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

PUBLIC UTILITY COMMISSION

OF TEXAS

COMPLAINANT GILLESPIE’S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS:

COMES NOW, Carol D. Gillespie (“Gillespie” or “Complainant”) and files this, her Exceptions to the Proposal for Decision (“PFD”) issued by the State Office of Administrative Hearings (“SOAH”) Administrative Law Judges (“ALJs”). In support thereof, Complainant respectfully shows the following:

I. BACKGROUND

Ms. Carol Gillespie is an affected person, member-owner,¹ and customer² of the Avalon Water Supply and Sewer Services Corporation (“Avalon” or “Corporation”). Since the 1890’s, her family has owned the rural farmland that currently lies within Avalon’s CCN area. After Avalon failed to provide legal notice for open and closed meetings that resulted in the illegal installation of a sewer line across her property in 2012,³ Complainant began investigating Avalon’s compliance with its Bylaws and statutorily required election and open meeting procedures. Ms. Gillespie identified, to both the Public Utility Commission of Texas (“Commission”) and the Texas Commission on Environmental Quality (“TCEQ”), legitimate concerns that the Corporation failed to follow the law applicable to *all* other water supply and

¹ TEX. WATER CODE ANN. § 13.002(1) (“TWC”); Avalon’s Bylaws, Article VIII, Sec. 1.

² See Title 16 Texas Administrative Code (“TAC”) Section 24.3(23) defining customer as any person provided with services by any retail public utility. Section 16 TAC 24.3(62) defines service as *any* act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties. As the PFD admits, Avalon has provided Ms. Gillespie with a meter, she is a member of the Corporation, and she votes regularly in Avalon’s elections. Avalon has run a line to her property and she receives a monthly bill from Avalon for the meter. Thus, Ms. Gillespie is a customer in addition to being a member-owner of Avalon.

³ Amazingly, although it charges a fee and submits certain reports for the quality of the water flowing through the lines, Avalon now disclaims ownership of a water line that it illegally installed on the Gillespie property.

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sewer service corporations (“WSCs”). Without the benefit of even completing one full round of discovery, Avalon provided clear evidence that the Corporation flagrantly violated its Bylaws, TWC Chapter 67 requirements for annual and special meetings and elections, and the Texas Open Meetings Act (“TOMA”)⁴ from at least 2012 through its recent annual meeting in 2016. While both agencies instructed Ms. Gillespie to file a complaint pursuant to TWC § 13.004(a) and both agencies found that she had “raised several violations that fall within the Commission jurisdiction,”⁵ the ALJs unfairly demonize this public citizen as a serial complainant with ulterior motives. It is bad public policy to discourage public participation, especially when overwhelming evidence exists of Avalon’s *current* violations, its blatant disregard for the law, and its disdain for Commission oversight.

In claiming that the Commission may not exercise its oversight authority under TWC § 13.004 as the TCEQ did before it and dismissing the legitimate input from a member-owner and customer of the Corporation, the PFD not only eviscerates the purpose of TWC § 13.004, but it also removes any Legislature-intended check on a WSC’s conduct. The PFD would completely tie the Commission’s hands from imposing any supervision on a WSC like Avalon under TWC § 13.004. The PFD throws out both Ms. Gillespie as well as the Commission - all without providing an evidentiary hearing and without any sworn evidence in an administrative record. Complainant excepts to the PFD as set forth below:

A. Complaints

Ms. Gillespie excepts to the PFD’s claim that her complaints encompass a 5-year period beginning in 2011. That is incorrect. Although the illegal installation of the sewer line occurred in 2012, Ms. Gillespie filed the subject complaint and supplements for this proceeding in July 2014. While the TCEQ evaluated the original complaint of July 14, 2014, Complainant identified subsequent violations by Avalon that occurred since the Legislature transferred jurisdiction to the Commission and that continue to occur as recently as April 2016. Thus,

⁴ TEX. GOV’T CODE ANN. CH. 551.

