



Agenda Date: 8/17/22
Agenda Item: 5D

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 1st Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

WATER

IN THE MATTER OF THE PETITION OF NEW JERSEY-)
AMERICAN WATER COMPANY, INC. FOR: (1)) ORDER ADOPTING INITIAL
APPROVAL OF ITS AGREEMENT WITH EGG HARBOR) DECISION AND STIPULATION
CITY, NEW JERSEY FOR THE PURCHASE AND SALE)
OF SYSTEMS; (2) A DETERMINATION THAT THE)
PURCHASE PRICE IS REASONABLE; AND (3) FOR) BPU DOCKET NO. WM21091150
SUCH OTHER APPROVALS AS MAY BE NECESSARY) OAL DOCKET NO. PUC 08739-2021S
TO COMPLETE THE PROPOSED TRANSACTION)

Parties of Record:

Stephen Bishop, Esq., for Petitioner, New Jersey-American Water Company, Inc.
Brian O. Lipman, Esq. Director, Division of Rate Counsel
Jay L. Kooper, Esq., Vice President, General Counsel & Secretary, for Middlesex Water Company, intervener

BY THE BOARD:¹

This matter is before the New Jersey Board of Public Utilities (“Board” or “BPU”) following an Initial Decision issued by Administrative Law Judge Jacob S. Gertsman (“ALJ Gertsman” or “ALJ”) July 7, 2022 in the above referenced matter (“Initial Decision”). By way of this Order, which is the Final Decision in the matter pursuant to N.J.S.A. 52:14B-10(c), the Board adopts the ALJ’s initial decision, as follows.

BACKGROUND AND PROCEDURAL HISTORY

New Jersey-American Water Company (“Company”, “Petitioner”, or “NJAWC”), is a public utility located in the State of New Jersey and subject to the jurisdiction of the Board. The Company provides water service to approximately 660,000 customers and provides wastewater service to approximately 49,900 customers in portions of the following counties: Atlantic, Bergen, Burlington, Camden, Cape May, Essex, Gloucester, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Salem, Somerset, Union, and Warren.

Egg Harbor City (“Egg Harbor” or “City”), which is located in Atlantic County, owns and operates a water and wastewater system (“System”) that provides water and wastewater service to 1,562

¹ Commissioner Zenon Christodoulou abstained from voting in this matter.

water customers and 1,405 wastewater customers in the City and in portions of the Townships of Galloway (“Galloway”) and Mullica (“Mullica”).

On September 30, 2022, NJAWC filed a petition, pursuant to the Water Infrastructure Protection Act (“WIPA”) N.J.S.A. 58:30-1 et seq. and N.J.A.C. 14:1-5.10 for: (1) approval of an agreement between the City and Petitioner (“Agreement”); (2) a determination that the purchase price pursuant to the Agreement was reasonable; (3) certain transaction costs to be recovered in a future base rate case; and (4) any other approvals as may be necessary to complete the proposed transaction.²

On October 18, 2021, the matter was transmitted to the Office of Administrative Law (“OAL”) for hearing as a contested case, pursuant to N.J.A.C. 17:27-12 et seq. and was assigned to ALJ Gertsman.

On October 1, 2021, Middlesex Water Company (“Middlesex”) filed a motion to intervene in this matter. Motions to participate were filed by Aqua New Jersey (“Aqua”) on October 28, 2021 and by the Association of Environmental Authorities (“AEA”) on November 16, 2022. ALJ Gertsman granted all motions on January 12, 2022.

On November 5, 2021, the Board sent an amended transmittal to the OAL, which attached a letter from the Office of the State Comptroller (“OSC”), dated September 21, 2021, raising certain concerns with the procurement and independence of the financial advisor used by the City in the course of valuing the Systems being sold by Egg Harbor to NJAWC. The letter further noted that some provisions allegedly required by WIPA were missing from the contract. The letter concluded by noting OSC’s position that WIPA did not give any agency, including this Board, authority to address its concerns.

On January 7, 2022, the Petitioner submitted the direct testimony for the following witnesses: Nicholas T. DeVecchis of NJAW (Exhibit P-1); Egg Harbor Mayor Lisa Jiampetti (Exhibit P-2); Ryan McGrowan of Remington and Vernick Engineers (“R&V”) (Exhibit P-3); Stephanie Cuthbert of R&V (Exhibit P-4), Anthony Festa of Cushman & Wakefield (Exhibit P-5); and Jermone Weinert of AUS Consultants (Exhibit P-6).

On February 4, 2022, the New Jersey Division of Rate Counsel (“Rate Counsel”) submitted the direct testimony for its witness Howard Woods, Jr., P.E.

On March 9, 2022, the Petitioner submitted the rebuttal testimony for the following witnesses: Nicholas T. DeVecchis of NJAW (Exhibit PR-1); Egg Harbor Mayor Lisa Jiampetti (Exhibit PR-2); Ryan McGrowan of R&V (Exhibit PR-3); Stephanie Cuthbert of R&V (Exhibit PR-4), and Jamie D. Hawn of NJAW (Exhibit PR-5).

² Also on September 30, 2022, NJAW filed petitions seeking separate approvals of the municipal consents for Egg Harbor, Galloway and Mullica. See: In re the Petition of New Jersey-American Water Company, Inc. for Approval of a Municipal Consent Granted by the Township of Mullica, Atlantic County, New Jersey (Docket No. WE21091146); In re the Petition Of New Jersey-American Water Company, Inc. for Approval of a Municipal Consent Granted by Egg Harbor City, Atlantic County, New Jersey (Docket No. WE21091147) and In re the Petition of New Jersey-American Water Company, Inc. for Approval of a Municipal Consent Granted by the Township of Mullica, Atlantic County, New Jersey (Docket No. WE21091148)

After a series of telephonic status conferences before ALJ Gertsman, and several rounds of settlement discussions between the parties, representatives of NJAWC, Rate Counsel and Board Staff (collectively, "Signatory Parties") entered into a Stipulation of Settlement ("Stipulation") that resolved all issues raised during the course of this proceeding. Middlesex filed a letter indicating that it did not object to the Stipulation.

