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June 7, 2016

Luly E. Massaro, Clerk  
Division of Public Utilities and Carriers  
89 Jefferson Boulevard  
Warwick, RI 02888

RE: RHODE ISLAND FAST FERRY, INC.  
Docket No. D-13-51

Dear Luly:

Enclosed for filing are an original and five copies of Interstate Navigation Company's Post-Hearing Memorandum.

If you have any questions, please feel free to call.

Very truly yours,



Michael R. McElroy

MRMc:tmg  
cc: Service List (attached)

*Interstate Donadio Post-Hearing Memorandum*

STATE OF RHODE ISLAND  
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC. : DOCKET No. D-13-51

**INTERSTATE NAVIGATION COMPANY'S**  
**POST-HEARING MEMORANDUM**

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STATE OF RHODE ISLAND  
DIVISION OF PUBLIC UTILITIES AND CARRIERS

IN RE: RHODE ISLAND FAST FERRY, INC. : DOCKET No. D-13-51

**INTERSTATE NAVIGATION COMPANY'S**  
**POST-HEARING MEMORANDUM**

**INTRODUCTION**

Rhode Island Fast Ferry (RIFF) is seeking a Certificate of Public Convenience and Necessity (CPCN) to run a passenger-only, summer-only, fast ferry from Quonset Point to Old Harbor, Block Island. Interstate Navigation Company (Interstate) opposes RIFF's proposal because it will cream-skim Interstate's valuable summer tourist traffic. This will drive up rates for Interstate's year-round lifeline service, and/or result in service reductions to make up for the lost revenues.

From the time Interstate began running its fast ferry from Point Judith, Interstate's fast ferry passengers have 100% supported the year-round lifeline ferry service Interstate runs to Block Island. Revenues from Interstate's fast ferry operation keep lifeline rates low and service levels high. With the approval of Interstate, the Division, the Town of New Shoreham (Town), and the Commission, 100% of Interstate's summer fast ferry profits have been dedicated to supporting Interstate's year-round lifeline conventional service. Therefore, all the profits earned by Interstate's fast ferry operation (in the estimated amount of almost \$500,000 per year) are utilized to support the lifeline service to Block Island. Similarly, the new fast ferry operation begun by Interstate between Newport and Block Island was designed, with Division and Commission approval, so that 100% of the profits from that operation also fully support the lifeline service.

Accordingly, although fast ferry **service** and conventional lifeline ferry **service** are different types of services, Interstate's fast ferry service has always been inextricably financially linked with Interstate's conventional lifeline service. In fact, were it not for the fact that Interstate's fast ferry service was generating a profit during the term of the last Rate Plan approved by the Division and the Commission, Interstate's conventional lifeline service would have suffered significant losses and Interstate would have been forced to seek rate relief from the Commission.

### **I. STANDARD OF REVIEW**

In determining whether a CPCN should be granted, the Division must, by Supreme Court mandate, consider evidence on various matters, including, but not limited to:

1. Has the applicant (RIFF) proven that "**public** convenience and necessity" require the proposed service? (R.I.G.L. § 39-3-3, emphasis added).
2. Is the incumbent provider (Interstate), meeting the needs of the public for ferry travel to Block Island?
3. What investments of capital have been made by Interstate?
4. What is the nature of the ferry service being rendered by Interstate?
5. If Interstate's service is adequate, what would be the probable effect of admitting RIFF into a field now adequately served?
6. What effect would RIFF have on Interstate's revenues?
7. Would RIFF have an adverse effect on the adequacy of the existing services provided by Interstate? and

8. Is RIFF “fit, willing, and able to properly . . . perform the service proposed . . .” (R.I.G.L. § 39-12-7).<sup>1</sup>

This test was established by the seminal CPCN case of *Abbott v. Public Utilities Commission*, 136 A. 490 (RI 1927).

In *Abbott*, the Supreme Court approved the denial by the Commission of a CPCN to operate jitneys.<sup>2</sup>

First, the Supreme Court explained the meaning of the statutory requirement that the “public convenience and necessity” must require the proposed new service. The Supreme Court held:

The expression “public convenience and necessity” has not a well-defined and precise meaning. “Convenience” is not used colloquially in the statute as the appellant appears to consider. **It is not synonymous with “handy” and “easy of access,”** although the question of ease of access may well enter into the determination of the public’s convenience. “Convenience” shall be given an interpretation in accord with its regular meaning of “suitable,” “fitting,” and “public convenience” has reference to something fitting or suited to the public need.

\* \* \*

The word “necessity” in the expression under consideration does not have reference to an indispensable necessity, but rather that the route in question appears to the commission to be reasonably requisite. In passing upon public convenience and necessity, the commission must consider whether a proposed route is suited to and tends to promote the accommodation of the public and also whether it is reasonably required to meet a need for such accommodation. (at 491, emphasis added).

After defining the “public convenience and necessity” standard, the Supreme Court then made it clear exactly what type of evidence should be considered in a CPCN proceeding. The Supreme Court held:

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<sup>1</sup> Interstate will not be addressing in this Memorandum the “fit, willing, and able” test due to limitations placed on the scope of Interstate’s intervention.

<sup>2</sup> In 1927, when this case was decided, CPCNs were issued by the Public Utilities Commission, rather than the Division of Public Utilities and Carriers.

In considering this question, the Public Utilities Commission have taken a broad view of the situation presented by such an application as that before us upon appeal. . . . **they are justified in considering the existing means of transportation, as to its substantial character and its probable permanence, also the investments of capital made by the owners of such existing means, the nature of the service that is being rendered, and, if such service is adequate, what will be the probable effect of admitting competition into a field now adequately served, and what effect such competition will probably have upon the receipts of existing lines of transportation, and as to whether, in the face of further competition, the adequacy of the existing service will be continued.** (at 491-92, emphasis added).

After examining the record, the Supreme Court held:

After an examination of the evidence presented before the commission, **we approve their finding that** both the steam railroad and the electric trolley service of the two utilities now operating between Providence and Woonsocket are adequate and reasonable, and rendered upon proper and suitable schedules; that, **if the appellant's busses are permitted to operate as requested in competition with the electric trolley service of the United Electric Railways Company, it would probably result in such a loss of traffic and revenue to the United Electric Railways Company as to cause the line to fail to earn its operating expenses, leading to a deterioration of its present service and perhaps the ultimate discontinuance of such service, to the public detriment.** We approve the conclusion of the commission that no such public convenience and necessity has been proved by the applicant as to warrant the granting to him of the permission which he seeks. (at 492, emphasis added).

Also, in Order No. 15652, which granted IHSF's CPCN, this Division held that:

The Division must weigh the impact on existing carriers, a concept that was embraced by the Supreme Court in *Abbott v. Public Utilities Commission*. (at 31).

Moreover, in Order No. 21170 in which the Division granted Interstate's motion to intervene in this docket, the Division ruled:

. . . the Division would agree with Interstate's argument that it would be proper for the Division, in its assessment of the Applicant's direct case to prove that there is a "public need" for its proposed services, to also **consider what impact, if any, the Applicant's services would have on Interstate's existing "lifeline" services.**<sup>12</sup>

However, 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.<sup>13</sup> The

Division also accepts that “protecting existing investments . . . from even wasteful competition must be treated as secondary to the first and most fundamental obligation of securing adequate service for the public.”<sup>14</sup>

In the final analysis, the Division agrees that **it is in the public interest to permit Interstate to participate in this docket for the purpose of safe-guarding the year-round lifeline services it provides to Block Island.** The Division considers the scope of this participation as relating to the Applicant’s burden of proof to demonstrate “that public convenience and necessity require[s] the services.”<sup>15</sup> (Emphasis added).

<sup>11</sup> See *In re: Island Hi-Speed Ferry, LLC.*, 746 A.2d 1240, at 1246.

<sup>12</sup> See *Abbott v. Public Utilities Commission*, 48 R.I. 196, 136 A. 490 (1927).

<sup>13</sup> See *Breen v. Division*, 194 A. 719, 720 (1937).

<sup>14</sup> *Id.*

<sup>15</sup> R.I.G.L. §39-3-3.

Although the Supreme Court in *Breen v. Division of Public Utilities*, 194 A. 719, 720 (RI 1937), held that protecting existing investments from “wasteful competition” is “secondary” to the “first and most fundamental obligation of securing adequate service for the public,” it is essential in properly reviewing a CPCN application that the matters outlined by the Supreme Court in *Abbott* be considered by the Division through competent evidence.

It is also the policy of this state that the municipality proposed to be served by the proposed carrier (i.e., the Town) has an important public interest role to play in any request for a CPCN. Therefore, R.I.G.L. § 39-3-3.1 provides that the notice of any hearing regarding a requested CPCN will be given to:

. . . the mayor and also any city manager of each city, and to the president of the town council and also any town manager for each town, in which the petitioner desires to pick up or discharge passengers. The division shall also publish a notice of the hearing at least ten (10) days prior to the date thereof in a newspaper of general circulation in each city or town in which the petitioner desires to pick up or discharge passengers.

