

141 FERC ¶ 61,227  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony T. Clark.

Hudson River-Black River Regulating District  
Erie Boulevard Hydropower L.P.  
Curtis/Palmer Hydroelectric Co.  
South Glens Falls Limited Partnership *et al.*  
Northern Electric Power Co. *et al.*  
Fort Miller Associates  
Stillwater Hydro Associates  
New York State Electric & Gas Corp.  
Albany Engineering Corporation  
Green Island Power Co.

Docket No. HB81-09-2-002

ORDER DENYING REHEARING

(Issued December 20, 2012)

1. On July 31, 2012, the Commission staff issued an order determining headwater benefits for projects in the Hudson River Basin.<sup>1</sup> The July 2012 Order assessed headwater benefits charges against Erie Boulevard Hydropower L.P. (Erie Boulevard) and other licensees of Commission-licensed hydropower projects on the Sacandaga and Hudson Rivers in New York downstream of the headwater project Great Sacandaga Lake Project No. 12252. The Great Sacandaga Lake Project is operated and maintained by the Hudson River-Black River Regulating District (District). On August 30, 2012, Erie Boulevard filed a timely request for rehearing of the order. Finding no error in the July 2012 Order, the Commission denies rehearing.

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<sup>1</sup> *Hudson River-Black River Regulating District*, 140 FERC ¶ 62,089 (2012) (July 2012 Order).

## I. Background

2. Regulation of stream flows by storage reservoirs such as the District's Great Sacandaga Lake on a river system's headwaters can increase the generation of electricity at downstream hydropower projects. Section 10(f) of the Federal Power Act (FPA)<sup>2</sup> provides that, whenever a licensee is directly benefited in this way by the construction work of another licensee, a permittee, or the United States of a storage reservoir or other headwater improvement, the Commission shall require that the licensee "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."

3. The benefits are commonly referred to as headwater benefits. Headwater benefits are 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>3</sup> FPA section 10(f) provides that the proportion of such charges to be paid by any licensee shall be determined by the Commission. The Commission assesses headwater benefits against downstream projects to allow the upstream project that provides the benefits to partially recoup its cost of conferring these benefits.<sup>4</sup>

4. The Commission's regulations provide for final and interim charges. A final charge is "a charge assessed on an annual basis to recover section 10(f) costs and which represents the final determination of the charge for the period for which headwater benefits are assessed. Final charges may be established retroactively, to finalize an interim charge, or prospectively."<sup>5</sup> Prospective final charges can be set if, among other factors, the development of the river basin "demonstrate[s] sufficient stability to project average energy gains and section 10(f) costs."<sup>6</sup>

5. If the Commission does not find sufficient stability, the Commission can assess interim charges prospectively. These charges would be "assessed to recover section 10(f)

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<sup>2</sup> 16 U.S.C. § 803(f) (2006).

<sup>3</sup> 18 C.F.R. § 11.10(a)(2) (2012).

<sup>4</sup> The Commission's regulations provide for the Commission to conduct an investigation to collect information for determining headwater benefits charges. 18 C.F.R. §§ 11.15, 11.17 (2012).

<sup>5</sup> 18 C.F.R. § 11.10(c)(11) (2012).

<sup>6</sup> 18 C.F.R. § 11.17(b)(1)(ii)(A) (2012).

costs for a specified period of headwater benefits pending determination of a final charge for that period.”<sup>7</sup>

6. The District operates and maintains the Great Sacandaga Lake Project, which is the headwater project at issue in these proceedings. The Conklingville Dam creates the Great Sacandaga Lake on the Sacandaga River, which is a tributary to the Hudson River. It is located in Saratoga, Fulton, and Hamilton Counties, New York. The Sacandaga Lake controls a drainage area of 1,044 square miles and has a surface area of approximately 42 square miles.

7. The District’s operation of the Conklingville Dam affects the flow at, and provides benefits to, 15 licensed hydropower projects downstream on the Sacandaga and Hudson Rivers.<sup>8</sup> Erie Boulevard operates six of these downstream projects.<sup>9</sup>

8. The July 2012 Order recounted in detail the procedural history of these proceedings. As pertinent here, the Conklingville Dam was constructed between 1928 and 1930; however, it remained a non-licensed facility until Commission staff determined it was required to be licensed, resulting in a Commission-issued license on September 25, 2002.<sup>10</sup> However, during the time between the construction of the Conklingville Dam and the issuance of the license, the District, pursuant to New York state law, assessed Erie Boulevard and other downstream projects for benefits they received from the District’s operation of Great Sacandaga Lake.

