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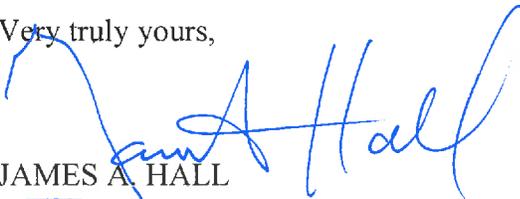
Ms. Luly Massaro
Division Clerk
Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, Rhode Island 02888

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 Post-Hearing Reply Memorandum for filing in connection with the above docket.

Very truly yours,


JAMES A. HALL
jhall@apslaw.com

Enclosure

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 POST-HEARING REPLY MEMORANDUM

Now comes Rhode Island Fast Ferry, Inc. (“RIFF”) and hereby submits its Reply Memorandum in further support of its application for a Certificate of Public Convenience and Necessity (“CPCN”) to operate a high-speed ferry between Quonset Point, North Kingstown (“Quonset Point” or “Quonset”) and Old Harbor, Block Island (“Block Island” or “New Shoreham”).¹

I. INTRODUCTION

On June 7, 2016, RIFF, Interstate Navigation Co. (“Interstate”) and the Town of New Shoreham (the “Town”), filed post-hearing memoranda with the Division of Public Utilities and Carriers (the “Division”). In their Memoranda, Interstate and the Town *erroneously* contend that RIFF failed to meet its burden of establishing a public need and convenience for its proposed high-speed ferry service from Quonset Point to Block Island—as is legally required in the State of Rhode Island (“State” or “State of Rhode Island” or “Rhode Island”).² *See* Interstate’s Post-

¹ This Reply Memorandum will jointly address both Interstate’s and the Town’s Post-Hearing Memoranda.

² It is undisputed that Charles A. Donadio (“Mr. Donadio”), owner of RIFF, is fit, willing and able to provide a high-speed ferry service from Quonset Point, North Kingstown to Old Harbor, Block Island. The Town does not assert in its Post-Hearing Memorandum, nor did it assert at the Hearing, that Mr. Donadio is unfit, unwilling or unable to provide the proposed high-speed ferry service, and Interstate’s intervener status is limited to public need and convenience only. *See* Docket No. D-13-51, Order No. 21170 at 19 (Sept. 24, 2013). Interstate, nonetheless, attempts to undercut RIFF’s willingness to provide the proposed service, despite the fact that RIFF currently runs multiple ferry services. Interstate alleges that Mr. Donadio seeks the CPCN for the single purpose of selling the resulting license to Interstate, which was allegedly discussed after Mr. Donadio offered to purchase Interstate. *See* Interstate’s Post-Hearing Mem. at 19; Hearing Tr. 03/02/16 at 203-05; Hearing Tr. 03/15/16 at 120, 132, 133. Not only is this argument inappropriate based on the limitation the Hearing Officer established on Interstate’s intervener status, but the contention itself is unfounded. RIFF currently operates multiple ferry services. Moreover, the expense and time forced upon Mr. Donadio by Interstate and the Town—over three years of hearings, briefings, data requests and motions, before both the Division and during an interlocutory appeal to the Rhode Island Superior

Hearing Memorandum (“Interstate’s Post-Hearing Mem.”), at 42; Town’s Post-Hearing Memorandum (“Town’s Post-Hearing Mem.”), at 11-12, 20. Not only do Interstate and the Town deliberately overlook material evidence presented by RIFF, but Interstate and the Town also misrepresent facts and law regarding relevant issues.

Most revealing, however, is the fact that neither Interstate nor the Town seem to recognize, or possibly chose to ignore, the fact that there is very little disagreement amongst the Parties as to the public need and convenience for an alternative service. All Parties agree that there is clearly a demand for the proposed service; *see e.g.*, Interstate’s argument that the demand is so high that Interstate’s very existence is threatened and the Town’s argument that Block Island will be subject to a dangerous increase in crowds, which argument inescapably presupposes a large *untapped* population of people who are not currently traveling to Block Island. Yet, both Interstate and the Town have argued to the Division that without market studies or a formal business plans, Mr. Donadio could not possibly know of the same demand upon which they rest their primary arguments. Such arguments are at best duplicitous.³

Court—further highlights RIFF’s commitment to running the proposed service. Interstate’s focus on some fictitious possible sale is entirely unavailing for no other reason than the fact that such a sale is provided for in law—should it ever come to pass. In the event of future business transactions involving CPCNs, there is a specific statutory scheme allowing the Division to review these types of business transactions. R.I. Gen. Laws §§ 39-3-24, 39-3-25. The fact that there may have been an offer on the table for Mr. Donadio to purchase Interstate or that Interstate admittedly offered to pay Mr. Donadio to forgo his CPCN Application is nothing more than a *red herring*.

³ *See* D-16-35, *In Re SeaStreak, LLC* (“*SeaStreak*”), Order (June 28, 2016). In *SeaStreak*, the Division’s most recent decision granting a CPCN for a ferry service from Newport to Providence, the applicant did not present an economics expert, nor did it present any study and/or survey to establish need and convenience for the ferry service. In *SeaStreak*, the Division relied on the public comment testimony of Peter Garino (“Mr. Garino), the Chief Operating Officer of Rhode Island Department of Transportation (“RIDOT”). *Id.* at 3, 22. Mr. Garino did not rely on a study or survey to support his opinion. Instead, Mr. Garino, “based on what his Department had observed in the past,” opined that “a ferry service such as the proposed by the instant application had the potential to take between 10,000 and 20,000 cars off the highways between Newport and Providence during the summer season, and potentially from 20,000 to 40,000 passengers, a significant benefit to Rhode Island’s stressed highway system at its busiest time of year.” *Id.* at 3-4. The Division next relied on two other public comment witnesses that “spoke from a slightly different perspective, that of encouraging commercial activities – including tourism – in this state.” *Id.* at 22. The Division specifically noted that “[b]oth made the point that travel by this ferry has the potential to be faster and more pleasant than any highway travel between Newport and Providence during the very busy summer tourist season.” *Id.* at 22-23. In this case, numerous RIFF witnesses testified that traveling to Block Island from Quonset

