



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 12, 2022

CBCA 7222-FEMA

In the Matter of CITY OF BEAUMONT, TEXAS

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Robin Taylor, General Counsel, The Texas A&M University System, College Station, TX; and Suzannah Jones, Deputy Chief of Texas Division of Emergency Management, Austin, TX, counsel for Recipient; and W. Nim Kidd, Division Chief, Recovery, of Texas Division of Emergency Management, Austin, TX, appearing for Recipient.

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Before the Arbitration Panel consisting of Board Judges **LESTER**, **ZISCHKAU**, and **O'ROURKE**.

The applicant, the City of Beaumont, Texas (City), seeks arbitration under 42 U.S.C. § 5189a(d) (2018) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), claiming a revised amount of \$8,108,468 in costs incurred to repair damages to its water transmission line, canal, and levee system caused by Hurricane Harvey and to restore the line and other items to their predisaster condition. The Federal Emergency Management Agency (FEMA) denied the City's public assistance request, determining that the project was ineligible because the damage was not directly caused by Hurricane Harvey. Consistent with section 5189a(a) of the Stafford Act and FEMA's regulations at 44 CFR 206.206(c) (2020), the City submitted an appeal of that denial to the state recipient, the Texas Division of Emergency Management (TDEM), within the sixty-day statutory deadline.

Nevertheless, FEMA denied the City's first-level appeal as untimely because TDEM transmitted the appeal to FEMA seven days beyond a further sixty-day regulatory deadline. We conclude that the appeal was timely submitted and that Hurricane Harvey caused damage to the City's water line, canal, and levee. Accordingly, we return the matter to FEMA to work with the applicant in preparing a project worksheet to determine the value of repairs for the damage caused by Hurricane Harvey.

Background

The City of Beaumont's water system is a looped system fed by two water intake sources. The first source is the Lawson line, which accounts for seventy to seventy-five percent of the City's water supplied by a conveyance system that pumps raw water from sources including the Neches River to the City's wastewater treatment plant. The second source is the Loeb groundwater pump station, which acquires water from a series of wells, supplying the remaining twenty-five to thirty percent of the City's water needs. Initially, the water going to the wastewater treatment plant flowed through a gravity feed above the saltwater barrier of the Neches River and was pumped through a man-made open canal. However, this system proved inefficient because the water was susceptible to contaminants in the open canal requiring additional treatment.

In April 2003, the City hired Freese and Nichols, Inc. (FNI) to design a 2.3-mile raw water transmission line to improve the water quality, reduce maintenance, and deliver more water to the treatment plant. The water line was constructed with a high-density polyethylene (HDPE) pipe and was placed at the bottom of the canal and secured with concrete anchors. The HDPE pipe material is strong and resistant to corrosion with fused joints to prevent leaks. The City and FNI chose HDPE because the pipe would require minimal maintenance.

The pipe system was constructed to pump 40 million gallons of water per day (MGD). The Texas Commission on Environmental Quality (TCEQ) required the City to treat and provide a maximum of 44.2 MGD from all sources based on the number of water taps or end point service connections. Combined with the Loeb groundwater system, which was capable of a maximum flow rate of 11 MGD, the 40 MGD flow rate of the Lawson line was more than enough for the City to meet TCEQ's requirement. The only recommended maintenance was periodically to flush the pipeline by pumping higher flow rates through the line. The City performed this maintenance by flushing the line whenever there were surges in demand. Additionally, the City regularly reviewed the water flow capacities for evidence of leaks.

In 2008, Hurricane Ike hit Texas, resulting in a massive flooding event that caused the maximum flow rate of the Lawson line to drop by over 4 MGD. The City hired Schaumburg and Polk, Inc. (SPI) in 2010 to survey the line and determine if there was any damage to the line from Hurricane Ike. SPI conducted a pump test and found that the Lawson line was

operating at a reduced flow rate. In 2012, SPI performed another survey, identifying thirty-five high points within the line.

