



Control Number: 43781



Item Number: 115

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83<sup>rd</sup>  
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

## FISHER &amp; NEWSOM, P.C.

ATTORNEYS AT LAW

3724 JEFFERSON STREET, SUITE 210  
AUSTIN, TEXAS 78731  
(512) 477-4121  
(512) 477-2860 FAX

Skip Newsom  
Board Certified Administrative Law  
Texas Board of Legal Specialization

March 30, 2005

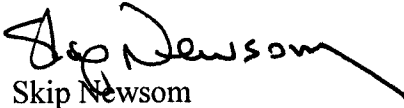
The Honorable James W. Norman  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West Fifteenth Street, Room 502  
Austin, Texas 78701

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 Fishtap Properties, LLP's Response to Closing Arguments of the Town of Prosper and the Executive Director in the above-referenced matter.

Sincerely,

  
Skip Newsom

SN/jam

cc: Service List

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 |

**FISHTRAP PROPERTIES, L.L.P. RESPONSE TO  
THE CLOSING ARGUMENTS OF  
THE TOWN OF PROSPER AND THE EXECUTIVE DIRECTOR**

**TO THE HONORABLE JAMES NORMAN, SOAH ADMINISTRATIVE LAW  
JUDGE:**

Comes now Fishtrap Properties, L.L.P. and files this Response to the Closing Arguments of the Town of Prosper and the Executive Director.

**I.**

**Response to Parts I and II of Prosper's Closing Argument**

Parts I and II of Prosper's Closing Argument present a number of sweeping and contentious claims in support of Prosper's position in this case. Extraordinarily broad and conclusionary in nature, these claims are generally unsupported by any foundation or reference to the trial testimony, admitted exhibits or citations to statutory or regulatory rules of law. Such conclusory and unsupported contentions simply do not aid the resolution of any factual issue or question of law presented. As mere "posturing," such claims should be wholly disregarded.

For example, on page 1, Prosper claims that the Executive Director "in issuing its notice of administrative completeness . . . certified that the Applicant does meet all statutory and regulatory requirements." No citation to supporting authority or reference to the trial record is offered for such a claim. At face value, such a claim could lead one

to wonder why a hearing would even be necessary if such significance attached to a determination of administrative completeness. However, such administrative certification has no such claimed stature. Rather, "administrative completeness" is merely a ministerial determination, to be performed within 10 days of the application's submission, of whether the agency's paper work "check list" has been satisfied by the Applicant's filing. If not, the Application will not be accepted for filing and will be returned. Whether an application is determined to be administratively complete has no bearing on the technical or legal merit of the application and the Town's attempt to proclaim otherwise is spurious.

The Town's characterization of its Application as satisfying all statutory requirements is even more ironic when it is recognized that the Town itself perceived the need to correct major Application errors and amend the Application's content through the prefiled and hearing testimony of its witnesses on such fundamental matters as Question 5B, to which the Town stated its available treatment capacity was limited to 15% or 75 thousand gallons, Question 5G, to which the Town stated it would rely solely upon its existing plant to serve the area and Question 2B to which the Town stated it had no service requests in the area. Similarly perplexing is the significance which Prosper attaches to its statement that "the sponsored portions of the Application (have) become part of the evidentiary record." Other than the Application having been admitted as one of multiple exhibits in the record of this case, Prosper offers no explanation as to how this inexorably leads one to conclude that the Town "has met its burden of proof with respect to each of the statutory and regulatory requirements." Prosper offers nothing by way of citation to the evidentiary record or legal authority to support such a claim, and it is,

moreover, clear that Fishtrap expressly contested much of the conclusory information presented by the Town's application. By way of example only, and without limitation, Application claims that granting the requested CCN application would have no effect on neighboring retail utilities, that Prosper will provide continuous and adequate service to the entire area and that the applicable rate to be charged in the requested area would be the Town's inside city rate; whereas, Fishtrap presented evidence that granting the CCN would financially harm Mustang Special Utility District,<sup>1</sup> that Prosper's own engineer agreed that the Town had no facilities or contracts with which to provide "practical" service to the requested area<sup>2</sup> and that the rate order attached to Prosper's Application was not applicable since the Town's out-of-city rate multiplier, undisclosed by the Town's application or prefiled testimony, applied to the entirety of the service area at the time of filing and to the vast majority of the service area even after the Town's 2004 annexations.

Part I's second paragraph further broadly and unequivocally asserts that "Protestant presented no controverting evidence to challenge the conclusion that Prosper's Application meets the Commission's regulatory requirements," and that "Protestant's case completely failed to provide any basis upon which the Application could be denied." Of course, the Town's contention here is also spurious since any such testimony would be an improper legal conclusion and inadmissible, so it is not surprising that there is no express testimony to such precise effect in the record. However, the record is replete with evidence offered by Fishtrap of Prosper's failure to satisfy the great majority of the substantive statutory and regulatory requirements for the issuance of a

---

<sup>1</sup> TR p. 519, line 2 to p. 520 line 4

<sup>2</sup> Travis Roberts Prefiled Testimony, Fishtrap Exhibit 22, p. 11, lines 4 - 9

CCN in this case. Notwithstanding the Town's inflated and near delusional view of the merits of its own case, as discussed in Fishtrap's Closing Arguments, the evidence offered by Fishtrap demonstrates that the granting of the requested amendment to Prosper's present CCN is not only unnecessary to achieve prompt and efficient sewer service to this area, it would, in fact, be injurious and harmful to the State's public interest in the timely development, implementation and use of long-planned regionalized facilities by area consumers. Indeed, the granting of the CCN proposed by Prosper would be detrimental to future retail consumers in the proposed area who will be unable to avail themselves of UTRWD's regional wastewater facilities located on or adjacent to their own property due to the exclusive nature of such requested CCN. Such issuance would also be disastrous to Fishtrap which requires timely service, not years of delay, and to Mustang which will suffer contract impairment under the Town's proposed CCN. Moreover, years of regionalized wastewater planning and implementation efforts by the Upper Trinity Regional Water District and its regional partners will be undermined if the Town's Application is granted for the entire area.

Part II of the Town's Argument, entitled "Recommendation Prosper Requests," spews further specious, exaggerated and unfounded claims that its "case is entirely uncontroverted," that "no credible, contradicting evidence was presented by Protestant," and that "Protestant's witnesses merely attempted to inject irrelevant issues into this proceeding." In making such grandstanding, contentious claims, Prosper does not discuss or furnish any references to the substantial trial record of eleven hundred pages of testimony or the numerous exhibits admitted, nor does Prosper offer any citations to legal

authority embracing such arguments. Indeed, such characterizations are complete fabrications.

It is one thing for a party to argue in good faith and with record references that it has met its burden of proof and that its evidence is more persuasive than that offered by an opposing party. However, it is an entirely different matter for a party to contend, as Prosper's Closing Argument portends that there is absolutely no evidence on the other side, or that its own evidence is uncontroverted. Where such claims are clearly false, the intent is to confuse, misdirect or deceive and such argument is not presented in good faith. Spurious, specious, duplicitous and self-serving contentions made in bad faith and without regard to the issues and evidence presented in a case reflect an underlying lack of trustworthiness and credibility of the party sponsoring such positions and asserting such claims. Examination of the record in this case will clearly reflect the contested and controverted nature of these proceedings. That Prosper chooses to so grossly mischaracterize Fishtrap's position and the nature of the evidence in this case reveals either a most tenuous claim premised upon acute bad faith or a total lack of essential comprehension of the applicable factual, statutory and constitutional issues presented in this matter. Fishtrap vigorously disputes Prosper's global, conclusionary, unsubstantiated and erroneous claims and characterizations of its Application and the evidence presented and submits that under the discretionary authority of the Commission such total disregard for evidentiary accuracy itself warrants the denial of the Town's Application.

## II.

### **Maps and Glossary of Basic Uncontroverted Facts**

Both Prosper and the Executive Director purport to structure their arguments around the statutory and regulatory requirements regarding the issuance of certificates of convenience and necessity as set out in §13.246(b) and (c) of the Texas Water Code and §291.102(c) and (d) of Title 30 of the Texas Administrative Code. Fishtrap will accordingly structure its response to each of these points in Part III below. Before doing so, however, Fishtrap believes that, in view of the Prosper and Executive Director arguments, and their noted disregard of available services and facilities in the area, it will be useful to identify and discuss the various maps in evidence, and, in relation to the physical features and facilities shown thereon, to set out a glossary of some basic and underlying uncontroverted facts concerning this case, such as the identification of various utility providers discussed in these proceedings, the contracts in effect between the parties involved in this matter, the geography of the requested service area here in dispute, wastewater facilities that already exist in the area and their relation to the issues presented, and those wastewater facilities that may be permitted or proposed but which have not been designed nor even contracted to be designed for the area. These basic facts are referenced repeatedly in this case in discussing applicable statutory and regulatory criteria that the Commission must consider in determining whether the wastewater CCN sought by Prosper in this case should be granted.



