

Control Number: 43146



Item Number: 76

Addendum StartPage: 0

# State Office of Administrative Hearings



Lesli G. Ginn  
Chief Administrative Law Judge

December 8, 2016

RECEIVED  
2016 DEC -8 PM 4:03  
PUBLIC UTILITY COMMISSION  
FILING CLERK

TO: Stephen Journeay, Director  
Commission Advising and Docket Management  
William B. Travis State Office Building  
1701 N. Congress, 7th Floor  
Austin, Texas 78701

Courier Pick-up

RE: SOAH Docket No. 473-16-2033.WS  
PUC Docket No. 43146

*Complaint of Carol D. Gillespie Against Avalon Water Supply and Sewer Services Corporation*

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. There is no deadline in this case. Please notify the undersigned ALJs and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,

Handwritten signature of Stephanie Frazee in cursive.

Stephanie Frazee  
Administrative Law Judge

Handwritten signature of Travis Vickery in cursive.

Travis Vickery  
Administrative Law Judge

Enclosure  
xc: All Parties of Record

SOAH DOCKET NO. 473-16-2033.WS  
PUC DOCKET NO. 43146

COMPLAINT OF § BEFORE THE STATE OFFICE  
CAROL D. GILLESPIE AGAINST §  
AVALON WATER SUPPLY AND § OF  
SEWER SERVICES CORPORATION §  
§ ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

I. BACKGROUND.....	1
A. Complaints.....	1
B. Parties .....	1
C. Procedural History .....	2
II. APPLICABLE LAW .....	6
III. ANALYSIS.....	7
A. Lack of Standing.....	7
B. Failure to State a Claim .....	12
C. Lack of Jurisdiction.....	12
1. The Commission's Narrow Scope of Jurisdiction under Water Code § 13.004.....	13
2. Failure to Articulate Jurisdiction over Specific Claims .....	16
a. Failure to Articulate Jurisdiction over Non-TOMA Claims in Compliance with Order No. 6.....	16
b. Failure to Articulate Specific Substantive Grounds for Jurisdiction over Non-TOMA Claims.....	19
D. Additional Reasons for Dismissing Certain Claims .....	20
1. Claims Stemming from Facts Prior to August 25, 2014, Should Be Barred in Deference to TCEQ Agency Action .....	20
2. The Commission Lacks Jurisdiction over Claims that Avalon Violated TOMA .....	23
3. Failure to Amend Pleadings.....	25
E. Summary .....	26

IV. ADDRESSING AVALON'S ALLEGATIONS.....	28
V. PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERING PARAGRAPHS .....	30
A. Findings of Fact.....	30
B. Conclusions of Law.....	32
C. Ordering Paragraphs .....	33

SOAH DOCKET NO. 473-16-2033.WS  
PUC DOCKET NO. 43146

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

§ BEFORE THE STATE OFFICE  
§  
§ OF  
§  
§ ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION TO DISMISS**

The Administrative Law Judges (ALJs) propose that this case be dismissed based solely on the parties' pleadings and legal authority. The ALJs propose dismissing this case based on lack of standing, failure to state a claim, lack of jurisdiction, failure to articulate jurisdiction, and failure to comply with SOAH Order No. 6. In addition, certain claims should be denied on separate bases as set forth below.

**I. BACKGROUND**

**A. Complaints**

In this action, Carol D. Gillespie (Complainant) filed a series of complaints against Avalon Water Supply and Sewer Services Corporation (Avalon) spanning from 2011 through July 2016. In general, the numerous complaints relate to allegations that Avalon has violated its by-laws and the Texas Open Meetings Act (TOMA).

**B. Parties**

Complainant is not a customer of Avalon. Complainant takes no service from Avalon and is not seeking service from Avalon. Although Complainant has an Avalon meter on her property, it is not active and was not active during the period applicable to her complaints. Nevertheless, Applicant is considered a member of Avalon.<sup>1</sup>

---

<sup>1</sup> Avalon Motion to Dismiss at 1-3 and Response to complaints filed on March 4, 2015; October 6, 2016; and October 22, 2015, in Docket No. 43146. Texas Water Code (Water Code) § 13.002(1), (11).

In filings, Avalon explains that it is a small rural water supply company (WSC), owned by its approximately 340 member-customers. Its seven directors and officers are unpaid volunteers. Only the general manager, bookkeeper, and operator are paid part-time positions. The WSC is located in and serves the unincorporated farming community of Avalon in southern Ellis County, Texas.<sup>2</sup>

Avalon notes that it has limited resources. The WSC's annual gross receipts are approximately \$350,000. Avalon asserts that during 2015-2016 alone, complaints filed by Complainant cost the WSC roughly \$100,000. Avalon estimates that participating in a full hearing at the State Office of Administrative Hearings (SOAH) would cost another \$100,000.<sup>3</sup>

### C. Procedural History

Before jurisdiction over WSCs was transferred from the Texas Commission on Environmental Quality (TCEQ) to the Public Utility Commission of Texas (PUC or Commission) on September 1, 2014, Complainant filed a number of complaints against Avalon. In 2014, TCEQ Staff conducted an investigation into Complainant's allegations and found no violations. On August 25, 2014, TCEQ Staff issued a positive determination under the Texas Water Code (Water Code) that, despite Complainant's assertions, Avalon was properly operating as a non-profit, member-owned and member-controlled WSC.<sup>4</sup> TCEQ Staff closed the complaint and took no action against Avalon.

On September 16, 2014, Complainant filed a complaint with the Commission asserting some of the same allegations that TCEQ Staff had already investigated and determined were without merit. Thereafter, the case remained at the Commission. After a series of additional complaint filings, on March 4, 2015, Avalon filed a response to the complaints attaching three

---

<sup>2</sup> Avalon Motion to Dismiss at 1-3 and Response to complaints filed on March 4, 2015; October 6, 2016; and October 22, 2015.

<sup>3</sup> Avalon Motion to Dismiss at 1-3 and Response to complaints filed on March 4, 2015; October 6, 2016; and October 22, 2015.

<sup>4</sup> The August 25, 2014 letter from the TCEQ Water Supply Division to Complainant is attached hereto as Attachment A. The letter was attached to Avalon's Response to Complainant's Verified Brief under SOAH Order No. 6: General Denial and Motion to Dismiss, as Exhibit 1. The ALJs take notice of Attachment A and its contents.

volumes of records totaling 184 pages. In its response, Avalon asserted that Complainant had failed to serve any of the complaints on Avalon or its counsel. Avalon stated that it was unaware of the proceeding until it received PUC Order No. 2 on February 13, 2015, requiring Avalon to file a response.

Thereafter, Commission Staff (Staff) requested Avalon file an additional response, which was ordered by the Commission ALJ. On October 6 and 22, 2015, Avalon filed a Supplemental and a Second Supplemental Response to the complaints. After reviewing Avalon's responses, Staff issued a Supplemental Recommendation, noting that it was Staff's prerogative to file a petition against Avalon, if warranted. Staff, however, recommended that no such petition was necessary and that Complainant's complaint be dismissed for failure to state a claim for which relief could be granted.<sup>5</sup>

Despite Staff's recommendation, on January 25, 2016, the Commission's Director of Advising and Docket Management issued an order of referral, referring this matter to SOAH for a hearing and proposal for decision, if necessary. On March 22, 2016, the Commission issued a preliminary order in this case requiring the ALJs to address the following issues:

1. Is Avalon failing to comply with Water Code § 13.004?
2. Is Avalon failing to conduct annual or special meetings in compliance with Water Code Section 67.007? Water Code § 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 Water Code §§ 13.002(11) and (24)? Water Code § 13.004(a)(2).
4. What should the Commission require of Avalon if it is failing to comply with Water Code § 13.004?

In March 2016, SOAH convened an initial prehearing conference. Between March 25 and April 11, 2016, Complainant filed and served three sets of Requests for Information (RFIs) on Avalon and one set of RFIs on Staff. On April 14, 2016, Avalon filed a Motion for Protective

---

<sup>5</sup> Commission Staff's Supplemental Recommendation, November 4, 2015.

Order regarding Complainant's Second and Third Sets of RFIs. Among other things, Avalon sought relief from SOAH to limit discovery from Complainant, which included 119 requests for admission and wide-ranging document requests going back seven years. The next day, on April 15, 2016, Complainant filed a Motion to Compel.

On April 20, 2016, Avalon and Complainant filed an agreed request to abate this matter while the parties explored mediation and possible settlement. On April 21, 2016, SOAH issued SOAH Order No. 3, granting the motion to abate.<sup>6</sup> The abatement was renewed a number of times by order and continued through June 17, 2016. Avalon asserts that the purpose of the first abatement was to attempt to settle this matter through mediation at SOAH. Although Complainant agreed to the abatement, she allegedly refused to mediate.<sup>7</sup>

On June 17, 2016, Avalon filed a Motion to Dismiss and Alternate Motion to Certify Question and Continue Temporary Abatement of Discovery and Hearing Schedule. On June 24, 2016, Staff filed a response, which opposed the motion to dismiss but supported the motion to certify a question to the Commission.<sup>8</sup> The same day, Complainant filed a response opposing both motions.

On July 7, 2016, the ALJs issued SOAH Order No. 6, abating discovery and requiring Complainant to file, by July 22, 2016, a verified brief addressing the factual background, legal authority, and remedy for each and every alleged deficiency committed by Avalon. Complainant's brief was required to include a table as follows:

---

<sup>6</sup> Avalon's Motion for Protective Order and Complainant's Motion to Compel have not been ruled on due to the abatement of the proceedings.

<sup>7</sup> Avalon's Motion to Dismiss at 1.

<sup>8</sup> Staff requested to certify to the Commission the question of "the scope of the Commission's specific jurisdictional authority under TWC § 13.004(a)." Commission Staff's Response to Gillespie's Verified Brief. As set forth in III.C.1. of this PFD, the ALJ's find that the scope of the Commission's jurisdiction is clear from the plain language of Water Code § 13.004(a); therefore, it is not necessary to certify Staff's question to the Commission.



Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
1.				
2.				
Etc.				

The ALJs required the table in Complainant's brief to be an exhaustive list of the alleged deficiencies for purposes of a hearing and any further pleadings, motions, or briefs.

SOAH Order No. 6 specifically required the columns addressing jurisdiction, causes of action, and statutory and regulatory authority for each proposed remedy to address every applicable subsection of the statutory and regulatory authority. In particular, for jurisdiction, the ALJs pointed out that it was not enough for Complainant to simply refer to Water Code § 13.004(a)(1). Instead, Complainant was required to provide specific citations and explain how the Commission has the same jurisdiction over Avalon as over a water and sewer utility, including the specific criteria. Furthermore, if new claims were added, SOAH Order No. 6 required the Complainant to amend her pleadings accordingly.

Complainant filed a verified brief on July 22, 2016. In the brief, Complainant asserts 72 different claims against Avalon, spanning roughly 31 pages, including claims that Avalon violated TOMA.<sup>9</sup> Staff and Avalon timely filed responsive briefs by August 15, 2016. Avalon seeks dismissal of all claims on a number of grounds. Staff also seeks dismissal of Complainant's claims. On August 15, 2016, the Texas Rural Water Association (TRWA) filed an amicus brief in support of Avalon's motion to dismiss. Complainant filed a reply on August 22, 2016, and Staff filed a motion to strike the reply the same day.<sup>10</sup>

<sup>9</sup> Tex. Gov't Code ch. 551. The ALJs have attached Complainant's claims charts as Attachments C and D to this order. Attachment C contains Complainant's non-TOMA claims. Attachment D contains Complainant's TOMA-based claims. Although Complainant did not number her claims as required by SOAH Order No. 6, the ALJs have numbered the non-TOMA claims to assist the Commission's analysis of this PFD. Additionally, the ALJs note that despite including new claims in her verified brief, Complainant has not amended her pleadings.

<sup>10</sup> The ALJs deny Staff's motion to strike. The ALJs considered Complainant's reply in its entirety.

