

EXHIBIT A

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888**

IN RE: Application by Rhode Island Fast :
Ferry, Inc. for Water Carrier Authority : Docket No. D-13-51

REPORT AND ORDER

1. Introduction

On July 2, 2013, Rhode Island Fast Ferry, Inc., 1347 Roger Williams Way, North Kingstown, Rhode Island (“RIFF” or “Applicant”), filed an application with the Rhode Island Division of Public Utilities and Carriers (“Division”) seeking authority to operate as a seasonal “fast ferry” water carrier of passengers between Quonset Point, North Kingstown (“Quonset”) and Old Harbor, New Shoreham (“Block Island”).¹ RIFF’s application was filed pursuant to Rhode Island General Laws, Sections 39-3-3 and 39-3-3.1, which require the issuance of a “certificate of public convenience and necessity” (“CPCN”) by the Division before “water carrier” services can be provided between points within the State.

¹ The Division notes that “fast” or “high-speed” ferry service is distinguishable from conventional “slower” ferry services. (See Interstate Navigation Company v. Division of Public Utilities, 824 A.2d 1282 (R.I. 2003)). With respect to the issue of the speed of the faster service, the Division’s experience with “fast ferry” service has suggested that a ferry must be capable of operating comparatively smoothly and quietly at a service speed of approximately 28 knots. (See Order No. 17081, issued in Docket No. 02-MC-56). The Division has decided to adopt this criterion as a minimum standard for “fast” or “high-speed” ferry service.

a. Motions to Intervene

In furtherance of starting the process of adjudicating the instant application request, the Division established a filing deadline of August 30, 2013 for all motions to intervene in the docket. Notification of the application filing and the prescribed deadline for intervention was posted on the Division's website, in accordance with State law, and also communicated during a pre-hearing/scheduling conference conducted on August 21, 2013, which was open to the public. The Division indicated that all motions would be considered in accordance with the requirements contained in Rule 17 of the Division's "Rules of Practice and Procedure."

In response to the notice of deadline to intervene, the Division received timely motions to intervene from the Interstate Navigation Company, d/b/a The Block Island Ferry ("Interstate"); Block Island Ferry Services LLC, d/b/a Block Island Express ("BI Express"); Intrastate Nav. Company ("INCo"); and the Town of New Shoreham (the "Town")(collectively, the "Movants").

After receiving copies of these formal intervention requests, the Applicant filed a timely written response and objections. The Applicant argued that, with the exception of the Town, none of the Movants had satisfied the intervention standards set forth in Rule 17, supra.

Rule 17(b) of the Division's Rules of Practice and Procedure sets forth the following requirements for intervention:

Subject to the provisions of these rules, any person with a right to intervene or an interest of such nature that intervention is necessary or appropriate

may intervene in any proceeding before the Division. Such right or interest may be:

- (1) A right conferred by statute.
- (2) An interest which may be directly affected and which is not adequately represented by existing parties and as to which movants may be bound by the Division's action in the proceeding. The following may have such an interest: consumers served by the applicant, defendant, or respondent and holders of securities of the applicant, defendant, or respondent.
- (3) Any other interest of such a nature that movant's participation may be in the public interest.

After carefully considering the arguments proffered by the Movants and the Applicant regarding the intervention motions, as well as the standards prescribed under Division Rule 17 and Rule 24 of the Superior Court Rules of Civil Procedure, and relevant case law, on September 24, 2013, the Division granted the intervention motion of the Town, denied the intervention motions filed by BI Express and INCo², and granted limited intervention to Interstate.³ Specifically, in accordance with the Division's decision on the issue, Interstate was allowed to participate in this docket for the purpose of safe-guarding the year-round lifeline services it provides to Block Island. The Division declared that it considered the scope of this participation as relating to the Applicant's burden of proof to demonstrate "that public convenience and necessity

² BI Express and INCo subsequently appealed the Division's decision to deny their intervention motions to the Superior Court. The Court ultimately affirmed the Division's decision on February 17, 2014.

³ See Order No. 21170.

require[s] the services.”⁴ Interstate was not permitted to challenge the Applicant with respect to its claims of “fitness.” This area of inquiry would be restricted to the Division’s Advocacy Section, an indispensable party in all CPCN application proceedings, such as the instant case.⁵

b. Requests for Extensions of Time

The Division established an initial procedural schedule in this docket during a scheduling conference conducted on August 21, 2013. This schedule was later extended six (6) times, mostly through requests from the Applicant.

The first postponement was in response to an October 3, 2013 request by RIFF for an extension of time to file pre-filed direct testimony.⁶ The resulting modified schedule was later held in abeyance, at RIFF’s request, after a Division decision denying two intervention requests was appealed to the Superior Court.⁷ After this appeal was denied and dismissed on February 17, 2014, RIFF agreed, on May 2, 2014, to attend another scheduling conference for the purpose of establishing another revised procedural schedule. Later, during a second scheduling conference, conducted on June 18, 2014, the Division established a new procedural schedule in this docket.

Subsequently, on August 1, 2014, the Applicant filed a motion for an extension of time “due to the temporary unavailability of an expert witness required for preparation of the pre-filed testimony.” In furtherance of its request, the Applicant proffered a revised schedule that sought an additional

⁴ R.I.G.L. §39-3-3.

⁵ See Order No. 21170, issued on September 24, 2013.

⁶ See Order No. 21189.

⁷ See Order No. 21170.

35 days to file its pre-filed direct testimony and a corresponding shift of approximately two (2) months for each of the remaining deadlines to the procedural schedule. In support of its motion, the Applicant stated that “we have discussed this proposed revision with all the parties to this proceeding, and we can represent that there are no objections to these revised dates.”

On November 6, 2014, the Applicant filed another motion for an extension of time “to respond to data requests issued by the parties....” In furtherance of its request, the Applicant proffered a revised schedule that sought an additional 31 days to respond to the data requests and a corresponding shift of one (1) month for each of the remaining deadlines to the procedural schedule. In support of its motion, the Applicant stated that “Rhode Island Fast Ferry has consulted with counsel... and there are no objections to this request.”

Subsequently, on January 23, 2015, the Town filed a motion for an extension of time, requesting an additional three (3) weeks for filing its pre-filed direct testimony in the instant docket. Based on a corresponding shift of approximately three weeks for each of the remaining deadlines to the procedural schedule, none of the parties objected to the Town’s request.

Finally, on May 15, 2015, the parties agreed to another extension of time, which resulted in a corresponding shift of approximately six (6) weeks for each of the remaining deadlines to the procedural schedule.

In total, the above-described requests for time extensions in this docket, chiefly coming from the Applicant, significantly contributed to a nearly two (2) year delay in the adjudication of RIFF's original July 2, 2013 application filing.

c. The Town's Motion to Dismiss

On July 21, 2015, the Town filed a motion for summary disposition, in accordance with Rule 19(e) of the Division's Rules of Practice and Procedure, wherein it argued that RIFF's application must be dismissed for RIFF's failure to identify the dock it plans to use in Old Harbor. After considering the arguments made by the Town in support of its motion, as well as the objection and response proffered by RIFF, the Division ordered RIFF to "submit a written declaration to the Division identifying the dock it is proposing to use on Block Island (in furtherance of its proposed ferry services) and offer proof of the dock's availability."⁸ RIFF was initially directed to file its "declaration" by August 28, 2015. However, after RIFF requested additional time, the Division extended this deadline to September 11, 2015.⁹ The Division also held that it would reserve final decision on the Town's motion for summary disposition until it received and considered RIFF's declaration.¹⁰

On September 11, 2015, RIFF submitted affidavits from its principal, Mr. Charles A. Donadio and from Mr. Paul Filippi, the principal member of Bluewater LLC ("Bluewater"), through which these individuals stated that their respective companies had reached an agreement relative to the planned

⁸ See Order No. 22030.

⁹ See Order Nos. 22030 and 22045.

¹⁰ See Order Nos. 22030 and 22045.

construction and use of a docking facility in Old Harbor. It was asserted in the affidavits that Bluewater had acquired rights to construct a wharf at either of two locations in Old Harbor and that RIFF planned to lease dock space from Bluewater once the wharf is constructed. RIFF also attached a copy of the relevant Lease Option Agreement (“Lease Agreement”) with Mr. Donadio’s affidavit. The affidavits and Lease Agreement also reflected that before construction can start, Bluewater must seek and receive the necessary permits from the Rhode Island Coastal Management Council and the U.S. Army Corps of Engineers, which it planned to file by November 1, 2015 and also a water quality certificate from the Rhode Island Department of Environmental Management.¹¹

Additionally, Mr. Donadio’s affidavit stressed that RIFF planned to utilize the South Pier, so-called (a.k.a. South Wharf), in Old Harbor “only as an alternative docking facility in the event that the Bluewater facility is not constructed for whatever reason.”¹²

In response to RIFF’s September 11, 2015 written declaration, the Town filed a response, on September 16, 2015, wherein the Town described the Lease Agreement between RIFF and Bluewater as a “sham.” In support of this claim, the Town argued, *inter alia*, that Bluewater had failed to demonstrate that it had acquired the necessary legal rights to wharf out at the Northerly Ell of the stone jetty at the Inner Basin (“Northerly Ell Facility”) or at the former location

¹¹ See Order No. 22103.

¹² See Order No. 22103.

of the Mount Hope Pier adjacent to the Easterly Breakwater (“East Breakwater Facility”), the two dock locations identified earlier by Bluewater and RIFF. The Town thereupon urged the Division to cancel the public hearings that had been scheduled for October 7 and 8, 2015 and grant the Town some time to propound additional discovery and depose Mr. Filippi.¹³

Though RIFF and Bluewater subsequently proffered documentary evidence, on September 17, 2015, that suggested that Bluewater had acquired rights to build a dock on Lot 158, plat 6 in Old Harbor (the location of the planned Northerly Ell Facility), the Division concluded that there was sufficient ambiguity in the matter to warrant a delay in the hearings and to permit the Town to conduct additional discovery. The Division directed the Town to file a response to RIFF’s September 11, 2015 declaration by November 16, 2015. Additionally, the Division directed RIFF to submit, by November 16, 2015, “a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater’s plans to construct a docking facility in Old Harbor... and also provide the Division with an anticipated start-date for its proposed services.” The Division also held that it would reserve final decision on the Town’s motion for summary disposition until after November 16, 2015.¹⁴

Subsequently, based on objections by Bluewater to the scope and relevancy of the discovery proposed by the Town, the Division reconsidered and vacated its earlier decision to permit the Town to conduct further discovery.

¹³ See Order No. 22103.

¹⁴ See Order Nos. 22103 and 22166.

The Division additionally denied a motion from RIFF to conduct related discovery in this matter.¹⁵ Notwithstanding its decision to suspend all requests to conduct additional discovery in this docket, the Division approved the Town's request for an opportunity to submit a written response to Bluewater's assertions of having the legal rights to wharf out at the Northerly Ell Facility or East Breakwater Facility without the Town's approval. The Town's response was due on November 5, 2015. Bluewater was also offered an opportunity to rebut the Town's response by November 16, 2015.¹⁶

On November 5 and 16, 2015, the Town filed its responses to Bluewater's dock construction claims and RIFF's September 11, 2015 declaration, respectively. On November 16, 2015, RIFF filed its response to the Division's request for a detailed chronology of the various anticipated regulatory steps and approvals concomitant with Bluewater's plans to construct a docking facility in Old Harbor; and its anticipated start-date for its proposed services. Also on November 16, 2015, Bluewater filed a response to the Town's November 5, 2015 filing, *supra*.

After a careful examination of the arguments and supporting documents offered by RIFF and the Town, and also the arguments and documents offered by Bluewater, the Division concluded that Bluewater's claims of interest and ability to construct a docking facility in Old Harbor were credible and that RIFF's access to Bluewater's planned docking facility was satisfactorily

¹⁵ See Order Nos. 22141 and 22166.

¹⁶ See Order Nos. 22183 and 22166.

demonstrated on the record. Though the Division is mindful that the Town plans to aggressively oppose Bluewater's permitting applications before the USACE and the CRMC, the Division found insufficient justification to deny RIFF an opportunity to pursue its current filing before the Division based on that anticipated opposition from the Town. The Town would have the Division accept the Town's opposition as a *fait accompli* on the question of Bluewater's ability to construct a new docking facility in Old Harbor. However, neither the prevailing law nor the facts associated with this matter provide that level of clarity. Consequently, the Division concluded that RIFF (through Bluewater) has a realistic expectation of having access to a future docking facility in Old Harbor from which it may operate a high-speed ferry service.

The Division further found that the expected timeline for completing the construction of a new docking facility in Old Harbor is not unreasonably long so as to necessitate additional delays in adjudicating RIFF's pending CPCN application.¹⁷ In its decision on the matter, the Division noted that it is expected that the Town will seek to intervene in the compulsory USACE and CRMC permitting application cases in order to express its opposition to the construction of a new dock in Old Harbor. The Division reserved the right to revisit this matter if the Town is successful in derailing Bluewater's plans in the preliminary stages of the proceedings scheduled before the CRMC and the USACE.¹⁸

¹⁷ See Order No. 22254.

¹⁸ See Order No. 22254.

In total, the Division issued seven (7) written decisions in connection with the Town's July 21, 2015 Motion for Summary Judgment.¹⁹ Predicated on the above travel and findings, the Division issued a final decision on the issue on December 10, 2015, denying the Town's July 21, 2015 Motion for Summary Disposition.²⁰

2. Hearings and Appearances

The Division conducted four public hearings in this docket. The hearings were duly noticed in conformance with the notice mandates contained in Rhode Island General Laws, Section 39-3-3.1. The hearings were conducted in the Division's hearing room located at 89 Jefferson Boulevard in Warwick, on March 2, 15, 22 and 24, 2016. The following counsel entered appearances:

For RIFF:	Alan M. Shoer, Esq. and James Hall, Esq.
For Interstate:	Michael R. McElroy, Esq.
For the Town:	Katherine A. Merolla, Esq.
For the Advocacy Section:	Christy Heatherington, Esq. Spec. Asst. Attorney General

3. RIFF'S Direct Case

RIFF proffered seven witnesses in support of its application filing. The witnesses were identified as: Ms. Elizabeth Dolan, Councilwoman, North Kingstown Town Council; Mr. Charles A. Donadio, Jr., President and owner of

¹⁹ See Order No. 22030, issued on August 11, 2015; Order No. 22045, issued on August 19, 2015; Order No. 22103, issued on September 21, 2015; Order No. 22141, issued on October 8, 2015; Order No. 22166, issued on October 20, 2015; Order No. 22183, issued on October 26, 2015; and Order No. 22254, issued on December 10, 2015.

²⁰ See Order No. 22254, issued on December 10, 2015.

the Applicant-Corporation; Mr. Lawrence R. Kunkel, Economist and President and Chief Strategy Officer, WhiteCap Holdings International, Inc.; Ms. Martha Pughe, Executive Director, North Kingstown Chamber of Commerce; Ms. Myrna George, President, South County Tourism Council; Mr. Steven J. King, P.E., Managing Director, Quonset Development Corporation; and Mr. Robert Billington, President, Blackstone Valley Tourism Council.

Ms. Elizabeth Dolan testified that she and the North Kingstown Town Council are familiar with RIFF's proposed service and support RIFF's application. She also noted that at the time RIFF filed its application with the Division she was Council President (her term as President ended in December of 2014). Ms. Dolan also noted that she submitted a letter to the Division on July 22, 2013 that expresses the support of the Council.²¹

Ms. Dolan testified that the Council supports RIFF's application because the Council believes that the proposal "offers both local and visiting tourists a more convenient Block Island ferry option due to the ease of access to Quonset from Route 95 via Routes 4 and 403." Ms. Dolan added that the Council believes that this new travel option will not only be of economic benefit to the Town of North Kingstown, but to Block Island as well, "by attracting additional tourism revenue and creating jobs." She also related that the "Council supports and encourages intermodal transportation as a means of making travel more convenient and alleviating traffic congestion...;" and that the

²¹ RIFF Exhibit 6. A copy of the Council's July 22, 2013 letter of support was marked as RIFF Exhibit 7.

“Council believes that the connections between RIFF’s ferry terminal, RIPTA bus service, the Wickford Junction commuter rail service and T.F. Green Airport will not only make RIFF’s service a success, it will promote State and federal transportation policy.”²²

Mr. Charles Donadio testified that he is RIFF’s sole owner and also holds all the corporate offices, including the office of President. Mr. Donadio related that RIFF is a company that specializes in fast ferry services; and that RIFF was the first ferry company to establish successful high-speed ferry service to Martha’s Vineyard. He added that RIFF also provides Sightseeing Cruises throughout Narragansett Bay and Newport Harbor; and has been involved in fast ferry charters and consulting services in Florida, New Jersey, New York and Bermuda.²³

Mr. Donadio testified that RIFF owns three high-speed ferries, the *Millennium*, a 400-passenger water-jet propelled ferry which can operate at speeds up to 35 knots, the *Ava Pearl*, a 150-passenger propeller-driven ferry which can operate at speeds up to 32 knots and an “offshore crew transfer vessel.”²⁴ Mr. Donadio described the *Ava Pearl*, delivered in 2012, as “one of the most advanced high-speed ferries in the country.”²⁵

Mr. Donadio next related that he has been involved in several other marine transportation companies over the years. He testified that he was the President and owner of Galilee Cruises, Inc., which operated the Southland

²² Id., pp. 1-3.

²³ RIFF Exhibit 12, p. 2.

²⁴ See 3/2/16 transcript, p. 172.

²⁵ RIFF Exhibit 12, p. 3.

Riverboat from 1995 to 2007. Mr. Donadio related that the Southland Riverboat provided narrated sightseeing cruises, sunset cruises and private charters throughout the Great Salt Pond and the Point Judith Harbor of Refuge. Mr. Donadio also testified that he was the founder of Island Hi-Speed Ferry, LLC (“IHSF”), which obtained a certificate from the Division in 1998 authorizing high-speed ferry services between Point Judith and Block Island. Mr. Donadio related that he ultimately sold his ownership interest in IHSF in 2003 to start RIFF.

Mr. Donadio also provided a summary of the awards that his companies have received. He related that in 1995, the South County Tourism Council awarded Galilee Cruises with an “Excellence Award for Tourism Development in South County, Rhode Island” in recognition for the rehabilitation of the Southland Riverboat and the return of traditional, daily-guided tours on Salt Pond. He noted that in 1997, the Southland Riverboat was voted “Best Scenic Water Ride” by Rhode Island Monthly Magazine.²⁶

Mr. Donadio testified that in 1998, the U.S. Small Business Administration awarded him with the “1998 RI Young Entrepreneur of the Year” award for Small Business in Rhode Island. He related that he received the award after being evaluated “on the evidence of success by measuring sales and profits, increased employment opportunities, development and/or utilization of innovative or creative business methods, and demonstrated entrepreneurial potential necessary for long-term success and economic

²⁶ Id., p. 4.

growth.”²⁷ Mr. Donadio related that he subsequently went on to become the 1998 New England Region Young Entrepreneur of the Year.²⁸

Mr. Donadio next testified that in 1999 and 2002 his Southland Riverboat was voted as “Editor’s Pick” in Yankee Magazine’s Travel Guide. He also noted that in 2003, he received an Excellence Award for Innovation & Entrepreneurship from the Providence Business News for the development of the new fast ferry service from Quonset Point to Martha’s Vineyard.²⁹

Mr. Donadio next turned his attention to the reasons why he believes there is a public need for an additional high-speed ferry service to Block Island from mainland Rhode Island. He related that based on his experiences in operating ferry services from both Point Judith and Quonset Point, he believes that 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 Point service if offered the opportunity.” Mr. Donadio reasoned that RIFF’s operation at Quonset Point offers fast ferry passengers amenities not available to users of either Interstate’s Point Judith or Newport fast ferry services that he believes would incentivize those who currently choose not to patronize those services even though it would mean more time spent travelling over water when compared to Interstate’s Point Judith high-speed service.

In comparing the two high-speed services, Mr. Donadio related that RIFF offers a “high level of personal service” and a “first class travel experience.” He

²⁷ Id., p. 4.

²⁸ Id.

²⁹ Id., p. 5.

declared that his customers “enjoy the fact that their vacation begins when they board our vessel.” Mr. Donadio is confident that his Block Island passengers would prefer the amenities that RIFF offers even though the trip will take 50 minutes, compared to Interstate’s 30 minute service. Mr. Donadio also indicated that RIFF will offer the following additional amenities with its proposed service: easy access to Quonset Point by highway from every direction (which he compares to Interstate’s Point Judith location, which he argues is “very time consuming and frustrating” to access from Route 95); 5.5 acres of dedicated dockside parking (which he compares to Point Judith’s parking, which he argues is “spread out and can fill to capacity regularly on busy Summer weekends”); always available dockside drop-off service (which he compares to Point Judith’s sometimes restricted drop-off access); intermodal transportation connections, including Airport Shuttle service and limousine service between the Kingston Train Station and Quonset Point; a “much more scenic ride, as part of the route will be through Southern Narragansett Bay;” that 99% of RIFF’s business is done through reservations, “so that no one is turned away (which he compares to the possibility of being turned away by Interstate on busy weekends); and that RIFF’s vessels (*Ava Pearl* and *Millennium*) will provide more spacious cabins for passengers than Interstate’s vessel (*Athena*).

Mr. Donadio also emphasized that Interstate’s vessel is a fifth generation whale watcher that was stretched out to accommodate 249 passengers in what had previously been a 149-passenger 29-meter platform. In contrast, he

explained that the *Ava Pearl* has a 33-meter platform and a capacity of 250 passengers, which he notes is “deliberately certificated for only 150, leaving at least 100 empty seats on every trip.” He noted that the *Ava Pearl* also has a “very spacious exterior luggage and bike storage area” (which he compared to the “cramped exterior deck luggage area” on Interstate’s vessel). Mr. Donadio added that the *Millennium* is a 37-meter 400-passenger catamaran, which he says “speaks for itself in terms of capacity.”³⁰

As an additional amenity, Mr. Donadio testified that RIFF is about to begin construction on a 4,000 square foot terminal facility that will “be like a mini airport terminal.” He related that the facility will “be spacious, climate controlled, and have both outdoor and indoor waiting areas;” and also have “flat screen televisions and phone/computer charging stations... food service with a liquor license and a gift shop.” Mr. Donadio compared his planned facility to Interstate’s Point Judith facility, which he described as “small” and “cramped.”³¹

As part of his public need assessment, Mr. Donadio testified that he has also studied RIFF’s market by population density. He related that “based upon a population radius analysis together with other evidence” he is confident “that a market for more Block Island fast ferry service exists.” In support, Mr. Donadio proffered population numbers and total business numbers located within close proximity to Quonset and Point Judith. He concluded that the

³⁰ Id., pp. 6-7.

³¹ Id., pp. 7-8.

data “show that there is a much larger population base with close proximity to Quonset than there is to Point Judith. Mr. Donadio asserted that this data, “together with all the other evidence I have seen, including Bob Billington’s experience with servicing pent-up demand for Block Island travel even after... [IHSF] started operations and after Interstate acquired IHSF’s assets tells me that an untapped market for Block Island fast ferry service exists.”³²

As additional evidence of “unsatisfied demand,” Mr. Donadio testified that RIFF frequently hears from people “who want to know whether we service Block Island or simply show up thinking we do.” He opined that “[p]resumably they would not do so if Quonset was not their desired departure point.”³³

Mr. Donadio also opined that there are untapped markets for fast ferry service to Block Island from other New England tourist destinations. As an example, he believes that “a reverse market” from Martha’s Vineyard to Block Island exists, and believes that he would be able to better serve this demand through his current services between Quonset and Martha’s Vineyard. He related that he “seriously” doubts that such travelers “would use Interstate’s fast ferry because it would not be a seamless route.”³⁴

Finally, Mr. Donadio testified that if his application is approved, he plans to charge between \$40 and \$50 for a round trip ticket. He noted that such rates would naturally be subject to the Commission’s approval. He also testified that he plans to start his service with an abbreviated schedule in the

³² Id., pp. 8-9.

³³ Id., p. 9.

³⁴ Id., p. 10.

last week of June and ending on Labor Day, with two to three round trips per day. Mr. Donadio explained that the schedule would continue until it can be optimized to respond to demand.³⁵

Mr. Lawrence Kunkel was proffered by the Applicant to provide an expert opinion on the question of whether there is a public need for RIFF's proposed new high speed ferry service. After providing a summary of his educational background and professional and business experience, Mr. Kunkel testified that he has been qualified and has testified as an expert witness before both the Division and Commission. Mr. Kunkel further related that he has been recognized by the Commission as an expert in economics, finance and game theory.³⁶

On the matter of whether there exists a public need for RIFF's proposed service, Mr. Kunkel testified that in his opinion "there is a public need for such a service and that RIFF's proposed service will satisfy that need."³⁷ Mr. Kunkel bases his opinion on several factors. First, he notes that Rhode Island and the federal government have invested "a combined \$660 million in infrastructure improvements in the Quonset Davisville Business Park and notably in the Route 403 exchange with the purpose of attracting private investment in diverse areas of commerce, including, marine transportation."³⁸ He opined that federal and State policymakers have clearly determined that multi-modal commerce compatible with these improvements justified such a large public

³⁵ Id.

³⁶ RIFF Exhibit 22, pp. 1-4.

³⁷ Id., p. 4.

³⁸ Id.

investment “because the Park’s unique location and attributes, to include its streamlined and uniform development process, would be a major economic driver.” Mr. Kunkel related that inherent in that decision making “was an assumption that there was a public need for the goods and services that business tenants of the Park would provide.”³⁹

Second, Mr. Kunkel relies on the fact that the Quonset Development Corporation’s Board of Directors “made a policy decision when it granted RIFF’s concession/land lease and approved its bulkhead improvements, that those actions would promote the manifest federal and State policies mentioned above, as well as serve the public’s marine transportation needs.”⁴⁰

Third, Mr. Kunkel testified that: “in my studied opinion there is a dormant, unserved, market for additional high-speed ferry service to Block Island not currently satisfied by Interstate Navigation’s fast ferry service from either Point Judith or Newport.”⁴¹ On this third factor, Mr. Kunkel opined that there has been a “maturation and market embrace” of the high speed ferry market to Block Island, but not a saturation of demand from all conceivable geographic markets that would embrace high speed ferry service to Block Island if the opportunity presented itself. To prove his point, Mr. Kunkel reminded the Division of his similar opinion in 1998 when he testified in support of IHSF’s application. He noted that at the time, Interstate argued that there was not a public need for high speed ferry service to Block Island; and

³⁹ Id., pp. 4-5.

⁴⁰ Id., p. 5.

⁴¹ Id.

that since that time, high speed services are now available to Block Island, through Interstate, from Point Judith, Newport and Fall River.⁴² Despite this expansion of high speed service, Mr. Kunkel maintains “that there is still an unserved market for travelers from mid-State and Northern Rhode Island,⁴³ as well as from Massachusetts who have avoided both Interstate’s traditional and high speed Galilee services because of the burdens involved in driving there in the Summer traffic down Route 95, then Route 4, then Route 1, then Point Judith Road, finding a parking space and lugging their belongings sometimes hundreds of yards to the terminal – and on extremely busy weekends being unable to find parking at all.”⁴⁴ Mr. Kunkel testified that Quonset offers obvious beneficial alternatives to those travelers. Mr. Kunkel also observes that Block Island currently has 5 mainland departure points for ferry access to the Island and that three of these departure points are controlled by Interstate. In comparison, he notes that Martha’s Vineyard has 7 mainland departure points, with 10 total ferry service options.⁴⁵

Mr. Kunkel also addressed Interstate’s involvement in this case. He testified that by “employing a game theoretic approach it is my opinion that Interstate has engaged in a game where the ultimate payoff has been preserving its monopoly on ferry transportation from mainland Rhode Island to Block Island.” To buttress this claim, Mr. Kunkel first observes that Interstate

⁴² Id., pp. 5-6.

⁴³ Mr. Kunkel stated that he is relying on Mr. Robert Billington’s opinion regarding a perceived demand in Northern Rhode Island. Id., p. 6.

⁴⁴ Id., p. 6.

⁴⁵ Id.

“opposed IHSF’s permitting on the fallacious ground that there was no need for Block Island high speed service. Then after the DPUC-imposed moratorium on Interstate’s entry into that market expired, it applied for its own Galilee high speed CPCN.”⁴⁶ Mr. Kunkel contends that Interstate has followed a similar path in this case. After learning that RIFF had an interest in providing high-speed service to Block Island, Interstate “inaugurated high speed service from Newport and added the Fall River route.” Mr. Kunkel testified that based on his practical experience and observations of Interstate’s strategic moves, “I can only conclude that Interstate’s motive here is not necessarily to serve a public need as much as it is to prevent entry by what it incorrectly perceives to be a market rival, with the ultimate payoff being the preservation of its monopoly.”⁴⁷

Mr. Kunkel concluded by emphasizing that RIFF is not a direct market rival to Interstate. He opines that RIFF and Interstate will be serving different markets, with geographic location of departure points being the main difference. He further opines that if there is some crossover from Interstate to RIFF the “direct competition will be beneficial to the traveling public.”⁴⁸ As a final argument, Mr. Kunkel asserted that high speed service has historically been treated as a discretionary service by the Division and, therefore, “there is no plausible economic reason or clear public policy for preventing some direct competition in that market.”⁴⁹

⁴⁶ Id., p. 7.

⁴⁷ Id., pp. 7-8.

⁴⁸ Id., p. 8.

⁴⁹ Id.

Ms. Martha Pughe testified that she was the Director of the North Kingstown Chamber of Commerce (“NK-Chamber”) at the time RIFF filed its application with the Division. She noted that she is now employed at Electric Boat and has been since April of 2015. Ms. Pughe testified that when she was the Director of the NK-Chamber, her duties included: achieving the strategic goals determined by the Board of Directors; to generate revenues for the operation and activities of the NK-Chamber; to manage in the recruitment, retention, and expansion of members and local business; and to provide tangible networking, educational, and advocacy opportunities for Chamber members.⁵⁰

With respect to RIFF’s application, Ms. Pughe testified that RIFF has been a member of the NK-Chamber since 2003. She related that the NK-Chamber is routinely in contact with RIFF over communications about referrals and service details. Ms. Pughe also stated that she is familiar with RIFF’s proposal now before the Division and that the NK-Chamber still fully supports it. As a further expression of support, Ms. Pughe testified that the NK-Chamber submitted a letter to the Division on August 8, 2013 wherein it urged the Division to approve RIFF’s application.⁵¹

Ms. Pughe related that the NK-Chamber supports RIFF’s application because it believes that RIFF “has all the necessary ingredients for success, including its existing infrastructure and intermodal transportation connections

⁵⁰ RIFF Exhibit 4, p. 2.

⁵¹ Id., pp. 2-3. A copy of the Chamber’s August 8, 2013 letter of support was marked as RIFF Exhibit 5.

via Routes 4 and 403. We also believe that offering tourists another, more convenient, Block Island fast ferry option will encourage more commerce by tapping into the market of people who might not have otherwise travelled to the island.”⁵² Ms. Pughe concluded that the NK-Chamber believes that RIFF’s services will “grow the market... rather than simply redistribute it.” She added that competition is “healthy, as it should cause the service providers to innovate and improve their business operations.”⁵³

Ms. Myrna George testified that she has been the President of the South County Tourism Council (“SCTC”) for over 10 years. She testified that the mission of the SCTC is to “plan, promote and market tourism beyond our 11-town region.” Ms. George explained that this effort includes “identifying our target tourism market, and developing marketing campaigns that attract visitors to our region.”⁵⁴

Ms. George testified that she is familiar with the business operations of both RIFF and Interstate. She related that she is also familiar with RIFF’s current plans to operate a high-speed ferry between Quonset and Block Island. Regarding RIFF’s current plans, Ms. George testified that SCTC supports RIFF’s proposal and has submitted a letter to the Division that expresses this support.⁵⁵

⁵² Id., pp. 3-4.

⁵³ Id., p. 4.

⁵⁴ RIFF Exhibit 2, p. 1.

⁵⁵ Id., pp. 2-3. A copy of the SCTC’s August 14, 2013 letter of support is included in the exhibit; and also separately marked as RIFF Exhibit 3.

