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July 22, 1991

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Steven Tribble,
Director of Division of
Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399

RE: Application for Sailfish Point Utility Corp. for a rate increase in Martin County; Document No: [redacted]; Submitted for Filing: July 22, 1991

Dear Mr. Tribble:

Enclosed please find original and twelve copies of the Brief of Intervenors Sailfish Point Property Owners Representatives and Charles R. Buckridge.

Sincerely yours,

Wm Reeves King/lsh

WM. REEVES KING
For the Firm

ACK ✓
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WRK/lsh
Enclosures
cc: Association
Catherine Bedell, Esquire
Steve Reilly, Esquire
Ben E. Girtman, Esquire
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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition for Rate Increase in Martin County by SAILFISH POINT UTILITY CORPORATION	Docket No.: 900816-WS Submitted for filing: July 22, 1991

BRIEF OF INTERVENORS,
SAILFISH POINT PROPERTY OWNERS REPRESENTATIVES
AND
CHARLES R. BUCKRIDGE

STATEMENT OF THE FACTS

Sailfish Point Utility Corporation (SPUC) is a wholly owned subsidiary of Sailfish Point, Inc., (SPI) the Developer of the Planned Unit Development (PUD) known as Sailfish Point. SPI is a wholly owned subsidiary of Mobil Land Development (Florida), Inc. (MLDF). It is a wholly owned subsidiary of Mobil Land Development Corporation (MLDC) which is a wholly owned subsidiary of Mobil Corporation.

MLDC and its subsidiaries are engaged in the development of real estate. SPUC provides water and waste water treatment services solely to Sailfish Point. MLDC and Mobil have no utility subsidiaries other than SPUC (T-548).[1] Neither is there any standard policy within the Mobil family to include or exclude utility costs in the cost of lot sales for tax purposes. (T-549). The decision to treat the assets of SPUC as a separate business unit rather than include the cost of the SPUC assets in lot sales was made by somebody in MLDC management. (T-550).

[1]Citations to the Transcript pages will be shown as (T-page number).

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Sailfish Point is established pursuant to a Planned Unit Development Zoning Agreement between Sailfish Point, Inc. and Martin County (Ex. 5, Pg. 3).[2] The PUD Zoning Agreement states that among the improvements comprising the PUD are a sewage, irrigation, and water treatment plant and lines and appurtenances thereto (Ex. 5, Pg. 59).

The PUD Zoning Agreement provides that the Developer agrees that the PUD will be undertaken and carried out in accordance with the preliminary and final development plans as officially adopted by Martin County; that the development of the PUD will be in complete accordance with such preliminary and final plans for each phase of the PUD, as approved by the County and recorded in the PUD Book in the Public Records of the County and that upon being so recorded, each plan will be deemed incorporated in the PUD Agreement and subject to all of the terms thereof. It further required the Developer to follow the plan as approved preliminarily and upon final approval and platting of each subdivision the Agreement was to be binding for each of the phases as approved by the County. It requires sale of lots or units or groups of lots or units within the PUD to be in accordance with the preliminary development plan and all such conveyances to be based on a plat or plats approved by the County and recorded in the County records. It further provided that no lots or units were to be conveyed by

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[2]Citations to Exhibits will be shown as (Ex. No., Pg. No.). The page numbers shown for Exhibit 5 refer to each page beginning with 1 and numbered consecutively through Number 220. The numbers are not on the pages. Please number them accordingly. Sorry!

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the Developer except by reference to the recorded plats or Declaration of Condominiums (Ex. 5, Pgs. 60-61, Para. 1)

The PUD Zoning Agreement further provides that SPI had created a Declaration of Covenants, Conditions and Restrictions of Sailfish Point, which was attached to and made a part of the Zoning Agreement, and which provided for the establishment of the Association for the maintenance, operation and management of the Common Areas, as defined therein. (Ex. 5, Pg. 62, Para. 1).

The PUD Zoning Agreement requires that any land conveyed by the Developer to be by an instrument which must contain by reference therein the covenants and restrictions. It further provides that the Association shall not be dissolved nor shall it dispose of any Common Areas, by sale or otherwise, except to an organization conceived and organized to own and maintain the Common Areas, without first receiving approval of the County, which as a condition precedent to the dissolution or disposal of any Common Areas, may require dedication of common or open areas, utilities or road rights-of-way to the public as deemed necessary. (Ex. 5, Pg. 62, Para. 2).

