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September 9, 2013

Via Electronic Filing and Hand-Delivery

Ms. Luly Massaro, Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, Rhode Island 02888

RE: Rhode Island Fast Ferry, Inc. Docket No. D-13-51

Dear Luly:

Please find enclosed an original and nine (9) copies of Rhode Island Fast Ferry Inc.'s Objections to 1) the Motion for Intervention filed on behalf of Interstate Navigation Company d/b/a The Block Island Ferry, and 2) the Motions for Intervention filed on behalf of Block Island Ferry Services LLC d/b/a Block Island Express and Intrastate Nav. Company.

Please note that Rhode Island Fast Ferry Inc. does not object to the Motion for Intervention filed on behalf of the Town of New Shoreham.

Thank you for your attention to these filings and please let me know if you have any questions.

Very truly yours,

ALAN M. SHOER
ashoer@apslaw.com

Enclosures

cc: Service List via e-mail

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

In Re: Rhode Island Fast Ferry, Inc.	)	**Docket No. D-13-51**
Ceiling Prices for 2011	)	

OBJECTION OF RHODE ISLAND FAST FERRY, INC.
TO MOTION OF INTERSTATE NAVIGATION COMPANY
D/B/A THE BLOCK ISLAND FERRY FOR INTERVENTION AS A FULL PARTY

Rhode Island Fast Ferry, Inc. ("R.I. Fast Ferry") hereby objects to the Motion of Interstate Navigation Company D/B/A the Block Island Ferry ("Interstate") for Intervention as a Full Party. Interstate is not a necessary or appropriate party in a competitive high-speed ferry application for a Certificate of Public Convenience and Necessity ("CPCN") before the Division of Public Utilities and Carriers (the "Division).

The Rhode Island Supreme Court, the Public Utilities Commission ("Commission") and the Division have recognized that high-speed ferry service to Block Island is a competitive market, separate and distinct from Interstate's "lifeline" or freight service. The Commission and the Division have also determined that Interstate does not satisfy the standard for full-party status in proceedings that involve licenses or rates for a competitor in the high-speed ferry business (especially where Interstate has chosen to forego serving customers that seek an alternative port in that region). As it has done in the past, Interstate's Motion is simply an effort to use the agency process to block competition, to the detriment of the public convenience and necessity and the well established benefits of competition and choice. As we describe below, at the same time that Interstate is objecting to alternative high-speed ferry service by R.I. Fast Ferry it is also seeking to, once again, hide the ball by using its Motion to Intervene (and protest) as a pretext to stall competition, so that it can launch a business seeking many of the same customers from the

Southeastern Massachusetts/Fall River region, engaging in exactly the kind of misleading statements that forced the Division to sanction Interstate in the 1999 investigation docket.[1] Interstate's participation as a full party is not necessary, not appropriate, is contrary to well developed court and agency precedent, and is contrary to the public interest. For the reasons set forth herein, R.I. Fast Ferry respectfully requests that Interstate's Motion for Intervention be denied.

BACKGROUND

In the years following the first Rhode Island high-speed ferry application in 1998, the Division and the Commission have developed a regulatory framework for the competitive market of high-speed ferries. Interstate ignores all this precedent, assuming that it is still1998, and that the Division and Commission have no understanding of the high-speed ferry market and how it is different, and unrelated to "lifeline" or freight service. However, as described in more detail herein, long ago, the Division and Commission answered the important fundamental regulatory questions concerning how to regulate high-speed ferry service, as compared to "lifeline" service, concluding that the high-speed ferry market and freight market are "apples to oranges" and ill-fit for comparison. Indeed, the Division and Commission have established that the high-speed ferry market is a competitive market, unlike the freight market.[2]

Over that same time period, the Division and Commission have also witnessed Interstate's desperate protectionist attempts to limit intrastate ferry service to Block Island to its

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[1] The press story is available at this web link: http://www.heraldnews.com/newsnow/x511622766/Fall-River-to-announce-fast-ferry-service-to-Newport-Block-Island (announcing Interstate's new ferry servicingBlock Island/Fall River is expected in the Spring of 2014, posted September 9, 2013 at 12:27 p.m. This press account appears ironically the same day that the Providence Journal posted a story on Interstate's dire predictions of how competing high-speed ferry business in other regions is harmful to their business.) *See also* this press story found at: http://www.wbur.org/2013/09/09/fast-ferry-to-link-block-island-fall-river

[2] The Intervention Rule for the Commission is substantively the same as that for the Division. *Compare* Division of Public Utilities & Carriers Rule 7 *with* Public Utilities Commission Rule 1.12.

service in Point Judith through a number of conniving maneuvers. Those failed attempts include: failing to answer basic and highly relevant questions in the 1998 high-speed CPCN proceeding; forcing the Division to impose fines against the company and to impose a moratorium on its entry into the high-speed market; offering self-serving and misleading ridership projections; driving up litigation expenses; and causing delays through a scorched earth litigation strategy designed to block the development of high-speed ferry service for Rhode Island customers. After all of those improper efforts to bar competition failed, Interstate immediately, and predictably, began running its own competitive fast ferry service.

Now, asserting the exact same arguments that were rejected in 1998, Interstate's Motion seeks to turn the clock back 15 years, as if the Division and Commission had never encountered a high-speed ferry application previously nor ever considered whether Interstate should be allowed to use its *de facto* lifeline ferry status as means to a barrier to entry into the Block Island high-speed ferry market by opposing a CPCN application for a new high-speed ferry service. Yet the Division, the Commission, and the courts of this State have already ruled on these exact issues, ruling against Interstate.

Interstate's Motion for Intervention ignores agency and court precedent. In so doing, it erroneously argues that it has a necessary and appropriate interest for intervention asserting that high-speed ferry competition will destroy its freight service. Putting aside the fact that there are already several other high-speed ferry businesses that carry customers to Block Island from nearby states, Interstate's argument is a red herring, as we will describe below. It is a fundamental principle that relying on ridership forecasts for high-speed ferries as a means to buttress an intervention to protect a "lifeline" and freight business is contrary to law. Quite simply, comparing high-speed ferry service to freight service is comparing apples to oranges.

Once the Division looks beyond that clearly erroneous argument, it is left only with considering whether the competition that the proposed high-speed ferry service would bring to Interstate's current high-speed service (*i.e.*, comparing apples to apples) is in the public interest. As a result, the only "interest" that Interstate could possibly assert is a potential loss of its monopoly over the Block Island high-speed ferry market in Rhode Island. That "interest" in a competitive market certainly is neither necessary nor appropriate, nor subject to protection in the name of "public interest." Accordingly, the Division should reject Interstate's unfounded attempt to assert itself in a license application proceeding because it merely seeks to destroy Rhode Island based competition.

