

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888**

IN RE: **Docket No. D-06-51**
Petition By Interstate Navigation Company For Authority to
Borrow \$5.6 Million.

Docket No. D-06-53

Petition By Interstate Navigation Company For Approval to:

- (1) Purchase the Rhode Island Assets Of Island Hi-Speed Ferry, LLC and Lease of the M/V Athena to Island Hi-Speed Ferry, LLC;
- (2) The Elimination of all Restrictions on Interstate Navigation Company's Fast Ferry CPCN;
- (3) The Elimination of all Restrictions on Island Hi-Speed Ferry, LLC's Fast Ferry CPCN;
- (4) Transfer Of Island Hi-Speed Ferry, LLC's Fast Ferry CPCN to Interstate and Approval to Continue to Hold the Island Hi-Speed Ferry, LLC CPCN in Abeyance (dormancy);
and
- (5) To Continue to Hold the Newport Leg of Interstate Navigation Company's Fast Ferry CPCN in Abeyance (dormancy).

REPORT AND ORDER

I. Travel

On December 6, 2004, the Interstate Navigation Company, 14 Eugene O'Neill Drive, New London, Connecticut ("Interstate"), filed an application with the Rhode Island Division of Public Utilities and Carriers ("Division") seeking authority to operate as a seasonal "fast ferry" water carrier of passengers and freight between (1) Point Judith and Old Harbor, Block

Island; and (2) Newport and Old Harbor, Block Island. The matter was docketed as Division Docket No. D-05-06.

Following the docketing of Interstate's application, the Division received motions to intervene from the town of New Shoreham ("New Shoreham"); the town of Narragansett ("Narragansett"); and Island Hi-Speed Ferry, LLC ("IHSF").¹ The Division's Advocacy Section ("Advocacy Section"), an indispensable party, also entered an appearance in the docket.

After a lengthy discovery phase, the Division subsequently conducted five public hearings in the docket, on June 13, 14, 15 and 22, and July 11, 2005. After briefs were submitted, the Division issued a final report and order in the docket on January 23, 2006.² In its report and order, the Division found that Interstate had adequately demonstrated that it is fit, willing and able to provide high-speed ferry services between Point Judith, Block Island (Old Harbor) and Newport. The Division additionally found that the "public convenience and necessity" required Interstate's proposed fast ferry services between Point Judith, Block Island (Old Harbor) and Newport.

In the interest of promoting continued coexistence, the Division also identified several licensing restrictions and regulatory measures that the Division believed would facilitate IHSF's efforts to coexist with Interstate. The Division adopted these restrictions and protective measures "as an initially crafted safety net", and indicated that it would take additional steps

¹ Interstate never objected to the intervention motions and all the movants ultimately became parties in the case.

² Order No. 18506.

to ensure the continued coexistence of these two water carrier companies as future circumstances warranted. Specifically, the Division's decision imposed the following three restrictions on Interstate's approved certificate of public convenience and necessity ("CPCN"):

- a. *Interstate shall adhere to its filed plan to operate three trips per day between Point Judith and Old Harbor and three trips per day between Newport and Old Harbor;*
- b. *Interstate's three departure times from Point Judith shall be 8:15 AM, 12:20 PM and 5:30 PM; and*
- c. *Interstate is prohibited from marketing its fast ferry service to IHSF's customer base.*

Subsequently, on April 6, 2006 Interstate filed a motion with the Division wherein Interstate requested "a one-year amendment to its fast ferry certificate..." Interstate filed the motion as a post-decision pleading in Docket No. D-05-06.

In its motion, Interstate stated as follows:

"IHSF will not be operating from Point Judith to Block Island in 2006. Instead, IHSF has agreed to lease its fast ferry vessel the M/V Athena to Interstate. Therefore, in 2006 Interstate wishes to operate a fast ferry between Point Judith and Old Harbor only. Interstate plans to fill the void created by IHSF's cessation of fast ferry service to Block Island from Point Judith by providing fast ferry service under Interstate's new CPCN. However, to fill that void, Interstate needs its CPCN amended for the summer of 2006 (1) to eliminate the restriction on the number, timing and marketing of fast ferry runs between Point Judith to Old Harbor, and (2) to hold in abeyance the Newport to Block Island leg of the new CPCN.

*(Conventional ferry service by Interstate between Newport and Block Island will continue). Therefore, Interstate requests that the restrictions set forth in Report & Order # 18506 be lifted and amended..."*³

In support of its motion, Interstate proffered a "stipulation" that was signed by all the parties who originally participated in its original CPCN application proceeding in Docket No. D-05-06, supra. The signatories consisted of Interstate, IHSF, the Advocacy Section, New Shoreham, and Narragansett. Additionally, although not a party in the underlying case, the City of Newport also signed the agreement.⁴

In a related filing, on April 10, 2006, IHSF filed a petition with the Division wherein it sought authority from the Division to hold its CPCN "in dormancy for a period of one year, from May 15, 2006 up to and including May 15, 2007."⁵ The Division docketed IHSF's petition and assigned the designation Docket No. D-06-16. In support of its motion, IHSF proffered a separate "stipulation" that was also signed by all the parties who originally participated in Interstate's original CPCN application proceeding in Docket No. D-05-06.⁶

Also on April 10, 2006, Interstate and IHSF filed a joint petition with the Division wherein the parties requested "...that the Division approve a Time Charter of the Motor Vessel *Athena* from IHSF to Interstate, for the

³ Interstate Exhibit A, Docket No. D-05-06

⁴ Interstate Exhibit C, Docket No. D-05-06.

⁵ IHSF Exhibit 1, Docket No. D-06-16.

