

Control Number: 43781



Item Number: 111

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd
Legislature, Regular Session, transferred the functions
relating to the economic regulation of water and sewer
utilities from the TCEQ to the PUC effective
September 1, 2014

43781

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Board Certified Administrative Law
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March 9, 2005


The Honorable James W. Norman
Administrative Law Judge
State Office of Administrative Hearings
300 West Fifteenth Street, Room 502
Austin, Texas 78701

Re: Application of the Town of Prosper to Amend Sewer CCN No. 20888
SOAH Docket No. 582-03-1994; TCEQ Docket No. 2002-1350-UCR

Dear Judge Norman:

Enclosed for filing please find Fishtrap Properties, LLP's Closing Argument in the above-referenced matter.

Sincerely,


Skip Newsom

SN/jam

cc: Service List

111

SOAH DOCKET No. 582-03-1994
TCEQ DOCKET NO. 2002-1350-UCR

APPLICATION OF THE TOWN OF § BEFORE THE STATE OFFICE
PROSPER TO AMEND SEWER §
CERTIFICATE OF CONVENIENCE AND § OF
NECESSITY NO. 20888 IN DENTON §
COUNTY, APPLICATION NO. 34004-C § ADMINISTRATIVE HEARINGS

**CLOSING ARGUMENT
OF
FISHTRAP PROPERTIES, L.L.P.**

TO THE HONORABLE JAMES NORMAN, SOAH ADMINISTRATIVE LAW JUDGE:

Comes now Fishtrap Properties, L.L.P. and submits this Closing Argument in opposition to the Town of Prosper's above-referenced application to amend its sewer CCN to include territory within Denton County, Texas.

**I.
Introduction to Argument**

This case involves an ambitious sewer service area expansion application by a small, Type A, General Law City¹ without any definitive plan, timetable, or contracts to serve the territory requested for certification. Fishtrap Properties L.L.P. (Fishtrap), is the owner of a 107.5 acre tract located in the western perimeter of the 5,000 acre area originally sought by the Town of Prosper² on FM 1385 in Denton County. Fishtrap opposes the Town of Prosper's application because, apart from the area which the Town has recently annexed adjacent to the Denton/Collin County line, the

¹Jennifer Finley Prefiled Testimony, Fishtrap Exhibit No.113, page 6, line 25, to page 7, line 10.

² John Dowdall August 14, 2003 Prefiled Testimony, Fishtrap Exhibit No. 13, page 4, lines 21 to 23, and page 5, lines 1 to 9.

application represents an unwarranted “land grab” effort by the Town. Fishtrap has its own sewer service plan for the development of its property which entails the provision of retail sewer service by Mustang Special Utility District, an adjacent and more proximate sewer CCN holder and sewer service provider,³ which has annexed Fishtrap’s land⁴ and contracted with Fishtrap to provide such retail sewer service⁵ as part of a regional wastewater system plan developed for the Little Elm and Doe Branch Watersheds by the Upper Trinity Regional Water District (UTRWD)⁶ in conjunction with local fresh water supply districts, the City of Celina and Mustang SUD.⁷ Indeed, at one time, the Town was a participant in such plan.⁸

It is Fishtrap’s view that the Town of Prosper’s proposed expansion of its sewer CCN into Denton County and, in particular, the Doe Branch Watershed, substantially interferes with and could undermine UTRWD’s master plan for the provision of sewer service within the watershed. Such gravity flow sewer interceptor is designed to serve such area and has been expressly sized to include the very same area sought to be certificated by Prosper and such oversized portion of this interceptor is on track to be constructed this calendar year⁹ in order to commence service to the Huffines’ development of the Love Tract within Denton County Fresh Water Supply District No. 10

³ Fishtrap Exhibit No. 18.

⁴ Fishtrap Ex 19; also, Fishtrap Ex. No. 15, John Dowdall Sept 23, 2004 Prefiled, p. 3, lines. 13 to 18.

⁵ Fishtrap Ex. No. 16, 17 and 14, Dowdall April 20, 2004 Prefiled, p. 2, lines. 12 to page 3, line 10.

⁶ Fishtrap Exhibit No. 20, Prefiled testimony of Tom Taylor.

⁷ Fishtrap Exhibit Nos. 5 and 9, Attachment 3.

⁸ Fishtrap Exhibit No. 20.

⁹ Fishtrap Exhibit No. 9, page 4.

