

In Re: Application by Nocatee)
 Utility Corporation for Original)
 Certificates for Water & Wastewater)
 Service in Duval and St. Johns)
 Counties, Florida)

Docket No. 990696-WS

In Re: Application for certificates)
 to operate water & wastewater)
 utility in Duval and St. Johns)
 Counties by Intercoastal Utilities, Inc.)

Docket No. 992040-WS

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**INTERCOASTAL'S RESPONSE IN OPPOSITION TO
 NOCATEE UTILITY CORPORATION'S MOTION TO STRIKE**

INTERCOASTAL UTILITIES, INC. ("Intercoastal"), by and through undersigned counsel, hereby files this Response in Opposition to Nocatee Utility Corporation's Motion to Strike and in support thereof would state and allege as follows:

1. In accordance with the Commission's procedure for entry into the record of the testimony of M.L. Forrester, Mr. Forrester's written redirect testimony was filed on May 22, 2001, and was responsive to matters elicited and discussed during cross-examination of Mr. Forrester via deposition. The redirect testimony to which Nocatee Utility Corporation ("NUC") now objects was wholly and properly responsive to matters raised by NUC during cross-examination.

2. After the cross-examination of a witness, the party who called the witness may conduct a redirect examination in order to rebut or explain matters elicited during the cross-examination. *Harmon v. State*, 527 So. 2d 182 (Fla. 1988). It is permissible on redirect examination to "explain, correct, or modify the testimony on cross-examination." *Id.* Further, if matters are gone into on cross about which a witness did not testify on direct, they may be addressed on redirect.

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Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1986). The cross-examination may “open the door” to the admission of certain testimony so that it will not be excluded during the redirect examination. *Ramirez v. State*, 739 So. 2d 568, 579-80 (Fla. 1999). “As an evidentiary principle, the concept of ‘opening the door’ allows the admission of otherwise inadmissible testimony to ‘qualify, explain, or limit’ testimony or evidence previously admitted.” *Id.*

3. As agreed to by the parties, the cross-examination of Mr. Forrester here consisted of entry into the record of the deposition of Mr. Forrester followed by written redirect testimony filed in response to that cross-examination. The written redirect material to which NUC objects consists of two categories:

- (a) testimony in response to questions regarding Intercoastal’s rates; and
- (b) testimony in response to questions regarding JEA’s Consumptive Use Permit.

Testimony Regarding Intercoastal’s Rates

4. While the Order cited in NUC’s Motion to Strike, Order No. PSC-01-1055-PCO-WS, disallowed portions of Intercoastal’s prefiled rebuttal testimony which dealt with Intercoastal’s intention to project rates over a ten-year period that will be even lower than NUC’s rates, that Order addressed certain of Intercoastal’s *rebuttal* testimony, not responses given in *redirect examination* to the cross-examination of Mr. Forrester by NUC. As such, the redirect testimony of Mr. Forrester in response to cross-examination may properly “explain, correct, or modify” any testimony elicited from him on cross-examination. The rebuttal testimony which was the subject of the Commission’s Order that was previously stricken was offered to rebut testimony given by NUC witness, Deborah Swain, not to respond to questions asked directly of Mr. Forrester on cross-examination. Intercoastal’s intention from the start of this proceeding has been to have rates lower than NUC’s,

and answers given on redirect examination in response to cross-examination questions about Intercoastal's rates are proper in that regard.

5. By utilizing Mr. Forrester's deposition as his cross-examination, a stipulation that was agreed to by all parties, NUC has in effect "opened the door" to any redirect which responds to cross-examination questions addressing Intercoastal's rate position. NUC cannot have it both ways, first asking the question about Intercoastal's rates during cross-examination, and then trying to control and limit the answers which the witness may use as his response to those questions. Redirect testimony is quite different from rebuttal testimony, as redirect testimony responds directly to cross-examination while rebuttal testimony is offered in response to testimony from another party. Accordingly, Mr. Forrester's written redirect may permissibly respond to cross-examination questions asked directly of him about Intercoastal's future rates.

6. While NUC's Motion to Strike notes that the Commission ruled that testimony on redirect examination of Mr. James could not address the Intercoastal commitment from its shareholders to reduce rates to below the rates of NUC's if Intercoastal's application is granted, that ruling was in response to redirect solicited to questions from Commissioner Jaber, not from redirect of cross-examination questions raised by NUC. (Tr. 492-495) It is impossible to fathom that if NUC had asked Mr. James about the intention of Intercoastal with respect to Intercoastal's future rates should Intercoastal's application be granted, the Commission would have ruled that Mr. James could then not answer that question truthfully and fully upon redirect examination. Similarly, Mr. Forrester was asked by NUC during his cross-examination whether "Intercoastal's position that rates for existing customers would fall if Intercoastal's application was granted," yet NUC now argues that he cannot address that question truthfully and fully upon redirect. Certainly, the Commission's

Order could not possibly have been intended to prevent Mr. Forrester from testifying fully and truthfully on redirect in response to cross-examination questions from NUC about Intercoastal's future rates should Intercoastal's application be granted.

