

132 FERC ¶ 61,049
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

FPL Energy Maine Hydro LLC v. Great Lakes Hydro America, LLC and Rumford Falls Hydro LLC Docket No. EL10-53-000

ORDER ON COMPLAINT

(Issued July 15, 2010)

1. On March 26, 2010, FPL Energy Maine Hydro LLC (FPL Energy), licensee of a storage project on the Androscoggin River, filed a complaint against Great Lakes Hydro America, LLC (Great Lakes) and Rumford Falls Hydro LLC (Rumford) (collectively, respondents), licensees of projects located downstream from its storage project. The complaint alleges that Great Lakes and Rumford Falls violated Article 11 of their licenses by improperly obstructing FPL Energy's efforts to allocate and recover project dam remediation costs in accordance with an agreement signed by the licensees' predecessors and approved by the Commission. Notice of the complaint was issued, and various filings were received in response, as discussed below in this order. For the reasons discussed below, we are denying the complaint.

Background

2. FPL Energy is the licensee of the Upper and Middle Dams Storage Project No. 11834, on the headwaters of the Androscoggin River in Maine. The storage dams had been owned by Union Water Power Company (Union), a subsidiary of Central Maine Power Company, and in 1994 the Commission found that they were required to be licensed.¹ FPL Energy acquired the dams in 1999, and the Commission issued it a license for the two dams as a single project in 2002.²

¹ *Union Water Power Company*, 68 FERC ¶ 61,180 (1994).

² *FPL Energy Maine Hydro LLC*, 101 FERC ¶ 62,179 (2002).

3. The Upper and Middle Dams are part of a series of water storage dams in western Maine and parts of eastern New Hampshire known as the Androscoggin River Storage System, which, since 1878, has regulated flows in the Androscoggin River for power and manufacturing purposes through raising and storing the waters of Rangeley, Mooselookmeguntic, and Richardson Lakes.³ The other storage projects are the Errol Project, jointly licensed to FPL Energy and Errol Hydroelectric Company (Errol), an affiliate of Brookfield Renewable Power (Brookfield), and the Aziscohos Project, licensed to the Androscoggin Reservoir Company (ARCO), stock in which is held by several licensees on the river, including FPL Energy and Rumford. The Errol and Aziscohos Projects generate electricity as well as provide storage, while the Upper and Middle Dam Project only provides storage.⁴

4. There are numerous downstream generational projects on the river in New Hampshire and Maine, some of which are also owned by FPL Energy. The other downstream projects are licensed to Pontook Operating Limited Partnership (Pontook) and the respondents, all affiliates of Brookfield, and to Public Service Company of New Hampshire (Public Service), Verso Corporation (Verso), Topsham Hydro Partners Limited Partnership (Topsham), and Miller Hydro Group (Miller).

5. In 1909, Union Water Power and other project owners on the river entered into an agreement (the 1909 agreement) that established the regime for flow releases from the storage projects in return for the downstream parties' consent to share the costs of Union Water Power's dams, based substantially on each party's developed head at its downstream developments. In 1983, a new agreement (the 1983 agreement) was negotiated by ARCO, Union, International Paper Company (International Paper), Rumford Falls Power Company (Rumford Power), James River Corporation (James River), and Public Service to govern ongoing obligations of the storage dam owners and the downstream generating entities then on the river. FPL Energy states that this agreement represented a settlement the primary purpose of which was to carry on cost-sharing concepts originally established by the 1909 agreement. However, another purpose of the 1983 agreement was to allocate headwater storage costs to those power generators that benefit from the dams such that each of the beneficiaries could demonstrate compliance with section 10(f) of the Federal Power Act (FPA).⁵

³ The other storage dams are Rangeley, Errol, and Aziscohos.

⁴ At the Errol Project, Errol owns the generating station while FPL Energy owns the storage facilities.

⁵ 16 U.S.C. § 803(f) (2006).

6. Section 10(f) provides that, whenever a licensee is directly benefited by the construction work of another licensee, a permittee, or the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee reimburse the owner of such reservoir or other improvement for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The benefits received are in the form of increased energy production as a result of the regulation of river flows by the headwater projects. Standard license Article 11 implements section 10(f), virtually adopting its language, by requiring a licensee to reimburse upstream headwater improvement owners as section 10(f) provides. Section 11.15(a) of the Commission's regulations⁶ provides that the Commission will conduct an investigation to obtain information for establishing headwater benefits charges. However, section 11.14(a)(1) of the regulations⁷ allows owners of downstream and headwater projects to negotiate a settlement for headwater benefits charges and to file it for Commission approval in accordance with Rule 602 of the Commission's Rules of Practice and Procedure⁸ in lieu of an investigation conducted by the Commission.