STANDARD FOR INTERVENTION

A third party's intervention in Division matters is not allowed as a general right. In contrast, to intervene, a party must have either an express statutory right to intervene or "an interest of such nature that intervention is necessary or appropriate." Division of Public Utilities and Carriers, Rules of Practice and Procedure ("Division Rules") § 17(b). The Division's Rules make it clear that a party seeking to intervene in a Division proceeding must prove that it has: (1) a right conferred by statute; or, (2) an interest which may be *directly* affected and which is not adequately represented by existing parties and as to which movants may be bound by the Division's action in the proceeding; or (3) any other interest of such a nature that movant's participation may be in the public interest.

The Division's Rules provide examples of such directly affected interests as follows: "consumers served by the applicant, defendant, or respondent and holders of securities of the applicant, defendant, or respondent." *Id.* However, no decision of the Division or a reviewing court has ever held that an interest in preventing competition so as to protect a monopoly

position in a market that is deemed competitive is sufficient to satisfy the discretionary intervention standards of Rule 17 since, *a fortiori,* such motives are not in the public interest – and in fact, as will be argued below, a moving party's motive for seeking intervenor status should be closely scrutinized, not just the nature of its purported interests.[3]

Division Rule 17 requires that a motion to intervene set out "clearly and concisely facts from which the nature of the movant's alleged right or interest can be determined, the grounds of the proposed intervention, and the position of the movant in the proceeding." *Id.* Accordingly, to determine the grounds for Interstate's Motion for Intervention, the Division must turn to the substance and the reasons for the Motion. *See City of East Providence v. Narragansett Elec. Co.*, No. 06-2888-2006 WL 1660761, at *3 (R.I. Super. June 15, 2006). In this case, Interstate's Motion asserts that its "interest" is only in maintaining its tariffed rates and forcing intrastate customers only one option--requiring a long drive (for most customers) to Point Judith-- so that its lifeline and freight service is not affected by competition from a new service providing high-speed ferry transportation options to customers via a different port. That type of interest is not a sufficient interest to warrant Interstate's discretionary intervention in this proceeding.

ARGUMENT

I. INTERSTATE HAS NO RIGHT TO INTERVENE – STATUTORY OR OTHERWISE

Section 17(b)(1) does not provide Interstate with any basis to intervene because Interstate has no "right" to intervene. Interstate is unable to point to any such "right," statutory or

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[3] Interstate's hysteria that the sky will fall if customers are allowed an option to travel to Block Island via high-speed ferry from Quonset concedes that there is a public convenience and necessity, indeed a strong customer demand, for competitive alternatives to avoid the struggle to get to Point Judith via clogged highways and country roads. Thus their "protest" is obviously not designed to advance the public interest but merely a means to: 1) protect a monopoly business and to deny customers any choice for intrastate high-speed service to Block Island; and 2) allow it the opportunity to move to open a new service in Fall River, Mass., to provide high-speed service to many of the same customers that could be served out of the port of Quonset, Rhode Island by R.I. Fast Ferry.

otherwise, allowing it to do so. Indeed, no such right exists. Certainly, no statutory provision exists that allows competitors to intervene in Division actions merely so that they may maintain their monopoly over the entire intrastate market. As Interstate has no statutory right to intervene in this matter, Interstate must show that it has a necessary or appropriate "interest" to intervene, which it is also unable to do.

II. INTERSTATE HAS NO NECESSARY OR APPROPRIATE INTEREST TO INTERVENE IN THIS LICENSE PROCEEDING.

Interstate has no interest of such a nature that would warrant intervention as necessary or appropriate. Specifically, Interstate's interests in protecting its monopoly lifeline and freight business is not "directly affected" by the proposed fast ferry service because the Division has already ruled that it is impermissible to link an interest in high-speed ferry service to an interest in lifeline/freight service. Interstate purports to hold a necessary or appropriate interest because it is striving to maintain its lifeline service to the Island, the existence of which would allegedly be threatened by the proposed high-speed ferry.

The Division, Commission, and Rhode Island Supreme Court, however, have explicitly rejected that argument and explained in the most basic terms that lifeline service and high-speed ferry service are utterly distinguishable. Thus, Interstate is left with its argument that it is "directly affected" due to the potential for competition with its ***discretionary*** high-speed ferry business. Such an argument must fail because the mere fear of competition in a *de jure* competitive segment of a marketplace is a legal oxymoron and cannot provide means for intervention in Division matters.

In addition, the competitive interests of Interstate, and the interests of ferry service consumers throughout Rhode Island are adequately represented by the Attorney General and the Division's Advocacy Section. Accordingly, Interstate has failed to demonstrate that it has any

legally cognizable interest in the Division's review of this CPCN application sufficient to warrant discretionary intervention.

A. INTERSTATE IS NOT "DIRECTLY AFFECTED" BY R.I. FAST FERRY'S PROPOSED SERVICE

Interstate has failed to demonstrate any "directly affected" interest that is not adequately represented by the Division's Advocacy Section and/or the Attorney General. Interstate, instead, relies on out-dated (and rejected) arguments. Interstate's only effort to demonstrate that it is "directly affected" is its plea that it may lose passenger traffic (and accompanying revenues) to a competing service. That type of interest is rarely sufficient, and for good reason: Allowing a direct competitor to intervene in a Division matter simply because it isa direct competitor places the applicant in a "precarious position" and is of questionable wisdom. *In re Island High-Speed Ferry*, 746 A.2d at 1246.

Interstate is only able to aver that it will be "directly affected" because, it fears, the fares on its lifeline service may increase. Such an argument is fundamentally diametric to Division and Commission precedent and compares apples to oranges. In stark contrast to Interstate's assertions, lifeline services and fast ferry passenger services cannot be intertwined, equated, or found to be in competition. As this Hearing Officer properly recognizes, it is well established that "'fast ferry services' and 'conventional' ferry services are two distinctly different water carrier options," and "the Division cannot accept Interstate's argument that the economic viability of the two services should be linked for licensing purposes." *In re: Interstate Nav. Co. for Water Carrier Auth*, No. D-O5-06 at 61 (Jan. 23, 2006) (emphasis added); *see also Interstate Nav. Co. vs. Div, of Pub. Utilities & Carriers of the State of R.I.*, 824 A.2d 1282, 1282 (R.I. 2003) ("A high-speed ferry substantially alters the kind of service that water carriers can provide.

It requires different equipment, it provides faster service and it operates on the water in an entirely different way than a standard ferry does."); *In re: Island HI-Speed Form of Regulation and Review of Rates*, No. 3495 at 10 (May 9, 2003) ("The Commission finds that Interstate's and the Town's interest in IHSF's form of regulation and rates as impacting the lifeline service is indirect, at best.").

Indeed, "it would be improper to base the issuance of a high-speed water carrier CPCN on the needs of a public utility ratepayer population that will not be utilizing any of the services authorized under that high-speed water carrier CPCN." *In re: Interstate Nav. Co.* at 62 (emphasis in original). By analogy, "[t]he Division would not authorize the issuance of a taxicab CPCN to a company that already possessed a jitney CPCN in order to take the pressure off jitney (bus) fares." *Id.* Thus, the Division consistently rejects arguments "that the economic viability of the two services should be linked for licensing purposes." *Id.* Accordingly, the Division must, once again, reject Interstate's attempt to rely on this rejected and outdated argument to demonstrate that it is directly affected by this license proceeding.

