

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: April 11, 2023)

INTERSTATE NAVIGATION COMPANY :
d/b/a THE BLOCK ISLAND FERRY, :
Petitioner, :

v. :

RHODE ISLAND FAST FERRY, INC.; :
RHODE ISLAND DIVISION OF PUBLIC :
UTILITIES AND CARRIERS; and :
MACKY MCCLEARY, Administrator, :
Respondents. :

C.A. Nos.
PC-2016-4804; PC-2017-3409;
PC-2018-5806; PC-2018-7658

consolidated with

TOWN OF NEW SHOREHAM, :
Petitioner, :

v. :

RHODE ISLAND FAST FERRY, INC.; :
RHODE ISLAND DIVISION OF PUBLIC :
UTILITIES AND CARRIERS; and :
MACKY MCCLEARY, Administrator, :
Respondents. :

C.A. Nos.
PC-2016-4758; PC-2017-3405;
PC-2018-5679; PC-2018-7687

DECISION

TAFT-CARTER, J. Before this Court for decision is the consolidated administrative appeal of the Town of New Shoreham (Town) and Interstate Navigation Company d/b/a The Block Island Ferry (Interstate) (collectively Petitioners) from various orders of the Rhode Island Division of Public Utilities and Carriers (Division); most notably, a September 22, 2016 Report and Order No. 22548, conditionally approving Rhode Island Fast Ferry, Inc's (RIFF) application for authority to

operate a seasonal, passenger-only fast-ferry service between Quonset Point in North Kingstown and Old Harbor in New Shoreham (Block Island). *See generally* R. nos. 2, 71.¹

This Decision also resolves Petitioners’ various appeals from the Division’s: (1) September 24, 2013 Order No. 21170, issued in response to Petitioners’ Motions to Intervene, *id.* no. 13; (2) June 23, 2017 Order No. 22823, finding insufficient cause to revisit issues related to a proposed docking facility, *id.* no. 185; (3) July 16, 2018 Report and Order No. 23217, declining to revisit the Division’s prior denial of the Town’s Motion for Summary Disposition, again relating to the docking issue, *id.* no. 223; and (4) September 26, 2018 Order No. 23283, granting RIFF a one-year continuance to satisfy certain conditions imposed in Order No. 22548, specifically—again—the docking issue. *Id.* no. 239.

Jurisdiction is pursuant to G.L. 1956 §§ 39-3-6 and 42-35-15.

I

Facts & Travel

A

Relevant Statutory Requirements

The proceedings before the Division addressed in detail the legal standard for obtaining authorization to operate as a water carrier in Rhode Island; therefore, the Court will outline a brief

¹ Citations to the Record throughout this Decision generally refer to the December 4, 2021 partial refiling of the “Designation of Record of Administrative Proceeding,” docketed at PC-2016-4758, with the following exceptions: (1) Record document numbers 1 through 23 and 53 through 67 are included in the November 17, 2016 original filing of the “Designation of Record of Administrative Proceeding”; (2) Record document numbers 181 through 185 are found in the August 11, 2017 filing of the “Amended Designation of Record of Administrative Proceeding”; and (3) Record document numbers 232 through 239 can be located in the January 16, 2019 filing of the “Supplemental Designation of Record of Administrative Proceeding.” *See generally* Docket, PC-2016-4758. Record citations will include the Record document number and internal document pagination, when appropriate—e.g., “R. no. xx, at xx.”

summary of the applicable legal framework as background. The General Assembly established the Public Utilities Commission and the Division “to provide fair regulation of public utilities and carriers in the interest of the public, [and] to promote availability of adequate, efficient, and economical . . . transportation services and water supplies to the inhabitants of the state[.]” See G.L. 1956 § 39-1-1(b); *see also* § 39-1-3(a).

Pursuant to the Division’s authority to “supervise, regulate, and make orders governing the conduct of companies offering” public transportation services, a common carrier operating “upon water” is required to obtain a certificate from the Division certifying that “public convenience and necessity” require the services. See §§ 39-1-1(c), 39-3-3(a). “That certificate sets out the scope and termini of the carrier’s operations.” *Interstate Navigation Co. v. Division of Public Utilities & Carriers*, 824 A.2d 1282, 1287 (R.I. 2003).

In addition, an applicant seeking authority to operate as a water carrier must demonstrate that it is “fit, willing, and able” to provide the service proposed in its application. *Interstate Navigation Co. v. Division of Public Utilities & Carriers*, Nos. 98-4804, 98-4766, 1999 WL 813603, at *7-8 (R.I. Super. Aug. 31, 1999).

B

Proceedings Before the Division

1

RIFF’s Application & the Town’s Motion for Summary Disposition

On July 2, 2013, RIFF filed a “Request for Authority to Operate as Jitney and/or Water Carrier” (Application), seeking to operate a passenger-only, seasonal fast-ferry service from Quonset Point to Old Harbor. See *generally* R. no. 71. Petitioners opposed the Application and sought to intervene in the proceedings. *Id.* nos. 68, 70. Interstate operates an existing year-round

ferry service to Block Island, carrying passengers, cars, and freight which departs from Point Judith in Narragansett. (Compl. No. PC-2018-7658, ¶ 1.) The Division granted full intervenor status to the Town but limited Interstate’s intervention to the issue of “public convenience and necessity.” (R. no. 13, at 19-20.)

The Town then filed a Motion for Summary Disposition, pursuant to Rule 1.19(E) of the Division’s Rules of Practice and Procedure,² in which it argued that RIFF would be unable “in the foreseeable future” to construct or utilize a dock in Old Harbor. *Id.* no. 45, at 6. Consequently, the Town urged the Division to find that RIFF was not “fit, willing[,] and able” to perform the requested water carrier services. *Id.* at 5-6. Notwithstanding the fact that it had not yet obtained Town approval, RIFF argued in response that it had entered into a lease option agreement with a private company, Bluewater LLC (Bluewater), through which RIFF would use docking facilities to be constructed by Bluewater in Old Harbor. *See generally id.* no. 23. The Division denied the Town’s Motion, finding that RIFF, through Bluewater, had a “realistic expectation of having access to a future docking facility in Old Harbor[.]” *Id.* no. 4, at 22. The Division also stated, however, that it “reserve[d] the right to revisit this matter upon a showing by the Town that it has been successful in its efforts to prevent the construction of Bluewater’s planned dock before [the United States Army Corps of Engineers (USACE)] or [the Rhode Island Coastal Resources Management Council (CRMC)].” *Id.* at 23.

² Rule 1.19(E) states that “[a]ny party may file a motion for summary disposition of all or part of any matter pending before the Division. If the Hearing Officer determines that there is no genuine issue of fact material to the decision, summary disposition of all or part of the matter may be granted.” (815 RICR 00-00-1.19(E).)

Evidentiary Hearings

Thereafter, on March 2, 15, 22, and 24 of 2016, the Division conducted four evidentiary hearings in consideration of the Application. *See generally id.* nos. 168-71.

i

RIFF's Presentation

In addition to Charles Donadio and Lawrence Kunkel, whose testimonies are further described below, RIFF's witnesses also included: (1) Elizabeth Dolan, in her capacity as the President of the North Kingstown Town Council, *id.* no. 89; (2) Martha Pughe, Executive Director of the North Kingstown Chamber of Commerce, *id.* no. 87; (3) Myrna George, President of the South County Tourism Council, *id.* no. 85; (4) Steven King, Managing Director of Quonset Development Corporation, *id.* no. 93; and (5) Robert Billington, President of the Blackstone Valley Tourism Council. *Id.* no. 91. All broadly focused on the inconvenience of the existing ferry departure location in Point Judith—due to distance, parking, and traffic congestion—as compared to the relative convenience of an alternative intermodal terminal in Quonset, which would be linked to the Rhode Island Public Transportation Authority (RIPTA) bus service, the Wickford Junction commuter rail station, and shuttle service to and from T.F. Green International Airport. *See generally id.* nos. 85, 87, 89, 91, 93, 95, 105. RIFF's witnesses further testified that an additional ferry option from Quonset would expand tourism to an untapped market of travelers, increasing revenues for North Kingstown and Block Island. *See generally id.* nos. 89, 95.

Various witnesses offered both anecdotal evidence and more technical analyses of the existing and potential demand and market conditions for ferry services in southern Rhode Island. For example, Charles Donadio, RIFF's president, testified that he had studied RIFF's potential

market by population density and concluded that there existed an unsatisfied demand for ferry services outside of Point Judith. *Id.* no. 95, at 8-9. As further evidence of an untapped market, Mr. Donadio recounted that customers regularly called RIFF, asking whether it provided service between Quonset and Block Island. *Id.* at 9.

Lawrence Kunkel, an economist, testified as an expert in industrial organization and game theory—“the study of mathematical models of conflict and cooperation between intelligent and rational decision makers.” *See id.* no. 105, at 2; *see also id.* no. 106; *id.* no. 170, at 238:12-17. Mr. Kunkel stated that there existed a “dormant, unserved[] market for additional high speed ferry service to Block Island[,]” specifically for residents of mid- and northern-Rhode Island. *Id.* no. 105, at 5-6. He also believed that RIFF’s proposal aligned with public policy, as evidenced by state and federal investment of \$660 million in infrastructure improvements in the Quonset Davisville Business Park (QDBP) and its nearby Route 403 exchange. *Id.* at 4-5. During cross-examination, he conceded, however, that there was no evidence that state legislators specifically expected that RIFF would commence seasonal high-speed ferry service to Block Island from Quonset Point when investing in the QDBP. *Id.* no. 170, at 227:20-228:14. Similarly, Mr. Kunkel conceded that he had no reason to believe that the Quonset Development Corporation (QDC) anticipated RIFF’s commencement of Block Island services when it leased QDBP space to RIFF. *Id.* at 228:15-229:22.

