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**SOAH DOCKET NO. 473-22-2652
PUC DOCKET NO. 51619**

COMPLAINT OF JEFF CONNORS AGAINST THE GALLERY APARTMENTS, ROSCOE PROPERTY MANAGEMENT, AND CONSERVICE	§ § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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COMMISSION STAFF’S INITIAL BRIEF

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AGAINST THE GALLERY	§	
APARTMENTS, ROSCOE PROPERTY	§	OF
MANAGEMENT, AND CONSERVICE	§	ADMINISTRATIVE HEARINGS

COMMISSION STAFF’S INITIAL BRIEF

I. INTRODUCTION

On December 14, 2020, Jeff Connors (Complainant) filed a formal complaint against the Gallery Apartments (the Gallery), Roscoe Property Management (RPM), and Conservice (together, Respondents) regarding improper billing practices. This complaint was filed under 16 Texas Administrative Code (TAC) § 22.242. On May 10, 2022, the Commission referred this docket to the State Office of Administrative Hearings (SOAH) for an evidentiary hearing, and a hearing on the merits was held on February 6, 2023. Staff (Staff) for the Public Utility Commission (Commission)’s Initial Brief will address the seventeen issues and their respective sub-issues identified in the Commission’s Preliminary Order (PO) of May 12, 2022.

II. PRELIMINARY ORDER ISSUES

1. Did Mr. Connors comply with the informal complaint process under 16 TAC § 22.242(c)?

Yes, Mr. Connors has complied with the informal resolution requirements of 16 TAC § 22.242(c). Under 16 TAC § 22.242(c), a person must present a complaint to the commission for informal resolution before presenting the complaint to the commission. The formal complaint references informal complaint #CP2020101118. Staff reviewed Consumer Protection Division (CPD) records and confirmed that informal complaint #CP2020101118 matches the parties and subject matter of this formal complaint.

2. Did Mr. Connors meet all of the requirements to bring his formal complaint under 16 TAC § 22.242(e)?

Mr. Connors is not required to bring his formal complaint under 16 TAC § 22.242(e). This provision establishes the requirements to present complaints concerning electric, water, or sewer utilities to a city. As none of the Respondents to Mr. Connors complaint are water utilities, he is not required to satisfy the requirements of 16 TAC 22.242(e). Mr. Connors is not obligated to first

“present any complaint concerning the electric, water, or sewer utility to the city before presenting the complaint to the Commission.” The TWC defines a "water and sewer utility," "public utility," or "utility" to mean any person or corporation "owning or operating for compensation in this state equipment or facilities for the transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public.”¹ This definition excludes any person or corporation "that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others.”²

3. Who is the owner, as defined by 16 TAC § 24.275(c)(12) and Texas Water Code (TWC) §13.501(5), that is responsible for compliance with the Commission rules applicable to this complaint?

Both 16 TAC § 24.275(c)(12) and TWC §13.501(5) define “owner” as:

The legal titleholder of an apartment house, a manufactured home rental community, or a multiple use facility; and any individual, firm, or corporation expressly identified in the lease agreement as the landlord of tenants in the apartment house, manufactured home rental community, or multiple use facility. The term does not include the manager of an apartment home unless the manager is expressly identified as the landlord in the lease agreement.

The Gallery is the owner. For the complaint period, the Gallery contracted with RPM to provide property management services and with Conservice to provide billing services.

4. Does the Commission have jurisdiction over Conservice in this proceeding under 16 TAC § 24.285? If the Commission does not have jurisdiction over Conservice, should Conservice be dismissed from this proceeding?

In SOAH Order No. 1, the SOAH ALJ determined that Conservice is subject to the Commission’s jurisdiction.³ The SOAH ALJ found Mr. Connors’s arguments and documentation persuasive and that Conservice failed to present evidence demonstrating that it made no billing decisions or determinations concerning the amount to be charged for RPM, the Gallery, or for Mr. Connors’s account.⁴ The SOAH ALJ found that the Commission has exclusive jurisdiction over

¹ TWC § 13.002(23).

² *Id.*

³ SOAH Order No. 1 – Filing Description, Ruling on Pending Motions to Strike and for Dismissal; and Setting Prehearing Conference at 4-5 (Jul. 11, 2023).