⁵ Commission Staff Response to Gillespie’s Verified Brief at 2. Also note, contrary to the PFD’s assertion, Commission staff did *not* recommend dismissal of the subject complaint, but only certification of the question to the Commission (staff could not have possibly reviewed new 2016 violations “thoroughly” in 2015). PUC legal staff also *upgraded* Ms. Gillespie’s complaints and CADM referred the case to SOAH.

contrary to the PFD's assertion, these recent post-transfer violations could not have possibly been reviewed or resolved by TCEQ staff. Yet, the PFD mistakenly claims that the allegations are old and stale and previously resolved by TCEQ. The ALJs ignore the fact that both the TCEQ and the Commission encouraged and instructed Ms. Gillespie to file this complaint, which occurred at a significant expense to her personally. Contrary to its allegations of "double-dipping," the PFD glosses over Avalon's recent violations of the TWC Chapter 67 annual meeting and election procedures, which happened while this case was pending before the Commission and while the ALJs' scrutiny of the Corporation's conduct should have been at its highest.⁶

B. Parties

In stating that Ms. Gillespie is not a customer of Avalon,⁷ the PFD is not only incorrect,⁸ but it creates the misimpression that her concerns should be taken less seriously. Complainant excepts to this mischaracterization. Ms. Gillespie's justiciable interest and affected person status, as established in Commission rule and the Corporation's Bylaws, are a function of property ownership and *nothing else*. Indeed, two of Avalon's own board members did not receive water or wastewater service during the pendency of this proceeding. As a member-owner *and* customer who votes in elections, Ms. Gillespie is specifically affected by Avalon's many failures, including for example, its failure to properly notice its annual or special meetings, prepare and disseminate ballots, and count and secure them once cast. Complainant is just one customer of Avalon, with much less resources. All she has asked from the beginning is that the Commission ensures that Avalon complies with the law, which it has not for a long time.

C. Procedural History

Complainant excepts to the PFD's mischaracterization of the action previously taken by the TCEQ. Contrary to the PFD's assertion that the complaint was closed and a positive

⁶ There is no basis for the PFD's statement that even those (claims of violations) extending into the present should be dismissed. Two illegal annual meeting elections have been held during the pendency of this case.

⁷ The Gillespie family was actually one of the first customers of Avalon from the early 1970's through 2012, owning as many as 3 meters at one point and with only one inactive meter presently. Ms. Gillespie currently pays \$40.20/month so that she can turn on her water at any time as may be necessary for livestock and vegetation.

⁸ See Section I, footnote 2 of these Exceptions.

determination or findings were made, the TCEQ made no adjudication or formal determination. Rather, in preparation for the transfer of jurisdiction (over WSCs) to the Commission on September 1, 2014, the TCEQ staff merely closed its file. In fact, TCEQ not only provided Avalon with Financial, Managerial, and Technical (“FMT”) training because of its well-known problems (as did the Texas Rural Water Association), the TCEQ provided additional assistance and training at Avalon’s own request. Significantly, TCEQ staff never investigated any violations that related to Avalon’s adherence to the annual and special meeting procedures under TWC § 13.004(a)(1) and Chapter 67 – which comprise the bulk of Ms. Gillespie’s complaint and Verified Brief and Response to Order No. 6. In fact, just before the transfer of jurisdiction to PUC, then-TCEQ employee Fred Bednarski instructed Ms. Gillespie to “document violations to support your claim (sic) ie minutes, agendas, invoices, contracts, etc. that are not pursuant to Texas Water Code Section 13.004 which establishes jurisdiction”⁹ that were *in addition* to the concerns she previously raised.

Thereafter, and unbeknownst to Ms. Gillespie, the Commission’s staff attorney upgraded her complaint on the attorney’s own initiative, as *newly* documented evidence (post transfer of jurisdiction to the Commission) existed that Avalon had denied members access to its meetings in violation of Bylaws Article V, Section 3. This failure to comply with the member-required Bylaws constitutes a violation of TWC § 13.004(a)(2), which incorporates the Bylaws as noted in the TWC § 13.002(24) requirement:

a 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.¹⁰

Avalon violates its Bylaws every time the Corporation holds a meeting or an election, each which constitutes a violation of the Texas Water Code. As attested by Complainant’s witness, a State expert on Open Meetings, Avalon’s problems are truly ongoing and exist even now. As such, one-time involvement of TCEQ cannot and does not bar the Commission from acting post-transfer.