In April 2013, the City hired FNI to evaluate SPI's survey data and to investigate solutions to address the reduced flow rate. FNI reviewed the 2010 and 2012 SPI data and, in a report for the City, determined that air pockets at the high points reduced the maximum water flow capacity of the line from 40 MGD to 35.38 MGD, effectively reducing the diameter in the pipeline for water to flow. FNI submitted to the City a project proposal to add ten air release valves throughout the water line at a cost of approximately \$900,000. However, to install the valves, the City would have to shut down the line and cut off the City's water supply for an extended period of time. The City decided not to install the proposed air valves because it could not justify the inherent safety and other risks with shutting down the line to install the valves. The City determined that the capacity of the Lawson line at 35.38 MGD, coupled with the Loeb groundwater supply of up to 11 MGD, was still adequate to meet peak demands and its permit requirements.

Between 2012 and 2016, the City experienced nine other flood events. The Neches River crested at a height of eight-and-a-half feet during one of these events, with the other events in a range of about four to seven feet. Floods over ten feet are classified as a major flood event. Thus, none of these events met the major flood classification. A winter storm in January 2017 led to a surge in water demand throughout the City when frozen pipes broke and residents continually ran water to prevent pipes from freezing. The City was able to keep up with the surge demand with a consistent maximum flow rate of 35.38 MGD. Thus, the line had not shown degraded flow rate capacity between 2010 and early 2017.

On August 25, 2017, seven months after the January 2017 winter storm, Hurricane Harvey hit southeast Texas, causing unprecedented flooding. That same day, the President declared a major disaster, DR-4332-TX. Over several days, the hurricane dumped fifty to sixty inches of rain on Beaumont. On September 1, 2017, the Neches River crested at a record height of 19.59 feet, over eight feet more than Hurricane Ike. The magnitude of the storm caused the Lawson line canal to flood, and the water breached two sections of the east levee, resulting in significant damage to the canal and the line. The force of the high velocity cross currents and depth of the water entering the canal from the breached levee displaced the line, creating air pockets in the line and causing the line to settle significantly into the base of the canal in several locations by as much as one-and-a-half feet. The storm also caused substantial amounts of sediment to be deposited in the line, which has acted to further constrict the effective diameter of the line and restrict water flow. If not repaired, the eroded sections of the canal likely would allow future flood waters to displace the line again.

Beyond the damage to the Lawson line, the Lawson pump station failed due to the flooding of the pump control systems. Also, the other source of water for the City failed. The Loeb pump station lost generator power and was unable to produce potable water from the wells. By midnight on August 31, 2017, the City's water supply was completely shut

down, affecting the City's residents and closing the local hospital and other facilities. A week later, the City mitigated the water shutdown by installing an emergency intake that pulled water directly from the nearby bayou and pumping this water to the water treatment plant with temporary pumps to meet the City's water needs. When the flood waters receded, the City repaired the Lawson pump station, supported by FEMA public assistance funding. Once pumping restarted, the City noticed that the pump's maximum flow rate had been further reduced by 4 MGD to a maximum flow rate of 31.61 MGD.

After the disaster, the City began working with FEMA to develop project worksheets to repair the damages caused by the hurricane. The City and FEMA started working on project #39169 to repair the Lawson line. The City hired SPI to conduct another survey of the water line in May 2018. FNI was also consulted to inspect damages to the canal, to evaluate the SPI survey, and then to develop an estimate of costs for the necessary repairs. FNI prepared a technical memorandum of their investigation and recommended repairs to both the canal and the line. In its report, FNI states that the Lawson line, by design, required minimal maintenance, that the City had properly maintained the line with purging at high demand points, and that the flow measurements received at the treatment plant indicated proper operation before the hurricane. FNI also stated that there was no indication of deterioration in the pipeline and no evidence of negligence on the part of the City in the proper maintenance and operation of the line.

FNI concluded that the flow rate reduction in the line was most likely caused by a combination of sediment deposits in the bottom of the pipe and air pockets in the line's high points. FNI recommended that the City repair the canal levees and install a bypass line to provide an alternate source of water to the treatment plant while the water line is shut down for cleaning and repairs. FNI initially estimated that the repairs would cost \$10,020,394, which included \$1.7 million for the bypass line.