As a matter of game theory, Mr. Kunkel had formed the opinion that Interstate opposed RIFF’s Application to preserve a monopoly on ferry transportation between mainland Rhode Island and Block Island. *Id.* no. 105, at 7-8. Mr. Kunkel believed, however, that competition would benefit the travelling public, as evidenced by service improvements initiated by Interstate in the wake of previous administrative proceedings dealing with new potential ferry service

competition. *Id.* at 8. In any event, he expressed the opinion that RIFF would not be a *direct* competitor to Interstate because the companies would be serving different markets with different population bases. *Id.*

The Division also received numerous public comments supportive of the Application and echoing the considerations highlighted by RIFF's witnesses, including comment from: (1) Kerry McKay, President of the North Kingstown Town Council, *id.* no. 171, at 25:5-26:9; (2) Kristin Urbach, Executive Director of the North Kingstown Chamber of Commerce, *id.* at 27:1-17; (3) Andrew Naughton, a professor at Bryant University, *id.* at 27:21-28:21; (4) Ross Notaroberto, a Cranston resident, *id.* at 29:1-12; and (5) Jerry Zarella, a regular visitor to Block Island. *Id.* at 30:17-32:2.

ii

The Town's Opposition

The Town presented two witnesses in opposition: (1) Stephen Land, the Town's Harbormaster and policeman, *id.* no. 142; and (2) Kenneth LaCoste, the Town's First Warden.³ *Id.* no. 141. Mr. Land testified that his greatest concern with the Application was public safety, specifically that Old Harbor was already an "extremely busy, mixed use harbor[.]" *Id.* no. 142, at 3. Mr. Land described the "crowded" existing activity in Old Harbor, including "swimmers, kayakers, pleasure boaters, wind surfers, paddle boaters, sailing, commercial fishing, lobster and charter boat companies, parasail and banana boat[ers,]" as well as existing ferry service. *Id.* at 3-4. In his professional opinion, RIFF's use of Old Harbor "would pose a serious public safety hazard." *Id.* at 4.

³ Under the New Shoreham Town Charter, the First Warden is a member of the Town Council and its presiding officer. (R. no. 141, at 2.)

Mr. LaCoste testified to the New Shoreham Town Council’s concerns, which also focused on the preexisting traffic in Old Harbor and associated safety issues. *Id.* no. 141, at 3-4, 6. He shared that the Town Council was uneasy about the Application because RIFF lacked a feasible docking facility in Old Harbor. *Id.* at 3-4. He also testified that the Town Council was concerned with the possibility of diverting revenue from Interstate, thereby threatening the ongoing viability of Interstate’s “lifeline” services to Town residents. *Id.* at 4. He explained that Interstate operates a year-round service, while RIFF proposes only a summer service, and that the diversion of significant seasonal revenues from Interstate would lead to a rate increase for year-round travelers—i.e., Block Island residents—or a substantial reduction in off-season service schedules. *Id.*

Beyond these two witnesses, members of the public also spoke in opposition to the Application. One commentor expressed concerns that RIFF’s proposed service would reduce Interstate’s revenue, negatively affecting lifeline services to Block Island. *Id.* no. 160. A second individual commented that Interstate’s ferry service adequately served the public and voiced concerns with overcrowding Block Island with seasonal tourists. *Id.* no. 159. A third individual stated that Interstate already provided adequate service and that the proposed Quonset service would not benefit the Town’s residents. *Id.* no. 158.

iii

Interstate’s Opposition

For its part, Interstate presented three witnesses in opposition to the Application: (1) Dr. Edward Mazze, Professor of Business Administration at the University of Rhode Island and a consultant in business and economics, *id.* no. 130, at 2; (2) Walter Edge, Jr., a certified public

accountant and Vice President of B&E Consulting, *id.* no. 127, at 1; and (3) Attorney Michael Voccola, representing PRIX, LP d/b/a The Lighthouse Inn Galilee (PRIX). *Id.* no. 129, at 2.

Dr. Mazze testified as a business and marketing expert regarding the outcome of a marketing research study he had conducted on behalf of Interstate in 2013. *Id.* no. 130, at 3. Dr. Mazze polled travelers in Point Judith and concluded from the survey responses that 17 percent of conventional ferry respondents and 27 percent of fast-ferry respondents would travel by fast ferry from Quonset Point to Old Harbor if the cost was \$50 for a round-trip ticket.⁴ *Id.* at 4-5, 11. Ultimately, Dr. Mazze anticipated that RIFF would divert as much as 20 percent of Interstate's customers during the summer months and that this diversion would adversely impact Interstate's year-round lifeline services, forcing rate increases, a reduction in services, and employment cuts. *Id.* at 12, 15. Dr. Mazze described RIFF's proposed service as "cream skimming," where a business provides services only to the high-value, low-cost customers and otherwise declines to service less profitable customers. *Id.* at 14. Further, Dr. Mazze contended that RIFF's witness testimony alleging an existing unmet traveler demand was unsupported by "any economic study, marketing study, traffic study, tourism study of Block Island or marketing plan[.]" *Id.* at 12-13.

Relying on Dr. Mazze's marketing research study and Interstate's revenue schedules, Mr. Edge testified that, should RIFF commence its proposed Quonset service, Interstate would lose \$1.2 million in revenue, which would then require a 14 percent rate increase and/or reduction in service. *Id.* no. 127, at 3-4. Mr. Edge reiterated Dr. Mazze's testimony that RIFF's proposed service constituted cream-skimming that would adversely impact Interstate's provision of lifeline services and, consequently, the Town's interests. *Id.* at 20-21. In response to RIFF's witness

⁴ Mr. Donadio previously testified that RIFF's anticipated ticket price for ferry service from Quonset to Block Island would be between \$40 and \$50 for a round-trip, passenger-only ticket. (R. no. 95, at 10.)

testimony by Mr. Billington, former Chair of Tour RI, Mr. Edge argued that Tour RI only transported around 1,400 visitors in a seven-year time span, a sample size too small to demonstrate an underserved market. *Id.* at 14-15; *see also id.* no. 91, at 3-4.

Finally, Attorney Voccola testified on behalf of PRIX, an entity that owns property directly across from Interstate's Point Judith terminal. *Id.* no. 129, at 3. From that property, PRIX offers paid parking services, primarily used by Interstate's Block Island ferry customers. *Id.* Attorney Voccola maintained that Interstate's ferry service was critical to the economic health of Galilee and South County and that granting RIFF's Application would "create an unstoppable downward economic spiral for greater Galilee." *Id.* at 3-4.

iv

RIFF's Rebuttal

Thereafter, RIFF presented the rebuttal testimony of Mr. Billington, Mr. Donadio, Mr. Kunkel, and Dr. Stephanie Costa, Associate Professor of Mathematics at Rhode Island College. *See generally id.* nos. 92, 97, 102, 107. Mr. Billington disputed Mr. Edge's characterization of Tour RI. *Id.* no. 92. Mr. Donadio explained, in his opinion, the various ways that Interstate could make its operations more efficient without raising rates or downsizing operations and employees. *Id.* no. 97, at 2-4. Specifically, Mr. Donadio testified that Interstate could redesign and optimize its schedule of daily trips and better control its fuel costs. *Id.*

Mr. Kunkel questioned the reliability of Dr. Mazze's marketing study, testifying that the underlying survey failed to appropriately control for the biases of both the surveyor and the respondent. *Id.* no. 107, at 2. Nevertheless, Mr. Kunkel asserted that the survey results themselves constituted evidence of the public need for an alternative high-speed ferry service from Quonset Point. *Id.* at 2-3. Mr. Kunkel further pointed to Interstate's recently-added routes to Block Island

from Newport and Fall River as implicit evidence that even Interstate had “perceived that there was [an] unsatisfied demand from other departure points.” *Id.* at 3-4. In response to concerns that approving the Application would have a downstream impact on Interstate’s lifeline services, Mr. Kunkel quoted the Division’s previous determination “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” and that “‘fast’ ferry services and ‘conventional’ ferry services ‘are two distinctly different water carrier operations.’” *Id.* at 6 (quoting *In Re: Application by Interstate Navigation Co. for Water Carrier Authority*, No. D-05-06, 2006 WL 322048 (Jan. 23, 2006)).

Dr. Costa also rebutted Dr. Mazze’s marketing study. *See generally id.* no. 102. Relying on her statistical expertise, Dr. Costa took issue with both the survey’s methodology and Dr. Mazze’s resulting conclusions. *See id.*; *see also id.* no. 104. As to the methodology, she opined that a nonprobability sample, as Dr. Mazze used, was less reliable than a probability sample. *Id.* no. 102, at 1. She was of the further opinion that Dr. Mazze’s survey inadequately mitigated bias. *Id.* at 3. As to Dr. Mazze’s survey analysis and conclusions, Dr. Costa criticized that Dr. Mazze had emphasized the respondents who answered “yes” to the survey’s initial question while failing to incorporate the results from subsequent survey questions. *Id.* at 4-11. After incorporating the additional information available from all available survey questions, Dr. Costa recalculated Interstate’s projected loss of conventional ferry passengers at a range of 4 to 10 percent and high-speed ferry customers at a range of four-tenths to 3 percent. *Id.* at 11. She therefore described Dr. Mazze’s study as “selectively analyzed” to present a “worst case scenario not necessarily supported by the data.” *Id.* at 1, 3.

