



Control Number' 43146



Item Number' 73

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BEFORE THE

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

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PUBLIC UTILITY COMMISSION  
PUBLIC UTILITY COMMISSION  
OF TEXAS

**BRIEF OF AMICUS CURIAE, TEXAS RURAL WATER ASSOCIATION, IN  
SUPPORT OF RESPONDENT'S MOTION TO DISMISS**

TO THE HONORABLE JUDGES STEPHANIE FRAZEE AND TRAVIS VICKERY  
COMES NOW Texas Rural Water Association (TRWA), as a friend of the Court, and submits  
this Brief in Support of Respondent, Avalon Water Supply Corporation, and in support of same,  
respectfully show the Court as follows:

**I. STATEMENT OF INTEREST OF AMICUS CURIAE**

TRWA is a statewide nonprofit educational and trade association. Founded in 1969.  
TRWA represents a full spectrum of the drinking water community including nonprofit water  
supply and sewer service corporations (WSCs), water districts, small municipal utilities, and  
privately-owned water utilities. Membership includes approximately 750 water utilities in Texas  
that supply water to more than 2.5 million Texans.

TRWA is actively involved in legislative and state agency policy matters affecting the retail  
water utility business, including the legal structure and agency oversight of WSCs. TRWA is a  
contractor for both the Texas Commission on Environmental Quality (TCEQ) and the Public  
Utility Commission of Texas (PUC), providing financial, managerial, and technical on-site

assistance to all types of retail public utilities. TRWA also provides general legal assistance to its members, but does not represent individual members in contested matters.

Non-profit water supply corporations such as the Avalon Water Supply and Sewer Service Corporation are created pursuant to the statutory provisions of Chapter 67, Texas Water Code (TWC) (formerly Article 1434a, Tex.Rev.Civ.Stat.), and the Texas Business Organization's Code (which encompasses the former Texas Non-Profit Corporation Act, Article 1396-1.01, et seq. Tex.Rev.Civ.Stat.) See Section 67.004, Water Code.

The issues posed by Complainant raise several concerns for all non-profit water supply corporations operating in Texas under TWC Chapters 13 and 67 and thus more than half of TRWA's members. For example, Complainant has attempted to expand the scope of Public Utility Commission (PUC) authority by claiming that it has jurisdiction to: hear complaints regarding Texas Open Meetings Act (TOMA) alleged non-compliance, readjudicate prior decisions by the Texas Commission on Environmental Quality (TCEQ), and consider matters wholly unrelated to whether the corporation is operating as a member-owned, member-controlled non-profit corporation. The question of whether the agency has jurisdiction to consider all these issues in the context of a 13.004 case is of the utmost importance to TRWA's more than 500 WSC members.

## **II. DISCUSSION**

### **a. PUC Jurisdiction Over Water Supply Corporations is Limited.**

Review of this matter should be conducted through a precisely focused lens given the PUC's narrow scope of jurisdiction over WSCs. Under TWC § 13.004, the PUC may obtain original jurisdiction over a WSC in two narrowly defined instances: (1) if it finds that the WSC is failing to conduct annual or special meetings in compliance with Texas Water Code Section

67.007: or (2) if the agency finds that a WSC is operating in a manner that does not comply with the requirements for classification as a WSC prescribed by Texas Water Code Sections 13.002(11) and (24).<sup>1</sup> Only if the PUC makes one of these two specific findings about Respondent, can the broader PUC regulations pertaining to a 'water and sewer utility' apply. Complainant raises several issues that are beyond these two limited instances.

Although the PUC has broad jurisdiction over rates and service issues for water and sewer utilities, also known as investor owned utilities, they have limited jurisdiction over WSCs. This is rooted in the differences between how each type of entity is governed and operates. Investor owned utilities are privately owned, for-profit entities that provide water and/or sewer service to communities, but are not governed by the customers that live in those communities. This is in contrast with water supply and sewer service corporations which are non-profit, self-governed entities whose bylaws are adopted through a vote of the members, and policies are adopted by the directors that the members elect. Because of the self-governing nature of WSCs, the legislature limited the scope of regulatory and investigative jurisdiction to only those issues that relate to whether the entity is truly non-profit and self-governing, thus the narrow focus on TWC §67.007. and 13.002(11) and (24).

