



Wharf, (6) IYRS Wharf to Rose Island, (7) Rose Island to Naval War College (“NWC”) Museum, and (8) NWC Museum to Fort Adams.<sup>1</sup>

On January 20, 2010, the Division received an email from the Applicant in which the Applicant advised the Division that the Applicant had modified its proposed route by substituting Fort Wetherill, located in the Town of Jamestown, Rhode Island, for the Naval War College.<sup>2</sup> The Applicant submitted further modifications to its proposed route on February 1, 2010, eliminating three of the eight stops (IYRS Wharf, Rose Island, and Fort Wetherill), and changing its original point of departure from Fort Adams to Perrotti Park, resulting in a proposed route of: (1) Perrotti Park to Bowens Wharf, (2) Bowens Wharf to Ann Street Dock, (3) Ann Street Dock to Fort Adams, (4) Fort Adams to Goat Island, and (5) Goat Island to Perrotti Park.<sup>3</sup>

At the March 11, 2010, hearing in this matter, the Applicant moved to modify the proposed route yet again by eliminating the Bowens Wharf stop; the motion was granted. This led to a proposed route of: (1) Goat Island to Perrotti Park, (2) Perrotti Park to Ann Street Dock, (3) Ann Street Dock to Fort Adams, and (4) Fort Adams to Goat Island.<sup>4</sup> This is the route presently under consideration in this Report and Order.

Following the filing of this application, the Division scheduled, and published notice of, the date, time and location of a formal hearing to review the application. The Division received timely motions to intervene from Conanicut Marine Services, Inc. d/b/a Jamestown & Newport Ferry, on February 2, 2010, and from Oldport Marine Services, Inc., on February 8, 2010, both of whom provide services similar to, though not identical with, those proposed by the Applicant

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<sup>1</sup> Applicant Exhibit 1.

<sup>2</sup> Applicant Exhibit 2.

<sup>3</sup> Applicant Exhibit 3.

<sup>4</sup> Tr. 3/11/10 at 37-42; Applicant Exhibit 10.

in this matter. The motions to intervene were granted pursuant to Rule 17 of the Division's *Rules of Practice and Procedure*.

Duly noticed public hearings on this application were held on February 15, March 11, April 13, and April 30, 2010. The following appearances were entered at all four hearings:

**Appearances:**

Sherry A. Goldin, Esq.<sup>5</sup>  
Ralph M. Kinder, Esq.<sup>6</sup>  
On behalf of  
**Aquidneck Ferry & Charter, Inc.**  
*Applicant*

Michael R. McElroy, Esq.  
On behalf of  
**Conanicut Marine Services, Inc. d/b/a Jamestown & Newport Ferry**  
*Intervenor*

Turner C. Scott, Esq.  
On behalf of  
**Oldport Marine Services, Inc.**  
*Intervenor*

**The Hearings**

The hearings in this matter continued over four days. The evidence presented relevant to the issues raised by this application (whether public convenience and necessity supports issuance of an CPCN, and whether the Applicant is fit, willing and able to perform the services proposed and to comply with the applicable regulations and statutes) is summarized below.<sup>7</sup>

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<sup>5</sup> Present and participated in February 15, 2010, hearing only.

<sup>6</sup> Present and participated in March 11, April 13 and April 30, 2010, hearings.

<sup>7</sup> A great deal of evidence was introduced by the parties concerning various aspects of the Applicant's business plan. Included among the issues addressed by that evidence was whether or not the Applicant would be able to obtain the necessary permission from the agencies or entities controlling landing rights at the proposed ferry stops to allow the Applicant to use those stops, and whether or not the Applicant's proposed vessel modifications, the vessel's freeboard, and the configuration of various docks, would allow wheelchairs to be safely accommodated. Those are issues that are more properly the province of other state and federal agencies, and do not bear directly on the two issues that must be decided by the Division in this matter, although the Applicant may find it necessary to return to the Division for permission to modify its proposed routes and schedules in some later proceeding. Accordingly,

**February 15, 2010**

The first hearing on this application was on February 15, 2010. A number of pre-filed exhibits, including the application, were marked “for identification,” and several Public Comment Exhibits were admitted into the record. Presentation of the parties’ substantive cases, as well as consideration of the motions to intervene and any objections thereto, was deferred until subsequent proceedings.

**Public Comment Exhibits In Favor Of Application**

State Representative Amy G. Rice, Esq., District 72, submitted a letter in support of the application on February 3, 2010, noting that the Applicant proposed to operate on a different business model, different route, and a quicker schedule than other ferry and water taxi services, enhancing the quality of our state’s visitors’ experiences in Newport, which could in turn increase economic activity to the area. Further, she believed that the Applicant’s plans to employ 20 to 25 people full time would be of benefit to the area’s economy.<sup>8</sup>

State Representative Douglas W. Gablinske, District 68, submitted a letter in support of the application on February 11, 2010, noting that the Applicant proposed to operate on a different business model, different route, and a quicker schedule than other ferry and water taxi services, enhancing the quality of our state’s visitors’ experiences in Newport, which could in turn increase economic activity to the area. Further, he believed that the Applicant’s plans to employ 20 to 25 people full time would be of benefit to the area’s economy.<sup>9</sup>

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while the Hearing Officer considered that evidence carefully before arriving at his decision in this matter, he ultimately determined that it was not directly relevant to the issues he was called upon to decide, and so did not see a need to summarize all of it in this Report and Order.

<sup>8</sup> Public Comment Exhibit 5.

<sup>9</sup> Public Comment Exhibit 9.

## **Public Comment Exhibits Opposed To Application**

Mr. David McCurdy, Executive Director, Rose Island Lighthouse Foundation, submitted a letter opposed to the application on January 26, 2010, noting that the passenger services currently provided by Conanicut Marine Services to Rose Island were more than adequate, and expressing the fear that additional passenger services in Newport Harbor could jeopardize the continuing viability of the existing services. If the Applicant's proposed services did force Conanicut Marine Services to discontinue its route to Rose Island as a cost-cutting measure, then Rose Island Lighthouse Foundation's ability to continue operating would be negatively affected. Mr. McCurdy opined that there was no public benefit to adding another ferry to an already crowded harbor and Rose Island landing.<sup>10</sup>

Mr. Terry Nathan, President, International Yacht Restoration School (IYRS), submitted a letter opposed to the application on January 26, 2010, noting that existing water-based services offer comparable transportation (i.e., Oldport Marine and Conanicut Marine) and have been important, visible, parts of the area's on-water transportation and visitor experiences for years. Mr. Nathan believes that, rather than introducing additional services, at this time we should be consolidating support for reliable existing services in a down economy. He is very concerned that an unintended consequence of the additional competition could be to put all of the services at financial risk, leading to reduced services for all concerned.<sup>11</sup>

Mr. Michael Sweeney, General Manager, Goat Island Marina, submitted a letter opposed to the application on February 1, 2010, stating that Oldport Marine has been providing safe, reliable and adequate services to Goat Island Marina for over 20 years. In his view, there is no

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<sup>10</sup> Public Comment Exhibit 1.

<sup>11</sup> Public Comment Exhibit 2.

need for additional services to Goat Island. Further, there is not enough room at Goat Island Marina to accommodate a 60-foot ferry.<sup>12</sup>

Mr. Bradford S. Read, Executive Director, Sail Newport, submitted a letter opposed to the application on February 2, 2010, stating that Conanicut Marine and Oldport Marine have adequately served the harbor-wide demand for cross harbor intermodal transportation. “As the entity managing the piers for the Department of Environmental Management, we are at the point position with the riders of the cross harbor shuttles. In our history of working with [Conanicut Marine and Olport Marine], we have never had an issue with service or demand exceeding their ability to supply. That includes festival weekends, regatta weekends, Tall Ships and other major summertime attractions.”<sup>13</sup>

Mr. Bartlett S. Dunbar, President, Bowen’s Wharf Company, submitted a letter opposed to the application on February 8, 2010, stating that his company owns a dock at Bowen’s Ferry Landing in Newport Harbor, and that the end of that dock is configured to allow small launches and ferry boats to land. The dock will accommodate vessels up to about 40 feet for touch and go landings, but is not big enough to handle the 65 foot AQUIDNECK FERRY. His company has not agreed to grant landing rights to the Applicant. He is concerned that the existing services, specifically the Newport-Jamestown Ferry, are financially fragile, and that increased competition will threaten its existence.<sup>14</sup>

Captain J. V. Voboril, U.S. Navy, Commanding Officer, Naval Station Newport, submitted a letter dated February 9, 2010, in which he declined to approve the Applicant’s request for landing rights on board Naval Station Newport on security grounds, as well as

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<sup>12</sup> Public Comment Exhibit 3.

<sup>13</sup> Public Comment Exhibit 4.

<sup>14</sup> Public Comment Exhibit 6.

because he was concerned that Naval Station Marine could not safely accommodate the proposed services. (He did not, however, object to the Applicant providing ferry services elsewhere in Newport Harbor.)<sup>15</sup>

W. Michael Sullivan, Ph.D., Director, Rhode Island Department of Environmental Management (“DEM”), submitted a letter on February 11, 2010, advising that the Applicant had not sought permission from DEM for landing rights at Fort Adams, and that such a request would not be entertained if submitted.<sup>16</sup>

### **March 11, 2010**

Three procedural issues were addressed at the March 11, 2010, hearing.

First of all, shortly prior to the hearing, the Applicant filed a motion seeking a waiver of the Division’s requirement for pre-filed testimony. The motion was not opposed by the other parties, subject to the caveat that pre-filed testimony would be required for any expert witnesses called by any of the parties. The Hearing Officer granted the motion subject to the caveat that the parties would be required to submit pre-filed testimony on behalf of any expert witnesses that they intended to call.<sup>17</sup>

Oldport Marine then noted that it actually had an expert witness present in the hearing room, and had planned on that witness testifying during the March 11, 2010, hearing. In view of the difficulty of rescheduling the expert’s time, counsel for Oldport inquired whether or not his expert might be allowed to testify in spite of not having submitted pre-filed witness testimony. In the absence of any strenuous objections from the other parties, and with the caveat that Oldport’s expert witness would have to appear at a subsequent hearing session if the other parties

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<sup>15</sup> Public Comment Exhibit 7.

<sup>16</sup> Public Comment Exhibit 8.

<sup>17</sup> Tr. 3/11/10 at 7, 9-11.

believed that they had been unable to conduct effective cross-examination without first having access to pre-filed testimony, the Hearing Officer agreed that he would allow Oldport to call its witness at the appropriate time.

Second, shortly before the hearing, the Applicant filed an objection to Oldport Marine's motion to intervene in this docket. At the February 15, 2010, hearing, counsel for Oldport Marine had noted that his motion to intervene in this docket had not been served on the Applicant prior to the hearing, and proposed that no final decision be made on his motion until after the Applicant had had an opportunity to decide whether or not to object. The Hearing Officer agreed, and gave the Applicant ten (10) days to file an objection, or until February 25, 2010. The objection in this case was not filed by February 25, 2010. In view of that fact, and in view of the Division's rather liberal rules on granting intervenor status, the Hearing Officer overruled the Applicant's objection and granted Oldport Marine's motion to intervene.<sup>18</sup>

Finally, the Applicant's counsel moved to continue the hearing in view of the fact he had recently learned that one of his client's potential competitors (Oldport Marine) had recently filed a request to amend its schedule in a way that would put it in direct competition with the Applicant along the Applicant's proposed route. He argued that he needed time to evaluate the impact that would have on his client's case, and further argued that it amounted to a concession on Oldport's part that public convenience and necessity demanded service along that route. The Hearing Officer denied the motion, finding that whether or not another company had filed such a request to operate along a similar route was irrelevant to the issues presented to him by the

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<sup>18</sup> Tr. 3/11/10 at 7, 11-17.

instant docket, and further noting that there were a number of witnesses already sitting in the hearing room and presumably prepared to testify that day.<sup>19</sup>

#### **Public Comment Exhibits In Favor Of Application**

State Senator Charles J. Levesque, District 11, submitted a letter in support of the application on February 12, 2010, noting that the Applicant proposed to operate on a different business model, different route, and a quicker schedule than other ferry and water taxi services, enhancing the quality of our state's visitors' experiences in Newport, which could in turn increase economic activity to the area. Further, he believed that the Applicant's plans to employ 20 to 25 people full time would be of benefit to the area's economy.<sup>20</sup>

State Senator William A. Walaska, District 30, submitted a letter in support of the application on February 23, 2010, noting that the Applicant proposed to operate on a different business model, different route, and a quicker schedule than other ferry and water taxi services, enhancing the quality of our state's visitors' experiences in Newport, which could in turn increase economic activity to the area. Further, he believed that the Applicant's plans to employ 20 to 25 people full time would be of benefit to the area's economy.<sup>21</sup>

#### **Public Comment Exhibits Opposed To Application**

On February 23, 2010, W. Michael Sullivan, Ph.D., Director, Rhode Island Department of Environmental Management ("DEM"), and Captain Addison Closson, President of the Applicant, exchanged e-mails regarding the Applicant's potential use of the Fort Adams dock for the Applicant's proposed ferry operations. Director Sullivan noted that the individual who manages the Fort Adams dock was only a tenant on DEM property and had no authority to bind

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<sup>19</sup> Tr. 3/11/10 at 19-37.

<sup>20</sup> Public Comment Exhibit 10.

<sup>21</sup> Public Comment Exhibit 11.

the DEM with respect to the use of the DEM's dock. Director Sullivan then reiterated his earlier opposition to the application, but concluded by saying that any "discussions must be direct and until such time as they occur directly we will remain opposed to PUC [sic] granting any agreements/approvals."<sup>22</sup> Thus, while the DEM continued to oppose the Applicant's proposed use of the Fort Adams facility, Director Sullivan appeared to leave the door open for the Applicant to approach the DEM with a proposal.

Mr. Jay Picotte, Curator, The Museum of Yachting, submitted a letter dated March 1, 2010, in which he expressed his concern that adding another ferry service to Newport Harbor could jeopardize Newport's "efficient and effective water-based transportation as well as the businesses of these long-time local service providers." He noted that many of the boats operated by Oldport Marine and Conanicut Marine around Newport Harbor have already been operating well below their capacity except "during the busiest festival weekends."<sup>23</sup>

Mr. John Hirschler, President, Sightsailing Inc., submitted a letter dated March 9, 2010, explaining that he operated a sail vessel named "AQUIDNECK" offering daily charters of Newport Harbor and Narragansett Bay. He expressed concern that if the Applicant began operating a ferry with a similar name in a similar type of business, it would lead to public confusion and could harm his charter business. In addition, he noted that he could not recall ever seeing Conanicut Marine's or Oldport Marine's vessels operating at their current capacity.<sup>24</sup>

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<sup>22</sup> Public Comment Exhibit 12.

<sup>23</sup> Public Comment Exhibit 13.

<sup>24</sup> Public Comment Exhibit 14. We would note that the Division does not regulate naming practices for commercial vessels, although it is possible that the U.S. Coast Guard or some other state agency might. In any event, we agree with Mr. Hirschler that there could be a potential for confusion with two passenger carriers operating under very similar names in the same restricted waters. That is not, however, an issue we can address in this proceeding.

## **Public Comment Testimony Opposed To Application**

In addition to his March 9, 2010, letter, Mr. Hirschler appeared at the March 11, 2010, hearing to offer sworn public comment on the application. In his sworn testimony, Mr. Hirschler adopted and expanded upon the substance of his comments in the letter he had submitted, which has been entered in this docket as Public Comment Exhibit 14.<sup>25</sup>

## **Applicant's Direct Case**

### **Testimony of Addison W. Closson, III**

Mr. Closson testified that he is the President of Aquidneck Ferry and Charter, Inc. He has a BA from the University of New Hampshire, and an MBA in hospitality administration from Johnson & Wales University. While at Johnson & Wales, he worked for the Hyatt Hotel on Goat Island in Newport, preparing a study for Hyatt on the types of visitors who come to Newport, the activities they are interested in, and the types of things they spend their money on.<sup>26</sup>

Next, he testified that Aquidneck Ferry and Charter, Inc., is incorporated in the State of Rhode Island, and is currently in good standing with the Rhode Island Secretary of State.<sup>27</sup>

With respect to his professional experience, Mr. Closson testified that he had been working as a real estate broker for the past seven years, but was currently the president of Aquidneck Ferry & Charter, Inc., and serving as its general manager while preparing the vessels the company planned to use for service.<sup>28</sup> (He later explained that when he graduated from Johnson & Wales University with an MBA in Hospitality Administration in 2002, the outlook for the hospitality industry in the wake of the 9/11 tragedy was bleak. In view of the dismal

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<sup>25</sup> Tr. 3/11/10 at 157-162.

<sup>26</sup> Tr. 3/11/10 at 43-44.

<sup>27</sup> Tr. 3/11/10 at 44-45; Applicant Exhibits 4 and 5; Hearing Officer Exhibit 1.

