STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: Interstate Navigation Company : Docket No. D-05-06

IHSF's POST-HEARING BRIEF

I.

INTRODUCTION

If nothing else has been established by more than seven years of warfare between Interstate Navigation (Interstate) and Island Hi-Speed Ferry (IHSF), it is that Interstate is the lifeline to Block Island and IHSF is an amenities based, discretionary service. Now, Interstate wants to become both.

Interstate's case is premised on the proposition that its core captured customer base is in "need" of high speed ferry service to Old Harbor, Block Island, because it does not use IHSF's service and because 35% of respondents to an Interstate survey would use a high speed ferry with an Old Harbor terminus, if one were offered. The fatal flaw in Interstate's case is that those passengers were not asked and did not respond that they would *not* use Interstate's service if they were *not* offered the high speed option.[1]

Contrariwise, in its own survey IHSF's passengers responded overwhelmingly that they would jump ship and use an Interstate fast ferry to Old Harbor, but would remain with IHSF if it provided high speed ferry service to that side of the island. Thus, the Division is left in the position of deciding whether to accede to the whims of a

[1] Interstate's survey instrument was never admitted as an Exhibit. IHSF has filed a motion to reopen the record for the limited purpose of admitting this crucial document.

minority, albeit a substantial one, of Interstate's customers and upset a carefully balanced administrative apple-cart, or simply allow the existing market to work out its seeming imbalances.

Interstate tries to bolster its case with the argument that it has lost ridership since IHSF and, most recently, BI Express began fast ferry service to the island. Interstate claims that *it* (not its customers) needs the fast ferry option, in order to compete with its neighbors. However, it correctly observes that since it is the lifeline service, unlike IHSF, the Division and the Commission will insulate it from the downside of direct competition, i.e., it will never be allowed to go out of business. So, in order to overcome this undeniable reality, Interstate has to wheel out the perennial threat that if it is not given its way, it will have to raise its rates.

To make matters even more complicated, IHSF has been caught in a competitive crossfire between Interstate and BI Express. IHSF's price-floor form of regulation was barely in effect two months, when it was exposed to predatory competition from BI Express in mid-July of 2004. BI Express began a passenger only, high-speed ferry service from New London to Block Island, Rhode Island, with a same day, adult, round trip fare of $25.00. IHSF's Commission-imposed rate floor is $26.00.

BI Express poses a serious, unfair, competitive threat to IHSF, because it provides its service with a foreign built high-speed ferry, which was re-flagged under the federal Wrecked Vessel Act. This vessel was purchased and repaired at a fraction of what it would cost to construct the same vessel in the United States today, dramatically lowering Block Island Express's cost of service, and allowing it to engage in predatory

pricing. This vessel also has nearly double the passenger carrying capacity of IHSF's vessel, *Athena*.

Prior to the start-up of BI Express in mid-July 2004, approximately forty eight (48%) percent of IHSF's passenger base was from the Connecticut – New York – New Jersey market. In July and August of 2005, which traditionally are IHSF's busiest months, IHSF suffered dramatic ridership losses. In July its ridership totals were down nineteen (19%) percent compared to 2003 and down sixteen (16%) percent compared to 2002. August's numbers were even worse. IHSF's ridership was down twenty six (26%) percent compared to 2003 and down twenty five (25%) percent compared to 2002.[2] IHSF's 2005 ridership numbers for those months were a repeat of the 2004 numbers. This confirms that those ridership losses are directly attributable to unfair competition from BI Express, which in turn is directly attributable to regulatory and market-imposed restrictions preventing IHSF from operating its service to Old Harbor and requiring that IHSF maintain at least a $10 ticket price differential over Interstate's rates.

Interstate seizes upon this and cynically argues that if IHSF fails, all the better for its business plan, since the segment of the public which has chosen to use IHSF's service will be forced to use its fast ferry. Yet out of the other side of its mouth Interstate piously denies that the intent of its plan is predatory, even though the impact most likely will be. That is the extraordinarily difficult context within which the Division must decide this case.

[2] This evidence was un-rebutted. Kunkel PFT, p. 4, ll. 16 – p. 5, l. 9, IHSF Exhibit 11.

II.

