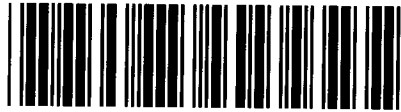


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DOCKET NO. 43146

COMPLAINT OF CAROL D. GILLESPIE §
AGAINST AVALON WATER SUPPLY §
AND SEWER SERVICES §
CORPORATION §

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COMMISSION STAFF'S STATEMENT OF POSITION

COMES NOW the Staff of the Public Utility Commission of Texas, representing the public interest and files this Statement of Position.

I. BACKGROUND

On August 25, 2014, Carol Gillespie (Complainant) filed a complaint with the Texas Commission on Environmental Quality against Avalon Water Supply and Sewer Services Corporation regarding violations of the Texas Open Meetings Act by Avalon. On September 1, 2014, the processing of Ms. Gillespie's complaint was transferred to the Public Utility Commission (Commission). Ms. Gillespie amended her complaint by letters dated September 29, 2014 (filed September 30, 2014), October 1, 2014 (filed October 6, 2014), January 31, 2015 (filed February 3, 2015) and July 14, 2014 (filed February 6, 2015).

On February 2, 2015, the Commission Administrative Law Judge (ALJ) issued Order No. 1, requiring Avalon to file a response no later than February 20, 2015 and Staff to file a statement of position no later than March 6, 2015. Ms. Gillespie subsequently amended her complaint, so in Order No. 2, issued February 6, 2015, the ALJ extended Avalon's deadline to file a response to February 27, 2015, and Staff's statement of position to March 13, 2015. While Staff and Ms. Gillespie received timely email service of Avalon's response, Avalon's response was not filed with the Commission until March 4, 2015. On March 16, 2015, the ALJ in Order No. 3 requested additional information from Ms. Gillespie, and required that information to be filed by March 27, 2015. The ALJ extended the deadline for Staff to file a statement of position to April 10, 2015. Ms. Gillespie timely filed additional information as required by Order No. 3 and Staff now timely files its statement of position.

II. COMPLAINT

Ms. Gillespie in her initial complaint argues that because Avalon is formed under Chapter 67 of the Texas Water Code, and because Texas Govt. Code § 551.001(3) includes a definition of governmental bodies that must follow the Texas Open Meetings Act and includes a nonprofit corporation organized under Chapter 67 of the Water Code, Avalon must comply with the Texas Open Meetings Act. Further, she argues that Avalon's own bylaws require the Avalon board to comply with the Texas Open Meetings Act. Therefore, if Avalon is violating its bylaws and not following the Texas Open Meetings Act, she argues, the TCEQ (now, PUC) must have jurisdiction.

Ms. Gillespie goes on to list violations of the Texas Open Meetings Act that she believes have occurred. These include abusing the use of closed sessions, discussing and voting on items not on the agenda, giving less than 72 hours posted notice for a meeting, allowing people to stay in closed session who should not be allowed, voting in closed sessions, not recording minutes during closed session, using a secret ballot, directors signing a resolution who were not present at the meeting where that resolution was presented, and a board member approving minutes for a meeting they did not attend.¹

In her initial complaint, Ms. Gillespie also lists violations that occurred at the August 14, 2014 monthly meeting. These include no agendas available, the format of the agenda changing, misuse of a consent agenda, switching from written minutes to recording the meetings, the July meeting minutes not being available, no financial report being given at that meeting, no copies of the monthly financial statements being given out, the financial report being placed on the consent agenda, a suspicious deposit being listed in that financial report, members not getting to speak on issues for an adequate amount of time, improper use of closed session for discussing pay rates for employees, misunderstanding of open records requests, mismanagement of funds, and not scheduling the next meeting at the current meeting.²

In her September 29, 2015 letter, Ms. Gillespie reiterates many of her past complaints, but adds that Avalon had improperly made an "emergency" addition to an agenda, that a new

¹ Complaint at 2 (Sept. 16, 2014).

² Complaint at 2-5 (Sept. 16, 2014).

