

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

**In Re: SeaStreak, LLC)
2 First Avenue)
Atlantic Highlands, New Jersey 07716)
Application For Authority To Operate)
As A Water Vessel Passenger Carrier)
Pursuant To R.I.G.L. §§ 39-3-3 And)
39-3-3.1)**

Docket No. D-16-35

**Filed: June 6, 2016
Heard: June 23, 2016**

REPORT AND ORDER

INTRODUCTION

On June 6, 2016, the Applicant identified above filed an application with the Rhode Island Division of Public Utilities and Carriers (“Division”), seeking a Certificate of Public Convenience and Necessity (“CPCN”) authorizing the holder thereof to operate as a water vessel passenger carrier pursuant to R.I.G.L. §§ 39-3-3 and 39-3-3.1. The application as originally filed sought authority to provide a seasonal ferry service from July 1, 2016, through September 5, 2016, between termini located in Newport, Rhode Island, and Providence, Rhode Island. The proposed service would offer four (4) round trips per day on weekends and holidays, and three round trips per day on weekdays. The

proposal contemplated starting the service as early as May and continuing until as late in October in subsequent years.¹

Following the filing of this application, the Division scheduled, and published notice of, the date, time and location of a formal hearing to review the application. Notice was published in *The Providence Journal* on June 10, 2016, and advised the public that the final day on which a motion for Intervention, or a statement of Protest, could be filed was close of business (4:00 p.m.) on Friday, June 17, 2016. No such timely motions to intervene or protests were filed.²

A duly noticed public hearing on this application was held on June 23, 2016. The following counsel entered appearances:

Appearances:

Jody Sceery, Esq.
On behalf of
SeaStreak, LLC
Applicant

Albert Vitali, Esq.
Special Assistant Attorney General
On behalf of
Advocacy Section of the Division of Public Utilities and Carriers

¹ Applicant Exhibit 1. If the Applicant does seek to modify its schedule in subsequent years, it should file its application for authority to do so **at least** two months prior to its new proposed start date to allow sufficient time to properly review and consider the request.

² On January 25, 2016, a similar application, seeking authority to provide a ferry service from Newport to Providence (with optional stops at Quonset Point), was filed with the Division by Rhode Island Fast Ferry, Inc. Although that applicant has taken no steps since to move its application forward, the Hearing Officer in this case directed the Division's Clerk to ensure that Rhode Island Fast Ferry, Inc., was advised of the instant application by SeaStreak, LLC. The Clerk has advised the Hearing Officer that she did so by notifying Mr. Charles A. Donadio, Jr., President of Rhode Island Fast Ferry, Inc., when she sent the notice of the instant proceeding to *The Providence Journal*. Comments of Mr. Vitali, Tr. 06/23/16; remarks of Hearing Officer Lueker, Tr. 06/23/16.

The Hearing

The hearing in this matter was held on June 23, 2016. The evidence presented relevant to the issues raised by this application (whether public convenience and necessity supports issuance of a CPCN, and whether the Applicant is fit, willing and able to perform the services proposed and to comply with the applicable regulations and statutes) is summarized below.

A number of pre-filed exhibits, including the application, were marked “for identification.”

Public Comment In Favor Of Application

Three members of the public appeared at the hearing to offer testimony in support of the application; no one appeared in opposition to the application.

Testimony of Mr. Peter Garino

Mr. Peter Garino testified that he was the Chief Operating Officer of the Rhode Island Department of Transportation. Mr. Garino explained that the Narragansett Bay is a magnificent but underutilized resource for Rhode Island, particularly with respect to its commercial potential as a transportation and tourism resource. He pointed out that Rhode Island is the second most densely populated state in the Union, yet the transportation and tourism potential of the state’s waters, particularly the Narragansett Bay, were largely untapped. He stated that, based on what his Department had observed in the past, a ferry service such as that proposed by the instant application had the

potential to take between 10,000 and 20,000 cars off the highways between Newport and Providence during the summer season, and potentially from 20,000 to 40,000 passengers, a significant benefit to Rhode Island's stressed highway system at its busiest time of the year.

Mr. Garino also noted that the use of Perrotti Park as the Newport terminus, and India Point Park as the Providence terminus should be of considerable benefit to the commercial interests of the surrounding neighborhoods for both communities. In order to facilitate matters on the Providence end of the trip, the Department of Transportation has partnered with the Rhode Island Public Transit Authority to provide a shuttle service for ferry passengers to and from India Point Park to the Providence train station; Perrotti Park's location in Newport is sufficiently convenient for disembarking ferry passengers without additional ground transportation being necessary.