7. The 1983 agreement was filed with the Commission in 1984 and approved by staff in 1992.⁹ As explained by FPL Energy, the 1983 agreement established a budget approval process that provides for the assessment of costs of all direct and indirect expenses arising out of the ownership, operation, and maintenance of the upstream storage projects. FPL Energy states that, according to the terms of the agreement and consistent with historic practice, all costs subject to the budget approval process are included as part of the annual budget and assessed on a quarterly basis in advance of the expenditures.

8. Section 3 of the 1983 agreement provides for an Engineering Committee having five members, with one member selected by and representing Union, International Paper, Rumford Power, James River, and Public Service. The committee is charged with requesting modification of water releases, approving the budget of operating and maintenance expenses for ARCO and Union, and approving for payment any operation and maintenance expenses not specifically provided for under the agreement. Any

⁶ 18 C.F.R. § 11.15(a) (2010).

⁷ 18 C.F.R. § 11.14(a)(1) (2010).

⁸ 18 C.F.R. § 385.602 (2010). This rule governs the submission of settlement offers generally.

⁹ *Androscoggin Reservoir Company et al.*, 59 FERC ¶ 62,372 (1992).

decision of the committee with respect to those duties must be made by an affirmative vote of at least four of the five members.

9. Section 4 of the agreement covers operation and maintenance expenses and the destruction of upstream storages. It proclaims the intent of the parties to be that the “Benefited Proprietors,” those entities that receive headwater benefits, shall bear the full cost to Union and ARCO of operating and maintaining the upstream storage facilities. Accordingly, under section 4, the Benefited Proprietors are to pay their “allocated share” of all operation and maintenance expenses incurred by Union and ARCO arising out of the ownership and operation of the upstream storages. “Operation and maintenance expenses” are defined as “all direct and indirect expenses arising out of the ownership, operation and maintenance” of the upstream storage facilities, while maintenance is to include “all ordinary repairs and all ordinary renewals to the present dams, works and other structures of Union or ARCO, connected with said storage upon the headwaters of the Androscoggin River.” If all or any part of an upstream storage dam or reservoir is “destroyed, damaged, or condemned,” Union or ARCO may elect to “complete, repair, restore, or reconstruct” the facility, and, upon approval of all members of the Engineering Committee, “each Benefited Proprietor shall contribute and pay its allocated share of the cost thereof.”

10. Under section 5 of the agreement, operation and maintenance expenses are to be allocated to Benefited Proprietors based on “allocated shares” that are to be determined once each year based on the number of Benefited Proprietors and their beneficial drainage areas and developed heads. Each Benefited Proprietor must make available to Union or ARCO, as appropriate, “such funds as the representative of Union may reasonably request in order to provide necessary funds for inventories of materials and supplies and working capital for the operation and maintenance” of the upstream storage facilities, to keep Union or ARCO from having to use its own funds to cover the Benefited Proprietors’ allocated shares of such payments.

11. Section 8.b of the agreement provides that the agreement is to be governed by the law of the State of Maine.

12. Since the agreement was executed, there have been various changes in project ownership. FPL Energy explains that the present Engineering Committee members are it (succeeding to the membership of Union), Verso (International Paper), Rumford (Rumford Power), Great Lakes (James River), and Public Service (the only remaining original signatory to the agreement). FPL Energy also states that it is allocated 19.8 percent of the costs as a Benefited Proprietor, by virtue of its ownership of licensed downstream generational projects, while the Brookfield affiliates collectively are allocated 49.7 percent of the costs. Public Service, Verso, ARCO, Topsham, and Miller are allocated the remaining 11.1, 10.4, 3.4, 2.4, and 3.2 percent of the costs, respectively.

