



Control Number: 43146



Item Number: 64

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DOCKET NO. 43146  
SOAH DOCKET NO. 473-16-2033.WS

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COMPLAINT OF CAROL D.  
GILLESPIE AGAINST AVALON  
WATER SUPPLY AND SEWER  
SERVICES CORPORATION  
(37985-1)

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§

BEFORE THE  
PUBLIC UTILITY COMMISSION  
OF TEXAS

PUBLIC UTILITY COMMISSION  
FILING CLERK

**MOTION TO DISMISS AND ALTERNATE**  
**MOTION TO CERTIFY QUESTION AND**  
**CONTINUE TEMPORARY ABATEMENT OF**  
**DISCOVERY AND HEARING SCHEDULE**

TO THE HONORABLE JUDGE STEPHANIE FRAZEE:

COMES NOW, Avalon Water Supply and Sewer Service Corporation ("Avalon" or Respondent") and files this Motion to Dismiss and Alternate Motion to Certify Question and Continue Temporary Abatement of the Discovery and Hearing Schedule in the above referenced matter. In support of the Motion, Avalon would show the following.

**I. Procedural Status**

On April 21, 2016, this matter was temporarily abated to allow the Parties to continue to negotiate a settlement. Because of the long history of acrimony between Complainant and Respondent, rather than negotiate directly with Complainant, Respondent requested Complainant to agree to mediation using the free mediation service provided to parties by the State Office of Administrative Hearings ("SOAH"). As Respondent understands it, because of the long history of acrimony between the parties, Complainant refused mediation. Additional abatements were granted through SOAH Orders No. 4 and 5.

By SOAH Order No. 5, a status report is due June 17. The status report has been or is expected to be filed reporting the breakdown of negotiations. Respondent requests that the matter continue to be abated until such time as this Motion can be resolved.

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## **II. Factual Bankground**

### **A. Respondent Avalon**

Avalon is a small rural water supply and sewer company (WSC). The WSC is owned by its member-customers. Its seven directors are elected by the membership and are unpaid volunteers. The WSC is located in and serves the community of Avalon, Texas. The community of Avalon is an unincorporated farming community located in southern Ellis County, Texas.

Avalon currently has approximately 340 member-customers. On information and belief, in the last nine years, only one complaint other than the one being considered in this docket, has been filed with the TCEQ or PUC by a member. That single complaint concerned a power outage on May 27, 2016.

Avalon, similar to WSCs across the State, has limited resources. Its annual gross receipts are generally around \$350,000. During the 2015 – 2016 period, complaints by Complainant have cost Avalon approximately \$100,000. If this matter continues as a contested case hearing before SOAH, it is anticipated that it will cost, at a minimum, an additional \$100,000. This financial burden must be alleviated. As summarized below, Avalon provides water and sewer services at an affordable rate to its customers and it would be a travesty if Avalon is run into bankruptcy because of complaints about how it runs its meetings and operates its office.

### **B. Complainant Gillespie**

Complainant has a meter from Avalon but it is not an active meter. She does not live in the Avalon community nor does she receive water or sewer service from Avalon. **Complainant does not complain about water or sewer service or about rates.** Because Complainant does not receive water or sewer service, Complainant would have no standing to make such complaints. Complainant has unleashed a barrage of complaints about how the WSC is administered, arguing that the complaints should be considered under Texas Water Code section 13.004. On information and belief, the underlying disagreement between the Parties, and one not mentioned in the Gillespie complaints, appears to involve the location of a service pipeline

crossing her property either within or outside the county right-of-way. For whatever reason, Ms. Gillespie started complaining about Avalon to the Ellis County District Attorney (DA) and then the TCEQ and then the PUC. Neither the DA nor the TCEQ found any wrong-doing by Avalon. She has filed at least five many-paged complaints. The main allegations are violations of the Texas Open Meetings Act and general displeasure with the way the Avalon Board administers the WSC. **There are no allegations about water or sewer service and no complaints about rates.**