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<sup>7</sup> 18 C.F.R. § 11.10(c)(12) (2012). In the case of a federal headwater project, interim charges will be 100 percent of the estimated final charge, if the Commission previously has completed its investigation. 18 C.F.R. § 11.17 (2012). In this case, the Commission found a reasonable estimate of interim charges beginning in the year 2009 onwards to be equal to the 2008 assessments. July 2012 Order, 140 FERC ¶ 62,089 at P 42.

<sup>8</sup> The 15 projects are listed in Table 1 of the July 31, 2012 order. Projects with generating capacity of 1.5 megawatt or less are exempted from paying headwater benefits charges. 18 C.F.R. § 11.10(b) (2012).

<sup>9</sup> Erie Boulevard operates the following facilities: E. J. West, Project No. 2318; Stewart’s Bridge, Project No. 2047; Spier Falls, Project No. 2482; Sherman Island, Project No. 2482; Feeder Dam, Project No. 2554; and Glens Falls, Project No. 2385.

<sup>10</sup> *Hudson River-Black River Regulating District*, 100 FERC ¶ 61,319 (2002).

9. After the Commission licensed the Great Sacandaga Lake Project in 2002, the District continued to assess the downstream operators for benefits pursuant to state law. In 2006, the licensee of the downstream Mechanicsville Project No. 6032, Albany Engineering, filed a complaint, asserting the District's assessment of charges pursuant to state law since 2002 was preempted by FPA section 10(f). The Commission concluded that FPA section 10(f) preempted the District from collecting charges pursuant to New York state law for "interest, maintenance, and depreciation," but was free to assess downstream operators for costs that did not fall within the "interest, maintenance, and depreciation" category.<sup>11</sup> The United States Court of Appeals for the District of Columbia Circuit reviewed the Commission's orders and ruled that FPA section 10(f) preempts all state assessments for headwater benefits.<sup>12</sup> The court remanded the case to the Commission to consider the scope of its authority to craft appropriate remedies.

10. The Commission on remand began a process to determine headwater benefits received by hydropower projects on the Sacandaga and Hudson Rivers from the Great Sacandaga Lake Project.<sup>13</sup> The Commission first attempted to facilitate the parties' resolution of the issues by appointing a settlement judge.<sup>14</sup> However, attempts at facilitating settlement failed. Consequently, Commission staff issued a letter on August 4, 2009, informing the District and the downstream project operators, including Erie Boulevard, that the Commission was initiating a headwater benefits determination. In the August 2009 letter, Commission staff informed the parties that its contractor Oak Ridge National Laboratory (Oak Ridge) would be conducting the headwater benefits study. The letter also informed the District and the downstream operators that Oak Ridge would be requesting data needed for the study. Oak Ridge and Commission staff subsequently sent letters to the parties specifying the 2002-2008 period as the subject of the headwater benefits study.<sup>15</sup>

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<sup>11</sup> See *Fourth Branch Associates (Mechanicville) v. Hudson River-Black River Regulating District*, 117 FERC ¶ 61,321 (2006), *order on reh'g*, 119 FERC ¶ 61,141 (2007).

<sup>12</sup> See *Albany Engineering Corp. v. FERC*, 548 F.3d 1071 (D.C. Cir. 2008).

<sup>13</sup> See *Albany Engineering Corp. v. Hudson River-Black River Regulating District*, 127 FERC ¶ 61,174 (2009), *reh'g denied* 129 FERC ¶ 61,134 (2009).

<sup>14</sup> *Albany Engineering Corp. v. Hudson River-Black River Regulating District*, 127 FERC ¶ 61,174 at P 19.

<sup>15</sup> See Oak Ridge November 2, 2009 letter and Commission staff September 23, 2010 letter.

11. On January 19, 2012, Commission staff issued the draft headwater benefits determination report prepared by Oak Ridge. As explained in Commission staff's cover letter, the draft report "summarizes the energy gains and headwater benefits assessments to the downstream hydropower projects for the years 2002 through 2008."

