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M E M O R A N D U M

June 12, 1997

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

FROM: DIVISION OF WATER & WASTEWATER (MESSER, REDEMANN) *SBM*
DIVISION OF LEGAL SERVICES (K. JOHNSON) *KJ*

RE: DOCKET NO. 960063-SU - CAPITAL SUNBELT/FUND '84 LTD. -
APPLICATION FOR TRANSFER OF CERTIFICATE NO. 271-S IN LEE
COUNTY FROM CAPITAL SUNBELT/FUND '84 LTD. TO SAND DOLLAR
PROPERTIES.
COUNTY: LEE

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

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\WAW\WP\960063SU.RCM

DOCUMENT NUMBER-DATE

05908 JUN 12 97

FPSC-RECORDS/REPORTING

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CASE 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. (F.M.B.C.), 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 F.M.B.C. 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; via a default on the loan commitment. Capital Sunbelt defaulted on its loan commitments and Sand Dollar, with Harry Cutcher as its principal, accepted a quitclaim deed in lieu of foreclosure on the wastewater treatment facility. Because the utility was acquired through a default of Capital Sunbelt, there was no contract for sale. Instead the two parties executed a quitclaim deed on May 5, 1993, which transferred all of Capital Sunbelt's rights, title, interest, and claim in the property on which the facility was located to Sand Dollar. At the time of this transfer the wastewater facility had not been operational for five years prior due to the interconnection with Lee County in 1988.

On January 17, 1996, Capital Sunbelt applied for a transfer of the Capital Sunbelt's wastewater system (Wastewater Certificate No. 271-S in Lee County) to Sand Dollar. The last available annual report for 1992, shows 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 transfer certificate. The objection stated:

Wastewater Certificate no. 271-S, the subject of the transfer application, contains the described area encompassing Pine Ridge Palms in its legal description. Lee County feels that the certificate's legal description violates Commission Order No. 22153 of November 6, 1989, issued in Docket No. 890849-SU, which granted a non-profit association exemption to Pine Ridge Palms under Section 367.022(7), Florida Statutes. Therefore, Lee

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County objects to the inclusion of Pine Ridge Palm's legal description in Certificate No. 271-S. Lee County will withdraw its objection if Pine Ridge Palm's legal description is removed from Certificate No. 271-S.

On October 30, 1996, Sand Dollar and Lee County entered into a Stipulated Settlement Agreement (Settlement Agreement) which was filed with the Circuit Court for Lee County, Florida, 20th Judicial Circuit, in Case No. 96-0353 CA-JRT. As outlined in the Settlement Agreement, Sand Dollar agreed to revise its legal territory description to delete reference to the Pine Ridge territory. 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 has 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 (F.M.B.C.). Based on the campground's method of operating, Sand Dollar has requested to be found exempt pursuant to Section 367.022(5), Florida Statutes (landlord/tenant exemption).

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission order Capital Sunbelt/Fund '84 Ltd., to show cause in writing within twenty days why it should not be fined for violation of Section 367.071(1), Florida Statutes?

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

STAFF ANALYSIS: As stated in the case background, Sand Dollar acquired the wastewater treatment facility from Capital Sunbelt through a transaction similar to a foreclosure proceeding; via a default by Capital Sunbelt on its loan commitment. Because the utility was acquired through a default of Capital Sunbelt, there was no contract for sale. Instead, the two parties executed a quitclaim deed to transfer the property on which the utility was located from Capital Sunbelt to Sand Dollar. At the time of this transfer in 1993, the wastewater facility had not been operational for five years due to the interconnection with Lee County in 1988. Therefore, this transaction is technically a transfer of the utility facilities from one entity to another without prior Commission approval.

Pursuant to Section 367.071(1), Florida Statutes, a utility may not transfer its facilities without determination and approval of the Commission. Section 367.071(2), Florida Statutes, authorizes the Commission to impose a penalty on a utility when a transfer occurs prior to approval of the Commission. 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.

Utilities are charged with the knowledge of the Commission's 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 the approval of the Commission 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,

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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. Therefore, the utility's failure to obtain antecedent Commission approval to transfer its facilities to another entity meets the "willful" standard.

Although Capital Sunbelt failed to obtain Commission approval prior to transferring its facilities to Sand Dollar, staff does 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 Commission approval of 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, staff recommends that the Commission not order Capital Sunbelt to show cause for why it should not be fined for failing to obtain the Commission's approval to extend its service area prior to serving that area.

