

## MEMORANDUM

**TO:** Nick Mavadones, Operations Manager  
Casco Bay Island Transit District

**FROM:** Aga Dixon and Ben Plante  
Drummond Woodsum

**DATE:** May 8, 2025

**RE:** Casco Bay Island Transit District Vehicle Rate Proposal

You have asked us to review a proposal to restructure the Casco Bay Island Transit District’s (“CBITD”) rate schedule for vehicle carriage to and from Peaks Island (the “Vehicle Rate Proposal”). In Part I of this memo, we provide relevant background information concerning CBITD’s current vehicle carriage rate structure and the Vehicle Rate Proposal. In Part II, we present a detailed legal analysis of the constitutional and regulatory provisions that bear upon the legality of the Vehicle Rate Proposal—specifically, the dormant Commerce Clause, Equal Protection clause and its related constitutional right to travel, as well as the applicable provisions of state law and rule. Finally, in Part III, we offer our recommendations to develop a robust public hearing record to support the Vehicle Rate Proposal in future proceedings before the Maine Public Utilities Commission (“MPUC”).

### SUMMARY OF LEGAL ANALYSIS AND RECOMMENDATIONS

For the reasons explained in Part II, in our opinion, the Vehicle Rate Proposal would not violate applicable constitutional or statutory restraints and appears consistent with CBITD’s broad authority to establish vehicle carriage and freight rates. Like the passenger rate increase CBITD implemented last year, the Vehicle Rate Proposal is structured to avoid discriminating, or distinguishing, between residents and non-residents. Instead, the Vehicle Rate Proposal would uniformly impose vehicle carriage rates for non-commercial and commercial vehicles irrespective of residency. Additionally, residents and non-residents alike may purchase annual and 90-day passenger boarding passes that, under the Vehicle Rate Proposal, would entitle passholders to discounted vehicle carriage rates.

In our view, the Vehicle Rate Proposal does not appear to discriminate against interstate commerce or provide preferential treatment to intrastate interests, in contravention with the U.S. Constitution’s commerce clause. Similarly, the proposal does not appear to deprive any class of persons of equal protection of the law, nor would it impermissibly restrict the fundamental right to travel, because it is not intended to deter or hinder travel to and from the Casco Bay islands but is designed to offset the cost to maintain CBITD’s facilities and to provide service to the islands. The proposal also falls squarely within the scope of CBITD’s broad authority to establish rates to reasonably ensure sufficient revenues to meet CBITD’s costs of service, and is consistent with express statutory authority that permits CBITD to cross-subsidize rates to preserve the affordability of passenger and freight services for year-round residents.

In our April 22, 2024 memorandum analyzing CBITD’s passenger rate increase, we recommended that CBITD create a public hearing record demonstrating that the passenger rate increase satisfies all constitutional and statutory requirements. We recommend the same approach here.

If the CBITD Board of Directors (the “Board”) votes to adopt the Vehicle Rate Proposal, CBITD must demonstrate to the MPUC that CBITD’s rates (i) are a “fair approximation” of the costs associated with passenger use of CBITD’s facilities; (ii) are not excessive in relation to the benefit that CBITD provides to passengers—namely, ferry service to the Casco Bay Islands; and (iii) are not structured such that they have a disparate impact on interstate commerce or non-residents. As before, we recommend that CBITD develop a public hearing record demonstrating that the proposal meets each of these criteria.

## **PART I: BACKGROUND—THE CURRENT AND PROPOSED VEHICLE RATE STRUCTURE**

Prior to 2024, CBITD experienced a trend of increasing year-over-year operating losses due to rising expenses and other economic factors. To reverse this trend, CBITD developed a multi-phased approach to increase CBITD’s revenues, reduce its operating expenses, and prudently shrink CBITD’s budget deficit in the coming years.

