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-00-1376-PCO-WS ISSUED: July 31, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
E. LEON JACOBS, JR.
LILA A. JABER

ORDER GRANTING MOTION FOR EXTENSION OF TIME AND DETERMINING THAT REVOCATION OF CERTIFICATE PROCEEDINGS SHALL BE INITIATED SHOULD THE UTILITY FAIL TO FILE RATES AND CHARGES INFORMATION BY AUGUST 20, 2000

BY THE COMMISSION:

BACKGROUND

Dana Utility Corporation (Dana or utility) was granted original Certificates Nos. 614-W and 529-S to operate a water and wastewater facility in Bay County, Florida by Order No. PSC-00-0227-FOF-WS, issued February 3, 2000, in this docket. Currently, Dana has no water or wastewater facility. Dana was formed for the specific purpose of providing water and wastewater service to Lake Merial multi-use development. Dana is a wholly owned subsidiary of Lake Merial Development Company, Inc. (Lake Merial). Lake Merial owns approximately 95% (approximately 2,100 acres) of the land 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. Lake Merial entered into an agreement with Fancher Management Group, Inc. (Fancher Management) to provide assessment, planning, and operational services for Dana.

Originally, Dana anticipated needing to construct its treatment facilities to accommodate a public school in its territory that would need service beginning March 1, 2000. The utility stated that if it had waited to file its application for

original certificates with the information necessary to establish initial rates and charges, it would not have had sufficient time to meet its obligation to the school. Moreover, the utility required the certificates of authorization to provide water and wastewater service prior to the Department of Environmental Protection (DEP) issuing construction permits. Therefore, simultaneous with its application for original certificates, 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. These rules address the information necessary for the setting of initial rates and charges along with the supporting engineering, operational, and financial information.

In its petition for temporary waiver, the utility requested the waiver for a period of 120 days or until February 20, 2000, whichever date occurred first. By Order No. PSC-00-0127-PAA-WS, issued January 14, 2000, in this docket, the petition for temporary waiver of the rule was granted. Pursuant to Order No. PSC-00-0227-FOF-WS, issued February 2, 2000, in this docket, the utility was ordered to file the temporarily waived rates and charges information by February 20, 2000.

On February 16, 2000, the utility filed a Motion for Extension of Time. In its motion, the utility requests a six month extension of time to file the temporarily waived rates and charges information. The utility states that the current owners of the Lake Merial Development are in negotiations to sell the development and change of control of the utility. In addition, the utility states that due to the ongoing negotiations, "neither the finalization of the financial and other data necessary to set initial rates nor the construction of utility facilities has begun as quickly as Dana originally anticipated."

Dana requested an informal meeting with our staff to discuss the circumstances described above. On February 18, 2000, our staff conducted an informal meeting with the utility's attorney and the utility's manager. At this meeting, the utility represented that negotiations were expected to be completed by May 2000. Moreover, the utility stated that no further development of the lots located in the utility's service territory were expected until the completion of negotiations. When our staff inquired about the status of the utility service needed by the school, the utility's manager asserted that the school will construct its own water and wastewater facilities. Furthermore, the utility stated that the few homes which are currently located in the utility's service

territory are on private wells and septic tanks and would not need service from the utility at this time.

At the March 28, 2000, Agenda Conference, our staff presented a recommendation which described the utility's current circumstances as stated above and recommended granting the utility's request for extension of time to file the rates and charges information. However, we expressed concerns regarding the continuing need for service in the utility's territory and the utility's inability to meet the needs of the public school. Therefore, we deferred ruling on the motion. We directed our staff to inquire of the Department of Community Affairs (DCA) and the DEP what impact the proposed transfer and the delay in the need for service might have on those agencies' decisions and to provide an update to us. Further, we directed our staff to address the possibility of cancellation of the certification of authorization, why revocation is a difficult process and whether our proposed agency action process could be utilized in a revocation proceeding. In addition, we instructed our staff to address the appropriateness of initiating a show cause action against the utility for failure to provide service to the school.

On June 7, 2000, the utility provided our staff with an update on the status of the negotiations. According to the utility, the transaction is close to being completed. However, no closing date has been scheduled. Further, the utility stated that no lines have been constructed as of yet.

DCA AND DEP COMMENTS

Our staff contacted DCA and DEP to request their input on what impact the proposed transfer and the delay in the need for service might have on those agencies' decisions. DCA stated that regardless of the short term change from central sewer to a package plant for the public school, the certificate area expansion remains consistent with the comprehensive plan and development agreement. The development agreement requires that the developer provide central service, but it does not specify the type of central service. Although the Bay County comprehensive plan future land use category allows one unit per three acres, clustering provisions and other allowable land uses, such as public schools, create the need for central service. Further, DCA reaffirmed its initial position that it had not identified any growth management concerns related to the consistency of the request with the Bay County comprehensive plan.

