

STATE OF RHODE ISLAND
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC. : DOCKET No. D-13-51

**INTERSTATE NAVIGATION COMPANY'S OBJECTION TO RHODE ISLAND
FAST FERRY'S MOTION TO EXTEND THE COMPLIANCE DATE IN THE
DIVISION'S SEPTEMBER 22, 2016 DECISION AND ORDER**

Interstate Navigation Company d/b/a The Block Island Ferry ("Interstate") submits this Objection to Rhode Island Fast Ferry's ("RIFF") Motion to Extend the Compliance Date in the Division of Public Utilities and Carrier's ("Division") September 22, 2016 Decision and Order. In support thereof, Interstate states as follows:

I. ARGUMENT

A. The Division lacks jurisdiction to hear and decide RIFF's Motion to Extend.

RIFF is seeking to extend the compliance date set forth in the Division's Decision and Order issued September 22, 2016 ("September 2016 Order"). To seek a continuance from the Division, RIFF should have first asked the Superior Court to remand this matter to the Division for the purpose of hearing and ruling on RIFF's Motion to Extend.¹ R.I.G.L. § 42-35-15(e).

Under Division Rule 31(e), the Division "retains jurisdiction over all matters until an appeal is docketed in the Superior Court." However, "once an appeal has been docketed, jurisdiction lies in the Superior Court." Division Rule 31(e). The Division's September 2016 Order was appealed to the Superior Court by Interstate and the Town of New Shoreham ("Town") in October 2016. Since that time, the Superior Court has remanded the matter back to the Division on several occasions to allow the Division to hear and decide specific limited issues.

¹ Interstate agrees that ultimately RIFF's request for a continuance must be heard and ruled upon by the Division.

At no time has the Superior Court remanded the matter to the Division in its entirety. Thus, jurisdiction over this matter currently rests with the Superior Court.²

As a result, the Division should deny RIFF's Motion to Extend because it lacks jurisdiction to hear or rule upon the Motion.

B. No legal impediment exists to prevent RIFF from meeting the conditions set forth in the Division's September 2016 Order.

The Division's September 2016 Order granted RIFF's CPCN application, subject to the satisfaction of certain conditions precedent ("CPCN Conditions").³ The Division required that RIFF satisfy the CPCN Conditions within one year.⁴ The Division granted a one-year continuance in September 2017 ("September 2017 Order").⁵ RIFF is again seeking to extend the compliance date set forth in the Division's September 2016 Order.

RIFF claims that "delays in the appeals process" are the reason RIFF has been unable to fulfill the CPCN Conditions set forth in the Division's September 2016 Order. *See* RIFF Motion, at 2. Predictably, RIFF blames Interstate and the Town for its delays, and claims the appeals brought by Interstate and the Town are the sole reason RIFF has failed to fulfill the CPCN Conditions. *Id.* at 3. RIFF's finger pointing is misleading and disingenuous.

² Should RIFF wish to remedy this error, Interstate would not oppose a motion to remand this matter from the Superior Court to the Division for the limited purpose of hearing RIFF's Motion to Extend.

³ The CPCN Conditions are set forth in Paragraph 2, on pages 141-142 of the Division's September 2016 Order: Before a CPCN is issued, RIFF must demonstrate to the Division that: (1) it has access to suitable docking/landing facilities in Quonset and on Block Island; (2) that it has leased, purchased or otherwise identified the vessel(s) it will use in providing its proposed ferry services consistent with the commitments and evidence presented during this case; (3) that it has satisfied all Coast Guard requirements associated with the provision of its proposed ferry services; (4) that it has satisfied any applicable municipal permitting requirements; (5) that it has adequate liability insurance in effect; and (6) that it has passed a Division inspection to ensure regulatory compliance.

⁴ Division's September 2016 Order, at 142.

⁵ Division's September 2017 Order, at 7.

To be clear, Interstate and the Town are taking steps as required by Rhode Island law to protect their interests and ensure the important issues in this matter are fully heard by the Superior Court and the Division. However, the appeal process is not the cause of RIFF's failure to meet the CPCN Conditions set forth in the Division's September 2016 Order. That failure rests entirely with RIFF.

