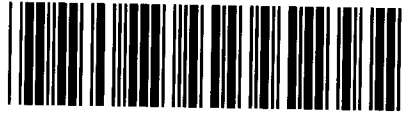




Control Number: 43781



Item Number: 148

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

FISHER & NEWSOM, P.C.

ATTORNEYS AT LAW

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PUBLIC UTILITY COMMISSION
FILING CLERK

Skip Newsom
Board Certified Administrative Law
Texas Board of Legal Specialization

November 30, 2004

Via Fax No. 512-936-0730

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 Motion to File Deposition
Testimony of Mustang Special Utility District Witnesses, pursuant to your Order No. 37.

Sincerely,


Skip Newsom

SN/jam

Enclosures

cc: service list

148

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

APPLICATION OF THE TOWN OF
PROSPER TO AMEND SEWER
CERTIFICATE OF CONVENIENCE
AND NECESSITY NO. 20888 IN
DENTON COUNTY, APPLICATION
NO. 34004-C

§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**MOTION TO FILE DEPOSITION TESTIMONY OF
MUSTANG SPECIAL UTILITY DISTRICT WITNESSES**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE;

COMES NOW Fishtrap Properties, LLC pursuant to Order No. 37 dated November 30, 2004, and files this Motion to File Deposition Testimony of Mustang Special Utility District Witnesses.

**I
INTRODUCTION TO MOTION**

This motion is prompted by Order No. 37 and the SOAH teleconference hearing conducted on November 29, 2004 in which the Town of Prosper expressed its opposition to Fishtrap's proposed presentation of the deposition testimonies and related exhibits of Mustang Special Utility District Engineer, Mark Mihm, P.E. of HDR Engineering, Inc., and new District General Manager, Bryon Gaines, conducted on November 19, 2004. Both individuals are witnesses over whom Fishtrap representatives have no control. Fishtrap proposes to offer such deposition testimony to both satisfy certain critical criteria as established by Texas Water Code §13.246(c) and Commission Rule 291.102 which the Commission is required to consider in its determination of whether a CCN is to be granted to any area sought to be certificated, and to respond to the Executive Director's November 19, 2004 supplemental pre-filed testimony to the effect that no changes or developments have occurred since the filing of the Executive Director's original pre-filed testimony on August 28,

2003, which would affect: the need for certificated service in the requested area (Rule 241.102(c)), the adequacy of service currently provided to the requested area (Rule 291.102(d)(1), the need for additional service in the requested area (Rule 291.102(d)(2)), the effect of the granting of a certificate upon a retail public utility of the same kind already serving the proximate area (Rule 291.102(d)(3)), the feasibility of obtaining sewer service for the effected area from an adjacent retail public utility (Rule 291.102(d)(5)), environmental integrity (Rule 291.102(d)(7)), and the probable improvement of service and/or lowering of cost to consumers in the area resulting from the granting of the certificate (Rule 291.102(d)(8)).

II.

DEPOSITION TESTIMONY AND EVIDENCE TO BE SUBMITTED

A. Deposition Testimony of Mark Mihm, P.E. of November 19, 2004 and pre-filed testimony of Mark Mihm filed with SOAH in this docket on April 20, 2004.

Notice of the deposition of Mark Mihm conducted on November 19, 2004 was provided to all parties on November 11, 2004. No parties objected to the taking of such deposition and the Town of Prosper fully participated in the taking of such deposition and cross-examined the witness. During the course of such deposition, Mr. Mihm adopted his pre-filed testimony and accompanying exhibits of April 20, 2004, originally filed on behalf of Mustang SUD, as testimony to be considered by the Commission's in connection with the Commission consideration of the Town of Prosper's sewer CCN in this docket, notwithstanding the withdrawal of Mustang SUD as a party in this docket. Such testimony addresses forecasted demographical information for the requested area, including population estimates and land use projections, forecasts water and wastewater demands in the requested area, and discusses the regional wastewater service plan developed for such area by the Upper Trinity Regional Water District (UTRWD) to which Mustang SUD is a subscribed member. Such plan includes the existing Riverbend regional wastewater treatment plant and Doe

