

EXHIBIT C

HEARING DATE: MARCH 20, 2017

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM

v.

C.A. No. PC-2016-4758

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISTRATOR

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

v.

C.A. No. PC-2016-4804

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY McCLEARY, ADMINISTRATOR

**MOTION OF PETITIONERS TOWN OF NEW SHOREHAM AND
INTERSTATE NAVIGATION COMPANY d/b/a THE BLOCK ISLAND FERRY
TO REMAND PURSUANT TO R.I.G.L. § 42-35-15 (e)**

Now come the Town of New Shoreham ("Town") and Interstate Navigation Company ("Interstate"), the petitioners in the above-referenced consolidated cases which are agency appeals, and move for an Order of this Honorable Court pursuant to R.I.G.L. § 42-35-15 (e) remanding this case to the Rhode Island Division of Public Utilities and Carriers ("Division").

In support of this motion, the petitioners state the following:

Rhode Island Fast Ferry, Inc. ("RIFF") filed an application with the Division for authority to operate a water carrier of passengers between Quonset Point and Old Harbor, Block Island pursuant to a certificate of convenience and necessity ("CPCN"). The Town and Interstate opposed the application for several reasons including, *inter alia*, that: public convenience and

necessity does not require the issuance of a CPCN; the service provided by Interstate is adequate and meets the public need for ferry service to Block Island; the hardship and inconvenience to the Town and its residents require that the application be denied; RIFF is not fit, willing or able to provide the proposed service because it cannot legally obtain a docking facility in Old Harbor; and the Town and its residents will suffer severe economic harm because Interstate will be forced to increase rates and/or reduce lifeline service to make up for the loss of revenue resulting from the diversion of Interstate's customers to Quonset Point. On September 22, 2016, the Division issued an order granting the application for a CPCN to RIFF for the operation of a seasonal fast ferry water carrier between Quonset Point and Old Harbor, Block Island. The Town and Interstate filed administrative appeals which were consolidated by order of the Superior Court.

During the proceedings before the Division, the Town was particularly concerned about the docking facility that RIFF proposed to use in Old Harbor. Indeed, the Town filed a summary disposition motion with the Division on the basis that it is the Town's contention that there is no viable docking facility in Old Harbor for RIFF's ferries. On August 11, 2015, the Division issued an order in response to the Town's summary disposition motion and stated:

In further support of its motion, the Town argues that there are only four docks in Old Harbor where a ferry could land and that RIFF has not been able to demonstrate that it has acquired rights to use any none (sic) of them. The Town relies on the discovery it conducted in this case, including a deposition of RIFF's owner, to verify that RIFF has been unable to establish a legal connection to any of the four docks. The Town adds that because RIFF has not identified its docking location in Old Harbor, the Town has been prevented from conducting discovery or performing an evaluation with respect to the proposed site.

August 11, 2015 Division Order pp. 2-3

The Division observes that RIFF filed its application in this case on July 2, 2013, over two years ago. The Division also acknowledges that during our last status conference in this docket, conducted on May 15, 2015, this hearing officer informed RIFF that *it would be required to identify the dock it planned to utilize in Old Harbor as a requisite element in its burden of proof in this case.* *Id.* p.5. (emphasis added).

The Division went on to order that: "On or before August 28, 2015, RIFF shall submit a written declaration to the Division identifying the dock it is proposing to use on Block Island (in furtherance of its proposed ferry services) and offer proof of the dock's availability." *Id.* pp. 7-8. By subsequent order, the Division extended this deadline to September 11, 2016.

In response to the Division's orders, RIFF submitted a proposed docking facilities diagram (Exhibit A attached) which depicted three proposed docking facilities:

(i) The first proposed docking facility is comprised of a dock along the inner harbor side of the East Breakwater which connects to the Town's Bait Dock and moves passengers to the land across the East Dock ("Docking Facility 1").

(ii) The second proposed docking facility is comprised of a dock along the inner harbor side of the East Breakwater which extends behind the Town's Bait Dock, connects to the East Dock and moves passengers to the land across the East Dock ("Docking Facility 2").

(iii) The third is a docking facility depicted at the Northerly L in the diagram, which is known as the red breakwater and which is under a long-term Coastal Resources Management Council ("CRMC") lease to the Town ("Docking Facility 3"). The CRMC Executive Director provided an affidavit to the Division which stated that the Town would have to consent to the construction of any such dock and that the Town would have to be a party to any such request. (See affidavit of CRMC Executive Director Exhibit B attached.)

These were the three proposed docking facilities which were the subject matter of the Town's investigations, analysis, discovery, review and arguments presented to the Division.

RIFF notified the Division that the docking facility which it planned to use would be built by a company known as Bluewater LLC ("Bluewater") and that RIFF would lease the docking facility from Bluewater.

Docking Facility 1 and 2 connect to the East Dock which is maintained and operated by the Town through a long-term agreement with the Army Corps of Engineers ("Army Corps"). Both Docking Facility 1 and 2 require not only a physical connection to the East Dock but also that hundreds of passengers be moved across the East Dock to get to land. In order to build either Docking Facility 1 or 2, RIFF/Bluewater is required to obtain the approval of the Army Corps through what is referred to as a Section 408 application because the East Breakwater is a federal project. The Town strenuously argued to the Division that the Section 408 application was not viable because the Town is a "non-federal sponsor" and the consent of a non-federal sponsor is required for the approval of all Section 408 applications. RIFF/Bluewater argued that the Town was not a non-federal sponsor and the Division hearing officer indicated that he could not make that determination.

RIFF/Bluewater apparently elected to go with Docking Facilities 1 or 2 because those were submitted to the Army Corps as part of the Section 408 application process. It has recently

come to the attention of the Town, its harbormaster and Interstate through communications with the Army Corps that the Army Corps has notified RIFF/Bluewater that the Town is indeed a non-federal sponsor of the East Dock in Old Harbor. Apparently, RIFF/Bluewater were notified of this sometime around the *end of November of 2016*; however, neither Bluewater nor RIFF has advised counsel to these proceedings or the Division of this development. Moreover, the petitioners have recently learned that in an apparent effort to avoid the Town approval necessary for the Section 408 application, RIFF/Bluewater has now submitted another, alternate proposed docking facility to the Army Corps. Again, neither RIFF nor Bluewater has advised counsel to these proceedings or the Division of this development. These developments have occurred since the administrative appeals were filed with the Superior Court.

The Town and Interstate aver that these new developments require that the case be remanded to the Division pursuant to R.I.G.L. § 42-35-15 (e) which states:

If, before the date set for the hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

The Division's Order of December 10, 2015 states that the Division reserves the right to revisit this matter and that the Town will inform the Division if it is successful in derailing Bluewater's plans in the proceedings before the Army Corps. In addition, the Division's Order of September 22, 2016 requires that RIFF notify the Division of any deviation from the services described in the testimony and exhibits, and that such deviation must be approved by the Division. This has not been done.

For the foregoing reasons, the Town and Interstate respectfully submit that this matter should be remanded to the Division for the presentation of additional evidence which was unavailable to the petitioners during the proceedings before the Division.

TOWN OF NEW SHOREHAM
By its solicitor

/s/ Katherine A. Merolla
Katherine A. Merolla, Esq. #2344
Kent Office Building
469 Centerville Road, Suite 206
Warwick, RI 02886
Phone: (401) 739-2900, ext. 304

INTERSTATE NAVIGATION
COMPANY
By its attorneys

/s/ Michael R. McElroy, Esq. #2627
/s/ Leah J. Donaldson, Esq. #7711
Schacht & McElroy
21 Dryden Lane
P.O. Box 6721
Providence, RI 02940-6721
Tel: (401) 351-4100

NOTICE OF HEARING

Please note that the foregoing motion will be called for hearing before the Superior Court for the County of Providence on the formal and special cause calendar on March 20, 2016.

CERTIFICATE OF SERVICE

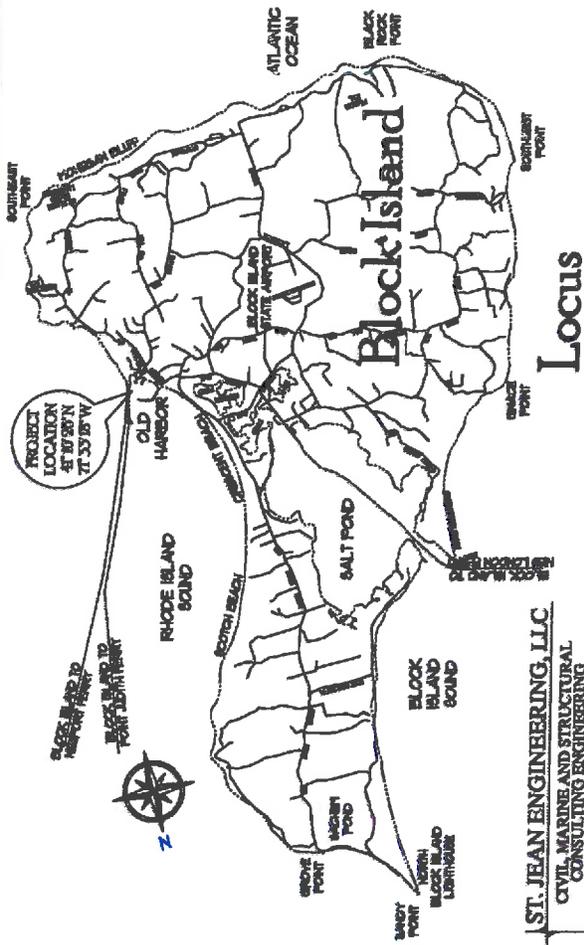
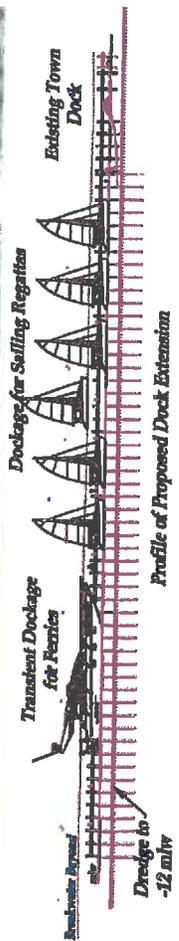
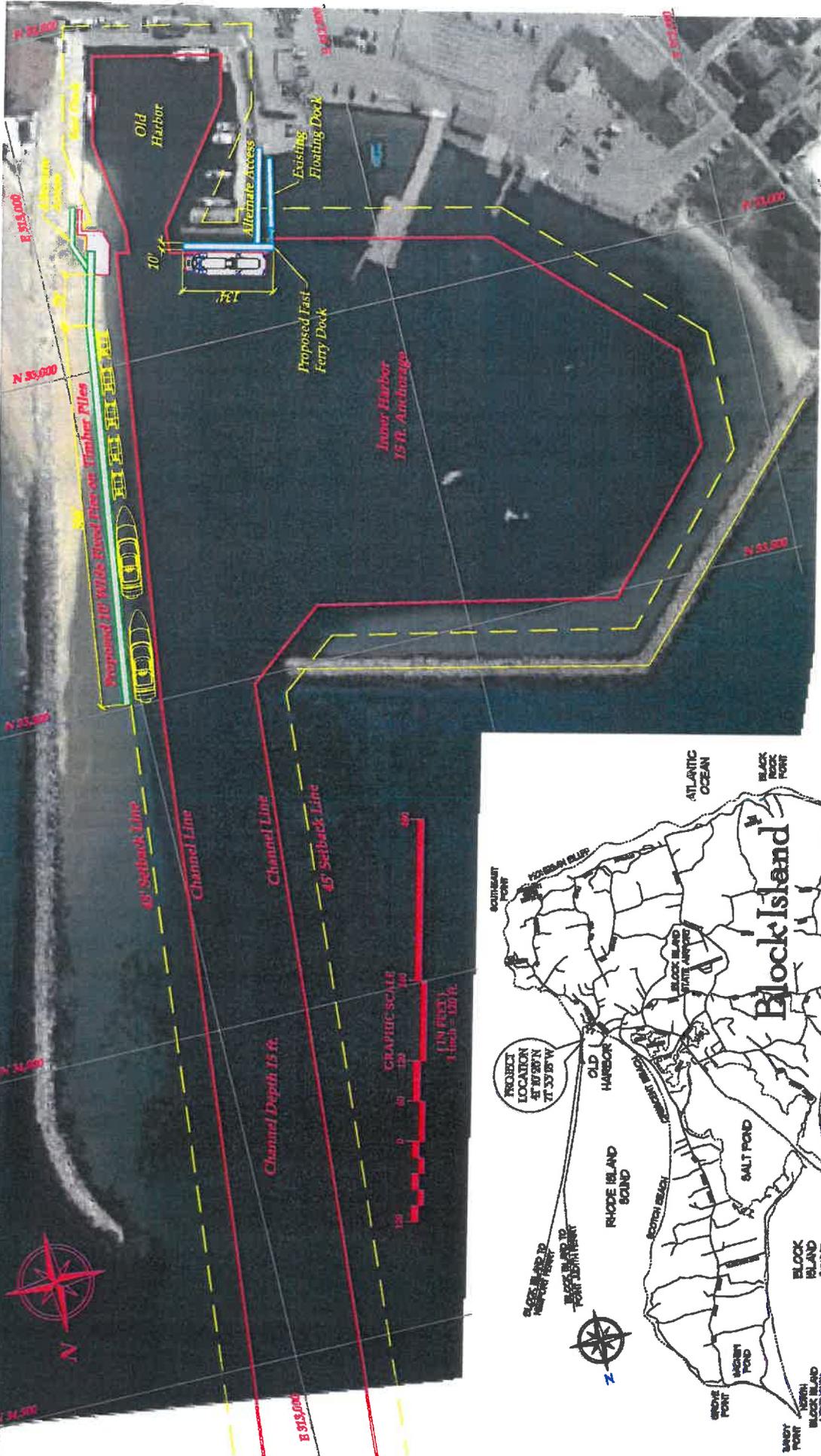
I hereby certify that on the 10th day of March, 2017
I filed and served this document through the electronic filing system on the following:

Michael R. McElroy	michael@mcelroylawoffice.com
James A. Hall	jhall@apslaw.com
Nicole M. Verdi	nverdi@apslaw.com
Alan M. Shoer	ashoer@apslaw.com
Casey J. Lee	casey@cjlfirm.com
Lea J. Donaldson	Leah@McElroyLawOffice.com

The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Katherine A. Merolla

See Number: PC-2016-4758
 Held in Providence/Sristol County Superior Court
 submitted: 3/19/2017 1:03:00 PM
 File#: 9617
 Reviewer: Cal



ST. JEAN ENGINEERING, LLC
 CIVIL, MARINE AND STRUCTURAL
 CONSULTING ENGINEERING
 100 Middle Road
 East Greenwich, RI 02818
 Phone: 401.868.8899
 e: stjean-engineering@stjean-engineering.com



State of Rhode Island and Providence Plantations
Coastal Resources Management Council
Oliver H. Stedman Government Center
4808 Tower Hill Road, Suite 3
Wakefield, RI 02879-1900

(401) 783-3370
Fax (401) 783-3767

RE: CRMC/New Shoreham Lease of Breakwater in Old Harbor

To Whom It May Concern:

I, Grover Fugate, under oath and penalty of perjury, state as follows:

1. I am the Executive Director of the State of Rhode Island Coastal Resources Management Council (CRMC).
2. Attached as Exhibit A to this Affidavit is a true and accurate copy of the Lease between the CRMC and the Town of New Shoreham (Town) for the breakwater/jetty identified with an "X" on the attached Exhibit B. The leased property is sometimes known as the "Red Breakwater" or the "Northern Ell" within Old Harbor, Block Island.
3. Originally constructed at the direction of the Army Corps of Engineers in the waters of the State of Rhode Island, the Red Breakwater is now the property of the State of Rhode Island managed and controlled by the Town pursuant to the Lease.
4. The term of the Lease is from May 2012 through April 2062. The Town is responsible for maintaining the Red Breakwater during the Lease term.
5. Pursuant to State law and the CRMC's Regulations, any alterations to the Red Breakwater, including constructing a dock attached to it, or anchoring a dock to it, would require an Assent from the CRMC. The Town, as holder of the Lease, would have to consent to any such dock and would have to be a party to any request for such an Assent.



Grover J. Fugate
Executive Director
Coastal Resources Management Council
Date: October 27, 2015

State of Rhode Island)
County of Providence)

On this 27th day of October 2015, before me, the undersigned notary public, personally appeared Grover Fugate, personally known to the notary to be the person who signed the preceding or attached document in my presence, and who swore or affirmed to the notary that the contents of the document are truthful and accurate to the best of his knowledge and belief.



John T. Longo
Notary Public
My Commission Expires: 12/4/17



State of Rhode Island and Providence Plantations
Coastal Resources Management Council
Oliver H. Stedman Government Center
4808 Tower Hill Road, Suite 116
Wakefield, RI 02879-1900

(401) 783-3370
Fax (401) 783-3767

A

LEASE AGREEMENT

THIS LEASE AGREEMENT is made as of the 1st day of April, 2012, by and between the State of Rhode Island by and through the Coastal Resources Management Council ("CRMC") (hereinafter referred to as "the State" or "CRMC"), and the Town of New Shoreham (hereinafter referred to as the "Town").

I. LEASED PREMISES

The State hereby leases to Town the following described property in the Block Island Old Harbor known as the Red Breakwater which is further described as follows:

That portion of the project for navigation, Block Island Harbor of Refuge, Rhode Island adopted by the Rivers and Harbors Act of July 11, 1870, consisting of the cut-stone breakwater lining the west side of the Inner Basin; beginning at a point with coordinates N32579.55, E312625.53, thence running northerly about 76.59 feet to a point with coordinates N32655.92, E312631.32, thence running northerly about 206.81 feet to a point with coordinates N32858.33, E312673.74, thence running easterly about 109.00 feet to a point with coordinates N32832.15, E312779.54.

The above-described property is referred to in this Lease Agreement as the "Red Breakwater."

II. TERM

The Town shall hold the Red Breakwater with all the rights, privileges, and appurtenances thereof, for and during the term of fifty (50) years, beginning on April 1, 2012, and ending on April 1, 2062.



III. *RENT*

The annual rent is one dollar (\$1.00) per year. Payment of the rent for the term of the lease shall be made upon execution of this Agreement by one, lump-sum payment of fifty dollars (\$50.00).

IV. *COVENANTS OF TOWN*

The Town hereby covenants with the State as follows:

- A. The Town will maintain the Red Breakwater in good order and repair;
- B. The Town will pay the rent in the manner aforesaid;
- C. The Town will use and occupy the Red Breakwater in a careful and proper manner;
- D. The Town will not use or occupy the Red Breakwater for any unlawful purpose, and will conform to and obey all present and future laws and ordinances and all rules, regulations, requirements, and orders of all governmental authorities or agencies pertaining thereto.
- E. The Town will quietly and peaceably surrender up possession of the Red Breakwater to the State at the expiration of this Lease Agreement subject to all reasonable wear and tear.

V. *MUTUAL COVENANTS*

It is mutually agreed by and between the CRMC and Town that:



A. The Town shall have the right to erect such signs, docks, and other structures on or near the Red Breakwater at its own expense as the Town shall deem desirable in accordance with applicable laws and regulations, and shall maintain all such structures in good order and repair.

B. All fixtures, structures and/or equipment as shall have been installed by the Town during the term of this Lease Agreement on or near the Red Breakwater shall become the property of the Town at the termination of this Lease Agreement. At the end of the lease period the Town shall be renewal of the lease all fixtures, structures and/or equipment shall be removed.

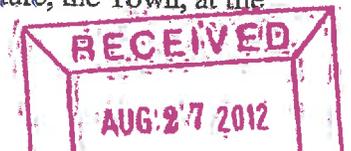
C. The Town shall peaceably and quietly have, hold, and enjoy the Red Breakwater for the term aforesaid.

D. This Lease Agreement and all the covenants, provisions, conditions, hereinbefore contained shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

E. The execution and performance by the Town of the terms and provisions of this Lease Agreement have been duly authorized by all requisite action and this Lease Agreement constitutes a valid and binding obligation of the Town. The execution and performance of this Lease Agreement will not violate any provision of law, any order of any court, or other agency of government, or any other instrument to which the Town is a party or by which Town is bound. The Town has full power and authority to enter into this Lease Agreement and to consummate the transactions herein contemplated.

E. The execution and performance by the CRMC of the terms and provisions of this Lease Agreement have been duly authorized by all requisite action and this Lease Agreement constitutes a valid and binding obligation of the CRMC. The execution and performance of this Lease Agreement will not violate any provision of law, any order of any court, or other agency of government, or any other instrument to which the CRMC is a party or by which CRMC is bound. The CRMC has full power and authority to enter into this Lease Agreement and to consummate the transactions herein contemplated.

F. Notwithstanding anything herein contained to the contrary, in the event that the Red Breakwater shall be materially damaged by flood, fire, or any act of nature, the Town, at the



Town's option, may cancel this Lease Agreement upon written notice to the CRMC, and the Town shall be under no obligation to repair or replace the Red Breakwater. For purposes of this Lease Agreement, material damage shall be damage which costs one-hundred-and-fifty thousand dollars (\$150,000) or more to repair or replace.

VI. ENTIRE AGREEMENT

This Lease Agreement constitutes the entire understanding and agreement between the parties hereto with respect to the lease of the Red Breakwater, and cancels all previous oral and written negotiations, agreements and, commitments, in connection therewith.

VII. CONSTRUCTION

This Lease Agreement shall be construed pursuant to the laws of the State of Rhode Island.

VIII. CONTROVERSIES AND CLAIMS SUBJECT TO ARBITRATION

All disputes between the parties hereto arising under this Lease Agreement may, with the mutual consent of the parties, be resolved by binding arbitration in Rhode Island pursuant to the rules then prevailing of the American Arbitration Association. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. Notwithstanding the foregoing, each party (hereinafter, the "initiating party") specifically reserves the right (i) to seek equitable remedies in a court of competent jurisdiction; and (ii) to bring a third party action against any other party in any proceeding to which the initiating party is a party under circumstances in which the basis of the initiating party's claim against the other party is that such other party is liable, in whole or in part, for any claim or counterclaim being asserted against the initiating party in such proceeding. Notwithstanding the foregoing, each party specifically reserves the right to seek equitable remedies in a court of competent jurisdiction including, without limitation, the right to seek injunctive relief to preserve the *status quo* during the period of arbitration under the terms of this paragraph.



IN WITNESS WHEREOF, the parties hereto have caused this Lease Agreement to be executed by their duly authorized representatives as of the day and date first written above.

WITNESS:

Lisa A. Turner
Lisa A. Turner

STATE OF RHODE ISLAND:
by and through the
Coastal Resources Management Council

Grover J. Fugate
Grover J. Fugate, Executive Director

WITNESS:

Shirlyde J. Gobern
Shirlyde J. Gobern

TOWN OF NEW SHOREHAM:

Nancy O. Dodge
Nancy O. Dodge, Town Manager



Google Maps Google Maps



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gls.com/maps/@41.1742329,-71.5562784,409m/data=!3m1!1e3



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

**SUPERIOR COURT
 OMNIBUS CALENDAR ASSIGNMENT FORM**

<input type="checkbox"/> Providence/Bristol County <input type="checkbox"/> Kent County <input type="checkbox"/> Washington County <input type="checkbox"/> Newport County	
TOWN OF NEW SHOREHAM	CASE NUMBER PC-2016-4758
VS. RHODE ISLAND FAST FERRY, ET AL	
CALENDAR TYPE MUST BE SELECTED FOR SCHEDULING PURPOSES	
<input checked="" type="checkbox"/> FORMAL SPECIAL CAUSE CALENDAR <input type="checkbox"/> BUSINESS CALENDAR <input type="checkbox"/> DISPOSITIVE MOTION CALENDAR	

FORMAL SPECIAL CAUSE AND BUSINESS CALENDAR	
<input checked="" type="checkbox"/> AGENCY APPEAL <input type="checkbox"/> ASSESSMENT OF DAMAGES <input type="checkbox"/> APPOINTMENT OF A SPECIAL MASTER <input type="checkbox"/> CONFIRM ARBITRATION <input type="checkbox"/> DECLARATORY JUDGMENT <input type="checkbox"/> ENTRY OF JUDGMENT <input type="checkbox"/> EVIDENTIARY HEARING <input type="checkbox"/> FIRST AND FINAL REPORT <input type="checkbox"/> FORECLOSURE OF RIGHT OF REDEMPTION <input type="checkbox"/> FRIENDLY SUIT <input type="checkbox"/> APPOINTMENT OF PERMANENT RECEIVER <input type="checkbox"/> MOTION TO ATTACH <input type="checkbox"/> MOTION FOR ATTORNEYS FEES <input type="checkbox"/> MOTION TO COMPEL RECEIVER <input type="checkbox"/> MOTION TO DEFAULT <input type="checkbox"/> MOTION FOR ENTRY OF FINAL JUDGMENT <input type="checkbox"/> MECHANIC'S LIEN <input type="checkbox"/> MOTION FOR APPROVAL <input type="checkbox"/> MANDATORY INJUNCTION <input type="checkbox"/> MOTION TO ADJUDGE IN CONTEMPT <input type="checkbox"/> OTHER FORMAL MATTER (EXPLAIN) _____ <input type="checkbox"/> OTHER BUSINESS MATTER (EXPLAIN) _____	<input type="checkbox"/> MOTION FOR PROTECTIVE ORDER <input type="checkbox"/> MOTION TO RECONSIDER <input type="checkbox"/> ORAL PROOF OF CLAIM <input type="checkbox"/> PETITION TO ALLOW SECURED CLAIM <input type="checkbox"/> PETITION TO APPOINT TEMPORARY RECEIVER <input type="checkbox"/> PROOF OF CLAIM <input type="checkbox"/> PETITION TO ENFORCE <input type="checkbox"/> PETITION FOR INSTRUCTIONS <input type="checkbox"/> PRELIMINARY INJUNCTION <input type="checkbox"/> APPOINTMENT OF PERMANENT SPECIAL MASTER <input type="checkbox"/> PETITION TO RECLAIM <input type="checkbox"/> PARTITION PROCEEDINGS <input type="checkbox"/> PETITION TO SELL <input type="checkbox"/> RECEIVERSHIP PROCEEDINGS <input type="checkbox"/> SHOW CAUSE HEARING <input type="checkbox"/> SUPPLEMENTARY PROCEEDINGS <input type="checkbox"/> TITLE PROCEEDINGS <input type="checkbox"/> TEMPORARY RESTRAINING ORDER <input type="checkbox"/> TRUSTEE PROCEEDINGS <input type="checkbox"/> VACATE ARBITRATION <input type="checkbox"/> WRIT OF MANDAMUS <input type="checkbox"/> WRIT OF REPLEVIN

If you require witnesses, state the estimated time frame of said hearing and attach a witness list and expected testimony to this form.

DISPOSITIVE MOTION CALENDAR	
<input type="checkbox"/> MOTION TO DISMISS, UNDER RULE 12 <input type="checkbox"/> MOTION FOR ENTRY OF JUDGMENT ON PLEADINGS <input type="checkbox"/> OTHER DISPOSITIVE MOTION: (EXPLAIN) _____ _____	<input type="checkbox"/> MOTION FOR PARTIAL SUMMARY JUDGMENT <input type="checkbox"/> MOTION FOR SUMMARY JUDGMENT

HEARING DATE: March 20, 2017	APPROVED BY: Rampone, clerk
Failure to fill out this form properly may result in your hearing date not being approved.	

Signature of Attorney or Self-represented Litigant /s/ Katherine A. Merolla	Address: 469 Centerville Road, Warwick, RI 02886
Rhode Island Bar Number: 2344	Office Telephone Number: 401-739-2900
Date: 3-10-17	

HEARING DATE: MARCH 22, 2017 AT 2:00PM

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM and
INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

Petitioners,

v.

RHODE ISLAND FAST FERRY, INC.
AND RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISRATOR

Respondents.

C.A. Nos. PC-2016-4758

PC-2016-4804

OBJECTION TO PETITIONERS' MOTION TO REMAND

Respondent Rhode Island Fast Ferry, Inc. ("RIFF") objects to Petitioners' Town of New Shoreham and Interstate Navigation Company d/b/a the Block Island Ferry Motion to Remand. The grounds for RIFF's Objection are set forth in the accompanying memorandum of law.

RHODE ISLAND FAST FERRY, INC.
By its Attorneys:

/s/ James A. Hall

James A. Hall (#6167)

Alan M. Shoer (#3248)

Nicole M. Verdi (#9370)

ADLER POLLOCK & SHEEHAN, PC

One Citizens Plaza, 8th Floor

Providence, RI 02903

Tel: (401) 274-7200

Fax: (401) 351-4607

Dated: March 17, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on March 17, 2017:

I electronically filed and served this document through the electronic filing system on the following parties:

Michael R. McElroy, Esq.
Leah J. Donaldson, Esq.
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casey@cjlfirm.com

The document electronically served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

I mailed or hand-delivered this document to the attorney for the opposing party and/or the opposing party if self-represented, whose name and address are:

/s/ James A. Hall

HEARING DATE: MARCH 22, 2017 AT 2:00PM

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM and
INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

Petitioners,

v.

RHODE ISLAND FAST FERRY, INC.
AND RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISRATOR

Respondents.

C.A. Nos. PC-2016-4758

PC-2016-4804

**MEMORANDUM OF LAW IN SUPPORT OF RHODE ISLAND
FAST FERRY, INC.'S OBJECTION TO PETITIONERS' MOTION TO REMAND**

Rhode Island Fast Ferry, Inc. ("RIFF") respectfully submits this memorandum of law in opposition to Petitioners' Town of New Shoreham ("Town") and Interstate Navigation Company d/b/a the Block Island Ferry ("Interstate") (collectively, "Petitioners") Motion to Remand ("Motion") the above-captioned matter to the Division of Public Utilities and Carriers ("Division"). As discussed below, Petitioners' Motion should be denied.

I. INTRODUCTION

This most recent dilatory dispute¹, which follows a comprehensive hundred page

¹ Petitioners' previous motion(s) for appellate discovery prior to briefing and requests for an extended briefing schedule were all denied by Judge Licht (ordering briefing within sixty days and that any issues Petitioners wish to address on appeal may be included in their briefing and that briefing shall be completed prior to assignment of the matter to any particular Justice for hearing). See Dec. 9, 2016 Order, attached as **Exhibit A**.

Decision and Order of the Division (“Division’s Final Order”) after it oversaw over three years of proceedings, discovery and hearings, arises out of Petitioners’ transparent and entirely unsupported belief that the Court should now remand this case back to the Division due to alleged “new developments” of which there is no evidence presented. *See* Division Docket No. D-13-51, Order No. 22548, dated Sept. 22, 2016, attached as **Exhibit B**; Petitioners’ Motion, at 4. Petitioners speculate that a nonparty’s proposed application for dockage to the Army Corps of Engineers (“ACOE”) could lay foundation for remand. *See* Petitioners’ Motion, at 4. There is, however, no factual foundation for Petitioners’ claim(s) and absolutely no legal basis for remand. Petitioners’ Motion is just the latest of their desperate attempts to avoid briefing, as ordered by Judge Licht, and ultimately to delay the appeal process.

Petitioners request the Court remand this case pursuant to R.I. Gen. Laws § 42-35-15(e).² R.I. Gen. Laws § 42-35-15(e) gives a court discretion to remand an administrative appeal if the party requesting the remand establishes that additional evidence *exists* that is *material* and that there was good reason for its failure to present the additional evidence before the agency. *Id.* Remand may be granted only when every prerequisite of R.I. Gen. Laws § 42-35-15(e) has been satisfied. None of those prerequisites have been satisfied here. Indeed, Petitioners failed to establish that any additional evidence exists. Additionally, Petitioners have presented no evidence that the purported additional evidence is material. Finally, Petitioners have presented no evidence that RIFF has somehow deviated from the services authorized by the Division. Without establishing that additional evidence exists, without establishing that the purported additional evidence is material and without establishing a deviation from service conditions

² Petitioners’ previous, fruitless, attempt to stall the appeal process was brought under R.I. Gen. Laws § 42-35-15(f).

imposed by the Division, the Court lacks authority to remand this case.

Ultimately, Petitioners' Motion seeks the Court to rule on their ultimate request for relief on a woefully thin premise without providing any support and relying solely on bald assertions. Petitioners ask the Court to remand this case back to the Division based on a four (4) page memorandum which lacks any evidence. Accordingly, under these circumstances, remand is neither warranted nor appropriate.

II. FACTUAL BACKGROUND

On July 1, 2013, RIFF filed its application with the Division for a certificate of public convenience and necessity ("CPCN") to operate a "fast ferry" between Quonset Point, North Kingstown and Old Harbor, Block Island (the "Service"). *See* Division Docket No. D-13-51. After three years, upon several days of evidentiary hearings and over the choreographed opposition of the Petitioners, the Division granted RIFF's application for a CPCN. *See* Exhibit B. The Division determined that RIFF satisfied all the requisite requirements of R.I. Gen. Laws §§ 39-3-3 and 39-3-3.1, that RIFF established that such Service is necessary and convenient and, therefore, that granting RIFF a license was in the best interest of the State. *Id.*

The Town and Interstate appealed the Division's Order. Approximately five months ago, the Division also found that, although no specific dock had yet been designated, RIFF had demonstrated a satisfactory plan for dockage at Old Harbor (premised on a third-party's approved dock construction via the ACOE). *See* Exhibit B, at 141. On October 25, 2016, RIFF moved for a Motion for a Briefing/Case Management Schedule ("RIFF's Motion"). Subsequently, the Petitioners objected to RIFF's Motion, arguing baldly that appellate discovery was warranted. *See* Interstate's Objection, dated October 31, 2016, at 2 (stating "Interstate anticipates additional discovery – including depositions – will be necessary in this matter, as

provided for under R.I.G.L. § 42-35-15(f)"); Town's Objection, dated October 31, 2016, at 2 (stating generically and without detail that "that procedural irregularities occurred which are not demonstrated in the record, and [the Petitioners] will be conducting discovery ..."). A hearing on RIFF's Motion for a Briefing Schedule and Petitioners' objections was held on November 7, 2016, and a conference further addressing Petitioners' objections was held on November 23, 2016. Finally, on December 9, 2016, the Court set a briefing schedule and did not allow Petitioners to conduct additional discovery at that time.³

As a desperate attempt to re-argue the contentions raised in Petitioners' October 2016 objections and to delay this administrative appeal, Petitioners filed this Motion two weeks prior to the date Petitioners' briefs are due, asserting that the briefing not go forward and that the Division needs to review some "additional evidence which was unavailable to the [P]etitioners during the proceedings before the Division." Petitioners' Motion, at 4. These conclusory assertions are similar in foundation to those related to Petitioners' previous motions requesting additional appellate discovery, which Judge Licht has not allowed.

In order to understand Petitioners' Motion, it is important that the Court be aware that during the licensing proceedings before the Division, the Town filed a Motion for Summary Disposition, asserting that RIFF did not have a dock to land its ferry. *See* Docket No. D-13-51. However, on December 10, 2015, the Division determined that it was "satisfied that Bluewater[, LLC's ("Bluewater"), a nonparty owner of waterfront property at Old Harbor,] claim[s] of interest and ability to construct a docking facility in Old Harbor are credible and that RIFF's access to Bluewater's planned docking facility is satisfactorily demonstrated on the record."

³ The Court further ordered that "Petitioners may move for appellate discovery and supplemental briefing before the assigned Justice regarding [Petitioners'] alleged procedural irregularities." **Exhibit A.**

Division Docket No. D-13-51, Order No. 22254, at 21 (Dec. 10, 2015), attached as Exhibit C.⁴

Accordingly, the Town's Motion for Summary Disposition as related to dockage was denied, the licensing proceedings continued, and the Division granted RIFF a license/CPCN, over Petitioners' objections, including those related to dockage. See Exhibit B.

Upon information and belief, as was anticipated by the Division, Bluewater indeed submitted preliminary papers to the ACOE in furtherance of its proposed application for permitting of a docking facility located in Old Harbor. As clearly set forth during the Division proceedings, RIFF plans to lease Bluewater's proposed dock, should it be permitted and constructed. Petitioners contend that remand of a grant of a CPCN to RIFF is appropriate because Bluewater *allegedly* submitted an "alternative proposed docking facility" to the ACOE, which was purportedly not part of its submissions to the Division. Petitioners' Motion, at 4. There is simply no evidence of that and, moreover, even if such were the case, such minor alterations would not lay foundation for remand.

Because the Petitioners' transparent allegations are entirely without foundation in fact or law, and for the reasons articulated below, the Petitioners' Motion should be denied.

III. ARGUMENT

This Court should deny Petitioners' request for remand because they have entirely failed to satisfy the statutory requirements necessary to remand this case. Petitioners ask this Court to remand the case pursuant to R.I. Gen. Laws § 42-35-15(e), despite the fact that judicial review of contested administrative appeals "shall be confined to the record." *Davis v. Wood*, 444 A.2d 190, 191-92 (1982) (quoting R.I. Gen. Laws § 42-35-15(f)). The Court may, however, remand a

⁴ The Division noted that it would not act as the arbiter of proper dockage, leaving this to the ACOE and Coastal Resource Management Council proceedings and that the Division was satisfied that there was a viable dock plan and general timeline for the same.

case to an agency if the Court is shown that additional evidence exists that is material and that there was good reason for the failure to present the additional evidence before the agency. R.I. Gen. Laws § 42-35-15(e). Under the relevant language of R.I. Gen. Laws § 42-35-15(e), a motion to present additional evidence to the agency *may* be allowed if all the following prerequisites have been fully satisfied: (1) additional evidence exists; (2) the additional evidence is material; and (3) there were good reasons for failure to present the additional and material evidence in the proceeding before the agency. *Id.* As will be discussed below, Petitioners cannot and have not established that this case meets the prerequisites to warrant remand.

A. Petitioners Failed To Establish That Additional Evidence Even Exists So As To Warrant Remand.

This Court should deny Petitioners' Motion because Petitioners failed to present any evidence to warrant remand under R.I. Gen. Laws § 42-35-15(e). Petitioners assert that "RIFF/Bluewater has now submitted another, alternative proposed docking facility to the [ACOE]." Petitioners' Motion, at 4. However, despite the ACOE process being open to intervention and/or document review, the Petitioners did not provide *any* evidence that Bluewater presented some sort of alternative proposed docking facility to the ACOE that was not part of the submission to the Division. In fact, Petitioners attached to their Motion nothing more than the actual documents referenced by the Division, without so much as an indication of what has allegedly been altered.

Mere assertions, without any supporting documentation, are not sufficient to be considered evidence, never mind material new evidence that could warrant remand. *See Nicolae v. Miriam Hosp.*, 847 A.2d 856, 860 (R.I. 2004) (distinguishing "unsubstantiated accusations and conclusory assertions" from "evidence"); *A.J.C. Enterprises, Inc. v. Pastore*, No. 80-40, 1981 WL 390926, at *1 (R.I. Super. Mar. 18, 1981), appeal denied, judgment aff'd, 473 A.2d 269 (R.I.

1984) (stating “[p]etitioner has not submitted an affidavit in support of this motion and there is nothing in the record to suggest that petitioner has additional material evidence”); *see also Jupiter v. Ashcroft*, 396 F.3d 487, 491 (1st Cir. 2005) (stating “Counsel’s factual assertions in pleadings or legal memoranda are not evidence”); *Riesenberg v. Watson*, 83 Mass. App. Ct. 1116, 983 N.E.2d 750 (2013) (stating “mere allegations and conclusory assertions are not evidence”).

Here, Petitioners’ have not introduced any supporting documentation that indicates any additional evidence exists to warrant remand. As grounds for the remand, Petitioners contend that an alternative docking facility—that was purportedly not previously proposed to the Division—was submitted to the ACOE by RIFF. *See* Motion, at 4 (stating “the petitioners have recently learned that in an apparent effort to avoid the Town approval necessary for the Section 408 application, RIFF/Bluewater has now submitted another, alternative proposed docking facility to the [ACOE]”).⁵ However, Petitioners have not supplied the Court with any evidence of this “alternative proposed docking facility.”⁶ Petitioners’ speculative assertions are not supported by any evidence. As such, Petitioners’ bald assertions are not evidence and cannot provide the basis for remand pursuant to R.I. Gen. Laws § 42-35-15(e).

