

127 FERC ¶ 61,174  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Albany Engineering Corporation  
v.  
Hudson River-Black River Regulating District

Docket No. EL06-91-002  
Project No. 12252-029

Hudson River-Black River Regulating District

Project No. 12252-030

ORDER ON REMAND AND ADDRESSING MOTION TO ESTABLISH  
PROCEDURES AND CHARGES

(Issued May 21, 2009)

1. In orders issued December 22, 2006, and May 17, 2007, we addressed a complaint filed by Albany Engineering Corporation (Albany Engineering) against the Hudson River-Black River Regulating District (District).<sup>1</sup> Albany Engineering asked us to find that a New York statute providing for the District's assessment of charges for headwater benefits is preempted by section 10(f) of the Federal Power Act (FPA)<sup>2</sup> and to grant Albany Engineering specified remedies as a result of our finding. In our orders, we found that section 10(f) preempts the New York statute to a certain extent but declined to grant the requests for remedies.

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<sup>1</sup> *Fourth Branch Associates (Mechanicville) v. Hudson River-Black River Regulating District*, 117 FERC ¶ 61,321 (2006) (December 2006 Order), *order on reh'g*, 119 FERC ¶ 61,141 (2007) (May 2007 Order). Fourth Branch Associates filed the complaint but subsequently transferred its license for the project at issue here to Albany Engineering, which pursued the complaint. For purposes of clarity, we will refer to Albany Engineering as the complainant throughout this order.

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

2. On November 28, 2008, the U.S. Court of Appeals for the District of Columbia Circuit reversed our orders in part, finding that section 10(f) preempted the New York statute as to all headwater benefits charges, and remanded the proceedings to us for reconsideration of the issue of remedies.<sup>3</sup> On January 22, 2009, the court issued its mandate, as a result of which we have regained jurisdiction over this proceeding. On February 10, 2009, the District filed a motion asking that we convene proceedings before a settlement judge to consider the matters remanded to us by the court and that we establish interim headwater benefits charges.

3. In this order, we are instituting proceedings before a settlement judge to assist the parties and other owners of projects in the affected river basin in reaching a headwater benefits settlement. Failing an agreement, Commission staff is directed to institute a headwater benefits investigation to determine the appropriate headwater benefits payments for these projects. We are not ordering the District to refund payments made under the New York law, as Albany Engineering requested us to do, and we are also denying the District's motion insofar as it seeks the establishment of interim charges. We may in the future consider whether it is appropriate to offset any amounts Albany Engineering owes the District to account for payments it has already made.

### **Background**

4. An extensive discussion of the history of the involved projects and of the relationship between them may be found in our December 2006 Order on complaint. We will summarize that discussion here.

5. Regulation of streamflow by storage projects on a river system's headwaters can increase the generation of electricity at hydropower projects downstream. Section 10(f) of the FPA provides that, whenever a licensee is directly benefited in this way by the construction work of another licensee, a permittee, or the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee reimburse the owner of such reservoir or other improvement for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. Section 10(f) provides that the proportion of such charges to be paid by any licensee shall be determined by the Commission. The Commission's regulations provide for the Commission to conduct an investigation to collect information for determining headwater benefits charges, but they also allow owners of downstream and headwater projects to negotiate a settlement for

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

these charges and file it for Commission approval in lieu of an investigation.<sup>4</sup>

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

7. Pursuant to New York's Environmental Conservation Law, the District and its predecessor agency have historically assessed downstream entities for the benefits they receive from the reservoir's regulation of this flow. The New York law authorizes this reimbursement of the "total cost" of maintaining and operating the reservoir "in proportion to the amount of benefit" inuring "to each public corporation and parcel of real estate."<sup>5</sup> These assessments have been based on a 1925 benefits study performed prior to construction of the Conklingville Dam.

8. In 1992, Commission staff determined that Conklingville Dam and Great Sacandaga Lake were required to be licensed, and, on September 25, 2002, we issued an original license to the District for the Great Sacandaga Lake Project, comprising principally Great Sacandaga Lake and Conklingville Dam.<sup>6</sup> In a subsequent order, issued on February 5, 2003, addressing an offer of settlement signed by downstream licensee Erie Boulevard Hydropower, L.P. (Erie), the District, the New York Department of Environmental Conservation, and other entities, we pointed out that, while our regulations allow parties to negotiate agreements as to headwater benefits assessments, including the methodology for calculating benefits, those agreements and their proposed assessments must be submitted to the Commission for approval.<sup>7</sup>

9. Albany Engineering's Mechanicville Project is located on the Hudson River downstream from the confluence of the Hudson and Sacandaga Rivers and has for decades been assessed charges for benefits under the New York law. In its complaint, Albany Engineering, which was not a signatory to the offer of settlement, argued that,

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<sup>4</sup> 18 C.F.R. §§ 11.15 and 11.14(a)(1) (2008).

<sup>5</sup> N.Y. Env'tl. Conserv. L. § 15-2121.

<sup>6</sup> *Hudson River - Black River Regulating District*, 100 FERC ¶ 61,319 (2002).

<sup>7</sup> *Erie Boulevard Hydropower, L.P.*, 102 FERC ¶ 61,133, at P 14 (2003).

once the District received a license for the Great Sacandaga Lake Project, it was required to follow the provisions of section 10(f) for the assessment of benefits and could no longer assess charges against the Mechanicville Project and other downstream beneficiaries under New York state law. Therefore, Albany Engineering asserted, the District's assessments pursuant to the New York statute were unlawful, since they were made in the absence of either a Commission-approved agreement with Albany Engineering or a Commission determination of headwater benefits. The District filed an answer to the complaint, arguing that the long-standing New York assessment system does not conflict with section 10(f) and must be maintained if the District is to recover all of its expenses.

