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April 9, 1991

Mr. Steve Tribble
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

Re: Docket No. 900816-WS, Petition for Rate Increase in Martin
County by SAILFISH POINT UTILITY CORPORATION

Dear Mr. Tribble:

Enclosed for filing is the original and 12 copies of the
Utility's Motion to Strike and Motion to Deny Petition for Leave to
Intervene in the above styled proceeding. Also enclosed, but
separately stapled, are the exhibits to the aforementioned
document.

Thank you for your assistance.

Sincerely yours,

Ben E. Girtman
Ben E. Girtman

BEG/sw
Enclosures

- ACK
- AFA
- APP
- CAF
- CMU
- CTR
- EAG
- LEG *1 w/m*
- LIN *6*
- OPC
- RBH
- REG *1*
- WAR
- RIN

2 filings

Motion To Strike
DOCUMENT NUMBER-DATE

03441 APR -9 1991

FPSC-RECORDS/REPORTING

Exhibits
DOCUMENT NUMBER-DATE

03442 APR -9 1991

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition for Rate Increase) Docket No.: 900816-WS
in Martin County by SAILFISH POINT) Submitted for filing:
UTILITY CORPORATION) April 9, 1991

UTILITY'S MOTION TO STRIKE
RESPONSE OF SAILFISH POINT PROPERTY OWNERS REPRESENTATIVES
AND CHARLES R. BUCKRIDGE TO UTILITY OBJECTION TO
PETITION FOR LEAVE TO INTERVENE
AND
MOTION TO DENY PETITION FOR LEAVE TO INTERVENE

COMES NOW, Sailfish Point Utility Corporation, Petitioner for a rate increase in the above styled proceeding, and in support of its Motion to Strike and its Motion to Deny Petition for Leave to Intervene states that:

1. The so-called "SPOR" petitioners (including the individual petitioner) are attempting to misuse proceedings before the Florida Public Service Commission in an effort to effect a transfer of the Utility assets to the property owners association (POA) and to acquire the Utility on more favorable terms than they otherwise might be able to do.

2. The Utility reemphasizes, without repeating here, the positions stated in its Objection to the SPOR petition for leave to intervene.

3. The "SPOR representatives" have filed two documents: A Response (dated March 29) to the Utility's Objection to their petition for leave to intervene, and a letter (dated April 2) in response to the PSC Staff Attorney's request of March 27 for additional clarification relating to their petition to intervene.

4. The SPOR Response to the Utility Objection and the SPOR April 2 letter to the Staff Attorney attempting to justify the intervention should be examined very carefully and compared with the facts. As such, they are misleading, full of spurious claims, replete with creative and purely self-serving interpretations, and are outright misrepresentations of fact. The March 29 Response is a sham pleading and should be stricken. And because the April 2 letter was intended to supplement and incorporate itself into the Response (see the first paragraph of the letter), it too should be stricken. There are simply no grounds to grant intervention to the "SPOR representatives", individually or collectively, in this case.

5. On March 15 the "SPOR representatives" served their Petition for Leave to Intervene in this proceeding. Attached hereto in Exhibit "A" is the list of the "SPOR representatives" prior to March 22. Attached in Exhibit "B" is the list of the new "SPOR representatives". Therefore, of the "SPOR representatives" who allegedly filed the Petition to Intervene, Messrs. Houghland, Speigel, DelCollo, Rich, Petrus, Bayles and Andrews were not included after March 22. There is no indication that the now-current list of "SPOR representatives" join in the Petition, and there is still no indication that the "SPOR representatives" on the first list (prior to March 22) joined in the Petition when originally filed.

6. There is still no indication of any basis for these "SPOR representatives" to seek to intervene; there is no resolution of the so-called organization; there are no organizational minutes

authorizing such a Petition to Intervene; there is no indication of any other agreement or authority suggesting that such an action is authorized to be taken.

7. As acknowledged on page 2 of the SPOR letter of April 2, the attorney for the "SPOR representatives" has been representing certain homeowners in what they call "transfer" issues relating to the turn-over of control of certain aspects of the development to the homeowners. The letter of April 2 responding to the Staff Attorney's request of March 27 claims (on page 2) that

. . . The documents also give the Developer the option to convey the Utility Facilities to the POA. One "turn-over" issue is whether conveyance of the Utility Facilities must be free and clear or can the Developer demand fair market value? [Emphasis supplied.]

