance of Erie's answer to the Regulating District answer conflicts with the Commission's rules. The Commission has not articulated an adequate basis to ignore its own rules of practice and procedure; stating only that "...we will accept the answer because it provides information that assists in our decision-making". As the Commission did in Portland General Electric Company v. FERC, 854 F3d 692 (U.S.C.A., D.C. Cir., 2017) the Commission should have rejected the filing because it viewed the document as an "answer to a[n] ... answer," which its procedural rules prohibit. The Commission should set aside this agency action as arbitrary, an abuse of discretion, and as without observance of procedure required by law. The Commission's determination to accept the receipt of information outside the bounds of the rules prejudiced the Regulating District's position. The Commission's determination to accept Erie's answer to the Regulating

District's answer penalizes the Regulating District's timely submission of its answer in advance of the Commission's March 6, 2023 deadline for filing interventions, protests and comments.

CONCLUSION

WHEREFORE, for the foregoing reasons, The Hudson River – Black River Regulating District respectfully requests that the Commission: **(1)** issue an Order distinguishing between the headwater flow benefitting downstream licensees and the head, or column of water, benefitting Erie's E.J. West hydroelectric plant; **(2)** issue an Order retaining jurisdiction over the parties' agreement forming the nexus linking the two licensed projects into a single unit of development; **(3)** issue an Order maintaining the negotiated exchange of value between parties by enforcing Erie's performance of contract obligations as a license condition; **(4)** determine and declare that pursuant to 18 C.F.R. § 385.213(a)(2), the Commission's rules of practice and procedure do not permit the Commission to accept Erie's March 6, 2023 answer to the Regulating District's February 13, 2023 answer to Erie's January 27, 2023 petition for declaratory order and request for expedited action; and **(5)** order any additional relief deemed appropriate.

Respectfully submitted,



John C. Callaghan
Executive Director
Hudson River – Black River Regulating District

Dated: July 14, 2023

Certificate of Service

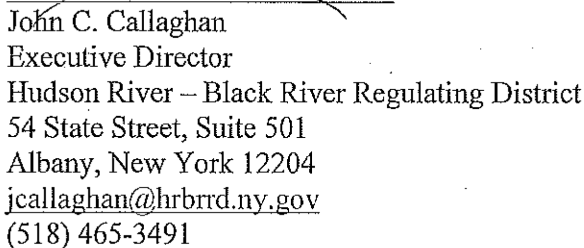
I hereby certify that I have this day served the foregoing document to each person designated below.

Via Electronic & First Class Mail:

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE, Room 1A
Washington, DC 20426
efiling@ferc.gov

Jacob Pollack, Esq.
General Counsel
Erie Boulevard Hydropower, L.P
C/O Brookfield Renewable
200 Liberty Street, 14th Floor
New York, New York 10281
jacob.pollack@brookfieldrenewable.com

Dated at this 14th day of July, 2023



John C. Callaghan
Executive Director
Hudson River – Black River Regulating District
54 State Street, Suite 501
Albany, New York 12204
jcallaghan@hrbrrd.ny.gov
(518) 465-3491