153 FERC ¶ 61,218
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Hudson River-Black River Regulating District	Docket No.	HB81-09-2-003
	Project Nos.	12252-033
		13-032
Green Island Power Authority and Albany Engineering Corp.		2047-059
Erie Boulevard Hydropower L.P.		2318-052
		2482-099 and 2554-072
		2385-028
FH Opco LLC		2609-045
Curtis/Palmer Hydroelectric Co.		2934-027
New York State Electric & Gas Corp.		4226-006
Fort Miller Associates		4684-069
GR Catalyst One., LLC		5276-063
Northern Electric Power Co. and Niagara Mohawk Power Corp.		5461-050
South Glens Falls Limited Partnership and Niagara Mohawk Power Corp.		6032-074
Albany Engineering Corp.		

ORDER ON REHEARING AND DISMISSING MOTION FOR STAY

(Issued November 19, 2015)

1. Erie Boulevard Hydropower, L.P. (Erie Boulevard) and, jointly, South Glens Falls Limited Partnership and Northern Electric Power Co. (collectively, Boralex Companies[1]) filed timely requests for rehearing and stay of Commission staff's August 21, 2015 order calculating dates for commencement of headwater benefits assessments pursuant to

[1] Boralex Inc. indirectly owns both companies.

Federal Power Act section 10(f)[2] based on benefits that the Hudson River-Black River Regulating District's (District) Great Sacandaga Lake Project No. 12252 provided to 13 downstream beneficiary projects in the Hudson River Basin (August 2015 Order).[3] On September 30, 2015, Albany Engineering Corp. (Albany Engineering) filed a request for clarification. For the reasons discussed below, we grant Erie Boulevard's rehearing in part, deny the Boralex Companies' rehearing, and dismiss the stay requests as moot. We also grant Albany Engineering clarification as explained below.

I. Background

A. Statutory Overview

2. Regulation of streamflow by storage projects on a river system's headwaters can increase the electric generation potential at downstream hydropower projects. Section 10(f) of the FPA provides:

> That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission.

3. Under the Commission's regulations, owners of downstream and headwater projects may negotiate a settlement for these charges and file it for Commission approval.[4] If, as pertinent here, the parties are unable to reach agreement, and one of the parties asks the Commission to determine the charges, the Commission will conduct an investigation and collect information for determining headwater benefits charges.[5]

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[2] 16 U.S.C. § 803(f) (2012).

[3] 152 FERC ¶ 62,124 (2015) (August 2015 Order).

[4] 18 C.F.R. § 11.14(a)(1) (2015).

[5] 18 C.F.R. § 11.15 (2015).

B. Parties

4. The District's Great Sacandaga Lake Project confers benefits in the form of regulated flow of water to 13 downstream projects. Erie Boulevard is the licensee for four of the downstream beneficiary projects: E.J. West Project No. 2318, Stewart's Bridge Project No. 2047, Hudson River Project No. 2482, and the Feeder Dam Project No. 2554. These proceedings have treated the Glens Falls Project No. 2385 as if Erie Boulevard is the licensee, when in fact the project has been licensed to FH Opco LLC since May 2007.[6] Both FH Opco LLC and Erie Boulevard are subsidiaries of Brookfield Renewable Energy Group (Brookfield).

5. The Boralex Companies are licensees for two other beneficiary projects: South Glens Falls is co-licensee for the South Glens Falls Project No. 5461; and Northern Electric is co-licensee for the Hudson Falls Project No. 5276.[7]

C. Procedural Background

6. The Conklingville Dam, which impounds the Great Sacandaga Lake, was constructed in the 1920s-1930s, and over the years the District assessed downstream entities (including licensees) for headwater benefits under authority of New York's Environmental Conservation Law. After the Commission licensed the Great Sacandaga Lake Project No. 12252 in 2002,[8] the District continued to assess headwater benefits under state law.

1. Erie Boulevard's 2006 Settlement

7. In 2002, after the Commission licensed the District's Great Sacandaga Lake Project, Erie Boulevard sued the District in New York Supreme Court, challenging the

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[6] The Glens Falls Project was licensed to Finch, Pruyn, and Company, Inc. in 2001, *Finch, Pruyn and Co., Inc.*, 97 FERC ¶ 62,170 (2001), and the license was transferred to Finch Hydro Holdings LLC in May 2007, *Finch, Pruyn and Co., Inc. and Finch Hydro Holdings LLC*, 119 FERC ¶ 62,133 (2007). In June 2007, Finch Hydro Holdings LLC changed its name to FH Opco LLC. The contacts for Erie Boulevard's and FP Opco's projects are the same. *See, e.g.*, Brookfield's January 6, 2012 filing in Project Nos. 2318, 2385, *et al.*

[7] Niagara Mohawk Power Company is the other co-licensee for both the South Glens Falls and the Hudson Falls Projects.

[8] *Hudson River - Black River Regulating District*, 100 FERC ¶ 61,319 (2002).

District's headwater benefits assessments under New York state law for its four beneficiary projects[9] for the six budget years from July 1, 2000, through June 30, 2006. Erie Boulevard challenged the District's "budgets, assessments, and apportionments." In May 2006, Erie Boulevard and the District agreed to settle the lawsuit, and filed a settlement (2006 Settlement) with the court that resulted in a credit to Erie Boulevard of $822,220 that would be used to reduce its payments to the District for budget years July 1, 2006, through June 30, 2009.[10]

8. In paragraph 10 of the 2006 Settlement, Erie Boulevard agreed to release the District from any claims relating to the six budget years (July 1, 2000, through June 30, 2006):[11]

> Each of the Parties, on behalf of itself and on behalf of any person or entity claiming by, through or under it, does hereby release and forever discharge each of the other Parties, … (collectively, the "Released Parties"), from any and all claims, demands, judgments, liabilities, damages, and causes of action of every kind and character, whether such claims arise in contract or tort, are founded upon statutory or common law, or whether such claims are known or unknown, at law or in equity ("Claim" or collectively, "Claims"), arising out of or in any way related to the District's budgets, assessments and apportionments for the budget years July 1, 2000 to … June 30, 2006, which such Party may now have against the Released Parties (to the extent that such claims originated in whole or in part or, based on presently existing facts, that could have originated in whole or in part on or before that date hereof).

