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

PUBLIC UTILITY COMMISSION  
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PUBLIC UTILITY COMMISSION

OF TEXAS

**COMPLAINANT GILLESPIE'S RESPONSE TO AVALON WATER  
SUPPLY AND SEWER SERVICES CORPORATION'S MOTIONS TO DISMISS  
AND CERTIFY QUESTION**

**TO THE HONORABLE JUDGE STEPHANIE FRAZEE:**

COMES NOW, Carol D. Gillespie ("Gillespie" or "Complainant") and files this Response to Avalon Water Supply and Sewer Services Corporation's ("Avalon" or "Corporation") Motion to Dismiss and Alternate Motion to Certify Question and Continue Temporary Abatement of Discovery and Hearing Schedule ("Response"). In support of the foregoing Response, Complainant respectfully shows the following:

**I. BACKGROUND**

1. On July 14, 2014, Carol D. Gillespie filed her original complaint against Avalon with the Texas Commission on Environmental Quality ("TCEQ"), which complaint was supplemented by additional complaint letters and other information on August 14, 2014, August 20, 2014, September 30, 2014, October 6, 2014 and February 3, 2015.

2. After jurisdiction was transferred to the Public Utility Commission of Texas ("Commission") on September 1, 2014, Ms. Gillespie's complaint was referred to the State Office of Administrative Hearings ("SOAH") for hearing on January 25, 2016.

3. SOAH Order No. 2 was issued on March 18, 2016, establishing a hearing schedule.

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4. On March 22, 2016, the Commission issued a Preliminary Order establishing a list of issues to be addressed in the hearing before SOAH, including whether Avalon was failing to comply with Texas Water Code §§ 13.002, 13.004 and 67.007 (“TWC”).

5. On April 21, 2016, after the parties moved jointly to abate this proceeding for settlement negotiations, Order No. 3 was issued abating the discovery and hearing schedule until a status report was filed on May 20, 2016.

6. On May 20, 2016, the Commission staff on behalf of the parties filed a status report seeking an extension to the abatement.

7. On May 31, 2016, Order No. 4 was granted extending the abatement period to June 3, 2016.

8. On June 3, 2016, Commission staff again sought to extend the abatement period on behalf of the parties to June 17, 2016 which request was granted on June 8, 2016 by the Administrative Law Judge (“ALJ”).

9. On June 17, 2016, before the next status report was filed, Avalon filed its Motion to Dismiss and Alternate Motion to Certify Question and Continue Temporary Abatement of Discovery and Hearing Schedule (“Motions to Dismiss and Certify Question”).

10. Complainant’s Response to Avalon’s Motions to Dismiss and Certify Question is filed within five (5) working days of receipt and is therefore timely.

## **II. LEGAL ARGUMENT**

### **A. Avalon’s Motion to Dismiss Lacks Merit**

#### **1. The Commission Has Jurisdiction**

Avalon’s kitchen-sink Motion to Dismiss raises multiple specious issues. Complainant will address each in turn; however, it appears Avalon’s chief legal argument is that the Commission lacks jurisdiction. At the same time as Avalon claims the

Commission lacks jurisdiction to consider a complaint under TWC § 13.004, it concedes that the Legislature transferred jurisdiction for these types of cases from the TCEQ to the Commission.<sup>1</sup> Strangely, Avalon argues that the Commission lacks jurisdiction while at the same time arguing the TCEQ traditionally had jurisdiction over these matters so the Commission should follow some unspecified TCEQ precedent.<sup>2</sup> Avalon's claims not only lack merit, they do not make sense.

TWC § 13.004 clearly vests the Commission with jurisdiction over water supply and sewer service corporations ("WSCs") as indicated by the explicit subtitle and text of the statute:

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).<sup>3</sup>

Avalon provides no evidence that the Commission has somehow been stripped of this authority. Nor does Avalon provide any basis for its reasoning that some claimed TCEQ policy controls the Commission process – Avalon neither identifies by docket number nor explains how the former TCEQ policy operated nor provides legal authority for the theory that the Commission cannot run its own agency. Remarkably, Avalon states that the Commission's complaint process involves electric and telecommunications utilities

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<sup>1</sup> Avalon's Motions to Dismiss and Certify Question at 3.

<sup>2</sup> *Id.*

<sup>3</sup> TWC § 13.004 (emphasis added).

only, but ignores the established complaint process for water utilities.<sup>4</sup>

The fact that this docket may be the Commission's first case under TWC § 13.004 is not the same thing as the Commission lacking jurisdiction.<sup>5</sup> Indeed, the TWC § 13.004 complaint process has been in the statute since 2005. Thus, if Avalon were truly concerned about its precedential impact on small, underfunded WSCs, it could have sought, and still can seek, a legislative remedy or propose administrative rulemaking. Avalon's problems with the procedural and substantive components of TWC § 13.004 and policy ramifications for other WSCs cannot be addressed in an ongoing SOAH proceeding, and the ALJ has no legal authority to dismiss this case with or without prejudice.

Avalon argues at cross purposes that while the Commission lacks jurisdiction on one hand, the Commission staff "ultimately decided that there was no cause of action under Texas Water Code section 13.004."<sup>6</sup> First, applying Avalon's logic, the Commission staff would have no authority to "ultimately decide" a matter – delegated or otherwise – if the Commission lacked jurisdiction. Second, since the discovery phase of this case is not even concluded, Complainant is not aware on what basis Commission staff could have reached an ultimate conclusion (assuming staff was even empowered to reach one), since there is no evidence in an administrative record. Avalon is putting words in Commission staff's mouth.

