

**In the United States Court of Appeals
for the District of Columbia Circuit**

No. 16-1015

ERIE BOULEVARD HYDROPOWER, L.P.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

All parties and intervenors appearing before this Court are identified in the Brief of Petitioner Erie Boulevard Hydropower, L.P.

B. Rulings Under Review

1. *Hudson River-Black River Regulating District*, 152 FERC ¶ 62,124 (2015) (2015 Initial Order), R.2085, JA 211; and

2. *Hudson River-Black River Regulating District*, 153 FERC ¶ 61,218 (2015) (2015 Rehearing Order), R.2168, JA 1.

C. Related Cases

This case has not previously been before this Court or any other court, and to counsel's knowledge there are no related cases pending before this Court or elsewhere. Counsel concurs with Petitioner's statements concerning the relationship of this case to *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071 (D.C. Cir. 2008), and the dismissal of a previously consolidated case in D.C. Cir. No. 16-1020.

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander

FINAL BRIEF: September 27, 2016

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| 2006 Complaint Order | <i>Fourth Branch Assoc. (Mechanicville) v. Hudson River-Black River Regulating Dist.</i> , 117 FERC ¶ 61,321 (2006), JA 965 |
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| Albany Engineering | Albany Engineering Corp. |
| Br. | Petitioner Erie Boulevard Hydropower, L.P.'s brief |
| District | Intervenor Hudson River-Black River Regulating District |
| Erie or Erie Boulevard | Petitioner Erie Boulevard Hydropower, L.P. |
| FERC or Commission | Respondent Federal Energy Regulatory Commission |
| P. | A paragraph in a Commission order |
| R. | An item in the record of this proceeding |

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**BRIEF OF RESPONDENT
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STATEMENT OF THE ISSUE

This case concerns the identification of, and responsibility for, “headwater benefits.” From 2009 to 2015, Respondent Federal Energy Regulatory Commission (Commission or FERC) conducted an administrative proceeding to determine how much hydroelectric projects downstream of the Conklingville Dam and the Great Sacandaga Lake Project, which are located on the Sacandaga River in upstate New York, benefitted from the upstream projects’ regulation of streamflow in the years 2002 through 2008. Storage projects’ regulation of streamflow can increase the generation of hydroelectricity at projects downstream.

When this occurs, the Federal Power Act requires that the downstream licensees reimburse the owner of the upstream storage projects for the portion of their annual charges for interest, maintenance, and depreciation that the Commission deems equitable. *See* 16 U.S.C. § 803(f).

Through its investigation, the Commission found that Petitioner Erie Boulevard Hydropower, L.P. (Erie or Erie Boulevard) reaped about \$1.8 million in headwater benefits from Intervenor Hudson River-Black River Regulating District's (District) regulation of streamflow upstream of Erie's five projects on the Sacandaga and Hudson Rivers; and beginning in 2009, Erie's annual headwater benefits charges would be \$365,100. But because Erie and the District had already reached a settlement in state court, under state law, governing Erie's headwater benefits liability for the years 2002 through 2008, the Commission held that Erie Boulevard must pay the District in accordance with the settlement for those years.

The issue presented on review is: Did the Commission reasonably honor Erie Boulevard's 2006 settlement with the District?

STATUTES AND REGULATIONS

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

STATEMENT OF FACTS

I. Statutory and Regulatory Background

The Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, empowers the Commission to issue licenses for hydroelectric projects “necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water” over which Congress may regulate interstate commerce. *Id.* § 797e. “The Commission operates, under the [Federal Power Act], a ‘complete scheme of national regulation’ intended to ‘promote the comprehensive development of the water resources of the Nation,’” regarding the construction, operation, and maintenance of hydroelectric projects. *Cal. Trout v. FERC*, 572 F.3d 1003, 1013 (9th Cir. 2009) (quoting *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946)). *See also Monongahela Power Co. v. Marsh*, 809 F.2d 41, 45 (D.C. Cir. 1987) (descriptions like those in *First Iowa* “reflect the centralization of powers previously exercised by other federal entities independently” with respect to regulation of water power development). The Commission is empowered to require applicants, as a condition of receiving a project license, to modify their plans in order to ensure that they are consistent with a comprehensive plan for project uses. 16 U.S.C. § 802(a)(1)-(2).

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). 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 must require, as a condition of the license, that the downstream 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.” 16 U.S.C. § 803(f); *see also* 18 C.F.R. § 11.10(a) (same).

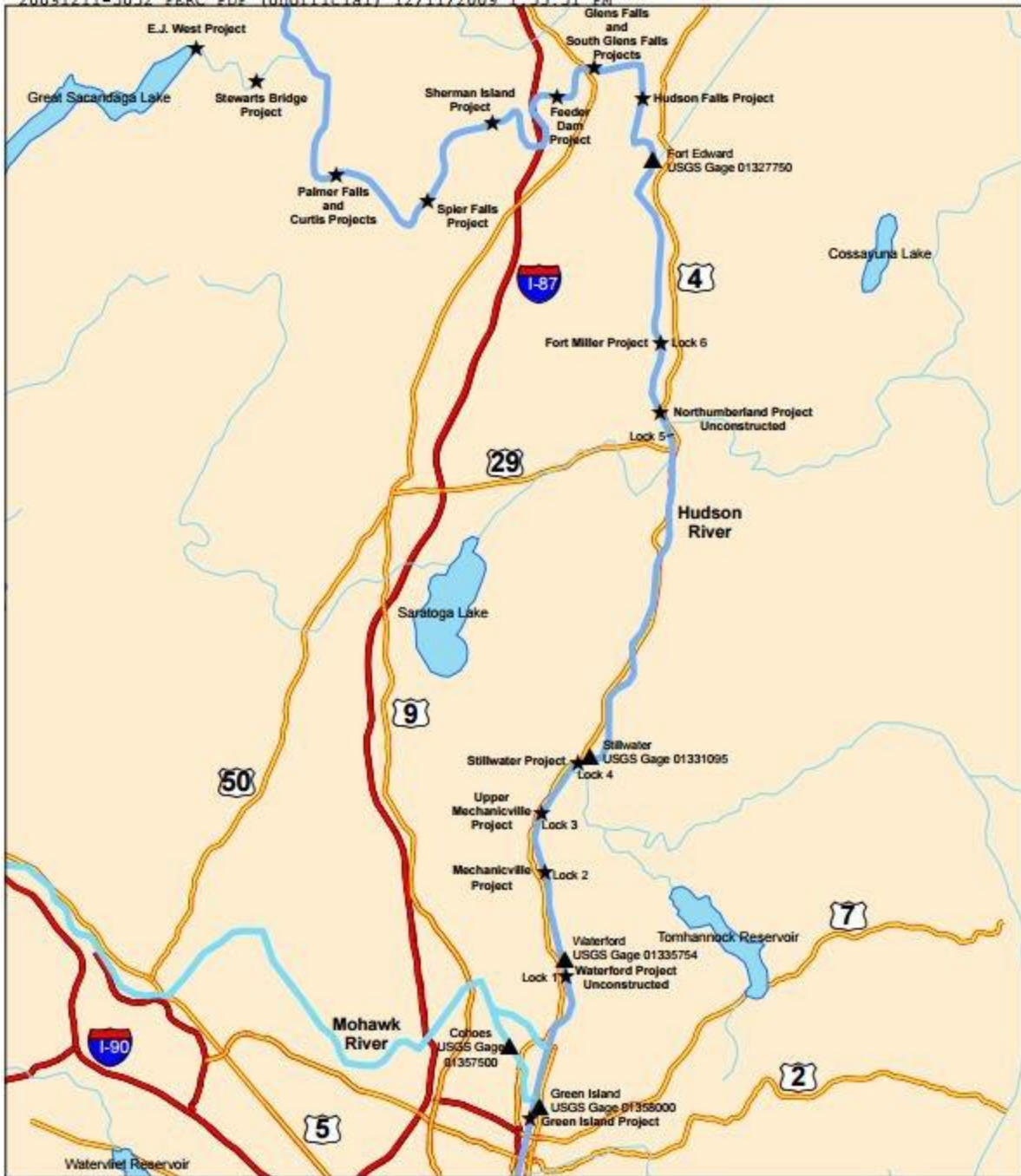
Commission regulations describe a procedure for determining headwater benefits and related charges by settlement or by investigation. *See generally* 18 C.F.R. §§ 11.10-11.17. Owners of headwater and downstream projects may negotiate a settlement for headwater benefits charges, and file it with the Commission for approval under Rule 602. *Id.* § 11.14(a) (referring to 18 C.F.R. § 385.602). Alternatively, in the case of an investigation, the Commission assesses information that licensees provide in annual filings to determine whether available information will be sufficient to “establish a reasonably accurate final charge.” 18 C.F.R. § 11.15(c)(3). If the Commission needs more information, then it requests additional data and performs studies as necessary to establish the charge. *Id.*

II. History of Dispute

A. Events Leading Up To *Albany Engineering* Decision

1. 2002 Licensing Proceeding

Early in the twentieth century, the State of New York built the Conklingville Dam on the Sacandaga River (a tributary of the Hudson River) to create Great Sacandaga Lake, primarily to provide flood control and other benefits to riverside communities. *Hudson River-Black River Regulating Dist.*, 100 FERC ¶ 61,319 at P 15 (2002) (2002 License Order), JA 1108, *on reh'g sub nom. Erie Boulevard Hydropower, L.P.*, 102 FERC ¶ 61,133 (2003) (2003 License Rehearing Order), JA 1104. The District's operation of the dam and the lake provides beneficial streamflow regulation for fifteen downstream projects on the Sacandaga and Hudson Rivers, as shown in the following map:



Hudson River Hydro Projects



Letter from James A. Besha, P.E., Albany Engineering Corp., to James F. Cada, Ph.D., Oak Ridge National Laboratory, at Attachment 2 (Dec. 11, 2009), R.76, JA 796.

In 1992, in the course of analyzing an application to relicense the E.J. West powerhouse and generating facilities (which belong to Erie), FERC staff determined that the lake and the dam are part of the same unit of development with the E.J. West facilities. 2002 License Order at P 5 & n.7, JA 1109, 1136. Their relationship meant that the lake and the dam must be licensed as well. *Id.*

The licensing proceeding was contentious. *See id.* at PP 2, 6-11, JA 1108-09 (describing procedural history); Br. 10 (acknowledging Erie's objections to the license requirement). It was eventually resolved by settlement among the parties, geared toward "the comprehensive development of the Upper Hudson River and Sacandaga River Basins," and FERC approved the agreement in 2002. 2002 License Order PP 2, 25-32, 36, JA 1108, 1111-13 (finding settlement agreement "fair and reasonable"). The Commission then simultaneously licensed the Conklingville Dam and Great Sacandaga Lake Project, and relicensed what are now four Erie Boulevard projects: E.J. West (Project No. 2318), Stewarts Bridge (Project No. 2047), Hudson River (Project No. 2482), and Feeder Dam (Project

No. 2554). *Id.* P 1 & n.1, JA 1108, 1136.¹ The Commission noted that the Great Sacandaga Lake Project “provides significant headwater benefits to Erie’s four downstream units,” and that under the “off-license” settlement agreement between the parties, headwater benefits would be determined by the District under New York state law. 2003 License Rehearing Order at P 13, JA 1105-06. The District asked FERC to confirm that its approval of the settlement agreement encompassed approval of the headwater benefits assessment procedures therein, but the Commission declined, noting that proposed assessments must be submitted to FERC for approval. *Id.* PP 13-14, JA 1105-06.

2. Erie Boulevard’s 2006 Settlement With the District

In May 2006, Erie Boulevard and the District executed a second settlement agreement that was intended to close a series of state court cases in which Erie challenged the District’s assessment of headwater benefits charges (2006 Settlement). *See Hudson River-Black River Regulating Dist.*, 153 FERC ¶ 61,218 at P 7 (2015) (2015 Rehearing Order), JA 3-4. *See also* Hudson River-Black River Regulating Dist. Response to Headwater Benefits Determination, R.1019, JA 347 (providing a copy of the 2006 Settlement). The 2006 Settlement provided for a reduction of \$822,000 in Erie Boulevard’s headwater benefit liability to the District for the fiscal years 2007, 2008, and 2009, as well as an amendment to

¹ The Hudson River Project includes two facilities, Spier Falls and Sherman Island Developments, under one license. *See* 2015 Initial Order P 1, Table 1, JA 212.

another agreement. *Id.* at Attachment pp. 2, 6, JA 350, 354. The parties also agreed to “release and forever discharge each of the other Parties . . . from any and all claims . . . of every kind and character . . . arising out of or in any way related to the District’s budgets, assessments and apportionments for the budget years” from July 1, 2000 through June 30, 2006. *Id.* at Attachment p. 5, JA 353. The parties agreed that this was “just, reasonable, and . . . in the best interest of the Parties.” *Id.* at Attachment p. 7, JA 357. A state court judge approved the settlement. *Id.* at Attachment p. 9, JA 359.