This legislative policy is even stronger for water carrier service to the Town. The specific statutory provision is set forth in R.I.G.L. § 39-3-3(b) which provides:

A copy of any application filed with either the commission or the division by a water common carrier which includes a New Shoreham [Block Island] terminus shall be provided by the water common carrier to the New Shoreham town clerk by certified mail.

These statutory provisions are a clear recognition by the Legislature that the impacts on the Town and its residents of any proposed common carrier service affecting the Town must be considered. Here, Block Island has flatly rejected RIFF's request for support and has repeatedly informed both RIFF and this Division that it is unequivocally opposed to this CPCN application because of the negative impacts the Town believes RIFF's proposed service would have on Block Island and its residents.

In addition, R.I.G.L. § 39-12-6 requires that notice of the hearing must be provided to "all common carriers . . . serving any part of the route or territory proposed to be served by the applicant. . . ." The purpose of this notice is to give carriers with whom the proposed applicant will compete the opportunity to present evidence to the Division regarding the potential negative impacts on existing carriers, and the public they serve, if the proposed CPCN is granted. It is for this reason, among others, that the Division correctly allowed Interstate to intervene.

## **II. INTERSTATE'S CASE**

Interstate presented the following evidence at the hearing:

1. Interstate is providing more than adequate and reasonable fast ferry service and conventional lifeline ferry service to Block Island, has done so for over 80 years, and can be expected to do so in the future;
2. Interstate has substantial excess passenger capacity;
3. Interstate has invested about \$30 million into its operation; and
4. Allowing unfair cream-skimming "competition" by RIFF would reduce Interstate's operating revenues, increase lifeline ferry rates, and/or reduce lifeline

ferry services to Block Island. **All parties agreed there would be a loss of revenues; the only dispute was how large the revenue loss would be.**<sup>3</sup>

RIFF is proposing to divert Interstate's round-trip, day-tripper, summer-only tourists from Galilee to Quonset. These summer tourists provide the bulk of Interstate's revenues. Interstate uses these revenues to operate during the approximate eight (8) months of the year (fall, winter, spring) when Interstate serves as the sole lifeline service to Block Island at significant financial loss.

RIFF is proposing to carry only passengers and to operate only in the summer. RIFF is not proposing to do any of the heavy lifting required during the other eight (8) months of the year when there is no profit to be made. RIFF will not be bringing any passengers, freight, cars,

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<sup>3</sup> Cream skimming refers to the business practice of a company providing a product or a service to only the high-value or low-cost customers of that product or service, while disregarding clients that are less profitable for the company.

. . . the idea behind the concept of cream skimming in business is that the 'cream' - high value or low-cost customers, who are more profitable to service – would be captured by some suppliers . . . leaving the more expensive or harder to service customers without the desired product or service at all or 'dumping' them on some default provider, who is left with less of the higher value customers who, in some cases, would have provided extra revenue to subsidize or reduce the cost to service the higher-cost customers, and the loss of the higher value customers might actually require the default provider to have to *raise* prices to cover the lost revenue, thus making things worse. [https://en.wikipedia.org/w/index.php?title=Cream\\_skimming&oldid=687474774](https://en.wikipedia.org/w/index.php?title=Cream_skimming&oldid=687474774)

As Justice Silverstein stated in *Interstate Navigation Company v. Division of Public Utilities and Carriers, et al.*, C.A. 98-4804 and 98-4766 page 9, fn6 (Superior Court 1999):

Cream-skimming occurs when “common carriers, finding themselves either losing or suffering reduced returns on the profitable part of the business [are] forced increasingly to subsist on a diet of skimmed milk [and] will be unable to carry on in the thinner geographic and seasonal markets, with consequent destruction of service to large areas of the country and bodies of customers.” Citing Alfred E. Khan, *The Economics of Regulation*, Vol. 2 (1971).

See also *SZ Enters., LLC v. Iowa Utils. Bd.*, 850 N.W.2d 441 (Iowa 2014):

Certainly, the case can be made that if Eagle Point is allowed to “cream skim” the most profitable customers, there may be impacts on the regulated utility. See *E. Shore Natural Gas Co. v. Del. Pub. Serv. Comm'n*, 635 A.2d 1273, 1281 (Del. S.Ct. 1993) (recognizing that providing gas service to select industrial customers affected public interest because of potentially “destructive competition”); *PW Ventures*, 533 So.2d at 283 (public interest implicated where revenue that “otherwise would have gone to the regulated utilities” is “diverted to unregulated producers”); *In re S. Jersey Gas Co.*, 226 N.J.Super. 327, 544 A.2d 402, 406 (N.J. S.Ct. App.Div. 1988) (using a cream-skimming analogy).

trucks, gasoline, diesel, propane, food, etc. to Block Island in the winter (or even in the spring and fall “shoulder seasons”). Instead, RIFF will be siphoning off Interstate’s summer round-trip tourists and pouring those profits directly into the pockets of RIFF’s owner, Mr. Donadio. By contrast, Interstate’s summer profits, **including 100% of its fast ferry profits**, are used to support Interstate’s lifeline service, to keep all rates low, and to keep service level high year-round.

RIFF apparently believes that Interstate’s owners make more profit when Interstate sells more tickets, and that Interstate’s owners lose money when Interstate sells fewer tickets. This shows a basic misunderstanding of rate base rate of return utility regulation. Interstate’s profit level is **not** determined by its revenues minus expenses. It is determined by an authorized rate of return calculated using rate base rate of return. This authorized profit allowance operates independently of Interstate’s ticket sales, revenues, or expenses.

Moreover, Interstate has **never once** in its 83-year history declared any dividends to its owners. Interstate has always reinvested **all** of its authorized profit back into the company to improve the level of service it provides to Block Island and to keep all rates as low as possible. Therefore, Interstate did not intervene in this docket to protect profits for its stockholders, as RIFF has incorrectly alleged. Interstate intervened so the Division would have all the information it needs to protect Interstate’s ratepayers, and especially to ensure the continued viability and affordability of its year-round lifeline services to the residents of Block Island. It is RIFF that wants to maximize profits for its owner, and to do so on the backs of Interstate’s ratepayers and the residents of Block Island.

### A. Dr. Mazze

Edward M. Mazze, Ph.D. is the Distinguished University Professor of Business Administration at the University of Rhode Island. He has held many prestigious positions in both academia, business, and government. (Interstate Exhibit 5, at 2-3).<sup>4</sup>

Dr. Mazze is the author of numerous books and papers in business, including marketing and marketing research. (at 3). From 2005 to 2013, Dr. Mazze served as co-economic forecast manager for the State of Rhode Island. (at 3). Importantly, Dr. Mazze has designed and conducted marketing and research studies for businesses, governmental agencies, educational institutions, and not-for-profit organizations. (at 3).

In 2013, Dr. Mazze performed a marketing research study for Interstate. (at 3). After analyzing the results of the study, Dr. Mazze concluded that:

. . . based on the results of my marketing research study, Interstate would lose as much as 17% of its traditional ferry passengers and 27% of its hi-speed ferry passengers from Point Judith during the summer months if Rhode Island Fast Ferry is permitted to offer summer-only, passenger only high-speed ferry service from Quonset Point to Old Harbor, Block Island . . . (at 4).

Dr. Mazze also concluded that:

. . . if Rhode Island Fast Ferry's application is approved, Rhode Island Fast Ferry would negatively impact Interstate's lifeline passenger, vehicle and freight services to Block Island by taking away customers and revenue from Interstate during the summer months. Interstate is highly dependent on its summer passenger revenue to support its year round passenger, vehicle and freight lifeline service to Block Island. (at 4).

Dr. Mazze utilized a "non-probability convenience sample" in his study and testified that such samples "are often used by businesses in making important decisions." (at 5). The study was conducted in July, August, and September of 2013 and it used "generally accepted

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<sup>4</sup> Dr. Mazze's extensive and impressive resume is attached to his prefiled direct testimony. We request that the Hearing Officer review Dr. Mazze's testimony, and the qualifications set forth therein, and compare Dr. Mazze's qualifications to Mr. Kunkel's qualifications (or lack thereof).

methods.” (at 6). Dr. Mazze made sure that the interviews “took place on different days, different weeks and in different months.” (at 8).

Dr. Mazze reviewed the prefiled RIFF testimonies of Robert Billington, Steven J. King, Elizabeth Dolan, Myrna George, Martha Pughe, and Lawrence R. Kunkel, and he concluded that they “did not rely on or used any economic study, marketing study, traffic study, tourism study of Block Island or marketing plan from Rhode Island Fast Ferry to support their opinions . . .” (at 12).

After reviewing Mr. Donadio’s testimony, Dr. Mazze testified that Mr. Donadio:

. . . presented no economic, marketing, traffic or tourism studies on Block Island or passenger research to support his opinions. He did not present a business plan, marketing plan or market feasibility study showing that there was a public need for an additional high speed ferry service to Block Island from Quonset Point. (at 13).

