ORAL ARGUMENT IS NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1162

ALBANY ENGINEERING COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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MARCH 17, 2008
FINAL BRIEF MAY 9, 2008

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties and amici are as stated in the brief of Albany Engineering Company.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Fourth Branch Associates (Mechanicville) v. Hudson River – Black River Regulating District*, "Order on Complaint," 117 FERC ¶ 61,321 (December 22, 2006), and

2. *Fourth Branch Associates (Mechanicville) v. Hudson River – Black River Regulating District*, "Order on Rehearing," 119 FERC ¶ 61,141 (May 17, 2007).

C. Related Cases:

Undersigned counsel is unaware of any related cases pending judicial review in the federal courts. Petitioner's Circuit Rule 28(1) Certificate states that there is a case pending in New York State dealing with the assessments imposed on downstream projects by the Hudson River-Black River Regulating District. *Niagara Mohawk Power Corp. v. New York and Bd. Of Hudson River-Black River Regulating District*, No. 6314-06 (N.Y. Sup. Ct. Fulton County filed July 28, 2006).

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Judith A. Albert
Senior Attorney

May 9, 2008

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GLOSSARY

Albany	Petitioner Albany Engineering Corporation
District	Hudson River-Black River Regulating District
Erie	Erie Boulevard Hydropower, L.P.
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Head	the vertical distance between two points on a stream
Headwater benefits	the additional electric generation at a downstream project that results from regulation of the flow of the river by the headwater, or upstream, project

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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission, after considering arguments on the one hand that the Federal Power Act ("FPA") totally preempts a New York statute providing for headwater benefits assessments on hydropower licensees, and, on the other, arguments that the FPA preempts no part of the state statute at all, permissibly concluded that the FPA preempts the New York statute in part.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

The orders under review are *Fourth Branch Associates (Mechanicville) v. Hudson River – Black River Regulating District*, 117 FERC ¶ 61,321 (December 22, 2006) ("Complaint Order"), R 19, JA 1, *reh'g denied*, 119 FERC ¶ 61,141 (May 17, 2007) ("Rehearing Order"), R 25, JA 18. The issue these orders decided is whether § 10(f) of the Federal Power Act, 16 U.S.C. § 803(f), preempts a long-standing New York state law that assesses charges on hydroelectric projects located downstream and benefiting from a state-owned reservoir. The charges are for the purpose of recovering the state's costs of operating the reservoir.

The Hudson River-Black River Regulating District ("District"), the upstream entity operating the reservoir, argued that there is no preemption because the federal and state statutes are consistent with each other. Petitioner Albany Engineering Company ("Albany"), the downstream beneficiary of that reservoir, contended that the Federal Energy Regulatory Commission ("Commission" or "FERC") must find that the FPA wholly preempts the New York law. Following a middle road, the Commission concluded that FPA § 10(f) preempts only part of the New York statute.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

It is unlawful for any person, state, or municipality to operate or maintain a hydroelectric project on navigable waters except in accordance with the terms of a license issued under the FPA. FPA § 23(b)(1), 16 U.S.C. §817(1). The Commission has exclusive jurisdiction to issue such licenses. FPA § 4(e), 16 U.S.C. § 797(e).

Section 10 of the FPA, 16 U.S.C. § 803, authorizes the Commission to impose various license conditions on hydropower development. Among these is the "headwater benefits" payment set forth in FPA § 10(f), *id.* § 803(f). The flow of a stream in its natural state typically undergoes seasonal fluctuations. These fluctuations limit energy production because the flows sometimes exceed the maximum, or fall below the minimum, operating range of the project's turbines. Regulation of streamflow by storage projects on a river system's headwaters can increase the generation of hydropower projects downstream by evening out or otherwise altering the water flow. *See Farmington River Power Co. v. FERC*, 103 F.3d 1002, 1003 (D.C. Cir. 1997). FPA § 10(f) provides that, whenever a licensee is "directly benefited" in this way by the construction "of a storage reservoir or other headwater improvement" by "another licensee," the Commission shall require as a condition of the license that the licensee reimburse the owner of such

reservoir or other improvement "for such part of the annual charges for interest, maintenance, and depreciation thereon that the Commission may deem equitable." FPA § 10(f), 16 U.S.C. § 803(f).

Under its regulations, the Commission may conduct an investigation to determine headwater benefits charges. 18 C.F.R. § 11.15(a). The regulations prescribe an investigation methodology, the Headwater Benefits Energy Gains Model, under which the charges are calculated and then allocated to each downstream project according to its share of the total extra power generation made possible by the headwater project. *See Payments for Benefits from Headwater Improvements*, Order No. 453, 1986-1990 FERC Stats. & Regs., Regs. Preambles 1986-1990, ¶ 30,703 at 30,302 (1986) (51 Fed. Reg. 24308 (July 3, 1986)). In lieu of an investigation, owners of downstream and headwater projects may negotiate a settlement and submit it to FERC. 18 C.F.R. § 11.14(a)(1).