3. 2006 Complaint Proceeding and *Albany Engineering*

Two months after the District and Erie Boulevard entered into the 2006 Settlement, the predecessor of Albany Engineering Corp. (Albany Engineering), another licensee downstream of Great Sacandaga Lake – and a non-signatory to the “off-license” settlement agreement approved in the 2002 License Order – filed a complaint before FERC that challenged the District’s assessment of headwater benefits under New York state law.² *Fourth Branch Assoc. (Mechanicville) v. Hudson River-Black River Regulating Dist.*, 117 FERC ¶ 61,321 (2006) (2006 Complaint Order), JA 965, *reh’g denied*, 119 FERC ¶ 61,141 (2007) (2007 Complaint Rehearing Order), JA 829, *rev’d in part sub nom. Albany Eng’g Corp. v. FERC*, 548 F.3d 1071 (D.C. Cir. 2008) (*Albany Engineering*). Albany

² Albany Engineering owns the Mechanicville Project, P-6032. *See* 2015 Initial Order P 1, JA 212.

Engineering's predecessor argued that once the District received a FERC license for the Great Sacandaga Lake Project, it became subject to the headwater benefits provisions of Federal Power Act Section 10(f), 16 U.S.C. § 803(f), and could no longer levy annual assessments under New York law. 2006 Complaint Order P 11, JA 967. Erie Boulevard intervened in the case, but did not take a substantive position. *Id.* P 12, JA 967.

The Commission found that there was “no question” that the District’s annual assessments were for headwater benefits, and that to the extent the District was assessing its beneficiaries for interest, maintenance, and depreciation, Federal Power Act section 10(f) pre-empted the New York statutory scheme. *Id.* PP 37-40, JA 971-72. But since the text of the Federal Power Act 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,” the Commission did not find that the Federal Power Act pre-empted other charges made pursuant to state law. *Id.* PP 48-50, JA 974.

As to the “off-license” settlement under which the District made its annual assessments to downstream beneficiaries, the Commission noted that the settlement was (by its own terms) not incorporated into the project licenses, and therefore was “a private matter” between the District and other signatories with respect to New York law. *Id.* PP 41-42, JA 972. The Commission therefore

declined Albany Engineering’s predecessor’s request for a settlement judge conference to resolve its liability for payments to the District for specific years, on the ground that further Commission involvement in this matter must be preceded by a request for a headwater benefits determination from an affected project owner. *Id.* PP 22, 57, JA 969, 975. Most important for this case, FERC held that it lacked authority to require the District to rescind assessments that it had already made, or to refund amounts that downstream beneficiaries had already paid, under state law. *Id.* P 55, JA 975.

Albany Engineering appealed FERC’s findings. On review, this Court held that states may not “authorize upstream firms to assess FERC licensees for all headwater improvement costs not fitting” into the three cost categories named in the statute. *Albany Eng’g*, 548 F.3d at 1073. Rather, the Federal Power Act generally, and section 10(f) specifically, “preempt all state orders of assessment for headwater benefits.” *Id.* The Court discerned that the Federal Power Act’s “limitation on the type of costs recoverable, and the insistence that such costs be deemed ‘equitable’ by FERC, manifest a deliberate congressional decision to balance the goal of compensating upstream owners . . . and that of protecting downstream ones” *Id.* at 1076. The Court concluded that the Commission’s view of Section 10(f) would have disrupted this balance, generated “complex issues of meshing state charges with FERC-approved ones,” and ultimately

undermined Congress’s intent to create a comprehensive scheme of hydropower development. *Id.* at 1078.

In light of its preemption holding, the Court did not “reach FERC’s decision to neither order refunds for Albany’s past payments to the District nor convene a settlement conference.” *Id.* at 1079. The Court reasoned instead that its finding of preemption “changes the context for FERC’s consideration of both these issues.” *Id.* In “light of these changed circumstances, we find it appropriate to remand to FERC to consider the scope of its authority to craft appropriate remedies.” *Id.* at 1079-80.

B. Orders on Remand of *Albany Engineering*

Following the Court’s remand of the *Albany Engineering* proceeding, the District asked FERC to appoint a settlement judge to consider the remanded issues and mediate efforts to reach a comprehensive headwater benefits settlement, and for the Commission to determine interim headwater benefits. *Albany Eng’g Corp. v. Hudson River-Black River Regulating Dist.*, 127 FERC ¶ 61,174 at PP 2-3, 15 (2009) (2009 Remand Order), JA 815, *on reh’g*, 129 FERC ¶ 61,134 (2009) (2009 Remand Rehearing Order), R.69, JA 797. Albany Engineering objected, arguing that such procedures were not necessary for the Commission to determine a remedy. 2009 Remand Order P 18, JA 818. The Commission granted the motion for settlement judge proceedings. 2009 Remand Order PP 3, 19, 21, JA 815, 818-

19. It also specified that if the parties did not reach a settlement, Commission staff should convene a headwater benefits investigation to determine appropriate headwater benefits charges for projects downstream of Great Sacandaga Lake. *Id.* PP 3, 22-23, JA 815, 819.

The Commission held that, for a variety of reasons, it could not order the District to pay refunds for headwater benefits payments already collected under state law. *Id.* PP 25-41, JA 819-24; 2009 Remand Rehearing Order PP 14-32, JA 801-08; *see also id.* P 16, JA 802 (“Our determination on remand does not reflect our refusal to see the adverse results of the District’s actions on the downstream licensees but rather the absence of any clear authority under which we could redress this situation”). The Commission noted that Albany Engineering had the right to seek refunds in court, and that the Commission could account for any such refunds in a headwater benefits determination. 2009 Remand Order P 24, JA 819. The Commission also stated that after a headwater benefits investigation, it “may be able to permit Albany Engineering to offset amounts it owes by the amounts it has paid to the District.” *Id.* P 23, JA 819; *see* 2009 Remand Rehearing Order P 31, JA 807-08 (same).

No party sought judicial review of the orders on remand.

C. Orders Determining Headwater Benefits

The settlement proceedings the Commission established on remand did not result in a settlement, and the judge returned the proceeding to the Commission. *See* Letter from William Guey-Lee, FERC, to Robert S. Foltan, et al., District, at 1 (Aug. 4, 2009) (citing orders from settlement judge and Chief Judge) R.1, JA 810. Therefore, as it had promised in the 2009 Remand Order, the Commission initiated a headwater benefits investigation, specifically identifying five Erie Boulevard facilities under four project licenses as potential beneficiaries of the improvements at Great Sacandaga Lake. *Id.* at 1-3, JA 810-12. FERC hired a contractor to quantify the benefits of the Great Sacandaga Lake Project's streamflow regulation to projects downstream. *Id.* at 2-4, JA 811-13. Separately, FERC gathered information about project and maintenance costs from the District and its downstream beneficiaries, including Erie Boulevard. *See* Letter from William Guey-Lee, FERC, to Robert S. Foltan, District (Sept. 16, 2010), R.249, JA 772; Letter from William Guey-Lee, FERC, to Timothy Lukas, Erie Boulevard, *et al.* (Sept. 16, 2010), R.256, JA 769. Commission staff issued draft headwater benefits reports in 2011 and 2012. *See* Hudson River Basin Headwater Benefits Report, Draft Scoping Report and Data Sufficiency Assessment (May 11, 2011), R.424, JA 696; Draft Report, Headwater Benefits Determination, Hudson River Basin (Jan. 19, 2012), R.609, JA 432. The parties filed responsive comments.

The District asked the Commission to “defer consideration of whether, and how, prior payments under the New York State Environmental Conservation Law would be credited against Headwater Benefit charges until after the amount of those charges has been finally settled,” and reserved its right to try to limit the amount of credits for payments licensees made prior to the *Albany Engineering* decision. Comments of Hudson River-Black River Regulating District at 2 (Mar. 16, 2012), R.705, JA 424. Erie did not respond to this request. Answer to Comments on Draft Report, R.758, JA 421.

Commission staff issued an order determining headwater benefits in July 2012. *Hudson River-Black River Regulating Dist.*, 140 FERC ¶ 62,089 (2012) (2012 Headwater Benefits Order), R.895, JA 399, *on reh’g*, 141 FERC ¶ 61,277 (2012), R.1074, JA 332. Staff determined that from 2002 through 2008, the Conklingville Dam and Great Sacandaga Lake Project produced a total of 509,038 megawatt-hours of energy gains for the Erie Boulevard projects, justifying total headwater benefits charges of \$1,849,610. 2012 Headwater Benefits Order PP 39-40, JA 412-13. From 2009 onward, Erie Boulevard’s assessment would be \$365,100 each year. *Id.* P 42, JA 414.

As to providing downstream licensees credits for their past payments to the District under state law, the Commission held that to the extent downstream owners had already paid the District under New York law “for what were,

incontestably, headwater benefits,” requiring further payment under Section 10(f) of the Federal Power Act would amount to an inequitable double payment. *Id.* P 44, JA 415. But the Commission could not determine the point at which annual assessments determined in its order would be offset by prior payments, for two reasons: First, the amounts that downstream licensees had paid to the District in the past were not in the record of the headwater benefits proceeding, *id.* P 45, JA 415-16; and second, it was possible that downstream project owners had obtained refunds from the District in court or by other means, *id.* P 46, JA 416. The Commission therefore encouraged the downstream project owners to contact the District to develop individual agreements as to when they must begin paying the District for headwater benefits according to the determinations in the order, and to file agreements for approval as they were reached. *Id.* P 46, 49, JA 416-17. Failing agreements, Commission staff would gather additional information and establish a headwater benefits payments schedule for each licensee. *Id.* P 48, JA 416-17.

Erie Boulevard was the only party to seek rehearing of the 2012 Headwater Benefits Order. *Hudson River-Black River Regulating Dist.*, 141 FERC ¶ 61,227 at P 1 (2012), R.1074, JA 332. Its request for rehearing did not seek changes to the Commission’s findings concerning offsets of future costs for prior payment. *Id.* P 13, JA 336-37.

No party sought judicial review of the 2012 headwater benefits orders. Three years of negotiation and litigation among the District and its downstream beneficiaries followed. *See Hudson River-Black River Regulating Dist.*, 140 FERC ¶ 62,089, at PP 6-30 (2015) (2015 Initial Order) (describing results), JA 215-23.

D. Federal District Court Proceeding

The District sued Erie Boulevard in New York state court in early 2014, after the Commission's 2012 rulings on headwater benefits, but prior to the orders challenged here. *See Hudson River-Black River Regulating Dist. v. Erie Boulevard Hydropower, L.P.*, 2014 WL 5502375 (N.D.N.Y. Oct. 30, 2014). The District sought a declaratory judgment that the 2006 Settlement precluded Erie's claim for a refund of assessments collected between 2000 and 2009. *Id.* at *2. The case was transferred to federal district court, and that court dismissed the case, holding that Erie Boulevard was seeking credits, not a refund, and that FERC should decide the matter. *Id.*

Erie Boulevard states that in that proceeding, the District admitted that the 2006 Settlement was completely preempted by the Federal Power Act and unenforceable. Br. 22. But Erie argued that "only the portion of the 2006 Settlement Agreement that deals with headwater benefits assessments – not the entire document – is unenforceable." *Hudson River-Black River Regulating Dist.*, 2014 WL 5502375 at *2. The district court made no findings as to the ongoing

enforceability of the 2006 Settlement, but merely noted the parties' disagreement.

Id. at *2.

III. The Proceeding Under Review

The only party to resolve its headwater benefits liability with the District was Albany Engineering, which obtained a money judgment for the return of unauthorized state assessments paid from 2003 to 2008. *See* 2015 Initial Order PP 6-7, JA 215. The District satisfied the judgment, and the parties agreed that, starting with 2009, Albany Engineering would pay the District in accordance with the determinations in the 2012 Headwater Benefits Order. *Id.* P 6, JA 215.

Three other parties also sought money judgments in state court, but their claims were dismissed as time-barred. *Id.* PP 21-23, JA 220-21. Four licensees had not reached resolution. *Id.* PP 26-30, JA 221-23. The Commission held that these seven parties would participate in the crediting mechanism described in the 2012 Headwater Benefits Order. *Id.* PP 25, 30, JA 221, 223.