When asked if he believes that competition between Interstate and RIFF would be beneficial, he unequivocally answered “No.” (at 14). He explained that:

. . . there are times where competition is not beneficial particularly if reliable and affordable service can best be served by a single regulated carrier. When passengers are receiving adequate service and there is enough capacity to meet the needs of passengers, new competition is not efficient. (at 14)

He explained that the witnesses for RIFF have “. . . presented no studies that concluded that there was a pent-up demand for more convenient travel to Block Island and that a fast ferry from Quonset Point will increase the number of travelers to Block Island via fast ferry rather than redistribute the number of travelers among ferry carriers.” (at 14).

He stated that RIFF had “. . . presented no studies that showed that the passengers of Interstate Navigation were receiving inadequate service or there was not enough capacity on the current Interstate Navigation hi-speed and traditional ferries to meet the needs of passengers going to and from Block Island to Rhode Island.” (at 14).

More importantly, he explained that RIFF's passenger-only, summer only proposal "... is not true competition because Rhode Island Fast Ferry will not be running year-round service and will not be carrying vehicles and freight. This is what is known as 'cream skimming' or 'cherry picking.'" (at 14).

Dr. Mazze testified that the effect of authorizing RIFF's service would be a loss of revenues that "would result in Interstate raising rates, reducing the number of ferries to Block Island and/or downsizing the number of full-time and seasonal employees." (at 15).

Dr. Mazze concluded that "Rhode Island Fast Ferry and the Interstate hi-speed ferry from Point Judith would be in direct competition for passengers from the same geographic areas." (at 15).

Addressing Dr. Costa's testimony in surrebuttal, Dr. Mazze testified (Interstate Exhibit 6) that Dr. Costa:

... did an analysis and concluded based on 95% certainty that between 13% and 21% of the entire population of all Point Judith conventional ferry riders would take the \$50 fast ferry from Quonset. She further concluded that she was 95% sure that the percentage of all Point Judith fast ferry users that would take the fast ferry from Quonset to Old Harbor is between 22% and 32%. Since this number was high, [she] then cross-tabulated questions, made assumptions and developed scenarios to arrive at lower numbers, namely, 4 to 10% of conventional ferry passengers and .04 to 3% of fast ferry customers, using confidence levels from probability sampling. (at 7).

Turning to Mr. Donadio's testimony, Dr. Mazze testified that:

Mr. Donadio's statements about Interstate Navigation's operations, efficiency, ridership and ferry schedules are based on guesses and/or his own personal experience and not on research or benchmarking studies. ... He simply has no basis on which to competently comment on how Interstate Navigation could allegedly operate more efficiently. (at 8 – 9).

Mr. Donadio did not provide essential business documents for his own proposed service, such as a business plan, market feasibility study or marketing research yet he boldly commented on another ferry service's operational efficiency. Without

such supporting documents and analysis, in my opinion it is not possible for anyone to come to an informed, fact based conclusion . . . (at 9).

Dr. Mazze then turned to Mr. Kunkel's claim that Interstate's survey allegedly demonstrates evidence of public need for the RIFF ferry:

Since Mr. Kunkel did no independent research, and provided no study or data of his own, he would like to use the marketing study I designed as a basis for his conclusion. But for the reasons I have previously explained, my study simply cannot be used to conclude that there is an unsatisfied public need for a Quonset fast ferry. What my study shows, in conjunction with the analysis of Mr. Edge, is that if the Division authorizes RIFF's proposed service, there will be a significant negative impact on Interstate's year-round lifeline ferry service to Block Island. (at 11).

Cross examination of Dr. Mazze took place on March 22, 2016. On cross examination by Ms. Merolla, the attorney for the Town of Block Island, Dr. Mazze testified that Mr. Kunkel could not express an opinion as to the public need for a high speed ferry service from Quonset Point to Block Island because he "provides no background information in terms of any type of study . . . it's bizarre to me to provide an opinion based on absolutely no information." (at 76).

Dr. Mazze explained that Interstate was opposing RIFF's application for a CPCN because RIFF "is basically going to be cherry picking, cream skimming or going after the low hanging fruit of customers that are critical to Interstate to operate their lifeline business, their 12-month business." (at 79).

Dr. Mazze challenged Mr. Kunkel's opinion that there would be an unserved niche market place that would be activated (at 81) and explained that:

. . . there's only a limited number of people that . . . have an interest to go to Block Island, and to make the assumption that you could separate the market, draw a borderline and not be able to attract the customers of somebody else, would just not be . . . believable. (at 82).

Dr. Mazze has been doing these types of surveys for 55 years; he has personally “conducted over 40 studies,” including a study he did for Adler Pollock & Sheehan, counsel for RIFF. (at 85).

Dr. Mazze reaffirmed his position that “I still stand with my opinion that Interstate will lose 20 percent of their customer base, minimally 20 percent, I think it may even be higher . . . to Rhode Island Fast Ferry, and at \$40 . . . it’s going to be a higher number of individuals.” (at 104-05).

**B. Walter E. Edge, Jr., CPA**

Walter E. Edge, Jr., CPA, has a Master’s in Business Administration. (Interstate Exhibit 2, at 1). Utilizing the information provided by Dr. Mazze, Mr. Edge provided calculations and testimony “showing the expected adverse financial impact (if the requested RIFF fast ferry CPCN is approved) on both Interstate’s existing fast ferry service and Interstate’s traditional lifeline service, both of which will be directly, significantly, and negatively affected. I have calculated that Interstate would lose over \$1.2 million, which would require a 14.2% rate increase and/or a reduction in service . . .” (at 1).

In his opinion, “there is no need for the proposed RIFF service because the fast ferry market to Block Island is saturated . . . and . . . the proposed service will result in wasteful competition, cream skimming, and adverse impacts on Interstate’s lifeline service, the lifeline ratepayers, and the Town of New Shoreham (Block Island).” (at 2).

Mr. Edge explained that “Interstate’s traditional rates are calculated using 100% of the fast ferry profit. Lost revenue (without any reduction in service) will result in a reduction of the fast ferry profit and therefore reduce the traditional revenue. This will require an increase in traditional service rates and/or a reduction in service.” (at 4).

In Division Docket D-05-06, when Interstate was seeking a fast ferry CPCN from Point Judith, “Interstate completed a survey of its own customers to determine if there was a need for Interstate to provide a fast ferry service to its own customer base in order to provide them choice. Seventy percent of the ridership projected for this new fast ferry service was predicted to be from Interstate’s own traditional passengers.” (at 5).

Mr. Edge pointed out that “RIFF has completed no surveys, marketing studies, traffic studies, economic studies, or business studies.” (at 5).

Mr. Edge testified that when fast ferry operations run by Mr. Donadio’s former company, Island Hi-Speed Ferry (IHSF), began “Interstate’s revenue declined, hurting the lifeline ratepayers.” (at 5).

Regarding Mr. Kunkel, Mr. Edge testified that:

In Docket D-05-06, Mr. Kunkel concluded that the fast ferry market to Block Island was “saturated.” Given the occupancy information and concluding that the market was saturated, Mr. Kunkel opined that entry into this market by Interstate would be “absurd, economically irrational and contrary to the public interest.” (at 7).

Regarding Interstate’s motives, Mr. Edge testified that he has been working for Interstate for many years and that Interstate’s motive was:

. . . to eliminate the threat to Interstate’s lifeline customers of the addition of a cream skimming predator and direct competitor that intends to create wasteful competition for the sole purpose of putting dollars in RIFF’s pockets in the form of profits. This has never been about Interstate’s profits because they will not be impacted by RIFF. (at 10).

Turning to RIFF’s claim that granting a CPCN to RIFF would reduce summer traffic, Mr. Edge testified that:

. . . the only way traffic is reduced by RIFF’s entry into the fast ferry market to Block Island is if RIFF is directly taking away Interstate customers. (at 17).

Regarding the testimony of Ms. Dolan, Ms. Pughe, and Ms. George, Mr. Edge stated that they did not provide support for RIFF's application because they simply "point out that their organizations support the new service because it will bring economic benefits to North Kingstown and South County." (at 18).

Mr. Edge also explained that he believes that RIFF and Interstate would be in direct competition, "but it won't be fair competition." (at 20). Mr. Edge explained there could be fair competition under certain scenarios such as "if RIFF proposed to run year-round and provide runs in the winter" or if RIFF was required "to pay a fee to Interstate's lifeline service to help with the winter runs and lost revenue." (at 21).

On schedules WEE-1 and WEE-2, Mr. Edge demonstrated how he calculated the \$1,214,509 of lost revenue he expects if the CPCN is granted to RIFF.

