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M E M O R A N D U M

June 12, 1997

TO: DIRECTOR OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF WATER AND SEWER (WALKER, REDEMANN) *NSM*  
DIVISION OF LEGAL SERVICES (VACCARO) *NSM*

RE: DOCKET NO. 970076-WS - JOINT APPLICATION FOR TRANSFER OF  
SAILFISH POINT UTILITY CORPORATION, UTILITY ASSETS, AND  
CERTIFICATES NOS. 334-W AND 335-S FROM SAILFISH POINT,  
INC. TO SAILFISH POINT SERVICE CORPORATION IN MARTIN  
COUNTY

AGENDA: JUNE 24, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY  
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\WAW\WP\970076.RCM

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#### CASE BACKGROUND

Sailfish Point Utility Corporation (SPUC or utility) is a Class B utility that provides water and wastewater service for residents of an exclusive, residential community located on Hutchinson Island in Martin County. In 1995, SPUC received total operating revenues of \$661,862, while reporting operating income of \$72 for its combined water and wastewater systems. When the service area is fully developed, approximately 540 customers are anticipated.

On July 30, 1996, after six years of litigation, Sailfish Point, Inc. (SPI), the utility's parent company, entered into a settlement agreement to transfer the capital stock and assets of SPUC to Sailfish Point Service Corporation (SPSC), a wholly-owned, nonprofit subsidiary of the Sailfish Point Property Owners and Country Club Association (the POA). The POA is a nonprofit entity whose membership consists of individuals who own property on Hutchinson Island.

The planned transfer of the utility's stock and assets to the POA was also recognized in an earlier transaction that involved the sale of developed property by SPI's parent organization, Mobile Land Development Corporation (Mobile Land). Per that agreement, reportedly effective on May 15, 1996, Westbrook Sailfish Holdings, L.P. (Westbrook) agreed to purchase land held by Mobil Land in seventeen residential communities throughout the United States, including SPI's assets, which included SPUC. While SPI's investment in land was reportedly small, the purchase agreement evidently required an interim assignment of the utility's assets to Westbrook. Thus, Westbrook acquired SPUC's assets with the full understanding that the utility system would likely be transferred to the POA as part of the settlement with the homeowners at Sailfish Point. The settlement agreement concerned numerous issues associated with turnover of control of the development from the developer to the homeowners. On October 29, 1996, the Circuit Court in Martin County entered an order approving the settlement agreement. However, on November 26, 1996, a group of residents filed a notice of appeal of the Circuit Court's decision in the Fourth District Court of Appeal.

That appeal has no bearing upon this application for transfer. The civil litigation arose from a dispute between the POA and SPI regarding the terms of the developer's Declaration of Covenants and Restrictions. Pursuant to that document, the developer could only convey title of the utility to the POA or a government utility. The POA sought to enforce this provision. Therefore, in approving

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the settlement, the Court made a determination regarding a contractual issue, which did not relate to, or infringe upon, the Commission's jurisdiction over the transfer itself.

Although SPUC and several other Mobil Land subsidiaries continue in existence, they serve as shell corporations. From that perspective, SPUC "arranged" for Westbrook to provide operational oversight until the proposed transfer to the POA is finalized. Although the settlement agreement was approved by the Circuit Court on October 29, 1996, the order provided that this Commission's approval of the proposed transfer is still needed in order to conclude the settlement agreement. According to the applicants, if the Circuit Court's decision is upheld on appeal, Westbrook is compelled to convey ownership of the utility assets to the POA.

On January 15, 1997, SPI and SPSC filed a joint application for permission to transfer the capital stock, assets, and operating authority of SPUC to SPSC. If this transfer is approved, SPSC will thereafter be exempt from Commission regulation pursuant to Section 367.022(7), Florida Statutes. This exemption is available to utilities that are not-for-profit, member-owned and controlled organizations that only serve their members.

Because SPSC will be exempt from Commission regulation, the usual rate base and tariff considerations that are encountered when the acquiring company remains subject to Commission regulation are not issues in this proceeding. Our recommendation is largely constrained to affirming that the notice was properly rendered and that other administrative tasks were likewise accomplished.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission order SPUC to show cause, in writing within twenty days, why it should not be fined for violation of Section 367.071, Florida Statutes?

RECOMMENDATION: No, show cause proceedings should not be initiated. (VACCARO)

STAFF ANALYSIS: As stated in the case background, the utility's facilities were initially transferred to Westbrook in the context of a substantial land purchase agreement between Westbrook and Mobile Land, a parent company of SPUC. That transfer occurred on or about May 15, 1996. Westbrook operated this system pending finalization of an agreement to ultimately transfer the utility system to the POA. The initial transfer to Westbrook, subject to review and ratification of the settlement agreement, predated the application filing date for this proceeding. Section 367.071, Florida Statutes, states the following:

No utility shall sell, assign, or transfer its certificate of authorization, facilities, or any portion thereof . . . , without determination and approval of the Commission that the proposed sale, assignment, or transfer is in the public interest and that the buyer, assignee, or transferee will fulfill the commitments, obligations, and representations of the utility.

Staff believes that the utility's action is "willful" in the sense intended by Section 367.161, Florida Statutes. Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 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 Order No. 24306, issued April 1, 1991, in Docket No. 890219-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." Id. at 6.

According to a statement provided by the utility, transfer of the utility system to Westbrook in May of 1996 was needed to

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conclude an unrelated sale of land by Mobile Land. Westbrook acquired the utility's assets expecting affirmation of a settlement agreement designed, in part, to transfer the utility system to the POA. The utility further explained that it believed that it would be premature to file an application for transfer pending the settlement agreement between SPI and the POA. The utility planned to file an application once the settlement agreement was approved by the Martin County Circuit Court. The utility indicated to staff that if the settlement had not been approved, SPUC would have immediately filed an application for transfer to Westbrook.