In response to a FEMA request for information, FNI submitted a second report. By studying the SPI survey data from 2010, 2012, and 2018, FNI determined that after Hurricane Harvey, the line had a total of forty-eight high points and several low points caused by significant settling. FNI concluded that the air pockets accounted for approximately two-thirds of the loss in MGD, and sediment in the bottom of the line accounted for the other one-third loss.

After the City submitted the FNI analysis, it took FEMA over a year to issue a determination memorandum. On November 18, 2020, FEMA rejected the City's request for public assistance in its entirety, determining that the project was ineligible because the City had failed to demonstrate that the damage was directly caused by Hurricane Harvey, citing 44 CFR 206.223(a)(1) (2016) and FEMA's Public Assistance Program and Policy Guide, FP 104-009-2 (Apr. 2018) at 19-20. FEMA informed the City of the right to appeal the eligibility determination pursuant to 44 CFR 206.206.

The City submitted its appeal of FEMA's denial to TDEM on January 19, 2021, alleging that FEMA did not properly consider the reasonableness of FNI's October 28, 2019, technical report. TDEM transmitted to FEMA the applicant's appeal and TDEM's recommendation on March 29, 2021. On July 22, 2021, FEMA denied the City's first-level appeal as untimely, finding that TDEM had submitted the applicant's appeal seven days after the sixty-day time frame required by FEMA regulation.

On September 23, 2021, the City filed a request for arbitration with us, challenging FEMA's denial on timeliness and the underlying decision that the hurricane had not damaged the line. On September 29, 2021, FEMA moved to dismiss the arbitration on the ground that the City's first-level appeal was untimely.

The panel conducted a hearing on November 8, 2021. At the hearing, the City reduced its initial cost estimate from \$10,020,394 to \$8,113,718, stating that it has begun the permanent bypass work and has removed that effort from the estimate. In addition to other revisions, the City has also agreed to remove \$5250 for aerators that were already funded by FEMA in a separate project.

Discussion

FEMA contends that we must dismiss this arbitration because the underlying first appeal was determined by FEMA to be untimely and an arbitration must "be dismissed as untimely if FEMA says it is untimely." In other words, FEMA suggests that the panel cannot decide the question of timeliness. We do not agree. It is well-established that the arbitration panel, "as the final executive branch decision-maker, is not bound by a deferential standard of review." *Bay St. Louis-Waveland School District*, CBCA 1739-FEMA, 10-1 BCA ¶ 34,335 (2009). The panel is not expected to defer to the decision making of lower level FEMA officials, but instead exercises *de novo* review. *Monroe County, Florida*, CBCA 6716-FEMA, 20-1 BCA ¶ 37,688. The arbitration panel "must find facts and interpret the law *independently* on behalf of the Executive Branch." *Livingston Parish Government*, CBCA 6513-FEMA, 19-1 BCA ¶ 37,436 (quoting 84 Fed. Reg. 7861, 7862 (Mar. 5, 2019) (emphasis added)). Indeed, the panel can exercise its own discretion to consider not only the record before FEMA but also new evidence, and it may request additional materials from the parties and seek input from expert witnesses. *Roman Catholic Church of the Archdiocese of New Orleans*, CBCA 5549-FEMA, 18-1 BCA ¶ 37,089.

As arbitrators, the panel makes decisions as FEMA would, by examining the facts in the arbitration record and fairly and impartially applying the applicable law. *Livingston Parish Government*; see *Harris County, Texas*, CBCA 6909-FEMA, 21-1 BCA ¶ 37,754 (2020) (rejecting FEMA's argument that the panel should review FEMA's underlying factual findings under a clearly erroneous standard; rather, the panel made its own factual findings); *Bay St. Louis-Waveland School District* ("the statutory and regulatory scheme envisions

independent fact finding by the arbitration panel based upon a record compiled by the arbitration panel”).