B. Events Leading Up To This Case

(1) The Great Sacandaga Lake

The Hudson River Regulating District, which developed the reservoir at issue, was organized in 1922 pursuant to the New York State Environmental Conservation Law. The Black River Regulating District had been similarly organized in 1919 and the two combined in 1959 to form the Hudson River-Black River Regulating District. District Answer to Complaint at 4-5, R 16, JA 255-56.

("District" will refer here to either the current combined districts or the relevant predecessor, Hudson River Regulating District.)

Under New York law, the District is authorized to plan, finance, build, operate, and maintain storage reservoirs "when required by the public welfare, including public health and safety." N.Y. Envtl. Conserv. Law § 15-2103. The governor of New York appoints a Board of Directors to manage the District. *Id*. § 15-2137. The Board reports annually to the New York State Department of Environmental Conservation on operations, personnel, finances, reservoir conditions, and other matters, and its financial operations are reviewed by the Office of the New York State Comptroller. *Id*. § 15-2131; *see* District Answer to Complaint at 5, JA 256.

New York state law requires the beneficiaries of the reservoirs to pay the District's costs and expenses. Pursuant to state law, the total cost of the reservoir "less the amount which may be chargeable to the state" shall be apportioned "among the public corporations and parcels of real estate benefited, in proportion to the amount of benefit which will inure to each public corporation and parcel of real estate by reason of such reservoir." N.Y. Envtl. Conserv. L. § 15-2121. Benefits are defined as including "benefits to real estate, public or private, to municipal water supply, to navigation, to agriculture and to industrial and general welfare by reason of the maintenance and operation of [the reservoir]. . . ." *Id*. §

15-2101(3). Ongoing costs of maintaining and operating the reservoir are recovered in a similar manner, *id*. § 15-2125, and include "all such part of the compensation and expenses of the [district] board, its officers and employees after the completion of such [reservoir] as are in the judgment of the board and the [state] department [of environmental conservation] properly chargeable thereto." *Id.* § 15-2101(10).

In 1932, the District completed the Conklingville Dam, which impounds the Great Sacandaga Lake in Adirondack State Park. The dam and lake were constructed "to provide flood control and summer flow augmentation for communities bordering the Hudson River below the Sacandaga River confluence." *Hudson River-Black River Regulating District*, 100 FERC ¶ 61,319, Paragraph ("P) 15 (2002) ("District Licensing Order").

As required by state law, the District completed a study on January 30, 1925 to apportion the costs of the planned dam and reservoir on downstream sites according to the benefits each would receive. The predecessor agency to the New York State Department of Environmental Conservation reviewed the study, a public hearing was held, and the District approved the apportionment on April 30, 1925. District's Answer to Complaint at 6-7, JA 257-58.

The District has used the same method of apportionment to recover its costs since then. The method relies primarily on "head;" *i.e.*, the drop of the river as it

flows downstream. Approximately 95 % of the project's benefits are attributed "to parcels of property that have fall or 'head' on the river, and which therefore derive all the benefit of increased water power production – whether hydroelectric, industrial (e.g., mills), or merely potential (undeveloped)." District Answer to Complaint at 7-8, JA 258-59. The other five percent of the District's costs are allocated "to municipalities along the river for flood control, flow augmentation, and sanitary benefits such as wastewater assimilation." *Id*. at 8, JA 259.

(2) Licensing of the Great Sacandaga Lake Project

The lake and the dam were not licensed at the time of their construction. In 1963, the Federal Power Commission issued a license to Niagara Mohawk Power Company for E.J. West Project No. 2318. The E.J. West powerplant and generating facilities lie at the base of the Conklingville Dam and use head created by the dam, but the Commission did not require the Great Sacandaga Lake to be made part of the license. *Id*. at 9, JA 260.

Subsequently, however, when Niagara Mohawk filed to renew the license, the Commission determined that the Conklingville Dam and the Great Sacandaga Lake are part of the "complete unit of development" under FPA § 3(11), 16 U.S.C. § 796(3)(11), and required licensing. Complaint Order P 3, JA 2; District Licensing Order P 6. Because the dam and the reservoir are part of the Adirondack State Park, state law barred the District from conveying any ownership interest to

Niagara Mohawk as a means to avoid the District itself becoming a licensee. District Answer to Complaint at 10, JA 261.

Ultimately, Erie Boulevard Hydropower, L.P. ("Erie"), the successor in interest to Niagara Mohawk, and the District (among others) reached an accord. Erie amended the application (and the relicense applications for three other downstream projects) by filing a Settlement Offer ("Settlement") covering all four applications. Complaint Order P 4, JA 2. The Settlement included a provision, Section 8.4, recognizing both the District's right to make assessments according to the state law and that the District had initiated a review of its assessment procedure. *Id.* P 8, JA 3. Erie (along with the District) also filed an amendment to add the District as a co-applicant to the E.J. West application. *Id*. P 3, JA 2.

