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

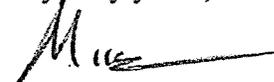
RE: RHODE ISLAND FAST FERRY, INC.
Docket No. D-13-51

Dear Luly:

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

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 Reply Memo

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 REPLY MEMO

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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 REPLY MEMO

INTRODUCTION

In apparent recognition of the inadequacy of the evidentiary record presented by Rhode Island Fast Ferry (RIFF) in this docket, RIFF has resorted to going outside of the evidentiary record and assuming that it could present misleading and inaccurate information without being called to task. RIFF is wrong on both counts.

First, this Division may not rely on evidence outside of the administrative evidentiary record. As the Supreme Court held in *Arnold v. Lebel*, 941 A.2d 813, 821 (R.I. 2007):

. . . all evidence that is received or considered must be on the record. This basic requirement . . . facilitates judicial review . . . All facts and opinions, including opinions of agency professionals and staff, as well as information obtained from an outside source, such as medical texts or the Internet, must be included on the record if the hearing officer plans to base his final decision on such facts. In short, **no litigious facts should reach the decision-maker off the record in an administrative hearing.** (Emphasis added).

Second, the main purpose of this Reply Memo will not be to re-argue the case. Instead, we will correct the numerous inaccuracies and misrepresentations set forth in RIFF's Post-Hearing Memo (Memo). We will address issues in the same order in which they were presented in RIFF's Memo.¹

¹ We recognize that portions of our reply will refer to matters outside of the record, but since RIFF has made grossly incorrect allegations outside of the record and devoid of evidentiary support, we feel we are compelled to correct these allegations. We believe that RIFF's outside the record arguments should not have been made in its Post-Hearing Memo. Therefore, those allegations should not be relied upon by the Division, and we respectfully request that they be stricken.

I. IHSF began service in 2001, not 1998.

RIFF incorrectly alleges that Mr. Donadio established a high speed ferry service to Block Island in 1998. (Memo, at 1). However, Island Hi-Speed Ferry (IHSF) did not operate until the summer of 2001. Moreover, and more importantly with regard to this docket, Mr. Donadio was involved in IHSF's operation for only a short while. He promptly "cashed out" by selling his ownership interest to his remaining partners, and walked away. If given a CPCN for RIFF, we expect that Mr. Donadio will once again promptly cash out.

II. Interstate has no monopoly on ferry service to Block Island.

RIFF alleges (on multiple occasions) in its Memo that Interstate allegedly holds a "monopoly" on ferry service to Block Island. (See e.g., Memo, at 1, 3). Monopoly is defined in *Black's Law Dictionary* 7th Edition (1999) in part as: "The market condition existing when only one economic entity produces a particular product or provides a particular service." Interstate has no monopoly on ferry service to Block Island. A successful seasonal high speed ferry service operates from New London, Connecticut to Old Harbor, Block Island (Block Island Express) and has done so for years, carrying thousands of passengers each summer. In addition, a seasonal ferry service operates from Montauk, Long Island to New Harbor, Block Island (Viking Fleet). Finally, from 2001 to 2006, IHSF ran its seasonal ferry from Point Judith to New Harbor, Block Island.

Interstate has a "monopoly" on providing lifeline traditional ferry service because no one else wants the burden. As Town Manager Nancy Dodge testified:

. . . fair competition, . . . 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." It simply doesn't happen." (tr. 3/24/16, at 15-16).

III. Interstate is headquartered in Galilee, Rhode Island.

RIFF incorrectly alleges that Interstate is “of Connecticut.” (Memo, at 1). However, Interstate is headquartered in Point Judith (Galilee), Rhode Island, and is duly registered to do business in Rhode Island. The overwhelming majority of its employees are Rhode Island residents. Although Interstate was incorporated in Connecticut 83 years ago in 1933, thousands of businesses are incorporated in one state (for example, the State of Delaware), but have their headquarters and primary business operations in another state. Interstate’s operations are headquartered in Pont Judith, Rhode Island, not Connecticut.

IV. Interstate suffered substantial losses when IHSF was operating.

RIFF boldly claims, without citation to the record, in its Memo (at 1) that Interstate and the Town “were dead wrong” regarding losing passengers in the IHSF docket. RIFF goes so far as to incorrectly claim that “. . . Interstate’s traditional ridership has grown immensely since 1998, **even during the time when Interstate competed directly with the new high-speed service [IHSF].**” (Memo, at 2, emphasis added).