The legislative history of TWC § 13.004 supports the limited scope of jurisdiction by the PUC. Section 13.004 was enacted in 2005 through House Bill 1358 in the 79<sup>th</sup> Legislative Session and has not been amended since.<sup>2</sup> Although the legislative history and intent documented by the Legislature is relatively minimal, it does reveal that the original bill filed in 2005 included much broader jurisdiction. As originally filed, HB 1358 would have given TCEQ jurisdiction over a water supply or sewer service corporation if the commission found that the corporation

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<sup>1</sup> The PUC also has limited appellate jurisdiction over a WSC's rates.

<sup>2</sup> Tex. H.B. 1358, 79<sup>th</sup> Leg. R.S.

was not charging rates that were reasonable or providing adequate service. TCEQ would have been able to exercise this jurisdiction after receiving a complaint from a municipality, customer, or other person and conducting an investigation.<sup>3</sup> However, through the legislative process, the bill that became law limited the agency's jurisdiction to the two instances outlined above.

Prior decisions by the PUC and TCEQ also reflect and support this limited jurisdiction. Although there are hundreds of WSCs in the state of Texas, the PUC, and TCEQ before them, have heard relatively few complaints under TWC § 13.004.<sup>4</sup> A search of the PUC database reveals only six complaints under TWC §13.004 that were transferred from the TCEQ to PUC as a result of HB 1600 and Senate Bill (SB) 567.<sup>5</sup> Three of the complaints were administratively closed prior to transfer to the PUC, two complaints were dismissed by the PUC for lack of jurisdiction, and this matter remains as the sole pending case.<sup>6</sup> Like the two complaints

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<sup>3</sup> House Research Organization Bill Analysis, HB 1358 Flores (CSHB 1358 by Puente) dated May 3, 2005 at p. 3.

<sup>4</sup>According to the Public Utility Commission Water Utility Database, there are 1051 total Water Supply Corporations in Texas, 825 of which are denoted as active.

<sup>5</sup> House Bill 1600 and Senate Bill 567. 83<sup>rd</sup> Legislature, Regular Session, transferred the functions relating to economic regulation of water and sewer utilities from the TCEQ to the PUC effective September 1, 2014.

<sup>6</sup> (1) PUC Docket No.43166: The matter began in 2008 when TCEQ initiated an investigation of Tynan Water Supply Corporation under 13.004. The matter was referred to the State Office of Administrative Hearings who issued a Proposal for Decision on May 21, 2009, recommending that the Commission has jurisdiction over Tynan pursuant to TWC §13.004 for failing, to conduct annual or special meetings in compliance with TWC §67.007: or for operating in a manner that does not comply with the requirements for classifications as a nonprofit water supply or sewer service corporation. Subsequently, the TCREQ Executive Director (ED) learned that Tynan had undergone a change in management. At that time, the ED requested the Commission remand the case to the ED for further consideration. The ED issued a letter indicating that sufficient time had passed for Tynan to come into compliance with section TWC §67.007. After receipt of sufficient documentation demonstrating such compliance, TCEQ issued a letter on August 20, 2014 administratively closing the matter. (2) PUC Docket No. 43904: The TCEQ received correspondence from a member of Flat Fork WSC (WSC) requesting an investigation of the operating procedures of the WSC pursuant to Texas Water Code Section 13.004. As documented in the May 17, 2012 letter from TCEQ Utilities and Districts Section Manager, Tammy Benter, the TCEQ initiated an investigation 2010 and Flat Fork WS provided sufficient documentation in 2011 and 2012 to show that it is properly operating as a non-profit, member-owned and member-controlled WSC. The matter was closed by TCEQ prior to transfer to the PUC effective September 1, 2016. (3) PUC Docket No. 43179: Investigation pursuant to TWC 13.004 of Gardendale Water Supply Corporation. The investigation was initiated as part of a public water system technical complaint. As documented in the August 7, 2014 letter from TCEQ Water Supply Assistant Director, Cari-Michel La Caille, the TCEQ initiated an investigation under TWC Section 13.004 and made a determination that the Respondent provided sufficient documentation to show that it is properly operating as a non-profit, member-owned and member-controlled WSC. The matter was closed by TCEQ prior to transfer to the PUC effective September 1, 2016. (4) PUC Docket No. 44484: Request by Ms. Maryanne Theriot (Ms. Theriot) for the Public Utility Commission of Texas (Commission) to investigate Etoile Water Supply Corporation (Etoile) for alleged violations of Tex. Water Code (TWC) §§

investigated and dismissed by the PUC, Complainant's attempt include issues beyond the agency's jurisdiction in a 13.004 matter pertaining to the Texas Open Meetings Act, perceived threats of eminent domain actions, and technical violations must be denied. While the issues raised center around actions by the Respondent, Complainant has not established that the Corporation is failing to conduct annual and special meetings where the members have an opportunity to elect their board of directors and vote on changes to their bylaws and tariff, or that Respondent is serving non-members or operating in a manner that does not comply with the requirements for classification as a non-profit WSC under 13.002(11) and (24).

