State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: JUNE 29, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (CHRISTENSEN)
DIVISION OF REGULATORY OVERSIGHT (REHWINKEL, REDEMANN)

RE: DOCKET NO. 991632-WS - APPLICATION FOR ORIGINAL CERTIFICATE TO OPERATE WATER AND WASTEWATER UTILITY IN BAY COUNTY BY DANA UTILITY CORPORATION.
COUNTY: BAY COUNTY

AGENDA: JULY 11, 2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\9916324.RCM

CASE 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. 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. Dana's parent company, Lake Merial, entered into an agreement with Fancher Management Group, Inc. (Fancher Management) to provide assessment, planning, and operational services for Dana.

Simultaneously 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 setting initial rates and charges along with supporting engineering, operational and financial information. By Order No. PSC-00-0127-PAA-WS, issued January 14, 2000, the petition for temporary waiver of the rule was granted. (Consummating Order No. PSC-00-0309-CO-WS, issued February 15, 2000). Pursuant to Order No. PSC-00-0227-FOF-WS, 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. A recommendation was filed by Commission staff (staff) on the Motion and was presented for the Commission's consideration at the March 28, 2000 Agenda Conference.

At the March 28, 2000, Agenda Conference, the Commissioners expressed concerns regarding the continuing need for service in the utility's territory and utility's inability to meet the need of the public school. The Commission deferred ruling on the Motion. Staff was directed to inquire of the Department of Community Affairs (DCA) and the Department of Environmental Protection (DEP) what impact the proposed transfer and the delay in the need for service might have on those agencies' decisions and provide an update to the Commission. Further, staff was directed to address the possibility of cancellation of the certification of authorization, why revocation is a difficult process and whether the Commission's proposed agency action process could be utilized in a revocation proceeding. In addition, staff was instructed to determine the appropriateness of initiating a show cause against the utility for failure to provide service to the school. A Commissioner also commented that the school should not be required to pay any connection charge when it interconnects with the utility's system.

On May 4, 2000, Dana filed a response to the issues raised by the Commission at the March 28, 2000, Agenda Conference. This recommendation addresses the issues raised at the March 28, 2000, Agenda Conference and the Motion for Extension of Time. However, the issue of whether the school should be charged an interconnection fee will be addressed when rates and charges are established for the utility.

DISCUSSION OF ISSUES

ISSUE 1: Should Dana's Motion for Extension of Time for filing of the initial rates and charges information along with supporting engineering, operational, and financial data be granted?

RECOMMENDATION: Yes. Dana's Motion for Extension of Time for filing initial rates and charges information along with supporting engineering, operational, and financial data should be granted. Staff further recommends that if Dana fails to provide the required information by August 20, 2000, then revocation proceedings should be initiated by issuing legal notice of the initiation of the revocation proceedings pursuant to Section 367.045(6), Florida Statutes, and Rule 25-30.030, Florida Administrative Code. (CHRISTENSEN, REHWINKEL, REDEMANN)

STAFF ANALYSIS: As stated in the case background, Dana was granted original water and wastewater certificates by Order No. PSC-00-0227-FOF-WS. Dana was formed for the specific purpose of providing water and wastewater service to Lake Merial multi-use development. Currently, the utility has not constructed its water and wastewater facility. Dana is a wholly-owned subsidiary of Lake Merial. Lake Merial owns approximately 95% of the land which is Dana's service territory.

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 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, the petition for temporary waiver of the rule was granted.

Pursuant to Order No. PSC-00-0227-FOF-WS, 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 in its motion 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 in its motion 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 Commission staff (staff), to discuss the circumstances described above. On February 18, 2000, staff conducted an informal meeting with the utility's attorney and the utility's manager. At this meeting, the utility represented that negotiations are 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 are expected until the completion of negotiations. When 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, 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, the Commissioners expressed concerns regarding the continuing need for service in the utility's territory and the utility's inability to meet the need of the public school. The Commission deferred ruling on the Motion. Staff was directed to inquire of the Department of Community Affairs (DCA) and the Department of Environmental Protection (DEP) what impact the proposed transfer and the delay in the need for service might have on those agencies' decisions and provide an update to the Commission. Further, staff was directed to address the possibility of cancellation of the certification of authorization, why revocation is a difficult process and whether the Commission's proposed agency action process could be utilized in a revocation proceeding. In addition, staff was instructed 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 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 yet.

