

density of the subdivision and the size of the lots, as being "incompatible" with Prosper's rural nature. Prosper, however, has no legal right to force Fishtrap to modify its subdivision regarding density per se, but there are other means to bring pressure to bear upon Fishtrap to accede to the town's wishes of changing the subdivision, and one of these methods is to obtain a monopoly upon utility service in the area where Fishtrap's property is located. If Fishtrap cannot obtain utility service, or if the service is delayed, Fishtrap could be forced to agree to change its subdivision density in return for quick and reasonably priced service. Mr. McRoy's testimony regarding the subdivision approval corroborates Fishtrap's position that Prosper is seeking its CCN in bad faith.

Page 18, line 19 through line 22

The testimony regarding what Mr. McRoy believes Ms. Finley felt is inadmissible speculation, conjecture, and opinion testimony under TEX. R. EVID. 602, 701, and 702. Mr. McRoy cannot possibly have personal knowledge regarding the feelings of Ms. Finley. Therefore, the testimony should be stricken.

Protestants' Response No. 35

Mr. McRoy was present when he talked to Ms. Finley, and he could observe her facial and other bodily expressions. Accordingly, a predicate has been laid that Mr. McRoy had personal knowledge regarding Ms. Finley's response, and his opinion is based upon that personal knowledge. It is not uncommon or unreasonable for people to express concern, worry or other emotions through facial or other physical expressions. Prosper's objections are without merit.

Page 19, line 4 through the first line 5 on page 20.

Prosper objects to and moves to strike this testimony as irrelevant based on TEX. R. EVID. 401 and 402. Protestants have not shown how Mr. McRoy's termination of employment from Prosper is relevant to this proceeding. Mr. McRoy's employment history is not an issue of law or fact in this case. Protestants have protested the application to amend its CCN. The proffered testimony is not relevant to a CCN amendment because the testimony does not have any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the testimony. The employment history of Mr. McRoy is immaterial to any matter at issue in this proceeding. Protestants have not provided any statutory or regulatory basis upon which anything other ability to serve will be considered in this proceeding. As such, consideration of such testimony is improper. Further, the proffered testimony does not tend to prove any element of Protestants' requested relief and, thus, is irrelevant and inadmissible and should be stricken under TEX. R. EVID. 402.

Protestants' Response No. 36

Mr. McRoy has testified that he was hired around May or June of 2002 and was fired shortly afterwards, around the end of August of 2002. Mr. McRoy was Mr. Kirk Wilson's primary contact at the Town of Prosper and his brief term as planning director raises questions when the difficulties Fishtrap encountered in dealing with the Town of Prosper are considered: whether Mr. McRoy was fired because of the way he dealt with Fishtrap, i.e., from a professional standpoint, his honest communications with Mr. Wilson, telling him that the city council and the mayor were not happy with the density of the Fishtrap development, his refusal to use the subdivision plat approval process as a

mechanism to stall the development process, his calling on Upper Trinity, as Mr. Thomas Taylor has testified, to inquire about the possibility of Prosper obtaining service from Upper Trinity for the Fishtrap development. The firing is highly suspicious and is corroborative of Fishtrap's contention that Prosper was stalling and obstructing Fishtrap's plan development of the 107 acres tract of land.

Page 20, line 21 through Page 33, line 21.

Prosper objects to and moves to strike this testimony as irrelevant based on TEX. R. EVID. 401 and 402. Protestants have not shown how the lot size and approval or disapproval of the development of Protestants' subdivision is relevant to this proceeding. The lot size and approval or disapproval of Protestants' subdivision has no relevance to the CCN amendment filed by Protestants. Protestants have protested the application to amend its CCN. The proffered testimony is not relevant to a CCN amendment because the testimony does not have any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the testimony. The lot size of Protestants' development and the approval or disapproval of Protestants' subdivision is immaterial to any matter at issue in this proceeding. Protestants have not provided any statutory or regulatory basis upon which anything other ability to serve will be considered in this proceeding. As such, consideration of such testimony is improper. Further, the proffered testimony does not tend to prove any element of Protestants' requested relief and, thus, is irrelevant and inadmissible and should be stricken under TEX. R. EVID. 402.

Protestants' Response No. 37

This is some of the strongest testimony Fishtrap has to offer to support its contention that Prosper strongly wanted the developer to alter the density of the Glenbrook

Estates subdivision and was prepared to use both the subdivision process, in which the developer had to obtain the approval of the Town for its subdivision plat, and the CCN if it were successful in obtaining it. Mr. McRoy was the planning director of the Town of Prosper, and his testimony is replete with instances of city officials wanting the developer to change the proposed subdivision to decrease the density and Prosper's willingness to use the subdivision process and the CCN as leverage in its dealings with Fishtrap. Ms. Finley's instructions to Mr. McRoy to keep them talking while they apply for their CCN is so obvious in its import that no speculation is needed; once the CCN has been obtained, Mr. McRoy spells out the kind of pressure the city can bring on the developers to acquiesce to Prosper's preference for a less dense subdivision, or as Mr. McRoy puts it, one more in keeping with Prosper's rural like setting. This testimony is not only highly relevant, it lies at the heart of Fishtrap's claims and contentions that Prosper hopes to use its CCN as further leverage; in fact, that is exactly what Mr. McRoy says.

Page 28, the first line 6 through the first line 11.

The testimony regarding what Prosper wanted Mr. Dowdall or Mr. Wilson to do is inadmissible speculation, conjecture, and opinion testimony under TEX. R. EVID. 602, 701, and 702. Mr. McRoy cannot possibly have personal knowledge of what any Prosper representative was thinking. Therefore, the testimony should be stricken.

Protestant's Response No. 38

Mr. McRoy is simply being asked what it was that his superiors, Ms. Finley and the mayor and members of the city council, wanted Mr. Dowdall, one of the owners of Fishtrap to do. Mr. McRoy was in constant communication with his superiors, seeing them and

talking to them, and it certainly is no speculation on his part as to what it was that his superiors wanted from Mr. Dowdall.

Page 30, line 7 through line 11.

The testimony regarding what Prosper wanted to do is inadmissible speculation, conjecture, and opinion testimony under TEX. R. EVID. 602, 701, and 702. Mr. McRoy cannot possibly have personal knowledge of what any Prosper representative was thinking. Therefore, the testimony should be stricken.

Protestants' Response No. 39

Of course, Mr. McRoy knows what his superiors wanted vis-à-vis the Fishtrap properties. He would have to be exceedingly obtuse not to know what his superiors wanted regarding the proposed Fishtrap development; he has testified that he saw them virtually every day which would be hard not to do in a small town such as Prosper; he has testified that he had discussions about the matter, and he has testified what these discussions concerning, namely, that Prosper officials wanted Fishtrap to lessen the density of the project.

Page 31, line 17 through line 21.

Prosper objects to and moves to strike this testimony based on TEX. R. EVID. 701 and 702. The prefiled testimony and credentials of Mr. McRoy do not establish that he is qualified by education, training, or experience to formulate and express expert opinions on the design and cost requirements involved in extending service to Protestants' subdivision. His background does not establish an engineering background whatsoever. Mr. McRoy has not shown that he

has any scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence. Further, his testimony is not admissible under TEX. R. EVID. 701 because no foundation for lay opinion has been presented

Protestants' Response No. 40

Mr. McRoy is the city planner; it is part of his responsibility to know these matters, because water and sewer, like streets and other vital city services, make up the heart of what municipalities offer in the way of services. As has already been testified to by the city engineer, Travis Roberts, offering wastewater service from the existing Prosper wastewater plant was not the most practical approach. It does not take an engineer to know this.