Erie Boulevard did not reach a resolution with the District. *See* 2015 Initial Order P 10, JA 216. It filed a letter with the Commission stating that it had paid the District \$9.1 million from 2002 through 2008, and that this amounted to an overpayment of approximately \$7.3 million. *Id.* The District answered that Erie Boulevard had not overpaid, because it had previously challenged the District's assessments in state court, and the parties had established Erie's payments to the

District by way of the 2006 Settlement. *Id.* P 11, JA 216. According to the District, the 2006 Settlement precluded Erie Boulevard from benefitting from the Commission's offset, and waived any claims that Erie might have as to assessments for the budget years beginning July 1, 2006, 2007, and 2008. *Id.* P 12, JA 216-17.

The Commission agreed, finding that Erie Boulevard had chosen state court litigation to challenge the amounts of the District's assessments for the period July 1, 2000 through June 30, 2009; that both parties believed that their resolution was fair and reasonable; and that both had chosen to give up any and all claims related to the District's assessments for the years 2002 through 2009. *Id.* P 19, JA 219-20; 2015 Rehearing Order PP 32-34, JA 12. Under these circumstances, the Commission found that it was "reasonable and equitable to hold Erie Boulevard and the District to the bargain they struck regarding these payments." 2015 Initial Order P 19, JA 219-20. The Commission therefore directed Erie Boulevard to begin to pay its FERC-set Section 10(f) assessment on July 1, 2009. *See id.* It later denied Erie Boulevard's request for rehearing of its decision to give effect to the 2006 Settlement. *See* 2015 Rehearing Order PP 31-52, JA 11-18.

This appeal followed.

SUMMARY OF ARGUMENT

Erie Boulevard’s arguments are all premised on the notion that the 2006 Settlement – and later, the orders on review – violated the Federal Power Act. The Commission’s orders on remand from this Court’s 2008 *Albany Engineering* decision demonstrate that this is not so. The District’s assessment of headwater benefits charges (through 2008) was not made under authority of the Federal Power Act, but rather of New York law. In light of *Albany Engineering*, all parties have come to understand that the Federal Power Act preempts the state scheme. The District must cease making headwater benefits assessments under state law, and the Commission has now established new headwater benefits assessments (for 2009 onward) for the District’s downstream beneficiaries under the authority of Federal Power Act Section 10(f), 16 U.S.C. § 803(f).

As for earlier years, the Commission could not provide a remedy for downstream beneficiaries’ overpayments, because it lacked authority to do so under the Federal Power Act. But “[a]lthough not required to do so,” 2015 Initial Order P 18, JA 219, FERC established a crediting mechanism that would enable the downstream beneficiaries to offset past payments to the District under state law against their future liability under federal law. The Commission reasoned that this was consistent with its Federal Power Act Section 10(f) responsibility to ensure that headwater benefits payments are equitable.

The Commission treated Erie Boulevard differently from other downstream beneficiaries because Erie Boulevard alone had agreed to pay the District's assessments – less a substantial settlement credit – and to accept other compensation in exchange for releasing and waiving its claims against the state agency. The Commission's decision to honor the pre-*Albany Engineering* settlement between Erie Boulevard and the District, which the parties entered into under auspices of a New York state court, was consistent with court precedent and reasonably balanced the Commission's obligation to ensure equitable payments under the Federal Power Act with the limits of its enforcement jurisdiction. The Court should respect that judgment.

ARGUMENT

I. Standard of Review

The Court reviews Commission orders under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *see also, e.g., Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under this standard, the court may not substitute its judgment for the Commission's, but must uphold the agency's decision if the agency has examined the relevant considerations and given a satisfactory explanation for its action, "including a rational connection between the facts found and the choice made."

FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

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. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). See also, e.g., *City of Tacoma v. FERC*, 460 F.3d 53, 63-64 (D.C. Cir. 2006) (applying *Chevron* principles in construing hydroelectric provisions of the Federal Power Act). If the statute is silent or ambiguous on the question at issue, then the court must decide whether the agency's decision is based on a permissible construction of the statute and, if it is, defer to the agency's construction. *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013).

The Court defers to the Commission's reading of a settlement agreement when its interpretation "will be influenced by [its] expertise in the technical language of that field and by its greater knowledge of industry conditions and practices." *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1570 (D.C. Cir. 1987). See also *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1198 (D.C. Cir. 2000) (upholding Commission's interpretation of settlement agreement under a deferential standard "[b]ecause Congress explicitly delegated to FERC broad

powers over ratemaking, including the power to analyze relevant contracts, and because the Commission has greater technical expertise in this field than does the Court”) (citation omitted); *Kan. Cities v. FERC*, 723 F.2d 82, 87 (D.C. Cir. 1983) (whether a contract interpretation raises “an issue of law” or “an issue of fact,” the Court “accord[s] great weight to the judgment of the expert agency that deals with agreements of this sort on a daily basis”).

II. FERC Reasonably Honored the 2006 Settlement

A settlement “by its very nature is a compromise – a process by which positions, legal or factual, no matter how seriously maintained or legally supportable, are surrendered in whole or in part to achieve peace.” *Tex. E. Transmission Corp. v. FERC*, 306 F.2d 345, 357 (5th Cir. 1962). “Parties settle in order to avoid the risk that they might do worse by litigating, both because they might lose and because winning might come at a high cost; both parties to a settlement accept the risk that they might have done better by fighting.” *Panhandle E. Pipe Line Co. v. FERC*, 95 F.3d 62, 74 (D.C. Cir. 1996). The very purpose of settlements is to render adjudication of intricate problems unnecessary. *Tex. E. Transmission Corp.*, 306 F.2d at 357.

Erie Boulevard received valuable compensation – an \$800,000 reduction of its headwater benefits liability, an amendment to another settlement agreement, and an end to its litigation with the District – in exchange for releasing or waiving

its claims against the District's headwater benefits assessments. *See* 2015 Initial Order PP 12, 19-20, JA 216, 219-20; 2015 Rehearing Order PP 7-9, 32, JA 3-5, 12. It had accepted that outcome, and monetary credits with it, for three years before this Court's ruling in *Albany Engineering*. *See* Erie Boulevard Response to 2012 Headwater Benefits Order at Att. A, unnumbered pp. 6, 10, 14 (Oct. 29, 2012), R.988, JA 369, 373, 377 (showing annual settlement credits of \$174,000 in the District's assessments for fiscal years beginning in 2006, 2007, and 2008).

Now, after *Albany Engineering*, Erie Boulevard asks the Court to reverse the FERC orders honoring Erie's prior settlement, and remand with instructions to award Erie credits and interest for its overpayments to the District. Br. 5, 54. But the Commission's decision to honor Erie's 2006 Settlement was reasonable – a workable solution to the “intensely practical difficulty” of reconciling new Federal Power Act precedent with an existing, non-jurisdictional, agreement – and it should be respected. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) (“The breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.”).

A. Erie Boulevard's Remedy For Overcharges Lies In State Court, Not Before the Commission

Erie Boulevard argues that the District's state-law headwater benefits assessments violate the Federal Power Act, and that the Commission is required to

correct that violation. Br. 28. Both parts of this argument are incorrect. *Albany Engineering* found that Section 10(f) of the Federal Power Act preempts the New York law under which the District collected assessments from its downstream beneficiaries through 2008, and that the District was without authority to continue to do so. *Albany Eng'g*, 548 F.3d at 1075-79. It did “not reach FERC’s decision to neither order refunds for [the downstream licensee’s] past payments to the District nor convene a settlement conference . . . [but found] it appropriate to remand to FERC to consider the scope of its authority to craft appropriate remedies.” *Id.* at 1080.

The argument that FERC has authority to remedy the District’s assessments was addressed at length in the Commission’s orders on remand from *Albany Engineering*. See 2009 Remand Order PP 14-19, JA 817-18; 2009 Remand Rehearing Order PP 23-32, JA 804-08. Those orders are final and no longer subject to challenge. 16 U.S.C. § 825*l* (prescribing deadlines for requesting agency rehearing or judicial review, as appropriate). The orders on review merely repeat their holdings.

In its analysis of whether refunds might be available as a remedy for the District’s past overcharges, the Commission explained the relationship between the District’s assessments, the Federal Power Act, and the Commission’s remedial authority. Section 10(f) of the Federal Power Act, 16 U.S.C. § 803(f), “contains

the Commission’s complete authority with respect to headwater benefits.” 2009 Remand Order P 27, JA 820. Its provisions “almost exclusively address the Commission’s authority to determine equitable headwater benefits charges and the obligation of downstream project owners to pay them.” *Id.* P 28, JA 820; *see also Farmington River Power Co. v. FERC*, 103 F.3d 1002, 1005 (D.C. Cir. 1997) (licensed dams have affirmative duty to pay). The Federal Power Act is silent as to the headwater benefits obligations of upstream project owners; their role is “essentially to receive the payments determined or approved by the Commission, and section 10(f) imposes no requirements on them.” 2009 Remand Order P 28, JA 820. The language of the Federal Power Act “does not even contemplate the direct assessment of charges by one licensee against another.” 2009 Remand Rehearing Order P 23, JA 804-05.

The District assessed headwater benefits to its downstream beneficiaries under New York Environmental Conservation Law. *See Albany Eng’g*, 548 F.3d at 1073 (noting that the District had been levying annual assessments against downstream FERC licensees “for decades” under this authority). Its practice was referenced in the 2002 “off-license” settlement that FERC approved in its order licensing the Great Sacandaga Lake Project and the Conklingville Dam. *See* 2002 License Order PP 36-39, JA 1113; 2003 License Rehearing Order PP 13-15, JA 1105-06.

Significantly, the District’s authority to assess headwater benefits was not incorporated into license articles – which are the Commission’s means of implementing the Federal Power Act in hydroelectric licensing proceedings. *See Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967) (statutory authority to issue certificates or permits on conditions implies broad authority to take effective action to achieve regulation in the public interest). When issuing licenses, the Commission speaks only to the obligations of downstream project owners to pay the upstream project owners. 2009 Remand Order P 28, JA 820. The District’s license therefore did not authorize the District to assess or collect payments. *Id.* P 29, JA 820.

It is not unusual for FERC to accept or approve a settlement, and not incorporate all of its provisions into license articles. FERC “strongly encourages settlements in hydropower licensing proceedings,” but this means that it often faces situations in which settlement agreements address both jurisdictional and non-jurisdictional activity. *See Pac. Gas & Elec. Co.*, 97 FERC ¶ 61,084 at p. 61,409 (2001); *Avista Corp.*, 93 FERC ¶ 61,116, at p. 61,329 (2000); *Erie Boulevard Hydropower, L.P.*, 88 FERC ¶ 61,176 at pp. 61,580-81 (1999). The Commission’s license requirements must remain within the limits of its enforcement authority, which extends only over “the licensee’s construction, operation, and maintenance of the licensed project, including environmental

mitigation and enhancement measures.” *Pac. Gas & Elec. Co.*, 97 FERC ¶ 61,084, at p. 61,409; *accord Avista*, 93 FERC ¶ 61,116, at p. 61,329; *Erie Boulevard*, 88 FERC ¶ 61,176 at pp. 61,581. Where “aspects of a settlement agreement are beyond the Commission’s jurisdiction to enforce, we may – insofar as they do not conflict with the license articles adopted for the project or interfere with the Commission’s statutory authority – ‘accept’ or ‘approve’ the terms of the settlement agreement.” *Pac. Gas & Elec. Co.*, 97 FERC ¶ 61,084, at p. 61,409; *accord Erie Boulevard*, 88 FERC ¶ 61,176 at p. 61,581 (Commission “is in no position” to approve or accept settlement agreements that deal with matters beyond its jurisdiction; at most it can “approve of” provisions). If a settlement term is not incorporated into the project license, then that term is not part of the license for purposes of Commission administration and enforcement. *Erie Boulevard*, 88 FERC ¶ 61,176 at p. 61,581.

Because neither the Federal Power Act nor the project license contemplated the District’s assessment of headwater benefits under the authority of state law, the District’s actions were “not a violation of Section 10(f) but simply an action taken without [Federal Power Act] authority.” 2009 Remand Order P 31, JA 821; 2015 Rehearing Order PP 14, 49, JA 6, 17 (same). *See also* 2009 Remand Rehearing Order P 23, JA 804-05 (“the situation here is not one of a licensee exceeding the authority that has been given to it . . . but rather of a licensee arrogating to itself

authority that it simply lacks entirely” under the Federal Power Act). “To use Albany Engineering’s own comparison, the [Federal Power Act] no more prohibits the issuance of headwater benefits assessments by the licensees than it does the issuance of speeding tickets by licensees.” *Id.* P 26, JA 806. For this reason they are not within the Commission’s power to correct, as Erie Boulevard submits they are. Br. 28. Instead, they are *preempted* by the Federal Power Act – something the Commission understands and acknowledged in the orders on review. *See* 2015 Initial Order P 4, JA 213-14 (all state assessments for headwater benefits are preempted); 2015 Rehearing Order P 14, JA 6 (payments to the District were not demanded or made with reference to a FERC determination or in a FERC proceeding, and therefore do not violate project license).