Last year, CBITD implemented the first phase of this approach by restructuring its passenger rate schedule for service to the Casco Bay islands. Notably, on August 1, 2024, the MPUC approved CBITD’s revised passenger rate structure, and rejected a request to investigate the matter. CBITD’s passenger rate increase reduced its operating loss for the fiscal year 2024. CBITD now proposes implementing the second phase of its multi-phase approach: restructuring the rates it charges to transport vehicles to and from Peaks Island.<sup>1</sup>

### ***A. The Current Vehicle Rate Structure***

CBITD’s current rate structure imposes fares for vehicle service based on various factors, such as commercial versus non-commercial vehicles, vehicle weight, and peak season versus off-peak season rates. Non-commercial vehicles are charged varying rates based on the day of the week and whether transport occurs during the off-peak season (roughly mid-October to mid-April) or peak season (mid-April to mid-October).<sup>2</sup> Non-commercial vehicles with handicapped license plates are charged reduced peak season rates Monday-Tuesday and Thursday-Sunday. Commercial vehicle transport fares are determined based on the vehicle’s registered gross vehicle weight and whether transport occurs during the off-peak or peak season. CBITD’s current vehicle carriage rates have not changed in 15 years or more.

### ***B. The Vehicle Rate Proposal***

The Vehicle Rate Proposal would alter the current rate structure by establishing, among other things, (1) regular and discount rates for passenger vehicles during off-peak and peak seasons, (2) discount rate eligibility for annual and 90-day passenger boarding pass holders, (3) increased

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<sup>1</sup> CBITD operates only one ferry capable of providing vehicle transport services—to and from Peaks Island.

<sup>2</sup> CBITD also charges trailer transport rates which are dependent upon the length of the trailer.

regular rates for vehicle transport on Thursday through Sunday, (3) increased discount rates for vehicle transport on Thursday through Sunday during the peak season, and (4) year-round specialty rates for vehicles with handicap license plates and/or tags and for medical vehicles.

In other words, the Vehicle Rate Proposal would overall raise non-commercial and commercial vehicle carriage rates; however, annual and 90-day passholders would be eligible for a discount rate, which for most users would represent a modest increase from rates currently charged for non-commercial vehicle carriage. For non-passholders, increased congestion rates would be in effect on Thursday-Sunday during both off-peak and peaks seasons.

The proposed rates are structured to encourage travel during certain times of the week and the year when CBITD has historically experienced fewer passengers seeking to transport vehicles to and from Peaks Island. Because the Peaks Island vehicle ferry operates at a loss during the off-peak season, higher peak season vehicle carriage rates are also intended to subsidize CBITD's operating loss during the off-peak season.

## **PART II: LEGAL ANALYSIS**

The U.S. Constitution, federal law, and state law all bear upon the Vehicle Rate Proposal's legality. The Vehicle Rate Proposal must not contravene the Constitution's so-called "dormant" Commerce Clause, Equal Protection Clause, or the constitutional right to travel. The proposal must also comply with the Private and Special Law that created CBITD, as well as Title 35-A of the Maine Revised Statutes, and the MPUC's regulations. Each of these constitutional and regulatory restrictions is addressed next.

### ***A. The Dormant Commerce Clause***

The U.S. Constitution's Commerce Clause vests Congress with the authority "[t]o regulate Commerce . . . among the several states."<sup>3</sup> The Commerce Clause "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce . . . [and t]his 'negative' aspect of the Commerce Clause 'has come to be called the dormant Commerce Clause [, the law of which] is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."<sup>4</sup> Put another way, the dormant Commerce Clause limits "a state's power to take actions impacting interstate commerce."<sup>5</sup>

A state statute, regulation, or policy may violate the dormant commerce clause in several different ways.<sup>6</sup> First, a policy that "clearly discriminates against interstate commerce in favor of intrastate commerce is virtually invalid *per se* and can survive only if the discrimination is demonstrably

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<sup>3</sup> U.S. Const., art. I, § 8, cl. 3; *Selevan v. New York Thruway Authority*, 711 F.3d 253, 254 n.1 (2d Cir. 2013) ("*Selevan I*").

<sup>4</sup> *Selevan II*, 711 F.3d at 254 n. 1.

<sup>5</sup> *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004).

<sup>6</sup> *Id*; *Selevan v. New York Thruway Authority*, 584 F.3d 82, 94 (2d Cir. 2009) ("*Selevan I*") (considering whether toll policy that charged different rates to non-residents of island municipality violated the dormant Commerce Clause).

justified by a valid factor unrelated to economic protectionism.”<sup>7</sup> This is often referred to as the “clear discrimination” standard. Discrimination against interstate commerce occurs when there is “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>8</sup>

Second, even if a particular policy does not discriminate against interstate commerce, “it may still be unconstitutional if it imposes a burden on interstate commerce incommensurate with the local benefits secured.”<sup>9</sup> The U.S. Supreme Court adopted what is known as the *Pike* balancing test to assess whether a particular statute, regulation, or policy “imposes a burden on interstate commerce incommensurate with the local benefits secured.”<sup>10</sup> The *Pike* Court held that:

[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>11</sup>

In sum, federal courts have concluded that “under either the ‘clear discrimination’ or the ‘Pike’ forms of analysis, ‘the minimum showing required . . . is that [the state statute, regulation, or policy] have a disparate impact on interstate commerce.’”<sup>12</sup>

Third, the U.S. Supreme Court has established a three-pronged test, known as the *Evansville* test, to evaluate “whether a fee imposed by a governmental entity to defray the cost of facilities used by those engaged in interstate commerce violates the dormant Commerce Clause or the right to travel.”<sup>13</sup> Under the *Evansville* test, a fee, assessment, or levy is reasonable if it “(1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits

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<sup>7</sup> *Selevan I*, 584 F.3d at 94; *Freedom Holdings*, 357 F.3d at 216 (noting that “a [state] statute that clearly discriminates against interstate commerce in favor of intrastate commerce is ‘virtually invalid *per se*’”).

<sup>8</sup> *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Oregon*, 511 U.S. 93, 99 (1994).

<sup>9</sup> *National Electrical Manufacturers Ass’n v. Sorrell*, 272 F.3d 104, 108 (2d Cir. 2001).

<sup>10</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Freedom Holdings*, 357 F.3d at 216-217 (applying the *Pike* test); *Sorrell*, 272 F.3d at 108 (same).

<sup>11</sup> *Pike*, 397 U.S. at 142.

<sup>12</sup> *Freedom Holdings*, 357 F.3d at 218 (2d Cir. 2004); *Automated Salvage Transp., Inc. v. Wheelabrator Env’t Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998) (“[w]here a regulation does not have this disparate impact on interstate commerce, then ‘we must conclude that ... [it] has not imposed any “incidental burdens” on interstate commerce that “are clearly excessive in relation to the putative local benefits”’); See also *National Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) (noting that “[i]n its ‘modern’ cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws ‘driven by ... economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors’”) (internal quotations omitted); *Northeast Patients Group v. Maine Dep’t of Admin. & Fin. Servs.*, 554 F. Supp. 3d 177, 181 (D. Me. 2021) (noting that plaintiff seeking to invalidate law on basis that it violates the dormant commerce clause “bears the initial burden of showing discrimination”).

<sup>13</sup> *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 715 (1972); *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 369 (1994); *Selevan I*, 584 F.3d at 94; *Selevan II*, 711 F.3d at 259.

conferred, and (3) does not discriminate against interstate commerce.”<sup>14</sup> Traditionally, the *Evansville* test has been applied to tolls and user fees that are assessed to persons and travelers using public facilities.<sup>15</sup>

In our opinion, the Vehicle Rate Proposal does not clearly discriminate against interstate commerce on its face. The proposal imposes regular and discount vehicle carriage rates for non-commercial vehicles that apply indiscriminately to residents and non-residents passengers alike. It also imposes a uniform 23% increase on all commercial vehicle transport, irrespective of residency. Moreover, the proposal offers discounted vehicle carriage rates to passengers who possess an annual boarding pass, or a 90-day boarding pass, and both residents and non-residents passengers are eligible to purchase either type of boarding pass. In other words, both residents and non-residents passholders are eligible for discount vehicle carriage rates. As a result, it is our opinion that eligibility for discounted vehicle carriage rates is not established by any discriminatory residency classification. This is also confirmed by the Vehicle Rate Proposal’s remaining features. For instance, the proposal establishes increased rates on Thursday through Sunday, when CBITD experiences its highest volume of vehicle transport, and during the peak season. However, these rates apply uniformly to vehicles irrespective of a vehicle owner’s residency. Consequently, it is unlikely that a court would find that the Vehicle Rate Proposal discriminates against interstate commerce by providing preferential treatment to intrastate interests over interstate interests.<sup>16</sup>

Similarly, the Vehicle Rate Proposal’s burden on interstate commerce does not on its face appear to exceed the local benefits to CBITD, and passengers seeking vehicle transport to Peaks Island, under the U.S. Supreme Court’s *Pike* test. The proposal imposes the same vehicle carriage rates on residents and non-residents, and both residents and non-residents are eligible to purchase annual and 90-day passenger boarding passes that in turn entitle them to discounted vehicle carriage rates. Much like the passenger fare rate increase, it is our understanding that the Vehicle Rate Proposal is essential to secure CBITD’s financial health and future by generating revenue that will offset CBITD’s operating losses. Further increasing CBITD’s revenue is not only necessary to reduce its operating losses, but is also necessary to adequately maintain and improve the facilities that CBITD uses to transport vehicles and passengers to Peaks Island.