(DCFWSO #10). This portion of District #10 is a large 500 acre "doughnut hole" within the original area sought by the Town of Prosper for certification but now excluded from the Town's pending application under a settlement agreement previously reached in this case.¹⁰ This UTRWD interceptor route is graphically shown on Attachment RP-2 of Robert Pettit's prefiled testimony¹¹ and Attachment JD-H of John Dowdall's prefiled testimony.¹² Initially, UTRWD's Doe Branch Interceptor will provide for the gravity flow of wastewater collected in this area to UTRWD's existing Doe Branch Lift Station, which currently transmits sewage for treatment from DCFWSO #10's Savannah tract (located across FM 1385 from Fishtrap's tract) to UTRWD's Riverbend Reclamation Plant. Such lift station site is also the site of UTRWD's currently permitted Doe Branch sewage treatment plant.¹³ Fishtrap's point of entry into the UTRWD's Doe Branch Interceptor is only 150 feet from Fishtrap's property line, approximately 3,000 feet from UTRWD's Doe Branch lift station and planned Doe Branch Reclamation Plant as shown on these exhibits.¹⁴

In contrast to the close proximity and timing and cost certainty of facilities and service from Mustang and UTRWD, the Town of Prosper has no sewer service area plan or project even approved by its Council with which to serve the Fishtrap development in any timely or predictable manner, much less the entirety of the service area requested. While the Town's original CCN application

¹⁰ Fishtrap Exhibit No. 1.

¹¹ Fishtrap Exhibit No. 9.

¹² Fishtrap Exhibit No. 15.

¹³ Fishtrap Exhibit No. 9.

¹⁴ Fishtrap Exhibit No. 9 (Pettit Prefiled Testimony) page 3, line 12

(DCFWSO #10). This portion of District #10 is a large 500 acre "doughnut hole" within the original area sought by the Town of Prosper for certification but now excluded from the Town's pending application under a settlement agreement previously reached in this case.¹⁰ This UTRWD interceptor route is graphically shown on Attachment RP-2 of Robert Petitt's prefiled testimony¹¹ and Attachment JD-H of John Dowdall's prefiled testimony.¹² Initially, UTRWD's Doe Branch Interceptor will provide for the gravity flow of wastewater collected in this area to UTRWD's existing Doe Branch Lift Station, which currently transmits sewage for treatment from DCFWSO #10's Savannah tract (located across FM 1385 from Fishtrap's tract) to UTRWD's Riverbend Reclamation Plant. Such lift station site is also the site of UTRWD's currently permitted Doe Branch sewage treatment plant.¹³ Fishtrap's point of entry into the UTRWD's Doe Branch Interceptor is only 150 feet from Fishtrap's property line, approximately 3,000 feet from UTRWD's Doe Branch lift station and planned Doe Branch Reclamation Plant as shown on these exhibits.¹⁴

In contrast to the close proximity and timing and cost certainty of facilities and service from Mustang and UTRWD, the Town of Prosper has no sewer service area plan or project even approved by its Council with which to serve the Fishtrap development in any timely or predictable manner, much less the entirety of the service area requested. While the Town's original CCN application

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¹¹ Fishtrap Exhibit No. 9.

¹² Fishtrap Exhibit No. 15.

¹³ Fishtrap Exhibit No. 9.

¹⁴ Fishtrap Exhibit No. 9 (Petitt Prefiled Testimony) page 3, line 12

proposed that no wholesale service would be needed to serve this area¹⁵ as service would be directly provided from the Town's existing sewer plant in Collin County through a line extending more than 45,000 feet to the east of Fishtrap's development on FM 1385,¹⁶ the Town's engineer has indicated that retail wastewater service to the area from the Town's existing plant is not practical due to the vast elevation difference and distance.¹⁷ Likewise impractical is the potential for wastewater transmission and treatment service to the requested area by North Texas Municipal Water District (NTMWD) at its Wilson Creek Treatment Plant, as the point of entry into such system is located in the Wilson Creek Watershed three miles further east of the Town's sewer plant.¹⁸ Although the Town has a contract with NTMWD for such Wilson Creek transmission and treatment, such agreement was designed and treatment capacity designated capped for sewage generated within the Wilson Creek Watershed, not the Doe Branch Watershed. Indeed, if it is too inefficient and costly to pump wastewater from the proposed service area to the Town's existing plant for all practical purposes, it stands to reason that it would be even more inefficient and costly to pump such sewage three miles further east and further uphill to NTMWD's Wilson Creek System point of entry for Prosper.