#### **A. Maps in Evidence**

Several maps in evidence contribute to a better understanding of the testimony and arguments advanced by the parties. Attachment B to Prosper's CCN Application,<sup>3</sup> for example, is a scaled map of Prosper's proposed service area and its existing certificated service area; it also shows the concentrated grid of Prosper streets in which the bulk of the Town's population is situated, and the various creeks, watersheds and elevations discussed by various witnesses in the case which determine if wastewater service can be provided by gravity flow or must be pumped by lift stations through force mains. Fishtrap Exhibit No. 18 is a map of Mustang's currently certificated sewer CCN boundaries evidencing that the area requested by Prosper is expressly bounded to the North, West and South by Mustang SUD's CCN. Attachment JD-H, an exhibit to the September 23, 2004 Prefiled John Dowdall Testimony<sup>4</sup>, also shows the proposed service area's geographic features and additionally shows the precise location of the Doe Branch Interceptor line to be constructed this year by Upper Trinity Regional Water District (UTRWD) and Dallas County Fresh Water Supply District No. 10 (DCFWSO No. 10), the Prosper Treatment Plant, Fishtrap's Glenbrook Estates and Prosper's Engineer's own proposed location of a Town of Prosper sewer trunk line to serve such area. Attachment RP-2 to the Robert Petitt Prefiled Testimony<sup>5</sup> depicts Upper Trinity Regional Water District's existing East Fork Lift Station (sometimes referred to as the Doe Branch List Station), UTRWD's Doe Branch Interceptor line connecting DCFWSO No. 10's Love

---

<sup>3</sup> Appellant Exhibit 100

<sup>4</sup> Fishtrap's Exhibit 15

<sup>5</sup> Fishtrap's Exhibit 9

Tract to the East Fork Lift Station, UTRWD's River Bend Reclamation Plant and various additional Fresh Water Supply District developments in Mustang's service area which are connected to the UTRWD's water and wastewater systems and for whom Mustang SUD currently furnishes water and wastewater utility service.<sup>6</sup> Finally, Doug Mousel's March 19, 2004 Prefiled Testimony<sup>7</sup>, on the eighth page of Attachment 4, includes a plat of the Mahard Egg Farm. This property alone constitutes nearly 50% of Prosper's requested service area and bisects the disputed service area into two distinct service area locations.<sup>8</sup>

**B. Proposed Service Area**

The testimony and various maps reflect the proposed service area to be generally rectangular in shape, about 3.5 miles from east to west and about 2.5 miles from north to south. While Prosper's CNN Application<sup>9</sup> states that this area is about 5100 acres, subsequent to the filing of this Application, Prosper entered into an agreement with Denton County Fresh Water Supply District No. 10 ("District No. 10") and other related parties to exclude from this original 5100 acres three tracts of land totaling 477 acres situated near the center of the proposed service area.<sup>10</sup> There are no wastewater lines presently within two miles of the most eastern boundary of this proposed service area

---

<sup>6</sup> Fishtrap's Exhibit 9, p. 2

<sup>7</sup> Prosper Exhibit 105

<sup>8</sup> March 19, 2004 Prefiled Testimony of Doug Mousel, under tab No. 4 (or DM-4), eighth page.

<sup>9</sup> Applicant's Exhibit 100

<sup>10</sup> Fishtrap Exhibit 1, the settlement agreement between Prosper and Denton County Fresh Water Supply District No. 10; also see Exhibit JD-H (map) to the Sept 23, 2004 Dowdall Prefiled admitted as Fishtrap Exhibit 15; also see Applicant Exhibit 102, Attachment 4

through which Prosper may make wastewater service available.<sup>11</sup> As presently situated, any governmental entity can extend sewer utility service to the proposed service area without first securing a CCN.<sup>12</sup> Once retail service is extended to a specific area, however, or if a CCN for such service area is issued, any other retail utility desiring to serve such area must first secure its own CCN prior to initiating such service.<sup>13</sup> While such dual certification is theoretically possible, Commission policy disfavors dual certification unless afforded by agreement under Texas Water Code Section 13.248.

**C. Fishtrap's Glenbrook Estates**

Fishtrap owns 107.5 acres of land, subdivided into 442 residential lots called Glenbrook Estates. It is located adjacent to and east of FM1385, and adjacent to and south of Fishtrap Road. As indicated earlier, the general outline of the subdivision is depicted in maps attached as Attachment RP-2 to the Robert Petitt Prefiled Testimony<sup>14</sup> and as JD-H in the September 23, 2004 Dowdall Prefiled.<sup>15</sup> Prosper has given preliminary plat approval to the entire subdivision and final plat approval for Phase One of Glenbrook Estates containing 178 lots. As the crow flies, Glenbrook Estates is about 5.5 miles to the Prosper wastewater treatment plant and about one-half mile from the UTRWD's East Fork Lift station. TR p. 69, lines 13 - 18 In pipeline distance, however,

---

<sup>11</sup> Travis Roberts Prefiled Testimony, Fishtrap Exhibit 22, page 14 lines 17 to 24

<sup>12</sup> TR p. 357, lines 19 - 23; p. 360, lines 1 - 6; p. 364, line 20 to p. 365, line 1

<sup>13</sup> Id.

<sup>14</sup> Fishtrap Exhibit 9, Exhibit RP-2

<sup>15</sup> Fishtrap Exhibit 15, Exhibit JD-H

Fishtrap's property is approximately 45,000 feet from Prosper's treatment plant<sup>16</sup> and 3,000 feet from UTRWD's existing lift station.<sup>17</sup> The interceptor line being constructed this year by UTRWD and District No. 10 will pass within 150 feet of the southwest corner of Glenbrook Estates.<sup>18</sup> Mustang SUD's certificated service area is directly across FM1385 from Glenbrook Estates.<sup>19</sup>

**D. The Mahard Egg Farm**

Special attention should be paid to the Mahard egg farm because of its size, configuration and, in particular, its location in Prosper's requested service area. The Mahard tract totally bisects the proposed service area from north to south. A map of the Mahard tract is shown the March 19, 2004 Prefiled Testimony of Doug Mousel, under tab No. 4 (or DM-4), eighth page.<sup>20</sup> For the ALJ's convenience, a copy of this map is attached as Exhibit A to this response brief. The map reflects that the Mahard egg farm is 2,151 acres out of the requested service area of 4623 acres (the original 5100 acres less the District 10's 477 acres) which amount to 46.5% of the requested service area. The eastern boundary of the Mahard tract follows Fields Road going north from US 380, then east on Prosper Road for a short distance, then north from Prosper Road until it intersects

---

<sup>16</sup> Dowdall September 23, 2004 Prefiled Testimony, Fishtrap Exhibit 15, Attachment JD-H

<sup>17</sup> Petitt Prefiled Testimony, Fishtrap Exhibit 9, Attachment 2

<sup>18</sup> Fishtrap Exhibit 9, Exhibit RP-2

<sup>19</sup> Fishtrap Exhibit 18

<sup>20</sup> Attachment DM-4, p. 8 to Prosper Exhibit 105. The map was presented as part of Mr. Mousel's March, 2004 Testimony that the owner of the Mahard egg Farm tract had requested Prosper utility service and annexation. However, such request was withdrawn by the landowner by May, 2004. TR p. 49, lines 16 - 25

Parvin Road, thus completely bisecting the requested service area. The Mahard tract is a rural agricultural tract, used as a farm for raising chickens and producing eggs. The trial record in this case is devoid of any evidence that the Mahard tract is going to be developed or will need utility service in the foreseeable future.<sup>21</sup>

**E. Prosper Wastewater Facilities**

Prosper's wastewater treatment plant is located in the Town, west of the Town's population center near the intersection of 5<sup>th</sup> and the Burlington Railroad tracks. Attachment B of App Exhibit 100 (Prosper's CCN Application) shows the layout of Prosper's streets and the intersection of the railroad and 5<sup>th</sup> Street.<sup>22</sup> The September 23, 2004 John Dowdall Prefiled Testimony, Attachment JD-H<sup>23</sup> shows the precise location of the treatment plant as situated two miles east of County Line Road 6, the easternmost boundary of the proposed service area, and about 5.5 miles east of FM1385, the westernmost boundary of the proposed service area.<sup>24</sup> Glenbrook Estates is considerably downhill from the treatment plant, and there are no wastewater transmission lines connecting any part of the proposed service area to the treatment plant. Indeed, no wastewater line runs west from Prosper's treatment plant, even in the Collin County area which is presently included in Prosper's current CCN, and no plans have been prepared

---

<sup>21</sup> Travis Roberts, Fishtrap Exhibit 22, p. 12, lines 24 to p. 25, line 23

<sup>22</sup> According to the trial testimony, Fifth Street actually stops a short distance before it would reach the railroad tracts, but if extended it would intersect the tracks. TR p. 59, lines 8 - 11

<sup>23</sup> September 23, 2004 John Dowdall Prefiled, Fishtrap Exhibit 15, Attachment JD-H

<sup>24</sup> See also Applicant's Exhibit 100, Attachment B (the Sewer CCN map)

by the Town or approved by the Town's Council to extend any wastewater lines westward.<sup>25</sup>

