RE: I Do Not See that We Ever Received Written Answers re IRS "Private Use Rule" (vis-à-vis Frito-Lay)

Alfred Paniccia Jr. <apaniccia@paniccialawoffice.com>

Mon 9/11/2023 11:54 AM

To:Ed Crumb <ecrumb@bjcjsb.onmicrosoft.com>

Cc:Bruce King <Flushed499@gmail.com>;Elliott Wagner <ewagner@bjcwwtp.onmicrosoft.com>;Billie Goodson <bgoodson@bjcwwtp.onmicrosoft.com>;Michele Cuevas <mcuevas@bjcwwtp.onmicrosoft.com>;George Kolba, Jr. (gkolba@live.com) <gkolba@live.com>

I suggest that this be placed on the Board's agenda for tomorrow's meeting, especially since it ties into the proposed renewal of Frito Lay's Industrial Wastewater Discharge Permit, which I believe has not been acted upon. The Frito Lay permit, and Ed's related proposal, may be appropriate under Old Business. I am including George on this email.

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From: Ed Crumb <ecrumb@bjcjsb.onmicrosoft.com>
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Subject: I Do Not See that We Ever Received Written Answers re IRS "Private Use Rule" (vis-à-vis Frito-Lay)

Al: (This came to mind in reviewing the draft 08/08/23 JSB Minutes and looking ahead to Tuesday's Board Meeting). Back in January 2022, when we were considering the potential concerns raised by William Jackson, Esq. (Bond Counsel for the Owners), a list of questions was developed (*e-copy attached*), some of which were discussed [to varying degrees] in a 45-minute (+/-) conference call beginning on or about 4:15pm on Monday, January 10, 2022 participated-in by me, you, George Kolba, and Bruce King on "our side" (and Mr. Jackson, Brian Organ, Esq., and Robert Smith, Esq. of the [NYC] Hawkins Dellafield & Wood LLP law firm on the "Bond Counsel side"). The was no set of formal answers to these questions developed, memorialized, or provided by Bond Counsel and, in any event, our discussion and any prior answers may have changed due to intervening IRS guidance, legislation or court rulings, JSTP operational changes, and/or Frito-Lay discharge changes. We don't yet have a "parameter

analysis" regarding the post R&R treatment capacity of the JSTP for the relevant parameters (especially carbonaceous biochemical oxygen demand [CBOD] material), the actual aggregate loadings received for treatment at the JSTP, and the specifics of Frito-Lay's discharges past (available by researching surcharge billings to Frito-Lay) and proposed for the future. Even so, the Owners (and, thus, the Board) are obligated to abstain from entering into "contracts which provide for use of any portion of the Project by a person(s) who is not a Governmental Unit **on a basis different than the general public**." (*emphasis added*). So-called "Tax Certificates" and "User Certificates" reciting this obligation have been entered-into in the past (and remain in effect) in conjunction with the issuance/placement of various bonded debt of the Owners in relation to paying for capital improvements of the JSTP. Whether Frito-Lay's discharge agreement (dating back to at least January 1, 1993 [and possibly a date in early 1973 {*cf.*, IMA-IV, dated 03/05/1973, adding provisions for surcharges on excess-strength wastewater -- *which may have had something to do with the development of the Frito-Lay facility in Kirkwood*}]) is "grandfathered" in relation to the IRS "Private Use Rule" is another inquiry/analysis that should be pursued. At a minimum, the Board needs to be updated on the law and regulations pertaining to the IRS "Private Use Rule" as well as the factual posture of Frito-Lay's discharges and the JSTP's treatment capacities. In this regard, I note that no formal "Headworks Analysis" or "treatability analysis" has been performed since the Owners' R&R projects were completed (and the damage from the 02/18/22 "CN Event" was repaired). It may be that procurement of these formal analyses is a prudent step to take as part of "moving forward". Another aspect that might be informed by updated formal analyses would be establishing a uniform formula ("applicable to all") for surcharging excess-strength wastewater (which we might be compelled to follow with respect to the additional volume Frito-Lay is asking to discharge to us so that we avoid running afoul of the IRS "Private Use Rule" as to the increased discharge from Frito-Lay [to the extent that following the formulae in the existing agreement is not grandfathered as to new discharges in excess of those allowed under the existing agreement]). Thank you, /s/ Ed

EDWARD CRUMB, Binghamton, New York

Chair, Board Finance Committee, Binghamton-Johnson City Joint Sewage Board

ecrumb@bjcjsb.onmicrosoft.com

cc: Bruce

Elliott

Billie

Michele

Questions to William Jackson, Esq. re IRS "Private Use Rule" and Frito-Lay, Inc.

