

TO: Nick Mavodones, Operations Manager
Casco Bay Island Transit District

FROM: Aga Dixon and Ben Plante
Drummond Woodsum

DATE: April 22, 2024

RE: Casco Bay Island Transit District Tarriff Proposal

You have asked us to review a proposal to restructure the Casco Bay Island Transit District’s (“CBITD”) rate schedule (the “Rate Proposal”) for passenger service to Peaks Island, Little Diamond Island, Great Island, Diamond Cove, Long Island, Great Chebeague, and Cliff Island (collectively, the “Casco Bay Islands”). In Part I of this memo, we provide relevant background information concerning CBITD’s current rate structure and the Rate Proposal. In Part II, we present a detailed legal analysis of the constitutional and regulatory provisions that bear upon the legality of the 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 that may be used in support of the Rate Proposal in any future proceeding before the Maine Public Utilities Commission (“MPUC”).

SUMMARY OF LEGAL ANALYSIS AND RECOMMENDATIONS

For the reasons explained in Part II, in our view, the Rate Proposal would not contravene applicable constitutional or statutory requirements and appears consistent with CBITD’s broad rate-making authority. This is because the Rate Proposal is structured so as to not discriminate between resident and non-resident passengers by (1) imposing a flat rate fare for all passengers, regardless of whether a passenger is a resident of one of the Casco Bay Islands, a Maine resident, or a visitor to the Islands; (2) charging residents and non-residents the same rates for all ticket classifications, and ensuring that the price to travel to any of the Casco Bay Islands would be the same regardless of residency status; and (3) offering monthly and annual boarding passes to residents and non-residents alike for the same rate.

Specifically, in our view, a court would likely conclude that the Rate Proposal does not discriminate against interstate commerce because it does not provide preferential treatment to intrastate interests over interstate interests. Likewise, we think a court would likely conclude that the Rate Proposal does not present equal protection concerns or substantially restrict travel because it equalizes the rates charged to all passengers, imposes rates uniformly on residents and nonresidents alike, and is intended to defray reasonable costs CBITD incurs to maintain its facilities and ferry service. Finally, the Rate Proposal falls well within the CBITD’s broad authority to establish passenger rates sufficient to meet CBITD’s costs of service and operating expenses and is consistent with the express statutory authority allowing CBITD to cross-subsidize rates charged to passengers traveling to one island in order to preserve the affordability of rates charged to passengers traveling to the other Casco Bay Islands.

As you know, the Rate Proposal is subject to the CBITD Board of Directors’ (the “Board”) review and approval. If the Board votes to adopt the Rate Proposal, it must submit the newly adopted rates to the MPUC and must demonstrate to the MPUC that CBITD’s rates:

- Are a “fair approximation” of the costs associated with passenger use of CBITD’s facilities;
- Are not excessive in relation to the benefit that CBITD provides to passengers—namely, ferry service to the Casco Bay Islands; and
- Are not structured such that they have a disparate impact on interstate commerce or non-residents.

We recommend that CBITD develop a public hearing record demonstrating that the Rate Proposal meets each of the three above-listed criteria. The record developed by CBITD could be used to support the Rate Proposal before the MPUC, including in the event objectors file a petition requesting that the MPUC investigate the Rate Proposal.

PART I: BACKGROUND—THE CURRENT RATE STRUCTURE AND THE RATE PROPOSAL

We understand that over the past several years CBITD has experienced a trend of increased operating losses due to rising expenses and other economic factors. Excluding 2020 and 2021, CBITD’s operating losses have continued to increase each year. In the 2024 fiscal year, CBITD passed a budget with a \$4.3 million operating loss. This has led CBITD staff to consider certain changes to its rate structure.¹

