

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 7th day of December, 2004 to the following parties of record:

Jeff Kirschbaum
Texas Commission on Environmental
Quality
Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0606 Facsimile

Kerry E. Russell and Art Rodriguez
Russell, Moorman & Rodriguez, L.L.P.
102 West Morrow, Suite 103
Georgetown, Texas 78626
(512) 930-7742 Facsimile

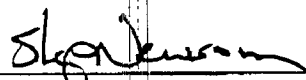
Honorable James W. Norman
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
(512) 475-4994 Facsimile

Holly Wise, SOAH Docket Clerk
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
(512) 475-4994 Facsimile

Sal Levatino
Law Office of Sal Levatino
1524 South IH-35, Suite 234
Austin, Texas 78704
(512) 482-0051 Facsimile

Blas Coy, Attorney
Office of the Public Interest Counsel
Texas Commission on
Environmental Quality
MC-103, P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-6377 Facsimile

LaDonna Castanuela, Chief Clerk
Texas Commission on Environmental
Quality
Office of the Chief Clerk
MC-105, P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3311 Facsimile



Skip Newsom

FISHER & NEWSOM, P.C.

ATTORNEYS AT LAW

3724 JEFFERSON STREET, SUITE 210
AUSTIN, TEXAS 78731
(512) 477-4121
FAX (512) 477-2860**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:** December 9, 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:** 9

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 Reconsider Fishtrap's Motion to File the Depositions of Mark S. Mihm, P.E. and Byron Gaines for filing in this matter.**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.

FISHER & 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

December 9, 2004

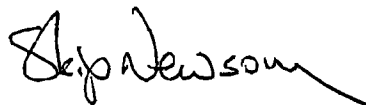
The Honorable James W. Norman
Administrative Law Judge
State Office of Administrative Hearings
300 West Fifteenth Street, Room 502
Austin, Texas 78701

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 please find Fishtrap's Motion to Reconsider Fishtrap's Motion to File the Depositions of Mark S. Mihm, P.E. and Byron Gaines for filing in this matter.

Sincerely,



Skip Newsom

SN/jam

Enclosures

cc: Service List

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

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**MOTION TO RECONSIDER FISHTRAP'S MOTION TO FILE
THE DEPOSITIONS OF MARK S. MIHM, P.E. AND BYRON GAINES**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Per Order No. 38, Your Honor denied Fishtrap's Motion to submit the depositions of Mark S. Mihm, P.E. and Byron Gaines taken on November 19, 2004 and within the deposition period allowed in this proceeding. By cover letter transmitting Fishtrap's prefiled testimony of September 23, 2004, Mr. Levitino adopted the testimony of Mr. Mihm and the former General Manager of Mustang SUD, Mr. Jason Pierce, indicating that

It is Fishtrap's intention to call Jason Pierce and Mark Mihms (sic) as witnesses, either in person or by deposition, and to rely on their respective testimony and exhibits previously filed with the court and served on all parties.

Attached hereto is the affidavit of Mark S. Mihm indicating his unavailability to appear as a witness due to his surgery scheduled to be performed on December 10, 2004 and medically mandated recuperation period the week of the hearing.

It is Fishtrap's continued intention to call Mr. Pierce for the presentation of his prior prefiled testimony. However, because Mr. Pierce is no longer employed as Mustang SUD's General Manager, he is unable to address matters arising since the pre-filing of his testimony from the

perspective of Mustang SUD. Mr. Byron Gaines is the current Mustang SUD Manager and is the only person within the Mustang SUD's employ who can address such recent matters.

Mr. Byron Gaines, Mr. Pierce's successor, has executed an affidavit also attached hereto, indicating that because his employment as General Manager of Mustang SUD did not begin until September 13, 2004, he would not have been able to knowledgeably respond to questions presented to him in his November 19, 2004 deposition on or before September 23, 2004, Fishtrap's supplemental prefilng date, relating to Mustang SUD's operations, capabilities or service intentions and commitment respecting the service area in dispute or regarding Mustang SUD's relationships with Upper Trinity Regional Water District and Fishtrap Properties because he then would have had insufficient knowledge of and experience with such matters at that time.

Hence, Fishtrap submits that it has demonstrated good cause for the submission of such deposition testimony of Mr. Mihm and Mr. Gaines, and submits that without such testimony, Fishtrap's effort to demonstrate the feasibility of alternative service to its property, its current availability and the lack of need for the certificate requested by Prosper will be impaired. E-transcript copies of each of these depositions have been filed with the Court pending the return of the originals from the Court Reporter.

WHEREFORE, premises considered, Fishtrap Properties prays that the Motion to submit the deposition testimonies of Mark S. Mihm and Byron Gaines on behalf of Fishtrap Properties, L.L.C. be favorably reconsidered and 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

Skip Newsom

State Bar No. 14973800

SAL LEVATINO

1524 South IH-35, Suite 234

Austin, Texas 78704

(512) 474-4462

(512) 482-0051 (Facsimile)

**ATTORNEYS FOR FISHTRAP
PROPERTIES, L.L.P.**

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 9th day of December, 2004 to the following parties of record:

Jeff Kirschbaum
Texas Commission on Environmental
Quality
Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0606 Facsimile

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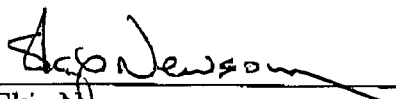
Blas Coy, Attorney
Texas Commission on Environmental
Quality
Office of the Public Interest Counsel
MC-103
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-6377 Facsimile

Sal Levatino
Law Office of Sal Levatino
1524 South IH-35, Suite 234
Austin, Texas 78704
(512) 482-0051 Facsimile

LaDonna Castanuela, Chief Clerk
Texas Commission on Environmental
Quality
Office of the Chief Clerk
MC-105
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3311 Facsimile

Honorable James W. Norman
SOAH ALJ
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
(512) 475-4994 Facsimile

Holly Wise, SOAH Docket Clerk
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
(512) 475-4994 Facsimile


Skip Newsom

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

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

AFFIDAVIT OF MARK S. MIHM

STATE OF TEXAS

§
§
§

COUNTY OF DALLAS

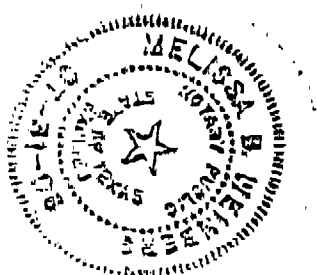
BEFORE ME, the undersigned authority, personally appeared Mark S. Mihm, who, being by me duly sworn, deposed and said:

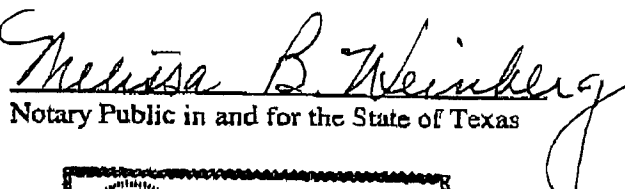
1. "My name is Mark S. Mihm. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated herein.