Petitioners failed to supply the Court with *any additional evidence*. Accordingly, Petitioners’ Motion must be denied.

⁵ It would appear, as fruitlessly attempted at the Division, that Petitioners are seeking to forgo intervention in the ACOE process and instead petition the Court to make a finding tangentially related to the ACOE proceedings. Notwithstanding the inappropriate nature of such a request, Petitioners make their plea for such judicial action without a scintilla of evidence in support.

⁶ As RIFF is not the applicant before the ACOE, neither it, nor its counsel, are parties to the ACOE application proceedings. However, it is RIFF’s understanding and belief that the docking plan being submitted to the ACOE is that which was submitted before the Division during the licensing/CPCN proceeding.

B. Petitioners Failed To Establish That The Purported Additional Evidence Is Material.

Even if this Court were to determine that the mere assertions raised in Petitioners' Motion constitute actual additional evidence, remand is unwarranted because Petitioners failed to establish that the purported additional evidence is material. The Court may remand this case to the Division, *if* Petitioners "show to the satisfaction of the court that the additional evidence is *material*." R.I. Gen. Laws § 42-35-15(e)(emphasis added). Petitioners bear the burden to establish that the purported additional evidence is material. *Muir v. Coastal Res. Mgmt. Council*, No. PC99-4595, 2001 WL 345817, at *3 (R.I. Super. Mar. 21, 2001) (finding that "plaintiffs have not met their *burden* in demonstrating either the materiality of the alleged 'additional evidence' or the good reason for failure to present same to this Court")(emphasis added). Absent a showing by Petitioners that the purported additional evidence is material, the Court cannot remand this case to the Division. *Id.*

Black Law's Dictionary defines "material" as "[i]mportant; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form." Black's Law Dictionary, <http://thelawdictionary.org/material/> (last visited Mar. 14, 2017). Rhode Island courts have found that evidence concerning events occurring after the decision being reviewed was rendered was immaterial. *See Davis*, 444 A.2d at 191-92 (holding "we fail to see how evidence of expenditures made by [applicant] after his license renewal was denied and evidence of substantial compliance with DEM's rules during the posthearing period were in any way material to issues raised in the hearing); *Bristow v. Kenyon Terrace Apartments, Inc.*, No. WC-11-0508, 2013 WL 4502719, *7 (R.I. Super. Aug. 16, 2013) (stating "[t]he evidence attempted to be added to the record here is similar to the evidence in *Davis* . . . , in that it concerns events occurring after the decision being reviewed" and finding that remand was not

required).

Petitioners' Motion does not even assert that the purported additional evidence is material. Accordingly, Petitioners failed to present any foundation for their assertion that the purported additional evidence is material. The fact that Petitioners failed to satisfy their burden and failed to present any argument that the purported additional evidence is material requires Petitioners' Motion be dismissed.⁷ Further, Petitioners claim, again without any supporting evidence, that the ACOE has determined the Town to be a necessary "non-federal sponsor" of some portion of the Bluewater proposed dockage. Petitioners' Motion, at 3-4. Petitioners offer no support for this assertion. Petitioners do not even assert that they are an intervening party in the ACOE process. Again, inappropriately and without support, Petitioners ask this court to make findings as to a pending ACOE process.

Finally, as discussed *infra* at Section C, even if there were some alteration to the Bluewater proposal, the Division specifically indicated that it would not revisit the dockage issue unless and until the Town was successful in preventing the construction of such a dock. Accordingly, per the Division's Final Order, such alteration would not be material to its Order.

C. Petitioners' Motion Misconstrues And Misrepresents The Division's Previous Orders.

Because Petitioners have failed to meet their burden and establish the R.I. Gen. Laws § 42-35-15(e) prerequisites, their Motion should be denied. Petitioners also woefully misconstrue and misrepresent the Division's previous orders when asserting that the Division's December 10, 2015 Order and the Division's Final Order warrant remand.

1. The Division's December 10, 2015 Order Does Not Warrant Remand.

⁷ Because Petitioners failed to establish the first two prerequisites of R.I. Gen. Laws § 42-35-15(e), it is unnecessary to discuss the third prerequisite: whether or not there were good reasons for failure to present the additional and material evidence in the proceeding before the agency.

Petitioners' misrepresent the contents of the Division's December 10, 2015 Order ("December Order") by inserting additional language that does not exist in the Order and by omitting language that is in the Order. See Petitioners' Motion, at 4; Exhibit C. Specifically, Petitioners allege that the "Division's Order of December 10, 2015 states that the Division reserves the right to revisit this matter *and* that the Town will inform the Division if it is successful in derailing Bluewater's plans in the proceedings before the [ACOE]." Petitioners' Motion, at 4 (emphasis added). That is a misleading presentation of the December Order. The Division did not reserve the right to revisit this matter—*docking in Old Harbor*—in general. It did so under a very specific circumstance. The Division "reserve[d] the right to revisit this [docking in Old harbor] matter [only] upon a showing by the Town that it has been successful in its efforts to prevent the construction of Bluewater's planned dock before the [ACOE] or CRMC." See Exhibit C, at 23(emphasis added).

The Division neither reserved for itself nor showed any interest in revisiting dockage. What the Division did reserve and show interest in is generally whether RIFF is capable of providing service via any dockage. The Petitioners' interpretation of the December Order, as articulated in Petitioners' Motion, is an attempt to re-write the December Order. Petitioners' assertion that the Division reserved the right to revisit the docking issue in general is false and misleading. This Court should not allow Petitioners' the ability to twist the words of the Division's December Order to suit Petitioners' efforts to delay the appeal process.

The actual language included in the Division's December Order clearly stated that the Division reserved the right to revisit the docking issue *only if* the Town successfully prevented permitting of Bluewater's dock(s) before the ACOE. *Id.* (presuming the Town's intervention in such proceedings). Upon information and belief, it is RIFF's understanding that Bluewater's

ACOE application process is moving forward and, therefore, the Town has not prevented the construction of Bluewater's planned dock. Further, the Petitioners' Motion does not include any "showing" that the Town successfully prevented construction of the dock during the ACOE application proceedings.

Accordingly, remand is not warranted under the December Order.

2. The Division's Final Order Does Not Warrant Remand.

Petitioners similarly and erroneously cite the Division's Final Order as grounds for remand and state that it "requires that RIFF notify the Division of any deviation from the services described in the testimony and exhibits, and that such deviation must be approved by the Division." Petitioners' Motion, at 4. The Final Order actually states that: "RIFF shall, as a condition of its continued authority to operate, provide its passengers with services substantially consistent with the services described in the testimony and exhibits presented during this case. Any deviation from these specified services must be approved by the Division." However, Petitioners' Motion assumes that "services" means a precise dock within Old Harbor where RIFF will dock its ferry. The Division's Final Order, however, defines the "service" as, *inter alia*, transit generally between Quonset and Old Harbor. See **Exhibit B**, at 141 ("Under this authority, RIFF is required to provide daily, summer-season, high speed ferry services between its ferry terminal located in 1347 Roger Williams Way located in Quonset Point, North Kingstown and *Old Harbor, Block Island*") (emphasis added). Moreover, there has been no deviation from RIFF's proposed service.

Again, although Bluewater, not RIFF, is the applicant submitting an application to the ACOE for permitting regarding dockage, RIFF is not aware of any deviation from the proposals for docking facilities in Old Harbor as presented before the Division. Further, Petitioners do not

offer a scintilla of evidence that RIFF's plans to use a Bluewater dock in Old Harbor have changed.

Accordingly, RIFF's Services remain consistent with the Division's Final Order and remand is not warranted.

IV. CONCLUSION

For the foregoing reasons, RIFF respectfully requests that this Court deny Petitioners' Motion to Remand.

RHODE ISLAND FAST FERRY, INC.
By its Attorneys:

/s/ James A. Hall

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CERTIFICATE OF SERVICE

I hereby certify that, on March 17, 2017:

I electronically filed and served this document through the electronic filing system on the following parties:

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The document electronically served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

I mailed or hand-delivered this document to the attorney for the opposing party and/or the opposing party if self-represented, whose name and address are:

/s/ James A. Hall

EXHIBIT A

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM

v.

C.A. No. PC-2016-4758

RHODE ISLAND FAST FERRY, INC. and
RHODE ISLAND DIVISION OF PUBLIC
UTILITIES AND CARRIERS, MACKEY
McCLEARY, ADMINISTRATOR

INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

v.

C.A. No. PC-2016-4804

RHODE ISLAND FAST FERRY, INC. and
RHODE ISLAND DIVISION OF PUBLIC
UTILITIES AND CARRIERS, MACKEY
McCLEARY, ADMINISTRATOR

ORDER

This matter came on for hearing on November 7, 2016 and for a conference on November 23, 2016 before Mr. Justice Licht on the Respondent Rhode Island Fast Ferry, Inc.'s ("RIFF") Motion for Accelerated Briefing Schedule. After consideration thereof, it is hereby ORDERED:

- (1) The Petitioners, Town of New Shoreham and Interstate Navigation Company, shall have ninety (90) days from the date of entry of this Order to file and serve their briefs;
- (2) The Respondents, RIFF and the Rhode Island Division of Public Utilities and Carriers ("DPUC"), shall have thirty (30) days from the date of service of both Petitioners' briefs to file and serve their briefs;
- (3) The Petitioners shall have thirty (30) days from the date of service of both Respondents' briefs to file and serve reply briefs;

- (4) Once briefing has been completed, the parties shall so notify the Court, and this matter will then be assigned to a Justice;
- (5) The Court recognizes that the Petitioners have alleged procedural irregularities before the DPUC which Petitioners assert are not shown in the record and that Petitioners have requested that they be allowed to engage in appellate discovery prior to briefing; such discovery not being allowed at this time;
- (6) Petitioners may move for appellate discovery and supplemental briefing before the assigned Justice regarding such alleged procedural irregularities.

Entered as an Order of this Court this 9th day of November, 2016.

ENTER:



Richard Licht 12/9/2016

Associate Justice

Presented by:

/s/ Michael R. McElroy, Esq.

Michael R. McElroy, Esq.

Schacht & McElroy

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Providence, RI 02940

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PER ORDER:



Michael C. Rampone

Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2016:

I filed and served this document through the electronic filing system on the following:

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The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Michael R. McElroy, Esq.

EXHIBIT B

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888**

IN RE: Application by Rhode Island Fast :
Ferry, Inc. for Water Carrier Authority : Docket No. D-13-51

REPORT AND ORDER

1. Introduction

On July 2, 2013, Rhode Island Fast Ferry, Inc., 1347 Roger Williams Way, North Kingstown, Rhode Island (“RIFF” or “Applicant”), filed an application with the Rhode Island Division of Public Utilities and Carriers (“Division”) seeking authority to operate as a seasonal “fast ferry” water carrier of passengers between Quonset Point, North Kingstown (“Quonset”) and Old Harbor, New Shoreham (“Block Island”).¹ RIFF’s application was filed pursuant to Rhode Island General Laws, Sections 39-3-3 and 39-3-3.1, which require the issuance of a “certificate of public convenience and necessity” (“CPCN”) by the Division before “water carrier” services can be provided between points within the State.

¹ The Division notes that “fast” or “high-speed” ferry service is distinguishable from conventional “slower” ferry services. (See Interstate Navigation Company v. Division of Public Utilities, 824 A.2d 1282 (R.I. 2003)). With respect to the issue of the speed of the faster service, the Division’s experience with “fast ferry” service has suggested that a ferry must be capable of operating comparatively smoothly and quietly at a service speed of approximately 28 knots. (See Order No. 17081, issued in Docket No. 02-MC-56). The Division has decided to adopt this criterion as a minimum standard for “fast” or “high-speed” ferry service.

a. Motions to Intervene

In furtherance of starting the process of adjudicating the instant application request, the Division established a filing deadline of August 30, 2013 for all motions to intervene in the docket. Notification of the application filing and the prescribed deadline for intervention was posted on the Division's website, in accordance with State law, and also communicated during a pre-hearing/scheduling conference conducted on August 21, 2013, which was open to the public. The Division indicated that all motions would be considered in accordance with the requirements contained in Rule 17 of the Division's "Rules of Practice and Procedure."

In response to the notice of deadline to intervene, the Division received timely motions to intervene from the Interstate Navigation Company, d/b/a The Block Island Ferry ("Interstate"); Block Island Ferry Services LLC, d/b/a Block Island Express ("BI Express"); Intrastate Nav. Company ("INCo"); and the Town of New Shoreham (the "Town")(collectively, the "Movants").

After receiving copies of these formal intervention requests, the Applicant filed a timely written response and objections. The Applicant argued that, with the exception of the Town, none of the Movants had satisfied the intervention standards set forth in Rule 17, supra.

Rule 17(b) of the Division's Rules of Practice and Procedure sets forth the following requirements for intervention:

Subject to the provisions of these rules, any person with a right to intervene or an interest of such nature that intervention is necessary or appropriate

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

After carefully considering the arguments proffered by the Movants and the Applicant regarding the intervention motions, as well as the standards prescribed under Division Rule 17 and Rule 24 of the Superior Court Rules of Civil Procedure, and relevant case law, on September 24, 2013, the Division granted the intervention motion of the Town, denied the intervention motions filed by BI Express and INCo², and granted limited intervention to Interstate.³ Specifically, in accordance with the Division's decision on the issue, Interstate was allowed to participate in this docket for the purpose of safe-guarding the year-round lifeline services it provides to Block Island. The Division declared that it considered the scope of this participation as relating to the Applicant's burden of proof to demonstrate "that public convenience and necessity

² BI Express and INCo subsequently appealed the Division's decision to deny their intervention motions to the Superior Court. The Court ultimately affirmed the Division's decision on February 17, 2014.

³ See Order No. 21170.

require[s] the services.”⁴ Interstate was not permitted to challenge the Applicant with respect to its claims of “fitness.” This area of inquiry would be restricted to the Division’s Advocacy Section, an indispensable party in all CPCN application proceedings, such as the instant case.⁵

b. Requests for Extensions of Time

The Division established an initial procedural schedule in this docket during a scheduling conference conducted on August 21, 2013. This schedule was later extended six (6) times, mostly through requests from the Applicant.

The first postponement was in response to an October 3, 2013 request by RIFF for an extension of time to file pre-filed direct testimony.⁶ The resulting modified schedule was later held in abeyance, at RIFF’s request, after a Division decision denying two intervention requests was appealed to the Superior Court.⁷ After this appeal was denied and dismissed on February 17, 2014, RIFF agreed, on May 2, 2014, to attend another scheduling conference for the purpose of establishing another revised procedural schedule. Later, during a second scheduling conference, conducted on June 18, 2014, the Division established a new procedural schedule in this docket.

Subsequently, on August 1, 2014, the Applicant filed a motion for an extension of time “due to the temporary unavailability of an expert witness required for preparation of the pre-filed testimony.” In furtherance of its request, the Applicant proffered a revised schedule that sought an additional

⁴ R.I.G.L. §39-3-3.

⁵ See Order No. 21170, issued on September 24, 2013.

⁶ See Order No. 21189.

⁷ See Order No. 21170.

35 days to file its pre-filed direct testimony and a corresponding shift of approximately two (2) months for each of the remaining deadlines to the procedural schedule. In support of its motion, the Applicant stated that “we have discussed this proposed revision with all the parties to this proceeding, and we can represent that there are no objections to these revised dates.”

On November 6, 2014, the Applicant filed another motion for an extension of time “to respond to data requests issued by the parties....” In furtherance of its request, the Applicant proffered a revised schedule that sought an additional 31 days to respond to the data requests and a corresponding shift of one (1) month for each of the remaining deadlines to the procedural schedule. In support of its motion, the Applicant stated that “Rhode Island Fast Ferry has consulted with counsel... and there are no objections to this request.”

Subsequently, on January 23, 2015, the Town filed a motion for an extension of time, requesting an additional three (3) weeks for filing its pre-filed direct testimony in the instant docket. Based on a corresponding shift of approximately three weeks for each of the remaining deadlines to the procedural schedule, none of the parties objected to the Town’s request.

Finally, on May 15, 2015, the parties agreed to another extension of time, which resulted in a corresponding shift of approximately six (6) weeks for each of the remaining deadlines to the procedural schedule.

In total, the above-described requests for time extensions in this docket, chiefly coming from the Applicant, significantly contributed to a nearly two (2) year delay in the adjudication of RIFF's original July 2, 2013 application filing.

c. The Town's Motion to Dismiss

On July 21, 2015, the Town filed a motion for summary disposition, in accordance with Rule 19(e) of the Division's Rules of Practice and Procedure, wherein it argued that RIFF's application must be dismissed for RIFF's failure to identify the dock it plans to use in Old Harbor. After considering the arguments made by the Town in support of its motion, as well as the objection and response proffered by RIFF, the Division ordered RIFF to "submit a written declaration to the Division identifying the dock it is proposing to use on Block Island (in furtherance of its proposed ferry services) and offer proof of the dock's availability."⁸ RIFF was initially directed to file its "declaration" by August 28, 2015. However, after RIFF requested additional time, the Division extended this deadline to September 11, 2015.⁹ The Division also held that it would reserve final decision on the Town's motion for summary disposition until it received and considered RIFF's declaration.¹⁰

On September 11, 2015, RIFF submitted affidavits from its principal, Mr. Charles A. Donadio and from Mr. Paul Filippi, the principal member of Bluewater LLC ("Bluewater"), through which these individuals stated that their respective companies had reached an agreement relative to the planned

⁸ See Order No. 22030.

⁹ See Order Nos. 22030 and 22045.

¹⁰ See Order Nos. 22030 and 22045.

construction and use of a docking facility in Old Harbor. It was asserted in the affidavits that Bluewater had acquired rights to construct a wharf at either of two locations in Old Harbor and that RIFF planned to lease dock space from Bluewater once the wharf is constructed. RIFF also attached a copy of the relevant Lease Option Agreement (“Lease Agreement”) with Mr. Donadio’s affidavit. The affidavits and Lease Agreement also reflected that before construction can start, Bluewater must seek and receive the necessary permits from the Rhode Island Coastal Management Council and the U.S. Army Corps of Engineers, which it planned to file by November 1, 2015 and also a water quality certificate from the Rhode Island Department of Environmental Management.¹¹

Additionally, Mr. Donadio’s affidavit stressed that RIFF planned to utilize the South Pier, so-called (a.k.a. South Wharf), in Old Harbor “only as an alternative docking facility in the event that the Bluewater facility is not constructed for whatever reason.”¹²

In response to RIFF’s September 11, 2015 written declaration, the Town filed a response, on September 16, 2015, wherein the Town described the Lease Agreement between RIFF and Bluewater as a “sham.” In support of this claim, the Town argued, *inter alia*, that Bluewater had failed to demonstrate that it had acquired the necessary legal rights to wharf out at the Northerly Ell of the stone jetty at the Inner Basin (“Northerly Ell Facility”) or at the former location

¹¹ See Order No. 22103.

¹² See Order No. 22103.

of the Mount Hope Pier adjacent to the Easterly Breakwater (“East Breakwater Facility”), the two dock locations identified earlier by Bluewater and RIFF. The Town thereupon urged the Division to cancel the public hearings that had been scheduled for October 7 and 8, 2015 and grant the Town some time to propound additional discovery and depose Mr. Filippi.¹³

Though RIFF and Bluewater subsequently proffered documentary evidence, on September 17, 2015, that suggested that Bluewater had acquired rights to build a dock on Lot 158, plat 6 in Old Harbor (the location of the planned Northerly Ell Facility), the Division concluded that there was sufficient ambiguity in the matter to warrant a delay in the hearings and to permit the Town to conduct additional discovery. The Division directed the Town to file a response to RIFF’s September 11, 2015 declaration by November 16, 2015. Additionally, the Division directed RIFF to submit, by November 16, 2015, “a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater’s plans to construct a docking facility in Old Harbor... and also provide the Division with an anticipated start-date for its proposed services.” The Division also held that it would reserve final decision on the Town’s motion for summary disposition until after November 16, 2015.¹⁴

Subsequently, based on objections by Bluewater to the scope and relevancy of the discovery proposed by the Town, the Division reconsidered and vacated its earlier decision to permit the Town to conduct further discovery.

¹³ See Order No. 22103.

¹⁴ See Order Nos. 22103 and 22166.

The Division additionally denied a motion from RIFF to conduct related discovery in this matter.¹⁵ Notwithstanding its decision to suspend all requests to conduct additional discovery in this docket, the Division approved the Town's request for an opportunity to submit a written response to Bluewater's assertions of having the legal rights to wharf out at the Northerly Ell Facility or East Breakwater Facility without the Town's approval. The Town's response was due on November 5, 2015. Bluewater was also offered an opportunity to rebut the Town's response by November 16, 2015.¹⁶

On November 5 and 16, 2015, the Town filed its responses to Bluewater's dock construction claims and RIFF's September 11, 2015 declaration, respectively. On November 16, 2015, RIFF filed its response to the Division's request for a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater's plans to construct a docking facility in Old Harbor; and its anticipated start-date for its proposed services. Also on November 16, 2015, Bluewater filed a response to the Town's November 5, 2015 filing, *supra*.

After a careful examination of the arguments and supporting documents offered by RIFF and the Town, and also the arguments and documents offered by Bluewater, the Division concluded that Bluewater's claims of interest and ability to construct a docking facility in Old Harbor were credible and that RIFF's access to Bluewater's planned docking facility was satisfactorily

¹⁵ See Order Nos. 22141 and 22166.

¹⁶ See Order Nos. 22183 and 22166.

demonstrated on the record. Though the Division is mindful that the Town plans to aggressively oppose Bluewater's permitting applications before the USACE and the CRMC, the Division found insufficient justification to deny RIFF an opportunity to pursue its current filing before the Division based on that anticipated opposition from the Town. The Town would have the Division accept the Town's opposition as a *fait accompli* on the question of Bluewater's ability to construct a new docking facility in Old Harbor. However, neither the prevailing law nor the facts associated with this matter provide that level of clarity. Consequently, the Division concluded that RIFF (through Bluewater) has a realistic expectation of having access to a future docking facility in Old Harbor from which it may operate a high-speed ferry service.

The Division further found that the expected timeline for completing the construction of a new docking facility in Old Harbor is not unreasonably long so as to necessitate additional delays in adjudicating RIFF's pending CPCN application.¹⁷ In its decision on the matter, the Division noted that it is expected that the Town will seek to intervene in the compulsory USACE and CRMC permitting application cases in order to express its opposition to the construction of a new dock in Old Harbor. The Division reserved the right to revisit this matter if the Town is successful in derailing Bluewater's plans in the preliminary stages of the proceedings scheduled before the CRMC and the USACE.¹⁸

¹⁷ See Order No. 22254.

¹⁸ See Order No. 22254.

In total, the Division issued seven (7) written decisions in connection with the Town's July 21, 2015 Motion for Summary Judgment.¹⁹ Predicated on the above travel and findings, the Division issued a final decision on the issue on December 10, 2015, denying the Town's July 21, 2015 Motion for Summary Disposition.²⁰

2. Hearings and Appearances

The Division conducted four public hearings in this docket. The hearings were duly noticed in conformance with the notice mandates contained in Rhode Island General Laws, Section 39-3-3.1. The hearings were conducted in the Division's hearing room located at 89 Jefferson Boulevard in Warwick, on March 2, 15, 22 and 24, 2016. The following counsel entered appearances:

For RIFF:	Alan M. Shoer, Esq. and James Hall, Esq.
For Interstate:	Michael R. McElroy, Esq.
For the Town:	Katherine A. Merolla, Esq.
For the Advocacy Section:	Christy Heatherington, Esq. Spec. Asst. Attorney General

3. RIFF'S Direct Case

RIFF proffered seven witnesses in support of its application filing. The witnesses were identified as: Ms. Elizabeth Dolan, Councilwoman, North Kingstown Town Council; Mr. Charles A. Donadio, Jr., President and owner of

¹⁹ See Order No. 22030, issued on August 11, 2015; Order No. 22045, issued on August 19, 2015; Order No. 22103, issued on September 21, 2015; Order No. 22141, issued on October 8, 2015; Order No. 22166, issued on October 20, 2015; Order No. 22183, issued on October 26, 2015; and Order No. 22254, issued on December 10, 2015.

²⁰ See Order No. 22254, issued on December 10, 2015.

the Applicant-Corporation; Mr. Lawrence R. Kunkel, Economist and President and Chief Strategy Officer, WhiteCap Holdings International, Inc.; Ms. Martha Pughe, Executive Director, North Kingstown Chamber of Commerce; Ms. Myrna George, President, South County Tourism Council; Mr. Steven J. King, P.E., Managing Director, Quonset Development Corporation; and Mr. Robert Billington, President, Blackstone Valley Tourism Council.

Ms. Elizabeth Dolan testified that she and the North Kingstown Town Council are familiar with RIFF's proposed service and support RIFF's application. She also noted that at the time RIFF filed its application with the Division she was Council President (her term as President ended in December of 2014). Ms. Dolan also noted that she submitted a letter to the Division on July 22, 2013 that expresses the support of the Council.²¹

Ms. Dolan testified that the Council supports RIFF's application because the Council believes that the proposal "offers both local and visiting tourists a more convenient Block Island ferry option due to the ease of access to Quonset from Route 95 via Routes 4 and 403." Ms. Dolan added that the Council believes that this new travel option will not only be of economic benefit to the Town of North Kingstown, but to Block Island as well, "by attracting additional tourism revenue and creating jobs." She also related that the "Council supports and encourages intermodal transportation as a means of making travel more convenient and alleviating traffic congestion...;" and that the

²¹ RIFF Exhibit 6. A copy of the Council's July 22, 2013 letter of support was marked as RIFF Exhibit 7.

“Council believes that the connections between RIFF’s ferry terminal, RIPTA bus service, the Wickford Junction commuter rail service and T.F. Green Airport will not only make RIFF’s service a success, it will promote State and federal transportation policy.”²²

Mr. Charles Donadio testified that he is RIFF’s sole owner and also holds all the corporate offices, including the office of President. Mr. Donadio related that RIFF is a company that specializes in fast ferry services; and that RIFF was the first ferry company to establish successful high-speed ferry service to Martha’s Vineyard. He added that RIFF also provides Sightseeing Cruises throughout Narragansett Bay and Newport Harbor; and has been involved in fast ferry charters and consulting services in Florida, New Jersey, New York and Bermuda.²³

Mr. Donadio testified that RIFF owns three high-speed ferries, the *Millennium*, a 400-passenger water-jet propelled ferry which can operate at speeds up to 35 knots, the *Ava Pearl*, a 150-passenger propeller-driven ferry which can operate at speeds up to 32 knots and an “offshore crew transfer vessel.”²⁴ Mr. Donadio described the *Ava Pearl*, delivered in 2012, as “one of the most advanced high-speed ferries in the country.”²⁵

Mr. Donadio next related that he has been involved in several other marine transportation companies over the years. He testified that he was the President and owner of Galilee Cruises, Inc., which operated the Southland

²² Id., pp. 1-3.

²³ RIFF Exhibit 12, p. 2.

²⁴ See 3/2/16 transcript, p. 172.

²⁵ RIFF Exhibit 12, p. 3.

Riverboat from 1995 to 2007. Mr. Donadio related that the Southland Riverboat provided narrated sightseeing cruises, sunset cruises and private charters throughout the Great Salt Pond and the Point Judith Harbor of Refuge. Mr. Donadio also testified that he was the founder of Island Hi-Speed Ferry, LLC (“IHSF”), which obtained a certificate from the Division in 1998 authorizing high-speed ferry services between Point Judith and Block Island. Mr. Donadio related that he ultimately sold his ownership interest in IHSF in 2003 to start RIFF.

Mr. Donadio also provided a summary of the awards that his companies have received. He related that in 1995, the South County Tourism Council awarded Galilee Cruises with an “Excellence Award for Tourism Development in South County, Rhode Island” in recognition for the rehabilitation of the Southland Riverboat and the return of traditional, daily-guided tours on Salt Pond. He noted that in 1997, the Southland Riverboat was voted “Best Scenic Water Ride” by Rhode Island Monthly Magazine.²⁶

Mr. Donadio testified that in 1998, the U.S. Small Business Administration awarded him with the “1998 RI Young Entrepreneur of the Year” award for Small Business in Rhode Island. He related that he received the award after being evaluated “on the evidence of success by measuring sales and profits, increased employment opportunities, development and/or utilization of innovative or creative business methods, and demonstrated entrepreneurial potential necessary for long-term success and economic

²⁶ Id., p. 4.

growth.”²⁷ Mr. Donadio related that he subsequently went on to become the 1998 New England Region Young Entrepreneur of the Year.²⁸

Mr. Donadio next testified that in 1999 and 2002 his Southland Riverboat was voted as “Editor’s Pick” in Yankee Magazine’s Travel Guide. He also noted that in 2003, he received an Excellence Award for Innovation & Entrepreneurship from the Providence Business News for the development of the new fast ferry service from Quonset Point to Martha’s Vineyard.²⁹

Mr. Donadio next turned his attention to the reasons why he believes there is a public need for an additional high-speed ferry service to Block Island from mainland Rhode Island. He related that based on his experiences in operating ferry services from both Point Judith and Quonset Point, he believes that there is “a market of passengers who currently choose not to travel to Block Island, even by high speed ferry, who would use RIFF’s proposed Quonset Point service if offered the opportunity.” Mr. Donadio reasoned that RIFF’s operation at Quonset Point offers fast ferry passengers amenities not available to users of either Interstate’s Point Judith or Newport fast ferry services that he believes would incentivize those who currently choose not to patronize those services even though it would mean more time spent travelling over water when compared to Interstate’s Point Judith high-speed service.

In comparing the two high-speed services, Mr. Donadio related that RIFF offers a “high level of personal service” and a “first class travel experience.” He

²⁷ Id., p. 4.

²⁸ Id.

²⁹ Id., p. 5.

declared that his customers “enjoy the fact that their vacation begins when they board our vessel.” Mr. Donadio is confident that his Block Island passengers would prefer the amenities that RIFF offers even though the trip will take 50 minutes, compared to Interstate’s 30 minute service. Mr. Donadio also indicated that RIFF will offer the following additional amenities with its proposed service: easy access to Quonset Point by highway from every direction (which he compares to Interstate’s Point Judith location, which he argues is “very time consuming and frustrating” to access from Route 95); 5.5 acres of dedicated dockside parking (which he compares to Point Judith’s parking, which he argues is “spread out and can fill to capacity regularly on busy Summer weekends”); always available dockside drop-off service (which he compares to Point Judith’s sometimes restricted drop-off access); intermodal transportation connections, including Airport Shuttle service and limousine service between the Kingston Train Station and Quonset Point; a “much more scenic ride, as part of the route will be through Southern Narragansett Bay;” that 99% of RIFF’s business is done through reservations, “so that no one is turned away (which he compares to the possibility of being turned away by Interstate on busy weekends); and that RIFF’s vessels (*Ava Pearl* and *Millennium*) will provide more spacious cabins for passengers than Interstate’s vessel (*Athena*).

Mr. Donadio also emphasized that Interstate’s vessel is a fifth generation whale watcher that was stretched out to accommodate 249 passengers in what had previously been a 149-passenger 29-meter platform. In contrast, he

explained that the *Ava Pearl* has a 33-meter platform and a capacity of 250 passengers, which he notes is “deliberately certificated for only 150, leaving at least 100 empty seats on every trip.” He noted that the *Ava Pearl* also has a “very spacious exterior luggage and bike storage area” (which he compared to the “cramped exterior deck luggage area” on Interstate’s vessel). Mr. Donadio added that the *Millennium* is a 37-meter 400-passenger catamaran, which he says “speaks for itself in terms of capacity.”³⁰

As an additional amenity, Mr. Donadio testified that RIFF is about to begin construction on a 4,000 square foot terminal facility that will “be like a mini airport terminal.” He related that the facility will “be spacious, climate controlled, and have both outdoor and indoor waiting areas;” and also have “flat screen televisions and phone/computer charging stations... food service with a liquor license and a gift shop.” Mr. Donadio compared his planned facility to Interstate’s Point Judith facility, which he described as “small” and “cramped.”³¹

As part of his public need assessment, Mr. Donadio testified that he has also studied RIFF’s market by population density. He related that “based upon a population radius analysis together with other evidence” he is confident “that a market for more Block Island fast ferry service exists.” In support, Mr. Donadio proffered population numbers and total business numbers located within close proximity to Quonset and Point Judith. He concluded that the

³⁰ Id., pp. 6-7.

³¹ Id., pp. 7-8.

data “show that there is a much larger population base with close proximity to Quonset than there is to Point Judith. Mr. Donadio asserted that this data, “together with all the other evidence I have seen, including Bob Billington’s experience with servicing pent-up demand for Block Island travel even after... [IHSF] started operations and after Interstate acquired IHSF’s assets tells me that an untapped market for Block Island fast ferry service exists.”³²

As additional evidence of “unsatisfied demand,” Mr. Donadio testified that RIFF frequently hears from people “who want to know whether we service Block Island or simply show up thinking we do.” He opined that “[p]resumably they would not do so if Quonset was not their desired departure point.”³³

Mr. Donadio also opined that there are untapped markets for fast ferry service to Block Island from other New England tourist destinations. As an example, he believes that “a reverse market” from Martha’s Vineyard to Block Island exists, and believes that he would be able to better serve this demand through his current services between Quonset and Martha’s Vineyard. He related that he “seriously” doubts that such travelers “would use Interstate’s fast ferry because it would not be a seamless route.”³⁴

Finally, Mr. Donadio testified that if his application is approved, he plans to charge between \$40 and \$50 for a round trip ticket. He noted that such rates would naturally be subject to the Commission’s approval. He also testified that he plans to start his service with an abbreviated schedule in the

³² Id., pp. 8-9.

³³ Id., p. 9.

³⁴ Id., p. 10.

last week of June and ending on Labor Day, with two to three round trips per day. Mr. Donadio explained that the schedule would continue until it can be optimized to respond to demand.³⁵

Mr. Lawrence Kunkel was proffered by the Applicant to provide an expert opinion on the question of whether there is a public need for RIFF's proposed new high speed ferry service. After providing a summary of his educational background and professional and business experience, Mr. Kunkel testified that he has been qualified and has testified as an expert witness before both the Division and Commission. Mr. Kunkel further related that he has been recognized by the Commission as an expert in economics, finance and game theory.³⁶

On the matter of whether there exists a public need for RIFF's proposed service, Mr. Kunkel testified that in his opinion "there is a public need for such a service and that RIFF's proposed service will satisfy that need."³⁷ Mr. Kunkel bases his opinion on several factors. First, he notes that Rhode Island and the federal government have invested "a combined \$660 million in infrastructure improvements in the Quonset Davisville Business Park and notably in the Route 403 exchange with the purpose of attracting private investment in diverse areas of commerce, including, marine transportation."³⁸ He opined that federal and State policymakers have clearly determined that multi-modal commerce compatible with these improvements justified such a large public

³⁵ Id.

³⁶ RIFF Exhibit 22, pp. 1-4.

³⁷ Id., p. 4.

³⁸ Id.

investment “because the Park’s unique location and attributes, to include its streamlined and uniform development process, would be a major economic driver.” Mr. Kunkel related that inherent in that decision making “was an assumption that there was a public need for the goods and services that business tenants of the Park would provide.”³⁹

Second, Mr. Kunkel relies on the fact that the Quonset Development Corporation’s Board of Directors “made a policy decision when it granted RIFF’s concession/land lease and approved its bulkhead improvements, that those actions would promote the manifest federal and State policies mentioned above, as well as serve the public’s marine transportation needs.”⁴⁰

Third, Mr. Kunkel testified that: “in my studied opinion there is a dormant, unserved, market for additional high-speed ferry service to Block Island not currently satisfied by Interstate Navigation’s fast ferry service from either Point Judith or Newport.”⁴¹ On this third factor, Mr. Kunkel opined that there has been a “maturation and market embrace” of the high speed ferry market to Block Island, but not a saturation of demand from all conceivable geographic markets that would embrace high speed ferry service to Block Island if the opportunity presented itself. To prove his point, Mr. Kunkel reminded the Division of his similar opinion in 1998 when he testified in support of IHSF’s application. He noted that at the time, Interstate argued that there was not a public need for high speed ferry service to Block Island; and

³⁹ Id., pp. 4-5.

⁴⁰ Id., p. 5.

⁴¹ Id.

that since that time, high speed services are now available to Block Island, through Interstate, from Point Judith, Newport and Fall River.⁴² Despite this expansion of high speed service, Mr. Kunkel maintains “that there is still an unserved market for travelers from mid-State and Northern Rhode Island,⁴³ as well as from Massachusetts who have avoided both Interstate’s traditional and high speed Galilee services because of the burdens involved in driving there in the Summer traffic down Route 95, then Route 4, then Route 1, then Point Judith Road, finding a parking space and lugging their belongings sometimes hundreds of yards to the terminal – and on extremely busy weekends being unable to find parking at all.”⁴⁴ Mr. Kunkel testified that Quonset offers obvious beneficial alternatives to those travelers. Mr. Kunkel also observes that Block Island currently has 5 mainland departure points for ferry access to the Island and that three of these departure points are controlled by Interstate. In comparison, he notes that Martha’s Vineyard has 7 mainland departure points, with 10 total ferry service options.⁴⁵

Mr. Kunkel also addressed Interstate’s involvement in this case. He testified that by “employing a game theoretic approach it is my opinion that Interstate has engaged in a game where the ultimate payoff has been preserving its monopoly on ferry transportation from mainland Rhode Island to Block Island.” To buttress this claim, Mr. Kunkel first observes that Interstate

⁴² Id., pp. 5-6.

⁴³ Mr. Kunkel stated that he is relying on Mr. Robert Billington’s opinion regarding a perceived demand in Northern Rhode Island. Id., p. 6.

⁴⁴ Id., p. 6.

⁴⁵ Id.

“opposed IHSF’s permitting on the fallacious ground that there was no need for Block Island high speed service. Then after the DPUC-imposed moratorium on Interstate’s entry into that market expired, it applied for its own Galilee high speed CPCN.”⁴⁶ Mr. Kunkel contends that Interstate has followed a similar path in this case. After learning that RIFF had an interest in providing high-speed service to Block Island, Interstate “inaugurated high speed service from Newport and added the Fall River route.” Mr. Kunkel testified that based on his practical experience and observations of Interstate’s strategic moves, “I can only conclude that Interstate’s motive here is not necessarily to serve a public need as much as it is to prevent entry by what it incorrectly perceives to be a market rival, with the ultimate payoff being the preservation of its monopoly.”⁴⁷

Mr. Kunkel concluded by emphasizing that RIFF is not a direct market rival to Interstate. He opines that RIFF and Interstate will be serving different markets, with geographic location of departure points being the main difference. He further opines that if there is some crossover from Interstate to RIFF the “direct competition will be beneficial to the traveling public.”⁴⁸ As a final argument, Mr. Kunkel asserted that high speed service has historically been treated as a discretionary service by the Division and, therefore, “there is no plausible economic reason or clear public policy for preventing some direct competition in that market.”⁴⁹

⁴⁶ Id., p. 7.

⁴⁷ Id., pp. 7-8.

⁴⁸ Id., p. 8.

⁴⁹ Id.

Ms. Martha Pughe testified that she was the Director of the North Kingstown Chamber of Commerce (“NK-Chamber”) at the time RIFF filed its application with the Division. She noted that she is now employed at Electric Boat and has been since April of 2015. Ms. Pughe testified that when she was the Director of the NK-Chamber, her duties included: achieving the strategic goals determined by the Board of Directors; to generate revenues for the operation and activities of the NK-Chamber; to manage in the recruitment, retention, and expansion of members and local business; and to provide tangible networking, educational, and advocacy opportunities for Chamber members.⁵⁰

With respect to RIFF’s application, Ms. Pughe testified that RIFF has been a member of the NK-Chamber since 2003. She related that the NK-Chamber is routinely in contact with RIFF over communications about referrals and service details. Ms. Pughe also stated that she is familiar with RIFF’s proposal now before the Division and that the NK-Chamber still fully supports it. As a further expression of support, Ms. Pughe testified that the NK-Chamber submitted a letter to the Division on August 8, 2013 wherein it urged the Division to approve RIFF’s application.⁵¹

Ms. Pughe related that the NK-Chamber supports RIFF’s application because it believes that RIFF “has all the necessary ingredients for success, including its existing infrastructure and intermodal transportation connections

⁵⁰ RIFF Exhibit 4, p. 2.

