



Control Number' 43146



Item Number' 70

Addendum StartPage 0

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PUBLIC UTILITY COMMISSION

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

**RESPONDENT AVALON'S RESPONSE TO COMPLAINANT GILLESPIE'S
VERIFIED BRIEF UNDER SOAH ORDER NO. 6: GENERAL DENIAL
AND MOTION TO DISMISS**

TO THE HONORABLE JUDGES STEPHANIE FRAZEE AND TRAVIS VICKERY:

COMES NOW Avalon Water Supply and Sewer Service Corporation ("Avalon" or "Respondent") and files this, its Response to Complainant Gillespie's Verified Brief under SOAH Order No. 6: General Denial and Motion to Dismiss, in the above referenced matter. In support Respondent would show the following.

I. General Denial

Respondent generally denies the allegations in Carol D. Gillespie's ("Gillespie" or "Complainant") complaint, whichever documents the Administrative Law Judges ("ALJs") consider to be her complaint, including those in Complainant Gillespie's Verified Brief in Response to Order No. 6 ("Gillespie's Brief").

II. Allegations of Deficiencies Occurring Prior to Certain Dates Must be Dismissed.

Complainant alleges deficiencies occurring five or more years ago. All allegations of deficiencies occurring prior to August 25, 2014 must be dismissed because they have already been investigated and adjudicated by the Texas Commission on Environmental Quality ("TCEQ"), the matters have been closed, and the TCEQ has found that Avalon was operating as a non-profit water supply corporation ("WSC"). Likewise, the ALJs should dismiss all allegations of deficiencies

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occurring prior to July 22, 2014 because a reading of the statute and implementing regulations supports a two year limitation.

A. Most Allegations Have Been Investigated and Rejected by the TCEQ; Therefore, They Must be Dismissed from this Docket.

Gillespie complained to the TCEQ about most of the alleged deficiencies and the TCEQ ruled that they had no merit.¹ The latest letter in which the TCEQ made a finding that ‘Avalon Water Supply and Sewer Service Corporation has provided TCEQ with sufficient documentation to show that is properly operating as a non-profit, member-owned and member-controlled WSC’ was dated August 25, 2014.² For this reason, Respondent moves to dismiss all allegations in this docket that pre-date August 25, 2014.

The TCEQ has initiated at least two investigations under Texas Water Code section 13.004 into Gillespie’s complaints about Avalon. Ms. Gillespie’s July 2013 complaints to the TCEQ were investigated and closed on June 16, 2014, with a finding that ‘Avalon Water Supply and Sewer Service Corporation has provided TCEQ with sufficient documentation to show that is properly operating as a non-profit, member-owned and member-controlled WSC.’³ Thus the allegations about Avalon actions prior to July 2013 and through June 16, 2014 have already been investigated by the TCEQ and that agency made its decision that Avalon was ‘properly operating as a non-profit, member-owned and member-controlled WSC.

On July 14, 2014 Ms. Gillespie asked that the TCEQ re-open her complaint or begin a new investigation. She re-urges her earlier complaints, which the TCEQ had previously investigated, and alleges misdeeds from May 2, 2014 to July 10, 2014.⁴ The TCEQ launched an investigation in response to these further complaints. Again, the TCEQ concluded that ‘Avalon Water Supply

¹ The state of the public records transferred from the TCEQ to the PUC and the rambling, repetitive nature of Gillespie’s complaints prevent Respondent linking specific allegations to the letters in which the TCEQ notified Gillespie that the investigations were closed with a finding that Avalon was ‘properly operating as a non-profit, member-owned and member-controlled WSC. The most logical method is to categorize the allegations by date – before and after the TCEQ findings, which Respondent does here.

² See, August 25, 2014 letter to Ms. Carol D. Gillespie from Cari-Michel La Caille, Assistant Director, Water Supply Division, TCEQ, attached as Exhibit 1.