The disconnect between the Commission’s authority under the Federal Power Act and the District’s “off-license” assessment of headwater benefits led the Commission to conclude that it could not order refunds of amounts improperly collected. 2009 Remand Order PP 25-37, JA 819-23; *see also id.* P 26, JA 820 (power to order refunds “does not follow inevitably” from power to preempt state law). In contrast to other areas of Commission jurisdiction, there was no statutory refund authority that applied to unauthorized collections of headwater benefits payments. 2009 Remand Order PP 29-35, JA 820-22 (portions of Federal Power Act governing Commission jurisdiction over hydropower projects are “nearly

silent” on refunds). *See also* 2015 Rehearing Order P 14 & nn. 18-19, JA 6 (citing 2009 Remand Rehearing Order P 29, JA 820-21) (Commission lacks authority to order refunds for unauthorized state assessments because they were not made with reference to a Commission determination or through a Commission proceeding).

Because the District had made its headwater benefits assessments under color of state law, the Commission stated at least three times that the court system was the proper venue in which to seek refunds. *See* 2009 Remand Order P 41, JA 823-24; 2012 Headwater Benefits Order n.18, JA 416; 2015 Rehearing Order P 51, JA 18. *See also* 2009 Remand Rehearing Order P 32, JA 808 (further responsibility to seek refunds of the District’s assessments lies with the downstream beneficiary, “armed with the court’s preemption finding”). And indeed, one downstream beneficiary (Albany Engineering) successfully did so. *See* 2015 Initial Order P 6, JA 215.

Similarly, the 2006 Settlement does not have Federal Power Act implications. *See* 2007 Complaint Rehearing Order P 35, JA 835 (2006 Settlement “does not reflect a Commission determination of the charges that Erie should pay under Section 10(f)” of the Federal Power Act, and “arrangements between the District and particular downstream beneficiaries as to the allocation of these costs are not a concern under” the Federal Power Act). FERC has maintained this position consistently since 2007 – with no challenge from Erie Boulevard until

after the Court's 2008 ruling in *Albany Engineering*. See 2009 Remand Order PP 36-37, JA 835-36; 2009 Remand Rehearing Order PP 22-27, JA 804-06; 2012 Headwater Benefits Order PP 44-46, JA 415-17.

B. Erie Boulevard Settled Away Its State-Law Claims

Unlike the other downstream beneficiaries, after the Court's ruling in *Albany Engineering*, Erie could not seek a refund in state court because it had entered into the 2006 Settlement Agreement. Yet Erie now states that it expected relief from the Commission in light of certain language in the 2012 Headwater Benefits Order, which gave it "every reason" to think that the Commission would allow it to offset prior payments to the District against its future headwater benefits liability. Br. 37 (citing 2012 Headwater Benefits Order P 44, JA 415).

But if Erie actually held such an expectation, it was unrealistic to do so. The Commission stated in the 2009 Remand Order, and again in the 2012 Headwater Benefits Order, that the Federal Power Act requires downstream licensees to reimburse upstream project owners for "such part of the annual charges for interest, maintenance, and depreciation . . . as the Commission may deem equitable." 2009 Remand Order P 19 & n.16, JA 818, 826 (quoting 16 U.S.C. § 803(f) (emphasis added by Commission); 2012 Headwater Benefits Order P 44, JA 415. "Equitable" meant that licensees downstream of the Conklingville Dam and Great Sacandaga Lake Project should not pay both the District's assessments

and FERC-determined Section 10(f) charges between the years 2002 and 2008. 2012 Headwater Benefits Order P 44, JA 415 (referring to Federal Power Act Section 10(f), 16 U.S.C. § 803(f)).

The Commission tempered its discussion of how it would establish offsets by stating that the amounts parties had already paid the District “are not of record in this proceeding,” and indicated that it would need the parties’ agreement, or further evidence, to establish the point at which downstream beneficiaries should begin making Section 10(f) payments to the District. 2012 Headwater Benefits Order PP 45-46, 48 & nn.17-18, JA 415-17. The Commission referred to the fact that the record of the Albany Engineering complaint proceeding contained some evidence – but not necessarily enough evidence – of prior payments. *Id.* n.17, JA 415-16. The record of that proceeding included a copy of the 2006 Settlement. *See* Response of Fourth Branch Assoc., Docket No. EL06-91-000 (Aug. 4, 2006), R.2169, JA 1079; National Grid Motion to Intervene, Docket No. EL06-91-000 (Aug. 15, 2006), R.2170, JA 1037. So in view of the Commission’s specific language about needing further evidence, Erie Boulevard cannot credibly claim that the Commission granted or promised it an offset in the 2012 Headwater Benefits Order. *See* Br. 37.

The further evidence that the District provided – which turned out to be another copy of the 2006 Settlement, together with a statement that the settlement

limits the amount Erie can claim as a credit – informed the Commission’s understanding of what was reasonable and equitable in this case. *See* 2015 Initial Order PP 19-20, JA 219-20; 2015 Rehearing Order P 53, JA 19. The Settlement Agreement demonstrated that Erie Boulevard had already challenged the District’s assessments in court, but then released its claims (and future claims) in exchange for compensation. *See* 2015 Rehearing Order PP 27-29, 34, JA 10-12. The 2006 Settlement showed that Erie Boulevard had accepted reductions of its annual assessments totaling \$822,220 for the budget years beginning in 2006 through 2009, plus an amendment to another agreement – the Reservoir Operating Agreement – in exchange for a broad release of its current and future claims against the District. *Id.* PP 7-9, 32, JA 3-5, 12. The 2006 Settlement states the parties’ belief that settlement is “just, reasonable, and . . . in the best interests of the Parties.” Hudson River-Black River Regulating Dist. Response to Headwater Benefits Determination, Attachment A (2006 Settlement) at 7, JA 355; *see also id.* at 5, JA 353 (broad release language over any and all claims arising from currently existing facts).

This “Court has consistently required the Commission to give weight to the contracts and settlements of the parties before it.” *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990) (citing *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1194-95 (D.C. Cir. 1989)). This is true even when – as here – “the parties’

agreements do not set a rate; they merely seek to resolve an element of the methodology that should govern the rate decision.” *Union Elec. Co.*, 890 F.2d at 1194. The policy extends to include settlement agreements. *Id.* at 1195. Strong public policy supports settling complex matters and avoiding the cost and burden of litigation. *See Burlington Res., Inc. v. FERC*, 513 F.3d 242, 249 (D.C. Cir. 2008) (quoting *Burlington Res. Oil & Gas Co.*, 112 FERC ¶ 61,053 at P 25 (2005)).

So the Commission found that it was equitable to honor the 2006 Settlement, 2015 Initial Order PP 18-19, JA 219-20, even as it applied the crediting mechanism to other downstream beneficiaries of the Great Sacandaga Lake Project and the Conklingville Dam, *id.* PP 21-30, JA 220-23. “The key to why the [Initial] Order treated Erie Boulevard differently from the other seven downstream beneficiaries (not including Albany Engineering) is that Erie Boulevard settled its disagreements with the District and in doing so, agreed to a very broad release of future claims based on facts then in existence.” 2015 Rehearing Order P 53, JA 19. “Given this factual distinction, Erie Boulevard’s treatment in the [Initial] Order was equitable.” *Id.* Consistent with its prior statements that no party should pay twice for headwater benefits assessed between 2002 and 2008, the Commission determined that Erie Boulevard should begin paying its Federal Power Act Section 10(f) assessments in 2009. 2015 Initial Order P 19, JA 219-20; 2015 Rehearing Order

P 47, JA 16-17 (Erie received credits up to its Section 10(f) responsibility, and thereby avoided making double payments).

With respect to the difference between Erie’s FERC-set Section 10(f) assessments and its larger prior payments to the District under New York law, the Commission’s decision to honor the settlement was consistent with precedent, and with the Commission’s earlier decision that it could not award refunds. *See Burlington Res., Inc.*, 513 F.3d at 249 (even in a settlement addressing one issue, FERC cannot insist that the exchange “match the parties’ cost obligations as ultimately determined”); *Panhandle E. Pipe Line Co.*, 95 F.3d at 74 (it is “perverse” to reject a settlement because “later developments make one party’s decision appear unwise”); *accord Morgan Stanley Capital Gp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 541, 545-46, 560 (2008) (declining to modify FERC-jurisdictional contracts that provided for unusually high rates, or relieve one party of its “improvident bargain,” after “buyer’s remorse set in”). *See also supra* Section II.A (FERC lacked statutory authority to order refunds). The Commission held that the Settlement did not fall under Rule 602 of its Rules of Practice and Procedure, 18 C.F.R. § 385.602. 2015 Initial Order P 20, JA 220. And the Commission did not amend or vacate the Settlement, but instead respected it as representative of the bargain struck between Erie and the District: “Contrary to

Erie Boulevard's and the District's concerns, our determination of what is fair and equitable in this case in no way affects the validity of the 2006 Settlement." *Id.*

As for the parties' conflicting statements to the Commission and to the New York district court concerning the enforceability of the 2006 Settlement, *see* Br. 22, they suggest that the 2006 Settlement addresses matters that are still valuable to both of them. Erie Boulevard argued to the district court that only the portions of the 2006 Settlement concerning headwater benefits were unenforceable. *See Hudson River-Black River Regulating Dist. v. Erie Boulevard Hydropower*, 2014 WL 5502375 at *2. Before the Commission, the District contended that if the Commission found that the headwater benefits portions of the 2006 Settlement were preempted, it would be inequitable not to preempt the entire settlement, "in particular those provisions involving the Amendment to Reservoir Operating Agreement contemplated at paragraph 14 of the 2006 Settlement." 2015 Initial Order P 15, JA 219; *see also* 2015 Rehearing Order P 36, JA 13 (Erie Boulevard raised, settled, and released its claims).

The Commission's resolution of the issue of headwater benefits balanced the competing considerations of ensuring equitable charges under Federal Power Act Section 10(f) and honoring a pre-existing agreement. When "entities before FERC present intensely practical difficulties that demand a solution, FERC must be given latitude to balance competing considerations and decide on the best

resolution.” *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 955-56 (D.C. Cir. 2013) (internal quotations omitted); *see also Permian Basin Area Rate Cases*, 390 U.S. at 790 (“The breadth and complexity of the Commission’s responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.”).

C. The Commission Did Not Improperly “Change Course” From Its Earlier Orders

Erie Boulevard contends that the Commission, in earlier orders concerning the District’s hydropower licenses, made rulings that precluded it from enforcing the 2006 Settlement. Br. 37-42. The order on review are, in fact, consistent with those prior orders.

As previously noted, in 2003 the Commission stated that the District’s assessment of headwater benefits would take place under the “off-license” settlement FERC accepted in 2002. *See* 2003 License Rehearing Order P 13, JA 1105-06. The District’s license, however, would reflect only the Commission’s authority to assess costs under Federal Power Act Section 10(f). *Id.* This is because the Commission’s license requirements must reflect its enforcement authority. *See Pac. Gas & Elec. Co.*, 97 FERC ¶ 61,084, at p. 61,409; *accord Avista*, 93 FERC ¶ 61,116, at p. 61,329; *Erie Boulevard*, 88 FERC ¶ 61,176 at pp. 61,329. The Commission’s enforcement authority does not extend to a licensee’s

assessment and collection of headwater benefits costs under state law. *See* 2009 Remand Order P 31, JA 821; 2015 Rehearing Order P 49, JA 17.

The passage from the Complaint Rehearing Order that Erie Boulevard quotes, and the portions of later orders that Erie Boulevard cites, say nothing different: The 2006 Settlement does not reflect a Commission determination of Erie Boulevard's responsibility to pay the District under Federal Power Act Section 10(f). *See* Br. 38-41 (quoting 2007 Complaint Rehearing Order at P 35, JA 835). The Commission held this view consistently. *See* 2015 Initial Order P 19, JA 219-20 (2006 Settlement resolves issues related to the District's state law assessments); 2015 Rehearing Order PP 26-27, JA 10 (Erie Boulevard described its prior payments to the District as having occurred under New York law; FERC staff distinguished this from Erie Boulevard's Federal Power Act Section 10(f) responsibility). Erie Boulevard agrees that the 2006 Settlement did not resolve the question of its Federal Power Act Section 10(f) costs, noting in its brief that the parties could not agree on the appropriate amount of "what would have been [New York Environmental Conservation Law]-based assessments." Br. 49.

