

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE COMPLAINT FILED)
BY SEA COLONY WEST PHASE XIX)
CONDOMINIUM ASSOCIATION VS. SOUTHERN) PSC COMPLAINT DOCKET NO.
SHORES WATER COMPANY CONCERNING WATER) 329-04
SERVICE IN NOVEMBER 2003 (FILED MAY 7,)
2004))

ORDER NO. 6613

AND NOW, this 26^h day of April, 2005;

WHEREAS, the Commission having received and considered the March 8, 2005 Findings and Recommendations of the Hearing Examiner ("Report") issued in the above-captioned docket, which was submitted after a duly noticed public evidentiary hearing;

AND WHEREAS, the Hearing Examiner recommends that the Commission find that Southern Shores Water Company ("Company") did not violate any Commission rules in connection with the water service interruption in November 2003, which affected Sea Colony West Phase XIX Condominium Association ("Association"), or in connection with the Company's response to the Association's complaint regarding the interruption;

AND WHEREAS, for the reasons provided in the Report, the Commission finds no violation of Commission rules and, therefore, denies the Association's request for censure or for imposition of a financial penalty on the Company; now, therefore,

IT IS ORDERED:

1. That, by and in accordance with the affirmative vote of a majority of the Commissioners, the Commission hereby adopts the

A T T A C H M E N T "A"

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IN THE MATTER OF THE COMPLAINT)
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SOUTHERN SHORES WATER COMPANY) NO. 329-04
CONCERNING WATER SERVICE IN)
NOVEMBER 2003 (FILED MAY 7, 2004))

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

DATED: MARCH 9, 2005

WILLIAM F. O'BRIEN
SENIOR HEARING EXAMINER

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FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

William F. O'Brien, duly appointed Hearing Examiner in this Docket, pursuant to 26 *Del. C.* § 502 and 29 *Del. C.* ch. 101, reports to the Commission as follows:

I. INTRODUCTION

A. Appearances

On behalf of the Complainant, Sea Colony West Phase XIX Condominium Association:

Patrick Davis, General Manager.

On behalf of the Respondent, Southern Shores Water Company:

Parkowski, Guerke & Swayze, P.A., by
Jeremy W. Homer, Esquire.

On behalf of the Public Service Commission Staff:

Constance S. McDowell, Chief of Technical Services.

B. Procedural Background

1. On May 4, 2004, the Sea Colony West Phase XIX Condominium Association ("Association") filed with the Commission a formal complaint against Southern Shores Water Company ("Southern Shores") regarding a planned service interruption that occurred in November 2003. The Association is Southern Shores' direct customer under a

"Water Supply Agreement" dated January 1, 1999. In its Complaint, The Association alleges that Southern Shores failed to provide adequate notice to the Association (and to the local fire company) of the service interruption in violation of various sections of the Commission's *Minimum Standards Governing Service Provided By Public Water Companies* (PSC Order No. 2076, as amended) ("*Minimum Standards*"). The Association requests that the Commission "censure" and fine Southern Shores. (Complaint at 2.)

2. An evidentiary hearing was originally scheduled for October 20, 2004. On October 7, 2004, however, the Association requested a continuance of the hearing, which was granted. Then, on October 20, 2004, Southern Shores filed an objection to Mr. Davis' representation of the Association, asserting that such representation constituted the "unauthorized practice of law" and was, therefore, prohibited. By memorandum dated November 5, 2004, the Hearing Examiner recommended that the Commission suspend proceedings in order to seek an opinion from the Supreme Court of Delaware regarding whether a non-lawyer officer or manager of an association or corporation (whether it is a customer or a utility) may appear on behalf of that association or corporation before the Commission. On November 23, 2004, however, before the Commission considered the matter, Southern Shores withdrew its objection. On December 23, 2004, Southern Shores filed its Answer to the Association's Complaint, in which Southern Shores denied violating any Commission standards governing its provision of water service.

3. On February 1, 2005, an evidentiary hearing was conducted at which the Association presented two witnesses, Southern Shores presented two witnesses, and Staff presented one witness. At the

conclusion of the hearing, the evidentiary record, consisting of eleven exhibits and 167 pages of transcript, was closed.¹ The parties made oral closing arguments and, therefore, post-hearing briefs were deemed unnecessary. I have considered all of the record evidence and, based thereon, I submit for the Commission's consideration these findings and recommendations.