Furthermore, Complainant fails to substantiate their claim of jurisdiction in their verified response by omitting the specific information requested of them in SOAH Order No. 6. Specifically, the Order requires the Complainant to include the statutory basis for jurisdiction, legal cause of action, and statutory and regulatory authority for each remedy, every applicable subsection of the statutory and regulatory authority. The Order further specifies as for jurisdiction, it is not enough to simply refer to Texas Water Code § 13.004(a)(1), but Complainant must cite and explain how the Commission has the same jurisdiction over Avalon as over a water and sewer utility, including the specific criteria. As seen in Complainant's Response filed on July 22, 2016, pages 11-28, the citations and explanations are absent. Because the Complainant ignored the Judge's instructions, has failed to provide the required citations and explanation, and to minimize the further waste of judicial and administrative time, SOAH should

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13.004(a)(1) and (2). Ms. Theriot's request raised concerns about a change in election procedures. The Commission found that Etoile was entitled to dismissal of this proceeding, having demonstrated that the utility did not violate TWC §13.004(a). Ms. Theriot's request was dismissed by the Commission on April 25, 2016 pursuant to 16 TAC § 22.181(a)(1)(A), for lack of jurisdiction. (5) PUC Docket No. 42121. Request by Ede and Randy Bullock for Determination of RCH Water Supply Corporation's Compliance with Texas Water Code § 13.004. The Bullock's request surrounded the Corporation's billing procedures and requirements for continuation of service. The Commission concluded that it did not have jurisdiction over the Bullock's complaint under TWC § 13.004(a) and issued an order dismissing the matter on April 25, 2016 pursuant to 16 TAC § 22.181(a)(1)(A).

find this complaint without basis, and recommend the Commission dismiss the matter for lack of jurisdiction.

**b. PUC Jurisdiction Does Not Include Review of Allegations Regarding Texas Open Meetings Act Non-compliance.**

Water Supply Corporations are subject to the Texas Open Meetings Act, or TOMA.<sup>7</sup> However, review of complaints regarding potential TOMA non-compliance can only be addressed as provided in the Act, which does not confer PUC jurisdiction. Rather, jurisdiction over these matters lies with state courts. As evidenced by the letter from the Ellis County District Attorney documenting complaints submitted over a series of years,<sup>8</sup> Complainant is aware of this fact and yet tries to use these concerns to substantiate her claims under TWC § 13.004. The April 23, 2012 letter from Ellis County Assistant District Attorney. W Lee Auvenshine, included in Item 12 of SOAH Docket 43146, discusses receipt of three written complaints regarding alleged violations of the Texas Open Meetings Act, Chapter 551 of the Texas Government Code.<sup>9</sup> The absence of any prosecution by the District Attorney does not confer that jurisdiction on the TCEQ or PUC. 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.<sup>10</sup> Considering this limitation on jurisdiction, any complaints regarding TOMA non-compliance should be excluded from consideration in this matter.

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<sup>7</sup> 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.

<sup>8</sup> See PUC Docket No. 43146, Item 12, pages 71-75 include the April 23, 2012 letter from Ellis County Assistant District Attorney, W. Lee Auvenshine and news articles regarding the DA's investigation.

<sup>9</sup> The April 23, 2012 letter indicates that the Complainant was carbon copied and includes references to the March 15, 2012, April 5, 2012 and April 10, 2012 complaint, requesting Respondents written reply by May 4, 2012.

<sup>10</sup> *Subaru of Am. Inc. v. David McDavid Nissan, Inc.* 84 S.W.3d 212, 220 (Tex. 2002).