10. In our December 2006 Order, we concluded that the District's assessments of downstream hydropower projects were clearly assessments for headwater benefits. Therefore, to the extent that the District was assessing these beneficiaries for interest, maintenance, and depreciation charges, the New York statutory scheme would be preempted by section 10(f), because it would bypass the Commission's prerogative to determine and approve the appropriate level of headwater benefits charges for those expenses. However, we also found that, because Congress did not specifically prohibit a state's assessment of charges for expenses other than interest, depreciation, and maintenance, the District was free to assess Albany Engineering under New York law for expenses other than ones in those categories.

11. We also stated that, despite our finding of partial preemption, we had no authority to prevent the District from attempting to assess charges under color of state law for interest, depreciation, and maintenance, to require it to rescind assessments made under state law, to refund amounts already paid by Albany Engineering, or to take certain other actions that Albany Engineering requested. We advised Albany Engineering that it would have to seek court relief from those assessment actions by the District. We stated that any further involvement of the Commission in this dispute would have to be preceded by a request from an affected project owner that we conduct a headwater benefits investigation, and we declined to set the matter for a proceeding before a settlement judge in the absence of such a prior request.

12. Albany Engineering requested rehearing as to both our finding that section 10(f) does not completely preempt the New York statute and our determination that we could not grant the various forms of relief requested in the complaint. In our May 2007 Order, we denied rehearing, and Albany Engineering petitioned the court to review our orders.

13. In its opinion, the court found that, upon review of the text and legislative history of the FPA and of section 10(f) specifically, section 10(f) must be understood to preempt all state assessments for headwater benefits if it is to accomplish the full objectives of

Congress.<sup>8</sup> The court reasoned that, given Congress's commitment to comprehensive federal regulation of hydropower development and the preclusion of dual licensing authority, Congress would have been unlikely to countenance disparate state headwater benefit reimbursement schemes.<sup>9</sup> Such a dual authority over headwater assessments, especially ones based on different methodologies, would, the court stated, "result in a morass of issues that would undermine the congressional intent to create a comprehensive scheme of hydropower development."<sup>10</sup> The court also concluded that our finding of only partial preemption "would undermine Congress's intent to limit the total amount of charges imposed on downstream operators" by allowing states to impose additional charges on those project owners.<sup>11</sup>

14. However, the court declined to address our decision to neither order refunds nor convene a settlement conference. The court reasoned that its holding that section 10(f) preempts all state headwater benefits assessments materially changed the context for our consideration of possible remedies, in that both Albany Engineering and the District would have an increased incentive to seek a headwater benefits investigation. Further, the court envisioned the possibility that we would feel less constrained in addressing the District's actions if the statute under which they were taken was completely, as opposed to partially, preempted by section 10(f). The court remanded the proceedings to us to consider the scope of our authority to craft appropriate remedies consistent with its holding.

15. On February 10, 2009, the District filed a motion in which it asked us to convene settlement proceedings before a settlement judge pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>12</sup> The District envisions that a settlement judge would consider the issues that the Commission must resolve on remand and would mediate efforts to reach a comprehensive headwater benefits settlement among the District and all of its headwater beneficiaries. Because any process to establish headwater benefits will take considerable time, the District also asks that we establish interim headwater benefits charges, to be effective July 1, 2009, the beginning of its next fiscal year, subject to adjustment upon determination of final charges, so that it may

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<sup>8</sup> *Albany Engineering Corporation v. FERC*, 548 F.3d 1071 at 1073.

<sup>9</sup> *Id.* at 1075.

<sup>10</sup> *Id.* at 1078.

<sup>11</sup> *Id.* at 1079.

<sup>12</sup> 18 C.F.R. § 385.603 (2008).

maintain a source of funding until that determination occurs. On February 26, 2009, Albany Engineering filed an answer opposing the motion, on the grounds that the requested procedures are unnecessary for the Commission to determine the remedy for its complaint and would be inconsistent with the court's remand.

### **Discussion**

16. In our prior orders, we recognized that Congress might have intended for section 10(f) to preempt any state assessment and payment scheme and thus to free downstream project owners from any further financial burden of assessments pursuant to state law.<sup>13</sup> We acknowledged that it was not unreasonable for Albany Engineering to argue that section 10(f) occupies the entire field of headwater benefits assessments, but, mindful of the presumption of reviewing courts against finding preemption of state authority, we adopted an interpretation of section 10(f) that would not wholly preempt the New York statute.<sup>14</sup> However, the court's conclusion that New York law is, in fact, completely preempted by section 10(f) settles this matter. Therefore, we will concern ourselves with the issue of remedies, as directed by the court.

17. In remanding this issue to us, the court noted that we had based our decision not to hold a settlement conference in part on the District's opposition to such a proceeding, and it reasoned that the District would now have an incentive to seek a headwater benefits investigation in light of the court's finding that it completely lacks authority to assess charges in the absence of a Commission investigation or Commission-approved settlement. And, indeed, the District, in its February 10 motion, requests that we appoint a settlement judge to mediate efforts to reach a comprehensive headwater benefits settlement. The District adds that it would ask us to conduct a headwater benefits determination if proceedings before the judge do not yield a settlement among it and the owners of the downstream hydropower projects.