THE LEGAL CONTEXT

Interstate is before the Division in this matter seeking a new CPCN, because in 2003 the Rhode Island Supreme Court held as follows:

> [R.I.G.L.] § 39-3-4 permits only those carriers incorporated before April 30, 1954, to avoid the public hearing requirement before acquiring a CPCN. We do not, however, read that provision to permit the carrier to change *the scope and type of service* that is set out in its original certificate without demonstrating that such a change will benefit the public convenience and necessity.
>
> A high-speed ferry substantially alters *the kind of service* that water carriers can provide. It requires different equipment, it provides faster service and it operates on the water in an entirely different way than a standard ferry does. Because Interstate's original CPCN did not and could not have contemplated the new, high-speed technology, Interstate's use of such a *substantially different service* naturally would be a material alteration of the scope specified in its original CPCN. Furthermore, Interstate's original CPCN was written to be 'subject to such terms, conditions, and limitations as are now by law, or may hereafter be, attached to the exercise of the privileges granted herein.' Thus, to comply with both the terms of Interstate's initial CPCN as well as the requirements of § 39-3-3, Interstate must petition for a new certificate and cannot benefit from § 39-3-4 *because the new and substantially different technology is outside the original scope of Interstate's services*. Accordingly, we reverse the trial justice's decision permitting Interstate to avoid demonstrating that its entry into the high-speed market would serve the public necessity and convenience." (Emphasis supplied). Interstate Navigation Co. v. Division of Public Utilities, 824 A.2d 1282, 1288 (R.I. 2003).

The hearing officer has correctly interpreted this ruling as meaning that "slow-speed and fast-speed ferry services are distinctly different transportation services for CPCN purposes". In defining the central task before the Division, the hearing officer poses the issue to be decided as "whether it would be appropriate for the Division to consider the potential benefit to Interstate's slow-speed operation (and its related ratepayers) from Interstate's proposed fast-speed ferry service in the context of the necessity and convenience criteria?"

The simple answer to this question is: *no*, it would not be appropriate. Interstate's main argument that its passengers *need* high speed service because of competition from other fast ferries and in order to keep Interstate's lifeline rates stable, does not satisfy the public convenience and necessity standard. The more complicated reasoning behind this conclusion, however, requires a restatement of the body of law defining the public convenience and necessity criteria, as well as consideration of the factual circumstances in which courts of appeal and related agencies have found that the legal standard either has or has not been met.

A.

THE PUBLIC CONVENIENCE AND NECESSITY STANDARD DEFINED

The leading national case defining what public convenience and necessity means is Pan-American Bus Lines, 1 M.C.C. 190 (I.C.C. 1936). In that case the Interstate Commerce Commission construed what is meant by the terms "required by the present or future public convenience and necessity", as that terminology is used in the Federal Motor Carrier Act.[3]

Generally, the Commission ruled that the words "convenience" and "necessity" are used conjunctively and they are not synonymous, but must be given a separate and distinct meaning" Id. at 202-203; accord, Abbott vs. Public Utilities Commission, 48 R.I. 196, 136 A. 490, 491 (R.I. 1927). In defining these criteria Pan-American relied upon two previously established principals: 1) "[i]t is undesirable if not impossible to lay down any general rule by which it can be determined whether or not certificates of public

[3] Rhode Island appears to have been a leading jurisdiction in defining these criteria, in that many of the principals espoused by the Commission in Pan-American Bus Lines, were adopted by the Supreme Court nearly a decade earlier in Abbott vs. Public Utilities Commission, 48 R.I. 196, 136 A. 490 (R.I. 1927).

convenience and necessity should be issued … [e]very case must be decided in light of its own special facts"; and, 2) the purpose underlying these criteria "is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, *and to protect them from being weakened by … a competing line not required in the public interest*". (Emphasis supplied). Id. at 203.

After establishing these general rules, the Commission synthesized a definition of public convenience and necessity still followed today:

> The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; ***and*** whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. (Emphasis supplied). Pan-American Bus Lines, 1 M.C.C. 190, 203 (1936); accord, c.f., Abbott vs. Public Utilities Commission, 48 R.I. 196, 136 A. 490, 492 (R.I. 1927) (denying an appeal from and approving an order of the RIPUC denying a CPCN on the grounds it would threaten an existing carrier "to the public detriment").

Thus, it is part of the applicant's burden of proof to establish by competent evidence that its proposed operation or service will not endanger or impair the operations of existing carriers "contrary to the public interest" or "to the public detriment". Id.