<sup>28</sup> Tr. 3/11/10 at 46-47; Applicant Exhibit 6.

outlook for the hospitality industry, he turned his attention to the commercial real estate market until that, too, went into free fall around 2009.<sup>29)</sup>

With respect to his nautical experience, Mr. Closson testified that he has been on the water since he was 12 years old, that he currently owns four boats (three of them sail-powered), that he has been a sailing instructor off and on for a number of years, and that he served as a private yacht captain for a number of years while in college. More recently, he has an application pending with the U.S. Coast Guard for a license to serve as master of a 100-ton near coastal motor vessel.<sup>30</sup>

Next, Mr. Closson testified that he had set up a management team to oversee the operation of his proposed ferry. That team already included two licensed masters who were familiar with the waters in and around Newport Harbor, and who could safely operate his proposed ferry.<sup>31</sup> He hopes to have five or six fully licensed captains, with two deckhands and two service staff assigned to his vessels.<sup>32</sup>

The vessel he proposes to use is a 1953 wooden packet boat built in Biloxi, Mississippi, to move passengers, cargo and mail along the tributaries of the Mississippi River. More recently, the boat has been operated as a tour boat out of Chicago on Lake Michigan, and on the river out of Philadelphia. The vessel is 65 feet long and 24 feet wide, it has two decks, is licensed to carry

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<sup>29</sup> Tr. 3/11/10 at 56.

<sup>30</sup> Tr. 3/11/10 at 47-48; Applicant Exhibit 6.

<sup>31</sup> Tr. 3/11/10 at 48.

<sup>32</sup> Tr. 3/11/10 at 69-70. The Applicant actually plans to operate two similarly sized boats, one primarily as a ferry and one as a cruise ship tender under a different certificate of operating authority. The tender vessel (currently the VIKING QUEEN) would serve as a back-up to the AQUIDNECK FERRY. This explains why Mr. Closson was speaking of hiring five or six captains for an operation that only plans to run one ferry.

145 passengers, and requires a master and two deckhands. There is a fully equipped large galley area, two heads, and tables and chairs for 89 people.<sup>33</sup>

According to Mr. Closson's testimony, the boat is currently being refurbished in Tiverton, Rhode Island, to bring it up to code. The goal is to make it look like a traditional Narragansett Bay ferry from the 1940's, with an extended pilot house and a (non-working) smokestack. He expected the work to be completed by around the first of May, with the Coast Guard completing the required hull and other inspections by about the same time.<sup>34</sup>

Mr. Closson brought the vessel up from Philadelphia in February 2010, so he believes it is clearly a sea-worthy vessel. He also testified that he has obtained insurance for the boat.<sup>35</sup>

Next, Mr. Closson testified that he has purchased (or has under a purchase and sale agreement) a second vessel, the VIKING QUEEN, to provide his company with some redundancy. That vessel has been in Newport since the 1970's, though she has been inactive for about the last five years. The VIKING QUEEN's previous owner has already refurbished her engine and generator and is going to sandblast and repaint her. She will arrive in Newport on June 15<sup>th</sup> with a Coast Guard certificate of inspection authorizing her to carry 149 passengers.<sup>36</sup> The purchase of the VIKING QUEEN is subject to a mortgage to the seller, but Mr. Closson indicated that he owned the AQUIDNECK FERRY outright.<sup>37</sup>

Mr. Closson then explained that he became interested in ferry operations when he and his wife came across an interesting ferry while on vacation in Maine in 2009. It occurred to him that perhaps there was a void he could fill in Newport with such a vessel, a void that fell between the

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<sup>33</sup> Tr. 3/11/10 at 49.

<sup>34</sup> Tr. 3/11/10 at 49-50.

<sup>35</sup> Tr. 3/11/10 at 50.

<sup>36</sup> Tr. 3/11/10 at 50-51; Applicant Exhibit 9.

<sup>37</sup> Tr. 3/11/10 at 55; Applicant Exhibit 9.

current tour boat operations in Newport and Oldport Marine's launch- and water taxi-type services. He decided to research the issue a little, visiting Oslo, Stockholm and Copenhagen in Scandinavia, then Vancouver and Victoria in British Columbia, and noting that those regions seemed to have very robust hop-on/hop-off type ferry operations. He decided that was a model that could work very well in Newport, and believed it represented a potentially underserved niche market there, a market that had not really been tapped in any way since bridges were built from Newport to Conanicut and Goat Islands. It appeared to him that the potential existed to reinstate some of those ferry services.<sup>38</sup>

Next, Mr. Closson began to address how he believed his service would satisfy "public convenience and necessity." He explained that, in his view, a ferry was different from a water taxi or launch service in that a ferry service has three components: (1) a lifeline component; (2) need; and, (3) convenience. In his view, his proposal would address all three components as some of his proposed stops (as of the time of his testimony) were currently served by one or two bridges that were vulnerable to damages from accidents, deterioration or storms. If those bridges were out of connection, his proposed ferry service might be the only way for the residents and businesses of Goat Island and Jamestown to reach the mainland.<sup>39</sup>

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<sup>38</sup> Tr. 3/11/10 at 56-57.

<sup>39</sup> Tr. 3/11/10 at 58-68. "Lifeline" may be defined as "a route or means of transportation or communication for receiving or delivering food, medicine, or assistance." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1111 (2<sup>nd</sup> ed. 1998). An alternative definition for "lifeline" in the context of this proceeding, and one that is consistent with the Division's view of a "lifeline ferry service" would be "something regarded as indispensable for the maintaining or protection of life." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 672 (10<sup>th</sup> ed. 1993). The Applicant's proposed ferry service does not qualify as a "lifeline" service under either definition. A "lifeline ferry service" for our purposes is a ferry service that represents the only publicly accessible transportation means for delivering goods, services and/or passengers to and from a particular destination. At present, Goat Island is connected to Aquidneck Island by a causeway, and Conanicut Island is connected to both the mainland and Aquidneck Island by bridges. Neither Goat Island nor Conanicut Island require a ferry service at present to receive indispensable services such as food, potable water, medical supplies and services, or access. If the causeway and bridges were to be removed from the equation, then a ferry service to Goat Island and Conanicut Island could be regarded as a "lifeline" service (such as is the case for Block Island and the Town of New Shoreham today, with the Interstate Navigation standard – as opposed to fast – ferry service with respect to the transportation of essential

With respect to public convenience, Mr. Closson testified that he had structured his proposed routes and operating schedule with a view toward providing services at times and locations not currently offered by the two existing companies. Further, he believed his vessel would be more luxurious than those currently being utilized by his competitors, and would accordingly provide a different quality of service as well. For example, his vessel would have a café offering sandwiches and drinks of a somewhat different caliber than that currently offered by his competitors, and would offer two separate restroom facilities. Further, the relatively large size of his vessel, when compared to those used by his prospective competitors, would allow it to maintain its schedule in less clement weather than the smaller vessels, allowing potential passengers greater confidence when planning their schedules around the ferry schedule. He suggested that these differences would all serve both public convenience and necessity.<sup>40</sup>

Next, Mr. Closson's testimony turned to a discussion of the operational structure of his company (the Applicant). He has a management team made of up master captains (and plans to utilize five or six between the two boats the Applicant plans to operate), with a least two deckhands on each boat. He also plans to utilize separate staff to help out with food and beverages, so he would have a total of five employees on board the boats when they are operating, one of whom would be a licensed master. He plans to run the vessels in the evenings as well as during the day, and is very comfortable with his own ability to manage personnel.<sup>41</sup>

In developing his business plan, according to his testimony, Mr. Closson utilized the formal training he received when earning his MBA to do some market research. He developed a

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cargo). So long as alternative means of transportation are available, the Applicant simply cannot claim that it would be providing lifeline services to Goat Island and Conanicut Island. However, the Applicant does not need to provide lifeline services in order to obtain a certificate of operating authority – it need only show public convenience and necessity (and, of course, fitness).

<sup>40</sup> Tr. 3/11/10 at 62-67; Applicant's Exhibit 10.

<sup>41</sup> Tr. 3/11/10 at 68-70.

pro forma in terms of projections on numbers (passengers), and looked at several different business models with his accountant. Based on input from his accountant, he made some adjustments to the business model he eventually settled on, and is comfortable with it.<sup>42</sup>

In addition, he testified that he was purchasing the VIKING QUEEN from an individual that is actually financing his venture, and that individual's CPA also reviewed Mr. Closson's pro forma and business projections, looking out six years. This CPA has had experience dealing with businesses running tour boats and ferry boats, and was sufficiently comfortable with Mr. Closson's pro forma that he recommended to the seller that the seller do 75% of the financing.<sup>43</sup>

Mr. Closson testified that, in terms of a ferry service, he expects the overhead to be roughly the same whether he is transporting one passenger or 145 passengers, and he also did not believe the operating costs would be all that different whether he was operating a 65-foot vessel or a 25-foot vessel, because all of the operations would be on confined routes within Newport Harbor, at generally very low speeds, consuming approximately one gallon of fuel per mile. Further, given the current state of the economy, he believed it was reasonable to expect that wages would be very competitive and predictable. All in all, his operations would not cost too much, and he has modeled the operation at a variety of passenger capacity levels. He recognizes that the initial ridership will be lower, and that there will be some ramp-up time, but he believes he will have the reserves to carry the boat through the first six months of operations even if the Applicant received not one dime of income. His cash reserves are about \$110,000.00.<sup>44</sup>

With respect to the question of public convenience and necessity, Mr. Closson testified that over one million visitors came to Newport in 2009. Very few of those visitors appear to

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<sup>42</sup> Tr. 3/11/10 at 70.

<sup>43</sup> Tr. 3/11/10 at 71.

<sup>44</sup> Tr. 3/11/10 at 70-72.

have utilized water transportation while they were in Newport. He believes that the potential for expanding this market, with a different business model and lower prices, in a place as beautiful as Newport Harbor, would support his decision to invest hundreds of thousands of dollars, moving forward with a new and different ferry service.<sup>45</sup>

In response to cross-examination by Oldport Marine, Mr. Closson testified that the boat he planned to use was currently berthed at Standish Boat Yard, Tiverton, Rhode Island. The vessel is 65 feet long, has a beam of 24 feet, and a draft of 9 feet. He acknowledged that it was a large craft for Newport Harbor, and that he had not yet determined where it would be permanently berthed. That was a decision he would make once he knew whether or not a certificate of public convenience and necessity was going to issue, although he had begun looking into possible berthing alternatives.<sup>46</sup>

Mr. Closson also acknowledged that his total business plan included sunset cruises, club cruises, private charters and the VIKING QUEEN tender service as well as the ferry service directly at issue in this proceeding. Even if he was limited solely to running a ferry service just with the one vessel proposed in this application, however, he believed he could make a go of the proposed operation.<sup>47</sup>

In response to cross-examination, Mr. Closson testified that he has applied for a 100-ton master's near coastal license. He anticipated receiving the license in the near future because he had successfully passed all of the required exams. In addition to himself, he expects to have five

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<sup>45</sup> Tr. 3/11/10 at 76.

<sup>46</sup> Tr. 03/11/10 at 78-79.

<sup>47</sup> Tr. 03/11/10 at 79-80. In fact, subsequent to this hearing, the Applicant was granted a certificate of public convenience and necessity for the operation of the Viking Queen tender service referred to by Oldport Marine's counsel. See *Aquidneck Ferry & Charter, Inc., Application For Authority To Operate As A Water Vessel Passenger Carrier Pursuant To R.I.G.L. §§ 39-3-3 And 39-3-3.1*, Division Order number 19966, issued on April 26, 2010, in Division Docket No. D-10-05.

or six other licensed masters working for his company, but had only reached an agreement with one individual who would serve as his chief captain.<sup>48</sup>

Mr. Closson further testified, in response to cross-examination, that he had personally brought his proposed ferry up to Tiverton, Rhode Island, stopping in Cape May, Atlantic City, and New Haven Connecticut, and traveling through New York Harbor. The vessel has two engines and can spin on a dime, while drawing less than six feet of harbor. Even operating it for the first time, he found it very easy to maneuver, and he is confident that a licensed master would have no trouble sailing that ferry around Newport Harbor.<sup>49</sup>

Mr. Closson plans to sell tickets both at the Newport Visitors' Center and on the vessel itself. People who happen to see his ferry and are struck by the impulse to go out on the harbor will simply have to walk up the gangway and buy a ticket.<sup>50</sup>

Mr. Closson then went on to explain that his company would operate a second boat as well, the Viking Queen, a former tour boat on Newport Harbor. While his first boat, the AQUIDNECK FERRY (currently the CAPT. LUCKY) has received a certificate of inspection (COI) from the U.S. Coast Guard, his second boat, the VIKING QUEEN, was still going through the certification process. The CAPT. LUCKY's current COI was for zone 2 (the mid-Atlantic), and did have to be reviewed and updated for zone 1 (New England), but the necessary inspections were scheduled. However, since the Coast Guard inspects the same types of things for issuing COI's regardless of the zone of operation (safety equipment, mechanical condition, etc.), he is confident that there will be no problems getting an updated COI for CAPT. LUCKY

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<sup>48</sup> Tr. 03/11/10 at 83-84.

<sup>49</sup> Tr. 03/11/10 at 89.

<sup>50</sup> Tr. 03/11/10 at 90.

in zone 1. He does have a “punch list” to complete from the initial inspection in order to receive the zone 1 COI, but he intends to complete all of the items on the punch list.<sup>51</sup>

With respect to his second vessel, the VIKING QUEEN (currently in New York), Mr. Closson testified that the purchase and sale agreement provided that the vessel would require a dry dock examination and annual inspection from the Coast Guard before it could be operated. All of the exams necessary for a COI short of drug testing and overboard drills (which he would have to complete) were to be successfully completed before the sale would go through. At present, however, neither of the vessels has a COI for zone 1 (i.e., Newport and other New England waters).<sup>52</sup>

In response to further cross-examination, Mr. Closson conceded that, as of the date of the hearing, he would not be able to perform the ferry functions he was proposing as he did not have commitments from the entities that control his various proposed landing sites that he could use those sites. He agreed that before he can operate, he first needs a certificate of public convenience and necessity issued by the Division, next he would need to obtain the Public Utilities Commission’s approval of his tariff (the fares he plans to charge), and finally he would need to secure docking rights at his proposed landing sites.<sup>53</sup>

Mr. Closson then agreed that he had a fairly substantial amount of money already tied up in his proposed ferry operation, particularly in the CAPT. LUCKY, and that there was a possibility that he would not be granted a certificate of public convenience and necessity by the

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<sup>51</sup> Tr. 03/11/10 at 93-97.

<sup>52</sup> Tr. 03/11/10 at 97-104.

<sup>53</sup> Tr. 03/11/10 at 117-120, 144.

Division. Nevertheless, after having researched the marketplace, he remains willing to make that investment and take his chances.<sup>54</sup>

Next, Mr. Closson admitted under cross-examination that he had not done a specific study as to whether public convenience and necessity required the addition of his ferry service from the Ann Street Dock, Fort Adams Dock or the Goat Island Dock. He also admitted that there was some overlap between his proposed schedule and that of the Jamestown and Newport Ferry.<sup>55</sup>

He also admitted that he made some assumptions in his pro forma regarding how full his ferry would be on its various proposed trips, but that he had never looked at how full the Jamestown and Newport Ferry was on its various trips along some of the same routes as he proposed to run. He has seen the Jamestown and Newport Ferry in operation, and is aware that it operates at capacity at certain events and certain times of the season, but has never personally seen it at full capacity. In reviewing the Jamestown and Newport Ferry's run sheets for 2009, he was surprised to learn that it made over 4,300 runs that year, roughly 2,600 of which would overlap his proposed AQUIDNECK FERRY runs. He agreed with Conanicut's counsel that only six of those 2,600 runs were at capacity, and all six of those runs occurred on two days in August of 2009, coinciding with festivals adjacent to Newport Harbor.<sup>56</sup>

Next, in response to cross-examination, Mr. Closson testified that when he indicated in his submission (Applicant's Exhibit 10 at 2) that there had been no service between Goat Island and Newport since 1971, he meant that the long-time ferry service along that route had ceased operations with the opening of the causeway to Goat Island in 1971. He was unaware that the

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<sup>54</sup> Tr. 03/11/10 at 120-122.

<sup>55</sup> Tr. 03/11/10 at 122-123.

<sup>56</sup> Tr. 03/11/10 at 123-127.

Jamestown and Newport Ferry ran to Goat Island from 1995 to 2008, and that they discontinued the service in 2008 due to a lack of demand.<sup>57</sup>

Mr. Closson also admitted under cross-examination that when he stated on page 11 of Applicant's Exhibit 10 that the Jamestown/Newport Ferry and the AQUIDNECK FERRY would have a different ridership, he had not done any studies to demonstrate that fact.<sup>58</sup>

Next, at the request of Conanicut's counsel, Mr. Closson read into the record an excerpt from a Newport Harbor marine passenger service development study, admitted into the record as Applicant's Exhibit 16. The excerpt, located at the top of the second page of the exhibit, was a summary of one of the key findings of the study:

The existing supply of water transportation services to Newport Harbor is adequate to service the current demand, which consists primarily of regularly scheduled water shuttle services from Perrotti Park to Fort Adams, as well as other locations, and on-demand water taxi services to the public and private piers and vessels moored within the harbor. *There is sufficient capacity* within the fleet of current service providers *to handle most weekend and other peak season events*, except in rare instances of particularly high demand, in which outside vendors are brought into Newport Harbor.