Ms. George explained that SCTC supports RIFF's proposed high-speed service to Block Island because "it may reduce some of the traffic burden in South County during [the] high season, created by those travelling to South County to reach other destinations, while at the same time it would increase the convenience and ease of access for ferry passengers coming from areas outside of South County."⁵⁶ Ms. George also explained that SCTC also supports alternative modes of transportation "and believes that the convenient access to Quonset via Routes 4 and 403 is underutilized." Ms. George also opined that due to "the proximity of Quonset to the Routes 4/403 exchange, Wickford Junction and the Airport, travelers from Northern Rhode Island and Massachusetts, as well as long distance airline passengers, should find RIFF's Block Island fast ferry option particularly appealing."⁵⁷

Mr. Steven King identified himself as the Managing Director of the Quonset Development Corporation ("QDC"). He said that he has held that position since 2008. Mr. King testified that as a Quonset tenant, he is familiar with RIFF's business operations and familiar with RIFF's plans to provide high-speed ferry services to Block Island. He also testified that the QDC supports RIFF's application.

Mr. King related that RIFF's proposal to operate a new fast ferry service from Quonset is consistent with RIFF's lease with QDC. He also testified that QDC supports RIFF's plans because, if approved, "it will optimize the use of

⁵⁶ Id., pp. 3-4.

⁵⁷ Id., p. 4.

RIFF's newly renovated docking facilities and will create additional private investment and employment opportunities.”⁵⁸ Mr. King noted that QDC submitted a letter to the Division on August 6, 2013 expressing support for the instant application process.⁵⁹ Mr. King added that QDC recently completed construction of two new docks to support RIFF's existing ferry operations with funding from RIDOT.⁶⁰ Mr. King testified that RIFF was eligible for the funding because it was successful in demonstrating “that the project would result in mitigation of vehicular traffic congestion and would have a collateral effect of improving air quality by taking automobiles off the road.”⁶¹

Mr. Robert Billington identified himself as the President of the Blackstone Valley Tourism Council (“BVTC”). He related that he has been serving in that capacity for over 30 years. He also related that the BVTC's mission is to develop sustainable tourism in the Blackstone Valley of Rhode Island. However, Mr. Billington explained that his support for the Applicant's services reflects his own personal support and not that of the BVTC.

Mr. Billington testified that he is familiar with the business operations of both RIFF and Interstate and is familiar with RIFF's proposal to provide high-speed ferry services between Quonset and Block Island. Mr. Billington also testified that he supports RIFF's application.

⁵⁸ RIFF Exhibit 10, pp. 2-3.

⁵⁹ Id., p. 3. A copy of the QDC's August 6, 2013 letter of support is included in the exhibit; and also separately marked as RIFF Exhibit 11.

⁶⁰ Id.

⁶¹ Id.

Mr. Billington explained that he supports RIFF's proposal "because Quonset will present a more convenient departure point to Block Island for persons living in Northern Rhode Island, which is the main State population base and location of major tourism markets...."⁶² He also observed and opined that RIFF "already has infrastructure in place at Quonset to accommodate the service... [and that] a Quonset fast ferry service may take some traffic off the roadways, alleviating Summertime congestion..." He added that he also believes RIFF's service "will satisfy pent up demand for more convenient travel to Block Island."⁶³

On this latter point, Mr. Billington testified that "it is a well known fact in the Rhode Island tourism industry that many Rhode Islanders have never enjoyed a trip to Block Island." Mr. Billington related that he first became aware of this fact ten years ago when he was involved in a program known as Tour RI. While at Tour RI, an organization he founded to promote tourism in Rhode Island, Mr. Billington said that he was surprised to see that so many Rhode Islanders were interested in visiting Block Island. He related that "the Block Island tours... always sold out first." However, he also believes that many Rhode Islanders "do not travel to Block Island because it is viewed as distant and difficult to reach." He opined that if "they are presented with a more convenient mode of traveling to the Island they will take advantage of it, even if the cost of that convenience is higher than driving to Galilee, parking

⁶² RIFF Exhibit 8, pp. 2-3.

⁶³ Id., p. 3.

and purchasing a ferry ticket.” Mr. Billington concluded his testimony by declaring that he believes that there is a public need for RIFF’s proposed services.⁶⁴

4. The Town’s Direct Case

The Town proffered pre-filed direct testimony from two witnesses in opposition to RIFF’s application filing. The witnesses were identified as Mr. Kenneth C. LaCoste, New Shoreham’s First Warden; and Mr. Stephen C. Land, New Shoreham’s Harbormaster.

First Warden LaCoste recounted that on August 5, 2013, Mr. Donadio made a verbal presentation to the New Shoreham Town Council regarding his proposed ferry services to Block Island. First Warden LaCoste related that Mr. Donadio told the Council that the ferry “will be at the dock for about an hour and a quarter each day... [that] no dockside ticketing facilities are planned... [and that] he planned to build a new ferry for the run, approximately 105 feet long with a 32-33 foot beam and a passenger capacity between 150 and 300... that the ferry will carry luggage and bicycles but [not] vehicles and freight... [and that] he estimated two to three round trips per day from Memorial Day to Columbus Day, depending on demand.”⁶⁵

In response to Mr. Donadio’s presentation, First Warden LaCoste related that the Council expressed a number of concerns. He described the concerns as follows:

⁶⁴ Id., pp. 3-5.

⁶⁵ Town Exhibit 1, p. 2.

a. Old Harbor is a relatively small harbor with much traffic in the summer months including the local fishing fleet, the charter fishing fleet, other charter boats, transient wharfage in Old Harbor, pleasure vessels and already existing ferries. The addition of yet another ferry to that harbor will cause further disruption, crowding and problems with vessel maneuvering. Safety is a serious concern.

b. There is no dock where the Fast Ferry vessel could dock except for possibly Ballard's Wharf; however, the construction and use of that dock is under a CRMC assent which only permits pleasure vessels and then no more than eight boats, with the seaward two boats limited to 26 feet in length.

c. The addition of a new passenger service at a time when the island is already saturated with people is a serious problem.

d. Ferry service rate increases as determined by the Public Utilities Commission cause a hardship to residents of the island. One of the factors which is a component of the Public Utilities Commission's decision to allow a rate increase is the income of Interstate Navigation. Interstate Navigation provides the only ferry service to and from Block Island during the off-season months and serves as a life line from the Town to the mainland for island residents. The revenues which Interstate Navigation obtains from the in-season period of Memorial Day to Columbus Day support the off-season ferry service. Rhode Island Fast Ferry plans to operate only from Memorial Day to Columbus Day, depending on demand and, if allowed to operate, 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.⁶⁶

First Warden LaCoste next testified that Mr. Donadio made a second presentation to the Town Council on September 18, 2013, at which time he

⁶⁶ Id., pp. 3-4.

indicated that he wanted “a positive relationship” with the Town and “is not going to force a ferry service on the island.” First Warden LaCoste also recounted that at that time Mr. Donadio “suggested that the Town apply for a grant to fund the construction of a dock.” After his presentation and based on the concerns identified above, First Warden LaCoste testified that the Town Council decided (voted) to oppose Mr. Donadio’s application. First Warden LaCoste also remains disappointed that Mr. Donadio failed to honor his commitment to the Town that he would not seek a CPCN without the Town’s support.⁶⁷

Mr. Stephen Land testified that he has been the Town of New Shoreham’s harbormaster since 2010. He also serves as a New Shoreham police officer. After describing his harbormaster qualifications, Mr. Land echoed the safety concerns enumerated earlier by the First Warden. He offered the following explanation for his concerns:

As Block Island Harbormaster my greatest concern regarding the Rhode Island Fast Ferry proposed service in Old Harbor, Block Island is the overall issue of public safety. The addition of another ferry service into an already extremely busy, mixed use harbor should be of great concern to everyone. Old Harbor is currently crowded throughout the summer months (the only months the new service has proposed to run) with swimmers, kayakers, pleasure boaters, wind surfers, paddle boaters, sailing, commercial fishing, lobster and charter boat companies, parasail and banana boat and for other recreational uses. These activities are combined with the several already established ferry services arriving and departing multiple times per day in and out of Old Harbor.

⁶⁷ Id., pp. 5-7.

In addition, it is my understanding that the RIFF does not have an actual dock space at this time in Old Harbor. Reading the RIFF testimony, I can only assume that the RIFF intends to use an area on the north side of Ballard's Marina, which is not a commercial dock. This would prove to be a significant challenge to any captain trying to dock the proposed RIFF ferries in this small area. The distance currently between the Ballard's Marina dock and the Wronowski's to the North, where the New London High Speed Ferry docks is 154 feet. Realistically, given the size of the RIFF vessels, the current dock space is inadequate and will leave a portion of the vessels to extend beyond the end of the dock on the east side, and require approximately 38' to 40' on the north side. This would leave only a small area for the non RIFF ferries and other boat traffic to maneuver. Compounding the issue is the way the two docks are awkwardly angled, (in toward each other) increasing the difficulty of safely docking the proposed RIFF vessels.⁶⁸

In closing, Mr. Land stated that it was his professional opinion that "the RIFF ferries in the Old Harbor of Block Island would pose a serious public safety hazard."⁶⁹

5. Interstate's Direct Case

Interstate proffered pre-filed direct testimony from three witnesses in opposition to RIFF's application filing. The witnesses were identified as Mr. Edward M. Mazze, Ph.D, Professor of Business Administration at the University of Rhode Island and a consultant in business and economics matters; Mr. Walter E. Edge, Jr., CPA, Vice President of B&E Consulting LLC, a consulting firm that specializes in accounting and utility regulatory matters; and Mr.

⁶⁸ Town Exhibit 2, pp. 3-4.

⁶⁹ Id., p. 4.

Michael A. Voccola, Esq., representing The Lighthouse Inn Galilee, 307 Great Island Road, Narragansett, Rhode Island.

Dr. Mazze related that the purpose of his testimony in this docket is to identify and discuss a marketing research study that he conducted for Interstate in 2013 on passenger ridership on Interstate's traditional and high-speed ferries that operate between Point Judith and Block Island; and to testify on the Applicant's proposed high-speed service between Quonset and Old Harbor, Block Island. Dr. Mazze's qualifications to testify as an expert witness, in the areas of business and economics, was not challenged by the Applicant.

In his opening comments, Dr. Mazze opined that based on his research, "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 under different pricing and travel time scenarios." Dr. Mazze also opined that if RIFF's application is approved, its services 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."⁷⁰

In reaching this conclusion, Dr. Mazze related that in addition to the study he conducted, he has also reviewed "business information provided by Interstate and filings, pleadings and other documents submitted to the Division

⁷⁰ Interstate Exhibit 5, p. 4.

by Interstate and other parties in this matter.” He also is basing his opinion on “my education, training and experience as a consultant to businesses and government agencies... [and] corporate board memberships...”⁷¹

Dr. Mazze testified that the purpose of his study was to determine if passengers of Interstate’s traditional and high-speed ferries would travel to Block Island on a fast ferry from Quonset Point under various pricing scenarios. To collect information, he related that a survey was used and that the questions in the survey were pre-tested to make sure that they were clear and not leading. He related that the survey included open-ended questions about the passengers being surveyed and closed-ended questions that required a “Yes” or “No” response; that the survey participants were passengers purchasing tickets from Interstate’s ticket office in Point Judith; that a “non-probability convenience sample” was used to choose respondents; that 200 passengers per day were surveyed; and that the study was conducted in July, August and September, one day each month (on July 31, August 12 and September 7), in the morning and early afternoon to collect information from round-trip day-trippers and others.⁷²

Dr. Mazze testified that the survey given to Interstate’s traditional ferry passengers asked the following questions: (1) in the summer months, approximately how many times do you travel on the Block Island conventional ferry? (2) What is your City? State? Zip Code? (3) How many people are

⁷¹ Id., pp. 4-5.

⁷² Id., pp. 5-6.

traveling in your party today? (4) If there was a \$50 round-trip fast ferry to Old Harbor from Quonset Point in North Kingstown, would you take the Quonset fast ferry instead of the Point Judith conventional ferry? Yes, No and (5) If the conventional ferry cost is about \$27 per person less from Point Judith than the Quonset fast ferry, does that change your answer to question 4? Yes, No.⁷³

For the passengers purchasing high-speed ferry tickets, the survey contained the following questions: (1) in the summer months, approximately how many times do you travel on the Block Island fast ferry? (2) What is your City? State? Zip Code? (3) How many people are traveling in your party today? (4) If there was a \$50 round-trip fast ferry to Old Harbor from Quonset Point in North Kingstown and took 1 hour on the water, would you take the Quonset fast ferry instead of the Point Judith fast ferry? Yes, No (5) If the cost is about \$15.00 per person less from Point Judith than from Quonset, does that change your answer to question 4? Yes, No and (6) If the on the water travel time is about a half hour less from Point Judith than from Quonset, does that change your answer to question 4? Yes, No.⁷⁴

Dr. Mazze next described the results of the surveys in detail, broken down by date.⁷⁵ He offered the following summary of the overall results of the study:

The results of the three surveys were: 17% of traditional ferry respondents answered that they would take the fast ferry from Quonset Point to Old Harbor,

⁷³ Id., p. 7.

⁷⁴ Id., pp. 7-8.

⁷⁵ Id., pp. 8-11.

Block Island if the round-trip cost was \$50 and twenty-seven percent of hi-speed ferry respondents answered that they would take the fast ferry if the round-trip cost was \$50.

55% of the respondents traveled in parties of two or more.

50% of the respondents made only one trip to Block Island during the summer months. Of these respondents, 51% traveled by hi-speed ferry and 49% the traditional ferry.

130 of the 614 surveyed passengers (21%) answered they would take the fast ferry from Quonset Point to Block Island before different scenarios were presented to them.

When different pricing and travel time scenarios were introduced to the respondents, the findings were:

57% of the traditional ferry passengers (34 of the 59 respondents who would take the fast ferry) answered that they would not take the fast ferry if the cost for taking the traditional ferry from Point Judith was \$27 less per person.

56% of the hi-speed passengers (40 of the 71 respondents who would take the fast ferry) answered that they would not take the fast ferry from Quonset Point if the cost was \$14 less from Point Judith.

62% of the hi-speed ferry passengers (44 of the 71 respondents who would take the fast ferry) answered that they would not take the fast ferry from Quonset Point if the on-the-water travel time is about a half hour less from Point Judith.⁷⁶

Based on the study results, Dr. Mazze concluded that RIFF would take away as many as 20% of the total passengers of Interstate's ferries during the

⁷⁶ Id., p. 11

summer months. This would include 17% of the traditional ferry passengers and 27% of the high-speed ferry passengers. Dr. Mazze testified that this outcome would have a significant negative impact on Interstate's yearly revenue and would adversely impact Interstate's ferry operations, including its year-round lifeline passenger, vehicle and freight service from Point Judith to Block Island.⁷⁷

Dr. Mazze next testified that after reviewing the pre-filed direct testimony of RIFF's witnesses, he noticed that none of their opinions relied on or used "any economic study, marketing study, traffic study, [or] tourism study of Block Island or marketing plan from... [RIFF]." He observed that Mr. Billington "relied on a Tourism Satellite Account for Rhode Island which made no mention of Block Island, fast ferry service in Rhode Island or the market for additional fast ferry service in Rhode Island;" that Mr. King's "knowledge about... [RIFF's] operations came from... [RIFF's] Counsel;" that Ms. Dolan "relied on her 'firsthand knowledge and experience with severe auto congestion on Route 4 and Route 1 from May through September;" that Ms. George "relied upon her experience of having lived in South County her entire life;" and that Mr. Kunkel "relied on the direct testimony of Billington and being recognized by the PUC as an expert in economics, finance and game theory."⁷⁸

Regarding Mr. Donadio's pre-filed testimony, Dr. Mazze again observed that "Donadio presented no economic, marketing, traffic or tourism studies...

⁷⁷ Id., p. 12.

⁷⁸ Id., pp. 12-13.

to support his opinions.” He also noted that Mr. Donadio “did not present a business plan, marketing plan or marketing feasibility study showing that there was a public need for an additional high speed ferry service to Block Island from Quonset Point.”⁷⁹

Dr. Mazze additionally opined that ferry passengers to Block Island would not benefit from competition between Interstate and RIFF. He related that “[t]rue competition can be beneficial when it can lower prices, offer better services for passengers and allow firms to compete on a level playing field.” However, 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.” Dr. Mazze maintained that when passengers “are receiving adequate service and there is enough capacity to meet the needs of passengers, new competition is not efficient.”⁸⁰

In further support of his opinion, Dr. Mazze stressed that RIFF plans to offer only passenger service, and only during the summer months taking passengers and revenue away from Interstate. He contended that this “is not true competition because... [RIFF] 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.’”⁸¹

Dr. Mazze related that Interstate’s high-speed ferry accounts for about 16% of its yearly revenue and the traditional ferry accounts for 84% of its

⁷⁹ Id., p. 13.

⁸⁰ Id., p. 14.

⁸¹ Id.

revenue. He emphasized that the summer revenue is needed to support Interstate's lifeline services to the island throughout the year; and that a loss of revenue would result in Interstate having to raise rates, reduce the number of ferries to the island and/or downsize the number of full-time and seasonal workers. Dr. Mazze also noted that Interstate has invested much money in promoting its ferry services to Block Island, and that it would be unfair to permit RIFF to benefit from Interstate's advertising expenditures during the most profitable time of the year.⁸²

In addressing Interstate's opposition to RIFF's application, Mr. Walter Edge stated that his testimony covers the following six areas connected to RIFF's case:

1. Proving 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.
2. Clarifying for the record some of the points raised by RIFF witnesses regarding the history of regulation relating to these two entities.
3. Addressing falsehoods in the RIFF pre-filed testimony relating to Interstate in order to correct the record.
4. Reviewing the claims regarding the alleged need for the proposed service given the current fast ferry market in southern New England.

⁸² Id., p. 15.

5. Evaluating the observations of the RIFF witnesses and the documentation used by them attempting to show that there is a need for the proposed RIFF service and demonstrating why I am of the opinion that their conclusions, based upon my review of their own documentation, are wrong and their faith in the documentation is misplaced.

6. Determining if the public in general will be provided a more convenient high speed service than what already exists if the RIFF application is granted.⁸³

Mr. Edge began his testimony by opining that (1) there is no need for the proposed RIFF service because the fast ferry market to Block Island is saturated; (2) there will be no general public convenience provided by the proposed service; (3) the addition of the RIFF service is contrary to the public interest; (4) 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.⁸⁴

Mr. Edge agreed with Dr. Mazze that '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 [RIFF] is permitted to offer summer-only, passenger only high-speed ferry service from Quonset Point to Old Harbor..., ' and 'that, if [RIFF's] application is approved, [RIFF] would negatively impact Interstate's lifeline passenger, vehicle and freight services to Block Island by taking away customers and revenue from Interstate during the

⁸³ Interstate Exhibit 2, pp. 1-2.

⁸⁴ Id., p. 2.

summer months.⁸⁵ Mr. Edge based his opinion on his education, training, and experience as a CPA and as a 24-year consultant for Interstate and many other regulated utilities in Rhode Island.⁸⁶

In calculating the financial impact on Interstate's lifeline service, Mr. Edge related that, based on Dr. Mazze's study, Interstate would lose \$1,214,590 of revenue if RIFF's proposed services are approved. He testified that to offset this impact, Interstate would have to increase its traditional service rates by 14.2%.⁸⁷ Mr. Edge also explained that the impact to Interstate's traditional ferry service rates come from the fact that "Interstate's traditional rates are calculated using 100% of the fast ferry profit."⁸⁸

Mr. Edge next compared the instant docket to the 2005 docket in which Interstate sought a high-speed ferry service CPCN from the Division at a time when there was another high-speed ferry service provider, IHSF, already operating between Point Judith and Block Island.⁸⁹ In contrasting the differences, Mr. Edge first noted that when Interstate applied for a CPCN it relied on a study that used a survey of its own customer base. He related that the study showed that 70% of the projected ridership would come from Interstate's own traditional service passengers. Mr. Edge points out that RIFF has offered no such studies to support its application.⁹⁰

⁸⁵ Id.

⁸⁶ Id., p. 3.

⁸⁷ Id., pp. 3-4.

⁸⁸ Id., p. 4.

⁸⁹ Id., pp. 4-5; referring to Docket D-05-06.

⁹⁰ Id., p. 5.

Mr. Edge next points out that in its 2005 case, Interstate provided complete operational and financial information, including a description of the vessel that would be used, rates, projected revenue and expenses, estimated financial impact on Interstate's lifeline customers and services, and the exact number and scheduled times of all trips proposed. He notes that RIFF "has provided none of these important pieces of information."⁹¹

Mr. Edge added a number of other comparisons to Interstate's 2005 case. First, that Interstate offered three options that were designed to protect Interstate's lifeline customers if Interstate's fast ferry was unsuccessful, and that RIFF has offered no such options to protect Interstate's lifeline customers or services, or any assurances that their entry into the fast ferry business will not hurt Interstate's lifeline customers.

Mr. Edge next discussed a number of comparisons that involve Mr. Kunkel, who Mr. Edge noted was IHSF's expert witness in the 2005 case (IHSF was an Intervenor in that case). Mr. Edge related that despite Mr. Kunkel's opinion in the 2005 case that IHSF and Block Island Express (another high-speed ferry company who operates between New London and Block Island) were "in direct competition" with each other, Mr. Kunkel now opines that RIFF and Interstate "would not be in direct competition" if RIFF's application is approved. Mr. Edge also relates, that despite Mr. Kunkel's concerns in 2005 that both IHSF and Interstate would financially suffer from the direct competition that would result from Interstate's entry into the fast ferry market,

⁹¹ Id., p. 5.

“Mr. Kunkel shows no concern at all for Interstate’s lifeline service” in this docket.⁹²

Mr. Edge further relates that Mr. Kunkel also based IHSF’s opposition to Interstate’s application in 2005 on the fact that there were “nearly 1,000,000 seats of fast ferry capacity serving Block Island and that only 16% of that capacity was being used.” Mr. Edge testified that because the same excess capacity exists today, Mr. Kunkel’s opinion in this case conflicts with the testimony he offered in 2005. He also related that due to Interstate’s new Fall River service, “I estimate that there are over 130,000 additional fast ferry seats now available.”⁹³ Mr. Edge also recounts that in his 2005 testimony before the Division in the Interstate case, Mr. Kunkel asserted that “no rational business person would enter a market characterized by extraordinary excess capacity, intense competition, which requires a capital intensive investment and which is highly regulated in the sense that management does not have the ability to adjust prices on a discretionary basis.”⁹⁴ Mr. Edge also points out that IHSF ultimately sold its assets to Interstate “when it became obvious that Interstate’s CPCN would be approved.”⁹⁵

Mr. Edge next indicated that he wished to offer some clarifications based on his review of RIFF’s pre-filed direct testimonies. He proffered the following clarifications:

⁹² Id., pp. 6 and 10-11.

⁹³ Id., pp. 6-7.

⁹⁴ Id., p. 7.

⁹⁵ Id., pp. 7-8.

In response to Mr. Kunkel:

- That Mr. Kunkel is correct that Interstate was not serving “a dormant high speed ferry business” when IHSF’s CPCN application was being considered by the Division in 1998 because, at the time, Interstate contended that high speed service as not needed. However, Mr. Edge related that in 2005 Interstate admitted that its earlier belief was wrong and that the fast ferry market was in fact growing. Mr. Edge also stated that although Interstate’s “death spiral” prediction was wrong when it was opposing IHSF’s application, Interstate “did suffer significant lost revenues during those five years.”⁹⁶

- That while it is true that Interstate just started two additional fast ferry services to Block Island (from Newport and Fall River), Mr. Edge declares that Mr. Kunkel’s contention that Interstate was starting the new services to respond to increased demand and RIFF’s planned service from Quonset is false.⁹⁷

- That Mr. Kunkel has not identified Interstate’s ‘ultimate payoff’ correctly. Mr. Edge asserts that Interstate has never decided to spend ratepayer money to fight to maintain its allegedly monopolistic position, but only to protect its lifeline services. Mr. Edge also rejects the claim that Interstate was looking to regain a monopolistic position in the fast ferry market “because it never had one.”⁹⁸

⁹⁶ Id., p. 8.

⁹⁷ Id., p. 9.

⁹⁸ Id., pp. 9-10.

- That Mr. Kunkel's assertion in 2005 that Interstate's motives for requesting a fast ferry CPCN were 'predatory' has been proven wrong. Mr. Edge notes that the Division's final written decision that was issued in that docket reflects that the Division "rejected Mr. Kunkel's predatory arguments."⁹⁹

- That Mr. Kunkel is incorrect in his comments regarding Interstate's decisions to begin fast ferry services from Newport and Fall River. Mr. Edge relates that "the Newport service has been in the works for years and the Fall River service has nothing at all to do with RIFF."¹⁰⁰

In response to Mr. Donadio:

- Mr. Edge questions the accuracy of Mr. Donadio's claim that he knows that his service will be better than Interstate's current fast ferry service based on the proximity of their respective operations 12 years ago. Mr. Edge notes that Interstate was not operating a high-speed ferry at the time Mr. Donadio was operating the Southland Riverboat and thus questions the basis for Mr. Donadio's assertion.¹⁰¹

- Mr. Edge questions why Mr. Donadio replaced the *M/V Millennium*, which had a capacity of 400 with the *M/V Ava Pearl*, which has a capacity of 150, if RIFF's services to Martha's Vineyard "was so successful?"¹⁰² Mr. Edge is also critical of RIFF's failure to identify which vessel it plans to use for its proposed Block Island service due to the significant problem this creates for

⁹⁹ Id., 9.

¹⁰⁰ Id., p. 10.

¹⁰¹ Id., p. 12.

¹⁰² Id.

Interstate “in estimating the number of passengers that RIFF will be carrying in the summer during the peak travel months.”¹⁰³

- Mr. Edge relates that although RIFF’s 4000 square foot terminal facility “sounds nice,” Interstate’s customers currently benefit from having “all of Galilee to enjoy while they wait...”¹⁰⁴

In response to “Public Need” claims:

- Mr. Edge rejects the notion that Mr. Billington’s Tour RI experience shows that there is an untapped, pent-up demand for fast ferry service to Block Island which is currently not being serviced. Mr. Edge argues that “although Tour RI was a nice political idea, it was heavily subsidized, infrequently offered, and turned out to be a program that ran out of steam in just a few years.”¹⁰⁵ Mr. Edge related that the Tour RI service only ran once per year and carried fewer than 200 people to Block Island. He reasoned that this limited and subsidized service does not provide evidence of an untapped market, only evidence “that there is an untapped population that will go to Block Island if they don’t have to pay for the boat ride.”¹⁰⁶

In response to “Amenities” claims:

- Mr. Edge stated that he would leave it to the Division to judge the differences in the amenities proposed by RIFF compared to those offered by

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id., p. 14.

¹⁰⁶ Id., pp. 14-15.

Interstate. He contended that the differences do not justify a claim of need for a new service.¹⁰⁷

In response to “Population Radius” claims:

- Mr. Edge rejected RIFF’s radius population analysis based on his opinion that the analysis “is not representative of the facts.” Mr. Edge maintains that because Interstate already serves “all of Rhode Island... and many customers from Massachusetts and Connecticut, and many other states and countries,” RIFF can only be targeting customers already served by Interstate. Mr. Edge also points out that Interstate is also providing high-speed ferry services to Block Island from Newport and Fall River, which RIFF appears to have not considered in its analysis.¹⁰⁸

In response to “Contacts Made Directly to RIFF” claims:

- Mr. Edge gave very little credence to RIFF’s claim that it often receives calls and visits from individuals looking to travel to Block Island. He noted that RIFF did not quantify these calls or visits; and that “hits on a website are far less meaningful.” Mr. Edge described this evidence “as a very weak argument attempting to support the need and/or convenience required for a CPCN.”¹⁰⁹

In response to “Reduction of Summer Traffic” claims:

- Mr. Edge rejected the argument regarding a reduction of summer traffic as evidence of need for a new fast ferry service to Block Island. Mr. Edge

¹⁰⁷ Id., p. 15.

¹⁰⁸ Id., p. 16.

¹⁰⁹ Id., p. 17.

asserted that the only way that RIFF's proposed service would reduce summer traffic "is if RIFF is directly taking away Interstate customers."¹¹⁰

In response to "Ms. Elizabeth Dolan, Ms. Martha Pughe and Ms. Myrna George" claims:

- Mr. Edge similarly rejected the testimonies of Ms. Dolan, Ms. Pughe and Ms. George as supportive of RIFF's application. While Mr. Edge accepts that their claims that RIFF's proposed ferry service to Block Island is likely to bring economic benefits to North Kingstown and South County, Mr. Edge stresses that these witnesses failed to consider the problems RIFF's service will cause for the Town of New Shoreham. Mr. Edge testified that Block Island:

...is already maxed out in the summer with day trippers and vacationers. Their police, public works, bathroom facilities, and medical services are already maxed out and if RIFF brings an entire new population of day trippers and vacationers, the Island will not be able to handle the influx, especially at peak times, such as summer weekends and holidays. If, on the other hand, RIFF simply takes former Interstate customers to the Island in the summer, the crowds will be the same, but the lifeline transportation to the Island in the winter will cost more or services will need to be reduced, due to the loss of income. Block Island loses either way.¹¹¹

In response to "Convenience" claims:

- Mr. Edge began his testimony on this issue with his definition of "convenience." He opined that in the context of ferry travel, convenience is: "(1) ease of travel, (2) comfort of travel, (3) time it takes for travel, (4) price, (5)

¹¹⁰ Id., pp. 17-18.

¹¹¹ Id., p. 18.

method of payment, (6) access to facilities and activities (at point of departure and landing), (7) number of departures and return times, (8) time at sea (water travel), (9) weather conditions, and (10) condition at sea.”¹¹² Mr. Edge testified that as a criterion for the issuance of a CPCN, public convenience includes all of the items listed above. He added that in his opinion, Interstate “is the most convenient water transportation to Old Harbor, Block Island and best serves the general public convenience.” He further opined that “ignoring the general public convenience for a bit more convenience for a small group of others is not public convenience.”¹¹³ In the instant case, Mr. Edge asserted that the question that must be answered “is does the ‘possible’ convenience of an insignificant, mostly out of state, inactive, unknown population (which represents RIFF’s projected customer base), and alleged ‘pent-up’ demand carry more weight than the harm to the Town of New Shoreham, its year-round residents, Interstate’s current ratepayers..., and all other island visitors who will pay higher prices for all goods on the Island because of increased freight and truck rates.” He declared: “I think not.”¹¹⁴

In response to “Competition” claims:

- Mr. Edge insisted that Interstate is not concerned about competition. He related that the process used for setting utility rates protects Interstate and its stockholders from competition. Instead, he contends that Interstate is concerned that the loss of revenues due to RIFF would be passed on to

¹¹² Id., p. 19.

¹¹³ Id.

¹¹⁴ Id., pp. 19-20.

Interstate's ratepayers through rate increases or through reductions in service. Mr. Edge did express concern however in that the direct competition that would exist between Interstate and RIFF "won't be fair competition." He noted that if RIFF is allowed to compete, it "will have the luxury of using its profits as it pleases, while Interstate will have to use its profits to subsidize its traditional service." Mr. Edge opined: "clearly, this is unfair competition."¹¹⁵ Mr. Edge also finds it "unfair" that RIFF will operate a passenger-only, summer-only, service while Interstate must operate year-round and carry freight, trucks and cars as well as passengers. He asserts that this added risk puts Interstate's ratepayers at risk of higher rates.¹¹⁶

In his final comments, Mr. Edge compared RIFF's current application before the Division with another ferry service application case that the Division addressed in Docket No. D-13-105.¹¹⁷ Mr. Edge acknowledged that although the Division approved that application, which involved competing ferry services between Bristol and Prudence Island (Portsmouth), he stresses that this case presents several contrasting circumstances. He enumerated the following differences:

1. In this case, there are no witnesses for the applicant testifying that they are 'frustrated and unhappy' with Interstate's amenities, or the care of Interstate's docks, ramps or parking areas.

¹¹⁵ Id., pp. 20-21.

¹¹⁶ Id., p. 21.

¹¹⁷ See Order No. 20136. The application in Docket D-13-105 was filed by A&R Marine Corporation, d/b/a Prudence & Bay Islands Transport, 894 Neck Farm Road, Prudence Island, Rhode Island seeking authority to operate as a common carrier of persons and property upon water between Bristol, Rhode Island and Prudence Island and Hog Island in Portsmouth, Rhode Island.

