

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: ISLAND HI-SPEED FERRY'S :
REQUEST FOR CONFIDENTIAL : DOCKET NO. 2802
TREATMENT OF COMPLIANCE :
REPORT AND DATA RESPONSES :

REPORT AND ORDER

On January 15, 2002, Island Hi-Speed Ferry LLC. ("Hi-Speed") filed a Compliance Report ("Compliance Report") with the Rhode Island Public Utilities Commission ("Commission"). The Compliance Report contained Hi-Speed's financial and operations data for the year 2001 and projections for 2002. Hi-Speed considered the data in the Compliance Report to be proprietary and confidential. Accordingly, Hi-Speed requested that the Commission enter a protective order limiting disclosure of the Compliance Report to the Commission and the Division of Public Utilities and Carriers ("Division").¹ Hi-Speed's basis for requesting this protection was that Interstate Navigation Company ("Interstate") is authorized to compete directly with Hi-Speed for the high speed ferry market and, therefore, disclosure of Hi-Speed's financial and operating information would give Interstate an unfair competitive advantage.

¹ The Commission treated Hi-Speed's request for a protective order as a request for confidential treatment pursuant to Rule 1.2(g) of the Commission's Rules of Practice and Procedure ("Rules"). In accordance with the Commission's past practice, and as permitted by Rule 1.2(g), the presiding commissioner (Chairman Germani) granted Hi-Speed's request for confidential treatment of the Compliance Report on a preliminary basis. In the event further action is requested or required, as in the case of an access to public records request, the full Commission will, after affording the parties notice

On February 1, 2002, Interstate objected to Hi-Speed's request for confidential treatment and made a request for the Compliance Report pursuant to the Rhode Island Access to Public Records Act ("APRA"), R.I.G.L. §§ 38-2-1, et seq. In support of its position, Interstate argued that it is entitled to the Compliance Report under APRA because of Charlesgate Nursing Center v. Bordeleau.² In Charlesgate, the Rhode Island Supreme Court upheld the disclosure of financial cost reports submitted by Charlesgate to the state Department of Human Services pursuant to an APRA request made by Local Union No. 76.³ Interstate noted that the Court rejected Charlesgate's argument that the disclosure of these financial reports would give a competitive advantage to other nursing homes. Interstate also noted that the Court rejected Charlesgate's argument that the information should not be disclosed to the labor union because it would give the union an advantage in labor negotiations.⁴

In addition, Interstate argued that the Compliance Report should be publicly disclosed because the information therein is necessary for the Commission to exercise its regulatory responsibilities over Hi-Speed pursuant to Title 39 of the Rhode Island General Laws ("Title 39"). According to Interstate, the Compliance Report is the equivalent of test

and an opportunity to be heard, make a final determination as to the request for confidential treatment.

² Charlesgate Nursing Center v. Bordeleau, 568 A.2d.775 (R.I. 1990), cited in Interstate's APRA memorandum, p. 6.

³ Interstate's APRA memorandum, pp. 6-7.

⁴ Id., pp. 7-8.

year and rate year filing information. Therefore, Interstate contended, to declare the information in the Compliance Report to be confidential would set a bad precedent and require the Commission to conduct its rate hearings in secret. Interstate also argued that, as a party in this docket, Interstate needs the information in the Compliance Report in order to assist the Commission in setting rates for Hi-Speed for its second year of operation.⁵

On February 12, 2002, Hi-Speed submitted an objection to Interstate's APRA request and objection. Hi-Speed noted that a public hearing under Title 39 is required only when a utility has requested a change in rates. Hi-Speed indicated that it is not requesting a rate change and that a full year's worth of operating and financial data needed to establish new rates was not available. In addition, Hi-Speed argued that in future Hi-Speed rate proceedings, the Commission should reexamine the appropriateness of granting full intervenor status to Interstate and the town of New Shoreham on Block Island ("New Shoreham").⁶

Hi-Speed relied upon Providence Journal Co. v. Convention Center Authority⁷ to support its contention that Interstate's APRA request for the Compliance Report should be denied because disclosure of the information contained therein would "cause substantial harm to the

⁵ Id., pp. 9-10.