³ Respondent does not have a copy of the TCEQ letter. See, footnote 1, above. But see, Letter from Carol D. Gillespie to Tammy Holguin-Benter, TCEQ dated July 14, 2014 and filed as Docket Item No. 9 on February 6, 2015, at p. 1 in which Ms. Gillespie states these facts.

⁴ Letter from Carol D. Gillespie to Tammy Holguin-Benter, TCEQ dated July 14, 2014 and filed as Docket Item No. 9 on February 6, 2015.

and Sewer Service Corporation has provided TCEQ with sufficient documentation to show that it is properly operating as a non-profit, member-owned and member-controlled WSC. The case was then closed on August 25, 2014.⁵

So, on September 16, 2014, when Ms. Gillespie began complaining to the Public Utility Commission (“PUC” or “Commission”), most of her complaints had already been investigated and Avalon had been found to be operating properly under Texas Water Code section 13.004(a). Thus, every allegation made in this docket that pre-dates August 25, 2014, is not relevant to this docket and has already been adjudicated.

In summary, allegations of deficiencies occurring prior to August 25, 2014 must be dismissed because they have already been investigated by the TCEQ and found to have no merit under Texas Water Code section 13.004. The following allegations must be dismissed under this standard: Exhibit A, Items 1 – 35, and 47 – 52; Exhibit B, Items 1 – 3, 5, and 7 – 19.⁶

B. In the Alternative, the ALJs Should Consider Only Allegations of Deficiencies Occurring in the 24 Months Prior to Gillespie’s Brief Because that is the Date on Which the PUC and the Respondent Received Notice of such Allegations.

Complainant argues that not only is every alleged deficiency subject to PUC scrutiny under 13.004, but even if the PUC finds one deficiency five years ago, the PUC ‘has the same jurisdiction over AWSSSC as it does over any other problematic water and sewer utilities.’⁷ Complainant’s reading of 13.004(a) goes too far, even without a statute of limitations applicable to this docket. Investigating Avalon’s historical actions of five years ago, or even of three years ago, serves no useful purpose. Avalon’s Board of Directors changes every year. Its employees have changed frequently. Even if the PUC were to find violations of the relevant statutes in 2011 or 2013, what relevance would the violations have?

The implementing regulations provide additional guidance on limiting the inquiry under 13.004(a). Under PUC Rule 24.35, if the PUC conducts an investigation, makes the required finding, and takes the same jurisdiction over a water supply corporation that it has over a water

⁵ See, August 25, 2014 letter to Ms. Carol D. Gillespie from Cari-Michel La Caille, Assistant Director, Water Supply Division, TCEQ, attached as Exhibit 1.

⁶ Gillespie fails to provide specific dates for many of the alleged deficiencies instead providing no date or a range of years. See, Gillespie’s Brief at Exhibits A and B.

⁷ Gillespie’s Brief at p. 5 addressing ‘violations’ of Avalon’s bylaws. See also, Gillespie’s Brief at Exhibits A and B, which allege deficiencies starting in 2011.

utility under Texas Water Code Chapter 13, that jurisdiction ends if the water supply corporation shows ‘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).’⁸ The standard for placing a water supply corporation under PUC regulatory and oversight jurisdiction under 13.004(a) is the same as the standard for ending that jurisdiction under Rule 24.35. Avalon believes that logic supports applying a 24-consecutive-month limitation on the complaint inquiry. Application of this standard would prevent the PUC from regulatory and oversight jurisdiction over a water supply corporation that may have had deficiencies in the past, but has remedied those deficiencies and can show no deficiencies for 24 consecutive months prior to the inquiry. This also speaks to judicial economy and agency efficiency. Why use the State’s time and resources to investigate such a water supply corporation when in all likelihood it will continue without failures for the next 24 consecutive months ending the jurisdiction.

In summary, applying this standard to this docket, all alleged deficiencies prior to July 22, 2014 should be dismissed because July 22, 2016 is the date on which the PUC and the Respondent received notice of Gillespie’s full list of complaints. These include the same allegations listed in Section II.A. above.

