



Hudson River - Black River Regulating District

KATHY HOCHUL
Governor

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Executive Director

November 30, 2022

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

Re: Report of Dispute – P-2318/P-12252
March 27, 2000 Offer of Settlement, Paragraph 2.5
FERC License Form L-3 Terms and Conditions, Art 5 & Art. 13

Regional Engineer Spain,

The Great Sacandaga Lake Project (P-12252) operated by the Hudson River – Black River Regulating District (“Regulating District”) and the powerhouse and generating facilities at the Conklingville Dam currently licensed to Erie Boulevard Hydropower LP (“Erie”) as the E. J. West Project (P-2318) form a complete unit of development in New York’s Fulton and Saratoga Counties. A dispute has arisen regarding Erie’s obligation to pay reasonable compensation for use of Regulating District assets; including property rights or parts thereof. Counsel for Erie contends that continued payment for use of the Regulating District’s property rights would be duplicative to the headwater benefit assessment Erie pays pursuant to section 10(f) of the federal power act¹. The Regulating District disagrees.

Erie does not own all of the head necessary to operate the E.J. West project (P-2318). The Regulating District owns fifty-six (56) feet of the seventy-one (71) feet of head supplying that project. Despite having compensated the Regulating District for use of the fifty-six (56) feet of head continuously without objection or challenge since acquiring the project, Erie has indicated its intention to cease doing so at the conclusion of the existing agreement on December 31, 2022². As far back as 1927, Erie’s predecessors recognized that they did not control all of the project components necessary for operation. In 1927 Erie’s predecessor interest entered into an agreement with the Regulating District allowing the power company to connect to the outlet of the Conklingville Dam for the purpose of producing power from the power company’s fifteen (15) feet of head and the Regulating District’s additional fifty-six (56) feet of head³. This, and subsequent operating agreements⁴, secured for the Regulating District the full value of the power

¹ October 13, 2022 Letter from Glick to Leslie

² November 21, 2022 Email from Glick to Leslie

³ 1927 - 11 14 1927 NY Power & Light ROA Conklingville

⁴ 1939 - 01 05 1939 NY Power & Light ROA Conklingville
1949 - 09 21 1949 NY Power & Light ROA Conklingville

thus produced by said additional head. In exchange, Erie's predecessors secured the project elements necessary to operate the E.J. West hydroelectric plant (P-2318). The intent of the parties was then, and is now, that the power company would pay the Regulating District for use of this property interest and for the timing of the release of the flow impounded by the Regulating District's dam at Conklingville. Absent an extension of this agreement, Erie does not control, and thus FERC is unable to bring under Erie's license, the remaining components of the unit of development. Likewise, absent an extension of this agreement, nothing in the Regulating District's license or the Offer of Settlement compels the Regulating District to make releases through E.J. West.

Through the series of reservoir operating agreements in place from 1927 through 2002, Erie's predecessors paid the Regulating District for use of the Regulating District's property right and the timing of the release of water at Conklingville; that final component necessary for Project 2318 (E.J. West) to operate. Nonetheless, at the E.J. West project's most recent license renewal, FERC noted that Erie, the then new owner, failed to permanently secure all project elements under license. Due to a NYS Constitutional prohibition preventing Erie's outright purchase of the state property interest necessary to complete the E.J. West project and a 1992 amendment to section 21 of the Federal Power Act (FPA) prohibiting the use of eminent domain to acquire state park lands for hydropower purposes, FERC issued project license 12252 to the Regulating District in order that all project elements be brought under license. Erie and the Regulating District entered the current reservoir operating agreement in July, 2003 (amended in 2006), through which Erie pays the Regulating District for use of this critical project element and for the timing of the release of the flow impounded by the Regulating District's dam.

