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 ORDER NO. PSC-97-0470-FOF-WU ISSUED: April 23, 1997

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
JOE GARCIA
DIANE K. KIESLING

ORDER FINDING WINDSTREAM'S MOTION TO DISMISS MOOT, GRANTING MARION COUNTY'S PETITION FOR LEAVE TO INTERVENE, GRANTING WINDSTREAM'S MOTION TO STRIKE THE COUNTY'S REPLY, AND DECIDING TO HOLD HEARING ON THE COMMISSION'S OWN MOTION

BY THE COMMISSION:

Case Background

Windstream Utilities Company (Windstream or utility) is a Class C water utility located in Marion County. Pursuant to Section 367.045, Florida Statutes, on July 29, 1996, Windstream filed an application to amend its certificate to provide water service to additional territory in Marion County, including the proposed J.B. Ranches, a 459-acre development which will consist of 694 residential units and 165 general service units. In its application, the utility stated that the Marion County Land Development Code requires that developments of more than 15 units located within one mile of an existing water system connect to such water system. According to the utility, the requested extension of service area would implement the newly revised development code. On August 27, 1996, J.B. Ranch timely filed a Petition in Opposition to Windstream's application, and accordingly, this matter was set for hearing and Order No. PSC-96-1273-PCO-WU issued October 10, 1996 to establish procedures.

On December 18, 1996, Windstream filed a Notice of Amendment to Application, whereby it sought to modify its original amendment application for the purpose of eliminating the JB Ranch property from the proposed territory to be served. On December 20, 1996, Marion County filed a Petition for Leave to Intervene or Alternative Petition in Opposition to Amended Application for Amendment to Certificate 427-W. On December 30, 1996, Windstream

filed a Motion to Dismiss Protests. On December 31, 1996, this Commission received a letter from JB Ranch, dated December 24, 1996, which states that if, in fact, the JB Ranch is eliminated from the proposed territory, it would be appropriate for them to withdraw their protest and that such protest should be withdrawn. On January 8, 1997 and January 9, 1997, respectively, JB Ranch and the County filed a Memorandum in Opposition and Response to Motion to Dismiss Protests.

On January 13, 1997, Windstream filed a Response to Marion County's Petition for Leave to Intervene. On January 15, 1997, the County filed a Reply to Windstream's Response to Marion County's Petition for Leave to Intervene. On January 17, 1997, Windstream filed a Motion to Strike Marion County's Reply. On January 21, 1997, JB Ranch filed its Reply to Windstream's Response to Marion County's Petition for Leave to Intervene.

On January 21, 1997, this Commission received a letter from JB Ranch, wherein JB Ranch attempts to clarify its letter dated December 24, 1996, and states that its December 24 letter is not and should not be considered a notice to withdraw its protest, as it was in the nature of an inquiry only as to the status of the application, and therefore, should be withdrawn. On January 23, 1997, the County filed a Memorandum in Opposition and Response to Windstream's Motion to Strike.

Windstream's Motion To Dismiss Protests

In its December 30, 1996 Motion to Dismiss, the utility explains that in July 1996, it simultaneously filed two separate applications for extensions of its water service area; however, states the utility, some of the protests belonging to the other docket, Docket No. 960866-WU, were incorrectly placed in this docket by the Commission Clerk. According to the utility, the following protests have been placed in this docket: 1) petition of 34 residents of the Country Garden Subdivision, 2) Ausley Construction Company, 3) Diane and James Mace, and 4) Joseph Lettelleir for JB Ranch. Windstream argues that all but the protest by JB ranch were incorrectly placed in this docket, and should, therefore, be dismissed, since the persons or entities are not substantially affected by this docket.

With regard to the petition of the 34 residents, the utility states that the petitioners are all purportedly residents of the Country Garden subdivision, which is not located in the proposed territory. Further, the petitioners attached a legal description which is not the legal description for this docket. The utility also states that the letter from Ausley Construction Company

specifically objected to Windstream extending into the Lemonwood II subdivision, which is also not located in the territory description for this docket. Finally, the utility states that the letter from the Maces attached a legal description which is not from this docket.

We agree with the utility, and have verified, that these protests, placed in both this docket and Docket No. 960866-WU, properly belong only in Docket No. 960866-WU. There was no docket number on the protests, so in an abundance of caution, the protests were placed in both dockets. After reviewing these protests, however, we believe they were not intended for this application and the protests have been removed from this docket. Therefore, it is not necessary to rule on the utility's motion in this regard.