2. There are no witnesses in this docket that have complained about Interstate's efforts to modernize its operations.
3. There are no witnesses in this docket that have claimed that Interstate or its management is 'unresponsive, unstable, manipulative and vindictive.'
4. In this docket, the Town of Block Island supports Interstate and does not want the services of the proposed competitor.
5. In this docket, Interstate has put on a full case to clarify certain comments provided by RIFF witnesses and to provide information that Interstate feels would assist the Division.
6. Interstate is committed to a future of reliable, safe, comfortable, affordable, and year-round traditional lifeline off-season service, and a complete schedule during the summer of reliable, safe, comfortable, and affordable fast ferry service.
7. Interstate believes and has provided testimony showing that the proposed RIFF service is not in the public interest and the RIFF CPCN, if awarded, would result in wasteful competition, an increase in lifeline rates, and/or a reduction in service.
8. Interstate agrees with the Division's observation in Docket D-13-105 that the approval of IHSF's CPCN was a good decision because it brought fast ferry service to Block Island. Although Interstate was late to the dance, and did not initially see the need and desire for fast ferry service, it paid for its mistake by a reduction of revenues for the next few years. Interstate then obtained its own fast ferry service to give its customers choice. Interstate eventually bought out IHSF in order to compete with BI Express from New London, which was taking far more customers from Interstate than IHSF ever did. Interstate may be missing something again, but we see no eventual benefit similar to the benefit which

arose from the Division's authorization of the IHSF CPCN, now or in the future.

9. If the RIFF CPCN is approved, Interstate requests that the same type of conditions, where applicable, be required of RIFF that were included in the Ordered section of the Docket D-13-105 Order.¹¹⁸

Mr. Michael Voccola identified himself as representing the interests of PRI X, LP, d/b/a The Lighthouse Inn Galilee ("PRI X"), which he described as a joint entity of The Procaccianti Group and Joseph R. Paolino, Jr. Mr. Voccola stated that the Lighthouse Inn Galilee is located at 307 Great Island Road in Narragansett.

Mr. Voccola testified that PRI X strongly objects to RIFF's application to operate a fast ferry from Quonset Point to Block Island.¹¹⁹ He explained that PRI X purchased the Lighthouse Inn Galilee property in 2005 "due to its seasonal attraction to our shoreline, its excellent proximity to Narragansett and Galilee, in general, and to ... [Interstate's] Block Island ferry service, and the Lighthouse Inn large parking area directly opposite the dock."¹²⁰ Mr. Voccola further explained that PRI X also made the purchase because "Interstate operates both the conventional ferry for patrons, cars and cargo and a 'fast ferry' for patrons only, the synergy and potential for additional co-partnering and fostering of mutual revenue generators between us and among us and the balance of the area was excellent."¹²¹

¹¹⁸ Id., pp. 22-23.

¹¹⁹ Interstate Exhibit 4, p. 2.

¹²⁰ Id., p. 3.

¹²¹ Id.

Mr. Voccola continued by testifying that shortly after PRI X acquired the property, Rhode Island's economy was hit by "the worst recession since 1929," which resulted in a dramatic loss of business at the Lighthouse Inn Galilee. He related that "[o]nly now are we seeing a minor indication of recovery." Mr. Voccola related that PRI X is supporting Interstate's opposition to RIFF's application in this case because "[w]e feel that the existence of ferry service at Galilee is critical to the economic health of the greater South County area..." He added: [t]he dedication of Interstate and their documented history of reinvestment in boats and equipment is a clear indication of their loyalty to this area;" and that "the continuation and enhancement of their service from Galilee to Block Island is of paramount importance to all."¹²²

Mr. Voccola opined that PRI X is opposed to RIFF's application due to the fact that "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." He related that with less revenues, Interstate will be forced to cut back in their reinvestment in its equipment and facilities; and that "any decline in ridership in Galilee will impact all the businesses which have evolved as a result of this historic service." Mr. Voccola predicted that granting RIFF's application "will create an unstoppable downward economic spiral for greater Galilee."¹²³

¹²² Id., pp. 3-4.

¹²³ Id., p. 4. In addition to the prefiled direct testimony of Mr. Voccola proffered in this docket, Mr. Voccola also submitted a letter to the Division on October 8, 2013 through which he additionally expressed his opposition to RIFF's application filing in this docket.

6. RIFF'S Rebuttal Case

In response to the direct cases presented by Interstate and the Town, RIFF proffered pre-filed rebuttal testimony from three (3) of its earlier witnesses; namely, Messrs. Billington, Donadio and Kunkel; and also from Dr. Stephanie A. Costa, PhD. Dr. Costa was identified as an Associate Professor of Mathematics at Rhode Island College.

Mr. Billington returned to “take issue” with Mr. Edge’s “sweeping generalizations regarding the Tour RI program.” Mr. Billington argued that Tour RI was an “economic development program” and not a “political idea,” as characterized by Mr. Edge. Mr. Billington explained that although Tour RI was small in scale its purpose was to “introduce Rhode Islanders to Rhode Island, in order to drive tourism locales within the State that Rhode Islanders may never have visited, with one intended salutary effect being the development of new tourism business for those locales.”¹²⁴ Mr. Billington added: “while Mr. Edge belittles the program as political in nature, I wholeheartedly disagree.”¹²⁵

Mr. Billington also disagreed with Mr. Edge’s characterization that Tour RI was ‘heavily subsidized’ and ‘ran out of steam in just a few years.’ He testified that Tour RI did not cease operating due a lack of financial support. He related that the real reason Tour RI ceased operating “is that it required the active participation off all of the member tourism Councils and various other Districts decided to concentrate their efforts in other areas.” Mr. Billington

¹²⁴ RIFF Exhibit 9, p. 2.

¹²⁵ Id., pp. 2-3.

stated that without “this diversity of venues, BVTC simply could not offer enough Blackstone Valley tours to keep the effort ongoing.”¹²⁶

Mr. Billington also rejected Mr. Edge’s implication that Tour RI provided tourism options to people who might not otherwise have been able to afford them. He related that Tour RI did not request “that Interstate offer travel free of charge, that contribution was volunteered by Interstate. Mr. Billington called Mr. Edge’s claim “unfounded.” Instead, Mr. Billington opined that Interstate’s motivation for offering the free ferry service was twofold. First, he opined that because the service was being offered in May, “they showcased the Island during what is known in the industry as a shoulder season, when the relative quiet of the Island is attractive to some.” He also believed that Interstate “likely viewed the program as a relatively low cost marketing investment during an otherwise slower time of the year that had the potential of creating repeat customers in the high season.”¹²⁷

In closing, Mr. Billington reiterated that he still believes that the most significant lesson from the Tour RI program was that many Rhode Islanders do not travel to Block Island because the trip is viewed “as a distant and difficult reach.” He believes that when Rhode Islanders are presented with a more convenient mode of traveling to Block Island “they will take advantage of it.”¹²⁸

Mr. Charles Donadio returned to rebut Interstate’s assertion that if it [Interstate] loses customers to RIFF it will have no choice but to cut service or

¹²⁶ Id., p. 3.

¹²⁷ Id., pp. 3-4.

¹²⁸ Id., p. 4.

raise rates. As an alternative, Mr. Donadio testified that if Interstate loses some customers to RIFF it has the option of re-designing its schedules “so as to get maximum efficiency and utilization of... [its] equipment.”¹²⁹ He related: “common sense leads to the conclusion that greater efficiencies could be found in their conventional ferry schedules and equipment usage without dramatically affecting service.”¹³⁰

Mr. Donadio further opined that Interstate “should seriously consider shutting down its Newport service completely.” He based this opinion on testimony from Interstate’s 2012 rate case, where “Josh Linda projected that their Newport ridership would increase to approximately 18,000 in the first year of the *Islander’s* service.” Mr. Donadio opined that “Interstate has obviously failed to meet that benchmark and I cannot see how they will achieve a ‘small profit by the third year of operation.’” He reasoned that as a stand-alone operation “I would venture a guess that the financial losses are significant.”¹³¹

As an additional alternative to raising rates and cutting services, Mr. Donadio opined that Interstate could purchase its fuel from a large regional supplier rather than from the smaller local supplier that Interstate has “used for many years.” Mr. Donadio was confident “that Interstate could probably save on the cost of fuel by publicly bidding it.”¹³²

¹²⁹ RIFF Exhibit 14, p. 2.

¹³⁰ Id., p. 3.

¹³¹ Id., pp. 3-4; and RIFF Exhibit 16.

¹³² Id., p. 5.

In his pre-filed rebuttal testimony, Mr. Donadio also briefly discussed RIFF's initial plans for a docking location in Old Harbor that RIFF could utilize in furtherance of its proposed ferry service to Block Island. As this testimony was later clarified and supplemented in connection with the Town's subsequently filed and considered motion for summary disposition, *supra*, the Division sees little value in summarizing Mr. Donadio's rebuttal testimony on the subject.¹³³

Mr. Kunkel also proffered pre-filed rebuttal testimony in this docket. Mr. Kunkel's rebuttal testimony addressed a number of assertions made by Mr. Edge and Dr. Mazze. Starting with the Interstate's survey, which was relied on by both Dr. Mazze and Mr. Edge, Mr. Kunkel questioned the soundness of the methodology used in conducting the survey. He opined that the survey "was fundamentally flawed because it was self-administered, leaving substantial opportunity for bias to affect the results."¹³⁴ Indeed, Mr. Kunkel argued that "it challenges credulity and common sense to believe that the Interstate employees administering it did not know its true purpose, particularly the permanent employees and management level personnel involved one of whom made the negative press comments regarding RIFF's plans and presumably is an authorized company spokesperson."¹³⁵

Mr. Kunkel alternatively argued that even if the methodology was sound and the sample was representative, "the survey results themselves are evidence

¹³³ Id., p. 6; and RIFF Exhibits 17 and 18.

¹³⁴ RIFF Exhibit 24, p. 2.

¹³⁵ Id.

of public need for a Quonset fast ferry that is currently unsatisfied.” In support of this argument, Mr. Kunkel relied on the Division’s final order in Docket D-05-06 “granting Interstate’s application for its own high speed CPCN,” wherein “the Division found that IHSF’s survey data showing that 57% of its ridership would cross the dock to use an Interstate fast ferry was an ‘admission that Interstate’s proposed high-speed service to Old Harbor would accommodate existing and future customers’ and further found that this was evidence of public convenience and necessity.”¹³⁶

Mr. Kunkel next offered a response to Mr. Edge’s statement that, since Interstate has excess capacity, there is no need for RIFF’s proposed service. Mr. Kunkel testified that if you follow this logic, “since the Division allowed Interstate to enter the high speed market in 2006 regardless of the existing capacity of other carriers, then it should allow RIFF to do so also regardless of this factor.”¹³⁷ Mr. Kunkel contends that “when all of the evidence here is weighed, including Interstate’s own survey, a Quonset fast ferry would satisfy the needs of a significant segment of the public, regardless of how Interstate tries to minimize that need.”

In further addressing the excess capacity issue, Mr. Kunkel testified that it has become apparent that the demand for Block Island high-speed ferry service was more inelastic than first predicted by IHSF when it opposed Interstate’s high-speed ferry service proposal in 2006. As evidence of this

¹³⁶ Id., pp. 2-3.

¹³⁷ Id., p. 3.

inelasticity, Mr. Kunkel pointed to Interstate's ability to raise its prices from \$26.00 to \$35.85 since 2006.¹³⁸ Mr. Kunkel also argues that Interstate expanded its operations to Newport and Fall River because "[c]learly, Interstate understands that its Galilee location is inconvenient for some, particularly those living in Massachusetts, and it has attempted to meet that unsatisfied demand despite its own excess capacity."¹³⁹

Mr. Kunkel next testified that Interstate's contention that its fast ferry market overlaps RIFF's and negates RIFF's position that there is an unsatisfied need is "simplistic" and "ignores generally accepted economic principles." Mr. Kunkel explained that there are significant factors differentiating RIFF's proposed service and Interstate's, "such as departure point and time over water, meaning that RIFF and Interstate will not be direct competitors and will serve different markets, by definition."¹⁴⁰ Mr. Kunkel added that Interstate itself made this argument in 2006 when it argued to the Division that its then proposal to "provide high speed service over two conjoined 'routes,' i.e., Point Judith and Block Island and Newport and Block Island, was necessary 'to serve three separate and distinct ferry markets.'" Mr. Kunkel argues that if Newport to Block Island is a separate and distinct market from Point Judith to Block Island, "a point I agree with – then clearly Quonset to Block Island is separate and distinct from the Point Judith to Block Island market."¹⁴¹

¹³⁸ Id., pp. 3-4.

¹³⁹ Id., p. 4.

¹⁴⁰ Id., p. 5.

¹⁴¹ Id.

Mr. Kunkel next took exception to Interstate's assertion that RIFF is trying to capitalize on Interstate's 80-year business history. He testified that RIFF's name "is not confusingly similar" to Interstate's, and that from a marketing standpoint, RIFF would benefit from differentiating its proposed service from Interstate's. Mr. Kunkel opined that in order to "activate this market," RIFF would be wise to describe its services as 'new,' 'more convenient' and 'easier to access,' which would distinguish it from Interstate's service.¹⁴²

Mr. Kunkel next turned to Interstate's argument that RIFF's entry into the market would jeopardize Interstate's high-speed ferry profits, which would in turn harm Interstate's traditional lifeline services to Block Island. He asserted that "[t]here should be no linkage between the two from a regulatory standpoint, particularly when determining public need and convenience."¹⁴³ Mr. Kunkel testified that this argument "ignores the Division's findings in Docket D-05-06 that the 'economic benefit to Interstate's lifeline operation' from its proposed high speed service has 'little if any' relevance to the public convenience and necessity, citing its previous determination that 'fast' ferry services and 'conventional' ferry services 'are two distinctly different water carrier operations.'"¹⁴⁴ Mr. Kunkel also noted that the Rhode Island Supreme Court later upheld the Division's decision.¹⁴⁵ Mr. Kunkel further notes that Interstate has agreed in both Commission and Division dockets that if its fast ferry service loses money, its losses will not affect its traditional ferry services.

¹⁴² Id., p. 6.

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ Id., pp. 6-7.

Mr. Kunkel therefore argues that Interstate “should be required to hold up its end of the regulatory bargain made when it was granted permission to expand from its traditional service orientation into the high speed market.”¹⁴⁶

In his final comments, Mr. Kunkel addressed measures that Interstate could take to make its Point Judith services more attractive to customers or to respond to market forces. First and foremost, Mr. Kunkel contended that Interstate has rate flexibility, which gives it the discretion to increase or decrease its high-speed ferry rates upon 30 days-notice to the Commission. Mr. Kunkel also notes that the Division has “agreed not to object... [to] any such changes except in extraordinary circumstances...” Mr. Kunkel further contends that Interstate also has the discretion to adjust certain traditional ferry rates upon 60 days-notice to a level not 10% higher or 20% lower than the rates approved in its last rate case in 2012, “in order ‘to respond more efficiently to market forces impacting the more discretionary portions of its business, namely, the non-lifeline portions of its business.”¹⁴⁷

Dr. Stephanie Costa was proffered by RIFF for the purpose of rebutting the survey methodology used by Interstate. She opined that the methodology “had significant weaknesses and conclusions were presented in a worst case scenario not necessarily supported by the data.”¹⁴⁸ In support of her opinion, Dr. Costa explained that generally, surveys are conducted using a sample to estimate population parameters since a census of the population demands

¹⁴⁶ Id., p. 7.

¹⁴⁷ Id., p. 8.

¹⁴⁸ RIFF Exhibits 19 (redacted) and 20 (unredacted), p. 1.

more resources than are generally available. She related that when a sample is taken, a sample statistic is calculated and used to create an interval that is likely to contain the population parameter. In this case, Dr. Costa testified that the parameter of interest is the percentage of all Interstate ferry riders who would choose to take a fast ferry from Quonset, while the sample statistic is the percentage of Interstate riders in the sample who would choose to take a high-speed ferry from Quonset. She explained that associated with every interval is a level of confidence (typically 90%, 95% or 99%) which essentially measures how confident we are that the interval we create actually contains the population parameter. She added, however, that since the confidence interval is based on our sample data, there is always a chance that our population parameter lies outside of the confidence interval. Dr. Costa observed that in his report, Dr. Mazze “simply reports sample statistics, but fails to provide an interval estimate for the population parameter.”

Dr. Costa next questioned the use of Interstate’s survey “as a marketing device designed to determine whether Interstate customers would use an Interstate operated fast ferry from Quonset under certain conditions,” as was described by some of Interstate’s witnesses, when “nowhere in the survey questions did Interstate inform the respondents of that precise purpose.”¹⁴⁹ She opined that this omission “affects the reliability of their answers, since the answers may have been different had the respondent known that the true

¹⁴⁹ Id., p. 2.

purpose was to determine whether Interstate customers would use a Quonset fast ferry service not operated by Interstate.”¹⁵⁰

Dr. Costa also explained that whenever a face-to-face survey is conducted there are a number of opportunities for bias. As an example, Dr. Costa related that not knowing the purpose of the survey or identity of the sponsor can lead to “social desirability bias,” which is described as “the tendency of the interviewee to respond in a way that he or she believes is desirable to the interviewer.”¹⁵¹ As another example of bias, Dr. Costa explained that the presence of other individuals, such as family members, may also influence responses of the interviewee. Dr. Costa additionally explained that “any reaction from the interviewer may also influence responses of the interviewee.”¹⁵²

Dr. Costa also took exception to Interstate’s apparent efforts to selectively analyze the data in order “to present a worst case scenario.” She testified that the “obvious” focus of Dr. Mazze “was on the responses to questions 4 and 5 as presented to conventional ferry riders and questions 4, 5 and 6 for fast ferry riders.” Question 4 asked conventional ferry riders:

If there was a \$50 round trip ferry ride from Quonset Point in North Kingstown to Old Harbor, would you take the Quonset fast ferry instead of the Point Judith conventional ferry?”

¹⁵⁰ Id., pp. 2-3.

¹⁵¹ Id., p. 3.

¹⁵² Id.

Dr. Costa noted that 17% of the 351 people surveyed (59/351) answered “yes” to Question 4. However, Dr. Costa asserted that it is important to note that this 17% is the percentage of the sample that responded yes to question 4, but this is not necessarily the proportion of all Point Judith conventional ferry riders that would respond yes to question 4. Dr. Costa testified that what we can conclude from this data “is that we are 95% sure” that between “13% and 21% of the entire population of all Point Judith conventional ferry riders would take the \$50 fast ferry from Quonset.” Dr. Costa acknowledged that this interval is “fairly wide, due to the fact that the margin of error... is approximately 4%, producing an interval with endpoints that are eight percentage points apart.” She explained that at 95% confidence, if we wished to get a narrower interval we would need to increase the size of the sample. For example, “if we wanted our margin of error to be 0.5%, to get an estimate within 1% of the population parameter, Interstate would need a sample of at least 21,488 people, or 3.5% of Interstate’s 2013 total clientele, rather than 351, which represents .06% of Interstate’s 2013 total clientele.”¹⁵³

Based on her examination, Dr. Costa testified that the “flaw” in Interstate’s analysis of this data “is that since the cost of the Interstate conventional ferry is in fact \$27 less than the hypothetical \$50 ferry from Quonset, the real answer to the question of interest lies in the results of Question 5:”

¹⁵³ Id., pp. 4-5.

If the conventional ferry cost is about \$27 less per person from Point Judith than the Quonset fast ferry, does that change your answer to question 4?

Dr. Costa testified that when you take into account the answers to questions 4 and 5, the number of people who would choose to take the fast ferry from Quonset drops to 25/351 or only 7%. In this case, Dr. Costa concludes “that the percentage of all Point Judith conventional ferry users that would choose to take the fast ferry from Quonset instead of Point Judith is between 4% and 10%, with 95% confidence....”¹⁵⁴

Dr. Costa next testified that this same flawed analysis was used in analyzing Interstate’s fast ferry customer responses. Starting with Question 4:

If there was a \$50 round trip [fast] ferry ride from Quonset Point to Old Harbor in North Kingstown, and took one hour on the water, would you take the Quonset fast ferry instead of the Point Judith fast ferry?

Dr. Costa observes that the survey responses reflect that 27% (71/263) of the fast ferry riders sampled would choose the Quonset service over the Point Judith service. Dr. Costa testified that what we can conclude from this data “is that we are 95% sure” that the percentage of all Point Judith high-speed ferry users that would take the fast ferry from Quonset to Old Harbor is between 22% and 32%.” Again, she pointed out, Dr. Mazze chose to report that Interstate would lose as much as 27% of its high-speed ferry passengers. However, Dr. Costa opined that since “the cost of the Point Judith fast ferry is in fact \$15 less and on the water travel time is in fact about a half an hour less

¹⁵⁴ Id., pp. 5-6.

than the hypothetical \$50 ferry from Quonset, what we should be focusing on are the responses to questions 5 and 6 as well.”¹⁵⁵

Dr. Costa proffered Question 5, below:

If the cost from Point Judith is about \$15 less per person does that change your answer to question 4?

Dr. Costa observed that the survey results on question 4 reflect that 12% (31/263) of the fast ferry riders sampled would choose the Quonset service over the Point Judith fast ferry service if the cost was \$15 less. Dr. Costa testified that what we can conclude from this data is that we are 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 8% and 16%.”

Dr. Costa next discussed the impact on the analysis resulting from the introduction of the travel time variable, as introduced through Question 6:

If the on water travel time is about half an hour less from Point Judith than from Quonset, does that change your answer to question 4?

Dr. Costa observed that the survey results on question 6 reflect that 11% (27/263) of the fast ferry riders sampled would choose the Quonset service over the Point Judith fast ferry service under the given conditions. Dr. Costa related that what we can conclude from this data is that we are 95% sure that the percentage of all Point Judith fast ferry users that would take the fast ferry

¹⁵⁵ Id., p. 7.

from Quonset to Old Harbor is between 7% and 14%, if it cost \$15 more and travel time over the water was a half hour more.¹⁵⁶

Again, based on her examination, Dr. Costa testified that the “flaw” in Interstate’s analysis of this data “is that the piece of information that we are missing here is the number of Interstate fast ferry users who responded ‘yes’ to both questions 5 and 6, that they would change their response to question 4 given that the fast ferry from Point Judith cost less and was shorter, respectively.”¹⁵⁷ She explained that having this data would allow us to calculate the percentage of people who would choose to take the fast ferry from Quonset given that it costs more and takes longer than the fast ferry from Point Judith with greater certainty. Having demonstrated the mathematical impact this lack of data can have on the results of the survey, Dr. Costa testified that “without all of the data, we could conclude that the number of people surveyed who would choose to take the fast ferry from Quonset given that it costs more and takes longer than the fast ferry from Point Judith could be as low as 4..., or 1.5% of the sample.”¹⁵⁸

Dr. Costa opined “that based upon the relatively small sample Interstate chose to survey, somewhere between 4% and 10% of its conventional ferry passengers might use a Quonset fast ferry that cost \$50 and took longer and between .04% and 3% of its fast ferry customers would use the Quonset fast ferry at that price and a longer ride over the water, with a level of certainty of

¹⁵⁶ Id., pp. 8-9.

¹⁵⁷ Id., pp. 9-10.

¹⁵⁸ Id., pp. 10-11.

95%.” In her final comments on the subject, Dr. Costa stressed that “this survey had significant weaknesses which I believe affect the reliability of the results.”¹⁵⁹

7. Interstate’s Surrebuttal Case

In its surrebuttal case, Interstate recalled two of its earlier direct-case witnesses, namely, Dr. Edward M. Mazze and Mr. Walter E. Edge. Interstate also proffered its Vice President, Joshua P. Linda, to rebut portions of RIFF’s rebuttal case.

Dr. Mazze offered surrebuttal comments on each of RIFF’s four rebuttal witnesses. Starting with Mr. Billington, Dr. Mazze observed that Mr. Billington’s opinion that Rhode Islanders do not travel to Block Island because it is viewed as distant and difficult to reach was not supported by any marketing research studies. Dr. Mazze also observed that Mr. Billington’s claim that when Rhode Islanders “are presented with a more convenient mode of traveling to the Island they will take advantage of it” is likewise unsupported by any research studies on tourism and travel preferences.¹⁶⁰

Regarding Dr. Costa’s opinions, Dr. Mazze observed that Dr. Costa’s educational background does not include any familiarity with marketing or marketing research or business experience developing and conducting marketing research studies. He related that Dr. Costa’s opinions and conclusions are based on a study using probability sampling which was not

¹⁵⁹ Id., p. 11.

¹⁶⁰ Interstate Exhibit 6, p. 2.

used for this matter. Instead, the study he performed for Interstate used a nonprobability convenience sample.¹⁶¹

Dr. Mazze questioned the practicality of Dr. Costa's suggested methodology. He testified that Dr. Costa's argument for using a sample size of at least 21,488 people, in order to obtain a margin of error of 0.5% to get an estimate within 1% of the population parameter for the results to be reliable, would have required Interstate to survey every one of its passengers in 2013. He related that this is why margin and error and confidence levels "are generally not used in nonprobability convenience samples...." He explained that a nonprobability convenience sample was used because "it would provide the information needed as well as be convenient in reaching a large number of passengers."¹⁶² Dr. Mazze emphasized that when using nonprobability sampling, the probability that each population unit will be chosen is not known and you cannot be sure each population unit has a non-zero chance of being chosen; he added that in a nonprobability sample, confidence intervals are not computed.¹⁶³

Dr. Mazze next addressed Dr. Costa's "bias" concerns. He testified that to avoid bias in the study, the interviews took place on different days, different weeks and in different months. He argued that the wording of questions were not loaded to unduly favor one response over another. Dr. Mazze also pointed out that the questions were close-ended other than the questions about the

¹⁶¹ Id., pp., 2-3.

¹⁶² Id., pp. 4-5.

¹⁶³ Id.

passenger, and that the interviewer recorded the responses verbatim. Dr. Mazze also observed that Dr. Costa “presented no evidence that there was any bias introduced by the interviewer before or during the study or that there was any bias as a result of social desirability or loyalty to Interstate Navigation.”¹⁶⁴

Dr. Mazze observed 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 also concluded that she was 95% sure that the percentage of all Point Judith fast ferry riders would take the fast ferry from Quonset to Old Harbor is between 22% and 32%. However, according to Dr. Mazze, because “this number was high, Dr. Costa 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.” Dr. Mazze contended that if RIFF “believes Dr. Costa’s opinions about this study, there are simply not enough passengers who wish to travel from Quonset Point to Block Island and RIFF would be wise not to continue to pursue this venture.”¹⁶⁵

Dr. Mazze also addressed Mr. Donadio’s rebuttal testimony. First, he argued that Mr. Donadio does not know the workings of Interstate’s lifeline

¹⁶⁴ Id., pp. 6-7.

¹⁶⁵ Id., pp. 7-8.

ferry business and therefore “has no basis on which to competently comment on how Interstate... could allegedly operate more efficiently.”¹⁶⁶

Dr. Mazze next criticized Mr. Donadio for not proffering a business plan, market feasibility study or marketing research with his application. He testified that without such supporting documents and analysis:

...it is not possible for anyone to come to an informed, fact based conclusion that (1) a fast ferry service from Quonset Point would be more convenient for people going to Block Island (2) there is pent-up demand for a new fast ferry service from Quonset Point to Block Island (3) a new fast ferry service from Quonset Point would increase the number of travelers to Block Island rather than simply redistribute the current number of travelers between Interstate... and RIFF (4) the passengers of Interstate... are receiving inadequate service and need a new port of departure from Quonset Point (5) there is not enough capacity on Interstate’s ferries to meet the needs of passengers going to and from Block Island to Rhode Island or (6) the proposed Quonset Point summer-only cream skimming service will not significantly harm Interstate Navigation’s year-round lifeline service to Block Island.¹⁶⁷

With respect to Mr. Kunkel’s rebuttal testimony, Dr. Mazze rejected Mr. Kunkel’s assertion “that the survey was fundamentally flawed because it was self-administered leaving substantial opportunity for bias to affect the results.” Dr. Mazze reiterated that “there were safeguards built into the design and implementation of the survey to reduce bias.” He stressed that the interviewers followed a set procedure in asking questions and recording answers, and that

¹⁶⁶ Id., p. 9.

¹⁶⁷ Id.

with a tightly worded questionnaire, interviewers had no discretion in influencing interviewees in their responses.¹⁶⁸

Dr. Mazze also rejected Mr. Kunkel's opinion that Interstate's survey showed that there was an unsatisfied public need for a Quonset Point fast ferry. Dr. Mazze testified: "my study simply cannot be used to conclude that there is an unsatisfied public need.... What my study shows, in conjunction with the analysis from Mr. Edge, is that if the Division authorizes RIFF's proposed service, there will be a significant negative impact the Interstate's year-round lifeline ferry service to Block Island."¹⁶⁹

Mr. Walter Edge began his surrebuttal testimony by addressing some of Mr. Kunkel's opinions. To start, Mr. Edge criticized Mr. Kunkel for suggesting that Interstate's survey results, which reflects that some interviewees would opt for ferry services from Quonset Point, provides evidence that there is a public need for RIFF's proposed services. Mr. Kunkel bases this opinion on an earlier survey Interstate performed in 2005 when it was trying to prove to the Division that there was a public need for Interstate's then proposed fast ferry service between Point Judith and Block Island. Mr. Edge testified that the basis for Mr. Kunkel's opinion is faulty due to the fact that Interstate's 2005 survey was limited to asking Interstate's traditional service customers if they would use Interstate's then proposed fast ferry services instead. Mr. Edge emphasizes that the 2005 survey did not seek to determine whether there was

¹⁶⁸ Id., p. 10.

¹⁶⁹ Id., p. 11.

a public need for an entirely different competitive service from a different location. Mr. Edge testified: “in this docket, RIFF will be pirating customers currently serviced by Interstate... to the direct detriment of Interstate’s lifeline service and its lifeline customers.”¹⁷⁰

Similarly, Mr. Edge attacked Mr. Kunkel’s reliance on previous testimony from Mr. Edge, testimony from 2005, where Mr. Edge testified that “choice is more important than market or participant efficiency.” Again, Mr. Edge argues that the difference is that “I was discussing the fact that Interstate was offering choice to its own ratepayers, which is a good thing.”¹⁷¹

Mr. Edge additionally rejected Mr. Kunkel’s opinion that RIFF should be allowed to pursue its proposed ferry service model because only RIFF’s stockholders bear the “risk of failure.” Mr. Edge explained that successful or not, RIFF’s proposed services, if approved, “will hurt Interstate’s traditional ratepayers.”¹⁷²

Next, in response to Mr. Kunkel’s observations and conclusions regarding Interstate’s fast ferry rate increases since 2006, Mr. Edge argued that Interstate’s management does not “assume” that the Point Judith fast ferry service is elastic.¹⁷³

Mr. Edge also took exception to Mr. Kunkel’s claim that Interstate’s decision to retain its Newport CPCN ‘does not pass good business-judgment.’ Mr. Edge related that based on his 50 years of experience as a CPA, and

¹⁷⁰ Interstate Exhibit 3, pp. 2-3.

¹⁷¹ Id., p. 3.

¹⁷² Id.

¹⁷³ Id., pp. 3-4.

knowing Interstate's history and financial considerations, he asserted that the "retention of the Interstate Newport run was a very good business decision based upon sound business judgment."¹⁷⁴

Mr. Edge next challenged Mr. Kunkel's opinion that RIFF and Interstate will not be in direct competition. On this issue, Mr. Edge testified that Mr. Kunkel's opinion in this docket is inconsistent with the position he took in previous cases "when he concluded that BI Express, which had a different departure point (New London, CT) and a much longer travel time over the water, was a direct competitor to IHSF."¹⁷⁵

Mr. Edge also criticized Mr. Kunkel for insisting that 'there should be no linkage between the two (Interstate's traditional and fast ferry services) from a regulatory standpoint.' Mr. Edge argues that no matter how many times he says it and disregards the facts, the fact is that there is a direct linkage.¹⁷⁶ Mr. Edge additionally stated that Interstate did agree, as Mr. Kunkel points out, that its traditional service would not be impacted by any losses from its fast ferry operation "because it was confident in the fact that the fast ferry operation would be profitable...."¹⁷⁷

With respect to Mr. Donadio's rebuttal testimony, Mr. Edge proffered a number of comments. First, he faulted Mr. Donadio's assertions that Interstate has ways to save money if RIFF takes away some of its business. Mr. Edge argues that the question of whether Interstate can save money is "irrelevant" to

¹⁷⁴ Id., p. 4.

