

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in
the City of Charleston on the 2nd day of November 2018.

CASE NO. 18-0674-WS-GI
TIMBERLINE FOUR SEASONS UTILITIES, INC.
General investigation into the management practices of
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 HENDON-BIBBEE
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 SCHIMPF
v.
TIMBERLINE FOUR SEASONS UTILITIES, INC.

CASE NO. 18-0921-WS-C
DAVID and JAN ROSENAU
v.
TIMBERLINE FOUR SEASONS UTILITIES, INC.

CASE NO. 18-1093-WS-C
RAYMOND SCOTT and LORRAINE ANN MCCLEERY
v.
TIMBERLINE FOUR SEASONS UTILITIES, INC.

COMMISSION ORDER

The Commission adopts the Chief Administrative Law Judge's Interim Recommended Decision Concerning Interim Relief as a Final Order, requires dedication of resources towards obtaining the services of a certified water operator, and directs the parties to move this matter to resolution as soon as possible.

INTRODUCTION

The situation at the Timberline Four Seasons Utilities, Inc. (TFSU) is increasingly untenable. In addition to a significant debt to its sewer treatment provider, TFSU has also lost its certified water operator. The loss of the certified water operator has resulted in the West Virginia Department of Health and Human Services, Bureau for Public Health (Health Department) issuing a boil water notice for the TFSU system. Commission Staff has filed allegations regarding serious financial and managerial irregularities. Additionally, it is possible that aspects of the alleged mismanagement may create civil or criminal liability for the owners and managers of TFSU.

The economy of Tucker County relies heavily on tourism, particularly during the fall leaf-watching and winter ski seasons. Failing utility services will likely have a significant adverse economic impact on that region.

The Commission initiated this general investigation for the purpose of determining whether TFSU should be placed into receivership. That a utility, while under a general investigation regarding receivership, would allow its service to degrade in so significant a manner, raises serious questions regarding the ownership and management of TFSU. In particular, whether TFSU is unable to provide its customers with safe, adequate and reliable service; whether the management of TFSU is grossly and willfully inefficient; whether TFSU is unresponsive to customer needs and Commission Orders; the billing, accounting and bookkeeping practices of TFSU; and whether TFSU is a candidate for receivership under W.Va. Code §24-2-7(b).

Mr. Frederick Herz is the vice-president and managing officer of TFSU. Mr. Herz, along with the other owners and managers of TFSU have a moral, legal, and regulatory obligation to conduct the operations of TFSU in a safe, reasonable, legal (non-criminal), and cost effective manner. Based solely on the complaints that this Commission has received about the utility operations to date, and the partial record

before us, the Commission remains convinced that this investigation into whether TFSU and its owners are meeting those obligations is warranted.

The Chief Administrative Law Judge of the Commission has scheduled a hearing in this matter for December 13, 2108, in Davis, West Virginia. At that hearing, in making a determination as to whether it is appropriate to move forward with receivership, an in-depth review of the TFSU finances and management will include, but not be limited to:

- a. How TFSU is funded;
- b. How TFSU is operated;
- c. Whether the utility operations of TFSU are conducted in compliance with the Rules of the Commission;
- d. Whether the revenues received from ratepayers are being used properly to cover the operations and maintenance (O&M), taxes, depreciation, taxes other, and other proper disbursements of TFSU for providing safe, reasonable and cost effective service to customers;
- e. Whether there is any evidence that TFSU funds have been wrongfully diverted to personal uses of the owners or affiliated companies without proper authority;
- f. The sources and uses of funds;
- g. The status and condition of the physical plant and operations of TFSU; and
- h. The training and technical abilities of the TFSU operational personnel.

BACKGROUND

Case No. 18-0674-WS-P Staff Petition

On May 15, 2018, Commission Staff filed a Petition to the Commission to order a General Investigation of TFSU.¹ In support of its Petition, Staff alleged that TFSU had

¹ The Staff Petition provided an overview of complaint cases filed in 2016 that, among other things, addressed arrearages to Monongahela Power Company, poor customer relations, and transactions with affiliates. Case Nos. 16-0623-W-C, 16-0691-WS-C, 16-0740-WS-C, 16-0871-WS-C (property owner complaints against Timberline Four Seasons Utilities, Inc.); Case No. 16-0624-E-C (property owner complaint against Monongahela Power Company); and Case No. 16-0631-S-C (Canaan Valley Public Service District complaint against Timberline Four Seasons Utilities, Inc.). For more information regarding the 2016 case, see the March 23, 2017 (Final April 2, 2017) Recommended Decision.

engaged in improper affiliate transfers, utility encumbrance to secure a debt to benefit an affiliate, and failure of affiliates to pay utility bills. Staff stated that its continued investigation of TFSU revealed that TFSU is “unable or unwilling to adequately serve its customers or has been actually or effectively abandoned by its owners, or that its management is grossly and willfully inefficient, irresponsible or unresponsive to the needs of its customers.” W.Va. Code §24-2-7(b).