Interstate's Sur-Rebuttal

In response to Dr. Costa's critique, Dr. Mazze testified that he had designed the marketing survey to avoid bias by conducting interviews on different days, weeks, and months and by ensuring that the questions were close-ended—i.e., triggered only a “yes” or “no” response. *Id.* no. 131, at 6-7. Additionally, Dr. Mazze testified that nonprobability convenience samples are widely used in marketing research and noted that Dr. Costa lacked significant experience in marketing. *Id.* at 2-3, 7. Similarly, Mr. Edge testified that Dr. Mazze's nonprobability convenience sampling method was appropriate and valid for a marketing study and that probability sampling, as suggested by Dr. Costa, was not typically used by public accounting firms due to its expense and inconvenience. *Id.* no. 128, at 9-10.

Joshua Linda, Interstate's Vice President, rebutted Mr. Donadio's opinion that Interstate could avoid rate increases or schedule reductions by adopting other efficiencies, specifically as to the proposal that Interstate could reduce fuel costs through bidding. *Id.* no. 132, at 2.

C

The Division's Report & Order 22548

On September 22, 2016, the Division issued Report and Order No. 22548, approving RIFF's Application for a water carrier certificate of public convenience and necessity (CPCN Order). *Id.* no. 2, at 141. The Division conditioned the CPCN Order on RIFF demonstrating within one year that it had: (1) access to suitable docking facilities in Quonset and Block Island; (2) leased, purchased, or otherwise identified the vessel(s) to be used in providing its proposed ferry services; (3) satisfied all Coast Guard requirements; (4) fulfilled any applicable municipal

permitting requirements; (5) obtained adequate liability insurance; and (6) passed a Division compliance inspection. *Id.* at 141-42.

D

Travel Following Appeals to Superior Court

In October 2016, Petitioners separately appealed the CPCN Order to this Court, both alleging that the Division’s finding of public convenience and necessity was affected by error of law and otherwise unsupported by competent evidence. *See* Compl. No. PC-2016-4758, ¶¶ 13-14; Compl. No. PC-2016-4804, ¶¶ 13-14; *see also* Dec. 5, 2016 Order (Licht, J.) (consolidating the appeals).

On May 2, 2017, this Court remanded the now-consolidated appeal to the Division “for the purpose of determining whether the Division [would] exercise its right to revisit” the docking issue raised in the Town’s prior Motion for Summary Disposition in light of possible new evidence affecting Bluewater’s ability to develop a docking facility in Old Harbor. (R. no. 185, at 2-3.) The Superior Court’s May 2017 remand Order stated that “the parties ha[d] the right to make arguments to the Division as to the reasons why the Division should or should not revisit the matter.” *Id.* at 3-4. On June 23, 2017, in response to that remand, the Division issued Order No. 22823 (the June 2017 Order), in which it found “insufficient cause” to revisit Bluewater’s—and, by extension, RIFF’s—planned Old Harbor docking facility construction efforts because there had been no “dispositive denial by USACE or CRMC of Bluewater’s efforts[,]” and the Town’s designation as a nonfederal sponsor by USACE did “not nullify Bluewater[] and RIFF’s chances of developing the docking facilities presently under consideration[.]” *Id.* at 7-8.

On July 21, 2017, Petitioners docketed separate appeals from the June 2017 Order, alleging that it was issued without a hearing and in violation of the Rhode Island Administrative

Procedures Act (APA), G.L. 1956 chapter 35 of title 42. (Compl. No. PC-2017-3405, ¶¶ 26, 37; Compl. No. PC-2017-3409, ¶¶ 26, 37.) By agreement of the parties, the Court consolidated Petitioner’s now-four pending appeals. (Aug. 28, 2017 Order (Licht, J.).)

On September 12, 2017, this Court issued two Orders remanding the consolidated matter to the Division for two separate determinations. The first Superior Court Order vacated the Division’s June 2017 Order and stated that, on remand, “[t]he parties shall have the right to present evidence and to make arguments on the record to the Division at a hearing to be conducted in accordance with the [APA.]” (Sept. 12, 2017 Order (Licht, J.).) After conducting public hearings in which only the Town—but not Interstate—was permitted to present evidence and make arguments, the Division issued Order No. 23217 on July 16, 2018 (the July 2018 Order). *See generally* R. no. 223. The July 2018 Order found “insufficient cause to revisit the issues discussed and addressed in the Division’s previous decision denying the Town’s Motion for Summary Disposition[.]” *Id.* at 39. In August 2018, Petitioners separately appealed the July 2018 Order. *See* Compl. No. PC-2018-5679, ¶ 19; Compl. No. PC-2018-5806, ¶¶ 24-26, 32-36; *see also* Assented to Joint Mot. to Consolidate.

The Superior Court’s second September 12, 2017 Order was remanded to the Division for the purpose of deciding RIFF’s request for a continuance of the deadline associated with the CPCN Order’s conditions. (Sept. 12, 2017 Order (Licht, J.).) On September 18, 2017, the Division issued Order No. 22877, “find[ing] sufficient cause to grant RIFF a one-year continuance, or until September 22, 2018[.]”⁵ (R. no. 227, at 7.) On September 26, 2018, the Division issued Order No. 23283 (the September 2018 Order), granting RIFF an additional one-year extension, until

⁵ Neither the Town nor Interstate appealed the Division’s September 18, 2017 Order. *See generally* Compl. No. PC-2018-7658; Compl. No. PC-2018-7687.

September 22, 2019, to fulfill the conditions of the CPCN Order. *Id.* no. 239, at 17. The September 2018 Order also stated “[t]hat if RIFF is not in possession of a final non-appealable decision affirming the [CPCN] Order by September 22, 2019, the deadline . . . shall be *stayed* until the pending appeal is concluded and a final non-appealable decision affirming the [CPCN] Order is issued by the Court.” *Id.* (emphasis added).

In October 2018, Petitioners filed separate appeals with this Court from the Division’s September 2018 Order. (Compl. No. PC-2018-7658, ¶ 27; Compl. No. PC-2018-7687, ¶ 27.) The Court consolidated these final two appeals with the preceding six, *see* Dec. 17, 2021 Order (Taft-Carter, J.), and now before the Court are Petitioners’ eight consolidated administrative appeals.

II

Standard of Review

When reviewing the decisions of an administrative agency, “the Superior Court sits as an appellate court with a limited scope of review.” *Mine Safety Appliances Co. v. Berry*, 620 A.2d 1255, 1259 (R.I. 1993). The Court’s review is governed by the APA. *See Iselin v. Retirement Board of Employees’ Retirement System of Rhode Island*, 943 A.2d 1045, 1048 (R.I. 2008). Section 42-35-15 provides, in pertinent part:

“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the

administrative findings, inferences, conclusions, or decisions are:

- “(1) In violation of constitutional or statutory provisions;
- “(2) In excess of the statutory authority of the agency;
- “(3) Made upon unlawful procedure;
- “(4) Affected by other error of law;
- “(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- “(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” (Section 42-35-15(g).)

“In essence, if ‘competent evidence exists in the record, the Superior Court is required to uphold the agency’s conclusions.’” *Auto Body Association of Rhode Island v. State of Rhode Island Department of Business Regulation*, 996 A.2d 91, 95 (R.I. 2010) (quoting *Rhode Island Public Telecommunications Authority v. Rhode Island State Labor Relations Board*, 650 A.2d 479, 485 (R.I. 1994)). When reviewing a decision under the APA, the Court may not substitute its judgment for that of the agency on questions of fact, provided that they are supported by legally competent evidence. See *Johnston Ambulatory Surgical Associates v. Nolan*, 755 A.2d 799, 805 (R.I. 2000); *Arnold v. Rhode Island Department of Labor and Training Board of Review*, 822 A.2d 164, 167 (R.I. 2003). The Court cannot “weigh the evidence [or] pass upon the credibility of witnesses [or] substitute its findings of fact for those made at the administrative level.” *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977). Accordingly, the Court will “reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record.” *Baker v. Department of Employment and Training Board of Review*, 637 A.2d 360, 363 (R.I. 1994) (quoting *Milardo v. Coastal Resources Management Council*, 434 A.2d 266, 272 (R.I. 1981)). Legally competent or substantial evidence is “relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.” *Caswell v. George*

Sherman Sand & Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981).

III

Analysis

Petitioners allege thirteen errors with respect to various Division Orders. *See* Joint Br. of Pet’rs’ Interstate Navigation Co. & Town of New Shoreham (Joint Br.) 12-15. According to Petitioners, these errors justify reversal of the CPCN Order. *Id.* at 57. Specifically, Petitioners argue that: (1) the Division did not apply the proper legal standard to determine public convenience and necessity; (2) findings of public convenience, necessity, and ability were unsupported by competent evidence; (3) the Division allowed two fatal procedural irregularities to infect the proceedings; (4) Interstate should have been granted full intervention rights; and (5) the Division erred when it granted RIFF a “stay” of deadlines associated with the CPCN Order. *See id.* at 12-15; *see also* Joint Suppl. Br. of Pet’rs’ Interstate Navigation Co. & Town of New Shoreham (Joint. Suppl. Br.) 2. The Court will address each of these issues in turn as well as Petitioners’ further ancillary arguments where appropriate in this Analysis.