None of the other possible service alternatives for the requested area mentioned by the Town are supported by any Town endorsed plan or project, nor are they presently available by contract.

¹⁵ Applicant's Exhibit 100.

¹⁶ Fishtrap Exhibit No. 5, Attachment JD-H.

¹⁷ Travis Roberts Prefiled Testimony, Fishtrap Exhibit No. 22, p. 11-12; see also D. Mousel testimony TR. p. 84 line 87 to p. 85 line 14.

¹⁸ TR page 630, line 22 - 10; page 631, line 6.

While the Town's witnesses discussed the possibility of constructing lines and lift stations to tie the area into a NTMWD proposed Panther Creek wastewater plant approximately three miles southeast of the Fishtrap Property¹⁹ or to connect to the City of Frisco's collection system and Stewart Creek treatment plant approximately 8 miles away²⁰ or to construct an interim package treatment plant at NTMWD's proposed Panther Creek site, no construction design plans or easements have been secured for such facilities and the Town has entered into no contracts with NTMWD or the City of Frisco for such service arrangements. Such "options" as announced by the Town at the hearing in this matter are wholly speculative and the time frames for service associated with such options are wholly unknown compared to the certain availability of service and facilities from Mustang and UTRWD.

Fishtrap's opposition to the Town's application in this proceeding is both concrete and pragmatic. Fishtrap has a contract with Mustang SUD which is "ready, willing and able to serve" the area at issue in this case,²¹ has contractual capacity to provide such service to Fishtrap from UTRWD in UTRWD's Doe Branch Lift Station, force main and Riverbend Reclamation Plant and reasonably expects the 3,000 feet of interceptor needed to connect Fishtrap's development to such system to be constructed this 2005 calendar year.²² Prosper has no easements or wholesale contracts for comparable or practicable service, has no design for facilities developed for the requested area, and cannot forecast what costs Fishtrap or any other landowner in the proposed service will be

¹⁹ TR page 630, line 22 to page 631, line 6.

²⁰ TR page 174, line 3 - 6.

²¹ Deposition of Mustang General Manager, Byron Gaines, Fishtrap Exhibit No. 25 p. 10 line 11 - 19.

²² Prefiled Testimony of Robert Petitt, p. 3 line 7 - 13.

required to bear.²³ Depending upon one's interpretation of the service plans attached to the Town's recent annexations immediately west of the Denton/Collin County line, the Town's commitment to furnish retail wastewater service, even to the lands now within the Town's boundaries, is represented to be within a 4½ to 7 year time frame.²⁴ No time frame is presented to service lands not within the Town's boundaries. The Town's proposal affords neither Fishtrap nor any other property owner within the area sought for certification in this proceeding the level of service cost and availability essential to the orderly and business-like development of property. How these pragmatic concerns form the legal basis for denying the bulk of the Town's application is the focus of Fishtrap's argument under the Water Code's statutory criteria.

II.

The Certificate Sought by the Town of Prosper is Not Necessary to the Service, Accommodation, Convenience or Safety of the Public and Should be Denied.

Texas Water Code Section 13.246(b) authorizes the TCEQ to grant an application and issue a certificate "only if the Commission finds that a certificate is necessary for the service, accommodation, convenience, or safety of the public."²⁵ In this case, regionalized wastewater service has been long proposed, definitively studied and planned and expressly extended to the same area involved in this application through the efforts of UTRWD, DCFWSD #10 and Mustang SUD, governmental entities who are not otherwise required to secure a CCN to serve such area under Texas Water Code Section 13.242(a).²⁶ That portion of UTRWD's regional plan for the gravity flow

²³ Testimony of Doug Mousel, TR p. 30 lines 10-11; TR p. 62 lines 2-5.

²⁴ See Applicant's Exhibit 109, Attachments DM-10 - 12.

²⁵ See also 30 TAC §291.102(c).

²⁶ See also 30 TAC §291.101(a).

interceptor extending from UTRWD's wastewater treatment facilities through the disputed area north to the City of Celina is in evidence as Attachment 3 to the prefiled testimony of Robert Petitt, a consulting engineer for Fishtrap and DCFWSD #10.²⁷ The plan evidences a UTRWD interceptor design and size sufficient to serve all areas within the territory sought by the Town in this proceeding as shown on attachment H to John Dowdall's Supplemental prefiled testimony.²⁸

The initial portion of the interceptor trunkline extending to DCFWSD #10 is scheduled to be constructed this calendar year.²⁹ Such segment will adequately serve Fishtrap and properties to the west and north of Fields Road. Mustang has secured wholesale contractual rights to wastewater treatment and transmission capacity from UTRWD,³⁰ has annexed the Fishtrap development property³¹ and has entered into contracts with Fishtrap to serve such development wherein Fishtrap's costs are expressly detailed.³² As reflected in UTRWD's Executive Director's testimony,³³ UTRWD relies upon Mustang SUD as a participant in the regional wastewater plan to provide retail wastewater services in this project area because UTRWD provides only wholesale service..

