

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

February 26, 2021

IN RE:

**COMPLAINT AND PETITION OF THE CONSUMER
ADVOCATE UNIT IN THE FINANCIAL DIVISION OF
THE OFFICE OF THE ATTORNEY GENERAL 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.**

**DOCKET NO.
20-00098**

ORDER APPROVING STIPULATION AND SETTLEMENT AGREEMENT

This matter came before Chairman Kenneth C. Hill, Vice Chairman Herbert H. Hilliard, and Commissioner David F. Jones of the Tennessee Public Utility Commission (“TPUC” or “Commission”), the voting panel assigned to this docket, during a regularly scheduled Commission Conference held on December 14, 2020, for consideration of the *Stipulation and Settlement Agreement* (“*Settlement Agreement*”) filed by the Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General (“Consumer Advocate”) on September 29, 2020. The *Settlement Agreement* has been executed by both parties in this docket, the Consumer Advocate and Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc. (“Thunder Air”).

BACKGROUND, COMPLAINT, AND ANSWER

On August 12, 2020, the Consumer Advocate filed a *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*”) seeking a Show Cause Order requiring Thunder Air to show cause why it should not be found in violation

of state law and be subject to a cease and desist order, civil penalties, and sanctions issued and imposed by the Commission. The *Complaint* alleges five (5) violations of state law that would subject Thunder Air to sanctions by the Commission.

Thunder Air is a Tennessee corporation developing approximately 9,000 acres on Jasper Mountain in Marion County, Tennessee.¹ Thunder Air owns a water system (the “JHWS”) that provides service to customers currently living within the Jasper Mountain development and expects to add more customers to the water system as the build-out of the development continues. All tracts of land within the development are required to connect to the water system, even if a drinking water well is currently in use.²

The Tennessee Department of Environment and Conservation (“TDEC”) issued approvals of the final construction plans for Phases 1A and 1B of the JHWS in March 2014 and for Phase 2 of the JHWS in July 2016. TDEC conducted an initial Sanitary Survey of the JHWS in March 2016.³

The *Complaint* refers to information contained in the *Joint Petition on Acquisition* of Thunder Air and Tennessee-American Water Company (“TAWC”) seeking approval of an asset purchase agreement which would convey the Jasper Highlands water system to TAWC.⁴ The asset purchase agreement for which the *Joint Petition on Acquisition* seeks approval states that Thunder Air “owns, maintains, and operates” the JHWS.⁵ The Commission held a hearing on the *Joint*

¹ *Complaint*, p. 2 (August 12, 2020).

² *Id.* at 2-3.

³ *Id.* at 3.

⁴ *In Re: Joint Petition of Tennessee-American Water Company and Thunder Air, Inc. D/B/A Jasper Highlands Development, Inc. for the Approval of an Asset Purchase Agreement and for the Issuance of a Certificate of Convenience and Necessity*, Docket No. 20-00011, *Expedited 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* (February 4, 2020) (“*Joint Petition on Acquisition*”).

⁵ *Complaint*, p. 4 (August 12, 2020). *See also*, *Joint Petition on Acquisition*, Exh. A p. 1 (February 4, 2020).

Petition on Acquisition during its October 12, 2020 Commission Conference. Following the hearing, the voting panel of Commissioners took the matter under advisement.⁶

The Consumer Advocate asserts in its *Complaint* that Thunder Air “seeks to evade the Commission’s jurisdiction” with a claim that a lease agreement between Thunder Air and the Jasper Highlands Property Owners’ Association, Inc. (“JHPOA”) makes the JHWS exempt from Commission jurisdiction under the provisions of Tenn. Code Ann. § 65-4-101(6)(B)(i).⁷ The Consumer Advocate states, in support of its contention that the JHWS is owned and operated by Thunder Air rather than by JHPOA, that Thunder Air has full control of the appointments to the Board of Directors of the JHPOA and remains in control until the development period expires upon conveyance of all single family residential tracts to third parties. In addition, the president of the JHPOA is the same person who serves as president of Thunder Air and Jasper Highlands Development, Inc., Dane Bradshaw.⁸ The JHWS purchases water from the South Pittsburg Board of Water Works and Sewers (“South Pittsburg”) through a contract for water service. The water service contract is between Thunder Investments, Inc. and South Pittsburgh. While Thunder Investments, Inc. may assign the water service contract with South Pittsburgh’s written consent, there is no evidence that the contract has been assigned to JHPOA or any other party.⁹

The *Complaint* further alleges that in the operation of the JHWS, Thunder Air provides all monetary support to and performs all administrative operations for the JHWS including: paying for electric service to the pump stations; paying bills for water purchased from South Pittsburgh; processing bills to customers for water service based upon monthly meter readings; providing

⁶ Excerpt of Transcript of Commission Conference (Held Via WebEx Conferencing Platform), Docket No. 20-00011 (Contains Proprietary Information), p. 158 (October 12, 2020).