This proposal for decision recommends dismissal of all Complainant's claims due to lack of standing, failure to state a claim, lack of jurisdiction, failure to articulate grounds for jurisdiction, and failure to comply with SOAH Order No. 6.

## II. APPLICABLE LAW<sup>11</sup>

Under Chapter 13 of the Water Code, the Commission "may regulate and supervise the business of each water and sewer utility within its jurisdiction, including ratemaking and other economic regulation."<sup>12</sup> The Commission, however, lacks such broad jurisdiction over a WSC unless certain requirements under Water Code § 13.004(a) are established.<sup>13</sup> Water Code § 13.004(a) 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) 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).

Water Code § 67.007 sets forth various requirements for annual meetings of members and shareholders, including that the annual meeting must be held between January 1 and May 1 at a time specified by the by-laws or the board; that the board shall adopt written procedures for conducting an annual or special meeting that address certain criteria; and that the board shall select an independent election auditor not later than the 30th day before the scheduled date of the annual meeting. Section 67.007 also sets forth parameters for achieving a quorum.

---

<sup>11</sup> In the interest of judicial economy, the ALJs have incorporated portions of the parties' briefing into this PFD.

<sup>12</sup> Water Code § 13.041(a).

<sup>13</sup> The definition of "water and sewer utility," "public utility," or "utility," specifically excludes "a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county." Tex. Water Code § 13.002(23).

Water Code § 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.

Water Code § 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.

### III. ANALYSIS

#### A. Lack of Standing

Avalon’s initial argument, joined by TRWA and Staff, is that Complainant lacks standing to bring any of her complaints as independent causes of action at SOAH.<sup>14</sup> Avalon notes that Water Code § 13.004 is silent regarding how a case under the statute must be initiated. That is, the inquiry under Water Code § 13.004 is to determine whether the Commission has jurisdiction, and nothing entitles an individual to a contested case hearing at SOAH for the purpose of determining whether jurisdiction exists.

Complainant argues that violation of any bylaw triggers Water Code § 13.004. Complainant asserts that a WSC that operates in a manner counter to any of the provisions of its

---

<sup>14</sup> Although these parties’ arguments are not identical, for ease of reference the ALJs generally refer to them as standing arguments, which are also closely related to arguments regarding Complainant’s failure to state a claim.

by-laws is not member-controlled because the by-laws are the rules that the members adopted to manage or control the corporation and are the vehicle by which a WSC is member-controlled.

Avalon and Staff argue that Water Code § 13.004 and the Commission's rules only contemplate Staff or the Executive Director of the Commission conducting an investigation of Complainant's claims. Only after finding violations that trigger the Commission's jurisdiction can Staff bring an enforcement action against the WSC, which can then be referred to SOAH for a hearing. Essentially, both Avalon and Staff argue that Complainant lacks standing to bring an action under Section 13.004, which must instead be brought through an enforcement action by the legislatively selected executive branch agency. The ALJs agree.

Complainant has failed to establish that Water Code Chapter 13 or the Commission's rules authorize her to individually bring this contested case hearing. That is, in her verified complaint, Complainant failed to identify any statutory grounds or regulatory structure that permits her to bring claims against Avalon or even assert that the Commission has jurisdiction under Section 13.004, as if she were a private Attorney General or executive branch agency with investigative and enforcement authority.

Consistent with Water Code § 13.004's silence on standing, the PUC's rules only address standing for Staff through an enforcement action.<sup>15</sup> Staff notes that, under the Commission's procedural rules, the issues raised by Complainant are not appropriate in an individual complaint proceeding. Instead, the Commission's procedural rules provide that: "[u]pon receiving an allegation of a violation or a continuing violation, the executive director shall determine whether an investigation should be initiated."<sup>16</sup> Thus, "although an enforcement proceeding may arise from a complaint, the rules give the Commission, not a complainant, the discretion to initiate an enforcement proceeding."<sup>17</sup>

---

<sup>15</sup> Recognizing that the Commission allows individual-brought complaints in non-water cases, Avalon notes that the Commission's rules regarding individual complaints only involve electric and telecommunication utilities.

<sup>16</sup> 16 Tex. Admin. Code § 22.246(e).

<sup>17</sup> *Complaint of Allyson Rockett Against Pre-BuyElectric, LLC*, Docket No. 35921, Order No. 2 at 3 (Apr. 2, 2009).

SOAH Order No. 6 required Complainant to identify each cause of action and the underlying regulatory basis. Consistent with Complainant's lack of individual standing, she was also unable to articulate individual causes of action against Avalon. For every non-TOMA claim, Complainant simply cited to Water Code § 67.007 and/or § 13.004.<sup>18</sup> These provisions, however, are the bases for the Commission to establish jurisdiction, not independent causes of action arising from that jurisdiction.

Likewise, Complainant does not have standing to seek the remedies she suggests for Avalon's alleged violations. Complainant requests the dissolution of the board and the imposition of receivership for every violation, arguing that receivership is most appropriate for small rural WSCs. In response, Avalon and Staff point out that receivership can only be brought about by the Commission requesting the Attorney General to bring suit for the appointment of a receiver, and receivership is authorized only in specific circumstances that are not present in this case.<sup>19</sup> Thus, Complainant, as an individual, cannot seek the remedy of receivership, and she has not alleged circumstances that would justify appointing a receiver. Moreover, SOAH does not have jurisdiction to recommend that the Commission seek receivership of a utility.

As authority for the remedies sought, Complainant cites Water Code § 13.004(a), and 16 Texas Administrative Code §§ 24.35 and 24.141. As previously stated, Water Code § 13.004(a) is jurisdictional, and the latter two cites are limited to either jurisdiction or Commission-initiated enforcement actions. 16 Texas Administrative Code § 24.35 is entitled "Jurisdiction of Commission over Certain Water or Sewer Supply Corporations" and, consistent with its title, deals only with the Commission's jurisdiction, not claims or remedies.

More informatively, however, Complainant's citation to 16 Texas Administrative Code § 24.141 reinforces the other parties' arguments that Complainant has no standing to bring her

---

<sup>18</sup> Attachment C.

<sup>19</sup> 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 Commission or the TCEQ that the owner is abandoning the system; (3) violates a final order of the Commission or the TCEQ; or (4) allows any property owned or controlled by it to be used in violation of a final order of the Commission or the TCEQ. Water Code § 13.412. 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.

complaints as an individual. Rather, the appropriate mechanism is a Commission-initiated enforcement action. 16 Texas Administrative Code § 24.141 is entitled "Supervision of Certain Utilities." Although that provision does provide remedies, those remedies are only applicable to the kinds of enforcement actions that are allowed by the subchapter in which § 24.141 is found. The scope of allowable remedies is set forth in the subchapter's initial provision, 16 Texas Administrative Code § 24.140, entitled "Enforcement Action," which states:

If *the commission* has reason to believe that the failure of the owner or operator of a water utility to properly operate, maintain, or provide adequate facilities presents an imminent threat to human health or safety, *the commission shall immediately*:

- (1) notify the utility's representative; and
- (2) *initiate enforcement action* consistent with:
  - (A) *this subchapter*; and
  - (B) procedural rules adopted by the commission.<sup>20</sup>

As a result, the remedies provided in the subchapter must result from a Commission-initiated enforcement proceeding.

Consistently, the specific language of 16 Texas Administrative Code § 24.141 is specifically limited to Commission-initiated enforcement proceedings. For instance, subsection (a) states: "The *commission* may place a utility under supervision where . . ." And subsection (b) states: "The *commission* may require the utility to abide by conditions and requirements." Nowhere does 16 Texas Administrative Code § 24.141 entitle an individual to pursue remedies or claims. Rather, the subchapter presumes a Commission-initiated enforcement action.

Thus, while Complainant may complain to Commission Staff about Avalon's governance, she has cited to nothing that grants her standing, a private cause of action, or the right to seek remedies. Rather, it is Staff's prerogative to investigate and pursue such

---

<sup>20</sup> Emphasis added.

complaints. After determining that Avalon's conduct falls under the Commission's jurisdiction Staff can bring an enforcement proceeding, seeking the remedies addressed by 16 Texas Administrative Code § 24.141.

In fact, the conduct of both PUC and TCEQ staff in this case is consistent with the concept that enforcement under these circumstances is strictly limited to agency action. When the TCEQ previously had jurisdiction over water utility matters before September 1, 2014, TCEQ staff investigated Complainant's allegations and determined that Avalon was properly operating as a non-profit, member-owned and member-controlled WSC, found no violations, and closed the complaint.<sup>21</sup>

After the TCEQ transferred jurisdiction to the PUC, Complainant re-urged her complaints to the Commission. Staff reviewed all of Complainant's claims, and requested and obtained numerous responses from Avalon. On November 4, 2015, after reviewing all of the claims and responses, Staff issued a Supplemental Recommendation, clearly asserting its prerogative to determine whether an enforcement action should be brought:

If Commission Staff were convinced that a complainant had identified violations of [Water Code] §§ 13.002(11) and (24) beyond a mere minor or technical violation, then Commission Staff could file a petition that would request that the [WSC] be found to be out of compliance with [Water Code] § 13.004. Such a petition, if successful, would result in that entity losing its status as a [WSC] and being subject to regulation as a water utility. . . . After a thorough review of the information submitted by Avalon in its responses, Staff does not believe any violation of [TOMA] or Avalon's bylaws exist. . . . Staff recommends that Ms. Gillespie's complaint be dismissed for failure to state a claim for which relief could be granted.<sup>22</sup>

In spite of Staff's recommendation, PUC Docket Management referred the matter to SOAH for a contested case hearing. The ALJs, however, find no basis for this referral on behalf of an individual. The ALJs recommend dismissal of all of Complainant's allegations due to lack of standing.

---

<sup>21</sup> Attachment B.

<sup>22</sup> Commission Staff's Supplemental Recommendation, November 4, 2015 at 2.

As explained below, the ALJs also recommend the Commission find that Complainant failed to articulate the Commission's jurisdiction over her complaints or individual causes of action. The ALJs also recommend, for future cases involving WSCs, that Staff should investigate complaints and that only Staff should be permitted to initiate an enforcement case if appropriate.

**B. Failure to State a Claim**

Complainant's failure to establish a basis for individual standing is coupled with her failure to articulate independent causes of action other than requests that the Commission open an investigation into Avalon's practices in order to determine if the Commission has jurisdiction under Water Code § 13.004. Specifically, Complainant was required by SOAH Order No. 6 to state the legal cause of action for each factual complaint. Complainant, however, simply referred to Water Code § 13.004(a) or § 67.007 for every non-TOMA claim contained in her complaint table.<sup>23</sup> Similarly, for every TOMA claim, Complainant cited Water Code § 13.004(a)(2), "including TWC § 13.002(24) and bylaws."<sup>24</sup>

These provisions only provide the basis for the Commission to acquire the same jurisdiction over a WSC than it would have over a regulated water utility. They are not independent causes of action. Instead, these provisions only support an investigation and, if the Commission determines that it has jurisdiction, Staff's pursuit of an enforcement action. Because Complainant provided the same response for every claim asserted, and the authority cited is jurisdictional, the ALJs recommend dismissal of all allegations for failure to state a claim.

**C. Lack of Jurisdiction**

In the event that the Commission determines that Complainant has standing to bring her complaints individually, and that she has articulated claims, the ALJs recommend that the Commission lacks jurisdiction over those claims as explained below.

---

<sup>23</sup> Attachments C and D.

<sup>24</sup> Attachments C and D.



**1. The Commission's Narrow Scope of Jurisdiction under Water Code § 13.004**

At the core of the parties' dispute in this proceeding is whether the Complainant's claims justify the Commission's exercise of the same jurisdiction over Avalon as it does over a water utility. Avalon, TRWA, and Staff argue that Water Code § 13.004 sets out very specific circumstances through which the Commission acquires jurisdiction over a WSC. Complainant argues that Section 13.004's scope is less specific and more expansive. As a result, Complainant provided only general information in response to SOAH Order No. 6. The ALJs agree with Avalon, TRWA, and Staff and recommend that, in order to invoke the Commission's jurisdiction under Water Code § 13.004, Complainant had to articulate how her complaints meet the specific statutory language of Section 13.004; however, she was unable to do so.

