

**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

(Issued in response to a May 2, 2017 remand order of the Superior Court in C.A. Nos. PC-2016-4758 and PC-2016-4804)

Whereas: On July 2, 2013, Rhode Island Fast Ferry, Inc., 1347 Roger Williams Way, North Kingstown, Rhode Island (“RIFF”), 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, New Shoreham (Block Island). 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: The Division previously issued eleven (11) 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; Order No. 22183, issued on October 26, 2015; Order No. 22254, issued on December 10, 2015; and Order No. 22548, issued on September 22, 2016. These eleven 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 remand matter, *infra*.

Whereas: In response to the final Report and Order issued in this docket (Order No. 22548, *supra*), the Report and Order which approved RIFF's application filing, Interstate Navigation Company, d/b/a The Block Island Ferry ("Interstate") and the Town of New Shoreham (the "Town"), both authorized Intervenors and Parties in this docket, filed timely appeals in the Superior Court. The appeals were filed pursuant to R.I.G.L. §42-35-15.

Whereas: An issue developed during the appeal related to the docking facilities that RIFF had identified for use in the town of New Shoreham, located in Old Harbor, which RIFF planned to use as a terminus in furtherance of the fast-ferry services approved by the Division in this docket. Specifically, the Company developing the docking facility

for RIFF, Bluewater LLC (“Bluewater”), had been notified by the United States Army Corp of Engineers (“USACE”) before which Bluewater was seeking regulatory authority to develop the proposed docking facility, that the Town, a Protestant/Intervenor in Bluewater’s case before USACE, would be treated as a “non-federal sponsor.” Under this designation, and in accordance with federal law, USACE would require the Town’s consent before authorizing Bluewater to construct the docking facility as originally planned. Based on this development, the Town and Interstate filed a motion with the Superior Court on March 10, 2017, requesting that their appeals be stayed and that the case be remanded back to the Division for review under R.I.G.L. §42-35-15(e). The Town and Interstate argued that in response to USACE’s ruling they ought to be permitted to present additional evidence to the Division in support of their original positions before the Division that RIFF will ultimately not be permitted to develop a docking facility in Old Harbor and/or that the likely harm to the Town’s interests outweigh RIFF’s quest to provide seasonal fast-ferry services to Block Island.

Whereas: The Superior Court granted the Town’s and Interstate’s motion on May 2, 2017. In his order, Justice Licht held as follows:

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 the matter.¹

Whereas: Paragraph four (4) of the Division's Order of December 10, 2015, Order No. 22254, states as follows:

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.

The text contained within the Order No. 22254 reinforces and clarifies the Division's paragraph 4 holding, to wit:

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.²

Whereas: Subsequently, on May 16, 2017, RIFF filed with the Division, a motion to re-open the instant docket per order of the Superior Court "for the limited purpose of determining whether the Division... will exercise its right to revisit RIFF's docking ability."

Whereas: On May 26, 2017, in response to RIFF's motion to re-open the case, *supra*, Interstate and the Town filed an objection; principally arguing that the Superior Court order also provides that the

¹ Reference to Division Order No. 22254, issued on December 10, 2015.

² Order No. 22254, p.22.

“parties have the right to make arguments to the Division as to the reasons why the Division should or should not revisit the matter.”

The Town and Interstate further argue that due to USACE’s recent determination that the Town is indeed a “non-federal sponsor,” RIFF and Bluewater have “now submitted another, new proposed docking facility to the Army Corps,” which necessitates another Division examination into the question of whether RIFF can “offer proof of the dock’s availability.”³ The Town and Interstate assert that “[t]his 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.”⁴

Predicated on the above arguments, the Town and Interstate insist that the Division approve an additional proceeding to permit Interstate and the Town to “conduct the type of discovery and investigation which RIFF/Bluewater seek to deprive them of by filing a new docking facility plan....”⁵

The Town and Interstate further argue that under Rule 31(b) of the Division’s *Rules of Practice and Procedure*, they are entitled to relief from the Division’s final order 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 by RIFF

³ Objection, p. 7.

⁴ Id.

⁵ Objection, pp. 7-8.

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.”⁶

Whereas: On June 1, 2017, RIFF submitted a response to the Town’s and Interstate’s objection. Through its response, RIFF contends that the Town’s and Interstate’s characterization that Bluewater has submitted a dockage plan to the USACE “that substantially deviates from the plan submitted to the Division during the CPCN hearing(s)... is false.” RIFF maintains that the only difference between the two plans is “the level of engineering detail provided to the... [USACE] and that one of the docking facility plans submitted to the ... [USACE] now shows an upland sidewalk that connects to the ‘alternative access’ clearly depicted in the submission to the Division.”⁷ RIFF argues that “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.”⁸

Whereas: In addition to the pleadings and exhibits submitted in this matter, the Division conducted a conference on June 5, 2017 for the purpose of offering the parties another opportunity to argue their respective positions.

The Division’s Advocacy Section, a party in this docket, also participated during this conference. The Advocacy Section argued against

⁶ Id., pp. 8-9.

⁷ RIFF Response, pp. 2-5.

⁸ Id., p. 5.

the positions taken by the Town and Interstate in this remand issue. The Advocacy Section further asserted that based on the Division's earlier finding in this docket that there is an unserved public need for RIFF's proposed ferry services, the interests of the public are not being served by further delays in implementing these services. The Advocacy Section urged the Division to reject any efforts by the Town and Interstate to revisit the docking availability issue.

Whereas: After carefully examining the pleadings submitted by the parties, and the attached exhibits, and after considering the arguments proffered by the parties, the Division finds insufficient justification to revisit the Old Harbor dock availability issue that was previously fully adjudicated in this docket. The reference to revisiting the matter in paragraph 4, *supra*, contemplated a dispositive **denial** by USACE or CRMC of Bluewater's efforts to construct a docking facility in Old Harbor. Such is clearly not the case here. Although the Town has been designated a non-federal sponsor by USACE that fact, by itself, does not nullify Bluewater's and RIFF's chances of developing the docking facilities presently under consideration in Old Harbor.

Accordingly, therefore, it is

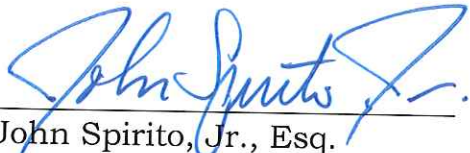
(22823) ORDERED:

1. That in response to the May 2, 2017 remand order of the Superior Court, and predicated on the findings contained herein, the

Division finds insufficient cause to revisit Bluewater's (and RIFF's) planned Old Harbor docking facility construction efforts.

2. That Interstate's and the Town's Rule 31(b) motion is hereby denied and dismissed.

Dated and Effective at Warwick, Rhode Island on June 23, 2017.



John Spirito, Jr., Esq.
Hearing Officer

APPROVED: _____



Macky McCleary
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.