Phase 1 of the PUD was defined to include construction of the water, sewer and irrigation facilities as shown on the Phase I Development Plan attached to the PUD Agreement and later phases were to be designed to complete the development as shown upon the Preliminary Development Plan. (Ex. 5, Pgs. 64-65).

The First Amendment to the PUD Zoning Agreement is dated January 21, 1980. It approved the final development plan for Phase

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I-A and permitted Plat No. 1 to be recorded. Upon recording of the plat, together with the recording of the Declaration of Protective Covenants and Restrictions for Sailfish Point, the Supplementary Declaration of Protective Covenants and Restrictions for Plat No. 1, Sailfish Point and the Unity of Title Agreement, the Developer was permitted to have certain rights including the right to construct the utility facilities, including the Phase One water distribution and wastewater collection system and lines, necessary to provide water and wastewater treatment services to Phase One of the Sailfish Point Project on Parcel "C" of Plat No. 1, Sailfish Point. The utilities were required to be owned and operated by a corporation to be known as Sailfish Point Utility Corporation, or such other entity authorized by the Declaration of Protective Covenants and Restrictions for Sailfish Point described in Paragraph 5 of that First Amendment. (Ex. 5 Pgs. 67-69) (That document is the unsigned Declaration of Protective Covenants and Restrictions for Sailfish Point. The signed document is included in Exhibit 5 Pages 167-190 and is the "Declaration"). The only entities other than SPUC authorized by the Declaration to own or operate the utility facilities are Sailfish Point Property Owners and Country Club Association, Inc. (POA) or any government entity. (Ex. 5, Pg. 172, Sec. 5). The First Amendment to the PUD Zoning Agreement also authorized the Developer to sell to third parties, upon such terms and conditions as the Developer shall determine Parcel "D", Parcel "E", and Lots numbered 1 through and including 40, as shown on Plat No. 1 of Sailfish Point. (Ex. 5, Pg. 69, Para

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(g)). As a condition to the approval of the Final Phase 1 Development Plan, the County required SPI and Mobil Corporation to execute a Subdivider's Completion Agreement; a copy of which is included in Exhibit 5 at Pages 55-58. That document obligated SPI and Mobil in the amount of $4,000,000 as a guarantee that SPI would in all respects comply with the terms and conditions of the PUD Agreement. It assigned certain values to various improvements within the PUD. Among those was $950,000 for construction of the water treatment plant and $920,000 for construction of the wastewater treatment plant (Ex. 5, Pg. 58).

The Second Amendment to the PUD Zoning Agreement is dated October 21, 1980. Among other things, it designated Parcel "C-1" of Plat No. 1-A as the site on which the Developer was to construct the improvements upon the Utility Parcel in accordance with the site plan and elevations approved by the County. It also authorized the construction of the maintenance facility on Parcel C-2 and the construction of the telephone facility on Parcel C-3 (Ex. 5, Pg. 102, Para. 2C., D., and E.)

The Third Amendment of the PUD Zoning Agreement dated January 31, 1981 authorized the Developer to proceed with "Interim Site Development Work" including subsurface improvements among which was the installation of underground utilities and irrigation systems and the paving of roads. (Ex. 5, Pg. 118, Para. 2)

The Fourth Amendment of the PUD Zoning Agreement dated March 30, 1981 authorized the recording of Plat 1-B which related to the Cluster Development to be constructed on Parcel B. It authorized

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the Developer to transfer title to that platted property to be developed as Sailfish Point Villas under a Declaration of Cluster Protective Covenants and Restrictions which were attached to that amendment. That Declaration requires the unit owners of the improved villa lots to pay assessments which include maintenance, improvements and replacements to the Common Elements, including utility collector lines or facilities located within or constructed upon that Plat. (Ex. 5, Pg. 124, Sec. 2(a)).

The Tenth Amendment dated January 12, 1983 of the PUD Zoning Agreement in Paragraph 4 authorized SPI to construct and erect Phase 2 of the Water Treatment Plant as per the designs, plans, etc. submitted and approved by the County. (Ex. 5, Pg. 144).

The Declaration has no specific reference to sewer and water lines or facilities. Instead, it speaks in terms of the "Utility Parcel" which means and refers to all or any part of Parcel "C-1" of Plat No. 1-A of Sailfish Point PUD. (Ex. 5, Pg. 171, Sec. 29), T-649).

