

**HUDSON RIVER-BLACK RIVER REGULATING DISTRICT
BOARD MEETING –August 9, 2011
Watertown, NY– 11:00 A.M.**

CALL TO ORDER

Chairman Berkstresser called the special meeting to order at 11:00 A.M.

PLEDGE OF ALLEGIANCE

ROLL CALL

Present: Chairman David W. Berkstresser; Second Vice Chairperson Albert J. Hayes and Board members; Philip W. Klein, Michael F. Astafan; Thomas Stover and Mark M. Finkle; Executive Director Michael A. Clark; General Counsel Robert P. Leslie; Chief Engineer Robert S. Foltan; Chief Fiscal Officer Richard J. Ferrara; Black River Area Administrator Carol L. Wright; and other Regulating District staff.

Excused: John Hodgson Hudson River Area Administrator

MOTION TO ADOPT MEETING AGENDA

A motion was made by Mr. Klein to adopt the meeting agenda. Mr. Stover seconded it and the motion was unanimously approved.

MOTION FOR EXECUTIVE SESSION

Chairman Berkstresser asked if there was a need for an Executive Session; hearing none.

PUBLIC COMMENT PERIOD

There were two speakers. Hon. Jeffrey Graham, Mayor of Watertown, welcomed the Regulating District to the meeting venue and voiced opposition to the proposed liquidation of District reserve funds. Assemblyman Kenneth Blankenbush (R. 122) also voiced opposition to the proposed liquidation.

APPROVAL OF THE JULY 12, 2011 MEETING MINUTES

Mr. Klein moved to approve the Regular Board Meeting minutes of July 12, 2011. Mr. Finkle seconded and the motion was unanimously approved. Mr. Astafan abstained.

EXECUTIVE DIRECTOR REPORT

Mr. Clark presented an oral report to the Board. Mr. Clark noted that the bulk of his time during the reporting period again involved litigation impacting the Regulating District's ability to meet expenses; including the School and Property taxes owed. Mr. Clark explained to the Board his efforts, and those of senior staff, to meet those obligations. Mr. Clark also noted his

appearance at the annual Great Sacandaga Lake Association meeting this past weekend at which he made a presentation to the Association's members and its guests.

COMMITTEE BUSINESS

a. Governance - Chairman Astafan (Mr. Hayes, Mr. Stover)

(1) Old Business (None)

(2) New Business

(A) RESOLUTION TO AUTHORIZE THE SOLICITATION OF LEGAL SERVICES TO REPRESENT THE DISTRICT IN A LAWSUIT FILED AGAINST THE REGULATING DISTRICT BY ALBANY ENGINEERING CORPORATION (AEC)

Mr. Leslie noted Albany Engineering Corporation (AEC) recently filed a Summons and Complaint seeking: a refund of \$516,655.62 assessed against AEC between 2003-2007; interest; attorney's fees; costs and disbursements. Staff sent a request for representation to the Attorney General's office. However, because an Answer to the Complaint is due within 20 days, staff seeks authorization to solicit for outside legal services in the event that the Attorney General declines the District's request for representation. General Counsel will coordinate with the Attorney General's office regarding who will seek additional time to Answer.

(B) RESOLUTION TO APPROVE A TENTH AMENDMENT TO THE RETAINER AGREEMENT FOR LEGAL SERVICES IN CONNECTION TO ONGOING LITIGATION WITH ERIE BOULEVARD HYDROPWER, L.P. AND NIAGARA MOHAWK POWER CORPORATION

Mr. Leslie noted that Niagara Mohawk Power Corporation (NiMo) has served another Article 78 Petition challenging the 2011-2012 Assessment of its Black River Area properties. Staff has sent a request for representation to the Attorney General's office. However, because an Answer is due within 20 days, staff seeks authority to amend legal services contract C022004 with Brown & Weinraub to add this new suit within the scope of services provided under such contract in the event that the Department of Law declines the Regulating District's request. Mr. Cherubin of Brown & Weinraub has indicated he will seek additional time to Answer.

(C) Counsel Report - Mr. Leslie

Mr. Leslie highlighted the following issues:

In the matter of *Albany, Rensselaer, Saratoga, Warren and Washington Counties vs. The Hudson River-Black River Regulating District and The New York State Department of Environmental Conservation*, the Honorable Stephen A. Ferradino, Justice Supreme Court, County of Saratoga by decision dated April 1, 2011 granted the respondents/defendants (Regulating District) motion for summary judgment dismissing the counties' complaint in its entirety. The counties have appealed the Ferradino ruling and have nine months to perfect that appeal. The Department of Law has indicated that it has filed a Motion to dismiss the Appeal for lack of prosecution, but that in response to such an appeal, the Court will likely provide the Five Counties with time to perfect the appeal.

