

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

Intervenor, MARION COUNTY, FLORIDA ("County"), by and through its undersigned counsel and pursuant to Fla. Admin. Code R. 25-22.037(2), files its Memorandum in Opposition and Response to Windstream's Motion to Strike the County's Motion to Request Official Recognition and Memorandum in Opposition to Windstream's Motion for Extension of Time. Windstream has filed a Motion to Strike the County's Motion to Request Official Recognition and the Memorandum of Law in Opposition to Windstream's Motion for an Extension of Time. The Commission has already granted Windstream's Motion for Extension of Time, so Windstream's Motion to Strike the County's Memorandum of Law is moot. Nevertheless, Windstream argues

ACK _____
AFA _____
APP _____
CAF _____
CMU _____
CTR _____
EAG _____
LEG _____
LIN _____
OPC _____
RCH _____
SEC _____
WAS _____
OTH _____

the County is not entitled to file any pleadings in this case since it has not yet been deemed a "party" to these proceedings. Windstream's Motion to Strike should be denied for either (or both) of two reasons: first, Windstream's argument is illogical and contrary to Florida law; second, Windstream is estopped from challenging the County's right to file pleadings by its own conduct.

LEGAL ARGUMENT

A. The County is Entitled (and Obligated) to Act as a Party Until its Status is Finally Determined by the Presiding Officer.

1. The County's status as a party to this proceeding has not been finally determined. Although the County has requested it be granted party status, a formal order granting the County that status has not yet been issued. However, the Commission staff has recommended the County be granted party status, and has already treated the County as an

RECEIVED & FILED

EPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

03184 MAR 26 5

FPSC-RECORDS/REPORTING

intervenor and a participant in this proceeding. Even Windstream has treated the County as a party by serving (sometimes) copies of pleadings on the County and (most importantly) by not objecting to the County's ability to file pleadings until now.

2. Although the Commission has not yet ruled the County is a "party" to these proceedings, the Commission has likewise not denied the County's request for party status either. The Commission expressly recognized a substantially affected entity's right to intervene five (5) days prior to the hearing proceedings, expressly authorizing and, in fact, mandating through the Order Establishing Procedure the filing of testimony, exhibits, and prehearing statements in these proceedings. Consequently, until (and unless) the Commission deems the County not to be a party, the County not only has the right but an obligation to fully participate in these proceedings. Dickinson v. Segal, 219 So. 2d 435 (Fla. 1969) (Intervention is appropriate until final judgment is rendered.) Furthermore, the Commission has previously ruled that the date the Petition to Intervene is filed is the critical date for determining ability to file pleadings. See In re: Objection of Beverly Hills Civic Association, Order No. 18077, 87 FPSC 8:403 (August 31, 1987).

3. The sole basis for Windstream's Motion to Strike is the illogical assertion that until the Commission deems an entity a party, it cannot file motions, memoranda, or responses in these proceedings. Under such a rule, no entity could ever file a motion to intervene, because it would be a pleading filed by a non-party. If Windstream's argument were correct, the Order Establishing Procedure is in error as it provides deadlines for all who are allowed to participate to file direct testimony exhibits, rebuttal testimony exhibits, prehearing statements, and briefs. If the Commission ultimately grants the County party status (which is recommended by staff and appears likely), the County will be a party for all purposes in these proceedings. If between the time of requesting and officially receiving party status, the County failed to fully participate in these proceedings, Windstream would certainly argue the County was barred from thereafter filing pleadings, motions, etc. Thus, Windstream's argument in its Motion to Strike simply is illogical and devoid of common sense.

4. Finally, Windstream suggests that the County is trying to circumvent Fla. Admin. Code R. 25-22.039 and is acting in "bad faith" to file pleadings until formally recognized as a party. Windstream further asserts it is entitled to the "luxury" of only having to "worry about those issues and filings of proper parties."

5. These assertions by Windstream are outrageous for several reasons. First, the Order Establishing Procedure contemplates the intervention of nonparties in these proceedings up to within five (5) days of the final hearing -- there is no "luxury" authorizing Windstream to ignore valid legal issues raised by any entity, whether a party or not. Second, for Windstream to suggest the County's filing pleadings is in "bad faith" when such filings are expressly authorized by Commission Order is incomprehensible. For Windstream to accuse the County of attempting to circumvent the Commission's rules is hypocritical, because Windstream has unapologetically attempted to circumvent Fla. Admin. Code R. 25-22.036(8) by attempting to amend its Application without leave of the presiding officer. For these reasons, Windstream's argument contradicts Florida law and common sense, and reveals a disregard for the Commission's authority.¹ Windstream's Motion to Strike should be denied.

B. Windstream is Estopped from Challenging the County's Right to File Pleadings

1. Windstream is estopped from arguing the County may not file pleadings by its own conduct. Notwithstanding numerous prior filings by the County of motions, replies, memoranda of law, testimony, and exhibits, the Motion to Strike constitutes the first time Windstream has suggested the County cannot file pleadings. Having failed to even raise this issue before now despite clear opportunities to do so, Windstream is barred from raising the issue in its Motion to Strike.

¹The 1996 amendments to Florida's Administrative Procedures Act, Chapter 120, effective October 1, 1996, authorizes agencies to grant a variance or waiver of its own rules when a requested and "when application of a rule. . . would violate principles of fairness." Windstream's filing its "Notice of Amendment" without even requesting a waiver or variance of the Commission's rules violates Section 120.542 and manifests a patent disrespect for the Commission's authority and undercuts Windstream's argument that the County may not file pleadings.

2. Moreover, Windstream itself has blatantly disregarded Fla. Admin. Code R. 25-22.036(a), which requires any amendment to an application be filed and served in the manner prescribed for filing and serving an original application, and may only be done so upon order of the presiding officer. If Windstream asserts the County is not a "party" until the presiding officer deems it so, then Windstream admits its Application is likewise not amended until the presiding officer or commission deems it amended. As previously discussed in the County's various memoranda of law, if and when the application is amended by deleting JB Ranch's property, the character and scope of Windstream's application will be substantially changed and will be, in the eyes of the law, a new application. At that point, a new "point of entry" becomes available for interested parties (like the County) to intervene as "parties." This logic applies whether the application is deemed amended on the date the presiding officer renders his decision, or whether it relates back to the "notice of amendment" improperly filed by Windstream. In either case, a new point of entry is created by the substantial amendment to the application, and the County will be entitled to party status as of that date. By its own acts, Windstream is prevented from arguing the County may not file pleadings until it is deemed a party by the Commission, because Windstream's application cannot therefore be deemed amended until similar official action by the Commission. Consequently, Windstream's Motion to Strike should be denied.

WHEREFORE, the County respectfully requests Windstream's Motion to Strike be denied.

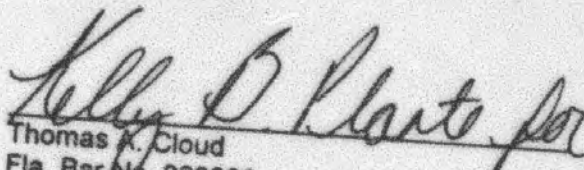
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and 7 copies was served March 26, 1997, via Hand Delivery 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, SUNDSTROM & BENTLEY
2548 Blairstone Pines Drive
Post Office Box 1567
Tallahassee, FL 32302-1567
904/877-6555
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


Thomas A. Cloud
Fla. Bar No. 293326
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

H:\WPFILES\SKBP\MEMO.OPP