CBITD’s current rate structure imposes passenger fares for service to the Casco Bay Islands based on: (1) the island a passenger is traveling to, (2) the fare type, and (3) peak season versus off-peak season rates. Passenger service rates to the Casco Bay Islands vary based on an island’s proximity to the Casco Bay Lines Ferry Terminal (the “Terminal”). For instance, passenger fares for service to Cliff Island are greater than passenger fares to Peaks Island because Cliff Island is a greater distance from the Terminal than Peaks Island. Passenger fare types are divided into several categories, including adult fares, half-price fares, commuter fares,² fares for monthly passes, and fares for an annual pass. Generally, increased peak season rates apply to tickets purchased for service to the Casco Bay Islands from mid-April to mid-October, while reduced off-peak season rates apply to tickets purchased from late-October to early-April.³

The Rate Proposal equalizes CBITD’s rates for all passengers by imposing a single flat fare for passenger service to any of the Casco Bay Islands. Specifically, the Rate Proposal would (1) establish flat full-price and half-price passenger rates for service to any of the Casco Bay Islands, (2) establish a flat full-price passenger rate for monthly and annual passes for service to all of the Casco Bay Islands, (3) establish a new half-price passenger rate for monthly and annual passes for service to all of the Casco Bay Islands, and (4) maintain peak season and off-peak season rates for service to the Casco Bay Islands.

In sum, while the Rate Proposal would increase rates for single full-price and half-price peak and off-peak season round-trip tickets to the Casco Bay Islands, it would significantly reduce rates for monthly and annual peak and off-peak season passes. Notably, the Rate Proposal would not establish tariffs based on any residency requirements; thus, residents and nonresidents alike could buy tickets and passes at the same rates.

¹ Specifically, CBITD’s current rate structure establishes tariffs for animals, bicycles, vehicles, and freight transported to the Casco Bay Islands. The Rate Proposal only contemplates restructuring CBITD’s passenger fares for service to the Casco Bay Islands. Accordingly, we focus only on those elements here.

² Commuters may purchase a “Commuter Book,” WHICH provides five (5) round-trip tickets to the purchaser.

³ For 2024, peak season rates apply from April 13th to October 14th, and off-peak season rates apply for the remainder of the year. See <https://www.cascobaylines.com/portland-ferry-rates/passenger/>.

PART II: LEGAL ANALYSIS

The U.S. Constitution, federal law, and state law all bear upon the legality of the Rate Proposal. In short, the Rate Proposal must not contravene the Constitution’s so-called “dormant” Commerce Clause, its Equal Protection Clause, or the constitutional right to travel. In addition, the Rate Proposal must 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.”⁴ 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.”⁵ Put another way, the dormant Commerce Clause limits “a state’s power to take actions impacting interstate commerce.”⁶

A state statute, regulation, or policy may violate the dormant commerce clause in several different ways.⁷

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 justified by a valid factor unrelated to economic protectionism.”⁸ 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.”⁹

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.”¹⁰ 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.”¹¹ 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

⁴ 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*”).

⁵ *Selevan II*, 711 F.3d at 254 n. 1.

⁶ *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004).

⁷ *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).

⁸ *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*’”).

⁹ *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Oregon*, 511 U.S. 93, 99 (1994).

¹⁰ *National Electrical Manufacturers Ass’n v. Sorrell*, 272 F.3d 104, 108 (2d Cir. 2001).

¹¹ *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).

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.¹²

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.’”¹³

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.”¹⁴ 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 conferred, and (3) does not discriminate against interstate commerce.”¹⁵ Traditionally, the *Evansville* test has been applied to tolls and user fees that are assessed to persons and travelers using public facilities.¹⁶

In our view, the Rate Proposal does not clearly discriminate against interstate commerce on its face. The Rate Proposal would impose a flat rate fare for all passengers, regardless of whether a passenger is a resident of one of the Casco Bay Islands, a Maine resident, or a visitor. Under the Rate Proposal, residents and non-residents would pay the same rates for all ticket classifications, and the price to travel to any of the Casco Bay Islands would be the same for all passengers. Additionally, monthly and annual boarding passes would be offered to residents and non-residents alike for the same rate. Consequently, it is unlikely that a Court would find that the Rate Proposal discriminates against interstate commerce by providing preferential treatment to intrastate interests over interstate interests.¹⁷

Likewise, it does not appear as though the Rate Proposal’s burden on interstate commerce exceeds the local benefits to CBITD and its passengers under the *Pike* test. Again, the Rate Proposal even-handedly imposes

¹² *Pike*, 397 U.S. at 142.

