

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for transfer
of Certificate No. 271-S in Lee
County from Capital Sunbelt/Fund
'84, Ltd. to Sand Dollar
Properties, Inc.

DOCKET NO. 960063-SU
ORDER NO. PSC-97-0833-FOF-SU
ISSUED: July 11, 1997

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER DECLINING TO INITIATE SHOW CAUSE PROCEEDINGS, APPROVING
REVISED TERRITORY DESCRIPTION, ACKNOWLEDGING WITHDRAWAL OF
OBJECTION, APPROVING TRANSFER, RECOGNIZING EXEMPT STATUS,
CANCELING CERTIFICATE, AND CLOSING DOCKET

BY THE COMMISSION:

BACKGROUND

Capital Sunbelt/Fund '84, Ltd. (Capital Sunbelt or utility) provided wastewater service as a Class C utility in Lee County. The system was originally certificated as Fort Myers Beach Campground Utilities, Inc. (FMBC), and was granted Certificate No. 271-S to provide wastewater service pursuant to Order No. 8949, issued July 12, 1979. On February 5, 1985, Order No. 14060 approved the transfer of Certificate No. 271-S from FMBC to Capital Sunbelt. On June 28, 1988, Capital Sunbelt entered into an agreement with Lee County (County) to receive bulk wastewater service from the County. Pursuant to this agreement, Capital Sunbelt dismantled its treatment plant. Currently, only the collection lines are in operation.

In May, 1993, Sand Dollar Properties, Inc. (Sand Dollar) acquired the wastewater treatment facility from Capital Sunbelt through a transaction similar to a foreclosure proceeding (a default on the loan commitment). Capital Sunbelt defaulted on its

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loan commitments and Sand Dollar, with Harry Cutcher as its principal, accepted a quitclaim deed in lieu of foreclosure on the wastewater treatment facility. Through this quitclaim deed, executed on May 5, 1993, Capital Sunbelt transferred all its rights, title, interest, and claim in the property on which the facility was located to Sand Dollar. Due to the interconnection with Lee County in 1988, the wastewater facility had not been operational for the five years prior to the transfer.

The application for the transfer of Certificate No. 271-S from Capital Sunbelt to Sand Dollar was filed on January 17, 1996. The last available annual report was for 1992, and showed that the annual operating revenue for the system was \$0 and the net operating loss was \$13,987.

On February 7, 1996, Lee County timely filed its objection to the application for transfer. In that objection, Lee County stated that it would withdraw its objection if Pine Ridge Palm's legal description was removed from the territory described in Certificate No. 271-S.

Sand Dollar agreed to revise its legal territory description to delete reference to the Pine Ridge territory, and on October 30, 1996, Sand Dollar and Lee County entered into a Stipulated Settlement Agreement (Settlement Agreement). On March 16, 1997, Sand Dollar submitted to the Commission a revised version of the territory description pursuant to the Settlement Agreement. Upon notice that the revised territory had been filed with the Commission by Sand Dollar, Lee County voluntarily withdrew its original objection to the transfer on April 29, 1997.

Under the revised territory description, the only portion of the system which remains are the collection lines within the Fort Myers Beach Campground and the old wastewater treatment plant site. Based on the campground's method of operation, Sand Dollar has requested that it be found exempt pursuant to Section 367.022(5), Florida Statutes (the landlord/tenant exemption).

SHOW CAUSE PROCEEDINGS

As stated above, Sand Dollar acquired the wastewater treatment facility from Capital Sunbelt through a default by Capital Sunbelt on its loan commitment and execution of a quitclaim deed. The execution of the quitclaim deed is technically a transfer of the

utility facilities from one entity to another without our prior approval.

Pursuant to Section 367.071(1), Florida Statutes, a utility may not transfer its facilities without our determination and approval. Section 367.071(2), Florida Statutes, authorizes us to impose a penalty pursuant to Section 367.161, Florida Statutes, on a utility when a transfer occurs prior to our approval. Section 367.161, Florida Statutes, further provides that we may assess a penalty if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes.

Utilities are charged with knowledge of our rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utility's failure to obtain our approval prior to transferring or selling of the utility's facilities is an apparent violation of Section 367.071(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, F.A.C., Relating To Tax Savings Refund 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." Therefore, the utility's failure to obtain our approval prior to transfer would appear to meet the "willful" standard.

