



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

PHIL MURPHY
Governor

SHEILA OLIVER
Lt. Governor

BRIAN O. LIPMAN
Director

June 30, 2022

VIA ELECTRONIC MAIL

Honorable Carmen D. Diaz, Acting 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 A
MUNICIPAL CONSENT GRANTED BY THE BOROUGH OF
BOUND BROOK, SOMERSET COUNTY, NEW JERSEY
BPU Docket No.: WE22020072

Dear Acting Secretary Diaz:

Please accept for filing the Division of Rate Counsel's ("Rate Counsel") comments in the above-referenced matter. Thank you for your consideration and attention to this matter.

Background & Analysis

On or about February 17, 2022, New Jersey American Water Company ("Company" or "Petitioner") filed a petition ("Petition") seeking approval of the Municipal Consent Ordinance No. 2021-032 (the "Municipal Consent")¹ adopted by the Borough of Bound Brook, Somerset

¹ A replacement Ordinance No. 2022-08 has been provided in Company Exhibit P-3.

County (“Borough”) allowing the Company to provide wastewater collection service within the Borough. (Petition, Exhibit A, Section 1). The Company is in the process of acquiring the Borough’s wastewater conveyance system following the procedures for such sales under N.J.S.A. 40:62-1 et. seq.

The Borough adopted Ordinance No. 2021-019 on July 13, 2021 (the “Sale Authorization Ordinance”) authorizing the sale of the wastewater conveyance system subject to the consent of the voters of the Borough (Petition, Exhibit B). That consent was later obtained through a referendum on November 2, 2021, in which the sale was approved by a vote of 1,052 for the sale and 634 against (Petition, Paragraph 6). The wastewater conveyance system provides wastewater collection services for 2,900 connections, which includes 400 connections in Bridgewater Township (Petition, Paragraph 8). The connections in Bridgewater are served through a bulk sale arrangement between the Borough and Bridgewater Township. This arrangement will be continued if the sale of the system is completed. The wastewater conveyance system within the Borough is being acquired for a purchase price of \$5,000,000 (Petition, Exhibit B, Section II, Page 2 of 4). The Explanatory Statement provided with the referendum ballot question indicated the purchase price and also described the Company’s commitment to maintain rates at the current Borough rates for a period of at least two years after closing and the Company’s further commitment to spend up to \$11 million on system improvements within ten years following closing. The Explanatory Statement also described the Company’s commitment to limit future rate increases after the initial rate freeze period to no more than 3% per year for the subsequent three years (Petition, Exhibit B, Section V, Pages 3 and 4 of 4).

Section 8.3 of the Agreement of Sale between the Borough of Bound Brook, New Jersey and New Jersey-American Water Company, Inc. (Petition, Exhibit C, Page 25 of 133) obligates the Company to adopt the Borough's existing sewer rates and to hold those rates for a minimum of two years following closing. Subsequent rate adjustments are to be limited to no more than 3% per year for years three through five following closing. Only then have the Company and the Borough agreed to include future rate adjustments in base rate proceeding filed with this Board. Furthermore, the Company committed to use its best efforts to minimize rates to Borough customers "by spreading costs of the Wastewater System across its statewide customer base."

Ordinance No. 2021-032 and replacement Ordinance No. 2022-08 grants municipal consent defined in N.J.S.A. 48:2-14 to New Jersey American to furnish wastewater conveyance service to all residents, businesses and governmental buildings within the Borough. The grant is exclusive and perpetual (Petition, Exhibit A, Section 1 and Company Exhibit P-3, Section 1). The Municipal Consent also grants the Company access to public streets and places, as required by N.J.S.A. 48:3-11 and N.J.S.A. 48:3-15, to allow for the construction and maintenance of the sewer facilities, as authorized for water companies in N.J.S.A. 48:19-17 and N.J.S.A. 48:19-20 (Petition, Exhibit A, Section 2 and Company Exhibit P-3, Section 2). The "exclusive consent and permission" is not time-limited.

The Borough introduced Ordinance No. 2021-032 on November 23, 2021 and adopted it on the second reading on December 14, 2021. The original notices were incomplete and as a result the Borough provided an additional notice of replacement Ordinance No. 2022-08. The Borough introduced this Ordinance on April 26, 2022 and adopted it on the second reading on May 10, 2022. The replacement Ordinance is part of the record in this matter and can be found

at Company Exhibit P-3. The Municipal Consent does not take effect until approved by the Board of Public Utilities (Petition, Exhibit A, Section 1 and Company Exhibit P-3, Section 1).

A public hearing on the Petition was held on June 15, 2022. 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." No reference to the provisions of N.J.S.A. 48:3-15 and the fifty-year term limit is made in Ordinance No. 2021-032 or the replacement Ordinance No. 2022-08.