18. The court also expected that its holding would cause Albany Engineering to have an increased incentive to seek a headwater benefits investigation. However, in its answer to the District's motion, Albany Engineering opposes initiating a settlement proceeding as a remedy to be pursued on remand. It argues that we should limit our actions to an order requiring the District to refund the amounts improperly collected from it, in the amount of \$516,655.62,<sup>15</sup> with interest, and instructions making it clear that no

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<sup>13</sup> December 2006 Order, 117 FERC ¶ 61,321 at P 47.

<sup>14</sup> May 2007 Order, 119 FERC ¶ 61,141 at P 42.

<sup>15</sup> This figure represents the amount of the charges Albany Engineering paid from 2003 through 2007, as evidenced by bills that it attached to its complaint or otherwise

headwater benefits charges can be assessed to downstream beneficiaries without our prior approval. Albany Engineering asserts that any delay in providing this remedy would be inequitable, given that it has been forced to pay unauthorized charges since 2002 and to expend significant funds to vindicate in federal court its right not to pay those charges.

19. The court remanded this proceeding for us to consider the scope of our authority to craft appropriate remedies. Section 10(f) authorizes us to determine the headwater benefits charges to be paid by any licensee to an upstream storage project owner. Implementing section 10(f), our regulations permit project owners to negotiate settlements for headwater benefits charges and also provide for us to institute headwater benefits investigations to determine payments. We also have the authority to assist parties to reach agreements through the appointment of a settlement judge. We conclude that the best course of action in this proceeding is to exercise our authority by appointing a settlement judge to assist in the development of a settlement among the District, Albany Engineering, and the other downstream licensees, and by instituting a headwater benefits investigation if the project owners are unable to reach an agreement. We continue to believe, as we concluded in our prior orders, that we do not have authority to order refunds of charges collected by the District without authority, although we may be able, at the conclusion of a headwater benefits investigation, to permit Albany Engineering to offset amounts it owes by the amounts it has paid to the District.<sup>16</sup> If Albany Engineering wishes to pursue immediate refunds, it would have to do so through the court system.

### **Commission remedies**

20. Albany Engineering, in its response to the District's motion, resists the initiation of settlement proceedings as a substitute for ordering immediate refunds. However, in its complaint, it expressed its opinion that "a Commission-supervised proceeding, preferably before a Commission Settlement Judge under Rule 603 would be most conducive to resolution,"<sup>17</sup> and it specifically requested that we schedule a settlement conference. On rehearing, it cited as error our decision not to institute proceedings before a settlement judge and argued that the use of settlement procedures seemed particularly appropriate in

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submitted to the Commission. Albany Engineering states that it did not pay the July 2008 assessment imposed by the District.

<sup>16</sup> Section 10(f) requires downstream licensees to reimburse upstream storage project owners for "such part of the annual charges for interest, maintenance, and depreciation . . . as the Commission may deem equitable." (*emphasis added*).

<sup>17</sup> Complaint at 25.

this case, as expressed by it and other downstream licensees.<sup>18</sup> Now, in opposing the District's motion, Albany Engineering asserts that any delay in ordering refunds would be inequitable, given that it has been forced to pay unauthorized charges since 2002 and to expend significant funds to vindicate in federal court its right not to pay those charges. However, Albany Engineering also states that it would welcome a resolution, in an appropriate proceeding, of the issues raised by the District and that it would not oppose a settlement judge proceeding to resolve the issue of prospective headwater benefits charges, proper resolution of the flow releases on the Hudson River, and calculation of actual benefits received by downstream entities.

21. Because we believe that such a proceeding would now be worthwhile, we will direct the appointment of a settlement judge to conduct a proceeding to mediate among the District, Albany Engineering, and any other participating downstream project owners in an effort to reach an agreement as to the headwater benefits that should be paid annually by each project to the District beginning in 2002, the year that the District became a licensee. The District asks that our order establishing procedures on remand be served on all of the hydropower project owners downstream of its Great Sacandaga Lake Project. We agree that this would be necessary, and notice of the settlement proceeding is to be served on all downstream project owners in the basin.<sup>19</sup>

22. We further instruct the judge that his role is to assist the parties to reach an agreement, not to make a determination of the headwater benefits that projects received or the assessments that should be payable by any project owner to the District. Should such a determination be necessary if settlement cannot be achieved, its complexity would

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<sup>18</sup> Request for rehearing at 30.

<sup>19</sup> According to Commission records, these project owners are: Erie Boulevard Hydropower, L.P. (E.J. West Project No. 2318, Stewarts Bridge Project No. 1047, Hudson River Project No. 2482, and Feeder Dam Project No. 2554); Curtis/Palmer Hydroelectric Company (Curtis/Palmer Falls Project No. 2609); FHOPCO, LLC (Glens Falls Project No. 2385); Niagara Mohawk Power Company, doing business as National Grid (co-licensee of South Glens Falls Project No. 5461 and of Hudson Falls Project No. 5276); South Glens Falls Limited Partnership (co-licensee of South Glens Falls Project No. 5461); Northern Electric Power Company, L.P. (co-licensee of Hudson Falls Project No. 5276); Fort Miller Associates (Fort Miller Project No. 4226); Stillwater Hydro Associates LLC (Stillwater Project No. 4684); Albany Engineering Company (Mechanicville Project No. 6032); and Green Island Power Authority (Green Island Project No. 13). All of these project owners are licensees except Fort Miller Associates, which has a Commission-issued exemption, under which it is exempted from all sections of the FPA.

warrant that it be made by our staff through a standard headwater benefits investigation. The judge will determine at the outset of the proceeding whether any project owners oppose the use of this procedure to reach a comprehensive headwater benefits agreement, and, in the case of opposition, will refer the matter back to the Commission. We will allow 180 days from the date of this notice for the parties to reach an agreement and the judge to inform the Commission of the result. Any agreement reached will have to be approved by the Commission to be effective.