### **C. Basis for Motion**

Texas Water Code 13.004 does not say how a case under the statute must be initiated, however, the TCEQ traditionally interpreted the statute to mean that a customer could initiate a complaint under the statute, but in the unlikely event that TCEQ staff could not address the matter without a contested case hearing, the TCEQ enforcement staff would file the case. The customer could join as an interested party, but the case would be driven by the agency. Through a series of unfortunate decisions at the PUC, however, this case is to be driven by the Complainant, not based on a legally articulated set of allegations, but on Complainant's long and rambling complaint letters filed with the TCEQ and then the PUC.

Nothing in Texas Water Code chapter 13 or in the PUC regulations authorizes the manner in which the agency has processed the Gillespie Complainants resulting in this contested case hearing. In fact, the PUC regulations related to complaints involve only electric and telecommunication utilities. On information and belief, PUC Docket Management has shoe-horned this complaint about a retail public utility into the existing PUC complaint regulations rather than looking to the existing TCEQ regulations or practice, which control until such time as the PUC amends its regulations to cover its new jurisdiction over retail public utilities.

When TCEQ transferred the complaints to the PUC and Gillespie made additional complaints to the PUC, the PUC staff reviewed all of her information and obtained information from Avalon and ultimately decided that there was no cause of action under Texas Water Code section 13.004. On information and belief, however, even after a second round of information gathering and a second position stated by PUC staff that there was no cause of action, Docket Management referred the matter to SOAH for a contested case hearing. The staff's pleadings are

attached as Exhibits A and B. The issues referred to SOAH are set out in a PUC order, which is attached as Exhibit C.

### **III. Motion to Dismiss with Prejudice and Alternative, Motion for Certified Question**

Such complaints against retail water and wastewater utilities, because of their small profit margin, and WSCs in particular (no profit margin for WSCs), should not be handled and processed in this manner. If this matter goes forward and bankrupts the WSC, even though the staff investigation found no basis for PUC action on the complaints and even though **no complaints have been made about water or sewer service or rates, nor would Complainant have standing to make water and sewer service complaints**, this will set a tragic precedent for all retail water and wastewater utilities throughout the State. The method used by the TCEQ for section 13.004 cases should be followed by the PUC and other than the fact that the WSC is now at SOAH, there would be nothing stopping the PUC from adopting that procedure. Therefore, Avalon moves that this matter be dismissed with prejudice on the basis that the PUC has no jurisdiction. In the alternative, Avalon moves that the question of whether this matter has been appropriately handled by the agency and whether it should be referred back to PUC staff, be certified to the Commissioners.

The bottom line is that Avalon simply does not have the funds to continue to engage in this protracted proceeding. The complaints by Gillespie, who is only one of the over three hundred members, are causing a huge monetary and resource burden on Avalon and its members, as summarized above. On information and belief, Complainant's stated goal is to run Avalon into bankruptcy so that it will be forced into receivership.

Complainant began intense discovery forcing Avalon to spend its limited funds on attorney fees. The Parties' Counsel met to discuss possible settlement, but no progress was made and Complainant refused to go to mediation. The parties did agree to abate the discovery and hearing schedule to continue negotiating and that abatement ends June 17. Much of the discovery responses, replies, objections, and motions are still pending. Complainant stated that further discovery was planned including depositions. On information and belief, Complainant

has stated that her desire is to bankrupt the WSC. When the abatement is lifted, this is a likely outcome.

This background is provided, not to continue the acrimony, but to show the ALJ that this motion is filed in good faith. Because mediation has been rejected, Avalon must endeavor to limit the financial effects of this matter. Avalon is at the mercy of SOAH in this legal morass. If this matter is allowed to proceed in this manner, Avalon may well be forced into bankruptcy. Additionally, water supply corporations throughout the State will be in the same jeopardy if, as in this case, a disgruntled customer, whom PUC staff believes has no recourse under Texas Water Code section 13.004, decides to pursue a personal vendetta.

