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

§  
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§  
§

PUBLIC UTILITY COMMISSION  
OF TEXAS

**ORDER**

This Order addresses the complaints of Carol Gillespie that Avalon Water Supply and Sewer Services Corporation did not operate in accordance with its bylaws or in a manner that complies with the requirements for classification as a nonprofit water supply corporation. In general, Ms. Gillespie complains that Avalon has failed to conduct annual or special meetings, failed to operate in accordance with its bylaws, and violated the Texas Open Meetings Act.

On December 8, 2016, the SOAH administrative law judges (ALJs) issued a proposal for decision to dismiss Ms. Gillespie's case in its entirety for seven enumerated reasons. First, Ms. Gillespie does not have standing to assert the Commission's jurisdiction under Texas Water Code (TWC) §13.004 or to bring an enforcement action on behalf of Commission Staff. Second, Ms. Gillespie failed to state a claim upon which relief can be granted and only pointed to general jurisdictional provisions, rather than specific causes of action, as the bases for her claims. Third, the Commission does not have jurisdiction under TWC § 13.004(a)(2) over Ms. Gillespie's allegations. Fourth, Ms. Gillespie failed to comply with SOAH Order No. 6 by failing to articulate the Commission's jurisdiction and the legal bases for her complaints as ordered. Fifth, Ms. Gillespie's claims before September 1, 2014 were investigated by TCEQ Staff and were found to be without merit. Sixth, neither the Commission nor SOAH has jurisdiction to adjudicate Ms. Gillespie's Texas Open Meetings Act claims. And seventh, Ms. Gillespie added new allegations against Avalon in her verified brief but did not amend her pleadings as required by SOAH Order No. 6. In addition, the ALJs concluded that the Texas Water Code and Commission rules only authorize a Commission Staff-initiated enforcement action for complaints against a water supply corporation.

The Commission agrees with the recommendations of the ALJs to the extent that the facts presented in this docket do not support a finding that Avalon failed to conduct annual or special

meetings, failed to operate in accordance with its bylaws, and violated the Texas Open Meetings Act. In addition, while the Commission agrees that an individual has no right to initiate a formal complaint under TWC § 13.004, the Commission disagrees with the ALJs' determination that proceedings under TWC § 13.004 should never be referred to SOAH, as the Commission may need, in some limited circumstances, to refer matters for development of an evidentiary record. Additionally, the Commission disagrees with the ALJs' reliance on a letter from the staff of the TCEQ in support of dismissal of some of Ms. Gillespie's claims. The Commission also disagrees with the ALJs' determination that Ms. Gillespie failed to state a claim upon which relief can be granted and with the ALJs' conclusion that Ms. Gillespie's claims do not allege that Avalon is failing to conduct annual or special meetings in compliance with TWC § 67.007, as three of Ms. Gillespie's claims directly reference Avalon's conduct regarding annual meetings. Instead, the Commission bases its dismissal of Ms. Gillespie's claims on the applicable facts and law. The Commission concludes that the facts in this docket do not subject Avalon to the Commission's jurisdiction under TWC § 13.004(a). Accordingly, the Commission adds conclusions of law 2A and 8.

The Commission adopts the proposal for decision, including findings of fact and conclusions of law, but disagrees with the ALJs as detailed in this Order.

## **I. Discussion**

### **A. Case processing**

The Commission agrees with the ALJs' determination that an individual lacks standing to initiate a formal complaint action under TWC § 13.004 because the statute does not provide an independent cause of action. Nor does this section provide any remedy to an individual complainant. While an individual is entitled to articulate grievances against a water supply corporation and its governance, it is the Commission's prerogative to initiate an investigation or enforcement proceeding to determine whether a water supply corporation is operating in accordance with TWC § 13.004. And if the requisite findings are made under TWC § 13.004, the result places the water supply corporation or sewer service corporation into a different regulatory framework: the framework applicable to a public utility. The Commission modifies conclusion of law 1 to reflect that Ms. Gillespie has no right to initiate a formal complaint under TWC § 13.004

and deletes the citation to 16 TAC § 22.246 because Ms. Gillespie never requested administrative penalties against Avalon.

