

SOAH DOCKET NO. 582-22-0259 – LEAD DOCKET
SOAH DOCKET NO. 582-22-0260
SOAH DOCKET NO. 582-22-0261
TCEQ DOCKET NOS. 2021-0571-DIS, 2021-0572-DIS, AND 2021-0573-DIS

APPLICATIONS FOR THE CREATION	§	BEFORE THE STATE OFFICE
OF LAKEVIEW MUNICIPAL UTILITY	§	OF
DISTRICT NOS. 2, 1, AND 3 OF ELLIS	§	ADMINISTRATIVE HEARINGS
COUNTY	§	

**PROTESTANTS’ RESPONSE TO EXECUTIVE DIRECTOR’S AND
APPLICANT’S EXCEPTIONS TO PROPOSAL FOR DECISION**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Come now the City of Waxahachie, Texas (City) and Ellis County, Texas (County, and collectively Protestants) and file this Response to the Executive Director’s and Applicant’s Exceptions to the Proposal for Decision (PFD) and, in support thereof, would show the following:

I. INTRODUCTION

Protestants disagree with the exceptions to the PFD proposed by the Executive Director (ED) and Applicant, Finch FP Ltd., (Applicant). In their exceptions, the ED improperly requests that the Commission ignore the findings of the Administrative Law Judges (ALJs) and the Applicant improperly requests that the Commission reopen the evidentiary record long after it has closed to allow the submission of new evidence, which the Protestants would not be allowed an opportunity to review, and if necessary, refute with rebutting expert testimony. Therefore, the Commission should deny Executive Director’s and Applicant’s exceptions to the PFD.

II. RESPONSE TO EXCEPTIONS

A. Response to the ED's Exceptions to the ALJs' analysis and recommendations regarding construction costs.

Contrary to the ED's arguments, the ALJs correctly concluded that Applicant's estimated cost for the proposed wastewater treatment plant is significantly understated, and therefore the construction costs presented are unreasonable. (PFD pg. 25). The ED argues that the Applicant carried its burden regarding the reasonableness of projected construction costs under Texas Water Code Section 54.021(a)(2) simply because Applicant hired an engineer to certify that construction of a wastewater treatment plant would cost some amount of money – even if the record shows that estimate was wildly inaccurate – and therefore the Application is indisputably reasonable and should receive Commission approval. This position does not comply with the Legislature's directive to this Commission in Chapter 54 of the Texas Water Code.

The ED acknowledges (1) that the statute requires the Commission to consider “the reasonableness of projected construction costs . . .” in section 54.021(b)(2) before creating a municipal utility district; and acknowledges (2) that the Applicant provided a cost estimate of \$1,750,000 to construct a 1.10 MGD wastewater treatment plant, and that the Protestants presented testimony and evidence from expert Gary Hendricks that the plant would require significantly greater capacity than Applicant estimated, and in actuality cost at least \$29,640,000 to construct. (ED's Exceptions, Sections B and C.). Despite acknowledging Mr. Hendricks' testimony, the ED erroneously represents that “[t]here is no evidence in the record that the proposed construction costs contained in that report are unreasonable.” (ED's Exceptions, Section C.). On the contrary, at the hearing on the merits, the Protestants' expert witness Gary Hendricks put forth evidence that the necessary capacity and cost estimate presented in Applicant's preliminary report was drastically understated. (Proposal for Decision, pages 18). The ALJs – the triers of fact in this

proceeding¹ – found Mr. Hendricks’ opinion credible and persuasive. (See Proposal for Decision, pages 18). Therefore, there is evidence in the record that the proposed construction costs as presented are unreasonable.

The ED states that it is the “ED’s practice to review cost estimates provided in the original engineering report,” and such numbers can be “*estimated*,” “*preliminary*,” “*tentative*,” and “a virtual ‘snapshot’ of proposed construction costs *at the time*,” and regardless, “these costs will undoubtedly change over the lifetime of the project.” (ED’s Exceptions, Section C, emphasis in original). The ED’s position obviates the Legislature’s requirement that construction costs be reasonable *before* a municipal utility district may be created by the Commission, ignores the evidence presented in the contested case hearing, and would blindly accept whatever cost estimates the Applicant provided in its original preliminary engineering report, no matter how inaccurate because those numbers might later change anyway. Here, the Application was contested, contravening evidence on the reasonableness of construction costs was presented in a hearing, and two Administrative Law Judges acting as the triers-of-fact determined that there is credible evidence that the Application’s cost estimates are underestimated by a factor of 15 to 20 times. The PFD found that the Executive Director did not independently verify the Applicant’s stated construction costs. (Proposal for Decision, pages 19, 24).