Prior to the Pan-American decision, the Rhode Island Supreme Court had ruled that in passing upon the question of whether a proposed service both "tends to promote accommodation of the public" *and* "is reasonably required to meet a public need for such accommodation", "the Public Utilities Commission have taken a broad view" of the public interest. Abbott vs. Public Utilities Commission, 48 R.I. 196, 136 A. 490, 491 (R.I. 1927). The Court wrote:

> [i]n their decision entitled, In re Applications for Certificates to Operate Jitneys, dated June 30, 1922, they lay down the principle that, ***in the determination of whether public convenience and necessity require the operation*** of jitneys over a

> given route, what will conduce to ***the general public welfare*** is the objective sought. We approve that position of the commission. They are justified in considering the existing means of transportation, as to its substantial character and its probable permanence, also the investments of capital made by the owners of such existing means, the nature of the service that is being rendered, and, if such service is adequate, what will be the probable effect of admitting competition into a field now adequately served, and what effect such competition will probably have upon the receipts of existing lines of transportation, and as to whether, in the face of further competition, the adequacy of the existing service will be continued. Id.

Therefore, under longstanding Rhode Island law, it is not enough for a CPCN applicant to prove that its proposed service will accommodate its existing or future customers. The desires of the potential users of its proposed service are not the *sina qua non* of the applicant's case. The applicant also has the burden of proving that the introduction of its service will not be inimical to the broader public interest, or "general public welfare", which includes the investment in existing carriers. Abbott vs. Public Utilities Commission, 48 R.I. 196, 136 A. 490, 491 (R.I. 1927) (CPCN denied). If the applicant fails to satisfy this burden, the desires of its potential users alone are irrelevant to resolution of the public convenience and necessity question and the application must be denied. Id. at 492. Abbott remains the controlling law in this state today on this issue.[4]

Both the Interstate Commerce Commission and the Rhode Island state and federal courts have recognized that the obligation to protect the investments of existing carriers,

[4] A lot of hay has been made from the Rhode Island Supreme Court's dicta in Breen **v.** Division of Public Utilities, 59 R.I. 134, 194 A. 719 (R.I. 1937), that: "[p]ublic service is the test in granting a certificate of convenience and necessity … it is said that: '[p]rotecting existing investments, however, from even wasteful competition must be treated as secondary to the first and most fundamental obligation of securing adequate service for the public'." However, unlike this case, the applicant in that case proved both that the existing public service was inadequate and that the impact upon the existing taxi owner was a non-issue, since he was absent at times from the geographic area in which the applicant proposed to operate, leaving it with *no* taxi service.

is not an end-all. The Commission has recognized "the desirability, *where possible*, of encouraging competitive circumstances", when considering the grant of a CPCN. (Emphasis supplied). Valley Transit Company, Inc., 128 M.C.C. 887, 917 (S.T.B.) (CPCN granted).[5] The Rhode Island Supreme Court has echoed this sentiment in affirming the grant of a CPCN to a loan and investment company, writing "[i]t has been held that the Interstate Commerce Commission, in granting a certificate of public convenience and necessity, may consider such factors as anti-monopoly prophylaxis", citing Short Line, Inc. vs. United States, 290 F.Supp. 390 (D.R.I. 1968) (CPCN granted). Domestic Safe vs. Hawksley, 111 R.I. 224, 301 A.2d 342, 344 (the rising demand for credit services, coupled with a monopolistic trend in satisfying demand warranted finding that competition could improve services, lower rates and reduce the threat of monopolies – CPCN granted).

But those cases are inapposite here, since the unrebutted, competent evidence shows that the granting of Interstate's CPCN request would result in the unlawfull reconstitution of a monopoly.[6] Also, the difference between the findings in those cases and this matter is that when IHSF's CPCN was granted in 1998, there were *no* high speed ferries to Block Island, whereas the evidence now shows there are *too many*, creating a market with "an unsustainable level of excess capacity … characterized by excess competition and wasteful competition".[7]

---

[5] The date this decision was reported is unavailable, but it refers to hearings by the Commission in 1974 and is reported as a decision of the Surface Transportation Board, which replaced the ICC, and is dated February 26, 1975.
[6] Kunkel Rebuttal Testimony, p. 4, ll. 10-14, p. 6, l. 16 – p.7, l. 2, IHSF Exhibit 15.
[7] Kunkel PFT, p. 3, ll. 11-12, p. 5, l. 10 – p.6., l. 7., IHSF Exhibit 11.

III.

ARGUMENT

A.

