

January 12, 2018

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 enclosed an original and four (4) copies of RIFF’s Objection to Interstate Navigation Company and the Town of New Shoreham’s Motion to Vacate, filed on January 2, 2018.

Very truly yours,



ALAN M. SHOER
ashoer@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

**OBJECTION OF RHODE ISLAND FAST FERRY, INC. TO INTERSTATE
NAVIGATION COMPANY D/B/A THE BLOCK ISLAND FERRY AND THE
TOWN OF NEW SHOREHAM'S MOTION TO VACATE DIVISION ORDER NO. 22877**

Now comes Rhode Island Fast Ferry, Inc. (“RIFF”) and hereby objects to Interstate Navigation Company d/b/a the Block Island Ferry (“Interstate”)¹ and the Town of New Shoreham’s (“Town’s”) most recent dilatory motion, a “Motion to Vacate Division of Public Utilities and Carriers (“Division”) Order No. 22877 Granting . . . RIFF a One-Year Continuance to Satisfy Conditions Precedent Contained in Division Order No. 22548 Granting RIFF’s [Certificate of Public Convenience and Necessity (“CPCN”)] Application[,]” dated January 2, 2018 (“Motion to Vacate”). *See* Jan. 2, 2018 Motion to Vacate, at 1.

Without citation to authority or rule of procedure, through assertion of clearly erroneous facts, Interstate and the Town make dubious arguments in a desperate attempt to avoid a hearing on remand.² The Town and Interstate erroneously claim that Bluewater, Inc. (“Bluewater”) and

¹ Interstate’s bringing of the Motion to Vacate directly violates the Division’s limitation on Interstate’s intervention status. 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. Although an interlocutory appeal was taken to the Superior Court as related to intervention, Interstate did not appeal that limitation. Issues related to dockage go directly to fitness and/or ability to provide service, not to the public need and convenience for a new competitive high speed ferry service. In accordance with Interstate’s limited intervention status, Interstate should be prohibited from bringing the Motion to Vacate regarding RIFF’s dockage.

² This matter is before the Division on limited remand from the Superior Court and “[t]he Town has the burden of proving that RIFF (through Bluewater) does not have a realistic expectation of constructing Bluewater’s planned docking facilities in Old Harbor, irrespective of design,

RIFF allegedly “fail[ed] to make realistic attempts to secure permits for a docking facility in Old Harbor” and that because RIFF allegedly made “misrepresentations” to the Division in its request for a continuance of the compliance period in the Division’s CPCN Order regarding its attempts to secure permits for a docking facility, the Division’s Order granting a one-year continuance of RIFF’s CPCN should be vacated. *Id.*

For the reasons discussed further below, Interstate and the Town’s contentions are meritless and the Motion to Vacate must be denied.

I. INTRODUCTION

This Motion is nothing more than a desperate attempt to undue the process and circumvent the remand proceeding that was requested by both Interstate and the Town and ordered by the Superior Court, as it has now been shown that not only does Bluewater have a realistic expectation of constructing a docking facility, but that Bluewater has also been moving forward with that process. Likewise, Interstate and the Town not only failed to demonstrate any legal authority in support of their Motion, but also improperly mischaracterize RIFF’s request for a stay of the compliance period in the Division’s CPCN Order.

The Motion to Vacate states that Interstate and the Town recently learned from RIFF’s discovery responses that RIFF has purportedly “failed to even try to [secure a docking facility] despite representing to the Division and other parties that it has ‘worked diligently’ to” do so. *Id.* at 7. Interstate and the Town assert that RIFF’s CPCN was conditioned only upon RIFF’s ability to demonstrate to the Division that it had access to a suitable docking/landing facility in Old Harbor within one year of receiving a license and that because Bluewater has yet to receive

through its permit applications with [only] the USACE or CRMC.” *See* Division Procedural Schedule, dated Oct. 20, 2017.

all necessary permits for the docking facility, RIFF made an alleged “strategic choice to mislead the Division and the parties” and, therefore, a vacatur of the Division’s previous order is allegedly warranted. *Id.* at 7.

As discussed further below, RIFF has not misled the Division or any other parties. RIFF’s recent discovery responses clearly establish that Bluewater has (and is) working diligently to secure permits for a docking facility for RIFF in Old Harbor. With that said, RIFF’s request for a stay of the compliance period was not based solely on the fact that Bluewater had yet to receive the necessary permits. The Motion to Vacate completely ignores that RIFF’s request for a stay of the compliance period was not based solely on the fact that RIFF had yet to secure a suitable docking facility; rather, RIFF requested the stay because it was unable to satisfy *all* of the conditions listed in the CPCN Order within the original one-year compliance period. In fact, it was also the pendency of the appeal, possibly enduring beyond the date of dock construction, that lay additional foundation for the continuance.