DCA AND DEP COMMENTS

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 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 should the Commission cancel the utility's certificates. One option 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 the Commission. 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, staff believes 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, the Commission applied the requirements of Section 120.542(2), Florida Statutes. In Order No. PSC-00-0127-PAA-WS, the Commission 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, the Commission 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 of approval by the Commission. However, the results of these negotiations are uncertain at this time. Therefore, staff believes 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 abilities 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 conversion with 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, staff believes that the substantial hardship previously applicable to the utility will no longer exist after August 20, 2000.

For the reasons stated above, staff believes 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, staff recommends that the utility's Motion for Extension of Time for filing the information required to establish initial rates and charges along with supporting information should be granted until August 20, 2000.

Nevertheless, staff believes 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 would be in violation of Rule 25-30.033, Florida Administrative Code, and subject to the Commission's authority to initiate revocation proceedings pursuant to Section 367.161(2), Florida Statutes. In order for the Commission 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. Staff recommends that if Dana fails to provide the required information by August 20, 2000, then

revocation proceedings should be initiated by providing legal notice of the initiation of revocation proceedings pursuant to Section 367.045(6), Florida Statutes, and Rule 25-30.030, Florida Adminstrative Code.

ISSUE 2: Should the Commission initiate proceedings to revoke Dana's certificates of authorization or delete territory from its certificates at this time?

RECOMMENDATION: No. Staff recommends that the Commission should not initiate proceedings to revoke Dana's certificates of authorization or delete territory from its certificates at this time. (CHRISTENSEN, REHWINKEL, REDEMANN)

STAFF ANALYSIS: In its May 4, 2000 response, Dana contends that the need for service has not changed. Currently, Lake Merial's parent company, Dana Properties, Ltd. (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 staff that it believes the transaction is close to being completed but 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.

Staff believes 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, staff believes 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, staff believes 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 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, staff was directed to address the revocation process and whether it would be appropriate to initiate a revocation proceeding in this matter.

The Commission is authorized to revoke a utility's certificate of authorization pursuant to Chapter 367.111, Florida Statutes. Section 367.045(6), Florida Statutes, requires that the Commission provide 30 days notice before it initiates 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." The Commission has 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 never 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).

The Commission 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 past Commission 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, and if the utility fails to provide service to any person reasonably entitled to service, then the Commission 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. Staff does not believe that any other person or entity has requested service from the utility except the school who 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 staff's 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, staff is not aware of any other water and wastewater utility in the area which is willing or able to provide service to the school within the next three to five years. Therefore, staff believes 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, staff believes that deletion of the school from the utility's territory is premature.

Based on the foregoing, staff does not recommend the Commission initiate revocation or deletion proceedings at this time. Staff does not believe that the current circumstances of the utility rise to the level of warranting initiation of revocation or deletion proceedings by the Commission. However, as discussed in Issue 1, staff believes that if the utility fails to provide the initial rates and charges information in a timely manner, then such failure would warrant the initiation of a revocation proceeding.

ISSUE 3: Should Dana be ordered 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 at this time?

RECOMMENDATION: No. A show cause proceeding should not be initiated at this time. (CHRISTENSEN, REHWINKEL, REDEMANN)

STAFF ANALYSIS: 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 the Commission in early February. However, when 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, staff believes 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 the Commission 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, the utility represented to 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, staff is 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, staff does not believe 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, staff recommends that the Commission not 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 at this time. However, staff notes 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.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending the filing of initial rates and charges information along with supporting data. (CHRISTENSEN, REHWINKEL, REDEMANN)

STAFF ANALYSIS: If the Commission approves staff's recommendations this docket should remain open pending the filing of initial rates and charges information along with supporting data. Should the utility timely file the information, then 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 staff will 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.