A

CPCN Order

1

Public Convenience and Necessity

i

Abbott v. Public Utilities Commission

“Before a certificate of public convenience and necessity may be issued, the Commission must have before it evidence that there is a public need for the proposed additional service.” *Murray v. LaTulippe’s Service Station, Inc.*, 108 R.I. 548, 549, 277 A.2d 301, 302 (1971). In determining the existence of public convenience and necessity, the Division is guided by *Abbott*

v. Public Utilities Commission, 48 R.I. 196, 136 A. 490 (R.I. 1927). The *Abbott* Court identified several factors appropriate to the ultimate determination of “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.” *Abbott*, 48 R.I. at 196, 136 A. at 491. Those factors include

“the existing means of transportation, as to its substantial character and its probable permanence, also the investments of capital made by the owners of such existing means, the nature of the service that is being rendered, and, if such service is adequate, what will be the probable effect of admitting competition into a field now adequately served, and what effect such competition will probably have upon the receipts of existing lines of transportation, and as to whether, in the face of further competition, the adequacy of the existing service will be continued.” *Id.* at 196, 136 A. at 492.

In light of the *Abbott* Court’s instruction to consider “the probable effect of admitting competition into a field now adequately served,” *id.*, the CPCN Order acknowledged Petitioners’ argument that the Application should be denied to prevent adverse impacts on Interstate’s year-round lifeline services. (R. no. 2, at 123.) The Division stated, however, that traditional and fast-ferry services “are distinctly different . . . two different modes of transportation—and the situation presented not unlike adding additional air carrier services between the mainland and Block Island.” *Id.* at 125. Consequently, the impact of new fast-ferry services on Interstate’s lifeline services was “too far removed for regulatory licensing purposes.” *Id.* The Division viewed Petitioners’ concerns as harboring an expectation that seasonal tourists to Block Island should “defray the annual transportation costs for Island residents and businesses without competition from other mainland ferry service provider(s).” *Id.* at 126. The CPCN Order stated that the Division was unwilling “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.” *Id.* at 126. Instead, the Division concluded that “[b]oth classes of needs must be considered important.” *Id.*

The Division then acknowledged that Interstate had repeatedly raised the lifeline services “death spiral” argument on numerous occasions over a twenty-year period across multiple separate proceedings and that such doomsday predictions had never proven true despite several new interstate and intrastate entrants to the Block Island ferry market. *Id.* at 126-28. The Division observed that the ongoing viability of Interstate’s lifeline services had been managed, at least in part, by the Public Utilities Commission’s approval of Interstate’s periodic “natural and anticipated” rate adjustments and increases. *Id.* at 128.

Notwithstanding the above discussion, Petitioners maintain that the CPCN Order was unlawful because the Division failed to consider the probable impact on Interstate’s existing services as required by *Abbott*. See Joint Br. 12-13, 16-22.⁶ Specifically, Petitioners take issue with the CPCN Order’s statement that “[w]hile 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.*” (R. no. 2, at 137 (emphasis added).)

This statement, read in full context, does not reflect that the Division failed to properly consider “whether, in the face of further competition, the adequacy of the existing service will be continued.” *Abbott*, 48 R.I. at 196, 136 A. at 492. Confronted with inconsistent revenue impact predictions from competing experts—Drs. Costa and Mazze—the CPCN Order is clear that the

⁶ Petitioners also assert that the Division’s conclusion of “public convenience and necessity” was unsupported by substantial evidence in the record. (Joint Br. 42.) This argument is merely a cursory restatement of the contention discussed in this section of the Analysis and, therefore, does not require separate consideration.

Division credited Dr. Costa’s testimony and acknowledged “valid concerns with respect to the strength and reliability of Dr. Mazze’s survey.” *See* R. no. 2, at 137-38. The Division acknowledged that Interstate’s revenues would likely be impacted to some degree by increased competition but concluded that Interstate’s “death spiral” predictions—anticipating annual losses of \$1.2 million—were not credible in the face of repeated historical experience to the contrary. *See id.* at 126-28. In any event, the Division reasoned that losses could be—and had been—mitigated through rate adjustments. *See id.* at 128; *see also Abbott*, 48 R.I. at 196, 136 A. at 491 (Division may apply its “wide experience and intimate knowledge of transportation problems in this state”). The Division also rightfully concluded that it could not blindly prioritize Interstate’s vested interests against competition. *See Breen v. Division of Public Utilities*, 59 R.I. 134, 134, 194 A. 719, 720 (1937). “Both classes of needs must be considered important.” *See* R. no. 2, at 126.

Therefore, contrary to Petitioners’ assertions, the Division did not *ignore* the probable impact to Interstate’s existing services; it simply did not *agree* with the extent and severity of the impact as argued by Interstate. The Court will not disturb the Division’s determinations as to weight and credibility on this topic. *E. Grossman & Sons, Inc.*, 118 R.I. at 285, 373 A.2d at 501.

ii

Competency of the Evidence

Petitioners’ next challenge to the CPCN Order concerns various claimed evidentiary errors that, taken together, would necessitate the conclusion that RIFF failed to carry its burden to establish public convenience and necessity. *See generally* Joint Br. 23-38. Specifically, Petitioners claim that the Division: (1) impermissibly relied on Mr. Kunkel’s testimony without proper foundation, *id.* at 13, 28-36; (2) abused its discretion by giving evidentiary weight to RIFF’s

lay witnesses and public commentators, *id.* at 13, 23-28; and (3) erred by ignoring, and not deferring to, the Town’s Harbormaster on harbor safety matters. *Id.* at 13, 36-38. As already stated above, to the extent Petitioners ask this Court to weigh the evidence or assess witness credibility, the Court, as it must, declines. *E. Grossman & Sons, Inc.*, 118 R.I. at 285, 373 A.2d at 501. Judicial review is limited to determining whether the Division’s decision was supported by legally competent evidence. *Id.*

a

Mr. Kunkel

Petitioners argue that Mr. Kunkel’s expert testimony recounted a personal opinion of unmet need “grounded in mere speculation or conjecture” that therefore lacked a factual foundation. (Joint Br. at 29 (quoting *DeChristofaro v. Machala*, 685 A.2d 258, 267 (R.I. 1996).) Rule 703 of the Rhode Island Rules of Evidence allows expert witnesses to provide opinion testimony if “relevant, within the witness’s expertise, and based on an adequate factual foundation.” *See Kurczy v. St. Joseph Veterans Association, Inc.*, 820 A.2d 929, 940 (R.I. 2003) (internal quotation and emphasis omitted); *see also* R.I. R. Evid. 703. Specifically, an expert’s testimony must describe the basis for the expert’s conclusions. *See Gorham v. Public Building Authority of City of Providence*, 612 A.2d 708, 717 (R.I. 1992). “If the expert has testified with ‘some degree of positiveness,’ his or her testimony is admissible and issues relative to the weight of the evidence are left to the fact-finder.” *Morra v. Harrop*, 791 A.2d 472, 477 (R.I. 2002) (quoting *Sweet v. Hemingway Transport, Inc.*, 114 R.I. 348, 355, 333 A.2d 411, 415 (1975)).

Contrary to Petitioners’ assertions, the record shows that Mr. Kunkel established the basis for his opinion; namely, that he interpreted data from Dr. Mazze’s survey; considered the timing, number, and location of new entrants to the Block Island ferry market and the related motivations

and market implications; and relied on his understanding of market dynamics to conclude that demand exists for RIFF's proposed service. (R. no. 105, at 4-6; *id.* no. 107, at 2-4; *id.* no. 170, at 230, 237, 277.) Mr. Kunkel's opinion was partly informed by government investment in the QDBP and RIFF's receipt of a concession and land lease from QDC. (R. no. 105, at 4-5.) The CPCN Order acknowledged that "the Town and Interstate were successful in their cross-examination of Mr. Kunkel," exposing that the QDBP investment and QDC decision were not made in consideration of a Block Island ferry service. (R. no. 2, at 131-32.) Nevertheless, the Division agreed with Mr. Kunkel's broader inference that RIFF's proposal was at least "harmonious with the original intent behind the public expenditure of financial resources" in the QDBP and QDC's concession and land lease grant to RIFF. *Id.* at 132.

Therefore, the true thrust of Petitioners' objection is not that Mr. Kunkel's testimony lacked a factual basis, but that their cross-examination should have rendered the testimony incompetent. It is the hearing officer's sole prerogative to determine credibility and weigh the evidence, *E. Grossman & Sons, Inc.*, 118 R.I. at 285, 373 A.2d at 501, and this Court "shall reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." *Milardo*, 434 A.2d at 272. Here, as presented by Petitioners' own expert, the record reflects that up to 17 percent of conventional ferry respondents and 27 percent of fast-ferry respondents would travel by fast ferry from Quonset Point to Old Harbor if the cost was \$50 for a round-trip ticket. (R. no. 130, at 5-6, 11.) Mr. Kunkel referenced these survey results when justifying his opinion. (R. no. 107, at 3.)