INTERSTATE HAS FAILED TO PROVE THAT ITS PROPOSED FAST FERRY IS REASONABLY REQUIRED TO ACCOMMODATE THE PUBLIC NEED

Interstate may arguably have proven that there is a need for fast ferry service to Old Harbor, Block Island, but it has failed to meet its burden of proving that *its* proposed service is *reasonably* required to accommodate that public need. The reason the first prong is only arguably satisfied is that its survey did not ask and its respondents did not reply that they would *not* use Interstate's service if they were *not* offered the high speed option by Interstate. Ironically, IHSF's own survey tends to show the need for Old Harbor fast ferry service, but it also shows that the majority of respondents to that survey would prefer that IHSF provide it. Therefore the evidence is, at best, mixed as to the true public need.

However, Interstate's evidence falls miserably short on the second prong of the public convenience test, since it has failed to prove by competent evidence that its introduction of a high speed service would *reasonably* accommodate the purported public need. That is because Interstate has not met its burden of proving that the introduction of its service will not be inimical to the broader public interest, or "general public welfare", which includes the investment in the existing high speed carrier, IHSF. Abbott vs. Public Utilities Commission, 48 R.I. 196, 136 A. 490, 491 (R.I. 1927).

Walter Edge gave gratuitous and unsupported testimony that he believed that Interstate's proposed fast ferry service "will have more of a positive impact on

Interstate's current operations … than it will impact Hi-Speed Ferry's operations".[8] Then, in rebuttal testimony Mr. Edge made the more credible acknowledgment that "Interstate may actually get more revenue should IHSF customers chose (*sic*) to travel to Old Harbor on Interstate's fast ferry".[9] But, when faced with the undeniable empirical evidence from IHSF's passenger survey that IHSF would lose 57% of its existing ridership to an Interstate, Old Harbor, fast ferry, as well as Mr. Kunkel's conclusion that this would "result in the financial collapse" of IHSF, Edge made an even more incredible change of course.[10] In sur-rebuttal testimony, Edge agreed that IHSF's financial collapse is a "possible result" of Interstate's business plan, but argued that while this may not be Interstate's intent, such a result will financially benefit its lifeline ratepayers, which will promote the public interest.[11]

If this line of thinking becomes precedent, then the rule will be that predatory market entry promotes the general public welfare, regardless of the investments made in existing carriers by their owners and the public prior to the introduction of the new service, as long as there is some economic benefit to some segment of the public.[12] This

---

[8] Edge PFT p. 15, 11. 5-7, Interstate Exhibit 4. In fact, Edge admitted on the stand in cross-examination that Interstate's proposed service would compete with IHSF and that he was not even qualified to testify as an expert regarding the impact of that competition. Transcript (TR) 6/13/05, p. 119, l.24 – p. 121, l. 10.

[9] Edge Rebuttal Testimony p. 2, 11. 11-14, Interstate Exhibit 10.

[10] IHSF Exhibits 18 and 19. Kunkel Rebuttal Testimony, p.4, ll. 10-13, IHSF Exhibit 15.

[11] Edge Sur-Rebuttal Testimony p. 9, 11. 1-28, Interstate Exhibit 12.

[12] Mr. Kunkel's testimony that Interstate's entry into the fast ferry market would be predatory, by both economic definition and theory, was not rebutted by Interstate (because it did not present evidence from a competent witness to the contrary. Kunkel Rebuttal Testimony, p. 5, l. 1. – p. 7, l. 5., IHSF Exhibit 15. Even Dr. Stutz, who at times sounded more like Interstate's advocate than the public's, had to admit on cross-examination that predatory market entry was "one possible reason" for Interstate's petition, although he though the evidence for it was "mixed". TR 6/15/05, p. 54, ll. 9-14, p. 56, ll. 4 – 24. Even Dr. Stutz could not agree with Interstate's counsel on cross-

would run contrary to at least a century of case law and decisions by federal and state administrative agencies to the contrary.

B.