(*Emphasis* supplied.) Mr. Closson was aware that this study was performed for the City of Newport by outside consultants, but he believes the study was done to justify the receipt of Federal funding for improving dock capacity and was tailored specifically to meet that need and the needs of the City, not necessarily the needs or interests of private concerns.<sup>59</sup>

#### April 13, 2010

The third hearing on this application was on April 13, 2010. A number of pre-filed exhibits were marked "for identification," and several Public Comment Exhibits were admitted

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<sup>57</sup> Tr. 03/11/10 at 127-128.

<sup>58</sup> Tr. 03/11/10 at 133.

<sup>59</sup> Tr. 03/11/10 at 133-136.

into the record. Two individuals appeared in person to offer public comment, and the presentation of the parties' substantive cases continued.

### **Public Comment Exhibits In Favor Of Application**

Ms. Corinne Calise Russo, Director, Rhode Island Department of Elderly Affairs, submitted a letter dated March 30, 2010, submitted a letter stating that "there is an unmet need for persons with physical disabilities to have public passenger service in and around Newport harbor. Currently, there are no public vessels who can meet this essential need at this time." Her letter then goes on to state that "the public would be better served if a public ferry could accommodate wheelchairs and persons less stable on their feet, allowing them to experience the 'City by the Sea' from the water." Accordingly, she supported the application.<sup>60</sup>

Ms. Lorna Ricci, Executive Director, Ocean State Center for Independent Living, and Ms. Susan Eleoff, Information/Referral Specialist, Ocean State Center for Independent Living, submitted a letter dated April 6, 2010, in which they voice their strong support for Aquidneck Ferry's application in this proceeding. They state that there is an unmet need for persons with mobility impairments to have accessible public passenger service in and around Newport Harbor, with no public vessel currently available to meet that need. They believe that the vessel Aquidneck Ferry proposes to use for its ferry service will have wheelchair access and wheelchair accessible bathrooms, greatly improving the quality of services available to the handicapped.<sup>61</sup>

Ms. Jody J. Sullivan, Executive Director, The Newport County Chamber of Commerce, submitted a letter dated April 9, 2010, "on behalf of the Newport County Chamber of Commerce

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<sup>60</sup> Public Comment Exhibit 15. *But see* Public Comment Exhibit 20 in which Ms. Russo states that, at the time she composed Public Comment Exhibit 15, she "was not aware of a current level of service for this population" [elderly and handicapped], and requests that Public Comment Exhibit 15 be retracted from the record. The Hearing Officer cannot approve her request to withdraw an exhibit that has already been admitted into the record, but notes that her subsequent letter clearly reflects on the weight to be given the earlier letter.

<sup>61</sup> Public Comment Exhibit 16.

Board of Directors” expressing support for Aquidneck Ferry’s application. The Chamber of Commerce “applauds all efforts to expand accessibility throughout Newport County.”<sup>62</sup>

Finally, Ms. Annette Bourbonniere, of Annette Bourbonniere Consulting, submitted a letter dated April 12, 2010, indicating that as “an advocate for persons with disabilities, I support the application for one or more accessible ferries on Narragansett Bay.” She states that there are no vessels on the water at this time that are accessible to the disabled, and believes that the state should have such vessels so that those with disabilities can enjoy the beauty of this area as much as anyone else.<sup>63</sup>

#### **Public Comment Exhibits Opposed To Application**

No new Public Comment exhibits opposed to the application were filed prior to this hearing.

#### **Public Comment Testimony In Favor Of Application**

Ms. Maria Perna appeared to offer public comment testimony in support of Aquidneck Ferry’s application. She explained that she had been contacted by Mr. Smith from the Newport Convention and Visitors Bureau concerning this application. She has worked extensively with Mr. Smith in the past on an Accessible Rhode Island project that has extended across some ten years. Mr. Smith explained to her what Mr. Closson had in mind to do in Newport with an accessible ferry.<sup>64</sup>

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<sup>62</sup> Public Comment Exhibit 17.

<sup>63</sup> Public Comment Exhibit 18. *But see* Public Comment Exhibit 19, in which Ms. Bourbonniere expresses doubt that Aquidneck Ferry’s vessel will be able to find a dock with sufficient ramp space to allow it to be safely accessible to wheelchairs. On the other hand, she believes that Oldport Marine’s proposed plans to make one of its vessels wheelchair accessible will easily be accommodated by existing docks. It is not clear where she is obtaining her information from, nor is it clear whether or not that information is accurate. Nevertheless, it seems clear that she supports all efforts to improve accessibility for the disabled.

<sup>64</sup> Tr. 04/13/10 at 135-136.

Ms. Perna testified that she has been very interested in accessibility issues, particularly since being diagnosed with MS in 1989. It seemed to her that an accessible ferry would be a logical step for Newport, not only because some 20% of people suffer from disabilities in one form or another, but also because accessibility is important to an increasingly elderly population and to young families trying to get around with strollers.<sup>65</sup>

Mr. Perna and her husband are part of an MS support group, and as a group have worked with both the Newport Convention and Visitor's Center and Accessible Rhode Island on a variety of issues. She does a lot of work for the MS Society, but the project she was referring to really came about as a result of the fact that a number of the members of her support group had difficulty getting into restaurants, theaters, and doctor's offices. As a result, her group has identified over 500 accessible venues in Rhode Island and published seven guides over the past ten years to help people find those venues. She is very passionate on the issue of accessibility, and strongly supports initiatives such as Mr. Closson's to provide new accessible services.<sup>66</sup>

In response to cross-examination, Ms. Perna testified that she never had a meeting with Mr. Closson to discuss his application, although she did have a phone conversation with him in which he explained what he was hoping to do, and he sent her an email with additional information. Mr. Closson did not tell her that he was going to be the only person with an accessible ferry boat operating on Newport Harbor. She is aware that there are already ferry boats operating in and around Newport, but has no idea whether or not any of the current boats are accessible. Her focus is to make sure that all venues are accessible to all people, not just those with disabilities.<sup>67</sup>

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<sup>65</sup> Tr. 04/14/10 at 136.

<sup>66</sup> Tr. 04/13/10 at 137.

<sup>67</sup> Tr. 04/13/10 at 140.

Ms. Perna also testified that she was very familiar with the Americans with Disabilities Act (“ADA”). Her group’s goal, when they first started their project, was to follow the ADA 100%, but they quickly found out that if they did, their guide would be very, very, small because few venues are totally accessible, and many are not even marginally accessible. As a result, they try to set out the limitations as well as the advantages of all of the listed venues, looking at such areas as parking, van accessible parking, direct entrance to a facility, accessible bathrooms, and wheelchair accessibility (the latter is viewed as particularly important, since if a venue is accessible to a wheelchair, it is generally accessible to all). The guides her group publishes try to give people enough information to determine whether or not it is accessible enough for them to use.<sup>68</sup>

Ms. Perna testified that she has never done any ADA studies, and has not had an experience with vessels or boats. She believes that the goal for most people with disabilities is to be able to enjoy a venue without having to have someone give them assistance, but she acknowledges that this is not always realistic. She does not believe that Mr. Closson will be able to make his ferry completely accessible to everyone, but that he will make it possible for many people with accessibility issues to make use of it, perhaps with some assistance. She believes it would be unrealistic to expect Mr. Closson to make his boat 100% compliant with the ADA, but he should not have to in order to make it more accessible to many people who previously would not have had any access to it.<sup>69</sup>

In response to further cross-examination, Ms. Perna testified that she has never been on either of the vessels Mr. Closson plans to use, but she has been on other ferries. With respect to

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<sup>68</sup> Tr. 04/13/10 at 140-144.

<sup>69</sup> Tr. 04/13/10 at 144-145.

accessible bathroom facilities, she explained that the first thing needed is a door wide enough to accommodate a wheelchair. You would also want a toilet that is raised with hand bars to facilitate transferring from the wheelchair to the toilet and back. You also need a sink that will allow a wheelchair to get close enough for the person to use, as well as soap and hand driers within easy reach of the wheelchair. She does not know whether Mr. Closson's vessels will provide that type of access to those in wheelchairs.<sup>70</sup>

For Ms. Perna, the bottom line is that any effort made to improve the accessibility of ferries in Newport is a good thing. She believes that the ability to pull up to a ferry landing, park the car, and somehow get on the boat, so that she (or others with disabilities) may enjoy the water like anyone else is all she wants. It does not have to be ideal, just enough to allow some access.<sup>71</sup>

In response to questions from the Hearing Officer, Ms. Perna testified that, so far as she knows, the only water borne venue in Rhode Island that is currently accessible is a single pontoon boat in Providence used to enjoy Water Fire. There was a marginally accessible ferry between Newport and Providence for a couple of years, but it no longer operates. To the best of her recollection, neither of the two intervenor's water transportation services are listed in her group's guide as being accessible.<sup>72</sup>

### **Public Comment Testimony Opposed To Application**

Mr. John David Picotte, Curator of the Museum of Yachting at Fort Adams in Newport, appeared to offer public comment testimony in opposition to Aquidneck Ferry's application. Mr. Picotte testified that he is the curator at the Museum of Yachting at Fort Adams in Newport.

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<sup>70</sup> Tr. 04/13/10 at 146-148.

<sup>71</sup> Tr. 04/13/10 at 149.

<sup>72</sup> Tr. 04/13/10 at 150-152.

Several years ago, his organization approached Oldport Marine and asked Oldport Marine to provide transportation between the Museum and the International Yacht Restoration School (“IYRS”), which is a part of the Museum. Oldport Marine began running a ferry service between the Museum and IYRS on an hourly basis. He has been able to watch the ferry pick up and discharge passengers at Fort Adams (because his office overlooks the ferry dock), and has observed how often few if any passengers actually use the ferry service there. The Museum does everything it can to encourage use of the ferry, including posting the ferry schedule on its web site and the IYRS web site, providing signage at both locations, but there is still very little use of the ferry. One of his employees actually uses the ferry to commute, and when the published schedule does not work out for her, Oldport has been willing to send a boat right over for her. He is afraid that initiating another ferry service would lead to both ferry services (Oldport and Aquidneck) failing due to too little business, and then it will be even harder for the Museum’s visitors (and employees) to make their way to and from the Museum.<sup>73</sup>

In response to cross-examination, Mr. Picotte testified that the Museum does have several moorings that are maintained for it by Oldport Marine, a service the Museum pays for. He does not know whether or not his employee who commutes by ferry would prefer the AQUIDNECK FERRY to one of Oldport’s vessels.<sup>74</sup>

Mr. Michael Sweeney was the next person to offer public comment testimony. He testified that he is the General Manager of the Goat Island Marina in Newport, and has had that position since 2002. From the beginning, he has worked with Oldport Marine and has always found Oldport’s service to be adequate to his marina’s needs. He dedicates a specific dock for

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<sup>73</sup> Tr. 04/13/10 at 16-17.

<sup>74</sup> Tr. 04/13/10 at 18-19.

Oldport's launch service, a 20-foot dedicated berth that allows Oldport to come and go, pick up guests at Goat Island, and transport them downtown. He does not believe he has room in his marina for a vessel the size proposed by the Applicant, and is not sure how that could be worked. His bottom line is that Oldport has done a good job supporting the marina, and continues to do so.<sup>75</sup>

In response to cross-examination, Mr. Sweeney testified that navigating something the size of a 60-foot ferry inside his marina's perimeter would be difficult if not impossible, certainly at or near the berth currently provided to Oldport. Nor would Mr. Sweeney be willing to allow a ferry to use the Goat Island Marina's fuel dock to pick up and discharge passengers. The fuel dock is kept very busy during the season. As an aside, Mr. Sweeney noted that his company also operates a banquet facility adjacent to the fuel dock that is essentially rented out exclusively to any group wishing to use it. Having passengers transiting the banquet facility to and from the fuel dock might interfere with the agreement his company makes to offer exclusive use of the banquet facility to any group renting that facility.<sup>76</sup>

In response to further cross-examination, Mr. Sweeney testified that he is familiar with how many people use Oldport's services from his marina. Over the last couple of years, Oldport has provided an on-demand service whereby whenever a guest comes in to the marina office to request transportation, Mr. Sweeney or his staff hail an Oldport launch operator by VHF radio and within minutes Oldport is at the dock to pick up the passengers. During the period where Oldport was only providing an on-demand service, the marina had stopped providing a dedicated berth and instead allowed Oldport to load from the end of the fuel dock or from the old berth

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<sup>75</sup> Tr. 04/13/10 at 20-21.

<sup>76</sup> Tr. 04/13/10 at 21-22.

inside the marina perimeter; more recently, the marina and Oldport had agreed to revert back to the practice of a dedicated berth inside the marina perimeter with signage in place to assist the public.<sup>77</sup>

Mr. Sweeney further testified that he was familiar with the number of passengers utilizing Oldport's services at his marina. From what he has seen, the Oldport vessels are never full except possibly during a festival one or two weekends per summer. With respect to whether or not he would allow the Applicant to pick up and discharge passengers at Goat Island, Mr. Sweeney stated that he has never been contacted by the Applicant, that he does not have the space for a vessel of that size, and that he does not feel there is a need for such a vessel at Goat Island.<sup>78</sup>

In response to questions from counsel for the Jamestown Ferry, Mr. Sweeney testified that he adopted the contents of his letter dated February 1, 2010 (marked as Public Comment Exhibit 3), as part of his sworn testimony. That letter specifically noted Mr. Sweeney's opinion that there was no need for additional water transportation services at Goat Island, and that the Goat Island Marina could not accommodate a 60-foot vessel.<sup>79</sup>

In response to further cross-examination, by the Applicant's counsel, Mr. Sweeney agreed that he had been in conversations with personnel from Oldport Marine, and had been at the time he wrote his letter on February 1, 2010. He also testified that he did not charge Oldport for use of his docking spaces, viewing that instead as simply providing a service to his organization's guests. He further explained that he was not saying that he would necessarily refuse to allow the Applicant or some other company to pick up and discharge passengers at the

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<sup>77</sup> Tr. 04/13/10 at 22-23; 31-32.

<sup>78</sup> Tr. 04/13/10 at 23-24, 33.

<sup>79</sup> Tr. 04/13/10 at 25-26.

marina, but rather than no one had contacted him concerning permission to do so. As a result, he has continued to rent out his slips and dedicated berths so that at present he no longer has any spaces left that would accommodate the Applicant's vessel.<sup>80</sup>

In response to further cross-examination, Mr. Sweeney agreed that his marina's fuel dock is centrally located within the marina's perimeter and is about 400 feet long overall, of which about 120 feet is dedicated to the actual fuel dock area. All of the approximately 280 feet of the fuel dock that is not actually used for fueling purposes is rented out as berthing for other vessels, and all of that space is in fact currently rented out and not available to other vessels. The Oldport Marine vessels have occasionally been allowed to pick up and discharge passengers along the fuel dock; there is a small "T"-dock off the fuel dock marked by signage indicating that it is a ferry dock, inside the marina perimeter large enough to accommodate Oldport's 25-foot vessels.<sup>81</sup>

### **Applicant's Direct Case**

#### **Testimony of Matthew R. Smith**

In response to direct examination, Mr. Smith testified that he is a naval architect, and has been since approximately 1988. The purpose of his testimony is to testify to the conditions of, and improvements to, the vessel currently known as the "CAPT. LUCKY" (to be renamed "AQUIDNECK FERRY") owned by the Applicant. Mr. Smith explained that he was hired by the Applicant to supervise and oversee improvements being made to the CAPT. LUCKY, as well as updating the CAPT. LUCKY's "COI". Among the improvements is the installation of a wheelchair accessible side door to permit passengers to land at dock facilities and a ramp to get

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<sup>80</sup> Tr. 04/13/10 at 26-28.

<sup>81</sup> Tr. 04/13/10 at 28-30.

them from the dock to the new wheelchair accessible side door and an electrical systems upgrade. The Coast Guard is inspecting the hull bottom as part of the process of transferring the CAPT. LUCKY's COI from the Philadelphia operating region to the southeastern New England operating region; he sees no reason why the CAPT. LUCKY shouldn't pass the Coast Guard inspection and have its COI transferred.<sup>82</sup>

In response to cross-examination, Mr. Smith explained that he was generally familiar with the stops planned by the Applicant, but that he has not measured or documented the docks that the ramp he is being asked to design will be landing on. He also explained that the side door design had just been finalized, and that he could not proceed with the ramp design until that was accomplished. He intended to submit his ramp design to the Coast Guard, as its regulations require for all engineering drawings and calculations for boarding ramps, and the Coast Guard will verify that the design meets the applicable Coast Guard requirements. He does not plan to seek ADA approval for the design and is not aware of any requirement that he do so.<sup>83</sup>

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<sup>82</sup> Tr. 04/13/10 at 36-41; Applicant's Exhibit 23A (pre-filed testimony) at 2-4. NOTE: The "COI" is a "certificate of inspection" issued by the U.S. Coast Guard. This certificate is specific to the vessel and its authorized areas of operation, and is required before it can be put in service as a passenger vessel.