¹³ *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”).

¹⁴ *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.

¹⁵ *Northwest Airlines*, 510 U.S. at 369; *Evansville*, 405 U.S. at 716-17.

¹⁶ *American Trucking Associations, Inc. v. Alviti*, 630 F. Supp. 3d 357, 379 (D.R.I. 2022) (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).

¹⁷ *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’”).

the same flat rate passenger fares on residents and non-residents alike. Additionally, monthly and annual passes are available to residents and non-residents at the same rates. As we understand it, the Rate Proposal is necessary to generate revenue that will reduce CBITD's operating losses and expenses, which have been steadily increasing each year since 2022. We presume that increasing CBITD's revenue is also necessary to adequately maintain the facilities that CBITD uses to transport passengers to the Casco Bay Islands.

Finally, to the extent that the *Evansville* test is applicable to the Rate Proposal,¹⁸ we suggest that CBITD develop data and record evidence to support the conclusion that the Rate Proposal is based on some fair approximation of the public's use of CBITD's facilities, and that the Rate Proposal does not impose excessive passenger rate increases in relation to the resulting benefits. The third prong of the *Evansville* test is readily satisfied by the Rate Proposal because the Rate Proposal does not discriminate, on its face, against interstate commerce. Based on the materials that have been provided to us, it would appear as though the Rate Proposal could also meet the first two prongs of the *Evansville* analysis. CBITD's costs to provide ferry service to the Casco Bay Islands are considerable, and a recent CBITD Finance Committee report confirms that CBITD's operating expenses continue to rise on an annual basis. CBITD provides passengers with ferry service to islands that are not otherwise accessible by any means other than water taxi or personal watercraft. Consequently, it seems likely that the Rate Proposal establishes new passenger fare rates that are both a "fair approximation" of the costs associated with such passenger use of CBITD's facilities, and that the Rate Proposal is reasonable in relation to the benefits conferred to passengers who use CBITD's service to the Casco Bay Islands. 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.¹⁹ 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.²⁰ 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."²¹ Accordingly, courts

¹⁸ Generally, the Courts have applied the *Evansville* test to tolls and user fees that are assessed by a governmental entity to defray the costs of the public's use of public facilities. Tolls and user fees are arguably distinguishable from the tariffs or rates that are charged to passengers for actual use of a public carrier service. However, it could be argued that the rates charged by CBITD to passengers for service to the Casco Bay Islands is intended "to defray the cost of facilities used by those engaged in interstate commerce," at least in part.

¹⁹ 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").

²⁰ 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").

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

subject interference-with-travel claims to heightened scrutiny—meaning that such programs must be necessary to promote a compelling government interest.²²

Conversely, courts have held that minor restrictions on travel do not amount to the denial of a fundamental right.²³ 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.”²⁴ 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.²⁵ 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.’”²⁶ 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.’”²⁷

In sum, a proposal that increases fares charged for single round-trip tickets to the Casco Bay Islands while substantially reducing the costs of monthly and annual passes to travel to and from the Islands, probably does not violate the Equal Protection clause or the fundamental right to travel flowing from it. The Rate Proposal does not draw any distinctions between residents and non-residents. Rather, the Rate Proposal equalizes the rates charged to all passengers for service to any of the Casco Bay Islands, and imposes such rates uniformly on residents and non-residents alike. CBITD’s increased passenger fares are intended to defray the costs CBITD incurs in order to maintain its facilities and the ferry service it provides passengers to the Casco Bay Islands. Such a 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.²⁸

The Private and Special Law requires the 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

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

²³ *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).

