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March 4, 2010

Mr. Fred Ayer
Executive Director
Low Impact Hydropower Institute
34 Providence Street
Portland, ME 04103

BY EMAIL

Re: School Street Project Application (FERC Project No. 2539)

Dear Mr. Ayer:

I am in receipt of your letter dated January 23, 2010¹, regarding the above application of Erie Boulevard Hydropower, L.P. (“Erie”) for a five-year certification of the School Street Project by your Institute. Although your letter requested that Green Island Power Authority (“GIPA”) respond by Friday, February 26, 2010, this acknowledges your consent, by telephone conversation of February 25, that GIPA’s comments would still be considered timely if filed by close of business on Thursday, March 4. Thank you for accommodating this request.

I. YOUR JANUARY 23, 2010 LETTER TO GIPA

You state that you have extended the public comment period to February 26, 2010, in order to allow GIPA to file substantive comments on the School Street application. January 23 Letter at 1. You explain (*id.* at 2) that the Institute has requested Erie to comply, in writing, with certain conditions, in order for the Institute to continue the processing of Erie’s application in light of the decision of the U.S. Court of Appeals for the Second Circuit to vacate the School Street Project license issued to Erie in 2007 by the Federal Energy Regulatory Commission (“FERC”).² Assuming Erie’s response in writing,³ you conclude that you will continue processing the Erie application. January 23 Letter at 2. You further note that your Institute does not require a license or a third-party-enforced (or enforceable) legal instrument as a condition for

¹ Letter from Fred Ayer, Executive Director, Low Impact Hydropower Institute, to Frances E. Francis, Esq., Attorney for Green Island Power Authority, Spiegel & McDiarmid LLP (Jan. 23, 2010) (“January 23 Letter”), available at <http://lowimpacthydro.org/application-attachment.aspx?id=646>.

² *Green Island Power Auth. v. FERC*, 577 F.3d 148 (2d Cir. 2009).

³ Erie Boulevard responded in a letter from Tom Uncher dated February 12, 2010. Letter from Tom Uncher, General Manager, Brookfield Renewable Power Inc., to Fred Ayer, Executive Director, Low Impact Hydropower Institute (Feb. 12, 2010) (“February 12 Uncher Letter”) (on file with author).

certification and note that you have granted certifications based “on operating conditions that are totally voluntary on the part of the applicant.” *Id.* Further, you note that you will not use the proposed criteria stated by your Institute to become effective in early 2010, but instead will select the older existing criteria to evaluate the application for two reasons: (1) the proposed regulations have not been formally adopted by the Institute Board; and (2) Erie filed its application at a time when the existing criteria were in effect. *Id.*

Finally, you stress that the Institute does not take sides in competing license applications and simply grants certification based on meeting the Institute’s criteria. *Id.* You then state that you welcome comments from GIPA as to why it does not believe the School Street facility meets the Institute’s criteria, and state that you “will fully weigh those comments” in your review of Erie’s application, and provide 30 days for GIPA to do so. *Id.* at 2-3.

II. GIPA’S RESPONSE

First, GIPA emphasizes that it did not and does not expect the Institute to “take sides” in any competitive licensing proceeding. That is a matter for FERC to decide. Second, GIPA notes that although Erie continues to operate the School Street Project, it presumably is authorized to do so pursuant only to an annual FERC license that is based on the 1969 School Street Project license that expired at the end of December 1993. That license did not authorize the changes undertaken by Erie during the past two years, including the deepening of the diversion canal.

At the core of Erie’s representations to the Institute in its letter dated February 12, 2010, is a basic assumption that Erie can do what it wants, and that the Institute can accept what Erie wants to do for purposes of “monitoring” its performance, presently (since you will backdate the effective applicability of any LIHI certification) and for five years thereafter—despite the fact that Erie’s current license for the Project, assuming it has one at all, has a remaining term of less than a year. The United States Court of Appeals for the Second Circuit has vacated the 2007 license that was issued by FERC and that was the basis for the operational changes that Erie asserts now make it eligible for low-impact hydropower certification; FERC has not yet acted on the Court’s remand. Erie assumes it can pick and choose from the terms of the now-vacated School Street operating license, for purposes of LIHI certification, but GIPA believes that this is untenable to assume over the five-year period for which the certification is intended.