⁶ IHSF Exhibit 2, Docket No. D-06-16.

period May 24, 2006 through October 11, 2006.”⁷ The petition was filed pursuant to the provisions of R.I.G.L. §39-3-24. The Division docketed the joint petition and assigned the designation Docket No. D-06-17. In further support of their joint petition, Interstate and IHSF proffered a separate “stipulation” that was again signed by all the parties who originally participated in Interstate’s original CPCN application proceeding in Docket No. D-05-06.⁸

Due to the obvious connections between the three filings and in the interest of administrative economy, the Division consolidated the three filings into one adjudicative proceeding. A consolidated “Notice of Public Hearing” was published in the *Providence Journal* on April 21, 2006 and the Division conducted a public hearing on May 1, 2006. No one appeared at the hearing in opposition to the motion and petitions filed by Interstate and IHSF.

The Division subsequently found the foregoing motion and petition filings in the public interest and approved each, as filed, through a report and order issued on May 5, 2006.⁹

Subsequently, on August 25, 2006, Interstate filed a petition for approval to borrow \$5.6 Million from the Washington Trust Company (“WTC”). The petition was filed in accordance with the requirements

⁷ Joint Exhibit 1, Docket No. D-06-17.

⁸ Joint Exhibit 3, Docket No. D-06-17.

⁹ See Order No.18597.

contained in R.I.G.L. §39-3-15, et. seq. The matter was docketed as Division Docket No. D-06-51.

In its petition, Interstate explained that the requested borrowing was necessary in order to facilitate Interstate's proposed purchase of IHSF's Rhode Island fast ferry business. The proceeds from this loan were to be used by Interstate to purchase the entire Rhode Island operation of IHSF, which includes the purchase of the *M/V Athena*, the IHSF CPCN to operate between Point Judith and Block Island (New Harbor), the IHSF customer list, the IHSF berthing permit in Point Judith, and a perpetual non-compete agreement, at a total cost of \$5,612,500.¹⁰

On August 31, 2006, Interstate filed another petition, in which it aggregately requested the following additional approvals:

1. Interstate requested approval under R.I.G.L. §§39-3-24 and 39-3-25 of Interstate's purchase of IHSF, including, but not limited to, the *M/V Athena*, the IHSF CPCN, and all other assets of IHSF for a sum of \$5,612,500.¹¹

2. Observing that because IHSF will no longer be operating a high speed ferry from Point Judith to Block Island, and because the restrictions imposed on Interstate's fast ferry CPCN were intended to protect IHSF, Interstate also requested the elimination of all restrictions on Interstate's fast

¹⁰ *Id.*, p. 3.

¹¹ Interstate Exhibit 1 (Docket No. D-06-53), pp. 1-2.

ferry CPCN, including, but not limited to, restrictions relating to scheduling and marketing;¹²

3. Additionally observing that because the restrictions on IHSF's fast ferry CPCN were imposed to protect Interstate, the lifeline carrier, and because IHSF would no longer be operating, and Interstate would now own IHSF's fast ferry CPCN, Interstate opined that the restrictions were no longer necessary and should be eliminated;¹³

4. Interstate also requested that IHSF's fast ferry CPCN be transferred to Interstate and that the IHSF CPCN being transferred (Point Judith to New Harbor) continue to be held in abeyance (dormancy);¹⁴ and

5. Interstate requested that the Newport leg of its fast ferry CPCN continue to be held in abeyance (dormancy).¹⁵

Due to the obvious connections between the two filings, and, again in the interest of administrative economy, the Division consolidated the two filings into one adjudicative proceeding. A consolidated "Notice of Public Hearing" was published in the *Providence Journal* on September 11, 2006 and the Division conducted a public hearing on October 2, 2006.

On the morning of the public hearing, the parties jointly proffered a stipulated agreement that addressed each of the issues presented in these consolidated dockets. Interstate, IHSF and the Advocacy Section executed

¹² *Id.*, p. 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

the agreement.¹⁶ The terms and conditions of the stipulated agreement are, in pertinent part, provided below:

Section 1. *Interstate may obtain financing in the amount of \$5,600,000 from the Washington Trust Company.*

Section 2. *Interstate may purchase the Rhode Island assets of IHSF, including: the M/V Athena, customer list, covenant not to compete, goodwill, CPCN, and berthing permit, for the total purchase price of \$5,612,500, utilizing a loan furnished by the Washington Trust Company. The terms of the loan are as described in the Washington Trust Commitment Letter and Term Sheet submitted in Docket D-06-51. Interstate may also charter the M/V Athena for November 15, 2006, to May 1, 2007, at \$1,285 per day.*

Section 3. *IHSF's CPCN will be transferred to Interstate and merged with the Interstate high speed ferry CPCN to authorize the provision of high speed ferry services by Interstate between Point Judith and Newport to any Block Island termini, including Old Harbor and New Harbor. Because Interstate would not be in a financial or operational position to commence a Newport high speed service until the summer of 2009 at the earliest, Interstate's combined high speed ferry CPCN will continue to be held in abeyance with respect to the Newport leg of its fast ferry service until October 31, 2008. However, Interstate shall be required to report to the Division by October 31 of each year as to the status of its plans to provide high speed service between Newport and Block Island. The continued authorization of that service on the CPCN will be decided after Interstate files its October 31, 2008, report, and annually thereafter. Interstate's combined high speed ferry CPCN shall be without restriction with respect to furnishing services between Point Judith and Block Island except that it shall be required, barring extraordinary circumstances, to provide services*

¹⁶ Joint Exhibit 1 (Docket Nos. D-06-51 and D-06-53).

commencing no later than July 7 and concluding no earlier than Labor Day of each year. Interstate's proposed schedule and termini for all fast ferry services, and any modifications thereto, shall be provided to the Division for review at least 45 days prior to the effective date of the scheduled services.