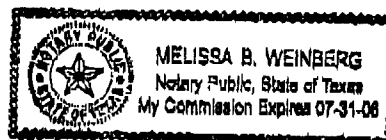
2. I am unable to appear at the evidentiary hearing scheduled to commence on December 13, 2004 in support of my testimony previously filed on behalf of Mustang Special Utility District in this proceeding for the reason that I am undergoing surgery on December 10, 2004 and my medically ordered recuperation period the week of the evidentiary hearing commencing on December 13, 2004 will preclude my travel and appearance in Austin, Texas.


Mark S. Mihm, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on this 9th day of December, 2004, to certify which witness my hand and official seal.




Notary Public in and for the State of Texas



SOAH DOCKET No. 582-03-1994
TCEQ DOCKET NO. 2002-1350-UCRAPPLICATION OF THE TOWN OF
PROSPER TO AMEND SEWER
CERTIFICATE OF CONVENIENCE
AND NECESSITY NO. 20888 IN
DENTON COUNTY, APPLICATION
NO. 34004-C§
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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

AFFIDAVIT OF BYRON GAINES

STATE OF TEXAS

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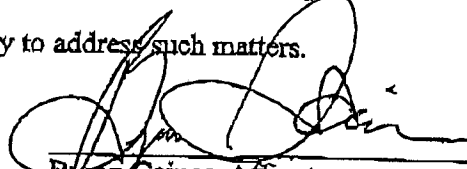
COUNTY OF COLLIN

BEFORE ME, the undersigned authority, personally appeared Byron Gaines, who, being by me duly sworn, deposed and said:

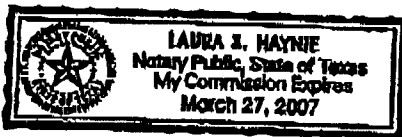
1. "My name is Byron Gaines. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated herein.


2. I assumed my employment duties as General Manager of Mustang Special Utility District on September 13, 2004. It has been brought to my attention that my deposition taken in these proceedings on November 19, 2004 will not be admitted as part of Fishtrap Properties, L.L.C.'s direct case because it was not filed as part of Fishtrap's prefiled testimony due on September 23, 2004. Had I been asked any of the questions in my deposition of November 19, 2004 at or prior to Fishtrap's pre-filing date of September 23, 2004 relating to the water and wastewater service operations, capabilities or intentions of Mustang Special Utility District to serve Fishtrap Properties or any other area requested for certification by the Town of Prosper in this proceeding, or any of the deposition questions concerning the relationships between Mustang Special Utility District, the Upper Trinity Regional Water District and Fishtrap Properties L.L.C., I would not have been able to answer them as I did in my deposition because I had not then been

employed with Mustang Special Utilities District for a sufficient period of time to then knowledgeably respond. I am also the only person within the employ of Mustang Special Utility District with the knowledge and authority to address such matters.


Byron Gaines, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on this ____ day of December, 2004,
to certify which witness my hand and official seal.




Notary Public in and for the State of Texas

Robert J. Huston, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Kathleen Hartnett White, *Commissioner*
Margaret Hoffman, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 9, 2003

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

RE: Application of Town of Prosper to Purchase Facilities and Transfer Water Certificate of Convenience and Necessity No. 11863 and to Obtain a Sewer Certificate of Convenience and Necessity (CCN) in Harris County; SOAH Docket No. 582-03-1994; TCEQ Docket No. 2002-1250-UCR

Dear Judge Norman:

Enclosed is the Executive Director's Objection to Fishtrap Properties, LLP, and Glenbrook Water Supply's Exhibit List and Prefiled Testimony.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lara Nehman".

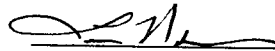
Lara Nehman
Staff Attorney
Environmental Law Division

cc: Mailing List, without Attachments

Mailing List
The Town of Prosper
SOAH Docket No. 582-03-1994
TCEQ Docket No. 2002-1250-UCR

Certificate of Service

I hereby certify that on this 9th day of September, 2003, a copy of the attached documents with exhibits were sent by mail to Judge Norman and without exhibits, sent by facsimile, First Class Mail, and intra-agency/inter-agency mail to the persons on this mailing list.



Lara Nehman
Staff Attorney
Environmental Law Division
Texas Commission on Environmental Quality

Kerry E. Russell
Russell, Moorman & Rodriguez, L.L.P.
102 West Morrow, Suite 103
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Representing Town of Prosper

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1524 South IH-35, Suite 234
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Tel. 512/477-7161
Fax 512/476-1676

Representing Fish Trap Properties, L.L.P. and
Glenbrook Water Supply

Lara Nehman, Staff Attorney
Sheridan Gilkerson, Staff Attorney
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Austin, Texas 78711-3087
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Representing the Executive Director of the Texas
Commission on Environmental Quality

TOWN OF PROSPER
SOAH DOCKET NUMBER: 582-03-1994
TCEQ DOCKET NUMBER: 2002-1250-UCR

PAGE 2

Tammy Holguin-Benter
Brian Dickey
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Water Utilities Division - MC 153
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James W. Norman, Administrative Law Judge
State Office of Administrative Hearings
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Blas J. Coy, Attorney
Public Interest Counsel - MC -103
Texas Commission on Environmental Quality
P.O. Box 13087
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Fax 512/239-6377

Docket Clerk
Office of Chief Clerk -MC - 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
Ph 512/239-3300
Fax 512/239-3311

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 (CCN) NO. 20888 IN
DENTON COUNTY, APPLICATION
NO. 34004-C

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

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**EXECUTIVE DIRECTOR'S OBJECTION TO FISHTRAP
PROPERTIES, LLP, AND GLENBROOK WATER SUPPLY'S
EXHIBIT LIST AND PREFILED TESTIMONY**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission") files the following Objection to Fishtrap Properties, LLP, and Glenbrook Water Supply's ("Fishtrap and Glenbrook's") Exhibit List and Prefiled Testimony.

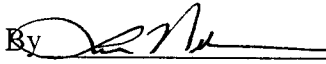
On August 14, 2003, Fishtrap and Glenbrook filed as prefiled testimony excerpts of deposition testimony plus selected exhibits to the deposition testimony of the following persons: Thomas E. Taylor, James Travis Roberts, Jr., Jennifer D. Finley, Edward S. McRoy and William Albert Little, III. The Executive Director objects to the introduction of these deposition exhibits without admitting the remainder of the deposition transcripts based upon Texas Rules of Evidence 106 and 107. Fishtrap and Glenbrook have selected only some of the pages of these deposition transcripts to enter into evidence and the remainder of the documents should be admitted so that the Administrative Law Judge may consider the entire testimony of these witnesses at the same time as the excerpts. As set forth in Texas Rules of Evidence 106 and 107, these rules apply to deposition testimony. The Executive Director has enclosed as exhibits the entire deposition transcripts to the Administrative Law Judge, but is not sending them to the other parties because they are voluminous and because the other parties already have copies. Fishtrap and Glenbrook provided copies of these deposition transcripts to the Executive Director, however, the Executive Director did not receive a copy of the transcript of William Albert Little, III's deposition testimony.

