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May 25, 2017

Luly E. Massaro, Clerk
Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888

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

Dear Luly:

As you know, this office represents intervenor Interstate Navigation Company d/b/a The Block Island Ferry ("Interstate") in this matter.

Enclosed for filing in this matter are an original and five copies of a joint Objection of the Town of New Shoreham ("Town") and Interstate to the Motion of Rhode Island Fast Ferry, Inc. to Re-Open Docket No. D-13-51, a joint Request for a Pre-Hearing Conference, and a joint Rule 31(b) Motion.

If you have any questions, please feel free to call.

Very truly yours,


Michael R. McElroy

MRMc/tmg
cc: Service List

STATE OF RHODE ISLAND
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC.

DOCKET No. D-13-51

***OBJECTION OF THE TOWN AND INTERSTATE TO RIFF'S
MOTION TO RE-OPEN DOCKET NO. D-13-51,***

***REQUEST OF THE TOWN AND INTERSTATE
FOR A PRE-HEARING CONFERENCE, and***

RULE 31(b) MOTION OF THE TOWN AND INTERSTATE

**I. OBJECTION OF THE TOWN AND INTERSTATE TO
RIFF'S MOTION TO RE-OPEN DOCKET No. D-13-51**

The Town of New Shoreham ("Town") and Interstate Navigation Company d/b/a the Block Island Ferry ("Interstate") object to the motion of the Rhode Island Fast Ferry, Inc. ("RIFF") to re-open Docket No. D-13-51. The first basis for this objection is that a motion to re-open is unnecessary in this case. The second basis is that RIFF's motion mischaracterizes Justice Licht's May 2nd order.

Following the Superior Court oral argument of April 4, 2017 with respect to the joint motion of the Town and Interstate to remand this case to the Rhode Island Division of Public Utilities and Carriers ("Division"), Mr. Justice Licht entered an order which granted the motion and which also stated: "This case is remanded to the Division for the purpose of determining whether the Division will exercise its right to revisit this matter pursuant to paragraph four of the Division's order of December 10, 2015. The parties have the right to make arguments to the Division as to the reasons why the Division should or should not revisit this matter."

The statutory authority for such a remand is contained in 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, R.I.G.L. § 42-35-15(g) allows the Superior Court to remand a case to an administrative agency for further proceedings.

Upon the entry of the judge’s order remanding the case to the Division, this docket was, by definition, re-opened. No motion is required nor is the re-opening of the case for purposes of the matters referenced in the court’s order discretionary.

The second basis for this objection is that RIFF’s motion does not appropriately characterize what Justice Licht ordered. RIFF’s motion states that the docket should be reopened for the “limited purpose of determining whether the Division will exercise its right to revisit RIFF’s docking ability . . .” This attempted restriction on the Justice’s order is not contained within the order nor does the order impose any such limitation. Rather, the order states, as quoted above, that the case is remanded to the Division for the purpose of determining whether the Division will exercise its right to revisit this matter pursuant to paragraph four of the Division’s order of December 10, 2015. In addition, the Superior Court order specifically affords the parties the right to make arguments to the Division in this regard. Paragraph four of 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 to the foregoing, the Town and Interstate request a pre-hearing conference at

the Division for purposes of discussing and establishing the process, procedure and schedule to be followed in this matter. The necessity for the pre-hearing conference is further discussed below.

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 certificate 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.”

In the proceedings before the Division, the Town and Interstate opposed RIFF’s application for a CPCN 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.

The schedule pertaining to RIFF's application for a CPCN was modified several times in response to extensions requested by RIFF and/or by agreement. One of the most important considerations in the proceedings before the Division was the docking facility that RIFF proposed 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 which depicted three proposed docking facilities:

(i) The first proposed docking facility was 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 was 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 was a docking facility depicted at the Northerly ELL, 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. These were the proposed docking facilities that were identified pursuant to the Division’s order. These were the docking facilities that the Town and Interstate investigated,

conducted discovery and submitted written and oral argument about. The Division's order did not permit RIFF to change its proposed docking facility midstream, thereby avoiding discovery, scrutiny and argument.

In its papers, the Town notified the Division that a Section 408 application to the Army Corps with reference to Docking Facility 1 and Docking Facility 2 would not be 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 told 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).

