

**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: 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 and Old Harbor, 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.

Whereas: After addressing several motions to intervene that were timely filed in this docket², the Division established an initial procedural schedule during a scheduling conference conducted on August 21, 2013. That schedule was later

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.

² See Division Order No. 21170, issued on September 24, 2013.

modified several times in response to requests for extensions of time by RIFF and/or by agreement between the parties.³

Whereas: In accordance with approved procedural schedules, the parties have submitted pre-filed direct, rebuttal and surrebuttal testimony and have been conducting discovery in anticipation of public hearings to be conducted on September 7 and 8, 2015.

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 argues that RIFF's application must be dismissed for RIFF's failure to identify the dock it plans to use in Old Harbor.

In its supporting legal memorandum, the Town argues that RIFF has had over two years to locate and identify the dock it hopes to utilize in Old Harbor to facilitate its proposed fast-ferry services to the island. The Town contends that to obtain a CPCN, RIFF must prove that it is "able" to perform its proposed services, which includes, *inter alia*, a showing that RIFF has a dock location in Old Harbor capable of accommodating the large aluminum catamaran that RIFF has identified as its planned vessel.⁴

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 of them. The Town relies on the discovery it conducted in this case, including a deposition of RIFF's owner, to

³ See Order Nos. 21189 and 21541.

⁴ See: Motion of the Town of New Shoreham For Summary Disposition, pp. 1-6.

verify that RIFF has been unable to establish a legal connection to any of the four docks.⁵ 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.”⁶

In response, RIFF filed an objection to the Town’s motion on August 3, 2015. Principally, RIFF argues that there is no prohibition in approving a CPCN “...where there are unresolved issues related to dockage....” RIFF observes that the Division has already held in the “Intervention Order,” previously issued in this docket⁷, that it is ‘ill-equipped to meaningfully evaluate harbor congestion and dock adequacy issues as a condition-precedent to the issuance of a CPCN.’⁸ RIFF also replies that it “has, and will continue, to pursue several options to secure dockage in either the Old or New Harbors of the Town.”⁹

In further reply to the Town’s assertion that RIFF has failed to demonstrate access to any dock in Old Harbor, RIFF counters that it “has the ability to dock its ferry vessel at the South Pier in Old Harbor.” RIFF contends that although the Town owns this dock, the Town is obliged to abide by the terms attached to the original conveyance of this dock from the federal government, which, RIFF contends, requires the Town to keep the dock open for “... ‘public use’ by any and all vessels, not just those vessels the Town sees fit to allow wharfage.”¹⁰

⁵ Id. According to the Town, the only four suitable docks in Old Harbor are two docks owned by Intrastate Nav. Company, “Ballard’s Dock,” and a dock owned by the Town,

⁶ Id.

⁷ See Division Order No. 21170, issued on September 24, 2013.

⁸ See: *Opposition of Rhode Island Fast Ferry, Inc. to the Motion of the Town of New Shoreham for Summary Disposition*, pp. 1-2.

⁹ Id., p. 3.

¹⁰ Id., p. 5.

RIFF also relies on the Division's handling of a comparable matter involving the Town and another CPCN applicant, Island Hi-Speed Ferry ("IHSF"), in Division Docket 98-MC-16 (1998), wherein the Town similarly argued against the issuance of a CPCN based on a dock availability issue. RIFF points out that in the IHSF case, the Town "...challenged the ability of IHSF to land at Payne's Dock in New Harbor on the grounds that the Town's Zoning Ordinance did not permit such use of the pier facility." RIFF also points out that the Division granted IHSF's application over the Town's objection to the use of Payne's Dock and that the Superior Court ultimately affirmed the Division's decision granting IHSF's application.¹¹

The Town proffered a response to RIFF's opposition on August 6, 2015. In its response, the Town emphasizes that RIFF's application specifically identified "Old Harbor" as one of the two planned termini for its proposed high-speed ferry services; the other being Quonset Point, North Kingstown. The Town argues that by now identifying "New Harbor" as a possible wharfing site on Block Island, "RIFF is attempting to materially alter its application midstream." The Town argues that had RIFF's application specified "New Harbor" as a possible docking location, some of the neighboring businesses located around New Harbor may have decided to seek to intervene in this docket.¹²

The Town also argues that had it known of the New Harbor connection in this case, it would have included related data requests in its discovery questions to RIFF

¹¹ Id., pp. 7-9.