There is no legal obstacle preventing RIFF from meeting the CPCN Conditions, even while the appeals of Interstate and the Town are pending. There is no stay of the Division's September 2016 Order wherein the Division approved RIFF's conditional CPCN.⁶ RIFF is and has been free to move forward with all steps required to meet the CPCN Conditions. RIFF has simply chosen not to do so.

Specifically:

- (1) The pendency of an appeal does not prevent RIFF from demonstrating to the Division that it has access to suitable docking facilities in Quonset and on Block Island;
- (2) The pendency of an appeal does not prevent RIFF from demonstrating to the Division that it has leased, purchased, or otherwise identified the vessel(s) it will use in providing its proposed ferry services;
- (3) The pendency of an appeal does not prevent RIFF from demonstrating to the Division that it has satisfied all Coast Guard requirements associated with its proposed ferry services;
- (4) The pendency of an appeal does not prevent RIFF from demonstrating to the Division that it has satisfied any applicable municipal permitting requirements;

⁶ R.I.G.L. § 39-3-3(c) states, in relevant part: "...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."

- (5) The pendency of an appeal does not prevent RIFF from demonstrating to the Division that it has adequate liability insurance; and
- (6) The pendency of an appeal does not prevent RIFF from demonstrating to the Division that it has passed a Division inspection to ensure regulatory compliance.

RIFF has offered no relevant law or fact to support its contention that the pending appeal prevents it from meeting the CPCN Conditions. RIFF is unable to do so, because the pending appeal has not and does not prevent RIFF from meeting any of the CPCN Conditions.

Accordingly, the Division should deny RIFF's Motion to Extend because no legal impediment exists to prevent RIFF from meeting the CPCN Conditions set forth in the Division's September 2016 Order.

C. RIFF's request for an additional continuance should be denied based on RIFF's continued misrepresentations to the Division.

In January 2018, Interstate and the Town filed a Joint Motion to Vacate the September 2017 Order which granted RIFF a one-year continuance to satisfy the CPCN Conditions. The basis of the Motion to Vacate was that RIFF concealed facts surrounding the inaction that led to RIFF's need for a continuance in September 2017. The Division issued an Order on January 25, 2018 ("January 2018 Order") that denied the Motion to Vacate but stated: "The evidence and arguments presented by the Town and Interstate can be revisited in the event that RIFF seeks an additional continuance after September 22, 2018."⁷ Interstate hereby incorporates by reference the evidence and argument presented within the Joint Motion to Vacate.

In RIFF's previous Motion for Stay (filed in September 2017) and RIFF's Objection to the Joint Motion to Vacate (filed in January 2018), RIFF asserted that it "worked diligently" to

⁷ Division's January 2018 Order, at 6.

satisfy the CPCN Conditions by the Division's deadline.⁸ The truth is that RIFF has taken no action (and Bluewater has taken very limited action) to satisfy the CPCN Conditions.

With regard to the first CPCN Condition, RIFF has repeatedly misled the Division by pledging that permit applications related to a proposed docking facility in Old Harbor would be filed soon. Bluewater, LLC ("Bluewater") has also made recurring empty promises.⁹ Such guarantees were made in RIFF's docking timeline, in RIFF's previously filed Motion for Stay, in RIFF's Objection to the Joint Motion to Vacate, in statements and testimony before the Division, and in the instant Motion to Extend.

RIFF admits that permits or approvals from US Army Corps of Engineers ("USACE"), Rhode Island Department of Environmental Management ("RIDEM"), and Rhode Island Coastal Resource Management Council ("CRMC") are needed for a docking facility in Old Harbor.¹⁰ RIFF and Bluewater advised the Division almost three years ago that the permit process would be complete by April 2017.¹¹ However, the permit process has still barely begun.