In 2002, FERC approved the Settlement and issued licenses to Erie for its four projects and to the District for the Great Sacandaga Lake Project. *See id.* P 4 and the orders cited in fn. 9 and 10, JA 2, 14. Section 8.4 required that the District's assessment procedures be outside FERC's jurisdiction, and, accordingly, the section was not incorporated into the licenses. *Id.* P 8, JA 3.

The District sought clarification that the Settlement approval encompassed approval of the Settlement's assessment procedures. The Commission pointed out, however, that the regulations require that agreements on assessments be filed and approved. *Id.* P 9, JA 3. Thus, "while the parties may reach agreement on a

methodology for calculating benefits, the proposed assessments must be submitted to the Commission for approval." Complaint Order P 9, JA 3.

C. Albany's Complaint

On July 25, 2006, Fourth Branch Associates (Mechanicville), an entity that was not a signatory to the Settlement, filed a complaint against the District pursuant to FPA § 306, 16 U.S.C. § 825(e). Fourth Branch is the predecessor in interest to Petitioner Albany Engineering Corporation and both entities will be referred to here as "Albany."

Albany's Mechanicville Project is located on the Hudson River downstream from the confluence of the Hudson and Sacandaga Rivers. Albany's complaint asserted that the assessments the District had levied for decades against Mechanicville and other downstream beneficiaries to cover the costs of the Great Sacandaga Lake Project were for headwater benefits. Now that the Project is federally licensed, Albany contended, assessments for such benefits must reflect the federal statute. Albany contended further that the New York assessments statute conflicts with the federal scheme of regulation by authorizing reimbursement for costs other than interest, maintenance, and depreciation. Accordingly, Albany argued, FPA § 10(f) preempts the New York State Environmental Conservation Law assessment provisions entirely. Rehearing Order P 26-27, JA 23.

Albany requested the Commission to: (1) clarify that the District could not levy assessments against Albany absent a Commission headwaters benefits study or an agreement between Albany and the District that was submitted and approved by the Commission; (2) clarify that assessments could consist only of an equitable portion of the District's maintenance, depreciation, and interest costs; (3) issue an order restraining the District from levying further assessments; and (4) require the District to file an executed agreement with Albany governing the assessments levied for 2003 through 2006, or, failing that, to show cause why it should not have to rescind those assessments and make refunds, with interest, of any payments made. Complaint Order P 21-22, JA 5-6.

In its answer, the District agreed that the FPA preempts inconsistent state law. However, the District asserted that New York law is consistent with FPA § 10(f) because both statutes seek to insure that downstream beneficiaries of headwater improvements will fairly compensate upstream project owners for a share of the costs of the improvements. Complaint Order P 27, JA 7. The District also argued that preemption of the New York apportionment scheme would threaten its viability, that its "head-based" assessment is equitable because parcels of land with head receive the greatest benefits from flow regulation, that it entered into the Settlement with the understanding that it could continue its funding under the state scheme, and that it cannot function in a system in which its annual

funding is dependent on two entirely separate and contradictory assessment schemes. Complaint Order P 27-32, JA 7-8.

The District requested FERC to find that FPA § 10(f) does not preempt the New York apportionment statute in any respect. *Id.* P 35, JA 8. In the alternative, if the Commission found preemption, it should waive its regulations to the extent necessary to approve the District's existing apportionment and assessment process as a reasonable and equitable way to establish headwater benefits charges. *Id*. P 35, JA 8.

D. The Challenged FERC Orders

The Commission found that that "there is no question" that the District's assessments are for headwater benefits. *Id*. P 38, JA 9. Thus, as Albany had stated, the "central question" was whether FPA § 10(f) is "part of a comprehensive federal regulatory scheme that vests the Commission with exclusive jurisdiction to determine the level of reimbursement for costs that an upstream licensee may demand from a downstream licensee on account of the provision of headwater benefits to the downstream licensee." *Id.* P 37, JA 9.

Turning to the District's arguments first, the Commission rejected the notion that there is no inherent conflict between the federal and state statutes. *Id.* P 40, JA 9. FPA § 10(f) requires FERC to determine the "equitable part" of the interest, depreciation, and maintenance that downstream beneficiaries must pay. "To the

extent that adherence to the New York statutory scheme would bypass the Commission's prerogative to determine and approve the appropriate level of headwater benefits charges, the New York statute must certainly yield to Section 10(f)." Complaint Order P 40, JA 9. Consequently, FPA § 10(f) preempts New York's statute at least with regard to interest, maintenance, and depreciation costs.

The Commission found that Section 8.4 of the Erie Settlement does not alter this result. *Id*. P 41, JA 9. Section 8.4 cannot nullify the § 10(f) requirement that FERC approve assessments, it was not a license condition, and it is a private matter between the District and the other signatories. *Id.* P 41-42, 9-10. Moreover, Albany was not a Settlement signatory and did not agree to assessments levied pursuant to the New York statute. *Id.* P 42, JA 10. The Commission declined to waive its regulations for similar reasons, emphasizing that waiver would be unfair to Albany. *Id.* P 43, JA 10.