Moreover, a general economic interest in a proceeding is not enough to warrant permissive intervention, especially where the claimed impact of a decision on the moving party is speculative or remote. *See, e.g., Town of Coventry v. Hickory Ridge Campground, Inc.* 337 A.2d 233 (R.I. 1975) (abutting property owners allowed to intervene in zoning enforcement action, but non-abutting owners not so threatened with special injury or economic loss to permit intervention); *Standard Hearing & Air Conditioning Co. v. City of Minneapolis*, 17 F.3rd 567, 571 (C.A. 8th 1998) (remote interests or interests requiring a sequence of events before becoming colorable do not meet the requirements of the Federal Rules of Civil Procedure governing permissive intervention); *Travelers Indemnity Co. v. Dingwell*, 884 F.2d 629, 638

(C.A. 1 1989) (the movant's interest must be "direct, not contingent" to warrant intervention). Even an interest in lower utility rates has been rejected by the federal courts as a ground for intervention. *See Public Service Co. of New Hampshire v. Patch*, 136 F.3rd 197, 207-208 (C.A. 1 1998) (Ratepayer Advocate's broad interest in lower electric rates "falls well outside the pale" to warrant intervention)(emphasis added).[4]

Thus, even if it were appropriate to consider Interstate's general economic interests in the CPCN proceeding of a new high-speed ferry service market entrant, Interstate's claim that it is only interested in maintaining lower rates is not sufficient to justify granting its motion to intervene.[5] The mere specter of a possible rate increase at some remote point in the future if the applicant here is granted authority to operate an alternative high-speed ferry service from a distant port aimed at a separate market is as speculative an interest as one can be – and these very chicken-little type arguments have proven false in the past.[6]

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[4] "It is well settled beyond peradventure, however, that an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right...That principle would be dispositive here for the [would-be intervenors] theory of economic interest operates at too high a level of generality. After all, every electricity consumer in New Hampshire and every person who does business with any electricity producer yearns for lower electric rates...To cinch matters...[that] interest has an overly contingent quality ...numerous market variables will impact New Hampshire electric rates even after the PUC implements a restructuring plan...Whether the interaction of these variables actually will produce lower rates is anybody's guess, thus demonstrating the fatally contingent nature of the asserted economic interest. *Public Service Co. of New Hampshire v. Patch*, 136 F.3rd at 207-208.

[5] Throughout the 15 years that the Division and Commission have regulated high-speed ferries, it is also well established that the high-speed ferry market exhibits different characteristics that warrant different regulatory treatment. For example, for purposes of rates, the high-speed ferry business is not regulated as a traditional public utility, based on cost of service, revenue requirements, etc. Instead, the Commission treats the high-speed ferry service market as analogous to the competitive telecommunications industry. In RE: Island High-speed Form of Regulation and Review of Rates, Docket No. 3495 (Order issued Nov. 25, 2003.

[6] For example, in 2003, three years after Island Hi-Speed Ferry received its CPCN, Interstate sought a rate increase for its lifeline service. Interstate cited rising operating costs – its last rate case had been in 1996 - and a fifteen percent decline in passenger traffic as the reasons for needing a 40% increase in its fares. Interstate pointed the finger at IHSF, but conceded that it could not isolate the causes for the decrease in traffic. This was the real world, empirical evidence for the final legal finding 4 years previously that "High-speed (*sic*) is more likely to attract existing customers of the airline rather than customers of Interstate. Thus, this Court finds that there is substantial evidence in the record that Hi-Speed's service will not cream-skim as to *these* remonstrants." *Interstate Navigation Company d/b/a Block Island Ferry v. Div. of Public Utilities and Carriers, et al*, 1999 WL 813603, *5 (R.I. Super., Aug. 31, 1999).

As Interstate's "lifeline" argument cannot show a "directly affected" interest, Interstate is left with the flimsy argument that the proposed new ferry service provider will be a direct competitor in the competitive marketplace of high-speed ferry service. This argument in support for intervention status must fail because in a competitive market the mere licensure of a potential competitor has no legitimate direct affect warranting intervention.[7] "To permit the intervention here sought would provide unwarranted opportunistic leverage" that would be inconsistent with the scope of the Division's proceedings. *The Narragansett Elec. Co.*, 2006 WL 1660761, *at*5*. Again, the proper "scope" of this proceeding is an application for a high-speed ferry license for R.I. Fast Ferry, Inc. This license proceeding is not about Interstate's Point Judith business activities, and the Division correctly rejects efforts by Interstate to turn a potential competitor's license review into a regulatory morass instituted to protect Interstate's monopoly business. *Id.* Manipulating the Division's resources as "opportunistic leverage" was exactly what the Division had in mind when it previously warned Interstate that it would not allow it to intervene in a license application for high-speed ferry service from Newport if Interstate itself did not itself want to serve customers from that location. *See In re: Interstate Nav. Co. Ferry Servs. Between Providence, Newport, and Block Island*, No. 99-MC-107 at 22. Interstate has abandoned serving customers from a port in the upper Narragansett Bay, relinquishing its Providence-based service option and only begrudgingly operating its Newport-based service after the Division warned it would open that up to competitors. Interstate should similarly be foreclosed from using intervention as "opportunistic leverage" to thwart competition in a region that Interstate itself has already abandoned. *Id.*

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[7] As the Commission has previously found, "while Interstate may be said to be an interested party, the nature of their interest does not elevate it to the level of a party of interest in this docket".

The Commission has also addressed (and rejected) Interstate's previous efforts to intervene, ruling that Interstate's intervention is simply a transparent attempt to insert itself in competitors' dockets as a means to delay and hinder legitimate competition. In rejecting such an attempt the Commission stated as follows:

> [T]he wisdom of the Commission's decision to permit Interstate and the Town to intervene in the previous docket to approve a form of regulation and set rates for IHSF was subsequently questioned by the Commission itself and by the Supreme Court. The Commission would like to believe that it learns from its prior experiences, and takes the guidance of the Supreme Court seriously. Furthermore, the Commission does not require Interstate's participation to make a reasoned decision about the appropriate form of regulation for IHSF, nor does the Commission require Interstate's participation to ensure that it will set just and reasonable rates for IHSF that do not result in unfair competition or discrimination. Therefore, the Commission finds that, while Interstate and the Town may be said to be interested parties, the nature of their interests does not elevate them to the level of parties in interest in this docket.