⁶ Hi-Speed's Objection dated 2/12/02, pp. 3-5.

competitive position” of Hi-Speed. Hi-Speed also argued that the Compliance Report is exempt from public disclosure under the trade secret exemption provided in R.I.G.L. § 38-2-2(4)(B).⁸ Hi-Speed emphasized that the Compliance Report would provide Interstate, a potential competitor, with competitively sensitive information as to the actual cost and prospective viability of starting up its own, competing high speed ferry service to Block Island. Hi-Speed explained that this concern was of particular relevance because the Rhode Island Superior Court had recently granted Interstate the right to enter the high speed ferry market for Block Island.⁹ In regards to New Shoreham’s objection, Hi-Speed stressed that it has not requested a rate change and that the initial \$26.00 rate should remain in effect until a full year’s worth of financial and operating data is collected.¹⁰

On February 21, 2002, the Commission received an objection from the town of New Shoreham regarding Hi-Speed’s Compliance Report. First, New Shoreham stated that no new rate for Hi-Speed had been set for 2002, and that New Shoreham would be entitled to participate in any such rate proceeding. Secondly, New Shoreham argued that Hi-Speed’s request for a protective order should be considered as only a letter and not as a motion. On February 28, 2002, New Shoreham resubmitted its

⁷ Providence Journal Co. v. Convention Center Authority, 774 A.2d 40 (R.I. 2001), cited in Hi-Speed’s Objection, p. 5.

⁸ Hi-Speed’s Objection, p. 6.

⁹ Id., p. 7.

¹⁰ Id., p. 9.

objection to Hi-Speed's request. Once again, New Shoreham argued no rate had been set for 2002, that the \$26.00 rate was set exclusively for 2001; and that New Shoreham would be entitled to participate in any hearings regarding Hi-Speed's rates for 2002.

After notice, a public hearing was conducted on February 27, 2002 at the offices of the Commission, 89 Jefferson Boulevard, Warwick, Rhode Island. The following appearances were entered:

FOR HI-SPEED:	Mark Hagopian, Esq. Jon Hagopian, Esq.
FOR INTERSTATE:	Michael McElroy, Esq.
FOR NEW SHOREHAM:	Merlyn O'Keefe, Esq.
FOR DIVISION:	Paul Roberti, Esq. Assistant Attorney General
FOR COMMISSION:	Steven Frias, Esq. Executive Counsel

At the hearing, Mr. McElroy contended that Hi-Speed's Compliance Report should be made public under both APRA and Title 39. In addition, he argued that to grant confidential treatment to Hi-Speed's filing could set a precedent that any filings by a competitive utility would receive confidential treatment.¹¹ Mr. McElroy suggested that, if information sought is confidential, review thereof should be limited to the Commission and the parties.¹²

¹¹ Tr. 2/27/02, pp. 8-10.

¹² Id., pp. 11-12.

In response, Mr. Hagopian emphasized that the Providence Journal case was controlling as the most recent Rhode Island Supreme Court case to interpret the APRA, and that the Charlesgate case was distinguishable as it involved the expenditure of public funds.¹³ Mr. Hagopian also contended that Interstate and New Shoreham were not entitled to the Compliance Report under Title 39 because Hi-Speed was not seeking a rate change.¹⁴ Also, Mr. Hagopian explained that the disclosure to Interstate of the information in the Compliance Report would cause substantial competitive harm to Hi-Speed because Interstate can enter the same high-speed ferry market.¹⁵

For the Division, Mr. Roberti pointed out that in a recent Division proceeding, Interstate had argued that whether it was planning to enter the high speed ferry market was competitively sensitive information that could not be disclosed to the Division. Furthermore, during its rate cases, Interstate has requested that certain information be held confidential.¹⁶ Mr. Roberti also emphasized that the public interest would be adequately protected if access to High Speed's Compliance Report were limited to the Division, which by law serves as the ratepayer advocate in rate matters.¹⁷

¹³ Id., p. 37.