II. ARGUMENT

A. It is Undisputed that a Market Demand Exists for RIFF's High-Speed Ferry Service from Quonset Point to Block Island.

All Parties agree that there is a market demand for RIFF's high-speed ferry service from Quonset Point to Block Island. The foundation of Interstate's entire argument hinges on its assertion that granting RIFF a CPCN will create a "death spiral," forcing Interstate out of business. *See* Interstate's Post-Hearing Mem. at 13 (quoting Dr. Edward Mazze ("Dr. Mazze") stating "Interstate will lose 20 percent of their customer base, minimally 20 percent, I think it may even be higher"). Interstate (and the Town's) arguments beg the question: How could Interstate's services be seriously "threatened" if there was no market demand for RIFF's service? *See id.* at 42. Similarly, the Town also admits that there is a market demand for RIFF's service when it asserts that the addition of RIFF's service will increase congestion (the amount of people) on Block Island. *See* Town's Post-Hearing Mem. at 17 (noting an alleged Town Council member concern and stating "[t]he addition of a new passenger service at a time when the island is already saturated with people is a serious concern"). Both arguments are admissions that there is a market demand, a need, for RIFF's service. All the paper, ink or time spent by these intervening Parties arguing that a market demand does not exist is therefore entirely inconsistent with the crux of both Parties' arguments challenging RIFF's evidence of market demand. Additionally, even the Advocacy Section of the Attorney General's office acknowledged that

Point has the potential to be more pleasant and will be more convenient. *See* Tr. 03/02/16 at 40, 55, 65, 112-13, 121; Tr. 03/15/16 at 210; *see also* Pre-Filed Direct Test. of Robert Billington at 4 & Rebuttal Test. Robert Billington at 4; Pre-Filed Test. of Elizabeth Dolan at 3; Pre-Filed Direct Test. of Charles Donadio at 10; Pre-Filed Test. of Myrna George at 2; Pre-Filed Test. of Martha Pughe at 3-4.

RIFF established a market demand for its service. *See* June 7, 2016, e-mail from the Advocacy Section of the Rhode Island Attorney General’s Office, Christy Hetherington to the Division.⁴

Accordingly, the only dispute is the extent to which this admitted demand is comprised of new passengers from the untapped market, as asserted by the Town or crossover passengers as asserted by Interstate. *See* Interstate’s Post-Hearing Mem. at 16 (“the only evidentiary dispute is the size of the projected losses”); Town’s Post-Hearing Mem. at 22 (“the only dispute concerned the amount of loss”). For these reasons, both Interstate and the Town’s efforts to discredit Lawrence Kunkel’s (“Mr. Kunkel”) expert opinion that there is a market demand for RIFF’s proposed fast-ferry service is entirely disingenuous.⁵

⁴ Unlike the Town and Interstate, the Advocacy Section agrees that RIFF did not need a survey, business plan etc. to establish a demand for its proposed service. The Advocacy Section specifically recognized that RIFF had the burden and that RIFF presented ample evidence to support its position. *See* June 7, 2016, e-mail from Advocacy Section of the Rhode Island Attorney General’s Office, Christy Hetherington to the Division (stating “the Advocacy Section is more than satisfied that the issues have been fully vetted” and that “the record was replete with evidence”).

⁵ It should be noted that the Town spends no less than ten (10) pages trying to discredit Mr. Kunkel’s opinion and agreement that there is a market demand for RIFF’s proposed service. *See* Town’s Post-Hearing Mem. at 1-10. Thereafter, the Town inexplicably highlights a string of internally inconsistent testimony and arguments. First, the Town asserts that Block Island is overrun and overcrowded and that the addition of RIFF will bring additional people who are not currently traveling to Block Island, thus exacerbating the alleged problem. *See id.* at 27-28. Next, the Town asserts that RIFF should not be given a license because it cannot allow Interstate to go out of business in light of the alleged passenger crossover. *Id.* at 25-26 (alleging that “Interstate’s customers will divert to Quonset . . . [purportedly resulting in] [i]ncreases in passenger and freight rates and decreases in [Interstate’s] ferry service”). The Town cannot have it both ways; either RIFF will bring masses of additional people to Block Island or it will take away passengers from Interstate. It is logically impossible for both scenarios to occur on a large scale simultaneously. For example, if there is minimal cross over, Interstate will not go out of business; if there is abnormally high cross over, the same amount of people will be traveling to Block Island as are today, just via a different ferry service. Such duplicitous arguments do nothing more than mask the fact that the Town has no true basis for its objection—other than the fact that that this proposed new service is not that of Interstate, as demonstrated by the Town’s unwavering support of Interstate’s new services from Newport, Rhode Island and Fall River, Massachusetts. *See* Hearing Tr. 03/24/16 at 23 (Testimony of Town Manager, Nancy Dodge responding to the question, “Are you concerned about the increase in passengers that might be coming from Newport and Fall River? Are they the same kind of concerns that you’re worried about. A. It’s not exactly apples-to-apples . . . Q. Okay. Have you ever expressed concerns or any worries to Interstate about more people coming from Newport and Fall River and the impact that that might have on your Island? A. I haven’t personally”); Hearing Tr. 03/24/16 at 68 (Testimony of Kenneth Lacoste, responding to the question, “Are you aware that Interstate Navigation is bringing passengers from Newport and is seeking to increase its passenger capacities from Newport and Fall River? Are you aware of that? A. I’m aware that they’re bringing passengers from Newport and Fall River. Q. Has the town council taken a formal position to oppose Interstate’s expansion of its ferry operations into Newport and Fall River? A. Not to my knowledge”).

B. Interstate and the Town's Motion to Strike Lawrence Kunkel as an Expert Witness and his Opinion(s) as to Market Demand Must be Denied.