INJECTING ADDITIONAL COMPETITION INTO THE BLOCK ISLAND FAST FERRY MARKET WILL BE INIMICAL TO THE GENERAL PUBLIC INTEREST

Contrary to the unqualified spin Interstate's witnesses put on its business plan, e.g., "we will not be attempting to market ourselves to IHSF's well-established customer base",[13] Mr. Kunkel testified clearly and convincingly that IHSF and Interstate would be direct competitors.[14] His unrebutted opinion was that: [t]he definition of direct competitors is two or more firms supplying a product or service to the same market (in this case fast ferry service to Block Island), where the product or service offered is characterized largely of the same attributes at or about the same price (and quality) and the competing firms draw their customers from largely the same geographic area. Based on this definition, IHSF and Interstate Navigation would be direct competitors."[15] Any doubt about this fact was erased by the results of IHSF's passenger survey.

Similarly, Mr. Kunkel's clear and unequivocal testimony was that if Interstate were allowed to offer fast ferry service, it would result in the financial collapse of IHSF.[16] While the two economists who testified disagreed as to whether Interstate's

---

examination that the "needs" of Interstate's passengers, as expressed in its survey, alone were a "good, solid, valid" reason for granting it a fast ferry CPCN. He agreed that the survey was evidence of public need "[o]nly because it's accompanied by a calculation that shows it would make a positive contribution to [Interstate's] bottom line". TR 6/15/05, p. 81, l. 22 – p. 82, l. 15.

[13] Susan Linda PFT, p. 10, ll. 12-13, Interstate Exhibit 2.

[14] Kunkel PFT, p. 3, l. 16 – l9, IHSF Exhibit 11.

[15] Kunkel PFT, p. 3, l. 21 – p. 4, l. 3, IHSF Exhibit 11.

[16] Kunkel Rebuttal Testimony, p.4, ll. 10-13, IHSF Exhibit 15.

game plan was predatory by design, Dr. Stutz had to agree that this was a real possibility and that IHSF's demise was at least one of the potential results of an Interstate fast ferry service.[17] But, once again, Dr. Stutz's equivocation on this point was empirically belied by IHSF's passenger survey results.

In the end those survey results destroy Interstate's case, as a matter of law. In the ICC case which resulted in the Shortline decision by the Rhode Island federal court, the Commission wrote:

> [i]n a proceeding of this nature an applicant has the burden of demonstrating the existence of a public need for the proposed operation before we may authorize a grant of common carrier authority. In connection with this requirement, the existing operations of opposing carriers become an important element for our consideration. This, however, cannot be the limit of our inquiry *** it is necessary that we consider a balanced transportation 'system' within the scope of the application and that we evaluate factors such as ***the existence of sufficient carrier capacity to encourage competition***, incentive for real innovation and improvement in services to the public, ***and constraint against monopolistic … operations***. (Emphasis supplied). Almeida Bus Lines, Inc., 106 M.C.C. 317, 323-324 (1967), affirmed sub nom, Short Line, Inc. vs. United States, 290 F.Supp. 390 (D.R.I. 1968).

When these factors are analyzed in the context of the evidence in this matter it is clear that they compel the denial of Interstate's application. Mr. Kunkel testified that the Block Island high speed ferry market is characterized by "extraordinary excess capacity" and he convincingly quantified the excess.[18] Dr. Stutz tried to avoid this issue, but was compelled to agree that excess capacity existed and that Mr. Kunkel's capacity calculations were correct.[19] Dr. Stutz testified that "qualitatively" he had a "problem"

[17] TR 6/15/05, p. 54, ll. 9-14.
[18] Kunkel PFT, p. 3, ll. 11-12, p. 5, l. 10 – p.6., l. 7., IHSF Exhibit 11.
[19] TR 6/15/05, p. 55, ll. 16-19.

with agreeing that it was extraordinarily excessive, but he would not "[take] the opposite opinion", i.e., that the market was not "intensely competitive".[20]

The point, however, is that the evidence shows there is already too much capacity in the Block Island ferry market and adding more will have anti-competitive effects. It will eliminate Interstate's most immediate indirect competitor and will reconstitute its Rhode Island geographic monopoly on Block Island ferry service.[21] Therefore, as matter of law, granting Interstate's application is contrary to the public interest.