8. Therefore, if there is a dispute about "turn-over issues", the proper forum for these individuals is in the Circuit Court, not the Florida Public Service Commission. The Public Service Commission has no jurisdiction or responsibility for the numerous "turn-over" issues relating to a development. That jurisdiction is with the Circuit Court. And in this case, there is no requirement whatsoever in any document anywhere that the Developer must convey the Utility, in whole or in part, to the "SPOR representatives" or to the property owners association (POA).

9. On two prior occasions the Public Service Commission has seen fit to grant certificates of public convenience and necessity to Sailfish Point Utility Corporation. In Docket Nos. 790904-W and 790905-S, water and sewer certificates were granted to the Utility when the Commission first obtained jurisdiction from Martin County.

Subsequently, the County took back jurisdiction for a short period of time, and then in Docket No. 810277-WS, the Commission again granted water and sewer certificates to the Utility after Martin County gave up jurisdiction for the second time.

10. If the "SPOR representatives" feel they have some type of "shareholder derivative action" for whatever legal reason, their remedy is not with the Public Service Commission. The SPOR letter response of April 2 states on page 2 that:

The SPOR committee previously authorized the intervention in this proceeding to insure that matters of interest which affect the POA might be brought before the PSC.

That reference to the "SPOR committee" in the April 2 letter is to the list of individuals as it existed after the filing of the Petition for Leave to Intervene on March 15, but before the March 22 change in the list. As shown in paragraph 5 above, seven (7) names on the old list were replaced by new names. There has been no vote of customers whose rates will be affected by rate case expense and no authorization of any other kind for "SPOR representatives", either as they existed before or after March 22, 1991, to seek intervenor status in this proceeding.

11. The SPOR letter of April 2 is not responsive to the Staff Attorney's request for signatures of the claimed "SPOR representatives", and it is not known, whether one, some, or all of the individuals or any majority of the individuals (on the list before or the list after the March 22 change) in fact want to be intervenors in this proceeding.

12. The interests which the "SPOR representatives" seek to

inject into this proceeding are: 1) How to acquire the Utility (if they can convince the Developer to convey it to them or to the POA), and 2) Under what terms and conditions might the Utility be acquired. There is no requirement, of any kind, in law, in contract, or otherwise, which would compel the Developer ever to convey the Utility to the POA, and certainly not to the "SPOR representatives".

13. On March 29, 1991, the "SPOR representatives" filed a Response to the Utility's objection to their petition for leave to intervene. Their response is a classic example of obfuscation. It stretches the English language past the breaking point, not to mention the credibility of the petitioners. In their effort to acquire the Utility system (if they can convince the Developer to convey it to them), the petitioners have made repeated misrepresentations of the facts set forth in written documents, particularly the Declaration of Covenants and Restrictions for Sailfish Point, a copy of which is attached hereto as Exhibit C. A few, but not all, of the misstatements will be addressed here, especially as they relate to the Declaration of Covenants and Restrictions for Sailfish Point as made on January 25, 1980. (Although eight (8) amendments have been made to the original Declaration, there were no substantive changes in any of the sections cited herein. However, for reference, there were slight wording changes in the following: Article I, Section 29 in the First Amendment at page 2; Article III, Sections 7(d) and (e) in the First Amendment at pages 2-3; Article VII, Section 9 in the

First Amendment at pages 8-9; Article XVI, Section 3 in the Fourth Amendment at page 3. Copies of those amended sections are attached hereto as Exhibit D.)

14. In Article I, Section 6, on page 2, the Declaration defines "Common Areas" to include any portion of the real or personal property within the boundaries of the development, Sailfish Point,

. . . title to which is not held by the Developer, the Owner of a Residential Unit or Parcel, the Golf Club, the Marina Owner, or Sailfish Point Utility Corporation
. . . . [Emphasis supplied.]

The real and personal property of the Utility is specifically exempt from the definition of Common Areas. (See also the identification of "Sailfish Point Property" in Section 26, page 4, and in the Exhibit A attached to the Declaration.)

Therefore, the insinuation that lines and mains which are placed in Common Areas somehow must be, or have been, conveyed to the POA or to any residents or customer group is spurious and without merit.

15. Article I, Section 27 on page 4 states that "Sailfish Point Utility Corporation"

. . . shall mean and refer to the entity, in whatever legal form, which owns and/or operates and/or manages the water and/or waste water treatment facilities which serve the Owners, the Golf Club, the Marina Owner, the Developer and all other uses of the Sailfish Point Property excluding the irrigation system which serves the Golf Club Facilities and Golf Course and the irrigation system which serves all Owners, the Developer, the Marina Owner, and all other users of the Sailfish Point Property. [Emphasis supplied.]