Mr. Garino stated that his agency strongly supported approving this application.

Testimony of Ms. Martha Sheridan

Ms. Martha Sheridan testified that she was the President of the Providence/Warwick Convention and Visitor's Bureau. She explained that her organization works very hard to convince groups to come to Providence (and/or Warwick) to hold conventions and meetings. Many of the attendees at these conventions and meetings arrive without personal transportation, but would like to see more of Rhode Island than just the convention venue. A convenient

and affordable ferry service between Providence and Newport would do just that, allow an easy and comfortable way for visitors to get from Providence to the many visitor amenities in Newport while enjoying much of the scenic beauty of Rhode Island from its most famous waterway. She also offered that she believes that Newport's many visitors would, similarly, enjoy a convenient and comfortable way to travel to Providence to take advantage of the cultural and scenic attractions of that city, as well.

Ms. Sheridan concluded by saying that she strongly supported approval of this application.

Testimony of Mr. Darin Early

Mr. Darin Early testified that he was the Chief Executive Officer and President of the Rhode Island Commerce Corporation. Mr. Early stated that tourism in Rhode Island is a \$2.5 billion business in Rhode Island, and the proposed ferry service can only enhance the state's appeal as a tourist destination. Operating a 7-day service from Perrotti Park in Newport to India Point Park in Providence will benefit not only tourism in the state, it will offer Rhode Island commuters a welcome alternative to auto transport to get between home and work in these two cities. Mr. Early also pointed out that a similar service offered between these cities in the past worked well, and he has no doubt that it would do so again.

Mr. Early concluded by stating that he and his organization strongly supported approval of this application.

Applicant's Direct Case

Testimony of Mr. Thomas M. Wynne

Mr. Thomas M. Wynne, Vice President and General Counsel of the Applicant, testified on behalf the Applicant. Mr. Wynne addressed the relationship of the Applicant, SeaStreak, LLC, with its predecessor in interest in Rhode Island, New England Fast Ferry Company, LLC. He explained that SeaStreak, LLC, is a wholly owned subsidiary of SeaStreak Holding Company, LLC, which was formerly known as the New England Fast Ferry Company, LLC. Sister companies include Moran Towing Co., The Interlake Steamship Company, and Mormac Marine Group, Inc., all of which own or operate vessels throughout the Northeast; Moran Towing Co. is the largest tug and barge operator on the East and Gulf Coasts. SeaStreak, LLC, itself currently operates ferry services in the New York metropolitan area and the Cape and Island areas of Massachusetts; it has been operating ferry services for about 15 years (including, for several years, in Rhode Island under its former name of New England Fast Ferry Company, LLC).³

Mr. Wynne then went on to testify that his company had responded to a request for proposal from the Rhode Island Department of Transportation with respect to operating a seasonal ferry service between Newport and Providence, and had been selected as the service provider. It his understanding that this is a pilot project of sorts, with a Federal subsidy via the Rhode Island Department

³ Applicant Exhibit 1.

of Transportation, and that his company is currently obligated to operate for the current season only. The program is expected to run about three years, and at the end of the first season, both his company and the Rhode Island Department of Transportation will evaluate the program's continuing viability. He believes that the ferry service, should it prove popular, would be able to work in the long run, though perhaps only if the tariffs were adjusted if the subsidy were withdrawn.

Mr. Wynne verified that the schedule proposed by the application is as follows:

SCHEDULE⁴
July 1, 2016 – September 5, 2016

Weekday Schedule (Mon. – Thur.)

Providence Departures

10:00 a.m.
12:30 p.m.
6:00 p.m.

Newport Departures

11:15 a.m.
1:45 p.m.
7:15 p.m.

Weekends (Fri. – Sun.) / Holidays

Providence Departures

10:00 a.m.
12:30 p.m.
5:00 p.m.
9:45 p.m.

Newport Departures

11:15 a.m.
1:45 p.m.
6:15 p.m.
11:00 p.m.

He also testified that the proposed fares were \$10.00 one-way for adults, and \$5.00 one-way for children 12 and under, seniors 65 and older, and for the disabled⁵.

⁴ Applicant Exhibit 2.

Mr. Wynne testified that his company planned to staff the vessel with crews operating out of the company's New Bedford facility, and would be assigning the same captain who had operated this same ferry between Newport and Providence in the past. He expected that the company would be able to add additional trips to the schedule in the future if that appeared necessary.

