

CITY OF NEW BEDFORD and NEW BEDFORD HARBOR DEVELOPMENT COMMISSION,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action
)	No. 00-12049-DPW
)	
WOODS HOLE, MARTHA'S VINEYARD AND NANTUCKET STEAMSHIP AUTHORITY,)	
)	
Defendant.)	

Woods Hole, Martha's Vineyard and
Nantucket Steamship Authority

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May 31, 2002

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1. The Woods Hole, Martha's Vineyard and Nantucket Steamship Authority was created by chapter 701 of the Massachusetts Acts of 1960 (as amended, the "Enabling Act"). The Enabling Act is published by West Publishing Company as an Appendix to chapter 159 of its annotated version of the Massachusetts General Laws ("Mass. Gen. Laws Ann. ch. 159 App., § 1-1, *et seq.*") (Appendix, TAB 1).

2. As stated in Section 1 of the Enabling Act, the Steamship Authority was created “[i]n order to provide adequate transportation of persons and necessities of life for the islands of Nantucket and Martha's Vineyard” (together, the “Islands”) and, to that end, is “authorized and empowered to purchase, construct, maintain and operate necessary vessels, docks, wharves, other vessels, equipment, furniture and supplies and to issue its revenue bonds payable solely from revenues, or funds” as authorized in the Enabling Act. (Enabling Act, § 1) (TAB 1, at p. 377).

3. Section 3 of the Enabling Act states that the Authority is a “body corporate ... which shall be deemed to be a public instrumentality for the purpose of this act.” The Authority currently is governed by a board comprised of potentially three voting and two nonvoting Members. The three voting Members are: one resident of the county of Dukes county (which includes Martha's Vineyard) appointed by the county commissioners thereof; one resident of the town of Nantucket appointed by the selectmen thereof; and one resident of the town of Falmouth (which includes Woods Hole) appointed by the selectmen thereof. The two nonvoting Members are: one resident of the town of Barnstable (which includes Hyannis) appointed by the town council thereof; and one resident of the city of New Bedford appointed by the mayor thereof with the approval of its city council, “who shall be a nonvoting member of the Authority for the period during which freight ferry service is operating to and from the port of New Bedford.” (Enabling Act, § 3, 2nd para.). All of the Authority’s Members serve without compensation. (Enabling Act, § 3, 4th para.) (TAB 1, 2002 Pocket Part, at pp. 102-103).

4. In Section 4 of the Enabling Act, the Legislature “authorized and empowered” the Authority to, among other things:

- (a) “acquire, maintain, repair and operate a boat line” [§ 4(a)];

- (b) "issue bonds ... for the purpose of paying for replacements and new construction or acquisition of vessels and other facilities required to provide adequate service" [§ 4(b)];
- (c) "fix, from time to time, such rates of fare and charges for service furnished or operated as in the judgment of its members are best adapted to insure sufficient income to meet the cost of the service" [§ 4(c)];
- (d) "contract by license, lease, charter or other arrangement for the provision of excursion service by other persons to and from the islands of Martha's Vineyard and Nantucket from any point on the mainland of the commonwealth, when it shall be deemed necessary or desirable to serve the purposes of this act" [§ 4(e)]; and
- (e) "do all acts and things necessary or convenient to carry out the powers expressly granted in this act" [§ 4(g)].

(TAB 1, at pp. 378-380).

5. Section 6 of the Enabling Act declares that "[t]he exercise of the powers granted by this act will be in all respects for the benefit of the people of the commonwealth, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions," and, further, that "the operation and maintenance of the steamship line by the Authority will constitute the performance of essential governmental functions" (Enabling Act, § 6) (TAB 1, at p. 384).

6. In the event the Authority's income is insufficient to meet the cost of the service, and the amount remaining in the Authority's reserve fund is insufficient to meet the deficiency, Section 9 of the Enabling Act provides that the amount of the deficiency ultimately is to be assessed as follows: ten percent (10%) on the town of Falmouth; forty percent (40%) on the town of Nantucket; and fifty percent (50%) on the county of Dukes county. (Enabling Act, § 9, 2nd, 3rd and 7th paras.) (TAB 1, at pp. 386-387).

7. Finally, the Enabling Act abolished the Steamship Authority's predecessor, the "New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority" (the

“predecessor authority”), which had been created by chapter 544 of the Acts of 1948 (the “1948 statute”), and vested all of the predecessor authority’s assets in the Steamship Authority. The Enabling Act also provided for the assumption by the Steamship Authority of all of the predecessor authority’s outstanding indebtedness and liabilities. (Enabling Act, § 16) (TAB 1, at p. 393).

B. The Creation of the Predecessor Authority.

8. As stated by the Massachusetts Supreme Judicial Court in Barnstable v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 343 Mass. 674, 681-82, 180 N.E.2d 440 (1962), in enacting the 1948 statute, the Massachusetts Legislature contemplated the continuation by the predecessor authority of the ferry service that theretofore had been furnished by Massachusetts Steamship Lines, Inc. between the mainland ports of New Bedford and Woods Hole, on the one hand, and ports on the islands of Martha's Vineyard and Nantucket.

9. Prior to the creation of the predecessor authority, the Massachusetts Legislature had established a Special Commission relative to the Operation of Steamships and Other Means of Water Transportation between New Bedford, Woods Hole, Martha's Vineyard and Nantucket. That Special Commission issued its report in May 1948 (the “1948 Report”) (TAB 2).

10. In its 1948 Report, the Special Commission noted that it had been established “for the purpose of making an investigation of the operation of steamships and other means of water transportation between New Bedford, Woods Hole, Martha's Vineyard and Nantucket, with a view to determining what action should be taken to better serve the interests of the public with respect to said transportation facilities in matters relating to equipment, passenger and freight rates and charges and other matters relating to such facilities.” (TAB 2, at p. 7). The Special Commission stated that it had “continued its task of finding a way to make permanent adequate

transportation by water between the mainland of the Commonwealth and the islands of Nantucket and Martha's Vineyard," and had prepared a plan which it believed would effect that purpose, including a proposed statute to create the predecessor authority. (TAB 2, at p. 8).

11. In its 1948 Report, the Special Commission further stated:

- (a) "Adequate transportation to the Islands cannot be provided by the two boats now running [operated by the Massachusetts Steamship Lines], and immediate action upon a plan for the rehabilitation of the line must be had to avoid damage to the economy of the Islands and damage to the interest which the Commonwealth has in keeping them as productive factors in producing income from the great body of summer residents and visitors who come to the islands." (TAB 2, at p. 9).
- (b) "Attempts to finance the steamship line from private sources of capital failed. The only resource, then, is some form of publicly managed capitalization and operation, and a statutory authority is the only recourse possible." (*Id.*, at p. 10).
- (c) A majority of the Commission "believe that the separation of the islands from the rest of the State lays upon the Commonwealth some obligation to furnish a road by water to the islands. The analogy of a highway is not destroyed by the accident that the intervening space is water, and a six-mile highway, even to the Vineyard, would cost the Commonwealth many times the moderate expense of rehabilitating the steamship line." (*Id.*, at p. 10).
- (d) "The steamship line must operate in winter, when the revenue is relatively small, as well as in summer, when profits are made. The line, as a public utility, must therefore be protected from the diversion of its trust by casual adventurers in boat operation who would skim off the cream of the summer business and leave the taxpayers and the public to bear the loss of the winter operation, and a provision for such protection has been placed in the proposed bill." (*Id.*, at p. 11).
- (e) "The Commission therefore presents the accompanying bill for the consideration of the General Court, with the respectful hope that the problem presented may be solved now for the immediate relief of the doubt that surrounds the future of the islands' transportation." (*Id.*, at p. 13).

12. The Special Commission also employed engineers who examined the operation of the steamship line and "formulated plans for the rehabilitation of the line." (TAB 2, at p. 9).

The engineers' report was presented to the General Court by the Special Commission as

Appendix A to its 1948 Report. In their report, the engineers noted that they had "completed a

preliminary engineering reconnaissance of the associated problems of an adequate water transportation system connecting the islands of Martha's Vineyard and Nantucket with the mainland of the State of Massachusetts" (TAB 2, at p. 14), and stated:

- (a) "The people of the islands now rely upon water transportation for all food and other supplies, mail and personal contact with the mainland of Massachusetts, and even, though air transportation has been available for a number of years, the people continue to look upon water transportation as their life line." (TAB 2, at p. 14).
- (b) "The islands of Martha's Vineyard and Nantucket, although separated by a long expanse of water, are a part of the Commonwealth of Massachusetts, and, due to the present status of transportation service, are experiencing a pressing need for the organization of a system assuring convenient and economical means of communication to and from the mainland." (*Id.*, at p. 15).
- (c) "The nature of the required service creates a difficult operating problem. The peak period of four summer months generates approximately 85 percent of the total annual passenger and automobile traffic. During the remainder of the year a very low traffic volume is experienced. Generally, the service is described as winter and summer operations." (*Id.*, at p. 17).
- (d) "The largest volume of passenger traffic is between Woods Hole and Martha's Vineyard during the summer peak periods. The major freight volumes are carried from New Bedford to Oak Bluffs and Nantucket. Although higher volumes are experienced during summer peaks, a fairly constant tonnage of freight of appreciable magnitude is carried between these points throughout the year." (*Id.*, at p. 17).
- (e) "Forecasts of future traffic will undoubtedly show a normal increase in the volume of passengers, freight and automobiles with a nominal amount of additional traffic, which should be induced by improved facilities and service. From present analyses, maintenance and operating costs will keep pace with increased revenues. In other words, neither public nor private ownership will obtain any material relief through increased transportation rates, increased volume of traffic, or a combination of the two." (*Id.*, at p. 22).
- (f) "The islands of Martha's Vineyard and Nantucket, although physically separated from the mainland, are, nevertheless, an integral part of the Commonwealth of Massachusetts, and, as such, merit consideration of its transportation problem by the state as a whole. To the same extent as other areas of the Commonwealth, separated by streams, are connected by bridges constructed at general state expense, these islands should perhaps be connected to each other and to the mainland by an acceptable means of transportation. That means may well be a ferry system." (*Id.*, at p. 22).

13. The engineers concluded, among other things, that “[a]n adequate means of transportation between New Bedford, Woods Hole, Oak Bluffs, Vineyard Haven and Nantucket is vital to the interests of Martha’s Vineyard and Nantucket islands and the Commonwealth of Massachusetts,” that “[t]he present ferry service is inadequate,” that “[n]o private means of improving the service to necessary standards are available,” and that “[p]ublic ownership and operation represent the most feasible medium through which the required transportation facilities may be assured.” (TAB 2, at p. 23).

C. Events Leading to the Creation of the Current Steamship Authority.

14. As previously noted, the Legislature, after receiving the report of the Special Commission, created the predecessor authority by enacting the 1948 statute. During the 1950s, however, disputes regarding the extent of the predecessor authority’s obligation to furnish adequate transportation service to and from the port of New Bedford resulted in four published decisions by the Massachusetts Supreme Judicial Court.¹ Further, in 1956, the Massachusetts Legislature enacted chapter 747 of the Acts of 1956, which amended the 1948 statute by inserting therein a new Section 5A requiring the predecessor authority to, among other things, “provide regularly scheduled ferry runs daily throughout the year of the type that will accommodate standard size trucks and semi tractor-trailer vehicles” to and from the port of New Bedford. (TAB 3).

¹ New Bedford v. New Bedford, Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority, 329 Mass. 243, 107 N.E.2d 514 (1952); New Bedford v. New Bedford, Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority, 330 Mass. 422, 114 N.E.2d 553 (1953); County of Dukes County v. New Bedford, Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority, 333 Mass. 405, 131 N.E.2d 206 (1956); and New Bedford v. New Bedford, Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority, 336 Mass. 651, 148 N.E.2d 637 (1958).

15. In 1957, the Massachusetts Legislature established another Special Commission to make an investigation and study of the management, operation, control and finances of the predecessor authority. That Special Commission submitted its final report in January 1959 (the "1959 Report") (TAB 4, at p. 3). In its 1959 Report, the Special Commission stated:

- (a) "The Steamship Authority was established by chapter 544 of the Acts of 1948 for the stated purpose of providing 'adequate transportation of persons and necessities of life for the islands of Nantucket and Martha's Vineyard.' This emergency legislation was necessitated by the failure of the Massachusetts Steamship Lines, Inc., which had taken over the line from the New Haven Railroad." (TAB 4, at p. 4).
- (b) "After the first year of operation, the Authority proved unable to meet the cost of operations out of current revenues and began compiling small annual deficits. As an economy move, the Authority sought to curtail winter service to the port of New Bedford, which lies sixteen miles further from the islands than the port of Woods Hole. ... Meanwhile, the Legislature enacted chapter 747, Acts of 1956 [T]his act ordered the Authority to construct a ferry slip at New Bedford and to provide daily service year round to the ports of New Bedford, Woods Hole, Vineyard Haven and Nantucket The annual deficit of the Authority increased to \$111,918 in 1956, reached a peak of \$614,000 in 1957, and was budgeted for \$350,000 in 1958." (*Id.*, at pp. 4-5).
- (c) "In a general sense, the over-all problem faced by the Steamship Authority is similar to that confronting other modes of transportation within the Commonwealth: the recurrence of annual deficits due to increased costs of operation which are not met by adequate revenues. The problem is increased by the highly seasonal nature of the economy of the two islands. Approximately 80 per cent of the traffic on the line is carried during the peak period of June through September (hereinafter referred to as the 'summer' season), whereas a very low volume is experienced, consisting mostly of passengers and necessities of life, during the remaining eight months (hereafter referred to as the 'winter' season). Yet the responsibility of the Commonwealth for insuring adequate water transportation to the islands is apparent, since the boat line is the only means of transporting freight and automobiles to the islands, and therefore exists as their 'state highway' to the mainland." (*Id.*, at pp. 5-6).

16. The Special Commission concluded that "the difficulties of the Steamship Authority and the region it serves are principally the following" (TAB 4, at p. 6):

- 1. "The annual deficit is presently the matter of greatest concern to the two islands and Falmouth (Woods Hole). ... The city of New Bedford, due to its greater assessed valuation, experienced less effect on its tax rate ... and is less affected by the size of the deficit."

2. The ferry steamer *Nantucket* "was intended to provide high-speed, ferry-type (end loading) transportation of freight and motor vehicles to the islands. After being placed in service, the *Nantucket* incurred unexpectedly large expenses for maintenance, operation, alterations, repairs and labor costs, which added substantially to the annual deficit for 1957. ..."
3. "The existence of two mainland ports on the steamship line has been the source of great controversy. The city of New Bedford lies 55 miles from Nantucket, 25 miles from Vineyard Haven. The village of Woods Hole is 39 miles from Nantucket, 8 miles from Vineyard Haven. The 16-mile differential, and the cost of operation of a possibly unnecessary mainland port, obviously add something to the annual operating expense of the line. From the evidence available, the New Bedford port makes money during the summer months, when it is a profitable source of excursionists and freight. But during the winter months, the New Bedford business is negligible"
4. Chapter 747 of the Acts of 1956 "required the Authority to construct a ferry slip in the city of New Bedford and to provide daily service year round to all ports, including the city, with a ferry steamer. It is noted that, by the mandatory daily service requirement, the General Court has undertaken to dictate the scheduling and operation of the Authority's principal vessel, and , in addition, has required the expenditure of capital funds for the necessary construction. ... Should [the provisions of this act] be followed, the Authority would have no discretion to curtail use of port facilities or vessels regardless of seasonal requirements or other considerations. Under these circumstances, it would seem impossible to reduce operating expenses substantially, a necessary step in eliminating the annual deficits."
5. "It has been said that the transportation to the islands is the most expensive in this country. It has also been said that this line is the only monopoly in the world which loses money. Despite the high rates charged, the revenues do not meet the cost of operation, and any increase in rates will, except in automobile transportation, price the Authority out of competition with the airlines and small private carriers. Since virtually everything used on the islands is carried by the Authority vessels, these freight charges add immensely to the cost of living on the islands, year round. And, due to the essentially one-way nature of the traffic, the islands are the consignees for almost all the freight and therefore bear the shipping costs."

(TAB 4, at pp. 6-8).