The Complaint

13. FPL Energy explains that, after more than a decade of testing and analysis, the owners of the Upper and Middle Dams (Union, then FPL Energy), in consultation with the Commission's New York Regional Engineer, determined that certain Commission dam safety requirements could not be met in a cost-effective manner without a substantial remediation of the spillway portions of the dams. As a result, FPL Energy developed a remediation project to bring the dams into compliance with the Commission's Part 12 safety regulations in a cost-effective manner for the life of the project's license. This effort led to what FPL Energy refers to as the "Renewal Project."

14. FPL Energy states that its conceptual plans were approved by Commission staff on October 10, 2007, for Middle Dam and on March 10, 2008, for Upper Dam. However, concerns on the part of FPL Energy's outside engineering firm about the feasibility of the remediation approach caused FPL Energy to set out a new plan for Part 12 compliance at a meeting of the Engineering Committee. FPL Energy states that the committee agreed with its approach, which ultimately resulted in the Renewal Project, and a final vote on funding approval of the project was scheduled for September 8, 2009.

15. On September 1, 2009, Brookfield issued a letter appointing a representative of Rumford as a member of the Engineering Committee, on the basis that Rumford, in 2006, had been transferred the generating facilities owned by Rumford Power. As a result, Brookfield now claimed two votes on the committee, through Great Falls and Rumford, and, at the September 8, 2009 meeting, those two members voted against funding the Renewal Project, while FPL Energy, Public Service, and Verso voted to approve it. Since then, FPL Energy asserts, the Brookfield entities have continued to resist any of its efforts to fund the Renewal Project.

16. FPL Energy submitted conceptual drawings and a hydraulic design for a new spillway and an overall remediation schedule for Upper Dam to the Regional Engineer, together with proposed milestones for completion of the separate construction schedules for both the Upper and Middle Dam aspects of the Renewal Project. Under the proposed schedule, contractor notification was scheduled for April 15, 2010, and construction on the Upper Dam portions of the Renewal Project was scheduled to begin in July 2010.¹⁰ However, as a result of the respondents' actions, FPL Energy claims, it will soon be

¹⁰ FPL Energy states that a responsive letter from the New York Regional Engineer approving the construction designs and directing commencement of construction of the Upper Dam portion of the renewal project is expected to be imminent. Such a letter was filed with the Commission on June 10, 2010.

forced to incur construction expenses without adequate assurance that they can and will be recovered pursuant to the 1983 agreement.

17. FPL Energy asserts that Great Lakes and Rumford, as holders of two putative votes on the Engineering Committee,¹¹ are engaging in an improper pattern of obstruction that is preventing FPL Energy from allocating and recovering any of the costs associated with the Renewal Project to and from any of the Benefited Proprietors. It contends that the payment obligations that resulted from approval of the 1983 agreement have been incorporated into the licenses of the parties to the agreement, including Great Falls and Rumford, and that both the amount and the method of making payments have become binding license conditions under standard Article 11. Therefore, by refusing to make these payments, and by improperly obstructing FPL Energy's efforts to have the payments approved pursuant to the agreement, the respondents are violating Article 11 of their licenses and the 1992 approval order.¹²

18. FPL Energy states that, following more than a decade of study and analysis, it has demonstrated that the Renewal Project is the most cost-effective proposal for complying with the Commission's Part 12 safety requirements and ensuring safe and efficient operation of the dams. Therefore, funding should not be subject to rejection by the Engineering Committee, as such rejection would interfere with the Commission's statutory need to ensure equitable reimbursement for headwater benefits projects. FPL Energy urges us to find that the standard for approval or disapproval of headwater benefits charges under Commission-approved settlement agreements like the 1983 agreement is the reasonableness of the storage dam owner's budgetary proposal, and if the expenses fall within the scope of the agreement and the request for payment is

¹¹ FPL Energy states (complaint, at n.34) that, to the best of its knowledge, this is the first time that a single corporate entity has claimed to have two votes on the Engineering Committee. FPL Energy believes that this result violates the intent of the agreement and that the Rumford transfer is void under Maine law because it materially alters the benefits of the bargain of the original contracting parties. Without addressing that contention, we note that transfers of licenses are a matter within the Commission's exclusive jurisdiction.