C. Jurisdiction

4. The Commission has jurisdiction over this matter pursuant to 26 Del. C. § 201(a).

II. SUMMARY OF EVIDENCE AND DISCUSSION

5. Doug Bowden, the Association's Property Manager, testified on behalf of the Association. (Tr. at 22-43.) Mr. Bowden testified that on Friday, November 21, 2003, the Association experienced a planned water service interruption. Southern Shores, the Association's water service provider, first notified Mr. Bowden of the interruption on the Monday of that week. Clarence Quillen, from Southern Shores, informed him that the water company needed to tie into another phase of the development and that they would have to shut off the water for a certain amount of time but that they did not have an exact date. (Tr. at 23-24.) Mr. Quillen asked when would be a good time and Mr. Bowden answered that there was no good time. Mr. Bowden testified that mid-week is the best time for an interruption, after 9:00 a.m., and that the end of the week is not a good time because many residents arrive then for the weekend. Mr. Quillen did not indicate how many units would be affected when he called.

¹ Exhibits will be cited as "Ex. __ at __" and references to the hearing transcript will be cited as "Tr. at __."

... (footnote continued to next page.)

6. Mr. Bowden testified that on Thursday afternoon, after 3:00 p.m., Mr. Quillen contacted his office and informed his assistant that Southern Shores would be shutting off the water on Friday from 10:00 a.m. until 3:00 p.m. (Tr. at 25.) Mr. Bowden's assistant, however, did not tell Mr. Bowden of the interruption until she arrived at work on Friday morning at 8:00 a.m. (Tr. at 27.) Mr. Bowden and his assistant then made telephone calls to, and placed fliers on the doors of, all the year-round residents in order to notify them of the interruption. They posted the notices from 9:00 to 9:30 a.m. (Tr. at 28.) In addition, Mr. Bowden sent out a "blanket E-mail" to all of the Association's departments, which included Southern Shores' Call Center, which is where residents likely would call with questions. (Tr. at 29.)

7. Mr. Bowden testified that shortly after 3:00 p.m., which was the time that Southern Shores first indicated the interruption would end, someone from Southern Shores called Mr. Bowden and informed him that the interruption would be extended. (Tr. at 30.) No further estimate of time was provided. Mr. Bowden sent out another blanket E-mail informing the residents of the extension of time for the interruption. Security personnel for the Association took over monitoring the interruption after 4:00 p.m., which is when Mr. Bowden's office closed for the day. (Tr. at 32.) Mr. Bowden knew of no further communication that day from Southern Shores to the Association.

8. Mr. Bowden also testified that Rick Parrot, who is an employee of the management company assigned to the Association, was

the Bethany Beach Fire Chief at the time. (Tr. at 33.) Mr. Bowden asserted that he did not speak with Chief Parrot about the interruption on that Thursday or Friday.

9. On cross-examination, Mr. Bowden testified that his employer is actually Resort Quest Management, which manages the Sea Colony condominium associations. (Tr. at 35.) When Mr. Quillen called him on the Monday of the week of the interruption, he told Mr. Quillen that he would take care of notifying the residents of the interruption. Mr. Bowden did not tell Mr. Quillen how much advance notice of the interruption he needed. Nor did he tell his assistant that she should contact him if Southern Shores notified her after he left work of when the interruption would take place. Normally, if there is an emergency, his assistant contacts him on his cell phone. (*Id.*)

10. Mr. Bowden asserted that he and his assistant put fliers on all of the full-time residents' doors, which numbered about fifteen, and which took about a half-an-hour. Mr. Bowden agreed that one-day's notice of the interruption was appropriate. (Tr. at 37.) In addition, he does not find fault with Southern Shores regarding the extension of the interruption because he knows that things can happen during a job that extends the time needed to complete the job. Mr. Bowden also agreed that if there had been no delay, the Association likely would not have filed a complaint. (*Id.*)

11. On redirect examination, Mr. Bowden testified that the service area affected included over 4,000 homes and that only about fifteen of the Association's residents are full-time residents. (Tr. at 38.) By Friday night or Saturday morning, however, there may be 300 to 400 residents (including many renters) who arrive for the

weekend. (Tr. at 39-40.) The Association, however, has no way of knowing if they are coming for the weekend and cannot, therefore, notify them of the interruption. (Tr. at 41.)