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[9] E.J. West Project No. 2318, Stewart's Bridge Project No. 2047, Hudson River Project No. 2482, and the Feeder Dam Project No. 2554. For budget years 2002 through June 2006, the District had charged Erie Boulevard (and Erie Boulevard had paid) $4,465,029 (rounded to the nearest dollar).

[10] *See* District's November 13, 2012 Filing, Docket No. HB81-09-2-1 (attaching copy of 2006 Settlement). Erie Boulevard's reduced payments for its four projects for budget years 2006 through 2008 totaled $4,401,491 (rounded to the nearest dollar).

[11] 2006 Settlement P 10.

9. In paragraph 13, Erie Boulevard also agreed to release any claims related to the three budget years from July 1, 2006, through June 30, 2009:[12]

> Petitioner agrees to waive any future challenges or claims with respect to the District's July 1, 2006 … to June 30, 2009 budgets, assessments and/or apportionments and agrees not to bring any lawsuit or legal action of any kind challenging, contesting or disputing the District's budgets, assessments and/or apportionments for the period July 1, 2006 to June 30, 2009.

10. The New York Supreme Court approved the 2006 Settlement on May 23, 2006.[13]

2. Albany Engineering's Complaint Proceeding

11. In July 2006, Albany Engineering Corp. (Albany Engineering), the licensee for one of the downstream beneficiaries, the Mechanicville Project No. 6032, took a different path. Albany Engineering challenged the District's New York state assessments by filing a complaint at the Commission against the District. Albany Engineering asserted the District's assessments for headwater benefits under color of New York state law were preempted by FPA section 10(f).

12. The Commission agreed that FPA section 10(f) preempted the New York headwater benefits scheme to the extent New York law allowed for assessments related to "interest, maintenance, and depreciation;" however, to the extent New York law allowed for assessments outside of "interest, maintenance, and depreciation," the Commission found no preemption.[14]

13. Albany Engineering sought judicial review, and in November 2008, the United States Court of Appeals for the District of Columbia Circuit ruled that FPA section 10(f) preempted all state assessments for headwater benefits, not just assessments for "interest,

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[12] *Id.* P 13.

[13] 2006 Settlement.

[14] *Fourth Branch Associates (Mechanicville) v. Hudson River-Black River Regulating District,* 117 FERC ¶ 61,321 (2006) (2006 Complaint Order), *reh'g denied,* 119 FERC ¶ 61,141 (2007) (2007 Complaint Rehearing Order).

maintenance, and depreciation."[15] The court remanded the case for the Commission to determine an appropriate remedy in light of the broader preemption.[16]

14. Following remand, Albany Engineering requested that the Commission require the District to refund with interest amounts Albany Engineering had paid under color of the preempted state law.[17] In May 2009, the Commission issued an order (2009 Remand Order) determining that, inasmuch as the payments to the District were neither demanded nor made with reference to a Commission determination or through a Commission proceeding, the District was not in violation of its license, and the Commission therefore lacked authority to order refunds for these unauthorized state assessments.[18] Although it could not order the District to make refunds, the Commission said that it "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."[19] The Commission explained that, if Albany Engineering insisted on obtaining an immediate refund of the payments, rather than a remedy that the Commission may be able to provide, it should do so through court action.[20]

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[15] *Albany Engineering Corp. v. FERC*, 548 F.3d 1071 (D.C. Cir. 2008) (*Albany Engineering*).

[16] *Id.* at 1081.

[17] Albany Engineering February 26, 2009 Answer, Docket No. EL06-91-000, at 3.

[18] *Albany Engineering Corporation v. Hudson River-Black River Regulating District*, 127 FERC ¶ 61,174 (2009 Remand Order), *reh'g denied* 129 FERC ¶ 61,134 (2009) (2009 Remand Rehearing Order) ("Authority to establish headwater benefits 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."); 2009 Remand Rehearing Order, 129 FERC ¶ 61,134 P 29.

[19] 2009 Remand Order, 127 FERC ¶ 61,174 at P 3. In support of this finding, the Commission explained that "[s]ection 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.*'" *Id.* P 19 n.16 (emphasis in original).

[20] *Id.* PP 19, 24, and 41. The Commission explained that in any court action Albany Engineering "can rely on the Court of Appeals determination that the assessments were unauthorized because they were made under preempted authority." *Id.* P 41.

15. Albany Engineering pursued a remedy through the New York state courts and received a refund of state assessments for the years 2003 through 2008, including interest.[21]

3. Commission Determination of Headwater Benefits

16. Because the District and downstream licensees thereafter proved unable to agree on FPA section 10(f) headwater benefits assessments, Commission staff at the request of the District initiated a headwater benefits investigation to establish section 10(f) assessments.[22] Commission staff issued for comment a draft headwater benefits determination report on January 19, 2012. In its comments on the draft report, the District stated that it "expressly reserves its right to raise any legal or equitable grounds for limiting the extent of credits against Headwater Benefits charges for payments made by licensees under color of State law prior to the [2008 *Albany Engineering* decision]."[23]

17. Following the submission of comments, Commission staff issued an order determining headwater benefits.[24] The July 2012 Order resolved issues raised in response to the draft report, and determined the extent of benefits the operation and maintenance of the Great Sacandaga Lake Project conferred to the downstream projects for the period 2002 through 2008.[25] The order also determined interim assessments beginning in 2009.

18. With respect to Erie Boulevard, the July 2012 Order found that the sum of Erie Boulevard's FPA section 10(f) assessments for the period 2002 through 2008 was $1,849,640.[26] This amount included not only Erie Boulevard's four projects (E.J. West, Stewart's Bridge, Hudson River, and Feeder Dam), but also FH Opco's Glens Falls

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[21] Albany Engineering August 22, 2012, and November 22, 2013 Filing. *See Albany Engineering Corp. v. Hudson River/Black Regulating District*, 973 N.Y.S.2d 391 (N.Y. App. Div. 2013).

[22] *See* August 4, 2009 Commission staff letter.