Similarly and again without citation, Avalon misstates the procedural record by saying that neither the Ellis County District Attorney nor TCEQ found any wrongdoing.<sup>7</sup> The proceedings in other venues are irrelevant to whether the Commission finds Avalon violated TWC § 13.004. Furthermore, the Ellis County District Attorney recused himself

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<sup>4</sup> See *Complaint of Wells Fargo Bank, N.A. Against Bolivar Service Utility, LLC*, Docket No. 44852; See also 16 Tex. Admin. Code §§ 24.81 and 24.82 ("TAC").

<sup>5</sup> See *Petition of North Austin Municipal Utility District No. 1, Northtown Municipal Utility District, Travis County Water Control and Improvement District No. 10 and Wells Branch Municipal Utility District From the Ratemaking Actions of the City of Austin and Request for Interim Rates in Williamson and Travis Counties*, Docket No. 42857 (Jan. 14, 2016), a case of first impression interpreting TWC § 13.044.

<sup>6</sup> Avalon's Motions to Dismiss and Certify Question at 3.

<sup>7</sup> *Id.*

from prosecuting Avalon's violations of the Texas Open Meetings Act ("TOMA") because of a self-identified conflict of interest, not because he gave Avalon a clean bill of health.<sup>8</sup> Additionally, the fact that TCEQ elected to provide Financial, Managerial, and Technical ("FMT") training to Avalon is an indication that problems exist at Avalon. The TCEQ did not absolve Avalon of any wrongdoing. Certainly, TCEQ's concern with the legal, ethical, and fiduciary responsibilities of the board and general manager are well documented, so much so that even the Avalon board requested additional assistance and training in these problem areas.<sup>9</sup>

## **2. Complainant Gillespie is an Affected Person with Standing**

As a second basis for its Motion to Dismiss, Avalon appears to argue that the Commission lacks jurisdiction because Complainant has no standing. This is simply untrue. Not only did Avalon have the opportunity to argue Complainant's standing in its List of Issues required by the Order of Referral and did not, but the Preliminary Order makes no mention of Carol Gillespie's standing being an issue. Whether Ms. Gillespie has an active meter or currently receives water or sewer service is not the statutory basis for standing in a TWC § 13.004 complaint. By definition, Ms. Gillespie is an "affected party" with standing in this matter, because she is a landowner:

*"Affected person" means any landowner within an area for which a certificate of public convenience and necessity is filed, any retail public utility affected by any action of the regulatory authority, any person or corporation whose utility service or rates are affected by any proceeding before the regulatory authority, or any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility or that desires to enter into competition.*<sup>10</sup>

Ms. Gillespie also clearly meets the definition of "member."

*"Member" means a person who holds a membership in a water or sewer*

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<sup>8</sup> Exhibit A, July 31, 2015 letter from the Ellis County & District Attorney's Office stating that District Attorney Wilson and his office "have determined not to bring an action...Mr. Wilson has a conflict of interest concerning the subject matter of this complaint."

<sup>9</sup> Exhibit B, Dec. 5, 2013 email correspondence from then TCEQ staffer Fred Bednarski to Carol Gillespie.

<sup>10</sup> TWC § 13.002(1) (emphasis added).

*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.*<sup>11</sup>

It is undisputed that Ms. Gillespie and her sisters own property in two locations within the Avalon service area, approximately one mile from each other: 1) one tract at 930 Gillespie Road Italy, Texas 76651, which includes a house and 160 acres of productive farmland (growing corn, cotton and sunflowers) and pasture for at least 65 head of cattle; and, 2) the second tract of approximately 41 acres planted in wheat, corn, and sunflowers is located at the intersection of W.W. Road and Goodwyn Road, Avalon, Texas 76623.<sup>12</sup> Avalon's bylaws specifically state:

*every person (which includes any legal entity) owning or having a legal right to the control, possession or occupancy of property served or which may reasonably be served by the Corporation, shall have the right to become a Member of the Corporation upon payment of the Membership fee hereinafter provided and upon compliance with the Corporation's conditions of water and/or sewer service as provided for in its published charges, rates and conditions of service.*<sup>13</sup>

Additionally, Ms. Gillespie has attended every annual meeting since 2011 and voted in each of those meetings where an election was held except for 2012. At no time did Avalon assert that Ms. Gillespie was not a member of the corporation without voting rights or other rights of participation, and Avalon has never attempted to cancel her stock or membership in the Corporation.<sup>14</sup>

The Commission also addressed its standard regarding the issues of standing and

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<sup>11</sup> TWC § 13.002(11) (emphasis added).

<sup>12</sup> Ms. Gillespie's mother was the postmaster for Avalon for 27 years. According to her, it is not uncommon for some tracts to lack a numbered address in some rural areas.

<sup>13</sup> Exhibit C, Avalon's Bylaws, Article VIII, Sec. 1 (emphasis added).