Apart from the fact there is absolutely no evidentiary support in the record for this absurd claim, RIFF is dead wrong. What Interstate and the Town both projected in the IHSF docket did occur, as testified to by Walter Edge in this docket. Interstate’s ridership significantly declined when IHSF operated in 2001 and the decline continued until 2006 when Interstate purchased IHSF. At that time, Interstate began operating its own high speed seasonal service. Mr. Edge’s testimony was unchallenged. He testified:

. . . since new fast ferry operations began servicing Block Island, Interstate’s revenue declined, hurting the lifeline ratepayers. (Interstate Exhibit 2, at 5).

In addition, Mr. Edge testified:

Although the “death spiral observation” did not come to fruition, **Interstate did suffer significant lost revenues during those five years [that IHSF operated].**

Interestingly, the death spiral was actually happening to IHSF (because, as Interstate pointed out, there was not enough need for a fast ferry to New Harbor). In addition, Interstate was able to save its business by offering the choice of fast ferry and traditional service to its own customers [when it purchased IHSF in 2006].” (Interstate Exhibit 2, at 8, emphasis added).

Mr. Edge again explained how Interstate stopped the death spiral during his cross examination:

Interstate finally got its own high speed ferry and stopped losing customers to Island Hi-Speed Ferry.” (tr. 3/22/16, at 203-204).

It is inexplicable that RIFF, in light of this undisputed testimony, would now try to argue that Interstate’s ridership grew “immensely,” “even during the time when Interstate competed directly with the new high-speed service.” (Memo, at 2). This is simply untrue and has no basis in the record.

To demonstrate how badly Interstate was hurt during the five years IHSF was operating, we can look at the public record landing fee statistics annually filed by Interstate with the Town. The Town’s landing fee is collected by Interstate from adult passengers traveling from Point Judith. The fee is \$0.50 per adult, so each \$1 in landing fees represents two adult passengers traveling to Block Island. IHSF operated from 2001 through 2005. Here are the facts.

- In 2001, landing fees collected at Point Judith totaled approximately \$119,000.
- In 2002, they declined to approximately \$118,000.
- In 2003, they declined to approximately \$106,000.
- In 2004, they declined to approximately \$102,000.
- In 2005, they declined to approximately \$89,000.²
- In 2006, after Interstate acquired IHSF, landing fees collected increased to approximately \$119,000.

² In the slow winter period of January through May of 2005, no landing fees were collected because of a contractual dispute with the Town, so this number is somewhat low.

Primarily because of the drop in passengers, Interstate was forced to file for a rate increase in Docket No. 3573. A \$1,456,061 rate increase effective May 28, 2004, was granted by the PUC. (Interstate Exhibit 15). Interstate was forced to file another rate increase in Docket No. 3762, which resulted in a \$1,100,694 increase effective January 1, 2007. (*Id.*)

Accordingly, Interstate was correct when it predicted a downward spiral in ridership caused by loss of seasonal passengers to IHSF. It was only the acquisition of IHSF by Interstate in 2006 that stopped the downward spiral.

V. The Block Island Tourism Council does not endorse RIFF's proposal.

RIFF incorrectly argues on page 3 in footnote 1 of its Memo that the Block Island Tourism Council “supports RIFF’s proposal.” The evidence presented, particularly RIFF Exhibit 40, clarifies that although the Tourism Council originally sent a letter to the Town Council on September 11, 2013, the Tourism Council clarified in a second letter dated March 22, 2016 that:

The Tourism Council did not intend for this letter to be used as an endorsement of the proposed ferry.

Accordingly, RIFF’s allegation that the Tourism Council “supports RIFF’s proposal” is wrong.³

VI. The Town did not endorse Interstate's Newport high-speed CPCN application.

RIFF, again with no citation to the record or evidentiary support, incorrectly claims on page 3 in footnote 1 that when Interstate sought its own high speed CPCN for a run from Newport to Block Island, “. . . the Town fully supported Interstate’s efforts to bring, presumably, the same number of new passengers [as RIFF is planning to bring to the Town] through Interstate’s new services proposed for Newport and Fall River.” This is wrong. A simple review

³ Moreover, Steven Filippi, a member of the Tourism Council, is the brother of Paul Filippi, the sole owner of Bluewater, LLC, the developer of the dock that RIFF hopes to use in Old Harbor.

of Docket No. D-05-06 shows that the Division granted Interstate a Newport to Block Island fast ferry CPCN, but the Town took no formal position. The Town also filed no prefiled testimony.

Moreover, RIFF has projected in its response to Interstate Navigation's data requests (RIFF Exhibit 28) that RIFF projects it will carry 32,000 passengers in its first year of operation, 40,000 in its second year, and 45,700 in its third year. (See Exhibit B). By comparison, in Interstate's first three years of operation, the Newport high speed ferry carried approximately 13,000 passengers to Block Island in 2014, approximately 16,000 in 2015, and approximately 23,000 in 2016, as shown on Interstate Exhibit 13. Interstate carried less than half of what RIFF is projecting.

