



Hudson River - Black River Regulating District

ANDREW M. CUOMO
Governor

MARK M. FINKLE
Chairman

RICHARD J. FERRARA
Acting Executive Director

To: Members of the Board
From: Robert Leslie, General Counsel
Re: Black River Area Apportionment
Basis for Identification of Beneficiaries
Date: Prepared April 8, 2016 for the April 12, 2016 Meeting

The Regulating District Board has asked staff to develop a new apportionment of costs for the Regulating District's Black River Area ("BRA"). As a preliminary step, it is important to draw a distinction between the process for identifying beneficiaries and the process of calculating the apportionment. Identification of a group or category of beneficiaries is a process which is independent of the apportionment calculation method and is a step that must take place regardless of the process used to calculate the apportionment. This memo will supply the basis for the Board to identify the hydroelectric facilities lying within the Beaver, Black and Moose Rivers and the counties lining those rivers as beneficiaries of the Regulating District's river regulation efforts. A separate memorandum, authored by the Regulating District's engineering staff, will develop the methodology and calculation of the apportionment.

The basis for identifying which beneficiaries will share in the apportionment of costs has been tested in the courts. In January, 2010, the Regulating District prepared an apportionment of costs for the Regulating District's Hudson River Area ("HRA") facilities to supersede the HRA apportionment adopted by the Board on December 5, 1924. The Board later revised the HRA apportionment in March 2010. The Board secured approval for the apportionment from the NYS Department of Environmental Conservation shortly thereafter. Petitioners named in the HRA apportionment commenced an Article 78 proceeding to challenge the HRA apportionment on several grounds. The trial court found the Regulating District's interpretation of ECL §15-2121 permitting the apportionment of costs against only those public corporations and privately held parcels receiving the most readily ascertainable benefits from its reservoirs to be entitled to deference. On appeal, the appellate court denied petitioner's request for a judgment invalidating the HRA apportionment but remanded the matter back to the trial court to ensure that the Regulating District modify its apportionment to calculate and deduct an amount chargeable to the state. Matter of County of Albany v. Hudson Riv.-Black Riv. Regulating Dist. 97 A.D.3d 61, 944 N.Y.S.2d 369 (3d Dept., 2012).

The Regulating District's enabling statute dealing with apportionment, ECL §15-2121(1) requires that the Board prepare a statement estimating the total cost to construct each reservoir, including interest on debt and all other expenses necessarily incurred in such construction and operation. The Board fulfills this responsibility through the adoption of the Regulating District's budget. By Resolution 15-24-06, passed June 9, 2015, the Board of the Hudson River-Black River Regulating District passed the current three year budget (July 1, 2015 – June 30, 2018) which determined the total cost to operate and maintain the Regulating District's Black River Area facilities.

Once the Board has estimated the costs to be apportioned, ECL §15-2121(2) provides that:

[t]he Board shall then apportion such cost, less the amount which may be chargeable to the state, among the public corporations and parcels of real estate benefited, in proportion to the amount of benefit which will inure to each such public corporation and parcel of real estate by reason of such reservoir. Such apportionment shall be made in writing and **shall show the name of each public corporation** and *a brief description of each parcel of real estate benefited; the name of the owner, or owners, of each such parcel of real estate; so far as can be ascertained;* the proportion of such cost less the amount which may be chargeable to the state to be borne by each, expressed in decimals; and the amount to be paid by each such public corporation or the owner or owners of each such parcel of real estate. (Emphasis added)

Before picking among the public corporations and individual parcels, the Board should determine whether any portion of its costs should be assessed against the state. Throughout ECL §15-2121, the statute provides for the Regulating District to apportion its cost "...less the amount chargeable to the state". ECL §15-2123(5) also provides for the Regulating District's consideration of amounts appropriated by the state. The Matter of Albany County v. Hudson Riv.-Black Riv. Regulating Dist. decision makes clear that while the calculation of the actual amount chargeable to the state is likely to be a complex, technical undertaking in itself, the statutory mandate that the benefit must be, in fact, considered and deducted is unambiguous. Id at 72. As such, the Regulating District engineering staff's apportionment methodology should calculate a state share to be deducted from the costs to be apportioned.

