

September 17, 2013

Via Electronic Filing and Hand-Delivery

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

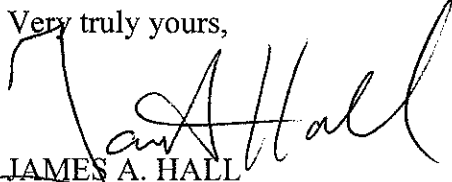
RE: Rhode Island Fast Ferry, Inc. Docket No. D-13-51

Dear Luly:

Please find enclosed an original and nine (9) copies of Rhode Island Fast Ferry Inc.'s Sur-Reply in further support of its 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.

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

Very truly yours,



JAMES A. HALL
jhall@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

**SUR-REPLY OF RHODE ISLAND FAST FERRY, INC.
IN FURTHER OBJECTION TO THE MOTIONS TO INTERVENE FILED BY
INTERSTATE NAVIGATION CO. D/B/A THE BLOCK ISLAND FERRY;
BLOCK ISLAND FERRY SERVICES LLC D/B/A BLOCK ISLAND
EXPRESS AND INTRASTATE NAV. COMPANY**

Rhode Island Fast Ferry, Inc. (“RIFF”) hereby responds to the unauthorized¹ Reply(s) of Interstate Navigation Company D/B/A the Block Island Ferry (“Interstate”); Block Island Ferry Services LLC D/B/A Block Island Express and Intrastate Nav. Company (collectively, “Cross Sound”) as related to their Motions to Intervene as Full Parties. Neither Interstate nor Cross Sound is a necessary or appropriate party in a competitive high-speed ferry application for a Certificate of Public Convenience and Necessity (“CPCN”).

Although each of the Replies simply reiterates previously stated arguments of both Interstate (re: the now disproved “death spiral” threat) and Cross Sound (re: irrelevant and speculative issues of docking), suffice it here in response to clarify and highlight the reasoning of the Commission in its Order denying intervenor status to Interstate in IHSF’s 2002 rate review case.

Therein, it was reasoned that the intervention rule requires that the interest upon which a party rests its request to intervene must be such that the movant would be directly affected and not otherwise adequately represented. *Island High-Speed Form of Regulation and Review of*

¹ The Division of Public Utilities & Carriers Rule 7, as related to motions to intervene, does not afford movants the right to reply memoranda. Nonetheless, and without leave from the Division and/or Hearing Officer, Interstate and Cross Sound filed Replies to RIFF’s Objection(s). Replies filed on September 16, 2013 and September 13, 2013 respectively (collectively the “Replies”). Accordingly, the Replies should be stricken from the Record.

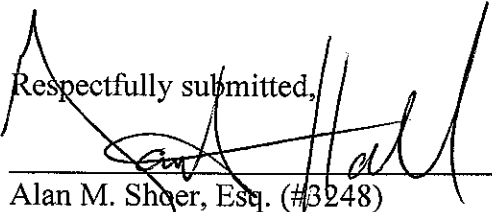
Rates, Docket No. 3495 (Order issued Nov. 25, 2003) at p. 10, attached hereto as **Exh. 1**. The Commission soundly rejected the arguments that Interstate satisfied both conjunctive elements; expressly reasoning that an interest based on “regulation or rates (of another) as impacting the lifeline service is indirect, at best” *Id.* The Commission further reasoned, therefore, that the intervention of Interstate in matters where the docket “does not address Interstate’s cost of services or rate of return [nor] level of Interstate’s (the lifeline service) rates” is unnecessary and inappropriate. *Id.* at 11.

As noted in RIFF’s Objections(s), the present docket neither addresses Interstate’s cost of service, returns or rates nor can the present docket address Cross Sound’s purported concerns as to future dockage. Accordingly, although one could argue “Interstate [and Cross Sound...] 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 (emphasis added).

CONCLUSION

Accordingly, and for the reasons stated in RIFF’s Objection(s), the Division should deny the Motions to Intervene filed by Interstate and Cross Sound.