⁵¹ Id., pp. 2-3. A copy of the Chamber’s August 8, 2013 letter of support was marked as RIFF Exhibit 5.

via Routes 4 and 403. We also believe that offering tourists another, more convenient, Block Island fast ferry option will encourage more commerce by tapping into the market of people who might not have otherwise travelled to the island.”⁵² Ms. Pughe concluded that the NK-Chamber believes that RIFF’s services will “grow the market... rather than simply redistribute it.” She added that competition is “healthy, as it should cause the service providers to innovate and improve their business operations.”⁵³

Ms. Myrna George testified that she has been the President of the South County Tourism Council (“SCTC”) for over 10 years. She testified that the mission of the SCTC is to “plan, promote and market tourism beyond our 11-town region.” Ms. George explained that this effort includes “identifying our target tourism market, and developing marketing campaigns that attract visitors to our region.”⁵⁴

Ms. George testified that she is familiar with the business operations of both RIFF and Interstate. She related that she is also familiar with RIFF’s current plans to operate a high-speed ferry between Quonset and Block Island. Regarding RIFF’s current plans, Ms. George testified that SCTC supports RIFF’s proposal and has submitted a letter to the Division that expresses this support.⁵⁵

⁵² Id., pp. 3-4.

⁵³ Id., p. 4.

⁵⁴ RIFF Exhibit 2, p. 1.

⁵⁵ Id., pp. 2-3. A copy of the SCTC’s August 14, 2013 letter of support is included in the exhibit; and also separately marked as RIFF Exhibit 3.

Ms. George explained that SCTC supports RIFF's proposed high-speed service to Block Island because "it may reduce some of the traffic burden in South County during [the] high season, created by those travelling to South County to reach other destinations, while at the same time it would increase the convenience and ease of access for ferry passengers coming from areas outside of South County."⁵⁶ Ms. George also explained that SCTC also supports alternative modes of transportation "and believes that the convenient access to Quonset via Routes 4 and 403 is underutilized." Ms. George also opined that due to "the proximity of Quonset to the Routes 4/403 exchange, Wickford Junction and the Airport, travelers from Northern Rhode Island and Massachusetts, as well as long distance airline passengers, should find RIFF's Block Island fast ferry option particularly appealing."⁵⁷

Mr. Steven King identified himself as the Managing Director of the Quonset Development Corporation ("QDC"). He said that he has held that position since 2008. Mr. King testified that as a Quonset tenant, he is familiar with RIFF's business operations and familiar with RIFF's plans to provide high-speed ferry services to Block Island. He also testified that the QDC supports RIFF's application.

Mr. King related that RIFF's proposal to operate a new fast ferry service from Quonset is consistent with RIFF's lease with QDC. He also testified that QDC supports RIFF's plans because, if approved, "it will optimize the use of

⁵⁶ Id., pp. 3-4.

⁵⁷ Id., p. 4.

RIFF's newly renovated docking facilities and will create additional private investment and employment opportunities."⁵⁸ Mr. King noted that QDC submitted a letter to the Division on August 6, 2013 expressing support for the instant application process.⁵⁹ Mr. King added that QDC recently completed construction of two new docks to support RIFF's existing ferry operations with funding from RIDOT.⁶⁰ Mr. King testified that RIFF was eligible for the funding because it was successful in demonstrating "that the project would result in mitigation of vehicular traffic congestion and would have a collateral effect of improving air quality by taking automobiles off the road."⁶¹

Mr. Robert Billington identified himself as the President of the Blackstone Valley Tourism Council ("BVTC"). He related that he has been serving in that capacity for over 30 years. He also related that the BVTC's mission is to develop sustainable tourism in the Blackstone Valley of Rhode Island. However, Mr. Billington explained that his support for the Applicant's services reflects his own personal support and not that of the BVTC.

Mr. Billington testified that he is familiar with the business operations of both RIFF and Interstate and is familiar with RIFF's proposal to provide high-speed ferry services between Quonset and Block Island. Mr. Billington also testified that he supports RIFF's application.

⁵⁸ RIFF Exhibit 10, pp. 2-3.

⁵⁹ Id., p. 3. A copy of the QDC's August 6, 2013 letter of support is included in the exhibit; and also separately marked as RIFF Exhibit 11.

⁶⁰ Id.

⁶¹ Id.

Mr. Billington explained that he supports RIFF's proposal "because Quonset will present a more convenient departure point to Block Island for persons living in Northern Rhode Island, which is the main State population base and location of major tourism markets..."⁶² He also observed and opined that RIFF "already has infrastructure in place at Quonset to accommodate the service... [and that] a Quonset fast ferry service may take some traffic off the roadways, alleviating Summertime congestion..." He added that he also believes RIFF's service "will satisfy pent up demand for more convenient travel to Block Island."⁶³

On this latter point, Mr. Billington testified that "it is a well known fact in the Rhode Island tourism industry that many Rhode Islanders have never enjoyed a trip to Block Island." Mr. Billington related that he first became aware of this fact ten years ago when he was involved in a program known as Tour RI. While at Tour RI, an organization he founded to promote tourism in Rhode Island, Mr. Billington said that he was surprised to see that so many Rhode Islanders were interested in visiting Block Island. He related that "the Block Island tours... always sold out first." However, he also believes that many Rhode Islanders "do not travel to Block Island because it is viewed as distant and difficult to reach." He opined that if "they are presented with a more convenient mode of traveling to the Island they will take advantage of it, even if the cost of that convenience is higher than driving to Galilee, parking

⁶² RIFF Exhibit 8, pp. 2-3.

⁶³ Id., p. 3.

and purchasing a ferry ticket.” Mr. Billington concluded his testimony by declaring that he believes that there is a public need for RIFF’s proposed services.⁶⁴

4. The Town’s Direct Case

The Town proffered pre-filed direct testimony from two witnesses in opposition to RIFF’s application filing. The witnesses were identified as Mr. Kenneth C. LaCoste, New Shoreham’s First Warden; and Mr. Stephen C. Land, New Shoreham’s Harbormaster.

First Warden LaCoste recounted that on August 5, 2013, Mr. Donadio made a verbal presentation to the New Shoreham Town Council regarding his proposed ferry services to Block Island. First Warden LaCoste related that Mr. Donadio told the Council that the ferry “will be at the dock for about an hour and a quarter each day... [that] no dockside ticketing facilities are planned... [and that] he planned to build a new ferry for the run, approximately 105 feet long with a 32-33 foot beam and a passenger capacity between 150 and 300... that the ferry will carry luggage and bicycles but [not] vehicles and freight... [and that] he estimated two to three round trips per day from Memorial Day to Columbus Day, depending on demand.”⁶⁵

In response to Mr. Donadio’s presentation, First Warden LaCoste related that the Council expressed a number of concerns. He described the concerns as follows:

⁶⁴ Id., pp. 3-5.

⁶⁵ Town Exhibit 1, p. 2.

a. Old Harbor is a relatively small harbor with much traffic in the summer months including the local fishing fleet, the charter fishing fleet, other charter boats, transient wharfage in Old Harbor, pleasure vessels and already existing ferries. The addition of yet another ferry to that harbor will cause further disruption, crowding and problems with vessel maneuvering. Safety is a serious concern.

b. There is no dock where the Fast Ferry vessel could dock except for possibly Ballard's Wharf; however, the construction and use of that dock is under a CRMC assent which only permits pleasure vessels and then no more than eight boats, with the seaward two boats limited to 26 feet in length.

c. The addition of a new passenger service at a time when the island is already saturated with people is a serious problem.

d. Ferry service rate increases as determined by the Public Utilities Commission cause a hardship to residents of the island. One of the factors which is a component of the Public Utilities Commission's decision to allow a rate increase is the income of Interstate Navigation. Interstate Navigation provides the only ferry service to and from Block Island during the off-season months and serves as a life line from the Town to the mainland for island residents. The revenues which Interstate Navigation obtains from the in-season period of Memorial Day to Columbus Day support the off-season ferry service. Rhode Island Fast Ferry plans to operate only from Memorial Day to Columbus Day, depending on demand and, if allowed to operate, would divert significant revenues from Interstate Navigation, thus resulting in either another rate increase for Town residents or a substantial reduction in service during the off-season months.⁶⁶

First Warden LaCoste next testified that Mr. Donadio made a second presentation to the Town Council on September 18, 2013, at which time he

⁶⁶ Id., pp. 3-4.

indicated that he wanted “a positive relationship” with the Town and “is not going to force a ferry service on the island.” First Warden LaCoste also recounted that at that time Mr. Donadio “suggested that the Town apply for a grant to fund the construction of a dock.” After his presentation and based on the concerns identified above, First Warden LaCoste testified that the Town Council decided (voted) to oppose Mr. Donadio’s application. First Warden LaCoste also remains disappointed that Mr. Donadio failed to honor his commitment to the Town that he would not seek a CPCN without the Town’s support.⁶⁷

Mr. Stephen Land testified that he has been the Town of New Shoreham’s harbormaster since 2010. He also serves as a New Shoreham police officer. After describing his harbormaster qualifications, Mr. Land echoed the safety concerns enumerated earlier by the First Warden. He offered the following explanation for his concerns:

As Block Island Harbormaster my greatest concern regarding the Rhode Island Fast Ferry proposed service in Old Harbor, Block Island is the overall issue of public safety. The addition of another ferry service into an already extremely busy, mixed use harbor should be of great concern to everyone. Old Harbor is currently crowded throughout the summer months (the only months the new service has proposed to run) with swimmers, kayakers, pleasure boaters, wind surfers, paddle boaters, sailing, commercial fishing, lobster and charter boat companies, parasail and banana boat and for other recreational uses. These activities are combined with the several already established ferry services arriving and departing multiple times per day in and out of Old Harbor.

⁶⁷ Id., pp. 5-7.

In addition, it is my understanding that the RIFF does not have an actual dock space at this time in Old Harbor. Reading the RIFF testimony, I can only assume that the RIFF intends to use an area on the north side of Ballard's Marina, which is not a commercial dock. This would prove to be a significant challenge to any captain trying to dock the proposed RIFF ferries in this small area. The distance currently between the Ballard's Marina dock and the Wronowski's to the North, where the New London High Speed Ferry docks is 154 feet. Realistically, given the size of the RIFF vessels, the current dock space is inadequate and will leave a portion of the vessels to extend beyond the end of the dock on the east side, and require approximately 38' to 40' on the north side. This would leave only a small area for the non RIFF ferries and other boat traffic to maneuver. Compounding the issue is the way the two docks are awkwardly angled, (in toward each other) increasing the difficulty of safely docking the proposed RIFF vessels.⁶⁸

In closing, Mr. Land stated that it was his professional opinion that "the RIFF ferries in the Old Harbor of Block Island would pose a serious public safety hazard."⁶⁹

5. Interstate's Direct Case

Interstate proffered pre-filed direct testimony from three witnesses in opposition to RIFF's application filing. The witnesses were identified as Mr. Edward M. Mazze, Ph.D, Professor of Business Administration at the University of Rhode Island and a consultant in business and economics matters; Mr. Walter E. Edge, Jr., CPA, Vice President of B&E Consulting LLC, a consulting firm that specializes in accounting and utility regulatory matters; and Mr.

⁶⁸ Town Exhibit 2, pp. 3-4.

⁶⁹ Id., p. 4.

Michael A. Voccola, Esq., representing The Lighthouse Inn Galilee, 307 Great Island Road, Narragansett, Rhode Island.

Dr. Mazze related that the purpose of his testimony in this docket is to identify and discuss a marketing research study that he conducted for Interstate in 2013 on passenger ridership on Interstate's traditional and high-speed ferries that operate between Point Judith and Block Island; and to testify on the Applicant's proposed high-speed service between Quonset and Old Harbor, Block Island. Dr. Mazze's qualifications to testify as an expert witness, in the areas of business and economics, was not challenged by the Applicant.

In his opening comments, Dr. Mazze opined that based on his research, "Interstate would lose as much as 17% of its traditional ferry passengers and 27% of its hi-speed ferry passengers from Point Judith during the summer months if Rhode Island Fast Ferry is permitted to offer summer-only, passenger only high-speed ferry service from Quonset Point to Old Harbor Block Island under different pricing and travel time scenarios." Dr. Mazze also opined that if RIFF's application is approved, its services would "negatively impact Interstate's lifeline passenger, vehicle and freight services to Block Island by taking away customers and revenue from Interstate during the summer months."⁷⁰

In reaching this conclusion, Dr. Mazze related that in addition to the study he conducted, he has also reviewed "business information provided by Interstate and filings, pleadings and other documents submitted to the Division

⁷⁰ Interstate Exhibit 5, p. 4.

by Interstate and other parties in this matter.” He also is basing his opinion on “my education, training and experience as a consultant to businesses and government agencies... [and] corporate board memberships...”⁷¹

Dr. Mazze testified that the purpose of his study was to determine if passengers of Interstate’s traditional and high-speed ferries would travel to Block Island on a fast ferry from Quonset Point under various pricing scenarios. To collect information, he related that a survey was used and that the questions in the survey were pre-tested to make sure that they were clear and not leading. He related that the survey included open-ended questions about the passengers being surveyed and closed-ended questions that required a “Yes” or “No” response; that the survey participants were passengers purchasing tickets from Interstate’s ticket office in Point Judith; that a “non-probability convenience sample” was used to choose respondents; that 200 passengers per day were surveyed; and that the study was conducted in July, August and September, one day each month (on July 31, August 12 and September 7), in the morning and early afternoon to collect information from round-trip day-trippers and others.⁷²

Dr. Mazze testified that the survey given to Interstate’s traditional ferry passengers asked the following questions: (1) in the summer months, approximately how many times do you travel on the Block Island conventional ferry? (2) What is your City? State? Zip Code? (3) How many people are

⁷¹ Id., pp. 4-5.

⁷² Id., pp. 5-6.

traveling in your party today? (4) If there was a \$50 round-trip fast ferry to Old Harbor from Quonset Point in North Kingstown, would you take the Quonset fast ferry instead of the Point Judith conventional ferry? Yes, No and (5) If the conventional ferry cost is about \$27 per person less from Point Judith than the Quonset fast ferry, does that change your answer to question 4? Yes, No.⁷³

For the passengers purchasing high-speed ferry tickets, the survey contained the following questions: (1) in the summer months, approximately how many times do you travel on the Block Island fast ferry? (2) What is your City? State? Zip Code? (3) How many people are traveling in your party today? (4) If there was a \$50 round-trip fast ferry to Old Harbor from Quonset Point in North Kingstown and took 1 hour on the water, would you take the Quonset fast ferry instead of the Point Judith fast ferry? Yes, No (5) If the cost is about \$15.00 per person less from Point Judith than from Quonset, does that change your answer to question 4? Yes, No and (6) If the on the water travel time is about a half hour less from Point Judith than from Quonset, does that change your answer to question 4? Yes, No.⁷⁴

Dr. Mazze next described the results of the surveys in detail, broken down by date.⁷⁵ He offered the following summary of the overall results of the study:

The results of the three surveys were: 17% of traditional ferry respondents answered that they would take the fast ferry from Quonset Point to Old Harbor,

⁷³ Id., p. 7.

⁷⁴ Id., pp. 7-8.

⁷⁵ Id., pp. 8-11.

Block Island if the round-trip cost was \$50 and twenty-seven percent of hi-speed ferry respondents answered that they would take the fast ferry if the round-trip cost was \$50.

55% of the respondents traveled in parties of two or more.

50% of the respondents made only one trip to Block Island during the summer months. Of these respondents, 51% traveled by hi-speed ferry and 49% the traditional ferry.

130 of the 614 surveyed passengers (21%) answered they would take the fast ferry from Quonset Point to Block Island before different scenarios were presented to them.

When different pricing and travel time scenarios were introduced to the respondents, the findings were:

57% of the traditional ferry passengers (34 of the 59 respondents who would take the fast ferry) answered that they would not take the fast ferry if the cost for taking the traditional ferry from Point Judith was \$27 less per person.

56% of the hi-speed passengers (40 of the 71 respondents who would take the fast ferry) answered that they would not take the fast ferry from Quonset Point if the cost was \$14 less from Point Judith.

62% of the hi-speed ferry passengers (44 of the 71 respondents who would take the fast ferry) answered that they would not take the fast ferry from Quonset Point if the on-the-water travel time is about a half hour less from Point Judith.⁷⁶

Based on the study results, Dr. Mazze concluded that RIFF would take away as many as 20% of the total passengers of Interstate's ferries during the

⁷⁶ Id., p. 11

summer months. This would include 17% of the traditional ferry passengers and 27% of the high-speed ferry passengers. Dr. Mazze testified that this outcome would have a significant negative impact on Interstate's yearly revenue and would adversely impact Interstate's ferry operations, including its year-round lifeline passenger, vehicle and freight service from Point Judith to Block Island.⁷⁷

Dr. Mazze next testified that after reviewing the pre-filed direct testimony of RIFF's witnesses, he noticed that none of their opinions relied on or used "any economic study, marketing study, traffic study, [or] tourism study of Block Island or marketing plan from... [RIFF]." He observed that Mr. Billington "relied on a Tourism Satellite Account for Rhode Island which made no mention of Block Island, fast ferry service in Rhode Island or the market for additional fast ferry service in Rhode Island;" that Mr. King's "knowledge about... [RIFF's] operations came from... [RIFF's] Counsel;" that Ms. Dolan "relied on her firsthand knowledge and experience with severe auto congestion on Route 4 and Route 1 from May through September;" that Ms. George "relied upon her experience of having lived in South County her entire life;" and that Mr. Kunkel "relied on the direct testimony of Billington and being recognized by the PUC as an expert in economics, finance and game theory."⁷⁸

Regarding Mr. Donadio's pre-filed testimony, Dr. Mazze again observed that "Donadio presented no economic, marketing, traffic or tourism studies...

⁷⁷ Id., p. 12.

⁷⁸ Id., pp. 12-13.

to support his opinions.” He also noted that Mr. Donadio “did not present a business plan, marketing plan or marketing feasibility study showing that there was a public need for an additional high speed ferry service to Block Island from Quonset Point.”⁷⁹

Dr. Mazze additionally opined that ferry passengers to Block Island would not benefit from competition between Interstate and RIFF. He related that “[t]rue competition can be beneficial when it can lower prices, offer better services for passengers and allow firms to compete on a level playing field.” However, he explained that there are times where competition is not beneficial “particularly if reliable and affordable service can best be served by a single regulated carrier.” Dr. Mazze maintained that when passengers “are receiving adequate service and there is enough capacity to meet the needs of passengers, new competition is not efficient.”⁸⁰

In further support of his opinion, Dr. Mazze stressed that RIFF plans to offer only passenger service, and only during the summer months taking passengers and revenue away from Interstate. He contended that this “is not true competition because... [RIFF] will not be running year-round service and will not be carrying vehicles and freight. This is what is known as ‘cream skimming’ or ‘cherry picking.’”⁸¹

Dr. Mazze related that Interstate’s high-speed ferry accounts for about 16% of its yearly revenue and the traditional ferry accounts for 84% of its

⁷⁹ Id., p. 13.

⁸⁰ Id., p. 14.

⁸¹ Id.

revenue. He emphasized that the summer revenue is needed to support Interstate's lifeline services to the island throughout the year; and that a loss of revenue would result in Interstate having to raise rates, reduce the number of ferries to the island and/or downsize the number of full-time and seasonal workers. Dr. Mazze also noted that Interstate has invested much money in promoting its ferry services to Block Island, and that it would be unfair to permit RIFF to benefit from Interstate's advertising expenditures during the most profitable time of the year.⁸²

In addressing Interstate's opposition to RIFF's application, Mr. Walter Edge stated that his testimony covers the following six areas connected to RIFF's case:

1. Proving calculations and testimony showing the expected adverse financial impact (if the requested RIFF fast ferry CPCN is approved) on both Interstate's existing fast ferry service and Interstate's traditional lifeline service, both of which will be directly, significantly, and negatively affected. I have calculated that Interstate would lose over \$1.2 million, which would require a 14.2% rate increase and/or a reduction in service.
2. Clarifying for the record some of the points raised by RIFF witnesses regarding the history of regulation relating to these two entities.
3. Addressing falsehoods in the RIFF pre-filed testimony relating to Interstate in order to correct the record.
4. Reviewing the claims regarding the alleged need for the proposed service given the current fast ferry market in southern New England.

⁸² Id., p. 15.

5. Evaluating the observations of the RIFF witnesses and the documentation used by them attempting to show that there is a need for the proposed RIFF service and demonstrating why I am of the opinion that their conclusions, based upon my review of their own documentation, are wrong and their faith in the documentation is misplaced.

6. Determining if the public in general will be provided a more convenient high speed service than what already exists if the RIFF application is granted.⁸³

Mr. Edge began his testimony by opining that (1) there is no need for the proposed RIFF service because the fast ferry market to Block Island is saturated; (2) there will be no general public convenience provided by the proposed service; (3) the addition of the RIFF service is contrary to the public interest; (4) the proposed service will result in wasteful competition, cream skimming, and adverse impacts on Interstate's lifeline service, the lifeline ratepayers, and the Town of New Shoreham.⁸⁴

Mr. Edge agreed with Dr. Mazze that 'Interstate would lose as much as 17% of its traditional ferry passengers and 27% of its hi-speed ferry passengers from Point Judith during the summer months if [RIFF] is permitted to offer summer-only, passenger only high-speed ferry service from Quonset Point to Old Harbor...', and 'that, if [RIFF's] application is approved, [RIFF] would negatively impact Interstate's lifeline passenger, vehicle and freight services to Block Island by taking away customers and revenue from Interstate during the

⁸³ Interstate Exhibit 2, pp. 1-2.

⁸⁴ Id., p. 2.

summer months.⁸⁵ Mr. Edge based his opinion on his education, training, and experience as a CPA and as a 24-year consultant for Interstate and many other regulated utilities in Rhode Island.⁸⁶

In calculating the financial impact on Interstate's lifeline service, Mr. Edge related that, based on Dr. Mazze's study, Interstate would lose \$1,214,590 of revenue if RIFF's proposed services are approved. He testified that to offset this impact, Interstate would have to increase its traditional service rates by 14.2%.⁸⁷ Mr. Edge also explained that the impact to Interstate's traditional ferry service rates come from the fact that "Interstate's traditional rates are calculated using 100% of the fast ferry profit."⁸⁸

Mr. Edge next compared the instant docket to the 2005 docket in which Interstate sought a high-speed ferry service CPCN from the Division at a time when there was another high-speed ferry service provider, IHSF, already operating between Point Judith and Block Island.⁸⁹ In contrasting the differences, Mr. Edge first noted that when Interstate applied for a CPCN it relied on a study that used a survey of its own customer base. He related that the study showed that 70% of the projected ridership would come from Interstate's own traditional service passengers. Mr. Edge points out that RIFF has offered no such studies to support its application.⁹⁰

⁸⁵ Id.

⁸⁶ Id., p. 3.

⁸⁷ Id., pp. 3-4.

⁸⁸ Id., p. 4.

⁸⁹ Id., pp. 4-5; referring to Docket D-05-06.

⁹⁰ Id., p. 5.

Mr. Edge next points out that in its 2005 case, Interstate provided complete operational and financial information, including a description of the vessel that would be used, rates, projected revenue and expenses, estimated financial impact on Interstate's lifeline customers and services, and the exact number and scheduled times of all trips proposed. He notes that RIFF "has provided none of these important pieces of information."⁹¹

Mr. Edge added a number of other comparisons to Interstate's 2005 case. First, that Interstate offered three options that were designed to protect Interstate's lifeline customers if Interstate's fast ferry was unsuccessful, and that RIFF has offered no such options to protect Interstate's lifeline customers or services, or any assurances that their entry into the fast ferry business will not hurt Interstate's lifeline customers.

Mr. Edge next discussed a number of comparisons that involve Mr. Kunkel, who Mr. Edge noted was IHSF's expert witness in the 2005 case (IHSF was an Intervenor in that case). Mr. Edge related that despite Mr. Kunkel's opinion in the 2005 case that IHSF and Block Island Express (another high-speed ferry company who operates between New London and Block Island) were "in direct competition" with each other, Mr. Kunkel now opines that RIFF and Interstate "would not be in direct competition" if RIFF's application is approved. Mr. Edge also relates, that despite Mr. Kunkel's concerns in 2005 that both IHSF and Interstate would financially suffer from the direct competition that would result from Interstate's entry into the fast ferry market,

⁹¹ Id., p. 5.

“Mr. Kunkel shows no concern at all for Interstate’s lifeline service” in this docket.⁹²

Mr. Edge further relates that Mr. Kunkel also based IHSF’s opposition to Interstate’s application in 2005 on the fact that there were “nearly 1,000,000 seats of fast ferry capacity serving Block Island and that only 16% of that capacity was being used.” Mr. Edge testified that because the same excess capacity exists today, Mr. Kunkel’s opinion in this case conflicts with the testimony he offered in 2005. He also related that due to Interstate’s new Fall River service, “I estimate that there are over 130,000 additional fast ferry seats now available.”⁹³ Mr. Edge also recounts that in his 2005 testimony before the Division in the Interstate case, Mr. Kunkel asserted that “no rational business person would enter a market characterized by extraordinary excess capacity, intense competition, which requires a capital intensive investment and which is highly regulated in the sense that management does not have the ability to adjust prices on a discretionary basis.”⁹⁴ Mr. Edge also points out that IHSF ultimately sold its assets to Interstate “when it became obvious that Interstate’s CPCN would be approved.”⁹⁵

Mr. Edge next indicated that he wished to offer some clarifications based on his review of RIFF’s pre-filed direct testimonies. He proffered the following clarifications:

⁹² Id., pp. 6 and 10-11.

⁹³ Id., pp. 6-7.

⁹⁴ Id., p. 7.

⁹⁵ Id., pp. 7-8.

In response to Mr. Kunkel:

- That Mr. Kunkel is correct that Interstate was not serving “a dormant high speed ferry business” when IHSF’s CPCN application was being considered by the Division in 1998 because, at the time, Interstate contended that high speed service as not needed. However, Mr. Edge related that in 2005 Interstate admitted that its earlier belief was wrong and that the fast ferry market was in fact growing. Mr. Edge also stated that although Interstate’s “death spiral” prediction was wrong when it was opposing IHSF’s application, Interstate “did suffer significant lost revenues during those five years.”⁹⁶

- That while it is true that Interstate just started two additional fast ferry services to Block Island (from Newport and Fall River), Mr. Edge declares that Mr. Kunkel’s contention that Interstate was starting the new services to respond to increased demand and RIFF’s planned service from Quonset is false.⁹⁷

- That Mr. Kunkel has not identified Interstate’s ‘ultimate payoff’ correctly. Mr. Edge asserts that Interstate has never decided to spend ratepayer money to fight to maintain its allegedly monopolistic position, but only to protect its lifeline services. Mr. Edge also rejects the claim that Interstate was looking to regain a monopolistic position in the fast ferry market “because it never had one.”⁹⁸

⁹⁶ Id., p. 8.

⁹⁷ Id., p. 9.

⁹⁸ Id., pp. 9-10.

- That Mr. Kunkel's assertion in 2005 that Interstate's motives for requesting a fast ferry CPCN were 'predatory' has been proven wrong. Mr. Edge notes that the Division's final written decision that was issued in that docket reflects that the Division "rejected Mr. Kunkel's predatory arguments."⁹⁹

- That Mr. Kunkel is incorrect in his comments regarding Interstate's decisions to begin fast ferry services from Newport and Fall River. Mr. Edge relates that "the Newport service has been in the works for years and the Fall River service has nothing at all to do with RIFF."¹⁰⁰

In response to Mr. Donadio:

- Mr. Edge questions the accuracy of Mr. Donadio's claim that he knows that his service will be better than Interstate's current fast ferry service based on the proximity of their respective operations 12 years ago. Mr. Edge notes that Interstate was not operating a high-speed ferry at the time Mr. Donadio was operating the Southland Riverboat and thus questions the basis for Mr. Donadio's assertion.¹⁰¹

- Mr. Edge questions why Mr. Donadio replaced the *M/V Millennium*, which had a capacity of 400 with the *M/V Ava Pearl*, which has a capacity of 150, if RIFF's services to Martha's Vineyard "was so successful?"¹⁰² Mr. Edge is also critical of RIFF's failure to identify which vessel it plans to use for its proposed Block Island service due to the significant problem this creates for

⁹⁹ Id., 9.

¹⁰⁰ Id., p. 10.

¹⁰¹ Id., p. 12.

¹⁰² Id.

Interstate “in estimating the number of passengers that RIFF will be carrying in the summer during the peak travel months.”¹⁰³

- Mr. Edge relates that although RIFF’s 4000 square foot terminal facility “sounds nice,” Interstate’s customers currently benefit from having “all of Galilee to enjoy while they wait...”¹⁰⁴

In response to “Public Need” claims:

- Mr. Edge rejects the notion that Mr. Billington’s Tour RI experience shows that there is an untapped, pent-up demand for fast ferry service to Block Island which is currently not being serviced. Mr. Edge argues that “although Tour RI was a nice political idea, it was heavily subsidized, infrequently offered, and turned out to be a program that ran out of steam in just a few years.”¹⁰⁵ Mr. Edge related that the Tour RI service only ran once per year and carried fewer than 200 people to Block Island. He reasoned that this limited and subsidized service does not provide evidence of an untapped market, only evidence “that there is an untapped population that will go to Block Island if they don’t have to pay for the boat ride.”¹⁰⁶

In response to “Amenities” claims:

- Mr. Edge stated that he would leave it to the Division to judge the differences in the amenities proposed by RIFF compared to those offered by

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id., p. 14.

¹⁰⁶ Id., pp. 14-15.

Interstate. He contended that the differences do not justify a claim of need for a new service.¹⁰⁷

In response to "Population Radius" claims:

- Mr. Edge rejected RIFF's radius population analysis based on his opinion that the analysis "is not representative of the facts." Mr. Edge maintains that because Interstate already serves "all of Rhode Island... and many customers from Massachusetts and Connecticut, and many other states and countries," RIFF can only be targeting customers already served by Interstate. Mr. Edge also points out that Interstate is also providing high-speed ferry services to Block Island from Newport and Fall River, which RIFF appears to have not considered in its analysis.¹⁰⁸

In response to "Contacts Made Directly to RIFF" claims:

- Mr. Edge gave very little credence to RIFF's claim that it often receives calls and visits from individuals looking to travel to Block Island. He noted that RIFF did not quantify these calls or visits; and that "hits on a website are far less meaningful." Mr. Edge described this evidence "as a very weak argument attempting to support the need and/or convenience required for a CPCN."¹⁰⁹

In response to "Reduction of Summer Traffic" claims:

- Mr. Edge rejected the argument regarding a reduction of summer traffic as evidence of need for a new fast ferry service to Block Island. Mr. Edge

¹⁰⁷ Id., p. 15.

¹⁰⁸ Id., p. 16.

¹⁰⁹ Id., p. 17.

asserted that the only way that RIFF's proposed service would reduce summer traffic "is if RIFF is directly taking away Interstate customers."¹¹⁰

In response to "Ms. Elizabeth Dolan, Ms. Martha Pughe and Ms. Myrna George" claims:

- Mr. Edge similarly rejected the testimonies of Ms. Dolan, Ms. Pughe and Ms. George as supportive of RIFF's application. While Mr. Edge accepts that their claims that RIFF's proposed ferry service to Block Island is likely to bring economic benefits to North Kingstown and South County, Mr. Edge stresses that these witnesses failed to consider the problems RIFF's service will cause for the Town of New Shoreham. Mr. Edge testified that Block Island:

...is already maxed out in the summer with day trippers and vacationers. Their police, public works, bathroom facilities, and medical services are already maxed out and if RIFF brings an entire new population of day trippers and vacationers, the Island will not be able to handle the influx, especially at peak times, such as summer weekends and holidays. If, on the other hand, RIFF simply takes former Interstate customers to the Island in the summer, the crowds will be the same, but the lifeline transportation to the Island in the winter will cost more or services will need to be reduced, due to the loss of income. Block Island loses either way.¹¹¹

In response to "Convenience" claims:

- Mr. Edge began his testimony on this issue with his definition of "convenience." He opined that in the context of ferry travel, convenience is: "(1) ease of travel, (2) comfort of travel, (3) time it takes for travel, (4) price, (5)

¹¹⁰ Id., pp. 17-18.

¹¹¹ Id., p. 18.

method of payment, (6) access to facilities and activities (at point of departure and landing), (7) number of departures and return times, (8) time at sea (water travel), (9) weather conditions, and (10) condition at sea.”¹¹² Mr. Edge testified that as a criterion for the issuance of a CPCN, public convenience includes all of the items listed above. He added that in his opinion, Interstate “is the most convenient water transportation to Old Harbor, Block Island and best serves the general public convenience.” He further opined that “ignoring the general public convenience for a bit more convenience for a small group of others is not public convenience.”¹¹³ In the instant case, Mr. Edge asserted that the question that must be answered “is does the ‘possible’ convenience of an insignificant, mostly out of state, inactive, unknown population (which represents RIFF’s projected customer base), and alleged ‘pent-up’ demand carry more weight than the harm to the Town of New Shoreham, its year-round residents, Interstate’s current ratepayers..., and all other island visitors who will pay higher prices for all goods on the Island because of increased freight and truck rates.” He declared: “I think not.”¹¹⁴

In response to “Competition” claims:

- Mr. Edge insisted that Interstate is not concerned about competition.

He related that the process used for setting utility rates protects Interstate and its stockholders from competition. Instead, he contends that Interstate is concerned that the loss of revenues due to RIFF would be passed on to

¹¹² Id., p. 19.

¹¹³ Id.

¹¹⁴ Id., pp. 19-20.

Interstate's ratepayers through rate increases or through reductions in service. Mr. Edge did express concern however in that the direct competition that would exist between Interstate and RIFF "won't be fair competition." He noted that if RIFF is allowed to compete, it "will have the luxury of using its profits as it pleases, while Interstate will have to use its profits to subsidize its traditional service." Mr. Edge opined: "clearly, this is unfair competition."¹¹⁵ Mr. Edge also finds it "unfair" that RIFF will operate a passenger-only, summer-only, service while Interstate must operate year-round and carry freight, trucks and cars as well as passengers. He asserts that this added risk puts Interstate's ratepayers at risk of higher rates.¹¹⁶

In his final comments, Mr. Edge compared RIFF's current application before the Division with another ferry service application case that the Division addressed in Docket No. D-13-105.¹¹⁷ Mr. Edge acknowledged that although the Division approved that application, which involved competing ferry services between Bristol and Prudence Island (Portsmouth), he stresses that this case presents several contrasting circumstances. He enumerated the following differences:

1. In this case, there are no witnesses for the applicant testifying that they are 'frustrated and unhappy' with Interstate's amenities, or the care of Interstate's docks, ramps or parking areas.

¹¹⁵ Id., pp. 20-21.

¹¹⁶ Id., p. 21.

¹¹⁷ See Order No. 20136. The application in Docket D-13-105 was filed by A&R Marine Corporation, d/b/a Prudence & Bay Islands Transport, 894 Neck Farm Road, Prudence Island, Rhode Island seeking authority to operate as a common carrier of persons and property upon water between Bristol, Rhode Island and Prudence Island and Hog Island in Portsmouth, Rhode Island.

2. There are no witnesses in this docket that have complained about Interstate's efforts to modernize its operations.

3. There are no witnesses in this docket that have claimed that Interstate or its management is 'unresponsive, unstable, manipulative and vindictive.'

4. In this docket, the Town of Block Island supports Interstate and does not want the services of the proposed competitor.

5. In this docket, Interstate has put on a full case to clarify certain comments provided by RIFF witnesses and to provide information that Interstate feels would assist the Division.

6. Interstate is committed to a future of reliable, safe, comfortable, affordable, and year-round traditional lifeline off-season service, and a complete schedule during the summer of reliable, safe, comfortable, and affordable fast ferry service.

7. Interstate believes and has provided testimony showing that the proposed RIFF service is not in the public interest and the RIFF CPCN, if awarded, would result in wasteful competition, an increase in lifeline rates, and/or a reduction in service.

8. Interstate agrees with the Division's observation in Docket D-13-105 that the approval of IHSF's CPCN was a good decision because it brought fast ferry service to Block Island. Although Interstate was late to the dance, and did not initially see the need and desire for fast ferry service, it paid for its mistake by a reduction of revenues for the next few years. Interstate then obtained its own fast ferry service to give its customers choice. Interstate eventually bought out IHSF in order to compete with BI Express from New London, which was taking far more customers from Interstate than IHSF ever did. Interstate may be missing something again, but we see no eventual benefit similar to the benefit which

arose from the Division's authorization of the IHSF CPCN, now or in the future.

9. If the RIFF CPCN is approved, Interstate requests that the same type of conditions, where applicable, be required of RIFF that were included in the Ordered section of the Docket D-13-105 Order.¹¹⁸

Mr. Michael Voccola identified himself as representing the interests of PRI X, LP, d/b/a The Lighthouse Inn Galilee ("PRI X"), which he described as a joint entity of The Procaccianti Group and Joseph R. Paolino, Jr. Mr. Voccola stated that the Lighthouse Inn Galilee is located at 307 Great Island Road in Narragansett.

Mr. Voccola testified that PRI X strongly objects to RIFF's application to operate a fast ferry from Quonset Point to Block Island.¹¹⁹ He explained that PRI X purchased the Lighthouse Inn Galilee property in 2005 "due to its seasonal attraction to our shoreline, its excellent proximity to Narragansett and Galilee, in general, and to ... [Interstate's] Block Island ferry service, and the Lighthouse Inn large parking area directly opposite the dock."¹²⁰ Mr. Voccola further explained that PRI X also made the purchase because "Interstate operates both the conventional ferry for patrons, cars and cargo and a 'fast ferry' for patrons only, the synergy and potential for additional co-partnering and fostering of mutual revenue generators between us and among us and the balance of the area was excellent."¹²¹

¹¹⁸ Id., pp. 22-23.

¹¹⁹ Interstate Exhibit 4, p. 2.

¹²⁰ Id., p. 3.

¹²¹ Id.

Mr. Voccola continued by testifying that shortly after PRI X acquired the property, Rhode Island's economy was hit by "the worst recession since 1929," which resulted in a dramatic loss of business at the Lighthouse Inn Galilee. He related that "[o]nly now are we seeing a minor indication of recovery." Mr. Voccola related that PRI X is supporting Interstate's opposition to RIFF's application in this case because "[w]e feel that the existence of ferry service at Galilee is critical to the economic health of the greater South County area..." He added: [t]he dedication of Interstate and their documented history of reinvestment in boats and equipment is a clear indication of their loyalty to this area;" and that "the continuation and enhancement of their service from Galilee to Block Island is of paramount importance to all."¹²²

Mr. Voccola opined that PRI X is opposed to RIFF's application due to the fact that "any ferry service from Quonset Point, particularly a seasonal-only service, will severely impact Interstate's revenues – revenues they need to maintain the winter service." He related that with less revenues, Interstate will be forced to cut back in their reinvestment in its equipment and facilities; and that "any decline in ridership in Galilee will impact all the businesses which have evolved as a result of this historic service." Mr. Voccola predicted that granting RIFF's application "will create an unstoppable downward economic spiral for greater Galilee."¹²³

¹²² Id., pp. 3-4.

¹²³ Id., p. 4. In addition to the prefiled direct testimony of Mr. Voccola proffered in this docket, Mr. Voccola also submitted a letter to the Division on October 8, 2013 through which he additionally expressed his opposition to RIFF's application filing in this docket.

6. RIFF'S Rebuttal Case

In response to the direct cases presented by Interstate and the Town, RIFF proffered pre-filed rebuttal testimony from three (3) of its earlier witnesses; namely, Messrs. Billington, Donadio and Kunkel; and also from Dr. Stephanie A. Costa, PhD. Dr. Costa was identified as an Associate Professor of Mathematics at Rhode Island College.