Finally, we question the extent to which the Supreme Court’s *Evansville* test is applicable to the Vehicle Rate Proposal.<sup>17</sup> In our memorandum analyzing CBITD’s passenger rates, we

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<sup>14</sup> *Northwest Airlines*, 510 U.S. at 369; *Evansville*, 405 U.S. at 716-17.

<sup>15</sup> *American Trucking Associations, Inc. v. Rhode Island Tpk. & Bridge Auth.*, 123 F.4th 27, 35 (1st Cir. 2024) (applying *Evansville* test to challenged Rhode Island highway tolling framework); *Selevan II*, 711 F.3d at 259 (applying *Evansville* test to challenge to toll assessed on Grand Island Bridge); *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 567 F.3d 79, 86 (2d Cir. 2009) (applying *Evansville* test to legality of passenger wharfage fee charged by Port Authority to passengers of third-party ferry service).

<sup>16</sup> *Selevan I*, 584 F.3d at 95 (holding that “in order to state a claim for discrimination in violation of the Commerce Clause, a plaintiff must ‘identify an[ ] in-state commercial interest that is favored, directly or indirectly, by the challenged statutes at the expense of out-of-state competitors’”).

<sup>17</sup> Generally, courts have applied the *Evansville* test to tolls and user fees that are assessed to defray the costs of the public’s use of public facilities. We think that tolls and user fees are distinguishable from the vehicle carriage rates CBITD charges to transport vehicles to and from Peaks Island and. However, the CBITD charges are at least arguably intended “to defray the cost of facilities used by those engaged in interstate commerce.”

recommended that CBITD develop data and evidence to support: (1) the conclusion that the passenger rate increase was based on some fair approximation of the public's use of CBITD's facilities, and (2) that the passenger rate increase did not impose excessive passenger rate increases in relation to the resulting benefits. We recommend that CBITD develop the same data and evidence to support the Vehicle Rate Proposal.<sup>18</sup> The materials that have been provided to us appear to demonstrate to us the Vehicle Rate Proposal will likely meet the *Evansville* test. CBITD's costs to provide vehicle carriage service to Peaks Islands, and maintain the infrastructure necessary to do so, are considerable. CBITD is the only ferry service that provides readily affordable vehicle carriage rates between Peaks Island and the mainland. The only other option is to charter a commercial vessel capable of transporting a vehicle, which we understand to be an expensive proposition. In our view, the Vehicle Rate Proposal establishes new vehicle carriage rates that are a "fair approximation" of the costs associated with CBITD's vehicle carriage service, and is reasonable in relation to the benefits conferred to passengers who use CBITD's service to ferry their vehicles to and from Peaks Island. For instance, CBITD's proposed 23% commercial vehicle carriage increase is necessary to modernize commercial carriage rates that have remained stagnant for 15 years, while inflation and CBITD's operating expenses have steadily increased.

Nonetheless, as explained in greater detail in Part III, we recommend that CBITD further develop data and evidence demonstrating that the proposal satisfies the first and second prongs of the *Evansville* test.

### ***B. Equal Protection and the Fundamental Right to Travel***

The U.S. Constitution protects a person's fundamental right to travel.<sup>19</sup> The fundamental right to travel is most often implicated in the context of interstate travel; however, courts have recognized that the Constitution also protects a person's right of intrastate travel.<sup>20</sup> Generally, the right to travel is implicated when a governmental program "actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right."<sup>21</sup> Accordingly, courts subject interference-with-travel claims to heightened

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<sup>18</sup> The third prong of the *Evansville* test is readily satisfied by the Vehicle Rate Proposal because the Proposal does not discriminate, on its face, against interstate commerce.

<sup>19</sup> See *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (stating that "[f]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution") (internal citations omitted); see also *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (noting that the "'right to travel' . . . protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State"); *Selevan I*, 584 F.3d at 99. Courts have invoked both the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of the U.S. Constitution to protect the right to travel, but usually evaluate infringement-of-travel claims using equal protection analysis. See *Saenz v. Roe*, 526 U.S. at 501-03; *Soto-Lopez*, 476 U.S. at 902 n.2; *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., concurring) (noting that "the right to travel achieves its most forceful expression in the context of equal protection analysis").