<sup>14</sup> Interestingly, neither Avalon Board Directors, Robin Donaldson, nor Matilda Williams live in the Avalon community and receive residential water or sewer service. Therefore applying Avalon's rationale, even Avalon's directors could not participate in this docket.

justiciable interest recently in PUC Docket 43731.<sup>15</sup> In that matter regarding an appeal of a SOAH interim order, the Commission cited the preeminent Texas Supreme Court case on standing -- *Hunt v. Bass*. The Commission declared the following:

“a justiciable interest in a Commission proceeding is akin to standing to maintain suit, and the Supreme Court of Texas has held that standing to maintain suit consists of some interest peculiar to a person individually and not as a member of the general public.”<sup>16</sup>

Among other things, Avalon’s failure to provide legal notice for its open and closed meetings, which resulted in the installation of sewer and water lines across Ms. Gillespie’s two (2) properties, is an interest peculiar to her. It is an infringement on some right and injury in fact that clearly provides her a justiciable interest.<sup>17</sup> Avalon’s continued abuse of TOMA and its bylaws, which result in a complete lack of transparency of its decision making, also provides a justiciable interest to each and every member of Avalon, including Ms. Gillespie. By law, each member of the corporation is also an *owner* of the Corporation:

The Avalon Water and Sewer Service Corporation is a **member-owned**, non-profit corporation incorporated pursuant to the Texas Water Code Chapter 67, Nonprofit Water Supply or Sewer Service Corporations and as supplemented by the Texas Non-Profit Corporation Act, Tex. Rev. Civ: Stat. Ann., Article 1396-1.01, et seq. (West 1980, Vernon Supp. 1996 as amended) for the purpose of furnishing potable water and or sewer utility service.<sup>18</sup>

Avalon’s pattern of demonizing Ms. Gillespie as some “rambling” serial complainant-outsider<sup>19</sup> bent on bankrupting the Corporation is an unfortunate diversion. These cheap

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<sup>15</sup> See *Application of Cross Texas Transmission, LLC to Amend its Certificate of Convenience and Necessity for the Proposed Salt Fork to Gray 345-KV Transmission Line in Gray and Donley Counties*, Docket No. 43731, Order (Feb. 24, 2015). Although Cross Texas is an electric utility case, the affected persons standard in 16 TAC § 22.103 is the procedural rule applicable to all PUC matters.

<sup>16</sup> *Id.*

<sup>17</sup> *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984); See also *Texas Ass’n. of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

<sup>18</sup> Exhibit D, Tariff 2003, Avalon Water and Sewer Service Corporation, Sec. B, paragraph 1.

<sup>19</sup> Avalon continues to attempt to paint a picture of Ms. Gillespie as an outsider who is not local or vested in the best interest of the WSC. On the contrary, the Gillespie family has been in the Avalon area since the 1890’s, graduating from Avalon schools and firmly engaged in the community serving as School



tactics cannot distract from the facts that Avalon already admitted during the first phase of discovery:

- Of 21 total ballot applications required by Avalon's bylaws for the directors' elections conducted from 2011-2016, only 2 were completed;
- No ballot applications exist for 2011, 2013, 2015 or 2016;
- No notices of ballot application deadlines were provided for 2011, 2012, 2014, 2015 or 2016 and the notice of ballot application for 2013 was incomplete;
- No election ballots exist for 2011-2012;
- No complete statements of qualifications for board member candidates exist for 2011-2016;
- No independent auditory report exists for 2011, 2012. or 2016;
- Approximately 178 checks (of those produced) were signed by unauthorized individuals in violation of Article III of the Bylaws;
- No budget exists for at least 2011-2015 and the 2016 budget is incomplete;
- No complete voting rosters exist for 2011-2016;
- Written, tape recorded or videotaped minutes of meetings do not exist for multiple meetings; many are unsigned by board directors; and,
- No complete notice of annual meetings exists for 2011-2016; Notices for 2011, 2012 and 2016 annual meeting do not exist at all.

Gillespie is member-owner of Avalon who is an affected person with standing to bring this complaint based on actual infringement of her rights as specified above. The ALJ should deny Avalon's Motion to Dismiss.

## **B. There is No Basis to Certify a Question**

### **1. TWC § 13.004 Case not Eligible Just Because it is a Case of First Impression**

Avalon's basis for its request to certify a question to the Commission is unclear. Furthermore, Avalon's question is unclear - what is the certified question? Avalon never articulated either the basis or the actual question. However, one can assume that Avalon's problem is the scope of inquiry under TWC § 13.004 generally – that since

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Board and Lions Club president. Both "Gillespie Road" and "WW Road" are named after family members (Ms. Gillespie's uncle was "Woodrow Wesley Gillespie").

WSCs like Avalon may enjoy minimal level of supervision, the inquiry should be minimal also. Avalon claims that because the Legislature did not express in detail the parameters of a TWC § 13.004 inquiry, then the inquiry must be a pure legal question that can only be answered by the Commission. Avalon is mistaken.