In response to Interstate's and the Town's lengthy Motion(s) to Strike Mr. Kunkel as an expert, RIFF asserts that the real debate—and question for the Hearing Officer to decide—is whether the facts and data that Mr. Kunkel relied upon were credible enough to support his opinion, not whether he actually did rely upon certain other facts and data that the movants assert he “should have” relied upon. *See* Interstate's Post-Hearing Mem. 38-40; Town's Post-Hearing Mem. 7-10. Contrary to Interstate and the Town's argument, Mr. Kunkel did not simply rely on his experience alone. In summary, the facts and data that Mr. Kunkel relied upon when making his expert opinion were, *inter alia*, the following: (1) the *fact* that both federal and state governments invested a combined \$660 million dollars in infrastructure improvements in the Quonset Davisville Business Park and Route 403, with the purpose of attracting private investment in diverse areas of commerce, including marine transportation; (2) the *fact* that the Quonset Development Corporation (“QDC”) Board of Directors made a specific policy decision when it granted RIFF's concession/land lease and approved its bulkhead improvements; (3) the *data* in Dr. Mazze's survey, “Marketing Research Study”; (4) the *facts* presented in other RIFF's witness testimony, i.e. Robert Billington's testimony; and (5) the *fact* that the New England and Block Island high-speed ferry markets have grown rapidly over the decades with the addition of new service providers and departure points. *See* Pre-Filed Direct Test. of Mr. Kunkel, at 4-6 (addressing the first two facts Mr. Kunkel relied upon, the other testimony Mr. Kunkel relied upon and the market growth relied upon); Pre-Filed Rebuttal Test. of Mr. Kunkel, at 2 (stating “the survey results themselves are evidence of public need for a Quonset fast ferry that is currently unsatisfied”).

Mr. Kunkel relied upon facts and data, as well as his experience, when making his expert opinions. What Interstate and the Town are really debating in their Post-Hearing Memoranda is the alleged type of facts and data Mr. Kunkel relied upon, which does not lay a foundation to strike an expert. Interstate and the Town's assertions regarding the sufficiency and quality of Mr. Kunkel's testimony "would go to the weight the [fact finder] might give to the testimony of the expert but that . . . d[oes] not make the expert's testimony inadmissible." *Sweet v. Murphy*, 473 A.2d 758, 760-61 (R.I. 1984) (acknowledging "that there were nonfactual responses, some quite wordy, and that there were references to the witness's real estate experience, but references to facts were also present" and finding "that the quality of the answers on cross-examination would go to the weight or credibility to which the witness was entitled rather than the admissibility of his testimony").⁶

It is apparent that Mr. Kunkel's qualifications warrant him being treated as an expert. The sufficiency of the facts upon which he relied in no way change that. The first fact that Mr. Kunkel relied upon was that both federal and state governments have invested millions of dollars in infrastructure improvements in the Quonset Davisville Business Park. Mr. Kunkel's opinion did not just fall out of the sky; in fact, millions of dollars were invested into Quonset Davisville Business Park and marine transportation uses were envisioned. Although the funding did not specifically identify that it was to be spent on a high-speed ferry or the allowed destinations of such ferries, the funding was not limited to a specific business type either. The funding was intended to expand the marine port. *See* Pre-Filed Test. of Steven King, at 3 ("[t]he purpose of the expenditure of those public funds was to complement private investment by RIFF in the

⁶ Interstate relied upon the *Sweet* case in its Post-Hearing Memoranda. *See* Interstate Post-Hearing Mem. at 38. However, this case does not support Interstate's argument. In fact, this case reinforces the appropriateness and admissibility of Mr. Kunkel's testimony, as an expert witness.

construction of its new fast ferry Ava Pearl. To qualify for the particular State funding for the new dock construction required evidence that the project would result in mitigation of vehicular traffic congestion and would have the collateral effect of improving air quality by taking automobiles off the road”).

Interstate and the Town have tried to limit the application of the funding source through a tortured reading of the funding documents as silently excluding ferry service to Block Island in the overall goals of the marine industry component. *See* Interstate’s Post-Hearing Mem. at 37 (stating “the funding was in the mid-90s and there were no high[-]speed ferry services at that time, nor was there any reference to high[-]speed ferry service in the documentation seeking the funding”); Town’s Post-Hearing Mem. at 4 (stating that “Mr. Kunkel could not point to a single committee report, legislative report, or hearing report which discussed the public need for a ferry service” and noting, similarly to Interstate, that “the 1990’s was before the time that high-speed ferry service was widely adopted in the Northeast”). However, simply because a high-speed ferry service from Quonset Point to Block Island was not specifically mentioned in the legislation, does not mean that RIFF’s high-speed ferry service to Block Island would not support the goals and intent of the legislation. Such an interpretation would be akin to asserting that the automobile import facility at Quonset is limited to the current importation of cars from Germany and importation of cars from Italy is prohibited. Interstate and the Town’s arguments go no further than to protest against the weight of Mr. Kunkel’s testimony, but simply do not lay the grounds to strike him as an expert.

Next, Mr. Kunkel relied upon the fact that the QDC Board of Directors made a policy decision when it granted RIFF’s concession/land lease and approved its bulkhead improvements and that this policy decision is part of the evidence that supports RIFF’s position that a public

need exists for a high-speed ferry service from Quonset Point to Block Island. Interstate and the Town make the same argument regarding this fact as they did regarding the first fact Mr. Kunkel relied upon above: that because the policy or lease does not specifically mention a high-speed ferry to Block Island, this policy decision purportedly cannot support that there is a public need for the RIFF service. *See* Interstate’s Post-Hearing Mem. at 37 (“[b]ut it was revealed that the lease said nothing about high[-]speed service from Quonset to Block Island”); Town’s Post-Hearing Mem. at 6 (“entering into the lease with the RIFF had nothing to do with a fast ferry service to Block Island”). This argument is extraordinarily flawed. If Interstate and the Town were correct, the Division would never find regulatory “need and convenience” unless there was a specific pre-existing governmental document that outlines in detail a need for the specific service being proposed. This reasoning is antithetical to common sense and the teachings of *Abbott* that a CPCN applicant need only show that the proposed service “tends to promote the accommodation of the public.” *Abbott v. Public Utilities Commission*, 136 A. 490 (R.I. 1927) (emphasis supplied). Since the burden of proof on the ultimate issue is judged only by a tendency standard, the foundation for an expert opinion cannot be a more rigorous standard. Again, Interstate and the Town’s arguments go no further than to protest against the weight of Mr. Kunkel’s testimony and simply do not lay the grounds to strike him as an expert.