[23] District March 16, 2012 Filing.

[24] *Hudson River – Black River Regulating District, et al.*, 140 FERC ¶ 62,089 (2012) (July 2012 Order).

[25] *Id.* Ordering Paragraph (A).

[26] *Id.* Table 4.

Project. As for future interim assessments, the July 2012 Order also again combined these five projects, and determined an interim annual amount of $365,100.[27]

19. After determining final and interim section 10(f) assessments, the July 2012 Order turned to the question of how to handle previous assessments the District had collected under color of New York state law. The order stated:

> To the extent that the downstream project owners have already paid the District under New York law for what were, incontestably, headwater benefits, requiring those project owners to pay the District yet again for headwater benefits for those years, this time under section 10(f), would amount to a double payment that could not be reconciled with the Commission's responsibility to ensure reimbursements that are "equitable."[28]

20. The order also was concerned with state assessments that may have exceeded the section 10(f) amount:

> Moreover, to the extent that, while the Great Sacandaga Lake Project has been under license, any of the downstream project owners made payments exceeding the amounts that this order finds were owed for those years, those overpayments, equitably, should be offset against future charges.[29]

21. The July 2012 Order recognized that the point at which the annual section 10(f) assessments would be completely offset by prior payments to the District would vary from project to project, and that the amounts paid by the downstream project owners to the District were not part of the record of the Commission proceeding. In addition, the order stated that "downstream project owners may already have obtained refunds from the District through court action or other means."[30]

22. The order therefore requested that the parties collaboratively determine a break-even point when the annual section 10(f) assessments determined in the July 2012 Order

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[27] *Id.* Table 5.

[28] *Id.* P 44.

[29] *Id.*

[30] *Id.* P 45.

would be offset by overpayment of prior state assessments, at which point section 10(f) payments to the District would resume. The order required the 13 downstream beneficiaries to file individual agreements that reflected: (1) Commission-determined headwater benefits assessments for the period 2002 through 2008; (2) annual interim assessments beginning in 2009; and (3) payments made pursuant to New York state law that each of the beneficiary projects made to the District since Commission licensing of the Great Sacandaga Lake Project in 2002.[31]

4. Post-July 2012 Order Filings and August 2015 Order

23. On October 31, 2012, Erie Boulevard filed a letter stating that attempts to reach an agreement with the District had failed. Erie Boulevard calculated it paid the District $9,146,507.98, resulting in an overpayment of $7,296,867.98 for 2002 through 2008. Erie Boulevard attached a table to its letter showing state assessments for each year for each project.[32]

24. On November 13, 2012, the District responded that there had been no overpayment by Erie Boulevard. Rather, the District maintained that the lawsuit and 2006 Settlement resolved headwater benefits assessments for Erie Boulevard for the budget years July 1, 2000, through June 30, 2009. Thus, according to the District, Erie Boulevard had essentially waived any arguments as to the District's charges for the 2002 through June 2009 budget years, and there should be no offset for these charges against future section 10(f) assessments.

25. In its December 3, 2012 response, Erie Boulevard argued that paragraph 10 of the 2006 Settlement is inapplicable because its current claim of overpayment did not arise until the *Albany Engineering* decision in November 2008; therefore, a claim did not exist at the time of the settlement and could not have been covered by it. Further, Erie Boulevard argued that paragraph 10 is applicable only to causes of action and claims brought or asserted in adversarial court proceedings rather than non-adversarial processes such as these administrative proceedings. Erie Boulevard contended that paragraph 13 is inapplicable because this administrative proceeding is not a lawsuit brought by Erie Boulevard or a claim advanced by Erie Boulevard. Finally, Erie Boulevard stated the District should have raised the waiver issue much earlier.

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[31] *Id.* Ordering Paragraph (B).

[32] This amount included Erie Boulevard's payments for FH Opco's Glens Falls Project of $139,769.51 for budget years 2007 (when FH Opco became the licensee) and 2008, for a total of $279,539 (rounded to nearest dollar).

26. On December 18, 2014, Erie Boulevard supplemented the record, contending that because the 2006 Settlement was not submitted to the Commission for approval as required by 18 C.F.R. § 11.14(a) (2014), the settlement cannot affect the equitable determination of FPA section 10(f) headwater benefit assessments. Further, Erie Boulevard stated that using the 2006 Settlement would "resurrect the preempted and defunct New York State scheme and retain for [the District] the vast majority of the payments it received from Erie Boulevard in response to the District's assessments under that illegal scheme."[33]

27. On August 21, 2015, Commission staff issued its order, crediting Erie Boulevard for its prior state law assessments up to the section 10(f) amount determined in the July 2012 Order, thereby avoiding double payment for the years 2002 through 2008. However, the August 2015 Order determined that the equities surrounding the 2006 Settlement made it inappropriate to allow Erie Boulevard to offset future section 10(f) assessments with the state law assessments to which it had agreed in the 2006 Settlement.

28. The August 2015 Order, relying on the analysis from the 2009 Remand Order and 2009 Remand Rehearing Order, explained that:

> Although not required to do so, the July 2012 order established a crediting mechanism to address prior overpayments for state headwater benefit assessments. As provided in FPA section 10(f), the purpose of the crediting mechanism is to require payments that the Commission "deem[s] equitable."[34]

29. In the case of Erie Boulevard and the District, the August 2015 Order stated:

> Erie Boulevard chose state litigation to challenge the amount of the District's state assessments. Erie Boulevard and the District resolved the issue and established assessments for July 1, 2000, through June 30, 2009, that both the District and Erie Boulevard believed were fair and reasonable, with both agreeing to give up "any and all claims, demands, judgments, liabilities, damages, and causes of action of every kind and character, whether such claims arise in contract or tort, are

[33] The District responded on December 24, 2014, and Erie Boulevard responded to the District on February 10, 2015.

[34] August 2015 Order, 152 FERC ¶ 62,124 at P 18.