⁷ Tenn. Code Ann. § 65-4-101(6) defines a “public utility.” Subdivision (6)(B)(i) of that section excludes “nonprofit homeowners associations or organization whose membership is limited to owners of lots in residential subdivisions, which associations or organizations own, construct, operate or maintain water...systems for the exclusive use of that subdivision” from the definition of “public utility.” Such a water system is not under the jurisdiction, supervision, or control of the TPUC. Tenn. Code Ann. § 65-4-101(6) (Supp. 2020).

⁸ *Complaint*, pp. 4-5 (August 12, 2020).

⁹ *Id.* at 5.

connections of customer meters; determining rates and fees for water service; paying all state sales taxes; enforcing proper usage of the water system; providing customer service; supervising necessary maintenance, repair, and improvements to the water system; and making reports to the JHPOA. In addition, Thunder Air receives 100% the meter fees billed to customers, 15% of the total billing collected for water services before sales tax and is reimbursed for all expenses incurred in the performance of its operation of the JHWS.¹⁰

The Consumer Advocate also states that Thunder Air is the subject of a complaint filed with the Tennessee Division of Consumer Affairs by a resident of Jasper Highlands (“CA Complaint”). The CA Complaint alleges that the resident paid the required hookup fee of \$2,150, but Thunder Air has refused to provide water service. As a result, the resident remains unconnected to the water system and since wells for drinking water are prohibited in the development, the resident must purchase and transport water for daily use to his home.¹¹

From the facts presented in the *Complaint*, the Consumer Advocate alleges five (5) counts of state law violation.

1. Thunder Air failed to obtain a Certificate of Convenience and Necessity (“CCN”) prior to the commencement of construction, operation, ownership, and control of the JHWS in violation of Tenn. Code Ann. § 65-4-201.
2. Thunder Air failed to pay annual inspection fees from 2016 through 2020 in violation of Tenn. Code Ann. § 65-4-301(a).
3. Thunder Air failed to file a tariff or schedule of its rates and charges with the Commission in violation of Tenn. Code Ann. § 65-5-102.

¹⁰ *Id.* at 5-6.

¹¹ *Id.* at 6-7.

4. Thunder Air collects rates and fees for water service to the public without prior Commission approval of such rates and fees in violation of Tenn. Code Ann. § 65-5-101(a).
5. Thunder Air has withheld water service from its customer because of a dispute between a homeowner and Thunder Air in violation of Tenn. Code Ann. § 65-4-115.

On August 21, 2020, Thunder Air filed the *Answer of Thunder Air, Inc. and Thunder Air, Inc. D/B/A/ Jasper Highlands Development, Inc. to Complaint and Petition* (“Answer”). In its *Answer*, Thunder Air provides admissions, denials, and additional explanations concerning the facts alleged by the Consumer Advocate in its *Complaint*. In general, Thunder Air asserts that the JHWS is not a public utility because it is operated by the JHPOA and as such, is not subject to the jurisdiction of the Commission.¹² Thunder Air denies each alleged count of violation of law, citing its position that the JHWS is not a public utility.¹³ Thunder Air also asserts that the Consumer Advocate lacks standing to bring its *Complaint* and that the Consumer Advocate failed to join an indispensable party, the JHPOA.¹⁴

THE PROPOSED SETTLEMENT AGREEMENT

On September 29, 2020, the Consumer Advocate filed a *Settlement Agreement* executed by both Thunder Air and the Consumer Advocate. Upon approval of the jointly submitted Settlement Agreement, all issues related to this docket would be resolved.¹⁵

In resolution of the Consumer Advocate’s *Complaint*, the Consumer Advocate asserts that the Commission has the jurisdiction to hear the matter and Thunder Air stipulates to the Commission’s jurisdiction for purposes of entering and authorizing the *Settlement Agreement*

¹² *Answer*, pp. 1-2 (August 21, 2020).