However, the Commission does not agree with the ALJs' determination that proceedings under TWC § 13.004 should not be referred to SOAH. Although an individual cannot initiate a formal complaint proceeding under TWC § 13.004, the Commission can and after doing so, the Commission may refer such matters to SOAH for the development of a factual record. The Commission anticipates that the majority of complaints under TWC § 13.004 will rely on a Commission Staff investigation, however, the Commission will refer a proceeding under the statute to SOAH when necessary for the development of an evidentiary record when the matter presents complex situations or unusual circumstances.

#### **B. Failure to amend pleadings**

Ms. Gillespie filed her initial complaint with TCEQ on August 25, 2014. Ms. Gillespie 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). Ms. Gillespie's January 31, 2015 letter alleges that a violation occurred on October 9, 2014; this is the most recent allegation that Ms. Gillespie makes against Avalon.

On July 7, 2016, the ALJs issued SOAH Order No. 6, which ordered Ms. Gillespie to file a verified brief addressing the factual background, legal authority, and remedy for each and every alleged deficiency committed by Avalon. In addition, Ms. Gillespie was required to properly amend her complaint if new claims were alleged in her brief.

In Ms. Gillespie's verified brief in response to SOAH Order No. 6, Ms. Gillespie asserted additional claims against Avalon without reference to specific dates. Despite adding new claims in her verified brief, Ms. Gillespie did not amend her complaint as required by SOAH Order No. 6.

Accordingly, the Commission agrees with the ALJs recommendation to dismiss (or perhaps more properly, to disregard) these claims as Ms. Gillespie did not properly amend her complaint as required by SOAH Order No. 6 to include additional allegations against Avalon.

### C. Texas Open Meetings Act

Ms. Gillespie asserted 20 claims against Avalon based on alleged violations of the Texas Open Meetings Act.<sup>1</sup> Although Avalon acknowledges that it is subject to the Texas Open Meetings Act,<sup>2</sup> the Commission lacks jurisdiction to adjudicate these alleged violations.

The Texas Open Meetings Act provides civil remedies and criminal penalties for violations of its provisions. The act allows an interested person to bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of the act by members of a governmental body and establishes Texas district courts as the proper venue for these actions. The act does not authorize a state agency to interpret or enforce the act.<sup>3</sup> Without express statutory language granting the Commission jurisdiction on these matters, the Commission does not have the authority to evaluate these types of violations.<sup>4</sup> Accordingly, the Commission dismisses all of Ms. Gillespie's claims related to violations of the Texas Open Meetings Act.

### D. TCEQ deference

The ALJs determined that Ms. Gillespie's claims based on facts prior to August 25, 2014 should be dismissed in deference to TCEQ action. In 2014, TCEQ staff twice investigated Ms. Gillespie's allegations and found no violations. On August 25, 2014, TCEQ staff issued a letter, again determining that Avalon was properly operating as a non-profit, member-owned and member-controlled water supply corporation. TCEQ staff closed the complaint and took no action against Avalon. The ALJs took official notice of TCEQ's August 25, 2014 letter and its findings and recommended that any claims already investigated by TCEQ staff should be dismissed in deference to TCEQ's jurisdiction and action.

Instead of relying on deference to TCEQ, the Commission bases its dismissal of Ms. Gillespie's claims on the applicable facts and law. A TCEQ staff letter does not constitute a policy or decision of the TCEQ or its executive director. Accordingly, the Commission deletes conclusion of law 6.

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<sup>1</sup> See Proposal for Decision, Attachment D.

<sup>2</sup> See Tex. Gov't Code § 551.001(3)(K).

<sup>3</sup> See Tex. Govt. Code § 551.142; see also Office of the Attorney General of Texas, *Open Meetings Handbook 2016* at 63.

<sup>4</sup> See *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 202 (Tex. 2002).

**E. Claims regrading Avalon's bylaws**

TWC § 13.004(a)(2) speaks to whether a water supply corporation “is operating in a manner that does not comply with the requirements for classifications as a nonprofit water supply or sewer corporation prescribed by Sections 13.002(11) and (24).” Section 13.002(24) defines *water supply corporation* as 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.”

The Commission agrees with the ALJs' narrow reading of TWC § 13.004(a)(2) and TWC § 13.002(24). The plain language of TWC § 13.002(24) sets the limits of the Commission's evaluation. The Commission can only evaluate whether a water supply corporation is operating in accordance with its bylaws or articles of incorporation that ensure that the water supply corporation is member-owned and member-controlled. Therefore, Ms. Gillespie's complaints alleging violations of Avalon's bylaws should be dismissed because none of Ms. Gillespie's complaints relate to the bylaws or articles of incorporation that ensure that Avalon is member-owned and member controlled. Accordingly, the Commission dismisses Ms. Gillespie's eight claims related to Avalon's bylaws, deletes conclusion of law 5 and adds conclusion of law 5A.