Even in the absence of this survey, Mr. Kunkel explained the relative amenities and ease of access of the proposed Quonset location. (R. no. 105, at 6.) These conveniences are differentiators that could be marketed specifically to northern-Rhode Islanders as "obvious

beneficial alternatives.” *Id.* This testimony was appropriate and probative in light of the *Abbott* Court’s instruction 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.” *Abbott*, 48 R.I. at 196, 136 A. at 491. “[C]ompetitive stimulation and anti-monopoly prophylaxis” are relevant considerations, and “the [Division], if we keep in mind its expertise in this field, was able to take into consideration the import of the missing data on the experts’ conclusions.” *Domestic Safe Deposit Co. v. Hawksley*, 111 R.I. 224, 228-29, 301 A.2d 342, 344 (1973).⁷

b

Lay Opinions

Petitioners next argue that the lay opinions of Ms. George, Ms. Pughe, Ms. Dolan, Mr. Billington, Mr. King, and Mr. Donadio were not “competent” evidence of an unserved public need for RIFF’s proposed services. (Joint Br. 27-28.) The relevant witness testimony pertained to Point Judith’s inconvenient geographic location for many Rhode Islanders, summer traffic on the common route to Point Judith, existing parking challenges, the relative amenities proposed in Quonset as compared to Point Judith, and anticipated benefits to the Town of North Kingstown as a new departure point. (R. no. 2, at 133-34.) The Division expressly stated in the CPCN Order

⁷ Petitioners also argue it was error for the Division to fail to rule on their Motion to Strike Mr. Kunkel’s expert testimony. (Joint Br. at 28.) Although the Division should have explicitly ruled on the Motion, the failure to do so was harmless. The Division acknowledged the pending Motion, as well as Petitioners’ further elaboration of their positions in their briefs, and then determined that Mr. Kunkel’s testimony was credible notwithstanding Petitioners’ cross-examination and the lack of Mr. Kunkel’s own study. (R. no. 2, at 100, 131-34.) The Division was permitted to consider Mr. Kunkel’s testimony, and reversal is not warranted. *See Pierce v. Providence Retirement Board*, 15 A.3d 957, 961 (R.I. 2011) (“If an error of law is found, it must ‘so infect[] the validity of the proceedings as to warrant reversal.’”) (quoting *Cullen v. Town Council of Lincoln*, 850 A.2d 900, 903 (R.I. 2004)).

that “it was not necessary for RIFF or its witnesses to have relied upon a ‘study’ to substantiate these opinions.” (R. no. 2, at 133.) Instead, the Division concluded that Mr. Kunkel’s assertion of an existing unmet need—as further supported by the lay witnesses listed above—was “reasonable on its face.” *Id.* at 134.

The Division therefore relied primarily on Mr. Kunkel’s opinion and determined his credibility based, in part, on the corresponding lay testimony and the Division’s own common-sense deductions. *See E. Grossman & Sons, Inc.*, 118 R.I. at 285, 373 A.2d at 501; *Abbott*, 48 R.I. at 196, 136 A. at 491 (stating the Division may apply its “wide experience and intimate knowledge of transportation problems in this state”). Had the record contained nothing more than lay testimony “in a general way” of personal opinion that public convenience and necessity would be served by the granting of the application, then the CPCN Order’s conclusion of need arguably would have lacked a competent factual basis. *See Abbott*, 48 R.I. at 196, 136 A. at 492. *But see Big Daddy Taxi Service, Inc. v. Rhode Island Division of Public Utilities & Carriers*, No. C.A. 02-6091, 2004 WL 253523, at *6 (R.I. Super. Jan. 14, 2004) (reversing CPCN denial in light of lay testimony and beneficial public value of applicant’s credit card payment system).

The lay witnesses and public commentators, however, provided more than general or speculative conclusions. For example, Ms. George served as President of the South County Tourism Council for ten years and supported the Application because it advanced the Tourism Council’s longstanding goal of enhancing alternative modes of transportation. (R. no. 85, at 2, 4.) She also testified that she had directly heard complaints from visitors to the area about the traffic. *See R. no. 171*, at 40; *see also In re Cross*, 617 A.2d 97, 102 (R.I. 1992) (“Hearsay is quite acceptable in administrative hearings.”). Mr. Notaroberto stated that the traffic problem in South County is a “huge deterrent” to him personally. (R. no. 171, at 29.) Mr. Zarella testified that he

would go to Block Island more often if he could depart from Quonset. *Id.* at 30. Mr. Billington claimed personal knowledge as a tourism professional that many Rhode Islanders have never visited Block Island. (R. no. 91, at 3.) The Division correctly viewed Mr. Billington’s further observation that Quonset will be more convenient because many people live in northern-Rhode Island as “simple geography and . . . demographics[.]” *Id.*; R. no. 2, at 134. This testimony may be anecdotal as opposed to scientific, but it is the Division’s function—and not this Court’s—to consider the specificity and rigor of the testimony in its credibility determinations. *Cf. Abbott*, 48 R.I. at 196, 136 A. at 492 (“[I]n the quasi judicial proceedings before the commissioners, where hearing is to be had upon sworn testimony of witnesses, the value of whose opinions would depend upon evidence as to their knowledge of the questions involved, and whose knowledge or prejudice or interest might be tested by cross-examination.”).

Petitioners’ reliance on *Newbay Corp. v. Annarummo*, 587 A.2d 63 (R.I. 1991) to the contrary is therefore misplaced. (Joint Br. 24.) *Newbay* addressed the statutory standard for agency rule-making and held that public comment provides knowledge “of the climate of the local community” but is otherwise “incompetent as an evidentiary foundation for the rule-making process.” *Newbay Corp.*, 587 A.2d at 66-67. The *Newbay* Court did not circumscribe the value of lay witness testimony and public comment in informing a factfinder’s weighing of the evidence and credibility determinations in the context of a licensing approval.

Considering the whole record and under the appropriate “deferential” standard to the Division’s factual determinations, the Division did not act in violation of statutory provisions or abuse its discretion when it gave evidentiary weight to RIFF’s lay witnesses. *See In re Cross*, 617 A.2d at 102.

Town Harbormaster

Petitioners' third evidentiary objection is that the Division "ignored the credible evidence of, and did not defer to, the Town Harbormaster on harbor safety matters outside the expertise of the Division." (Joint Br. at 36.) Petitioners argue that, in 2013, the Division ruled that it was "'ill-equipped to meaningfully evaluate harbor congestion and dock adequacy issues . . . ' and therefore the Division 'must defer to the CRMC and New Shoreham's Harbormaster concerning matters related to boat docks and ferry congestion in Old Harbor[.]'" *Id.* at 37-38 (quoting R. no. 13, at 17-18). Nevertheless, the CPCN Order included a statement, contrary to the Harbormaster's stated concerns for safety and harbor congestion, that the Division expected the Harbormaster and his twenty-two summer assistants "ought to be able to continue to maintain order[.]" *Compare* R. no. 2, at 138, *with id.* no. 142, at 3-4. Petitioners contend this statement demonstrates that "[i]nstead of deferring to the testimony of the Harbormaster, the Division substituted its own unsupported determination as to matters related to ferry congestion and harbor safety." (Joint Br. at 38.)

Notwithstanding the Division's "maintain order" statement, the whole record demonstrates that the Division repeatedly refused to address dockage—and related concerns over safety and harbor congestion—as a condition-precedent of the CPCN Order. *See, e.g.,* R. no. 2, at 121-22; R. no. 13, at 17. In full context, the September 2013 Order quoted by Petitioners stated that "it would be impractical for the Division to spend any significant time addressing these issues in the context of the instant CPCN (licensing) proceeding." *Id.* no. 13, at 17. The September 2013 Order went on to state that RIFF would have to address dock adequacy issues and harbor congestion "before the CRMC and . . . New Shoreham's Harbormaster"—meaning that RIFF would secure approval for its docking facilities in another forum and the Division would defer to that *outside*

determination as a condition-subsequent of the CPCN Order. *Id.* at 18 (emphasis added). The Division’s position on this topic persisted consistently through 2016 with the issuance of the CPCN Order, which similarly stated that the Division would not require proof of immediate access to docks and a vessel but would treat such requirements as “conditions-subsequent.” *Id.* no. 2, at 121. The Division reiterated “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.” *Id.*

Consequently, the “maintain order” comment was mere dicta due to the Division’s prior determination that dockage was beyond its licensing purview and would be left to the appropriate authorities to be addressed in other fora. *Id.* Therefore, even accepting, *arguendo*, that the Division erred and ignored the Harbormaster’s testimony, the error did not infect the proceedings because the Harbormaster’s statements went to an issue outside of the Division’s remit. *Cf. Pierce v. Providence Retirement Board*, 15 A.3d 957, 961 (R.I. 2011) (“If an error of law is found, it must ‘so infect[] the validity of the proceedings as to warrant reversal.’”) (quoting *Cullen v. Town Council of Lincoln*, 850 A.2d 900, 903 (R.I. 2004)).

In sum, the Division applied the proper legal standard to assess public convenience and necessity and its findings and conclusions are supported by legally competent record evidence. *Baker*, 637 A.2d at 363.