¹³ *Id.* at 5.

¹⁴ *Id.*

¹⁵ *Stipulation and Settlement Agreement* (September 29, 2020).

without waiving its ability to challenge the Commission's jurisdiction over the JHWS in future proceedings. The parties also submit to the Commission's retention of jurisdiction for future orders and directions that may be necessary concerning the *Settlement Agreement*. The parties also stipulate that the entry of the *Settlement Agreement* is in the public interest.¹⁶

The terms of the *Settlement Agreement* are as follows:

1. The *Settlement Agreement* shall not be construed as admissions by the Consumer Advocate or Thunder Air, nor shall it be construed as a finding of any violation of any Tennessee law or Commission rule by the Commission.¹⁷
2. The *Settlement Agreement* is binding upon Thunder Air and 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 JHWS.¹⁸
3. Thunder Air agrees to:
 - a. Connect and/or reconnect any residents to water service that it has disconnected or refused to connect for any reason other than nonpayment of a connection fee or water bill;
 - b. Connect any Jasper Highlands residents to the system if requesting water service and paying the appropriate connection fee for as long as it owns, operates, manages, or controls the water system;
 - c. Continue to provide water service to any Jasper Highland resident that continues to pay his or her water bill and/or engages in a payment plan to pay off credited amounts for water service for as long as it owns, operates, manages, or controls the water system; and

¹⁶ *Id.* at 2-3.

¹⁷ *Id.* at 6.

¹⁸ *Id.*

- d. Not charge any discriminatory rates or other fees related to the provision of water service.¹⁹
4. Thunder Air will make a payment of fifty-thousand dollars (\$50,000) to the Commission, conditioned upon approval of acquisition of the Jasper Highlands water system by TAWC in Docket No. 20-00011 and the subsequent closing of that acquisition. Such payment is to be paid within fifteen (15) days of the closing of the acquisition and shall not serve as an acknowledgement of any alleged violation contained in the Consumer Advocate's *Complaint*.²⁰
5. The *Settlement Agreement* is null and void if the acquisition between Thunder Air and TAWC is not approved in Docket No. 20-00011 or is otherwise cancelled, withdrawn, or fails to close.²¹

HEARING ON THE MERITS

A Hearing in this matter was held before the voting panel of Commissioners during the regularly scheduled Commission Conference on December 14, 2020, as noticed by the Commission on December 4, 2020. Participating in the Hearing were Daniel P. Whitaker, III, Esq. on behalf of the Consumer Advocate and William H. Horton, Esq. on behalf of Thunder Air. During the Hearing, Mr. Whitaker presented the *Settlement Agreement* to the Commission and was subject to questions before the panel. Mr. Horton provided additional comments to the Commission, emphasizing that the *Settlement Agreement* provided no admission of responsibility or liability on the allegations of the *Complaint* and that the *Settlement Agreement* is contingent

¹⁹ *Id.* at 7.

²⁰ *Id.* at 7-8.

²¹ *Id.* at 9.

upon approval of the *Joint Petition on Acquisition* in TPUC Docket No. 20-00011 and the completion of the acquisition transaction for which approval is sought therein.²²

COMMISSION AUTHORITY

The Commission has “general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter.”²³ The Tennessee Supreme Court has interpreted the supervisory and regulatory powers of the Commission as “practically plenary authority over the utilities within its jurisdiction.” *BellSouth Adver. & Publ’g Corp. v Tenn. Reg. Auth.*, 79 S.W.3d 506, 512-513 (Tenn. 2002).

The Commission is charged with the duty to enforce laws within its jurisdiction, ensure prosecutions of violations of such laws, and to collect penalties for such violations.²⁴ In the performance of its enforcement duty, the Commission is authorized to issue show cause orders and conduct show cause proceedings,²⁵ impose civil penalties for violations of law,²⁶ and assess civil penalties for noncompliance with Commission orders.²⁷

FINDINGS AND CONCLUSIONS

The voting panel found that the terms of the *Settlement Agreement* are fair and reasonable, allowing the parties to avoid the time and cost associated with the extensive litigation associated with this type of matter. In addition, the panel found that settlement of this matter is in the public interest as it offers potential savings in the legal expenses of the water system and promotes the transfer of the ownership and operation of a water system from a developer who is unaccustomed

²² The *Joint Petition on Acquisition* was deliberated by the voting panel of Commissioners assigned to the docket during the December 14, 2020 Commission Conference, subsequent to the Hearing on this docket. The Commission approved the *Joint Petition on Acquisition* during the Commission Conference.