Page 35, line 25 through Page 36, line 7

Prosper objects to and moves to strike this testimony as hearsay. Any testimony as to what discussions transpired between Mr. McRoy and an employee of Prosper and what a Prosper employee may or may not have advised is inadmissible hearsay pursuant to TEX. R. EVID. 801 and 802 and must be stricken. Mr. McRoy has not laid the proper predicate to prove an exception to the hearsay rule. Mr. McRoy's statement and opinion offered in this testimony are based on out-of-court statements, and are offered to prove the truth of the matter asserted. Therefore, the testimony should be stricken. Further, the testimony regarding what Mr. McRoy believes employees of Prosper felt is inadmissible speculation, conjecture, and opinion testimony under TEX. R. EVID. 602, 701, and 702. Mr. McRoy cannot possibly have personal knowledge regarding the feelings of employees of Prosper. Therefore, the testimony should be stricken.

Protestants' Response No. 41

Mr. McRoy was an employee of the Town of Prosper, and his discussions with his superior, Ms. Finley, is admissible as a statement against interest. Moreover, Ms. Finley is listed as a witness for Prosper, so she will have the opportunity to testify regarding what Mr. McRoy has said that she stated or how she responded.

Page 36, line 18 through page 37, line 8.

Prosper objects to and moves to strike this testimony based on TEX. R. EVID. 701 and 702. The prefiled testimony and credentials of Mr. McRoy do not establish that he is qualified by education, training, or experience to formulate and express expert opinions on engineering aspects of the Town's wastewater system. His background does not establish an engineering background whatsoever. Mr. McRoy has not shown that he has any scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence. Further, his testimony is not admissible under TEX. R. EVID. 701 because no foundation for lay opinion has been presented.

Protestants' Response No. 42

Mr. McRoy was the city's only planning director, and it was his job to know something of the infrastructure regarding Prosper. What must be remembered is that Prosper is a small town, there is only one wastewater treatment plant, and there is ample testimony that all the consumers, except for a couple of business, are located primarily east of the treatment plant, and that there is almost no development west of the treatment plant. This is the same testimony given by Ms. Finley, the Town Manager, and Mr. Bill Little, the

wastewater treatment plant operator. Knowing where the sewer mains go does not require an engineering expertise.

Page 37, line 19 through Page 43, line 20

Prosper objects to and moves to strike this testimony as irrelevant based on TEX. R. EVID. 401 and 402. Protestants have not shown how his termination of employment and the duties assigned prior to his termination from Prosper is relevant to this proceeding. Mr. McRoy's employment history or job duties are not issues of law or fact in this case. Protestants have protested the application to amend its CCN. The proffered testimony is not relevant to a CCN amendment because the testimony does not have any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the testimony. The employment history of Mr. McRoy is immaterial to any matter at issue in this proceeding. Protestants have not provided any statutory or regulatory basis upon which anything other ability to serve will be considered in this proceeding. As such, consideration of such testimony is improper. Further, the proffered testimony does not tend to prove any element of Protestants' requested relief and, thus, is irrelevant and inadmissible and should be stricken under TEX. R. EVID. 402.

Protestants' Response No. 43

Guilty parties usually do not come out and say why they engaged in wrongful conduct, so it must be surmised from surrounding circumstances. It is Fishtrap's contention that Prosper was against the Fishtrap development as planned because of its density, and that Prosper was determined to stop it, and Mr. McRoy's strange and abrupt termination is suspicious conduct tending to corroborate Fishtrap's claims and contentions.

Fishtrap's Responses to Prosper's Objections to
Fishtrap's Prefiled Testimony and Exhibits

Page 46

Mr. McRoy has testified that he was not making headway in getting Fishtrap to voluntarily reduce the number of lots, he has testified that he made contact with Upper Trinity as a possible provider of utility service to the Fishtrap development, and he has testified that Prosper officials, such as Ms. Finley, the mayor, council members, and members of the public did not want the Fishtrap development, because they believed it was too dense, not in keeping with Prosper's "rural setting." Mr. McRoy's abrupt termination, just three or four months after being hired is highly suspicious and should be admitted as part of Fishtrap's proof that Prosper was opposed to Fishtrap's development and was prepared to use, and did use, its approval authority vis-à-vis subdivision plan approval, and that Prosper is prepared to use any authority it obtains if granted a CCN to again pressure Fishtrap to change its development or give up on its development altogether.

Prefiled Testimony of William Albert Little, III – Exhibit No. 8

Prosper does not object to the introduction of Mr. William Albert Little, III's, deposition as his prefiled testimony, except as otherwise noted below, subject to optional completeness pursuant to Tex. R. Evid. 106 and 107 as it is simply excerpts from a deposition conducted by Prosper's counsel and is not a complete transcript of the deposition. Prosper reserves the right to substitute with the complete transcript of the deposition or portions thereof. Prosper does object to the extent that the proffered prefiled direct testimony offered is not the certified, corrected, or sworn to copy of the deposition transcript. Further, the deposition transcript being offered as prefiled direct testimony is inadequate and improper in form as it is not in a question and answer format as if the witness was asked the question by the counsel offering the prefiled direct testimony. Order No. 3, issued by Your Honor, is clear when the instructions for prefiled direct

testimony state that the format shall be that of a question and answer format. Prosper requests that the entirety of the testimony be stricken due to improper form.

Protestants' Response No. 44

Fishtrap plans to offer the original deposition testimony into evidence, and the format is a question and answer format. Prosper's objection is clearly without merit.

III. CONCLUSION

Based on the foregoing, Fishtrap respectfully requests that the Administrative Law Judge overrule these objections and admit the testimony and exhibits. Fishrtrap also respectfully requests any further relief to which it has shown itself to be justly entitled.

Respectfully submitted,

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

By: Sal Levatino

Sal Levatino
State Bar No. 12245000

**ATTORNEY FOR FISHTRAP PROPERTIES, LLC
and GLENBROOK WATER SUPPLY CORP.**

CERTIFICATE OF SERVICE

I hereby certify that on this 22th day of September 2003, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the following:

State Office of Administrative Hearings

Honorable James Norman
Administrative Law Judge
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Public Interest Counsel

Mr. Blas Coy, Attorney
Office of the Public Interest Counsel
TCEQ - MC 103
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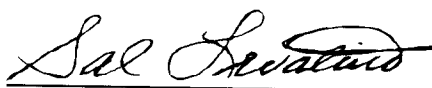
Executive Director of the TCEQ

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Environmental Law Division
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Mr. Kerry Russell
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Docket Clerk

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TCEQ - MC 105
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Sal Levatino

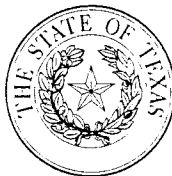
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FACSIMILE COVER PAGE**To:** TCEQ Docket Clerk**Fax #:** 2393311**Company:** TCEQ Office of the Chief Clerk**From:** Sal Levatino**Fax #:** 512-482-0051**Tel #:** 512-474-4462**Subject:****Sent:** 9/21/03 at 4:30:22 PM**Pages:** 50 (including cover)**MESSAGE:**

Town of Prosper Application TO AMMEND WASTEWATER CCN
SOAH DOCKET NO. 582-03-1994
TCEQ DOCKET NO. 2002-1350-UCR

273 SEP 22 AM 8:09
CHIEF CLERK'S OFFICE

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 23, 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
1350

Dear Judge Norman:

Enclosed is the Executive Director's Response to Fishtrap Properties, LLP's and Glenbrook Water Supply Corporation's Plea to the Jurisdiction or, in the Alternative, its Plea in Abatement.

