STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS

In Re: Rhode Island Fast Ferry, Inc.) **Docket No. D-13-51**

RHODE ISLAND FAST FERRY, INC.'S MEMORANDUM REGARDING POST-HEARING INITIATION OF A PROTEST

Rhode Island Fast Ferry, Inc. ("RIFF"), submits this memorandum in accordance with the Hearing Officer's instructions following hearing on March 24, 2025. This memorandum addresses the lack of propriety of Interstate Navigation Company d/b/a The Block Island Ferry's ("Interstate") request that the Division receive Interstate's Objection to RIFF's Motion to Reconsider as a protest, despite the untimeliness of the request and Interstate's limited intervenor status.

Protests are addressed under Division Rule 1.18. The Rule provides, *in toto*, as follows:

> A. General
> 1. Any person other than a party who objects to the approval of an application, petition, motion, or other matter which is, or will be, under consideration by the Division may file a protest. No particular form of protest is required, but the letter or writing should contain the name and address of the protestant and a concise statement of the protest. If possible, four (4) legible copies of the protest should be forwarded to the Division with the original. The Clerk shall serve copies of all protests filed upon all parties.
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> B. Effect of Protest
> 1. A protest is intended solely to alert the Division and the parties to a proceeding of the fact and nature of the protestant's objections to an application, petition, or any other proposed action and does not become evidence in the proceeding. The filing of a protest does not make the protestant a party to the proceedings.
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> C. Motor Carrier Protests
> 1. In all matters before the Motor Carrier Section of the Division, the following special protest rules shall apply:

> a. A protest filed with the Administrator, against the granting of an application, shall set forth specifically the ground or grounds upon which it is made and shall contain a concise statement of the interest the protesting party has in the proceeding. A protest shall be filed in writing within seven (7) calendar days after notice of the filing has been given to the public by legal notice in The Providence Journal-Bulletin. A copy of any protest filed with the Administrator under this rule shall be served simultaneously upon the applicant.
> b. Protestants who have satisfied the requirements of § 1.18(C)(1) of this Part shall be treated as intervenors and accorded all appropriate rights.
> c. Protestants who are represented by legal counsel shall file with the Administrator, at least three days prior to the scheduled hearings, direct testimony in the form prescribed by § 1.23(D) of this Part, to be proffered by the protestants at the hearing. A copy of the prefiled testimony shall be served upon the applicant simultaneously by certified mail. The requirements of this paragraph may be waived at the discretion of the Hearing Officer.
> d. Protestants filing direct testimony shall make the witness whose testimony has been prefiled available at the hearing for cross-examination. A protestant may elicit rebuttal testimony from the witness through oral examination.
> e. Members of the general public wishing to be heard at Motor Carrier proceedings shall be allowed to voice their opinions on the record. These witnesses shall be limited to five minutes of testimony, or more at the discretion of the Hearing Officer.

Interstate appears to base its argument upon subsection A.1, as the instant matter is not a motor carrier protest. To be clear: Interstate's Objection is entirely regarding matters upon which Interstate has been repeatedly prohibited from offering comment – by both the Division and the Superior Court. Interstate's request to have its objection recharacterized as a protest is an attempt to perform an end-run around these repeated rulings. This latest attempt by Interstate to place its thumb on the scales in a naked effort to protect its ferry monopoly should be summarily rejected.

As the Hearing Officer correctly observed, Interstate's participation in this matter has been limited to commenting only on matters involving public need – Interstate has

been expressly prohibited from offering evidence or argument on RIFF's fitness and ability to provide its service. A review of the procedural history reminds the parties and the Division that Interstate's inability to opine on these matters has long been settled.

Interstate's status has been limited since the Division first ruled that Interstate could only provide input on the issue of public convenience and necessity back in 2013. *See* Division Order No. 21170 (September 2013). The Division "recognized that existing carriers do not have a legal right to maintain a monopoly upon services rendered, and that increased competition is not a valid ground for denying a common carrier CPCN." The Division allowed Interstate to participate in the licensing proceeding "in the context of the 'public convenience and necessity' elements[,]" but refused to allow Interstate "to challenge the Applicant with respect to its claims of 'fitness.'" The Division specifically stated that it "will not permit Interstate to participate beyond this limited issue[.]".

Although an interlocutory appeal was taken to the Superior Court as related to intervention (by another ferry service), Interstate elected to forgo an appeal of its limitation and instead agreed to participate in the proceedings from 2013 to 2016, only raising the intervention issue on appeal. Interstate has twice taken this issue to the Superior Court, and lost both times. *See* Order dated September 12, 2017 (Licht, J.) The issue was fully and finally addressed in the Superior Court's Decision dated April 11, 2023 (Taft-Carter, J.) The Court, rejecting Interstate's argument, held that "on the merits, the Division did not err in limiting Interstate's intervention status." Order at 32. Interstate never appealed this Order, which has become final. At this point, after repeated trips to the Superior Court on this issue, Interstate's limited status is both law of the case and res judicata. Interstate's belated attempt to inject material into the record regarding RIFF's fitness and

ability to meet its condition is inappropriate.

Interstate cannot now, at this late stage, recharacterize its objections to RIFF's fitness and ability to meet its conditions as a protest. Interstate's inability to comment on "fitness and ability" has become the law of the case. The doctrine of law of the case provides "that ordinarily after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a subsequent phase of the suit with the same question in the identical matter, should refrain from disturbing the first ruling." *State v. Infantolino*, 116 R.I. 303, 310, 355 A.2d 722, 726 (1976). This doctrine:

> is one that generally ought to be adhered to for the principal reason that it is designed to promote the stability of decisions of judges of the same court and to avoid unseemly contests and differences that otherwise might arise among them to the detriment of public confidence in the judicial function.

