

**STATE OF RHODE ISLAND
PUBLIC UTILITIES COMMISSION**

IN RE A & R MARINE CORP., d/b/a/

Docket No. 4589

PRUDENCE AND BAY ISLANDS TRANSPORT

**TOWN OF PORTSMOUTH’S OBJECTION TO A & R MARINE CORPORATION’S
“MOTION TO DISMISS OR STRIKE” and alternative “MOTION FOR SUMMARY
DISPOSITION”**

The Town of Portsmouth hereby objects to A & R Marine Corporation’s (hereafter “A & R”) motion to dismiss or strike the Town’s request for discounted ferry rates for municipal vehicles and passengers performing essential governmental services, and its alternative motion seeking “summary disposition.” These motions should be denied on both procedural and substantive grounds.

BACKGROUND

This proceeding involves what appears to be an unprecedented request to drastically increase rates charged for a lifeline ferry service to a part of the Town of Portsmouth. The Town moved to Intervene after it became known that the applicant’s projected need for a “six percent” rate increase has mushroomed into a one hundred and twelve percent rate increase. The Town’s motion to intervene, which was unopposed and approved, noted its interest in the proceeding and characterized the requested increase as excessive and unreasonable.

As an Intervenor with a recognized interest in the request pending before the Commission, the Town filed Direct Testimony, as well as Surrebuttal Testimony, that likewise opposed the

requested increase as excessive. In requesting rate relief for passengers and vehicles that perform essential governmental services, Portsmouth cited its unique characteristic as a ratepayer providing essential governmental services that benefit the applicant and other ratepayers, and requested the Commission order the utility to provide it with a ferry rate discount reflecting its unique role. No party disputed the characterization of the Town as a unique type of ratepayer, or that it provides essential governmental services to island residents and businesses, including the applicant. Nor could they, as such matters are beyond serious dispute.

As a result of all parties acquiescing to Portsmouth's claim of having a unique role, and special characteristics as a ratepayer of this utility, Portsmouth submits that it is to be distinguished from all other passengers using the ferry who do not expend public funds in furtherance of the utility's business and the public interest. Because of the unique and uncontested attributes of the Town with regard to the operation of A& R's service, Portsmouth submits that the Commission has ample legal authority to consider whether to grant or reject Portsmouth's request.

Portsmouth filed its testimony seeking a discount in ferry rates on March 2, 2016, over two months ago. It repeated such a request in the Surrebuttal Testimony it filed. Instead of raising the arguments now presented in a timely fashion, A & R instead chose to sit back and wait until about ten days before the hearing is set to commence (pursuant to an Order entered back in December, 2015) before filing a dispositive "Motion to Dismiss...or Strike." The late filing of A & R's Motion has barely allowed the Town a chance to respond before the hearing begins. Thus, to the extent A & R's arguments have any merit, and Portsmouth asserts they do not, such arguments have not been timely presented, and should be denied not only on substantive grounds, but also to avoid the proverbial "trial by ambush" and unfair prejudice to the Town that

would result from not being informed of a ruling on a dispositive motion until the hearing has already commenced.

ARGUMENT

I. A & R IS NOT ENTITLED TO SUMMARY DISPOSITION

While A & R has not stated the standard of review that applies to its “alternate” motion seeking a so-called “summary disposition,” the Commission’s Rules of Practice and Procedure do set forth the rules that apply to consideration of such a drastic remedy. Rule 1.15 entitled “Motions” contains a subsection entitled “Summary Disposition” which permits only “The Division or any Intervenor” to file a motion for summary disposition. Rule 1.15(e). A & R is clearly not one of the limited parties entitled by the Commission’s rules to seek a summary disposition, and accordingly its request must be denied on that basis.

Even if A & R was authorized by the operative rules of procedure to seek such relief it would have to be denied because of the existence of numerous disputed material facts, and because A & R is not entitled to such relief as a matter of law. No controlling legal precedent is cited by A & R as grounds for its request, because none exists.

II. A & R’s ARGUMENTS ARE FLAWED AND UNPERSUASIVE

AND SHOULD BE REJECTED.

A & R first goes to great lengths citing chapter and verse of various provisions of the RI General Laws that prohibit “discrimination” in rates charged by regulated utilities. But A & R then openly acknowledges that municipalities such as Portsmouth actually “do qualify” for

discounted utility rates under the very laws against “discriminatory” rates that the company cites as purported legal authority in support of its argument.