¹² FPL Energy also argues (complaint at 23) that the 1983 agreement, particularly the payments provided thereunder and the allocation methodology of the agreement, constitutes a filed rate, which was put in place by the 1992 approval order and is subject to the filed rate doctrine. Therefore, it asserts, that rate remains in place and must be enforced unless and until it is changed. This argument mischaracterizes the nature of headwater benefits assessments, which are not rates. Part I of the FPA, which includes section 10(f), does not encompass rate regulation.

reasonable, the duty to approve such expenses must be met. In particular, upon authorization by the New York Regional Engineer to begin construction of the Renewal Project, the associated costs would, by definition, be reasonable and should not be subject to rejection by the Engineering Committee.

19. FPL Energy emphasizes that the 1992 approval order approved the recovery of all expenses directly and indirectly related to the ownership, operation, and maintenance of Upper and Middle Dams and required the downstream beneficiaries to make up-front payments of their allocated shares pursuant to the terms of the agreement. It argues that the intent of the 1983 agreement was clearly to allow FPL Energy to pass on to the Benefited Proprietors the cost of the rebuilding those dams, particularly as that agreement, unlike the previous 1909 agreement, did not specifically provide that “maintenance” was to exclude the rebuilding of the dams. FPL Energy notes¹³ that Appendix A to the 1983 agreement lists, as representative direct and indirect expenses to be covered: administrative expenses; engineering expenses including dam safety inspections; legal expenses; operating expenses; purchasing expenses; repair and maintenance expenses; regulatory expenses, including the cost of obtaining and retaining required permits and licenses; and debt service, including interest and principal for major capital expenditures. FPL Energy claims that portions of the costs associated with the Renewal Project are covered by several of these categories.

20. Accordingly, FPL Energy asks us to find: that it has the right to allocate and recover the costs of the Renewal Project to and from the Benefited Proprietors pursuant to the 1983 agreement and the order approving it; that the 1983 agreement and the payments received under it are statutory conditions of the respondents’ and the other Benefited Proprietors’ licenses by virtue of standard Article 11, section 10(f), and the 1992 approval order; that section 10(f) and standard Article 11 require the respondents and all other Benefited Proprietors to reimburse FPL Energy for all costs associated with the Renewal Project in accordance with the cost allocation and payment methodology established in the 1983 agreement and the 1992 approval order; and that the cost estimates for the Renewal Project are reasonable and that FPL Energy’s requests for funding approval should not be subject to rejection by the Engineering Committee. FPL Energy asks us to order the respondents to pay all costs associated with the Renewal Project in accordance with the cost allocation and payment methodology under the 1983 agreement.

¹³ Complaint at 33.

Responses to the Complaint

21. Notice of the complaint was issued on March 29, 2010, establishing April 15, 2010, as the date for filing comments. A subsequent notice issued April 12, 2010, extended that date to May 14, 2010. Timely motions to intervene were filed by respondents (jointly), Topsham, Miller, Public Service, and Verso.¹⁴ An answer to the complaint was filed jointly by respondents, and comments were filed by Miller and Topsham (jointly) and by Public Service.

22. On June 1, 2010, Verso filed an answer to the answer of respondents.¹⁵ On June 1, 2010, FPL Energy filed a response to the answers and comments of respondents, Public Service, and Miller and Topsham. On June 11, 2010, respondents filed an answer in response to the answers of FPL Energy and Verso. All of these answers or responses were accompanied by motions for leave to file them. The motions all acknowledge that Commission rules do not permit the filing of answers to answers unless specifically ordered¹⁶ but urge that the filings be accepted in the interest of aiding the decision-making process and clarifying issues. Because these answers clarify the record, we will permit their filing.

23. Respondents acknowledge that FPL Energy is authorized under the 1983 agreement to recover costs associated with ordinary maintenance of the dams. However, they argue that the comprehensive reconstruction of Upper and Middle Dams that FPL Energy is proposing is not ordinary maintenance. They point out that, while the operation and maintenance budget for these dams in any given year typically does not exceed \$2 million, the project developed by FPL Energy has grown from one that would have cost about \$7 million into full-scale reconstruction that would cost about \$35 million. Although they had voiced their concerns about this cost early in the process, respondents claim that FPL Energy proceeded with developing the proposal in disregard of those concerns. Respondents emphasize that the agreement defines maintenance as

¹⁴ More accurately, separate motions to intervene were filed by Verso Androscoggin LLC and Verso Paper LLC. These entities identify themselves as indirect subsidiaries of Verso Paper Corporation and specify Verso Androscoggin as the licensee of the downstream projects pertinent to this complaint. The complaint itself refers only to “Verso Corporation” as a relevant project owner. For purposes of clarity in this order, we will refer to these entities collectively as Verso.