⁴ *Id.*

violations of its water utility submetering and allocation rules and complaints of those rules, as described in 16 TAC 24.285(b).⁵ The SOAH ALJ found that an entity not specifically listed in subsection (b) may be the subject of such a complaint and subject to the Commission's jurisdiction under Chapter 24, Subchapter I, if they assisted or participated in the violation alleged in the complaint.⁶ Because the SOAH ALJ was unable to determine the exact role Conservice had in contested billing practices alleged in Mr. Connors's complaint, she found that Conservice is a necessary party to this proceeding.⁷

5. Have a copy of the applicable water and sewer tariffs been provided in this docket?

No. Because the respondents are not utilities, no water or sewer tariffs were filed. However, a rate schedule was filed in PDF formed as part of Item No. 10 on the Commission's Interchange.⁸

6. For each asserted violation of the TWC and Commission rules, what was the time period for each of the possible violations?

The service period for this complaint began on August 14, 2019, and continued through March 13, 2020.⁹

7. Did the owner comply with 16 TAC § 24.277(a), relating to registration requirements for owners that intend to bill tenants for submetered or allocated utility service or who change the method to bill tenants for utility service?

Yes.¹⁰ The provisions of 16 TAC § 24.277(a) require that an owner who intends to bill tenants for submetered or allocated utility service or who changes the method used to bill tenants for utility service shall register with the PUC in a form that it prescribes.¹¹ PUC records indicate that the Owner filed its Registration of Submetered or Allocated Utility Service form (Form) for The Gallery II on November 12, 2018 in Project No. 47191.¹² On April 23, 2021, the Owner filed

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ This is a secondary This is a secondary submission for [COMPLAINT No: CP2020101118] - Jeff Connors. I was asked to re-submit even though I had received a letter from Isabel Ford from the PUC absolving The Gallery of any billing issues. Our billing service asked me to re-send, MultiFamilyPublicRates_2021 (Feb. 3, 2021).

⁹ Staff's Ex 1 at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.*

a new Form to change the method it bills tenants in Project No. 51613.¹³ This Form identified the property as Motif South Lamar II.¹⁴

8. Did Mr. Connors request any records from the owner that are addressed in 16 TAC § 24.277(e)? If so, did the owner maintain its records and make its records available in accordance with the applicable requirements in 16 TAC 24.277(e) and (g)?

Yes, Mr. Connors requested records from the owner that are addressed in 16 TAC 24.277(e).¹⁵ In his complaint, Mr. Connors stated that in February 2020, he requested to review the water, drainage, and sewer bills covering a monthly billing period both before Roscoe Property Management began managing The Gallery II and afterwards.¹⁶ Mr. Connors wanted to compare the two bills to determine the difference in common area charges between the time that Valiant Residential (Valiant), the former management company, administered the water bills and the period that Roscoe Property Management began providing billing services.¹⁷ Mr. Connors made additional requests three times from September to October, 2020 and once in mid-December 2020.¹⁸

No, the owner did not maintain its records and make its records available in accordance with the applicable requirements in 16 TAC 24.277(e) and (g). The provisions of 16 TAC § 24.277(e), relating to Records, states in part:

the owner shall make the following records available for inspection by the tenant or the commission or commission staff at the on-site manager's office during normal business hours in accordance with subsection (g).

Subsections (e)(1) through (e)(10) of 16 TAC 24.277 list the records that the Owner is required to make available. Here, the Gallery failed to make the requested records available.¹⁹ According to the Owner's response to the Complaint, the original complaint was never received by the

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 7.

¹⁶ *Id.* See also Complaint at 3-4.

¹⁷ Staff's Ex 1 at 7.

¹⁸ *Id.* at 8. See also Motion to Amend Complaint at 2 (Jan. 19, 2021).

¹⁹ Staff's Ex 1 at 8.

Community Manager (the email went to a spam folder, and they never saw it).²⁰ Mr. Connors made a total of five requests for the Owner to make the records available.²¹

16 TAC 24.277(g) details the rules regarding the availability of records. Each of these provisions has a different time frame within which the owner is required to make on-site records available after receiving a written request. Records that are routinely maintained at the on-site manager's office are to be made available at the on-site manager's office within three days after receiving a written request for inspection;²² records that are not routinely maintained at the on-site manager's office within 15 days.²³ If there is no on-site manager, the owner shall make copies of the records available at the tenant's dwelling within 30 days.²⁴

In February of 2020, Mr. Connors requested to review the water, drainage, and sewer bills covering a monthly billing period both before RPM began managing the Gallery and afterwards.²⁵ He made additional requests for records three times from September to October of 2020 and once in mid-December 2020.²⁶ Mr. Connors did not receive any of the requested information until January 5, 2021,²⁷ far beyond any of the timeframes established by 16 TAC § 24.277(g). He was not provided all of the billing information that he requested and was entitled to review, including the total amount billed to tenants each month for water/wastewater.²⁸ Even if the email went to a spam folder and was not seen,²⁹ there is no language within 16 TAC § 24.277(g) providing an exception to its timeframes on this basis.