Mr. Kunkel looked at concrete proven unrebutted *facts* when rendering his expert opinion: *inter alia*, (1) that federal and state funding was given at this particular site in Quonset and (2) that the lease at this particular site in Quonset supports a high-speed ferry service. The argument that Mr. Kunkel relies only on his experience is untrue and incorrect. Not only did Mr. Kunkel rely on the facts discussed above, he further based his opinion on additional facts and data, including the increased demand for ferry service to Martha’s Vineyard and Block Island, as

evidenced by the increased number of service providers and departure points, as signs of demand for high-speed ferry service in the region and, importantly, to a certain extent, on the results of Dr. Mazze's survey. *See* Pre-Filed Rebuttal Test. of Lawrence Kunkel, at 2 ("the survey results themselves are evidence of public need for a Quonset fast ferry that is currently unsatisfied"). The Division has relied in the past upon this very same type of evidence to support a finding of public need. *See id.* at 2-3 (stating "[i]n its Order in Docket D-05-06 granting Interstate's application for its own high[-]speed CPCN, the Division found that [Island Hi-Speed Ferry's] survey data showing that 57% of its ridership would cross the dock to use an Interstate fast ferry was an 'admission that Interstate's proposed high-speed service to Old Harbor would accommodate existing and future customers' and further found that this was evidence of public convenience and necessity"). All of these facts, along with Mr. Kunkel's extensive experience analyzing ferry markets, which cannot be ignored, led him to his conclusions. Interstate and the Town may not be fond of the facts he relied upon, but that does not mean he did not rely on facts in support for his expert opinions or that there is foundation for the Motion(s) to Strike.⁷

C. Despite Interstate's Predictable Assertions to the Contrary, Granting RIFF a CPCN Will Have Minimal Impact on Interstate's Lifeline Service.

The Division is quite literally left with only one question: what impact will granting RIFF a CPCN have on Interstate? Interstate and the Town (aside from its over-crowding

⁷ Interstate's argument that Mr. Kunkel's opinion lacks foundation because he did not rely on formal studies is as empty as it is predictable. Interstate points to the fact that in the Island Hi-Speed Ferry ("IHSF") proceedings, Dr. Timothy Tyrrell, IHSF's economics expert, at least relied upon the Galilee Master Plan and general tourism statistics as support for his dormant market opinion. However, the fact is that Interstate attacked Dr. Tyrrell in its IHSF Post-Hearing Brief because he had "done [no] studies in any way to try to determine if the [niche] market really exists." See **Exhibit A** attached hereto. So today the Galilee Master Plan and Dr. Tyrrell's general tourism market studies are the holy grail, whereas back then these formal "studies" did not account for much in Interstate's argument. The point being is that back then no formal studies of the dormant market were done and the Division not only admitted the testimony, it found that both Dr. Tyrrell's and Mr. Kunkel's predictions that the unserved niche market existed were both credible and persuasive—and history has proved them right.

argument due to RIFF tapping into a new market) focus their entire cases around one argument: that granting RIFF a CPCN will drive Interstate out of business or that Interstate will be forced to increase rates to an oppressive level. However, that is not what the numbers reveal.

Based on the data included in Dr. Mazze's pre-filed testimony, Dr. Stephanie Costa ("Dr. Costa") calculated and testified that "... somewhere between 4% and 10% of its conventional ferry passengers *might* use a Quonset fast ferry that cost[s] \$50 and took longer and [that] between .04% and 3% of [Interstate's] fast ferry customers would use the Quonset fast ferry at that price and [requiring] a longer ride over the water, with a level of certainty of 95%." Pre-Filed Test. of Dr. Stephanie Costa at 11. Using Dr. Costa's figures, the average cost to the ratepayer could increase by \$0.40, less than one dollar—for the traditional or conventional service. *See* Interstate Exhibit 15. Dr. Costa noted, however, that Dr. Mazze's analysis, upon which she rests her calculations, fails to account for the number of people who would change their responses based upon the factors of cost differential *and* time over water differential, *i.e.* the survey failed to ask the obvious and important "Question 7." *See* Pre-Filed Test. of Dr. Stephanie Costa at 9-11. Dr. Costa was nonetheless able to utilize Dr. Mazze's numbers and extrapolated them to account for the number of people who would change their responses based upon the factors of cost differential (Question 5) *and* time over water differential (Question 6) when determining her range—essentially a reliable range predicting the responses to missing "Question 7." *See* Pre-Filed Test. of Dr. Stephanie Costa at 9-11.

Neither Interstate's nor the Town's Post-Hearing Memoranda challenge Dr. Costa's testimony. They note that she is a mathematician and not a marketing expert, but RIFF does not need a marketing expert to analyze the results of a survey nor was Dr. Costa presented as a marketing expert. *See* Interstate's Post-Hearing Mem. at 16 (stating that Dr. Costa "was

testifying as a mathematician, not as an expert in marketing studies”); Town’s Post-Hearing Mem. at 24 (stating that Dr. Costa “is a mathematician and . . . is not a marketing or economic expert”). Importantly, neither Interstate nor the Town challenge the mathematics she employed when analyzing the survey data.

Interstate attempts to gloss over the shortcomings in Dr. Mazze’s survey by calculating ridership impacts through the use of knowingly inaccurate figures. Interstate initially represented its impact numbers, which do not account for the missing “Question 7,” in a manner assuming *all* passengers were full-rate paying adult fares. *See* Interstate Exhibit 2. Interstate failed to account for discounts such as seniors, children and/or commuter fares. Further, Interstate’s percentage loss of customers (predicted by Walter Edge (“Mr. Edge”) and Dr. Mazze) did not account for the survey results for either Question 5 or Question 6.⁸ *See* Hearing Tr. 03/22/16 at 68, 72-74. At a minimum, this renders Interstate’s predictions unreliable.