⁹ See 8/8/14 email correspondence from Fred Bednarski to Carol Gillespie.

¹⁰ TWC § 13.002(24) (emphasis added).

II. APPLICABLE LAW

Complainant does not except to the basic citations provided in the PFD; however, she does except to the PFD's fundamental inability to apply the applicable laws in a logical manner. The PFD ignores the fact that much of the Commission's jurisdiction under Chapter 13 of the Texas Water Code is based upon whether the Commission finds that certain facts exist. For example, before the Commission may have jurisdiction to modify or cancel a certificate of convenience and necessity, *it must find* that certain issues exist that warrant modification or cancellation under TWC § 13.254. Section 13.254 includes similar language as found in TWC § 13.004... "if the Commission finds...." Yet, as more fully explained in Section III.B. of these Exceptions, the PFD prevents fact finding in accordance with the prescribed 16 TAC § 24.35 hearing process in favor of an ill-fitting staff-initiated enforcement process that is not appropriate given the nature of the complaint's allegations.

In constructing the statutes, the PFD fails to read them comprehensively and to give meaning to each of the provisions. For example, the Commission has jurisdiction under TWC § 13.004(a) if it finds that a WSC failed to conduct election meetings properly under TWC § 67.007 (the first prong or Subsection – TWC § 13.004(a)(1)) *or* if the WSC is "operating in a manner that does not comply with the requirements for classifications as a nonprofit water supply or sewer service corporation . . ." (the second prong or Subsection - TWC § 13.004(a)(2) relating to Bylaws). In this case, while there is ample evidence that Avalon violated both Subsections, the statute does not include a sliding scale indicating which violations carry more weight than others. The Commission may invoke its jurisdiction on a finding of only one violation in one prong.

Additionally, the PFD does not apply statutory provisions and their many subparts incorporated by reference. TOMA and Bylaw provisions are incorporated into TWC § 13.002(24) which, in turn, is incorporated into TWC § 13.004(a)(2). Similarly TWC § 67.007(b) requires a WSC to adopt written procedures for conducting an annual or special meeting of the members or shareholders or "election procedures."¹¹ As a result, any violation of an election procedure constitutes a violation of TWC § 67.007 and thus TWC § 13.004(a)(1). These various

¹¹ TWC § 67.007(b).

incorporations are the “nexus” that the PFD misses. As explained more fully below in Section III.C.1 of these Exceptions, *any* violation of Avalon’s TOMA or its Bylaws is a violation of TWC § 13.002(24) that triggers Commission jurisdiction.

The PFD has particular disdain for the Corporation’s Bylaws, complaining that they relate to mere day-to-day operations.¹² While it is true that Bylaws may deal with a WSC’s operations, more importantly, Bylaws are the governance mechanism that enables the *members* to manage or control the corporation in a public manner.¹³ This member oversight and control is the reason why the Legislature allows WSCs to escape the scrutiny of the PUC. Thus, when the elected board of a member-owned and member-controlled WSC like Avalon does not abide by the rules of operation approved by its member-owners – whether it be by failing to approve audits, budgets and annual reports, not preparing director’s application criteria or annual meeting packets, not appointing representatives as independent (election) auditors or credentials committee members, not maintaining voter rosters or membership transfer books – the board subjects the WSC to the oversight of the State through the Commission and the WSC is no longer controlled or owned by its members. At that point, the Commission has the authority under TWC § 13.004 to regulate the WSC as any other utility.

III. ALJS’ ANALYSIS

A. Gillespie Standing

The PFD mistakenly reads into TWC § 13.004(a) a requirement that there be a private cause of action for a public citizen to participate in the process where the *Commission finds* a WSC has violated various statutes. Then, contrary to the rules of statutory construction that legislative history is employed to derive meaning only to ambiguous statutory language, the PFD also resorts to irrelevant legislative history relating to rate jurisdiction.¹⁴ In other words, the PFD

¹² PFD at 16.

¹³ TEX. BUS. ORGS. CODE ANN., § 22.001 (2). *Also see* Brief of Amicus Curiae, Texas Rural Water Association, In Support of Respondent’s Motion to Dismiss at 3, agreeing that “water supply and sewer service corporations which are non-profit, self governed entities whose *Bylaws are adopted through a vote of the members*, and policies are adopted by the directors that the members elect.” (emphasis added).