Id. at 13. Thus, to the extent that Interstate is seeking to intervene solely on the basis that it also runs a high-speed ferry from Point Judith, that interest does not elevate it to the level of a party-in-interest for the CPCN proceeding of a potential competitor. The mere existence of competition and the potential that customers may choose another company is not a sufficient and legitimate interest that can be used to claim a right to intervention, but rather simply is a signal that a competitive market is functioning. Further, if unfair competition is the concern, the Attorney General and Division will adequately represent the public interest to ensure that there is no unfair competition. Interstate, therefore, cannot intervene because its general concern over the interests of Rhode Island customers is already represented by a party to the matter. Accordingly, Interstate does not have any directly affected interest sufficient to satisfy the standard for intervention set forth in Rule 17.

B. INTERSTATE IS NOT ACTING ON BEHALF OF THE PUBLIC'S INTEREST

Interstate apparently defines "public interest" as maintaining its monopoly in Rhode Island, forcing all customers to Point Judith over congested and difficult summer-clogged highways, eliminating competition for high-speed ferry service from any other port in Rhode Island, and granting only itself the opportunity to develop another service to meet customer demand in the northern Rhode Island and Southeastern Massachusetts region. Interstate's argument essentially boils down to the claim that competition with its high-speed ferry may hurt its unrelated business, thereby potentially causing its lifeline service to collapse. However, as explained *supra*, the Division and Commission have rejected that argument on a plethora of occasions. Thus, Interstate's contention that its intervention is required as a matter of public interest because the "bridge to the mainland will collapse" is simply untrue and unwarranted. Moreover, these same "death spiral" and "worst case scenario" arguments were rejected in the 1998 high-speed ferry CPCN docket – and rightfully so, as history shows these dire prognostications never materialized.[8]

1. The Division Should Reject The "Too Big To Fail" Argument.

In contrast to Interstate's futile attempts to demonstrate its cohesion with the public interest, Interstate's current position actually demonstrates that its interests are antithetical to the public interest because they seek a ruling barring competition. Its argument essentially states that Interstate cannot have competition because it is "too big to fail." Thus, Interstate believes that if competition is allowed, its ridership will be affected. Somehow, Interstate believes that it is in the public interest that all customers in the Rhode Island region who wish to visit Block Island in the summer season must be forced to travel to Point Judith by way of crowded and

[8] *See* note 6 *supra*.

congested highways so that Interstate can capture all the intrastate travel-related revenue. Interstate, by seeking to freeze its monopoly position and to eliminate customer choice, is actually taking a position antithetical to the public interest, as the Division previously recognized in the Newport high-speed ferry proceeding.

As discussed above, this is not the first time that Interstate has attempted to assert an anti-competitive interest on behalf of the public, and it is plainly not in the public interest to let Interstate overburden this license application with a self serving protectionist strategy to delay and hinder the efforts of a competitor seeking to benefit the greater Rhode Island region and its economy. Rather, the public interest requires competition with Interstate's high-speed service, in order to alleviate congestion and burdening of public resources, to encourage greater use of alternative modes of transportation and to secure development of Rhode Island based business opportunities and jobs.

In contrast of its Motion, logically, it is in the public interest to eliminate monopolies, allow for more options for the public to visit Block Island, and to encourage entrepreneurial activity and business development in Rhode Island. In fact, due to the different geographical location of the proposed fast ferry, the customers seeking to use the R.I. Fast Ferry service to Block Island will, in many instances, be customers from the Upper Bay/Southern Massachusetts or other regions that travel via flights to T.F. Green Airport, and who do not and would not travel to Point Judith to reach Block Island. The proposed fast ferry will, therefore, not necessarily affect Interstate's ridership, as it will activate and service a dormant, un-served, niche market. Indeed, Interstate's recent actions to announce a new port of service from Fall River,

Massachusetts (just announced today) merely prove that there are other customers that would never drive all the way to Point Judith but who may still be interested in visiting Block Island.[9]

As pointed out above, the Division has previously been unconvinced by Interstate's claims that the public interest is served by its intervention in a competitor's license application. Specifically, when Interstate threatened to hold its license to operate a Newport ferry in abeyance (thereby denying passengers from Newport an option for high-speed ferry service), the Division rejected that attempt and found that the public interest mandated offering another ferry company the opportunity to operate a Newport to Block Island high-speed ferry. *See In re: Interstate Nav. Co. Ferry Servs. Between Providence, Newport, and Block Island*, No. 99-MC-107 at 22. Recognizing Interstate's proclivity to abuse the administrative process as a means to block lawful competition, the Division concluded that "[a] contested case resulting from possible Interstate intervention is clearly not in the public interest." *Id.* (emphasis added). The Division therefore, refused to "impede the start-up of a potential replacement service provider by requiring the replacement provider to also have to fend off a potential intervention by Interstate." *Id.* The same conclusion is warranted in this proceeding.

2. Interstate Is Not Acting In The Public Interest of Rhode Island.

Interstate does not represent the public interest because it is not a Rhode Island business entity. As a Connecticut based business, Interstate's real interests are protecting its Connecticut business activities, not in seeking to benefit Rhode Island's public interest. Indeed, today Interstate announced new high-speed ferry service from Fall River, Massachusetts, so as to push even more business away from Rhode Island and towards Massachusetts. Here, the Town of New Shoreham, the Attorney General, and the Division, will more than adequately represent

[9] *See* : http://www.heraldnews.com/newsnow/x511622766/Fall-River-to-announce-fast-ferry-service-to-Newport-Block-Island (announcing Interstate's new ferry service from Block Island/Fall River expected in the Spring of 2014). See also: http://www.wbur.org/2013/09/09/fast-ferry-to-link-block-island-fall-river

Rhode Island's public interest. In fact, almost all of the other public interest commentary at this stage (i.e., from South County Tourism, North Kingstown, and the Quonset Development Corporation-QDC) fully support this application for a license for high-speed ferry service from a different port. These public entities urge the Division to agree it is in the public interest to grant this license for a competitive choice from Quonset. These entities have not complained that competition is not good for Rhode Island. And, the Town of New Shoreham (quite unlike the 1998 application) has remained neutral and has not joined Interstate's objections, thus allowing the Division staff and the Attorney General the opportunity to represent the public interest as it sees fit.

Interstate, as an out-of-state business operator, essentially asks the Division to allow for out-of-state monopolistic control of Rhode Island's resources, but not allow for more competitive options within the state of Rhode Island to the benefit of consumers and the economic opportunities to the greater Rhode Island economy. Currently, high-speed ferries operate to Block Island from New London, Connecticut, Montauk, New York, and Newport. Additionally a proposed ferry operated by none other than Interstate itself from Fall River, Massachusetts may also soon be bringing in completely new customers to Block Island. Yet we hear of no complaints from Interstate about these other out-of-state businesses (or its own Fall River venture). The Division should be rightfully suspicious that Interstate would prefer customers to seek high-speed ferry service to Block Island from Connecticut, New York or Massachusetts (using Interstate's newly announced high-speed ferry service), rather than from a new option here in Rhode Island at Quonset. Of course, Interstate ignores the associated business development and job creation opportunities a new high-speed ferry service could foster here in

Rhode Island. These new opportunities to benefit the Rhode Island public interest cannot be overstated.

