**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 )

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)

 **PETITION FOR LEAVE TO INTERVENE OR**

 **ALTERNATIVE PETITION IN OPPOSITION TO AMENDED APPLICATION**

 **FOR AMENDMENT TO CERTIFICATE 427-W**

Marion County, Florida, (hereinafter Marion County), by and through the undersigned counsel, and pursuant to Sections 367.045 and 120.569, Florida Statutes, and Rules 25-22.039 and 25-22.036, Florida Administrative Code, files this Petition for Leave to Intervene in the instant application for a service area certification filed by Windstream Utilities Company (hereinafter Windstream) in Marion County, Florida. Alternatively, Marion County also files a petition in opposition to the amended application for amendment of Certificate 427-W. In support thereof Marion County states:

1. This Petition is filed pursuant to the provisions of Sections 367.045 and 120.569, Florida Statutes, and Rules 25-22.036, F.A.C., 25-30.039, F.A.C., and 25-30.031, F.A.C.

 **STATEMENT OF THE PARTIES TO THIS PROCEEDING**

2. Marion County is a political subdivision of the State of Florida whose official address is 601 S.E. 25th Avenue, Ocala, Florida, 34471-2690. For purposes of this Petition, all notices, pleadings and correspondence regarding this matter should be sent to Thomas A. Cloud, Esquire, Gray, Harris & Robinson, P.A., 201 East Pine Street, Suite 2100, P.O. Box 3068, Orlando, Florida 32802-3068.

3. Respondent Windstream is a Florida Corporation operating as a utility supplying water to certain areas of Marion County, Florida, as authorized by the Public Service Commission. Windstreams street address is 3002 N.W. 10th Street, Ocala, Florida, 34475, its Post Office box address is P.O. Box 4201, Ocala, Florida, 34478-4201.

 **STATEMENT OF SUBSTANTIAL INTERESTS AFFECTED**

4. Marion Countys substantial interests will be affected by the proposed extension requested by Windstream in that:

a. Marion County is a provider of utility services, including water, to residents of Marion County. Marion County has substantial interests in the instant proceeding which are protected under Chapter 367, Florida Statutes, and which may be materially, substantially, and adversely affected by the approval of the extension sought by Windstream.

b. In the event that Windstreams request is granted, Windstream will be the designated provider of water service for the areas so designated and the residents therein and Marion County may be precluded from providing both water and sewer service at better quality and less cost.

c. If Windstream is not financially able to provide adequate service, the areas designated for service by Windstream and the residents therein will be left without a water provider.

d. If Windstream is not technically able to provide adequate service, the areas designated for service by Windstream and the residents therein will be faced with an inadequate water system to meet their needs.

e. Marion County presently is contractually committed to providing service in the area. That contract is the Marion County/Barrett Family/Zacco Subregional Water and Wastewater Utilities Agreement, Contract No. 96-5 (the Subregional Agreement) attached to and incorporated in this pleading as **Exhibit A.**

f. Marion County has contracted with the firm of Hartman & Associates, Inc. to master plan the area as a part of Marion Countys S.R. 200 Subregional Area. That Master Plan is due to be complete in January 1997.

g. Marion County has the ability to provide both water and sewer service to the area.

h. Marion County has completed the engineering and has applied for permits for both subregional water and wastewater facilities capable of serving a large portion of the area and providing logical expansions to service the entire area.

i. Granting such area to Windstream could remove the potential customers ability to enjoy the economy of scale in Marion Countys facilities. Marion County has lower water rates than Windstream. Marion County is the political subdivision of the state which provides public services and protects the public welfare, health, and safety.

j. This region has shown susceptibility to groundwater contamination from pollution sources which include septic tanks and small, uneconomical package wastewater treatment plants. Marion Countys subregional wastewater program, with beneficial reuse of reclaimed water, will be substantially affected through the loss of customers and the water resources of Marion County will be potentially damaged without the provision of central sewerage service by Windstream.

k. Granting Windstream the certificate amendment is inconsistent with the Marion County Water Resources Protection and Utilities Plan adopted May 21, 1996, a copy of which is attached to and incorporate in this Petition as **Exhibit B** (the Countys Game Plan). The Countys Game Plan calls for central water and wastewater service to be provided by the County in this Area.

l. Granting Windstream the certificate amendment is inconsistent with the Marion County Comprehensive Plan (the Comprehensive Plan) and will frustrate Marion Countys ability to implement the Comprehensive Plan as required by its terms, Chapter 163, Florida Statutes, and the Florida Department of Community Affairs (see, **Exhibit C** attached to and incorporated in this petition).