Sincerely,

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

Lara Nehman
Staff Attorney
Environmental Law Division

cc: Mailing List

SOAH Docket No. 582-03-1994
TCEQ Docket No. 2002-1250-UCR

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

**EXECUTIVE DIRECTOR'S RESPONSE TO FISHTRAP PROPERTIES, LLP'S AND
GLENBROOK WATER SUPPLY CORPORATION'S PLEA TO THE JURISDICTION
OR, IN THE ALTERNATIVE, ITS PLEA IN ABATEMENT**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality and files her response to Fishtrap Properties, LLP's and Glenbrook Water Supply Corporation's (Movants') Plea to the Jurisdiction or, in the Alternative, its Plea in Abatement.

The notice of application that the Town of Prosper ("Prosper") sent to neighboring utilities contained correct information regarding the location of the requested service area that should have put neighboring utilities on notice as to where Prosper intended to provide service. The correct information includes a general description of the northern, southern, eastern and western boundaries. Also, the language regarding the service area being located approximately two miles west of Prosper is a correct approximation. Typically, the boundary of a proposed new or amended Certificate of Convenience and Necessity ("CCN") is described in the notice as an approximation and in a way that should be familiar to the intended audience. Prosper's notice of its application also contained an attached map with the correct proposed service area indicated.

The Executive Director agrees, however, with Movants' assertion that some of the language of the notice may have been misleading and caused confusion to neighboring utilities who received it. Specifically, the language stating that the proposed service area is totally within the city limits of Prosper is misleading. The Executive Director, when reviewing a city's proposed notice, has no independent way of verifying a city's assertion that an area is within its

city limits or not. These boundaries often change due to annexation. Since this issue was brought to light, the Executive Director has learned that the proposed service area is bounded by Prosper's city limits, but is mostly not located inside the city limits. If a neighboring utility glanced only at that language which was in all caps, bolded, and underlined, the utility may have been misled. Movants' mistated the law, however, regarding a city's requirement to obtain a CCN. A city is not required to obtain a CCN to provide water and sewer service to areas inside or outside their corporate boundaries, but as in this case, they may choose to do so. See Texas Water Code §13.242, regarding entities required to obtain a CCN.

The Executive Director is disappointed that Movants' are only now raising this issue on the eve of the evidentiary hearing when apparently, they have known about it for some. Counsel for Movants raised this issue during the deposition of Jennifer D. Finley which took place on July 16, 2003. That being said, the Executive Director is not aware of a time restriction for raising the jurisdictional issue, but questions the motives of the Movants raising it at this time.

The Executive Director asserts that appropriate relief is for new notice to be sent to neighboring utilities, not for the matter to be dismissed. Dismissing the matter for lack of jurisdiction is an extreme measure that would not honor the time, money, and effort that the parties have invested in this proceeding. If the matter is dismissed from SOAH, Prosper would still be able to reissue notice, but the proceeding would start over from the beginning. The Executive Director asserts that sending a second notice to neighboring utilities, although also disruptive to the process, would ensure that neighboring utilities are not misled by the notice of the application, but will allow the parties to proceed with this matter without undue delay.

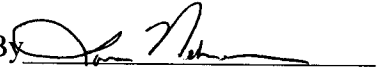
Therefore, the Executive Director respectfully recommends that Prosper be required to send new notice to neighboring utilities, that neighboring utilities be given 30 days to respond, and thereafter, that this case go forward either with the evidentiary hearing as originally planned or if a neighboring utility chooses to participate, that the schedule be reevaluated at that time.

Respectfully Submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Margaret Hoffman
Executive Director

Stephanie Bergeron, Director
Environmental Law Division

By 
Lara Nehman
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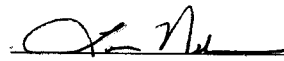
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REPRESENTING THE
EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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 23rd day of September, 2003, a copy of the attached document was sent by facsimile, First Class Mail, and or intra-agency/inter-agency mail to the persons on this mailing list.



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

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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

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RM&RRUSSELL, MOORMAN & RODRIGUEZ, L.L.P.
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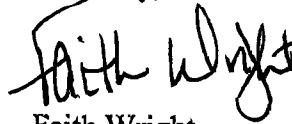
September 22, 2003

VIA FACSIMILEMs. LaDonna Castañuela
TCEQ Chief Clerk MC-105
12015 Park 35 Circle, Bldg. F – 1st Floor
P.O. Box 13087
Austin, Texas 78767Re: SOAH Docket No. 582-03-1994, TCEQ Docket No. 2002-1350-UGR,
*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:

This letter is transmitting a facsimile copy of the Town of Prosper's Replies to Fishtrap Properties, LLP's Objections to the Prefiled Testimony and Exhibits of the Town of Prosper. Please file the following document on behalf of the Town of Prosper in the above-mentioned matter.

Sincerely,



Faith Wright

ADR/fmw
190/00/ltr 030922
Enclosurescc: Service List
Mayor Charles Niswanger

**SOAH DOCKET NO. 582-03-1994
TCEQ DOCKET NO. 2002-1250-UCR**

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

**TOWN OF PROSPER'S REPLIES TO FISHTRAP PROPERTIES, LLP'S
OBJECTIONS TO PREFILED TESTIMONY AND EXHIBITS OF
THE TOWN OF PROSPER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Town of Prosper ("Prosper" or "Town") and files these replies to objections of Fishtrap Properties, LLP ("Protestants") to the Prefiled Testimony and Exhibits filed by the Town in the above-styled matter.

I. REPLIES TO OBJECTIONS

Unfortunately, Prosper and Protestants were unable to agree on withdrawing any objections in this proceeding. In order to reduce confusion, Prosper will reply to each objection raised by Protestants in the same order as were raised. Prosper includes the objection filed by Protestants and provides a response to each objection immediately below it.

II. SPECIFIC OBJECTIONS

Prefiled Testimony of Jennifer Finley

1. Page 8, lines 13-18

Protestants' Objection: Fishtrap objects to Ms. Finley's testifying to a "need for service in the proposed territory" because this is opinion testimony for which Ms. Finley has not been qualified to testify, nor has there been any predicate laid to support her testimony. Nothing in Ms. Finley's prior testimony would qualify her to testify regarding demographic or population trends in the proposed service area. Moreover, there has been no predicate laid to support such testimony, no demographic studies have been testified to, no investigation has been testified to by Ms. Finley into the area which would qualify her to testify, in fact no testimony concerning

the nature or the characteristics of the area has been testified to by Ms. Finley. Ms. Finley's testimony that Glenbrook Estates, owned by Fishtrap Properties, will add 445 residential units is speculative because Fishtrap Properties cannot develop Glenbrook Estates without reliable assurance of utility service. Further, Ms. Finley's testimony that the Town has received eleven plat requests "to the west of the Town of Prosper" is irrelevant to the issue of service need in the proposed service area, because there are areas "to the west of the Town of Prosper" which are not in the proposed service area; in other words, there is no evidence to suggest that these eleven plat requests are in the proposed service area. In addition, Ms. Finley's testimony regarding the eleven plat requests is irrelevant because a plat request is only a request that a tract of land be approved for subdivision; it is not a request for wastewater service and never may materialize into a request for utility service.