The vessel the Applicant proposes to use is the *M/V Ocean State*, a RIPTA-Class Catamaran ferry constructed specifically for the Newport to Providence run and used for that purpose when the Applicant's predecessor company, New England Fast Ferry Company, LLC, was providing ferry services in Rhode Island (from 2003 through 2008). Mr. Wynne indicated that this vessel can carry 149 passengers. The vessel will be berthed at the McAllister Towing Corp. facility adjacent to the India Point Park ferry terminus.

Finally, Mr. Wynne indicated that the Applicant had already secured permission for the use of both termini, and had already invested in excess of \$50,000.00 in improvements for the India Point Park terminus to insure that passengers could embark and disembark safely. His company anticipates that about 30 percent of its total workforce (i.e., about 10 people) will be Rhode Island residents, with the remainder probably from southeastern Massachusetts.

⁵ "Disabled" is an undefined term. The Applicant should develop a clear definition of what constitutes a passenger eligible for the "disabled" rate.

Advocacy Section's Rebuttal Case

The Advocacy Section of the Division did not oppose the application for ferry service. Attorney Vitali did, however, note that an application to provide a similar ferry service had been filed by Rhode Island Fast Ferry, Inc., on January 25, 2016; the application had been assigned Division Docket number D-16-03, but the applicant in that case had not yet requested a hearing on the matter. Attorney Vitali requested that the Hearing Office take administrative notice of this prior filing, and further indicated that it was his understanding that the Hearing Officer had asked the Division Clerk to take steps to ensure that the applicant in this earlier case, Rhode Island Fast Ferry, Inc., had been notified of the instant hearing. The Hearing Officer confirmed that this had occurred, and that the Division Clerk had advised him that she had personally sent a copy of the hearing notice in this matter to Mr. Charles A. Donadio, Jr., President of Rhode Island Fast Ferry, Inc.⁶

Discussion

Applicable Law

The General Assembly has declared that it is the policy of the state to regulate certain business enterprises in the best interests of the public:

(a) The general assembly finds and therefore declares that:

⁶ Hearing Officer Lueker noted on the record that the hearing officer originally assigned to hear this matter, John Spirito, Esq., Division Chief of Legal Services, had indeed directed the Division Clerk to notify Mr. Donadio. Sometime later, this case was reassigned to Hearing Officer Lueker, who confirmed with the Clerk that she had sent a copy of the notice to Mr. Donadio. Subsequent to this hearing, Hearing Officer Lueker marked a copy of the filing Attorney Vitali had asked him to take notice of as Hearing Officer Exhibit E for Identification in order to make it clear in the record what information was available to him at the time of the hearing..

(1) The businesses of ... offering to the public transportation of persons and property ...are affected with a public interest;

(2) Supervision and reasonable regulation by the state of the manner in which such businesses construct their systems and carry on their operations within the state are necessary to protect and promote the convenience, health, comfort, safety, accommodation, and welfare of the people, and are a proper exercise of the police power of the state;

(3) Preservation of the state's resources, commerce, and industry requires the assurance of adequate public transportation ... facilities, ... all supplied to the people with reliability, at economical cost, and with due regard for the preservation and enhancement of the environment, the conservation of natural resources, including scenic, historic, and recreational assets, and the strengthening of long-range, land-use planning;

(b) It is hereby declared to be the policy of the state to provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient and economical ... transportation services ... to the inhabitants of the state, to provide just and reasonable rates and charges for such services and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, and to co-operate with other states and agencies of the federal government in promoting and coordinating efforts to achieve realization of this policy.

(c) To this end, there is hereby vested in the public utilities commission and *the division of public utilities and carriers* the exclusive power and authority to supervise, regulate, and make orders governing the conduct of companies offering to the public in intrastate commerce ... transportation services ... for the purpose of increasing and maintaining the efficiency of the companies, according desirable safeguards and convenience to their employees and to the public, and protecting them and the public against improper and unreasonable rates, tolls and charges by providing full, fair, and adequate administrative procedures and remedies, and by securing a judicial review to any party aggrieved by such an administrative proceeding or ruling. ...

R.I.G.L. § 39-1-1 (*emphasis supplied*.) It is apparent from this declaration of policy that the General Assembly intended to establish a qualified administrative body to evaluate technical evidence, address the myriad complex problems associated with regulatory proceedings, and render rational decisions. *South County Gas Co. v. Burke*, 551 A.2d 22 at 25 (R.I. 1988). In this case, the Division is the agency specifically charged with regulating transportation companies, such as the Applicant proposes to become, operating solely upon Narragansett Bay, an area entirely located within this state (although the Public Utilities Commission must still evaluate and approve the tariff of water transportation companies).