Staff recommended that the Commission initiate a general investigation of whether it is appropriate to seek to place TFSU in receivership pursuant to W.Va. Code §24-2-7(b) because TFSU has:

1. Failed to collect payment on water and sewer services provided to affiliates, in light of a Commission order to do so, with arrearages increasing to \$168,078,
2. Encumbered utility revenues and facilities to secure debt to the benefit of an affiliate, both historically and currently,
3. Failed to collect the ordered repayment for improper affiliate transfers of cash, while increasing the amount transferred from Timberline Utilities to affiliate entities since January 2015 to \$257,182,
4. Participated in a distribution in excess of retained earnings to shareholders, and
5. Failed to satisfy multiple years of federal and state tax liabilities.

On June 12, 2018, the Canaan Valley Public Service District (CVPSD) filed a reply and motion to intervene. CVPSD stated that it treats the wastewater generated by the customers of TFSU. CVPSD asserted that if the financial transactions and management viability of TFSU are at risk, there could be a direct impact on the income stream and operations of CVPSD. CVPSD requested intervenor status and that the Commission conduct an investigation with regards to the matters raised in the Staff Petition.

Case No. 18-0745-WS-C, Deal v. TFSU

On May 25, 2018, Robert and Janet Deal filed a formal complaint against TFSU. Mr. and Mrs. Deal asserted that TFSU is not paying its employees, is not repairing leaking water lines, does not have employees available in its offices, and has not checked

In the present Petition, regarding the cases filed in 2016, Staff stated that it was not aware of any significant issues regarding amounts owed to Monongahela Power Company or to the sewer provider Canaan Valley Public Service District, or customer billing issues.

the lines in homes for pressure or proper operations in over ten years. Mr. and Mrs. Deal requested that the Commission take the utility away from its current owner and make it a publicly owned system.

Case No. 18-0762-WS-C, Henson-Bibbee v. TFSU

On May 30, 2018, Karen Henson-Bibbee filed a formal complaint against TFSU. Ms. Henson-Bibbee asserted that TFSU was not covering its payroll obligations, the water service leak detection system is not operational, and the rates are extremely high. Ms. Henson-Bibbee requested that TFSU be placed into receivership, the utility rates be re-examined, the leak detection system be repaired, and the utility lines be maintained.

Case No. 18-0781-WS-C, Rayhart V. TFSU

On May 31, 2018, Quentin T. Rayhart filed a formal complaint against TFSU. Mr. Rayhart asserted that TFSU has not inspected utility lines within ten years, there are two leaks on the system, employee paychecks have bounced three times in a row, the office is not staffed, and phones are not maintained. Mr. Rayhart requested that the CVPSD take complete control over the utility.

Case No. 18-0793-WS-C, Gilchrist v. TFSU

On June 4, 2018, Robert J. Gilchrist filed a formal complaint against TFSU. Mr. Gilchrist requested that the Commission ensure that TFSU repair, replace and test equipment, and operate the business, as required by law.

Case No. 18-0811-WS-C, Schimpff v. TFSU

On June 6, 2018, Stephen Callender Schimpff filed a formal complaint against TFSU. Mr. Schimpff asserted that the TFSU business office is locked and unstaffed during normal business hours, employees are not working because their paychecks have bounced, there are frequent service interruptions, and the utility facilities are inadequately maintained. Mr. Schimpff requested assurance that clean, safe water will be continuously available.

Collective Responses

On June 5, 2018, TFSU filed a general denial of the allegations in each of the complaint cases filed to date.

On June 19, 2018, Staff filed its Initial Joint Staff Memorandum, providing an overview of the complaint cases, and repeating the request for a general investigation made in its May 14, 2018 Petition.

On June 26, 2018, TFSU filed a response to the Initial Joint Staff Memorandum. TFSU stated that Staff failed to address the content of the individual complaints. Because each complaint addressed different issues, TFSU asserted that it was unfair to treat the complaints as part of the Staff Petition for a general investigation. TFSU also stated that it was improper for Staff to have reiterated the arguments of its Petition in the Staff response to the complaints.