#### **IV. Alternative Motion for Certified Question**

In the alternative, Respondent moves that the ALJ certify a more limited question to the Commissioners for resolution, as follows.

Discovery by Complainant has made it clear, if it was not already clear from the breadth of the complaints, that she believes the scope of the PUC inquiry into a WSC's operations authorized by Texas Water Code section 13.004 encompasses all actions of the WSC. Respondent believes that the scope of authority is limited to determining whether a WSC is a non-profit organization. As evidenced by the PUC's referral order, the parameters of a section 13.004 inquiry have not been defined. Because this is purely a legal question, it is one to be determined by the PUC and not by SOAH.

The Commission's Preliminary Order, a copy of which is attached as Exhibit C, identifies the following issues that must be addressed in this docket:

- "1. Is Avalon failing to comply with TWC § 13.004?
2. Is Avalon failing to conduct annual or special meetings in compliance with Section 67.007? TWC § 13.004(a)(1).
3. Is Avalon operating in a manner that fails to comply with the requirements for classification as a nonprofit water supply or sewer service corporation as prescribed by TWC §§ 13.002(11) and (24)? TWC § 13.004(a)(2).

4. What should the Commission require of Avalon if it is failing to comply with TWC § 13.004?"

For the Administrative Law Judge's convenience, an excerpt of the Texas Water Code showing Texas Water Code sections 13.002(11) and (24), 13.004, and 67.007 is attached as Exhibit D.

Texas Water Code section 13.004 must be put in context. Rural areas of the state are often served by a "water supply or sewer service corporation" (WSC). A WSC is a nonprofit, member-owned and member-controlled corporation organized and operating under Texas Water Code chapter 67 that provides potable water service or sewer service for compensation. Respondent is a WSC.

Many of the PUC's rules under 16 Texas Administrative Code chapter 24, subchapter E, governing customer service requirements do not apply to WSCs. The PUC has appellate jurisdiction of rates set by a WSC. This minimal level of supervision in part reflects that WSCs operate on a nonprofit basis. More fundamentally, however, it reflects that WSCs must be governed by boards of directors elected by member customers. Finally, it reflects that rural water companies like Avalon are usually quite small, with a small number of members and limited resources, and are managed by a volunteer board of directors.

Respondent argues that the only jurisdiction the PUC has over Gillespie's complaint is in the two narrowly defined instances set out in Texas Water Code section 13.004. Under Texas Water Code section 13.004, the agency may obtain original jurisdiction in two instances and only two instances: (1) if it finds that the WSC is failing to conduct annual or special meetings in compliance with Texas Water Code Section 67.007; or (2) if the agency finds that a WSC is operating in a manner that does not comply with the requirements for classification as a WSC prescribed by Texas Water Code Sections 13.002(11) and (24). Only if the PUC makes one of these two specific findings about Avalon, and thus obtains original jurisdiction over Avalon, do the PUC regulations pertaining to a "water and sewer utility" apply.

The PUC's original jurisdiction over a WSC ends if the PUC's order under 13.004 expires, or the WSC demonstrates that for the past 24 consecutive months it has conducted annual meetings as required and has operated in a manner that complies with the membership and nonprofit organization requirements for WSCs. See 16 Tex. Admin. Code § 24.35.

Avalon is a nonprofit corporation organized and operating under Texas Water Code chapter 67. It provides potable water service and sewer service for compensation. It has adopted and is operating according to its by-laws and articles of incorporation, which ensure that Avalon is member-owned and member-controlled. Avalon does not provide water or sewer service to individuals who are not members. Avalon conducts annual and special meetings in compliance with Texas Water Code section 67.007. For at least the past 24 months and probably longer, Avalon has conducted annual meetings as required and has operated in a manner that complies with the membership and nonprofit organization requirements for WSCs.