In November 2017, Bluewater submitted an opinion letter with a permitting timeline that promised the USACE application would be complete by the end of November 2017.¹² Yet, the USACE application has still not been completed and no application has been filed with the

⁸ See RIFF Motion for Stay, at 3 ("RIFF worked diligently to ensure that it would satisfy all the requisite conditions by the Division's deadline."); RIFF Objection to the Joint Motion to Vacate, at 7.

⁹ It is RIFF's obligation to satisfy the Conditions Precedent, not Bluewater's, yet RIFF used Bluewater's inactivity as an excuse for RIFF's failure to move forward.

¹⁰ See RIFF's Response to Town Data Request I-22 and I-24.

¹¹ RIFF presented a timeline to the Division in November 2015 depicting the anticipated availability of a docking facility, including all related permits, based on a regulatory process of 12 to 18 months, which would have ended in April 2017. See Affidavit of Charles A. Donadio, Jr. dated November 2015, at 2 ("...attached hereto ... is a timeline pursuant to which RIFF reasonably anticipates the availability of dockage and start of its service based upon a regulatory process of 12-18 months and an additional 3-4 months to construct the facility.").

¹² See Letter from Kelley Drye & Warren LLP, dated November 20, 2017, at 1 ("By the end of November, we anticipate that the Corps of Engineers will have all the information it requires from Bluewater in order to make a decision to authorize the proposed project.").

USACE Regulatory Division. Bluewater further represented to the Division in November 2017 that applications would be filed with all other relevant regulatory agencies by the end of December 2017.¹³ Despite these representations, no such applications were filed.

Most recently, on April 4, 2018, when asked by the Hearing Officer when submissions would be filed with CRMC and ACOE, Bluewater committed that filings would be made “within the next ten days to two weeks.”¹⁴ RIFF and Bluewater were instructed by the Division to provide copies of all CRMC and ACOE filings to the parties. It is now almost five months later and neither Interstate nor the Town have received any subsequent filings. Counsel for Interstate and the Town have made inquiries with CRMC and ACOE and have been advised that no additional filings were ever made.

As of this filing: (a) the RIDEM permit application process has not begun, (b) the USACE approval process has stalled due to the failure to file the appropriate application with the USACE Regulatory Division, and (c) the CRMC approval process was terminated when the preliminary determination request was returned to Bluewater due to deficiencies in the application.

With regard to all other CPCN Conditions, RIFF claims that it “worked diligently” to satisfy all of the CPCN Conditions by the Division’s deadline.¹⁵ However, RIFF has offered no proof that it has made any effort whatsoever.

RIFF (and Bluewater) should not be permitted to continue making empty promises to the Division and the parties. Interstate urges the Division to deny RIFF’s Motion to Extend because

¹³ *Id.* at 2 (“Bluewater anticipates filing the requisite submissions with the relevant regulatory agencies by the end of the calendar year.”)

¹⁴ Tr. Vol. II, p. 211.

¹⁵ *See* RIFF Motion for Stay, at 3; RIFF Objection to the Joint Motion to Vacate, at 7.

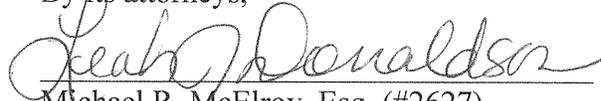
of RIFF's failure to make realistic attempts to satisfy the CPCN Conditions, and RIFF's misrepresentations to the Division regarding the same.

II. CONCLUSION

WHEREFORE, Interstate respectfully requests that the Division deny RIFF's Motion to Extend the Compliance Date in the Division's September 2016 Order.

Respectfully submitted,

INTERSTATE NAVIGATION COMPANY
By its attorneys,



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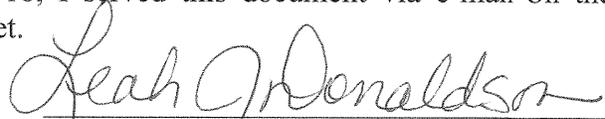
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Dated: August 29, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on August 29, 2018, I served this document via e-mail on the individuals listed on the service list for this docket.



Leah J. Donaldson, Esq.