Respectfully submitted,


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Dated: September 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2013, I delivered a true copy of the foregoing document via electronic mail to the parties on the attached service list.

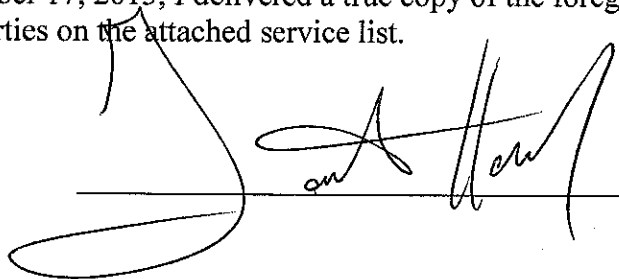
A handwritten signature in black ink, appearing to read "Jonathan H. H.", is written over a horizontal line. The signature is stylized and cursive.

EXHIBIT 1

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: ISLAND HI-SPEED FORM OF :
REGULATION AND REVIEW OF RATES : DOCKET NO. 3495

ORDER

I. Overview

On February 27, 2003, the Public Utilities Commission ("Commission") initiated the instant docket to review Island Hi-Speed Ferry, LLC's ("IHSF") form of regulation and to investigate the reasonableness of its current rates and charges.¹ On March 19, 2003, Commission Counsel conducted a pre-hearing conference. At the pre-hearing conference, Commission Counsel indicated that it is the Commission's intent to bifurcate the two issues and continue its review using a two-phase approach. The first phase is to review the form of regulation appropriate to IHSF. The second phase will entail a review of IHSF's cost of service and to determine the reasonableness of current rates.² The deadline set for the filing of Motions to Intervene was March 26, 2003.

On March 26, 2003, Interstate Navigation Company d/b/a The Block Island Ferry ("Interstate") filed a Motion for Full Party Intervention.³ Also, on March 26, 2003, the Town of New Shoreham ("Town") filed a Motion to Intervene. On April 9, 2003, IHSF filed Objections to both Motions.⁴

On April 24, 2003, at its Open Meeting, the Commission denied Interstate's and the Town's respective Motions to Intervene finding that neither party has a direct interest

¹ Minutes of the Commission's February 27, 2003 Open Meeting. IHSF is authorized to operate a seasonal high speed ferry service between termini in Galilee and Block Island.

² Memorandum from Commission Clerk to the Attendees of the Pre-Hearing Conference dated March 19, 2003.

³ Interstate is authorized to operate a year-round "lifeline" ferry service between termini in Galilee and Block Island.

⁴ The Certification of Service was dated April 4, 2003.

in the form of regulation or rates for IHSF. Additionally, the Commission noted that when Commission Docket No. 2802 (the initial case setting IHSF's form of regulation and rates)⁵ was reviewed by the Rhode Island Supreme Court, the Court indicated that although the decision allowing these parties to intervene in that case was not clearly wrong, the wisdom of that decision was questionable.⁶

II. Commission's Rules of Practice and Procedure

The Commission Rules of Practice and Procedure ("Procedural Rules") 1.13 addresses intervention. Specifically, Procedural Rule 1.13(b) addresses who may intervene in a matter before the Commission. Procedural Rule 1.13(c) governs the requirements to be contained in a Motion to Intervene.⁷ Rule 1.13(e) indicates that Motions to Intervene are deemed granted unless a party files an objection within ten (10) days.

⁵ See Order No. 15816 (issued March 31, 1999), pp. 58-63 (noting that there is ample precedent where the Commission has used a variety of ratemaking methodologies, including price cap plans, price stabilization plans, and further noting that the Commission may wish to employ other methodologies in the future, including, potentially, rate caps). In reviewing the Commission's determination of the appropriate ratemaking approach utilized in Docket No. 2802, which included revenue/profit caps, the Supreme Court reiterated that "[n]o particular formula binds the Commission in formulating its rate decision; the sole requirement is that the ultimate rate be fair and reasonable." (citations omitted). In re Island Hi-Speed Ferry, LLC, 746 A.2d 1240, 1245-46 (R.I. 2000).