**F. Upper Trinity Regional Water District Wastewater Facilities**

Upper Trinity Regional Water District is a regional water and wastewater wholesale service provider operating in Denton County, parts of Collin County and in those cities which are members of the district.<sup>26</sup> Upper Trinity has planned regional water and wastewater service for the Doe Creek Drainage Basin, and part of that plan involves the construction of the Doe Branch Reclamation Plant, at the site of the existing East Fork Lift Station, and the Doe Branch Interceptor line to be constructed this year to run from District 10, located in the middle of Prosper's requested service area (but not a part of the service area per the settlement agreement), through the Mahard tract to the Upper Trinity East Fork lift station, which will then transport the wastewater to UTRWD's existing Riverbend treatment plant.<sup>27</sup>

UTRWD's East Fork Lift Station, near the intersection of FM1385 and US380, about 3,000 feet downhill from Fishtrap's Glenbrook Estates.<sup>28</sup> This lift station transports wastewater to Upper Trinity's Riverbend Treatment Plant. A new treatment plant, UTRWD's Doe Branch Reclamation Plant has been permitted for the same location

---

<sup>25</sup> Fishtrap Exhibit 22 (Travis Prefiled Testimony), page 5, lines 5 to 20

<sup>26</sup> Tom Taylor Prefiled Testimony, Exhibit No. 20, page 6, line 8 and 9

<sup>27</sup> Fishtrap Exhibits 5 and 9, Attachment RP-3

<sup>28</sup> Fishtrap Exhibit 9 (Petitt Prefiled), pages 4 and 5

as the East Fork Lift Station.<sup>29</sup> All of these facilities are shown on Attachment RP-2 to Robert Petitt's Prefiled Testimony.<sup>30</sup>

District No. 10 overlays several tracts in this general area of Denton County, but, as directly pertinent to this case, occupies the 477 acres that was removed from the original proposed service area Prosper sought in this case by pre-trial settlement agreement.<sup>31</sup> Attachments A and B to FT Exhibit No. 1 contain a map that shows the 477 acres which makes up the District 10 area east of FM 1385, and on this map can be seen the Mahard Egg Farm just to the west of District 10. On UTRWD's behalf, District 10 is constructing this year that portion of the UTRWD interceptor line necessary to carry wastewater from District 10 area to the Upper Trinity East Fork Lift Station.<sup>32</sup> The Interceptor line has been designed to transport wastewater generated throughout the Doe Branch Watershed and is depicted on the map RP-2 attached to the Robert Petitt Prefiled Testimony, Attachment JD-4 to John Dowdall's September 23, 2004 testimony, and the maps made part of the Doe Branch Interceptor Route Selection Study, Attachment 3 to Robert Petitt's Prefiled Testimony. The Interceptor will be located within 150 feet from the corner of Glenbrook Estates.

**G. Mustang Special Utility District**

Mustang Special Utility District is a retail water and wastewater service provider with a CCN for the area immediately to the north, west and south of the proposed service

---

<sup>29</sup> Fishtrap Exhibit 9 (Petitt Prefiled), pages 4 and 5

<sup>30</sup> Fishtrap Exhibit 9 (Petitt Prefiled) Attachment RP-2

<sup>31</sup> Fishtrap Exhibit 1

<sup>32</sup> Fishtrap Exhibit No. 9, page 4

area.<sup>33</sup> Mustang SUD provides retail service through UTRWD facilities in the area because UTRWD furnishes wholesale services only. Fishtrap's Glenbrook Estates is separated from Mustang's service area by FM1385.<sup>34</sup> Mustang has annexed the Fishtrap development property.<sup>35</sup> Fishtrap also has entered into a contract with Mustang under which Mustang will provide wastewater service to Fishtrap,<sup>36</sup> for which Mustang has secured wholesale contractual rights to wastewater treatment from UTRWD.<sup>37</sup> Mustang's wastewater service to Fishtrap will be furnished via the Upper Trinity East Lift Station by connecting Glenbrook Estates to the Doe Branch Interceptor Line, whose point of entry will be within 150 feet of Fishtrap's Glenbrook Estates, and which will transport the wastewater to the existing Upper Trinity East Fork lift station or to the future Doe Branch treatment plant to be built on the existing lift station site.<sup>38</sup>

#### **H. The North Texas Municipal Water District Facilities**

North Texas Municipal Water District is a regional water and wastewater provider operating in Collin County. It has entered into a contract with Prosper to provide wastewater service for 4,960,000 gallons per day to the Upper East Fork Interceptor line,

---

<sup>33</sup> Fishtrap Exhibit 18

<sup>34</sup> Fishtrap Exhibit 18

<sup>35</sup> Fishtrap Exhibit 15, Attachment C

<sup>36</sup> Fishtrap Exhibits 16 and 17

<sup>37</sup> Byron Gaines Deposition, page 10, line 22 to page 11, line 4. And see Petitt Prefiled Testimony, Fishtrap Exhibit 9, p. 4, last sentence; also Fishtrap Exhibit 10

<sup>38</sup> Petitt Prefiled Testimony, Fishtrap Exhibit 9, pages 3 to 5



also referred to sometimes as the Wilson Creek Interceptor Line.<sup>39</sup> This volume was calculated based on the volume of sewage projected to be generated within the Wilson Creek Watershed portion of Prosper.<sup>40</sup> The tie in for Prosper would be eastern part of the Town.<sup>41</sup> North Texas does not have a contract with Prosper to take any of its wastewater to the Panther Creek treatment plant and such plant has not been built or designed.<sup>42</sup>

The North Texas Municipal Water District's ("NTMWD") Upper East Fork Interceptor line (sometimes referred to as the Wilson Creek or McKinney/Prosper Sewer Line) has not yet been built,<sup>43</sup> but, once constructed will provide wastewater transportation from the Wilson Creek watershed portion of Prosper to the NTMWD's Wilson Creek Regional Wastewater Treatment Plant. Wilson Creek and the proposed interceptor run generally northwest to southeasterly in the eastern part of Prosper's present wastewater CCN service area<sup>44</sup> about three miles east of Prosper's present wastewater treatment plant, or about eight miles east of Glenbrook Estates. Such facilities will serve primarily the substantial Prosper development currently taking place in the Wilson Creek watershed.<sup>45</sup> The map included as Attachment B to Prosper's CCN

---

<sup>39</sup> Mousel Prefiled Testimony, Applicant's Exhibit 105, page 16, line 11 and DM 5

<sup>40</sup> TR p. 82, lines 5 - 12; also, TR p. 233, lines 3 - 13; also Dowdall Prefiled Testimony, Fishtrap Exhibit 15, Attachment JD-F, Section 3.1 at p. 7

<sup>41</sup> TR p. 96, lines 17 to 23

<sup>42</sup> TR p. 85, line 18 to p. 86, line 11

<sup>43</sup> TR p. 79, line 4 to line 10

<sup>44</sup> TR p. 79, line 4 to p. 80, line 15

<sup>45</sup> TR p. 81, lines 24 to p. 82, line 12

Application also shows Wilson Creek in the very eastern portion of Prosper's existing CCN in Collin County. Prosper and NTMWD have entered into a contract which authorizes Prosper to transport up to 4,960,000 gallons of wastewater per day from anywhere in Prosper wastewater CCN to this interceptor line,<sup>46</sup> although this capacity was calculated on the basis of projected wastewater flows generated strictly within the Wilson Creek watershed portion of the Town of Prosper rather than projected flows from the Doe Branch watershed.<sup>47</sup>

NTMWD has also obtained a permit for a treatment plant to be located one mile east of Highway 423, on Panther Creek approximately one mile south of US380.<sup>48</sup> However, this plant has not yet been designed,<sup>49</sup> and its feasibility and scope of service, while under study, has not yet been determined. TR p. 243, line 11 through 244, line 19. No contract exists between North Texas and Prosper and no facilities have been designed or easements secured under which Prosper could transport wastewater to the proposed Panther Creek treatment plant for wastewater treatment and disposal.<sup>50</sup>

---

<sup>46</sup> Mousel Prefiled Testimony, Applicant's Exhibit 105, p. 16, line 11 and DM-5

<sup>47</sup> TR p. 82, lines 5 - 12; Dowdall Prefiled Testimony, Fishtrap Exhibit 15, Attachment JD-F, Section 3.1 at p. 7

<sup>48</sup> TR p. 86, line 12 to line 17; also, Tom Taylor Prefiled Testimony, Fishtrap Exhibit 20, page 26, line 21 to page 27, line 15

<sup>49</sup> TR p. 87, lines 5 to 14

<sup>50</sup> TR p. 85, line 18 to p. 86, line 11

# **I. City of Frisco's Stewart Treatment Plant**

The City of Frisco wastewater treatment plant, the Stewart treatment plant, is located in the southern part of Frisco, about eight miles south of US380.<sup>51</sup> It is one of the potential service options that Prosper has put forth for providing service to the requested service area.<sup>52</sup> However, there are no wastewater lines connecting the proposed service area to the Stewart Treatment Plant,<sup>53</sup> no feasibility analysis has been prepared regarding the provision of wastewater service to the proposed service area using the Stewart Treatment Plant and Prosper has no contract with Frisco regarding any such service.<sup>54</sup>

