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April 16, 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 NEW JERSEY AMERICAN WATER
COMPANY, INC. FOR APPROVAL OF A MUNICIPAL CONSENT
GRANTED BY THE CITY OF SALEM, SALEM COUNTY
BPU Docket No.: WE23120922**

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 or about December 28, 2023, New Jersey-American Water Company, Inc. ("Company" or "NJAWC") filed a petition ("Petition") seeking approval of a municipal consent ordinance (the "Municipal Consent") by the City of Salem (the "City") granting the Company a franchise to provide water and wastewater services to the City. The Municipal Consent was

granted pursuant to Ordinance No. 23-16, adopted on December 18, 2023.¹ The City's Municipal Consent grants the Company a franchise to construct, lay, maintain, and operate the necessary water and wastewater mains, pipes and appurtenances throughout the geographical area of the City (the "Proposed Franchise Area") and to provide water and wastewater services to the City. The City held a referendum on whether or not to approve the acquisition of the Systems by Petitioner on November 7, 2023.

The City currently owns and operates the Systems servicing the residents and property owners within the Proposed Franchise Area. NJAWC and the City have executed an Asset Purchase Agreement (the "Agreement") for the sale and purchase of the Systems. The Ordinance provides the Municipal Consent for the Company to construct, lay, maintain, and operate the necessary water and wastewater mains, pipes and appurtenances throughout the geographical area of the Proposed Franchise Area and to provide water and wastewater services to the City and expressly grants access to public streets and places for that purpose.² Regarding the term of the grant to provide service the Ordinance states that it provides "perpetual consent" to NJAWC.³ The Ordinance properly limits the term of the grant of access to public streets to fifty years.⁴

The Ordinance grants municipal consent to construct and maintain water and wastewater facilities and provide water and 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.

¹ Petition at Paragraph 2.

² Ordinance No. 16-23.

³ Id. at Section One; see also SE-5.

⁴ Id. at Section Two.

A public hearing on the Petition was held virtually on April 9, 2024. 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 specific reference to the provisions of N.J.S.A. 48:3-15 is made in the Ordinance; however, Section 3 limits this grant properly to the maximum of fifty years.

As noted, the Ordinance purports to grant two types of consent—consent to provide water and wastewater service, and consent to maintain, repair, and replace water and wastewater service facilities. The right to provide utility service within the City granted by the Ordinance is limited with respect 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 an unlimited 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 City 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 City'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 City did in fact address this limitation in the Ordinance. It would be both reasonable and practical for the City 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 City'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. Rate Counsel believes that the Board should act within its purview to establish conditions on the City'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 service as it already limits access public streets and places within the City.

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. 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 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 Lam

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EL/fjr

cc: Service List *via e-mail*

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GRANTED BY THE CITY OF SALEM, SALEM COUNTY
BPU Docket No.: WE23120922
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