Third, we accept your invitation to explain in greater detail GIPA’s Comments 3 and 4 (January 23 Letter at 2-3), in light of the Institute’s present certification criteria, although we find it puzzling for an organization striving for the highest environmental standards to evaluate Erie’s School Street Application based on standards that are about to be replaced with presumably more refined criteria.⁴

⁴ In this regard, we note that one of the changes proposed in the new rules is to expand the standard two-year term of LIHI certification to a five-year term. Although operating under the “old” rules, it is our understanding that the certification at issue for the School Street Project is for a term of five years, beginning in October 2009, according to the Erie Application and the LIHI website (http://lowimpacthydro.org/content/proposed_cert_application_program.aspx).

A. *Erie's Application Is Deficient and Should Have Been Accompanied By An Agency Certificate*

The Institute's Certification Criteria on Fish Passage and Protection require that a facility demonstrate, *inter alia*, "that existing fish passage survival rates at the facility are greater than 95% over 80% of the run, or provide a letter prepared for the application from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service confirming the existing passage is appropriately protective."⁵ This criterion has not been met in Erie's application. FERC's Final Environmental Assessment for the School Street Project ("FEA"),⁶ issued in 2001, noted that as to outmigrating juvenile blueback herring in the Mohawk River, the School Street Project could reasonably be estimated to have an incremental mortality rate of 20-30% - more than any other hydropower project on the Mohawk River. FEA at 35-36. For outmigrating adult blueback herring in the Mohawk River, the incremental mortality rate was also projected at 20-30% for School Street. FEA at 37, Table 4. The FEA noted that factors affecting these numbers would be the carrying capacity of the river and the density-dependent factors affecting the population, but stated that "these factors are unknown at this time." FEA at 38. The FEA concluded "that migrating adult and juvenile blueback herring should be provided with a safe and effective downstream passage route at the project." FEA at 40.

Although Erie relies on the Phase I fish passage requirements that it agreed to as part of the 2005 relicensing Settlement Agreement for a new license for the School Street Project,⁷ those facilities are untested and their performance and effectiveness are not yet known.⁸ If those Phase I fish passage facilities are in fact complete, it is GIPA's understanding that studies are now being conducted to evaluate fish conditions and the effectiveness with the newly-installed fish passage facilities. GIPA, however, is not privy to the results of those studies and they have not yet been submitted to the Commission. So, to the best of GIPA's information and the public's knowledge, there is no verification that the present School Street Project, with any new Phase I fish passage facilities, is working effectively and at what level of effectiveness, if it is. Presumably, a letter from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (as required by the Institute's criterion where the mortality rates are so high), reporting on the status of those studies and an update of actual conditions at the Plant site would resolve any question as to the criterion. Since no such letter was attached to Erie's application, GIPA assumes the Erie application must be supplemented to meet the Institute's criterion.

⁵ Low Impact Hydropower Institute, Low Impact Hydropower Certification Criteria Summary of Goals and Standards at 2 (Nov. 2008) ("LIHI Certification Criteria") available at <http://lowimpacthydro.org/userfiles/file/Criteria%20Summary%2011-08.pdf>.

⁶ Final Environmental Assessment, School Street Hydroelectric Project, FERC Project No. 2539-003 (Sept. 2001), available at FERC eLibrary Accession No. 20011002-0374.

⁷ See, e.g., Erie Boulevard Hydro, L.P., Low Impact Hydro Institute (LIHI) Certification Questionnaire, Response to C.1 at 5 (last updated Nov. 18, 2009) ("Erie Application"), available at <http://lowimpacthydro.org/application-attachment.aspx?id=544>.

⁸ Indeed, based on publicly available documents filed at FERC by Erie, it is unclear whether construction of the Phase I fish passage facilities has been completed. Certain documents, however, appear to have been filed by Erie as protected documents and are not available for the public to review.