2

Fitness, Willingness, and Ability

Petitioners next assert that the Division’s fitness and ability determination suffered from two fatal errors: first, RIFF’s lack of docking space meant that RIFF was not “able” to perform the services proposed; and second, the CPCN Order’s docking condition—requiring RIFF to submit post-order proof of access to suitable docking facilities—violated the APA. *See* Joint Br. 38-42

(citing § 42-35-9(c) which requires that “[o]ppportunity shall be afforded all parties to respond and present evidence and argument on all issues involved”).

As to whether RIFF was required to have a “confirmed dock in Old Harbor,” *see id.* at 41, Interstate has pressed this argument before in the context of an unrelated application. *See Interstate Navigation Co.*, 1999 WL 813603, at *7-8. In response, a justice of this Court agreed with the Division that an applicant is not required to resolve every possible issue that may prevent operation prior to the Division granting a water carrier certificate. *Id.* at *8. An applicant need not invest millions to finalize all components of a proposed service before applying for operating authority where the record supports the determination that the applicant with “proven diligence as a businessman . . . [would] overcome any unresolved financing, licensing or other issues that would otherwise prevent him from operating.” *Id.* (quotations omitted).

Here, the record supports the same conclusion. It reflects that Mr. Donadio had worked in the marine transportation industry for nearly twenty years, operating and consulting on multiple high-speed ferry services in various states. *See* R. no. 171, at 172:18-23, 189:1, 193:2-10; *see also* R. no. 2, at 120. The record further supports the Division’s determination that “Bluewater’s claims of interest and ability to construct a docking facility in Old Harbor are credible” and that RIFF would have access to Bluewater’s future docking facilities through the lease option agreement. *See id.* no. 2, at 119-20; *see also id.* no. 40, at 5-6. Paul Filippi, principal member of Bluewater, also submitted an affidavit attesting that Bluewater had obtained wharfage rights in two potential locations, hired an engineering firm to develop plans, engaged a law firm to advise on related regulatory matters, and had met with representatives of USACE to discuss Bluewater’s plans and any necessary applications. *Id.* no. 40, at 9. The record also reflects that RIFF was open to pursuing docking space at the existing South Pier as an alternative option. *Id.* at 2. Mr. Donadio’s

successful track record in the marine industry coupled with RIFF and Bluewater's concrete, preliminary steps toward developing a docking location constitute substantial evidence of fitness, willingness, and ability. *See Interstate Navigation Co.*, 1999 WL 813603, at *7-8.

Petitioners' further contention, that the Division violated the APA by conditioning the CPCN Order on RIFF demonstrating in the future that it had access to suitable docking facilities, is stated without authority and is otherwise without merit. *See* Joint Br. 41; *see also* R. no. 2, at 141. Petitioners claim that they must "be given the opportunity to be heard at evidentiary hearings on the viability and impact of any proposed docking location." (Joint Br. 41.) This argument ignores that the Division is not the authority responsible for docking approval. *See* R. no. 13, at 17 ("[T]he Division finds that . . . it must defer to the CRMC and New Shoreham's Harbormaster concerning matters related to boat docks[.]"); *see also id.* no. 226, at 5 ("The Division must make it abundantly clear—in this docket, the Division will not be presiding over a proceeding designed to duplicate the anticipated contested and esoteric proceedings to be adjudicated before the USACE and CRMC."). The Division "routinely" issues conditional certificates of public convenience to prospective common carriers, and "it would not be uncommon for the Division to require a water carrier to produce evidence of insurance, applicable U.S. Coast Guard approval(s), [and] applicable State and local permit approval(s)[.]" *Id.* no. 13, at 17-18. "[R]equiring documentation of compliance with all necessary governmental regulations, adds nothing, save some photocopying, to [an applicant's] obligations under a water carrier certificate[.]" *Interstate Navigation Co.*, 1999 WL 813603, at *3. Accordingly, there is no "issue" on which Petitioners would need to be heard before the Division and no "legal rights, duties, or privileges . . . to be determined by" the Division. *See* §§ 42-35-9(c), 42-35-1(5). As a result, the conditional approval did not violate the APA.

In sum, although the Town made it clear to the Division that it would oppose RIFF's attempts to obtain docking approval on Block Island, there is no evidence in the record as to the Town's likelihood of success in mounting that opposition, nor is there any evidence that CRMC or USACE had denied RIFF the necessary permits. Considering Mr. Donadio's proven track record and RIFF's documented ongoing efforts with Bluewater, the Division did not err when it determined that RIFF was "fit, willing, and able" to provide the service proposed in the Application. *See Interstate Navigation Co.*, 1999 WL 813603, at *7-8.

3

Interstate's Limited Intervention Status

Petitioners leverage a reference to Interstate's limited intervention status in the CPCN Order as a vehicle to assert what is technically a challenge to the Division's September 2013 intervention Order No. 21170 (September 2013 Order). *See* Joint Br. 47; *see also* R. no. 2, at 19-20; *id.* no. 13, at 19-20. Procedurally, they argue that this is proper because the September 2013 Order was not a final judgment. (Joint Reply Br. 14.) On the merits, they assert that the Division erred when it limited Interstate's intervention to the issue of public convenience and necessity. (Joint Br. 47-48.)

The Court notes several potential procedural issues with Interstate's challenge to its intervention status. First, RIFF argues that a justice of this Court already adjudicated this exact issue in denying Interstate's December 11, 2018 Motion to Remand and that the law-of-the-case doctrine should preclude reconsideration. *See* Opp'n Br. on Behalf of Resp't R.I. Fast Ferry, Inc. (RIFF Br.) 45. "The law-of-the-case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'"

State v. Presler, 731 A.2d 699, 705 (R.I. 1999) (Flanders, J. concurring) (quoting *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-16 (1988)).

A review of the transcript from the February 21, 2019 hearing reveals that the prior motion judge did not adjudicate the “exact issue” raised by Petitioners. To the extent Petitioners seek to relitigate whether Judge Licht’s remand Order expanded Interstate’s intervention status and permitted Interstate to present evidence relating to RIFF’s fitness and ability, *see* Joint Br. 55-57, RIFF is correct that the motion judge definitively ruled on *that* issue. *See* Sept. 12, 2017 Order (Licht, J.) (permitting “[t]he parties . . . to present evidence and to make arguments” on remand); RIFF’s Br. App. P (Hr’g Tr. 9:22-10:3, Feb. 21, 2019) (ruling as to Judge Licht’s intent that “the only parties that would be allowed to participate in any such proceeding on this specific issue [of fitness and ability] . . . would be the Town”). She did not, however, address the broader issue of whether the Division’s decision to limit Interstate’s intervention status was proper. (Joint Br. 47-48.) In fact, she expressly recognized Interstate’s “continuing objection to their limited participation” as being preserved as a separate issue. (RIFF’s Br. App. P (Hr’g Tr. 12:20-13:3, Feb. 21, 2019).) Even more clear was her statement “that the scope of [Interstate’s] participation had been limited by a prior Division order[,]” an order that “was not challenged, and it has not been challenged at this point in time.” *Id.* at 14:1-4. Therefore, the law-of-the-case doctrine does not bar this Court’s consideration of Interstate’s limited intervention status.

Second, it is possible, however, that this specific challenge is untimely. Orders denying a motion to intervene as of right are immediately appealable. *Town of Coventry v. Hickory Ridge Campground, Inc.*, 111 R.I. 716, 720, 306 A.2d 824, 827 (1973). Conversely, orders granting a motion to intervene are not immediately appealable. *Id.* at 721, 306 A.2d at 827. The parties do not offer the Court any case law or other authority on the appealability of a *limited* grant, nor do

they advance any arguments that distinguish intervention as of right versus permissive intervention. See, e.g., *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 373-76 (1987) (holding that a grant of intervention, though severely circumscribed, is not immediately appealable); *Hines Road, LLC v. Hall*, 113 A.3d 924, 927 (R.I. 2015) (explaining permissive judicial intervention requires satisfaction of a four-factor test not otherwise applicable to a motion to intervene as of right); see also 815 RICR 00-00-1.17(B)(1). Following the reasoning of *Stringfellow*, this Court will assume that Interstate’s challenge to its limited intervention status would not have been permissible as an interlocutory appeal and is therefore now properly before this Court. But see *City of East Providence v. Narragansett Electric Co.*, No. C.A. 06-2888, 2006 WL 1660761, at *5 (R.I. Super. June 15, 2006) (addressing interlocutory appeal of limited intervention order).

In any event, on the merits, the Division did not err in limiting Interstate’s intervention status. The standard for determining whether to grant intervenor status is contained in Rule 1.17(B) of the Division’s Rules of Practice and Procedure and “is liberally drawn in order to ensure that the interests of interested parties are met through the adversarial process.” *In re Island Hi-Speed Ferry, LLC*, 746 A.2d 1240, 1245 (R.I. 2000).

“B. Who May Intervene

“1. 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:

“a. A right conferred by statute.

“b. 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.

“c. Any other interest of such a nature that movant’s participation may be in the public interest.” (815 RICR 00-00-1.17(B).)

Further, “[i]ntervention other than as a matter of right”—i.e., other than intervention pursuant to 1.17(B)(1)(a)—“may be granted with such limitations and/or upon such conditions as the Division shall determine.” *Id.* at 1.17(D). Relatedly, “[t]he Division will not allow the broadening of issues unless the public interest requires it[.]” *Id.* at 1.17(F)(1).