Given the availability of service from UTRWD's regional facilities through Mustang SUD without the need to secure a CCN for such service, what is the basis claimed by the Town for any

²⁷ Fishtrap Exhibit No. 9.

²⁸ Fishtrap Exhibit No. 15.

²⁹ Fishtrap Exhibit 9, Robert Petitt Prefiled Testimony, page 4, line 18 - 19.

³⁰ Byron Gaines Deposition, page 10, line 22 to page 11, line 4.

³¹ Fishtrap Exhibit No. 15, Attachment C.

³² Fishtrap Exhibit No. 14, Attachments A and B.

³³ Fishtrap Exhibit No. 20.

alleged “necessity” for the issuance of a CCN to the Town? What facts has the Town of Prosper brought to these proceedings which compel or even preponderate a conclusion that the certificated service which the Town has proposed for this same area is “necessary” to the “service, accommodation, convenience or safety of the public,” particularly where such certification to the Town would effectively preclude such presently planned and contractual service in this area by any of the participants in the regional interceptor plan?³⁴ The Town has made no demonstration that the issuance of such a certificate is “necessary,” despite the Town’s statutory burden to do so under Water Code Section 13.246(b). To have met such burden, the Town needed to show that the regional plan and designed project is deficient, or, at a minimum, that the Town’s plan and proposed project is superior in that it can provide wastewater service to the area more feasibly, more economically, sooner, and with more certainty. The Town made no effort to conduct any such demonstration. Indeed, the Town could not even identify a specific plan, cost or timetable under which it would provide service to the area. Under such facts, the Commission cannot make the statutory prerequisite finding of certificate necessity under Section 13.246(b).

**III.
Service Currently Provided to the Requested Area is
Adequate and No Additional Service is Needed**

Texas Water Code Section 13.246(c) and TCEQ Rule No. 291.102(d)(1) and (2)³⁵ additionally require Commission consideration of both the adequacy of service that is currently provided to the requested area and the need, if any, for additional service to such area. Both the

³⁴ Such service would be effectively precluded if the Town should be certificated to the area since Water Code §13.242(a) would require such participants to obtain their own CCN to areas already certificated to another retail utility and TCEQ policy and precedents disfavor dual certification.

³⁵ 30 TAC §291.102(d)(1) and (2).

Town and Executive Director staff testimony have disregarded the wastewater treatment and transmission facilities and services of UTRWD's regional wastewater system made available by Mustang SUD as "service" currently provided to the area, concluding that no "service" is currently provided to such area. Such conclusion is in express conflict with the Commission's own definition of "service" under Chapter 13 of the Water Code:

Service – Any act performed, anything furnished or supplied, and any facilities used by a retail public utility in the performance of its duties under the Texas Water Code to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.³⁶

Clearly, and as a matter of law, the contracts entered into between Fishtrap and Mustang meet this definition of "service" and neither the Executive Director nor the Town make any effort to address either the "adequacy" of such service arrangements or the underlying infrastructure and capacity agreements providing for the facility interchanges to be utilized by Mustang SUD to make wastewater service available to this area. Moreover, neither the Town nor the Executive Director examine whether current wastewater needs in the area are being adequately met by the private sewage facilities serving current land uses. Where the quantity and quality of land owner provided self-service meets such users' needs, the service is deemed adequate.³⁷

Similarly, both the Executive Director and the Town give only "lip service" to the legislative requirement that the "need" for additional service be demonstrated. The only tract of land within

³⁶ 30 TAC §291.3(41).

³⁷ Application of Creedmoor-Maha WSC, SOAH Docket No. 582-00-0546, TCEQ Docket No. 2000-0018-UCR, Proposal for Decision p. 11. Copies of the Creedmoor-Maha Proposal for Decision and related party filings and commission Orders were provided to the ALJ and parties at the hearing in this case. Should additional copies be desired, please contact counsel for Fishtrap and additional copies will be forwarded.

the territory requested for which any need for service was demonstrated is that tract owned by Fishtrap for which it has an approved subdivision plat for the Glenbrook Estates Subdivision consisting of 442 residential lots and limited commercial development.³⁸ This development is located some eight miles from the historic area of Prosper in Collin County on the east side of the Burlington Northern Railroad where over 90% of Prosper's population is concentrated.³⁹ None of Prosper's population is situated in the area sought to be certificated and such area presently is wholly undeveloped.

