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DOCKET NO. 43146

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

**PUBLIC UTILITY COMMISSION
OF TEXAS**

2015 JUNE 10 AM 10:02
PUBLIC UTILITY COMMISSION
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COMMISSION STAFF'S REVISED STATEMENT OF POSITION

COMES NOW the Staff of the Public Utility Commission of Texas, representing the public interest and files this Revised 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, that docket was transferred to the Commission, and 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 email service of Avalon's response timely, 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 timely filed its statement of position on April 10, 2015. Staff now files this revised 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 (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 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

¹ Complaint at 2 (Sept. 16, 2014).

² Complaint at 2-5 (Sept. 16, 2014).

³ Complaint at 2-3 (Sept. 30, 2014).

In her October 1, 2014 letter, Ms. Gillespie alleges that Avalon did not, in violation of its bylaws, 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 both Section 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 Sections 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

IV. JURISDICTION

Section 13.004 of the Texas Water Code provides:

(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

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).

⁹ *Id.* at 4-27.

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).

Section 13.002(24) of the Texas Water Code states that:

"Water supply or sewer service corporation" means a nonprofit corporation organized and operating under Chapter 67 that provides potable water service or sewer service for compensation and that has adopted and is operating in accordance with by-laws or articles of incorporation which ensure that it is member-owned and member-controlled.

V. STAFF'S REVISED STATEMENT OF POSITION

On April 10, 2015, Staff filed a Statement of Position that the type of action raised by Ms. Gillespie's complaint is not appropriate relief in a formal complaint proceeding, and recommended that Ms. Gillespie's complaint be dismissed for failure to state a claim upon which relief may be granted.

The economic regulation of water and sewer service transferred to the PUC on September 1, 2014, pursuant to House Bill 1600. Upon further consideration of this complaint case, Staff withdraws its recommendation that Ms. Gillespie's complaint be dismissed for failure to state a claim upon which relief may be granted. As stated in Staff's initial Statement of Position, TWC § 13.004 authorizes the Commission to exercise jurisdiction over certain WSCs. In this proceeding, Staff seeks to determine whether Avalon is operating in compliance with TWC § 13.004.

Ms. Gillespie's complaint is that Avalon is failing, in various ways, to operate in accordance with its bylaws, and that Avalon is therefore failing to conduct annual meetings in compliance with 67.007 or to operate in a manner that complies with the requirements for classification as a nonprofit water service corporation under Section 13.002(24).

Staff respectfully recommends that Avalon be ordered to provide information to demonstrate that it is conducting annual meetings in compliance with 67.007 and operating in a manner that complies with the requirements for classification as a nonprofit water service

corporation under Section 13.002(24). Specifically, Staff asserts that Avalon should be required to provide the following information:

- 1) A copy of Avalon's current bylaws, and an acknowledgement from Avalon, if true, that those bylaws require Avalon to follow the Texas Open Meetings Act.¹⁰ If the bylaws do require Avalon to follow the Texas Open Meetings Act, Staff would assert that Avalon be required to additionally provide items 2-5, below.
- 2) A copy of the notice of potential violation from TCEQ dated April 17, 2014 (the exit interview form attached to Avalon's Response to Ms. Gillespie's complaint is from March 5, 2014), or other documentation that shows that the May 8, 2014 emergency meeting called by Avalon was necessary due to an "imminent threat to public health and safety."
- 3) Documentation that David Waishes was present at the May 8 or May 15, 2014 open meetings, and if not, the specific legal basis for signing the May 8, 2014 Corporate Resolution.
- 4) Documentation that Jimmy Brown and Matilda Williams were present at the February 24, 2015 monthly meeting of Avalon, and if not, the specific legal basis of signing any resolutions passed at that meeting.
- 5) Documentation that the hiring of a CPA firm on or before August of 2014 was voted on at a public meeting, and if not, the justification for not doing so.
- 6) Documentation that checks issued by Avalon for the last three months have been signed according to Avalon's bylaws.

V. CONCLUSION

For the reasons discussed above, Staff recommends that Avalon be ordered to provide the information requested above.

¹⁰Ms. Gillespie alleges that Avalon's bylaws require Avalon to follow the Texas Open Meetings Act and that Avalon has violated the Texas Open Meetings Act. This allegation, if true, would give the Commission jurisdiction over Avalon because TWC § 13.004 authorizes the Commission to exercise jurisdiction over certain water supply corporations (WSCs,) specifically if the WCS "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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on June 5, 2015, in accordance with P.U.C. Procedural Rule 22.74.



Katherine Lengieza Gross

13.002(11) and (24).”TWC § 13.002(24) defines a WSC as a nonprofit corporation that, among other things, is operating in accordance with by-laws that ensure that it is member-owned and member-controlled.