23. If the parties cannot reach an agreement on headwater benefits within 180 days, the settlement judge will be instructed to refer the matter back to us, and staff will initiate a headwater benefits investigation. Under our regulations, we investigate and determine headwater benefits charges for projects downstream of non-federal headwater projects only if the parties are unable to reach agreement and one of the parties requests the Commission to determine charges.<sup>20</sup> The District states in its motion that, if the proceeding before the settlement judge does not result in a headwater benefits settlement, it would request a Commission headwater benefits investigation.<sup>21</sup> In any event, we would consider it fruitful, at that stage of this proceeding, to institute such an investigation to resolve what would likely continue to be a contentious situation. Without a headwater benefits determination, pursuant to either an agreement among the parties or a Commission investigation, the District would be unable to collect future payments from hydropower projects as a source of funding. At the conclusion of such an investigation, we may be able to permit Albany Engineering to offset amounts it owes by the amounts it has paid to the District.<sup>22</sup>

24. Nevertheless, Albany Engineering retains the right to seek refunds in the courts if it chooses to pursue this course of action, regardless of whether a headwater benefits investigation later determines that it was liable for past headwater benefits, since the District's collection of all previous payments was unauthorized. In any headwater benefits determination, we could take into account such refunds as Albany Engineering may have obtained through court action.

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<sup>20</sup> 18 C.F. R. § 11.15(a) (2008).

<sup>21</sup> Motion at 8.

<sup>22</sup> In its complaint, Albany Engineering raised the possibility that the amounts it had paid, with interest calculated in accordance with our regulations, should be credited against any future headwater benefits payment obligation fixed by the Commission, in the event that the District lacks the legal capacity to refund moneys paid pursuant to unlawful headwater benefit levies. Complaint at 9.

## Refunds

25. In arguing that we have authority to require refunds, Albany Engineering asserted<sup>23</sup> that courts have repeatedly held that “a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.”<sup>24</sup> Albany Engineering argued that, based on this precedent and our authority under section 309 of the FPA,<sup>25</sup> we have the power to preempt the District’s assessments, declare them unenforceable and void, and require full refunds of the improperly collected charges.<sup>26</sup> We have not disputed that we had the authority to preempt the New York law if it conflicted with section 10(f) or to declare the assessments unenforceable and void, and, in fact, we essentially made such findings in our previous orders as to the charges for interest, maintenance, and depreciation.

26. But the power to order refunds does not follow inevitably from the authority to preempt state law and to declare the assessments unenforceable. To have that power, we would have to have jurisdiction over the District in respect to its actions. The court stated that, “[a]s a FERC licensee, “the District is subject to FERC’s full FPA Part I jurisdiction.”<sup>27</sup> However, the court did not appear to regard this fact as settling the matter of refunds, as it also concluded that the Commission’s authority to grant refunds in other situations “by no means compels a finding that FERC can order refunds of rates collected under the authority of a *state law* that is preempted by a federal statute.”<sup>28</sup> While we would agree that the District as a licensee is subject to our jurisdiction under Part I of the FPA, we do not think that jurisdiction extends to ordering refunds in this situation.

27. Section 10(f) contains the Commission’s complete authority with respect to headwater benefits. It directs the Commission to require, as a license condition, that any

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<sup>23</sup> Initial brief at 51.

<sup>24</sup> *City of New York v. FCC*, 486 U.S. 57 at 63-64 (1988), quoting *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 369 (1986).

<sup>25</sup> 16 U.S.C. § 825h.

<sup>26</sup> Initial brief at 54.

<sup>27</sup> *Albany Engineering Corporation v. FERC*, 548 F.3d 1071 at 1080-81.

<sup>28</sup> *Id.* at 1081 (emphasis in the original. However, charges for headwater benefits are not rates and are not subject to statutory provisions that govern the Commission’s rate regulation authority.).

licensee receiving headwater benefits reimburse the upstream owner that provided them for an equitable part of its annual charges for interest, maintenance, and depreciation, with the assessed amounts to be paid into the Treasury of the United States when the United States is the upstream project owner. Section 10(f) also directs the Commission to determine the proportion of such charges to be paid by each downstream licensee. Affected licensees and permittees are to pay the cost of making a headwater benefits determination. If a power project not under license is benefited by the construction of an upstream reservoir or headwater improvement, the Commission is to fix a reasonable and equitable annual charge to be paid to the upstream project owner after notice to the owner of the unlicensed project.

28. The provisions of section 10(f) almost exclusively address the Commission's authority to determine equitable headwater benefits charges and the obligations of downstream project owners to pay them. Since section 10(f) places these payment obligations on downstream project owners, the Commission has the authority to require the payment of the determined amounts and to initiate enforcement actions if the downstream owners fail to comply. In contrast, the role of upstream project owners is essentially to receive the payments determined or approved by the Commission, and section 10(f) imposes no requirements on them, even when their projects are licensed by the Commission.<sup>29</sup> While the Commission includes articles in the licenses of downstream projects requiring those licensees to pay headwater benefits, in licenses, such as the District's, that are issued to private upstream storage project owners, the Commission includes no headwater benefits articles relating to the status of those licensees as entities entitled to headwater benefits payments.<sup>30</sup> Indeed, section 10(f) imposes no requirement on upstream projects that such an article would implement.