The entire area sought to be certificated by the Town in this proceeding is rural, completely devoid of any commercial or residential development. Indeed, apart from Fishtrap's tract, there have not even been any subdivision plats approved by the Town for future development in this area. When asked to describe the area sought by Prosper in this application, the Town's Engineer described it as follows:

a large part of it is chicken farms, where they're raising chickens and eggs, which is an agricultural type product. There are other areas that are grassland. There are other areas that are tracts of land that are native pasture. It's some cultivation in there with grains and sorghums and wheat. There are areas where there's some trailer houses in there.

Q. Has there actually been any construction of residential developments in this area yet?

³⁸ Supplemental Prefiled Testimony of John Dowdall, Fishtrap Exhibit No. 13, p. 6, lines 6-16.

³⁹ Prefiled Testimony of Jennifer Finley, prior Town Administrator, Fishtrap Exhibit No. 21, p. 18, line 20 to p. 19 line 4; p. 22, line 1-6; Travis Roberts Prefiled Testimony, Fishtrap Exhibit No. 22, p. 13.

A. You're talking -- There has been -- There have been individual houses, structures built. But as far as a concentration of two or more lots, in my opinion, no, sir.⁴⁰

Apart from the five tracts of land annexed by the Town in April 2004,⁴¹ the Town has received no requests for service in the requested area. Two of these tracts⁴² comprise 45 acres in total, are located along FM 1385, did not request service and do not require wastewater service from the Town and the Town has no plans to furnish such service.⁴³ These two tracts appear to have voluntarily annexed within the Town solely in order to provide beer and wine sales under the local option election conducted in May of 2004.⁴⁴ The three remaining tracts annexed are contiguous and appear to be under common ownership of the Rudman Group and others⁴⁵ and lie immediately adjacent to the Denton/Collin County line.⁴⁶ Reduced to its essence, the Town's entire application to serve the 5,000 acre area requested by its application appears to be based upon the ultimate projected development of one developer/landowner or business affiliated owners controlling approximately 700 acres within two miles of the Town's existing sewer plant. Curiously, one of the

⁴⁰ Travis Roberts, Fishtrap Exhibit No. 22, p. 12, lines 24 to p. 25, line 23.

⁴¹ Applicant's Exhibit No. 109, Attachment DM-10 through DM-14.

⁴² Id., Attachments DM-13 and 14.

⁴³ TR page 60, line 25 to page 61, line 8; TR page 62, line 2 - 5; TR page 64, line 23 to page 65, line 10; TR page 70, line 1 - 9.

⁴⁴ TR page 61, line 12 to page 62, line 1.

⁴⁵ Applicant's Exhibit 109, Attachments DM-10 through 12.

⁴⁶ Id. and Attachment DM-15.

tracts encompassed by the Town's application, a 2,151 acre tract known as the Mahard Egg Farm,⁴⁷ withdrew its service and annexation request and was not annexed by the Town. The Town's evidentiary presentation makes no effort to demonstrate that such Mahard property is likely to develop from its current agricultural egg farm land use. Significantly, the UTRWD's interceptor segment from US 380 to DCFWSD #10 runs directly through the Mahard tract.⁴⁸ Clearly such tract will not need sewer service from the Town of Prosper to realize any future development prospects since it will already have a major UTRWD trunk main from which to receive service running directly through the entire property at a southwest to northeast diagonal. Under such circumstances it would be absurd to impose the sewer utility servitude proposed by the Town's CCN application upon the Mahard tract or any other tracts west of the Mahard property which both precludes such tracts from receiving service from the UTRWD's sewer system and compels service to same by the Town when such landowners do not seek service from the Town. There is no evidence that these westerly tracts require service from the Town or any other utility and the Town has presented no evidence that public health needs or nuisance conditions exist which would warrant the establishment of such a utility servitude in the Town's favor. Neither the Town nor the Executive Director can seek solace from the fact that these westerly landowners, with the exception of Fishtrap, did not object to the inclusion of their properties within the Town's proposed CCN for the very basic reason that there

⁴⁷ See Applicant's Exhibit 105, Attachment 4, pages 7-8.