---

<sup>51</sup> TR p. 174, lines 3 to 4

<sup>52</sup> TR p. 172, lines 4 to page 174, line 10

<sup>53</sup> TR p. 172, line 25 to p. 173, line 18

<sup>54</sup> TR p. 174, lines 7 to 10

**III.**  
**Fishtrap's Response to Prosper's**  
**and the Executive Director's Arguments**

Both Prosper and the Executive Director structure their arguments around the statutory and TCEQ regulatory criteria that must be considered and satisfied prior to the issuance of a certificate of convenience and necessity. Fishtrap will use a similar format for its response. However, prior to reviewing the claimed evidentiary basis relied upon by the Town and the Executive Director under these criteria, it is essential to understand that where the asserted evidence relied upon to support a proposition is opinion testimony and such opinion is conclusory, such evidence is incompetent and provides no probative value with which to support either the proposition asserted or a finding or order based upon such proposition.<sup>55</sup> In Coastal Transport, our Supreme Court reviewed the applicable legal standards governing the sufficiency of expert opinion testimony to support an evidentiary finding:

We noted in Burrow v. Arce that, although expert opinion testimony often provides valuable evidence in a case, "it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere ipse dixit of a credentialed witness." Burrow v. Arce, 997 S.W.2d 229, 235 (Tex.1999). Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact "more probable or less probable." See Tex.R. Evid. 401. This Court has labeled such testimony as "incompetent evidence," and has often held that such conclusory testimony cannot support a judgment. Cas. Underwriters v. Rhone, 134 Tex. 50, 132 S.W.2d 97, 99 (1939) (holding that a witness's statements were "but bare conclusions and therefore incompetent"); see also Wadewitz v.

---

<sup>55</sup> Coastal Transport Company, Inc. v. Crown Central Petroleum Corporation, 136 S.W.3d 227 (Tex.Sup. 2004)

Montgomery, 951 S.W.2d 464, 466 (Tex.1997) ("[A]n expert witness's conclusory statement ... will neither establish good faith at the summary judgment stage nor raise a fact issue to defeat summary judgment."). Furthermore, this Court has held that such conclusory statements cannot support a judgment even when no objection was made to the statements at trial. [FN1] Dallas Ry. & Terminal Co. v. Gossett, 156 Tex. 252, 294 S.W.2d 377, 380 (1956) ("It is well settled that the naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection."); Rhone, 132 S.W.2d at 99 (holding that "bare conclusions" did not "amount to any evidence at all," and that "the fact that they were admitted without objection add[ed] nothing to their probative force"); see also Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 712 (Tex.1997) ("When the expert 'brings to court little more than his credentials and a subjective opinion,' this is not evidence that would support a judgment.... If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no.").<sup>56</sup>

Hence, to the extent that the Town and Executive Director rely upon conclusory opinion testimony to support a global pronouncement that agency statutory and regulatory criteria have been satisfied for the entire area in dispute, when the basis for such opinion is not clearly shown to be applicable to the entire area, such opinion lacks probative value to support a determinative finding for such area as a whole.

**A. Adequacy Of Service Currently Provided To The Requested Area<sup>57</sup>**

Texas Water Code Section 13.246(c) and TCEQ Rule No. 291.102(d)(1) require Commission consideration of the adequacy of service that is currently provided to the

---

<sup>56</sup> Id. at 232.

<sup>57</sup> §13.246(c) of the Texas Water Code and §291.102(d)(1) of Title 30, Texas Administrative Code; see Prosper Closing Argument, page 4, Executive Director Closing Argument, page 6.

requested area. Prosper's and the Executive Director's arguments under this point are set out respectively on page 4 of Prosper's Closing Argument and on page 6 of the Executive Director's Closing Argument. Their arguments are nearly identical, are both very short, and basically state that there is not adequate service in the requested service area because there is no "centralized wastewater system" in said area. Both the Town and Executive Director staff testimony disregard 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 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.<sup>58</sup>

Clearly, and as a matter of law, Mustang's participation in regional planning for this service area and 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 Fishtrap and other properties within this Doe Branch watershed west of the Collin/Denton County line. Moreover, neither the Town nor the Executive Director examine whether current

---

<sup>58</sup> 30 TAC §291.3(41).

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.<sup>59</sup> Since the Town and Executive Director base their opinion on the lack of "service" currently existing in the area when Mustang is currently furnishing such service under the Commission's own definition of the term, their opinion cannot support a determination that wastewater service in the disputed area is inadequate.

**B. The Need For Additional Service In The Requested Area.<sup>60</sup>**

As evidence of need, both Prosper and the Executive Director rely primarily upon the annexations to Prosper which have occurred in the area. Prosper claims it has received "voluntary annexation requests for approximately 2,800 acres of land in Denton County" and that "[A]ll, but one, were completed and annexed into the Town" and that the "annexations have occurred throughout the requested service territory not merely areas closest to Prosper's downtown."<sup>61</sup> The Executive Director merely states that Prosper has submitted letters from developers requesting annexation and, except for one, these requests have been granted.<sup>62</sup>

---

<sup>59</sup> 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.

<sup>60</sup> §13.246(c) of the Texas Water Code and §291.102(d)(2) of Title 30, Texas Administrative Code; see Prosper Closing Argument, page 6 and Executive Director Closing Argument, page 3

<sup>61</sup> Prosper's Closing Argument, page 6, Part IV.B.

<sup>62</sup> Executive Director's Closing Argument, page 4, Part B

Fishtrap believes such statements are seriously misleading. With respect to Prosper's claims regarding annexations, what Prosper does not state is that one of the requests for annexation and service was withdrawn -- the Mahard tract, a 2156 acre tract of land representing about over 75 percent of the original annexation request territory and which bisects the proposed service area right down the middle.<sup>63</sup> In other words, only about 650 acres were annexed, not 2800. Moreover, over 90% of the acreage that was annexed by Prosper lies along County Line Road 6, the Collin/Denton County line boundary and the western limit of Prosper's current sewer CCN. Only two small tracts lay further west, one for 30 acres in the northwest corner of the proposed service area and one for 15 acres in the southwest corner. Neither of these annexations were related to any anticipated or proposed development as they were instead motivated by the liquor sale option election held in Prosper and the owners sought annexation in order to sell beer and wine.<sup>64</sup> With respect to the approximately 600 acres of land actually annexed by Prosper for claimed future development, such tracts represent only about 15% of the proposed service area. None of these tracts have been subdivided, and there was no evidence presented of any development plans for these tracts. With respect to development plans in the area generally, there are only two planned developments, one occurring in District 10, which is not in the proposed service area, and the other being Fishtrap's Glenbrook Estates, which opposes Prosper's application and has secured service from Mustang SUD under express contract. The testimony of the Town and

---

<sup>63</sup> March 19, 2004 Prefiled Testimony of Doug Mousel, under tab No. 4 (or DM-4), eighth page.

<sup>64</sup> TR p. 61, line 12 to p. 62, line 5



Executive Director witnesses as to the need for additional service in the disputed area is wholly conclusory for areas west of the Mahard tract's eastern boundary.

Dr. Harkins' March 19, 2004 Prefiled Testimony<sup>65</sup>, in this regard begins on page 4, line 19 and extends to page 5, line 12 and can be analyzed as follows: (1) the proposed service is made up of mainly areas that have requested annexation into the Town; (2) Prosper has recently received requests for water and sewer service for the same approximately 2,800 acre area sought for annexation; (3) Fishtrap has proposed a development of 107 acres; (4) Binary Investments is proposing a development of 227 acres; and (5) the Texas Water Development Board projects a population of 30,000 for Prosper by 2050, and "as can be seen there is a large amount of activity and growth west of Prosper." In her August 20, 2004 Prefiled Testimony,<sup>66</sup> page 6, lines 1 to 8, Dr. Harkins again cites the Town's annexations in support of her opinion regarding need for service and attaches the Town's annexation map, VRH-9.

Prosper's own tender of evidence refutes Dr. Harkins' items (1) and (2). The proposed service area is over 4,600 acres, but the number of acreage annexed to Prosper in the proposed service area is only about 600 acres, not 2800 acres, and over 90% of those 600 acres is immediately adjacent to the county line between Denton and Collin county and the Town's existing sewer CCN boundary.<sup>67</sup> The number of acres for which service has been requested is less than 600, which constitutes less than twenty percent of

---

<sup>65</sup> Applicant's Exhibit 106

<sup>66</sup> Applicant's Exhibit 110

<sup>67</sup> See Attachment VRH-9 to the App Exhibit 110, wherein it shows almost all of the annexations occurring next to the county line, except for two very small tracts, one in the northwest corner and the other in the southwest corner.

the requested service area, and the record is devoid of any evidence that any of these six hundred acres are going to be developed. In fact, Dr. Harkins testified that there is no evidence as to how much development would be occurring in the entire requested service area:

Q. (BY MR. KIRSHBAUM) Is there any evidence you've looked at, though, as to how much development would be occurring in the entire requested area?