STIPULATION

As a result of an analysis of the petition, pre-filed testimony and exhibits, numerous conferences, negotiations, responses to discovery requests, and follow-up discovery requests, the Signatory Parties executed the Stipulation, the relevant terms of which are reproduced below.

10. The Signatory Parties agree that the procurement of an independent financial advisor by any municipality seeking to sell its water or wastewater facilities pursuant to WIPA must comply with all applicable public procurement laws. No Party waives its position on this issue, but for purposes of settlement, the Signatory Parties agree that they will not contest Egg Harbor City's procurement of R&V here or in any future agency or legal proceeding related to this WIPA application. Moreover, the unique facts of this matter do not foreclose any party from making any argument regarding this issue in any separate and distinct future proceedings related to WIPA. Rate Counsel does not make any affirmative assertion regarding the City's compliance with the law.
11. The Signatory Parties agree that when proceeding under WIPA going forward, an independent financial advisor ("IFA") must be independent of 1) the municipality, which means that an IFA hired to prepare an IFA report should not at the time of hiring be currently employed or engaged by the municipality that owns the system; and 2) the engineer responsible for providing the report and certification that emergent conditions exist. No Party waives its position on this issue, but for purposes of settlement, the Signatory Parties agree that they will not contest whether R&V satisfied the statutory requirements as to the extent of the independence of an IFA here or in any future agency or legal proceeding related to this WIPA application. Moreover, the unique facts of this matter do not foreclose any party from making any argument regarding this issue in separate and distinct future agency or legal proceedings related to WIPA. Rate Counsel takes no position as to whether R & V was independent from the City, the engineer or NJAWC, however, Rate Counsel, in consideration of other terms of this settlement agrees to deem this issue settled.
12. The Signatory Parties agree that emergent conditions exist under WIPA in this matter and will not contest whether statutory requirements of an emergent condition were satisfied here or in any future agency or legal proceeding related to the acquisition of the Egg Harbor City system by NJAWC. No Party waives its position on this issue, but agree not to contest it for purposes of settlement. Moreover, the unique facts of this matter do not foreclose any party from making any argument regarding this issue in separate and distinct future agency or legal proceedings related to WIPA.
13. The Parties explicitly acknowledge that their agreement as to the interpretation of WIPA set forth in the Stipulation is not precedential and is not binding upon the Board or any other State agency, which, to the extent they have the authority to do so by law, may construe WIPA in ways that are not consistent with the terms of the Stipulation.

14. The Parties recognize that this is the first proceeding under WIPA, and that more guidance is likely needed. It is expected that in future matters, municipalities will procure and retain an IFA in compliance with all relevant laws, regulations and administrative guidance. To that end, NJAWC and Rate Counsel respectfully request that, in addition to the recent guidance provided by DEP after the commencement of this WIPA proceeding, BPU, DEP and the Division of Local Government Services within DCA (“DLGS”), issue further guidance for future municipalities seeking to sell or lease facilities pursuant to WIPA. In this regard, NJAWC and Rate Counsel recommend that the DEP, BPU, and/or DLGS issue guidance that specifies that the IFA will not participate in the RFP and bid evaluation process should the municipality decide to go forward with a sale pursuant to WIPA. Rate Counsel believes that this is a conflict and should be prohibited by the appropriate regulatory authority. NJAWC commits that it will not file another WIPA petition with the Board unless it has determined through reasonable diligence that the municipality has complied with all guidance from relevant administrative agencies current at the time of each step in the WIPA process. Staff takes no position on the recommendations set forth in paragraph 13 of the Stipulation. In addition, the Signatory Parties acknowledge that the granting of the requests and/or acceptance of recommendations set forth in paragraph 13 of the Stipulation are not within the control or authority of any of the signatories to the Stipulation and are subject to the discretion of each of DEP, BPU and DLGS.
15. The Signatory Parties agree that it is appropriate to adopt the initial City water and sewer rates proposed in Section 5.12 of the Agreement as the initial tariff for City customers. These rates are the existing City water rates adjusted to achieve a 5% reduction and the existing City wastewater rates. The Signatory Parties agree to allow these rates to be in effect from the date of closing of the proposed transaction contemplated in the Agreement until the conclusion of the Company’s Next Subsequent Base Rate Proceeding (i.e., not the current ongoing base rate proceeding docketed at WR22010019, but the subsequent base rate proceeding initiated by the Company, referred to herein as the “Next Subsequent Base Rate Proceeding”). During the course of the Next Subsequent Base Rate Proceeding, the Board will consider and approve the water and sewer rates for the former City customers on a going-forward basis. Rate Counsel reserves all rights to advance any position with respect to rates for former City customers in the Next Subsequent Base Rate Proceeding.
16. The Signatory Parties agree that NJAWC Rate Schedule O-1 (PWAC) and Rate Schedule K (DSIC), in addition to any purchased sewage treatment adjust clause charges and any wastewater system improvement charges authorized under BPU Docket No. WR21060917, will not initially apply to City customers’ bills, and accordingly these charges will only apply after the conclusion of the Company’s Next Subsequent Base Rate Proceeding.
17. The Signatory Parties further agree that with respect to the nine (9) municipal accounts identified in Appendix I of the Agreement, these nine (9) municipal accounts will receive free service, as has been consistent with the City’s prior practice, until the conclusion of the Company’s Next Subsequent Base Rate Proceeding, at which time these nine (9) municipal accounts will be joined with the rest of the Company’s water and sewer tariffs, as approved by the Board.
18. The Signatory Parties also agree that the current City System tariff rate for Fire Protection Service will remain in effect until the conclusion of the Company’s Next

Subsequent Base Rate Proceeding, at which point Rate Counsel expressly reserves the right to contend that the City System tariff rate for Fire Protection Service should move toward Rate Schedule M-1 on an ongoing basis. In the Next Subsequent Base Rate Proceeding, the Company will be free to argue that a different rate schedule should apply to Fire Protection Service for Egg Harbor City.