Branch lift station and future Doe Branch wastewater treatment plant site currently located and serving the area immediately adjacent to Fishtrap's property within the area requested by Prosper and a long planned and fully designed gravity flow trunk main interceptor running through the requested area northeast up Doe Branch to Denton County Freshwater Supply District No. 10 ("DCFWS District No. 10") for which easements have been secured and for which construction is expected to commence and be completed in calendar year 2005. The testimony of Mr. Mihm addresses the oversized nature of the interceptor designed to serve additional developments, such as Fishtrap's Glenbrook Estates, within the area requested by the Town of Prosper and that the certification requested by the Town, if granted, would result in an underutilization of such regional facilities and a stranded investment in such unutilized capacity which would increase the costs of participants such as Mustang SUD in the regional project.

Mr. Mihm's testimony also addresses the Town of Prosper's proposed CCN facilities plan, as modified by the Town's post CCN filing proposal, to transmit wastewater from the requested area to a future wastewater treatment plant to be designed and constructed by the North Texas Municipal Water District ("NTMWD") in the Panther Creek drainage basin and compares the two plans from the standpoint of operational efficiency, environmental integrity and responsible allocation of fiscal resources. Mr. Mihm further discussed the volume of wastewater treatment capacity to which Mustang SUD is subscribed for Fishtrap's express benefit and action taken by the Mustang Board of Directors as recently as October 18, 2004 to increase such subscribed capacity, again for the benefit of Fishtrap's Glenbrook Estates Development.

Not Jason Pierce

B. Deposition Testimony of Byron Gaines of November 19, 2004 General Manager of Mustang SUD.

Notice of the November 19, 2004 deposition of Byron Gaines was served on the parties in this docket on November 11, 2004. No party objected to the conduct of such deposition and the Town of Prosper appeared and fully participated in the taking of such deposition and conducted cross-examination of the witness. At his deposition Mr. Gains testified that he has served in a water and wastewater utility management capacity for over thirty years, that he began his employment with Mustang SUD as General Manager shortly following Mustang SUD's withdrawal as a party in this docket in September 2004, and that in the two months of his employment with Mustang he is still learning a great deal about the District's operations and service relationships. Mr. Gaines testified that he is Mustang's representative on the Board of Directors of UTRWD, is the custodian of Mustang SUD records and is responsible for executing and administering the policies set forth by Mustang's Board of Directors in the furtherance of retail water and sewer service. Mr. Gaines testified that Mustang withdrew both its CCN application and as a party to this docket due to a temporary lack of knowledgeable personnel with the time and ability to further Mustang's continued and required participation in this Docket. Jason Pierce, the District's former General Manager who had pre-filed testimony on behalf of the District, had terminated his employment with the District several months earlier and that the District's Board President was heavily engaged in his nation-wide private consulting business and did not have the time to devote to sponsoring Mustang's party status or CCN application for the area in dispute. Hence the District was left with no direct representative to speak on behalf of the District or otherwise advise and assist the Board of Directors and District counsel in the contested proceeding and had to withdraw. Mr. Gains further testified that the Fishtrap property lies within the annexed boundaries of Mustang SUD, that Mustang has contracts

to serve the Fishtrap property with both retail water and wastewater service for which, in his opinion, Mustang is not required to secure a CCN, that Mustang is a participant in UTRWD regional water and wastewater projects, including those projects designed to serve the area requested by the Town of Prosper in this proceeding, and that Mustang remains ready, willing and able to serve Fishtrap Property's Glenbook Estates development and other properties readily serviceable by the UTRWD's gravity flow interceptor to be constructed along Doe Branch within the area requested by the Town. Mr. Gaines further testified that neither Mustang's withdrawal of its CCN application nor its withdrawal as a party in these proceedings should be construed as a lack of desire, will, ability or capacity to serve either the Fishtrap development or any other area within the Doe Branch drainage basin requested for sewer CCN certification by the Town of Prosper. Indeed, Mr. Gaines attaches a copy of Mustang Board's October 18, 2004 meeting minutes directing the subscription of additional treatment capacity. Mr. Gains further testified that the granting of the Town's CCN application would result in stranded costs in capacity designed to be incorporated into the UTRWD's Doe Branch regional interceptor and that such capacity would result in increased costs to Mustang and other UTRWD Doe Branch regional wastewater project participants. Mr. Gains further testified that granting of the CCN application filed by Prosper would adversely affect the regional planning efforts of UTRWD and its project participants.