¹⁴ Contrary to the PFD’s assertions, Complainant has not raised any issues relating to the Corporations’ operations, rates or services. Mere review of the tables attached to the Complainant’s Verified Brief and Response to Order No. 6 shows alleged violations focus on Bylaws and annual and special meeting violations.

goes to incredible lengths to deny a public citizen, customer and member-owner of the Corporation from the process that the Commission clarified through its promulgation of rules implementing the otherwise plain meaning of TWC § 13.004(a). In 16 TAC § 24.35, the Commission specifically inserted the words, “after notice and opportunity for hearing” in the text of 16 TAC § 24.35 that does not appear in statute.¹⁵ This insertion means the Commission intentionally created a hearing process where a fact-finding must occur during which the Commission could scrutinize whether a WSC is complying with §13.004, Chapter 67, and the WSC’s Bylaws. Nowhere does it say a public citizen may *not* participate in the process by providing evidence to the Commission, which makes the ultimate finding. Nor does it say, in 16 TAC § 24.35 or elsewhere, that the Commission hearing is an enforcement action. In fact, contrary to the PFD’s assertions, there is precedent at the Commission for individual complaints to be litigated in a SOAH proceeding in water cases.¹⁶

Fully understanding that she was a complainant and not a “private Attorney General,” Ms. Gillespie identified remedies that the Commission has readily available under the Water Code, if the Commission finds the Corporation violated its Bylaws, Chapter 67 and §13.004(a). Complainant has not asserted any right to personally force Avalon into Commission-controlled supervision or receivership. As a customer and property owner within the Avalon CCN area who is an affected person with a justiciable interest, she has merely highlighted numerous instances of violations that trigger these Commission remedies. Thus, the existence of these violations establishes the Commission’s jurisdiction, not who or what entity brings that evidence forward. Complainant excepts to the PFD’s finding on the issue of her standing.

B. Failure to State a Claim

Complainant excepts to the assertion that she failed to state a claim for several reasons. First, the legal standard as described by the PFD does not exist. TWC § 67.007 does not establish pleading rules, that are “integral” to § 67.007 or otherwise. TWC § 67.007 only provides ground rules for boards of directors, not pleading rules for complainants. Second,

¹⁵ 16 TAC § 24.35 is virtually identical to TWC § 13.004 except for its use of “commission” instead of “utility commission” and the addition of the “after notice and opportunity for hearing” text.

¹⁶ See *Complaint of Wells Fargo Bank, N.A. Against Bolivar Service Utility, LLC*, Docket No. 44852; 16 TAC §§ 24.81 and 24.82.

claiming Gillespie failed to state a claim is unreasonable in light of the vastly premature procedural status of this case. Complainant had not received complete answers to even a fraction of the discovery questions asked when Order No. 6 required her to identify with specificity *all* the legal grounds and a “statutory-required nexus” to the source of Commission jurisdiction.¹⁷ Ironically, the PFD states that Complainant failed to state a claim, but it then acknowledges 72 different complaints.¹⁸ This is disingenuous.

The PFD also misapplies Commission rules. On one hand, the PFD suggests the Commission staff is the only party vested with authority to initiate enforcement,¹⁹ then elsewhere states that the appropriate mechanism is a Commissioner-initiated enforcement action.²⁰ The PFD wrongly confuses staff and Commission-initiated enforcement and oversight and their different functions under the rules. The staff cannot initiate a 16 TAC § 24.140 enforcement action when the Commission has already initiated the TWC § 24.35(a) prescribed hearing. The Commission’s Preliminary Order ordered the ALJs to determine: 1) if Avalon is failing to comply with TWC § 13.004; 2) if Avalon is failing to conduct annual or special meetings in compliance with Sections 67.007 and 13.004(a)(1); 3) if Avalon is operating in a manner that fails to comply with the requirements for a nonprofit water supply or sewer service corporation (TWC §§ 13.002(11) and (24) and 13.004(a)(2)); and, 4) what the Commission should require if Avalon is failing to comply.

