

APPLICATION OF THE TOWN OF	)	SOAH DOCKET NO.
PROSPER TO AMEND SEWER	)	582-03-1994
CERTIFICATE OF CONVENIENCE AND)		
NECESSITY NO. 20888 IN	)	
DENTON COUNTY,	)	TCEQ DOCKET NO.
APPLICATION NO. 34004-C	)	2002-1250-UCR

HEARING ON THE MERITS  
THURSDAY, DECEMBER 16, 2004

BE IT REMEMBERED THAT at 10:03 a.m., on Thursday, the 16th day of December 2004, the above-entitled matter continued at the State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, Room 404, Austin, Texas, before JAMES NORMAN, Administrative Law Judge; and the following proceedings were reported by Aloma J. Kennedy, a Certified Shorthand Reporter of:

Volume 4

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1           A     Yes, it is.

2           Q     And can you please describe for the Court your  
3 training with respect to regionalization.

4           A     Certainly. I played a role in the -- although  
5 that was done by the -- the actual document was done by  
6 our Publications section or division of the Commission,  
7 that information was gathered and supplied, and draft  
8 form of that came from the Enforcement Division.

9                     I was on a committee with the Enforcement  
10 Division to develop that document and trained on that  
11 document, and I actually provide training on the  
12 document myself to date to additional staff people with  
13 regards to what actually feasibility means -- or I'm  
14 sorry -- the environmental -- I can't even think  
15 anymore. Let me turn to it.

16                    What the feasibility of regionalization  
17 actually means or how we're supposed to treat it with  
18 regards to water and wastewater.

19                    CLARIFYING EXAMINATION

20 BY JUDGE NORMAN:

21           Q     What does "regionalization" mean?

22           A     Regionalization means we've got three factors  
23 that we need to consider when we're looking at  
24 regionalization. And regionalization may take many  
25 forms. And I try to -- and I train staff in my section

1 on -- I'm one of the trainers that will train staff on  
2 what information to look at in determining whether  
3 something is a regional system or not. And a regional  
4 system -- and we look at three things. We look at  
5 whether there are no other systems, whether no other  
6 systems are reasonably close to the planned system, if  
7 you requested service from neighboring utilities and how  
8 their request was treated or denied or perhaps accepted,  
9 and also whether an applicant can successfully  
10 demonstrate that an exception based on cost, affordable  
11 rates, or financial, managerial or technical  
12 capabilities of the existing system should be granted.  
13 We look at those three factors.

14           There's many forms regionalization can  
15 take. It can be an interim contract or a contract  
16 between a provider to get wholesale service. It can be  
17 in the form of regionalized managerial where they share  
18 a management company, two systems share a management  
19 company.

20       Q     Well, does regionalization -- excuse me. I'm  
21 interrupting here and I -- excuse me. But I thought --  
22 I had the idea that it meant combining forces.

23       A     It does.

24       Q     I thought that's what it meant, that  
25 regionalization means instead of having a lot of

1 separate little lines, you have a big one.

2 A That's correct.

3 Q Is that what it means?

4 A Yes.

5 Q Okay. Excuse me. But go ahead with your  
6 testimony.

7 A Okay. And --

8 Q My understanding was so simple that you just  
9 passed it over.

10 A That's basically it. That's where I was  
11 driving, that you could be combining management sources,  
12 it could become any of that. That's a form of  
13 regionalization.

14 JUDGE NORMAN: Okay.

15 MR. RODRIGUEZ: What does regionalization  
16 pol- --

17 JUDGE NORMAN: Yes. Go ahead.

18 MR. NEWSOM: At some point I would like to  
19 have an opportunity --

20 JUDGE NORMAN: Please. Please go ahead.  
21 Your turn.

22 MR. NEWSOM: Okay.

23 MR. KIRSHBAUM: Your Honor, can I have a  
24 procedural clarification?

25 JUDGE NORMAN: Yes.

1                   MR. KIRSHBAUM: I believe in 2003,  
2   Ms. Benter filed her original testimony about  
3   environmental integrity, and I believe there was a  
4   deadline for objections to that testimony back then.  
5   And I don't believe -- either there was no objection  
6   filed or it was overruled. But the testimony that was  
7   specifically objected to in her supplemental direct  
8   testimony just says there are no changes that she would  
9   like to make to that recommendation at this time.

10                  So to the extent that that original  
11   testimony has already been admitted into the record, I  
12   don't see the problem. I mean, I think she's qualified,  
13   first of all. But second of all, I think she's just  
14   clarifying that there are no changes she would like to  
15   make to that recommendation.