**III.
RESPONSE TO ANTICIPATED OPPOSITION
TO DEPOSITION SUBMITTAL**

Prosper appears to contend that the submittal of the aforesaid deposition testimony constitutes a surprise and that Fishtrap should have included the nature of the testimony offered with its pre-filed submittal on September 23, 2004. The Executive Director has indicated that it may have to revise its pre-filed direct case if the deposition testimony is presented.

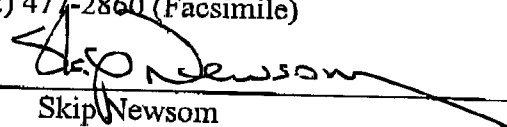
Fishtrap submits that the testimony at issue is not a surprise. Indeed, Fishtrap notified the ALJ and all parties of its intent to conduct their depositions and rely upon same and Mustang's pre-filed testimony at the time of its September 23, 2004 filing. See Exhibit A correspondence from Sal Levatino to Judge Norman. The testimony of Mark Mihm has been on file and of record since April 2004. Because Robert Petitt, Fishtrap's engineer, is also Denton County Fresh Water Supply District No. 10's engineer, and District 10's developer (Huffines/Binary Investments) and Prosper entered into an agreement whereby District 10 would not oppose the remainder of Prosper's CCN application, Mr. Petitt was reluctant to adopt, as his own testimony, all facets of Mr. Mihm's pre-filed testimony due to a conscientious concern that same would be considered by Prosper as District 10 opposition. Such reluctance, however, was only expressed by Mr. Petitt at the time that his pre-filed testimony was due to be filed and could not be timely remedied. Moreover, Mustang's additional subscription of UTRWD treatment capacity on behalf of Fishtrap in mid-October could not have been known at the time of filing of Fishtrap's pre-filed testimony in September. Furthermore, Mr. Mihm's testimony is directly responsive to the Executive Director's pre-filed testimony as supplemented on November 19, 2004. Fishtrap could not have envisioned that the Executive Director would disregard Mr. Mihm's pre-filed testimony as to available regional wastewater service capacity being made available to Mustang through the UTRWD for this same area and the impact which the granting of Prosper's application would have upon wastewater service efficiency, duplication of facilities, environmental impact, consumer cost, regionalized wastewater service for the area, and Mustang costs. Similarly, the Executive Director's testimony appears to disregard the direct and near term availability of service from Mustang to this requested area as a direct consequence of Mustang's withdrawal from the case. Consequently, Mr. Gains' testimony is essential to dissuade any inference that Mustang's withdrawal is to be regarded as any indication

that it is no longer ready, willing or able to serve the requested area since it already has in place express contracts to provide such service and does not need a CCN awarded to it in order to provide such service. Such testimony could not have been secured from Mr. Gains at the time of Fishtrap's supplemental pre-filing date of September 23, 2004, because Mr. Gains had not been employed by Mustang long enough to be in any way familiar with any of the issues involved in this dispute.

Fishtrap has no objection to the Executive Director reviewing her testimony in light of this deposition testimony and indeed, her witnesses have expressly reserved such right in their November 29, 2004 supplemental filing. Prosper would have the ALJ treat his pre-filed testimony scheduling requirement as a preclusion of the submittal of deposition testimony at time of the hearing. Such a contention raises serious due process issues as it relates to Fishtrap's ability to respond to testimony of parties such as the Executive Director who present their testimony only after Fishtrap has submitted its own testimony. Moreover, an administrative hearing requirement for pre-filed testimony is a requirement of convenience and efficient utilization of hearing time. It is not a modification of the Texas Rules of Evidence or Rules of Civil Procedure which expressly allow for the submission of deposition testimony where notice of same is afforded and the parties have been given the opportunity to cross examine the witnesses deposed. It should also be recognized that the deposition testimony sought to be submitted is the testimony of witnesses of a withdrawn party whose withdrawal came as a complete surprise to Fishtrap. The timing of such withdrawal immediately prior to a testimony filing date without advance notice severely prejudices any party relying upon that withdrawn party's prior testimony unless such testimony can be effectively preserved through deposition as allowed by Texas Rules.