¹⁷⁵ Id.

¹⁷⁶ Id., p. 5.

¹⁷⁷ Id.

whether or not the proposed RIFF service is needed or more convenient.¹⁷⁸ Mr. Edge presses that Mr. Donadio has ignored several important facts. As examples, Mr. Edge related that the number of runs and times of departure are agreed to by the Commission, the Division, the Town and Interstate. He argues that Interstate “cannot simply change the number or times of runs to maximize efficiency and utilization.”¹⁷⁹

Mr. Edge also testified that Interstate “will not just walk away from its responsibilities under its CPCN for the Newport run.” He criticized Mr. Donadio for not being able to recognize Interstate’s efforts to make the Newport run a financial success “while at the same time addressing the need and convenience of its Newport ratepayers.”¹⁸⁰

Mr. Edge next challenged Mr. Donadio’s claims that he can calculate Interstate’s net income or loss for FY’s 2013 and 2014 “with no idea of the actual operating costs.” Mr. Edge contended that it is improper to make revenue calculations from only passenger number and “projected” costs.¹⁸¹ Mr. Edge also argues that Mr. Donadio is in no position to claim that Interstate can save money on fuel when he has “absolutely no knowledge of how Interstate currently purchases its fuel. Mr. Edge relates that the savings that he believes might exist, do not.”¹⁸²

¹⁷⁸ Id., p. 6.

¹⁷⁹ Id.

¹⁸⁰ Id., pp. 6-7.

¹⁸¹ Id., p. 7.

¹⁸² Id., p. 8.

Shifting his focus to Mr. Billington's rebuttal testimony, Mr. Edge testified that although it is true that he [Mr. Edge] was not involved in the Tour RI promotion when it occurred, he was able to access Interstate's related records through "the Interstate employee that ran the entire Interstate aspect of the Tour RI program." Mr. Edge related that it was through this employee that he "determined the limited number of passengers that were taken on the Interstate portion of the Tour RI program." Mr. Edge added that it was not his intention to belittle the Tour RI program, "but simply to provide the Hearing Officer the facts relating to the size of the program as I knew them." Mr. Edge concluded: "I am OK with agreeing to disagree on what, if any, value one can place on the Tour RI Program as a guide for estimating the size and existence of an unidentified new population of customers that RIFF could service."¹⁸³

In his final comments, Mr. Edge briefly addressed Dr. Costa's rebuttal testimony. Mr. Edge testified that although he found Dr. Costa's knowledge of statistics "impressive," as an accountant, he has learned that "not all accepted sampling uses random numbers and Ms. Costa's statistical sampling approach." Mr. Edge maintained that in the "real world" the statistical sampling Dr. Costa is discussing "results in significantly greater sample sizes and requires far more time and expense to complete."¹⁸⁴

Interstate next proffered Mr. Joshua Linda to respond to Mr. Donadio's claims regarding Interstate's Newport operation and its fuel purchases. As for

¹⁸³ Id., p. 9.

¹⁸⁴ Id., pp. 9-10.

the Newport operation, Mr. Linda testified that its ridership is steadily increasing every year. He related that Interstate had predicted that it would take a minimum of three years for the run to become popular; and that it would be “ridiculous for Interstate to shut down its Newport service for the benefit of Mr. Donadio’s proposed service out of North Kingstown.”¹⁸⁵

Mr. Linda also opined that Interstate made a good investment in the purchase and complete renovation of the M/V Islander, the fast ferry operating from Newport. He related that for the fraction of the cost of a new catamaran ferry, Interstate “now has a like new state of the art 30 knot water jet drive vessel that can carry twice as many passengers as Mr. Donadio’s newest vessel.”¹⁸⁶

With respect to the fuel issue, Mr. Linda stated that Mr. Donadio’s fuel supplier, Santa Energy, “stated that they could not sell fuel directly to Interstate because Santa does substantial business with Interstate’s present fuel supplier.”¹⁸⁷

8. Public Comments

Nine members of the public offered comments in this docket. A summary of their comments are provided below:

Comments in support of RIFF’s application:

Mr. Kerry McKay, identified himself as the president of the North Kingstown Town Council, a business owner in North Kingstown (McKay’s

¹⁸⁵ Interstate Exhibit 7, p. 2.

¹⁸⁶ Id.

¹⁸⁷ Id.

Furniture) and a board member of the Quonset Point Development Corporation. Mr. McKay expressed support for RIFF's application. He based his support on the anticipated additional tourism business that RIFF's proposed services will bring to North Kingston.¹⁸⁸

Ms. Kristin Urbach identified herself as the executive director of the North Kingstown Chamber of Commerce. Ms. Urbach related that her Chamber's Board of Directors fully support RIFF's application.¹⁸⁹

Mr. Andrew Naughton identified himself as a professor of English who has taught at Bryant University and Brown University. Mr. Naughton also expressed support for RIFF's application. He based his opinion on the anticipated additional recreational and economic opportunities RIFF's proposed service will bring to Rhode Island.¹⁹⁰

Mr. Ross Notaroberto indicated that he is a resident of Cranston. He too expressed support for RIFF's application. He based his opinion on the inconvenience of having to drive in traffic to Galilee in the summertime to take the ferry to Block Island.¹⁹¹

Mr. Jerry Zarrella identified himself as a resident of Rhode Island who frequently travels to Block Island in the summertime. Mr. Zarrella also expressed support for RIFF's application. He based his support on the difficulty he has experienced with the heavy traffic into Galilee and with

¹⁸⁸ 3/2/16, Tr. 25-26.

¹⁸⁹ 3/2/16, Tr. 27.

¹⁹⁰ 3/2/16, Tr. 28.

¹⁹¹ 3/2/16, Tr. 29-30.

parking availability and related costs. He also opined that additional tourism to the Island is good for the local businesses.¹⁹²

Comments in opposition to RIFF's application:

Ms. Debbie Dalrymple identified herself as Professor Emerita at Montgomery County Community College. Ms. Dalrymple opposed RIFF's application based on the proposal's limited seasonal utility and the additional visitors it will bring to Block Island. Ms. Dalrymple is also concerned about "the day trippers [who] arrive with booze and bad attitudes leaving our pristine island a mess."¹⁹³

Mr. Christopher Delaney also opposes RIFF's application due to the harm it will cause to Interstate and the people of Block Island. Mr. Delaney is concerned that the limited seasonal competition from RIFF will drive up ticket and freight rates for island residents; he also believes that Interstate's services will likely have to be reduced due to the competition.¹⁹⁴

Mr. Carder Starr also wrote to express opposition to RIFF's application. Mr. Starr stated that he has been using Interstate's services for 62 years and that it would be unfair to Interstate and the residents of Block Island to permit a seasonal competitor to diminish the lifeline services which Interstate provides.¹⁹⁵

Intrastate Nav. Co. ("INCo"), through counsel, offered written comments in this case. INCo identified itself as the owner of the pier in Old Harbor that is

¹⁹² 3/2/16, Tr. 30-36.

¹⁹³ 3/25/16 email message addressed to the Hearing Officer.

¹⁹⁴ 3/25/16 email message addressed to the Hearing Officer.

¹⁹⁵ 3/25/16 email message addressed to the Hearing Officer.

used by Block Island Ferry Services, LLC d/b/a Block Island Express, which operates a high speed ferry service between Old Harbor and New London, Connecticut, *supra*. Interstate also uses INCo's pier. INCo expressed concern with the impact RIFF's proposed services will have on INCo and its lessees in Old Harbor. Specifically, INCo is concerned with the close proximity of ferry operations at both RIFF's and INCo's docking facilities in Old Harbor. INCo describes the anticipated ferry traffic congestion as a "danger" which will also "result in the inevitable disruption" to Block Island Express' and Interstate's ferry operations to the island. INCO also asserts that RIFF's proposed high speed ferry "is not only unnecessary, but it is likely to interfere with existing services which unquestionably are necessary to serve the public interest."¹⁹⁶

9. Final Positions of the Parties

At the conclusion of the presentation of their respective cases, the parties were given an opportunity to submit post-hearing memoranda, to either supplement their closing statements, or to rely upon in lieu of offering a closing statement. RIFF, Interstate and the Town all submitted post-hearing memoranda in this docket.¹⁹⁷

a. RIFF'S Final Position

RIFF submitted its post-hearing memorandum on June 7, 2016. As an introduction, RIFF emphasizes that Mr. Donadio was the individual responsible for initially bringing high-speed ferry service to Rhode Island. He started the

¹⁹⁶ 3/1/16 letter addressed to then Administrator Ahern.

¹⁹⁷ The Advocacy Section opted to not offer the Division a recommendation in this docket.

Point Judith to Block Island high-speed service after the Division approved IHSF's application in 1998. RIFF points out that the Town and Interstate strongly opposed IHSF's original application at that time and both were proven incorrect in their original assessments and arguments that there was no need for a high-speed service to Block Island and that, if approved by the Division, a new high-speed service would destroy then existing lifeline services to the Island. RIFF observes that not only were they wrong, but the record shows that Interstate's traditional ridership has "grown immensely since 1998" and that Interstate was able to expand its successful high-speed services to Block Island from Newport and Fall River.¹⁹⁸

RIFF maintains that Mr. Donadio now plans to do the same for the currently existing unserved market for high-speed ferry services between Quonset and Block Island. RIFF argues that operating from the Quonset location will "provide a convenient and attractive service to customers, particularly those who come from areas north, west and east of Quonset." RIFF also argues that the Division should again reject Interstate's repeated "chicken-little" claim that this service will hurt its ability to continue to provide a 'lifeline' through its traditional slower ferry and freight service. RIFF contends that Interstate was wrong in 1998 and it is wrong again now.¹⁹⁹ RIFF

¹⁹⁸ RIFF Post-Hearing Memorandum, p. 1-2.

¹⁹⁹ Id., pp. 2-3.

argues that Interstate's position in this docket is really only based on Interstate's interest to preserve its monopoly market position.²⁰⁰

RIFF next offered a summary of the legal standard that the Division must use in deciding this case. To start, RIFF cites to R.I.G.L. §39-1-1(b) and argues that the Division is obligated to:

...provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient and economical energy, communication, and transportation services and water supplies to the inhabitants *of the state*, to provide just and reasonable rates and charges for such services and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive practices.... (Emphasis in original).

RIFF also relies on R.I.G.L. §39-3-3(a), which provides that “[n]o common carrier of persons and/or property operating upon the water between fixed termini within the state shall hereafter furnish or sell its services unless the common carrier shall first have made application to and obtained a certificate from the division certifying that the public convenience and necessity required the services.” Lastly, RIFF notes that the Division has in previous similar cases required a showing that the CPCN applicant also prove “that it is ‘fit, willing and able to perform the service’ proposed.”²⁰¹

RIFF next proffered an analysis to support its contention that the instant record satisfies the above-described legal standard. With regard to the question of whether Mr. Donadio is fit, willing and able to provide the proposed

²⁰⁰ Id., p. 3.

²⁰¹ Id., pp. 3-4; relying on Division Report and Order No. 20292, issued in Docket No. D-10-01 on February 25, 2011 in *In Re: Aquidneck Ferry & Charter, Inc.*

service, RIFF directs the Division to the IHSF case from 1998. RIFF observes that both the Division and the Superior Court were persuaded that Mr. Donadio had “satisfied” this standard, and that he was fit, willing and able to operate a high-speed water ferry.²⁰² RIFF further directs the Division to the fact that Mr. Donadio has had “close to twenty years of additional experience in the high-speed ferry industry...,” and “has successfully operated a number of high-speed ferry businesses.” RIFF also argues that because the record abundantly supports a finding that Mr. Donadio has proven that he is fit, willing and able to provide the proposed services, the Division should not be distracted by Interstate’s attempt “to diminish Mr. Donadio’s fitness by highlighting little more than the fact that Mr. Donadio did not create a ‘formal’ business plan before applying for a CPCN with the Division.” RIFF stresses that there is absolutely no legal requirement that a business plan be submitted with an application for a CPCN.²⁰³

On the question of Mr. Donadio’s “willingness” to provide the proposed services, RIFF notes that it has “endured over three years of hearings, briefings, data requests and motions, before both the Division and the interlocutory appeal to the Rhode Island Superior Court.” RIFF argues that the travel of this case “exemplifies that RIFF and Mr. Donadio are willing to operate a high-speed ferry service from Quonset to Block Island.”²⁰⁴

²⁰² Id., pp. 4-5.

²⁰³ Id., pp. 5-6.

²⁰⁴ Id., p. 6.

On the subject of “ability,” RIFF argues that the record shows that it has adequate dock space in Quonset and that it has “satisfactorily demonstrated the ability to dock at Old Harbor by and through its agreements with Bluewater, LLC....”²⁰⁵

RIFF next offered a breakdown of the record in support of its contention that the public convenience and necessity require its proposed services. But first, relying on the 1927 seminal case of *Abbott v. Public Utilities Comm’n*, 48 R.I. 196, 136 A. 490, RIFF observed that the Rhode Island Supreme Court “interprets public convenience broadly as referencing ‘something fitting or suited to the public need;’ and further has “explained that ‘[t]he 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*.” RIFF argues that the Supreme Court in *Abbott* has also instructed that there is no formula through which the Division must view public convenience and necessity but that “[i]n 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.’ (Emphasis in original).²⁰⁶

In this case, RIFF presented the testimony of five lay witnesses to support its assertion that its proposed service satisfies the public convenience

²⁰⁵ Id., pp. 6-7.

²⁰⁶ Id., pp. 7-8.

and necessity requirement. Relying on the Rhode Island Rules of Evidence, RIFF maintains that lay witness opinion testimony is admissible, if the witness' opinions are "(A) rationally based on the perception of the witness and (B) helpful to a clear understanding of the witness' testimony or determination of a fact in issue." RIFF argues that there "is no legal requirement that lay witnesses rely on studies, surveys or any other similar tool;" in this case, "[t]he threshold question is merely whether the proposed service 'tend[s] to promote the accommodation of the public.'"²⁰⁷

RIFF argues that its five witnesses all have "extensive experience in the tourism industry;" and while "the opinions of these five witnesses might not be given the same weight of a disclosed expert, the testimony and opinions they provide are admissible and should be given more weight than public comment." RIFF also observes that the Division has relied upon this same type of testimony in the past, and specifically in its approval of IHSF's application filing in 1998.²⁰⁸

In support of its claim that the public convenience and necessity require its proposed services, RIFF argues that it has:

...established that the market has been, and continues to, move more and more towards efficient high-speed service and that its proposed service meets the growing need for intermodal travel and will, as a result, attract additional tourism that does not add to traffic on already overly congested roadways, especially during the busy summer tourist season. Its proposed service contributes to the goals of reducing auto

²⁰⁷ Id., pp. 8-9.

²⁰⁸ Id., p. 9.

emissions and supports the investment made by the public in the State's infrastructure, by encouraging increased use of the Quonset facilities. In short, RIFF has established that there is a clear demand for its service, that its service will benefit the Rhode Island economy, 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, that RIFF's service encourages competition through consumer choice and that the existence of choice utilizing the State's infrastructure investment will not result in a collapse of Interstate.²⁰⁹

RIFF argues that several of its witnesses testified that they believe that RIFF's service will increase tourism and reduce traffic congestion. RIFF pointed to the testimony from Myrna George, who testified in her capacity as the President of the South County Tourism Council; Elizabeth Dolan, in her capacity as immediate past-president of the North Kingstown Town Council; and Mr. Donadio himself.²¹⁰

As evidence of the "untapped demand" for its proposed service, RIFF principally relied on the expert testimony of Lawrence Kunkel. Mr. Kunkel has testified that there is a "dormant, unserved, niche market [that] will be activated, because this is not a zero sum game.... There are riders out there who want to go to Block Island who don't want to go from Galilee." RIFF points to the public comment testimony of Mr. Zarrella as further evidence of this currently unserved market.²¹¹ RIFF also relies on the testimony of Mr. Donadio on the question of whether there is an unserved demand for his service. RIFF

²⁰⁹ Id., pp. 9-10.

²¹⁰ Id., pp. 10-11.

²¹¹ Id., pp. 12-14.

contends that Mr. Donadio's vast experience in operating high-speed ferry services in Rhode Island make him uniquely qualified to offer an opinion on this issue.²¹² Additionally, RIFF revisits the testimony of Ms. George, Mr. Billington and those members of the public who voiced support for the application (Mr. Naughton and Mr. Zarrella), as further evidence of RIFF's perception of this unserved market.²¹³

RIFF next defended its argument that its proposed service will benefit the Rhode Island economy. RIFF notes that Rhode Island has one of the highest unemployment rates in the country and that approving RIFF's application will provide new jobs. RIFF also notes that unlike Interstate, a Connecticut company, RIFF is a Rhode Island corporation. RIFF argues that if Mr. Donadio is permitted "to grow his Rhode Island based businesses [it will] benefit all citizens in the State."²¹⁴ On this issue, RIFF also relies on the testimony of Ms. Pughe, the previous Executive Director of the North Kingstown Chamber of Commerce, who opined that "providing more choice will make... the larger Rhode Island economy stronger," and Mr. King, who testified that the greater the utilization of the Quonset terminal "...the more benefit... the public is going to receive for the investment the public has made."²¹⁵

RIFF next rejected Interstate's and the Town's assertion that RIFF's proposed service is inconsistent with Block Island's Comprehensive Plan, and consequently, unable to "satisfy a public need or convenience." RIFF argues

²¹² Id., pp. 14-15.

²¹³ Id., pp. 16-17.

²¹⁴ Id. pp. 17-18.

²¹⁵ Id., pp. 18-19.

that not only does the Plan not “dictate public need,” but that there is actually a provision in the Plan which discusses the potential for expansion of Old Harbor by allowing for “other ferry operations and small cruise vessels.” Further, RIFF argues that the Town’s Comprehensive Plan “cannot be dispositive as to whether the service satisfies a generalized public need and convenience in the State. If it were, and subjective, parochial barriers to entry could be erected by each municipality there would be no need for a Division with statewide jurisdiction.”²¹⁶

In further support of its claim to have established the existence of “public convenience and necessity,” RIFF argues that the record reflects that “Interstate’s service is no longer adequate.” RIFF contends that while Interstate’s service can be described as “adequate,” the more important question is: “adequate compared to what?” RIFF submits that Interstate’s definition of adequacy is that which is minimally required to legally transport passengers from the mainland in Rhode Island to Block Island. Making reference to the five high-speed ferry services providing service to Martha’s Vineyard this summer, RIFF argues that “being the ‘only show in town’ is a poor foundation to claim that Interstate’s service needs special protection merely because its ‘adequacy’ is due to being the only option available.” Finally, RIFF argues that just because Interstate provides Rhode Islanders with

²¹⁶ Id., pp. 19-21.

the only ferry access to Block Island “does not justify denying RIFF a CPCN, nor does it mean that the existing service is truly adequate for everybody...”²¹⁷

RIFF next submits that it has established public convenience and necessity by offering to bring competition and ratepayer choice to the marketplace. RIFF argues that the Rhode Island Supreme Court has warned that “increased competition is not a valid ground for denying a common carrier certificate;” that “existing carriers do not have a legal right to maintain a monopoly upon the services rendered;” and 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.”²¹⁸ RIFF observes that “throughout this case, there has been a great deal of discussion regarding the impact RIFF’s service may have on Interstate’s... ‘lifeline’... service.” However, RIFF also observes that this “is exactly the same argument proffered by Interstate in 1998, which is now known to have been grossly overstated. In fact, Interstate has grown its business enormously, despite new competition.”²¹⁹ RIFF urges the Division to “be very cautious given Interstate’s propensity to overstate its case.” RIFF also emphasizes that the current regulatory trend is to implement a regime that promotes competition.²²⁰ RIFF offers the Rhode Island General Assembly’s decision to promote competition in the electric industry as an example of this

²¹⁷ Id., pp. 21-22.

²¹⁸ Id. p. 23, citing *Interstate Navigation Co.*, 1999 WL 813603, at 5, which relies on several R.I. Supreme Court decisions.

²¹⁹ Id., p. 24.

²²⁰ Id., citing to *Town of Norwood v. FERC*, 202 F.3d 392 (1st Cir. 2000).

trend. RIFF also cites to a recent Division decision wherein the Division observed that “wasteful competition” must be treated as “secondary consideration” for denying a CPCN.²²¹

Lastly, RIFF argues that Interstate has admittedly overstated the impact of RIFF’s proposed service on its existing ferry service. RIFF calls attention to the testimony of Dr. Mazze, who admitted during cross-examination that Interstate’s claims that RIFF’s services would have a severe negative impact on Interstate’s lifeline service were overstated. Specifically, RIFF asserts that Dr. Mazze admitted that the ridership impact numbers, which were based on responses to Interstate’s survey, “substantially decrease when survey takers were also asked to consider both ‘cost’ and when the same passengers were later asked to consider ‘time over water.’”²²² RIFF contends that the omission of such a question from the survey “renders the survey numbers incorrect and, at a minimum, unreliable.”²²³ Using Dr. Costa’s testimony, RIFF emphasizes that “...somewhere between 4% and 10% of... [Interstate’s] conventional ferry passengers might use a Quonset fast ferry that cost[s] \$50 and took longer and between .04% and 3% of [Interstate’s] fast ferry customers would use the Quonset fast ferry at that price and [requiring] a longer ride over the water, with a level of certainty of 95%.” Again using Dr. Costa’s calculations, RIFF

²²¹ Id., p. 25, citing to the Division’s February 28, 2014 Report and Order in Docket No. D-13-05 (*In Re Application by A & R Marine Corporation for Water Carrier Authority*).

²²² Id., pp. 25-25.

²²³ Id., p. 26.

emphasizes that “the average cost to the ratepayer could increase by \$.40 – less than one dollar – for the traditional or conventional service.”²²⁴

RIFF argues that this fundamental flaw in Interstate’s survey methodology and analysis not only makes Dr. Mazze’s conclusions at best unreliable, it impacts Mr. Edge’s testimony as well. RIFF notes that Mr. Edge relied on Dr. Mazze’s “Marketing Research Study” to arrive at his prediction of “an across-the-board increase in Interstate’s traditional service rates of 14.2%” if RIFF is permitted to enter the market. RIFF additionally notes that since it filed its application with the Division in 2013, Interstate has requested and received rate increases from the Commission, equal to one-half of the subsidies that Mr. Edge predicted Interstate would require if RIFF were granted a CPCN. Based on these recent rate increases, RIFF observes that using Mr. Edge’s “adjusted worst-case scenario figures, giving RIFF a license would allegedly result in a rate increase of only \$1.85 for an adult, round-trip, traditional ferry ticket.” RIFF asserts that “[t]o suggest that this relatively small rate increase corresponds to a ‘death spiral’ for Interstate’s business is preposterous.”

RIFF also questioned whether any rate increase would be needed at all in view of Interstate’s new Fall River to Block Island service, which Interstate has stated is now making a profit; or whether its service would have any negative impact on Interstate’s operation, considering RIFF’s contention that most of its

²²⁴ Id., pp. 26-27.

passengers “will be new customers that have never traveled to or rarely travel to Block Island.”²²⁵

b. Interstate’s Final Position

Interstate also submitted its post-hearing memorandum on June 7, 2016. In its introduction, Interstate highlighted that 100% of its summer high-speed ferry profits have been “dedicated to supporting Interstate’s year-round lifeline conventional service.” Interstate stresses that without the application of these profits, “lifeline service would have suffered significant losses and Interstate would have been forced to seek rate relief from the Commission.”²²⁶

Like RIFF, Interstate also offered the Division direction on the standard of review that the Division must use in this case. Interstate argues that the Supreme Court has “mandate[d]” that the Division must 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?

²²⁵ Id., pp. 28-29.

²²⁶ Interstate Post-Hearing Memorandum, pp. 1-2.

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).²²⁷

Interstate acknowledges that the test for deciding CPCN cases was established in the seminal case of *Abbott v. Public Utilities Commission*, 136 A. 490 (RI 1927). Interstate also relies on the *Abbott* case for an explanation of the meaning of the statutory requirement that the "public convenience and necessity" must require the proposed new service; and the type of evidence that should be considered in a CPCN proceeding.²²⁸

Interstate also argues that it is 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." To buttress this assertion, Interstate points out that R.I.G.L. §39-3-3.1 provides that a special notice of any hearing regarding a requested CPCN must be given to the towns where an applicant plans to pick up or discharge passengers. Interstate argues that this notice requirement makes it clear that the General Assembly wants the Division to consider the Town's concerns regarding the impact the proposed services will have on the Town.²²⁹

²²⁷ Id., pp. 2-3. Interstate also notes that it will not be addressing RIFF's fitness, willingness and ability to provide the proposed services "due to limitations placed on the scope of Interstate's intervention."

²²⁸ Id., pp. 3-5.

²²⁹ Id., pp. 5-6.

Interstate also cites to R.I.G.L. §39-12-6 to support its assertion that the notice of hearing must also be provided to “all common carriers... serving any part of the route or territory proposed to be served by the applicant...” Interstate maintains that this notice is designed to give these carriers the opportunity to present evidence regarding the “potential negative impacts on existing carriers, and the public they serve....”²³⁰

Interstate next turned to a summary of its direct case in this proceeding. Specifically, Interstate maintains that it has proffered sufficient evidence to prove that:

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.²³¹

However, before going into detail, Interstate exclaims that RIFF is “proposing to divert Interstate’s round-trip, day-tripper, summer-only tourists from Galilee to Quonset,” whom Interstate maintains represent “the bulk of Interstate’s revenues.” Interstate relates that these revenues are needed to

²³⁰ Id., p. 6.

²³¹ Id., pp. 6-7.

maintain Interstate's lifeline services during the remaining eight months of the year. Interstate also faults RIFF for proposing to operate only during the lucrative summer months.²³²

Interstate next recounted the results and conclusions associated with Dr. Mazze's marketing research study. Interstate focused on Dr. Mazze's conclusions that Interstate "would lose as much as 17% of its traditional ferry passengers and 27% of its hi-speed ferry passengers... if [RIFF] is permitted to offer summer-only, passenger only high-speed ferry service from Quonset Point..." and that RIFF "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."²³³

Interstate also relies on Dr. Mazze's testimony to devalue RIFF's witnesses' opinions on the issue of public need. Dr. Mazze observed that RIFF's witnesses "did not rely on or use any economic study, marketing study, traffic study, tourism study of Block Island or marketing plan from... [RIFF] to support their opinions." Dr. Mazze also criticized Mr. Donadio for not presenting "a business plan, marketing plan or market feasibility study showing that there is a public need for an additional high speed ferry service...."²³⁴

Interstate further relies on Dr. Mazze's conclusion that competition between Interstate and RIFF would not be "beneficial," in part due to the

²³² Id., pp. 7-8.

²³³ Id., p. 9.

²³⁴ Id., p. 10.

“cream skimming” and “cherry picking” nature of RIFF’s proposed service. Interstate also recounts Dr. Mazze’s opinion that Interstate would have to raise its rates, reduce the number of ferries it uses to provide services and/or downsize the number of full-time and seasonal employees if RIFF enters the market.²³⁵

Interstate next summarized Mr. Edge’s testimony, who relied in large measure on information provided by Dr. Mazze. Using this information, Mr. Edge calculated that Interstate “would lose over \$1.2 million, which would require a 14.2% rate increase and/or a reduction in service.”²³⁶ Mr. Edge also opined that “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....”²³⁷ Mr. Edge also criticized RIFF for not proffering any surveys, marketing studies, traffic studies, economic studies, or business studies in support of its application. Interstate adds that Mr. Edge’s testimony also contained the following observations and assertions:

- That when IHSF began operations, “Interstate’s revenue declined, hurting the lifeline ratepayers.”²³⁸
- That when Interstate applied for its own fast ferry CPCN, Mr. Kunkel, testifying on behalf of IHSF, testified that the fast ferry market was “saturated”

²³⁵ Id., p. 11.

²³⁶ Id., p. 13.

²³⁷ Id.

²³⁸ Id., p. 14.

and that entry by Interstate into this market would be “absurd, economically irrational and contrary to the public interest.”²³⁹

- 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’s customers.”²⁴⁰

- That bringing economic benefits to North Kingstown and South County does not provide support for RIFF’s application.²⁴¹

- That RIFF’s operation would be in direct competition with Interstate and that this competition would be unfair. In order to make it fair, RIFF either must provide year-round services too or it should “pay a fee to Interstate’s lifeline service to help with the winter runs and lost revenue.”²⁴²

- That Interstate’s Newport to Block Island fast ferry service is now profitable.²⁴³

- That Interstate’s predicted “death spiral” in IHSF’s original CPCN case was averted because “Interstate finally got its own high speed ferry and stopped losing customers to... [IHSF].”²⁴⁴

- That using Dr. Mazze’s projections, Interstate would lose \$1,224,970 in revenues - versus Dr. Costa’s projections of \$333,640. Mr. Edge emphasizes that this proves that Interstate would incur losses under either set of projections.

²³⁹ Id.

²⁴⁰ Id.

²⁴¹ Id., p. 15.

²⁴² Id.

²⁴³ Id., pp. 15-16.

²⁴⁴ Id., p. 16.

Interstate proffered Joshua Linda to rebut RIFF's claims that Interstate's Newport to Block Island ferry service is still losing money and that Interstate was overpaying for the fuel used in Interstate's vessels. Mr. Linda also dispelled RIFF's argument that Interstate ought to reduce the number of its summer runs in order to operate more efficiently. Additionally, Mr. Linda was presented by Interstate to discuss Mr. Donadio's offer to buy Interstate or have Interstate operate out of Quonset. Mr. Linda related that after Interstate rejected these ideas, Mr. Donadio questioned whether Interstate would be interested in executing a "non-compete agreement." Through these discussions, Mr. Linda and Interstate have concluded that Mr. Donadio "wants to obtain a CPCN and sell it. He is not concerned about the public. He is solely concerned about personal profit."²⁴⁵

With respect to the public comments that were offered in support of RIFF's application, Interstate argues that these witnesses "were simply presenting expressions of personal opinion." Interstate contends that because their opinions were not based on any studies, their comments "are therefore entitled to no evidentiary weight."²⁴⁶

Interstate also critiqued the testimony that was proffered by RIFF's direct/rebuttal-case witnesses. Starting with Mr. Donadio, Interstate emphasizes that Mr. Donadio's assessment of "public need" was based on "only information provided by Mr. Donadio... [of] how many people and businesses

²⁴⁵ Id., pp. 17-19.

²⁴⁶ Id., p. 29.

reside in each of the towns.” Interstate argues that this “was not a ‘study’ of any kind.”²⁴⁷ Interstate also points out that Mr. Donadio conceded that Interstate has excess capacity and has invested many millions of dollars in its service.²⁴⁸ Interstate adds that Mr. Donadio confirmed that the new terminal he plans to use at Quonset has not been built yet.²⁴⁹ In summation, Interstate contends that Mr. Donadio’s testimony “provided no probative evidence of public convenience and necessity for RIFF’s proposed high speed ferry service.” Interstate observes that Mr. Donadio presented no studies, business plan, marketing plan, or other information that would establish a foundation for, or lend weight to, his personal opinion.²⁵⁰

Interstate next argues that Dr. Costa’s testimony “mostly supported Interstate’s case and undercut Mr. Donadio’s case.” Interstate observes that after Dr. Costa recast Dr. Mazze’s numbers, she concluded that “there was a 95% certainty that Interstate would lose between 4% and 10% of its traditional customers to RIFF.” Interstate notes that the only disagreement between Dr. Costa and Dr. Mazze “is how many customers will be lost.”²⁵¹

Interstate argues that Mr. Kunkel’s testimony should be given little if any weight. Interstate argues that this witness offered an expert opinion without conducting any studies or relying upon any data or analysis; what he offered was “simply... his bald personal opinion that ‘there is a public need for such a

²⁴⁷ Id., p. 30.

²⁴⁸ Id., p. 31.

²⁴⁹ Id.

²⁵⁰ Id., pp. 32-33.