Avalon, TRWA, and Staff argue that jurisdictional analysis under Water Code § 13.004 is limited to examining whether a WSC is acting as a non-profit corporation and does not include evaluating the operations, rates, and service, as Complainant suggests. In support of its argument for a narrow jurisdictional analysis, Avalon and TRWA note the provision's legislative history. Section 13.004 was enacted through House Bill (HB) 1358 in the 79th Regular Legislative Session in 2005 and has not been amended since. According to the House Research Organization Bill Analysis of an early version of HB 1358:

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.<sup>25</sup>

Avalon and TRWA point out, however, that through the legislative committee process, the bill was changed to enact Section 13.004(a) as it exists today. That is, the legislature specifically rejected broad agency jurisdiction in favor of the limited investigative jurisdiction stated in the current statute.

---

<sup>25</sup> House Research Organization Bill Analysis, HB 1358 Flores (CSHB 1358 by Puente) dated May 3, 2005, at 3.

Avalon points out that the legislature heard from both proponents and opponents of a narrower scope provision, including arguments that because of their unique nature as private non-profit entities, there should be no state investigative oversight of WSCs at all.<sup>26</sup> Avalon argues that HB 1358 as filed, and the House Research Organization Bill Analysis summary of positions, makes it clear that the purpose of Section 13.004 is to allow the PUC (originally the TCEQ) to review only whether a WSC is acting as a non-profit corporation, not the full range of the WSC's operations, rates, and service, as Complainant suggests.<sup>27</sup> As explained below, the ALJs agree, noting that the statutory definition of a WSC or sewer service corporation is limited to non-profit corporations.<sup>28</sup>

Water Code § 13.004 provides two avenues for Commission jurisdiction. As noted by Avalon, TRWA, and Staff, the first avenue under Water Code § 13.004(a)(1) inquires whether a WSC conducts annual or special meetings in compliance with Water Code § 67.007. Water Code § 67.007(a) through (d) are very specific and are focused on WSC procedures for annual or special meetings. For instance, Water Code § 67.007(b) requires a WSC to adopt written procedures for conducting an annual or special meeting of the members or shareholders in accordance with subsections 67.007(b)(1)-(4) and Water Code §§ 67.0052 (relating to ballot applications), 67.0053 (relating to ballots), and 67.0054 (relating to election procedures). Thus, under Water Code § 13.004(a)(1), the Commission's jurisdiction only extends to a WSC that fails to conduct annual or special meetings in accordance with these very specific requirements. As a result, SOAH Order No. 6 required Complainant to plead the detailed legal grounds for jurisdiction with the specificity integral to Water Code § 67.007. Complainant failed to do so.

As for the second avenue for Commission jurisdiction, Avalon, TRWA, and Staff note that Water Code § 13.004(a)(2) relates to whether a WSC "is operating in a manner that does not

---

<sup>26</sup> See, House Research Organization Bill Analysis, HB 1358 Flores (CSHB 1358 by Puente) dated May 3, 2005, at 3-4.

<sup>27</sup> To implement Water Code § 13.004 prior to the change in jurisdiction to the PUC, the TCEQ adopted 30 Texas Administrative Code § 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 Water Code § 13.004. When jurisdiction was transferred to the PUC, it adopted the same rule, numbering it as 16 Texas Administrative Code § 24.35, likewise without discussion.

<sup>28</sup> Water Code § 13.002(24).

comply with the requirements for classifications as a nonprofit water supply or sewer corporation prescribed by [Water Code] Sections 13.002(11) and (24).” Water Code § 13.002(11) defines a “member” of a WSC and is not a factor in the parties’ arguments. Water Code § 13.002(24), however, defines “water supply or sewer service corporation” and states that it “means a nonprofit corporation organized and operating under Chapter 67 . . . 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.”

Avalon, TRWA, and Staff focus on the “member-owned and member-controlled” clause in Water Code § 13.002(24), arguing that any Commission inquiry into a WSC’s operations under its by-laws is limited to allegations that its status as a *member-owned and member-controlled* WSC was affected. Avalon notes that in her complaint, Complainant ignores this clause and focuses only on whether the WSC “has adopted and is operating in accordance with by-laws.”<sup>29</sup> Avalon, TRWA, and Staff argue that this would impermissibly broaden the Commission’s inquiry beyond Water Code § 13.002(24)’s limited focus on the by-laws and articles of incorporation to ensure that members own and operate the WSC as a non-profit.<sup>30</sup>

Avalon, TRWA, and Staff contend that to ignore that clause in Section 13.002(24) would expand the Commission’s jurisdiction beyond the statutory language to include inquiries into every issue included in a WSC’s by-laws. Staff points out that the limited scope of an administrative agency’s jurisdiction has been established by the Texas Supreme Court. Specifically, 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

<sup>29</sup> Complainant’s verified brief at bates pages 5-8.

<sup>30</sup> Water Code § 13.002(24).

matter that the new power is viewed as being expedient for administrative purposes.<sup>31</sup>

As a result, Staff argues that the Commission's authority to examine issues beyond those which are specifically authorized cannot be inferred.

The ALJs agree with Avalon, TRWA, and Staff that the scope of an inquiry under Water Code § 13.004(a)(2) is limited to whether a WSC is operating in accordance with its by-laws or articles of incorporation that ensure the WSC is non-profit, member-owned, and member-controlled. Based on the statutory language, Water Code § 13.004(a)(2) does not authorize the Commission's inquiry into all of the day-to-day operations of a WSC. As explained below, the ALJs find Complainant's verified brief failed to trigger the Commission's jurisdiction over Avalon because it does not articulate the statutorily-required nexus between her allegations and a source of Commission jurisdiction.

## **2. Failure to Articulate Jurisdiction over Specific Claims**

If Complainant's entire case is not dismissed for the reasons set forth above, the ALJs find that certain of Complainant's claims should be dismissed as is further explained below.

### **a. Failure to Articulate Jurisdiction over Non-TOMA Claims in Compliance with Order No. 6**

The purpose of SOAH Order No. 6 was to provide Complainant an opportunity to show why her claims should not be dismissed as requested by Avalon, TRWA, and Staff. Rather than articulate the Commission's jurisdiction over her non-TOMA claims, Complainant continued to provide general and vague references that do not establish jurisdiction. Therefore, the ALJs recommend dismissal of Complainant's non-TOMA claims because she failed to comply with SOAH Order No. 6.

---

<sup>31</sup> *Pub. Util. Com'n of Tex. v. GTE-SW, Inc.*, 901 S.W.2d 401, 406 (Tex.1995) (citations omitted).

As explained immediately above, the factual and statutory grounds for invoking the Commission's jurisdiction over a WSC are narrow and specific. As a result, the ALJs required Complainant to state the exact statutory grounds for Commission jurisdiction, so that the parties and the ALJs could assess whether her allegations could potentially trigger jurisdiction. SOAH Order No. 6 was clear in this regard. The order even required the jurisdictional column in her claims chart to be labeled "Detailed Statutory Basis for Commission Jurisdiction." Contrary to the clear instructions in the order, Complainant failed to provide jurisdictional cites for most of her claims and in the few claims for which a statutory cite was provided, the citation was too general to meet SOAH Order No. 6's requirements. Under the jurisdictional column in her claims chart, Complainant cited the following as the "statutory bases" for Commission jurisdiction over her non-TOMA claims:

- Avalon's election procedures;
- Avalon's by-laws;
- Water Code § 13.002; or
- Water Code § 67.007.<sup>32</sup>

These references do not meet the requirements of SOAH Order No. 6. For Complainant's assertions of jurisdiction, the order even stated it was not enough for Complainant to simply refer to Texas Water Code § 13.004(a)(1) or (2). Instead, Complainant was required to provide specific citations and explain how the Commission has jurisdiction over Avalon.

For the vast majority of Complainant's claims, she provided no statutory basis for the Commission's jurisdiction whatsoever. Instead, the purported statutory jurisdictional bases for most of Complainant's claims are references to Avalon's election procedures and by-laws, which are not statutes. Only in claim numbers 7-9, 14, 31, and 47, did Complainant even cite a statute in the jurisdiction column. For those complaints, Complainant cited Water Code §§ 13.002 and 67.007 as the bases for the causes of action. But these statutes do not create causes of action, and these references are far too vague to establish jurisdiction and meet the requirements of SOAH Order No. 6.

---

<sup>32</sup> Attachment C.

For instance, in the first item in the verified brief, Complainant failed to connect her allegations to the Commission's potential grounds for jurisdiction under Water Code § 13.004.<sup>33</sup> Complainant provided no statutory cite for jurisdiction, whatsoever. Nor did she show, for example, how an alleged failure to obtain ballot applications for board directors means that Avalon is: (1) failing to conduct annual or special meetings in compliance with Water Code § 67.007 or (2) is operating in a manner that does not comply with the requirements for classification as a member-owned and member-controlled nonprofit WSC under Water Code § 13.002(24).<sup>34</sup>

In other examples, Staff points out that Complainant alleged Avalon "failed to adopt or approve orders or resolutions adopting a budget for fiscal years 2011-2015,"<sup>35</sup> "failed to adopt or approve federal tax returns for 2011-2016,"<sup>36</sup> and "does not have a conflict of interest policy, written or otherwise."<sup>37</sup> Complainant argues that these requirements are stated in Avalon's by-laws and thus grant the Commission jurisdiction. However, none of these types of violations are referenced in Water Code §§ 13.004(a), 67.007, or go to the requirement that the by-laws ensure that the WSC is member-owned or member-controlled.

Finally, Complainant's references to Section 67.007 are entirely inadequate. SOAH Order No. 6 required Complainant to tie her complaints regarding election procedures to specific statutory provisions, such as Subsection 67.007(b)(2) and Sections 67.0052, 67.0053, and 67.0054. Complainant's verified brief failed to comply with this requirement.

As a result of Claimant's failure to comply with SOAH Order No. 6, the ALJs recommend dismissal of the following allegations: Attachment C, claim nos. 1-6, 10-13, 15-30, 32-46, and 48-52.<sup>38</sup>

---

<sup>33</sup> Attachment C at 2, item no. 1.

<sup>34</sup> Water Code § 13.004.

<sup>35</sup> Complainant's verified brief at 13-14.

<sup>36</sup> Complainant's verified brief at 17.

<sup>37</sup> Complainant's verified brief at 18.

<sup>38</sup> See 16 Tex. Admin. Code § 22.161(b)(3), (c).

**b. Failure to Articulate Specific Substantive Grounds for Jurisdiction over Non-TOMA Claims**

Setting aside Complainant's failure to establish jurisdiction in compliance with SOAH Order No. 6, Avalon, TRWA, and Staff point out that the majority of Complainant's claims are unrelated to the requirements of Water Code §§ 67.007 and 13.002(24) and should be dismissed because they are beyond the PUC's jurisdiction under Section 13.004(a). The ALJs agree.

As explained above, Water Code § 13.002(24) requires that a nonprofit water supply or sewer supply corporation adopt and abide by by-laws or articles of incorporation *that ensure it is member-owned and member-controlled*. Many of Complainant's claims, however, incorrectly focus only on whether Avalon is operating in accordance with by-laws and fail to articulate a nexus to by-laws that ensure Avalon is member-owned and member-controlled.<sup>39</sup> The alleged deficiencies range from failing to prepare annual financial audit reports to failure to adopt a conflict of interest policy.<sup>40</sup>

Avalon argues that to broaden the inquiry to all of Avalon's by-laws would be inconsistent with the statutory scheme under which the operations of water supply corporations are unregulated by the Commission except in two instances: the Commission hears appeals of rate disputes and the Commission has the authority under Section 13.004 to determine whether a WSC is operating as a non-profit corporation. Under the Water Code, the members and Board of Directors (composed of members) oversee the administration and day-to-day operations of a WSC. Avalon asserts that Complainant is asking the Commission to step into that role, which would destroy the independence of these member-owned utilities. TRWA and Staff generally join in this argument.

