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

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Fourth Branch Associates (Mechanicville) Docket No. EL06-91-001
Project No. 12252-024

v.

Hudson River – Black River Regulating District

ORDER ON REHEARING

(Issued May 17, 2007)

1. By order issued December 22, 2006, we granted in part and denied in part a formal complaint that had been filed by Fourth Branch Associates (Mechanicville) (Fourth Branch) against Hudson River - Black River Regulating District (District)[1] pursuant to Rule 206 of the Commission's Rules of Practice and Procedure[2] and section 306 of the Federal Power Act (FPA).[3] Fourth Branch alleged that the District has been improperly assessing it charges under New York state law for headwater benefits that Fourth Branch's Mechanicville Project No. 6032 receives from the operation of the District's upstream Great Sacandaga Lake Project No. 12252.

2. By order issued October 25, 2006, Commission staff approved the transfer of the Mechanicville Project to Albany Engineering Company (Albany Engineering).[4] Both

[1] *Fourth Branch Associates (Mechanicville) v. Hudson River-Black River Regulating District*, 117 FERC ¶ 61,321 (2006).

[2] 18 C.F.R. § 385.206 (2006).

[3] 16 U.S.C. § 825(e) (2000).

[4] *Fourth Branch Associates (Mechanicville)*, 117 FERC ¶ 62,065 (2006).

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Albany Engineering and the District have filed requests for rehearing of our order on complaint. For the reasons discussed below, we are affirming that order and denying the requests for rehearing.

Background

3. The order on complaint contains an extensive background discussion of these projects. We will summarize that discussion here as necessary for addressing the rehearing requests.

4. Regulation of streamflow by storage projects on a river system's headwaters can increase the generation of electricity at hydropower projects downstream. Section 10(f) of the FPA[5] 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 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 as the Commission may deem equitable. Section 10(f) provides that the proportion of such charges to be paid by any licensee shall be determined by the Commission. The Commission's regulations provide for the Commission to conduct an investigation to collect information for determining headwater benefits charges, but they also allow owners of downstream and headwater projects to negotiate a settlement for these charges and file it for Commission approval in lieu of an investigation.[6]

5. Early in the twentieth century, the State of New York constructed the Conklingville Dam to create Great Sacandaga Lake on the Sacandaga River, a tributary of the Hudson River, primarily to provide flood control and other benefits to riverside communities. The District is a New York state agency authorized to operate and maintain that dam and reservoir, among others. The District's operation of these facilities affects flow at a number of hydropower projects, industrial facilities, and municipalities downstream on the Sacandaga and Hudson Rivers.

6. Pursuant to New York's Environmental Conservation Law, the District and its predecessor agency have historically assessed downstream entities for the benefits they receive from the reservoir's regulation of this flow. The New York law authorizes this reimbursement of the "total cost" of maintaining and operating the reservoir "in

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[5] 16 U.S.C. § 803(f) (2000).

[6] 18 C.F.R. §§ 11.15 and 11.14(a)(1) (2006).

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proportion to the amount of benefit" inuring "to each public corporation and parcel of real estate."[7] These assessments have been based on a 1925 benefits study performed prior to construction of the Conklingville Dam.

7. In 1992, Commission staff determined that Conklingville Dam and Great Sacandaga Lake were required to be licensed because the E.J. West Project No. 2318, located immediately downstream, used them to generate power. On September 25, 2002, we issued new licenses to Erie Boulevard Hydropower, L.P. (Erie), for four projects, including the E.J. West Project, and an original license to the District for the Great Sacandaga Lake Project, comprising principally Great Sacandaga Lake and Conklingville Dam.[8] We also issued an order approving an offer of settlement filed by Erie, and signed by Erie, the District, the New York Department of Environmental Conservation, and other entities, relating to all of the applications.[9] In that order, we found that operation of the Great Sacandaga Lake Project and the four Erie projects would affect generation, in most instances by increasing it, at other downstream projects on the Hudson River not covered by the settlement offer.

8. In the offer of settlement, the signatories acknowledged that the District is reimbursed for its expenses of operating and maintaining the dam and lake through charges for benefits to downstream hydroelectric facilities and charges to municipalities for flood protection benefits under the New York State Conservation Law. Nevertheless, the four Erie licenses contained standard articles requiring the licensee to reimburse the owner of any headwater improvement for headwater benefits at the time those benefits are assessed and reserving the Commission's authority to assess headwater benefits charges. In a subsequent order, we clarified that our approval of the settlement offer did not encompass approval of its assessment procedures. We stated that, while our regulations allow parties to negotiate agreements as to headwater benefits assessments, including the methodology for calculating benefits, those agreements and their proposed assessments must be submitted to the Commission for approval.[10]

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[7] N.Y. Envtl. Conserv. L. § 15-2121.

[8] *Hudson River - Black River Regulating District*, 100 FERC ¶ 61,319 (2002) and *Erie Boulevard Hydropower, L.P.*, 100 FERC ¶¶ 61,317, 61,318, 61,320, and 61,322 (2002).

[9] *Erie Boulevard Hydropower, L.P.*, 100 FERC ¶ 61,321 (2002).