Although Capital Sunbelt failed to obtain our approval prior to transferring its facilities to Sand Dollar, we do not believe that the violation of Section 367.071(1), Florida Statutes, rises in these circumstances to the level of warranting initiation of show cause proceedings. First, the transfer of the facilities was much more akin to a foreclosure type transaction than a sale or transfer of control of the utility. Apparently, Capital Sunbelt thought that since the wastewater facility was not operational and because it defaulted on its loan, and was not selling the facility, it did not need to, or did not know that it should request that we approve the transaction. Second, at the time of the transfer, the facility was dismantled and had not been operational for the prior five years due to the interconnection with the County. Finally,

the transferee, Sand Dollar, has no intention of ever bringing the wastewater treatment facility back on line. For these reasons, we find that show cause proceedings are not warranted.

REVISED TERRITORY DESCRIPTION AND WITHDRAWAL OF COUNTY OBJECTION

As stated in the Background, Lee County filed a timely objection to Capital Sunbelt's transfer application because the legal description in the application included a recreational vehicle park called Pine Ridge Palms, a nonprofit association which was granted an exemption by this Commission. On April 29, 1997, pursuant to the Settlement Agreement, after Capital Sunbelt revised its territory description to exclude the Pine Ridge Palms area, Lee County withdrew its objection to the transfer of Capital Sunbelt to Sand Dollar.

This was the only objection, and it has now been withdrawn. Therefore, we shall approve the revised territory description, acknowledge Lee County's voluntary withdrawal of its objection to Capital Sunbelt's transfer, and proceed with the utility's application.

TRANSFER OF CERTIFICATE NO. 271-S

As stated above, the application for a transfer of the Capital Sunbelt wastewater system to Sand Dollar was filed on January 17, 1996. Sand Dollar acquired the wastewater system through foreclosure proceedings as of May 13, 1993.

Except for the violation discussed above, the application is in compliance with the governing statute, Section 367.071, Florida Statutes, and other pertinent statutes and administrative rules concerning an application for transfer. The application contains \$750, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. Because only the collection lines are in operation, the applicant was not required to provide evidence that the utility owns the land upon which the utility's facilities are located as required by Rule 25-30.037(2)(q), Florida Administrative Code.

The application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code. The only objection to the application has been withdrawn, and the time for other such filings has expired. A description of

the territory as stipulated by the parties is appended to this Order as Attachment A.

Sand Dollar has indicated that it has the technical and financial ability to operate the system. As previous owner of the utility, prior to Capital Sunbelt, Sand Dollar is familiar with the operations of the system. Further, since the utility is receiving bulk wastewater service from Lee County, there are no outstanding notices of violation against this utility.

The financial statement supplied by Sand Dollar indicates that approximately forty-eight percent of the company's net worth is invested in building, improvements and equipment, and that it has approximately thirty-nine thousand dollars in liquid assets. While there is some concern about the liquidity of the assets, we believe the owner possesses the overall financial ability to operate the wastewater facility. As stated previously, the annual report for 1992 shows that the annual operating revenue for the system was \$0 and the net operating loss was \$13,987. Since the system is small and only consists of collection lines, we believe that the assets of the new owner should be adequate to insure the continued operations of the utility.

Because the utility has been acquired through default of Capital Sunbelt, there was no contract for sale. However the application did include documents involved in transferring the property from Capital Sunbelt to Sand Dollar.

The utility has submitted an affidavit consistent with Section 367.045(2)(d), Florida Statutes, which states that it has tariffs and annual reports on file with the Commission. Customers will experience no change in rates or charges as a result of the transfer.

As stated earlier, Sand Dollar has operated the wastewater system since May, 1993. Pursuant to Section 367.145, Florida Statutes, each utility is responsible for paying annual regulatory assessment fees. Therefore, Sand Dollar shall be put on notice that it will be responsible for filing a 1996 annual report and for payment of all outstanding regulatory assessment fees from May, 1993 through 1996. The collection of regulatory assessment fees shall be addressed in a separate docket.

Based on the above information, we find that the transfer of Certificate No. 271-S from Capital Sunbelt/Fund '84, Ltd., to Sand

Dollar Properties, Inc., is in the public interest and shall be approved.