<sup>20</sup> See *Selevan I*, 584 F.3d at 100; see also *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646, 648 (2d Cir. 1971) (stating that "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state").

<sup>21</sup> *Soto-Lopez*, 476 U.S. at 903 (internal citations and quotations omitted).

scrutiny—meaning that such programs must be necessary to promote a compelling government interest.<sup>22</sup>

Conversely, courts have held that minor restrictions on travel do not amount to the denial of a fundamental right.<sup>23</sup> Thus, programs with negligible or minimal impact on the right to travel “will withstand a constitutional challenge as long as [the program] is rationally related to a legitimate state interest and is neither arbitrary, unreasonable nor irrational.”<sup>24</sup> In some instances, courts have applied the *Evansville* test to a levy, assessment, or toll in order to evaluate whether a minor restriction on travel violates the fundamental right to travel.<sup>25</sup> Courts have “recognized a difference between the sort of ‘invidious distinctions’ that penalize the right to travel and cases in which a state has simply levied ‘a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance.’”<sup>26</sup> Thus, the Courts have “permitted the imposition of ‘fees designed to offset the cost of maintaining a state-provided facility . . . [so long as the fees] reflect a uniform, fair and practical standard relating to public expenditures.’”<sup>27</sup>

In our opinion, the Vehicle Rate Proposal does not violate the Equal Protection clause or the fundamental right to travel flowing from it. The Vehicle Rate Proposal does not draw regulatory distinctions between residents and non-residents; rather, it imposes vehicle carriage rate increases on commercial and non-commercial vehicles. Rather than deter or penalize passengers seeking vehicle transport, reduced vehicle carriage rates on certain days and during certain times of the year are intended to incentivize travel when CBITD experiences lower vehicle transport volumes and to reduce congestion and wait times during the busiest times of year. Peak season vehicle carriage rates are also intended to subsidize the revenue generated by CBITD’s vehicle ferry during the off-peak season, when it operates at a loss. Importantly, CBITD’s commercial vehicle carriage rates are uniformly increasing for all registered gross vehicle weight classes—irrespective of residency.

In short, CBITD’s vehicle carriage rate increase is not intended to deter, impede, or penalize travel generally, or to otherwise hinder the transport of vehicles to Peaks Island. CBITD’s increased vehicle carriage fares are intended to update rates that have remained the same for +/- 15 years

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<sup>22</sup> See *Shapiro v. Thompson* 394 U.S. 618, 634 (1969).

<sup>23</sup> *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 54 (2d Cir. 2007) (holding strict scrutiny did not apply to local law that required ferries to obtain a special permit to use terminal at East Hampton because “[t]he fact that the Ferry Law may make travel less direct for some passengers does not meet the threshold required for strict scrutiny review”); see also *Kansas v. United States*, 16 F.3d 436, 442 (D.C. Cir. 1994) (explaining that “something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied”) (internal citations and quotations omitted).

<sup>24</sup> *LCM Enterprises, Inc.*, 14 F.3d at 679; *City of Cleburne, Tex. V. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (stating that “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest”).

<sup>25</sup> *Selevan II*, 711 F.3d at 258 (noting that “if the District Court were to find that the toll policy involved ‘invidious distinctions,’ then the test of strict scrutiny would apply; if it were to determine that the toll policy was merely ‘a minor restriction on travel,’ then the three-part test announced in the Supreme Court’s subsequent decision in *Northwest Airlines* [decision] would govern”).

<sup>26</sup> *Selevan II*, 711 F.3d at 258.

<sup>27</sup> *Selevan II*, 711 F.3d at 258 (quoting *Evansville*, 405 U.S. at 714).

(despite increasing inflation and CBITD’s increased operating expenses), reduce CBITD’s operating losses, and defray the costs CBITD incurs to maintain the facilities necessary to transport vehicles to and from Peaks Island. In our opinion, the Vehicle Rate Proposal likely constitutes, at most, a minor restriction on travel, which would not be subject to heightened scrutiny.