<sup>83</sup> Tr. 04/13/10 at 43-46, 67-69, 72-73. "ADA" refers to the "Americans With Disabilities Act." The cross-examination continued on for several more pages focusing on whether the ramp being designed by Mr. Smith would be the right length to meet ADA standards with every dock the CAPT. LUCKY might tie up to; significantly, the Intervenor's never cited any Federal ADA regulations that applied directly to ferries and docks. Tr. 04/13/10 at 41-66, 69-70, 73-75. The Hearing Officer attempted to find the accessibility standards referred to by the Intervenor's counsel, but after searching the Code of Federal Regulations following the hearing was forced to conclude that no such standards existed for ferry boats as recently as January 11, 2011. See 49 CFR § 38.177, see also 49 CFR § 37.108, 49 CFR Part 39 subpart E (all of which are reserved for rules governing ferries and other passenger vessels; i.e., accessibility rules for ferries have not yet been promulgated); see generally 28 CFR § 36.310 (defers to Secretary of Transportation for developing accessibility requirements for vehicles and systems). Not too surprisingly, Mr. Smith was not in a position to answer those questions about ferry boat ADA compliance definitively. Since the Intervenor's failed to refer the Division to any existing ADA regulations applicable to ferry boat design (because no such regulations existed), the Division finds this line of questions irrelevant to the matters it must decide in this proceeding.

**Testimony of Robert E. McMahon, Jr.**

The Applicant next called Mr. Robert E. McMahon, Jr., to the stand. Mr. McMahon testified that he has been employed since 1994 by “Pinnacle Marine Corporation, which is engaged in developing marketing and sales programs for new and pre-owned passenger vessels worldwide; providing marketing, sales, and vessel design consulting to select shipyards; providing consulting services to the passenger vessel industry such as the National Park Service; and vessel and barge valuations and auctions in North America.”<sup>84</sup> He is currently President of Pinnacle Marine Corporation. Prior to 1994 he was employed in various capacities by SkipperLiner Industries, Inc., for 10 years, eventually rising to senior vice president of sales and marketing; SkipperLiner is a leading manufacturer of recreational and commercial passenger vessels, as well as an operator of such vessels and marinas throughout the United States.<sup>85</sup>

Mr. McMahon went on to testify that he was retained by the Applicant to look into the feasibility of the Applicant’s proposed operation. He examined the proposed services and service area, as well as the service area and services provided by Oldport Marine and Conanicut’s Jamestown Ferry, spoke to area tourism and economic development officials, examined the vessels to be used and the proposed points of departure and arrival, and reviewed available literature about tourism in Newport. Based on the foregoing, he concluded that the proposed Aquidneck Ferry would provide tourists in Newport Harbor with greater comfort and safety in terms of a permanently enclosed deckhouse, additional space for movement throughout the cabin and open decks, wheelchair access and the ability to secure a wheelchair underway, a wheelchair accessible toilet, and easier and more stable movement throughout the vessel for the

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<sup>84</sup> Tr. 04/13/2010; Applicant’s Exhibit 25 at 2 (pre-filed testimony).

<sup>85</sup> Tr. 04/13/2010; Applicant’s Exhibit 25 at 2-3.

elderly. The Aquidneck Ferry would also provide passengers additional benefits such as a beverage and snack bar. In his opinion, this would represent improved services for passengers, particularly for those confined to wheelchairs, and as such meets a public need that is currently being under served in Newport Harbor.<sup>86</sup>

With respect to the question of whether the Applicant is fit, willing and able to perform the services proposed by its application, Mr. McMahon testified that it was his opinion that it was. He bases his opinion on his examination of the Applicant's proposed operation, including the marketing plan and financial assumptions relied upon by the Applicant. Having said that, Mr. McMahon did express some concern about the proposed use of the Ann Street Pier during low tide (unless it was dredged), and also noted that the Applicant had yet to secure a new COI from the U.S. Coast Guard. He explained that issuance of a new COI would be predicated upon successful completion of:

1. Dry Dock Credit Exam and Internal Structures Exam (required every 24 months in saltwater);
2. Simplified Stability Test with issuance of a new Stability Letter; and,
3. New to Zone Certificate of Inspection exam.

Mr. McMahon noted that the Applicant would incur costs to conduct the Simplified Stability Test, and might see its rated passenger capacity reduced as a result of new Coast Guard standards. The vessel would also have to be commanded by a Coast Guard licensed captain (several of which have been tentatively identified by the Applicant), and equipped with industry standard mechanisms to secure a wheelchair to her deck; it is his understanding that the AQUIDNECK FERRY is being equipped with additional safety and communications gear to

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<sup>86</sup> Applicant's Exhibit 25 at 3-4. The Intervenors objected to this being considered expert testimony on the question of public convenience and necessity in view of the fact that none of the witness' conclusions were based on public need surveys or other objective criteria. The Hearing Officer agreed, but allowed the testimony in as a reflection of this witness' personal opinion rather than as the witness' expert opinion, and agreed to adjust the weight given the testimony accordingly. Tr. 04/13/10 at 78-83.

facilitate her safe operation in constricted waters near piers and docks. He also testified that it would be important to operate the vessel as many hours as possible including for sightseeing and charter cruises to supplement her regular ferry runs in order to maximize the operation's chance of succeeding financially.<sup>87</sup>

Next, Mr. McMahon's testimony turned to a discussion of the Applicant's updated revenue and expense projections that Mr. McMahon had assisted the Applicant with. Mr. McMahon explained that in working up the new revenue and expense projections, he had also reviewed the City of Newport Department of Planning, Zoning, Development & Inspection website, portions of the City of Newport's "Comprehensive Land Use Plan" adopted in 2004, the City of Newport's "Newport Harbor Marine Passenger Services Development Project" report, and the Newport Harbor Marine Passenger Service Development Study "Technical Memorandum: Market, Financial, and Economic Impact Considerations."<sup>88</sup> Review of this documentation led Mr. McMahon to conclude that the Applicant's updated revenue and expense projections were sound.<sup>89</sup>

In response to cross-examination, Mr. McMahon testified that if the Applicant could not get permission to land on Goat Island, the Applicant's pro forma (financial projections) would be affected to a small degree.<sup>90</sup>

Mr. McMahon also testified that he was familiar with the vessel (CAPT LUCKY / AQUIDNECK FERRY) the Applicant proposed to use because his company had sold that vessel to the Applicant. He is the President and sole stockholder of that company, Pinnacle Marine. The vessel had been on the market for about ten months, and his company received a

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<sup>87</sup> Tr. 04/13/10; Applicant's Exhibit 25 at 3-5.

<sup>88</sup> Tr. 04/13/10 at 85-86; Applicant's Exhibits 13, 14, 15, 16 and 20.

<sup>89</sup> Tr. 04/13/10 at 86-87; Applicant's Exhibit 25 at 4.

<sup>90</sup> Tr. 04/13/10 at 89-92, 95-96.

commission on its sale to the Applicant. Brokerage of ferries is a part of his company's business, although his company also does quite a bit of consulting in the industry and quite a bit of valuation work (meaning appraisal of vessels). However, the actual percentage of his business that each of these components makes up varies from year to year. In 2009, for example, the brokerage component represented about 65% of his total business. Appraisals represents about five to ten percent of his business, and the remainder (25% to 30%) comes from consulting.<sup>91</sup>

In response to further cross-examination, Mr. McMahon testified that he considered having a snack bar on board the vessel represented an additional benefit to its passengers, even though it was intended as a hop on-hop off type of service, particularly for those who are planning to simply ride it around its full circuit without getting off. It is a convenience for passengers to be able to purchase souvenirs or drinks, if they are thirsty, while riding the ferry.<sup>92</sup>

With respect to the proposed landing sites in Newport, Mr. McMahon testified in cross-examination that he had visited the sites. With respect to Perrotti Park, he stated that the new piers for that location were not yet in, but that the location for the new pier for ferry docking was identified for him. The new piers being installed will be just north of the existing piers where the Newport/Providence ferry once disembarked. He also discussed the proposed landing sites with the Applicant, specifically at Goat Island, Perrotti Park and Ann Street. He visited the Ann Street pier and noted that the vessel would have a good ability to pull in on the south pier, the south floating pier, and it is his understanding that the City is in the process of putting a ramp from the existing pier to the new permanent access to the permanent pier, although no one from the City of Newport described for him the specific changes the City has in mind for that pier.

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<sup>91</sup> Tr. 04/13/10 at 96-98.

<sup>92</sup> Tr. 04/13/10 at 98-99.

The water depth at Ann Street was measured by him one hour before low tide as ranging from 5'3" to 5'6". He did not believe that it would be necessary for the AQUIDNECK FERRY to have anyone on the pier to assist with landing, although one of the two mates the Coast Guard would probably require could probably jump off the vessel to the pier if necessary.<sup>93</sup>

Finally, in response to cross-examination by Oldport Marine's counsel, Mr. McMahon testified that his company was also the broker selling a second vessel, the VIKING QUEEN, to the Applicant.<sup>94</sup>

In response to further cross-examination, this time by counsel for the Conanicut Marine, Mr. McMahon testified that if the application is not approved, and the Division does not issue a CPCN to the Applicant, the purchase and sale agreements would still be required to go through.<sup>95</sup>

Next, the cross-examination turned to the Applicant's pro formas. Mr. McMahon testified that he had been asked by the Applicant to review the original pro forma (Applicant's Exhibit 11), and had determined that some of the original numbers did not seem to him to work. As a result, he reviewed the available data with the Applicant and helped the Applicant to develop a new pro forma (Applicant's Exhibit 20), which reflects lower numbers, particularly for the ferry side of the operation. Although he was provided with the daily run sheets for Conanicut Marine's Jamestown and Newport Ferry before working on the new pro forma, he did not rely on them. Instead, his own analysis suggested that a daily count of 50 adults was probably more reasonable than the Applicant's original assumption of 168; his analysis was based on the population that comes to and from Newport and might want to ride a ferry. Based on that population, he came up with a total load factor of under 10 per cent for the day for adults and

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<sup>93</sup> Tr. 04/13/10 at 101-105.

<sup>94</sup> Tr. 04/13/10 at 105.

<sup>95</sup> Tr. 04/13/10 at 105.

under 2 per cent for the day for seniors and children. With that in mind, the actual load factors shown in Applicant's Exhibit 20 are incorrect but could be recalculated.<sup>96</sup>

With respect to whether or not all of the passengers Mr. McMahon was predicting for the proposed AQUIDNECK FERRY would be new ferry passengers or would be ferry passengers coming out of the current ridership of the Oldport Marine and Conanicut Marine services, Mr. McMahon indicated that he could not answer that question definitively. In his opinion, the AQUIDNECK FERRY is a vessel that should be marketed quite a bit differently than an on-demand service. It would have more creature comforts than the existing services and should develop its own market niche. However, he admitted that, while familiar with the Conanicut Marine service between Jamestown and Newport, he had never actually ridden one of that service's ferries and was not fully familiar with its creature comforts; he admitted that the Conanicut Marine service was a scheduled ferry and not an on-demand service such as Oldport Marine ran.<sup>97</sup>

With respect to the run sheets for Conanicut Marine's Jamestown and Newport ferry service, Mr. McMahon reiterated in response to cross-examination that he had reviewed the run sheets but that he did not calculate that service's load factors. He agreed, however, that the load factor was certainly significantly less than 100% and that there were very few occasions when that ferry service had been full. When presented with a summary of all of Conanicut Marine's daily run sheets (Conanicut Exhibit 3), Mr. McMahon agreed that the sheet showed that Conanicut Marine's ferry service was full 0.18% of the time for all runs, and that for those runs

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<sup>96</sup> Tr. 04/13/10 at 105-112.

<sup>97</sup> Tr. 04/13/10 at 112-113.

from Perrotti Park to Fort Adams that overlap the runs proposed by the Applicant, Conanicut Marine's ferry service was full only about 0.23% of the time.<sup>98</sup>

With respect to the pro forma, Mr. McMahon testified that he did help to develop the ridership figures set out therein, and he believed those figures to be on the conservative side. He also testified that the American's With Disability Act does not apply at present to vessels with less than 10,000 feet of deck space. At present, from what he could observe, there were no vessels currently operating in Newport Harbor that afforded wheelchair passengers access from the floating piers without having someone lift that wheelchair passenger onto the vessel.<sup>99</sup> He believes that the Applicant could structure a marketing campaign, emphasizing among other aspects the size of the vessel and enhanced wheelchair accessibility, that would allow it to attract passengers that have not availed themselves of the services of the Intervenors.<sup>100</sup>

#### **Testimony of Lawrence Closson**

The next witness called to the stand was Lawrence Closson. Mr. Closson testified that he is a self-employed chemist and a seasonal, licensed boat captain; his last work as a Master was operating the MAJESTIC, a tour boat out of Newport Harbor and the East Passage of Narragansett Bay. He has held a masters license for vessels of not more than 100 tons in near coastal waters issued by the U.S. Coast Guard since 1990. He has been engaged by the MAJESTIC since 2006. Prior to serving as Master of the MAJESTIC, he worked as a master for a four-ferry fleet operated by New England Fast Ferry Company for three years; as Master of the tour boats SPIRIT OF NEWPORT and HARBOR QUEEN, operated by Blount Marine for five years; as Master of the tour boats ISLAND QUEEN and ISLAND GIRL, operated by the Sunline

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<sup>98</sup> Tr. 04/13/10 at 113-115.

<sup>99</sup> Tr. 04/13/10 at 120-122, 127-129.

<sup>100</sup> Tr. 04/13/10 at 130-131.

Cruise Company, for three years; as Master of the tour boat SPIRIT OF NEWPORT, operated by Newport Navigation Company, for three years; and, earlier in his career, operated both the VIKING QUEEN and the VIKING PRINCESS, in Newport Harbor.<sup>101</sup>

Mr. Lawrence Closson then went on to testify that, based on his observations as a tourist in Newport, and as a Master providing tourists services in the Newport area, it was his opinion that the Applicant's service would be an enhancement over the current level of services provided tourists in Newport, particularly wheelchair bound tourists.<sup>102</sup> Further, based on his experience with vessels similar to that the Applicant plans to operate, he believes that the proposed landings can in fact accommodate both the CAPT LUCKY and the VIKING QUEEN. He has himself brought similar vessels into all of these sites and, with the possible exception of the Ann Street landing, believes that they can all accommodate the Applicant's vessels.<sup>103</sup>

In response to cross-examination, Mr. Closson testified that he is Addison Closson's brother. He also indicated that he was laid off by MAJESTIC the previous fall, and had not yet committed to another season on that boat, although he had been asked to come back again.<sup>104</sup>

He then went on to testify that he had docked the MAJESTIC at the new Perrotti Pier, and had heard that it was being dredged the winter of 2010/2011. He used the center pier at Perrotti to dock the MAJESTIC the previous year. It is his understanding that the Applicant's ferry would be docking at one of the two southernmost piers at Perrotti. In his opinion, if the dredging in the northeast corner of the Perrotti Park piers made the water deep enough, it would

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<sup>101</sup> Tr. 04/13/10; Applicant's Exhibit 24 at 2-3.

<sup>102</sup> Tr. 04/13/10; Applicant's Exhibit 24 at 3.

<sup>103</sup> Tr. 04/13/10 at 159-167; Applicant's Exhibit 24 at 3-4.

<sup>104</sup> Tr. 04/13/10 at 167-168.

be possible to back the Applicant's ferry into that area safely for the purpose of picking up and discharging passengers.<sup>105</sup>

With respect to the Ann Street area, Mr. Closson testified that he has brought both the VIKING QUEEN and the VIKING PRINCESS directly in to the Ann Street dock and tied up there on a handful of occasions. This would have been in 1989 and 1990 when he was Captain for Viking Tours in Newport. The Ann Street basin can be congested on weekends, but it did not present him with a problem handling the Viking Tours vessels. After pulling away from the dock, he was able to turn his vessels around and drive out without having to back them up the full length of the passage. The VIKING QUEEN was about 54 feet or more in length, and the VIKING PRINCESS was perhaps 42 feet long.<sup>106</sup>

With respect to Goat Island, Mr. Closson testified that he assumed that the Applicant's vessel would be able to tie up at the Goat Island Marina, possibly at the fuel dock. He has brought many vessels in there, including charters, the MAJESTIC, the VIKING QUEEN, and the SPIRIT OF NEWPORT, all with no problem. He has also seen some large vessels tied up at some of the slips off the fuel pier, although he himself has never had occasion to do so.<sup>107</sup>

With respect to the Fort Adams dock, Mr. Closson testified that the Applicant's 65 foot long vessel would be able to tie up where its side port could let people off in the wheelchair staging area. It would not be possible, or necessary, to tie off the stern lines to do so; you could safely load and off-load passengers with a breast line (and, presumably, a bow line) tied up to the dock.<sup>108</sup>

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<sup>105</sup> Tr. 04/13/10 at 168-179, 195.

<sup>106</sup> Tr. 04/13/10 at 179-181, 195-196.

<sup>107</sup> Tr. 04/13/10 at 182-187.

<sup>108</sup> Tr. 04/13/10 at 187-188.