Additionally, the PFD incorrectly paints Commission or staff-initiated action with one brush where there is a clear distinction between traditional penalty-imposed enforcement,²¹ supervision, and the process envisioned under TWC § 13.004. Section 24.140, the mechanism favored by the PFD to address any Avalon violations, pertains to the “failure of the owner or operator of a water utility to properly operate, maintain, or provide adequate facilities (that

¹⁷ PFD at 14. The PFD fails to explain how the nexus is statutorily required.

¹⁸ PFD at 28.

¹⁹ PFD at 12 (“...only Staff should be permitted to initiate an enforcement case if appropriate”) (emphasis added). But see PFD at 8 (“...the rules give *the Commission*, not a complainant, the discretion to initiate an enforcement proceeding”) (emphasis added).

²⁰ PFD at 10.

²¹ The legal authority for 16 TAC § 24.140 is derived from TWC § 13.411, Subchapter K relating to Violations and Enforcement (23 Tex. Reg. 10843) which not only predates § 13.004, but deals with an altogether different nature of problems.

presents an imminent threat to human health or safety.”²² Neither Complainant nor the Commission in its Preliminary Order raises human health or safety issues relating to the operation and maintenance of Avalon’s facilities. Through its Preliminary Order, the Commission requested a fact finding on the elements of TWC § 13.004, which relate back to adherence to Bylaws and annual and special meeting requirements set forth in TWC § 67.007.

C. Jurisdiction

1. Scope of Commission’s Jurisdiction Under TWC § 13.004(a)

Complainant excepts to the PFD’s attempt to strip the Commission of its jurisdiction based on an alleged lack of specificity in the table of violations attached to her Verified Brief and Response to Order No. 6. This is not only illogical, it is unfair. Again, the PFD faults Complainant for not triggering (through pleading) the Commission’s jurisdiction where it is the Commission that invokes its own jurisdiction, after the notice and hearing process prescribed by 16 TAC § 24.35. Indeed, how can individuals, who the PFD claims lack standing, be responsible for invoking the Commission’s jurisdiction - jurisdiction for which it also concedes the predecessor agency, TCEQ, previously enjoyed?

Complainant did not argue the Commission’s legal authority was “expansive” under TWC § 13.004(a); rather, the ALJs clearly did not understand how to interpret Complainant’s table, which must be read as a whole, columns 1-5. For example, the PFD states that Complainant referred to “election procedures and by-laws, which are not statutes.” Contrary to the PFD’s assertion that the “majority of Complainant’s claims are unrelated to the requirements of Water Code §§ 67.007 and 13.002(24),” almost the entirety of Ms. Gillespie’s verified table notes the Corporation’s failure to act as a WSC as required by §13.002(24), which includes failure to comply with election procedures and Bylaws. This failure included for instance, Avalon’s inability to obtain ballot applications or statements of qualifications by its board director candidates or approve the meeting packet for their election at the annual meeting. These are all violations of specific election procedures under TWC § 67.007 (and those provisions cited

²² 16 TAC § 24.140.

therein), any of which trigger the Commission's jurisdiction to treat Avalon like any other water utility.

As stated in Section II of these Exceptions, Bylaws are the vehicle by which a water or sewer utility is member-controlled. If a WSCs' board had no responsibility to its members, or only followed some of Bylaws but not others, it would be no different than an investor-owned-utility who is only accountable unto itself. Like standard operating procedures, Bylaws are not just a collective statement of how the members want its representatives to function, but a binding duty on those representative board members to carry out the member's will as exemplified in the Bylaws. It is therefore unreasonable for the PFD to suggest that some Bylaws illustrate member ownership or control while other Bylaw provisions do not. And which Bylaw provisions would those be? TWC § 13.002(24) does not make this distinction, but requires WSCs to operate in accordance with *all* its Bylaws or articles of incorporation, because it is those rules collectively that ensure the members interests are represented by the non-profit entity.

As a consequence, a WSC that operates in a manner counter to *any* of the provisions of the corporation's Bylaws is not member-controlled, and a corporation operating in that manner is not complying with the requirements for classification as a nonprofit water supply or sewer service corporation. Therefore, such a WSC is subject to the oversight and scrutiny of the Commission. Avalon's failure to comply with numerous Bylaws provisions constitutes an obvious and definitive demonstration of its failure to operate in a member-controlled manner under TWC § 13.004(a)(2) (which in turn triggers the Commission's jurisdiction). It also leaves Avalon completely unaccountable to its membership.