[10] *Erie Boulevard Hydropower, L.P.*, 102 FERC ¶ 61,133 at P 14 (2003).

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9. The Mechanicville Project is located on the Hudson River downstream from the confluence of the Hudson and Sacandaga Rivers and has for decades been assessed charges for benefits under the New York law. In its complaint, Fourth Branch, which was not a signatory to the offer of settlement, argued that, once the District received a license for the Great Sacandaga Lake Project, it was required to follow the provisions of section 10(f) for the assessment of benefits and could no longer assess charges against the Mechanicville Project and other downstream beneficiaries under New York state law. Therefore, Fourth Branch asserted, the District's assessments pursuant to the New York statute were unlawful, since they were made in the absence of either a Commission-approved agreement with Fourth Branch or a Commission determination of headwater benefits.

10. The District filed an answer to the complaint, arguing that the long-standing New York assessment system does not conflict with section 10(f) and must be maintained if the District is to recover all of its expenses, since it has practically no other source of funding. However, if we determined that section 10(f) applies to it, the District asked us to waive our regulations to the extent necessary, to approve its existing apportionment and assessment process as a reasonable and equitable method to establish headwater benefits charges, and to approve its assessments for the period July 1, 2003 through June 30, 2007. Motions to intervene were filed by municipalities and other downstream project licensees concerned that disposition of the complaint would affect their own assessments.

11. In our December 2006 Order, we concluded that the District's assessments of Fourth Branch and the other downstream hydropower projects were, without question, assessments for headwater benefits, since the benefits were increased energy production resulting from regulation of the reservoir. We also concluded that, to the extent that the District is assessing downstream hydropower beneficiaries for interest, maintenance, and depreciation charges, section 10(f) clearly requires a Commission determination of the extent to which the charges are equitable and the proportion of the charges to be paid by any licensee. Therefore, the New York statutory scheme would be preempted by section 10(f) to the extent that it would bypass the Commission's prerogative to determine and approve the appropriate level of headwater benefits charges for those expenses. We declined to waive our headwater benefits regulations and approve the District's apportionment and assessment process and the assessments themselves.

12. However, we also noted that Congress did not specifically prohibit a state's assessment of charges for expenses other than interest, depreciation, and maintenance, and we reasoned that Congress would not have intended to preclude recovery by a state-created entity of its entire costs of administering a state-owned storage facility. Therefore, we determined that the District was free to assess Fourth Branch, under New York law, for expenses other than interest, depreciation, and maintenance. We also

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stated that, despite our preemption finding, we had no authority to prevent the District from attempting to assess charges under color of state law for interest, depreciation, and maintenance, to require it to rescind assessments made under state law, to refund amounts already paid by Fourth Branch, or to take certain other actions that Fourth Branch requested. We stated that Fourth Branch would have to seek court relief from those assessment actions by the District. Our role would be only to conduct a headwater benefits investigation on the request of an affected project owner or to approve a headwater benefits settlement agreement negotiated by the District and downstream beneficiaries.

13. On rehearing, Albany Engineering asserts that section 10(f) of the FPA is part of a comprehensive federal regulatory scheme that Congress clearly intended to preempt entirely any non-federal regulation in this area. It argues that our interpretation of section 10(f) as permitting the District to assess charges for its costs of operation under New York law will undermine the equitable allocation of headwater project costs envisioned by Congress. Albany Engineering also challenges our failure to grant the various forms of relief requested in the complaint.

14. The District argues on rehearing that we erred in determining that section 10(f) preempts in part the apportionment and assessment system established under New York law. It also argues that we erred in declining to approve its existing apportionment methodology and its 2003-2006 assessments.

Discussion

15. In our order on complaint, the initial matter for determination was whether the District's assessments of the Mechanicville Project and other downstream projects were assessments for headwater benefits. We concluded that they clearly were, since the benefits received were in the form of increased energy production resulting from the storage project's regulation of streamflow. The District states on rehearing that it disagrees with our conclusion that its annual assessments are headwater benefits charges within the meaning of section 10(f), yet it fails to elaborate on its position or to offer any argument in support of it. Therefore, we have no reason to reconsider this conclusion.

16. The central issues on rehearing, then, are: whether, and to what extent, section 10(f) preempts the New York law's authorization of the District's assessments for these headwater benefits; if the assessment scheme is preempted, whether circumstances nevertheless warrant our accepting the method of calculating those assessments under New York law and approving the assessments themselves; and, if the assessment scheme is preempted, whether we can grant the relief that Albany Engineering seeks.

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Preemption

17. Section 10(f) requires that downstream hydropower beneficiaries reimburse an upstream storage project owner "for such part" of the project's annual interest, maintenance, and depreciation as "the Commission may deem equitable," and that "[t]he proportion of such charges to be paid by any licensee shall be determined by the Commission." Noting this language in our order on complaint, we concluded that section 10(f) must therefore preempt the New York law at least to the extent that the New York assessment scheme would bypass the Commission's prerogative to determine the equitable part of the interest, depreciation, and maintenance to be reimbursed and the proportion of these charges to be paid by each downstream licensee. As to whether section 10(f) would more extensively preempt the New York law, we stated that the legislative history of section 10(f) is sparse and does not reveal Congress's reasons for limiting reimbursable costs to interest, maintenance, and depreciation or Congress's intentions regarding reimbursement by downstream projects for other upstream project expenses pursuant to state or local authority.

