

STATE OF TENNESSEE

Office of the Attorney General



HERBERT H. SLATERY III
ATTORNEY GENERAL AND REPORTER

P.O. BOX 20207, NASHVILLE, TN 37202
TELEPHONE (615)741-3491
FACSIMILE (615)741-2009

September 29, 2020

VIA ELECTRONIC FILING

Kenneth Hill, Chairman
c/o Ectory Lawless
Tennessee Public Utility Commission
502 Deaderick Street, Fourth Floor
Nashville, TN 37243
tpuc.docketroom@tn.gov

Re: TPUC Docket No. 20-00098, Stipulation and Settlement Agreement

Dear Chairman Hill:

Please find attached for filing and for the Commission's consideration the *Stipulation and Settlement Agreement* executed by the parties in this matter, the Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General and Thunder Air, Inc. and Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc.

Due to the nature of this Docket and Docket No. 20-00011, which pertains to the same water system, the parties respectfully request a status conference as soon as possible to address the timing of this matter.

Sincerely,

A handwritten signature in blue ink that reads "Daniel P. Whitaker, III".

Daniel P. Whitaker, III
Assistant Attorney General

cc: William H. Horton, Esq. (by email)
Kelly Cashman Grams, Esq.
Monica Smith-Ashford, Esq.

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
OF THE TENNESSEE ATTORNEY
GENERAL AGAINST THUNDER AIR, INC.,
a Tennessee corporation, and THUNDER AIR,
INC. D/B/A JASPER HIGHLANDS
DEVELOPMENT, INC.

Docket No. 20-00098

STIPULATION AND SETTLEMENT AGREEMENT

Thunder Air, Inc. and Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc. ("Company" or "Thunder Air") and the Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General ("Consumer Advocate"), constituting all of the parties of record to the above-captioned docket and in settlement of the issues related to this Docket No. 20-00098, do hereby jointly submit to the Tennessee Public Utility Commission ("Commission" or "TPUC") for its approval this *Stipulation and Settlement Agreement* ("*Settlement Agreement*") reflecting the following stipulations and agreement of the Parties:

1. Plaintiff, the Consumer Advocate, pursuant to Tenn. Code Ann. § 65-4-118, and Thunder Air, as evidenced by their signatures, do consent to the entry of this *Settlement Agreement*, which is subject to the Commission's approval.

2. Defendants enter into this *Settlement Agreement* to avoid the time and expense associated with litigation and deny any wrongdoing. Except as expressly provided by law,

nothing in this *Settlement Agreement* shall have preclusive effect as to any issue of fact or law except in an action between the parties.

PARTIES

Plaintiff

3. Plaintiff, the Consumer Advocate, “has the duty and authority” pursuant to Tenn. Code Ann. § 65-4-118 to represent the interests of Tennessee consumers of public utility services by initiating a proceeding or intervening as a party in an existing proceeding before the Commission in accordance with the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-101, *et seq.*, and TPUC rules.

Defendants

4. Thunder Air is a Tennessee corporation duly authorized to do business in the state. Thunder Air owns approximately 9,000 acres atop Jasper mountain in Marion County, Tennessee. Moreover, Thunder Air funded and owns a water system operated by Jasper Highlands Property Owners’ Association, Inc. (“JHPOA”) that provides water services to customers within its growing development in Kimball, Tennessee.¹

FINDINGS

5. The Consumer Advocate asserts that this Commission has the requisite jurisdiction to hear this matter. While Thunder Air does not waive its ability in any future proceeding to challenge this Commission’s jurisdiction over the water system currently located and providing service in the Jasper Highlands community, Thunder Air does stipulate to this

¹ *Joint Petition of Tennessee-American Water Company, and Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc. for Approval of an Asset Purchase Agreement and for the Issuance of a Certificate of Convenience and Necessity*, p. 2, TPUC Docket No. 20-00011 (February 3, 2020).

Commission's jurisdiction for the purpose of entering into and authorizing this *Settlement Agreement*.

6. Jurisdiction is further retained by this Commission for the purpose of enabling either party to apply for such further orders and directions as may be necessary or appropriate for the construction, modification, or execution of the terms of this *Settlement Agreement*, including enforcement of compliance therewith and assessment of penalties for violation(s) thereof.