RIFF, with the help of the Hearing Officer, was eventually able to have Mr. Edge redo Interstate’s impact numbers based on the actual passengers and based upon Dr. Costa’s unrebutted calculation methodology. *See* Interstate Exhibit 15, Revised WEE-3. These new numbers, using Dr. Costa’s range, are more reliable than Mr. Edge’s initial calculations. Using Interstate’s worst case scenario numbers, the most credible information now before the Hearing Officer is that somewhere between four percent (4%) and ten percent (10%) of Interstate’s conventional passengers might use a high-speed ferry from Quonset Point at a higher price with

⁸ Dr. Mazze’s passenger loss calculations never accounted for survey Question 5 or Question 6. *See* Hearing Tr. 03/22/16 at 68, 72-74. Dr. Mazze’s seventeen percent (17%) and twenty-seven percent (27%) loss of customers is calculated based on survey Question 4 only. *See* Hearing Tr. 03/22/16 at 68, 72-74 (“Q. How can you be sure that these numbers represent 17 and 2[7] percent of the population? A. Because the individuals who were sampled were representative of the population because they were buying tickets and they were going to Block Island. . . . Q. So if you look at your results, your results showed, I believe, that there were 71 people out of 263, that’s your 27 percent, correct? A. Right. Q. Those are the 27 percent of the people that answered yes to Question 4, correct? A. Yes.”). Mistakenly or purposefully, Mr. Edge does not account for those passengers that said they would change their minds if the proposed new service were more expensive or required more time over water—Questions 5 and 6.

a longer ride over water time. *See* Dr. Costa’s Pre-Filed Rebuttal Test. at 11. Utilizing a median of seven percent (7%), the calculated loss to Interstate would be at most \$302,680.⁹ *See* Hearing Tr. 03/22/16 at 136-38 (RIFF walked Mr. Edge through the calculations using Dr. Costa’s seven percent (7%) as applied to WEE-1’s actual passenger and actual rate information in effect in 2013). Ultimately, it remains unclear if the revenue loss will even be that high because Interstate’s survey conveniently never asked a “Question 7,” whether increase ticket price *and* increase time over water would impact whether passengers would utilize a high-speed ferry service from Quonset Point to Block Island¹⁰ and because Interstate’s revenue loss calculations did not account for either Question 5 or 6 in its passenger loss percentage. *See* Hearing Tr. 03/22/16 at 68, 72-74; *supra* n.7.

To put this impact in context, using Mr. Edge’s adjusted worst-case scenario figures, giving RIFF a license would allegedly result in a rate increase of only \$1.85 for an adult, round-trip, traditional ferry ticket. *See* Interstate Exhibit 15, Revised WEE-3 (\$24.75-\$22.90). Accordingly, using Mr. Edge’s own worst-case-scenario calculations, relying on Dr. Mazze’s survey, Interstate would need to raise traditional or conventional ticket prices by *less than* the

⁹ Mr. Edge also calculated the revenue loss to Interstate using Dr. Costa’s worst-case-scenario numbers for the discretionary high-speed service, three percent (3%), which Mr. Edge stated would result in a revenue loss of \$53,000 to Interstate. *See* Hearing Tr. 03/22/16 at 139-40. Calculating the revenue loss using Dr. Costa’s median of one-and-a-half percent (1.5%), the revenue loss would be \$26,500 to Interstate. *Id.* Summarily and in an effort to support Interstate’s “death spiral” arguments, Mr. Edge predicted that the total loss revenue (traditional and high-speed) would be \$1,214,590; however, what the evidence now proves is that the actual predicted loss of revenues to Interstate will be at most, \$329,180. *See* Interstate’s Exhibit 2, WEE-1, *compared to* Hearing Tr. 03/22/16 at 136-41 (utilizing Dr. Costa’s median numbers). This is a difference of \$885,410. *Id.* (\$1,214,590-\$329,180).

¹⁰ Mazze testified as follows:

- Q. So the decision to take the fast ferry from Quonset is dependent on both the cost and price differential from the traditional or high speed ferry and that the on-water time is a half hour longer from Quonset than Point Judith, correct?
A. Yea, under these scenarios.
Q. Correct. Do you calculate the number of people who would change their mind if either the cost was more or because the on-water time is longer?
A. No.

Hearing Tr. 03/22/16 at 74.

amount requested and approved in Interstate’s most recent rate request. *See id.* at 5 (Interstate recently requested a rate increase of \$2.00 for an adult round trip fast-ferry ticket price). To suggest that this relatively small rate increase corresponds to a “death spiral” for Interstate’s business is preposterous.

D. Interstate Does Not Have a Right to Maintain a Monopoly.

Both Interstate and the Town also argue for the Division to deny RIFF a CPCN in order for Interstate to maintain its monopoly, contending that granting a CPCN to RIFF would lead to “unfair competition” negatively impacting Interstate’s lifeline service. *See* Interstate’s Post-Hearing Mem. at 15; Town’s Post-Hearing Mem. at 23, 27.¹¹ It is important to be mindful that the Division previously ruled “to be clear, the Division recognizes that existing carriers do not have a legal right to maintain a monopoly upon services rendered, and that increased competition is *not* a valid ground for denying a common carrier CPCN.” *See* Docket No. D-13-51, Order No. 21170 at 19 (Sept. 24, 2013) (emphasis added) (citing *Breen v. Division of Public Utilities*, 59 R.I. 134, 194 A. 719, 720 (1937)). As noted in RIFF’s Post-Hearing Memoranda, the Rhode Island Superior Court has also warned that “increased competition is not a valid ground for denying a common carrier certificate.” *Interstate Navigation Co. v. Div. of Pub. Utilities & Carriers of R.I.*, No. C.A. 98-4766, 1999 WL 813603, at *5 (R.I. Super. Ct. Aug. 31, 1999) (citing *Yellow Cab Co.*, 73 R.I. 217 at 226, 54 A.2d 28 at 32-33). Specifically, the Court reasoned that “existing carriers do not have a legal right to maintain a monopoly upon the services rendered.” *Id.* The Court noted that “protecting existing investments . . . from even