Gillespie's complaint is primarily based upon issues outside those authorized for an inquiry under Texas Water Code 13.004 and is based on events that occurred not only more than 24 months ago, but events going back six years and events that occurred during the term of prior boards of directors. For example, complaints about Avalon's tariff and rules and regulations relating to or affecting the rates, utility service, product, or commodity furnished are not properly considered under section 13.004. While Avalon must file its tariff with the PUC, the filing, according to statute and regulation, "is for information purposes only." See Tex. Water Code § 13.136(c); 16 Tex. Admin. Code § 24.21(j).

As another example, complaints about whether Avalon complies with the Open Meetings Act are outside the scope of this case. Although the Open Meetings Act applies to WSCs, alleged non-compliance with the Act can only be addressed as provided in the Act, which requires litigation in state courts. The Open Meetings Act provides that an interested person "may bring an action by

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*Avalon Motion to Dismiss, etc.*



mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body. See Government Code Section 551.142. The PUC has no jurisdiction to order such remedies.

In the event that the PUC finds that Avalon is failing to comply with Texas Water Code section 13.004, the only remedy allowed by Texas law is to obtain original jurisdiction over Avalon and apply PUC regulations pertaining to a “water and sewer utility” to Avalon until such time as Avalon can again demonstrate that for 24 consecutive months it has conducted annual meetings as required and has operated in a manner that complies with the membership and nonprofit organization requirements for WSCs. See 16 Tex. Admin. Code 24.35.

If the Commission accepts the Complainant’s expansive view of the scope of inquiry under Texas Water Code section 13.004 it will be drawn into factual disputes about an entire range of issues that Respondent believes are not intended to be covered by a section 13.004 inquiry. For example, Complainant takes the position that inquiry in this proceeding can be made into whether Avalon is complying with public water supply regulations, even though Complainant receives no water service.

Using logic similar to that used by Complainant to defend her myriad requests for admission and documents regarding Open Meetings Act issues, Gillespie has posed requests for admission and interrogatories inquiring into facts that Complainant categorizes as being relevant to “the required minimum drinking water capacity rules . . .” Gillespie argues that because these requests are based on 30 Texas Administrative Code section 290.45 (TCEQ rule 290.45), they are relevant to whether Avalon has failed to comply with applicable public drinking water capacity requirements, which in turn, argues Gillespie, is relevant to whether Avalon is complying with its bylaws, which in turn, argues Gillespie, is relevant to whether Avalon is complying with Texas Water Code section 67.007, which in turn, argues Gillespie, is relevant to whether the PUC should take action against Avalon under Texas Water Code 13.004. Gillespie’s tortured path to relevancy should give pause, particularly since it is based on such tenuous

connections and is based on the original flawed premise that the PUC has jurisdiction to even make findings of fact on compliance with Texas Commission on Environmental Quality rules.

These examples of arguments made by the Parties make it clear that a decision about the scope of the inquiry is essential and the ALJ should not be in the position of making the decision piecemeal in response to discovery objections and later to objections to pre-filed testimony. If that process unfolds, both Parties will have spent huge resources, which may not have been necessary. Avalon, for one, cannot afford to do so. Every dollar spent on these differences of opinion about the scope of the inquiry, is a dollar not available to support Avalon's core mission: providing water and sewer service to its members. Establishing the standards by which the ALJ must rule on the issues identified by the Commission is uniquely within the Commission's judgment and authority.

#### **V. Motion to Continue Abatement**

Avalon moves that the hearing and discovery schedule be abated while this Motion is considered and during the pendency of any related proceedings.

#### **VI. Motion for Discovery Schedule Hearing**

In the further alternative, if the ALJ determines not to certify these questions to the Commissioners and denies Avalon's motion for further abatement, Avalon moves that a hearing, in person, be held to clarify where the parties are in the discovery process and to set new deadlines for all pending discovery matters, which are in various stages of the discovery process, including a pending Avalon Motion for Protective Order.

