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

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BEFORE THE STATE PUBLIC
UTILITY COMMISSION
OF
ADMINISTRATIVE HEARINGS
CLERK

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PUBLIC UTILITY COMMISSION
CLERK

COMMISSION STAFF'S RESPONSE TO GILLESPIE'S VERIFIED BRIEF

COMES NOW the Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this Response to Gillespie's Verified Brief and would show the following:

I. BACKGROUND

On July 7, 2016, SOAH Order No. 6 was issued, requiring that Gillespie, by July 22, 2016, file a verified brief (regarding the factual allegations) that addresses the legal authority and remedy for each and every alleged deficiency committed by Avalon. Staff and Avalon were required to submit responses and/or motions to dismiss by August 15, 2016. Accordingly, this response is timely filed.

II. STAFF'S RESPONSE

Under Chapter 13 of the Texas Water Code (TWC), the Commission may regulate and supervise the business of each water and sewer utility within its jurisdiction, including ratemaking and other economic regulation.¹ However, the Commission does not have this authority over a water supply or sewer service corporation (WSC) unless certain requirements under TWC § 13.004(a).² This section states:

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 Texas Water Code § 13.041(a) (West 2008 & Supp. 2015).

² The definition of "water and sewer utility," "public utility," or "utility" under TWC § 13.002 specifically excludes "a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county."

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- (1) is failing to conduct annual or special meetings in compliance with Section 67.007; or
- (2) is operating in a manner that does not comply with the requirements for classifications as a nonprofit water supply or sewer service corporation prescribed by Sections 13.002(11) and (24).

TWC § 13.002(11) states:

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

TWC § 13.002(24) states:

‘Water supply or sewer service corporation’ means a nonprofit corporation organized and operating under Chapter 67 that provides potable water service or sewer service for compensation and that has adopted and is operating in accordance with by-laws or articles of incorporation which ensure that it is member-owned and member-controlled. The term does not include a corporation that provides retail water or sewer service to a person who is not a member, except that the corporation may provide retail water or sewer service to a person who is not a member if the person only builds on or develops property to sell to another and the service is provided on an interim basis before the property is sold.

These references under TWC § 13.004(a) are, by their own terms, very limited in their description. While Gillespie has raised several violations that fall within the Commission jurisdiction under this section, Staff believes that Gillespie is raising other issues that go far beyond the Commission’s jurisdiction under Texas Water Code § 13.004. For example, Gillespie argues that Avalon was in violation of the Texas Open Meetings Act,³ which is not referenced in TWC 13.004(a), or in any of the statutes referenced in TWC § 13.004(a). Staff believes that it is improper to infer jurisdiction over these acts of a WSC. Thus, Staff believes that the question should be certified to the Commission to address the specific scope of the violations that can be addressed under TWC § 13.004.

1. The plain language of TWC § 13.004 sets the limits of the Commission’s jurisdiction.

³ Texas Gov’t Code Ch. 551 (West 2013 & Supp. 2015).

An examination of the plain language of TWC § 13.004 supports the limited scope of the statute. TWC § 13.004(a)(1) only refers to ‘conduct annual or special meetings in compliance with [TWC] Section 67.007. TWC § 67.007 addresses the procedures for an annual or special meeting of the WSC, as noted by Gillespie.⁴ TWC § 67.007 also requires that the WSC adopt written procedures for conducting an annual or special meeting of the members or shareholders in accordance with this section and TWC §§ 67.0052, relating to ballot applications, 67.0053, relating to ballots, and 67.0054, relating to election procedures. Therefore, under TWC § 13.004(a)(1), the Commission’s jurisdiction extends to a WSC that fails to conduct annual or special meeting in accordance with these requirements.

As stated above, TWC § 13.004(a)(2) refers TWC §§ 13.002(11) and (24), which refer to the definition of a ‘water supply or sewer service corporation’ and the definition of a ‘member’ of a WSC. Gillespie emphasizes two parts of the definition of a ‘water supply or sewer service corporation’ under TWC § 13.002(24): ‘a nonprofit corporation organized and operating under Chapter 67’ and ‘that has adopted and is operating in accordance with by-laws.’⁵ However, Gillespie ignores the part of the definition that the by-laws or articles of incorporation must ‘ensure that [the WSC] is member-owned and member-controlled. This clause provides specific language that the focus on the by-laws and articles of incorporation should be to ensure that members own and operate the WSC, not to unreasonably expand the Commission’s jurisdiction to infer that it has authority to address every issue included in a WSC’s by-laws. The scope of an administrative agency’s jurisdiction has been established by the Texas Supreme Court. The Commission:

.is a creature of the legislature and has no inherent authority. An agency may exercise only those specific powers that the law confers upon it in clear and express language. As a general rule, the legislature impliedly intends that an agency should have whatever power is reasonably necessary to fulfill a function or perform a duty that the legislature has expressly placed in the agency. The agency may not, however, on a theory of necessary implication from a specific power, function, or duty expressly delegated, erect and exercise what really amounts to a new and additional power or one that contradicts the statute, no matter that the new power is viewed as being expedient for administrative purposes.⁶

⁴ Complainant Gillespie's Verified Brief in Response to Order No. 6 at 3-5, citing TWC § 67.007 (June 22, 2016).