Case No. 18-0921-WS-C, Rosenau v. TFSU

On June 25, 2018, David and Jan Rosenau filed a formal complaint against TFSU. The Rosenaus alleged that TFSU (i) failed to properly monitor and take appropriate pre-emptive actions to ensure uninterrupted availability of water to paying customers, (ii) failed to replace a malfunctioning SCADA device resulting in delayed detection of leaks, (iii) charged a customer based on a faulty meter reading, (iv) would not cooperate regarding bill payments, and (v) continued to use postcard billing statements that get lost in the mail. The Rosenaus requested appropriate compensation.

On July 5, 2018, TFSU filed a general denial of the allegations in the Rosenau complaint.

On July 13, 2018, the Rosenaus filed a response to the TFSU Answer.

On July 13, 2018, Staff filed an Initial Joint Staff Memorandum recommending that this complaint be processed along with the Staff Petition and the other complaints.

Case No. 18-1093-WS-C, McCleery v. TFSU

On July 25, 2018, Raymond and Lorraine McCleery filed a formal complaint against TFSU. The McCleerys alleged that they had been inaccurately billed and the utility was not responding to requests for assistance. The McCleerys asked for a meter test and adjusted charges.

On August 6, 2018, TFSU filed a general denial of the allegations in the McCleery complaint.

Combined Cases

On August 17, 2018, the Commission issued an Order (i) converting the Staff petition into a general investigation, (ii) consolidating the general investigation with the complaint cases, and (iii) referring these cases to the Division of Administrative Law Judges (ALJ). Regarding the general investigation, the Order stated:

The general investigation will include, but is not limited to, inquiry into whether TFSU is unable to provide its customers with safe, adequate and reliable service; whether the management of TFSU is grossly and willfully inefficient; whether TFSU is unresponsive to customer needs and Commission Orders; the billing, accounting and bookkeeping practices of TFSU; and whether TFSU is a candidate for receivership under W.Va. Code §24-2-7(b).

If the investigation concludes that TFSU is a candidate for receivership, recommendations should be made as to an appropriate receiver and regarding an appropriate provider of permanent service to the customers of TFSU.

August 17, 2018 Commission Order, at 5.

On September 4, 2018, the Chief ALJ issued a Procedural Order setting this case for hearing on December 13, 2018.

On October 17, 2018, CVPSD petitioned the Commission for emergency interim relief. CVPSD stated that TFSU was not paying for treatment services and owed CVPSD \$105,000 as of October 6, 2018. CVPSD alleged that the failure of TFSU to make payments for its treatment costs put the viability of CVPSD at risk.

On October 18, 2018, the ALJ issued a Procedural Order requiring TFSU and Staff to respond in writing to the emergency interim relief request on or before October 23, 2018. The matter was set for hearing on the issue of interim relief on October 30, 2018. The hearing was held as scheduled. At the hearing the parties stated that they had entered into a Settlement Agreement concerning the interim relief. Both Frederick Herz and Robert Metzger testified that they were in agreement with the proposed settlement and had the authority to bind their parties to the agreement. Mr. Herz is the managing officer of TFSU. Mr. Metzger is a Board member of CVPSD.

On October 31, 2018, Staff filed a Further Joint Staff Memorandum. Staff stated that TFSU was under a boil water notice because the TFSU water plant did not have a certified operator. Staff attached a Health Department Issued Boil Water Notice dated October 29, 2018, from the Fairmont District Office of the Health Department.

On November 1, 2018, the ALJ issued an Interim Recommended Decision Concerning Interim Relief that adopted the Settlement Agreement between the parties. Among other things, the Settlement Agreement required that TFSU would allow its account to be swept for funds three times a month to assure repayment of the arrearage to CVPSD.

DISCUSSION

The question of receivership is scheduled to be addressed during the December 13, 2018 hearing. At present, however, there are two situations requiring immediate resolution: (i) the TFSU water operation is in dire need of a certified water operator and (ii) TFSU owes a significant arrearage to its sewer treatment provider, CVPSD.

The TFSU water operation requires a certified Class II water operator to be on the premises during water production. Because TFSU no longer has a certified water operator on site, the Fairmont District Office of the Health Department issued a boil water notice. This boil water notice will remain in place until a new certified operator is in place.

The Commission is aware that the Engineering Staff of the Commission has been engaged in a search for a certified water operator so that the boil water notice may be lifted. Staff should continue in its efforts. The ultimate burden, of course, rests on TFSU. TFSU should redouble its own efforts to obtain the services of a qualified certified water operator, including a determination as to payment for services of the certified water operator. Because of the critical need for a certified water operator, and because financial irregularities are among the allegations raised by Staff,² this Order will require that TFSU earmark, and set aside, sufficient water revenue funds from its collections from customers to assure timely payments for its certified water operator. The accumulated amount is to be used solely for assuring the continuing services of a certified water operator. If necessary, the Chief ALJ should consider whether an interim Recommended Decision creating additional safeguards to assure payment of the certified water operator is necessary. TFSU should file an update with the Commission immediately after the boil water notice has been lifted.

