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COMPLAINT OF CAROL D. § BEFORE THE STATE OFFICE OF PUBLIC UTILITY COMMISSION
GILLESPIE AGAINST AVALON § OF FILING CLERK
WATER SUPPLY AND SEWER § ADMINISTRATIVE HEARINGS
SERVICES CORPORATION §

COMMISSION STAFF’S RESPONSE TO AVALON’S MOTION TO DISMISS AND ALTERNATE MOTION TO CERTIFY QUESTION AND CONTINUE TEMPORARY ABATEMENT OF DISCOVERY AND HEARING SCHEDULE

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this Reply to Avalon’s Motion and would show the following:

I. BACKGROUND

On April 20, 2016, the parties filed a Joint Motion to Temporarily Abate Discovery and Hearing Schedule. On April 21, 2016, SOAH Order No. 3 was issued which abated the proceeding. The abatement was continued in SOAH Order No. 4, issued May 31, 2016. SOAH Order No. 5, issued on Jun 8, 2016, continued the abatement until June 17, 2016, at which time the parties were required to file a status report or a joint revised procedural schedule. On June 17, 2016, Staff filed a proposed procedural schedule. On June 17, 2016, Avalon Water Supply and Sewer Service Corporation (Avalon) filed a Motion to Dismiss and Alternate Motion to Certify Question and Continue Temporary Abatement of Discovery and Hearing Schedule.

II. RESPONSE TO AVALON’S MOTION

This proceeding is evaluating the actions of Avalon pursuant to Texas Water Code (TWC) § 13.004, which states, in part:

- (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).

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TWC sections 13.002(11) and (24) define “member” and “water supply or sewer service corporation,” respectively. “Member” is defined, in part, as:

[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.

A “water supply or sewer service corporation” is defined, in part, 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.”

1. Motion to Dismiss

Avalon begins its motion with a description of the parties. Avalon describes itself as a “small rural water supply and sewer company (WSC).”¹ Avalon also describes the financial cost that it has incurred.² Avalon states that Ms. Gillespie does not have any complaints about water or sewer service or rates. However, it should be noted that TWC § 13.004 does not address service or rates, only if the WSC “is failing to conduct annual or special meetings in compliance with Section 67.007, or is operating in a manner that does not comply with the requirements for classifications as a nonprofit water supply or sewer service corporation....”

Avalon complains about the process under which this proceeding is conducted, referring to previous procedures at the Texas Commission on Environmental Quality (TCEQ), the agency that conducted this type of proceeding before jurisdiction was transferred in 2014.³ Avalon maintains that “[n]othing in Texas Water Code chapter [sic] 13 or in the PUC regulations authorizes the manner in which the agency has processed the Gillespie complaint.”⁴ As described below, Avalon’s argument is not applicable to this proceeding.

Avalon continues with its explanation, again pointing out that the complaint does not involve water or sewer service or rates and the TCEQ process should be used by the Commission. However, this explanation, in Avalon’s view, leads to the argument that the application should be

¹ Avalon Motion to Dismiss at 2 (June 17, 2016).

² *Id.*

³ CITE to statute?

⁴ Avalon Motion at 4.

dismissed because the Commission has no jurisdiction.⁵ Commission rule, 16 Tex. Admin. Code § 22.181(a)(1)(A) (TAC) allows the presiding office to recommend dismissal of a proceeding for “lack of jurisdiction.” However, this argument ignores the plain reading of TWC § 13.004 which states that “**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 certain criteria are met. [Emphasis added] The statute requires the Commission to make certain findings, and if those findings are made, the Commission has certain jurisdiction over a WSC. Therefore, under TWC § 13.004, based on the plain reading of the statute, the Commission has jurisdiction in this proceeding, regardless of how the complaint is processed. Avalon provides no support, either in statute or case law, to this argument.

Finally, Avalon again raises its financial situation, stating that it may be forced into bankruptcy, which Avalon believes is the intent of Ms. Gillespie.⁶ In any proceeding, Staff is mindful of the costs that are incurred by utilities and market participants. However, there is no standard under 16 TAC 22.181(a)(1) relating to financial condition as one of the reasons to recommend dismissal, other than “other good cause shown.”⁷ While Staff is sympathetic to Avalon’s position, Staff does not recommend that the proceeding should be dismissed only because of Avalon’s financial situation. Allowing Avalon to dismiss the proceeding at this point would negate the Commission’s authority to determine if Avalon meets the requirements of TWC § 13.004, and thus falls under the Commission’s jurisdiction.

2. Motion to Certify Question

Staff recommends that Avalon’s question on the scope of a proceeding under TWC § 13.004 be certified to the Commission. Gillespie has sought discovery on a wide range of issues related to Avalon’s by-laws.⁸ For example, Gillespie has alleged that Avalon has violated its by-laws with respect to a conflict of interest policy,⁹ the capacity of its wells,¹⁰ and the Texas Open Meetings Act,¹¹ in addition to failing to conduct annual or special meetings in compliance with Section 67.007. To rebut one of Gillespie’s issues listed above, Avalon points to Tex. Gov’t Code

⁵ *Id.* at 4.

⁶ *Id.* at 4-5.

⁷ 16 TAC § 22.181(a)(1)(H).

⁸ See, e.g., Complainant Gillespie’s Motion to Compel (April 15, 2016).

⁹ *Id.* at 4-5.

¹⁰ *Id.* at 5-7.

¹¹ *Id.* at 4.

§ 551.142 as the appropriate remedy to address a violation of the Texas Open Meetings Act, noting that the Commission does not have jurisdiction to order such remedies.¹²

Avalon argues that TWC § 13.004 should be interpreted narrowly, and that “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.”¹³ Gillespie interprets the scope of this proceeding much more broadly, arguing that the Commission “is to determine whether Avalon is complying with TWC § 13.004 which includes by reference the TWC § 13.002(11) and (24) and chapter 67 requirements to operate ‘in accordance with bylaws or articles of incorporation.’”¹⁴ Staff agrees that the scope of the Commission’s review under TWC § 13.004 should be clarified so that the complaint may be properly evaluated.

III. CONCLUSION

Staff recommends that Avalon’s Motion to Dismiss be denied, but that the alternative Motion to Certify Question to the Commission be granted.

¹² Avalon’s Motion at 7-8.

¹³ *Id.* at 7.

¹⁴ Gillespie’s Motion to Compel at 3, citing TWC § 13.002(24).

Dated: June 24, 2015

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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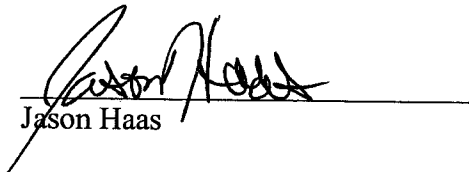


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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on June 24, 2016, in accordance with 16 TAC § 22.74.



Jason Haas