7. Contrary to NUC's assertion in its Motion to Strike, it is not inconsistent with the Commission's prior rulings with respect to the testimony concerning Intercoastal's rate commitment should the Commission deny NUC's Motion to Strike and allow Mr. Forrester's redirect testimony concerning this topic. The Commission's prior rulings concerned Intercoastal's rebuttal testimony in response to the testimony of an NUC witness, not redirect responses from Mr. Forrester to questions asked of Mr. Forrester during cross-examination. NUC has opened the door to allowing this redirect testimony through its cross-examination, and Mr. Forrester's redirect testimony is within the scope of his cross-examination and may properly expand and modify upon those responses during redirect examination.

Testimony Regarding JEA's Consumptive Use Permit

8. NUC also objects in its Motion to testimony of Mr. Forrester pertaining to testimony offered at the Hearing which questioned whether JEA's Consumptive Use Permit allows for the provision of water to the portion of the Nocatee Development which lies in St. John's County. NUC objects based on Mr. Forrester's admission that he has not reviewed the permits themselves. And while Mr. Forrester makes no pretense otherwise that he has not reviewed JEA's Consumptive Use Permits, Mr. Forrester's redirect testimony simply commented upon the testimony by a witness from the St. Johns River Water Management District, Caroline Silvers, and not on the legal effect of the permits themselves.

9. Mr. Forrester's unavoidable absence at Hearing due to illness necessitated the

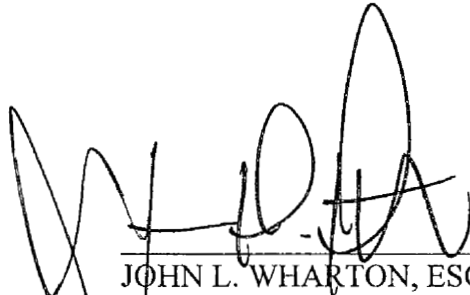
provision of the alternate method we are now operating under to ensure that his testimony would be accurately and fairly entered into the record without undue prejudice to Intercoastal. And while this procedure, in lieu of continuance, probably did hamper Intercoastal's preparation as well as the live presentation of Intercoastal's case before the full Commission, Intercoastal agreed to the process of entering the deposition of Mr. Forrester as his cross-examination, as though read and sworn, and the submission by Intercoastal of written redirect testimony in response to that cross-examination, also as though read and sworn. Similarly, Mr. Forrester is fully apprised of the testimony which took place at the Hearing and it is certainly permissible for him to comment on that testimony during his redirect examination. Here again, NUC seeks to have deposition questions and answers entered into the record as if Mr. Forrester were present at the Hearing for cross-examination, but seeks to have his answers during redirect examination stricken because he was not present at the Hearing and did not see first-hand the testimony upon which he is commenting. To force Mr. Forrester to limit his answers on redirect strictly to matters which took place prior to the Hearing, and to exclude from his comment testimony which took place at the Hearing, is to further handicap his testimony and subject Intercoastal to additional disadvantage in this proceeding. Again, certainly this was not the Commission's intention when the decision was made to move forward with the Hearing without Mr. Forrester's participation.

10. Intercoastal should not be forced to give up a key witness' ability to assess the testimony of the other witnesses involved in this proceeding, simply because he did not see them testify "live," rather than through transcript. In fact, had Mr. Forrester seen Ms. Silvers' damaging testimony "live," his response on redirect to the question about JEA's Consumptive Use Permit would probably have been quite a bit more aggressive with respect to JEA's questionable permit to

provide water to the portion of Nocatee which lies in St. John's County. The fact that Mr. Forrester has not reviewed JEA's Consumptive Use Permits is irrelevant to his ability to comment on the testimony of a witness who has significant knowledge of the effect of those permits. Accordingly, Mr. Forrester's redirect testimony is permissible and fully responsive to cross-examination testimony concerning those permits.

WHEREFORE, and in consideration of the above, Intercoastal respectfully requests that the Motion to Strike be denied in its entirety.

DATED this 6th day of June, 2001.



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CERTIFICATE OF SERVICE

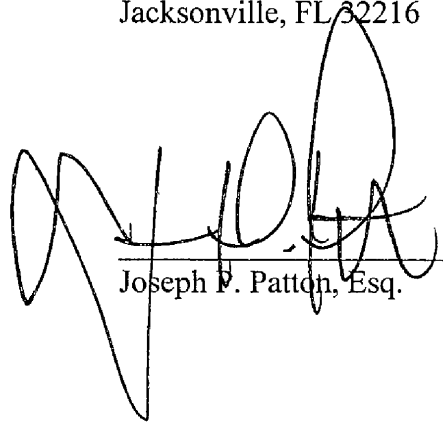
I HEREBY CERTIFY that a true and accurate copy of Intercoastal's Response in Opposition to Nocatee Utility Corporation's Motion to Strike has been furnished by facsimile and U.S. Mail to the following this 6th day of June, 2001:

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