### ***C. Maine’s Statutory and Regulatory Framework***

CBITD was created by a Private and Special Law (the “Private & Special Law”), and it is regulated by the MPUC, which has adopted rules that govern CBITD’s rates and operations.<sup>28</sup>

The Private and Special Law requires CBITD’s Board to “fix such rates of fare to be charged for such public transportation service as shall to the extent possible reasonably assure sufficient income to meet the cost of the service, including, but not limited to, operating expenses, insurance, taxes, rentals, annual serial bond payments, interest, allocation for a reserve account and an allowance for depreciation.”<sup>29</sup>

Title 35-A, Chapter 51, of the Maine Revised Statutes requires that “[a]ll ferries shall maintain reasonable and adequate service, rates and schedules to the islands of Casco Bay.”<sup>30</sup> Title 35-A M.R.S. § 5101-A(2) provides that “[i]n making decisions that require an evaluation of the rates charged by the Casco Bay Island Transit District, the [MPUC] shall allow reasonable cross-subsidization of rates in order to preserve the affordability of passenger and freight services for the year-round residents of the affected islands, the financial viability of the district and the viability of the island communities served by the district.”<sup>31</sup> This statute also provides that “[i]n allowing such cross-subsidization, the [MPUC] shall attempt to minimize the potential need for governmental operating subsidies for the operations maintained by the district.”<sup>32</sup>

The MPUC’s rules require CBITD to file its rate schedules and terms and conditions of service with the MPUC.<sup>33</sup> The MPUC’s rules also require that CBITD publish notice of any rate change at least 30 days in advance of the effective date of the changes.<sup>34</sup> Notice must be published: (1) at least twice in the Portland Press Herald or a similar newspaper of general daily circulation that is distributed in Cumberland County, and (2) in a conspicuous location at the mainland ferry terminal and on each of CBITD’s vessels.<sup>35</sup> Fifty or more ratepayers can request that the Commission

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<sup>28</sup> P & S.L. 1981, Ch. 22, §§ 8, 12; 35-A M.R.S. § 5101 *et. seq.*; 65-407 C.M.R. ch. 510 and 560.

<sup>29</sup> P & S.L. 1981, Ch. 22, § 8.

<sup>30</sup> 35-A M.R.S. § 5103.

<sup>31</sup> 35-A M.R.S. § 5101-A(2).

<sup>32</sup> 35-A M.R.S. § 5101-A(2).

<sup>33</sup> 65-407 C.M.R. ch. 510, § 3(A) (providing that “[f]erry service providers shall file with the Commission a rate schedule and its terms and conditions of service showing all fares, charges, and terms and conditions which it has established and which are in force at the time for any service rendered or furnished or to be rendered or furnished, including all rates and charges established for the transportation of property when such transportation has been authorized by the Commission. The rate schedule and terms and conditions of service shall set forth all rules and regulations that in any manner affect fares and charges and the rates and charges assessed or to be assessed for any service”).

<sup>34</sup> 65-407 C.M.R. ch. 560, § 3.

<sup>35</sup> 65-407 C.M.R. ch. 560, § 3(A)-(B).

investigate CBITD's rate changes.<sup>36</sup> Additionally, the Commission possesses the authority to investigate and suspend the operation of any CBITD rate schedule or any term or condition of service.<sup>37</sup>

The Vehicle Rate Proposal falls well within the Board's broad authority to establish "public transportation service" rates that are sufficient to meet CBITD's costs of service and operating expenses.<sup>38</sup> Like CBITD's restructured passenger rates, the Vehicle Rate Proposal is intended to raise additional revenue to meet CBITD's operating expenses, which is consistent with the Private and Special Law's mandate that the Board establish rates sufficient to generate revenue to meet CBITD's costs of service and expenses.<sup>39</sup>

CBITD's vehicle carriage service is only available to Peaks Island, and the Vehicle Rate Proposal is projected to increase revenue by roughly \$450,000 annually. With this increase, CBITD estimates that scheduled service to Peaks Island will account for roughly between 63% to 74% of the total revenue for scheduled service to the Casco Bay islands. You have asked us to opine on whether this is lawful. You have also asked us to consider whether linking eligibility for discounted vehicle carriage rates to the procurement of an annual or 90-day pass is lawful. We think that both proposals conform to Maine law.