Next, Mr. Closson testified, in response to cross-examination, that he has on occasion seen Jamestown/Newport Ferry's vessels actually traveling empty, and on many times he has seen them underway with only 10 to 15 passengers on board, although he has only had occasion to observe them from Bowen's Wharf.<sup>109</sup>

Finally, Mr. Closson agreed under cross-examination that every boat has its own handling characteristics, depending on the hull form, type of propulsion, and many other factors. He also agreed that he has never himself operated the AQUIDNECK FERRY, though he has operated the Applicant's second boat, the VIKING QUEEN. Nevertheless, based on his years of experience of handling vessels of many different types and sizes in and around Narragansett Bay, he was of the firm opinion that it was possible for both of the proposed vessels to dock safely at all four of the proposed locations. He has no doubt as to his own ability to maneuver the AQUIDNECK FERRY into any of the proposed landing sites.<sup>110</sup>

#### **April 30, 2010**

The fourth and final hearing on this application was on April 30, 2010. All of the pre-marked exhibits previously introduced were entered into evidence in full, two Public Comment Exhibits were admitted into the record (one of which, Public Comment Exhibit 19, was adopted by its drafter, Ms. Annette Bourbonniere, as part of her testimony and treated as a full exhibit), one individual (Ms. Bourbonniere) appeared in person to offer public comment, and the Intervenors presented their witnesses.

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<sup>109</sup> Tr. 04/13/10 at 198-199.

<sup>110</sup> Tr. 04/13/10 at 199-204.

## **Public Comment Exhibits Opposed To The Application**

Ms. Annette Bourbonniere, of Annette Bourbonniere Consulting, submitted a letter dated April 22, 2010, in which she indicated that, after having met with Oldport Marine and reviewing its plans to make its Harbor Shuttle wheelchair accessible, she could no longer favor the Applicant's proposal as being truly wheelchair accessible. Based on what she now believes to be the case, she does not believe that any of the docks along the Applicant's proposed route are wide enough to accommodate a ramp long enough to safely get a wheelchair from the dock up to the Applicant's ferry and back again. She acknowledges that, as of the date of her letter, there were no published guidelines from the Federal Access Board for ferries and other passenger vessels, but expected that some existing draft guidelines would be adopted in final form by September 2010. In her opinion, the draft guidelines should be used as the starting point for determining accessibility. It was her opinion that the Applicant's vessel "will not be able to meet the requirements to be accessible under the federal Americans with Disability Act with the current plan."<sup>111</sup>

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<sup>111</sup> Public Comment Exhibit 19. *But see* Public Comment Exhibit 18, in which Ms. Bourbonniere supports the Application because the Applicant is seeking to make his vessel more accessible to wheelchairs. On the other hand, it is not clear where she is obtaining her information from with respect to dock size, nor is it clear whether or not that information is accurate. Nevertheless, it seems clear that she generally supports all efforts to improve accessibility for the disabled. Two other points are worth making here. First of all, no one has addressed the obligation of the dock owners to make their docks more readily accessible to the disabled by making it easier for the disabled to get from the docks to a wider variety of vessels that are routinely accommodated by the docks; it is not only the vessel owner's responsibility, and in many cases, it may be easier to modify the docks than to modify every vessel that may have occasion to use those docks. Second, the Hearing Officer attempted to find the accessibility standards referred to by Ms. Bourbonniere and the Intervenor's counsel, but after searching the Code of Federal Regulations following the hearing was forced to conclude that no such standards existed for ferry boats as recently as January 11, 2011. *See* 49 CFR § 38.177, *see also* 49 CFR § 37.108, 49 CFR Part 39 subpart E (all of which are reserved for rules governing ferries and other passenger vessels; i.e., accessibility rules for ferries have not yet been promulgated); *see generally* 28 CFR § 36.310 (defers to Secretary of Transportation for developing accessibility requirements for vehicles and systems). Since neither Ms. Bourbonniere nor the Intervenor referred the Division to any existing ADA regulations applicable to ferry boat design (because no such regulations apparently existed yet), the Division can neither find that the Applicant's plans fall short of the requirements of the (non-existent) regulations, nor that the Intervenor's plans will be in greater overall compliance with the (non-existent) regulations than will the Applicant's.

Ms. Corinne Calise Russo, Director, Rhode Island Department of Elderly Affairs, submitted a letter dated April 29, 2010, in which she stated that at the time she submitted an earlier letter in support of the application, she “was not aware of a current level of service for this population [elders and adults with disabilities]; therefore, I request that you retract my letter from any current of [sic] future testimony.”<sup>112</sup>

### **Intervenor Oldport Marine’s Rebuttal Case**

#### **Testimony of Annette Bourbonniere**

Ms. Annette Bourbonniere appeared to offer public comment testimony<sup>113</sup> to supplement the two letters she had previously submitted. She indicated that her biggest concern was the issue of accessibility. She believes that all vessels should be accessible under the ADA. Although there were currently no Federal guidelines regarding wheelchair accessibility, she believed that there were draft guidelines that she expected to be published in September 2010, and those guidelines required a boarding ramp slope of 12-to-1, that is, for every 1 inch of rise,

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<sup>112</sup> Public Comment Exhibit 20. *But see* Public Comment Exhibit 15 in which Ms. Russo states that “there is an unmet need for persons with physical disabilities to have public passenger service in and around Newport harbor. Currently, there are no public vessels who can meet this essential need at this time.” That letter then goes on to state that “the public would be better served if a public ferry could accommodate wheelchairs and persons less stable on their feet, allowing them to experience the ‘City by the Sea’ from the water.” She does not clearly indicate in Public Comment Exhibit 20 the source of her new insight into the services available to her constituency (leaving us to speculate), making it very difficult for the Division to know how much weight to give either of her letters. The Hearing Officer cannot approve her request to withdraw an exhibit (Public Comment Exhibit 15) that has already been admitted into the record, but notes that her subsequent letter clearly reflects on the weight to be given the earlier letter.

<sup>113</sup> In fact, as became apparent later, Ms. Bourbonniere was being paid \$200.00 to appear and offer rebuttal testimony on behalf of Oldport Marine and apparently prepared and submitted her second letter, Public Comment Exhibit 19, on behalf of Oldport. As such, Oldport should have submitted pre-filed testimony from Ms. Bourbonniere prior to the hearing, just as the Applicant was required to do for the direct testimony of all of his witnesses. *See Division Rules of Practice and Procedure*, Rule 23(e) and (f). Instead, not only did Oldport fail to file written testimony from Ms. Bourbonniere, it remained silent concerning its relationship with her when she asked to testify in response to the Hearing Officer’s call for public comment witnesses at the beginning of the April 30 hearing. In fact, Oldport purported to cross-examine its own witness, and did not admit to the relationship between itself and Ms. Bourbonniere until it came out upon cross-examination conducted by counsel for the other Intervenor, Conanicut Marine Services. This type of deceptive behavior on the part of a party (and regulated public utility) before a Division of Public Utilities and Carriers Hearing Officer is totally unacceptable, and cannot but lead the Division to view Oldport’s overall presentation in this proceeding with the greatest skepticism.

there should be 12 inches of length in the ramp with enough space on either end to stop and turn a wheelchair around safely.<sup>114</sup>

In response to cross-examination by the Applicant's counsel, Ms. Bourbonniere testified that she had been on the docks in question, and it was her opinion, based on where the ramp on the AQUIDNECK FERRY would be on the vessel, and where the vessel would tie up on the dock, that there would not be enough room on the dock to accommodate the necessary length of ramp. She had been contacted by Mr. Gineo a week earlier and he had gone over the layout of the Applicant's ferry and the dock sites with her. Mr. Gineo showed her pictures of the AQUIDNECK FERRY, but she has never actually seen the ferry herself. Their conversation focused on Perrotti Park. She was told that the ferry's ramp would be only five feet long. She has been to the dock at Fort Adams many times, but she was not sure of its precise layout.<sup>115</sup>

Ms. Bourbonniere went on to testify that she had also been informed that the Oldport Marine shuttle was scheduled to be modified to make it accessible, and that the Coast Guard had approved those modifications, but there had been no approval of the Oldport modifications in terms of the ADA. She was aware that Oldport Marine's vessels had never been modified before to make them wheelchair accessible, and that Oldport Marine had never really had an accessibility plan before; Oldport Marine had simply assisted people on and off on an ad hoc basis. Based on what Mr. Gineo told her, and his description of Oldport Marine's plans, she believes that the Oldport Marine vessels will be ADA compliant.<sup>116</sup>

In response to cross-examination by counsel for Oldport Marine, Ms. Bourbonniere testified that she is a consultant in the accessibility field. She has been a consultant on

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<sup>114</sup> Tr. 04/20/10 at 7-8.

<sup>115</sup> Tr. 04/30/10 at 9-12. Mr. Gineo is the General Manager of Oldport Marine and has been for the past nine years. See Tr. 04/30/10 at 39.

<sup>116</sup> Tr. 04/30/10 at 12-14.

accessibility for approximately eight years, and has been employed in the health care industry for 25 years. She works with different businesses on accessibility issues, mostly in the health care arena, helping those businesses to become more accessible to the disabled, and showing them to how to market their businesses to the disabled more effectively.<sup>117</sup>

Upon further cross-examination, Ms. Bourbonniere agreed that Oldport Marine, after reviewing her first letter to the Division (Public Comment Exhibit 18), had asked her to look at a couple of exhibits, and to look at Oldport's launch boat (the Crosby 26). She then identified Oldport Exhibit 26 as draft accessibility guidelines put out by the Federal Access Board. Ms. Bourbonniere explained that the Federal Access Board prepares draft guidelines for businesses to follow in making their operations more accessible under the ADA, sending them out for public comment, and eventually publishing the guidelines once they are finally approved. In this case, the draft guidelines are pretty similar to those for other establishments in terms slope of ramps. She reviewed all of this material with Mr. Gineo.<sup>118</sup>

Next, she testified that she based the comments in her second letter to the Division (Public Comment Exhibit 19) with respect to the length of the ramp proposed for the AQUIDNECK FERRY on page 11 of Applicant's Exhibit 21, which shows a 36" wide door with

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<sup>117</sup> Tr. 04/30/10 at 15-16.

<sup>118</sup> Tr. 04/30/10 at 16-18; Oldport Exhibit 26. This exhibit appears to contain only excerpts from the full set of Draft Passenger Vessel Accessibility Guidelines, containing only a general purpose statement from Chapter One of the draft Guidelines and one section (V405 Ramps) from Chapter 4 (Accessible Routes, Accessible Means of Escape, and Accessible Passenger Boarding Systems). As a result, it is of limited use in evaluating the overall accessibility of either the Applicant's proposed vessels or those of the two Intervenor, since accessibility includes far more than simply the ability to board a vessel. It includes, too, the ability to take full advantage of all the amenities the vessel may have to offer, including dining and restroom facilities, and the simple ability to move freely about the vessel once on board. It may be easy for a wheelchair to roll on to the cargo deck of ferry that carries vehicles, but if the person in that wheelchair were then confined to that cargo deck with the cars, trucks, freight and livestock, we do not believe they would consider the vessel truly "accessible" to them as a passenger. On the other hand, a vessel that allows them to board only with assistance, but that, once on board, allows them to associate freely with other passengers and partake fully in the vessels other amenities, might well be considered by them more fully accessible than a ferry they can roll onto, but confines them to the freight levels.

a hinged 60” long gangway-ramp. She used this drawing and some measurements she herself took with respect to distance from the water to the top of the dock, and from the dock to the door on the ferry, to formulate her concerns with respect to the length of the proposed ramp.<sup>119</sup> She also testified that Mr. Gineo showed her Oldport Exhibit 30 during that same conversation last week, and that the proposed modifications shown therein for Oldport’s 26’ launch would satisfy ADA requirements (although the ramp shown in the drawings needed to be widened by 6½” to a full 36” width to be fully compliant, something Mr. Gineo had agreed to do).<sup>120</sup>

In response to cross-examination by Conanicut’s counsel, Ms. Bourbonniere testified that, as a consultant on accessibility issues, she normally gets paid for her advice on accessibility. In fact, she testified, she was being paid \$200.00 by Oldport Marine to appear at the hearing and testify concerning the relative accessibility of the Applicant’s and Oldport’s vessels.<sup>121</sup> The Applicant’s counsel, upon hearing that Ms. Bournniere was being paid by Intervenor Oldport to appear and offer expert witness testimony, objected to her being allowed to do so under the guise of offering public comment testimony without his having received appropriate prior notice of the testimony. Her testimony was eventually allowed to stand although she was not allowed to adopt her two prior letters (Public Comment Exhibits 18 and 19) as part of her formal testimony; they remained Public Comment.<sup>122</sup>

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<sup>119</sup> Tr. 04/30/10 at 18-20.

<sup>120</sup> Tr. 04/30/10 at 20-22.

<sup>121</sup> Tr. 04/30/10 at 22-24.

<sup>122</sup> Tr. 04/30/10 at 24-33. Initially, the Hearing Officer indicated that he would schedule a fifth hearing session in order to allow the Applicant’s counsel to review Ms. Bourbonniere’s expert testimony and prepare appropriate cross-examination and rebuttal witnesses. This was intended to cure the failure of Oldport to disclose in advance (or, for that matter, during its “cross-examination” of its own paid witness) that it was calling Ms. Bourbonniere to offer expert testimony on its behalf and its failure to submit pre-filed testimony by Ms. Bourbonniere. However, at the conclusion of the hearing, and upon consulting with his client, Applicant’s counsel indicated that he did not see a need to bring Ms. Bourbonniere back for an additional hearing.

### Testimony of Matthew P. Gineo

Oldport Marine's second witness was Matthew P. Gineo, General Manager of Oldport Marine for the past nine years. Mr. Gineo testified that he is responsible for all day-to-day operations, including hiring staff, training, budgets, sales and marketing, purchasing, fleet maintenance, and all Coast Guard, OSHA, and FCC-related issues. He is also certified as an inspector for the State of Rhode Island's "No Discharge Program." He is directly responsible for all Coast Guard vessel inspections (of Oldport's vessels), including dry dock inspections, sea trials, stability testing and burn and hardness testing. He also oversees the Department of Transportation's Drug and Alcohol Program, Coast Guard safety training, FCC training and firefighting training. Finally, he is responsible for the ADA wheelchair access project on Oldport's Crosby 26' Harbor Shuttle.<sup>123</sup>

Oldport Marine has been in operation on Newport Harbor from the same location for 37 years, running tour boats, launches, water taxis, harbor shuttles, cruise ship tenders, towboats and salvage vessels, as well as building some small vessels and selling and installing marine engines, employing a full-time year-round staff of 15 employees and a seasonal staff of 75 employees. Among its other services, it presently operates a Harbor Shuttle that transports passengers around Newport Harbor on a fixed schedule and a fixed route, and a water taxi service throughout Newport Harbor servicing such land points as Perrotti Park, Newport Harbor Hotel, Bowen's Wharf, Newport Yachting Center, Ann Street Pier, IYRS, Newport Marina, Ida Lewis Yacht Club, and the Newport Yacht Club among other locations as far north as the Newport Bridge.<sup>124</sup>

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<sup>123</sup> Tr. 04/30/10 at 39-40.

<sup>124</sup> Tr. 04/30/10 at 40-42. Oldport Marine operates its Harbor Shuttle under Division CPCN W-1138, and has done so since 1978. *Id.* at 46.

According to Mr. Gineo's testimony, all of Oldport's Harbor Shuttle vessels are 26' launches capable of boarding and discharging passengers to either side. The vessels are highly maneuverable, and can easily pull into, and operate from, very small docks. Their 26' Brownell shuttle is used on days when it is raining, since it is partially covered; they never get more than one to five people a day when it is raining. The vessel they are planning to modify for wheelchair access is a 26' Crosby launch that is fully covered. They also use the 26' Oldport launch (which they manufacture) for the Harbor Shuttle occasionally, when the weather is sunny; normally it is used to service boats at moorings, however.<sup>125</sup>

The primary vessel used for the Newport Shuttle service, though, according to Mr. Gineo's testimony, is the 26' Crosby launch. It has a very shallow draft, less than three feet, and a relatively low freeboard. In fact, the deck of the Crosby is only about 3 inches above the floating docks, making it very easy to modify for accommodating wheelchairs. All that is required is to cut a 40-inch door (opening inward) in the side of the vessel and use a short, portable, ramp to allow wheelchairs to roll up to the Crosby's deck. The Crosby has an 8½ foot beam in the interior of the vessel, which more than allows for the 60-inch end-of-ramp clearance that the ADA requires. Once the wheelchair is on board, you run nylon straps through its framework and secure the chair to flush-mounted deck plates. The whole conversion should only take about one week; Oldport plans to have the conversion done in time to allow the vessel to accommodate wheelchairs in the summer of 2010.<sup>126</sup>

Next, Mr. Gineo testified that, after having reviewed the Applicant's proposed accessibility plans for the AQUIDNECK FERRY, he was of the opinion that the plan was

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<sup>125</sup> Tr. 04/30/10 at 48-49.