A. No.<sup>68</sup>

When Dr. Harkens' March 19, 2004 prefiled testimony was filed, the Mahard farm was requesting annexation, however, by the time of trial, it had withdrawn its request for annexation and service.<sup>69</sup> With respect to item Number 3, Fishtrap opposes Prosper's CCN application, and Fishtrap's witness, Mr. John Dowdall testified that Fishtrap has an express contract for sewer with Mustang Special Utility District and needs no additional service from Prosper. With respect to item Number 4, as Dr. Harkins says in her own prefiled testimony the 227 acres being developed by Binary Investments, Inc. is excluded from the service area request.<sup>70</sup> Finally, item number 5 deals with Prosper's long-term projected population growth. Such long-term projection does mean that such growth will occur in the disputed area or even if it will occur within the seven to 10 year time frame customarily employed by the Executive director staff. In short, Dr. Harkins' opinion that there is a need for additional service throughout the requested service area, and by implication, west of the Mahard tract, is purely conclusory and

---

<sup>68</sup> TR p. 422, lines 9 to 12

<sup>69</sup> TR p. 49, lines 16 - 25

<sup>70</sup> Applicant's Exhibit 106, page 5, lines 1 to 5

speculative, because her testimony provides no essential underlying facts which would support such a conclusion.

Mr. Brian Dickey's testimony regarding the need for additional service in the requested area is limited solely to his August 28, 2003 prefiled testimony, page 4, lines 16 to 23, ending with the word "Prosper."<sup>71</sup> Basically, Mr. Dickey's testimony is that there is a need for service because Fishtrap is developing its 107 acres. But in his trial testimony, Mr. Dickey testified that Fishtrap has not requested service from Prosper, that Fishtrap has objected to the inclusion of its property within Prosper's CCN, and that it was feasible for Fishtrap to receive service from Mustang:

Q. ... Fishtrap has not requested wastewater service from the Town of Prosper. Do you agree?

A. Yes.

Q. Do you agree that Fishtrap has objected to the inclusion of its property within Prosper's CCN?

A. Yes.

...

Q. ... And do you agree that Mustang can provide feasibly wastewater service to the Fishtrap development?

A. Feasibly?

Q. Yes, sir.

A. I agree that they can provide service to the Fishtrap property, yes.<sup>72</sup>

Not only has Mr. Dickey not provided any basis for rendering his opinion that there is a need for service in the requested service area, but his testimony that Fishtrap has not requested service, has objected to the inclusion of its property in Prosper's CCN, and that Fishtrap can feasibly obtain service from Mustang is in direct conflict with his

---

<sup>71</sup> Executive Director Exhibit No. 8

<sup>72</sup> Tr. Page 1084, line 18 to page 1085, line 14

opinion that additional service is needed in the area, since Fishtrap has already contracted for service from Mustang. Mr. Dickey's opinion is not only conclusory, but its basis is contradicted by his own testimony.

No other witness from either Prosper or the Executive Director testified regarding the need for service in the requested service area. Because the evidence fails to demonstrate a need for the additional service proposed by Prosper west of the eastern boundary of the Mahard 2156 acre tract, any finding related to such alleged need must be limited to the corridor between Prosper's current western CCN boundary and the Mahard eastern boundary line. Such corridor includes the Town's recently annexed areas and adjacent tracts along the County line which are claimed to be proposed for development but for which no subdivision plat requests have even been filed.

**C. The Effect Of Granting Of A Certificate On Prosper And On Any Retail Public Utility Of the Same Kind Serving The Proximate Area<sup>73</sup>**

Prosper claims that the effect of granting its application is uncontroverted: i.e., "Prosper will increase the number of connections and the service area for which Prosper is obligated to provide continuous and adequate service."<sup>74</sup> Claiming the service area will increase is tautological since that is precisely what Prosper is seeking in its application, i.e., to increase its service area. But it is not uncontroverted that the number of Prosper's connections will increase as a consequence of the pending application being granted, because the record shows that Prosper presently is in no position to increase the

---

<sup>73</sup> §13.246(c) of the Texas Water Code and §291.102(d)(3) of Title 30, Texas Administrative Code; see Prosper's Closing Brief, page 8, and Executive Director's Closing Brief, page 8

<sup>74</sup> Prosper Closing Argument, page 6, fifth line under Section (C)

number of connections, at least in the proposed service area, without entering into markedly new contracts with wholesale service providers and undertaking substantial construction of infrastructure, none of which has been planned, decided upon, or even approved by the Prosper City Council.<sup>75</sup>

Prosper claims it can increase the number of connections by several ways, none of which withstand evidentiary scrutiny. First, while Prosper claims it has ample sewer capacity in its present treatment plant, (a) it has no wastewater transportation lines in the service area to connect such area to Prosper's treatment plant, and (b) Prosper's own engineer testified that it was simply not practical to install such lines to pump wastewater from the service area more than five miles uphill to the treatment plant.<sup>76</sup> No witness has refuted this Engineer's determination that serving the proposed service area from the Town's existing plant is simply not practical. Second, while Prosper claims it can provide wastewater service via North Texas Municipal Water District facilities, Prosper confuses two distinctly different NTMWD service options, neither one of which is a viable alternative. Prosper's witnesses testified that one possibility for providing wastewater service via North Texas would be through the proposed East Fork (aka the Wilson Creek or Prosper/McKinney) interceptor, but that is three miles further eastward and further uphill from the service area than Prosper's existing treatment plant, making it an even more impractical service option than the Prosper treatment plant. The second option discussed by Prosper's witnesses is the Panther Creek Treatment Plant, a mile south of the proposed service area. While this plant has been permitted, it has not been

---

<sup>75</sup> Travis Roberts Prefiled Testimony, FT-22, page 14 lines 17 to 24

<sup>76</sup> Travis Roberts Prefiled Testimony, Fishtrap Exhibit 22, page 11 lines 4 to 21

designed, nor has there even been a contract awarded to engineers for such a design and NTMWD still has yet to complete its own feasibility analysis which is essential to such design.<sup>77</sup> Moreover, there is no contract in existence to authorize Prosper to utilize any proposed Panther Creek facility.<sup>78</sup> Substantial financial consideration paid by Prosper and contract terms, provisions and conditions agreed to by all parties will be necessary before any such contract may be consummated. Prosper's prospect for receiving service from the North Texas Panther Creek is purely speculative at this time and provides no basis upon which to now award a certificate of convenience and necessity for exclusive area wastewater service.

Prosper's and the Executive Director's comments that granting Prosper's application to expand its service area would not have any harmful effect on adjacent or nearby retail utility providers is wholly conclusory and speculative as it is based solely upon a lack of protest in these proceedings by other utility service providers at the time of hearing and not based upon any review of the evidence or other information, such as Mustang SUD's prefiled testimony directly pertinent to such harmful effects. The fact that other utility providers have not sought to involve themselves in the costly and protracted litigation that this case represents is not evidence of the lack of harmful effects which the granting of this CCN to Prosper may result in. Mustang SUD's General Manager's deposition reflects the specific reason's for Mustang's withdrawal from this case and those reasons clearly do not support a determination that Mustang will not be

---

<sup>77</sup> Travis Roberts Prefiled Testimony, Fishtrap Exhibit 22, page 14 lines 12 to p. 15, line 25; TR p. 243 - 244

<sup>78</sup> TR p. 242, line 23 to p. 243, line 10

harmful by the granting of the CCN requested by Prosper.<sup>79</sup> Substantial and costly infrastructure is underway for the Doe Creek Drainage Basin which occupies the great majority of the requested service area, and this infrastructure is being implemented and paid for by the Upper Trinity Regional Water District and various participants in the area, such as the City of Celina, District 10 and Mustang Special Utility District. It can only result in wasteful, costly, needless duplication, and stranded investment in capacity if Prosper is given the exclusive right to serve this disputed area. By choosing to ignore the impacts which granting the requested CCN will have on Mustang SUD and the attainment of UTRWD's regionalization goals and investments in this area, the Town and Executive Director opinions as to lack of negative impact is cursory, superficial and wholly conclusory and lack credible foundation in the record.

**D. The Ability Of Prosper To Provide Adequate Service<sup>80</sup>**

The Executive Director's argument regarding Prosper's "ability" to serve the area amounts to nothing more than citation to the conclusionary testimony of Brian Dickey and Victoria Harkins, primarily that there is adequate capacity in Prosper's treatment plant, plus an agreement with North Texas Municipal Water District allowing Prosper to tie into the East Fork interceptor line. There is no testimony by Mr. Dickey or Dr. Harkins as to how or when the wastewater is to be transported from the proposed service area within the Doe Creek Drainage Basin to the considerably distant Prosper treatment plant or the East Fork interceptor line or even further away.

---

<sup>79</sup> Fishtrap Exhibit 25, Byron Gaines deposition at TR p. 11, line 12 to p. 13 line 4

<sup>80</sup> §13.246(c) of the Texas Water Code and §291.102(d)(4) of Title 30, Texas Administrative Code; see Prosper's Closing Argument, page 10, and the Executive Director's Closing Argument, page 4

In its Closing Argument, Prosper claims it has the ability to provide adequate service in the three following ways: (1) its wastewater treatment plant which has excess capacity; (2) through its contract with the North Texas authorizing it to transport wastewater to the East Fort Interceptor; or (3) utilization of the Panther Creek treatment plant permitted to North Texas. None of these options hold the hope of providing wastewater service in the foreseeable future for continuous and adequate service to the requested service area.