18. The District contends that we erred in finding that section 10(f) preempts the New York assessment scheme at all. It claims that we erroneously relied on court cases that have "suggested, in *dicta*," that Part I of the FPA preempts all state and local laws concerning hydroelectric licensing apart from those adjudicating proprietary water rights. The District argues that neither the cases we cited as controlling precedent[11] nor any other Commission or court preemption decisions address the Commission's headwater benefits authority under section 10(f), and that the cited cases involved circumstances distinguishable from those here.

19. What the District dismisses as "dicta" is in fact an established principle clarifying the extent to which the FPA preempts state and local laws that would interfere with the Commission's broad authority, granted to it by Congress, over the comprehensive development of the nation's waterways. We cited those cases not for their similarity to the present one but simply for this general principle. That the Commission and the courts have not previously addressed preemption in respect to section 10(f) does not invalidate our application of that principle to the circumstances of this case.

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[11] The District refers to, and attempts to distinguish, *California v. FERC*, 495 U.S. 490 (1990), and *Sayles Hydro Associates v. Maughan*, 985 F.2d 451 (9th Cir. 1993). The District seems to imply that we also cited *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), although we did not.

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20. The District emphasizes that previous preemption cases involved a state regulatory requirement that either directly conflicted with the federal license or thwarted Congress's objective of promoting the orderly and comprehensive development of the nation's water power resources. In *First Iowa Hydro-Electric Cooperative v. FPC (First Iowa)*[12] and *Sayles Hydro Associates v. Maughan (Sayles),*[13] courts concluded that the state in question could not require a licensee to obtain, in addition to its Commission-issued license, a state permit as a condition of operating its project. In *California v. FERC,*[14] the Supreme Court concluded that the state could not impose on a project a minimum streamflow requirement in addition to the streamflow requirement of the license.

21. In contrast, the District argues, its assessment process not only does not interfere with the Commission's licensing authority but actually supports the objective of section 10(f) to promote the construction and maintenance of regulating reservoirs. It postulates that Congress expected section 10(f) to be the only effective mechanism by which an upstream storage project could be assured of recouping a portion of its construction costs from downstream hydropower beneficiaries, and that it would not have contemplated the establishment by a state of an entity directed to construct and operate regulating reservoirs and to recover its costs from downstream beneficiaries under state law. Since that situation exists here, the District claims that its apportionment and assessment scheme can exist in harmony with the Commission's statutory responsibilities, and that there is no reason the District's established funding system should undergo a fundamental change simply because the Commission determined, after many years, that operation of the District's dam and reservoir is now subject to federal oversight.

22. This argument is not convincing. Section 10(f) clearly gives the Commission authority over the assessment and allocation of charges among downstream hydropower projects for interest, maintenance, and depreciation expenses of upstream licensed projects in reflection of the benefits that the downstream projects receive from the upstream projects' operation. To the extent that the District, under New York law, is also assessing downstream projects charges for those expenses, in reflection of those benefits, New York's regulatory scheme overlaps that of section 10(f). That the Commission and New York may both be concerned with ensuring reimbursement of a headwater project's expenses does not justify New York pursuing that objective through regulation that

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[12] 328 U.S. 152 (1946).

[13] 985 F.2d 451 (9th Cir. 1993).

[14] 495 U.S. 490 (1990).

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duplicates that of the Commission. We believe that, in enacting section 10(f), Congress intended to reserve to the Commission the sole authority with respect to the assessment of downstream projects for interest, maintenance, and depreciation.

23. The District urges us to view any overlap between its organic act and the Commission's authority as minor and tangential, since the organic act does not on its face concern hydroelectric licensing, and as not in conflict with any fundamental aspect of the Commission's regulatory authority. It argues that, under principles of federalism and public policy, we should honor the presumption against preemption of the historic police powers of the state and abstain from asserting preemptive jurisdiction over any aspect of its statutory apportionment and assessment scheme. The District asserts that such abstention is especially warranted by its reliance on the offer of settlement, which contemplated that the District's assessments would continue under state law, and which we approved.

24. Collection by the District from downstream licensees of charges for interest, maintenance, and depreciation pursuant to state law would not constitute a minor overlap of the Commission's authority; it would wholly supplant the assessment provisions of the FPA as to charges for those expenses. Moreover, assessing hydropower projects for benefits derived from the regulation of a Commission-licensed storage project is not a traditional state power. As to the settlement, we explained in our order on complaint that approval of a settlement is not tantamount to incorporation of all settlement terms as license conditions. Further, we had already informed the District in our 2003 Order that the settlement provisions did not obviate the need for it to comply with section 10(f) and the headwater benefits conditions of its license.

25. For the above reasons, we do not accept the District's arguments that section 10(f) entirely fails to preempt the New York statute's authorization of assessments against hydropower beneficiaries.