B. *Erie Avoids LIHI Questions for “New” Facilities by Asserting That School Street Is an “Existing Project”; But It Has Simultaneously Requested New York State Certification of Generation Gains Due To Recent Canal Excavation That Erie States Significantly Increased Water Flow Diverted from the Mohawk River*

According to Erie, the Institute’s criteria applicable to “new” facilities do not apply to the School Street Project. Erie Application, Background Information at 1-2 (last updated Nov. 18, 2009). According to the Institute, a facility is “new” if it is “an existing dam that added or increased power generation capacity after August of 1998.”⁹ *Id.* at 1. The LIHI Questionnaire also asks whether “the added or increased capacity include[d] or require[d] a change in water flow through the facility that worsened conditions for fish, wildlife, or water quality, (for example, did operations change from run-of-river to peaking)?” *Id.* at 2.

Erie recently excavated the School Street canal, removing 44,000 cubic yards of earth and rock, and possibly PCB-contaminated sediment, in order to increase the water flows diverted from the Mohawk River from 5,000 cfs to 6,600 cfs.¹⁰ In the attached Erie application to the New York State Energy Research and Development Authority (“NYSERDA”) (Appendix hereto), Erie claims that the modifications to the canal and resulting larger water diversions will increase Project generation by 23,037 MWh/year, or over 15%. *Id.* at 11.

Erie should not be allowed to have it both ways, claiming to the Institute that its facility qualifies as an “Existing Project” that has not been significantly altered since August 1998, and *also* claiming to NYSERDA that it has incrementally increased Project generation through changes to the Project diversion canal that increase the water diversions from the Mohawk River to the School Street canal by 32%.

Both the canal excavation and Erie’s proposed addition of a new 11-MW turbine were not only being contested in relicensing litigation while the canal was being excavated by Erie, the 2007 FERC license, and the authorization to excavate the canal it contained, were actually vacated by the Court¹¹ as a result of the litigation. As noted in Erie’s NYSERDA application, the in-service date for the canal excavation was September 4, 2009¹²—*i.e.*, a month after the Second Circuit decision. In other words, Erie apparently continued with the canal excavation, even though it was aware that the Court had already determined that the FERC authorization to do so was faulty and must be vacated. Therefore, based on the criteria explained in LIHI

⁹ Although it is unclear whether the increased flows might increase the capacity rating of the School Street Project, Erie has expressly stated that it will substantially increase both the total and instantaneous Project water diversions from the Mohawk River and the energy generation of the Project.

¹⁰ Erie Boulevard Hydro, L.P., NYSERDA RFP No. 1681, New York State Renewable Portfolio Standard Provisional Certification Application Form, Independent Engineer’s Report – School Street Hydro Development at 4, 5, 7-8, 10, 11 (Oct. 13, 2008) (“Erie NYSERDA Application”).

¹¹ *Green Island Power Auth.*, 577 F.3d at 169.

¹² Erie NYSERDA Application at 4.

Certification Questionnaire, Question No. 18 (Erie Application at 2), it appears that the facility should be deemed ineligible for consideration by LIHI.¹³

C. It Is Not Clear Whether Erie Is Reducing the Amount of Water Left in the Bypass Reach by the Way It Nets Aesthetic Flows Against Minimum Flows Established by the Settlement Offer

Erie's LIHI Application also raises two other issues that may impact fish, as Erie now operates the Project. The first relates to the calculation of the minimum flows that are needed to water the bypassed reach of the Mohawk River. The other relates to the deepening of the canal.