III. The Only Allegations Properly before the ALJs are Deficiencies Related to Avalon’s Status as a Non-Profit Water Supply Corporation. Other Alleged Deficiencies Must be Dismissed because they are outside the PUC’s Investigative Jurisdiction under Texas Water Code Section 13.004(a).

Clearly, the PUC has the authority to determine whether Avalon ‘is failing to conduct annual or special meetings in compliance with [Texas Water Code] Section 67.007’⁹ and ‘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 [Texas Water Code] Sections 13.002(11) and (24).’¹⁰ There exists a wide gap, however, between having that authority and having ‘the same jurisdiction over AWSSSC as it does over any other problematic water and sewer utilities.’¹¹

⁸ 16 Tex. Admin. Code § 24.35.

⁹ TEX. WATER CODE § 13.004(a)(1).

¹⁰ TEX. WATER CODE § 13.004(a)(2).

¹¹ Gillespie’s Brief at p. 5

Avalon has requested dismissal on the basis that the PUC staff already made the determination that none of Complainant's allegations, if true, would rise to the level requiring PUC to step into that gap and the Docket Management Office ignored the staff position. In the alternative, Avalon has requested a certified question on the very issue presented above: in an inquiry undertaken under 13.004(a), may the PUC delve into the everyday operations of a water supply corporation or must it restrict itself to actions specific to the non-profit status of such utilities? Thus, Avalon believes the PUC has jurisdiction over a properly defined inquiry: the PUC does not have authority over an inquiry into the day-to-day operations of a water supply corporation. This being said, if the PUC conducts a properly defined inquiry and makes the findings established by Texas Water Code Section 13.004(a)(1) or (2), the statute then grants the PUC the same jurisdiction over that water supply corporation as the PUC has over regulation and oversight over a water and sewer utility.¹²

A look at the legislative history of Section 13.004 is enlightening. It was enacted through House Bill 1358 in the 79th Regular Legislative Session in 2005 and has not been amended since. According to the House Research Organization Bill Analysis:

As filed, HB 1358 would have given TCEQ jurisdiction over a water supply or sewer service corporation if the commission found that the corporation was not charging rates that were reasonable or providing adequate service. TCEQ could have exercised jurisdiction after receiving a complaint from a municipality, customer, or other person and conducting an investigation.¹³

Through the legislative committee process, the bill was changed to enact Texas Water Code 13.004(a) as it stands today. Thus, the legislature rejected a sweeping State agency oversight jurisdiction in favor of the limited investigative jurisdiction stated in the current statute. It is clear that the legislature had before it proponents and opponents of the narrower scope that became law. It also heard from those opposing any State agency investigative oversight of water supply corporations because of their unique nature.¹⁴ By reading HB 1358 as filed and the House Research Organization Bill Analysis summary of positions taken in support of the bill as enacted and opposed to the bill as enacted, it becomes clear that the purpose of 13.004 is to allow the PUC

¹² TEX. WATER CODE § 13.004(a).

¹³ House Research Organization Bill Analysis, HB 1358 Flores (CSHB 1358 by Puente) dated May 3, 2005 at p. 3. A copy is attached as Exhibit 2.

¹⁴ See, House Research Organization Bill Analysis, HB 1358 Flores (CSHB 1358 by Puente) dated May 3, 2005 at pp. 3-4. A copy is attached as Exhibit 2.

(originally, the TCEQ) to review solely whether a water supply corporation is acting as a non-profit corporation, not the full range of the operations, rates, and service, as Complainant suggests.¹⁵

In further support is the TCEQ practice regarding many of these very allegations. As explained above, under Texas Water Code section 13.004(a), the TCEQ twice investigated Gillespie's complaints about Avalon. In both instances, the TCEQ closed the investigation with the following finding: 'Avalon Water Supply and Sewer Service Corporation has provided TCEQ with sufficient documentation to show that is properly operating as a non-profit, member-owned and member-controlled WSC.'¹⁶ Clearly, the TCEQ interpreted 13.004(a) to apply only to issues related to Avalon's non-profit status and not to the myriad other allegations made by Gillespie. The PUC is operating under the same statutory authority and has adopted the same implementing regulations as the TCEQ;¹⁷ therefore, the PUC should limit its investigation to the same issues.