17. "In an attempt to clarify the mass of information, testimony, history, economics, personalities and comment" which it had heard (TAB 4, at p. 8), the Special Commission

submitted the following basic approach to the then present situation:

The fundamental purpose of the Steamship Authority is "to provide adequate transportation of persons and necessities of life for the islands of Nantucket and Martha's Vineyard." The line exists solely as a means of transportation and should be operated in the first instance for the benefit of the island communities which are completely dependent upon it. Since their economy is seasonal, the line should operate as much as possible on a seasonal basis, giving the necessary service in the summer and reducing it to the bare minimum in the winter. As it is clear that the line carries only necessities of life during the winter and since the needs of the islands in this regard have not changed perceptibly for ten years, there is no practical way to increase business or revenues during the eight "winter" months of the year. The line must make its money, if at all, during the summer, and effect utmost economies during the winter season. Whether the summer revenues can offset the winter losses is problematical.

(TAB 4, at pp. 8-9).

18. The Special Commission continued:

Unless and until the Authority can operate without incurring an annual deficit, there will exist a continuing threat to the economic life of the island communities. It is not the mere fact of the additional tax rate increase, but the realization that this increase is something over which these communities have absolutely no control and are utterly powerless to prevent, which poses the greatest threat. The attempt by the Authority to reduce the deficit by means of an increase in rates and fares again falls heaviest on the islands, as they are consignees of most the freight shipments. Either way the islands are in a precarious position. Nor only are their costs of living materially increased, but their attractiveness as summer resorts is visibly impaired by the deficit operation of the Authority.

(TAB 4, at p. 9).

19. The Special Commission later made the following legislative recommendation for approval by the General Court:

It is the opinion of a majority of the Commission that [chapter 747 of the Acts of 1956], which requires daily service to all ports on the line year round and which requires the construction of ferry facilities in New Bedford should be repealed. This recommendation is in keeping with the aforementioned need of the boat line for flexibility of operation and maximum economy during the winter season. The port of New Bedford is the only port which may be closed temporarily and still provide the necessary service for the islands, and this closing can only be

accomplished by removal of the statutory requirement for daily service. The Commission has noted that New Bedford is the mainland port most distant from the islands; that its winter traffic is negligible; that no evidence has shown a possible increase in winter business on the line due to daily service to the city; that only one mainland port is necessary to serve the islands; that similar facilities are available at the port of Woods Hole; and that the basing of vessels at New Bedford detracts from the necessary flexibility of scheduling on the line. ...

(TAB 4, at p. 14).

D. The Evolution of the Current Steamship Authority.

20. For several years after its creation, the Steamship Authority operated from only one mainland port in Woods Hole. However, the Authority began providing ferry service to Nantucket from Hyannis after the Legislature amended the Enabling Act in 1969 to empower the Authority to operate out of inner Lewis Bay from May first to September thirtieth. (Mass. St. 1969, § 573) (*See* Mass. Gen. Laws Ann. ch. 159 App., TAB 1, at p. 394). In 1974, the Enabling Act was amended again to allow the Authority, in its discretion, to provide ferry service from Hyannis throughout the year (Mass. St. 1974, c. 392) (*see id.*, TAB 1, at p. 394) and, since 1979, the Enabling Act has required the Authority to provide ferry service between Hyannis and Nantucket for no less than the period of April first to December thirty-first of each year. (Enabling Act, ¶ 16, 4th para., as last amended by Mass. St. 1979, c. 133, § 1) (*see id.*, TAB 1, at p. 394).

21. Since 1965, the Enabling Act also has expressly empowered the Authority to operate ferry service between the port of New Bedford and the Islands annually from May first to September thirtieth. (Enabling Act, § 16, last para.; Mass. St. 1965, c. 413) (*See* Mass. Gen. Laws Ann. ch. 159 App., TAB 1, at p. 394).

22. The Enabling Act provides that, during any period when freight ferry service is operating to and from the port of New Bedford, New Bedford shall have a nonvoting Member of

the Authority to be appointed by the mayor of New Bedford with the approval of its city council. (Enabling Act, § 3, 2nd para., as last amended by Mass. St. 2000, c. 235, § 24) (*See* ¶ 3, *supra*). But New Bedford Mayor Frederick Kalisz, Jr. has never appointed a New Bedford resident to be a nonvoting Member of the Authority, even though freight ferry service operated to and from the port of New Bedford during 2000 and 2001. (Frederick Kalisz Depos. Tr., TAB 5, at pp. 26-28; George Leontire Depos. Tr., TAB 6, at pp. 195-196).

E. The 2001 Report of the Governor's Task Force.

23. On December 8, 2000, then Governor A. Paul Cellucci issued Executive Order No. 425 establishing the Governor's New Bedford, Cape and Islands Ferry Service Task Force (the "Governor's Task Force"). (TAB 7). The Governor's Task Force was chaired by retired Appeal Court Justice Rudolph Kass, and it issued its written report to the Governor on or about April 12, 2001. (TAB 8).

24. In its Report, the Governor's Task Force declared that "[t]wo fundamental sets of observations came to guide the Task Force in this report" (TAB 8, at p. 1), the first of which they stated as follows:

Establishment of the SSA in 1948 by the Legislature was a response to the failure of private carriers to provide reliable year-round service to Martha's Vineyard and Nantucket. We understand that the SSA is the transportation lifeline for the island communities. There are other options: air transportation and licensed private carriers; but the vessels of last resort upon which the islanders rely after September and before June are those of the SSA. ...

For the last 40 years, the SSA has provided reliable service to the islands without running a deficit. Overall, the SSA has been responsibly run in the public interest. ... Tinkering with what has been a successful public authority needs, therefore, to be approached with reluctance and, certainly, with caution.

(TAB 8, at pp. 1-2) (footnote omitted).

25. In its Report, the Governor's Task Force also specifically addressed the Authority's licensing powers, stating:

We think the SSA must retain its licensing authority if it is to discharge its basic responsibility of providing year round service without deficits (or off-season rates) that would impose a hardship on the participating communities, particularly those on the Islands.

...

The Task Force considered whether there should be some sort of administrative review of SSA licensing decisions. We concluded that this would only encumber the procedure. Not only has the SSA established procedures for licensing, its statement of policy requires it to articulate in writing its reasons for grant or denial of a license, or the conditions placed on a license, in light of those policies. There would be no basis for overturning such a decision unless the SSA's findings and rulings showed that it had acted arbitrarily or capriciously. The remedy of a complaint in the nature of certiorari is already available to correct arbitrary and capricious conduct.

In the exercise of its discretion, we think the SSA should be generously disposed to applications for license amendments involving the upgrade of existing vessels (e.g., faster ones) that provide the same volume and level of service. If the request is to substitute a vessel that accommodates a wider range of service, e.g., a vessel that accommodates automobiles and freight trucks for a vessel that carried only passengers, the SSA may properly look to its financial interests.

(TAB 8, at pp. 5-6).

26. Further, in its Report, the Governor's Task Force recommended that the Barnstable and New Bedford nonvoting members of the Authority become full voting members. However, the Governor's Task Force also recommended weighting each member's vote so that voting control of the Authority will still be maintained by the Islands, declaring that "[i]t is the people of the Islands - particularly the year round residents - who need reliable ferry service provided as economically as possible." (TAB 8, at pp. 2-3).

II. THE AUTHORITY'S LICENSING POWER, POLICY AND PRACTICES.

A. The Authority's Licensing Power.

27. The fifth and sixth paragraphs of Section 5 of the Steamship Authority's Enabling Act (as amended by Mass. St. 1973, c. 942 and Mass. St. 1981, c. 584) provide:

Except as provided in this act, no person shall operate a vessel with a Coast Guard approved capacity rating in excess of forty passengers or a vessel of more than seventy-five gross tons for the carriage of passengers for hire by water between the mainland and the island of Martha's Vineyard or the island of Nantucket or between said islands unless licensed or permitted in writing to do so by the Authority. Except as provided in this act, no person shall operate a vessel for the carriage of vehicles or freight for hire or resale by water between the mainland and the island of Martha's Vineyard or the island of Nantucket or between said islands unless licensed or permitted in writing to do so by the Authority. The superior court shall have jurisdiction, on a petition in equity by the Authority, to enjoin any such operation. This section shall not apply to the continuance of existing services by vessels or a replacement of similar capacity thereof, which were in service on a daily seasonal basis on or before May thirtieth, nineteen hundred and seventy-three, or which were under contract for construction or purchase therefor executed on or before May thirtieth, nineteen hundred and seventy-three. The foregoing exclusion, however, shall not be applicable to vessels operating on a charter basis from a non-financial institution.

The provisions of the foregoing paragraph shall not apply to the continuance of the existing service from the port of New Bedford to the island of Martha's Vineyard by the motor vessel Manisee or a replacement of similar capacity, nor shall said provisions be construed to prohibit the operation of another motor vessel for a period of twenty days, in the event that the motor vessel Manisee or a replacement is unable to operate because of a breakdown or an emergency situation.

(TAB 1, at p. 383).

28. At all times relevant to this lawsuit, the Steamship Authority consistently has interpreted its licensing powers under Section 5 of the Enabling Act to apply solely to vessels operating between the mainland of Massachusetts and the island of Martha's Vineyard or the island of Nantucket, or between the Islands. The Authority has not purported to exercise any

licensing authority over any vessels carrying passengers, vehicles or freight between ports outside of Massachusetts and either of the Islands. (Steven Sayers Aff., May 31, 2002, TAB 9, ¶ 2, at pp.1-2). This is consistent with the original version of Section 5 of the Enabling Act which, until it was amended in 1973, required vessels of more than one hundred gross tons to be licensed by the Authority “for the carriage of passengers, vehicles or freight for hire by water between the mainland of the commonwealth and the island of Martha's Vineyard or the island of Nantucket or between said islands.” (Mass. St. 1960, c. 701, § 5, 5th para.) (See Mass. Gen. Laws Ann. ch. 159 App., TAB 1, at pp. 383-384) (emphasis added).

29. In this regard, over the last few years, a high-speed passenger-only ferry service has been provided by a private operator between Martha's Vineyard and Long Island, New York on a seasonal basis. Consistent with its interpretation of the Enabling Act, the Authority has neither required that service to be licensed by the Authority nor attempted to stop the service on the grounds that it has not been licensed by the Authority. (S. Sayers Aff., TAB 9, ¶ 3, at p. 2).

30. Section 5 of the Enabling Act also does not give the Authority any power to regulate air traffic between the Massachusetts mainland and the Islands, as airplanes are not “vessels” operated “by water”. In this regard, airplanes carry not only passengers to the Islands, but also freight. (F. Kalisz Depos. Tr., TAB 5, at pp. 8-9; Wesley Ewell Depos. Tr., TAB 10, at pp. 118, 121-122).

B. Limitations on the Authority's Licensing Powers.

31. The licensing requirements contained in Section 5 of the Enabling Act also do not apply to passenger service with vessels having a Coast Guard approved capacity rating of forty or fewer passengers, to replacements of the vessel *Manisee* between New Bedford and Martha's Vineyard, or to vessels (or replacements thereof) which were in service on a daily seasonal basis

on or before May 30, 1973 or which were under contract for construction or purchase therefor executed on or before May 30, 1973. (See ¶ 27, *supra*). The services provided by those vessels have been as follows:

- (a) The operation by Hyannis Harbor Tours, Inc. (d/b/a "Hy-Line") of the vessel *Point Gammon* (with a Coast Guard approved capacity rating of around 450 passengers) and the vessel *Brant Point* (with a Coast Guard approved capacity rating of around 600 passengers) for a limited number of round trips between Hyannis and Nantucket on specified days during each summer season; and Hy-Line's operation of the vessel *East Chop* (with a Coast Guard approved capacity rating of 500 passengers) and the vessel *Cross Rip* (with a Coast Guard approved capacity rating of 400 passengers) for a limited number of round trips between Hyannis and Martha's Vineyard on specified days during each summer season.
- (b) The operation by Island Commuter Corp. of the vessel *Island Queen* (with a Coast Guard approved capacity rating of around 600 passengers) for a limited number of round trips between Falmouth and Martha's Vineyard on specified days during each summer season.
- (c) The operation by Cape Island Express Lines, Inc. of the vessel *Schamonchi* (with a Coast Guard approved capacity rating of around 640 passengers), as the replacement of the vessel *Manisee*, for a limited number of round trips between New Bedford and Martha's Vineyard on specified days during each summer season.
- (d) The operation of a year-round "water taxi" service between Martha's Vineyard and Falmouth by Patriot Party Boats, Inc. with vessels having a Coast Guard approved capacity rating of forty or fewer passengers.

(S. Sayers Aff., TAB 9, ¶ 4, at p. 2-3).

32. All of the services described above which are exempt from the licensing requirements of the Section 5 of the Enabling Act have been provided from private facilities on the Massachusetts mainland and the Islands, and the Authority has no power to regulate the private facilities from which those services are provided. (S. Sayers Aff., TAB 9, ¶ 5, at p. 3).

33. In April 2001, the Authority purchased the *Schamonchi* and all of the other assets of the ferry business operated by Cape and Island Express Lines, Inc. Since then, the Authority has continued to operate the *Schamonchi* between Billy Woods Wharf in New Bedford and the

Authority's Oak Bluffs terminal on Martha's Vineyard during the summer season with essentially the same sailing schedule as it had before, with the only significant difference being that, because the Authority is not empowered to provide the service before May 1st or after September 30th in any year, it has scheduled the sailing season to end during the latter part of September instead of on the Columbus Day Weekend. (S. Sayers Aff., TAB 9, ¶ 6, at p. 3).

C. The Authority's Adoption of a Licensing Policy.

34. In March 1995, the Authority adopted a policy pertaining to the licensing of private vessel transportation services (the "Licensing Policy"), which was last amended in 1996. (TAB 11). Since March 1995, the Licensing Policy has been generally followed by the Authority when issuing licenses for passenger vessel transportation services between the Massachusetts mainland and the islands of Martha's Vineyard and Nantucket. (S. Sayers Aff., TAB 9, ¶ 7, at p. 4). In summary, under the Licensing Policy:

- (a) the Authority does not grant a license for any proposed vessel transportation service between the Massachusetts mainland and the Islands unless it is demonstrated that public convenience and necessity require the proposed service;
- (b) the Authority considers all requests for licenses on a case-by-case basis, although the Authority expressly adopted in the Licensing Policy certain policies, principles and standards to guide the exercise of its discretion in appraising the public interest;
- (c) before any request for a license is considered, the Authority's management staff holds public hearings thereon after due notice is given to all interested parties, and provides the Authority's governing members with a comprehensive analysis as to whether, in the staff's opinion based upon the information received, public convenience and necessity require the proposed service; and
- (d) each license agreement entered into by the Authority specifies the routes over which the licensee's vessels may operate, contains such terms and conditions as the Authority deems that public convenience and necessity require, are subject to revocation for cause, and are subject to revision at any time to the extent the Authority finds such action to be in the public interest.

(Licensing Policy, TAB 11, at p.1).

35. The Licensing Policy also contains a summary of the policies, principles and standards the Authority applies when evaluating individual license requests. (Licensing Policy, TAB 11, at p. 10), as follows:

- (a) The Authority must make certain that the islands are always provided with adequate transportation (discussed at pages 10 through 12 of the Licensing Policy);²
- (b) The Authority must make certain that additional licensed services do not adversely affect its financial situation (discussed at pages 12 through 14 of the Licensing Policy);
- (c) The Authority also shall consider the financial health of the “grandfathered” services when evaluating license requests (discussed at pages 14 through 16 of the Licensing Policy);³
- (d) Traffic growth is a concern that the Authority shall consider when evaluating license requests (discussed at pages 16 through 17 of the Licensing Policy);

² In this regard, the Licensing Policy provides that there may be instances “where the public interest will be served by licensing a private carrier to operate on a certain route which the Authority does not serve.” (TAB 11, at p. 12). “For example, a new route operating out of a town or village which previously did not have any ferry service may divert passengers from an already existing port, thereby reducing traffic congestion and parking problems there.” (*Id.*, at p. 18). Further, in the Licensing Policy, the Authority abandoned its previous requirement that a proposed route be the subject of competitive proposals, because “it discouraged investment in new private ferry routes which public convenience and necessity may warrant.” (*Id.*, at pp. 17-18).