⁶ In re Island Hi-Speed Ferry, LLC, 746 A.2d at 1245-46 (R.I. 2000).

⁷ Procedural Rule 1.13 states in part: (b) Who may Intervene. Subject to the provisions of these rules, any person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate may intervene in any proceeding before the Commission. Such right or interest may be:

- (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 Commission's action in the proceeding. (The following may have such an interest: consumers served by the applicant, defendant, or respondent; holders of securities of the applicant, defendant, or respondent.)
- (3) Any other interest of such nature that movant's participation may be in the public interest.

(c) Form and Contents of Motion. A motion to intervene shall 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.

III. Interstate's Motion

Interstate asserted that under Procedural Rule 1.13, even if its participation were not deemed necessary to the outcome of the case, its intervention should be allowed as "appropriate" or "in the public interest."⁸ As a basis for the contention that its involvement is not only appropriate and in the public interest, but also necessary, Interstate argued that its intervention in the instant docket is necessary to protect the lifeline service from revenue erosion.

Interstate alleged that IHSF intends to control the summer tourist passenger ferry market and that "if IHSF is successful, the loss of passengers could reduce Interstate to an expensive freight service in the summer and an expensive winter lifeline service."⁹ Interstate asserted that IHSF's rates directly affect Interstate's service, positing that, "[i]n a worst case scenario, Interstate's rates could be forced so high by loss of summer tourists to IHSF that Interstate could be unable to recover its fixed costs from declining traffic and could ... even be forced out of business."¹⁰ According to Interstate, its future viability as the lifeline service is inextricably linked to IHSF's operations.¹¹ Interstate noted that IHSF is allowed to carry more passengers than when the initial rate case was heard, and alleged that Interstate had reduced revenues and passenger attrition during the summer of 2002.¹² Therefore, Interstate argued that "the only real distinction that [currently] remains to protect the lifeline service is the determination of an appropriate rate differential in rates, and a commitment by the Commission to set just and reasonable

⁸ Interstate's Motion to Intervene, p. 2.

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 9.

¹² *Id.* at 10, 13.

rates for IHSF that do not result in unfair competition.¹³ In its conclusion, Interstate argued that it should be involved in the instant docket because IHSF's rates could affect a future Interstate rate case.¹⁴

Interstate contended that it would be illegal for the Commission to deregulate IHSF's service. Furthermore, even if the Commission did not completely deregulate IHSF's service and rates, a limited form of deregulation would be inherently discriminatory against Interstate because Interstate is competing with IHSF for summer tourists.¹⁵ Interstate argued that if the Commission allowed some regulatory flexibility to IHSF, the Commission would be obligated to apply the same standards to Interstate.¹⁶ According to Interstate, "it will be difficult, if not impossible for the Commission to make a reasoned decision about the appropriate form of regulation *for IHSF*" without Interstate's participation.¹⁷

Interstate conceded that the Commission previously approved an "unconventional method" of regulation for IHSF which differs from the form of regulation for Interstate. However, Interstate objected to the Commission's undertaking a review of IHSF's form of regulation and rates, appearing to argue that the Commission is not permitted to conduct this sort of review without first allowing arguments, presumably from another utility, as to whether the Commission should undertake a review of a utility's form of

¹³ *Id.* at 13.

¹⁴ *Id.* at 20.

¹⁵ *Id.* at 6-7. Interstate conceded that the year-round lifeline portion of its business should continue to be regulated on the traditional cost of service/rate of return method because there is no competition for that service.

¹⁶ *Id.* at 6-7, 10.