⁴⁸ Id.; Fishtrap Exhibit No. 15, Attachment JD-H.

is no evidence that such landowners were ever notified by the Town that their properties were to be so burdened. It should be recognized that the current rules of the Commission expressly do not require landowner notification of a CCN application.

As previously discussed, Fishtrap's development has no need for the additional wastewater service proposed by the Town's application because it has already contracted with Mustang SUD to receive service from the UTRWD's regional wastewater system.

**IV.
Granting the Town's Requested Service Area West
of the Mahard Tract Would Be Adverse to Mustang SUD
and Other Retail Utility Participants in the UTRWD
Doe Branch Interceptor Project.**

Texas Water Code Section 13.246(c) also requires Commission consideration of the impacts which the granting of a CCN may have on retail utilities serving the proximate area.⁴⁹ The granting of the Town's requested sewer CCN for areas west of the Mahard tract will preclude the tracts encompassed thereby from receiving Mustang SUD wastewater service through the UTRWD Doe Branch Regional Interceptor. Such preclusion will deprive the Interceptor of flows it was designed to transmit and developments it was designed to serve, thereby increasing the unit capital cost of retail utility participants in the project such as Mustang, DCFWSD #10 and the City of Celina because there will be a lesser number of flow volume units over which to spread the project's fixed capital costs. By precluding Mustang from serving the Fishtrap property, such a CCN as requested by the Town will also result in Mustang's immediate loss of payments from Fishtrap under its contracts as well as the long-term loss of service revenues expected to be generated by such

⁴⁹ See also 30 TAC §291.102(d)(3).

contracts. Such action has constitutional ramifications because it would directly impair the rights and obligations arising under such contracts in violation of Texas Constitution Article I Section 16.

V.

**The Town Has Failed to Demonstrate Its Ability to
Provide Continuous and Adequate Service to
the Entirety of the Area Sought to be Certificated.**

Texas Water Code Section 13.246(c) also requires an applicant to demonstrate its ability to provide continuous and adequate service throughout the service area requested.⁵⁰ The Town has presented no evidence of any definitive plan to serve the area it has requested for certification; it has only discussed various options which it perceives may be available to it by which it could ultimately serve Fishtrap. There are several problems with such approach. First, Fishtrap represents only about 2% of the area requested by the Town's application and the Town has presented no evidence of even the range of costs potentially encountered by each of such options in order to compare its available fiscal resources to the costs to be incurred. Without a true engineering feasibility study of the costs of serving the entire area proposed, it is impossible to know what such costs may be and how such costs are to be recovered. Effective cost recovery is the foundation of any cost or service feasibility analysis. Importantly, the Town decided not to present its wastewater system engineer as a witness in this case to discuss such alternative costs of extending facilities and services through the territory sought to be certificated and how such costs may be reasonably projected to be recovered. Without such testimony the Town has failed to demonstrate a viable and financially feasible service plan. Prosper's speculative hope that it will enter into a wholesale service agreement with NTMWD and/or the City of Frisco to provide service to the area at an unknown cost within an unknown period of

⁵⁰ See also 30 TAC §291.102(d)4.

time is a wholly inadequate predicate upon which to premise the demonstrated ability to serve the area requested as required by Section 13.246(c).

**VI.
The Area Requested by the Town's Application
Can Be Feasibly Served By Mustang SUD**

The feasibility of an area receiving service from an adjacent retail public utility is a factor to be considered by the Commission in determining whether or not to grant a CCN under Texas Water Code Section 13.246(c).⁵¹ Such legislative criteria bears directly upon the Commission's statutory inquiry into whether the issuance of the requested CCN is actually "necessary" under Section 13.246(b), since if service to an area may be feasibly provided by an adjacent retail utility which does not require a CCN to serve such area and such utility is willing and able to provide such service to that area, exclusive service certification of such territory to the applicant is not "necessary" for the service, accommodation, convenience, or safety of the public." Indeed, as is the case in this proceeding, issuance of a certificate under such circumstances could even be adverse to such public service, accommodation, convenience and safety needs. In this case, such exclusive certification of the entire requested area to the Town would impair the efficiency and economies of the UTRWD's regional plan for wastewater collection and treatment within the Doe Branch Watershed, will delay the availability of service to tracts of land until such time as the Town may elect to extend and pay for service facilities and will greatly inconvenience the public since the regional facilities expressly designed and installed by UTRWD for service to such area will not be available for use by such

⁵¹ See also 30 TAC §291.102(d)(5).

intended area properties due to the exclusivity of the CCN issued to the Town, which has no facilities within or even proximate to the requested area with which to provide service.