> founded upon statutory or common law, or whether such claims are known or unknown, at law or in equity … in any way related to the District's … assessments …" for budget years 2002 through June 30, 2009. [footnote omitted] Under these circumstances, it is reasonable and equitable to hold Erie Boulevard and the District to the bargain they struck regarding these payments.[35]

II. Discussion

A. Erie Boulevard Rehearing Request

30. On rehearing, Erie Boulevard argues that (1) the August 2015 Order relied on truncated sections of the 2006 Settlement; (2) the August 2015 Order ignored prior Commission orders; (3) the District's reliance on the 2006 Settlement amounted to an untimely collateral attack on the July 2012 Order; (4) reliance on the 2006 Settlement was not based on substantial evidence in the record; (5) reliance on the 2006 Settlement was not in accordance with the FPA and the Commission's regulations; (6) denying equitable relief effectively resurrected a state statutory scheme for assessing headwater benefits that *Albany Engineering* had held to be preempted; (7) denial of equitable relief to Erie Boulevard was particularly inappropriate in light of the fact that only it and Albany Engineering had provided timely notice of objection to the state law assessments; (8) the August 2015 Order erroneously included the Glens Falls Project among Erie Boulevard's other projects subject to the 2006 Settlement; and (9) the August 2015 Order erroneously denied interest.

1. Given the 2006 Settlement, the August 2015 Order reasonably denied credits for Erie Boulevard's payments to the District pursuant to state law.

31. Erie Boulevard asserts that the August 2015 Order's reliance on the 2006 Settlement to deny it equitable relief was misplaced. It contends that the order failed to recognize that paragraph 10 of the Settlement provides that the parties agreed to give up all claims the parties "*may now have.*" Erie Boulevard maintains that it did not have a preemption claim against the District at the time it entered into the 2006 Settlement

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[35] *Id*. P 19. The order also noted that "Erie Boulevard instead could have chosen, as Albany Engineering did, to challenge the legality of the assessments under the FPA. But it did not." *Id.* n.28.

because that claim is based on the preemption of the state scheme by the FPA, a claim that did not arise until the 2008 *Albany Engineering* decision.[36]

32. Erie Boulevard's analysis of whether it had a "claim" does not comport with the language of paragraph 10. The August 2015 Order set forth in full the relevant provisions of paragraphs 10 (which applies to budget years July 2000-June 2006) and 13 (which applies to budget years July 2006-June 2009) of the 2006 Settlement, and they are again set forth above. Language from paragraphs 10 and 13 shows the parties intended a broad release. Paragraph 10's broad language applies to "claims, demands, judgments, liabilities, damages, and causes of action," and includes phrases such as "any and all" and "of every kind and character" to emphasize the expansive breadth of the release. The release applies to such claims whether they were "known or unknown," and covers claims that are "based on presently existing facts." Paragraph 13 also contains very broad language. Erie Boulevard "agrees to waive any future challenges or claims" with respect to the District's budgets, assessments and/or apportionments for budget years July 2006-June 2009 and "agrees not to bring any lawsuit or legal action of any kind challenging, contesting or disputing" the District's assessments for these years.

33. Erie Boulevard places great emphasis on the "which such Party may now have" language in paragraph 10, but in doing so it ignores the language that immediately follows. The release applies to any and all claims "which such Party may have against the Released Parties (to the extent that such claims originated in whole or in part or, *based on presently existing facts, that could have originated in whole or in part on or before the date hereof*.)" (Emphasis added.) The relevant facts arose in 2002 when the Commission issued the District a license for the Great Sacandaga Lake Project and when the District continued to assess downstream beneficiaries based on state law. That Erie Boulevard had a claim is demonstrated by the fact that Albany Engineering, which was in a similar position to Erie Boulevard, litigated and prevailed on its claim.

34. Erie Boulevard, like Albany Engineering, *"*could have*"* made a claim against the District, arguing that the District's assessments were illegal. The *Albany Engineering* decision supports this view, recognizing that from the time the District received its license in 2002, the District lacked the authority to make assessments under state law.[37] Erie Boulevard could have refused to pay the assessments on the grounds they were preempted, and could have sought return of assessments already paid. Instead, Erie Boulevard sued the District, challenging the specific amount being assessed, and then signed a release broadly covering any additional challenges to those amounts.

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[36] Erie Boulevard Rehearing Request at 10-11.

[37] 548 F.3d 1071, 1079.

35. Erie Boulevard argues the *Albany Engineering* decision was not a presently existing "fact."[38] This argument confuses facts with law. To be sure, the "fact" of the *Albany Engineering* decision represented helpful precedent to Erie Boulevard; however, it does not follow that this precedent created a claim that did not previously exist. The decision represents an interpretation of law, not the creation of new facts. The facts upon which Albany Engineering mounted its successful challenge to the District's assessments existed when Erie Boulevard entered into the settlement.

36. Erie Boulevard challenged certain aspects of the District's assessments, settled these challenges, and as part of that settlement agreed to broadly release all claims regarding those state assessments, not excluding claims based on federal preemption. Accordingly, the August 2015 Order correctly denied Erie Boulevard equitable relief from the charges it had agreed to pay the District.

2. Prior orders in these proceedings did not bind the Commission to allow credits for Erie Boulevard's payments under state law.

37. Erie Boulevard maintains that giving effect to the 2006 Settlement is contrary to Commission precedent. In support, the company cites the 2006 Complaint Order[39] and the 2007 Complaint Rehearing Order:

> [T]he fact that the District and Erie reached a settlement in respect to Erie's assessments does not affect our authority under section 10(f) to determine the proportion of equitable charges for interest, maintenance, and depreciation that each downstream hydropower beneficiary should pay the District. The settlement was not submitted to the Commission for approval and does not reflect a Commission determination of the charges that Erie should pay under section 10(f).[40]

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[38] Erie Boulevard Rehearing Request at 11 n.2.

[39] 2006 Complaint Order, 117 FERC ¶ 61,321 at P 53 n.48 ("This settlement was not submitted to or approved by the Commission, and it does not affect our responsibility under section 10(f) to determine the proportion of the equitable charges for interest, maintenance, and depreciation that each downstream hydropower project owner receiving headwater benefits should pay the District.").

[40] 2007 Complaint Rehearing Order, 119 FERC ¶ 61,141 at P 35 (footnotes omitted).

