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September 14, 2023

**VIA ELECTRONIC MAIL**

The Honorable Sherri Golden, Secretary  
State of New Jersey, Board of Public Utilities  
44 South Clinton Avenue, 10<sup>th</sup> Floor  
P.O. Box 350  
Trenton, New Jersey 08625-0350

**Re: I/M/O THE PETITION OF NEW JERSEY AMERICAN  
WATER COMPANY FOR APPROVAL OF A MUNICIPAL  
CONSENT GRANTED BY THE BOROUGH OF  
SOMERVILLE, COUNTY OF SOMERSET**

**BPU Docket No.: WE23020197**

Dear Secretary Golden:

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

## Background & Analysis

On or about March 29, 2023, New Jersey American Water Company (“Company”) filed a petition (“Petition”) seeking approval of a Municipal Ordinance adopted by the Borough of Somerville (“Borough”) authorizing the sale of the Borough’s water system to the Company. The filing of this Petition followed a public offering process that was initiated by the Borough’s issuance of a Request for Proposals on May 3, 2022, requesting bids for the purchase of the system pursuant to N.J.S.A. 40:62-1 et seq. The Company responded to the Request for Proposals on June 22, 2022, by offering a bid to acquire the system for \$7,000,000. Subsequently, the Borough adopted Ordinance No. 2694-23-0221 authorizing the sale of the system to the Company contingent upon the approval of the voters at the next general election. The proposed sale of the system was put to a public referendum on November 8, 2022. The results of the referendum overwhelmingly approved the sale with 75% of the votes favoring the proposed transaction.<sup>1</sup>

The Borough encompasses approximately 2.4 square miles and has a population of about 12,599 people.<sup>2</sup> The proposed franchise addresses sewer service within the Borough. Currently, the Borough sewer system provides service to 3,812 accounts in the Borough and an additional 43 properties in adjacent Bridgewater Township. The Borough owns the system serving the 43 Bridgewater properties and this portion of the system will be transferred to the Company.<sup>3</sup> The present petition seeks Board approval of the Municipal Consent only, and the Company explains that it will seek approval of ratemaking treatment in a future base rate case.<sup>4</sup> The Company and

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<sup>1</sup> Petition at pp. 3-6.

<sup>2</sup> Petition at para 7.

<sup>3</sup> Petition at para 8.

<sup>4</sup> Petition at para 9.

the Borough have executed an Asset Purchase Agreement for the sale and purchase of the system, and the transaction will be completed upon Board approval of the Municipal Consent.<sup>5</sup>

Ordinance No. 2694-23-0221 (the “Municipal Consent”) permits the Company to purchase the system and provide sewer service to all areas of the Borough. The Company already provides water service throughout the Borough. The Municipal Consent grants the Company a perpetual franchise and access to streets and public places without specifying duration.<sup>6</sup> However, N.J.S.A. 48:3-15 limits such grants to a maximum term of fifty years. A public hearing on the Petition was held on August 23, 2023. No members of the public attended and no written comments from the public were submitted. Board Staff and Rate Counsel engaged in discovery with the Company. All discovery questions and responses were placed into the record of this proceeding at the public hearing. The initial tariff for the customers in the Borough was agreed to by the parties as set forth in second updated discovery response SE-19.<sup>7</sup>

#### 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

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<sup>5</sup> Petition at para 10.

<sup>6</sup> See Article I of the Ordinance, “Borough Consent” shall mean the municipal consent ordinance that is to be enacted by the Borough as a condition of the Closing and which grants the authority to Buyer to provide wastewater services in the Borough and granting Buyer the right to utilize the roads, streets, alleys, byways and public places within the Borough.”

<sup>7</sup> See Second Updated Response to SE-19, dated June 27, 2023.

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." Ordinance No. 2694-23-0221, however, is silent with respect to the fifty-year limit on the duration of the consent to utilize streets and public places that is set forth in N.J.S.A. 48:3-15.

None of the applicable 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. In fact, Section 1 of the Ordinance, after granting a perpetual right, limits that right to the maximum extent allowed by law.

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 a 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 Ordinance No. 2694-23-0221. 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 water 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 water service and to access public streets and places within the Borough.

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 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 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 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, ESQ.  
Director, Rate Counsel

By: /s/ Emily Smithman  
Emily Smithman, Esq.  
Assistant Deputy Rate Counsel

ES/fjr

cc: Service List *via e-mail*

**I/M/O New Jersey-American Water  
Company, Inc. for Approval of a  
Municipal Consent Granted by the  
Borough of Somerville, Somers County  
BPU DOCKET NO: WE23030197**

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