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Ms. Luly Massaro, Clerk
Division of Public Utilities and Carriers
89 Jefferson Blvd.
Warwick, RI 02889

In Re: Docket No. D-13-105

The Advocacy Section writes to provide its Recommendation to the Division regarding the Application of A & R Marine Corp., d/b/a Prudence Bay Island Transport ("A & R") for a Certificate of Public Convenience and Necessity ("CPCN"). G.L. § 39-3-3 provides "[n]o common carrier of persons and/or property operating upon water between termini within this state shall hereafter furnish or sell 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" (emphasis added). In addition to this requirement, the Division has held that a CPCN applicant must show that it is *"fit, willing and able"* to provide the ferry service along the proposed route. In Re: Petition by Interstate Navigation Company, Docket Nos. D-06-51 & D-06-53, Order No. 19477 at 2 (emphasis added).

In the case before the Division, no real debate exists that A & R is "fit and willing" to provide the proposed ferry service. See e.g., Tr. 10/29/2013 at 8, 97-102, 122 (evidence of the fitness and willingness of A & R's management team). The Record reflects that the principal members of A & R's management team are Islanders, and, as a result, have a vested interest in ensuring that they and their families and neighbors receive reliable, efficient, and appropriate ferry services. They are also, as long-standing customers of Prudence Ferry, Inc. ("PFI" or "Prudence Ferry"), in the position of being intimately familiar with the reliability, efficiency, and appropriateness of the services offered by the incumbent carrier PFI. They have every incentive to provide a service which serves the best interests of the Islanders. Their testimony, then, cannot be considered as simply self-serving in the same way that a taxicab CPCN applicant who does not reside within the service territory he seeks to serve and has never used taxicab services in that service area himself might be considered self-serving. Moreover, the Division as recently at four days ago found that an applicant seeking a CPCN to provide taxi service had proved a "public need" existed solely on the testimony of *the pro se* applicant himself and that of a taxi-driver colleague. In Re: Application for Taxicab Certificate of Operating Authority [sic] Pursuant to R.I. Gen. Laws §39-14-3: Anytime Anywhere Taxi, LLC., Docket No 13 MC 111, Order No. 21311.

Prudence Ferry, however, opines that A & R's application must fail because A & R is not currently "able" to provide the service it proposes to provide. Specifically, PFI asserts that A & R does not own a vessel, does not have proper financials, and has not made arrangements for a place to dock its vessel. 12/5/2013 Tr. at 24. For its part, to satisfy the "public necessity and convenience" criterion, A & R proffered evidence to show that the service currently offered by Prudence Ferry is inadequate and of uncertain duration due to statements and an e-mail, made/written by PFI's owner, Mr. Bruce Medley. See e.g., Tr. 10/29/2013 at 12, 36, 50-52, 74-77, 170-71.

The Advocacy Section disagrees with PFI's suggestion that the application should be denied because A & R is not currently "able" to provide the service proposed. The Division has always recognized the flexible nature of the CPCN process, approving the grant of ferry certificates (as well as many other types of transportation CPCNs) "subject to the fulfillment of . . . terms and conditions prior to the commencement of transportation services," *e.g.*, obtaining all U.S. Coast Guard, State and local permits, proof of insurance, and Division inspection that the applicant has satisfied the material terms of its business plan. See e.g., In Re: Aquidneck Ferry & Charter, Inc., Docket No. D-10-05, Order No. 19966 at 13; In Re Island Hi-Speed Ferry, LLC, Docket No. 98 MC 16, Order No. 15652 at 26. The uncertainties alleged by Prudence Ferry, here, are no different than those the Division has addressed on a conditional basis in other matters; likewise, they may easily be satisfied as conditions of A & R's CPCN.

The substantial evidence on record brings into question the adequacy of PFI's service. Tr. 10/29/2013 at 26, 29, 32, 34. Mr. Medley's initial decision to terminate his lifeline service is contrary to his customers' need for the provision of certain and continuous service. Indeed, it caused considerable and understandable consternation among Islanders and town officials that is, by definition, contrary to the "public convenience" and, truth be told, led to the very application at issue in this docket. While Mr. Medley eventually retracted his decision to terminate service as of December 1, 2013, the Advocacy Section is not convinced his change of heart guarantees that he will not discontinue his service with little or no notice sometime this year.