¹² See *Response of the Town of New Shoreham to Rhode Island Fast Ferry Inc.'s Objection to Motion for Summary Disposition*, p. 2.

and would have addressed the use of this dock site in detail in the pre-filed direct testimony it submitted in this docket.¹³

Additionally, the Town takes exception to RIFF's contention that it has the right to use the Town's "South Pier" dock. The Town maintains that the "legislation to which RIFF refers states that the Town may not implement tolls or charges for the use of the wharf by 'public vessels of the United States.'" The Town offered case law on the matter in support of its assertion that a public vessel of the United States "is a vessel which is either owned by the United States government or bareboat chartered by the United States government as its owner *pro hac vice*." The Town argues that to contend that a private passenger ferry owned and operated by RIFF is somehow a public vessel owned by the United States government is absurd."¹⁴

Lastly, the Town contends that RIFF's reference to an IHSF application is inapplicable and irrelevant to this case. The Town asserts that IHSF had a letter of intent from the owner of Payne's dock in that 1998 case; in contrast, RIFF has offered no such letter of intent to use Payne's dock in this case.¹⁵

FINDINGS

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.

¹³ Id., p. 3.

¹⁴ Id., p. 4.

¹⁵ Id., pp. 4-5.

As RIFF has argued in its objection to the Town's motion, it is true that the Division has routinely granted applications that seek authority to operate as ferry companies in Rhode Island subject to various conditions-subsequent. It is also true that the finality of matters related to dock access, construction or repair work has been treated by the Division as a post-application-approval condition for the issuance of an actual CPCN. However, the Division is not aware of a single ferry "CPCN application" case where the Division has approved the application without a *de facto* record of the proposed docking facility(ies). Thus far, in this docket, the Applicant has offered no such indication of its planned docking facility in Old Harbor on Block Island.

To further complicate the matter, RIFF has now suggested that it is also studying the possibility of utilizing a docking facility in New Harbor, which is unambiguously and materially inconsistent with its July 2, 2013 application filing. Regarding this issue, the Division must agree with the Town in its cry of foul against this new potential service dimension and the concomitant denial of discovery and testimonial opportunities. The Division also agrees that it is conceivable that additional intervention requests may have been received in this matter if it had been known since 2013 that RIFF was contemplating the use of New Harbor as a docking location on the island. Notably, the Division has previously recognized a significant and profound difference between "Old Harbor" and "New Harbor" with respect to the Division's analysis of whether there exists a "public need" for an additional ferry

services to and from Block Island.¹⁶ Therefore, it would be improper to now treat the two docking destinations on Block Island as indistinguishable.

In view of the circumstances outlined above, the Division is inclined to reserve final decision on the Town's motion until August 28, 2015. In the interim, the Division shall require RIFF to declare which dock it is proposing to use on Block Island and offer proof of the dock's availability.

Further, if RIFF proposes to use a docking facility located in New Harbor, rather than Old Harbor, the Division will immediately suspend the current procedural schedule in this docket and require RIFF to amend its application accordingly. Thereafter, the Division will conduct an additional scheduling conference for the purpose of ensuring that the Intervenors in this docket, and the Division's Advocacy Section, are provided sufficient time to explore and address this new development. The Division will also entertain any intervention requests directly linked to the change of docking locations on Block Island.

Now, therefore, it is

(22030) ORDERED:

1. Consistent with the findings contained herein, the Division shall reserve final decision on the Town of New Shoreham's July 21, 2015 motion for summary disposition until August 28, 2015.
2. 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

¹⁶ See Order No. 15652, issued in Docket 98-MC-16 on August 25, 1998.

furtherance of its proposed ferry services) and offer proof of the dock's availability.

3. That if RIFF proposes to use a docking facility located in New Harbor, rather than Old Harbor, the Division will immediately suspend the current procedural schedule in this docket and require RIFF to amend its application accordingly.
4. That if RIFF proposes to use a docking facility located in New Harbor, the Division will conduct an additional scheduling conference for the purpose of ensuring that the Intervenors in this docket, and the Division's Advocacy Section, are provided sufficient time to explore and address this new development. The Division will also entertain any intervention requests directly linked to the change of docking locations on Block Island.

Dated and Effective at Warwick, Rhode Island on August 11, 2015.

Division of Public Utilities and Carriers



John Spirito, Jr., Esq.
Hearing Officer

APPROVED: 

Thomas F. Ahern
Administrator



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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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.