As a part of the development, SPI caused the POA to be incorporated. Under the Declaration, Article IV, Sec. 1, the POA has primary authority and control over all Common Areas and will become owner of all Common Areas, including the Country Club. It is the organization with the sole responsibility to make and collect assessments from all members to be used to improve, construct, reconstruct, repair or replace, maintain and operate the Common Areas, including the Country Club (T-650). (Ex. 5, Pg. 178).

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The Declaration defines Common Areas as any portion of the Sailfish Point Property, whether real or personal, to which title is not held by the Developer, an owner, the Golf Club, the Marina Owner, or by SPUC as those terms are defined in the Declaration. Common Areas include real or personal property submerged or unsubmerged shown on any plat either to be conveyed to the Association or reserved for use as a Common Area. (Ex. 5 Pg. 169, Sec. 6). (T-650-651).

According to the Unity of Title Agreement recorded as a part of the First Amendment to the PUD Zoning Agreement, (ex. 5, Pgs. 97-98) the Developer originally had title to the entire Sailfish Point Property. Article III, Section 1 of the Declaration (Ex. 5, Pg. 172) gives the Developer an election to convey all or part of the Common Areas and/or the Country Club to the POA when it decides to, but in all events, when title to 573 residential units has been conveyed. The POA is required to accept title to the Common Areas and has no right to reject it (T-651). The Developer has not conveyed title of the Common Areas to the POA (T-678).

The Declaration, Article VII, Sec. 1, imposes upon the POA the duty to maintain, protect, repair and replace at POA expense all Common Areas; to own, operate, govern, administer and manage the Common Areas and to insure compliance with the PUD Zoning Agreement; to maintain all permits for operation of Sailfish Point Property required by governmental entities having jurisdiction; to control the waterways, lagoons, lakes, and inlets in Sailfish Point and comply with all terms of the water management system and other

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permits, licenses and governmental approvals in connection with the waterways and to ensure that the provisions of the Declaration are duly enforced. (T-652) (Ex. 5, Pg. 179).

SPUC is required by the Declaration only to be responsible for the maintenance, repair and replacement of the Utility Parcel or any improvement thereon. (T-652). (Ex. 5 Pg. 181, Para. Sec. 5).

The Declaration for the 2001 and 2800 Condominiums both specifically provide that all unit owners shall be members of the POA and contribute to the cost of maintenance and replacement of the water and sewer lines within Sailfish Point incurred by the POA as a part of the POA assessments and that such obligation is a covenant running with the land (T-629-636) (Ex. 5 Pg. 218 Para. 12.2).

The Developer has responsibility for maintenance, repair and replacement of all parts of Sailfish Point Property owned by the Developer (T-653) (Ex. 5, Pg. 181, Sec. 8).

SPUC applied for its certificate from the Public Service Commission (PSC), sometime around 1980-1981. SPI never applied and was never certified by the PSC. (T-357). The certificate was issued in 1983 and MLDC was required through SPI to guarantee that the facilities would be funded. No utility assets were shown for 1980 when the plant was under construction. (T-223). In 1981, Utility assets in the amount of $2,741,154 were added to the books of SPI and SPI took the investment tax credit for that year. (T-224). SPI took the tax benefits and never transferred those to SPUC. (T-225).

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SPI took depreciation on those assets in 1981, 1982 and 1983 and received a tax savings associated with that tax depreciation. (T-228-229). Those assets were depreciated for tax purposes by SPI at an accelerated rate for those years. (T-232). SPUC failed to offer evidence as to whether it was more advantageous vis a vis the relative tax benefits for SPI to book the assets and depreciate them rather than write them off against lot sales. (T-235-239).

In 1983, SPI transferred $1,016,057 in construction work in progress to SPUC. Those assets were moved to plant in service in 1984. But since that time, nothing further has been moved into plant in service except as adjustments in this rate case. (T-226-228).

The depreciation schedule and information contained in Ex. Vol. 1, Pg. 25 and the information contained in the MFR's are not totally reflective of the books of SPI and the Utility. They were put together for MFR purposes. (T-290-291).