19. The Signatory Parties do not contest the purchase price of \$21,800,000.00 provided in the Agreement. However, the Company agrees not to seek recovery of the purchase price in rates until its Next Subsequent Base Rate Proceeding in accordance with Paragraph 21 of the Stipulation.
20. The Signatory Parties agree that the Company will forego recovery of the transaction costs which the Company is reimbursing the City for, in the amount of \$100,000.00 as provided in Section 2.4 of the Agreement. Apart from this specific reimbursement of the City's transaction costs, the Signatory Parties agree that the Company may recover all other reasonable transaction, closing, and transition costs. As of May 31, 2022, the recoverable transaction, closing and transition costs are \$547,799. While the Signatory Parties agree that, pursuant to WIPA, such transaction costs may be included in rate base, for the purpose of resolution of this proceeding, and based on the specific and unique circumstances of this proceeding, the Company agrees to forego inclusion of transaction costs in rate base for future recovery as provided in Paragraph 21 of the Stipulation.
21. The Signatory Parties agree that, at the Company's Next Subsequent Base Rate Proceeding, the Company shall be permitted to recover the revenue requirement associated with \$21,200,000.00 in rate base (i.e., a return of and on) through rates. The Signatory Parties agree that this is not precedential and recognize that WIPA allows for immediate inclusion of the agreed-upon purchase price in rate base. In addition, the Company agrees that the transaction costs referenced in Paragraph 20 of the Stipulation will be deferred in a regulatory asset and amortization of that regulatory asset will begin upon the conclusion of NJAWC's next subsequent base rate case. The regulatory asset will not include a carrying charge.
22. The Signatory Parties agree that the Company will prepare, within two (2) years of closing of the proposed transaction contemplated in the Agreement, a capital improvement plan for the City's Systems. The reasonableness and prudence of the capital improvements made to the Systems will be subject to review and approval by the Board as part of future rate-related proceedings. Rate Counsel reserves all rights to advance any position in any future base rate proceedings in which the Company seeks recovery of any costs for improvements to the Systems. The Signatory Parties acknowledge that Rate Counsel's reservations of rights in Paragraphs 15, 18 and 22 of the Stipulation to advance any position on the issues described in Paragraphs 15, 18 and 22 of the Stipulation in the Next Subsequent Base Rate Proceeding or any future base rate proceedings are not intended to foreclose other parties to those proceedings, to the extent they have the right to do so, from also advancing any position in the respective proceedings as to the issues described in Paragraphs 15, 18 and 22 of the Stipulation.
23. The Signatory Parties agree that NJAWC is not seeking preapproval of its \$14,000,000.00 commitment to capital improvements as provided in Section 5.12 of the

Agreement. The Company will be obligated to justify these capital expenditures as prudent and reasonable before the Board in future rate-related proceedings.

24. The Signatory Parties agree and recommend that the ALJ and the BPU should approve, without modification, the Stipulation, determine that the purchase price provided in the Agreement is reasonable as required under WIPA, and authorize NJAWC and the City to enter into the proposed transaction contemplated in the Agreement subject to further approvals by the DCA of the proposed use of funds as required under WIPA and the Board's approvals of the municipal consents by Mullica Township (BPU Docket No. WE21091146), EHC (BPU Docket No. WE21091147), and Galloway Township (BPU Docket No. WE21091148).

ALJ Gertsman filed his Initial Decision on July 7, 2022 recommending that the Board adopt the Stipulation.

DISCUSSION AND FINDINGS

After a review of the entire record in this proceeding, including the petition and exhibits, the pre-filed and rebuttal testimony of NJAW and Rate Counsel, the Board **HEREBY FINDS** the Initial Decision and the Stipulation to be reasonable, in the public interest, and in accordance with the law.

WIPA assigns duties to three (3) agencies: the Board, the Department of Environmental Protection ("DEP"), and the Department of Community Affairs, Department of Local Government Services ("DLGS"). Under WIPA, "[i]f an owner [of a water system] determines that emergent conditions exist, the owner may long-term lease or sell its water or wastewater assets to a capable private or public entity" N.J.S.A. 58:30-4. After an owner determines that an emergent condition exists, the owner must certify that the condition exists, and submit that certification to the DEP for approval. N.J.S.A. 58:30-5(e). Additionally, the owner must retain the services of an independent financial advisor to "review, analyze and report on" the value of the system. N.J.S.A. 58:30-5(c). The Signatory Parties have agreed not to contest the City's procurement of the independent financial advisor in this case, but have otherwise reserved all arguments on the independent financial advisor issue to be raised in other proceedings. The Stipulation notes that the parties' collective interpretation of WIPA, and their interpretation of the independent financial advisor requirement under the statute, is not binding on the Board. While the parties are free to raise any arguments on any issue they may deem proper, WIPA circumscribes the Board's review to two (2) issues, neither of which involve the procurement of the independent financial advisor: whether the Board approves the contract, and whether the purchase price is reasonable.

After the emergent condition is certified, the system owner may request qualified bids to purchase the system, and eventually negotiate a sale price. See N.J.S.A. 58:30-6, -7. After the system owner and system purchaser reach an agreement on a proposed contract to purchase the system, the system owner must submit the contract, together with "any appraisals supporting the rent or sale price, documentation regarding the defeasance of debt, and any other information requested by the [B]oard." N.J.S.A. 58:30-7(c)(1). Following receipt of this information, the Board is required under WIPA to approve or reject the proposed contract. After our review of the record, including the parties' stipulation and proposed contract for sale, the Board **HEREBY APPROVES** the contract. See N.J.S.A. 58:30-7(c)(1).

In addition to reviewing the contract for sale, WIPA also requires the Board to review the purchase price for reasonableness. N.J.S.A. 58:30-7(c)(2). The statute requires us to deem the purchase

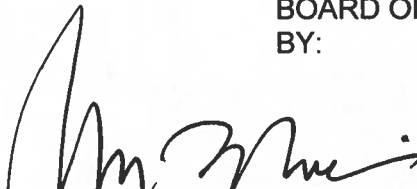
price reasonable if 1) the "rent or sale price is sufficient to defease the debt of the owner" and either 2a) the rent or sale price is "within the range of appraisals obtained" or 2b) "[i]f there is little or no established rate base . . . the rent or sale price is reasonably comparable to a proxy rate base equivalent to the rate base of the designated respondent." N.J.S.A. 58:30-7(c)(2)(a) and -7(c)(2)(b). After our review of the record, the contract for sale, the stipulation, and supporting testimony and exhibits, the Board **HEREBY FINDS** that the purchase price is reasonable in that it is sufficient to defease the debt of the system owner and it is within the range of appraisals obtained with respect to the sale of the assets.