¹¹ The Town also argues that the Town of New Shoreham, Block Island, does not support RIFF’s application for a high-speed ferry service from Quonset Point to Block Island. However, the Town conveniently failed to note that the Block Island Tourism Council unanimously voted in favor of this and that is different than 1998. *See* RIFF Exhibit 40. The Block Island Tourism Council is made up of business owners on Block Island. RIFF has support from the Town’s business community. Despite the inappropriate last minute political pressure that the Town Manager and Town Solicitor tried to put on the Tourism Council to reverse its opinion, the Tourism Council refused to do so. *See* RIFF Exhibits 38-39. The fact that they did not reverse their decision, speaks volumes and the irony is inescapable.

wasteful competition must be treated as *secondary* to the first and most fundamental obligation of securing adequate service for the public.” *Id.* (quoting *Breen*, 194 A. at 720). In fact, as also noted in RIFF’s Post-Hearing Memoranda, the Supreme Court has stressed that, in granting a CPCN, it is proper to consider “such factors as competitive stimulation and anti-monopoly prophylaxis.” *Domestic Safe Deposit Co. v. Hawksley*, 111 R.I. 224, 228, 301 A.2d 342, 344 (1973).

It is important to emphasize that the Public Utilities Commission (“PUC”) has previously ruled that high-speed ferry service is a discretionary service and that it is to be treated differently from Interstate’s “lifeline” service. *See Interstate Navigation Co. v. Division of Public Utilities*, 824 A.2d 1282, 1288 (R.I. 2003) (stating “[a] high-speed ferry substantially alters the kind of service that water carriers can provide. It requires different equipment, it provides faster service and it operates on the water in an entirely different way than a standard ferry does”)¹²; *In Re Island Hi-Speed Form of Regulation & Review of Rates*, 17619, 2003 WL 23341232 (Nov. 25, 2003) (“IHSF is not a traditional public utility because it does not, nor is it required to, provide a lifeline service. IHSF’s service is purely discretionary in that it is a passenger and bicycle only service”).¹³ In fact, the PUC noted that “[r]egulation is merely a substitute for the competitive market in setting prices.” *In Re Island Hi-Speed Form of Regulation & Review of Rates*, 2003 WL 23341232.

¹² It’s important to note that the Town’s witness, Stephen Land (“Mr. Land”), Block Island’s Harbormaster and a New Shoreham Police Officer did not have a problem with RIFF’s additional high-speed ferry service. *See* 03/24/16 at 40-42 (“Q. Well, are you aware that there’s also a proposal to bring a new floating dock here where passengers would be walking off from an area away from where your concern is . . . Are you aware of that? A. . . . I thought that was not on the table anymore. Q. Okay. Well, if I told you that that is on the table, does that change your concern in any way [?] . . . A. Yes. They should be able to walk down the dock.”) Mr. Land also noted that he “ha[s] no concern of the qualifications and skills of the licensed captains.” *Id.* at 43.

¹³ The PUC specifically stated that the approach of treating high-speed ferry service as discretionary and separate from the lifeline “will incent both IHSF and Interstate to be cost-efficient as they compete for the discretionary market of summer season visitors to Block Island.” *In Re Island Hi-Speed Form of Regulation & Review of Rates*, 2003 WL 23341232.

Accordingly, the PUC long ago determined that the high-speed ferry market is a competitive market.¹⁴ *See In Re: Island Hi-Speed Ferry, LLC, Proposed Passenger Rates & Ferry Schedule, Petition for Waiver or Rate Hearing & Investigation, & Motion for Exemption from Rate Filing Requirement*, 2802, 1999 WL 35645630 (Mar. 31, 1999) (stating “[w]e must also remain cognizant of the competitive markets developing in many utility sectors and the particular business exigencies arising therefrom. In our view, establishing choice for ferry travel to Block Island is a positive development for consumers”). To waiver from the PUC’s previous ruling regarding the competitive nature of the discretionary high-speed ferry service is inconsistent with the law.

The competent evidence in the record is that Interstate’s opposition to RIFF’s CPCN application is motivated by a desire to maintain its intrastate monopoly. Pre-Filed Direct Test. Lawrence Kunkel, at 8 (stating “I can only conclude that Interstate’s motive here is not necessarily to serve a public need as much as it is to prevent entry by what it incorrectly perceives to be a market rival, with the ultimate payoff being the preservation of its monopoly”). Despite Mr. Edge’s protestations to the contrary, this evidence was unrebutted, as Interstate was forced to admit in its Data Request responses that Mr. Edge is not an expert in economics, marketing or tourism economics. *See Interstate’s Responses to RIFF’s Data Requests*, at Nos. 1-18 – 1-20. Mr. Kunkel’s expertise in monopoly economics and Game Theory on the other hand is unassailable and has been relied upon in the past by both the Division and reviewing courts to find that Interstate has a “monopolistic mindset” when it comes to challenges by other market entrants. *See Interstate Navigation Co.*, 1999 WL 813603, at *6; D 98-MC-16, at 35 (relevant portions attached hereto as **Exhibit B**) (stating that “[t]he testimony [of Interstate] evinces a

¹⁴ It is also important to note that recently the Division recognized that “common carriers of passengers are not legally entitled to protection from reasonable competition.” *See D-16-35, In Re SeaStreak, LLC*, Order at 23 (June 28, 2016 Order).

monopolistic mindset on the part of Interstate's management, which ignores the evidence demonstrating that the Applicant's service is suited to the public's convenience and necessity. That the general public should be denied the opportunity to avail itself of the Applicant's service in order to insulate Interstate Navigation from all risk of revenue erosion is a concept that the Division cannot embrace, especially given the current trends toward competition and the increasing availability of consumer choice in numerous industries subject to regulation by both the Division and Commission").¹⁵

