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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. 960867-WU

**MARION COUNTY'S MEMORANDUM IN
OPPOSITION AND RESPONSE TO
WINDSTREAM'S MOTION TO STRIKE**

MARION COUNTY, by and through its undersigned counsel files this Memorandum in Opposition and Response to Windstream's Motion to Strike. For reasons which appear below, Windstream's Motion to Strike should be DENIED. In support thereof Marion County states:

1. As support for its Motion to Strike, Windstream argues that there is no rule authorizing the filing of a reply to a response, citing to In Re: North Fort Myers Utility, Inc., 96 FPSC 3:120, Docket No. 930373-SU, Order No. PSC-96-0348-FOF-SU, issued March 11, 1996.

2. The instant case differs significantly from the North Fort Myers Utility case in several significant ways. The North Fort Myers Utility case involved protracted, convoluted, and lengthy pleadings and appeals which culminated in North Fort Myers Utility ("NFMU") filing a "Motion to Terminate Escrow Account." The Office of Public Counsel ("OPC") responded, to which NFMU replied. No attempt was made to argue the existence or lack of FPSC jurisdiction in these motions. While it struck the reply, the FPSC granted the initial motion saying "We have considered all issues raised in NFMU's initial motion and OPC's

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response." In other words, the FPSC felt a full and fair opportunity had been given the parties to argue all the issues raised.

3. In this case, however, Windstream's "Response" is to a "Petition for Leave to Intervene" and in the alternative, a "Petition in Opposition." In other words, Marion County's pleading comes at the beginning of the proceeding and, were the FPSC to find a new point of entry, constitutes an initial pleading, not a motion. Motions are not pleadings. Trawick, Florida Practice and Procedure, §64, pg. 77. Second, unlike the North Fort Myers Utility case, Windstream in its "Response" for the first time raised a variety of fact arguments and legal issues (both relevant and irrelevant) to which Marion County had not yet had an opportunity to respond. One of these issues, which Windstream touts as "the simple and controlling fact" in effect argues the FPSC lacks jurisdiction to hear Marion County's case because of actions characterized as a "voluntary dismissal." In this case, fundamental fairness requires that Marion County be permitted to address these newly raised issues.

4. The Rules Governing Practice and Procedure, Fla. Admin. Code Chapter 25-22 (the "Rules") do allow the responsive pleading filed by Marion County. Principles of statutory construction apply to rules. 49 Fla. Jur. 2d, Statutes §1, pgs. 10, 11. It is a general rule of law that statutes which are remedial in nature are entitled to liberal construction in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute. 73 Am. Jur. 2d, Statutes §278, pg. 443. A remedial statute pertains to rules of practice or procedure. 49 Fla. Jur. 2d, Statutes §188, pg. 228. The rule of liberal construction also applies to statutes (or rules) having for their design the

simplification of procedure and the removal of technicalities in connection therewith. 73 Am. Jur. 2d, Statutes §278, pg. 443.

5. While it is true that the FPSC's rules are silent on the ability to file a "reply," they do not expressly prohibit it. The rules go on to provide the following:

Procedure: Generally, the Florida Rules of Civil Procedure shall govern in proceedings before the Commission under this part, except that the provisions of these rules supersede the Florida Rules of Civil Procedure where conflict arises between the two. Fla. Adm. Code Rule 25-22.035(3).

Pleading shall substantially conform to the Florida Rules of Civil Procedure as to content, form, size, signatures, and certifications. Fla. Adm. Code Rule 25-22.037(1). (Emphasis supplied)

The Florida Rules of Civil Procedure expressly permit a reply as a responsive pleading. Florida Rules of Civil Procedure 1.100. Since there is no conflicting section prohibiting the filing of replies in the FPSC's rules governing practice and procedure, the Florida Rules of Civil Procedure should control. To interpret the Rule otherwise would negate virtually any use of the Florida Rules of Civil Procedure wherever the FPSC's rules are silent. In the interpretation of statutes (and rules), it is presumed that the adoptor intended every part thereof for a purpose; in other words, effect should be given to each of the provisions of a rule. 49 Fla. Jur. 2d, Statutes §179, pgs. 214, 215. Courts favor a construction of potentially conflicting statutes (or rules) that give a field of operation to both rather than construe one as being meaningless or repealed by implication. Oldham v. Rooks, 361 So.2d 140 (Fla. 1978) as cited in 49 Fla. Jur. 2d, Statutes §180, pg. 216.