38. The 2006 Complaint Order and 2007 Complaint Rehearing Order were reversed and remanded by *Albany Engineering;* thus, they do not serve as controlling precedent here. Indeed, as the court explained in *Albany Engineering*,

> Our holding that § 10(f) preempts *all* state headwater benefits assessments materially changes the context for FERC's consideration of both these issues.… In light of these changed circumstances, we find it appropriate to remand to FERC to consider the scope of its authority to craft appropriate remedies.…
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> . . .
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> Thus we leave the issue of an appropriate remedy for FERC to resolve on remand, in light of the much broader preemption that we find compared to what FERC assumed.[41]

39. Moreover, the Commission issued these orders before Commission staff issued the headwater benefits determination in January 2012, before the necessity of considering a remedy for previous state assessments arose, and before it had the language of the 2006 Settlement before it.[42] Therefore, the complaint orders cited by Erie Boulevard do not represent binding precedent that prevents the Commission from giving the 2006 Settlement equitable consideration.

3. <u>The District's arguments regarding the 2006 Settlement do not amount to an untimely, collateral attack on the July 2012 Order.</u>

40. Erie Boulevard argues the District should have raised the issue of the 2006 Settlement in response to the 2009 Remand Order or in a timely request for rehearing of the July 2012 Order rather than in its November 13, 2012 filing.[43] It contends that the July 2012 Order indicated the intent to provide credits for all downstream beneficiaries

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[41] 548 F.3d 1071, 1079-81.

[42] Albany Engineering attached to its rehearing request the District's press release regarding 2006 Settlement—not a copy of the settlement itself. *See* Albany Engineering January 22, 2007 Rehearing Request at 18 n.7 ("[Albany Engineering] has not yet been able to acquire the text of the entire state court settlement.").

[43] Erie Boulevard Rehearing Request at 26-28.

without exception.[44] Erie Boulevard elaborates that the July 2012 Order put the District on notice that the Commission intended to credit Erie Boulevard for all of its overpayments to the District.

41. Erie Boulevard misstates the extent of the determinations made in the July 2012 Order. The substantive issues resolved in the order addressed comments filed in response to the draft headwater benefits report, and calculated headwater benefits for the basin. The July 2012 Order resolved those issues, and arrived at a section 10(f) "interest, maintenance, and depreciation" determination, but concluded that additional information needed to be collected from all parties—not just from the downstream beneficiaries, but also from the District. Until such time as the Commission had all the facts before it, it could not make a final determination on these matters.

42. The 2009 Remand Order recognized only that the Commission "*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."[45] On rehearing of the 2009 Remand Order, the Commission again acknowledged only that, at the conclusion of a headwater benefits investigation, it "*may be able* to consider offsetting future charges by amounts that have already been paid."[46] Moreover, the July 2012 Order recognized that "downstream project owners may already have obtained refunds from the District through court action or other means" and that "in any headwater benefits determination done for the basin, [the Commission] could take into account such refunds…."[47] It is within this context that the July 2012 Order sought additional information.

43. The Commission contemplated collecting information, not only regarding previous assessments, but also regarding "any funds that may have since been returned to the downstream licensees."[48] In response to the July 2012 Order's request for additional information, and after the parties failed to reach a mutually agreeable resolution, Erie

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[44] *See* July 2012 Order, 140 FERC ¶ 62,089 at P 44 ("Moreover, to the extent that, while the Great Sacandaga Lake Project has been under license, any of the downstream project owners made payments exceeding the amounts that this order finds were owed for those years, those overpayments, equitably, should be offset against future charges.").

[45] *See* 2009 Remand Order, 127 FERC ¶ 61,174 at P 3.

[46] 2009 Remand Rehearing Order, 129 FERC ¶ 61,134 at P 31.

[47] *Id.* P 45 and n.18.

[48] July 2012 Order, 140 FERC ¶ 62,089 at P 48.

Boulevard filed information regarding its previous state law assessments, and the District filed additional information highlighting the unique circumstances with respect to Erie Boulevard, i.e. the provisions of the 2006 Settlement. The Commission resolved these issues in the August 2015 Order, and it is then that the issue became ripe for rehearing.

44. In support, Erie Boulevard cites *New York Independent System Operator, Inc.*[49] and *Tennessee Gas Pipeline Co.*[50] However, these cases do not help Erie Boulevard. Unlike the situation here, in those cases the Commission had made an explicit finding on a specific issue. As explained above, the issue of how to treat Erie's payments to the District under the 2006 Settlement only arose as a result of the request in the July 2012 Order for additional information.[51] Thus, the facts of these proceedings do not fit within the rule set forth in the cases cited by Erie Boulevard.

45. For the above reasons, we deny rehearing on this issue.

4. <u>The determination to give effect to the 2006 Settlement language was not arbitrary and capricious.</u>

46. Erie Boulevard avers that the August 2015 order was not based on substantial evidence, and was in fact contrary to all the evidence in the record. Erie Boulevard states that, by relying on the 2006 Settlement to deprive it of credits for its past payments, the August 2015 Order ignored the Commission's January 19, 2012 draft headwater benefits determination report. Erie Boulevard reasons that the denial of credits forces it essentially to pay headwater benefits that exceed the section 10(f) amount determined in the January 2012 draft report and in the July 2012 Order.

47. The August 2015 Order did not ignore the January 19, 2012 draft report. The August 2015 Order relied on the draft report for the purpose of concluding that Erie Boulevard had made sufficient payments to the District for the 2002 through 2008 time period to satisfy amounts determined pursuant to section 10(f). It is known that Erie Boulevard made sufficient payments to satisfy these section 10(f) amounts because the

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[49] 135 FERC ¶ 61,170, at P 105 (2011).

[50] 105 FERC ¶ 61,120, at P 5 (2003).