Under the Commission's procedural rules, the ALJs "may certify to the commission an issue that involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law."<sup>20</sup> The key word in that rule is "may," which grants the ALJ sole discretion whether she believes it necessary to certify any question to the Commission. Accordingly, the ALJ should certify an issue only if the issue falls within the category of those subjects deemed eligible by the Commission and only if the ALJ believes an issue is ambiguous or unknown. Those issues eligible for certification include (1) the commission's interpretation of its rules and applicable statutes; (2) which rules or statutes are applicable to a proceeding; or (3) whether Commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.<sup>21</sup>

The Preliminary Order is unambiguous. This docket is not about whether the Commission's past interpretation of its rules or statutes is prejudicial, what rules or statutes apply, or whether a particular policy should be adopted or clarified. At no time has Avalon challenged the Preliminary Order's number one issue on its list of issues – whether Avalon failing to comply with TWC § 13.004. That is to say, Avalon has never argued that TWC § 13.004 did not apply but some other statute or rule did, it has never argued that some Commission policy governs or should govern this matter and, it has certainly never argued that the Commission's past interpretation of its rules and statutes was incorrect. As previously discussed, just because a case is one of first impression, where the Commission has not issued an order "interpreting" a particular law, does not mean that SOAH needs the Commission's interpretation to proceed with the hearing. Avalon's approach would not only result in advisory opinions, but like would create a

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<sup>20</sup>16 TAC § 22.127(a) (emphasis added).

<sup>21</sup> *Id.*, 16 TAC § 22.127(b).

precedent for unnecessary delay that could be followed in each and every first impression case disrupting the administrative hearing process.<sup>22</sup> And of course, the potential for mischief is ripe. Whenever a party wants to slow down the hearing process, as Avalon attempts, the party would simply seek Commission interpretation on some rule. That is not necessary in this case where the Preliminary Order very clearly defines the scope of this docket by requesting a fact finding by the ALJ whether Avalon violated TWC §§ 13.002, 13.004, and 67.007:

- 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.<sup>23</sup>

As is evident, the Preliminary Order identified as issues to be addressed more than whether Avalon is a non-profit organization as Avalon asserts.<sup>24</sup> By virtue of including the multiple statutory references in the Preliminary Order, the Commission specifically directed the ALJ to develop an administrative record, not only about the conduct of its meetings (as provided in TWC §67.007), but also regarding Avalon's adherence to its bylaws (as provided in TWC § 13.002(24)) as well:

(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:

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<sup>22</sup> Under Avalon's approach, arguably any matter after September 1, 2014 previously under the jurisdiction of the TCEQ could be deemed new and fall in this certification trap.

<sup>23</sup> *Complaint of Carol D. Gillespie Against Avalon Water Supply and Sewer Services Corporation (37985-1)*, Docket No. 43146, Preliminary Order (Feb. 25, 2016).

<sup>24</sup> Avalon's Motions to Dismiss and Certify Question at 5.

(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)*.<sup>25</sup>

Section 13.002(24), included by reference in TWC § 13.004(a)(2), specifically requires a WSC to operate in compliance with *all* of Chapter 67 as well as its bylaws or articles of incorporation.<sup>26</sup>

“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.<sup>27</sup>

Both chapter 551 of the Texas Government Code and Avalon’s bylaws require it to hold all of its meetings in accordance with the Texas Open Meetings Act (“TOMA”).<sup>28</sup> This legal requirement is not a “tenuous connection,”<sup>29</sup> but basic statutory construction. In exchange for their special status as near political subdivisions (*e.g.*, WSCs can raise utility rates without prior Commission approval), every WSC in Texas must follow their bylaws and the laws of open government pursuant to TWC § 13.004. Avalon’s lack of transparency and failure to comply with the law and bylaws is exactly the situation the Legislature hoped to avoid by enacting TWC § 13.004.

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<sup>25</sup> TWC § 13.004(a)(emphasis added).

<sup>26</sup> Avalon’s bylaws, which are based on a FmHA form, impose many more obligations on the WSC than just how to hold its meetings and elections; *See* Exhibit F, Avalon’s Bylaws, Art X, Section 1 which requires members to ensure that business done by the Corporation continues within the capacity of its facilities and to prevent undue financial burden to members.

<sup>27</sup> TWC § 13.002(24) (emphasis added).

<sup>28</sup> *See* Exhibit E, Avalon’s Bylaws, Article V, Sec. 4; *see also* TEX. GOV’T CODE ANN. §551.001(3)(k) (including WSC’s in the definition of governmental body) and § 551.002 (requiring every governmental body to conduct every regular, special, or called meeting open to the public, except as provided by exception under Chapter 551).

<sup>29</sup> Avalon’s Motions to Dismiss and Certify Question at 8.

## 2. Avalon's Would-be Limits on Hearing are Inappropriate

Avalon urges a limited scope of hearing, because it fears being “drawn into factual disputes.”<sup>30</sup> But the ALJ’s fact finding is precisely what the contested case hearing process is for – to take evidence on and determine questions of fact like whether notices and elections were held in compliance with chapter 67 and the bylaws. In the Commission’s implementation of TWC § 13.004(a) through its 16 TAC § 24.35, it is important to note that the statute and its implementing rule are similar but not identical. The Commission specifically inserted the words, “after notice and opportunity for hearing” in the text of 16 TAC § 24.35 that does not appear in statute.<sup>31</sup> This means the Commission intentionally created a hearing process where a fact-finding could occur during which the Commission could scrutinize whether a WSC is complying with §13.004, chapter 67, and the WSC’s bylaws. Thus, ample authority and direction exists for the ALJ to proceed with this case, and the scope is not a “purely legal question . . . one to be determined by the PUC and not by SOAH.”<sup>32</sup>

