

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for original certificate to operate water and wastewater utility in Bay County by Dana Utility Corporation.

DOCKET NO. 991632-WS
ORDER NO. PSC-00-0127-PAA-WS
ISSUED: January 14, 2000

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION

ORDER ON PETITION FOR TEMPORARY WAIVER OF RULES 25-30.033 (1)(h), (k), (m), (o), (t), (u), (v), (w); (2); (3); and (4), FLORIDA ADMINISTRATIVE CODE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

On October 20, 1999, Dana Utility Corporation (Dana or utility) filed an application for original certificates to operate a water and wastewater facility in Bay County, Florida. Simultaneously, the utility filed a petition for temporary waiver of Rules 25-30.033 (1)(h), (k), (m), (o), (t), (u), (v), (w); (2); (3); and (4), Florida Administrative Code.

Dana is a wholly-owned subsidiary of Lake Merial Development Company, Inc. (Lake Merial). Dana was formed for the specific purpose of providing water and wastewater service to Lake Merial multi-use development. Dana's parent company, Lake Merial, has

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entered into an agreement with Fancher Management Group, Inc. (Fancher Management) to provide assessment, planning, and operational services for Dana. Lake Merial owns approximately 95% (approximately 2,100 acres) of the land included within the territorial description proposed to be served by Dana. The remainder of the land has been donated to the Bay County School Board for the construction of a public school which is presently under construction. This school will require utility service beginning on or about March 1, 2000. Further, the development is scheduled to have a substantial number of lots available for service beginning in the Summer of 2000.

This action pertains to the petition for temporary waiver of Rules 25-30.033 (1)(h), (k), (m), (o), (t), (u), (v), (w); (2); (3); and (4), Florida Administrative Code. We will address Dana's application for original certificates upon further review of the application.

PETITION FOR TEMPORARY WAIVER OF THE RULES

Rule 25-30.033 (1)(h), (k), (m), (o), (t), (u), (v), (w), Florida Administrative Code, addresses the information necessary for setting initial rates and charges and requires the utility to file the following information: the number of equivalent residential connections proposed to be served; one original and two copies of a sample tariff containing all rates, classifications, charges, rules, and regulations; one copy of a detailed system map showing the proposed lines, treatment facilities and the territory to be served; a statement regarding the separate capacities of the proposed lines and treatment facilities; a cost study including customer growth projections supporting the proposed rates, charges and service availability charges; a schedule showing the projected cost of the proposed system(s) by uniform system of accounts and account numbers; a schedule showing the projected operating expenses of the proposed system; and a schedule showing the projected capital structure including methods of financing the construction. Rule 25-30.033 (2); (3); and (4), Florida Administrative Code, requires the utility to implement the base facility and usage rate structure, to establish a return on common equity using the Commission's equity leverage formula, and

authorizes the accrued allowance for funds used during construction.

Statutory Requirements

Notice of the petition for temporary waiver of the above-mentioned rules was provided to the Department of State and was thereafter published in the Florida Administrative Weekly on November 5, 1999, pursuant to Section 120.542(6), Florida Statutes. No written comments on the petition for temporary waiver have been received and the time for filing said comments has expired.

Section 120.542(1), Florida Statutes, authorizes us to grant variances or waivers to the requirements of our rules. Section 120.542(2), Florida Statutes, sets forth the requirements for granting a variance or waiver to an agencies rules. The person subject to the rules must demonstrate that: 1) the underlying purpose of the statute has been or will be achieved by other means; and 2) strict application of the rules would cause the person substantial hardship or violate principles of fairness. "Substantial hardship" as defined in this section means demonstrated economic, technological, legal, or other hardship by the person requesting the variance or waiver.

The Underlying Statute

The underlying statutory provisions pertaining to the above-mentioned rules are Sections 367.031 and 367.045, Florida Statutes. Section 367.031 requires each utility seeking to provide water and wastewater service to obtain a certificate of authorization from this Commission prior to obtaining permits from the Department of Environmental Protection (DEP) and water management districts. Further, Section 367.045(5)(a), Florida Statutes, states that we may grant a certificate of authorization if it is in the public interest. The purpose of Sections 367.031 and 367.045, Florida Statutes, is to ensure that a utility has the financial and technical ability to provide service and that there is a need for service in the proposed service area.

Although Dana has requested a temporary waiver for filing part of the required financial and technical information, we find that Dana has provided sufficient information to demonstrate that it will have the financial and technical ability to provide water and wastewater service to the proposed service area. Dana is a wholly-owned subsidiary of Lake Merial. Lake Merial has signed an agreement with Dana to provide financial assistance to the utility for a period of ten years. Lake Merial has obtained a Utility Loan Commitment from Dana Properties, Ltd. (Dana Properties), its parent company, that provides for construction and operational funding for the utility up to \$4,500,000. Further, Dana filed a copy of the financial statement of Dana Properties that shows a net worth of approximately 3,900,000 pounds sterling, which is over \$6,000,000 U.S. dollars. Mr. Goldstein, President of Lake Merial, has 25 years of management experience including a position as Chief Operational Officer for developments which operated water and wastewater facilities. Dana has entered into an agreement with Fancher Management to provide assessment, planning, and management service for the utility. Mr. Fancher, the president Fancher Management, also has over 25 years of experience in the operations and management of water and wastewater facilities.

