

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

MEI NORTHWEST LLC'S RESPONSE
TO ARROW LAUNCH'S MOTION TO
STRIKE PORTIONS OF THE PREFILED
REBUTTAL TESTIMONY OF RANDY S.
ESCH FILED DECEMBER 5, 2016 AND
EXHIBIT NO. ____ (RSE-8)

I. INTRODUCTION

1 MEI Northwest, LLC ("MEI") respectfully requests the Commission deny Arrow
Launch Service, Inc.'s ("Arrow") motion to strike portions of Randy S. Esch's rebuttal
testimony and Exhibit No. ____ (RSE-8).

2 The Commission should deny Arrow's motion because the evidence provided by Mr.
Esch, as well as Exhibit No. ____ (RSE-8), are proper forms of rebuttal testimony that
substantively respond to Arrow's direct testimony.

II. PROCEDURAL AND FACTUAL BACKGROUND

3 The following paragraphs 4-12 set forth the procedural filings relevant to this response.

4 MEI submitted an Application for Commercial Ferry Service on May 5, 2016. This
application indicated that MEI sought authority to serve areas in the Puget Sound where
another provider, Arrow, currently has the authority to serve.

5 The Commission docketed the application on June 29, 2016, and Arrow formally
protested the application on July 22, 2016.

6 On August 5, 2016, the Commission issued a Notice of Prehearing Conference. The
Prehearing Conference took place on September 1, 2016.

7 On September 2, 2016, administrative law judge Marguerite Friedlander issued Order
01 which, among other things, outlined the procedural schedule for this matter.

8 Attached as Appendix B was the Procedural Schedule for this matter. This schedule is
reproduced below.

EVENT	DATE
MEI Direct Testimony and Exhibits	October 4, 2016
Staff and Intervenor Response Testimony and Exhibits	November 1, 2016
MEI Rebuttal Testimony and Exhibits; Cross-Answering Testimony and Exhibits	December 5, 2016
Cross-Examination Exhibits, Witness Lists, and Time Estimates	December 30, 2016
Evidentiary Hearing	January 5 and 6, 2017
Simultaneous Post-Hearing Briefs	February 17, 2017

9 MEI pre-filed its direct testimony on October 4, 2016. Arrow pre-filed its response
testimony on November 1, 2016. Arrow's response testimony made two references to the fact
that MEI's direct testimony did not include any shipper support statements.

10 For example, Arrow's testimony included the following exchange:

**Q: What is your reaction to the failure of MEI to provide any shipper/user
support testimony in its case in chief?**

A: I was surprised frankly, that MEI went through the entire application
process, prehearing conference and all this time and expense for parties and
staff, to this point, and then, when it needed to put forward its application case
in chief, apparently had no direct evidence of need for service to present.

Exhibit No. ____ (JLH-1T), at 23:18-23. *See also id.* at 21:21-26.

11 In its direct testimony, Arrow testified generally that it was adequately serving its territory. *See, e.g.*, Exhibit No. ____ (JLH-1T), at 8:9-25, 10:21 – 11:12, 14:24 – 15:16, 18:10 – 19:2. Arrow also attempted to provide specific examples of adequate service. *See, e.g.*, Exhibit No. ____ (JLH-1T), at 17:20-21.

12 MEI filed its rebuttal testimony on December 5, 2016. Included in its rebuttal testimony was a shipper support statement from Crowley Petroleum Services, Inc., which directly rebutted the above-referenced testimony from Arrow. *See* Exhibit No. ____ (RSE-8).

13 In response to MEI’s submissions of of testimony and exhibits that are squarely within the scope of rebuttal, Arrow filed its present motion to strike Crowley’s Shipper Support Statement, Exhibit No. ____ (RSE-8), and any mention of the statement in Mr. Esch’s Rebuttal Testimony.

III. ARGUMENT

14 It is proper for an Applicant to submit evidence of shipper need in response to testimony that an Applicant cannot prove such need.

There is no Commission rule or precedent that requires evidence of shipper need and support to be filed in an Applicant’s direct testimony.

15 There is no Commission rule or precedent that states all evidence of shipper need must be presented in direct testimony.

Neither the RCWs nor the WACs applicable to commercial ferry applications address when an applicant must submit evidence of shipper need or support.

16 The standards for granting an application in a territory that is already served are prescribed in RCW 81.84.020. This legislation prescribes the standard of proof necessary for obtaining a certificate of public convenience and necessity in a territory that is already served,

but does not limit meeting these standards to an applicant’s direct testimony.

17 Likewise, the Commission's procedural rules outlined in WAC 480-07 do not forbid a party from presenting evidence of shipper support in rebuttal testimony. WAC 480-07-460, the Commission rule governing the "Predistribution of exhibits and prefiled testimony" is silent on the contents of direct or rebuttal testimony. Thus, neither the legislature, nor the Commission has promulgated procedural rules specifically forbidding testimony evidencing shipper need or support in rebuttal testimony.

Evidence of shipper need or support does not need to be filed in an Applicant's direct testimony.

18 Commission precedent also does not forbid submitting evidence of shipper need or support in rebuttal testimony.

19 Arrow relies on *In the Matter of the Petition of Verizon Northwest, Inc.*, Tenth Supplemental Order, Docket No. UT-011439 (Dec. 2002) (the "Tenth Supplemental Order") to argue that any new evidence in rebuttal testimony that could have been included on direct, must be stricken. But this is incorrect.