VII. The Division must consider the public interest.

RIFF correctly sets forth that R.I.G.L. § 39-1-1(b) states that the purpose of the Division is to:

“provide fair regulation of public utilities and carriers in the interest of **the public**, to promote availability of adequate, efficient and economical . . . transportation services . . . to the inhabitants **of the state** . . . without unjust discrimination, undue preferences or advantages, or **unfair or destructive competitive practices**” (Emphasis added).

RIFF reads this statutory mandate to argue that RIFF is entitled to a CPCN. To the contrary, this mandate makes it clear that RIFF's proposal to provide service only “during the summer tourist season and especially to provide a convenient and attractive service to customers, particularly those who come from areas north, west and east of Quonset” (Memo, at 2) should not be granted. It is the obligation of the Division to look at the “public,” i.e., **all** the inhabitants “of the state,” not a particular community such as North Kingstown.⁴

⁴ However, because Block Island is an offshore island dependent on Interstate for lifeline ferry service, it is fully appropriate to look carefully at the impact of RIFF's proposed service on the lifeline to Block Island.

It is the obligation of the Division to make sure that authorized transportation services are provided “without . . . unfair or destructive competitive practices” As the testimonies of Dr. Mazze, Mr. Edge, and Ms. Dodge have demonstrated, allowing RIFF to “compete” against Interstate with a summer only, passenger only service, when Interstate must provide year-round lifeline service for passengers, vehicles, and freight, would authorize not only unfair competition, but destructive competition, and the losers would primarily be the residents of Block Island who rely every day on Interstate’s lifeline services.

VIII. The lack of a business plan deprives the Division of needed information.

RIFF did not submit either a business plan or information that would normally be included in such a plan.⁵ Dr. Mazze and Mr. Edge pointed out that the Division should have access to the usual information in a business plan in order for the Division to determine whether it should grant a CPCN to RIFF. RIFF has not laid an appropriate evidentiary foundation to support its argument that its proposed Quonset to Block Island service is required to meet the public convenience and necessity. Because of the lack of a business plan, or even the presentation of the information that a typical business plan would provide, the Division (and the Intervenors) do not have access to important information needed to evaluate RIFF’s proposal, such as:

⁵ RIFF belatedly argues that Interstate’s testimony about the lack of a business plan “should be stricken and not considered” because it allegedly relates to fitness. (Memo, at 5). However, such a motion cannot be made in a post-hearing memo. RIFF failed to make an objection or a motion to strike at the hearing and cannot make it now. See *Tinney v. Tinney*, 770 A.2d 420 (R.I. 2001) (“According to our well-settled ‘raise or waive’ rule, issues that present themselves at trial and that are not preserved by a specific objection at trial, sufficiently focused so as to call the trial justice’s attention to the basis for said objection, may not be considered on appeal.”)

- details regarding the vessel that would be used (Mr. Donadio never committed to a particular vessel);
- details regarding the number of daily runs being proposed (Mr. Donadio never committed to a specific number of daily runs);
- the departure times of the runs (such times were never set forth by Mr. Donadio);
- the passenger capacity of the vessel that would be used (because the vessel was never specified, the capacity is unknown);
- the specific time it would take to travel over the water from Quonset to Block Island (again because the vessel was never specifically identified, travel times are only estimates);
- the specific dock where the ferry would land (only docking options were discussed);
- a pro forma financial statement showing anticipated revenues, expenses, etc. (not provided);
- a marketing study or survey demonstrating a need for the service (not provided);
- a marketing plan for the proposed service (not provided);
- the ticket prices (only set forth in a broad range of \$40 to \$50 per round-trip ticket).

This is exactly the type of information provided by IHSF in seeking its fast ferry CPCN for IHSF, and by Interstate when it sought its fast ferry CPCN. These are important details of the proposed service that should have been submitted by way of prefiled testimony and/or a business plan, and they are necessary to allow the Division (and the Intervenors) to fully evaluate the proposed service. Without these details, the Division is being asked to grant a CPCN for proposed ferry service it knows little about.

IX. Delays were primarily caused by RIFF, not the Intervenors or the Division.

RIFF argues that it “endured over three years of hearings, briefings, data requests and motions . . .” (Memo, at 6). RIFF, however, inaccurately implies that Interstate was responsible

for delays in the processing. As this Hearing Officer knows, multiple delays were repeatedly requested by RIFF, not by Interstate. RIFF has only itself to blame, therefore, for the years which have passed. Interstate, the Town, and this Division have been ready, willing, and able to move forward with this case.