Under WIPA, if the Board finds the purchase price reasonable, the Board "shall accept the negotiated sale price . . . as the new rate base." N.J.S.A. 58:30-7(c)(2). Here, the parties have stipulated to one purchase price and a slightly lower figure for rate base. While NJAW may have been within its rights under WIPA to insist on full rate base treatment for the entirety of the purchase price, it chose to forego a portion of the rate base in order to reach a settlement on all issues with the assent of all parties. WIPA is a new statute which has not been interpreted by any court, which apportions various duties to three agencies, and the parties to this litigation, in the stipulation, seek further guidance from the relevant agencies. Under these circumstances, it is not unreasonable for the parties to this litigation to settle and bring predictability and finality to this transaction, rather than embark on a course of litigation conduct with unknown results. For those reasons, the Board **HEREBY FINDS** that the stipulated value for rate base is reasonable. Accordingly, the Board **HEREBY ADOPTS** the Initial Decision in its entirety as its own and **HEREBY AUTHORIZES** the acquisition of the City's system by NJAWC pursuant to WIPA.

This Order is effective on August 24, 2022.

DATED: August 17, 2022

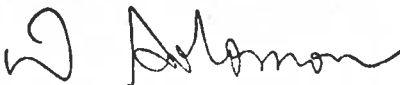
BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT



MARY-ANNA HOLDEN
COMMISSIONER




DIANNE SOLOMON
COMMISSIONER




ROBERT M. GORDON
COMMISSIONER

ATTEST:



CARMEN DIAZ
ACTING SECRETARY


I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public Utilities.

IN THE MATTER OF THE PETITION OF NEW JERSEY-AMERICAN WATER COMPANY, INC.
FOR: (1) APPROVAL OF ITS AGREEMENT WITH EGG HARBOR CITY, NEW JERSEY FOR
THE PURCHASE AND SALE OF SYSTEMS; (2) A DETERMINATION THAT THE PURCHASE
PRICE IS REASONABLE; AND (3) FOR SUCH OTHER APPROVALS AS MAY BE
NECESSARY TO COMPLETE THE PROPOSED TRANSACTION

BPU DOCKET NO. WM21091150
OAL DOCKET NO. PUC 08739-2021S

SERVICE LIST

<p>New Jersey American Water Company</p> <p>Stephen Bishop, Esq., Corporate Counsel New Jersey American Water Company 1 Water St, Camden, NJ 08102 stephen.bishop@amwater.com</p> <p>Gregory Eisenstark, Esq. Cozen O'Connor One Gateway Center- Suite 910 Newark, NJ 07102 geisenstark@cozen.com</p> <p>William Lesser, Esq. Cozen O'Connor 3 World Trade Center 175 Greenwich Street; 55th Floor New York, NY 10007 wlesser@cozen.com</p> <p>Division of Rate Counsel 140 East Front Street, 4th Floor P.O. Box 003 Trenton, NJ 08625-0003</p> <p>Brian O. Lipman, Esq., Director blipman@rpa.nj.gov</p> <p>Susan McClure, Esq. smcclure@rpa.nj.gov</p> <p>Division of Rate Counsel (continued)</p> <p>Christine Juarez, Esq. cjuarez@rpa.nj.gov</p> <p>Emily Smithman, Esq. esmithman@rpa.nj.gov</p>	<p>Office of the State Comptroller Procurement Division P.O. Box 024 Trenton, NJ 08625-0024</p> <p>Barbara Geary, Esq., Director barbara.geary@osc.nj.gov</p> <p>Alysia Walsh, Esq., Deputy Director alysia.walsh@osc.nj.gov</p> <p>New Jersey Department of Environmental Protection Water Resources Management Mail Code: 401-04Q PO Box 420 401 East State Street Trenton, NJ 08625</p> <p>Pat Gardner, Assistant Commissioner patricia.gardner@dep.nj.gov</p> <p>Chelsea Brook chelsea.brook@dep.nj.gov</p> <p>New Jersey Department of Community Affairs 101 South Broad Street P.O. Box 800 Trenton NJ 08625-0800</p> <p>Jason Martucci, Esq. Legislative & Regulatory Affairs Officer Division of Local Government Services jason.martucci@dca.nj.gov</p>
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<p>Division of Law</p> <p><u>Public Utilities Section</u> Richard J. Hughes Justice Complex 25 Market Street P.O. Box 112 Trenton, NJ 08625</p> <p>Daren Eppley, DAG, Chief daren.eppley@law.njoag.gov</p> <p>Pamela J. Owen, DAG, Assistant Chief pamela.owen@law.njoag.gov</p> <p>Brandon Simmons, DAG brandon.simmons@law.njoag.gov</p> <p>Terel Klein, DAG terel.klein@law.njoag.gov</p> <p><u>Environmental Permitting & Counseling Section</u> Richard J. Hughes Justice Complex 25 Market Street; 7th Fl., P.O. Box 093, Trenton, NJ 08625</p> <p>Kristen Heinzerling, DAG, Assistant Chief kristen.heinzerling@law.njoag.gov</p> <p>Elizabeth A. Delahunty, DAG elizabeth.delahunty@law.njoag.gov</p> <p><u>Community Affairs, State and Elections Section</u> Richard J. Hughes Justice Complex – 25 Market Street, 7th Fl., P.O. Box 112 Trenton, NJ 08625</p> <p>Susan Scott, DAG, Chief Susan.scott@law.njoag.gov</p>	<p>Board of Public Utilities 44 South Clinton Avenue, 1st Floor Post Office Box 350 Trenton, NJ 08625-0350 nj.gov/bpu</p> <p>Carmen Diaz, Acting Secretary board.secretary@bpu.nj.gov</p> <p>Robert Brabston, Executive Director robert.brabston@bpu.nj.gov</p> <p>Stacy Peterson, Deputy Executive Director stacy.peterson@bpu.nj.gov</p> <p><u>Counsel's Office</u></p> <p>Carol Artale, Esq, Deputy General Counsel carol.artale@bpu.nj.gov</p> <p>David Schmitt, Esq, Legal Specialist david.schmitt@bpu.nj.gov</p> <p><u>Division of Water and Energy</u></p> <p>Mike Kammer, Director mike.kammer@bpu.nj.gov</p> <p>Rupal Patel rupal.pater@bpu.nj.gov</p> <p>Justin Cederberg justin.cederberg@bpu.nj.gov</p> <p>Andrew Tuzzo andrew.tuzzo@bpu.nj.gov</p>
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. PUC 08739-21