¹⁵ This motion was filed jointly by Verso Androscoggin LLC and Verso Paper LLC.

¹⁶ Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2) (2010).

“all ordinary repairs and all ordinary renewals to the present dams,” and that “ordinary,” in its common usage, would not encompass a large one-of-a-kind project of the scope proposed here. They argue that the scope of the proposed project extends well beyond what would be necessary to satisfy the Commission’s safety concerns and would entail such a cost that the dams might no longer benefit the Benefited Proprietors and arguably ought to be removed.

24. Respondents argue that, under FPL Energy’s interpretation of the 1983 agreement, FPL Energy would be able to decide unilaterally to undertake any project and then foist the resulting costs on the Benefited Proprietors. They assert that this was not the intent of the agreement, which provides for approval by four of five members of the Engineering Committee for maintenance expenses and by all five members for costs to “complete, repair, restore or reconstruct” the dams. Moreover, the Engineering Committee has never automatically approved the budgets that FPL Energy proposes. In this instance, because two members of the committee voted against the proposed reconstruction expenditure, it could not be approved under the agreement regardless of whether it would be categorized as an ordinary maintenance expense or as reconstruction. Respondents argue that their vote against approval of the expenditure was not a violation of their licenses generally or of standard Article 11 specifically, since the 1983 agreement was a negotiated agreement approved by the Commission for establishing the procedures for determining headwater benefits payments. Contrary to the suggestion of FPL Energy, they assert, there is nothing in the agreement that could be construed as a prohibition on a single corporate family holding more than one seat on the Engineering Committee through its affiliates or that would limit such a corporate family to a single vote.

25. Respondents argue that the language of the 1983 agreement is clear as to the number of Engineering Committee members that must approve ordinary maintenance expenses and repair and reconstruction expenses, and that the complaint should be dismissed since the requisite votes were not obtained to approve the proposed expense no matter how it is characterized. However, in the event that we were to find the agreement’s language ambiguous, respondents urge that we set the matter for hearing to develop an adequate record and resolve any outstanding issues of material fact. They request further that we hold that hearing in abeyance while the parties attempt to resolve the dispute in settlement proceedings before an administrative law judge serving in the role of mediator.

26. Public Service is owner and licensee of two downstream projects and a joint owner of ARCO, licensee of the Azischohos headwater project. Public Service points out that section 10(f) provides for the reimbursement by downstream licensees only for annual charges for interest, maintenance, and depreciation, not for major restoration and reconstruction, and not for payment of the up-front costs of the improvement itself. It notes that the Commission, in the rulemaking proceeding for establishing headwater benefits matters, declined to define “maintenance” for purposes of its regulations,

observing that the terms were so commonly used that definitions were unnecessary.¹⁷ From this, Public Service concludes that “maintenance,” in common usage, could not refer to the kind of reconstruction proposed by FPL Energy but only to ordinary repairs and ordinary renewals, as reflected in the 1983 agreement. Instead, Public Service states, restoration and reconstruction of dams are covered by section 4(d) of the agreement and subject to unanimous approval of the Engineering Committee members. Public Service adds that requiring the Benefited Proprietors to fund major expenditures up front would have unfair and unintended consequences, in that they would have to fund the payments out of cash flow or expensive financing vehicles and that they would be providing up-front payments in excess of 85 percent of actual benefits received, the limitation imposed by the Commission’s regulations.¹⁸

27. Miller and Topsham are each an owner and licensee of one downstream project and became parties to the 1983 agreement after it was executed. As Benefited Proprietors but not members of the Engineering Committee, they support the respondents’ position in response to the complaint. They also argue that FPL Energy breached a fiduciary duty under the agreement by not keeping them informed of the status of the proposal on an ongoing basis and did not provide them with a detailed justification for the work proposed and the costs projected.