As noted, the Municipal Consent purports to grant two types of consent—consent to provide sewer service, and consent to lay and maintain pipes and other facilities. The right to provide sewer utility service within the Borough granted by Ordinance No. 2021-032 and Ordinance No. 2022-08 is perpetual. However, neither the original Ordinance No. 2021-032 nor the replacement Ordinance No. 2022-08 refers to the fifty-year limit on the duration of the consent to lay pipes in public places set in N.J.S.A. 48:3-15.

None of these statutes contemplates the grant of a municipal consent in perpetuity. 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 grant of a 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, which specifically addresses water utilities, 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 Borough 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 Borough'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. The Borough also failed to address this explicit limitation in its original Ordinance No. 2021-032 or the replacement Ordinance No. 2022-08. It would be both reasonable and practical for the Borough 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 Borough's Municipal Consent subject to the recommendation that the Board modifies the term of the consent to provide sewer service to 50 years from the date of the grant. Similarly, and separately, Rate Counsel recommends that the Board modify the term of consent to access public streets to a maximum of fifty years consistent with the limitation in N.J.S.A. 48:3-15. Rate Counsel believes that the Board should act within its purview to establish conditions on the Borough's 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 and to access public streets and places within the City. Rate Counsel also notes the Company's response to RCR-23 in which the "Company would have no objection should the Board wish to clarify in its order approving {the Municipal Consent} a condition, as the Board may do pursuant to N.J.S.A. 48:2-14, limiting the Company's right to use the streets to the statutory limit of 50 years from the date of grant."

In addition, Rate Counsel does not object to the specific provision in Section 8.3 of the Agreement of Sale that would have existing Borough rates take effect as the Company's initial tariff rates on closing. Given the Company's schedule of base rate filings, these initial rates would most likely then remain in effect for the minimum period required by Section 8.3 of the Agreement. In the Company's next base rate proceeding after the current Petition before the

Board in Docket No. WR22010019 is concluded, all rate making issues associated with this acquisition could then be considered.

Accordingly, Rate Counsel recommends that any Board Order approving the 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. The negotiated rates described in Section 8.3 of the Agreement of Sale between the Borough of Bound Brook, New Jersey and New Jersey-American Water Company, Inc. shall take effect upon closing as the Company's initial tariff for sewer service in the area now served by the Borough of Bound Brook. All other rate making issues associated with this transaction shall be held for consideration in the Company's next base rate proceeding following the conclusion of Docket No. WR22010019.
3. 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.
4. The Petitioner shall not depreciate any portion of the sewer system as it may be expanded that is funded by CIAC.
5. 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 from the effective date of this Order.
6. In order to ensure periodic municipal and Board review, the term of the municipal consent to provide sewer service under N.J.S.A. 48:2-14 is 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, that a proper initial tariff is established at closing, and that there is no authorization to include any specific assets or amounts in rate base, nor authorization for any other ratemaking

treatment other than the establishment of an initial tariff. If the Board adopts these conditions, Rate Counsel is not opposed to approval of the Petition.

Respectfully submitted,

BRIAN O. LIPMAN, ESQ.
Director, Rate Counsel

By: 

Susan E. McClure, Esq.
Managing Attorney – Water/Wastewater

SEM: _____
cc: Service List *via e-mail*

**NEW JERSEY-AMERICAN
WATER COMPANY, INC. FOR
APPROVAL OF A MUNICIPAL
CONSENT GRANTED BY
THE BOROUGH OF BOUND
BROOK, SOMERSET COUNTY**

BPU DOCKET NO.: WE22020072

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

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

Christine Juarez, Esquire
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625

Emily Smithman, Esquire
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625

Marilyn Silva, Legal Secretary
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625

Carmen Diaz, Acting Secretary
Board of Public Utilities
44 South Clinton Ave.
P.O. Box 350
Trenton, NJ 08625

Mike Kammer, Director
Board of Public Utilities
Division of Water and Wastewater
44 South Clinton Avenue
PO Box 350
Trenton, NJ 08625

Rupal Patel
Board of Public Utilities
Division of Water and Wastewater
44 South Clinton Avenue
PO Box 350
Trenton, NJ 08625

Andrew Tuzzo
Board of Public Utilities
Division of Water and Wastewater
44 South Clinton Avenue
PO Box 350
Trenton, NJ 08625

Nicholas T. DeVecchis
New Jersey American Water
1 Water Street
Camden, NJ 08102

Donna Carney, Paralegal
New Jersey American Water
1 Water Street
Camden, NJ 08102

Stephen R. Bishop, Deputy General
Counsel
New Jersey American Water
1 Water Street
Camden, NJ 08102

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

Meliha Arnautovic, DAG
Department of Law Hughes
Justice Complex
25 Market Street
P. O. Box 112
Trenton, NJ 08625