 **STATEMENT OF ALL KNOWN DISPUTED ISSUES**

 **OF MATERIAL FACT**

5. The following disputed issues of material fact are known as of the date of the filing of this Petition:

a. Whether the Application for Amendment to Certificate 427-W is consistent with the Marion County Comprehensive Plan;

b. Whether Windstream can provide adequate fire flow;

c. Whether all agreements required to be executed by and between Windstream and certain of the residents of the proposed extension are in place and effective;

d. Whether Windstream gave appropriate notice as required by Section 367.045(1)(a), Florida Statutes, and Rule 25-30.030, Florida Administrative Code;

e. Whether Windstream has the financial ability to provide the service for the area requested;

f. Whether Windstream has the technical ability to provide water and sewer service for the area requested;

g. Whether there is a need for water service only for the area requested;

h. Whether, if the amendment is not consistent with the Marion County Comprehensive Plan, the amendment is in the public interest;

i. Whether Windstream owns the land upon which the utility treatment facilities that will serve the proposed territory are located, or, alternatively, whether Windstream has appropriately secured the rights to use the land required;

j. Whether the legal description submitted with the application is correct and accurate;

k. Whether Windstream has submitted a detailed system map showing the proposed lines, treatment facilities, and the territory proposed to be served;

l. Whether Windstream has submitted a copy of the official county tax assessment map or other map showing township, range, and section, with the appropriate scale, and with the proposed territory accurately plotted thereon by use of metes and bounds or quarter sections, and with a defined reference point of beginning;

m. Whether Windstream has provided the required statement describing the capacity of the existing lines, the capacity of the treatment facilities, and the design capacity of the proposed extension;

n. Whether Windstream has supplied the numbers and dates of any permits issued for the proposed systems by Marion County, the Florida Department of Environmental Protection, and the appropriate Water Management District;

o. Whether Windstream has supplied a detailed statement regarding the proposed method of financing the construction, and the projected impact on Windstreams capital structure;

p. Whether Windstream has supplied an affidavit that the utility has tariffs and annual reports on file with the Commission;

q. Whether Windstream has provided an appropriate statement regarding the projected impact of the extension on the utilitys monthly rates and service availability charges;

r. Whether Windstream has submitted the original Certificate No. 427-W for possible amendment;

s. Whether Windstream has specified which rate and charge it intends to charge the customers in the proposed development;

t. Whether Windstreams proposed rate and charge is justified;

u. Whether Windstream has specified which water treatment plant will be providing water to customers in the proposed territory;

v. Whether Windstream can provide the most cost-effective and environmentally acceptable water and sewer service to the proposed extension area; and

w. Whether it is the preference of the residents of the proposed extension area to receive water service from Windstream.

Because Windstreams application is substantially, recklessly, and deliberately inadequate, incomplete and misleading, Marion County reserves the right to raise additional issues, as they arise and appear through the course of discovery and further investigation into Windstreams application.

 **STATEMENT OF THE ULTIMATE FACTS ALLEGED**

6. Marion County contends that the following deficiencies exist with regard to Windstreams application:

a. The proposed amendment is not consistent with the Marion County Comprehensive Plan. In fact, Windstream has submitted an outdated and superseded copy of portions of the Marion County Comprehensive Plan;

b. Windstream has failed to demonstrate that it can provide adequate fire flow;

c. Windstream has failed to give appropriate notice as required by Section 367.045(1)(a), Florida Statutes, and Rule 25-30.030, Florida Administrative Code;

d. Windstream has failed to demonstrate that it has the financial ability to provide the service for the area requested;

e. Windstream has failed to demonstrate that it has the technical ability to provide the service for the area requested;

f. Windstream has failed to demonstrate that there is a need for water service only for the area requested;

g. Windstream has failed to demonstrate whether, if the amendment is not consistent with the Marion County Comprehensive Plan, that the amendment is in the public interest;

h. Windstream has failed to establish who owns the land upon which the utility treatment facilities that will serve the proposed territory are located, or, alternatively, Windstream has not appropriately secured the rights to use the land required;