Therefore, only those irrigation systems specified in that section

are exempt from Utility ownership, not the lines, mains, pumps or any other equipment or Utility property.

16. Article I, Section 29 on page 4 defines "Utility Parcel" to mean and refer to

. . . all or any part of Parcel "C" of Plat No. 1 of Sailfish Point to be recorded concurrently with this Declaration and shall include where the context so requires, all improvements thereon and appurtenances thereto.

"Utility Parcel" defines a part of the total Utility assets and is a convenient phrase to identify the land which, essentially, contains the plant and improvements thereon. Merely defining the real estate and the plant for convenience of reference in no way excludes the mains and lines and the other assets of the Utility from being owned, used and maintained by the Utility.

17. In Article III, Section 7(a) on page 6, easements are specifically reserved for all utilities

. . . including but not limited to, electricity, telephone, water and wastewater services . . . for [the described users of utility services at Sailfish Point] . . . or as may be required for utility services, including the maintenance and operation of wells, well sites and a system for drainage, irrigation and effluent areas in order to adequately serve all or any part of the Sailfish Point Property, and all improvements thereon. [Emphasis supplied.]

The introductory portion of this Section 7 provides that each of the easements described therein were

. . . reserved and otherwise created and conveyed in favor of the Association, all Members, all Builders, the Developer, Sailfish Point Utility Corporation, the Golf Club and its members, the Marina . . . and assigns [Emphasis supplied.]

18. Therefore, the Utility is clearly described as owning the

utility easements.

19. Conversely, in addition to reserving utility easements throughout Sailfish Point, the Declaration [Article III, Section 7(d) at page 6] reserves easements for exterior maintenance and repair over all property at Sailfish Point, including the Utility Parcel. (See also Article VIII, Section 11, page 18). Article III, Section 7(e), page 6 also conversely reserves an easement for ingress and egress from and to each lot and the named parcels, including the Utility Parcel. Therefore, easements and access are reserved through the Common Areas for the Utility to install, operate and maintain its mains and lines, and easements and access are conversely reserved for the POA to carry out its responsibilities, such as exterior maintenance, if required, as to each lot and the named parcels, including the Utility Parcel.

20. Article VII, beginning on page 15, sets forth the duties of various entities, including maintenance duties. Section 5 on page 17 deals with the Utility Parcel where the plant is located, and it is the Utility's responsibility to maintain that parcel. (But that is not the only maintenance duty of the Utility.)

21. Section 9 on page 17 provides that the Association will have, in effect, what is a permissive "secondary" authority to ". . . provide exterior maintenance service . . ." of areas such as the Golf Club, any residential unit, any parcel of land, the Golf Course, the Marina and Marina Facilities, and even the Utility Parcel, if the responsible entity does not provide that exterior maintenance. [Emphasis supplied.]

The type of authorized maintenance by the Association includes:

. . . paint; repair; roof repair and replacement; installation of gutters, down spouts and exterior building surfaces; yard clean-up; maintenance of the Golf Course; bulkheading; dredging, and otherwise maintaining the Marina and Marina Facilities . . . maintenance to the landscaping, sprinklers, trees, shrubs, grass, pools, walks, private drives, shorelines and streets, Owner's irrigation systems, and may provide maintenance to other exterior improvements. . . .

There is no authority, whether primary, secondary, or otherwise for the POA to maintain utility mains, lines or any other property used in providing water or wastewater service. Furthermore, the POA's "secondary" authority is limited to "exterior maintenance" which does not contemplate ownership or maintenance of buried utility pipes.

22. Section 9 (page 17) also specifically states that, even as to exterior maintenance:

To the extent such maintenance is provided in a satisfactory manner by a Condominium Association or a Cluster Committee, the Golf Club, the Marina Owner, an Owner, Sailfish Point Utility Corporation, or by the Developer for any part of Sailfish Point, such maintenance shall not be duplicated by the Association. [Emphasis supplied.]

23. Furthermore, Section 9 (page 17) states that

The provision of any exterior maintenance services by the Association to . . . [several specifically named facilities including the Utility Parcel (plant location), but not including any utility assets, lines or facilities] . . . shall not be deemed to constitute and does not constitute an acceptance of the ongoing responsibility to maintain such properties or the ownership of such properties. [Emphasis supplied.]

24. And, if the association does render exterior maintenance services, a separate assessment will be made against the entity

primarily responsible for the maintenance, including Sailfish Point Utility Corporation. To date, and at no expense to the POA (or to the "SPOR representatives") the Utility has provided all maintenance, for all of the lines, mains, plant, equipment, and other assets used by the Utility in providing water and wastewater services. The Association has never been required to provide such maintenance, and no claim or assessment has ever been made against the Utility for any such "secondary", permissive maintenance.