³ In this regard, the Licensing Policy notes that:

There is little doubt that the limited services provided by the grandfathered carriers are a necessary adjunct to the Authority’s service during the summer months. Indeed, if any of those carriers were to go out of business, the Authority would be hard pressed to acquire the extra facilities which would be needed to carry all the additional passengers who otherwise would have been its competitor’s patrons. The island economies also would suffer from the decrease in daily summer visitors. Therefore, the grandfathered carriers have become an integral part of the transportation system to this islands, and their continued existence is an important objective to ensure that the islands are provided with ‘adequate’ transportation during the busy summer seasons.

(TAB 11, at p. 15).

- (e) The Authority shall not grant any license request unless the carrier demonstrates that it is able to provide the proposed service (discusses at pages 17 through 18 of the Licensing Policy); and
- (f) The Authority shall consider the localized physical impacts of any proposed new service (discussed on page 18 of the Licensing Policy).

(Licensing Policy, TAB 11, at pp. 10-18).

36. The Licensing Policy also requires that all license agreements entered into by the Authority contain adequate provisions to protect the public interest. (Licensing Policy, TAB 11, at p. 18). The Licensing Policy lists a number of such provisions that generally should be included in such agreements, although it also explicitly recognizes that in some situations a carrier may demonstrate that good cause exists for not including certain provisions in its license agreement which the Authority otherwise may feel are necessary to protect the public interest. (*Id.*, at pp. 18-21). In the absence of such good cause, the Licensing Policy provides that the following provisions (among others) generally are to be included in each license agreement:

- (a) A description of the licensed route and an agreement by the carrier not to otherwise operate its vessels between the mainland and the islands unless licensed by the Authority to do so.
- (b) A specification of the vessels which will be used by the carrier to provide the service.
- (c) A specification of the vessels' schedule of arrivals and departures, with any change thereto subject to the Authority's approval, and an agreement by the carrier that the Authority may require the carrier to change its schedule so as not to conflict with the Authority's schedule.
- (d) An acknowledgment by the carrier that the license agreement does not authorize it, either directly or indirectly, to use any of the Authority's facilities in any way.
- (e) An acknowledgment by the carrier that the Authority may terminate the license if the service adversely affects its ability to fulfill its statutory responsibilities.
- (f) A provision allowing the Authority to terminate the license at any time for cause and an agreement by the carrier to cease providing its service promptly thereafter.

- (g) An agreement that the license may not be assigned.

(Licensing Policy, TAB 11, at pp. 18-21).

D. The Authority's Practice of Issuing Licenses under Its Licensing Policy.

37. At the time it adopted its Licensing Policy in March 1995, the Authority already had licensed a number of persons to operate vessels for the carriage of passengers for hire by water between the mainland and the island of Martha's Vineyard or the island of Nantucket or between said islands. Since adopting its Licensing Policy, the Authority has issued additional passenger licenses, and currently the following private operators are licensed by the Authority to provide passenger service between the Massachusetts mainland and the Islands, or between the Islands:

- (a) The Authority has licensed Hy-Line to operate between Hyannis and Nantucket and between Hyannis and Martha's Vineyard during the summer seasons through 2005 with the vessels *Great Point* (with a licensed capacity of 720 passengers per trip), *Brant Point* (with a licensed capacity of 520 passengers per trip), *Point Gammon* (with a licensed capacity of 450 passengers per trip) and *East Chop* (with a licensed capacity of 500 passengers per trip). These license agreements generally have been referred to as Hy-Line's "Additional Service" License Agreements because they permit Hy-Line to operate additional trips with larger vessels (and greater passenger capacities) beyond that which it has a right to operate by virtue of the limitations of the Authority's licensing power contained in Section 5 of the Authority's Enabling Act (*see* ¶ 31(a), *supra*).
- (b) The Authority has licensed Hy-Line to operate a year-round high-speed passenger transportation service with the vessel *Grey Lady II* (with a licensed capacity of 149 passengers per trip) between Hyannis and Nantucket. The Authority also has granted Hy-Line's request to replace the *Grey Lady II* with the *Grey Lady III*, which, after it is constructed, will have a licensed capacity of 300 passengers on two of its trips each day and 149 passengers for its other four trips). Hy-Line also has agreed to retire one of its grandfathered vessels, the *Point Gammon*, once the *Grey Lady III* commences service. The current license will expire on December 31, 2005.
- (c) The Authority has licensed Hy-Line to operate between Martha's Vineyard and Nantucket during the 2002 summer season with the vessels *Cross Rip* (with a licensed capacity of 400 passengers per trip) and *East Chop* (with a licensed capacity of 500 passengers).

- (d) The Authority has licensed the New England Steamship Foundation to operate the steamship *Nobska* (with a licensed capacity of 1,000 passengers) between New Bedford and Nantucket by way of Martha's Vineyard during the summer seasons beginning no earlier than May 15, 2002 and ending no later than October 15, 2018, together with permission to use the Authority's ferry terminals on both Martha's Vineyard and Nantucket for dockage.
- (e) The Authority has licensed Cape & Islands Transport, Inc. to operate the vessel *Pied Piper* (with a licensed capacity of at least 90 passengers per trip) between Falmouth and Edgartown (which is on the island of Martha's Vineyard) during the summer season. The current license will expire at the end of the 2002 season.
- (f) The Authority has licensed Freedom Cruise Line, Inc. to operate the vessel *Freedom* (with a licensed capacity of 80 passengers per trip) between Harwich Port and Nantucket during the summer season. The current license will expire at the end of the 2002 season.

(S. Sayers Aff., TAB 9, ¶ 8, at p. 4-5).

38. Since 1996, the Authority also has given its permission to another private vessel operator, Patriot Party Boats, Inc., to carry casual and hand freight from Falmouth to Martha's Vineyard. (Sayers Aff., TAB 9, ¶ 9, at p. 5).

39. All of the services licensed by the Authority referred to above (with the exception of the *Nobska*) have been provided from dockage facilities that are owned either privately or by municipalities on the Massachusetts mainland and the Islands, and the Authority has not asserted any regulatory authority over the facilities from which those services are provided. Rather, in its license agreements, the Authority has required the land-based facilities of its licensed private operators to comply with all necessary permits, licenses and approvals of federal, state and local authorities, such as regulations promulgated by the Massachusetts Architectural Access Board regarding transportation terminals (521 CMR 18) which may be applicable to their operations. (S. Sayers Aff., TAB 9, ¶ 10, at p. 5).

40. Although the Licensing Policy generally requires the Authority's license agreements, in the absence of good cause, to contain provisions requiring its licensees to acknowledge that they are not authorized to use the Authority's facilities, the Authority has given certain private operators permission to use its terminal facilities, including Seabulk International, Inc. (formerly known as Hvide Marine, Inc.) in connection with the Authority's New Bedford freight service pilot program during 2000 and 2001 (see ¶¶ 94-97, *infra*) and the New England Steamship Foundation (see ¶ 37(d), *supra*). In the past, the Authority also has allowed private operators to use its terminal facilities on both Martha's Vineyard and Nantucket in connection with their provision of passenger service between the Islands and, further, has entered into agreements for the occasional use of its dockage facilities by cruise lines. (S. Sayers Aff., TAB 9, ¶ 11, at p. 6).

41. From time to time since the Authority adopted its Licensing Policy in March 1995, a few individuals have expressed interest in providing either a passenger or freight vessel transportation service between the mainland and one of the Islands. However, no one has applied to the Authority for a license to provide any passenger, vehicle or freight ferry service between the mainland of Massachusetts and either or both of the Islands on either a seasonal or year-round basis except for those persons and entities referred to above who have been granted licenses, the private operators who responded to the Authority's requests for proposals in 1999 and 2001 to provide a freight transportation service from an off-Cape port to one or both of the Islands (which will be discussed in paragraphs 82 through 90 and paragraphs 107 through 112, *infra*), and Seabulk International, Inc. in March 2001 (which will be discussed in paragraphs 98 through 102, *infra*). (S. Sayers Aff., TAB 9, ¶ 12, at p. 6).

III. THE 1994 URBAN HARBORS INSTITUTE REPORT

A. The Issuance of the 1994 Urban Harbors Institute Report.

42. In May 1994, Professors Martin C. Pilsch, Jr. and Lawrence Held of the Urban Harbors Institute of the University of Massachusetts - Boston issued a final report for the Office of Technical Assistance and Safety of the Federal Transit Administration of the U.S. Department of Transportation, entitled *The Impact of a Ferry System Upon Its Communities* (the "Urban Harbors Institute Report") (TAB 12). The purpose of the Report "was to analyze the impacts of the Steamship Authority and private carriers on the communities in which they operate," and "[t]he impacts were examined in light of economic, physical and social effects." (TAB 12, at p. 4). At the beginning of the Report, the authors noted that it had been organized with the following important distinctions in mind (among others):

- (a) "The survival of the islands is dependent on the lifeline service that the Steamship Authority provides. The survival of the Steamship Authority as an agency that can provide that lifeline service is dependent on revenues gained from a market that is some ten times larger than the islands provide, being regional, national and even international in scope."
- (b) "The islands have a fundamentally different relationship with the ferry system than the mainland communities. To the islands, the ferry is an essential lifeline and intrinsic element of the community, to the mainland the ferry is inessential and extrinsic."

(Urban Harbors Institute Report, TAB 12, at pp. 4-5).

B. The Steamship Authority's Remarkable Performance Over the Years.

43. The Urban Harbors Institute Report described the importance of the Authority's ferry system to the economies of the Islands, and reviewed the Authority's performance over the

prior decades. Its "Summary of Findings," for example, included the following:

- (a) "The islands of Martha's Vineyard and Nantucket are served by a ferry system that features outstanding reliability, a high frequency of non-peak service, an ability to handle a very wide range of both cargo and people and that is remarkably adaptive to changes in demand. The island ferry system is one of the few transportation systems on the eastern half of the United States that has kept pace with and essentially met the demand for its services." (TAB 12, at p. 7).
- (b) "Because the Steamship Authority has offered reliable and demand responsive ferry service for forty years its presence has become synonymous with island transportation. That stability has undergirded the growth of the islands. It has provided the stable platform upon which non-resident homeowners, innkeepers and virtually anyone in the tourist business has built their investment. It is a remarkable tribute to the Authority as a transportation entity that the islands have been able to grow at virtually the same rate as coastal communities which offer direct highway access. The impact of the comfort level that islanders and visitors alike have with the Authority has had a subtle but powerful influence on the development of the islands." (*Id.*, at pp. 7-8).
- (c) "Steamship Authority traffic is readily identifiable, is fast, directed and is more subject to rapid ebb and flow than other forms of traffic. However, ferry-related traffic is far from the largest component of the communities' traffic flows. The largest component of traffic is attributable to the towns themselves. Because of its visibility, ferry-related traffic has the appearance of constituting a larger share of congestion than in reality it causes. Community impacts have to be measured with that illusion in mind." (*Id.*, at p. 8).

44. In its Introduction, the Urban Harbors Institute Report also observed:

- (a) "One aspect of the islands transportation system that has not been suppressed, is the ferry system, a mode which has consistently accommodated increases in the number people, freight and automobiles being brought over to the islands." (TAB 12, at p. 15).
- (b) "The self-preservation of the Authority must be accomplished within a highly polarized market. To survive, the Authority must balance the needs of the Islanders and freight haulers with the cost of running vessels in winter that are only fractional capacitized, and it must balance short, medium and long-range planning in a market that endures both wide seasonal and climatic variations and systemic changes in service demand." (*Id.*, at p. 16).

45. In Chapter 4, entitled "The Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, and its Predecessor Organizations," the Report described how the Islands

had not been well served prior to the establishment of the current Authority. The New York, New Haven and Hartford Railroad had purchased the boat line in 1912, but by 1945:

The New Haven Railroad simply could not afford to operate the island steamboats anymore. ... Neglect was the inevitable result, and by the end of the Second World War the much-reduced boat line was hurriedly put up for sale. Massachusetts Steamship Line, a new entity created solely to operate the island service, purchased the Steamboat line and terminal properties from the New Haven Railroad in 1945.

... Massachusetts Steamship Line inherited a physical plant that had seen little upgrading since 1912 and its terminals were reported to be in generally poor condition. ...

By 1948, the demise of MSL was apparent. Unable to gain the capital necessary to rehabilitate the neglected terminals and order new vessels, and facing an imminent Coast Guard decertification of the *Islander*, the plight of MSL finally moved the islands' legislative delegation to action. In 1947, the legislature convened the "Special Commission to Make a Study Relative to the Operation of Steamship and Other Means of Water Transportation Between New Bedford, Woods Hole, Martha's Vineyard and Nantucket." The study committee was renewed in 1948, and its recommendations became the basis of a bill which passed later in the year.

...

The Authority ran a consistent if limited schedule to the islands until 1960, running a near-constant deficit at the same time. ...

...

... Although the Authority was charged with maintaining sufficient revenues through its tariff structure, it had inexplicably run almost twelve years of constant debt. As a result of this, the Authority's facilities suffered from deferred maintenance and its fleet was only barely sufficient to meet demand. ...

(Urban Harbors Institute Report, TAB 12, at pp. 24-26).

46. In Chapter 10, entitled "Social Impacts of the Cape and Island Ferry System on the Four Communities," the Report observed that "[t]here are few ferry-dependent island communities which have such a high frequency of service, nor mainland communities which have such easy access to outlying islands. The benefits of this is to allow the islanders greater

flexibility in lifestyle, decreased isolation and greater access to mainland resources such as medical care and education.” (TAB 12, at p. 68).

47. In Chapter 12, entitled “Systemic Impacts of the Cape and Island Ferry System,” the Report stated:

- (a) “The economies of both islands are extremely dependent on the ferry service for maintenance of both the year round and seasonal economy. Frequency and reliability of service appear to be key to the stability and well-being of the economy.” (TAB 12, at p. 82).
- (b) “Without regular ferry service Martha's Vineyard could only support a fraction of the activities it now hosts. ... It is an open question whether private initiatives would or could replace the Steamship Authority if it had never been created or in the unlikely event that it was dissolved. In all probability, some level of year-round service by private entities would be offered in lieu of the operations of the Steamship Authority. However, there is a strong correlation between the stability and frequency of service offered by the Authority and the growth of the island communities and their economies.” (*Id.*, at p. 82).

48. In Chapter 15, entitled “Conclusions,” the Urban Harbors Institute Report also recognized that:

- (a) “The Steamship Authority has not forsaken its most fundamental mission, for in truth the islanders are receiving the best ferry service they have ever had. Ferries run more frequently, are more capacious and operate on a steadier year round basis than every before. On a constant dollar basis the ferries are cheaper than at any time since the new authority was formed in 1960.” (TAB 12, at p. 104).
- (b) “Perhaps the most profound impact of the ferry system on its communities is in the case of the Islands, where it has enabled them to achieve a level of growth in both permanent and seasonal populations that is equivalent to that experienced by coastal communities on the mainland. This is a remarkable achievement considering the inconveniences that a ferry system presents versus a direct highway connection. One of the findings of this report is that the quality of life and standards of living of the island communities are significantly higher than that of Massachusetts on average. This is in marked contrast to their relative position 20 or 30 years ago. The growth in tourism and influx of wealthy retirees and non-resident homeowners which has created this remarkable economic turnaround could not have occurred without the presence of a ferry system that responded aggressively to demand. A demand that has transported some 30 million individuals and their automobiles over the past thirty years, and that has carried some over one million tons of freight over the same period.” (*Id.*, at p. 105).

C. Projected Future Growth in Steamship Authority Traffic.

49. The Urban Harbors Institute Report also concluded that the Steamship Authority's traffic would continue to increase at the rate it had achieved in the past, about three to four percent per year. In addition, the Report noted that there were no indications that the real long-term rate of growth of the Authority's island and mainland port communities had abated either. (TAB 12, at pp. 9, 105-106). Accordingly, the authors declared: "In light of this unabated growth rate we believe it is time for the SSA and the four communities to plan for major operational changes which will head-off a future crisis in the host communities." (*Id.*, at p. 116).