The Fulton County Supreme Court, Hon. Richard T. Aulisi has ruled in the matter of the application of *County of Fulton, New York, Broadalbin-Perth Central School District, Mayfield Central School District, and Northville Central School District vs. The State of New York and Hudson River-Black River Regulating District*. The Court dismissed the claims brought by the three school districts, dismissed the County's claim against the State and has ordered the

Regulating District to pay back taxes. A Resolution will be presented to the Board at today's meeting through which the Board could authorize the liquidation of Hudson and Black River Area Reserve Funds for use in paying the Fulton County Judgment.

On September 29, 2010, U.S. District Court Judge Norman Mordue dismissed the NiMo federal Court Permit System and Assessment challenge. Niagara Mohawk filed a Notice of Appeal on October 26, 2010. NiMo filed its Brief and Joint Appendix on February 24, 2011. The HRBRRD Reply Brief was due and was filed on May 26, 2011.

On October 27, 2009, permit holders John & Kandy McDonald brought an Article 78 challenge against the Regulating District, Saratoga County and an adjacent permit holder Judith Campbell. The suit, commenced in Supreme Court, Albany County attempted to get the Regulating District and/or the County to prohibit Ms. Campbell and her relatives from using a driveway that traversed the McDonald's Access Permit Area. Supreme Court Justice Eugene Devine dismissed the Petition and the Campbell's counterclaim in its entirety. The McDonalds appealed to the Appellate Division, Third Department. The Regulating District filed its response to the McDonald appeal on April 8, 2011. On July 21, 2011, the appellate court dismissed the McDonald's appeal.

On July 24, 2005, Christine V. Chera sustained significant personal injuries alleged to have resulted from a fall from a rope swing on State lands at Great Sacandaga Lake. Counsel for Ms. Chera then commenced suits against the State in the Court of Claims and against the Regulating District in Supreme Court, Albany County. The Court of Claims dismissed Ms. Chera's claim against the State in an April 2010 ruling. The Regulating District, represented by Clem Parente of the law firm of Crane and Parente filed a Motion to Dismiss in April 2011. The parties continue to await the Court's decision.

On August 3, 2011, Niagara Mohawk Power Corporation, d/b/a National Grid filed the 2011 version of their annual assessment challenge and Notice of Intention to File a Claim in the Court of Claims. The Article 78 Petition filed in Supreme Court Herkimer County seeks the removal, or reduction of the 2011-2012 Black River Area assessment on Niagara Mohawk property. This suit is the next in a series of similar suits brought annually by Niagara Mohawk since 2000. The Regulating District is represented by David Cherubin of Brown & Weinraub in each of the previously filed suits. A copy of the Petition and Exhibits has been delivered to Mr. Cherubin. It is anticipated that the defense of this suit will fit neatly into the defense offered with respect to each of the other similar suits. As noted earlier, a Resolution was proposed to the Board through which the Board could elect to amend the scope of Mr. Cherubin's current legal services contract to include this new NiMo challenge. Also note that on July 27, 2011, NiMo served its annual request for a hearing on the Apportionment underlying the 2011-2012 Black River Area Assessment. Also, on July 26, 2011 the Sacandaga Protection Committee filed a Notice of Motion to Intervene in the NiMo Assessment Challenge. The return date for the Motion is August 25th before Judge Aulisi.

b. Finance - Chairman Stover (Mr. Astafan, Open)

- (1) Approval of Expenses (None)
- (2) Old Business (None)
- (3) New Business

CFO's Report – Mr. Ferrara

Mr. Ferrara presented his report to the Board. Mr. Ferrara noted that the Regulating District's independent auditor has commenced its office visit and anticipates completion of the draft and final audit reports in time for submission by the September 30th deadline.

Mr. Ferrara noted that the Office of the State Comptroller has released the invoice for Retirement benefit contributions. Mr. Ferrara indicated that he would continue his analysis of such invoice to ensure its accuracy and will be prepared to report his findings at the September Board meeting.

Mr. Ferrara presented to the Board Mrs. Wright's expenditure request in the amount of \$10,565 for the purchase of new stems and guides for repair to Gate 3 at the Stillwater dam. The proposed cost is in excess of the \$4,000 budgeted amount. In addition, it is over the threshold for formal solicitation pursuant to the Regulating District's procurement policy. However, an informal price comparison conducted as part of the procurement effort taken in conjunction with a similar repair to Gate 5 at the Stillwater Dam last year revealed a single vendor, who because of his familiarity with this proprietary equipment, and ownership of the plans/drawings, is able to provide the Regulating District with replacement parts at a much less expensive price than competing vendors. Due to a budget shortfall for this project, \$4k budgeted versus an estimated cost of \$10,500, staff must seek Board authorization before proceeding with the work.