Mr. Edge was cross examined on March 22, 2016. At the request of the Hearing Officer, Mr. Edge updated the exhibit prepared by Mr. Donadio regarding the Newport run and inserted actual numbers. Mr. Edge explained that until recently, the Newport service "has always been a loss and it's always been subsidized by the Point Judith customers." (at 121). But in 2014, customers went from 6,000 to almost 13,000 in the first year then increased to 16,000. By the third year, Interstate had a gain from the Newport run of over \$168,000. (at 121-122). This updated exhibit was marked Interstate Exhibit 13.

Mr. Edge is of the opinion that there is no need for the proposed RIFF fast ferry because the fast ferry market to Block Island is saturated. He testified that "I got that information from Mr. Kunkel's testimony . . . he is an economist expert and that's when he said, it was saturated, and I agree with him . . . there is significantly more available seats than there is demand . . ." (at 132).

Mr. Edge explained that because Interstate is “regulated on a rate base rate of return method when calculating the profit” (at 158-59), Interstate’s profits will not be affected by RIFF. He also testified that the investments into fixed assets by Interstate have been over \$30 million. (at 159-60). Mr. Edge explained that now that the Newport run is generating a profit, it “is going to be very helpful to the rates.” (at 165). Moreover, Mr. Edge emphasized that when IHSF began running, “[e]ach year we lost more customers.” (at 166).

Mr. Edge explained that there was no death spiral, as originally predicted by Interstate, because “Interstate finally got its own high speed ferry and stopped losing customers to Island Hi-Speed Ferry.” (at 203-04).

The Hearing Officer asked Mr. Edge for certain information which was provided at the hearing on March 24, 2016. Mr. Edge had calculated the need for a 14.2% across-the-board increase, but the Hearing Officer asked that it be broken out and that the rates be updated. Mr. Edge prepared a new WEE-3, which was included as part of Interstate Exhibit 15. This exhibit shows that Dr. Mazze’s projected losses would result in the need for an 8.17% increase in traditional rates and a 37% increase in high speed rates.

Utilizing Dr. Mazze’s projections, Interstate’s lost revenue would be \$1,224,970, but using Dr. Costa’s projections, Interstate’s lost revenue would be \$333,640. In other words, the only evidentiary dispute is the size of the projected losses, not whether they would occur.

We respectfully submit that Dr. Mazze’s study, and the conclusions he drew from that study, are more credible than the conclusions drawn by Dr. Costa. Dr. Costa conceded that she never performed a single marketing study in her life and that she was testifying as a mathematician, not as an expert in marketing studies. Dr. Mazze, on the other hand, has spent his entire professional life of 50 plus years doing this kind of work for businesses, governments,

educational institutions, and non-profits. His qualifications to perform such a study and draw conclusions from it were never challenged, whereas Dr. Costa, while probably an excellent mathematician, did no study of her own.

### **C. Joshua P. Linda**

The testimony of Joshua P. Linda is set forth in Interstate Exhibit 7. Mr. Linda is Vice President of Interstate, has a Bachelor's Degree in Business Management, and is a licensed Captain. He has worked for Interstate in various capacities for 27 years. (at 1).

Mr. Linda testified that the Newport operation is steadily increasing its ridership and that it "would be ridiculous" for Interstate to discontinue it. (at 2). Mr. Linda also testified that Interstate made a good investment in the purchase and complete renovation of the M/V *Islander*. (at 2).

During his testimony at the hearing on March 22, 2016, Mr. Linda testified in response to Mr. Donadio's claim that his company was paying \$0.30 to \$0.40 per gallon of fuel less than Interstate, that "I cannot see how he buys it for that amount less than we do. If that were the case, then he would be buying it less than the rack price in Providence."<sup>5</sup> (at 207).

Mr. Linda explained that Interstate buys fuel at the rack price plus \$0.15 per gallon, and the \$0.15 compensates the supplier:

. . . for delivering the oil down to the boats. We receive multiple shipments of oil for different boats. The big boats are fueled twice a week in the summer. The high speed boats are fueled once a day in the summer from multiple locations . . . We want a reliable company that has a proven track record . . . The deliveries are very important as far as their timing goes in the summer. The boats are only at dock for a certain amount of time on their schedules in the summer. So the truck has to be there at a certain time. (at 208).

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<sup>5</sup> Mr. Linda further explained that the rack price is ". . . the terminal price that it's sold at . . . wholesale terminals in Providence, and he would be buying it below that price if that were the case." (at 207).

Interstate's fuel company has "never had a problem with a shipment being missed or not delivered." (at 209).

Regarding Interstate holding down expenses, Mr. Linda explained that Interstate does "90 percent of our own maintenance work on all vessels" and that if Interstate "were to take the boats to shipyards to do this work, it would be much, much more expensive." (at 211).

Responding to Mr. Donadio's testimony that Interstate should reduce the number of its summer runs, Mr. Linda explained that "in the morning you're carrying a lot of people, cars, trucks, freight to the island, and then in the afternoon, evening you're carrying it all back . . . If we were to start cutting out trips in the middle of the summer, we by no means would be able to provide the service that we do." (at 212).

Mr. Linda discussed Mr. Donadio's proposal to have Interstate pay RIFF \$1 million for a non-compete agreement. He explained that Mr. Donadio:

. . . contacted us about having a meeting . . . Sue [Linda], Ray [Linda], and myself . . . met with Mr. Donadio. And he . . . wanted to know if we were interested in selling Interstate Navigation to him which we said we were not interested . . . Mr. Donadio followed up with an idea of if we were interested in developing ferry service out of Quonset Point, and using his facility, to Block Island . . . Then he had followed up with the third option which was an option of a non-compete agreement. (at 213).

Mr. Linda explained that:

After the meeting we discussed it, myself, Sue and Ray, about the Quonset Point option and we decided that it wasn't worth it for Interstate. The main reason was we felt it would take business away from our Point Judith business. We'd be basically competing with ourselves . . .

So I had sent Mr. Donadio an e-mail basically stating that, but that we would like to look into the non-compete option that he had suggested . . . he had brought up a year-to-year agreement where we'd pay him . . . 30,000 a year. And we were not interested in it. We asked if he would be . . . interested in a permanent non-compete and he came back with a \$1 million asking price . . . And we rejected the \$1 million price . . . He had ended the call by saying that if we were to revisit this in the future, the price of this would . . . be higher in the future. (at 213-14).

Mr. Linda authenticated an email to Mr. Donadio stating that Interstate was not interested in running a boat out of Quonset because “. . . we strongly feel that this service would drastically take away passengers from the Point Judith service.” (Interstate Exhibit 14). (See also pages 215-16).

These conversations took place in the summer of 2014. The RIFF CPCN application was filed in the summer of 2013. (at 215). The conclusion is inescapable. As he did when he formed IHSF, got a CPCN, and then sold out, we submit that Mr. Donadio seeks to do the same here. He wants to obtain a CPCN and sell it. He is not concerned about the public. He is solely concerned about personal profit.

Mr. Donadio authenticated a text he sent to Mr. Linda which became Interstate Exhibit 1, which stated in pertinent part:

Josh, thanks for taking time out of your busy schedule to meet this morning. In summary u would be purchasing the developmental rights and/or Business Plan to the ferry route as well as a non-compete to Block Island with RI Fast Ferry and myself and any related family member for life. . . .

In response to Mr. Donadio’s claim that Interstate made a bad investment purchasing the fast ferry *Islander* for the Newport run, Mr. Linda testified “I strongly disagree . . . We purchased it for about \$440,000 and invested over \$1 million into it and we basically ended up with a like-new vessel . . . we had the boat appraised and the appraisal came in at \$4.4 million.” (at 217).

Regarding Mr. Donadio’s suggestion that Interstate stop the Newport run, Mr. Linda stated “I totally do not agree . . . From the start we had said that it would take three years for the run to catch on. And the third season it definitely has caught on. The ridership has been steadily increasing every year.” (at 218).

Regarding Mr. Donadio’s claim in his testimony that RIFF had better Trip Advisor ratings, Mr. Linda testified that he investigated this and “I found that Interstate had a 4.5 rating as well as Rhode Island Fast Ferry . . .” (at 218).

Mr. Linda also explained that when Interstate sought permission for its own high speed ferry service, “we did a survey.” (at 230).

**D. Michael A. Voccola, Esq.**

Michael A. Voccola is an attorney and also has a degree in marketing. (March 22, 2016 tr., at 38). He filed testimony on behalf of The Lighthouse Inn, Galilee, which is located directly across the street from the Block Island docking facility in Galilee.

Mr. Voccola explained that The Lighthouse Inn objected to RIFF’s request for a CPCN because:

. . . any ferry service from Quonset Point, particularly a seasonal-only service, will severely impact Interstate’s revenues—revenues they need to maintain the winter service . . . Importantly, any decline in ridership in Galilee will impact all the businesses which have evolved as a result of this historic service. Granting the CPCN for Quonset Point will create an unstoppable downward economic spiral for greater Galilee.