28. Verso objects both to FPL Energy’s position that the Engineering Committee members are obligated to approve its Renewal Project proposal and to respondents’ position that allowing Brookfield entities two seats on the Engineering Committee, and thus virtual veto power, is consistent with the intent of the agreement. It argues that the need to bring this dispute to the Commission resulted from the inability of the Engineering Committee to function as intended, and it urges that any Commission order on the merits or further process to resolve the dispute ensure that the Engineering Committee be able to function properly in the future. In support of this request, it asserts that the staff-approved agreement fulfilled the requirement of section 10(f) that headwater benefits charges be equitable, and that the present dysfunction of the Engineering Committee jeopardizes the equity of the reimbursement process. Verso envisions that the Commission could either provide for the parties to discuss the composition and decision-making process of the Engineering Committee in a settlement proceeding or determine, on the merits, that the assignment of Rumford Falls’ seat on the committee to Brookfield was null and void.

¹⁷ *Payments for Benefits from Headwater Improvements*, Order No. 453, FERC Stats. and Regs., Regulations Preambles 1986-1990 ¶ 30,703, at n.21 (1986).

¹⁸ The Commission’s regulations, 18 C.F.R. § 11.11(b)(5) (2010), provide that no final charge assessed by the Commission may exceed 85 percent of the energy gains.

29. In its answer to the answers or comments of respondents, Public Service, and Miller and Topsham, FPL Energy contends, among other things, that, contrary to the argument of respondents, the agreement defines “operation and maintenance” very broadly, that the unanimous approval provision of section 4(d) of the agreement is not applicable because the dams are not “destroyed, damaged or condemned,” and that it kept Topsham and Miller informed of the status of the Renewal Project.

30. In their answer to FPL Energy’s and Verso’s responses, respondents argue that, pursuant to staff’s order, the entire agreement became the basis for allocating costs, including the discretion given to the Engineering Committee. They contend that the proposed project cannot be considered ordinary maintenance because it would substantially extend the life expectancy of the dams, and that the need for substantial reconstruction of the dams demonstrates that the dams have been damaged as contemplated by section 4(d) of the agreement, thus triggering the need for unanimous Engineering Committee approval.

Discussion

31. Although parties may file a headwater benefits settlement for Commission approval as an alternative to having assessments determined through a headwater benefits investigation, this option is not required by statute but rather is provided by the Commission’s regulations, promulgated pursuant to a 1986 rulemaking proceeding, Order No. 453.¹⁹ The scope of the Commission’s headwater benefits authority is determined by the language of section 10(f), and neither the Commission’s regulations nor a settlement approved pursuant to them can expand it.

32. Section 10(f) provides that the Commission shall require project owners receiving headwater benefits to “reimburse” the owner of an upstream headwater project “for such part of the annual charges for interest, maintenance, and depreciation” of the construction work of the headwater improvement “as the Commission may deem equitable.” In Order No. 453, we stated that the charges owed do not include operational costs.²⁰ This

¹⁹ *Payments for Benefits from Headwater Improvements*, Order No. 453, FERC Stats. and Regs., Regulations Preambles 1986-1990 ¶ 30,703 (1986); *reh’g denied*, Order No. 453-A, 37 FERC ¶ 61,205 (1986).

²⁰ “Downstream power beneficiaries pay only that portion of the interest, maintenance, and depreciation costs of the headwater project that are allocated to power, and no part of the operation costs.” *Payments for Benefits for Headwater Improvements*, Order No. 453-A, FERC Stats. and Regs., Regulations Preambles 1986-1990, ¶ 30,703 at 30,310.

determination has been confirmed by the court of appeals in *Albany Engineering Company v. FERC*, 548 F.3d 1071 (D.C. Cir. 2008).²¹ Further, section 10(f) provides for the payment of interest, maintenance, and depreciation on an upstream project owner's construction costs, not of the construction costs themselves. Finally, section 10(f) provides for "reimbursement" of the allowable costs, not payment of those costs in advance.

33. The 1983 agreement far exceeds in scope the payment provisions of section 10(f). Section 4(a) of the agreement states: "It is the intent of the parties to this Agreement that the Benefited Proprietors shall bear the full cost to [the upstream storage project owners] of operating and maintaining the Upstream Storages." Further, "the Benefited Proprietors agree to contribute and pay (no more often than quarterly) their "allocated share" of all operation and maintenance expenses incurred by [the upstream project owners] arising out of the ownership and operation of the Upstream Storages . . ." Section 4(b) of the agreement provides that "operation and maintenance expenses" is to mean "all direct and indirect expenses arising out of the ownership, operation and maintenance of the Upstream Storages including without limitation those expenses specified in Appendix A . . ." As noted earlier, these expenses could include administrative, engineering, legal, operating, purchasing, repair and maintenance, and regulatory expenses, as well as debt service, including interest and principal for major capital expenditures.