Section 4. *The Parties believe that the maintenance of safe and reliable year round service to Block Island at reasonable rates for passengers, vehicles and freight is of critical importance. The provision of high speed ferry services provides economic benefits to Block Island as well as benefits to customers who use that service. However, the Parties also agree that the provision of high speed service by competitors has posed, and would continue to pose, risks to the profitability of Interstate and its ability to maintain safe and reliable year round traditional service to Block Island at reasonable rates for passengers, vehicles, and freight. The Parties are confident that the proposed transaction can mitigate such risks.*

Nevertheless, the Parties recognize that the proposed transaction is not without its own risks, including, but not limited to, generation of adequate revenues by the high speed service to cover the costs of that service (including the interest and principal repayments on approximately \$5.6 million of additional debt). Therefore, to protect the year round traditional service to Block Island at reasonable rates for passengers, vehicles, and freight, Interstate agrees that any losses incurred from the operation of high speed service will not affect the year round service, or rates, to Block Island for passengers, vehicles, or freight, unless the Public Utilities Commission should direct otherwise.

Section 5. *This Stipulation and Settlement should not be interpreted to restrict the rights of any party to recommend a particular treatment of the profits from the operation of high speed operations for ratemaking purposes or to restrict the authority of the Public Utilities Commission with regard to the treatment of*

*the profits from the high speed operations for ratemaking purposes.*¹⁷

After carefully examining the record evidence, including the settlement agreement between the parties, the Division found that approving the instant petitions, as modified by the settlement agreement between the parties, would be reasonable and in the interest of ratepayers.¹⁸ The Division, however, expressed a few concerns that it determined warranted some modifications to the approvals in issue.

Regarding the issue of whether the Division should relax the restrictions currently attached to IHSF's and Interstate's CPCNs, the Division found that it "is important to preserve the nature of luxury high-speed ferry service, vis a vis the service provided by Interstate's conventional slower speed ferries, by maintaining the following restrictions: (1) that the vessel(s) be capable of operating comparatively smoothly and quietly with a service speed of approximately 28 knots; (2) that services continue to include advanced ticketing and guaranteed seating; and (3) that amenities like airline seating, wall-to-wall carpeting, climate control (including A/C) and galley services continue to be provided."¹⁹

The Division was also willing to grant Interstate's request to hold its Newport authority in abeyance through the 2008 operating season, but held

¹⁷ Joint Exhibit 1 (Docket Nos. D-06-51 and D-06-53).

¹⁸ See Order No. 18728, issued on October 3, 2006.

¹⁹ *Id.*, p. 21. The Division also noted that these requirements are consistent with the Division's previous order in 02-MC-56 (Order No. 17081, issued on 8/2/02).

that it would “not agree to limit its scheduled review (after October 31, 2008) to only a determination of whether that aspect of the authority contained in Interstate’s CPCN ought to be continued or not.” Instead, the Division held that it would “address the entirety of the authority conferred in Interstate’s CPCN, as the Division originally granted Interstate’s high-speed ferry CPCN based on the totality of the fast ferry services being proposed at the time, which prominently included high-speed ferry services between Newport to Block Island”.²⁰ The Division further held that it would also investigate the status of Interstate’s originally planned larger car/freight/passenger fast ferry at the same time, which was another influential factor in the granting of Interstate’s fast ferry CPCN.

The Division additionally found that it would be “unreasonable to permit Interstate to shelf its ‘New Harbor’ authority in perpetuity or never utilize the second fast ferry authorized under IHSF’s CPCN” and, accordingly, held that it would “examine the propriety of allowing Interstate to retain the authority realized through the transfer of IHSF’s CPCN when it conducts its evaluation of Interstate’s dormant Newport authority (and larger vessel status) sometime after the 2008 operating season.”²¹

On October 24, 2008, Interstate filed compliance testimony in consolidated Docket Nos. D-06-51 and D-06-53, relating to all the open issues, in which it recommended that the Division “keep everything status

²⁰ Id., p. 21-22.

²¹ Id., p. 22.

quo for at least another three years...” Upon receipt, and in view of the travel of this matter, the Division concluded that the public interest required a current reexamination of the approvals detailed above in order to determine whether the Division ought to modify and/or revoke any authority currently conferred through Interstate’s fast ferry CPCN.

Accordingly the Division’s Clerk was instructed to reopen the instant consolidated dockets and schedule, as soon as practicable, a public hearing for the purpose of examining Interstate’s compliance actions with the commitments it made in the dockets identified herein for the purpose of determining whether the Division ought to modify and/or revoke any authority currently conferred through Interstate’s fast ferry CPCN.²²

The Division thereafter scheduled and conducted a duly noticed public hearing on the matter. The hearing was conducted in the Division’s hearing room located at 89 Jefferson Boulevard in Warwick on December 18, 2008. The following counsel entered appearances:

For Interstate:	Michael R. McElroy, Esq.
For the Division’s Advocacy Section:	Paul J. Roberti, Esq. Assistant Attorney General

II. Interstate’s Direct/Compliance Case

In support of its position, Interstate proffered pre-filed direct testimony from Mr. Walter E. Edge, Jr., who is the president of B&E Consulting LLC, a consulting firm specializing in utility regulatory matters. Interstate also

²² Order No. 19477, issued on October 31, 2008.

made available its Vice President, Mr. Joshua Linda, at the hearing to answer any questions concerning the Company's operations.