50. Nevertheless, the Report stated that this added burden of "automobile congestion and truck traffic" to the Authority's host communities was "not sufficient to recommend immediate and substantial changes in the way that the Steamship Authority operates." (TAB 12, at p. 8). In this regard, the Report stated:

While the current rate of development is not necessarily seen as desirable by community residents, studies of the buildout potential of some of the communities indicate that they can accommodate it, at least through the next generation. It also seems likely that the ferry system can grow to accommodate their anticipated future demand, and so will not be themselves act as a logistical brake on island growth.

(Urban Harbors Institute Report, TAB 12, at p. 105).

51. The Report concluded, however, that Falmouth "could face in one or two decades seriously deficient conditions on its major roadways" which "could jeopardize the efficient and timely operations of the ferry system. Accordingly, the Report stated, "the continued use of Woods Hole Terminal as the sole Steamship Authority egress to Martha's Vineyard may not be possible." (TAB 12, at pp. 109-110). Further, the Report stated that "[t]he most effective way

to alleviate congestion at Falmouth is to create an alternative service port for the Steamship Authority,” and examined New Bedford as one such port. (*Id.*, at pp. 100-101).

D. Examination of New Bedford as an Alternative Port.

52. In Chapter 13, entitled “Examination of New Bedford as an Alternative Port,” the Urban Harbors Institute Report noted that in the past few year there had been “a renewed call” for the return of ferry service between New Bedford and the Islands from two sources, “the current generation of New Bedford leaders, who see a revival of ferry service as a way to help revitalize” their port, and “organizations in Falmouth and Woods Hole that see New Bedford as a supplementary port that could alleviate congestion resulting form growth of the Steamship Authority at Woods Hole.” (TAB 12, at p. 68). Thus, the Report described the perceived benefits of a resumption of ferry/freight service to New Bedford as “mitigative,” in that it “would ameliorate much of the existing and future ... impacts that the ferry system has on the town of Falmouth,” and as a source of “economic development” for the city of New Bedford, in that it “would bring significant spin-off economic benefits to the city.” (*Id.*, at p. 69).

53. Ultimately, the Report concluded that “New Bedford has excellent potential as an alternate or supplementary port to Woods Hole,” provided that a number of conditions are met, including the following:

- (a) “Steamship Authority patronage continues to grow at a rate that justifies service supplementary to Woods Hole.”
- (b) “Terminal construction and land acquisition costs are not borne by the Authority or by private ferry operators.”
- (c) “That the additional costs of constructing high speed versus conventional vessels not be borne by the Steamship Authority or private operator.”
- (d) “That the City of New Bedford ensures provision of adequate parking facilities adjacent to any proposed ferry terminal site.”

- (e) "That the vessels are high speed craft offering a Vineyard passage in ninety minutes or less."

(Urban Harbors Institute Report, TAB 12, at p. 111).

54. In Chapter 16, entitled "Recommendations," the Urban Harbors Institute Report stated:

In many ways, New Bedford offers significant advantages over Woods Hole as a freight and passenger port. However, due to the additional seventeen miles in distance to Martha's Vineyard from New Bedford versus Woods Hole, the only truly viable service would require high-speed vessels to make up a large portion of the time difference. If the SSA used low-speed conventional vessels from New Bedford, the utilization of similarly sized vessels would drop from seven roundtrips per day to three or four, representing an unacceptable loss of capital efficiency. Furthermore, the longer trip time with a conventional vessel would be a serious hardship to island freight haulers and would likely increase freight transportation costs.

(Urban Harbors Institute Report, TAB 12, at p. 118).

55. The Report also recommended that the fares and tariffs "be managed in such a way as to offer New Bedford to Martha's Vineyard rates of around 150% of Woods Hole to Martha's Vineyard tariffs" or even to equalize the rates "so as to provide incentives for New Bedford users." (TAB 12, at pp. 118-119).

IV. THE AUTHORITY'S EXPLORATION OF AN OFF-CAPE PORT.

A. The Authority's Attempts to Address Issues Surrounding Its Growth in Traffic.

56. In July 1995, the Authority, under its new General Manager, Armand L. Tiberio, announced that it was preparing a request for proposals to secure professional services to develop a statistical model for forecasting future traffic volumes. (Minutes of the Authority's July 27, 1995 Meeting in Public Session, TAB 13, at p. 6). In February 1996, Mr. Tiberio reported that

the proposals submitted for a proposed contract to develop a statistical model for ferry traffic forecasting had been evaluated, and that KJS Associates was the first-ranked finalist for the contract. (Minutes of the Authority's February 15, 1996 Meeting in Public Session, TAB 14, at pp. 2-3). In March 1996, the Members approved the contract which the staff had negotiated with KJS Associates. (Minutes of the Authority's March 21, 1996 Meeting in Public Session, TAB 15, at p. 5).

57. In August 1996, KJS Associates issued its "Statistical Model for Ferry Traffic Forecasting Summary Report." (TAB 16). In that report, KJS Associates projected, among other things, that over the following ten years, to the year 2005, truck traffic to Martha's Vineyard would increase at the rate of around one percent (1%) to three percent (3%) per year, and that truck traffic to Nantucket would increase at the rate of around two percent (2%) to four percent (4%) per year. (TAB 16, at p. 5).

58. Around the same time period, the Authority started to hear complaints from the shipping industry that it was not able to meet their schedules. Those complaints prompted the Authority to undertake a vessel expansion program. (Armand Tiberio Depos. Tr., TAB 17, at pp. 334-335). In October 1997, Mr. Tiberio announced that the Authority was acquiring a new freight vessel called the *Governor*, which the U.S. Coast Guard was making available to the Authority as surplus property at no cost due to the closing of the Coast Guard's facilities on Governor's Island in New York. (Minutes of the Authority's October 9, 1997 Meeting in Public Session, TAB 18, at p. 2).

59. In January 1998, the Authority also awarded a contract to repower and lengthen another one of its freight vessels, the *Katama*, to increase that vessel's speed so that she could make three round trips between Hyannis and Nantucket within an 18-hour operating day and also

to increase the average freight capacity of the vessel by four trucks. (Minutes of the Authority's January 22, 1998 Meeting in Public Session, TAB 19, at pp. 2-4). After work on the *Katama* was successfully completed by June 1998, the Authority awarded a second contract in January 1999 similarly to repower and lengthen the *Gay Head*. (Minutes of the Authority's January 21, 1999 Meeting in Public Session, TAB 20, at pp. 7-8).

60. By the end of its vessel expansion program, the Authority generally was able to accommodate freight bound for Nantucket, just not necessarily at the time desired by the shippers. (A. Tiberio Depos. Tr., TAB 17, at p. 336).

B. The Authority's Investigation of an Off-Cape Freight Facility.

61. Even though no freight shipper had asked the Authority to explore the possibility of providing service from an off-Cape port (A. Tiberio Depos. Tr., TAB 17, at p. 337), in May 1997 the Members directed management to commence immediately a thorough review and analysis to determine where an additional mainland freight facility could be located that would be utilized for the express purpose of assisting the Authority in meeting its mandate of providing freight service to the islands and how such service would be carried out. (Minutes of the Authority's May 15, 1997 Meeting in Public Session, TAB 21, at pp. 5-6).

62. The Steamship Authority's management staff therefore began to explore more aggressively whether there was another mainland port other than the two ports of Woods Hole and Hyannis that the Steamship Authority could use in the future. (A. Tiberio Depos. Tr., TAB 17, at pp. 31-32). In November 1997, the Steamship Authority's staff prepared a "Report of Analysis of a Mainland Freight Facility to serve the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (TAB 22)." (A. Tiberio Depos. Tr., TAB 17, at pp. 37-38). In

the report, the staff concluded that the principal port which stood out among all of the criteria for such a facility was the port of New Bedford. (A. Tiberio Depos. Tr., TAB 17, at p. 41).

63. Mr. Tiberio provided the Members with a copy of the report at their November 20, 1997 public meeting. At the meeting, Mr. Tiberio reported that the New Bedford waterfront stood out as the only port suitable for a mainland freight facility serving both Islands, because none of the other ports had the highway access and water depth needed for the proposed use. Mr. Tiberio further stated that the Authority's management staff would continue working on the project to identify a preferred site, to explore the possibility of obtaining financial assistance from state and federal sources, and to analyze what the impact of operating from this port would have on the Authority's operations and the islands' cost of living. (Minutes of the Authority's November 20, 1997 Meeting in Public Session, TAB 23, at p. 3).

C. The Authority's 1997 Agreement with the Town of Barnstable.

64. In November 1997, the Authority also entered into an agreement with the Town of Barnstable in which the Authority agreed, among other things, to "work toward the development of an off-Cape freight terminal for Nantucket-bound freight trucks originating from locations other than Cape Cod and Eastern Massachusetts to handle future long term increases in freight traffic and hazardous cargo." (TAB 24, at p. SA30508). In that agreement, the Authority agreed upon specific goals and objectives leading to the commencement of construction of such a "new public or private freight facility and terminal" by the end of 2008, although both parties recognized that the assurances and agreements were being made "before necessary engineering, environmental and other studies and, therefore, are subject to reasonable modification due to legal, engineering, economic or environmental infeasibility, which cannot be determined until the development process commences." *Id.* The Authority also agreed that "[u]pon completion

of the alternative off-Cape freight terminal, the SSA will endeavor to return Hyannis freight traffic to a level that does not exceed the 1997 freight traffic levels.” *Id.*

65. In the agreement, the Town of Barnstable agreed, among other things, to allow the Authority to (a) operate more than six daily round trips by passenger ferry and three daily round trips by freight vessel from the Hyannis terminal; (b) use the second slip at the Hyannis terminal for berthing a freight vessel longer than 185 feet; and (c) use the Hyannis terminal for the docking of a passenger-only vessel, and for loading and unloading passengers from that vessel, and for tie-up of that vessel. (TAB 24, at pp. SA30507-SA30508). However, if “substantial progress” is not made by the end of 2003 toward the goals leading to the commencement of construction of an off-Cape freight facility by the end of 2003, the entire agreement will then be considered “null and void.” (*Id.*, at p. SA30509).

D. The Cambridge Systematics Report.

66. In early 1998, the Members concluded that it would then be prudent to analyze the costs and other issues associated with the development of an off-Cape port to provide freight service to the Islands. (A. Tiberio Depos. Tr., TAB 17, at pp. 185-186, 340). In June 1998, the Members awarded a contract to perform such an economic study to Cambridge Systematics, which had submitted a proposal in response to a request for proposals that the Authority had issued earlier that year. (Minutes of the Authority’s June 29, 1998 Meeting in Public Session, TAB 25, at pp. 3-4). Cambridge Systematics then performed the study between June 1998 and December 1998. (A. Tiberio Depos. Tr., TAB 17, at p. 340).

67. Cambridge Systematics made a public presentation of its findings at the Authority’s December 17, 1998 meeting, and submitted its final report (the “Cambridge

Systematics Report”) in January 1999. (TAB 26). The Cambridge Systematics Report arrived at a number of findings, including the following:

- (a) “The increment of cost to the retail price of goods sold on the islands of diverting one-third of all freight trips to New Bedford would be under 0.35 percent in all tested cases, or an average of \$4.4 million out of a future (2005) retail value of all goods shipped to the islands of \$1.25 billion.” (at p. ES-3). “The impact varies somewhat among different types of commodities, with food experiencing a below average impact and fuel and construction material an above average impact.” (at p. ES-3, n. 2). “While the increment of cost to shippers of New Bedford-based service would range from 12 to 40 percent, the cost of ferry transportation represents only 0.8 percent of the retail price of goods sold on the island.” (TAB 26, at pp. ES-3 - ES-4).
- (b) “Based on the results of the economic model, however, New Bedford-based service could *theoretically* be made attractive to a significant number of shippers (accounting for between 29 and 66 percent of all shipments depending on the scenario) by actually lowering their shipping costs through a combination of equalized fares among New Bedford and the respective Cape ports, and either the use of faster vessels in New Bedford or the use of New Bedford only in the summer season when traffic congestion on the Cape is most severe and the landside travel time advantage of New Bedford is greatest.” (*Id.*, at p. ES-4) (emphasis in original).
- (c) “Based on the results of the shipper survey, however, New Bedford-based service is never attractive to large numbers of shippers under any scenario (no more than 20 percent). In most scenarios, approximately 11 percent of Martha's Vineyard shippers and five percent of Nantucket shippers would choose to go to New Bedford. Equalizing fares between Woods Hole and New Bedford, and between Hyannis and New Bedford, would increase this amount to 20 percent for both islands.” (*Id.*, at p. ES-4).
- (d) “The most efficient operation model for the SSA in New Bedford is to use modified existing freight vessels (such as the expanded M/V Katama), and operate five days/week during the peak season.” (*Id.*, at p. ES-4).
- (e) “The diversion of all island truck traffic to New Bedford would not have a quantifiable impact on traffic operations at the Cape Cod Canal bridges, or in the vicinity of the Cape ports.” (*Id.*, at p. ES-5).

68. The Cambridge Systematics Report also concluded that “[t]here is no obvious market-based strategy for solving the SSA’s freight capacity problem, either by diverting a significant amount of freight traffic to New Bedford, or by changing aspects of its Cape-based

services.” (TAB 26, at p. ES-5).⁴ Accordingly, the Report stated that the Authority will have to solve this problem by making policy choices, including diverting some or all of the freight to New Bedford by policy and heavily subsidizing New Bedford service by making it equal to or less expensive than Cape-based services in order to encourage a voluntary diversion of a significant number of shippers. (Tab 26, at pp. ES-5 - ES-6).

69. In its “Summary Findings from Freight Operations Options,” the Cambridge Systematics Report stated that “there appears to be no clearly favored operational scenarios for New Bedford freight service,” although several options seemed to combine certain advantages. For example, “peak season service from New Bedford would tend to be most cost-efficient,” but “year-round freight operations are more attractive to the shippers.” The Report also noted that “[p]rivate operation of the freight service could relieve SSA of major capital and operating expenses, but may be difficult to combine with ongoing Cape-based SSA freight operations.” (TAB 26, at p. 2-26).

70. The Cambridge Systematics Report also developed an economic model to account for all components of the cost of transporting goods to the Islands, and used that model to test the economic impact of various alternatives for New Bedford-based freight service. The Report described some of the results as follows:

The economic model shows that under most scenarios, freight operation from New Bedford will increase the cost of goods on the islands, but that the increase will be small. Transportation costs are kept equal or reduced only if fares are equalized across all ports, and the service is operated only in peak season or with faster vessels out of New Bedford. It is only under these conditions that the

⁴ Indeed, Mr. Leontire testified that, even today, there still can be differences of opinion on these issues. “I think that there are substantial differences that one can deal with, differences about the kinds of boats, the operating schedules, year-round versus seasonal. There are lot of issues that reasonable minds can disagree with.” (G. Leontire Depos. Tr., TAB 6, at pp. 106-107).

model indicates it would be cost-effective for shippers to voluntarily shift to New Bedford in appreciable numbers.

Under most scenarios, shippers would have to be directed to use New Bedford through the establishment of reservations policies by the SSA that would limit the number of vessel spaces available at the existing ports of Woods Hole and Hyannis. ...

(Cambridge Systematics Report, TAB 26, at p. 3-9).

71. In addition, shippers were surveyed to quantitatively test their willingness to divert to New Bedford under variable price and service parameters. Some of the results of the survey described in the Report are as follows:

- (a) "The most significant factor in attracting shippers to New Bedford is the fare. A scenario with equal pricing across all of the ports would attract 19 percent of Martha's Vineyard shippers and 20 percent of Nantucket shippers to New Bedford. These are the highest percentages obtained in the survey"
- (b) "The use of faster vessels ... has only about half of the impact of fare policy, attracting 12 percent of Martha's Vineyard shippers and five percent of Nantucket shippers. ... These findings indicate that investing in faster vessels for New Bedford service is probably not worth the added cost."
- (c) "Providing year-round service out of New Bedford attracts 11 percent of Martha's Vineyard shippers and five percent of Nantucket shippers. ..."
- (d) "Combining several favorable attributes does not result in a cumulative impact on shipper choice. For example, combining equalized fares and faster vessels still results in 20 percent of shippers choosing New Bedford, the same result as for equalized fares alone."

(Cambridge Systematics Report, TAB 26, at p. 4-7). In conclusion, the Report stated that "[t]here is very little interest in the shipping community in shifting to New Bedford" and that the number of Martha's Vineyard shippers interested was generally about double that of Nantucket shippers. (*Id.*, at p. 4-7).