The ALJs agree with Avalon, TRWA, and Staff. Complainant attempts to broaden the jurisdictional inquiry under Water Code § 13.004(a) beyond the provision's specific and narrow focus by complaining about all of Avalon's by-laws and its alleged failure to operate in

---

<sup>39</sup> Tex. Water Code § 13.002(24).

<sup>40</sup> Complainant's verified brief at 4-6.

accordance with those by-laws. In doing so, Complainant failed to articulate a statutorily required nexus between the alleged by-law violations and Avalon's status as a non-profit that is member-owned and member-controlled. As a result, the ALJs recommend granting Avalon and Staff's motion to dismiss the following claims: Attachment C, claim nos. 10, 20, 21, 22, 24-26, 28, 30-34, 49-52; Attachment D, claim nos. 1-20.

**D. Additional Reasons for Dismissing Certain Claims**

**1. Claims Stemming from Facts Prior to August 25, 2014, Should Be Barred in Deference to TCEQ Agency Action**

Even if Complainant's claims were not dismissed for the reasons set forth above, certain claims should be dismissed because they were investigated by the TCEQ and found to be without merit.

As noted above, before September 1, 2014, jurisdiction over WSCs rested with the TCEQ. Before the transition of jurisdiction to the Commission, Complainant filed a number of complaints against Avalon with the TCEQ, many of which are raised again here. As a result, Avalon and TRWA argue that the Commission should defer to the TCEQ's actions for all claims that the TCEQ reviewed, issued determinations on, and dismissed. Understanding that Avalon and TRWA are not urging a *res judicata* argument, the ALJs agree and recommend dismissal as explained below.

In 2014, TCEQ staff twice investigated Complainant's allegations and found no violations. The initial investigation, based on complaints submitted in 2013, was closed on June 16, 2014. The Commission found that Avalon was properly operating as a non-profit, member-owned and member-controlled WSC. On July 14, 2014, Complainant requested that the TCEQ reopen the complaint. Complainant re-urged her earlier complaints and alleged additional violations occurring from May 2 to July 10, 2014.<sup>41</sup> On August 25, 2014, TCEQ staff issued

---

<sup>41</sup> Complainant's July 14, 2014 letter to the TCEQ, discussing the TCEQ's actions and her complaints is attached as Attachment A. The letter was filed in this docket on February 6, 2015, as item number 9. The ALJs take administrative notice of this letter from Complainant.



another determination under the Water Code that, despite Complainant's assertions, Avalon was properly operating as a non-profit, member-owned and member-controlled WSC.<sup>42</sup> TCEQ staff closed the complaint and took no action against Avalon.

The ALJs take official notice of the TCEQ's August 25, 2014 letter and the findings therein. Additionally, the ALJs take official notice of the Memorandum of Understanding (MOU) entered between the TCEQ and the Commission regarding the transfer of jurisdiction over water and sewer utilities.<sup>43</sup> The legislature directed the two agencies to enter into an MOU to address specific elements of the transfer of jurisdiction.<sup>44</sup> In the MOU, the agencies addressed jurisdiction over complaints and enforcement actions, stating that each agency would investigate complaints under its jurisdiction. The MOU also specifies that the TCEQ would transfer any pending matters to the PUC on the date of the transfer.<sup>45</sup> The MOU further states that the agencies will communicate and coordinate regarding enforcement matters and work together "to efficiently address enforcement actions relating to each agency's respective jurisdiction."<sup>46</sup> The idea that a complainant who received an unfavorable determination from the TCEQ could seek a different outcome at the PUC for the same complaints is contrary to both the legislative intent in directing the agencies to enter into the MOU and the spirit of the MOU. Such "double-dipping" can only lead to inefficiencies and misuse of state and private resources. Therefore, the TCEQ's determination in this matter is entitled to deference by the Commission and SOAH.

The ALJs recommend that the Commission defer to the TCEQ's determinations, as the agency lawfully imbued with jurisdiction over such claims at that time. Any of Complainant's claims that were, or could have been, brought during the TCEQ's jurisdiction should be dismissed in deference to that agency's jurisdiction and action. Complainant's verified

<sup>42</sup> The August 25, 2014 letter from the TCEQ Water Supply Division to Complainant is attached hereto as Attachment B. The ALJs take administrative notice of this letter from the TCEQ Water Supply Division to Complainant.

<sup>43</sup> Memorandum of Understanding Between the Texas Commission on Environmental Quality (TCEQ) and the Public Utility Commission of Texas (PUC) (MOU), effective September 1, 2014, *available at* <https://www.tceq.texas.gov/assets/public/agency/puc-tceq-mou-accessible.pdf>.

<sup>44</sup> See House Bill 1600 and Senate Bill 567, 83rd Legislature (2013).

<sup>45</sup> Complainant's complaints to the TCEQ were not transferred because they had been closed by the TCEQ before the transfer of jurisdiction.

<sup>46</sup> MOU at 7.

complaint includes numerous complaints dating back to 2011. At a minimum, those claims that predate August 25, 2014, should be dismissed.

Complainant argues that there can be no issue-preclusion or *res judicata*-like effect because there was no final appealable adjudication of her complaints. This is so, however, because only the TCEQ could have brought an enforcement action based on her complaints and it chose not to; therefore, there is no case to appeal.<sup>47</sup> As explained above, Complainant has failed to articulate standing or individual causes of action arising from Water Code § 13.004. While Complainant may complain to the Commission about Avalon's alleged misdeeds, it is up to Commission Staff to determine whether those complaints merit an enforcement action. Because an agency with lawful jurisdiction has already reviewed certain of those complaints and determined and communicated its decision that there are no violations, the ALJs recommend the Commission defer to that determination, instead of allowing Complainant to bring a contested case hearing at SOAH for which she has no individual standing and no authority for individual claims.

Therefore, the ALJs recommend that to the extent Complainant's claims are based on Avalon's alleged misconduct that was already investigated by TCEQ staff, all such claims should be dismissed – even those extending into the present. Complainant's verified brief fails to allege any changed circumstances that would show that TCEQ staff's conclusions are no longer valid. In fact, by alleging that certain claims date back to 2011, Complainant has openly reasserted the same claims that were presented to TCEQ staff in 2013 and extended them into the present – without any attempt at distinguishing the claims as based on new facts. Complainant simply seeks a different result from the same set of allegations at a different state agency.<sup>48</sup> The claims to be dismissed on this basis are: Attachment C, claim nos. 1-35 and 47-52.<sup>49</sup>

---

<sup>47</sup> The ALJs also note that there is no procedural mechanism for the reconsideration or "rehearing" of the outcome of the TCEQ's determination regarding the complaint. See 16 Tex. Admin. Code ch. 22.

<sup>48</sup> In her Reply, Complainant states that many of the alleged violations occurred after jurisdiction transferred from TCEQ to the Commission. However, as addressed above, Complainant failed to establish a basis for jurisdiction over her claims, including the claims that are alleged only for the time period beginning after the transfer of jurisdiction.

<sup>49</sup> In the event the Commission finds that it has jurisdiction to hear Complainant's TOMA claims, then the ALJs also recommend dismissal of Attachment D, item nos. 1-3, 5, and 7-9.

## 2. The Commission Lacks Jurisdiction over Claims that Avalon Violated TOMA

Complainant asserted 20 claims against Avalon based on alleged violations of TOMA.<sup>50</sup> Avalon, TRWA, and Staff argue that the Commission lacks jurisdiction to adjudicate and establish these alleged violations as underpinning for the Commission's jurisdiction. The ALJs agree.

Avalon acknowledges that TOMA applies to WSCs.<sup>51</sup> Avalon points out, however, that any alleged non-compliance with TOMA requires litigation in state courts. Avalon argues that no state agency, not even the Office of the Attorney General of Texas, has the authority to enforce TOMA.<sup>52</sup>

Avalon explains, for instance, that TOMA provides civil remedies and criminal penalties for violations of its provisions and establishes the venue for such actions. District courts have original jurisdiction over criminal violations of TOMA as misdemeanors involving official misconduct.<sup>53</sup> Section 551.142 of TOMA creates a cause of action for mandamus or injunction to address violations of its provisions: Under TOMA, an interested person has standing to bring such suits, including a declaratory judgment action "to determine the validity of a governmental body's actions under TOMA."<sup>54</sup> According to the Attorney General, jurisdiction may be proper in county or state district court, depending on the amount in controversy.<sup>55</sup> Avalon points out, however, that neither TOMA nor the Attorney General's Handbook mentions a state agency having jurisdiction to interpret or enforce TOMA.

---

<sup>50</sup> Attachment D.

<sup>51</sup> See, Tex. Gov't Code § 551.001(3)(K), which defines a governmental entity subject to TOMA under section 551.002, as including water supply corporations under Texas Water Code chapter 67.

<sup>52</sup> Office of the Attorney General of Texas, *Open Meetings Handbook 2016*, at 63.

<sup>53</sup> Office of the Attorney General, *Open Meetings Handbook 2016*, at 63, citing *State v. Williams*, 780 S.W.2d 891, 892-93 (Tex. App.—San Antonio 1989, no writ).

<sup>54</sup> Tex. Gov't Code § 551.142; Office of the Attorney General, *Open Meetings Handbook 2016*, at 63-64.

<sup>55</sup> Office of the Attorney General, *Open Meetings Handbook 2016*, at 63.

Staff points out that TOMA is not referenced in Water Code § 13.004(a) or any of the statutes referenced in that provision. Staff contends that if the Legislature had intended for the Commission to address issues under TOMA, then it would have clearly and expressly so stated. Without a specific statutory reference that the Commission has the authority to evaluate these types of violations, the Commission cannot infer authority over such alleged acts of a WSC. Avalon adds that the Commission would exceed its authority if it exercised jurisdiction over TOMA claims, stating:

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>56</sup>

Complainant does not contend that the alleged violations of TOMA have been litigated and determined by a state court. Instead, Complainant attached a lawyer's verification to her TOMA-claims that purports to establish the violations.<sup>57</sup> To even consider the verification necessarily requires the ALJs to allow Avalon and Staff to respond. Thereafter, the ALJs would have to propose evidentiary findings and conclusions of law, thus litigating claims over which the Commission and SOAH lack jurisdiction.

In addition to taking evidence on TOMA claims, Avalon pointed out that conducting discovery would require the ALJs to conduct in-camera reviews of Avalon's executive session closed meeting records, for which there is no statutory authority. Avalon notes that the certified agenda of a closed meeting of a WSC's board of directors is confidential under TOMA § 551.104 and disclosure of such proceedings would expose the corporation and its directors to potential criminal liability.<sup>58</sup> Access to certified agenda must be through a court order issued by a district court.<sup>59</sup> These restrictions reinforce the fact that neither the Commission nor SOAH has jurisdiction over TOMA claims.

---

<sup>56</sup> *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002).

<sup>57</sup> Attachment D.

<sup>58</sup> Tex. Gov't Code §§ 551.104, 551.146.

<sup>59</sup> Tex. Gov't Code § 551.104.

The ALJs do not address whether the Commission could take notice of TOMA violations under Water Code § 13.004 once those violations have been established in state court. That has not happened in this case. As a result, Complainant lacks the condition precedent that Avalon has been found to have violated TOMA by a state court. The ALJs recommend the dismissal of all of Complainant's TOMA-related claims for lack of jurisdiction.<sup>60</sup>

### 3. Failure to Amend Pleadings

Avalon argues that Complainant failed to comply with an additional requirement of SOAH Order No. 6, which stated "Complainant will be required to amend her complaint if she presents alleged deficiencies in her brief that are not set forth in her complaint."<sup>61</sup> Avalon points out that, before the issuance of SOAH Order No. 5, Complainant filed in this docket a total of five documents, which comprise her complaint. As summarized by PUC Staff,

On August 25, 2014, [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 [Complainant's] complaint was transferred to the [Commission]. [Complainant] 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).<sup>62</sup>

Avalon points out the most recent alleged violation included in Complainant's most recently filed complaint occurred on October 9, 2014.<sup>63</sup> Avalon argues that Complainant's verified brief includes a number of additional alleged violations described as occurring after that date. Although Complainant recognized that new allegations were added in her verified brief, Complainant did not file an amended complaint capturing these claims.<sup>64</sup>

---

<sup>60</sup> Attachment D.