A. Allegations of Deficiencies Unrelated to the Statutory Requirements under Texas Water Code Sections 67.007, 13.002(11), or 13.002(24) Must be Dismissed Because They Are Beyond the PUC's Investigative Jurisdiction Under Section 13.004(a).

Allegations of deficiencies unrelated to the statutory requirements of Texas Water Code sections 67.007, 13.002(11), and 13.002(24) must be dismissed because they are outside the PUC's jurisdiction under Texas Water Code section 13.004(a). Complainant attempts to unacceptably broaden the inquiry under 13.004(a) by misconstruing the Texas Water Code Section 13.002(24) definition of water supply or sewer supply corporation. Complainant incorrectly focuses on 'is operating in accordance with by-laws' and ignores the full sentence: 'is operating in accordance with by-laws or articles of incorporation which [sic] ensure that it is member-owned and member-controlled.'¹⁸ Complainant urges the PUC to look at all of Avalon's by-laws and hear evidence

¹⁵ To implement Section 13.004 prior to the change in jurisdiction to the PUC, the TCEQ adopted 30 Texas Administrative Code section 291.35. The Preambles of the proposed and adopted rules provide no insight into the content of the rule except to note that the rule was being proposed and adopted to implement the newly enacted Texas Water Code section 13.004. When jurisdiction was transferred to the PUC, it adopted the same rule, numbering it as 16 Texas Administrative Code section 24.35, likewise without discussion.

¹⁶ See, Letter from Carol D. Gillespie to Tammy Holguin-Benter, TCEQ dated July 14, 2014 and filed as Docket Item No. 9 on February 6, 2015, at p. 1 and August 25, 2014 letter to Ms. Carol D. Gillespie from Cari-Michel La Caille, Assistant Director, Water Supply Division, TCEQ, attached hereto as Exhibit 1.

¹⁷ Compare, 30 Tex. Admin. Code § 291.35 (TCEQ) and 16 Tex. Admin. Code § 24.35 (PUC).

¹⁸ TEX. WATER CODE § 13.002(24).

of every instance Complainant alleges Avalon has failed to ‘operat[e] in accordance’ with those by-laws. The alleged deficiencies run the gamut from failing to prepare annual financial audit reports to failure to adopt a conflict of interest policy.¹⁹

Section 13.002(24) states that a nonprofit water supply or sewer supply corporation must adopt and abide by either by-laws or articles of incorporation that ensure that it is member-owned and member-controlled. In keeping with the statutory scheme under which the operations of water supply corporations are unregulated by the State except in two instances (the PUC hears appeals of rate disputes and the PUC has the authority under 13.004 to determine whether a water supply corporation is operating as a non-profit corporation) the members and the Board of Directors made up of members oversee the administration and day-to-day operations of a water supply corporation. Complainant is asking the PUC to step into that role. If the PUC were to do so, it would eviscerate the independence of these unique member-owned utilities.

In summary, allegations of deficiencies unrelated to whether Avalon conduct annual or special meetings in compliance with Section 67.007 must be dismissed. These include Exhibit A: Item 10, 20, 21, 22, 24, 25, 26, 30, 31, 32, 33, 34, 49, 50, 51, 52; Exhibit B: Items 1 – 20.²⁰

B. Allegations of Texas Open Meetings Act Deficiencies Must be Dismissed Because They Are Beyond the PUC’s Investigative Jurisdiction under Section 13.004(a).

