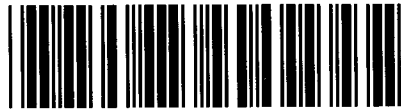




Control Number: 43781



Item Number: 91

Addendum StartPage: 0

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

43781

FISHER & NEWSOM, P.C.

ATTORNEYS AT LAW

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

RECEIVED

2014 NOV 21 PM 4:16

PUBLIC UTILITY COMMISSION
FILING CLERK

Skip Newsom
Board Certified Administrative Law
Texas Board of Legal Specialization

January 21, 2005

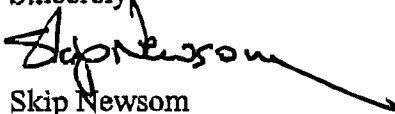
The Honorable James W. Norman
Administrative Law Judge
State Office of Administrative Hearings
300 West Fifteenth Street, Room 502
Austin, Texas 78701

Re: Application of the Town of Prosper to Amend Sewer CCN No. 20888
SOAH Docket No. 582-03-1994; TCEQ Docket No. 2002-1350-UCR

Dear Judge Norman:

Enclosed please find Fishtrap Properties, LLP's Submission of Trial Testimony Excerpts in Support of the Admission of Byron Gaines Deposition Testimony for filing.

Sincerely,


Skip Newsom

SN/jam

Enclosures

cc: Service List

91

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

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

**FISHTRAP PROPERTIES, LLP'S SUBMISSION OF
TRIAL TESTIMONY EXCERPTS IN SUPPORT OF
THE ADMISSION OF BYRON GAINES DEPOSITION TESTIMONY**

Comes now Fishtrap Properties, LLP ("Fishtrap"), and submits the following trial testimony excerpts in support of its request that the deposition testimony of Byron Gaines be admitted for the truth of the matters set forth therein.

Introduction to Submission

Prior to the evidentiary hearing in this proceeding, the Administrative Law Judge (ALJ) ruled that Fishtrap would not be allowed to present the deposition testimony of Mustang Special Utilities District ("Mustang") General Manager, Byron Gaines, taken on November 19, 2004 (Fishtrap Exh. 11) as part of Fishtrap's direct case, reasoning that such testimony should have been pre-filed by Fishtrap as part of its supplemental testimony filing on September 23, 2004. It is not Fishtrap's intention here to reargue its position relative to such ruling that such testimony was not available at the time of Fishtrap's supplemental pre-filing date due to Mr. Gaines' recent hiring and his lack of familiarity with the subject matter of his deposition testimony prior to such supplemental testimony filing date. However, during the course of the live testimony presented in these proceedings, witnesses for the Town and the Executive Director presented

testimony to the effect that Mustang was not interested in furnishing service to the area requested by the Town in this case, nor, in particular, to Fishtrap's Glenbrook Estates development. The deposition testimony of Mr. Gaines directly refutes such live testimonial contentions and should be admitted into evidence to establish such refutation. Likewise, both the Town and Executive Director, in the course of their respective examination of witnesses in this proceeding presented questions directly relating to Mustang's intent to serve the Fishtrap property in an effort to establish either a lack of interest or a lack of reliable information with which to evidence an intent or desire on the part of Mustang to serve the Fishtrap property as a consequence of Mustang's withdrawal as a party in these proceedings. The Town has also asserted, through its counsel, that Mustang's withdrawal from these proceedings evidences that it is not "ready, willing and able" to serve the Fishtrap property or other areas within the service territory requested by the Town. Such live testimonial and advocacy efforts on the part of the Town and the Executive Director open the door for the receipt and consideration of Mr. Gaines' deposition testimony, since, otherwise, parties adverse to Fishtrap may duplicitously contend that Mustang does not desire to serve the area when such parties know that such contention is expressly refuted by Mr. Gaines' deposition testimony and that the specific reasons underlying Mustang's withdrawal from this case are set forth therein.

TESTIMONY OF DR. VICTORIA HARKENS

1. **Page 350, line 8 to page 352, line 19, under cross-examination by Mr. Newsom.**

In this exchange, Mr. Newsom asks Dr. Harkins about her duty to investigate utility service alternatives. Dr. Harkins testified that other "utilities were put on notice of

this application. And their lack of involvement shows no interest.” Mr. Newsom then asks if that means that where it can be shown that utility service can be secured from Mustang, there is still no need to explore that criteria, Dr. Harkins testifies that “Mustang has withdrawn its application, therefore, showing it does not have the interest of serving.” Fishtrap believes that Dr. Harkins' unsolicited response that Mustang is not interested in serving the area opened the door for Fishtrap to put on rebuttal evidence through the Byron Gaines deposition regarding Mustang's express and specific interest in serving the area and its reasons for withdrawing from the case.