The Commission also rejected Albany's argument at the other extreme, that FPA § 10(f) wholly preempts the New York statute. *Id.* P 49, JA 11. FPA § 10(f) is not "such a comprehensive statutory provision that there is no room for supplemental state regulation of charges that are not specified in that section." *Id*. There is no physical impossibility involved in compliance with both the federal and state law. *Id.* Moreover, the federal interest in assuring that downstream project owners contribute to construction costs of upstream projects is not

undermined by a state's assessing the "costs of operating and administering a storage project that affects a variety of downstream uses within that state." Complaint Order P 49-50, JA 11-12.

FERC also declined to grant Albany's requests that it take various actions to constrain the District from levying assessments. *Id.* P 55-57, JA 13. The Commission found, *inter alia*, that it has no authority to prevent a storage project from levying assessments under color of state law, or to require the District to rescind such assessments already made. *Id.* P 55, JA 13. Moreover, there was no basis for ordering refunds, as there had been no headwater benefits investigation. *Id*. If an investigation occurs, final charges "may be established retroactively, to finalize an interim charge, or prospectively." *Id.*, citing 18 C.F.R. § 11.10(c)(11).

Neither party was satisfied with FERC's construction of FPA § 10(f). Both requested rehearing, which the Commission denied. Rehearing Order P 2, JA 18. Only Albany petitioned for review.

SUMMARY OF ARGUMENT

Albany's interpretation of FPA § 10(f), 16 U.S.C. § 803(f), as wholly preempting the New York statute, is not completely unreasonable. However, the Commission's conclusion that FPA § 10(f) does not preempt New York state law except as to charges for interest, maintenance, and depreciation is a permissible construction and, consequently, should be sustained under the deferential standard of review. FPA § 10(f) is not so comprehensive that there is no room for supplemental state regulation of charges that are not specified in § 10(f). There is no physical impossibility that prevents projects from complying with both the federal and state statutes, nor is the underlying federal policy undermined by the state recovering all of its costs of operating the state-owned storage facility.

The Commission's findings are consistent with applicable precedent finding that the FPA "occupies the field with regard to hydropower licensing." Unlike the state laws in the cited precedent, application of the New York law, as limited by the challenged orders, does not infringe upon, or otherwise interfere with, the Commission's authority over hydropower projects.

The Commission's construction is also consistent with the language and purpose of FPA § 10(f). Congress did not specifically prohibit a state's assessment of charges for expenses other than interest, depreciation, and maintenance, nor does the legislative history reveal a Congressional intent to prohibit additional

charges under the circumstances here. In fact, there is no indication that Congress anticipated the situation of a state-created entity attempting to recover, pursuant to state law, its costs of operating a state-owned reservoir. Rather, Congress sought to promote the equitable sharing of costs by all entities, upstream or downstream, that benefit from the incurrence of those costs.

Albany's other arguments lack merit. A construction of FPA § 10(f) limiting its preemptive effect will not create a "patchwork" of headwater benefits charge regimes. The situation here is unusual, involving as it does a state-owned and state-operated dam and reservoir. Albany's argument that FERC's interpretation would allow two different assessments for the same headwater benefits is misplaced, as the two assessments will address different cost elements.

Finally, the Commission appropriately declined to take the remedial actions proposed by Albany. FPA § 10(f) authorizes the Commission to institute headwater benefits investigations, to require downstream licensees to pay assessments, and to require both upstream and downstream licensees to pay the costs of a headwater benefits study. However, FPA § 10(f) does not authorize FERC to address independent actions taken by an upstream licensee to collect charges under color of state law, even if FERC determines the law is preempted in part by the FPA.

ARGUMENT

I. STANDARD OF REVIEW

Where a court is called upon to review an agency's construction of the statute it administers, well-settled principles apply. If Congress has directly spoken to the precise question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S.C. 837, 842-43 (1984). *See also, e.g., City of Tacoma, Washington v. FERC*, 460 F.3d 53, 63-64 (D.C. Cir. 2006) (applying *Chevron* principles in construing hydroelectric provision of the FPA). "[I]f the statute is silent or ambiguous with respect to the specific issue," however, the Court must "proceed to step two and defer to any 'permissible construction of the statute' offered by the agency." *HolRail, LLC v. STB*, 515 F.3d 1313, 1316 (D.C. Cir. 2008), quoting *Chevron*, 467 U.S. at 843.

Albany contends (Br. at 39) that the Commission's orders are "not entitled to deference" because its "conclusion that the law is unclear . . . is not supported by historical evidence, conflicts with the statutory intent, and is illogical." This contention lacks merit. Congress did not speak directly to the issue here; FPA § 10(f), 16 U.S.C. § 803(f), does not expressly preempt state law or address the recovery of specific costs other than "interest, maintenance, and depreciation."