[51] The July 2012 Order specifically found not only that it did not have the necessary information to incorporate previous state assessments but also that there may be special circumstances whereby "downstream project owners may already have obtained refunds from the District through court action or other means." July 2012 Order, 140 FERC ¶ 62,089 at P 45.

state assessments Erie Boulevard had paid for this same time period exceeded the section 10(f) amounts determined in the January 19, 2012 draft report and in the July 2012 Order. These proceedings have simply used Erie Boulevard's previous state assessments as credits against the section 10(f) amount determined in the July 2012 Order, thereby not requiring Erie Boulevard to make double payments for this time period. However, with respect to the excess payments Erie Boulevard had made pursuant to state law—where other equities such as the 2006 Settlement come into play—the Commission has determined that crediting Erie Boulevard for these excess payments is not appropriate based on the bargain it struck in that settlement. These determinations, therefore, in no way mean that the August 2015 Order was not based on substantial evidence.

5. Reliance on the 2006 Settlement is consistent with FPA section 10(f).

48. Erie Boulevard argues the August 2015 Order's reliance on the 2006 Settlement to deny Erie Boulevard credits is inconsistent with the FPA and Commission regulations. Erie Boulevard contends, while the section 10(f) study determined Erie Boulevard's share of "interest, maintenance, and depreciation," the state assessments included not only "interest, maintenance, and depreciation" but also included expenses such as capital and operating expenses. Erie Boulevard states that Commission staff failed to explain how it could rely on the 2006 Settlement to eliminate future offsets when clearly the 2006 Settlement could not have been approved under FPA section 10(f). Erie Boulevard adds that Commission staff erred in relying on the 2006 Settlement because it had not been submitted to the Commission for approval under Rule 602 of the Commission's Rules of Practice and Procedure.[52]

49. In the remand orders, the Commission was clear that the District's collection of state headwater benefits assessments was not a violation of the District's license, and was not a violation of the FPA. The July 2012 Order determined section 10(f) amounts for "interest, maintenance, and depreciation" and the August 2015 Order ensured that Erie Boulevard has made sufficient payments to the District to cover these amounts, while at the same time recognizing the bargain struck between Erie Boulevard and the District. Given the equities at stake, the Commission considers amounts Erie Boulevard paid that exceed the amount determined pursuant to section 10(f) to have been settled by the 2006 Settlement. As the Commission has said throughout these proceedings, Erie Boulevard's remedies for anything in excess of the section 10(f) amount determined in the July 2012 Order lie in state court.

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[52] 18 C.F.R. § 385.602 (2015).

6. **The August 2015 Order did not give effect to state law assessments that the D.C. Circuit Court of Appeals had found to be preempted.**

50. Erie Boulevard argues Commission staff's treatment of the 2006 Settlement inappropriately resurrected state law assessments that *Albany Engineering* had found to be preempted. The company emphasizes the statements by the D.C. Circuit Court of Appeals that the state headwater benefits assessment scheme has been totally preempted. Erie Boulevard argues that Commission staff did not explain why the District is entitled to be "unjustly enriched" by the state law payments.

51. As explained above, the Commission concludes that the August 2015 Order did not violate the FPA. Similarly, nothing about the August 2015 Order resurrects the state scheme and nothing about the August 2015 Order is contrary to *Albany Engineering.* Erie Boulevard's remedy for the excess lies in state court—a point the Commission made in the 2009 Remand Order and 2009 Remand Rehearing Order.[53]

7. **The August 2015 Order treated Erie Boulevard equitably.**

52. Erie Boulevard argues that denying it equitable relief was particularly inappropriate in light of the fact that only it and Albany Engineering had provided the District with timely notice of objections to the state law assessments. The company bolsters its argument by assuming the August 2015 Order's rationale for treating Erie Boulevard differently from other downstream licensees was that Erie Boulevard should have joined its preemption claim with its other claims in the proceeding that culminated in the 2006 Settlement.[54]

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[53] 2009 Remand Order, 127 FERC ¶ 61,174 at P 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."); 2009 Remand Rehearing Order, 129 FERC ¶ 61,134 at P 32 ("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.")

[54] Erie Boulevard Rehearing Request at 35 ("Finally, to the extent Staff's rationale for treating Erie differently than the seven other downstream licensees is that Erie should have brought a preemption claim while challenging the District's assessment of charges under the New York ECL . . ., Erie notes that, except for Albany, none of the other

(continued ...)

53. We disagree. The key to why the August 2015 Order treated Erie Boulevard differently from the other seven downstream beneficiaries (not including Albany Engineering) is that Erie Boulevard settled its disagreements with the District and in doing so, agreed to a very broad release of future claims based on facts then in existence. Given this factual distinction, Erie Boulevard's treatment in the August 2015 Order was equitable.

8. Erie Boulevard is correct that the August 2015 Order should be revised to provide an offset for payments it made on behalf of the Glens Falls Project, which was not part of the 2006 Settlement.

54. Erie Boulevard maintains that the August 2015 Order's denial of credits for past payments to the District erroneously included the Glens Falls Project No. 2385, which was not part of the 2006 Settlement. The company states that it did not become the owner of the Glens Falls project until August 2007—fourteen months after the 2006 Settlement.

55. Erie Boulevard is correct. The August 2015 Order mistakenly included the Glens Falls Project among those Erie Boulevard projects subject to the 2006 Settlement, and rehearing is granted on this point. Erie Boulevard states that, while under its ownership, the District assessed the Glens Falls Project $139,769.51 in 2007 and 2008 ($279,539.02 for both years), which Erie Boulevard paid. The project's section 10(f) assessments for the same time period were $51,741 and $66,547, respectively, for a total of $118,288. Because the Glens Falls Project No. 2385 was not part of the 2006 Settlement, and because Erie Boulevard paid $161,251 more than the District was due under section 10(f), we will allow this overpayment to offset section 10(f) assessments of $66,547 for future years.

56. By including the Glens Falls Project among Erie Boulevard's projects, the August 2015 Order also omitted the Glens Falls Project from its Table 3, which calculated the offsets. Correction of this error raises yet another issue of material concern which requires correction. Erie Boulevard provides information on amounts it has paid the District beginning in 2007 when the license was transferred to its subsidiary. It also gives estimates of the amounts paid by the prior licensee of the Glens Falls Project. To the extent there were overpayments before the license was transferred to Erie Boulevard's subsidiary in 2007, they were made by the prior licensee. Under these circumstances, we will not provide an offset to Erie Boulevard for payments made by a third party. By the

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downstream licensees challenged the District's [New York Environmental Conservation Law] assessments on § 10(f) grounds until 2012.").

same token, we will not hold the present licensee responsible for assessments for those past years.