¹⁷ *Id.* at 6-7 (emphasis added).

regulation. Otherwise, according to Interstate, the Commission will be violating its obligations under R.I.G.L. § 39-1-1.¹⁸

Interstate argued that there was no party to the instant docket that would represent the interests of the lifeline service.¹⁹ As support for its claim, Interstate accused the Division of Public Utilities and Carriers (“Division”), which by law represents the interests of the ratepayers, of failing to adequately represent the interests of ratepayers in the prior rate case.²⁰ Finally, Interstate argued that the Supreme Court did not find the Commission’s order allowing intervention by Interstate in the previous IHSF rate docket to be unlawful or unreasonable.²¹

IV. Town of New Shoreham’s Motion

The Town of New Shoreham, the destination of both Interstate and IHSF’s ferries from Narragansett to Block Island, argued that it has a “profound interest” in the setting of IHSF rates, that it is entitled to participate in the hearing regardless of whether or not the instant docket is a rate hearing, and that the notice provision in R.I.G.L. § 39-3-

¹⁸ Id. at 8. “The Commission is now apparently considering utilizing another regulatory method, despite the fact that no motion was been [sic] filed requesting this, no evidence was taken, and no arguments have been presented as to whether or not this is appropriate.” Id.

¹⁹ Id.

²⁰ Id. at 17-19.

²¹ Id. at 16.

11(b)²² confers a statutory right to participate in matters before the Commission, regardless of whether the matter is initiated by the Commission or a party.²³

Explaining its profound interest, the Town noted that it will be the only participant exclusively representing the specific and narrow interests of the Block Island residents who are dependent upon Interstate's lifeline ferry service for transportation between Block Island and the mainland. The Town stated that its interest is in keeping a high level of lifeline ferry service at low rates, "for not only summer walk on traffic but also for year round walk on traffic, cars and freight."²⁴

V. IHSF's Objections

A. Interstate

In its objection to Interstate's Motion, IHSF argued that "intervention by Interstate in this matter would be inappropriate given the final findings of the Commission in Docket 2802, as well as the Rhode Island Supreme Court's comments regarding those findings."²⁵ IHSF noted that in its Order in Docket No. 2802, the Commission questioned the motives of Interstate in the proceeding, finding them to be

²² R.I.G.L. § 39-3-11(b) states: (b) Upon receipt from a common carrier of persons and/or property upon water of a notice of any change proposed to be made in any schedule filed pursuant to § 39-3-10, the commission shall give notice as it may prescribe of the pendency of the proposal and of the time and place of hearing thereon to the mayor and also any city manager of each city, and to the president of the town council and also any town manager of each town in which the carrier picks up or discharges passengers. The commission shall also publish a notice of the hearing at least ten (10) days prior to the date thereof in a newspaper of general circulation in each city or town in which the carrier picks up or discharges passengers. In all other respects, hearings and investigations with respect to the proposals by the carriers shall be governed by the provisions of subsection (a) of this section.

²³ Town of New Shoreham's Motion to Intervene, pp. 1-3. In its Motion, the Town also made an argument that appears to be more akin to an argument under the Access to Public Records Act which the Commission has addressed in Docket No. 2802, the decision of which is currently on appeal before the Supreme Court. See Town of New Shoreham's Motion to Intervene, p. 3.

²⁴ Id. at 1-2.

²⁵ IHSF Objection to Interstate's Motion to Intervene, p. 1. IHSF also argued in the alternative that if the Commission were to allow intervention, it should limit participation to observing and commenting upon matters raised in the instant docket. Practice Rule 1.13 (d) states in part, "Intervention other than as a matter of right may be granted with such limitations and/or upon such conditions as the Commission shall determine."

self-serving.²⁶ IHSF also cited dicta of the Supreme Court that questioned the wisdom of allowing Interstate to intervene.²⁷ IHSF argued that while the Court did not agree with IHSF's argument that the granting of intervenor status to Interstate was unlawful under the Commission's rules, the Court "went out of its way to telegraph the message" that it may have been lawful, but was clearly unwise and not appropriate.²⁸