1. Is the IRS "Private Use Rule" statutory, regulatory, and/or a construct of decisional/case law? (Please provide citations/references as applicable).

2. What is the substance of the "rule" set forth by the IRS "Private Use Rule"? What, if any, are the specific/"fixed" boundaries of the rule that may not be crossed?

3. What are the consequences of violating the IRS "Private Use Rule"?

4. When did the IRS "Private Use Rule" become effective? Are relationships/arrangements which pre-date the effective date of the IRS "Private Use Rule" grandfathered?

5. Are there economic "mitigating factors" that may be considered in evaluating whether the IRS "Private Use Rule" has been violated? For example, in the context of Frito-Lay, Inc. as an EPA-defined "Significant Industrial User" (SIU) of the Binghamton-Johnson City Joint Sewage Treatment Facilities, is it permissible/appropriate to consider/take into account economic development factors such as [i] the number of local jobs created/sustained, [ii] the commerce generated locally by Frito-Lay's purchase of regional agricultural products and other raw materials/supplies, and/or [iii] the spin-off economic benefits such as employment and commerce in supporting enterprises (trucking, technical, engineering, utilities)?

6. If Frito-Lay is obligated to pay generally-applicable sewer rents to the Town of Kirkwood, does that violate the IRS "Private Use Rule"?

7. If Frito-Lay, as a SIU, discharges to the public sewer system in the Town of Kirkwood wastewater/sewage that is "overstrength" as to given parameters such as carbonaceous biochemical oxygen demand (CBOD) material and total suspended solids (TSS) in accordance with Article 7 of the Board's *Rules and Regulations Relating to the Use of the Binghamton-Johnson City Joint Sewage Treatment Plant* (JSTP), does it violate the IRS "Private Use Rule" for the Board to surcharge Frito-Lay to recoup costs associated with treating so much of its discharges that are "overstrength" in accordance with generally-applicable Article 7 of the *Rules and Regulations*?

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CERTIFICATE OF BINGHAMTON-JOHNSON CITY JOINT SEWAGE BOARD

The Binghamton-Johnson City Joint Sewage Board (the "Sewage Board") operates the sewage systems (the "Sewage Plant") of the City of Binghamton (the "City") and the Village of Johnson City (the "Village"). In connection with the issuance of the City's $12,330,000 Bond Anticipation Note-2016 Series A and the Village's $10,170,000 Bond Anticipation Note-2016 Series A (collectively, the "Notes"), the Sewage Board hereby certifies as follows:

The Sewage Board will comply with the provisions of the Tax Certificates executed by the Village and the City on the Issue Date, to which this certificate is attached as Exhibit H (collectively, the "Tax Certificate") insofar as such provisions relate to the Sewage Board's operation of the sewage systems, including the Sewage Plant. The Sewage Board has entered into an agreement with Frito-Lay, Inc. ("FLI"), dated February 22, 1993 (the "FLI Agreement") to accept and treat at the Sewage Plant FLI's sewage wastes containing biochemical oxygen demand ("BOD") and total suspended solids ("TSS") in the maximum average daily amount of 7,300 pounds for BOD and 4,000 pounds for TSS. The FLI Agreement also sets forth the billing rates to be charged. The term of the FLI Agreement was January 1, 1993 through December 31, 2013 and thereafter could be extended an additional 20 years upon mutual consent of the Sewage Board and FLI. The Sewage Board and FLI extended the agreement with the same terms and conditions for the period starting January 1, 2014 and ending December 31, 2016. The Sewage Board covenants and agrees that so long as the Notes (including any tax-exempt obligations used to refund the Notes) remain outstanding: (a) the Sewage Board will not amend or supplement the FLI Agreement without first obtaining the written consent of the Village and the City which consent will not be unreasonably withheld provided that any such amendment or supplement does not in the opinion of Bond Counsel to the Village and the City adversely affect the exclusion of the interest on the Notes from gross income for Federal income taxation purposes (b) the Sewage Board will not accept and treat BOD and TSS from FLI in excess of the maximum amounts set forth in the FLI Agreement; (c) the Sewage Plant, after reconstruction, is designed to accept and treat an average daily load of 32,000 pounds of BOD and 31,000 pounds of TSS and the maximum amount of BOD and TSS from FLI to be treated at the Sewage Plant respectively represents 22.8125% and 12.9033% of such design and treatment capacity; (d) if the Sewage Plant cannot be operated for any reason at its design and treatment capacity for six months or longer, the Sewage Board will promptly reduce proportionately the amount of BOD and TSS from FLI accepted and treated at the Sewage Plant so that aforesaid BOD and TSS percentages are not exceeded; (e) the Sewage Board will promptly notify the Village and the City of any violation of these additional covenants and agreements; and (f) the Sewage Board understands that a violation of these additional covenants and agreements may cause the interest on the Notes to be included in gross income for Federal income taxation purposes and may require the Village and the City to take certain remedial actions at the expense of the Sewage Board, including redemption and defeasance of a portion of the Notes.

All capitalized terms not otherwise defined herein shall have the meanings as defined in the Tax Certificate.

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IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of February, 2016.

Binghamton-Johnson City Joint Sewage Board

By: George Kolba Jr

Name: George Kolba, Jr.

Title: Chair // Chairman

CERTIFICATE OF BINGHAMTON-JOHNSON CITY JOINT SEWAGE BOARD

The Binghamton-Johnson City Joint Sewage Board (the "Sewage Board") operates the sewage systems (the "Sewage Plant") of the City of Binghamton (the "City") and the Village of Johnson City (the "Village"). In connection with the issuance of the City's $12,330,000 Bond Anticipation Note-2016 Series A and the Village's $10,170,000 Bond Anticipation Note-2016 Series A (collectively, the "Notes"), the Sewage Board hereby certifies as follows:

The Sewage Board will comply with the provisions of the Tax Certificates executed by the Village and the City on the Issue Date, to which this certificate is attached as Exhibit H (collectively, the "Tax Certificate") insofar as such provisions relate to the Sewage Board's operation of the sewage systems, including the Sewage Plant. The Sewage Board has entered into an agreement with Frito-Lay, Inc. ("FLI"), dated February 22, 1993 (the "FLI Agreement") to accept and treat at the Sewage Plant FLI's sewage wastes containing biochemical oxygen demand ("BOD") and total suspended solids ("TSS") in the maximum average daily amount of 7,300 pounds for BOD and 4,000 pounds for TSS. The FLI Agreement also sets forth the billing rates to be charged. The term of the FLI Agreement was January 1, 1993 through December 31, 2013 and thereafter could be extended an additional 20 years upon mutual consent of the Sewage Board and FLI. The Sewage Board and FLI extended the agreement with the same terms and conditions for the period starting January 1, 2014 and ending December 31, 2016. The Sewage Board covenants and agrees that so long as the Notes (including any tax-exempt obligations used to refund the Notes) remain outstanding: (a) the Sewage Board will not amend or supplement the FLI Agreement without first obtaining the written consent of the Village and the City which consent will not be unreasonably withheld provided that any such amendment or supplement does not in the opinion of Bond Counsel to the Village and the City adversely affect the exclusion of the interest on the Notes from gross income for Federal income taxation purposes (b) the Sewage Board will not accept and treat BOD and TSS from FLI in excess of the maximum amounts set forth in the FLI Agreement; (c) the Sewage Plant, after reconstruction, is designed to accept and treat an average daily load of 32,000 pounds of BOD and 31,000 pounds of TSS and the maximum amount of BOD and TSS from FLI to be treated at the Sewage Plant respectively represents 22.8125% and 12.9033% of such design and treatment capacity; (d) if the Sewage Plant cannot be operated for any reason at its design and treatment capacity for six months or longer, the Sewage Board will promptly reduce proportionately the amount of BOD and TSS from FLI accepted and treated at the Sewage Plant so that aforesaid BOD and TSS percentages are not exceeded; (e) the Sewage Board will promptly notify the Village and the City of any violation of these additional covenants and agreements; and (f) the Sewage Board understands that a violation of these additional covenants and agreements may cause the interest on the Notes to be included in gross income for Federal income taxation purposes and may require the Village and the City to take certain remedial actions at the expense of the Sewage Board, including redemption and defeasance of a portion of the Notes.