²⁰ *Id.* See also "This is a secondary submission for [COMPLAINT No:CP2020101118 – Jeff Connors. (Feb. 23, 2021), Email dated January 5, 2021.

²¹ Staff's Ex 1 at 8. See also Motion to Amend the Complaint at 2 (Jan. 19, 2021).

²² 16 TAC 24.277(g)(1).

²³ 16 TAC § 24.277(g)(2).

²⁴ 16 TAC § 24.277(g)(3).

²⁵ Staff's Ex 1 at 7.

²⁶ *Id.* at 8.

²⁷ *Id.*

²⁸ *Id.* at 9.

²⁹ *Id.* at 8.

9. Did the rental agreement between the owner and Mr. Connors include all of the information required under 16 TAC § 24.279, including written statements explaining the owner's billing for water and wastewater services? Was Mr. Connors provided a copy of the pertinent Commission rules at the time the lease was discussed in accordance with 16 TAC § 24.279(b)?

No.³⁰ Mr. Connors's rental agreement with the Gallery dated February 1, 2019, did not include all of the information required by 16 TAC § 24.279.³¹ Specifically, the *Lease Addendum for Allocating Water/Wastewater Costs* did not provide the following:

- The average monthly bill for all dwelling units in the previous calendar year and the highest and lowest month's bills for that period;
- A clear description of the formula used to allocate utility services; and information regarding billing such as the meter reading dates.³²

Under 16 TAC § 24.279(b), At the time a rental agreement is discussed, the owner shall provide a copy of this subchapter or a copy of the rules to the tenant to inform the tenant of his rights and the owner's responsibilities under this subchapter. In an email dated January 5, 2021, Mr. Connors received a copy of 16 TAC 24.281 as an attached document in PDF format.³³ This was provided 11 months after Mr. Connors requested the information in February of 2020, not at the time the lease was discussed. Therefore, the Gallery did not comply with the requirement of 16 TAC § 24.279(b).

10. Did the owner charge Mr. Connors for water and wastewater utility service by means of submetering or an allocation formula? If an allocation formula was used, identify the formula, and indicate whether it is one of the formulas allowed under 16 TAC § 24.281(e).

The owner charged Mr. Connors for water and wastewater utility service by means of an allocation formula. As found in the Form filed in Project No. 47191, the Gallery indicated that the property has an installed irrigation system that is not separately metered or submetered and that it

³⁰ *Id.* at 9.

³¹ *Id.*

³² *Id.*

³³ The Gallery and RPM's Exhibit J.

would therefore deduct 25% of the retail public utility's total charges for water and wastewater consumption.³⁴ Then, the Gallery allocated the remaining charges among the tenants.

In Project No. 47191, the Gallery selected the ratio occupancy method. 16 TAC 24.281(e)(2)(A)(iv) states that the owner shall multiple the amount established in paragraph (1) of this subsection by: a factor using a combination of square footage and occupancy in which no more than 50% is based on square footage. The square footage portion must be based on the total square footage living area of the dwelling unit as a percentage of the total square footage living area of all dwelling units of the apartment house.

In the Registration of Submetered or Allocated Utility Service Form filed in Project No. 47191, the Gallery selected the box stating that the occupancy and size of rental unit.³⁵ Within that block, it references an above checked occupancy method.³⁶ The Gallery selected the ratio occupancy method.³⁷ This combination does not comport with 16 TAC 24.281(e)(2)(A)(iv). However, because the method was updated in Project No. 51613, the Gallery does not have to update this in Project No. 47191.

11. Has the owner changed its billing method for water or wastewater charges since the inception of Mr. Connors's lease? If so, did the owner obtain Mr. Connor's agreement and provide notice as required by 16 TAC § 24.279(c)?

Yes, the Gallery changed its billing method since the inception of Mr. Connors's lease.³⁸ On the Form filed in Project No. 51613, the Gallery selected the estimated occupancy method to allocate utility charges.³⁹ Under this method, the estimated occupancy for each unit is based on the number of bedrooms as shown in the table below.⁴⁰ The estimated occupancy in the tenant's

³⁴ Staff's Ex 1 at 6.