The Mobil personnel were in complete control of the accounting treatment to be given to SPI and SPUC assets. They originally contemplated that SPI would drop the land into SPUC and try to translate its investment in SPUC into its land basis. That arrangement would involve a tri-party agreement whereby at some later date, SPUC would be obligated to give the assets to a local government agency or to the POA. However, that plan was apparently abandoned by 1983 when it was decided to book the assets in SPUC. (T.-294-298). Mobil and SPI determined whether they or SPUC would take the investment tax credits. (T-298). Mobil and SPI determined

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whether they would make loans to SPUC in the year of asset transfer or at some later time. (T-299). The Utility's expert witness did not know whether the development cost of Sailfish Point were increased by $6,000,000 to $7,000,000 to compensate SPI for the cost of the Utility Plant. (T-309). Mobil and SPI personnel decided the year in which the assets were transferred from one corporation to the other. (T-319-322). The only assets transferred to plant in service consisted of a note in the amount of $886,260 at 11% and a refundable advance of $2,658,778. (T-323). The refundable advance carried no terms associated with it. The Utility's expert Seidman admitted that as far as he could tell "there are no terms or anything that indicates [the advance is] cost-free or not cost-free. (T-324-325). No interest expense has been booked on SPUC's books associated with the advance and SPUC has paid no interest. (T-325). SPUC carries on its books as an expense the management allocation charges from MLDC to SPUC and MLDF allocates a proportionate cost of its operations to SPUC. Those allocations are included in the O & M expenses of SPUC and carried on its books even though on a consolidated basis those allocations between the subsidiary and the parent are a wash in that income to one entity is an expense to the other. (T-342-345). SPUC's witness Seidman admitted that in order to prepare his testimony and the schedules in this case, he had to make a determination of whether or not the assets transferred from the Mobil family to SPUC were by sale rather than by donation.

No rate base has ever been established.

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ARGUMENT AND CITATIONS OF AUTHORITY

Part I
Issues 3 and 4

What, if any, Portions of the Facilities Included in Rate Base in the MRP's are CIAC?

Contributions-in-aid-of-construction are, by statute, prohibited from inclusion in the rate base of utilities under the jurisdiction of the PSC.

> "[T]he Commission shall not allow the inclusion of contributions-in-aid-of-construction in the rate base of any utility during any rate proceeding" §367.081(2)(a) Fla. Stats. 1991.

CIAC is defined by statute as

> "... any amount of money, services or property received by a utility, from any person or governmental authority, any portion of which is provided at no cost to the utility, which represents a donation or contribution to the capital of the utility, which is used to offset the acquisition, improvement, or construction costs of the utility property, facilities, or equipment used to provide utility services." §367.021(3) Fla. Stats. 1991.

That definition has been expanded by PSC Rule 25-30.513(3) to make clear that any "addition or transfer" to the capital of a utility at no cost to the utility is CIAC, so that CIAC, rather than being in the nature of a voluntary donation in the usual sense, is something which is given to obtain service. Florida Water Works Assoc. v. Florida PSC, 473 So.2d 237, 242 (1st DCA 1985). The reason for excluding CIAC from the rate base is because it would be unfair to allow a rate of return upon property in which the investor has no equity interest. Tamaron Homeowners Association, Inc. v. Tamaron Utilities, Inc., 460 So.2d 347 (Fla. 1984).

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It is clear from those authorities that the duty of this Commission is to determine from the evidence before it whether the application of SPUC includes, in its requested rate base, any amount of money, services or property added or transferred to the capital of SPUC at no cost to SPUC. There is no evidence that SPUC raised equity through the usual sources like public or private stock offerings; loans from institutional or private lenders or from the sale of other assets. The reason is because SPUC was never established, capitalized or operated as a bona fide attempt by its parent, SPI, or its grandparent MLDF or its great-grandparent, MLDC or its great-great grandparent, Mobil Corporation to venture into the water and sewer business as a conscious decision to earn a return on investment.

SPUC was established, capitalized and operated solely because Martin County would not have approved the PUD known as Sailfish Point without water and wastewater facilities included as a part of the real estate development. That fact is clear from the provisions of the PUD Zoning Agreement and its amendment contained in Exhibit 5. It is also acknowledged by SPI in all of the information statements contained in Exhibit 5 at Pages 16, 30 and 30-31.

The funds furnished by the Mobil family to SPUC, its only utility child, were not to assist that child to make its own way, in the economic sense, but so that the parents could obtain water and sewer services in order that their business activities would be profitable. The funds and property made by inter-corporate

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transfers and additions were given to SPUC without cost in order to obtain service. They are therefore CIAC.