Administrative bodies may exercise only those powers the law confers upon them in clear and express language; courts will not imply the existence of additional authority for administrative bodies, nor may such bodies create for themselves any excess powers.²¹ Complainant urges the PUC to ignore this tenet of administrative law. Complaints about whether Avalon complies with the Open Meetings Act²² (“TOMA”) are outside the scope of this case. Although the Open Meetings Act applies to WSCs,²³ alleged non-compliance with the Act can only be addressed as

¹⁹ Gillespie’s Brief at pp. 4 – 6.

²⁰ See, Gillespie’s Brief at Exhibits A and B.

²¹ *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002).

²² TEX. GOV’T CODE, chapter 551.

²³ See, TEX. GOV’T CODE §551.001(3)(K), which defines a governmental entity subject to the Act under section 551.002, as including water supply corporations under Texas Water Code chapter 67.

provided in the Act, which requires litigation in state courts. No state agency, not even the Office of the Attorney General of Texas, has the authority to enforce TOMA.²⁴

Complainant alleges various deficiencies related to Respondent's duties under TOMA. If it is determined that the PUC has the authority to entertain these allegations, the ALJs and the PUC face a serious dilemma in trying to do so. For example, during discovery, Complainant served Requests for Information and Admissions, including Requests for Production of Documents, involving Avalon's closed meetings (executive sessions). A certified agenda of a closed meeting of the corporation's board of directors is confidential under TOMA section 551.104, which provides for court-ordered access to such a certified agenda only in litigation in district court involving an alleged violation of the Texas Open Meetings Act.²⁵ Likewise, closed meeting proceedings of the corporation's board of directors are confidential and disclosure of such proceedings exposes the corporation and its directors to potential criminal liability.²⁶

Section 551.103(a) of the Open Meetings Act requires Avalon to make and keep either a certified agenda or a recording of each executive session, except for an executive session held by the governmental body to consult with its attorney.²⁷ A certified agenda or recording of an executive session is confidential. A person who knowingly and without lawful authority makes these records public commits a Class B misdemeanor and may be held liable for actual damages, court costs, reasonable attorney fees and exemplary or punitive damages.²⁸

Public access to such documents is limited to narrow, specific circumstances established by Government Code section 551.104, as follows:

§ 551.104. Certified Agenda or Recording; Preservation; Disclosure

(a) A governmental body shall preserve the certified agenda or recording of a closed meeting for at least two years after the date of the meeting. If an action involving the meeting is brought within that period, the governmental body shall preserve the certified agenda or recording while the action is pending.

(b) In litigation in a district court involving an alleged violation of this chapter, the court:

(1) is entitled to make an *in camera* inspection of the certified agenda or recording;

²⁴ Office of the Attorney General of Texas, *Open Meetings Handbook 2016*, at p. 63.

²⁵ TEX. GOV'T CODE § 551.104.

²⁶ TEX. GOV'T CODE § 551.146.

²⁷ TEX. GOV'T CODE § 551.103(a).

²⁸ Office of the Attorney General of Texas, *Open Meetings Handbook 2016*, at p. 61, citing TEX. GOV'T CODE § 551.146.

(2) may admit all or part of the certified agenda or recording as evidence, on entry of a final judgment; and

(3) may grant legal or equitable relief it considers appropriate, including an order that the governmental body make available to the public the certified agenda or recording of any part of a meeting that was required to be open under this chapter.