In his pre-filed testimony, Mr. Edge provided information updates on several of the open issues related to the instant dockets. Mr. Edge started with an update on what he described as "the successful purchase" of all of the Rhode Island assets of IHSF by Interstate, including "the fast ferry *M/V Athena*, IHSF's CPCN, customer list, a covenant not to compete, etc.," with a \$5.6 million loan from the WTC. Regarding this subject, Mr. Edge related that through the Division's approval of its earlier petition to borrow \$5.6 million to purchase IHSF's assets, it was able to obtain favorable financing from the WTC in order to complete the purchase. Mr. Edge further related that the Public Utilities Commission ("PUC") also allowed Interstate to collect, through its fast ferry rates, the entire debt service on the \$5.6 million loan.²³

Mr. Edge next provided an update on the planned lease of the *M/V Athena* to IHSF for the period November 15, 2006 until May 1, 2007. The update was brief, however, as Mr. Edge quipped that the lease arrangement "fell through." Mr. Edge testified that Interstate was able to alternatively charter the boat to New York Waterways for substantial portions of the winter seasons of 2006-07 and 2007-08.²⁴

²³ Interstate Exhibit 1, p. 2.

²⁴ *Id.*, p. 3. Incidentally, the Division recognizes that the *M/V Athena* was instrumental in the successful rescue of passengers aboard U.S. Airways Flight 1549, which crash landed in the Hudson River on January 15, 2009.

Mr. Edge also provided an update on Interstate's fast ferry operations relating to the merged fast ferry CPCNs (Interstate's original CPCN and the CPCN purchased by Interstate from IHSF) authorized by the Division to provide fast ferry service between Block Island and the ports of Point Judith and Newport. According to Mr. Edge, the operation is "working quite well, and the company is very pleased."²⁵ Mr. Edge related that Interstate started its fast ferry operation in the summer of 2006 by leasing the *M/V Athena* from IHSF. He testified that although that first summer operation was profitable, Interstate's management was disappointed with the ridership. Mr. Edge explained that Interstate found that it was getting most of IHSF's customers but that there was little new ridership.

Mr. Edge testified that the summer of 2007 was much better for the fast ferry service. He attributed the increased ridership (and profitability) to the additional time Interstate had to market its fast ferry service to Old Harbor. He also observed that Interstate's traditional service customers were beginning to change over from traditional service to the fast ferry service, as evidenced by a decrease in Interstate's traditional service ridership that summer.²⁶ Mr. Edge related that ridership and profitability were even better in the summer of 2008. He noted, however, that traditional service ridership continued to decline.

²⁵ *Id.*

²⁶ *Id.*, pp. 3-4.

As an additional update on fast ferry operations, Mr. Edge related that although Interstate runs its fast ferry primarily from Point Judith to Old Harbor, it also runs it to New Harbor during Race Week on Block Island. Mr. Edge explained that Interstate provides the fast ferry services to New Harbor during that week because the races are staged exclusively from that harbor location.²⁷

Mr. Edge next provided an update on the financial results from Interstate's fast ferry operations. Beginning with the summer of 2006, Mr. Edge related that Interstate realized a profit of \$364,666 as compared to an estimate of \$365,730, which he noted was used by the PUC in establishing Interstate's current rates. He called the difference immaterial to the rate calculation. For the summer of 2007, Mr. Edge testified that Interstate's fast ferry profits rose to \$503,363.²⁸

Mr. Edge also provided an update on Interstate's plans regarding its originally proposed new larger fast ferry vessel, capable of carrying passengers, vehicles and freight. Specifically, he testified that while Interstate "would still like to eventually acquire a larger passenger/vehicle/freight fast ferry as was described in Interstate's original request for its fast ferry CPCN" Interstate "has not observed that there is an adequate demand that would support two fast ferry vessels."²⁹ Mr. Edge based this conclusion on Interstate's observation that the *M/V Athena* only

²⁷ *Id.*, p. 4.

²⁸ *Id.*, pp. 4-5.

²⁹ *Id.*, p. 5.

rarely operates at full capacity. He also reasoned that the additional revenue that Interstate would receive from carrying freight and vessels on the new fast ferry, estimated to be \$285,908, would be insufficient justification for adding the new larger vessel to its fast ferry fleet, whose debt service alone would be \$720,000 per year.³⁰ Interstate additionally considered the poor economy and the high current price of fuel as reasons for not pursuing the second fast ferry vessel at this time.³¹ Mr. Edge did note, however, that Interstate would consider a second fast ferry vessel in the event that it determined that it needed to replace one of its traditional ferry vessels. Mr. Edge observed that “Interstate is keeping its options open.”³²

In his final update comments, Mr. Edge testified that Interstate does not know when it might lease another fast ferry to provide services to and from Newport. Mr. Edge explained that Interstate “has a great deal of outstanding debt and is hesitant to expand its operations.”³³ Mr. Edge added that “Interstate is in the second year of a five year PUC rate plan that allows for inflation adjustments in the last three years, but does not allow for a full rate filing during the plan.” Mr. Edge emphasized that “this is not a good time to start this new service.”³⁴

In his closing remarks, Mr. Edge urged the Division “to keep everything status quo for at least another three years until the PUC Rate

³⁰ Id., pp. 5-6.

³¹ Id., p. 6.

³² Id.

³³ Id., p. 7.

³⁴ Id.

Plan ends.” He testified that Interstate would also like the Newport leg of its fast ferry CPCN to remain in dormancy at least until the end of the Rate Plan. Mr. Edge recommended that the Division “simply extend” Interstate’s merged fast ferry CPCN until July 2012 when Interstate would be in a better position to address “these issues.” He observed that in June 2012 Interstate is required to calculate the sharing of profits from the five-year rate plan for the PUC and may in fact have to refund earnings to ratepayers. He therefore suggested that “another filing similar to this one be made no earlier than July 1, 2012.”³⁵

III. The Advocacy Section’s Position

At the conclusion of the hearing, the Advocacy Section opined that the history associated with the development of fast ferry services between Point Judith and Block Island suggests that “no one really wants to go to New Harbor.”³⁶ The Advocacy Section contends that the draw on Block Island is Old Harbor. Inexplicably, however, the Advocacy Section recommended that Interstate be allowed to keep its CPCN authority to New Harbor.³⁷

The Advocacy Section also opined that permitting Interstate to hold its fast ferry authority between Newport and Block Island in abeyance might be a better choice than revoking the authority on dormancy grounds.³⁸ The Advocacy Section opined further that it believes that Interstate would

³⁵ *Id.*, p. 8.

