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February 22, 2024

VIA E-MAIL

The Honorable Sherri Golden, Secretary
State of New Jersey
Board of Public Utilities
44 South Clinton Avenue
P.O. Box 350
Trenton, New Jersey 08625-0350

**Re: I/M/O THE PETITION OF AQUA NEW JERSEY, INC. FOR
APPROVAL OF A MUNICIPAL CONSENT TO PROVIDE
WASTEWATER TO A PORTION OF THE TOWNSHIP OF
HARRISON, GLOUCESTER COUNTY
BPU Docket No.: WE23100730**

Dear Secretary Golden:

Please accept for filing 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 October 12, 2023, Aqua New Jersey, Inc. ("Company" or "Aqua") filed a petition ("Petition") seeking approval of a municipal consent by the Township of Harrison (the "Township") granting the Company a limited franchise to provide wastewater service within a limited area of the Township. Municipal consent was granted pursuant to Ordinance No. 18-2023 ("Ordinance"), adopted on September 18, 2023.¹ The Township's municipal consent grants the Company a franchise to maintain, repair, replace, and operate wastewater facilities,

¹ Petition at Paragraph 3.

and provide wastewater service to a portion of the Township, a community not previously served by the Company. Currently, there is no public sewer service in the Franchise Area, and to the extent wastewater service is available, it is provided by private septic systems and cesspools. The Township provides wastewater service elsewhere in the municipality but does not have the resources to provide such service in the Franchise Area. Aqua intends to provide service via an interconnection with its existing facilities in Woolwich Township.

Initially, Aqua will serve a commercial facility along State Route 322. The facilities needed to provide wastewater service will be installed by the developer and contributed to Aqua. The Ordinance provides municipal consent for the Company to maintain, repair, replace, and operate wastewater service facilities and to provide wastewater service to the Franchise Area but does not expressly grant access to public streets and places for that purpose.² The Ordinance is silent as to the term of the grant of the municipal consent to provide service.

The Ordinance grants municipal consent to construct and maintain wastewater facilities and provide wastewater service as defined in N.J.S.A. 48:2-14, N.J.S.A. 48:3-11, N.J.S.A. 48:3-15, N.J.S.A. 48:19-17, and N.J.S.A. 48:19-20 all subject to approval of the Board. The Ordinance grants the Company a franchise to provide wastewater service to a specific parcel of the Township.

A public hearing on the Petition was held virtually on February 20, 2024. No members of the public attended and no written comments from the public were submitted.

² Ordinance No. 18-2023.

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 specific reference to the provisions of N.J.S.A. 48:3-15 is made in the Ordinance.

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 an unlimited duration 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 a municipality’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.

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 wastewater 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 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 wastewater service.

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 wastewater system that is funded by CIAC.
4. In order to ensure periodic municipal and Board review, the term of the municipal consent to provide wastewater service under N.J.S.A. 48:2-14 is limited to 50 years.

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 Lam

Emily Lam, Esq.

Assistant Deputy Rate Counsel

EL/fjr

cc: Service List *via e-mail*

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