In previous cases, the Executive Director has relied upon the feasibility of obtaining service from adjacent retail utilities as a basis for excluding territory from a requested CCN.⁵² In the Creedmore-Maha Proposal for Decision, the ALJ there reviewed the parameters of “feasibility” and equated the term to the “capability, probability or likelihood of obtaining service.”⁵³ In this case, although neither the Executive Director nor the Applicant addressed the feasibility of securing service to this area from Mustang SUD as part of their direct case, on cross-examination both Executive Director staff witnesses testified that service to the area by Mustang is “feasible.”⁵⁴ Such testimony is directly supported by the testimony of Mr. Petitt and Mr. Taylor, UTRWD’s Executive Director, as well as Mustang’s General Manager’s specific characterization of Mustang SUD’s willingness and ability to serve such area.⁵⁵ While Mustang has the capability and willingness to serve the entire area requested by the Town’s application, given the Town’s recent annexations of areas to the immediate west of the Denton/Collin County line, Fishtrap submits that the most logical westerly extension of Prosper’s sewer CCN in this case should be the eastern boundary of the Mahard tract.⁵⁶

⁵² See discussion of Dr. Harkins’ territorial exclusion rationale at pages 47 - 49 of the Proposal for Decision in the Creedmore-Maha case.

⁵³ Id. At 49.

⁵⁴ TR page 1085, lines 7 - 17; TR page 939, lines 17 - 25.

⁵⁵ Fishtrap Exhibit No. 25, page 10, line 11 to page 11, line 1 and page 12, line 15 to page 13, line 1.

⁵⁶ See Applicant’s Exhibit No. 105, Attachment 4, page 7.

VII.
Granting The Town's Application Will Not
Result in an Improvement of Service or Lowering
of Cost to Consumers in the Requested Area

While Texas Water Code Section 13.246(c) also addresses the Applicant's financial stability and environmental integrity concerns, Fishtrap does not perceive that the Commission's decision in this matter will likely turn on such issues. However, the last criteria set forth in Section 13.246(c) – the probable improvement in service and/or lowering of cost to consumers – is perceived as a critical factor in this case. Service will not be improved in this area merely by the granting of a certificate. Service improvement will require the installation and extension of facilities for which the Town presently has no designed or approved plans, no approved pipeline route or easements secured for same and no wholesale service agreements or currently accessible wastewater treatment options other than pumping sewage several miles uphill from the proposed service area to the Town's existing service plant, or even further away to a yet to be designed or built Wilson Creek interceptor. In contrast to that which the Town proposes, all UTRWD's facilities necessary for Mustang SUD to provide service to this area are already in place, excepting the Doe Branch Interceptor which will be constructed this year. The immediate availability and proximity of these UTRWD facilities represents a service time-line and cost certainty for the public in this area, when the best that can be said about the Town's proposed service for the area is that the time-line for service availability is uncertain and its costs are unknown. Such uncertainties do not constitute an improvement over the immediate availability and cost certainty of service afforded by Mustang SUD through UTRWD facilities without the need for the issuance of any CCN for this area.

VIII.
Fishtrap's Proposed Exclusion of Territory
From the Town's Requested Service Area

Fishtrap proposes that the Commission grant the Town's Application for sewer CCN certification extending west from its current Denton/Collin County western boundary only to the eastern property boundary line of the 2,151 acre Mahard Egg Farm tract. Such western boundary line for the Town's CCN is proposed for several reasons. First, other than Fishtrap's immediate development and utility service needs for its approved Glenbrook Estates subdivision, which can and will be met by Mustang SUD not the Town, the Town presented no evidence of any active service requests or development prospects west of such proposed boundary line. The Town evidenced no subdivision plat approvals or pending requests for same and no evidence was introduced to suggest that the long-standing rural and agricultural land use characterizing this westerly area is changing or that it is expected to soon change so as to warrant a finding of service needs for such area. Indeed, while the owners of Mahard Egg Farm tract had preliminarily presented a municipal service and annexation request in March of 2004,⁵⁷ by the following May, such request had been withdrawn and the property was not annexed by the Town.⁵⁸ Similarly, none of the properties within the Town's requested service area to the west of the Mahard tract have shown any interest or desire in securing sewer service from the Town.