Accordingly, because there is no legal authority to support the Motion to Vacate, because Bluewater is moving forward with obtaining the necessary permits for the docking facility, because RIFF’s recent discovery does not establish in any way that RIFF misled the Division or the parties and because Interstate and the Town ignore and mischaracterize relevant language in RIFF’s previous request for a continuance of the CPCN compliance period, RIFF requests that the Division deny the Motion to Vacate.

II. ARGUMENT

A. *There is no Authority to Support Vacating the Division’s Previous Order Granting RIFF a One-Year Continuance.*

Because Interstate and the Town failed to identify any authority in support of their Motion to Vacate, the Motion should be denied. The lack of authority supportive of Interstate

and the Town's position is evidenced by their failure to cite any relevant legal authority in their Motion. Indeed, the Motion does not cite to any Division precedent nor does it cite to any Division Rule to support the request that the Division vacate its Order granting RIFF a one-year continuance of the CPCN licensing conditions. Interstate and the Town's failure to establish any legal authority to support the request is fatal to their Motion. The Division should refrain from vacating a previous order when the movants have failed to provide any legal support or authority for such a request.

Therefore, because Interstate and the Town failed to establish any legal authority to support vacating the Division's previous Order granting RIFF a one-year continuance of the compliance period contained in the CPCN, the Motion to Vacate should be denied.

B. RIFF has Not Misled the Division or the Parties.

Because Interstate and the Town improperly mischaracterize (or misunderstand) RIFF's recently filed discovery responses and because Interstate and the Town improperly mischaracterize the reasons RIFF requested a stay/continuance of the compliance period listed in the Division's Order granting a conditional license to RIFF, the Motion to Vacate should be denied.

1. Interstate and the Town Mischaracterize (or Misunderstand) RIFF's Recently Filed Discovery.

The Motion to Vacate erroneously claims that a vacatur of the Division's previous Order granting RIFF a one-year continuance of the compliance period is warranted, arguing that they allegedly learned from RIFF's recent discovery responses that "neither Bluewater nor RIFF^[3]

³ It is important to note that Bluewater, not RIFF, is securing the necessary permits for the docking facility and will be the operator of the dockage facility. Accordingly, RIFF has not and cannot file permit requests or permit applications.

have made any real attempt to secure permits from the” United State Army Corps of Engineers (“USACE”), the Coastal Resource Management Council (“CRMC”), the Rhode Island Department of Environmental Management (“RIDEM”) or the Town.⁴ *Id.* at 10. The Motion to Vacate goes on to assert that because RIFF allegedly “withheld” that Bluewater purportedly “took almost no action” to meet one of the conditions listed in the Division’s licensing order, the “Division may very well have determined there was insufficient cause to support RIFF’s request for a continuance to satisfy the Conditions Precedent.” *Id.* at 9-10.

As stated in RIFF’s data responses, Bluewater has taken myriad action to secure the necessary permits for a docking facility in Old Harbor. Specifically, Bluewater submitted its 408 Application with USACE on May 15, 2017. *See* RIFF’s Response to Data Request, D-1. As noted in Exhibit D-2, the USACE explained that due to the nature of the 408 Application, the review process requires coordination with the National Environmental Policy Act and the District’s Regulatory Division. It is RIFF’s understanding that since filing the 408 Application, Bluewater has been coordinating with both of these agencies. (Nothing in the recent discovery refutes this nor does Interstate and the Town address this work.) It is RIFF’s understanding that Bluewater is also working with consultants and engineers on compiling the necessary information and documentation to submit the additional permits required for the docking facility in Old Harbor.⁵ By way of just a single example, in October of 2017, Bluewater was able to

⁴ As noted in RIFF’s response to the Town’s Data Request, neither RIFF nor Bluewater believe that any permit is required from the Town. *See* RIFF’s Response to Data Requests, I-10, I-12, I-15 & I-22.