X. RIFF offered to sell a non-compete to Interstate for \$1 million.

RIFF, contrary to the clear evidence, argues that Mr. Donadio rejected “*Interstate’s non-compete offer*” (Memo, at 6, emphasis in original). However, the testimony makes it clear that the non-compete offer came from Mr. Donadio, not Interstate.

Interstate Exhibit 1 is an email that Mr. Donadio sent to Interstate Vice President Joshua Linda, clearly demonstrating that Mr. Donadio was trying to sell to Interstate a non-compete. The text states:

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 . . . I am sure that iMike (sic) could draft a simple document if u and your family decided to move fwd on this. If u hav any further questions just let me know.

Interstate Exhibit 14 is comprised of two emails from Joshua Linda. The first is to Mr. Donadio and states in part:

We would like to explore the option of a non-compete agreement with you. Do you have any ideas on how you would like to structure such an agreement and what would you be looking for in return for such an agreement?

The second email to Interstate’s legal counsel from Joshua Linda sets forth his recollection of his meetings with Mr. Donadio. It states:

This is the e-mail that I sent Charlie after our original meeting with him with Ray, Sue, and myself. He wanted to meet with out attorneys present so we decided to meet him to see what he had in mind. After reading the e-mail, I now remember how things transpired. First he asked if we were interested in selling out to him. We said no to this. He then pitched an idea of to us for running a boat out of Quonset to Block Island. We said that we would have to think about this and get

back to him and I did respond to him with this e-mail. The final option that he proposed was a non-compete agreement which we did discuss with him. First he wanted a year to year agreement and I think that he wanted \$30,000 per year. We did not want to go this route and wanted a permanent agreement. **He came back with an offer for \$1 million.** I think we offered \$100,000 and he was not interested in that figure. He said that if we wanted to revisit this in the future that the price would be much higher. (Emphasis added).

At the hearing on March 22, 2016, Mr. Linda expanded on this, and once again confirmed that it was Mr. Donadio who offered the \$1 million for the non-compete:

So I had sent Mr. Donadio an e-mail basically stating that . . . we would like to look into the non-compete option that he had suggested. We had asked what he was thinking about and he had brought up a year-to-year agreement where we'd pay him a certain amount of money for non-compete, and I can't remember the exact dollar amounts. I think it might have been maybe 30,000 a year. And we were not interested in it. We had asked if he would be . . . interested in a permanent non-compete and **he came back with a \$1 million asking price** and I think we had maybe offered 100,000 or something like that. And we rejected the \$1 million price and that was our last correspondence with Mr. Donadio. 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 24, emphasis added).

It is therefore incomprehensible that RIFF would argue in its Memo that it was Interstate that made the \$1 million non-compete offer. Mr. Donadio has a history of making a fast profit by starting up IHSF and then quickly selling out. We believe that Mr. Donadio is following the same game plan in filing for a Quonset CPCN and then trying to essentially extort \$1 million out of Interstate for him to stop pursuing a CPCN. This is clear evidence that it is not the public that Mr. Donadio is concerned about. This CPCN would simply be a tool for Mr. Donadio to turn another fast profit, at the expense of the ratepayers.

XI. Interstate provided all the information that would be in a business plan in the Newport docket.

RIFF argues that it did not need to provide a business plan because "Interstate did not provide a formal business plan when applying for a certificate for its Newport or Fall River high-speed service." (Memo, at 6, footnote 4). However, Interstate provided all of the information

(and more) that would have been provided in a traditional business plan when it filed its request for a CPCN for its Newport high speed service in Docket No. D-05-06. The thoroughness of Interstate's case, as compared to the inadequacy of RIFF's evidentiary case in this docket, is evident simply by looking at the Division's Order granting Interstate's CPCN (Order No. 18506 dated January 23, 2006). Interstate's testimony was summarized in that Order:

Interstate proffered pre-filed direct testimony from seven witnesses with its application. The witnesses were identified as follows: Ms. Susan Linda, President, Secretary, and Treasurer, Interstate; Mr. Joshua Linda, Vice President, Interstate; Mr. Walter E. Edge, Jr., MBA CPA, Consulting Department Director and President of Bacon & Edge, p.c., a CPA firm specializing in utility regulation . . . Dr. Timothy Tyrell, Professor, Department of Environmental and Natural Resource Economics, University of Rhode Island; Mr. Mark G. Brodeur, Director of Operations, Rhode Island Tourism Division . . . Mr. Alan Slaimen, Contract Manager, Collette Vacations . . . and Mr. David Laraway . . . (at 4).

