

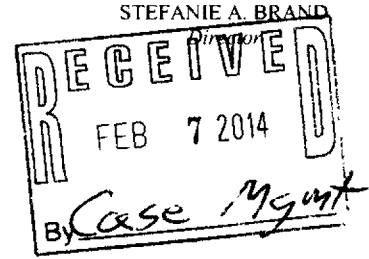


State of New Jersey
DIVISION OF RATE COUNSEL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

fund 2/7/14



February 6, 2014

Via E-Mail & UPS Overnight Delivery

Kristi Izzo, Secretary
State of New Jersey, Board of Public Utilities
44 South Clinton Avenue, 9th Floor
P.O. Box 350
Trenton, New Jersey 08625

**Re: I/M/O the Petition of Aqua New Jersey, Inc. for Approval of
a Restated Municipal Franchise To Serve the Township of
Chesterfield, Burlington County
BPU Docket No. WE13111058**

Dear Secretary Izzo:

Please accept for filing an original and eleven copies of the Division of Rate Counsel's ("Rate Counsel") comments regarding the above referenced matter. Please date stamp the additional copy as "filed" and return it in the enclosed, self-addressed, stamped envelope. Thank you for your consideration and attention to this matter.

Background

On November 6, 2013, Aqua filed a Petition with the Board requesting the Board's approval of a Restated Franchise Agreement ("Franchise Agreement") originally provided by the Township of Chesterfield in 1910 to Aqua's corporate predecessor, Crosswicks Water Company ("Crosswicks"). On December 18, 1956, the Board granted an application by Crosswicks to approve Ordinances approved by Hamilton and Chesterfield to extend Aqua's franchise service

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territory to provide to additional customers located within Hamilton and Chesterfield.¹ Since the original franchise was issued, Crosswicks underwent a series of corporate restructurings, mergers and name changes, resulting in Aqua as the corporate successor that currently holds the franchise to serve Chesterfield. Aqua has provided water and fire protection services to Chesterfield and certain of its municipal subdivisions pursuant to the franchise.²

This matter has been brought to the Board after a lengthy legal dispute regarding monies due to Aqua from Chesterfield for the provision of fire protection and other services. The dispute resulted in a counterclaim by Chesterfield that, among other things, Aqua's provision of water service was unauthorized because the franchise awarded to Aqua's predecessor had expired.³ The legal battle went from Superior Court to the Appellate Division, where the Company was granted leave to appeal. During the pendency of the appeal, the parties executed a Settlement Agreement that resolved all issues in the proceeding.⁴ The Settlement Agreement is subject to the Board's approval of this Petition. The Appellate Division has stayed the appeal pending action by the Board.

The Company has filed this petition with the Board pursuant to N.J.S.A. 48:2-14 and N.J.S.A. 48:1-5.5, for approval of the restatement of Aqua's franchise to provide potable water, fire protection and related services to Chesterfield. The material terms of the Franchise Agreement are set forth in the Petition. The Franchise Agreement grants Aqua, its successors and assigns, a non-exclusive franchise to install, construct, operate, maintain, replace and manage a water works and distribution system within the limits of Chesterfield and the redefined

¹ Petition, Exhibit G.

² Petition, p.2

³ Petition,,p.3

⁴ Petition, Exhibit D.

“Franchise Area”.⁵ The Franchise Area refers to the municipal boundaries of the Township of Chesterfield as of the date of the Franchise Agreement, together with any enlargements or extensions to the area that are approved by Chesterfield and any other agency with jurisdiction over Aqua.⁶

Chesterfield also grants Aqua a renewed Right of Way consent in accordance with the Franchise Agreement and N.J.S.A. 48:3-15 and N.J.S.A. 48:19-17.⁷ The term of the franchise is clarified to be perpetual unless terminated by the Board or in accordance with the terms of the Franchise Agreement.⁸ The initial term of the Right of Way Consent is to be 50 years, retroactive to August 1, 2006, the expiration date of the prior consent⁹, consistent with N.J.S.A. 48:3-15. The Franchise Agreement will become effective on the date it is approved by the Board, with the restated franchise to be deemed effective retroactive to August 1, 2006.¹⁰