<sup>61</sup> SOAH Order No. 6, at footnote 2.

<sup>62</sup> Commission Staff's Statement of Position, filed April 10, 2015, at 1.

<sup>63</sup> Letter from Carol D. Gillespie to PUC Central Records dated January 31, 2015, and filed as Docket Item No. 8 on February 3, 2015, at 1.

<sup>64</sup> Complainant's verified brief at bates page 8.

Because Complainant has failed to amend her complaint as required by SOAH Order No. 6; all deficiencies alleged to have occurred after October 9, 2014, should be dismissed.<sup>65</sup> These include all alleged deficiencies that Complainant has identified without specific dates and those identified as occurring during 2014, 2015, and 2016. The ALJs recommend the following allegations be dismissed:<sup>66</sup> Attachment C, claim nos. 1–6, 8–22, 24, 26, 30, 32, 34–47, and 51–52.<sup>67</sup>

#### **E. Summary**

The ALJs recommend that Complainant's case be dismissed in its entirety for the following reasons: (1) Complainant does not have standing to assert the Commission's jurisdiction or to bring an enforcement action on behalf of Staff; (2) Complainant failed to state a claim upon which relief can be granted—Complainant has cited only to general jurisdictional provisions, rather than causes of action, as the bases for her claims; and (3) the Commission does not have jurisdiction under Water Code § 13.004 over Complainant's allegations.

If Complainant's case is not dismissed in its entirety, the ALJs find that certain claims should be dismissed for the following reasons: (1) Complainant failed to comply with SOAH Order No. 6 by setting forth the Commission's jurisdiction and the legal bases for her complaints as ordered; (2) TCEQ Staff investigated Complainant's claims dating before September 1, 2014, and found them to be without merit; (3) neither the Commission nor SOAH has jurisdiction to adjudicate Claimant's TOMA claims; and (4) Complainant added new allegations against Avalon in her verified brief but did not amend her pleadings.

Finally, the ALJs note that, in their experience, this is one of the most unusual cases referred to SOAH by the Commission. The ALJs recommend dismissal of this case on numerous fundamental grounds, including lack of jurisdiction, failure to state a claim, deference to prior agency action, and standing. The ALJs have concluded that the Water Code and the

---

<sup>65</sup> Tex. Gov't Code §§ 2001.051-.052; 16 Tex. Admin. Code § 22.55.

<sup>66</sup> Despite adding additional claims, Complainant has not amended her pleadings as of the date of this proposal for decision.

<sup>67</sup> Attachment C.

Commission's rules authorize only a Staff-initiated enforcement action for complaints against a WSC:

Most important, consistent with TCEQ staff's findings, after jurisdiction was transferred to the Commission, Staff analyzed Complainant's claims and twice correctly recommended this case be dismissed for failure to state a claim. As early as April 10, 2015, Staff issued a Statement of Position recommending this case be dismissed:

Staff's position is that the type of action raised by [Complainant]'s complaint is not appropriate relief in a formal complaint proceeding. . . . Commission rules provide that the executive director shall decide whether an investigation is appropriate and should be initiated. . . .<sup>68</sup> [Texas Administrative Code] § 22.246(d). . . . Therefore, "although an enforcement proceeding may arise from a complaint, the rules give the Commission, *not a complainant*, the discretion to initiate an enforcement proceeding."<sup>68</sup> Nothing in the Water Code nor the Commission's rules provide for enforcement actions by an individual complainant. Therefore [Complainant's] request for an investigation fails to state a claim for which relief can be granted.<sup>69</sup>

Thereafter, Staff reviewed additional claims and information from both parties. On November 4, 2015, Staff issued a Supplemental Recommendation, reiterating that it was Staff's prerogative to initiate an enforcement action but, after "a thorough review of the information submitted by Avalon in its responses, Staff does not believe any violation by Avalon of [TOMA] or Avalon's bylaws exist."<sup>70</sup> Staff again recommended the complaint be dismissed for failure to state a claim.

After spending a large amount of time reviewing Complainant's verified brief, the parties' responses and replies, other filings, and conducting their own independent research, the ALJs reached the same conclusion as Staff – that this case was not appropriate for referral to SOAH as a contested case in the absence of an enforcement petition filed by Staff. The record

---

<sup>68</sup> *Complaint of Allyson Rockett Against Pre-buyElectric, LLC*, Docket No. 35291, Order No. 2, at 3 (Apr. 2, 2009) (emphasis added by Staff).

<sup>69</sup> Commission Staff's Statement of Position, April 10, 2015, at 4-5.

<sup>70</sup> Commission Staff's Supplemental Recommendation, November 4, 2015, at 2.

does not reflect why this case was referred to SOAH despite Staff's explanatory recommendation otherwise.

#### IV. ADDRESSING AVALON'S ALLEGATIONS REGARDING COSTS OF LITIGATING COMPLAINTS

The ALJs address one final set of allegations by Avalon that raises concerns over Complainant's motivations in bringing her complaints, and the resulting costs incurred by Avalon and the state. Complainant, who is represented, has alleged 72 different complaints about Avalon. As noted by Avalon and TRWA, Complainant first submitted complaints regarding Avalon to the TCEQ. That agency closed its investigation finding not only no wrongdoing, but that Avalon was operating properly as a non-profit, member-owned, and member-controlled WSC. After the transfer of jurisdiction from the TCEQ to the Commission, Complainant resubmitted many of the same allegations to the PUC, ultimately leading to this proposal for decision.

Shortly after this matter was referred to SOAH, Complainant served numerous lengthy discovery requests on Avalon and Staff, prompting Avalon to file a motion for protection and an agreed motion to abate this docket to attempt to settle this case. Thereafter, when required to file a verified complaint, Complainant submitted a filing that does not meet the requirements of SOAH Order No. 6. As noted above, for non-TOMA claims, almost no specific statutory grounds for jurisdiction were offered, despite a clear directive to do so from the ALJs. Complainant submitted complaints under TOMA without any legally-established findings of actual violations. Complainant cited to pre-jurisdictional statutory references instead of cognizable causes of action. And Complainant seeks almost punitive remedies, such as dissolution of the board, the imposition of a receiver, and original rate jurisdiction, instead of a specific remedy that would provide relief to Complainant. Indeed, it is difficult to see how Complainant could have been materially harmed even assuming each and every one of her allegations were true because, according to Avalon, Complainant is not a customer of Avalon, takes no service from Avalon, and is not seeking service from Avalon.



Complainant has not articulated any ultimate justification or goal for her complaints through which she could receive some relief from Avalon. And based on the pleadings, the ALJs can discern no justified motivation for these complaints. Furthermore, Avalon alleges that:

- The genesis of this dispute is an Avalon-owned pipeline on Complainant's property;
- Avalon's previous enforcement history is limited to only one other complaint filed by a member, which related to a power outage on May 27, 2016;
- Avalon's annual gross receipts are generally around \$350,000;
- During the 2015–2016 period, litigating complaints by Complainant has cost Avalon approximately \$100,000;
- Avalon could possibly face bankruptcy if this matter goes to a full hearing;
- On information and belief, Complainant's goal in this proceeding is to force Avalon into bankruptcy; and
- Complainant refused to agree to mediate this case for free at SOAH despite agreeing to abate the case.

Because there has been no basis to hold an evidentiary hearing, there is no evidence in the record to corroborate Avalon's claims. If, however, they are correct and the Commission agrees with this proposal for decision to dismiss then the ALJs are concerned that this process may have been initiated for reasons other than insuring that Avalon is operating in accordance with the law and its by-laws.

Avalon is providing water, a necessary resource for life, to some 340 customers in a rural area. If Avalon's allegations are supported by the facts, using an administrative process for the sole purpose of driving up such an entity's costs could be a serious violation of the PUC's procedural rules.

**V. PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
ORDERING PARAGRAPHS**

**A. Findings of Fact**

1. Carol D. Gillespie (Complainant) filed complaints with the Texas Commission on Environmental Quality (TCEQ) against Avalon Water Supply and Sewer Services Corporation (Avalon). TCEQ Staff investigated the complaints; found that Avalon was properly operating as a non-profit member-owned, member-controlled water supply corporation (WSC); and closed the complaints.
2. TCEQ Staff issued a letter to Complainant explaining its findings and closing the complaints on August 25, 2014.
3. On September 1, 2014, jurisdiction over water utilities transferred from TCEQ to the Public Utility Commission of Texas (PUC or Commission).
4. On September 16, 2014, Complainant filed complaints with the Commission asserting some of the same allegations that TCEQ Staff had investigated and determined to be without merit.
5. Avalon filed a response consisting of three volumes of records totaling 184 pages. Avalon also submitted supplemental responses.
6. On April 10, 2015, Staff reviewed the complaints and Avalon's responses and issued a Statement of Position recommending dismissing the complaints for failure to state a claim upon which relief can be granted.
7. On November 4, 2015, Staff reviewed additional complaints and Avalon's responses and issued a Supplemental Recommendation that the complaints made by Complainant be dismissed for failure to state a claim upon which relief can be granted.
8. On January 25, 2016, the Commission issued an order of referral to the State Office of Administrative Hearings (SOAH) for a hearing and proposal for decision, if necessary.
9. On March 22, 2016, the Commission issued a preliminary order setting forth the issues for the SOAH Administrative Law Judges (ALJs) to consider.
10. On March 18, 2016, a telephone prehearing conference was convened by SOAH during which the parties agreed to a procedural schedule.
11. On April 20, 2016, Avalon and Complainant filed an agreed request to abate the case so that the parties could explore mediation and possible settlement. On April 21, 2016, SOAH issued an order granting the motion.
12. The parties did not participate in mediation.

13. On June 17, 2016, Avalon filed a Motion to Dismiss and Alternate Motion to Certify Question and Continue Temporary Abatement of Discovery and Hearing Schedule. On June 24, 2016, Staff filed a response opposing the motion to dismiss but supporting the motion to certify a question to the Commission. The same day, Complainant filed a response opposing both motions.
14. On July 7, 2016, the ALJs issued SOAH Order No. 6, abating the case and requiring Complainant to file, by July 22, 2016, a verified brief addressing the factual background, legal authority, and remedy for each and every alleged deficiency committed by Avalon. Complainant's brief was required to include a table as follows:

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
1.				
2.				
Etc.				

15. SOAH Order No. 6 required Complainant, through the table, to set forth every alleged deficiency that formed her complaint. It also required the table in Complainant's brief to be an exhaustive list of the alleged deficiencies for purposes of a hearing and any further pleadings, motions, or briefs.
16. SOAH Order No. 6 specifically required the columns addressing jurisdiction, causes of action, and statutory and regulatory authority for each remedy to address every applicable subsection of the statutory and regulatory authority. In particular, for jurisdiction, the ALJs noted that it was not sufficient for Complainant to simply refer to Texas Water Code § 13.004(a)(1). Rather, Complainant was required to provide specific citations and explain how the Commission has the same jurisdiction over Avalon as over a water and sewer utility, including the specific criteria. Additionally, if new claims were added in the brief, SOAH Order No. 6 required Complainant to amend her pleadings accordingly.
17. Complainant filed a verified brief on July 22, 2016. Complainant asserted 72 separate claims against Avalon, spanning approximately 31 pages, including claims that Avalon violated the Texas Open Meetings Act (TOMA).
18. Despite adding new claims in her verified brief, Complainant did not amend her pleadings as required by SOAH Order No. 6.
19. Staff and Avalon timely filed responsive briefs by August 15, 2016. Avalon seeks dismissal of all claims on several grounds. Staff seeks dismissal of most, but not all, claims.

20. On August 15, 2016, Texas Rural Water Association (TRWA) filed an amicus brief in support of Avalon's motion to dismiss.
21. On August 22, 2016, Complainant filed a reply. The same day, Staff filed a motion to strike the reply, which was denied by the ALJs in this proposal for decision.
22. Complainant's verified brief did not comply with SOAH Order No. 6.
23. Complainant did not adequately demonstrate the legal bases for her claims or the source of the Commission's jurisdiction over her claims.