Respectfully Submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Margaret Hoffman
Executive Director

Stephanie Bergeron, Director
Environmental Law Division

By 

Lara Nehman
Staff Attorney
Environmental Law Division
State Bar of Texas No. 00794358

Sheridan L. Gilkerson
Staff Attorney
Environmental Law Division
State Bar of Texas No. 24034458

P.O. Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-0600 Telephone
(512) 239-0606 Facsimile

REPRESENTING THE
EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 2, 2004

CHIEF CLERK'S OFFICE

2004 DEC -2 PM 4: 07

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Ms. LaDonna Castañuela
Texas Commission of Environmental Quality
Office of Chief Clerk, MC 105
P.O. Box 13087
Austin, TX 78711-3087

Re: SOAH Docket No. 582-03-1994; TCEQ Docket No. 2002-1350-UCR; In the Matter Of
The Application of the Town of Prosper to Amend Sewer Certificate of Convenience
and Necessity No. 20888 In Denton County, Application No. 34004-C

Dear Ms. Castañuela:

Enclosed please find the *Executive Director's Response to Fishtrap Properties, L.L.P.'s
Motion to File Deposition Testimony of Mustang Special Utility District Witnesses* in the above-
referenced matter.

Sincerely,

A handwritten signature in cursive script that reads "Geoff Kirshbaum".

Geoff Kirshbaum
Staff Attorney
Environmental Law Division

Enclosure

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

APPLICATIONS OF THE TOWN OF
PROSPER TO AMEND ITS SEWER
CERTIFICATE OF CONVENIENCE AND
NECESSITY (CCN) NO. 20888 IN
DENTON COUNTY, TEXAS,
APPLICATION NO. 34004-C

§ BEFORE THE STATE OFFICE
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§ OF
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§ ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

2004 DEC -2 PM 4:08

TEV
CONFIDENTIAL
OFFICIAL

**EXECUTIVE DIRECTOR'S RESPONSE TO FISHTRAP PROPERTIES, L.L.P.'S
MOTION TO FILE DEPOSITION TESTIMONY OF MUSTANG SPECIAL UTILITY
DISTRICT WITNESSES**

TO THE HONORABLE JAMES W. NORMAN, ADMINISTRATIVE LAW JUDGE OF THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS:

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), by and through a representative of the Commission's Environmental Law Division, and files the Executive Director's Response to Fishtrap Properties, L.L.P.'s ("Fishtrap") Motion to File Deposition Testimony of Mustang Special Utility District ("Mustang SUD" or "District") Witnesses. The Executive Director opposes Fishtrap's motion for the following reasons.

I. INTRODUCTION

On November 29, 2004, the Honorable Administrative Law Judge ("ALJ") held a prehearing conference by telephone in this matter during which Fishtrap expressed its desire to offer deposition testimony of Mustang SUD witnesses as part of its direct case in this contested case hearing in which it is protesting a sewer Certificate of Convenience and Necessity ("CCN") amendment application filed by Town of Prosper ("Prosper"). The ALJ requested briefs on the matter from the parties. On November 30, 2004, Fishtrap filed a motion explaining its request to file deposition testimony of Mustang SUD witnesses.

Fishtrap's motion states that Fishtrap proposes to offer its deposition testimony for the following reasons:

- (1) to "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;"
- (2) "to respond to the Executive Director's November 19, 2004 supplemental pre-filed testimony

The parties agreed to the most recent procedural schedule in this case during prehearing conferences held on September 14, 2004 and September 20, 2004. A schedule was included in the ALJ's September 14, 2004 Order No. 34 that was subsequently clarified during the prehearing conference on September 20, 2004. The most recent schedule was set by the ALJ in Order No. 35 issued September 20, 2004. The schedule allowed Fishtrap an opportunity to file supplemental direct testimony on September 23, 2004. It also allowed the Executive Director an opportunity to file supplemental direct testimony on November 19, 2004. No other deadlines for direct testimony by the parties were set forth in the September 20, 2004 schedule set forth in Order No. 35 and none were requested.

The Executive Director responds to each of Fishtrap's issues listed above as follows:

- (1) The Executive Director does not dispute that the role of the Commission in this contested case hearing is to consider the evidence and Prosper's sewer CCN amendment application in light of certain criteria set forth in the Texas Water Code and Commission rules. However, the Executive Director submits that the Commission may fulfill its role by evaluating the evidence admitted into the record by the ALJ with or without the benefit of Fishtrap's additional direct evidence consisting of the deposition testimony of Mustang SUD witnesses. The additional deposition testimony of Mustang SUD witnesses is not vital to this proceeding. Fishtrap has had three opportunities to present direct evidence in this case and has taken advantage of those opportunities.
- (2) Fishtrap mischaracterizes the Executive Director's November 19, 2004 supplemental pre-filed testimonies of Brian Dickey and Tammy Holguin-Benter. Nowhere in the testimony does Mr. Dickey or Ms. Benter state 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 CCN granting or amending criteria in the Texas Water Code and Commission rules. Both witnesses state that developments have taken place that necessitated their supplemental direct testimony. However, as Fishtrap is welcome to explore upon cross-examination of the Executive Director's witnesses, the Executive Director's witnesses only changed portions of their original direct testimony in response to new developments evidenced by the record of the case and adopted the rest of their direct testimony as originally submitted. This is quite different than Fishtrap's characterization of the Executive Director's witnesses' testimony that "no changes or developments have occurred" that would have an impact on the evidence the ALJ and the Commission is to consider in this case.
- (3) Fishtrap suggests that its additional deposition testimony of Mustang SUD witnesses should be allowed because it is not a "surprise" to the other parties since it notified them in its cover letter accompanying its September 23, 2004 pre-filed testimony. In that letter, Fishtrap stated, "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." First,

The order of appearance in contested case hearings on TCEQ applications is clearly set forth in 30 Texas Administrative Code ("TAC") § 80.117:

The applicant shall present evidence to meet its burden of proof on the application, followed by the protesting parties, the public interest counsel, and, if named as a party, the executive director. In all cases, the applicant shall be allowed a rebuttal. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.

30 TAC § 80.117(b). According to the Commission rules, the Executive Director always presents his case last. This allows the Executive Director to present his recommendation to the ALJ and the Commission based on all evidence presented in a contested case hearing. Mustang SUD appears to be proposing that the ALJ allow it to file new supplemental pre-filed direct testimony in response to the Executive Director's supplemental direct testimony. Any evidence Fishtrap wished the Executive Director to consider in formulating his recommendation to the ALJ and the Commission that was available on September 23, 2004 should have been presented by Fishtrap at that time.

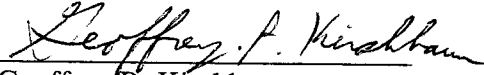
- (6) The personal affairs of Mustang SUD personnel described by Fishtrap in its motion were known at the time of the September 14, 2004 and September 20, 2004 prehearing conferences. No request for a different supplemental direct testimony deadline was made by Fishtrap.
- (7) The Executive Director incorporates his response to Fishtrap issue number four (4) here by reference as it relates to Mustang SUD's hiring of Byron Gaines.
- (8) Mustang SUD served the parties with its notice of withdrawal of protest and motion to dismiss its applications on September 7, 2004. This was not a surprise on September 23, 2004.