Second, the initial segment of the UTRWD's Doe Branch Regional Interceptor project is to be constructed on the Mahard property, upon which property such Interceptor construction is to

⁵⁷ Doug Mousel 3/19/04 Prefiled testimony, page 11, line 17 - 19, and Exhibit DM-4.

⁵⁸ TR page 49, line 16, to page 50, line 10.

commence this 2005 calendar year.⁵⁹ Given the location of the Interceptor and its designed service capacity to receive wastewater service from this portion of the Doe Branch Watershed in addition to those areas North to Celina, such facility presents specific service capability and availability to the Mahard tract should the need for such service ever arise. It would be hard to imagine anything more inconvenient and unaccommodating to any future development of the Mahard tract than the Town's CCN proposal that such potential development not be able to avail itself of the wastewater facilities located directly on the property and, instead, be required to bear the indefinite and uncertain costs and delays of securing wastewater service from the Town.

Third, the eastern property line of the Mahard 2,151 acre tract represents a clear, definitive and unbroken line of demarcation between a Prosper service area to the east, Mustang SUD's existing CCN boundaries to the south, west and north,⁶⁰ and this remaining uncertificated area which may be served by either Mustang SUD or the Town without a CCN. The Mahard property line extends between the northern and southern limits of the proposed service area, for the most part, along Fields Road until it intersects with Prosper Road when it turns east and then north to Parvin Road.⁶¹ Use of the Mahard eastern property line as the Town's western CCN boundary will not preclude Town service to such tract should same even be desired. More importantly, it will not preclude Mustang SUD from furnishing service to the property through UTRWD's facilities located directly on the property and will not significantly impair the UTRWD's regional service plan for this

⁵⁹ Fishtrap Exhibit No. 9, Pettitt Prefiled Testimony, page 4.

⁶⁰ Fishtrap Exhibit No. 18.

⁶¹ See Attachment 4, page 8, Applicant Exhibit #105.

area. Such proposed boundary line will also avoid the DCFWSD #10 Love tract from becoming a “doughnut hole” in the midst of the Town’s sewer CCN as disfavored by the Commission as a matter of policy.

While Fishtrap believes that the Town has failed to meet its burdens of proof and persuasion under the statutory criteria discussed previously, by its Mahard tract eastern boundary proposal for the Town’s western CCN limit, Fishtrap wishes to accommodate the Town’s three annexations along the Denton/Collin County line and provide some service capability to additional adjoining tracts in this county line corridor. These tracts can be proximately served by the Town’s existing sewer plant and the distances and elevation differences of such properties from the Town’s existing sewer plant are not nearly as extreme as is the case with the Mahard tract and properties further west.

At the very minimum, the Commission should exclude the Fishtrap property from the Town’s proposed western service area expansion. Clearly, Fishtrap opposes the proposed inclusion of its property in the Town’s CCN. Equally as clearly, Fishtrap has established that its property, as well as others in the area, may be feasibly served by Mustang SUD which stands ready, willing and able to serve the development and which has annexed the tract and entered into express contracts for such service. Finally, such exclusion will not create any “doughnut hole” in the Town’s CCN by leaving the omitted property entirely surrounded by a new service area certificated to one entity. Fishtrap has clearly met each of the criteria for the exclusion of property established by SOAH and the Commission on the basis of landowner opposition in the Creedmore-Maha case.⁶² It is of paramount importance that a utility servitude not be forced upon a landowner against his will when viable utility

⁶² Supra at 61. Order Approved, 4/25/03, Motion for Rehearing granted on other grounds, 7/16/03.

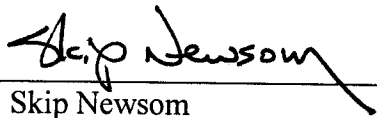
service options are available in a more timely and potentially far less costly manner. The Commission disfavors "land grabs" which reduce development options and impair long-planned regional projects from achieving their regionalization goals. The Town has presented no viable basis for the Commission to depart from such policy in this case and the Commission should decline to do so now.

WHEREFORE PREMISES CONSIDERED, Fishtrap Properties prays that the Commission deny the entirety of the service area requested by the Town for certification in this proceeding and that the area proposed for certification to the Town be modified and the majority of territory proposed thereby excluded as herein proposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served on the following persons by fax, hand delivery or 1st class mail on the 9th day of March, 2005.

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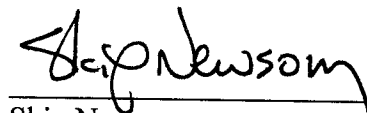
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