Richardson v. Smith, 691 A.2d 543, 546 (R.I. 1997) (citing *Salvadore v. Major Elec. & Supply, Inc.*, 469 A.2d 353, 356 (R.I. 1983)). The doctrine applies here. Interstate has been told, repeatedly, by both the Division and the Superior Court, that it cannot submit evidence on fitness and ability. Interstate has supplied no reason, compelling or otherwise, to revisit these rulings, nor any authority for the proposition that the Division may do so at this late date.

Interstate's attempt to inject material regarding fitness and ability considerations is also inappropriate under the doctrine of res judicata, which bars claims or defenses that were raised or could have been raised from being re-litigated once they have already been adjudicated by a court. *Town of Richmond v. Wawaloam Reservation, Inc.*, 850 A.2d 924, 932 (R.I.2004).

> "Res judicata operates as an absolute bar to a cause of action [when] there exists '(1) identity of parties, (2) identity of issues and (3) finality of judgment.'" Id. (quoting Rhode Island Student Loan Authority v. NELS, Inc.,

> 600 A.2d 717, 720 (R.I.1991)). Res judicata has been held to bar re-litigation of unappealed decisions, even decisions of administrative agencies or boards. *Id.* at 932-33 (citing *Dep't of Corrections v. Tucker*, 657 A.2d 546 (R.I.1995) and *Town of Lincoln v. Cournoyer*, 118 R.I. 644, 375 A.2d 410 (1977)).

Palazzolo v. State, C.A. No. WM-88-0297, 2005 WL 1645974, at n.30 (R.I. Super. Ct. July 5, 2005). Interstate's inability to submit evidence or argument on fitness and ability has become res judicata. The same parties have litigated this same issue to the Superior Court, and Interstate never appealed the Superior Court's ruling to the Supreme Court. Accordingly, Judge Taft-Carter's decision that Interstate may not fully intervene has become a final order, whether by recharacterizing such intervention as a protest or otherwise.

Interstate's Objection cannot be considered a protest. There is no support for the proposition that a party (albeit a limited party) may lie in wait, for more than 12 years and while participating fully in the hearing and appellate process, to relaunch the same objections it has long been prohibited from offering by simply calling its objection by a new name. Protests are clearly intended to be lodged within a short time after notice is given, so that the protest may be heard. A search of appeals taken to the Superior Court emanating out of protests lodged before the Division is illuminating. *See e.g.*, *Dominican Taxi, Inc. v. State of R.I.*, 1999 WL 813704 (Oct. 4, 1999) (protest filed less than 1 month after taxicab applications filed); *Rhode Island Public Towing v. P.U.C.*, 1994 WL 930885 (Jan. 24, 1994) (hearing occurred less than three months after application was filed, plaintiff filed protest prior to hearing). *Interstate Navigation Co. v. Div. P.U.C.*, C.A. Nos. 98-4804, 98-4766, 1999 WL 813603 (Aug. 31, 1999) is particularly revealing. Interstate sought reversal of a Division order granting a competing ferry service authorization to

operate a high-speed ferry to Block Island from Galilee. Six days after the application was filed, Interstate moved to intervene as a full party/protestant, which motion was granted. Following the intervention and protest, the parties agreed upon a hearing schedule and, after extensive hearings, the new ferry service was approved. Interstate unsuccessfully appealed. Notably, the Superior Court called into question Interstate's credibility due to its own designs on a high-speed ferry service and "testimony from Interstate which it believes 'evinces a monopolistic mind-set on the part of Interstate's management.'" *Id.* at *6. This decision was affirmed by the Supreme Court (*see* 746 A.2d 1240), which notably held that "the wisdom and appropriateness of [permitting Interstate's intervention] in this case was questionable."

Interstate is desperately seeking full-party status because it fears its stranglehold on Block Island ferry service may be disrupted. Interstate has long relied upon the Town of New Shoreham's support in these proceedings. Notably, the Town has recently dropped its objection to RIFF's ferry and has ceased supporting Interstate's Quixotic quest. The Division should be made aware that Interstate requested that the Town reconsider this position, and the Town Council met earlier this month to both discuss Interstate's request and discuss a potential increase in landing fees. Interstate advised the Town that if the Town did not renew its objection to RIFF, then Interstate would object to the proposed fee increase. Interstate itself referred to this approach as a "quid pro quo." The meeting can be viewed online at https://www.youtube.com/watch?v=TIafETYnozU&t=223s. Despite the pressure put on the Town by Interstate, the Town, at its public meeting of April 7, 2025, refused Interstate's request to change its previously stated position not to object to RIFF. This meeting can

be viewed online at https://www.youtube.com/watch?v=DW4ilUPNbeQ&t=10283s (at 1:50).

Interstate's Hail Mary attempt to have its latest attempt to intervene recast as a protest should not succeed. To entertain this request would require a tortured reading of the Division's rules and be contrary to binding decisions issued by the Superior Court. The Objection should be stricken and Interstate should not be allowed to recast the Objection as a Protest.

Dated: April 14, 2025

RHODE ISLAND FAST FERRY, INC.,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2025, I delivered a true copy of the foregoing document via electronic mail to the parties on the service list and the attorneys representing the parties.

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