

129 FERC ¶ 61,134  
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

Docket No. EL06-91-004  
and Project No.  
12252-031

v.

Hudson River-Black River Regulating District

ORDER ON REHEARING

(Issued November 19, 2009)

1. In orders issued December 16, 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.

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

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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).

statute as to all headwater benefits charges, and remanded the proceedings to us for reconsideration of the issue of remedies.<sup>3</sup> By order on remand issued May 21, 2009, we again declined to grant Albany Engineering's requested remedies.<sup>4</sup> Albany Engineering, joined by Green Island Power Authority, seeks rehearing of our May 2009 Order.<sup>5</sup> We deny rehearing for the reasons explained below.

## **BACKGROUND**

3. An extensive discussion of the history of the involved projects and of the relationship between them may be found in our December 2006 Order. We will summarize that discussion here.
4. Regulation of streamflow by storage projects on a river system's headwaters can increase the generation of electricity at hydropower projects downstream. Section 10(f) of the FPA provides that, whenever a licensee is directly benefited in this way by the construction work of another licensee, a permittee, or the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee reimburse the owner of such reservoir or other improvement for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. Section 10(f) provides that the proportion of such charges to be paid by any licensee shall be determined by the Commission. The Commission's regulations provide for the Commission to conduct an investigation to collect information for determining headwater benefits charges, but they also allow owners of downstream and headwater projects to negotiate a settlement for these charges and file it for Commission approval in lieu of an investigation.<sup>6</sup>
5. Early in the twentieth century, the State of New York constructed the Conklingville Dam to create Great Sacandaga Lake on the Sacandaga River, a tributary of the Hudson River, primarily to provide flood control and other benefits to riverside

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

<sup>4</sup> *Albany Engineering Corporation v. Hudson River-Black River Regulating District*, 127 FERC ¶ 61,174 (2009) (May 2009 Order).

<sup>5</sup> Green Island Power Authority, like Albany Engineering a licensed project owner assessed charges by the District, intervened in the complaint proceeding and is thus entitled to seek rehearing of our order on remand. We will refer to the project owners jointly as Albany Engineering in this order.

<sup>6</sup> 18 C.F.R. §§ 11.15 and 11.14(a)(1) (2009).

communities. The District is a New York state agency authorized to operate and maintain that dam and reservoir. 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. Pursuant to New York's Environmental Conservation Law, the District has historically assessed downstream entities for the benefits they receive from the reservoir's regulation of this flow, based on a 1925 benefits study performed prior to construction of the Conklingville Dam. Albany Engineering's Mechanicville Project, located on the Hudson River downstream from the confluence of the Hudson and Sacandaga Rivers, has for decades been assessed charges for benefits under the New York law.

6. 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>7</sup> In its complaint, Albany Engineering argued that, once the District received a license for the Great Sacandaga Lake Project, it was required to follow the provisions of section 10(f) for the assessment of benefits and could no longer assess charges against the Mechanicville Project and other downstream hydropower 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.

7. In our December 2006 Order, we concluded that the District's assessments of downstream hydropower projects were clearly assessments for headwater benefits but that the New York statutory scheme was preempted by section 10(f) only to the extent that it authorized the assessment of interest, maintenance, and depreciation charges (the cost components specifically listed in the statute). 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. In addition, we declined to set the matter for a proceeding before a settlement judge in the absence of a request from any of the project owners that we conduct a headwater benefits investigation. We advised Albany Engineering that it would have to seek court relief from those assessment actions by the District.

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<sup>7</sup> *Hudson River - Black River Regulating District*, 100 FERC ¶ 61,319 (2002).

8. 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.

9. In its opinion, the court ruled that section 10(f) preempts all state assessments for headwater benefits. However, the court declined to address our decision to neither order refunds nor convene a settlement conference. The court reasoned that, in the context of its finding of total preemption, both parties might have an increased incentive to seek a headwater benefits investigation and we might feel less constrained in addressing the District's actions. The court remanded the proceedings to us to consider the scope of our authority to craft appropriate remedies consistent with its holding.

10. In our May 2009 Order, we noted that our authority over our licensees is limited by the provisions of the FPA and the requirements of their licenses. We concluded that, while the District, as a licensee, is subject to our full FPA Part I jurisdiction, that jurisdiction does not extend to ordering refunds in the situation here. We explained that section 10(f) contains the Commission's complete authority with respect to headwater benefits but that its provisions address almost exclusively our authority to determine equitable headwater benefits charges and the obligations of downstream owners to pay them. Section 10(f) imposes no requirements on upstream project owners, even when they are licensees rather than federal entities, and the licenses of upstream project owners likewise contain no requirements in respect to the receipt of headwater benefits.