Next, IHSF asserted that Interstate's allegation that IHSF presents a threat to the lifeline service between the mainland and Block Island is merely conjecture and is based on unsubstantiated assumptions. IHSF pointed out that while Interstate argued that IHSF poses a threat to Interstate's summer passenger travel based on carrying capacity alone, Interstate did not reveal what its own summer carrying capacity is. Furthermore, IHSF argued that Interstate was making an "apples to oranges" comparison between carrying capacity and actual passenger count, noting that in order to reach its carrying capacity, IHSF would have to sell out each trip, every day for the entire operating season, something that does not occur.²⁹

With regard to Interstate's contention that all ferry companies should have the same type of regulation, IHSF did not address the substantive issue of whether Interstate should be afforded the same form of regulation for its discretionary services as IHSF. Rather, IHSF pointed out that the purpose of the instant docket is not to determine the form of regulation for Interstate, but only that of IHSF. IHSF asserted that if Interstate

²⁶ *Id.* at 2; See Order No. 15816 (issued March 31, 1999) (stating, "the Commission found the Intervenor's ridership forecasts and related revenue projections self-serving and of questionable value."). *Id.*

²⁷ See In re Island Hi-Speed Ferry, LLC, 746 A.2d at 1245-46 (questioning the wisdom of the Commission's decision allowing intervention).

²⁸ IHSF Objection to Interstate's Motion to Intervene, p. 2.

²⁹ *Id.* at 3-4.

wishes to have its form of regulation reviewed, it is free to file a petition with the Commission.³⁰

With regard to the lawfulness of the Commission's actions, IHSF argued that unlike a lifeline service, it provides an entirely discretionary amenities-based service; therefore, the Commission is not bound to regulate it in the same manner as a lifeline service. In support of its position, IHSF asserted that Interstate provided no indication that IHSF's service is anything but indirect competition, an issue that was litigated and determined in favor of IHSF in Division Docket 98-MC-16. Moreover, IHSF argued, there is nothing illegal about the Commission allowing different levels of regulatory treatment for different services. Finally, IHSF maintained that in Docket No. 2802, "the Commission gave IHSF differential treatment by departing from conventional rate making methods...and that departure was upheld by the Supreme Court."³¹

Turning to the argument that Interstate could be harmed if IHSF is given rate flexibility to reduce its rates, IHSF pointed out that it is not seeking a rate change. Furthermore, even if IHSF were seeking a rate reduction in the instant docket, it would need to seek a change to its existing operating certificate issued by the Division because the operating certificate contains the restriction that IHSF's rates must be no lower than its current \$26 round trip ticket price.³²

In conclusion, IHSF noted that Interstate claimed that it did not have passenger growth in 2002 due to the fact that the summer of 2002 was the first full season of operation for IHSF. IHSF pointed out, however, that in 2001, Interstate paid more in

³⁰ *Id.* at 4.

³¹ *Id.* at 5.

³² *Id.* at 5-6. IHSF stated that it does not intend to seek the flexibility to lower its rates unless Interstate at some point places its own high-speed ferry into service. *Id.* at 6.

landing fees to the Town of New Shoreham than in any other year, despite the fact that IHSF was in full operation from July 17, 2001 through October 16, 2001. Therefore, IHSF argues, Interstate's lack of growth could have to do with factors other than IHSF's operations.

B. Town Of New Shoreham

In its objection to the Town of New Shoreham's Motion to Intervene, IHSF argued that, contrary to the Town's assertions, the Town does not have a statutory or "automatic" right to intervene in a rate case, or in any other matter before the Commission. IHSF contended that the fact that the Town has participated in rate hearings in the past is irrelevant to whether or not the Town has a right to intervene in this docket. Again, IHSF raised the concerns of the Commission in Docket 2802 and of the Supreme Court in reviewing the wisdom of the Commission's decision to grant intervention in that docket.³³

IHSF contended that, under R.I.G.L. § 39-3-11(b), it need only provide the Town with notice of a proposed rate change. Because it is not requesting a rate change, IHSF asserted that it went beyond the requirements of the statute by giving the Town notice of the instant docket. Furthermore, IHSF asserted that nothing in the statute requiring notice of a proposed rate change provides the Town with a right to intervene. As support for its position, IHSF noted that in Narragansett v. Malachowski,³⁴ the Commission's decision not to allow late intervention by the Town of Narragansett in a previous rate filing was upheld, suggesting, in IHSF's view, that there is no automatic right to intervene in a

³³ See *supra* n. 22 to 25 and accompanying text.

