

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
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M E M O R A N D U M

DECEMBER 26, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (CYRUS-WILLIAMS) *Law*
DIVISION OF WATER & WASTEWATER (REDEMANN) *RRR*

RE: DOCKET NO. 960866 - WU - APPLICATION FOR AMENDMENT OF
CERTIFICATE NO. 427-W TO ADD TERRITORY IN PARCELS A, B,
C, D, AND E BY WINDSTREAM UTILITIES COMPANY
COUNTY: MARION COUNTY

AGENDA: JANUARY 7, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\960866WD.RCM

DOCUMENT NUMBER-DATE

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CASE BACKGROUND

Windstream Utilities Company (Windstream or the utility) is a Class C water utility located in Marion County. On July 29, 1996, Windstream filed an application to amend its certificate to add parcels A, B, C, D, and E in Marion County. 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. The utility also stated that a 44 single family development unit, which would be in need of water service before the end of 1996, was proposed for the requested service area. According to the utility, the requested extension of service area would implement the newly revised development code.

On August 23, 1996, the City of Ocala (the City), a municipality located within Marion County timely filed an objection to Windstream's application. On August 23, 1996, a Petition Against Windstream Utilities Company Connecting its Water Line into the Country Gardens Subdivision, containing the signatures of 34 residents, was also timely filed. Some of the signers of the petition also forwarded individual letters of protest to the Commission. Other letters in objection to the proposed extension were timely filed by residents of the Sherwood Hills and Lemonwood II subdivisions. Accordingly, this Commission, in Order No. PSC-96-1272-PC0-WU, issued an Order Establishing Procedure on October 10, 1996, setting this docket for hearing.

On December 9, 1996, the utility filed a Notice of Voluntary Dismissal without prejudice, formally withdrawing its application from consideration by this Commission.

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DISCUSSION OF ISSUES

ISSUE 1: Should the utility's Notice of Voluntary Withdrawal be acknowledged?

RECOMMENDATION: Yes. Staff recommends that this Commission acknowledge the utility's Notice of Voluntary Withdrawal and close the docket. (CYRUS-WILLIAMS)

STAFF ANALYSIS: This docket was opened when the utility filed an application for amendment of its service territory. After objections were filed by the City of Ocala and by potential customers, this matter was set for hearing. On December 9, 1996, Windstream filed a Notice of Voluntary Dismissal without prejudice. As of the date the Notice of Withdrawal was filed, this Commission had not taken any action upon the application for amendment. Also, the utility is not currently serving the requested territory. The potential customers state in their letters that they have their own wells and pumps, so a withdrawal of Windstream's application will not impair water service in the area.

Rule 25-22.035(3), Florida Administrative Code, states that generally, the Florida Rules of Civil Procedure shall govern in proceedings before the Commission. Rule 1.420(a)(1), Florida Rules of Civil Procedure, allows a party to file a notice of voluntary dismissal without order of court any time before the case has been submitted for decision. Further, the Florida Supreme Court has interpreted Rule 1.420(a)(1), Florida Rules of Civil Procedure, liberally in favor of the movant, such that the movant has an unqualified right to a voluntary dismissal in Florida. See Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975); Freeman v. Mintz, 523 So. 2d 606, (Fla. 3rd DCA 1988). Once a timely voluntary dismissal is taken, the trial court loses its jurisdiction to act and cannot revive the original action for any reason. Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So. 2d 68, 69 (Fla. 1978).

In Wiregrass Ranch, Inc. v. Saddlebrook Resorts, Inc., 645 So. 2d 374 (Fla. 1994), the Supreme Court held that the discretion of the agency to proceed with a formal proceeding is not lost by the action of a party (not the applicant) seeking to withdraw from the proceeding, where an objector filed a voluntary dismissal after an adverse factual finding by a hearing officer, but before the agency acted on the hearing officer's recommendation. Wiregrass, however,

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can be distinguished from this instance because 1) the Commission has not taken any action, and 2) the applicant, and not a third-party objector, is seeking voluntary withdrawal.

This Commission has accepted voluntary withdrawals or dismissals from applicants in the past. See Order No. PSC-96-1483-FOF-WS, issued on December 4, 1996 in Docket No. 96009, In Re: Request for Exemption from Florida Public Service Commission Regulation for Provision of Water Service in Pinellas County by Brookgreen Apartments; Order No. PSC-94-1352-FOF-SU, issued November 7, 1994 in Docket No. 930851, In Re: Application for Amendment of Certificate No. 249-S in Volusia County by North Peninsula Utilities Corporation. Based on the foregoing, staff recommends that this Commission acknowledge the utility's Notice of Voluntary Withdrawal of its Application for Amendment of Certificate No. 427-W to Add Territory in Parcels A, B, C, D, and E in Marion County and close this docket.