<sup>126</sup> Tr. 04/30/10 at 50-52. The Division notes again that, although Mr. Gineo refers to ADA requirements, no such requirements appear to have been approved as of the date of the hearing (or, indeed, the date this Order was prepared).

seriously flawed in that the proposed location of the new access port would not line up with the wheelchair staging areas on the Fort Adams and Perrotti Park docks. Indeed, the designs of the Perrotti Park and Ann Street locations are already quite tight with respect to the space required to safely maneuver and stage wheelchairs, making it very hard for a vessel such as the AQUIDNECK FERRY to line up properly for embarking and disembarking wheelchair passengers. Further, he did not believe it would be safe for the AQUIDNECK FERRY to tie up at any of these docks using only bow and breast lines in order to line up properly for embarking or disembarking wheelchair passengers.<sup>127</sup>

Next, Mr. Gineo testified that he had spoken to a Mr. Larry Mouradjian, the DEM director of parks, about the proposal for the Applicant's vessel to use the Fort Adams dock on a regular basis. He claimed that Mr. Mouradjian had told him that the Fort Adams docks were intended for vessels significantly smaller than the AQUIDNECK FERRY, and could not take the strain imposed by docking a ferry of that size. He further testified that Mr. Mouradjian had concerns because the dock was unsupervised, with no one there to tell people to maintain a safe distance until the ferry had come to rest.<sup>128</sup>

Next, Mr. Gineo testified that all of Oldport's vessels operated on an approved schedule, had approved rates, and had the permission of the entities controlling all of Oldport's landing sites to embark and disembark passengers at each of those sites. Oldport's shuttle service offers a hop-on, hop-off, service similar to that proposed by the Applicant. Oldport offers all-day, fares, weekly fares, monthly fares, seasonal fares and a one-way round trip fare to any location.<sup>129</sup>

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<sup>127</sup> Tr. 04/30/10 at 53-56.

<sup>128</sup> Tr. 04/30/10 at 56-57.

<sup>129</sup> Tr. 04/30/10 at 58-64.

Mr. Gineo's testimony turned next to Oldport's ridership figures. Oldport does not keep a head-count for each trip, but does track daily revenue. Using the revenue figures and fares from \$6.00 to \$10.00, he could show that his busiest day in the summer of 2009 was Sunday, September 6, 2009, Labor Day weekend. On that day, Oldport Shuttle served 30-45 passengers total. Each of Oldport's shuttles has a daily passenger capacity of 184 passengers. Put another way, each of Oldport's Shuttles can carry 12,000 passengers during the summer season (based on a 23-passenger capacity), yet the total number of passengers carried by all of Oldport's vessels combined is from 2,000 to 3,000 passengers for the season. On rainy, cold, windy days, Oldport's Harbor Shuttle may carry from 0 to 5 passengers total all day. On sunny, nice, warm-weather days, Oldport's Harbor Shuttle may carry between 25 and 45 passengers total in a day. The Oldport Harbor Shuttle vessels are never full, they never have to leave passengers waiting on the dock to board. There are only a couple of weekends each year where the shuttle vessels operate near capacity (festival weekends), and on those occasions Oldport places back-up vessels into operation to increase total carrying capacity.<sup>130</sup>

The testimony turned next to a discussion of the *Newport Harbor Marine Passenger Service Development Study—Technical Memorandum: Market, Financial, and Economic Impact Considerations* done by FXM Associates at the request of the City of Newport. (Applicant Exhibit 16.) Mr. Gineo testified that the study was done to determine the feasibility of operating a city-owned Harbor Shuttle in Newport Harbor and, because Oldport Marine had been providing a shuttle service in Newport Harbor for years, he made himself very familiar with the contents of the report. He pointed to several of the bullet points contained in the summary of findings that he considered particularly germane. The bottom line of the report, as highlighted

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<sup>130</sup> Tr. 04/30/10 at 65-69.

by Mr. Gineo's testimony, is that it would not be economically feasible for the city to operate such a harbor shuttle service. Indeed, Oldport Marine and Conanicut together could easily absorb any additional ridership identified by the study.<sup>131</sup>

Mr. Gineo also testified that he had had an opportunity to review the Applicant's pro forma, and does not believe the projections therein are realistic, particularly the expectation of transporting 60 passengers daily on the Applicant's hop-on, hop-off, service. He also believes the other projections, with respect to sunset cruises and private harbors, is very unrealistic. Oldport Marine has been providing such services since 1976 and has yet to keep any momentum going for those ancillary activities.<sup>132</sup>

In response to cross-examination by the Applicant's attorney, Mr. Gineo testified that Applicant's Exhibit 16 in fact also included a statement that "With an effective joint, public/private advertising and promotional campaign, it can increase ridership to 9,000 to 12,000," not just from 3,000 to 6,000 passengers per year. Oldport in the past has spent more than \$2,000.00 a year for advertising, and did not really see much increase in ridership as a result. Given total ridership revenue of just \$14,000.00 to \$20,000.00 a year, Oldport felt additional advertising costs could not be justified. In essence, Oldport has decided to simply rely on signage near the docks and in tourist areas as the most cost-effective advertising for its Harbor Shuttle business; it has done little if anything to use advertising to try to draw additional people into Newport to take advantage of Oldport's services.<sup>133</sup>

Next, the Applicant's counsel asked Mr. Gineo about Oldport's plans to install a ramp on one of its boats to make it wheelchair accessible. Mr. Gineo testified that the ramp had been

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<sup>131</sup> Tr. 04/30/10 at 71-81; Applicant's Exhibit 16 at 2-4.

<sup>132</sup> Tr. 04/30/10 at 81-82, 84.

<sup>133</sup> Tr. 04/30/10 at 108-113.

designed by the boat's manufacturer, Crosby, in 2007 (three years earlier), but the modifications had not yet been made. None of Oldport's other vessels used under its Division-issued CPCN's have wheelchair accessible ramps either, except for Oldport's 90-passenger tour boat (and that vessel, the AMAZING GRACE, lacks accessible restrooms and upper deck, meaning it is not ADA compliant). Aside from the tour boat, the only vessel in Oldport's fleet that can be modified to accommodate wheelchairs is the 26' Crosby. Oldport sought plans for a ramp from Crosby in 2007 because Oldport had bid on the City of Newport's Harbor Shuttle project, and since that project was to receive Federal funds, all bidders had to comply with the ADA.<sup>134</sup>

Mr. Gineo testified that it was impossible to make some vessels ADA compliant (that is, in his view, wheelchair accessible). Further, he agrees that until the Spring of 2010, the only thing Oldport had done to make any of its vessels wheelchair accessible was develop plans to modify its 26' Crosby shuttle. In his view, short of using a crane to lift wheelchair passengers on and off, there was no way any of his launch service vessels could transport wheelchair-bound passengers; even if he could get them on his vessels, he did not see how he would be able to get them from Oldport's vessels onto any other vessel (which is what the launch service does). It would not be safe for him to even try doing this.<sup>135</sup>

Mr. Gineo further testified that Oldport Marine and Conanicut Marine Service are in limited competition with each other in view of the fact that both provide service from Perrotti Park to Fort Adams. For the most part, however, Conanicut's service is primarily from Jamestown to Newport, and it only occasionally picks up a few passengers at Perrotti Park who may have been waiting for Oldport; there is really very little direct competition.<sup>136</sup>

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<sup>134</sup> Tr. 04/30/10 at 113-117.

<sup>135</sup> Tr. 04/30/10 at 118-119.

<sup>136</sup> Tr. 04/30/10 at 131, 134, 140.

Finally, Mr. Gineo testified that Mr. Fisher was not being paid by Oldport Marine to testify. Oldport hosted him for lunch meetings a couple of times while they discussed this matter, but that was it.<sup>137</sup>

### **Testimony of Captain Bruce Fisher**

Oldport Marine's next witness was Captain Bruce Fisher. Captain Fisher testified that he was asked by Oldport to review the application of Aquidneck Ferry.<sup>138</sup> Captain Fisher graduated from the Massachusetts Maritime Academy in 1966, and currently has a U.S. Master Mariner, Oceans/Unlimited license for any gross tonnage, issued by the U.S. Coast Guard, a U.S. Coast Guard Federal License-First Class Pilot for any gross tonnage in all U.S. coastal waters, harbors and ports, and is holds State Pilotage Commissions in Rhode Island, Massachusetts, Connecticut and New York. He has resided in Newport since 1973, and has been involved in and around the Newport waterfront for that entire period of time.<sup>139</sup> It is safe to say that Captain Fisher has some very impressive maritime credentials and a great deal of experience in and around Newport Harbor.<sup>140</sup>

Captain Fisher explained that Oldport Marine had requested that he:

...study, investigate, give an assessment and render an opinion on the following issues:

- 1) To comment and give opinions as to the perceived or actual suitability of the vessel 'CAPT. LUCKY' [also referred to in this Report and Order as the AQUIDNECK FERRY] and the vessel 'VIKING QUEEN' based on my familiarity with each to serve as water taxis [sic] and scheduled shuttle vessels in Newport over an intended schedule route.
- 2) To study and survey the Ann St. Pier – collect data, plans, conduct soundings, get drawings, dimensions, pontoon arrangements and ladder &

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<sup>137</sup> Tr. 04/30/10 at 137-138.

<sup>138</sup> Tr. 04/30/10 at 141.

<sup>139</sup> Tr. 04/30/10 at 141-142; Oldport Exhibit 6 at 3; Oldport Exhibit 12 at 1.

<sup>140</sup> Tr. 04/30/10 at 141-142; Oldport Exhibit 12 at 2-6.

ramp arrangements. To assess the suitability for the Ann St. Pier to be used by the 'CAPT. LUCKY' in normal and abnormal weather conditions – on hourly schedules.

- 3) To study, make an assessment and give an opinion as to whether the 'CAPT. LUCKY' might be suitable for Perrotti Park on hourly or half-hourly scheduled shuttle service in various scenarios – wind, weather, visibility, marine traffic and congestion – particularly at busy times with cruise ship tenders and yacht club traffic.

Oldport Exhibit 12 at 6-7.

Captain Fisher testified that he had observed (though never boarded) the CAPT. LUCKY on several occasions and noted the U.S. Coast Guard data sheet of the vessel's particulars and details. It appeared to him that the only planned access to the vessel's main deck would be via an opening cut in the vessel's port side, suggesting also that she would only dock port side to a berth for passenger use. In his view, given the configuration of the vessel, visibility from the pilot house looking forward and off the bow might be acceptable, but the view from the pilot house looking aft and astern is obscured, as is the view directly amidship. The upper deck railings restrict the operator from leaving the controls long enough to walk out and observe the vessel's clearance alongside as the railings are considerably inset from the vessel's side. The lack of visibility from the pilot house would, in his opinion, restrict the safe maneuvering of the vessel in and around low, narrow pontoon berths on hourly or half-hourly schedules.<sup>141</sup>

Captain Fisher disagreed with the testimony of the Applicant's President that the CAPT. LUCKY would "turn on a dime." The vessel is 65 feet long with a rather wide beam of 24 feet. Even with no wind, and using one engine ahead and the other astern to minimize the turning radius, the fact that the pivot point of most vessels is generally not the center of the vessel but somewhat forward suggests the turning diameter of the CAPT. LUCKY would be closer to 75 to

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<sup>141</sup> Tr. 04/30/10 at 143-146; Oldport Exhibit 12 at 8-9; Oldport Exhibit 16 at 10-11, 13-14.

80 feet, than it would to 65 feet. With the type of wind typical of Newport Harbor, and the significant windage presented by this vessel, it would be a problem to maneuver her in close confines of the Ann St. Pier and the Perrotti Park dock. He did not feel this was a suitable size vessel to operate a hop-on/hop-off style operation from small docks in congested areas. Indeed, without line tenders on the docks and an adequate crew of deck hands on board, he believed there was a significant chance of CAPT. LUCKY having allisions with docks and collisions with other water craft<sup>142</sup>

With respect to the Ann St. Pier, Captain Fisher testified that there are both draft and dock space restrictions that would limit the piers' accessibility to larger vessels. Transient boats up to 35 feet are accommodated on a first-come/first serve basis, and at times there is simply no available space for additional vessels to dock. Maneuvering room is very limited, particularly when large, expensive, yachts are on the adjoining piers, and the fairway width can be reduced to as little as 112 feet -- leaving a vessel the size of the CAPT. LUCKY only 44 feet to either side. The waters around the Ann St. Pier are shallow, shoaling rapidly from about 4 feet at the west end of the pontoons to only 1 foot toward the east end. In his view, the water at the Ann St. Pier is simply too shallow to allow a vessel like the CAPT. LUCKY to operate safely and reliably, causing the vessel to run a substantial risk of grounding. He would not recommend that it use this pier.<sup>143</sup>

With respect to the Perrotti Park facility, Captain Fisher testified that recent improvements have included dredging of the area to a depth of nine feet and a build-out of pontoon docking space. This is another congested area for a vessel configured like the CAPT.

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<sup>142</sup> Oldport Exhibit 12 at 10-12.

<sup>143</sup> Tr. 03/30/10 at 148-149; Oldport Exhibit 12 at 12-17; Oldport Exhibit 16 at 6-9.

LUCKY to maneuver safely in, particularly if there is a southwesterly sea breeze to contend with. In the high season of summer and fall, there is a significant concentration of yachts, commercial vessels and cruise ship tenders all maneuvering in the vicinity of Perrotti Park. Given the congestion, and the relative unwieldiness of the CAPT. LUCKY, Captain Fisher could not recommend its use of the Perrotti Park facility on a set ferry schedule.<sup>144</sup>

Finally, with respect to berthing arrangements at Fort Adams, Captain Fisher testified that he believed the CAPT. LUCKY could be berthed alongside the Fort Adams floating north dock at the location opposite the Museum of Yachting provided that it berthed fully alongside the dock float, not in a spot where the rear half of the vessel extended out beyond the end of the dock. However, he did not believe it would be possible for the CAPT. LUCKY to dock safely in such a way that its portside opening would line up with the wheelchair staging area on the dock, since the only way it could do so was by having the stern of the vessel protrude well out beyond the end of the dock. Other berthing areas at the Fort Adams area would require the CAPT. LUCKY to maneuver in rather tight spaces, something that would be difficult to do safely, particularly when other vessels were also in the area.<sup>145</sup>

In response to cross-examination by the Applicant's counsel, Captain Fisher testified that most of his experience has been in larger vessels than the one that the Applicant proposed to use as a ferry. While he has been on, and piloted, vessels ranging in size from those used by Oldport up through pilot boats, tour boats, large yachts, fishing and utility boats, but he has not generally served as a pilot on vessels like the Applicant's because those types of vessels do not generally require licensed pilots, just some type of licensed operator. Whoever operates these vessels have

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<sup>144</sup> Tr. 04/30/10 at 146-148; Oldport Exhibit 12 at 17-19; Oldport Exhibit 16 at 3-6.

<sup>145</sup> Oldport Exhibit 16 at 9-10.

to be licensed by the U.S. Coast Guard to do so, and that person is responsible for the safety of the vessel and its passengers.<sup>146</sup>

Captain Fisher agreed that much of his stated concerns about use of the CAPT. LUCKY center around the obstructed site lines from its pilot house. He has had experience with ferries with video cameras in the past, and knows that the cameras are suitable, generally, to spot the vessel with stern ramps as it comes into a berth. But such cameras have their limitations, in that there is no depth perception with them. Some of that problem might be reduced somewhat by having a deckhand acting as a lookout on the stern, so long as he is in constant communication with pilot house, but it is never as good as having the operator in the pilot house see for himself.<sup>147</sup>

Captain Fisher agreed that there have been significant improvements to Perrotti Park, with more to come, but none of those improvements were done with a vessel the size of the CAPT. LUCKY in mind. The new piers that are being used for domestic vessels (as opposed to cruise ship tenders) were really intended to accommodate vessels up to 40 feet in length, not a 65 foot long vessel like the CAPT. LUCKY. From his conversations with the Harbor Masters, that could be a problem. It would be very tight for a 65 foot long vessel with a 24 foot beam to maneuver in this area, particularly if it could only dock port side to.<sup>148</sup>

On April 24, 2010, Captain Fisher happened to be in Tiverton and noticed that the CAPT. LUCKY was turned around at its dock. It appears to have had a new door carved into its starboard side, similar to the one on the port side. That would allow the vessel to dock starboard side to, and would eliminate some of the issues caused by having to maneuver to back into a

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<sup>146</sup> Tr. 04/30/10 at 151-152.

<sup>147</sup> Tr. 04/30/10 at 152-153.

<sup>148</sup> Tr. 04/30/10 at 153-159.

particular docking location port side to, but it does nothing to address the fundamental problem of having to maneuver a boat this size into a tight space in congested waters when the wind is blowing from an adverse direction.<sup>149</sup>

### **Intervenor Conanicut Marine Service's Rebuttal Case**

#### **Testimony of William Munger**

Conanicut's first and only witness was Mr. William Munger, founder, president and general manager of Conanicut Marine Services. Mr. Munger is a certified marine manager with the International Marine Institute. He purchased the Jamestown/Newport Ferry from its previous owners in 2003.<sup>150</sup>

According to Mr. Munger's testimony, in the eight year period from 1995 to the time of his purchase of the ferry in 2003, the previous owners of the ferry service never had enough riders to show a profit. At the point where he purchased the operation, the route included Goat Island, Bowen's Wharf, Fort Adams, Rose Island and Jamestown. In 2006, he dropped Goat Island due to a lack of passengers, then added additional departures between Perrotti Park and Fort Adams. Currently, the everyday operating schedule includes eight departures daily to Fort Adams from either Perrotti Park or Bowen's Landing; during special events, he has 15 departures to Fort Adams to meet demand.<sup>151</sup>

His current schedule would overlap with those proposed by the Applicant at several points during the day from Fort Adams to Bowen's Landing, and from Perrotti Park to Fort Adams. On special event days, when demand is highest, Conanicut regularly adds a second vessel, and has the ability to add a third where necessary. Both his primary and secondary

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<sup>149</sup> Tr. 04/30/10 at 159-160.