With regard to JB Ranch, the utility argues that this protest should also be dismissed. According to the utility, since it amended its application to remove the JB Ranch property from this docket, all of the allegations of substantial interests alleged by JB Ranch have been removed.

In a letter dated December 24, 1996 and received by the Commission on December 31, 1996, JB Ranch stated:

> If, in fact, JB Ranch is thereby eliminated from the proposed territory it would be appropriate for us to withdraw our protest [sic] and said protest [sic] should appropriately be withdrawn.

On January 8, 1997, JB Ranch filed a Memorandum in Opposition and Response to Motion to Dismiss Protests, wherein it states that Windstream's motion to dismiss is untimely, pursuant to Rule 25-22.037(2), Florida Administrative Code, which requires motions in opposition to be filed within twenty days of service of the petition, plus five days if service is by mail. According to JB Ranch, since Windstream's original application for amendment was filed on August 26, 1996, its motion to dismiss, in order to be timely, should have been filed within twenty-five days of this date. JB Ranch also argues that since an Order Establishing Procedure was issued in this docket recognizing it as a party to this proceeding, Windstream's motion to dismiss is inconsistent with this order. According to JB Ranch, Rule 25-22.0376(1), Florida Administrative Code, requires any party who is adversely affected by a non-final order to seek reconsideration of the order within ten days. Therefore, argues JB Ranch, the utility's only recourse would have been to file a motion for reconsideration within ten days of the Order Establishing Procedure.

In addition, JB Ranch argues that its substantial interests remain affected, despite the amended application, because if Windstream is able to expand its certificated territory, it will be deprived of the economic benefits of the economies of scale from the full development of the County's water and wastewater system, as well as a valuable contract right. Furthermore, argues JB Ranch, the future capital costs and rates in the County system may increase if the territory is awarded to Windstream, thereby increasing costs of receiving water and wastewater service to JB Ranch. JB Ranch also argues that prefiled testimony by the utility proposes use of its facilities to provide service to the requested territory, and the utility has failed to provide any evidence of its right or ability to do this, or any information regarding what alternatives exist for interconnection. Finally, JB Ranch argues that Windstream's substantial modification of its application for amendment opens a new window and point of entry for JB Ranch and others to object, and it therefore, renews its objection.

On January 9, 1997, Marion County filed a Memorandum in Opposition and Response to Dismiss Protests. In this response, the County states that its substantial interests are affected by the proposed extension, and realleges and incorporates the allegations made in its petition to intervene. The County also argues that its interests, as well as those of JB Ranch's, remain substantially affected, despite Windstream's purported amendment to its application because the expansion will adversely affect the County's ability to comply with the Marion County/Barrett Family/Zacco Subregional Water and Wastewater Utilities Agreement (Marion County/Barrett Family Agreement), and its ability to realize economies of scale. The County also argues that the amendment may result in increased contract costs.

On January 21, 1997, this Commission received a letter from JB Ranch, wherein JB Ranch attempts to clarify its letter dated December 24, 1996. In this letter, JB Ranch states that because of the abrupt and unusual nature of the Notice of Amendment and corresponding pleadings, it is in doubt as to the precise status of Windstream's application. JB Ranch further states that its December 24 letter is not and should not be considered a notice to withdraw its protest, as it was in the nature of an inquiry only as to the status of the application; therefore, it withdraws the December 24 letter.

The Commission has allowed the filing of a motion to dismiss at any time during a proceeding. See Orders Nos. PSC-95-1568-FOF-WS, issued December 18, 1995 and PSC-95-1327-FOF-WS, issued November 1, 1995 in Docket No. 950495-WS, In Re: Application for Rate Increase and Increase in Service Availability Charges by

Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties, in which the Commission permitted the filing of motions to dismiss beyond the time specified in Rule 25-22.037(2), Florida Administrative Code. Therefore, we find that Windstream's motion to dismiss is timely.

Further, JB Ranch's argument that Windstream's motion to dismiss is inconsistent with the Order Establishing Procedure is without merit. The purpose of the order is to establish the procedures for hearing, and therefore, has no bearing on whether parties may be dismissed from the proceeding.