Mr. Billington returned to “take issue” with Mr. Edge’s “sweeping generalizations regarding the Tour RI program.” Mr. Billington argued that Tour RI was an “economic development program” and not a “political idea,” as characterized by Mr. Edge. Mr. Billington explained that although Tour RI was small in scale its purpose was to “introduce Rhode Islanders to Rhode Island, in order to drive tourism locales within the State that Rhode Islanders may never have visited, with one intended salutary effect being the development of new tourism business for those locales.”¹²⁴ Mr. Billington added: “while Mr. Edge belittles the program as political in nature, I wholeheartedly disagree.”¹²⁵

Mr. Billington also disagreed with Mr. Edge’s characterization that Tour RI was ‘heavily subsidized’ and ‘ran out of steam in just a few years.’ He testified that Tour RI did not cease operating due a lack of financial support. He related that the real reason Tour RI ceased operating “is that it required the active participation off all of the member tourism Councils and various other Districts decided to concentrate their efforts in other areas.” Mr. Billington

¹²⁴ RIFF Exhibit 9, p. 2.

¹²⁵ Id., pp. 2-3.

stated that without “this diversity of venues, BVTC simply could not offer enough Blackstone Valley tours to keep the effort ongoing.”¹²⁶

Mr. Billington also rejected Mr. Edge’s implication that Tour RI provided tourism options to people who might not otherwise have been able to afford them. He related that Tour RI did not request “that Interstate offer travel free of charge, that contribution was volunteered by Interstate. Mr. Billington called Mr. Edge’s claim “unfounded.” Instead, Mr. Billington opined that Interstate’s motivation for offering the free ferry service was twofold. First, he opined that because the service was being offered in May, “they showcased the Island during what is known in the industry as a shoulder season, when the relative quiet of the Island is attractive to some.” He also believed that Interstate “likely viewed the program as a relatively low cost marketing investment during an otherwise slower time of the year that had the potential of creating repeat customers in the high season.”¹²⁷

In closing, Mr. Billington reiterated that he still believes that the most significant lesson from the Tour RI program was that many Rhode Islanders do not travel to Block Island because the trip is viewed “as a distant and difficult reach.” He believes that when Rhode Islanders are presented with a more convenient mode of traveling to Block Island “they will take advantage of it.”¹²⁸

Mr. Charles Donadio returned to rebut Interstate’s assertion that if it [Interstate] loses customers to RIFF it will have no choice but to cut service or

¹²⁶ Id., p. 3.

¹²⁷ Id., pp. 3-4.

¹²⁸ Id., p. 4.

raise rates. As an alternative, Mr. Donadio testified that if Interstate loses some customers to RIFF it has the option of re-designing its schedules “so as to get maximum efficiency and utilization of... [its] equipment.”¹²⁹ He related: “common sense leads to the conclusion that greater efficiencies could be found in their conventional ferry schedules and equipment usage without dramatically affecting service.”¹³⁰

Mr. Donadio further opined that Interstate “should seriously consider shutting down its Newport service completely.” He based this opinion on testimony from Interstate’s 2012 rate case, where “Josh Linda projected that their Newport ridership would increase to approximately 18,000 in the first year of the *Islander’s* service.” Mr. Donadio opined that “Interstate has obviously failed to meet that benchmark and I cannot see how they will achieve a ‘small profit by the third year of operation.’” He reasoned that as a stand-alone operation “I would venture a guess that the financial losses are significant.”¹³¹

As an additional alternative to raising rates and cutting services, Mr. Donadio opined that Interstate could purchase its fuel from a large regional supplier rather than from the smaller local supplier that Interstate has “used for many years.” Mr. Donadio was confident “that Interstate could probably save on the cost of fuel by publicly bidding it.”¹³²

¹²⁹ RIFF Exhibit 14, p. 2.

¹³⁰ Id., p. 3.

¹³¹ Id., pp. 3-4; and RIFF Exhibit 16.

¹³² Id., p. 5.

In his pre-filed rebuttal testimony, Mr. Donadio also briefly discussed RIFF's initial plans for a docking location in Old Harbor that RIFF could utilize in furtherance of its proposed ferry service to Block Island. As this testimony was later clarified and supplemented in connection with the Town's subsequently filed and considered motion for summary disposition, *supra*, the Division sees little value in summarizing Mr. Donadio's rebuttal testimony on the subject.¹³³

Mr. Kunkel also proffered pre-filed rebuttal testimony in this docket. Mr. Kunkel's rebuttal testimony addressed a number of assertions made by Mr. Edge and Dr. Mazze. Starting with the Interstate's survey, which was relied on by both Dr. Mazze and Mr. Edge, Mr. Kunkel questioned the soundness of the methodology used in conducting the survey. He opined that the survey "was fundamentally flawed because it was self-administered, leaving substantial opportunity for bias to affect the results."¹³⁴ Indeed, Mr. Kunkel argued that "it challenges credulity and common sense to believe that the Interstate employees administering it did not know its true purpose, particularly the permanent employees and management level personnel involved one of whom made the negative press comments regarding RIFF's plans and presumably is an authorized company spokesperson."¹³⁵

Mr. Kunkel alternatively argued that even if the methodology was sound and the sample was representative, "the survey results themselves are evidence

¹³³ *Id.*, p. 6; and RIFF Exhibits 17 and 18.

¹³⁴ RIFF Exhibit 24, p. 2.

¹³⁵ *Id.*

of public need for a Quonset fast ferry that is currently unsatisfied.” In support of this argument, Mr. Kunkel relied on the Division’s final order in Docket D-05-06 “granting Interstate’s application for its own high speed CPCN,” wherein “the Division found that IHSF’s survey data showing that 57% of its ridership would cross the dock to use an Interstate fast ferry was an ‘admission that Interstate’s proposed high-speed service to Old Harbor would accommodate existing and future customers’ and further found that this was evidence of public convenience and necessity.”¹³⁶

Mr. Kunkel next offered a response to Mr. Edge’s statement that, since Interstate has excess capacity, there is no need for RIFF’s proposed service. Mr. Kunkel testified that if you follow this logic, “since the Division allowed Interstate to enter the high speed market in 2006 regardless of the existing capacity of other carriers, then it should allow RIFF to do so also regardless of this factor.”¹³⁷ Mr. Kunkel contends that “when all of the evidence here is weighed, including Interstate’s own survey, a Quonset fast ferry would satisfy the needs of a significant segment of the public, regardless of how Interstate tries to minimize that need.”

In further addressing the excess capacity issue, Mr. Kunkel testified that it has become apparent that the demand for Block Island high-speed ferry service was more inelastic than first predicted by IHSF when it opposed Interstate’s high-speed ferry service proposal in 2006. As evidence of this

¹³⁶ Id., pp. 2-3.

¹³⁷ Id., p. 3.

inelasticity, Mr. Kunkel pointed to Interstate's ability to raise its prices from \$26.00 to \$35.85 since 2006.¹³⁸ Mr. Kunkel also argues that Interstate expanded its operations to Newport and Fall River because "[c]learly, Interstate understands that its Galilee location is inconvenient for some, particularly those living in Massachusetts, and it has attempted to meet that unsatisfied demand despite its own excess capacity."¹³⁹

Mr. Kunkel next testified that Interstate's contention that its fast ferry market overlaps RIFF's and negates RIFF's position that there is an unsatisfied need is "simplistic" and "ignores generally accepted economic principles." Mr. Kunkel explained that there are significant factors differentiating RIFF's proposed service and Interstate's, "such as departure point and time over water, meaning that RIFF and Interstate will not be direct competitors and will serve different markets, by definition."¹⁴⁰ Mr. Kunkel added that Interstate itself made this argument in 2006 when it argued to the Division that its then proposal to "provide high speed service over two conjoined 'routes,' i.e., Point Judith and Block Island and Newport and Block Island, was necessary 'to serve three separate and distinct ferry markets.'" Mr. Kunkel argues that if Newport to Block Island is a separate and distinct market from Point Judith to Block Island, "a point I agree with – then clearly Quonset to Block Island is separate and distinct from the Point Judith to Block Island market."¹⁴¹

¹³⁸ Id., pp. 3-4.

¹³⁹ Id., p. 4.

¹⁴⁰ Id., p. 5.

¹⁴¹ Id.

Mr. Kunkel next took exception to Interstate's assertion that RIFF is trying to capitalize on Interstate's 80-year business history. He testified that RIFF's name "is not confusingly similar" to Interstate's, and that from a marketing standpoint, RIFF would benefit from differentiating its proposed service from Interstate's. Mr. Kunkel opined that in order to "activate this market," RIFF would be wise to describe its services as 'new,' 'more convenient' and 'easier to access,' which would distinguish it from Interstate's service.¹⁴²

Mr. Kunkel next turned to Interstate's argument that RIFF's entry into the market would jeopardize Interstate's high-speed ferry profits, which would in turn harm Interstate's traditional lifeline services to Block Island. He asserted that "[t]here should be no linkage between the two from a regulatory standpoint, particularly when determining public need and convenience."¹⁴³ Mr. Kunkel testified that this argument "ignores the Division's findings in Docket D-05-06 that the 'economic benefit to Interstate's lifeline operation' from its proposed high speed service has 'little if any' relevance to the public convenience and necessity, citing its previous determination that 'fast' ferry services and 'conventional' ferry services 'are two distinctly different water carrier operations.'"¹⁴⁴ Mr. Kunkel also noted that the Rhode Island Supreme Court later upheld the Division's decision.¹⁴⁵ Mr. Kunkel further notes that Interstate has agreed in both Commission and Division dockets that if its fast ferry service loses money, its losses will not affect its traditional ferry services.

¹⁴² Id., p. 6.

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ Id., pp. 6-7.

Mr. Kunkel therefore argues that Interstate “should be required to hold up its end of the regulatory bargain made when it was granted permission to expand from its traditional service orientation into the high speed market.”¹⁴⁶

In his final comments, Mr. Kunkel addressed measures that Interstate could take to make its Point Judith services more attractive to customers or to respond to market forces. First and foremost, Mr. Kunkel contended that Interstate has rate flexibility, which gives it the discretion to increase or decrease its high-speed ferry rates upon 30 days-notice to the Commission. Mr. Kunkel also notes that the Division has “agreed not to object... [to] any such changes except in extraordinary circumstances...” Mr. Kunkel further contends that Interstate also has the discretion to adjust certain traditional ferry rates upon 60 days-notice to a level not 10% higher or 20% lower than the rates approved in its last rate case in 2012, “in order ‘to respond more efficiently to market forces impacting the more discretionary portions of its business, namely, the non-lifeline portions of its business.”¹⁴⁷

Dr. Stephanie Costa was proffered by RIFF for the purpose of rebutting the survey methodology used by Interstate. She opined that the methodology “had significant weaknesses and conclusions were presented in a worst case scenario not necessarily supported by the data.”¹⁴⁸ In support of her opinion, Dr. Costa explained that generally, surveys are conducted using a sample to estimate population parameters since a census of the population demands

¹⁴⁶ Id., p. 7.

¹⁴⁷ Id., p. 8.

¹⁴⁸ RIFF Exhibits 19 (redacted) and 20 (unredacted), p. 1.

more resources than are generally available. She related that when a sample is taken, a sample statistic is calculated and used to create an interval that is likely to contain the population parameter. In this case, Dr. Costa testified that the parameter of interest is the percentage of all Interstate ferry riders who would choose to take a fast ferry from Quonset, while the sample statistic is the percentage of Interstate riders in the sample who would choose to take a high-speed ferry from Quonset. She explained that associated with every interval is a level of confidence (typically 90%, 95% or 99%) which essentially measures how confident we are that the interval we create actually contains the population parameter. She added, however, that since the confidence interval is based on our sample data, there is always a chance that our population parameter lies outside of the confidence interval. Dr. Costa observed that in his report, Dr. Mazze “simply reports sample statistics, but fails to provide an interval estimate for the population parameter.”

Dr. Costa next questioned the use of Interstate’s survey “as a marketing device designed to determine whether Interstate customers would use an Interstate operated fast ferry from Quonset under certain conditions,” as was described by some of Interstate’s witnesses, when “nowhere in the survey questions did Interstate inform the respondents of that precise purpose.”¹⁴⁹ She opined that this omission “affects the reliability of their answers, since the answers may have been different had the respondent known that the true

¹⁴⁹ Id., p. 2.

purpose was to determine whether Interstate customers would use a Quonset fast ferry service not operated by Interstate.”¹⁵⁰

Dr. Costa also explained that whenever a face-to-face survey is conducted there are a number of opportunities for bias. As an example, Dr. Costa related that not knowing the purpose of the survey or identity of the sponsor can lead to “social desirability bias,” which is described as “the tendency of the interviewee to respond in a way that he or she believes is desirable to the interviewer.”¹⁵¹ As another example of bias, Dr. Costa explained that the presence of other individuals, such as family members, may also influence responses of the interviewee. Dr. Costa additionally explained that “any reaction from the interviewer may also influence responses of the interviewee.”¹⁵²

Dr. Costa also took exception to Interstate’s apparent efforts to selectively analyze the data in order “to present a worst case scenario.” She testified that the “obvious” focus of Dr. Mazze “was on the responses to questions 4 and 5 as presented to conventional ferry riders and questions 4, 5 and 6 for fast ferry riders.” Question 4 asked conventional ferry riders:

If there was a \$50 round trip ferry ride from Quonset Point in North Kingstown to Old Harbor, would you take the Quonset fast ferry instead of the Point Judith conventional ferry?”

¹⁵⁰ Id., pp. 2-3.

¹⁵¹ Id., p. 3.

¹⁵² Id.

Dr. Costa noted that 17% of the 351 people surveyed (59/351) answered “yes” to Question 4. However, Dr. Costa asserted that it is important to note that this 17% is the percentage of the sample that responded yes to question 4, but this is not necessarily the proportion of all Point Judith conventional ferry riders that would respond yes to question 4. Dr. Costa testified that what we can conclude from this data “is that we are 95% sure” that between “13% and 21% of the entire population of all Point Judith conventional ferry riders would take the \$50 fast ferry from Quonset.” Dr. Costa acknowledged that this interval is “fairly wide, due to the fact that the margin of error... is approximately 4%, producing an interval with endpoints that are eight percentage points apart.” She explained that at 95% confidence, if we wished to get a narrower interval we would need to increase the size of the sample. For example, “if we wanted our margin of error to be 0.5%, to get an estimate within 1% of the population parameter, Interstate would need a sample of at least 21,488 people, or 3.5% of Interstate’s 2013 total clientele, rather than 351, which represents .06% of Interstate’s 2013 total clientele.”¹⁵³

Based on her examination, Dr. Costa testified that the “flaw” in Interstate’s analysis of this data “is that since the cost of the Interstate conventional ferry is in fact \$27 less than the hypothetical \$50 ferry from Quonset, the real answer to the question of interest lies in the results of Question 5:”

¹⁵³ Id., pp. 4-5.

If the conventional ferry cost is about \$27 less per person from Point Judith than the Quonset fast ferry, does that change your answer to question 4?

Dr. Costa testified that when you take into account the answers to questions 4 and 5, the number of people who would choose to take the fast ferry from Quonset drops to 25/351 or only 7%. In this case, Dr. Costa concludes “that the percentage of all Point Judith conventional ferry users that would choose to take the fast ferry from Quonset instead of Point Judith is between 4% and 10%, with 95% confidence....”¹⁵⁴

Dr. Costa next testified that this same flawed analysis was used in analyzing Interstate’s fast ferry customer responses. Starting with Question 4:

If there was a \$50 round trip [fast] ferry ride from Quonset Point to Old Harbor in North Kingstown, and took one hour on the water, would you take the Quonset fast ferry instead of the Point Judith fast ferry?

Dr. Costa observes that the survey responses reflect that 27% (71/263) of the fast ferry riders sampled would choose the Quonset service over the Point Judith service. Dr. Costa testified that what we can conclude from this data “is that we are 95% sure” that the percentage of all Point Judith high-speed ferry users that would take the fast ferry from Quonset to Old Harbor is between 22% and 32%.” Again, she pointed out, Dr. Mazze chose to report that Interstate would lose as much as 27% of its high-speed ferry passengers. However, Dr. Costa opined that since “the cost of the Point Judith fast ferry is in fact \$15 less and on the water travel time is in fact about a half an hour less

¹⁵⁴ Id., pp. 5-6.

than the hypothetical \$50 ferry from Quonset, what we should be focusing on are the responses to questions 5 and 6 as well.”¹⁵⁵

Dr. Costa proffered Question 5, below:

If the cost from Point Judith is about \$15 less per person does that change your answer to question 4?

Dr. Costa observed that the survey results on question 4 reflect that 12% (31/263) of the fast ferry riders sampled would choose the Quonset service over the Point Judith fast ferry service if the cost was \$15 less. Dr. Costa testified that what we can conclude from this data is that we are 95% sure that the percentage of all Point Judith fast ferry users that would take the fast ferry from Quonset to Old Harbor is between 8% and 16%.”

Dr. Costa next discussed the impact on the analysis resulting from the introduction of the travel time variable, as introduced through Question 6:

If the on water travel time is about half an hour less from Point Judith than from Quonset, does that change your answer to question 4?

Dr. Costa observed that the survey results on question 6 reflect that 11% (27/263) of the fast ferry riders sampled would choose the Quonset service over the Point Judith fast ferry service under the given conditions. Dr. Costa related that what we can conclude from this data is that we are 95% sure that the percentage of all Point Judith fast ferry users that would take the fast ferry

¹⁵⁵ Id., p. 7.

from Quonset to Old Harbor is between 7% and 14%, if it cost \$15 more and travel time over the water was a half hour more.¹⁵⁶

Again, based on her examination, Dr. Costa testified that the “flaw” in Interstate’s analysis of this data “is that the piece of information that we are missing here is the number of Interstate fast ferry users who responded ‘yes’ to both questions 5 and 6, that they would change their response to question 4 given that the fast ferry from Point Judith cost less and was shorter, respectively.”¹⁵⁷ She explained that having this data would allow us to calculate the percentage of people who would choose to take the fast ferry from Quonset given that it costs more and takes longer than the fast ferry from Point Judith with greater certainty. Having demonstrated the mathematical impact this lack of data can have on the results of the survey, Dr. Costa testified that “without all of the data, we could conclude that the number of people surveyed who would choose to take the fast ferry from Quonset given that it costs more and takes longer than the fast ferry from Point Judith could be as low as 4..., or 1.5% of the sample.”¹⁵⁸

Dr. Costa opined “that based upon the relatively small sample Interstate chose to survey, somewhere between 4% and 10% of its conventional ferry passengers might use a Quonset fast ferry that cost \$50 and took longer and between .04% and 3% of its fast ferry customers would use the Quonset fast ferry at that price and a longer ride over the water, with a level of certainty of

¹⁵⁶ Id., pp. 8-9.

¹⁵⁷ Id., pp. 9-10.

¹⁵⁸ Id., pp. 10-11.

95%.” In her final comments on the subject, Dr. Costa stressed that “this survey had significant weaknesses which I believe affect the reliability of the results.”¹⁵⁹

7. Interstate’s Surrebuttal Case

In its surrebuttal case, Interstate recalled two of its earlier direct-case witnesses, namely, Dr. Edward M. Mazze and Mr. Walter E. Edge. Interstate also proffered its Vice President, Joshua P. Linda, to rebut portions of RIFF’s rebuttal case.

Dr. Mazze offered surrebuttal comments on each of RIFF’s four rebuttal witnesses. Starting with Mr. Billington, Dr. Mazze observed that Mr. Billington’s opinion that Rhode Islanders do not travel to Block Island because it is viewed as distant and difficult to reach was not supported by any marketing research studies. Dr. Mazze also observed that Mr. Billington’s claim that when Rhode Islanders “are presented with a more convenient mode of traveling to the Island they will take advantage of it” is likewise unsupported by any research studies on tourism and travel preferences.¹⁶⁰

Regarding Dr. Costa’s opinions, Dr. Mazze observed that Dr. Costa’s educational background does not include any familiarity with marketing or marketing research or business experience developing and conducting marketing research studies. He related that Dr. Costa’s opinions and conclusions are based on a study using probability sampling which was not

¹⁵⁹ Id., p. 11.

¹⁶⁰ Interstate Exhibit 6, p. 2.

used for this matter. Instead, the study he performed for Interstate used a nonprobability convenience sample.¹⁶¹

Dr. Mazze questioned the practicality of Dr. Costa's suggested methodology. He testified that Dr. Costa's argument for using a sample size of at least 21,488 people, in order to obtain a margin of error of 0.5% to get an estimate within 1% of the population parameter for the results to be reliable, would have required Interstate to survey every one of its passengers in 2013. He related that this is why margin and error and confidence levels "are generally not used in nonprobability convenience samples...." He explained that a nonprobability convenience sample was used because "it would provide the information needed as well as be convenient in reaching a large number of passengers."¹⁶² Dr. Mazze emphasized that when using nonprobability sampling, the probability that each population unit will be chosen is not known and you cannot be sure each population unit has a non-zero chance of being chosen; he added that in a nonprobability sample, confidence intervals are not computed.¹⁶³

Dr. Mazze next addressed Dr. Costa's "bias" concerns. He testified that to avoid bias in the study, the interviews took place on different days, different weeks and in different months. He argued that the wording of questions were not loaded to unduly favor one response over another. Dr. Mazze also pointed out that the questions were close-ended other than the questions about the

¹⁶¹ Id., pp., 2-3.

¹⁶² Id., pp. 4-5.

¹⁶³ Id.

passenger, and that the interviewer recorded the responses verbatim. Dr. Mazze also observed that Dr. Costa “presented no evidence that there was any bias introduced by the interviewer before or during the study or that there was any bias as a result of social desirability or loyalty to Interstate Navigation.”¹⁶⁴

Dr. Mazze observed that Dr. Costa did an analysis and concluded based on 95% certainty that between 13% and 21% of the entire population of all Point Judith conventional ferry riders would take the \$50 fast ferry from Quonset; she also concluded that she was 95% sure that the percentage of all Point Judith fast ferry riders would take the fast ferry from Quonset to Old Harbor is between 22% and 32%. However, according to Dr. Mazze, because “this number was high, Dr. Costa then cross-tabulated questions, made assumptions and developed scenarios to arrive at lower numbers, namely, 4 to 10% of conventional ferry passengers and .04 to 3% of fast ferry customers, using confidence levels from probability sampling.” Dr. Mazze contended that if RIFF “believes Dr. Costa’s opinions about this study, there are simply not enough passengers who wish to travel from Quonset Point to Block Island and RIFF would be wise not to continue to pursue this venture.”¹⁶⁵

Dr. Mazze also addressed Mr. Donadio’s rebuttal testimony. First, he argued that Mr. Donadio does not know the workings of Interstate’s lifeline

¹⁶⁴ Id., pp. 6-7.

¹⁶⁵ Id., pp. 7-8.

ferry business and therefore “has no basis on which to competently comment on how Interstate... could allegedly operate more efficiently.”¹⁶⁶

Dr. Mazze next criticized Mr. Donadio for not proffering a business plan, market feasibility study or marketing research with his application. He testified that without such supporting documents and analysis:

...it is not possible for anyone to come to an informed, fact based conclusion that (1) a fast ferry service from Quonset Point would be more convenient for people going to Block Island (2) there is pent-up demand for a new fast ferry service from Quonset Point to Block Island (3) a new fast ferry service from Quonset Point would increase the number of travelers to Block Island rather than simply redistribute the current number of travelers between Interstate... and RIFF (4) the passengers of Interstate... are receiving inadequate service and need a new port of departure from Quonset Point (5) there is not enough capacity on Interstate’s ferries to meet the needs of passengers going to and from Block Island to Rhode Island or (6) the proposed Quonset Point summer-only cream skimming service will not significantly harm Interstate Navigation’s year-round lifeline service to Block Island.¹⁶⁷

With respect to Mr. Kunkel’s rebuttal testimony, Dr. Mazze rejected Mr. Kunkel’s assertion “that the survey was fundamentally flawed because it was self-administered leaving substantial opportunity for bias to affect the results.” Dr. Mazze reiterated that “there were safeguards built into the design and implementation of the survey to reduce bias.” He stressed that the interviewers followed a set procedure in asking questions and recording answers, and that

¹⁶⁶ Id., p. 9.

¹⁶⁷ Id.

with a tightly worded questionnaire, interviewers had no discretion in influencing interviewees in their responses.¹⁶⁸

Dr. Mazze also rejected Mr. Kunkel's opinion that Interstate's survey showed that there was an unsatisfied public need for a Quonset Point fast ferry. Dr. Mazze testified: "my study simply cannot be used to conclude that there is an unsatisfied public need.... What my study shows, in conjunction with the analysis from Mr. Edge, is that if the Division authorizes RIFF's proposed service, there will be a significant negative impact the Interstate's year-round lifeline ferry service to Block Island."¹⁶⁹

Mr. Walter Edge began his surrebuttal testimony by addressing some of Mr. Kunkel's opinions. To start, Mr. Edge criticized Mr. Kunkel for suggesting that Interstate's survey results, which reflects that some interviewees would opt for ferry services from Quonset Point, provides evidence that there is a public need for RIFF's proposed services. Mr. Kunkel bases this opinion on an earlier survey Interstate performed in 2005 when it was trying to prove to the Division that there was a public need for Interstate's then proposed fast ferry service between Point Judith and Block Island. Mr. Edge testified that the basis for Mr. Kunkel's opinion is faulty due to the fact that Interstate's 2005 survey was limited to asking Interstate's traditional service customers if they would use Interstate's then proposed fast ferry services instead. Mr. Edge emphasizes that the 2005 survey did not seek to determine whether there was

¹⁶⁸ Id., p. 10.

¹⁶⁹ Id., p. 11.

a public need for an entirely different competitive service from a different location. Mr. Edge testified: “in this docket, RIFF will be pirating customers currently serviced by Interstate... to the direct detriment of Interstate’s lifeline service and its lifeline customers.”¹⁷⁰

Similarly, Mr. Edge attacked Mr. Kunkel’s reliance on previous testimony from Mr. Edge, testimony from 2005, where Mr. Edge testified that “choice is more important than market or participant efficiency.” Again, Mr. Edge argues that the difference is that “I was discussing the fact that Interstate was offering choice to its own ratepayers, which is a good thing.”¹⁷¹

Mr. Edge additionally rejected Mr. Kunkel’s opinion that RIFF should be allowed to pursue its proposed ferry service model because only RIFF’s stockholders bear the “risk of failure.” Mr. Edge explained that successful or not, RIFF’s proposed services, if approved, “will hurt Interstate’s traditional ratepayers.”¹⁷²

Next, in response to Mr. Kunkel’s observations and conclusions regarding Interstate’s fast ferry rate increases since 2006, Mr. Edge argued that Interstate’s management does not “assume” that the Point Judith fast ferry service is elastic.¹⁷³

Mr. Edge also took exception to Mr. Kunkel’s claim that Interstate’s decision to retain its Newport CPCN ‘does not pass good business-judgment.’ Mr. Edge related that based on his 50 years of experience as a CPA, and

¹⁷⁰ Interstate Exhibit 3, pp. 2-3.

¹⁷¹ Id., p. 3.

¹⁷² Id.

¹⁷³ Id., pp. 3-4.

knowing Interstate's history and financial considerations, he asserted that the "retention of the Interstate Newport run was a very good business decision based upon sound business judgment."¹⁷⁴

Mr. Edge next challenged Mr. Kunkel's opinion that RIFF and Interstate will not be in direct competition. On this issue, Mr. Edge testified that Mr. Kunkel's opinion in this docket is inconsistent with the position he took in previous cases "when he concluded that BI Express, which had a different departure point (New London, CT) and a much longer travel time over the water, was a direct competitor to IHSF."¹⁷⁵

Mr. Edge also criticized Mr. Kunkel for insisting that 'there should be no linkage between the two (Interstate's traditional and fast ferry services) from a regulatory standpoint.' Mr. Edge argues that no matter how many times he says it and disregards the facts, the fact is that there is a direct linkage.¹⁷⁶ Mr. Edge additionally stated that Interstate did agree, as Mr. Kunkel points out, that its traditional service would not be impacted by any losses from its fast ferry operation "because it was confident in the fact that the fast ferry operation would be profitable...."¹⁷⁷

With respect to Mr. Donadio's rebuttal testimony, Mr. Edge proffered a number of comments. First, he faulted Mr. Donadio's assertions that Interstate has ways to save money if RIFF takes away some of its business. Mr. Edge argues that the question of whether Interstate can save money is "irrelevant" to

¹⁷⁴ Id., p. 4.

¹⁷⁵ Id.

¹⁷⁶ Id., p. 5.

¹⁷⁷ Id.

whether or not the proposed RIFF service is needed or more convenient.¹⁷⁸ Mr. Edge presses that Mr. Donadio has ignored several important facts. As examples, Mr. Edge related that the number of runs and times of departure are agreed to by the Commission, the Division, the Town and Interstate. He argues that Interstate “cannot simply change the number or times of runs to maximize efficiency and utilization.”¹⁷⁹

Mr. Edge also testified that Interstate “will not just walk away from its responsibilities under its CPCN for the Newport run.” He criticized Mr. Donadio for not being able to recognize Interstate’s efforts to make the Newport run a financial success “while at the same time addressing the need and convenience of its Newport ratepayers.”¹⁸⁰

Mr. Edge next challenged Mr. Donadio’s claims that he can calculate Interstate’s net income or loss for FY’s 2013 and 2014 “with no idea of the actual operating costs.” Mr. Edge contended that it is improper to make revenue calculations from only passenger number and “projected” costs.¹⁸¹ Mr. Edge also argues that Mr. Donadio is in no position to claim that Interstate can save money on fuel when he has “absolutely no knowledge of how Interstate currently purchases its fuel. Mr. Edge relates that the savings that he believes might exist, do not.”¹⁸²

¹⁷⁸ Id., p. 6.

¹⁷⁹ Id.

¹⁸⁰ Id., pp. 6-7.

¹⁸¹ Id., p. 7.

¹⁸² Id., p. 8.

Shifting his focus to Mr. Billington's rebuttal testimony, Mr. Edge testified that although it is true that he [Mr. Edge] was not involved in the Tour RI promotion when it occurred, he was able to access Interstate's related records through "the Interstate employee that ran the entire Interstate aspect of the Tour RI program." Mr. Edge related that it was through this employee that he "determined the limited number of passengers that were taken on the Interstate portion of the Tour RI program." Mr. Edge added that it was not his intention to belittle the Tour RI program, "but simply to provide the Hearing Officer the facts relating to the size of the program as I knew them." Mr. Edge concluded: "I am OK with agreeing to disagree on what, if any, value one can place on the Tour RI Program as a guide for estimating the size and existence of an unidentified new population of customers that RIFF could service."¹⁸³

In his final comments, Mr. Edge briefly addressed Dr. Costa's rebuttal testimony. Mr. Edge testified that although he found Dr. Costa's knowledge of statistics "impressive," as an accountant, he has learned that "not all accepted sampling uses random numbers and Ms. Costa's statistical sampling approach." Mr. Edge maintained that in the "real world" the statistical sampling Dr. Costa is discussing "results in significantly greater sample sizes and requires far more time and expense to complete."¹⁸⁴

Interstate next proffered Mr. Joshua Linda to respond to Mr. Donadio's claims regarding Interstate's Newport operation and its fuel purchases. As for

¹⁸³ Id., p. 9.

¹⁸⁴ Id., pp. 9-10.

the Newport operation, Mr. Linda testified that its ridership is steadily increasing every year. He related that Interstate had predicted that it would take a minimum of three years for the run to become popular; and that it would be “ridiculous for Interstate to shut down its Newport service for the benefit of Mr. Donadio’s proposed service out of North Kingstown.”¹⁸⁵

Mr. Linda also opined that Interstate made a good investment in the purchase and complete renovation of the M/V Islander, the fast ferry operating from Newport. He related that for the fraction of the cost of a new catamaran ferry, Interstate “now has a like new state of the art 30 knot water jet drive vessel that can carry twice as many passengers as Mr. Donadio’s newest vessel.”¹⁸⁶

With respect to the fuel issue, Mr. Linda stated that Mr. Donadio’s fuel supplier, Santa Energy, “stated that they could not sell fuel directly to Interstate because Santa does substantial business with Interstate’s present fuel supplier.”¹⁸⁷

8. Public Comments

Nine members of the public offered comments in this docket. A summary of their comments are provided below:

Comments in support of RIFF’s application:

Mr. Kerry McKay, identified himself as the president of the North Kingstown Town Council, a business owner in North Kingstown (McKay’s

¹⁸⁵ Interstate Exhibit 7, p. 2.

¹⁸⁶ Id.

¹⁸⁷ Id.

Furniture) and a board member of the Quonset Point Development Corporation. Mr. McKay expressed support for RIFF's application. He based his support on the anticipated additional tourism business that RIFF's proposed services will bring to North Kingston.¹⁸⁸

Ms. Kristin Urbach identified herself as the executive director of the North Kingstown Chamber of Commerce. Ms. Urbach related that her Chamber's Board of Directors fully support RIFF's application.¹⁸⁹

Mr. Andrew Naughton identified himself as a professor of English who has taught at Bryant University and Brown University. Mr. Naughton also expressed support for RIFF's application. He based his opinion on the anticipated additional recreational and economic opportunities RIFF's proposed service will bring to Rhode Island.¹⁹⁰

Mr. Ross Notaroberto indicated that he is a resident of Cranston. He too expressed support for RIFF's application. He based his opinion on the inconvenience of having to drive in traffic to Galilee in the summertime to take the ferry to Block Island.¹⁹¹

Mr. Jerry Zarrella identified himself as a resident of Rhode Island who frequently travels to Block Island in the summertime. Mr. Zarrella also expressed support for RIFF's application. He based his support on the difficulty he has experienced with the heavy traffic into Galilee and with

¹⁸⁸ 3/2/16, Tr. 25-26.

¹⁸⁹ 3/2/16, Tr. 27.

¹⁹⁰ 3/2/16, Tr. 28.

¹⁹¹ 3/2/16, Tr. 29-30.

parking availability and related costs. He also opined that additional tourism to the Island is good for the local businesses.¹⁹²

Comments in opposition to RIFF's application:

Ms. Debbie Dalrymple identified herself as Professor Emerita at Montgomery County Community College. Ms. Dalrymple opposed RIFF's application based on the proposal's limited seasonal utility and the additional visitors it will bring to Block Island. Ms. Dalrymple is also concerned about "the day trippers [who] arrive with booze and bad attitudes leaving our pristine island a mess."¹⁹³

Mr. Christopher Delaney also opposes RIFF's application due to the harm it will cause to Interstate and the people of Block Island. Mr. Delaney is concerned that the limited seasonal competition from RIFF will drive up ticket and freight rates for island residents; he also believes that Interstate's services will likely have to be reduced due to the competition.¹⁹⁴

Mr. Carder Starr also wrote to express opposition to RIFF's application. Mr. Starr stated that he has been using Interstate's services for 62 years and that it would be unfair to Interstate and the residents of Block Island to permit a seasonal competitor to diminish the lifeline services which Interstate provides.¹⁹⁵

Intrastate Nav. Co. ("INCo"), through counsel, offered written comments in this case. INCo identified itself as the owner of the pier in Old Harbor that is

¹⁹² 3/2/16, Tr. 30-36.

¹⁹³ 3/25/16 email message addressed to the Hearing Officer.

¹⁹⁴ 3/25/16 email message addressed to the Hearing Officer.

¹⁹⁵ 3/25/16 email message addressed to the Hearing Officer.

used by Block Island Ferry Services, LLC d/b/a Block Island Express, which operates a high speed ferry service between Old Harbor and New London, Connecticut, *supra*. Interstate also uses INCo's pier. INCo expressed concern with the impact RIFF's proposed services will have on INCo and its lessees in Old Harbor. Specifically, INCo is concerned with the close proximity of ferry operations at both RIFF's and INCo's docking facilities in Old Harbor. INCo describes the anticipated ferry traffic congestion as a "danger" which will also "result in the inevitable disruption" to Block Island Express' and Interstate's ferry operations to the island. INCO also asserts that RIFF's proposed high speed ferry "is not only unnecessary, but it is likely to interfere with existing services which unquestionably are necessary to serve the public interest."¹⁹⁶

9. Final Positions of the Parties

At the conclusion of the presentation of their respective cases, the parties were given an opportunity to submit post-hearing memoranda, to either supplement their closing statements, or to rely upon in lieu of offering a closing statement. RIFF, Interstate and the Town all submitted post-hearing memoranda in this docket.¹⁹⁷

a. RIFF'S Final Position

RIFF submitted its post-hearing memorandum on June 7, 2016. As an introduction, RIFF emphasizes that Mr. Donadio was the individual responsible for initially bringing high-speed ferry service to Rhode Island. He started the

¹⁹⁶ 3/1/16 letter addressed to then Administrator Ahern.

¹⁹⁷ The Advocacy Section opted to not offer the Division a recommendation in this docket.

Point Judith to Block Island high-speed service after the Division approved IHSF's application in 1998. RIFF points out that the Town and Interstate strongly opposed IHSF's original application at that time and both were proven incorrect in their original assessments and arguments that there was no need for a high-speed service to Block Island and that, if approved by the Division, a new high-speed service would destroy then existing lifeline services to the Island. RIFF observes that not only were they wrong, but the record shows that Interstate's traditional ridership has "grown immensely since 1998" and that Interstate was able to expand its successful high-speed services to Block Island from Newport and Fall River.¹⁹⁸

RIFF maintains that Mr. Donadio now plans to do the same for the currently existing unserved market for high-speed ferry services between Quonset and Block Island. RIFF argues that operating from the Quonset location will "provide a convenient and attractive service to customers, particularly those who come from areas north, west and east of Quonset." RIFF also argues that the Division should again reject Interstate's repeated "chicken-little" claim that this service will hurt its ability to continue to provide a 'lifeline' through its traditional slower ferry and freight service. RIFF contends that Interstate was wrong in 1998 and it is wrong again now.¹⁹⁹ RIFF

¹⁹⁸ RIFF Post-Hearing Memorandum, p. 1-2.

¹⁹⁹ Id., pp. 2-3.

argues that Interstate's position in this docket is really only based on Interstate's interest to preserve its monopoly market position.²⁰⁰

RIFF next offered a summary of the legal standard that the Division must use in deciding this case. To start, RIFF cites to R.I.G.L. §39-1-1(b) and argues that the Division is obligated to:

...provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient and economical energy, communication, and transportation services and water supplies to the inhabitants *of the state*, to provide just and reasonable rates and charges for such services and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive practices.... (Emphasis in original).

RIFF also relies on R.I.G.L. §39-3-3(a), which provides that “[n]o common carrier of persons and/or property operating upon the water between fixed termini within the state shall hereafter furnish or sell its services unless the common carrier shall first have made application to and obtained a certificate from the division certifying that the public convenience and necessity required the services.” Lastly, RIFF notes that the Division has in previous similar cases required a showing that the CPCN applicant also prove “that it is ‘fit, willing and able to perform the service’ proposed.”²⁰¹

RIFF next proffered an analysis to support its contention that the instant record satisfies the above-described legal standard. With regard to the question of whether Mr. Donadio is fit, willing and able to provide the proposed

²⁰⁰ Id., p. 3.

²⁰¹ Id., pp. 3-4; relying on Division Report and Order No. 20292, issued in Docket No. D-10-01 on February 25, 2011 in *In Re: Aquidneck Ferry & Charter, Inc.*

service, RIFF directs the Division to the IHSF case from 1998. RIFF observes that both the Division and the Superior Court were persuaded that Mr. Donadio had “satisfied” this standard, and that he was fit, willing and able to operate a high-speed water ferry.²⁰² RIFF further directs the Division to the fact that Mr. Donadio has had “close to twenty years of additional experience in the high-speed ferry industry...,” and “has successfully operated a number of high-speed ferry businesses.” RIFF also argues that because the record abundantly supports a finding that Mr. Donadio has proven that he is fit, willing and able to provide the proposed services, the Division should not be distracted by Interstate’s attempt “to diminish Mr. Donadio’s fitness by highlighting little more than the fact that Mr. Donadio did not create a ‘formal’ business plan before applying for a CPCN with the Division.” RIFF stresses that there is absolutely no legal requirement that a business plan be submitted with an application for a CPCN.²⁰³

On the question of Mr. Donadio’s “willingness” to provide the proposed services, RIFF notes that it has “endured over three years of hearings, briefings, data requests and motions, before both the Division and the interlocutory appeal to the Rhode Island Superior Court.” RIFF argues that the travel of this case “exemplifies that RIFF and Mr. Donadio are willing to operate a high-speed ferry service from Quonset to Block Island.”²⁰⁴

²⁰² Id., pp. 4-5.

²⁰³ Id., pp. 5-6.

²⁰⁴ Id., p. 6.

