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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 980867-WU

MARION COUNTY'S REPLY TO WINDSTREAM'S RESPONSE TO MARION COUNTY'S PETITION FOR LEAVE TO INTERVENE

MARION COUNTY, by and through its undersigned counsel files this reply to Windstream's Response to Marion County's Petition for Leave to Intervene filed by Windstream Utilities Company ("Windstream"). For reasons which appear below, Marion County's initial request should be granted. In support of this reply, Marion County states:

1. Setting aside the numerous malicious and unsubstantiated personal attacks delivered by Windstream's counsel, Windstream's position can be summed up as follows:

a. Because Windstream amended its application, intervention is untimely and moot because "there is no pending protest,"

b. Windstream can file a motion to dismiss anytime it amends its application and it need not respond to arguments that its motion is inconsistent with the Order Establishing Procedure based on the "legal" concepts of "absurdity" and "unworthiness,"

c. JB Ranch can only respond to Windstream's Motion to Dismiss by amending its protest and cannot file any documents as exhibits it failed to provide with its initial protest,

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- d. Marion County's alternative petition in opposition is untimely filed,
- e. Counsel for Windstream is under no obligation to copy counsel for Marion County with pleadings or substantial amendments to its application even though he admits to being informed of the impending intervention and is only required to consult the PSC home page as a follow-up.

2. There has been no order of dismissal entered in this proceeding. Indeed, counsel for Windstream was previously informed by counsel for the Florida Public Service Commission that simply amending its application would not end the proceeding. JB Ranch has clearly indicated its continuing protest in this matter and JB Ranch has previously been determined to be a party. Both the County and JB Ranch have filed extensive prefiled testimony in a timely manner in accordance with the Order Establishing Procedure. Furthermore, the intervention was timely filed insofar as it is well in excess of five-days prior to the hearing. Until an order of dismissal is entered, the Agency retains jurisdiction.

3. If it was Windstream's intention to divest the Public Service Commission of further jurisdiction to proceed, it should have withdrawn its entire application. See Orange County v. Debra, Inc., 451 So.2d 868 (Fla. 1st DCA 1983); Middlebrooks vs. St. Johns River Water Management District, 529 So.2d 1167 (Fla. 5th DCA 1988). Windstream didn't withdraw because it still wanted to enjoy some of the fruits of its request for service territory which it knew the County wanted to serve. Windstream misrepresents its amendment as a voluntary dismissal and as precedent cites to a 1988 Third District Court of Appeals case involving the dismissal of amended complaints in a circuit court (not administrative) proceeding. In effect, Windstream argues that an amendment to its application serves as a voluntary dismissal. Were such the case, why did Windstream feel the need to file a

motion to dismiss the protests?

4. Next, Windstream takes the position that its Motion to Dismiss is not untimely as "the facts giving rise to the motion did not exist 20-days after JB Ranch initially filed its protest." There is no support for this position in the Rules of the Florida Public Service Commission. In fact, filing such a motion is inconsistent with the Rules and the Order Establishing Procedure as previously discussed. There is nothing contained in any Rules or order of the Public Service Commission allowing such a motion to be filed "within 20-days of the date the facts arose supporting the motion." In effect, Windstream is arguing that it can create new opportunities to file motions simply by amending its application without regard to the status of the proceeding or the identity of the parties. Such a process creates a moving target, vitiates Windstream's prefiled testimony, and as will be seen below, is blatantly inconsistent with the position Windstream would have the Commission take regarding JB Ranch and the County.

5. When the shoe is on the other foot, Windstream would not have the Commission accord the County or JB Ranch the ability to respond to Windstream's changing application. While it would accord itself the right to file motions based on facts that did not exist 20-days after the filing of its protest, Windstream argues that documents (which likewise did not exist 20-days after JB Ranch initially filed its protest) not provided in JB Ranch's initial protest should be ignored. In effect, Windstream wants to have its cake and eat it too. It argues for a position that is fundamentally unfair and has no support in the statutes, rules, or precedent of the Commission. Even under the Order Establishing Procedure, additional issues can be raised by a party prior to issuance of the prehearing

order. This would be particularly relevant where (as here) Windstream changes its application in midstream.

6. Curiously, Windstream then argues that JB Ranch can only respond to the Motion to Dismiss by amending JB Ranch's initial protest. This position is likewise inconsistent with Commission rule, not required by the Order Establishing Procedure and is internally inconsistent with its argument that the filing of a new petition by Marion County is untimely. Amendments to petitions and applications may only be amended prior to the filing of a responsive pleading or a designation of a presiding officer by filing and serving an amended initial pleading in the manner prescribed for filing and serving an original petition, application or complaint. Otherwise, a petitioner or applicant may amend its initial pleading after the designation of the presiding officer only upon order of the presiding officer. See Florida Administrative Code Rule 25-22.036(8). A presiding officer has been designated in this proceeding. The officer has not entered an order authorizing the amendment of the application. The amended application was not filed and served as was the original application. Therefore, the whole basis of Windstream's Motion to Dismiss is invalid and in violation of the Rules. If the facts have changed enough for Windstream to file an amendment to its application, how can a new petition be untimely? If the filing of an amendment to the application is supposed to be accomplished in the same manner as the original application, then the filing of a petition by Marion County and JB Ranch is not untimely and is appropriate. If, on the other hand, there are no new facts substantially changing Windstream's application, what possible grounds could there be to authorize filing a motion to dismiss JB Ranch's protest?