11. We stated that, in assessing charges under New York law, the District was not acting as a licensee, and we emphasized that we have no jurisdiction over licensees other than when they act in that capacity. We found 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. On the same basis, we stated that we lacked authority to order the District to cease assessing charges or to restrain it from doing so. We concluded that the District's assessment of charges was not a violation of section 10(f) but simply an action taken without authority. We stated that, to obtain refunds of the unauthorized payments, Albany Engineering should pursue a court action, relying on the court of appeals' determination that the District's assessments were preempted by section 10(f).

12. In the same order, we also addressed a motion filed by the District to convene settlement proceedings before a settlement judge. We directed 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. We instructed the judge 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. We allowed 180 days for the parties to reach an agreement to be submitted for Commission approval. The settlement judge was instructed to refer the matter back to us for staff to initiate a headwater benefits investigation if the parties could not reach an agreement on headwater benefits within that time.<sup>8</sup>

13. The settlement judge held three settlement conferences but, in an order issued July 22, 2009, returned the matter to the Commission for the institution of a headwater benefits investigation, on the basis that the parties had reached an impasse and requested an investigation to resolve the contested issues. By order issued July 24, 2009, the chief administrative law judge terminated the settlement procedures. By letter of August 4, 2009, Commission staff notified the project owners that it was initiating a headwater benefits investigation and that they would be contacted to provide data necessary for the study.

### **DISCUSSION**

14. Albany Engineering argues that we erred in determining that we lack statutory or other authority to require the District, a licensee, to cease issuing bills for headwater benefits charges or to order refunds of such preempted charges for the period 2003 through 2008. It contends that we improperly found that the District could assess such charges without violating the FPA, notwithstanding the court's finding of preemption, and that this holding was inconsistent with the court's decision and with the FPA, was arbitrary and capricious, and failed to evidence reasoned decision making. Albany Engineering claims that our failure to remedy the District's assessment was inconsistent with the court's ruling requiring us to balance the needs of the upstream reservoir owner and the downstream licensees.

15. Albany Engineering asserts that the congressional purpose in granting the Commission exclusive authority to establish headwater benefits is to ensure that downstream licensees pay no more than certain specific costs and that the charges do not

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<sup>8</sup> 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. The District stated that it would request such an investigation if the settlement proceeding did not result in a headwater benefits settlement. The District also asked that we establish interim headwater benefits charges, to be effective July 1, 2009, subject to adjustment upon determination of final charges, so that it could maintain a source of funding until that determination occurs. We denied this request in the May 2009 Order, and the District did not seek rehearing.

exceed the actual benefits. In support of this statement, it cites several of the court's findings: that section 10(f) reflects a deliberate congressional decision to balance the goal of compensating upstream owners and protecting downstream ones; that interpreting section 10(f) to only partially preempt state law would generate complex issues of meshing state charges with Commission-approved ones; that a dual system of headwater benefits assessments would undermine the congressional intent to create a comprehensive system of hydropower development; and that allowance of state charges would enable states to charge downstream projects in excess of the benefits received. Albany Engineering contends that, notwithstanding these findings, we have not changed our position on remedies and, therefore, continue to "undermine Congress's clear intent to limit the total amount of charges imposed on downstream operators."<sup>9</sup> It argues that we have, unjustifiably, focused only on the upstream reservoir owner and declined to see adverse results on the downstream licensees.

16. Albany Engineering's citations to the court opinion relate to the issue of total versus partial preemption, which the court has decided and which is not at issue on remand. We do not dispute the court's finding that Congress intended to limit the extent to which downstream licensees could be charged for headwater benefits. The issue here is to what extent, if any, the Commission has been given the authority to reverse or restrain the unilateral, unauthorized assessment of headwater benefits payments by an upstream licensee not acting pursuant to its license. Albany Engineering's statements about congressional intent support the conclusion that section 10(f) completely preempts conflicting state law but do not resolve the issue of remedies. Our determination on remand does not reflect our refusal to see the adverse results of the District's actions on the downstream licensees but rather the absence of any clear authority under which we could redress this situation.

17. Albany Engineering complains that, on remand, we virtually restated the same rationale that the court assumed we would reevaluate in light of its ruling. But the court only directed us to evaluate whether we would reach a different result as to remedies in light of its finding of total preemption; it did not require us actually to reach a different result or dictate what that result should be. Our conclusion that we lack the authority to provide the remedies Albany Engineering seeks is not inconsistent with the court's order; it is sufficient that we reconsidered the remedy issue in light of the court's conclusions.