On the subject of “ability,” RIFF argues that the record shows that it has adequate dock space in Quonset and that it has “satisfactorily demonstrated the ability to dock at Old Harbor by and through its agreements with Bluewater, LLC....”²⁰⁵

RIFF next offered a breakdown of the record in support of its contention that the public convenience and necessity require its proposed services. But first, relying on the 1927 seminal case of *Abbott v. Public Utilities Comm’n*, 48 R.I. 196, 136 A. 490, RIFF observed that the Rhode Island Supreme Court “interprets public convenience broadly as referencing ‘something fitting or suited to the public need;’” and further has “explained that [t]he word ‘necessity’ in the expression under consideration does not have reference to an *indispensable necessity*, but rather that the route in question appears to the commission to be *reasonably requisite*.” RIFF argues that the Supreme Court in *Abbott* has also instructed that there is no formula through which the Division must view public convenience and necessity but that “[i]n passing upon public convenience and necessity, the commission must consider whether a proposed route is suited to and *tends* to promote the accommodation of the public and also whether it is reasonably required to meet a need for such accommodation.’ (Emphasis in original).²⁰⁶

In this case, RIFF presented the testimony of five lay witnesses to support its assertion that its proposed service satisfies the public convenience

²⁰⁵ Id., pp. 6-7.

²⁰⁶ Id., pp. 7-8.

and necessity requirement. Relying on the Rhode Island Rules of Evidence, RIFF maintains that lay witness opinion testimony is admissible, if the witness' opinions are "(A) rationally based on the perception of the witness and (B) helpful to a clear understanding of the witness' testimony or determination of a fact in issue." RIFF argues that there "is no legal requirement that lay witnesses rely on studies, surveys or any other similar tool;" in this case, "[t]he threshold question is merely whether the proposed service 'tend[s] to promote the accommodation of the public.'"²⁰⁷

RIFF argues that its five witnesses all have "extensive experience in the tourism industry;" and while "the opinions of these five witnesses might not be given the same weight of a disclosed expert, the testimony and opinions they provide are admissible and should be given more weight than public comment." RIFF also observes that the Division has relied upon this same type of testimony in the past, and specifically in its approval of IHSF's application filing in 1998.²⁰⁸

In support of its claim that the public convenience and necessity require its proposed services, RIFF argues that it has:

...established that the market has been, and continues to, move more and more towards efficient high-speed service and that its proposed service meets the growing need for intermodal travel and will, as a result, attract additional tourism that does not add to traffic on already overly congested roadways, especially during the busy summer tourist season. Its proposed service contributes to the goals of reducing auto

²⁰⁷ Id., pp. 8-9.

²⁰⁸ Id., p. 9.

emissions and supports the investment made by the public in the State's infrastructure, by encouraging increased use of the Quonset facilities. In short, RIFF has established that there is a clear demand for its service, that its service will benefit the Rhode Island economy, that its service is not contrary to the Block Island Comprehensive Plan, that Interstate's service is no longer adequate to serve the growing need, that RIFF's service encourages competition through consumer choice and that the existence of choice utilizing the State's infrastructure investment will not result in a collapse of Interstate.²⁰⁹

RIFF argues that several of its witnesses testified that they believe that RIFF's service will increase tourism and reduce traffic congestion. RIFF pointed to the testimony from Myrna George, who testified in her capacity as the President of the South County Tourism Council; Elizabeth Dolan, in her capacity as immediate past-president of the North Kingstown Town Council; and Mr. Donadio himself.²¹⁰

As evidence of the "untapped demand" for its proposed service, RIFF principally relied on the expert testimony of Lawrence Kunkel. Mr. Kunkel has testified that there is a "dormant, unserved, niche market [that] will be activated, because this is not a zero sum game.... There are riders out there who want to go to Block Island who don't want to go from Galilee." RIFF points to the public comment testimony of Mr. Zarrella as further evidence of this currently unserved market.²¹¹ RIFF also relies on the testimony of Mr. Donadio on the question of whether there is an unserved demand for his service. RIFF

²⁰⁹ Id., pp. 9-10.

²¹⁰ Id., pp. 10-11.

²¹¹ Id., pp. 12-14.

contends that Mr. Donadio's vast experience in operating high-speed ferry services in Rhode Island make him uniquely qualified to offer an opinion on this issue.²¹² Additionally, RIFF revisits the testimony of Ms. George, Mr. Billington and those members of the public who voiced support for the application (Mr. Naughton and Mr. Zarrella), as further evidence of RIFF's perception of this unserved market.²¹³

RIFF next defended its argument that its proposed service will benefit the Rhode Island economy. RIFF notes that Rhode Island has one of the highest unemployment rates in the country and that approving RIFF's application will provide new jobs. RIFF also notes that unlike Interstate, a Connecticut company, RIFF is a Rhode Island corporation. RIFF argues that if Mr. Donadio is permitted "to grow his Rhode Island based businesses [it will] benefit all citizens in the State."²¹⁴ On this issue, RIFF also relies on the testimony of Ms. Pughe, the previous Executive Director of the North Kingstown Chamber of Commerce, who opined that "providing more choice will make... the larger Rhode Island economy stronger;" and Mr. King, who testified that the greater the utilization of the Quonset terminal "...the more benefit... the public is going to receive for the investment the public has made."²¹⁵

RIFF next rejected Interstate's and the Town's assertion that RIFF's proposed service is inconsistent with Block Island's Comprehensive Plan, and consequently, unable to "satisfy a public need or convenience." RIFF argues

²¹² Id., pp. 14-15.

²¹³ Id., pp. 16-17.

²¹⁴ Id., pp. 17-18.

²¹⁵ Id., pp. 18-19.

that not only does the Plan not “dictate public need,” but that there is actually a provision in the Plan which discusses the potential for expansion of Old Harbor by allowing for “other ferry operations and small cruise vessels.” Further, RIFF argues that the Town’s Comprehensive Plan “cannot be dispositive as to whether the service satisfies a generalized public need and convenience in the State. If it were, and subjective, parochial barriers to entry could be erected by each municipality there would be no need for a Division with statewide jurisdiction.”²¹⁶

In further support of its claim to have established the existence of “public convenience and necessity,” RIFF argues that the record reflects that “Interstate’s service is no longer adequate.” RIFF contends that while Interstate’s service can be described as “adequate,” the more important question is: “adequate compared to what?” RIFF submits that Interstate’s definition of adequacy is that which is minimally required to legally transport passengers from the mainland in Rhode Island to Block Island. Making reference to the five high-speed ferry services providing service to Martha’s Vineyard this summer, RIFF argues that “being the ‘only show in town’ is a poor foundation to claim that Interstate’s service needs special protection merely because its ‘adequacy’ is due to being the only option available.” Finally, RIFF argues that just because Interstate provides Rhode Islanders with

²¹⁶ Id., pp. 19-21.

the only ferry access to Block Island “does not justify denying RIFF a CPCN, nor does it mean that the existing service is truly adequate for everybody...”²¹⁷

RIFF next submits that it has established public convenience and necessity by offering to bring competition and ratepayer choice to the marketplace. RIFF argues that the Rhode Island Supreme Court has warned that “increased competition is not a valid ground for denying a common carrier certificate;” that “existing carriers do not have a legal right to maintain a monopoly upon the services rendered;” and that “protecting existing investments... from even wasteful competition must be treated as secondary to the first and most fundamental obligation of securing adequate service for the public.”²¹⁸ RIFF observes that “throughout this case, there has been a great deal of discussion regarding the impact RIFF’s service may have on Interstate’s... ‘lifeline’... service.” However, RIFF also observes that this “is exactly the same argument proffered by Interstate in 1998, which is now known to have been grossly overstated. In fact, Interstate has grown its business enormously, despite new competition.”²¹⁹ RIFF urges the Division to “be very cautious given Interstate’s propensity to overstate its case.” RIFF also emphasizes that the current regulatory trend is to implement a regime that promotes competition.²²⁰ RIFF offers the Rhode Island General Assembly’s decision to promote competition in the electric industry as an example of this

²¹⁷ Id., pp. 21-22.

²¹⁸ Id. p. 23, citing *Interstate Navigation Co.*, 1999 WL 813603, at 5, which relies on several R.I. Supreme Court decisions.

²¹⁹ Id., p. 24.

²²⁰ Id., citing to *Town of Norwood v. FERC*, 202 F.3d 392 (1st Cir. 2000).

trend. RIFF also cites to a recent Division decision wherein the Division observed that “wasteful competition” must be treated as “secondary consideration” for denying a CPCN.²²¹

Lastly, RIFF argues that Interstate has admittedly overstated the impact of RIFF’s proposed service on its existing ferry service. RIFF calls attention to the testimony of Dr. Mazze, who admitted during cross-examination that Interstate’s claims that RIFF’s services would have a severe negative impact on Interstate’s lifeline service were overstated. Specifically, RIFF asserts that Dr. Mazze admitted that the ridership impact numbers, which were based on responses to Interstate’s survey, “substantially decrease when survey takers were also asked to consider both ‘cost’ and when the same passengers were later asked to consider ‘time over water.’”²²² RIFF contends that the omission of such a question from the survey “renders the survey numbers incorrect and, at a minimum, unreliable.”²²³ Using Dr. Costa’s testimony, RIFF emphasizes that “...somewhere between 4% and 10% of... [Interstate’s] conventional ferry passengers might use a Quonset fast ferry that cost[s] \$50 and took longer and between .04% and 3% of [Interstate’s] fast ferry customers would use the Quonset fast ferry at that price and [requiring] a longer ride over the water, with a level of certainty of 95%.” Again using Dr. Costa’s calculations, RIFF

²²¹ Id., p. 25, citing to the Division’s February 28, 2014 Report and Order in Docket No. D-13-05 (*In Re Application by A & R Marine Corporation for Water Carrier Authority*).

²²² Id., pp. 25-25.

²²³ Id., p. 26.

emphasizes that “the average cost to the ratepayer could increase by \$.40 – less than one dollar – for the traditional or conventional service.”²²⁴

RIFF argues that this fundamental flaw in Interstate’s survey methodology and analysis not only makes Dr. Mazze’s conclusions at best unreliable, it impacts Mr. Edge’s testimony as well. RIFF notes that Mr. Edge relied on Dr. Mazze’s “Marketing Research Study” to arrive at his prediction of “an across-the-board increase in Interstate’s traditional service rates of 14.2%” if RIFF is permitted to enter the market. RIFF additionally notes that since it filed its application with the Division in 2013, Interstate has requested and received rate increases from the Commission, equal to one-half of the subsidies that Mr. Edge predicted Interstate would require if RIFF were granted a CPCN. Based on these recent rate increases, RIFF observes that using Mr. Edge’s “adjusted worst-case scenario figures, giving RIFF a license would allegedly result in a rate increase of only \$1.85 for an adult, round-trip, traditional ferry ticket.” RIFF asserts that “[t]o suggest that this relatively small rate increase corresponds to a ‘death spiral’ for Interstate’s business is preposterous.”

RIFF also questioned whether any rate increase would be needed at all in view of Interstate’s new Fall River to Block Island service, which Interstate has stated is now making a profit; or whether its service would have any negative impact on Interstate’s operation, considering RIFF’s contention that most of its

²²⁴ Id., pp. 26-27.

passengers “will be new customers that have never traveled to or rarely travel to Block Island.”²²⁵

b. Interstate’s Final Position

Interstate also submitted its post-hearing memorandum on June 7, 2016. In its introduction, Interstate highlighted that 100% of its summer high-speed ferry profits have been “dedicated to supporting Interstate’s year-round lifeline conventional service.” Interstate stresses that without the application of these profits, “lifeline service would have suffered significant losses and Interstate would have been forced to seek rate relief from the Commission.”²²⁶

Like RIFF, Interstate also offered the Division direction on the standard of review that the Division must use in this case. Interstate argues that the Supreme Court has “mandate[d]” that the Division must consider evidence on various matters, including, but not limited to:

1. Has the applicant (RIFF) proven that “**public convenience and necessity**” require the proposed service? (R.I.G.L. §39-3-3, emphasis added).
2. Is the incumbent provider (Interstate), meeting the needs of the public for ferry travel to Block Island?
3. What investments of capital have been made by Interstate?
4. What is the nature of the ferry service being rendered by Interstate?
5. If Interstate’s service is adequate, what would be the probable effect of admitting RIFF into a field now adequately served?

²²⁵ Id., pp. 28-29.

²²⁶ Interstate Post-Hearing Memorandum, pp. 1-2.

6. What effect would RIFF have on Interstate's revenues?
7. Would RIFF have an adverse effect on the adequacy of the existing services provided by Interstate? and
8. Is RIFF 'fit, willing and able to properly... perform the service proposed...?' (R.I.G.L. §39-12-7).²²⁷

Interstate acknowledges that the test for deciding CPCN cases was established in the seminal case of *Abbott v. Public Utilities Commission*, 136 A. 490 (RI 1927). Interstate also relies on the *Abbott* case for an explanation of the meaning of the statutory requirement that the "public convenience and necessity" must require the proposed new service; and the type of evidence that should be considered in a CPCN proceeding.²²⁸

Interstate also argues that it is the "policy of this state that the municipality proposed to be served by the proposed carrier (i.e., the Town) has an important public interest role to play in any request for a CPCN." To buttress this assertion, Interstate points out that R.I.G.L. §39-3-3.1 provides that a special notice of any hearing regarding a requested CPCN must be given to the towns where an applicant plans to pick up or discharge passengers. Interstate argues that this notice requirement makes it clear that the General Assembly wants the Division to consider the Town's concerns regarding the impact the proposed services will have on the Town.²²⁹

²²⁷ Id., pp. 2-3. Interstate also notes that it will not be addressing RIFF's fitness, willingness and ability to provide the proposed services "due to limitations placed on the scope of Interstate's intervention."

²²⁸ Id., pp. 3-5.

²²⁹ Id., pp. 5-6.

Interstate also cites to R.I.G.L. §39-12-6 to support its assertion that the notice of hearing must also be provided to “all common carriers... serving any part of the route or territory proposed to be served by the applicant...” Interstate maintains that this notice is designed to give these carriers the opportunity to present evidence regarding the “potential negative impacts on existing carriers, and the public they serve....”²³⁰

Interstate next turned to a summary of its direct case in this proceeding. Specifically, Interstate maintains that it has proffered sufficient evidence to prove that:

1. Interstate is providing more than adequate and reasonable fast ferry service and conventional lifeline ferry service to Block Island, has done so for over 80 years, and can be expected to do so in the future;
2. Interstate has substantial excess passenger capacity;
3. Interstate has invested about \$30 million into its operation; and
4. Allowing unfair cream-skimming ‘competition’ by RIFF would reduce Interstate’s operating revenues, increase lifeline ferry rates, and/or reduce lifeline ferry services to Block Island.²³¹

However, before going into detail, Interstate exclaims that RIFF is “proposing to divert Interstate’s round-trip, day-tripper, summer-only tourists from Galilee to Quonset,” whom Interstate maintains represent “the bulk of Interstate’s revenues.” Interstate relates that these revenues are needed to

²³⁰ Id., p. 6.

²³¹ Id., pp. 6-7.

maintain Interstate's lifeline services during the remaining eight months of the year. Interstate also faults RIFF for proposing to operate only during the lucrative summer months.²³²

Interstate next recounted the results and conclusions associated with Dr. Mazze's marketing research study. Interstate focused on Dr. Mazze's conclusions that Interstate "would lose as much as 17% of its traditional ferry passengers and 27% of its hi-speed ferry passengers... if [RIFF] is permitted to offer summer-only, passenger only high-speed ferry service from Quonset Point..." and that RIFF "would negatively impact Interstate's lifeline passenger, vehicle and freight services to Block Island by taking away customers and revenue from Interstate during the summer months."²³³

Interstate also relies on Dr. Mazze's testimony to devalue RIFF's witnesses' opinions on the issue of public need. Dr. Mazze observed that RIFF's witnesses "did not rely on or use any economic study, marketing study, traffic study, tourism study of Block Island or marketing plan from... [RIFF] to support their opinions." Dr. Mazze also criticized Mr. Donadio for not presenting "a business plan, marketing plan or market feasibility study showing that there is a public need for an additional high speed ferry service...."²³⁴

Interstate further relies on Dr. Mazze's conclusion that competition between Interstate and RIFF would not be "beneficial," in part due to the

²³² Id., pp. 7-8.

²³³ Id., p. 9.

²³⁴ Id., p. 10.

“cream skimming” and “cherry picking” nature of RIFF’s proposed service. Interstate also recounts Dr. Mazze’s opinion that Interstate would have to raise its rates, reduce the number of ferries it uses to provide services and/or downsize the number of full-time and seasonal employees if RIFF enters the market.²³⁵

Interstate next summarized Mr. Edge’s testimony, who relied in large measure on information provided by Dr. Mazze. Using this information, Mr. Edge calculated that Interstate “would lose over \$1.2 million, which would require a 14.2% rate increase and/or a reduction in service.”²³⁶ Mr. Edge also opined that “there is no need for the proposed RIFF service because the fast ferry market to Block Island is saturated... and... the proposed service will result in wasteful competition, cream skimming, and adverse impacts on Interstate’s lifeline service, the lifeline ratepayers, and the Town of New Shoreham....”²³⁷ Mr. Edge also criticized RIFF for not proffering any surveys, marketing studies, traffic studies, economic studies, or business studies in support of its application. Interstate adds that Mr. Edge’s testimony also contained the following observations and assertions:

- That when IHSF began operations, “Interstate’s revenue declined, hurting the lifeline ratepayers.”²³⁸
- That when Interstate applied for its own fast ferry CPCN, Mr. Kunkel, testifying on behalf of IHSF, testified that the fast ferry market was “saturated”

²³⁵ Id., p. 11.

²³⁶ Id., p. 13.

²³⁷ Id.

²³⁸ Id., p. 14.

and that entry by Interstate into this market would be “absurd, economically irrational and contrary to the public interest.”²³⁹

- That the “...only way traffic is reduced by RIFF’s entry into the fast ferry market to Block Island is if RIFF is directly taking away Interstate’s customers.”²⁴⁰

- That bringing economic benefits to North Kingstown and South County does not provide support for RIFF’s application.²⁴¹

- That RIFF’s operation would be in direct competition with Interstate and that this competition would be unfair. In order to make it fair, RIFF either must provide year-round services too or it should “pay a fee to Interstate’s lifeline service to help with the winter runs and lost revenue.”²⁴²

- That Interstate’s Newport to Block Island fast ferry service is now profitable.²⁴³

- That Interstate’s predicted “death spiral” in IHSF’s original CPCN case was averted because “Interstate finally got its own high speed ferry and stopped losing customers to... [IHSF].”²⁴⁴

- That using Dr. Mazze’s projections, Interstate would lose \$1,224,970 in revenues - versus Dr. Costa’s projections of \$333,640. Mr. Edge emphasizes that this proves that Interstate would incur losses under either set of projections.

²³⁹ Id.

²⁴⁰ Id.

²⁴¹ Id., p. 15.

²⁴² Id.

²⁴³ Id., pp. 15-16.

²⁴⁴ Id., p. 16.

Interstate proffered Joshua Linda to rebut RIFF's claims that Interstate's Newport to Block Island ferry service is still losing money and that Interstate was overpaying for the fuel used in Interstate's vessels. Mr. Linda also dispelled RIFF's argument that Interstate ought to reduce the number of its summer runs in order to operate more efficiently. Additionally, Mr. Linda was presented by Interstate to discuss Mr. Donadio's offer to buy Interstate or have Interstate operate out of Quonset. Mr. Linda related that after Interstate rejected these ideas, Mr. Donadio questioned whether Interstate would be interested in executing a "non-compete agreement." Through these discussions, Mr. Linda and Interstate have concluded that Mr. Donadio "wants to obtain a CPCN and sell it. He is not concerned about the public. He is solely concerned about personal profit."²⁴⁵

With respect to the public comments that were offered in support of RIFF's application, Interstate argues that these witnesses "were simply presenting expressions of personal opinion." Interstate contends that because their opinions were not based on any studies, their comments "are therefore entitled to no evidentiary weight."²⁴⁶

Interstate also critiqued the testimony that was proffered by RIFF's direct/rebuttal-case witnesses. Starting with Mr. Donadio, Interstate emphasizes that Mr. Donadio's assessment of "public need" was based on "only information provided by Mr. Donadio... [of] how many people and businesses

²⁴⁵ Id., pp. 17-19.

²⁴⁶ Id., p. 29.

reside in each of the towns.” Interstate argues that this “was not a ‘study’ of any kind.”²⁴⁷ Interstate also points out that Mr. Donadio conceded that Interstate has excess capacity and has invested many millions of dollars in its service.²⁴⁸ Interstate adds that Mr. Donadio confirmed that the new terminal he plans to use at Quonset has not been built yet.²⁴⁹ In summation, Interstate contends that Mr. Donadio’s testimony “provided no probative evidence of public convenience and necessity for RIFF’s proposed high speed ferry service.” Interstate observes that Mr. Donadio presented no studies, business plan, marketing plan, or other information that would establish a foundation for, or lend weight to, his personal opinion.²⁵⁰

Interstate next argues that Dr. Costa’s testimony “mostly supported Interstate’s case and undercut Mr. Donadio’s case.” Interstate observes that after Dr. Costa recast Dr. Mazze’s numbers, she concluded that “there was a 95% certainty that Interstate would lose between 4% and 10% of its traditional customers to RIFF.” Interstate notes that the only disagreement between Dr. Costa and Dr. Mazze “is how many customers will be lost.”²⁵¹

Interstate argues that Mr. Kunkel’s testimony should be given little if any weight. Interstate argues that this witness offered an expert opinion without conducting any studies or relying upon any data or analysis; what he offered was “simply... his bald personal opinion that ‘there is a public need for such a

²⁴⁷ Id., p. 30.

²⁴⁸ Id., p. 31.

²⁴⁹ Id.

²⁵⁰ Id., pp. 32-33.

²⁵¹ Id., p. 34.

service and that RIFF's proposed service will satisfy that need."²⁵² Interstate also attacks the three reasons on which Mr. Kunkel bases his opinion; specifically: (1) that the government has spent \$660 million in infrastructure improvements at Quonset, (2) that the Quonset Development Corporation "allegedly 'made a policy decision' that this proposal would serve the public's marine transportation needs when it provided a lease to RIFF, and (3) that there is "allegedly a dormant, unserved market for additional high speed ferry service to Block Island that is 'not currently satisfied by Interstate Navigation's fast ferry service from Point Judith or Newport."²⁵³ However, Interstate argues that through cross-examination, it was established that there was no connection whatsoever between the \$660 million and ferry service to Block Island; it was also established that RIFF's lease was given for the Quonset to Martha's Vineyard ferry run – not a run to Block Island. Finally, Interstate argues that Mr. Kunkel's 'studied opinion' about an unserved market "is purely a personal opinion because it has no foundation in any study, data, or analysis."²⁵⁴ Interstate also questions Mr. Kunkel's credibility for testifying that all of RIFF's customers could be "new customers" who have never used Interstate's ferry services. Interstate asserts that this testimony "[n]ot only make[s] no sense, it is unbelievable, is against the overwhelming evidence, and illustrates how little weight, if any, should be given to Mr. Kunkel."²⁵⁵

²⁵² Id., p. 35.

²⁵³ Id., pp. 35-36.

²⁵⁴ Id.

²⁵⁵ Id., p. 36.

Lastly, Interstate revisits its motion to strike Mr. Kunkel's testimony, a motion that was jointly made by the Town and Interstate during the March 22, 2016 hearing. Interstate notes that the hearing officer took the motion under advisement and permitted the parties to "further elaborate on their positions in their briefs." In support of the motion, Interstate and the Town argue that "expert testimony must be based on facts and data to determine whether the opinion has probative force or is merely speculation." Interstate argues that "since the reasons which allegedly supported Mr. Kunkel's opinion were thoroughly discredited, we are left with an opinion not based on any facts, data, studies, or analyses, and therefore it should be stricken, or at a minimum, be treated simply as personal opinion/public comment and given little or no weight."²⁵⁶ In further support of its motion, Interstate points out that when Mr. Donadio and IHSF applied for a CPCN in 1998, the application was supported by expert testimony from Dr. Timothy J. Tyrrell, Ph.D. Interstate stresses that as bases for his expert testimony, Dr. Tyrrell relied on his experience in "tourism economics" and also research that was incorporated into the Port of Galilee Master Development Plan and the Rhode Island Travel and Tourism Research Report. Interstate asserts that Mr. Kunkel's testimony, in comparison, only relies on his personal opinion.²⁵⁷

²⁵⁶ Id, pp. 38-40.

²⁵⁷ Id., pp. 40-41.

c. The Town's Final Position

The Town also filed its post-hearing legal memorandum on June 7, 2016. As its first argument, the Town reiterated its assertion that Mr. Kunkel's testimony must be stricken from the record. Reciting the three factors on which Mr. Kunkel bases his opinion of public need, the Town offers a counter-argument to each.

The first basis for Mr. Kunkel's opinion on public need was that both federal and State governments had invested a combined \$660 million in infrastructure improvements in the Quonset-Davisville Business Park; and that '[i]nherent in that decision making was the assumption that there was a public need for the goods and services that the business tenants of the park would provide.' The Town rejects this public investment in infrastructure as evidence of public need for RIFF's proposed services. As Interstate has argued, the Town contends that when Mr. Kunkel was cross-examined on this issue he acknowledged that the funding he referenced in his testimony occurred in the mid-1990's through a bond referendum which was approved by the Rhode Island Legislature. The Town underscores that Mr. Kunkel could not produce any evidence that this bond was issued to facilitate ferry services between Quonset and Block Island and that Mr. Kunkel admitted that the 1990's was before the time that high-speed ferry service was widely adopted in the Northeast.²⁵⁸

²⁵⁸ Town's Post Hearing Memorandum, pp. 3-4.

The second basis for Mr. Kunkel's opinion was that the QDC made a policy decision when it granted RIFF's concession/land lease and approved its bulkhead improvements, that those actions would serve the public marine transportation needs, including services to Block Island. But the Town stresses that during cross-examination, Mr. Kunkel admitted that the approval of the lease was ostensibly based on RIFF's then proposed services between Quonset and Martha's Vineyard and not services to Block Island.²⁵⁹

The third basis for Mr. Kunkel's opinion rested with his 'studied opinion' that there is a dormant, unserved market for additional high-speed ferry service to Block Island. Also similar to Interstate's argument, the Town asserts that Mr. Kunkel's opinion cannot be viewed as an expert opinion due to the fact that he offered no studies, interviews, data or surveys to support his opinion. The Town contends that Rhode Island law provides that an expert may not give an opinion without describing the foundation on which the opinion rests. As the Town believes that Mr. Kunkel has offered no such foundation in this case, the Town argues that Mr. Kunkel's opinion "has no probative force" and should be stricken.²⁶⁰

Next, relying on the *Abbott* case, *supra*, the Town asserts that RIFF has failed to establish that there is a public need for a new fast ferry service between Quonset and Block Island. The Town submits that not only is Mr. Kunkel's expert testimony without foundation and not useful to RIFF, but that

²⁵⁹ *Id.*, pp. 5-6.

²⁶⁰ *Id.*, pp. 6-10.

RIFF's remaining witnesses also failed to establish public need in this docket. Starting with Myrna George's testimony, the Town summarized her testimony as simply an opinion that there is a public need to reduce traffic congestion in the "South County" area in the summertime. The Town asserts that Ms. George's testimony failed "to establish a public need for a new fast ferry service from Quonset to Block Island."²⁶¹

The Town offered the same argument against the testimony presented by Martha Pughe. The Town summarized Ms. Pughe's testimony as an opinion that RIFF could improve business in North Kingstown if RIFF were allowed to provide ferry services to Block Island. The Town maintains that Ms. Pughe "provided no competent testimony about a public need for a new fast ferry service from Quonset to Block Island."²⁶²

The Town argues that "nothing" in Elizabeth Dolan's testimony "was related to the public need for a new fast ferry service from Quonset to Block Island." The Town suggests that Ms. Dolan is only interested in RIFF's success in order "to benefit North Kingstown."²⁶³

The Town argues that Mr. Billington's opinion "as to an alleged 'pent-up demand' for more convenient travel to Block Island is not based on any facts, just his assumptions and what he said was the experience gained from running a tour to Block Island..." The Town, however, takes note that Mr. Billington's tour only lasted one year and that Mr. Billington could not recall anyone telling

²⁶¹ Id., pp. 12-13.

²⁶² Id., p. 13.

²⁶³ Id., pp. 13-14

him that that they did not want to take his tour because the ferry was leaving from Narragansett. The Town insists that Mr. Billington “did not provide any competent evidence in support of RIFF’s position that there is a public need for the proposed service.”²⁶⁴

With respect to Mr. King’s testimony, the Town argues that its cross-examination of Mr. King brought out that Mr. King’s use of the phrase “public need” was connected to ‘our view of the public being served... by utilizing those investments that have been made’ rather than being connected to the question of whether there is a public need for another ferry service to Block Island. The Town argues: ‘[c]learly, Mr. King did not provide any competent evidence about public need for RIFF’s proposed high-speed ferry service.’²⁶⁵

The Town next criticized Mr. Donadio for initially promising the Town that he would not pursue a CPCN without the Town’s support and then reneging on his promise.²⁶⁶ The Town notes that it could not support Mr. Donadio’s CPCN proposal due to a number of concerns, including harbor traffic congestion, the number of visitors coming to Block Island already, and likely rate increases caused by a reduction in Interstate’s summertime passenger revenues and/or a reduction in services during the off-peak seasons.²⁶⁷ With respect to Mr. Donadio’s claims of public need, the Town reiterates that the

²⁶⁴ Id., pp. 14-15.

²⁶⁵ Id., pp. 15-16.

²⁶⁶ Id., pp. 16-17.

²⁶⁷ Id., pp. 17-18.

Division should disregard Mr. Donadio's opinion as he fails to back it up with the use of any studies, data, interviews or surveys.²⁶⁸

The Town also focused on the "hardship and inconvenience" that the Town asserts RIFF's proposed service would bring to New Shoreham. The Town argues that the Division should afford significant weight to the Town's position in this matter based on the special notification provisions contained in R.I.G.L. §§39-3-3 and 39-3-3.1. The Town declares that its concern that RIFF's services will damage the lifeline services the Town receives from Interstate must be given serious attention by the Division.²⁶⁹ The Town argues that RIFF's proposal to compete with Interstate would not result in fair competition due to the fact that RIFF does not propose to provide year-round services. To support its position, the Town relies on the testimony of Dr. Mazze who has asserted that RIFF's entry into the market "would negatively impact Interstate's lifeline passenger, vehicle and freight services to Block Island by taking away customers and revenue from Interstate during the summer months."²⁷⁰ The Town also relies on the testimony of Mr. Edge, who "also testified about the deleterious effects" that RIFF's operation would have on Interstate's lifeline services to Block Island.²⁷¹ The Town also urges the Division to consider the testimony of the Town's Manager, First Warden, Second Warden and Harbormaster, who all "testified to the inconvenience, traffic, congestion and

²⁶⁸ Id., pp. 18-20.

²⁶⁹ Id., pp. 21-22.

²⁷⁰ Id., pp. 23-24.

²⁷¹ Id., pp. 25-26.

indeed danger that would result in a fast ferry coming into the corner of the Old Harbor...”²⁷²

Lastly, the Town argues that in view of the *Abbott* factors to be considered in determining whether a CPCN should be issued, the evidence reflects that RIFF has not satisfied its burden of proof in this case. The Town lists the following eight factors that *Abbott* requires the Division to consider:

- Has RIFF proven that “public convenience and necessity” require the proposed service from Quonset to Old Harbor, Block Island;
- Does Interstate meet the needs of the public for ferry travel to Block Island;
- What investments of capital has Interstate made in its ferry operations;
- What is the nature of the ferry service being rendered by Interstate;
- If Interstate’s service is adequate, what would be the probable effect of admitting RIFF into the fast ferry field which is already adequately served;
- What is the anticipated effect of RIFF’s proposed ferry service operations upon Interstate’s revenues;
- Would RIFF’s proposed ferry service operations have an adverse impact on the adequacy of the existing services provided by Interstate; and
- Is RIFF fit, willing and able to properly perform the service proposed?²⁷³

The Town submits that a consideration of all these factors “weighs heavily against the issuance of a CPCN to RIFF.”²⁷⁴

²⁷² Id., pp. 26-28.

²⁷³ Id., p. 29.

d. The Advocacy Section's Final Position

On June 7, 2016, the Advocacy Section notified the Division "that it would not be filing a post-hearing memorandum" in this docket. The Advocacy Section reasoned that the applicant "was afforded the opportunity to present a complete case; likewise, the intervening parties... fully participated in the process, ensuring that the record was replete with evidence to support its respective concerns and objections." The Advocacy Section adds that the Division "now has ample evidence with which to make a fully-informed, fair and reasoned decision."²⁷⁵

e. RIFF's Reply Position

On June 31, 2016 the Division received a Reply Memorandum from RIFF, which was proffered in response to the closing positions of the Town and Interstate.

In its reply, RIFF argues that Interstate and the Town "erroneously" contend that RIFF failed to meet its burden of establishing a public need and convenience for its proposed high-speed ferry service. RIFF submits that the demand for its proposed service is obvious, as evidenced by the Town's concerns over "a dangerous increase in crowds... traveling to Block Island" and Interstate's argument "that the demand is so high that Interstate's very existence is threatened...." RIFF contends that these concerns "inescapably presuppose... a large untapped population of people who are not currently

²⁷⁴ Id., pp. 30-35.

²⁷⁵ June 7, 2016 email communication from Attorney Hetherington to the Hearing Officer (copied to Service List).

traveling to Block Island.” RIFF adds: “[a]ll the paper, ink or time spent by these intervening Parties arguing that a market demand does not exist is therefore entirely inconsistent with the crux of both Parties’ arguments challenging RIFF’s evidence of market demand.” RIFF submits that the “only dispute is the extent to which this admitted demand is comprised of new passengers from the untapped market, as asserted by the Town or crossover passengers as asserted by Interstate.”²⁷⁶

RIFF also urged the Division to deny the Town’s and Interstate’s joint motion to strike the expert testimony of Mr. Kunkel. RIFF argues that “the real debate... is whether the facts and data that Mr. Kunkel relied upon were credible enough to support his opinion, not whether he actually did rely upon certain other facts and data that the movants assert he ‘should have’ relied upon.” RIFF argues that Interstate and the Town’s assertions regarding the sufficiency and quality of Mr., Kunkel’s testimony ‘would go to the weight the [fact finder] might give to the testimony of the expert but that... d[oes] not make the expert’s testimony inadmissible.’²⁷⁷ RIFF maintains that Mr. Kunkel is permitted to base his expert opinion on the facts and data that he espoused during the hearing.²⁷⁸

RIFF also argues that despite Interstate’s assertions to the contrary, granting RIFF a CPCN will have a minimal impact on Interstate’s lifeline service. Using Dr. Mazze’s data, RIFF points out that Dr. Costa calculated and

²⁷⁶ RIFF Reply Memorandum, pp. 1-4.

²⁷⁷ Id., pp. 5-6, also citing *Sweet v. Murphy*, 473 A.2d 758, 760-761 (R.I. 1984).

²⁷⁸ Id., pp. 6-9.

testified that somewhere between 4% and 10% of Interstate's conventional ferry passengers "might" use a Quonset fast ferry that costs \$50 and took longer; and that between .04% and 3% of Interstate's fast ferry customers would use the Quonset fast ferry at that price and requiring a longer ride over the water, with a level of certainty of 95%. RIFF observes: "[u]sing Dr. Costa's figures, the average cost to the ratepayer could increase by \$0.40, less than one dollar – for the traditional or conventional service."²⁷⁹ RIFF also argues that "it remains unclear if the revenue loss will even be that high because Interstate's survey conveniently never asked a 'Question 7,' whether increased ticket price and increase time over the water would impact whether passengers would utilize a high-speed ferry service from Quonset Point to Block Island... and because Interstate's revenue loss calculations did not account for either Question 5 or 6 in its passenger loss percentage." RIFF further argues that to put this impact in context, "using Mr. Edge's adjusted worst-case scenario figures, giving RIFF a license would allegedly result in a rate increase of only \$1.85 for an adult, round-trip, traditional ferry ticket." Based on this worst-case rate increase projection by Mr. Edge, RIFF characterizes Interstate's 'death spiral' claim as "preposterous."²⁸⁰

RIFF next argues that Interstate "does not have a right to maintain a monopoly." In making this argument, RIFF relies on a recent Division decision which held that "existing carriers do not have a legal right to maintain a

²⁷⁹ Id., pp. 10-11.

²⁸⁰ Id., pp. 12-13.

monopoly upon services rendered, and that increased competition is not a valid ground for denying a common carrier CPCN.”²⁸¹ RIFF also notes that the Rhode Island Superior Court reached a similar holding; adding that the Court noted that ‘protecting existing investments... from even wasteful competition must be treated as *secondary* to the first and most fundamental obligation of securing adequate service to the public.’²⁸² RIFF also emphasizes that both the Public Utilities Commission and the Rhode Island Supreme Court have held that high-speed ferry service is a discretionary service and that it is to be treated differently from Interstate’s ‘lifeline’ service.²⁸³ RIFF additionally notes that the Public Utilities Commission has stated: “[w]e must also remain cognizant of the competitive markets developing in many utility sectors and the particular business exigencies arising therefrom. In our view, establishing choice for ferry travel to Block Island is a positive development for consumers.”²⁸⁴ In closing, RIFF argues that the “competent evidence in the record is that Interstate’s opposition to RIFF’s CPCN application is motivated by a desire to maintain its intrastate monopoly.”²⁸⁵ RIFF maintains that the general public “should not be denied the opportunity to avail itself of the Applicant’s service in order to insulate Interstate... from all risk of revenue

²⁸¹ Id., p. 13, citing to Division Order No. 21170, issued in Docket No. D-13-51 on September 24, 2013.

²⁸² Id., pp. 13-14, citing to *Interstate Navigation Co. v. Division of Public Utilities and Carriers*, No. C.A. 98-4766, 1999 WL 813603, at 5 (R.I. Super. Ct., August 31, 1999).

²⁸³ Id., p. 14, citing to *Interstate Navigation Co. v. Division of Public Utilities*, 824 A.2d 1282, 1288 (R.I. 2003).

²⁸⁴ Id., p. 15, citing to *In Re: Island Hi-Speed Ferry, LLC, Proposed Passenger Rates & Ferry Schedule, Petition for Waiver or Rate Hearing & Investigation, & Motion for Exemption from Rate Filing Requirements*, 2802, 1999 WL 35645630 (Mar. 31, 1999).

²⁸⁵ Id., p. 15.

erosion is a concept that the Division cannot embrace, especially given the current trends toward competition and the increasing availability of consumer choice in numerous industries subject to regulation by both the Division and Commission.”²⁸⁶

f. Interstate’s Reply Position

Interstate filed a post-hearing reply memorandum on July 5, 2016. In its reply, Interstate accuses RIFF of “going outside the evidentiary record and assuming that it could present misleading and inaccurate information without being called to task.” Interstate offers the following corrections:

- Interstate notes that IHSF began service in the summer of 2001, not in 1998, as asserted by RIFF;²⁸⁷
- Interstate rejects RIFF’s claim that Interstate has a monopoly on ferry service to Block Island. Interstate notes that another high speed ferry operates between New London, Connecticut, and Old Harbor, Block Island, and that another traditional ferry service operates between Montauk, Long Island and New Harbor, Block Island. Interstate does admit that it “has a ‘monopoly’ on providing lifeline traditional ferry service because no one else wants the burden.”²⁸⁸
- Interstate also rejects RIFF’s assertion that Interstate is a Connecticut company. Interstate relates that it is headquartered in Galilee and

²⁸⁶ Id., p. 16.

²⁸⁷ Interstate’s Reply Memorandum, p. 1.