²⁴ *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”).

²⁵ *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”).

²⁶ *Selevan II*, 711 F.3d at 258.

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

²⁸ 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.

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.”²⁹

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.”³⁰ 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.”³¹

The MPUC’s rules require CBITD to file its rate schedules and terms and conditions of service with the MPUC.³² 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.³³ 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.³⁴ Fifty or more ratepayers can request that the Commission investigate CBITD’s rate changes.³⁵ Additionally, the Commission possesses the authority to investigate and suspend the operation of any CBITD rate schedule or any term or condition of service.³⁶

The Rate Proposal falls well within the Board’s broad authority to establish passenger rates sufficient to meet CBITD’s costs of service and operating expenses.³⁷ One of the Rate Proposal’s primary purposes is to raise additional revenue to meet CBITD’s rising operating expenses, which is consistent with the Private and Special Law’s requirement that the Board establish rates sufficient to generate revenue to meet CBITD’s costs of service and expenses.³⁸

Moreover, the Legislature has expressly directed the MPUC to allow “reasonable cross-subsidization of rates in order to preserve the affordability of passenger and freight services.”³⁹ Consistent with MPUC

²⁹ P & S.L. 1981, Ch. 22, § 8.

³⁰ 35 M.R.S. § 5103.

³¹ 35-A M.R.S. § 5101-A(2).

³² 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”).

³³ 65-407 C.M.R. ch. 560, § 3.

³⁴ 65-407 C.M.R. ch. 560, § 3(A)-(B).

³⁵ 65-407 C.M.R. ch. 560, § 3.

³⁶ 65-407 C.M.R. ch. 510, § 3(A).

³⁷ 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).

³⁸ P & S.L. 1981, Ch. 22, § 8

³⁹ 35-A M.R.S. § 5101-A(2).

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 traveling to one island in order to preserve the affordability of rates charged to passengers traveling to the other Casco Bay Islands.⁴⁰

PART III: RECOMMENDATIONS

Although the Rate Proposal does not appear to violate the dormant Commerce Clause, the Equal Protection Clause, the constitutional right to travel, or Maine law, we note that the Rate Proposal may still be subject to an MPUC investigation. As noted above, the MPUC is vested with the authority to investigate the Rate Proposal if requested by fifty or more ratepayers, or on its own initiative. We understand that several Casco Bay Island residents have submitted public comment objecting to the Rate Proposal, arguing that it will disproportionately impact senior citizens, their family members and invitees, and more generally Casco Bay Island residents who infrequently visit the mainland. It is thus possible that 50 or more ratepayers could request that the MPUC investigate the Rate Proposal,⁴¹ and CBITD should be prepared to respond to any such investigation.

Accordingly, we recommend that, as part of the public hearing on the Rate Proposal, CBITD should develop the public 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 Rate Proposal is intended to reduce CBITD’s operating losses by overhauling CBITD’s current rate structure to create additional revenue from CBITD’s ticket sales. Additional evidence should be prepared and entered into the public hearing record to demonstrate that (1) the Rate Proposal imposes passenger fares that are a “fair approximation” of costs of passenger use of CBITD’s facilities; (2) that those passenger fares are reasonable in relation to the benefits resulting to CBITD from the Rate Proposal—namely, ferry services to the Casco Bay Islands; and (3) that the fares are not structured such that they have a disparate impact on interstate commerce or non-residents. We think the Rate Proposal likely meets these requirements, but we recommend that CBITD present the data and other evidence to support that conclusion.

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

⁴⁰ 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).

⁴¹ Notably, 50 ratepayers requested that the MPUC open an investigation in 2021 when CBITD filed its last notice of a rate change with the MPUC.