The facts and the evidence here are completely inapposite to the Almeida case, where the Commission found: "[w]e are satisfied that the protestants' operations are not economically marginal such that the interest of the public as a whole would be adversely affected by a grant to applicant of a somewhat competitive operation". Almeida Bus Lines, Inc., 106 M.C.C. 317, 327 (1967) (CPCN granted). The uncontraverted evidence here is that IHSF's operation has become "economically marginal", as a result of it being caught in the competitive crossfire between the Linda-family companies.[22] What is equally true is that the credible evidence demonstrates that Interstate will become IHSF's direct competitor, not a "somewhat competitive operation".[23]

There are other striking non-parallels between Almeida and this case. In Almeida the Commission found that: "[t]he limited competition that will be established by a partial grant of authority will provide [the public with] contrasting schedules". Id. at 327. Here, the evidence is that Interstate's proposed schedule would provide faster service

[20] TR 6/15/05, p. 55, l. 8 – p. 56, l. 24.
[21] Kunkel Rebuttal Testimony, p. 4, ll. 10-14, p. 6, l. 16 – p.7, l. 2, IHSF Exhibit 15.
[22] Kunkel PFT, p. 4, ll. 16 – p. 5, l. 9, IHSF Exhibit 11. IHSF Response to Interstate Data Request 1-57, IHSF *Sealed* Exhibit.
[23] Kunkel PFT, p. 3, l. 21 – p. 4, l. 3, IHSF Exhibit 11.

from Galilee, to the preferred Block Island port, Old Harbor, with a larger capacity vessel, just fifteen minutes before IHSF's high season noon departure, one of its busiest runs.[24] The unrebutted evidence shows that this alone would cause IHSF's ridership to evaporate quickly, since IHSF passengers will simply adjust their travel plans by a few minutes to take advantage of the added convenience of arriving in and departing from Old Harbor.[25] IHSF proffered unrebutted evidence that "[w]ith the hit IHSF has already taken from BI Express's high speed service from New London, it would not take a large shift of IHSF's passenger base, percentage-wise, for IHSF's service to become economically unviable", narrowing the public's options once again to a sole source provider.[26]

In Almeida it was significant that: "[i]n the past, protestant's have enjoyed a monopoly … and their operations have many features that will enable them to compete effectively and to retain the patronage of that part of the traveling public represented by those witnesses who expressed their satisfaction with existing service". Id. It is a profound understatement to say that IHSF's passenger survey speaks for itself on the

[24] Interstate-IHSF Comparative Schedule, Interstate Exhibit 9.
[25] IHSF Response to Interstate Data Request 1-52, IHSF Exhibit 14.
[26] Id. In fact, Frederick Nolan credibly testified that in his experience with BHC's Provincetown – Boston high speed service, passengers who are offered the same service to the same destination by different companies "typically take whatever boat is most convenient for them and meets their time frame best", even if the two companies do not operate from the same pier. TR 6/22/05, p. 106, l. 14 – p. 107, l.16. He also opined that "I see this, quite honestly, as nothing more than Interstate replacing the Nelseco with a high speed boat and at the point that they do that [,] then they roll it into their operation, it becomes blended with their entire operation and depending on where they end up relative to rate blended schedules against our schedule I think it makes it very difficult for us to survive after the issuance of a certificate *** [w]e're talking about Interstate's overall aggregate schedule competing against us in my opinion in an unfair fashion". TR 6/22/05, p. 94, l. 4 – 15, p. 109, ll. 5-7.

point of retaining patronage.[27] Moreover, Interstate is the pre-existing monopolist here, not IHSF.

In a later decision citing circumstances similar to Almeida, the Commission concluded: [n]ew competition appears to be the *only* means to assure the public of the provision of [the service applied for there] *** this innovation can only be salutory (*sic*)." Valley Transit Company, Inc., 128 M.C.C. 887, 922 (I.C.C. ____). The evidence is just the opposite here. IHSF could be given access to Old Harbor and a grant to Interstate will have anything but a salutary effect.

In another case, the Commission capsulated the issue of whether competition would promote public convenience and necessity as follows: "[i]n essence, the question is whether the advantages to those members of the public that would use the proposed service out weigh the disadvantages, real or potential, to existing services (and those who depend upon them) that may result". Western Mass. Bus Lines, Inc., 118 M.C.C. 74, 82 (I.C.C. 1973) (CPCN granted), quoting All American Bus Lines, Inc., 18 M.C.C. 755, 776-777 (1939). The Commission concluded there that: "a grant of the authority sought will make available to those members of the traveling public a usable … service and inject into the market an element of effective competition *which is now lacking*". (Emphasis supplied). Id. at 82-84.