There is no basis for excluding the issue of timeliness from the arbitration proceeding, and we have previously decided the issue of the timeliness of a first-level appeal to FEMA. *Village of Pinecrest, Florida*, CBCA 7011-FEMA, 21-1 BCA ¶ 37,798 (holding that a first-level appeal filed on a Monday was timely where the sixtieth day fell on the preceding Sunday). We have also considered timeliness of requests for arbitration and requests for public assistance. *City of Pine Bluff, Arkansas*, CBCA 7102-FEMA, 21-1 BCA ¶ 37,883 (evaluating timeliness of arbitration request after the first-appeal decision was issued); *Town of Elizabethtown*, CBCA 7064-FEMA, 21-1 BCA 37,842 (same); *St. John’s River Utility, Inc.*, CBCA 6903-FEMA, 20-1 BCA ¶ 37,723 (evaluating timeliness of original request for public assistance). Our approach is consistent with interpretations of arbitrators’ authority under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, where it is generally recognized that “the role of the arbitrator [is] to decide procedural issues that arise out of an arbitrable dispute, including timeliness and credibility issues that affect or relate to timeliness.” *Wiregrass Metal Trades Council v. Shaw Environmental & Infrastructure, Inc.*, No. 1:13-CV-84, 2013 WL 4496316, at *4 (M.D. Ala. Aug. 21, 2013); see *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (finding that procedural arbitrability prerequisites, “such as time limits,” are matters “presumptively for the arbitrator”); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir. 2004) (“Gateway arbitrability issues,” like timeliness, “are generally for the arbitrators themselves to resolve.”); *International Brotherhood of Electrical Workers Local Union No. 2022 v. Teletype Corp. Little Rock, Arkansas*, 551 F. Supp. 676, 681 (E.D. Ark. 1982) (“Any underlying dispute of whether the grievance was timely would . . . be a procedural dispute which the arbitrator should decide.”).

We now address the timeliness of the City’s first-level appeal of FEMA’s November 18, 2020, determination memorandum which denied the City’s request for public assistance. FEMA argues that the Stafford Act and its regulations bar any further review or arbitration if the first-level appeal is submitted by the recipient to FEMA more than 120 days after the applicant received the public assistance denial.

The Stafford Act provides applicants a right of a first-level appeal of a FEMA decision:

Any decision regarding eligibility for, from, or amount of assistance under this subchapter may be appealed within 60 days after the date on which the applicant for such assistance is notified of the award or denial of award of such assistance.

42 U.S.C. § 5189a(a). In its implementing regulations, FEMA expands the Stafford Act’s sixty-day requirement with the following two-step process:

- (1) Appellants must file appeals within 60 days after receipt of a notice of the action that is being appealed.
- (2) The recipient will review and forward appeals from an applicant or subrecipient, with a written recommendation, to the Regional Administrator within 60 days of receipt.

44 CFR 206.206(c). FEMA further specifies the roles for the applicant and recipient/grantee:

- (a) *Format and content.* The applicant or subrecipient will make the appeal in writing through the recipient to the Regional Administrator. The recipient shall review and evaluate all subrecipient appeals before submission to the Regional Administrator. The recipient may make recipient-related appeals to the Regional Administrator. The appeal shall contain documented justification supporting the appellant's position, specifying the monetary figure in dispute and the provisions in Federal law, regulation, or policy with which the appellant believes the initial action was inconsistent.

44 CFR 206.206(a).

Thus, to appeal a FEMA decision denying public assistance funding, the applicant submits its challenge to the recipient within sixty days after receiving FEMA's decision. The "recipient" is "the government to which a grant is awarded, and which is accountable for the use of the funds provided." 44 CFR 206.201(m). There is no question that the City timely submitted its appeal to the entity designated by FEMA for receiving the appeal, namely, the recipient, TDEM, within the required sixty-day period, in compliance with the Stafford Act. The City received the determination memorandum denying funding by email on Wednesday, November 18, 2020. On Tuesday, January 19, 2021, the City submitted its first-level appeal of FEMA's denial to TDEM. Although that date was sixty-two days after the City had received FEMA's determination memorandum, it was timely because the sixtieth day after November 18, 2020, was a Sunday and the next day, a Monday, was a federal holiday. *See Village of Pinecrest, Florida, CBCA 7011-FEMA* (holding that, "if the last day of a period [to file an appeal under 44 CFR 206.206(c)] falls on a Sunday, the due date is the following business day").

