



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

PHIL MURPHY  
*Governor*

TAHESHA L. WAY  
*Lt. Governor*

BRIAN O. LIPMAN  
*Director*

October 1, 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 TOWNSHIP OF QUINTON, SALEM COUNTY  
BPU Docket No.: WE24040228**

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 April 11, 2024, New Jersey-American Water Company, Inc. ("Company" or "NJAWC") filed a petition ("Petition") seeking approval of a municipal consent ordinance (the "Municipal Consent") granted to NJAWC by the Township of Quinton, County of Salem ("Quinton" or "Township") granting the Company a franchise to provide water services to the Township. The Municipal Consent was granted pursuant to Ordinance No. 2024-03, adopted on

April 2, 2024.<sup>1</sup> The Township’s Municipal Consent grants the Company a franchise to construct, lay, maintain, and operate the necessary water mains, pipes and appurtenances throughout the Designated Franchise Area and to provide water services to the Township.<sup>2</sup>

The Municipal Consent is granted in anticipation of the sale of Salem’s water and wastewater systems (the “Salem System”).<sup>3</sup> The Ordinance grants NJAWC “exclusive and perpetual consent and permission” to provide water service within the Designated Franchise Area.<sup>4</sup> It also grants NJAWC permission to access public roads for the purposes of maintaining infrastructure, and limits this permission to fifty years.<sup>5</sup>

A public hearing on the Petition was held virtually on September 26, 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.

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<sup>1</sup> Petition at p. 2.

<sup>2</sup> Id.

<sup>3</sup> Petition at p. 1.

<sup>4</sup> Ordinance 2024-03 at Section 1; see also NJAWC Response to S-NJAW-ENG-7.

<sup>5</sup> Id. at Section 2; see also NJAWC Response to S-NJAW-ENG-7.

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.

As noted, the Ordinance purports to grant two types of consent—consent to provide water service, and consent to maintain, repair, and replace water service facilities. The right to provide utility service within the Township granted by the Ordinance is not limited with respect to the fifty-year limit, while the right to access public streets is.

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. Under N.J.S.A. 48:3-15, the consent to access public streets within the Township must be limited to 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 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 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 fifty years for the specific authorization to provide 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 water system that is funded by CIAC.
4. In order to ensure periodic municipal and Board review, the term of municipal consent to provide water service is limited to fifty 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/ Susan E. McClure

Susan E. McClure, Esq.

Deputy Rate Counsel

SM/fjr

cc: Service List *via e-mail*

**ANEW JERSEYAMERICAN WATER COMPANY, INC. FOR APPROVAL OF A MUNICIPAL CONSENT  
GRANTED BY THE TOWNSHIP OF QUINTON, COUNTY OF SALEM  
BPU Docket No.: WE24040228  
Service List**

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**BPU STAFF**

Stacy Peterson,  
Deputy Executive Director  
NJ Board of Public Utilities  
44 South Clinton Ave., Suite 314  
P.O. Box 350  
Trenton, NJ 08625-  
0350 [Stacy.Peterson@bpu.nj.gov](mailto:Stacy.Peterson@bpu.nj.gov)

Dean Taklif,  
Board of Public Utilities  
44 South Clinton Ave.  
P.O. Box 350  
Trenton, NJ 08625  
[Dean.Taklif@bpu.nj.gov](mailto:Dean.Taklif@bpu.nj.gov)

Mike Hunter  
Board of Public Utilities  
44 South Clinton Ave  
P.O. Box 350  
Trenton, NJ 08625  
[Michael.Hunter@bpu.nj.gov](mailto:Michael.Hunter@bpu.nj.gov)

Mike Kammer  
Board of Public Utilities  
44 South Clinton Ave  
P.O. Box 350  
Trenton, NJ 08625  
[Mike.Kammer@bpu.nj.gov](mailto:Mike.Kammer@bpu.nj.gov)

Nisa Rizvi  
Board of Public Utilities  
44 South Clinton Ave  
P.O. Box 350  
Trenton, NJ 08625  
[Nisa.Rizvi@bpu.nj.gov](mailto:Nisa.Rizvi@bpu.nj.gov)

**RATE COUNSEL**

Brian Lipman, Esq  
Division of Rate Counsel  
140 E. Front Street, 4<sup>th</sup> Floor  
Trenton, NJ 08625  
[blipman@rpa.nj.gov](mailto:blipman@rpa.nj.gov)

Christine Juarez, Esq.  
Division of Rate Counsel  
140 East Front Street, 4<sup>th</sup> Floor  
P.O. Box 003  
Trenton, NJ 08625  
[cjuarez@rpa.nj.gov](mailto:cjuarez@rpa.nj.gov)

Susan McClure, Esq.  
Managing Attorney-Water/Wastewater  
Division of Rate Counsel  
140 East Front Street, 4<sup>th</sup> Floor  
P.O. Box 003  
Trenton, NJ 08625  
[smcclure@rpa.nj.gov](mailto:smcclure@rpa.nj.gov)

Emily Lam, Esq.  
Division of Rate Counsel  
140 East Front Street, 4<sup>th</sup> Floor  
P.O. Box 003  
Trenton, NJ 08625  
[elam@rpa.nj.gov](mailto:elam@rpa.nj.gov)

Felecia Jackson-Rodgers  
Legal Secretary  
Division of Rate Counsel  
140 East Front Street, 4<sup>th</sup> Floor  
P.O. Box 003  
Trenton, NJ 08625  
[fr Rodgers@rpa.nj.gov](mailto:fr Rodgers@rpa.nj.gov)

**DAG**

Pamela Owen, DAG  
Division of Law  
Hughes Justice Complex  
25 Market Street  
P.O. Box 112  
Trenton, NJ 08625  
[pamela.owen@law.njoag.gov](mailto:pamela.owen@law.njoag.gov)

Meliha Arnautovic,  
DAG Division of Law  
Hughes Justice Complex  
25 Market Street  
P.O. Box 112  
Trenton, NJ 08625  
[meliha.arnautovic@law.njoag.gov](mailto:meliha.arnautovic@law.njoag.gov)

**COMPANY**

Stephen R. Bishop  
V.P. Managing General Counsel & Secretary  
New Jersey American Water Company, Inc.  
1 Water Street  
Camden, New Jersey 08102  
(856) 955-4877  
[stephen.bishop@amwater.com](mailto:stephen.bishop@amwater.com)

Jamie Hawn  
Director, Rates & Regulatory  
New Jersey-American Water Company, Inc.  
1 Water Street  
Camden, New Jersey 08102  
(856) 955-4797  
[jamie.hawn@amwater.com](mailto:jamie.hawn@amwater.com)

Donna Carney  
Principal Paralegal  
New Jersey-American Water Company, Inc.  
149 Yellowbrook Road  
Farmingdale, NJ 07727  
(856) 955-4797  
[donna.carney@amwater.com](mailto:donna.carney@amwater.com)

Lee E. Mueller  
New Jersey-American Water Company, Inc.  
1 Water Street  
Camden, New Jersey 08102  
(856) 955-4797  
[Lee.Mueller@amwater.com](mailto:Lee.Mueller@amwater.com)