72. Cambridge Systematics also assessed "the impact of island truck traffic on Cape Cod traffic conditions" (TAB 26, at p. ES-2), and found that "[t]he total volume of trucks that

would shift to a New Bedford terminal is insignificant compared to all other Cape Cod traffic and would not significantly change congestion on Cape Cod roadways” (*id.*, at p. 1-11).

Specifically:

When compared to the total number of vehicles crossing the canal bridges, the diversion of all mainland truck trips to New Bedford will have no impact on traffic conditions on the bridges. The summer weekday traffic on the Bourne Bridge is 57,000 vehicles and on the Sagamore Bridge is 69,000 vehicles. The total truck traffic for both islands that travels to and from the mainland is only 245 trucks per day In no time period would the shifting of all mainland-to-island truck traffic away from the bridges amount to more than a fraction of a percent of the total traffic crossing the Cape Cod Canal.

(TAB 26, at p. 1-10). Indeed, Cambridge Systematics found that even near the Authority’s Woods Hole and Hyannis terminals “[t]he volume of trucks ... is modest at the present and has an insignificant impact on traffic conditions” there. (*Id.*, at p. 1-10).

V. THE AUTHORITY’S EFFORTS BEGINNING IN 1999 TO PROVIDE FREIGHT SERVICE BETWEEN NEW BEDFORD AND THE ISLANDS.

A. The Authority’s Attempts to Develop Options for New Bedford Freight Service.

73. As of late 1998 and early 1999, there was no adequate facility in New Bedford which was capable of handling freight service from New Bedford to the Islands. (G. Leontire Depos. Tr., TAB 6, at p. 108). Nevertheless, after Cambridge Systematics presented its Report, the Authority’s management staff began working to develop a series of freight operating alternatives for the Members to review and begin discussions. (A. Tiberio Depos. Tr., TAB 17, at p. 345).

74. In February 1999, Mr. Tiberio presented the Members with five options for managing projected freight traffic to the islands through the year 2005. (Minutes of the Authority’s February 18, 1999 Meeting in Public Session, TAB 27, at pp. 3-9). Mr. Tiberio also

emphasized that the number of possible solutions to the islands' freight needs was not limited to the five options he was presenting that day, and he invited other suggestions on how the situation should be addressed. (*Id.*, at p. 4). The five options presented by Mr. Tiberio were as follows:

- Option 1: Make no substantive changes to existing operations; allow all freight traffic increases to be processed through Woods Hole and Hyannis terminals.
- Option 2: Direct all special commodity freight to a New Bedford terminal. A private operator for this service would be secured through a request for proposals and subsequent negotiations.
- Option 3: Direct all special commodity freight plus any freight volume increases above the 1997 freight traffic levels for the period of May through September to a New Bedford terminal. A private operator for this service would be secured through a request for proposals and subsequent negotiations.
- Option 4: Direct all special commodity freight to a New Bedford terminal. The Authority will realign one existing vessel to this service and will operate the vessel.
- Option 5: Direct all special commodity freight plus any freight volume increase above the 1997 freight traffic levels for the period of May through September to a New Bedford terminal. The Authority will realign one existing vessel plus secure an additional vessel (this could be a used freight vessel) and will operate the vessels.

(Minutes of the Authority's February 18, 1999 Meeting in Public Session, TAB 27, at pp. 4-6).

75. Mr. Tiberio believed that it made sense to focus on "special commodity freight" (which included hazardous cargo) at this time, because the Authority wanted "to try to capture the freight that existed off-Cape, and we knew that that freight originated off-Cape." (A. Tiberio Depos. Tr., TAB 17, at pp. 350-351) (*see also* Minutes of the Authority's February 18, 1999 Meeting in Public Session, TAB 27, at p. 12).

76. Also, at the February 18, 1999 meeting, George Leontire, City Solicitor and Economic Development Director for the City of New Bedford, declared that directing special commodity freight through New Bedford was degrading, outrageous, totally unacceptable,

irrational, irresponsible and demeaning to the City's citizens. (Minutes of the Authority's February 18, 1999 Meeting in Public Session, TAB 27, at p. 11).

B. The Authority's Issuance of an Initial RFP for Off-Cape Freight Service.

77. After Mr. Leontire's comments regarding directing special commodity freight service through New Bedford, the Members decided to issue a request for proposals for a contract with a private operator to provide freight service to both Martha's Vineyard and Nantucket which did not earmark carrying special commodity freight. (Tiberio Depos. Tr., TAB 17, at pp. 358, 361). In April 1999, the Members instructed the Authority's management to, among other things, "issue a request for proposals seeking an established private ship/barge operator to provide freight shipping services using alternate off-Cape port options, including the port of New Bedford." (Minutes of the Authority's April 22, 1999 Meeting in Public Session, TAB 28, at p. 8).⁵

78. However, later that same day, the City of New Bedford's Mayor and City Council unanimously adopted a resolution "to make their position regarding freight service from New Bedford fully understood by the Steamship Authority Board." (TAB 29). In that resolution, New Bedford's Mayor and City Council declared that the Members' vote "to provide either a private carrier or barge operator out of the port of New Bedford is of no interest to the City of New Bedford" and notified the Authority "that the City of New Bedford rejects the operation of a private carrier and/or barge operator from the port of New Bedford." *Id.*

⁵ The Members instructed the Authority's management to issue the request for proposals in order to meet the goal they adopted that day "to reduce freight traffic levels through the ports of Hyannis and Woods Hole to the 1997 levels as soon as practicable, but not later than May 2000 for the Woods Hole-Martha's Vineyard run and as soon as feasible for the Hyannis-Nantucket run." (TAB 28, at p. 8).

79. Nevertheless, the Authority continued towards the issuance of a request for proposals to determine the feasibility of a private vessel/barge operator to provide freight service to the Islands. In May 1999, Mr. Tiberio reported that the draft request had been broadened in an effort to be as flexible as possible, and that the proponents would be able to suggest how long they felt any agreement should run, as well as whether the service should be seasonal or year-round. (Minutes of the Authority's May 20, 1999 Meeting in Public Session, TAB 30, at p. 2) The Authority's Dukes County Member, Ronald Rappaport, further suggested that it be made clear that any form of proposed agreement attached to the request was simply a suggestion, and that proponents could submit alternative forms of agreement that could then be negotiated with the Authority. (TAB 30, at p. 3).

80. However, at the Authority's May 20, 1999 meeting, Mr. Leontire reminded the Members that New Bedford's Mayor and City Council "unanimously voted and sent you a resolution saying that private service is not acceptable to the City of New Bedford." (TAB 30, Statement of George Leontire (attached as a supplement to the minutes), at p. 1). Mr. Leontire continued:

"So to the extent that you are putting out a request for proposals for a private barge service, you are welcome to do so, and it is certainly your privilege, but I want you to know the City of New Bedford says, 'No.' So you might as well continue with your language of an off-Cape port and not include New Bedford because you are not coming to New Bedford with a private carrier or with barge service. End of Story. Period. That is not George Leontire. That is the City Council, unanimously, the Mayor, unanimously, the representative delegation, unanimously."

(TAB 30, Leontire Statement, at p. 1).

81. In June 1999, Mr. Leontire told the Members that he had been asked to attend their meeting by New Bedford's Mayor and City Council to tell them that it was inconceivable to them that the Authority was continuing with a plan for private carriers that has been rejected by

the City. (Minutes of the Authority's June 16, 1999 Meeting in Public Session, TAB 31, Statement of George Leontire (attached as a supplement to the minutes), at p. 1). Mr. Leontire declared, "You have a fantasy boat going nowhere" (*id.*), and then said:

It is not acceptable; we won't accept it; and stop this game. Stop this fantasy plan that we have rejected. It is our port. You can't come to our port and tell us what you are going to do in our port. If you want to run your boats around this island [Martha's Vineyard] in a circle, continue to do so, but when you reach the mainland, the mainland port has the rights that you deny.

(TAB 31, Leontire Statement, at p. 2). Mr. Leontire continued:

Stop this charade. Stop the charade that you are going to provide a private carrier to New Bedford. You are not coming to New Bedford with a private carrier, and you ought to explain to this public ... where are you going to land your boats in the port of New Bedford? Where is this private carrier going to land its boats? ... [L]et met explain something about the harbor of the port of New Bedford.

The port of New Bedford is a designated port. It comes under the Harbor Master Plan, both municipal and state, and the people who have the authority is the harbor governing commission of New Bedford as to what operates out of their port. That is something you may not be used to, but it is our approval that you need. We own the freight facility. We determine what takes place in our harbor and for you to continue, to continue on a course with a private carrier month after month where we've said 'no' show your utter disrespect for the fourth largest community in this Commonwealth.

(TAB 31, Leontire Statement, at p. 3).

82. In June 1999, the Authority issued a request for proposals from vessel and barge operators to provide a freight vessel or barge transportation service from the Massachusetts mainland off of Cape Cod to one or both of the Islands, with the Martha's Vineyard service beginning in May 2000 and the Nantucket service beginning as soon as practicable (the "Initial RFP, as supplemented with Addendum #1, issued July 23, 1999) (TAB 32, at p. 3 & at pp. 2-3 of Addendum #1). In that Initial RFP, the Authority stated, among other things, that:

1. The preferred system would be a year-round freight service, but seasonal operations would be considered. (TAB 32, at p. 3)

2. The Authority was willing to allow the operator to use the Authority's terminal facilities that are located on the islands of Martha's Vineyard and Nantucket at no charge. (*Id.*, at p. 16).
3. The Authority also was willing to undertake all of the reservations and ticketing operations for the service (except for bulk cargo transported by barge). (*Id.*, at p. 18 & at p. 3 of Addendum #1).
4. The Authority was willing to consider an arrangement that exceeded five years. (*Id.*, at p. 3 of Addendum #1).

83. On July 7, 1999, Mayor Kalisz wrote a letter to the Members "to restate the City of New Bedford's position with regard to freight service from New Bedford to the Islands."

(TAB 33, at p. 1). In that letter, Mayor Kalisz stated:

Simply providing access for thousands of trucks to exit the interstate and drive onto a vessel to or from the Islands is in itself of no interest to my community. Such an arrangement would create virtually no jobs for our citizens and, in fact, would have a negative impact on our ability to further enhance the City's economy. Under your plan, our harbor would be committed to an unproductive use.

It only makes sense for New Bedford to be involved in shipping to the Islands if there is real economic activity from such an operation. Such activity can only be achieved if the potential freight forwarders, shippers, suppliers and other vendors believe that the Steamship Authority intends to operate year round freight service from New Bedford for the long term. ...

Accordingly, a critical component of any agreement with the Steamship Authority must include Steamship Authority service operated by the Steamship Authority crews based on a reasonable schedule. ...

Your plan to run barge service from New Bedford is totally unacceptable. The only materials shipped by barge are garbage, fuel, septage and building materials such as stone and gravel. Such service provides no benefit to New Bedford.

(TAB 33, at pp. 1-2) (emphasis in original).⁶

⁶ It is still the City's position that it is not interested in freight service where the port of New Bedford's role is "[s]imply having a roll-on, roll-off facility" for freight shippers. (F. Kalisz Depos. Tr., TAB 5, at pp. 65-66).

84. Later that summer, the Authority received five proposals in response to the Initial RFP. The Authority's management staff estimated that the service provided under each of the four proposals which had not been evaluated as "not advantageous" would meet the basic goal of carrying from New Bedford around 3,500 trucks to and from Martha's Vineyard and around 2,100 trucks to and from Nantucket annually on a one-way basis. (Authority Staff Summary #GM-409 Revised, *Freight RFP - Results and Ranking of Finalists*, dated Sept. 21, 1999) (TAB 34, at p. 4). However, each of those proposals would have required the Authority to pay the operator millions of dollars for the freight service as a guaranteed subsidy. (TAB 34, at p. 4; A. Tiberio Depos. Tr., TAB 17, at pp. 377-378). For example, Seaport Maritime proposed that it be compensated by the Authority in the amount of more than \$5,800,000 per year to provide year-round freight service to both islands; American Overseas Marine asked for over \$4,600,000 per year; and Hvide Marine, Inc. ("Hvide") requested over \$3,700,000 per year. (Tisbury Towing and Transportation, Inc. proposed providing service by barge only to Martha's Vineyard for more than \$1,100,000 per year.) (TAB 34, at p. 4).

C. The Authority's Issuance of a Second RFP for Seasonal Freight Service between New Bedford and Martha's Vineyard.

85. In November 1999, the Members rejected all of the proposals received in response to the Initial RFP. (Minutes of the Authority's November 5, 1999 Meeting in Public Session, TAB 35, at pp. 2-11). At the same meeting, the Members directed management to prepare a new RFP for their consideration to provide a six-month seasonal freight service by a private operator between an off-Cape port and the island of Martha's Vineyard for one year, with an option on the Authority's part to renew that program for another year, unrestricted as to the

type of commodities carried and requiring the service to have a minimum daily capacity to carry nine trucks each way five days a week. (TAB 35, at pp. 11-13).

86. At their November 18, 1999 public meeting, the Members then approved a second request for proposals from vessel and barge operators to provide a freight transportation service only to Martha's Vineyard and only from May 1, 2000 through October 31, 2000, with an option on the Authority's part to renew the agreement for the same period in the year 2001 (the "Second RFP") (TAB 36). In that Second RFP, the Authority stated, among other things, that:

1. The Authority was willing to allow the operator to use the Authority's terminal facilities on Martha's Vineyard at no charge in order to provide the freight service.
2. The operator would be responsible for making its own arrangements to acquire, develop and/or use terminal facilities at its proposed off-Cape mainland port. Indeed, the Authority stated that it anticipated that the operator would propose using the State Pier Freight Ferry Terminal in New Bedford as its mainland terminal facility and that, if so, the operator would be responsible for negotiating directly with the City for such use.
3. The Authority would be responsible for the making of all reservations, the sale of all tickets, and the collection of all ticket proceeds.

(Second RFP, TAB 36, at pp. 1-2, 17-18 and Exh. D thereto, at p. 4)

87. At this time, the City of New Bedford still had not modified its position that it was opposed to having a private operator use the State Pier in New Bedford in order to provide the service. (A. Tiberio Depos. Tr., TAB 17, at p. 383).⁷ Further, by letter dated December 6,

⁷ In November 1999, the City filed an application for Federal Highway Administration Ferry Boat Discretionary funds to develop the terminal (TAB 37), in which the City stated that the HDC had entered into an agreement with the Massachusetts Department of Environmental Management, which had jurisdiction over the State Pier, delineating responsibilities and terms for development and operation of the facility (TAB 37, at p. NB006492). The City also stated that the ferry terminal "will provide berthing and facility space through HDC user agreements with public and private carriers, including the Steamship Authority," and that the "HDC expects to conclude negotiations with the Steamship Authority and enter an finalize an use agreement within the next few months." (*Id.*, at p. NB006493).

1999 and in response to an inquiry from the Authority regarding the costs the City would charge for operational use and vessel tie-up at the State Pier, Mr. Leontire stated that the City also was "not interested in the proposed six month seasonal service." (TAB 38).

88. The City's position prompted a concern among potential private operators as to whether they were going to be able to use the New Bedford State Pier to provide the service. As Mr. Tiberio testified, private operators were concerned that they were "just going through the motions in terms of submitting a proposal" (A. Tiberio Depos. Tr., TAB 17, at p. 387), because:

I mean everybody knew the City's position vis-à-vis private versus the Steamship Authority. And so with that position on the table, we were out asking the industry to respond; and so the logical response from the industry and us was are we just going through a drill for no purpose whatsoever; or is the door going to be shut. I can remember having those kinds of discussions [with operators who were considering responding to the RFP].

(A. Tiberio Depos. Tr., TAB 17, at p. 387).