12. The Association moved into the record copies of the November 29, 2003 complaint letter from Mr. Davis to Gerard Esposito, President of Tidewater Utilities, Inc. ("Tidewater") (Southern Shores' parent corporation) (Ex. 2), the January 15, 2004 response letter from Mr. Esposito to Mr. Davis (Ex. 3), the June 2, 2004 letter from Mr. Esposito to Mr. Davis (with an attached June 1, 2003 letter from William Ring of Tidewater to Karen Nickerson, Commission Secretary) (Ex. 4), the June 16, 2004 Minutes of the meeting between the Association and Tidewater (Ex. 5), and a July 6, 2004 letter from Mr. Davis to Ms. Nickerson (Ex. 6.). (Tr. at 44-48.)

13. Edward Webster, President of the Association's Council and a full-time resident, testified on behalf of the Association. (Tr. at 49-86.) Mr. Webster testified that the Council oversees the Association's management company, serves as spokesmen for the owners, and conducts the day-to-day affairs of the Association. In addition, the Association itself is Southern Shores' customer as the owners do not have meters and are not billed individually. (Tr. at 51.) The Association purchases water from Southern Shores under a written agreement.

14. On November 21, 2003, the date of the interruption, Mr. Webster was at home. He first learned of the interruption at approximately 9:30 a.m., when someone from Mr. Bowden's office knocked on his door and handed him a flier. (Tr. at 52.) The flier indicated that the interruption would take place from 10:00 a.m. until 3:00 p.m. and it provided a customer service telephone number for the water

company. Sometime after 3:00 p.m., Mr. Webster called the number, but the customer service representative was unaware of the interruption and referred Mr. Webster to the Tidewater Operations Center. The person answering the telephone there was also unaware of the interruption but he indicated that he would investigate the matter. In fifteen or twenty minutes, he called back and told Mr. Webster that they had encountered unanticipated difficulties and that the job may last until 7:00 p.m. that night. (Tr. at 53.) At 7:00 p.m., the water was still off, and Mr. Webster contacted Security personnel, who told him that their latest information was that the work would be completed by 7:00 p.m.

15. Mr. Webster then visited the worksite and spoke to Mike Serman, who was not the supervisor, but whom he found to be "antagonistic" and whom would not update him on the progress of the work. (Tr. at 53.) Mr. Webster then went home, called the Tidewater Operations Center again, and left a message on an answering machine asking for a return call. He received no return call. Many residents, however, called Mr. Webster to express their outrage over the interruption and the hardship that it caused, including one resident with an infant, one resident who was ill, and one couple who had planned social events for the weekend. (Tr. at 55-56.) Mr. Webster got up several times in the night to check the water and, at 3:00 a.m., the water was running.

16. Mr. Webster testified that, at the time of the interruption, he also served as president of the Sea Colony Council, a consortium of association presidents from each phase of Sea Colony. (Tr. at 56-57.) The interruption affected several other phases, encompassing over 1,000 units, and many of the other phase presidents also received

calls from angry residents. The Council agreed, therefore, to initiate a complaint, which, after consulting with Commission Staff, began with the November 29, 2003 letter to Mr. Esposito. (Ex. 2.) After no response was received by mid-January 2004, Mr. Davis contacted Tidewater, who responded by letter dated January 15. (Ex. 3.)

17. Mr. Webster asserted that the Council found the letter unsatisfactory because it took six weeks, because its "tone" was unpleasant, and because he believed certain statements were not factual. (Tr. at 59-60.) For instance, Mr. Esposito stated that Chief Parrot of the Bethany Beach Fire Department was aware of the problem. Mr. Webster asserted, however, that Chief Parrot did not know of the interruption until the morning it took place, and then only because he happened to be an employee of the Association's management company. In addition, there was no indication in Mr. Esposito's response of what Tidewater would do in the future to minimize the possibility of a recurrence of the event.

18. The Association then filed an informal complaint with the Commission and, in accordance with the specified procedures, met with Tidewater to discuss the matter. (Tr. at 61; Ex. 5.) Again, Mr. Webster was unsatisfied with the outcome, as he did not believe that a "we're sorry about that" was an appropriate resolution, based on Tidewater's "arrogant disregard for the health, the safety, much less the convenience of the owners." (Tr. at 62.) Mr. Webster testified that he "challenged the Commission to enforce its own rules."

19. Mr. Webster asserted that, during the meeting, Tidewater representatives made several misstatements of fact, including that

Chief Parrot should have known of the interruption through his employment with the management company, that Mr. Bowden and his assistant should have taken greater initiative in notifying the owners, and that the fire main pressure was not interrupted because of the existence of a cross connection between the Sea Colony water system and Bethany Beach's system (which, according to Mr. Webster, could only serve 1,000 units). (Tr. at 63-64.) Mr. Webster asserted that Tidewater did not give proper consideration to the customer's concerns in this instance and he asked the Commission to impose a meaningful fine, a sanction, or a formal warning.