³⁵ Registration of Submetered or Allocated Utility Service – The Gallery II, 3506 Manchaca Rd (Nov. 12, 2018).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Staff's Ex 1 at 6

³⁹ *Id.*

⁴⁰ *Id.*

dwelling unit is divided by the total estimated occupancy in all dwelling units regardless of the actual number of occupants or occupied units.⁴¹

Number of Occupants	Number of Occupants for Billing Purposes
0 (Efficiency)	1
1	1.6
2	2.8
3	4.0
>3	4.0 + 1.2 for each additional bedroom

This allocation method is in line with the requirements of 16 TAC § 281(e)(2)(A)(iii).

12. Did the owner comply with all applicable requirements of 16 TAC § 24.281 with respect to its water and wastewater billing charges? If not, which provisions of 16 TAC § 24.281 did the owner violate?

No.⁴² Under 16 TAC § 24.281(e)(1), before an owner may allocate the retail public utility's master meter bill for water and sewer service to the tenants, the owner shall first deduct:

(A) dwelling unit base charges or customer service charge, if applicable; and
(B) common area usage such as installed landscape irrigation systems, pools, and laundry rooms, if any, as follows:

- (i) if all common areas are separately metered or submetered, deduct the actual common area usage;
- (ii) if common areas that are served through the master meter that provides water to the dwelling units are not separately metered or submetered and there is an installed landscape irrigation system, deduct at least 25% of the retail public utility's master meter bill;
- (iii) if all water used for an installed landscape irrigation system is metered or submetered and there are other common areas such as pools or laundry rooms that are not metered or submetered, deduct at least 5% of the retail public utility's master meter bill; or
- (iv) if common areas that are served through the master meter that provides water to the dwelling units are not separately metered or submetered and there is no installed

⁴¹ *Id.*

⁴² *Id.* at 10-11.

landscape irrigation system, deduct at least 5% of the retail public utility's master meter bill.

The Gallery did not provide evidence to indicate that the customer service fee was deducted from the water and wastewater charges before they were allocated as required by 16 TAC § 24.281(e)(1).

Additionally, 16 TAC § 24.281(c)⁴³ states:

If the retail public utility's rate structure includes a customer service charge, the owner shall bill each dwelling unit the amount of the customer service charge divided by the total number of dwelling units, including vacant units, that can receive service through the master meter serving the tenants.

The Gallery violated this provision as well.⁴⁴

13. If Mr. Connors was overbilled, what is the amount of the refund owed to him as required by 16 TAC § 24.283(k) and TWC § 13.505? Has the owner refunded Mr. Connors any overbilled amounts? If so, what are the specific amounts, and in what form were they distributed?

The total amount of the refund owed to Mr. Connors is \$76.90.⁴⁵ The amount overbilled is \$74.47.⁴⁶ The accrued interest on this amount, as of November 30, 2022, totals \$2.43.⁴⁷ Mr. Connors received \$103.12 in bill credits for water service from March 18, 2021 through June 14, 2021.⁴⁸ Additionally, counsel for the Gallery and RPM mailed Mr. Connors a check on September 20, 2022 in the amount of \$85.06 for overcharges from August 2019 through October 2020.⁴⁹ In his opening statement, Mr. Connors stated that he was owed less than \$85.06, Staff believes Mr. Connors stated that the correct amount around \$30.00.⁵⁰

⁴³ *Id.* at 11.

⁴⁴ *Id.*

⁴⁵ *Id.* at 16-17.

⁴⁶ *Id.* at 16-17.

⁴⁷ *Id.* at 16-17.

⁴⁸ *Id.* at 14.

⁴⁹ *Id.* at 14.

⁵⁰ Based on notes taken during the hearing on the merits. Staff was unable to access the audio recording of the proceeding.

14. If Mr. Connors was overbilled, did the overbilling affect all tenants, requiring an adjustment to all tenants' bills in accordance with 16 TAC § 24.283(k)?

Yes.⁵¹ It appears that an adjustment may be due to all tenants' bills due to the manner in which the Gallery calculated its charges to Mr. Connors for water and wastewater utility service.⁵² If Mr. Connors was overbilled, it stands to reason that other tenants would be similarly overbilled. When the Gallery originally gave him a refund, they recalculated it for everybody.

15. Did the owner comply with all requirements of 16 TAC § 24.283 with respect to rendering bills to tenants? If not, which provisions did the owner violate? In addressing this question, evaluate the following:

- a. Were the bills timely rendered and delivered in compliance with 16 TAC § 24.283(b) through (d) and (h) with a due date not less than 16 days after they are mailed or hand delivered to the tenant, unless the due date falls on a federal holiday or weekend?**

Yes.