i. Windstream has failed to submit a proper legal description;

j. Windstream has failed to submit a detailed system map showing the proposed lines, treatment facilities, and the territory proposed to be served;

k. Windstream has failed to submit a copy of the official county tax assessment map or other map showing township, range, and section, with the appropriate scale, and with the proposed territory accurately plotted thereon by use of metes and bounds or quarter sections, and with a defined reference point of beginning;

l. Windstream has failed to provide the required statement describing the capacity of the existing lines, the capacity of the treatment facilities, and the design capacity of the proposed extension;

m. Windstream has failed to provide the numbers and dates of all permits issued for the proposed systems by Marion County, the Florida Department of Environmental Protection and the appropriate Water Management District;

n. Windstream has failed to supply a detailed statement regarding the proposed method of financing the construction, and the projected impact on Windstreams capital structure;

o. Windstream has failed to supply an affidavit that the utility has tariffs and annual reports on file with the Commission;

p. Windstream has failed to provide an appropriate statement regarding the projected impact of the extension on the utilitys monthly rates and service availability charges;

q. Windstream has failed to submit the original Certificate No. 427-W for possible amendment;

r. Windstream has failed to specify which rate and charge it intends to charge the customers in the proposed development;

s. Windstream has failed to justify its proposed rate and charge;

t. Windstream has failed to specify which water treatment plant will be providing water to customers in the proposed territory;

u. Windstream has failed to demonstrate that it is the most cost effective and environmentally acceptable water and sewer provider for the proposed extension; and

v. Windstream has deliberately misrepresented that it has the consent and preference of certain residents within the proposed extension to receive service from Windstream.

10. In addition to the deficiencies with the application, Marion County contends that the application must be denied because:

a. The proposed amendment is not consistent with the Marion County Comprehensive Plan;

b. Windstream cannot provide adequate fire flow;

c. All necessary agreements are not in place to provide the service;

d. If the extension is granted, residents in the proposed service area will be forced to be served by Windstream at unreasonable rates;

e. The application is incomplete and blatantly misrepresents facts known to the applicant;

f. The residents in the proposed extension area prefer to be served by others, or by no utility at all;

g. Windstream has failed to prove compliance with applicable statutes and rules of the Public Service Commission;

h. This application is in direct conflict with the Marion County Comprehensive Plan, the Game Plan, existing contracts, sound planning, engineering, financing and permitting presently underway, and future construction anticipated to be completed in 1997 and 1998.

 **STATEMENT OF THE RULES AND STATUTES**

 **ENTITLING PETITIONER TO RELIEF**

11. Marion County is entitled to relief under the provisions of Sections 367.045 and 120.569, Florida Statutes, and Rules 25-22.030, 25-22.036(3), Florida Administrative Code.

 **DEMAND FOR RELIEF**

12. Marion County respectfully requests that an Order be entered granting Marion Countys Petition for Leave to Intervene, and according Marion County full party status in this proceeding, with all rights attendant thereto, and that a hearing be convened to examine Windstreams Application for Amendment of Certificate 427-W to Add Territory in Marion County, Florida, that Marion County be allowed to present evidence, testimony, and cross-examine witnesses presented by other parties to this action, and that Windstreams application for Amendment be denied.

13. In the alternative, Marion County hereby requests that a hearing be convened regarding the amendment of Certificate 427-W, that Marion County be allowed to present evidence and, testimony, and cross-examine witnesses presented by other parties to this action, and that Windstreams amended application be denied.

14. In support thereof, Marion County realleges and reavers all of the above, including the following:

a. On Tuesday, November 5, 1996, Windstreams representative, Mr. Butch Dlouhy, went before the Board of County Commissioners of Marion County (the Board) and represented to them that he would be willing to negotiate in good faith with Marion County to provide water on a wholesale basis so that Marion County could provice retail service to the area that is the subject of this proceeding.

b. Representatives of Marion County met with Mr. Dlouhy on at least two (2) occasions, November 7 and December 4, 1996, to develop an agreement such that Marion County would be the retail water provider for all of the area that is the subject of this proceeding.

c. On November 11, 1996, an outline of such a proposed agreement was presented to the Board which included the provision that Marion County would be the sole retail water provider within all of the area that is the subject of this proceeding. Mr. Dlouhy was present and indicated his desire to negotiate and conclude such an agreement.