III. CONCLUSION

Ultimately, everyone agrees that there is a market demand for RIFF's proposed service. Interstate and the Town's cases are credible evidence that there is in fact a market demand for RIFF's high-speed service from Quonset Point to Block Island. Interstate and the Town's contentions that RIFF has not established need and convenience because RIFF did not perform a market survey is completely inconsistent with the crux of their arguments in this proceeding as well as the evidence in the record. There is no dispute on the fact that there is a market demand

¹⁵ "On this issue, the Division subscribes to the philosophy of Lawrence Kunkel:

- Q. And if Interstate were to lose some portion of passengers, not putting any specific number on it, but any number of passengers, with fixed costs it would require it to raise its rates to some degree; fewer passengers lost, a smaller rate increase, larger passengers lost, a larger rate increase, correct?
- A. I'm sorry, I absolutely disagree with that. I categorically disagree with that.
- Q. Okay.
- A. There is no relationship at all beyond a certain scale where the loss of ridership necessarily translates into the need for a fare increase. I mean, what you are assuming when you make that statement is that Interstate operates under 100 percent fixed costs, has no management capability or maneuverability at all, undertakes no marketing strategy at all to undertake a ridership replacement program, and those are all leaps of faith that I find profoundly incorrect."

See Exhibit B.

and public need. Therefore, the only issue remaining is the impact, or lack thereof, on the incumbent provider. As discussed above, even using Interstate's worst-case-scenario numbers, the impact to Interstate will be minimal at best and, such impact is more than offset by the profits of the Newport/Fall River service(s); profits stressed by Interstate in its testimony and during the Hearing.

Accordingly, for the reasons articulated above and in RIFF's Post-Hearing Memorandum, filed with the Division on June 7, 2016, the Division should grant RIFF's application for a CPCN.

Respectfully submitted,

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

/s/ Alan M. Shoer

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Dated: June 30, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2016, I delivered a true copy of the foregoing document via electronic mail to the Parties in this proceeding.

/s/ Alan M. Shoer

EXHIBIT A

BEFORE THE
RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS
MOTOR CARRIERS DIVISION

IN RE: ISLAND HI-SPEED FERRY, LLC

DOCKET #98-MC-16

INTERSTATE NAVIGATION COMPANY'S
POST-HEARING BRIEF IN OPPOSITION TO THE
APPLICANT'S REQUEST FOR A WATER CARRIER
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Interstate Navigation Co.
d/b/a Block Island Ferry
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"niche" it claims it wants to serve. Instead, applicant will be serving Interstate's former customers who will go over to the applicant's operation simply because the rate is cheaper. As Mr. Edge said:

"In other words, even if there is a need to serve the 'niche' identified by the applicant in his filing, the service they are proposing to provide will not address that need" (at 15, emphasis added).

Mr. Edge showed how the applicant's PUC approved rate will be much lower than Interstate's rates by explaining as follows:

"First, the applicant's rates can be lower because the applicant will only operate during the 5 months of May-October, which are all profitable months. The applicant (unlike Interstate) does not have to recover through summer tourists the losses from operating a huge expensive freight/passenger service in the winter, therefore, the applicant's rates can be far less than Interstate's. This is also the primary reason why there is not only no public need for the proposed service, but shows why the proposed service could force Interstate out of business by taking away the tourists who financially support the entire operation" (at 19, emphasis in original) * * * Another way of looking at this is to compare the fact that Interstate has invested \$8,000,000 in a new boat and needs twelve crew members for the boat while the applicant only invested \$2,000,000 and has just three crew. If the applicant's costs are one fourth (or less) of Interstate's costs, then rates that are one fourth or less of Interstate's rates are not unreasonable" (at 22).

Mr. Edge explained how Interstate and its ratepayers would be seriously impacted by increased rates, reduced service, and possibly even forcing Interstate out of business (at 23-26). Mr. Edge prepared charts showing that Interstate's average occupancy over the six months from May through October is only 20.24% of the available capacity of all the boats (at 26). See INC9 (Analysis of Current Capacity Available versus Actual Usage Leaving Point Judith), and INC10 (Analysis of Current Capacity Available, Actual Usage, and Potential Total Capacity Leaving Point Judith) INC11. Copies of INC10 and INC11 are attached hereto as Exhibits 1 and 2, and dramatically demonstrate the lack of public need for this proposed new service.

D. APRIL 30, 1998

1. **Timothy Tyrrell, Ph.D.** testified that "if the applicant's rate were equal to Interstate's rate, this "would shrink the niche market in terms of who it would be attractive to" (at 72). He admitted that he had not "in any way quantified the number of people that fall into this niche market" (at 73), and had not "done any studies in any way to try to determine if the market really in fact exists" (at 73,

emphasis added). He also agreed that if the rate for the applicant's ferry was the same as Interstate's rate, "the applicant would attract a substantial number of Interstate's existing customers" (at 73).

He admitted that the market for transporting ferry passengers from Galilee to Block Island for the last four years has been "virtually flat...or even a downward trend" (at 77-79), even though R.I. tourism in general showed an increase (79-80). Dr. Tyrrell also agreed that Block Island is fairly "saturated in terms of the amount of tourists that it can handle in the prime summer months, especially July and August" (at 80). Dr. Tyrrell testified that the applicant's proposed service would be a public "convenience" but was reluctant to testify that "the public necessity required" the new service (81-83). He agreed that "the public interest in terms of whether or not a competitive business in the same market would adversely affect [the existing] utility is something that needs to be taken into consideration" (at 84).

He agreed "that Interstate has more capacity than is currently being used" (at 95), that only on six or seven occasions in 1997 did Interstate's vessels ever leave with more than 1,000 passengers (at 97), and that on only two occasions were Interstate's vessels at full capacity (at 97-98). Dr. Tyrrell therefore stated that he agreed "that Interstate has generally speaking excess capacity to meet the current public demand" (at 98, emphasis added). Furthermore, Dr. Tyrrell agreed that is a public utility that is operating at less than full capacity "would be adversely impacted by the establishment of a new public utility that provides the same service" (at 98).

