



Control Number 43146



Item Number 74

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PUBLIC UTILITY COMMISSION
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BEFORE THE

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

**COMPLAINANT GILLESPIE’S REPLY TO RESPONSES OF AVALON,
COMMISSION STAFF AND THE TEXAS RURAL WATER ASSOCIATION**

**TO THE HONORABLE JUDGES STEPHANIE FRAZEE AND TRAVIS
VICKERY**

COMES NOW Carol D. Gillespie (“Gillespie” or “Complainant”) and files this Reply to the Responses of Avalon Water Supply and Sewer Services Corporation (“Avalon” or “Corporation”), the Staff of the Public Utility Commission of Texas (“Commission Staff), and to the amicus brief of the Texas Rural Water Association (“TRWA”), and in support of which Complainant respectfully shows the following:

I. BACKGROUND

On August 15, 2016, Avalon and the Commission Staff filed responses to Complainant Gillespie’s Verified Brief in Response to Order No. 6. TRWA, not a party to this case, filed an amicus brief also on August 15, 2016 in support of Avalon. This reply is timely filed within five (5) business days of the other parties’ responses.

II. ARGUMENT

1. Violation of *Any* Bylaw Triggers TWC § 13.004

Commission Staff concedes that Gillespie ‘has raised several violations that fall within the Commission jurisdiction.’¹ This statement alone triggers the Commission’s jurisdiction and warrants the continuation of this hearing forthwith. Unfortunately,

¹ Commission Staff’s Response at 2.

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Commission Staff's argument devolves into confusing hair splitting arguing some of Avalon's bylaw violations are evidence of operating outside of member control, while arguing the Commission may not consider other bylaw violations.² The Commission Staff's argument lacks any legal merit or support, and Tex. Water Code Ann. § 13.004 ("TWC") does not make this distinction between different bylaw violations. Rather, bylaws by definition are the rules that the *members adopted* to manage or control the corporation.³ Bylaws are the vehicle by which a WSC is member-controlled. Thus Avalon's failure to comply with *any* bylaw provision constitutes an obvious and definitive demonstration of its failure to operate in a member-controlled manner. In other words, a WSC that operates in a manner counter to *any* of the provisions of the corporation's bylaws is not member-controlled. A corporation operating in that manner is not complying with the requirements for classification as a nonprofit WSC. Commission Staff, Avalon, and TRWA ignore very real and serious violations – some which happened during the pendency of this case – claiming investigating TWC § 13.004 violations 'serves no useful purpose.'⁴ SOAH must apply the plain meaning of TWC § 13.004, not what Avalon believes 'logic supports' just because these cases 'use the State's time and resources.'⁵ Avalon must not be allowed to escape regulatory and public accountability because fidelity to the statute is inconvenient and costly.

Contrary to Commission Staff's argument, nothing shows failure to be member-owned or member-controlled more than Avalon's failure to provide access to its members to its monthly meetings in accordance with Article V. Section 3 of Avalon's Bylaws (which staff would remove as a basis of jurisdiction). Also adopting budgets and undergoing financial audits are other ways members know how the financial decisions of *their* corporation are being made and more examples of Avalon's hiding its essential business from the membership.

³ Tex. Bus. Org. Code Ann. § 22.001(2). *See also* TRWA's Response at 3, agreeing that water supply and sewer service corporations ("WSCs") '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. (emphasis added).

⁴ Avalon Response at 3.

⁵ Avalon Response at 4. Both Avalon and TRWA attach identical yet ultimately unhelpful legislative history, which is only appropriate where the statute is ambiguous. The normal legislative winnowing and 'sausage-making' changes to the original bill reflect a disagreement on rate authority, not a desire to give WSCs unfettered discretion. Indeed, the surviving language mandates that WSCs hold proper meetings and elections and behave as member-controlled bodies because, 'if a corporation failed to meet those standards, it would be imperative that TCEQ have some means of ensuring the quality of the water supplier's service otherwise a corporation could escape both regulatory and public accountability. House Research Organization Bill Analysis, H.B. 1358 at 2.

2. No Adjudication or Findings of Compliance

Avalon argues repeatedly that the Texas Commission on Environmental Quality (“TCEQ”) made findings and final decisions implying that this closed case should not be rehashed. These arguments are disingenuous. First, there was never any adjudication or actual ‘findings of fact’ of Avalon’s compliance. Even if the August 25, 2014 letter from then-TCEQ staffer, Cari-Michel La Caille, could qualify as a final decision or adjudication by the TCEQ Commissioners, her letter relates to compliance with only part of TWC § 13.004. Again, the other parties would read out of existence the TWC § 13.004(a)(1) requirement that Avalon hold its annual and special meetings in accordance with chapter 67, rendering the statute meaningless. Rather, the August 25, 2014 letter is merely a restatement of Ms. La Caille’s June 16, 2014 letter, adding the form letter notification that responsibility for rates and CCNs is moving to the PUC. If this were more than ‘buttoning up’ its files, why would TCEQ staffer Fred Bednarski have informed Ms. Gillespie just a few days earlier that her application was ‘in the process of being administratively reviewed, instructing her to ‘document violations to support your claim (sic) ie minutes, agendas, invoices, contracts, etc. that are not pursuant to Texas Water Code Section 13.004 which establishes jurisdiction’?”⁶ Gillespie has identified many actual past and recent violations of the applicable meeting and election procedures and bylaws that warrant the kind of scrutiny that is only possible in an evidentiary setting.

