

Public Service Commission of West Virginia

201 Brooks Street, P.O. Box 812
Charleston, West Virginia 25323



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October 23, 2018

01:52 PM OCT 23 2018 EXEC SEC DIV

Ingrid Ferrell, Executive Secretary
Public Service Commission
P. O. Box 812
Charleston, WV 25323

Re: Case No. 18-0674-WS-P
Timberline Four Seasons Utilities,
Inc.

Case No. 18-0745-WS-C
Robert And Janet Deal
v.
Timberline Four Seasons Utilities,
Inc.

Case No. 18-0762-WS-C
Karen Henson-Bibbee
v.
Timberline Four Seasons Utilities,
Inc.

Case No. 18-0921-WS-C
David and Jan Rosenau
v.
Timberline Four Seasons Utilities, Inc.

Case No. 18-0781-WS-C
Quentin T. Rayhart
v.
Timberline Four Seasons Utilities, Inc.

Case No. 18-0793-WS-C
Robert J. Gilchrist
v.
Timberline Four Seasons Utilities, Inc.

Case No. 18-0811-WS-C
Stephen Callender Schimpff
v.
Timberline Four Seasons Utilities, Inc.


Dear Ms. Ferrell:

Enclosed for filing are the original and twelve (12) copies of Staff's Response to Fifth Reply of Canaan Valley Public Service District and Motion to Compel Frederick Hertz, the Person Responsible for Managing Timberline Four Seasons Utilities, Inc., to Appear at the October 30, 2018 Hearing in the above-referenced proceeding.

Case No. 18-0674-WS-P, Case No. 18-0781-WS-C
Case No. 18-0745-WS-C, Case No. 18-0793-WS-C
Case No. 18-0762-WS-C, Case No. 18-0811-WS-C and
Case No. 18-0921-WS-C
October 23, 2018
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A copy has been served upon all parties of record.

Sincerely,



LESLIE J. ANDERSON
Supervising Attorney
West Virginia State Bar I.D. No. 5777

LJA/cs

Enclosures

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**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

**CASE NO. 18-0674-WS-P
TIMBERLINE FOUR SEASONS UTILITIES, INC.**

**CASE NO. 18-0745-WS-C
ROBERT AND JANET DEAL**

**v.
TIMBERLINE FOUR SEASONS UTILITIES, INC.**

**CASE NO. 18-0762-WS-C
KAREN HENSON-BIBBEE**

**v.
TIMBERLINE FOUR SEASONS UTILITIES, INC.**

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**CASE NO. 18-0921-WS-C
DAVID AND JAN ROSENAU**

**v.
TIMBERLINE FOUR SEASONS UTILITIES, INC.**

**RESPONSE TO FIFTH REPLY OF CANAAN VALLEY
PUBLIC SERVICE DISTRICT
AND
MOTION TO COMPEL FREDERICK HERTZ,
THE PERSON RESPONSIBLE FOR MANAGING TIMBERLINE FOUR
SEASONS UTILITIES, INC., TO APPEAR AT THE
OCTOBER 30, 2018 HEARING**

The Staff of the Public Service Commission of West Virginia (PSCWV), by counsel, hereby files Staff's Response to Fifth Reply of Canaan Valley Public Service District and Motion to Compel Frederick Hertz, the Person Responsible for Managing Timberline Four Seasons Utilities, Inc., to Appear at the October 30, 2018 Hearing. Staff recommends that emergency interim relief be granted in the form of Timberline Four Seasons Utilities, Inc. (Timberline Utilities) being directed to immediately pay the District \$83,752.50 (the total of the current unpaid bills issued by the Canaan Valley Public Service District (District) to Timberline Utilities for August, September and October 2018 without the late fees). Staff further recommends that Timberline Utilities be required to immediately authorize the Canaan Valley Public Service District (District) to sweep Timberline Utilities' bank account in which all utility sewer revenue are being deposited on the first of every month each month for \$27,917.50 starting with the month after emergency interim relief has been granted. The District should be ordered to make a filing monthly that states what amount was swept from Timberline Utilities' account and the date the account was swept (this should be a running history while this case is pending).

Lastly, Staff recommends that the Administrative Law Judge issue an order compelling Frederick Hertz, whom Staff understands is currently managing Timberline Utilities, to appear at the October 30, 2018 hearing in Charleston for the purpose of explaining why the District has not been paid and explaining when Timberline Utilities intends to pay the District.

I. Staff Recommends that Emergency Interim Relief be Granted

On October 16, 2018, the District filed its Fifth Reply of Canaan Valley Public Service District to Staff's Petition to the Commission to Order a General Investigation of Timberline Four Seasons Utilities, Inc. The District explained that Timberline Utilities had failed to pay its August, September and October 2018 current bills, which totaled \$83,752.50. The District stated that as of October 16, 2018, Timberline Utilities owes a total of \$100,503.55 which includes late fees in addition to the unpaid current bills. The District asserted that the failure of Timberline Utilities has reached a critical point for the District and that emergency intervention is needed from the Commission in order to protect the viability of the District.