26. Albany Engineering, on rehearing, contends that we did not go far enough in determining the extent to which section 10(f) preempts the New York law's assessment provisions. It argues that we incorrectly characterized the legislative history of section 10(f) as sparse and failing to reveal Congress's reasons for limiting reimbursable costs to interest, maintenance, and depreciation. On the contrary, Albany Engineering claims, Congress's reasons for enacting section 10(f), and for not including in that section costs of operation, are clear and reveal that Congress could have intended no parallel regulation of other charges.

27. Albany Engineering contends that our concession to the District of the authority to recover costs, such as operation costs, not specified in section 10(f) rests on our erroneous conclusion that Congress, in enacting that section, was primarily concerned

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with relieving the financial burden incurred by upstream owners in constructing their reservoirs. Albany Engineering argues that the legislative history reveals Congress's intent not to hold downstream licensees responsible for reimbursing all costs incurred by an upstream reservoir owner but rather to limit reimbursement to certain of those costs, tied to direct benefits. It asserts that Congress intended to include incentives to upstream owners to construct the "right-sized" reservoirs, so that the reservoirs not only would suit their own economic needs but also would make the full potential use of a river available to downstream projects. In the view of Albany Engineering, the section 10(f) payments were intended to be an integral part of a comprehensive federal regulatory scheme, in which no one licensee could diminish the comprehensive development of a river by controlling upstream storage in a way that precluded the best use of the waterway. It asserts that the obvious reason for Congress's omission of costs of operation in section 10(f) was that Congress had no intention of forcing downstream licensees to subsidize upstream licensees or of letting upstream licensees "exert their monopoly position to extort money from downstream licensees, at will."

28. Section 10(f) was introduced as an amendment to the legislation that became the Federal Water Power Act of 1920. In introducing this amendment, Representative Esch of Wisconsin explained that its purpose was:[15]

> To encourage the construction of storage reservoirs by licensees upon the stream, to the end that if another licensee builds a power plant on same stream . . . that licensee shall annually pay into an amortization reserve fund a proportion of the cost of operation and maintenance and of interest charges represented by the construction of the reservoir by the first licensee.

Representative Esch explained further that the amendment sought to "equalize competitive conditions," because:[16]

> if a licensee who builds the reservoir stands all the costs of the reservoir and maintenance charges, and another licensee builds another dam on the same stream and gets the advantage of the equalization of the flow of that stream by reason of the construction of the reservoir by the first licensee he has an advantage.

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[15] 56 Cong. Rec. 9915 (1918).

[16] *Id.*

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Representative Esch also described his amendment as requiring:[17]

> that the money paid by the first licensee toward interest charges and maintenance and operation for the reservoir shall be segregated and put into an amortization reserve, in order, in the course of years, to wipe out the net-investment cost of the reservoir. So that when that shall have been wiped out there will be nothing that will be chargeable to the second or other licensees except purely maintenance and operation charges.

Similar statements about the purpose of the amendment were made by Representatives Small and Raker, with the addition that compensation for the construction of reservoirs should be extended to the United States and not restricted to private entities.[18]

29. Regardless of Representative Esch's references to costs of operation, the actual language of section 10(f) requires reimbursement only for interest, maintenance, and depreciation. As we stated in our previous order, and despite Albany Engineering's assertions on rehearing, it is not clear why Congress excluded operations from the costs for which a beneficiary was to reimburse the owner of a storage project. This omission is particularly curious in light of Representative Esch's references. Nevertheless, we have refrained from imputing to section 10(f) an intention to assess beneficiaries for operating expenses, in light of that section's plain language, and we have consistently excluded costs of operation in assessing headwater benefits charges for specific river basins. This approach is consistent with standard accounting practices, under which maintenance costs and operation costs have distinct meanings.

30. Albany Engineering's reading of the legislative intent underlying section 10(f) is questionable. There is no doubt that Congress was primarily concerned with ensuring the reimbursement of at least a portion of the upstream owners' construction costs. Indeed, the discussion of the proposed section focused almost entirely on fairness to the upstream licensee. The 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. Conversely, there is no mention in the discussion of the proposed section of ensuring that upstream owners build the "right-sized" reservoir or of the danger that they might exercise monopoly power over the waterway.

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[17] *Id.*

[18] 56 Cong. Rec. 9916 (1918).

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31. Albany Engineering criticizes as incorrect our statement that Congress meant to ensure reimbursement for the costs of upstream project construction. It seems to infer that we imputed to Congress an intention to guarantee such reimbursement rather than to establish a mechanism for assessing equitable charges. In fact, we recognized that Congress limited the category of reimbursable expenses under section 10(f) and that it did not intend to impose all of an upstream storage project owner's costs on downstream licensees. We also did not impute to Congress an intention to ensure that upstream projects would be compensated for construction costs regardless of whether downstream licensees actually received benefits.

32. Albany Engineering argues that Congress clearly did not intend to make downstream licensees responsible for all of the costs of upstream storage projects, and that, by conceding the District authority to assess for other costs, we are violating Congress's implied intention to limit the extent of reimbursement. But 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. In any event, Albany Engineering's statements about legislative intent bring us no closer to certainty about why Congress omitted operations and other costs from section 10(f) and what inference should be drawn from this omission in addressing the particular situation before us.