Prosper's Response:

Ms. Finley, Prosper's former Town Administrator, testified that she was responsible for the daily operating decisions of the Town and negotiated development agreements on behalf of the Town.¹ With this background, it is logical that Ms. Finley would know where the need for utility service is in order to properly plan for the Town's capital improvement projects. Ms. Finley is an expert in municipal issues, including the planning for the Town's future utility needs. Demographic studies are not needed in order to determine that there is need for a utility service in a particular area. It would be dilatory for a municipality to not note population trends and plan for providing service in anticipation of those trends. Further, as the Town Administrator, Ms. Finley would be privy to reports on population studies/estimates made available to municipalities by the Town's local Council of Governments. Although not an expert in performing demographic studies, Ms. Finley, as Town Administrator, can make use of data in order to properly plan for the Town's growth. Indeed, a formal population study need not be conducted by Ms. Finley in order for Ms. Finley to be able to testify regarding population growth/trends from her experience as Town Administrator. Ms. Finley's testimony regarding the plat approvals serve to provide a foundation for her opinion that need for service is imminent in

¹ APP. Ex. No. 101 at 2, L. 2-8 (Prefiled Direct Testimony of Jennifer Finley).

the proposed service territory. Because Ms. Finley has an expertise in the Town's planning, she is qualified to provide this testimony. However, if Your Honor is inclined to sustain Protestants' objection, Prosper requests that Your Honor reserve ruling on the objection until Prosper has the opportunity to question the witness about her qualifications to provide such testimony.

2. Page 8, Line 20 to page 9, line 8

Protestants' Objection: Fishtrap objects to Ms. Finley's testimony that Prosper is located in a very high growth area, because she has not been qualified to provide expert opinions regarding the demographic trends of the proposed service area, and because no proper predicate has been laid for rendering such an opinion.

Prosper's Response:

Ms. Finley, Prosper's former Town Administrator, testified that she was responsible for the daily operating decisions of the Town and negotiated development agreements on behalf of the Town.² With this background, it is logical that Ms. Finley would know about the growth trends in the area that affect the Town. Demographic studies are not needed in order to understand that the Town is experiencing growth. It would be dilatory for a municipality to not note population trends and fail to plan for providing service in anticipation of those trends. Further, as the Town Administrator, Ms. Finley would be privy to reports on population studies/estimates made available to municipalities by the Town's local Council of Governments. Although not an expert in performing demographic studies, Ms. Finley, as Town Administrator, can make use of data in order to properly plan for the Town's growth. Indeed, a formal population study need not be conducted by Ms. Finley in order for Ms. Finley to be able to testify regarding population growth/trends from her experience as Town Administrator. Ms. Finley's testimony regarding the plat approvals serve to provide a foundation for her opinion

² *Id.*

that need for service is imminent in the proposed service territory. Because Ms. Finley has an expertise in the Town's planning, she is qualified to provide this testimony. However, if Your Honor is inclined to sustain Protestants' objection, Prosper requests that Your Honor reserve ruling on the objection until Prosper has the opportunity to question the witness about her qualifications to provide such testimony.

3. Page 9, lines 5-7

Protestants' Objection: Fishtrap objects to Ms. Finley's testimony on page 9, lines 5 through 7 regarding "the areas the Town of Prosper will eventually annex" because such testimony is pure speculation. As long as Prosper remains a general law city, it does not have the statutory authority to annex territory without the consent of the owners of the property being annexed. If Prosper ever attains a population in excess of 5,000 residents, it will require passage of a city election to approve a home rule charter to give the Town of Prosper the right to annex territory without the approval of the owners of the property being annexed. Even then, the annexation must be reviewed by the Civil Rights Division of the United States Justice Department for compliance with the Voting Rights Act of 1965, plus it must be approved by the governing body of the Town of Prosper. In addition numerous services and notice requirements under Section 43.051, Texas Local Government Code, must be satisfied to permit unilateral annexation to proceed. Ms. Finley is in no position to testify that some day in the future the Town of Prosper will annex any of this area.

Prosper's Response:

Ms. Finley, Prosper's former Town Administrator, testified that she was responsible for the daily operating decisions of the Town and negotiated development agreements on behalf of the Town.³ She is familiar with the Town's ability to annex as well as the desire of persons to be voluntarily annexed into the Town. Based on this knowledge, the Town could properly plan for the annexation of areas. Indeed, the Local Government Code requires municipalities to plan for the annexation of land into its corporate limits. The Town of Prosper has incorporated a border

³

Id.

that surrounds the areas that it seeks to eventually annex. Ms. Finley can testify regarding these plans. There is no speculation that the Town intends to annex the territory. The only uncertainty is when. However, if Your Honor is inclined to sustain Protestants' objection, Prosper requests that Your Honor reserve ruling on the objection until Prosper has the opportunity to question the witness about her qualifications to provide such testimony.

4. Page 9, lines 10 to 13

Protestants' Objection: Fishtrap objects to Ms. Finley's testimony that the area currently located in the extraterritorial jurisdiction ("ETJ") will ultimately be within the corporate limits of Prosper for all the reasons set forth in Objection Number 3 above, i.e., Ms. Finley's testimony is based upon speculation. Such a decision would be made in the future by the council of the Town of Prosper, and it is pure speculation on the part of Ms. Finley that Prosper will ever annex said area. Municipalities have voluntarily deannexed areas, plus they can be required to deannex areas if they fail to provide adequate services following annexation. Indeed, in view of the failure of the Town of Prosper to furnish any services in the past thirty-six years to the area subjected to the ten foot annexation, the property owners subject to that unilateral annexation (including those property owners in the ETJ created by the ten foot strip annexations) may well have a cause of action under Section 43.141, Texas Local Government Code, to force judicial deannexation which would eliminate Prosper's ETJ in that area and open the door to incorporation for other municipalities. So the ETJ area to which Ms. Finley refers could just as easily cease to be in Prosper's ETJ if Prosper deannexed the ten foot strip that created that ETJ.

Prosper's Response:

Prosper reiterates the response to objection No. 3 above and incorporates it herein for all purposes. Further, Protestants erroneously believe that a municipality's decision to deannex is germane to Ms. Finley's testimony. It is not. Whether a municipality deannexes an area is wholly irrelevant and immaterial to Ms. Finley's discussion regarding the reason for providing service to the requested service territory. Protestants' objection is simply a red herring that has nothing to do with the Town's belief regarding the importance of seeking a certificate for the area. Further, any citizen action pursuant to the Local Government Code is wholly irrelevant to

this proceeding. The Commission has absolutely no jurisdiction to determine if a citizen could assert any rights under § 43.141 of the Texas Local Government Code. If a citizen did bring suit against Prosper pursuant to said section, the Commission has no jurisdiction to determine whether such action is in the least bit meritorious. Ms. Finley's testimony goes to the Town's reasoning for seeking certification of the area. Any objection by Protestants in this regard is spurious. Protestants' objection should be overruled.