Further, the ED mischaracterizes Mr. Hendricks’ expert testimony. Mr. Hendricks testified that the costs proposed were not reasonable at the time the petitions were submitted. For example,

¹ See, e.g., *Texas Dept. of Public Safety v. Pruitt*, 75 S.W.3d 634, 639 (Tex. App.—San Antonio, 2002) (“[T]he ALJ is deemed the ultimate trier of fact. See Tex. Gov’t Code Ann. § 2001.174.”); see also *Rogers v. Texas State Board of Public Accountancy*, No. 03-00-000738-CV, 2001 WL 1337606 (Tex. App.—Austin 2001, pet. denied) (“‘An ALJ has broad discretion in determining whether to admit or exclude expert testimony in an administrative hearing.’ *Fay Ray Corp. v. Texas Alcoholic Beverage Comm’n*, 959 S.W.2d 362, 367 (Tex. App.—Austin 1998, no pet. ‘Expert opinion testimony should be admitted when it will assist the trier of fact in understanding the evidence or determining a fact issue.’ *Id.* An ALJ’s decision on the issue of expert testimony will not be disturbed absent an abuse of discretion. *Id.*”).

Mr. Hendricks testified that the Applicant's cost estimate in 2021 equates to \$1.50 per gallon of treated wastewater when the correct cost is in the range of \$19 to \$24 per gallon. (*See* Protestants' Exhibit No. 3, Gary Hendricks' Prefiled Testimony, page 11.) Mr. Hendricks' opinion that the cost estimates were understated and unreasonable was not limited to or predicated on the fact that wastewater plant construction costs have increased by a factor of 15 to 20 times between the time of filing in August of 2021 until the time of hearing in December of 2022, or on some other future cost scenario, as implied in the ED's Response. Rather, the Application did not correctly state, even at the time it was filed, the actual cost of wastewater infrastructure construction needed for this scale of development as proposed, which amounts to an unreasonable estimation at the time the petitions were submitted.

The point of conducting a contested case hearing on the merits of this Application is to have an independent trier of fact analyze the evidence and testimony, determine the credibility of such evidence and testimony, and issue a proposed decision. If the Applicant is permitted to carry its burden of proof solely through the original submission of inaccurate, vastly understated cost estimates regardless of subsequent evidence presented, on the logic that those numbers may change after the conclusion of the hearing and the close of the evidentiary record based on new estimates that Protestants do not have the opportunity to review or rebut, then the whole contested case hearing process is rendered meaningless. This interpretation is contrary to the Legislature's charge to the Commission in Water Code section 54.021 that it consider the reasonableness of projected construction costs before creating a new local governmental entity, and is contrary to the entire review of municipal utility district applications and the purpose of the contested case hearing

process. Therefore, the above referenced sections of the PFD are proper, and the ED's exceptions should be denied.

B. Response to the Applicant's Exceptions to the PFD's analysis and recommendations regarding construction costs and the submission of new evidence.

In the Applicant's Exceptions to the Proposal for Decision and Supporting Brief, the Applicant attempts to present revised calculations and cost estimates through new evidence, in the form of a brief and Letter from Applicant Addressing Increased Projected Costs of MUDs 1-3.² The Applicant should not be permitted to submit revised or updated estimates and new evidence at this point in the proceedings, after the contested case hearing has taken place and the record is closed. See SOAH Order No. 4 (1/26/22). The deadline for prefiled testimony has long since passed, as has the hearing on the merits³ The Applicant had multiple opportunities to present testimony and evidence regarding the reasonableness of its estimated construction costs for the proposed districts. At this juncture, the Applicant should not be permitted to rely upon new testimony and evidence that was not admitted at the hearing or into the record, and about which the Protestants do not get a meaningful opportunity to dispute or conduct cross-examination. The Applicant's proposed exceptions to the PFD, which are predicated on this new evidence and updated testimony, are not proper and should be denied.

III. CONCLUSION AND PRAYER

The Protestants respectfully request that the Commission deny the ED's and Applicant's exceptions and respectfully request that the Commission issue an order consistent with the PFD

² To the extent this letter is not considered an attempt to introduce new evidence, it contains nothing but conclusory assumptions about home prices and the financing of increased construction costs.

³ Applicant's deadline to submit its direct case, including testimony, exhibits, and proposed order of witnesses, was July 28, 2022. The hearing on the merits took place December 6-9, 2022.

with the corrections as set out in Protestants' Exceptions to the PFD. The Protestants respectfully request any other relief to which they are entitled.

Respectfully submitted,

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BY: 
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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2023, a true and correct copy of the above and foregoing document was served on all parties on the mailing list via electronic or regular mail.

Emily W. Rogers

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