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

RECEIVED

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

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PUBLIC UTILITY COMMISSION

OF TEXAS

**2017 JAN 18 PM 2:00
PUBLIC UTILITY COMMISSION
FILING CLERK**

COMMISSION STAFF'S RESPONSE TO EXCEPTIONS

COMES NOW the Staff of the Public Utility Commission, representing the public interest, and files this Response to Exceptions and would show the following:

I. BACKGROUND

A Proposal for Decision (PFD) was filed by the SOAH Administrative Law Judge (ALJ) on December 8, 2016, which dismissed the complaint by Carol Gillespie (Complainant) against Avalon Water Supply and Sewer Services Corporation (Avalon) 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. Commission Advising and Docket Management set January 11, 2017 as the deadline for parties to file exceptions to the PFD, and January 18, 2017 as the deadline for parties to file responses to exceptions. On January 11, 2017, Staff filed a letter indicating that it had no exceptions and supported the PFD, and the Complainant filed exceptions to the PFD.

II. EXCEPTIONS

The ALJ's correctly set out the legal deficiencies with an individual complaint filed under Texas Water Code (TAC) § 13.004. The Complainant's assertions that the PFD would "tie the Commission's hands," "throw out...the Commission," and would not allow the Commission to exercise its oversight authority are incorrect.¹ Rather, the PFD sets out the legal basis as to why the Complainant does not have standing to bring a complaint under TWC § 13.004, why there is a failure to state a claim upon which relief can be granted, and why the Complainant field to argue jurisdiction over specific claims, as well as the failure to comply with the ALJs' specific instructions.

I. A. Complaints

¹ Complainant Gillespie's Exceptions to the Proposal for Decision at 2 (January 11, 2017).

The Complainant mistakenly claims that any potential violations that occurred after the transfer of the water utility jurisdiction from the Texas Commission on Environmental Quality (TCEQ) to the Commission were reviewed by TCEQ staff, and that the complaints are “old and stale.”² PFD clearly states that claims stemming from facts prior to August 25, 2014, when the TCEQ staff issued its final determination of Ms. Gillespie’s complaints, should be dismissed in deference to TCEQ action.³

I. B. Parties

The Complainant takes offense at the “mischaracterization” of her service from Avalon.⁴ However, it is correct that Ms. Gillespie does not take service from Avalon, nor has she requested service during the entire period involved with the complaint, although she does have an inactive meter on her property.

I. C. Procedural History

The Complainant excepts to the characterization that the TCEQ made a “positive determination” on Ms. Gillespie’s complaint to the TCEQ. Instead, Complainant asserts that TCEQ staff “merely closed its file.”⁵ However, the plain language of the August 25, 2014 letter 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. Accordingly we have closed this case and will take no further action in this matter.”⁶ The TCEQ’s response appears to be more than “merely closing the file” and does provide an affirmative resolution to the complaint.

The Complainant also refers to the Commission’s staff attorney “upgrad[ing] [Gillespie’s] complaint on the attorney’s own initiative,” based on newly discovered evidence.⁷ The Complainant does not reference any filing in association with this statement, so Staff cannot respond on how the complaint was “upgraded.”

Complainant also references that a violation of the bylaws is a violation of TWC § 13.002(24), which states, in part:

² *Id.* at 3

³ Proposal for Decision at 20-22 (December 8, 2016).

⁴ *Id.* at 3.

⁵ *Id.* at 3-4.

⁶ Respondent Avalon’s Response to Complainant Gillespie’s Verified Brief Under SOAH Order No. 6: General Denial and Motion to Dismiss, at Exhibit 1 (August 15, 2016).

⁷ Gillespie Exceptions at 4.

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.

Complainant focuses almost exclusively on the clause “operating in accordance with by-laws” in an attempt to rationalize that *every* violation of its bylaws would cause Avalon to be in violation of TWC § 13.004(a)(2). However, Complainant takes this clause out of context and ignores the rest of the sentence: “which ensure that it is member-owned and member-controlled,” which modifies the clause relied upon by the Complainant. Staff has previously addressed this issue, noting that “[t]his clause provides specific language that the focus on the by-laws and articles of incorporation should be to ensure that members own and operate the WSC, not to unreasonably expand the Commission's jurisdiction to infer that it has authority to address every issue included in a WSC's by-laws.”⁸ The ALJ’s agreed with Staff, noting that “[b]ased on the statutory language, Water Code § 13.004(a)(2) does not authorize the Commission’s inquiry into all of the say-to-day operations of a WSC”⁹