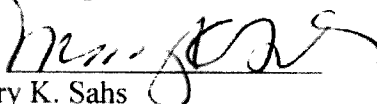
## **VII. Prayer**

WHEREFORE, PREMISES CONSIDERED. Respondent respectfully prays as follows:

1. That, the ALJ dismiss this matter with prejudice.
2. That in the alternative, pursuant to PUC Procedural Rule Section 22.127, the ALJ certify to the commission the issue of whether this matter should be before SOAH and if so, whether the PUC Executive Director should be the moving party and be required to legally plead the matter to provide appropriate notice to Avalon of the questions at issue;
3. That in the further alternative, pursuant to PUC Procedural Rule Section 22.127, the ALJ certify to the commission the scope of the inquiry under Texas Water Code section 13.004, the interpretation of a statutory standard that is committed to the discretion or judgment of the commission by law.
4. Further, Respondent prays that pursuant to PUC Procedural Rule Section 22.127 and 1 Texas Administrative Code Section 155.15, the Administrative Law Judge continue the temporary abatement of the hearing and discovery schedule until such time as the issues raised in this Motion are resolved.
5. In the further alternative, if the ALJ does not dismiss this matter or certify either question to the Commissioners and denies Avalon's motion for further abatement, Avalon moves that a hearing be held in person to clarify where the parties are in the discovery process and to set new deadlines for all pending discovery matters.
6. That the ALJ consider Avalon's counsel's "vacation" letter on file with the PUC when setting deadlines or scheduling a hearing. See attached Exhibit E. Counsel is the sole attorney representing Avalon and is a solo practitioner. Counsel will be out of state and unavailable from July 31 through August 8.

Respectfully submitted.  
MARY K. SAHS, P.C.


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By:   
Mary K. Sahs  
State Bar No. 17522300

ATTORNEY FOR RESPONDENT,  
AVALON WATER SUPPLY AND  
SEWER SERVICE  
CORPORATION

**CERTIFICATE OF SERVICE**

I certify that, on June 17, 2016, I have served a copy of this filing upon all known parties of record via email with read receipt requested per SOAH Order No. 2.

  
Mary K. Sahs

## **EXHIBIT A**

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.<sup>1</sup>

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.<sup>2</sup>

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

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<sup>1</sup> Complaint at 2 (Sept. 16, 2014).

<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

### **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.<sup>8</sup>

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.<sup>9</sup>

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<sup>3</sup> Complaint at 2-3 (Sept. 30, 2014).

<sup>4</sup> Complaint at 1 (Oct. 6, 2014).

<sup>5</sup> Complaint at 1-2 (Feb 3, 2015).

<sup>6</sup> Complaint at 2-3 (Feb. 6, 2015).

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

<sup>8</sup> 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,<sup>10</sup> 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

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<sup>9</sup> *Id.* at 4-27.

<sup>10</sup> 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.”<sup>11</sup> 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

Shelah J. Cisneros  
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<sup>11</sup> *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

## **EXHIBIT B**

**PUC DOCKET NO. 43146**

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

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**PUBLIC UTILITY COMMISSION  
OF TEXAS**

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**COMMISSION STAFF'S SUPPLEMENTAL RECOMMENDATION**

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this Supplemental Recommendation, and would show the following:

**I. BACKGROUND**

On August 25, 2014, Carol Gillespie filed a complaint with the Texas Commission on Environmental Quality against Avalon Water Supply and Sewer Services Corporation (Avalon) regarding alleged violations of the Texas Open Meetings Act by Avalon. On September 2, 2015, Order No. 4 was issued, which required Avalon to submit additional information on or before October 2, 2015, and that Staff should file a supplemental recommendation in this proceeding and additional procedural schedule, if appropriate, on or before November 4, 2015. Avalon filed additional information with the Commission on October 6 and 22, 2015. Staff's supplemental recommendation is therefore timely filed.