CPA firm was hired without being voted on, that possibly Avalon's 2013 taxes had not been completed, and that checks to Avalon were being signed in violation of Avalon's bylaws.³

In her October 1, 2014 letter, Ms. Gillespie alleges that Avalon, in violation of its bylaws, did not respond to her questions about Avalon's 2012 income tax return.⁴

In her January 31, 2015 letter, Ms. Gillespie additionally alleges that Avalon placed a water pipeline on her property without first discussing the placement of this pipeline at an open meeting.⁵

In her July 14, 2014 letter, Ms. Gillespie additionally alleges that no notice was given as to why the June 12, 2014 meeting was postponed, and Ms. Gillespie raises additional questions about Avalon's finances.⁶

In her response to Order No. 3, Ms. Gillespie clarifies that she is alleging that TWC § 13.004(a)(1) and (2) of the Water Code have been violated by Avalon.⁷

III. AVALON'S RESPONSE

In its response to Ms. Gillespie's complaint, Avalon argues that Chapter 13 of the Texas Water Code prescribes a very narrow jurisdiction for the Commission over a water supply or sewer service corporation, and that none of Ms. Gillespie's complaints deal with Avalon's annual or special meetings, or with the requirements for classification of Avalon as a non-profit water supply or sewer service corporation in TWC § 13.002(11) and (24). Therefore, Avalon argues that the Commission does not have jurisdiction over Ms. Gillespie's complaints.⁸

Avalon goes on to address each individual complaint of Ms. Gillespie, noting that Avalon is not waiving its position that the Commission lacks jurisdiction over Ms. Gillespie's complaints by addressing each complaint.⁹

³ Complaint at 2-3 (Sept. 30, 2014).

⁴ Complaint at 1 (Oct. 6, 2014).

⁵ Complaint at 1-2 (Feb 3, 2015).

⁶ Complaint at 2-3 (Feb. 6, 2015).

⁷ March 24, 2015 Letter from Ms. Gillespie, available on the Commission's Interchange at item no. 15 (March 27, 2015).

⁸ Avalon Response at 4 (March 4, 2015).

IV. JURISDICTION

Staff agrees with Avalon that Chapter 13 of the Texas Water Code prescribes the Commission's jurisdiction over water supply or sewer service corporations (WSCs). While such jurisdiction may be more narrow than the Commission's jurisdiction over water and sewer utilities,¹⁰ TWC § 13.004 authorizes the Commission to exercise jurisdiction over certain WSCs. TWC § 13.004 states:

(a) Notwithstanding any other law, the utility commission has the same jurisdiction over a water supply or sewer service corporation that the utility commission has under this chapter over a water and sewer utility if the utility commission finds that the water supply or sewer service corporation:

- (1) is failing to conduct annual or special meetings in compliance with Section 67.007; or
- (2) is operating in a manner that does not comply with the requirements for classifications as a nonprofit water supply or sewer service corporation prescribed by Sections 13.002(11) and (24).

As explained below, it is the Commission that would make a determination of whether a WSC is in violation of TWC § 13.004.

V. STATEMENT OF POSITION

Staff's position is that the type of action raised by Ms. Gillespie's complaint is not appropriate relief in a formal complaint proceeding. Ms. Gillespie requests that the Commission open an investigation into Avalon's open meetings practices in order to determine if the Commission has the jurisdiction over Avalon pursuant to Section 13.004 of the Water Code. However, Commission rules provide that the executive director shall decide whether an

⁹ *Id.* at 4-27.

¹⁰ A water and sewer utility is defined as "any person, corporation, cooperative corporation, affected county, or any combination of these persons or entities, other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others. 16 TAC 24.3(54).

investigation is appropriate and should be initiated. 16 TAC § 22.246(d) provides that “[u]pon receiving an allegation of a violation or a continuing violation, the executive director shall determine whether an investigation should be initiated.” Therefore, “although an enforcement proceeding may arise from a complaint, the rules give the Commission, *not a complainant*, the discretion to initiate an enforcement proceeding.”¹¹ Nothing in the Water Code nor the Commission’s rules provide for enforcement actions by an individual complainant. Therefore, Ms. Gillespie’s request for an investigation fails to state a claim for which relief can be granted.


VI. CONCLUSION

Mrs. Gillespie does not state a claim upon which relief may be granted. Staff recommends dismissal of the formal complaint against Avalon. Staff respectfully requests that the ALJ issue an order consistent with the recommendation above.

Respectfully Submitted,

Margaret Uhlig Pemberton
Division Director
Legal Division

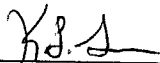
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¹¹ *Complaint of Allyson Rockett Against Pre-BuyElectric, LLC*, Docket No. 35921, Order No. 2 at 3 (Apr. 2, 2009) (emphasis added).

CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on April 10, 2015, in accordance with P.U.C. Procedural Rule 22.74.



Katherine Lengieza Gross