The numerous categories of violations are a combination of outright violations of its Bylaws and TOMA (constituting violations of TWC § 13.004(a)(2)) and Chapter 67 (constituting violations of TWC § 13.004(a)(1)). Yet, within these violation categories, there are additional violations, because the same mistakes were made year after year. For example, ballot applications and secure ballot box procedures were ignored for years. Each of these examples, all set forth in the tables attached to Complainant's Verified Brief and Response to Order No. 6 demonstrate that Avalon failed to conduct annual or special meetings in compliance with TWC §

67.007 or was not operating in a manner compliant with § 13.002(11) and (24) (violating its Bylaws or TOMA).

Importantly, TWC § 13.004(a) does not establish a minimum threshold number or type of violations that the Commission must find to exercise its jurisdiction. So even if the Commission were to disregard all of Avalon's many TOMA and Bylaws violations, there are still numerous annual or special meeting violations that alone warrant the Commission's jurisdiction over Avalon as a utility. And, despite sorely incomplete document production,²³ ample evidence still exists of Avalon's violations, including but not limited to its failure to: 1) adhere to its election procedures, Bylaws, and TOMA, including but not limited to its failure to provide proper notices of the annual and special meetings; 2) provide proper or complete ballots, director's applications, meeting packets, voting rosters, and election reports; 3) have a conflict of interest policy and appoint a credentials committee and independent auditors who comply with its election procedures; 4) maintain its financial management obligations by failing to prepare budgets, audits and annual reports; 5) comply with TOMA by allowing "walking quorums," not posting meeting notices with specificity, discussing items not specifically noticed, improperly posting its closed meeting notices, improper consultation during those closed meetings, and illegal action thereafter; 6) provide sufficient certified agendas, recordings, and minutes. Complainant provided specific prima facie evidence detailing names, dates, Subsections, and paragraphs of relevant election procedures and Bylaws demonstrating that Avalon is not operating in a manner that complies with the requirements for nonprofit WSCs. This case should have proceeded to at least a hearing, if not a summary judgment finding that the Commission has jurisdiction over Avalon due to the Corporation's failure to behave as a WSC.

Finally, if an individual lacks a private cause of action under TWC § 13.004(a) and the Commission can only exercise its enforcement jurisdiction through a staff-initiated enforcement action under 16 TAC § 24.140 relating to imminent endangerment from inadequate facilities, then according to the ALJs' analysis, nobody can participate in a TWC § 13.004(a) proceeding.

²³ Avalon submitted non-responsive answers and incomplete document production to Complainant's First Requests for Information. Before its answers were due to Gillespie's second round of discovery requests and Complainant could file her Motion to Compel (first round answers), Avalon sought an abatement.

The PFD's reading of this statute renders it meaningless and wholly thwarts the Legislative intent for a check on WSCs.

2. Jurisdiction Over Specific Claims Articulated

a. Non-TOMA Claims Articulated

As set out above in Section II.C.1 to these Exceptions, in order to interpret Complainant's table correctly, it was necessary that the ALJs read the columns together from left to right. The excerpt from Complainant's table below illustrates this point:

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
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.

In the first column (under the bolded heading on the far left), Complainant identified the factual basis of the allegation that Avalon failed to prepare voting rosters from 2011-2016. The second column provides the citation, by article and paragraph number, of the Bylaws and election procedures that explicitly require the rosters that Avalon failed to prepare as noted in column one. Failure to prepare the rosters in compliance with the Bylaws and election procedures, in turn, constitutes violations of TWC §§ 13.004(a) (which incorporates TWC §13.002(24), mandating compliance with Bylaws) and 67.007 (which requires adoption of written procedures for annual or special meetings including validation of eligible voters) as noted in the third column from the

left. The fourth column clearly states that the Commission is the entity with the authority to impose various remedies, for the violations noted in the three previous columns, which it may exercise at its discretion. Finally, the fifth column provides citations to the Commission's legal authority to impose the remedies identified in the fourth column. It could not be clearer, that in this instance as with many others, Avalon is not holding its annual or special meetings in compliance with applicable law and the Commission is authorized to invoke its TWC § 13.004(a) jurisdiction to redress the situation, as it might with any retail utility until such time as Avalon follows the law. Avalon's many other violations are noted in Complainant's Verified Brief and Response to Order No. 6.