II. APPLICABLE LAW

The Complainant also states that 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.”¹⁰ The Complainant then makes the conclusory statement that the PFD prevents fact finding “in accordance with the prescribed 16 TAC § 24.35 hearing process in favor of an ill-fitting” staff-initiated proceeding which is “not appropriate given the nature of the complainant’s allegations.”¹¹ However, the Complainant never explains how a Staff-initiated proceeding is “ill fitting” or “not appropriate” given that the Commission engages in these types of proceedings all the time. In addition, there is no prescribed hearing process under 16 TAC § 24.35. Finally, it appears that the Complainant does not understand that the Commission finds facts in **all** contested cases, regardless of whether these proceedings are complaints, applications (e.g.: CCN applications), or enforcement proceedings. The contested case process is designed to

⁸ Commission Staff’s Response to Gillespie’s Verified Brief at 3 (August 15, 2016).

⁹ PFD at 16.

¹⁰ Gillespie Exceptions at 5.

¹¹ *Id.*

find facts, and is appropriate in many different settings. In addition, in an enforcement proceeding, the Commission has previously ruled that it is not appropriate for third-parties to intervene.¹²

The Complainant also states that the “PFD does not apply statutory provisions that their many subparts incorporated by reference.”¹³ The Complainant relies upon this argument to show that the Texas Open Meetings Act (TOMA) and bylaws are “incorporated” into TWC § 13.002(24), which is incorporated into TWC § 13.004(a)(2). It is unreasonable expand the Commission's jurisdiction to infer that it has authority to address every issue included in a WSC's by-laws or in statutes not specifically set out in TWC § 13.0004. The scope of an administrative agency's jurisdiction has been established by the Texas Supreme Court. The Commission:

...is a creature of the legislature and has no inherent authority. An agency may exercise only those specific powers that the law confers upon it in clear and express language. As a general rule, the legislature impliedly intends that an agency should have whatever power is reasonably necessary to fulfill a function or perform a duty that the legislature has expressly placed in the agency. The agency may not, however, on a theory of necessary implication from a specific power, function, or duty expressly delegated, erect and exercise what really amounts to a new and additional power or one that contradicts the statute, no matter that the new power is viewed as being expedient for administrative purposes.¹⁴

Thus, while the Complainant attempts to infer and incorporate by reference other areas under which the Commission should extend its jurisdiction, without explicit statutory approval, the Commission should not do so.

The Complainants also states that the PFD has “particular distain” for the bylaws.¹⁵ However, while the bylaws are important to the operation of the Corporation, there is no “distain” for these rules. Rather, the plain language of the TWC § 13.002(24) sets the limits of the Commission evaluation, as stated above. Based on the plain language of TWC § 13.002(24), it is the bylaws that “ensure that it is member-owned and member-controlled” which are specifically referenced in the statute and must be evaluated by the Commission.

III. A. Gillespie Standing

¹² See Docket No. 30216, *Notice of Violation by Cap Rock Energy of PURA Section 36.004(a) Relating to Equality of Services and Rates and P.U.C. Subst. R. 25.241(b) Relating to Form and Filing of Tariff*, Order Granting Appeal of Order No. 4 (May 27, 2005). In this proceeding, the Commission overruled the granting of intervention of two parties in an enforcement proceeding. “Staff bears the burden of proving that a violation occurred, and intervention by third parties can interfere with the Staffs exercise of its prosecutorial responsibilities and discretion.”

¹³ Gillespie Exceptions at 5.

¹⁴ *Pub. Util. Com'n of Tex. v. GTE-Sw. Inc.*, 901 S.W.2d 401, 406 (Tex.1995).

¹⁵ *Id.* at 6.

The Complainant mistakenly asserts that because the Commission added the words “after notice and opportunity for hearing” in 16 TAC § 24.35, this creates a hearing process in which the Complainant can participate.¹⁶ The issue arises because the Commission has never held a proceeding under TWC § 13.004, and the process had never been explicitly set out. The ALJ’s correctly compares a TWC § 13.004 proceeding to an enforcement proceeding, in that the Commission must make certain findings that a water supply corporation (WSC) was in violation of statutory requirements under TWC § 13.004 before other penalties can attach to the WSC.

The Complainant also states that they have “not asserted any right to personally force Avalon into Commission-controlled supervision or receivership.”¹⁷ While this may technically be correct, it should be noted that the Complainant, in its Verified Brief, offers as a remedy to every complaint that the Commission may dissolve Avalon’s board or impose a receiver. The Complainant makes this assertion even though the requirements for receivership under 16 TAC § 24.142 are very specific, and require that a utility abandon or express a desire to abandon its system, or has violated an order of the Commission or allowed its property to be used to violate an order of the Commission, and there is no evidence that any of these requirements may be reached even if it is found that Avalon is in violation of TWC § 13.004.