20. On cross-examination, Mr. Webster agreed with Mr. Bowden's statement that one-day's notice to the Association would have been appropriate, to the extent that one day constitutes at least twenty-four hours. (Tr. at 66.) Mr. Webster then qualified his statement, however, that one day is not adequate when the day of the interruption is a Friday. Mr. Webster was not concerned that the management company did not notify the owners on the day it received notice of the interruption nor did he find fault with them for that delay. Regarding the Association's meeting with Tidewater, Mr. Webster agreed that he stated that there was nothing Tidewater could do to resolve the complaint and that he wanted Tidewater to answer to the Commission for breaking the rules. (Tr. at 71.)

21. Mr. Webster agreed that the Association, in its November 29, 2003 complaint letter to Tidewater stated that it believed that it should be compensated for the lack of water service on the day of the interruption. (Tr. at 72, Ex. 2.) He asserted, however, that it was never his intention to seek compensation and that the statement was

due to a misunderstanding between Mr. Davis and him. The Association later dropped its request for compensation.

22. Regarding the Association's allegation that Mr. Esposito's January 15 letter was not "courteous," Mr. Webster testified that he felt its tone was "dismissive," based on Mr. Esposito's statement that the residents were not in danger "should a fire have broken out as the majority of the fire hydrants were still active in the development," because such statement is incorrect. (Tr. at 76.) He also stated that he had no "quibble" about the water company experiencing a delay once it was five hours into the project and discovered that they had far more to do than what was originally anticipated. (Tr. at 80.) In addition, he agreed with Mr. Bowden that had those delays not been encountered, the Association would not have filed its Complaint.

23. Mr. Webster agreed that the Association's Water Supply Agreement with Southern Shores provides that affected customers should be notified of an interruption prior to the scheduled interruption but provides no set time for prior notification. (Tr. at 82.) Mr. Webster, however, asserted that notice was not timely and that Southern Shores, therefore, violated the "sense" of the agreement. (Tr. at 82-83.)

24. Clarence Quillen, District Manager for Tidewater, testified on behalf of Southern Shores. (Tr. at 87-129.) Mr. Quillen oversaw the shutdown and the work performed in connection with the November 2003 interruption and he was present at the jobsite during the entire project. Mr. Quillen asserted that because Tidewater had to connect its system to a new Sea Colony West phase, it had the opportunity to replace an old 12-inch transite water line, with a new line that met industry standards. By putting in a new line when it had the chance,

Tidewater could alleviate future problems with the old line. (Tr. at 88.) All 2000 Sea Colony residents are served by the water line as it is the main line that leaves the water plant. Had the old line failed, and had it failed during the summer, all 2000 residents would have likely been inconvenienced, and it would have been a much longer process involved to fix it.

25. Mr. Quillen testified that he first notified Mr. Bowden of the impending shutdown several weeks in advance, since he knew that a new phase was going in and they would have the opportunity to replace the line. (Tr. at 89.) Then, on the Monday of the week of the interruption, he again notified Mr. Bowden and asked when would be a good time. While Mr. Bowden indicated that there was no good day, but he stated that after 9:00 a.m. on any day, Tidewater could proceed with the work. Mr. Quillen did not recall Mr. Bowden saying that Friday was a bad day for an interruption. (Tr. at 121.) Mr. Quillen knows that Saturdays and Sundays are bad, but he did not think Fridays were so bad. In addition, based on their conversation, Mr. Quillen believed that Mr. Bowden thought that one-day's notice was sufficient and that Mr. Bowden would take care of notifying the owners. (Tr. at 90.)

26. Mr. Quillen asserted that the reason the work was pushed to Friday is that there was a bad week of weather and, when the ground is wet, the jobsite is dangerous for the workforce. The reason that it was not pushed to the next week is that Carl Freeman, the builder involved in the new phase, indicated that his tentative schedule called for blacktopping that area in the near future - and it was necessary that Tidewater complete its line replacement before the blacktopping took place. (Tr. at 91.) If the Association had

objected to the work being done that Friday, however, Mr. Quillen could have worked with the blacktopping contractor to see if Tidewater could postpone its work. When Mr. Quillen spoke with Mr. Bowden's assistant, at 3:00 p.m. on Thursday, she did not indicate that there was any problem with the work being completed the next day; nor did she complain about the adequacy of the notice.