Allowing any competitor in a regulated industry to cherry-pick when to do business—when other regulated providers in that same industry do not and cannot—is an ill-conceived business model that will create far more disadvantages than advantages to our citizens, patrons and business owners when we can least afford it. (Interstate Exhibit 4, at 4).

### **III. THE TOWN'S CASE**

#### **A. Nancy Dodge**

The Town put on its case on March 24, 2016. Nancy Dodge, Town Manager of the Town of New Shoreham, testified as a year-round resident. In part, she testified that:

I find it hard to believe that the word “competition” is used in Supreme Court decisions or in these hearings doesn’t include the concept of fair competition, and that’s really what we’ve always been talking about here. In sixteen years, I’ve never seen another ferry company or developer come in and say, “We’d like to run a ferry twelve months a year to Block Island.” (at 15-16).

She further explained that:

. . . it is inconceivable that a service in June, July, August and September bringing people to the Island is any form of fair competition. I find it really hard to believe that there is anyone out there who can’t get to the Island during the high season on a ferry that exists now. . . the idea that a ferry from Quonset would bring an entirely new group of people, not part of the existing ridership . . . seems impossible to understand . . . People who want to come already know where we are and they know how to get there . . . If they’re going down Route 4 and the traffic is bad, they’re going to be urged to deviate to Quonset and go over that way. And anything that impacts the traditional ferry and the revenue source that Interstate relies on . . . is something that we are very, very concerned about . . . I find it hard to believe that convenience and necessity can apply in this case. (at 16-19).

#### **B. Norris Pike**

Norris Pike, Second Warden, testified that his concern was “congestion in the area that Mr. Donadio proposes to discharge the passengers.” (at 24).

He said that Mr. Donadio was proposing to bring significant passengers “into an extremely congested area without a public safety study [and] without the town’s ability to look at the situation to plan accordingly, it’s beyond comprehension to me. Block Island is at a point now where I believe . . . we are saturated. We are pretty much maximized with the amount of people that we can handle.” (at 25).

Mr. Pike also was concerned about the effect on Interstate and the Town if the Division granted the requested CPCN, testifying that:

. . . to have someone come along and take the gravy from Interstate, which . . . would . . . make their profitability in the wintertime less palatable, I think it's not going to do anybody any good. It's just really beyond me why Mr. Donadio would think he could go ahead without the town's consent . . . it's contrary to our own comprehensive community plan to control the safety issues in the town to the best of our ability. (at 26-27).

### **C. Stephen Land**

Harbormaster Stephen Land is also a New Shoreham Police Officer. (Town Exhibit 2, at 2). He is also a licensed Coast Guard captain. (at 2). He testified that: "The addition of another ferry service into an already extremely busy, mixed use harbor should be of great concern to everyone." (at 3).

He concluded in his direct testimony that: "It is my professional opinion, with many years experience as a captain and as the Block Island Harbormaster, that the addition of the RIFF ferries in the Old Harbor of Block Island would pose a serious public safety hazard." (at 4).

Interstate believes that a serious public inconvenience that arises to the level of a safety hazard on Block Island falls squarely within the test of whether the "public convenience" test has been met. As shown above, the statutes make it clear that the Town being served is an important party in a CPCN case. Therefore, if the proposal would cause serious inconvenience to the Town and its residents that rises to the level of a safety hazard, a determination should be made that the public convenience test has not been met.

### **D. Ken LaCoste**

Ken LaCoste, First Warden, testified that Mr. Donadio presented his plans to the Town Council in the summer of 2013. (Town Exhibit 1, at 3). The Council expressed a number of concerns, including "disruption, crowding and problems with vessel maneuvering. Safety is a

serious concern”; “the island is already saturated with people is a serious concern”; and “Interstate Navigation provides the only ferry service to and from Block Island during the off-season months and serves as a life line . . . if allowed to operate, [RIFF] would divert significant revenues from Interstate Navigation, thus resulting in either another rate increase for Town residents or a substantial reduction in service during the off-season months.” (at 4).

Mr. LaCoste testified that in his 2013 presentation to the Town, Mr. Donadio said that he was “not going to force a ferry service on this island.” (at 5). The Town voted against the RIFF application and asked Mr. Donadio to honor his commitment not to pursue the CPCN application if the Town opposed it. (at 6). However, Mr. Donadio refused to honor his commitment to the Town. (at 7).

On cross examination on March 24, 2016, Mr. LaCoste testified that the Tourism Council recently wrote a letter to the Town Council stating that “The tourism council did not intend for [its] letter to be used as an endorsement of the proposed ferry.” (at 60).

Mr. LaCoste testified that the Tourism Council does not speak for the people of Block Island and that “the town council is the voice of the Island.” (at 78). Mr. LaCoste also pointed out that Steven Filippi, one of the members of the Tourism Council, is the brother of Paul Filippi, who is the sole owner of Bluewater, which plans to build a dock and lease it to RIFF. (at 78-79).

#### **IV. RHODE ISLAND FAST FERRY’S CASE**

##### **A. Myrna George**

Myrna George testified for RIFF. She is the President of the South County Tourism Council. (RIFF Exhibit 2). She testified that: “The primary reasons the Council supports the Quonset Point departure proposal are that it may reduce some of the traffic burden in South County . . .” (at 3). In the letter attached to her prefiled testimony (RIFF Exhibit 3), she stated in

pertinent part: “The cardinal rule to consumer enjoyment of a tourism destination, first and foremost is: Travel must not be a burden! Sitting for prolonged periods of time in traffic is that very burden.”

During cross examination on March 2, 2016, she reaffirmed that: “the primary reason that the South County Tourism Council is in favor of Fast Ferry’s proposal is it may reduce some traffic burden in South County.” (at 39).

Ms. George conceded that she did no surveys in connection with her testimony. (at 40-41). She also conceded that she would like to think she is a friend with Mr. Donadio. (at 41). She testified that reducing the traffic burden would be accomplished by “coming off of Route 95 and Route 4, not going south into the summer beach traffic, and instead going to Quonset . . .” (at 44-45, 48). Ms. George also conceded there was nothing in the letter attached to her testimony that talks about the public need not being satisfied. (at 49, 52). Moreover, she clarified that her testimony regarding need not being satisfied dealt with the need of an over-burdened highway. (at 53-54).

The Hearing Officer, after hearing arguments from the parties on a motion to strike, denied the motion to strike, but stated that Ms. George’s testimony was not accepted as the testimony of an expert witness. (at 70). The Hearing Officer also summarized her testimony (and she agreed with the summary) that “there’s a huge traffic problem in the summertime . . . and . . . [if] some of that traffic is diverted to Quonset, that could have the potential to alleviate some of the traffic.” (at 70).

Ms. George’s testimony was (1) public comment/personal opinion from a friend of Mr. Donadio, and (2) directed solely to traffic issues. It is, therefore, of no evidentiary help to RIFF.

**B. Martha Pughe**

Martha M. Pughe is a former previous Director of the North Kingstown Chamber of Commerce (RIFF Exhibit 4). She attached a letter to her testimony (RIFF Exhibit 5) in which the Chamber of Commerce stated that granting RIFF's application would create "a more robust economy in Rhode Island simply by providing a choice of services for consumers to utilize."

On cross examination, she clarified that she was not testifying as an expert. (at 75). Her primary concern was with improving business in North Kingstown. (at 79-80). She testified that she was "not concerned" about any negative impact that RIFF's proposal may have on the Town of New Shoreham. She stated that she had traveled on Interstate's vessels and found the ferry to be "very adequate." (at 80). She also conceded that the RIFF ferry "could divert some business" from Interstate. (at 81).

Ms. Pughe's testimony is also of no evidentiary help to RIFF. It is (1) public comment/personal opinion, and (2) directed solely to improving business in North Kingstown.

**C. Elizabeth Dolan**

Elizabeth Dolan is a past President of the North Kingstown Town Council (RIFF Exhibit 6). She testified that the Council was in support of the RIFF's proposal and attached a letter to her testimony. (at 2). The attached letter (RIFF Exhibit 7) expressed support for the application.

On cross examination, Ms. Dolan stated that she was not testifying as an expert. (at 91). She conceded that, although she testified in her prefiled direct testimony that she believes RIFF would "attract additional tourism revenue to Block Island," she never looked at anything involving the trends of tourism on Block Island and her opinion is not based on any studies. (at 92-93).

Regarding the studies she has looked at, including the Town's comprehensive plan, they dealt exclusively "with the benefits to North Kingstown." (at 94).

She did not look at the Town of New Shoreham's comprehensive plan because "I'm more concerned about my own town's goals . . ." (at 98). She conceded that if traffic is diverted off Route 95 and Route 4 over to Quonset instead of Galilee, Interstate will have summertime revenue loss. (at 99-100).

She clarified that when she was testifying about "public interest," she meant "public interest" defined by North Kingstown. (at 100).

