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CHRIS CHRISTIE
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KIM GUADAGNO
Lt. Governor

STEFANIE A. BRAND
Director

April 24, 2015

VIA HAND DELIVERY

Kenneth Sheehan, Secretary
State of New Jersey, Board of Public Utilities
44 South Clinton Avenue, 10th Floor
P.O. Box 350
Trenton, New Jersey 08625-0350

**Re: I/M/O the Petition of New Jersey American Water Company, Inc.
for Approval of Municipal Consent Granted by the Borough of
Haddonfield, County of Camden
BPU Docket No.: WE15010073**

Dear Secretary Sheehan:

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.

Summary of Position

In this Petition, New Jersey American Water Company ("American" or "Company") requests approval of a municipal consent ordinance ("Ordinance") granted by the Borough of Haddonfield, Camden County ("Borough") to allow the provision of water and wastewater service in the Borough and to permit the Company to install and maintain water and sanitary sewer lines within public places in the Borough. Rate Counsel does not object to Board

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Case Mgmt
J. Kane

approval of the Company's request. However, Rate Counsel recommends language that should be included in any Board Order approving the Company's request in this proceeding.

Background

On or about January 13, 2015, American filed a Petition with the Board requesting the Board's approval of Borough of Haddonfield, Camden County, Ordinance No. 2014-13, which granted municipal consent to the Company to provide public water utility service throughout the limits of the Borough and to install water and sanitary sewer pipes beneath such public roads, street and places within the geographical area of the Borough as the Company deems necessary for its corporate purposes.¹

Discovery was propounded on American by Board Staff and Rate Counsel and a discovery conference was held on this matter on March 31, 2015 at the Board's offices in Trenton, N.J. Public notice of the request was published in the newspaper, and the Board held a hearing on April 8, 2015 at the Board's offices in Trenton, New Jersey. No members of the public attended. The Company presented two witnesses – Frank Simpson, Director of Rates and Regulation, and Carmen Tierno, Senior Director of Operations. Mr. Tierno offered testimony under oath in response to questions from Board Staff and Rate Counsel. Rate Counsel and Board Staff entered discovery and other evidence into the record at the hearing.

Analysis

The Company is a regulated public utility corporation engaged in the production, treatment and distribution of drinking water and the collection and treatment of sanitary

¹ Petition, para. 2. Although the Ordinance states its intention to grant consent to American to provide both water and wastewater service in Borough, the ordinance omitted reference to N.J.S.A. 48:13:11, the statute addressing municipal consent franchises for wastewater service. The Company clarified at the hearing that the Ordinance should have included this provision.

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wastewater within its defined service territories throughout the State of New Jersey. This service territory includes portions of Atlantic, Bergen, Burlington, Camden, Cape May, Essex, Gloucester, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Salem, Somerset, Sussex, Union and Warren Counties.² American owns, operates and maintains potable water production, treatment, storage, transmission, and distribution systems for the purpose of furnishing potable water for residential, commercial, industrial and governmental purposes in its service areas. In addition American owns, operates and maintains collection, pumping and treatment systems for the purpose of providing sanitary wastewater utility services for residential, commercial, industrial and governmental users in its service areas. American provides service to approximately 612,791 water customers and 35,987 sewer service customers in 188 communities throughout New Jersey. American's field operations employees serve these customers from eight Operating Centers located in Short Hills, Shrewsbury, Egg Harbor Township, Delran, Plainfield, Belle Mead, Lakewood, and Washington (Warren County).

The Borough of Haddonfield is a Municipal Corporation of the State of New Jersey. It is the current owner of certain water and wastewater assets located within the limits of the Borough of Haddonfield in Camden County, New Jersey. The water system is comprised of three active water supply wells, two water treatment plants, one standpipe, two below ground water storage reservoirs and a water distribution network consisting of approximately 51 miles of pipes and numerous valves, services and hydrants.³ The system services approximately 4,700 customers. The Borough's wastewater collection system consists of wastewater pumping stations, approximately 2 miles of force mains, 55 miles of collector sewers and interceptor

² Petition, para. 1.

³ Petition, Exhibit C, p. 114.

sewers, 820 manholes and approximately 4,500 customer service laterals.⁴ The Borough does not own or operate any wastewater treatment facilities. All water collected by the Borough's wastewater system is conveyed to the Camden County Municipal Utilities Authority for treatment.⁵

American and Haddonfield negotiated an Agreement of Sale dated November 2014. Under the terms of this agreement, Haddonfield has agreed to sell and American has agreed to purchase the assets of the water and sewer systems including all mains, valves, hydrants, wells, services, meters, structures and the land on which the system assets are located. The sale of the systems was the subject of a public referendum in which the voters of the Borough overwhelmingly approved the sale of the systems to American.

American has indicated that it will undertake a series of improvements to the systems following the acquisition and has represented that it will complete these improvements within five years of closing. The estimated cost of these improvements is \$16,000,000.

The Company is the New Jersey subsidiary of a large investor-owned water and wastewater utility system providing service throughout the United States. American Water Works Company, the parent of the Company, is the largest publicly traded water services company in the United States. Both the Company and American Water Works Company are headquartered in nearby Voorhees, New Jersey. American has the technical, financial and managerial capacity to provide safe, adequate and proper service in the Borough of Haddonfield.

Term of Consents

⁴ Id. at p. 159.

⁵ Id.

