



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

PHIL MURPHY
Governor

SHEILA OLIVER
Lt. Governor

BRIAN O. LIPMAN
Director

January 16, 2025

VIA E-MAIL

Honorable Sherri L. Golden, Secretary
State of New Jersey, Board of Public Utilities
44 South Clinton Avenue, 1st Floor
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
Hillsborough, Somerset County, BPU Docket No.: WE24090674**

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

On or about September 9, 2024, New Jersey American Water Company, Inc. ("Company" or "Petitioner") filed a petition ("Petition") seeking approval of the Municipal Consent Ordinance No. 2024-06 adopted by the Township of Hillsborough, Somerset County ("Township") allowing the Company to provide wastewater collection and conveyance service in an expanded area of the Township. (Petition, Exhibit A). The Company already provides water service to the Township (Petition, para. 2). There will be 440 new connections if this municipal consent (the "Municipal Consent") is approved. (Petition, para. 5.) All of these

customers already receive water service from the Company. (Id.). The Petition only seeks approval of the Municipal Consent, not approval for any ratemaking treatment. (Id. at para. 6). (emphasis added).

The Township adopted the Ordinance 2024-06 granting the Company a franchise to provide wastewater service to specified areas of the Township. (Petition, Exhibit A). Ordinance No. 2024-06 grants municipal consent to provide collection and conveyance wastewater service to the Township. Ordinance No. 2024-06 also allows access to public streets and places for these purposes (Id.). Ordinance No. 2021-11 grants a perpetual franchise (Id.) to furnish wastewater collection and conveyance service, and the term of the grant of access to lay pipes and conduits is limited to 50 years (Petition, Exhibit A). The Township introduced Ordinance No. 2024-06 on May 14, 2024. The Ordinance was heard at a public hearing at a Township governing body meeting on June 11, 2024. The Township adopted the Ordinance on the same day, June 11, 2024. (Id.).

The Board of Public Utilities conducted a virtual public hearing on the Petition on January 7, 2025. 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 Municipal Consent purports to grant two types of consent—consent to provide sewer service, and consent to lay and maintain sewer pipes and other facilities. The right to provide sewer utility service within the Township granted by Ordinance 2024-06 is perpetual. Conversely, Ordinance 2024-06 complies with 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, 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 2024-06 complies 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 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 the Township’s streets and the term limits (fifty years) granted to the Company in other wastewater franchises. 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. It would be both reasonable and practical for the Township 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 Township'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 Township, 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 Township'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. The Petitioner shall not depreciate the portion of the sewer system expansion 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 sewer 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: Christine M. Juarez
Christine M. Juarez, Esq.
Assistant Deputy Rate Counsel

CMJ/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 Granted by the
Township of Hillsborough,
County of Somerset
BPU Docket No. WE24090674**

Service List

Mike Hunter
Board of Public Utilities
44 South Clinton Avenue
PO Box 350
Trenton, NJ
08625 michael.hunter@bpu.nj.gov

Stacy Peterson
Board of Public Utilities
44 South Clinton Avenue
PO Box 350
Trenton, NJ
08625 stacy.peterson@bpu.nj.gov

Dean Taklif
Board of Public Utilities
44 South Clinton Ave PO
Box 350
Trenton, NJ 08625
dean.taklif@bpu.nj.gov

Stephen R. Bishop, Esq.
VP and General Counsel
New Jersey American Water
1 Water Street
Camden, NJ 08102
stephen.bishop@amwater.com

Brian O. Lipman, Director
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
blipman@rpa.nj.gov

Susan McClure, Managing Attorney
Water/Wastewater
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
smcclure@rpa.nj.gov

Christine Juarez, Esq.
Water/Wastewater
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
cjuarez@rpa.nj.gov

Felecia Jackson-Rodgers, Secretary
Water/Wastewater
Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
frodgers@rpa.nj.gov

Pamela Owen, DAG Division of Law
Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, NJ 08625
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

Jamie D. Hawn
Rates and Regulatory
New Jersey American Water
1 Water Street
Camden, NJ 08102
jamie.hawn@amwater.com

Donna Carney
Principal Paralegal
New Jersey American Water
149 Yellowbrook Road - Suite 109
Farmingdale, NJ
07727 donna.carney@amwater.com

Kit Burnette
Board of Public Utilities
44 South Clinton Ave
PO Box 350
Trenton, NJ 08625
kit.burnette@bpu.nj.gov

Yanina Lepore
Board of Public Utilities
44 South Clinton Ave
PO Box 350
Trenton, NJ 08625
yanina.lepore@bpu.nj.gov