16                 MR. NEWSOM: Your Honor, she --

17                 MR. KIRSHBAUM: But she is certainly  
18   qualified to make that testimony.

19                 MR. NEWSOM: -- she is certainly  
20   testifying to a great many things. Whether or not she's  
21   qualified to testify to those great many things is the  
22   issue before the Court. And all we're attempting to do  
23   through voir dire is to try to determine just, you know,  
24   whether or not what she did she had qualifications to  
25   perform and if what she did satisfies any fundamental

1 test for the offering of expert conclusions of the  
2 nature that there is no impact on environmental quality  
3 or environmental integrity, and I think that's what the  
4 exercise here is attempting to do.

5 JUDGE NORMAN: I think your point is good.  
6 I'm not sure -- and I just don't recall. I wondered  
7 before -- and that is whether or not there has to be an  
8 initial objection or a Robinson/Daubert analysis is  
9 waived.

10 And I think the case is going both ways as  
11 I recall, and I may be wrong on that. But as I recall,  
12 there wasn't an original Robinson/Daubert objection to  
13 that testimony, and I think that's a very good point.  
14 We can have a Robinson/Daubert hearing the rest of the  
15 afternoon.

16 MR. KIRSHBAUM: That's certainly what this  
17 has turned into, Your Honor.

18 MR. RUSSELL: Your Honor, this is even a  
19 more basic attack on the Commission's ability to appoint  
20 people to interpret and apply its own regulations.

21 MR. NEWSOM: I don't have a problem with  
22 that, Your Honor.

23 MR. RUSSELL: It's a very fundamental  
24 attack on the Commission itself, far beyond a normal  
25 Robinson or Daubert objection. And I think if it's

1 going to go like this, we would like the opportunity --  
2 and I think the Attorney General probably would like the  
3 opportunity to brief what the standard should be in  
4 these types of proceedings if the attack is on the  
5 people that the Commission has appointed in supervisory  
6 positions to implement these regulations.

7 MR. NEWSOM: I think that's unfair. The  
8 attack is not on anybody. The attack is not on  
9 Ms. Benter. The question is, what we have is a witness  
10 offering opinion testimony, and that opinion testimony  
11 over time with judicial history is required to meet  
12 certain standards.

13 And we have not taken -- we're not  
14 objecting to Ms. Benter talking about those financial  
15 matters over which she clearly has expertise. But when  
16 we're talking about environmental matters and impacts on  
17 environmental matters, she is not an engineer. She is  
18 not a health scientist. She doesn't have those kind of  
19 qualifications.

20 And to the extent that she is offering  
21 testimony as to the lack of any kind of environmental  
22 impact, I think it's essential to explore what it is  
23 that she's done. I've been very confused by her  
24 testimony here. First, the service area is at a higher  
25 elevation than the wastewater plants, when that's

1 contrary to the evidence in this record.

2 We have the testimony that said, "Well,  
3 regionalization is great because we can utilize  
4 infrastructure that's already in place." The testimony  
5 in this case has already been that there is no  
6 infrastructure in the service area, that a wastewater  
7 plant that is proposed to provide service to this area  
8 has not been designed, much less built. But the other  
9 direction of wastewater infrastructure is, there has not  
10 been a line that has been designed or built to take it  
11 to the Wilson Creek plant.

12 I'm very confused as to just exactly what  
13 kind of assessment the witness has actually done. I'm  
14 not trying to make this in any way a personal attack,  
15 but I am just extremely concerned that we have testimony  
16 being directed at specific issues that are statutory and  
17 regulatory criteria that, (A) there's not qualifications  
18 to and (B), there's not a foundation that would apply  
19 any type of expertise or qualifications to any  
20 assessment performed in this case. That's what I've got  
21 a problem with.

22 JUDGE NORMAN: Now, Under 702, she can be  
23 qualified by knowledge, skill, experience, training.

24 MR. RUSSELL: Your Honor, let me make this  
25 once again. This is not a general environmental impact



1 statement we're talking about. It's not an ASTM  
2 standard. It's not what you would normally expect an  
3 environmental engineer to come in and testify to in a  
4 major case.

5 What this is, is the Commission's own  
6 regulations. Those eight points are the Commission's  
7 regulations. They adopted those regulations. They  
8 train their people how they want their own regulations  
9 interpreted.