18. Albany Engineering claims that, once it was clear that the entirety of the District's assessments were preempted by section 10(f), the whole assessment came under the

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<sup>9</sup> Request for rehearing at 6, citing *Albany Engineering Corporation v. FERC*, 548 F.3d 1071 at 1079.

Commission's jurisdiction. But it does not follow that a finding of total preemption provides the authorization to grant all of the remedies that Albany Engineering seeks.

19. Albany Engineering asserts that the District had ample notice that it was collecting headwater benefits charges without complying with federal law. It states, as it has stated earlier in this proceeding, that, on rehearing of the license order for the District's project, we specifically directed the District to file its headwater benefits assessments with us for approval.<sup>10</sup> However, as we pointed out in our May 2009 Order,<sup>11</sup> we did not, in that rehearing order, include a requirement that the District submit any agreement with us, but simply clarified that, while project owners could negotiate headwater benefits settlements, the assessments established in those settlements would have to be filed for our approval.<sup>12</sup> Until we ruled on Albany Engineering's complaint, the issue of whether section 10(f) preempted New York law and invalidated the assessments thereunder had not been raised. Albany Engineering also complains, again not for the first time, that the District failed to complete a reapportionment of its charges, even though it had committed to conduct a study for that purpose in 2002 when its license was first issued. However, the District's professed intention to conduct a new study assumed the continuing assessment of charges under state law; we did not require any such study in issuing the District its license or at any other time. In any case, none of these arguments, including whether and when the District should have known that its assessments were subject to section 10(f) procedures, addresses the issue of whether the Commission actually has the authority to provide the remedies that Albany Engineering seeks.

20. Albany Engineering states that our position gives the District no incentive to change its behavior, as supported by the fact that the District has refused to withdraw its opposition to Albany Engineering's state court challenge to the headwater benefits charges that the District assessed in July 2008. Albany Engineering attaches statements sent to it by two New York counties seeking immediate payment of delinquent taxes representing headwater benefits charges that the company refused to pay in 2008.

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<sup>10</sup> See *Erie Boulevard Hydropower, L.P.*, 102 FERC ¶ 61,133, at P 14 (2003).

<sup>11</sup> *Albany Engineering Corporation v. Hudson River-Black River Regulating District*, 127 FERC ¶ 61,174 at n.38.

<sup>12</sup> Until such time as we approve a headwater benefits settlement, that agreement may be a contract between the settling parties, but it cannot be considered to have resolved section 10(f) issues. Moreover, our statements in that rehearing order did not concern Albany Engineering's assessments but rather a settlement agreement dealing with a variety of matters, including headwater benefits, that the District had reached with *Erie Boulevard Hydropower, L.P.*, another downstream licensee.

Albany Engineering argues that it cannot simply ignore these bills without risking penalties and foreclosure of its property. It contends that, as long as there is a threat that the District will issue a bill, Albany Engineering and the other downstream licensees may be forced to spend money to contest such statements of delinquent taxes.

21. Although Albany Engineering asserts that it has been placed in a difficult position by the operation of New York law, we cannot see that this would be altered by our granting the remedies it seeks. First, we have no indication that the District has attempted to issue any assessments to downstream licensees since the court issued its opinion that New York law was totally preempted by section 10(f) as to hydropower projects. In any event, ordering the District to cease issuing future headwater benefits assessments would not resolve Albany Engineering's problems relating to its non-payment of the 2008 assessments and the consequent issuance of delinquent tax statements by the counties. Since Albany Engineering does not indicate what steps it has taken to contest these tax statements, we do not know that the counties would insist on collecting these amounts if Albany Engineering presented it with the court's opinion that the District had no authority to issue these assessments. Moreover, even if we were to assert authority over the District to provide the requested remedies, we clearly have no authority over New York counties if they choose to issue and enforce delinquent tax bills based on assessments the District made under the preempted New York law. While we do not know why the District has refused to withdraw its opposition to Albany Engineering's state court challenge, we have no control over positions the District may take in a state court proceeding, but we reiterate that Albany Engineering has a federal court opinion to support its position that the 2008 charges were unauthorized, and we fail to see how any remedy it requests here would be more effective in support of its state court challenge than that opinion would be.

22. Albany Engineering contests our finding that we have no jurisdiction over our licensees other than when they act in their capacity as licensees. Albany Engineering emphasizes that the District has been a licensee since 2002; therefore, when the District subsequently imposed headwater benefits charges on downstream licensees, there was no other capacity in which it could have been acting. In Albany Engineering's view, since the court ruled that the Commission has exclusive authority to determine the proper headwater benefits charges, the Commission also must have the authority to prevent a licensee from collecting excessive and improper headwater benefits charges. Albany Engineering argues that the Commission's exclusive power to set headwater benefits charges necessarily encompasses the power to order a licensee to pay refunds when, for whatever reason, the licensee has failed to properly calculate the headwater benefits charge, issued bills for charges without Commission authority, or otherwise taken actions that conflict with the congressionally-intended protections against excessive charges.