We find that JB Ranch's December 24 letter is a withdrawal of its protest based on Windstream's amendment to its application, and therefore, Windstream's motion to dismiss with regard to JB Ranch is moot. A protest, once withdrawn, may not be reinstated. Even had we not found JB Ranch's December 24 letter to be a withdrawal of protest, however, JB Ranch still has no standing to object in light of the utility's amendment of its application to delete it from the proposed territory to be served. See Order No. 18398, issued November 9, 1987 in Docket No. 870649-WS, In Re: Objection by RAD Properties, Inc. to Notice by Sunray Utilities, Inc. of Intention to Apply for Original Water and Sewer Certificates in Nassau County, in which this Commission, with regard to a developer situated outside of the proposed territory to be served, stated:

> We believe that an owner of property outside of a proposed utility's requested territory has no right or standing relative to the issuance of certificates authorizing the utility's provision of water and sewer service to that territory.

Therefore, JB Ranch, as a developer situated outside of the amended proposed territory to be served, has no standing to object. Further, JB Ranch cannot renew its objection. The amendment of the application did not create a new window or point of entry for new objections because it did not seek to enlarge the size of the utility's original request for additional territory, but to decrease it; therefore, no new substantial interests were created as a result of the modification of the application.

Marion County's Petition To Intervene or Alternative Petition in Opposition to Amended Application

As previously stated, on December 20, 1996, Marion County filed a Petition for Leave to Intervene or Alternative Petition in Opposition to Amended Application for Amendment to Certificate 427-W. In support of its petition, Marion County states, among other things, that it is a provider of utility services, including water, to residents of Marion County, and therefore, its substantial interests may be materially, substantially, and adversely affected by the approval of the extension sought by Windstream. According to the County, it is contractually committed to providing service to the requested area by the Marion County/Barrett Family Agreement. The County also states that if Windstream does not have the financial and technical ability to provide water service, the residents would be left with an inadequate water system; a grant of the application would remove the potential customers' ability to enjoy the benefits of economies of scale; and a grant of the application is inconsistent with the Marion County Water Resources Protection and Utilities Plan and the Marion County Comprehensive Plan.

On January 13, 1997, Windstream filed a Response to Marion County's Petition for Leave to Intervene. Windstream's response is untimely, pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, which provides that a written memorandum in opposition to a motion may be filed within seven days, plus an additional five days if service is by mail. Windstream, however, states that it did not receive the County's motion to intervene until after the time for filing a response had expired. In light of this assertion by the utility, and the fact that other parties to this proceeding will not be prejudiced by the consideration of the utility's response, the utility's response shall be given consideration.

In its Response, Windstream argues that if the County's petition is an objection, it is untimely, and if it is a petition to intervene, the County must take the case as it finds it, pursuant to Rule 25-22.039, Florida Administrative Code. According to the utility, since it amended its application to eliminate all objectionable territory, and such amendment is tantamount to a voluntary dismissal granted as a matter of right, the County has no objecting party on whose side to intervene. Therefore, the utility argues, the County's attempts to intervene are moot.

Initially, we note that the County failed to file a timely objection to the utility's notice of its July 29, 1996 application for amendment of its certificates. Section 367.045, Florida Statutes, provides that written objections to a notice of

application must be received within thirty days after the last day the notice was mailed or published by the applicant. The utility was not required to notice its December 18 amendment to its application because, as discussed previously, the amendment did not seek to enlarge the size of the utility's original request for additional territory, but to decrease it, and therefore, no new substantial interests requiring notice were created as a result of the modification of the application. The County, therefore, cannot use its alternative petition to create a timely objection. In light of the foregoing, the County's Alternative Petition in Opposition to Amended Application for Amendment to Certificate 427-W is denied.

Rule 25-22.039, Florida Administrative Code, provides that "[p]ersons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene" up to five days before the final hearing. The rule further provides:

> Petition for leave to intervene must . . . include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

The County alleges that its substantial interests are affected by this proceeding because, among other things, there is an issue of whether Windstream is financially or technically able to provide adequate service, and a grant of Windstream's application is inconsistent with the Marion County Comprehensive Plan. In Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), the Court developed a two-pronged test for determining substantial interest: before a person or entity can be considered to have a substantial interest in the outcome of a proceeding, that person or entity must demonstrate 1) injury in fact which is of sufficient immediacy to warrant a formal hearing, and 2) the injury is of a type which the proceeding is designed to protect. In Order No. PSC-95-0062-FOF-WS, issued January 11, 1995 in Docket No. 940091, this Commission recognized that the Agrico test does not exclude governmental authorities and that the Commission had applied the test in previous cases. The County has alleged facts sufficient to demonstrate injury-in-fact of the type this proceeding was designed to protect.