33. Albany Engineering argues that there are irreconcilable conflicts between the New York statute and section 10(f). It points out that section 10(f) is meant to measure only the value to downstream hydropower projects of the power actually generated and attributable to the upstream reservoir operations, whereas the state system defines benefits by a beneficiary's head on the river, regardless of actual power benefits, and is based on the full recovery of costs necessary to run the District's operations. This observation adds nothing that we previously failed to consider. There is no doubt that these differences between the assessment schemes exist. To the extent that both statutes would authorize assessments for interest, maintenance, and depreciation, we determined that the New York statute was in conflict with section 10(f) and would have to yield. To the extent that the New York scheme assesses charges for other expenses, based on a different method of determining benefits, we concluded that there was no conflict between the statutes.

34. Albany Engineering argues that, if an upstream project owner is entitled to charge downstream licensees for services that are unsupervised and unregulated by the Commission, the entire cost-based system of the FPA could be undermined. In this regard, it cites the relationship between the District and Erie. As we noted in our order on complaint, the District and Erie, in May 2006, reached a settlement under which the District would provide credits against Erie's assessments under the New York law for three years. Albany Engineering argues that this arrangement creates an inequity among

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downstream licensees, since, by the District's admission, any reduction in the charges paid by one beneficiary will have to be made up by the remaining beneficiaries. Albany Engineering cites section 20 of the FPA, which provides that the rates charged and the service rendered by any licensee serving the interstate market "shall be reasonable, nondiscriminatory and just to the customer." In Albany Engineering's view, the effect of the arrangement between the District and Erie is to discriminate between Erie and the other downstream licensees in the rates charged for essentially the same service.

35. We are not convinced by this reasoning. The District's assessments for interest, maintenance, and depreciation must be approved by the Commission, following either a Commission investigation or a settlement reached by the District and the beneficiaries. As we stated in our order on complaint, the fact that the District and Erie reached a settlement in respect to Erie's assessments does not affect our authority under section 10(f) to determine the proportion of equitable charges for interest, maintenance, and depreciation that each downstream hydropower beneficiary should pay the District.[19] The settlement was not submitted to the Commission for approval and does not reflect a Commission determination of the charges that Erie should pay under section 10(f). On the other hand, insofar as the settlement addresses Erie's share of costs for expenses not included in section 10(f), those costs are outside of our jurisdiction. Therefore, arrangements between the District and particular downstream beneficiaries as to the allocation of those costs are not a concern under the FPA. Section 20 of the FPA is inapt in this context in any event, since neither headwater benefits payments under section 10(f) nor operational costs charged by a storage project to beneficiaries are rates charged or services rendered by a licensee in respect to a customer.

36. Albany Engineering contends that the state assessment scheme is fraught with anticompetitive effects that are barred by section 10(h) of the FPA.[20] It states that, during Congressional debate over passage of that section, concern was expressed about giving an initial developer of a storage reservoir a monopoly of the stream. Albany Engineering asserts that, in 2003, the District and Erie entered into a reservoir operating agreement which provides that Sacandaga River flows are to be utilized in a manner that maximizes the returns or profits to Erie. Albany Engineering contends that the ability to control the flows from the reservoir in this way, which reduces the benefits to it and other

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[19] 117 FERC ¶ 61,321 at n.48.

[20] 16 U.S.C. § 803(h) (2000). Section 10(h)(1) prohibits "combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service."

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downstream beneficiaries, appears to "limit the output of electrical energy" and to "fix . . . or increase prices for electrical energy or service" contrary to section 10(h). It argues that the District should have filed the agreement with the Commission and that we should take action against the District for its failure to do so.

37. We fail to see how this matter is related to our disposition of the headwater benefits assessment issues that are the subject of this proceeding. The distribution of energy gains among downstream hydropower projects as the result of the reservoir operating agreement is not a consequence of our determination that the District may assess charges from those project owners for its operating costs. We perceive no relationship between the existence of this agreement and our conclusion that the section 10(f) provision for headwater benefits charges and New York's scheme, insofar as it relates to non-section 10(f) charges, can coexist. Further, the complaint did not seek relief with respect to the reservoir operating agreement or, indeed, even mention it. Therefore, issues relating to that agreement are outside the scope of our consideration in this rehearing order.[21]

38. Albany Engineering contends that we have ignored applicable precedents regarding preemption by the FPA of conflicting state regulatory schemes. It cites *Wisconsin Valley Improvement Co. v. Meyer (Wisconsin Valley)*,[22] in which the court determined that a Wisconsin law assessing fees from licensees for costs incurred by a state agency in analyzing environmental impacts of proposed hydropower projects was preempted by the FPA. The court found preemption on the grounds that Congress, through amendments to the FPA, had authorized the Commission to monitor the collection of fees from license applicants for such studies, and that the FPA implicitly occupies the field of hydropower licensing except with respect to proprietary rights. The court also noted that the state statute authorized the recovery of costs directly from the licensees, whereas Congress had intended that the Commission would determine the extent to which the fees for these studies would be based on "reasonable costs." Albany Engineering argues that, particularly in this respect, the reasoning in that decision is applicable here.