7. This Commission is the proper venue for this proceeding.

8. The Consumer Advocate and Thunder Air hereby stipulate that entry of this Settlement Agreement is in the public interest.

REPRESENTATIONS AND WARRANTIES

9. Thunder Air represents and warrants that the signatories to this *Settlement Agreement* have authority to act for and bind each signatory.

10. Thunder Air represents and warrants that it is the proper party to this Settlement Agreement. Moreover, Thunder Air represents and warrants that no costs or other expenses, legal or otherwise, will be passed on, charged, or billed to any resident of the Jasper Highlands community or JHPOA, and Thunder Air will issue any payments due as a result of this Docket No. 20-00098 from a bank account owned by Thunder Air.

11. The Consumer Advocate filed on August 13, 2020, its *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.* ("Complaint") alleging, among other things, that Thunder Air, Inc. has unlawfully operated the water system located at

the Jasper Highlands community since at least 2016. On August 21, 2020, Thunder Air filed its *Answer* generally denying the Consumer Advocate's assertion that it was subject to regulation by this Commission. Neither party by entering into this Settlement Agreement is waiving any factual or legal assertion filed in the *Complaint* or the *Answer*.

12. The Consumer Advocate alleges that Thunder Air has violated Tennessee law by committing the following actions:

COUNT 1

The failure of Thunder Air to obtain a CCN upon its purchase and operation of a water company that serves the public violates Tenn. Code Ann. § 65-4-201, which states:

No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system, or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate; provided, however, that this section shall not be construed to require any public utility to obtain a certificate for an extension in or about a municipality or territory where it shall theretofore have lawfully commenced operations, or for an extension into territory, whether within or without a municipality, contiguous to its route, plant, line, or system, and not theretofore receiving service of a like character from another public utility, or for substitute or additional facilities in or to territory already served by it.

Thunder Air did not pay an annual inspection fee in 2016 through 2020.

COUNT 2

The failure of Thunder Air to pay annual inspection fees in 2016 through 2020 violates Tenn. Code Ann. § 65-4-301(a), which states:

(a)(1) Every public utility doing business in this state and subject to the control

and jurisdiction of the authority to which the provisions of this chapter apply, shall pay to the state of Tennessee on or before April 1 of each year, a fee for the inspection, control and supervision of the business, service and rates of such public utility.

Jasper Highlands has not filed a tariff or schedule of its rates or charges with the Commission.

COUNT 3

The failure of Thunder Air to file a tariff since constructing the water utility in 2016 violates Tenn. Code Ann. § 65-5-102, which states:

The authority has the power to require every such public utility to file with it complete schedules of every classification employed and of every individual or joint rate, toll, fare, or charge made or exacted by it for any product supplied or service rendered within this state as specified in such requirement.

Thunder Air has charged, and is charging, rates and has attempted to collect money for water service without approval of the Commission.

COUNT 4

The actions of Thunder Air in imposing rates for water service to the public without Commission approval violates Tenn. Code Ann. § 65-5-101, which states:

(a) The Tennessee regulatory authority has the power after hearing upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as defined in § 65-4-101, whenever the authority shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established. In fixing such rates, joint rates, tolls, fares, charges or schedules, or commutation, mileage or other special rates, the authority shall take into account the safety, adequacy and efficiency or lack thereof of the service or services furnished by the public utility.

Thunder Air withheld water service from its customer for disputes between a homeowner and Thunder Air.

COUNT 5

The actions of Thunder Air to withhold water service from its customers violates Tenn. Code Ann. § 65-4-115, which states:

No public utility shall adopt, maintain, or enforce any regulation, practice, or measurement which is unjust, unreasonable, unduly preferential or discriminatory, nor shall any public utility provide or maintain any service that is unsafe, improper, or inadequate, or withhold or refuse any service which can reasonably be demanded and furnished when ordered by the authority.

13. The parties agree that this *Settlement Agreement* shall not be construed as admissions by the Consumer Advocate or Thunder Air, nor shall it be construed as a finding by the Commission of any violation of the provisions of Tennessee law or this Commission's rules. Thunder denied all allegations set forth in Paragraph 12. Further, Thunder Air asserts that such system is operated by JHPOA pursuant to contractual agreements with Thunder Air and pursuant to the exemption provided by Tenn. Code Ann. § 65-4-101(6)(B)(i) and there are no violations.