²⁸⁸ Id., pp. 1-2.

is registered to do business in Rhode Island. Interstate also notes that the “overwhelming majority” of its employees are Rhode Island residents.²⁸⁹

- Interstate rejects RIFF’s assertions that Interstate did not lose passengers after IHSF was granted a CPCN and that ‘Interstate’s traditional ridership has grown immensely since 1998, even during the time when Interstate competed directly with the new [IHSF] high-speed service.’ Interstate argues that not only is there no evidentiary support for this claim, “RIFF is dead wrong.” Interstate contends that its ridership significantly declined when IHSF started operating in 2001 and that the decline continued until 2006 when Interstate purchased IHSF.²⁹⁰

- Interstate next corrects RIFF’s claim that the Block Island Tourism Council endorsed RIFF’s proposal. Interstate points out that Tourism Council sent a letter to the Block Island Town Council on March 22, 2016 making clear that it was not endorsing RIFF.²⁹¹

- Interstate also corrects RIFF’s claim that the Town endorsed Interstate’s Newport high-speed CPCN application. Interstate replies that that record in that docket, Docket No. D-05-06, reflects that “the Town took no formal position.” Interstate also challenges RIFF’s suggestion that the Town is unfairly opposing RIFF’s application, but had no apparent problem with the increased passenger traffic Interstate’s Newport and Fall River services brought to Block Island. Interstate emphasizes that its Newport run carried far fewer

²⁸⁹ Id., p. 3.

²⁹⁰ Id., pp. 3-5.

²⁹¹ Id., p. 5.

passengers to Block Island in its three years of operation than what RIFF is projecting for its first three years of operations (52,000 v 117,800).²⁹²

- Interstate next faulted RIFF for narrowing the “public interest” component of R.I.G.L. §39-1-1(b) to “a particular community such as North Kingstown.” Interstate argues that the law requires the Division to consider what would be in the interest of “**all** the inhabitants ‘of the state.’” (Emphasis in original).²⁹³

- Interstate next argues that by not submitting a business plan with its application RIFF has not laid an appropriate evidentiary foundation to support its claim of public need for its services. Interstate submits that a business plan would have provided necessary details regarding: the vessel to be used, the number and departure times of daily runs, travel time over the water, specifics on the dock to be used, a pro forma financial statement, marketing study or survey demonstrating a need for the service, a marketing plan and ticket prices. Interstate argues that without these details, “the Division is being asked to grant a CPCN for a proposed ferry service it knows little about.”²⁹⁴

- Interstate notes that RIFF has stated that it “endured over three years of hearings, briefings, data requests and motions...” However, Interstate attributes all the delays in this case to RIFF.²⁹⁵

²⁹² Id., pp. 5-6.

²⁹³ Id., pp. 6-7.

²⁹⁴ Id., pp. 7-8.

²⁹⁵ Id., pp. 8-9.

- Interstate next takes exception to RIFF's claim that Mr. Donadio rejected Interstate's non-compete offer.' Interstate argues that the record shows that "the non-compete offer came from Mr. Donadio, not Interstate." Interstate reiterates that "[t]his CPCN would simply be a tool for Mr. Donadio to turn another fast profit, at the expense of ratepayers."²⁹⁶

- Interstate rejects RIFF's claim that Interstate did not submit a business plan when it applied for its Newport to Block Island CPCN. Interstate argues that unlike RIFF, it provided all the information that would have been included in a business plan in its direct case to the Division.²⁹⁷

- Interstate next argues that RIFF misrepresented several facts when it claimed that its "service is not contrary to the Block Island Comprehensive Plan, that Interstate's service is no longer adequate to serve the growing need [and] that RIFF's service encourages competition..." Interstate contested RIFF's assertion about the Town's Comprehensive Plan by revisiting the testimonies of the Town's First and Second Wardens and actual excerpts from the Comprehensive Plan.²⁹⁸

- Interstate also challenges RIFF's claim that "Interstate's service is no longer adequate to serve the growing need." Interstate argues that RIFF offered no citations to the record "to support this absurd statement..." Interstate emphasizes that it runs eight traditional ferry trips each weekday during the summer and nine on weekends; and six high-speed ferry trips daily.

²⁹⁶ Id., pp. 9-10.

²⁹⁷ Id., p. 11.

²⁹⁸ Id., pp. 12-13.

Interstate also notes that its traditional ferries can carry at least 1000 passengers; the high-speed ferry can carry 250 passengers; and that passengers can make reservations in advance. Interstate argues that sold-out ferries are rare for “walk-on” customers without a reservation, but that such customers are never turned away. Interstate also notes that RIFF will not operate traditional ferries and that riding time over the water will be twice as long as Interstate’s high-speed service.²⁹⁹

- Interstate also argues that RIFF’s proposal would not noticeably reduce traffic. Interstate asserts that the record does not support RIFF’s claim that its service would reduce traffic in the South County area. Further, Interstate argues that “whether traffic would be reduced has absolutely nothing to do with whether or not the public convenience and necessity requires the proposed fast ferry service.” Interstate also adds that if you consider RIFF’s plan to operate for 75 days per summer, RIFF’s projection of carrying 32,000 passengers in its first year of operation and that each car will carry an average of two persons, the traffic reduction would be only 213 cars per day, which Interstate argues “could not have a noticeable or even measurable impact on traffic reduction.”³⁰⁰

- Interstate rejects RIFF’s argument that because Mr. Donadio is proposing to make a “private investment” he should be given a CPCN.

²⁹⁹ Id., pp. 13-15.

³⁰⁰ Id. p. 15.

Interstate stresses that the test is whether the proposed service will satisfy the public need and convenience.³⁰¹

- Interstate also challenges RIFF's claim that there is inadequate parking in Galilee. Interstate notes that while it is true that the Lighthouse Inn parking lot may be full for 30 or 45 days per summer, there are many other parking lots in Galilee.³⁰²

- Interstate also argues that "job creation" is not an issue in this case. Again, Interstate stresses that the test is whether the proposed service will satisfy the public need and convenience.³⁰³

- Interstate next criticizes RIFF for arguing that Interstate's survey is defective "for not asking a question that RIFF felt should have been asked." Interstate questions "where is RIFF's survey?"³⁰⁴

- Interstate next criticizes RIFF for arguing that Dr. Mazze's analysis was "fundamentally flawed." Interstate responds by arguing that "Dr. Costa conceded that she never did a single survey in her life" and is not qualified to find fault with Dr. Mazze.³⁰⁵

- Finally, Interstate responded to RIFF's claim that Interstate "has requested and received rate increases, continuing to gain more revenue from its passengers." Interstate notes that in its most recent 2015 rate filing for its traditional ferry service, the Commission "imposed a **decrease** in revenues of

³⁰¹ Id., p. 18.

³⁰² Id., pp. 18-19.

³⁰³ Id., p. 19.

³⁰⁴ Id., p. 20.

³⁰⁵ Id.

\$733,842 per year, which is approximately a 9% overall across-the-board decrease. (Emphasis in Original).³⁰⁶

g. The Town's Reply Position

The Town also filed a post-hearing reply memorandum on July 5, 2016. In its reply memorandum, like Interstate, the Town asserts that much of the argument contained in RIFF's post-hearing memorandum has no factual support in the record of this docket and, consequently, must be ignored by the hearing officer.³⁰⁷ The Town draws particular attention to RIFF's frequent reference to IHSF's 1998 application case. The Town contends that throughout its memorandum, RIFF "attempts to influence the hearing officer by not only referring to but also drawing inappropriate and, indeed, untrue inferences and conclusions about what occurred during the hearing in the 1998 Application and the resulting effects and outcomes of the granting of the application." The Town thereupon submits that the Division should disregard all of RIFF's inappropriate references to the 1998 Application case.³⁰⁸

The Town also argued that RIFF's lay witnesses are not permitted to provide testimony predicting how a person or population will act. The Town contends that due to the weaknesses in Mr. Kunkel's "opinion testimony," RIFF "attempts in its post-hearing memorandum to create evidence in support of its obligation to demonstrate the need for the proposed ferry service through the testimony of certain lay witnesses, none of whom are competent to testify as to

³⁰⁶ Id., p. 21.

³⁰⁷ The Town's Reply Memorandum, pp. 1-2.

³⁰⁸ Id., pp. 2-3.

need.”³⁰⁹ However, the Town maintains that this effort by RIFF should be disallowed by the Division because the law does not permit a lay witness to testify as to the lay witness’ opinion about what another person would or would not do in the circumstances presented.³¹⁰

The Town also argues that RIFF’s use of the word “competition” in its post-hearing memorandum is misplaced. The Town submits that “[c]ompetition refers to a choice between two like services that a consumer can freely make. From the prospective [sic] of the island residents and those travelling to the island during the off season, the establishment of a new ferry service from Quonset to Block Island will not provide them with any choice whatsoever...”³¹¹

Lastly, the Town reiterates that RIFF’s proposed ferry service “violates the Town’s Comprehensive Plan. As examples of its inconsistencies with the Town’s Comprehensive Plan, the Town notes that RIFF’s proposed service “does not present Block Island as a destination for travel... [or] encourage off season visitors... [or] promote alternatives to tourism.”³¹²

10. Findings

Before addressing the relevant findings, the Division notes that Rhode Island General Laws, Section 39-3-3, establishes the requisite burden of proof that RIFF must satisfy in order to receive the “water carrier” CPCN that it seeks. The pertinent provisions state as follows:

³⁰⁹ Id., p. 5.

³¹⁰ Id., pp. 6-8.

³¹¹ Id., pp. 8-9.

³¹² Id., p. 9.

No common carrier of persons and/or property operating upon the water between termini within this state shall hereafter furnish or sell its services unless the common carrier shall first have made application to and obtained a certificate from the division certifying that public convenience and necessity required the services.³¹³

In addition to a determination of whether the “public convenience and necessity require[s] the services” the Division must also evaluate the applicant’s “fitness, willingness and ability” to provide the proposed transportation services.³¹⁴

a. Fitness, Willingness and Ability

The Division observes that the only arguable challenges to RIFF’s “fitness” and “ability” to provide its proposed ferry service come from the Town. Specifically, on the issue of “ability,” the Town maintains that RIFF has failed to prove that it has legitimate access rights to a docking facility in Old Harbor. On RIFF’s “fitness,” the Town seems to suggest that because Mr. Donadio reneged on an earlier commitment to not move forward with his CPCN case without the Town’s support, the Division should conclude that Mr. Donadio (and RIFF) is unfit to hold the requested CPCN. Additionally, as a fitness/ability hybrid issue, the Town faults RIFF for not proffering a business plan with its application. The Division rejects all three of these arguments.

First, on the dock issue, the Division has made it abundantly clear that it believes that RIFF has adequately demonstrated that Bluewater’s claims of interest and ability to construct a docking facility in Old Harbor are credible,

³¹³ Under R.I.G.L. §39-1-2 (7), the definition of a “common carrier” includes “ferry companies”.

³¹⁴ See generally R.I.G.L. §§39-1-1, 39-1-38 and 39-3-3.1; also *Interstate Navigation Co. v. Division of Public Utilities and Carriers*, 1999 WL 813603 (R.I. Super. 1999).

supra. The record also sufficiently supports a finding that RIFF will have access to Bluewater's planned dock after it is constructed, *supra*. Therefore, the Division must find that the dock issue raised by the Town is without merit and not a regulatory impediment to RIFF's "ability" to provide its proposed ferry services.

With respect to the Town's suggestion that Mr. Donadio's fitness has been called into question due to his decision to pursue a CPCN without the Town's support, the Division cannot possibly ascribe application-denying weight to this turn of events. Though it does appear that Mr. Donadio broke his promise to Town officials, that fact, by itself, is insufficient to deny the requested CPCN. The Division recognizes that Mr. Donadio has had a long and successful business career as a transportation service provider via cruising/touring vessels and high-speed catamarans. His experiences with the Southland Riverboat, IHSF, charter and consulting services in Florida, New Jersey, New York and Bermuda, and now RIFF, a career of related service collectively spanning over twenty years, abundantly evidences his fitness to provide the services he now proposes through the instant application.

The Division also cannot accept that Mr. Donadio's (and RIFF's) fitness and/or ability is adversely impacted by RIFF's decision to not include a business plan with its application. Once more, in view of his extensive experience in the water carrier industry and the time and financial resources that Mr. Donadio has devoted to the instant application process, it would be unreasonable to infer that Mr. Donadio lacks the business and financial

wherewithal to effectuate his proposal. Further, the Division fails to see how the Town (or Interstate) will be prejudiced in any way if RIFF is unable to raise the necessary funds to purchase or lease a vessel and/or lease the necessary dock in Old Harbor. In such case, the status quo is preserved; Interstate remains the sole high-speed ferry service provider to Block Island.

Also on the issue of an applicant's "ability" to carry out a proposed offer of ferry services without a vessel or dock(s), the Division has established a precedent for approving CPCN applications without proof that an applicant already possesses suitable docks and a vessel. The Division has held that requiring an applicant to possess the docks and vessel at the time of the application filing is economically impractical and contrary to Division precedent.³¹⁵ The Division acknowledges that it has, in the past, granted applications for water carrier CPCNs without *de facto* evidence of immediate access to docks and a vessel. The critical element for regulatory purposes is that the applicant whose application has been granted is subject to various conditions-subsequent (i.e., availability of docks and a vessel, consistent with the Division's Report and Order; proof of insurance; satisfaction of applicable Coast Guard and municipal permitting requirements; and a Division inspection) as a prerequisite before the Division actually issues a CPCN and before services may legally begin. Therefore, the Division finds nothing

³¹⁵ See Application by A & R Marine Corporation for Water Carrier Authority, Docket No. D-13-105, Order No. 21363 at 54.

improper with RIFF's decision to seek approval of its application before expending any funds on a new vessel and docking privileges.³¹⁶

Based on the foregoing, the Division finds sufficient evidence to support a determination that RIFF is "fit" and "willing" to provide its proposed ferry services and that the Company possesses the requisite "ability" to successfully initiate and maintain a high-speed ferry service between Quonset and Block Island.

b. Public Convenience and Necessity

RIFF has argued that there currently exists an unserved public need for its proposed service and that its proposed service would provide greater convenience for many ferry customers currently traveling between mainland-Rhode Island and Block Island aboard Interstate's traditional and high-speed ferries. In response to these assertions, Interstate and the Town have offered forceful counter-arguments. First, arguing that RIFF has failed to demonstrate the existence of an unserved public need for RIFF's Quonset - Block Island ferry service; and, secondly, that Interstate's year-long lifeline services to the Town would suffer significantly by the introduction of a competing summer-only high-speed ferry service from Quonset, which Interstate and the Town contend will invariably lead to higher lifeline rates and/or reduced lifeline services.

³¹⁶ Id.

1. Lifeline Benefits

Interstate and the Town have asserted in this docket that RIFF's proposed high-speed ferry services must be denied to keep Interstate's "lifeline" service-related rates from increasing and to avoid any reduction in lifeline services to and from Block Island. The Intervenors contend that the revenues that Interstate will lose from the anticipated migration of some of Interstate's summer customers over to RIFF will result in lost business and revenues for Interstate, which Interstate and the Town argue will place upward pressure on Interstate's lifeline service rates and/or necessitate a reduction in lifeline services. However, the Division has heard this argument from Interstate before; and has rejected it.

When Interstate applied for its current high-speed ferry CPCN in 2004, its direct case principally relied on an argument that its proposed fast ferry services were needed, in part, to keep its "lifeline" service-related rates from increasing. Interstate argued that the need to keep its lifeline service rates "as low as possible" ought to be a determining factor in the Division's assessment of whether the "public convenience and necessity" required Interstate's proposed fast ferry service. The core of Interstate's argument rested on the expected profitability of its fast ferry services (then projected to be approximately \$500,000 annually) and the Company's promise to "pour all of

that profit into the lifeline ferry service to control rates on its conventional ferry service for the benefit of its ratepayers.”³¹⁷

However, in its Report and Order in that 2004 docket, the Division found “little, if any, relevance” in Interstate’s commitment to share the profits from its proposed high-speed ferry service with the Company’s lifeline ferry service. The Division reasoned as follows:

The Division has previously determined that “fast” ferry services and “conventional” ferry services are two distinctly different water carrier operations. The Rhode Island Supreme Court has thoroughly vetted the issue and has agreed with the Division. Therefore, the Division cannot accept Interstate’s argument that the economic viability of the two services should be linked for licensing purposes.

While the accounting and ratemaking treatments of Interstate’s high-speed services and conventional-speed services may be inextricably linked, the Division finds that 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. As an analogy, the 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. In short, the Division finds the argument illogical from a licensing perspective.³¹⁸

With this previous finding and decision as controlling precedent, the Division will not decide the issue of what revenue impact would befall an existing traditional or conventional lifeline ferry service from the introduction of

³¹⁷ See Application by Interstate Navigation Company for Water Carrier Authority, Docket No. D-05-06, Order No. 18506 at 61.

³¹⁸ Id. at 61-62.

a new discretionary high-speed ferry service. The two services, as noted above, are distinctly different services – two different modes of transportation – and the situation presented not unlike adding additional air carrier services between the mainland and Block Island. The impact is too far removed for regulatory licensing purposes.

“Lifeline” services exist to provide the residents and businesses on Block Island with a level of certainty that they will be able to travel and transport goods between the Island and the mainland throughout the year. Conversely, “discretionary” high-speed ferry service exists, almost exclusively, to expedite the transit of passengers between termini. Again, a situation not unlike air carrier services. In the instant case, the argued impact to Interstate’s lifeline service would result from an expected loss of passenger revenues from Interstate losing both traditional and high-speed ferry passengers to RIFF during the summer months. As for the expected losses associated with Interstate’s traditional service riders, the Division finds that if Block Island residents and business owners/employees decide to take a high-speed ferry to Block Island from Quonset in the summertime, then those riders are no longer availing themselves of “lifeline” services. Instead, they have become discretionary riders aboard a high-speed ferry. The same can be said for those Block Island residents and business owners/employees that ride Interstate’s high-speed ferries. The two services are different. In the shoulder and winter months (the non-summer months), Block Island residents and business owners/employees will know that they have access to unwavering “lifeline”

service from Interstate. Nothing in this record causes the Division to conclude that this existing lifeline service would be altered in any material way from the introduction of a new seasonal high-speed service.

Interstate and the Town have maintained that the lifeline services that Interstate provides cannot survive, as presently priced and structured, if RIFF is permitted to poach summer customers from Interstate. Unquestionably, the bulk of these summer travelers to which Interstate refers are **not** residents of Block Island or directly related to business activities on Block Island. They are, more accurately, tourists and day-trippers visiting Block Island. Interstate and the Town, in effect, are arguing that these tourists and day-trippers should be expected to defray the annual transportation costs for Island residents and businesses without competition from other mainland ferry service provider(s). The wisdom of this rate design is properly before the Commission. However, for CPCN licensing purposes, the Division is not willing to quell all competition, whether it be direct or indirect, in order to perpetuate a rate arrangement that places the narrow financial needs of the Island residents and businesses over the broader transportation needs of the general public. Both classes of needs must be considered important.

The Division is cognizant that Interstate offered the same lifeline “death spiral” prognostication in 1998 when IHSF applied for what would be Rhode Island’s first high-speed ferry service. In that 1998 CPCN application docket, Interstate not only argued that its lifeline services would be fatally impacted by IHSF’s proposed services, but it also argued that there was categorically no

public need for a high-speed ferry service to Block Island in the first place.³¹⁹
Both predictions proved dramatically incorrect.

The Intervenors' concerns over lost revenues to traditional lifeline services will never abate. Especially considering that Interstate's lifeline services will need to coexist with existing and potential future interstate ferry services to Block Island. Presently, there exists a directly-competing high-speed ferry service between New London, Connecticut, and Block Island. Undoubtedly, a large number of riders on that ferry service would be coming to Point Judith for a connection to Block Island if the New London service was not available. Under Interstate's current rate structure, the New London service affects Interstate's lifeline rates and services to Block Island. Similarly, Interstate has begun a high-speed service from Fall River to Block Island, which provides a clear disincentive for those living in the Fall River area to travel to Block Island from Point Judith or Newport. If another Fall River connection to Block Island were operated by RIFF, or another company, in direct competition with Interstate, that operation would similarly have some impact on Interstate's lifeline rates and services. In short, interstate ferry services to Block Island are not regulated by state authorities, and all such services, both present and future, will have some impact on Interstate's lifeline services and rates. That fact is not novel and will continue to be baked into Interstate's lifeline rates. Adding another competing high-speed service to the Block Island tourism market will likely have a similar minor incremental effect.

³¹⁹ See In Re: Island Hi-Speed Ferry LLC, Docket No. 98-MC-16, Order No. 15652.

The Division acknowledges that Interstate has established itself as an invaluable lifeline ferry connection between Point Judith and Block Island. Interstate has been providing this excellent passenger and freight service for many decades. During these decades of service Interstate has requested and received rate adjustments and increases from the Commission in order to keep its lifeline services viable and profitable. This is a natural and anticipated reality for a regulated public utility. Indeed, over the years, such rate adjustments and increases have led to abundant advances in the level and comfort of ferry services to the Island. There is nothing significant in the instant record that would lead the Division to conclude that this historical pattern of lifeline service would be jeopardized by the entry of a new water carrier providing a different mode (high-speed versus traditional ferry service) of seasonal transportation service.

2. The Towns of North Kingstown and New Shoreham

In this docket, the towns of North Kingstown and New Shoreham have both weighed in on the issue of whether RIFF's proposed ferry services would be beneficial to the public, the regulatory standard by which the Division must base its decision.

The town of North Kingston, through its current and former Town Council presidents, spoke in support of RIFF's application. Their support was chiefly linked to their belief that if RIFF's application were approved it would bring additional tourism dollars to North Kingstown businesses,

which would ultimately benefit the Town of North Kingstown. The Executive Director of the North Kingstown Chamber of Commerce agreed.

The Town of New Shoreham went a step further and decided to actively participate in this docket as an Intervenor. The Town of New Shoreham opposes RIFF's application on the grounds that another ferry service to Old Harbor would bring boat traffic safety concerns in Old Harbor, additional crowding on the island and place upward pressure on lifeline service rates. New Shoreham also contends that RIFF's proposed services ought to be rejected by the Division based on its inherent inconsistencies with the Town's Comprehensive Plan. The Town of New Shoreham further argues that the Division must put its opposition to RIFF's application ahead of North Kingstown's support for RIFF's application.

Under Rhode Island law, the Division is charged with the responsibility and duty to determine whether the public needs a newly proposed transportation service (citations omitted). The Division must make this determination predicated on what it finds is best for all Rhode Islanders, not just what is best for the residents and businesses of individual municipalities. Indeed, Interstate has stressed this broader duty in its attack on RIFF's effort to focus on the town of North Kingstown as evidence of the public's need for its proposed services. Interstate has reminded the Division that it must consider RIFF's application in the

context of what would be in the interest of “**all** the inhabitants ‘of the state” (Emphasis in original). The Division agrees, *infra*.³²⁰

3. Public Convenience and Necessity

In its application, RIFF has requested authority to provide high-speed ferry services between Quonset Point in North Kingstown and Old Harbor in New Shoreham (Block Island). In support of its application, RIFF has offered direct and/or rebuttal testimony from a North Kingstown councilwoman, the former Director of the North Kingstown Chamber of Commerce, the President of the South Kingstown Tourism Council, the President of the Blackstone Valley Tourism Council, the Director of the Quonset Development Corporation, the Applicant’s President, and separate expert testimony from an economist and a professor of mathematics.

Through the aforementioned witnesses, RIFF submits that it has established that public convenience and necessity requires its proposed high-speed ferry service. Specifically, these witnesses have espoused opinions that Quonset offers local and visiting tourists a more convenient travel option to Block Island due to its ease of access from Routes 95, 4 and 403 and its proximity to intermodal transportation connections (i.e., RIPTA bus service, commuter rail and T.F. Green Airport). The record also reflects that Quonset offers 5.5 acres of dedicated dockside parking, in contrast to Point Judith’s parking, which is spread out and sometimes filled to capacity in the summer. It was also asserted that RIFF’s route through Southern Narragansett Bay”

³²⁰ See also Town of East Greenwich v. O’Neil, 617 A.2d 104 (R.I. 1992).

would be “a much more scenic ride,” that RIFF’s vessels provide more spacious accommodations for passengers, bike storage and baggage, and that RIFF’s planned 4,000 square foot terminal building would contain superior amenities than those offered by Interstate’s facility in Point Judith.

As additional support for its claim that public convenience and necessity requires its proposed high-speed ferry service, RIFF submits “that there is a much larger population base with close proximity to Quonset than there is to Point Judith.” Some of RIFF’s witnesses contend that many individuals living within this geographic area, the area closer to Quonset than Point Judith, will likely prefer to travel to Block Island from Quonset, and that some may decide to visit Block Island for the first time, or revisit Block Island after many years, due to the availability of this more convenient alternative service offering. To buttress this belief, Mr. Donadio related that RIFF receives many contacts from people inquiring about whether RIFF provides ferry services to Block Island in addition to the ferry services it presently provides to Martha’s Vineyard from its Quonset location.

Mr. Kunkel was offered by RIFF as an expert witness in economics, finance and game theory. The Intervenors never challenged Mr. Kunkel’s qualifications as an expert in these areas. Mr. Kunkel testified that in his opinion “there is a public need for... [RIFF’s] service and that RIFF’s proposed service will satisfy that need.” As support for this opinion, Mr. Kunkel relied on three factors: (1) the \$660 million public infrastructure investment that was made in the Quonset Davisville Business Park and for the connecting Route

403 exchange; (2) the decision by the QDC to grant RIFF a land lease and approve its bulkhead improvements; and (3) his “studied opinion” that “there is a dormant, unserved, market for additional high-speed ferry service to Block Island not currently satisfied by Interstate...” In explaining the first two elements making up his opinion, Mr. Kunkel testified that the public investment made in the Quonset Davisville Business Park and the connecting Route 403 exchange was to attract private investment in diverse areas of commerce, including marine transportation. He further testified that the QDC’s decision to grant RIFF’s concession and land lease is consistent with this public purpose. Although the Town and Interstate were successful in their cross-examination of Mr. Kunkel, whereby Mr. Kunkel acknowledged that RIFF’s proposal to provide high-speed ferry service to Block Island was not part of the original thought process that went into the decision to use public funds to improve the Quonset Davisville Business Park and the Route 403 exchange or the QDC’s decision to grant RIFF a concession and land lease in Quonset, the fact remains that government funds were clearly used to promote the investment of private funds in the Quonset Davisville Business Park. Therefore, the Division would agree with Mr. Kunkel that RIFF’s proposal to offer another marine transportation service from Quonset is generally harmonious with the original intent behind the public expenditure of financial resources in the Quonset Davisville Business Park and the QDC’s decision to grant the original concession/land lease to RIFF (this is especially apparent in Mr. King’s support of the instant application).

Regarding the third factor, namely the perception of a dormant unserved market for additional high-speed ferry services to Block Island, the Division finds little doubt in the notion that there are residents of Rhode Island that would prefer to visit Block Island from Quonset rather than from Point Judith or Newport; and that some Rhode Island and neighboring state residents forego a visit to Block Island in the summer months altogether due to the anticipated long drive in stop-and-go “beach” traffic, with the added unpleasant potential for problematic parking once you arrive at Interstate’s ferries. Contrary to the arguments proffered by Interstate and the Town, it was not necessary for RIFF or its witnesses to have relied upon a “study” to substantiate these opinions. Notably, Ms. George’s testimony was chiefly motivated by an effort to “reduce some of the traffic burden in South County during [the] high season....” Public comments from Messrs. Notaroberto and Zarrella also support this perception. And Mr. Billington was certainly credible in his opinion that many Rhode Islanders living in Northern Rhode Island would prefer to travel to Block Island from Quonset. Even Interstate’s witness, Mr. Voccola, admitted that the parking lots at Point Judith can fill-up during busy weekends in the summer.

Any reasonable Rhode Islander would agree that it is not uncommon to experience heavy traffic in and into South County during the so-called “high season.” And Newport is clearly no better, perhaps worse. Accordingly, while a study may have been useful in attempting to quantify the number of Rhode Islanders that likely fit into this group, the Division finds that Mr. Kunkel’s assertion (as well as Mr. Billington’s and Ms. George’s) that there are Rhode

Islanders that opt out of traveling, or limit their travel, to Block Island due to driving time, traffic and/or parking considerations attached to Point Judith and Newport is sufficiently demonstrated on the record and wholly reasonable on its face.

The Division must also agree with RIFF in its claim that many more Rhode Islanders live within closer proximity to Quonset than Point Judith. It would be unreasonable to ignore simple geography and the demographics at play here. And yes, while Interstate is providing “adequate” service, the Division would agree that the meaning of “adequate” can and should be linked to the driving distance that must be traversed in order to access these ferry services.

Finally, the Division would also agree with RIFF’s claim that the amenities and services that it will offer are also in the public interest. The vessels, terminal surroundings and services planned for use by RIFF manifest a clear intention to provide RIFF’s riders with a first-class travel experience. Such is the benefit from true competition.

i. Would competing high-speed ferry operations be in the public interest?

The Division examined this issue in the context of pertinent law and Division precedent. As an initial observation, the law under which Interstate was granted a high-speed ferry CPCN (R.I.G.L. §39-3-3) does not confer monopoly control or an exclusive franchise over the market it serves.³²¹

³²¹ See Albert Capaldo v. Public Utility Hearing Board, 71 R.I. 245 (1945).

Therefore, the Division is free to authorize additional carriers if the additional carriers meet the requisite burden of proof required under applicable law.

Under Rhode Island law, the seminal case of Abbott v. Public Utilities Commission³²² provides that in determining whether to approve an application for a common carrier CPCN, the Division must find that the proposed service “will conduce to the general public welfare.” Abbott also permits the Division to consider the existing means of transportation, its “character” and “probable permanence,” the capital invested, the service rendered, whether the existing “service is adequate” and the effect of admitting competition. Abbott also provides that the expression “public convenience” has reference to something fitting or suited to the public need, and the word “necessity” has reference to the fact that the route in question appears to be reasonable and tends to promote the accommodation of the public.

Subsequent cases have provided the Division with additional guidance. The word “necessity” in the expression under consideration does not have reference to an “indispensable necessity,” but rather that the route in question appears to the Division to be “reasonably requisite.”³²³ That is, before a CPCN may be issued the Division must have before it “evidence that there is a public need for the proposed additional service.”³²⁴ The “primary purpose of the regulation” of common carriers “is to provide the public with safe and adequate transportation.” “A secondary purpose is to preserve the investment of those

³²² 48 R.I. 196, 136 A. 490 (12927).

³²³ See Interstate Navigation v. Division, 1999 WL 813603 (R.I. Super.) (1999).

³²⁴ See Murray, et al v. La Tulippe’s Service Station, Inc., et al, 277 A2d 310 (1971).

conducting such business from the deleterious effects of wasteful competition.”

The basic question respecting the issuance of CPCNs is whether the “service available to the public is reasonably adequate to supply the public need therefor.”³²⁵ In granting a CPCN, it is also proper to consider “such factors as competitive stimulation and anti-monopoly prophylaxis.”³²⁶ Increased competition is not a valid ground for denying a CPCN. “Public service is the test” in granting a CPCN; “[p]rotecting existing investments... from even wasteful competition must be treated as secondary to the first and most fundamental obligation of securing adequate service for the public.”³²⁷

In this docket, the record reflects that Interstate is adequately serving Block Island with its “lifeline” services. This issue is not in dispute. Nonetheless, as discussed above, the application in this case requests authority to provide seasonal “high-speed” ferry service, which is recognized by the Division and the Court to be a transportation service that is distinctly different from traditional lifeline ferry service. Therefore, the proper question to consider in this docket is whether public need and convenience demands a competitive high-speed service to Block Island from Quonset. Based on the record, the Division finds that the general public would indeed benefit from the addition of this service. Under Abbott and its progeny, the Division finds that the route in question appears to the Division to be “reasonably requisite” and that the record contains sufficient evidence that “there is a public need for the

³²⁵ See Yellow Cab Co. v. Public Util. Hearing Board, 96 R.I. 247 (1963).

³²⁶ See Domestic Safe Deposit Co. v. Hawksley, 301 A.2d 342 (1973).

³²⁷ See Breen v. Division, 194 A. 719, 720 (1937).

proposed additional service.” The Division also finds that competition in the high-speed ferry market to Block Island will be beneficial to the interests of both RIFF’s and Interstate’s passengers/ratepayers. On this issue of competition, the Division is reminded that the Commission made it very clear over 16 years ago that “establishing choice for ferry travel to Block Island is a positive development for consumers.”³²⁸ The Commission has also made it clear that it will treat high-speed ferry services different than traditional ferry services for ratemaking purposes. Indeed, the Commission has recognized the discretionary nature of this service by deciding to no longer apply traditional rate filing requirements to requested rate changes for this type of service.³²⁹

The relationship between RIFF’s proposed high-speed ferry service and Interstate’s existing high-speed service is properly before the Division in this docket. Dr. Mazze predicts that Interstate would lose 27% of its high-speed riders, while Dr. Costa predicts as few as .04% of Interstate’s high-speed riders would migrate to RIFF. Clearly, the parties do not agree on the likely impact of RIFF’s entry into the market. RIFF also raises some valid concerns with respect to the strength and reliability of Dr. Mazze’s survey. While the Division expects that some of Interstate’s summer high-speed ferry ridership would opt to leave for Block Island from Quonset rather than Point Judith, the Division cannot conclude from the record what the actual impact would be. Simply stated, the Division is not persuaded that Dr. Mazze’s survey results represent

³²⁸ See Order No. 15816 issued in Docket No. 2802 on February 9, 1999.

³²⁹ See Order No. 21069 issued in Docket No. 4373 on June 20, 2013; and also Order No. 22415 issued in Docket No. 4598 on May 20, 2016.

an accurate indicator of how Interstate's revenues would be affected by the introduction of RIFF's proposed service. The Division does find, however, that the record does not support Interstate's and the Town's predicted "death spiral" scenario.

As an additional observation, Interstate's and the Town's primary focus in this docket was on the impact that RIFF's proposed service would have on Interstate's "lifeline" services to Block Island. The focus was not so much on the impact to Interstate's high-speed ferry service; specifically, on whether Interstate would need to increase its high-speed ferry rates and/or cut back on high-speed services during the summer months. The absence of this line of concern from the Intervenors suggests that Interstate would neither reduce its high-speed ferry services to Block Island if RIFF were competing in the high-speed ferry market, nor anticipate increasing its high-speed ferry rates.

Finally, the Division acknowledges the Town's Harbormaster's concerns over traffic safety with Old Harbor. The record reflects that Block Island's Harbormaster, Officer Stephen Land, is experienced and extremely competent in his efforts to maintain order and safety in Old Harbor, especially during the high-traffic summer months. The Division finds that Officer Land, along with his summer staff of 22 assistants, ought to be able to continue to maintain order during RIFF's vessel's infrequent stops in Old Harbor during the summer months. Harbormaster Land is free to exercise his local authority over RIFF's vessel in the same fashion he exercises control over Interstate's vessels and the other ferry vessels entering and departing Old Harbor.

11. CONCLUSION

The Division finds that RIFF has adequately demonstrated that it is fit, willing and able to operate as a water (ferry) carrier of persons and property between Quonset Point, North Kingstown, and Old Harbor, Block Island. The Division additionally finds that the “public convenience and necessity” requires RIFF’s proposed ferry services between Quonset Point, North Kingstown and Old Harbor, Block Island.

Additionally, in the interest of promoting a proper regulatory framework to facilitate coexistence between RIFF and Interstate, the Division finds that if it becomes necessary to examine and adjust the operating schedules of these two carriers, it will open a docket to address this concern. Interstate and RIFF are also free to petition the Division for such review at any time. The Division may also take additional steps to ensure the continued coexistence of these two water carrier companies as future circumstances warrant.

In the final analysis, the Division must reject Interstate’s and the Town’s contention that the general public interest will suffer if RIFF is permitted to operate a ferry between Quonset Point, North Kingstown, and Old Harbor, Block Island. Although it is possible that Interstate may experience reduced ridership in the future, the record does not support definitive conclusions that RIFF’s ferry services between Quonset and Block Island will either force Interstate from the high-speed ferry market or create any significant service hardship for the general public. On the

other hand, the record is replete with evidence that there is a public desire for RIFF's proposed ferry services. The Division finds that the satisfaction of this need is paramount to the public interest.

From the evidence and arguments proffered in the instant matter, the Division finds no possibility that Interstate's lifeline service will suffer any meaningful decay from the indirect competition that would result from the granting of RIFF's application for seasonal high-speed ferry service. On the other hand, Interstate's high-speed service will be in direct competition with RIFF's service and, consequently, Interstate may in fact lose some of its high-speed ferry customers. However, alternatively, the record in this docket also suggests the possibility that both high-speed carriers survive - and prosper. Consider that Interstate operates its high-speed ferry services out of Galilee (Point Judith) and Newport. These communities represent two of Rhode Island's most premier tourist locations, offering abundant sightseeing, beaches, dining and shopping opportunities. Quonset in contrast, offers none of these peripheral amenities. Also consider that a high-speed ferry ride to Block Island will take 20 minutes longer from Quonset than from Point Judith (30 minutes versus 50 minutes); and because of this extra time on the water, likely to continue to cost more for a passenger ticket. However, Quonset, on the other hand, offers the potential for a shorter and quicker drive for many Rhode Islanders looking to minimize their time getting to the ferry. There is no reason why these two high-speed ferry services cannot co-exist and even thrive.

Now, therefore, it is

(22548) ORDERED:

1. That the July 2, 2013, application filing by Rhode Island Fast Ferry, Inc., 1347 Roger Williams Way, North Kingstown, Rhode Island seeking authority to operate as a seasonal "fast ferry" water carrier of passengers between Quonset Point, North Kingstown, and Old Harbor, Block Island, is hereby granted. Under this authority, RIFF is required to provide daily, summer-season, high-speed ferry services between its ferry terminal located at 1347 Roger Williams Way located in Quonset Point, North Kingstown and Old Harbor, Block Island. RIFF is to use an aluminum catamaran with a capacity of between 150 and 300 passengers and operate between 29.5 – 34 knots. The 30-mile route from Quonset shall follow a course down the West Passage of Narragansett Bay and along the Narragansett coastline into Old Harbor and take approximately 45-50 minutes depending on passenger/luggage loads, tides, and sea and wind conditions.
2. That the approval granted herein is subject to the following conditions: 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

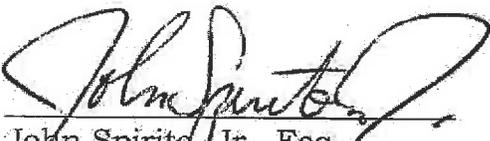
Coast Guard requirements associated with the provision of its proposed ferry services; (4) that it has satisfied any applicable municipal permitting requirements; (5) that it has adequate liability insurance in effect; and (6) that it has passed a Division inspection to ensure regulatory compliance.

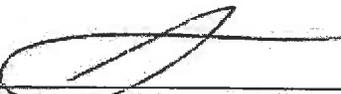
3. That RIFF shall satisfy the conditions contained in "Ordered" paragraph "2," above within one (1) year from the issue date of this Report and Order. Failure to satisfy these conditions within the time specified shall result in the nullification and voiding of the authority granted herein. Continuances may be granted by the Division for just cause.
4. That RIFF must have a Public Utilities Commission-approved tariff in effect before it provides any ferry services authorized under the authority granted herein.
5. That RIFF shall, as a condition of its continued authority to operate, provide its passengers with services substantially consistent with the services described in the testimony and exhibits presented during this case. Any deviation from these specified services must be approved by the Division.
6. That RIFF shall provide the Division with a copy of its initial operating schedule, and all subsequent changes thereto, at least 30 days prior to adoption and use. The Division reserves the right to

suspend any scheduling proposals and conduct a public hearing if deemed by the Division to be in the public interest.

7. The Division commits to facilitating coexistence between RIFF and Interstate. Toward this end, the Division finds that if it becomes necessary to examine and adjust the operating schedules of these two carriers it will open a docket to address this concern. Interstate and RIFF are also free to petition the Division for such review at any time. The Division may also take additional steps to ensure the continued coexistence of these two water carrier companies as future circumstances warrant.

Dated and Effective at Warwick, Rhode Island on September 22, 2016.