Several years ago, the Utility paid the POA to mow the grass and for similar grounds maintenance at the Utility Parcel, as well as for some building upkeep and cleaning. Currently, the POA has one person perform maintenance on its own irrigation system serving the Common Areas and individual lots. At the request of the POA, that person works under utility supervision but is paid by the POA. The POA also pays the Utility for any parts used for their irrigation system. On occasion, the Utility maintenance man, (Marty), will assist the POA maintenance man (Pat) on the work required on the POA irrigation system. Because some of this type of maintenance work requires two people, there is a trade-off between Pat and Marty on work which Pat sometimes does on the Utility, but this is done in the interest of economy and safety and to minimize the cost of maintenance. Therefore, any work done involving the POA has been done, and is currently being done, strictly on a "quid-pro-quo" basis. Any such "maintenance" done "by" the POA has been, and is, fully compensated by the Utility. If it had not been, the POA's remedy would have been in the Courts

of Martin County, not the Public Service Commission. (For general information, the Utility has only two other employees, one who manages and supervises the system and performs some maintenance, and the other who essentially performs quality control and lab work.)

25. The POA does not now have, nor has it ever had, the responsibility for maintaining water or wastewater mains, lines, pumps, meters, equipment or any other property used to provide water or wastewater services to the Utility customers. The POA, and certainly the "SPOR representatives", are not authorized to perform work on mains, lines, pumps, meters, equipment or any other property used in providing water or wastewater services, because the POA is only authorized to perform "exterior maintenance" and then only if the entity primarily responsible for the exterior maintenance fails to do so. This is a common provision for developments so as to preserve the outward appearance of the community if a responsible entity fails to perform its "exterior maintenance" responsibilities.

26. Furthermore, the mere listing of certain duties in Article VII is not intended to cover, and could not be expected to cover, every item of required responsibility, such as maintaining the mains and lines. Such maintenance is only one of the "duties" implicit in owning and operating the water and wastewater systems.

27. Duties of the association include certain maintenance responsibilities in common areas " . . . including the Country Club and the irrigation system for the Common Areas"

"Irrigation systems" should not be confused with regular utility mains and lines. "Irrigation systems" do not include potable water distribution systems or wastewater collection systems, especially when the irrigation systems carry treated wastewater for irrigation.

28. Article VIII, Section 4 on page 19 provides that:

Except for Sailfish Point Utility Corporation, the Golf Club, Marina Owner or the Developer, no Owner shall be permitted to develop or establish any septic tanks, sewer, or water supply systems or wells All Owners, the Golf Club, the Marina Owner, Sailfish Point Utility Corporation, and the Developer shall pay the "tap-in" and connection fees as well as monthly service charges as required by Sailfish Point Utility Corporation, the Association, or the Developer, or whichever entity owns and operates the water and wastewater treatment facilities which serve all Owners and users of the Sailfish Point Property. [Emphasis supplied.]

29. Section 5 on page 19 provides that:

The Golf Club and the Association each may own and operate separate irrigation systems for the property owned by each. Each irrigation system is a part of, and must comply with the terms of, the Water Management System.

The Water Management System is defined in Article I, Section 30 on page 4 and provides that the Water Management System

. . . shall mean and refer to the system described in the Surface Water Management Permit No. 43-00125-S, issued by the South Florida Water Management District, which encumbers all Sailfish Point Property and which must be maintained by the Association, as from time to time amended with approval of the South Florida Water Management District, or whatever governmental agencies have jurisdiction over a drainage system at Sailfish Point. [Emphasis supplied.]

This is not the water and wastewater system, but rather provides for drainage and surface water management. The POA authority in

relation to that drainage requirement does not give them any right, title or interest in any utility property, especially the distribution and collection lines and mains.

30. Article IX, Section 8 on page 21 provides general restrictions relating to the use of the Utility Parcel:

It is hereby declared that the Utility Parcel will be improved and maintained to provide water and wastewater treatment facilities and services to all Owners and users of the Sailfish Point Property.

Section 6 on page 21 provides general restrictions relating to the use of Common Areas:

It is hereby declared that the Common Areas shall be used exclusively for the benefit of the Members, Members of the Golf Club, the Marina Owner and Sailfish Point Utility Corporation. [Emphasis supplied.]