The General Assembly also took great care to define a number of terms relevant to the regulation of common carriers such as the Applicant proposed to become. For example:

“Common carrier”, except when used in chapters 12, 13, and 14 of this title, means and includes all carriers for hire or compensation including ... *steam boat, motor boat, power boat, hydrofoil, and ferry companies and all other companies operating any agency or facility for public use in this conveyance over fixed routes, or between fixed termini within this state or persons or property by or by a combination of land, air, or water,...*

R.I.G.L. § 39-1-2(7) (*emphasis supplied*.) Under this definition, anyone operating a “motor boat”, “power boat”, or “hydrofoil”, or “ferry” company, or any other company operating a conveyance for carrying persons or property for hire or compensation, by, or by a combination of, land, air, or water, along

fixed routes or between fixed termini, within this state, is considered a “common carrier.”

However, this definition of “common carrier” specifically excludes persons operating sail-powered vessels, or those operating powered vessels that do not follow fixed routes or operate between fixed termini (plural), even though they may be transporting passengers for hire or compensation. These types of operation, which would include excursion boats (which generally operate from a single terminus, with each cruise beginning and ending at that terminus to embark and disembark all passengers with no other stops) are considered “charter carriers”:

“Charter carrier” means and includes all carriers for hire or compensation within this state not included in the definition of common carrier; ...

R.I.G.L. § 39-1-2(4).

The Applicant, which proposes to transport passengers for compensation between fixed termini in Newport, Rhode Island, and Providence, Rhode Island, clearly comes within the definition of a common carrier. As a common carrier, the Applicant is subject to regulation as a public utility:

“Public utility” means and includes ... every company operating or doing business in intrastate commerce and in this state as a ... common carrier

R.I.G.L. § 39-1-2(20). As a common carrier type of public utility, the Applicant is subject to the authority of the Administrator of the Division in all matters save approval of the Applicant’s tariff:

The administrator ... shall exercise the jurisdiction, supervision, powers, and duties not specifically assigned to the commission, including the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities and who shall perform such other duties and have such powers as are hereinafter set forth.

R.I.G.L. § 39-1-3(b).

The application process itself is governed by chapter 3 of Title 39:

(a) No common carrier of persons and/or property operating upon 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....

(c) Notwithstanding any provision of §§ 39-5-1 and/or 42-35-15 or any other provision of the general or public laws to the contrary, no agency nor reviewing court, may order 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. Nothing herein shall be construed to limit the right of any petitioner, public utility, party in interest or other person or entity aggrieved by an order of the division entered under § 39-3-3.1, from seeking judicial review in accordance with §§ 39-5-1 and/or 42-35-15.

R.I.G.L. § 39-3-3. Collectively, these two subsections establish the need to apply to the Division for a CPCN prior to beginning operations as common carrier by water and make it clear that the application process will proceed to its conclusion (i.e., issuance of a Report and Order by the Division determining whether or not the application is approved) before any party may challenge the application process in court (under R.I.G.L. §§ 39-5-1 and 42-35-15, appeals of Division orders may only be made to Superior Court). Once the application is filed, the Division is required to schedule a hearing on the application after first

ensuring that the interested municipal officials and the public are properly notified. R.I.G.L. § 39-3-3.1.

It is interesting to note that R.I.G.L. § 39-3-3 only requires the Applicant to show that public convenience and necessity supports issuance of a CPCN; there is no requirement under that statute for the Applicant to establish that it is fit, willing and able to perform the services proposed and to comply with the applicable regulations and statutes. However, “as part of its broad statutory authority to protect the public, the Division must ensure that an applicant for a certificate is fit, willing and able to properly perform the service performed. Moreover, the Division must be confident that the Applicant will not only provide safe and reliable service, but also will adhere to Orders of the Division, as well as applicable rules and regulations promulgated by the Division.” *See In Re Island Hi-Speed Ferry, LLC, 8 Pier Marketplace, Narragansett, RI 01882*, Division Report and Order Number 15652 issued on August 25, 1998, in Division Docket No. 98 MC 16 (application for a CPCN to operate a high speed ferry between the Port of Galilee and the Town of New Shoreham; footnotes omitted); *see also* R.I.G.L. § 39-1-38 for the General Assembly’s grant of broad incidental powers to the Division. Accordingly, in order to have its application for operating authority approved, the Applicant must establish not only that public convenience and necessity requires issuing a CPCN, but that the Applicant is fit, willing and able.