FEMA tells us, however, that for the timely filing of an appeal, it is not enough for the applicant to file its appeal with the recipient within sixty days. FEMA states that, after the applicant files its appeal with the recipient within the sixty days as provided in the Stafford Act, the recipient must then forward the appeal to FEMA within another sixty days pursuant to 44 CFR 206.206(c)(2). If the recipient fails to forward to FEMA the timely-filed appeal within that additional sixty-day period, FEMA deems the appeal untimely and the applicant loses any right to challenge FEMA's underlying decision. Thus, FEMA essentially transforms the Stafford Act's sixty-day filing deadline into a 120-day bifurcated deadline with its regulation. There are two problems with FEMA's approach.

First, FEMA changes the statutory mechanism for the appeal process by injecting the recipient into the process, leaving the applicant with no control over the recipient's action to forward the appeal to FEMA. The statute says nothing about any *further* requirement that, for the appeal to be considered timely, the recipient would have to forward it on to FEMA within the *next* sixty-day period. To the contrary, the statute gives the right to appeal to the applicant, who perfects its appeal by filing it within sixty days after receiving notice of the funding denial. The statute does not contemplate that, once the applicant files a timely appeal within the sixty-day deadline contemplated by the statute, the appeal may retroactively be deemed untimely because FEMA's designated agent for accepting the applicant's appeal did not act appropriately in subsequently administering the timely-filed appeal.

Second, FEMA argues that it lacks the authority to waive these deadlines if either sixty-day submission is late. We do not agree. Statutory time limits are not jurisdictional bars unless there is clear congressional intent to make them such. A court may look at the plain language of the provision and the context of the time limit within the statute to determine if a statutory time limit is jurisdictional. *Henderson v. Shinseki*, 562 U.S. 428, 438-41 (2011). In *Henderson*, the Court concluded that the 120-day appeal deadline for an adverse veterans benefits determination in 38 U.S.C. § 7266(a) was not jurisdictional because the statutory deadline lacked jurisdictional attributes and imposing a rigid jurisdictional bar in the procedural context for benefits determinations for veterans would clash with the remedial and non-adversarial scheme of the statute. As in *Henderson*, we do not find jurisdictional attributes in the Stafford Act language. Treating the first appeal deadlines for FEMA determinations as rigid jurisdictional bars would clash with the remedial and non-adversarial scheme of the Stafford Act for providing public assistance benefits. *See id.* at 440-41. Furthermore, under 42 U.S.C. § 5141, a related Stafford Act provision, Congress authorizes FEMA to modify or waive administrative conditions when the disaster affects an applicant's ability to comply with such conditions. Further supporting that these sixty-day deadlines are not jurisdictional but rather procedural is that FEMA itself has repeatedly granted waivers and extensions of the appeal filing deadlines both retroactively and prospectively over the years, most recently in response to the disruptions caused by the pandemic. In the present matter, we find under the circumstances that TDEM's seven-day delay in forwarding the City's appeal to FEMA was an administrative delay in processing the otherwise timely-filed appeal. Accordingly, we find the City's first-level appeal to be timely submitted.

FEMA cites to a district court decision in *City of Pembroke Pines v. Federal Emergency Management Agency*, 510 F. Supp. 3d 1126 (S.D. Fla. 2021), as holding that FEMA was entitled to create by regulation an appeal system that required the applicant to rely on the recipient to forward a timely-filed appeal to FEMA within an additional sixty-day period not identified in the Stafford Act. With all due respect to the district court, given the Stafford Act's sixty-day appeal deadline and the right that the statute gives the applicant to decide whether to submit an appeal, we disagree with the district court's decision to the

extent that it finds that the recipient's failure to forward an applicant's timely-filed appeal (within the sixty-day period after the recipient receives it) renders the appeal untimely. Further, we are an arbitration panel, not a district court reviewing agency action, and as explained earlier, our arbitration decision replaces final action by FEMA. In *Livingston Parish Government*, we stated: "As explained in the preamble to our arbitration rulemaking, 'because an arbitration decision replaces final action by FEMA' and a panel is not a reviewing court, 'the arbitrators must find facts and interpret the law independently on behalf of the Executive Branch.'" CBCA 6513-FEMA, 19-1 BCA ¶ 37,436 (quoting 84 Fed. Reg. 7861, 7862); *see also Howsam v. Dean Witter Reynolds, Inc.*, 573 U.S. 79, 85 (2002) (citing the Revised Uniform Arbitration Act, which states that perquisites, such as time limits, among others, "are for the arbitrators to decide").