AGENCY DKT. NO. WM21091150

**IN THE MATTER OF THE PETITION
OF NEW JERSEY AMERICAN WATER
COMPANY, INC. FOR: (1) APPROVAL
OF ITS AGREEMENT WITH EGG HARBOR
CITY, NEW JERSEY FOR THE PURCHASE
AND SALE OF SYSTEMS; (2) A DETERMINATION
THAT THE PURCHASE PRICE IS REASONABLE;
AND (3) FOR SUCH OTHER APPROVALS AS
MAY BE NECESSARY TO COMPLETE
THE PROPOSED TRANSACTION.**

William Lesser, Esq., for petitioner New Jersey American Water, Inc. (Cozen
O'Connor, attorneys)

Terel Klein and Brandon Simmons, Deputy Attorneys General, for Staff of the
Board of Public Utilities (Matthew J. Platkin, Acting Attorney General of New
Jersey, attorney)

Susan E. McClure, Managing Attorney, for Division of Rate Counsel (Brian O.
Lipman, Director)

Jay L. Kooper, Esq., Vice President, General Counsel and Secretary Water Company, for intervenor, Middlesex Water Company

Anthony R. Francioso, Esq., for participant, Associate of Environmental Authorities

Colleen A. Foley, Esq., for participant, Aqua New Jersey (Saul, Ewing, Arnstein & Lehr, attorneys)

Record Closed: July 5, 2022

Decided: July 7, 2022

BEFORE JACOB S. GERTSMAN, ALJ t/a:

This proceeding involves a petition by New Jersey American Water Company (Company) with the Board of Public Utilities (Board) seeking approval, pursuant to the Water Infrastructure Protection Act (N.J.S.A. 58:30-1 et seq.) of a proposed transaction with Egg Harbor City, New Jersey to address emergent conditions with the water and wastewater systems that are currently maintained and operated by Egg Harbor City. This matter was transmitted to the Office of Administrative Law (OAL), on October 20, 2021, for determination as a contested case, pursuant to N.J.A.C. 10:120A et seq. and assigned to the undersigned, who conducted the initial case management conference on November 4, 2021. The Board sent a revised transmittal on November 5, 2021, that attached the September 21, 2021, letter from the Office of the State Comptroller (OSC) and contained an explicit instruction to address the questions raised in the letter (OSC questions.)

A motion to intervene was filed by Middlesex Water Company (Middlesex) on October 1, 2021. The motion was opposed by the (Company – was noted above?) and supported by the remaining parties. The motion was granted on January 12, 2022.

Motions to participate were filed by Aqua New Jersey (Aqua) on October 28, 2021, and the Association of Environmental Authorities (AEA) on November 16, 2021. The motions were granted on January 12, 2022.

The parties filed on July 5, 2022, a Stipulation of Settlement, resolving all issues in this proceeding. The Stipulation has been signed by petitioner, New Jersey American Water Company, the Staff of the Board of Public Utilities, and the Division of Rate Counsel. It indicates the terms of settlement and is attached and fully incorporated herein. Intervenor Middlesex Water Company submitted a letter indicating no objection to the Stipulation of Settlement.

I have reviewed the terms of settlements and I **FIND**:

1. The parties have voluntarily agreed to the settlements as evidenced by their signatures or their representatives' signatures on the attached document.
2. The settlements fully dispose of all issues in controversy between the parties and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified, or rejected by the **BOARD OF PUBLIC UTILITIES**, which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 7, 2022

DATE



JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency:

7/7/2022

Date Mailed to Parties:

7/8/2022

JSG/sm



July 1, 2022

VIA E-MAIL (STACI.MIGLIACCIO@OAL.NJ.GOV)

William Lesser

Direct Phone 212-453-3808

Direct Fax 646-588-1450

wlesser@cozen.com

Honorable Jacob Gertsman, ALJ
Office of Administrative Law
9 Quakerbridge Plaza
Mercerville, New Jersey 08619

**Re: In the Matter of the Petition of New Jersey American Water Company, Inc. for: (1) Approval of its Agreement with Egg Harbor City, New Jersey for the Purchase and Sale of Systems; (2) a Determination that the Purchase Price is Reasonable; and (3) For Such Other Approvals as May Be Necessary to Complete the Proposed Transaction
BPU Docket No. WM21091150; OAL Docket No. PUC 08739-2021S**

Dear Judge Gertsman:

On behalf of the Petitioner, New Jersey-American Water Company, Inc. (the "Company"), we respectfully submit the agreed upon Stipulation of Settlement for your review and approval. Counsel on behalf of the Company, the Division of Rate Counsel, and Board Staff have all signed the Stipulation of Settlement. Counsel on behalf of Intervenor Middlesex Water Company has not signed the Stipulation, but has indicated that he will be filing a letter of non-objection.

I hereby confirm that copies of this letter are being served electronically to the parties on the attached service list.