³⁴ Narragansett v. Malachowski, 621 A.2d 190 (R.I. 1993).

Commission docket.³⁵ Therefore, according to IHSF, the Town possesses no greater rights to intervene in the instant docket than any other person or entity. In the alternative, IHSF argued that, even if the Commission were to grant intervention, the Commission could limit the involvement of the Town.³⁶

Finally, IHSF argued that the Town has failed to satisfy the requirements of Procedural Rule 1.13(b)(2). IHSF argued that the Town only made conclusory statements that it represents the interests of year-round residents in keeping ferry service levels high and rates low, but did not explain why the Division, through the Attorney General, cannot adequately represent those interests. IHSF also argued that the Town did not set forth its position regarding the appropriate form of regulation for IHSF, which is the focus of the instant docket. Therefore, IHSF argued that the Town has failed to show how it will add to the debate over IHSF's form of regulation.³⁷

VI. Commission Findings

Under Procedural Rule 1.13(b), a person or entity wishing to intervene must demonstrate that it has "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 Commission's action in the proceeding." 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. IHSF has completed one and a half seasons of high speed ferry service operations between Block Island and Galilees; yet, Interstate has not petitioned for an increase in rates. It appears that since the inception of IHSF, neither Interstate nor the

³⁵ IHSF Objection to the Town of New Shoreham's Motion to Intervene, p. 3.

³⁶ *Id.*, citing Procedural Rule 1.13(d).

³⁷ IHSF Objection to the Town of New Shoreham's Motion to Intervene, pp. 4-5.

residents of New Shoreham have experienced any adverse financial impact from IHSF's service.

The instant docket will not address the rights or obligations of Interstate or the residents of the Town. For example, if the instant docket were to have an impact on Interstate's rate of return or form of regulation, there would be a clear direct interest to both Interstate and the Town. However, the instant docket is not about Interstate's form of regulation or rates. The instant docket does not address Interstate's cost of service or rate of return, nor does it address the level of Interstate's (the lifeline service) rates to the residents of the Town.

This docket is about the review of a purely discretionary ferry service provided by IHSF. Unlike Interstate, IHSF does not provide lifeline service to the residents of the Town of New Shoreham. Rather, IHSF provides a passenger-only, amenities-based service for five months of each year. Conversely, in addition to passenger service, Interstate provides service that includes freight, cars, mail, food and building supplies on a year-round basis. While Interstate may offer some discretionary services, this case is not about the appropriate form of regulation of Interstate's discretionary services or rates. This case is only about the appropriate form of regulation for IHSF and a review of the reasonableness of IHSF's rates in accordance with Commission Order No. 15816.³⁸ If

³⁸ In its Order, the Commission stated, "This Commission shall revisit IHSF's rates after its initial season of operations." IHSF's first full season of operation was the summer of 2002. In its Order, the Commission recognized that its rate making approach was somewhat divergent from previous Commission rate-setting methodologies. The Commission explained that the facts and circumstances surrounding that case were those of first impression which appropriately warranted the unique regulatory treatment ordered. Furthermore, the Commission asserted its jurisdiction to deviate from any single regulatory approach and to make pragmatic adjustments as appropriate to a particular set of circumstances. Because the Commission applied a unique regulatory approach to IHSF's form of regulation during the initial season, it only makes sense that the Commission, in reviewing the reasonableness of the rates set under that regulatory approach, would also review the reasonableness of the form of regulation at the same time. Furthermore, it is irrelevant that the Commission opened the instant docket *sua sponte* to look into the form of regulation and

Interstate wishes the Commission to revisit Interstate's form of regulation and/or for the reasonableness of its rates, Interstate only has to file a rate case.³⁹