57. Accordingly, the offset calculations in Table 3 based on information Erie Boulevard provided in its October 31, 2012 filing should have included information for Glens Falls as follows:

Revised Table 3 from August 2015 Order

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
Beneficiary	Section 10(f) Owed (2002 - 2008)	Amount Paid to District	Overpayment	Annual Section 10(f) (2009 - Forward)	Years Fully Offset By Overpayment	Year Overpayment Offset	Remaining Overpayment	Payment for Year Overpayment Offset
Curtis Palmer (P-2609)	$ 682,647.00	$ 4,202,648.00	$ 3,520,001.00	$ 171,694.00	20	2029	$ 86,121.00	$ 85,573.00
South Glens Falls (P-5461)	$ 402,482.00	$ 761,812.53	$ 359,330.53	$ 104,614.00	3	2012	$ 45,488.53	$ 59,125.47
Glens Falls (P-2385)*	$ 118,288.00	$ 279,539.02	$ 161,251.02	$ 66,547.00	2	2011	$ 28,157.02	$ 38,389.98
Hudson Falls (P-5276)	$ 385,336.00	$ 2,753,816.51	$ 2,368,480.51	$ 83,117.00	28	2037	$ 41,204.51	$ 41,912.49
Fort Miller (P-4226)	$ 36,014.00	$ 418,957.00	$ 382,943.00	$ 9,690.00	39	2048	$ 5,033.00	$ 4,657.00
Stillwater (P-4684)	$ 16,358.00	$ 317,561.00	$ 301,203.00	$ 4,190.00	71	2080	$ 3,713.00	$ 477.00
Upper Mechanicville (P-2934)	$ 126,461.00	$ 714,077.27	$ 587,616.27	$ 35,205.00	16	2025	$ 24,336.27	$ 10,868.73
Green Island (P-13)	$ 31,540.00	$ 515,323.40	$ 483,783.40	$ 6,500.00	74	2083	$ 2,783.40	$ 3,716.60

* Because we only have data for 2007 and 2008, the offset was computed based only on those years.

58. The July 2012 Order and the August 2015 Order combined numbers for Erie Boulevard's four projects and FH Opco's Glens Falls Project. The January 19, 2012 draft headwater benefits determination report stated energy gains separately for each of the individual Erie Boulevard projects and the Glens Falls Project. Based on each projects' proportional share of energy gains, the following table expands Table 4 from the July 2012 Order to show headwater benefits assessments for the 2002 through 2008 period for each project, including separate entries for each of Erie Boulevard's four projects and the Glens Falls Project:

Revised Table 4 from July 2012 Order (showing only individual headwater benefit amounts)

Year	E J West (P-2318)	Stewarts Bridge (P-2047)	Curtis Palmer (P-2609)	Hudson River (P-2482)	Feeder (P-2554)	South Glens Falls (P-5461)	Glens Falls (P-2385)	Hudson Falls (P-5276)	Fort Miller (P-4226)	Stillwater (P-4684)	Upper Mechanicville (P-2934)	Mechanicville (P-6032)	Green Island (P-13)
2002	$8,205	$11,102	$16,618	$19,250	$1,278	$9,655	$7,062	$9,570	$839	$386	$3,159	$596	$788
2003	$35,047	$31,305	$86,229	$89,843	$9,656	$49,209	$33,807	$36,387	$5,218	$2,354	$19,459	$0	$4,120
2004	$47,158	$69,631	$82,518	$85,266	$6,251	$44,567	$33,038	$43,448	$1,318	$1,100	$18,661	$1,243	$2,936
2005	$48,540	$71,990	$93,506	$111,735	$7,216	$51,290	$37,378	$54,161	$5,958	$1,827	$22,203	$3,931	$4,947
2006	$61,285	$76,513	$118,166	$150,249	$6,130	$77,986	$59,223	$80,168	$5,846	$1,816	$0	$3,873	$3,722
2007	$62,637	$103,307	$113,917	$140,313	$8,387	$65,162	$51,741	$78,485	$7,145	$4,685	$27,773	$7,820	$8,528
2008	$52,450	$36,120	$171,694	$195,441	$14,541	$104,614	$66,547	$83,117	$9,690	$4,190	$35,205	$7,857	$6,500
Totals	$315,320	$399,968	$682,647	$792,097	$53,459	$402,482	$288,795	$385,336	$36,014	$16,358	$126,461	$25,321	$31,540

59. Again, based on each projects' proportional share of energy gains, the following table expands Table 5 from the July 2012 Order to show interim assessment amounts for each beneficiary project:

Revised Table 5 from July 2012 Order

Beneficiary	Interim Assessments
E J West (P-2318)	$52,450
Stewarts Bridge (P-2047)	$36,120
Curtis Palmer (P-2609)	$171,694
Hudson River (P-2482)	$195,441
Feeder (P-2554)	$14,541
South Glens Falls (P-5461)	$104,614
Glens Falls (P-2385)	$66,547
Hudson Falls (P-5276)	$83,117
Fort Miller (P-4226)	$9,690
Stillwater (P-4684)	$4,190
Upper Mechanicville (P-2934)	$35,205
Mechanicville (P-6032)	$7,857
Green Island (P-13)	$6,500
Total	$787,968

60. Revised Tables 4 and 5 were derived using numbers from the January 19, 2012 draft report and do not represent a substantive change. With the exception of a slight rounding discrepancy, the amounts in the revised tables for the Erie Boulevard licensed projects (E.J. West, Stewart's Bridge, Hudson River, and Feeder Dam) and FH Opco's project (Glens Falls) equal the amounts in the corresponding tables from the July 2012 Order under "Erie Boulevard."

61. We are modifying Ordering Paragraph (B) of the August 2015 Order such that the interim assessments, which begin July 1, 2009, are specified for each of the beneficiary projects.