Regarding Interstate's supporting testimony, the Order pointed out that:

Interstate enlisted the help of Dr. Timothy Tyrell, who designed a survey that was administered to Interstate's current customers. . . . the survey reflected that 35% of the responders traveling from Point Judith to Block Island, and 73% of the responders traveling from Newport to Block Island said that they would have taken a fast ferry, at double the rate, if Interstate had made one available. (at 5-6).

Additionally, as further evidence of need and convenience, Interstate offered some data generated from a survey that it conducted of passengers riding on its conventional mono-hull ferry (*M/V Nelseco*) between Newport and Block Island during the summer of 2004. According to the survey data offered by Interstate, 73% of the responders (representing 86% of the passengers surveyed) indicated that they would have taken a fast ferry (at about double the rate) if Interstate offered such a service (the current adult round-trip regular fare is \$13.00, including port taxes). (at 57)

Contrast this partial summary of Interstate's evidence to support its request for a Newport CPCN to the lack of similar evidence presented by RIFF in this docket.

XII. RIFF's proposed service would violate Block Island's comprehensive plan.

In a string of misrepresentations in a single sentence, RIFF claims that its “service is not contrary to the Block Island Comprehensive Plan, that Interstate’s service is no longer adequate to serve the growing need [and] that RIFF’s service encourages competition . . .” (Memo, at 10).

First, regarding the Block Island comprehensive plan, the only competent testimony in the record shows that RIFF’s proposed service is contrary to the Block Island comprehensive plan. During the March 24, 2016 hearing, Norris Pike, the Second Warden for the Town, testified. He explained that he was the Chairman of the Planning Board on Block Island, was a member of the Planning Board for several years, and has been on the Town Council for seven years. (tr. 3/24/16, at 24).

Mr. Pike unequivocally testified that, regarding Mr. Donadio’s plan:

“I really can’t see it. I don’t agree with it. The council, as a whole, does not agree with it. There’s no planning and, quite frankly, **I think it’s contrary to our comprehensive community plan** to control the safety issues in the town to the best of our ability. That’s our charge. That’s why we’re elected.” (at 27, emphasis added).

Although RIFF, in examining Ken LaCoste, First Warden, pointed out there is provision in the comprehensive plan that discusses the potential for expansion that might accommodate ferry operations, Mr. LaCoste explained:

. . . in the last couple of three years it seems like there’s been more and more people coming, and we’ve been concerned that we are reaching somewhat of a saturation point . . . **Contrary to what the comprehensive plan statement was.** But I know that the comprehensive plan was dated March 2nd, 2009, five or six seven years ago . . .” (tr. 3/24/16, at 69, emphasis added).

Interstate Exhibit 12 is the economic development excerpt from the existing comprehensive plan.

The first bullet point states, among other things, that the first consideration is to “promote alternatives to tourism.” (at 22). RIFF’s plan is to expand tourism, which is contrary to this goal.

The second bullet point in the plan is to “promote off-peak activities for both the “shoulder” and mid-winter seasons . . .” RIFF’s proposal, which is set for the peak summer season only, does not comply with this off peak goal in the plan.

The third bullet of the plan states, among others, “encourage no more than modest growth in the numbers of peak season visitors, since serving them takes up resource capacity while adding little to diversity or off-peak economic opportunities.” The RIFF proposal is contrary to this comprehensive plan off-peak goal.

The fourth bullet states “[t]o the extent that tourism-related activity is encouraged, it should present Block Island as a destination for travel, not just a place for day visits.” RIFF has made it clear that, as with Interstate, the bulk of its summer passenger traffic will be day trippers who go over in the morning and return in the evening, which is contrary to this comprehensive plan goal.

The seventh bullet states: “[e]ncourage business developments in which there is equity participation by Islanders, or even better, which are wholly Islander-owned.” Mr. Donadio is not an Islander and is the only owner of RIFF.

It is therefore abundantly clear that RIFF’s proposal is contrary to Block Island’s comprehensive plan and the goals expressed therein. That is one of the main reasons the Town vehemently opposes RIFF’s proposal.

XIII. Interstate is providing more than adequate service.

RIFF argues that “Interstate’s service is no longer adequate to serve the growing need.” (Memo, at 10). Note there is no citation to any evidence in the record to support this absurd statement and it is wrong. Every witness who testified to the quality, quantity, and character of Interstate’s service agreed that it was adequate or better. There is no testimony at all claiming that Interstate’s service is inadequate in any way, shape, or form.