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[21] Accordingly, we will not address various other points that Albany Engineering raises about the reservoir operating agreement.

[22] 910 F. Supp. 1375 (W.D. Wis. 1995).

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39. The decision in *Wisconsin Valley* does not dictate Albany Engineering's desired finding in this proceeding. The pertinent statutory provision in that decision, section 10(e)(1) of the FPA,[23] provides that a licensee shall pay:

> reasonable annual charges in an amount to be fixed by the Commission . . . including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this part.

Thus, the authority that the Wisconsin statute granted to the state over fee payments for studies duplicated authority that section 10(e) had granted to the Commission. In the present proceeding, the New York statute overlaps section 10(f) only to the extent that it authorizes collection of headwater benefits charges from downstream hydropower projects for interest, maintenance, and depreciation expenses of an upstream storage project. There is no state duplication of the Commission's authority as to charges for other expenses. Moreover, the court in *Wisconsin Valley* emphasized that the Wisconsin statute added another, state, requirement, with a related cost, to the securing of a license, thus providing an additional licensing deterrent,[24] an element that is not present in the present proceeding.

40. Albany Engineering also cites *First Iowa*, which we discussed earlier, for the principle that:[25]

> [w]here the federal government supersedes the state government, there is no suggestion that the two agencies shall have final authority. . . . A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable.

But, again, we do not view the federal and state assessment schemes here to be duplicative except insofar as they both authorize assessments for interest, maintenance, and depreciation.

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[23] 16 U.S.C. § 803(e)(1) (2000).

[24] 910 F. Supp. 1375 at 1382-83.

[25] 328 U.S. 152 at 167-68 (1946).

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41. Albany Engineering argues that, where rivers pass through, or are the borders between, different states, our decision would cause headwater benefits charges to vary depending on the state in which a particular downstream project is located. It asserts that the resulting patchwork of headwater benefits charges along a single waterway would be a result fundamentally inconsistent with the FPA's goal of comprehensive development. We anticipate that 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. However, in any such situation, including the present one, the charges to be paid by each downstream project for expenses specified by section 10(f) must be approved by the Commission. It is only the charges for expenses outside the scope of section 10(f) that would vary.

42. In essence, the issue here is whether section 10(f) occupies the entire field of assessments to reimburse upstream reservoirs for the provision of headwater benefits or preempts parallel state regulation only to the extent of charges for the expenses that Congress chose to specify. Albany Engineering's position that section 10(f) occupies the entire field is not an unreasonable one. However, as the court noted in *Wisconsin Valley*, courts, in determining Congressional intent, begin with a presumption against finding preemption of state law.[26] Since we think that section 10(f) and the New York statute can coexist to the degree that they do not assess charges for the same headwater project expenses, we are reluctant to adopt an interpretation of section 10(f) that would wholly preempt the application of New York's law to downstream hydropower projects. In the absence of a clear Congressional mandate that completely preempts New York's actions, we are loathe to disturb the state's regulatory actions any more than is required by the FPA.

Consideration of the District's Assessments

43. The District argues that we acted arbitrarily and abused our discretion in failing to approve its existing apportionment of costs and annual assessments, once we concluded that section 10(f) requires us to establish or approve headwater benefits charges with respect to its interest, maintenance, and depreciation expenses. Instead, the District claims, we created an unwieldy, bifurcated system for funding its functions.

44. The District explains that its current three-year budget contains no line items for interest or depreciation. However, it uses an expense and income classification system developed by the Office of the New York State Comptroller that does not require a clear delineation between expenses classified as maintenance and those classified as

[26] 910 F. Supp. 1375 at 1379.

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operations. While some expense categories clearly relate to maintenance, the District would have to make some subjective allocations from other categories to estimate its total costs allocable to maintenance. The District attaches a spreadsheet summarizing its "preliminary attempt" to identify items in the budget that would likely be classified as maintenance costs for purposes of section 10(f) under the Commission's Uniform System of Accounts. These include specific repair and maintenance projects, as well as an allocation of its overall labor, vehicle, and equipment expenses. These expenses amount to about $1,768,293, or about 9.8 percent, of its present budget.

45. Once the classification of these costs is determined, the District points out, under section 11.12(a) of the regulations[27] the Commission would have to determine what part of these expenses would constitute "section 10(f) costs," that is, essentially, the annual interest, maintenance, and depreciation costs that are to be allocated to the facilities that provide power benefits to downstream projects.[28] The District suggests that it would be difficult to make this determination for a state-owned reservoir like Great Sacandaga Lake, unlike a federal headwater project, for which the Commission can often obtain relevant information from the U.S. Army Corps of Engineers or the Bureau of Reclamation. The District expresses concern that any such determination might amount to a de facto reapportionment of its costs among hydroelectric and non-hydroelectric beneficiaries. It argues that such a process to reapportion costs between power and non-power benefits would be a waste of administrative resources, given that less than 10 percent of its costs would be subject to our headwater benefits jurisdiction.