FEMA and the City have requested that we decide the merits of the public assistance determination if we conclude that the City's first-level appeal is timely. The parties have submitted numerous documents for the panel's review and an arbitration hearing was conducted with both fact and expert witnesses. We find that the arbitration record is adequate to resolve the threshold issues of eligibility and return the matter for FEMA to conduct a valuation as required by the Stafford Act and its regulations.

The Stafford Act and its regulations provide that a facility damaged by a major disaster may be eligible for public assistance funds. 42 U.S.C. § 5172(a)(1); 44 CFR 206.223(a). The Stafford Act provides that the President shall estimate the eligible cost of repairing, restoring, reconstructing, or replacing a public facility "on the basis of the design of the facility as the facility existed immediately before the major disaster." *Id.* 5172(e)(1)(A)(i). We conclude that the record clearly supports finding that Hurricane Harvey caused damage to the Lawson line, the canal, and the levee. The record contains sufficient evidence of their condition immediately prior to and after the disaster. The documentary record, and the testimony of the witnesses, including the City's engineer and the FNI engineer, show that the applicant appropriately maintained the line. We find their testimony credible on the issue of maintenance and damage causation. Even FEMA's engineer agreed that the City's maintenance was appropriate, although he felt that the City should have installed ten air valves in the line in 2013. The record adequately supports finding that the City's decision not to install the air valves in 2013 (five years after Hurricane Ike) was not unreasonable under the circumstances. In addition, based on the testimony from the City's witnesses and the FNI technical reports, we find that the damage caused by Hurricane Harvey would have occurred regardless of the presence of the air valves proposed in 2013. The substantial damage to the line resulted from the magnitude of Hurricane Harvey's flooding and the flood water forces that breached the levee, flooded and damaged the canal, and forced the line to settle and shift.

Due to its ineligibility and timeliness determinations, FEMA never conducted a valuation of the damage to restore the line, canal, and levee to their pre-disaster condition. Providing public assistance to repair damage caused by Hurricane Harvey and return the line,

canal, and levee to their pre-disaster condition is precisely what the Stafford Act provisions were meant to accomplish. Funding repairs for such damage is not a “windfall” for the City. We return the matter to FEMA to conduct the necessary analysis with the cooperation of the applicant.

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge

LESTER, Board Judge, writing separately.

I concur with the arbitration panel’s decision that, under the authority granted to us under section 5189a(d) of the Stafford Act, 42 U.S.C. § 5189a(d) (2018), we can review the timeliness of the applicant’s appeal request. I believe that the language of section 5189a(d) is broad enough to encompass decisions denying first-level appeals as untimely. For the reasons that the panel explains, I disagree with FEMA’s position that an arbitration panel is required to accept by rote FEMA’s representation that an appeal was untimely.

I further concur with the panel’s decision that the City’s first-level appeal was timely. Section 5189a(a) of the Stafford Act provides that an applicant may file a first-level appeal of a denial of a request for assistance within sixty days after being notified of that denial. FEMA’s regulations implementing the Stafford Act direct applicants to submit their first-level appeals to FEMA’s grant recipients within that sixty-day deadline. 44 CFR 206.201, .206(a), (c)(1) (2020). The City did just that. FEMA’s regulations create additional deadlines for entities *other* than the applicant that are not found in the Stafford Act, but nowhere in the regulations does FEMA state that a failure by an entity *other* than the applicant to meet a regulatory deadline after an appeal is filed will somehow retroactively render the appeal untimely. As an example, FEMA’s regulations state that FEMA will decide a first-level appeal within ninety days after receiving it, *id.* 206.206(c)(3), a deadline that FEMA severely failed to satisfy in this case, but it is impossible to believe that FEMA would ever argue that its own failure to meet its own regulatory deadline could retroactively render the applicant’s original appeal filing untimely. By that same logic, the fact that FEMA has added a regulatory requirement that is not a part of the statute directing the recipient to forward any timely-submitted appeal to FEMA within sixty days after receiving

