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Item Number: 80

Addendum StartPage: 0

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

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

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

STATE OFFICE OF
ADMINISTRATIVE HEARINGS

**TOWN OF PROSPER'S REPLY TO FISHTRAP PROPERTIES, LLP'S
MOTION TO FILE DEPOSITION TESTIMONY OF
MUSTANG SPECIAL UTILITY DISTRICT WITNESSES**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Town of Prosper ("Prosper" or "Town") and files this reply to Fishtrap Properties, LLP's ("Fishtrap") Motion to File Deposition Testimony of Mustang Special Utility District ("Mustang") Witnesses ("Motion") in the above-styled matter.

I. REPLY TO MOTION

Fishtrap's Motion is the latest example of Fishtrap's bad faith in this proceeding. Fishtrap consistently has made it clear that it will do whatever it can to delay this proceeding or confuse the central issues in this case. Fishtrap's conduct is indicative of a protestant that will do or say anything in order to try to ensure that it be treated differently than any other party in a proceeding. What is surprising are the lengths to which it will go in order to accomplish this. While Fishtrap certainly attempts to re-write Your Honor's clear and unambiguous Orders in this proceeding, the central question is: May a party attempt to submit deposition evidence from a witness for which it has not previously sponsored pre-filed direct testimony? The rules adopted by the Texas Commission on Environmental Quality ("TCEQ" or "Commission") and State Office of Administrative Hearings ("SOAH"), Your Honor's Order Nos. 1 and 20 and the

parties' due process rights clearly require that the question in this instance be answered in the negative.

A. Fishtrap Should Not Be Allowed To Prefile Additional Direct Evidence

Fishtrap's Motion is based solely on unsupported, unverified claims. The Motion appears to be predicated on Fishtrap's bold assertion that it has a "right" to "respond to testimony of other parties, such as the Executive Director, who present their testimony only after Fishtrap has submitted its own testimony."¹ This is certainly a unique position. Certainly, a position that is not grounded in any legal "right" granted statutorily or by Commission rule. The TCEQ rules clearly indicate that in a proceeding of this type the Applicant has the right to open the proceeding, followed by any protesting parties, the Office of Public Interest Counsel, the Executive Director of the TCEQ, and finally rebuttal from the Applicant.² Further, the rules allow for a SOAH Administrative Law Judge to require written prefiled testimony.³ Your Honor's Order Nos. 1 and 20 provide that "all parties shall prefile their direct-case evidence in writing."⁴ Order Nos. 1 and 20 continue: "Evidence that is not prefiled may not be introduced as part of a party's direct case absent a showing of good cause."⁵ Clearly, the rules afford due process to each and every party in this proceeding.

It is incumbent upon the protesting parties to place their best direct case into evidence before the statutory parties present their evidence. Thus, the protesting parties should attempt to place into evidence every piece of information it believes to be relevant to the proceeding as, by

¹ *Fishtrap Properties' Motion to File Deposition Testimony of Mustang Special Utility District Witnesses*, TCEQ Docket No. [2002-1250-UCR] SOAH Docket No. [582-03-1994] at 7 (Nov. 30, 2004).

² 30 TEX. ADMIN. CODE § 80.117(b).

³ *Id.* § 80.127(c); 1 TEX. ADMIN. CODE § 155.51(c).

⁴ Order No. 1 at 5; Order No. 20 at 5.

⁵ *Id.*

Commission rule, the Applicant is the only party with the opportunity to present a rebuttal case, absent good cause. In this case, Fishtrap has been afforded the opportunity to present whatever evidence it chose by way of prefiled direct testimony in the same manner as every other party. However, it seeks to write into the TCEQ rules a “right” to respond to the testimony of others by the introduction of late-filed direct evidence. There is no such “right” to introduce late-filed evidence because Fishtrap was unwilling or unable to anticipate what the Executive Director’s testimony would be. What Fishtrap essentially states is that despite 30 TEX. ADMIN. CODE § 80.127, Fishtrap, as a protestant, should be able to sit back and review all of the evidence, then get a chance to respond to each and every allegation, instead of present its complete case at the outset, like all other protestants before it. Such actions cannot be allowed. In reality, Fishtrap’s due process rights are protected as it has the right to respond to the Executive Director’s testimony by cross-examining his witnesses. Fishtrap’s due process rights are not violated in any manner by requiring that it prefile its direct case. Without doubt Fishtrap, through all its delays, has been given due process.

