Exhibit No. (JLH-9T)

Docket TS-160479

Witness: Jack Harmon

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

|  |  |  |
| --- | --- | --- |
|  |  |  |
| In re Application of MEI NORTHWEST LLC For a Certificate of Public Convenience and Necessity to Operate Vessels in Furnishing Passenger Ferry Service   |  | Docket TS-160479 |
|  |  |  |

**CROSS-ANSWERING TESTIMONY OF**

**JACK HARMON**

**PRESIDENT, ARROW LAUNCH SERVICE, INC.**

**December 5, 2016**

# **introduction**

* 1. Please state your name, position at Arrow Launch Service, Inc., and business address.

A: My name is Jack Harmon and I am and have been an owner of Arrow Launch Service, Inc. (“Arrow”) for the past 27 years. My business address is 830 Boathaven Drive Port Angeles, Washington 98362.

# **purpose of testimony**

Q: What is the purpose of your testimony?

A. The purpose of my testimony is to respond, on behalf of Arrow Launch Service, Inc, to the testimony of Scott Sevall, Regulatory Analyst with the WUTC, which was filed on November 1, 2016. Specifically, I am responding to points raised within his testimony regarding the fitness of MEI Northwest LLC (“MEI”) to receive a certificate of public convenience and necessity, the WUTC’s investigation into Arrow’s service, and his testimony regarding the overlapping application of MEI.

# **financial fitness of mei**

* 1. I take it then you have read the Testimony of Scott Sevall filed on November 1, 2016?

A. Yes, I have read his testimony repeatedly now.

* 1. Mr. Sevall testified he concluded MEI had the financial resources to operate the service proposed by MEI in its application for a certificate of public convenience and necessity. Do you take issue with any of the steps he describes in reaching his conclusion?

A. Based on the testimony that was filed, I do. It is indeed difficult to determine from his testimony what specific actions he took to investigate and verify the validity of the information and representations provided by MEI in its application. However, if he did no more investigation than what is described in his testimony, I find it unfortunate that such a minimal inquiry was performed of MEI’s fitness, which would then ultimately serve as the basis for opinions offered by the witness.

* 1. What do you believe Mr. Sevall might have investigated that it appears he did not?

A. On the financial front, to start, it appears Mr. Sevall took MEI’s cash on-hand of $300,000 at face value without doing anything to confirm that the cash deposit exists. Rather than accept that representation as correct, in my view the better approach would be to confirm the balance through documentation by the Applicant from the financial institution at which it is deposited.

* 1. Do you take issue with any other aspects of Mr. Sevall’s investigation of MEI’s financial fitness?

A. Yes. Meaning no disrespect to staff, I disagree with his acceptance of MEI’s projected income and expenses in their pro forma. As I addressed in my testimony filed on November 1, 2016, there are several expense items which appear to me to be materially understated and which merit further investigation or due diligence and analysis by the witness. I also question the work done to investigate the projected revenue. As I indicated in my testimony of November 1, 2016, there has been a substantial year-over-year decrease in ships entering the Puget Sound over the past several years, which we believe is likely to be accelerated in the years ahead. Additionally, none of that seems to have been evaluated to any significant degree given the potential sizeable losses that might be experienced by all providers in the aftermath of an overlapping certificate grant.

# **adequacy of EXISTING service**

* 1. Mr. Sevall also testified regarding whether Arrow had ever failed or refused to provide reasonable and adequate service. Specifically, he testified he did not find any record at the UTC of Arrow ever failing or refusing to provide service. Can you comment on his testimony?

A. Yes. Again, I am also not aware of any instance in which Arrow has ever failed or refused to provide service. Of more importance is the fact that Arrow has never received any notification from the WUTC, or any customer, noting the existence of a complaint or any need for modification or improvement to Arrow’s service levels.

* 1. Is it significant to you that the WUTC never gave notice to Arrow of any complaint or particular need to modify service levels?