III. CONCLUSION

For all these reasons, the Executive Director respectfully requests that the Honorable Administrative Law Judge issue an order denying Fishtrap Properties, L.L.P.'s Motion to File Deposition Testimony of Mustang Special Utility District Witnesses.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2004, a true and correct copy of the foregoing Executive Director's Response to Fishtrap Properties, L.L.P.'s Motion to File Deposition Testimony of Mustang Special Utility District Witnesses was sent by first class, agency mail and/or facsimile to the persons on the attached Mailing List.



Geoffrey P. Kirshbaum

Staff Attorney

TCEQ Environmental Law Division

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2004 DEC -2 PM 4:08

CHIEF CLERKS OFFICE

MAILING LIST
**APPLICATION OF THE TOWN OF PROSPER TO AMEND SEWER CERTIFICATE
OF CONVENIENCE AND NECESSITY (CCN) NO. 20888 IN DENTON COUNTY,
APPLICATION NO. 34004-C**

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Administrative Law Judge
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FROM: TEXAS NATURAL RESOURCE CONSERVATION COMMISSION
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NOTES:

Re: Town of Prosper; SOAH Docket No. 582-03-1994; TCEQ Docket
 No. 2002-1350-UCR;

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Protecting Texas
 by Reducing and
 Preventing Pollution



Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 7, 2004

CHIEF CLERKS OFFICE

2004 DEC -7 PM 4:56

2004 DEC 7 PM 4:56

Ms. LaDonna Castañuela
Texas Commission of Environmental Quality
Office of Chief Clerk, MC 105
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Austin, TX 78711-3087

Re: SOAH Docket No. 582-03-1994; TCEQ Docket No. 2002-1350-UCR; In the Matter Of
The Application of the Town of Prosper to Amend Sewer Certificate of Convenience and
Necessity No. 20888 In Denton County, Application No. 34004-C

Dear Ms. Castañuela:

Enclosed please find the Executive Director's Responses to Fishtrap Properties, L.L.P.'s
Objections to the Pre-Filed Supplemental Direct Testimony of the Executive Director in the
above-referenced matter.

Sincerely,

A handwritten signature in cursive script that reads "Geoff Kirshbaum".

Geoff Kirshbaum
Staff Attorney
Environmental Law Division

Enclosure

MAILING LIST
**APPLICATION OF THE TOWN OF PROSPER TO AMEND SEWER CERTIFICATE
OF CONVENIENCE AND NECESSITY (CCN) NO. 20888 IN DENTON COUNTY,
APPLICATION NO. 34004-C**

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

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

EXECUTIVE DIRECTOR'S RESPONSES TO FISHTRAP PROPERTIES, L.L.P.'s
OBJECTIONS TO THE PRE-FILED SUPPLEMENTAL DIRECT TESTIMONY OF
THE EXECUTIVE DIRECTOR

TO THE HONORABLE JAMES W. NORMAN, ADMINISTRATIVE LAW JUDGE OF THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS:

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), by and through a representative of the Commission's Environmental Law Division, and files the Executive Director's Responses to Fishtrap Properties, L.L.P.'s Objections to the Pre-filed Supplemental Direct Testimony of the Executive Director. The Executive Director respectfully requests that the Honorable State Office of Administrative Hearings ("SOAH") Administrative Law Judge ("ALJ") overrule all the objections filed by Fishtrap Properties, L.L.P. ("Fishtrap") for the reasons set forth in this response.

1. Executive Director's Responses to Fishtrap's Objections to the Supplemental Direct Testimony of Tammy Lee Holguin-Benter

A. Objection No. 1: Page 3, Lines 41-42

Fishtrap objects to Ms. Holguin-Benter's testimony that Town of Prosper ("Prosper") has "annexed portions of the requested area" because such testimony is hearsay and violates the best evidence rule in that any annexations that have occurred are best proved up by introduction of the

Prosper annexation ordinances which will identify exactly what tracts of land, if any, have been annexed by Prosper. Ms. Holguin-Benter's testimony should not be excluded because it is not hearsay and the best evidence rule is not applicable to her testimony.

The Texas Water Code requires the Executive Director or his designated representative to present the position of and information developed by the TCEQ at hearings of the Commission and hearings held by SOAH on matters affecting the State's environment and natural resources, including matters that have been determined to be policy of the State. *See* TEX. WATER CODE ANN. § 5.228(a) (Vernon Supp. 2004–2005). The Executive Director, subject to approval by the Commission, is required to employ any engineering, accounting, and administrative personnel necessary to carry out the duties in Texas Water Code, Chapter 13. *See* TEX. WATER CODE ANN. § 13.011(a) (Vernon 2000). The Executive Director and TCEQ staff are responsible for the gathering of information relating to all matters within the jurisdiction of the Commission under Texas Water Code, Chapter 13, Subchapter B. *See* TEX. WATER CODE ANN. § 13.011(b) (Vernon 2000). The duties of the Executive Director and staff include preparation and presentation of evidence before the Commission or its appointed examiner in proceedings. *See* TEX. WATER CODE ANN. § 13.011(b)(2) (Vernon 2000). By rule, the Commission has determined that the Executive Director is a mandatory party to all Commission proceedings involving matters concerning Texas Water Code, Chapter 13. *See* 30 TAC § 80.109(b)(1)(A).

The Commission has authority to grant or deny Certificate of Convenience and Necessity ("CCN") applications and issue or refuse to issue CCNs under Texas Water Code § 13.246. *See* TEX. WATER CODE ANN. § 13.246 (Vernon 2000); *see also* 30 TAC § 291.102. In Commission contested case hearings on CCN applications held under Title 30 of the Texas Administrative Code

("TAC"). Chapter 80, the burden of proof is on the moving party by a preponderance of the evidence.

See 30 TAC § 80.17 (a)–(d).

To the extent that the information upon which Ms. Holguin-Benter has based her supplemental direct testimony is not excluded from evidence in this contested case hearing, Ms. Holguin-Benter's testimony as to changes and/or developments that have occurred in this case affecting the feasibility of obtaining sewer service for Prosper's requested area from an adjacent retail public utility should not be excluded from evidence in this case. The particular testimony Fishtrap objects to is direct testimony provided by Mr. Douglas Mousel, Prosper's Town Administrator. *See* Holguin-Benter Direct Testimony, Page 4, Lines 44–47.

Ms. Holguin-Benter's review of the testimony presented by Prosper in this case cannot be considered "hearsay" testimony since she will be available for cross-examination about her review of Prosper's application and her pre-filed supplemental direct testimony at the hearing on the merits and her testimony does not include out-of-court statements offered to prove the truth of the matters asserted. *See* TEX. R. EVID. 801. Further, Ms. Holguin-Benter's pre-filed supplemental direct testimony falls within the hearsay exception for public records and reports under the Texas Rules of Evidence in that it is a data compilation by Ms. Holguin-Benter based on her analysis of the facts presented by Prosper in this case. *See* TEX. R. EVID. 803(8). Additionally, the testimony offered by Ms. Holguin-Benter, one of the Executive Director's expert witnesses, should not be excluded from this proceeding because it is relevant and admissible as an offered expert opinion and may assist the trier of fact to understand the evidence or determine a fact in issue. *See* TEX. R. EVID. 702 and 703.