DEP stated that a number of construction permits have been issued including drinking water lines, water treatment plant, wastewater collection system and wastewater treatment plant. DEP indicated that there are several options available to the DEP should we cancel the utility's certificates. One of its options is to revoke the utility's construction permits. However, DEP stated that probably the permits would be modified to dry line permits. The dry lines permits would allow the utility to construct its facilities and lines, but not provide service. DEP requested that it be notified if the status of the utility's certificates change.

MOTION FOR EXTENSION OF TIME

The issue of whether to grant an extension of time for filing information temporarily waived pursuant to Section 120.542, Florida Statutes, as well as the appropriate standard to apply, is a matter of first impression for us. Section 120.542(3), Florida Statutes, sets forth the statutory authority for the adoption of rules to implement granting, denying or revoking a rule waiver request. Rule 28-104.0051, Florida Administrative Code, establishes the criteria for revocation of a temporary waiver which states that:

> "[u]pon receipt of evidence sufficient to show that the recipient of an order granting an ... temporary ... waiver is not in compliance with the requirements of that order, the agency shall issue an order to show cause why the ... waiver should not be revoked."

In establishing whether an extension of time should be granted for a temporary waiver, we find it is necessary to address whether the recipient of the temporary waiver is and will continue to be in compliance with the order which granted the waiver.

In granting the temporary waiver in this docket, we applied the requirements of Section 120.542(2), Florida Statutes. In Order No. PSC-00-0127-PAA-WS, we found that Dana had met the underlying purpose of Sections 367.031 and 367.045, Florida Statutes, because it demonstrated the technical and financial ability to provide service and a need for service in the area. (Id. at 6). Further, we found that the utility showed that it would suffer a substantial hardship if all of the provisions of Rule 25-30.033, Florida Administrative Code, were strictly applied. (Id.).

As previously stated, the utility is seeking an extension of time on the temporary waiver because the owners of its parent

company are in negotiations to sell the Lake Merial development. If these negotiations are successful, the utility asserts that a change in control of the utility will take place and it will file the appropriate application for our approval. However, the results of these negotiations are uncertain at this time. Therefore, we find it is appropriate to address the utility's current situation.

When the utility was granted its temporary waiver, it demonstrated that it had the financial and technical ability to provide service to the proposed area and that there was a need for service. Lake Merial signed an agreement with Dana to provide financial assistance to the utility for a period of ten years. Lake Merial 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. The negotiations have not altered the utility's financial and technical ability to serve at this time. Fancher Management is providing technical services for the utility. Lake Merial is obligated to provide the financial backing for Dana despite the delay in construction due to the ongoing negotiations. Although the timing of need for service has been delayed, there still will be a need for service in the territory. The public school apparently decided to build its own facilities due to the delays with the utility. However, in a recent conversation with our staff, school personnel indicated that the school is still interested in connecting to the utility's system at some time in the future. The utility asserts that there are no other potential customers who need service immediately. Once development resumes at the conclusion of the negotiations, Lake Merial's lots will need service. Thus, the underlying circumstances which formed the basis for the temporary waiver will remain substantially unchanged until August 20, 2000. However, since the school will no longer need immediate service, we find that the substantial hardship previously applicable to the utility will no longer exist after August 20, 2000.

For the reasons stated above, we find that the utility has demonstrated that it will continue to meet the requirements of Section 120.542, Florida Statutes, if the Motion for Extension of Time is granted until August 20, 2000. Therefore, the utility's Motion for Extension of Time for filing the information required to

establish initial rates and charges along with supporting information shall be granted until August 20, 2000.

Nevertheless, we find that if the utility fails to provide this information in a timely manner, then such failure would warrant the initiation of a revocation proceeding. Should the utility fail to provide this information, the utility will be in apparent violation of Rule 25-30.033, Florida Administrative Code, and subject to our authority to initiate revocation proceedings pursuant to Section 367.161(2), Florida Statutes. In order for us to initiate revocation proceedings, notice must be provided pursuant to Section 367.045(6), Florida Statutes, which requires that the utility be given 30 days notice prior to the initiation of the revocation proceeding. Moreover, Rule 25-30.030 (2), (6), and (7), Florida Administrative Code, requires that certain governing bodies, governmental agencies, and affected persons, including customers in the affected territory, receive notice by mail or personal service, as well as notice being published once in a newspaper of general circulation in the territory to be deleted. If Dana fails to provide the required information by August 20, 2000, revocation proceedings shall be initiated and our staff shall provide the requisite legal notice of the initiation of revocation proceedings pursuant to Section 367.045(6), Florida Statutes, and Rule 25-30.030, Florida Administrative Code.