Again at cross purposes, Avalon urges a certified question, because the “parameters” or scope of hearing appear to be unknown on one hand, but it states without hesitation that the inquiry should be limited to only 24 months on the other.<sup>33</sup> Avalon is both disingenuous and mistaken. Commission substantive rule 16 TAC § 24.35 references the 24 month period in subsection (b) *after* the Commission finds violations under 16 TAC § 24.35(a) first.<sup>34</sup> As the text of the rule clearly indicates, once the Commission finds violation and asserts its water and sewer utility jurisdiction (like it does for IOUs), it can continue to treat the WSC as a utility for a Commission-determined period of time, depending on the circumstances. The Commission will stop treating a WSC found in violation as a utility if it converts to a special utility district, the order expires, or the WSC demonstrates compliance for 24 months. Clearly, the 24 month time

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<sup>30</sup> *Id.*

<sup>31</sup> 16 TAC § 24.35 is virtually identical to TWC § 13.004 except for its use of “commission” instead of “utility commission” and the addition of the “after notice and opportunity for hearing” text.

<sup>32</sup> Avalon’s Motions to Dismiss and Certify Question at 5.

<sup>33</sup> Avalon’s Motions to Dismiss and Certify Question at 7.

period applies *after* the violation finding and is not an initial limit on the violation proceeding itself as Avalon mistakenly urges:

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

(1) is failing to conduct annual or special meetings in compliance with TWC, §67.007; or

(2) is operating in a manner that does not comply with the requirements for classification as a nonprofit water supply or sewer service corporation prescribed by TWC, §13.002(11) and (24).

(b) The commission's jurisdiction provided by this section *ends* if:

(1) the water supply or sewer service corporation voluntarily converts to a special utility district operating under TWC, Chapter 65;

(2) the time period specified in the commission order expires; or

(3) the water supply or sewer service corporation demonstrates that for the past 24 consecutive months it has conducted annual meetings as required by TWC, §67.007 and has operated in a manner that complies with the requirements for membership and nonprofit organizations as outlined in TWC, §13.002(11) and (24).<sup>35</sup>

Avalon further attempts to limit the hearing based on a misreading of Gillespie's discovery questions. Again, Avalon protests that it does not know the "parameters of inquiry," but then it argues that the Complainant raises issues "outside those authorized," like those relating to public water supply.<sup>36</sup> Avalon misunderstands that Complainant is entitled to ask discovery questions on any subject matter if it is reasonably calculated to lead to the discovery of admissible evidence.<sup>37</sup> Here, Avalon's bylaws, which are specifically germane to a finding of TWC § 13.002(24) and, therefore, TWC § 13.004 compliance, provide that the business of the Corporation shall continue "within the capacity of its facilities to prevent undue financial burden on the Members of the

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<sup>35</sup> 16 TAC § 24.35 (emphasis added).

<sup>36</sup> Avalon's Motions to Dismiss and Certify Question at 7-8.

<sup>37</sup> Tex. R. Civ. P. 192.3(a).

Corporation.”<sup>38</sup> Elsewhere, with respect to its federal indebtedness, Avalon is prohibited from withdrawing funds unless the withdrawals are made for emergency repairs or to replace obsolete equipment or improvements.<sup>39</sup> Based on Avalon’s response to Complainant’s initial requests for information, the WSC has made various financial, managerial, and operational decisions that violate its bylaws. Complainant’s experts plan to testify about these violations at hearing, which are relevant to Avalon’s compliance with TWC § 13.004. However, even if assuming Avalon was correct that questions about its facility operations are outside of the scope of this hearing, then the ALJ may handle that issue with an evidentiary ruling. The admissibility of evidence does not warrant a certified question to the Commission.

Finally, Avalon attempts to restrict the scope of hearing by arguing that the Commission has no jurisdiction over its TOMA compliance.<sup>40</sup> While Avalon may be correct that district court is the proper venue to enjoin violations of TOMA, Complainant is not seeking such remedy, and the Preliminary Order did not identify enjoinder of Avalon’s TOMA violations.<sup>41</sup> That is, Complainant is not trying to stop or prevent Avalon’s TOMA violations in this proceeding, and she certainly is not seeking fines or incarceration. Rather, she is merely identifying violations within the context of the Preliminary Order. A fact finder can determine, based on the evidentiary record, whether Avalon has violated TOMA for purposes of finding whether Avalon continues to violate TWC § 13.004 without either the Commission or SOAH overstepping their legal authority. Tex. Gov’t Code Ann. § 551.142 does not prohibit a SOAH ALJ or the Commission from making an administrative finding. Conversely, if the Commission is legislatively charged to review WSCs for TWC § 13.004 compliance, yet is prevented from looking at actual violations as Avalon urges, including its TOMA violations, legislative intent will be thwarted.

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<sup>38</sup> Exhibit F, Avalon’s Bylaws, Article X, Section 1.

<sup>39</sup> Exhibit G, Avalon’s Bylaws, Article VII.

<sup>40</sup> Avalon’s Motions to Dismiss and Certify Question at 7-8.