d. From November 11, 1996 until December 4, 1996, Marion County and Mr. Dlouhy negotiated and concluded an agreement (the Agreement) that included the provision that Marion County would be the sole retail water provider within all of the area that is the subject of this proceeding. Before witnesses (including the Board) Mr. Dlouhy indicated he approved the Agreement. Two days later, originals of the Agreement were delivered to Mr. Dlouhy. A copy of the Agreement is attached to and incorporated herein as **Exhibit D.**

e. Instead of executing the agreements or contacting Marion County, Mr. Dlouhy proceeded to file additional materials with the Florida Public Service Commission in the instant proceeding, including information received from Marion County during negotiations regarding the Agreement.

f. On December 12, 1996, a Marion County representative contacted Mr. Dlouhy to discover the whereabouts of the signed Agreement. Only then did Mr. Dlouhy inform Marion County that he might not sign the agreement, despite his prior assent to its terms before the Board.

g. On December 17, 1996, at the next available Board meeting, the Board voted to challenge Windstreams application, based on the facts and reasons outlined in this petition and based on Mr. Dlouhys conduct following the negotiations.

h. On December 18, 1996, counsel for Marion County contacted Mr. Martin Friedman, counsel for Windstream, via telephone, to inform him of Marion Countys decision to challenge the application.

i. Twenty-five minutes after that telephone conversation, Mr. Friedman faxed a Notice of Amendment to Application to Mr. Joseph T. Lettelleir, representative of the JB Ranch property, a challenger in this proceeding, notifying Mr. Lettelleir that Windstream was amending its application by deleting certain lands in the application. See **Exhibit E** to this petition. No copy of this amendment was sent to counsel for Marion County, nor was the fact of this amendment mentioned during the phone conversation between counsel for Marion County and Mr. Friedman. Counsel for Marion County received a copy of this communication and notice from Mr. Lettelleir on December 19, 1996.

j. But for Windstreams outrageous and deliberately misleading conduct, Marion County would have challenged this application in November. Such inequitable conduct cannot and should not be sanctioned as a basis for allowing Windstream to extend its certificate and deny Marion County its right to challenge such extension. Furthermore, amending the application by deleting significant acreage substantially changes the nature of this proceeding, and creates a new point of entry to challenge the amended application. Therefore, in the alternative, Marion County objects to the amended application to amend certificate 427-W for the reasons set forth in this petition, and requests that the application be denied.

 **CONCLUSION**

Marion County is entitled to intervene in this proceeding because it has a substantial interest in the proceeding and is entitled to participate as a matter of constitutional or statutory right or pursuant to Commission rule, and the substantial interests of Marion County are subject to determination or will be affected through this proceeding. The Notice of Amendment to Application does not sever this right. The owner of JB Ranch is still a party to this proceeding; even if this was not the case, it would be inappropriate to dismiss Marion Countys petition because Marion County delayed its intervention into this proceeding based upon inequitable and misleading conduct of the applicant. Furthermore, the notice of amendment is flawed, because the legal description is vague and it is impossible to tell exactly how the application has been amended, insofar as there is no precise legal description. Finally, even if the amendment for the application is deemed adequate, the amendment creates, in effect, a different application, and provides a new point of entry. Therefore, Marion County requests that it be allowed to intervene in this proceeding and be granted full party status, or, in the alternative, that Marion Countys petition in opposition to Windstreams application be accepted and that this case proceed to final hearing.

Respectfully submitted,

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904-222-7717

Attorneys for Marion County

 **CERTIFICATE OF SERVICE**

**I CERTIFY** that a true copy of the foregoing was served on the \_\_\_ day of \_\_\_\_\_\_\_\_\_, 199\_, on the following:

Original and 7 copies, together with the document on diskette, via hand delivery / U.S. Mail to:

**Blanca S. Bayo, Director**

**Division of Records and Reporting**

Public Service Commission

Capital Circle Office Center

2540 Shumard Oak Boulevard

Tallahassee, Florida 32399-0850

904-413-6770

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

**Donna Cyrus-Williams, Esquire**

Florida Public Service Commission, Legal Division

Capital Circle Office Center

2540 Shumard Oak Boulevard

Tallahassee, Florida 32399-0850

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