³⁶ Tr. 108.

³⁷ Tr. 112.

³⁸ Tr. 109.

ultimately be the provider of fast ferry service to Newport, and as such, the Division ought to permit it to retain its CPCN for as long as it takes the Company to acquire a second vessel and find a berthing space in “downtown” Newport.³⁹

IV. Public Comment

The Town of New Shoreham (“Town”) offered two letters in support of Interstate’s compliance filing. In the first letter, dated November 14, 2008, the Town stated that it had “no objection to Interstate’s request for maintaining the status quo until the conclusion of the 5-year rate plan in 2012.” The Town reasoned that “[i]n light of the present economic crisis, we see no point in examining the issue of expanded ferry operations to Newport or to New Harbor...” The Town also declared that if the “Division does not wish to keep the status quo until 2012, the Town suggests a review next year rather than now.”⁴⁰

In a second letter, dated December 19, 2008, the Town supplemented its earlier letter by requesting that “the Division not take away Interstate’s fast ferry CPCN for the Point Judith to New Harbor service run and, in particular, supports Interstate’s operating its fast ferry to New Harbor during race week.”⁴¹

³⁹ Tr. 111.

⁴⁰ Public Comment (Town) Exhibit 1.

⁴¹ Public Comment (Town) Exhibit 2.

V. Findings

Interstate is presently before the Division requesting that it be permitted to continue to hold several Division-mandated facets of its fast ferry CPCN operating authority in abeyance for some unspecified term of at least several more years.⁴² As the travel above indicates, the genesis of this instant request dates back to 2006.

The facets of operating authority in issue are inextricably linked to Interstate's and IHSF's respective CPCNs, supra. Though these CPCNs were merged in 2006, the individual authority from the respective CPCNs, along with their respective individual concomitant regulatory obligations, remain in full force and effect. A breakdown of Interstate's currently "merged" operating authority, and the remaining attached regulatory obligations, will be helpful to fully identifying and understanding the "shelved" fast ferry services in issue. Interstate's original CPCN confers the following authority:

"[A]uthority to operate as a seasonal "fast ferry" water carrier of passengers and freight between (1) Point Judith and Old Harbor, Block Island; and (2) Newport and Old Harbor, Block Island."⁴³

The IHSF CPCN confers the following authority:

"[A]uthority as a ferry passenger service from the Port of Galilee in Narragansett, Rhode

⁴² Although the compliance filing indicates a request for maintaining the status quo until 2012, the date of an actual activation or reactivation of the services in issue remains unknown.

⁴³ Order No. 18506, issued on January 23, 2006.

*Island to New Harbor located in the Town of New Shoreham (Block Island), Rhode Island.*⁴⁴

The current status of concomitant regulatory obligations/conditions attached to Interstate's now "merged" authority CPCN are as follows:

1. Interstate is required to maintain the following restrictions:

*"(1) that the vessel(s) be capable of operating comparatively smoothly and quietly with a service speed of approximately 28 knots; (2) that services continue to include advanced ticketing and guaranteed seating; and (3) that amenities like airline seating, wall-to-wall carpeting, climate control (including A/C) and galley services continue to be provided;"*⁴⁵

2. Interstate is required to operate as a seasonal "fast ferry" water carrier of passengers and freight between Point Judith and Old Harbor, Block Island as a condition of retaining the entirety of operating authority conferred in its original "fast ferry" CPCN, as issued on January 23, 2006;⁴⁶

3. Interstate is required to operate as a seasonal "fast ferry" water carrier of passengers and freight between Newport and Old Harbor, Block Island as a condition of retaining the entirety of operating authority conferred in its original "fast ferry" CPCN, as issued on January 23, 2006;⁴⁷

4. Interstate is required to operate as a seasonal "fast ferry" water carrier of passengers and freight between (1) Point Judith and Old Harbor, Block Island; and (2) Newport and Old Harbor, Block Island, with a vessel

⁴⁴ Order No. 15652, issued on August 25, 1998.

⁴⁵ Order No. 18728, issued on October 3, 2006.

⁴⁶ Order No. 18728, pp. 21-22.

⁴⁷ Id.

that is materially consistent with the “originally planned larger car/freight/passenger fast ferry” that Interstate described in Docket No. D-05-06, as a condition of retaining the entirety of operating authority conferred in its original “fast ferry” CPCN, as issued on January 23, 2006;⁴⁸ and

5. Interstate is required to operate “as a ferry passenger service from the Port of Galilee in Narragansett, Rhode Island to New Harbor located in the Town of New Shoreham (Block Island), Rhode Island,” as a condition of retaining the entirety of operating authority conferred in IHSF’s “fast ferry” CPCN, as it existed on October 3, 2006.⁴⁹

Several of the aforementioned obligations/conditions were temporarily suspended by the Division in 2006 as part of the Division’s decision approving the merger of Interstate’s and IHSF’s operating CPCNs, and the ultimate acquisition by Interstate of the newly combined fast ferry operating authority. Specifically, the Division agreed to suspend all services between Old Harbor and Newport; regular services between Pt. Judith and New Harbor; and the requirement that Interstate provide additional fast ferry services through the use of a second larger vessel designed to carry passengers, freight and vehicles. The temporary suspension of these regulatory obligations/conditions was allowed by the Division primarily due to Interstate’s inability, in the short term, to provide all the fast ferry services

⁴⁸ Id.

⁴⁹ Id.

authorized and required under the two CPCNs with only one fast ferry vessel, the *M/V Athena*. However, since the Division's 2006 decision to approve the suspension of these operating requirements, almost two and one half years have passed, and instead of seeing a renewed interest from Interstate, the Division finds that Interstate's focus has turned exclusively to maximizing its profits and away from providing these "needed," but not as profitable services.