Fishtrap's "best evidence rule" objection should be overruled because it is inapplicable in that Ms. Holguin-Benter's testimony does not seek to prove the content of a writing, recording, or photograph. *See* TEX. R. EVID. 1002. Ms. Holguin-Benter is not seeking to prove the contents of a disputed document not in evidence. Ms. Holguin-Benter's testimony provides her expert opinion based on facts offered as direct evidence by Prosper as of the date Ms. Holguin-Benter's supplemental direct testimony was pre-filed. Additionally, Fishtrap's objection actually relates to the weight that should be afforded the testimony offered by Ms. Holguin-Benter rather than its admissibility. For all these reasons, Fishtrap's Objection No. 1 to Ms. Holguin-Benter's supplemental direct testimony should be overruled.

B. Objection No. 2: Page 4, Lines 45–47

In response to Fishtrap's Objection No. 2 to Ms. Holguin-Benter's supplemental direct testimony, the Executive Director incorporates by reference his response to Fishtrap's Objection No. 1 to Ms. Holguin-Benter's supplemental direct testimony. Fishtrap's Objection No. 2 should be overruled if the ALJ admits the supplemental direct testimony provided by Mr. Douglas Mousel that Prosper has annexed several properties in Prosper's requested area.

C. Objection No. 3: Page 4, Lines 50–52

Fishtrap objects to Ms. Holguin-Benter's supplemental direct testimony that "there have been no developments and/or changes that would affect Prosper's financial stability" because such testimony "violates the requirements of *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995)." Fishtrap states that Ms. Holguin-Benter has provided the court with no testimony regarding her ability to express an opinion on "whether granting the requested CCN amendment would affect environmental integrity of the proposed service area." However, she provided precisely this

testimony in her original direct testimony pre-filed in this contested case hearing in 2003 for which the ALJ overruled all objections.

In *Robinson*, the Texas Supreme Court held that Texas Rule of Evidence 702 has three requirements for the admission of expert testimony. *See Robinson*, 923 S.W.2d at 556. Specifically, Texas Rule of Evidence 702 requires: (1) the witness must be qualified; (2) the proposed testimony must be scientific, technical, or other specialized knowledge; and (3) the testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. *See id.*; *see also* TEX. R. EVID. 702.

Ms. Holguin-Benter is well-qualified to provide a recommendation on Prosper's sewer CCN amendment application in this case, including the financial ability of Prosper to provide sewer service to its requested area. In her original direct testimony, pre-filed on August 29, 2003, Ms. Holguin-Benter testifies that she holds a Bachelor of Science degree in Economics from Angelo State University, and a Master of Business Administration from the University of the Incarnate Word. *See Holguin-Benter Direct*, Page 1, L. 8–9. She was previously employed as the Executive Director of Keep San Antonio Beautiful, a non-profit organization in San Antonio, Texas, where her responsibilities included business and financial development, program development, budget and financial analysis, staff training and development and board training and development. *See id.* at Page 1, L. 9–13. Ms. Holguin-Benter was also employed as a socioeconomic analyst with Pacific Western Technologies, Inc. *See id.* at Page 1, L. 13–14.

Ms. Holguin-Benter also testified that her responsibilities at the TCEQ have included: reviewing and processing applications to obtain or amend Certificates of Convenience and Necessity ("CCN"), assisting with the negotiation of settlements, preparing testimony and exhibits for

contested hearings regarding investor-owned, nonprofit, and governmental water and sewer utilities, and reviewing business plans and financial and managerial information. *See id.* at Page 1, L. 15–20. Ms. Holguin-Benter also works with the Capacity Development Program in researching, reviewing, and writing reports on the financial, managerial and technical capability of systems seeking State Revolving Fund (“SRF”) loans through the Texas Water Development Board. *See id.* at Page 1, L. 20–22 and Page 2, L. 1. As of August 29, 2004, Ms. Holguin-Benter has been assigned over 200 separate CCN-related applications during her employment at the Commission. *See id.* at Page 2, L. 3–4. Ms. Holguin-Benter testified that she has worked for the TCEQ and its predecessor agency, the Texas Natural Resource Conservation Commission, since October 1999 as a Program Specialist. *See id.* at Page 1, L. 4–6 (NOTE: Ms. Holguin-Benter would like the parties and the ALJ to be aware that she has actually worked at the TCEQ/TNRCC since 1998; she will revise and correct her testimony before it is offered at the hearing on the merits).

In response to Fishtrap’s objection, Ms. Holguin-Benter’s complete resume is included as Attachment 1. Ms. Holguin-Benter is well-qualified to provide the testimony included in her supplemental testimony on Page 4, L. 50–52 relating to the financial ability of Prosper to provide sewer utility service to its requested area and the proper predicate for that testimony has been laid. Further, Ms. Holguin-Benter is the most qualified person to express to the court whether there have been any developments or changes which would necessitate changes to her own original direct testimony already admitted by the ALJ in this contested case hearing. Ms. Holguin-Benter is an expert in the Texas Water Code statutory provisions and Commission rules related to CCN applications and is qualified to assess Prosper’s application according to those criteria. Ms. Holguin-Benter’s testimony is relevant and admissible as an offered expert opinion and may assist the trier

of fact to understand the evidence or determine a fact in issue. *See* TEX. R. EVID. 702 and 703.

Therefore, Fishtrap's Objection No. 3 should be overruled.

D. Objection No. 4; Page 4, Lines 55–58

Fishtrap objects to Ms. Holguin-Benter's supplemental direct testimony that "there have been no changes and/or developments that would affect Prosper's managerial capability" because such testimony "violates the requirements of *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995)." Fishtrap states that Ms. Holguin-Benter has provided the court with no testimony regarding her ability to express an opinion on the managerial capability of a public agency to provide the utility service at issue in this case. However, she provided precisely this testimony in her original direct testimony pre-filed in this contested case hearing in 2003 for which the ALJ overruled all objections.

In response to Fishtrap's Objection No. 4 to Ms. Holguin-Benter's supplemental direct testimony, the Executive Director incorporates by reference the discussion of Texas Rule of Evidence 702, the *Robinson* standard for expert witness testimony, and Ms. Holguin-Benter's qualifications set forth in response to Fishtrap's Objection No. 3 to Ms. Holguin-Benter's supplemental direct testimony. Also, Ms. Holguin-Benter's complete resume is included as Attachment 1.