ECL §15-2121 makes a clear distinction between 'parcels of real estate' and 'public corporations'. The statute requires that the Board show the 'name of each public corporation', but does not require that the Board prepare a description of the land within that entity. By contrast, each parcel of real estate benefited must be described and linked to the owner or owners thereof. The manner in which the Regulating District has prepared its annual assessment shows how the Board has historically viewed the distinction between these two groupings.

The Regulating District's annual assessments have treated 'parcels' separately from 'public corporations'. The statutory provision on 'assessments', ECL §15-2123(1), requires the Board to prepare a statement showing the name of each public corporation and a description of

each parcel of real estate benefited. This is the same language used in the earlier section setting up the apportionment. The Regulating District's statement of annual assessment addresses these requirements by listing each hydropower company, the proportion of cost, and total dollars to be borne by such company. This treatment is consistent with the balance of ECL §15-2123 which requires the legislative body for each municipality to levy the assessment on the municipality as a whole. The county legislature levies the amount to be collected directly on the relevant county or town. The common council of a city levies upon its city and the village board of trustees levies upon the relevant village. By contrast, for parcels of real estate, the statute contemplates that each county legislature shall create a separate assessment roll and levy any assessment directly upon any specific parcel identified for apportionment.

The Regulating District has interpreted the statute to hold 'parcels of real estate' to mean the hydroelectric facilities lying within the regulated rivers under its jurisdiction. The Appellate Division Third Department agreed with the Supreme Court that the Regulating District's interpretation of the cumbersome and less than clear legislation is neither irrational nor unreasonable. See Matter of County of Albany v. Hudson Riv.-Black Riv. Regulating Dist. 97 A.D.3d 61, at 66.

In preparing the Hudson River Area apportionment, the Board recognized that the Albany Engineering v. FERC decision eliminated the Regulating District's authority to assess the FERC licensed hydropower companies lining the Sacandaga and Hudson Rivers. Albany Eng'g Corp v. Federal Energy Regulatory Commn 548 F3d 1071 (U.S.C.A, D.C. Cir., 2008). The federal power act's preemption of the Regulating District's authority to issue assessments does not pertain to the assessment of 'parcels of real estate' lying downstream of the Regulating District's Black River Area facilities. None of the Regulating District's Black River Area upstream impoundments are licensed by FERC. Therefore, the Board can identify as beneficiaries the hydroelectric power facilities along the Beaver, Black and Moose Rivers.

The Regulating District's first apportionment in the Hudson River Area split the benefit derived among the 'parcels of real estate' lying along the Sacandaga and Hudson Rivers upon the basis of 'head'. The first Black River Area apportionment also identified the 'parcels of real estate' lying along the Beaver, Black and Moose Rivers and also split the benefits derived upon the basis of 'head'. The Board could do so again.

The term 'public corporation' is not defined within ECL Title 21 of Article 15, but is defined for the purposes of all of Article 15 by ECL §15-0107(2) and all of the Environmental Conservation Law by ECL §1-0303 to mean public corporation as defined at NY General Corporation Law §3(1). The General Corporation Law was repealed in 1973. The definition of a public corporation is now covered by General Construction Law §66 which defines a public corporation to include a municipal corporation, a district corporation, or a public benefit corporation. In addition, as noted at ECL §1-0303(20), the term public corporation includes all public authorities. The General Construction Law further defines a municipal corporation to include counties, towns, cities, villages and school districts. A district corporation in essence includes any territorial division of the state established by law which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate. These definitions are important because while the Board might be inclined to expand an apportionment of its costs

from towns, cities and villages to include counties, towns, cities and villages, the Board might also determine to include school districts, public benefit corporations, district corporations, or public authorities.