The September 2013 Order determined that Interstate could not intervene as of right and that Interstate was not otherwise “directly affected” by the Application—i.e., that it could not intervene pursuant to 1.17(B)(1)(a) or (b). (R. no. 13, at 16.) Petitioners do not challenge these determinations. (Joint Br. 47-48; Joint Reply Br. 13-14.) Instead, the Division granted Interstate’s intervention motion based on the “public need” for Interstate’s year-round lifeline services, thereby permitting Interstate’s intervention pursuant to 1.17(B)(1)(c). (R. no. 13, at 19.) Interstate’s argument that the Division’s Advocacy Section did not adequately represent Interstate’s interests as to the fitness or ability determinations is therefore unprevailing. The question of whether or not an alternate existing party would “adequately represent[]” the needs identified by an intervenor is a relevant consideration only under 1.17(B)(1)(b).

Further, in making its determination, the Division relied upon Interstate’s argument that permitting RIFF to enter the Block Island ferry market would “have a dramatic negative impact on Block Island, its residents and its businesses” by impacting year-round rates and/or ferry service, thereby driving up the costs of transportation and goods for the island’s residents. (R. no. 70, at 3.) Nowhere did Interstate’s Motion to Intervene or its Reply to RIFF’s Objection to that Motion claim that Interstate had an interest, ability, or right to present evidence of a competitor’s

fitness or ability. *See generally id.*; *id.* no. 64. Consequently, Interstate got exactly what it asked for in its Motion to Intervene, and this Court rejects its attempt to raise a new argument on appeal. *See Neuschatz v. Reitsma*, No. PC-02-1589, 2004 WL 1351325, at *5-7 (R.I. Super. May 24, 2004).

Finally, even if this Court were to credit Interstate’s claims that it should have been granted full intervention status, its naked assertion that its limited status “directly prejudiced the rights of Interstate” is stated without further elaboration, argument, or authority. (Joint Br. 51.) “When there is no meaningful development of issues and, importantly, no citation to the record or legal authority, this Court will not ‘give life’ to arguments that are not properly developed.” *Terzian v. Lombardi*, 180 A.3d 555, 558 (R.I. 2018). Interstate did not have a claim to intervention by right, and it is not the role of this Court to speculate as to what evidence Interstate would have presented or the various ways Interstate may have been prejudiced by the limited intervention. *Cf. id.* Nevertheless, the only argument Petitioners have advanced before this Court as to fitness and ability is their repeated assertion, in various guises, that the Division should have denied the Application based on a lack of finality as to Interstate’s docking facilities. *See supra* III.A.2. As the Court has already determined that line of attack to be meritless, no prejudice resulted from Interstate’s inability to assert it before the Division. *See id.*; *see also* § 42-35-15(g).

4

Procedural Irregularities

Petitioners’ final challenge to the CPCN Order alleges that two procedural irregularities infected the proceedings before the Division. *See* Joint Br. 43-47. “In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.” (Section 42-35-15(f).) To that end, this Court granted Petitioners’ February 10, 2020 Motion for Discovery,

Evidentiary Hearing, and Supplemental Briefing and authorized Petitioners to depose: (1) former Division Administrator Thomas Ahern; (b) Respondent and signatory of the CPCN Order, Division Administrator Sidney “Macky” McCleary; and (3) Division Hearing Officer John Spirito, Jr. *See generally* Joint Mot. for Disc., Evid. Hr’g, and Suppl. Briefing; Feb. 2, 2021 Order Re: Pet’rs’ Joint Mot. The parties subsequently filed supplemental briefing on the issues of: (1) whether Administrator McCleary improperly issued the CPCN Order in violation of § 42-35-11; and (2) whether Mr. Spirito wrongfully delayed issuance of the CPCN Order until Mr. Ahern’s retirement, knowing that the former administrator did not support granting RIFF’s Application. *See generally* Joint Suppl. Br.; Div. Resp. to Joint Suppl. Br.; RIFF’s Resp. to Joint Suppl. Br.; Pet’rs’ Joint Reply to Resp’ts’ Resp. to Joint Suppl. Br.

i

Section 42-35-11

Section 42-35-11(a) of the APA provides that:

“Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision.” (Section 42-35-11(a).)

Separately, § 39-1-15 of the Division’s enabling act states that “[f]or effective administration, supervision, and regulation[,]” the Division’s administrator, at his or her discretion, can designate a hearing officer, such as Mr. Spirito, to conduct investigations and hearings. (Section 39-1-15.) The hearing officer then provides a written recommendation of decision and findings to the administrator. *Id.* If approved by the administrator, the hearing officer’s decision “shall have the same force and effect as a decision and findings by the administrator.” *Id.*

Petitioners argue that Administrator McCleary, who signed the CPCN Order, did not hear the case or read the record. (Joint Suppl. Br. 4.) Consequently, they assert that, notwithstanding § 39-1-15, the CPCN Order was procedurally improper because it should have been served on the parties as a proposed decision with an opportunity to file exceptions and present arguments to Administrator McCleary in accordance with § 42-35-11. *See id.* at 4-10.

It is not necessary for this Court to resolve any alleged conflict between §§ 39-1-15 and 42-35-11 because—even assuming that the APA obligated Administrator McCleary to “read the record” personally and in full—Petitioners have not met their burden of presenting evidence that overcomes the presumption of administrative regularity. *Cf. Banki v. Fine*, 224 A.3d 88, 99 (R.I. 2020); *Davis v. Wood*, 444 A.2d 190, 192 (R.I. 1982). Administrator McCleary testified that his typical practice was to read a proposed order, rely on the summary of the record included in an order, and further discuss the record with the relevant hearing officer. (Div. Resp. to Joint Suppl. Br. Ex. B (McCleary Dep.) 17:13-16.) However, for “long and complicated decisions”—which is how Administrator McCleary classified the CPCN Order—he generally recollected reviewing documents in the record. *Id.* at 21:21-22:14. He also confirmed that the record “was always available” to him and that he understood his role as the final decisionmaker. *Id.* at 15:24-16:16, 22:7-14. As to the CPCN Order specifically—which Administrator McCleary had signed five years before his deposition—he could not recall his depth of review. *Id.* at 21:8-22:6. Petitioners reframe this lack of recollection as a definitive statement that “McCleary did not read the record prior to approving the [CPCN Order,]” which is a misrepresentation of the testimony. (Joint Suppl. Br. 9.) In their final reply, Petitioners then attempt to shift the burden of proof to the Division, stating that “[t]he Division has never claimed or argued that McCleary reviewed the record, despite being in the best position to provide such proof” and that “[t]he Division did not include a

certification with the . . . CPCN Order that a review of the record had been completed by McCleary.” (Pet’rs’ Joint Reply to Resp’ts’ Resp. to Joint Suppl. Br. 5.) The Division, as respondent, has no such obligation.

Nevertheless, the Court holds that when a contested case before the Division is properly heard by the administrator’s designated hearing officer, there is no requirement that a proposal for a decision be served upon an adversely-affected party. *Brant v. Department of Business Regulation*, No. C.A. 81-2994, 1985 WL 663447, at *2 (R.I. Super. June 18, 1985) (holding § 42-35-11 is inapplicable in similar circumstances involving the Department of Business Regulation). As a justice of this Court determined in *Brant*, § 42-35-11 is not controlling in cases where a hearing officer is properly designated to hear the case and act on behalf of the ultimate decision maker. *Id.* As numerous other courts have held, § 42-35-11(a) is limited to multi-member decision-making bodies. *See, e.g., Hoven, Vervick & Amrine, P.C. v. Montana Commissioner of Labor*, 774 P.2d 995, 1001 (Mont. 1989) (concluding that this language is not applicable to an agency headed by “single individual and not to a number of officials”); *Donnelly v. Edgar*, 509 N.E.2d 1015, 1018 (Ill. 1987) (requirements do not apply when “there is only one agency official who is to render the final decision in each case”); *Turner v. Harden*, 222 S.E.2d 621, 623 (Ga. App. 1975) (language is “intended to apply only to multi-member agencies and not to agencies where a single official is charged with the responsibility of making decisions”).

ii

Timing of CPCN Order Approval

Petitioners also argue that Mr. Spirito wrongfully withheld the CPCN Order until Mr. Ahern retired, thereby violating § 39-3-5 and Division Rule 1.30(a). (Joint Suppl. Br. 10-15.) However, neither Rule 1.30 of the Division Rules of Practice and Procedure nor § 39-3-5 establish

a timeline for publishing orders. “After the hearing the division of public utilities and carriers shall enter an order granting or refusing to grant the petition.” (Section 39-3-5.) This unambiguous statute does not include a time requirement. Rule 1.30 provides that “[t]he Administrator or the Administration and Operations Officer will issue Division orders in writing in every proceeding.” (815 RICR 00-00-1.30(A)(1).) This rule merely limits who may issue orders on behalf of the Division and requires that orders be in writing.

Furthermore, the record does not establish purposeful withholding by Mr. Spirito. The Town’s attorney, who spoke with Mr. Ahern at his retirement party, testified that “Ahern *suggested* that a proposed order granting a CPCN had been drafted[.]” (Joint Suppl. Br. Ex. A (Dodge Aff.) ¶ 8 (emphasis added).) She further stated that “Ahern also *suggested* that presentation of the order to the Administrator was being delayed by Spirito until a new Division Administrator was appointed[.]” *Id.* ¶ 9 (emphasis added). Interstate’s attorney also spoke with Mr. Ahern and testified as to the same “suggestions.” (Joint Suppl. Br. Ex. B (McElroy Aff.) ¶¶ 9-10.) Both attorneys testified that Mr. Ahern stated he would “never approve a Division order that granted RIFF a CPCN[.]” *Id.* ¶ 8; Dodge Aff. ¶ 7.