Ms. Holguin-Benter is well-qualified to provide the testimony included in her supplemental testimony on Page 4, L. 55–58 relating to the managerial capability of Prosper and the proper predicate for that testimony has been laid. Further, Ms. Holguin-Benter is the most qualified person to express to the court whether there have been any changes or developments which would necessitate changes to her own original direct testimony already admitted by the ALJ in this contested case hearing. Ms. Holguin-Benter is an expert in the Texas Water Code statutory

provisions and Commission rules related to CCN applications and is qualified to assess Prosper's application according to those criteria. Ms. Holguin-Benter's supplemental testimony is relevant and admissible as an offered expert opinion and may assist the trier of fact to understand the evidence or determine a fact in issue. *See* TEX. R. EVID. 702 and 703. Therefore, Fishtrap's Objection No. 4 should be overruled.

E. Objection No. 5: Page 4, Line 62 to Page 5, Line 65

Fishtrap objects to Ms. Holguin-Benter's supplemental direct testimony that "there have been no changes and/or developments that would affect environmental integrity" of Prosper's requested area because such testimony "violates the requirements of *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995)." Fishtrap states that Ms. Holguin-Benter has provided the court with no testimony regarding her ability to express an opinion regarding whether granting the requested CCN amendment would affect environmental integrity of the proposed area. However, she provided precisely this testimony in her original direct testimony pre-filed in this contested case hearing in 2003 for which the ALJ overruled all objections.

In response to Fishtrap's Objection No. 5 to Ms. Holguin-Benter's supplemental direct testimony, the Executive Director incorporates by reference the discussion of Texas Rule of Evidence 702, the *Robinson* standard for expert witness testimony, and Ms. Holguin-Benter's qualifications set forth in response to Fishtrap's Objection No. 3 to Ms. Holguin-Benter's supplemental direct testimony. Also, Ms. Holguin-Benter's complete resume is included as Attachment 1.

Ms. Holguin-Benter is well-qualified to provide the testimony included in her supplemental direct testimony on Page 4, L. 62 to Page 5, L. 65 relating to the effect Prosper's requested CCN

amendment would have on the environmental integrity of the proposed area. Further, Ms. Holguin-Benter is the most qualified person to express to the court whether there have been any changes or developments which would necessitate changes to her own original direct testimony already admitted by the ALJ in this contested case hearing. Ms. Holguin-Benter is an expert in the Texas Water Code statutory provisions and Commission rules related to CCN applications and is qualified to assess Prosper's application according to those criteria. Ms. Holguin-Benter's supplemental direct testimony is relevant and admissible as an offered expert opinion and may assist the trier of fact to understand the evidence or determine a fact in issue. *See* TEX. R. EVID. 702 and 703. Therefore, Fishtrap's Objection No. 5 should be overruled.

F. Objection No. 6; Page 5, Lines 69–72

Fishtrap objects to Ms. Holguin-Benter's supplemental direct testimony that "there have been no changes and/or developments that would affect probable improvement in service or lowering of cost to consumers" that would result from Prosper receiving its requested amended sewer CCN because such testimony "violates the requirements of *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995)." Fishtrap states that Ms. Holguin-Benter has provided the court with no testimony regarding her ability to express an opinion regarding probable improvement in service or lowering of cost to consumers. However, she provided precisely this testimony in her original direct testimony pre-filed in this contested case hearing in 2003 for which the ALJ overruled all objections.

In response to Fishtrap's Objection No. 6 to Ms. Holguin-Benter's supplemental direct testimony, the Executive Director incorporates by reference the discussion of Texas Rule of Evidence 702, the *Robinson* standard for expert witness testimony, and Ms. Holguin-Benter's qualifications set forth in response to Fishtrap's Objection No. 3 to Ms. Holguin-Benter's

supplemental direct testimony. Also, Ms. Holguin-Benter's complete resume is included as Attachment 1.

Ms. Holguin-Benter is well-qualified to provide the testimony included in her supplemental direct testimony on Page 5, L. 69–72 relating to the probable improvement in service or lowering of cost to consumers that would result from Prosper receiving its requested amended sewer CCN. Further, Ms. Holguin-Benter is the most qualified person to express to the court whether there have been any changes or developments which would necessitate changes to her own original direct testimony already admitted by the ALJ in this contested case hearing. Ms. Holguin-Benter is an expert in the Texas Water Code statutory provisions and Commission rules related to CCN applications and is qualified to assess Prosper's application according to those criteria. Ms. Holguin-Benter's supplemental direct testimony is relevant and admissible as an offered expert opinion and may assist the trier of fact to understand the evidence or determine a fact in issue. *See* TEX. R. EVID. 702 and 703. Therefore, Fishtrap's Objection No. 6 should be overruled.

2. Executive Director's Responses to Fishtrap's Objections to the Supplemental Direct Testimony of Brian David Dickey

A. Objection No. 1; Page 4, Line 21 to Page 5, Line 4

1. Objection No. 1 (a) and (b)

Fishtrap's Objection No. 1(a) and (b) to Brian Dickey's supplemental direct testimony objects to Mr. Dickey's recitals of testimony offered by Dr. Victoria Harkins and Randal Dobbs "to the extent that same is offered for the proof of the matter asserted for the reason that same is hearsay." Mr. Dickey's testimony should not be excluded because it is not hearsay.

The Texas Water Code requires the Executive Director or his designated representative to present the position of and information developed by the TCEQ at hearings of the Commission and hearings held by SOAH on matters affecting the State's environment and natural resources, including matters that have been determined to be policy of the State. *See* TEX. WATER CODE ANN. § 5.228(a) (Vernon Supp. 2004–2005). The Executive Director, subject to approval by the Commission, is required to employ any engineering, accounting, and administrative personnel necessary to carry out the duties in Texas Water Code, Chapter 13. *See* TEX. WATER CODE ANN. § 13.011(a) (Vernon 2000). The Executive Director and TCEQ staff are responsible for the gathering of information relating to all matters within the jurisdiction of the Commission under Texas Water Code, Chapter 13, Subchapter B. *See* TEX. WATER CODE ANN. § 13.011(b) (Vernon 2000). The duties of the Executive Director and staff include preparation and presentation of evidence before the Commission or its appointed examiner in proceedings. *See* TEX. WATER CODE ANN. § 13.011(b)(2) (Vernon 2000). By rule, the Commission has determined that the Executive Director is a mandatory party to all Commission proceedings involving matters concerning Texas Water Code, Chapter 13. *See* 30 TAC § 80.109(b)(1)(A).

The Commission has authority to grant or deny Certificate of Convenience and Necessity (“CCN”) applications and issue or refuse to issue CCNs under Texas Water Code § 13.246. *See* TEX. WATER CODE ANN. § 13.246 (Vernon 2000); *see also* 30 TAC § 291.102. In Commission contested case hearings on CCN applications held under Title 30 of the Texas Administrative Code (“TAC”), Chapter 80, the burden of proof is on the moving party by a preponderance of the evidence. *See* 30 TAC § 80.17 (a)–(d).

To the extent that the information upon which Mr. Dickey has based his supplemental direct testimony is not excluded from evidence in this contested case hearing, Mr. Dickey's testimony as to evidence presented by Prosper witnesses concerning Prosper's wastewater treatment capacity and North Texas Municipal Water District contract should not be excluded from evidence in this case.