Since there is no dispute that “municipalities do qualify as valid exceptions” to laws intended to prevent unfair discrimination in rate setting, Portsmouth asserts that as a matter of law it at least qualifies for the special rates that the Commission may order a regulated utility to provide to “municipalities” for public purposes without violating the anti-discrimination provisions of law.

After reluctantly acknowledging that discounted rates to municipalities are in fact perfectly acceptable under RI law, A & R resorts to suggesting that the Commission is essentially beholden to the utilities it is charged with regulating. A & R’s position is that the Commission lacks the legal authority to order that the “municipal” exception apply to A & R’s rates – unless and until the utility tells the Commission whether it may approve such a request.

As purported support for the propositions that A & R is in charge and is the entity that controls the rates that may be charged to municipalities, and that the Commission may not interfere with the decisions the private company makes concerning such rates, A & R relies on three claims, i.e.: 1.) The regulated utility’s “belief” that granting special rates for public purposes would in its view be “unfair”; 2.) a 1993 Commission Order which found the Commission has the legal authority to approve special rates on a ferry servicing Prudence Island for Portsmouth employees and equipment; and 3.) a provision of the General laws entitled “Exceptions to Anti-Discrimination Provisions” (i.e., RIGL 39-2-5).

The first claim must be rejected out-of-hand because the “beliefs” of a regulated utility can never serve as a basis for restricting the powers of the Commission. The question at issue is

whether the Commission possesses the legal authority to Order special rates to be applied to municipalities performing governmental services, and in deciding this question the views and beliefs of a privately company are simply irrelevant. The “tail does not wag the dog” when it comes to regulating public utilities in Rhode Island, and such regulated utilities do not get to tell the Commission when it may order rates that it finds reasonable and appropriate after listening to the direct testimony, the cross-examinations, and reviewing all of the evidence produced at the hearing.

A & R’s second claim is similarly flawed. The nearly quarter-century old PUC Order cited by A & R is not binding precedent, and it should not be followed because it rests on an erroneous interpretation of law regarding municipal discounted rates for public purposes. It should be noted that in the proceedings involving ferry rates to be charged by the previous operator of ferries to Prudence Island the Division of Public Utilities and Carriers regrettably “proffered no direct case.” Still, without a case even being presented by the State, the Commission nonetheless ruled that different rates for special classes of ratepayers such as municipalities are indeed allowed under Rhode Island law.

A & R asserts that the Commission cannot even “consider” the propriety of discounted rates for municipalities because it has not proposed any such discounts. But that is not what the statute says, and A & R cannot amend the statute by adding terms to its liking. The statute’s language controls here, and it certainly does not contain any language precluding the Commission “from considering” discounted rates for special classes of ratepayers. Nor does the statute say the regulated utility must propose such discounts before the Commission may order them. In concluding that it could not order municipal discounts unless the applicant proposed them and the Division concurred the Commission obviously misread the statute, and also ignored its

plenary powers. As was correctly pointed out to the Commission about RIGL 39-2-5 by counsel for Prudence Ferry, Inc. in 2005 when it sought so –called “Tariff Advice” (in Docket No. 3656) (that would allow it to grant discounted rates to a special class of customers): “even though this subsection refers to the Division, under RIGL 39-1-1(c), most powers ‘to supervise, regulate, and make orders governing the conduct’ of public utilities are vested jointly in the Commission and the Division.” In terms of the extent of the Commission’s authority to govern rates charged to municipalities Prudence Ferry Inc.’s counsel’s interpretation of law was correct in 2005, and A & R’s counsel’s 2016 contrary interpretation of this provision is erroneous.

The General Assembly recognized that businesses offering to the public the public transportation of people are “affected with a public interest” (RIGL 39-1-1), and has explicitly vested this Commission with the “power and authority to supervise, regulate and make orders governing the conduct of companies offering to the public in intrastate...transportation services...” In this proceeding, Portsmouth seeks nothing more than the type of Order the Commission is clearly authorized to issue, and such request may certainly be “considered” without needing the permission of the regulated utility, or the Division.

CONCLUSION

For the reasons set forth herein, the Town of Portsmouth requests that A & R’s motion and alternate motion be denied.

Town of Portsmouth
By its Attorney

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CERTIFICATE OF SERVICE

I certify that a copy of the within Objection was sent to the Service List via e-mail on the 6th day of May, 2016.

/s/ Terence J. Tierney

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