In this proceeding, Fishtrap has been represented by no less than three duly licensed Texas attorneys. Further, Fishtrap and all other parties have come to an agreement regarding the scheduling of prefiled testimony at least six times. In none of the prehearing conferences and in no written motion regarding any scheduling order has Fishtrap ever raised a due process problem about the Executive Director filing his case after Fishtrap and the other parties. Indeed, there is no due process problem. Fishtrap’s argument is solely made to attempt to gain special treatment that is not afforded to any other party and will serve to substantially harm Prosper. The real concern with Fishtrap’s Motion is that Prosper’s and the Executive Director’s due process rights

will be violated by the late introduction of the deposition testimony as part of Fishtrap's direct case.

Order Nos. 1 and 20 provide that "evidence that is not prefiled may not be introduced as part of a party's direct case absent a showing of good cause."⁶ Good cause may only be shown by evidence of need, unanticipation of its use, *and* that other parties will not be prejudiced by its late entry into the record. Fishtrap fails to demonstrate that there is good cause to allow the late filed deposition testimony as part of its case in chief. Fishtrap failed to provide any evidentiary proof in its Motion that the deposition testimony it seeks to introduce should be allowed for good cause. In fact, Fishtrap's entire pleading is unverified. Not one factual assertion contained in Fishtrap's Motion is supported by extrinsic evidence. Thus, Fishtrap's Motion fails to demonstrate need and how the testimony is needed because its use was unanticipated. The fact that the testimony of the Executive Director should have been anticipated is discussed below. Finally, Fishtrap fails to allege that no prejudice to any party will occur by its late introduction of the pre-filed evidence in its Motion, much less provide any facts to support the allegation. As such, Fishtrap fails to plead and prove that good cause exists for the introduction of the deposition testimony for its case in chief.

What is not clear is how Fishtrap can claim surprise by the Executive Director's position in this case or that the Executive Director's position was unanticipated. The Executive Director filed essentially the same testimony as he filed last year in this proceeding. It is not difficult to deduct that the Executive Director or any other person would understand that Mustang does not seek to provide service to Prosper's requested service territory that is the subject of this proceeding. This is especially not a surprising position considering the manner in which

⁶ Order No. 1 at 6; Order No. 20 at 5.

Mustang conducts its business affairs, i.e. a Board President that, according to Fishtrap, is too busy to conduct Mustang's affairs and Mustang's employment of three general managers in six months. It is easy to see from this that there is serious doubt that Mustang could even provide service to anyone. Fishtrap could reasonably have anticipated the Executive Director's position and prefiled whatever Fishtrap thought was necessary in order to address the Executive Director's concerns.

Fishtrap seems to state that the introduction of the depositions will not be a surprise to anyone as the testimony of Mustang was prefiled when Mustang was an applicant and party in this proceeding. Prosper has never claimed surprise to the fact that Mustang's testimony was filed. What Prosper strongly objects to is the introduction of depositions that Fishtrap now seeks to introduce under the guise of "newly discovered" or "recently secured" evidence. The record in this case clearly shows that Mustang withdrew as an applicant and as a party to this case. Thus, any pre-filed testimony filed by Mustang is not to be considered as there is no party to sponsor such testimony. As such, it does come as a surprise that Fishtrap did not see fit to prefile any testimony or deposition testimony from any of its intended Mustang witnesses.

Mustang witness Mark Mihm's testimony was indeed previously filed by Mustang. However, Fishtrap has not demonstrated why, between Mustang's withdrawal and the date of Fishtrap's pre-filed testimony deadline, Fishtrap did not attempt to secure the testimony for pre-filing. Fishtrap merely states that Mustang's alleged subscription of certain capacity in an unspecified Upper Trinity Regional Water District treatment facility could not have been anticipated. This is not a reason for failure to secure the testimony. Fishtrap, if it had previously filed the testimony, could have sought to supplement the testimony with the new "unanticipated" testimony. Fishtrap's failure to secure and properly file any testimony it seeks to introduce was a

failure solely on its part to meet the deadlines set in this case. It is important to remember that Fishtrap itself filed a motion to delay its prefiled testimony deadlines, thus allowing it additional time to secure and properly file evidence it sought to include in its direct case.