The Division does not accept Interstate's reasons for further delaying the reestablishment of regular services between Pt. Judith and New Harbor. Similarly, the Division does not accept Interstate's reasons for not implementing its promised services between Old Harbor and Newport, or its reasons for not adding a second larger fast ferry vessel that is capable of carrying freight and vehicles, as well as passengers. Instead, the Division finds ample evidence on the record that Interstate's objective for the foreseeable future is to shelf the less profitable, and/or potentially unprofitable components, of its now solitarily controlled comprehensive fast ferry authority between the mainland and Block Island, and keep them on the shelf until such time as a would-be competing service attempts to enter the market. In further support of this conclusion, the Division notes that this is not the first time Interstate has employed this business strategy.

To illustrate, in 1999 Interstate filed a notice with the Division expressing its decision to relinquish that portion of CPCN No. W-2, which

authorized conventional passenger and freight ferry services between Providence and Newport. In that same filing, Interstate indicated that it would also be holding in abeyance the remaining portion of the same CPCN, which authorized passenger and freight transportation services between, incidentally, Newport and Block Island. Interstate asserted at the time that it would be unwilling to resume these ferry services unless it could arrange for a suitable and affordable overnight berth in Newport's tourist and business district, which Interstate argued was absolutely necessary if the Company was to realize a profit in the provision of this leg of the authority contained in CPCN W-2. Nevertheless, Interstate was not at all optimistic that such overnight berthing would become available in the short term. Indeed, based upon its prior efforts to secure such a berthing location, Interstate remained extremely doubtful that an overnight berth in Newport's business center would ever be possible. Faced with the likely prospect of relegating a CPCN to an extended and perhaps perpetual period of dormancy, the Division denied Interstate's open-ended "hold in abeyance" plan and instead required Interstate to locate an overnight berthing facility within one year, (even if it meant berthing the vessel in Middletown, Portsmouth, Bristol or Block Island) or surrender its CPCN.⁵⁰ However, rather than surrender its certificate, Interstate satisfied this directive by selecting another overnight berth, and, as a result, services between Newport and Block Island resumed the following summer (and have remained operational ever since). This

⁵⁰ See Order No. 16190, issued on February 29, 2000 in Docket No. 99 MC 107.

business decision by Interstate is as telling now as it was then. Interstate has always operated this service at a loss, even today,⁵¹ but, in the opinion of the Division, continues to provide these traditional ferry services between Newport and Block Island in order to minimize the chances of a competitive service coming in and filling a potential vacuum.

Another example of Interstate's readiness to keep a CPCN indefinitely inactive or dormant, for business reasons, is CPCN W-3. This CPCN authorizes passenger and freight transportation services between Point Judith and Newport. When questioned about the status of this CPCN during the instant proceeding, Interstate acknowledged that CPCN W-3 has been dormant for a very long time. In fact, Interstate could not recall "when or if there was actually a passenger-paying operation between Newport and Point Judith."⁵² Nevertheless, Interstate stated that it has and will continue to pay all relevant annual renewal fees for this CPCN, and that it "would like to retain the certificate."⁵³ Again, this practice suggests an intention by Interstate to rely on a "dormant" CPCN as a strategy for dissuading interested new entrants from seeking a CPCN of their own.

When Interstate was before the Division in 2005 seeking its own fast ferry CPCN there was an existing fast ferry service operating between Point Judith and New Harbor, Block Island. That carrier, IHSF, was operating six

⁵¹ During the hearing held on December 18, 2008, Mr. Edge testified that "the Newport run has never been profitable. It has been subsidized by the Point Judith to Block Island run for years, probably forever" (Tr. 18).

⁵² Tr. 11-12.

⁵³ Tr. 12.

round trips daily between the mainland and Block Island. Despite this then existing fast ferry service, Interstate insisted that there was a public need for an additional fast ferry service to the Island. At the same time, Interstate argued that there was a vast unsatisfied fast ferry market between Block Island and Newport as well. In fact, Interstate's perceived unsatisfied market between these three termini extended to freight and vehicles too. Much evidence was proffered to prove that such need(s) existed and that Interstate was fit, willing and able to satisfy these need(s). Further, relative to the fast ferry service between Point Judith and Block Island, Interstate maintained that most of its prospective customers would come from its own existing conventional (slower) ferry vessel passengers who, Interstate asserted, would be eager to pay twice the fare price for the much faster transportation service.⁵⁴ Interstate was abundantly confident that its proposed fast ferry services would be immediately profitable.⁵⁵ Based on the extensive evidence proffered by Interstate in that proceeding, the Division found Interstate's case credible and persuasive, and consequently granted Interstate's petition for a fast ferry CPCN.⁵⁶

Fast forward to the present. Interstate no longer has any fast ferry competition between Point Judith and Block Island. The record reflects that Interstate's fast ferry operation between Point Judith and Block Island is highly successful and profitable, and growing more profitable with the

⁵⁴ See Order No. 18506, pp. 4-24, 37-40 and 44-50.

⁵⁵ *Id.*

⁵⁶ *Id.*, pp. 53-70.

passing of each summer season.⁵⁷ While its traditional ferry service numbers have declined, this was expected, and in fact, part of Interstate's calculus for increasing its long-term profits.