**B. Conclusions of Law**

1. Complainant lacks standing to bring this enforcement action against Avalon on behalf of the Commission. Tex. Water Code § 13.004; 16 Tex. Admin. Code § 22.246; *Complaint of Allyson Rockett Against Pre-BuyElectric, LLC*, Docket No. 35921, Order No. 2 at 3 (Apr. 2, 2009).
2. Complainant failed to state a claim upon which relief can be granted. Tex. Water Code § 13.004.
3. Complainant's allegations do not state that the Commission has the same jurisdiction over Avalon as it does over a water or sewer utility under Texas Water Code § 13.004(a).
4. Complainant's allegations do not state that Avalon is failing to conduct annual or special meetings in compliance with Texas Water Code § 67.007.
5. Complainant's allegations do not state that Avalon 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 Texas Water Code § 13.002(11) and (24).
6. Complainant's claims related to facts occurring before August 25, 2014, should be dismissed because they were previously investigated by TCEQ Staff when TCEQ had jurisdiction over water and sewer utilities. Memorandum of Understanding Between the Texas Commission on Environmental Quality (TCEQ) and the Public Utility Commission of Texas (PUC), effective September 1, 2014, [www.tceq.texas.gov/assets/public/agency/puc-tceq-mou-accessible.pdf](http://www.tceq.texas.gov/assets/public/agency/puc-tceq-mou-accessible.pdf).
7. The Commission and SOAH do not have jurisdiction to adjudicate claims under TOMA. Tex. Gov't Code ch. 551; Tex. Water Code ch. 13.

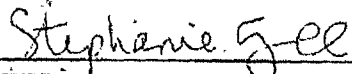
**C. Ordering Paragraphs**

In accordance with these findings of fact and conclusions of law, the Commission issues the following orders:

1. This case is dismissed for lack of standing, failure to state a claim upon which relief can be granted, and for lack of jurisdiction.

All other motions, requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly granted, are denied.

**SIGNED December 8, 2016.**

  
STEPHANIE FRAZEE  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

  
TRAVIS VICKERY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 43146**  
**SOAH DOCKET NO. 473-16-2033.WS**

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

**ATTACHMENT A**

43146

RECEIVED

CAROL D. GILLESPIE  
caroldgillespie@earthlink.net

3921 Bobbin Lane  
Addison, TX 75001  
214 536-1784 (cell)

2015 FEB -6 AM 11:47  
PUBLIC UTILITY COMMISSION  
FILING CLERK

2015 FEB 18 AM 9:18

RECEIVED

July 14, 2014

Tammy Holguin-Benter, Manager  
Utilities and Districts Section  
TCEQ  
MC 153  
P.O. Box 13087  
Austin, TX 78711-3087

Dear Ms. Benter:

In July of 2013 I requested an investigation into the activities of Avalon Water Supply and Sewer Services Corporation. I am a member of AWS&SSC and did not believe that the corporation was operating as a member-owned and member-controlled water supply corporation. TCEQ did open an investigation, and worked for several months on this issue.

AWS&SSC admitted to the allegations that I made in my original complaint. As part of an agreement, they were required to undergo training provided by TRWA. The Board was also to provide copies of agendas/meeting notices and minutes of the meetings to TCEQ. The investigation was closed on June 16, 2014 after AWS&SSC held their annual meeting in April and submitted minutes for the April meeting. The letter that I received from TCEQ states, "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."

At this time, I am requesting that TCEQ re-open this investigation or open a new investigation. Unfortunately, once AWS&SSC was no longer required to provide agendas/meeting notices and minutes to TCEQ, the meetings returned to repeated indifference to members and ignoring Texas law. Here are the issues support my claims:

- 1) On May 2, 2014 AWS&SSC posted a notice/agenda for a meeting to be held on May 8th at 7PM. On May 8th at 12:56PM, a notice was posted adding an "emergency" addition to the agenda. This item was, "Adoption of resolution of the Board of Directors authorizing the purchase of approximately 1.01 acres of land adjacent to the Avalon Water Supply and Sewer Service Corp. Wastewater Treatment plant." According to the Texas Open Meetings Act (TOMA) the purchase of land is not an emergency item and requires a 72 hour notice.

This item was actually about land my family was in the process of selling to AWS&SSC. After reviewing the original agenda, I chose not to attend the meeting. If I had known this item was going to be addressed at the meeting, I would have attended.

Another member addressed the Board about the last minute addition of this item, but the Board signed the resolution anyway. I understand that this member was not treated with respect. She and her husband filed a complaint with the Ellis County District Attorney regarding this and other issues. AWS&SSC is currently under investigation by the DA's office. (See item #5 regarding members speaking at meetings.)

9

- 2) Once AWS&SSC learned there was an open investigation by the District Attorney's office, they posted a notice for a Special Meeting to be held on May 15, 2014. This notice was posted on May 12<sup>th</sup> at 2:44 PM. The only item on the agenda is, "Approve and sign Corporate Resolution related to purchase of land adjacent to Waste Water Treatment Plant."
- 3) During the meeting on May 15<sup>th</sup>, the resolution was passed around the table to be signed by Directors of the Board. However, it appeared that not all Directors signed. The resolution was not read aloud. During "Open Forum," I requested that it be read aloud. It was, but I was not treated with respect.

During closing on the sale of land, I was given a copy of the resolution. It was dated, "Executed as; but not necessarily on, May 8, 2014." It appears that there was no resolution signed at the meeting on May 15<sup>th</sup>. The resolution from the May 8<sup>th</sup> meeting was given to the title company.

The resolution is signed by all 7 Directors. Only 6 were present at the May 8<sup>th</sup> meeting. Only 5 were present at the May 15<sup>th</sup> meeting. David Walshes was absent from both meetings. Jacob Carter was not present at the May 15<sup>th</sup> meeting. *How can Directors who are not present at a meeting sign a resolution passed at that meeting?*

- 4) For years the monthly meeting of AWS&SSC has been held on the 2<sup>nd</sup> Thursday of the month. There was no meeting held on June 12, 2014. No notice was posted explaining that the meeting was postponed or why it was postponed. After someone called and questioned why, we were told "something came up." No explanation.
- 5) As a concerned member of AWS&SSC, I have been attending their meetings since September 2011. I have missed very few. Once TCEQ stopped reviewing their agendas/notices in April 2014, a major change took place. "Visitor Comments and Concerns" has always been listed as the second item on the agenda. It was on the agenda for April 10, 2014. There has also been an "Open Forum" at the end of the meeting. It appears that beginning in May, AWS&SSC is attempting to limit members from speaking at the meetings.

On the May 8, 2014 agenda, it was changed to, "Introduction of guests and visitors and invitation to express any questions or concerns. Each speaker is limited to three minutes." There was still an "Open Forum" at the end of the agenda.

On the May 15, 2014 Special Meeting agenda, there was no "Visitor Comments and Concerns." However, at the end of the meeting there is "Open Forum. Each speaker is limited to three minutes."

On the June 19, 2014 agenda, there is no "Visitor Comments and Concerns." There is an "Open Forum" at the end of the agenda.

On the June 23, 2014 Special Meeting agenda, there is no opportunity for members to address the Board.

On the June 30, 2014 Special Meeting agenda, there is no opportunity for members to address the Board.

On the July 10, 2014 agenda, there is still no "Visitor Comments and Concerns." There is an "Open Forum" at the end.

- 6) On the July 10, 2014 agenda there is an item, "Assignment of responsibilities of personnel." The Board voted to make one of the Directors (Gary Low) the General Manager. Visitors and members tried to explain to them that they could not vote to make Mr. Low the General Manager because it was not worded on the agenda to vote to make anyone GM. The President replied that they were trying to



Include broad-based topics so they could do what they needed to do. I believe this is a Texas Open Meetings Act violation.

- 7) For two monthly meetings after the training provided by TRWA, agendas, minutes, and financial report copies discussed during the meetings were made available at the door for members/visitors to pick up on their way into the meeting. It was commented that TRWA told them that they must provide copies or read aloud during the meeting.

Now, it has returned to being difficult to obtain copies. Excuses have been that the computer had a virus and they couldn't produce (but the Directors had copies), they don't have enough copies for everyone present, or they just say that they don't have copies. Since they will not give a financial report during the meeting (directors only look at the report and comment on items), I have no idea what they are talking about. I've been to a lot of public and club meetings, and I usually know when the meeting is over how much money the group has. However, that is not the case with AWS&SSC.

- 8) AWS&SSC uses a calendar year. At the Annual Meeting in April 2014, the annual audit for the year 2012 was presented for a second time. It was stated that the 2013 audit was "not complete at this time." In the July 14, 2014 it was stated that the 2013 audit has not been done because of "some circumstances" but would not elaborate. *How long does it take for an audit of a small water supply corporation take?*

- 9) In December 2013, AWS&SSC borrowed \$35,000 from a local bank. (One of the Directors is an employee of the bank.) The loan is secured by a CD that the corporation has at the bank. The corporation only has three CD's. At the time this loan was obtained, two of the CD's were pledged to the USDA for outstanding loans and each are less than \$30,000. The third CD was made up of membership deposits. The value is in excess of \$38,000. I do not know for sure, but I believe that the CD containing member deposits was pledged as collateral for this loan. *Is it legal for a water supply corporation to use member deposits for collateral?* I believe this is why the 2013 audit has not been completed.

In April 2014, AWS&SSC paid off the oldest of the two outstanding USDA loans. One CD is no longer pledged to the loan. However, it does not have enough funds to secure the \$35,000 loan.

- 10) On June 23, 2014, AWS&SSC held a Special Meeting with one topic on agenda -- "Discuss bids for well repair and decide which bid to accept." The Board voted to pay \$44,852 for well repairs. According to financial reports, at the end of June they only had \$30,986 in the bank account. *Where to they intend to get this money?*

TCEQ has order AWS&SSC to have the well repaired by September 1<sup>st</sup>. The well has not been working since July 2013. State law requires water supply corporations the size of AWS&SSC to have 2 working wells.

- 11) The amount to obtain a water meter with AWS&SSC has always been \$3800 (\$3500 capital investment, \$200 tap fee, and \$100 membership fee). However, in November 2013 AWS&SSC there is a capital investment amount of \$1858.64. What is this amount? In February 2014, there is a capital investment amount of \$1304 and a \$100 membership fee. What is this amount? Is AWS&SSC now discounting the capital investment?

- 12) I recently obtained copies of several checks AWS&SSC wrote in 2012 and 2013. These were obtained through a legal open records request, but not through AWS&SSC. One check is signed by only one person and two checks are signed by two people. However, one of the people is not an officer of the corporation and never has been. The bylaws state that checks MUST be signed by the secretary/treasurer and the president. If the president is not available, then the vice-president may

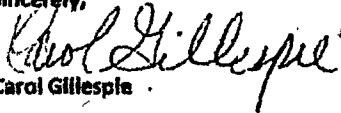
sign. Although the checks are rather old, I believe that this practice is still ongoing from my observations during meetings.

Two representatives (President and Office Manager) from a neighboring water supply corporation have attended the last two meetings. They have questioned many of AWS&SSC's practices. They are trying to help, but our Board does not like to be questioned. I'm sure these ladies would be willing to speak with TCEQ about their observations.

For these reasons, I am asking that the investigation into Avalon Water Supply and Sewer Services Corporation be re-opened. Or, a new investigation opened. If TCEQ cannot help, please refer me to someone who can. This cannot go. The members of AWS&SSC fear that the corporation is about to go into bankruptcy. The rates were increased earlier this year. A new rate increase is already being discussed less than 6 months later. Our members simply cannot afford to pay the legal expenses incurred by this Board.

I will be happy to discuss this with anyone from TCEQ.