Whatever apportionment methodology the Regulating District's engineering staff produces, the Board must determine which 'public corporations' must share in the costs apportioned. One way to address the question of who should share in the apportionment of costs is to break out the benefit derived by each affected group. In the Hudson River Area apportionment, the Board elected to apportion costs based on benefits from flow control (flood protection) and, flow augmentation (waste water and white water recreation). With respect to flow control, the benefit could have been attributed to individual parcels, neighborhoods, or to whole communities. Those parcels which flood less frequently or with less severity were considered to have received a flood control benefit. The Board could have determined value of that benefit for each property or neighborhood. However, the Board recognized that simply aggregating the value of the flood benefit to all such properties would not accurately represent the value of potential flood avoidance to the community as a whole. Such a methodology would have failed to account for costs to the community like the loss of highways, blockage of pathways to hospitals, industrial facilities or retail establishments, and the expenditure of municipal disaster response resources, etc. Therefore, in completing the Hudson River Area apportionment, the Board noted that an apportionment of only those parts of a community close to the River (the ones flooded) would fail to capture the value of the benefits received by those properties located farther away. Conversely, the flood avoidance benefit to the community as a whole could capture in the apportionment costs to the community as a whole. The Board's analysis assumed that as the group against whom an apportionment is asserted increases in size, the potential for disparate treatment diminishes. The Appellate Division Third Department determined that the Board's analysis was rational. See Matter of County of Albany v. Hudson Riv.-Black Riv. Regulating Dist. 97 A.D.3d 61, at 71. The Board should consider using a similar basis for determining which public corporations should share in the apportionment of costs.

In adopting the Hudson River Area apportionment, the Board factored in other practical considerations in selecting to apportion the Hudson River Area costs against a public corporation rather than against the properties within that public corporation. For instance, ECL §15-2121(4) requires that the Board, or a majority of the members thereof, view the premises and public corporations benefited before it apportions costs against such premises. There is no case law interpreting exactly what the legislature meant when it required that the Board 'view' the premises. However, because the statute separately mentions 'public corporations', and fails to define the term premises, the Board inferred that the legislature intended that the Board, or a majority thereof, visit the hydroelectric power generating facilities identified for apportionment. While a visit to a few dozen Adirondack region hydropower companies in the summer circa 1925 may have imposed a burden, viewing thousands of individual properties, even with the benefit of modern transportation, could still prove costly and time consuming; an absurd result. The Court agreed with the Board's rational interpretation. Id at 65.

Assuming that the methodology developed by the Regulating District's engineering staff would be suitable for a county-level, or a city, town and village-level, apportionment, staff recommends that the Board identify only the counties as beneficiaries. By grouping the towns,

cities and villages within each affected county, the potential for disparate treatment of one individual property, neighborhood or municipality compared with others diminishes. Staff has yet to identify any school district, public benefit corporation, district corporation or public authority which derives a distinct and definable benefit from the operation of the Black River Area facilities and therefore recommends that no other 'public corporation', other than those counties downstream of the Regulating District's Black River Area facilities, be included as beneficiaries. Further, staff notes that breaking out a benefit to individual properties may fail to capture the totality of such benefit and will fail to spread the value of such benefit to the wider group who derive a benefit. As a result, staff recommends that the Regulating District Board not apportion any portion of the perceived benefit against any individual property.

Based on the foregoing, for the purpose of developing a Black River Area apportionment, staff recommend that the Board identify as beneficiaries the hydroelectric power generating facilities along the Beaver, Black and Moose rivers and the counties lying along those rivers downstream of the Regulating District's impoundments.



Hudson River - Black River Regulating District

ANDREW M. CUOMO
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MARK M. FINKLE
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ROBERT J. SMULLEN
Executive Director

To: Members of the Board
From: Robert Leslie, General Counsel
Re: Black River Area Apportionment
The Apportionment Grievance Process
Date: Prepared June 2, 2016 for the June 14, 2016 Meeting

As the Board embarks upon the update of the Black River Area apportionment, it is worth a look at the rules the Regulating District adopted in September 2010 to facilitate the administration of the apportionment grievance process required by NY ECL §15-2121(5). The Board utilized the process described therein successfully in its adoption of the Hudson River Area apportionment.