She testified that RIFF would alleviate traffic congestion by "diverting those people who are driving down to Galilee to get on Interstate's ferries and instead sending them over to Quonset." (at 103-04).

Ms. Dolan is of no evidentiary assistance to RIFF. Her testimony is (1) public comment/personal opinion, and (2) directed solely to North Kingstown's interests.

#### **D. Robert Billington**

Robert Billington is President of the Blackstone Valley Tourism Council. (RIFF Exhibits 8 and 9). Mr. Billington clarified that the Council had not taken a vote on the RIFF proposal and therefore his testimony was not the Council's testimony. (at 111-14). He also conceded that he was not testifying as an expert witness, and that he had done no surveys prior to expressing his opinion. (at 114-15).

He testified that he ran "Tour Rhode Island," which included a trip to Block Island, for about 7 years. (at 115). This event was staged once a year on the first Saturday in May of each year. (at 115). All participants took the ferry from Narragansett. (at 116). Nobody ever said they

did not want to go to Block Island on his tour because the ferry was leaving from Narragansett. (at 120).

Mr. Billington said that he has known Mr. Donadio for at least 20 years. (at 120).

Mr. Billington testified that he did not explore whether the RIFF proposal might have a negative impact on the existing ferry to Block Island. (at 121).

Regarding Interstate's service, he testified that "I respect that company very, very much . . . I do like their service, I'll continue to use it . . ." (at 121-22).

Mr. Billington was not aware that the Block Island Town Council had voted against the proposal, but he opined that "**I think communities are the stakeholders, they're the final judge . . . .** That has to be reconciled with the people of Block Island as far as I'm concerned." (at 123-24, emphasis added).

Mr. Billington conceded that some people who normally drive to Galilee would divert to Quonset Point if the RIFF proposal was approved. (at 125-26).

After hearing arguments on a motion to strike, the Hearing Officer ruled that Mr. Billington's testimony was being taken "as his personal opinion as if he were a . . . member of the public offering public comment." (at 145).

Mr. Billington provided no evidentiary support for RIFF's case. He presented public comment/personal opinion as a friend of Mr. Donadio. He was not even made aware that Block Island opposed the RIFF proposal, and conceded that Block Island should be "the final judge."

#### **E. Steven King**

RIFF's next witness was Steven J. King, Managing Director of the Quonset Development Corporation. (RIFF Exhibit 10). He also submitted a supporting letter. (RIFF Exhibit 11).

On cross examination on March 2, 2016, Mr. King admitted that he was not testifying as an expert witness. (at 147). Mr. King limited his testimony regarding public need to “the public need at Quonset” and “improvement of investment at Quonset.” (at 148-49). He also admitted that he is a “friendly business colleague” with Mr. Donadio and that he has known Mr. Donadio since 2003. (at 150-51).

He clarified that the Board of Directors of the Quonset Development Corporation had not adopted a resolution because it was never voted on. (at 152).

He testified that (1) he never looked at whether the RIFF proposal would have a negative impact on the existing Block Island ferry; (2) he did not look at whether the Town of New Shoreham supported the plan; and (3) Mr. Donadio did not tell him that the Town of New Shoreham did not support the plan. (at 154-55).

Mr. King conceded that his focus was “solely on the Quonset Development Corporation.” (at 155).

Regarding his personal experiences with Interstate, he said that their service has “been fine” and that it is “adequate.” (at 155).

He conceded that if the RIFF proposal is approved, there would be diversion of traffic from Route 95 and Route 4 to Quonset instead of Galilee and this would cause loss of revenue to Interstate. (at 155-56).

Mr. King has dealt with Dr. Mazze in the past and testified that “He’s very well qualified.” (at 156-57).

Regarding the Quonset air show, which runs one weekend per summer, Mr. King testified that “access to the business park is nearly impossible” at that time. (at 157-58).

Finally, Mr. King clarified that the “need” he was talking about in his testimony was restricted to Quonset and there was no reference to “need” in his supporting letter. (at 158-59).

Mr. King also confirmed that, contrary to what Mr. Kunkel claimed, funding for the Quonset improvements had nothing to do with Block Island. (at 160-61).

He reiterated that he was not speaking to whether there was a ridership need to get to Block Island through Quonset. (at 161-62).

Mr. King was of no benefit to RIFF. His testimony was (1) public comment/personal opinion from a friend of Mr. Donadio’s, and (2) dealt solely with Quonset. He conceded he was not testifying about “public” need, but only about Quonset’s needs.

#### **F. Summary of RIFF Public Comment**

The public comment witnesses were simply presenting expressions of personal opinion. None of them relied on studies regarding whether there was a need for a summer only, passenger only fast ferry from Quonset Point to Block Island. They are therefore entitled to no evidentiary weight. *See Newbay Corporation v. Annarummo*, 587 A.2d 63, 66-67 (R.I. 1991).

#### **G. Charles Donadio**

RIFF’s next witness was President Charles A. Donadio, Jr., who provided direct testimony (RIFF Exhibit 12) and rebuttal testimony (RIFF Exhibits 14 and 15, together with supporting documents 16 through 19).

In Exhibit 12, Mr. Donadio testified regarding his belief that there is a “public need” for his service:

I believe there is a market of passengers who currently choose not to travel to Block Island, even by high speed ferry, who would use RIFF’s proposed Quonset service if offered the opportunity. Our operation at Quonset offers fast ferry passengers amenities not available to users of either Interstate’s Point Judith or Newport fast ferry services that I believe would incentivize those who currently choose not to patronize those services even though it would mean more time spent

travelling [sic] over water when compared to Interstate's Point Judith high speed. (at 5-6).

According to Mr. Donadio, those amenities include the possibility of "a new 4,000 square foot terminal facility . . ." (at 7). Mr. Donadio "studied RIFF's market" (at 8), by simply looking at population densities in various surrounding towns. (at 8 -9). The only information provided by Mr. Donadio was how many people and businesses reside in each of the towns. This was not a "study" of any kind.

On cross examination on March 2, 2016, Mr. Donadio confirmed that he had "no intention" of using any profits from the proposed RIFF fast ferry to assist Interstate's lifeline service to Block Island." (at 178). He also testified that "There is no formal substantial written business plan for this proposal." (at 179).

Mr. Donadio also conceded that "There would be some form of competition" with Interstate and that "We've always been forefront that there will be crossover. Our estimation of crossover is a lot different than yours." (at 186).

Mr. Donadio conceded that "I haven't done a study." (at 190).

Mr. Donadio stated that he asked the Block Island Town Council for their support and told them he would not go forward with his plan unless the Town supported him. (at 193-94). However, the Town Council rejected Mr. Donadio's request for support and asked him to honor his commitment and not to go forward, but Mr. Donadio went forward anyway. (at 195-97). One reason he went forward was because it was "very important" to have the support of the Block Island Tourism Council. However, the Tourism Council later stated that it "did not intend for [its] letter to be used as an endorsement of the proposed ferry." (RIFF Exhibit 40).

Mr. Donadio also testified that he met with Susan Linda, Raymond Linda, and Joshua Linda, at his request. (at 201-02). He asked the Lindas if they were interested in selling

Interstate, and they said no. (at 202-03). He asked if they would be interested in running a ferry out of Quonset, and they said no. (at 203). He floated the idea of a non-competition clause. (at 203-04). There was discussion of “around a million” dollars for a permanent non-competition agreement. (at 205). Mr. Donadio denied having said to the Lindas that if the Lindas did not purchase a permanent non-competition agreement from him for about \$1 million, that the price would only go up. (at 206). As shown above, Mr. Linda expressly contradicted this.

Do we really need any more evidence that Mr. Donadio has not filed for this CPCN to serve the public? He is solely interested in making a fast profit. By contrast, the Wronowski/Linda family have made lifeline ferry service to Block Island a life-long, three generation commitment.

Mr. Donadio confirmed that his testimony was based on his own personal opinion without the benefit of any studies or surveys. (at 209-10).

Mr. Donadio conceded that Interstate had enormous capacity available and has plenty of capacity to take more passengers. (at 229). He also conceded that Interstate has invested many millions of dollars in its service. (at 229-30)

The hearings resumed on March 15, 2016 and the cross examination of Mr. Donadio continued.

Photographs of the existing RIFF terminal facility and the existing Interstate terminal facility were introduced into evidence as fair and accurate representations of these facilities (at 70-72). Even a cursory examination of these photographs demonstrates that Interstate’s existing facility is significantly better than RIFF’s existing facility. The “new” RIFF terminal facility that Mr. Donadio would like to compare to Interstate’s facility does not yet exist. (at 75). In his 2013

CPCN application, Mr. Donadio claimed RIFF was about to begin construction, but construction still has not begun three years later. (at 75).

Mr. Donadio issued a press release (Interstate Exhibit 11) that stated that the proposed Quonset Point location “avoids all the heavy beach traffic during the busy summer months.” (at 94). Mr. Donadio confirmed that this statement correctly sets out RIFF’s proposed marketing approach. (at 84-85). In other words, RIFF’s plan, by their own admission, is to divert Interstate’s customers from the highway to Quonset.