Erie's imminent abandonment of the arrangement through which it secures use of the Regulating District's property interest will cause Erie to be in violation of its FERC license. Erie's FERC license for E.J. West, issued September 25, 2002 and as modified on February 5, 2003, demonstrates FERC's commitment to support the contractual relationship linking the two licensees creating the single unit of development (E.J. West at Conklingville). Subsection "E" of Erie's license provides that "[T]his license is subject to the articles set forth in Form L-3, (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States,".... Article 5 thereof requires in part that "The Licensee...shall, during the period of the license, retain possession of all project property covered by the license as issued...including...water rights..." Likewise, the Regulating District's license, also issued on September 25, 2002, and subject to those same license conditions, contemplates that Erie will have to compensate the Regulating District for use of that project element. See condition Article 13 which provides in part that "The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur". In essence, neither licensee alone controls all the necessary project elements. Clearly, Erie's obligation to compensate for use of the Regulating District's property interest, is separate and distinct from Erie's obligation under its own license's Article 11 to reimburse the Regulating District for an equitable portion of the cost to construct and maintain the headwater improvement. Yet Erie continues to argue that one is duplicative of the other.

1971 - 12 28 1971 Nimo ROA Conklingville
1980 - 06 17 1980 Nimo ROA Conklingville
2003 - 07 01 2003 ROA with Erie Blvd Hydropower at Conklingville
2003 - 07 01 2003 ROA With Erie Exhibit A to 07 01 2003 ROA - Mutual Release
2003 - 07 01 2003 ROA With Erie Exhibit B to 07 01 2003 ROA - Stillwater Reservoir Letter Agreement
2006 - 05 19 2006 First Amendment to ROA
2021 - 06 16 2021 Second Amendment to ROA
2022 - 06 29 2022 Third Amendment to ROA

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The Offer of Settlement similarly demonstrates FERC's commitment to support the contractual relationship. The Regulating District filed its original FERC license application in the context of an Offer of Settlement dated March 27, 2000. Tables established in the Offer of Settlement, which illustrate the level curves incorporated into the license, require the Regulating District to achieve several objectives including: minimizing energy losses to affected hydroelectric projects by the aggressive use of storage (see License Article 402(a)). Erie has cited this language to suggest it must be permitted to generate revenue even after it ceases compensating the Regulating District for use of the Regulating District's property interest. However, Article 402 subsection (j) only requires the Regulating District to make every reasonable attempt to limit releases to not exceed target maximum flows in the Hudson River below its confluence with the Sacandaga River and to limit releases from Great Sacandaga Lake below E.J. West. The Regulating District maintains that such target flows are measured below E.J. West specifically so that the Regulating District is not compelled, in the Offer of Settlement, or in the FERC license, to make prescribed releases through Erie's E. J. West hydroelectric plant absent an agreement through which Erie pays reasonable compensation for Erie's use of the Regulating District's property interest; namely the fifty-six (56) feet of head that Erie is not entitled to absent the agreement.

Section 2.5 of the Offer of Settlement establishes a dispute resolution procedure through which licensees shall report such disputes to FERC. As such, if Erie and the Regulating District have not resolved the disputes enumerated herein, the Regulating District will thereafter petition the Commission for assistance resolving the dispute. We suspect that once the Regulating District commences fulfilling the flow requirements of the license, beginning January 1, 2023, by making prescribed releases through its outlets rather than through E.J. West Erie may also seek FERC's assistance.

The Regulating District is interested in continuing its partnership with Erie through the end of the current license term (September 2042) and beyond. The current reservoir operating agreement, representing the parties' negotiated resolution of the reasonable return due for Erie's use of the Regulating District's water rights, expires on December 31, 2022. Negotiations for a new agreement commenced June 23, 2020. In anticipation of the expiration of the current reservoir operating agreement, and in recognition of the public authority's responsibility to secure fair market value through this revenue contract, the Regulating District commissioned an appraisal to determine the value of the water rights. Nearly two and half years later, Erie has yet to challenge the Regulating District's appraisal or to offer their own appraisal valuing the property rights provided by the Regulating District. While this correspondence does not constitute a formal petition to FERC under Section 2.5 of the Offer of Settlement, the Regulating District feels obligated to inform FERC of the status of these negotiations, the possibility that generation through E. J. West may cease on January 1, 2023, and that a formal petition to FERC may be forthcoming if the matter is not resolved by the end of the year.

Sincerely,



John C. Callaghan
Executive Director