John Spirito, Jr., Esq.
Hearing Officer

APPROVED: 
Macky McCleary
Administrator



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 Jefferson Boulevard
Warwick R.I. 02888
(401) 941-4500

FAX (401) 941-9248
TDD (401) 941-4500

NOTICE OF AVAILABILITY OF JUDICIAL REVIEW

(PROVIDED PURSUANT TO R.I.G.L. §42-35-12)

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

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

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

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

EXHIBIT C

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888**

IN RE: Application by Rhode Island Fast :
Ferry, Inc. for Water Carrier Authority : Docket No. D-13-51

ORDER

(In Response to the Town's Motion for Summary Disposition)

Whereas: The Rhode Island Division of Public Utilities and Carriers ("Division") previously issued nine Orders ("Orders") in the instant docket, specifically, Order No. 21170, issued on September 24, 2013; Order No. 21189, issued on October 3, 2013; Order No. 21541, issued on August 1, 2014; Order No. 22030, issued on August 11, 2015; Order No. 22045, issued on August 19, 2015; Order No. 22103, issued on September 21, 2015; Order No. 22141, issued on October 8, 2015; Order No. 22166, issued on October 20, 2015; and Order No. 22183, issued on October 26, 2015. These nine previously issued Orders are inextricably linked with this Order, and accordingly shall be adopted as the introduction to this Order and, by necessity, incorporated by reference. As the travel of this docket is long and complicated, the Division will skip all discussion of this travel in the instant Order, relying instead on the incorporation of the above-identified Orders as a comprehensive prologue, thereby permitting the Division to limit its focus to the outstanding motions.

Whereas: On July 21, 2015, the Town of New Shoreham (the "Town"), a party to the instant case, filed a motion for summary disposition, in accordance with Rule 19(e) of the Division's Rules of Practice and Procedure,

wherein it argued that Rhode Island Fast Ferry, Inc.'s ("RIFF") application must be dismissed for RIFF's failure to identify the dock it plans to use in Old Harbor. After considering the arguments made by the Town in support of its motion, as well as the objection and response proffered by RIFF, the Division ordered RIFF to "submit a written declaration to the Division identifying the dock it is proposing to use on Block Island (in furtherance of its proposed ferry services) and offer proof of the dock's availability." (See Order No. 22030, *supra*). RIFF was initially directed to file its "declaration" by August 28, 2015. However, after RIFF requested additional time, the Division extended this deadline to September 11, 2015. (See Order Nos. 22030 and 22045, *supra*). The Division also held that it would reserve final decision on the Town's motion for summary disposition until it received and considered RIFF's declaration. (See Order Nos. 22030 and 22045, *supra*).

Whereas: On September 11, 2015, RIFF submitted affidavits from its principal, Mr. Charles A. Donadio and from Mr. Paul Filippi, the principal member of Bluewater LLC ("Bluewater"), through which these individuals state that their respective companies have reached an agreement relative to the planned construction and use of a docking facility in Old Harbor. It was asserted in the affidavits that Bluewater had acquired rights to construct a wharf at either of two locations in Old Harbor and that RIFF planned to lease dock space from Bluewater once the wharf is constructed. RIFF also attached a copy of the relevant Lease Option Agreement ("Lease Agreement") with Mr. Donadio's affidavit. The affidavits and Lease Agreement also reflect that before

construction can start, Bluewater must seek and receive the necessary permits from the Rhode Island Coastal Management Council and the U.S. Army Corps of Engineers, which it planned to file by November 1, 2015 and also a water quality certificate from the Rhode Island Department of Environmental Management. (See Order No. 22103, *supra*).

Additionally, Mr. Donadio's affidavit stressed that RIFF planned to utilize the South Pier, so-called (a.k.a. South Wharf), in Old Harbor "only as an alternative docking facility in the event that the Bluewater facility is not constructed for whatever reason." (See Order No. 22103, *supra*).

Whereas: In response to RIFF's September 11, 2015 written declaration, the Town filed a response, on September 16, 2015, wherein the Town described the Lease Agreement between RIFF and Bluewater as a "sham." In support of this claim, the Town argued, *inter alia*, that Bluewater had failed to demonstrate that it had acquired the necessary legal rights to wharf out at the Northerly Ell of the stone jetty at the Inner Basin ("Northerly Ell Facility") or at the former location of the Mount Hope Pier adjacent to the Easterly Breakwater ("East Breakwater Facility"), the two dock locations identified earlier by Bluewater and RIFF. The Town thereupon urged the Division to cancel the public hearings that had been scheduled for October 7 and 8, 2015 and grant the Town some time to propound additional discovery and depose Mr. Filippi. (See Order No. 22103, *supra*).

Whereas: Though RIFF and Bluewater subsequently proffered documentary evidence, on September 17, 2015, that suggested that Bluewater had acquired rights to build a dock on Lot 158, plat 6 in Old Harbor (the location of the planned

Northerly Ell Facility), the Division concluded that there was sufficient ambiguity in the matter to warrant a delay in the hearings and to permit the Town to conduct additional discovery. The Division directed the Town to file a response to RIFF's September 11, 2015 declaration by November 16, 2015. Additionally, the Division directed RIFF to submit, by November 16, 2015, "a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater's plans to construct a docking facility in Old Harbor... and also provide the Division with an anticipated start-date for its proposed services." The Division also held that it would reserve final decision on the Town's motion for summary disposition until after November 16, 2015. (See Order Nos. 22103 and 22166, *supra*).

Whereas: Subsequently, based on objections by Bluewater to the scope and relevancy of the discovery proposed by the Town, the Division reconsidered and vacated its earlier decision to permit the Town to conduct further discovery. The Division additionally denied a motion from RIFF to conduct related discovery in this matter. (See Order Nos. 22141 and 22166, *supra*). Notwithstanding its decision to suspend all requests to conduct additional discovery in this docket, the Division approved the Town's request for an opportunity to submit a written response to Bluewater's assertions of having the legal rights to wharf out at the Northerly Ell Facility or East Breakwater Facility without the Town's approval. The Town's response was due on November 5, 2015. Bluewater was also offered an opportunity to rebut the Town's response by November 16, 2015. (See Order Nos. 22183 and 22166, *supra*).

Whereas: On November 5 and 16, 2015, the Town filed its responses to Bluewater's dock construction claims and RIFF's September 11, 2015 declaration, respectively. On November 16, 2015, RIFF filed its response to the Division's request for a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater's plans to construct a docking facility in Old Harbor; and its anticipated start-date for its proposed services. Also on November 16, 2015, Bluewater filed a response to the Town's November 5, 2015 filing, *supra*.

The Town's Argument that RIFF and Bluewater lack the legal ability to construct and utilize a dock in Old Harbor

Bluewater has asserted that it has the legal right to construct a dock in either of two locations in Old Harbor. The two locations have been described as being located at: (1) the Northerly Ell of the inner harbor along the Red Breakwater ("Northerly Ell Facility"), and (2) along the East Breakwater of the Old Harbor which connects to the Town's Bait Dock ("East Breakwater Facility"). The Town addresses these proposed docking facilities in its November 5, 2015 response memorandum.

With respect to the Northerly Ell Facility, the Town argues that it is uncontroverted that pursuant to Rhode Island law the construction of any docking facility at this location requires the approval of the State of Rhode Island Coastal Resources Management Council ("CRMC"). The Town also points out that the Northerly Ell Facility was "deauthorized" by the United States Army Corps of Engineers ("USACE") and is now owned by the State; and that the State has leased the Northerly Ell Facility to the Town for a term of

fifty (50) years, beginning on April 1, 2012 and ending on April 1, 2062. The Town also asserts that the CRMC will not approve construction of this docking facility without the Town's approval and consent.¹

In support of this argument, the Town offers a written statement from Mr. Grover Fugate, the CRMC's Executive Director. In his statement, Mr. Fugate confirms that the Northerly Ell Facility is the property of the State, and that the Northerly Ell Facility is 'managed and controlled' by the Town pursuant to the Lease.² The Town adds that Mr. Fugate's statement "clearly" reflects that the construction of a dock at the Northerly Ell Facility "requires the consent of the Town and, furthermore, that the Town would have to be a party to any request for such an assent."³

The Town next addresses Bluewater's plans to bypass the Town's assent by using the existing floating dock at the Northerly Ell Facility to move passengers from RIFF's ferry to the land, and the proposed alternative access extension of the dock. The Town argues that both plans require the consent of Ballard's Wharf Realty, LLC. ("BWR"), which the Town shows has already denied consent. As proof, the Town offers documents to show that Plat 6, Lot 159, the location of Bluewater's proposed bypass connections, is owned by BWR and that BWR is on record opposing Bluewater's plan. A statement from Blake Filippi, BWR's manager, was proffered as additional proof.⁴

¹ See Town's November 5, 2015 Response, pp. 2-3.

² Id., p. 3 and Schedule B, Exhibits A and B.

³ Id.

⁴ Id., pp. 4-5 and Schedule F.

In its closing on the Northerly Ell Facility, the Town emphasizes that without a method of moving private passenger ferry customers to and from the land, the construction of such a docking facility “is nonsensical.” The Town argues that Bluewater has not proven that it has a “realistic expectation” of being able to develop a docking facility at the Northerly Ell Facility.⁵

Like with the Northerly Ell Facility, the Town argues that constructing a dock at the East Breakwater Facility similarly requires a CRMC permit and the Town’s consent. The Town argues that the East Breakwater Facility can only be used through a connection or attachment to the Town’s Bait Dock and that the CRMC, under such circumstances, will not authorize the construction of a dock at the East Breakwater Facility without the Town’s consent.⁶ The Town included a statement from “the CRMC employee assigned to Block Island who would be part of the permitting process” to buttress this position.⁷

The Town next addressed Bluewater’s plans to utilize an “Alternative Access” docking facility, located behind the Town’s Bait Dock, which connects with a dock known as the East Dock. Again, the Town asserts that it is uncontroverted that the construction of any alternative access docking facility requires a CRMC permit. Regarding East Dock, the Town states that it “operates, manages, repairs and controls the East Dock through a license agreement with the USACE.⁸ Once again relying on “the CRMC employee assigned to Block Island who would be part of the permitting process,” the

⁵ Id., p. 5.

⁶ Id., p. 6.

⁷ Id., pp. 6-7 and Schedules G and H.

⁸ Id., p. 7 and Schedule H.

Town asserts that “any application submitted to the CRMC for a permit to construct a dock in Old Harbor which connects or attaches to the East Dock must be accompanied by the written approval of the owner of the East Dock and also by the written approval of the Town as the licensee of the East Dock.”⁹

Specifically, the Town maintains that the construction of the “Alternative Access” docking facility behind its Bait Dock “requires the prior consent of the Town through the Town’s issuance of a special use permit prior to CRMC’s consideration of an application for a permit to construct the docking facility.” Citing from Section 4.2(5) of the regulations associated with the CRMC’s Management Procedures and Section 300.1 of the CRMC’s Management Procedures, the Town observes that all “Applicants shall be required to obtain and certify that they have in their possession current approvals from municipal bodies which are otherwise required for the proposed action. Municipal approval shall be construed to mean compliance and conformity with all applicable comprehensive plans and zoning ordinances and/or the necessary variance, exception and other special relief therefrom....”¹⁰ Predicated on these CRMC requirements, the Town reiterates that Bluewater cannot move forward with the CRMC application process without the Town’s consent.¹¹

The Town further argues that construction of the “Alternative Access” docking facility is not permitted by the USACE “because it would involve

⁹ Id. and Schedule G.

¹⁰ Id., pp. 7-8.

¹¹ Id., p. 8.

building on or attaching to a federal navigation structure.”¹² Despite the opinion letter of Bluewater’s attorney that the proposed facility would not have “any physical contact with Corps’ structure (breakwater) which is often a concern for the Corp,” the Town argues that it would. The Town identifies a USACE breakwater that the Town’s Bait Dock partially rests on as “a federal navigation structure” that the USACE would need to consider in a permitting application case. The Town stresses that “it is not disputed that the USACE does not and would not permit the ‘Alternative Access’ docking facility structure to be built on or attached to a federal navigation structure.”¹³

The Town reinforces its claim that its consent is required if Bluewater is to construct a dock in Old Harbor by citing to the “USACE Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Civil Engineers Civil Works Projects pursuant to 33 USC 408 (‘USACE Project Alteration Guide’).” Specifically, the Town argues that “Section 408 authorizes the Secretary of the Army to grant permission for the alteration or occupation or use of the project if the Secretary determines that the activity will not impair the usefulness of the project.” The Town observes that under the USACE Project Alteration Guide, the use of the term “alteration” or “alter” refers to any action by any entity other than USACE that builds upon, alters or improves, moves, occupies, or otherwise affects the usefulness, or structural or ecological integrity, of a USACE project. The Town further observes that alterations also include actions approved as “encroachments’ pursuant to 33 CFR 208.10.

¹² Id., p. 9.

¹³ Id., pp. 9-10.

The Town next applies Section 6.d and 6.e.(2) of the USACE Project Alteration Guide, which reads as follows:

A request for Section 408 permission can originate from a non-federal sponsor or an independent requester. For USACE projects with a non-federal sponsor as described in paragraph 6.e, the requester must either be the non-federal sponsor or have the endorsement of the non-federal sponsor prior to a written request, reference paragraph 7.c.(2), being submitted to USACE. (Section 6.d.).

For USACE projects that were constructed in whole or in part pursuant to a cost-share agreement with a non-federal sponsor, but are operated and maintained by the USACE, the district will obtain written concurrence by each of the non-federal sponsors for the proposed alteration prior to USACE approval of a Section 408 request. (Section 6.e.(2)).¹⁴

Based on the aforementioned provisions, the Town, who describes itself as a non-federal sponsor of the Project, contends that it must provide its written consent for the proposed alteration and that its written consent must be attached to Bluewater's application in order to initiate the USACE Section 408 approval process.¹⁵

In its November 16, 2015 response to RIFF's September 11, 2015 declaration, the Town divided its rejoinder into four sections, one for each of the three documents included in RIFF's declaration: the Filippi Affidavit, the Donadio Affidavit and the Lease Option Agreement, and one to address RIFF's continued interest in Old Harbor's South Pier.

¹⁴ Id., p. 11 and Schedule L.

¹⁵ Id., and Schedule H.

Starting with the Filippi Affidavit, the Town points out that although Mr. Filippi represented under oath that Bluewater had ‘acquired from the riparian landowners of Lots 158 and 159 in Plat 6 and Lot 23 in Plat 7... the right to wharf out at two locations...,’ it was demonstrated by the Town that “the statements by Paul Filippi as to Lot 159 in Plat 6 and Lot 23 in Plat 7 were not accurate.”¹⁶ The Town also points out that in his affidavit, Mr. Filippi asserts that Bluewater would be filing “the applications for the necessary permits with the CRMC and the Army Corps no later than November 1st, 2015.” However, the Town states that to its knowledge no such applications have been filed. Consequently, the Town argues that “any further representations as to time tables and dates must be viewed with skepticism.”¹⁷

In reply to the Donadio Affidavit, the Town integrates the arguments contained in its November 5, 2015 response to Bluewater’s dock construction claims, *supra*; essentially, that RIFF has not offered adequate proof of the availability of a docking facility in Old Harbor.

The Lease Option Agreement is labeled as “a nebulous, non-specific document” by the Town. The Town argues that the Lease Option Agreement should be rejected by the Division as it neither references the dock that is the subject matter of the lease nor specifies the date that the docking facility will be available.¹⁸

¹⁶ The Town’s November 16, 2015 Response, p. 2.

¹⁷ *Id.*, pp. 2-3.

¹⁸ *Id.*, p. 3.

Finally, the Town discusses RIFF's intentions to use the Town's South Pier (a.k.a. South Wharf or South Dock) in Old Harbor in the event that a Bluewater facility is not constructed. Initially, the Town relies on language contained in the Lease Option Agreement, which "acknowledges that RIFF's use of the South Pier to operate a ferry service 'will dramatically alter the use of the Inner Basin to the detriment of the commercial fishermen, charter boats and recreational boats and local commercial interests, as well as the Town of New Shoreham, which operates the South Wharf.'" The Town observes that the Lease Option Agreement further recognizes that: "The Town of New Shoreham and the people of Block Island have a significant economic and cultural interest in maintaining the traditional use of the Inner Basin *to the exclusion of ferries.*" (emphasis added in original). In view of this language contained in the Lease Option Agreement itself, the Town argues that it is clear that the "public convenience and necessity" would not be served by the use of this dock and that the Division's issuance of a CPCN on this docking facility would not be appropriate.¹⁹

The Town next reiterates its earlier argument that RIFF does not have a right to use the South Pier. The Town argues that RIFF's reliance on the United States 1890 Rivers and Harbors Act is misplaced. The Town contends that this federal legislation "merely states that the Town may not implement tolls or charges for the use of the wharf by 'public vessels of the United States.'" As RIFF's private passenger ferry is not a public vessel owned by the United

¹⁹ Id., pp. 4-5.

States, the Town asserts that RIFF would have no right to use the Town's South Pier.²⁰

**Bluewater's Opposition to and Arguments Against the
Town of New Shoreham's Assertions**

On November 16, 2015, Bluewater submitted a legal memorandum designed to address the legal claims that have been embraced by the Town in this case. In short, Bluewater asserts that "...the permission of the Town is not required to initiate, navigate, or complete either the USACE or CRMC process."²¹

Bluewater argues that the Town's claims have no basis in law, as evidenced by its failure to offer any supporting case law. Bluewater points out that in every ferry application case that has come before the Division, other than Interstate's, the Town "has vowed 'vehement opposition' based on illusory legal authority."²² Bluewater notes that "each time, the Superior Court has found the Town's arguments to be legally meritless."

Bluewater stresses that the Town has already been proven wrong with respect to its claims that Bluewater is not a "real company," and that Mr. Filippi had not acquired any riparian rights in Old Harbor. Bluewater argues that the Town's newest claim, that the Town controls "all possibilities of ingress and egress" at the Northerly Ell Facility (a.k.a. "Lot 158/Red Breakwater") and the Easterly Breakwater Facility (a.k.a. "Mount Hope Dock") is also without merit.

²⁰ Id., pp. 5-6.

²¹ November 16, 2015 Bluewater Opposition Memorandum, p. 1.

²² Id., pp. 1-2.

Starting with the East Breakwater Facility and the USACE 408 process, Bluewater argues that the Town “has erroneously claimed they are the non-federal sponsor of both sites.” Rejecting the authority relied upon by the Town, Bluewater asserts that the “actual law governing the matter” reflects that the Town is not a non-federal sponsor of the USACE’s Block Island project as the term is used in the 408 process. To buttress its assertion, Bluewater provided an opinion letter from a Washington D.C. law firm that specializes in USACE 408 application cases. A summary of the key points in the opinion letter are provided below:

...in short, the Town is not a non-federal sponsor of the project. The Town would only be a non-federal sponsor if it had a cost-share agreement with the Corps. *See 33 U.S.C. §2211(e)*.... The Town, however, does not have a cost-share agreement with Corps for this project. 33 U.S.C. §2211 provides that non-federal interests (e.g. state, tribal, or local agencies or governments) for a navigation project for a harbor shall pay a percentage of costs associated with general navigation features for projects that were not awarded before November 17, 1986. *See 33 U.S.C. §2211(a)(1)*.... The Corps’ Block Island project was authorized in 1870. Therefore, there is no cost-sharing sponsor for the project.²³

By its plain terms, Section 408 does not require the written consent of the Town, even if the Town were a non-federal sponsor, which it is not. The Corps requires a permit under Section 408 for proposed modifications to authorized Corps projects. The Secretary of the Army’s authority to grant permission for temporary or permanent alterations to Corps projects is contained in Section 14 of the Rivers and Harbors Act of 1899, as codified in 33 U.S.C. §408, which states in relevant part:

²³ Id., pp. 3-4 and Exhibit A.

Provided, That the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest: *Provided further*, That the Secretary may, on the recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work.

Nothing in the statute's terms requires the approval of a non-federal sponsor for a Section 408 permit.

Federal regulations governing the Corp's Section 408 permitting process also do not state that the Town's approval is required, whether it is a federal sponsor or not. See 33 C.F.R. §320.4.

Contrary to the Town's assertion, the EC²⁴ recognizes that a request for a Section 408 permit can originate from either a non-federal sponsor *or* an independent requester.

More specifically, the EC delimits three specific circumstances that require a request to be made by a non-federal sponsor or require the concurrence of a non-federal sponsor. None of these circumstances apply to the Block Island project, so the Town has no basis to claim it must approve the Bluewater section 408 application as a non-federal sponsor. First, approval by a non-federal sponsor is required for a request involving certain local flood protection projects.... The flood control statutes and regulations regarding changes to local flood protection works are not implicated by the Corps' Block Island project authorization, and therefore the approval of a non-federal sponsor is not required for alteration of this project.

²⁴ "EC" is an abbreviation for the USACE's Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects (July 31, 2014).

Second, the EC provides: 'For USACE projects that were constructed in whole or in part pursuant to a cost-share agreement with a non-federal sponsor, but are operated and maintained by USACE, the district will obtain written concurrence by each of the non-federal sponsors for the proposed alteration prior to USACE approval of a Section 408 request....' As explained above, the Corps project at Block Island dates back to 1870 and was not constructed in whole or in part pursuant to a cost-share agreement with the Town. Therefore, no written concurrence from the Town is required....

Third, the EC states that '[f]or requested alterations located in inland and intracoastal waterways, the district will issue a public notice to notify users of the waterways, navigation stakeholders, and other interested parties as the district deems appropriate.... Bluewater's proposed docks are not located in inland or intracoastal waterways.²⁵

Bluewater adds that it has "already initiated the 408 process at a meeting with the USACE on Sept 8th attended by New England Division USACE Chief Ed O'Donnell, Project Engineer Mike Elliott, and Mike Walsh P.E." Bluewater asserts that it will continue with the process of developing the East Breakwater Facility "as it is fully within its legal rights to do so."²⁶

Bluewater next addresses the CRMC permitting process connected to the East Breakwater Facility. Relying on the fact that it does not intend to utilize any attachments to the Town's Bait Dock, Bluewater maintains that it does not need the Town's permission to move forward with its permitting case before the CRMC. Bluewater also rejects the Town's claim that any connections to the

²⁵ Id., pp. 4-5; and November 12, 2015 letter from Messrs. Joseph Corrigan and David Frulla at Kelley, Drye & Warren, LLP., 3050 K Street, Washington, DC.

²⁶ Id., p. 6.

East Dock would similarly require Town permission before the CRMC. Bluewater observes that the Town is relying on the opinion of a CRMC employee who is “a biologist assigned to Block Island.” Bluewater notes that the biologist “cites no CRMC regulation or specific portion of the license agreement, which supports this legal assertion.”²⁷ However, Bluewater relies instead on Section 18D in the actual licensing agreement that provides: “...the grantee shall manage the Timber wharf in the interest of the general public and the facilities shall be available to all members of the general public on equal terms.”²⁸

Moving next to the issue of the CRMC Lease associated with the Northerly Ell Facility, Bluewater takes exception to the Town’s and Grover Fugate’s claims that the Town must approve any dock construction at this location. Bluewater thereupon offers several case citations, which Bluewater asserts clearly define the Town’s rights in this matter.

While not challenging CRMC or Mr. Fugate’s authority, Bluewater argues instead that Mr. Fugate’s opinion is based on a false belief that Bluewater plans to seek alterations to the Red Breakwater at the Northerly Ell Facility, which Bluewater says is not the plan. Bluewater insists that it is not planning to “attach or anchor” a dock to the Red Breakwater.²⁹ Relatedly, Bluewater asserts that the “property” the Town controls under its lease from the State “refers to the Red Breakwater” and that the Town’s control under the lease, and

²⁷ Id., p. 16.

²⁸ Id., p. 17.

²⁹ Id., pp. 6-7.

case law, does not extend past that point. Bluewater argues that pursuant to the lease, “the Town has ostensibly been ‘given the right to construct and operate a dock on or near the Northerly Ell/Red Breakwater for the next fifty years; and ‘to erect such signs, docks, and other structures on or near the Red Breakwater at its own expense as the Town shall deem desirable in accordance with applicable laws and regulations, and shall maintain all such structures in good order and repair.’ Yet no express provision of the lease by Mr. Fugate has conveyed upon the Town the power to block any other riparian rights holder from doing the same.... [T]he great weight of case law, much directly against the Town, supports the opposite.”³⁰ Bluewater next offered a summary of several Rhode Island Court decisions that involved the Town as a party to demonstrate that the Town has frequently attempted, without success, to overstep its municipal authority in cases related to wharfing and development along its shores.³¹ Bluewater also offered an opinion letter from a Rhode Island attorney who specializes in CRMC permitting matters that reflects that Mr. Filippi’s right to wharf out at this location is superior to any interests the Town possesses. This opinion also reflects that the “CRMC has no jurisdiction to determine claims of private ownership of littoral space in the waters of the state. It does not and cannot locate boundaries between abutting littoral landowners in the... harbor. That jurisdiction is exclusively judicial.”³²

³⁰ Id., p. 7.

³¹ Id., p. 7-10.

³² Id., pp. 9-11; and November 16, 2015 letter from Attorney Sean O. Coffey.

Bluewater next addresses the Town's claim of ingress and egress control over the Northerly Ell Facility. Bluewater contends that because its "alternative plan" connects "to the space behind the timber pier leased by the Town and will not connect or have physical contact with the USACE breakwater," a location outside the control of the Town under its licensing agreement with the USACE, the Town's assertion of ingress/egress control is baseless. Bluewater also provides case law that reflects that the Town may not restrict access through zoning requirements.³³

Bluewater concluded its memorandum/response with a discussion concerning the "public good" and its anticipated timetable for completing this project. On the public good, Bluewater argues that the Town has shown a propensity for "blocking public access and providing preferential treatment." Bluewater contends that the Town "is not protecting public interests, only its own pecuniary and parochial interests." Bluewater contends that the Town "operates for-profit docks, with the Town picking and choosing which local residents do and don't have to pay wharfage." Bluewater also criticizes the Town for its "unwavering defense of the for-profit intrastate monopoly held by... [Interstate] for nearly sixty years."³⁴

Regarding the timetable associated with this dock project, Bluewater notes that "the Division granted the CPCN in *A&R Marine* giving *A&R* 180 days to have a dock built." Though Bluewater recognizes that the *A&R* dock and the Bluewater dock sites are located in CRMC Type 2 and 5 waters, respectively,

³³ Id., p. 12-14.

³⁴ Id., pp. 17-20.

Bluewater anticipates that the USACE permitting process will take between 12 and 18 months and that the Corps' schedule for review "is concurrent with the various State permitting requirements and includes the time for required coordination with other state and federal agencies."³⁵

RIFF'S Permitting and Service Start-up Timeline Declaration

On November 16, 2015, RIFF timely complied with the Division's directive for "a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater's plans to construct a docking facility in Old Harbor" and directive to "provide the Division with an anticipated start-date for its proposed services."

In its response, RIFF principally relies on the timetable provided by Bluewater. RIFF relates that once the USACE process is complete, within 12 to 18 months, "Bluewater's dock could be constructed and operational within an additional 80 to 100 days according to its dock construction contractor, Anaconda, after dredging is complete."³⁶ Regarding dredging, RIFF notes that the East Breakwater Facility will require some dredging; and that after dredging it would take about 75 days to construct a dock. However, the Northerly Ell Facility requires no dredging and that a dock could be completed within 15 days.³⁷ All told, RIFF anticipates that the permitting and construction process will take about 22 months.

³⁵ Id., pp. 20-21.

³⁶ See RIFF's November 16, 2015 Memorandum, p. 1.

³⁷ Id., pp. 1-2.

RIFF explains: “[a]ssuming that the Bluewater Pier is fully permitted by April 1, 2017, it would be reasonable and prudent at that point in time for Bluewater to start its pier construction process and for RIFF to start its vessel construction process (assuming that it does not use one of its existing vessels to provide the service). If RIFF uses an existing vessel and the... [Northerly Ell Facility], then giving Bluewater 15 days to construct that pier, RIFF could be in service on May 31, 2017. If RIFF constructs a purpose-built vessel or the... [East Breakwater Facility] is constructed instead of the... [Northerly Ell Facility], service start-up would be by May 31, 2018.”³⁸

Finally, RIFF likens the above timeline to the timeline that Island Hi-Speed Ferry (“IHSF”) required to begin its ferry service after the Division granted its CPCN application. RIFF notes that IHSF applied for its CPCN in February 1998 and began service in July 2001.³⁹

FINDINGS

After a careful examination of the arguments and supporting documents offered by the parties, RIFF and the Town, and also the arguments and documents offered by Bluewater, the Division is satisfied that Bluewater’s claims of interest and ability to construct a docking facility in Old Harbor are credible and that RIFF’s access to Bluewater’s planned docking facility is satisfactorily demonstrated on the record. Though the Division is mindful that the Town plans to aggressively oppose Bluewater’s permitting applications before the USACE and the CRMC, the Division finds insufficient justification to

³⁸ Id., p. 2.

³⁹ Id.

deny RIFF an opportunity to pursue its current filing before the Division based on that anticipated opposition from the Town. The Town would have the Division accept the Town's opposition as a *fait accompli* on the question of Bluewater's ability to construct a new docking facility in Old Harbor. However, neither the prevailing law nor the facts associated with this matter provide that level of clarity. Consequently, the Division must conclude that RIFF (through Bluewater) has a realistic expectation of having access to a future docking facility in Old Harbor from which it may operate a high-speed ferry service.

The Division further finds that the expected timeline for completing the construction of a new docking facility in Old Harbor is not unreasonably long so as to necessitate additional delays in adjudicating RIFF's pending CPCN application.

It is expected that the Town will seek to intervene in the compulsory USACE or CRMC permitting application cases in order to express its opposition to the construction of a new dock in Old Harbor. The Town will undoubtedly inform the Division if it is successful in derailing Bluewater's plans in the preliminary stages of the proceedings scheduled before the CRMC and the USACE. The Division reserves the right to revisit this matter upon such a showing by the Town.

Predicated on these findings, the Division must deny the Town's July 21, 2015 Motion for Summary Disposition.

Now, therefore, it is

(22254) ORDERED:

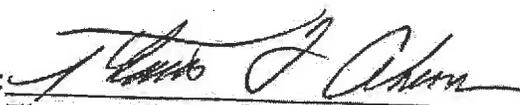
1. That Order No. 21170, issued on September 24, 2013; Order No. 21189, issued on October 3, 2013; Order No. 21541, issued on August 1, 2014; Order No. 22030, issued on August 11, 2015; Order No. 22045, issued on August 19, 2015; Order No. 22103, issued on September 21, 2015; Order No. 22141, issued on October 8, 2015; Order No. 22166, issued on October 20, 2015, and Order No. 22183, issued on October 26, 2015 are hereby adopted as the introduction to this Order and, by necessity, incorporated by reference.
2. That the Town's July 21, 2015 Motion for Summary Disposition is denied.
3. That the Division's Clerk is instructed to place the instant docket back on the Division's hearing calendar and to schedule a public hearing on RIFF's application as soon as practicable.
4. That the Division reserves the right to revisit this matter upon a showing by the Town that it has been successful in its efforts to prevent the construction of Bluewater's planned dock before the USACE or CRMC.

Dated and Effective at Warwick, Rhode Island on December 10, 2015.

Division of Public Utilities and Carriers


John Spirito, Jr., Esq.
Hearing Officer

APPROVED:


Thomas F. Ahern
Administrator

**STATE OF RHODE ISLAND
PROVIDENCE, SC**

SUPERIOR COURT

TOWN OF NEW SHOREHAM

v.

C.A. No. PC-2016-4758

RHODE ISLAND FAST FERRY, INC. and
RHODE ISLAND DIVISION OF PUBLIC
UTILITIES AND CARRIERS, MACKAY
McCLEARY, ADMINISTRATOR

INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

v.

C.A. No. PC-2016-4804

RHODE ISLAND FAST FERRY, INC. and
RHODE ISLAND DIVISION OF PUBLIC
UTILITIES AND CARRIERS, MACKAY
McCLEARY, ADMINISTRATOR

**DIVISION OF PUBLIC UTILITY AND CARRIERS'
OBJECTION TO MOTION TO REMAND**

The Division of Public Utilities and Carriers (the "Division") objects to the Motion of Petitioners Town of New Shoreham and Interstate Navigation Company d/b/a The Block Island Ferry to Remand Pursuant to R.I.G.L. § 42-35-15(e) (the "Motion"). The Motion was filed on March 10, 2017 by the Town of New Shoreham (the "Town") and Interstate Navigation Company ("Interstate"). In support of its objection, the Division attaches and relies on the accompanying Memorandum in Support of Objection to Motion to Remand.

WHEREFORE, for the reasons set forth in this objection and the accompanying memorandum in support, the Division respectfully requests that this Court deny the Town and Interstate's Motion.

Submitted by the Division of Public Utilities and Carriers, through its attorney:

/s/ Casey J. Lee

Casey J. Lee, Esq. #8454
91 Friendship Street, Suite 1
Providence, RI 02903
(401) 400 – 4005
casey@cjlfirm.com

CERTIFICATE OF SERVICE

I hereby certify that, on the 20th day of March, 2017, I filed and served this document through the electronic filing system on the following parties:

Interstate Navigation Company d/b/a The Block Island Ferry, through its attorneys, Michael R. McElroy and Leah J. Donaldson of Schacht & McElroy;

The Town of New Shoreham, through its attorney Katherine A. Merolla of Merolla Accetturro D'Ovidio & Lough;

Rhode Island Fast Ferry Inc., through its attorneys, James A. Hall, Alan M. Shoer, and Nicole Verdi of Adler Pollock & Sheehan P.C.

The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Casey J. Lee

**STATE OF RHODE ISLAND
PROVIDENCE, SC**

SUPERIOR COURT

TOWN OF NEW SHOREHAM

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RHODE ISLAND FAST FERRY, INC. and
RHODE ISLAND DIVISION OF PUBLIC
UTILITIES AND CARRIERS, MACKAY
McCLEARY, ADMINISTRATOR

**DIVISION OF PUBLIC UTILITY AND CARRIERS' MEMORANDUM
IN SUPPORT OF OBJECTION TO MOTION TO REMAND**

The Division of Public Utilities and Carriers (the "Division") objects to the Motion of Petitioners Town of New Shoreham and Interstate Navigation Company d/b/a The Block Island Ferry to Remand Pursuant to R.I.G.L. § 42-35-15(e) (the "Motion"). The Motion was filed on March 10, 2017 by the Town of New Shoreham (the "Town") and Interstate Navigation Company ("Interstate"). In support of its objection, the Division states as follows:

I. SUMMARY OF THE ARGUMENT

This matter involves the Town's and Interstate's consolidated appeals of the Division's September 22, 2016 Report and Order pursuant to Section 42-35-15 of the Administrative Procedures Act ("APA"). The Report and Order conditionally approved Rhode Island Fast Ferry Inc.'s ("RIFF") application for a certificate of public convenience and necessity ("CPCN") to operate seasonal passenger fast ferry service between Quonset Point in North Kingstown and Old

Harbor in New Shoreham. The Town and Interstate now move to remand the appeal back to the Division for purposes of presenting additional evidence. While the APA does provide a mechanism for remanding administrative appeals for the purpose of presenting additional evidence, it is not without bounds. *See* R.I.G.L. § 42-35-15(e). Such evidence must, among other things, be material and relate to circumstances occurring before or during the underlying administrative proceedings. *See Id.*; *see also Davis v. Wood*, 444 A.2d. 190, 191 – 192 (R.I. 1982). In this case, the Motion should be denied because the evidence the Town and Interstate seek to present fails to meet these critical requirements.

II. IDENTIFICATION OF REFERENCED DOCUMENTS

This memorandum references documents that are part of the administrative record and which have been filed with the Court pursuant to R.I.G.L. 42-35-15(d). External reference is made to the name of the applicable document and the tab number under which the document was filed.

III. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

On July 2, 2013, RIFF filed an application with the Division seeking authority to operate seasonal fast ferry service between Quonset Point in North Kingstown and Old Harbor in New Shoreham. The application was filed pursuant to R.I.G.L. 39-3-3 and 39-3-3.1. These statutes require the Division to issue a certificate of public convenience and necessity (“CPCN”) before a common carrier could offer ferry service in Rhode Island. The Town and Interstate intervened in that docket and opposed RIFF’s application.

On July 21, 2015, the Town filed a motion for summary disposition pursuant to the Division’s Rules of Practice and Procedure. In summary, the motion for summary disposition sought dismissal of RIFF’s application on grounds it had not secured a docking facility in Old Harbor. Town’s Motion for Summary Disposition, Admin. Record, Tab 45, p. 6.

On August 11, 2015, the Division entered an order relative to the Town's motion for summary judgment. That order required RIFF to identify proposed docking facilities. The order also noted

that the Division has routinely granted applications that seek to operate as ferry companies in Rhode Island subject to various conditions-subsequent. It is also true that finality of matters related to docking access, construction and repair work has been treated by the Division as a post-application-approval condition for the issuance of an actual CPCN.

Division's August 11, 2015 order, Admin. Record, Tab 10, p. 6.

In response to the August 11, 2015 order, evidence was submitted indicating that RIFF would be working with a firm called Bluewater to secure adequate docking facilities in Old Harbor. *See* Division's December 10, 2015 Order in Response to the Town's Motion for Summary Disposition, Admin. Record, Tab 4, pp. 2 –3. After reviewing submissions from Bluewater, the Division entered an order denying the Town's motion for summary disposition, finding "...that Bluewater's claims of interest and ability to construct a docking facility in Old Harbor are credible and that RIFF's access to Bluewater's planned docking facility is satisfactorily demonstrated on the record." *Id.* at 21.

On September 22, 2016, the Division issued its final Report and Order conditionally approving RIFF's application. In doing so, the Report and Order dismissed the Town's concerns that RIFF did not then have access to docking facilities in Old Harbor. In pertinent part, the Report and Order stated that

[t]he Division has held that requiring an applicant to possess the docks and vessel at the time of the application filing is economically impractical and contrary to Division precedent. The Division acknowledges that it has, in the past, granted applications for water carrier CPCNs without *de facto* evidence of immediate access to docks and a vessel. The critical element for regulatory purposes is that the applicant whose application has been granted is subject to various conditions subsequent (i.e., availability of docks...) as a prerequisite before the Division actually issues a CPCN and before services may legally begin.

Division's September 22, 2016 Report and Order, Tab 2, pp. 120 – 121. (Footnote omitted).

The Report and Order further conditioned issuance of the final CPCN on, among other things, RIFF demonstrating "...to the Division that...it has access to suitable docking/landings facilities in Quonset and on Block Island..." *Id.* at 141 – 142. This means that no CPCN will issue—and RIFF will not be able to operate ferry service—unless it has actually secured appropriate docking facilities. *Id.* at 142. Under the terms of the Report and Order, RIFF has one year from the date it was entered to secure adequate docking facilities and fulfill certain other enumerated prerequisites. *Id.*

IV. LEGAL ARGUMENT

The Superior Court's authority to remand an administrative appeal for purposes of taking additional evidence is limited by Section 42-35-15(e) of the APA. Critically, a party moving for remand must show that the additional evidence it seeks to present is material. *Id.*

Requests to remand a matter to present additional evidence related to events which occur after the conclusion of the agency proceedings should be denied. *See Davis* 444 A.2d. at 191 – 192 (upholding trial justice's denial of request to remand based on additional evidence of circumstances occurring *after* the agency proceedings had concluded).

In this case, the Motion should be denied for at least two reasons. First, the purported additional evidence described in the Motion is immaterial. Second, even if such evidence were material, it relates to circumstances occurring after the Division's Report and Order was issued.

A. The Motion Should be Denied Because the Town and Interstate’s Purported Additional Evidence is Immaterial.

The Motion should be denied because the purported additional evidence on which it is based is immaterial. It appears that the Town and Interstate seek remand of this administrative appeal based on bare allegations¹ “...that the Army Corps of Engineers has notified RIFF/Bluewater that the Town is indeed a non-federal sponsor” of one of the docking locations originally selected by RIFF, and “...that RIFF/Bluewater has now submitted another, alternate proposed docking facility to the Army Corps.” Motion, p. 4.

Even if those assertions could be considered additional evidence, which the Division disputes, they are not material and cannot support remand in this case. As indicated above, the CPCN application was conditionally granted. The final CPCN will not issue unless RIFF has access to suitable docking or landing facilities in Old Harbor. Division’s September 22, 2016 Report and Order, Tab 2, p. 141. The Report and Order was issued with the understanding that RIFF’s proposed docking facility was still in the approval stage. *Id.* at p. 9. The conditional approval of the CPCN is also supported by Division precedent. *Id.* at p. 121 (“...the Division has established a precedent for approving CPCN applications without proof that an applicant already possesses suitable docks and a vessel.”).