Moreover, § 10(f) is subject to more than one interpretation. By limiting reimbursement to these three types of charges, Congress may have intended these charges "to constitute the entire extent of equitable reimbursement for upstream project expenses." Complaint Order P 47, JA 11. On the other hand, Congress may have meant only to give FERC jurisdiction over recovery of construction costs, without intending to foreclose states from recovering other costs of state-owned facilities. *Id*. P 48, JA 11. Given this ambiguity, step two of *Chevron* applies.

II. THE COMMISSION REASONABLY INTERPRETED THE FPA TO PREEMPT ASSESSMENT UNDER NEW YORK STATE LAW ONLY OF CHARGES COVERING THE INTEREST, MAINTENANCE, AND DEPRECIATION COSTS OF PROVIDING HEADWATER BENEFITS.

A federal statute can implicitly preempt state law by, *inter alia*: (1) inference when Congress occupies the field by enacting legislation so comprehensive that it leaves no room for supplemental state regulation; and (2) implied or conflict preemption, when there is a conflict between the federal and state statute. *See, e.g., Geier v. American Honda Motor Co*., 166 F.3d 1236, 1237 (D.C. Cir. 1999); Complaint Order P 39, JA 9 (citing case). In every preemption case, "the purpose of Congress is the ultimate touchstone." *Geier*, 166 F.3d at 1237 (citations omitted).

In determining Congressional intent, the courts begin with a presumption against preemption of state law. *See* Rehearing Order P 42, JA 27 (citing *Wisconsin Valley Improvement Co. v. Meyer*, 910 F. Supp 1375, 1379 (W.D. Wisc. 1995)); *see also, e.g., Don't Tear It Down, Inc. v. Pa. Ave. Develop. Corp.*, 642 F.2d 527, 534-35 (D.C. Cir. 1980) (the Supreme Court has consistently reminded the courts "that, to the extent possible, the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted") (citations and internal quotation marks omitted). Concomitantly, even the FPA's broad delegation of licensing power to the Commission "hardly determines the extent to which Congress intended . . . to pre-empt concurrent state regulation. . . ." *California v. FERC*, 495 U.S. 490, 496-97 (1990) (addressing preemption under a particular provision of the FPA).

In the orders under review, the Commission considered FPA § 10(f) in light of these principles and concluded that FPA § 10(f) preempts the New York statute only from assessing charges for interest, maintenance, and depreciation:

> Congress has not expressly indicated that Section 10(f) should preempt state law as to all upstream storage facility charges. We do not think Section 10(f) is such a comprehensive statutory provision that there is no room for supplemental state regulation of charges that are not specified in that section. There is no physical impossibility involved in compliance with Section 10(f) as to interest, maintenance, and depreciation assessments and with state law as to assessments for other expenses. The federal interest underlying Section 10(f) is ensuring the participation of downstream project owners in the financial burden incident to the construction of power and storage

> facilities of a river basin. This interest is not undermined by allowing states to assess for the operating expenses of state-controlled storage projects, and in that respect the New York law does not pose an obstacle to the accomplishment of that Congressional objective.

Complaint Order P 49, JA 11.

Albany has taken the position that the Commission is compelled - not simply authorized - to find that FPA § 10(f) wholly preempts the New York statute. That position, "that section 10(f) occupies the entire field [,] is not an unreasonable one." Rehearing Order P 42, JA 27. As the challenged orders demonstrate, however, the Commission's position is not unreasonable either, as its findings are entirely consistent with precedent and with the language and purpose of § 10(f). Accordingly, the Commission's less preemptive construction of § 10(f), leaving some role for state involvement in assessments for headwater benefits, is a permissible one and should be sustained. *Chevron*, 467 U.S. at 843.

A. The Commission's Construction Is Consistent With General FPA Precedent And Purpose.

Albany (Br. at 27) cites *First Iowa Electric Coop. v. FPC*, 328 U.S. 152 (1946), for the proposition that Congress' intention was "to secure a comprehensive development of national resources" that "leave[s] no room or need for conflicting state controls." The Commission agrees that, as a general matter, it is well-established that the FPA preempts state and local laws concerning hydropower licensing. Complaint Order P 39, JA 9. Nevertheless, the specific

preemptive effect, if any, of FPA § 10(f) must still be considered. *California v. FERC*, 495 U.S. at 496-97. As the challenged orders demonstrate, the Commission's construction of § 10(f) is entirely consistent with congressional purpose.

In *First Iowa*, state dam licensing provisions were in direct conflict with the FPA. The state code, for example, required that "the method of construction, operation, maintenance, and equipment of any and all dams" would be subject to the approval of state officials. *First Iowa*, 328 U.S. at 165. As the Court found, "[t]his would subject to state control the very requirements of the project that Congress has placed at the discretion of the Federal Power Commission." *Id*.

Here, in contrast, there is no physical impossibility or other conflict that prevents projects from complying with both FPA § 10(f) and the New York statute. Complaint Order P 49, JA 11. Assessments for interest, maintenance, and depreciation may be levied pursuant to the federal statute, while assessments for other costs are charged pursuant to the state statute. *Id*.