The orders on review therefore do not reflect a "policy of disregarding unapproved private settlements," as Erie would have it (Br. 40), nor do they articulate new policy. Rather, they consistently reflect the Commission's determination to respect the limits of its statutory jurisdiction, and not to interfere

with private arrangements that fell outside that jurisdiction. *See* 2009 Remand Order P 37, JA 822-23 (District’s actions under preempted state assessment scheme did not violate its license or the Federal Power Act, so the Commission cannot order a Federal Power Act remedy); 2009 Remand Rehearing Order PP 26-29, 806-07 (that Federal Power Act does not provide authority for a licensee to take certain actions is not equivalent to the statute prohibiting such actions); 2015 Initial Order P 19, JA 219-20 (Erie Boulevard chose state litigation to resolve state law claims, and then settled them in a way the parties deemed fair and reasonable); 2015 Rehearing Order P 34, JA 12 (Erie Boulevard chose this path to resolution when others were available). They are also consistent with precedent that does not invalidate private agreements that allow one party “to retain funds collected pursuant to unlawfully high prices.” *Burlington Res. Inc. v. FERC*, 396 F.3d 405, 411 (D.C. Cir. 2005); *Burlington Res., Inc.*, 513 F.3d at 246 (same). Erie Boulevard’s claims that FERC changed or misapplied its policy toward unapproved private settlements is therefore incorrect.

III. Erie Boulevard’s Remaining Arguments Do Not Justify Reversal

Erie Boulevard raises several other arguments in favor of reversing the Commission’s orders, and remanding them with instructions to apply the crediting mechanism. None of its contentions is persuasive.

A. Nothing Required The Parties To File The 2006 Settlement

Erie Boulevard mistakes the 2006 Settlement – which, as previously established, was developed under the auspices of a state court and outside the Commission’s Federal Power Act authority – for a settlement that establishes headwater benefits liability under the Commission’s regulations. *See* Br. 34-36. Settlement is, indeed, one of two ways to establish a downstream beneficiary’s Section 10(f) costs. 18 C.F.R. § 11.14(a). *See supra* p. 4. In cases where settlement is used, the parties file their agreement for Commission approval under Rule 602 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.602. *Id.* If settlement negotiations fail – as they did after the 2009 Remand Rehearing Order – the Commission may establish Section 10(f) costs by investigation. *Id.* § 11.15.

Erie contends that the Commission used (or might have used) the 2006 Settlement to calculate headwater benefits, even though the 2006 Settlement had not received prior Commission approval. Br. 35-36. This is not what the Commission said, nor is it what occurred. Both the record of this case and Erie Boulevard’s brief show that the 2006 Settlement was not intended to resolve the issue of Erie Boulevard’s Section 10(f) costs under the Federal Power Act, but rather to bring state court litigation to a close. *See* 2015 Initial Order P 19, JA 219-20 (litigation challenged amount of District’s assessments under state law); Br. 49

(2006 Settlement does not resolve Erie’s liability for headwater benefits, but resolved related litigation). Further, the basis for Erie Boulevard’s appeal is that giving effect to the 2006 Settlement means that Erie must pay greater amounts for some years than the Commission found were warranted under Federal Power Act Section 10(f). *See* Br. 2-4. There is no basis for Erie to argue that the 2006 Settlement was used to determine Federal Power Act Section 10(f) charges – and in fact, Erie waived this argument when it did not challenge the Commission’s findings in the 2007 Complaint Rehearing Order. *See* 2007 Complaint Rehearing Order P 35, JA 835 (2006 Settlement does not establish Section 10(f) charges).

In view of these facts, FERC did not need to do more than simply state that the 2006 Settlement did not have to be filed. 2015 Initial Order P 20, JA 220. The 2006 Settlement was not advanced to establish Erie Boulevard’s Section 10(f) liability going forward, but rather to support the District’s “view of how the Commission should resolve the issue of how Erie Boulevard’s headwater benefits assessments should be calculated.” *Id.*

B. The Commission Correctly Interpreted the 2006 Settlement

Erie Boulevard contends that the 2006 Settlement cannot fairly be read to discharge the Commission from granting it credits for its overpayments to the District under the preempted state law. Br. 50-51. Erie claims that this is because the Commission’s Section 10(f) investigation – which revealed that Erie had paid

the District more under state law than the Commission would have assessed under federal law – was not a claim against the District that Erie released in the 2006 Settlement. *Id.*

This argument has evolved a bit from Erie’s prior contention that it did not have a preemption claim to release in 2006, *see* 2015 Rehearing Order P 31, JA 11-12. But here, as before FERC, Erie Boulevard’s argument founders upon the fact that it released all claims “based on presently existing facts” in 2006, and the relevant facts arose in 2002 with the licensure of the Great Sacandaga Lake Project. *Id.* PP 32-33, JA 12. The 2008 *Albany Engineering* decision was not a new fact that created a new claim, outside the scope of the 2006 Settlement’s release language, but an interpretation of relevant law. *Id.* P 35, JA 13.

Further, the Commission did not find that its headwater benefits proceeding, or its subsequent evaluation of evidence of prior overpayments, created new claims against the District on the part of Erie or any other beneficiary. The challenged orders sought only to determine “the ‘break-even’ point for each downstream licensee – that point, whether in the past or in the future, when a licensee’s prior payments are ‘used up’ and the licensee must begin reimbursing the District” according to the Commission’s assessments under Federal Power Act Section 10(f). 2012 Headwater Benefits Order P 45, JA 415-16; *accord* 2015 Initial Order PP 1, 32, JA 1-2, 223 (order “addresses the filings in response” to the 2012

Headwater Benefits Order and “determines the point at which annual assessments established in the [Headwater Benefits] Order would be completely offset by prior overpayments, and payments under Federal Power Act Section 10(f) should begin).

Erie’s argument that the 2006 Settlement was not admissible before the Commission has been waived. As Erie points out in its brief, third parties filed copies of the 2006 Settlement in Albany Engineering’s complaint proceeding, as evidence of downstream beneficiaries’ prior payments to the District. *See* Br. 12 (citing Response of Fourth Branch Assoc., Docket No. EL06-91-000, JA 1079; National Grid Motion to Intervene, Docket No. EL06-91-000, JA 1037). Erie Boulevard did not object to these filings; its participation in the Albany Engineering complaint proceedings was limited to filing an intervention. *See supra* p. 10. Here, the Commission noted the District’s use of the Settlement to support its views of how to calculate Erie Boulevard’s headwater benefits assessment, and found that it was “reasonable and equitable” to respect the parties’ earlier bargain. 2015 Initial Order PP 19-20, JA 219-22.

C. Erie Boulevard Is Not Entitled To Interest

Erie contends that the Commission erred because it did not include interest when it calculated the credits due to Erie Boulevard. *See* Br. 52-54. Erie Boulevard was properly denied credits, as detailed *supra*, and therefore the Court need not reach this issue.

In its orders, the Commission reasonably denied Erie Boulevard's request for interest. The Commission had calculated Federal Power Act Section 10(f) cost responsibility for downstream beneficiaries under statutory and regulatory provisions that do not call for calculation of interest. 2015 Rehearing Order P 63, JA 22. And in making these calculations, and developing an offset mechanism to take past payments into account, the Commission was not attempting to make parties whole in light of a statutory violation. 2015 Initial Order P 31, JA 223. Rather, the Commission developed the offset mechanism in order to avoid inequity. *Id.*

Erie Boulevard proposes that the Commission treat the District's illegal overcharges in the same way it does illegal underpayments of Federal Power Act Section 10(f) charges – something that would involve awarding interest. Br. 53 (citing 18 C.F.R. § 11.21). Erie Boulevard did not propose this to the Commission, and, because the Commission has not had an opportunity to respond to it, the Court lacks jurisdiction to consider it. 16 U.S.C. § 825l; *see also, e.g., Pub. Utils. Comm'n of Calif. v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004). But even if Erie had raised and preserved this particular argument for appeal, the Commission would be unable to award interest. This argument again is based on the mistaken premise that the Commission was required to remedy violations of the Federal Power Act and the parties' licenses. As previously discussed, the Federal Power

Act preempts the District's assessments under state law, but does not provide the Commission with authority to remedy them. *See supra* pp. 24-31. *See also, e.g., Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043-44 (D.C. Cir. 2000) (agency is not compelled to order retroactive relief for even an acknowledged statutory violation).

CONCLUSION

For the foregoing reasons, this Court should deny Erie Boulevard's petition for review and should affirm the challenged orders.

Respectfully submitted,

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FINAL BRIEF: September 27, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,844 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

/s/ Elizabeth E. Rylander
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Attorney

FINAL BRIEF: September 27, 2016

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dicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

| <i>Derivation</i> | <i>U.S. Code</i> | <i>Revised Statutes and Statutes at Large</i> |
|-------------------|-------------------|---|
| | 5 U.S.C. 1009(c). | June 11, 1946, ch. 324, §10(c), 60 Stat. 243. |

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

| <i>Derivation</i> | <i>U.S. Code</i> | <i>Revised Statutes and Statutes at Large</i> |
|-------------------|-------------------|---|
| | 5 U.S.C. 1009(d). | June 11, 1946, ch. 324, §10(d), 60 Stat. 243. |

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

- (B) contrary to constitutional right, power, privilege, or immunity;

- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

- (D) without observance of procedure required by law;

- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

| <i>Derivation</i> | <i>U.S. Code</i> | <i>Revised Statutes and Statutes at Large</i> |
|-------------------|-------------------|---|
| | 5 U.S.C. 1009(e). | June 11, 1946, ch. 324, §10(e), 60 Stat. 243. |

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85-791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

- Sec. 801. Congressional review.
- 802. Congressional disapproval procedure.
- 803. Special rule on statutory, regulatory, and judicial deadlines.
- 804. Definitions.
- 805. Judicial review.
- 806. Applicability; severability.
- 807. Exemption for monetary policy.
- 808. Effective date of certain rules.

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

- (i) a copy of the rule;
- (ii) a concise general statement relating to the rule, including whether it is a major rule; and
- (iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

- (i) a complete copy of the cost-benefit analysis of the rule, if any;
- (ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Assumption of project by United States after expiration of license

Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

(June 10, 1920, ch. 285, pt. I, § 7, 41 Stat. 1067; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 205, 212, 49 Stat. 842, 847; Pub. L. 90-451, § 1, Aug. 3, 1968, 82 Stat. 616; Pub. L. 99-495, § 2, Oct. 16, 1986, 100 Stat. 1243.)

CODIFICATION

Additional provisions in the section as enacted by act June 10, 1920, directing the commission to investigate the cost and economic value of the power plant outlined in project numbered 3, House Document numbered 1400, Sixty-second Congress, third session, and also in connection with such project to submit plans and estimates of cost necessary to secure an increased water supply for the District of Columbia, have been omitted as temporary and executed.

AMENDMENTS

1986—Subsec. (a). Pub. L. 99-495 inserted “original” after “hereunder or” and substituted “issued,” for “issued and in issuing licenses to new licensees under section 808 of this title”.

1968—Subsec. (c). Pub. L. 90-451 added subsec. (c).

1935—Act Aug. 26, 1935, § 205, amended section generally, striking out “navigation and” before “water resources” wherever appearing, and designating paragraphs as subsecs. (a) and (b).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

§ 801. Transfer of license; obligations of transferee

No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial

sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

(June 10, 1920, ch. 285, pt. I, § 8, 41 Stat. 1068; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.)

§ 802. Information to accompany application for license; landowner notification

(a) Each applicant for a license under this chapter shall submit to the commission—

(1) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

(3)¹ Such additional information as the commission may require.

(b) Upon the filing of any application for a license (other than a license under section 808 of this title) the applicant shall make a good faith effort to notify each of the following by certified mail:

(1) Any person who is an owner of record of any interest in the property within the bounds of the project.

(2) Any Federal, State, municipal or other local governmental agency likely to be interested in or affected by such application.

(June 10, 1920, ch. 285, pt. I, § 9, 41 Stat. 1068; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847; Pub. L. 99-495, § 14, Oct. 16, 1986, 100 Stat. 1257.)