The Hearing Officer ruled that Mr. Donadio’s testimony would not be treated as expert testimony. (at 95).

Mr. Donadio conceded that:

- Interstate provides adequate year-round lifeline service to Block Island. (at 122-23).
- RIFF has no formal business plan, no formal marketing plan, no formal marketing feasibility study, no formal advertising budget or plan, no formal revenue projections, and no formal proforma profit or loss statements. (at 132-34).
- RIFF does not have “any studies, surveys or calculations that show that there is a demand for Rhode Island Fast Ferry’s services which is not being met by Interstate.” (at 135-36).
- Both Interstate’s existing high speed ferry service and RIFF’s proposed service would have heating and air conditioning, are both high speed, would both have online ticket sales and reservations, would both have food and beverage sales, and would both have rest rooms. (at 136-37).

- RIFF is projecting ridership of approximately 32,000 riders in year one, and with a possible ticket price of \$50, that would generate approximately \$800,000 for RIFF. (at 143-44).

When questioned why he was not proposing a year-round ferry from Quonset to Block Island, Mr. Donadio responded “there is not enough ridership” and “Interstate fulfills that need perfectly fine.” (at 216).

#### **H. Summary of Mr. Donadio’s Testimony**

Mr. Donadio’s testimony provided no probative evidence of public convenience or necessity for RIFF’s proposed high speed ferry service. He expressed his personal opinion only, and that opinion was not supported by any study, business plan, marketing plan, or other information that would establish a foundation for or lend weight to his personal opinion.

This is surprising, especially because when Mr. Donadio sought a CPCN from this Division for IHSF in Docket 98-MC-16, he provided the Division with a full business plan, including a marketing plan and proforma financial information. Moreover, when he sought a CPCN for IHSF, he hired Dr. Timothy Tyrrell of the University of Rhode Island as an expert witness, one of the foremost tourism experts in the country. Dr. Tyrrell submitted to the Division support for his expert testimony in the form of two extensive studies. We ask that the Division take administrative notice of the business plan submitted by Mr. Donadio in the IHSF docket, together with the testimony and studies submitted by Dr. Tyrrell. For some reason, Mr. Donadio now appears to believe that he no longer needs to provide facts, data, plans, or studies in order to obtain a CPCN from the Division.

## **I. Dr. Stephanie Costa**

The next witness who testified on behalf of Mr. Donadio was Dr. Stephanie Costa, a mathematician (RIFF Exhibit 19) and a family friend. (at 27). Dr. Costa's testimony mostly supported Interstate's case and undercut Mr. Donadio's case. Dr. Costa conceded that she never conducted a marketing research study of any kind. (at 12). Dr. Costa testified that Dr. Mazze used a non-probability convenience sample to conduct his survey and she agreed that approach is one legitimate way to do such a survey. (at 14).

Dr. Costa then looked at Dr. Mazze's numbers and recast them in a "probability mode." (at 15). She testified that the technique used by Dr. Mazze "is very similar to what we would use in a probability-based random sampling." (at 17). This is why she felt "comfortable recasting his numbers using . . . probability . . ." (at 17).

Dr. Costa concluded, after recasting Dr. Mazze's numbers, that there was a 95% certainty that Interstate would lose between 4% and 10% of its traditional customers to RIFF. (at 18). She also conceded that Interstate will lose customers if RIFF is granted a CPCN, and the only disagreement between her and Dr. Mazze is how many customers will be lost. (at 18).

Dr. Costa was asked to utilize her 95% certainty figure of 4% to 10% loss of traditional customers to calculate an estimated revenue loss for Interstate, and she calculated a loss of \$410,888. (at 23).

Dr. Costa agreed that she had no formal educational background or training in marketing or marketing research. (at 26).

Mr. Donadio never asked her to do a survey that would determine the number of passengers that RIFF would take away from Interstate. (at 30).

Dr. Costa also conceded that she has no background in business. (at 33).

In fact, Dr. Costa conceded that she was **not** testifying “as to whether there’s a public need for a new high speed ferry service from Quonset Point to Block Island . . .” (at 41). Therefore, her testimony is of no help to RIFF.

However, Dr. Costa clarified that if you have no data, and you perform no analysis utilizing data, then you are left merely with personal opinion. (at 42-43). This is why Mr. Donadio’s testimony was merely personal opinion, but more importantly, as will be shown later, it is why Mr. Kunkel’s testimony, which was unsupported by any data, survey, or analysis, was only personal opinion, is inadmissible as expert testimony, and should be stricken or given little or no weight.

#### **J. Lawrence Kunkel**

RIFF’s final witness was Mr. Lawrence Kunkel. (RIFF Exhibits 22, 23, and 24). Without conducting any studies or relying upon any data or analysis, Mr. Kunkel (who is not a Ph.D.) simply expressed his bald personal opinion that “there is a public need for such a service and that RIFF’s proposed service will satisfy that need.” (Exhibit 22, at 4).

When asked for the basis of that opinion, Mr. Kunkel gave three reasons, none of which withstand scrutiny.

The first alleged reason was that the government has invested \$660 million in infrastructure improvements in Quonset. (at 4). However, it was established through cross examination that there was no connection whatsoever between the \$660 million and ferry service to Block Island. (Cross, at 227).

The second alleged reason was that the Quonset Development Corporation allegedly “made a policy decision” that this proposal would serve the public’s marine transportation needs when it provided a lease to RIFF. (at 5). However, on cross examination, it was again

established that this lease was given for the Quonset to Martha's Vineyard ferry run and there was no mention in the lease (or elsewhere) of service to Block Island. (Cross, at 229).

The third alleged reason was his opinion that there is allegedly a dormant, unserved market for additional high speed ferry service to Block Island that is "not currently satisfied by Interstate Navigation's fast ferry service from either Point Judith or Newport." (RIFF Exhibit 22, at 5). However, this "studied opinion" expressed by Mr. Kunkel is purely a personal opinion because it has no foundation in any study, data, or analysis.

Mr. Kunkel's credibility was seriously called into question when he testified that "it is logical to assume that . . . there will not be any crossing of the dock and that potentially every single customer could be a new customer." (at 232-33). In other words, despite all of the testimony about people traveling from the northern part of Rhode Island to Galilee who would be enticed to get off Route 95 and Route 4 and diverted to Quonset Point, Mr. Kunkel incredulously believes that "every single customer" of RIFF could be "a new customer." Not only does this make no sense, it is not believable, is against the overwhelming evidence, and illustrates how little weight, if any, should be given to Mr. Kunkel.

When Mr. Kunkel was asked whether he agreed with Dr. Costa's testimony that "a valid analysis regarding how a population will behave" cannot be done "if it is not based on any survey data," Mr. Kunkel could only state, "I don't agree with her analysis." (at 236).

Mr. Kunkel conceded that he conducted no marketing research study to determine if his so-called "dormant market" for additional high speed ferry service to Block Island was not being satisfied by Interstate. (at 241). He also amazingly claimed that "there will be no competition between Rhode Island Fast Ferry and Interstate's business if the license is granted." (at 244).

Mr. Kunkel admitted that he was given no information by Mr. Donadio prior to preparing his testimony. (at 260). Mr. Kunkel was not given a business plan or marketing plan; he did not rely on any specific tourism, travel, or population studies or reports; and he performed no studies regarding whether the proposed ferry service would be in the public interest or needed. (at 260-61).

He did, however, concede that Interstate is adequately serving the lifeline needs of Block Island. (at 261-62).

Mr. Kunkel conceded that he has never conducted even a single marketing survey for a business (at 262), that he has seen no studies that would demonstrate that RIFF's service would not negatively affect Interstate's revenues (at 264), and that he did no study to determine what percentage of RIFF's passengers would be passengers who have never been to Block Island. (at 264).

#### **K. Motions to Strike Mr. Kunkel's Testimony**

The hearings resumed on March 22, 2016, with Motions from Interstate and the Town to strike Mr. Kunkel's testimony. (at 8).

Attorney Merolla pointed out that Mr. Kunkel identified three alleged bases for his opinion. The first basis was the state and federal investment in Quonset. (at 9). But 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. (at 9-10).

The second basis was that Quonset had allegedly made a policy decision when it granted RIFF's lease at Quonset. But it was revealed that the lease said nothing about high speed service from Quonset to Block Island, and that the purpose of the lease was to establish high speed ferry service from Quonset to Martha's Vineyard. (at 10-12).

The third basis of his opinion was simply that he was an expert. (at 12).

Ms. Merolla pointed out that the Supreme Court has stated that simply being an expert does not allow a person to express an opinion without first laying a proper foundation and establishing valid reasons to support the opinion, such as surveys, studies, data, analyses, etc. Yet Mr. Kunkel admitted that his opinion was not based on studies of any kind and that he had conducted no marketing surveys for businesses. (at 12-13).