APPLICATION OF SETTLEMENT AGREEMENT TO DEFENDANTS AND OTHERS

14. Thunder Air and all of its parents, affiliates, subsidiaries, owners, officers, agents, assigns, lessees, employees, and third-party contractors agree that the duties, responsibilities, burdens, and obligations undertaken in connection with this *Settlement Agreement* shall apply to Thunder Air as set forth below. This *Settlement Agreement* shall bind Thunder Air and all of its parents, affiliates, subsidiaries, owners, officers, agents, assigns, lessees, employees, and third-party contractors for as long as it owns, operates, manages, or controls the water system providing service to the Jasper Highlands community.

ASSURANCES AND AGREEMENTS

15. Thunder Air and all of its parents, affiliates, subsidiaries, owners, officers, agents, assigns, lessees, employees, and third-party contractors, including JHPOA, together with each of their officers, agents, servants, employees, and assigns and upon those persons in active concert of participation with them who receive actual notice of this injunction by personal service or otherwise, agrees to the following terms:

A. Thunder Air will connect and/or reconnect any residents to water service that it has either refused to connect or has disconnected for any reason other than nonpayment of a connection fee or water bill;

B. Thunder Air, for as long as it owns, operates, manages, or controls the water system, will connect any Jasper Highlands resident to the system if the resident requests water service and pays the appropriate connection fee;

C. Thunder Air, for as long as it owns, operates, manages, or controls the water system, will continue to provide water service to any resident so long as the resident continues to pay his or her water bill and/or engages in a payment plan to pay off credited amounts for water service; and

D. Thunder Air will not charge any discriminatory rates or other fees related to the provision of water service.

MONETARY PAYMENT TO THE COMMISSION

16. Conditioned on the approval, if any, in TPUC Docket No. 20-00011 of Tennessee-American Water Company's acquisition of the water system serving the Jasper Highlands Community, and further conditioned upon the subsequent closing of that acquisition, Thunder

Air agrees to make a settlement payment to TPUC of fifty-thousand dollars (\$50,000.00) within fifteen (15) days of the acquisition's closing. By making this payment, Thunder Air does not acknowledge any of the allegations contained in the *Complaint* filed by the Consumer Advocate.

GENERAL PROVISIONS

17. This *Settlement Agreement* is entered into voluntarily by Thunder Air on its own free will and with full knowledge and understanding of the nature of the proceedings and the obligations and duties imposed on them by this *Settlement Agreement*.

18. Entry of this *Settlement Agreement* is for the purpose of resolving only this TPUC Docket No. 20-00098. Except as provided below, nothing herein shall bind or prohibit the Attorney General or any other subagency of the State of Tennessee from filing any action related to the Attorney General's powers from any laws of the State of Tennessee or the United States of America or the Attorney General's powers at common law. Except as otherwise provided in Paragraph 21, the Attorney General shall not bring any other cause of action afforded by law or equity before the TPUC, against Thunder Air or JHPOA, related in any manner to facts or issues contained within this TPUC Docket No. 20-00098 or related to the water system. According to the terms of this *Settlement Agreement*, if these terms are approved by the Commission, the Commission may enter a final order resolving the Consumer Advocate's *Complaint* filed in this Docket on the terms contained herein, after any acquisition pending before the Commission in Docket No. 20-00011 is approved and the sale closed.

19. The Parties acknowledge that entry of this *Settlement Agreement* is appropriate for resolving only this TPUC Docket No. 20-00098, and the Consumer Advocate, by entering into this *Settlement Agreement*, is not limited in any manner from representing the interests of

ratepayers or advocating for any regulatory treatment in TPUC Docket No. 20-00011.

20. Upon approval of this *Settlement Agreement* and the Commission's receipt of payment in accordance with Paragraph 16 hereof, this Docket shall be concluded and a final order concerning the Consumer Advocate's *Complaint* may be entered by the Commission. If, however, the Commission does not approve the acquisition in TPUC Docket No. 20-00011 or the sale does not close, this *Settlement Agreement* shall be null and void.