Pumping wastewater from the requested service area to Prosper's existing treatment plant located at Fifth Street and the Burlington RR tracks is not, in the words of Prosper's own engineer, a realistic or practical method of providing service to the service area. One does not have to be an experienced engineer to understand this. The maps, testimony and other evidence show the following with respect to the Prosper treatment plant. (1) It is located two miles east of the service area and five and one half miles east of the western boundary of the service area and Glenbrook Estates. (2) The treatment plant is at a higher elevation than the service area requiring one or more lift stations to transport the wastewater from the service area to the treatment plant. (3) There are no wastewater transportation lines in the service area or even in the two miles between the requested service area and the Prosper treatment plant. (4) There are no plans to build or design such a wastewater transportation system, nor any study as to how much such a system to serve such entire area would cost. The existence of Prosper's current wastewater plant is wholly irrelevant to the Town's ability to serve the disputed area if the Town has no means to transport wastewater to such plant, has performed no cost



estimates for such service area collection and transmission system, has no design plans for such system and has no present plans to develop such a system.

If there are problems with utilizing the Prosper treatment plant to provide wastewater service to the requested service area because of distance and lack of a wastewater transportation system, then that problem is compounded when considering the availability of a yet-to-be-constructed East Fork Interceptor, three miles further east. The problems the East Fork Interceptor proposal presents is the same as those for the Prosper treatment plant, compounded by the greater distance the East Fork interceptor is from the requested service area. Again, Prosper has not even attempted to provide an explanation how it plans to transport the wastewater from the requested service area to the East Fork Interceptor.

Finally, Prosper offers up the Panther Creek treatment plant as another potential option it has to treat wastewater from the proposed service area. There are numerous problems with the Panther Creek option. First and foremost, the Panther Creek treatment plant has not been built, it has not been designed, and no firm has been selected to design it.<sup>81</sup> This raises serious questions as to when the Panther Creek treatment plant could be available to service the requested service area. Second, Prosper does not own the Panther Creek treatment plant or proposed site and has no easements or facilities through which to transport wastewater from the proposed service area to the proposed plant site. Finally, Prosper has no contractual rights to utilize the proposed Panther Creek treatment plant. At this stage, it is total speculation that this plant will be built, or built anytime in

---

<sup>81</sup> TR, p. 242, line 23 to page 244, line 25

the foreseeable future, and it is also speculation that North Texas may enter into a contract with Prosper to provide it wastewater service.

At present, Prosper has no realistic way to provide service to the requested service area for years to come. In fact, Prosper simply has no present plan to provide service to the area. In this context, a finding that the Town is able to provide service to the proposed area would render the statutory criteria meaningless. 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.<sup>82</sup> 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 projects may be available to it in the future by which it could ultimately serve Fishtrap. The problems with such approach are specifically addressed in Fishtrap's earlier Closing Argument. For the reasons discussed, the opinion testimony elicited from Dr. Harkins and Mr. Dickey as to Prosper's present ability to provide service to the disputed area is entirely speculative and wholly conclusory and hence has no probative value to support the issuance of a CCN in this proceeding.

**E. The Feasibility Of Obtaining Service From An Adjacent Public Utility<sup>83</sup>**

The language of the applicable statute and regulation are virtually identical regarding the "feasibility of obtaining service from an adjacent public utility." Both Prosper and the Executive Director's witnesses appear to construe the statutory term

---

<sup>82</sup> See also 30 TAC §291.102(d)4.

<sup>83</sup> §13.246(c) of the Texas Water Code and §291.102(d)(5) of Title 30, Texas Administrative Code; see Prosper Closing Argument, page 11, and the Executive Director's Closing Argument, page 6

“feasibility” to mean something that it doesn’t mean. Both interpret the word to include not only the meaning normally associated with the term “feasibility,” such as reasonableness of cost, practicality, physical capability, proximity, etc., but also to mean an explicit expression of intent or desire to serve an area by an adjacent public utility which must, in turn, be accompanied by an active protest filed with the Commission upon receiving a notice of a CCN application. No authority is given for such a proposition and none exists. Fishtrap maintains that such interpretation is clearly contrary to the plain meaning of the wording of both the statute and the regulation. While it may arise that an adjacent public utility may not wish to provide service even though it is economically and physically efficient and possible to do so, that does not mean it is not feasible.

The Legislature, and the Commission if so authorized by the Legislature, could have made the willingness or intent of an adjacent public utility to serve a factor to consider, but it did not. While it may be arguable that if a utility did make its position known that it was not willing to serve an area, and could show some rationale for such a position, there might be some basis for the Commission to consider this express lack of intent to serve a factor in determining whether to grant a CCN. However, such facts are not presented here. Not only did the Executive Director and Town make no effort to determine if Mustang SUD lacked the intent or desire to serve the area, it disregarded the contract executed by Mustang's Board of Directors in which Mustang not only made its express intentions known, it contractually committed to serve such area. They further

blatantly ignore Mustang's General Manager's testimony that Mustang stands "ready, willing and able" to serve this area.<sup>84</sup>

The evidence presented by Fishtrap and even the Executive Director's own witnesses is that it is feasible for an adjacent public utility, in this case Mustang, to provide service. Both Mr. Dickey and Ms. Benton-Holguin testified that it was feasible for Fishtrap to obtain service from Mustang. Both Prosper and the ED, however, focus on the excerpt from Mr. Gaines' deposition<sup>85</sup> that it would be for his Board of Directors to decide if Mustang would provide sewer service if Prosper provided the water service to Fishtrap's development. Prosper's Argument asserts that such excerpt "illustrates the uncertainty of Mustang Special Utility District's desire to provide sewer service to Protestant's property or any other property with Prosper's requested service area." The Executive director argument states that such evidences Mustang's Board's "lack of involvement." Both contentions are in error. As previously discussed, Mustang has a contract with Fishtrap to provide sewer service and has taken steps to increase its sewage treatment and transmission capacity rights with UTRWD. Such actions demonstrate neither uncertainty nor lack of involvement. Mr. Gaines' response was to a hypothetical question posed to him by Prosper's counsel. Mr. Gaines' response was essentially that it would be for the Board of Directors, not the General Manager, to determine if any change in the Board's commitment to serve Fishtrap would be warranted by the assumption stated in the hypothetical question. The parties' efforts to suggest uncertainty, indecision

---

<sup>84</sup> Fishtrap Exhibit 25 at p. 10, lines 11 - 19

<sup>85</sup> Fishtrap Exhibit 25 at p. 21, line 23 to p. 22, line 2

or indifference to Mustang's contractual service commitment and intent to serve are sorely misplaced.

The evidence presented regarding feasibility makes this not even a close case on the issue of availability of service from an adjacent retail public utility. Fishtrap's property is a mere 3000 feet from the Upper Trinity East Fork Lift station which transports wastewater to Upper Trinity's Riverbend treatment plant. The East Fork lift station is down hill from Glenbrook Estates, so a gravity line could be used to transport the waste from Glenbrook Estates to the lift station. Moreover, this year the Doe Branch Interceptor running from the District 10 to the Upper Trinity's East Fork lift station will be constructed and pass within 150 feet of Glenbrook Estates, meaning the cost of hooking up Glenbrook Estates to the Upper Trinity lift station is about as minimal, certain and easy as one could imagine, in stark contrast to the myriad uncertainties presented by the Prosper "options."

Obviously, Prosper and the Executive Director do not want to debate the feasibility of Fishtrap obtaining service from Mustang under its agreements with Upper Trinity, so the only response that either Prosper and the Executive Director puts forth is that since Mustang is not protesting this CCN application, it must mean that Mustang does not want to provide service, and if it does not want to provide service, then it is not feasible to obtain service. There are several problems with such an argument. First, a lack of intent to provide service is not the same thing as a lack of feasibility to provide service. Second, the evidence is that Mustang does want to provide service and has expressed that intent by its contract for service to Fishtrap and the General Manager's direct testimony that Mustang is "ready, willing and able to provide service." The

Executive Director's responds that it is not the general manager who must provide this evidence of willingness, but Mustang's Board of Directors. However, such response ignores the testimony of the Executive Director's own witnesses and disregards Mr. Gaines' testimony that it is his job to implement the policies of his Board. Moreover, the Mustang Board of Directors did provide this evidence: first, when it approved the contract<sup>86</sup> and second, when it instructed its staff to increase its capacity entitlement to wastewater service from UTRWD.<sup>87</sup> Why would any party presume that Mustang would breach its contractual obligations to provide service in order to avoid the presentation and analysis of evidence regarding a statutory criteria. While Mustang is no longer a party to these proceedings, Fishtrap certainly is, and there could be no doubt on the part of Mustang that Fishtrap would provide evidence of the contract to the ALJ, because Mustang, in response to Fishtrap's request, provided certified copies of the contract and authorized its General Manager to give deposition testimony on its behalf. If the Executive Director and Prosper want evidence of Mustang's willingness to provide service, it is present in the strongest form available -- a legal, binding contract between Mustang and Fishtrap. It is astonishing that the Executive Director would disregard the testimony of both of its witnesses, the declarations of Mustang's management and the only express contract in existence addressing service to this area to propound the argument that service by Mustang to this disputed area is not feasible. Such a position is patently unsupportable.