<sup>41</sup> Offenses of TOMA may be punishable by fines, confinement, civil damages and/or attorneys’ fees. Tex. Gov’t Code Ann. § 551.141 *et seq.*

There is no basis to certify a question about the scope of inquiry under TWC § 13.004 where the existing statute, rules, and Preliminary Order provide clear guidance to the fact finder. The ALJ should deny Avalon's Motion to Certify Question.

### **C. Further Abatement and Hearing are Delay Tactics**

The two (2) month abatement has already been extended twice, and no good cause exists to delay this matter further. Avalon's financial situation is one of its own making and does not justify further abatement. Ms. Gillespie, on the other hand, is a single unemployed lady and only one member of a 340-member WSC that has used, with the assistance of two (2) attorneys, federal funds and monthly customer utility receipts to fund its participation in this docket as well as separate civil litigation against Ms. Gillespie. Complainant has waited for over four (4) years for her day in court, but as long as Avalon is able to put that off and any ultimate finding of its non-compliance, Avalon can continue to violate state law with abandon. This case must go forward without further delay.

By the same token, no need exists for the further of waste time and resources to meet in person at a hearing to clarify the discovery schedule. Complainant understood that all pleading and discovery deadlines effectively became "frozen" when Order No. 3 was issued and the first abatement became effective April 21, 2016. Once the ALJ issues a new order lifting the abatement or resuming the hearing schedule, the clock begins to tick. No reason prohibits the parties from agreeing among themselves on the new due dates. In the event that does not happen, the parties can ask the ALJ to intervene.

The ALJ should deny Avalon's Motions to Continue the Abatement and Schedule Discovery Hearing.

### **III. CONCLUSION**

WHEREFORE, PREMISES CONSIDERED, Complainant prays that the ALJ deny Avalon's Motion to Dismiss, Motion to Certify the Question, Motion to Continue the Abatement and Motion for Discovery Schedule Hearing, issue an order resuming the



hearing schedule proposed by Commission staff, and for all other relief to which Complainant may be entitled.

Respectfully submitted,

**GILBERT WILBURN, PLLC**  
7000 North MoPac Blvd., Suite 200  
Austin, Texas 78731  
Telephone: (512) 494-5341  
Telecopier: (512) 472-4014  
[hgilbert@gwtxlaw.com](mailto:hgilbert@gwtxlaw.com)

By: Helen S. Gilbert  
Helen S. Gilbert  
State Bar No. 00786263  
Randall B. Wilburn  
State Bar No. 24033342

**ATTORNEYS FOR COMPLAINANT**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested on all parties on the 24<sup>th</sup> of June 2016.

By: Helen S. Gilbert  
Helen S. Gilbert

# EXHIBIT A



## ELLIS COUNTY & DISTRICT ATTORNEY

PATRICK M. WILSON

ELLIS COUNTY COURTS BUILDING • 109 S. JACKSON • WAXAHACHIE, TX 75165 • (972) 825-5035 • FAX (972) 825-5047

July 31, 2015

Zachary L. Newland  
Law Offices of Michael W. Hartley  
216 West Franklin  
Waxahachie, Texas 75165

Via CMRRR: 7007 0710 0003 5878 6658  
and first class mail

RE: Open Records Complaint Determination

Dear Mr. Newland:

On July 2, 2015, you filed a complaint with this office pursuant to the *Texas Public Information Act*. Section 552.3215(g) of the Government Code requires the district or county attorney to "determine whether: (A) the violation alleged in the complaint was committed; and (B) an action will be brought against the governmental body under this section." As is also required by the act, this correspondence is the formal written notice of our determination.

The substance of your complaint is that you never received a response to your original request to the Ellis County Clerk, Cindy Polley for copies of the following information:

- "1. Any final or proposed agenda, minutes, memoranda, studies, or other documents created, maintained or held as a record of Commissioner's Court action which purport to establish or describe the scope or extent of a claimed right-of-way along W.W. Road in Ellis County, Texas since 1995;
2. Unabridged Copies of all Ellis County Transportation Studies produced or maintained since 1995;
3. Any and all maps, reports, surveys, or other documents created, maintained, or held which purport to establish or describe the scope or extent of a claimed easement along W.W. Road in Ellis County, Texas since 1995;

# EXHIBIT A

4. Any and all maps, reports, surveys, or other documents created, maintained, or held which purport to classify the public roads of Ellis County under the Texas Transportation Code, including W.W. Road, since 1995.
5. Any and all maps, reports, surveys, or other documents created, maintained, or held which purport to classify the public roads of Ellis County under the Texas Transportation Code, including W.W. Road, since 1995.
6. Any and all reports or other documents created, maintained, or held which relate to or are a part of the annual commissioner's road report pursuant to Texas Transportation Code Section 251.005 for Ellis County Precinct Two, including W.W. Road, since 1995."

In response to your complaint, the Ellis County and District Attorney, Patrick Wilson and his office have determined not to bring an action. Mr. Wilson has a conflict of interest concerning the subject matter of this complaint. Pursuant to Section 552.3215(h) of the *Texas Public Information Act*, Mr. Wilson believes his conflict of interest precludes him or his office from bringing an action under Section 552.3215 of the Act. This determination is based on the fact that Mr. Wilson's family owns land along W.W. Road. The issue underlying this request involves the installation of a water line in the easement right-of-way owned by Ellis County along W.W. Road on Ms. Carol Gillespie's property. Ms. Gillespie wants the water line moved from her property and rerouted through the properties on the other side of W.W. Road. Mr. Wilson's family owns property abutting W.W. Road, on the opposite side of W.W. Road from Ms. Gillespie's. If Ms. Gillespie is successful in her pursuits, then the outcome could affect the land of Mr. Wilson's family. We believe this personal conflict of interest precludes Mr. Wilson and his office from bringing an action under Section 552.3215 of the Act.