²³ Tenn. Code Ann. § 65-4-104(a) (Supp. 2020).

²⁴ Tenn. Code Ann. § 65-1-113 (Supp. 2020).

²⁵ Tenn. Code Ann. § 65-2-106 (Supp. 2020).

²⁶ Tenn. Code Ann. § 65-4-116 (Supp. 2020).

²⁷ Tenn. Code Ann. § 65-4-120 (Supp. 2020).

in utilities operations to a national operator of public utilities well equipped with the financial, technical, and managerial capabilities to successfully operate the system. Therefore, the panel voted unanimously to approve the terms of the *Settlement Agreement*.

The panel noted that the *Settlement Agreement* by its own terms is conditioned upon Commission approval of the acquisition of the Jasper Hills water system by TAWC in Docket No. 20-00011 and the closing of the acquisition transaction after Commission approval. Therefore, the panel determined that approval of the *Settlement Agreement* should be contingent upon approval of the Asset Purchase Agreement sought in TPUC Docket No. 20-00011 and the filing of proof of the closing of the acquisition transaction in this docket.

During the pendency of TPUC Docket No. 20-00011 and the closing of the transaction for which approval is sought therein, the panel found that Thunder Air should be directed to comply with the assurances and agreements set forth in paragraph 15 of the *Settlement Agreement*. Further, the panel determined that the parties should provide evidence of the satisfaction of the conditions upon which the *Settlement Agreement* is contingent. Therefore, the panel voted unanimously to direct Thunder Air to file in this docket documentation evidencing the closing of the asset purchase transaction and to submit payment to the Commission as set forth in paragraph 16 of the *Settlement Agreement*.

The panel authorized and directed the Hearing Officer assigned to this docket to enter an order closing this matter upon the filing of documentation evidencing the closing of the asset purchase transaction and submission of settlement funds to the Commission. The panel directed that if the Asset Purchase Agreement in Docket No. 20-00011 is not approved or fails to close subsequent to Commission approval, then the *Settlement Agreement* shall be declared null and void and the parties shall proceed with the litigation of the Consumer Advocate's *Complaint*.

IT IS THEREFORE ORDERED THAT:

1. The *Stipulation and Settlement Agreement* executed and submitted by the Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General and Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc. on September 29, 2020 is approved. A copy of the *Settlement Agreement* is attached to this Order as Exhibit 1 and is incorporated in this Order as if fully rewritten herein.

2. Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc. is directed to:

- a. Comply with the continuing services assurances and agreements set forth in Paragraph 15 of the *Stipulation and Settlement Agreement* while the *Expedited 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* in Tennessee Public Utility Commission Docket Number 20-00011 is pending and the acquisition transaction for which approval is sought therein has been completed;
- b. File in this docket evidence of the closing of the Asset Purchase Agreement transaction, if approved by this Commission; and,
- c. Pay to the Commission the settlement payment in the amount of \$50,000 (fifty thousand dollars) within fifteen (15) days of the closing of the Asset Purchase Agreement as set forth in Paragraph 16 of the *Stipulation and Settlement Agreement*.

3. The Hearing Officer assigned to this docket is directed to enter an order closing this docket upon satisfaction of the Commission directives to Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc.

4. If the Commission does not approve the Asset Purchase Agreement in Tennessee

Public Utility Commission Docket Number 20-00011, or if the Asset Purchase Agreement is approved and fails to close, the parties are directed to file notice in this docket and to proceed with the litigation of the *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..*

5. Any person who is aggrieved by the Commission's decision in this matter may file a Petition for Reconsideration with the Commission within fifteen (15) days from the date of this Order.

6. Any person who is aggrieved by the Commission's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

FOR THE TENNESSEE PUBLIC UTILITY COMMISSION:

**Chairman Kenneth C. Hill,
Vice Chairman Herbert H. Hilliard, and
Commissioner David F. Jones concurring.**

None dissenting.

ATTEST:



Earl R. Taylor, Executive Director