21. TPUC Docket No. 20-00011 contains, among other items, a joint request from Tennessee-American Water Company, Inc. and Thunder Air for approval of an asset purchase agreement whereby Tennessee-America Water Company, Inc., a public utility regulated by this Commission, would purchase the water system serving the Jasper Highlands community and provide water service to ratepayers in the Jasper Highlands Community. If, for any reason, the Commission does not approve the joint petitioners' request in TPUC Docket No. 20-00011 or the acquisition deal between Tennessee-American Water Company, Inc. and Thunder Air is cancelled or otherwise withdrawn or does not close for any reason, this *Settlement Agreement* shall be null and void and the parties may continue to litigate this matter before the Commission.

22. Under no circumstance shall Thunder Air be able to recover from the Commission, the Attorney General, or the State of Tennessee the \$50,000 payment made pursuant to this *Settlement Agreement* at the closing of any sale approved in TPUC Docket No. 20-00011.

23. Thunder Air avers that no offers, agreements, or inducements of any nature whatsoever have been made to procure this *Settlement Agreement* other than those contained herein.

24. In the event the Commission does not approve this *Settlement Agreement*, this

Settlement Agreement shall be of no force and effect. Any statements made in connection with such an unsuccessful attempt at compromise or in this *Settlement Agreement* shall be inadmissible in any subsequent proceeding, pursuant to Rule 408 of both the Tennessee and Federal Rules of Evidence.

25. The acceptance of this *Settlement Agreement* by the Consumer Advocate shall not be deemed approval by the Consumer Advocate Unit, the Attorney General, or the State of Tennessee of any of Thunder Air's business practices. Further, neither Thunder Air nor anyone acting on its behalf shall state or imply or cause to be stated or implied that the Consumer Advocate, the Attorney General, the State of Tennessee, or any other governmental unit of the State of Tennessee has approved, sanctioned, or authorized any practice, act, or conduct of Thunder Air.

26. The titles and headers to each section of this *Settlement Agreement* are for convenience purposes only and are not intended by the Parties to lend meaning to the actual provisions of the paragraphs in each section.

27. No waiver, modification, or amendment of the terms of this *Settlement Agreement* shall be valid or binding unless approved by this Commission.

28. Any failure by any party to this *Settlement Agreement* to insist upon the strict performance by any other party of any of the provisions of this *Settlement Agreement* shall not be deemed a waiver of any of the provisions of this *Settlement Agreement*, and such party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this *Settlement Agreement*.

29. If any clause, provision, or section of this *Settlement Agreement* shall, for any

reason, be held illegal, invalid or unenforceable, such illegality, invalidity, or unenforceability shall not affect any other clause, provision, or section of this *Settlement Agreement*, and this *Settlement Agreement* shall be construed and enforced as if such illegal, invalid, or unenforceable clause, section, or other provision had not been contained herein.

30. Time shall be of the essence with respect to each provision of this *Settlement Agreement* that requires action to be taken by Defendants.

31. Nothing in this *Settlement Agreement* shall be construed to waive any claims of Sovereign Immunity the State may have in any action or proceeding.

32. Any Party to this *Settlement Agreement* may provide written or oral testimony and other appropriate documentation to the Commission in support of the approval of this Stipulation and Settlement Agreement.

33. The Parties agree to support this *Settlement Agreement* before the Commission and in any hearing, proposed order, or brief conducted or filed in this proceeding. The resolution of issues reflected herein is the result of give and take negotiations between the Parties and does not necessarily reflect the position of any single Party on any discrete issue. None of the signatories hereto shall be deemed to have acquiesced in any ratemaking or procedural principle, including without limitation, any cost of service determination or cost allocation or revenue-related methodology, and none of the Parties waives its right to take other positions with respect to matters similar to those settled herein in future proceedings before the Commission. This *Settlement Agreement* shall not have any precedential effect in any future proceeding or be binding upon any of the Parties in this or any other jurisdiction, except to the extent necessary to implement the provisions hereof and as expressly contemplated herein.

34. Thunder Air will not participate, directly or indirectly, in any activity or form a separate entity or corporation for the purpose of engaging in acts or practices, in whole or in part, in the State of Tennessee which are prohibited in this *Settlement Agreement*, or for any other purpose which would otherwise circumvent any part of this *Settlement Agreement* or the spirit or purposes of this *Settlement Agreement*.