As an example, in the summer, Interstate runs eight traditional ferry trips from Point Judith to Block Island every weekday (and nine on weekends) from 8 a.m. to 8 p.m. A traditional ferry leaves almost once every hour from Point Judith. Besides the traditional ferries, Interstate operates a high speed ferry with six daily trips departing Point Judith. A high speed ferry departs Point Judith approximately once every 2 hours.

Each of Interstate's three traditional ferry vessels can carry 1,000 passengers or more, and its high speed ferries can carry 250 passengers or more. Reservations can be made for passenger travel. Reservations assure that customers will be carried on the ferry for which the reservations are made.

Admittedly, there are rare instances when the high speed ferry may be sold out if a customer shows up to walk on not having made a reservation. These instances are unusual and walk on customers are never "turned away," as RIFF claims on page 15 of its Memo.

Passengers who show up without having made a reservation and encounter a sold out high speed ferry have several options. If the 9 a.m. high speed ferry is sold out, a passenger arriving without a reservation could choose the 9:30 a.m. traditional ferry, the 10:30 a.m. traditional ferry, or the 11:10 a.m. high speed ferry from Point Judith.

This range of options is much greater than the limited (and unknown) options that would be available to a customer who attempts to walk on to a sold out RIFF ferry from Quonset Point without having made a reservation. There will be only one fast ferry boat running from Quonset Point. It will take approximately an hour to make the trip each way, whereas Interstate's fast ferry takes only approximately 30 minutes to make the trip. There will be no traditional ferries operating out of Quonset Point. However, due to the lack of detail in RIFF's proposal, we do not know the exact departure schedule or the frequency of runs.

Also, Mr. Donadio admitted in his testimony on March 2, 2016:

Q. You know that in [Galilee] if you get there early and you've got time to kill, there are places you can go, there are restaurants there, there are shops there, ice cream shops, T-shirt shops, gift shops, et cetera in Galilee, correct?

A. Yes.

Q. All within walking distance, correct?

A. Yes. (at 214).

The Quonset Business Park offers no similar amenities within walking distance. When asked if there were similar businesses available within walking distance in Quonset, Mr. Donadio conceded that a customer must drive somewhere to find a place to get a bite to eat or to shop. RIFF directs customers to Wickford to do this. (at 215).

XIV. RIFF's proposal would not noticeably reduce traffic.

RIFF incorrectly focuses on a reduction in traffic as a purported reason to grant RIFF a CPCN. (Memo, at 10). First, there is no credible testimony in the record, based on a study or otherwise, to support RIFF's statement that there are "prospective tourists who currently forgo travel to Block Island due to traffic and/or parking burdens." (Memo, at 10). Second, and more importantly, the issue of whether traffic would be reduced has absolutely nothing to do with whether or not the public convenience and necessity requires the proposed fast ferry service.

Nancy Dodge made it absolutely clear that those who want to go to Block Island know how to get to Block Island and are going there. As she testified:

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 . . . (tr. 3/24/16, at 17).

Even if traffic was a relevant issue in a CPCN case, there is no way RIFF could make a perceptible change in the traffic to South County. The unfounded assumption (again with no

evidence in the record) is that if RIFF runs a ferry from Quonset, there will be a noticeable reduction in traffic to South County. However, an analysis of the actual numbers makes it clear that this is not possible.

Although we do not know the exact traffic numbers, because RIFF did no study to support its traffic claim, and RIFF's application is woefully inadequate regarding details, we can assume for argument that RIFF will run about 75 days per summer. RIFF has projected 32,000 passengers in its first year of operation. The accepted standard for tourism activities is an average of approximately two persons traveling per car.

Therefore, 32,000 passengers will travel in approximately 16,000 cars. Dividing the 16,000 cars by 75 days of fast ferry operation yields a reduction of traffic in the Route 4 area of approximately 213 cars per day.

The State of Rhode Island has a traffic flow map publicly available which shows that on average (not seasonal, but an average over the entire year), the 24-hour average daily traffic count on Route 4 leading to the Quonset exit is **71,200 vehicles per day**, and in the summer, this would be much higher. But even using the 71,200 figure, it is immediately evident that reducing 71,200 vehicles by 213 cars could not have a noticeable or even measurable impact on traffic reduction. This idea that somehow the RIFF ferry will reduce the traffic burden in South County is not only unsupported by any record evidence, but is unsupported by the facts.⁶

XV. Mr. Kunkel's testimony should be stricken or disregarded.

RIFF next argues that Mr. Kunkel may provide expert testimony because he was an expert. As we have demonstrated in our opening Memo, that is not the case. On pages 12-13 of its Memo, RIFF argues that Rule 702 of the Rhode Island Rules of Evidence allows for this

⁶ Attached hereto is a copy of the state highway map of Rhode Island prepared by the Rhode Island Department of Transportation showing the traffic flow map for 2009. Also attached is an excerpt from the Federal Highway Administration report in 2009 showing that there are approximately two persons per car when traveling for social and recreational purposes.

testimony. It does not. Rule 702 simply deals with qualifications to testify. What RIFF has ignored is Rule 705, which requires that:

Unless the court directs otherwise, before testifying in terms of opinion, an expert witness shall first be examined concerning the facts or data upon which the opinion is based.