**II. SUPPLEMENTAL RECOMMENDATION**

The Commission's jurisdiction in this proceeding is based on TEX. WATER CODE § 13.004 (TWC). As noted by Avalon, the TWC "prescribes a narrow jurisdiction" for the Commission over water supply and sewer service corporations.<sup>1</sup> Under TWC § 13.004(a), the Commission has jurisdiction only if the water supply 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)." TWC § 13.002(24) defines a water supply or sewer service corporation as "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."

<sup>1</sup> Avalon's Response to Order No. 4 at 1 (Oct. 6, 2015).

If Commission Staff were convinced that a complainant had identified violations of TWC §§ 13.002(11) and (24) beyond a mere minor or technical violation, then Commission Staff could file a petition that would request that the water supply and sewer service corporation be found to be out of compliance with TWC § 13.004. Such a petition, if successful, would result in that entity losing its status as a water supply and sewer service corporation and being subject to regulation as a water utility.

Ms. Gillespie, in her original complaint and subsequent filings, including her response to Avalon's response to Order No. 4, alleges that Avalon has violated the Texas Open Meeting Act and other requirements of Avalon's by-laws. After a thorough review of the information submitted by Avalon in its responses, Staff does not believe any violation by Avalon of the Texas Open Meeting Act or Avalon's bylaws exist. Specifically, the complaints made by Ms. Gillespie relating to violations of the Texas Open Meeting Act were either cured by subsequent actions of Avalon's Board, as cited by Avalon under *Markowski v. City of Marlin*, 940 S.W.2d 720 (Tex.Civ.App. - Waco 1997, writ denied),<sup>2</sup> or address issues outside of the Commission's consideration under TWC § 13.004. Based upon Staff's review, Staff recommends that Ms. Gillespie's complaint be dismissed for failure to state a claim for which relief could be granted.

### III. CONCLUSION

Staff recommends that Ms. Gillespie's formal complaint be dismissed for failure to state a claim for which relief could be granted. Staff respectfully requests that the ALJ issue an order consistent with the recommendation above.

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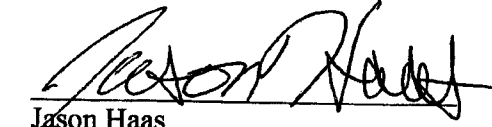
<sup>2</sup> *Id.* at 7,8.

**Dated: November 4, 2015**

Respectfully Submitted,

Margaret Uhlig Pemberton  
Division Director – Legal Division

Karen S. Hubbard  
Managing Attorney – Legal Division

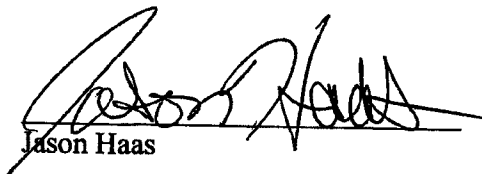


Jason Haas

Attorney-Legal Division  
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1701 N. Congress Avenue  
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Austin, Texas 78711-3326

**CERTIFICATE OF SERVICE**

I certify that a copy of this document will be served on all parties of record on November 4, 2015,  
in accordance with 16 Tex. Admin. Code § 22.74.

  
Jason Haas

## **EXHIBIT C**



SOAH DOCKET NO. 473-16-2033.WS  
PUC DOCKET NO. 43146

2016 MAR 22 AM 11:24

COMPLAINT OF CAROL D. GILLESPIE § PUBLIC UTILITY COMMISSION  
AGAINST AVALON WATER SUPPLY § FILING CLERK  
AND SEWER SERVICES § OF TEXAS  
CORPORATION (37985-I) §

**PRELIMINARY ORDER**

On August 24, 2014, Carol Gillespie filed a complaint with the Texas Commission on Environmental Quality against Avalon Water Supply and Sewer Services Corporation regarding alleged violations of Texas Water Code (TWC) § 13.004. Avalon is a Texas Water Code chapter 67 water supply and sewer service company located Avalon, Texas and serves approximately 340 customers.<sup>1</sup> Ms. Gillespie alleges that Avalon violated TWC § 13.004(a)(1) and (2) by not operating in accordance with the bylaws or in a manner that complies with the requirements for classification as a nonprofit water service corporation water supply corporation.<sup>2</sup>

On September 1, 2014, this case transferred to the Public Utility Commission of Texas (Commission).<sup>3</sup> This docket was referred to the State Office of Administrative Hearings (SOAH) on January 25, 2016. Lists of issues were timely filed by Carol Gillespie, Avalon, and Commission Staff.