it, *see id.* 206.206(c)(2), should not affect the timeliness of the applicant's original appeal submission. In drafting its regulations, FEMA has essentially designated the recipient as its receiving agent for purposes of the filing of the appeal. If the recipient is late in forwarding the timely-submitted appeal to FEMA, that is not a delay that is attributable to the applicant. The statute provides the applicant the right to appeal within a sixty-day window, and the City met that deadline by delivering its appeal in the manner that FEMA has directed. Delays by FEMA or its receiving agent in forwarding or deciding the appeal should not be viewed as retroactively rendering the appeal untimely.

After deciding that the first-level appeal was timely filed, the panel then considers the reasonableness of the City's prior decision not to address earlier damage to its water line and whether Hurricane Harvey damaged the City's water line. I do not feel that we have a viable basis for conducting such a review because of the seriously underdeveloped record in this matter. Because FEMA rejected the first-level appeal as untimely, it did not develop an evidentiary record on the merits. Almost all of the evidence before us about the history of damage to the City's water line from Hurricanes Ike and Harvey, the City's decision not to repair the line after Hurricane Ike despite its experts' recommendations in 2013 to do so and its post-Harvey decision to repair the line but to seek reimbursement from FEMA for the full cost of repairs that will likely restore the water line to its original 40 MGD capacity was presented through testimony. Little, if any, documentary support was submitted to the Board.

Because the repairs that the City is seeking here will likely restore the water line to its original 40 MGD capacity, I have concerns about whether FEMA reimbursement for restoration costs will provide the City with a windfall following its 2013 decision to defer any repair of its water line, when prior storms had reduced capacity from 40 MGD to 35.38 MGD. Generally, FEMA only restores facilities to their predisaster function, design, and capacity, *Roman Catholic Church of the Archdiocese of New Orleans*, CBCA 5549-FEMA, 18-1 BCA ¶ 37,089; 44 CFR 206.226, which, in this case, would apparently mean that FEMA should pay to restore the City's line to a 35.38-MGD capacity. It appears from the hearing, though, that, when repairs are made, the goal will plainly have to be to restore full 40-MGD capacity. To the extent that FEMA now funds restoration of the line to a 40-MGD capacity level, it is unclear the extent to which the City will have shifted to FEMA repair costs that its experts recommended it incur but that it avoided in 2013.¹ If the City had

¹ The City argued to the Board that it could not have made the repairs recommended back in 2013 because, if it had, it would have had to shut down the water line for an extended period of time – something that it could not have done because it had no alternative way to deliver water to its citizens. It was only after Harvey hit that the City decided to pay to install an emergency intake “bypass” line that it could use for temporary water transport while the main water line was shut down. It is completely unclear from this record why the City could not have paid to install that “bypass” line in 2013, when the City's

repaired the line in 2013 to restore the 40-MGD capacity, would that repair have affected or reduced the extent to which Harvey would have been able to damage that line? How did the unrepaired damage seen in 2013 affect the stability of the line when Harvey hit? Is the City effectively shifting its 2013 costs to FEMA, or would the same damage that occurred as a result of Harvey have occurred even if the City had made repairs in 2013? We cannot know because no sufficient investigation or review has occurred. Although the majority of the panel “find[s] that the damage caused by Hurricane Harvey would have occurred regardless of the presence of the air valves proposed in 2013,” I see no evidence in the record to support that finding.

Although the Stafford Act provides that applicants are entitled to submit additional evidence to the Board beyond that submitted in the first-level appeal, 42 U.S.C. § 5189a(d)(2), (d)(5)(B), I do not believe that the Board should be making factual findings in an arbitration on such an underdeveloped record, particularly when many questions about why the City deferred repair of its water line in 2013 and the effect of that decision on current damages were left unanswered. I would remand this matter for development of a first-level appeal decision.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

experts originally recommended repairs to the water line. Although the panel finds that the City’s 2013 decision not to make repairs following Ike was “reasonable,” nothing in the record explains why the City was unable to install in 2013 the same emergency intake “bypass” line that it has now installed and that now makes it possible to repair the water line.