DECLINING INITIATION OF REVOCATION OR DELETION PROCEEDINGS

In its May 4, 2000 response, Dana contends that the need for service has not changed. Currently, Dana Properties is in the process of negotiations which may result in a transfer of the utility. Further, Dana expected that these negotiations would be concluded by May 2000. However, the utility has subsequently advised our staff that it believes the transaction is close to being completed. However, no date has been set for closing. Due to these ongoing negotiations, construction in the Lake Merial development has been temporarily delayed. However, Dana asserts that delays are not unusual for a project of this size and scope. Further, Dana asserts that it has been moving forward on the permitting process and construction bidding process. Moreover, Dana asserts that negotiations have not impacted on these processes.

Dana further contends that typically in the new utility situation, service in not needed for 12-24 months from the issuance of a certificate of authorization. Dana states that the normal

time frame for commencement of retail service is at least 12 months from the issuance date of a certificate of authorization. In this case, Dana asserts that the public school needed initial service four months after the certificates of authorization were issued, resulting in a compressed time frame from the onset on the development project. Dana states that service will be required in the Lake Merial Development within 12 months regardless of the results of the negotiations. Moreover, it is Dana's understanding that the public school will want to be connected to the utility's facilities when available.

We find that although the timing of need for service has been delayed, there still will be a need for service in the territory. The public school has decided to build its own facilities but may ultimately seek service from the utility. The utility asserts that there are no other potential existing customers who need service immediately. However, once development resumes at the conclusion of the negotiations, Lake Merial's lots will need service.

Although the issue of need for service is exacerbated by the ongoing negotiations to sell the development, we find that absent a finding that the proposed development will not move forward in the near future, it would be premature to revoke or amend the certificates. In addition, we find that the school is satisfied at this time with the facilities it has already constructed. It should be noted that Lake Merial, in an arms length transaction, donated the land for the school's construction. Dana has also indicated to our staff that it will negotiate in good faith with the school the terms and conditions by which the school will connect with the utility.

REVOCATION

As stated previously, we directed our staff to address the revocation process and whether it would be appropriate to initiate a revocation proceeding in this matter.

We are authorized to revoke a utility's certificate of authorization pursuant to Chapter 367.111, Florida Statutes. Section 367.045(6), Florida Statutes, requires that we provide 30 days notice before we initiate revocation or deletion proceedings.

Section 367.111, Florida Statutes, states:

> "...If utility service has not been provided to any part of the area which a utility is authorized to service, whether or not there has been a demand for such service, within 5 years after the date of authorization of service to such part, such authorization may be reviewed and amended or revoked by the commission."

Section 367.111, Florida Statutes, was amended to include the above language in 1980. The comments to Senate Bill 297 state the effect of the proposed changes is "...to allow PSC to modify a certificate if service has not been provided (for 5 years) to part of the territory which a utility is authorized to serve." We have previously revoked certificates when no service has been provided after five years. (See Order No. 14012, issued January 18, 1985, in Docket No. 840440-WS, In Re: Monument Utility Company-Revocation of Authority to Provide Service and Cancellation of Certificates Nos. 319-W and 267-S, (the utility's certificates were canceled because the utility had no facilities, no customers, and had not provided service after 5 years); Order No. 14069, issued February 11, 1985, in Docket No. 900223-SU, In Re: Revocation by Florida Public Service Commission of St. George Island Utility Company, Ltd., Certificate No. 356-S in Franklin County, Pursuant to Section 367.111(1), Florida Statutes, (the utility's wastewater certificate was revoked, in part, because the utility had not provided service to its territory after five years).

We recently stated in Order No. PSC-00-0259-PAA-WS, issued February 8, 2000, in Docket No. 990080-WS, that "[r]evocation of certificate proceedings are reserved for cases of severe violations of Commission rules." Further, revocation is only sought after all other efforts to bring the utility into compliance with Commission rules have failed. (Id. at 7). Since revocation is the most severe sanction that can be brought against a utility, it has been our past practice to utilize revocation sparingly and as a sanction of last resort.

DELETION

Section 367.111(1), Florida Statutes, requires a utility to provide service within a reasonable time. If the utility fails to provide service to any person reasonably entitled to service, then we may amend the certificate to delete the area not served or properly served or rescind the certificate. As stated previously, the utility's territory does have a few homes which are currently on septic tanks. We do not find that any other person or entity has

requested service from the utility except the school which requested service prior to issuance of the utility's certificates of authorization. However, the school has built its own facilities to meet the needs for the August 2000 opening of the school.