Mr. Dickey's review of the testimony presented by Prosper in this case cannot be considered "hearsay" testimony since he will be available for cross-examination about his review of Prosper's application and his pre-filed supplemental direct testimony at the hearing on the merits and his testimony does not include out-of-court statements offered to prove the truth of the matters asserted. *See* TEX. R. EVID. 801. Further, Mr. Dickey's pre-filed direct testimony falls within the hearsay exception for public records and reports under the Texas Rules of Evidence in that it is a data compilation by Mr. Dickey based on his analysis of the facts presented by Prosper in this case. *See* TEX. R. EVID. 803(8). Additionally, the testimony offered by Mr. Dickey, one of the Executive Director's expert witnesses, should not be excluded from this proceeding because it is relevant and admissible as an offered expert opinion and may assist the trier of fact to understand the evidence or determine a fact in issue. *See* TEX. R. EVID. 702 and 703.

2. Objection No. 1 (c)

Fishtrap Objection No. 1(c) to Mr. Dickey's supplemental direct prefiled testimony objects to Mr. Dickey's "recital of and reference to the NTMWD contracts with Prosper for the transportation and treatment of wastewater for the reason that same is irrelevant and not probative of any issue in dispute." Fishtrap states, "The contracts referenced are for wastewater originating in the Wilson Creek Drainage Basin of the trinity East Fork River Basin whereas the area involved in this dispute lies within the Doe Branch Drainage Basin of the Trinity River's Elm Fork River Basin."

The Texas Water Code and Commission rules provide that one of the criteria the Commission shall consider when considering whether to grant or amend a CCN is “the ability of the applicant to provide adequate service.” *See* TEX. WATER CODE ANN. § 13.246(c) (Vernon 2000); *see also* 30 TAC § 291.102(d)(4). Any contracts that exist between North Texas Municipal Water District (“NTMWD”) and Prosper for transportation and treatment of wastewater are highly relevant and probative to this proceeding to the extent they impact Prosper’s ability to provide adequate sewer utility service to its requested sewer CCN amendment area. The direct evidence submitted by Prosper in this case demonstrates that its requested area includes multiple drainage basins, including the Wilson Creek Drainage Basin of the Trinity East Fork River Basin and the Doe Branch Drainage Basin of the Trinity River’s Elm Fork River Basin— not just one or the other as Fishtrap suggests in Objection No. 1(c). The NTMWD contract increases Prosper’s ability to provide sewer utility service for wastewater originating in either basin. Therefore, Prosper’s ability to provide adequate sewer utility service to its requested area is enhanced by its NTMWD contract.

If Mr. Mousel’s direct testimony and the NTMWD contract are admitted into evidence, Mr. Dickey’s testimony concerning that evidence should also be admitted as relevant and probative testimony concerning the issue of Prosper’s ability to serve its requested amended sewer CCN area. The testimony offered by Mr. Dickey, one of the Executive Director’s expert witnesses, should not be excluded from this proceeding because it is relevant and admissible as an offered expert opinion and may assist the trier of fact to understand the evidence or determine a fact in issue. *See* TEX. R. EVID. 702 and 703. Moreover, Fishtrap’s objection appears to relate more to the weight to be afforded evidence offered by Prosper and the Executive Director concerning the Prosper/NTMWD contract rather than its admissibility. For all these reasons, Fishtrap Objection No. 1(c) to Brian

Dickey's supplemental direct pre-filed testimony should be overruled.

B. Objection No. 2: General Objection as to Lack of Witness Special Knowledge, Training and Expertise to Offer Opinion Testimony and Recommendations

Fishtrap's Objection No. 2 to Brian Dickey's supplemental direct testimony objects to "the witness's conclusions and recommendations for the reason that the testimony as a whole fails to reflect the specialized knowledge, training, education, experience or expertise to offer expert testimony on the issues presented to the witness to address in this proceeding." This objection should be overruled for the following reasons.

Mr. Dickey is well-qualified to provide the conclusions and recommendations set forth in his pre-field supplemental direct testimony concerning Prosper's sewer CCN amendment application in this case. In his original direct testimony, pre-filed on August 29, 2003, Mr Dickey testifies that he holds a Bachelor's degree in Mechanical Engineering from Texas Tech University. *See* Dickey Direct, Page 1, L. 8-9. He has been employed by the Commission since November 1999. *See id.* at Page 1, L. 4-5. His current position at the Commission is General Engineering Specialist I. *See id.* at Page 1, L. 5-6. Mr. Dickey's work responsibilities include reviewing and processing applications to obtain or amend CCNs, reviewing rate packages filed with TCEQ, negotiating settlements, preparing testimony and exhibits for rate hearings for investor-owned, non-profit, and governmental water and sewer utilities, conducting rate-related inspections of water utility systems within the state, and reviewing of water utility plans and specifications. *See id.* at Page 1, L. 11-16. He has been assigned approximately forty-six separate CCN cases during his tenure at the Commission. *See id.* at Page 1, L. 18-19. He has testified before SOAH as an expert witness in a contested matter concerning a CCN application. *See id.* at Page 1, L. 20-22 to Page 2, L. 1-3.

In response to Fishtrap's objection, Mr. Dickey's complete resume is included as Attachment 2. Mr. Dickey is well-qualified to provide the conclusions and recommendations set forth in his pre-field supplemental direct testimony. Mr. Dickey is an expert in the Texas Water Code statutory provisions and Commission rules related to CCN applications and is qualified to assess Prosper's application according to those criteria. Further, Fishtrap fails to explain precisely how Mr. Dickey's testimony fails to reflect his specialized knowledge training, education, or expertise. Mr. Dickey's testimony is relevant and admissible as an offered expert opinion and may assist the trier of fact to understand the evidence or determine a fact in issue. *See* TEX. R. EVID. 702 and 703. For all these reasons, Fishtrap Objection No. 2 should be overruled.

CONCLUSION

For all these reasons, the Executive Director respectfully requests that the ALJ overrule all objections filed by Fishtrap Properties, L.L.P. to the Executive Director's supplemental pre-filed direct testimonies of Tammy Lee Holguin-Benter and Brian David Dickey. All the direct testimony provided by the Executive Director's witnesses are relevant and admissible and may assist the ALJ to understand the evidence or determine a fact in issue.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Glenn Shankle
Executive Director

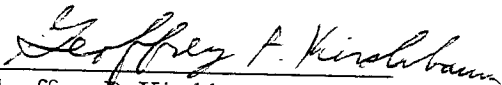
Stephanie Bergeron Perdue, Director
Environmental Law Division

By: Geoffrey P. Kirshbaum
Geoffrey P. Kirshbaum

Staff Attorney
Environmental Law Division
State Bar of Texas No. 24029665
MC-173, P.O. Box 13087
Austin, Texas 78711-3087
Phone: (512) 239-6257
Fax: (512) 239-0606

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2004, a true and correct copy of the foregoing Executive Director's Responses to Fishtrap Properties, L.L.P.'s Objections to the Pre-Filed Supplemental Direct Testimony of the Executive Director was sent by first class, agency mail and/or facsimile to the persons on the attached Mailing List.