3. Interstate's Protectionist Tactics Are Not In the Public Interest.

Interstate has not only set forth a public interest argument that is unsupported by both facts, law, and logic, but it has also demonstrated through its prior acts and behavior that it will use intervention in a potential competitor's license proceeding as a means of engaging in self-interested and anticompetitive behavior by delaying the application process and engaging in endless litigation to the detriment of the public interest and the customer benefits that would follow by offering customers a choice of ports to travel to and from Block Island. Interstate has a storied and notorious past with the Division and Commission in this regard, and, therefore, the Division should deny its Motion so that history does not repeat itself. Indeed, Interstate has inserted itself into numerous cases in the past, the most memorable of which was its attempt to prevent Island Hi-Speed Ferry, LLC's ("IHSF") entry into the high-speed ferry market. The Division is well aware of the tactics favored by Interstate in these types of proceedings. Although the applicant respectfully requests that the Division take administrative notice of those proceedings, we provide just a short summary.

Interstate's scorched-earth-litigation strategy as a means to block lawful competition, which was termed "endless litigation" by the Rhode Island Supreme Court, began on February 20, 1998, when Island High-speed Ferry ("IHSF") filed an application with the Division for a CPCN to provide a high-speed ferry service from Galilee to Block Island. *See Interstate Nav. Co. v. Div. of Pub. Utilities & Carriers of the State of R.I.*, 824 A.2d at 1284. During those proceedings, the Division granted Interstate's Motion to Intervene. *In re Island High-Speed Ferry, LLC*, 746 A.2d 1240, 1242 (R.I. 2000). After conducting marathon type hearings,

resulting in over 2000 pages of transcript, admitting hundreds of exhibits and taking testimony from dozens upon dozens of witnesses, the Division approved Hi-Speed's application subject to certain conditions, such as inspection of a vessel and procurement construction of a dock in Block Island's harbor. *See id.* Yet, after IHSF sought an expedited Commission approval for its rates in order to acquire and launch the high-speed catamaran in time for the 1999 season, Interstate filed yet another motion to intervene "in order to contest the filing and frustrate [ISHF]'s efforts to launch its operation in time for the 1999 summer season." *Id.* Although the Court affirmed Interstate's discretionary intervention in the Commission matter, due to statutory "limitation to [its] power of review," it discussed the Commission's view of Interstate's motives as "self-serving and questionable." *Id.* at 1245 (emphasis added). In addition, the Attorney General admitted during oral argument that the intervention of Interstate was "ill-advised." (emphasis added). The Supreme Court, therefore, explicitly warned that the "wisdom and appropriateness of the interventions in th[e] case was questionable." *Id* (emphasis added).

Three years later, Interstate found itself in the Rhode Island Supreme Court again on the same matter due to its blatant refusal to answer simple and relevant questions during the Division's hearings, which sought to expose its improper anti-competitive intent in the IHSF CPCN Division proceedings. On that occasion, Interstate was appealing: (1) a fine of $22,000 for its president's refusal to answer questions at a Division hearing, (2) the requirement that Interstate itself apply for a CPCN if it even wanted to enter the high-speed ferry market, and (3) a prohibition on Interstate from attempting to obtain that CPCN for three years, all of which were imposed by the Division as a sanction for improper use of its intervenor status in the IHSF licensing proceeding.[10]

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[10] In its rebuttal case in the CPCN proceedings, IHSF had exposed the fact that while Interstate took the position before the Division that there was no public need for a high-speed ferry to Block Island, it had announced to

This appeal centered on Interstate President Susan Linda's assertions during the IHSF CPCN hearings that "the privileges of confidentiality" applied when asked whether Interstate planned to enter the high-speed market at those hearings. *Id.* After that hearing, the Division investigated Ms. Linda's comments. Ms. Linda then refused to answer any questions on the subject, asserting not only the privilege of confidentiality, but her Fifth Amendment privilege against self-incrimination. The Division then determined that Mrs. Linda had no right to assert the Fifth Amendment, nor did the Division's inquiry into Interstate, as a public utility, cross into the realm of confidential information. *Id.* at 1285. Further, "drawing negative inferences from Linda's refusal to answer the questions posed to her at the hearing, the Division determined that Interstate had engaged in the act of planning an entrance into the high-speed ferry market," while opposing IHSF's attempts to do so under the pretext that there was no need for a Block Island high-speed ferry service. *Id.* Accordingly, the Division fined Ms. Linda, prohibited Interstate from engaging in high-speed ferry services for three years and required Interstate to apply for a CPCN if it desired to provide such services at the end of the moratorium. *Id.* Of course, Interstate applied for that CPCN for high-speed ferry service after its three years in the penalty box had passed, revealing its real anti-competitive motive behind years of aggressive litigation against IHSF.

4. What is Past is Prologue If It Involves Interstate's Efforts to Block Competition

After all of its documented and purposeful indiscretions during the prior litigation for IHSF's CPCN application and rate making proceedings, Interstate now moves to intervene again, but this time in R.I. Fast Ferry's application for a CPCN for a high-speed ferry service from Quonset to Block Island. Interstate seeks to intervene because it alleges that R.I. Fast Ferry's

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the ferry industry at a symposium just before the IHSF CPCN filing that due to advances in technology it was itself in the market for a high-speed vessel. *Interstate Nav. Co.*, 824 A.2d at 1284.

service would have disastrous consequences on its lifeline service to the Island. Although Interstate previously abandoned providing service from Upper Narragansett Bay, it now seeks to block R.I. Fast Ferry's proposal to do exactly that, with the worn-out mantra that it would have catastrophic results on its own service. *See generally In re: Interstate Nav. Co. Ferry Servs. Between Providence, Newport, and Block Island*, No. 99-MC-107.

Given the benefit of years of litigation, where Interstate mimics here the same old arguments raised in the IHSF intervention request, the Division should not allow Interstate's Motion to proceed the same way it did in 1998. Specifically, the Division should reflect on the manner in which Interstate would behave if allowed intervention status, and the Division has good reason to suspect that Interstate will, yet again, engage in any effort to misuse the administrative process and to engage in "endless litigation" as a means to preserve its monopoly status. We suggest that the type of tactics deployed by Interstate previously, which any reasonable person would expect again here if Interstate is granted intervenor status, are not in the public interest. To avoid such endless litigation with an entity that does not hold any interest in the CPCN application mandating intervention, the Division should deny Interstate's Motion.

5. Whatever Interstate's Interests are, They are Adequately Represented by the Attorney General and the Staff of the Division.

