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August 21, 2020

VIA ELECTRONIC FILING

Hon. Kenneth C. Hill, Chairman
c/o Tory Lawless, Dockets and Records Manager
Tennessee Public Utilities Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243
tpuc.docketroom@tn.gov

RE: Complaint and Petition for the Tennessee Public Utility Commission to Convene a Show Cause Proceeding Against Thunder Air, Inc. and Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc., TPUC Docket No. 20-00098

Dear Chairman Hill:

We are enclosing for filing the Answer of Thunder Air, Inc. and Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc. to Complaint and Petition in the above-referenced matter.

As required, the original and four copies will be mailed to your office. Please give me a call if you have any questions.

Sincerely,



Carol M. Ballard
For Horton, Ballard & Pemerton, PLLC

Attachment

cc: Daniel Whitaker, Consumer Protection and Advocate Division
Kelly Cashman Grams, TPUC General Counsel
Dane Bradshaw

**IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE**

IN RE:)	
)	
COMPLAINT AND PETITION OF THE)	
CONSUMER ADVOCATE UNIT IN THE)	
FINANCIAL DIVISION OF THE OFFICE)	Docket No. 20-00098
OF THE TENNESSEE ATTORNEY)	
GENERAL AGAINST THUNDER AIR, INC.,)	
a Tennessee corporation, and THUNDER AIR,)	
INC. D/B/A JASPER HIGHLANDS)	
DEVELOPMENT, INC.)	

**ANSWER OF THUNDER AIR, INC. AND THUNDER AIR, INC. D/B/A JASPER
HIGHLANDS DEVELOPMENT, INC. TO COMPLAINT AND PETITION**

Thunder Air, Inc. and Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc. (“Thunder”), through counsel, answer the Complaint and Petition for the Tennessee Public Utility Commission to Convene a Show Cause Proceeding as follows:

I. JURISDICTION.

For the reasons stated in this answer, Thunder does not admit this Commission’s jurisdiction. The Consumer Advocate has no standing to represent “the interests of consumers” because the users of the water system are members of Jasper Highlands Property Owners’ Association, Inc., a Tennessee nonprofit corporation (“JHPOA”), and the overwhelming majority of such users/members are not dissatisfied with the water arrangements and support the sale of the system to Tennessee-American Water Company, Inc. pursuant to a pending contract so that JHPOA would have no continuing or future responsibilities as to the system. That matter is currently before the Commission in Docket No. 20-00011.

II. RELEVANT FACTS.

1. Thunder admits the cited legal authority in Paragraph 1. Thunder denies that the Consumer Advocate has standing to pursue this action since the water system at issue has been

operated by JHPOA with the assistance of Thunder under a lease and management agreement for the benefit of approximately 184 current homeowner users in the subdivision at issue, known as Jasper Highlands.

2. Paragraph 2 is admitted. Thunder would show that well water was not practical for Jasper Highlands and the existing water utility in the area, South Pittsburg Board of Water Works & Sewers, was unwilling to provide service to the subdivision. The development is on top of Jasper Mountain, with an elevation in excess of 1,500 feet. Digging of wells, although successfully performed at some common areas, was not practical for the subdivision given the planned density and number of properties. South Pittsburg Board of Water Works & Sewers provided water at the base of the mountain, which had to be transported up the mountain for residents. Thunder purchased and installed the piping and other infrastructure for the water system for the benefit of JHPOA.

South Pittsburg Board of Water Works & Sewers was unwilling to incur the expenditures for pump stations and infrastructure on top of the mountain and JHPOA and the homeowner members did not have the funds nor the ability to finance the infrastructure and other costs by loans with a financial institution. The only practical solution was for the developer to advance such expenses to enable JHPOA to operate the system under management and lease agreements.

The statutory exemption for nonprofit homeowner associations, TCA § 65-4-101(6)(B)(i), does not require such homeowner associations to construct, operate AND maintain water systems. In fact, the statutory language authorizes an exemption to “own, construct, operate OR maintain” a water system. Further, the exemption provides that none of the property rights or facilities “owned OR used” by the association for the rendering of such services shall be under the jurisdiction, supervision or control of the Tennessee Public Utility Commission. It was obviously the intent of the legislature, in using the disjunctive rather than the conjunctive language, to give such associations flexibility on the options available dictated by the financial and geographic

circumstances faced by such associations. This particular suit is an attempt to usurp and rewrite the statute and is not for the benefit of the consumers, but is contrary to the benefit of the consumers. This is an issue for the legislature, not this Commission.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted. Furthermore, over the last five years, the water system consistently received exemplary rankings in the annual survey conducted by TDEC's Chattanooga field office, with facility maintenance fees assessed and paid each year by the water system. This year, the system ranked in the 99th percentile.

5. Paragraph 5 is admitted. However, at all times JHPOA has operated the system with the assistance of Thunder under the exemption of Tenn. Code Ann. § 65-4-101(6)(B)(i). JHPOA has consented to the proposed sale, and essentially all homeowners/users in the subdivision are in favor of the sale.