29. Our authority over our licensees is limited by the provisions of the FPA and the requirements of their licenses. When the District collected payments from Albany Engineering, it did so in its capacity as a state agency, not as a licensee. While the license issued for the Great Sacandaga Project contained a standard article providing that the District would be required to reimburse the owner of any upstream project for benefits received from it,<sup>31</sup> the license did not authorize the District to assess and collect

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<sup>29</sup> The sole exception to this is the provision that the "licensees or permittees affected" shall pay the costs of a headwater benefits determination. Since this language is not restricted to licensees of downstream projects, it applies to both upstream and downstream licensees.

<sup>30</sup> By "private" in this context, we mean upstream project owners other than the United States, which would include the District.

<sup>31</sup> See *Hudson River-Black River Regulating District*, 100 FERC ¶ 61,319 at

payments from any entity that might receive benefits from its own project. Thus, when the District imposed assessments on Albany Engineering, it did not do so under color of the FPA as a licensee. We have no jurisdiction over our licensees other than when they act in their capacity as licensees. In the present instance, we find nothing in either the FPA or the District's license that would authorize us to order the District to refund payments that it collected outside the bounds of its license. Accordingly, the remedy for the District's extra-license activities lies elsewhere.<sup>32</sup>

30. As we stated in our order on rehearing, section 10(f) authorizes us to institute headwater benefits investigations, to require downstream project owners to pay assessments, and to require both upstream and downstream licensees to pay the costs of a headwater benefits study.<sup>33</sup> Therefore, we could certainly institute a headwater benefits investigation to determine the appropriate headwater benefits charges for the downstream projects from 2002, when the District received its license, into the future. But none of these section 10(f) provisions grants us authority to order an upstream project licensee to refund headwater benefits payments that it solicited and collected without relying on any Commission authority to do so.

31. Addressing the Commission's authority to require actions by a licensee in the absence of a specific license requirement, the court of appeals stated in *Clifton Power Corporation v. FERC*<sup>34</sup> that section 6 of the FPA<sup>35</sup> "provides that all terms or conditions

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62,459 and 62,467 (2002).

<sup>32</sup> Most headwater projects are owned not by licensees but by the United States, whose unilateral actions as a project owner the Commission has been given no authority to regulate. That the District is a licensee as well as the owner of a headwater project is, therefore, incidental. It would be incongruous for us to claim authority over actions of a licensed headwater project owner that we lack in respect to actions of the United States as a headwater project owner in an area in which the FPA does not evidence any such distinction.

<sup>33</sup> May 2007 Order, 119 FERC ¶ 61,141 at P 55. Although the court (548 F. 3d at 1080) viewed our recitation of these provisions as undercutting our statement that we had no authority over the District's actions, in fact these provisions show, as we intended them to show in citing them, that section 10(f) gives us almost no authority over an upstream storage project licensee in respect to headwater benefits matters.

<sup>34</sup> 88 F.3d 1258 (D.C. Cir. 1996) (*Clifton Power*).

<sup>35</sup> 16 U.S.C. § 799 (2006).

of a license for a hydroelectric power project must be accepted by the licensee, and the conditions and the licensee's acceptance of those conditions must be expressed in the license."<sup>36</sup> There are no conditions in the District's license relating to its position as a storage project owner entitled to headwater benefits payments, and we cannot infer requirements that the license does not expressly provide.<sup>37</sup> Section 6 also provides that a license "shall be conditioned upon acceptance by the licensee of all of the terms and conditions" of the FPA, but this provision would not justify our ordering refunds here, because neither section 10(f) nor any other provision of the FPA contains terms and conditions with which an upstream storage project licensee must comply in respect to headwater benefits. While section 10(f) establishes a statutory framework for assessing headwater benefits under authority granted to the Commission, the District's assessment of headwater benefits outside of that framework was not a violation of section 10(f) but simply an action taken without FPA authority.<sup>38</sup>

32. In the absence of any specific license or statutory requirements for recipients of headwater benefits payments, other provisions of the FPA do not provide us with any additional authority to require refunds by the District. For instance, under section 31(a) of the FPA,<sup>39</sup> the Commission, after notice and opportunity for public hearing, may issue

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<sup>36</sup> *Clifton Power*, 88 F.3d 1258 at 1261. Section 6 of the FPA provides that each license:

shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license.

<sup>37</sup> In *Clifton Power*, the court determined that the Commission could not require a licensee to operate its project in a run-of-river mode when its license "does not expressly . . . require" that mode of operation. 88 F.3d 1258 at 1261.

<sup>38</sup> Albany Engineering has asserted (complaint at 17, request for rehearing at 23, initial brief at 25-26, 55) that the District did not comply with the Commission's order in *Erie Boulevard Hydropower, L.P.*, 102 FERC ¶ 61,133 (2003), to file its headwater benefits assessments and any agreement setting those benefits for Commission approval. In that order, as noted earlier (at P 8), we clarified for the District that any negotiated headwater benefits agreements and assessments must be submitted to the Commission for approval. However, we did not order the District to submit any agreement, and the District is not in violation of any Commission order in failing to do so. Moreover, that order did not concern assessments for Albany Engineering's Mechanicville Project.

<sup>39</sup> 16 U.S.C. § 823b(a) (2006).

“such orders as are necessary to require compliance with the terms and conditions of licenses.” Under section 31(b),<sup>40</sup> if a licensee knowingly violates a final order issued under subsection (a), the Commission may issue an order revoking its license, while under section 31(c),<sup>41</sup> a licensee who violates or fails or refuses to comply with any rule or regulation under Part I of the FPA or any order issued under subsection 31(a) is subject to civil penalties. However, since the District has not violated a term or condition of its license, we would have no basis to issue an order requiring compliance under this section.

33. The court cites section 309 of the FPA in connection with our authority to craft remedies, as does Albany Engineering in its initial brief. Section 309 provides that the Commission:

shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.