Sincerely,



Carol Gillespie

DOCKET NO. 43146  
SOAH DOCKET NO. 473-16-2033.WS

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

§  
§  
§  
§  
§

BEFORE THE  
PUBLIC UTILITY COMMISSION  
OF TEXAS

ATTACHMENT B

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

43400

RECEIVED

2014 SEP 29 AM 9:16

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**

PAGE 15 OF 20

P.O. Box 13087

Austin, Texas 78711-3087

512-239-1000

[tceq.texas.gov](http://tceq.texas.gov)


How is our customer service? [tceq.texas.gov/customersurvey](http://tceq.texas.gov/customersurvey)

000004

Ms. Carol D. Gillespie  
Page 2  
August 25, 2014

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

Sincerely,



Cari-Michel La Caille, Assistant Director  
Water Supply Division

CML/LF/FB/mmg

DOCKET NO. 43146  
SOAH DOCKET NO. 473-16-2033.WS

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

§  
§  
§  
§  
§

BEFORE THE  
PUBLIC UTILITY COMMISSION  
OF TEXAS.

ATTACHMENT C

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
1. AWSSSC failed to obtain ballot applications for board directors for elections conducted in 2011-2016.	AWSSSC's Election Procedures for Members' Meetings ("Election Procedures"), paragraph 4 at 1.	TWC §§ 13.004(a) and 67.007 (annual meetings)	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
2. AWSSSC failed to provide notifications to the members of the ballot application deadline for elections conducted in 2011-2016.	Election Procedures, paragraph 4 at 1.	TWC §§ 13.004(a) and 67.007 (annual meetings):	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
3. AWSSSC failed to obtain statements of each candidate's qualifications, including biological information, for	Election Procedures, paragraph 4.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.

elections conducted in 2011-2016.				of a receiver, and original rate jurisdiction.	
4. AWSSSC failed to adopt or approve orders or resolutions approving the annual meeting packet in 2011-2016.	Amendment to Bylaws, page 1; Election Procedures, paragraph 2.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	
5. AWSSSC failed to adopt or approve orders or resolutions calling for board directors' elections in 2011-2016.		TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	
6. AWSSSC failed to obtain an independent election auditor's written report for election results for elections conducted in 2011, 2012 and	Election Procedures, paragraph 13.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	

<sup>1</sup> All citations to bylaws include amendments to bylaws, except as explicitly noted.



2016.				jurisdiction.	
7. AWSSSC failed to adopt written procedures for conducting annual or special meetings in 2011-2012.	TWC § 67.007(b); Bylaws Article XI, Section 3.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	
8. AWSSSC failed to adopt or approve orders or resolutions approving the ballot form used for annual or special meetings in 2011-2016.	TWC § 67.007(b); Election Procedures, paragraph 2.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	
9. AWSSSC failed to adopt or approve orders or resolutions selecting the independent election auditor for elections conducted in 2011-2016. exist.	TWC § 67.007(d); Election Procedures, paragraph 5.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	
10. AWSSSC failed to	Bylaws Article XIX, second paragraph.	TWC §§ 13.004(a)	PUC may exercise original jurisdiction	TWC §13.004(a),	

adopt or approve orders or resolutions adopting a budget for fiscal years 2011-2015.				over AWSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	16 TAC §§ 24.35 and 24.141.
11. AWSSC failed to obtain board director candidates' sworn statement of qualifications for elections conducted in 2011-2016.	Election Procedures, paragraph 4, vi.		TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
12. AWSSC failed to obtain board director candidates' written consent to serve for elections conducted in 2011-2016.	Election Procedures, paragraph 4, viii.		TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
13. AWSSC failed to obtain board of director candidates' statement of eligibility for elections conducted	Election Procedures, paragraph 4, vii.		TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSC, including the dissolution of the board, the imposition	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.

in 2011-2016.				of a receiver, and original rate jurisdiction.	
14. AWSSSC failed to approve the ballot forms to be used in annual elections from 2011-2016, including any drafts of ballot forms presented by the credentials committee.	TWC § 67.007(b)(3); Election Procedures, paragraph 2.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	
15. AWSSSC failed to obtain and approve drafts of the annual meeting agenda that the credentials committee must present to the board for elections conducted in 2011-2016.	Election Procedures, paragraph 2.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	
16. AWSSC failed to obtain and approve draft meeting packets for elections conducted in 2011-2016.	Election Procedures, paragraph 2.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	

17. AWSSSC failed to prepare voting rosters for elections conducted in 2011-2016 exist.	Bylaws Article XI, Section 2; Election Procedures, paragraph 8.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
18. AWSSSC failed to mail complete meeting packets to voting members for member meetings conducted in 2011-2016.	Amendment to Bylaws, page 1; Election Procedures, paragraph 6.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
19. A WSSSC failed to provide its members 30-day written notice of its annual meetings in 2013 and 2016.	Amendment to Bylaws, page 1; Election Procedures, paragraph 6.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
20. A WSSSC does not maintain a membership transfer	Bylaws Article IX.	TWC §§ 13.004(a).	PUC may exercise original jurisdiction over AWSSSC,	TWC §13.004(a), 16 TAC §§

book.				including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	24.35 and 24.141.
21. AWSSSC failed to prepare annual reports of financial activity in 2011-2016.	Bylaws Article XIX, second paragraph.		TWC §§ 13.004(a).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
22. AWSSSC failed to adopt or approve federal tax returns in 2011-2016.	Bylaws Article XIX.		TWC §§ 13.004(a).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
23. Mr. David Waishes was installed as a board director without filing an application or having his name	Election Procedures, paragraph 4.		TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.

placed on a ballot for the 2012 elections.				original rate jurisdiction.	
24. AWSSSC does not have a conflict of interest policy, written or otherwise.	Bylaws Article IV, Section 4.	TWC §§ 13.004(a).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	
25. AWSSSC board members have had conflicts of interest which impede the business of the corporation and disserve the interests of the membership, including in August 2014 relating to its banker and Secretary-Treasurer.	Bylaws Article IV, Section 4.	TWC §§ 13.004(a).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	§13.004(a), 16 TAC §§ 24.35 and 24.141.	
26. AWSSSC members are frequently videotaped in the audience, prohibited from asking questions and asked	Bylaws Article V, Section 3.	TWC §§ 13.004(a).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and	TWC §13.004(a); 16 TAC §§ 24.35 and 24.141.	

to leave board meetings.				original rate jurisdiction.	
27. AWSSSC failed to hold its annual member meetings timely from 2011-2013.	Bylaws Article XI; Election Procedures, paragraph 1.		TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
28. AWSSSC failed to appoint a credentials committee prior to its 2012 and 2013 directors' elections.	Bylaws Article XI, Section 3.		TWC §§ 13.004(a).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
29. AWSSSC has installed new board members without election, proper notice or memorialization in minutes, including the changes on March 2012.	Bylaws Articles IV and XI; Election Procedures, paragraph 4.		TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
30. Approximately 178 AWSSSC	Bylaws Article III.		TWC §§ 13.004(a).	PUC may exercise original jurisdiction	TWC §13.004(a),

<p>checks are signed by 1 director and/or by unauthorized personnel who are not officers of the board or dutifully appointed employees, including check numbers:</p> <p>3266 3279 3291 3294-3302 3312-3321 3347-3355 3364-3373 3382-3391 3397-3406 3414 3416-3426 3454-3455 3456-3462 3475 3639-3648 3655 3661-3671 3678 3691-3694 1001 1003-1008</p>			<p>over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.</p>	<p>16 TAC §§ 24.35 and 24.141.</p>
---	--	--	---	--



1022-1025 1027 1043-1048 1051-1052 1054 1056 1035 1049-1050 1053 1072-1073 1078-1083 1074-1077 1099-1102 1960 2017-2019 2067 2342 2380 2409 1227 1229-1233 1235-1245					
31. AWSSSC board has voted on motions made by non-board directors, including motions made by Jesse Munguia on December 13, 2012.	TWC §13.002(24) incorporates by reference TWC § 67.004, which incorporates the Texas Business Organizations Code § 22.214 that acts of a board of directors of a corporation are only made by a majority of the directors present in person or by proxy.	TWC §§ 13.004(a).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	

32. AWSSSC failed to approve its audits at annual meetings, in 2013-2016.	Bylaws Article XIX.	TWC §§ 13.004(a).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
33. AWSSSC does not reply in writing to member grievances or concerns, including to the letter it received on August 14, 2014.	Bylaws Article V, Section 3.	TWC §§ 13.004(a).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
34. AWSSSC violated the minimum capacity for public water systems under 30 TAC § 290.45.	Bylaws Articles X and XVIII	TWC §§ 13.004(a).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
35. AWSSSC failed to prepare a list of all its voting members from 2011-2016.	Election Procedures, paragraph 8.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the	TWC §13.004(a), 16 TAC §§ 24.35 and

36. AWSSSC failed to send notice of opportunity to submit directors' applications 75 days prior to its April 11, 2016 annual meeting.	Amendment to Bylaws, p. 1; Election Procedures, paragraph 4.	TWC §§ 13.004(a) and 67.007 (annual meetings).	dissolution of the board, the imposition of a receiver, and original rate jurisdiction.  PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	24.141.  TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
37. AWSSSC failed to mail the members' meeting packet notices of its April 11, 2016 annual meeting 30 days before the meeting.	Amendment to Bylaws, p. 1; Election Procedures, paragraph 6.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
38. AWSSSC failed to select an independent auditor 30 days prior to the April 11, 2016 annual meeting.	Amendment to Bylaws, p. 1; Election Procedures, paragraph 5.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.

39. AWSSSC failed to make its voting roster available to its members in its offices at least 28 days prior to April 11, 2016.	Amendment to Bylaws, p. 1; Election Procedures, paragraph 8.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
40. AWSSSC failed to prepare an alphabetical list of names and addresses for all its voting members on or before March 11, 2016 for its 2016 annual meeting.	Bylaws Article XI, Section 2; Election Procedures, paragraph 8.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
41. AWSSSC failed to maintain a secure ballot box, and multiple directors, candidates, office staff, independent contractors and others had access to the box between the time it began accepting ballot forms and the	Election Procedures, paragraph 13.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.

meeting of members on April 11, 2016.					
42. AWSSSC failed to use a ballot box for the 2016 elections which was a secure box with lock and key.	Election Procedures, paragraph 13.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	
43. AWSSSC failed to keep the ballot box in the sole possession of the election auditor between April 1 at 12:00 noon and April 11, 2016 at 7:00 pm.	Election Procedures, paragraph 13.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	
44. AWSSSC failed to have its election auditor verify and its auditor did not verify whether members had previously submitted ballots on April 11, 2016.	Election Procedures, paragraphs 9 and 10.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.	
45. AWSSSC's staff, not the election	Election Procedures, paragraph 13.	TWC §§ 13.004(a) and 67.007 (annual	PUC may exercise original jurisdiction	TWC §13.004(a),	

auditor, opened ballot envelopes prior to the April 11, 2016 meeting.		meetings).	over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	16 TAC §§ 24.35 and 24.141.
46. AWSSSC kept ballot envelopes at its offices from the time it began accepting them until sometime before the April 11, 2016 meeting.	Election Procedures, paragraph 9.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
47. AWSSSC failed to maintain a current signed version of AWSSSC's Election Procedures.	Bylaws Article XI, Section 3; TWC § 67.007(b).	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC, §13.004(a), 16 TAC §§ 24.35 and 24.141.
48. AWSSSC failed to hold an annual meeting in 2013.	Bylaws Article XI, Section 1.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.

49. AWSSSC has denied access to members to regular monthly meetings, including through its legal counsel's correspondence in September 2014.	Bylaws Article V, Section 3.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
50. AWSSSC's general manager has made unauthorized hiring and termination decisions, including those decisions made in July-August 2014.	Bylaws Article XIII.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.
51. AWSSSC office staff has made or approved unauthorized purchases without the approval of the board of directors, in at least August 2014, December 2014 and August 2015.	Bylaws Article XIII.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC §13.004(a), 16 TAC §§ 24.35 and 24.141.