Such conclusion is the only one reasonably supported by the evidence when viewed in its totality as it is required to be. Greyhound Lines, Inc. v. Mayo, 207 So.2d 1 (Fla. 1968). See also Occidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla. 1977). SPUC cannot be viewed apart from the historical facts of its birth and ten year nurturing by its parents just because they have now decided it can stand alone and should be viewed as and given regulatory treatment as an adult capable of earnings its way. If this Commission ignores that historical evidence and views SPUC solely on the basis of the test year with a capital structure concocted by after-the-fact inter-company accounting transfers and reversals, it will abandon its statutory responsibility "... to fix rates which are just, reasonable, compensatory and not unfairly discriminatory". §367.081(2)(a) Fla. Stats. 1991.

Although rate making is said to be prospective rather than retro-active, Westwood Lake, Inc. v. Dade County, 264 So.2d 7, 12 (Fla. 1972), the Commission is required to gird its decisions upon substantial competent evidence, Jacksonville Suburban Utilities Corp. v. Hawkins, 380 So.2d 425 (Fla. 1980); Gulf Power Company v. Florida PSC, 453 So.2d 799 (Fla. 1984); Citizens of State v. PSC, 448 So.2d 1024 (Fla. 1984). In exercising its rate making authority, the Commission must take into account existing facts which will affect future rates. Gulf Power Company v. Bevis, 289 So.2d 401 (Fla. 1974); H. Miller & Sons, Inc. v. Hawkins, 373 So.2d

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913 (Fla. 1979). Although those latter cases concern future events known to have an effect upon rates, that does not mean the Commission can ignore past facts which also have any effect on rates. Moreover, the Commission is obligated by statute not to include CIAC in the rate base. It therefore must make a determination as to what portion of the money, services and property provided by its parents to SPUC were at no cost to SPUC and are therefore CIAC. That decision will resolve issues 3 & 4 which are the only issues which will be addressed by this brief of the Intervenors.

The remainder of this Part I will discuss the sub-issues which must be considered by the Commission in making that determination. They are:

1) Did SPUC receive any money, services or property from any person which represented a transfer or addition to the capital of SPUC which was used to offset the acquisition, improvement or construction cost of the utility property, facilities or equipment used to provide utility services?

2) If so, was it without cost to SPUC?

The undisputed facts are that all improvements, acquisition and construction costs of the utility property, facilities or equipment used to provide utility services have come from or through SPI or from Service Availability Charges authorized by this Commission. The rates which SPUC has charged to date have been insufficient to cover its operating expenses. Therefore, there have been no profits generated to be reinvested as capital. All

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improvements were either constructed by SPI and transferred to SPUC or were constructed by SPUC with funds provided via inter-corporate transfers or additions. Surely, there is no question that SPI or its parents are a "person" as used in §367.021(3).

Given that those facts are established and not in dispute, the only relevant inquiry is what portion of the transfers and additions to the capital of SPUC were provided at no cost to SPUC?

The Commission must view all the evidence of the relationship between SPUC and the persons from whom it received additions and transfers to its capital structure and determine whether those transfers and additions were "at no cost to the Utility".

As used in that phrase in §367.021, "cost" obviously should be given its general meaning viz. the amount paid for something; the loss or penalty incurred to gain something or the amount of money, time or labor required to obtain something. That meaning is entirely consistent with the idea expressed in Tamaron Homeowners Association, Inc., supra., that it would be unfair to allow a return upon property in which one has no equity investment. If we view the facts in this record apart from the parent-subsidiary relationship between the corporate actors involved, funds contributed by SPI to SPUC without any evidence of indebtedness, without any promise to repay and with any interest charges would clearly be without "cost" to SPUC. Why should this Utility be allowed to ignore those separate corporate entities and present evidence for rate purposes as if SPUC were Mobil Corporation. That the tax laws and accounting procedures may allow certain

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consolidated treatment of related corporations does not change the statutory requirement that this Commission determine whether SPUC, a separate corporation which is the only entity with a certificate from this Commission to provide utility services, has included in its requested rate base transfers and additions to its capital from other persons without cost to SPUC.