III. B. Failure to State a Claim

The PFD correctly reasons that any action under TWC § 13.004 would only be jurisdictional, that is, to find that the Commission has jurisdiction to treat Avalon as any other “water and sewer utility.”¹⁸ TWC § 13.004 does not provide any other independent cause of action. The Complainant believes that by simply asserting a laundry-list of complaints under TWC § 13.004 that she has the ability to participate in a proceeding against Avalon. However, as stated above, holding a contested case proceeding does not automatically allow an individual to participate. Should the Commission decide to compare a TWC § 13.004 proceeding to an enforcement proceeding, the Commission has already noted that “though an enforcement proceeding may arise from a complaint, the rules give the Commission, not a complainant, the discretion to initiate an enforcement proceeding.”¹⁹

¹⁶ *Id.* at 7.

¹⁷ *Id.*

¹⁸ PFD at 12.

¹⁹ PFD at 8, citing *Complaint of Allyson Rockett Against Pre-Buy Electric, LLC*, Docket No. 35921, Order No. 2 at 3 (Apr. 2, 2009).

III. C. 1. Scope of Commission's Jurisdiction Under TWC § 13.004(a)

The Complainant excepts that the PFD would “strip the Commission of its jurisdiction” under the PFD’s analysis. To the contrary, the PFD accurately sets out the statutory limits on the Commission’s evaluation of a WSC under TWC § 13.004. As stated above, the Commission should not adopt the Complainant’s “expansive” reading of the authority under TWC § 13.004, to look at all of Avalon’s bylaws or to evaluate compliance with other statutes, without specific statutory authority to support that reading. Despite the Complainant’s claims, a “correct” reading of its table of complaints will not lead to the conclusion that the Commission has authority or jurisdiction when it is not explicitly set out in the statute.

The Complainant also attempts to point to discovery to show that Avalon committed multiple violations.²⁰ It should be noted, again, that the ALJs did not evaluate any factual evidence in its decision. Rather, it was determined, on a legal basis, the specific statutory parameters of the Commission’s evaluation under TWC § 13.004. Reference to any “evidence” by the Complainant is improper as nothing has been admitted into the record and rebutted in a contested hearing process.

III. C. 2. a. Non-TOMA Claims Articulated

The Complainant again provides the proper way to read its complaint chart as the only way to show that the Commission has jurisdiction.²¹ However, as stated in the PFD, providing references to the bylaws or other statutes not referenced in TWC § 13.004 does not confer the Commission with jurisdiction over the complaints.

III. C. 2. b. Specific Substantive Grounds Articulated

The Complainant again attempts to incorporate its “expansive” reading to apply to bylaws and statutes not referenced in TWC § 13.004. The same analysis applies here as was explained above.

III. D. 1. Claims Prior to August 25, 2014

No response.

III. C. 2. Commission Jurisdiction Over TOMA Claims

The Complainant again attempts to unreasonably expand Commission jurisdiction by requiring the Commission evaluate statutes not specifically referenced in TWC § 13.004,

²⁰ Gillespie Exceptions at 11.

²¹ *Id.* at 12-13.

specifically over TOMA violations. As stated above, the Commission cannot read additional authority where it does not exist.

III. C. 3. Amended Pleadings

No response.

III. CONCLUSION

This is a case of first impression for the Commission under TWC § 13.004. The process for evaluation of a WSC under TWC § 13.004 has not been established, which creates much of the confusion in the current proceeding. As the ALJs determine in the PFD, this type of proceeding should be compared to an enforcement proceeding, where Staff investigates and the Commission makes certain finding of whether the WSC is in violation of TWC § 13.004. If the finding is in the affirmative, then Staff and the Commission can evaluate the WSC as any other utility and/or require further action as a result of the investigation. Staff agrees with this analysis, and disagrees with the Complainants contention that TWC § 13.004 allows for an individual cause of action against a WSC under this statute and that the Commission should evaluate extraneous “violations” that are outside of the scope of TWC § 13.004. Staff recommends that the Commission adopt the PFD and dismiss the complaint of Ms. Gillespie.

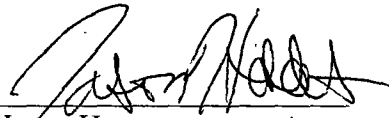
Dated: January 18, 2017

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on January 18, 2017 in accordance with 16 Tex. Admin. Code § 22.74.



Jason Haas