EXEMPT STATUS AND CANCELLATION OF CERTIFICATE

As discussed in the Background, Sand Dollar has requested recognition as an exempt entity pursuant to Section 367.022(5), Florida Statutes (the landlord/tenant exemption). According to Mr. Harry Cutcher, owner of Sand Dollar Properties and FMBC, the wastewater service is being provided to the tenants of the FMBC without specific compensation. FMBC is currently receiving bulk wastewater service from the County. Section 367.022(5), Florida Statutes, states that landlords providing service to their tenants without specific compensation for the service are exempt from our regulation.

Although the statute was changed on July 1, 1996 to allow exemptions to become self-executing, this case was filed prior to the statute's effective date. Therefore, we shall specifically recognize that Sand Dollar is an exempt utility, and cancel Certificate No. 271-S.

CLOSING OF DOCKET

No further action is required in this docket and it shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Capital Sunbelt/Fund '84, Ltd., shall not be required to show cause for failing to obtain prior Commission approval of the transfer. It is further

ORDERED that Lee County's withdrawal of its objection is acknowledged. It is further

ORDERED that the transfer of Certificate No. 271-S from Capital Sunbelt/Fund '84, Ltd., Post Office Box 5252, Lakeland, Florida 33807-5252, to Sand Dollar Properties, Inc., 16299 San Carlos Boulevard, Ft. Myers, Florida 33908 is approved. It is further

ORDERED that the revised territory description is approved as set forth in Attachment A. It is further

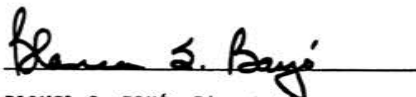
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ORDERED that Sand Dollar Properties, Inc., shall be put on notice that it will be responsible for filing a 1996 annual report and for payment of all outstanding regulatory assessment fees from May, 1993 through 1996. It is further

ORDERED that, pursuant to the provisions of Section 367.022(5), Florida Statutes, Sand Dollar Properties, Inc., is exempt from regulation, and Certificate No. 271-S shall be canceled. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 11th day of July, 1997.

A handwritten signature in black ink, appearing to read "Blanca S. Bayó", is written over a solid horizontal line.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

RRJ

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

SAND DOLLAR PROPERTIES, INC.

WASTEWATER SERVICE AREA

LEE COUNTY

Township 46 South, Range 24 East

Section 6

Starting at an iron pin in the center of Pine Ridge Road marking the southeast corner of the Northeast 1/4 of said section; thence North 00°38' 50" East, a distance of 810.42 feet along the center line of Pine Ridge Road said centerline being the East boundary line of said Section 6; thence North 89°50'19" West a distance of 33 feet to a point on the Westerly right-of-way line of Pine Ridge Road to a Point of Beginning; thence continue North 89°50'19" West a distance of 2,513.52 feet; thence North 00°36'02" West a distance of 492.98 feet; thence North 89°51'42" East a distance of 2,518.16 feet; thence South 00°55'50" East a distance of 493.22 feet to the Point of Beginning.

Less and Except the Pine Ridge Palms Subdivision

A Tract of Land lying in the Northeast Quarter (NE 1/4) of Section 6, Township 46 South, Range 24 East, Lee County, Florida, described as follows:

Commencing at the Southeast corner of the Northeast Quarter (NE 1/4) of the aforesaid Section 6, thence run North 00°47'29" East along the East line of said Section 6 for 810.42 feet, thence run North 89°56'56" West for 33.00 feet to a point on the West right-of-way line of Pine Ridge Road and the Point of Beginning; thence continue North 89°56'56" West for 1282.79 feet; thence run North 00°37'03" West for 493.35 feet; thence North 89°58'19" East for 94.77 feet; thence run South 00°37'03" East for 83.89 feet; thence North 89°22'57" East for 12.00 feet; thence run South 00°37'03" East for 46.00 feet; thence run South 89°22' 57" West for 12.00 feet; thence run South 00°37'03" East for 66.00 feet; thence run South 89°56'56" West for 74.77 feet; thence run South 00°37'03" East for 100.30 feet; thence run North 89°56'56" East for 239.94 feet; thence run North 82°17'46" East for 26.67 feet; thence North 00°03'04" West for 292.55 feet; thence North 89°58'19" East for 992.00 feet to the aforesaid West right-of-way line of Pine Ridge

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Road; thence run South 00°47'29" East along said right-of-way line for 492.84 feet to the Point of Beginning. Said tract contains 13.041 acres, more or less.