The arrearage owed by TFSU to CVPSD was addressed during the October 30, 2018 emergency hearing before the Chief ALJ. At that time, TFSU and CVPSD agreed to the terms of the Settlement Agreement to create a mechanism for facilitating payment of the arrearage owed by TFSU to CVPSD. The Chief ALJ adopted that agreement in the November 1, 2018 Interim Recommended Decision Concerning Interim Relief. To further solidify the Settlement Agreement, the Interim Recommended Decision Concerning Interim Relief should be adopted as a Final Order of the Commission. W.Va. Code §24-1-9. Furthermore, it should be understood by TFSU that only sewer revenues

² Herz, Herz & Reichle, Inc. (HHRI) and Timberline Four Seasons Resort Management, Inc. (TFSRM) own real estate and recreational interests in the area and are affiliates of TFSU. See, Gilchrist v. Timberline Four Seasons Utilities, Inc., Case No. 16-0623-W-C (Recommended Decision March 13, 2017, Final Order April 2, 2017) and citations to the record therein. We are aware that ski operations and the hotel are not operating because electric power has been disconnected to those facilities.

should be placed in the sweep accounts to assure that the cost of sewer treatment is paid for by sewer customer revenues. To be clear, TFSU should assure that no cross-utility subsidization is occurring between the water and sewer operations.

Although we considered accelerating the hearing date in this case, the hearing scheduled for December 13, 2018 strikes a reasonable balance between expedition and due process, and assures the parties sufficient time to prepare for hearing. Among other aspects of the preparation, Staff will conduct an on-site financial and engineering investigation of the utility. The ALJ should proceed with the December 13, 2018 hearing and issue a Recommended Decision as soon as possible.

FINDINGS OF FACT

1. The TFSU and CVPSD entered into the Settlement Agreement that required action by the parties prior to the Interim Recommended Decision Concerning Interim Relief becoming a Final Order of the Commission.
2. The Fairmont District Office of the Health Department issued a boil water notice for TFSU. October 31, 2018 Staff memorandum.

CONCLUSIONS OF LAW

1. TFSU should immediately obtain the services of a certified water operator.
2. TFSU should earmark, and set aside, sufficient water revenue funds from its collections from customers to assure timely payments for its certified water operator. The accumulated amount is to be used solely for assuring the continuing services of a certified water operator.
3. TFSU should notify the Commission as soon as the boil water notice has been lifted.
4. TFSU should assure that no cross-utility subsidization is occurring.
5. The Interim Recommended Decision Concerning Interim Relief should be adopted as a Final Order of the Commission. W.Va. Code §24-1-9.
6. The ALJ and parties should maintain the current hearing schedule and, remaining mindful of the due process rights of all parties, endeavor to bring this case to conclusion as soon as possible.

ORDER

IT IS THEREFORE ORDERED that the November 1, 2018 Interim Recommended Decision Concerning Interim Relief is adopted as a Final Order of the Commission.

IT IS FURTHER ORDERED that Timberline Four Seasons Utilities, Inc., shall obtain the services of a certified water operator as soon as possible.

IT IS FURTHER ORDERED that Timberline Four Seasons Utilities, Inc., shall earmark, and set aside, sufficient water revenue funds from its collections from customers to assure timely payments for its certified water operator. The accumulated amount is to be used solely for assuring the continuing services of a certified water operator.

IT IS FURTHER ORDERED that only sewer revenues should be placed in the sweep accounts to assure that the cost of sewer treatment is paid for by sewer customer revenues.

IT IS FURTHER ORDERED that Timberline Four Seasons Utilities, Inc., shall assure that no cross-utility subsidization is occurring.

IT IS FURTHER ORDERED that Timberline Four Seasons Utilities, Inc., shall notify the Commission as soon as the boil water notice has been lifted by the West Virginia Department of Health and Human Services, Bureau for Public Health.

IT IS FURTHER ORDERED that the Executive Secretary serve a courtesy copy of this order on the complainant in Case No. 18-1180-WS-C, Monongahela Power Company, and the West Virginia Department of Health and Human Services, Bureau for Public Health.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this order by electronic service on all parties of record who have filed an e-service agreement, by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Staff by hand delivery.

A True Copy, Teste,



Ingrid Ferrell
Executive Secretary

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