b. Specific Substantive Grounds Articulated

The PFD's statement that the majority of Complainant's claims are "unrelated" to the requirements of TWC §§ 67.007 and 13.002(24) is incorrect and a failure to apply the law.²⁴ Each deficiency on Ms. Gillespie's verified table alleges a violation of either a Bylaw or an election procedure or both. As to the election procedures (required by TWC § 67.007(b)), Complainant noted direct violation of either the written procedures themselves, citing paragraph and page numbers, or the annual or special meeting requirements in TWC § 67.007. Nowhere did the table allege operational problems or rate disputes.

D. Additional Grounds

1. Claims Prior to August 25, 2014

The PFD's assertion that the Commission lacks jurisdiction under TWC § 13.004(a) makes no sense in light of the fact that TCEQ was authorized under the identical statute. In other words, the PFD finds that the TCEQ properly exercised its authority, but the Commission cannot.²⁵ Yet the PFD steps short of claiming the Commission is barred by *res judicata* and gives no legal or policy basis to support its contention. Some action by staff level personnel at

²⁴ PFD at 19.

²⁵ The PFD's confusing statement that, "[b]efore 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. . ." would suggest that the Commission has already acquired jurisdiction and does not lack it as the PFD urges elsewhere. *See* PFD at 2.

TCEQ should not prevent the Commission from looking at the past and many present serious violations of Avalon.

It is unreasonable to claim that the Commission should defer to the TCEQ for claims that arose after September 1, 2014, as many of those identified in Ms. Gillespie's table happened well into 2015 and 2016 and are ongoing. For that matter, it is misleading to argue that Commission staff completed a "thorough review" as of only November 2015. Indeed, because the date of the annual meeting in April 2016 was moved without proper notice and meeting packets, while some unsecure ballots were cast (and apparently counted) at both meetings, literally dozens of violations arose well after jurisdiction was transferred.²⁶ Significantly, TCEQ never analyzed meetings packets, ballots and other details associated with the annual or special meetings. To now bar complaints that "could have been brought" by Complainant at TCEQ or to require her to foresee "changed circumstances" creates a standard that simply does not exist and forces the Commission to evaluate only a frozen unrepresentative period in time. As the tables indicate, Avalon's violations are pervasive in many different areas over many years.

Additionally, Avalon's obligation to act as a nonprofit WSC is continuing in nature. The Commission is charged to determine if a WSC is "operating," in the present tense, in a manner that complies with the requirements for classifications as a WSC.²⁷ Therefore, compliance with the statute must be ongoing, not a one-time, check of the box.

2. Commission Jurisdiction Over TOMA Claims

Avalon's Bylaws require that regular, annual, and special meetings be held in compliance with TOMA. Therefore, a violation of TOMA is a violation of its Bylaws, and violation of the Bylaws is, in turn, a violation of TWC § 13.004(a)(2). Complainant is not suggesting that the Commission enforce TOMA or bring an action by mandamus or injunction under TEX. GOV'T CODE ANN. § 551.142 to stop, prevent, or reverse Avalon's violations of TOMA. Nor has Gillespie sought to invalidate any action taken by Avalon in violation of TOMA,²⁸ although that

²⁶ Avalon has held two annual elections since jurisdiction was transferred and dozens of board meetings.

²⁷ TWC § 13.004(a)(2).

²⁸ TEX. GOV'T CODE ANN. § 551.141.

is within her right as an interested person.²⁹ Rather, Gillespie has only sought a remedy well within the Commission's jurisdiction under TWC Chapter 13 -- to find that Avalon has violated Article V, Sections 1 and 4 of its Bylaws and therefore TWC §§ 13.002(24) and 13.004(a)(2). The PFD would strip the Commission of its authority to ascertain violations of TWC § 13.002(24) (*i.e.*, Bylaws) where the Legislature specifically created a process for a WSC's actions to be reviewed.