Notwithstanding the obvious success, today, Interstate pleads that it is financially unable to provide the fast ferry services it first proposed, and promised; indeed, the very services that, in their aggregate totality, led the Division to agree to issue another CPCN for fast ferry services to Block Island. In furtherance of its request for maintaining the status quo, Interstate's witnesses offer a litany of excuses: fuel is too expensive,⁵⁸ must wait for the current rate plan to expire,⁵⁹ Interstate has too much debt,⁶⁰ high-speed vessels are suddenly not as plentiful as they use to be,⁶¹ the off-season charter market is in decline,⁶² there is presently too much unused capacity,⁶³ the economy is bad,⁶⁴ and so on. So, what is the Division to conclude from this development, this assertion that only the most profitable aspects of the business model ought to be continued? One possible conclusion is that Interstate's intent from the outset was only to eliminate IHSF from the Block Island ferry service marketplace, a position that was strongly argued by IHSF in Docket No. D-05-06. If true, this would mean that the proposed Newport fast ferry service was merely a calculated effort to advance Interstate's quest

⁵⁷ Tr. 7-8.

⁵⁸ Tr. 25 and 39.

⁵⁹ Interstate Exhibit 1, pp. 7-8.

⁶⁰ Tr. 36-37

⁶¹ Tr. 27-32.

⁶² Tr. 58-60.

⁶³ Tr. 26

⁶⁴ Tr. 39.

for its own fast ferry CPCN, a necessary step to drive IHSF from the marketplace, a necessary step to maximize profits. The stipulated agreement offered the Division on October 2, 2006, which included a provision that allowed for the subsequent abandonment of the fast ferry service between Newport and Block Island, a provision that was rejected by the Division, now, in retrospect, unfortunately appears to buttress this conclusion. Similarly, the original plan to utilize a larger freight/vehicle and passenger carrying fast ferry vessel is also, in retrospect, now suspect. Whether the original motivation was genuine or not, the Division finds it abundantly clear from the current record that Interstate has no intention of developing a Newport fast ferry service in the foreseeable future, if ever. Linked to this conclusion, the Division also finds it extremely unlikely that Interstate will be endeavoring to carry through on its promise to add a larger freight/vehicle and passenger carrying fast ferry vessel to its fleet.

Moving forward, the Division must now determine what regulatory course of action most benefits the present and future public convenience and necessity of fast ferry travelers between the mainland and Block Island. Toward this end, the Division finds that it would be inimical to the public interest to permit Interstate to unilaterally decide when it will provide fast ferry services to Newport, or regular fast ferry services to New Harbor. This finding remains consistent with the Division's previous finding in the 1999 matter noted above, involving Interstate's decision to hold its conventional

ferry services between Newport and Block Island in abeyance. With regard to the Newport authority component, in 1999 Interstate wanted to wait until it could locate an overnight berth in Newport's business center before restoring services. To date, however, no such berthing location has presented itself. Interestingly, in this proceeding, the Advocacy Section opines that Interstate ought to be able to retain its fast ferry CPCN authority to Newport so that the search for "downtown" dock space may continue. This search has been going on for a very long time without results, accordingly, how long would the Advocacy Section have those Newport tourists waiting for the fast ferry service that everyone agrees is needed now? .

The Division also finds now, as then, that such discretion would only discourage potential new market entrants from seeking a CPCN for the necessary authority to actually provide such services. Empowering Interstate to invariably seek intervention in the application process of any prospective competitor for the purpose of protesting such application on the grounds that Interstate already possesses such authority is clearly not the fastest way to bring these already demonstrated publicly needed fast ferry services on line.⁶⁵ Again, an examination of Interstate's 1999 bid to indefinitely suspend its Newport to Block Island conventional ferry services is instructive. In that docket, the Division observed as follows:

⁶⁵ During the hearing counsel for Interstate stated that Interstate would "very much object" to a new entrant applying for authority to provide fast ferry services between the mainland and New Harbor (Tr. 118-119). With respect to Newport authority, Interstate's counsel opined: "[y]es, I think we could come in and object to it" (Tr. 118).

“[T]he Division may take steps to advertise for a replacement ferry service provider. A replacement provider may then apply for operating authority free from the possibility of an adversarial intervention from Interstate. The public’s need for ferry services between Newport and Block Island demands a speedy restoration. A contested case resulting from a possible Interstate intervention is clearly not in the public interest. While the Division will afford Interstate a one-year suspension of authority and encourage Interstate to resume its historic ferry service, the Division will not impede the start-up of a potential replacement service provider by requiring the replacement provider to also have to fend off a potential intervention by Interstate.”⁶⁶

The Division finds that the action that it took in Interstate’s 1999 CPCN dormancy matter provides an appropriate remedial regulatory course of action to take in the instant case. Accordingly, in the interest of fostering a dynamic high-speed ferry service market between Rhode Island’s mainland and Block Island, the Division will not agree to Interstate’s recommendation to maintain the status quo for another three years, and more than likely beyond. Alternatively, the Division will require that Interstate submit a proposal to the Division by December 31, 2009 that sets forth a plan to provide regular fast ferry services between Newport and Block Island and Point Judith and New Harbor by the summer of 2010. Despite Interstate’s dire evaluation of the economy and its purported financial limitations, the Division finds sufficient evidence on the record that Interstate has options that would permit it to augment its services to New Harbor and provide some

⁶⁶ Order No. 16190.

level of regular fast ferry service between Newport and Block Island. Chief among these options is Interstate's ability to search for and lease another fast ferry vessel for its fleet. The Division finds little evidence that Interstate has sincerely considered this option.⁶⁷ Further, the Division finds evidence that Interstate is also able to use the *M/V Athena* to provide some level of fast ferry service between Point Judith, Block Island and Newport.⁶⁸

In the event that Interstate is unable or unwilling to propose such a plan by December 31, 2009, the Division will summarily revoke that portion of Interstate's fast ferry CPCN that provides the authority to operate a fast ferry service between Newport and Block Island and Point Judith and New Harbor. If a revocation of the above-described authority becomes necessary, Interstate may, if it wishes to continue providing fast ferry services to and from New Harbor during "Race Week," file a petition with the Division on an annual basis for the requisite limited authority to provide such services. Interstate will thereupon be required to satisfy the burden of proof prescribed under Rhode Island General Laws, Section 39-3-3 before such authority will be granted by the Division. If granted, the duration of such authority will be limited to only one "Race Week" at a time and will expire immediately thereafter.