27. Mr. Quillen initially estimated that it would take from 10:00 a.m. until 3:00 p.m. to complete the work. (Tr. at 92.) He noted, however, that while they had blueprints of the water system, Tidewater had purchased (rather than built) the system, and, therefore, had no idea what it would find in the ground. Once they got into the ground, Mr. Quillen began to discover a sequence of unforeseeable problems that would extend the time needed to complete the work. First, there were main well lines crossing in the area where they had to do the tie-in. Second, a twelve-inch main valve that had not been installed properly blew apart. As a result of the extra work encountered, Mr. Quillen called in an extra crew and he held his operations staff there after their work period ended. (Tr. at 93.) They worked as fast as they could and finally restored the water at 2:00 a.m., Saturday morning.

28. Mr. Quillen testified that, when Tidewater serves the residents in a community directly, it will post fliers at the entrances to notify the customers of an interruption. In this case, however, since the Association was its customer, it only notified the Association. Mr. Quillen also asserted that, during office hours, when a customer service representative takes a call regarding an interruption, the representative will contact the District Manager for information and then call the customer back. (Tr. at 95.)

Mr. Quillen noted that a customer service representative did, in fact, contact him during the interruption in question.

29. According to Mr. Quillen, if a customer calls in to customer service after business hours, an answering service will contact the supervisor on call, who will contact the District Manager for information. The supervisor will then call back the answering service so that it would have the necessary information to relay if any more customers called. Mr. Quillen testified that that night, he spoke several times with the on-call supervisor, Thomas Herholdt, in order to keep him abreast of the situation. (Tr. at 96.) Via affidavit, Mr. Herholdt stated that he spoke with Mr. Quillen at least three times and kept the answering service apprised of the progress of the work. (Ex. 8.) At no point did the Association indicate that it was dissatisfied with the process for keeping the residents apprised of the developments. Mr. Quillen noted that, once the crew began encountering problems, there was no way to tell how long it would take to complete the job. (Tr. at 98.)

30. Mr. Quillen testified that Tidewater serves several developments in the beach area that do not have fire hydrants. The fire department, therefore, automatically sends a tanker truck to fight fires in that area. (Tr. at 101-102.) The fire department then sends pumper trucks to the nearest hydrant to serve as backfill to the tanker truck. That process was available in this case, as there was a live hydrant near the project, which Mr. Quillen identified on a schematic. He did not know, however, if Chief Parrot was aware of the live fire hydrant or whether he would have in fact used it had there been a fire. (Tr. at 126.)

31. Mr. Quillen testified that he notified Chief Parrot, two weeks in advance, that there would be a shutdown. (Tr. at 102.) Chief Parrot replied that he had no concerns over water pressure. Mr. Quillen told Chief Parrot that he did not have an exact date but that it would be in a couple of weeks. He also told Chief Parrot that he was coordinating the project with Mr. Bowden, who would copy Chief Parrot with any E-mail notices of the exact date. Mr. Quillen heard from Ron Forman, the water plant coordinator for Bethany Beach, that Chief Parrot had received the E-mail and was aware of the interruption. (Tr. at 104.) Had Chief Parrot had concerns about the shutdown, he could have contacted Mr. Quillen and Tidewater would not have gone forward with the project. (Tr. at 113.)

32. Mr. Quillen testified that Tidewater's policy regarding service interruptions had been to post notices in the affected community but that Tidewater, in light of the problems that arose in this case, has developed a new policy. (Tr. at 127.) The new policy also includes new instructions regarding the process by which Tidewater will contact the fire department. Under the new policy, Tidewater calls the Call Board for the County where the interruption will take place and the Call Board notifies the local fire department. If Tidewater were to call the fire department directly, there is a chance that there would not be anyone there to take the call.

33. Mr. Esposito, testifying on behalf of Southern Shores, asserted that there were several reasons why it took a long time for Tidewater to respond to the Association's November 29, 2003 complaint letter. (Tr. at 129-142.) First, the letter arrived in early December and there were a lot of things going on prior to the holidays. In order to investigate the matter, many people had to be

contacted and some of the people were on vacation. Second, the Association asked for monetary damages, which meant that Tidewater had to be cautious in how it responded.

34. Mr. Esposito testified that he contacted Mr. Webster by telephone, at least once, and spoke to him again at the June 16, 2004 meeting between the Association and Tidewater. (Tr. at 132.) Whenever he spoke with Mr. Webster, he tried to find out what it would take to satisfy his concerns. It was apparent to Mr. Esposito that nothing would satisfy the Association short of appearing before the Commission. (Tr. at 133.)