**F. Claims regrading Avalon's annual meetings**

TWC § 13.004(a)(1) states that the Commission can assume jurisdiction over a water supply corporation if the commission finds that the water supply corporation is failing to conduct annual or special meetings in compliance with Section 67.007. Section 67.007 requires water supply corporations to comply with various requirements for annual meetings, including the adoption of written procedures and when annual meetings must be held.

The Commission disagrees with the ALJs' conclusion that Ms. Gillespie's claims do not allege that Avalon is failing to conduct annual or special meetings in accordance with section 67.007 and thus, failed to state a claim upon which relief can be granted. Ms. Gillespie specifically alleges that Avalon failed to adopt written procedures for conducting annual meetings or special meetings in 2011 and 2012, failed to timely hold its annual meetings from 2011 through 2013, and failed to hold an annual meeting in 2013. Accordingly, the Commission deletes conclusions of law 2 and 4.

The Commission dismisses Ms. Gillespie's three annual meeting claims because the record does not support Ms. Gillespie's assertions. Avalon has adopted written procedures for its annual meetings in its bylaws.<sup>5</sup> These procedures were last revised in 1996, and were therefore applicable to the 2011 and 2012 annual meetings. In addition, the written procedures were properly amended at the 2012 annual meeting.<sup>6</sup>

Regarding Ms. Gillespie's claim that Avalon did not timely hold annual meetings from 2011 through 2013, the record shows that the annual meetings in 2011 and 2012 were timely held. The 2011 annual meeting was held on March 14, 2011<sup>7</sup> and the 2012 annual meeting was held on April 9, 2012.<sup>8</sup> Avalon's response contains the minutes from the 2014 annual meeting, which references the 2013 annual meeting and the 2013 annual meeting minutes.<sup>9</sup> In addition, Ms. Gillespie's own statements and pleadings acknowledge that an annual meeting was held in 2013.<sup>10</sup>

However, the record reflects that Avalon's 2013 annual meeting was held on June 13, 2013, outside of the time period prescribed by with TWC §67.007(a).<sup>11</sup> However, the Commission will not use this single deviation from the statutory time period as a basis to assume jurisdiction over Avalon. Accordingly, the Commission adds conclusion of law 2A and dismisses Ms. Gillespie's three claims regarding Avalon's 2011, 2012, and 2013 annual meetings. Lastly, the Commission adds findings of fact 24-29 to reflect its findings regarding Avalon's annual meetings conduct.

The Commission adopts the following findings of fact and conclusions of law:

## II. Findings of Fact

1. Carol D. Gillespie filed complaints with the Texas Commission on Environmental Quality against Avalon Water Supply and Sewer Services Corporation. TCEQ Staff investigated the complaints; found that Avalon was properly operating as a non-profit member-owned, member-controlled water supply corporation; and closed the complaints.

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<sup>5</sup> Avalon's Second Supplemental Response at 14-16; 22-25 (Oct. 22, 2015).

<sup>6</sup> *Id.* at 22.

<sup>7</sup> *Id.* at Bates Avalon000658 (Apr. 19, 2016).

<sup>8</sup> Avalon's Second Supplemental Response at 22 (Oct. 22, 2015).

<sup>9</sup> Filing of Carol D. Gillespie at 19 (Feb. 6, 2015).

<sup>10</sup> *Id.*

<sup>11</sup> Avalon's Response to Gillespie's 1st RFI at Bates Avalon0001278 (Apr. 19, 2016).

2. TCEQ Staff issued a letter to Ms. Gillespie 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 (Commission).
4. On September 16, 2014, Ms. Gillespie 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, Commission 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, Commission Staff reviewed additional complaints and Avalon's responses and issued a supplemental recommendation that the complaints made by Ms. Gillespie 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 Ms. Gillespie 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,



Commission Staff filed a response opposing the motion to dismiss but supporting the motion to certify a question to the Commission. The same day, Ms. Gillespie filed a response opposing both motions.

