
Office of Utilities Regulation

Office Decision Arising from Hearing into Dynamics Environment Licence Application

A Determination



OFFICE OF UTILITIES REGULATION

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OFFICE OF UTILITIES REGULATION
Decision Arising from Hearing into Application for Licence by Dynamic Environment Limited
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**In the Matter of an Application for a Sewerage Service License by Dynamic
Environment Ltd**

And

Objection raised by CAN-CARA Ltd

HEARING

Date of Hearing: September 30, 2005

Present: **The Office**
J Paul Morgan, Director General
Raymond Silvera, Deputy Director General

CAN-CARA Ltd.
Junior Lincoln
Donavan Dowie, Corporate Alliance

Dynamic Environment Management Ltd. (DEML)
L Thomas
C. Tucker

Consumers
Ralph Chen, Consumer Advisory Committee on Utilities

Office of Utilities Regulation Staff
Eileen Crosbie-Salmon, Senior Legal Counsel
Maurice Charvis, Director, Analysis and Research
Marsha Minott, Analyst, Consumer Policy

Background to Proceedings

- 1.0 Dynamic Environment Management Ltd. applied for a license to provide sewerage services to the Vineyard Estate, a housing development in Bushy Park, St. Catherine by way of application dated April 27 2005.
- 1.1 In accordance with its procedures the OUR published that fact in the print media, namely, *The Daily Gleaner* and *The Observer* on July 27 2005, inviting interested parties to comment by August 26 2005.
- 1.2 By way of letter dated August 11 2005 CAN-CARA Environment Ltd. submitted an objection to the issuance of the license to DEML. In this submission CAN-CARA states:

“You will recall that in earlier discussions we had raised the matter of a level of protection for CAN-CARA’s investment in its Western Spanish Town Treatment Plant facility. An investment risk analysis highlights a great weakness if there is no control over access to potential new customers in the approved designated catchment area.

From information available to us it would appear that the request by Dynamic Environment Management Ltd is for that entity to operate within CAN-CARA’s designated catchment area.

We wish to lodge our objection to the grant of a licence to Dynamic Environment Management Ltd. to operate as a water and sewage provider in Bushy Park as we think it will present a great difficulty to us”

- 1.3 The Office in seeking to observe the rules of natural justice and procedural fairness considered that, in this case, a hearing on the matter would be appropriate. The hearing was held on September 30, 2005 at which parties likely to be affected by the Office’s decisions were given an opportunity to make submissions and to be heard. Present at this hearing were representatives of CAN-CARA Environment Ltd. Dynamic Environment Management Ltd. A consumer representative also attended and made submissions.

Summary of arguments by the parties

2.1 CAN-CARA

CAN-CARA asserts that, while it accepts that it does not have exclusivity to provide sewerage services to Western St. Catherine, the fact that its license was issued based on proposals for the development of infrastructure to service some 22,000 households within a specified service area was sufficient assurance for the company to commit to the investment necessary to provide this scope of service. They argued that the Office was well aware of the circumstances leading up to the grant of their license where they acted to fill a recognized gap in the available infrastructure to meet the rapidly increasing housing development and sewerage service needs in the area. CAN-CARA cited several meetings between Developers, National Environmental and Planning Agency (NEPA), the Ministry of Land and Environment and the National Water Commission which debated among other things, the problems developers were facing in providing sewerage service to the developments in Western Spanish Town, and the concerns of the Ministry of Lands and the Environment arising out of NWC’s stated inability to meet the demand which resulted in the proposal by CAN-CARA’s to develop infrastructure of such capacity to meet the needs of development in the area. All parties agreed to this approach and on this basis CAN-CARA proceeded to commit to the investment. Their objection therefore was not so much out of an intention to block the grant of the particular license to DEML (which was recognized as an ongoing project preceding the initiative taken by CAN-CARA) but to use it as a forum to place the wider issues and concerns on the table.

2.2 These wider issues include:

1. the need for a clearly articulated policy framework for the provision of sewerage services;
2. the need to ensure efficiencies in the provision of these services which cannot be achieved by the way of a proliferation of small plants;
3. the need to provide for effective protection of the environment; and
4. the obligation of the Office to acknowledge that by virtue of the grant of the license there is a commitment to facilitating the opportunity for the company to meet its business objectives which are predicated on providing the proposed scope of services to the service area.