Respectfully Submitted,

Cozen O'Connor

WL

cc: Service List

In the Matter of the Petition of New Jersey American Water Company, Inc. for: (1) Approval of its Agreement with Egg Harbor City, New Jersey for the Purchase and Sale of Systems; (2) a Determination that the Purchase Price is Reasonable; and (3) For Such Other Approvals as May Be Necessary to Complete the Proposed Transaction

BPU Docket No. WM21091150
OAL Docket No. PUC 08739-2021S

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**STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES
OFFICE OF ADMINISTRATIVE LAW**

In the Matter of the Petition of New Jersey American Water Company, Inc. for: (1) Approval of its Agreement with Egg Harbor City, New Jersey for the Purchase and Sale of Systems; (2) a Determination that the Purchase Price is Reasonable; and (3) For Such Other Approvals as May Be Necessary to Complete the Proposed Transaction

**STIPULATION
OF
SETTLEMENT**

BPU Docket No. WM21091150
OAL Docket No. PUC 08739-2021S

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE AND THE NEW JERSEY BOARD OF PUBLIC UTILITIES:

APPEARANCES:

Gregory Eisenstark, Esq. and William Lesser, Esq., (Cozen O'Connor, PC, attorneys) for Petitioner, New Jersey-American Water Company, Inc.

Stephen Bishop, Esq., for Petitioner, New Jersey-American Water Company, Inc.

Brian O. Lipman, Esq. (Director), Susan E. McClure, Esq. (Managing Attorney Water/Wastewater), Christine Juarez, Esq. (Assistant Deputy Rate Counsel), and Emily Smithman, Esq. (Assistant Deputy Rate Counsel), for Division of Rate Counsel

Terel Klein, Deputy Attorney General, for the Staff of the New Jersey Board of Public Utilities (**Matthew J. Platkin, Acting Attorney General of New Jersey**)

Jay L. Kooper, Esq., (Vice President, General Counsel & Secretary), for intervenor Middlesex Water Company

Colleen A. Foley, Esq. (Saul Ewing Arnstein & Lehr LLP), for participant Aqua New Jersey, Inc.

Anthony R. Francioso, Esq. (Fornaro Francioso LLC Counsellors at Law), for participant the Association of Environmental Authorities

This Stipulation of Settlement ("Stipulation") is hereby made and executed as of the dates indicated below, by and among the Petitioner, New Jersey-American Water Company, Inc. ("NJAWC" or "Company"), the Staff of the New Jersey Board of Public Utilities ("Staff"), the New Jersey Division of Rate Counsel ("Rate Counsel"), and Middlesex Water Company ("MWC") (collectively, "Parties").

The Parties do hereby join in recommending that the Administrative Law Judge (“ALJ”) issue an Initial Decision approving the Stipulation, and that the New Jersey Board of Public Utilities (“Board” or “BPU”) issue an Order approving the Stipulation without modification, based upon the following terms:

Background

1. On September 30, 2021, NJAWC filed a Petition with the Board seeking approval of a proposed transaction with the City of Egg Harbor City, Atlantic County, New Jersey (“EHC” or “City”) to acquire the City’s potable water system and wastewater collection and conveyance systems (“Systems”) pursuant to the Water Infrastructure Protection Act, N.J.S.A. 58:30-1, *et seq.* (“WIPA”), for approval of the associated Agreement Between Egg Harbor City, Atlantic County, New Jersey and New Jersey-American Water Company, Inc. for Sale of Systems, dated March 26, 2021 (“Agreement”), and for a determination that the purchase price is reasonable, among other requests to effectuate the proposed transaction (“Petition”). The Petition outlined the steps the City had taken to comply with the requirements under WIPA prior to seeking Board approval. The Petition was accompanied by (a) City Resolution No. 55A-2019 accepting the Emergent Condition Evaluation Report; (b) the New Jersey Department of Environmental Protection (“NJDEP”) certification of Emergent Condition No. 5 under WIPA; (c) City Resolution No. 189B-2019 authorizing the solicitation of proposals for the sale of its Systems under WIPA; (d) City Resolution 113-2020 authorizing negotiations with NJAWC; (e) City Resolution No. 53-2021 approving execution of the Agreement with NJAWC and authorizing NJAWC to bring this Petition before the Board; (f) the First Amendment to the Agreement; (g) the appraisal of the City’s Systems prepared by Cushman & Wakefield of New Jersey, LLC; and (h) the appraisal of the City’s Systems prepared by AUS Consultants.

2. On October 18, 2021, the Board transmitted the case to the Office of Administrative Law ("OAL"), after which the Honorable Jacob Gertsman, ALJ was assigned to the matter.

3. On November 5, 2021, a subsequent transmittal was sent by the Board to the OAL that attached a letter from the Office of State Comptroller ("OSC") dated September 21, 2021, raising certain concerns with the procurement and independence of the financial advisor utilized by EHC in the course of valuing the Systems and assets being sold by EHC to NJAWC under the subject contract for which BPU approval is sought, as required under WIPA, but without identifying the applicable administrative agency or authority to resolve such concerns.

4. After a series of telephonic status conferences before Judge Gertsman, the Parties entered into a Stipulation on December 1, 2021, approved by Judge Gertsman on December 2, 2021, in which the Parties agreed to toll the statutory 90-day requirement for the Board to accept the proposed contract under WIPA solely for the purposes of this proceeding, given the unique circumstances of the concerns raised in the OSC letter dated September 21, 2021 and the fact that this is the first petition brought pursuant to WIPA.

5. On October 1, 2021, MWC filed a motion to intervene. On October 28, 2021, Aqua New Jersey, Inc. ("Aqua") filed a motion to participate. On November 16, 2021, the Association of Environmental Authorities ("AEA") filed a motion to participate. On January 12, 2022, Judge Gertsman granted MWC's motion to intervene, and Aqua and AEA's motions to participate.

6. On December 23, 2021, Judge Gertsman approved the Parties' proposed procedural schedule, and on January 20, 2022, Judge Gertsman issued a prehearing order.

7. On January 7, 2022, Petitioner submitted direct testimony for the following witnesses: Nicholas T. DeVecchis of NJAWC (Exhibit P-1), EHC Mayor Lisa Jiampetti (Exhibit P-2), Ryan McGowan of Remington & Vernick Engineers ("R&V") (Exhibit P-3), Stephanie Cuthbert of R&V

(Exhibit P-4), Anthony Festa of Cushman & Wakefield (Exhibit P-5), and Jerome Weinert of AUS Consultants (Exhibit P-6).