In *First Iowa*, moreover, state water development policy was fundamentally at odds with federal policy. Iowa had a policy that water taken from a stream in connection with a project had to be returned to the stream at the nearest practicable point. 328 U.S. at 166, 171. This, the Court found, "strikes at the heart of the present project," because "the feature of the project which especially commended

it to the Federal Power Commission was its diversion of substantially all of the waters of the Cedar River near Moscow, to the Mississippi River near Muscatine." *Id.* at 166. It was the diversion that made the project productive enough to warrant Commission approval. *Id.* Accordingly, as "[c]ompliance with state requirements that are in conflict with federal requirements may well block the federal license," the state law must yield. *Id*. at 167-68.

In the instant case, in contrast, "the federal and state assessment schemes [are not] duplicative except insofar as they both authorized assessments for interest, maintenance, and depreciation." Rehearing Order P 40, JA 27. Moreover, the state assessment scheme does not infringe upon the Commission's authority to license and condition hydropower projects or otherwise to foster development of the nation's waterways as mandated by the FPA. *See id*. P 39, JA 26-27; *see also Public Service Co. of Colorado v. FERC*, 754 F.2d 1555, 1561 (10th Cir. 1995) (quoting *First Iowa*, 328 U.S. at 180, that FPA purpose is to promote the comprehensive development of water resources instead of the piecemeal approach of prior statutes). As discussed in detail *infra* at 23, § 10(f) fosters development of the nation's waterways by "ensuring the participation of downstream project owners in the financial burden incident to the construction of power and storage facilities of a river basin." Complaint Order P 49, JA 11. The District's collection of other costs does not infringe upon this purpose. *Compare California v. FERC*,

495 U.S. at 491 (the FPA, which requires FERC to set license conditions, including the minimum stream flows, preempts California requirements for higher minimum stream flows); *Sayles Hydro Assoc. v. Maughan*, 985 F.2d 451, 456 (9th Cir. 1993) (finding FPA preemption of California state board refusal to issue hydroelectric permit and stating that its conclusion "is strengthened by the fact that most or all of the State Board's concerns were considered by [FERC] in granting the license").

Albany also cites the federal district court decision in *Wisconsin Valley*, which found that a state law assessing fees on license applicants "thwarted the federal intent that FERC should regulate the *reasonableness* of charges assessed to license applicants." (Br. 29, emphasis Albany's). That case involved a Wisconsin law that assessed fees on licensees for costs incurred by a state agency in analyzing environmental impacts of proposed hydropower projects. *Wisconsin Valley*, 910 F. Supp. at 1378-79. The court found preemption on the grounds that Congress had authorized the Commission to monitor the collection of fees for such studies, and that the FPA implicitly occupies the field of hydropower licensing except with respect to proprietary rights. 910 F. Supp. at 1383; *see* Rehearing Order P 38, JA 26.

In *Wisconsin Valley*, however, the pertinent FPA provision explicitly gives FERC the authority to fix the charges to cover costs "incurred by Federal and State fish and wildlife agencies . . . in connection with studies or other reviews carried

out by such agencies for purposes of administering their responsibilities under this part." FPA § 10(e)(1), 16 U.S.C. § 803(e)(1). "Thus, the authority that the Wisconsin statute granted to the state over fee payments for studies duplicated authority that section 10(e) granted to the Commission." Rehearing Order P 39, JA 26. Here, in contrast, there is no state duplication of the Commission's authority as to expenses other than interest, maintenance, and depreciation, and no state-added requirement impeding the securing of a license. *Id.*, citing 910 F. Supp. at 1382-83.

B. The Commission's Construction Is Consistent With The Federal Interest Underlying FPA § 10(f).

The limited compliance with the New York statute permitted under the challenged orders also does not interfere with any federal interest particular to FPA § 10(f). "The federal interest underlying Section 10(f) is ensuring the participation of downstream project owners in the financial burden incident to the construction of power and storage facilities of a river basin." Complaint Order P 49, JA 11; *see also Public Service Co. of Colorado*, 754 F.2d at 1562 (considering "statutory and historical background" of FPA § 10(f)). Indeed, the sparse legislative discussion of proposed § 10(f) "focused almost entirely on fairness to the upstream licensee" and that licensee's recovery "of at least a portion of [its] construction costs." Rehearing Order P 30, JA 24; *see also id*. P 28, JA 23-24

(considering legislative debate); Addendum to this brief (attaching four pages of legislative history).

FPA § 10(f) addressed the potential for unfair competition by conferring a right private developers did not previously have, *i.e.*, to receive a limited reimbursement for their provision of headwater benefits. There is no indication, however, "that Congress anticipated the situation of a state-created entity attempting to recover, pursuant to state law, its costs of operating a state-owned reservoir." Rehearing Order P 32, JA 25. Indeed, state-created entities already had authority to assess charges for state-provided benefits, as demonstrated by the District's (pre-license) decades of doing so, *see* discussion *supra* at 5, 9.

