



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

July 12, 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
MULLICA, ATLANTIC COUNTY, NEW JERSEY
BPU Docket No. WE21091146**

Dear Acting Secretary Diaz:

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

Background & Analysis

On or about September 30, 2021, New Jersey American Water Company ("Company" or "Petitioner") filed a petition ("Petition") seeking approval of the Municipal Consent Ordinance No. 14-2021 adopted by the Township of Mullica, Atlantic County ("Township") allowing the Company to provide water and wastewater service to properties located along Hamburg Avenue between U.S. Route 30 and West Moss Mill Road. (Petition, Exhibit A, Section 1.1 and Schedule A). The Company is in the process of acquiring the City of Egg Harbor's water and sewer

utilities under a separate proceeding before the Board filed under the Water Infrastructure Protection Act (“WIPA”) and will not have the ability to render water or wastewater service to the properties now served by the Egg Harbor City system until the acquisition is approved and subsequently completed.

The Township adopted Ordinance No. 14-2021 on August 31, 2021 (the “Municipal Consent”) granting the Company a franchise to provide water and wastewater service to all residents, businesses, and government buildings within the Township along a designated portion of Hamburg Avenue. (Petition, Exhibit A, Section 1.1). Ordinance No. 14-2021 grants municipal consent to construct and maintain water and sewer facilities and provide water and wastewater service as defined in N.J.S.A. 48:2-14, N.J.S.A. 48:3-11 and N.J.S.A. 48:3-15. Ordinance No. 14-2021 also allows access to public streets and places for these purposes (Petition, Exhibit A, Section 1.2.a. and Section 1.2.b.). Ordinance No. 14-2021 grants an “exclusive and perpetual consent” for the franchise and it limits the term of the grant of access to public streets and places to fifty years. The Township introduced Ordinance No. 14-2021 on July 27, 2021 and adopted it on the second reading on August 31, 2021. Subsequently, the Township published the Ordinance on December 8, 2021 and on December 15, 2021 and held an additional public hearing on the Ordinance on December 28, 2021. The Municipal Consent does not take effect until approved by the Board of Public Utilities and the issuance of a final Order by the Board allowing the Company to acquire the assets of the City of Egg Harbor water and wastewater systems. (Petition, Exhibit A, Section 1.3).

A public hearing on the Petition was held at the Board of Public Utilities, New Jersey on June 23, 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."

As noted, the Municipal Consent purports to grant two types of consent—consent to provide water and sewer service, and consent to lay and maintain pipes and other facilities. The right to provide water and sewer utility service within the Township granted by Ordinance No. 14-2021 is perpetual. However, Ordinance No. 14-2021 properly limited the duration of the consent to lay pipes in public places set in N.J.S.A. 48:3-15 to the maximum of fifty years.

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 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. The Township included this explicit limitation in its Ordinance No. 14-2021. 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 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 Township's Municipal Consent subject to the recommendation that the Board modifies the term of the consent to provide water and sewer service to 50 years from the date of the grant. Such a limitation would be consistent with the 50-year limit the Township placed on its consent to allow the Company to use streets and public places 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 Township'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 water and sewer service and to access public streets and places within the Township. Accordingly, Rate Counsel recommends that any Board Order approving the Petition contain the following language:

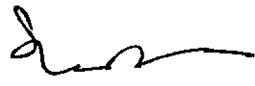
1. This Order shall not be construed as directly or indirectly fixing for any purposes whatsoever any value of any tangible or intangible assets now owned or hereafter to be owned by the Petitioner.
2. This Order shall not affect nor in any way limit the exercise of the authority of this Board or of 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 any portion of the water and sewer system as it may be expanded after completion of the acquisition of the City of Egg Harbor systems under WIPA 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 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 water and 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, 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,

BRIAN O. LIPMAN, ESQUIRE
Director, Rate Counsel

By: 

Susan E. McClure, Esquire
Managing Attorney—Water/Wastewater

SEM:ms

c: Service List via e-mail

**I/M/O THE PETITION OF NEW
JERSEY-AMERICAN WATER
COMPANY, INC. FOR APPROVAL
OF A MUNICIPAL CONSENT
GRANTED BY THE TOWNSHIP OF
MULLICA, ATLANTIC COUNTY,
NEW JERSEY**

BPU DOCKET No. WE21091146

Brian Lipman, Acting 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

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

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

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

Mike Kammer
Board of Public Utilities
Division of Water and Wastewater
44 South Clinton Avenue, 3rd Fl.
PO Box 350
Trenton, NJ 08625

Rupal Patel
Board of Public Utilities
Division of Water and Wastewater
44 South Clinton Avenue, 3rd Fl.
PO Box 350
Trenton, NJ 08625

David Schmitt, Esquire
Board of Public Utilities
Division of Water and Wastewater
44 South Clinton Avenue, 3rd Fl.
PO Box 350
Trenton, NJ 08625

Andrew Tuzzo
Board of Public Utilities
Division of Water and Wastewater
44 South Clinton Avenue, 3rd Fl.
PO Box 350
Trenton, NJ 08625

Justin Cederberg
Board of Public Utilities
Division of Water and Wastewater
44 South Clinton Avenue, 3rd Fl.
PO Box 350
Trenton, NJ 08625

Robert Brabston Executive Director
Board of Public Utilities
Division of Water and Wastewater
44 South Clinton Avenue, 3rd Fl.
PO Box 350
Trenton, NJ 08625

Stephen Bishop, Corporate Counsel
New Jersey American Water
One Water Street
Camden, NJ 08102

Donna Carney, Paralegal
New Jersey American Water
149 Yellowbrook Road, Suite 109
Farmingdale, NJ 07727

William Lesser, Esquire
COZEN O'CONNOR P.C.
3 WTC, 175 Greenwich Street 55TH
Floor
New York, NY 10007

Nicholas DeVecchis, Senior Manager
Business Development
New Jersey American Water
One Water Street
Camden, NJ 08102

Debbie Albretch, Vice President and
Director
New Jersey American Water
One Water Street
Camden, NJ 08102

Brandi N. Belvey Paralegal
Business Development
New Jersey American Water
One Water Street
Camden, NJ 08102

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

Terel L. Klein, DAG
Department of Law Hughes
Justice Complex
25 Market Street
P. O. Box 112
Trenton, NJ 08625

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

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