**I. Issues to be Addressed**

The Commission must provide to the administrative law judge (ALJ) a list of issues or areas to be addressed in any proceeding referred to SOAH.<sup>4</sup> After reviewing the pleadings

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<sup>1</sup> Response of Avalon Water Supply and Sewer Services Corporation to the Complaint of Carol Gillespie at 2 (March 4, 2015).

<sup>2</sup> Letter from Carol Gillespie, Response to Order No. 3 at 2 (March 27, 2015).

<sup>3</sup> Act of May 13, 2013, 83rd Leg., R.S., ch. 170 (HB 1600), § 2.96, 2013 Tex. Gen. Laws 725, 730; Act of May 13, 2013, 83rd Leg., R.S., ch. 171 (SB 567), § 96, 2013 Tex. Gen. Laws 772.

<sup>4</sup> Tex. Gov't Code Ann. § 2003.049(e) (West 2011).

submitted by the parties, the Commission identifies the following issues that must be addressed in this docket:

1. Is Avalon failing to comply with TWC § 13.004?
2. Is Avalon failing to conduct annual or special meetings in compliance with Section 67.007? TWC § 13.004(a)(1).
3. Is Avalon operating in a manner that fails to comply with the requirements for classification as a nonprofit water supply or sewer service corporation as prescribed by TWC §§ 13.002(11) and (24)? TWC § 13.004(a)(2).
4. What should the Commission require of Avalon if it is failing to comply with TWC § 13.004?

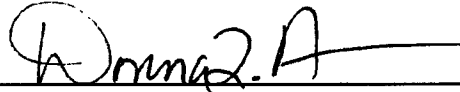
This list of issues is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by the ALJ or by the Commission in future orders issued in this docket. The Commission reserves the right to identify and provide to the ALJ in the future any additional issues or areas that must be addressed, as permitted under Tex. Gov't Code Ann. § 2003.049(e).

## **II. Effect of Preliminary Order**

This Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order before the SOAH ALJ at hearing. The SOAH ALJ, upon his or her own motion or upon the motion of any party, may deviate from this Order when circumstances dictate that it is reasonable to do so. Any ruling by the SOAH ALJ that deviates from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of a SOAH ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

SIGNED AT AUSTIN, TEXAS the 22<sup>nd</sup> day of March 2016.

PUBLIC UTILITY COMMISSION OF TEXAS



DONNA L. NELSON, CHAIRMAN



KENNETH W. ANDERSON, JR., COMMISSIONER



BRANDY MARTY MARQUEZ, COMMISSIONER

## **EXHIBIT D**

EXCERPT OF TEXAS WATER CODE

**Sec. 13.002. DEFINITIONS.** In this chapter:

. . .

(11) "Member" means a person who holds a membership in a water supply or sewer service corporation and is a record owner of a fee simple title to property in an area served by a water supply or sewer service corporation or a person who is granted a membership and who either currently receives or will be eligible to receive water or sewer utility service from the corporation. In determining member control of a water supply or sewer service corporation, a person is entitled to only one vote regardless of the number of memberships the person owns.

. . .

(24) "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. The term does not include a corporation that provides retail water or sewer service to a person who is not a member, except that the corporation may provide retail water or sewer service to a person who is not a member if the person only builds on or develops property to sell to another and the service is provided on an interim basis before the property is sold.

. . .

**Sec. 13.004. JURISDICTION OF UTILITY COMMISSION OVER CERTAIN WATER SUPPLY OR SEWER SERVICE CORPORATIONS.** (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).