The Mobil related parents certainly know how to make transfers and additions of money and services to their subsidiaries with cost. They did it with the $886,260 loan in 1983. They took a secured note at 11% interest. There is no doubt those funds were transferred at a "cost" to SPUC. When the Mobil parents allocate to their subsidiaries their pro-rata share of the overhead of the parent who furnishes services to those subsidiaries, they know how to reflect a "cost" to that subsidiary. They have no problem including charges on the books of SPUC for those allocations as O & M expenses to SPUC even though they are paid by offsetting debits and credits between each other.

If this Utility had been formed to earn a profit through the rates charged for its services, establishing a rate base would have been a first priority. Loans or advances would have been immediately shown on the books of SPUC. Evidences of indebtedness would have been executed by SPUC and interest would have been charged. In short, this record would be replete with evidence that of that intention.

While the Intervenors have been unable to find any case on the issue, it seems obvious that the burden should be upon the Utility

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seeking to establish a rate base to demonstrate that transfers and additions from other persons to its capital which it includes in its rate base were at a "cost" to the Utility. It should not be up to the Citizens or the Intervenors to prove that those transfers and additions were made without cost. Certainly, there should be no presumption that advances made by a parent to a subsidiary, whose very existence is absolutely essential to the life of that parent, should be considered a "cost" to the subsidiary merely because the funds originated from the parent.

The evidence in this record is clear that the decisions to fund SPUC in the manner it was funded were made by the Mobil parents. The evidence is less clear as to why they made those decisions but its is certainly susceptible of an inference that they were made for their own purposes, most likely to obtain the most advantageous tax treatment available at the time and not as a prudent decision in the interest of SPUC. If the PUD Zoning Agreement did not require the Developer to insure that water and sewer services were available as a condition to approval, there would be no SPUC. It has no siblings within the Mobil family. It was created for one reason - to provide water and sewer services to the lots to be developed and sold by its parent, SPI. It was funded by SPI so SPI could obtain water and sewage treatment services from it. Except that portion evidenced by the $886,260 Note, all other amounts were funded by SPI or its Mobil relatives. They have not been shown to be a cost to SPUC and therefore are CIAC and should be excluded from rate base.

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Issues 3 and 4 should be answered in the negative.

Alternatively, should the Commission not be persuaded that all but $886,260 of the funding from Mobil related sources be treated as CIAC, it should find the cost of that portion of the system outside the Utility Parcel should be treated as CIAC. That proposition is discussed in Part II which follows.

PART II
ISSUE 3

The Wastewater Collection and Water Distribution Lines Lying Outside The Utility Parcel are a Part of the Common Areas and are CIAC

The Common Areas are required to be maintained by the entity having title to those areas. SPUC is required to maintain the Utility Parcel and improvements constructed thereon. As such, the cost of the improvements located without the Utility Parcel were never intended to be contributed to the Utility as a part of its capital structure but were intended by SPI to be part of the infrastructure just as all other improvements included in the amenity package. As such, they should receive regulatory treatment as CIAC.

The real estate documents were drafted to differentiate between the Utility Parcel and other property within Sailfish Point. The declaration was drafted by the Developer and expresses the Developer's intentions with respect to those matters contained in it. Its scheme is to restrict conveyances of parcels within Sailfish Point to only those entities and for only the uses permitted by those documents.

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The Utility Parcel is specifically limited to be used for water and wastewater treatment services for Sailfish Point. It can be owned only by SPI, by SPUC, by the POA, or by some government entity. Whoever owns it has the maintenance responsibility for it and the improvements located on it. The Declaration requires all persons who are authorized to own parcels to maintain the improvements on those parcels unless some other entity is specifically given that maintenance responsibility. All areas that are not platted lots or areas for lots not yet platted, are Common Areas owned by the Developer until they are conveyed to the POA. The Developer is responsible for maintenance of all property owned by it. The POA is responsible for all property owned by it. The water distribution and wastewater collection lines are within the Common Areas. The Common Areas are defined to include all improvements upon or beneath those areas. The Condominium Declarations specifically provide that the POA assessments will include cost of maintenance of the water and sewer lines within Sailfish Point. The 1985 Information Statement prepared by SPI specifically shows that the POA has maintenance responsibility for the water distribution and wastewater collection lines and SPUC has only maintenance responsibility for the treatment plants themselves. (Ex. 5 Pgs. 26-27).