This case is not unlike instances of concurrent jurisdiction with other administrative agencies, like the Texas Department of Savings and Mortgage Lending under the Finance Commission of Texas. There, for example, the Department can take disciplinary action and suspend the license of a mortgage loan originator if that individual has been indicted (pre-final disposition, not adjudicated) or engaged in other conduct violating the law, but the Department is not acting as or usurping the role of the prosecutor or district attorney who actually prosecutes the individual.³⁰ The Department is merely taking notice of the individual's alleged, not adjudicated, violations under a separate regulatory scheme to inform its decision-making within its own sphere of authority as the licensing body. Similarly, the TOMA violations set out in the tables attached to Gillespie's Verified Brief and Response to Order No. 6, particularly in Judge Aleshire's table, are additional examples of how Avalon continues to ignore the provisions of its Bylaws, thwarting the control of its members as intended by the Legislature. By ignoring this member-control mechanism, Avalon invokes the jurisdiction of the Commission. The members adopted the TOMA requirements in their Bylaws to ensure that the actions of the Avalon board remain under their strict control and oversight, and the board's actions are transparent. These obvious violations are additional examples of how Avalon continues to operate in a manner that does not comply with the requirements for classification as a nonprofit WSC and warrant Commission supervision and oversight.

3. Amended Pleadings

Despite identifying numerous egregious recent violations, post-September 1, 2014 jurisdictional transfer, the PFD dismisses them all out of hand because the "complaint" was not

²⁹ *Id.* § 551.142(a).

³⁰ TEX. FIN. CODE ANN. § 157.024.

formally amended. This death penalty-like dismissal ignores the fact that there was never a complaint, akin to a formal petition. Rather, Ms. Gillespie made her letter filings and supplements *pro se*, without the aid of discovery responses, and under the informal direction of Commission staff. Nor is there any rule or policy guidance directing the style and content of TWC § 13.004(a) complaints. Nevertheless, the Verified Brief and Response to Order No. 6 specifically stated that the allegations cited in the tables *superseded and replaced* the allegations in Ms. Gillespie's 2014-2015 complaint letters.³¹ In other words, the allegations in the tables did indeed amend the earlier complaint and supplements and should have been considered as the sole the basis for jurisdiction. The PFD ignored this amendment.

E. Summary

[No exception]

IV. AVALON'S ALLEGATIONS

Since there is no sworn testimony or other evidence in an administrative record in this case, it is unclear why the PFD would include a section on Avalon's allegations, since these are unproven personal attacks at best. Much of the PFD's recount of this case are misstatements based on supposition, as the case has not been allowed to move forward to a point for the parties to acquire and defend factual evidence.

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

Complainant excepts to proposed Findings of Fact 1, 2, 4, 18, 22 and 23, Conclusions of Law 1-7 and Ordering Provision 1.

VI. CONCLUSION

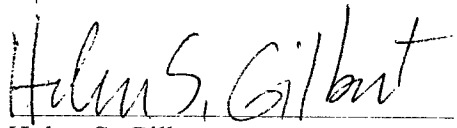
By its own admission, Avalon is a small-underfunded WSC with problems. It is the poster child for systems needing Commission oversight and assistance. Yet instead of seeking help from the Commission, Avalon's violations would remain unchecked while it is wholly unaccountable to its member-owners and customers like Ms. Gillespie who spent significant time

³¹ Verified Brief and Response to Order No. 6 at 8.

and resources at staff's direction to bring these violations to light. Because of her tireless efforts, the Commission (as acknowledged by its own staff) now has ample evidence of violations to invoke its jurisdiction and oversee Avalon as it might other utilities. Therefore, even if the Commission agrees with the PFD and dismisses this case, it should directly proceed with an enforcement case against Avalon on its clear record of past and ongoing violations.

Respectfully submitted,

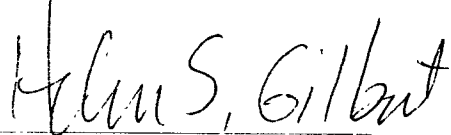
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ATTORNEYS FOR GILLESPIE

CERTIFICATE OF SERVICE

I hereby certify that I have or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on the 11th of January 2017.


Helen S. Gilbert