The District noted that under the existing agreement between the District and Timberline Utilities dated September 28, 2009 (Agreement) Timberline Utilities was obligated to collect a \$64 charge per equivalent dwelling unit (EDU) from its customers to be paid over to the District upon receipt of the next month's statement from the District (the Agreement states \$64 per EDU, but in the District's Fifth Reply the District states it is \$65 per EDU). Staff notes that in Timberline Four Seasons Utilities, Inc., Case No. 12-0233-S-19A, Recommended Decision entered January 8, 2013, and final on January 28, 2013, the Commission approved the addition of a \$65.00 per EDU per month rate to Timberline Utilities' tariff and found that the District had agreed to reduce billing Timberline Utilities based on 477 EDUs per month to 426 EDUs per month.

The District further noted that the Agreement made clear that "The DISTRICT'S invoice shall have first priority in the distribution of funds available to meet the operations and maintenance expenses of TIMBERLINE." The District requested that

the collection procedures for customers of [Timberline Utilities] be changed to that (1) the customer and customer address lists of [Timberline Utilities] immediately be transferred to [the District], (2) that the billing software and account information of the customers of [Timberline Utilities] be immediately transferred to [the District]; (3) that [Timberline Utilities] provide [the District] with copies of [Timberline Utilities'] meter readings and billing information for each of its customers in sufficient time each billing cycle for bills to be generated and mailed to [Timberline Utilities'] customers; (4) that the ORDER from the PSC specifically direct that monthly payments for all sewage services from [Timberline Utilities'] customers be delivered and paid to [the District]; (5) that [the District] be authorized to receive from the customer receipts a reasonable and adequate fee for the administration of the billing of [Timberline Utilities'] customers and collection of payments from them; and (6) that the ORDER also provide that [the District] may satisfy its past and present invoices to [Timberline Utilities] from the customer receipts, and that after satisfying all current and previous unpaid invoices owing to [the District] from said receipts from [Timberline Utilities'] customers, that the remaining balance each month be remitted to [Timberline Utilities] for the operations, maintenance, repairs, and other lawful needs of [Timberline Utilities] for its water system and sewage collection system.”

At the outset, the fact that Timberline Utilities is three months behind in paying the District for the treatment of its sewer is an example of Timberline Utilities' being grossly mismanaged so as to warrant putting Timberline Utilities into receivership. Timberline Utilities bills the \$65 monthly EDU charge to its customers separate from the charge Timberline Utilities bills its customers for revenues needed for Timberline Utilities to operate and maintain its water and sewer systems. Timberline Utilities should have the funds to pay the District in hand if it is properly maintaining its books, records and should be required to immediately pay the monies owed to the District. The District only has five customers of which Timberline Utilities is the largest and depends on

receiving all revenue from those customers in order to operate and maintain its sewage treatment system, including paying its bonds. The relief being requested by the District, however, is what the Commission would request a circuit court to grant pursuant to W. Va. Code §24-2-7 (the statute setting forth the Commission's authority to seek to put a utility into receivership). In Staff's opinion the Commission does not have authority to grant the relief being requested without going to circuit court and seeking the circuit court's authority to attach Timberline Utilities' assets if Timberline Utilities does not agree in this proceeding to the District's request.

While Staff is not recommending that the District's request be granted as requested, Staff recommends that the Administrative Law Judge find emergency interim relief is needed. In place of the District's recommendations, Staff recommends that Timberline Utilities be directed to immediately pay the District \$83,752.50 (the total of the current unpaid bills issued by the Canaan Valley Public Service District (District) to Timberline Utilities for August, September and October 2018 without the late fees). Staff further recommends that Timberline Utilities be required to immediately authorize the District to sweep Timberline Utilities' bank account in which all utility sewer revenue are being deposited on the first of every month each month for \$27,917.50 starting with the month after emergency interim relief has been granted. The District should be ordered to make a filing monthly that states what amount was swept from Timberline Utilities' account and the date the account was swept (this should be a running history while this case is pending). Staff is not recommending that the late fees be collected as part of the emergency interim relief, but will make a further recommendation regarding the late fees in subsequent final recommendation if warranted.

When analyzing whether it is appropriate to grant emergency interim relief the Commission stated it