Moreover, the Record reflects that Mr. Medley and/or Prudence Ferry sold its/their ownership interest in the Bristol dock to the Town of Bristol on June 14, 2013 and leased back the right to use the dock only through June 14, 2014. Tr. 10/29/2013 at 21-22. No evidence, then, exists in the Record that either Prudence Ferry or A & R will be able to use the Bristol dock to provide service to the public after June 14, 2014. Id. The issue becomes in terms of determining "public convenience and necessity" whether the Division, by virtue of its authority under G. L. § 39-3-3, should pick winners and losers when there are two or more potential providers of lifeline service. The Advocacy Section does not believe that it should make that choice in this forum. We do, however, believe that such a choice may appropriately be made by the ratepayer, through the marketplace.

When it comes to the regulation of essential utility services such as ferry services, the modern regulatory trend is to implement a regime that promotes competition. See e.g., Town of Norwood v. FERC, 202 F.3d 392, 396 (1st Cir. 2000) ("[a]s with other, once fully

regulated industries, legislators and regulators have over the last 25 years sought to introduce a greater measure of competition…").

The benefits of competition are manifest:

> Competitive markets are the preferable economic mechanism for achieving, allocative, productive and dynamic efficiency . . . Deregulation can achieve greater efficiency in entry and investment decisions, lower administrative costs, elimination of pricing distortions, increased innovation and greater opportunities for customer choice.

J. G. Sidak and D. F. Spulber, "Deregulation and Managed Competition in Network Industries," Yale Journal on Regulation at 4 (Winter 1998).

In order to achieve the economic benefits of competition and entry, regulators must allow all companies to have an equal opportunity to compete:

> Competition means that the most efficient and creative firms prosper. The market cannot be expected to discover the best competitors unless all companies begin on an equal regulatory footing.

Id. at 8. Pursuant to this principle, regulatory experts acknowledge that "[f]or markets to function properly, government cannot direct the outcomes without incurring high administrative costs and constraining customer choice and company innovation. The impartiality principle is, therefore, a fundamental component of public policy: ***Regulators should not 'pick winners' in terms of technology, products and service, companies or market institutions."*** Id. at 14 (emphasis added).

Like these noted experts, the General Assembly has recognized this modern trend when it mandated that "it is in the public interest to promote competition in the electric industry"—an industry, like ferry service, that is critical to the health, safety and welfare of the public, *i.e.,* a lifeline service. G.L. § 39-1-1(d)(4). In a word, ***"[g]reater competition is the goal, not something to suppress."*** In Re: R.I. Hope Energy Limited Partnership, Docket No. SB-98-1, Order No. 35 at 9 (emphasis added).

Embracing the General Assembly's legislative determination regarding the benefits of competition, the Division, itself, has ruled, in the context of "already significant competition for water passenger services," that the "public interest would be served from the competitive interplay that will invariably exist between competing services." In Re: Aquidneck Ferry & Charter, Inc. Docket No. D-10-01, Order No. 20292 at 45. See also In Re: Newportravel, LLC, 10 MC 33, Order No. 19977 at 13 (the Division finds that the public interest would be served by the competitive interplay that would exist between two jitney carriers).[1] The

[1] This rule applies when an applicant shows that its services possess "distinguishing characteristics." Aquidneck Ferry & Charter, Docket No. D-10-01, Order No. 20292 at 45. In the pending matter, no debate exists that A & R satisfied its burden of proof in this regard. Unlike Prudence Ferry, A & R showed that it will adequately provide heated and lighted

Administrator of the Division, likewise, in circumstances not dissimilar to the case before the Hearing Officer, hailed the entry of a second cable television operator into a Rhode Island service area in order to provide the public with "real competition" for critical "bundled video, telephone and data (internet) services." In Re: Application Filing for a Certificate of Authority to Operate by Verizon New England, Inc., Docket No. 2007-C-1, Order No. 19148 at 7, 10. See also In Re Application of Cox CoxCom, Inc., d/b/a Cox Communications for a Compliance Order Certificate in Service Area 5, Docket No. 2000-C-5, Order No. 16402. Whatever the market, the Division has held, "[i]ncreased competition in itself is not a valid ground for denying a CPCN (or like franchise right) as existing carriers do not have a legal right to maintain an oligopoly upon the services rendered." In Re: G. Metz Moving, Inc., Docket No. 13-MC-103, Order No. 21206 at 10. The Division has even gone a step further, holding: ***"The Division questions how the public interest is ever served by unnecessarily delaying competition."*** Verizon New England, Docket No. 2007-C-1, Order No. 19148 at 9.

