STATE OF RHODE ISLAND

DIVISION OF PUBLIC UTILITIES AND CARRIERS

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

REPLY MEMORANDUM OF THE TOWN OF NEW SHOREHAM IN OPPOSITION TO RHODE ISLAND FAST FERRY INC.'S APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

I. INTRODUCTION

The Town of New Shoreham ("Town") submits this reply memorandum to the Division of Public Utilities and Carriers in support of the Town's opposition to the application of the Rhode Island Fast Ferry, Inc. ("RIFF") for a Certificate of Public Convenience and Necessity ("CPCN") to operate a fast ferry service from Quonset Point to Old Harbor on Block Island.

II. RIFF'S REPLY MEMORANDUM CONTAINS MATTERS AND ALLEGED FACTS OUTSIDE OF THE RECORD IN VIOLATION OF RHODE ISLAND LAW.

At the onset, it must be noted that a substantial portion of the post-hearing memorandum submitted by RIFF is in direct violation of both Title 42, Chapter 35 of the Rhode Island General Laws and well-established case law to the effect that statements of counsel in a brief which are based in whole or in part upon factual matters which are not contained in the record of the proceedings should not be considered. R.I.G.L. § 42-35-9 (g) requires that a hearing officer's findings of fact be based exclusively on the evidence presented. It is impermissible for a hearing officer to consider matters which were not made part of the record. *Arnold v. Lebel*, 941 A.2d 813 (R.I. 2007).

The Rhode Island Supreme Court has consistently held that contentions and statements of counsel having factual bases in part or in whole dehors the record in a brief will not be considered. *Surber v. Pearce*, 97 R.I. 40, 195 A.2d 541 (1963); *Nagy v. Lumbermens Mutual Casualty Company*, 100 R.I. 1, 210 A.2d 603 (1965). Throughout its memorandum, RIFF has

cavalierly disregarded this most basic of legal principles as the memorandum repeatedly refers to and even begins with matters pertaining to a 1998 application for a CPCN ("1998 Application"). Throughout its memorandum, RIFF attempts to influence the hearing officer by not only referring to but also drawing inappropriate and, indeed, untrue inferences and conclusions about what occurred during the hearing on the 1998 Application and the resulting effects and outcomes of the granting of the application. Owing to the dearth of evidence submitted at the hearing on its own CPCN application, RIFF apparently felt compelled to resort to matters outside of the record to support its position.

In its reply memorandum, Interstate Navigation Company ("Interstate") discusses at length the reasons why the statements, conclusions and inferences which RIFF makes in its post-hearing memorandum regarding the 1998 Application hearing and decision are incorrect and the reasons why RIFF's discussion of the events which followed the 1998 Application hearing is factually inaccurate. However, the intervenors should not be put in a position of trying to address such dehors the record matters in post-hearing legal memoranda. Rather, the Town respectfully submits that all such references by RIFF to the 1998 Application, to what allegedly occurred during the hearing on the application and the purported results and inferences as set forth by RIFF in its memorandum should be stricken and disregarded by the hearing officer.

The law in Rhode Island is clear that if RIFF sought to have these outside-the-record matters considered by the hearing officer, RIFF should have offered the appropriate evidence, whether by testimony, judicial notice, or otherwise at the hearing. The intervenors would then have had the opportunity to object to such evidence and/or to offer evidence which contradicted that which RIFF was seeking to prove. Even as to the taking of judicial notice, § 42-35-10 (4) states that although notice of certain types of facts may be judicially noticed, the parties must be

given prior notice of the material proposed for notice, and the parties, "shall be afforded an opportunity to contest the material so noticed."

If the Hearing Officer is for some reason inclined to consider any of such outside-the-record matters, which the Town submits would be an error of law, then the Town requests that discovery and the hearing in the within matter be reopened for purposes of allowing the Town the proper opportunity to conduct discovery, submit prefiled testimony, and address the outside-the-record matters alleged by RIFF at an appropriate hearing.

III. RIFF'S OUTSIDE OF THE RECORD MOTION TO STRIKE FACTS SUBMITTED INTO EVIDENCE AT THE HEARING SHOULD BE DENIED.

Incredibly, in its post-hearing memorandum, RIFF has moved to strike and requests that the hearing officer not consider: "any testimony or evidence elicited or provided by Interstate as to willingness, fitness or ability." (RIFF memorandum, p 5, footnote 3). It appears that Interstate is asking the hearing officer to cull through the record of the hearings on its CPCN application, make a determination as to whether any evidence submitted by Interstate applies to RIFF's fitness, and then make a decision to strike that evidence.