**c. PUC Jurisdiction Does Not Include The Authority To Readjudicate Prior Final Decisions By The TCEQ.**

Water supply corporations should not be subject to an endless series of investigations and inquiries into matters which were fully investigated by the proper regulatory authority. In this matter, the TCEQ investigated inquiries submitted by Complainant over several years and found no violation of TWC § 13.004. To do so now would only serve to frustrate administrative efficiencies and allow the PUC to undermine TCEQ's prior regulatory authority. As documented in the August 25, 2014 letter from TCEQ Water Supply Assistant Director, Cari-Michel La Caille (now Director), the TCEQ initiated an investigation under TWC Section 13.004 and made a determination that the Respondent provided sufficient documentation to show that it is properly operating as a non-profit, member-owned and member-controlled WSC. Neither TCEQ nor PUC procedural rules provide the opportunity to file a motion for reconsideration in response to a determination regarding an investigation under TWC § 13.004.<sup>11</sup> Absent express provision in statute or rule, the PUC has no authority to readjudicate prior TCEQ decisions and thus any complaints that were included in the prior investigation and determination should be dismissed.

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<sup>11</sup> PUC Rule 16 TAC § 22.248(g) provides for continuation of TCEQ rules after the date the duties were transferred to the PUC stating, "The rules of the TCEQ related to the duties transferred to the commission regarding water and sewer utilities continue as rules of the commission until amended or replaced by this commission. This section is a replacement of those procedural rules, provided however, that the procedural rules of the TCEQ are continued for proceedings transferred to the commission to the extent not inconsistent with this section. PUC Rule 16 TAC § 22.248(e) addresses motions for rehearing stating: 'Motions for rehearing for every proceeding transferred to the commission shall be governed by this chapter,' referring to the PUC procedural rules in Chapter 22. Although PUC rule 16 TAC § 22.241 specifically provides that nothing in this section shall be construed to limit the commission's authority to investigate persons subject to the commission's jurisdiction, that jurisdiction should not be construed to apply to matters that were closed prior to the commission's grant of authority by the Texas Legislature under HB 1600.



**d. If the Commission Determines That the Respondent has Complied with the Requirements of TWC § 13.004 for the Last 24 Months, This Matter Should be Dismissed for Lack of Jurisdiction.**

Since TCEQ already determined the pre-2014 allegations did not have merit, the PUC may only consider allegations filed since that time. This leaves only allegations regarding actions that occurred from 2014 to today. In accordance with PUC Rule 24.35(b)(3), the PUC's jurisdiction ends if 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>12</sup> As of the date of this filing, nearly 24 months have passed since the final determination by TCEQ that the Respondent has operated in a manner that complies with the requirements for membership and nonprofit organizations as outlined in TWC, §13.002(11) and (24). It would be expected that by the end of the hearing conducted by SOAH, 24 months would have passed and the Respondent will have had the opportunity to make the requisite demonstration for Commission consideration. If this demonstration is made, the Commission shall not take jurisdiction over the Respondent, but shall dismiss the matter for lack of jurisdiction.

### **III. CONCLUSION**

This matter has created an unprecedented burden on a small WSC. This case has been subject to a lengthy, repetitive, and costly administrative process. Requiring WSCs to continually defend against allegations outside the scope of the Commission's jurisdiction has the

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<sup>12</sup> 16 Tex. Admin. Code § 24.35(b). PUC rules include three ways that the Commission's jurisdiction under the section ends: (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). There is no evidence to suggest that the Respondent is converting to a Special Utility District and it is not currently subject to a Commission Order related to TWC § 13.004.

potential to open a Pandora's Box, allowing any perceived grievance to become the platform to impose economic hardships on corporations, that flow through to the entirety of its members through the rate increases necessary to pay the legal fees. The threat of this negative impact should not be imposed on non-profit, member-owned, member-controlled water supply corporations.

WHEREFORE, PREMISES CONSIDERED. Amicus Curiae, Texas Rural Water Association requests that the Motion to Dismiss raised by Respondent Avalon Water Supply Corporation be expeditiously granted, and that Complainant's request for relief be denied for lack of jurisdiction.

Respectfully submitted,




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ATTORNEY FOR  
AMICUS CURIAE  
TEXAS RURAL WATER ASSOCIATION

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15<sup>th</sup> day of August, 2016, a true and correct copy of the above and foregoing "Brief of Amicus Curiae, Texas Rural Water Association, In Support of Respondent's Motion to Dismiss" was served on all known parties of record via email with read receipt requested per SOAH Order No. 2.



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Erin Selvera