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November 12, 2024

**VIA E-MAIL**

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 Borough of  
Farmingdale, County of Monmouth, BPU Docket No.: WE24090716**

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 September 10, 2024, New Jersey American Water Company, Inc. ("Company" or "Petitioner") filed a petition ("Petition") seeking approval of the Municipal Consent Ordinance No. 2023-07 adopted by the Borough of Farmingdale, Monmouth County ("Borough") allowing the Company to construct, lay, maintain, and operate the necessary water mains, pipes and appurtenances to furnish public fire service to the Borough (the "Municipal Consent"). (Petition, Para. 4). The Borough adopted Ordinance No. 2023-07 on October 17, 2023 granting the Company a franchise in perpetuity under the provisions of N.J.S.A. 48:19-17

and 48:19-20 in order to permit the Company to add to, extend, operate and maintain water facilities on public property described therein in order to provide public fire service. (Petition, Exhibit A, Section 1).

A public hearing on the Petition was held virtually November 7, 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."

As noted, the right to access public streets to extend, operate and maintain facilities in order to provide fire service within the Borough granted by Ordinance 2023-07, is perpetual.

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, 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 the 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 lack of a specified 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 and Ordinance 2023-07 does not comply with this requirement. 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 fifty years. Rate Counsel believes it would be reasonable to make the franchise term consistent with the statutory term limit of fifty years. 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, a fifty year 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 service to 50 years from the date of the grant. Rate Counsel believes this recommendation, if adopted by the Board, would provide consistency with the term of the

consent to access public streets to a maximum of fifty years granted by the Borough, as limited 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.

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. 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.

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, Esq.  
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SEM/fjr  
cc: Service List *via e-mail*

**I/M/O the Petition of New Jersey-American Water Company, Inc.  
for approval of a Municipal Consent,**

**Farmingdale Borough, Monmouth County**

**BPU Docket No. WE24090716**

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