This argument and motion are fatally flawed for the following reasons:

a. Since the early 1900's the Rhode Island Supreme Court has consistently ruled that a party who objects to the introduction of certain evidence must object or move to strike at the time the evidence is offered or the party will be deemed to have waived the objection. For example, this rule was expressed by the court in *Corbin v. Gomes*, 49 R.I. 300, 142 A. 328 (1928) wherein the Rhode Island Supreme Court stated:

> After the admission of such evidence, considerable testimony was taken before the motion for a direction of a verdict was made. The plaintiff, by failing to object and failing to make a timely motion to strike out such testimony waived all objection to its admissibility. Her objection is that the trial justice gave legal effect to evidence which, at the time of the ruling, was properly before the jury. The rule is stated in 31 Cyc. at 754, as follows: 'Failure to object to evidence at the time it is offered is a waiver of the objection that it is not admissible under the pleadings. If the evidence offered is not objected to, the party presenting it is entitled to the benefit of any cause of action or defense established thereby.' *Id* at p. 329.

Much more recently, in *Arnold v. Lebel*, *supra*, the Rhode Island Supreme Court discussed the raise or waive rule as follows:

> Initially, DHS challenges the trial justice's decision to take jurisdiction under the UDJA, asserting that plaintiffs failed to exhaust their administrative remedies. Because DHS did not raise this issue in the court below, it has waived its right to raise this issue on appeal under this jurisdiction's well-established raise-or-waive rule. *State v. Merced,* 933 A.2d 172, 174 (R.I.2007) ("[A]llegations of error committed at trial are considered waived if they were not effectively raised at trial, despite their articulation at the appellate level.") (quoting *State v. Toole,* 640 A.2d 965, 973 (R.I.1994)). *Id*. at p. 818.

Since RIFF did not object or move to strike during the hearing certain specific evidence submitted by Interstate, any objections and motions to strike pertaining to such evidence are waived.

b. Not only did RIFF fail to object at the hearing to the evidence which it seeks to strike by way of its post-hearing memorandum, but RIFF does not even specify which evidence it seeks to strike and merely states that: "any evidence elicited or provided by Interstate as to willingness, fitness or ability should be stricken and not considered." Again, this motion fails to put the intervenors or the hearing officer on notice of what RIFF is talking about. Is the hearing

officer supposed to peruse the record and guess specifically what evidence RIFF wants stricken? Clearly, this is ludicrous and should not be countenanced by the hearing officer.

c. As discussed above, the law in Rhode Island is well established that if evidence offered is not objected to, the party presenting it is entitled to the benefit of using that evidence in support of its claims or defenses. Accordingly, evidence cannot be stricken from the record as an afterthought. In addition, it must be noted that once any evidence to which RIFF now objects became part of the record, the Town was entitled to rely on the fact that such evidence was part of the record. If for some reason during the hearing evidence proffered by Interstate had been successfully objected to on the theory that the evidence pertained to fitness, the Town would then have had the opportunity to introduce into the record the same or similar evidence. Once that evidence became part of the record without objection, the Town and Interstate are entitled to rely on being able to use that evidence in support of their positions and arguments in this case.

IV. RIFF'S LAY WITNESSES ARE NOT PERMITTED TO PROVIDE TESTIMONY PREDICTING HOW A PERSON OR POPULATION WILL ACT.

The post-hearing memoranda filed by both the Town and Interstate discuss at length the reasons why the testimony of Larence Kunkel should be stricken owing to the fact, among others, that the alleged factual bases for Mr. Kunkel's opinion testimony were demonstrated at the hearing to be legally insufficient. Apparently realizing that the testimony of its expert is not supported by an appropriate legal foundation, RIFF attempts in its post-hearing memorandum to create evidence in support of its obligation to demonstrate the need for the proposed ferry service through the testimony of certain lay witnesses, none of whom are competent to testify as to need.

The law is well established in Rhode Island that although a lay witness may testify as to the witness' direct observations, a lay witness may not testify as to the lay witness' opinion about what another person would or would not do in the circumstances presented. *State v. Speaks*, 691 A.2d 547 (R.I.1997).

In further explaining the role of the lay witness' testimony, the Rhode Island Supreme Court stated the following in the case of *Rhode Island Insurers' Insolvency Fund v. Leviton Manufacturing Company, Inc.*, 763 A.2d 590 (R.I. 2000):

> This argument, however, misconstrues the function and purpose of a lay witness. By its very definition, a lay witness is a "[p]erson called to give testimony who does not possess *any expertise in the matters about which he [or she] testifies.*" Black's Law Dictionary 888 (6th ed.1990). (Emphasis added.) Further, under Rule 701, the opinion testimony offered by a lay witness is limited to two narrow situations: first, the testimony must be "rationally based on the perception of the witness," and, second, it must be "helpful to a clear understanding of the witnesses testimony or determination of a fact in issue." Although Leviton may be correct in stating that Pierce's testimony is helpful to determine the facts in issue, this satisfies only one prong of the rule. In order to be admissible, his testimony also must be rationally based on his perception, which it clearly was not. The type of testimony considered under the first prong of the rule is properly limited to events that occur in the presence of the testifying witness to enable the trier of fact to better picture the events and how they were perceived at the moment they occurred. We have consistently held that testimony under Rule 701(A) is applicable to this type of eye witness testimony. *See State v. Speaks,* 691 A.2d 547 (R.I.1997) (***a lay witness may not render an opinion on what another person would or would not do in the circumstances presented***); *State v. St. Jean,* 554 A.2d 206 (R.I.1989) (testimony proper where witness personally observed automobile approaching); *State v. Fogarty,* 433 A.2d 972 (R.I.1981) (testimony proper where witness had the opportunity to personally observe the person and to give the concrete details of intoxication). *Id*. at 596 (emphasis added).