14. On July 7, 2016, the ALJs issued SOAH Order No. 6, abating the case and requiring Ms. Gillespie 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. Ms. Gillespie'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 Ms. Gillespie, through the table, to set forth every alleged deficiency that formed her complaint. It also required the table in Ms. Gillespie'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 Ms. Gillespie to simply refer to Texas Water Code § 13.004(a)(1). Rather, Ms. Gillespie 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 Ms. Gillespie to amend her pleadings accordingly.

17. Ms. Gillespie filed a verified brief on July 22, 2016. Ms. Gillespie asserted 72 separate claims against Avalon, spanning approximately 31 pages, including claims that Avalon violated the Texas Open Meetings Act.
18. Despite adding new claims in her verified brief, Ms. Gillespie did not amend her pleadings as required by SOAH Order No. 6.
19. Commission Staff and Avalon timely filed responsive briefs by August 15, 2016. Avalon seeks dismissal of all claims on several grounds. Commission Staff seeks dismissal of most, but not all, claims.
20. On August 15, 2016, Texas Rural Water Association filed an amicus brief in support of Avalon's motion to dismiss.
21. On August 22, 2016, Ms. Gillespie filed a reply. The same day, Commission Staff filed a motion to strike the reply, which was denied by the ALJs in this proposal for decision.
22. Ms. Gillespie's verified brief did not comply with SOAH Order No. 6.
23. Ms. Gillespie did not adequately demonstrate the legal bases for her claims or the source of the Commission's jurisdiction over her claims.
24. Avalon has adopted written procedures for its annual meetings in its bylaws. The written procedures were properly amended at the 2012 annual meeting.
25. The annual meetings in 2011 and 2012 were timely held. The 2011 annual meeting was held on March 14, 2011 and the 2012 annual meeting was held on April 9, 2012.
26. Avalon's response contains the minutes from the 2014 annual meeting, which references the 2013 annual meeting and the 2013 annual meeting minutes.
27. Ms. Gillespie's own statements and pleadings acknowledge that an annual meeting was held in 2013.
28. Avalon's 2013 annual meeting was held on June 13, 2013, outside of the time period prescribed by with TWC §67.007(a).
29. The Commission should not assume jurisdiction over Avalon for this single, minor deviation of the statute.

### III. Conclusions of Law

1. Ms. Gillespie has no right to initiate formal complaint under Tex. Water Code § 13.004.
2. [DELETED]
- 2A. The facts in this docket do not subject Avalon to the Commission's jurisdiction under Texas Water Code § 13.004(a).
3. Ms. Gillespie'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. [DELETED]
5. [DELETED]
- 5A. The Commission can only evaluate whether a water supply corporation is operating in accordance with its bylaws or articles of incorporation that ensure that the water supply corporation is member-owned and member-controlled. TWC § 13.004(a)(2) and TWC § 13.002(24).
6. [DELETED]
7. The Commission and SOAH do not have jurisdiction to adjudicate claims under the Texas Open Meetings Act. Tex. Gov't Code ch. 551; Tex. Water Code ch. 13.
8. A proceeding involving a retail public utility as defined by section 13.002 of this code may be an informal proceeding, except that the proceeding is subject to the public notice requirements of this chapter and the rules and orders of the regulatory authority involved. TWC § 13.015.

### IV. Ordering Paragraphs

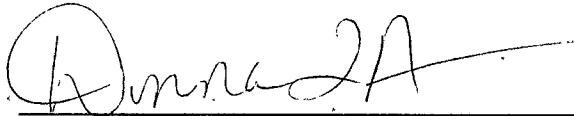
In accordance with these findings of fact and conclusions of law, the Commission issues the following orders:

1. The Commission declines to assume jurisdiction over Avalon for this single, minor deviation of the statute.
2. This docket is dismissed.

3. 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 at Austin, Texas the 9<sup>th</sup> day of March 2017.

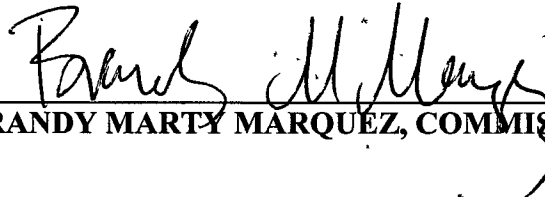
**PUBLIC UTILITY COMMISSION OF TEXAS**



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