Both movants contend that the Division cannot adequately represent their interests in the instant docket.⁴⁰ The movants also contend that their participation in the instant docket would be in the public interest by protecting the lifeline service provided by Interstate. These arguments are strikingly similar to those made by these same movants in Docket No. 2802. Turning to the Order in that Docket and to the arguments proffered by the movants, the Commission can reach no conclusion other than the movants lack of standing to represent any interest but their own respective interests, which are adverse to IHSF in this docket. In its Order, the Commission stated:

[t]he Commission found the Intervenor's ridership forecasts and related revenue projections self-serving and of questionable value....We query whether these [forecasts] were more to do about impeding IHSF from going into business, than about actually establishing just and reasonable rates for IHSF....

....

During the instant proceeding [in Docket 2802], it became abundantly clear to the Commission that the Town and Interstate believed that they could keep their opposition to IHSF's operating authority viable by arguing in support of the lowest possible rates for IHSF. This strategy, if successful, could permit the Town and Interstate to request that the Division reopen its docket for the purpose

adequacy of the rates of a utility. Order No. 15816 (issued March 31, 1999), pp. 67-68. The Commission has the right at any time to initiate a review and investigation of the rates and/or form of regulation of any of the public utilities regulated by it. See In re Island Hi-Speed Ferry, LLC, 746 A.2d 1240, 1246-47 (R.I. 2000) (stating that under R.I.G.L. § 39-3-11, the Commission "is mandated to periodically review and hold public hearings respecting [a utility's] rates in the absence of any proposed rate change.").

³⁹ With regard to Interstate's argument that if the Commission excludes Interstate from a review of IHSF's form of regulation and does not automatically apply such regulation to Interstate, it will be violating R.I.G.L. § 39-1-1(b) "to provide just and reasonable rates and charges for...transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive practices....", the Commission points out that IHSF and Interstate are already regulated differently, a point that has been affirmed by the Supreme Court. See In re Island Hi-Speed Ferry, LLC, 746 A.2d 1240, 1246-47 (R.I. 2000).

⁴⁰ Interstate acknowledges, on the one hand, that in IHSF's operating certificate the Division imposed restrictions to protect Interstate. On the other hand, Interstate also contends that the Division did not adequately represent Interstate or the Town in the Commission's docket. It was unnecessary for the Division to represent Interstate or the Town in the Commission's ratemaking docket, however, since both Interstate and the Town were parties to that docket. Nevertheless, the Commission expects that in the instant docket, the Division will carry out its mandate to represent the interests of all ratepayers affected by IHSF's form of regulation and rates.

of revisiting the “cost differential” issue, and perhaps convincing the Division that IHSF’s operating certificate ought to be rescinded.⁴¹

In reviewing the Commission’s Order setting IHSF’s initial form of regulation and rates, the Supreme Court stated:

*In light of the Commission’s concern about the intervenors’ motives, and in light of the precarious position in which Hi-Speed was placed by having to defend against its competitor before the Division and again before the Commission, the wisdom and appropriateness of the interventions in this case was questionable.*⁴²

The Commission notes that, in support of its motion to intervene in the instant docket, Interstate raises many of the same types of arguments that caused concern regarding Interstate’s motives for intervening in the first rate docket. However, the 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 in order 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.⁴³

⁴¹ Order No. 15816, pp. 39-41.

⁴² *In re Island Hi-Speed Ferry*, 746 A.2d at 1246 (emphasis added).