89. By letter dated December 8, 1999, Mr. Tiberio expressed his disappointment to Mr. Leontire that the City was "not interested" in allowing the operational use and vessel-tie up at the State Pier for "the proposed six month seasonal service." (TAB 39, at p. 1), and he asked Mr. Leontire to reconsider his position and state his willingness to negotiate an agreement with the Authority to allow a private operator to use the State Pier for the proposed service. (*Id.*, at p. 2). Mr. Tiberio does not remember any response to his letter from Mr. Leontire. (A. Tiberio Depos. Tr., TAB 17, at p. 392).⁸

90. Ultimately, the Authority received two proposals in response to the Second RFP. In its proposal, Hvide offered to provide the freight service if it were paid \$1,475,000 per year by

⁸ Subsequently, three private vessel operators who were interested in providing the service informed the Authority that they would not be able to submit proposals in response to the Second RFP. Each operator cited the uncertainty of the availability of the New Bedford State Pier as a reason for declining to submit a proposal. (TAB 40).

the Authority; and Seaport Maritime asked for more than \$1,575,000 per year. At the time, neither Hvide nor Seaport Maritime had received a commitment from the City of New Bedford for the use of the State Pier as its mainland terminal facility. (Minutes of the Authority's December 29, 1999 Meeting in Public Session, TAB 41, at pp. 3-4). Nevertheless, at their December 29, 1999 meeting, the Members awarded the agreement to Hvide. (*Id.*, at p. 6).

91. The Members also voted on December 29, 1999 to establish the freight rates for the service between New Bedford and Martha's Vineyard so that they were equal to the freight rates for the Woods Hole-Martha's Vineyard route. (TAB 41, at p. 16).

D. The Authority's Pilot Program for Freight Service between New Bedford and Martha's Vineyard during 2000 and 2001.

92. Hvide and the City of New Bedford finally entered into an agreement dated April 28, 2000 for Hvide's use of the State Pier in connection with the Authority's pilot program. (TAB 42).

93. The City's freight ferry terminal at the New Bedford State Pier finally was not operational until May 2000. (G. Leontire Depos. Tr., TAB 6, at pp. 109, 179; A. Tiberio Depos. Tr., TAB 17, at p. 395).

94. As soon as the New Bedford State Pier freight ferry terminal was ready, Hvide began providing freight service under the Steamship Authority's pilot program on May 2, 2000. (G. Leontire Depos. Tr., TAB 6, at pp. 109, 179; A. Tiberio Depos. Tr., TAB 17, at p. 395; Craig Johnson Depos. Tr., TAB 43, at p. 33). At that time, Hvide began providing freight service between New Bedford (operating from the City's State Pier Freight Ferry Terminal) and Martha's Vineyard on weekdays (except for legal holidays) through October 31, 2000, using the Authority's Vineyard Haven terminal on Martha's Vineyard at no charge. (*See* TAB 44).

95. Authority records show that, from May 2 to October 31, 2000, Hvide carried a total of 1,900 trucks on a one-way basis between New Bedford and Martha's Vineyard, for which it received compensation from the Authority in the amount of approximately \$1,484,500 (including payment of a fuel adjustment charge). Authority records also show that the total revenue derived by the Authority from the trucks (and related passengers) carried on the New Bedford-Martha's Vineyard route during 2000 was approximately \$235,000. The total cost of running the pilot program during 2000 was \$1,526,000, leaving an operating loss of approximately \$1,291,000. (TAB 44).

96. In November 2000, the Members exercised the Authority's option to have Hvide provide the same freight service during 2001, with the only change being that Hvide was required to begin the service earlier in the year, on April 2, 2001, and to continue it later, through November 30, 2001, for the \$1,548,750 in compensation called for in the agreement (which was equal to its base compensation for the year 2000 plus five percent). (Minutes of the Authority's November 16, 2000 Meeting in Public Session, TAB 45, at p. 5) In September 2000, the Members also had expanded the New Bedford freight service by voting to accept reservations for commercial vehicles under 20 feet. (Minutes of the Authority's September 21, 2000 Meeting in Public Session, TAB 46, at pp. 17-18).

97. Authority records show that, from April 2 to November 30, 2001, Hvide carried a total of 3,030 trucks on a one-way basis between New Bedford and Martha's Vineyard, for which it received compensation from the Authority in the amount of approximately \$1,560,812 (including payment of a fuel adjustment charge). Authority records also show that the total revenue derived by the Authority from the trucks (and related passengers) carried on the New Bedford-Martha's Vineyard route during 2001 was approximately \$353,000. The total cost of

running the pilot program during 2001 was around \$1,595,000, leaving an operating loss of approximately \$1,242,000. (TAB 47).

VI. SEABULK'S LICENSE APPLICATION TO PROVIDE FREIGHT SERVICE BETWEEN NEW BEDFORD AND THE ISLANDS.

A. Seabulk's License Application.

98. In March 2001, the Authority received a proposal from Seabulk for a license to provide water carriage between New Bedford and each of the Islands. (TAB 48) (without exhibits thereto). In its proposal, Seabulk proposed limiting its service to (i) transporting freight and pickup vehicles and their occupants to and from each of the Islands year round, and (ii) transporting passenger vehicles and their occupants from each of the Islands to New Bedford on a no-reservation standby basis, if the Authority were to reduce freight traffic between Woods Hole and Hyannis and the Islands on its vessels to 1997 levels by the commencement of Seabulk's proposed water carriage. (TAB 48, Proposal, at p. 3). In the alternative, if the Authority did not reduce its freight traffic to 1997 levels, Seabulk proposed to carry freight vehicles, passenger vehicles and passengers year round between New Bedford and each of the Islands. (*Id.*) Also in its proposal, Seabulk proposed beginning its service "at the earliest upon completion of the current Pilot program" (*id.*, Proposal, at p. 1); that the license be for an initial term of five years, with an option on Seabulk's part to renew for two additional five-year terms (*id.*, Proposal, at p. 3); and that Seabulk provide the service from the State Pier in New Bedford (*id.*, Proposal, at p. 4).

99. Under each alternative in its proposal, Seabulk also had requirements with respect to docking facilities and scheduling. First, Seabulk declared that it "must have the right to use

the Steamship Authority's docking facilities in Vineyard Haven and Nantucket" (TAB 48, Proposal, at p. 6), and proposed being able to use them "at no more than nominal cost" (*id.*, Proposal, at p. 4). Seabulk also refused to give the Authority any "power to require changes in its schedule." (*Id.*, Proposal, at p. 6). Further, Seabulk "reserve[d] the right to employ any ... comparable ships from our fleet of vessels in order to provide service in an efficient manner, taking into account the season, fluctuating levels of demand and the needs of our global operations." (*Id.*, Proposal, at p. 3)

B. The Authority's Consideration of Seabulk's License Application.

100. On April 25, 2001, the Authority's management staff submitted its analysis of Seabulk's application (Management Summary #L-322, dated April 25, 2001) (TAB 49). In that analysis, the staff recommended that Seabulk's application be denied because, in the staff's opinion, "the alternative Seabulk proposals, and the various conditions imposed by Seabulk on its willingness to provide service to the islands as a licensee, are contrary to the Authority's interests, and would compromise the Authority's ability to fulfill its statutory mandate." (TAB 49, at p. 30). The staff also set forth a number of reasons for its recommendation, including the following:

- (a) Management did not believe that the Authority should compromise its ability to fulfill its statutory mission of providing the Islands with adequate transportation of persons and necessities of life on a year-round basis by agreeing with Seabulk to limit the amount of freight carried on its vessels to a certain absolute number of trucks a year. In any event, management noted, were serious legal and practical limitations on the Authority's ability to achieve a reduction in freight levels through the sort of blunt instrument proposed by Seabulk. (TAB 49, at p. 31).
- (b) Management did not believe that Seabulk should be allowed to carry an unlimited number of automobiles and passengers to the Islands, given the strong position that has been taken by the residents of both Islands on this issue of local concern, and especially when the Authority itself has excess vehicle capacity during the off-season and substantial excess passenger capacity at all times of the year. (*Id.*, at pp. 32-33).

- (c) Management believed that the Authority should retain control over its own terminal facilities for the benefit of its own operations, and that the Authority should not agree to any proposal which would require it to subordinate its operational needs to the preservation of another operator's sailing schedule or would require it to accept any vessel another operator wants to dock at its terminals. (*Id.*, at pp. 33-35).⁹
- (d) Management did not believe that the Authority should allow a private operator the free use of its terminal facilities for commercial purposes without an open and fair competitive process. (*Id.*, at pp. 35-36).
- (e) Management also felt that there were other reasons for denying Seabulk's application although, because of the time constraints imposed by the Court's scheduling order, was not able to review the additional issues in any detail. (*Id.*, at p. 36). These other issues included a concern over Seabulk's ability to provide a long-term, successful freight service in accordance with its proposal (*id.*, at pp. 36-37); management's belief that the Authority should be able to terminate Seabulk's license agreement for cause (*id.*, at pp. 38-39); and management's belief that Seabulk should not be allowed to assign its license without the Authority's consent (*id.*, at p. 39).

101. The Authority's staff also declared that, in their opinion, "the most prudent and responsible course for the Authority is to continue moving forward with steady, incremental change" with certain "considerations for the future" in mind (TAB 49, at p. 42), as follows:

- (a) that the Authority needed to decide whether to continue freight service from New Bedford on a seasonal or year-round basis (TAB 49, at p. 44);
- (b) that it may not be wise to consider New Bedford service to Nantucket until New Bedford service to Martha's Vineyard proves successful (*id.*, at p. 45);
- (c) that if permanent freight service from New Bedford to the Islands is going to be provided in the future, the Authority should consider providing such service itself (*id.*, at pp. 45-48); and
- (d) that the Authority needed to develop a fair method of determining who is allowed to travel to the Islands from Cape Cod, and who is required to travel from New Bedford (*id.*, at pp. 48-49).

⁹ In this regard, management noted that under Seabulk's first option, it would not need to use any physical space on the Authority's terminal property except to stage vehicles. However, under Seabulk's second option, it would also require a physical presence at each island terminal in terms of an office or other place from which to make reservations and sell tickets. (TAB 49, at pp. 18-19).

102. On their April 27, 2001 public meeting, the Members denied Seabulk's license application, voting to adopt the staff's management summary subject to and modified by the Members' comments at that meeting. (Minutes of the Authority's April 27, 2001 Meeting in Public Session, TAB 50, at pp. 2-3, and the supplement thereto).

VII. THE AUTHORITY'S EFFORTS TO CONTINUE AND EXPAND FREIGHT AND PASSENGER FERRY SERVICE FROM NEW BEDFORD.

A. The Authority's Efforts to Provide Freight and High-Speed Passenger Service from New Bedford Commencing in 2002.

103. During the first half of 2001, Mr. Tiberio began to explore the possibility of developing a new service model for the Authority's operations, including "how New Bedford potentially could be used in the future in terms of providing a level of service." (A. Tiberio Depos. Tr., TAB 17, at p. 120). One aspect of the potential new model was to transition the Authority's New Bedford-Martha's Vineyard passenger service, which the Authority was then providing with the *Schamonchi*, to a high speed application, which would be "the main centerpiece as far as New Bedford was concerned in terms of moving passengers and traffic." (*Id.*, at pp. 121-122). Under the potential new model, the Authority also would increase the amount of freight coming out of New Bedford to Martha's Vineyard. (*Id.*, at p. 123).¹⁰

104. In June 2001, the Members authorized Mr. Tiberio to begin to explore the feasibility of conducting a demonstration project in 2002 whereby the Authority would operate a

¹⁰ Nantucket was a little bit different. Because it was felt that the biggest obstacle to providing freight service to Nantucket from New Bedford was the amount of time spent on the water, Mr. Tiberio proposed that the Authority should consider operating a high speed passenger combination vessel on the Nantucket route. The debate centered on how much freight could be moved on that type of vessel, and there still were a lot of unknowns about that piece of the model. (A. Tiberio Depos. Tr., TAB 17, at pp. 123-124).

high-speed passenger-only vessel between New Bedford and Martha's Vineyard from May through September in lieu of the *Schamanchi*. (Minutes of the Authority's June 21, 2001 Meeting in Public Session, TAB 51, at pp. 3-7). Also at that meeting, Mr. Tiberio presented to the Members for discussion an alternative for continuing during 2002 the freight service pilot project between New Bedford and Martha's Vineyard. (TAB 51, at p. 2; Management Summary GM-431, *New Bedford Freight Service - 2002*, dated June 12, 2001, TAB 52). Specifically, Mr. Tiberio proposed in the management summary, among other things, that:

- (a) The freight service period would be from early May through mid-September 2002;
- (b) There would be three freight round trips per day Mondays through Fridays;
- (c) The Authority would operate the service with one of its own vessels utilizing the New Bedford State Pier and the Authority's Vineyard Haven terminal; and
- (d) The first daily trip from New Bedford, at approximately 5:00 in the morning, would be a designated hazardous trip, which would enable the Authority to eliminate its 6:00 hazardous trip from Woods Hole.

(TAB 52, at pp. 1-2).

105. At the meeting, the Members agreed that management should continue to review the subject and, in connection with that review, also consider the alternative of issuing another request for proposals from private operators to provide the service. (TAB 51, at pp. 2-3). Mr. Leontire, who also was present at the meeting, stated that New Bedford had no problem with the New Bedford freight service proposal recommended by Mr. Tiberio, and that it was willing to work with the Authority to make that service succeed and to help the Authority obtain money for the service. (TAB 51, at p. 13).

106. Thus, by this time, Mr. Tiberio was proposing for the Authority to attempt to reduce or hold constant the amount of freight service offered between Woods Hole and Martha's

Vineyard during the 2002 summer season. The thinking was that, "if you have a growth, it's got to go somewhere" and:

That is where New Bedford came into play as a future port, whether it's on a seasonal basis, or whether -- and I think most people looked at it on a seasonal basis to start with. Whether it would ever grow to a year-round basis, I think that is a question that only time is going to be able to answer. ...

(A. Tiberio Depos. Tr., TAB 17, at pp. 151-152). The Steamship Authority's Members were responsive to his proposal, and the discussions were "just evolving into who was going to provide the service, as opposed to no service being provided at all." (*Id.*, at p. 153).¹¹

107. In September 2001, the Authority issued a third Request for Proposals from private vessel operators to provide a freight transportation service between New Bedford and Martha's Vineyard during the year 2002 (the "Third RFP"). (TAB 53). The Third RFP contained certain minimum requirements (among others):

- (a) that, during the period of time that service is provided, the operator must operate three trips per day Mondays through Fridays on a mutually agreeable schedule which does not interfere with the Authority's own operations;
- (b) That the operator must demonstrate that it will be able to use terminal facilities located in the port of New Bedford sufficient to provide the Services; and
- (c) that, if the operator chooses not to use the Authority's Vineyard Haven terminal facilities in connection with the service, it must demonstrate that it will be able to use other facilities on Martha's Vineyard sufficient to provide the service.

(TAB 53, at p. 7).

¹¹ Mr. Tiberio also advised the Members that "[i]t may not be wise to consider New Bedford service to Nantucket until New Bedford service to Martha's Vineyard proves successful." (A. Tiberio Depos. Tr., TAB 17, at pp. 406-407). Mr. Tiberio did not believe the Authority had in service the type of vessel that would be adequate to provide service between New Bedford and Nantucket, which he felt should be "an all purpose freight vessel, the capacity of carrying somewhere between 14 to 15 trucks that was capable of doing around 25, 27 knots." (*Id.*, at pp. 407-408).

108. The Third RFP also advised private operators that, based upon an evaluation of all proposals received, the Authority would decide whether to provide freight service between New Bedford and Martha's Vineyard itself during 2002 or to negotiate and enter into an agreement with the eligible and responsible proponent who submits the most advantageous proposal to the Authority and the public for the provision of a freight transportation service between New Bedford and Martha's Vineyard. (TAB 53, at pp. 3, 15-16). The Third RFP also advised private operators that the Authority was allowing proponents to propose two different compensation arrangements in their proposals, including one which Seabulk had advised the Authority it was willing to consider submitting, as follows:

Accordingly, the Authority will allow proponents to propose two different Total Compensation arrangements in their Financial Proposals. One arrangement will be essentially the same one that has been in place for the last two years, namely, for the Authority to pay the proponent directly to provide the Services, and for the Authority to be responsible for the making of all reservations, the sale of all tickets and the collection of all ticket revenues. The second arrangement is for the proponent to retain whatever revenues are generated from the Services as its total compensation for the Services, which would in turn require the proponent to handle its own reservations and collect its own fares. However, if a proponent proposes this second Total Compensation arrangement, it also will be required to give hazardous cargo freight shippers priority in making reservations for the first trip in the morning. The Authority in turn will agree to eliminate its 6:00 a.m. weekday hazardous cargo freight trip from Woods Hole during the period when the Services are being provided.