10 So she has tried to explain to us over and  
11 over what environmental integrity means in the  
12 Commission's policy and opinion and how it's interpreted  
13 in reviewing these applications. And we're getting way  
14 off, it seems to me, into an overall environmental  
15 impact statement that would require significantly more  
16 qualifications, and I would not deny that. I mean, that  
17 would probably require engineering training in  
18 environmental engineering.

19 But once again, we're getting back to the  
20 Commission's own regulations, how they're interpreted by  
21 the Commission itself in the form of its employees who  
22 implement these regulations. And I think that's a  
23 fundamentally different thing than an overall  
24 environmental impact statement.

25 MR. NEWSOM: Well, the regulations aren't

1 any different than what the status is. I mean, it's the  
2 same words.

3 MR. RUSSELL: And the Commission, the  
4 Texas Commission on Environmental Quality is empowered  
5 to be the implementing agency by the Texas Legislature  
6 of the statute of the Texas Water Code. If there is a  
7 collateral attack on the Commission's rules in this  
8 proceeding, it will be disallowed by the courts in this  
9 state to the extent that's an issue.

10 This is the Commission's regulations that  
11 have been adopted, been in place for a long period of  
12 time, long past Administrative Procedures Act attack on  
13 these regulations. It's how the Commission is  
14 implementing its own regulations. This is just a  
15 Statutory implementation -- this is the Commission's  
16 implementation of the statutes.

17 So what she -- the only thing she really  
18 needs to be qualified to do is to implement the  
19 Commission's regulations. And if this is a basic  
20 challenge as to how Commission employees implement their  
21 regulations and there should be a higher standard in  
22 their review, then at that point I would suggest that  
23 this is an issue that the Commission itself should be  
24 involved in.

25 MR. NEWSOM: Your Honor, I think that's

1     distorting what's at issue. You know, there's not a  
2     collateral attack on any rule. The question -- the  
3     question is where a witness is offering expert testimony  
4     on the impact on environmental integrity, it's not a  
5     matter of what the Commission's rules require to be  
6     implemented. The question is whether or not a witness  
7     has the qualifications to address matters relating to  
8     that inquiry.

9             JUDGE NORMAN: How long are your  
10    questions? How many questions do you have?

11            MS. RUSSELL: Your Honor, I'll just say  
12    what we would ask at this point, if the issue is going  
13    to be this fundamental, we would ask for certification  
14    of this question to the Commission because I believe  
15    this is a very fundamental important question.

16            I don't want to go there. You know, I  
17    thought we were going to get through with this whole  
18    proceeding today. I've never run into this sort of  
19    thing before. But this is a fundamental question. So  
20    if that's where we're headed, I wanted to give you a  
21    heads-up of where we would be headed, too.

22            MR. NEWSOM: Well, I mean, I don't know  
23    what the question that Mr. Russell may be referring to.  
24    I think that the question that has been bothering me --  
25    and it appears to have been bothering the Court -- is

1 the qualifications of the witness to offer expert  
2 testimony as to the nature of the environmental  
3 integrity impacts. That's all that it's been directed  
4 at.

5 And to the extent -- if the Court wants to  
6 take it into consideration, you know, and look at the  
7 testimony and give it whatever weight, I mean, that's  
8 fine. But I can't allow for my client to just simply  
9 accept or waive the idea that -- receiving expert  
10 testimony on a matter that the witness would not  
11 otherwise appear to be qualified for.

12 I mean, normally in those type of  
13 instances, there is some kind of -- I mean, let me just  
14 give you an example. To do an assessment or to opine on  
15 the impacts associated with land disturbance, one would  
16 think that they would have some specialized training in  
17 how to categorize those impacts. We haven't heard of  
18 that specialized training on categorizing the nature of  
19 impacts.

20 We would also expect that there would be  
21 some evaluation pursuant to that type of qualification,  
22 some evaluation of the volume of materials taken out,  
23 the depth at which they would be taken out, what would  
24 happen to those materials once they're taken out, what  
25 precautions are going to be utilized to prevent them

1 from entering into a watercourse and waterway. We have  
2 the testimony that there is no impact without any of  
3 that assessment being conducted.

4 JUDGE NORMAN: Let me ask you this, Ms. --  
5 Bentner or Benter?

6 A Benter.

7 JUDGE NORMAN: Benter. Did you perform  
8 the analysis that you have been trained to perform in  
9 this case?

10 A Yes, I did.

11 JUDGE NORMAN: Okay. But I'm still going  
12 to let -- how long are your questions?

13 MR. NEWSOM: Your Honor, I think we've  
14 made our point.

15 JUDGE NORMAN: Okay.

16 MR. NEWSOM: And I do not want to be here  
17 all afternoon. I do not know what question Mr. Russell  
18 may be referring to as certifying.