46. Although acknowledging that we encouraged it to reach a negotiated settlement with the beneficiaries as an alternative to a Commission-conducted headwater benefits investigation, the District believes that we underestimated the difficulty involved. The District states that there are ten separate licensees operating 13 projects on the Sacandaga and Hudson Rivers. Because it must recover all of its operation and maintenance costs from beneficiaries, a decrease in one beneficiary's assessments will require an increase in another's, so that it will be hard to obtain agreement among all of the hydropower beneficiaries. Moreover, such a settlement would likely affect non-hydropower beneficiaries not subject to Commission jurisdiction.

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[27] 18 C.F.R. § 11.12(a) (2006).

[28] Section 10(f) costs are defined more precisely in our regulations at 18 C.F.R. § 11.09(c) (2006).

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47. The District objects to our refusal to consider information submitted with its answer to the complaint in support of its contention that the existing charges are reasonable and equitable. As a result, the District complains, we have unreasonably limited its alternatives to reaching a comprehensive settlement with all downstream project owners or submitting to a Commission headwater benefits determination that will use the standard "energy gains" method of benefit allocation and will necessarily alter the existing balance among beneficiaries as well as categories of beneficiaries. The District argues that this choice threatens its ability to fund its operations fully, as well as to obtain financing for replacements and additions.

48. The District advances no argument that would cause us to reconsider our previous position, accept its assessment method, and approve its assessments as appropriate headwater benefits charges. The difficulties of allocating the District's expenses between maintenance, the charges for which are subject to our section 10(f) approval, and operations, the charges for which are not, do not appear insurmountable. Indeed, the District has already made a preliminary allocation. And Commission staff will address how to obtain the information necessary to make a determination of section 10(f) costs if this becomes necessary. Further, in suggesting that the District pursue a settlement to be submitted for our approval, we were not unaware of the difficulties that might be involved in obtaining the agreement of all hydropower beneficiaries.

49. Whatever difficulties may be involved in these choices do not justify simply accepting the District's methodology and approving its assessments. In our order on complaint, we explained our reasons for declining to take these actions. Fourth Branch challenged the fairness of the assessments, particularly in that the District, based on the 1925 benefits study, continues to allocate the charges for 95 percent of its expenses to hydropower beneficiaries and for only five percent of those expenses to municipalities benefiting from the reservoir's flood control. The District advocates acceptance of its assessment method, which is based on the amount of head owned by each water power owner, as "predictable," "simple and relatively inexpensive to administer," "not subject to fluctuation," and designed to assure the District of recovering all of its operating budget.

50. None of these advantages addresses whether the assessments are equitable, which section 10(f) directs the Commission to determine in any consideration of headwater benefits charges. We would be avoiding our statutory responsibility in this regard if we were to accede to the District's request without the agreement of Albany Engineering and other beneficiaries that might challenge the equitability of the charges. And, as we noted

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in our previous order, it is hardly obvious that the present assessment allocation is equitable, since the District has promised to conduct a benefits reassessment under the New York law.[29]

51. In addition, the financial consequences of a reallocation of charges might not be as great as the District foresees. By its own preliminary estimate, maintenance expenses account for just under 10 percent of the District's present budget. If this estimate were confirmed by a Commission headwater benefits investigation or were accepted by the downstream beneficiaries in a settlement agreement, any reallocation of charges subject to section 10(f) would affect downstream hydropower and non-hydropower beneficiaries only to that extent. Further, the reallocation of charges would not affect the District's ability to collect charges for the remaining 90 percent of its expenses.

Requested Remedies

52. Albany Engineering objects to our conclusion that we lack authority to take a number of specific actions requested in the complaint. Among other things, it argues that we erred in stating that we could not require the District to initiate a reassessment procedure, as the 2000 settlement between the District, Erie, and other entities had contemplated, to replace the existing one based on the 1925 benefits study. As we explained in our prior order, the section of the settlement dealing with this and other assessment issues was not made a provision of the District's license; indeed the settlement itself specifically directs that this section be omitted from the licenses issued to the District and to Erie. Moreover, the anticipated reassessment was intended to address the District's assessments under state law, not its section 10(f) license obligations. That reassessment would also involve beneficiaries not within the Commission's jurisdiction.

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[29] We think it worth noting that the New York Conservation Law provides for the total cost of the reservoir to be apportioned "among the public corporations and parcels of real estate benefited by reason of such reservoir," and that the benefits include "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 a regulating reservoir." N.Y. Envtl. Conserv. L. §§ 15-2121 and 2101(3). It is not the New York statute that restricts the District to recovering costs only from hydropower beneficiaries and municipalities receiving flood protection benefits but rather adherence to the 1925 benefits study allocation.

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53. Albany Engineering complains that our unwillingness to intervene in this matter will force parties to resort to the state court system and apply private contract law, a remedy that might not even be available to Albany Engineering itself, since it was not a signatory to the settlement. This result is entirely appropriate, since any representations in the settlement agreement as to assessments apply to state procedures, not to section 10(f) headwater benefits procedures. It is not for the Commission to enforce the representations made by parties in settlement provisions over which the Commission has no authority. That Albany Engineering may be at a disadvantage in compelling a reassessment under state law because it did not sign the settlement does not provide a basis for us to become involved.