52. AWSSSC has failed to keep required records and has destroyed records maintained on the corporation's computer(s), including in November 2014.	Bylaws Article XIX.	TWC §§ 13.004(a) and 67.007 (annual meetings).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC. §13.004(a), 16 TAC §§ 24.35 and 24.141.
---	---------------------	--	---	--



DOCKET NO. 43146  
SOAH DOCKET NO. 473-16-2033.WS

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

§  
§  
§  
§  
§

BEFORE THE  
PUBLIC UTILITY COMMISSION  
OF TEXAS

ATTACHMENT D

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
<p>AWSSSC's meeting notices, including subjects such as "General Manager's Report," "Operator's Report," "President's Report" and "Financials" are in flagrant violation of the TOMA meeting notice requirements as specifically interpreted in Tex. Att'y Gen. Op. GA-0668 (Oct. 6, 2008) (declaring TOMA violation for agenda subjects "City Manager's Report," "Mayor's Update" and "Council and Other Reports").</p> <p>The violations are significant because they could subject all actions taken in violation of TOMA to being voided by court order and injunction against future violations even if no action was voted on by the board. (TOMA § 551.141).</p> <p>AWSSSC violations of this board meeting notice requirement occurred on:</p> <p>(2016)</p> <p>January 14, 2016 February 11, 2016 February 25, 2016 March 10, 2016. April 4, 2016 (membership meeting, "President's Report") April 11, 2016 (membership meeting, "President's Report") April 14, 2016 May 12, 2016 June 9, 2016 July 14, 2016</p> <p>(2015)</p> <p>January 8, 2015 February 24, 2015 March 9, 2015 April 9, 2015 May 14, 2015</p>	<p>Bylaws Article V, Sections 1 &amp; 4. TOMA §§ 551.041 (notice requirement); 551.141; Tex. Att'y Gen. Op. GA-0668 (Oct. 6, 2008).</p>	<p>TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).</p>	<p>PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.</p>	<p>TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141</p>

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
June 18, 2015 July 9, 2015 August 13, 2015 September 10, 2015 October 8, 2015 November 12, 2015 December 10, 2015 (2014) January 9, 2014 February 13, 2014 February 27, 2014 March 13, 2014 April 10, 2014 (member meeting) May 8, 2014 June 19, 2014 July 10, 2014 August 14, 2014 September 11, 2014 October 9, 2014 November 13, 2014 December 11, 2014				

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
<p>On May 8, 2014, the AWSSSC Board failed to give 72-hour notice of its meeting and improperly used the "Emergency Notice" provision of TOMA § 551.045 without complying with the provision of that section. The board met for a purpose not covered by § 551.045 (which is limited to an "emergency or an urgent public necessity") for the purpose of "authorizing the purchase of approximately 1.01 acres of land adjacent to the AWSSSC [ ] Treatment Plant." §551.045(c) requires the notice of an emergency meeting to "clearly identify the emergency or urgent public necessity" which the AWSSSC notice also failed to do.</p>	<p>Bylaws Article V, Sections 1 &amp; 4. TOMA §§ 551.041 (notice requirement); 551.045; 551.141.</p>	<p>TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).</p>	<p>PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.</p>	<p>TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141</p>
<p>On September 25, 2014 the AWSSSC Board conducted an unlawful closed meeting for a purpose not authorized by TOMA. According to the meeting notice, the Board went into executive session "to allow Heather Howell to discuss past payroll issues and the Audit." There is no exception to TOMA's open meeting requirement which permits such discussion of an audit in a closed meeting. In addition, apparently no tape recording or certified agenda of the closed meeting was created and retained.</p>	<p>Bylaws Article V, Sections 1 &amp; 4. TOMA §§ 551.002; 551.103; 551.104; 551.144; 551.145.</p>	<p>TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).</p>	<p>PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.</p>	<p>TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141</p>

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
On March 10, 2016, the Board approved in a "Consent" motion backhoe repairs in the amount of \$4,500 - \$4,800, a subject that was not listed on the meeting notice. This violates the meeting notice requirement of TOMA § 551.041.	Bylaws Article V, Sections 1 & 4; TOMA § 551.041.	TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141.
Gillespie alleges that AWSSSC failed to post public meeting notices with the County Clerk from 2011-2013 as required by TOMA.	Bylaws Article V, Section 4. TOMA § 551.054.	TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141.

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
On December 10, 2015, the AWSSSC Board voted to give Christmas bonuses to AWSSSC employees when no such subject appeared on the meeting notice. This violates the meeting notice requirement of TOMA § 551.041.	Bylaws Article V, Sections 1 & 4. TOMA § 551.041.	TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141
The AWSSSC board meeting minutes of January 5, 2012 indicate that the Board received information about and deliberated "needed expenditures for improvements/upgrading and repair to the sewer plant." This subject was not adequately, or arguably was omitted entirely, from the meeting notice in violation of TOMA.	Bylaws Article V, Sections 1 & 4. TOMA §§ 551.041 (notice requirement); 551.141; Tex. Att'y Gen. Op. GA-0668 (Oct. 6, 2008).	TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
Gillespie alleges that AWSSSC did not post public notice for 72 hours before its February 9, 2012 meeting.	Election Procedures, paragraph 7. Bylaws Article V, Section 4. TOMA §§ 551.041; 551.043(a).	TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141
AWSSSC's notice of its February 9, 2012 board meeting included a legally inadequate subject called "executive session" that failed to give proper notice of the subject of Board's deliberation or action related thereto. This is a TOMA violation.	Bylaws Article V, Sections 1 & 4. TOMA §§ 551.041 (notice requirement); 551.141; Tex. Att'y Gen. Op. GA-0668 (Oct. 6, 2008).	TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
<p>Gillespie alleges that AWSSSC's presiding officer did not announce under which TOMA provision it was authorized to meet in a closed meeting on March 8, 2012 and no vote was taken in open meeting following the closed meeting to authorize the installation of a sewer line that did occur thereafter.</p>	<p>Bylaws Article V, Section 4. TOMA § 551.101(2).</p>	<p>TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).</p>	<p>PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.</p>	<p>TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141</p>
<p>AWSSSC's meeting notice has included notice of closed meetings without indicating what subjects were to be discussed in the closed meetings or having the presiding officer indicate which items listed on the agenda meeting notice were being discussed in the closed meeting. Examples include agenda item "Executive Session (if required)" on January 10, 2013; February 14, 2013; March 14, 2013; April 11, 2013; April 18, 2013; May 9, 2013; June 13, 2013 ("to discuss hiring another employee" which subject was not listed on the meeting notice); and, August 8, 2013.</p>	<p>Bylaws Article V, Sections 1 &amp; 4. TOMA §§ 551.041 (notice requirement); 551.141; Tex. Att'y Gen. Op. GA-0668 (Oct. 6, 2008).</p>	<p>TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).</p>	<p>PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.</p>	<p>TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141.</p>



Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
<p>AWSSC's meeting notice of November 14, 2013 listed a subject "Presentation by Todd Watson of J.L. Myers Co regarding well #2" but did not indicate that the Board would take any action other than to receive the presentation. The minutes shows that Board acted to authorize payment to J. L. Myers to inspect the well for a total cost of \$5,400, a matter that was not listed on the meeting notice. This is a TOMA violation.</p>	<p>Bylaws Article V, Sections 1 &amp; 4. TOMA §§ 551.041 (notice requirement); 551.141; Tex. Att'y Gen. Op. GA-0668 (Oct. 6, 2008).</p>	<p>TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).</p>	<p>PUC may exercise original jurisdiction over AWSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.</p>	<p>TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141</p>
<p>Ironically, AWSSC's meeting minutes of November 14, 2013 indicate that there was a recommendation received by the Board from the General Manager to have a TOMA workshop, a subject that was not listed on the meeting notice. This is a TOMA violation.</p>	<p>Bylaws Article V, Sections 1 &amp; 4. TOMA §§ 551.041 (notice requirement); 551.141; Tex. Att'y Gen. Op. GA-0668 (Oct. 6, 2008).</p>	<p>TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).</p>	<p>PUC may exercise original jurisdiction over AWSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.</p>	<p>TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141</p>

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
<p>Gillespie alleges that AWSSC's presiding officer failed to identify under which TOMA provision it was authorized to meet in closed session on many occasions from 2013-2015 and on April 9 and June 14, 2012. For example it failed to identify the TOMA provision which allows closed session deliberation on the issue of employee health insurance.</p>	<p>Bylaws Article V, Section 4. TOMA § 551.101(2).</p>	<p>TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).</p>	<p>PUC may exercise original jurisdiction over AWSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.</p>	<p>TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141</p>

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
Gillespie alleges that AWSSSC held an emergency board meeting on April 27, 2012 when no emergency existed (no imminent threat to public health and safety or no unforeseeable situation).	Bylaws Article V, Sections 1 & 4. TOMA §§ 551.041 (notice requirement); 551.045; 551.141.	TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141
Gillespie alleges that a quorum of the board met in secret on December 8, 2011 after adjournment by then-president Patsy Russell. Deliberation about AWSSSC business by a quorum of the Board outside of a posted meeting violates TOMA.	Bylaws Article V, Section 4. TOMA §§ 551.002; 551.143; 551.144.	TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141
No certified agendas or tape recordings exist for the closed sessions occurring during the two-year period prior to the filing of the Gillespie Complaint (July 14, 2014) for closed meetings on: August 9, 2012 September 13, 2012 October 11, 2012	Bylaws Article V, Sections 1 & 4. TOMA §§ 551.103; 551.104; 551.145.	TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).	PUC may exercise original jurisdiction over AWSSSC, including the	TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
November 1, 2012 November 8, 2012 December 13, 2012 January 10, 2013 February 14, 2013 March 14, 2013 April 11, 2013 April 18, 2013 May 9, 2013 June 11, 2013 July 11, 2013 August 8, 2013 September 12, 2013 March 13, 2014 June 19, 2014 June 30, 2014 August 14, 2014 September 25, 2014 October 9, 2014 October 23, 2014 November 13, 2014 November 20, 2014 August 13, 2015 September 10, 2015 October 8, 2015 November 12, 2015 November 17, 2015 December 10, 2015 December 17, 2015 February 25, 2016 March 10, 2016			dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
Gillespie alleges that not all board members have taken the mandatory TOMA training. This is a TOMA violation.	Bylaws Article V, Section 4. TOMA § 551.005.	TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141
On June 14, 2012 the AWSSSC Board met in a closed meeting to obtain attorney advice under TOMA section 551.071 but permitted Patsy Russell—a person who was not at that time an Avalon director, officer or employee—to attend the closed meeting. Since Ms. Russell does not qualify as an appropriate attendee at such a closed meeting, this is a TOMA violation. (See cited Attorney General Opinion on point).	Bylaws Article V, Sections 1 & 4. TOMA §§ 551.002; 551.071 Tex. Att'y Gen. Op. No. JC-0506 (2002).	TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).	PUC may exercise original jurisdiction over AWSSSC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.	TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141

Alleged Deficiency (including factual background and date of occurrence)	Detailed Statutory Basis for Commission Jurisdiction	Legal Cause of Action	Remedy Description	Statutory and Regulatory Authority for Remedy
<p>At some point between February 12, 2015 and February 24, 2015, six of the AWSSEC Board members executed a Corporate Resolution to retain legal services of Aimee Hess, without giving the required TOMA notice of a meeting or meeting in public to take such action. At its February 24, 2015 board meeting the President admitted that the Corporate Resolution had been signed without a public meeting of the Board and that was the reason the Board had an agenda item "to ratify" the unlawfully approved resolution retaining legal counsel. Approval of the hiring of legal counsel without an open meeting in accordance with TOMA is a TOMA violation.</p>	<p>Bylaws Article V, Sections 1 &amp; 4. TOMA, §§ 551.002 (open meeting requirement) 551.041 (notice requirement).</p>	<p>TWC § 13.004(a)(2) (including TWC § 13.002(24) and bylaws).</p>	<p>PUC may exercise original jurisdiction over AWSSEC, including the dissolution of the board, the imposition of a receiver, and original rate jurisdiction.</p>	<p>TWC § 13.004(a), 16 TAC §§ 24.35 and 24.141</p>