Based upon the conflict of interest and pursuant to Section 552.3215(I) of the Government Code, as the complainant, you are entitled to file your complaint with the Office of the Attorney General before the 31<sup>st</sup> day after the date this complaint is returned to you. This letter is being sent to you via both certified mail, return receipt requested, and first class mail. The original complaint served on our office is included in the certified mail envelope, with a copy in the first class mail envelope. If you have any questions, please do not hesitate to contact me.

Sincerely,

  
Vance Hinds

cc: Cindy Polley, Ellis County Clerk  
Office of the Attorney General

# EXHIBIT B

Subject: Avalon Water/Sewer Application No. 37673-1

http://webmail.earthlink.net/wam/printable.jsp?msgid=318024&x=380.

RE: Avalon Water/Sewer Application No. 37673-1

From: Fred Beckman <FredBeckman@earthlink.net>  
To: Carol Gilmore  
Cc: Susan Flores <susan.flores@coq.tx.us> Sharon Perryman <sharon.perryman@coq.tx.us> Elizabeth Flores <elizabeth.flores@coq.tx.us>  
Subject: RE: Avalon Water/Sewer Application No. 37673-1  
Date: Tue 5/20/13 1:00 PM

Re: The 5/17/13 meeting with the EAT staff with the Avalon WS&S general manager  
The 5/17/13 meeting with the EAT staff with the Avalon WS&S general manager  
approximately 2 hours were spent onsite with the system. The  
presentation on "Board & Manager Roles & Responsibilities" that covered issues of legal  
responsibilities. There were many issues discussed including but not limited to OMA rates  
water operation, sewer operation, water & sewer rates & tariff and the board had many questions.  
**Since there was quite a list of issues, the board would like to continue additional assistance and training. A**  
**follow-up assignment will be requested for additional board training/assistance as well as a separate**  
assignment for the wastewater issue.

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# EXHIBIT C

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backed by the full faith and credit of the United States of America. Securities so purchased shall be deemed at all times to be part of the reserve fund account.

## ARTICLE VIII

Section 1. Every person (which includes any legal entity) owning or having a legal right to the control, possession or occupancy of property served or which may reasonably be served by the Corporation, shall have the right to become a Member of the Corporation upon payment of the Membership fee hereinafter provided and upon compliance with the Corporation's conditions of water and/or sewer service as provided for in its published charges, rates and conditions of service. Membership shall not be denied because of the applicant's race, color, creed, citizenship, or national origin. It is the intent of the Corporation to provide service on a nondiscriminatory basis to all persons desiring service to the extent that the capabilities of the system will reasonably permit.

Section 2. The Membership fee shall be \$100.00. Payment of Membership fee or transfer of Membership shall entitle an applicant to further qualify for one (1) connection to the system or shall entitle a transferee of Membership to continue to qualify for service to an existing connection to the system by meeting the conditions for water and/or sewer as provided in the Corporation's published rates, charges, and conditions of service. A person may own more than one Membership but each Member shall be entitled to only one vote regardless of the

# EXHIBIT D

## SECTION B. STATEMENTS

1. **Organization.** The Avalon Water and Sewer Service Corporation is a member-owned, non-profit corporation incorporated pursuant to the Texas Water Code Chapter 67, Nonprofit Water Supply or Sewer Service Corporations and as supplemented by the Texas Non-Profit Corporation Act, Tex. Rev. Civ. Stat. Ann., Article 1396-1.01, et seq. (West 1980, Vernon Supp. 1996 as amended) for the purpose of furnishing potable water and or sewer utility service. Corporation operating policies, rates, and regulations are adopted by the Board of Directors elected by the Members of the Corporation.
2. **Non-Discrimination Policy.** Membership in the Corporation and service is provided to all Applicants who comply with the provisions of this Tariff regardless of race, creed, color, national origin, sex, disability, or marital status.
3. **Policy and Rule Application.** These policies, rules, and regulations apply to the water and or sewer services provided by the Avalon Water and Sewer Service Corporation, also referred to as Corporation, (AWSSC), or (AWSSC). Failure on the part of the Member, Consumer, or Applicant to observe these policies, rules and regulations gives the Corporation the authority to deny or discontinue service according to the terms of this Tariff as amended from time to time by the Board of Directors of the Corporation.
4. **Corporation Bylaws.** The Corporation Members have adopted bylaws (see Article 1396-2.09) which establish the make-up of the Board of Directors and other important regulations of the Corporation. The bylaws are on file at the Corporation's office.
5. **Fire Protection Responsibility.** The Corporation does not provide nor imply that fire protection is available on any of the distribution system. All hydrants or flush valves are for the operation and maintenance of the system and may be used for refill only by authorized fire departments. The Corporation reserves the right to remove any hydrant, due to improper use or detriment to the system as determined by the Corporation, at any time without notice, refund, or compensation to the contributors unless such hydrants are installed pursuant to the terms of a Non-Standard Service Contract as provided for in Section F, in which event the terms and conditions of the Contract shall apply.
6. **Damage Liability.** The Avalon Water and Sewer Service Corporation is not liable for damages caused by service interruptions, events beyond its control, and for normal system failures. The limits of liability of the Avalon Water and Sewer Service Corporation is the extent of the cost of service provided. By acceptance of Membership, Member consents to waiver of such liability.
7. **Information Disclosure.** The records of the Corporation shall be kept in the Corporation office in Itasca, Texas. All information collected, assembled, or maintained by or for the Corporation shall be disclosed to the public in accordance with the Texas Public Information Act. An individual customer may request in writing that their name, address, telephone number, or social security number be kept confidential. Such confidentiality does not prohibit the utility from disclosing this information to an official or employee of the state or a political subdivision of the state acting in an official capacity or