35. Mr. Esposito asserted that he had concerns over Tidewater's response to the complaint. (Tr. at 134.) First, it took six weeks to respond to the November 2003 complaint letter, which he believes is too long. Second, Tidewater should have notified the fire department directly rather than rely on an Association employee, despite the fact that notice did get to the fire department in this case. Tidewater's policy now is to directly notify the fire department. (Tr. at 135.)

36. Mr. Esposito asserted that Tidewater did the best job that it could on the project in question and that the delay was caused by unforeseen circumstances. Tidewater, in fact, took extraordinary measures, working overtime well into the night, once the problems arose. (Tr. at 136.) Mr. Esposito noted that Tidewater has owned the Southern Shores system for three-and-a-half years and have had almost no complaints. After one year of owning the system, Tidewater spent \$400,000 in capital improvements to the system. Mr. Esposito sympathizes with the residents who were out of water -- it is understandable that they were frustrated -- but in light of the good track record Tidewater has had with the system, he wished the

Association had been more understanding under the circumstances. (Tr. at 137.)

37. Mr. Esposito added that it would have been irresponsible for Tidewater not to have replaced the old transite pipe, which is not industry standard, when it had the chance to do so. (Tr. at 140.)

38. Counsel for Southern Shores moved into the record a January 28, 2005 E-mail from Mr. Davis to Kevin Neilson (Ex. 7); the affidavit of Thomas Herholdt (Ex. 8); a copy of a proposed (but unsigned) stipulation of facts between the parties (Ex. 9);² and a packet of documents including the Water Supply Agreement between the parties, with its attached "Rules and Regulations," and PSC Order No. 5394 (March 28, 2000), in which the Commission approved the agreement (Ex. 10.). (Tr. at 143-144.)

39. Kevin Neilson, the Commission's Regulatory Policy Administrator -- Compliance and Engineering, testified on behalf of Staff. (Tr. at 145-153.) On January 28, 2004, Mr. Neilson received an informal complaint, by E-Mail, from the Association concerning the November 2003 interruption. Mr. Neilson conducted an investigation, including speaking with Mr. Davis, and concluded that Southern Shores had not violated its tariff or any Commission rules governing water companies. (Tr. at 145.) Mr. Neilson provided his conclusions to Mr. Davis by E-mail dated February 19, 2004. (Ex. 11.) On cross-examination, Mr. Neilson testified that Commission rules require a water utility to notify the official responsible for fire protection of an interruption that would affect fire protection. (Tr. at 150-

² The unsigned stipulation was admitted into evidence, against an objection by the Association, for the limited purpose of one statement by Mr. Davis that ... (footnote continued to next page.)

152.) Mr. Neilson noted, however, that Southern Shores is governed by its Water Service Agreement with the Association and that the PSC Order approving that agreement (and tariff) states that the *Minimum Standards* are not included as part of the agreement.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

40. In its Complaint, the Association alleges that Southern Shores violated three sections of the Commission's *Minimum Standards* and asks the Commission to fine or censure the utility for such violations. The Association cites the following sections under Rule 2.4.7:

- (a) Utilities shall make all possible efforts to re-establish service in the shortest time practicable with due regard to safety;
- (b) When service is interrupted for scheduled repairs or maintenance, such work should be done at a time which will cause the least inconvenience to customers. The customers who would be affected should be notified prior to the scheduled interruption; and
- (c) If any interruption affects or would affect the service to any public fire protection device or department, the utility shall immediately notify the official responsible for fire protection.

41. As a threshold matter, Southern Shores argues that only its Water Supply Agreement, and not the *Minimum Standards*, applies to the service it provides to the Association. (Tr. at 156.) Staff agrees. (Tr. at 152.) In PSC Order No. 5394 (March 28, 2000), the Commission deferred ruling on whether the Water Supply Agreement conflicts with the *Minimum Standards* but stated that the Water Supply Agreement shall

the Sea Colony management company notified Chief Parrot of the interruption shortly before it took place. (Tr. at 107-111, 143.)

govern the water service provided by the water company. (PSC Order No. 5394 at Ordering ¶ 3.)

42. I do not recommend that the Commission decide this issue because: (1) based on PSC Order No. 5394, I do not find it clear that the *Minimum Standards* do not apply to Southern Shores in this case;³ (2) the issue was not fully briefed or argued by Staff or the parties; and (3) I do not believe the Commission must answer this question in order to decide this matter. The reason that I do not believe the Commission must decide this issue in order to decide this matter is that even if the *Minimum Standards* do apply, the evidence does not support a finding that there was a violation.

