

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

**MOTION TO STRIKE PORTIONS OF
THE PREFILED REBUTTAL
TESTIMONY OF RANDY S. ESCH
FILED DECEMBER 5, 2016 AND
EXHIBIT NO. ___(RSE-8)**

I. MOTION TO STRIKE

1 Arrow Launch Service, Inc. (“Arrow”) hereby moves the Commission, pursuant to
WAC 480-07-375(1)(d), for an Order striking portions of the prefiled Rebuttal Testimony of
Randy S. Esch, Exhibit No. ___ (RSE-7T), filed on December 5, 2016 and Exhibit No. ___
(RSE-8).

2 Specifically at issue in this Motion are the testimony of Mr. Esch concerning hearsay
statements purported to have been made by Marc Aikin, who has not filed any testimony in this
proceeding, and Exhibit No. ___ (RSE-8), a shipper support statement filed on December 5,
2016. The testimony Arrow moves to strike is specifically contained on the following pages
and lines:

Page	Lines
2	20-25
11	18-25
12	1-26
13	1-22
15	3-23
16	4

MOTION TO STRIKE PORTIONS OF THE PREFILED REBUTTAL
TESTIMONY OF RANDY S. ESCH FILED DECEMBER 5, 2016
AND EXHIBIT NO. ___(RSE-8) - 1

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3 Arrow moves to strike the testimony and exhibit identified above because they raise
new matters which should have been included in the direct testimony filed by or in support of
MEI Northwest LLC's application and because by waiting until the deadline for filing any
testimony in this case (and nearly 6 months after its application) to file a shipper support
statement, MEI's conduct has effectively preempted Arrow's ability to file responsive
testimony to what should have been proffered by MEI's in its case in chief, rather than as
rebuttal.

4 **II. PROCEDURAL BACKGROUND**

5 The following paragraphs 5-10 set forth the procedural filings relevant to this Motion.

6 This matter was initiated by the filing of an Application for Commercial Ferry Service,
by MEI Northwest LLC ("MEI") on May 5, 2016. MEI's application failed to include any
shipper support statements after docketing of this application on June 29, 2016 by the
Commission, Arrow, as an existing carrier, formally protested the application on July 22, 2016.

7 On September 2, 2016, Order 01 was served by administrative law judge Marguerite
Friedlander, and which included a scheduling order in Exhibit B, setting forth various
procedural deadlines in this matter.

8 Pursuant to Order 01, Appendix B, applicant MEI Northwest LLC ("MEI") was
required to pre-file its direct testimony and exhibits on October 4, 2016, Staff and Intervenor
Response Testimony and Exhibits were due November 1, 2016, and MEI's Rebuttal Testimony
and Exhibits and Cross-Answering Testimony and Exhibits were due December 5, 2016.

9 On October 4, 2016, MEI filed as its direct evidence, the Testimony of Randy S. Esch,
President, LLC Manager, MEI Northwest LLC and multiple exhibits. However, MEI failed to
include the testimony of any shipper or customer witness in support.

10 On November 1, 2016, response testimony was filed by Commission Staff, Arrow, and
several customers in support of Arrow.

10 On December 5, 2016, the final deadline for filing testimony of any kind, MEI submitted the Rebuttal Testimony of Randy S. Esch and Exhibit No. ___ (RSE-8). This testimony contained the first reference to any kind of specific shipper support, but did so relying upon hearsay statements and by reference to Exhibit No. ___ (RSE-8).

III. ARGUMENT

11 It is improper and contrary to Commission law and rule to submit evidence of need after the applicant's case in chief is filed in a protested certificate application case.

12 When a party offers evidence to meet its burden of proof it must do so on direct. Pursuant to RCW 81.84.020, an applicant for a certificate of public convenience and necessity for provision of commercial ferry service in a territory in which there is an existing provider is required to supply admissible evidence establishing all elements on which it carries the burden of proof, including the need for service and the failure of the incumbent provider to provide reasonable and adequate service. These elements must be established by shipper testimony. *See Order M.V. No. 140304, In re Application P-72429 of Joseph F. Saccomanno*, (Oct. 1989).

13 Additionally, Commission precedent establishes that new evidence offered in rebuttal which could have been filed on direct, should be stricken, absent leave to file additional testimony. *See In the Matter of the Petition of Verizon Northwest, Inc*, Tenth Supplemental Order, Docket No. UT-011439 (Dec. 2002).