CODIFICATION

Former subsec. (c), included in the provisions designated as subsec. (a) by Pub. L. 99-495, has been editorially redesignated as par. (3) of subsec. (a) as the probable intent of Congress.

AMENDMENTS

1986—Pub. L. 99-495 designated existing provisions as subsec. (a), redesignated former subsecs. (a) and (b) as pars. (1) and (2) of subsec. (a), and added subsec. (b).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this

¹ See Codification note below.

chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title¹ if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

- (i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or
- (ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for

proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, 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 subchapter; for recompensing it for the use, occupancy, and

¹ So in original. Probably should be followed by “; and”.

chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

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- (ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

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That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, 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 subchapter; for recompensing it for the use, occupancy, and

¹ So in original. Probably should be followed by “; and”.

enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: *Provided however*, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

(A) The contract covers one or more projects for which a license was issued by the Commission before January 1, 1985.

(B) The contract contains provisions specifically providing each of the following:

(i) A powerplant may be built by the licensee utilizing irrigation facilities constructed by the United States.

(ii) The powerplant shall remain in the exclusive control, possession, and ownership of the licensee concerned.

(iii) All revenue from the powerplant and from the use, sale, or disposal of electric energy from the powerplant shall be, and remain, the property of such licensee.

(C) The contract is an amendatory, supplemental and replacement contract between the United States and: (i) the Quincy-Columbia Basin Irrigation District (Contract No. 14-06-100-6418); (ii) the East Columbia Basin Irrigation District (Contract No. 14-06-100-6419); or, (iii) the South Columbia Basin Irrigation District (Contract No. 14-06-100-6420).

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f) of this section, such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.

(3) The provisions of paragraph (2) shall apply with respect to—

(A) all licenses issued after October 16, 1986; and

(B) all licenses issued before October 16, 1986, which—

(i) did not fix a specific charge for the use of the Government dam or structure involved; and

(ii) did not specify that no charge would be fixed for the use of such dam or structure.

(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.

(f) Reimbursement by licensee of other licensees, etc.

That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall 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. The proportion of such charges to be paid by any licensee shall be deter-

mined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for head-water improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such head-water improvement.

(g) Conditions in discretion of commission

Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

(h) Monopolistic combinations; prevention or minimization of anticompetitive conduct; action by Commission regarding license and operation and maintenance of project

(1) 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 are hereby prohibited.

(2) That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in subchapter II of this chapter) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 808 of this title.

(i) Waiver of conditions

In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

(June 10, 1920, ch. 285, pt. I, §10, 41 Stat. 1068; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§206, 212, 49 Stat. 842, 847; Pub. L. 87-647, Sept. 7, 1962, 76 Stat. 447; Pub. L. 90-451, §4, Aug. 3, 1968, 82 Stat. 617; Pub. L. 99-495, §§3(b), (c), 9(a), 13, Oct. 16, 1986, 100 Stat. 1243, 1244, 1252, 1257; Pub. L. 99-546, title IV, §401, Oct. 27, 1986, 100 Stat. 3056; Pub. L. 102-486, title XVII, §1701(a), Oct. 24, 1992, 106 Stat. 3008.)

REFERENCES IN TEXT

The Fish and Wildlife Coordination Act, referred to in subsec. (j)(1), is act Mar. 10, 1934, ch. 55, 48 Stat. 401, as amended, which is classified generally to sections 661 to 666c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

AMENDMENTS

1992—Subsec. (e)(1). Pub. L. 102-486, in introductory provisions, substituted “administration of this subchapter, 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 subchapter;” for “administration of this subchapter;” and inserted “*Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the reasonable and necessary costs of such agencies shall be available to such agen-

cies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended:" after "as conditions may require:".

1986—Subsec. (a). Pub. L. 99-495, §3(b), designated existing provisions as par. (1), inserted "for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat)," after "water-power development", inserted "irrigation, flood control, water supply, and" after "including", which words were inserted after "public uses, including" as the probable intent of Congress, substituted "and other purposes referred to in section 797(e) of this title" for "purposes; and", and added pars. (2) and (3).

Subsec. (e). Pub. L. 99-546 inserted proviso that no charge be assessed for use of Government dam or structure by licensee if, before Jan. 1, 1985, licensee and Secretary entered into contract which met requirements of date of license, powerplant construction, ownership, and revenue, etc.

Pub. L. 99-495, §9(a), designated existing provisions as par. (1) and added pars. (2) to (4).

Subsec. (h). Pub. L. 99-495, §13, designated existing provisions as par. (1) and added par. (2).

Subsec. (j). Pub. L. 99-495, §3(c), added subsec. (j).

1968—Subsec. (d). Pub. L. 90-451 provided for maintenance of amortization reserves on and after effective date of new licenses.

1962—Subsecs. (b), (e), (i). Pub. L. 87-647 substituted "two thousand horsepower" for "one hundred horsepower".

1935—Subsec. (a). Act Aug. 26, 1935, §206, substituted "plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial uses, including recreational purposes" for "scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses," and "such plan" for "such scheme".

Subsec. (b). Act Aug. 26, 1935, §206, inserted "installed" before "capacity".

Subsec. (d). Act Aug. 26, 1935, §206, substituted "net investment" for "actual, legitimate investment".

Subsec. (e). Act Aug. 26, 1935, §206, amended subsec. (e) generally.

Subsec. (f). Act Aug. 26, 1935, §206, inserted last sentence to first par., and inserted last par.

Subsec. (i). Act Aug. 26, 1935, §206, inserted "installed" before "capacity", and "annual charges for use of" before "lands" in proviso.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

SAVINGS PROVISION

Pub. L. 99-495, §9(b), Oct. 16, 1986, 100 Stat. 1252, provided that: "Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall affect any annual charge to be paid pursuant to section 110(e) of the Federal Power Act [16 U.S.C. 803(e)] to Indian tribes for the use of their lands within Indian reservations."

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (e)(4) of this section relating to reporting recommendations to Congress every 5 years, see section 3003 of Pub. L. 104-66, as amended, set out as a note under section 113 of Title 31, Money and Finance, and page 91 of House Document No. 103-7.

§ 804. Project works affecting navigable waters; requirements insertable in license

If the dam or other project works are to be constructed across, along, or in any of the navi-

gable waters of the United States, the commission may, insofar as it deems the same reasonably necessary to promote the present and future needs of navigation and consistent with a reasonable investment cost to the licensee, include in the license any one or more of the following provisions or requirements:

(a) That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of the Army and made part of such license.

(b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete such navigation facilities.

(c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States.

(June 10, 1920, ch. 285, pt. I, §11, 41 Stat. 1070; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847; July 26, 1947, ch. 343, title II, §205(a), 61 Stat. 501.)

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

§ 805. Participation by Government in costs of locks, etc.

Whenever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures cannot, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in subsection (a) of section 804 of this title, the commission may grant the application with the provision to be expressed in the license that the licensee will install the necessary navigation structures if the Government fails to make provision therefor within a time to be fixed in the license and cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures.

vertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859.)

CODIFICATION

“Sections 1535 and 1536 of title 31” substituted in text for “sections 601 and 602 of the Act of June 30, 1932 (49 Stat. 417 [31 U.S.C. 686, 686b])” on authority of Pub. L. 97-258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825I. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall

be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85-791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109-58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), “section 1254 of title 28” substituted for “sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)” on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58 inserted “electric utility,” after “Any person,” and “to which such person,” and substituted “brought by any entity unless such entity” for “brought by any person unless such person”.

1958—Subsec. (a). Pub. L. 85-791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85-791, §16(b), in second sentence, substituted “transmitted by the clerk of the court to” for “served upon”, substituted “file with the court” for “certify and file with the court a transcript of”, and inserted “as provided in section 2112 of title 28”, and in third sentence, substituted “jurisdiction, which upon

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other indebtedness may not be deducted in determining the net profit of the project.

(e) *Sales for resale.* Notwithstanding compliance by a State or municipal licensee with the requirements of paragraph (d) of this section, it shall be subject to the payment of annual charges to the extent that electric power generated, transmitted, or distributed by the project is sold to another State, municipality, person, or corporation for resale, unless the licensee shall show that the power was sold to the ultimate consumer without profit. The matter of whether or not a profit was made is a question of fact to be established by the licensee.

(f) *Interchange of power.* Notwithstanding compliance by a State or municipal licensee with the requirements of paragraph (d) of this section, it shall be subject to the payment of annual charges to the extent that power generated, transmitted, or distributed by the project was supplied under an interchange agreement to a State, municipality, person, or corporation for sale at a profit (which power was not offset by an equivalent amount of power received under such interchange agreement) unless the licensee shall show that the power was sold to ultimate consumers without profit.

(g) *Construction period.* During the period when the licensed project is under construction and is not generating power, it will be considered as operating without profit within the meaning of this section, and licensee will be entitled to total exemption from the payment of annual charges, except as to those charges relating to the use of a Government dam or tribal lands within Indian reservations.

(h) *Optional showing.* When the power from the licensed project enters into the electric power system of the State or municipal licensee, making it impracticable to meet the requirements set forth in this section with respect to the operations of the project only, such licensee may, in lieu thereof, furnish the same information with respect to the operations of said electric power system as a whole.

(i) *Application for exemption.* Applications for exemption from payment of annual charges shall be signed by an

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authorized executive officer or chief accounting officer of the licensee or exemptee and verified under oath. The application must be filed with the Secretary of the Commission in accordance with filing procedures posted on the Commission's Web site at <http://www.ferc.gov> within the time allowed (by § 11.20) for the payment of the annual charges. If the licensee or exemptee, within the time allowed for the payment of the annual charges, files notice that it intends to file an application for exemption, an additional period of 30 days is allowed within which to complete and file the application for exemption. The filing of an application for exemption does not by itself alleviate the requirement to pay the annual charges, nor does it exonerate the licensee or exemptee from the assessment of penalties under § 11.21. If a bill for annual charges becomes payable after an application for an exemption has been filed and while the application is still pending for decision, the bill may be paid under protest and subject to refund.

[Order 143, 13 FR 6681, Nov. 13, 1948. Redesignated and amended by Order 379, 49 FR 22778, June 1, 1984. Redesignated at 51 FR 24318, July 3, 1986; 60 FR 15048, Mar. 22, 1995; Order 737, 75 FR 43403, July 26, 2010]

§ 11.7 Effective date.

All annual charges imposed under this subpart will be computed beginning on the effective date of the license unless some other date is fixed in the license.

[51 FR 24318, July 3, 1986]

§ 11.8 Adjustment of annual charges.

All annual charges imposed under this subpart continue in effect as fixed unless changed as authorized by law.

[51 FR 24318, July 3, 1986]

Subpart B—Charges for Headwater Benefits

SOURCE: Order 453, 51 FR 24318, July 3, 1986, unless otherwise noted.

§ 11.10 General provision; waiver and exemptions; definitions.

(a) *Headwater benefits charges.* (1) The Commission will assess or approve

charges under this subpart for direct benefits derived from headwater projects constructed by the United States, a licensee, or a pre-1920 permittee. Charges under this subpart will amount to an equitable part of the annual costs of interest, maintenance, and depreciation expenses of such headwater projects and the costs to the Commission of determining headwater benefits charges. Except as provided in paragraph (b) of this section, the owner of any non-Federal downstream project that receives headwater benefits must pay charges determined under this subpart.

(2) 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.

(b) *Waiver and exemptions.* The owner of a downstream project with installed generating capacity of 1.5 MW (2000 horsepower) or less or for which the Commission has granted an exemption from section 10(f) is not required to pay headwater benefits charges.

(c) *Definitions.* For purposes of this subpart:

(1) *Energy gains* means the difference between the number of kilowatt-hours of energy produced at a downstream project with the headwater project and that which would be produced without the headwater project.

(2) *Generation* means gross generation of electricity at a hydroelectric project, including generation needed for station use or the equivalent for direct drive units, measured in kilowatt-hours. It does not include energy used for or derived from pumping in a pumped storage facility.

(3) *Headwater project costs* means the total costs of an upstream project constructed by the United States, a licensee, or pre-1920 permittee.

(4) *Separable cost* means the difference between the cost of a multiple-function headwater project with and without any particular function.

(5) *Remaining benefits* means the difference between the separable cost of a specific function in a multiple-function project and the lesser of:

(i) The benefits of that function in the project, as determined by the responsible Federal agency at the time the project or function was authorized; or

(ii) The cost of the most likely alternative single-function project providing the same benefits.

(6) *Joint-use cost* means the difference between the total project cost and the total separable costs. Joint-use costs are allocated among the project functions according to each function's percentage of the total remaining benefits.