When government is an existing party, there is a rebuttable presumption that the public is adequately represented. *See, e.g., Daggett v. Commission on Governmental Ethics & Election Practices,* 172 F.3d 104, 111 (C.A. 1 1999); *see also, United States v. City of Los Angeles*, 288 F.3d 391, 401-402 (C.A. 9 2001). The presumption of adequacy may be overcome where, for example, a governmental representative fails in its duties or fails to exercise some tangible right. *See, e.g., Marteg v. Zoning Board of Review,* 425 A.2d 1240, 1243 (R.I. 1981) (failure of a municipality to take an appeal when entitled to do so is indicative of the fact that the party

seeking intervention is not adequately represented). However, the burden of proving inadequacy of representation is particularly high where a state agency and its proceedings are structured in such a way that the public interest is adequately represented, as it is here. *See, e.g., Public Service Co. of New Hampshire v. Patch*, 136 F.3rd 197, 207-208 (C.A. 1 1998) ("...the adequacy of interest requirement is more than a paper tiger...the burden of persuasion is ratcheted upward in this case because the [New Hampshire PUC] commissioners are [acting] in their capacity as a representative governmental body...rebuttal requires a 'strong affirmative showing' that the agency (or its members) is not fairly representing the applicants' interests.")

Whatever Interstate's interest may be in this matter, it has utterly failed to make any showing, let alone the strong showing that the law requires, that the Department of Attorney General and or the Division's own Advocacy Section are failing in their duties to protect the public interest in this matter, in order to rebut the presumption that they are.

CONCLUSION

For all of the foregoing reasons, the Division should deny Interstate's Motion to Intervene.

Respectfully submitted,

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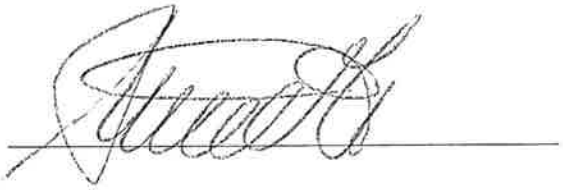
Dated: September 9, 2013

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2013, I delivered a true copy of the foregoing document via electronic mail to the parties on the attached service list.



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

In Re: Rhode Island Fast Ferry, Inc.	)	**Docket No. D-13-51**
	)	

OBJECTION OF RHODE ISLAND FAST FERRY, INC. TO MOTIONS OF BLOCK ISLAND FERRY SERVICES LLC D/B/A BLOCK ISLAND EXPRESS AND INTRASTATE NAV. COMPANY FOR INTERVENTION AS A FULL PARTY

Rhode Island Fast Ferry, Inc. ("R.I. Fast Ferry") hereby objects to the Motions of Block Island Ferry Services LLC D/B/A Block Island Express and Intrastate Nav. Company (collectively, "Cross Sound") to Intervene as Full Parties. Cross Sound is not a necessary or appropriate party in this proceeding concerning an application for a competitive high-speed ferry Certificate of Public Convenience and Necessity ("CPCN") before the Rhode Island Division of Public Utilities and Carriers (the "Division). Cross Sound has no Rhode Island based intrastate customers, and its primary concerns, related to dockage issues on Block Island, are within the exclusive jurisdiction of the CRMC and the Town of New Shoreham Harbormaster. Dockage permits and zoning approvals are not subjects that the Division will concern itself in this initial CPCN application.

The Division's review in this Docket is properly limited to the public convenience and necessity for an optional port for customers seeking intrastate high-speed ferry service to Block Island. If the public convenience and necessity are benefited, the Division (as in previous CPCN proceedings) will grant a conditional license, so that the Applicant has the opportunity to obtain the required permits, vessels, and dockage within a reasonable period of time. This is how the Division properly ruled when Island High-Speed Ferry ("IHSF") first sought a license to offer

customers a choice in high-speed ferry service to Block Island in 1998. The same rationale applies here.

Once again, a competing out of state company seeks to flip the process around so as to force delay upon a new entrant. Worse, the Motions for Intervention seek to impermissibly turn the Division into a quasi-CRMC so that the Applicant has to "prove" to the Division that it has all required permits, financing, zoning, vessels before seeking a CPCN from the Division. Once again, an out-of-state business (through these Motions for Intevention) seeks to manipulate an initial CPCN application by a potential competitor so as to protect its so-called "property interest" in a dock in the Town of New Shoreham. Indeed, it is the Town and CRMC that will, under their delegated statutory authority, determine what is best for the public in the use of the harbor.

The Division should reject Cross Sound's unfounded attempt to intervene as Full Parties. Cross Sound, as an out-of-state corporation, should not be allowed to intervene as a means to encourage this Division to usurp the authority and jurisdiction of the Town of New Shoreham, its Harbormaster, and Coastal Resources Management Council's ("CRMC"). For the reasons set forth herein, R.I. Fast Ferry respectfully requests that the Division deny both of these Motions for Intervention.

INTRODUCTION

Cross Sound asserts in its Motion to Intervene that it has an interest based on harbor congestion and /or the fact that it is uncertain at this time where R.I. Fast Ferry will dock. Ostensibly, without looking any deeper, Cross Sound asserts that it has an appropriate interest for intervention based on the fact that it also uses Old Harbor for its Connecticut based ferry operation. Yet, Cross Sound concedes that it has no Rhode Island intrastate customers, ignoring

that the Division has already determined that "BI Express services have no bearing on the needs and convenience of Rhode Island's intrastate travelers." *See* Report and Order in Docket D-05-06, at pg. 60. Cross Sound claims that it has an adequate interest to become a Full Party since it consists of Connecticut corporations operating out of Connecticut with no other attachment to Rhode Island other than a right to some kind of small fiefdom (a dock space) within the State of Rhode Island (*i.e.*, Old Harbor, New Shoreham). Cross Sound further asserts, although not expressly, that that interest alone is sufficient to allow its intervention as a full party. In short, it asserts that its interest in protecting its dock fiefdom, which R.I. Fast Ferry Inc. asserts is not even an issue here, cannot be represented by the Division, the Attorney General's Office, the Town, or its Harbormaster.

As described below, the Division has previously rejected such efforts to manipulate the CPCN process to prevent a new applicant from securing an initial license, based upon the false premise that the Applicant must first obtain all other required permits, financing, vessels and dockage required to provide the new service to customers. The Division has rejected this premise in the past and has issued a CPCN conditioned upon the requirement that a successful Applicant obtain such legal and business necessities within a reasonable period of time. The same ruling should follow here. Cross Sound's Motions for Intervention do not meet the minimum requirements of the Division's rules for Intervention.

STANDARD FOR INTERVENTION

A third party's intervention in Division matters is not allowed as of right. In contrast, to intervene, a party must have either a right to intervene or "an interest of such nature that intervention is necessary or appropriate." Division of Public Utilities and Carriers, Rules of Practice and Procedure ("Division Rules") § 17(b). The Division Rules specify that such a right

or interest may involve (1) a right conferred by statute; (2) an interest which may be directly affected and which is not adequately represented by existing parties and as to which movants may be bound by the Division's action in the proceeding; or (3) any other interest of such a nature that movant's participation may be in the public interest. None of those interests include an interest in maintaining an anti-competitive market. The Division's Rules, instead, provides examples of those whose interests may be "directly affected," such as "consumers served by the applicant, defendant, or respondent and holders of securities of the applicant, defendant, or respondent." *Id.*

That section of Rule 17 requires that a motion to intervene set out "clearly and concisely facts from which the nature of the movant's alleged right or interest can be determined, the grounds of the proposed intervention, and the position of the movant in the proceeding." *Id.* Accordingly, to determine the bases for the Plaintiff's intervention, the Division must turn to the motion for intervention. *See City of East Providence v. Narragansett Elec. Co.*, No. 06-2888-2006 WL 1660761, at *3 (R.I. Super. June 15, 2006).