Mr. Ferrara noted that the proposed Motion to Authorize Gate 3 Stem Replacement at the Stillwater Dam provided an opportunity to revisit the procurement process utilized with respect to the similar repair to Gate 5 at the Stillwater Dam last year. That review revealed that the 2010 repair to the Gate 5 bent shaft was completed last fall without the Board's approval. Although originally determined to be a part of a budgeted item, (Gate Seal Repair), upon consultation with the Chief Engineer, it was determined that the item budgeted was not intended to cover this unplanned item. Mr. Ferrara proposed that the Board ratify the \$8,890 expenditure for the Gate 5 Repair at the same time it authorized Mrs. Wright to move forward with the Gate 3 repair. Committee Chairman Astafan asked the Committee to open the question to the entire Board. Mr. Finkle seconded the Motion. Chairman Berkstresser posed the Motion to the entire Board and the Motion to authorize the expenditure of funds to repair Gate 3 and to ratify the expenditure of funds to repair Gate 5 passed unanimously.

c. Operations - Chairman Hayes (Mr. Stover, Open)

(1) Old Business - (None)

(2) New Business

(A) Chief Engineer's Report - Mr. Foltan

Mr. Foltan presented his report to the Board.

(B) Hudson River Area Administrator's Report - Mr. Hodgson

Mr. Clark presented the Hudson River Area Administrator's report to the Board on behalf of Mr. Hodgson.

(C) Black River Area Administrator's Report - Mrs. Wright

Mrs. Wright presented her report to the Board.

d. Board Business – Chairman Berkstresser

(1) Old Business - (None)

(2) New Business

(A) RESOLUTION AUTHORIZING THE LIQUIDATION OF \$3.045 MILLION IN REGULATING DISTRICT SENTINEL/RESERVE FUNDS FOR USE IN PAYMENT OF THE JUDGMENT IMPOSED BY A JUNE 23, 2011 FULTON COUNTY COURT DECISION IN ORDER TO FORESTAL CONTEMPT PROCEEDINGS FOR NON-COMPLIANCE WITH SUCH JUDGMENT

Mr. Leslie presented the Resolution to the Board noting that the current circumstances surrounding the use of Black River Area reserve funds are not the same circumstances that begat the need for legislative solution authorizing a loan from one area to another. The June 23rd Fulton County Supreme Court Judgment issued by Judge Aulisi granted Fulton County's petition for an order of mandamus requiring the Regulating District to pay the sum of \$3,045,337.65. The Order, in the nature of Mandamus, compels the entire District to pay the judgment, not an operating area within that District. While mandamus remedies usually don't lie against public authorities, in this case the remedy does. Mr. Leslie referenced a 1990 Court of Appeals case involving the District. County of Fulton 76 NY2d 675, 1990.

Mr. Leslie further noted that the creation of the Regulating District in 1959 abolished the Black River Regulating District and the Hudson River Regulating District; citing to NY Environmental Conservation Law section 15-2137. Since the judgment lies against the entire District, non-compliance with the Aulisi Judgment subjects the Regulating District Board to sanctions available to the Court under the Contempt Statute. Fines (limited to litigant's actual loss) or imprisonment). While imprisonment is unlikely, it is also difficult to discern with certainty whether any fine imposed would lie against the District as a whole or against individual Board Members.

Contempt of Court requires knowledge of the existence of a court order. Here, each Board Member is presumed to be familiar with the June 23rd Aulisi Order. The Court order must be clear and unequivocal. Here, the Order unequivocally requires the District to pay a sum certain to a specific litigant. Finally, violation of the Order must prejudice the rights of a party to the litigation. Here, Fulton County sued to be paid, the Judge has ordered it and the Board is compelled by the Judge's Order to pay. Mr. Leslie noted that while the Board might determine it more appropriate to pass any such fine through to the Hudson River Area beneficiaries, who have refused to pay amounts lawfully due, any fine assessed by the Fulton County Court will lay against the entire Regulating District.

Mr. Leslie noted that the Regulating District has taken this action in the past, has accounted for such action as planned here, and has done so without incident or challenge. Resolution 86-7-2 the Regulating District established that when such a deficiency existed in one Area's cash flow, any amount temporarily loaned would bear interest at the same rate currently earned on the District's investments in the Comptroller's STIP account. Typically, it has been the Black River Area that has needed an infusion of cash, temporarily, from the Hudson River Area. Such loans were specifically authorized by Resolution 86-53-12 in December of 1986.