The evidence here is irrefutable that the disadvantages to IHSF and its customers of an Interstate fast ferry would be overwhelming, compared to the advantage gained by Interstate's clientele. The evidence is that the Block Island fast ferry market is already characterized by wasteful competition and that injecting another carrier into the mix will

[27] IHSF Exhibits 18 and 19. Kunkel Rebuttal Testimony, p.4, ll. 10-13, IHSF Exhibit 15.

only exacerbate the existing market dynamics between existing direct and indirect competitors.[28]

In Valley Transit Company, Inc., supra, the Commission concluded that: "applicant's service would be compatible with the existing service ***rather than directly competitive*** since basically each competing carrier would be offering ***a different type of … service*** designed to attract ***two different groups of patrons*** who are ***interested in two different types of service***". Valley Transit Company, Inc., 128 M.C.C. 887, 926 (I.C.C. ____). It goes without further recitation of the evidence that those are not the facts here.

C.

INTERSTATE'S APPLICATION IS MOTIVATED BY THE DESIRES AND NEEDS OF ITS MANAGEMENT AND NOT A TRUE PUBLIC NEED

It should not be forgotten that desire of Interstate's management to test the high speed ferry waters goes back nearly a decade, but that IHSF understood the true need and came forward with a business plan while Interstate tarried.[29] Now, Interstate acknowledges that it missed the boat and it was wrong when it took the position that there was no need for high speed ferry service to Block Island. One thing is true, Interstate missed the boat. As Mr. Kunkel testified, the window of opportunity for an additional high speed carrier to Block Island was closed by the introduction of direct competition

[28] Kunkel PFT, p. 3, ll. 11-12, p. 5, l. 10 – p.6., l. 7., IHSF Exhibit 11.

[29] In re Island Hi-Speed Ferry, LLC, DPUC Docket 98-MC-16, Report and Order, pp. 36-37, 42-43. In fact, the Division concluded in that docket that "while Interstate was clearly knowledgeable about the dynamics of high speed ferry service, it appears from the company's actions and the evidence in this proceeding, that high speed ferry service would likely never be introduced [from Galilee to Block Island] *but for* the attempts of [IHSf]". Id. at 42-43.

from BI Express and indirect competition from Vineyard Fast Ferry.[30] Interstate's not-so-subtle response to this is that IHSF should have to pay the penance for its belated mea culpa. That is not only unfair and inequitable, it makes for bad public policy.

In his pre-filed testimony Mr. Kunkel made the most compelling case for why Interstate's proposed venture would make for both bad business and bad public policy:

> Regardless of the market, entry in the face of excess capacity and a highly competitive and seasonal environment (especially entry which is capital intensive) is irrational and eventually extremely wasteful. Perhaps the preeminent economist, Paul Samuelson, provided the best answer when he wrote about why, on occasion, entry takes place in a market characterized by excess capacity and wasteful competition. He writes that entry occurs "Apparently, partly out of ignorance and partly out of misplaced hope." The market realities, which are irrefutable, are the following: (1) the fast ferry market to Block Island is saturated, as evidenced by excess capacity and wasteful competition; (2) the market is subject to passenger base leakage due to the Vineyard Fast Ferry operation; (3) the entry by Interstate Navigation is capital intensive; (4) failure has very dire consequences for the lifeline mono-hull service; and (5) the "window of opportunity" has closed. In addition, the management of Interstate Navigation could pursue more logical and less risky strategies to make themselves more competitive by simply offering a better service, re-powering existing vessels in the fleet, to make them faster and offering a loyalty incentive program. All of which would certainly be in the public interest and which Interstate is already doing with ratepayer dollars, i.e., the re-powering and refitting of the *Carol Jean*. Also, if, as I understand it to be, the DPUC's legal mandate is to concern itself primarily with the public need, the most economically rational and efficient means of satisfying it would be to simply allow the incumbent fast ferry carrier to travel to Old Harbor instead of New Harbor, particularly in light of the irrefutable fact that IHSF has excess passenger capacity. (Footnote omitted).[31]

Additionally, Interstate's entire case depends upon the ability to charge a rate of $20 just to break even, and a rate in excess of $20, in order to have the proposed public benefit of subsidizing its lifeline rates.[32] This would require a major unprecedented departure from the traditional rate-base, rate-of-return, methodology the Commission has used over several decades to set Interstate's rates. However, Mr. Edge also admitted in

[30] Kunkel PFT, pp. 7, IHSF Exhibit 11.
[31] Id. at pp. 7-8.
[32] TR 6/13/05, p. 201, l. 12 – p.202, l. 9.

questioning by the Hearing Officer that there was a possibility that the Commission would not approve its proposed $29 rate; that it might, instead deregulate all Block Island fast ferry rates, in order to let the market work itself out; in which case it was possible IHSF would lower its fares to protect its market share; which in turn could cause Interstate to lower its rates; which would decrease the cross-subidization of its passenger rates and defeat its business plan.[33] Not only is that a mouthful, it is a recipe for disaster.