2. Page 434, line 7 to page 435, line 9, under re-direct examination by Mr. Rodriguez

Mr. Rodriguez's question related to the effect which the granting of a CCN has on Mustang SUD. In response to Mr. Rodriguez's question, Dr. Harkins answered that if the Town of Prosper were granted a CCN, Mustang SUD would not be able to serve in this particular area. Then again without further questioning, Dr. Harkins volunteered that Mustang's withdrawal of its own CCN application and protest indicated to her that “they're not interested in serving this area because of the fact that, if Prosper becomes certificated to the area, Mustang cannot serve that area as a consequence of them withdrawing their protest.” Fishtrap is entitled to refute such representations of Mustang's intent through the introduction of the deposition testimony of Mr. Gaines as to such intent and reasons for Mustang's withdrawal.

TESTIMONY OF BRIAN DICKEY

3. Page 831, line 4 to page 834, line 23, under cross examination by Mr. Newsom.

Mr. Newsom's question to Mr. Dickey was whether Mr. Dickey considered “what

facilities that adjacent public utility may have at its disposal" in conducting a feasibility assessment as to whether an adjacent retail public utility could provide service to a requested area. Mr. Dickey did not respond to the question, but instead stated that the first thing "you have to know is, do they want to provide service." Later on in this sequence of cross examining the witness, Mr. Newsom asked Mr. Dickey whether Mustang had entered into a wastewater service contract with Fishtrap, and Mr. Dickey's response was that "[B]efore they withdrew their protest and their application," they did enter into such a contract. Then Mr. Newsom asked Mr. Dickey whether Mustang had ever repudiated its utility service contracts with Fishtrap, and Mr. Dickey's response was again not responsive, but volunteered that "[T]here is nothing in the record to indicate that they still wish to provide service." Fishtrap's position is that it is clear that the inference Mr. Dickey is attempting to convey by his answer is that Mustang does not wish to provide service to Fishtrap, especially when considered with his response that "before they withdrew their protest and their application, they did enter into a contract" with Fishtrap to provide wastewater service to the property, thereby suggesting or inferring that the contract was now moot, withdrawn or no longer in effect. Fishtrap believes Mr. Dickey's volunteering of his assertions as to the lack of Mustang intent to provide service, unsolicited by questions from Fishtrap's legal counsel, opens the door for Fishtrap to provide direct testimony through Mr. Gaines' deposition that Mustang, in fact, continues in its desire to serve Fishtrap.

4. Page 1088, lines 1 through 17, under cross examination by Mr. Russell.

Mr. Russell asked whether Mustang's lack of personnel, alluded to by Mr.

Newsom when cross examining Mr. Dickey concerning the reasons why Mustang withdrew its application and protest, would also be a basis for Mr. Dickey to conclude that Mustang was not able to provide continuous and adequate service. This matter was not inquired into by Mr. Newsom, and Mr. Russell's questioning in this regard opens the door to allow Fishtrap to introduce those parts of Mr. Gaines' deposition to the effect that Mustang was able to provide continuous and adequate service despite the period of vacancy in Mustang's General Manager position during the summer of 2004.

TESTIMONY OF JOHN DOWDALL

5. Page 677, Line 4 to page 679, line 16 on cross examination by Mr. Kirshbaum.

Mr. Kirshbaum questioned Mr. Dowdall concerning whether or not there was anything in the record to indicate that the board of directors for Mustang SUD was still interested in providing utility service to the Fishtrap development since it withdrew from this proceeding. Mr. Dowdall testified that Mustang still desired to provide service and that he had numerous conversations to such effect with Mustang's board members and Mr. Gaines. When Mr. Rodriguez objected to the answer on hearsay grounds, Mr. Kirshbaum rephrased the question, asking whether there was anything in writing from the Board of Directors that Mr. Dowdall could base his "opinion that Mustang would still like to serve Fishtrap Properties ..." Mr. Dowdall's response referenced the existing contract, but Mr. Kirshbaum then qualified his questioning concerning evidence of Mustang's interest in serving Fishtrap to a time-period subsequent to Mustang's withdrawal from the case. Mr. Dowdall's answer was not to his knowledge, which is true regarding something in "writing from the board of directors" for Mustang. But, of

course, there is something in writing reflecting the position of Mustang SUD on such matters subsequent to its withdrawal from this case and that is the deposition testimony of Mr. Gaines, testimony which is not hearsay and which would survive any hearsay objection, such as the one posed by Mr. Rodriguez. Moreover, the inference underlying Mr. Kirshbaum's question is that Mustang's withdrawal somehow repudiated its express or written contract with Fishtrap and Fishtrap anticipates that both the Executive Director and the Town will so argue before the Commission. Mr. Gaines' deposition directly refutes such inference and lays to rest any such duplicitous argument.