The apportionment grievance rules are set forth at 6 NYCRR Part 606 and include sections 606.126 through 606.134 [attached]. The rules provide a roadmap permitting the Board to address each of the statutory requirements which must be met for a successful apportionment. The rules require that the Board determine the cost to operate its facilities and to proportion such costs, less an amount chargeable to the state, among the public corporations and parcels of real estate benefitted [606.126]. Next, the Board must establish the apportionment date; the date upon which the value, condition and ownership of parcels of real estate benefitted by the reservoir shall be determined [606.127]. Once the Commissioner of the Department of Environmental Conservation approves the apportionment [ECL §15-2121(4)], the Board must publish in its official newspapers notice of where and when the apportionment roll, and the data upon which it relies, will be available for review [606.128]. Section 606.128 also requires that the Board determine the last date it will accept written complaints and date, place, and time for the apportionment grievance hearing at which the Board shall hear argument regarding those complaints. Section 606.129 requires that the Board provide not less than 45 days' notice before it conducts the public hearing at which all public corporations and owners of parcels of real estate interested in or aggrieved by the apportionment shall be afforded an opportunity to present documentary and/or oral testimony contesting such apportionment. Section 606.130 requires aggrieved parties to file their written complaint at least seven days before the hearing articulating their basis for any requested modification to the apportionment. Section 606.131 provides that complaints should be supported by documentary evidence and can be presented by parties or their representative. The rule also permits the Board to require an aggrieved party to submit additional evidence and/or answer any material question the Board may interject. Section 606.132 makes clear that the apportionment approved by DEC is presumed to be correct and that the burden rests with aggrieved parties to prove, by substantial evidence, otherwise. Section

606.133 provides that any modification to the apportionment requires a new approval by the DEC Commissioner; but that, absent a modification, the apportionment is final. The last section, 606.134, provides that parties dissatisfied with the final apportionment may file an Article 78 challenge in court.

The Board's June 9, 2015 adoption of the Regulating District's current three year budget (July 1, 2015 – June 30, 2018), through resolution 15-24-06, determined the total cost to operate and maintain the Regulating District's Black River Area facilities. Following the engineering staff's production of its recommended beneficiary list, apportionment methodology, an apportionment date, and state share, the Board will be in a position to adopt a new Black River Area apportionment. The next step will be the Board's submission of the apportionment, along with any supporting memoranda and data upon which it relies, to the Department of Environmental Conservation for approval by the Commissioner. Staff will publish notice of the apportionment grievance hearing upon receipt of the Commissioner's approval.

Compilation of Codes, Rules and Regulations of the State of New York Currentness

Title 6. Department of Environmental Conservation

Chapter V. Resource Management Services

Subchapter E. Water Regulation

Part 606. Use, Operation and Maintenance of Great Sacandaga Lake (Formerly the Sacandaga Reservoir)

Review of Apportionment. (Refs & Annos)

6 NYCRR 606.126

Section 606.126. Apportionment purpose

Pursuant to statute, the board of the Hudson River-Black River Regulating District must prepare an estimate of the cost of the reservoirs operated by the regulating district and then apportion such cost, less the amount which may be chargeable to the state, among the public corporations and parcels of real estate benefitted, in proportion to the amount of benefit which will inure to each such public corporation or parcel of real estate by reason of such reservoir. The regulating district board shall certify such apportionment to the department of environmental conservation for approval. Upon department approval, the apportionment shall be served and filed as required by statute.

Credits

Sec. filed: Jan. 22, 2010 as emergency measure eff. Jan. 22, 2010; emergency rulemaking eff. Apr. 22, 2010, expired June 20, 2010; emergency rulemaking eff. June 18, 2010, expired Aug. 15, 2010; new adopted filed Aug. 13, 2010 eff. Sept. 1, 2010.

Current with amendments included in the New York State Register, XXXVIII, Issue 21 dated May 25, 2016.

6 NYCRR 606.126, 6 NY ADC 606.126

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6 NYCRR 606.127

Section 606.127. Apportionment date

The regulating district shall by resolution determine the apportionment date. The value, condition and ownership of parcels of real estate benefitted by the operation of the reservoir shall be determined as of the apportionment date. Unless directed to modify the apportionment by the department, the regulating district may not unilaterally modify the apportionment until after the conclusion of the apportionment grievance hearing.

Credits

Sec. filed: Jan. 22, 2010 as emergency measure eff. Jan. 22, 2010; emergency rulemaking eff. Apr. 22, 2010, expired June 20, 2010; emergency rulemaking eff. June 18, 2010, expired Aug. 15, 2010; new adopted filed Aug. 13, 2010 eff. Sept. 1, 2010.