Those facts, when viewed in conjunction with the requirement that all lot owners are members of the POA and are responsible to pay, via assessments, their pro-rata share of the Common Expenses of the POA, clearly require the conclusion that the Developer

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intended to contribute the wastewater collection and water distribution lines outside of the Utility Parcel as a part of the infra-structure of the development. The roads are also part of the Common Areas which the POA will be required to maintain at such time as it is conveyed title of the Common Areas. There are other improvements which have been described by the customer testimony as the "amenity package" which was touted as a part of the sales pitch. Those include bulkheads, water control structures, irrigation systems, lakes, harbors, etc.

All of the amenity package improvements are to be enjoyed by the residents equally. If a resident happens to have three cars, he does not pay three times more for the cost of maintenance of the roads than a resident who has only one car. That concept is directly expressed in the development documents. The fact that SPUC is limited to the maintenance of the Utility Facilities located upon the Utility Parcel is evidence of a deliberate intention by the Developer to have the operations and maintenance expenses related to those facilities distributed among the customer base through rate structures governed by the rules and decisions of this Commission. Those structures contemplate charges based upon usage factors; presumably, the greater the consumption the more the cost.

The provisions of the Declaration of Condominium and Information Statements are very specific evidence of the intention of the Developer with regard to the unit owners' obligations to pay via POA assessments the cost of maintenance of the wastewater

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collection and water distribution lines rather than via the rate structure authorized by this Commission. Testimony was given by SPUC's witness Seidman that this Commission's Rules require the Utility to maintain the collection and distribution lines. If that is a requirement, it would not require the Utility to include the expense of such maintenance in its rate base. The POA could contract that responsibility to SPUC. The same people pay whether through SPUC rates or POA assessments but, it was clearly intended that the collection and distribution lines would be paid for as a part of the POA assessments as are all other improvements in the amenity package.

Such development scheme is also entirely consistent with Part VI of Chapter 25-30, F.A.C., the Service Availability Rules of this Commission. In fact, had SPUC been operated as a "stand alone" utility in the manner envisioned by the Regulations of this Commission, the Developer would have been required to make an application for extension of service under the provisions of that section of the Rules each time it wanted utility services to be extended to new subdivisions within the PUD. Because of the family relationship between SPI and SPUC, the requirements of that Rule were ignored. SPI merely funded a contract in SPUC's name and installed the lines. No application as required by that Rule was made to SPUC.

Rule 25-30.530(3)(a) 3. specifically envisions and allows the Developer to provide the necessary facilities for the extension or to pay for the construction of such facilities and to be

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responsible for the planning, design and developing of construction drawings to extend the facilities to serve the proposed development. 25-30.540(6) envisions executed service agreements or Developer agreements with either the utility or the Developer preparing final engineering plans and specifications. 25-30.545(2) permits construction of the facilities to be made by the Utility or by a construction agency acceptable to it.

The guidelines for designing service availability policy contained in 25-30.580(1) state that the minimum amount of CIAC should not be less than the percentage of the facility and plant that is represented by the water distribution and sewage collection systems. The development scheme expressed in the development documents is entirely consistent with that policy in that it intended the distribution and collection lines to be contributed by the Developer rather than be included in SPUC's rate base.

There is no reason for distinguishing the water distribution and wastewater collection lines from the treatment facilities located on the Utility Parcel if those differences have no purpose and can be ignored. The requested rate base in the MFR's makes no distinctions in the way those have been treated. Schedule A5 (Ex. 2 Vol. I, Pg. 21) shows $806,820 of water transmission and distribution mains as Water Plant In Service for the test year. Schedule A-6 (Ex. 2, Vol. I, Pg. 23) shows $1,099,511 of Collection Sewers-Force and Gravity as Sewer Plant In Service for the test year. Presumably, all of those are located off the Utility Parcel. There are other accounts on those schedules which may reflect

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improvements off the Utility Parcel. At least the $1,906,311 should be considered as CIAC on the basis that the evidence cited clearly shows it was the Developer's intention for those items to be another part of the amenities to be maintained and paid for via POA assessments rather than Utility rates. They therefore were never intended to become part of the capital structure of SPUC and should be treated as CIAC and deducted from rate base.

SPUC has the burden of proving that the funds provided by its parent were at a "cost" to SPUC. Other than the amount of the $886,260 note, it has failed to carry that burden. The true facts are SPUC and the services it provided were considered by the Developer to be part and parcel of the cost of engaging in the real estate development business. Other than discussion by Mobil's employees and advisors about how to obtain the most advantageous tax treatment of the assets to be invested in the Utility Facilities, there is no evidence that they were invested with the intention of producing a return on that investment.