14 Here, it is apparent that MEI failed to meet its burden of proof on direct not only because it should have originally filed shipper testimony to meet its burden of proof, it was required to do so. However, instead of filing shipper testimony in support of either the need for additional service or Arrow's purported failure to provide reasonable and adequate service,

MEI attempted to prove a need for service through the applicant itself, including a hypothetical comparison of San Francisco Bay to the Puget Sound, inaccurate speculation about Arrow's ability to serve the market, and by attacking Arrow's service quality through self-serving and indeterminate third-party hearsay testimony alleging dissatisfied customers were unwilling to speak on the record for fear of possible reprisal. MEI continues this ellipsis of shipper testimony, but has apparently now attempted to cure this patent defect in its case by submitting a pre-printed, executed shipper support statement along with hearsay testimony from Randy S. Esch interweaving MEI's own newly proffered shipper support statement into rebuttal testimony.

15 Although Arrow had an opportunity to respond to MEI's original self-serving hearsay statements through direct evidence controverting MEI's third-hand references in the form of shipper/customer testimony from Debi Collins of Blue Water Shipping Company, Doug Coburn of General Steamship Agencies, and Brian Westad of Inchcape Shipping, Arrow has no opportunity to respond to new "evidence" proffered for the first time in rebuttal to its response. Thus, MEI's submission not only attempts to contravene or otherwise retroactively amend the scheduling order by filing at the rebuttal phase what should have been evidence offered on direct, in the process, it deprives Arrow of its due process right to a response.

16 Notwithstanding that various other objections exist as to the admissibility of MEI's self-serving hearsay statements, had MEI timely proffered such evidence, Arrow might have been able to present additional witnesses in response in the month interval for gathering and preparing its case and certainly would have supplied the Commission with additional responsive testimony.

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MEI offers no explanation for its late filing of a shipper support statement, ostensibly signed on October 31, which statement also curiously contradicts MEI's claim that it was not able to procure shipper support testimony because shippers feared speaking out against Arrow. Instead, MEI files its self-serving hearsay and cursory shipper statement as "new evidence" under the pretense that it rebuts Arrow's response. MEI should not be entitled to challenge Arrow or otherwise manipulate the established presentation of evidence schedule by reserving new evidence for its rebuttal. Accordingly, Arrow requests that the testimony identified in paragraph 2, above, and Exhibit No. ___ (RSE-8) particularly, be wholly stricken from the agency record.

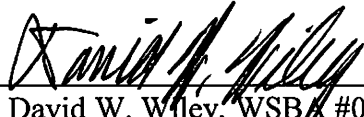
IV. CONCLUSION

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The Rebuttal Testimony of Randy S. Esch is clearly not confined to rebuttal of the response testimony filed by Arrow Launch and attempts to introduce and interweave new evidence on subject matters upon which MEI carries the burden of proof in an overlapping application case pursuant to RCW 81.84.020. Accordingly, Arrow Launch Service, Inc. respectfully requests that the testimony and exhibit which could (and should) have been filed on direct, be stricken.

DATED this 8 day of December, 2016.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I certify that on December 8, 2016, I caused to be served the original of the foregoing document to the following address via US Mail 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:

<p><i>For Washington Utilities and Transportation Commission Staff:</i> Julian Beattie Office of the Attorney General Utilities and Transportation Division 1400 S. Evergreen Park Drive SW P.O. Box 40128 Olympia, WA 98504-0128 Phone: (360) 664-1225 Email: jbeattie@utc.wa.gov</p>	<p><i>For MEI Northwest, LLC:</i> Mr. Dan Bentson Bullivant, Houser, Bailey, PC 1700 Seventh Ave, Suite 1810 Seattle, WA 98101 Email: dan.bentson@bullivant.com</p>
<p><i>For Pacific Cruises Northwest, LLC:</i> Captain Drew M. Schmidt President Pacific Cruises Northwest, Inc. 355 Harris Avenue, Suite 104 Bellingham, WA 98225 Phone: (360) 738-8099 Email: drew@whales.com</p>	<p><i>Administrative Law Judge</i> Judge Marguerite E. Friedlander WUTC 1300 S. Evergreen Park Dr. SW PO Box 47250-7250 Olympia, WA 98504 Email: mfriedla@utc.wa.gov</p>

Signed at Seattle, Washington this 8th day of December 2016.


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