²⁵¹ Id., p. 34.

service and that RIFF's proposed service will satisfy that need.”²⁵² Interstate also attacks the three reasons on which Mr. Kunkel bases his opinion; specifically: (1) that the government has spent \$660 million in infrastructure improvements at Quonset, (2) 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, and (3) 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 Point Judith or Newport.”²⁵³ However, Interstate argues that through cross-examination, it was established that there was no connection whatsoever between the \$660 million and ferry service to Block Island; it was also established that RIFF’s lease was given for the Quonset to Martha’s Vineyard ferry run – not a run to Block Island. Finally, Interstate argues that Mr. Kunkel’s ‘studied opinion’ about an unserved market “is purely a personal opinion because it has no foundation in any study, data, or analysis.”²⁵⁴ Interstate also questions Mr. Kunkel’s credibility for testifying that all of RIFF’s customers could be “new customers” who have never used Interstate’s ferry services. Interstate asserts that this testimony “[n]ot only make[s] no sense, it is unbelievable, is against the overwhelming evidence, and illustrates how little weight, if any, should be given to Mr. Kunkel.”²⁵⁵

²⁵² Id., p. 35.

²⁵³ Id., pp. 35-36.

²⁵⁴ Id.

²⁵⁵ Id., p. 36.

Lastly, Interstate revisits its motion to strike Mr. Kunkel's testimony, a motion that was jointly made by the Town and Interstate during the March 22, 2016 hearing. Interstate notes that the hearing officer took the motion under advisement and permitted the parties to "further elaborate on their positions in their briefs." In support of the motion, Interstate and the Town argue that "expert testimony must be based on facts and data to determine whether the opinion has probative force or is merely speculation." Interstate argues that "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."²⁵⁶ In further support of its motion, Interstate points out that when Mr. Donadio and IHSF applied for a CPCN in 1998, the application was supported by expert testimony from Dr. Timothy J. Tyrrell, Ph.D. Interstate stresses that as bases for his expert testimony, Dr. Tyrrell relied on his experience in "tourism economics" and also research that was incorporated into the Port of Galilee Master Development Plan and the Rhode Island Travel and Tourism Research Report. Interstate asserts that Mr. Kunkel's testimony, in comparison, only relies on his personal opinion.²⁵⁷

²⁵⁶ Id, pp. 38-40.

²⁵⁷ Id., pp. 40-41.

c. The Town's Final Position

The Town also filed its post-hearing legal memorandum on June 7, 2016. As its first argument, the Town reiterated its assertion that Mr. Kunkel's testimony must be stricken from the record. Reciting the three factors on which Mr. Kunkel bases his opinion of public need, the Town offers a counter-argument to each.

The first basis for Mr. Kunkel's opinion on public need was that both federal and State governments had invested a combined \$660 million in infrastructure improvements in the Quonset-Davisville Business Park; and that '[i]nherent in that decision making was the assumption that there was a public need for the goods and services that the business tenants of the park would provide.' The Town rejects this public investment in infrastructure as evidence of public need for RIFF's proposed services. As Interstate has argued, the Town contends that when Mr. Kunkel was cross-examined on this issue he acknowledged that the funding he referenced in his testimony occurred in the mid-1990's through a bond referendum which was approved by the Rhode Island Legislature. The Town underscores that Mr. Kunkel could not produce any evidence that this bond was issued to facilitate ferry services between Quonset and Block Island and that Mr. Kunkel admitted that the 1990's was before the time that high-speed ferry service was widely adopted in the Northeast.²⁵⁸

²⁵⁸ Town's Post Hearing Memorandum, pp. 3-4.

The second basis for Mr. Kunkel's opinion was that the QDC made a policy decision when it granted RIFF's concession/land lease and approved its bulkhead improvements, that those actions would serve the public marine transportation needs, including services to Block Island. But the Town stresses that during cross-examination, Mr. Kunkel admitted that the approval of the lease was ostensibly based on RIFF's then proposed services between Quonset and Martha's Vineyard and not services to Block Island.²⁵⁹

The third basis for Mr. Kunkel's opinion rested with his 'studied opinion' that there is a dormant, unserved market for additional high-speed ferry service to Block Island. Also similar to Interstate's argument, the Town asserts that Mr. Kunkel's opinion cannot be viewed as an expert opinion due to the fact that he offered no studies, interviews, data or surveys to support his opinion. The Town contends that Rhode Island law provides that an expert may not give an opinion without describing the foundation on which the opinion rests. As the Town believes that Mr. Kunkel has offered no such foundation in this case, the Town argues that Mr. Kunkel's opinion "has no probative force" and should be stricken.²⁶⁰

Next, relying on the *Abbott* case, *supra*, the Town asserts that RIFF has failed to establish that there is a public need for a new fast ferry service between Quonset and Block Island. The Town submits that not only is Mr. Kunkel's expert testimony without foundation and not useful to RIFF, but that

²⁵⁹ Id., pp. 5-6.

²⁶⁰ Id., pp. 6-10.

RIFF's remaining witnesses also failed to establish public need in this docket. Starting with Myrna George's testimony, the Town summarized her testimony as simply an opinion that there is a public need to reduce traffic congestion in the "South County" area in the summertime. The Town asserts that Ms. George's testimony failed "to establish a public need for a new fast ferry service from Quonset to Block Island."²⁶¹

The Town offered the same argument against the testimony presented by Martha Pughe. The Town summarized Ms. Pughe's testimony as an opinion that RIFF could improve business in North Kingstown if RIFF were allowed to provide ferry services to Block Island. The Town maintains that Ms. Pughe "provided no competent testimony about a public need for a new fast ferry service from Quonset to Block Island."²⁶²

The Town argues that "nothing" in Elizabeth Dolan's testimony "was related to the public need for a new fast ferry service from Quonset to Block Island." The Town suggests that Ms. Dolan is only interested in RIFF's success in order "to benefit North Kingstown."²⁶³

The Town argues that Mr. Billington's opinion "as to an alleged 'pent-up demand' for more convenient travel to Block Island is not based on any facts, just his assumptions and what he said was the experience gained from running a tour to Block Island..." The Town, however, takes note that Mr. Billington's tour only lasted one year and that Mr. Billington could not recall anyone telling

²⁶¹ Id., pp. 12-13.

²⁶² Id., p. 13.

²⁶³ Id., pp. 13-14

him that that they did not want to take his tour because the ferry was leaving from Narragansett. The Town insists that Mr. Billington “did not provide any competent evidence in support of RIFF’s position that there is a public need for the proposed service.”²⁶⁴

With respect to Mr. King’s testimony, the Town argues that its cross-examination of Mr. King brought out that Mr. King’s use of the phrase “public need” was connected to ‘our view of the public being served... by utilizing those investments that have been made’ rather than being connected to the question of whether there is a public need for another ferry service to Block Island. The Town argues: ‘[c]learly, Mr. King did not provide any competent evidence about public need for RIFF’s proposed high-speed ferry service.’²⁶⁵

The Town next criticized Mr. Donadio for initially promising the Town that he would not pursue a CPCN without the Town’s support and then reneging on his promise.²⁶⁶ The Town notes that it could not support Mr. Donadio’s CPCN proposal due to a number of concerns, including harbor traffic congestion, the number of visitors coming to Block Island already, and likely rate increases caused by a reduction in Interstate’s summertime passenger revenues and/or a reduction in services during the off-peak seasons.²⁶⁷ With respect to Mr. Donadio’s claims of public need, the Town reiterates that the

²⁶⁴ Id., pp. 14-15.

²⁶⁵ Id., pp. 15-16.

²⁶⁶ Id., pp. 16-17.

²⁶⁷ Id., pp. 17-18.

Division should disregard Mr. Donadio's opinion as he fails to back it up with the use of any studies, data, interviews or surveys.²⁶⁸

The Town also focused on the "hardship and inconvenience" that the Town asserts RIFF's proposed service would bring to New Shoreham. The Town argues that the Division should afford significant weight to the Town's position in this matter based on the special notification provisions contained in R.I.G.L. §§39-3-3 and 39-3-3.1. The Town declares that its concern that RIFF's services will damage the lifeline services the Town receives from Interstate must be given serious attention by the Division.²⁶⁹ The Town argues that RIFF's proposal to compete with Interstate would not result in fair competition due to the fact that RIFF does not propose to provide year-round services. To support its position, the Town relies on the testimony of Dr. Mazze who has asserted that RIFF's entry into the market "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."²⁷⁰ The Town also relies on the testimony of Mr. Edge, who "also testified about the deleterious effects" that RIFF's operation would have on Interstate's lifeline services to Block Island.²⁷¹ The Town also urges the Division to consider the testimony of the Town's Manager, First Warden, Second Warden and Harbormaster, who all "testified to the inconvenience, traffic, congestion and

²⁶⁸ Id., pp. 18-20.

²⁶⁹ Id., pp. 21-22.

²⁷⁰ Id. pp. 23-24.

²⁷¹ Id., pp. 25-26.

indeed danger that would result in a fast ferry coming into the corner of the Old Harbor...”²⁷²

Lastly, the Town argues that in view of the *Abbott* factors to be considered in determining whether a CPCN should be issued, the evidence reflects that RIFF has not satisfied its burden of proof in this case. The Town lists the following eight factors that *Abbott* requires the Division to consider:

- Has RIFF proven that “public convenience and necessity” require the proposed service from Quonset to Old Harbor, Block Island;
- Does Interstate meet the needs of the public for ferry travel to Block Island;
- What investments of capital has Interstate made in its ferry operations;
- What is the nature of the ferry service being rendered by Interstate;
- If Interstate’s service is adequate, what would be the probable effect of admitting RIFF into the fast ferry field which is already adequately served;
- What is the anticipated effect of RIFF’s proposed ferry service operations upon Interstate’s revenues;
- Would RIFF’s proposed ferry service operations have an adverse impact on the adequacy of the existing services provided by Interstate; and
- Is RIFF fit, willing and able to properly perform the service proposed?²⁷³

The Town submits that a consideration of all these factors “weighs heavily against the issuance of a CPCN to RIFF.”²⁷⁴

²⁷² Id., pp. 26-28.

²⁷³ Id., p. 29.

d. The Advocacy Section's Final Position

On June 7, 2016, the Advocacy Section notified the Division “that it would not be filing a post-hearing memorandum” in this docket. The Advocacy Section reasoned that the applicant “was afforded the opportunity to present a complete case; likewise, the intervening parties... fully participated in the process, ensuring that the record was replete with evidence to support its respective concerns and objections.” The Advocacy Section adds that the Division “now has ample evidence with which to make a fully-informed, fair and reasoned decision.”²⁷⁵

e. RIFF's Reply Position

On June 31, 2016 the Division received a Reply Memorandum from RIFF, which was proffered in response to the closing positions of the Town and Interstate.

In its reply, RIFF argues that Interstate and the Town “erroneously” contend that RIFF failed to meet its burden of establishing a public need and convenience for its proposed high-speed ferry service. RIFF submits that the demand for its proposed service is obvious, as evidenced by the Town’s concerns over “a dangerous increase in crowds... traveling to Block Island” and Interstate’s argument “that the demand is so high that Interstate’s very existence is threatened....” RIFF contends that these concerns “inescapably presuppose... a large untapped population of people who are not currently

²⁷⁴ Id., pp. 30-35.

²⁷⁵ June 7, 2016 email communication from Attorney Hetherington to the Hearing Officer (copied to Service List).

traveling to Block Island.” RIFF adds: “[a]ll the paper, ink or time spent by these intervening Parties arguing that a market demand does not exist is therefore entirely inconsistent with the crux of both Parties’ arguments challenging RIFF’s evidence of market demand.” RIFF submits that the “only dispute is the extent to which this admitted demand is comprised of new passengers from the untapped market, as asserted by the Town or crossover passengers as asserted by Interstate.”²⁷⁶

RIFF also urged the Division to deny the Town’s and Interstate’s joint motion to strike the expert testimony of Mr. Kunkel. RIFF argues that “the real debate... is whether the facts and data that Mr. Kunkel relied upon were credible enough to support his opinion, not whether he actually did rely upon certain other facts and data that the movants assert he ‘should have’ relied upon.” RIFF argues that Interstate and the Town’s assertions regarding the sufficiency and quality of Mr., Kunkel’s testimony ‘would go to the weight the [fact finder] might give to the testimony of the expert but that... d[oes] not make the expert’s testimony inadmissible.’²⁷⁷ RIFF maintains that Mr. Kunkel is permitted to base his expert opinion on the facts and data that he espoused during the hearing.²⁷⁸

RIFF also argues that despite Interstate’s assertions to the contrary, granting RIFF a CPCN will have a minimal impact on Interstate’s lifeline service. Using Dr. Mazze’s data, RIFF points out that Dr. Costa calculated and

²⁷⁶ RIFF Reply Memorandum, pp. 1-4.

²⁷⁷ Id., pp. 5-6, also citing *Sweet v. Murphy*, 473 A.2d 758, 760-761 (R.I. 1984).

²⁷⁸ Id., pp. 6-9.

testified that somewhere between 4% and 10% of Interstate’s conventional ferry passengers “*might*” use a Quonset fast ferry that costs \$50 and took longer; and that between .04% and 3% of Interstate’s fast ferry customers would use the Quonset fast ferry at that price and requiring a longer ride over the water, with a level of certainty of 95%. RIFF observes: “[u]sing Dr. Costa’s figures, the average cost to the ratepayer could increase by \$0.40, less than one dollar – for the traditional or conventional service.”²⁷⁹ RIFF also argues that “it remains unclear if the revenue loss will even be that high because Interstate’s survey conveniently never asked a ‘Question 7,’ whether increased ticket price *and* increase time over the water would impact whether passengers would utilize a high-speed ferry service from Quonset Point to Block Island... and because Interstate’s revenue loss calculations did not account for either Question 5 or 6 in its passenger loss percentage.” RIFF further argues that to put this impact in context, “using Mr. Edge’s adjusted worst-case scenario figures, giving RIFF a license would allegedly result in a rate increase of only \$1.85 for an adult, round-trip, traditional ferry ticket.” Based on this worst-case rate increase projection by Mr. Edge, RIFF characterizes Interstate’s ‘death spiral’ claim as “preposterous.”²⁸⁰

RIFF next argues that Interstate “does not have a right to maintain a monopoly.” In making this argument, RIFF relies on a recent Division decision which held that “existing carriers do not have a legal right to maintain a

²⁷⁹ Id., pp. 10-11.

²⁸⁰ Id., pp. 12-13.

monopoly upon services rendered, and that increased competition is not a valid ground for denying a common carrier CPCN.”²⁸¹ RIFF also notes that the Rhode Island Superior Court reached a similar holding; adding that the Court noted that ‘protecting existing investments... from even wasteful competition must be treated as *secondary* to the first and most fundamental obligation of securing adequate service to the public.’²⁸² RIFF also emphasizes that both the Public Utilities Commission and the Rhode Island Supreme Court have held that high-speed ferry service is a discretionary service and that it is to be treated differently from Interstate’s ‘lifeline’ service.²⁸³ RIFF additionally notes that the Public Utilities Commission has stated: “[w]e must also remain cognizant of the competitive markets developing in many utility sectors and the particular business exigencies arising therefrom. In our view, establishing choice for ferry travel to Block Island is a positive development for consumers.”²⁸⁴ In closing, RIFF argues that the “competent evidence in the record is that Interstate’s opposition to RIFF’s CPCN application is motivated by a desire to maintain its intrastate monopoly.”²⁸⁵ RIFF maintains that the general public “should not be denied the opportunity to avail itself of the Applicant’s service in order to insulate Interstate... from all risk of revenue

²⁸¹ Id., p. 13, citing to Division Order No. 21170, issued in Docket No. D-13-51 on September 24, 2013.

²⁸² Id., pp. 13-14, citing to *Interstate Navigation Co. v. Division of Public Utilities and Carriers*, No. C.A. 98-4766, 1999 WL 813603, at 5 (R.I. Super. Ct., August 31, 1999).

²⁸³ Id., p. 14, citing to *Interstate Navigation Co. v. Division of Public Utilities*, 824 A.2d 1282, 1288 (R.I. 2003).

²⁸⁴ Id., p. 15, citing to *In Re: Island Hi-Speed Ferry, LLC, Proposed Passenger Rates & Ferry Schedule, Petition for Waiver or Rate Hearing & Investigation, & Motion for Exemption from Rate Filing Requirements*, 2802, 1999 WL 35645630 (Mar. 31, 1999).

²⁸⁵ Id., p. 15.

erosion is a concept that the Division cannot embrace, especially given the current trends toward competition and the increasing availability of consumer choice in numerous industries subject to regulation by both the Division and Commission.”²⁸⁶

f. Interstate’s Reply Position

Interstate filed a post-hearing reply memorandum on July 5, 2016. In its reply, Interstate accuses RIFF of “going outside the evidentiary record and assuming that it could present misleading and inaccurate information without being called to task.” Interstate offers the following corrections:

- Interstate notes that IHSF began service in the summer of 2001, not in 1998, as asserted by RIFF;²⁸⁷
- Interstate rejects RIFF’s claim that Interstate has a monopoly on ferry service to Block Island. Interstate notes that another high speed ferry operates between New London, Connecticut, and Old Harbor, Block Island, and that another traditional ferry service operates between Montauk, Long Island and New Harbor, Block Island. Interstate does admit that it “has a ‘monopoly’ on providing lifeline traditional ferry service because no one else wants the burden.”²⁸⁸
- Interstate also rejects RIFF’s assertion that Interstate is a Connecticut company. Interstate relates that it is headquartered in Galilee and

²⁸⁶ Id., p. 16.

²⁸⁷ Interstate’s Reply Memorandum, p. 1.

²⁸⁸ Id., pp. 1-2.

is registered to do business in Rhode Island. Interstate also notes that the “overwhelming majority” of its employees are Rhode Island residents.²⁸⁹

- Interstate rejects RIFF’s assertions that Interstate did not lose passengers after IHSF was granted a CPCN and that ‘Interstate’s traditional ridership has grown immensely since 1998, even during the time when Interstate competed directly with the new [IHSF] high-speed service.’ Interstate argues that not only is there no evidentiary support for this claim, “RIFF is dead wrong.” Interstate contends that its ridership significantly declined when IHSF started operating in 2001 and that the decline continued until 2006 when Interstate purchased IHSF.²⁹⁰

- Interstate next corrects RIFF’s claim that the Block Island Tourism Council endorsed RIFF’s proposal. Interstate points out that Tourism Council sent a letter to the Block Island Town Council on March 22, 2016 making clear that it was not endorsing RIFF.²⁹¹

- Interstate also corrects RIFF’s claim that the Town endorsed Interstate’s Newport high-speed CPCN application. Interstate replies that that record in that docket, Docket No. D-05-06, reflects that “the Town took no formal position.” Interstate also challenges RIFF’s suggestion that the Town is unfairly opposing RIFF’s application, but had no apparent problem with the increased passenger traffic Interstate’s Newport and Fall River services brought to Block Island. Interstate emphasizes that its Newport run carried far fewer

²⁸⁹ Id., p. 3.

²⁹⁰ Id., pp. 3-5.

²⁹¹ Id., p. 5.

passengers to Block Island in its three years of operation than what RIFF is projecting for its first three years of operations (52,000 v 117,800).²⁹²

- Interstate next faulted RIFF for narrowing the “public interest” component of R.I.G.L. §39-1-1(b) to “a particular community such as North Kingstown.” Interstate argues that the law requires the Division to consider what would be in the interest of “**all** the inhabitants ‘of the state.’” (Emphasis in original).²⁹³

- Interstate next argues that by not submitting a business plan with its application RIFF has not laid an appropriate evidentiary foundation to support its claim of public need for its services. Interstate submits that a business plan would have provided necessary details regarding: the vessel to be used, the number and departure times of daily runs, travel time over the water, specifics on the dock to be used, a pro forma financial statement, marketing study or survey demonstrating a need for the service, a marketing plan and ticket prices. Interstate argues that without these details, “the Division is being asked to grant a CPCN for a proposed ferry service it knows little about.”²⁹⁴

- Interstate notes that RIFF has stated that it “endured over three years of hearings, briefings, data requests and motions...” However, Interstate attributes all the delays in this case to RIFF.²⁹⁵

²⁹² Id., pp. 5-6.

²⁹³ Id., pp. 6-7.

²⁹⁴ Id., pp. 7-8.

²⁹⁵ Id., pp. 8-9.

- Interstate next takes exception to RIFF's claim that Mr. Donadio rejected 'Interstate's non-compete offer.' Interstate argues that the record shows that "the non-compete offer came from Mr. Donadio, not Interstate." Interstate reiterates that "[t]his CPCN would simply be a tool for Mr. Donadio to turn another fast profit, at the expense of ratepayers."²⁹⁶

- Interstate rejects RIFF's claim that Interstate did not submit a business plan when it applied for its Newport to Block Island CPCN. Interstate argues that unlike RIFF, it provided all the information that would have been included in a business plan in its direct case to the Division.²⁹⁷

- Interstate next argues that RIFF misrepresented several facts when it claimed 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..." Interstate contested RIFF's assertion about the Town's Comprehensive Plan by revisiting the testimonies of the Town's First and Second Wardens and actual excerpts from the Comprehensive Plan.²⁹⁸

- Interstate also challenges RIFF's claim that "Interstate's service is no longer adequate to serve the growing need." Interstate argues that RIFF offered no citations to the record "to support this absurd statement..." Interstate emphasizes that it runs eight traditional ferry trips each weekday during the summer and nine on weekends; and six high-speed ferry trips daily.

²⁹⁶ Id., pp. 9-10.

²⁹⁷ Id., p. 11.

²⁹⁸ Id., pp. 12-13.

Interstate also notes that its traditional ferries can carry at least 1000 passengers; the high-speed ferry can carry 250 passengers; and that passengers can make reservations in advance. Interstate argues that sold-out ferries are rare for “walk-on” customers without a reservation, but that such customers are never turned away. Interstate also notes that RIFF will not operate traditional ferries and that riding time over the water will be twice as long as Interstate’s high-speed service.²⁹⁹

- Interstate also argues that RIFF’s proposal would not noticeably reduce traffic. Interstate asserts that the record does not support RIFF’s claim that its service would reduce traffic in the South County area. Further, Interstate argues that “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.” Interstate also adds that if you consider RIFF’s plan to operate for 75 days per summer, RIFF’s projection of carrying 32,000 passengers in its first year of operation and that each car will carry an average of two persons, the traffic reduction would be only 213 cars per day, which Interstate argues “could not have a noticeable or even measurable impact on traffic reduction.”³⁰⁰

- Interstate rejects RIFF’s argument that because Mr. Donadio is proposing to make a “private investment” he should be given a CPCN.

²⁹⁹ Id., pp. 13-15.

³⁰⁰ Id. p. 15.

Interstate stresses that the test is whether the proposed service will satisfy the public need and convenience.³⁰¹

- Interstate also challenges RIFF's claim that there is inadequate parking in Galilee. Interstate notes that while it is true that the Lighthouse Inn parking lot may be full for 30 or 45 days per summer, there are many other parking lots in Galilee.³⁰²

- Interstate also argues that "job creation" is not an issue in this case. Again, Interstate stresses that the test is whether the proposed service will satisfy the public need and convenience.³⁰³

- Interstate next criticizes RIFF for arguing that Interstate's survey is defective "for not asking a question that RIFF felt should have been asked." Interstate questions "where is RIFF's survey?"³⁰⁴

- Interstate next criticizes RIFF for arguing that Dr. Mazze's analysis was "fundamentally flawed." Interstate responds by arguing that "Dr. Costa conceded that she never did a single survey in her life" and is not qualified to find fault with Dr. Mazze.³⁰⁵

- Finally, Interstate responded to RIFF's claim that Interstate "has requested and received rate increases, continuing to gain more revenue from its passengers." Interstate notes that in its most recent 2015 rate filing for its traditional ferry service, the Commission "imposed a **decrease** in revenues of

³⁰¹ Id., p. 18.

³⁰² Id., pp. 18-19.

³⁰³ Id., p. 19.

³⁰⁴ Id., p. 20.

³⁰⁵ Id.

\$733,842 per year, which is approximately a 9% overall across-the-board decrease. (Emphasis in Original).³⁰⁶

g. The Town's Reply Position

The Town also filed a post-hearing reply memorandum on July 5, 2016. In its reply memorandum, like Interstate, the Town asserts that much of the argument contained in RIFF's post-hearing memorandum has no factual support in the record of this docket and, consequently, must be ignored by the hearing officer.³⁰⁷ The Town draws particular attention to RIFF's frequent reference to IHSF's 1998 application case. The Town contends that 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 in the 1998 Application and the resulting effects and outcomes of the granting of the application." The Town thereupon submits that the Division should disregard all of RIFF's inappropriate references to the 1998 Application case.³⁰⁸

The Town also argued that RIFF's lay witnesses are not permitted to provide testimony predicting how a person or population will act. The Town contends that due to the weaknesses in Mr. Kunkel's "opinion testimony," 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

³⁰⁶ Id., p. 21.

³⁰⁷ The Town's Reply Memorandum, pp. 1-2.

³⁰⁸ Id., pp. 2-3.

need.”³⁰⁹ However, the Town maintains that this effort by RIFF should be disallowed by the Division because the law does not permit a lay witness to testify as to the lay witness’ opinion about what another person would or would not do in the circumstances presented.³¹⁰

The Town also argues that RIFF’s use of the word “competition” in its post-hearing memorandum is misplaced. The Town submits that “[c]ompetition refers to a choice between two like services that a consumer can freely make. From the prospective [sic] of the island residents and those travelling to the island during the off season, the establishment of a new ferry service from Quonset to Block Island will not provide them with any choice whatsoever...”³¹¹

Lastly, the Town reiterates that RIFF’s proposed ferry service “violates the Town’s Comprehensive Plan. As examples of its inconsistencies with the Town’s Comprehensive Plan, the Town notes that RIFF’s proposed service “does not present Block Island as a destination for travel... [or] encourage off season visitors... [or] promote alternatives to tourism.”³¹²

10. Findings

Before addressing the relevant findings, the Division notes that Rhode Island General Laws, Section 39-3-3, establishes the requisite burden of proof that RIFF must satisfy in order to receive the “water carrier” CPCN that it seeks. The pertinent provisions state as follows:

³⁰⁹ Id., p. 5.

³¹⁰ Id., pp. 6-8.

³¹¹ Id., pp. 8-9.

³¹² Id., p. 9.

No common carrier of persons and/or property operating upon the water between termini within this state shall hereafter furnish or sell its services unless the common carrier shall first have made application to and obtained a certificate from the division certifying that public convenience and necessity required the services.³¹³

In addition to a determination of whether the “public convenience and necessity require[s] the services” the Division must also evaluate the applicant’s “fitness, willingness and ability” to provide the proposed transportation services.³¹⁴

a. Fitness, Willingness and Ability

The Division observes that the only arguable challenges to RIFF’s “fitness” and “ability” to provide its proposed ferry service come from the Town. Specifically, on the issue of “ability,” the Town maintains that RIFF has failed to prove that it has legitimate access rights to a docking facility in Old Harbor. On RIFF’s “fitness,” the Town seems to suggest that because Mr. Donadio reneged on an earlier commitment to not move forward with his CPCN case without the Town’s support, the Division should conclude that Mr. Donadio (and RIFF) is unfit to hold the requested CPCN. Additionally, as a fitness/ability hybrid issue, the Town faults RIFF for not proffering a business plan with its application. The Division rejects all three of these arguments.

First, on the dock issue, the Division has made it abundantly clear that it believes that RIFF has adequately demonstrated that Bluewater’s claims of interest and ability to construct a docking facility in Old Harbor are credible,

³¹³ Under R.I.G.L. §39-1-2 (7), the definition of a “common carrier” includes “ferry companies”.

³¹⁴ See generally R.I.G.L. §§39-1-1, 39-1-38 and 39-3-3.1; also *Interstate Navigation Co. v. Division of Public Utilities and Carriers*, 1999 WL 813603 (R.I. Super. 1999).

supra. The record also sufficiently supports a finding that RIFF will have access to Bluewater's planned dock after it is constructed, *supra*. Therefore, the Division must find that the dock issue raised by the Town is without merit and not a regulatory impediment to RIFF's "ability" to provide its proposed ferry services.

With respect to the Town's suggestion that Mr. Donadio's fitness has been called into question due to his decision to pursue a CPCN without the Town's support, the Division cannot possibly ascribe application-denying weight to this turn of events. Though it does appear that Mr. Donadio broke his promise to Town officials, that fact, by itself, is insufficient to deny the requested CPCN. The Division recognizes that Mr. Donadio has had a long and successful business career as a transportation service provider via cruising/touring vessels and high-speed catamarans. His experiences with the Southland Riverboat, IHSF, charter and consulting services in Florida, New Jersey, New York and Bermuda, and now RIFF, a career of related service collectively spanning over twenty years, abundantly evidences his fitness to provide the services he now proposes through the instant application.

The Division also cannot accept that Mr. Donadio's (and RIFF's) fitness and/or ability is adversely impacted by RIFF's decision to not include a business plan with its application. Once more, in view of his extensive experience in the water carrier industry and the time and financial resources that Mr. Donadio has devoted to the instant application process, it would be unreasonable to infer that Mr. Donadio lacks the business and financial

wherewithal to effectuate his proposal. Further, the Division fails to see how the Town (or Interstate) will be prejudiced in any way if RIFF is unable to raise the necessary funds to purchase or lease a vessel and/or lease the necessary dock in Old Harbor. In such case, the status quo is preserved; Interstate remains the sole high-speed ferry service provider to Block Island.

Also on the issue of an applicant's "ability" to carry out a proposed offer of ferry services without a vessel or dock(s), the Division has established a precedent for approving CPCN applications without proof that an applicant already possesses suitable docks and a vessel. The Division has held that requiring an applicant to possess the docks and vessel at the time of the application filing is economically impractical and contrary to Division precedent.³¹⁵ The Division acknowledges that it has, in the past, granted applications for water carrier CPCNs without *de facto* evidence of immediate access to docks and a vessel. The critical element for regulatory purposes is that the applicant whose application has been granted is subject to various conditions-subsequent (i.e., availability of docks and a vessel, consistent with the Division's Report and Order; proof of insurance; satisfaction of applicable Coast Guard and municipal permitting requirements; and a Division inspection) as a prerequisite before the Division actually issues a CPCN and before services may legally begin. Therefore, the Division finds nothing

³¹⁵ See Application by A & R Marine Corporation for Water Carrier Authority, Docket No. D-13-105, Order No. 21363 at 54.

improper with RIFF's decision to seek approval of its application before expending any funds on a new vessel and docking privileges.³¹⁶

Based on the foregoing, the Division finds sufficient evidence to support a determination that RIFF is "fit" and "willing" to provide its proposed ferry services and that the Company possesses the requisite "ability" to successfully initiate and maintain a high-speed ferry service between Quonset and Block Island.

b. Public Convenience and Necessity

RIFF has argued that there currently exists an unserved public need for its proposed service and that its proposed service would provide greater convenience for many ferry customers currently traveling between mainland-Rhode Island and Block Island aboard Interstate's traditional and high-speed ferries. In response to these assertions, Interstate and the Town have offered forceful counter-arguments. First, arguing that RIFF has failed to demonstrate the existence of an unserved public need for RIFF's Quonset - Block Island ferry service; and, secondly, that Interstate's year-long lifeline services to the Town would suffer significantly by the introduction of a competing summer-only high-speed ferry service from Quonset, which Interstate and the Town contend will invariably lead to higher lifeline rates and/or reduced lifeline services.

³¹⁶ Id.

1. Lifeline Benefits

Interstate and the Town have asserted in this docket that RIFF's proposed high-speed ferry services must be denied to keep Interstate's "lifeline" service-related rates from increasing and to avoid any reduction in lifeline services to and from Block Island. The Intervenors contend that the revenues that Interstate will lose from the anticipated migration of some of Interstate's summer customers over to RIFF will result in lost business and revenues for Interstate, which Interstate and the Town argue will place upward pressure on Interstate's lifeline service rates and/or necessitate a reduction in lifeline services. However, the Division has heard this argument from Interstate before; and has rejected it.