⁶⁷ Notably, Interstate admits that leasing a vessel would have no impact on the Company's debt/equity ratio (Tr. 37).

⁶⁸ In response to a discovery request from the hearing officer, Interstate has opined that using the *M/V Athena* to service Point Judith and Newport would result in logistical problems for the Company. (See post-hearing data response from Interstate, which the Division has entered on the record as Hearing Officer Exhibit 1, by agreement). The Division, however, disagrees with Interstate's opinion, and finds evidence to support the potential use of this vessel to service customer needs from Point Judith and Newport.

With respect to Interstate's obligation to operate with a vessel that is materially consistent with the "originally planned larger car/freight/passenger fast ferry" that Interstate described in Docket No. D-05-06, the Division will reserve judgment on this matter for the time being. The Division may wish to revisit this requirement in a future proceeding related to the issues addressed in this decision, and/or in a future rate proceeding before the PUC when the subject matter relates to the replacement of one or more of Interstate's existing traditional ferry vessels.

Additionally, the Division finds that Interstate's CPCN W-3, which authorizes passenger and freight transportation services between Point Judith and Newport, has remained dormant for far too long. Accordingly, the Division will instruct Interstate to submit an additional proposal by December 31, 2009, which sets forth a plan to reactivate (or activate for the first time) this CPCN by the summer of 2010. In the event that Interstate is unable or unwilling to propose such a plan by December 31, 2009, Interstate shall show cause, by the same deadline, why CPCN W-3 should not be revoked by the Division on "dormancy" grounds. If necessary, the Division shall conduct a special "show cause" hearing on this matter.

The Division must also address the actual CPCN number that it assigned to Interstate's fast ferry certificate, specifically, CPCN No. W-1163. As discussed during the hearing, it appears that the Division never issued the physical CPCN to Interstate after its application for a fast ferry CPCN was

approved by the Division on January 23, 2006. Instead, Interstate's current fast ferry CPCN bears the number that was first issued to IHSF in 1998.⁶⁹ Interstate was inadvertently issued this number after it acquired IHSF's CPCN in May 2006. However, because Interstate's and IHSF's respective CPCNs were merged in May 2006, the Division finds that a new CPCN ought to have been issued to Interstate, a CPCN that reflects the merger of the authority from Interstate's and IHSF's respective CPCNs. Interstate did not object to this proposal to correct the aforementioned deficiencies.⁷⁰ Therefore, to cure this oversight, the Division will instruct its Carrier Section to issue Interstate a new fast ferry CPCN, which appropriately reflects the merged authority derived from its original fast ferry CPCN and IHSF's CPCN.

Finally, with regard to the Town's position, the Division can appreciate the Town's interest in promoting fast ferry services to Old Harbor, over New Harbor and Newport. However, the outstanding issues relate to currently existing CPCN obligations that cannot be resolved with an indefinite period of tacit dormancy. If Interstate is unable or unwilling to utilize its Division-approved operating authority it should surrender that authority in order to provide a clear and unimpeded path for others to enter the market.

Accordingly, it is

(19599) ORDERED:

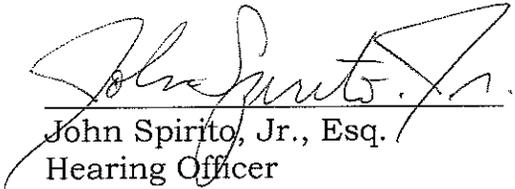
⁶⁹ IHSF was issued a CPCN in 1998 after its application for a fast ferry service between Point Judith and New Harbor was approved by the Division. See Order No. 15652, issued on August 25, 1998.

⁷⁰ Tr. 14-18.

1. That Interstate shall submit a proposal to the Division by December 31, 2009 that sets forth a plan to provide regular fast ferry services between Newport and Block Island and Point Judith and New Harbor by the summer of 2010. In the event that Interstate is unable or unwilling to propose such a plan by December 31, 2009, the Division shall revoke that portion of Interstate's fast ferry CPCN that provides the authority to operate a fast ferry service between Newport and Block Island and Point Judith and New Harbor.
2. If a revocation of above-described authority becomes necessary, Interstate may, if it wishes to continue providing fast ferry services to and from New Harbor during "Race Week," file a petition with the Division on an annual basis for the requisite limited authority to provide such services. Interstate will thereupon be required to satisfy the burden of proof prescribed under Rhode Island General Laws, Section 39-3-3 before such authority will be granted by the Division. If granted, the duration of such authority will be limited to only one "Race Week" at a time and will expire immediately thereafter.
3. With respect to Interstate's obligation to operate with a vessel that is materially consistent with the "originally planned larger car/freight/passenger fast ferry" that Interstate described in Docket No. D-05-06, the Division will reserve judgment on this matter consistent with its findings herein.

4. That Interstate shall submit an additional proposal by December 31, 2009, which sets forth a plan to reactivate (or activate for the first time) CPCN W-3 by the summer of 2010. In the event that Interstate is unable or unwilling to propose such a plan by December 31, 2009, Interstate shall show cause, by the same deadline, why CPCN W-3 should not be revoked by the Division on "dormancy" grounds. If necessary, the Division shall conduct a special "show cause" hearing on this matter.
5. The Division's Carrier Section is hereby directed to issue Interstate a new fast ferry CPCN, which appropriately reflects the merged authority derived from its original fast ferry CPCN and IHSF's CPCN.

Dated and Effective at Warwick, Rhode Island on March 17, 2009.


John Spirito, Jr., Esq.
Hearing Officer

APPROVED: 
Thomas F. Ahern
Administrator