¹⁴ Id., p. 40.

¹⁵ Id., pp. 44-45.

¹⁶ Id., pp. 52-53.

¹⁷ Id., pp. 55-57.

After a brief recess, Mr. McElroy conceded that if Interstate was not a party to a Title 39 ratemaking proceeding, Interstate would not be entitled to Hi-Speed's financial information under Title 39.¹⁸ Mr. Hagopian then explained which portions of the Compliance Report, if disclosed, would cause substantial harm to Hi-Speed's competitive position.¹⁹ At the conclusion of the hearing, the Commission unanimously voted to grant confidential and proprietary treatment to Hi-Speed's Compliance Report and related Data Responses to the Commission on a preliminary basis.²⁰

In a post-hearing brief filed with the Commission on March 6, 2002, Hi-Speed maintained that the Commission is not required to conduct a rate case to set Hi-Speed's rates for 2002. Hi-Speed argued that nothing in Order No. 15816 (issued March 31, 1999), the Commission's Rules, the Rhode Island General Laws, or the Rhode Island Supreme Court's cases requires further ratemaking for Hi-Speed for the year 2002. Rather, Hi-Speed stressed, the Commission indicated it would revisit the rates after one year's operating data was available.²¹ Also, Hi-Speed pointed out that the Rhode Island Supreme Court had upheld the Commission's practical approach to setting Hi-Speed's initial rates and noted that it is within the Commission's discretion to

¹⁸ Id., pp. 80-81.

¹⁹ Id., pp. 88-93, 97-100.

²⁰ Id., pp. 129-130. On February 26, 2002, the Commission received Data Responses from Hi-Speed regarding its Compliance Report.

²¹ Hi-Speed's Post-Hearing Memorandum, pp. 1-2 (citing Order No. 15816 (issued 3/31/99), p. 59).

determine which ratemaking approach to utilize.²² Accordingly, Hi-Speed concluded, it is within the Commission's discretion to leave Hi-Speed's initial rates in place until a full year's financial and operating data is available after the 2002 operating season.²³

On March 8, 2002, Interstate filed its post-hearing memorandum. Interstate maintained that the Commission had only set initial rates for Hi-Speed and would revisit the rates after one year's actual operating data had become available.²⁴ Interstate argued that it would be illegal for the Commission not to hold hearings to establish Hi-Speed's rates for 2002 and that the initial rates set for 2001 could not be used for 2002.²⁵

In addition, on March 8, 2002, Interstate filed an objection to a Commission data request. In response to the Commission's inquiry as to whether Interstate has made preparations or has plans to enter the high speed ferry business in the future, Interstate objected that the information requested "is proprietary and confidential and is protected from disclosure because to disclose it would cause substantial harm to the competitive position of Interstate."²⁶ Also, Interstate stated that it is "currently in competition with Island Hi-Speed Ferry," and stated that Interstate can not know whether or not it will add a so-called high speed vessel to its fleet now or at any time in the future.²⁷

²² *Id.*, p. 3 (citing *In re Island Hi-Speed Ferry, LLC*, 746, A.2d 1240, 1246 (R.I. 2000)).

²³ *Id.*, pp. 3-4.

²⁴ Interstate's Post-Hearing Memorandum, p. 1 (citing *Order No. 15816*, p. 59).

²⁵ *Id.*, p. 15.

²⁶ Interstate's Data Response dated 3/8/02, p. 2.

²⁷ *Id.*, pp. 1, 4.