(c) The certified agenda or recording of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).²⁹

Thus, '[i]n litigation in a district court involving an alleged violation' of the Texas Open Meetings Act, the district judge may make an *in camera* inspection of the certified agenda or recording and act with regard to its confidentiality.³⁰

Citing to Tex. Att'y Gen. Op. No. JM-995 (1988) at 5, the Attorney General states that Section 551.104 is 'the only means under state law whereby a certified agenda or recording of a closed session may be released to the public.' (Emphasis added.)³¹ In fact, the Office of the Attorney General does not even have authority to review certified agendas or recordings of closed sessions for compliance with the Open Meetings Act.³² This was emphasized in Open Records Decision No. 684 (2009). In that Decision, the attorney general authorized all governmental bodies to withhold certified agendas and tapes of closed meetings without the necessity of requesting an attorney general decision.³³

This proceeding is not in district court and is not an Open Meetings Act violation lawsuit; therefore, respectfully, the Administrative Law Judge would have no authority to make an *in camera* inspection of such documents during the discovery process if disputes arise. This restriction poses an insurmountable burden on Respondent, the ALJs, and the PUC if Gillespie's TOMA complaints are heard in this docket.

Other aspects of TOMA support dismissal of Gillespie's TOMA claims. The Act provides civil remedies and criminal penalties for violations of its provisions and establishes the fora for such actions. For example, District courts have original jurisdiction over criminal violations of the Act as misdemeanors involving official misconduct.³⁴ Section 551.142 of TOMA creates a

²⁹ TEX. GOV'T CODE § 551.104.

³⁰ TEX. GOV'T CODE § 551.104(b).

³¹ Office of the Attorney General, *Open Meetings Handbook 2016*, at pp. 61–62.

³² See, Office of the Attorney General, *Open Meetings Handbook 2016*, at p. 62 citing Tex. Att'y Gen. ORD-495 (1988) at 2, 4.

³³ Office of the Attorney General, *Open Meetings Handbook 2016*, at p. 65; Tex. Att'y Gen. ORD-84 (2009), at 5.

³⁴ Office of the Attorney General, *Open Meetings Handbook 2016*, at p. 63, citing *State v. Williams*, 780 S.W.2d 891, 892–93 (Tex. App.—San Antonio 1989, no writ).

cause of action for mandamus or injunction to address violations of its provisions. ‘An interested person’ has standing to bring such suits.³⁵ The courts have held that the same interested person may bring a declaratory judgment action ‘to determine the validity of a governmental body’s actions under TOMA.’³⁶ According to the Attorney General:

The Act does not automatically confer jurisdiction on the county court, but where the plaintiff’s money demand brings the amount in controversy within the court’s monetary limits, the county court has authority to issue injunctive and mandamus relief. [Citations omitted.] Absent such a pleading, jurisdiction in original mandamus and original injunction proceedings lies in the district court. [Citations omitted.]³⁷

‘A court of record within its jurisdiction has power’ to issue a declaratory judgment under the Uniform Declaratory Judgments Act.³⁸ No mention is made in the Act or in the Attorney General’s Handbook of a State agency having jurisdiction to enforce or interpret TOMA.

Finally, the Texas Water Code does not confer upon the PUC the power to determine compliance with TOMA ‘in clear and express language. Therefore, the PUC may not exercise this power. Allegations of TOMA deficiencies, catalogued in Gillespie’s Brief in Exhibit B, must be dismissed because they are beyond the PUC’s investigative jurisdiction.

IV. Certain Allegations Must be Dismissed because Gillespie’s Brief Fails to Comply with SOAH Order No. 6.

To the extent that Complainant has failed to comply with SOAH Order No. 6, her complaint must be dismissed.

A. Complainant Failed to Cite the Statutory Basis for Commission Jurisdiction for Most Allegations; Therefore, These Allegations Must be Dismissed.

Complainant failed to comply with the requirements of SOAH Order No. 6. As stated in Order No. 6 at page 2, ‘[I]t is not enough to simply refer to Texas Water Code § 13.004(a)(1). Complainant must cite and explain how the Commission has the same jurisdiction over Avalon as over a water and sewer utility, including specific criteria. Complainant submitted Exhibits A and

³⁵ TEX. GOV’T CODE § 551.142. *See also*, Office of the Attorney General, *Open Meetings Handbook 2016*, at pp. 63 – 64.

³⁶ Office of the Attorney General, *Open Meetings Handbook 2016*, at p. 64.