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Review of Apportionment. (Refs & Annos)

6 NYCRR 606.128

Section 606.128. Publication of the apportionment

Upon approval of the department, the regulating district board shall place a notice in the regulating district's official newspapers detailing when and where the apportionment roll and the data upon which it is based will be available for review. The notice shall specify:

- (a) The apportionment date;
- (b) The address and telephone number for the regulating district office at which aggrieved persons may make an appointment with regulating district staff to review the apportionment;
- (c) The address and telephone number for the regulating district office at which formal complaints may be filed;
- (d) The last date for the filing of formal complaints;
- (e) The date upon which aggrieved parties must notify the board regarding the basis for the complaint and approximate time required to present written and/or oral testimony in support of the complaint; and
- (f) The date, time and place for the apportionment grievance hearing at which the regulating district board shall hear formal complaints.

Credits

Sec. filed: Jan. 22, 2010 as emergency measure eff. Jan. 22, 2010; emergency rulemaking eff. Apr. 22, 2010, expired June 20, 2010; emergency rulemaking eff. June 18, 2010, expired Aug. 15, 2010; new adopted filed Aug. 13, 2010 eff. Sept. 1, 2010.

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Review of Apportionment. (Refs & Annos)

6 NYCRR 606.129

Section 606.129. Apportionment grievance hearing

Following department approval, service and filing, the regulating district board shall, upon not less than 45 days' notice, conduct a public hearing at which all public corporations and owners of parcels of real property interested in or aggrieved by the apportionment shall be afforded an opportunity to present documentary and/or oral testimony contesting such apportionment.

Credits

Sec. filed: Jan. 22, 2010 as emergency measure eff. Jan. 22, 2010; emergency rulemaking eff. Apr. 22, 2010, expired June 20, 2010; emergency rulemaking eff. June 18, 2010, expired Aug. 15, 2010; new adopted filed Aug. 13, 2010 eff. Sept. 1, 2010.

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Review of Apportionment. (Refs & Annos)

6 NYCRR 606.130

Section 606.130. Notice to board of intent to seek modification

Following the board's publication of notice that it will conduct a public hearing, and at least seven days prior to the commencement of that public hearing, any public corporation or person deeming themselves to have been aggrieved shall notify the Board in writing regarding the basis for the requested modification to the apportionment. The aggrieved party's written complaint shall provide an estimate of the time necessary to present evidence at the apportionment grievance hearing and must be received by the board, at the address indicated on or before the date and time indicated in the board's published notice. The Board shall cause to be published on its website a copy of each such written complaint.

Credits

Sec. filed: Jan. 22, 2010 as emergency measure eff. Jan. 22, 2010; emergency rulemaking eff. Apr. 22, 2010, expired June 20, 2010; emergency rulemaking eff. June 18, 2010, expired Aug. 15, 2010; new adopted filed Aug. 13, 2010 eff. Sept. 1, 2010.

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Review of Apportionment. (Refs & Annos)

6 NYCRR 606.131

Section 606.131. Complaint procedure

The complaint should include statements, records and other relevant information to support the requested apportionment modification. The aggrieved party may appear at the apportionment grievance hearing in person to present oral and written testimony, and may appear with or without an attorney or other representative. Authorization for appearances by counsel or other representation must be put in writing and bear a date within the same calendar year in which the complaint is filed. A quorum of the regulating district board will preside at the apportionment grievance hearing. The Board may require an aggrieved party to submit additional evidence and, should the party willfully refuse to submit such evidence, or should the aggrieved party refuse to answer any material question, the aggrieved party will not be entitled to an apportionment modification or subsequent judicial review.

Credits

Sec. filed: Jan. 22, 2010 as emergency measure eff. Jan. 22, 2010; emergency rulemaking eff. Apr. 22, 2010, expired June 20, 2010; emergency rulemaking eff. June 18, 2010, expired Aug. 15, 2010; new adopted filed Aug. 13, 2010 eff. Sept. 1, 2010.

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Review of Apportionment. (Refs & Annos)

6 NYCRR 606.132

Section 606.132. Conduct of apportionment grievance hearing

There is a presumption that the apportionment determined by the regulating district and approved by the department is correct. The burden to prove otherwise, by substantial evidence, lies with the public corporation or owner of a parcel of real property interested in or aggrieved by the apportionment. Only the current apportionment may be aggrieved. A separate complaint must be filed for each parcel or public corporation.