Courts have held that this section grants us broad authority and that such “necessary and appropriate” provisions “authorize an agency to use means of regulation not spelled out in detail, provided the agency’s action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.”<sup>42</sup> However, section 309 “merely augment[s] existing powers conferred upon the agency by Congress;” it does not “confer independent authority to act.”<sup>43</sup> Therefore, it cannot be a justification for ordering a licensee to do anything that we wish. We have, for example, declined to apply section 309 to order a licensee to reduce a fee for recreational use of the licensee’s non-project lands, over which we have no jurisdiction.<sup>44</sup> Here, similarly, we do not think that

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<sup>40</sup> 16 U.S.C. § 823b(b) (2006).

<sup>41</sup> 16 U.S.C. § 823b(c) (2006).

<sup>42</sup> *Niagara Mohawk Power Corporation v. FERC*, 379 F. 2d 153 at 158 (D.C. Cir. 1967), citing *Public Serv. Comm’n of State of New York v. FPC*, 327 F. 2d 893, 896-7 (D.C. Cir. 1964).

<sup>43</sup> *New England Power Company v FERC*, 467 F. 2d 425 at 430-1 (D.C. Cir. 1972).

<sup>44</sup> *Central Maine Power Company*, 40 FERC ¶ 61,075 (1987), *aff’d Kokajko v. FERC*, 873 F.2d 419 (1<sup>st</sup> Cir. 1989).

section 309 gives us authority to order a licensee to provide refunds of payments that were collected by it outside of our procedures but not in violation of its license.<sup>45</sup>

34. In other areas within the Commission's regulatory jurisdiction, the authority to order refunds is specifically set out. Section 205 of the FPA<sup>46</sup> provides that any public utility must file its rates and charges with the Commission. No changes in those rates and charges are permissible without prior notice to the Commission and the public, and the Commission has authority to enter upon a hearing concerning the lawfulness of a new rate or charge. If proposed changes may go into effect before the Commission has concluded a proceeding, the Commission may require the public utility to keep records of the amounts received under the increase and from whom they were received, so that the Commission may require the utility to refund, with interest, any portion of the increased rates or charges that it finds not justified. Under section 206,<sup>47</sup> the Commission may hold a hearing to determine whether an existing rate or charge is unreasonable and may order refunds, with certain limitations, of amounts in excess of whatever charge the Commission found to be just and reasonable. Section 4 of the Natural Gas Act (NGA)<sup>48</sup> contains refund provisions for natural gas companies that are comparable to the FPA section 205 provisions for public utilities. Any public utility or natural gas company that fails to comply with a Commission order of refunds or that continues to charge a rate that the Commission has found in an order to be not just and reasonable would be subject to enforcement actions and penalties under sections 314 through 316A of the FPA<sup>49</sup> and sections 20 through 22 of the NGA,<sup>50</sup> respectively.

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<sup>45</sup> The court itself recognized that a project owner's status as a licensee does not give the Commission discretion to order it to take actions that are beyond the Commission's authority. The court noted with approval the Commission's recognition that the Commission could not impose charges on a downstream licensee for headwater benefits other than interest, maintenance, and depreciation since Congress did not provide, in section 10(f), for the Commission to order reimbursement of any but the costs in those specified categories. *Albany Engineering Corporation v. FERC*, 548 F.3d 1071 at 1075.

<sup>46</sup> 16 U.S.C. § 824d (2006).

<sup>47</sup> 16 U.S.C. § 824e (2006).

<sup>48</sup> 15 U.S.C. § 717c (2006).

<sup>49</sup> 16 U.S.C. § 824m-825o-1 (2006).

<sup>50</sup> 15 U.S.C. § 717s- 717t-1 (2006).

35. In contrast, Part I of the FPA, which governs the Commission's jurisdiction over hydropower projects, is nearly silent on the matter of refunds.<sup>51</sup> Under the Commission's regulations, a licensee may appeal a final charge for headwater benefits and pay it under protest, subject to refund pending the outcome of the appeal.<sup>52</sup> In that situation, Commission staff places the payment in an escrow account to make it available for refunds. However, where, as here, a downstream licensee has made payments directly to an upstream storage project owner, outside of the Commission's procedures, the Commission has no access to the payments that have been made and no ability to effect refunds. The District's collection of payments from Albany Engineering and other downstream project owners occurred wholly outside of Commission authority, not pursuant to some procedure over which we have jurisdiction.

36. Albany Engineering has asserted that the absence of an express refund provision in section 10(f) is irrelevant to determining whether we can order refunds here. It contends that, since Congress did not authorize any state-law-based headwater benefits charges that might need to be refunded, there would have been no reason to include such a provision.<sup>53</sup> We agree that Congress would have been unlikely to include such a provision in the context of the headwater benefits scheme that it established, but this hardly supports a determination that authority to order refunds is implied in a situation that Congress understandably did not anticipate. Rather, this underscores the fact that the District's assessments and collections of payments were undertaken completely outside of the Commission's statutorily-prescribed headwater benefits scheme, in contrast to situations in which the Commission has been given specific refund authority to remedy situations in which rates filed with the Commission are found to be unjust and unreasonable.

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<sup>51</sup> The only specific provision for refunds is found in section 15(d)(2), 16 U.S.C. § 808(d)(2) (2006), concerning situations in which the Commission issues a new license to an applicant that is not the existing licensee, where the Commission finds that it is not feasible for the new licensee to use the energy from the project without the provision of reasonable services by the existing licensee. If the existing and new licensees are unable to reach a mutually satisfactory arrangement for the provision of those services, the Commission is authorized to order the existing licensee to file a tariff, pursuant to section 205, subject to refund, ensuring such services.