It is our understanding that the school does not wish to be in the utility business on a long term basis. The school's manager overseeing the water and wastewater operations has indicated that at some time in the future, the school will probably connect to the utility's system. Therefore, if the utility's territory containing the school was deleted, the utility would have to request this territory be added back when the school desired service. This would result in a delay in the school's ability to interconnect with the utility pending the outcome of the utility's application for amendment of territory. Moreover, we are not aware of any other water and/or wastewater utility in the area which is willing or able to provide service to the school within the next three to five years. Therefore, we find that deletion of the school from the utility's territory could result in additional harm to the school in the future should the school be required to wait to interconnect with the utility. Thus, we find that deletion of the school from the utility's territory is premature.

Based on the foregoing, we decline to initiate revocation or deletion proceedings at this time. We do not find that the current circumstances of the utility rise to the level of warranting initiation of revocation or deletion proceedings. However, as discussed previously, we find that if the utility fails to provide the initial rates and charges information in a timely manner, then such failure will warrant the initiation of a revocation proceeding.

DECLINING TO INITIATE SHOW CAUSE PROCEEDINGS

As stated above, Dana represented that it had an obligation to provide service to the school by March 2000 for the school's opening in August 2000. However, the utility failed to provide the school with service by March 2000, and will not be able to provide service by August 2000. Section 367.111(1), Florida Statutes, states:

> "Each utility shall provide service to the area described in its certificate of authorization within a reasonable time. If the commission finds that any utility has failed to provide service to any person reasonably

> entitled thereto, or finds that extension of service to any such person could be accomplished only at an unreasonable cost and that addition of the deleted area to that of another utility company is economical and feasible, it may amend the certificate of authorization to delete the area not served or not properly served by the utility, or it may rescind the certificate of authorization."

In Dana'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, the utility represented that one of the reasons for the waiver was the utility's obligation to provide service to the public school by March 2000. The utility stated that its representatives met with school board personnel in December 1999 to discuss the status of the utility's facilities. According to the utility, Dana advised the school that the certificate issue was scheduled for a mid-January agenda conference which would result in an order being issued by this Commission in early February. However, when our staff spoke with the school facility's manager on June 2, 2000, he stated that in the January meeting, it became clear that Dana would not be in a position to provide service to the school site as construction would begin. The school subsequently decided to build its own facilities to ensure that it would have the necessary water and wastewater facilities available to open in August, 2000. Therefore, we find that the utility has failed to provide service to the school within a reasonable time, in apparent violation of Section 367.111, Florida Statutes.

Section 367.161(1), Florida Statutes, authorizes us to assess a penalty of not more than $5000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes. In failing to provide service to the school within a reasonable time, the utility acted "willfully" within the meaning and intent of Section 367.161 (1), Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, titled In Re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refunds For 1988 and 1989 For GTE Florida, Inc., the Commission having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[i]n our view, 'willful' implies an intent to

do an act, and this is distinct from an intent to violate a statute or rule."

Although the utility acted "willfully" and in apparent violation of Section 367.111, Florida Statutes, the school is not currently in need of service because it has built its own water and wastewater facilities. Moreover, as previously noted, the utility represented to our staff in an informal conversation on June 28, 2000, that it will negotiate in good faith with the school the terms and conditions by which the school will connect with the utility. The utility has represented that the school is not interested in negotiating the connection issues at this time. Also, we are not aware of the school having made a formal request for service of the utility after the certificates of authorization were issued.

For the foregoing reasons, we do not find that the apparent violation of Section 367. 111, Florida Statutes, rises in these circumstances to the level which warrants the initiation of a show cause proceeding at this time. Therefore, we decline to order Dana to show cause in writing within 21 days why it should not be fined for its apparent violation of Section 367.111, Florida Statutes, for failing to provide service to the school. However, we note that the need for the initiation of a show cause proceeding and the efforts of the utility to provide service to the school can be reevaluated when the initial rates and charges are addressed.

This docket shall remain open pending the filing of initial rates and charges information along with supporting data. Should the utility timely file the information, our staff will prepare a recommendation to address the appropriate rates and charges for Dana. However, if the utility fails to timely file the rates and charges information, then our staff is directed to initiate proceeding to revoke Dana's certificates by providing legal notice pursuant to Section 367.045(6), Florida Statutes, and Rule 25-30.030, Florida Administrative Code.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Dana Utility Corporation's Motion for Extension of Time for filing initial rates and charges information along with supporting engineering, operational, and financial data is granted until August 20, 2000. It is further

ORDERED if Dana Utility Corporation fails to timely file the rates and charges information, our staff shall initiate a proceeding to revoke the utility's certificates by providing legal notice pursuant to Section 367.045(6), Florida Statutes, and Rule 25-30.030, Florida Administrative Code. It is further

ORDERED that this docket shall remain open pending the establishment of initial rates and charges for Dana Utility Corporation or the initiation of revocation proceeding should the utility fail to timely file the rates and charges information, as set forth in the body of this Order.

By ORDER of the Florida Public Service Commission this 31st day of July, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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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 or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review will be granted or result in the relief sought.

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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.