5. Page 10, lines 9 to 12

Protestants' Objection: For the reasons stated in Objections Numbers 3 and 4, Fishtrap objects to Ms. Finley's testifying that "the development will in all likelihood be annexed into the Town" on grounds that it is based upon speculation. Such a decision can be made only by the council of the Town of Prosper and will require a majority vote of the council. What the council of the Town of Prosper will vote on in the future is pure speculation, including questions of annexation. Annexation of territory would require substantial financial obligations on the part of the Town of Prosper to provide costly municipal services, and these decisions are political decisions to be decided in the future by both the citizens of the Town of Prosper in their selection of councilmen and by the elected councilmen participating as members of the Town council. Official records disclose that the Town of Prosper has "stripped annexed" over 16,000 acres, substantially more than the 1,280 acre maximum for the incorporation of a new municipality. Section 5.901(1), Texas Local Government Code. The "town" has bitten off more than it can chew, and there is every reason to believe it cannot, and does not intend, to deliver municipal services to the areas required by law.

Prosper's Response:

Prosper incorporates herein its response to Objections Nos. 3 and 4. Ms. Finley is merely testifying regarding the Town's intention. As the Town Administrator, she would have knowledge of the Town's intentions and plan to implement such intentions. There is no speculation on Ms. Finley's part.

Prosper objects to and moves to strike Protestants' attempt to submit facts not in evidence regarding the acreage that is contained within Prosper's corporate limits. Further, the Commission has no jurisdiction to receive evidence or make any sort of determination regarding

whether a municipality complies with Chapter 5 of the Texas Local Government Code. Additionally, whether "there is every reason to believe it cannot, and does not intend, to deliver municipal services to the areas" is immaterial to this proceeding, except to the extent of whether the Town has the financial, managerial, and technical ability to provide sewer service to its requested service territory. Protestants' request to expand the scope of this proceeding is improper.

6. Page 14, lines 9 to 13

Protestants' Objection: Fishtrap objects to Ms. Finley testifying that North Texas Municipal Water District is an option for Prosper to acquire Wastewater Treatment Capacity, because such a possibility depends upon future governmental approval of a contract between the Town of Prosper and NTMWD, and it is speculative on the part of Ms. Finley to opine that this is an option for wastewater service. Further, in the same vein, Fishtrap objects to Ms. Finley's testimony that negotiations with the City of Frisco is another option, because again for such an option to exist depends upon the willingness of both the Town of Prosper and the City of Frisco to agree to any contractual arrangement whereby Frisco will agree to provide wastewater service to Prosper. Frisco could conclude it does not have excess capacity, or Frisco could seek to charge an amount that the town council of Prosper would not be willing to pay. Ms. Finley's testimony regarding a possible contract with Frisco is speculative.

Prosper's Response:

Protestants' objection is curious as Ms. Finley has not related that the Town will definitely use either North Texas Municipal Water District or the City of Frisco, but has merely stated that she has personally worked with the two entities to explore the Town's options of receiving service from them. The testimony is not speculative as she testifies that these are options that the Town has explored. Because Prosper has no obligation to serve in its requested service territory, it is not necessary to have executed contracts with North Texas or Frisco at this time. However, Ms. Finley describes that these two entities are options for service to the proposed service territory once Prosper has the obligation to serve the area. It is not speculative for the Town Administrator to state that she has explored options that are available to the Town.

Prefiled Testimony of Randel L. Dobbs

1. Page 6, lines 7 to 9

Protestants' Objection: Fishtrap objects to Mr. Dobbs' testimony that "there are additional contracts being drafted for the provision of wastewater transportation and wastewater treatment services" on the following grounds: (1) there is no predicate for such testimony to show that Mr. Dobbs would know that contracts are being drafted; he has not testified that he has been authorized to draft such contracts or that he is a party to drafting any such contracts; (2) the testimony is not responsive to the question that asked for a description of the relationship between Prosper and NTMWD, and "additional contracts being drafted" is not indicative of any relationship; (3) the testimony is based upon speculation, i.e., that the parties will enter into a contract for wastewater services because "additional contracts are being drafted," and parties often cannot agree to terms, conditions and provisions set out in a draft.

Prosper's Response:

Protestants spuriously object to this testimony on three grounds. Each will be considered in turn.

(1) Protestants claim that there is no predicate for Mr. Dobbs' testimony regarding the existence of draft contracts between North Texas and Prosper. Mr. Dobbs testifies that as part of being the District's Planning Officer, he is knowledgeable of the District's resources and the demands on those resources. He states that his Department tracks "requests for new or expanded service."⁴ Then, Mr. Dobbs details his knowledge regarding the District's relationship with the Town. Mr. Dobbs has exhibited his personal knowledge of the new contracts and their terms. Protestants' objection is curious and should be overruled.

(2) Protestants assert that continued negotiations on new contracts do not provide any indication of a relationship between the parties. On the contrary, it is logical to state that if there was a sour relationship between the parties, the parties would

⁴ APP. Ex. 104 at 3, l. 12-13 (Prefiled Direct Testimony of Randel L. Dobbs, P.E., R.P.L.S.).

not seek to continue to negotiate with one another. Protestants' assertion is illogical and not supported by the facts. Accordingly, their objection should be overruled.

- (3) The testimony does not offer an opinion regarding whether the contracts will be executed. It merely states that the parties are continuing to negotiate for wastewater services. This testimony is merely solicited to establish that the parties have a continuing, on-going relationship. It does not offer an opinion regarding whether the contracts will be executed in the future. As such, the testimony is not speculative and the objection should be overruled.

2. Page 6, lines 16 to 17

Protestants' Objection: Fishtrap objects to Mr. Dobbs' testimony regarding NTMWD having "the ability to provide Prosper with wastewater treatment plant capacity within two years," because such testimony is speculative and no foundation has been laid for such testimony. Testimony about what could be done in two years is of its very nature speculative. There has been no testimony about a time schedule for design of any wastewater plant, no testimony about the financing of such a wastewater treatment plant, no testimony regarding acquisition of needed plant sites or right-of-ways, no testimony regarding construction schedule, no discussion as to board or city council action required before any actions are taken, no discussion as to the cost to Prosper for any delivery of wastewater service and of Prosper's willingness to pay such cost. All of Mr. Dobbs' testimony about what may happen in two years is pure speculation.

Prosper's Response:

Mr. Dobbs is the District's Planning Officer and an expert in the planning of utility service to many municipalities in the north Texas area. It is his responsibility to ensure that entities receive service in a timely manner. In the six years that Mr. Dobbs has been with the District, he has gained knowledge of the amount of time it takes to provide service to a customer. Based on his experience, Mr. Dobbs can opine on the amount of time that it would take to provide service to Prosper. However, if Your Honor is inclined to sustain Protestants' objection,

Prosper requests that Your Honor reserve ruling on the objection until Prosper has the opportunity to question the witness about his qualifications to provide such testimony.

3. Page 8, line 12 to page 9, line 4

Protestants' Objection: Fishtrap objects to Mr. Dobb's testimony regarding a proposed wastewater transportation contract and the proposed wastewater treatment plant because what the fully executed contract will ultimately contain and who will sign such a contract is speculation. There is no basis or predicate laid to support Mr. Dobb's testimony as to what the town council of the Town of Prosper will agree to or to what the final provisions, terms and conditions of any future contract will be.

Fishtrap objects to Mr. Dobbs' testimony (see lines 19 and 22-23 of page 8) that "In all likelihood, Prosper will participate in this contract" because such testimony is speculative as to whether the town council of the Town of Prosper will participate in such a contract, which is a matter to be decided in the future.