However, satisfying the Division that a CPCN should be issued is only the beginning, not the end, of a ferry company's administrative journey; the Public Utilities Commission has a role to play in this process, too, and one which must be played out before the Applicant can begin any ferry operations.

Authority To Approve Rates

The basic delineation of the functions of the Commission and Division is set out in R.I.G.L. § 39-1-3. According to this statute:

... The commission shall serve as a quasi-judicial tribunal with jurisdiction, powers, and duties to ... *hold investigations and hearings involving the rates, tariffs, tolls, and charges*, and the sufficiency and reasonableness of facilities and accommodations of railroad, gas, electric distribution, water, telephone, telegraph, and pipeline public utilities, the location of railroad depots and stations, and the control of grade crossings, the revocation, suspension, or alteration of certificates issued pursuant to R.I.G.L. § 39-10-4, appeals under R.I.G.L. § 39-1-30, petitions under R.I.G.L. § 39-1-31, and proceedings under R.I.G.L. § 39-1-32.

R.I.G.L. § 39-1-3(a) (*emphasis supplied*). While the Commission clearly has broad authority under this provision with regard to "rates, tariffs, tolls, and charges," the shopping list of public utilities to which that language applies does not include common carriers other than railroads.

With respect to the Division's authority, the same statute provides as follows:

The administrator shall be a person who is not a commissioner and who shall exercise the jurisdiction, supervision, powers, and duties not specifically assigned to the commission, *including the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and*

charges of public utilities and who shall perform such other duties and have such powers as are hereinafter set forth....

R.I.G.L. § 39-1-3(b) (*emphasis* supplied). On its face, this is a rather broad grant of authority to the Division that would arguably cover authority over any “rates, tariffs, tolls, and charges” for utilities not specifically covered in the Commission’s assignment – including such common carriers as ferries. Yet it also contains language suggesting that it is the Commission that issues “all regulations and orders ... governing the ... charges of public utilities.” Clearly, we will have to look further for clarification.

That clarification comes in R.I.G.L. § 39-3-11(b), which provides, in pertinent part:

Upon receipt from a common carrier of persons and/or property *upon water* of a notice of any change proposed to be made in any schedule filed pursuant to § 39-3-10, *the commission* shall give notice as it may prescribe of the pendency of the proposal and of the time and place of the hearing thereon to the mayor and also any city manager of each city, and to the president of the town council and also any town manager of each town in which the carrier picks up or discharges passengers. *The commission* shall also publish a notice of the hearing at least ten (10) days prior to the date thereof in a newspaper of general circulation in each city or town in which the carrier picks up or discharges passengers. In all other respects, hearings and investigations with respect to the proposals by the carriers shall be governed by the provisions of subsection (a) of this section.

(*Emphasis* supplied.) This section makes it crystal clear that it is the Commission, and not the Division, that has jurisdiction over the “rates, tolls and charges” of **all** common carriers of persons and/or property *upon water*, **not just those of ferry operations.**

This conclusion is reinforced when you consider that there is specific statutory authority granting the Division power over the “rates, tolls and charges” of several clearly delineated types of common carriers. R.I.G.L. §§ 39-12-12 and 39-12-13 grant the Division the power to establish and alter the rates, charges, classifications, regulations and practices of common carriers of property. R.I.G.L. § 39-13-2 grants the Division the power to establish and alter the rates, charges, classifications, regulations and practices of jitney operators. R.I.G.L. §§ 39-14-2, 39-14-2.1, and 39-14-2.2 grant the Division the power to establish and alter the rates, charges, classifications, regulations and practices of taxicabs and limited public motor vehicles (common carriers of persons).

There is no comparable grant to the Division of explicit authority over the “rates, tolls and charges” of common carriers of persons and/or property *upon water* anywhere in Title 39. Applying the maxim of statutory interpretation *expressio unius est exclusio alterius*, we may conclude that because the General Assembly chose not to give the Division express authority over the “rates, tolls and charges” of common carriers of persons and/or property *upon water*, while it did give the Division such express authority over other types of common carriers, the General Assembly must have intended to have that authority remain with the Commission (to whom the General Assembly gave broad general authority with respect to most public utilities *including* common carriers of persons and/or property *upon water*).