# EXHIBIT E

Continuing to act in this capacity as an officer or Director of the Corporation. Any Director that has been removed under the provisions of this Article shall not be precluded from subsequent election to a position on the Board of Directors.

Section 4. The Board of Directors shall adopt and maintain a conflict of interest policy designed to promote the business of the Corporation and serve the interests of the Membership.

## ARTICLE V

Section 1. Regular meetings of the Board of Directors shall be held at such time and place as the Board may determine at the next previous regular meeting and shall include posting of the meeting as required by the Texas Open Meetings Act, Chapter 551 Texas Government Code including any amendment thereto. Such notice shall specify the date, hour, place and subject of each meeting held by the Board of Directors.

Section 2. Any Director failing to attend two (2) Consecutive regular monthly meetings shall be given written notice by the balance of the Board of Directors that failure by said Director to attend a third consecutive monthly meeting, without justifiable cause acceptable to the balance of the Board of Directors, shall give rise to removal of said Director from the Board. A successor shall be elected by a majority vote of the Directors remaining to serve until the next regular or

# EXHIBIT E

special Membership meeting, at which time the general Membership shall elect a successor for the balance of the term. If the removal of a Director pursuant to this Section 2 occurs at an annual Membership meeting, then the successor shall be elected by majority vote of the Membership in attendance at the meeting.

Section 3. The Board of Directors shall provide access for the public, new service applicants, or Members to the regular monthly meetings of the Board of Directors by setting aside a time for hearing of suggestions, proposals, or grievances. The Board of Directors shall establish reasonable rules for access to such meetings.

Section 4. The Board of Directors shall ensure that all meetings comply with the requirements of the Open Meetings Act, Article 6252-17, Tex. Rev. Div. Stat., including any subsequent amendment thereto. In the event of any conflict between the provisions of these Bylaws and the requirements of the Open Meetings Act, the provisions of the Open Meetings Act shall prevail.

Section 5. In conducting their duties as members of the Board, each Director (1) shall be entitled to rely, in good faith and with ordinary care, on information, opinions, reports, or statements, including financial statements and other financial data, concerning the Corporation or the Corporation's affairs, that have been prepared or presented by one or more officers or employees of the Corporation; or by legal counsel, public accountants, or other persons retained by the Corporation for the



# EXHIBIT F

notification of the Corporation, preclude the holder of such mortgages from exercising legal rights pursuant to such mortgages upon proper notice to the Corporation.

## ARTICLE X

Section 1. In order to insure that business done by the Corporation shall continue within the capacity of its facilities and to prevent undue financial burden on the Members of the Corporation, Membership in the Corporation shall be transferred in accordance with the following:

(a) Except as herein provided, Membership in the Corporation shall be deemed personal estate and a person or entity that owns any stock of, is a Member of, or has some other right of participation in the Corporation may not sell or transfer that stock, Membership, or other right of participation to another person or entity except: (1) by will to a transferee who is a person related to the testator within the second degree by consanguinity; (2) by transfer without compensation to a transferee who is a person related to the owner of the stock or other interest within the second degree by consanguinity; or (3) by transfer without compensation or by sale to the Corporation.

(b) Subsection (a) of this section does not apply to a person or entity that transfers the Membership or other right of participation to another person or entity as part of the conveyance of real estate from which the Membership or other right of participation arose.

(c) The transfer of stock, a Membership, or another right of

# EXHIBIT G

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provided that no such dividends shall ever be paid while any indebtedness of the Corporation remains unpaid.

## ARTICLE VII

The Directors of the Corporation shall establish and maintain, so long as the Corporation is indebted to the Government, in an institution insured by the State or Federal Government, or invested in readily marketable securities backed by the full faith and credit of the United States of America, a reserve account separate and apart from other fund accounts of the Corporation. There shall be deposited in such fund the sum as required by a total of all loan resolutions executed by the Corporation. Such deposits shall be made monthly and shall continue until the total amount deposited equals the sum as required by the executed loan resolutions provided, however that after any withdrawals, such deposits shall be resumed until the amount accumulated in the fund is restored to the sum as required by the executed loan resolutions.

Withdrawals may be made from this fund only upon prior written approval from Farmers Home Administration. Approval shall be made only for emergency repairs, obsolescence of equipment, improvements to facility, and for making up any deficiencies in revenue for loan payments.

The Directors shall invest all sums in this fund not required to be expended within the year in which the same are deposited in bonds or other evidence of indebtedness of the United States of America, or in readily marketable securities