Mr. Leslie explained that the Resolution authorizes the liquidation of reserve funds, but does not affect such liquidation. Upon passage of the Resolution, the assistant Attorney General assigned to defend the case on behalf of the Regulating District will present a settlement stipulation or consent decree to Fulton County. Upon reaching agreement, the two parties will present the Consent Decree to Judge Aulisi to ensure that the settlement is sufficient. Once the Judge enters the Consent decree, the Regulating District will present the request for liquidation,

attached to the Consent Decree and the Resolution authorizing the liquidation, to the Comptroller for release of the funds. Upon release, the funds will be paid to Fulton County.

In response to concerns raised earlier in the meeting, and before the meeting's start, Mr. Leslie noted that the liquidation should not have any effect on the rates/levies imposed upon Black River Area beneficiaries, and that the Regulating District's commitment to replenish the Hudson and Black River Area reserve funds is as firm as can be contemplated at this time. It is anticipated that staff will approach the Board for authorization to replenish such reserves as soon as the three Assessments based on the March 2010 Hudson River Area Apportionment are paid by the Five Counties responsible for such payments.

Mr. Astafan spoke at length questioning the legality of the liquidation. Mr. Finkle and Mr. Klein spoke at length regarding the hardships caused by the District's non-timely payment of the taxes owed; especially to the three Fulton County school districts. Chairman Berkstresser spoke at length regarding the difficulties occasioned by the U.S. Court of Appeals decision, the resulting Federal Energy Regulatory Commission proceedings, and the failure of Albany, Rensselaer, Saratoga, Warren and Washington Counties to pay the Hudson River Area Assessments due. Chairman Berkstresser noted the difficult decision facing the Board as a result of the potential contempt proceeding and advocated passage of the Resolution.

Mr. Klein moved to adopt the resolution. Mr. Stover seconded. Mr. Klein called for a roll call vote. The Resolution was adopted with five votes in favor and one opposed.

MOTION FOR NEXT BOARD MEETING

(1) Regular Board Meeting

Mr. Berkstresser confirmed that the Board adopted a Resolution at the July Board Meeting setting the date for the next Regular Board Meeting to be held on Tuesday, September 13, 2011 at the Lowville Town Offices, Lowville, New York at 10:00 A.M.

RESOLUTIONS

11-24-08 RESOLUTION AUTHORIZING THE LIQUIDATION OF \$3.045 MILLION IN REGULATING DISTRICT SENTINEL/RESERVE FUNDS FOR USE IN PAYMENT OF THE JUDGMENT IMPOSED BY A JUNE 23, 2011 FULTON COUNTY COURT DECISION IN ORDER TO FORESTALL CONTEMPT PROCEEDINGS FOR NON-COMPLIANCE WITH SUCH JUDGMENT

Mr. Klein moved to adopt the Resolution. Mr. Stover seconded. Mr. Klein called for a roll call vote. The Resolution was adopted with five votes in favor and one opposed.

11-25-08 RESOLUTION TO AUTHORIZE THE SOLICITATION OF LEGAL SERVICES TO REPRESENT THE DISTRICT IN A LAWSUIT FILED AGAINST THE REGULATING DISTRICT BY ALBANY ENGINEERING CORPORATION (AEC)

Mr. Hayes moved to adopt the Resolution. Mr. Astafan seconded it and the Resolution was unanimously adopted.

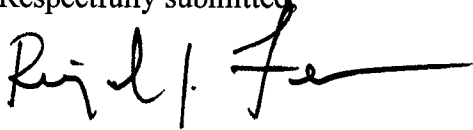
11-26-08 RESOLUTION TO APPROVE A TENTH AMENDMENT TO THE RETAINER AGREEMENT FOR LEGAL SERVICES IN CONNECTION TO ONGOING LITIGATION WITH ERIE BOULEVARD HYDROPWER, L.P. AND NIAGARA MOHAWK POWER CORPORATION

Mr. Klein moved to adopt the Resolution. Mr. Astafan seconded it and the Resolution was unanimously adopted.

ADJOURNMENT

There being no further business to come before the Board, Mr. Hayes moved to adjourn the meeting. Mr. Astafan seconded it. The motion was unanimously approved. The meeting adjourned at 12:10 P.M.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard J. Ferrara". The signature is written in a cursive style with a long horizontal stroke at the end.

Richard J. Ferrara
Secretary/Treasurer