

June 1, 2017

Via E-mail/Federal Express Delivery

Ms. Luly Massaro
Division Clerk
Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, Rhode Island 02888

In re: Rhode Island Fast Ferry, Inc. – Docket No. D-13-51

Dear Luly:

On behalf of Rhode Island Fast Ferry, Inc. (“RIFF”), please find an original and four (4) copies of the enclosed Objection and Response in connection with the above referenced docket.

Very truly yours,



JAMES A. HALL
jhall@apslaw.com

Enclosure

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

**RHODE ISLAND FAST FERRY, INC.’S OBJECTION AND RESPONSE
TO THE TOWN OF NEW SHOREHAM AND INTERSTATE NAVIGATION
COMPANY D/B/A THE BLOCK ISLAND FERRY’S OBJECTION AND RULE 31(B) MOTION¹**

Rhode Island Fast Ferry, Inc. (“RIFF”) submits this response and objection to Interstate Navigation Company’s d/b/a The Block Island Ferry (“Interstate”)² and the Town of New Shoreham’s (“Town”) Objection and Rule 31(b) Motion. RIFF opposes this latest baseless effort by Interstate and the Town to delay, as long as possible, the pending appeal of the Division of Public Utilities and Carriers (“Division”) Order No. 22548, granting RIFF a Certificate of Public Convenience and Necessity (“CPCN”) to operate a high speed ferry from Quonset Point, North Kingstown to Old Harbor, Block Island. The Town and Interstate assert that non-party Bluewater, LLC (“Bluewater”) has submitted a dockage plan to the United States Army Corps of

¹ Rhode Island Fast Ferry, Inc. hereby incorporates by reference its filings in the Superior Court as related to remand. Those filings were provided to the Division with RIFF’s Motion to Re-Open the Division docket on May 16, 2017.

² It should be noted that Interstate has no standing to object or to move to re-open concerning an issue unrelated to their limited intervention in this matter. 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). The Division specifically stated that it “will not permit Interstate to participate beyond this limited issue.” *Id.* at 19. Issues related to the availability of dockage go to RIFF’s fitness and/or ability, not to the public’s need and convenience. Interstate ignores its limited party status and tries, yet again, to contest RIFF’s fitness, willingness and ability to provide high speed ferry service to New Shoreham. Accordingly, the Division should reject Interstate’s portion of this “objection” and “motion” as well as any remedy sought therein including re-opening this proceeding to investigate matters that the Division has barred Interstate from raising.

Engineers (“ACOE”) that substantially deviates from the plan submitted to the Division during the CPCN hearing(s). Simply stated, that is *false*.

As discussed below, RIFF respectfully requests that the Division: (1) deny the Town’s request for a pre-hearing conference, (2) deny the Town’s Rule 31(b) motion as it lacks merit and (3) proceed with deciding upon the one issue that is the subject of the limited remand from the Superior Court.

I. The Division Should Deny the Town’s Request for a Pre-Hearing Conference.

Because a pre-hearing conference is unnecessary and will serve to only further delay this process, RIFF respectfully requests that the Division deny the Town’s request for a pre-hearing conference.

The Town requests a pre-hearing conference “for the purposes of discussing and establishing the process, procedure and schedule to be followed in this matter.” May 25, 2017 Objection & Motion (“Motion”), at 2-3. The Town further argues that 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 [alleged] New Docking Facility Plan.” *Id.* at 8.

However, the Town’s argument that the Superior Court remanded the case to the Division to determine anything more than whether or not the *Division* wants to exercise its right that it reserved in paragraph four of the Division’s December 10, 2015 Order is a predictable mischaracterization of the Court’s language. Correctly stated, the Superior Court remanded this case to the Division for the “*sole purpose* of determining whether or not it wanted to exercise its right that is reserved in paragraph four of its [December 10, 2015] order.” *See* Apr. 4, 2017 Tr. at p. 33 (emphasis added), attached as **Exhibit A**. The Court never imposed or discussed an

open ended remand for an entirely new evidentiary inquiry into nonparty Bluewater's plans for dockage in Old Harbor nor did the Court opine on how the Division should undertake its directive. The Court simply remanded to the Division for the stated limited purpose of a determination by the Division of whether the Town has in fact met the terms of paragraph four, which requires a showing of "derailment" of the ACOE process.³

Assuming, for the sake of argument, that the Town can make a showing of "derailment," only then would the Division need to make a second determination of "whether the Division will exercise its right to revisit this matter" (as relates to dockage). *See* Division Docket No. D-13-51, Order No. 22254, at 23. If the Town, however, fails to establish sufficient proof of a "derailment" of the ACOE process, then the Division need not even get to the second question of whether the Division will exercise its right to revisit this dockage matter, let alone schedule a full evidentiary hearings.

