

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment)
of Certificate No. 427-W to add)
territory in Marion County by) Docket No. 960867-WU
Windstream Utilities Company.)
_____)

WINDSTREAM UTILITIES COMPANY'S
RESPONSE TO MARION COUNTY'S PETITION
FOR LEAVE TO INTERVENE

WINDSTREAM UTILITIES COMPANY ("Windstream"), by and through its undersigned attorneys, files this Response to Marion County's Petition for Leave to Intervene or Alternative Petition in Opposition to Amended Application for Amendment to Certificate 427-W which Petition was received by Windstream's attorneys on January 9, 1997.

The Petition filed by Marion County ("County") purports to be pursuant to Rule 225-22.036 and 25-22.039, Florida Administrative Code. The Petition is untimely as one to initiate a formal proceeding pursuant to Rule 25-22.036, F.A.C. The time for filing objections has long since passed. As an intervenor,

ACK _____ pursuant to Rule 25-22.039, F.A.C., the County must "take the
AFA _____ case as it finds it". Since Windstream has amended its
APP _____
CAF _____ application to eliminate all objectionable territory, the County
CMU _____ has no objecting party on whose side to intervene.

CTR _____ As one would expect when someone misses a deadline, the
EAG _____
LEG 1 County seeks to place the blame on anyone but itself; and, in
LIN 3 this case, Windstream. The attorneys for Marion County are not
OPC _____ novices and should be held to the same standard as other persons
RCH _____

SEC 1
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OTR

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notwithstanding the fact that they represent a government entity.

While Windstream did attempt to negotiate the dispute with the County regarding service to the J.B. Ranch property, it was clear long before December 20, 1996 that Windstream was proceeding with its application to amend its territory. In fact, it prefiled its direct testimony on December 9, 1996 and copied J.B. Ranch. It is ironic that the County accused Windstream of outrageous and misleading conduct. It is exactly that conduct by the County which compelled Windstream to file its application to extend its service area. In fact, arrogance should also be added to the description of the County's conduct. There has never been any good faith negotiations by the County. It has always been the County, which has unlimited resources, dictating terms to Windstream, which the County knows has limited resources. The drafts of proposed agreements between the County and Windstream for providing service to the J.B. Ranch property never reflected what Windstream believed had been agreed to. After so many such proposed agreements, Windstream became frustrated and broke off further negotiations.

The County implies that the undersigned attorney had some obligation to advise Attorney Cloud when he filed a notice with the Public Service Commission ("PSC") eliminating the J.B. Ranch property from its application. Since Windstream was going to eliminate the contested property from its application, it hardly seemed necessary to advise the County directly that it had won the fight with Windstream over the J.B. Ranch property. Instead

of making outrageous allegations against Windstream and its attorneys, the County should be pleased that Windstream eliminated the J.B. Ranch property from its application.

Also, the implication that Windstream filed its amendment to eliminate the J.B. Ranch property as a result of the telephone conference between Attorney Cloud and the undersigned shows the County's arrogance. Attorney Cloud knew that Windstream was aware that the County was going to challenge its application at the same time the County voted to take that action. Windstream filed its amendment to eliminate the J.B. Ranch property because of the objection by J.B. Ranch, not because of any action by the County. To allege otherwise is merely an excuse by the County to cover up a mistake in not filing a timely protest. We must all live with our mistakes, and that applies equally to the County and its attorney.

The simple and controlling fact is that the County did not file a timely protest, and its attempts to intervene is moot since there is no pending protest upon which to base the intervention. Windstream's actions in the instant case are tantamount to taking a voluntary dismissal against another party. Voluntary dismissal is a matter of right and is without the necessity of a court order. *Freeman v. Mintz*, 523 So.2d 606 (Fla. 3d DCA 1988). See also Rule 25-22.035 (3), Florida Administrative Code, and Fla.R.Civ.P. 1.420(a)(1).

The assertion that Windstream's Motion to Dismiss is not timely as alleged by J.B. Ranch is not persuasive. The facts

giving rise to the Motion did not exist twenty days after J.B. Ranch initially filed its protest. It should be noted that the Motion was filed within twenty days of the date the facts arose supporting the Motion. The assertion that the filing of the Motion to Dismiss is contrary to the Order Establishing Procedure is absurd and unworthy of response. In opposition to dismissal, J.B. Ranch attaches documents which it failed to provide with its initial protest. If J.B. Ranch desires to amend its protest, then there is a procedure to do so and in a response to a Motion to Dismiss is not the correct procedure.

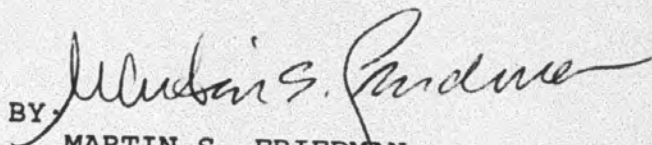
Marion County contends that it was entitled to notice of Windstream's amendment to eliminate the J.B. Ranch property although it asserts no prejudice as a result. First, the mere fact that the County's Attorney advised Windstream's attorney that the County was going to intervene did not mean that the County was going to do so in light of Windstream's dismissal of the J.B. Ranch property from its application. In addition, when Windstream's attorneys prepared the Motion on December 27, 1996, they consulted the PSC Home Page which did not disclose any pleading being filed on behalf of the County or any appearance by the County. The undersigned has a copy and will provide it to the PSC should the PSC believe it is relevant to this issue. It is typical for Attorney Cloud to attempt to impinge the integrity of other attorneys, such as the undersigned, to draw attention away from its own mistake in not advising the County to file a timely protest. If the County mailed Windstream a copy of its

Motion to Intervene, it was never received by Windstream's attorneys. It would serve no purpose to avoid sending pleadings to the County since Attorney Cloud advised the undersigned in a telephone conference on December 18, 1996 that he was going to file an appearance on behalf of J.B. Ranch, so Windstream's attorneys knew the County's attorneys were receiving documents sent to J.B. Ranch. Upon filing of such a notice, Windstream would have served Attorney Cloud with copies of pleadings.

WHEREFORE, Windstream requests this Commission deny Marion County's Motion to Intervene in any capacity.

Respectfully submitted on this
13th day of January, 1997, by:

ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301
(904) 877-6555

BY: 
MARTIN S. FRIEDMAN
For the Firm

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CERTIFICATE OF SERVICE

Docket No. 960867-WU

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail (unless otherwise noted) to the following parties this 13th of January, 1997.

D. Cyrus-Williams
Florida Public Service Commission
Legal Division
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

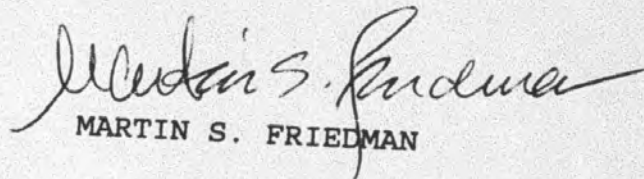
VIA HAND DELIVERY

Carlyle Ausley
Ausley Construction Company
1107 E. Silver Springs Blvd., #2
Ocala, Florida 34470

Joseph Lettelleir
J.B. Ranch
300 S. Duncan Ave., #296
Clearwater, Florida 34615

Thomas A. Cloud, Esquire
Gray, Harris & Robinson, P.A.
201 East Pine Street
Suite 2100
Orlando, FL 32802

Lee M. Killinger, Esquire
Gray, Harris & Robinson, P.A.
225 South Adams Street
Suite 250
Tallahassee, FL 32301


MARTIN S. FRIEDMAN