---

<sup>86</sup> Dowdall April 20, 2004, Prefiled Testimony, Fishtrap Exhibit 14, Exhibit A

<sup>87</sup> Fishtrap Exhibit 10

**F. Probable Improvement Of Service Or Lowering Of  
Cost To Consumers In The Area<sup>88</sup>**

Both the Town and Executive Director's arguments on this issue are tautological and conclusory. Both assume that, notwithstanding the long-term regional planning, construction of facilities and express contracts to serve this very area, no wastewater "service" exists and therefore Prosper's proposal constitutes an improvement in "service." Neither party attempts to compare the consumer costs associated with furnishing wastewater service under any of the distant service "options" proposed by Prosper with the costs of serving the area by Mustang through UTRWD's interceptor and adjacent transmission and treatment facilities. This statutory criteria requires a comparison of service capabilities and costs, neither of which are provided by the Town or Executive Director to satisfy this legislatively required consideration.

Dr. Harkins' testimony regarding a probable improvement of service or lowering of cost to consumers in the area is contained in her March 19, 2004 prefiled testimony,<sup>89</sup> very slightly modified in her August 20, 2004 prefiled testimony,<sup>90</sup> plus some very limited trial testimony.<sup>91</sup> In her prefiled testimony, as supplemented at the hearing, Dr. Harkins testifies that there will be probable improvement in service because "sewer service will now be available" <sup>92</sup>whereas presently "[S]ewer service is currently

---

<sup>88</sup> §291.102(d)(8) of Title 30, Administrative Code and 13.246(c), Texas Water Code

<sup>89</sup> Applicant Exhibit 106, page 9, lines 5 to 16

<sup>90</sup> Applicant Exhibit 110, page 7, lines 3 to 7

<sup>91</sup> TR p. 418, line 21 to page 421, line 16

<sup>92</sup> Applicant Exhibit 106, page 9, lines 5 and 6

unavailable in the Proposed Service Territory.”<sup>93</sup> Dr. Harkins goes on to state that “a substantial portion of the Proposed Service Territory has already been annexed into the corporate limits of Prosper.”<sup>94</sup> In her trial testimony, Dr. Harkins, when questioned about her opinion on the probability of improvement of service, testified as follows:

Q ... Tell me what your opinion is now about the probable improvement of service or lowering of cost to consumers that would result from the commission granting the Prosper’s CCN amendment application.

A. The probability of improving service would be that service, of course, is going to be – will be provided ...Generally, the service will be better, of course, because it is provided.<sup>95</sup>

The gist of Dr. Harkins’ testimony, both prefiled and at trial, is that there is no service now and when the CCN is granted there will be service, therefore, that will be a probable improvement in service. Such opinion lacks foundation or basis since it speculates as to the nature of service to be provided by Prosper and disregards the service already contracted for this area through Mustang and UTRWD, equating same with “no service.” Such opinion is conclusory and thus of no probative value under Coastal Transport, supra.<sup>96</sup>

In her prefiled testimony, Dr. Harkins did not attempt to address whether there would be a lowering of cost to consumers. She simply testified what Prosper’s current

---

<sup>93</sup> Applicant Exhibit 106, page 9, lines 6 and 7

<sup>94</sup> Applicant Exhibit 106, page 9, lines 8 to 10

<sup>95</sup> TR p. 418, line 21 to page 419, line 8

<sup>96</sup> 136 S.W.3d 227 (Tex Sup Ct 2004)



tap fee for wastewater and monthly rate charges.<sup>97</sup> The March 19, 2006 prefiled testimony in this regard was not amended by her August 20, 2004 prefiled testimony.<sup>98</sup> In her trial testimony, she did not attempt to address whether there would be a lowering of costs:

A ... The lowering of costs to customers is that there was no service to start with.

So it's difficult to compare what the costs were before with what costs will be after service is provided ...<sup>99</sup>

...

Q Has there been an overall cost comparison between all the costs that would be associated with service from another utility such as Mustang SUD and that which would be associated with service from Prosper in this case?

A No. I basically looked at what the monthly charges were. I did not make a cost of service analysis, no.<sup>100</sup>

In effect, Prosper's expert witness did not offer an opinion on the probability of lowering cost or improving service.

Mr. Brian Dickey stated in his prefiled testimony that he was not offering any opinion on the probability of improving service or lowering of cost to consumers in the area, but that Ms. Holguin-Benter would be providing that testimony.<sup>101</sup> The extent of Ms.

---

<sup>97</sup> Applicant's Exhibit 106, page 9, lines 12 to 16

<sup>98</sup> Applicant's Exhibit 110, page 7, lines 3 to 7

<sup>99</sup> Tr. Page 419, line 3 to 7

<sup>100</sup> Tr. Page 421, line 6 to 13

<sup>101</sup> Executive Director Exhibit 8, page 6, lines 17 to 19

Holguin-Benter's testimony regarding improvement consists of two lines in her August 28, 2003 prefiled testimony, Page 5 line 122 to page 6, line 125 where she stated that "[S]ince sewer service is not currently available in the Amended Application Service Area, the availability of sewer service will be an improvement." Her trial testimony was almost verbatim the same.<sup>102</sup> Again, no factual explanation is provided how or when Prosper is to furnish service or how that would compare to service from nearby Mustang which has contracted to serve the area with both existing and proposed facilities. This opinion regarding an improvement of service is wholly conclusory and is not probative.<sup>103</sup>

Ms. Holguin-Benter's entire testimony regarding a lowering of costs consists of one sentence in her August 28, 2003 prefiled testimony to the effect that "since Prosper is currently providing water and sewer service to adjacent areas, Prosper is promoting the Commission's regionalization policy, which may ultimately decrease cost to consumers due to economies of scale."<sup>104</sup> This amounts to no opinion whatsoever and cannot be said to constitute probative evidence that there will be a lowering of costs to the consumers in the proposed service area. Moreover, Ms. Holguin's statement that Prosper is providing service in the adjacent areas is not even true. Prosper provides no service west of its treatment plant which is two miles east of the requested service area. Finally, Ms. Holguin fails to even consider the service that Mustang offers through its contracts with

---

<sup>102</sup> TR p. 1033, lines 3 to 10

<sup>103</sup> Costal Transport, supra

<sup>104</sup> August 28, 2003 Prefiled Testimony of Holguin-Benter, page 6, lines 125 to 128

Upper Trinity Regional Water District. Ms. Holguin-Benter provided no further testimony regarding a lowering of costs or improved service in her trial testimony.

**G. Statutorily Required Finding Of Necessity By The Commission That A Certificate Is Necessary For The Service, Accommodation, Convenience, Or Safety Of The Public<sup>105</sup>**

Neither the Executive Director nor Prosper seriously address the Legislature's express and separate requirement that a certificate be granted only if the Commission finds that the granting of such Certificate is necessary for the service, accommodation, convenience or safety of the public.<sup>106</sup> Prosper argues that since it provided testimony on each of the criteria to be considered under §13.246(c) of the Water Code and §291.102(d) of the Title 30 of the Administrative Code, it must necessarily follow that it has demonstrated the necessity for granting the certificate requested. The Executive Director says even less in its closing argument, dedicating one whole sentence to this requirement of necessity: “[B]ased on all the considerations of the evidence discussed above,” it is recommended that the ALJ and the Commission find it necessary for the service.

Both Prosper and the Executive Director treat this requirement casually and superficially, failing to demonstrate to the ALJ why and how granting a certificate is necessary for the service, accommodation, convenience or safety of the public. And while it is clearly Prosper's burden of proof and persuasion to satisfy this requirement, Fishtrap has shown, based on the evidentiary record, why it is not necessary for the Commission to grant a certificate for the service, accommodation, convenience, or safety

---

<sup>105</sup> §13.246(b) of the Texas Water Code and §291.102(c) of Title 30, Texas Administrative Code; see Prosper's Closing Argument, page 14, and Executive Director's Closing Argument, page 11

<sup>106</sup> *ibid*

of the public, and, in fact, why the granting of a certificate would be harmful to such express public interest concerns.

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).<sup>107</sup> That portion of UTRWD's regional plan for the gravity flow 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.<sup>108</sup> 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.<sup>109</sup>

The initial portion of the interceptor trunkline extending to DCFWSD #10 is scheduled to be constructed this calendar year.<sup>110</sup> 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,<sup>111</sup> has annexed the Fishtrap development property<sup>112</sup> and has entered into

---

<sup>107</sup> See also 30 TAC §291.101(a).

<sup>108</sup> Fishtrap Exhibit No. 9.

<sup>109</sup> Fishtrap Exhibit No. 15.

<sup>110</sup> Fishtrap Exhibit 9, Robert Petitt Prefiled Testimony, page 4, line 18 - 19.