Moreover, the federal purpose in projects' sharing certain project construction costs "is not undermined by allowing states to assess for the operating expenses of state-controlled storage projects." Complaint Order P 49, JA 11. Once the congressional purpose has been satisfied, "reimbursement for other charges is not meant to be a matter for Commission involvement but may be addressed by the states." *Id.* P 50, JA 11.

For its part, Albany contends (Br. at 31-32) that Congress did not intend that downstream licensees be responsible for reimbursing all costs incurred by the upstream licensee. As indicated above, the challenged orders agree that it is plausible that Congress intended "to free downstream project owners from the

further financial burden of assessments for additional items by upstream storage project owners pursuant to state law." Complaint Order P 47, JA 11. However, other than focusing on costs of constructing the upstream project, "the legislative history of § 10(f) is sparse and does not otherwise reveal Congress's reasons for limiting reimbursable costs to interest, maintenance, and depreciation." *Id*. P 45, JA 11.

Moreover, as demonstrated above, there is no indication in either the statute itself or the legislative history that Congress anticipated a state-created entity seeking to recover, under state law, its costs of operating a state-owned reservoir. Accordingly, the Commission was reluctant to infer preemption:

> Nevertheless, the statute and legislative history do not explicitly reveal a Congressional intent to prohibit additional charges pursuant to state law, and we are reluctant to infer one. Since Congress meant to ensure reimbursement for the costs of upstream project construction, its omission of operational and other costs from the items specified in Section 10(f) suggests that it did not consider those costs sufficiently related to upstream project construction to necessitate their inclusion. Given that Congress did not explicitly authorize the Commission to require reimbursement of these costs from downstream project owners, we would be hesitant to conclude that Congress meant to foreclose states from doing so.

Complaint Order P 48, JA 11; Rehearing Order P 42, JA 27. The Commission's construction, leaving some role for the state when the statute did not dictate otherwise, is permissible, and, accordingly, should be sustained. *Chevron*, 467 U.S. 843.

Albany similarly contends (Br. at 31) that FPA § 10(f) requires that reimbursements be tied to the direct benefits that downstream licensees receive, while New York law ties its charges to the District's costs. Rehearing Order P 33, JA 25. "There is no doubt that these differences exist." *Id*. However, "[t]o the extent that the New York scheme assess charges for [expenses not addressed in § 10(f)], based on a different method of determining benefits," there is no conflict between the statutes. *Id.*

Albany asserts (Br. at 32-33) that the purpose of FPA § 10(f) was to get a "right-sized reservoir." However, "there is no mention in the discussion of the proposed section of ensuring that upstream owners build the 'right-sized' reservoir." Rehearing Order P 30, JA 24; *see* attached Congressional Record excerpts. Instead, the Congressional "representatives who spoke in support of the proposal uniformly expressed concern that owners of downstream projects might unfairly reap benefits attributable to previously-constructed upstream storage projects without contributing to the costs of their construction." Rehearing Order P 30, JA 24.

Moving on to the 1950's, Albany argues (Br. at 34-37) that since Congress in subsequent years debated expanding the costs that could be reimbursed under FPA § 10(f), it must have meant in 1920, when the FPA (with § 10(f)) was first enacted, to prohibit additional assessments under state law. Albany did not make

any arguments pertaining to subsequent legislative proposals in its rehearing request and is barred by FPA § 313(b), 16 U.S.C. § 825*l*(b), from doing so now. *See, e.g.*, *Consumers Energy Co. v. FERC*, 367 F.3d 915, 925 (D.C. Cir. 2004). In any event, this particular argument has the same deficiency as Albany's arguments regarding the earlier legislative history: there is no indication that Congress was considering the situation of a state-owned and state-operated reservoir or anything other than the equitable reimbursement of costs benefiting others.

Albany's discussion (Br. at 37- 39) of Congressional rejection of proposals that would have explicitly endorsed state systems for imposing headwater benefits charges likewise cannot be dispositive. Those proposals were directed at allowing private companies to assess headwater benefits under a state, rather than federal, regime. *See* Complaint Order P 38 and fn. 34, JA 9, 16 (noting "unusual" circumstance of state-owned and state-operated project providing headwater benefits, and providing 1964 example of benefits paid according to Wisconsin state laws for upstream reservoirs owned by private interests). More importantly, congressional rejection in the 1950's of legislation that would wholly delegate headwater benefits charges to the states does not indicate a congressional intention in the 1920's as to whether states can recoup the costs of state-provided services.

Albany also asserts (Br. at 40) that limiting the preemptive effect of FPA § 10(f) "will create a patchwork of head water benefits regimens, directly contrary to

statutory intent." However, "the situation here, in which an upstream storage reservoir is owned by a state and is dependent on state-authorized assessments to cover its operations costs, is likely to remain very unusual." Rehearing Order P 41, JA 27; Complaint Order P 38, JA 9. Albany continues (Br. at 40-42) that the "fundamental incompatibility" between the state and federal systems is "highlighted" by the District's recent (post-record) modification of its accounting practices. However, that issues may arise in the transition from pre-license assessments to post-license assessments in the unusual circumstances of this case does not demonstrate the "fundamental incompatibility" that Albany posits.