The Legislature expressly directed the MPUC to allow "reasonable cross-subsidization of rates in order to preserve the affordability of passenger and freight services."<sup>40</sup> Consistent with MPUC guidance, the Legislature has conferred "considerable discretion" on the Board to structure CBITD's rates, and expressly authorizes CBITD to cross-subsidize rates charged to passengers and freight traveling to one island in order to preserve the affordability of rates charged to transport passengers and freight traveling to the other Casco Bay islands.<sup>41</sup> Last year, the MPUC approved CBITD's passenger rate increase, and the MPUC declined to investigate the matter further, concluding that CBITD had appropriately exercised its authority to establish passenger service rates and that the cross-subsidization of rates associated with the increase was a lawful exercise of CBITD's rate-setting authority.<sup>42</sup>

Based on our understanding of the Vehicle Rate Proposal, we believe the same is true here. CBITD is permitted to cross-subsidize the cost of service to the other Casco Bay islands with the costs of

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<sup>36</sup> 65-407 C.M.R. ch. 560, § 3.

<sup>37</sup> 65-407 C.M.R. ch. 510, § 3(A).

<sup>38</sup> See P & S.L. 1981, Ch. 22, § 8. Moreover, in a 2021 decision in which the MPUC declined to initiate a formal investigation into CBITD's pilot Peaks Island residential boarding pass program, the MPUC opined that it interprets Title 35-A, Chapter 51, of the Maine Revised Statutes and the Private and Special Law to "mean[] that CBITD has considerable discretion in designing rates, which are not required to be based principally on costs as is the case with other utilities' rates." *Casco Bay Island Transit Dist.*, Request for Approval of Proposed Increase in Rates in Casco Bay, No. 2021-00098, Order (Me. P.U.C. September 20, 2021).

<sup>39</sup> P & S.L. 1981, Ch. 22, § 8

<sup>40</sup> 35-A M.R.S. § 5101-A(2).

<sup>41</sup> 35-A M.R.S. § 5101-A; P & S.L. 1981, Ch. 22, § 8; *Casco Bay Island Transit Dist.*, Request for Approval of Proposed Increase in Rates in Casco Bay, No. 2021-00098, Order (Me. P.U.C. September 20, 2021).

<sup>42</sup> *Casco Bay Island Transit District Request for Approval of Proposed Increase in Rates in Casco Bay*, Docket No. 2024-00097 Order at 5 (August 1, 2024).

providing vehicle carriage service to Peaks Island. Moreover, by charging higher rates during the peak season, CBITD is permissibly cross-subsidizing lower rates charged during the off-peak season, when CBITD's car ferry operates at a loss. The MPUC expressly determined that it was lawful for CBITD to "prioritize[] rates for residents, commuters, and other frequent ferry users over rates for tourists and other less frequent users." By offering discounted vehicle carriage rates to annual and 90-day passholders, CBITD has done just that, which is consistent with the Maine Legislature's directive that the MPUC consider the "affordability of . . . freight services for the year-round residents" when evaluating CBITD's rates.

### **PART III: RECOMMENDATIONS**

Although the Vehicle Rate Proposal appears to conform to applicable Constitutional requirements and Maine law, we note that the proposal may be subject to an MPUC investigation. As you know, the MPUC is vested with the authority to investigate the Vehicle Rate Proposal if requested by fifty or more ratepayers, or on its own initiative. Last year, Casco Bay island residents unsuccessfully petitioned the MPUC- to investigate CBITD's passenger rate proposal. We think that 50 or more ratepayers could petition the MPUC to investigate the Vehicle Rate Proposal. CBITD should be prepared to respond to any such investigation.

We recommend that, as part of its public hearing on the Vehicle Rate Proposal, CBITD develop the record with data and other evidence that support the necessity of changes to its rate structure. The materials provided to us and considered by CBITD's Finance Committee should be entered into the public record, as they explain that the Vehicle Rate Proposal is intended to reduce CBITD's operating losses by overhauling CBITD's current vehicle carriage rate structure to create additional revenue from CBITD's vehicle carriage services. Additional evidence should be prepared and entered into the public hearing record to demonstrate that (1) the Vehicle Rate Proposal imposes commercial and non-commercial carriage fares that are a "fair approximation" of costs to transport vehicles via CBITD's facilities; (2) carriage fares are reasonable in relation to the benefits resulting to CBITD from the Vehicle Rate Proposal; and (3) the carriage fares are not structured to have a disparate impact on interstate commerce or non-residents. As discussed above, in our view, the Vehicle Rate Proposal meets these requirements.

We trust this memo is responsive to your questions. If you have any additional questions, please don't hesitate to contact us.