⁵ Although it has taken longer than expected to secure the necessary permits, taking appropriate time to carefully complete the engineering studies and documentation necessary to support a permit application does not equate to wrongdoing on the part of RIFF and does not justify vacating the Division’s previous Order, which was premised upon several factors including the pendency of the appeal.

schedule and arrange for the National Land Surveyors to conduct a bathymetric survey of Old Harbor, an engineering pre-requisite of filing the necessary applications.⁶

It is apparent, therefore, that Bluewater has made (and is making) “real attempt[s]” to secure the permits required for the docking facility to assist RIFF in satisfying one of the conditions listed in the Division’s licensing Order and would have no logical reason for strategic delay, as asserted by Interstate and the Town. There is no new information upon which Interstate and the Town rest their Motion to Vacate; just more bald conjecture.⁷

2. Interstate and the Town Improperly Mischaracterize RIFF’s Request for a Continuance of the Compliance Period Listed in the Division Order Granting RIFF a CPCN.

Not only is the assertion that Bluewater took “almost no action” untrue, but Interstate and the Town’s statements that RIFF’s request for a continuance was conditioned on the fact that Bluewater had yet to receive the necessary permits mischaracterizes RIFF’s request (and the basis of Order No. 22877) and completely ignores the fact that RIFF’s request for a continuance was much more expansive and explained generally that just cause existed to stay the compliance period because it would be unable to satisfy *all* the requisite conditions⁸ within the compliance

⁶ Design information is beyond the scope of remand discovery and was therefore not the focus of RIFF’s recent discovery responses. Interstate and the Town’s assertion of lack of reasonable efforts exemplifies the obviously flawed logic of the movants—that Bluewater has failed to move forward simply because additional applications are to be filed.

⁷ RIFF has been informed by Bluewater that the USACE regulatory review documents and engineering information are substantially the same as that to be filed with CRMC and RIDEM. Accordingly, Bluewater anticipates filing with each of these agencies simultaneously.

⁸ RIFF’s CPCN was not conditioned solely on RIFF’s ability to demonstrate that it has access to a suitable docking/landing facility. RIFF’s CPCN was conditioned upon a showing of the following: (1) it has access to suitable docking/landing facilities in Quonset and on Block Island; [and] (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

period. RIFF's request stated that it worked diligently to satisfy all the requisite conditions by the Division's deadline and went on to state—which is strategically not included in Interstate and the Town's Motion—that:

*due to delays in the appeal process, RIFF has been placed in an untenable position and will be unable to satisfy the conditions in Paragraph 2 of the Division's Order by the Division's one (1) year compliance deadline. In particular, the ability of RIFF to . . . purchase or otherwise secure a vessel, satisfy all Coast Guard requirements, fulfill any applicable municipal permitting requirements, secure liability insurance and secure a Division inspection of the vessel will all depend on RIFF securing a *final non-appealable decision* affirming the Division's Order granting a conditional license to RIFF.*

See RIFF's Motion Requesting a Stay, dated Sept. 13, 2017, at 3 (emphasis added). All of these necessary and relevant conditions were (we must assume) strategically not referenced in their Motion. Nevertheless, the request for the continuance—and the Division's Order granting the continuance—was not based solely on the fact that permits had yet to be obtained for the docking facility. RIFF also sought a stay because it was (and is) unable to satisfy the other conditions, i.e. securing a lease, purchasing or otherwise securing a vessel, satisfying all Coast Guard requirements for that vessel, securing liability insurance and securing a Division inspection of that vessel, until RIFF receives a final non-appealable decision affirming the Division's Order granting a conditional license to RIFF. Importantly, even if Bluewater had received all necessary permits for the docking facility, RIFF still would have sought a continuance of the compliance period, because it was (and is) unable to satisfy the other conditions of the Division's license due

proposed ferry service; (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.” Division Order, No. 22548, dated Sept. 22, 2016, at 141-42.

to the ongoing appeal.

Because Interstate and the Town ignore and mischaracterize relevant language in RIFF's previous request for a continuance of the compliance period in the Division's CPCN Order, because RIFF's recent discovery does not establish that RIFF in any way misled the Division or the parties and because Bluewater is indeed moving forward with obtaining the necessary information in support of permits for the docking facility, the Motion to Vacate must be denied.

III. CONCLUSION

Accordingly, for the reasons discussed thoroughly above, the Division should deny Interstate and the Town's Motion to Vacate.⁹

RHODE ISLAND FAST FERRY, INC.,
By its Attorneys,

/s/ Alan M. Shoer

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Dated: January 12, 2018

⁹ Due to the frivolous nature of the Motion to Vacate, RIFF also requests the Division prohibit Interstate and the Town from any further filings that prevent the Division from deciding the remand issue, so that the appeal can finally proceed with the Superior Court.

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2018, I delivered a true copy of the foregoing document via electronic mail to the parties on the attached service list.

/s/ Alan M. Shoer_____