⁴³ In Commission Docket 3452, the Commission recently applied this same standard in deciding whether or not to allow a potential vendor interested in obtaining a contract to build a utility’s new facilities to intervene in a matter in which the Commission was investigating the adequacy of the utility’s existing facilities. The Commission determined that while the vendor may have a direct interest in building the new facilities, the vendor was not an interested party with standing to intervene in the investigation docket,

With regard to the Town's argument that it has a statutory right to intervene because of its statutory right to receive notice of a proposed rate change, the Commission notes once again that there has been no proposal to change the rates of IHSF.⁴⁴ Furthermore, the clear language of R.I.G.L. § 39-3-11 requires notice to be given to the Town of proposed rate changes, but is silent as to the Town's right to participate in the rate setting proceedings. It is reasonable to conclude from the statute's silence on this point that, while notice is mandatory, the grant of intervention is intended to be discretionary on the part of the Commission. This differs from the absolute statutory right conferred other entities to participate in Commission proceedings. For example, R.I.G.L. § 39-1-11 specifically contemplates the involvement of the Division in all Commission hearings.⁴⁵ In light of this, the Commission does not require the Division to file for intervention, but rather, expects the Division's automatic participation in all of its cases. Therefore, it seems that if the Town had an absolute automatic statutory right to participate in these proceedings, the statute would clearly confer this right and there would be no need for the Town to file a Motion to Intervene.⁴⁶

because the selection of the vendor for the new facilities was outside of the scope of whether or not the utility's existing facilities were adequate to provide service to customers. Commission Minutes of April 1, 2003.

⁴⁴ In fact, if IHSF were to seek to lower its rates below \$26, it would need to petition the Division for a change in the terms of its operating certificate regardless of the rates set by the Commission.

⁴⁵ R.I.G.L. § 39-1-11 states: The commission shall adopt reasonable rules and regulations governing the procedure to be followed in any matter that may come before it for a hearing, and in the hearing the commission shall not be bound by technical rules of evidence. The commission shall sit as an impartial, independent body, and is charged with the duty of rendering independent decisions affecting the public interest and private rights based upon the law and upon the evidence presented before it by the division and by the parties in interest. The presence of one commissioner shall constitute a quorum at all hearings provided that the concurrence of a majority of the commission shall be required for the rendering of a decision.

⁴⁶ Finally, IHSF also argues that if a town had an absolute automatic statutory right to intervene in a ferry case, the Commission would have been required to allow late intervention by a town in a water rate case which *directly* affected the town's water rates. Therefore, according to IHSF, the Town does not have an automatic statutory right to intervene just because it had a right to notice of rate changes. The Commission finds merit in this argument. IHSF's Objection to the Town's Motion to Intervene, pp. 2-3, citing Town of Narragansett v. Malachowski, 621 A.2d at 197-99.

Therefore, for all of the reasons discussed in the Commission Findings, the Commission finds that neither Interstate nor the Town has standing to intervene in the instant docket.

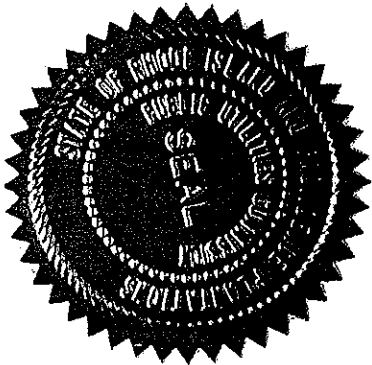
Accordingly, it is

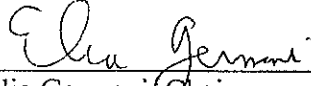
(17452) ORDERED:

1. That the Motion to Intervene by Interstate Navigation Company d/b/a The Block Island Ferry is hereby denied.
2. That the Motion to Intervene by the Town of New Shoreham is hereby denied.

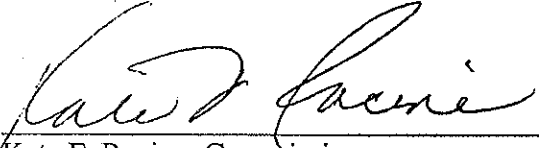
EFFECTIVE AT WARWICK, RHODE ISLAND ON APRIL 24, 2003, PURSUANT TO AN OPEN MEETING DECISION. WRITTEN ORDER ISSUED ON MAY 9, 2003.

PUBLIC UTILITIES COMMISSION





Elia Germani, Chairman



Kate F. Racine, Commissioner



Brenda K. Gaynor, Commissioner