In *O'Neil v. Interstate Navigation Company*, 565 A.2d 530 (R.I. 1989), the Rhode Island Supreme Court adopted the same analysis to conclude that the Commission has subject matter jurisdiction over rate change applications filed under R.I.G.L. § 39-3-11. In that case, Interstate Navigation Company, a ferry operator transporting passengers and cargo between Point Judith and New Shoreham, filed an application with the Commission to adjust its tariffs. The Commission, by a 2-1 vote, held that it did not have subject matter jurisdiction over the application because common carriers of passengers and property by water were not among the public utilities specifically enumerated in R.I.G.L. § 39-1-3(a) as being subject to the Commission's jurisdiction with respect to investigating and holding hearings involving "rates, tariffs, tolls and charges." Upon appeal, the Supreme Court disagreed, stating:

The ambiguity in § 39-1-3 can be clarified when read together with other sections of the statute. Interstate, a ferry company, is engaged in the water transportation of persons, vehicles, and freight to New Shoreham, Rhode Island. Interstate is a common carrier as defined by § 39-1-2(8)⁷, which defines a common carrier as all carriers for hire or compensation, including ferry companies. According to § 39-1-2(7)⁸, Interstate would be classified as a public utility by virtue of being a common carrier.

In *Town of New Shoreham v. Rhode Island Public Utilities Commission*, 464 A.2d 730, 737 n.5 (R.I. 1983), we stated that "the commission has exclusive jurisdiction to determine the rates of public utilities." Further, pursuant to G.L. 1956 (1984 Reenactment) § 39-3-11, as amended by P.L. 1986, ch. 504, § 2,

⁷ Since this decision was issued in 1989, the definition set out in § 39-1-2 has been renumbered. "Common carrier" is now defined at R.I.G.L. 1956 (2006 Reenactment) § 39-1-2(7) rather than § 39-1-2(8) as cited in the *O'Neil* decision.

⁸ Since this decision was issued in 1989, the definition set out in § 39-1-2 has been renumbered. "Public utility" is now defined at R.I.G.L. 1956 (2006 Reenactment) § 39-1-2(20) rather than § 39-1-2(7) as cited in the *O'Neil* decision.

the commission has the jurisdiction to review rate-change applications of public utilities, to hold hearings and investigations, and to issue orders pertaining to these rate-change applications. Section 39-3-11 illustrates the Legislature's intention to reserve rate-making authority over public utilities to the quasi-judicial commission.

The commission relied on the certificate requirement imposed on water carriers by § 39-3-3 in determining that the division had jurisdiction to hear Interstate's rate-change application. Section 39-3-3 requires water carriers to obtain a certificate of public convenience and necessity from the division prior to commencing business within the state. **Section 39-3-3's certificate requirement is not applicable to the determination of rates of water carriers.** The issuance of certificates of public convenience and necessity to utilities is an administrative function reserved to the division. **The determination of rates of water carriers is a quasi-judicial function reserved to the commission.**

Further, the commission interpreted specific legislative grants of rate-making power to the division over certain common carriers to extend to *all* common carriers including ferries. The Legislature delegated some of the commission's rate-making authority to the division. These include rate-making power over air carriers (G.L. 1956 (1984 Reenactment) chapter 11 of title 39), motor carriers of property (chapter 12 of title 39), motor passenger carriers (chapter 13 of title 39), and taxi cabs and limited public motor vehicles (chapter 14 of title 39). This delegation of rate-making authority is not absolute; it is limited to those specifically enumerated by the Legislature. Had the Legislature intended to delegate rate-making authority over ferries to the division, it would have done so in a similar manner.

O'Neil at 532-533 (footnotes in text omitted) (**emphasis** supplied).

While *O'Neil* dealt only with filing new rates and charges (that is, with modifying existing rates and charges), the Supreme Court soon extended its rationale to cover the initial rate-filing of a start-up company such as the Applicant:

...[W]e conclude that although § 39-3-10 may be construed as a “file and run” statute wherein a start-up utility may simply file a rate with the Commission without requiring initial approval of that rate, the Commission has the authority to *sua sponte* investigate the rates of a public utility at any time. Further, we conclude that the Commission has broad authority under § 39-3-11 to review and approve the rates of a public utility, whether an initial rate or a proposed change of existing rates, and is mandated to periodically review and hold public hearings respecting those rates in the absence of any proposed rate change. Therefore, we are satisfied that **the Commission has subject matter jurisdiction to determine the propriety of the initial rate filing of a public utility, particularly where, as in this case, the Division’s Certificate of Public Convenience and Necessity is conditioned upon the initial rate filing approval of the Commission.**

In Re Island Hi-Speed Ferry, LLC., 746 A.2d 1240, 1244 (R.I. 2000) (**emphasis** supplied).