Pursuant to these noted authorities and long line of regulatory precedent, the Division should grant A & R's application for a CPCN. If the history of competition in markets for essential utility services is any window into the future shape of the Prudence Island - Bristol ferry market, then permitting A & R and Prudence Ferry to compete assuredly satisfies the Division's "most fundamental obligation of securing adequate service for the public." Breen v. Division of Public Utilities, 59 R.I. 134, 194 A. 719, 720 (1937). "Inexperienced" and "fledgling" providers of utility service typically "disappear" in a competitive landscape, usually consolidating with financially stronger and experienced utilities. Verizon New England at 7. The fittest utilities survive because they offer the "products, price, [and] features" that their customers demand. Id. at 10. Time and again, across multiple utility markets, this fundamental tenet has proven true. Thus, one experienced Rhode Island cable service provider absorbed many fledging companies that failed to adapt their "freestanding infrastructure" to the world of "bundled video, telephone and data products." Id.

The same holds true in the ferry industry. Hi-Speed Ferry sold its assets and transferred its CPCN to incumbent Interstate Navigation when a competitor offered ferry service from New London to Block Island that rendered its business model unprofitable. See Interstate Navigation Company, Docket Nos. D-06-51 & D-06-53, Order No. 19477. Similarly, in the mid 1980's PFI (then owned by Mr. Luther Blount) was providing ferry services between Prudence Island, Hog Island and Bristol in direct competition with Island Transport Company (then owned by Mr. Bruce Medley) providing ferry services between Portsmouth and Prudence Island. The Prudence Islanders appeared to prefer the route being offered by PFI over that offered by Island Transport, and were not happy with the way PFI was being managed. Blount got fed up with the Islanders' constant complaints about his service, and put out overtures about selling his company. Accordingly by 1986, PFI was transferred to Mr. Medley and his partner, and the services of Island Transport Company discontinued. See generally In Re: Prudence Ferry Company (Luther H. Blount), Docket

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cabins, telephone, texting and online vehicle reservation and cancellation capability, dock snow removal services, and an available restroom. See e.g., Tr. 10/29/2013 at 13. These distinguishing features are no different than those that the Division typically has held satisfies this criterion, thereby sanctioning the competitive entry of a CPCN applicant. See e.g., Aquidneck Ferry & Charter at 45 (where the Division held that a ferry's wheelchair access—"an action that perfectly illustrates the potential benefits of direct competition"—constituted a distinguishing characteristic); Newportravel at 13 (where small van size and different stops were held by the Division to constitute distinguishing features of two significantly similar narrated jitney tour services).

No. 86-MC-219, Order No. 12218. When a ferry operator can no longer be run in a profitable manner, time and again, history shows that the industry consolidates. The weaker operator exits the market, typically transferring its assets to a surviving entity that continues in business as a financially stronger entity, offering the superior services that customers demand.

While nurturing a competitive environment has become paramount in the modern regulatory paradigm, the Division has observed that "wasteful competition" may be a *"secondary consideration"* for denying a CPCN when the fundamental obligation of securing adequate service cannot be achieved. In Re: Application By Interstate Navigation Company for Water Carrier Authority, Docket No. D-05-06, Order No. 18506 at 64 (emphasis added). In the pending matter, no evidence exists to support a finding that, were the Division to grant A & R a CPCN, the market would become subject to "destructive competition." Prudence Ferry did not present a case in chief, and the mere fact that A & R and Prudence Ferry may compete to garner the Prudence Island - Bristol route is not, in itself, evidence of such destructive competition. See Breen, 59 R.I. at 134, 194 A. at 720 (Order granting a certificate to a second taxi company to provide more convenient service in a franchise territory than the incumbent taxi service did not trigger a finding of wasteful competition that would overturn the Division's Order). See also State Utilities Comm'n v. American Courier Corp. 174 S.E.2d 808, 813 (N.C. Ct. App. 1970) ("there is no public policy condemning competition in the field of public utilities").

Rather, based on competition's legacy in Rhode Island, see regulatory precedent *supra*, and the instant Record, the overwhelming weight of the evidence is that one ferry company—either A & R or Prudence Ferry—will survive. The fundamental obligation of securing adequate ferry service for the public will be assured. Customers will receive ferry service that is superior to that which they now receive, thus satisfying the "public convenience and necessity" criterion under § 39-3-3. No basis, then, exists to deny A & R's application for a CPCN.

For all of the foregoing reasons, the Advocacy Section recommends that the Division grant A & R's Application for a CPCN subject to the company's identifying and purchasing an appropriate vessel, securing financing, obtaining docking facilities, and any other terms and conditions as the Division deems just and proper.

Respectfully Submitted,

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