However, there is no existing valid objection to the utility's amended application, and therefore, the County cannot be an objecting party, but can be an intervenor. Therefore, the County's Petition for Leave to Intervene is hereby granted. See Order No. 22342, issued December 26, 1989 in Docket No. 891110-WS, In Re: Objection to Notice of Joint Application to transfer Water and Sewer Certificates in St. Johns County from St. Johns North Utility Corporation to Jacksonville Suburban Utilities Corporation, wherein this Commission stated:

> On October 17, 1989, Fruit Cove filed a petition to intervene, objecting to the proposed transfer on grounds that it would violate Order No. 20762, issued February 17, 1989. Order No. 20762 required St. Johns North to make a refund to Fruit Cove for collection of unauthorized contributions-in-aid-of-construction (CIAC) gross-up charges. However, Fruit Cove's petition was not filed within twenty days of the joint applicant's notice, as required by Section 367.051(1), Florida Statutes. Since GDU withdrew its objection, Fruit Cove must obtain status as an objecting party, as opposed to an intervenor, and the time for doing such has passed. We, therefore, find it appropriate to deny Fruit Cove entry to this proceeding as an objecting party, but will grant Fruit Cove intervention as an interested party. Further, as there is no existing valid objection to the proposed transfer, we find it appropriate to process the transfer without a hearing, pursuant to Section 367.051(1), Florida Statutes, and to process all other matters in this docket by proposed agency action.

Pursuant to Rule 25-30.039, Florida Administrative Code, however, the County takes the case as it finds it. When the utility amended its application to remove the territory objected to by JB Ranch on December 18, 1996, JB Ranch lost its standing to object to this amendment proceeding, and the matter could no longer proceed to hearing on the basis of that objection. Thus, when the County filed its petition to intervene on December 20, 1996, the matter was no longer proceeding to hearing. Although the County requested a hearing in its petition, Section 367.045, Florida Statutes, entitles substantially affected persons a right to a hearing only if they file a timely objection within thirty days of the last day the notice was mailed or published by the applicant.

The County, therefore, may not use its petition to intervene to create a timely objection, and is not entitled to a hearing on the basis of its petition to intervene.

Notwithstanding the fact that the County is not entitled to a hearing because it failed to file an objection and request for hearing within the time allowed in Section 367.045, Florida Statutes, we believe that a hearing in this case is in the public interest. Accordingly, on our own motion, a hearing shall be held in this matter.

Windstream's Motion to Strike

On January 15, 1997, the County filed a Reply to Windstream's Response to Marion County's Petition for Leave to Intervene. On January 17, 1997, Windstream filed a Motion to Strike Marion County's Reply. On January 21, 1997, JB Ranch filed its Reply to Windstream's Response to Marion County's Petition for Leave to Intervene. On January 23, 1997, the County filed a Memorandum in Opposition and Response to Windstream's Motion to Strike. The replies filed by the County and JB Ranch are not appropriate. Petitions to intervene are motions, and pursuant to Rule 25-22.037(2), Florida Administrative Code, parties may file motions in opposition to a motion within seven days; this rule, however, does not allow parties to file a reply to a response. The pleading cycle must stop at a reasonable point and our rules reflect that. Accordingly, Windstream's Motion to Strike the County's Reply is granted.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Windstream Utilities Company's Motion to Dismiss Protests is moot. It is further

ORDERED that Marion County's Alternative Petition in Opposition to Amended Application for Amendment to Certificate 427-W is hereby denied. It is further

ORDERED that Marion County's Petition for Leave to Intervene is hereby granted. It is further

ORDERED that, on the Commission's own motion, a hearing will be held in this matter. It is further

ORDERED that Windstream Utility Company's Motion to Strike Marion County's Reply is hereby granted. It is further

ORDERED that this docket shall remain open pending the final resolution of this case.

By ORDER of the Florida Public Service Commission, this 23rd day of April, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

DCW

Commissioner Kiesling dissents with opinion.

I respectfully dissent. Section 367.045, Florida Statutes, provided the County a clear point of entry. At this late date, having failed to avail itself of this point of entry by not timely objecting to the utility's amendment application, the County should not be allowed to intervene and require a hearing in this case. See Florida League of Cities, Inc. v. Administration Com'n, 586 So. 2d 397 (Fla. 1st DCA 1991); Friends of Everglades, Inc. v. Bd. of County Com'rs of Monroe County, 456 So. 2d 904 (Fla. 1st DCA 1984); Londono v. City of Alachua, 438 So. 2d 91 (Fla. 1st DCA 1983); Caloosa Property Owners Ass'n, Inc. v. Palm Beach County Bd. of County Com'rs, 429 So. 2d 1260 (Fla. 1st DCA 1983).

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.