TESTIMONY OF MR. PETITT

**6. Page 535, lines 10 through page 536, line 19
under cross examination by Mr. James Parker.**

Mr. Parker on behalf of the Executive Director questions Mr. Petitt as to whether there is anything in the record to indicate that the Mustang Board wishes to provide service to Fishtrap other than the utility service contract between Fishtrap and Mustang. Mr. Petitt's response directed Mr. Parker to the Byron Gaines deposition, which Mr. Parker then states is not in the record. The Executive Director's effort to represent the record as devoid of any evidence of Mustang's intent to provide service to Fishtrap subsequent to its withdrawal from this proceeding is fundamental to the staff's erroneous assumption that Mustang's withdrawal from this case somehow evidenced a lack of intent to serve, an assumption which is directly and expressly repudiated by Mr. Gaines' deposition. Fishtrap should have the opportunity of providing such direct evidence that Mustang does desire to provide service to Fishtrap in light of the parties' express effort to distort the facts of this case. Mr. Parker's comments that the Gaines deposition is not in

the record is a thinly veiled attempt on the Executive Director's part to rely on a lack of direct testimonial evidence from Mustang of Mustang's interest in providing service to support the unwarranted inference that Mustang has no desire or interest in performing its contractual obligation to Fishtrap to provide service. The only reason the record in this case may lack such evidence is strictly due to the procedural objections of Prosper and the Executive Director to keep such direct evidence of Mustang's intent to serve the area out of the record due to Fishtrap's inability to present such pre-filed testimony from Mustang within the two weeks following Mustang's withdrawal from the case prior to Fishtrap's supplemental filing deadline. It is duplicitous for a party to rely on a lack of record evidence to establish a proposition by inference when such party has, by its own procedural maneuvering, prevented the admission of otherwise credible and reliable evidence directly refuting such proposition.

ARGUMENT OF MR. RUSSELL

7. Page 715, line 4 to line 15, statement made by Mr. Russell.

It is also clear that the Town is suggesting that the fact that Mustang has withdrawn from these proceedings is indicative of whether it is "ready, willing and able" to provide service. If Mr. Russell, on behalf of the Town, is entitled to make these statements and arguments on the record, Fishtrap ought to be afforded the right of express rebuttal of such assertions through Mr. Gaines' deposition testimony. Otherwise, the Town will be able to expressly mislead the Commission in this case by espousing the opinion that Mustang has no intent or desire to service the area, when the Town knows such opinion to be wholly untrue and directly belied by the sworn testimony of Mustang's

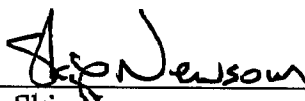
General Manager. Such a result is grossly unfair and unreasonable and equitable estoppel should prevent parties from propounding an assertion of fact or opinion based solely on their success in defeating the admission of direct testimony to the contrary, not on evidentiary grounds, but on pre-trial procedural grounds alone.

Wherefore, premises considered, Fishtrap prays that the hearing record excerpts set forth above be considered and that Fishtrap Exhibit No. 11, the deposition testimony of Byron Gaines, be admitted into evidence.

Respectfully submitted,

Skip Newsom
3724 Jefferson Street, Suite 210
Austin, Texas 78731
Telephone: 512/477-4121
Fax: 512/477-2860
State Bar #14973800

Law Office of Sal Levatino
1524 South IH-35, Suite 234
Austin, Texas 78704
Phone: (512) 474-4462
Fax: (512) 482-0051
State Bar #12245000

By: 
Skip Newsom

ATTORNEYS FOR FISHTRAP
PROPERTIES, LLP AND GLENBROOK
WATER SUPPLY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served on the following persons by fax, hand delivery or 1st class USPS mail on the 21st day of January, 2005.

Kerry Russell
Russell, Moorman & Rodriguez, LLP
102 W. Morrow, Suite 103
Georgetown, Texas 78626
Fax 1-512-864-7744

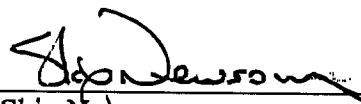
Geoffrey Kirschbaum
Environmental Law Division
TCEQ
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
Fax 239-0606

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

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

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

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



Skip Newsom