Therefore, the Utility is entitled to use not only the Utility Parcel, but also the Commons Areas to carry out its responsibilities to provide water and wastewater services to the customers and residents at Sailfish Point.

31. In Article XIII, Section 1 (d) and (e) on page 29, the Developer specifically reserves the right to establish and convey easements in the entire property. It also reserves the right to amend the Declaration of Covenants and Restrictions (Article XVI, Section 3 at page 33) and refers to its right to amend the Planned Unit Development agreement (Article XIII, Section 1(k) at page 30).

32. These foregoing are only a few of the provisions of the Declaration of Protective Covenants and Restrictions for Sailfish Point, but they clearly show that the "SPOR representatives" have deliberately attempted to distort and manipulate the facts and the

provisions in the governing documents so that they may, in their efforts to acquire the Utility, try to gain financial advantage totally separate and apart from the issue of setting rates for this utility.

33. The petition for leave to intervene filed by the "SPOR representatives" has nothing to do with the actual rate increase. The "SPOR representatives" are attempting to find someone . . . anyone . . . to interpret the governing documents in a manner which will: 1) limit the Developer's ability to convey the Utility to a third-party water and sewer company, and 2) which will, in their opinion, reduce the "value" of the Utility so that they may have a bargaining edge in their efforts to acquire the Utility.

34. Therefore, this is a sham pleading and it should be stricken.

35. As further indication of the distortions in the SPOR pleadings, the Utility clearly holds title to the Utility assets. The Utility Parcel and the Effluent Tank Parcel, together with all easements and appurtenances to both these parcels and " . . . all mains, lines, meters, pumps, and equipment appurtenant thereto which are located off the Lands [Lands being, collectively, the Utility Parcel and the Effluent Tank Parcel] but within Sailfish Point . . . " were conveyed in December, 1983, from Sailfish Point, Inc. to Sailfish Point Utility Corporation, as shown by that Special Warranty Deed attached hereto as Exhibit E. [Emphasis supplied.] The Utility property also was made subject to the Mortgage and Security Agreement made by Sailfish Point Utility

Corporation as mortgagor to Sailfish Point, Inc. as mortgagee, as shown by that Mortgage and Security Agreement attached hereto as Exhibit F. Article I on pages 2 and 3 of the mortgage (Section 1.04) also covers, among other things, the water and sewer mains and lines located off the Utility Parcel and off the Effluent Tank Parcel.

36. Documents filed by the "SPOR representatives" allege that the Office of Public Counsel (OPC), which has also filed its Notice of Intervention in this case, will not be handling the issues which are sought to be raise by the "SPOR representatives".

37. The only subject about which the "SPOR representatives" could be interpreted as seeking to have an impact relates to the ownership of the property, or rate base, as previously discussed herein. Rate base is in fact being examined and challenged by the Office of Public Counsel. However, even on the rate base issue, the Office of Public Counsel has declined to engage in the misinformation, deception, creative interpretation, and abuse of the Commission hearing process that is sought to be perpetrated by the "SPOR representatives".

38. If the "SPOR representatives" have an issue to negotiate, let them present it to whomever they wish to negotiate. If there is a legal dispute let them file suit in Circuit Court. But the attempt to use the time, energies and cost of everyone involved in this proceeding outside the Public Service Commission's jurisdiction is an abuse of the legal process.

CONCLUSION

Because the so-called "SPOR representatives" are attempting to abuse the hearing process before the Florida Public Service Commission, and because the SPOR Response is replete with misinformation, deception, creative and self-serving interpretation, and outright misrepresentations of fact, the SPOR Response should be stricken. Because the April 2 letter was intended to supplement and incorporate itself into the Response, it too should be stricken.

Furthermore, the Petition for Leave to Intervene should be denied because 1) the "SPOR representatives" are not an appropriate entity, individually or collectively, to be a party to this proceeding, 2) the "SPOR representatives", individually and collectively, seek to formulate matters outside the jurisdiction of the Public Service Commission, and 3) the rate base is already being challenged by the Office of Public Counsel.

Respectfully submitted this 9th day of April, 1991.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to Mr. Stephen C. Reilly, Office of Public Counsel, 111 West Madison Street, 812 Claude Pepper Building, Tallahassee, FL 32399-1400, Wm. Reeves King, Esq., 500 Australian Avenue So., Suite 600, Clearlake Plaza, West Palm Beach, FL 33401, and Catherine Bedell, Esq., Florida Public Service Commission, Division of Legal Services, 101 East 9th Gaines Street, Tallahassee, FL 32399-0873 by U.S. Mail, this 9th day of April, 1991.



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