(7) *Specific power cost* means that portion of the headwater project costs that is directly attributable to the function of power generation at the headwater project, including, but not limited to, the cost of the electric generators, turbines, penstocks, and substation.

(8) *Joint-use power cost* means the portion of the joint-use cost allocated to the power function of the project.

(9) *Section 10(f) costs* means the annual interest, depreciation, and maintenance expense portion of the joint-use power cost, including costs of non-power functions required by statute to be paid by revenues from the power function.

(10) *Party* means:

(i) The owner of a non-Federal downstream hydroelectric project which is directly benefited by a headwater project constructed by the United States, a licensee, or a pre-1920 permittee;

(ii) The owner of a headwater project constructed by the United States, a licensee, or a pre-1920 permittee;

(iii) An operating agency of, or an agency marketing power from, a headwater project constructed by the United States; or

(iv) Any party, as defined in § 385.102(c) of this chapter.

(11) *Final charge* means 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.

(12) *Interim charge* means a charge assessed to recover section 10(f) costs for

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a specified period of headwater benefits pending determination of a final charge for that period.

(13) *Investment cost* means the sum of:

(i) Project construction costs, including cost of land, labor and materials, cost of pre- and post-authorization investigations, and cost of engineering, supervision, and administration during construction of the project; and

(ii) Interest during construction.

[Order 453, 51 FR 24318, July 3, 1986, as amended by Order 699, 72 FR 45324, Aug. 14, 2007]

§ 11.11 Energy gains method of determining headwater benefits charges.

(a) *Applicability.* This section applies to any determination of headwater benefits charges, unless:

(1) The Commission has approved headwater benefits charges pursuant to an existing coordination agreement among the parties;

(2) The parties reach, and the Commission approves, a settlement with respect to headwater benefits charges, pursuant to § 11.14(a) of this subpart; or

(3) Charges may be assessed under § 11.14(b).

(b) *General rule—(1) Summary.* Except as provided in paragraph (b)(3) of this section, a headwater benefits charge for a downstream project is determined under this subpart by apportioning the section 10(f) costs of the headwater project among the headwater project and all downstream projects that are not exempt from or waived from headwater benefits charges under § 11.10(b) of this chapter, according to each project's share of the total energy benefits to those projects resulting from the headwater project.

(2) *Calculation; headwater benefits formula.* The annual headwater benefits charge for a downstream project is derived by multiplying the section 10(f) cost by the ratio of the energy gains received by the downstream project to the sum of total energy gains received by all downstream projects (except those projects specified in § 11.10(b) of this chapter) plus the energy generated at the headwater project that is assigned to the joint-use power cost, as follows:

$$P = C_p \times \frac{E_n}{E_j + E_d}$$

In which:

P = annual payment to be made for headwater benefits received by a downstream project,

C_p = annual section 10(f) cost of the headwater project,

E_n = annual energy gains received at a downstream project, or group of projects if owned by one entity,

E_d = annual energy gains received at all downstream projects (except those specified in § 11.10(b) of this chapter), and

E_j = portion of the annual energy generated at the headwater project assigned to the joint-use power cost.

(3) If power generation is not a function of the headwater project, section 10(f) costs will be apportioned only among the downstream projects.

(4) If the headwater project is constructed after the downstream project, liability for headwater benefits charges will accrue beginning on the day on which any energy losses at the downstream project due to filling the headwater reservoir have been offset by subsequent energy gains. If the headwater project is constructed prior to the downstream project, liability for headwater benefits charges will accrue beginning on the day on which benefits are first realized by the downstream project.

(5) No final charge assessed by the Commission under this subpart may exceed 85 percent of the value of the energy gains. If a party demonstrates, within the time specified in § 11.17(b)(3) for response to a preliminary assessment, that any final charge assessed under this subpart, not including the cost of the investigation assessed under § 11.17(c), exceeds 85 percent of the value of the energy gains provided to the downstream project for the period for which the charge is assessed, the Commission will reduce the charge to not more than 85 percent of the value. For purposes of this paragraph, the *value of the energy gains* is the cost of obtaining an equivalent amount of electricity from the most likely alternative source during the period for which the charge is assessed.

§ 11.12 Determination of section 10(f) costs.

(a) *for non-Federal headwater projects.* If the headwater project was constructed by a licensee or pre-1920 permittee and a party requests the Commission to determine charges, the Commission will determine on a case-by-case basis what portion of the annual interest, maintenance, and depreciation costs of the headwater project constitutes the section 10(f) costs, for purposes of this subpart.

(b) *For Federal headwater projects.* (1) If the headwater project was constructed or is operated by the United States, and the Commission has not approved a settlement between the downstream project owner and the headwater project owner, the section 10(f) cost will be determined by deriving, from information provided by the headwater project owner pursuant to § 11.16 of this subpart, the joint-use power cost and the portion of the annual joint-use power cost that represents the interest, maintenance, and depreciation costs of the project.

(2) If power is not an authorized function of the headwater project, the section 10(f) cost is the annual interest, maintenance, and depreciation portion of the headwater project costs designated as the joint-use power cost, derived by deeming a power function at the project. The value of the benefits assigned to the deemed power function, for purposes of determining the value of remaining benefits of the joint-use power cost, is the total value of downstream energy gains included in the headwater benefits formula.

(3) For purposes of this paragraph, *total value of downstream energy gains* means the lesser of:

(i) The cost of generating an equivalent amount of electricity at the most likely alternative facility at the time the headwater project became operational; or

(ii) The incremental cost of installing electrical generation at the headwater project at the time the project became operational.

§ 11.13 Energy gains calculations.

(a) *Energy gains at a downstream project.* (1) Energy gains at a downstream project are determined by sim-

ulating operation of the downstream project with and without the effects of the headwater project. 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, as presented in *The Headwater Benefits Energy Gains (HWBEG) Model Description and Users Manual*, which is available for the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

(2) If more than one headwater project provide energy gains to a downstream project, the energy gains at the downstream project are attributed to the headwater projects according to the time sequence of commencement of operation in which each headwater project provided energy gains at the downstream project, by:

(i) Crediting the headwater project that is first in time with the amount of energy gains that it provided to the downstream project prior to operation of the headwater project that is next in time; and

(ii) Crediting any subsequent headwater project with the additional increment of energy gains provided by it to the downstream project.

(3) Annual energy losses at a downstream project, or group of projects owned by the same entity, that are attributable to the headwater project will be subtracted from energy gains for the same annual period at the downstream project or group of projects. A net loss in one calendar year will be subtracted from net gains in subsequent years until no net loss remains.

(b) *Energy generated at the headwater project.* (1) Except as provided in paragraphs (b)(2) and (b)(3) of this section, the portion of the total annual energy generation at the headwater project that is to be attributed to the joint-use power cost is derived by multiplying the total annual generation at the headwater project and the ratio of the project investment cost assigned to the joint-use power cost to the sum of the investment cost assigned to both the specific power cost and the joint-use power cost of the headwater project, as follows:

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$$E_j = E \times \frac{C_j}{C_s + C_j}$$

In which:

E_j = annual energy generated at the headwater project to be attributed to the joint-use power cost,

E = total annual generation at the headwater project,

C_j = project investment costs assigned to the joint-use power cost, and

C_s = project investment costs assigned to specific power costs.

(2) If the headwater project contains a pumped storage facility, calculation of the portion of the total annual energy generation at the headwater project that is attributable to the joint-use power cost will be determined on a case-by-case basis.

(3) If no power is generated at the headwater project, the amount of energy attributable to the joint-use power cost under this section is the total of all downstream energy gains included in the headwater benefits formula.

§ 11.14 Procedures for establishing charges without an energy gains investigation.

(a) *Settlements.* (1) Owners of downstream and headwater projects subject to this subpart may negotiate a settlement for headwater benefits charges. Settlements must be filed with the Commission for its approval, according to the provisions of § 385.602.

(2) If the headwater project is a Federal project, any settlement under this section must result in headwater benefits payments that approximate those that would result under the energy gains method.

(b) *Continuation of previous headwater benefits determinations.* (1) For any downstream project being assessed headwater benefit charges on or before September 16, 1986, the Commission will continue to assess charges to that project on the same basis until changes occur in the river basin, including hydrology or project development, that affect headwater benefits.

(2) Any procedures that apply to § 11.17(b)(5) of this subpart will apply to any prospectively fixed charges that are continued under this paragraph.

§ 11.15 Procedures for determining charges by energy gains investigation.

(a) *Purpose of investigations; limitation.* Except as permitted under § 11.14, the Commission will conduct an investigation to obtain information for establishing headwater benefits charges under this subpart. The Commission will investigate and determine charges for a project downstream from a non-Federal headwater project only if the parties are unable to agree to a settlement and one of the parties requests the Commission to determine charges.

(b) *Notification.* The Commission will notify each downstream project owner and each headwater project owner when it initiates an investigation under this section, and the period of project operations to be studied will be specified. An investigation will continue until a final charge has been established for all years studied in the investigation.

(c) *Jurisdictional objections.* If any project owner wishes to object to the assessment of a headwater benefits charge on jurisdictional grounds, such objection must:

(1) Be raised within 30 days after the notice of the investigation is issued; and

(2) State in detail the grounds for its objection.

(d) *Investigations.* (1) For any downstream project for which a final charge pursuant to an investigation has never been established, the Commission will conduct an initial investigation to determine a final charge.

(2) The Commission may, for good cause shown by a party or on its own motion, initiate a new investigation of a river basin to determine whether, because of any change in the hydrology, project development, or other characteristics of the river basin that effects headwater benefits, it should:

(i) Establish a new final charge to replace a final charge previously established under § 11.17(b)(5); or

(ii) Revise any variable of the headwater benefits formula that has become a constant in calculating a final charge.

(3) *Scope of investigations.* (i) The Commission will establish a final charge pursuant to an investigation

based on information available to the Commission through the annual data submission requirements of § 11.16, if such information is adequate to establish a reasonably accurate final charge.

(ii) If the information available to the Commission is not sufficient to provide a reasonably accurate calculation of the final charge, the Commission will request additional data and conduct any studies, including studies of the hydrology of the river basin and project operations, that it determines necessary to establish the charge.

§ 11.16 Filing requirements.

(a) *Applicability.* (1) Any party subject to a headwater benefits determination under this subpart must supply project-specific data, in accordance with this section, by February 1 of each year for data from the preceding calendar year.

(2) Within 30 days of notice of initiation of an investigation under § 11.15, a party must supply project-specific data, in accordance with this section, for the years specified in the notice.

(b) *Data required from owner of the headwater project.* The owner of any headwater project constructed by the United States, a licensee, or a pre-1920 permittee that is upstream from a non-Federal hydroelectric project must submit the following:

(1) Name and location of the headwater project, including the name of the stream on which it is located.

(2) The total nameplate rating of installed generating capacity of the project, expressed in kilowatts, with the portion of total capacity that represents pumped storage generating capacity separately designated.

(3) A description of the total storage capacity of the reservoir and allocation of storage capacity to each of its functions, such as dead storage, power storage, irrigation storage, and flood control storage. Identification, by reservoir elevation, of the portion of the reservoir assigned to each of its respective storage functions.

(4) An elevation-capacity curve, or a tabulation of reservoir pool elevations with corresponding reservoir storage capacities.

(5) A copy of rule curves, coordination contracts, agreements, or other

relevant data governing the release of water from the reservoir, including a separate statement of their effective dates.

(6) A curve or tabulation showing actual reservoir pool elevations throughout the immediately preceding calendar year and for each year included in an investigation.

(7) The total annual gross generation of the hydroelectric plant in kilowatt-hours, not including energy from pumped storage operation.

(8) The total number of kilowatt-hours of energy produced from pumped storage operation.

(9) The investigation costs attributed to the power generation function of the project as of the close of the calendar year or at a specified date during the year, categorized according to that portion that is attributed to the specific power costs, and that portion that is attributed to the joint-use power costs.

(10) The portion of the joint-use power cost, and other costs required by law to be allocated to joint-use power cost, each item shown separately, that are attributable to the annual costs of interest, maintenance, and depreciation, identifying the annual interest rate and the method used to compute the depreciation charge, or the interest rate and period used to compute amortization if used in lieu of depreciation, including any differing interest rates used for major replacements or rehabilitation.

(c) *Data required from owners of downstream projects.* The owner of any hydroelectric project which is downstream from a headwater project constructed by the United States, a licensee, or pre-1920 permittee must submit the following:

(1) Name and location of the downstream project, including the name of the stream on which it is located.

(2) Total nameplate rating of the installed generating capacity of the plant, expressed in kilowatts, with the portion of total capacity that represents pumped storage generating capacity separately designated.