The Board's consideration of the referenced Petition is governed by several related statutes. N.J.S.A. 48:2-14 provides that "[n]o privilege or franchise granted after May first, one thousand nine hundred and eleven, to any public utility by a political subdivision of this state shall be valid until approved by the board." This statute also empowers the Board to "impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interests may reasonably require." N.J.S.A. 48:3-11 et seq. governs a municipal grant to a utility of the right to use the municipality's streets and other public places. Under N.J.S.A. 48:3-15, such grants must be for "a period not exceeding fifty years" Moreover, the Municipal Consent granted by the Borough of Haddonfield references N.J.S.A. 48:19-17 and N.J.S.A. 48:19-20. These two statutes apply exclusively to water companies. N.J.S.A. 48:19-17 addresses the right to lay pipes free of charge. N.J.S.A. 48:19-20 addresses extension of a franchise to or within a municipality.

As noted, the Municipal Consent purports to grant two types of consent—consent to provide water utility service, and consent to lay and maintain the Company's water and sewer pipes and other facilities. Moreover, American represented at the hearing that the Borough intended the Ordinance to also grant consent pursuant to N.J.S.A. 48:13-11 et seq., the municipal consent statute pertaining to sewer franchises.⁶ The right to provide water and sewer utility service within the Township is purportedly being granted in perpetuity. The Municipal Consent grants the Company the right to lay pipes under N.J.S.A. 48:3-15, which, according to the statute is limited to a period of fifty years.

None of these statutes contemplates 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

⁶ 8T:L11-20 (4/8/15).

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 municipalities, or the Board, to take action that would be binding on future municipal officials, and future Boards, in perpetuity.

Perpetuities are not favored under New Jersey law. As stated by the New Jersey Supreme Court, "[p]erpetual contractual performance is not favored in the law and is to be avoided" absent a clear expression of intent. In re Estate of Alton Glenn Miller, 90 N.J. 210, 218 (1982). In the absence of such an expression of intent, the court will determine a term that is reasonable under the circumstances. Id. at 209. This same principle applies to governmental action. As the Court explained in West Caldwell Bor. v. Caldwell Bor., 26 N.J. 9, 31 (1958) "a municipality cannot bind itself by a perpetual contract, or a contract of unreasonable duration, unless by legislative sanction." Thus, the Court held that an agreement without a specified term to maintain connections to a neighboring municipality's sewerage system, and pay the associated fees, would be interpreted as continuing for a "reasonable time" based on the construction and other costs incurred in reliance on the agreement and other relevant facts and circumstances. Id. at 31-32. See also Town of Secaucus v. City of Jersey City, 20 N.J. Tax 562, 571-72 (2003) (holding that an agreement by Secaucus to waive "forever" its right to challenge certain tax exemptions granted by Jersey City was invalid as contrary to public policy); Dorchester Manor v. New Milford Bor., 287 N.J. Super. 163, 169-70 (L. Div. 1994) (holding that municipality's agreement to provide garbage removal service two days a week to a garden apartment development was binding, at most, for a reasonable period after the date of the agreement).

The perpetual duration of the Borough's Municipal Consent to provide service is inconsistent with the role envisioned for municipalities by the New Jersey Legislature with regard to utility service within their borders. As noted above, under N.J.S.A. 48:3-15, municipal grants of the right to use streets and other public places are explicitly limited to fifty years. Neither N.J.S.A. 48:19-20 nor N.J.S.A. 48:2-14 gives explicit sanction for a municipality to grant, or the Board to approve, a franchise in perpetuity. In the absence of a specific statutory authorization to create a perpetually binding obligation, the consent to provide utility service within the Township must be limited to a reasonable period of time. 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 streets.

Rate Counsel recognizes and respects the Borough's position as expressed by granting of an unlimited franchise. However, the Legislature reserved to the Board the authority to review municipal consents in order to preserve regulatory consistency and oversight throughout the State. 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.

For the reasons set forth above, reasonable term limits should be established as a condition of the Board's approval of the Municipal Consent. As noted previously, the Board is authorized to impose such conditions through the powers delegated by the Legislature in N.J.S.A. 48:2-14.

Recommendation

Rate Counsel does not object to the Company's request to approve the Haddonfield Borough municipal consents. However, approval of the Petition should not include authorization to include in rate base the specific assets that will be acquired or 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 these new customers should be addressed in a future base rate proceeding.

Furthermore, Rate Counsel believes that the Board should act within its purview to establish conditions on the municipal consent needed to assure consistency with N.J.S.A. 48:3-15. Specifically, the term of the consent should be limited to 50 years for the laying of water and sewer mains and for the specific authorization to provide water and wastewater service within the Borough.

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. The Petitioner shall not depreciate the portion of the water or wastewater system that is funded by CIAC.
4. 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.
5. In order to ensure periodic municipal and Board review, the term of the municipal consent to provide sewer service under N.J.S.A. 48:13-11 et seq. is limited to the same period as the municipal consent for the use of streets and other places.

6. The term of the right to lay pipes under N.J.S.A. 48:19-17 and the municipal consent under N.J.S.A. 48:19-20 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 the Company complies with the proper statutory framework, that BPU approval is limited to the specific approvals requested, 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: 

Christine M. Juarez, Esq.
Assistant Deputy Rate Counsel

CMJ/dn

cc: Service List *via e-mail and regular mail*

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