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TO: Chairperson Vered Meltzer
Members of the Utilities Committee

FROM: Christopher R. Behrens, City Attorney
Chris W. Shaw, Director of Utilities

DATE: November 3, 2023

RE: PFAS Opt Out
Our File No. A21-0078

Most Wisconsin water utilities, including Appleton, have received class action settlement notices related to PFAS settlements with 3M and Du Pont. Appleton will need to determine if it wishes to be covered by the settlement; otherwise, it must specifically opt out of the Du Pont settlement by December 4, 2023 and the 3M settlement by December 11, 2023.

City staff including the Utilities Director, City Attorney and Risk Manager along with their staff, have reviewed this matter in several respects. From the Utilities perspective, the known impact of PFAS on the water utility is minimal at this time due to the City's primary water source being surface water. Tests for PFAS have fallen well below current regulatory limits. Appleton is fortunate in that it hasn't been negatively impacted as some other communities around the country who have been forced to take extreme measures including trucking in water. What is unknown is how the regulatory requirements regarding acceptable PFAS levels might change in future years or decades and, in that scenario, the extent of additional infrastructure that would be required to meet those new requirements. These considerations (even though still relatively unknown) and preservation of potential future rights have to be balanced against what rights would be given up should Appleton stay in the settlement class and accept a (projected) settlement from each company.

There is a resource that staff were able to use where various inputs result in a projected settlement amount from each company. The 3M settlement, according to this resource, could be in the area of \$1,825,000 and the Du Pont settlement is around \$175,000. While these numbers are certainly significant in some contexts, it is important to consider them in the context of the Water Utility. These total amounts equate to about thirty-six (36) days' revenue for the Utility. Should changes in PFAS regulatory standards require the Utility to add new infrastructure to its system, that would require \$10s of millions in capital costs alone. To put these costs into context, the water utility will experience approximately \$400,000,000 in expenses over the next 20 year period (without PFAS treatment). The proposed combined settlements equate to less than 0.5 % of utility expenses. Moreover, after 20 years, any PFAS treatment equipment would likely reach its useful life and need

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to be replaced. Therefore, the settlement would provide minimal current relief without the possibility of funding recourse for these large water plant expansions and ongoing operating costs.

The release of claims, i.e., rights given up, in the Du Pont settlement are primarily related to impacts on drinking water. The 3M release is broader and also releases claims not related to drinking water (any claim for punitive or exemplary damages relating to PFAS or any product containing PFAS, any claim related to the municipality's transport, disposal or arrangement for disposal of waste containing PFAS or wastewater containing PFAS). In both cases, significant weight must be placed on whether it is prudent to accept a settlement now that would prevent the City of Appleton from seeking future remedies against these companies based on the terms of the respective releases. For example, should regulations change in future decades requiring more extensive remediation or, should PFAS have a greater negative local impact in the future, the City's recourse would be limited if it stays in the settlement classes and releases these companies.

The decision before this committee and ultimately the Council is whether to accept the projected settlements by remaining in the lawsuit or, opting-out of the class action suit to preserve the right to potential future claims. It is not an easy decision because it involves unknowns that may impact future generations. Based on staff analysis, the projected present day settlement amounts do not merit releasing rights that otherwise would be available if needed in the future. Accordingly, we are respectfully recommending that it be:

APPROVED that City Staff and the Mayor be authorized, on behalf of the City of Appleton, to immediately execute and file a Request for Exclusion with the appropriate courts and parties in the 3M and Du Pont class action lawsuits so that the City is opted-out of these respective lawsuits.