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. During the pendency of the Superior Court appeal, it came to the attention of the Town, its harbormaster and Interstate that the Army Corps had notified RIFF/Bluewater by letter dated November 28, 2016 that the Town is indeed a non-federal sponsor of the East Dock in Old Harbor and that Bluewater's application with respect to Docking Facility 1 and 2 could not go forward without the Town's written consent because these docking facilities move passengers over the East Dock.

Apparently, RIFF/Bluewater were notified of this sometime around the *end of November of 2016*; however, neither Bluewater nor RIFF ever notified counsel to these proceedings or the Division of this development. Moreover, the Town and Interstate 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, new proposed docking facility to the Army Corps.

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 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 a thorough investigation and provide its input to the Division. This tactic of switching docking facilities after the hearings have closed and after the report and order of the Division has issued, deprives the parties of their right to do that and to present their arguments to the Division regarding the many issues presented by the newly proposed docking facility. Based upon this, the Superior Court remanded the case to the Division.

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. RIFF did not do this.

II. REQUEST OF THE TOWN AND INTERSTATE FOR A PRE-HEARING CONFERENCE

The Town and Interstate request a pre-hearing conference to establish the proceedings and process and to set a schedule in order, among other things, that the parties may conduct the type of discovery and investigation which RIFF/Bluewater seek to deprive them of by filing a new docking facility plan ("New Docking Facility") with the Army Corps without disclosing this

to counsel or the Division. The New Docking Facility plan diagram which was filed with the Army Corps is rudimentary; however, just from that plan, it is apparent that the New Docking Facility moves the planned pilings, piers and ramps high upon the beach and provides a different method of moving passengers which would substantially interfere with the Town and public's use of that area. Bluewater has apparently filed more detailed plans and documentation with the Army Corps which have not been provided to counsel for the parties; however, the rudimentary diagram itself causes the Town serious concern. This is not just about whether the Army Corps will grant the requisite permits. This New Docking Facility Plan, if it came to fruition, would cause hardship and inconvenience to the Town and its residents.

The Superior Court order gives the parties the right to argue these matters before the Division. This right would not be meaningful if the parties are not permitted to request documentation, submit data requests and conduct discovery in connection with the New Docking Facility Plan. Indeed, without the ability to conduct such discovery, RIFF/Bluewater will have succeeded in both violating the Division's order that the docking facility must have been submitted by September 11, 2015, and in effectively thwarting the 'right of the parties to obtain the requisite information regarding the New Docking Facility Plan and to then submit written and oral argument to the Division. The Town and Interstate respectfully submit that this would deprive them of due process and would nullify the Superior Court order explicitly granting them the right to make these arguments before the Division.

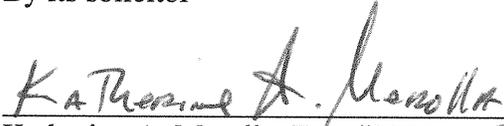
III. RULE 31(b) MOTION OF THE TOWN AND INTERSTATE

The actions of Bluewater and RIFF in not submitting this New Docking Facility Plan by September 11, 2015 also warrant, pursuant to Division Procedural Rule 31(b), relief from the final order of the Division dated September 22, 2016, because of: mistake, inadvertence,

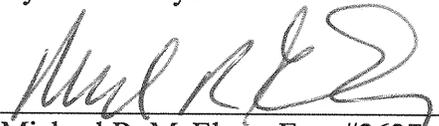
surprise, or excusable neglect; newly discovered evidence, which by due diligence could not have been discovered in time to move to reopen the proceedings under Rule 29; fraud, misrepresentation, or other misconduct of RIFF and Bluewater; it is no longer equitable that the order should have prospective application; and/or any other reason justifying relief from the operation of the order as determined by the Division.

In the interest of administrative economy, the Town and Interstate submit that both the remand from the Superior Court and the Town and Interstate's Rule 31(b) motion should proceed in tandem.

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By its solicitor


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CERTIFICATION

I hereby certify that, on May 25, 2017, I served this document via e-mail on the individuals listed on the service list for this docket as well as upon Casey J. Lee, Esq. casey@cjlfirm.com.


Theresa Gallo

Rhode Island Fast Ferry (RIFF) – CPCN Application Docket No. D-13-51
Updated 10-21-15

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