34. The 1983 agreement, then, is much more than the kind of headwater benefits settlement envisioned by our regulations; it is, rather, a comprehensive funding agreement providing for the payment of costs in a multitude of categories, most of them outside the scope of those specified in section 10(f), and in advance of expenditures by the upstream project owners. The actual amounts for which downstream project owners may be liable, even for a category such as "maintenance" that is covered by section 10(f), are not determinable without resolution of disputes regarding the terms and procedures that the parties established in the agreement.

35. That Commission staff approved this agreement is not tantamount to a commitment by the Commission to enforce all of these payment provisions. While our regulations require headwater benefits settlements to be filed for approval, staff is not

²¹ "We start with FERC counsel's concession at oral argument that under § 10(f) FERC itself could not impose charges for headwater benefits other than "interest, maintenance, and depreciation." . . . The concession was surely inevitable. As the certainty of other costs was as plain as plain could be, Congress's express provision for three types could hardly leave room for a FERC mandate of reimbursement of, say, the operational costs in dispute here." 548 F.3d 1071 at 1075.

required to analyze such settlements provision by provision, rejecting provisions that would be outside the scope of section 10(f) and that the Commission would not enforce or identifying terms and provisions the meaning of which could cause future problems in implementation. In this instance, staff's approval order contained only the following brief summary of the agreement's provisions:²²

The present Agreement sets forth a method for calculating the headwater benefits received by the downstream projects. The calculation is based upon the gross head of the project, the storage drainage area above the project, and the total operation and maintenance expenses for the five headwater projects.

Payments for headwater benefits are determined by taking the costs of the headwater storage projects and allocating them to the owners of the downstream projects. The payments are allocated according to the guidelines in the Agreement. Based on the information provided in the Agreement, including method of payment, we find the Agreement and payments thereunder satisfactory for approval.

36. FPL Energy asserts that the payment obligations imposed by the 1983 agreement became incorporated into the parties' licenses by staff's approval order and became binding license conditions. Similarly, respondents assert that, pursuant to staff's order, the entire agreement became the basis for allocating costs, including the discretion given to the Engineering Committee. Both FPL Energy and respondents overstate the implications of staff's approval of the 1983 agreement. The Commission is directed to require reimbursement of such part of the annual charges for interest, maintenance, and depreciation as it "may deem equitable." By approving the 1983 agreement, staff was simply recognizing that the parties had developed a mechanism for determining those charges and finding that whatever charges the parties determined were payable pursuant to the agreement would be equitable ones, essentially because the parties had agreed to them. Staff was not passing judgment on every provision of the agreement or incorporating any of its provisions into licenses. Moreover, staff's order did not purport to expand the Commission's authority to cover all provisions of the agreement; it ordered that the "Agreement dated June 1, 1983, and payments made thereunder, is approved to the extent of the Commission's authority."²³

²² *Androscoggin Reservoir Company et al.*, 59 FERC ¶ 62,372 at 63,749.

²³ *Id.* at 63,749.

37. A Commission investigation to determine headwater benefits assessments is generally a long, complex, and expensive proceeding. The negotiated settlement option provides project owners and the Commission itself a means of bypassing this more involved procedure. The essence of such a settlement is the establishment of headwater benefits payments on which the project owners have agreed, and the Commission's principal interest is in having the appropriate headwater benefits payments for each beneficiary determined so that they can be paid. Nowhere in Order No. 453 did the Commission indicate that, by approving a headwater benefits settlement, it intended to involve itself in interpreting all, or even any, of a settlement's terms.

38. The complexity of the 1983 agreement and the contentiousness about the meaning of its provisions underscores our reluctance to undertake any such effort. Providing the negotiated agreement option was not intended to entangle the Commission in complex disputes regarding the meaning of terms defined by the parties, procedural mechanisms established by the parties for determining what expenses may be authorized, and, in particular, provisions relating to payments for expenses that are not even within the scope of section 10(f).²⁴ In providing for the filing of settlements, we were not inviting the substitution of complex complaint proceedings for complex headwater benefits investigations.