D.

IF, CONTRARY TO THE EVIDENCE, THE DIVISION FINDS THAT INTERSTATE HAS MET ITS BURDEN OF PROOF, THEN IT MUST PLACE CONDITIONS ON INTERSTATE'S CPCN

Although there has been significant debate and second-guessing since 1998 as to whether the Division should have conditioned IHSF's CPCN on approval of a $26 adult roundtrip rate by the Commission, based upon the evidence in this case, any grant of a CPCN must be conditioned upon approval by the Commission of a at least a $29 rate for Interstate.

Alternatively, if IHSF is not able to gain access to an Old Harbor dock, Interstate's CPCN should be conditioned on approval of some higher rate, which in the sole discretion of the Commission would create a sufficient differential to protect IHSF from predatory competition by Interstate. Additionally, Interstate's CPCN should be conditioned upon the filing of a schedule with its morning and mid-day runs out of Galilee leaving fifteen minutes after IHSF's scheduled runs.[34]

[33] TR 6/13/05, p. 176, l. 1 – p.182, l. 8.
[34] TR 6/22/05, p. 95, l. 18 – p.96, l. 4 .

E.

IF, CONTRARY TO THE EVIDENCE, THE DIVISION FINDS THAT INTERSTATE HAS MET ITS BURDEN OF PROOF, THEN IT MUST RESCIND THE CONDITIONS PLACED ON IHFS' CPCN IN DOCKET 98-MC-16

The credible evidence in the record is that IHSF cannot survive direct competition from Interstate, unless the playing field is leveled. This will require rescission of all of the conditions placed on its CPCN in Docket 98-MC-16, with the further stipulation that the Division imposed $26 price floor should be automatically rescinded if the Commission deems that to be necessary in any Interstate fast ferry rate case. The Division's Public Advocacy Section agrees with such an approach, with the exception that it reserves the right to address changes in IHSF's price floor in the Commission.[35]

IV.

CONCLUSION

Interstate has failed to meet its burden of proving that a grant of its application will not be inimical the general public welfare. The evidence shows that injecting additional competition into the Block Island fast ferry market will be contrary to the public interest. At best, Interstate has proven that its passengers would use a high speed service to Old Harbor, but that there is no genuine public need for one. Its business plan, which is allegedly only intended to cross-subsidize its lifeline rates, is predatory by economic definition, because of the circumstances under which it seeks to enter the market. That plan will result in the financial collapse of IHSF and the evidence in that regard is uncontraverted. Interstate's plan is also a house of cards, which depends

[35] Division Response to IHSF Data Requests 1-1 and 1-2, IHSF Exhibit 16.

entirely upon its ability to charge rates which would be the product of a major unprecedented departure by the Commission from the traditional ratemaking methodology it has applied to Interstate for decades.

For all of the foregoing reasons, Interstate's application for a fast ferry CPCN should be denied.

ISLAND HI-SPEED FERRY, LLC
By its Attorneys,
HAGOPIAN & HAGOPIAN

_____

Mark J. Hagopian, Esq. (#3281)
Jon G. Hagopian, Esq. (#4123)
HAGOPIAN & HAGOPIAN
60 South County Commons Way
Suite G-5
South Kingstown, RI 02884
(401) 783-9787
(401) 783-9977 (Fax)

CERTIFICATION

I hereby certify that I mailed a true copy of the within "Post-Hearing Brief" by regular mail, postage pre-paid on the _____ day of September, 2005, **AND SERVED IT ELECTRONICALLY,** to and upon the following:

Michael R. McElroy, Esq.
Schacht & McElroy
P.O. Box 6721
Providence, RI 02940-6721

Merlyn P. O'Keefe, Esq.
Packer & O'Keefe
1220 Kingstown Road
Peace Dale, RI 02879

Paul Roberti, Esq.
Assistant Attorney General
150 South Main Street
Providence, RI 02903

C:_FILES\CLIENTS\BI-FERRY\INTERSTATE.HSF.DPUC\ IHSF.Post-HearingBrief.4.doc