<sup>150</sup> Tr. 04/30/10 at 161-162.

<sup>151</sup> Tr. 04/30/10 at 162-163.

vessels offer covers for inclement weather, a head, and a beverage bar. His primary and secondary vessels are from 40 feet to 42 feet long. The only thing the Applicant's vessel will offer that his vessels do not is a flat-screen TV.<sup>152</sup>

Based on his experience operating a ferry service in Newport Harbor, Mr. Munger opined in his testimony that no additional ferry services were required to satisfy public need. He bases his opinion on the fact that ridership is very low for both his service and Oldport's, with many runs by both of the existing companies' vessels being made at far less than full capacity. Both companies maintain back-up vessels that are rarely utilized. Neither company has to turn away passengers at the dock due to a lack of space on their regularly scheduled runs.<sup>153</sup>

In fact, Conanicut's ferry service made a total of 4,379 departures in 2009 on its scheduled service, of which 2,600 would have overlapped with the Applicant's planned departures had it been operating in 2009 on its proposed schedule. Of the total of 4,379 runs his company made in 2009, only ten (10) were at full capacity (approximately 0.23%). Further, according to Mr. Munger's testimony, if you look at only the 2,600 runs that overlapped with the Applicant's proposed schedule, only eight (8) of Conanicut's runs were at capacity (approximately 0.30%). Making a run completely empty is a not infrequent occurrence for Conanicut's ferry service.<sup>154</sup>

According to his testimony, Mr. Munger believes that his ferry service carries a total of 50 passengers each day on average. His carrying capacity, based on 16 trips each day (eight each way) at 46 passenger seats per trip, is 736 passenger seats each day. This works out to an average daily load factor for the Conanicut ferry of less than one percent. Mr. Munger then

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<sup>152</sup> Tr. 04/30/10 at 166-171.

<sup>153</sup> Tr. 04/30/10 at 172-174.

<sup>154</sup> Tr. 04/30/10 at 174-181.

noted that the Applicant projected 60 passengers per day for his operation, ten per day more than Conanicut has experienced.<sup>155</sup>

Next, Mr. Munger testified that although his vessels are not ADA accessible, they do carry handicapped passengers from time to time. His company has handicapped parking adjacent to its boarding area, and its shore bathrooms adjacent to its boarding areas are ADA compliant, but the vessels are not. However, when a handicapped person wants to avail him or herself of Conanicut's services, his crew will help them to board then give them priority seating near the boarding area.<sup>156</sup>

Mr. Munger also testified that his company does a lot of advertising. His ferry operation has its own website, and he pays another company that is in the search engine business to help drive traffic to that website; the website is being used by more and more people to find out about his ferry services. In addition, his ferry service has links to several other websites run by other Newport tourist destinations. He has a brochure that goes to hotels, visitor centers, and B&B's on both Aquidneck Island and Washington County. He does paid advertising at the Newport Visitors Center in their window facing Main Street, a display ad on Bowen's Wharf, and sandwich boards at each departure point. The company is listed in the Verizon Yellow Pages as well as the Yellow Book. Very occasionally they will advertise on the radio or in the newspaper. With all of that advertising, though, ridership has remained essentially flat over the last several years, averaging out at around 7,500 (except for a spike in 2006, a Tall Ships year).<sup>157</sup>

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<sup>155</sup> Tr. 04/30/10 at 181-183. Actually these figures give an average daily load factor of approximately 6.79%. Mr. Munger slipped a decimal point in doing his calculations. (50 passengers per day on average/736 passengers capacity per day = 0.0679, or 6.79%, load factor.)

<sup>156</sup> Tr. 04/30/10 at 183-185.

<sup>157</sup> Tr. 04/30/10 at 185-188.

In response to cross-examination by the Applicant's counsel, Mr. Munger explained that it was not unusual for people to show up in Jamestown in their wheelchairs looking for a ride over to Newport. His employees will get them aboard and situated, then stow their wheelchairs on board so it is readily available when they reach their destination; at the other end, his employees will get the wheelchair set up on the pier, then help the passenger off the boat and into the chair so that they can continue on their way. Sometimes, though, wheelchair passengers will show up in Jamestown and just ask to have their wheelchairs stored at Conanicut's office while they ride about the harbor. The result, though, is that Mr. Munger does not have a solid feel for as to what the market is for handicapped riders, though he assumes that they want to enjoy the bay like everyone else.<sup>158</sup>

### **Closing Arguments**

In closing, Mr. Kinder noted on behalf of the Applicant that this had been a hotly contested case, largely because Oldport is already providing similar services (though he did not believe the Applicant would really be competing directly with Conanicut for the most part). He also believed that the evidence established that, especially with regard to Newport Harbor, the ferry-type services were still very underdeveloped, and that there is still much room for improvement. In essence, he believes that his Applicant, by offering services on a significantly larger vessel than either of the competitors, is going to be offering a qualitatively different type of service, particularly with respect to accessibility to the disabled. Indeed, the very fact that Oldport has responded to this application by finally moving to make one of its boats more accessible helps to support the Applicant's case that a market for such services exists and has been underserved. Accessibility is more than being willing to pick someone up and plunk them

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<sup>158</sup> Tr. 04/30/10 at 194-195.

down on a seat onboard a vessel. It is a start, but accessibility is more than that. The Applicant's vessel will offer services that are more protected from the weather than either of the Intervenor's services. The fact that none of the ferry services, proposed or existing, are lifeline services means that there is no need to protect the existing services from competition. The public, in this case, is served by competition and the benefits that are traditionally derived therefrom. Yes, there are still issues that the Applicant must address, such as securing landing rights, but those cannot be fully addressed until he has a certificate of operating authority that shows that he has a right to operate a ferry service on Newport Harbor.

Mr. Scott, on behalf of the Intervenor Oldport Marine, stated that he could not agree with Mr. Kinder's statements. He believes that Oldport has shown that the Applicant has failed to meet the requirements for being granted a certificate of public convenience and necessity. There simply is not existing demand or need for additional ferry services, even if you were going to offer the services in Rolls-Royces out on the water.

Mr. McElroy, on behalf of Conanicut Marine Services, stated that the primary issue presented to the Division was whether or not there is a current need for the proposed ferry service in Newport Harbor. He argued that not one person came before the hearing to state that there was a need for another ferry in Newport Harbor, that not one person had said they had wanted to get on a ferry in Newport Harbor and had been unable to do so. Both of the existing ferry services are operating far under their capacity except when there is a special event occurring on the Newport waterfront, and both services have additional boats to put on to meet the occasional spike in demand. The Newport Harbor Marine Passenger Development Study done for the City of Newport concluded that "The existing supply of water transportation services in Newport Harbor is adequate to serve current demand." Many of the Public Comment

letters, as well, speak to the availability of adequate water transportation services in Newport Harbor. In short, according to Mr. McElroy, “the evidence is not just overwhelming. The evidence is 100 percent that there is no current public need for the service being proposed, and we will respectfully request that the Division deny the application.”

### Discussion

#### Applicable Law

The General Assembly has declared that it is the policy of the state to regulate certain business enterprises in the best interests of the public:

(a) The general assembly finds and therefore declares that:

(1) The businesses of ... offering to the public transportation of persons and property ...are affected with a public interest;

(2) Supervision and reasonable regulation by the state of the manner in which such businesses construct their systems and carry on their operations within the state are necessary to protect and promote the convenience, health, comfort, safety, accommodation, and welfare of the people, and are a proper exercise of the police power of the state;

(3) Preservation of the state’s resources, commerce, and industry requires the assurance of adequate public transportation ... facilities, ... all supplied to the people with reliability, at economical cost, and with due regard for the preservation and enhancement of the environment, the conservation of natural resources, including scenic, historic, and recreational assets, and the strengthening of long-range, land-use planning;

(b) It is hereby declared to be the policy of the state to provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient and economical ... transportation services ... to the inhabitants of the state, to provide just and reasonable rates and charges for such services and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, and to co-operate with other states and agencies of the federal government in promoting and coordinating efforts to achieve realization of this policy.

(c) To this end, there is hereby vested in the public utilities commission and *the division of public utilities and carriers* the exclusive power and authority to

supervise, regulate, and make orders governing the conduct of companies offering to the public in intrastate commerce ... transportation services ... for the purpose of increasing and maintaining the efficiency of the companies, according desirable safeguards and convenience to their employees and to the public, and protecting them and the public against improper and unreasonable rates, tolls and charges by providing full, fair, and adequate administrative procedures and remedies, and by securing a judicial review to any party aggrieved by such an administrative proceeding or ruling. ...

R.I.G.L. § 39-1-1 (*emphasis supplied*.) It is apparent from this declaration of policy that the General Assembly intended to establish a qualified administrative body to evaluate technical evidence, address the myriad of complex problems associated with regulatory proceedings, and render rational decisions. *South County Gas Co. v. Burke*, 551 A.2d 22 at 25 (R.I. 1988). In this case, the Division is the agency specifically charged with regulating transportation companies, such as the Applicant proposes to become, operating solely upon Narragansett Bay, an area entirely located within this state (although the Public Utilities Commission must still evaluate and approve the tariff of water transportation companies).

The General Assembly also took great care to define a number of terms relevant to the regulation of common carriers such as the Applicant proposed to become. For example:

“Common carrier”, except when used in chapters 12, 13, and 14 of this title, means and includes all carriers for hire or compensation including ... *steam boat, motor boat, power boat, hydrofoil, and ferry companies and all other companies operating any agency or facility for public use in this conveyance over fixed routes, or between fixed termini within this state or persons or property by or by a combination of land, air, or water;*...

R.I.G.L. § 39-1-2(7) (*emphasis supplied*.) Under this definition, anyone operating a “motor boat”, “power boat”, or “hydrofoil”, or “ferry” company, or any other company operating a conveyance for carrying persons or property for hire or compensation, by, or by a combination of, land, air, or water, along fixed routes or between fixed termini, within this state, is considered a “common carrier.”

However, this definition of “common carrier” specifically excludes persons operating sail-powered vessels, or those operating powered vessels that do not follow fixed routes or operate between fixed termini (plural), even though they may be transporting passengers for hire or compensation. These types of operation, which would include excursion boats (which generally operate from a single terminus, with each cruise beginning and ending at that terminus to embark and disembark all passengers with no other stops) are considered “charter carriers”:

“Charter carrier” means and includes all carriers for hire or compensation within this state not included in the definition of common carrier; ...

R.I.G.L. § 39-1-2(4).

The Applicant, which proposes to transport passengers for compensation from (1) Goat Island to Perrotti Park, (2) Perrotti Park to Ann Street Dock, (3) Ann Street Dock to Fort Adams, and (4) Fort Adams to Goat Island, all of which are fixed termini located in Newport, Rhode Island, clearly comes within the definition of a common carrier. As a common carrier, the Applicant is subject to regulation as a public utility:

“Public utility” means and includes ... every company operating or doing business in intrastate commerce and in this state as a ... common carrier ....

R.I.G.L. § 39-1-2(20). As a common carrier type of public utility, the Applicant is subject to the authority of the Administrator of the Division in all matters save approval of the Applicant’s tariff:

The administrator ... shall exercise the jurisdiction, supervision, powers, and duties not specifically assigned to the commission, including the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities and who shall perform such other duties and have such powers as are hereinafter set forth.

R.I.G.L. § 39-1-3(b).

The application process itself is governed by chapter 3 of Title 39:

(a) No common carrier of persons and/or property operating upon water between termini within this state shall hereafter furnish or sell its services unless the common carrier shall first have made application to and obtained a certificate from the division certifying that public convenience and necessity required the services....

(c) Notwithstanding any provision of §§ 39-5-1 and/or 42-35-15 or any other provision of the general or public laws to the contrary, no agency nor reviewing court, may order an interlocutory stay of any order of the division with respect to an application entered under § 39-3-3.1, and/or certificate under § 39-3-3.1. Nothing herein shall be construed to limit the right of any petitioner, public utility, party in interest or other person or entity aggrieved by an order of the division entered under § 39-3-3.1, from seeking judicial review in accordance with §§ 39-5-1 and/or 42-35-15.

R.I.G.L. § 39-3-3. Collectively, these two subsections establish the need to apply to the Division for a CPCN prior to beginning operations as common carrier by water and make it clear that the application process will proceed to its conclusion (i.e., issuance of a Report and Order by the Division determining whether or not the application is approved) before any party may challenge the application process in court (under R.I.G.L. §§ 39-5-1 and 42-35-15, appeals of Division orders may only be made to Superior Court). Once the application is filed, the Division is required to schedule a hearing on the application after first ensuring that the interested municipal officials and the public are properly notified. R.I.G.L. § 39-3-3.1.

It is interesting to note that R.I.G.L. § 39-3-3 only requires the Applicant to show that public convenience and necessity supports issuance of a CPCN; there is no requirement under that statute for the Applicant to establish that it is fit, willing and able to perform the services proposed and to comply with the applicable regulations and statutes. However, “as part of its broad statutory authority to protect the public, the Division must ensure that an applicant for a certificate is fit, willing and able to properly perform the service performed. Moreover, the Division must be confident that the Applicant will not only provide safe and reliable service, but

also will adhere to Orders of the Division, as well as applicable rules and regulations promulgated by the Division.” *In Re Island Hi-Speed Ferry, LLC, 8 Pier Marketplace, Narragansett, RI 01882*, Division Report and Order Number 15652 issued on August 25, 1998, in Division Docket No. 98 MC 16 (application for a CPCN to operate a high speed ferry between the Port of Galilee and the Town of New Shoreham; footnotes omitted); *see also* R.I.G.L. § 39-1-38 for the General Assembly’s grant of broad incidental powers to the Division. Accordingly, in order to have its application for operating authority approved, the Applicant must establish not only that public convenience and necessity requires issuing a CPCN, but that the Applicant is fit, willing and able.

However, satisfying the Division that a CPCN should be issued is only the beginning, not the end, of a ferry company’s administrative journey; the Public Utilities Commission has a role to play in this process, too, and one which must be played out before the Applicant can begin any ferry operations.

### **Authority To Approve Rates**

The basic delineation of the functions of the Commission and Division is set out in R.I.G.L. § 39-1-3. According to this statute:

... The commission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties to ... *hold investigations and hearings involving the rates, tariffs, tolls, and charges*, and the sufficiency and reasonableness of facilities and accommodations of railroad, gas, electric distribution, water, telephone, telegraph, and pipeline public utilities, the location of railroad depots and stations, and the control of grade crossings, the revocation, suspension, or alteration of certificates issued pursuant to R.I.G.L. § 39-10-4, appeals under R.I.G.L. § 39-1-30, petitions under R.I.G.L. § 39-1-31, and proceedings under R.I.G.L. § 39-1-32.

R.I.G.L. § 39-1-3(a) (*emphasis supplied*). While the Commission clearly has broad authority under this provision with regard to “rates, tariffs, tolls, and charges,” the shopping list of public utilities to which that language applies does not include common carriers other than railroads.

With respect to the Division’s authority, the same statute provides as follows:

The administrator shall be a person who is not a commissioner and who shall exercise the jurisdiction, supervision, powers, and duties not specifically assigned to the commission, *including the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities* and who shall perform such other duties and have such powers as are hereinafter set forth....

R.I.G.L. § 39-1-3(b) (*emphasis supplied*). On its face, this is a rather broad grant of authority to the Division that would arguably cover authority over any “rates, tariffs, tolls, and charges” for utilities not specifically covered in the Commission’s assignment – including such common carriers as ferries. Yet it also contains language suggesting that it is the Commission that issues “all regulations and orders ... governing the ... charges of public utilities.” Clearly, we will have to look further for clarification.

That clarification comes in R.I.G.L. § 39-3-11(b), which provides, in pertinent part:

Upon receipt from a common carrier of persons and/or property *upon water* of a notice of any change proposed to be made in any schedule filed pursuant to § 39-3-10, *the commission* shall give notice as it may prescribe of the pendency of the proposal and of the time and place of the hearing thereon to the mayor and also any city manager of each city, and to the president of the town council and also any town manager of each town in which the carrier picks up or discharges passengers. *The commission* shall also publish a notice of the hearing at least ten (10) days prior to the date thereof in a newspaper of general circulation in each city or town in which the carrier picks up or discharges passengers. In all other respects, hearings and investigations with respect to the proposals by the carriers shall be governed by the provisions of subsection (a) of this section.

(*Emphasis supplied.*) This section makes it crystal clear that it is the Commission, and not the Division, that has jurisdiction over the “rates, tolls and charges” of **all** common carriers of persons and/or property *upon water*, **not just those of ferry operations.**

This conclusion is reinforced when you consider that there is specific statutory authority granting the Division power over the “rates, tolls and charges” of several clearly delineated types of common carriers. R.I.G.L. §§ 39-12-12 and 39-12-13 grant the Division the power to establish and alter the rates, charges, classifications, regulations and practices of common carriers of property. R.I.G.L. § 39-13-2 grants the Division the power to establish and alter the rates, charges, classifications, regulations and practices of jitney operators. R.I.G.L. §§ 39-14-2, 39-14-2.1, and 39-14-2.2 grant the Division the power to establish and alter the rates, charges, classifications, regulations and practices of taxicabs and limited public motor vehicles (common carriers of persons).