When Interstate applied for its current high-speed ferry CPCN in 2004, its direct case principally relied on an argument that its proposed fast ferry services were needed, in part, to keep its "lifeline" service-related rates from increasing. Interstate argued that the need to keep its lifeline service rates "as low as possible" ought to be a determining factor in the Division's assessment of whether the "public convenience and necessity" required Interstate's proposed fast ferry service. The core of Interstate's argument rested on the expected profitability of its fast ferry services (then projected to be approximately \$500,000 annually) and the Company's promise to "pour all of

that profit into the lifeline ferry service to control rates on its conventional ferry service for the benefit of its ratepayers.”³¹⁷

However, in its Report and Order in that 2004 docket, the Division found “little, if any, relevance” in Interstate’s commitment to share the profits from its proposed high-speed ferry service with the Company’s lifeline ferry service. The Division reasoned as follows:

The Division has previously determined that “fast” ferry services and “conventional” ferry services are two distinctly different water carrier operations. The Rhode Island Supreme Court has thoroughly vetted the issue and has agreed with the Division. Therefore, the Division cannot accept Interstate’s argument that the economic viability of the two services should be linked for licensing purposes.

While the accounting and ratemaking treatments of Interstate’s high-speed services and conventional-speed services may be inextricably linked, the Division finds that it would be improper to base the issuance of a high-speed water carrier CPCN on the needs of a public utility ratepayer population that will not be utilizing any of the services authorized under that high-speed water carrier CPCN. As an analogy, the Division would not authorize the issuance of a taxicab CPCN to a company that already possessed a jitney CPCN in order to take the pressure off jitney (bus) fares. In short, the Division finds the argument illogical from a licensing perspective.³¹⁸

With this previous finding and decision as controlling precedent, the Division will not decide the issue of what revenue impact would befall an existing traditional or conventional lifeline ferry service from the introduction of

³¹⁷ See Application by Interstate Navigation Company for Water Carrier Authority, Docket No. D-05-06, Order No. 18506 at 61.

³¹⁸ Id. at 61-62.

a new discretionary high-speed ferry service. The two services, as noted above, are distinctly different services – two different modes of transportation – and the situation presented not unlike adding additional air carrier services between the mainland and Block Island. The impact is too far removed for regulatory licensing purposes.

“Lifeline” services exist to provide the residents and businesses on Block Island with a level of certainty that they will be able to travel and transport goods between the Island and the mainland throughout the year. Conversely, “discretionary” high-speed ferry service exists, almost exclusively, to expedite the transit of passengers between termini. Again, a situation not unlike air carrier services. In the instant case, the argued impact to Interstate’s lifeline service would result from an expected loss of passenger revenues from Interstate losing both traditional and high-speed ferry passengers to RIFF during the summer months. As for the expected losses associated with Interstate’s traditional service riders, the Division finds that if Block Island residents and business owners/employees decide to take a high-speed ferry to Block Island from Quonset in the summertime, then those riders are no longer availing themselves of “lifeline” services. Instead, they have become discretionary riders aboard a high-speed ferry. The same can be said for those Block Island residents and business owners/employees that ride Interstate’s high-speed ferries. The two services are different. In the shoulder and winter months (the non-summer months), Block Island residents and business owners/employees will know that they have access to unwavering “lifeline”

service from Interstate. Nothing in this record causes the Division to conclude that this existing lifeline service would be altered in any material way from the introduction of a new seasonal high-speed service.

Interstate and the Town have maintained that the lifeline services that Interstate provides cannot survive, as presently priced and structured, if RIFF is permitted to poach summer customers from Interstate. Unquestionably, the bulk of these summer travelers to which Interstate refers are not residents of Block Island or directly related to business activities on Block Island. They are, more accurately, tourists and day-trippers visiting Block Island. Interstate and the Town, in effect, are arguing that these tourists and day-trippers should be expected to defray the annual transportation costs for Island residents and businesses without competition from other mainland ferry service provider(s). The wisdom of this rate design is properly before the Commission. However, for CPCN licensing purposes, the Division is not willing to quell all competition, whether it be direct or indirect, in order to perpetuate a rate arrangement that places the narrow financial needs of the Island residents and businesses over the broader transportation needs of the general public. Both classes of needs must be considered important.

The Division is cognizant that Interstate offered the same lifeline “death spiral” prognostication in 1998 when IHSF applied for what would be Rhode Island’s first high-speed ferry service. In that 1998 CPCN application docket, Interstate not only argued that its lifeline services would be fatally impacted by IHSF’s proposed services, but it also argued that there was categorically no

public need for a high-speed ferry service to Block Island in the first place.³¹⁹ Both predictions proved dramatically incorrect.

The Intervenor's concerns over lost revenues to traditional lifeline services will never abate. Especially considering that Interstate's lifeline services will need to coexist with existing and potential future interstate ferry services to Block Island. Presently, there exists a directly-competing high-speed ferry service between New London, Connecticut, and Block Island. Undoubtedly, a large number of riders on that ferry service would be coming to Point Judith for a connection to Block Island if the New London service was not available. Under Interstate's current rate structure, the New London service affects Interstate's lifeline rates and services to Block Island. Similarly, Interstate has begun a high-speed service from Fall River to Block Island, which provides a clear disincentive for those living in the Fall River area to travel to Block Island from Point Judith or Newport. If another Fall River connection to Block Island were operated by RIFF, or another company, in direct competition with Interstate, that operation would similarly have some impact on Interstate's lifeline rates and services. In short, interstate ferry services to Block Island are not regulated by state authorities, and all such services, both present and future, will have some impact on Interstate's lifeline services and rates. That fact is not novel and will continue to be baked into Interstate's lifeline rates. Adding another competing high-speed service to the Block Island tourism market will likely have a similar minor incremental effect.

³¹⁹ See In Re: Island Hi-Speed Ferry LLC, Docket No. 98-MC-16, Order No. 15652.

The Division acknowledges that Interstate has established itself as an invaluable lifeline ferry connection between Point Judith and Block Island. Interstate has been providing this excellent passenger and freight service for many decades. During these decades of service Interstate has requested and received rate adjustments and increases from the Commission in order to keep its lifeline services viable and profitable. This is a natural and anticipated reality for a regulated public utility. Indeed, over the years, such rate adjustments and increases have led to abundant advances in the level and comfort of ferry services to the Island. There is nothing significant in the instant record that would lead the Division to conclude that this historical pattern of lifeline service would be jeopardized by the entry of a new water carrier providing a different mode (high-speed versus traditional ferry service) of seasonal transportation service.

2. The Towns of North Kingstown and New Shoreham

In this docket, the towns of North Kingstown and New Shoreham have both weighed in on the issue of whether RIFF's proposed ferry services would be beneficial to the public, the regulatory standard by which the Division must base its decision.

The town of North Kingston, through its current and former Town Council presidents, spoke in support of RIFF's application. Their support was chiefly linked to their belief that if RIFF's application were approved it would bring additional tourism dollars to North Kingstown businesses,

which would ultimately benefit the Town of North Kingstown. The Executive Director of the North Kingstown Chamber of Commerce agreed.

The Town of New Shoreham went a step further and decided to actively participate in this docket as an Intervenor. The Town of New Shoreham opposes RIFF's application on the grounds that another ferry service to Old Harbor would bring boat traffic safety concerns in Old Harbor, additional crowding on the island and place upward pressure on lifeline service rates. New Shoreham also contends that RIFF's proposed services ought to be rejected by the Division based on its inherent inconsistencies with the Town's Comprehensive Plan. The Town of New Shoreham further argues that the Division must put its opposition to RIFF's application ahead of North Kingstown's support for RIFF's application.

Under Rhode Island law, the Division is charged with the responsibility and duty to determine whether the public needs a newly proposed transportation service (citations omitted). The Division must make this determination predicated on what it finds is best for all Rhode Islanders, not just what is best for the residents and businesses of individual municipalities. Indeed, Interstate has stressed this broader duty in its attack on RIFF's effort to focus on the town of North Kingstown as evidence of the public's need for its proposed services. Interstate has reminded the Division that it must consider RIFF's application in the

context of what would be in the interest of “**all** the inhabitants ‘of the state’” (Emphasis in original). The Division agrees, *infra*.³²⁰

3. Public Convenience and Necessity

In its application, RIFF has requested authority to provide high-speed ferry services between Quonset Point in North Kingstown and Old Harbor in New Shoreham (Block Island). In support of its application, RIFF has offered direct and/or rebuttal testimony from a North Kingstown councilwoman, the former Director of the North Kingstown Chamber of Commerce, the President of the South Kingstown Tourism Council, the President of the Blackstone Valley Tourism Council, the Director of the Quonset Development Corporation, the Applicant’s President, and separate expert testimony from an economist and a professor of mathematics.

Through the aforementioned witnesses, RIFF submits that it has established that public convenience and necessity requires its proposed high-speed ferry service. Specifically, these witnesses have espoused opinions that Quonset offers local and visiting tourists a more convenient travel option to Block Island due to its ease of access from Routes 95, 4 and 403 and its proximity to intermodal transportation connections (i.e., RIPTA bus service, commuter rail and T.F. Green Airport). The record also reflects that Quonset offers 5.5 acres of dedicated dockside parking, in contrast to Point Judith’s parking, which is spread out and sometimes filled to capacity in the summer. It was also asserted that RIFF’s route through Southern Narragansett Bay”

³²⁰ See also Town of East Greenwich v. O’Neil, 617 A.2d 104 (R.I. 1992).

would be “a much more scenic ride,” that RIFF’s vessels provide more spacious accommodations for passengers, bike storage and baggage, and that RIFF’s planned 4,000 square foot terminal building would contain superior amenities than those offered by Interstate’s facility in Point Judith.

As additional support for its claim that public convenience and necessity requires its proposed high-speed ferry service, RIFF submits “that there is a much larger population base with close proximity to Quonset than there is to Point Judith.” Some of RIFF’s witnesses contend that many individuals living within this geographic area, the area closer to Quonset than Point Judith, will likely prefer to travel to Block Island from Quonset, and that some may decide to visit Block Island for the first time, or revisit Block Island after many years, due to the availability of this more convenient alternative service offering. To buttress this belief, Mr. Donadio related that RIFF receives many contacts from people inquiring about whether RIFF provides ferry services to Block Island in addition to the ferry services it presently provides to Martha’s Vineyard from its Quonset location.

Mr. Kunkel was offered by RIFF as an expert witness in economics, finance and game theory. The Intervenor never challenged Mr. Kunkel’s qualifications as an expert in these areas. Mr. Kunkel testified that in his opinion “there is a public need for... [RIFF’s] service and that RIFF’s proposed service will satisfy that need.” As support for this opinion, Mr. Kunkel relied on three factors: (1) the \$660 million public infrastructure investment that was made in the Quonset Davisville Business Park and for the connecting Route

403 exchange; (2) the decision by the QDC to grant RIFF a land lease and approve its bulkhead improvements; and (3) his “studied opinion” that “there is a dormant, unserved, market for additional high-speed ferry service to Block Island not currently satisfied by Interstate...” In explaining the first two elements making up his opinion, Mr. Kunkel testified that the public investment made in the Quonset Davisville Business Park and the connecting Route 403 exchange was to attract private investment in diverse areas of commerce, including marine transportation. He further testified that the QDC’s decision to grant RIFF’s concession and land lease is consistent with this public purpose. Although the Town and Interstate were successful in their cross-examination of Mr. Kunkel, whereby Mr. Kunkel acknowledged that RIFF’s proposal to provide high-speed ferry service to Block Island was not part of the original thought process that went into the decision to use public funds to improve the Quonset Davisville Business Park and the Route 403 exchange or the QDC’s decision to grant RIFF a concession and land lease in Quonset, the fact remains that government funds were clearly used to promote the investment of private funds in the Quonset Davisville Business Park. Therefore, the Division would agree with Mr. Kunkel that RIFF’s proposal to offer another marine transportation service from Quonset is generally harmonious with the original intent behind the public expenditure of financial resources in the Quonset Davisville Business Park and the QDC’s decision to grant the original concession/land lease to RIFF (this is especially apparent in Mr. King’s support of the instant application).

Regarding the third factor, namely the perception of a dormant unserved market for additional high-speed ferry services to Block Island, the Division finds little doubt in the notion that there are residents of Rhode Island that would prefer to visit Block Island from Quonset rather than from Point Judith or Newport; and that some Rhode Island and neighboring state residents forego a visit to Block Island in the summer months altogether due to the anticipated long drive in stop-and-go “beach” traffic, with the added unpleasant potential for problematic parking once you arrive at Interstate’s ferries. Contrary to the arguments proffered by Interstate and the Town, it was not necessary for RIFF or its witnesses to have relied upon a “study” to substantiate these opinions. Notably, Ms. George’s testimony was chiefly motivated by an effort to “reduce some of the traffic burden in South County during [the] high season....” Public comments from Messrs. Notaroberto and Zarrella also support this perception. And Mr. Billington was certainly credible in his opinion that many Rhode Islanders living in Northern Rhode Island would prefer to travel to Block Island from Quonset. Even Interstate’s witness, Mr. Voccola, admitted that the parking lots at Point Judith can fill-up during busy weekends in the summer.

Any reasonable Rhode Islander would agree that it is not uncommon to experience heavy traffic in and into South County during the so-called “high season.” And Newport is clearly no better, perhaps worse. Accordingly, while a study may have been useful in attempting to quantify the number of Rhode Islanders that likely fit into this group, the Division finds that Mr. Kunkel’s assertion (as well as Mr. Billington’s and Ms. George’s) that there are Rhode

Islanders that opt out of traveling, or limit their travel, to Block Island due to driving time, traffic and/or parking considerations attached to Point Judith and Newport is sufficiently demonstrated on the record and wholly reasonable on its face.

The Division must also agree with RIFF in its claim that many more Rhode Islanders live within closer proximity to Quonset than Point Judith. It would be unreasonable to ignore simple geography and the demographics at play here. And yes, while Interstate is providing “adequate” service, the Division would agree that the meaning of “adequate” can and should be linked to the driving distance that must be traversed in order to access these ferry services.

Finally, the Division would also agree with RIFF’s claim that the amenities and services that it will offer are also in the public interest. The vessels, terminal surroundings and services planned for use by RIFF manifest a clear intention to provide RIFF’s riders with a first-class travel experience. Such is the benefit from true competition.

i. Would competing high-speed ferry operations be in the public interest?

The Division examined this issue in the context of pertinent law and Division precedent. As an initial observation, the law under which Interstate was granted a high-speed ferry CPCN (R.I.G.L. §39-3-3) does not confer monopoly control or an exclusive franchise over the market it serves.³²¹

³²¹ See Albert Capaldo v. Public Utility Hearing Board, 71 R.I. 245 (1945).

Therefore, the Division is free to authorize additional carriers if the additional carriers meet the requisite burden of proof required under applicable law.

Under Rhode Island law, the seminal case of Abbott v. Public Utilities Commission³²² provides that in determining whether to approve an application for a common carrier CPCN, the Division must find that the proposed service “will conduce to the general public welfare.” Abbott also permits the Division to consider the existing means of transportation, its “character” and “probable permanence,” the capital invested, the service rendered, whether the existing “service is adequate” and the effect of admitting competition. Abbott also provides that the expression “public convenience” has reference to something fitting or suited to the public need, and the word “necessity” has reference to the fact that the route in question appears to be reasonable and tends to promote the accommodation of the public.

Subsequent cases have provided the Division with additional guidance. 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 Division to be “reasonably requisite.”³²³ That is, before a CPCN may be issued the Division must have before it “evidence that there is a public need for the proposed additional service.”³²⁴ The “primary purpose of the regulation” of common carriers “is to provide the public with safe and adequate transportation.” “A secondary purpose is to preserve the investment of those

³²² 48 R.I. 196, 136 A. 490 (12927).

³²³ See Interstate Navigation v. Division, 1999 WL 813603 (R.I. Super.) (1999).

³²⁴ See Murray, et al v. La Tulippe’s Service Station, Inc., et al, 277 A2d 310 (1971).

conducting such business from the deleterious effects of wasteful competition.” The basic question respecting the issuance of CPCNs is whether the “service available to the public is reasonably adequate to supply the public need therefor.”³²⁵ In granting a CPCN, it is also proper to consider “such factors as competitive stimulation and anti-monopoly prophylaxis.”³²⁶ Increased competition is not a valid ground for denying a CPCN. “Public service is the test” in granting a CPCN; “[p]rotecting 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.”³²⁷

In this docket, the record reflects that Interstate is adequately serving Block Island with its “lifeline” services. This issue is not in dispute. Nonetheless, as discussed above, the application in this case requests authority to provide seasonal “high-speed” ferry service, which is recognized by the Division and the Court to be a transportation service that is distinctly different from traditional lifeline ferry service. Therefore, the proper question to consider in this docket is whether public need and convenience demands a competitive high-speed service to Block Island from Quonset. Based on the record, the Division finds that the general public would indeed benefit from the addition of this service. Under Abbott and its progeny, the Division finds that the route in question appears to the Division to be “reasonably requisite” and that the record contains sufficient evidence that “there is a public need for the

³²⁵ See Yellow Cab Co. v. Public Util. Hearing Board, 96 R.I. 247 (1963).

³²⁶ See Domestic Safe Deposit Co. v. Hawksley, 301 A.2d 342 (1973).

³²⁷ See Breen v. Division, 194 A. 719, 720 (1937).

proposed additional service.” The Division also finds that competition in the high-speed ferry market to Block Island will be beneficial to the interests of both RIFF’s and Interstate’s passengers/ratepayers. On this issue of competition, the Division is reminded that the Commission made it very clear over 16 years ago that “establishing choice for ferry travel to Block Island is a positive development for consumers.”³²⁸ The Commission has also made it clear that it will treat high-speed ferry services different than traditional ferry services for ratemaking purposes. Indeed, the Commission has recognized the discretionary nature of this service by deciding to no longer apply traditional rate filing requirements to requested rate changes for this type of service.³²⁹

The relationship between RIFF’s proposed high-speed ferry service and Interstate’s existing high-speed service is properly before the Division in this docket. Dr. Mazze predicts that Interstate would lose 27% of its high-speed riders, while Dr. Costa predicts as few as .04% of Interstate’s high-speed riders would migrate to RIFF. Clearly, the parties do not agree on the likely impact of RIFF’s entry into the market. RIFF also raises some valid concerns with respect to the strength and reliability of Dr. Mazze’s survey. While the Division expects that some of Interstate’s summer high-speed ferry ridership would opt to leave for Block Island from Quonset rather than Point Judith, the Division cannot conclude from the record what the actual impact would be. Simply stated, the Division is not persuaded that Dr. Mazze’s survey results represent

³²⁸ See Order No. 15816 issued in Docket No. 2802 on February 9, 1999.

³²⁹ See Order No. 21069 issued in Docket No. 4373 on June 20, 2013; and also Order No. 22415 issued in Docket No. 4598 on May 20, 2016.

an accurate indicator of how Interstate's revenues would be affected by the introduction of RIFF's proposed service. The Division does find, however, that the record does not support Interstate's and the Town's predicted "death spiral" scenario.

As an additional observation, Interstate's and the Town's primary focus in this docket was on the impact that RIFF's proposed service would have on Interstate's "lifeline" services to Block Island. The focus was not so much on the impact to Interstate's high-speed ferry service; specifically, on whether Interstate would need to increase its high-speed ferry rates and/or cut back on high-speed services during the summer months. The absence of this line of concern from the Intervenor suggests that Interstate would neither reduce its high-speed ferry services to Block Island if RIFF were competing in the high-speed ferry market, nor anticipate increasing its high-speed ferry rates.

Finally, the Division acknowledges the Town's Harbormaster's concerns over traffic safety with Old Harbor. The record reflects that Block Island's Harbormaster, Officer Stephen Land, is experienced and extremely competent in his efforts to maintain order and safety in Old Harbor, especially during the high-traffic summer months. The Division finds that Officer Land, along with his summer staff of 22 assistants, ought to be able to continue to maintain order during RIFF's vessel's infrequent stops in Old Harbor during the summer months. Harbormaster Land is free to exercise his local authority over RIFF's vessel in the same fashion he exercises control over Interstate's vessels and the other ferry vessels entering and departing Old Harbor.

11. CONCLUSION

The Division finds that RIFF has adequately demonstrated that it is fit, willing and able to operate as a water (ferry) carrier of persons and property between Quonset Point, North Kingstown, and Old Harbor, Block Island. The Division additionally finds that the “public convenience and necessity” requires RIFF’s proposed ferry services between Quonset Point, North Kingstown and Old Harbor, Block Island.

Additionally, in the interest of promoting a proper regulatory framework to facilitate coexistence between RIFF and Interstate, the Division finds that if it becomes necessary to examine and adjust the operating schedules of these two carriers, it will open a docket to address this concern. Interstate and RIFF are also free to petition the Division for such review at any time. The Division may also take additional steps to ensure the continued coexistence of these two water carrier companies as future circumstances warrant.

In the final analysis, the Division must reject Interstate’s and the Town’s contention that the general public interest will suffer if RIFF is permitted to operate a ferry between Quonset Point, North Kingstown, and Old Harbor, Block Island. Although it is possible that Interstate may experience reduced ridership in the future, the record does not support definitive conclusions that RIFF’s ferry services between Quonset and Block Island will either force Interstate from the high-speed ferry market or create any significant service hardship for the general public. On the

other hand, the record is replete with evidence that there is a public desire for RIFF's proposed ferry services. The Division finds that the satisfaction of this need is paramount to the public interest.

From the evidence and arguments proffered in the instant matter, the Division finds no possibility that Interstate's lifeline service will suffer any meaningful decay from the indirect competition that would result from the granting of RIFF's application for seasonal high-speed ferry service. On the other hand, Interstate's high-speed service will be in direct competition with RIFF's service and, consequently, Interstate may in fact lose some of its high-speed ferry customers. However, alternatively, the record in this docket also suggests the possibility that both high-speed carriers survive - and prosper. Consider that Interstate operates its high-speed ferry services out of Galilee (Point Judith) and Newport. These communities represent two of Rhode Island's most premier tourist locations, offering abundant sightseeing, beaches, dining and shopping opportunities. Quonset in contrast, offers none of these peripheral amenities. Also consider that a high-speed ferry ride to Block Island will take 20 minutes longer from Quonset than from Point Judith (30 minutes versus 50 minutes); and because of this extra time on the water, likely to continue to cost more for a passenger ticket. However, Quonset, on the other hand, offers the potential for a shorter and quicker drive for many Rhode Islanders looking to minimize their time getting to the ferry. There is no reason why these two high-speed ferry services cannot co-exist and even thrive.

Now, therefore, it is

(22548) ORDERED:

1. That the July 2, 2013, application filing by Rhode Island Fast Ferry, Inc., 1347 Roger Williams Way, North Kingstown, Rhode Island seeking authority to operate as a seasonal “fast ferry” water carrier of passengers between Quonset Point, North Kingstown, and Old Harbor, Block Island, is hereby granted. Under this authority, RIFF is required to provide daily, summer-season, high-speed ferry services between its ferry terminal located at 1347 Roger Williams Way located in Quonset Point, North Kingstown and Old Harbor, Block Island. RIFF is to use an aluminum catamaran with a capacity of between 150 and 300 passengers and operate between 29.5 – 34 knots. The 30-mile route from Quonset shall follow a course down the West Passage of Narragansett Bay and along the Narragansett coastline into Old Harbor and take approximately 45-50 minutes depending on passenger/luggage loads, tides, and sea and wind conditions.
2. That the approval granted herein is subject to the following conditions: Before a CPCN is issued, RIFF must demonstrate to the Division that: (1) it has access to suitable docking/landing facilities in Quonset and on Block Island; (2) that it has leased, purchased or otherwise identified the vessel(s) it will use in providing its proposed ferry services consistent with the commitments and evidence presented during this case; (3) that it has satisfied all

Coast Guard requirements associated with the provision of its proposed ferry services; (4) that it has satisfied any applicable municipal permitting requirements; (5) that it has adequate liability insurance in effect; and (6) that it has passed a Division inspection to ensure regulatory compliance.

3. That RIFF shall satisfy the conditions contained in “Ordered” paragraph “2,” above within one (1) year from the issue date of this Report and Order. Failure to satisfy these conditions within the time specified shall result in the nullification and voiding of the authority granted herein. Continuances may be granted by the Division for just cause.
4. That RIFF must have a Public Utilities Commission-approved tariff in effect before it provides any ferry services authorized under the authority granted herein.
5. That RIFF shall, as a condition of its continued authority to operate, provide its passengers with services substantially consistent with the services described in the testimony and exhibits presented during this case. Any deviation from these specified services must be approved by the Division.
6. That RIFF shall provide the Division with a copy of its initial operating schedule, and all subsequent changes thereto, at least 30 days prior to adoption and use. The Division reserves the right to

suspend any scheduling proposals and conduct a public hearing if deemed by the Division to be in the public interest.

7. The Division commits to facilitating coexistence between RIFF and Interstate. Toward this end, the Division finds that if it becomes necessary to examine and adjust the operating schedules of these two carriers it will open a docket to address this concern. Interstate and RIFF are also free to petition the Division for such review at any time. The Division may also take additional steps to ensure the continued coexistence of these two water carrier companies as future circumstances warrant.

Dated and Effective at Warwick, Rhode Island on September 22, 2016.



John Spirito, Jr., Esq.
Hearing Officer

APPROVED:



Macky McCleary
Administrator



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 Jefferson Boulevard
Warwick R.I. 02888
(401) 941-4500

FAX (401) 941-9248
TDD (401) 941-4500

NOTICE OF AVAILABILITY OF JUDICIAL REVIEW

(PROVIDED PURSUANT TO R.I.G.L. §42-35-12)

Please be advised that if you are aggrieved by this final decision (report and order) of the Rhode Island Division of Public Utilities and Carriers (“Division”) you may seek judicial review of the Division’s final decision by filing an appeal with the Rhode Island Superior Court. You have thirty (30) days from the mailing date (or hand delivery date) of the Division’s final decision to file your appeal. The procedures for filing the appeal are set forth in Rhode Island General Laws, Section 42-35-15.

Proceedings for review may be instituted by filing a complaint in the Superior Court of Providence or Kent Counties. Copies of the complaint must be served upon the Division and all other parties of record in your case. You must serve copies of the complaint within ten (10) days after your complaint is filed with the Superior Court.

Please be advised that the filing of a complaint (appeal) with the Superior Court does not itself stay enforcement of the Division’s final decision. You may however, seek a stay from the Division and/or from the Court.

The judicial review shall be conducted by the Superior Court without a jury and shall be confined to the record. The Court, upon request, shall hear oral argument and receive written briefs.

EXHIBIT B

CONSOLIDATED CASES

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM

v.

C.A. No. PC-2016-4758

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISTRATOR

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

v.

C.A. No. PC-2016-4804

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY McCLEARY, ADMINISTRATOR

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

TOWN OF NEW SHOREHAM

v.

C.A. No. PC-2017-3405

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY MCCLEARY, ADMINISTRATOR

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

INTERSTATE NAVIGATION COMPANY
d/b/a THE BLOCK ISLAND FERRY

v.

C.A. No. PC-2017-3409

RHODE ISLAND FAST FERRY, INC.
and RHODE ISLAND DIVISION OF
PUBLIC UTILITIES AND CARRIERS,
MACKY McCLEARY, ADMINISTRATOR

ORDER

This matter came on for hearing in the above-referenced consolidated cases on September 8, 2017 before Judge Licht on the Motion of the Rhode Island Fast Ferry, Inc. ("RIFF") for a stay. By agreement of the parties, it is hereby ORDERED:

This case is remanded to the Division of Public Utilities and Carriers for the purpose of deciding RIFF's request for a continuance of the time period for RIFF to complete the requisite conditions precedent to the issuance of a CPCN pursuant to the DPUC order of September 22, 2016.

The parties may submit to the Division position papers on this issue by noon on Friday, September 15, 2017. The parties agree that the Division may decide this issue on the papers filed and need not conduct a formal hearing. The Division shall issue its determination as to any such extension, or denial thereof, by no later than 4:30 PM on Thursday, September 21, 2017.

ENTER:

1/2 H. Hall

PER ORDER:

Mill C. Rogers

Dated:

9/12/2017

Dated:

9/12/2017

Presented By:

/s/ Katherine A. Merolla
Katherine A. Merolla, Esq., No. 2344
Kent Office Building
469 Centerville Road, Suite 206
Warwick, RI 02886
401-739-2900
401-739-2906 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of September, 2017, I filed and served this document through the electronic filing system on the following:

Michael R. McElroy
James A. Hall
Nicole M. Verdi
Alan M. Shoer
Casey J. Lee
Lea J. Donaldson

michael@mcelroylawoffice.com
jhall@apslaw.com
nverdi@apslaw.com
ashoer@apslaw.com
casey@cjlfirm.com
Leah@McElroyLawOffice.com

The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Katherine A. Merolla

EXHIBIT C

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888**

IN RE: Application by Rhode Island Fast :
Ferry, Inc. for Water Carrier Authority : Docket No. D-13-51

ORDER

(Issued in response to a September 12, 2017 remand order of the Superior Court regarding Rhode Island Fast Ferry, Inc.'s Motion for a Stay in consolidated C.A. Nos. PC-2016-4758, PC-2016-4804 and PC-2017-3405)

Whereas: On July 2, 2013, Rhode Island Fast Ferry, Inc., 1347 Roger Williams Way, North Kingstown, Rhode Island ("RIFF"), filed an application with the Rhode Island Division of Public Utilities and Carriers ("Division") seeking authority to operate as a seasonal "fast ferry" water carrier of passengers between Quonset Point, North Kingstown and Old Harbor, New Shoreham (Block Island). RIFF's application was filed pursuant to Rhode Island General Laws, Sections 39-3-3 and 39-3-3.1, which require the issuance of a "certificate of public convenience and necessity" (CPCN) by the Division before "water carrier" services can be provided between points within the State.

Whereas: The Division previously issued twelve (12) Orders ("Orders") in the instant docket, specifically, Order No. 21170, issued on September 24, 2013; Order No. 21189, issued on October 3, 2013; Order No. 21541, issued on August 1, 2014; Order No. 22030, issued on August

11, 2015; Order No. 22045, issued on August 19, 2015; Order No. 22103, issued on September 21, 2015; Order No. 22141, issued on October 8, 2015; Order No. 22166, issued on October 20, 2015; Order No. 22183, issued on October 26, 2015; Order No. 22254, issued on December 10, 2015; Order No. 22548, issued on September 22, 2016 and Order No. 22823, issued on June 23, 2017. These twelve previously issued Orders are inextricably linked with this Order, and accordingly shall be adopted as the introduction to this Order and, by necessity, incorporated by reference. As the travel of this docket is long and complicated, the Division will skip all discussion of this travel in the instant Order, relying instead on the incorporation of the above-identified Orders as a comprehensive prologue, thereby permitting the Division to limit its focus to the latest outstanding remand matter, *infra*.

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

Whereas: An issue developed during the Superior Court appeal related to the following two "Ordered" paragraphs contained in Order No.

22548, which constitutes the Order that granted RIFF's July 2, 2013 application:

2. That the approval granted herein is subject to the following conditions: Before a CPCN is issued, RIFF must demonstrate to the Division that: (1) it has access to suitable docking/landing facilities in Quonset and on Block Island; (2) that it has leased, purchased or otherwise identified the vessel(s) it will use in providing its proposed ferry services consistent with the commitments and evidence presented during this case; (3) that it has satisfied all Coast Guard requirements associated with the provision of its proposed ferry services; (4) that it has satisfied any applicable municipal permitting requirements; (5) that it has adequate liability insurance in effect; and (6) that it has passed a Division inspection to ensure regulatory compliance.
3. That RIFF shall satisfy the conditions contained in "Ordered" paragraph "2," above within one (1) year from the issue date of this Report and Order. Failure to satisfy these conditions within the time specified shall result in the nullification and voiding of the authority granted herein. Continuances may be granted by the Division for just cause.¹

Specifically, RIFF claims that due to time delays associated with litigating the appeals filed by the Town and Interstate in this docket, it has been unable to satisfy the conditions precedent enumerated in Ordered Paragraph "2" above (hereafter, "Paragraph 2"), within the "one (1) year" time limit contained in Ordered Paragraph "3," above (hereafter, "Paragraph 3").

¹ See Order No. 22548, pp. 141-142.