The advisory committee note to Rule 705 sets forth many of the cases cited in Interstate's Memo seeking to strike the testimony of Mr. Kunkel for failure of his opinion to be predicated upon facts legally sufficient to form a basis for his conclusion. The advisory committee note states:

The Rhode Island approach has been to **exclude expert opinion where the facts upon which the expert's opinion are based are not stated**. See, for example, *Alterio v. Biltmore Constr. Co.*, 119 R.I. 307, 377 A.2d 237, 240 (1977); *Nasco, Inc. v. Director of Pub. Works*, 116 R.I. 712, 360 A.2d 871 (1976); *L'Etoile v. Director of Pub. Works*, 89 R.I. 394, 153 A.2d 173 (1959).

In *Alterio*, the plaintiff's expert was able to give his opinion on the total cost of repairing defects at issue in the case, but was unable to provide back-up data on the cost of each item included in the total. The Supreme Court held that the plaintiff's expert's testimony on the cost of repairs should have been excluded by the trial justice because of the expert's inability to state the factual basis on which his opinion was predicated. This defect "precluded effective cross-examination and caused his estimate to be too speculative to entitle it to any weight." 377 A.2d at 240. In reaching this conclusion, the Court stated:

Unquestionably, an expert's opinion must be predicated upon facts legally sufficient to form a basis for his conclusion. *Nasco, Inc. v. Director of Pub. Works*, 116 R.I. 712, 360 A.2d 871 (1976); *Dickinson-Tidewater, Inc. v. Supervisor of Assmts.*, 273 Md. 245, 329 A.2d 18 (1974). It follows that the facts 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." *Dickinson-Tidewater, Inc. v. Supervisor of Assmts.*, *supra* at 253, 329 A.2d at 23-24. See also *Uhlik v. Kopec*, 20 Md. App. 216, 314 A.2d 732 (1974). In both *Nasco* and *L'Etoile*, *supra*, the Court held that real estate experts' opinions based on their "experience" in evaluating property, 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."

Nasco, supra, 116 R.I. at 721. See *L'Etoile, supra*, 89 R.I. at 402, where the Court stated, "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." See also *McGovern v. Michael*, 62 R.I. 485, 491, 6 A.2d 709 (1939): "An opinion of market value must be founded on facts and not conjecture. **Where there is substantially no evidence upon which to base such an opinion, then no opinion can be given, however competent the witness may be.**" (Emphasis added).

Accordingly, RIFF has misconstrued the expert testimony rules of the Rhode Island Rules of Evidence by ignoring Rule 705. Mr. Kunkel's testimony is entitled to no weight as expert opinion and should either be stricken or disregarded.

XVI. Public need, not private investment, is the test.

RIFF makes the unlikely argument that because Mr. Donadio is proposing to make a "private investment," he should be given a CPCN, not because the public convenience and necessity require the proposed service, but because Mr. Donadio should be allowed to "make bad bets with [his] own money . . ." (Memo, at 14). However, the Division is not in the business of giving out a CPCN just to satisfy the private investment whims of wealthy entrepreneurs. The decision that must be made in this docket looks at public need, not Mr. Donadio's private investment/profit desires.

XVII. There is abundant parking in Galilee.

RIFF has argued that because the parking lot behind The Lighthouse Inn is full for 30 or 45 days per summer (Memo, at 15), this somehow demonstrates there is a need for RIFF's Quonset operation because there is parking in Quonset. What RIFF has missed is there are many parking lots in Galilee. The parking lot behind The Lighthouse Inn, while convenient to the ferry, is not the largest lot in Galilee. There is a large privately operated lot near The Lighthouse Inn and across from the ferry that is rarely full. There are also two large lots owned by the State of Rhode Island at the end of the Galilee Escape Road, and there is another state lot on the

Galilee Connector Road. There are multiple smaller private lots throughout Galilee. There is recently expanded on-street parking throughout Galilee on the Circulator Road and on the Escape Road. On those very few times, such as a busy holiday weekend when the weather is terrific, if there is no convenient parking in Galilee, passengers can park in the huge state lot at Roger Wheeler Beach, which is about a 10-15 minute walk from the ferry dock.⁷

XVIII. Job creation is not the issue.

Again, apparently due to its inability to satisfy the public convenience and necessity test with traditional evidence of need, RIFF argues that a CPCN should be granted because RIFF's Quonset to Block Island ferry "will create in-state jobs." (Memo, at 18). While it may be politically popular right now to advocate for anything that helps to bring even a few jobs to the state, this issue is irrelevant to determining whether a CPCN should be granted to meet the public convenience and necessity. If job creation was the touchstone of the CPCN application process, every company that applied for a CPCN would be automatically entitled to a CPCN.