We believe these conditions show that Westbrook's ownership of this utility system was a relatively minor part of an agreement to purchase land. For these reasons, staff does not believe that the violation of Section 367.071, Florida Statutes, rises to the level of warranting initiation of show cause proceedings. Staff recommends that the Commission not order SPUC to show cause for violation of Section 367.071, Florida Statutes, for failing to obtain approval of the Commission prior to the transfer.

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ISSUE 2: Should Certificates Nos. 394-W and 335-S be transferred from SPUC to SPSC be approved and then canceled due to SPSC's exempt status?

RECOMMENDATION: Yes, the transfer should be approved. However, the utility should be ordered to submit a warranty deed that properly transfers its plant sites to SPSC within 60 days of the Commission order approving the transfer. The certificates should then be canceled due to SPSC's exempt status.  
(WALKER, REDEMANN)

STAFF ANALYSIS: 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 of a certificate. The application contains a check in the amount of \$3,000, which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code.

The utility did not produce evidence of ownership of its plant sites, a filing condition that is required pursuant to Rule 25-30.037(2)(g), Florida Administrative Code. Instead, the utility provided copies of a special warranty deed and a quit-claim deed, both dated November 26, 1996, whereby the subject plant sites were first conveyed to Westerra Sailfish Point, L.P., an operating unit of Westbrook. For this docket, the applicants have asked the Commission to accept late submission of the plant site documents. They argue that the requested delay will permit recording of those deeds in Martin County after the proposed transfer of SPUC's stock is approved by the Commission. A draft copy of a special warranty deed transferring the subject parcels to SPSC, contingent upon Commission approval of the transfer, was filed. Accordingly, we recommend that SPUC be ordered to submit a properly executed warranty deed conveying title to SPSC within 60 days of issuance of the order.

The application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code, including notice to the customers of the system to be transferred. No objections to the notice of application have been received and the time for filing such has expired. According to the application, the required notices were mailed to customers and the prescribed governmental agencies on January 22, 1997. The application also shows that newspaper publication of the required notice also occurred on January 22, 1997.

A description of the territory served by the utility is appended to this memorandum as Attachment A.

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We believe the public interest is served by approving the proposed transfer. SPUC provides water and wastewater service for Sailfish Point, an exclusive residential community on Hutchinson Island in Stuart, Florida. The utility's facilities will be transferred to the POA, a not-for-profit entity whose membership is comprised of the owners of Sailfish Point property. The POA will form a subsidiary company to operate the utility system. The POA intends to retain the personnel who are currently employed by SPUC. Further, the POA believes it will be able to render less costly service to residents of Sailfish Point. In addition, the application indicates that SPUC has already expanded the water and wastewater plant facilities to adequately service the system demands at buildout. The POA contends that it is financially stable and will be able to adequately serve the needs of Sailfish Point residents. We believe the POA has shown that it possesses the technical and financial capabilities needed to maintain satisfactory service for this community.

We contacted the Department of Environmental Protection (DEP) concerning SPUC's compliance status and were advised that this system is not subject to any presently outstanding Notices of Violation or consent orders.

The application contains a copy of the contract for sale which includes the purchase price, terms of payment and a list of the assets purchased and the liabilities assumed. Our review shows that SPUC is current with respect to payment of regulatory assessment fees for service rendered through 1996. However, SPUC will be responsible for regulatory assessment fees that will be due and payable for 1997.

Based on the above, staff believes the transfer of Water Certificates Nos. 394-W and 335-S from SPUC to SPSC is in the public interest. Accordingly, we recommend that the requested transfer should be approved. Also, as discussed above, if this transfer is approved, SPSC will thereafter be exempt from Commission regulation pursuant to Section 367.022(7), Florida Statutes. This exemption is granted to utilities that are not-for-profit, member-owned and controlled organizations that only serve their members. Accordingly, staff recommends that Certificates 394-W and 335-S should be canceled concurrent with approving the requested transfer in this docket.

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ATTACHMENT A

SAILFISH POINT UTILITY COMPANY

TERRITORY DESCRIPTION

PER ORDER NO. 11673

Township 38 South, Range 41 East

Section 8

The South 3,000 feet of said Section 8

Section 16 and 17

All of Sections 16 and 17 lying on Hutchinson Island between the Indian River on the West, the Atlantic Ocean on the East, and the St. Lucie Inlet on the South.



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ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes, this docket should be closed administratively upon submission of an appropriate deed showing ownership of plant sites has been conveyed to SPSC. (VACCARO)

STAFF ANALYSIS: As noted in Issue 2, the applicant did not present evidence that the utility owns the land sites where its plant facilities are located, a filing condition required by Rule 25-30.037(2)(g), Florida Administrative Code. Instead, the applicant filed a copy of a special warranty deed and a quit-claim deed that initially conveyed the plant sites to Westerra Sailfish Point, L.P., an operating unit of Westbrook. That transfer was made pending the outcome of the class action suit that, among things, involved transferring the utility systems to the POA.

The applicants have proposed that actual execution of the deed transferring the property to SPUC be delayed until after the Commission issues an order approving the proposed transfer to the POA's subsidiary company - SPSC. A draft copy of a special warranty deed transferring the subject parcels to SPSC, contingent upon Commission approval of the transfer, was filed. Accordingly, we recommend that SPUC, the presently certificated company, should be ordered to submit a properly executed warranty deed conveying title to SPSC within 60 days following issuance of an order for this proceeding.