Although Erie has represented to the Institute that "Erie will continue to operate the facility fully in compliance with the terms contained in the vacated license, at least insofar as they are terms that are relevant to LIHI's criteria for certification" (February 12 Uncher Letter at 1), it is unclear what that means. For example, in examining the way that Erie is currently modeling the School Street Project, it appears that Erie may be: (1) combining the two types of minimum flows (aesthetic and aquatic); and (2) determining compliance with the minimum instream aquatic flow targets, based on an *average* hourly flow calculated over a 24-hour period or longer. Specifically, Erie states that it modeled aesthetic flow requirements of 500 cfs for 14 hours per day "as 292 cfs over 24 [hours]," and that minimum bypass flow releases "are included in the 500 cfs." Erie NYSERDA Application, Independent Engineer's Report – School Street Hydro Development at 6.¹⁴ This calculation does not seem to be correct. If, on June 1 there is to be continuous release of 245 cfs into the bypass reach with an increase to 500 cfs during daylight hours, then the average flow for the daily release is 394 cfs not 292 cfs.¹⁵ Erie's calculation seems to disregard the effect of the minimum release requirements during the non-daylight hours of the day, which leads one to wonder if the bypass reach will, in fact, be left dry for extended periods of time.

GIPA notes that ignoring the effect of the minimum release requirements during non-daylight hours would operate to the detriment of Section 3.2.3 of the Erie Offer of Settlement,¹⁶ requiring channel modifications in the river bottom of the bypass reach "in order to optimize the distribution of the permanent aquatic habitat flows into the existing channel downstream of the dam." If the objective of the Offer of Settlement was to maintain and retain a permanent aquatic

¹³ Question 18 provides:

- (a) If the increased or added generation is not yet operational, has the increased or added generation received regulatory authorization (e.g., approval by the Federal Energy Regulatory Commission)? If not, the facility is not eligible for consideration; and
- (b) Are there any pending appeals or litigation regarding that authorization? If so, the facility is not eligible for consideration.

¹⁴ In the Independent Engineer's Report (Erie NYSERDA Application), at 6, Erie's engineer reports that the aesthetic flows over Cohoes falls are "set to be 500 cfs" during certain periods, and then suggests that these weekend and federal holiday aesthetic flows may be combined with the minimum flow releases required for the bypass reach.

¹⁵ $((245 \text{ cfs} \times 10 \text{ hours}) + (500 \text{ cfs} \times 14 \text{ hours})) \div 24 \text{ hours} = 394 \text{ cfs}$.

¹⁶ Erie Boulevard Hydropower, L.P., Explanatory Statement and Offer of Settlement (Mar. 9, 2005), available at eLibrary Accession No. 20050314-0150.

habitat in the bypassed channel, it would seem logical that the flows would have to be maintained on a 24-hour continuous basis.

Accordingly, the Institute should ascertain how Erie is calculating the requisite minimum flows to assure itself that Erie is in compliance with its representations to the Institute. In conjunction with leaving less water than the minimum in the bypass, if that is the case, LIHI should also consider the additional impact of Erie's drawing more water through the now-deepened diversion canal, upon the fish. As noted above, Erie recently excavated the School Street Project canal in order to increase diversions to the canal by 32%. Unless priority of use is given to the minimum release flows, drawing more water through the canal will leave less flow in the bypass reach. This is of critical importance, as both the U.S. Department of Interior and the New York State Department of Environmental Conservation in 1996 had originally recommended a minimum flow near 1,500 cfs or a minimum flow of 300-500 cfs in combination with habitat enhancements to restore the bypassed reach of the Mohawk River. FEA at 32. FERC Staff's Recommended Alternative in the FEA provided for a minimum flow of 200 cfs or 300 cfs, in combination with recommended habitat improvements. FEA at 68-69. Erie's 2005 Offer of Settlement (Section 3.2), which is the basis for its LIHI Application, provided interim releases of 90 cfs, followed by "Permanent Flows" ranging from 120 cfs to 245 cfs, depending on the season.