As a consequence of RIFF's inability to satisfy the aforementioned conditions within the prescribed one-year time limit, RIFF has sought to "stay the compliance date" in accordance with the terms of Paragraph 3, which provides that "[c]ontinuances may be granted by the Division for just cause." However, as the Division's jurisdiction to hear RIFF's motion needed to first be approved by the Superior Court, which now possesses exclusive jurisdiction over this case (based on the appeals), the issue was presented to the Superior Court on September 8, 2017. Subsequently, on September 12, 2017, the Superior Court issued the following remand order:

This case is remanded to the Division of Public Utilities and Carriers for the purpose of deciding RIFF's request for a continuance of the time period for RIFF to complete the requisite conditions precedent to the issuance of a CPCN pursuant to the DPUC order of September 22, 2016.

The parties may submit to the Division position papers on this issue by noon on Friday, September 15, 2017. The parties agree that the Division may decide this issue on the papers filed and need not conduct a formal hearing. The Division shall issue its determination as to any such extension, or denial thereof, by no later than 4:30 PM on Thursday, September 21, 2017.

Whereas: On September 13, 2017, RIFF filed a "Motion to Stay the Compliance Date Set Forth in the Division of Public Utilities and Carriers' Final Report and Order Pending Final Judgment on Appeal." In its supporting memorandum, RIFF relies on Paragraph 3, to argue that it has

“just cause” for a stay. RIFF also relies on R.I.G.L. §42-35-15(c), as well as Rule 31(b) of the Division’s Rules of Practice and Procedure.²

RIFF next addresses the reasons why it was unable to satisfy the Division’s one-year time limitation. Essentially, RIFF maintains that the appeals and related appellate motions filed by Interstate and the Town have caused a protracted delay which has prevented RIFF from fully satisfying all of the conditions contained in Paragraph 2.³

Whereas: On September 14, 2017, Interstate and the Town filed a joint objection to RIFF’s “Motion to Stay the Compliance Date Set Forth in the Division of Public Utilities and Carriers’... Final Report and Order Pending Final Judgment on Appeal.” In support of their objection, Interstate and the Town argue that although the Division is free to grant a continuance for just cause, it is not free to grant a “stay,” which Interstate and the Town identify as the form of relief being requested by RIFF.⁴

Interstate and the Town assert that under R.I.G.L. §39-3-3(c), a reviewing court is prohibited from ordering “an interlocutory stay of any order of the division with respect to an application entered under §39-3-3.1, and/or certificate under §39-3-3.1.”⁵ Further, Interstate and the Town note that the Division’s Final Order authorizes RIFF to seek a continuance, not a stay.⁶

² See RIFF Motion, pp. 1-2.

³ Id., pp. 2-4.

⁴ See Interstate and Town Objection, p. 1.

⁵ R.I.G.L. §39-3-3.1 confers authority to the Division to issue CPCNs to water carriers.

⁶ See Interstate and Town Objection, p. 2.

Additionally, Interstate and the Town argue that it is disingenuous for RIFF to blame the delays in the appeal process on “repeated motions” filed by Interstate and the Town. Instead, Interstate and the Town contend that the delays were caused by RIFF’s failure “to identify its docking facility as previously ordered by the DPUC.”⁷

In their concluding arguments, Interstate and the Town assert that the Division should deny RIFF’s motion for a stay; but agree that the Division has the authority to grant a continuance “for a reasonable, specific period of time.” Accordingly, Interstate and the Town proffered the following continuance-related recommendation:

Interstate and the Town respectfully suggest that a continuance of one year would be appropriate given the posture and complexity of this case. If, after one year, RIFF is unable to satisfy the requirements set forth in the DPUC’s Order, RIFF could request an additional continuance from the DPUC.

FINDINGS

The Division has carefully considered the arguments and positions of the parties and finds that RIFF has provided sufficient “just cause” to justify a continuance of the one-year deadline contained in Paragraph 3. The Division also accepts Interstate’s and the Town’s suggestion that the continuance should be limited to one (1) year, or until September 22, 2018 and that RIFF may seek additional continuances, for just cause, beyond the new September 22, 2018 deadline.

⁷ Id., pp. 2-3.

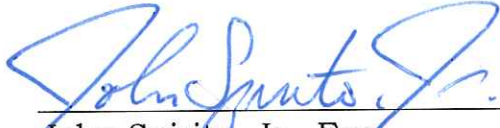
Accordingly, therefore, it is

(22877) ORDERED:

1. That in response to the September 12, 2017 remand order of the Superior Court, and predicated on the findings contained herein, the Division finds sufficient cause to grant RIFF a one-year continuance, or until September 22, 2018, to satisfy the conditions precedent contained in Paragraph 2, *supra*.


2. That RIFF may request additional continuances, for just cause, in the event that it is still unable to satisfy the conditions precedent contained in Paragraph 2, *supra*, by September 22, 2018.

Dated and Effective at Warwick, Rhode Island on September 18, 2017.



John Spirito, Jr., Esq.
Hearing Officer

APPROVED:



Macky McCleary
Administrator

EXHIBIT D

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888**

IN RE: Application by Rhode Island Fast :
Ferry, Inc. for Water Carrier Authority : Docket No. D-13-51

ORDER

**(Issued in response to a January 2¹, 2018 Motion to Vacate
Division Order No. 22877 from the Town of New Shoreham and
the Interstate Navigation Company)**

Whereas: On July 2, 2013, Rhode Island Fast Ferry, Inc., 1347 Roger Williams Way, North Kingstown, Rhode Island ("RIFF"), filed an application with the Rhode Island Division of Public Utilities and Carriers ("Division") seeking authority to operate as a seasonal "fast ferry" water carrier of passengers between Quonset Point, North Kingstown and Old Harbor, New Shoreham (Block Island). RIFF's application was filed pursuant to Rhode Island General Laws, Sections 39-3-3 and 39-3-3.1, which require the issuance of a "certificate of public convenience and necessity" (CPCN) by the Division before "water carrier" services can be provided between points within the State.

Whereas: The Division previously issued fifteen (15) Orders ("Orders") in the instant docket, specifically, Order No. 21170, issued on September 24, 2013; Order No. 21189, issued on October 3, 2013; Order No. 21541, issued

¹ Date stamp reflects that the motion was received by the Division on January 8, 2018.

on August 1, 2014; Order No. 22030, issued on August 11, 2015; Order No. 22045, issued on August 19, 2015; Order No. 22103, issued on September 21, 2015; Order No. 22141, issued on October 8, 2015; Order No. 22166, issued on October 20, 2015; Order No. 22183, issued on October 26, 2015; Order No. 22254, issued on December 10, 2015; Order No. 22548, issued on September 22, 2016; Order No. 22823, issued on June 23, 2017; Order No. 22877, issued on September 18, 2017; Order No. 22980, issued on December 13, 2017; and Order No. 23001, issued on January 8, 2018. These fifteen previously issued Orders are inextricably linked with this Order, and accordingly shall be adopted as the introduction to this Order and, by necessity, incorporated by reference. As the travel of this docket is long and complicated, the Division will skip all discussion of this travel in the instant Order, relying instead on the incorporation of the above-identified Orders as a comprehensive prologue, thereby permitting the Division to limit its focus to the latest outstanding dispute matter, *infra*.

Whereas: In response to the remand order of the Superior Court (See Order Nos. 22823 and 22877, *supra*), the Division conducted a pre-hearing conference on October 20, 2017 for the purpose of defining the scope of the remanded issue before the Division and to adopt a procedural schedule for affording the parties an opportunity to proffer their respective positions and arguments. During that pre-hearing conference, the Division held that the scope of the instant proceeding would be limited to providing the Town with

an opportunity to prove that RIFF (through Bluewater) does not have a realistic expectation of constructing Bluewater's planned docking facilities in Old Harbor, irrespective of design, through its permit applications with the United States Army Corps of Engineers ("USACE") and the Rhode Island Coastal Resources Management Council ("CRMC").² The Division subsequently clarified the scope of the remand proceeding by informing the parties as follows:

[T]he Town shall be required to prove to the Division that RIFF will not be able to operate its proposed ferry service from a Bluewater docking facility in Old Harbor. Evidence of this prospect must be obvious and compelling, not ambiguous and speculative. The Division will not consider matters of design, environmental impacts or the terms in construction contracts.³

Whereas: After a brief discovery period, the aforementioned remand proceeding now awaits a hearing, whose scheduling is currently being addressed by the parties and the Division's Clerk.

Whereas: Contemporaneous with the instant remand proceeding, the Town of New Shoreham (the "Town") and the Interstate Navigation Company ("Interstate"), parties to the docket, on January 2, 2018, filed a motion to vacate Division Order No. 22877, which previously granted RIFF a one-year continuance, to September 22, 2018, to satisfy the conditions precedent that

² See Order No. 22980

³ Id., pp., 5-6.

were attached to the Division's approval of RIFF's July 2, 2013 CPCN application filing, *supra*.⁴

In their motion, the Town and Interstate argue that "despite repeated promises to do so, RIFF and Bluewater have admittedly failed to submit required permit applications for a docking facility in Old Harbor." The Town and Interstate maintain that "[i]t is disingenuous for RIFF to delay the permitting process before USACE, CRMC, RIDEM and the Town Building Inspector for an unknown period of time, while simultaneously representing to the Division and the Superior Court that the Town and Interstate have not yet proven RIFF's inability to secure a docking facility in Old Harbor."⁵

The Town and Interstate further argue that the "Division should place little or no weight on Bluewater's claims regarding the timing of the permitting and related applications." In support of this argument, the Town and Interstate cite to earlier claims by the consultant/attorney working on Bluewater's application filings, Joseph Corrigan of Kelley Drye & Warren LLP, whereby Mr. Corrigan had advised the Division in November of 2015, "that the permitting process would be complete in 12 to 18 months..."⁶

Whereas: RIFF filed an objection to the Town's and Interstate's motion on January 12, 2018. In its objection, RIFF argues that "[t]his motion is nothing more than a desperate attempt to undue the process and circumvent the remand proceeding that was requested by both Interstate

⁴ See Order No. 22877.

⁵ Motion, pp., 6-7.

⁶ Motion, pp., 7-8

and the Town and ordered by the Superior Court, as it has now been shown that not only does Bluewater have a realistic expectation of constructing a docking facility, but that Bluewater has also been moving forward with that process.”⁷

In further support of its objection, RIFF contends that it has not misled the Division or any other parties. RIFF argues that its “recent discovery responses clearly establish that Bluewater has (and is) working diligently to secure permits for a docking facility for RIFF in Old Harbor.” RIFF also argues that the Town’s and Interstate’s motion to vacate “completely ignores that RIFF’s request for a stay of the compliance period was not based solely on the fact that RIFF had yet to secure a suitable docking facility; rather, RIFF requested the stay because it was unable to satisfy *all* of the conditions listed in the CPCN Order within the original one-year compliance period.”⁸

FINDINGS

The Division has considered the arguments proffered the Town and Interstate in support of their motion to vacate Division Order No. 22877, and RIFF’s objection thereto, and finds insufficient justification to grant such an extreme prayer at this time. Order No. 22877 approved a one-year continuance, or until September 22, 2018 for RIFF to satisfy the conditions attached to the approval of the CPCN that was granted to RIFF in this

⁷ Objection, pp., 1-2.

⁸ Objection, pp., 3-8.


docket. The Division finds that the Town and Interstate have proffered inadequate support to take up this matter again at this time. The evidence and arguments presented by the Town and Interstate can be revisited in the event that RIFF seeks an additional continuance after September 22, 2018.

Accordingly, therefore, it is

(23018) ORDERED:

That the Town's and Interstate's January 2, 2018 motion to vacate Order No. 22877, is hereby denied.

Dated and Effective at Warwick, Rhode Island on January 25, 2018.



John Spirito, Jr., Esq.
Hearing Officer

APPROVED: _____



Macky McCleary
Administrator

EXHIBIT E

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS
89 JEFFERSON BOULEVARD
WARWICK, RHODE ISLAND 02888**

IN RE: Application by Rhode Island Fast :
Ferry, Inc. for Water Carrier Authority : Docket No. D-13-51

REPORT AND ORDER

1. Introduction

On July 2, 2013, Rhode Island Fast Ferry, Inc., 1347 Roger Williams Way, North Kingstown, Rhode Island ("RIFF"), filed an application with the Rhode Island Division of Public Utilities and Carriers ("Division") seeking authority to operate as a seasonal "fast ferry" water carrier of passengers between Quonset Point, North Kingstown and Old Harbor, New Shoreham (Block Island). RIFF's application was filed pursuant to Rhode Island General Laws, Sections 39-3-3 and 39-3-3.1, which require the issuance of a "certificate of public convenience and necessity" (CPCN) by the Division before "water carrier" services can be provided between points within the State.

The Division previously issued sixteen (16) Orders ("Orders") in the instant docket, specifically, Order No. 21170, issued on September 24, 2013; Order No. 21189, issued on October 3, 2013; Order No. 21541, issued on August 1, 2014; Order No. 22030, issued on August 11, 2015; Order No. 22045, issued on August 19, 2015; Order No. 22103, issued on September 21, 2015; Order No. 22141, issued on October 8, 2015; Order No. 22166, issued on October 20, 2015; Order No. 22183, issued on October 26, 2015; Order No.

22254, issued on December 10, 2015; Order No. 22548, issued on September 22, 2016; Order No. 22823, issued on June 23, 2017; Order No. 22877, issued on September 18, 2017; Order No. 22980, issued on December 13, 2017; Order No. 23001, issued on January 8, 2018; and Order No. 23018, issued on January 25, 2018. These sixteen previously issued Orders are inextricably linked with this Order, and accordingly shall be adopted as the introduction to this Order and, by necessity, incorporated by reference. As the travel of this docket is long and complicated, the Division will skip all discussion of this travel in the instant Order, relying instead on the incorporation of the above-identified Orders as a comprehensive prologue, thereby permitting the Division to limit its focus to the latest outstanding dispute matter, *infra*.

In response to the remand order of the Superior Court (See Order Nos. 22823 and 22877, *supra*), the Division conducted a pre-hearing conference on October 20, 2017 for the purpose of defining the scope of the remanded issue before the Division and to adopt a procedural schedule for affording the parties an opportunity to proffer their respective positions and arguments. During that pre-hearing conference, the Division held that the scope of the instant proceeding would be limited to providing the Town with an opportunity to prove that RIFF (through Bluewater) does not have a realistic expectation of constructing Bluewater's planned docking facilities in Old Harbor, irrespective of design, through its permit applications with the United States Army Corps of Engineers ("USACE") and the Rhode Island Coastal Resources Management

Council ("CRMC").¹ The Division subsequently clarified the scope of the remand proceeding by informing the parties as follows:

[T]he Town shall be required to prove to the Division that RIFF will not be able to operate its proposed ferry service from a Bluewater docking facility in Old Harbor. Evidence of this prospect must be obvious and compelling, not ambiguous and speculative. The Division will not consider matters of design, environmental impacts or the terms in construction contracts.²

2. Hearing and Appearances

After a brief discovery period, the Division conducted two public hearings on this remand matter. The hearings were conducted on March 30, and April 4, 2018 in the Division's hearing room located at 89 Jefferson Boulevard in Warwick. The following counsel entered appearances:

For RIFF:

Alan M. Shoer, Esq.
James Hall, Esq. and
Nicole M. Verdi, Esq.

For Interstate Navigation
Company ("Interstate"):

Michael R. McElroy, Esq.

For the Town of New
Shoreham (the "Town"):

Katherine A. Merolla, Esq.

3. The Town's Direct Case

In support of its position on the remand issue, the Town proffered the pre-filed testimony of Mr. Marc Tillson, the Town's Building Official; an affidavit from Mr. Grover Fugate, the Executive Director of the State of Rhode Island

¹ See Order No. 22980

² Id., pp., 5-6.

Coastal Resources Management Council (“CRMC”); and some documentary evidence, *infra*.

Mr. Tillson introduced himself as the Town’s Building Official. He related that he has held this position for 29 years. Mr. Tillson testified that his responsibilities include enforcement of the State Building Code and the Town’s zoning laws, and compliance inspections related to State (RIDEM) and local Town environmental protection laws.³

Mr. Tillson testified that based on the documents that he has reviewed regarding the East Breakwater docking facility that RIFF is planning to utilize, he contends that the construction and use of such docking facility would require approval from CRMC. He bases his opinion on the related plans he has examined, and specifically on the fact that the plans depict a concrete floating dock which connects to a fixed pier that uses a paver walkway to connect to Water Street. Mr. Tillson thereupon asserted that the CRMC will not approve this design without a Building Permit issued from the Town. Mr. Tillson added that the Town would not issue such a permit in this case because the property in issue “lies entirely within a Special Flood Hazard Area.” He contended that “[n]o Building Permit can issue because the Walkway is in violation of the State Building Code.”⁴

Mr. Tillson also testified that RIFF’s proposed docking facility would violate the Town’s zoning laws as well. He explained that “any walkway in that area would be located in the Town’s Coastal Zone,” which, under the Town’s

³ Town (Remand) Exhibit 4, p. 2.

⁴ *Id.*, pp. 3-4.

zoning laws, “does not allow a breach or other disturbance of dunes or dune vegetation...” He testified that the construction “of a two hundred twenty-one foot long walkway irrespective of design in the Coastal Zone is not permitted.”⁵ Mr. Tillson added that such construction would also violate the Town’s zoning laws by its planned location in a “Waterfront Overlay,” (a saltwater harbor).⁶

Mr. Tillson additionally argued that pursuant to the “Right of Entry Agreement” between the Town and the Federal Government, “the Federal Government has agreed that it will not permit any temporary or permanent structure to be constructed by any person or entity which will impede or restrict the Town and the public’s access to the town bait dock, to the Right of Entry Land, to the East Breakwater or to the beach located along the west side of the East Breakwater.” Due to the existence of this agreement, Mr. Tillson opined that RIFF’s proposed docking facility cannot be constructed without the consent of the Town.⁷

Mr. Fugate’s two-page affidavit, with attachment, reflects that there exists a property lease (“Lease”) between the CRMC and the Town for the breakwater/jetty known as the ‘Red Breakwater’ or the ‘Northern Ell’ within Old Harbor, Block Island.⁸ The affidavit states that “the Red Breakwater is now the property of the State of Rhode Island managed and controlled by the Town pursuant to the Lease.” Mr. Fugate notes that the term of the Lease is from

⁵ Id., p. 4.

⁶ Id., pp. 4-5.

⁷ Id., p. 5.

⁸ Town (Remand) Exhibit 7. The Lease Agreement addressed in Mr. Fugate’s affidavit is attached to the affidavit as an exhibit.

May 2012 through April 2062 and that the Town is responsible for maintaining the Red Breakwater during the Lease term. Mr. Fugate's affidavit also contains the following opinion: "[p]ursuant to State law and CRMC Regulations, any alteration to the Red Breakwater, including constructing a dock attached to it, or anchoring a dock to it, would require an Assent from the CRMC" and that "[t]he Town, as holder of the Lease, would have to consent to any such dock and would have to be a party to any request for such an Assent."⁹

The documentary evidence proffered by the Town as part of its direct case included a January 16, 2018 letter from attorney Jeffrey Gladstone, Esq. to the Town's attorney in this docket, Katherine Merolla, Esq., wherein Attorney Gladstone opines that Paul Filippi is not authorized to sign or act for Ballard's Inn Realty, LLC's real estate and therefore unable to advance Bluewater's planned construction of the docking facility in Old Harbor.¹⁰

Attorney Gladstone also proffered testimony during the April 4, 2018 hearing. He explained that he represents two of the owners of Ballard's Inn Realty. Attorney Gladstone expressed concern with Mr. Filippi's assertion that none of the property associated with Bluewater's planned docking facility crosses onto property owned by Ballard's Inn Realty.¹¹ Attorney Gladstone opined that the land involved is "above the high mark," and accordingly not within the ownership purview of the ACOE.¹²

⁹ Id.

¹⁰ Town (Remand) Exhibit 11.

¹¹ 4/4/18, Tr. 221-223.

¹² Id., Tr. 223.

The documentary evidence also included a September 18, 2015 letter from the manager of Ballard's Wharf Realty, LLC ("BWR"), the owner of the property on which Bluewater plans to develop a docking facility, that states that BWR "has not agreed to allow Bluewater, LLC to utilize BWR's riparian/littoral rights, nor has BWR agreed to allow Bluewater, LLC's proposed pier to connect to BWR's existing marine facility."¹³

4. RIFF's Direct Case

Before it proffered its only witness in this matter, *infra*, RIFF submitted a copy of an April 3, 2018 letter from Bluewater's attorney, Mary Shekarchi, Esq., addressed to the CRMC, which indicated that Bluewater would be "addressing those deficiencies" that the CRMC identified in the application that Bluewater had previously filed with the CRMC.¹⁴

In support of its position in this matter, RIFF proffered the pre-filed testimony of Mr. Paul Filippi, President of Bluewater, Inc. ("Bluewater"). Mr. Filippi testified that the Town's direct case "offers nothing new and is yet another attempt to add costs and create delay by rehashing previously considered matters and/or an attempt to supplant the authority of the ...[ACOE] and ...[CRMC] by asking the Division to make ultimate decisions as to docking facilities in a Federal Navigation Project know [sic] as Old Harbor."¹⁵

¹³ Town (Remand) Exhibit 10.

¹⁴ RIFF (Remand) Exhibit 3.

¹⁵ RIFF (Remand) Exhibit 1.

Mr. Filippi called the Town's arguments "redundant, incorrect, [and] irrelevant" and asserted that the Town's case "far exceeds the scope of this remand proceeding." He cited the following reasons for his opinion:

1. Bluewater's ACOE process is progressing and Bluewater's CRMC application filing is imminent.
2. The assent of the Town is unnecessary and not a requirement to receive a permit from CRMC because the CRMC has State jurisdiction over dock permitting. Similarly, the affidavit of Grover Fugate is irrelevant because Bluewater is not proposing to attach nor anchor a dock to the dock known as the "Red Breakwater."
3. The approval of the Town (via a building permit) is neither necessary nor required for Bluewater to build its docking facility because the ACOE, through Navigational Servitude, has control over the property on which the docking facility will be built.
4. The correspondence of attorney Jeffrey H. Gladstone, dated January 16, 2018 and submitted as a filing with the Town's testimony, is irrelevant to this remand proceeding and does not present facts that would prevent the permitting process for Bluewater's docking facility which is progressing.
5. It is my understanding that aspects of the proposed docking facility related to design is beyond the scope of this remand proceeding and all of the issues raised in the Town's pre-filed testimony and additional filings relate and center around the impact of different design options for the docking facility walkway. The ACOE, however, has design expertise and the ACOE has accepted and is presently reviewing Bluewater's permit filings. Similarly, CRMC will soon undertake design review.¹⁶

In response to Mr. Tillson's testimony, Mr. Filippi testified that Bluewater's ACOE process "is progressing well." He related that Bluewater's engineers and consultants are currently working with the ACOE and its Agency

¹⁶ Id., pp. 1-2

Technical Review (“ATR”) Committee in the context of the ACOE’s “Section 408” application review process. Mr. Filippi also added that Bluewater is “now working on completing its permit application under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act, which is planned to be filed imminently and concurrently with Bluewater’s CRMC application.”¹⁷

Mr. Filippi also disagreed with Mr. Tillson’s assertion that a building permit from the Town will be required to gain approval from CRMC. He related that Mr. Tillson took a similar position in 2005 when the Town opposed a dock proposal from Ballard’s Wharf Really, before the CRMC, which turned out to not make a difference in the CRMC’s ultimate approval of the proposed dock.¹⁸

Mr. Filippi similarly rejected Mr. Tillson’s claim that the building permit is required due to the docking facility’s planned walkway’s location in an upland and special flood hazard area. Mr. Filippi contends that the ACOE, through Navigational Servitude, “has supreme authority over this area.” He maintained that the Town does not have veto power over the ACOE.¹⁹ Mr. Filippi also argues that the walkway issue constitutes a “design” matter and is beyond the scope of this remand proceeding.²⁰

Mr. Filippi next criticized Mr. Tillson’s claim that the planned walkway would violate the State’s Building Code. Mr. Filippi related that because the proposed docking facility is on ACOE controlled property, a building permit is

¹⁷ Id., p. 3.

¹⁸ Id., pp. 3-4.

¹⁹ Id., p. 4.

²⁰ Id.

not required. He explained that the Town does not have any jurisdiction over ACOE property. Mr. Filippi also argued that because “any building code issue inherently and inescapably relates to design,” such matter would be outside the scope of the instant proceeding.²¹ Mr. Filippi buttressed his argument by citing to a case of the recently built Ballard’s Wharf Marina, another project where the Town refused to grant an electrical permit; he related that the State’s Electrical Inspector’s Office ultimately issued the appropriate permits over the Town’s objections.²²

In response to the Town’s objection to the walkway on zoning grounds, Mr. Filippi, again, contended that because this property is under the control of ACOE the Town’s Zoning Ordinance does not apply. He again asserted that this is a “design” issue, which is beyond the scope of the Division’s remand proceeding.²³

Mr. Filippi also addressed the Town’s “Right of Entry Agreement” argument by reiterating his opinion that the Town has no jurisdiction over the property in issue. He also described this issue as another matter related to “design,” which is off-base in this proceeding.²⁴

With respect to Mr. Fugate’s affidavit, Mr. Filippi emphasized that Bluewater is not proposing to build or anchor its docking facility at the “Red Breakwater” or the “Northern Ell,” which is location addressed by Mr. Fugate.

²¹ Id.

²² Id., p. 5.

²³ Id., pp. 5-6.

²⁴ Id., p. 6.

Mr. Filippi also noted that the “validity” of the property lease between the Town and CRMC “is disputed.”²⁵

Mr. Filippi next addressed the letter from Attorney Jeffrey Gladstone, regarding the appointment of a special master. Mr. Filippi stressed that Attorney Gladstone is not the Special Master in the “complex trust litigation” involving him and members of his family. Although he argues that the Special Master issue “is entirely irrelevant to this proceeding,” Mr. Filippi related that he has been and continues to be “a manager in Ballard’s Inn Realty, LLC and Bluewater has been keeping the Special Master up to date regarding dockage proceedings to which there has been no notice of objection.” Mr. Filippi insists that Bluewater has the authority to proceed with the dockage permitting process.²⁶

As a final matter, Mr. Filippi called the September 18, 2015 letter from his brother Blake Filippi, which the Town has reintroduced in this remand proceeding, no longer accurate and outdated. Mr. Filippi points out that when Blake Filippi wrote that letter he was the manager of Ballard’s Wharf Realty, LLC, which is not the case today. Mr. Filippi also observes that the 2015 letter was offered at the time in reference “to ingress egress design aspects of the project and does not offer any obvious and compelling material information which proves RIFF will be unable to operate its proposed ferry service from a Bluewater docking facility in Old Harbor.”²⁷

²⁵ Id., p. 7.

²⁶ Id., p. 8.

²⁷ Id., pp. 8-9.

In his concluding remarks, Mr. Filippi described the Town's case as "old arguments," offered "with the goal of protecting, it seems to me, the 85-year-old monopoly ferry service... to the detriment of the public and inconsistent with the Division's grant of a license to RIFF." Mr. Filippi asserted that Bluewater "has moved diligently forward on all fronts, despite unyielding futile attempts by the Town and Interstate Navigation Company to slow our progress."²⁸

Under cross-examination by the Town, Mr. Filippi was asked to explain the meaning of a letter that ACOE sent Bluewater on November 28, 2016. The Town maintains that the letter reflects that ACOE will not approve Bluewater's planned docking facility without the Town's consent.²⁹ However, Mr. Filippi took exception to the Town's characterization of the ACOE letter. He explained that the ACOE letter only relates to the "east wharf and bulkhead" and not the "entire federal navigation project."³⁰ Mr. Filippi opined that for the Town's consent to apply to the entire federal navigation project three requirements must be present. Specifically, he related that the Town's consent would only be necessary if the "project was authorized after November 17, 1986... involved certain flood protection projects... and that the project... be located in inland or intercoastal waterways...." Mr. Filippi proclaimed that none of those conditions are present here.³¹

The Town next questioned Mr. Filippi on the response letter that Bluewater's attorney sent ACOE on May 15, 2017. The Town was particularly

²⁸ Id., pp. 9-10.

²⁹ 4/4/18, Tr. 130; and Town (Remand) Exhibit 12.

³⁰ Id., Tr. 130-134.

³¹ Id., Tr. 134-136.

interested in Bluewater's claim that "[n]either the docks nor the path cross any real estate other than that owned by the applicant's family...."³² Mr. Filippi responded that this assertion is true with respect to the Mount Hope (East Breakwater) dock and the property owned by Ballard's Wharf Realty, not Ballard's Inn Realty.³³

The Town and Mr. Filippi also disagreed on the issue of whether the "federal navigational servitude" in this matter lies below or above the mean high-water mark. Mr. Filippi maintained that the entirety of Old Harbor "is a federal navigation project that was created by the Army Corps." He testified that the "ordinary high-water mark is the historical natural high-water mark." He added: "so the pedestrian pathway that you're so concerned about lies below, even though it is dry land, it lies below the ordinary high-water mark and is subject to navigational servitude."³⁴

The Town also questioned Mr. Filippi about a representation contained in Bluewater's May 15, 2017 letter to the ACOE that stated that Paul Filippi was authorized to sign documents on behalf of both Ballard's Inn Realty and Ballard's Wharf, LLC. Mr. Filippi responded that he did not have permission from the Ballard's Inn Realty's Special Master to make that representation and has since instructed his "consultants" to correct the error.³⁵

The Town next cross-examined Mr. Filippi regarding a June 22, 2017 reply letter from ACOE that was sent to Bluewater in response to Bluewater's

³² Id., Tr. 137-138; and Town (Remand) Exhibit 13.

³³ Id., Tr. 138-142.

³⁴ Id., Tr. 141-142.

³⁵ Id., Tr. 146-153; and Town (Remand) Exhibit 8.

May 15, 2017 letter. The Town called Mr. Filippi's attention to a part in the letter that provides that "the proposed alterations will require evaluation and separate permitting by the Corps Regulatory Division pursuant to... Section 10 of the Rivers and Harbors Act of 1889 and Section 404 of the Clean Water Act... [and that] [t]he subject Section 404 evaluation cannot be completed without the required NEPA coordination which must also be completed by the district's Regulatory Division."³⁶ In response to the Town's request for a status report regarding this necessary filing with ACOE, Mr. Filippi related that Bluewater is preparing the filing and will file it with the ACOE when it files its related "complete application" with the CRMC. Mr. Filippi reasoned that "it's the policies of both agencies that the applications be filed concurrently."³⁷

The Town also sought clarification from Mr. Filippi on whether Bluewater's CRMC filing was a "preliminary determination" or "full application." Mr. Filippi responded that Bluewater had filed a preliminary determination on March 2, 2018 based upon CRMC's suggestion that applicants file for a preliminary determination before filing a full application. Mr. Filippi also confirmed that Bluewater has not filed its full application yet.³⁸ Mr. Filippi additionally acknowledged that a representation contained in Bluewater's preliminary determination filing with the CRMC concerning dredging materials is not accurate and needs to be corrected.³⁹

³⁶ Id., Tr. 153-155; and Town (Remand) Exhibit 14.

³⁷ Id., Tr. 155-157.

³⁸ Id., Tr. 164-165.

³⁹ Id., Tr. 166-174.

Mr. Filippi was also questioned by the Town with respect to the “Notice of Deficient Application” that Bluewater received from the CRMC on March 29, 2018.⁴⁰ The Town focused on the observation that Bluewater had failed to provide proof of ownership or proof of access rights to the “upland” property where the proposed docking facility is to be constructed. However, Mr. Filippi asserted that Bluewater does have access rights to the property through a lease agreement “for the riparian rights that coincide with Lot 158” that he acquired from his mother and Ballard’s Wharf Realty. Mr. Filippi also noted that he is the current manager of Ballard’s Wharf Realty.⁴¹ In further explanation of what Bluewater is doing to advance its cases before the CRMC and ACOE, Mr. Filippi offered the following:

There is a lease from Marion Filippi to Bluewater, LLC for the riparian rights to Lot 158 for the purpose of wharfing out Old Harbor. Furthermore, under the 408 application that we’ve made to the... [ACOE], we’ve applied as a private entity to use certain portions of the federal navigation project that the... [ACOE] owns and that’s where Bluewater believes that we will have the rights to wharf out per the 408 request to the... [ACOE], and I believe that that’s one of the things that we will need to address with the CRMC at an early time because I don’t think that they’re aware of the... esoteric 408 process and what it entails.