43. Under Rule 2.4.7(a), if service is interrupted, utilities "shall make all possible efforts to re-establish service in the shortest time practicable with due regard to safety." Even the Association seems to agree that Southern Shores re-established service in the shortest time practical. (Tr. at 37, 80.) In his testimony, Mr. Quillen identified the unforeseen problems that arose during the project and described the substantial efforts undertaken by his crew (and the extra crew called in) to complete the project in the shortest time possible. I agree with Mr. Quillen and, therefore, find that Southern Shores did not violate Rule 2.4.7(a).

44. Under Rule 2.4.7(b), utilities must perform scheduled work at a time that will cause the least inconvenience to customers. Mr. Quillen performed the work during the off-season and, in addition, asked

³ In PSC Order No. 5394, at ¶ 11, the Commission stated the following: "If it later appears that the Company's Rules conflict, in some manner, with the Commission's [*Minimum Standards*], the Commission will then determine whether [the Company] must comply with the *Minimum Standards* or whether a waiver from such *Minimum Standards* is needed or appropriate."

... (footnote continued to next page.)

Mr. Bowden when would be a good time during the week. Mr. Quillen testified that he knew that weekends were a bad time to interrupt service but he has no recollection that Mr. Bowden told him that Fridays were bad. (Tr. at 121.) This testimony is not inconsistent with Mr. Bowden's testimony, because Mr. Bowden never testified that he actually told Mr. Quillen that Fridays were bad. (Tr. at 24.) Mr. Quillen noted that had Mr. Bowden told him that Friday was bad, he could have contacted the paving contractor to see if the project could be postponed into the next week.

45. Moreover, Southern Shores anticipated that the work would be performed from 10:00 a.m. to 3:00 p.m., which, according to Mr. Bowden and Mr. Quillen, would not have caused a problem. (Tr. at 37, 80.) It was the unanticipated work that arose during the project that pushed the interruption into Friday night, which was clearly an inconvenient time for the Sea Colony residents. In other words, while 2.4.7(b) requires that scheduled work be performed at a convenient time, in this case it was only the unforeseen, or unscheduled, work that was performed at an inconvenient time. For all of these reasons, Southern Shores' selection of the time for the work was reasonable under the circumstances and did not constitute a violation of Rule 2.4.7(b).

46. Rule 2.4.7(b) also provides that "customers who would be affected should be notified prior to the scheduled interruption." Mr. Quillen notified Southern Shores' customer, the Association, of the interruption two weeks prior to the work and again on the Monday of the week that the work was performed. Once Southern Shores knew the exact timing of the interruption, Mr. Quillen relayed that information to the

Association, at 3:00 p.m. on the afternoon prior to the day of the interruption. This notice clearly satisfies Rule 2.4.7(b) as there is no dispute that the Association was notified prior to the interruption.

47. Regarding whether Southern Shores violated the spirit of the notice requirement, as alleged by Mr. Webster, I find that Southern Shores acted in a reasonable manner under the circumstances. First, Mr. Quillen provided the Association with a general timeframe for the service interruption weeks before the project took place. (Tr. at 89.) Second, as stated by Mr. Quillen, Tidewater, on the one hand, had to wait for the weather to improve and, on the other hand, was trying to complete the project before the area was paved. As such, Mr. Quillen was limited to some extent regarding both when he knew he could perform the work and how much advance notice he could provide. Even under these time constraints, however, Mr. Quillen stated that had the Association complained about the notice or the timing of the work, he could have contacted the paving contractor in an effort to postpone his work on the water line. (Tr. at 91-92.)

48. I also agree with Southern Shores that had notice been such a concern to the Association, it would have notified its residents once notice was provided to it, rather than waiting until 9:00 a.m. the following morning. In this regard, the forcefulness with which the Association has pursued its Complaint regarding notice of the interruption is inconsistent with its own conduct once it received notice and raises an issue regarding the Association's motivation for filing the Complaint. Curiously, Mr. Webster found no lack of diligence on the part of the property management company in waiting until the following morning to notify residents of the exact timing of

the interruption, but found wholly unacceptable Southern Shores' provision of such notice at 3:00 p.m. on the afternoon before. (Tr. at 71.)

49. I also note that the Parties' Water Supply Agreement, under Rule 3.4 of its "Rules and Regulations" attachment, provides only that "notice will be given, when practicable," but does not provide how much advance notice is required. (Ex. 10.) If the Association believes that this contract term does not provide for adequate notice, the Association certainly may seek to modify the notice requirements now or once the Water Supply Agreement expires. It does not appear, however, that Southern Shores violated the Water Supply Agreement in providing notice on the afternoon before the interruption.