³⁷ Office of the Attorney General, *Open Meetings Handbook 2016*, at p. 63.

³⁸ TEX. CIV. PRAC. & REM. CODE ch. 37; at § 37.003(a).

B in the tabular format ordered by the ALJs, however most allegations cite to no statutory basis for Commission jurisdiction (the second column in each table). Avalon urges that each allegation that is not supported in these tables by a statutory basis for Commission jurisdiction be dismissed. The following allegations must be dismissed under this standard: Exhibit A, Items 1 – 6, 10 – 13, 15 – 30, 32 – 46, and 48 – 52.³⁹

B. Complainant Failed to Amend Her Complaint as Required by Order No. 6; Therefore, the New Allegations Must be Dismissed.

Complainant failed to comply with an additional requirement of SOAH Order No. 6. As stated in Order No. 6 at page 2, footnote 2, ‘Complainant will be required to amend her complaint if she presents alleged deficiencies in her brief that are not set forth in her complaint. Complainant filed in this docket thus far, a total of five documents assumedly comprise her ‘complaint. As summarized by PUC Staff,

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).⁴⁰

The most recent alleged deficiency included in Complainant’s panoply listed above is on October 9, 2014.⁴¹ Complainant’s Verified Brief in Response to Order No. 6 includes a myriad of additional alleged deficiencies described as occurring after that date. Because Complainant has failed to ‘amend her complaint’ as required by Order No. 6, all deficiencies alleged to have occurred after October 9, 2014 must be dismissed. These include all alleged deficiencies that Complainant has identified without specific dates and those identified as occurring during 2014, 2015, and 2016. The following allegations must be dismissed under this standard: Exhibit A, Items 1 – 6, 8 – 22, 24, 26, 30, 32, 34 – 47, 51 – 52.⁴²

³⁹ Gillespie’s Brief at Exhibit A.

⁴⁰ Commission Staff’s Statement of Position, filed April 10, 2015, at page 1.

⁴¹ Letter from Carol D. Gillespie to PUCT Central Records dated January 31, 2015 and filed as Docket Item No. 8 on February 3, 2015, at p. 1.

⁴² Gillespie’s Brief at Exhibit A.

V. The Remedies Sought by Complainant are Not Supported by Law.

To the extent that any allegations remain after the ALJs rule on this Motion to Dismiss, the remedies sought by Complainant are not supported by law. The only remedy allowed by Texas Law is for the PUC 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 non-profit organization requirements for WSCs.⁴³

Complainant cites to 16 Texas Administrative Code section 24.141 for its proposition that the Commission may put Avalon under Commission supervision. Under Section 24.141, however, the Commission must find gross or continuing mismanagement, gross or continuing noncompliance with [Texas Water Code chapter 13] or a rule adopted under [that] chapter, or noncompliance with an order issued under [chapter 13].⁴⁴ As an initial matter in this docket, the only possible provision of Chapter 13 that could apply to Avalon as a WSC, is Section 13.004(a). Thus the only finding that can be made by the ALJs is whether Avalon is properly operating as a non-profit, member-owned and member-controlled WSC. No sub-issues in such an inquiry are based on Chapter 13. Only if the Commission finds that Avalon is not properly operating as a non-profit, member-owned and member-controlled WSC, does it have the authority to make any of the findings under Section 24.141. Additionally, no allegations have been made in this regard.

Complainant avers, without citing statutory support, that the Commission may ‘dissolve the board [and] impose receivership’ on Avalon.⁴⁵ Texas Water Code section 13.412 controls receiverships of water and sewer utilities. Under Section 13.412, the Commission may request the attorney general to file suit asking for a receiver to be appointed, only in specific instances: if the utility tells the Commission that it is abandoning the system or has abandoned operation of its facilities, or violates a commission final order or allows its property to be used in those manners.⁴⁶

In summary, only upon a finding that Avalon is not properly operating as a non-profit, member-owned and member-controlled WSC does the Commission have authority to impose its

⁴³ See, 16 Tex. Admin. Code § 24.35.