(3) Record of daily gross generation, not including energy used for pumped storage, and any unit outage which may have occurred.

(4) The total number of kilowatt-hours of energy produced from pumped storage operation.

(d) *Abbreviated data submissions.* (1) For those items in paragraphs (b) and (c) of this section in which data for the current period are the same as data furnished for a prior period, the data need not be resubmitted if the owner identifies the last period for which the data were reported.

(2) The Commission will notify the project owner that certain data items in paragraphs (b) and (c) are no longer required to be submitted annually if:

(i) A variable in the headwater benefits formula has become a constant; or

(ii) A prospective final charge, as described in § 11.17(b)(5), has been established.

(e) *Additional data.* Owners of headwater projects or downstream projects must furnish any additional data required by the Commission staff under paragraph (a) of this section and may provide other data which they consider relevant.

§ 11.17 Procedures for payment of charges and costs.

(a) *Payment for benefits from a non-Federal headwater project.* Any billing procedures and payments determined between a non-Federal headwater project owner and a downstream project owner will occur according to the agreement of those parties.

(b) *Charges and payment for benefits from a Federal headwater project—(1) Interim charges.* (i) If the Commission has not established a final charge and an investigation is pending, the Commission will issue a downstream project owner a bill for the interim charge and costs and a staff report explaining the calculation of the interim charge.

(ii) An interim charge will be a percentage of the estimate by the Commission staff of what the final charge will be, as follows:

(A) 100 percent of the estimated final charge if the Commission previously has completed an investigation of the project for which it is assessed; or

(B) 80 percent of the estimated final charge if the Commission has not completed an investigation of the project for which it is assessed.

(iii) When 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.

(2) *Preliminary assessment of a final charge.* Unless the project owner was assessed a final charge in the previous year, the Commission will issue to the downstream project owner a preliminary assessment of any final charge when it is determined. A staff technical report explaining the basis of the assessment will be enclosed with the preliminary assessment. Copies of the preliminary assessment will be mailed to all parties.

(3) *Opportunity to respond.* After issuance of a preliminary assessment of a final charge, parties may respond in writing within 60 days after the preliminary assessment.

(4) *Order and bill.* (i) After the opportunity for written response by the parties to the preliminary assessment of a final charge, the Commission will issue to the downstream project owner an order establishing the final charge. Copies of the order will be mailed to all parties. A bill will be issued for the amount of the final charge and costs.

(ii) If a final charge is not established prospectively under paragraph (b)(5) of this section, the Commission will issue an order and a bill for the final charge and costs each year until prospective final charges are established. After the Commission issues an order establishing a prospective final charge, a bill will be issued annually for the amount of the final charge and costs.

(5) *Prospective final charges.* When the Commission determines that historical data, including the hydrology, development, and other characteristics of the river basin, demonstrate sufficient stability to project average energy gains and section 10(f) costs, the Commission will issue to the downstream project owner an order establishing the final charge from future years. Copies of the order will be mailed to all parties. The prospective final charge will remain in effect until a new investigation is initiated under § 11.15(d)(2).

(6) *Payment under protest.* Any payment of a final charge required by this section may be made under protest if a party is also appealing the final charge

pursuant to §385.1902, or requesting rehearing. If payment is made under protest, that party will avoid any penalty for failure to pay under §11.21.

(7) *Accounting for payments pending appeal or rehearing.* The Commission will retain any payment received for final charges from bills issued pursuant to this section in a special account. No disbursements to the U.S. Treasury will be made from the account until 31 days after the bill is issued. If an appeal under §385.1902 or a request for rehearing is filed by any party, no disbursements to the U.S. Treasury will be made until final disposition of the appeal or request for rehearing.

(c) *Charges for costs of determinations of headwater benefits charges.* (1) Any owner of a downstream project that benefits from a Federal headwater project must pay to the United States the cost of making any investigation, study, or determination relating to the assessment of the relevant headwater benefits charge under this subpart.

(2) If any owner of a headwater or downstream project requests that the Commission determine headwater benefits charges for benefits provided by non-Federal headwater projects, the headwater project owners must pay a pro rata share of 50 percent of the cost of making the investigation and determination, in proportion to the benefits provided by their projects, and the downstream project owners must pay a pro rata share of the remaining 50 percent in proportion to the energy gains received by their projects.

(3) Any charge assessed under this paragraph is separate from and will be added to, any final or interim charge under this subpart.

Subpart C—General Procedures

§ 11.20 Time for payment.

Annual charges must be paid no later than 45 days after rendition of a bill by the Commission. If the licensee or exemptee believes that the bill is incorrect, no later than 45 days after its rendition the licensee or exemptee may file an appeal of the bill with the Chief Financial Officer. No later than 30 days after the date of issuance of the Chief Financial Officer's decision on the appeal, the licensee or exemptee may file

a request for rehearing of that decision pursuant to §385.713 of this chapter. In the event that a timely appeal to the Chief Financial Officer or a timely request to the Commission for rehearing is filed, the payment of the bill may be made under protest, and subject to refund pending the outcome of the appeal or rehearing.

[60 FR 15048, Mar. 22, 1995]

§ 11.21 Penalties.

If any person fails to pay annual charges within the periods specified in §11.20, a penalty of 5 percent of the total delinquent amount will be assessed and added to the total charges for the first month or part of month in which payment is delinquent. An additional penalty of 3 percent for each full month thereafter will be assessed until the charges and penalties are satisfied in accordance with law. The Commission may, by order, waive any penalty imposed by this subsection, for good cause shown.

[51 FR 24318, July 3, 1986]

APPENDIX A TO PART 11—FEE SCHEDULE FOR FY 2016

| State | County | Fee/acre/yr |
|----------|-----------|-------------|
| Alabama | Autauga | \$60.42 |
| | Baldwin | 105.25 |
| | Barbour | 59.80 |
| | Bibb | 55.47 |
| | Blount | 96.06 |
| | Bullock | 57.58 |
| | Butler | 64.23 |
| | Calhoun | 80.55 |
| | Chambers | 68.82 |
| | Cherokee | 90.41 |
| | Chilton | 77.55 |
| | Choctaw | 49.52 |
| | Clarke | 54.08 |
| | Clay | 65.42 |
| | Cleburne | 72.59 |
| | Coffee | 69.71 |
| | Colbert | 74.57 |
| | Conecuh | 52.66 |
| | Coosa | 54.81 |
| | Covington | 59.63 |
| | Crenshaw | 53.65 |
| | Cullman | 110.44 |
| | Dale | 66.37 |
| | Dallas | 48.52 |
| | DeKalb | 100.22 |
| | Elmore | 83.96 |
| | Escambia | 60.06 |
| Etowah | 94.11 | |
| Fayette | 56.16 | |
| Franklin | 55.63 | |
| Geneva | 57.15 | |
| Greene | 53.68 | |

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(2) If any excluded evidence is in the form of an exhibit or is a public document, a copy of such exhibit will constitute the offer of proof or the public document will be specified for identification.

Subpart F—Conferences, Settlements, and Stipulations

§ 385.601 Conferences (Rule 601).

(a) *Convening.* The Commission or other decisional authority, upon motion or otherwise, may convene a conference of the participants in a proceeding at any time for any purpose related to the conduct or disposition of the proceeding, including submission and consideration of offers of settlement or the use of alternative dispute resolution procedures.

(b) *General requirements.* (1) The participants in a proceeding must be given due notice of the time and place of a conference under paragraph (a) of this section and of the matters to be addressed at the conference. Participants attending the conference must be prepared to discuss the matters to be addressed at the conference, unless there is good cause for a failure to be prepared.

(2) Any person appearing at the conference in a representative capacity must be authorized to act on behalf of that person's principal with respect to matters to be addressed at the conference.

(3) If any party fails to attend the conference such failure will constitute a waiver of all objections to any order or ruling arising out of, or any agreement reached at, the conference.

(c) *Powers of decisional authority at conference.* (1) The decisional authority, before which the conference is held or to which the conference reports, may dispose, during a conference, of any procedural matter on which the decisional authority is authorized to rule and which may appropriately and usefully be disposed of at that time.

(2) If, in a proceeding set for hearing under subpart E, the presiding officer determines that the proceeding would be substantially expedited by distribution of proposed exhibits, including written prepared testimony and other documents, reasonably in advance of

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the hearing session, the presiding officer may, with due regard for the convenience of the participants, direct advance distribution of the exhibits by a prescribed date. The presiding officer may also direct the preparation and distribution of any briefs and other documents which the presiding officer determines will substantially expedite the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.602 Submission of settlement offers (Rule 602).

(a) *Applicability.* This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under subpart E. For purposes of this section, the term “offer of settlement” includes any written proposal to modify an offer of settlement.

(b) *Submission of offer.* (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transmit the offer to:

(i) The presiding officer, if the offer is filed after a hearing has been ordered under subpart E of this part and before the presiding officer certifies the record to the Commission; or

(ii) The Commission.

(3) If an offer of settlement pertains to multiple proceedings that are in part pending before the Commission and in part set for hearing, any participant may by motion request the Commission to consolidate the multiple proceedings and to provide any other appropriate procedural relief for purposes of disposition of the settlement.

(c) *Contents of offer.* (1) An offer of settlement must include:

(i) The settlement offer;

(ii) A separate explanatory statement;

(iii) Copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(2) If an offer of settlement pertains to a tariff or rate filing, the offer must include any proposed change in a form

suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type at issue in the proceeding.

(d) *Service.* (1) A participant offering settlement under this section must serve a copy of the offer of settlement:

(i) On every participant in accordance with Rule 2010;

(ii) On any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d)(1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) *Use of non-approved offers of settlement as evidence.* (1) An offer of settlement that is not approved by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.

(f) *Comments.* (1) A comment on an offer of settlement must be filed with the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(4) Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the

offer of settlement, or items not included in the settlement, that are relevant to support the claim. Reply comments may include responding affidavits.

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1)(i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contesting parties or contested issues can not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contesting parties or contested issues are severable, the contesting parties or uncontested portions may be severed. The uncontested portions will be decided in accordance with paragraph (g) of this section.

(2)(i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested,

whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h)(2)(ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the offer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710, or, if all parties do not concur in the motion, the presiding officer determines that omission of the initial decision is appropriate under Rule 710(d), and

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.

(iv) If any contesting parties or contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

(i) *Reservation of rights.* Any procedural right that a participant has in the absence of an offer of settlement is not affected by Commission disapproval, or approval subject to condition, of the uncontested portion of the offer of settlement.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 541, 57 FR 21734, May 22, 1992; Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.603 Settlement of negotiations before a settlement judge (Rule 603).

(a) *Applicability.* This section applies to any proceeding set for hearing under subpart E of this part and to any other proceeding in which the Commission

has ordered the appointment of a settlement judge.

(b) *Definition.* For purposes of this section, *settlement judge* means the administrative law judge appointed by the Chief Administrative Law Judge to conduct settlement negotiations under this section.

(c) *Requests for appointment of settlement judges.* (1) Any participant may file a motion requesting the appointment of a settlement judge with the presiding officer, or, if there is no presiding officer for the proceeding, with the Commission.

(2) A presiding officer may request the Chief Administrative Law Judge to appoint a settlement judge.

(3) A motion under paragraph (c)(1) of this section may be acted upon at any time, and the time limitations on answers in Rule 213(d) do not apply.

(4) Any answer or objection filed after a motion has been acted upon will not be considered.

(d) *Commission order directing appointment of settlement judge.* The Commission may, on motion or otherwise, order the Chief Administrative Law Judge to appoint a settlement judge.

(e) *Appointment of settlement judge by Chief Administrative Law Judge.* The Chief Administrative Law Judge may appoint a settlement judge for any proceeding, if requested by the presiding officer under paragraph (c) (2) of this section or if the presiding officer concurs in a motion made under paragraph (c)(1) of this section.

(f) *Order appointing settlement judge.* The Chief Administrative Law Judge will appoint a settlement judge by an order, which specifies whether, and to what extent, the proceeding is suspended pending termination of settlement negotiations conducted in accordance with this section. The order may confine the scope of any settlement negotiations to specified issues.

(g) *Powers and duties of settlement judge.* (1) A settlement judge will convene and preside over conferences and settlement negotiations between the participants and assess the practicalities of a potential settlement.

(2)(i) A settlement judge will report to the Chief Administrative Law Judge

***Erie Boulevard Hydropower, et al. v. FERC* Docket No. HB81-09-2-002
D.C. Cir. Nos. 16-1015 and 16-1020**

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 27th day of September 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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