A. It is. As I understand it, so long as Arrow provides reasonable and adequate service and does not fail or refuse to do so, overlapping certificates of public convenience and necessity cannot be issued. Further, an overlapping certificate cannot be issued for new service in the same territory without notice and a hearing afforded Arrow along with an opportunity to provide that service. It is also significant to me because Arrow undertakes constant internal and external evaluation of its service in order to meet customer needs and makes enhancements and improvements to Arrow’s fleet and practices whenever practicable, including by purchasing additional vessels and equipment as we previously testified.

* 1. Though he concluded there was no evidence of Arrow failing to provide reasonable or adequate service and no proof that Arrow’s customers felt constrained in offering service evaluations, Mr. Sevall concluded there was some factual support for MEI’s allegation that a single, unidentified customer was “dissatisfied.” Can you comment on that statement?

A. I find Mr. Sevall’s statement deeply concerning for a number of reasons. For one, Arrow goes to great lengths to provide excellent customer service to all of its customers, encourages feedback, and if there had been a negative experience meriting any form of “dissatisfaction” we would certainly like to know what we could do to improve. Additionally, if any customer has a complaint which has any bearing on the reasonableness or adequacy of service provided by Arrow, I believe it is detrimental to Arrow’s basic due process rights for the UTC’s staff to fail to address what that complaint was, who made it, whether it related to regulated or nonregulated service, pricing, invoicing practices, etc, and instead, in a conclusory manner, offer that it “provides some factual support” for MEI’s allegation which is certainly a loaded reference by implication. If Arrow is to be provided an opportunity to respond to the anonymous allegation, to which I believe it has a right, more specific information might have been provided by Mr. Sevall.

# **overlapping certificates**

* 1. **Mr. Sevall also testified as to what he believed would be the impact on launch service in the Puget Sound of granting an overlapping application. Do you any take issue with his conclusions?**

A. I do. Mr. Sevall states “the introduction of limited competition would, by definition, introduce customer choice.” While Mr. Sevall did not exactly say so, I strongly disagree that there has been any lack of innovation or efforts to improve regulated launch service. As I stated in my testimony, and as corroborated by Arrow’s customer witness testimony, Arrow constantly strives to ensure its customers are satisfied by periodically reaching out and asking for feedback and by continually evaluating demand for service and working to anticipate that demand by adding to its fleet before there is a need or service vacuum, keeping its fleet well maintained and in the water. Arrow endeavors to offer and maintain excellent customer service, not only because it is our mission to do so, but also because Arrow is keenly aware of what is required under Washington law to maintain its certificate of public convenience and necessity. Arrow’s investments in infrastructure, equipment, personnel training and acquisition of its vessels and equipment have been made, in part, in reliance upon its understanding of the explicit condition in Washington law that if Arrow does not fail to provide reasonable and adequate service, that investment would be preserved.

Q. Did you happen to review Mr. Sevall’s Exhibit No. \_\_\_ (SS-2), and the cases he cited in support of the possibility that overlapping certificates could be issued?

**A:** Yes I did. I both read the exhibit and read completely the approximate 13 or so proposed (Initial) and Final Orders referenced there.

Q. Can you tell us, generally, your response to that review and analysis of those orders referenced in Exhibit No. \_\_\_ (SS-2)?

A. Yes. That was a classic “trip down memory lane” to the extent that the orders and exhibits were all from approximately four decades ago and followed the original establishment of Commission jurisdiction over launch service activity. A perfect example is in 1977, as reflected in the Island Mariner case that is attached in Exhibit No. \_\_\_( SS-3) to Mr. Sevall’s testimony. Many of the cases reflected the flurry of activity to “grandfather in” operating rights following that decision and to memorialize vested operations under law that pre-dated those decisions in recognizing existing launch service operations as, for instance, Order S.B.C. No. 379 of Lavina Longstaff, Application B-266 (Sept. 1979). And to be frank, after a thorough review of the facts in each order referenced in Exhibit No. \_\_\_(SS-2), I do not find any supporting evidence for Mr. Sevall’s conclusion that a basis exists for issuance of an overlapping certificate.