6. If the ruling from the North Fort Myers Utility case is extended to the facts of this case, form will be elevated over substance and confusion will occur with respect to the application of the Rules of Practice and Procedure. For example, nowhere in the Rules of

the FPSC is a "response" to a petition to intervene expressly authorized.¹ The substance of Windstream's "response" is in reality a motion to dismiss in so far as it requests that Marion County's petition be denied. Obviously, some type of responsive pleading should be permitted under these circumstances, particularly where as here Windstream in effect raises jurisdictional issues. Such arguments can be raised and addressed in a reply. See Florida Rules of Civil Procedure 1.140(b) and 12.140. Factual matters which raise a new point have been held to require an avoidance by reply. American Salvage and Jobbing Co., Inc. v. Salomon, 295 So.2d 712 (Fla. 3rd DCA 1974).

7. Under the circumstances of this case, striking Marion County's "reply" would work a substantial injustice and would unnecessarily elevate form over substance. When adopting its Rules, the FPSC has previously successfully argued that it should not elevate form over substance. Florida-Texas Freight Inc. v. Hawkins, 379 So.2d 944 (Fla. 1979). In applying procedural rules under Florida APA, courts likewise will not elevate form over substance. Schomer v. Department of Professional Regulation, Board of Optometry, 417 So.2d 1089 (Fla. 3rd DCA 1982). If the use of the term "reply" is deemed objectionable by the Commission for whatever reason, Marion County's "reply" can be deemed a "memorandum in opposition to Windstream's response," or such other caption as is deemed appropriate by the Commission to preserve the arguments. To elevate form over substance and to construe the Rules Governing Practice and Procedure in any other manner would deny Marion County the opportunity to respond to the new arguments and issues raised in Windstream's "response" and violate the tenet of statutory construction that

¹ The Rules of Practice and Procedure only expressly allow the filing of "written memoranda in opposition." Fla. Adm. Code Rule 25-22.037(2)(b).

procedural statutes (and rules) should be liberally construed.

WHEREFORE, Marion County respectfully requests that this Commission deny Windstream's Motion to Strike, and that such arguments as deemed relevant by this Commission in Marion County's "reply" be considered.

Respectfully submitted,

Thomas A. Cloud

Thomas A. Cloud
Fla. Bar No. 293326
Kenneth J. Plante
Fla. Bar No. 444790
Lee Killinger
Fla. Bar No. 607320
GRAY, HARRIS & ROBINSON, P.A.
Post Office Box 11189
Tallahassee, FL 32302-3189
Telephone: (904) 222-7717
Facsimile: (904) 222-3494

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:


- (1) Blanca S. Bayo, Director
Division of Records and Reporting
Public Service Commission
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
904/413-6770

With a copy via hand delivery/U.S. Mail to:

- (2) Donna Cyrus-Williams, Esquire
Florida Public Service Commission, Legal Division
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
904/413-6222
Counsel for the PSC

- (3) Martin S. Friedman, Esquire
ROSE, SUNDBSTROM & BENTLEY
2548 Blairstone Pines Drive
Post Office Box 1567
Tallahassee, FL 32302-1567
904/877-8555
Counsel for Windstream Utilities Co.
- (4) Carlyle Ausley
AUSLEY CONSTRUCTION COMPANY
1107 E. Silver Springs Blvd., #2
Ocala, FL 34470
- (5) Joseph Lettelleir
JB Ranch
300 S. Duncan Avenue, Suite 296
Clearwater, FL 34615

this 23rd day of January, 1997.



Thomas A. Cloud
Fla. Bar No. 293326
Kenneth J. Plante
Fla. Bar No. 444790
Lee Killinger
Fla. Bar No. 607320
GRAY, HARRIS & ROBINSON, P.A.
Post Office Box 11189
Tallahassee, FL 32302-3189
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Facsimile: (904) 222-3494