19 MR. RUSSELL: The question I would ask to  
20 be certified to the Commission is the ability of the  
21 Commission-appointed person to interpret and apply the  
22 Commission's own regulations. And in this context,  
23 environmental integrity is whatever the Commission means  
24 it to be to apply the Commission's regulations in  
25 reviewing a CCN and then to testify in a proceeding such

1 as this. And it appears to me to be a different  
2 standard than we would have in other situations.

3 JUDGE NORMAN: There are two -- there is  
4 an issue that you brought up.

5 So you have made your point. Is that  
6 right?

7 MR. NEWSOM: I think so, Your Honor.

8 JUDGE NORMAN: Have you made yours?

9 MR. RODRIGUEZ: Yes.

10 JUDGE NORMAN: Have you made yours?

11 MR. KIRSHBAUM: I just want to agree with  
12 Mr. Russell, that, you know, her specialized knowledge  
13 and training are in applying Commission rules and  
14 informing Your Honor and the Commission how the  
15 Executive Director and his staff apply these rules in  
16 reviewing CCN applications. And one of the criteria  
17 they look at is environmental integrity, and she's  
18 explained how they look at it.

19 JUDGE NORMAN: Let me ask you one other  
20 question. You looked -- in determining environmental  
21 integrity, did you look at this application more on its  
22 own to determine whether it's qualified or did you look  
23 at it in determining whether some other application  
24 would be more qualified in this particular case?

25 A I looked at this application and whether it

1 would be qualified because we're not required to look at  
2 better -- we just meet the criteria, not determine if  
3 one is better than the other --

4 Q Okay.

5 A -- unless it's an area that is an economically  
6 distressed area, then we're required to make that  
7 determination.

8 JUDGE NORMAN: I see. Overruled.

9 A Rule-based, yes.

10 JUDGE NORMAN: No. I said "overruled."

11 A Oh, okay.

12 MR. RUSSELL: Thank you, Your Honor.

13 MR. RODRIGUEZ: Thank you, Your Honor.

14 JUDGE NORMAN: Do you still want it  
15 certified?

16 MR. RUSSELL: No, Your Honor.

17 JUDGE NORMAN: Okay.

18 MS. RUSSELL: I believe your ruling took  
19 care of -- and I did not ask for it to be certified. I  
20 tried to give the Court where I would be headed if we  
21 were really going to get into this in depth. Thank you,  
22 Your Honor.

23 MR. KIRSHBAUM: Your Honor, I would like  
24 to reoffer Exhibits ED-5, ED-6 and ED-7.

25 JUDGE NORMAN: Except for the objections

1 already made, any objections?

2 MR. RODRIGUEZ: No objections.

3 JUDGE NORMAN: Including your --

4 MR. NEWSOM: Yes, I understood that.

5 JUDGE NORMAN: It's admitted.

6 (Executive Director Exhibit Nos. 5, 6 and  
7 7 admitted)

8 MR. KIRSHBAUM: I would like to offer  
9 Tammy Benter for cross-examination by the other parties  
10 in this case.

11 WITNESS BENTER: Can I take a quick break  
12 to go get my Powerade?

13 JUDGE NORMAN: Please.

14 WITNESS BENTER: Thanks.

15 MR. NEWSOM: Can we take about 10 minutes,  
16 Your Honor?

17 JUDGE NORMAN: Yes.

18 (Off the record: 2:21 p.m. to 2:34 p.m.)

19 CROSS-EXAMINATION

20 BY MR. NEWSOM:

21 Q Ms. Benter, good afternoon. I hope you're  
22 feeling better than you were yesterday. You're sounding  
23 like you're feeling a lot better.

24 A Yes.

25 Q Let me just ask you the same way I started



## C E R T I F I C A T E


STATE OF TEXAS )

COUNTY OF TRAVIS )

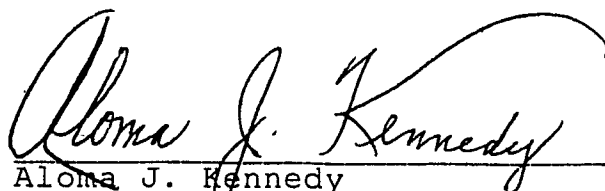
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IN WITNESS WHEREOF, we have hereunto set our hand and seal this 31st day of December 2004.

  
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