Interstate joined in the motion. (at 13-14). Interstate clarified that it was not arguing Mr. Kunkel was not an expert (at 16), but pointed out that an expert opinion must be based on facts and data to determine whether the opinion has probative force or is mere speculation. (at 17-18).

The motion to strike was taken under advisement (at 18), and the parties were given the opportunity to “further elaborate on their positions in their briefs.” (at 19).

Interstate draws the attention of the Hearing Officer to a series of Rhode Island cases that require that facts and data must underlie an expert opinion or it will be given no weight because of a lack of foundation.

In *Nasco, Inc. v. Director of Public Works*, 360 A.2d 871, 876 (R.I. 1976), the Supreme Court stated:

. . . in . . . *Kargman v. Jacobs*, 113 RI 696, 703, 325 A.2d 543-547 (1974), or *L’Etoile v. Director of Pub. Works*, 89 RI 394, 402, 153 A.2d 173, 178 (1959) . . . we ruled that an expert’s opinion based solely on the witness’ “experience”. . . without detailing any specific reasons or factors, **was entitled to no weight**. An expert may not give an opinion without describing the foundation on which his opinion rests. (Emphasis added).

Similarly, in *Sweet v. Murphy*, 473 A.2d 758, 761 (R.I. 1984), the Supreme Court stated that:

. . . this court [has] held that “an expert’s opinion based solely on the witness’ “experience” . . . without detailing any specific reasons or factors, **was entitled to no weight**. *Id.* at 721, 360 A.2d at 876. (Emphasis added).

In *Gorham v. Public Building Authority of the City of Providence*, 612 A.2d 708, 717

(R.I. 1992), the Supreme Court held:

“an expert’s opinion must be predicated upon facts legally sufficient to form a basis for his conclusion.” *Alterio v. Biltmore Construction Corp.*, 119 R.I. 307, 312, 377 A.2d 237, 240 (1977) (citing *Nasco, Inc. v. Director of Public Works*, 116 R.I. 712, 360 A.2d 871 (1976); *Dickinson-Tidewater, Inc. v. Supervisor of Assessments*, 273 Md. 245, 329 A.2d 18 (1974)). “[F]acts upon which the opinion of the expert is based must be stated; otherwise, ‘it becomes impossible to ascertain whether the conclusion drawn from them possesses sufficient probative force; or is not mere conjecture or speculation.’ “ 119 R.I. at 313, 377 A.2d at 240 (quoting *Dickinson-Tidewater, Inc.*, 273 Md. at 253, 329 A.2d at 23-24; see also *Uhlik v. Kopec*, 20 Md.App. 216, 314 A.2d 732 (1974)). **An expert’s opinion about the value of buildings that is based solely on the expert’s experience in evaluating property is entitled to no weight in the absence of any specific reasons or factors for arriving at such an opinion.** See *Nasco, Inc.*, 116 R.I. at 721, 360 A.2d at 876. “An expert may not give an opinion without describing the foundation on which his opinion rests.” *Id.* Indeed in *L’Etoile v. Director of Public Works*, 89 R.I. 394, 153 A.2d 173 (1959), this court affirmed the trial justice’s exclusion of an expert’s opinion concerning the fair-market value of property that was based on his experience in real estate. This court reasoned, “To assist him in conducting an intelligent cross-examination, respondent was entitled to know the reasons or factors on which the witness relied to support his opinion.” *Id.* at 402, 153 A.2d at 178. (Emphasis added).

More recently, in *Franco v. Latina*, 916 A.2d 1251, 1258 (R.I. 2007), the Supreme Court ruled:

When presenting opinion testimony, “an expert witness shall be first examined concerning the facts or data upon which the opinion is based.” R.I. Evid. R. 705. **An expert opinion must be derived from sufficiently articulated facts to allow the trial justice to determine whether the opinion elicited has probative force or is merely speculative.** *Gorham v. Public Building Authority of Providence*, 612 A.2d 708, 717 (R.I. 1992). “An expert may not give an opinion without describing the foundation on which the opinion rests.” *Id.* (quoting *Nasco, Inc. v. Director of Public Works*, 116 R.I. 712, 721, 360 A.2d 871, 876 (1976)). (Emphasis added).

The first two bases of Mr. Kunkel’s opinion were eliminated on cross examination as without any basis whatsoever. That leaves only the third basis of his opinion, which was that he believed he could testify to alleged public need simply because he is an “expert.” The Supreme

Court has made it absolutely clear that simply being an expert does not allow a person to present an opinion. Expert testimony must have an appropriate foundation, with facts, data and analyses. Since the reasons which allegedly supported Mr. Kunkel's opinion were thoroughly discredited, we are left with an opinion not based on any facts, data, studies, or analyses, and therefore it should be stricken, or at a minimum, be treated simply as personal opinion/public comment and given little or no weight.

RIFF's case is therefore without any credible supporting evidence to underlie its claim that the public convenience and necessity require RIFF's proposed ferry service from Quonset Point to Block Island.

Interestingly, the Hearing Officer asked the parties during oral argument on this motion, "Did Island Hi-Speed Ferry offer a survey or study back in 1998?" (at 33). Counsel for RIFF responded "[t]here was no survey in 1998. I just asked Mr. Donadio. Okay?" (at 33). The Hearing Officer responded "Subject to check." (at 33).

However, in the 1998 IHSF docket, IHSF filed testimony and supporting documentation from Timothy J. Tyrrell, Ph.D. Dr. Tyrrell's work concentrated, as he testified, in "tourism economics," which he defined as "the measurement of economic variables related to the tourism industry and the development of theoretical models to explain the behavior of tourists in the tourism industry. This leads to the creation of planning and forecasting models for the industry." (at 2, question 8).

Dr. Tyrrell had previous experience working with the Towns of Narragansett and Block Island "providing them with economic information about the tourism industry of their area in order to help with their planning process." (at 2, question 11).

Dr. Tyrrell testified that the proposed IHSF ferry service would be “a niche-market that is reasonably distinct from the market served by the existing ferry service.” (at 9, question 64). In reaching this expert opinion, Dr. Tyrrell relied upon, and attached as exhibits to his testimony, the Port of Galilee Master Development Plan prepared for the Rhode Island Economic Development Corporation (74 pages) and the Rhode Island Travel and Tourism Research Report for which Dr. Tyrrell was the author dated April 30, 1997 (29 pages).

Regarding the Galilee Master Development Plan, Dr. Tyrrell testified that he assisted the contractor who put the Plan together “with the conduct of a visitor survey and a car count survey” and that he also “participated in four of the project meetings.” (at 3, question 19).

Dr. Tyrrell pointed out that his tourism research report was prepared by him with assistance from his students and had been published for 15 years. (at 3, question 22).

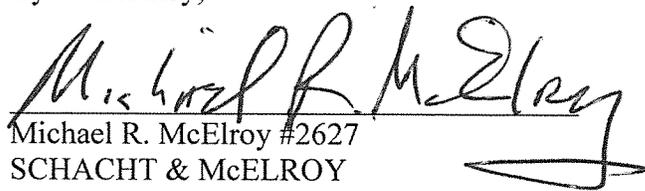
Dr. Tyrrell also pointed out that he had reviewed IHSF’s business plan. (at 3, question 23).

Dr. Tyrrell then expressed his expert opinion, which was based upon not only his qualifications, but IHSF’s business plan and studies that he had either directly participated in or authored. Dr. Tyrrell’s expert testimony was accepted because it had a proper foundation. By contrast, Mr. Kunkel’s testimony should be rejected.

## CONCLUSION

We respectfully submit that RIFF has failed to meet its burden of proof of establishing that the public convenience and necessity require the proposed service and therefore its request for a CPCN should be denied. Interstate has provided year-round lifeline ferry services to Block Island since 1933. The Division has regulated Interstate since the Division was created. The Division has been involved in many proceedings involving Interstate. The Division knows that Interstate, in its 83<sup>rd</sup> year of operation, is a small, family owned business. This Division knows Susan (Wronowski) Linda, the President of Interstate, her husband, Raymond Linda, the General Manager of Interstate, and their son, Joshua Linda, the Vice President of Interstate. The Division has witnessed first-hand Interstate's entire operation and knows of Interstate's commitment to providing safe, reliable, convenient, and affordable year-round lifeline passenger, vehicle and freight ferry service to Block Island. These services would be threatened if RIFF is granted the cream-skimming, summer-only, passenger-only CPCN it seeks.

Respectfully submitted,  
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By its attorney,

  
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Dated: June 7, 2016

**CERTIFICATE OF SERVICE**

I certify that on the 7<sup>th</sup> day of June, 2016, I emailed a true copy of the foregoing to the attached service list.

  
Theresa Gallo

*Interstate Donadio Post Hearing Memorandum*

**Rhode Island Fast Ferry (RIFF) – CPCN Application Docket No. D-13-51**  
**Updated 11/7/14**

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