Additionally, Avalon’s obligation to act as a nonprofit WSC is continuing in nature – ‘operating, in the present tense, in a manner that complies with the requirements for classifications as a WSC.’⁷ Compliance with the statute must be ongoing, not a one-time, check of the box. In any event, many of the violations identified by Complainant have occurred after jurisdiction was transferred by TCEQ.

⁶ See Exhibit 1, 8/8/14 email correspondence from Fred Bednarski to Carol Gillespie.

⁷ Tex. Water Code Ann. § 13.004(a)(2).

3. TOMA Violations are Bylaws' Violations, Triggering Jurisdiction

With respect to violations of the Texas Open Meetings Act (“TOMA”),⁸ Gillespie has not asked the Commission to enforce TOMA nor brought an action by mandamus or injunction under section 551.142 to stop, prevent, or reverse Avalon’s violations of TOMA that would properly be in District Court. Nor has Gillespie sought to invalidate any action taken by Avalon in violation of TOMA,⁹ although that is within her right as an interested person.¹⁰ Rather, Gillespie has only sought a remedy well within the Commission’s jurisdiction under TWC chapter 13, that is, to find that Avalon has violated Article V Sections 1 and 4 of its bylaws and therefore TWC §§ 13.002(24) and 13.004(a)(2). Avalon’s and TRWA’s mischaracterization of Complainant’s argument and faulty policy rationale would strip the Commission of its authority to ascertain violations of TWC § 13.002(24) (*i.e.* bylaws) where the Legislature specifically created a process for a WSC’s actions to be reviewed. If SOAH were to accept Avalon’s and TRWA’s arguments, it would read out of existence part of the statute rendering TWC §§ 13.002(24) and 13.004 meaningless, and WSCs would escape Commission jurisdiction despite documented violations.

This case is not unlike instances of concurrent jurisdiction with other administrative agencies, like the Texas Department of Savings and Mortgage Lending under the Finance Commission of Texas. There, for example, the Department can take disciplinary action and suspend the license of a mortgage loan originator if that individual has been indicted (pre-final disposition, not adjudicated) or engaged in other conduct violating the law, but the Department is not acting as or usurping the role of the prosecutor or district attorney who actually prosecutes the individual.¹¹ The Department is merely taking notice of the individual’s alleged, not adjudicated, violations under a separate regulatory scheme to inform its decision-making within its own sphere of authority as the licensing body. Similarly, the TOMA violations set out in Gillespie’s

⁸ Tex. Gov’t Code Ann. § 551.141 *et seq.*

⁹ *Id.* § 551.141.

¹⁰ *Id.* § 551.142(a).

¹¹ Tex. Fin. Code Ann. § 157.024.

verified brief and tables are additional examples of how Avalon continues to ignore the provisions of its bylaws, thwarting the control of its members as intended by the Legislature. By ignoring this member control mechanism, Avalon invokes the jurisdiction of the Commission. The members adopted the TOMA requirements in their bylaws to ensure that the actions of the Board of Directors of Avalon remain under their strict control and oversight, and the board's actions are transparent. These obvious violations are additional examples of how Avalon continues to operate in a manner that does not comply with the requirements for classification as a nonprofit WSC. These violations are evidence that support the Commission exerting the same jurisdiction over Avalon as it would over any other water or sewer utility.

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Complainant prays that the ALJs deny Avalon's Motion to Dismiss, Motion to Certify the Question, Motion to Continue the Abatement, and Motion for Discovery Schedule Hearing, and issue an order resuming the hearing schedule, and for all other relief to which Complainant may be entitled.

Respectfully submitted,

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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 22ND of August 2016.

By: Helen S. Gilbert
Helen S. Gilbert

Exhibit 1

From: Fred Bednarski <Fred.Bednarski@tceq.texas.gov>
Sent: Aug 8, 2014 12:19 PM
To: Carol Gillespie <caroldgillespie@earthlink.net>
Cc: Lisa Fuentes <lisa.fuentes@tceq.texas.gov>
Subject: RE: Avalon Status of My Complaint

Hello Carol,

Your application is in in the process of being administratively reviewed. During this time I would document violations to support your claim ie minutes, agendas, invoices, contracts, etc. that are not pursuant to Texas Water Code Section 13.004 which establishes our jurisdiction.

Sincerely,
Fred

Fred Bednarski III, CGAP
TCEQ, Utilities & District Section
Financial Review Team, Auditor
12100 Park 35 Circle, Bldg F
Austin, TX 78753
Ph. 512-239-4758

-Original Message-

From: Carol Gillespie [<mailto:caroldgillespie@earthlink.net>]
Sent: Friday, August 08, 2014 11:36 AM
To: Fred Bednarski
Subject: Avalon Status of My Complaint

Hello Mr. Bednarski,

Do you happen to know the status of the complaint that I filed last month? There will be another meeting in less than a week and I would like to know something.

Thank you,
Carol Gillespie