The Town, of course, puts the cart before the horse and invites the Division to ignore the two initial questions (whether there is a showing of derailment and whether to revisit) and tries to fool the Division into jumping to the conclusion that, despite the obvious fact that the ACOE application is moving forward, that the Town has in fact successfully "derailed" the ACOE process. The Town fantasizes that the Division has no choice but to "revisit this matter" (as to dockage). The Town misses the entire point of the Division's December 10, 2015 Order. Without a showing of "derailment," the Town fails to even get to first base.

³ *See* Division Docket No. D-13-51, Order No. 22254, at 22, 23 (Dec. 10, 2015) (stating "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." and "[T]he Division reserves the right to revisit this matter upon a showing by the Town that is has been successful in its efforts to prevent the construction of Bluewater's planned dock before the USACE or CRMC.") (emphasis added).

In other words, the Court left it up to the Division, pursuant to its discretion, to decide if the circumstances warrant a remand for further proceedings or if the circumstances compel that the matter be forthwith sent back to the Superior Court for the processing of the pending appeal. The only item that was arguably “re-opened” by the order of the Superior Court was for the Division to answer the question posed by the Court, not for the Division to undertake an entirely new proceeding or to re-hash the licensing application that the Division long ago decided. The Town’s argument seeks, yet again, to inappropriately further delay and obfuscate this appeal, which has been the mantra and basis of their opposition all along.

Additionally, there is no point in opening up a long drawn out discovery proceeding, with pre-filed testimony and evidentiary hearings. The Division need only look at the proposed dock facilities presented by RIFF in the 2015 proceedings and compare it with the proposed docking facility currently pending with the ACOE. *Compare at Exhibit B* (the first document is the plan submitted to ACOE; the second document is the plan submitted to the Division). A pre-hearing conference would be pointless. Again, the only reason the Town and Interstate seek this relief is to further delay these proceedings so as to avoid having to brief the matter or have it decided on appeal before the Superior Court.

Accordingly, RIFF respectfully requests the Division deny the Town’s request for a pre-hearing conference.

II. The Division Should Deny the Town’s Rule 31(b) Motion.

The Town also asserts that the alleged “actions of Bluewater and RIFF in not submitting this [purported] 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[.]” Motion, at 8. The Town’s Rule 31(b) Motion is nonsensical, as 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 the level of engineering detail provided to the ACOE and that one of the docking facility plans submitted to the ACOE now shows an upland sidewalk that connects to the "alternative access" clearly depicted in the submission to the Division. *See Exhibit B.* However, depicting an upland sidewalk in no way constitutes a "different docking facility" as asserted by the Town, 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. *See* Division Docket No. D-13-51, Order No. 21170, at 18 (Sept. 24, 2013) (stating "*the Division is ill-equipped to meaningfully evaluate harbor congestion and dock adequacy issues as a condition-precedent to the issuance of a CPCN*") (emphasis added).

Because the docking facility has not changed, neither RIFF nor Bluewater failed to present anything to the Division as asserted by the Town. Therefore, the Rule 31(b) Motion must be denied.

III. The Division Should Proceed to Determine the *Sole Issue Before It: Whether or Not it Wants to Exercise the Right that it Reserved in Paragraph Four of its December 10, 2015 Order.*

The Superior Court remanded this case to the Division for the "*sole purpose of determining whether or not it wanted to exercise its right that is reserved in paragraph four of its [December 10, 2015] order.*" *See* Apr. 4, 2017 Tr. at p. 33 (emphasis added), attached as **Exhibit A.** Paragraph Four of the Division's December 10, 2015 Order states: "[T]he 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." *See* Division Docket No. D-13-51, Order No. 22254, at 23 (Dec. 10, 2015). Because the Town's objection and motion in response to RIFF's Motion to Re-Open the docket lack merit, the Division should proceed to determining whether or not it wants to exercise its right expressed in the December 10, 2015 Order.