7. Assuming arguendo that the proceeding that was pending yesterday has somehow vanished into thin air because Windstream alleges new facts that recently came into existence (to wit, the deletion of the JB Ranch territory), and further assuming the amendment itself has been appropriately filed and noticed, the amendment creates, in effect, a different application and provides a new point of entry. Such a construction is consistent with the Commission's Rules as can be seen in Florida Administrative Code Rule 25-22.036(8), which provides that an application may be amended prior to the filing of a responsive pleading or the designation of a presiding officer by filing and serving an amended initial pleading in the manner prescribed for filing and serving an original application. The Rule goes on to provide that the applicant may amend its initial pleading after the designation of the presiding officer only upon order of the presiding officer. In other words, without leave to amend the application, the applicant can't turn this proceeding into a moving target without affected parties being accorded their due process and statutory right to object. The reasons why this is sound public policy can be seen by a cursory examination of the prefiled testimony filed by Gerald C. Hartman:

"Q. Didn't Windstream delete JB Ranch and what effect did that action have?

A. Yes. JB Ranch was deleted. By doing so the application materials, the responses to Mr. Redemann and the pre-filed testimony by Butch Dlouhy are all in error significantly. The financial capability must be seriously questioned because there is no customer CIAC available at this time. The Sun Country Estates system is having piping failure problems and only has one well without a system back-up or

interconnection. Without the infusion of JB Ranch capital and the very modest growth in the area, the CIAC capital that was represented to fund the improvements is not available. The representation by Windstream that Sun County would have the same rates and would be interconnected is now significantly more expensive by their own deletion of JB Ranch. If Windstream proposed to use the County system then the condition of service was mutually negotiated by both parties, included the full and complete withdrawal of this service area application and the service area agreement shown in my exhibits."

8. Windstream is equitably estopped from seeking a dismissal of this proceeding. Prefiled testimony has been timely submitted to the Florida Public Service Commission which states a prima facie case for the application of the doctrine of equitable estoppel. Four separate witnesses corroborate that but for Mr. Dlouhy's misrepresentations, the County would have filed its petition to intervene much earlier. Assuming, then, that somehow Windstream could articulate arguments supporting the dismissal of this proceeding (which they clearly have not), they would be estopped from cutting off Marion County's due process rights by such inequitable conduct. Notions of equitable estoppel and equity in general apply to administrative proceedings. Council Brothers, Inc. v. City of Tallahassee, 634 So.2d 264 (Fla. 1st DCA 1994); Dolphin Outdoor Advertising v. FDOT, 582 So.2d 709 (Fla. 1st DCA 1991).

9. Counsel for Windstream then takes the position that it did not need to copy counsel for Marion County or JB Ranch with pleadings or substantial amendments to its application. The position of Windstream's counsel in this matter is curious, to say the least.

First, he admits to a violation of the Rule that requires that he send copies of pleadings to counsel for parties by admitting he sent a pleading to JB Ranch on December 18, 1996, just 25-minutes after being advised that a notice of appearance was to be filed on behalf of JB Ranch by the same attorney.¹ Next, counsel for Windstream assumes that it is okay not to copy Marion County because he claims to have known that the County's attorneys were receiving documents sent to JB Ranch anyway. If his statement were true, then why not send the pleadings directly to the County's attorneys as a matter of professional and common courtesy? Next, counsel for Windstream argues that he checked the PSC home page. At the top of the PSC home page, a caveat is listed which states:

"The information in this and related pages was automatically generated from the case management system (CMS) of the FPSC and may be incomplete. For COMPLETE and OFFICIAL information from CMS you MUST contact the Division of Records and Reporting at (904) 413-6770."
(Underlining supplied)

Finally, counsel for Windstream states that the attorneys for Marion County are "not novices and should be held to the same standard as other persons" Presumably, counsel for Windstream is no novice at these proceedings and should be held to the same standard he demands that attorneys for Marion County be held to. Counsel for Windstream admits to being informed that a petition to intervene was to be filed. By his own admission, counsel for Windstream has clearly indicated he chose not to provide pleadings to counsel

¹ JB Ranch later decided to continue Mr. Lettelleir as its attorney-in-fact.

for Marion County. Marion County did not and is not at this time seeking sanctions against Windstream or its counsel and in fact concurred in an extension of time for Windstream to respond. We just want to receive pleadings as a party.

CONCLUSION

Rather than argue the merits of his case, counsel for Windstream's response degenerates into a series of unsubstantiated and vehement ad hominem personal attacks claiming arrogance, misleading conduct, bad faith, typical attempts to impinge integrity, and even clairvoyance ("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"). Counsel for Marion County respectfully denies all such charges and humbly suggests that counsel for Windstream refrain from such name calling and argue the merits of his case.

Marion County's Petition to Intervene should be granted, and Marion County and JB Ranch should be accorded their "day in court" pursuant to the Order Establishing Procedure. In the alternative, Marion County and JB Ranch should be found to have a new point of entry and their alternative petitions to object should be granted. Portions of Windstream's response accusing Marion County or its counsel of arrogance, misleading conduct, bad faith, attempts to impinge integrity, and clairvoyance should be struck as scandalous, impertinent, with basis in fact and in violation of Florida Administrative Code Rules 25-22.008(5) and 28-5.1058.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and 7 copies, was served together with the document on diskette, via hand delivery/~~U.S. Mail~~ to:

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