In view of these decisions, and particularly in view of the fact that R.I.G.L. §§ 39-3-3 and 39-3-3.1, and the Supreme Court in *O’Neil*, speak of “water carriers” without distinguishing between ferries and other types of water carriers, we must conclude that the type of operation proposed by the application in this case requires initial tariff approval from the Commission. We are confident that the Applicant agrees with our analysis on this particular issue as we are aware that the Applicant has already filed proposed rates with the Public Utilities Commission, and that agency has already opened Commission Docket number 4621 for the purpose of addressing the Applicant’s proposed rates.

Findings

The Division notes that no one filed a motion to intervene in this matter for the purpose of actively opposing this application. Further, the Division notes that the Applicant's predecessor in interest, New England Fast Ferry Company, LLC, was previously granted authority very similar to that sought in this case (which, in turn, required similar findings as to fitness and public convenience and necessity). *See generally In Re Boston Harbor Cruises LLC d/b/a "Ride the Wave" Application For Ferry Authority*, Division Report and Order number 16199 dated and effective March 10, 2000, in Division Docket number 00 MC 09 (finding public convenience and necessity supported ferry service between Newport, Portsmouth and Providence); *In Re Request For Authority To Transfer Certificate W-1167 From Boston Harbor Cruises, LLC, to New England Fast Ferry Company, LLC*, Division Report and Order number 17426 dated and effective April 22, 2003, in Division Docket number 03 MC 25 (finding New England Fast Ferry Company, LLC, fit, and that public convenience and necessity still required ferry service between Newport, Portsmouth and Providence); *In Re Certificate Transfer From New England Fast Ferry Company, LLC, To NEXTMarine*, Division Report and Order number 19672 dated and effective June 22, 2009, in Division Docket number 09 MC 38 (finding that public convenience and necessity still required ferry service between Newport and Providence). Much the same case has been presented now as was presented in those three earlier applications.

In addition, the Division notes that the Applicant will be using the same vessel, under the same master, as its predecessor in interest used for providing essentially the same services as those currently proposed. This, too, strongly supports a finding that this Applicant is “fit.”

With respect to whether “public convenience and necessity” requires the proposed ferry service, it appears to the Division that the record supports that finding. The three witnesses who all offered public comment testimony strongly supported the application on behalf of their respective organizations. The first of these witnesses, Mr. Garino, represented the Rhode Island Department of Transportation, an agency specifically charged with ensuring safe and efficient public transportation facilities within the State of Rhode Island. He made it very clear that his agency believed that establishing the proposed ferry service has the potential to reduce some traffic congestion along the very busy highway corridor between Newport and Providence, a consideration that speaks directly to the “present or future public convenience and necessity.”

The other two public comment witnesses spoke from a slightly different perspective, that of encouraging commercial activities – including tourism – in this state. Both agreed that the proposed service would be in furtherance of the stated goals of their organizations and would clearly facilitate transportation within the state between two very important tourism centers. Both made the point that travel by this ferry has the potential to be faster and

more pleasant than any highway travel between Newport and Providence during the very busy summer tourist season.

The Division also places considerable weight in this case on the fact that the State's transportation authorities have obtained Federal funding to subsidize the rates to be charged the public for these services. Clearly, both the State and Federal transportation authorities believe that a seasonal ferry service between Newport and Providence such as this one will serve the public interest by offering an affordable alternative to highway transportation, and equally clearly the riding public will benefit directly by having their fares reduced through the subsidy.

For the foregoing reasons, the Division finds that the Applicant has established that its proposed services will satisfy "public convenience and necessity."

The Division recognizes that there is another application pending to provide similar services to that proposed in this docket. However, common carriers of passengers are not legally entitled to protection from reasonable competition.⁹ The primary concern is the matter of whether the public is receiving adequate transportation services. The goal of preserving the investments of other common carrier businesses, including even those already

⁹ See *Application Filing By The Block Island Trolley Company, Inc.*, Division Report and Order number 15285, issued on April 29, 1997, in Division Docket No. 97-MC-18, citing *Yellow Cab Co. v. Public Utilities Hearing Board*, 73 R.I. 217, 54 A.2d 28 (1947), a case where taxicabs and limited public motor vehicles sought to block a trolley company from being allowed to operate a jitney on the grounds that many taxi operations would be "deprived of a substantial portion of their income." The Division rejected this argument as a basis for denying the application.

in business, from the effects of competition is a secondary concern,¹⁰ at least where the existing businesses are not providing a life-line service.