20 *Verizon Northwest* involved Verizon's petition to provide certain regional services and the petition was opposed by another service provider, Qwest. During the *Verizon Northwest* proceedings, the administrative law judge ("ALJ") issued an order that allowed the Commission Staff to submit reply testimony responsive to Qwest's direct testimony. See *In the Matter of the Petition of Verizon Northwest, Inc.*, Ninth Supplemental Order, Docket No. UT-011439 (Nov. 2002) ("Ninth Supplemental Order") at ¶ 8. The Staff's reply testimony, however, contained testimony responding to Verizon. Because the ALJ had authorized the Staff to respond only to Qwest—not Verizon—the ALJ struck the Verizon-related testimony from the record. *Id.* at ¶ 13.

21 Accordingly, at least two key facts distinguish *Verizon Northwest* from this case. First, in *Verizon Northwest*, the ALJ limited Staff's reply testimony so that it would respond only to

earlier pleading that it would need the ALJ's leave to file additional testimony addressing Verizon. Thus, the Staff's testimony responding to Verizon's case plainly violated the ALJ's prior order. *See* Tenth Supplemental Order at ¶ 28.

22 Second, the Staff's testimony did not rebut Verizon's testimony: "[A] review of [Verizon's] testimony shows that Staff's reply did not rebut [Verizon], but rather sought the occasion of [Verizon's] testimony to insert information into the record about a subject [Verizon] did not address." *Id.* at ¶ 29. In other words, the Staff's testimony contained material outside the scope of rebuttal, which the ALJ struck from the record.

23 Here, in contrast to *Verizon Northwest*, MEI's testimony is squarely within the scope of rebuttal and does not violate any prior Commission orders or decisions. Unlike *Verizon Northwest*, MEI has fully complied with the Commission's procedural order. Moreover, unlike the Staff in *Verizon Northwest*, MEI's testimony addresses the correct party and does not seek to "insert information into the record about a subject [Arrow] did not address." MEI testified directly that it had received complaints from Arrow's customers, Arrow alleged that no such customers existed, and MEI then rebutted Arrow's testimony with a shipper support statement from Crowley. MEI's testimony squarely rebuts the testimony of Arrow and further demonstrates that Arrows is not adequately serving the area.

Proper evidence submitted in rebuttal should not be stricken, even if it could have been submitted on direct.

24 Contrary to Arrow's assertions, the Commission may admit evidence and exhibits in the form of rebuttal testimony, even if these exhibits and testimony could have been introduced in a party's direct testimony. *See Wash. Utils. & Transp. Comm'n v. U.S. West Commc'ns, Inc.*, Third Supplemental Order, Docket No. UT-961638 (Dec. 1997).¹

¹ A copy of this order is attached to this motion as Exhibit A.

25 In *U.S. West*, the Staff, among other parties, filed a joint motion to strike a specific exhibit that was submitted by U.S. West in its rebuttal testimony. The Staff argued that the exhibit was beyond the proper scope of rebuttal testimony and that the exhibit and testimony could have been introduced in U.S. West's direct case.

26 The Commission, however, rejected the Staff's arguments. In doing so, the Commission accepted U.S. West's argument that its new rebuttal testimony was proper because it directly responded to challenges asserted in the Staff's testimony. According to the Commission it preferred to consider "all information relevant to an ultimate determination" of the issue before it. The Commission also noted that public policy determinations, "should be informed by the broadest exploration permitted [to the Commission]."

27 Like *U.S. West*, the Commission will make an important public policy determination when it decides this case: that is, whether Arrow should maintain its monopoly over the multi-million dollar launch service industry in the Puget Sound, notwithstanding the complaints of significant customers like Crowley, or whether MEI should also be allowed to provide launch services in the region. Accordingly, the Commission should inform its decision with as much evidence and information as proper in determining whether to grant MEI's certificate application.

Arrow will not be prejudiced by Crowley's testimony because it will have the opportunity to cross-examine Crowley during the evidentiary hearing.

28 Arrow alleges that it will be prejudiced if MEI is allowed to introduce Crowley's shipper support statement. Arrow will not suffer any prejudice, however, because MEI intends to present Crowley's representative, Mr. Aikin, at the evidentiary hearing. Along with this response, MEI is concurrently filing a motion to allow Mr. Aikin to appear at the evidentiary hearing telephonically and be subject to cross examination by Arrow. Because Arrow will have the opportunity to cross-examine Crowley, it will suffer no prejudice.

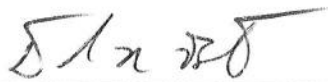
IV. CONCLUSION

29 MEI has submitted proper rebuttal testimony that directly responds to Arrow. There is no Commission rule or precedent that requires MEI to present evidence of shipper support or need in its direct testimony. Arrow testified on direct that MEI had a lack of shipper support witnesses and testified at length about Arrow's purportedly adequate service in the region. MEI's rebuttal testimony addresses these contentions only and does not expand the scope of testimony. Further, Arrow will suffer no prejudice because it will have the opportunity to cross examine Crowley's representative.

30 For these reasons, Arrow's motion to strike should be denied.

DATED: DECEMBER 16, 2016

BULLIVANT HOUSER BAILEY PC

By 
Daniel R. Bentson, WSBA #36825

Attorney for MEI Northwest, LLC

Docket TS-160479
CERTIFICATE OF SERVICE

I hereby certify that on December 16, 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
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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:

For Arrow Launch Service, Inc.:

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Signed at Seattle, Washington this 16th day of December 2016.



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