The Town will not repeat here the lengthy discussion of the testimony of each RIFF lay witness and the arguments presented as set forth in the Town and Interstate's post-hearing memoranda; however, a brief review of such testimony is warranted.

Myrna George of the South County Tourism Council testified that when she was talking about need, she was referring to the need to alleviate the congestion on the highways and not the need for a fast ferry service. She presented no direct observation testimony regarding how RIFF's proposed ferry service would affect such congestion.

Martha Pughe, a former member of the North Kingstown Chamber of Commerce, testified that the RIFF option will encourage more commerce by tapping into the market of people who might not otherwise have traveled to the island; however, this was not direct observation testimony, but was merely her speculation regarding how certain members of the population would react to RIFF's service. This testimony, as referenced above, violates the legal principle that a lay witness may not render an opinion as to what another person would or would not do in the circumstances presented.

Elizabeth Dolan, former president of the North Kingstown Town Council, speculated that the RIFF proposed fast ferry would bring additional tourism revenues to North Kingstown and to Block Island. This testimony really did not have anything to do with a public need for the service.

Robert Billington of the Blackstone Valley Tourism Council, another lay witness, speculated that there was a pent-up demand for more convenient travel to Block Island and that the proposed ferry service would cause people to travel to Block Island who had not otherwise done so. Again, this testimony had no foundation whatsoever and violates the rule that

a lay witness may not render an opinion on what another person would or would not do in the circumstances presented.

Steven King, the managing director at the QDC, testified that his opinion on need had to do with the fact that the public had invested in the ferry terminal at Quonset, the access highways and the Quonset infrastructure. Clearly, Mr. King did not provide any competent evidence about the public need for RIFF's proposed high-speed ferry service.

Last, Mr. Donadio, the owner and president of RIFF, also testified as a lay witness and gave his personal opinion that he believes there is a market of passengers who choose at this time not to travel to Block Island but who would travel to Block Island if RIFF's service from Quonset is available. Mr. Donadio, a lay witness, is not permitted to testify regarding what the population of people who have never been to Block Island would do if there was a high-speed ferry from Quonset. Moreover, Mr. Donadio's testimony was not based on any studies, surveys or other acceptable methodology.

In summary, the Town respectfully submits that RIFF has not met its burden of establishing public need for the proposed fast ferry service.

V. RIFF'S USE OF THE WORD "COMPETITION" IN ITS POST-HEARING MEMORANDUM IS MISPLACED.

Competition refers to a choice between two like services that a consumer can freely make. From the prospective of the island residents and those traveling to the island during the off season, the establishment of a new fast ferry service from Quonset to Block Island will not provide them with any choice whatsoever regarding passenger service during the off-season

period, nor will it provide them with any choice whatsoever concerning the transportation of vehicles or freight at any time. RIFF is not proposing to transport passengers during the off-season or freight and vehicles at any time; rather, RIFF will take away vital revenues which support the island's lifeline service.

VI. THE FAST FERRY SERVICE RIFF PROPOSES TO RUN VIOLATES THE TOWN'S COMPREHENSIVE PLAN.

RIFF's proposed ferry service violates the Town's Comprehensive Plan ("Plan").

a. Second Warden Norris Pike, the former Chairman of the New Shoreham Planning Board and Planning Board member for seven years, discussed RIFF's plan as follows: "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 safety issue in the town to the best of our ability" (TR. 3-24-16 p. 24)

b. Contrary to the Plan, RIFF's proposal encourages day visits, and does not present Block Island as a destination for travel.

c. Contrary to the Plan, RIFF's proposal does not encourage off season visitors.

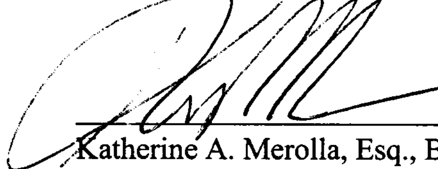
d. Contrary to the Plan, RIFF's proposal does not encourage off season economic opportunities.

e. Contrary to the Plan, RIFF's proposal does not promote alternatives to tourism.

VII. CONCLUSION

For the foregoing reasons as well as those reasons as set forth in the Town's and Interstate's post-hearing memoranda, the Town respectfully submits that RIFF's application for a CPCN should be denied.

TOWN OF NEW SHORHAM
By its attorneys,
Merolla & Accetturo



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CERTIFICATE OF SERVICE

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

Katherine A. Merolla

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