(TAB 53, at p. 5).

109. The Authority received only one proposal in response to the Third RFP, which was again submitted by Seabulk. In its service proposal (TAB 54), Seabulk's proposed:

- (a) to continue its service between New Bedford and Martha's Vineyard in 2002 with the *Seabulk Minnesota*, the same vessel it had used on that route the prior two years (TAB 54, at pp. SA29689-SA29698) ;
- (b) to continue using the New Bedford State Pier Freight Ferry Terminal in New Bedford and the Authority's Vineyard Haven terminal on Martha's Vineyard in connection with the service (*id.*, at p. SA29675);

- (c) to provide the service from March 18, 2002 through December 13, 2002, or approximately nine months of the year (*id.*, at p. SA29675); and
- (d) to provide three round trips each weekday between New Bedford and Martha's Vineyard (*id.*, at p. SA29700).

110. In its financial proposal (TAB 55), Seabulk proposed a continuation of its previous arrangement (with the Authority making all reservations, selling all tickets, and retaining all revenues from the service, and paying Seabulk directly to provide the service), except that its Total Compensation would be \$1,625,000. (TAB 55, at p. 2). (Seabulk also offered to pay the Authority \$1,000 for the use of the Vineyard Haven terminal in connection with the service. *Id.*, at p. 3) However, Seabulk declined to enter into the second alternative arrangement where it would handle its own reservations, collect its own fares, and retain whatever revenues are generated from the service as its Total Compensation, in exchange for the Authority eliminating its 6:00 a.m. weekday hazardous cargo freight trip from Woods Hole during the period when the New Bedford service is being provided. (*Id.*, at p. 2). Seabulk offered the following explanation for declining to enter into this alternative arrangement:

There is currently no written guarantee that the Authority will reduce the number of trips through Woods Hole or any means of diverting trucks outside of the 6am hazardous trip to New Bedford. Seabulk International is willing to perform this service at no expense to the Authority provided that a sufficient number of trucks are able to be diverted to New Bedford.

(TAB 55, at p. 2).

111. On October 12, 2001, the Authority's Acting General Manager, Wayne Lamson,¹² recommended to the Members that, instead of entering into an agreement with Seabulk to provide freight service between New Bedford and Martha's Vineyard for nine months during

¹² Mr. Tiberio had left his position as the Authority's General Manager in September 2001. (A. Tiberio Dep. Tr., TAB 17, at pp. 6-7).

2002, the Authority should provide such freight service itself from May 2 through September 25, 2002. (Management Summary #GM-436, *Proposed New Bedford-Martha's Vineyard Freight Service*, October 12, 2001, TAB 56, at pp. 1, 6). Mr. Lamson stated that he was making this recommendation because he believed this was the more prudent financial approach, noting that he earlier had estimated that the Authority's total incremental cost of providing such freight service itself would be around \$750,000, and that in his opinion, the benefits from having Seabulk provide the service for a longer period of time throughout the year did not outweigh the significant savings the Authority would realize from providing the service itself. (TAB 56, at pp. 5-6). However, Mr. Lamson also recommended that such service be made contingent upon being able to enter into a satisfactory agreement with the City of New Bedford for the use of the New Bedford State Pier Freight Ferry Terminal. (*Id.*, at pp. 1, 6).

112. At their October 18, 2001 public meeting, the Members decided to have the Authority provide freight service between New Bedford and Martha's Vineyard from May through September 2002, as previously proposed by management, contingent upon being able to enter into a satisfactory agreement with the City of New Bedford for the use of the New Bedford State Pier Freight Ferry Terminal. (Minutes of the Authority's October 18, 2001 Meeting in Public Session, TAB 57, at p. 8). However, at the same meeting, the Members decided not to authorize the implementation of a three-year high-speed passenger-only seasonal service demonstration project between New Bedford and Martha's Vineyard commencing in May 2002. (TAB 57, at p. 9).

113. The following day, October 19, 2001, New Bedford Mayor Kalisz announced "a series of measures in direct response to this week's actions by two members of the [Authority]

and a member from Nantucket on the SSA's Financial Advisory Board." (TAB 58, at p.

NB005882). As stated in his press release that day, Mayor Kalisz took the following actions:

1. He will not recommend that the Harbor Development Commission enter into any agreements with the SSA to operate freight service out of the port of New Bedford next season. As a consequence a) the 3,000 trucks, which operated out of the New Bedford terminal to Martha's Vineyard this past season, will be rerouted through Woods Hole and b) the 6 AM 800 hazardous cargo trucks scheduled to operate from New Bedford next season will continue to operate from Woods Hole.
2. The City's efforts to relocate Ralph Packer's barge operation will continue however, no final agreement will be reached with Mr. Packer. Mr. Packer's facility must be moved to accommodate the New Bedford harbor cleanup. His barges presently carry jet fuel, petroleum products, sand and stone. If those materials do not go by barge from New Bedford and additional 7,000 trucks will be diverted through Woods Hole.
3. A letter is being drafted to Governor Jane Swift requesting an immediate response to a request that an executive order be issued to the Executive Office of Transportation and Commerce freezing any SSA capital requests. All federal and state transportation money flows through the EOTC and the SSA has filed a plan seeking millions of dollars of such aid over the coming years.
4. The Mayor is requesting a meeting with Senator Montigny and the legislative delegation regarding the status of the Governor's bill adding New Bedford and Barnstable as voting members of the SSA.
5. The Mayor has instructed the City Solicitor to vigorously once again pursue the federal litigation including commencing depositions to determine the circumstances surrounding the vote by Mr. Robbins and Mrs. Grossman as it affects the SSA's attempt to keep New Bedford out of the flow of interstate commerce.

(TAB 58, at pp. NB005883-NB005884).

114. Discussions between the Authority and New Bedford continued regarding the possible implementation of a high-speed service between New Bedford and Martha's Vineyard commencing in 2002 and, on November 14, 2001, Mr. Leontire sent a letter to Mr. Lamson in response to his request for clarification of the City's positions on a variety of issues regarding the

Authority. (TAB 59). In his letter, Mr. Leontire stated:

[W]e are looking for the development of both passenger and freight service from the port of New Bedford. As we have discussed with the SSA staff on numerous occasions, we see no impediments to providing the necessary infrastructure in the port of New Bedford to service both passengers and freight. ...

I want to re-iterate the New Bedford Harbor Development Commission's prior vote and offer to the SSA. The Harbor Development Commission voted to pay 50% of any stand alone operating deficit for the New Bedford High Speed Ferry service to Martha's Vineyard and 50% of any lay up cost for the Schamonchi not including depreciation.

With respect to an agreement with the SSA to utilize the freight facility and passenger facility at the State Pier we offer the same terms and conditions as were provided in the HVIDE Marine Agreement which you previously reviewed except there will be no charge for utilization of the pier and passenger facilities for the first two years.

...

I have indicated on several occasions and will represent to the SSA once again that upon institution of SSA freight service and a two season high speed pilot ferry service to Martha's Vineyard from the port of New Bedford, I will withdraw without prejudice on behalf of the City of New Bedford and Harbor Development Commission both the federal litigation and the environmental justice claim pending before the Federal Highway Department.

(TAB 59, at pp. SA30697-SA30698).

115. At their November 15, 2001 public meeting, the Members then authorized the implementation of a two-year high-speed passenger-only seasonal demonstration project between New Bedford and Martha's Vineyard subject to a number of conditions, including the following:

- (a) A satisfactory two-year bare-boat charter agreement for use of the high-speed vessel *Catalina Jet*;
- (b) A satisfactory written agreement with the City of New Bedford and the New Bedford Harbor Development Commission allowing the Authority to use the New Bedford State Pier Freight and Ferry Terminal for both its proposed freight service and the demonstration project;
- (c) A satisfactory written agreement with the City and the Harbor Development Commission for the dismissal of both the federal lawsuit and the discrimination

complaint, which is to include a covenant by the City and the Harbor Development Commission not to sue or file any complaint against the Steamship Authority based upon any alleged constitutional violations or alleged discrimination during the duration of the demonstration project;

- (d) A satisfactory written agreement with the City and the Harbor Development Commission encompassing the City's offer to pay fifty percent of any stand-alone operating deficit for the New Bedford high-speed ferry demonstration project.
- (e) A satisfactory written agreement with the City and the Harbor Development Commission obligating the City to develop and make available for the demonstration project a 900-space parking facility ready for use on or before May 1, 2002.
- (f) The completion of necessary modifications to the existing New Bedford ferry terminal facility, including a passenger service and waiting area, at no expense to the Steamship Authority; and
- (g) The execution of all agreements with the City and the Harbor Development Commission by all parties by no later than December 20, 2001.

(Minutes of the Authority's November 15, 2001 Meeting in Public Session, TAB 60, at pp. 7-10).

116. On November 21, 2001, the parties filed a "Joint Motion for Temporary Stay through December 20, 2001," citing the Authority's vote "to proceed with the implementation of the high-speed passenger-only seasonal service demonstration project between New Bedford and Martha's Vineyard." (TAB 61, at p. 1). The parties also represented that they had "agreed in principle on the substantive terms of such an agreement and anticipate consummation of the agreement by December 20, 2001 in accordance with the deadline adopted by the Authority." (*Id.* at p. 2).

B. New Bedford's Refusal to Allow the Authority to Use Its State Pier Freight Ferry Terminal to Provide Either Freight or High-Speed Passenger Service.

117. On December 5, 2001, the Dukes County Commissioners voted not to reappoint the Authority's Dukes County Member, J.B. Riggs Parker, to another three-year term as an

Authority Member. After Mr. Parker was not reappointed, Mr. Leontire announced that the City was withdrawing from the agreement that it had entered into with the Steamship Authority. (G. Leontire Depos. Tr., TAB 6, at p. 226-229).

118. In response, on December 7, 2001, Mr. Lamson sent a letter to Mr. Leontire, in which he stated:

This letter is to confirm our telephone conversations yesterday after I read in the *New Bedford Standard Times* that the City of New Bedford was severing its relationship with the Authority, including the high-speed and freight ferry projects. In those conversations, you confirmed the accuracy of the newspaper reports and informed me that everything was over. When I then asked whether there was anything that could change your mind, you said no, that you already had instructed your attorneys to resume the federal lawsuit, and that you would be pursuing the proposed legislation to change the structure of the Authority.

Frankly, I was completely surprised by your decision. Since the Members' November 15, 2001 vote, the Authority has devoted its entire efforts to make certain that the high-speed demonstration project would become a reality this next summer. ...

...
... Indeed, upon hearing the news yesterday, I first couldn't believe it and then thought there still might be a possibility that the City would change its position, but you made it clear to me yesterday that such will not be the case.

Accordingly, I have had little choice but to instruct everyone here at the Authority to stop their work on this project despite all of the time and effort they all have already put into it, and we have informed Nichols Brothers of the situation. I also will report to the Board Members the City's position that we will not be able to proceed with the implementation of the high-speed demonstration project next year and, further, that we will not be allowed to use the New Bedford State Pier Freight Ferry Terminal for our proposed freight service between New Bedford and Martha's Vineyard. If I have somehow misunderstood the situation in any respect, please let me know immediately, as the City's actions have created a difficult situation for us with respect to our schedules and service obligations, and we now quickly have to explore what other alternatives we have.

(TAB 62, at pp. 1-2).

119. On December 18, 2001, Mayor Kalisz sent a letter to Mr. Lamson, declaring that "[u]nfortunately, unforeseeable events occurred at the most inopportune time." (TAB 63, at p. 002/008). In that letter, Mayor Kalisz stated:

New Bedford agreed at the last SSA Board meeting to a set of conditions known as items a through n negotiated primarily with Mr. Parker. Several items obligated the City of New Bedford to expend substantial public funds. As New Bedford has no voice on the SSA, the City's willingness to agree to such terms was primarily based on Mr. Parker's integrity and his leadership on the Board.

Unfortunately, forces beyond our control lead to a 4 to 3 vote by the Dukes County Commissioners not to reappoint Mr. Parker to a new three year term. ...

Over the past week, however, an extraordinary number of events have occurred. Five of six town of Martha's Vineyard adopted a resolution requesting the Legislature to change the method by which the Martha's Vineyard SSA member is appointed The Town of Barnstable issued a letter dated December 14, 2001 fully supporting the Kass Commission Legislation The Town of Falmouth voted December 17, 2001 to reaffirm its support for the Kass Commission Legislation and to support in part the Resolution of the five towns of Martha's Vineyard. The City of New Bedford supports both the Kass Commission legislation and further supports the Resolution of the five towns of Martha's Vineyard. All of the above communities are in support of high-speed ferry service from New Bedford as well as conventional freight service.

...

Accordingly, I am writing to formally request that the December 20, 2001 deadline for finalizing high-speed ferry service from New Bedford be extended to January 15, 2002. This will allow time for the affected communities to fully air their concerns and give the Legislature the opportunity to finalize its position on these matters. As most of the agreements necessary to implement the service are almost complete, I would urge that we continue to move these agreements forward as we await a Legislative decision.

In the final analysis, it might turn out that the Legislature fails to act and, therefore, service from New Bedford cannot proceed. ...

(TAB 63, at pp. 002/008 - 003/008).

120. At their December 20, 2001 meeting, the Members declined to take action on Mayor Kalisz's request for the Authority to extend a deadline for finalizing various agreements

pertaining to a proposed high-speed ferry project. (Minutes of the Authority's December 20, 2001 Meeting in Public Session, TAB 64, at p. 4).

121. Nevertheless, the Authority continued its efforts to enter into a satisfactory agreement for the use of the New Bedford State Pier Freight Ferry Terminal in connection with its proposed freight service between New Bedford and Martha's Vineyard during 2002. On December 26, 2001, Mr. Lamson wrote a letter to John Simpson, the Executive Director of the New Bedford Harbor Development Commission ("HDC"), in which he requested the HDC to consider this matter at their next regularly scheduled meeting on January 10, 2002. (TAB 65, at p. 2). Mr. Lamson also advised Mr. Simpson that, because of the Authority's pressing scheduling needs, it needed to know as soon as possible whether the HDC would allow the Authority to use the New Bedford State Pier Freight Ferry Terminal as the Authority had proposed and, if so, on what terms and conditions. (TAB 65, at p. 3).

122. At its January 10, 2002 meeting, the HDC referred the Authority's request for access to the New Bedford State Pier Freight Ferry Terminal for 2002 to Mr. Leontire. Therefore, on January 17, 2002, the Authority's counsel asked Mr. Leontire in writing to advise him by January 22, 2002 whether the HDC would proceed on a reasonable, and very brief, timetable to resolve the issue. (TAB 66).

123. On January 30, 2002, the Authority's counsel again asked Mr. Leontire in writing for a response as soon as possible to the Authority's request to provide freight service from the State Pier. (TAB 67, at p. 2). In his letter, the Authority's counsel also noted that a newspaper article had reported that the City of New Bedford intended to conduct a study to determine "whether there is any value to the city of having a freight ferry run," and suggested that, because the study reportedly would not be completed until at least August 2002, the Authority's proposed

use of the State Pier through September 2002 would not limit any of the City's options that the study may recommend. (*Id.*, at pp. 1-2). The Authority's counsel also stated that the Authority was willing to make the same annual payment for use of the State Pier as Seabulk had made in 2000 and 2001. (*Id.*, at p. 2).

124. Because of the lack of any response from the City of New Bedford, the Members voted at their February 15, 2002 meeting to delay the Authority's proposed freight service between New Bedford and Martha's Vineyard from its previously scheduled commencement date of May 2, 2002. They also approved a revised commencement date of May 17, 2002 (the beginning of the Authority's summer schedule) for the service, contingent upon the development by March 8, 2002 of a satisfactory written agreement allowing the Authority to use the New Bedford State Pier Freight Ferry Terminal for the proposed freight service. (Minutes of the Authority's February 15, 2002 Meeting in Public Session, TAB 68, at p. 3).

125. On February 22, 2002, the Authority's counsel once again wrote to Mr. Leontire to advise him of the Authority's action, and notified him that the Authority would have to cancel freight service for the entire 2002 summer season if it could not conclude a signed agreement with the HDC by March 8, 2002 for the use of the New Bedford State Pier. (TAB 69).