54. Albany Engineering also objects to our statement that we have no authority to require the District to rescind assessments made under state law, to refund amounts paid by Albany Engineering under those assessments, or to stay the District's referral of unpaid bills to affected New York counties for collection. Albany Engineering contends that our error in reaching this conclusion rests on our incorrect assumption that the District's state-law-based headwater benefits charges are compatible with the federal headwater benefits scheme of section 10(f). It argues that we have broad authority and an obligation to ensure that section 10(f) headwater benefits charges are equitable. Moreover, it asserts, our regulations allow us to establish final charges retroactively. Therefore, since the District has failed to submit its headwater benefits charges for Commission approval, we have authority to set final charges here that are lower than the amounts that the District has unilaterally imposed and collected to date, as well as to require appropriate refunds.

55. We did not find that the District's assessment system is entirely compatible with section 10(f). 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. Albany Engineering identifies no authority granted us by the FPA to the contrary. Section 11.10(c)(11) of our regulations,[30] which it cites, provides that final charges "may be established retroactively, to finalize an interim charge, or prospectively." But the regulations contemplate that such final charges will be established as the result of a

[30] 18 C.F.R. § 11.10(c)(11) (2006).

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headwater benefits investigation.[31] It is not clear what final charges Albany Engineering would have us set at the present time, or on what information they would be based, in the absence of a headwater benefits determination or settlement.

56. Albany Engineering objects to our statement that, in the absence of a negotiated headwater benefits settlement in this proceeding, we would apply the energy gains method to determine charges if were to conduct our own investigation and assessment. It argues that there is no basis in the record for using the energy gains method to ascertain headwater benefits charges in this river basin, and that we should not have prejudged the methodology we would use. This objection is without merit. The Commission's regulations themselves provide that, except for determinations which are not complex or in which headwater benefits are expected to be small, calculations will be made by application of the Headwater Benefits Energy Gains Model.[32] Albany Engineering's objection also seems at odds with its insistence that, in accordance with the intent underlying section 10(f), it should be charged for its actual energy gains, not for simply owning head on the river.

57. Albany Engineering objects to our denial of its request to set this matter for proceedings before a settlement judge in the absence of a prior request for the institution of a headwater benefits determination. It claims that this denial is contrary to our regulations, which provide for the convening of settlements proceedings on motion "in a proceeding at any time for any purpose related to the conduct or disposition of the proceeding."[33]

58. Our regulations simply provide that we "may" convene a conference of participants in a proceeding. While we have a complaint proceeding at this time, we do not have a headwater benefits proceeding. In its response to the complaint, the District objected to setting this matter before a settlement judge, and its rehearing request does not reveal a change in this position. The complaint raised primarily legal issues, which we have addressed, about the District's authority to assess charges and the Commission's authority over the District's actions. It is not clear what a settlement conference would accomplish under these circumstances, in the context of the complaint. We continue to

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[31] For example, section 11.15(b) of the regulations, 18 C.F.R. § 11.15(b) (2006), provides that a headwater benefits investigation "will continue until a final charge has been established for all years studied in the investigation."

[32] 18 C.F.R. § 11.13(a) (2006).

[33] 18 C.F.R. § 385.601 (2006).

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believe that convening one would be more productive in the context of a proceeding instituted to establish headwater benefits charges, a subject more conducive to negotiations.[34]

Motion to dismiss

59. On May 15, 2007, the District filed a motion to dismiss the complaint. The District explains that, on May 14, 2007, the Board of the District approved a resolution to establish an accounting policy that would eliminate the assessment of maintenance, interest, and depreciation expenses in its present three-year budget. The District asserts that the approval of this resolution effectively moots the complaint. Albany Engineering filed an answer on May 15, 2007, opposing the motion.

60. The District board's action does not moot the complaint. Among other things, it does not address Albany Engineering's contention that the District lacks authority to assess projects under state law for any expenses at all based on headwater benefits, and it does not address assessments before the present budget period. Therefore, we will deny the motion to dismiss.

Conclusion

61. For all of the above reasons, neither of the rehearing requests convinces us to alter our previous determinations that section 10(f) preempts the New York statute and the District's assessment procedures to the extent that they authorize the collection of charges from hydropower owners for interest, maintenance, and depreciation expenses of the District's facilities without the Commission's approval, that we should not approve the District's assessments on the present record, and that we cannot take the various corrective actions requested in the complaint.

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[34] In arguing that the circumstances here are suited for a settlement process, Albany Engineering notes that Erie would have no incentive to participate in a settlement in light of the favorable agreements it has reached with the District. This factor actually supports our decision not to refer this matter to a settlement judge, since Erie would not be required to participate in those proceedings. Given that Erie would have to share in paying the costs of a headwater benefits study, which we apportion among all affected entities, and that it would be subject to the results of the study, Erie would have a strong incentive to participate in any headwater benefits proceeding.

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The Commission orders:

(A) The requests for rehearing, filed January 22, 2007, by Albany Engineering Company and the Hudson River - Black River Regulating District, of the Commission's December 22, 2006 order in this proceeding are denied.

(B) The motion to dismiss the complaint, filed on May 15, 2007, by the Hudson River – Black River Regulating District, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.