2.3 CAN-CARA made three recommendations, implementation of which it felt would solve some of the problems:

1. The creation of different licenses categories not dissimilar to the principles that apply in the telecommunications sector.
2. Limit the number of licenses issued so as to ensure some level of economic efficiency – recognizing
 - a. The potential for future interconnectivity into built infrastructure.
 - b. The importance of identifying suppliers of last resort.
3. Act in such manner as to secure protection of the environment as the national priority.

2.4 Dynamic Environment Management Ltd

DEML provided a background to the development of the Vineyard Estate, confirming that the development has been ongoing since 1992, that it represented a defined and limited service area and size (400 homes) and that its operations in one form or the other predated the CAN-CARA development and issue of the CAN-CARA License.

2.5 Consumer Advisory Committee on Utilities

The representative from CACU expressed the view that the concerns of consumers are of paramount importance and that the “ad hoc” approach to doing things is the root of many of our (Jamaica’s) problems and proposed that the issues that must be viewed as important in the grant of the license must be:

1. economic viability of the players which impacts on ability to deliver cost effective service; and
2. a holistic approach must be taken to the delivery of services such as sewerage

The representative further expressed concerns that where CAN-CARA appeared “to have acted in good faith on certain verbal undertakings which might not be

evidenced in writing, but commitments were nevertheless made” the other participants to the arrangements must honour their part of the bargain”.

- 2.6 All parties agreed that protection of the environment must be a primary consideration in the discussions taken in respect of sewerage services.

Important considerations for the Office

- 3.1 The Office is of the view that the legal and policy framework which must inform the Office’s decisions in this matter are:

- Government’s Water Policy
- The Office of Utilities Regulations (OUR) Act
- CAN-CARA License

Government’s Water Policy

- 4.1 The following are extracts from relevant sections of the Government’s Water Policy dated November 2000:

Section 3.2 Objectives in the Urban Water and Sewerage Sector

3.2.1 Services to be provided

In the area of services to be provided to consumers the Government intends to:

i)

iv. provide for the expansion of the sewerage network in areas with high population densities, having regard to health and environmental considerations;

v. ensure improvements in sewage treatment and disposal, to protect the environment

Section 3.2.3 Enabling Environment

To enable the achievement of the above objectives the Government will promote:

i.

iii. effective and efficient operation of an appropriate regulatory framework to protect customers, investors and the environment.

- 4.2 The Action Plan and Strategy related to the Water Policy Section 3.3 – Wastewater Systems Development Strategies states:

..... In addition to the major systems, the GOJ will also be seeking to improve the operations of smaller sewerage systems associated with housing developments. The NWC or other licenced providers will be encouraged to assume the operation and maintenance of these systems.

In respect of new developments, developers will be obliged to ensure that the necessary arrangements are put in place to facilitate sustainable operation of associated sewerage facilities.

This may be achieved by:

- i. *service providers being contracted to design build and operate the system at the developers cost;*
- ii. *service providers being contracted to operate and maintain the system on behalf of the developer, prior to take over during the statutory period;*
- iii. *the developer designing, building and operating the facility for the statutory operational period and handing over to a service provider expeditiously;*
- iv. *the developer designing, building and seeking a licence to operate the facility.*

Office of Utilities Regulation Act

5.1 Section 4 (1) of the OUR Act provides “Subject to the provisions of this Act, the functions of the Office shall be to –

.....
(b) receive and process applications for a licence to provide a prescribed utility service and make such recommendations to the Minister in relation to the application as the Office considers necessary or desirable;”

Section 4B, (3) states

*“In deciding whether to recommend to the Minister that an application be granted or to refuse a licence, the Office shall satisfy itself that the prescribed utility service which is the subject of an application for a licence –
 Will meet the need of the community to which the application relates;”*

and Section 4B (4) provides

“For purposes of subsection (3), the Office shall have regard to –

-
- (b) the need to protect and preserve the environment*
 - (c) whether the consumers will be afforded an economic and reliable service;*
 - (d) whether the service will be provided on terms which will allow to the applicant and to any other persons financing the operation of the utility service a reasonable return on capital invested in providing the service;”*

5.2 While these set the framework, the Office must also take the following into account:

- 1. Does CAN-CARA have exclusive rights to the service?
- 2. Is the fact that DEML service in fact predates (albeit unlicensed and provided by the developer) the award of the CAN-CARA license relevant?
- 3. What are the wider implications for the viability of CAN-CARA and its ability to deliver economical service should some form of exclusivity not be recognized?
- 4. What are the implications for the environment?
- 5. How are consumers’ interests best served in the long run?

