

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint application for transfer of Sailfish Point Utility Corporation, utility assets, and Certificates Nos. 394-W and 335-S from Sailfish Point, Inc. to Sailfish Point Service Corporation in Martin County.

DOCKET NO. 970076-WS
ORDER NO. PSC-97-0852-FOF-WS
ISSUED: July 15, 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 FINDING NO SHOW CAUSE REQUIRED,
APPROVING TRANSFER AND CANCELLING CERTIFICATES

BY THE COMMISSION:

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), SPUC'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 subsidiary of the Sailfish Point Property Owners and Country Club

DOCUMENT NUMBER-DATE

07044 JUL 15 97

ORDER NO. PSC-97-0852-FOF-WS
DOCKET NO. 970076-WS
PAGE 2

Association (the POA). The POA is a nonprofit entity whose membership consists of individuals who own property in the Sailfish Point Development on Hutchinson Island.

The planned transfer of SPUC's stock and assets to the POA was recognized in an earlier transaction that involved the sale of developed property by SPI's parent organization, Mobile Land Development Corporation (Mobile Land). Pursuant to that agreement, effective on May 15, 1996, Westbrook Sailfish Holdings, L.P. (Westbrook) agreed to purchase land held by Mobile Land in seventeen residential communities throughout the United States, including SPI's assets in Florida, which included SPUC. While SPI's land investment was reportedly small, the purchase agreement evidently required an interim assignment of SPUC's assets to Westbrook. Westbrook thus acquired SPUC with the full understanding that the utility system would likely be transferred to the POA as part of a settlement agreement with homeowners in Sailfish Point, which involved numerous issues relating to turning over control of the development 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 the settlement, the Court made a determination regarding a contractual issue, which did not relate to, or infringe upon, our jurisdiction over the transfer itself.

Although SPUC and several other Mobil Land subsidiaries still exist, they serve as shell corporations. From this perspective, SPUC "arranged" for Westbrook to provide operational oversight until the proposed transfer to the POA is finalized. The settlement agreement, which was approved by the Circuit Court on October 29, 1996, provided that our approval of the proposed transfer is required to conclude the 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. Accordingly, 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.

SHOW CAUSE

As stated earlier, 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, in part, that no utility shall sell, assign, or transfer its certificate of authorization, facilities, or any portion thereof, without prior Commission approval.

Section 367.161, Florida Statutes, authorizes us 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. We find the utility's action "willful" in the sense intended by Section 367.161, 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., this 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 conclude an unrelated sale of land by Mobile Land. Westbrook acquired SPUC'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 us 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, we do not believe that the violation of Section 367.071, Florida Statutes, rises to the level of warranting initiation of show cause proceedings. Therefore, SPUC shall not be required to show cause for violation of Section 367.071, Florida Statutes, for failing to obtain Commission prior to the transfer of SPUC to Westbrook.

APPLICATION

Except as previously discussed, 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)(q), 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 us to accept late submission of the plant site documents in order to permit recording of these deeds in Martin County after we approve the transfer of SPUC's stock. Accordingly, SPUC shall submit a properly executed warranty deed conveying title to SPSC within 60 days of issuance of this 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. The required notices were mailed to customers and the prescribed governmental agencies on January 22, 1997. Likewise, 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 Order as Attachment A.

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, but believes it will be able to render less costly service to residents of Sailfish Point. 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 purchase contract, which disclosed 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 shall be responsible for regulatory assessment fees that will be due and payable for 1997.

Based on the foregoing, we find that the transfer of Certificates Nos. 394-W and 335-S from Sailfish Point Utility Corporation to Sailfish Point Service Corporation is in the public interest and is hereby approved. Further, since it appears that Sailfish Point Service Corporation satisfies the requirements for exemption pursuant to Section 367.022(7), Florida Statutes, Certificates Nos. 394-W and 335-S are hereby cancelled. This docket shall be closed administratively upon Sailfish Point Utility

ORDER NO. PSC-97-0852-FOF-WS
DOCKET NO. 970076-WS
PAGE 6

Corporation's submission of an appropriate deed showing that ownership of plant sites has been conveyed to Sailfish Point Service Corporation.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Sailfish Point Utility Corporation shall not be required to show cause for violation of Section 367.071, Florida Statutes, for failing to obtain prior Commission approval of the utility transfer to Westbrook Sailfish Holdings, L.P. It is further

ORDERED that the transfer of Sailfish Point Utility Corporation, 6929 S. E. South Marina Way, Stuart, Florida 34996 to Sailfish Point Service Corporation, 2201 S. E. Sailfish Point Boulevard, Stuart, Florida 34996, is hereby approved. It is further

ORDERED that Attachment A to this Order is by reference incorporated herein. It is further

ORDERED that Sailfish Point Utility Corporation shall file with this Commission a properly executed warranty deed conveying title of the utility plant sites to Sailfish Point Service Corporation within sixty (60) days of the issuance of this Order. It is further

ORDERED that Sailfish Point Utility Corporation shall be responsible for regulatory assessment fees that will be due and payable for 1997. It is further

ORDERED that Water Certificate No. 394-W and Wastewater Certificate No. 335-S are hereby cancelled. It is further

ORDERED that this docket shall be closed administratively upon Sailfish Point Utility Corporation's filing of the properly executed warranty deed conveying ownership of the utility plant sites to Sailfish Point Service Corporation.

ORDER NO. PSC-97-0852-FOF-WS
DOCKET NO. 970076-WS
PAGE 7

By ORDER of the Florida Public Service Commission, this 15th
day of July, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

TV

ORDER NO. PSC-97-0852-FOF-WS
DOCKET NO. 970076-WS
PAGE 8

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.

ORDER NO. PSC-97-0852-FOF-WS
DOCKET NO. 970076-WS
PAGE 9

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.