<sup>52</sup> 18 C.F.R. §§ 11.17(b)(6) and 11.20 (2008). The latter section applies also to annual charges for the use of government and tribal lands and of government dams, and for the Commission's costs of administration of its hydropower program.

<sup>53</sup> Initial brief at 24.

37. Since section 10(f) preempts the state statutory scheme under which the District presumed to assess headwater benefits, its assessments were unauthorized and invalid. However, the actions of the District were not in violation of any condition of its license or of any provision of the FPA. We would have no authority to order refunds from a non-licensed entity that collected unauthorized charges from a licensee. We do not believe that we have any greater authority in respect to a licensee that takes such an action if the licensee is not violating the terms of its license or of the FPA.

38. Our reasoning as to our authority to order refunds is applicable to other remedies that Albany Engineering has sought. In its complaint, Albany Engineering asked that we secure the District's assent that it cease the issuance of unilateral levies against it and, in the absence of obtaining the District's assent, that we issue an order restraining it from issuing such unlawful levies "as contrary to the District's license, to the Federal Power Act, and to the Commission's regulations." Albany Engineering also asked that we grant the District a brief grace period for submitting, under Commission Rule 602, an executed agreement with it governing the levies issued by the District in 2003 through 2006, and, failing the prompt submission of such an executed agreement, that we direct the District to show cause why it should not be required to rescind the assessments for those years and refund the amounts collected, with interest. Albany Engineering asserted that we should take these actions "if the District is found to have failed to comply with its license, the Commission's applicable Orders, the Federal Power Act, or this Commission's regulations in its 2003-2006 levies." In its response to the District's motion, Albany Engineering asks us, in addition to ordering refunds with appropriate interest, to confirm that the District's "continuing demand" that it pay headwater benefits charges under New York state law for the period 2008-09 is invalid, and to bar the District from making any further requests for headwater benefits payments unless they are consistent with the Commission's regulations and the court's rulings.

39. Some of these requested remedies have been overtaken by events. The court's ruling has certainly made it clear that the District has no authority to collect charges for headwater benefits. It is hard to believe that the District would continue to attempt to collect headwater benefits payments from Albany Engineering and the other downstream projects under the New York statute in light of this ruling, but, if it were to do so, Albany Engineering and the other project owners could simply refuse to make payment. In any event, it would be problematic to order the District to cease issuing unauthorized assessments, because their issuance would simply be an action taken with no legal basis, not one that violates the FPA or any condition of the District's license. We cannot order the District to show cause why it should not be required to rescind the assessments, because we cannot actually compel the District to return the payments, which we had in no way endorsed and which were not made pursuant to any Commission procedures. We cannot order the District to execute an agreement with Albany Engineering, because, although the FPA establishes procedures for determining and approving headwater benefits, it does not require either upstream or downstream project owners, licensed or

not, to enter into agreements on headwater benefits payments. We would have no basis for enforcing an order that the District ignored, since the lack of an underlying obligation or violation would deprive any such order of legitimacy.

40. The remedy of any downstream licensee such as Albany Engineering that is tendered unauthorized bills for headwater benefits charges from an upstream storage project is to refrain from paying those charges. It is understandable that Albany Engineering would have been reluctant to do so here, since the assessments were occurring pursuant to state law and the District threatened it with tax liens, fees, and penalties if Albany Engineering failed to make payment.<sup>54</sup> Faced with that situation, Albany Engineering appropriately sought a determination from the Commission that section 10(f) of the FPA preempts the New York statute and renders the assessments invalid. With the issuance of the court's opinion, Albany Engineering now has a final determination that the payments were collected under authority that was preempted by section 10(f) of the FPA and were therefore unauthorized.<sup>55</sup>

41. For these reasons, we continue to believe that, if Albany Engineering insists on obtaining a refund of the payments, rather than a remedy that we can provide, it should do so through a court action. Our determination that we cannot order refunds does not leave Albany Engineering without a remedy. In seeking a refund through the court system, Albany Engineering can rely on the court of appeals' determination that the assessments were unauthorized because they were made under preempted authority. In the absence of such a determination, a trial court would have lacked the legal and factual

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<sup>54</sup> See December 2006 Order, 117 FERC ¶ 61,321 at P 16.

<sup>55</sup> In declining to order refunds, we stated in our rehearing order that section 10(f) does not grant us "authority to address independent actions taken by an upstream licensee to collect charges under color of state law." Our use of this phrase caused the court to question how much our decision was influenced by the fact that the District's actions were sanctioned by the New York statute. We did not consider ourselves inhibited by the fact that the assessments were made under color of state law but rather by our conviction that we lack authority to order refunds of charges collected outside the purview of Commission headwater benefits procedures. We intended the phrase "under color of state law" only to describe the situation we were addressing, not to signify a limitation on our discretion to act. We believe that we would lack the authority to order refunds even if the District had managed to obtain payments from Albany Engineering without citing any state authority at all. The controlling factor, in our view, is that the District's unauthorized actions were outside of our regulatory jurisdiction.

analysis from the Commission or the court of appeals to support ordering such refunds. In effect, the finding of preemption is itself a remedy.<sup>56</sup>

### **Interim charges**

42. In its motion, the District also asks that we establish interim headwater benefits charges to maintain a source of its funding. The District states that either negotiating a settlement agreement for Commission approval or conducting a staff headwater benefits investigation will consume much more time than the District can afford to go without funding from hydropower projects, which have historically supplied most of its revenues. The District asserts that, because Commission regulations provide for the assessment of interim headwater benefits pending the determination of final charges,<sup>57</sup> it would be within our discretion to establish interim charges subject to adjustment upon the determination of final charges in a settlement proceeding or headwater benefits investigation. The District states that it would be prepared to provide factual support and expert opinion for its request for interim charges. It suggests that our order initiating settlement judge proceedings authorize interim charges and give the parties 60 days to reach agreement on those charges, failing which the District will move that the Commission establish them.