Had Fishtrap been serious about securing evidence from Mustang's general manager, it could have sought to depose Mr. Pierce upon his recent separation from Mustang. However, it chose to wait until a new manager was appointed before even taking his deposition. In Fishtrap's *Motion for Extension of Time to File Pre-filed Testimony*, filed on September 13, 2004, Fishtrap states that it will rely solely on its own witnesses being that Mustang had withdrawn from the case. Now, Fishtrap claims that it could not secure the testimony from Mustang in a timely manner. What Fishtrap does not explain is why it never sought to secure the testimony earlier for its earlier introduction in this proceeding. For example, if Mustang's Board President was too busy to provide deposition testimony voluntarily to Fishtrap, why did Fishtrap not seek a subpoena from Your Honor months ago to secure the testimony? Likewise, why was a subpoena not secured for Mark Mihm in September or October? Such actions would have at least allowed Fishtrap to attempt to supplement their direct case prior to the Executive Director pre-filing his testimony. It is important to remember that Mustang requested to withdraw from this proceeding on September 7, 2004. Fishtrap had time upon Mustang's withdrawal to request a subpoena from Your Honor to take the depositions of any Mustang witnesses it sought testimony from. It failed to do so. Instead, on September 13, 2004, Fishtrap specifically stated that it would only introduce its own witnesses, not any Mustang witnesses.

Prosper does not object to the use of deposition testimony in this proceeding. Indeed, Prosper did not object to the introduction of Fishtrap's deposition testimony last year. Prosper objects solely to the introduction of depositions as part of Fishtrap's case in chief that were not

previously filed like all other parties, including Prosper and the Executive Director, were required to do.

B. Fishtrap's Detrimental Reliance on Mustang Should Not Be Rewarded

Fishtrap states that it should be allowed to submit the deposition testimony because the withdrawal of Mustang came as a surprise to Fishtrap. There cannot and should not be any leeway given to Fishtrap for its detrimental reliance on any other party to argue its case. Fishtrap has protested this case and caused many delays. It cannot now state that it should be allowed time to introduce additional testimony because another party withdrew. Fishtrap specifically stated on the record that Prosper should re-publish notice of its CCN Application in order to allow Mustang to be named a party in this proceeding. Any reliance on Mustang to then argue Fishtrap's case came at Fishtrap's peril. Fishtrap should not be rewarded for such conduct.

In essence, Fishtrap's Motion makes a mockery of the evidentiary process in administrative cases. What Fishtrap essentially seeks is to wait for all evidence to be presented before filing its "true" case in chief. If Fishtrap's actions are allowed, then it begs the question: Why did Prosper, the party with the burden of proof in this case, file any prefiled testimony? It would have been better to ignore Your Honor's Order and not file anything and present everything live or through depositions. Prosper, however, respects Your Honor's Orders and the administrative process.

Finally, yesterday all parties filed objections to the prefiled testimony submitted by the parties to this proceeding. Prosper does not know yet which portions of the depositions Fishtrap seeks to introduce in order to object to assert any objections to the testimony. This is another example of Fishtrap's attempt to be treated differently in this case.

II. CONCLUSION

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

Respectfully submitted,

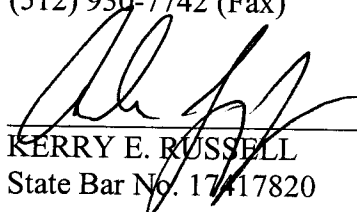
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December 2004, 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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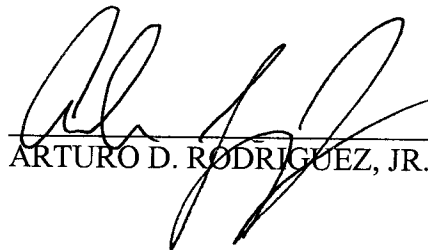
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