



State of New Jersey
 DIVISION OF RATE COUNSEL
 140 EAST FRONT STREET, 4TH FL
 P.O. Box 003
 TRENTON, NEW JERSEY 08625

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STEFANIE A. BRAND
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April 3, 2018

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 CASE MANAGEMENT

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BOARD OF PUBLIC UTILITIES
 TRENTON, NJ

Aida Camacho-Welch, Secretary
 State of New Jersey, Board of Public Utilities
 44 South Clinton Avenue, 3rd Floor, Suite 314
 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 a Municipal Consent Granted by the Township of Howell, County of Monmouth
 BPU Docket No.: WE17111148**

Dear Ms. Camacho-Welch:

Please accept for filing an original and eleven copies of the Division of Rate Counsel's ("Rate Counsel") comments in the above-referenced petition. 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 & Analysis

On or about November 13, 2017, New Jersey American Water Company, Inc. ("Company" or "Petitioner") filed a petition ("Petition") seeking approval of the Franchise Ordinance adopted by Howell Township, Monmouth County ("Howell") allowing the Company to provide service in an additional area of Howell defined as Block 135, Lot 26 which was to be subdivided and known as Lot 26.01. (Petition, Para. 2). The Company already provides water and wastewater service to portions of Howell (Petition, Para. 2 and Responses to RCR-1 and RCR-2). Howell adopted Ordinance No. O-17-29 on September 5, 2017 (the "Municipal

Case Mgmt
list copied

Tel: (609) 984-1460 • Fax: (609) 292-2923 • Fax: (609) 292-2954
<http://www.nj.gov/rpa> E-Mail: njratepayer@rpa.state.nj.us

Consent”) granting the Company a perpetual franchise to the subject area. (Petition, Exhibit A, Section 1.) Ordinance No. O-17-29 granted municipal consent to construct and maintain sewer facilities and provide wastewater service as defined in N.J.S.A. 48:19-17 and N.J.S.A. 48:19-20 (Petition, Exhibit A, Section 2.) and allows access public streets and places for a term of fifty years in accordance with N.J.S.A. 48:3-15. Howell published a public notice of the proposed franchise grant in a newspaper of general circulation in the area on August 18, 2017 after Ordinance O-17-29 had been introduced and passed on the first reading on August 17, 2017. (RCR-3.) Howell also published a notice in a newspaper of general circulation on September 8, 2017 after the Municipal Consent was adopted on September 5, 2017. (RCR-3.) Rate Counsel believes that this satisfied the notice requirements of N.J.S.A. 48:3-15.

The expanded service area will include a development known as “Cornerstone at Howell,” which is planned to include 72 residential units consisting of 14 one bedroom apartments, 42 two bedroom apartments and 15 three bedroom apartments. The anticipated average daily sewer flow from the completed development is 16,275 gallons per day. (Petition, Para. 4.)

A public hearing on the Petition was held at the offices of the Board of Public Utilities (“Board”), on March 20, 2018. No members of the public attended and no written comments from the public were submitted.

Term of Consents

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.”

As noted, the Municipal Consent purports to grant two types of consent—consent to provide sewer service, and consent to lay and maintain sewer pipes and other facilities. The right to provide sewer utility service within the Howell is purportedly being granted in perpetuity. There is a fifty-year limit on the duration of the consent to lay pipes in public places consistent with N.J.S.A. 48:3-15.

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 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 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 Howell 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 Howell’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 and Howell has included this limitation in its Ordinance. It would be both reasonable and practical for Howell to re-examine consent for the provision of utility service at the same time it re-examines the consent to use streets.

Rate Counsel believes 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 Petitioner's request for approval of the Howell Municipal Consent subject to the recommendation that the Board modifies the term of the consent to provide service to 50 years from the date of the grant. Rate Counsel believes that the Board should act within its purview to establish conditions on the Howell 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 specific authorization to provide sewer service within the designated area of the Howell.

Rate Counsel recommends that any Board Order approving the Joint Petition contain the following language:

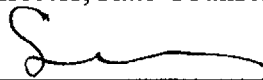
1. This Order shall not be construed as directly or indirectly fixing for any purposes whatsoever any value of any tangible or intangible assets now owned or hereafter to be owned by the Petitioner.
2. This Order shall not affect nor in any way limit the exercise of the authority of this Board or of 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 sewer system expansion 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 term of fifty years, as granted by the Township of Howell, from the effective date of this Order.
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. 48:19-20 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 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 Petitioner complies with the proper statutory framework, that Board 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: _____

Susan E. McClure, Esq.
Assistant Deputy Rate Counsel

SEM:kah

cc: Service List via e-mail and regular mail

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American Water Company, Inc. for
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Granted by the Township of
Howell, County of Monmouth**

BPU Docket No. WE17111148

Service List

Stephen R. Bishop
Corporate Counsel
New Jersey American Water
1025 Laurel Oak Road
Voorhees, NJ 08043

Stefanie A. Brand, Director
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625

Alex Moreau, DAG
Division of Law
124 Halsey Street
P.O. Box 45029
Newark, NJ 07101

Maria L. Moran
Board of Public Utilities
44 South Clinton Ave.
P.O. Box 350
Trenton, NJ 08625

*Debra F. Robinson, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625

Howard J. Woods, Jr., P.E.
Howard J. Woods, Jr.
& Associates LLC
49 Overhill Road
East Brunswick, NJ 08816

Irene Kim Asbury, Secretary
Board of Public Utilities
44 South Clinton Ave.
P.O. Box 350
Trenton, NJ 08625

Brian Lipman, Esquire
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, New Jersey 08625

Mona Mosser
Board of Public Utilities
44 South Clinton Ave.
P.O. Box 350
Trenton, NJ 08625

Mark C. Beyer
Board of Public Utilities
44 South Clinton Ave.
P.O. Box 350
Trenton, NJ 08625

Susan McClure, Esq.
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, New Jersey 08625

Jim Kane
Board of Public Utilities
44 South Clinton Ave.
P.O. Box 350
Trenton, NJ 08625

Mike Kammer
Board of Public Utilities
44 South Clinton Ave.
P.O. Box 350
Trenton, NJ 08625

Kathryn A. Hart, Legal Assistant
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625

Veronica Beke, DAG
Board of Public Utilities
44 South Clinton Ave.
P.O. Box 350
Trenton, NJ 08625

Rupal Patel
Division of Water
Board of Public Utilities
44 South Clinton Ave., Ste 314
P.O. Box 350
Trenton, New Jersey 08625