Analysis and Recommendation

Rate Counsel is not opposed to Board approval of this petition, subject to provisions discussed below. It is Rate Counsels position that New Jersey statutory framework does not contemplate the grant of a municipal consent in perpetuity, or for an unlimited term. Under both N.J.S.A. 48:2-14 and N.J.S.A. 48:3-11, et seq., both a municipality and the Board must consider a utility’s request to do business within the municipality. If such consents were given perpetual effect, then there would be no such role for future governing bodies of the municipality, or for future Boards. It is Rate Counsel’s position that the legislature did not intend to enable

⁵ Petition, p.4.

⁶ Petition p.4, Exhibit A.

⁷ Petition, p.4.

⁸ Petition, p.4.

⁹ Petition , p.4.

¹⁰ Petition, p.4

municipalities, or the Board, to take action that would be binding on future municipal officials and future Boards, in perpetuity. The purportedly perpetual duration of the consent granted under the Franchise Agreement is inconsistent with the role envisioned for municipalities by the New Jersey legislature with regard to utility service within their borders.

A reasonable limitation on the duration of such consents is necessary to balance the utility's interests against the need for continuing oversight by the municipality and the Board. Rate Counsel believes it would be reasonable to make the franchise term consistent with the term limit on the use of the Township's streets. The legislature has determined that a municipality is required to review its authorization for a utility to use its streets no less frequently than every fifty years. It would be both reasonable and practical for the Township to re-examine consent for the provision of utility service at the same time it re-examines the consent to use the streets. The Board is authorized to impose such conditions through the powers delegated by the Legislature in N.J.S.A. 48:2-14.

Although the petition at hand involves a restated Franchise Agreement and does not include a request for approval of new construction, approval of the Petition should not include authorization to include in rate base any assets that might be constructed as a result of approval of this Petition. The determination of any assets to be included in rate base and the ratemaking impact of serving new customers should be addressed in a future base rate proceeding.

Accordingly, Rate Counsel recommends that any Board Order approving the Company's Petition contain the following language:

1. This Order shall not be construed as directly or indirectly fixing for any purposes whatsoever any value of any tangible or intangible assets now owned or hereafter to be owned by the Petitioner.
2. This Order shall not affect nor in any way limit the exercise of the authority of this Board or of this State, in any future Petition or in any proceedings with respect to

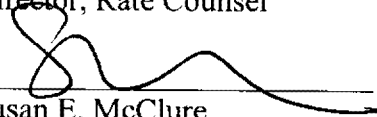
rates, franchises, service, financing, accounting, capitalization, depreciation, or in any other matter affecting the Petitioner.

3. As required by N.J.S.A. 48:3-15, the municipal consent for the use of streets is limited to a reasonable term not to exceed fifty years.
4. In order to ensure periodic municipal and Board review, the term of the municipal consent to provide water service is limited to the same period as the municipal consent for the use of streets and other places.
5. The term of the right to lay pipes under N.J.S.A. 48:19-17 is also limited to the same period as the municipal consent for the use of streets and other places.

These provisions will satisfy the concerns of Rate Counsel that Aqua complies with the proper statutory framework, that BPU approval is limited to the Municipal Consent, and that there is no authorization to include any specific assets or amounts in rate base, nor authorization for any other ratemaking treatment. If the Board adopts these conditions, Rate Counsel is not opposed to approval of the Petition.

Respectfully submitted,

STEFANIE A. BRAND, ESQ.
Director, Rate Counsel

By: 
Susan E. McClure
Assistant Deputy Rate Counsel

SEM:iaa

cc: Service List *via regular mail*

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Serve the Township of Chesterfield,
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BPU Docket No. WE13111058
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** Receives all correspondence
except discovery.*