ARGUMENT

I. CROSS SOUND IS NOT A NECESSARY OR APPROPRIATE PARTY BECAUSE THE ISSUE OF "CONGESTION" IN THE HARBOR OR DOCKAGE IS NOT WITHIN THE DIVISION'S JURISDICTION.

Cross Sound has no interest of such a nature that intervention is necessary or appropriate in this application for a license to operate an intrastate high-speed ferry business. Specifically, with respect to the dockage issue, the proper *fora* for Cross Sound to present its concerns are the Rhode Island CRMC and before the Harbormaster of the Town of New Shoreham, not the Division of Public Utilities and Carriers. *See, e.g.*, *Champlin's Realty Assocs. V. Tikoian*, 989 A.2d 427, 431 (R.I. 2010) ("The CRMC is a state agency charged with protecting and regulating Rhode Island's coastal resources."); *Interstate Nav. Co. v. Coastal Res. Mgmt. Council*, No. PC-

2005-6081, 2010 R.I. Super. LEXIS 148, at *8-*9 (R.I. Super. Oct. 19, 2010) ("[T]he General Assembly established the Coastal Resources Management Council and imbued it with the responsibility of 'planning for and management of the resources of the state's coastal region. Additionally, the CMRC [*sic*] has been granted the power to 'approve, modify, set conditions for, or reject any proposed development or operation within, above or beneath the tidal water . . .'" (omission in original) (quoting *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1260 (R.I. 1990) (internal citations omitted)).

Consequently, after the issuance of a license in this proceeding, R.I. Fast Ferry will, of course, have to seek either an amendment to an existing CRMC permit for dockage or seek a new CRMC Assent or permit to build a new dock in the Town of New Shoreham. R.I. Fast Ferry Inc. will also, of course, need to satisfy the requirements of the Harbormaster and the Town of New Shoreham to the extent applicable. Therefore, the so-called "property interest" in a dock, and the general interests of the public claimed by Cross Sound in its Motions, (referring to harbor congestion and/or water born traffic) will be fully and adequately adjudicated by the CRMC and reviewed as required by the Town, under their lawful authority to manage the Rhode Island waters and harbors. The only question is one of timing, and whether it is proper for an applicant to have to spend millions in dollars to secure permits, vessels and dockage, before seeking a conditional CPCN, or whether (as in previous applications) the applicant properly should seek a conditional CPCN from the Division first, in order to then be able to secure the other required approvals necessary to begin operations.

As the Division is well aware, an application for a CPCN for a new high-speed ferry service is the proper first step in the process to secure, *inter alia*, all the required permits, conditions and financing required in order to begin high-speed ferry operations. *See* Report and

Order, Docket No. 99 MC 19 at pg. 8 (affirmed by the Superior Court in *Interstate Navigation Company d/b/a Block Island Ferry et al. v. Division of Public Utilities and Carriers et al.*, C.A. 99 No. 1999-5058; C.A. No. 1999-5317 (August 31, 1999). See also *In Re Island Hi Speed Ferry, LLC,* Docket 98 MC 16 (Order 16146, January 7, 2000) ("Generally, the Division establishes a time period between the issuance of an order granting authority and the planned date of operations so that an Applicant will have a reasonable amount of time to fulfill the conditions contained in the order"). The proper order of events is, therefore, to allow the Applicant to first secure a CPCN so that it may secure the other required regulatory and zoning approvals.

As these previous decisions establish, the Division has heard the same type of objections raised by Cross Sound here, that the Applicant is not able to provide the service because it has not yet secured all the required dockage (or vessel, or financing, or whatever else can be conjured up as a means to block the application of a competitor). The Division "has not expected other applicants to invest millions of dollars into a business before applying for operating authority, and does not intend to do so now." Report and Order, Docket No. 99 MC 19 at pg. 8 (affirmed by the Superior Court in *Interstate Navigation Company d/b/a Block Island Ferry et al. v. Division of Public Utilities and Carriers et al.,* C.A. 99 No. 1999-5058; C.A. No. 1999-5317 (August 31, 1999)).

The Division, again, should reject the fundamental premise of Cross Sound's Intervention request. The Division should not allow an out-of-state company with no interests in Rhode Island intrastate ferry service to use the intervention process as a means to obfuscate and delay a

Rhode Island entrepreneur seeking a new option for customers seeking high-speed ferry service to Block Island, one of Rhode Island's premier tourist destinations.[1]

Certainly, when R.I. Fast Ferry initiated high-speed ferry service to Block Island, in its application of 1998, its license was issued without confirmed dockage at Block Island and, in fact, without a vessel on which to provide the service. *Id.* Yet, at that time, over substantial objection, the Division and the Commission provided a license and a regulatory scheme whereby Rhode Island Fast Ferry was given the opportunity to find, confirm and retain a dockage as well as acquire a vessel.[2]

In short, Cross Sound asserts nothing more than a generalized public interest which it somehow, although not expressly, contends cannot be protected by the Attorney General, the Commission, the Division, the Town or its Harbormaster. Allowing intervention in a Division proceeding based on such a generalized concern capable of being raised by multitudes of public boaters and obviously this basis for Intervention has the potential to disable such proceedings. Here, there is not even a scintilla of evidence, or even argument, that the Applicant will somehow compete with these Connecticut companies. Such an interest cannot support a motion for intervention in a CPCN proceeding. *See, e.g. Public Service Co. of New Hampshire v. Patch*, 136 F.3rd 233, 207-208 (R.I. 1975) ("It is well settled beyond peradventure, however, that an

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[1] Cross Sound's intent to use this process as a means to delay entry of a new Rhode Island based business is obvious by its threat that the first thing it would do if allowed to intervene as a full party is to seek a "stay" of these proceedings. Obviously, if the Applicant does not have a conditional CPCN for a high-speed ferry service it is difficult to imagine how any business, town or official would seriously review the other requirements of the business, thus forcing the Applicant into a black hole of regulatory uncertainty and delay. Of course this strategy to force a new applicant into regulatory uncertainty and delay only protects existing competitors who are able to manipulate a monopoly position. Prevention of a new option to customers is obviously what is behind Cross Sound's Motions for Intervention.