8. On February 4, 2022, the Division of Rate Counsel submitted direct testimony for its witness Howard Woods, Jr., P.E.

9. On March 9, 2022, Petitioner submitted rebuttal testimony for the following witnesses: Nicholas DeVecchis of NJAWC (Exhibit PR-1), EHC Mayor Lisa Jiampetti (Exhibit PR-2), Ryan McGowan of R&V (Exhibit PR-3), Stephanie Cuthbert of R&V (Exhibit PR-4), and Jamie Hawn of NJAWC (Exhibit PR-5).

Stipulation

The undersigned Parties **DO HEREBY STIPULATE AND AGREE** as follows:

Financial Advisor Independence and Emergent Condition Certification

10. The Parties agree that the procurement of an independent financial advisor by any municipality seeking to sell its water or wastewater facilities pursuant to WIPA must comply with all applicable public procurement laws. No Party waives its position on this issue, but for purposes of settlement, the Parties agree that they will not contest Egg Harbor City's procurement of R&V here or in any future agency or legal proceeding related to this WIPA application. Moreover, the unique facts of this matter do not foreclose any party from making any argument regarding this issue in any separate and distinct future proceedings related to WIPA. Rate counsel does not make any affirmative assertion regarding the City's compliance with the law.

11. The Parties agree that when proceeding under WIPA going forward, an independent financial advisor ("IFA") must be independent of 1) the municipality, which means that an IFA hired to prepare an IFA report should not at the time of hiring be currently employed or engaged by the municipality that owns the system; and 2) the engineer responsible for providing the report and

certification that emergent conditions exist. No Party waives its position on this issue, but for purposes of settlement, the Parties agree that they will not contest whether R&V satisfied the statutory requirements as to the extent of the independence of an IFA here or in any future agency or legal proceeding related to this WIPA application. Moreover, the unique facts of this matter do not foreclose any party from making any argument regarding this issue in separate and distinct future agency or legal proceedings related to WIPA. Rate Counsel takes no position as to whether R & V was independent from the City, the engineer or NJAWC, however, Rate Counsel, in consideration of other terms of this settlement agrees to deem this issue settled.

12. The Parties agree that emergent conditions exist under WIPA in this matter and will not contest whether statutory requirements of an emergent condition were satisfied here or in any future agency or legal proceeding related to the acquisition of the Egg Harbor City system by NJAWC. No Party waives its position on this issue, but agree not to contest it for purposes of settlement. Moreover, the unique facts of this matter do not foreclose any party from making any argument regarding this issue in separate and distinct future agency or legal proceedings related to WIPA.

13. The Parties explicitly acknowledge that their agreement as to the interpretation of WIPA set forth in this Stipulation is not precedential and is not binding upon the Board or any other State agency, which, to the extent they have the authority to do so by law, may construe WIPA in ways that are not consistent with the terms of this Stipulation.

14. The Parties recognize that this is the first proceeding under WIPA, and that more guidance is likely needed. It is expected that in future matters, municipalities will procure and retain an IFA in compliance with all relevant laws, regulations and administrative guidance. To that end, NJAWC and Rate Counsel respectfully request that, in addition to the recent guidance provided by DEP after the commencement of this WIPA proceeding, BPU, DEP and the Division of Local Government Services within DCA ("DLGS"), issue further guidance for future municipalities seeking

to sell or lease facilities pursuant to WIPA. In this regard, NJAWC and Rate Counsel recommend that the DEP, BPU, and/or DLGS issue guidance that specifies that the IFA will not participate in the RFP and bid evaluation process should the municipality decide to go forward with a sale pursuant to WIPA. Rate Counsel believes that this is a conflict and should be prohibited by the appropriate regulatory authority. NJAWC commits that it will not file another WIPA petition with the Board unless it has determined through reasonable diligence that the municipality has complied with all guidance from relevant administrative agencies current at the time of each step in the WIPA process. Staff takes no position on the recommendations set forth in this paragraph. In addition, the Parties acknowledge that the granting of the requests and/or acceptance of recommendations set forth in this paragraph are not within the control or authority of any of the signatories to this Stipulation and are subject to the discretion of each of DEP, BPU and DLGS.

Initial Rates

15. The Parties agree that it is appropriate to adopt the initial City water and sewer rates proposed in Section 5.12 of the Agreement as the initial tariff for City customers. These rates are the existing City water rates adjusted to achieve a 5% reduction and the existing City wastewater rates. The Parties agree to allow these rates to be in effect from the date of closing of the proposed transaction contemplated in the Agreement until the conclusion of the Company's Next Subsequent Base Rate Proceeding (i.e., not the current ongoing base rate proceeding docketed at WR22010019, but the subsequent base rate proceeding initiated by the Company, referred to herein as the "Next Subsequent Base Rate Proceeding"). During the course of the Next Subsequent Base Rate Proceeding, the Board will consider and approve the water and sewer rates for the former City customers on a going-forward basis. Rate Counsel reserves all rights to advance any position with respect to rates for former City customers in the Next Subsequent Base Rate Proceeding.

16. The Parties agree that NJAWC Rate Schedule O-1 (PWAC) and Rate Schedule K (DSIC), in addition to any purchased sewage treatment adjust clause charges and any wastewater system improvement charges authorized under BPU Docket No. WR21060917, will not initially apply to City customers' bills, and accordingly these charges will only apply after the conclusion of the Company's Next Subsequent Base Rate Proceeding.

17. The Parties further agree that with respect to the nine (9) municipal accounts identified in Appendix I of the Agreement, these nine (9) municipal accounts will receive free service, as has been consistent with the City's prior practice, until the conclusion of the Company's Next Subsequent Base Rate Proceeding, at which time these nine (9) municipal accounts will be joined with the rest of the Company's water and sewer tariffs, as approved by the Board.