Lake Merial development will require water and wastewater service. Lake Merial intends to have lots available for service by the Summer of 2000. Moreover, a public school is currently under construction in this area which will require water and wastewater service beginning March 1, 2000. The closest city, Lynn Haven, is unable to provide service to the area. The two closest public utilities, Bay County and Gulf Coast Electric Cooperative, are unable to provide service at this time. The earliest time either utility could provide water service is three to five years from now and longer for wastewater.

Dana provided notice of its application in a paper of general circulation on October 14, 1999, which contained a typographical error in one of the parcel descriptions by leaving out the word "North" in one of survey measures. However, we find that the absence of this word does not materially change the meaning of the legal description and would not be subject to misinterpretation when placed in the context of the overall legal description

contained in the notice. Therefore, we do not find that this typographic error requires renoticing. Dana has provided a corrected legal description. No protests have been received regarding Dana's application or petition for temporary rule waiver. Included in the application is an unexecuted sale contract that would convey the land for the proposed site of the water and wastewater facilities to Dana and related draft warranty deed. Currently, the land is owned by Dana's parent company, Lake Merial.

Substantial Hardship

In the petition for temporary waiver, Dana stated that gathering the information required by the rules to establish the initial rates and charges would have delayed the filing of the application for certificates of authorization by approximately 120 days. This delay in filing of the application would have delayed the time frame for action on the application, issuance of the construction permits by DEP, and ultimately the construction of the water and wastewater facilities. If Dana had waited the 120 days, Lake Merial and Dana would have been unable to fulfil their obligation to provide water service to the public school by March 1, 2000. Therefore, Dana faces technical and other hardship because it must obtain its certificates of authorization with sufficient time to construct the water and wastewater facilities to meet the needs of the public school. In addition, Lake Merial and Dana require the certificates of authorization to provide water and wastewater service prior to DEP issuing construction permits.

When a utility has met the criteria set forth in Section 120.542, Florida Statutes, we have granted a temporary waiver of the rules regarding establishment of initial rates and charges. See Order No. PSC-98-1644-FOF-WS, issued December 7, 1998, in Docket No. 980876-WS, In re: Application for certificate to operate water and wastewater facility in Marion County by Ocala Springs Utilities, Inc. However, if the utility is unable to meet the underlying purpose of the statute, we have not granted a rule waiver. See Order No. PSC-99-1603-PAA-WS, issued August 16, 1999, in Docket No. 990696-WS, In re: Application for original certificates to operate water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation (Consummating

ORDER NO. PSC-00-0127-PAA-WS
DOCKET NO. 991632-WS
PAGE 6

Order No. PSC-99-1800-CO-WS, issued September 15, 1999). In the instant case, we find that Dana has met the underlying purpose of Sections 367.031 and 367.045, Florida Statutes, because it has demonstrated the technical and financial ability to provide service and a need for service in the proposed territory. In addition, Dana has shown that it will suffer substantial hardship if all of the provisions of Rule 25-30.033, Florida Administrative Code, are strictly applied.

Therefore, we find that Dana's petition for temporary waiver of rules has met the criteria set forth in Section 120.542(2), Florida Statutes. Therefore, pursuant to Section 120.542(1), we authorize a temporary waiver of Rules 25-30.033 (1)(h), (k), (m), (o), (t), (u), (v), (w); (2); (3); and (4), Florida Administrative Code, for a period of 120 days from the effective date of this order or until February 20, 2000, whichever date occurs first. Upon the completion of the deferral period, the utility shall submit a separate application for initial rates and charges along with the supporting financial, engineering, and operating information.

If no timely protest is filed upon expiration of the protest period, this Order shall become final and effective upon the issuance of a Consummating Order. This docket shall remain open pending action on Dana's application for original water and wastewater certificates.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Dana Utility Corporation's petition for temporary waiver of Rules 25-30.033 (1)(h), (k), (m), (o), (t), (u), (v), (w); (2); (3); and (4), Florida Administrative Code, is granted. It is further

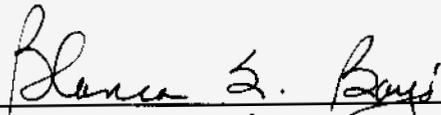
ORDERED that Dana Utility Corporation shall submit a separate application for initial rates and charges along with supporting financial, engineering, and operating information, 120 days from the effective date of this order or by February 20, 2000, whichever date occurs first. It is further

ORDER NO. PSC-00-0127-PAA-WS
DOCKET NO. 991632-WS
PAGE 7

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 14th day of January, 2000.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

ORDER NO. PSC-00-0127-PAA-WS
DOCKET NO. 991632-WS
PAGE 8

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on February 4, 2000.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.