Q. Was that time almost four decades ago for issuing launch certificates different in your mind from the present?

A: Absolutely.

Q. In what ways?

A: Well first, now there obviously is not a group of existing providers scrambling to be issued regulated certificates in a “land grab,” as is the case when an industry first comes under regulation. Second, in none of the cases that I have reviewed in Exhibit No. \_\_\_ (SS-2) was there an established, existing certificate holder who had built up infrastructure and resources in a historic regulated launch service under its certificate who was an “existing provider” and who could meet the test under RCW 81.84.020 to show that it had not “failed or refused” to provide satisfactory service to the Commission. At most, there was a newly-issued certificated incumbent objecting to a subsequent application where there was no built-up, historic regulated launch service with sufficient equipment and resources to cover the newly-applied for territory which is decidedly different than in 2016.

Q. Do you have any further distinctions to draw that would contrast the time and context of the cases noted in Exhibits No. \_\_\_ (SS-2) and \_\_\_ (SS-3)?

A: Yes. There is a huge contrast in shipping activity between the late 1970’s and 40 or so years later, today. As I noted in my Testimony in Exhibit No. \_\_\_\_(JLH-1T), pages 4, 3-14, the volume of marine activity has dropped dramatically over the last 25-plus years. The late 1980’s was the height of the boom in Alaska pipeline production and oil shipments via tanker from Valdez to the refineries in Puget Sound. Since then, after the Exxon Valdez incident, and the growth of oil trains and Bakken Shield oil drilling activity in the Midwest particularly, the number of oil shipments into Puget Sound has plunged. Mergers in the tanker and ship service industries have also drastically cut both the volume of shipments and the number of prospective customers, all a reflection of this plunge in demand.

Q. Did you point to any sources for those diminishing trends in your direct testimony?

A. Yes. In my responsive direct testimony both in my capacity as a launch company owner and operator since 1989 and my role as a member of the board of the Puget Sound Marine Exchange, I relayed first-hand knowledge and backup statistics for that detrimental decline in shipping volume which has adversely impacted our launch business over the years, and particularly, in the last five or so years. In fact, Alyeska Pipeline Co.’s own website documents this dramatic decline in production and throughput which, in turn, causes the substantial decrease in oil shipments to Puget Sound Refineries. *See*, alyeskapipeline.com.

Q. Did you then draw further parallels between launch activities at the chronological backdrop of Exhibit No. \_\_\_ (SS-2) and Exhibit No. \_\_\_ (SS-3) and today?

A. Yes. There could be far more room for error in authorizing overlapping certificates in the late-1970’s during the “grandfather” era compared to the present. Especially today in the absence of any established inability of “refusal or failure” to provide adequate service, the damage of overlap without any showing of need for new service, let alone, documented failure/refusal to provide adequate service, is greatly magnified. As noted, customer demand is down significantly for regulated launch service in the past few years. Yet, customer requirements for increased insurance liability limits coupled with demands for higher vessel quality and safety standards significantly increase launch company costs while simultaneously customers are utilizing our services less and less. For Arrow Launch this is a “cruel irony.” Ignoring that trend and simply authorizing competition because it “feels good,” not only contradicts all the assumptions for regulated service upon which we have built our operations over the last 27 years (which has strictly controlled our allowed operating profits in that interval), but jeopardizes all future growth and investment if that “new competition for competition’s sake” metric is what we can now expect.

Q. Do you have any other thoughts about your analysis of Exhibits No. \_\_\_ (SS-2) and \_\_\_\_ (SS-3)?

A. Yes. I really find the exhibits and their rather casual conclusions exist more in a theoretical vacuum. That state of detachment might be neutral as academic theory if it were not for such a direct, consequential impact on Arrow, its ownership, employees and our future. We simply have not failed or refused to provide anything but timely, efficient, responsive and superior service and without any showing to the contrary, we cannot fathom how duplicating, unnecessary, wasteful and potentially destructive overlap could be authorized.