There is no comparable grant to the Division of explicit authority over the “rates, tolls and charges” of common carriers of persons and/or property *upon water* anywhere in Title 39. Applying the maxim of statutory interpretation *expressio unius est exclusio alterius*, we may conclude that because the General Assembly chose not to give the Division express authority over the “rates, tolls and charges” of common carriers of persons and/or property *upon water*, while it did give the Division such express authority over other types of common carriers, the General Assembly must have intended to have that authority remain with the Commission (to whom the General Assembly gave broad general authority with respect to most public utilities *including* common carriers of persons and/or property *upon water*).

In *O’Neil v. Interstate Navigation Company*, 565 A.2d 530 (R.I. 1989), the Rhode Island Supreme Court adopted the same analysis to conclude that the Commission has subject matter

jurisdiction over rate change applications filed under R.I.G.L. § 39-3-11. In that case, Interstate Navigation Company, a ferry operator transporting passengers and cargo between Point Judith and New Shoreham, filed an application with the Commission to adjust its tariffs. The Commission, by a 2-1 vote, held that it did not have subject matter jurisdiction over the application because common carriers of passengers and property by water were not among the public utilities specifically enumerated in R.I.G.L. § 39-1-3(a) as being subject to the Commission's jurisdiction with respect to investigating and holding hearings involving "rates, tariffs, tolls and charges." Upon appeal, the Supreme Court disagreed, stating:

The ambiguity in § 39-1-3 can be clarified when read together with other sections of the statute. Interstate, a ferry company, is engaged in the water transportation of persons, vehicles, and freight to New Shoreham, Rhode Island. Interstate is a common carrier as defined by § 39-1-2(8)<sup>159</sup>, which defines a common carrier as all carriers for hire or compensation, including ferry companies. According to § 39-1-2(7)<sup>160</sup>, Interstate would be classified as a public utility by virtue of being a common carrier.

In *Town of New Shoreham v. Rhode Island Public Utilities Commission*, 464 A.2d 730, 737 n.5 (R.I. 1983), we stated that "the commission has exclusive jurisdiction to determine the rates of public utilities." Further, pursuant to G.L. 1956 (1984 Reenactment) § 39-3-11, as amended by P.L. 1986, ch. 504, § 2, the commission has the jurisdiction to review rate-change applications of public utilities, to hold hearings and investigations, and to issue orders pertaining to these rate-change applications. Section 39-3-11 illustrates the Legislature's intention to reserve rate-making authority over public utilities to the quasi-judicial commission.

The commission relied on the certificate requirement imposed on water carriers by § 39-3-3 in determining that the division had jurisdiction to hear Interstate's rate-change application. Section 39-3-3 requires water carriers to obtain a certificate of public convenience and necessity from the division prior to commencing business within the state. **Section 39-3-3's certificate requirement**

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<sup>159</sup> Since this decision was issued in 1989, the definition set out in § 39-1-2 has been renumbered. "Common carrier" is now defined at R.I.G.L. 1956 (2006 Reenactment) § 39-1-2(7) rather than § 39-1-2(8) as cited in the *O'Neil* decision.

<sup>160</sup> Since this decision was issued in 1989, the definition set out in § 39-1-2 has been renumbered. "Public utility" is now defined at R.I.G.L. 1956 (2006 Reenactment) § 39-1-2(20) rather than § 39-1-2(7) as cited in the *O'Neil* decision.

**is not applicable to the determination of rates of water carriers.** The issuance of certificates of public convenience and necessity to utilities is an administrative function reserved to the division. **The determination of rates of water carriers is a quasi-judicial function reserved to the commission.**

Further, the commission interpreted specific legislative grants of rate-making power to the division over certain common carriers to extend to *all* common carriers including ferries. The Legislature delegated some of the commission's rate-making authority to the division. These include rate-making power over air carriers (G.L. 1956 (1984 Reenactment) chapter 11 of title 39), motor carriers of property (chapter 12 of title 39), motor passenger carriers (chapter 13 of title 39), and taxi cabs and limited public motor vehicles (chapter 14 of title 39). This delegation of rate-making authority is not absolute; it is limited to those specifically enumerated by the Legislature. Had the Legislature intended to delegate rate-making authority over ferries to the division, it would have done so in a similar manner.

*O'Neil* at 532-533 (footnotes in text omitted) (**emphasis** supplied).

While *O'Neil* dealt only with filing new rates and charges (that is, with modifying existing rates and charged), the Supreme Court soon extended its rationale to cover the initial rate-filing of a start-up company such as the Applicant:

...[W]e conclude that although § 39-3-10 may be construed as a “file and run” statute wherein a start-up utility may simply file a rate with the Commission without requiring initial approval of that rate, the Commission has the authority to *sua sponte* investigate the rates of a public utility at any time. Further, we conclude that the Commission has broad authority under § 39-3-11 to review and approve the rates of a public utility, whether an initial rate or a proposed change of existing rates, and is mandated to periodically review and hold public hearings respecting those rates in the absence of any proposed rate change. Therefore, we are satisfied that **the Commission has subject matter jurisdiction to determine the propriety of the initial rate filing of a public utility, particularly where, as in this case, the Division's Certificate of Public Convenience and Necessity is conditioned upon the initial rate filing approval of the Commission.**

*In Re Island Hi-Speed Ferry, LLC.*, 746 A.2d 1240, 1244 (R.I. 2000) (**emphasis** supplied).

In view of these decisions, and particularly in view of the fact that R.I.G.L. §§ 39-3-3 and 39-3-3.1, and the Supreme Court in *O'Neil*, speak of “water carriers” without distinguishing

between ferries and other types of water carriers, we must conclude that the type of operation proposed by the application in this case requires initial tariff approval from the Commission.

### Findings

The Division notes that the Intervenors directed much of their effort toward establishing that the Applicant's proposed vessel for this ferry service, the CAPT. LUCKY (being renamed the AQUIDNECK FERRY) was not suitable for the proposed service, and challenged the ability of the Applicant's potential Masters to safely bring the vessel in to several of the proposed termini. The Division has addressed these issues before, in *New England Steamboat Lines, Inc., Haddam Connecticut*, Division Report and Order number 10959, issued June 27, 1983, in Division Docket No. MC-W-24, a case where an applicant sought authority to transport passengers between locations in Newport Harbor, Narragansett Bay, Rhode Island Sound and Block Island Sound. In that case, the Division held:

...Lest one wonder regarding the seaworthiness of his vessels or the maritime skills of the corporation's crews, this division is not empowered to establish standards of safety nor to enforce such standards. These matters are the established and long-standing responsibility of the U.S. Coast Guard and the enforcement branch of the state's Department of Environmental Management. We ask only that the applicant provide evidence that his craft meet Coast Guard standards and that his masters hold proper license. The transcript reflects testimony concerning the possible congestion within the waters of New Harbor at Block Island, which might lead to hazardous operations. We are not qualified to pass judgment on this issue nor is it a matter of consideration by this division.

The identical issue was presented in this proceeding by the Intervenors, and the Division must again state, as it did in *New England Steamboat Lines*, that it is "not qualified to pass judgment on this issue nor is it a matter of consideration by this division."

With respect to whether "public convenience and necessity" requires the proposed ferry service, it appears to the Division that the Applicant's vessel is significantly larger than those

operated by the Intervenor, offers permanent shelter from the weather (as opposed to removable glassine curtains), offers a larger snack area, a handicapped accessible toilet facility (which neither Intervenor can offer), and has sufficient deck space to allow passengers confined to wheelchairs to move about, weather and other conditions permitting (which neither of the Intervenor's vessels can offer). All of these differences from the existing services offered by the Intervenor serve to distinguish the Applicant's proposed service from those currently available in Newport Harbor from the Intervenor and support a finding that the Applicant has satisfied the requirement to establish that public convenience and necessity would be served by his proposed services.

Further the Division notes that, in addition to evidence offered by the Applicant, eight individuals went to the time and trouble to offer written public comment in support of the application. State Representatives Amy G. Rice and Douglas W. Gablinski, and State Senators Charles Levesque and William Walaska, all wrote in to urge approval of the application, arguing that the new service would be qualitatively different than those currently provided.<sup>161</sup> Corinne Calise Russo, Director of the Rhode Island Department of Elderly Affairs, Lorna Ricci, Executive Director, Ocean State Center for Independent Living, Jody J. Sullivan, Executive Director, Newport Chamber of Commerce, and Annette Bourbonniere, a consultant on accessibility issues, all wrote in to support the application because they believed the proposed service would allow handicapped persons greater access to the waters of Narragansett Bay; Ms. Ricci, in particular, noted that there were currently no vessels with a wheelchair accessible restroom facility carrying passengers in Newport Harbor.<sup>162</sup>

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<sup>161</sup> Public Comment Exhibits 5, 9, 10 and 11.

<sup>162</sup> Public Comment Exhibits 15, 16, 17 and 18. However, after being approached by Mr. Gineo, general manager of Intervenor Oldport Marine, and told by him that the Applicant's vessel would not be ADA compliant, Ms. Russo

For the foregoing reasons, the Division finds that the Applicant has established that his proposed services will satisfy “public convenience and necessity.”

The Division recognizes that there is already significant competition for water passenger services in and around Newport Harbor, and understands that the Intervenor’s concerns are driven by the possibility of lost revenues. However, common carriers of passengers are not legally entitled to protection from reasonable competition.<sup>163</sup> The primary concern is the matter of whether the public is receiving adequate transportation services. The goal of preserving the investments of existing common carrier businesses from the effects of competition is a secondary concern,<sup>164</sup> at least where the existing businesses are not providing a life-line service.

Indeed, the Division believes that it is appropriate for it to consider such factors as competitive stimulation and anti-monopoly prophylaxis in its determination of whether to grant a CPCN in this matter.<sup>165</sup> The record reflects that both Intervenor have been providing good ferry services in and around Newport Harbor for many years. However, the record also reflects that none of the ferries currently operating provide handicapped accessible toilet facilities on board (and that the current vessels probably cannot be modified to provide such facilities), and the

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and Ms. Bourbonniere withdrew their support citing as their reason that the Applicant’s vessel would not be ADA compliant. See Public Comment Exhibits 20 and 19, respectively. We could find no actual ADA regulations on this point. More to the point, Intervenor Conanicut Marine Services has no plan, nor ability, to make its ferry service vessels wheelchair accessible, and Intervenor Oldport Marine Services only began making one of its ferry service vessels wheelchair accessible after this hearing began. Neither Intervenor expressed plans to install wheelchair accessible toilet facilities on their ferry service vessels. All in all, we find the AQUIDNECK FERRY, when fully converted, will offer more amenities to the handicapped, once on board, than either of the Intervenor. We believe that Ms. Russo and Ms. Bourbonniere would both agree that that is a significant step forward for the many handicapped persons who come to Newport and wish to enjoy more of the “City by the Sea’s” seaborne amenities.

<sup>163</sup> See *Application Filing By The Block Island Trolley Company, Inc.*, Division Report and Order number 15285, issued on April 29, 1997, in Division Docket No. 97-MC-18, citing *Yellow Cab Co. v. Public Utilities Hearing Board*, 73 R.I. 217, 54 A.2d 28 (1947), a case where taxicabs and limited public motor vehicles sought to block a trolley company from being allowed to operate a jitney on the grounds that many taxi operations would be “deprived of a substantial portion of their income.” The Division rejected this argument as a basis for denying the application.

<sup>164</sup> *Yellow Cab Co. v. Public Utilities Hearing Board*, 96 R.I. 247, 191 A.2d 23 (1963).

<sup>165</sup> See *Domestic Safe Deposit Company v. Hawksley*, 111 R.I. 224, 301 A.2d 342 (1973); *Short Line, Inc. v. United States*, 290 F.Supp. 939 (D.R.I. 1968). See generally *In Re Newporttravel, LLC*, Division Report and Order number 19977, issued April 27, 2010, in Division Docket No. 10 MC 33.

Applicant is the first ferry company to actually begin modifying its vessel to allow wheelchairs to be rolled directly on board (significantly, Intervenor Oldport Marine Services, faced with this competitive pressure, resurrected three-year-old plans of its own to modify one of its vessels to allow direct wheelchair access, an action that perfectly illustrates the potential benefits of direct competition). As the Applicant is proposing to provide an alternative ferry service, with distinguishing characteristics, the Division finds that the public interest would be served from the competitive interplay that will invariably exist between competing services.

Based on the record, the Division finds that the Applicant has shown itself to be fit, willing and able to provide the proposed services, and to comply with all applicable rules, regulations and statutes pertaining to the proposed services. Further, the Division finds that the Applicant has shown that there is a public convenience and necessity that warrants the award of a certificate granting authority for a ferry service in Newport Harbor, particularly one offering such a large and comfortable vessel capable of accommodating the on-board needs of handicapped passengers to a degree not currently available, as well as accommodating passengers without challenges to their mobility, providing services between the following termini: (1) Goat Island to Perrotti Park, (2) Perrotti Park to Ann Street Dock, (3) Ann Street Dock to Fort Adams, and (4) Fort Adams to Goat Island.

Having said this, it is important to note that the Division is not the only governmental agency which has jurisdiction over all aspects of the proposed ferry service. For example, the Applicant must first obtain a Certificate of Inspection from the Coast Guard before it can begin to carry passengers on the AQUIDNECK FERRY, and it will have to secure landing rights from the appropriate agency or landowner for each of the proposed termini on its route. The

Applicant shall be expected to show compliance with all regulatory requirements, including those from other agencies, before it can begin operating its ferry service.

Accordingly, it is

**(20292) ORDERED:**

1. That the application of Aquidneck Ferry & Charter, Inc., 459 Winstone Drive, Portsmouth, Rhode Island 02871, for a Certificate of Public Convenience and Necessity (“CPCN”) authorizing the holder thereof to operate as a water vessel passenger carrier providing a seasonal ferry service from April 15 through October 15 in and around Newport Harbor with the following circuit: (1) Goat Island to Perrotti Park, (2) Perrotti Park to Ann Street Dock, (3) Ann Street Dock to Fort Adams, and (4) Fort Adams to Goat Island, pursuant to R.I.G.L. §§ 39-3-3 and 39-3-3.1 is hereby approved.
2. The Division’s approval is subject to fulfillment of the following terms and conditions prior to the commencement of the transportation services:
  - a. That prior to offering service to the public, the Applicant must provide the Division with sufficient documentation proving that it has complied with all necessary government regulations (i.e., U.S. Coast Guard, State and local permits);
  - b. That the vessel utilized by the Applicant to provide the service contain all the amenities stated in the Applicant’s testimony and business plan, and that the services provided substantially conform with the evidence of record;
  - c. That the Applicant file with the Public Utilities Commission, and have approved, tariffs reflecting the rates and charges to be charged for its services;

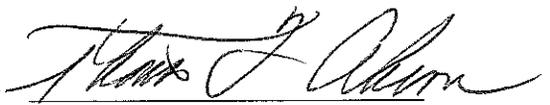
- d. That the Applicant submit proof of insurance and also hand deliver to the Motor Carrier Section of the Division a copy of the approved tariffs reflecting the rates and charges approved by the Public Utilities Commission;
  - e. That prior to offering service to the public, the Applicant shall notify the Motor Carrier Section of the Division and allow it to inspect the vessel to ensure compliance with this Report and Order.
3. Upon satisfactory completion of the aforementioned terms and conditions, a CPCN shall be issued. The Applicant shall not perform any of the transportation services authorized through this Report and Order until it has satisfied the aforementioned terms and conditions and has been physically issued a CPCN.
  4. If the terms and conditions outlined above in paragraphs 2(a), 2(b), 2(c), 2(d) and 2(e) are not met within one hundred eighty (180) days, the approval granted herein will be of no further force and effect.
  5. The Applicant's business address must remain at the same location as listed on the application unless otherwise approved by the Division.
  6. The authority conferred herein is further limited to the water vessels that were described by the Applicant during the hearing. The Division must approve any change in water vessel.

**DATED AND EFFECTIVE AT WARWICK, RHODE ISLAND, FEBRUARY 28, 2011.**



William K. Lueker, Esq.  
Senior Legal Counsel  
Hearing Officer

APPROVED:



Thomas F. Ahern  
Administrator



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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**NOTICE OF AVAILABILITY OF JUDICIAL REVIEW**  
(PROVIDED PURSUANT TO R.I.G.L. §42-35-12)

Please be advised that if you are aggrieved by this final decision (report and order) of the Rhode Island Division of Public Utilities and Carriers (“Division”) you may seek judicial review of the Division’s final decision by filing an appeal with the Rhode Island Superior Court. You have thirty (30) days from the mailing date (or hand delivery date) of the Division’s final decision to file your appeal. The procedures for filing the appeal are set forth in Rhode Island General Laws, Section 42-35-15.

Proceedings for review may be instituted by filing a complaint in the Superior Court of Providence or Kent Counties. Copies of the complaint must be served upon the Division and all other parties of record in your case. You must serve copies of the complaint within ten (10) days after your complaint is filed with the Superior Court.

Please be advised that the filing of a complaint (appeal) with the Superior Court does not itself stay enforcement of the Division’s final decision. You may however, seek a stay from the Division and/or from the Court.

The judicial review shall be conducted by the Superior Court without a jury and shall be confined to the record. The Court, upon request, shall hear oral argument and receive written briefs.