6. With respect to Paragraph 6, Thunder admits that it provided a copy of the lease agreement and management agreement between Thunder and JHPOA. The remaining allegations of Paragraph 6 are denied. The exemption of Tenn. Code Ann. § 65-4-101(6)(B)(i) is applicable to the water system.

7. Paragraph 7 is admitted. This is the typical practice of developers in such developments.

8. With respect to Paragraph 8, the terms of the contract speak for themselves. None of the contract terms demonstrate any failure of the water system to come within the coverage of Tenn. Code Ann. § 65-4-101(6)(B)(i).

9. Paragraph 9 is denied.

10. Thunder admits the contract terms cited in Paragraph 10 but denies that such terms demonstrate any failure of the water system to come within the coverage of Tenn. Code Ann. § 65-4-101(6)(B)(i). The remaining allegations of Paragraph 10 are denied.

11. Paragraph 11 is admitted. The water system is not operated as a profit center. Residents needed water service, and JHPOA, with assistance from Thunder, is providing the service at a reasonable cost, which essentially all homeowners/consumers appreciate and support.

12. With respect to Paragraph 12, Thunder admits the filing of a complaint by Robert Schlenkert. The remaining allegations of Paragraph 12 are denied. Mr. Schlenkert violated the recorded Amended and Restated Declarations of Protected Covenants, Conditions and Restrictions for the Jasper Highlands subdivision in multiple respects during the construction of his home. He declined to connect to the water system for an extended period of time, and when he subsequently paid the hook-up fee, that payment was inadvertently accepted by a representative of the water system, but was promptly returned to him because he owed JHPOA fees incurred by JHPOA, which he refused to pay. He then initiated litigation against JHPOA and Thunder which he dismissed shortly thereafter. Claims by JHPOA against Mr. Schlenkert are still pending in Marion County Chancery Court.¹

Mr. Schlenkert requested a variance to drill a well, and such variance was granted verbally and again in writing on December 18, 2019. At one point earlier that month, Mr. Schlenkert responded to a letter with, "I will drill a well. Saves me money for this liquid gold." Mr. Schlenkert was provided a path to obtain water service. Instead, Mr. Schlenkert elected to haul water up and down the mountain. Mr. Schlenkert was offered another opportunity, if he decided not to build a well, to obtain water service through JHPOA if he met certain requirements. Mr. Schlenkert has expressed a desire for the sale of the water system to Tennessee-American Water Company.

III. ALLEGED VIOLATIONS OF STATE LAW

A. Thunder denies any violation of state law. JHPOA has been operating the system with the assistance of Thunder through a management agreement. JHPOA meets the exception of

¹ The other homeowner identified in the petition, Ms. Long, also has litigation pending for funds she owes to an affiliate of Thunder. Mr. Schlenkert and Ms. Long constitute approximately 1% of consumers/members, hardly a mandate for this petition.

Tenn. Code Ann. § 65-4-101(6)(B)(i) to the definition of a public utility, *i.e.*, a “nonprofit homeowners associations or organizations whose membership is limited to owners of lots in residential subdivisions, which associations or organizations own, construct, operate *or* maintain water, street light or park maintenance service systems for the exclusive use of that subdivision.”

COUNT 1:

Count 1 is denied. The water system did not constitute a public utility, as JHPOA meets the exception of Tenn. Code Ann. § 65-4-101(6)(B)(i).

COUNT 2:

Count 2 is denied. As discussed above, the water system was not a public utility.

COUNT 3:

Count 3 is denied. As discussed above, the water system was not a public utility.

COUNT 4:

Count 4 is denied. As discussed above, the water system was not a public utility. Furthermore, Thunder has not withheld water service from a customer.

COUNT 5:

Count 5 is denied. As discussed above, the water system was not a public utility. Furthermore, Thunder has not withheld water service from a customer.

As additional defenses, Thunder asserts lack of standing and the failure to join an indispensable party, JHPOA.

WHEREFORE, Thunder respectfully requests that this action be stayed until the conclusion of the sale proceeding before the Commission, No. 20-00011. Also, Thunder requests an assignment to a hearing officer on the merits.

Respectfully submitted,

HORTON BALLARD & PEMERTON, PLLC

By: 

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Chattanooga, TN 37402
(423) 826-2641
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served on counsel for all parties at interest in this cause by hand delivery, email, facsimile, or by depositing a copy of same in the United States Mail with sufficient postage thereon to carry same to its destination, addressed as follows:

Kelly Cashman Grams
General Counsel
Tennessee Public Utility Commission
Legal Division
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Nashville, TN 37243

Daniel P. Whitaker III
Assistant Attorney General
Office of the Tennessee Attorney General
Economic and Regulatory Section
Financial Division, Consumer Advocate Unit
P.O. Box 20207
Nashville, TN 37202

This 21st day of August, 2020.

HORTON, BALLARD & PEMERTON, PLLC

By: CBA