[2] Further, if Cross Sound were allowed to intervene simply because it simply has concerns as to harbor congestion and issues as to future dockage and usage of Rhode Island's coastline, then any individual who either has utilized Old Harbor or the coastline surrounding Block Island or any individual who has some future intent to utilize Old Harbor or the coastline surrounding Rhode Island would bear the same interest and also have the same right to intervene in this action as Cross Sound now asserts. This is plainly incompatible with the Division's Rules for Intervention, which require at minimum a substantial showing of an interest that will be directly impacted, not able to be represented by another party, and in this case, with no other forum to express such concerns.

undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right . . . That principle would be dispositive here for the [would-be intervenors'] theory of economic interest operates at too high a level of generality. After all, every electricity consumer in New Hampshire and every person who does business with any electricity producer yearns for lower electric rates...To cinch matters...[that] interest has an overly contingent quality . . .numerous market variables will impact New Hampshire electric rates even after the PUC implements a restructuring plan...Whether the interaction of these variables actually will produce lower rates is anybody's guess, thus demonstrating the fatally contingent nature of the asserted economic interest").

In fact, such an "interest" in the management of boat traffic in the harbor would usurp the New Shoreham's Harbormaster's authority to regulate harbor congestion. Pursuant to R.I. Gen. Laws § 46-4-6.10, the General Assembly granted to the Town Council of the Town of New Shoreham the right to control that portion of the State's immediate waterways (*i.e.*, Old and New Harbors) out to their harbor lines. In summary, that enabling Act transfers the States' power to regulate these areas to the towns and allots the town the right appoint a Harbormaster to oversee the usage of these areas which includes the express right and duty to oversee and regulate issues associated with congestion and traffic. That statutory provision states in pertinent part:

> (a) [It] shall also be granted to the town council of the town of New Shoreham to authorize it for appointment of a Harbormaster and by ordinance grant such authority as the town council may deem necessary. . . to regulate by ordinance the speed, management, and control of all vessels, and the size, type, location and use of all anchorages and moorings within the public waters within the confines of the town . . .
> (b) No powers or duties granted herein shall be construed to abrogate the powers or duties granted to the coastal resources management council as provided in chapter 23 of this title as amended.

§ 46-4-6.10. The Town of New Shoreham, by legislative grant, therefore has both the ability and the duty to protect the public interest as it relates to the usage of Old Harbor out to its harbor line. Thus, Cross Sound's "property interest" will be protected to the extent that R.I.Fast Ferry Inc. eventually seeks to use the same harbor.[3]

Cross Sound's Motion also seems to assert that its interests associated with the issue of dockage makes it a necessary party in order for the Division to undertake an analysis of whether or not the applicant, in this case Rhode Island Fast Ferry, is "able" to provide the service. In short, it would appear that Cross Sound is asserting that neither the Division, the Attorney General nor the Town or its Harbormaster are able to determine whether R.I. Fast Ferry, whose principals established fast ferry service to Block Island and whose principals now run a successful and modern fast ferry service to Martha's Vineyard, would be able to operate a high-speed ferry business in Rhode Island. Yet, Cross Sound does not indicate how its role as an out of town corporation seeking to protect its small dock fiefdom in Rhode Island is more capable of representing the interests of the people of the State of Rhode Island.

II. CROSS SOUND IS NOT A NECESSARY OR APPROPRIATE PARTY BECAUSE IT DOES NOT REPRESENT THE INTEREST OF THE RHODE ISLAND PUBLIC

Cross Sound unquestionably cannot represent the public interest because it is not a Rhode Island business entity and has no Rhode Island customers. As it is a Connecticut business, with admittedly out-of-state customers its interests rest with protecting the interests of its Connecticut business activities, not Rhode Island's public interest. Cross Sound, as an-out-of state competitor, essentially asks the Division to protect its business in Connecticut by protecting and

[3] To the extent the Division believes that dockage is an issue in this CPCN application the only entity that would have a proper interest to intervene would be appropriate would be New Shoreham. R.I. Fast Ferry Inc. has no objections to the Town's intervention as a full party. Indeed, by expressly reserving all other powers over Rhode Island waters to the CRMC, the General Assembly has explicitly delegated such powers to the CRMC, the Town and its Harbormaster, and no other agency, or entity.

promoting the businesses of Connecticut to the detriment of the public convenience and necessity and the potential for the development of business here in Rhode Island. Certainly, the legislature has not granted the right to undertake and protect that public interest to an out of state corporation operating out of New London, Connecticut. Instead, the Town, Attorney General, and Division should be allowed to represent the Rhode Island public interest.[4] In fact, almost all of the public interest commentary at this stage (from South County Tourism, North Kingstown and QDC) have agreed that it is in the public interest to grant this license for a competitive choice out of Quonset Point. These entities have not complained that competition is not good for Rhode Island.

Under Rule 17, Cross Sound must convince the Division that the participation as Parties by the Division, through the Attorney General, and the Town of New Shoreham (to which R.I. Fast Ferry has not objected) and the employment of New Shoreham's Harbormaster to undertake regulation of harbor congestion (and the full CRMC review process) will not adequately protect the public interest of Rhode Island. Cross Sound simply fails to do so. Moreover, Cross Sound's assertion that dockage is required before a CPCN application can be acted upon, as a basis to support intervention as a full party, is (as pointed out above) is entirely contrary to well established precedent in high-speed ferry CPCN applications before the Division. In fact, the enabling Act which transfers powers to the Town of New Shoreham to regulate congestion,

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[4] When government is an existing party, there is a rebuttable presumption that the public is adequately represented. See, e.g., *Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (C.A. 1 1999); see, also, *United States v. City of Los Angeles*, 288 F.3d 391, 401-402 (C.A. 9 2001). The burden of proving inadequacy of representation is particularly high where a state agency and its proceedings, are structured in such a way that the public interest is always represented, as it is here. See, e.g., *Public Service Co. of New Hampshire v. Patch*, 136 F.3rd 197, 207-208 (C.A. 1 1998) ("...the adequacy of interest requirement is more than a paper tiger...the burden of persuasion is ratcheted upward in this case because the [New Hampshire PUC] commissioners are [acting] in their capacity as a representative governmental body...rebuttal requires a 'strong affirmative showing' that the agency (or its members) is not fairly representing the applicants' interests"). Cross Sound's Motion fails to even suggest why its general concerns over use of a harbor cannot be adequately represented by the Rhode Island Attorney General, the Division, or the Town of New Shoreham.

traffic and usage within its harbors, clearly states that the only other entity which has jurisdiction over these dockage and harbor issues is the Rhode Island CRMC. Again, this power and obligation under express statutory authority does not allow an out-of-state corporation to intervene at the Division to purportedly represent the public interest of the people of Rhode Island before an agency that does not have zoning or harbor permit jurisdiction for dockage, in order to simply protect a small dock fiefdom within the state.

CONCLUSION

For all of the foregoing reasons, the Division should deny Cross Sounds Motions to Intervene as Full Parties to R.I. Fast Ferry's CPCN application for a high-speed ferry alternative for customers seeking intrastate travel to Block Island.

Respectfully submitted,

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