- b. Do the bills that the owner issued to Mr. Connors clearly state that the utility service is submetered or allocated, as applicable, and provide the appropriate information as required by 16 TAC § 24.283(f)(1) through (4)?**

No, the bills issued to Mr. Connors did not clearly state that the utility service is allocated.⁵³ In its response to Staff RFI 1-5 and Staff RFI 1-6, it did not provide a copy of each bill for water and sewer service issued to Mr. Connors for the eight-month period in dispute. Subsequent bills that it provided indicate the bills do not include the total amount due to customer service charges.⁵⁴

- c. Do the bills clearly state the name of the firm rendering the bill and the name or title, address, and telephone number of the firm or person to be contacted in case of a billing dispute as required by 16 TAC § 24.283(f)(7)?**

The bills clearly state the name of the firm, Conservice. The bills do not state the name or title, address of Conservice, but they do state a telephone number and email address for customer service.

- d. Do the bills clearly state the name, address, and telephone number of the party to**

⁵¹ Staff's Ex 1 at 14.

⁵² *Id.*

⁵³ *Id.* at 15.

⁵⁴ *Id.* at 15-17.

whom payment is to be made as required by 16 TAC § 24.283(f)(8)?

At the bottom of the first page of each bill, they state that the payment should be made out to: The Gallery II, 3506 Manchaca Rd, Austin TX, 78704. It does not provide the telephone number here. However, at the top of the bills, the number for the leasing office is provided: 512-443-1738.

e. If the service is submetered, do the bills that the owner issued to Mr. Connors include all information as required by 16 TAC § 24.283(g)?

Because the service is allocated and not submetered, 16 TAC § 24.283(g) is inapplicable.

16. Did Mr. Connors dispute the bills at issue with the owner? If so, did the owner conduct a timely investigation of any bills disputed by Mr. Connors and report the results to him in accordance with 16 TAC § 24.283(l)?

Yes, Mr. Connors disputed the bills at issue with the Gallery.⁵⁵ The information Mr. Connors provided in the Complaint indicates that he contacted the Gallery as early as February 28, 2020.⁵⁶ He requested that the Gallery provide all available billing information to him.⁵⁷ His request included the formula that was used to calculate his bill in June 2019 as well as how it was billed at that time by Roscoe Property Management.⁵⁸ Furthermore, Mr. Connors requested to review the amount of money that the Gallery paid for the common areas in June 2019 and at the time of his request.⁵⁹

There is no evidence in the record to indicate that the Gallery conducted a timely investigation of the written dispute or that the Gallery reported the results of the investigation to Mr. Connors in writing within 30 days.⁶⁰ To the contrary, Mr. Connors received the email providing him some, but not all, of the requested information in January of 2021, far beyond the

⁵⁵ *Id.* at 16.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* See also Formal Complaint at 56.

⁵⁹ Staff's Ex 1 at 16.

⁶⁰ *Id.*

30-day timeframe required by 16 TAC § 24.283(l). This was confirmed at the hearing on the merits.

17. If the Gallery Apartment, Roscoe Property Management, or Conservice did not comply with Commission rules of the Texas Water Code, what is the appropriate remedy?

Staff respectfully recommends that the Gallery be ordered to refund Mr. Connors the amount overbilled and accrued interest. If the SOAH ALJ follows Staff's calculation that would constitute a total amount of \$76.90.⁶¹ If the SOAH ALJ follows the figure provided by Mr. Connors in his opening statement, that totals roughly \$30.00.⁶² Furthermore, the Gallery should be ordered to review all of its water and wastewater billing practices to ensure that they comply with 16 TAC Subchapter I, Water Utility Submetering and Allocation.⁶³ Staff respectfully recommends that the Gallery be ordered to file a compliance report detailing the steps taken to alleviate the violations.⁶⁴

III. CONCLUSION

Staff respectfully requests the issuance of a proposal for decision consistent with the foregoing recommendations.

**SOAH DOCKET NO. 473-22-2652
PUC DOCKET NO. 51619**

CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on March 6, 2023, in accordance with the Second Order Suspending Rules, issued in Project No. 50664.

/s/ Phillip Lehmann
Phillip Lehmann

⁶¹ *Id.* at 16-17.

⁶² Based on notes taken during the hearing on the merits. Staff was unable to access the audio recording of the proceeding.

⁶³ Staff's Ex 1 at 17.

⁶⁴ *Id.*