In sum, the Commission's conclusion that FPA § 10(f) does not preempt New York state law except as to charges for interest, maintenance, and depreciation is consistent with the language of § 10(f) itself, its purpose, and FPA precedent. At best, Albany's argument demonstrates only that its aggressive interpretation of § 10(f), as wholly preemptive of the state scheme is, possibly, reasonable. It fails altogether to demonstrate that the Commission's less preemptive interpretation, advanced by neither Albany nor the District and leaving some role for the state, is unreasonable or otherwise undeserving of judicial respect. *See City of Tacoma*, 460 F.3d at 74 (where statute is ambiguous and FERC's interpretation is reasonable, then the agency is entitled to *Chevron* deference).

III. THE COMMISSION APPROPRIATELY DECLINED TO REQUIRE REFUNDS.

Albany argues (Br. at 51) that the Commission should have ordered refunds "of the headwater benefits charges improperly collected by the District." The Commission, however, found that it lacked authority to do so under the circumstances here:

> However, even to the extent that it is preempted by section 10(f), we have no authority over the District's actions. Our headwater benefits authority is circumscribed by section 10(f) and the related requirements included in licenses. We have authority to institute headwater benefits investigations, to require downstream licensees to pay assessments, and to require both upstream and downstream licensees to pay the costs of a headwater benefits study. But section 10(f) does not give us authority to address independent actions taken by an upstream licensee to collect charges under color of state law, even if we determine that the law is, in part, preempted by the FPA.

Rehearing Order P 55, JA 30.

Albany asserts (Br. at 51- 52) that "[c]ontrary to FERC's apparent belief," FERC does not require express authority to preempt state law. Albany, however, misunderstands the Commission's position. FPA § 10(f) requires (and gives FERC authority to order) *Albany* to pay an equitable portion of interest, maintenance, and depreciation charges to an upstream project. *Id.* The provision, however, does not require the *District* to do anything except to pay some of the costs of a headwater benefits investigation. Consequently, as FERC found, FPA § 10(f) does not give it any authority "to address independent actions taken by an upstream licensee [such

as the District] to collect charges under color of state law." Rehearing Order P 55, JA 30; *see also Transmission Agency of Northern California v. FERC,* 495 F.3d 663, 673-76 (D.C. Cir. 2007) (overturning, in relevant respect, FERC refund decision where FERC lacked refund authority over municipal entity).

Albany also argues (Br. at 54-56) that the Commission can require the District to make refunds and to discontinue improper assessments because the District is a licensee and because the District has not submitted a reassessment of its apportionment procedures as contemplated by the orders arising from the Settlement. *See supra* page 8 (discussing Settlement). However, as explained *supra* at 29, the District's status as a licensee does not give FERC refund authority.

Additionally, Albany's reliance on the reassessment procedure provided for by Section 8.4 of the Settlement is misplaced. Section 8.4 "was not incorporated into the license and remains a private agreement," which, moreover, "relates solely to the District's responsibilities under state law." Complaint Order P 56, JA 13. Consequently, the Commission has "no authority to require the District to initiate the reapportionment procedure" contemplated by that section. *Id*.; *see also* Rehearing Order P 52, JA 29; *Columbia Gas Transmission Corp. v. FERC,* 404 F.3d 459, 461-62 (D.C. Cir. 2005) (overturning FERC enforcement of metering requirements on non-jurisdictional natural gas gathering facilities that were addressed in jurisdictional tariff).

Finally, Albany's proposal (Br. at 55) that the Commission set the District's FPA § 10(f) reimbursement at zero in the absence of a headwater benefits analysis lacks merit. The complaint raised primarily legal issues concerning the District's authority to assess charges under state law; there has been no headwater benefits investigation. Thus, there is no basis to set the District's assessment at zero or at any other number. Moreover, if a headwater benefits investigation is done, the charges "may be established retroactively, to finalize an interim charge, or prospectively." 18 C.F.R. § 11.10(c)(11); Rehearing Order P 55, JA 30.

Albany is not without remedies. It may seek relief in the courts. It may also request a headwater benefits investigation. However, FPA § 10(f) requires that the affected licensees pay the cost of an investigation. The cost of one in a complex river basin such as this one can be substantial; past studies of similar river basins have cost in the range of $250,000 to $300,000. Complaint Order P 53 & fn. 47, JA 12, 16. Consequently, once the preemption issue has been finally resolved, Albany might find it advantageous to attempt to reach a settlement. *Id.* Failing that, an investigation could be requested at that time.

CONCLUSION

For the reasons stated, Albany's petition for review should be denied, and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission contains 7,071 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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