The Utility was required to receive a certificate from the PSC by statute and because it was a requirement of the PUD Zoning Agreement. SPUC was organized and properly certificated but no other steps were taken to indicate that SPUC was to be operated as a certificated utility. PSC rules requiring direct ownership of utility facilities were ignored. PSC rules requiring transfer from CWIP to Plant in Service were ignored. PSC rules requiring extensions of service to new areas within the service territory

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were ignored. No rate base was sought to be established until 1990 after then years of operation.

Those facts are more telling about the Developer's intentions than are after-the-fact compilations and adjustments made for the purposes of this rate case. The conclusion is inescapable that establishing rate basis was an after-thought decided upon in 1989 in order to determine the potential for sale of SPUC.

As stated in the study performed by Mr. Seidman's firm for MLDF,

> "Sailfish Point, Inc. presently has about $3.8 million tied up in advances to SPUC.... It would certainly help in attracting a purchaser, if rate relief had already been applied for and obtained. In fact, a potential purchaser might make the application for or attaining the rate relief, a condition of sale" (T-403).

It is significant, that statement made by Mr. Seidman's firm prior to SPUC applying for rate relief, said Sailfish Point, Inc. had $3.8 million tied up in the form of advances to SPUC not that SPUC had $3.8 million in assets on which it was receiving no return.

All the accounting gymnastics notwithstanding, SPI and the Mobil family looked at that money as being "tied up in" not "invested in" SPUC. They concluded the way to obtain a return on those funds was to sell SPUC not to begin a rate case so SPUC could obtain a return on those funds. What more evidence does the Commission need to conclude that those funds were still considered to belong to SPI? They were tied up in SPUC not by a prudent investment decision of SPI but by the requirement to own that

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deformed child whose creation had been a necessary evil and, when no longer needed is abandoned and placed on its own.

CONCLUSION

The only conclusion to be reached from this record is that SPUC is a zero rate base utility and this Commission should declare it as such. There is no constitutional problem with deducting contributions in aid of construction from rate base. Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla. 1972). It is only investors with an equity interest in utility property who constitutionally are entitled to earn a rate of return on such property. Therefore it is unfair to customers of the utility to include contributed assets in the rate base. Tamaron Homeowners Association v. Tamaron Utilities, Inc., 460 So.2d 347, 350 (Fla. 1984). That case involved a utility providing water and sewer services to its parent, the developer of a subdivision served by the utility. The parent provided the utility with the capital assets necessary to operate the system. Because practically all of the capital assets were obtained by means of such contributions, Tamaron was a zero rate base utility. Since it had no rate base, it limited its request for a rate increase to cover operating expenses, including depreciation on non-contributed assets, and taxes and a contingency fund which was determined in reality to be an allowance for depreciation on contributed property. The County ordinance under which the parties were proceeding excluded the depreciation on contributed property. The Supreme Court concluded that a utility was not constitutionally entitled to be compensated

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for depreciation on contributed property as an operating expense. It pointed out, however, that there are different considerations which come into play when all or practically all of the property used by a utility has been contributed to it. In that situation, the utility is not entitled to earn a rate of return on the contributed property because it has invested nothing in obtaining the property. It is therefore limited to earning enough revenue to cover its operating expenses. But, that inability to earn a return may place the utility in serious "cash-flow" positions due to insufficient working capital and the utility may be forced into measures to obtain short-term financing which might ultimately damage it so as to be confiscatory. Without increased rates or being placed in a position where it would be unable to attract capital for replacement of worn-out equipment, the Utility may have a real inability to provide the required service. But, those matters can be taken into consideration in the rate making process, by allowing rates which enable it to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed.

This Commission obviously is required to consider such factors in its determination of this rate request. However, in making that determination, it should also consider that this utility was never intended to operate as a utility to attract investment capital. This Commission should take into consideration the testimony of the customers and the provisions contained in the Information Statements prepared by Developer, that the utility has the decided

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potential of being transferred to the POA by the Developer. When taking all of those factors into account, this Commission should set a rate which excludes from the rate base all contributed property, is sufficient to cover operating expenses, and to provide a reserve for depreciation and replacement of the facilities in their normal course.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been by U. S. Mail this 22nd day of July, 1991 to:

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