Prosper's Response:

Mr. Dobbs has worked with the District for many years. He has knowledge of the negotiation process for the District's services and the likelihood of entities to contract with the District. Indeed, as the Planning Officer for the District, it is his responsibility to negotiate and evaluate the likelihood of the negotiations coming to fruition. Further, Mr. Dobbs has not testified that the contracts are final, but is merely testifying about what the negotiated contracts currently contain. Such testimony is not speculative. Further, based on Mr. Dobbs' experience, he can provide opinion testimony regarding the probability of entities contracting with the District. As an expert in the provision of utility service, Mr. Dobbs can provide opinion testimony that is proffered. As such, the Protestants' objections should be overruled.

4. Page 9, line 6

Protestants' Objection: Fishtrap objects to Mr. Dobbs' testimony regarding the "term" of the proposed contract, because the parties to the contract will decide what the term will be, and Mr. Dobbs' testimony regarding the term of the contract is speculative regarding what the term of the contract may ultimately be.

Prosper's Response:

Based on Mr. Dobbs' experience, he can opine of the effective term of a contract, especially when the term is dependent on the repayment of bonds as Mr. Dobbs states. Further, Mr. Dobbs does not testify as to what an executed contract contains. He testifies, based on personal knowledge, what the proposed contract contains. Testimony based on personal knowledge is not speculative.

5. Page 9, lines 11 to 22

Protestants' Objection: Fishtrap objects to Mr. Dobbs' testifying to the reasons why Prosper would seek a contract with the District, because no predicate has been laid to support said testimony, because of the following reasons: first, Mr. Dobbs has not testified that he is qualified to render an opinion regarding all of the aspects to be considered in Prosper's making a decision regarding providing or not providing, wastewater treatment service to the proposed service area, and second, Mr. Dobbs has not testified that he has studied and analyzed all of the options available to Prosper, including the option of deciding not to serve the proposed area for financial reasons, and thus he is not in a position to testify as to what may motivate Prosper to decide to enter into any wastewater service agreements with third parties.

Prosper's Response:

Mr. Dobbs is providing testimony regarding his relationship with the Town. As such, he is qualified to render an opinion based on his understanding of the Town. Because Mr. Dobbs, through the District, has a history with the Town, he is qualified to opine regarding the Town's reasons to contract with the District. Mr. Dobbs does not provide any testimony regarding other options that may or may not be available to the Town. As such, Mr. Dobbs speaks only of the District's relationship with the Town. Therefore, no study of the Town's options is necessary.

Prefiled Testimony of Dr. Victoria R. Harkins

1. Page 8, lines 16 to line 20

Protestants' Objection: Fishtrap objects to Dr. Harkins' testifying regarding a need for additional service in the requested area, because no predicate has been laid for such testimony. Dr. Harkins is being requested to render an opinion, and she has not testified (1) that she is qualified to render such an opinion, (2) what would be the basis for such an opinion or what data she has reviewed, or (3) what methodology she has utilized in formulating an opinion prior to testifying.

Prosper's Response:

It is curious that Protestants claim that there is no predicate laid for testimony regarding need for service in the proposed service territory as "need for service" is an element of Prosper's burden of proof. Dr. Harkins has established that she is qualified to testify regarding need for service as she was assigned approximately 180 separate CCN cases while she was an employee for the Texas Commission on Environmental Quality ("TCEQ" or "Commission", formerly the Texas Natural Resources Conservation Commission). The plats that she testifies about is precisely the type of information that she used and relied upon in this case and while at the Commission to determine if a need for service exists for the requested service territory. As such, Protestants' claim that Dr. Harkins has not established that she is qualified to testify regarding need is absurd. Further, she testifies regarding recent developments in the proposed service territory. Dr. Harkins should be allowed to testify regarding the basis for opinion that there is a need for service in the proposed service territory. However, if Your Honor is inclined to sustain Protestants' objection, Prosper requests that Your Honor reserve ruling on the objection until Prosper has the opportunity to question the witness about her qualifications to provide such testimony.

2. Page 8, line 21 to page 9, line 7

Protestants' Objection: Fishtrap objects to Dr. Harkins testimony regarding a need for service outside the proposed or requested service area, i.e., those areas removed from the proposed service area such as the land owned by Binary Investments, because it is irrelevant to the issue of whether there is a need for service in the proposed service area. Fishtrap objects to Dr. Harkins testifying regarding Prosper having received eleven plat requests "to the west of the town indicating an increase in growth to the west of Prosper" for the following reasons: (1) the alleged plat request is hearsay evidence, (2) testimony about plat requests is irrelevant because there is no evidence that the alleged plat requests "to the west of town" are located in the proposed or requested service area, because there are significant areas to the "west of town" which are not located in the proposed service area, and (3) testimony concerning plat requests are irrelevant because a plat request is merely a request that a tract of land be approved for subdivision and it is not requests for utility service and may never lead into a request for utility service.

Prosper's Response:

It is basic evidentiary law that an expert may rely on hearsay evidence in order to formulate an expert opinion. Dr. Harkins is an expert regarding CCNs. As such, even if the existence of plat requests is hearsay, Dr. Harkins is able to use the hearsay as the basis for her opinion. In such instances, hearsay testimony is not hearsay as it is not being offered to prove the truth of the matter asserted, but as the basis for the opinion expressed.

Protestants further allege that the plat testimony is irrelevant to this proceeding. Such an assertion is incorrect. Dr. Harkins, after working for many years with the Commission, is qualified to use otherwise irrelevant information to form the basis of her testimony. The use of irrelevant information goes to the weight, not the admissibility of the testimony. Prosper, however, does not agree that the testimony is irrelevant. The growth trend to the west of Prosper is wholly relevant to the need for service in the requested service territory.

Protestants demonstrate their lack of understanding for the CCN process. It is basic practice to utilize plat requests as the basis for determining need. It is the Commission's desire to provide for wastewater utilities to provide service to subdivisions as the alternative is

environmentally unfriendly use of septic systems. Because plats are used to determine need, the testimony is not irrelevant to this proceeding.

3. Page 10, lines 1-3

Protestants' Objections: Fishtrap objects to Dr. Harkins testimony regarding Prosper's having "a good relationship with NTMWD" because (1) she has not testified that she has personal knowledge regarding such a relationship, and such testimony without personal knowledge is based upon hearsay.

Prosper's Response:

Protestants' hearsay objection is one of the most egregious objections made in this proceeding. It is obvious from reading the testimony that the information is not hearsay as it is not being offered to prove the truth of the matter asserted but for the fact or data which Dr. Harkins relied upon in forming her expert opinion on Prosper's CCN application. As it is common to rely on information provided from a municipality, it is logical to assume that such information is the type of information that would be relied upon by other experts in the field. It is basic evidentiary law in Texas that an expert's opinion may be predicated on otherwise inadmissible evidence.⁵ Accordingly, Protestants' objection and motion to strike should be overruled.

4. Page 10, lines 1-3

Protestants' Objection: Fishtrap objects to Dr. Harkins testimony that Prosper "will soon enter into contracts for obtaining wholesale sewer service for portions of the Proposed Territory" because (1) such testimony is speculative, for the reason that such a decision requires a majority vote of the respective governing bodies of both Prosper and North Texas Municipal Water District, and until such a vote is taken, no one can predict what the outcome will be, and (2) the terms of any contract that may be entered into between Prosper and North Texas Municipal Water District are yet to be negotiated and/or agreed upon, and Dr. Harkins'

⁵ *Noriega v. Mireles*, 925 S.W.2d 261, 264-65 (Tex.App.-Corpus Christi 1996, writ denied).

testimony regarding the future terms, provisions and conditions of any such contract are wholly speculative.