18. The Parties also agree that the current City System tariff rate for Fire Protection Service will remain in effect until the conclusion of the Company's Next Subsequent Base Rate Proceeding, at which point Rate Counsel expressly reserves the right to contend that the City System tariff rate for Fire Protection Service should move toward Rate Schedule M-1 on an ongoing basis. In the Next Subsequent Base Rate Proceeding, the Company will be free to argue that a different rate schedule should apply to Fire Protection Service for Egg Harbor City.

Purchase Price/Transaction Costs

19. The Parties do not contest the purchase price of \$21,800,000.00 provided in the Agreement. However, the Company agrees not to seek recovery of the purchase price in rates until its Next Subsequent Base Rate Proceeding in accordance with Paragraph 21 hereof.

20. The Parties agree that the Company will forego recovery of the transaction costs which the Company is reimbursing the City for, in the amount of \$100,000.00 as provided in Section 2.4 of the Agreement. Apart from this specific reimbursement of the City's transaction costs, the Parties agree that the Company may recover all other reasonable transaction, closing, and transition costs. As

of May 31, 2022, the recoverable transaction, closing and transition costs are \$547,799. While the Parties agree that, pursuant to WIPA, such transaction costs may be included in rate base, for the purpose of resolution of this proceeding, and based on the specific and unique circumstances of this proceeding, the Company agrees to forego inclusion of transaction costs in rate base for future recovery as provided in Paragraph 21 hereof.

Next Subsequent Base Rate Proceeding

21. The Parties agree that, at the Company's Next Subsequent Base Rate Proceeding, the Company shall be permitted to recover the revenue requirement associated with \$21,200,000.00 in rate base (i.e., a return of and on) through rates. The Parties agree that this is not precedential and recognize that WIPA allows for immediate inclusion of the agreed-upon purchase price in rate base. In addition, the Company agrees that the transaction costs referenced in Paragraph 20 hereof will be deferred in a regulatory asset and amortization of that regulatory asset will begin upon the conclusion of NJAWC's next subsequent base rate case. The regulatory asset will not include a carrying charge.

Capital Improvements

22. The Parties agree that the Company will prepare, within two (2) years of closing of the proposed transaction contemplated in the Agreement, a capital improvement plan for the City's Systems. The reasonableness and prudence of the capital improvements made to the Systems will be subject to review and approval by the Board as part of future rate-related proceedings. Rate Counsel reserves all rights to advance any position in any future base rate proceedings in which the Company seeks recovery of any costs for improvements to the Systems. The Parties acknowledge that Rate Counsel's reservations of rights in Paragraphs 15, 18 and 22 to advance any position on the issues described in Paragraphs 15, 18 and 22 in the Next Subsequent Base Rate Proceeding or any future base rate proceedings are not intended to foreclose other parties to those proceedings, to the extent

they have the right to do so, from also advancing any position in the respective proceedings as to the issues described in Paragraphs 15, 18 and 22.

23. The Parties agree that NJAWC is not seeking preapproval of its \$14,000,000.00 commitment to capital improvements as provided in Section 5.12 of the Agreement. The Company will be obligated to justify these capital expenditures as prudent and reasonable before the Board in future rate-related proceedings.

Other

24. The Parties agree and recommend that the ALJ and the BPU should approve, without modification, this Stipulation, determine that the purchase price provided in the Agreement is reasonable as required under WIPA, and authorize NJAWC and EHC to enter into the proposed transaction contemplated in the Agreement subject to further approvals by the DCA of the proposed use of funds as required under WIPA and the Board's approvals of the municipal consents by Mullica Township (BPU Docket No. WE21091146), EHC (BPU Docket No. WE21091147), and Galloway Township (BPU Docket No. WE21091148).

25. The Parties agree that this Stipulation contains mutual balancing and interdependent clauses and is intended to be accepted and approved in its entirety. In the event any particular provision of this Stipulation is not accepted and approved in its entirety by the Board, or is modified by a court of competent jurisdiction, then any Party aggrieved thereby shall not be bound to proceed with this Stipulation and shall have the right, upon written notice to be provided to all other Parties within ten (10) days after receipt of any such adverse decision, to litigate all issues addressed herein to a conclusion. More particularly, in the event this Stipulation is not adopted in its entirety by the Board in an appropriate Order, or is modified by a court of competent jurisdiction, then any Party hereto is free, upon the timely provision of such written notice, to pursue its then available legal remedies with

respect to all issues addressed in this Stipulation, as though this Stipulation had not been signed. The Parties agree that this Stipulation shall be binding on them for all purposes herein.

26. It is specifically understood and agreed that this Stipulation represents a negotiated agreement and, except as otherwise expressly provided for herein:

a. By executing this Stipulation, no Party waives any rights it possesses under any prior Stipulation, except where the terms of this Stipulation supersede such prior Stipulation.

b. The contents of this Stipulation shall not in any way be considered, cited or used by any of the undersigned Parties as an indication of any Party's position on any related or other issue litigated in any other proceeding or forum, except to enforce the terms of this Stipulation.

27. This Stipulation may be executed in any number of counterparts, each of which shall be considered one and the same agreement, and shall become effective when one or more counterparts have been signed by each of the Parties. The Parties understand that the Board's written Order approving this Stipulation shall become effective in accordance with N.J.S.A. 48:2-40.

CONCLUSION

WHEREFORE, the Parties hereto have duly executed and do respectfully submit this Stipulation to the ALJ and the Board, and recommend that the ALJ issue an Initial Decision adopting and approving this Stipulation in its entirety and without modification, and that the Board issue a Final Decision and Order adopting and approving this Stipulation in its entirety and without modification in accordance with the terms hereof.

New Jersey-American Water Company, Inc.



By: _____
Gregory Eisenstark, Esq.
Cozen O'Connor PC

Dated: June 29, 2022

Matthew J. Platkin, Acting Attorney General of New Jersey, Attorney for Staff of the Board of Public Utilities



By: _____
Terel Klein, Esq.
Deputy Attorney General

Dated: June 30, 2022

**Brian O. Lipman, Esq.
Director, Division of Rate Counsel**

By: 

Brian O. Lipman, Esq.
Director

Dated: 6/30/2022