126. On March 11, 2002, the Authority's counsel wrote another letter to Mr. Leontire in which he noted that the Authority "still has not received any response from either the City or the HDC." Therefore, the Authority's counsel advised Mr. Leontire that "New Bedford's failure to take any steps to conclude by March 8 an agreement that would allow the Authority to use the State Pier in connection with its proposed 2002 freight service leaves the Steamship Authority

with little choice but to cancel the service for the entire summer season,” and that “it is doing so.” (TAB 70).¹³

127. The Steamship Authority does not have the right to use the City’s freight ferry terminal at the New Bedford State Pier as a matter of right. (G. Leontire Depos. Tr., TAB 6, at p. 168). At the time of his deposition, it was still the Mayor’s recommendation that the Harbor Development Commission not reach any agreement with the Steamship Authority which would allow the Authority to use the freight ferry terminal at the New Bedford State Pier. As Mayor Kalisz testified, “Nothing has changed.” (F. Kalisz Depos. Tr., TAB 5, at p. 93).

128. Even without carrying any of the Islands’ freight traffic from the port of New Bedford, it is the Authority’s position that both its Woods Hole terminal and its Hyannis terminal are currently operating below capacity, even taking into consideration the restrictions which the Authority agreed to regarding its use of those terminals. (Steamship Authority (by Wayne Lamson) Depos. Tr., TAB 71, at pp. 77-79). Further, if the Authority’s level of service from its Hyannis terminal were not limited by its 1997 agreement with the town of Barnstable, its physical property there would be able to handle far more traffic than it is currently handling. (Wesley Ewell Depos., Tr., TAB 10, at pp. 38-39).

129. The situation is similar with respect to the Authority’s Woods Hole terminal, where the Authority has agreed to restrictions regarding the use of its third slip that is located there (using it only for maintenance, repair and emergencies when one of the other slips is disabled). If the Authority were to use that third slip as an operational slip, the terminal’s operating capacity would increase by forty percent. (W. Ewell Depos., Tr., TAB 10, at p. 39).

¹³ However, the Authority is continuing to provide passenger service during the 2002 summer season with the *Schamanchi* between Billy Woods Wharf in New Bedford and the Authority’s Oak Bluffs terminal on Martha’s Vineyard. (See ¶ 33, *supra*).

Road capacity is also not a constraint, as the Woods Hole Road is probably operating at less than one half of its capacity. (*Id.*, at pp. 40-41).

C. **The City of New Bedford's Efforts to Change the Authority's Enabling Act.**

130. After issuance of the Governor's Task Force Report, legislation was filed in the Massachusetts House of Representatives to amend the Authority's Enabling Act. The City of New Bedford supports a different version of the legislation which originally had been proposed by the Governor's Task Force. (TAB 72) (*See also* G. Leontire Depos. Tr., TAB 6, at pp. 44-46; F. Kalisz Depos. Tr., TAB 5, at pp. 22-24). If this version is enacted into law, Barnstable's nonvoting Member would become a voting Member (TAB 72, at p. NB007746); New Bedford will have a nonvoting member until January 1, 2004, at which time its nonvoting Member will become a voting Member (*id.*, at pp. NB007749, NB007746); and the votes of the Members will become weighted (*id.*, at pp. NB007749, NB007748). In addition, the appointment process for the Authority's Dukes County member would be changed so that, instead of being appointed by the Dukes County Commissioners, that member would be appointed "by a majority of a seven person selection committee comprised of one selectman from each of the six towns of Martha's Vineyard appointed by the selectmen of each respective town and one county commissioner appointed by the county of Dukes county commissioners." (TAB 72, at p. NB007747). In addition, this version of the legislation provides that "[w]ithin ten business days of the effective date of this Act, the respective selection committee and communities shall appoint the five members of the Authority as provided above. The term of any member in office shall end on the date a member is appointed in accordance with the preceding sentence." *Id.*

131. Even the legislation supported by the City of New Bedford, however, will continue to authorize the Authority to provide transportation services to the Islands, will continue to vest the Authority with its licensing powers, and, in Mr. Leontire's opinion, will still violate the dormant Commerce Clause of the United States Constitution and, therefore, still be unconstitutional. (G. Leontire Depos. Tr., TAB 6, at pp. 47-48). Nevertheless, earlier this year New Bedford Mayor Kalisz fully endorsed this version of the legislation in a letter to the chairs of the Legislature's Joint Transportation Committee (which letter was drafted by Mr. Leontire) (TAB 73), even though Mr. Leontire had advised the Mayor that, in his opinion, the revised legislation would still be unconstitutional. (G. Leontire Depos. Tr., TAB 6, at pp. 48-50; F. Kalisz Depos. Tr., TAB 5, at pp. 22-24).

132. As early as 1999, the City of New Bedford had developed a three-pronged strategy to deal with everything that was going on with the Steamship Authority. There was a negotiation process that was taking place with the Steamship Authority; there was a legislative process with regard to the Steamship Authority; and there was the potential litigation issue. (G. Leontire Depos. Tr., TAB 6, at pp. 27, 106). Further, it has been part of the City's strategy to use this litigation as leverage to secure legislative action. As Mr. Leontire testified, "No question about it." (*Id.*, at p. 200). And at various times Mr. Leontire has indicated to the Legislature that the City would withdraw its complaint in this action if acceptable legislation emerged from the legislative process. (*Id.*, at pp. 213-215).

VIII. THE ANALYSIS OF KEVIN NEELS, PH.D., REGARDING THE PROBABLE CONDITIONS OF A FREE-ENTRY MARKET FOR FERRY SERVICES TO THE ISLANDS, AND THE "EMPTY CORE" PROBLEM.

133. In connection with this litigation, the Authority has engaged a consultant in the fields of economics and transportation, Kevin Neels, Ph.D., to analyze, among other things, the economic justification for the continuation of the Authority as the principal provider of water transportation between the Massachusetts mainland and the Islands, and the probable market conditions that would emerge in the event there were unrestricted entry into the market for marine transportation between the Massachusetts mainland and the Islands. Dr. Neels issued his report to the Authority in April 2002. (TAB 74).

134. Dr. Neels observes that the Authority's cost structure is characterized by very high fixed costs, minimal marginal costs, and significant economies of scale. (TAB 74, ¶ 20, at p. 9). He also observes that the Authority's demand for ferry service to the Islands is highly seasonal, with over 70% of the passenger traffic occurring in the peak months of May through October, and one third of the passenger traffic occurring in the months of July and August alone. (*Id.*, ¶ 26, at p. 11). To accommodate these changes in traffic levels, the level of service provided by the Authority also varies considerably by the season. (*Id.*, ¶ 28, at p. 11). However, despite the relatively reduced level of service provided in the winter months, the Authority is limited in its ability to reduce its off-season costs. (*Id.*, ¶ 29, at p. 12).

135. Dr. Neels also observes that the nature of ferry service is such that capacity is delineated in very large increments. This is because capacity can be increased or reduced only by adding or removing one or more round trips of an entire vessel, which may have the capacity to carry more than 1,000 passengers and 50 vehicles. While daily service frequency can be

adjusted according to the seasonal nature of the demand as described above, the rigid nature of the capacity makes it practically impossible to match capacity exactly with demand. (TAB 74, ¶ 30, at p. 12).

136. Dr. Neels found that the Authority's overall profitability obscures the unequal contribution that each segment of its business makes. He explains how the Authority, in order to operate profitably overall, must generate revenues internally with which to subsidize less profitable services it is obliged to provide. The first key cross-subsidy identified by Dr. Neels is the subsidy across seasons: peak (summer) and off-peak (winter). In other words, surpluses from summer service are used to fund substantial operating losses incurred during the winter. The second key cross-subsidy is the subsidy across classes of service: passenger, automobile, and freight. In other words, passenger and automobile service subsidize freight service. (TAB 74, ¶ 37, at p. 14).

137. Dr. Neels reports that these internal cross-subsidies remain vital to the Authority's ability to be a self-sustaining operation even today, and that such internal cross-subsidization is possible only because the Authority has been granted some authority to control the market for ferry service. (TAB 74, ¶ 37, at pp. 14-15). In particular, private operators under a free entry scenario would be likely to target the passenger/automobile segments of the market (especially during the peak season), and would not enter the freight segment of the market which needs to be subsidized. Holding all else constant, the result of such free entry would be that the Authority would have fewer sources of subsidies upon which it could draw, without experiencing any, let alone a commensurate, decrease in the segments of its operation that need the benefit of a cross-subsidy. That is, the Authority would have less ability to underwrite internally the least profitable segments of its operation. (*Id.*, ¶ 38, at p. 15).

138. Dr. Neels also concludes, as a purely economic matter, that freight service between New Bedford and the Islands — or even only Martha's Vineyard — would probably not be profitable on a stand-alone basis, because the longer distance of the New Bedford route makes it structurally less profitable than the Woods Hole route. Noting that several studies of the competitiveness of New Bedford service vis-à-vis the Cape ports have indicated that shippers would not voluntarily divert to New Bedford unless fares are held equal to those for service through the Cape ports, Dr. Neels observes that equal fares would mean significantly lower revenue per truck per mile, and the longer distance of the route means fewer trips can be made in a day with a given vessel. Therefore, at any given level of capacity utilization, the vessel will produce less revenue. Because the costs of operating from New Bedford are likely to be at least as high as those of operating from the Cape ports, net income must necessarily be less and the achievement of profitability is problematic. (TAB 74, ¶¶ 62-63, at p. 24).

139. “While the consequences of permitting free entry into ferry services are not completely predictable, [Dr. Neels] conclude[s] that moving to such a regime would, at a minimum, likely result in dramatic changes in the pricing and level of ferry services provided between the mainland of Massachusetts and the Islands. Moreover, there is a very real possibility that free entry could fail to lead to a stable competitive equilibrium. Anyone contemplating the remedy proposed by Plaintiffs needs to consider these possible consequences and how they would affect the public policy goals that the present Authority structure has been designed to serve. For that reason, [Dr. Neels] briefly sketch[ed] some scenarios that illustrate the kinds of outcomes that could occur under free entry. [He] then assess[ed] these outcomes in light of the public policy goals that the Authority now serves in fulfilling its mandate to be the Islands’ ‘state highway to the mainland.’” (TAB 74, ¶ 117, at p. 46).

140. "It is highly likely that in the absence of entry controls, private firms would expand their capacity to provide summer passenger ferry service, as these services are currently profitable for private operators. At the Authority's current summer rates, private operators also might choose to begin providing seasonal combined passenger/automobile ferry services, as the Authority is able to run its combined passenger/automobile services at a profit. With potentially far lower labor costs, private operators may well find such service profitable, provided they can obtain access to necessary terminal facilities." (TAB 74, ¶ 118, at pp. 46-47).

141. "It is considerably less likely that private firms would choose to provide year-round passenger or automobile service or significant freight service at current rates. At the Authority's current price and cost structure, all of these services are dependent on cross-subsidies for their existence. While it is possible that lower cost private firms might be able to operate some of these services at a profit, such a result is by no means guaranteed and, indeed, seems unlikely over the long-term." (TAB 74, ¶ 119, at p. 47).

142. "Free entry into ferry service should, in long-run equilibrium, drive prices for those services provided by efficient competitive firms down to a level where firms are earning no economic profits—the profits earned by the firms should be sufficient to recover capital costs, but no higher. Even if the Authority were able to match the efficiency of these competitive firms, it would not be able to generate any surplus profits from these services (peak-season transportation of passengers and automobiles) to use in subsidizing the provision of low-profit services that private operators are unlikely to provide at current prices (freight services and off-season services of all kinds). To avoid operating at a deficit, the Authority would have to increase prices, decrease service levels, or both relative to current levels for those services now subsidized by peak-season passenger and automobile traffic." (TAB 74, ¶ 120, at p. 47).

143. "As a result of all these changes, fares would likely decrease and service levels increase for peak-season passenger and automobile ferry services, while freight and off-season passenger and automobile rates would rise and service levels would decrease. The distributional consequences of these changes are likely to disadvantage island residents. Summer visitors to the Islands are the likely primary beneficiaries of increased peak season services. In contrast, permanent residents would bear the brunt of a reduction in service and/or increase in off-season passenger and automobile fares. They also would face higher living costs as higher year-round freight rates are reflected in higher costs for goods on the Islands. These increases are likely to be most noticeable in an increase in the costs of relatively low-value commodities." (TAB 74, ¶ 121, at pp. 47-48).

144. "The disruptions to the island economies that would follow such changes cannot be over-emphasized. Myriad investments, business relationships, lines of supply, and employment decisions are predicated on the pricing and service policies of the Authority and the stability of service that it has maintained over the decades of its existence. How many of these could be maintained in the dramatically different market environment that free entry would produce is unknown." (TAB 74, ¶ 122, at p. 48).

145. "In some ways, however, the scenario in which the effects of free entry are restricted to an increase in the level and decrease in the price of currently profitable services and a decrease in the level and increase in price of unprofitable services is an optimistic one. This scenario assumes that ferry service will be provided on these terms on a stable basis." (TAB 74, ¶ 123, at p. 48).

146. "Ferry service between the Massachusetts mainland and the Islands is, however, characterized by the conditions that can lead to the existence of markets with an empty core— a

market in which no competitive equilibrium can exist because of the difficulty of matching demand and capacity. The experience of ocean cargo liners service demonstrates that such markets can be unstable, with periodic price wars giving way to periods of service retrenchment or the emergence of unregulated monopoly.” (TAB 74, ¶ 124, at p. 48).

147. “Neither a scenario which sees drastic reductions in services currently supported by summer passenger surpluses, nor a scenario in which there is a very real potential for chronic price wars, instability, and turnover of operators comports with the public policy purposes that prompted the legislature to establish the Authority.” (TAB 74, ¶ 125, at pp. 48-49).

148. “Permitting free entry would place at risk the public policy objectives that the Authority was created to meet. The Authority was created to ensure that (1) Island residents and visitors to the Islands were provided with adequate year-round ferry service, free from the risk of major disruptions; (2) Islanders could obtain “the necessities of life”; and (3) ferry service was placed on a firm financial footing without resort to public subsidy. Free entry would place all of these objectives at risk. Free entry would imperil the Authority’s ability to provide off-season service at current rates and service levels without public subsidy and prohibit it from providing freight service at current rates and service levels. Moreover, free entry could lead to periods of unpredictably varying fares and service levels as price wars alternate with periods of sharp service contraction.” (TAB 74, ¶ 126, at p. 49).

149. “The Authority’s licensing power to control the levels of ferry service between the Massachusetts mainland and the Islands, therefore, is essential to the Authority’s ability to fulfill its mandate “to provide adequate transportation of persons and necessities of life for the islands” on an assured basis. Plaintiffs’ proposed remedy would place the achievement of this mandate at great risk.” (TAB 74, ¶ 127, at p. 49).

IX. PRIVATE ACCESS TO THE AUTHORITY'S TERMINAL FACILITIES.

150. While the Authority's mainland terminals on Cape Cod are currently operating at below capacity (*see* ¶¶ 128-129, *supra*), its terminal facilities on the Islands face constraints on their limited capacity. There already is congestion existing at the Authority's Vineyard Haven terminal on Martha's Vineyard, and the Authority has to consider a major upgrade to the Oak Bluffs terminal to handle a proportional share of the expected increases in even its own vehicle and passenger traffic. Indeed, the Authority may even need to re-design its Oak Bluffs terminal, which currently is operational only during the peak season, in order to handle year-round service. (TAB 16, a pp. ii & 10). The Authority similarly has noted that it is hard pressed to accommodate the sailings of even its own vessels at its Nantucket terminal, especially during the peak season and with the barge activity taking place there. (See TAB 49, at pp. 34, 13).

151. There is a limit to the capacity of the Authority's current terminal facilities, particularly during the periods (generally the early morning) for which there is the greatest demand among shippers. A study conducted by FXM Associates in 1999 concluded that the Authority's Martha's Vineyard and Nantucket facilities only could accommodate two trips daily each from New Bedford. (TAB 75).

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Dated: May 31, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy
of the above document was served upon the
attorney of record for each other party by mail/by hand

Date 5/31/02

Emily C. Shanahan