WHEREFORE, premises considered, Fishtrap Properties respectfully requests that the foregoing Motion be granted.

Respectfully submitted,
FISHER & NEWSOM, P.C.
3724 Jefferson Street, Suite 210
Austin, Texas 78731
(512) 477-4121
(512) 477-2860 (Facsimile)

By: 
Skip Newsom
State Bar No. 14973800

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**ATTORNEYS FOR FISHTRAP
PROPERTIES, LLP**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was delivered via facsimile and/or regular mail on this 30th day of November, 2004 to the following parties of record:

Jeff Kirschbaum
Texas Commission on Environmental
Quality
Environmental Law Division
MC-173
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(512) 239-0606 Facsimile

Kerry E. Russell and Art Rodriguez
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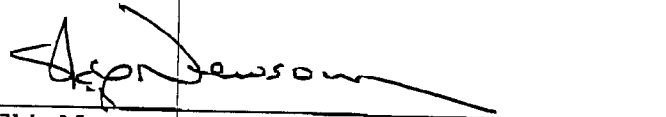
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Honorable James W. Norman
SOAH ALJ
State Office of Administrative Hearings
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(512) 475-4994 Facsimile

Holly Wise, SOAH Docket Clerk
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September 23, 2004

VIA HAND DELIVERY

The Honorable James W. Norman
Administrative Law Judge
State Office of Administrative Hearings
William Clements Building, Suite 504
300 W. 15th Street
Austin, Texas 78701

2004 SEP 23 PM 2:38
CHIEF CLERKS OFFICE

Re: SOAH Docket No. 582-03-1994, TCEQ Docket No. 2002-1250-UCR:
Application of the Town of Prosper to Amend Sewer Certificate of
Convenience and Necessity No. 20888 in Denton County, Application No.
34004-C

Dear Judge Norman:

Enclosed please find the following for Fishtrap Properties, LLP:

- (1) Exhibit List
- (2) Supplemental Prefiled Testimony and Exhibits of John S. Dowdall
- (3) Prefiled Testimony and Exhibits of Robert D. Pettit, Jr., P.E.

It is Fishtrap's intention to call Jason Pierce and Mark Mihms as witnesses, either in person or by deposition, and to rely on their respective prefiled testimony and exhibits previously filed with the court and served on all parties. Fishtrap is providing copies of the enclosed to all parties of record indicated on the attached Certificate of Service.

Respectfully Yours,

Sal Levatino
Sal Levatino

SL/mgl
Enclosures
cc: Service List
(w/Enclosures)



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on the following persons by federal express or hand delivery on the 23rd of September, 2003.


Judge James Norman
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
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Sal Levatino

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FACSIMILE TRANSMITTAL

TO	TELEPHONE NUMBER	FAX NUMBER
Hon. James W. Norman		936-0730
SOAH Docket Clerk		475-4994
TCEQ Docket Clerk		239-3311
Jeff Kirschbaum		239-0606
Blas Coy		239-6377
Kerry Russell		930-7742
Sal Levatino		482-0051

FROM: Skip Newsom
skipnewsom@fnlawtx.com

DATE: November 30, 2004

SUBJECT: *Applications of the Town of Prosper to Amend Sewer CCN No. 20888*

CLIENT/MATTER: Fishtrap Properties **CODE:** 204

Number of pages, including this cover sheet: 13

IF PROBLEMS ARE ENCOUNTERED IN RECEIVING THIS TRANSMISSION, PLEASE CALL (512) 477-4121 AS SOON AS POSSIBLE.

Comments/Special Instructions: See attached correspondence from Skip Newsom, along with Motion to File Deposition Testimony of Mustang SUD Witnesses for filing.

CONFIDENTIALITY NOTICE

The information contained in this facsimile transmittal and the matters transmitted hereby are confidential and/or privileged and are intended for the use of the individual or entity named below. If the reader of this message is not the intended recipient or an employee or representative responsible to deliver it to the intended recipient, you are hereby notified that any review, dissemination or copying of this communication or the matters transmitted hereby are strictly prohibited. If you have received this fax in error, please notify us by telephone immediately and return the original message to us at the above address via the U.S. Postal Service. Thank you.