⁵ *Id.* at 3.

⁶ *Pub. Util. Com'n of Tex. v. GTE-Sw. Inc.* 901 S.W.2d 401, 406 (Tex.1995).

Based on well-established case law, the Commission's authority to examine issues beyond what which is specifically referenced cannot be inferred.

For example, Gillespie raises the issues that Avalon 'failed to adopt or approve orders or resolutions adopting a budget for fiscal years 2011-2015,'⁷ that Avalon 'failed to adopt or approve federal tax returns for 2011-2016,'⁸ and that Avalon 'does not have a conflict of interest policy, written or otherwise.'⁹ Gillespie argues that these requirements are in Avalon's by-laws as the basis for the Commission's jurisdiction. However, none of these types of violations are referenced in TWC § 13.004(a), TWC Ch. 67, or go to the requirement that the by-laws ensure that the WSC is member-owned or member-controlled. More specifically, Staff recommends that Gillespie's following arguments, as set out in the verified brief, should not be included in the analysis under TWC § 13.004:

1. AWSSSC failed to adopt or approve orders or resolutions adopting a budget for fiscal years 2011-2015 (pp. 13-14);
2. AWSSSC does not maintain a membership transfer boog (p. 16);
3. AWSSSC failed to prepare annual reports of financial activity in 2011-2016 (p. 17);
4. AWSSSC failed to adopt or approve federal tax returns in 2011-2016 (p. 17);
5. AWSSSC does not have a conflict of interest policy (p. 18);
6. AWSSSC board members have had conflicts of interest (p. 18);
7. AWSSSC members are frequently videotaped (p. 18);
8. AWSSSC failed to appoint a credentials committee prior to its 2013 and 2013-director's elections (p. 19);
9. Approximately 178 AWSSSC checks were signed by one director and/or unauthorized personnel (pp. 19-21);
10. AWSSSC board has voted on motions made by non-board directors (p. 21);
11. AWSSSC failed to approve its audits (pp. 21-22);
12. AWSSSC does not reply in writing to member grievances (p. 22);
13. AWSSSC violated the minimum capacity requirements (p. 22);
14. AWSSSC has denied access to members to regular monthly meetings (p. 27);

⁷ *Id.* at bates page 13-14.

⁸ *Id.* at bates page 17.

⁹ *Id.* at bates page 18.

15. AWSSSC's general manager made unauthorized hiring and termination decisions (p. 27);
16. AWSSSC office staff has made or approved unauthorized purchases (p. 27);
17. AWSSSC has failed to keep required records (pp. 27-28);
18. Violations of the Texas Open Meetings Act (pp. 30-42).

If the Legislature had intended that the Commission address issues such as the Texas Open Meetings Act or the full bylaws of a WSC, then the statutory language must be 'clear and express. Without a specific statutory reference that the Commission has the authority to evaluate these types of violations, the Commission's authority cannot be inferred.

2. Receivership should not be evaluated by the Commission in this proceeding

Gillespie raises the 'remedy' of receivership for the utility consistently throughout its brief. In fact, for the remedy description for every violation, Gillespie includes 'the imposition of a receiver' as a remedy. Gillespie argues that it precisely for 'small, rural' WSCs for which receivership is most appropriate.¹⁰ Although not referenced by Gillespie, the Commission can only seek to appoint a receiver in limited circumstances, as set out in TWC § 13.412. Specifically, the Commission can only request that the Attorney General bring a suit for the appointment of a receiver if the utility: (1) has abandoned operation of its facilities; (2) informs the utility commission or the commission that the owner is abandoning the system; (3) violates a final order of the utility commission or the commission; or (4) allows any property owned or controlled by it to be used in violation of a final order of the utility commission or the commission. As Avalon has not abandoned, nor has it informed the Commission of abandoning operations, nor is there a final order that Avalon is currently violating, the decision of appointing a receiver is speculative at this point. Receivership of Avalon should only be examined once the statutory requirements of TWC § 13.412 have been met.

III. CONCLUSION

Gillespie has raised many alleged violations by Avalon that it seeks to have the Commission address through an evaluation under TWC § 13.004. However, many of these alleged violations are not referenced in TWC §§ 13.004, 13.002(11) or (24), or TWC Ch. 67. The Commission's authority should not be extended or inferred to include authority that is not

¹⁰ *Id.* at 5.

specifically referenced in statute. Because Gillespie alleges many violations as described above that go beyond the Commission's statutory authority to address, Staff recommends that the question of the scope of the Commission's specific jurisdictional authority under TWC § 13.004(a) be referred to the Commission for determination.

Dated: August 15, 2016

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on August 15, 2016, in accordance with 16 TAC § 22.74.



Jason Haas