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ISSUE 2: Should the Commission approve the revised territory description and acknowledge the withdrawal of Lee County's objection to Capital Sunbelt's transfer application?

RECOMMENDATION: Yes. The Commission should approve the revised territory description and acknowledge the withdrawal of Lee County's objection. (MESSER, REDEMANN, K. JOHNSON)

STAFF ANALYSIS: As stated in the case background, Lee County filed a timely objection to Capital Sunbelt's transfer application because the legal description in the application included a RV park called Pine Ridge Palms, a nonprofit association which was granted an exemption by the Commission. On April 29, 1997, 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 Properties. The withdrawal states:

All matters between the parties relating to Lee County's prior objection to the transfer of Wastewater Certificate No. 271-S filed as of February 7, 1996, have been fully resolved and satisfied. No other matters are outstanding with respect to the requested Transfer of Wastewater Certificate No. 271-S by Sand Dollar.

Although staff has not suggested nor required that Pine Ridge be "carved out" of Capital Sunbelt's territory, staff believes that under these circumstances the revised territory description should be approved by the Commission. The objection previously filed by Lee County was the only outstanding objection. The parties have represented that their differences have been fully resolved. Therefore, staff recommends that the Commission acknowledge Lee County's voluntary withdrawal of its objection to Capital Sunbelt's transfer and proceed with the utility's application since no other protests are pending.

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ISSUE 3: Should the Commission approve the transfer of Wastewater Certificate No. 271-S from Capital Sunbelt/Fund '84 Ltd. to Sand Dollar Properties, Inc.?

RECOMMENDATION: Yes. The Commission should approve the transfer of Wastewater Certificate No. 271-S from Capital Sunbelt/Fund'84 Ltd. to Sand Dollar Properties, Inc. Sand Dollar should also 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. (MESSER, REDEMANN)

STAFF ANALYSIS: As stated in the case background, Sand Dollar applied for a transfer of the Capital Sunbelt wastewater system (Wastewater Certificate No. 271-S in Lee County) to Sand Dollar on January 17, 1996. Sand Dollar acquired the wastewater system through foreclosure proceedings as of May 13, 1993.

Except as noted in Issue 1, 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. As stated in the Case Background, on June 28, 1988, Capital Sunbelt contracted to receive bulk wastewater service from the County and has since dismantled the wastewater treatment plant. Only the collection lines are in operation. Therefore, 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. One objection to the application, filed by Lee County, was received, and the time for other such filings has expired. As discussed in Issue 2, Lee County has since withdrawn its objection. A description of the territory as stipulated by the parties is appended to this memorandum 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.

Regarding financial ability, Sand Dollar supplied a financial statement to staff. The statement indicates that approximately forty eight percent of the company's net worth is invested in

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building, improvements and equipment, and that it has approximately thirty nine thousand dollars in liquid assets. While staff does have some concerns 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, staff believes 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 should 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 will be addressed in a separate docket.

Based on the above information, Staff believes the transfer of Wastewater Certificate No. 271-S from Capital Sunbelt/Fund '84 Ltd. to Sand Dollar Properties, Inc., is in the public interest and should be approved.

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Attachment A

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 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.

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ISSUE 4: Is Sand Dollar Properties, Inc. exempt from the Commission's regulation pursuant to Sections 367.022(5), Florida Statutes, and should Certificate No. 271-S be cancelled?

RECOMMENDATION: Yes. Pursuant to Section 367.022(5), Florida Statutes, Sand Dollar Properties is exempt from the Commission's regulation, and Certificate No. 271-S should be cancelled.
(MESSER, K. JOHNSON)

STAFF ANALYSIS: As discussed in the Case Background, Sand Dollar has requested recognition as an exempt entity pursuant to Section 367.022(5), Florida Statutes (landlord/tenant exemption). According to Mr. Harry Cutcher, owner of Sand Dollar Properties and F.M.B.C., the wastewater service is being provided to the tenants of the F.M.B.C. without specific compensation pursuant to Section 367.022(5), Florida Statutes. F.M.B.C. 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 Commission 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, staff recommends that the Commission recognize that Sand Dollar is an exempt utility, and Wastewater Certificate No. 271-S be cancelled.

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ISSUE 5: Should this docket be closed?

RECOMMENDATION: Yes. (K. JOHNSON)

STAFF ANALYSIS: No further action is required in this docket and it should be closed.