Credits

Sec. filed: Jan. 22, 2010 as emergency measure eff. Jan. 22, 2010; emergency rulemaking eff. Apr. 22, 2010, expired June 20, 2010; emergency rulemaking eff. June 18, 2010, expired Aug. 15, 2010; new adopted filed Aug. 13, 2010 eff. Sept. 1, 2010.

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Review of Apportionment. (Refs & Annos)

6 NYCRR 606.133

Section 606.133. Modification of apportionment following apportionment grievance hearing

If, after examining documentary evidence and hearing testimony, the regulating district board shall modify such apportionment, the revised apportionment shall not become effective until approved by the department of environmental conservation and a copy thereof is served and filed in the same manner as upon the completion of the same in the first instance at which time the apportionment shall be final and conclusive. If the regulating district board adopts a resolution approving the apportionment without modification, the apportionment shall be final and conclusive.

Credits

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Review of Apportionment. (Refs & Annos)

6 NYCRR 606.134

Section 606.134. Judicial review

Parties dissatisfied with the final apportionment determination may elect to challenge such apportionment pursuant to Article 78 of the New York Civil Practice Law and Rules.

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ANDREW M. CUOMO
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MARK M. FINKLE
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ROBERT J. SMULLEN
Executive Director

To: Members of the Board
From: Robert Leslie, General Counsel
Re: Black River Area Apportionment
A New Black River Area Apportionment is Necessary
Date: Prepared June 10, 2016 for the June 14, 2016 Meeting

There are two principal reasons the Board should consider a new apportionment for the Black River Area. First, the Office of the State Comptroller has made a recommendation with respect to uncollectable accounts. Second, adoption of a new apportionment would implement a significant element of a recent litigation settlement agreement.

The Office of the State Comptroller's November 24, 2015 audit of the Regulating District's financial management practices recommended that the Regulating District evaluate the collectability of outstanding Black River Area accounts and adjust budgets to reflect uncollectible amounts. The Comptroller's audit team noted that the Regulating District did not reduce the Black River Area portion of its 2013-2014 budget to reflect uncollected assessments levied in 2012-2013 (and earlier years) which the Comptroller deemed unlikely to be collected.

The Regulating District's enabling legislation makes no provision for consideration of lost revenue. Absent recourse to the reapportionment provisions outlined at ECL §15-2121, the Board cannot unilaterally determine to forego collection of an assessment. Stated differently, the Board's decision to forego collection of a past due assessment would constitute a reapportionment of costs among the balance of the identified beneficiaries. Instead, unless the Board follows the apportionment process outlined at ECL §15-2121, ECL §15-2123(6) requires the Board to pursue the penalties which may be imposed for the failure to pay general taxes within the time prescribed; including, but not limited to, foreclosure.

In the case of the uncollectable Black River Area accounts, and as articulated in the Comptroller's report, the Regulating District timely turned past due accounts over to the relevant counties for collection and foreclosure as appropriate. Staff acknowledges that it has experienced difficulty securing commitments from some affected counties to consummate the foreclosure process. While the Regulating District could continue to lobby the affected counties to push for resolution, including foreclosure if appropriate, the property owners argue that their respective businesses are defunct or not producing revenue and the counties show little appetite for foreclosure. A new apportionment would provide a longer lasting, perhaps more equitable, solution.

The Regulating District committed to cease assessments against National Grid's undeveloped properties in the Black River Area as part of the agreement to settle National Grid's twenty-eight suits challenging Regulating District assessments. The Regulating District reached the agreement with representatives from National Grid in November 2015 to settle all of the state and federal litigation commenced by Niagara Mohawk. The agreement requires the Regulating District to forego collection of unpaid Hudson River and Black River Area assessments for the years 2009-2015 and to immediately complete a new apportionment of Regulating District costs in the Black River Area. Niagara Mohawk Power Corporation, d/b/a National Grid would forego claimed refunds for assessments paid by Niagara Mohawk to the Regulating District in the Hudson River Area between 2000 and 2009 and in the Black River Area between 2000 and 2015.