Based on the record, the Division finds that the Applicant has shown itself to be fit, willing and able to provide the proposed services, and to comply with all applicable rules, regulations and statutes pertaining to the proposed services. Further, the Division finds that the Applicant has shown that there is a public convenience and necessity that warrants the award of a certificate granting authority for a ferry service between termini located in Newport, Rhode Island, and Providence, Rhode Island.

Having said this, it is important to note that the Division is not the only governmental agency which has jurisdiction over all aspects of the proposed ferry service. For example, the Applicant must first obtain a Certificate of Inspection from the Coast Guard before it can begin to carry passengers on its vessel, and it will have to secure landing rights from the appropriate agency or landowner for each of the proposed termini on its route. The Applicant shall be expected to show compliance with all regulatory requirements, including those from other agencies, before it can begin operating its ferry service.

Normally, the Division requires that its personnel inspect the vessel proposed for a ferry service in order to ensure that the vessel conforms to the application and provides all of the services and amenities claimed for it in both the application and any supporting testimony offered at the hearing. In this

¹⁰ *Yellow Cab Co. v. Public Utilities Hearing Board*, 96 R.I. 247, 191 A.2d 23 (1963).

case, however, the Motor Carrier Section of the Division is familiar with the *M/V Ocean State*, having inspected it before when it was first put into service for the Newport to Providence ferry run. For that reason, we shall not require another inspection by Motor Carrier Section personnel in this case.

Finally, the Division approves the operating schedule set out in Applicant Exhibit 2. The Applicant shall conform to this schedule and shall not modify it without the express prior approval of the Division.

Accordingly, it is

(22450) ORDERED:

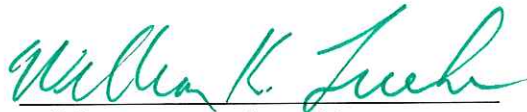
1. That the application of SeaStreak, LLC, 2 First Avenue, Atlantic Highlands, New Jersey 07716, for a Certificate of Public Convenience and Necessity ("CPCN") authorizing the holder thereof to operate as a water vessel passenger carrier providing a seasonal ferry service from July 1 through September 5 between termini located in Newport, Rhode Island, and Providence, Rhode Island, pursuant to R.I.G.L. §§ 39-3-3 and 39-3-3.1 is hereby approved.
 - a. If the Applicant wishes to adjust its starting or ending dates for subsequent years it must first obtain the approval of the Division; such requests to amend the starting or ending dates should be submitted to the Division at least 60 days in advance of the effective date of the proposed schedule amendment.

- b. The Division has the discretion to approve such requests for modified starting and ending dates with, or without, holding a public hearing, depending on the circumstances.
2. The Division's approval is subject to fulfillment of the following terms and conditions prior to the commencement of the transportation services:
 - a. That prior to offering service to the public, the Applicant must provide the Division with sufficient documentation proving that it has complied with all necessary government regulations (i.e., U.S. Coast Guard, State and local permits);
 - b. That the vessel utilized by the Applicant to provide the service contain all the amenities stated in the Applicant's testimony and business plan, and that the services provided substantially conform with the evidence of record;
 - c. That the Operating Schedule proposed during this hearing in Applicant's Exhibit 2 is approved; the Applicant shall not modify that approved schedule with respect to the approved departure times without the prior express approval of the Division.
 - d. That the Applicant file with the Public Utilities Commission, and have approved, tariffs reflecting the rates and charges to be charged for its services; and,
 - e. That the Applicant submit proof of insurance and also hand deliver to the Motor Carrier Section of the Division a copy of the approved tariffs

reflecting the rates and charges approved by the Public Utilities Commission.

3. Upon satisfactory completion of the aforementioned terms and conditions, a CPCN shall be issued. The Applicant shall not perform any of the transportation services authorized through this Report and Order until it has satisfied the aforementioned terms and conditions and has been physically issued a CPCN.
4. If the terms and conditions outlined above in paragraphs 2(a), 2(b), 2(c), 2(d) and 2(e) are not met within one hundred eighty (180) days, the approval granted herein will be of no further force and effect.
5. The Applicant's business address must remain at the same location as listed on the application unless otherwise approved by the Division.
6. The authority conferred herein is further limited to the water vessels that were described by the Applicant during the hearing. The Division must approve any change in water vessel.

DATED AND EFFECTIVE AT WARWICK, RHODE ISLAND, JUNE 28, 2016.



William K. Lueker, Esq.
Deputy Chief of Legal Services
Hearing Officer

APPROVED:



Thomas F. Ahern
Administrator



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF PUBLIC UTILITIES AND CARRIERS
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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.