Erie's recent canal excavation may also have other significant impacts on fish. By way of background, Erie's contention in its relicensing proceeding was that its primary fish protective measure was a new 11-MW turbine that Erie labeled a "fish-friendly" unit.¹⁷ Erie is not presently authorized to construct that unit; and in any event, prior to the Second Circuit decision vacating the 2007 license, Erie sought a significant extension of the deadlines in the 2007 license Article authorizing the installation of the new unit.¹⁸ In the FERC relicensing proceeding, Erie presented the canal excavation discussed above and in Part II.B, as needed to provide the additional water to accommodate the proposed new turbine. In its recent NYSERDA application for certification as green energy, however, Erie now claims that the canal excavation, by increasing water withdrawals from the Mohawk River, will allow it to produce significantly more generation from the existing turbines. Erie NYSERDA Application, Independent Engineer's Report – School Street Hydro Development at 11.

In the absence of a fish passage system that has been tested and determined to be highly effective, however, drawing more water into the existing old (and presumably less "fish-friendly") units means that there will likely be more juvenile blueback herring and other fish passing through those turbines, and the chances of those fish surviving are quite small.¹⁹ The

¹⁷ See Erie Offer of Settlement, Explanatory Statement at 7, stating that the "next generation" new advanced turbine "will become the principal fish passage system at the Project."

¹⁸ Erie Boulevard Hydropower, L.P., Project No. 2539, Request for Extension of Time re License Article 301 – *Start of Construction*; re: new Fish Friendly Turbine (Jan. 22, 2009), available at eLibrary Accession No. 20090122-5101; FERC, Project No. 2539-057, Order Granting Extension of Time (Feb. 5, 2009), available at eLibrary Accession No. 20090205-4044.

¹⁹ See Exh. GIP-011 at 11, Declaration of James A. Besha, attached to GIPA Comments Opposing the Offer of Settlement and Related Comments (Apr. 13, 2005), available at eLibrary Accession No. 20050413-5093; see also Letter from Sherry W. Morgan, Field Supervisor, U.S. Fish & Wildlife Service, to Steven P. Murphy, Niagara

combination of entrainment and the extreme fall and the rapid pressure change resulting from the 100-foot drop at the School Street Project are particularly lethal to fragile juvenile fish; and the more of them that are drawn into the turbines and dropped because of the greater canal diversion flows, the fewer the number of juveniles that are likely to survive to adulthood and create new generations.

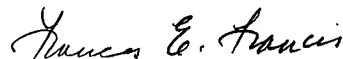
To summarize, the current Erie proposal to qualify for NYSERDA certification because of the additional MWh generated due to the canal excavation would likely come at the expense of the fishery resources in the Mohawk River, particularly blueback herring, because of the greater number of fish drawn into the deepened diversion canal and turbines. The principal proposed mitigation for this impact was a new, "fish-friendly" turbine, which is now not authorized; the backup Phase I fish passage facilities are unproven.

Under the circumstances above—namely: (1) no extant legal authorization for deepening the School Street Project diversion canal, and uncertainty as to whether the canal excavation has been properly addressed in Erie's LIHI application; (2) some uncertainty whether Erie may be "netting" flows (melding aesthetic flows with minimum aquatic flows and reducing the minimum aquatic flows below the target in some hours); and (3) no additional assurances or specific reports from a resource department that the new fish passage facilities are working and if so, at what level of effectiveness—it would appear premature for the Institute to conclude, without more information, that the School Street Project is consistent with the Institute's goal of granting certification only to those facilities that "provide river flows that are healthy for fish, wildlife, and water quality..."²⁰

As to whether Erie can decide unilaterally what it will and will not do beyond its authorized scope under its presumably presently effective annual license, GIPA has a different view of the law, and it would not be fruitful for it to pursue those comments in this letter.

We request that the Low Impact Hydropower Institute post this letter on its website, so that it is available to the public, consistent with its announced policy.

Very truly yours,



Frances E. Francis
William S. Huang
Attorneys for Green Island Power Authority

Attachment: Erie NYSERDA Application
cc: Erie Boulevard, Attention: Thomas Uncher

Mohawk Power Corp. at 1-3 (Mar. 25, 1996), available at eLibrary Accession No. 19960403-0133, in which various fish passage devices were discussed by the U.S. Fish & Wildlife Service, and noting (at 2) that at that time, no additional hydraulic capacity of the canal was proposed.

²⁰ LIHI Certification Criteria at 1.