All capitalized terms not otherwise defined herein shall have the meanings as defined in the Tax Certificate.

[SIGNATURE PAGE IS NEXT]

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of February, 2016.

Binghamton-Johnson City Joint Sewage Board

By: George Kolba Jr

Name: George Kolba, Jr.

Title: Chair // Chairman

CERTIFICATE OF BINGHAMTON-JOHNSON CITY JOINT SEWAGE BOARD

The Binghamton-Johnson City Joint Sewage Board (the "**Board**") operates the sewage systems of the City of Binghamton (the "**City**") and the Village of Johnson City (the "**Village**" and together with the City, the "**Recipients**"). In connection with the issuance of bonds by the Recipients and the purchase of such bonds by the New York State Environmental Facilities Corporation (the "**Corporation**") on June 24, 2010 (the "**Issue Date**"), the Board hereby certifies as follows:

The Board will comply with the provisions of Section 2.6(a) of the Arbitrage and Use of Proceeds Certificate executed by each of the Recipients on the Issue Date insofar as such provisions relate to the Board's operation of the sewage systems. The Board has entered into an agreement with Frito-Lay, Inc. ("**FLI**") to accept and treat at the Project FLI's sewage wastes containing biochemical oxygen demand ("BOD") and total suspended solids ("**TSS**") in the maximum average daily amount of 7,300 pounds for BOD and 4,000 pounds for TSS. The agreement also sets forth the billing rates to be charged. The agreement terminates December 31, 2013 and thereafter may be extended an additional 20 years upon mutual consent of the Recipient and FLI. The Board covenants and agrees that so long as the Recipient Bonds are outstanding: (a) the Board will not amend or supplement the agreement without first obtaining the written consent of the Corporation which consent will not be unreasonably withheld provided that any such amendment or supplement does not (i) in the opinion of Bond Counsel to the Corporation adversely affect the exclusion of the interest on the Corporation Bonds, the proceeds of which are used to purchase a portion of the Recipient Bonds from the Recipients, from gross income for Federal income taxation purposes and (ii) in the judgment of the Corporation diminish the safety margin the Corporation maintains with respect to the Corporation Bonds for Federal income tax purposes; (b) the Board will not accept and treat BOD and TSS from FLI in excess of the maximum amounts set forth in the agreement; (c) the Project is designed to accept and treat an average daily load of 45,600 pounds of BOD and 54,000 pounds of TSS and the maximum amount of BOD and TSS from FLI to be treated at the Project respectively represents 16.009% and 7.408% of such design capacity; (d) if the agreement is extended beyond December 31, 2013 and the Project cannot be operated for any reason at its design capacity for six months or longer, the Board will promptly reduce proportionately the amount of BOD and TSS from FLI accepted and treated at the Project so that aforesaid BOD and TSS percentages are not exceeded; (e) the Board will promptly notify the Corporation of any violation of these additional covenants and agreements; and (f) the Board understands that a violation of these additional covenants and agreements may cause the interest on the Corporation Bonds to be included in gross income for federal income taxation purposes and may require the Corporation to take certain actions at the expense of the Recipients and the Board, including redemption and defeasance of the portion of the Corporation Bonds that are allocable to the financing of the Recipient Bonds."

All capitalized terms not otherwise defined herein shall have the meanings as defined in the Arbitrage and Use of Proceeds Certificate executed by each of the City and the Village.

[SIGNATURE PAGE IS NEXT]

IN WITNESS WHEREOF, I have hereunto set my hand as of the Issue Date as defined herein.

BINGHAMTON-JOHNSON CITY JOINT SEWAGE BOARD

By: _____

Name: Edward Crumb

Title: Chairman