COMMISSION FINDINGS

At an open meeting held on March 14, 2002, the Commission reviewed the arguments made by the parties. For the reasons discussed below, the Commission by unanimous vote made a final determination that Hi-Speed's Compliance Report and related Data Responses to the Commission are to be deemed proprietary and confidential, except for those specific portions of said documents voluntarily disclosed by Hi-Speed at the February 27, 2002 hearing and in its March 13, 2002 letter. Accordingly, the Commission granted Hi-Speed's request for confidential treatment of said documents, and denied Interstate's APRA request and overruled Interstate's and New Shoreham's objections. The Commission also determined that Hi-Speed's initial rates will remain in effect because the Commission will not be conducting a new rate proceeding for Hi-Speed until a full year of financial and operating data is available.

It is the Commission's general practice and in accordance with its Rules to grant, on a preliminary basis, a party's request for confidential treatment of information/documentation filed with the Commission. Upon receipt of an APRA request or an objection by a party to affording the information in question confidential treatment, the Commission will, after offering the parties an opportunity to be heard, make a final

determination as to whether the information or document in question will receive confidential treatment.²⁸

Hi-Speed bears the burden of proof to demonstrate that the Compliance Report and related Data Responses are entitled to confidential and proprietary treatment. Hi-Speed's primary argument is that disclosure of the information contained in the Compliance Report and Data Responses will cause substantial harm to Hi-Speed's competitive position. The Commission is persuaded by the weight of Hi-Speed's arguments that the information sought by Interstate's APRA request should not be disclosed.

The APRA specifically allows for an exception to public disclosure for commercial or financial information that is proprietary or confidential.²⁹ The Rhode Island Supreme Court has recently interpreted the APRA, in accordance with federal law, to define as "confidential any financial or commercial information whose disclosure would be likely...to cause substantial harm to the competitive position of the person from whom the information was obtained".³⁰ Disclosure of Hi-Speed's Compliance Report and Data Responses would give a potential competitor such as Interstate competitively sensitive information as to the actual cost and prospective viability of providing a high speed ferry service to Block Island. In other words, we agree with Hi-Speed that

²⁸ The Commission also reserves the right, *sua sponte*, to deny a request for confidential treatment, whether or not an APRA request or objection has been received.

²⁹ R.I.G.L. § 38-2-2(4)(B).

disclosure of the Compliance Report and Data Responses would provide Interstate with an actual blueprint or “roadmap” for starting up its own, competing high speed ferry service to Block Island.

Although Interstate has had experience in the ferry business and may have operated a hydrofoil-type ferry in the 1970s, the high speed ferry service and type of vessel provided by Hi-Speed is unique and novel to Block Island. As in any entrepreneurial or creative commercial endeavor, the financial information developed in establishing such a business is proprietary and to disclose it to a potential competitor would likely cause substantial harm to the entrepreneur. In particular, Interstate is the incumbent ferry operation and could use its superior capital resources and name recognition in the market to enter the high-speed ferry business to Block Island. With the assistance of the financial and operating information contained in the Compliance Report and Data Responses, Interstate could, for example, determine how best to undercut Hi-Speed, how not to repeat any mistakes Hi-Speed may have made in starting up its high speed ferry service, or even decide not to enter the high speed ferry market because of its lack of profitability.

The Commission finds that the Charlesgate case is distinguishable from the facts presented here. First, Charlesgate preceded the Providence Journal case. Second, the Rhode Island Supreme Court rejected Charlesgate’s confidentiality arguments on the basis of federal

³⁰ Providence Journal Co. v. Convention Center Authority 774 A.2d 40 (R.I. 2001).

cases in which the courts required the disclosure of financial reports by medical institutions. In contrast, the facts in this case involve an entrepreneurial business venture in competition with an incumbent utility. Third, Charlesgate's financial information was not deemed confidential because there were numerous nursing homes in existence for many years at the time of the case and thus, the disclosure of the financial information in question would not assist a competitor in entering the nursing home market. In contrast, the high speed ferry business to Block Island is novel and entrepreneurial in nature.