5.3 Finally, in the scheme of things, the Office must give consideration to what is practical, equitable and the “right thing” to do in the specific circumstances.

- 5.4 The Office notes that CAN-CARA's primary concern is not so much about the grant of a license to DEML's but more importantly the implications for its own business, the protection of the significant investment that it has made and will have to make to honour its license obligations. The Office notes the recommendations that have been tabled by CAN-CARA which speaks to the peculiarity of sewerage services provisions and the need for the policy framework to recognize and acknowledge these peculiarities, particularly in the context of protecting the environment.
- 5.5 Consumer concerns speak more specifically to the need to assure cost effective and efficient services while ensuring that any action taken recognizes that protection of the environment is of paramount importance.
- 5.6 DEML represented that the facility in question has been in operation in one form or the other since 1992 and that it does not jeopardize the integrity of CAN-CARA's investment (as it was not included in the revenue projections – which CAN-CARA confirmed) and they themselves have made significant investment. The existing sewerage operation for which the license application is made is for the well defined, specific development of 400 homes – Vineyard Estate, and for that development only.
- 5.7 Reversal of Commitments
Concerns were raised by CAN-CARA about the reversals in commitments by the other developers and to some extent the Ministry of Land and Environment/NEPA. This reference is to the assertions made by CAN-CARA that the level and scope of investment to which it committed itself was based on agreements with other developers that were brokered under the auspices of the Ministry of Land and Environment/NEPA and which would be at risk if the understandings are not honoured.

Decision

- 6.1 The Office after considering the arguments and presentations by the parties concerned **determines**
1. That the submission by CAN-CARA Environment Ltd. objecting to the issuance of a license to Dynamic Environment Ltd. to provide sewerage services to the Vineyard Estate housing development at Bushy Park, St. Catherine **be and the same is hereby disallowed** for the following reasons:
 - i. The services being provided to Vineyards Estate predate the CAN-CARA licence (albeit an unlicensed service which also predated the current regime for licensing)

- ii. DEML have already made significant investment in upgrading the facilities and have taken over the operations from the developers as an ongoing concern
 - iii. CAN-CARA acknowledges that the Vineyards Estate was not a factor in its business plan
2. That other arrangements to introduce additional treatment capacity in the service area should be curtailed – and accordingly no further licences for treatment and disposal will be issued at this time as arrangements for the handling of sewage should be centered on the capabilities of the existing NWC Horizon Park facility and that being developed by CAN-CARA. Consequently the Office, consistent with its statutory duty to protect and preserve the environment, will not until further notice consider any further applications for licences to provide sewerage treatment and disposal services in the service area defined in the CAN-CARA Licence.
3. That the wider issues raised by CAN-CARA and to some extent DEML and CACU are of significance and must be addressed. In this regard the question of monopoly service versus exclusivity within a policy and legal framework of encouraging competition must be looked at in the peculiar context of the nature of sewerage services and the all important issue of environmental protection. The arguments raised by CAN-CARA appear to have some merit in that the nature of sewerage collection, conveyance and treatment should be treated as discrete licensable activities. The Office is therefore **adopting** the following policy guidelines:
 - i. Some level of exclusivity must be afforded for sewerage services because unlike other utility services sewerage does not easily afford the flexibility to attract customers outside of the defined service area. This is particularly applicable to arrangements for treatment and disposal services.
 - ii. There is a need to examine development areas and to make provisions for optimally sized treatment facilities to serve these areas as there can be no merit to nor can it be efficient or environmentally friendly for a policy to be adopted which allows the proliferation of sewerage treatment plant around the island.
 - iii. The licensing and construction and development of sewerage treatment facilities should be seen as a separate licensed business to that of service provision which would be defined as collection and conveyance.
 - iv. There is a recognized need for the policy and legal framework to be articulated but until such time that these are in place the Office will, in the interest of securing, order, efficiency, minimal cost to consumers and protection of the environment, consider and recommend the grant of

licenses for sewerage services in the categories or combination of categories identified hereunder, as a matter of regulatory policy:

- Treatment and disposal
 - Transportation
 - Collection
- v. An important consideration in the licensing of sewerage services is the arrangements that have to be put in place for "a service provider of last resort". The Office will address this matter in its consultation but its preliminary thinking is that licenses will have to provide a condition for "Step In Rights" on the part of the Minister should it be determined that a Licensee can no longer provide the service intended. A procedure will then have to be established for the Minister to secure operation of the facilities under these circumstances.

Dated this 26th day of October 2005

By **ORDER** of
The Office



J. Paul Morgan
Director General