35. The Parties further agree to execute and deliver all authorizations, documents, and instruments which are necessary to carry out the terms and conditions of this *Settlement Agreement*.

36. This *Settlement Agreement* may be executed in any number of counterparts and by different signatories on separate counterparts, each of which shall constitute an original counterpart hereof and all of which together shall constitute one and the same document. One or more counterparts of this *Settlement Agreement* may be delivered by electronic transmission with the intent that it or they shall constitute an original counterpart thereof.

37. The provisions of this *Settlement Agreement* are not severable.

38. By agreeing to this *Settlement Agreement*, no Party waives any right to continue litigating this matter should the *Settlement Agreement* be rejected by the Commission in whole or in part.

39. No provision of this *Settlement Agreement* shall be deemed an admission of any Party in any proceeding.

40. The provisions of this *Settlement Agreement* do not necessarily reflect the positions asserted by any Party, and no Party waives the right to assert any position in this Docket, or in any future proceeding, except as expressly stipulated and agreed herein.

41. This *Settlement Agreement* may only be enforced by any of the Parties or the Commission.

COMPLIANCE WITH ALL LAWS

42. Nothing in this *Settlement Agreement* shall be construed as relieving Thunder Air of the obligation to comply with all state and federal laws, regulations, or rules, nor shall any of the provisions of this *Settlement Agreement* be deemed to be permission to engage in any acts or practices prohibited by such law, regulation, or rule.

COMPLIANCE

43. If the Commission approves this *Settlement Agreement*, within seven (7) days of the approval, Thunder Air shall submit proof to the Consumer Advocate that it has abided by the terms set forth in this *Settlement Agreement*.

PAYMENT OF COSTS

44. No costs shall be taxed to the State as a result of this Docket.

ENTIRE AGREEMENT

45. This *Settlement Agreement* sets forth the entire agreement between the Parties, and there are no representations, agreements, arrangements, or understandings, oral or written, between the Parties relating to the subject matter of this *Settlement Agreement* which are not fully expressed hereto or attached hereto.

Intentionally Blank

JOINTLY APPROVED AND SUBMITTED FOR ENTRY:

FOR THE TENNESSEE ATTORNEY GENERAL:



HERBERT H. SLATTERY III (BPR No. 09077)

Attorney General and Reporter
State of Tennessee



DANIEL P. WHITAKER III (BPR No. 035410)

Assistant Attorney General

KAREN H. STACHOWSKI (BPR No. 019607)

Assistant Attorney General

VANCE L. BROEMEL (BPR No. 011421)

Senior Assistant Attorney General

OFFICE OF THE TENNESSEE ATTORNEY GENERAL

Economic and Regulatory Section

Financial Division, Consumer Advocate Unit

P.O. Box 20207

Nashville, Tennessee 37202-0207

Phone: (615) 532-9299

Fax: (615) 532-2910

Email: Daniel.Whitaker@ag.tn.gov

Karen.Stachowski@ag.tn.gov

Vance.Broemel@ag.tn.gov

FOR THUNDER AIR, INC.:



WILLIAM H. HORTON (BPR NO. 1935)

735 Broad Street, Ste. 306

Chattanooga, Tennessee 37402


(423) 826-2641

whorton@hpblawfirm.com

THUNDER AIR, INC.'S SIGNATURE AND ACKNOWLEDGMENT

Thunder Air and its attorneys have read and understand this *Settlement Agreement* and each of its terms. Thunder Air admits to the jurisdiction of the Commission for the limited purpose of the approval of this *Settlement Agreement* and consents to the entry of this *Settlement Agreement*. Thunder Air agrees to each and every term contained herein.

John Thornton, on behalf of Thunder Air, being first duly sworn on oath, deposes and says that he is the Chief Executive Officer of Thunder Air, Inc. and is fully authorized and empowered to sign this *Settlement Agreement* on behalf of Thunder Air, Inc., and bind the same to the terms hereof.


John Thornton, in his capacity as
Chief Executive Officer of Thunder Air, Inc.

Address:

Telephone:

SUBSCRIBED AND SWORN to before
me this 11th day of February, 2020.


Notary Public

My Commission Expires