(b) If the water supply or sewer service corporation voluntarily converts to a special utility district operating under Chapter 65, the utility commission's jurisdiction provided by this section ends.

Added by Acts 2005, 79th Leg., Ch. 1057 (H.B. 1358), Sec. 1.01, eff. September 1, 2005.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 170 (H.B. 1600), Sec. 2.09, eff. September 1, 2013.

Acts 2013, 83rd Leg., R.S., Ch. 171 (S.B. 567), Sec. 9, eff. September 1, 2013.

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**Sec. 67.007. ANNUAL OR SPECIAL MEETING OF RETAIL CORPORATION.** (a) The annual meeting of the members or shareholders of the corporation must be held between January 1 and May 1 at a time specified by the bylaws or the board.

(a-1) A quorum for the transaction of business at a meeting of the members or shareholders is a majority of the members and shareholders present. In determining whether a quorum is present, all members and shareholders who mailed or delivered ballots to the independent election auditor or the corporation on a matter submitted to a vote at the meeting are counted as present.

(b) The board shall adopt written procedures for conducting an annual or special meeting of the members or shareholders in accordance with this section and Sections

67.0052, 67.0053, and 67.0054. The procedures shall include the following:

- (1) notification to eligible members or shareholders of the proposed agenda, location, and date of the meeting;
- (2) director election procedures, including candidate application procedures;
- (3) approval of the ballot form to be used; and
- (4) validation of eligible voters, ballots, and election results.

(c) The board shall adopt an official ballot form to be used in conducting the business of the corporation at any annual or special meeting. No other ballot form will be valid. Ballots from members or shareholders are confidential and are exempted from disclosure by the corporation until after the date of the relevant election.

(d) The board shall select an independent election auditor not later than the 30th day before the scheduled date of the annual meeting. The independent election auditor is not required to be an experienced election judge or auditor and may serve as an unpaid volunteer. At the time of selection and while serving in the capacity of an independent election auditor, the independent election auditor may not be associated with the corporation as:

- (1) an employee;
- (2) a director or candidate for director; or
- (3) an independent contractor engaged by the corporation as part of the corporation's regular course of business.

(e) This section applies only to a corporation that provides retail water or sewer service.

Added by Acts 1997, 75th Leg., ch. 166, Sec. 2, eff. Sept. 1, 1997. Amended by Acts 1999, 76th Leg., ch. 54, Sec. 1, eff. May 10, 1999.

Amended by:

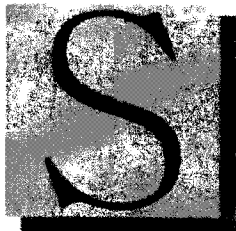
Acts 2011, 82nd Leg., R.S., Ch. 10 (S.B. 333), Sec. 2, eff.  
September 1, 2011.

Acts 2013, 83rd Leg., R.S., Ch. 84 (S.B. 447), Sec. 5, eff.  
May 18, 2013.

Acts 2013, 83rd Leg., R.S., Ch. 84 (S.B. 447), Sec. 6, eff.  
May 18, 2013.



## **EXHIBIT E**



Mary K. Sahs, P.C.

attorney at law

June 15, 2016

Central Records Filing Clerk  
Public Utility Commission of Texas  
1701 N. Congress Ave.  
P.O. Box 13326  
Austin, TX 78711-3326

RE: **DOCKET NO. 43146; SOAH DOCKET NO. 473-16-2033.WS**  
Complaint of Carol D. Gillespie against Avalon Water Supply  
and Sewer Services Corporation (37985)

**Vacation Letter**

Dear Filing Clerk:

The undersigned is the sole counsel for Avalon Water Supply and Sewer Services Corporation and is a solo practitioner. The purpose of this letter is to notify the PUC and the Administrative Law Judge that I will be out of the office August 1-8, 2016. I ask for consideration of this unavailability in any scheduling for this case.

Sincerely,

Mary K. Sahs

Cc: All parties of record