Prosper's Response:

Dr. Harkins is an expert in CCN matters. As such, Dr. Harkins should be allowed to rely on information provided to her. It is basic evidentiary law in Texas that an expert's opinion may be predicated on otherwise inadmissible evidence.⁶ As such, Dr. Harkins has not provided an opinion on the terms of the contract in this testimony, just that a contract between the parties is imminent. Because an expert may testify on what may be considered otherwise inadmissible evidence, Protestants' objection and motion to strike should be overruled.

5. Page 10, lines 5 - 20

Protestants' Objection: Fishtrap objects to Dr. Harkins' testimony regarding Prosper's ability to adequately provide sewer service to the proposed service area on the following grounds: first, it is unresponsive since the question concerned the ability of Prosper to provide wastewater service to the requested or proposed service area and Dr. Harkins' response deals with the capacity of the Town of Prosper existing wastewater treatment plant for which there is no evidence to support that it will be used to treat effluent from the proposed or requested service area; and, second, there is no predicate to support Dr. Harkins testimony that "Prosper has retained Hunter Associates Texas, Ltd for design and permitting of ... collection lines throughout the Proposed Service Territory..." and further such testimony regarding Hunter Associates being retained to design a collection system for the proposed service area is hearsay.

Prosper's Response:

It is very common and indeed expected by the Commission to understand if one has the capacity (i.e. technical capability) to provide service to a requested service territory. Therefore, Dr. Harkins' testimony regarding the Town's wastewater treatment capacity is responsive to whether the Town can provide adequate sewer service. Without the capacity or plans to obtain adequate capacity, an applicant would fail to meet its burden of proof. Because Prosper's

⁶ *Id.*

technical capability to provide sewer service is an element of an applicant's burden of proof. Protestants' objection and motion to strike should be overruled.

Protestants further state that no predicate has been laid for testimony regarding Hunter Associates. Such testimony is elicited to demonstrate the Town's preparedness for providing service to the requested service territory. This testimony, when read in context, demonstrates that the Town has the capacity and the plans to provide service to the requested service territory. This demonstrates the Town's technical ability to provide service to the territory. The proper foundation has been laid for the testimony as Dr. Harkins explains the Town's plans with regards to service lines that will be utilized for the service territory. As such, Dr. Harkins may rely on information she has received regarding Hunter Associates. It is basic evidentiary law in Texas that an expert's opinion may be predicated on otherwise inadmissible evidence.⁷ Because Dr. Harkins may rely on otherwise inadmissible evidence, she may testify regarding her understanding of the Town's relationship with Hunter Associates. Because an expert may testify on what may be considered otherwise inadmissible evidence, Protestants' objection and motion to strike should be overruled. However, if Your Honor is inclined to sustain Protestants' objection, Prosper requests that Your Honor reserve ruling on the objection until Prosper has the opportunity to question the witness about her such testimony.

6. Page 10, lines 14-17

Protestants' Objection: Fishtrap objects to Dr. Harkins testifying that "Prosper has retained Hunter Associates Texas, Ltd. for design and permitting of the new addition to the wastewater plant as well as design of collection lines throughout the Proposed Service Territory" on grounds that such testimony is obviously based upon hearsay and not personal knowledge, nor has Dr. Harkins testified as to how she knows that Prosper has retained, if it has so retained, Hunter Associates Texas, Ltd. for the purposes for which she has so testified. In fact, the testimony of Travis Roberts, an engineer for Hunter Associates who has responsibility for work

⁷ *Id.*

with Prosper, has testified in deposition that the firm has not been retained to design collection lines and that such a proposal to transport wastewater from the Proposed Service Area would be "impractical."

Prosper's Response:

Prosper incorporates herein its previous response to Protestants' fifth objection to Dr. Harkins' testimony. For the same reasons stated above, the objection and motion to strike should be overruled. However, if Your Honor is inclined to sustain Protestants' objection, Prosper requests that Your Honor reserve ruling on the objection until Prosper has the opportunity to question the witness about her such testimony.

Prosper objects to Protestants' attempt to introduce facts not in evidence in constructing its argument. If Protestants believe that it has impeachment testimony, it can use such testimony at hearing. It is improper to utilize such to support an objection.

7. Page 10, lines 18 to 20

Protestants' Objection: Fishtrap objects to Dr. Harkins' testimony that "Prosper will soon enter into contracts for obtaining wastewater treatment service from NTMWD (North Texas Water Municipal District, parenthetical added) for additional wastewater treatment capacity" on grounds that such testimony is not predicated on personal knowledge, that it is hearsay testimony, and that it is speculative as to whether Prosper and NTWMD will enter into any contracts regarding wastewater treatment capacity. If the two parties ever enter into such agreements, then the contracts themselves can be introduced into evidence, but until then, it is improper for witnesses to engage in such speculative testimony.

Prosper's Response:

Prosper incorporates by reference its response to Protestants' objections to Dr. Harkins' testimony nos. 3-6. For the reasoning contained in said responses, the objection and motion to strike should be overruled. However, if Your Honor is inclined to sustain Protestants' objection, Prosper requests that Your Honor reserve ruling on the objection until Prosper has the opportunity to question the witness about her such testimony.

8. Page 11, lines 1 to 10

Protestants' Objections: Fishtrap objects to Dr. Harkins testimony that "sewer service will be available in the Proposed Service Territory" if the Amendment to Sewer CCN No. 20888 is granted to Prosper on grounds that such testimony is speculative and made without proper predicate. The Proposed Service Territory is today without any wastewater service, a fact not disputed by any party to these proceedings. Providing wastewater service does not depend on just the granting a certificate of convenience and necessity to Prosper, but also the installation of and financing for a wastewater infrastructure, which may consist of, among other things, collection lines, lift stations, and wastewater treatment plants. Dr. Harkins has provided no testimony, nor has any other witness, that such a system has been designed or that it has been approved or denied by the proper governmental authorities, including Prosper, or that adequate financing has been decided upon, put in place and authorized by the proper parties, whether it be by the governing bodies of the respective parties or the voters if so required. Dr. Harkins assumption that these matters will occur is the rankest sort of speculation and whether these matters occur depends upon what the proper bodies decide, if they should so decide, in the future.

Prosper's Response:

Protestants' objection demonstrates its unfamiliarity with the CCN process. Obtaining a CCN requires the CCN holder to provide continuous and adequate service to its customers. In granting a CCN, the Commission itself makes the determination that a CCN holder will provide service in the future or be subject to an enforcement action or risk having its certificate revoked. In granting a CCN, the Commission's goal is for the CCN to ensure the environmental integrity of the area and remove underground septic systems from utilization. Dr. Harkins is merely providing testimony that with the CCN, Prosper will have the obligation to provide service in the area which will result in environmental protection for the area. As an expert in CCN matters, Dr. Harkins is allowed to provide testimony regarding her belief of what will happen based on her experience. It is basic evidentiary law in Texas that an expert's opinion may be predicated on otherwise inadmissible evidence.⁸ Protestants' objection goes to the weight, not the admissibility

⁸ *Id.*

of the evidence. Because an expert may testify on what may be considered as otherwise inadmissible evidence, Protestants' objection and motion to strike should be overruled.