Due to the conditional approval of the CPCN in this case, the Town and Interstate’s allegations are immaterial. Under the terms of the Report and Order, RIFF has one year from the date it was entered to establish that it has secured access to adequate docking or landing facilities. The allegations raised in the Motion simply show that the process of securing suitable

¹ The Division agrees with RIFF that the assertions made by the Town and Interstate are not evidence that could support remand in this case. *See* Memorandum of Law in Support of Rhode Island Fast Ferry, Inc.’s Objection to Petitioner’s Motion to Remand, dated March 17, 2017, pp. 6 – 7.

dock facilities is still ongoing, which is permissible under the terms of the Report and Order. The assertions raised in the Motion are therefore immaterial, and the Motion should be denied.

B. The Motion Should be Denied because it Concerns Circumstances Occurring After the Report and Order was Entered.

The Motion should also be denied because the purported additional evidence on which it is based relates to circumstances occurring after the Report and Order was entered. Evidence of circumstances occurring after agency proceedings have concluded is not a basis for remanding an administrative appeal. *See Davis*, 444 A.2d. at 191 – 192. In this case, the Motion concerns circumstances alleged to have occurred at the end of and after November 2016, approximately two months after the Report and Order was issued. Such post-hearing circumstances cannot support remand in this case, and the Motion should be denied.

V. CONCLUSION

The Motion should be denied because the Town and Interstate have failed to demonstrate the existence of material evidence that would support remand. Further, the Motion should be denied because it concerns allegations about circumstances occurring months after the administrative proceedings had concluded. As explained more fully above, such allegations cannot support a motion to remand and the Motion should be denied.

Submitted by the Division of Public Utilities and Carriers, through its attorney:

/s/ Casey J. Lee

Casey J. Lee, Esq. #8454
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Providence, RI 02903
(401) 400 – 4005
casey@cjlfirm.com

CERTIFICATE OF SERVICE

I hereby certify that, on the 20th day of March, 2017, I filed and served this document through the electronic filing system on the following parties:

Interstate Navigation Company d/b/a The Block Island Ferry, through its attorneys, Michael R. McElroy and Leah J. Donaldson of Schacht & McElroy;

The Town of New Shoreham, through its attorney Katherine A. Merolla of Merolla Accetturro D'Ovidio & Lough;

Rhode Island Fast Ferry Inc., through its attorneys, James A. Hall, Alan M. Shoer, and Nicole Verdi of Adler Pollock & Sheehan P.C.

The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Casey J. Lee

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM

v.

C.A. No. PC-2016-4758

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISTRATOR

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

v.

C.A. No. PC-2016-4804

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY McCLEARY, ADMINISTRATOR

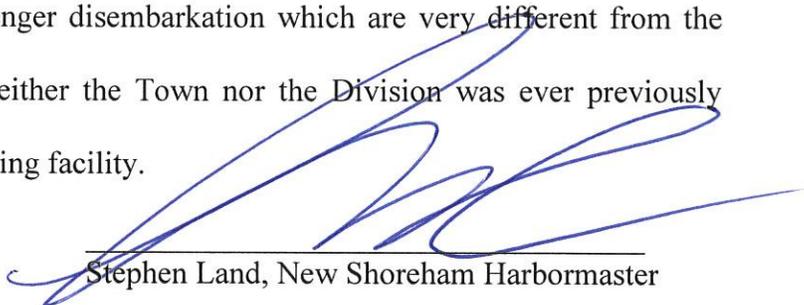
**NEW SHOREHAM HARBORMASTER AFFIDAVIT IN SUPPORT OF
MOTION OF PETITIONERS TO REMAND**

The undersigned, being duly sworn, under oath does depose and state as follows:

I am the duly appointed harbormaster of the Town of New Shoreham ("Town") as designated by the Town Council pursuant to the Home Rule Charter of New Shoreham. In my capacity as harbormaster I participated in the proceedings before the Division of Public Utilities and Carriers ("Division") (Docket No. D-13-51) pertaining to the application of the Rhode Island Fast Ferry Inc. ("RIFF") for a certificate of public convenience and necessity to operate a passenger-only, seasonal ferry from Quonset Point to Old Harbor, Block Island. My participation in those proceedings involved testifying at the Division hearing and evaluating the three docking

facilities which RIFF submitted to the Division through evidence presented in conjunction with Bluewater, LLC ("Bluewater"), the company that plans on building and leasing a docking facility to RIFF in Old Harbor. The three proposed docking facilities were depicted on a proposed docking facilities diagram which is attached to the Petitioners' Motion to Remand.

As part of my duties as harbormaster, I am in contact with Michael E. Walsh, the U.S. Army Corps of Engineers ("ACOE") Project Manager assigned to Old Harbor, Block Island. On February 16, 2017, Mr. Walsh I had a telephone conversation. During this conversation, Mr. Walsh notified me that the ACOE had issued correspondence to Bluewater notifying Bluewater that the Town was a non-federal sponsor of the East Dock in Old Harbor and that as a result of that correspondence, Bluewater had submitted a sketch for a new proposed docking facility which had not been previously submitted. Mr. Walsh described the proposed docking facility as containing ramps and methods of passenger disembarkation which are very different from the proposed docking facilities diagram. Neither the Town nor the Division was ever previously presented with this newly proposed docking facility.



Stephen Land, New Shoreham Harbormaster

Subscribed and sworn to before me in New Shoreham, Rhode Island, this 21st day of March, 2017.


Notary Public Shirlyne Govern
My Commission Expires: 10/3/2017
Notary ID #: 28753

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of March, 2017

I filed and served this document through the electronic filing system on the following:

Michael R. McElroy	michael@mcelroylawoffice.com
James A. Hall	jhall@apslaw.com
Nicole M. Verdi	nverdi@apslaw.com
Alan M. Shoer	ashoer@apslaw.com
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The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Katherine A. Merolla

HEARING DATE: APRIL 4, 2017

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM

v.

C.A. No. PC-2016-4758

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISTRATOR

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

v.

C.A. No. PC-2016-4804

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY McCLEARY, ADMINISTRATOR

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITIONERS TOWN
OF NEW SHOREHAM AND INTERSTATE NAVIGATION COMPANY'S
MOTION TO REMAND**

The Town of New Shoreham ("Town") and Interstate Navigation Company d/b/a The Block Island Ferry ("Interstate"), the petitioners in the above-referenced consolidated cases which are agency appeals, have moved for an Order of this Honorable Court pursuant to R.I.G.L. § 42-35-15 (e) remanding this case to the Rhode Island Division of Public Utilities and Carriers ("Division"). In support of this motion, the petitioners submit the following supplemental memorandum.

Rhode Island law provides that the Town is to be notified whenever a ferry service files an application with the Division to operate to Block Island. The purpose of this notice is to give the Town an opportunity to participate and to provide input into the application process before the Division. Specifically, R.I.G.L. § 39-3-3 states that: "(a) No common carrier of persons and/or property operating upon water between termini within this state shall hereafter furnish or sell its services unless the common carrier shall first have made application to and obtained a certificate¹ from the division certifying that public convenience and necessity required the services..." and that "(b) *A copy of any application filed with either the commission or the division by a water common carrier which includes a New Shoreham terminus shall be provided by the water common carrier to the New Shoreham town clerk by certified mail.*" (emphasis added). In addition, R.I.G.L. § 39-3-3.1 requires that the Division notify an affected city or town of a petition for issuance of a certificate under § 39-3-3, and states: "Upon receipt of the petition, the division shall fix a time and place of hearing thereon and shall give notice as it may prescribe of the pendency of the petition and of the time and place of a hearing thereon to the petitioner, to the mayor and also any city manager of each city, and to the president of the town council and also any town manager for each town, in which the petitioner desires to pick up or discharge passengers."

Rhode Island Fast Ferry, Inc. ("RIFF") filed an application with the Division for authority to operate a water carrier of passengers between Quonset Point and Old Harbor, Block Island. The Town and Interstate opposed the application for several reasons including, *inter alia*, that: public convenience and necessity does not require the issuance of a CPCN; the service provided by Interstate is adequate and meets the public need for ferry service to Block Island; the hardship

¹ This certificate is known as a Certificate of Public Convenience and Necessity ("CPCN").

and inconvenience to the Town and its residents require that the application be denied; RIFF is not fit, willing or able to provide the proposed service because it cannot legally obtain a docking facility in Old Harbor; and the Town and its residents will suffer severe economic harm because Interstate will be forced to increase rates and/or reduce lifeline service to make up for the loss of revenue resulting from the diversion of Interstate's customers to Quonset Point.

RIFF's application for a CPCN was filed on July 2, 2013. The schedule was modified several times in response for extensions by RIFF and/or by agreement.

One of the most important considerations in this process is the docking facility that RIFF proposes to use in Old Harbor. Discovery was conducted in the form of data requests and deposition in order to obtain information regarding the proposed docking facility. Not having received RIFF's proposed docking facility, the Town, on July 21, 2015, filed a motion for summary disposition as a result of RIFF's failure to identify the proposed docking facility. On August 11, 2015, the Division issued an order in response to the Town's summary disposition motion and stated:

In further support of its motion, the Town argues that there are only four docks in Old Harbor where a ferry could land and that RIFF has not been able to demonstrate that it has acquired rights to use any none (sic) of them. The Town relies on the discovery it conducted in this case, including a deposition of RIFF's owner, to verify that RIFF has been unable to establish a legal connection to any of the four docks. The Town adds that because RIFF has not identified its docking location in Old Harbor, the Town has been prevented from conducting discovery or performing an evaluation with respect to the proposed site.

August 11, 2015 Division Order pp. 2-3

The Division observes that RIFF filed its application in this case on July 2, 2013, over two years ago. The Division also acknowledges that during our last status conference in this docket, conducted on May 15, 2015, this hearing officer informed RIFF that *it would be required to identify the dock it planned to utilize in Old Harbor as a requisite element in its burden of proof in this case. Id. p.5.* (emphasis added).

The Division went on to order that: "On or before August 28, 2015, RIFF shall submit a written declaration to the Division identifying the dock it is proposing to use on Block Island (in furtherance of its proposed ferry services) and offer proof of the dock's availability." *Id* pp. 7-8. By subsequent order, the Division extended this deadline to September 11, 2015.

RIFF notified the Division that the docking facility which it planned to use would be built by a company known as Bluewater LLC ("Bluewater"), and that RIFF would lease the docking facility from Bluewater. In response to the Division's orders, RIFF submitted a proposed docking facilities diagram (attached) which depicted three proposed docking facilities:

(i) The first proposed docking facility is comprised of a dock along the inner harbor side of the East Breakwater which connects to the Town's Bait Dock and moves passengers to the land across the East Dock ("Docking Facility 1").

(ii) The second proposed docking facility is comprised of a dock along the inner harbor side of the East Breakwater which extends behind the Town's Bait Dock, connects to the East Dock and moves passengers to the land across the East Dock ("Docking Facility 2").

(iii) The third is a docking facility depicted at the Northerly ELL in the diagram, which is known as the red breakwater and which is under a long-term Coastal Resources Management Council ("CRMC") lease to the Town ("Docking Facility 3"). The CRMC Executive Director provided an affidavit to the Division which stated that the Town would have to consent to the construction of any such dock and that the Town would have to be a party to any such request.

These were the three proposed docking facilities which were the subject matter of the Town's investigations, analysis, discovery, review, testimony and arguments presented to the Division.

Docking Facility 1 and 2 connect to the East Dock which is maintained and operated by the Town through a long-term agreement with the Army Corps of Engineers ("Army Corps"). Both Docking Facility 1 and 2 require not only a physical connection to the East Dock but also that hundreds of passengers be moved across the East Dock to get to land. In order to build either Docking Facility 1 or 2, RIFF/Bluewater is required to obtain the approval of the Army Corps through what is referred to as a Section 408 application because the East Breakwater is a federal project. The Town notified the Division that the Section 408 application is not viable because the Town is a "non-federal sponsor" and the consent of a non-federal sponsor is required for the approval of all Section 408 applications. Contrary to the Town's position, Bluewater informed the Division: "In their latest filing the Town speaks through every authority but their own, now claiming that Town permission is required to initiate the Federal USACE (US Army Corps of Engineers) process *and* the CRMC process. *To be very clear, the permission of the Town is not required to initiate, navigate, or complete either the USACE or CRMC process.* The Town's claims have no basis in law." (emphasis added). (Bluewater, LLC memorandum in opposition to Town of New Shoreham's Motion to Reconsider at page 1 which is included in the transmitted record.)

RIFF/Bluewater apparently elected to go with Docking Facility 1 or 2 because those were submitted to the Army Corps as part of the Section 408 application process. It has recently come to the attention of the Town, its harbormaster and Interstate through communications with the Army Corps that the Army Corps has notified RIFF/Bluewater that the Town is a non-federal sponsor of the East Dock in Old Harbor. Attached to this memorandum is a letter from the Army Corps dated March 23, 2017, attached to which is correspondence dated November 28, 2016 from the Army Corps to Bluewater. The November 28, 2016 correspondence clearly states:

In your letter you indicated that "...the project (FNP) does not have a non-federal project sponsor, as that term is used in the section 408 process." However, that information is inaccurate. On August 12, 1970, the Town of New Shoreham entered into an agreement with the Federal Government relative to the east wharf and bulkhead located on the east side of the FNP's inner basin (see attached). The subject agreement establishes responsibilities for both parties regarding the east wharf and bulkhead, and established the Town of New Shoreham as the non-federal sponsor (NFS) for that feature of the FNP...your written request for Section 408 permission must also include a written statement from the Town of New Shoreham endorsing the proposed project alteration."

Apparently, RIFF/Bluewater were notified of this sometime around the *end of November of 2016*; however, neither Bluewater nor RIFF has advised counsel to these proceedings or the Division of this development. Moreover, the petitioners have recently learned that in an apparent effort to avoid the Town approval necessary for the Section 408 application, RIFF/Bluewater has now submitted another, alternate proposed docking facility to the Army Corps. See attached Army Corps correspondence of March 23, 2017, attached to which is a different, newly developed proposed docking facility. Again, neither RIFF nor Bluewater has advised counsel to these proceedings or the Division of this development.

As discussed above, the Division ordered RIFF to submit its written declaration on or before August 28, 2015 (extended to September 11, 2015) of its proposed dock and to offer proof of the dock's availability. This newly proposed docking facility violates the Division's order which did not state that the RIFF could come up with some other docking facility later on. Indeed, the whole purpose of requiring that RIFF identify the docking facility was so that the Town could conduct its investigation and provide its input. This tactic of switching docking facilities after the hearings have closed and after the report and order of the Division has issued, deprives the Town of its right to do that and to present its arguments to the Division regarding

the many issues presented by the newly proposed docking facility, unless this Court grants the Petitioners' Motion to Remand.

The Town and Interstate aver that these new developments require that the case be remanded to the Division pursuant to R.I.G.L. § 42-35-15 (e) which states:

If, before the date set for the hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

In addition, such remand is also provided for under R.I.G.L. § 42-35-15 (g) which states: 'The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings...' In discussing the ability of the Superior Court to remand a matter to an administrative agency, the Rhode Island Supreme Court stated the following in *Lemoine v. Department of Mental Health, Retardation and Hospitals*, 113 R.I. 285, 320 A.2d 611 (1974):

The authority to 'remand the case for further proceedings' is a broad grant of power, but it is in essence merely declaratory of the inherent power of the court to remand, in a proper case, to correct deficiencies in the record and thus afford the litigants a meaningful review...Section 42-35-15(e) does not limit the authority of the Superior Court to remand for the taking of additional evidence. The underlying philosophy of the administrative process for settling disputes is to give finality to findings of fact made by administrative agencies, when such findings are supported by competent evidence and are procedurally proper. While judicial review is provided, a court cannot, under the act, substitute its judgment for that of the agency 'as to the weight of the evidence on questions of fact.' To implement this basic philosophy of the administrative process, s 42-35-15(e) gives litigants, while the case is pending on appeal in the Superior Court, an opportunity to present additional evidence before the agency so that the agency may modify its original findings and decision by reason of such additional evidence and '* * * file that evidence and any modifications, new findings or decisions with the reviewing court.' Thus, as we have stated above, s 42-35-

15(e) does not limit the authority of the Superior Court to remand under s 42-35-15(g) for the taking of further evidence; it merely affords the litigants a further opportunity to present additional evidence, and it likewise gives the agency a chance to modify its original action if warranted by the new evidence." *Id.* at pp. 614-615.

The Division's Order of December 10, 2015 states that the Division reserves the right to revisit this matter and that the Town will inform the Division if it is successful in derailing Bluewater's plans in the proceedings before the Army Corps. In addition, the Division's Order of September 22, 2016 requires that RIFF notify the Division of any deviation from the services described in the testimony and exhibits, and that such deviation must be approved by the Division. This has not been done.

For the foregoing reasons, the Town and Interstate respectfully submit that this matter should be remanded to the Division.

TOWN OF NEW SHOREHAM
By its solicitor

/s/ Katherine A. Merolla
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Kent Office Building
469 Centerville Road, Suite 206
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Phone: (401) 739-2900, ext. 304

INTERSTATE NAVIGATION
COMPANY
By its attorneys

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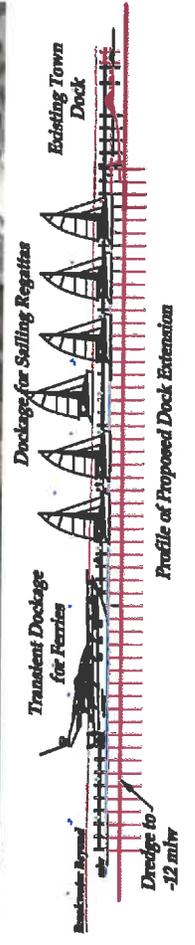
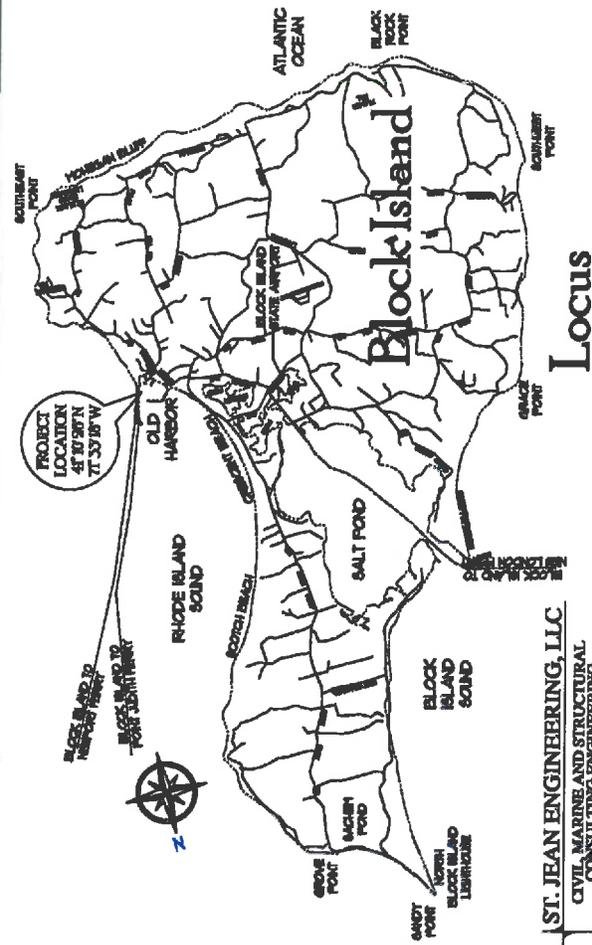
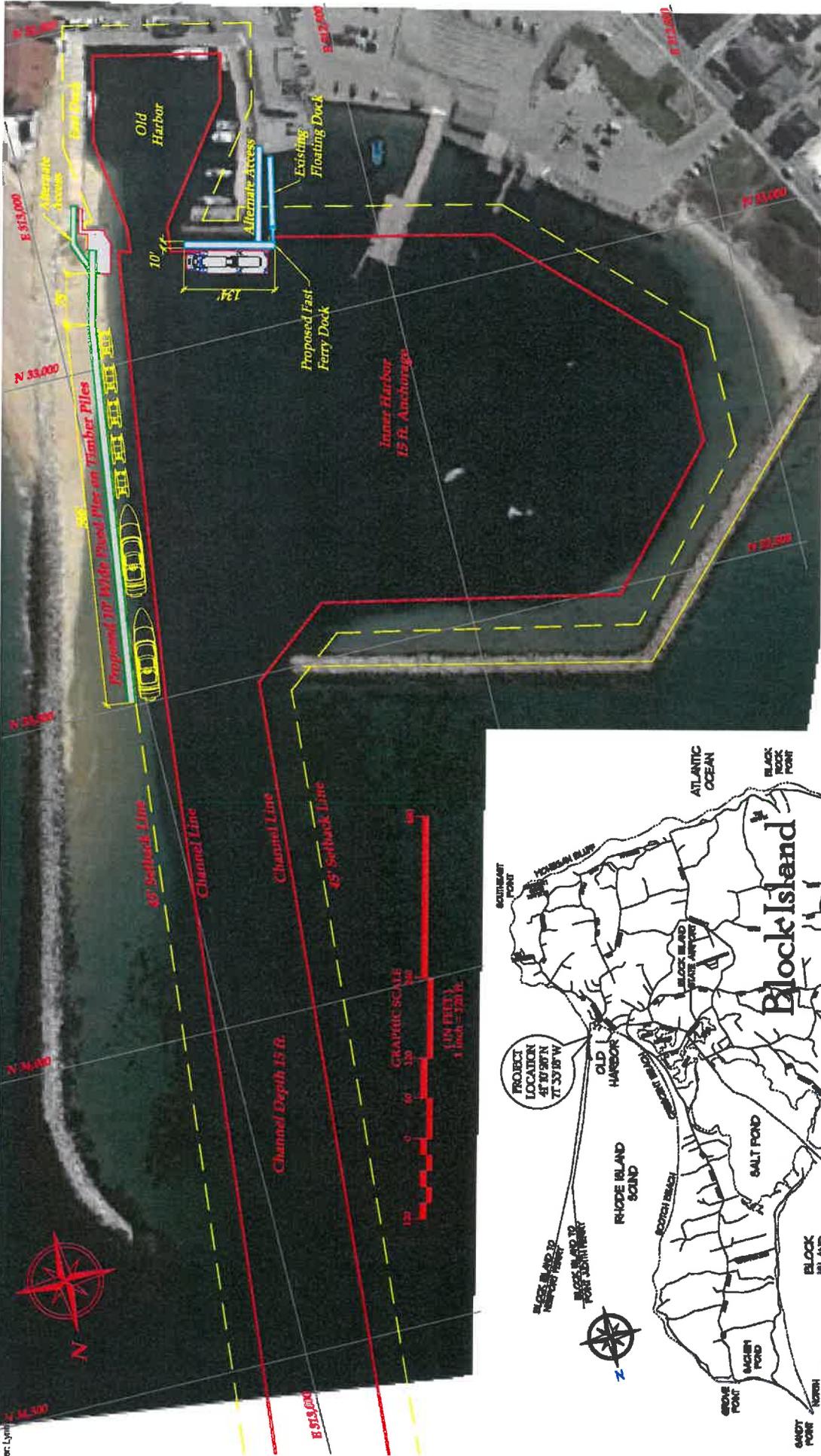
CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2017
I filed and served this document through the electronic filing system on the following:

Michael R. McElroy	michael@mcelroylawoffice.com
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The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Katherine A. Merolla



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DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NEW ENGLAND DISTRICT
696 VIRGINIA ROAD
CONCORD MA 01742-2751

March 23, 2017

Programs & Project Management Division
Civil Works / IIS Project Management Branch

Katherine A. Merolla, Esq.,
Merolla, Accetturo & Lough
469 Centerville Road Suite 206
Warwick, RI 02886

Dear Ms. Merolla:

As requested, I am forwarding to you the following:

1. The Corps' response letter to BlueWater, LLC dated November 28, 2016, following their initial proposal for dockage at the Block Island Harbor of Refuge Federal navigation project. Their initial proposal made reference to requiring access and utilization of the federal east wharf in order to access their proposed dock along the federal breakwater. In that case the town is considered a non-federal sponsor. However, Bluewater later submitted a revised proposal to avoid the requirement to utilize the federal east wharf, in which case the town would not be considered a non-federal sponsor for the purposes of reviewing the 408 request.
2. A copy of BlueWater's subsequent conceptual plan, showing their most recent proposed dock layout and plan for access to the docks.

Based on the most recent submission by BlueWater, the Corps will move forward with reviewing BlueWater's section 408 permission request in accordance with applicable Corps guidance.

Please feel free to contact me if you have any questions regarding this matter. I can be reached at (978) 318-8586, or by email at michael.e.walsh@usace.army.mil.

Sincerely,

A handwritten signature in black ink that reads "Michael E. Walsh".

Michael E. Walsh, P.E., PMP
Project Manager



DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NEW ENGLAND DISTRICT
696 VIRGINIA ROAD
CONCORD MA 01742-2761

November 28, 2016

Programs & Project Management Division
Civil Works / IIS Project Management Branch

Mr. Paul Filippi
Bluewater LLC
PO Box 1818
42 Water Street
Block Island, Rhode Island 02807

Dear Mr. Filippi:

I am writing to acknowledge receipt of your Section 408 permission request to construct and use two docks at the Block Island Harbor of Refuge Federal navigation project (FNP) and to request additional information regarding your proposal.

In your letter you indicated that "...the project (FNP) does not have a non-federal project sponsor, as that term is used in the section 408 process." However, that information is inaccurate. On August 12, 1970 the Town of New Shoreham entered into an agreement with the Federal Government relative to the east wharf and bulkhead located on the east side of the FNP's inner basin (see attached).

The subject agreement establishes responsibilities for both parties regarding the east wharf and bulkhead, and establishes the Town of New Shoreham as the non-federal sponsor (NFS) for that feature of the FNP. Additionally, your submitted proposal involves access over the referenced east wharf for which the town is the NFS. As such, in accordance with EC 1165-2-216 parts 6.d and 7.c(2)(b)v, your written request for Section 408 permission must also include a written statement from the Town of New Shoreham endorsing the proposed project alteration.

The New England District of the US Army Corps of Engineers (Corps) will not initiate review of your proposed project alteration until endorsement from the town of New Shoreham is provided. Once provided, the Corps will establish an Agency Technical Review (ATR) team to initiate review of your proposal.

Please feel free to contact me if you have any questions regarding this matter. I can be reached at (978) 318-8586, or by email at michael.e.walsh@usace.army.mil.

Sincerely,

A handwritten signature in blue ink that reads "Michael E. Walsh".

Michael E. Walsh, P.E., PMP
Project Manager

HEARING DATE: APRIL 4, 2017 AT 9:30AM

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM and
INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY
Petitioners,

v.

RHODE ISLAND FAST FERRY, INC.
AND RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISRATOR
Respondents.

C.A. Nos. PC-2016-4758

PC-2016-4804

**RHODE ISLAND FAST FERRY, INC.'S OBJECTION AND
RESPONSE TO PETITIONERS' SUPPLEMENTAL MEMORANDUM**

Rhode Island Fast Ferry, Inc. ("RIFF") respectfully submits this memorandum in response and opposition to Petitioners' Town of New Shoreham ("Town") and Interstate Navigation Company d/b/a the Block Island Ferry ("Interstate")¹ (collectively, "Petitioners") Supplemental Memorandum in support of their Motion to Remand ("Motion") the above-captioned matter to the Division of Public Utilities and Carriers ("Division"). As discussed

¹ It should be noted that the Division expressly ordered that Interstate's intervention in this case be limited. Interstate's joining in the Motion to Remand directly violates that limitation. The Division allowed Interstate to participate in the licensing proceeding "in the context of the 'public convenience and necessity' elements[.]" but refused to allow Interstate "to challenge the Applicant with respect to its claims of 'fitness.'" See Division Docket No. D-13-51, Order No. 21170, at 19-20 (Sept. 24, 2013) (Order was attached to RIFF's Objection as Exhibit C, filed with the Court on March 17, 2017.) The Division specifically stated that it "will not permit Interstate to participate beyond this limited issue." *Id.* at 19. Although an interlocutory appeal was taken to this Court as related to intervention, Interstate did not appeal that limitation. Issues related to the availability of dockage go to RIFF's fitness and/or ability, not to the public's need and convenience. Accordingly, Interstate should be prohibited from joining in this Motion to Remand regarding RIFF's ability to dock its ferry.

below, Petitioners' Motion must be denied.

I. INTRODUCTION

Petitioners' Supplemental Memorandum in support of their Motion is the latest in a series of dilatory attempts to delay a final decision in this case. Petitioners' ostensibly bring this Supplemental Memorandum as a last ditch effort to delay and circumvent the briefing schedule ordered by this Court (Petitioners' briefs being due on April 6, 2017). As discussed below, Petitioners' Supplemental Memorandum does not present any additional material evidence that would warrant remand in this case.

Petitioners' latest diversion is a letter from the Army Corps of Engineers ("ACOE") to the Town's legal counsel regarding Bluewater, Inc.'s ("Bluewater") proposed application for permitting of docking facilities in Old Harbor. This letter, however, does not support Petitioners' contention that Bluewater is proposing different docking facilities than those submitted to the Division. The docking facilities proposed to the ACOE are the same docking facilities submitted to the Division in RIFF's filings before the Division. The only difference being that one of the docking facility plans submitted to the ACOE now shows an upland sidewalk. However, depicting an upland sidewalk in no way constitutes a "different docking facility" as asserted by Petitioners, nor is such a depiction material to the Division's CPCN grant.

The Division previously determined that the only docking issue appropriately before the Division was whether RIFF had made a showing of the ability to dock its ferry somewhere in Old Harbor. The Division further noted that the specific details about the docking facility, such as construction and/or harbor congestion, is within the jurisdiction of the ACOE and Coastal Resources Management Council ("CRMC") and that it would not insert itself into such permitting proceedings.

Bluewater's decision to depict a sidewalk is similarly not within the scope of the Division's licensing review. The Division specifically reserved the right to revisit whether RIFF had the ability to dock its ferry *only if* the Town was successful in its efforts to prevent the construction of Bluewater's planned dock(s) before the ACOE or CRMC. Petitioners' Motion and Supplemental Memorandum clearly demonstrates that Bluewater's ACOE application is moving forward. As the Petitioners' Motion shows, the Town has not been successful in derailing it.

Additionally, RIFF requests that this Court award RIFF its attorneys' fees. Petitioners filed their Motion to Remand and Supplemental Memorandum for an improper purpose: to circumvent this Court's scheduling order and further delay briefing and a final decision in this case.

Accordingly, under these circumstances, Petitioners' Motion to Remand must be denied and the Court should award RIFF attorneys' fees. The Court should also enter an order prohibiting Petitioners' from filing any further frivolous motions designed with the obvious purpose to block this appeal process from moving forward.

II. ARGUMENT

A. Petitioners' Supplemental Memorandum Does Not Present New Evidence To Warrant Remand.

This Court should deny Petitioners' Motion because Petitioners failed to present any evidence to warrant remand under R.I. Gen. Laws § 42-35-15(e). Petitioners' argue that the docking facility submitted to the ACOE is "a different, newly developed proposed docking facility" than the docking facility submitted to the Division. *See* Petitioner's Supplemental Memorandum ("Supp. Mem."), dated March 31, 2017, at 6. Petitioners are incorrect.

The docking facility submitted to the ACOE is the exact same docking facility that was

presented to the Division. When comparing both diagrams—the diagram previously submitted to the Division and the diagram submitted to the ACOE—side-by-side, it is apparent that the docking facility submitted to the ACOE utilizes the “alternative access” docking area presented to the Division and is what Petitioners name “Docking Facility 1.”² “Docking Facility 1” and the “alternative access” were, in fact, previously presented to the Division, and the Division determined “that RIFF (through Bluewater) has a realistic expectation of having access to a future docking facility in Old Harbor from which it may operate a high-speed ferry service.” *See* Division Docket No. D-13-51, Order No. 22254, at 22 (Dec. 10, 2015). The *only* difference between the docking facility submitted to the ACOE and the docking facility submitted to the Division is the depiction of an upland paver sidewalk that Bluewater would install so as to indicate a pathway to the Docking Facility 1.

Bluewater’s depiction of where it plans to install its paver sidewalk is not sufficient to warrant remand under R.I. Gen. Laws § 42-35-15(e). As discussed thoroughly in RIFF’s Objection to Petitioners’ Motion to Remand, a motion to present additional evidence to the agency *may* be allowed if all the following prerequisites have been fully satisfied: (1) additional evidence exists; (2) the additional evidence is material; and (3) there were good reasons for failure to present the additional and material evidence in the proceeding before the agency. R.I. Gen. Laws § 42-35-15(e). Depicting an upland sidewalk neither meets any of those prerequisites, nor does it constitute additional *material* evidence.

Petitioners are upset about Bluewater’s decision to utilize the “alternative access” as

² Schedule A, the proposed docking facility diagram that was previously submitted to the Division was attached to Petitioners’ Supplemental Memorandum. The proposed docking facility diagram that was submitted to the ACOE was also attached to Petitioners’ Supplemental Memorandum.

proposed to the Division because doing so does not lay a foundation for the Town to assert “non-federal sponsor” status within the ACOE proceedings. The Town’s frustrations certainly do not constitute a “derailment” of the ACOE application, the threshold criteria set by the Division.

B. Petitioners’ Supplemental Memorandum Requests Remand On A Matter That The Division Already Determined Was Not Material.

Because Petitioners’ Supplemental Memorandum requests that this Court remand this case to the Division on a matter that is neither within its licensing authority nor material, Petitioners’ Motion for Remand must be denied.

When other ferry providers sought to intervene before the Division (including Interstate and its sister corporation), arguing an interest concerning matters related to boat docks and harbor congestion, the Division determined that these matters were not within the Division’s authority nor immediately relevant to whether RIFF’s proposed service would be a public benefit. The Division stated that because it must defer to other authorities “...concerning matters related to boat docks and ferry congestion in Old Harbor, it would be impractical for the Division to spend any significant time addressing these issues in the context of the instant CPCN (licensing) proceeding.” *Id.* at 17. The Division stated that “*the Division is ill-equipped to meaningfully evaluate harbor congestion and dock adequacy issues as a condition-precedent to the issuance of a CPCN.*” *Id.* at 18. (emphasis added.)

The Division went on to deny the Town’s Motion for Summary Disposition, which was entirely related to dockage issues, and thus the *only* issue remaining before the Division was whether RIFF (through Bluewater) had demonstrated access to any dockage in Old Harbor. *See* Order No. 22254, at 21. The Division never opined that RIFF must utilize a specific pathway or sidewalk to off-ramp its passengers. The Division never analyzed the characteristics or construction of the dockage and most certainly did not see relevant whether pavers or some other

material must be used for the pathway. The only issue before the Division was whether RIFF had a proposal for the ability to utilize a potential dock in Old Harbor. The Division found that RIFF had “a realistic expectation of having access to a future docking facility in Old Harbor from which it may operate a high-speed ferry service.” *Id.*

The docking facilities presented to the Division are the same facilities that Bluewater has proposed to the ACOE and RIFF’s potential ability to access those docking facilities in Old Harbor has not changed. Indeed, the letter attached to Petitioners’ Supplemental Memorandum from the ACOE, dated March 23, 2017, evidences that Bluewater’s application to construct the docking facility is moving forward and preliminarily acceptable to the ACOE. *See* Letter from ACOE, dated 2017 (stating “[b]ased on the most recent submission by Blue[w]ater, the [ACOE] will move forward with reviewing Blue[w]ater’s section 408 permission request[.]” (emphasis added)). RIFF’s ability to access dockage in Old Harbor has in no way changed and the proposed dockage itself has not changed.

Accordingly, Petitioners’ Supplemental Memorandum does not provide a scintilla of support that remand is warranted here, and therefore, it must be denied.

C. Remand Is Not Warranted Because The Town Failed To Derail Bluewater’s Plans Before The ACOE.

Petitioners have failed to “derail” Bluewater’s docking plans before the ACOE; therefore, their Motion for Remand must be denied.

In the Division’s December 10, 2015 Order denying the Town’s request for Summary Disposition, the Division determined that RIFF had demonstrated, to the satisfaction of the Division, the ability to access a future docking facility. *See* Order No. 22254, at 23. Petitioners’ argue, via a purposeful misrepresentation of the Order’s language, that the “Division’s Order of December 10, 2015 states that the Division reserve[d] the right to revisit this matter *and that the*

Town will inform the Division if it is successful in derailing Bluewater's plans in the proceedings before the [ACOE]." Petitioners' Motion, at 4 (emphasis added); Petitioners' Suppl. Mem., at 8. Petitioners would have this Court believe that the Division reserved the right to revisit this matter—*docking in Old Harbor*—in general, even if any design details—such as paving materials, were still under consideration. However, that is simply not truthful. The Division was merely interested only in reserving for itself "...the right to revisit this [docking in Old harbor] matter [only] upon a showing by the Town that it has been successful in its efforts to prevent the construction of Bluewater's planned dock before the [ACOE] or CRMC." See Order No. 22254, at 23 (emphasis added).

Neither Petitioners' Motion to Remand nor their Supplemental Memorandum establishes that the Town has been successful in its efforts to prevent the construction of Bluewater's planned dock before the ACOE. In fact, much to the Petitioners' chagrin, the letter attached to Petitioners' Supplemental Memorandum from the ACOE, dated March 23, 2017,³ establishes that just the opposite is true. The letter states that "[b]ased on the most recent submission by Blue[w]ater, the [ACOE] will move forward with reviewing Blue[w]ater's section 408 permission request[.]" (Emphasis added.) The ACOE process is moving forward.

Accordingly, as Bluewater's ACOE application process continues to move forward, remand is not warranted.

III. THIS COURT SHOULD AWARD RIFF ATTORNEYS' FEES

This Court should require Petitioners pay RIFF's attorneys' fees. The Rules of Civil

³ It should be noted that Petitioners received this letter after Petitioners filed their Motion to Remand and one day after the hearing on Petitioners' Motion to Remand and RIFF's Objection was originally set to be heard before Judge Keough.

Procedure require that the positions taken by parties in their filings with the Court be warranted by existing law or a good faith argument *and* that such positions not be interposed for any improper purposes, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. This Court can award attorneys' fees when there has been such a violation.

As demonstrated in detail above and in RIFF's Objection(s) to Petitioners' Motion to Remand, this Court has ample basis to conclude that Petitioners' Motion to Remand was not warranted by existing law. Petitioners filed their Motion to Remand and Supplemental Memorandum knowing that the docking facility presented to the Division was the same docking facility that was proposed to the ACOE. Petitioners filed their Motion to Remand and Supplemental Memorandum knowing that the Division determined that it would be impractical for the Division to spend any significant time addressing issues related to boat docks and ferry congestion in Old Harbor in the context of its licensing proceeding. Further, Petitioners filed their Motion to Remand and Supplemental Memorandum knowing that Division "reserve[d] the right to revisit this [docking in Old harbor] *matter [only] upon a showing by the Town that it has been successful in its efforts to prevent the construction of Bluewater's planned dock before the [ACOE] or CRMC.*" See Order No. 22254, at 23

Petitioners' Motion to Remand is a clear attempt to circumvent this Court's Scheduling Order and further delay briefing and a final decision in this case. Petitioners should not be allowed to cause unnecessary delay and needlessly increase the cost of litigation without being held accountable.

For these reasons, RIFF is entitled to attorneys' fees for the cost of Objecting and defending against Petitioners' Motion to Remand and upon order of the Court shall present its fees. Additionally, the Court should issue an order preventing the Petitioners from filing any

further frivolous motion to prevent the Court from deciding this appeal.

IV. CONCLUSION

For the foregoing reasons, RIFF respectfully requests that this Court deny Petitioners' Motion to Remand, award RIFF attorneys' fees, order Petitioners to forego filing frivolous motions, order Petitioners to file their post-hearing briefs and stop these obvious efforts to delay this appeal process.

RHODE ISLAND FAST FERRY, INC.
By its Attorneys:

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Alan M. Shoer (#3248)
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Tel: (401) 274-7200
Fax: (401) 351-4607
Dated: April 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on April 3, 2017:

I electronically filed and served this document through the electronic filing system on the following parties:

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The document electronically served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

I mailed or hand-delivered this document to the attorney for the opposing party and/or the opposing party if self-represented, whose name and address are:

/s/ James A. Hall