Furthermore, the Commission finds it ironic, if not disingenuous, for Interstate to object to the Commission's data request as to whether Interstate is or may be planning to enter the high speed ferry market in Rhode Island. To object on the basis that disclosure of such information would cause substantial harm to Interstate's competitive position diminishes the credibility of Interstate's APRA argument for disclosure of Hi-Speed's competitively sensitive financial and operations data. Although Interstate stated it did not know if it would enter the high speed ferry market, the Commission notes that Interstate has stipulated that it is currently Hi-Speed's competitor; hence, it is not unreasonable to assume that Interstate would be likely to use the information contained in Hi-Speed's Compliance Report and Data Responses in a manner that would cause substantial harm to Hi-Speed's competitive position.

With regard to the Title 39 arguments of Interstate and New Shoreham, the Commission finds these arguments are either not ripe or without merit. The basis of Interstate's Title 39 argument is that the Commission has an open docket with respect to Hi-Speed and is in the process of conducting a rate proceeding. We disagree. The Commission is not presently conducting a rate proceeding regarding Hi-Speed. The initial rates currently in effect for Hi-Speed will remain in place until at least a full year of financial and operating data is available. To conduct a rate proceeding at this time based on only a few months of data, and then conduct another rate proceeding for Hi-Speed at the end of this year after a full year's data is collected, would be an inefficient use of time and resources on the part of this Commission and the Division. Also, allowing a full year's worth of data to be collected in order to set new rates, if appropriate, is consistent with the Commission's prior orders in this docket and will not harm the ratepayers.

Finally, the Commission does not consider Hi-Speed's Compliance Report filing to be an application for a rate change pursuant to R.I.G.L. § 39-3-11. At such time as Hi-Speed actually files for a rate change or has at least a full year of financial and operating data available, the Commission will exercise its discretion in opening a new docket with regard to setting new rates, if appropriate, for Hi-Speed. At that time, Interstate and New Shoreham may seek to intervene and the Commission

will decide whether or not to grant the motions.³¹ In the event that intervenor status is granted to Interstate and/or New Shoreham, the Commission will then decide to what extent, if any, and upon what terms Hi-Speed's financial and operating information may be disclosed to the other parties. As there is no Hi-Speed rate proceeding pending at this time, however, the issue of what information Interstate or New Shoreham may be entitled to receive in any subsequent Hi-Speed rate proceedings is premature and not ripe for determination at this time. We also note that the Division will, in any case, have access to all of Hi-Speed's financial and operating information and can ably represent and serve the interests of the ratepayers in any Hi-Speed rate proceedings.

Accordingly, it is

(17102) ORDERED:

1. The Compliance Report and related Data Responses filed by Island Hi-Speed Ferry LLC are deemed proprietary and confidential and shall not be disclosed, except for those specific portions disclosed by Island Hi-Speed Ferry LLC at the February 27, 2002 hearing and in its March 13, 2002 letter.
2. The initial rates set for Island Hi-Speed Ferry LLC pursuant to Commission Order No. 15816 will remain in effect until at least one full year's financial and operating data is available for

³¹ The Commission is mindful, however, of the RI Supreme Court's criticism of the intervenor status granted to Interstate and New Shoreham in the Docket 2802 rate proceedings.

purposes of setting new rates, if appropriate, for Island Hi-Speed Ferry LLC.

3. The Access to Public Records Act request of Interstate Navigation Company as well as the objections of Interstate Navigation Company and the town of New Shoreham are denied and overruled.

EFFECTIVE AT WARWICK, RHODE ISLAND PURSUANT TO AN OPEN MEETING DECISION ON MARCH 14, 2002. WRITTEN ORDER ISSUED AUGUST 20, 2002.

PUBLIC UTILITIES COMMISSION

Elia Germani, Chairman

Kate F. Racine, Commissioner

Brenda K. Gaynor, Commissioner