Compellingly, however, Mr. Ahern conceded that he was speculating when he “suggested” that the hearing officer withheld the order from him. (Div. Resp. to Joint Suppl. Br. Ex. A (Ahern Dep.) 25:13-15 (“I may have suggested that, but I had no evidence to substantiate the actual withholding of the order from me.”); *id.* 25:22-23 (“I had no idea if the order was complete or not at that point[.]”); *id.* 27:24-28:2 (“Whether it was a favorable decision or adverse decision, I didn’t know what the decision was at that point in time.”).) Moreover, Mr. Spirito testified that Mr. Ahern never asked for the draft decision relating to RIFF’s Application, nor had Mr. Spirito completed the draft prior to Mr. Ahern’s departure. (Div. Resp. to Joint Suppl. Br. Ex. C (Spirito

Dep.) 49:1-2.) Petitioners have therefore failed to establish that Spirito purposefully withheld the CPCN Order. *See La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights*, 419 A.2d 274, 284-85 (R.I. 1980) (requiring evidence that “convincingly suggest[s]” impropriety to overcome “presumption of honesty and integrity in those serving as adjudicators”) (quotations omitted).

B

June 2017 Order

Petitioners’ objections to the now-vacated June 2017 Order are moot, and the Court need not address them. *See* Joint Br. at 49-50; Sept. 12, 2017 Order (Licht, J.). If this Court’s judgment would fail to have a practical effect on the existing controversy, the question is moot, and the Court will not render an opinion on the matter. *See Morris v. D’Amario*, 416 A.2d 137, 139 (R.I. 1980) (“As a general rule we only consider cases involving issues in dispute; we shall not address moot, abstract, academic, or hypothetical questions.”).

C

July 2018 Order

As to the July 2018 Order, Petitioners argue that the Division created and applied an erroneous legal standard when it required “‘obvious and compelling’ proof that RIFF did not have a realistic expectation of constructing Bluewater’s planned docking facility in Old Harbor.” (Joint Br. 51.) In the alternative, Petitioners further assert that, even under the Division’s allegedly erroneous standard, the evidence proved that RIFF and Bluewater had “zero chance of attaining necessary approvals from CRMC or [USACE.]” *Id.* at 51-52 n.44.⁸

⁸ The Division argues that this Court should not consider Petitioners’ challenges to the July 2018 Order because the Town’s underlying Complaint is unsigned and should be “stricken.” (Div. Resp. to Joint Br. 29-30 (quoting Super. R. Civ. P. 11).) The Division’s request to effectively dismiss

The Division did not err in requiring “obvious and compelling” evidence of RIFF’s inability to obtain docking facilities for the purpose of deciding whether to revisit its ruling on the Town’s 2015 Motion for Summary Disposition. In full context, the Division’s instruction required evidence of docking inability that was “obvious and compelling, not ambiguous and speculative.” (R. no. 223, at 3.) Specifically, the Division instructed that it would not consider “matters of design, environmental impacts or the terms in construction contracts” for the obvious and previously repeatedly stated reason that those matters were outside of the Division’s licensing scope. *See id.*; *see also id.* no. 226, at 5-6; *Interstate Navigation Co.*, 1999 WL 813603, at *7-8; R. no. 13, at 17.⁹ Petitioners fail to explain why these instructions were erroneous or what standard should have been used. *See Terzian*, 180 A.3d at 558.

Nevertheless, as explained *supra*, docking was a condition-subsequent of the CPCN Order. *See supra* III.A.2. Further, the July 2018 Order decided whether to exercise the Division’s reserved right from a December 2015 Order No. 22254 “to revisit this matter upon a showing by the Town that it has been *successful* in its efforts to prevent the construction of Bluewater’s planned

the Complaint associated with PC-2018-5679 does not comply with the appropriate legal standard for dismissal for failure to comply with the Superior Court Rules of Civil Procedure, and the Court declines to exercise its discretion to dismiss. *See* Super. R. Civ. P. 41(b)(2); *Coates v. Ocean State Jobbers, Inc.*, 18 A.3d 554, 560 (R.I. 2011) (“In considering a dismissal motion, a trial justice ‘must weigh the equities between the parties.’”) (quoting *Harvey v. Town of Tiverton*, 764 A.2d 141, 143 (R.I. 2001)).

⁹ This Court has previously upheld the Division’s determination that it need not consider docking and congestion in the context of operating authority. *See generally* R. no. 180. Block Island Ferry Services d/b/a Block Island Express and Intrastate Navigation Company sought to intervene before the Division to oppose Interstate’s Application, both alleging anticipated issues with dock space and harbor congestion. *Id.* at 3:23-4:20; *see also id.* no. 13, at 2, 11-12. A justice of this Court upheld the Division’s decision to deny intervention for both entities, stating that “[i]t was no abuse of discretion or error for the Division to decline to hear these [docking and congestion] issues in the context of this licensing proceeding” because it would be “duplicative, time consuming, and potentially a waste of time if it should turn out that the CRMC or the Harbormaster reach different conclusions from the Division’s Hearing Officer.” (R. no. 180, at 7:8-15.)

dock before the USACE or CRMC.” (R. no. 4, at 23 (emphasis added).) It was therefore entirely appropriate for the Division to consider revisiting the Town’s Motion for Summary Disposition and possibly vacating the CPCN Order only if there existed “dispositive”—i.e., “obvious and compelling”—“evidence on the record that reflects that Bluewater’s permit application cases before the CRMC and the [USACE] have reached final decisions.” (R. no. 223, at 37.)

As to Petitioner’s alternative argument that it did, in fact, present obvious and compelling evidence of RIFF’s inability, Petitioners maintain that they demonstrated to the Division that RIFF would be unable to obtain the Town’s required consent to construct the proposed docking facilities. (Joint Br. 52-53.) To the contrary, regardless of the Town’s potential intent or ongoing effort to withhold its consent, the evidence before the Division on remand showed that any relevant permitting remained outstanding. *See, e.g.*, R. no. 205, at 4-6 (testimony of Town building official acknowledging that Bluewater’s plans remained “proposed” and describing the prospective ways the Town “would” oppose those plans); *id.* no. 230, at 41:5-42:20 (testimony of 2018 Town Manager that Bluewater’s filing with CRMC had not been denied); *id.* no. 229, at 156:1-3, 188:16-194:8 (explaining that paperwork to and evaluations by CRMC and USACE remained outstanding). The undisputed incomplete and ongoing status of Bluewater and RIFF’s docking proposals is substantial evidence supporting the Division’s decision not to reconsider the docking issue. *See Interstate Navigation Co.*, 1999 WL 813603, at *7-8. Accordingly, the Court finds no error in the Division’s decision and affirms the July 2018 Order.

D

September 2018 Order

Finally, Petitioners argue that the Division acted in excess of its authority when it agreed to “stay” the deadline for compliance with the CPCN Order’s conditions until this appeal was

resolved. *See* Joint Br. 54-55; *see also* R. no. 239, at 17. In support, Petitioners interpret § 39-3-3(c) as providing that “no agency, including the Division, may grant a stay of any order of the Division with respect to a water carrier CPCN order.” *See* Joint Br. 55 (citing § 39-3-3(c)).

Stated in full, however, § 39-3-3(c) actually reads:

“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.” (Section 39-3-3(c).)

In light of this plain language, Petitioners’ argument fails for several reasons. First, § 39-3-3 expressly permits a stay in accordance with § 42-35-15. *Id.* Section 42-35-15(c) allows an agency to grant a stay “upon the appropriate terms” when a contested case is pending judicial review. (Section 42-35-15(c).) Here, the September 2018 Order stayed compliance with the CPCN Order’s conditions only until the instant appeal has concluded. (R. no. 239, at 17.) Second, § 39-3-3(c) is limited to “interlocutory stay[s].” (Section 39-3-3(c).) The CPCN Order represented the Division’s final order on the Application; consequently, any request to stay compliance with a post-approval docking condition was not an “interlocutory stay.” *See id.*; *see also* Black’s Law Dictionary 819 (7th ed. 1999) (defining “interlocutory” as “interim or temporary, not constituting a final resolution of the whole controversy”).

Therefore, this Court affirms the September 2018 Order.

IV

Conclusion

After review of the entire record, this Court: (1) affirms the CPCN Order, as well as the September 2013 Order, the July 2018 Order, and the September 2018 Order; and (2) declines to address the issues raised in relation to the now-vacated June 2017 Order. Counsel shall prepare the appropriate order.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Interstate Navigation Company v. Town of New Shoreham, et al.
Consolidated with
Town of New Shoreham v. Rhode Island Fast Ferry, Inc., et al.

CASE NOS: PC-2016-4804; PC-2017-3409; PC-2018-5806; PC-2018-7658
Consolidated with
PC-2016-4758; PC-2017-3405; PC-2018-5679; PC-2018-7687

COURT: Providence County Superior Court

DATE DECISION FILED: April 11, 2023

JUSTICE/MAGISTRATE: Taft-Carter, J.

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