⁴⁴ TEX. WATER CODE § 13.4131.

⁴⁵ See, Gillespie’s Brief at p. 7.

⁴⁶ See, TEX. WATER CODE § 13.412.

regulatory oversight on Avalon. Even in that situation, the Commission has no authority to impose the remedies sought by Complainant, absent further proceedings that result in findings to support such remedies.

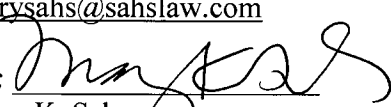
PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Avalon respectfully prays as follows:

1. That the ALJs dismiss this matter in its entirety, with prejudice.
2. That in the alternative, the ALJs dismiss all allegations enumerated in this Response and Motion to Dismiss, with prejudice.
3. That in the further alternative, pursuant to PUC Procedural Rule Section 22.127, the ALJs certify to the Commission, the issues presented in this Motion to Dismiss, as well as those presented in Avalon's June 17, 2016 Motion to Dismiss and Alternate Motion to Certify Question and Continue Temporary Abatement of Discovery and Hearing Schedule.

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

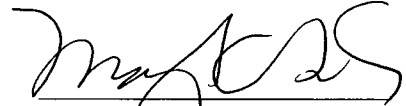
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marysahs@sahslaw.com

By: 
Mary K. Sahs
State Bar No. 17522300

ATTORNEY FOR RESPONDENT
AVALON WATER SUPPLY AND
SEWER SERVICE CORP.

CERTIFICATE OF SERVICE

I certify that, on August 15, 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

Bryan W. Shaw, Ph.D. P.E., *Chairman*
Toby Baker, *Commissioner*
Zak Covar, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*

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PUBLIC UTILITY COMMISSION
FILING CLERK

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 25, 2014

Ms. Carol D. Gillespie
3921 Bobbin Lane
Addison, Texas 75001

Re: Investigation Pursuant to Texas Water Code, Section 13.004, of Avalon Water Supply and Sewer Service Corporation, Certificate of Convenience and Necessity (CCN) No. 10913, in Ellis County Application No. 37673-I

CN: 600788590; RN: 102689684

Dear Ms. Gillespie:

On September 24, 2013, the Texas Commission on Environmental Quality (TCEQ) sent a letter requesting information regarding allegations that Avalon Water Supply and Sewer Service Corporation was not operating as a member-owned and member-controlled WSC. TCEQ then initiated an investigation under Texas Water Code, Chapter 13.004. Avalon Water Supply and Sewer Service Corporation has provided TCEQ with sufficient documentation to show that it is properly operating as a non-profit, member-owned and member-controlled WSC.

Accordingly we have closed this case and will take no further action in this matter. If you have any questions about this letter please contact Mr. Fred Bednarski III at (512)239-4758, or if by correspondence, include MC153 in the letterhead address.

No response is required. Effective September 1, 2014, responsibility for regulating water and wastewater rates and CCNs will transfer to the Public Utility Commission of Texas (PUC). After September 1, 2014, please submit all correspondence to the address below:

Public Utility Commission
Water Utilities Division
1701 N. Congress Avenue
P. O. Box 13326
Austin, Texas 78711-3326

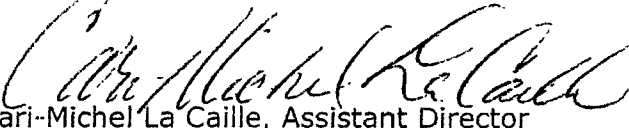
EXHIBIT 1

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If you have any questions, please contact Mr. Fred Bednarski at (512) 239-4758 or by email at Fred.bednarski@tceq.texas.gov. Mr. Bednarski will be your contact person for this application at the PUC after September 1, 2014.

Sincerely,



Carri-Michel La Caille, Assistant Director
Water Supply Division

CML/LF/FB/mmg