9. Page 11, lines 12 to 16

Protestants' Objection: Fishtrap objects to the testimony of Dr. Harkins because there is no predicate laid for rendering such an opinion and because it is speculative that just because a CCN is granted, wastewater service will automatically follow. Granting the CCN amendment application will have no effect on sewer service. Only the installation of a wastewater treatment infrastructure will "improve sewer service" and that depends upon a host of decisions that must be made in the future by various parties involving decisions regarding financing, design, construction, schedules, etc. When a sewer or wastewater service system will be put in place is wholly speculative, and Dr. Harkins has no basis for speculating on when or if ever such a system will ever be installed.

Prosper's Response:

Protestants' objection demonstrates its unfamiliarity with the CCN process. Obtaining a CCN requires the CCN holder to provide continuous and adequate service to its customers. In granting a CCN, the Commission itself makes the determination that a CCN holder will provide service in the future or be subject to an enforcement action or risk having its certificate revoked. In granting a CCN, the Commission's goal is for the CCN to improve or ensure service to an area. Dr. Harkins is merely providing testimony that with the CCN amendment, Prosper will have the obligation to provide service in the area which will result in an improvement of service for the area. As an expert in CCN matters, Dr. Harkins is allowed to provide testimony regarding her belief of what will happen based on her experience. It is basic evidentiary law in Texas that an expert's opinion may be predicated on otherwise inadmissible evidence.⁹ Protestants' objection goes to the weight, not the admissibility of the evidence. Because an

⁹ *Id.*

expert may testify on what may be considered as otherwise inadmissible evidence, Protestants' objection and motion to strike should be overruled.

8. Page 12, lines 2 to 4 (Protestants have two number 8s in their objections, Your Honor may refer to this as number 10 for ordering purposes and to allow for ease in rulings.)

Protestants' Objection: Fishtrap objects to Dr. Harkins' testimony that Prosper has entered into contract negotiations with NTWMD for wholesale wastewater treatment, because such testimony is clearly hearsay testimony. Dr. Harkins has provided no testimony showing she has personal knowledge of this fact, and her only basis for so testifying is based upon hearsay testimony.

Prosper's Response:

Protestants' hearsay objection is egregious. It is obvious from reading the testimony that the information is not hearsay as it is not being offered to prove the truth of the matter asserted but for the fact or data which Dr. Harkins relied upon in forming her expert opinion on Prosper's CCN application. As it is common to rely on information provided from a client for which you provide expert opinions, it is logical to assume that such information is the type that would be relied upon by other experts in the filed. It is basic evidentiary law in Texas that an expert's opinion may be predicated on otherwise inadmissible evidence.¹⁰ Accordingly, Protestants' objection and motion to strike should be overruled.

9. Page 12, line 18 to Page 13, line 4

Protestants' Objection: Fishtrap objects to Dr. Harkins testimony that Prosper "can provide continuous and adequate service to the Proposed Service Territory" because at present Prosper has no wastewater service infrastructure whatsoever in place in the Proposed Service Territory, or has taken steps involving a financial and contractual commitment enabling it to install wastewater service infrastructure which would enable it to provide wastewater service to the Proposed Service Territory. Further, Fishtrap objects to this testimony because it is not based upon personal knowledge nor any investigation conducted by Dr. Harkins. Dr. Harkins has not

¹⁰ *Id.*

testified that she has made an engineering study of the Proposed Service Territory to determine what infrastructure is in place or would be required to put in place, nor has she testified that others have performed such a study to determine what infrastructure is in place or required to be put in place. Finally, Dr. Harkins has not testified what steps Prosper has taken to provide wastewater service to the proposed service area to what steps Prosper has put in motion that would result in wastewater service to the proposed service area. Dr. Harkins testimony regarding her recommendation is based upon speculation that contracts will be executed, that designs will be performed, that construction will occur, and that financial commitments will be made, all of which are matters which must be voted upon and approved by the town council of Prosper, and Dr. Harkins' testimony that these events will occur is unfounded speculation upon her part.

Prosper's Response:

Protestants object to the proffered testimony on several grounds. Each will be considered in turn:

- (1) Protestants object to the testimony because "at present Prosper has no wastewater service infrastructure whatsoever in place in the Proposed Service Territory, or has taken steps involving a financial and contractual commitment enabling it to install wastewater service infrastructure..." Prosper cannot respond to this objection as it is not a legal objection, but merely a response to the testimony provided. Protestants had ample opportunity to provide controverting evidence. Testimony should not be stricken merely because the Protestants do not like or disagree with the testimony. Because there is no legal objection, the objection and motion to strike should be overruled.
- (2) Protestants next object because the testimony is not based upon Dr. Harkins' personal knowledge. Dr. Harkins is an expert, not merely a fact witness. As an expert, Dr. Harkins may rely on information provided to her. Protestants do not provide any citation for the proposition that an expert may only testify from personal knowledge. The Rules of Evidence do not require that an expert testify merely from personal knowledge. It is basic evidentiary law that an expert may

rely of facts or data that are reviewed by or made known to the expert.¹¹ The Rules of Evidence give wide latitude to experts. The Rules do not limit an expert to provide only fact testimony.

(3) Again, Protestants seek to strike testimony because it does not like the testimony or the opinions expressed therein. It is basic evidentiary law that an expert may express an opinion on the ultimate issue.¹² The Protestants will have an opportunity to cross-examine Dr. Harkins regarding the bases for her opinions. Protestants objection goes to the weight, not the admissibility of the testimony.

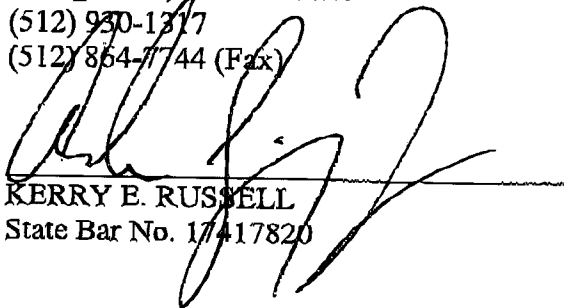
For the above stated reasons, Protestants' objection and motion to strike should be overruled.

III. CONCLUSION

Based on the foregoing, Prosper respectfully requests that the Administrative Law Judge overrule these objections. Prosper also respectfully requests any further relief to which it has shown itself to be justly entitled.

Respectfully submitted,

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¹¹ TEX. R. EVID. 703.

¹² TEX. R. EVID. 704.

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**ATTORNEYS FOR THE TOWN OF PROSPER,
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September 2003, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the following:

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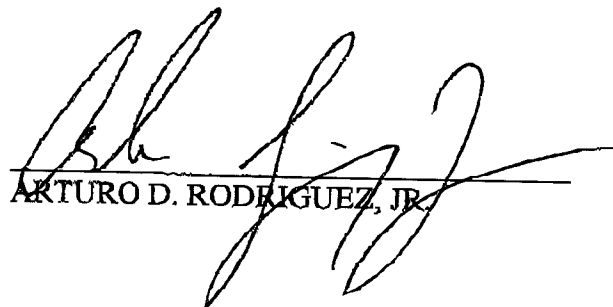
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PAGES 24 PAGES + COVER PAGE

Comments:

Prosper's Replies to Fishtrap Properties, LLP's Objections to the Prefiled Testimony and Exhibits of the Town of Prosper.

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