50. Rule 2.4.7(c) provides that if any interruption affects the public fire protection, the utility shall immediately notify the official that is responsible for fire protection. Mr. Quillen notified Rick Parrot, the Bethany Beach Fire Chief, approximately two weeks prior to the interruption and, according to Mr. Quillen, Chief Parrot did not express any concern over his receiving notice of the exact timing of the interruption by way of E-mail from the property management company for whom he worked. I also agree with Southern Shores that in light of the fact that Chief Parrot actually works for the Association's management company, and that the adequacy of the notice provided to Chief Parrot is an issue in this case, it is unfortunate that the Association did not simply call Chief Parrot as a witness or ask him to provide an affidavit. I also note that although Chief Parrot obviously was aware of the notice procedure utilized by Southern Shores in this case, neither his fire department nor the State Fire Marshall has contacted the Commission with any concerns.

51. I agree with the Association, however, that direct notice of the specific time of an interruption would be preferable to relying on the Association's property management company. Based on the change in policy that Tidewater has instituted, which calls for direct notice of the date and time of an interruption to the Call Board that serves the local fire department, Southern Shores also agrees. That is not to say, however, that Southern Shores violated Commission rules in this regard or that, even if it did, a fine would be warranted. After all, Southern Shores provided direct notice of the general timeframe of interruption to Chief Parrot, and then set up a procedure for communication of the exact time to reach Chief Parrot, which Chief Parrot accepted. In this case, the procedure did result in actual notice to the fire department, albeit in an indirect manner.⁴

52. Rule No. 2.5.1 provides that "all complaints should be handled promptly, courteously, and include a full investigation prior to any conclusion." Although the Association did not allege a violation of this rule in its Complaint, it argued during the hearing that Southern Shores' response to its Complaint was neither prompt nor courteous. Mr. Esposito testified that he regretted that his initial response took six weeks. He explained, however, that the Complaint required a significant investigation and that the holidays and vacations delayed his response. Southern Shores also noted that because the Association asked for monetary damages in its initial Complaint letter, Southern Shores was particularly cautious in its

⁴ Even if the Commission did find a violation here, however, without notice to Southern Shores that the Commission finds indirect notice to be a violation of Commission regulations and without providing Southern Shores with an opportunity to correct its notice procedure, it would be unreasonable for the Commission to impose a fine.

approach. While it would have been preferable for Mr. Esposito to contact the Association prior to six weeks to inform them that an investigation was underway and that a response would be forthcoming, I do not find that the response was untimely under the circumstances described by Mr. Esposito.

53. Furthermore, I do not find that the response was discourteous. Tidewater certainly took the complaint seriously as it conducted a full investigation of the matter and, in fact, Mr. Esposito apologized for the inconvenience caused by the prolonged interruption. In addition, throughout the Complaint process, Mr. Esposito asked the Association what it would take to satisfy the Association's concerns, but the Association did not provide Mr. Esposito with any course of action that would resolve the matter. There is no evidence, therefore, that Southern Shores did not afford the Association's concerns due consideration nor that Southern Shores did not reasonably attempt to resolve the matter to the Association's satisfaction.

54. I also note that, while it may not fall under Southern Shores' "response" to the Complaint, the fact that a Southern Shores representative asked Mr. Webster to leave the construction worksite, during an emotional and potentially volatile confrontation, was not unreasonable, given the time of day and the safety considerations. Similarly, although it was unfortunate that the Tidewater customer service representatives were not aware of the interruption before the first call, Tidewater made reasonable efforts to keep customer service, and then the answering service, apprised of the work progress, as seen in Mr. Quillen's testimony and the Herholdt affidavit. (Tr. at 96; Ex. 8.)

55. For all the above reasons, I agree with Staff and Southern Shores that Southern Shores did not violate any Commission rules in connection with the interruption to the Association's water service in November 2003, or in its response to the Association's Complaint.

III. RECOMMENDATION

56. For all the reasons discussed above, I recommend that the Commission find no violation of Commission rules, deny the Association's request for censure or for imposition of a financial penalty on Southern Shores, and dismiss the Complaint. A proposed Order, which will implement the foregoing recommendation, is attached hereto.

Respectfully submitted,

/s/ William F. O'Brien
William F. O'Brien
Senior Hearing Examiner

Dated: March 9, 2005