XIX. The Army Corps of Engineers regulates Interstate's docks.

RIFF inaccurately claims that the docks RIFF intends to use will "be controlled by the Army Corps of Engineering (sic), for the benefit of the public." (Memo, at 19). RIFF argues that by contrast, the public is "being held hostage to private dockage" with Interstate's service. (Memo, at 19). Clearly, RIFF has no understanding of the Army Corps of Engineers regulatory process.

RIFF's proposed docks will be under the regulation of (not "controlled" by) the Army Corps of Engineers, and a permit must be obtained from the Army Corps of Engineers (and the Coastal Resources Management Council) for constructing the dock. However, neither the Army

⁷ RIFF will have a significant problem with traffic each year during the weekend of the Quonset Air Show when "access to the business park is nearly impossible." (tr. 3/2/16, at 157-158).

Corps of Engineers, nor the Coastal Resources Management Council, “controls” the docks for the benefit of the public. The regulations of the Army Corps of Engineers and the Coastal Resources Management Council apply equally to the dock RIFF is proposing, and to the existing docks operated by Interstate on Block Island and in Point Judith. No one is “held hostage” by Interstate regarding its docking arrangements. Interstate leases its dock in Galilee from the State of Rhode Island and leases its dock in Old Harbor from a private entity in the same way that RIFF leases its Quonset dock from the State and intends to lease its dock on Block Island from Bluewater, a private entity.

XX. RIFF should have done a survey.

RIFF almost laughably criticizes Interstate’s survey for not asking a question that RIFF felt should have been asked. (Memo, at 26). RIFF claims that failing to ask this question somehow renders the survey unreliable. (Memo, at 26). But where is RIFF’s survey? RIFF did none. Yet RIFF inexplicably feels that it can criticize Interstate’s survey. If RIFF wanted a particular question asked of the public, RIFF could easily have conducted its own survey and asked that very question. RIFF did not do so and instead is critical of Interstate for failing to ask a question that RIFF would like asked. RIFF should simply have conducted its own survey.

XXI. Dr. Mazze’s survey was not flawed.

RIFF has argued that Dr. Mazze’s analysis was “fundamentally flawed.” (Memo, at 27), citing testimony from Dr. Costa. As pointed out in Interstate’s opening Memo, Dr. Costa conceded that she never did a single survey in her life. She has no qualifications to make an argument that Dr. Mazze, who has conducted many such surveys for over 50 years, was flawed in his study.

XXII. Interstate is currently operating under a \$733,842 rate decrease.

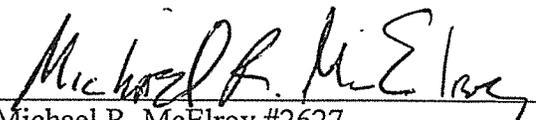
RIFF argues that since its application was filed in 2013, “Interstate has requested and received rate increases, continuing to gain more revenue from its passengers.” (Memo, at 28). However, in Interstate’s most recent 2015 rate filing for its traditional service, the PUC imposed a **decrease** in revenues of \$733,842 per year, which is approximately a 9% overall across-the-board decrease. (Interstate Exhibit 15).

CONCLUSION

RIFF has failed to meet its evidentiary burden of demonstrating that the public convenience and necessity require RIFF’s proposed service, and that RIFF’s proposed service will not harm the existing lifeline. It is inexcusable that RIFF has attempted to fill in the gaping holes in its evidentiary presentation by making incorrect outside the record statements that do not withstand scrutiny.

We therefore respectfully submit that RIFF’s request for a CPCN should be denied.

Respectfully submitted,
Interstate Navigation Company
By its attorney,


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Dated: June 30, 2016

CERTIFICATE OF SERVICE

I certify that on the 30th day of June, 2016, I emailed a true copy of the foregoing to the attached service list.


Theresa Gallo

Interstate Donadio Post Hearing Reply Memo

Rhode Island Fast Ferry (RIFF) – CPCN Application Docket No. D-13-51
Updated 10-21-15

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