<sup>111</sup> Byron Gaines Deposition, page 10, line 22 to page 11, line 4.

contracts with Fishtrap to serve such development and Fishtrap's costs are expressly certainly detailed therein.<sup>113</sup> As reflected in UTRWD's Executive Director's testimony,<sup>114</sup> 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, there is no "necessity" for the issuance of a CCN to the Town. Service to this area has long been planned and is now being extended through existing UTRWD facilities and an interceptor under construction this year. How can what Prosper proposes to do in this area be "necessary" if it has already been done? The certification sought by the Town would effectively preclude the service to be afforded under UTRWD and Mustang's long-term plans, investments and contractual commitments.<sup>115</sup> 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 UTRWD's regional plan and designed project in which Mustang participates is deficient, or, at a minimum, that the Town's plan and proposed project is

---

<sup>112</sup> Fishtrap Exhibit No. 15, Attachment C.

<sup>113</sup> Fishtrap Exhibit 14, Attachments A and B.

<sup>114</sup> Fishtrap Exhibit 20.

<sup>115</sup> 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.

superior in that it can provide wastewater service to the area more timely, more feasibly, more economically, more efficiently, 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).

### CONCLUSION

The statutory criteria required for Commission consideration and action in this case are straight forward. Prosper's approach to such criteria, however, has been to largely avoid them or ignore critical facts required to be considered by such criteria. The Executive Director does likewise. In order to show that "service" to the proposed area is inadequate, that the additional service proposed by the Town is needed and that service from adjacent utilities is not feasible, Prosper and the Executive Director ignored the long-term efforts of regional wastewater service planning groups which are now being implemented by the UTRWD for the area's Elm Creek and Doe Branch Basins.<sup>116</sup> As a participant in these efforts, Mustang has secured contractual entitlements to wastewater service with UTRWD, has contracted to serve Fishtrap and is UTRWD's retail service agent for the remaining area that may be served from the Doe Branch Interceptor. Only by ignoring such "service" availability, express contractual commitments, and feasibility of service from Mustang, can Prosper predicate the illusion that the granting of its requested CCN is "necessary" and will not be harmful to adjacent utilities and will constitute an improvement in service or consumer cost. Fortunately, the Commission is

---

<sup>116</sup> Fishtrap Exhibit 5; Fishtrap Exhibit 9, Attachment RP-3

not an Ostrich with its head in the sand. It recognizes the value of regional planning and the efforts required to implement same. It recognizes that "service" is a broad encompassing term under its definition and that through Mustang's efforts, such service has already been extended to this area. The necessity for the issuance of a certificate of convenience and necessity is dependent upon local needs. When these local needs are scheduled to be met without the issuance of a CCN, such a CCN as proposed by Prosper is not necessary. Where this issuance of a CCN will preclude use of available services and facilities long planned for an area and will require the duplication of new investment in facilities by the newly certificated utility and the stranding of utility investments made by others, such a certificate is not necessary for the service, accommodation, convenience or safety of the public. Prosper should be allowed a certificate for those tracts which it has annexed east of the Mahard property. Further west, however, such area should remain uncertificated to honor the wishes of the property owners who have not requested service and through whose very properties the UTRWD's wastewater facilities are now being constructed to serve this area.

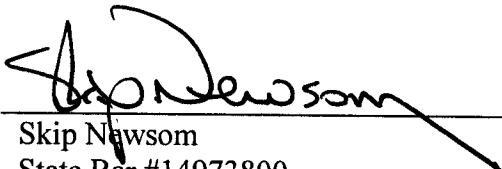
WHEREFORE PREMISES CONSIDERED, Fishtrap Properties prays that the Commission deny the entirety of the service area requested by the Town for certification in this proceeding and that the area proposed for certification to the Town be modified and the majority of territory proposed thereby excluded as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

Respectfully submitted,

Skip Newsom  
3724 Jefferson Street, Suite 210  
Austin, Texas 78731  
Telephone: 512/477-4121

Fax: 512/477-2860

Law Office of Sal Levatino  
1524 South IH-35, Suite 234  
Austin, Texas 78704  
Phone: (512) 474-4462  
Fax: (512) 482-0051

By:   
Skip Newsom  
State Bar #14973800

ATTORNEYS FOR FISHTRAP PROPERTIES,  
LLP AND GLENBROOK WATER SUPPLY



**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 1<sup>st</sup> class mail on the 30th day of March, 2005.

Kerry Russell  
Russell, Moorman & Rodriguez, LLP  
102 W. Morrow, Suite 103  
Georgetown, Texas 78626  
FAX 1-512-930-7744

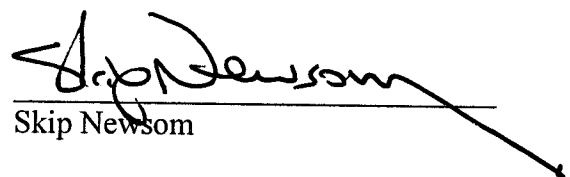
James D. Parker  
Environmental Law Division  
TCEQ  
P.O. Box 13087, MC 173  
Austin, Texas 78711-3087  
FAX 239-0606

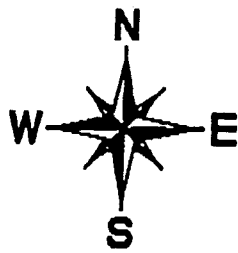
Blas Coy, Jr.  
Public Interest Counsel  
TCEQ  
P.O. Box 13087, MC 103  
Austin, Texas 78711-3087  
FAX 239-6377

TCEQ Docket Clerk  
Office of the Chief Clerk  
TCEQ  
P.O. Box 13087, MC 105  
Austin, Texas 78711-3087  
FAX 239-3311

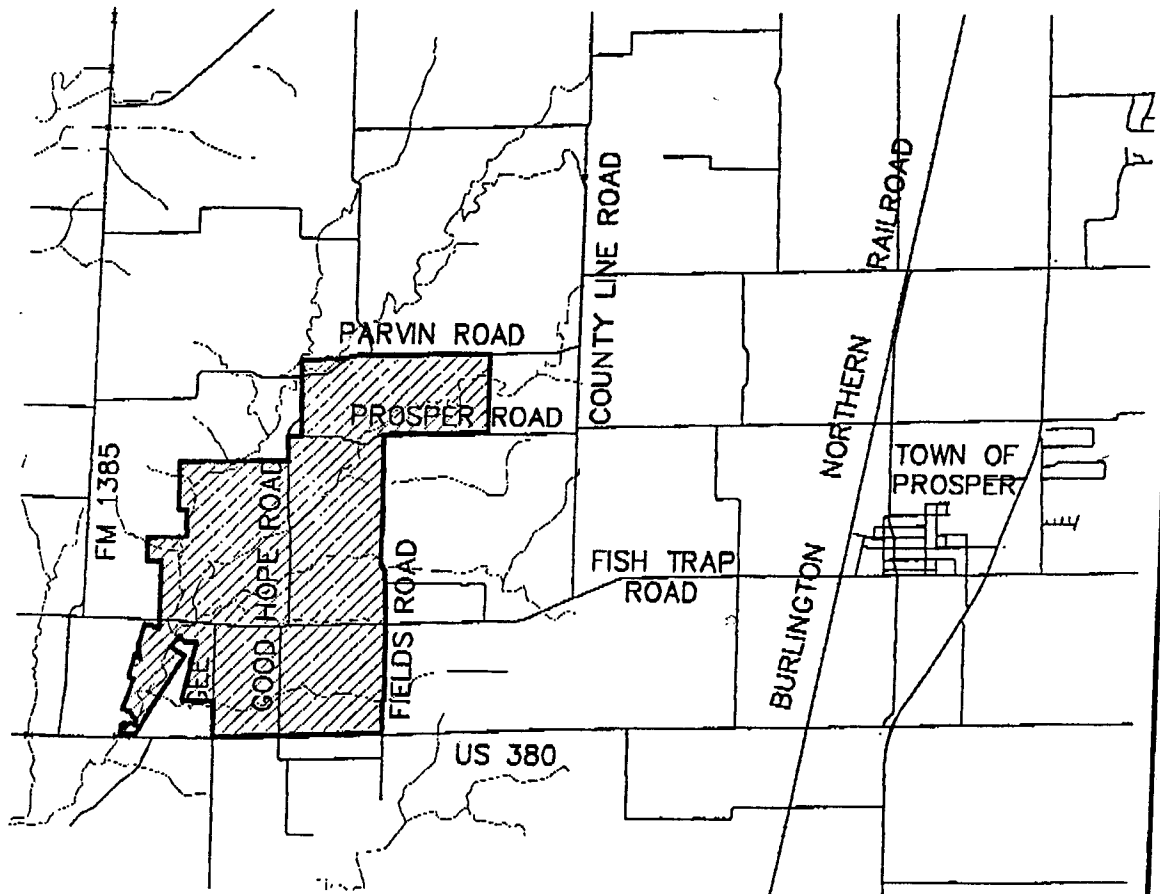
Judge James Norman  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025  
Fax 475-4994

Holly Wise, SOAH Docket Clerk  
State Office of Administrative  
Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025  
Fax 475-4994

  
Skip Newsom



NOT TO SCALE



**LOCATION MAP  
2151 ACRE MAHARD PROPERTY  
DENTON COUNTY, TEXAS**