The federal government has asked us in order to proceed with their NEPA analysis to file the Section 10/404 concurrently with the CRMC and that’s what we have been preparing since last fall.⁴²

⁴⁰ Town (Remand) Exhibit 2.

⁴¹ Id., Tr. 175-179.

⁴² Id., Tr. 179-180.

[B]ack in June of '18 [sic], the project manager for Block Island Old Harbor, Mike Elliott, went on extended sick leave until the end of August. So that held us back a few months. Then there was a new guy, Mr. Bell, who was appointed to be the project manager, and at the end of August he asked us to file the Section 10/404 and the CRMC permit. So since that time, we've done a lot of work. We did a bathymetric survey of Old Harbor, we spent tens of thousands of hours on engineering documents that were drawn up by St. Jean Engineering in preparation for the Section 10/404. So even though the Army Corps asked us to submit the Section 10/404 so they could proceed with the 408, it's taken time to get that material together so we can file a viable concrete application with the Army Corps and the CRMC at the same time.⁴³

Also, with respect to the March 29, 2018 "Notice of Deficient Application," the Town asked Mr. Filippi how he plans to continue with his plans if the "CRMC requires the Town approval to move forward with the east breakwater docking facility." On this point, Mr. Filippi contended that "the CRMC's biologist got that wrong" and that Bluewater does not need the Town's approval to move forward with its plans.⁴⁴

On redirect examination, Mr. Filippi testified that Bluewater will be submitting additional information to the CRMC in response to its notice of deficiency.⁴⁵ He added that Bluewater also plans to "educate them on the process... with the Army Corps..."⁴⁶

He also explained that Bluewater does not believe that the Town's consent is required since "the entire area of this project is under the

⁴³ Id., Tr. 181-182.

⁴⁴ Id., Tr. 184-185.

⁴⁵ Id., Tr. 187, 189-191.

⁴⁶ Id., Tr. 187-188.

navigational servitude which is controlled by the... [ACOE] and we've applied to the... [ACOE] under the 408 process to use those portions of the federal navigation project, the portions that are beyond the ordinary high tide mark, all of them, to fulfill the goals of this project."⁴⁷

Mr. Filippi also clarified why he believes the CRMC staff person has interpreted the Right of Entry Agreement improperly. He testified that the Right of Entry agreement "was for the Army Corps to be able to repair the jetty after Hurricane Sandy." Mr. Filippi also argued that the Bluewater's proposed docks and pedestrian pathway "will not be interfering with any of the use of the east dock, the bait dock, the beach or the jetty itself."⁴⁸

Mr. Filippi also testified that Bluewater has no plans to "touch" the red stone breakwater. He related that there is no plan to wharf "off of it." He explained that Bluewater's plans to build its dock adjacent to the breakwater "on portions of the federal navigation project that are owned and controlled by the... [ACOE]." He testified that this proposal is part of "the 408 process."⁴⁹

Mr. Filippi added that he has had experience with obtaining authority from the CRMC for construction activities without the Town's consent. He described a 2005 project, which was also adjacent to the red stone breakwater, wherein he rebuilt a bulkhead and put in a recreational marina over objections

⁴⁷ Id., Tr. 189.

⁴⁸ Id., Tr. 191.

⁴⁹ Id., Tr. 192.

from the Town. He testified that he expects the same result in the instant matter.⁵⁰

Mr. Filippi also addressed the Special Master's concerns in this case. He related that the Special Master mastership is over the operations of Ballard's Inn Realty, LLC. Mr. Filippi opined that Bluewater does not need permission from the Special Master to complete its plans because the real estate involved in this project "does not involve the real estate owned by Ballard's Inn Realty."⁵¹

5. The Town's Rebuttal Case

In response to RIFF's direct case, the Town proffered a rebuttal filing on February 21, 2018. The filing consisted of pre-filed rebuttal testimony from Edward L. Roberge, the Town's current Town Manager; pre-filed rebuttal testimony from Nancy Dodge, the Town's former Town Manager; pre-filed rebuttal testimony from Marc Tillson, the Town's Building Official; an affidavit from Stephen F. Del Sesto, identified as the Court-appointed Special Master of Ballard's Inn Realty, LLC; and the affidavit of Steven Filippi, a member of Ballard's Wharf Realty, LLC.

Town Manager Edward Roberge, testified that he disagrees with Mr. Filippi's claim that because Bluewater does not plan on attaching or anchoring its proposed docking facility to the Red Breakwater, that the consent of the Town is not required. Mr. Roberge observes that Article V, Paragraph A of the Lease Agreement between the Town and CRMC "specifically gives the Town the

⁵⁰ Id., Tr. 193-195.

⁵¹ Id., Tr. 202-203.

right to erect such docks and other structures on or near the Red Breakwater...” He explained that Bluewater’s planned “Red Jetty Dock” will be less than 15 feet from the Red Breakwater and parallel to it. Mr. Roberge contends that because Bluewater’s dock “would block any dock which the Town has the right to erect and use at that location,” the Town’s consent must be required.⁵²

Mr. Roberge also testified that Article IV, Paragraph A of the Lease Agreement requires that the Town maintain the Red Breakwater in good order and repair. He maintained that because the proposed dock “would block and limit the Town’s ability to maintain the Red Breakwater,” the Town consent would be required.⁵³

Mr. Roberge noted, while under cross-examination, that the Lease Agreement does not contain a definition for the word “near” or reflect that the Town has an “exclusive right to erect a sign, dock or other structure on or near the red breakwater.”⁵⁴ He also admitted that he does not have specific experience in maintaining docks “on an ocean.”⁵⁵ Mr. Roberge also acknowledged that the CRMC will have an opportunity to consider the Town’s concerns during its review of Bluewater’s application.⁵⁶

Former Town Administrator, Nancy Dodge, testified regarding the “Right of Entry Agreement” that exists between the Town and the federal

⁵² Town (Remand) Exhibit 1, p. 2.

⁵³ Id., p. 3.

⁵⁴ 3/30/18, Tr. 37-39.

⁵⁵ 3/30/18, Tr. 36-37.

⁵⁶ 3/30/18, Tr. 40-42.

government.⁵⁷ She began her testimony by criticizing Mr. Filippi's assertion that this agreement has already been considered by the Division in a previous proceeding. She characterized his claim as "pure fiction," based on the fact that this agreement only came into existence on September 16, 2016, which she points out was "long after the hearing before the Division concluded."⁵⁸

Ms. Dodge related that she was involved in the negotiations that took place between the Town and the federal government regarding the Right of Entry Agreement. She maintains that during those negotiations the federal government agreed with the Town's proposal to prohibit "any person or entity to construct any structure which would impede the Town and the public's access to the Town's Bait Dock, to the East Breakwater, to the beach located on the west side of the East Breakwater or to the Right of Entry land." She testified that this support from the federal government is memorialized in the Right of Entry Agreement.⁵⁹ Therefore, Ms. Dodge asserts that the Town's consent would be required for the construction of Bluewater's proposed East Breakwater docking facility. She opined that the proposed docking facility "would clearly and obviously impede and restrict the Town and the public's access" to the areas in issue around the proposed docking facility.⁶⁰

Ms. Dodge next discussed the Town's ability to issue building permits for the construction of the proposed dock. On this matter, Ms. Dodge contends that Mr. Filippi "clearly does not understand the law as it pertains to state and

⁵⁷ Attached to Town (Remand) Exhibit 4.

⁵⁸ Town (Remand) Exhibit 3, p. 2.

⁵⁹ Id., p. 3.

⁶⁰ Id., p. 4.

local ability to regulate federal land.” Ms. Dodge testified that as an attorney who has practiced in the area of real estate law, she can say that there is no federal preemption in this case that would bar the Town from enforcing its zoning laws.⁶¹

Ms. Dodge also testified that Bluewater’s reliance on the River and Harbors Act of 1870 is misplaced. She testified that the “Act does not express any congressional intent regarding the use of the breakwater...”⁶²

During cross-examination, Ms. Dodge conceded that she was not testifying in this docket as an expert witness. She related that her testimony was based on her former position as the Town’s Administrator as well as her legal opinion in her capacity as an attorney.⁶³ She also admitted to not having reviewed the amendments that have been made to the Rivers and Harbors Act since its original enactment in 1870.⁶⁴

Mr. Marc Tillson also submitted rebuttal testimony. His testimony was proffered in response to Mr. Filippi’s claim that the Town is prohibited from regulating “the upland” (areas of land above the mean high-water mark) in this matter. Echoing Mr. Roberge’s and Ms. Dodge’s testimony, Mr. Tillson argued that the Town is not prohibited from enforcing its zoning laws with respect to the upland area adjacent to the proposed dock facility.⁶⁵

⁶¹ Id., p. 5.

⁶² Id.

⁶³ 3/30/18, Tr. 68-69.

⁶⁴ 3/30/18, Tr. 54-57.

⁶⁵ Town (Remand) Exhibit 5, pp. 2-3.

Mr. Tillson also disagreed with Mr. Filippi's characterization of what transpired during the CRMC assent process for the Ballard's Wharf Realty, LLC eight boat slip marina. Mr. Tillson testified that contrary to Mr. Filippi's recollection, the Town did not intervene or object to that project.⁶⁶

Mr. Tillson also took exception to Mr. Filippi's assertion that the Town's objections regarding the proposed docking facility are all limited to design. Mr. Tillson related that the proposed walkway of the East Breakwater docking facility does not qualify for permitting for construction "irrespective of design."⁶⁷

The affidavit of Steven Filippi was proffered by the Town to refute Paul Filippi's claim that he is the current manager of Ballard's Wharf Realty, LLC. Mr. Steven Filippi related that he is a member of Ballard's Wharf Realty, LLC and that it is his understanding that the current manager of Ballard's Wharf Realty, LLC is Blake Filippi, not Paul Filippi.⁶⁸

The affidavit of Attorney Stephen Del Sesto was proffered by the Town to refute Mr. Filippi's testimony that the Special Master appointed by the Superior Court is aware of plans to construct a docking facility and is not opposed to the project. Attorney Del Sesto identified himself as the Special Master of Ballard's Inn Realty, LLC. He related that as Special Master, Ballard's Inn Realty must obtain his permission to "engage in any transaction that is outside of the ordinary course of business or enter into any agreement regardless of whether

⁶⁶ Id., p. 3.

⁶⁷ Id.

⁶⁸ Town (Remand) Exhibit 9.

such agreement is within the ordinary course of business.”⁶⁹ Attorney Del Sesto related that he has had a few “general conversations with Mr. Paul Filippi regarding the proposed dock project” and has “not taken any substantive position regarding this project and I have not come to terms with Bluewater or Mr. Paul Filippi on even a preliminary basis as to whether or not Ballard’s Inn Realty would provide any of the consents required for the docking facility to be constructed.”⁷⁰ Attorney Del Sesto also opined that formal Court approval would be required in order for him to grant such authority.⁷¹

6. The Town’s Final Position

The Town submitted a post-hearing memorandum in this matter on May 21, 2018. In its memorandum, the Town maintains that it has proffered sufficient evidence to show that RIFF “does not have a reasonable expectation of obtaining a docking facility in Old Harbor and, consequently, the Division should vacate its previous decision granting RIFF a CPCN. The bases for the Town’s assertion rests in the testimony of several witnesses and documentary evidence from the CRMC and the ACOE. The Town offered a summary of this evidence in its memorandum.

Starting with the testimony of Edward Roberge, Town Manager, the Town contends that Mr. Roberge’s testimony demonstrates that Bluewater’s proposed Red Breakwater dock lies less than 15 feet from the Red Breakwater and parallel to it. This proximity is important in that the Town asserts that the

⁶⁹ Town (Remand) Exhibit 8.

⁷⁰ Id., p. 1.

⁷¹ Id., pp. 1-2.

Lease Agreement between the CRMC and the Town, *supra*, specifically gives the Town the right to erect such docks and other structures “**on or near** (emphasis in original) the Red Breakwater as the Town shall deem desirable.” The Town stresses that the Lease also requires the Town to maintain the Red Breakwater. The Town argues that because the proposed dock would block any dock which the Town has the right to erect and use in that location and impede the Town’s ability to maintain the Red Breakwater, the CRMC will not approve the construction of Bluewater’s proposed dock without the Town’s consent. In support of this argument, the Town further relies on the “CRMC Notice of Deficient Application” and the Affidavit that was offered by the CRMC’s Executive Director.⁷²

The Town also relies on the testimony of Nancy Dodge, the Town’s former Town Manager. Ms. Dodge explained that the September 16, 2016 Right of Entry Agreement between the Town and the ACOE prevents any person or entity from constructing any structure which would restrict the Town and the public’s access to the Town’s Bait Dock, to the East Breakwater, to the beach located on the west side of the East Breakwater or to the Right of Entry land. Ms. Dodge asserted that due to this Right of Entry Agreement, Bluewater needs the Town’s consent to construct its planned docking facility near the East Breakwater.⁷³

Ms. Dodge also weighed in on the what the CRMC’s March 29, 2018 Notice of Deficient Application means to the Town. She maintains that this

⁷² Town Memorandum, pp. 6-9 and Town (Remand) Exhibits 2 and 7.

⁷³ *Id.*, pp. 9-11.

Notice clearly establishes that the consent of the Town is required to construct the proposed East Breakwater docking facility and that Bluewater has not established the requisite proof of ownership or Town or federal consent.⁷⁴

The Town additionally points to the testimony of its Building Official, Mark Tilson. Mr. Tilson testified that the Town's consent is required before Bluewater can build its planned East Breakwater docking facility. He based his opinion on his belief that the CRMC application requires that the Town's Building Official sign off on the "CRMC Building Official Letter" and that the construction of the proposed walkway which is on the upland, above the mean high-water mark, requires a building permit. Mr. Tilson explained that the Town would not issue a building permit in this case "because the proposed walkway is in violation of the State Building Code."⁷⁵

Mr. Tilson also agreed with Nancy Dodge regarding the Right of Entry Agreement between the Town and the Federal Government. He agreed that the construction of the proposed docking facility would impede the Town and the public's access to the Town Bait Dock, to the East Breakwater and to the beach located along the west side of the East Breakwater.⁷⁶

Finally, the Town calls into question the seriousness and efficacy of Bluewater's efforts to get permission from the CRMC and the ACOE to build its docking facilities. The Town relies, in part, on the following observations and

⁷⁴ Id., pp. 11-12.

⁷⁵ Id., pp. 12-13.

⁷⁶ Id., pp. 13-14.

beliefs derived from Mr. Filippi's testimony and certain specific documentary evidence:

- That other than the November 28, 2016 filing, which the ACOE rejected, Bluewater's has made only one other filing with the ACOE (a May 15, 2017 letter);
- That Bluewater's May 15, 2017 filing with the ACOE and its March 2018 Preliminary Determination filing with the CRMC contained several false representations regarding his authority to provide the necessary consents of Ballard's Inn Realty, LLC;
- That representations made by Paul Filippi in the ACOE and CRMC filings were in direct violation of the Special Master's authority to oversee the activities of Ballard's Inn Realty, LLC;
- That the June 22, 2017 letter from ACOE states that the ACOE will not continue with the Section 408 review unless Bluewater obtains separate evaluation and permitting from the Corps' Regulatory Division pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act, which Bluewater has not made;
- That Bluewater does not own any of the real estate associated with either of the proposed docking facilities and has not obtained the approval of any owner; and

- That other than the March 2018 Preliminary Determination filing, which the CRMC rejected, Bluewater has made no other filings with the CRMC.

The Town subsequently submitted a Reply Memorandum to the Division on June 5, 2018. Through this pleading, the Town reiterated its vehement opposition to RIFF's and Bluewater's assertions that Bluewater will be able to construct docking facilities in Old Harbor without the Town's consent. The Town insists that the evidence presented in the instant remand proceeding demonstrates that Bluewater's applications "have been derailed."⁷⁷

7. RIFF's Final Position

RIFF submitted a post-hearing memorandum in this matter on May 21, 2018. After providing a summary of the travel of RIFF's efforts to secure a CPCN, starting with its 2013 filing with the Division, through the instant remand matter, RIFF stressed that the instant remand matter has a very narrow scope. Specifically, RIFF emphasizes that the Division has ordered that the scope of the instant remand proceeding "would be limited to providing the Town with an opportunity to prove that RIFF (through Bluewater) does not have a realistic expectation of constructing Bluewater's planned docking facilities in Old Harbor, irrespective of design, through its permit applications with the... [ACOE] and the... [CRMC]".⁷⁸ RIFF also points out that the Division further clarified this narrow scope by informing the parties that: "the Town shall be required to prove to the Division that RIFF will not be able to operate

⁷⁷ Town Post-Hearing Reply Memorandum.

⁷⁸ RIFF Memorandum, pp. 3-4, citing Division Order 23018, issued on January 25, 2018, 2-3.

its proposed ferry service from a Bluewater docking facility in Old Harbor” and that “[e]vidence of this prospect must be obvious and compelling, not ambiguous and speculative.” RIFF also notes that the Division further ordered that it would “not consider matters of design, environmental impacts or the terms of construction contracts” as part of this review.⁷⁹

RIFF argues that the Town has failed to satisfy its burden in this remand matter before the Division as it did not provide obvious and compelling evidence that RIFF will be unable to operate its proposed ferry service from a Bluewater docking facility in Old Harbor. RIFF argues that the “ACOE and CRMC process have inarguably moved forward” and that the Division should recognize the arguments of the Town “as dilatory and end this attempt... to circumvent the appeal process and to inappropriately use the Division as a means to block further ACOE and CRMC process.”⁸⁰

RIFF argues that the Town has failed to establish that Bluewater’s proposals before the CRMC and the ACOE have been “derailed.” RIFF contends after Bluewater received notice from ACOE on November 28, 2016 that an endorsement from the Town would be required if its proposed docking facility “touches upon the east wharf and bulkhead,” Bluewater elected to propose to use an ‘alternative access’ (an alternative walkway) to the proposed Mount Hope docking facility, “which avoids the need to use the east wharf and bulkhead.”⁸¹ RIFF explains that as a consequence of Bluewater’s decision to

⁷⁹ Id., p. 4, citing Division Order No. 22980, issued on December 13, 2017, 5.

⁸⁰ Id., p. 4.

⁸¹ Id., p. 5 and RIFF Remand Exhibit 1.

use an alternative walkway, the ACOE has now required Bluewater to seek additional review by the Corps' Regulatory Division (pursuant to Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act and the National Environmental Protection Act (NEPA)). RIFF argues that Mr. Filippi has testified that Bluewater is now in the process of satisfying this ACOE requirement.⁸² RIFF points to testimony from Mr. Filippi who explained that the Section 10/404 application must be submitted concurrently with its finalized CRMC application; "after CRMC's preliminary review (which is currently in progress)."⁸³ RIFF argues that although "the ACOE permitting process may be taking longer than expected, nothing put forth during the remand hearings demonstrates that Bluewater's ACOE permitting process has been derailed. In fact, the ACOE has not yet issued a decision on Bluewater's Section 408 Application."⁸⁴

RIFF makes a similar argument regarding Bluewater's CRMC permitting process. RIFF notes that Bluewater filed its Preliminary Determination Application with the CRMC on March 2, 2018. RIFF argues that the CRMC's March 29, 2018 "notice of deficient application" "clearly contemplates further CRMC proceedings." As evidence of the contemplated additional proceedings, RIFF points to the two sections contained in the Notice, which, requires Bluewater to submit additional information (regarding ownership rights). RIFF also emphasizes that the Notice also states: "[n]ot supplying it at this time will

⁸² Id., p. 6.

⁸³ Id.

⁸⁴ Id., pp. 7-8.

not prevent your application from being accepted by the CRMC.” Further, RIFF observes that “contrary to the Town’s testimony,” the Notice does not request the “Town Building Official sign-off.”⁸⁵ RIFF also observes that the statements contained in the Notice are requests not requirements, and that the requests were made by a staff member of CRMC, not the full Council of the CRMC.⁸⁶

RIFF contends that the Town is requesting that the Division usurp the authority of the CRMC Council by declaring that Bluewater does not have a realistic expectation of success based on a very preliminary CRMC phase.⁸⁷ RIFF argues that the Town has mischaracterized the substance of the CRMC staff Notice throughout the remand proceedings, when in actuality, “this notice does nothing more than confirm that Bluewater’s CRMC permit process is being reviewed (preliminarily) and is moving forward.” RIFF argues that the record before the Division reflects that Bluewater “intends to submit the required additional information requested by staff.”⁸⁸

RIFF next addresses “a few falsehoods the Town continues to fruitlessly argue.” RIFF starts with the Town’s claim that its consent is required to rebuild the Mount Hope Dock. On this claim, RIFF maintains that the ACOE has jurisdiction over this property, not the Town, and that the viability of the proposal will be determined through the ongoing ACOE process. RIFF argues that because the proposed Mount Hope docking facility is not an application for a new facility, but rather a proposal to re-build the old ACOE dock formally

⁸⁵ Id., pp. 8-10.

⁸⁶ Id., p. 10.

⁸⁷ Id.

⁸⁸ Id., pp. 11-13.

known as the Mount Hope Dock, Bluewater is confident that its proposal has a realistic expectation of approval before the ACOE.⁸⁹

RIFF next argues that notwithstanding the Town's claim to the contrary, neither the Right of Entry Agreement nor the Town's zoning laws negatively impact Bluewater's proposed Mount Hope docking facility. In short, RIFF contends that the Right of Entry Agreement and the Town's zoning ordinance does not give the Town "veto power" over the ACOE's jurisdiction over this docking facility.⁹⁰

RIFF also addresses the Town's claims regarding Ballard's Inn Realty's control over Bluewater's proposed docking facility. RIFF argues that neither Ballard's Inn Realty, LLC nor that company's Special Master has anything to do with Bluewater's proposed docking facility. Relying on Mr. Filippi's testimony, RIFF contends that "the path proposed for the east breakwater dock does not cross land owned by Ballard's Inn Realty."⁹¹

RIFF similarly argues against the Town's claim that its consent is required to extend the proposed Red Breakwater docking facility. Regarding this claim, RIFF notes that the proposed Red Breakwater docking facility "simply extends what is currently in place today in the same proximity to the Red Breakwater as previously permitted by CRMC."⁹² RIFF argues that the lease between CRMC and the Town limits its discussion to the Town's rights over the Red Breakwater. RIFF observes that this lease "specifically defines

⁸⁹ Id., p. 14.

⁹⁰ Id., pp. 14-19.

⁹¹ Id., pp. 19-20.

⁹² Id., p. 20.

what it considers to be the ‘Red Breakwater’ by detailing the coordinates of the property.” RIFF argues that neither Bluewater’s current dockage directly adjacent to the Red Breakwater nor its proposed extension of this facility are within the property defined by the lease agreement as the “Red Breakwater.”⁹³ RIFF also rejects the Town’s argument that its consent is required because the proposed docking facility is “near” the Red Breakwater. In response to this argument from the Town, RIFF contends that the Town has failed to support its assertion that 15 feet falls within the definition of “near,” especially considering that “the current facility permitted by CRMC, also within the same proximity, is not ‘near’ the Red Breakwater.”⁹⁴ RIFF also rejects the Town’s argument that the proposed dock would block and limit the Town’s ability to maintain the Red Breakwater in good order and repair. RIFF argues that the Town has offered no support for such a claim.⁹⁵

Finally, RIFF argues that the Town’s objections are purely parochial and incompatible with the public interest. RIFF contends that Rhode Law makes the CRMC responsible for regulating the construction of docks, not local cities and towns. Citing Rhode Island Supreme Court precedent, RIFF observes that the Court “warns that ‘some cities and towns, acting out of parochial interest, might make it more difficult to get approval to construct docks, thereby

⁹³ Id., p. 20-21.

⁹⁴ Id., p. 21.

⁹⁵ Id., pp. 21-22.

resulting in unreasonable concentrations of docks in some places and too few docks in others.”⁹⁶

RIFF also filed a Post-Hearing Reply Memorandum in this remand matter, which was submitted on June 5, 2018. In this pleading, RIFF takes exception to the Town’s characterization of the details surrounding the Superior Court’s remand decision. RIFF points out that the Superior Court did not order the remand based on the Court’s finding that Bluewater had proposed a “new” docking facility that deprived the Town of an opportunity of its right to be heard. Rather, RIFF contends that the Court has remanded that question back to the Division for evaluation and decision.⁹⁷

RIFF also reiterates its contention that the plans now before the ACOE do not depict a new docking facility, but the originally planned docking facility with an ‘alternative access’ design component. Moreover, RIFF stresses that this “alternative access” option “was specifically and clearly identified in the plan submitted to the Division during the 2015-2016 CPCN proceeding.” RIFF therefore argues that it “did not ‘add new facilities later on’ and RIFF did not use a ‘tactic of switching docking facilities[,] as alleged in the Town’s memorandum and as alleged by the Town to support its remand request.”⁹⁸

RIFF contends that the Town’s efforts in the instant remand matter are designed to steer the Division into making “substantive decisions based upon a preview of the arguments the Town plans to make before the ACOE and CRMC

⁹⁶ Id., pp. 22-23.

⁹⁷ RIFF Post -Hearing Reply Memorandum, pp. 2-4.

⁹⁸ Id., pp. 4-5.

so as to avoid the process before those agencies.” Instead, RIFF argues that the Division must decide if Bluewater’s cases before the ACOE and CRMC have been “derailed,” which, RIFF maintains is clearly not supported in the record.⁹⁹

FINDINGS

In a previously issued 2013 decision in the instant docket, the Division made it clear that it would be impractical to spend any significant time addressing matters related to boat docks. Indeed, this finding was a basis on which the Division limited Interstate’s intervention status in this case and denied Block Island Ferry Services LLC, d/b/a Block Island Express and Intrastate Nav. Company from participating as parties in this docket. The Division made it abundantly clear that it would be deferring totally to the CRMC on such issues.¹⁰⁰

When the Division later considered the Town’s motion for summary disposition in 2015, the focus again was on the issue of docking facilities in Old Harbor. Specifically, the Town questioned whether RIFF had *de facto* access to any docking facility in Old Harbor. The Town argued and insisted that no such docking would be available to RIFF and, therefore, the Division should deny RIFF’s application for a CPCN. When RIFF later identified docking opportunities at planned Bluewater facilities at the Northerly Ell of the stone jetty at the Inner Basin and the former location of the Mount Hope Pier adjacent to the Easterly Breakwater, the Town asserted that the relationship

⁹⁹ Id., pp. 5-9.

¹⁰⁰ See Order No. 21170, pp. 17-18.

between RIFF and Bluewater was a “sham” and should be disregarded by the Division.

From that point in time, the Town went all in on endeavoring to convince the Division that Bluewater (and RIFF) had zero chance of ever developing and constructing a new docking facility in Old Harbor. The Town then, as it does now, argued that its approval and consent would be required in the context of any case before the ACOE and CRMC before Bluewater could legally move forward with its planned docking facilities. In support of its motion for summary disposition, the Town relied then, as it does now, on its 50-year Lease Agreement with the State; an opinion from CRMC’s Grover Fugate (and CRMC staff); CRMC regulations; a competing opinion from another member of the Filippi family; a license agreement with ACOE and ACOE policies; and a claim that Bluewater does not have legal permission to construct a dock from the relevant riparian landowners.

In response to the above-mentioned arguments from the Town, RIFF and Bluewater argued then, as they do now, that Bluewater does not need the Town’s approval to initiate, navigate, or complete either the ACOE or CRMC application process. While Bluewater acknowledges that it has suffered some recent setbacks, Bluewater and RIFF contend that the processes before the CRMC and ACOE remain active and viable. They are confident that Bluewater will prevail.

When the Division denied the Town’s motion for summary disposition in 2015, the Division predicated its decision on a finding that Bluewater’s claims

of interest and ability to construct a docking facility in Old Harbor were “credible.” The Division accepted at the time that the Town would aggressively oppose Bluewater’s permitting applications before the ACOE and CRMC, but rejected that fact alone as sufficient cause to deny RIFF’s application for a CPCN. The Division concluded “that RIFF (through Bluewater) has a realistic expectation of having access to a future docking facility in Old Harbor....”¹⁰¹ However, if the Town’s opposition to Bluewater’s CRMC and ACOE permitting applications resulted in the “derailing” of Bluewater’s plans, the Division expected the Town to request the Division to revisit the issue of RIFF’s ability to provide its proposed ferry services.¹⁰²

The Town now maintains that it has successfully “derailed” Bluewater’s CRMC and ACOE applications. The Town bases its contention on the grounds previously proffered in its motion for summary disposition, *supra*, and, also, on new arguments regarding Ballard’s Inn Realty, LLC; the need for Town building permits; the Town’s zoning laws; a *Right of Entry Agreement* between the Town and the Federal Government; a March 29, 2018 *Notice of Deficient Application* from the CRMC; and two letters from the ACOE, dated November 28, 2016 and June 22, 2017, regarding Bluewater’s quest to construct a dock on ACOE-controlled property.

Per the Superior Court’s remand order, the Division must decide whether it wishes to revisit the issue of whether RIFF will have access to a docking facility in Old Harbor based on evidence from the Town that

¹⁰¹ See Order No. 22254, p. 22.

¹⁰² *Id.*, pp. 22-23.

Bluewater's efforts to gain permission from the CRMC and the ACOE has been categorically prevented, or "derailed." In clarifying the scope of this remand proceeding, the Division mandated that "the Town shall be required to prove to the Division that RIFF will not be able to operate its proposed ferry service from a Bluewater docking facility in Old Harbor" and that "[e]vidence of this prospect must be obvious and compelling, not ambiguous and speculative." The Division further ordered that it would "not consider matters of design, environmental impacts or the terms of construction contracts" as part of this review.

The Division has carefully considered the evidence presented by the Town in the instant remand proceeding and finds that the Town has insufficiently demonstrated that Bluewater's pursuit of permission from the CRMC and the ACOE to construct docking facilities in Old Harbor is over - has been "derailed." There simply is no dispositive evidence on the record that reflects that Bluewater's permit application cases before the CRMC and the ACOE have reached final decisions. Instead, what the evidence does show is a Herculean effort by the Town to persuade the Division to accept the Town's position as prophetic and inviolate on the merits of the remaining legal processes before the CRMC and ACOE, which is not the standard that must be applied on this remand matter.

RIFF has presented a copious rebuttal to the many old and new opposition arguments expressed by the Town. The record is replete with this back-and-forth between the two parties. In the final analysis, however, the

Town has failed to demonstrate through “obvious” and “compelling” evidence that Bluewater’s plans to construct a docking facility in Old Harbor have been exhausted. Indeed, even if Bluewater were to be denied a permit by the CRMC and/or the ACOE, the matter would not be irrefutably concluded until after Bluewater’s appellate rights have been exhausted.

As an ancillary issue in this remand proceeding, the Town has argued that the modified docking facility plans now being considered by Bluewater constitute a totally new design that warrants a fresh review by the Division. The Division disagrees. The latest designs being considered by Bluewater are connected to the originally proposed and identified docking facilities. These are not new docking facilities.

Moreover, as emphasized in previous Division decisions, the Division has established a precedent for approving CPCN applications without proof that an applicant already possesses suitable docks. The CPCN approved in this docket will not be issued until after RIFF demonstrates that it has access to suitable docking/landing facilities on Block Island.¹⁰³ It is unreasonable for the Town to continue to urge the Division to revisit the licensing aspect of this docket based on a present lack of demonstrable docking access. The proper time for the Town to raise this issue would be during the Division’s consideration of any further requests from RIFF to extend the deadline for effectuating the start of its proposed ferry services.


¹⁰³ See Order No. 22548, p. 141.

Accordingly, therefore, it is

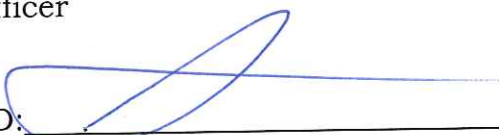
(23217) ORDERED:

1. That in response to the May 2, 2017 remand order of the Superior Court, and predicated on the findings contained herein, the Division finds insufficient cause to revisit the issues discussed and addressed in the Division's previous decision denying the Town's Motion for Summary Disposition (Order No. 22254, issued on December 10, 2015).
2. That the latest designs being considered by Bluewater do not reflect new docking facilities that warrant additional review by the Division.

Dated and Effective at Warwick, Rhode Island on July 16, 2018.



John Spirito, Jr., Esq.
Hearing Officer

APPROVED: 

Macky McCleary
Administrator