Q: Finally, do you have any comments on the policy recommendations included by Mr. Sevall at the end of his testimony?

A: Yes. The issue here is not really policy-driven as I understand it, but factual and legal for the Commission to make based on the record. In other words, there is not a pending rulemaking or notice of inquiry where the Commission is attempting to potentially reinterpret the commercial ferry statute. Obviously, the issue of whether overlapping certificates should be issued in the regulated commercial ferry industry in this proceeding, as I indicated, is a factual and legal one, not an abstract policy premise.

Q: What did you think about staff’s reference to common carriage in the trucking industry operating “under competitive conditions while still requiring regulatory oversight of rates and charges?”

A: I thought that was rather an “apples to oranges” comparison to the extent that in 1980 at the federal level and in 1994 at the state level, trucking regulation was eliminated for “price, routes or service.” Launch and commercial ferries are obviously vastly different than trucks, and in Washington, commercial ferries, for a number of historical as well as navigational reasons including potential conflict with the Washington State ferry routes, do not operate in “competitive conditions.” I also don’t believe that Mr. Sevall’s testimony takes into account the Washington State Supreme Court’s historic interpretation of RCW 81.84 about which I have been informed by counsel. Everyone typically has a preference for “more competition” in America, but in this regulated industry, there are very important impacts to consider in evaluating 24/7/365-day launch service which is far more comparable to energy service in that arena than it is to motor carrier transportation.

Q: Did you note that the staff nevertheless qualified its pronouncements on overlapping certificates and increased competition with the caveat that it still needs to review the evidentiary record?

A: Yes. And that at least made me hopeful that staff was not now advocating for a change in law here on its own.

**Q:** **Do you have any other thoughts regarding Mr. Sevall’s testimony?**

A: Yes. I could not help but notice a disproportionate emphasis on review of our service, including the highly unusual staff-initiated survey of existing customers and their response and a far less developed focus and analysis of what the staff believes MEI would be bringing to the marketplace, both operationally and financially, through its case in chief testimony. I would also note that the staff omits acknowledging that not one supporting shipper was included in applicant’s case in chief which means there is no independent evidence to support any need for service in the requested territory.

Q: Does this conclude your cross-answering testimony for now?

A: It does.

Docket TS-160479

CERTIFICATE OF SERVICE

I certify that on December 5, 2016, I caused to be served the original of the foregoing document to the following address via FedEx to:

Steven V. King, Executive Director and Secretary

Washington Utilities and Transportation Commission

Attn: Records Center

PO Box 47250

1300 S. Evergreen Park Dr. SW

Olympia, WA 98504-7250

I further certify that I have also provided to the Washington Utilities and Transportation Commission’s Secretary an official electronic file containing the foregoing document via the WUTC web portal; and served a copy via email to the following parties:

|  |  |
| --- | --- |
| ***For Washington Utilities and Transportation Commission Staff:***Julian BeattieOffice of the Attorney GeneralUtilities and Transportation Division1400 S. Evergreen Park Drive SWP.O. Box 40128Olympia, WA 98504-0128Phone: (360) 664-1225Email: jbeattie@utc.wa.gov | ***For MEI Northwest, LLC:***Mr. Dan BentsonBullivant, Houser, Bailey, PC1700 Seventh Ave, Suite 1810Seattle, WA 98101Email: dan.bentson@bullivant.com |
| ***For Pacific Cruises Northwest, LLC:***Captain Drew M. SchmidtPresidentPacific Cruises Northwest, Inc.355 Harris Avenue, Suite 104Bellingham, WA 98225Phone: (360) 738-8099Email: drew@whales.com | ***Administrative*** ***Law Judge***Judge Marguerite E. FriedlanderWashington Utilities and Transportation CommissionEmail: mfriedla@utc.wa.gov |

Signed at Seattle, Washington this 5th day of December 2016.

|  |  |
| --- | --- |
|  | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Maggi GruberLegal AssistantWilliams Kastner & Gibbs PLLCmgruber@williamskastner.com |