23. We might accept Albany Engineering's reasoning if the FPA gave a licensee the authority to make assessments itself and charged the Commission with ensuring that the

licensee's assessments did not exceed reasonable limits. But the FPA no more authorizes a licensee to demand payments from another licensee for headwater benefits than it authorizes a licensee to seek any other type of payments; its language does not even contemplate the direct assessment of charges by one licensee against another. Under the provisions of the FPA, a licensee would never calculate headwater benefits charges and issue bills based on such a calculation, because it would not have been given the authority to do so. As a licensee is not given any role in the assessment and collection of charges in the first place, the situation here is not one of a licensee exceeding the authority that has been given to it subject to Commission review but rather of a licensee arrogating to itself authority that it simply lacks entirely.

24. While the District unquestionably has been a licensee ever since it received its license in September 2002, this does not mean that every action it has taken since then was taken in its capacity as licensee, nor does this bring all of its actions under the Commission's jurisdiction. In dealings with the state government or in contracts with private entities, for example, it could take actions that are not reviewable by the Commission. For example, if the District were to hire Albany Engineering to perform environmental measures we required of the District in its license (such as building a recreation area), we would have no jurisdiction over disputes between the two entities regarding such a contract and could not require the District to comply with any of the contract's terms. Even though the matters at issue would have some relationship to our license, it would not give us authority to oversee the implementation of a private contract. Our jurisdiction over a licensee is never total; the issuance of a license to the District does not make it unanswerable to all state and local laws.

25. Albany Engineering argues, however, that we erred in finding that the District's assessments were not a violation of section 10(f) but simply an action taken without FPA authority. It contends that we failed to recognize the difference between an action for which the FPA provides no authority, such as the issuance of speeding tickets, and an action that the FPA actually prohibits, such as the collection of headwater benefits without following the Commission's procedures. Albany Engineering points out that section 6 of the FPA provides that every license "shall be conditioned upon acceptance by the licensee of all the terms and conditions" of Part I of the FPA. Further, the District's license provides that it "is subject to the terms and conditions of the Federal Power Act (FPA), which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA." Albany Engineering reasons that, since one of the obligations of licensees is acceptance of the FPA's provisions, the District, by levying headwater benefits charges in violation of the FPA, was, and still is, violating the conditions of its license. From that conclusion,

Albany Engineering infers that, under FPA section 31,<sup>13</sup> which empowers us to issue such orders as necessary to require compliance with the terms and conditions of a license, we could issue an order providing for refunds and a declaratory order forbidding future assessments without a headwater benefits determination or approved settlement agreement.

26. The fact that the FPA does not provide for a licensee to take certain actions is not equivalent to the FPA prohibiting those actions. Section 10(f) makes no provision for any project owner, licensed or unlicensed, to assess headwater benefits and attempt to collect payments for those benefits. If an upstream project owner nevertheless undertakes those actions on its own, or under a mistaken belief that state law authorizes them, those actions are of no force and effect. Contrary to Albany Engineering's argument, section 10(f) of the FPA does not prohibit actions by upstream project owners. Rather, it establishes Commission authority to assess headwater benefits and thereby renders invalid any headwater benefits assessments made or collected by other entities. To use Albany Engineering's own comparison, the FPA no more prohibits the issuance of headwater benefits assessments by the licensees than it does the issuance of speeding tickets by licensees. It simply does not authorize licensees to take either of those actions.<sup>14</sup>

27. Albany Engineering criticizes our statement that, in imposing its assessments on Albany Engineering, the District did not do so under color of the FPA as a licensee. It questions how the charges could not be under color of the FPA, since the FPA is the only possible authority for a licensee to assess headwater benefits charges. The charges were not assessed under color of the FPA because the District relied on New York law, not section 10(f), in assessing them. And even if the District had invoked section 10(f), that section, as we have explained, does not provide any basis for one licensee to assess charges on another.

28. In arguing that we should grant rehearing and order the relief it has requested, Albany Engineering also asserts that the matter of refunds of improperly collected charges is hardly a new concept for the Commission. It cites Part II of the FPA, dealing with interstate sales of electricity at wholesale, the Natural Gas Act, and the

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<sup>13</sup> 16 U.S.C. § 823b(a) (2006).