Dr. Tyrrell showed that in a study he did on the closing of the loading ramp at Galilee in 1991, that the closing did not prevent tourists from visiting the island because "the total daily capacity of the small ferries is estimated to be greater than the average number of daily passengers" (at 102). This was true for passengers when Interstate was running the two small ferries, as opposed to the large ferries it is running now (at 102-03).

Importantly, Dr. Tyrrell admitted that in the short run, approving the applicant's service would have a negative effect on Interstate. As Dr. Tyrrell stated:

"Q. Would you agree, however, that in the short run there would be a negative effect on Interstate Navigation?

A. Yes, I would expect that" (at 109-10).

Furthermore, Dr. Tyrrell agreed that the applicant's market and Interstate's market overlap:

"Q. You do agree that the market the applicant intends to serve and the market that Interstate is currently serving are overlapping markets; correct?

A. Yes" (at 110).

He is aware that New Harbor is very sensitive ecologically, that Block Islanders, generally speaking, want to discourage development in New Harbor (at 147), and that local wishes to discourage development in New Harbor should be respected (at 147).

Most importantly, Dr. Tyrrell was unable to actually quantify whether a single passenger out of 50,000 projected passengers would, in fact, come from a new market. As Dr. Tyrrell stated: "I'm not quite sure whether it's a new market" (at 137). He was also asked:

"Q. Now, in terms of the new customers that you've testified to who you believe may take the applicant's ferry, you haven't done any studies or you're unable to quantify how many of 50,000 that he's projecting in the first year will in fact be new customers; correct?

A. No, I don't know" (at 147-48).

2. Leonard Lardaro, Ph.D.'s testimony was admitted as INC13, and his resume as INC14.

As shown by Dr. Lardaro's resume (INC 14), he has written three books and has literally hundreds of other publications, etc. His work focuses on the R.I. economy, and he is a full professor in the Department of Economics at the University of R.I.. He was appointed by Governor Almond to the Labor Market Information Committee in July of 1997. Dr. Lardaro testified that the applicant has not proven a public need for the service he is proposing:

"Q. In your professional opinion, has the Applicant proven 'need'?

A. No. According to figures provided to me by Walter Edge, CPA, Interstate operated at only about 20% of its adult passenger carrying capacity from Point Judith during the May to October period of 1997...Thus, Interstate is currently operating substantially below its capacity. Furthermore, the Applicant has proposed a service with an anticipated occupancy rate of 19%...In my professional opinion, I do not see any need to add such an underutilized service...when an underutilized service already exists. This is a clear misallocation of resources. The applicant has done no studies, surveys or calculations to demonstrate the need for the proposed service that is not being met by Interstate. And, they have failed to consider any possibly negative

EXHIBIT B

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
100 ORANGE STREET
PROVIDENCE, RHODE ISLAND 02903

IN RE: ISLAND HI-SPEED FERRY, LLC :
8 PIER MARKETPLACE : DOCKET NO. 98 MC 16
NARRAGANSETT, RI 02882 :

REPORT AND ORDER

By application filed with the Rhode Island Division of Public Utilities and Carriers ("Division"), Island Hi-Speed Ferry LLC ("Hi-Speed Ferry"), 8 Pier Marketplace, Narragansett, Rhode Island sought operating authority as a ferry passenger service from the Port of Galilee in Narragansett, Rhode Island to New Harbor located in the Town of New Shoreham (Block Island), Rhode Island.¹ Interstate Navigation Company ("Interstate"), which currently provides service between Galilee and Old Harbor (also located in the Town of New Shoreham), and the Town of New Shoreham ("New Shoreham"), each filed "Protests" and Motions to Intervene in the Docket (collectively, the "Protestants").² Duly noticed hearings were held by the Division at 100 Orange

¹ Island Hi-Speed Ferry LLC's Application was filed with the Division on February 20, 1998. See *Exhibit DPU-1*. The limited liability corporation has two members: Galilee Cruises, Inc. whose principal is Charles A. Donadio, Jr., and The Galilee Group, Inc., which is comprised of three individuals: Dana A. Hagopian, Jon G. Hagopian, and Mark J. Hagopian. The Application was signed by Mr. Donadio on behalf of all principals of the LLC. Mr. Donadio proffered testimony on behalf of the LLC and is referred throughout this Decision as the "Applicant."

² Both petitions were granted thus affording Interstate Navigation and the Town of New Shoreham full intervention status in the proceedings. A third petition to intervene was filed by the Block Island Tourism Council; however, after further consideration, the Council withdrew its request and decided to participate by way of offering comments through its Executive Director at the public hearings. See *Exhibit Public Comment 1*.

Q. Isn't that the way to reduce costs to do just that, reduce costs?

A. We could reduce our costs; but why should we be forced to reduce our costs because the Applicant wants to run a vessel?⁸²

The testimony evinces a monopolistic mindset on the part of Interstate's management, which ignores the evidence demonstrating that the Applicant's service is suited to the public's convenience and necessity. That the general public should be denied the opportunity to avail itself of the Applicant's service in order to insulate Interstate Navigation from all risk of revenue erosion is a concept that the Division cannot embrace, especially given the current trends toward competition and the increasing availability of consumer choice in numerous industries subject to regulation by both the Division and Commission. On this issue, the Division subscribes to the philosophy of Lawrence Kunkel:

Q. And if Interstate were to lose some portion of passengers, not putting any specific number on it, but any number of passengers, with fixed costs it would require it to raise its rates to some degree; fewer passengers lost, a smaller rate increase, larger passengers lost, a larger rate increase, correct?

A. I'm sorry. I absolutely disagree with that. I categorically disagree with that.

Q. Okay.

A. There is no relationship at all beyond a certain scale where the loss of ridership necessarily translates into the need for a fare increase. I mean, what you are assuming when you make that statement is that Interstate operates under 100 percent fixed costs, has no management capability or maneuverability at all, undertakes no marketing strategy at all to undertake a ridership replacement program, and those are all leaps of faith that I find profoundly incorrect.⁸³

⁸² Tr. 5/14/98, p. 86.

⁸³ Tr. 5/13/98 at pp. 147-48.