As discussed in RIFF's filings with the Superior Court, which were attached to RIFF's Motion to Re-Open the Docket as Exhibit C, the Town has failed to show a single thread of evidence that it has "derailed" the Bluewater permit application with the ACOE for the same dock location(s) in Old Harbor, known as the Mount Hope/East Breakwater dock, referred to by the Town and Interstate as "the East Dock" and "Docking Facility 1," the same docking facility identified in RIFF's application before the Division and ruled as adequate for the Division's issuance of a conditional license. Simply put, the Division should not for a moment be fooled by the Town's fictional assertions that the Town has succeeded in proving the fundamental predicate set forth in the Division's Order, which left open the possibility of a remand, if – and only if – the Town could prove that it had "derailed" the application of Bluewater to the ACOE for a permit to construct a dock in the so-called Old Harbor of New Shoreham.

On the contrary, the same dock proposed by RIFF before the Division in this proceeding remains the same dock that is presently pending before the ACOE in the submission filed by Bluewater. *See Exhibit B*. That process is indisputably moving forward, and neither the Town nor Interstate provide a scintilla of evidence to prove otherwise. Moreover, the ACOE process is a public process, where the Town, and any other entity with concerns, may file comments and inform the ACOE of their positions.

The Division should not be fooled for an instant into thinking that the Town is not capable of participating in the ACOE process. The Town may have its reasons for avoiding the ACOE process and seeking to use this Division as fodder for its stubborn efforts to block the compelling public convenience and necessity that the Division found by allowing a competing high speed ferry to New Shoreham. However, RIFF is not interested in exploring the reasons why the Town refuses to consent to this appeal moving forward in due course. Regardless, the Division has already ruled that it will not turn its licensing review into an ACOE (or CRMC) process of adjudicating competing arguments over a dock permit application. *See* Division Docket No. D-13-51, Order No. 21170, at 18 (Sept. 24, 2013) (stating “*the Division is ill-equipped to meaningfully evaluate harbor congestion and dock adequacy issues as a condition precedent to the issuance of a CPCN*”) (emphasis added). Therefore, the Division should continue to avoid preempting the permitting jurisdiction and authority of the ACOE with regard to permit applications for dockage in Old Harbor.

With the ACOE process moving forward for a permit for the dock that was before the Division in the Old Harbor, known as the Mount Hope/East Breakwater dock(s), referred to by the Town and Interstate as “the East Dock” and “Docking Facility 1,” this inquiry must end now, and the Division should respond in the negative to the question posed by the Superior Court – namely whether the Division will exercise its right to revisit this matter pursuant to paragraph four of the Division’s Order of December 10, 2015. Once the Division concludes, as it must, that the ACOE process is indeed moving forward for the permitting of a dock in Old Harbor and that the Town has failed to show any evidence of a “derailment” of the ACOE process, the Division should decline to “revisit” this matter.

The Town goes on to lament over the facts that the dockage rights held by Bluewater and the submission filed by Bluewater do not confer “non-federal sponsor status” upon the Town. This issue, which is squarely and exclusively within the jurisdiction of the ACOE, is nothing more than another attempt to delay the appellate process via a request that the Division engage itself in the ACOE process. Whether the Town is or is not a “non-federal sponsor” for purposes of permitting via the ACOE, is an issue upon which the Division has neither control nor the ability to fashion a remedy. Whether the ACOE views Bluewater’s proposal – the same proposal for dockage presented to the Division – as one requiring the participation of a “non-federal sponsor” is entirely irrelevant to the Division and/or Superior Court proceedings.

Finally, the Town’s representation that “RIFF could come up with some other docking facility later on” is inconsistent with the current facts nor relevant to the fact that the ACOE application remains focused on the same dock(s) presented to the Division in 2015. Motion, at 7. Moreover, RIFF is not the applicant seeking dockage via the ACOE (a fact repeatedly ignored by the Town). RIFF is a proposed lessee of the proposed dockage. Accordingly, there is no “other” dockage nor alternative plan that RIFF could propose. There has been no “switching of dock facilities,” and at most, there are different features associated with the dock that are under consideration by the ACOE – such as sidewalks.

IV. Conclusion

For the foregoing reasons, RIFF respectfully requests that the Division deny the Town’s objection and motion, order the Town to forego filing frivolous motions, stop these obvious efforts to delay this appeal process and proceed to deciding the sole issue before it.

RHODE ISLAND FAST FERRY, INC.
By its Attorneys:

/s/ James A. Hall

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Dated: June 1, 2017

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2017, I delivered a true copy of the foregoing document via electronic mail to the Parties in this proceeding.

/s/ Alan M. Shoer