<sup>14</sup> The issuance of a declaratory order, as Albany Engineering urges, would, in any event, not provide the relief it expects. Pursuant to rule 207(a)(2) of the Commission's Rules and Regulations, 18 C.F.R. §385.207(a)(2) (2009), we issue declaratory orders "to terminate a controversy or remove uncertainty." A declaratory order would not contain ordering paragraphs prohibiting any entity from taking particular actions.

Commission's jurisdiction over certain pipeline rates as demonstrating our expertise in the matter of establishing rates and ordering refunds when jurisdictional entities impose charges in excess of the proper rates. If anything, Albany Engineering argues, our authority to grant refunds under section 10(f) is even broader, since we have expressly recognized our authority to establish proper headwater benefits charges retroactively.

29. The examples provided by Albany Engineering in fact support our position. As we explained in our May 2009 Order, in other areas of Commission jurisdiction, such as the ones cited by Albany Engineering, Congress has explicitly provided the Commission with authority to order refunds.<sup>15</sup> Refund authority is noticeably absent from section 10(f) and, indeed, from virtually all of Part I of the FPA, which does not deal with Commission jurisdiction over rates. The concept that our authority to order refunds is even broader where it is not specified at all is difficult to credit. Authority to establish headwater benefits charges retroactively does not imply authority to require refunds of payments that were neither demanded nor made with reference to a Commission determination or through a Commission proceeding.

30. Albany Engineering asserts that a proper reading of the law that balances the concerns of both the upstream and downstream project owners could lead to a reasonable resolution for all parties. It claims that, if we were to acknowledge the proper scope of our jurisdiction, there could be a headwater benefits determination that would allow the District and the downstream licensees to continue their operations, with the District coming to recognize that headwater benefits charges on downstream licensees were not meant to be a mechanism for recovering its full revenue requirement. Without the requested remedies, Albany Engineering asserts, the District has in effect been given a green light to continue its practices because we claim we have no authority to stop it. Therefore, Albany Engineering reiterates its requests that we order the District to cease demanding payments until a headwater benefits study is completed or a settlement is approved by the Commission, establish appropriate charges for the future and determine what charges were appropriate in the past, and order the District to make refunds of the excessive charges since 2003.

31. As we stated before, the proper balance of concerns of upstream and downstream project owners was central to the court's opinion finding that Congress intended section 10(f) to preempt state law completely, but it does not resolve the issue of the authority the Commission has been given to provide remedies in this situation. As we also stated, Commission staff is, in fact, in the process of conducting a headwater benefits investigation that will determine the appropriate headwater benefits charges for all

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<sup>15</sup> *Albany Engineering Corporation v. Hudson River-Black River Regulating District*, 127 FERC ¶ 61,174 at P 34.

downstream project owners since the District received its license. Since section 10(f) requires payment by downstream licensees of such annual charges for interest, maintenance, and depreciation “as the Commission may deem equitable,” we may be able to consider offsetting future charges by amounts that have already been paid. In any event, Albany Engineering’s claim that our position gives the District a green light to continue its practices is untenable. Apart from the fact that we have no indication that the District (as opposed to the New York counties) has tried to continue assessing headwater benefits under New York law since the court issued its opinion, the idea that the District would not be constrained by a court of appeals finding that it lacks authority to assess those charges strikes us as a discredit to the authority of the court.

32. We did not authorize, let alone direct, the District to assess headwater benefits from the downstream licensees, nor did we either explicitly or implicitly approve its actions in doing so. The District took these actions on its own.<sup>16</sup> Similarly, we did not require Albany Engineering or the other downstream licensees to pay those assessments. Albany Engineering could have refused to pay the assessments if it had thought that the District lacked the authority to make them. It approached this problem by seeking, and ultimately receiving, a determination that the authority under which the assessments were being made is preempted by the FPA. We continue to believe that any further responsibility to address continuing unauthorized acts taken by the District or by the counties, or to seek refunds of payments solicited by the District through its reliance on state law, lies with Albany Engineering itself, armed with the court’s preemption finding. We also believe that we have fulfilled our responsibilities by ruling on the preemption issue and by instituting a headwater benefits investigation to determine the appropriate past and future headwater benefits charges beginning with the issuance of the District’s license.

The Commission orders:

The request filed June 22, 2009, by Albany Engineering Corporation and Green Island Power Authority for rehearing of the Commission’s order issued May 21, 2009, in this proceeding is denied.

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<sup>16</sup> To the extent that Albany Engineering implies that, in finding the District’s assessments not to be a violation of section 10(f), we sanctioned the issuance of past or future assessments, the company mischaracterizes our position.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.