9. <u>The August 2015 Order properly did not provide for interest in its calculations.</u>

62. Erie Boulevard contends that Commission staff erroneously denied interest when providing credits for state assessments. The company states the August 2015 Order inappropriately conflated concepts when it compared illegal past state assessments with past FPA 10(f) assessments, where no interest is awarded. Erie Boulevard emphasizes how awarding interest will make the downstream beneficiaries whole by accounting for the time value of money. Erie Boulevard also points out that a court would have awarded interest as a matter of course, as exemplified by the outcome from the Albany

Engineering's proceeding in state court. Finally, Erie Boulevard states the failure to award interest penalizes Erie Boulevard in favor of those who sought relief in New York state court.

63. The Commission does not compute interest in headwater benefits cases where licensees are assessed headwater benefits retroactively, where the same time value of money arguments would be applicable. The Commission's regulations contain formulas for determining section 10(f) amounts,[55] and none of these provisions call for calculation of interest. Indeed, throughout these proceedings, Erie Boulevard has never requested that the Commission calculate interest on the section 10(f) amounts going back to 2002 determined in the July 2012 Order. The Commission calculated a section 10(f) amount for Erie Boulevard for the years 2002 through 2008, for which Erie Boulevard was given credit for its previous state law assessments. The Commission does not award interest for the past assessments, and finds that it would be inequitable to award interest for the past state law assessments but not for the section 10(f) amounts. Similarly, assessments going forward are not adjusted to account for inflation. Moreover, in a future headwater benefits study, when interim assessments are made final, Commission regulations similarly do not provide for the calculation of interest.[56] Accordingly, the August 2015 Order properly determined that interest should not be applied to credits for previous state assessments.

10. Conclusion

64. The remand orders (2009 Remand Order and 2009 Remand Rehearing Order) concluded that Albany Engineering confused the authority to preempt with the authority to order refunds. Similarly, Erie Boulevard now confuses the preemption issue with what it considers an obligation of the Commission to grant it a remedy for assessments made under color of state law that neither violated a Commission license nor the FPA. Nothing in the court's decision or the remand orders suggests that giving equitable consideration to the 2006 Settlement results in a violation of the FPA, the Commission's own regulations, and the mandate of *Albany Engineering.* The Commission has simply attempted herein to craft an equitable solution that both avoids calling on Erie Boulevard to make double payment and takes into account additional considerations such as the 2006 Settlement. Accordingly, with the exception of the issues discussed above involving Glens Falls, Erie Boulevard's rehearing request is denied.

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[55] *See* 18 C.F.R. § 11.10 *et seq.* (2015).

[56] *See, e.g., Wausau Paper Mills, et al.,* 144 FERC ¶ 62,058 (2013).

B. Boralex Companies Rehearing Request

65. On rehearing, the Boralex Companies argue that the August 2015 Order failed to provide similar treatment for similarly-situated licensees. The Boralex Companies explain that the August 2015 Order aggregated overpayments for purposes of calculating the break-even date for Erie Boulevard's five projects (E.J. West, Stewart's Bridge, Hudson River Project, and Feeder Dame) and FH Opco's project (Glens Falls), which are all under the common ownership of a common parent company, Brookfield Renewable Energy Group, but did not aggregate overpayments for the Boralex Companies' projects (South Glens Falls and Hudson Falls) to determine their "break-even" date.

66. The clarifications above change the landscape for approaching the Boralex Companies' rehearing request. The August 2015 Order erroneously included the Glens Falls Project with Erie Boulevard's projects subject to the 2006 Settlement, and also omitted Glens Falls from the table calculating commencement of section 10(f) assessments. This order corrects that omission by determining a separate date for commencement of headwater benefits assessments for the Glens Falls Project.

67. Given these modifications and clarifications, it is clear that no party to these proceedings received a benefit from aggregating numbers, and no party was harmed from aggregating numbers. The combined presentation of the numbers for Erie Boulevard's projects and the FH Opco's project was meant to simplify the orders, and was not meant to confer any benefit or detriment to Erie Boulevard or any of the other parties to these proceedings. Each project involved in these proceedings has a separate headwater benefit obligation independent of the others, and the same is true for the Boralex Companies. Accordingly, rehearing is denied.

C. Albany Engineering's Request for Clarification

68. On September 30, 2015, Albany Engineering filed a request for clarification as to whether commencing payment of headwater benefits should precede resolution of the pending requests for rehearing.

69. The order was effective upon issuance, and the filing of a request for rehearing does not operate as a stay of the order's effective date.[57]

[57] August 2015 Order, 152 FERC ¶ 62,124 at ordering para. (D).

III. Motions for Stay

70. On October 5, and 19, 2015, respectively, Erie Boulevard and the Boralex Companies filed motions for stay of the August 2015 Order pending our action on their requests for rehearing. The District filed answers opposing Erie Boulevard's and the Boralex Companies' motions for stay on October 20 and 21, 2015, respectively. This order acts on the requests for rehearing, and the motions for stay are therefore dismissed as moot.

The Commission orders:

(A) The Erie Boulevard Hydropower, L.P. rehearing request filed on September 21, 2015, is granted in part and denied in part.

(B) Interim Headwater benefits assessments for Erie Boulevard Hydropower, L.P. (E.J. West Project No. 2318 ($52,450), Stewart's Bridge Project No. 2047 ($36,120), Hudson River Project (Spier Falls and Sherman Island Developments) Project No. 2482 ($195,441), and the Feeder Dam Project No. 2554 ($14,541)) are assessed beginning July 1, 2009.

(C) Headwater benefits assessments for FH Opco LLC, licensee for the Glens Falls Project No. 2385, shall commence as set forth in Revised Table 3 from the August 2015 Order set forth above.

(D) The request for rehearing filed September 21, 2015, in this proceeding by South Glens Falls Limited Partnership and Northern Electric Power Company, jointly, is denied.

(E) Motions for stay filed by Erie Boulevard on October 5, 2015, and by South Glens Falls Limited Partnership and Northern Electric Power Company on October 19, 2015, are dismissed as moot.

(F) The request for clarification filed by Albany Engineering Corporation on September 30, 2015, is granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.