Geoffrey P. Kirshbaum
Staff Attorney
TCEQ Environmental Law Division

CHIEF CLERK'S OFFICE

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LAW DIVISION

ATTACHMENT 1

Tammy Lee Holguin-Benter
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78753
(512) 239-6136 phone

Professional Experience

Texas Commission on Environmental Quality (TCEQ) October 1998 to Present
State of Texas (Agency Headquarters – Austin, Texas)

Program Specialist. Review and analyze business plans and financial & managerial information to include annual reports, budgets, and pro forma projections for public drinking water systems and water/sewer utilities. Review technical information for permit applications. Financial analysis and business plan review of applications for the sale, transfer, and merger of water/sewer utilities including stock transfers. Prepare staff recommendations for approval of applications. Provide assistance to public water systems and utilities in the development of business plans, understanding and compliance of financial/managerial/technical requirements, and responding to inquiries concerning utility service areas, rate regulation, and compliance with state standards and guidelines pursuant to State of Texas rules. Expert witness testimony of factual evidence regarding the financial and managerial capabilities of water/sewer utilities in administrative law hearings of contested cases.

Keep San Antonio Beautiful, Inc. (KSAB) May 1997 to July 1998
San Antonio, Texas

Executive Director (Non-Profit Agency). Responsible for daily business operations and program supervision of a 501 (c)(3), non-profit organization. Managed staff, public relations, fund raising/development, program services, and contract negotiations. Business development functions included financial/budget preparation & analysis, grant research & writing, annual campaigns, direct mail, special events, and membership drives. Program and service duties included educational & informational outreach in solid waste management, beautification, litter, and graffiti related issues. Public and media relations functions included public speaking, writing press releases, creating newsletters & brochures, website development & maintenance, and completing award applications for the organization. Created and implemented marketing plans & campaigns, annual outreach contests & activities, and established partnerships and contacts with the media. Reported and presented materials and information to the KSAB Board of Directors, corporate executives, city council, county commissioners, and other local entities.

San Antonio Iguanas Hockey Club October 1996 to May 1997
San Antonio, Texas

Account Executive/Public Relations Representative of Game Operations. Established and sought out corporate sponsorships and trade agreements. Responsible for marketing of group and corporate ticket sales, creating flyers, mass mailings and promotions to generate ticket sales. Utilized the TicketMaster ticketing system to generate single and group tickets and assisted with merchandise sales. Customer relations/service responsibilities included daily cash handling, balance, and reconciliation, and on-line applications. Submitted press releases to media/media partners, media relations, and public relations during game operations.

San Antonio Spurs/SAOne
San Antonio, Texas

December 1995 to June 1996

Advertising/Marketing Promotions (Internship). Performed daily event coordination and sports administrative duties for professional NBA franchise. Assisted with media coordination, marketing, advertising, event coordination, public relations, customer service, and on/off court promotions for Spurs and SAOne events. Direct event responsibilities included: San Antonio Spurs (advertising and event coordination, general marketing, marketing research, in-arena media tracking and promotions, media relations, game operations, customer service and 1996 NBA All-Star Weekend staff assistant); 1996 NBA Jam Session (media relations, marketing, local NBA contact, crowd control, sponsor and partner relations, press conference/remote activities, and managed NBA Jam Session booth at Spurs games prior to event); SAOne (1995 Builders Square Alamo Bowl - assisted with merchandise licensee contracts and agreements, volunteer coordination for novelty sales, marketing, creating and editing ad drop-in summaries, media relations, merchandise inventory, sponsor/partner relations, and event wrap-up). Fulfilled mailing and phone merchandise requests, inspected orders, shipments, invoicing, collecting payment for orders, and reporting/closing of sales.

Pacific Western Technology, Ltd.
San Antonio, Texas

May 1994 to December 1995

Socioeconomist/Marketing & Administrative Assistant. Socioeconomic research, analysis, and document writing/editing for environmental reports submitted to government for publication. Customer service, public relations, and outreach coordination. Extensive computer use to include word processing, spreadsheets, database, presentation preparation, graphics, and on-line applications. Office management and training course administrator (training site coordination, conferences, registration, travel accommodations, materials management). Provided marketing support, and special project support/coordination for projects under government contract.

Education

Masters of Business Administration

University of the Incarnate Word
San Antonio, Texas

Bachelor of Science in Economics - Supporting Concentrations in Mathematics & Biology

Angelo State University
San Angelo, Texas

References

References available upon request.

ATTACHMENT 2



BRIAN D. DICKEY
Utilities and Districts Section (MC 153)
Water Supply Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
email: BDICKEY@tceq.state.tx.us
(512) 239-0963 Fax: (512) 239-6972

Education:

Oct 29th -Nov 3rd NARUC Utility Rate School Clearwater Beach, Florida

1988-1994: Texas Tech University school of Engineering
 Lubbock, Texas - B.S. Mechanical Engineering

1986-1988: South Plains College Levelland, Texas

Professional Experience:

Feb 02 to Present **General Engineering Specialist II**, Texas Natural Resource
Conservation Commission, Austin, Texas

- Review applications and prepare Certificates of Convenience and Necessity (CCNs)
- Review applications and prepare rate designs for retail public utilities
- Attend and participate in resolution of contested cases concerning CCNs and rates
- Provide utility and consumer assistance
- Review plans and specifications for water system modifications

Dec 00 to Feb 02 **Engineering Assistant III**, Texas Natural Resource Conservation
Commission, Austin, Texas

- Review applications and prepare Certificates of Convenience and Necessity (CCNs)
- Review applications and prepare rate designs for retail public utilities
- Attend and participate in resolution of contested cases concerning CCNs and rates
- Provide utility and consumer assistance
- Review plans and specifications for water system modifications

BDickey(cont.)

- Nov 99 to Dec 00 **Engineering Assistant II**, Texas Natural Resource Conservation Commission, Austin, Texas
- Review applications and prepare Certificates of Convenience and Necessity (CCNs)
 - Review applications and prepare rate designs for retail public utilities
 - Attend and participate in resolution of contested cases concerning CCNs and rates
 - Provide utility and consumer assistance
 - Review plans and specifications for water system modifications
- Jan 99 to Nov 99 Part time HPD Medical Inc. Amarillo, Texas
- Jan-99 to Nov-99 Jimmie Dickey Housemoving Lubbock, Texas
- Sept-97 to Jan-99 HPD Medical Inc. Amarillo, Texas
- Worked on developing an implantable medical device\
 - Worked with various type of urethane and adhesives
 - Supervised employees
 - Maintained and modified equipment
 - Helped to maintain the Cleanroom
- May-86 to Sept-97 Jimmie Dickey Housemoving Lubbock, Texas
- Supervised five to seven employees in moving houses, demolition work, and working on equipment
 - Worked on diesel trucks and equipment
 - Worked on gasoline engines
 - Operated heavy machinery
- May-84 to Dec-85 Hydra-Tech, Lubbock, Texas
- Repaired hydraulic equipment