has adopted the “balance-of-hardship” test enunciated by the United States Court of Appeals for the Fourth Circuit in Blackwelder Furniture Co. of Statesville, Inc. v. Seilig, Manufacturing Co., 550 F.2d 189 (4th Cir. 1977) in analyzing requests for interim relief. See, Hope Gas, Inc. v. Eastern American Energy Corp., Case No. 94-0229-GT-C, Commission Order March 28, 1994 at 2; and Foote Mineral Co. v. Appalachian Power Co., Case No. 83-226-E-C, Commission Order May 25, 1983. Under the Blackwelder test, four factors are considered in determining whether to grant or withhold interim injunctive relief: (i) the plaintiffs likelihood of success in the underlying dispute; (ii) whether the plaintiff will suffer irreparable injury if interim relief is denied; (iii) the injury to defendant if an injunction is issued; and (iv) the public interest. See, Dan River, Inc. v. Icahn, 701 F.2d 278, 283 (4th Cir. 1983) (applying Blackwelder test). The decision to grant a preliminary injunction depends on a “flexible interplay” among the factors considered. Blackwelder, 550 F.2d at 196. The courts and the Commission must balance the “likelihood” of irreparable harm to the plaintiff against the “likelihood” of harm to the defendant. If a decided imbalance of hardship should appear in the plaintiffs favor, then the likelihood of success element of the test is relaxed and it will ordinarily be sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for litigation. Blackwelder, 550 F.2d. at 195. Imagine Communications Corp. and Internet Dev. & Exchange Assoc. v. Bell Atlantic West Virginia, Inc. Bell Atlantic Corp., and Bell Atlantic Internet Solutions, Inc., Case No. 99- 1696-T-C, Commission Order June 16, 2000 at 9-10; General Investigation into Capacity Improvement Fees, Case No. 09-0961-PSWD-GI, Commission Order October 20, 2011 at 2. (Pisgna v. Berry Energy, Case No. 18-0571-GT-C *et al.*, Commission order entered May 17, 2018, pp. 2-3)

Applying the Blackwelder test to the instant matter, Staff finds that (1) the Commission is likely to succeed in its request to put Timberline Utilities into receivership pursuant to W. Va. Code §24-2-7 if Timberline Utilities continues to fail to pay the

District for sewage treatment as this is a strong example of gross mismanagement; (2) Timberline Utilities continued failure to pay the District for its sewage treatment would cause irreparable harm to the District since the District only has five customers, of which Timberline Utilities is the largest, and depends on receiving all revenue from those customers in order to operate and maintain its sewage treatment system, including paying its bond, (3) there is no showing of comparable harm to Timberline Utilities if its bank account is swept once a month to pay the \$27,917.50 current bill since Timberline Utilities is directly billing and collecting the \$65 monthly EDU charge billed to its customers; (4) the public interest is served by ensuring the District has funds to maintain and operate its system and Timberline Utilities' customers' monies are not used for purposes other than to pay for utility service in this limited relief being recommended.

**II. Frederick Herz, as the Person Managing Timberline Utilities,
Should be Compelled to Attend the October 30, 2018 Hearing**

In Timberline Utilities' Supplemental Response to the Staff's Second Request for Information filed on September 25, 2018, Timberline Utilities indicated that the responses were prepared by Frederick Herz and that he would be prepared to offer testimony regarding the responses. Given the District's serious allegations, Staff wants to be sure that Frederick Herz, as the person managing Timberline Utilities, appears at the October 30, 2018 hearing. Mr. Herz should be available to be called as witness to explain (1) why Timberline Utilities is not timely paying the District; (2) where Timberline Utilities' monies are going and (3) how Timberline Utilities intends to rectify this situation. Staff is concerned that Mr. Herz may not attend and that his attorney will simply argue the legal issue. Timberline Utilities should also be prepared to explain how

it will ensure that the District and Timberline Utilities' customers will not suffer irreparable harm from Timberline Utilities' failure to pay its current bills to the District.

III. Conclusion

Staff recommends the Administrative Law Judge enter an Interim Recommended Decision:

- (1) Finding emergency interim relief should be granted pursuant to the Blackwelder test;
- (2) Directing Timberline Utilities to immediately pay the District \$83,752.50 (the total of the current unpaid bills issued by the District to Timberline Utilities for August, September and October 2018) without the late fees;
- (3) Directing Timberline Utilities to take action at its bank to immediately authorize the District to sweep Timberline Utilities' bank account in which all utility sewer revenue are being deposited on the first of every month each month for \$27,917.50 starting with month after emergency interim relief has been granted;
- (4) Ordering the District to make a filing monthly that states what amount was swept from Timberline Utilities' account and the date the account was swept (this should be a running history while this case is pending); and
- (5) Ordering Frederick Hertz to appear the October 30, 2018 hearing for the purpose of explaining how Timberline Utilities will ensure that the District and Timberline Utilities' customers will not suffer irreparable harm from Timberline Utilities' failure to pay its current bills to the District.

Respectfully submitted this the 23rd day of October 2018.

STAFF OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA

By Counsel,



LESLIE J. ANDERSON

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

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CERTIFICATE OF SERVICE

I, LESLIE J. ANDERSON, Staff Counsel for the Public Service Commission of West Virginia, hereby certify that I have served a copy of the foregoing Staff's Response

to Fifth Reply of Canaan Valley Public Service District and Motion to Compel Frederick Hertz, the Person Responsible for Managing Timberline Four Seasons Utilities, Inc., to Appear at the October 30, 2018 Hearing upon all parties of record by First Class United States Mail; postage prepaid this 23rd day of October 2018.

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