39. The court in *Albany Engineering* made it clear that Congress intended interest, maintenance, and depreciation on the costs of construction to be the only items for which downstream licensees can be required to reimburse upstream project owners. In this case, however, the parties have agreed to include more expenses as payable, and to make them payable up front rather than merely reimbursable. We see no prohibition on their agreeing to do this, but they cannot thereby commit the Commission to compel payments that do not fall within the scope of section 10(f).²⁵ Similarly, it is not pertinent to our

²⁴ As an example of the difficulties we would encounter in interpreting the 1983 agreement, the parties hotly contest whether the term "maintenance" was meant to cover something as extensive as the Renewal Project proposed by FPL Energy. But although headwater benefits assessments can include maintenance expenses, the scope of this term, for purposes of the exercise of our jurisdiction over headwater benefits payments, cannot be defined by the agreement but must be governed by general accounting principles that would apply to headwater benefits assessments for all river basins. Were that not so, parties could expand or contract the scope of the Commission's jurisdiction at will through definitions in individual negotiated agreements. As another example, Verso would have us go even beyond the complainant's requested resolution and essentially reconstitute the composition of the Engineering Committee.

²⁵ Although the court in *Albany Engineering* ruled that states cannot impose

regulatory responsibilities to interpret provisions in an agreement that do not relate to section 10(f) assessments. Since section 10(f) directs the Commission to require reimbursement for interest, maintenance, and depreciation, whether the Commission should or must enforce payments for these items that have been clearly determined in an approved headwater benefits settlement may some day have to be addressed, but we need not do so here, and in the absence of a specific dispute of that nature, given that the complainant is asking us to do far more than compel payment of specified sums attributable to section 10(f) reimbursable items.

40. The 1983 agreement's inclusion of both section 10(f) expenses and expenses over which we have no jurisdiction would complicate any effort on our part to identify and enforce the payment of those charges actually within our section 10(f) authority. To the extent that the 1983 agreement provides for the payment of costs up front or for operation or other costs not covered by section 10(f), establishes rules and procedures for the composition of committees and the approval of expenses, or defines terms that are intended to have a particular meaning in the context of the agreement, disputes regarding these matters arguably should be settled by courts in the State of Maine, under its laws, as, in fact, provided by the agreement itself.²⁶

headwater benefits assessments for items other than interest, maintenance, and depreciation on the basis that the Commission itself lacks jurisdiction over such other charges, we do not read that opinion as prohibiting project owners from agreeing to a more extensive payment scheme as long as neither the Commission nor a state is purporting to compel payments for such items under their regulatory or statutory authority.

²⁶ Although acknowledging that the matters in its complaint might give rise to contract interpretation disputes over which the Commission has concurrent jurisdiction with state courts, FPL Energy contends that the complaint satisfies the three-factor test established in *Arkansas Louisiana Gas Company v. Hall*, 7 FERC ¶ 61,175, at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979), for Commission assertion of jurisdiction over contractual issues otherwise litigable in state court: the Commission possesses special expertise that makes the case particularly appropriate for Commission decision; there is a need for uniformity of interpretation of the type of question raised in the dispute; and the case is important in relation to the Commission's regulatory responsibilities. However, we have no particular expertise in interpreting what here is essentially a private contract, and the agreement's provisions are peculiar to the agreement, not general provisions of headwater benefits settlements that require uniform interpretation. And we believe we have satisfied our regulatory responsibilities by clarifying our position with respect to approved headwater benefits settlements.

41. Nevertheless, to the extent that interest, maintenance, and depreciation expenses could be included in the payments that FPL Energy is seeking from the other project owners, the Commission has an interest in the proper recovery of those expenses. Therefore, should they so choose, the parties may contact the Commission's Dispute Resolution Service or the Chief Administrative Law Judge for the appointment of a settlement judge to assist them in resolving these matters.

The Commission orders:

(A) The motions filed on June 1, 2010, by Verso Androscoggin LLC and Verso Paper LLC, on June 1, 2010, by FPL Energy Maine Hydro LLC, and on June 11, 2010, by Great Lakes Hydro America, LLC and Rumford Falls Hydro LLC for leave to file answers to previously-filed answers and responses are granted.

(B) The complaint filed March 26, 2010, by FPL Energy Maine Hydro LLC is denied.

By the Commission. Commissioner LaFleur is voting present.

(S E A L)

Kimberly D. Bose,
Secretary.