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<sup>56</sup> It is for this reason that we considered it necessary to address the preemption issue in our orders before addressing the issue of remedies. Consideration of the remedies we could provide would have been pointless unless we first determined that the District had taken unauthorized actions for which remedies might be appropriate. Moreover, by addressing preemption first, we provided Albany Engineering with a valuable determination, comparable to a declaratory order, that the FPA at least partly preempted the New York statute's assessment scheme. Our statement in the rehearing order, cited by the court, that "even to the extent that it is preempted by section 10(f), we have no authority over the District's actions" does not imply that an analysis of the preemption issue was unnecessary, since a finding of partial or total preemption would be of use to Albany Engineering in seeking a refund through the courts. If we had addressed only our ability to provide remedies, without addressing the preemption issue, Albany Engineering would not have been given a Commission determination (and, on appeal, a court of appeals determination) on the preemption issue to use in a future court action. At the same time, if we had concluded that section 10(f) did not preempt the New York statute at all, we would have had no cause to discuss any possible remedies. We did not intend for our remedies determination to be independent of our preemption determination, as the court suggests may have been the case; rather, we viewed the remedies determination as logically dependent on our prior preemption determination.

<sup>57</sup> 18 C.F.R. § 11.10(c)(12), 11.17(b)(1) (2008).

43. While the District asks that a settlement judge be assigned to preside over negotiations for a settlement agreement on final headwater benefits, it does not appear to be proposing that the settlement judge address interim headwater benefits charges as well. In any event, there are several problems with implementing the District's request for establishing interim charges. The District expects to present evidence in support of its requested interim charges but also asks that parties be given 60 days to reach an agreement on those charges. It is not clear to us whether the District is requesting a Commission evidentiary proceeding, a negotiating period, or both, and, if the latter, in what sequence these processes are to occur. The possibility that the District and the downstream project owners would agree on interim charges within 60 days appears to us unlikely, given the contentions in this proceeding that, for years, the District has been assessing hydropower projects for more than their share of the benefits conferred by the regulation of Great Sacandaga Lake.

44. Failing agreement, the District would have the Commission establish interim charges. A determination of interim assessments for a river basin has always been made by Commission staff following a full headwater benefits investigation, with the assessments being made final if and when a subsequent investigation confirms that the data considered in the previous investigation accurately reflected the benefits for the period in question. We do not expect that, within the short time period required by the District, it could provide data on which staff could comfortably rely to establish interim charges. In addition, delays will likely occur since Albany Engineering and other downstream project owners could be expected to challenge the data initially and on appeal of any staff determination. Finally, since 2002, Albany Engineering and the other downstream project owners have paid charges that the District lacked the authority to collect; we are not authorizing refunds of those charges in this order; and a staff investigation might well find that the headwater benefits actually received during that period did not warrant charges that high. In consideration of these factors, as a matter of equity we would not require Albany Engineering and the other downstream project owners additionally to pay interim charges for future fiscal years until an overall headwater benefits determination is made. For these reasons, we will deny the District's motion insofar as it seeks the establishment of interim headwater benefits charges.

The Commission orders:

(A) The motion of Hudson River-Black River Regulating District, filed February 10, 2009, in this proceeding is granted insofar as it requests the Commission to convene a settlement judge proceeding to assist in the development of a comprehensive headwater benefits agreement in respect to benefits received by hydropower projects on the Sacandaga and Hudson Rivers from the Great Sacandaga Lake Project, and the Office of Administrative Law Judges is directed to assign a settlement judge for this purpose.

(B) The settlement judge assigned to this proceeding shall determine at the outset of the proceeding whether any project owners oppose the use of this procedure to reach a comprehensive headwater benefits agreement, and, in the case of opposition, shall refer the matter back to the Commission for disposition. The settlement judge shall mediate efforts of the parties to reach an agreement and shall make no findings or determinations of the headwater benefits received or assessments owed by hydropower projects in the basin.

(C) Notice of this proceeding and an opportunity to participate will be served on the Hudson River-Black River Regulating District, Erie Boulevard Hydropower, L.P.; Curtis/Palmer Hydroelectric Company; FHOPCO, LLC; Niagara Mohawk Power Company, doing business as National Grid; South Glens Falls Limited Partnership; Northern Electric Power Company, L.P.; Fort Miller Associates; Stillwater Hydro Associates LLC; Albany Engineering Company; and Green Island Power Authority. The proceeding is to be completed within 180 days of the date of the notice. At the conclusion of the proceeding, the judge shall inform the Commission of the result. Any agreement reached must be submitted to the Commission at that time and must be approved by the Commission to be effective.

(D) If the parties do not reach a comprehensive headwater benefits agreement within the time designated, the settlement judge shall refer the matter back to the Commission for disposition. Upon the return of the matter to the Commission, the Office of Energy Projects is directed to institute a headwater benefits investigation for this river basin, in accordance with the Commission's regulations.

(E) The motion of Hudson River-Black River Regulating District, filed February 10, 2009, is denied insofar as it seeks the establishment of interim headwater benefits charges.

(F) The remedies requested by Albany Engineering Corporation are granted to the extent set forth in this order and are otherwise denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.