## **II. The July 31, 2012 Order**

12. Commission staff's July 2012 Order determined final charges for the amount of headwater benefits owed to the District for the regulation of Great Sacandaga Lake for the period 2002 through 2008.<sup>16</sup> The order also established interim charges for the period 2009 onwards, equal to the final charges assessed for 2008.<sup>17</sup> Citing the dramatic increase in maintenance costs of the headwater project and the uncertainties in future capital improvements and exact maintenance costs for each year, the order found that it was appropriate to establish interim, as opposed to final, annual assessments from 2009 onwards.<sup>18</sup>

## **III. Erie Boulevard's Rehearing Request**

13. On rehearing, Erie Boulevard states the Commission should modify interim charges set in the July 2012 Order to account for additional installed and hydraulic capacities authorized by the Commission for the downstream Green Island Project No. 13 on August 17, 2012.<sup>19</sup> Erie Boulevard states that in setting future headwater benefits

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<sup>16</sup> 140 FERC ¶ 62,089 at PP 39-40.

<sup>17</sup> *Id.* PP 41-42.

<sup>18</sup> *Id.* P 42. The order also established a process for downstream licensees to receive credits against future headwater benefits assessments for the post-2002 payments they had already made to the District pursuant to New York state law and determined to be preempted by the FPA. *Id.* PP 43-49 ("Moreover, to the extent that, while the Great Sacandaga Lake Project has been under license, any of the downstream project owners made payments exceeding the amounts that this order finds were owed for those years, those overpayments, equitably, should be offset against future charges.").

<sup>19</sup> *See Green Island Power Authority*, 140 FERC ¶ 62,133 (2012). An increase in Green Island's installed capacity would decrease Erie Boulevard's proportionate share of headwater benefits assessments. On September 24, 2012, Erie Boulevard filed an untimely supplement to its request for rehearing, acknowledging similar post-2008 increases in installed capacity at two of its projects. The supplement was not filed within the 30-day time limit required by FPA section 313(a), 16 U.S.C. § 8251(a) (2006), and therefore, is rejected as late-filed. *See Public Service Co. of New Hampshire*, 56 FERC

(continued...)

assessments, the order mistakenly assumed that “[n]o changes either in the existing developments or in the operation of the Great Sacandaga Lake are anticipated.” Erie Boulevard does not dispute the determination of final assessments for the 2002 to 2008 period.

#### IV. Discussion

14. In the case of the present headwater determination for the Hudson River Basin, the Commission asked for data for the 2002 to 2008 period,<sup>20</sup> and the Commission staff’s final determination covered that same 2002 to 2008 period. The modification to Green Island’s installed capacity that Erie Boulevard requests would not affect the calculation of final charges for the period 2002 to 2008. Rather than modify piecemeal the future interim charges, which could undermine regulatory certainty and, moreover, be inefficient to the extent that it requires frequent redeterminations, the Commission finds that a more prudent course of action is to continue with the interim assessments set at a level of 100 percent of the 2008 assessments until such time as a new, comprehensive study can be completed for the period 2009 onwards. When the Commission conducts the next headwater benefits study, final assessments can be made based on sufficient years of actual data.<sup>21</sup> These final assessments for the period 2009 onwards will be trued up with a full accounting of the interim payments made.<sup>22</sup> With this method, the District and the downstream project owners will be kept whole. Accordingly, the Commission denies Erie Boulevard’s rehearing request.

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¶ 61,105, at 61,403 (1991) (“Commission precedent is clear that supplements to timely filed requests for rehearing when filed after the expiration of the statutory thirty-day period, will be rejected.”).

<sup>20</sup> The Commission’s notice of a headwater benefits investigation will specify the period of project operations to be studied. 18 C.F.R. § 11.15(b) (2012).

<sup>21</sup> Given the expense of a headwater benefits study, which, in this case, cost \$309,580, the Commission has a practice of conducting headwater benefits studies at roughly 10 year intervals.

<sup>22</sup> When the Commission establishes a final charge for a period for which payment of an interim charge has been made, it will adjust the final charge to reflect the amount paid. *See* 18 C.F.R. § 11.17(b)(1)(iii) (2012). That section provides that, for federal headwater projects, “[w]hen a final charge is established for a period for which an interim charge was paid, the Commission will apply the amount paid to the final charge.” The Commission believes a similar “true up” should be used in the case of non-federal headwater projects.

The Commission orders:

Erie Boulevard Hydropower L.P.'s request for rehearing is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.