

Docket No. TS-160479 - Vol. II

In re Application of MEI Northwest LLC

December 23, 2016



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BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

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In re Application of )  
MEI NORTHWEST LLC )  
Docket No. TS-160479 )  
For a Certificate of Public Convenience and Necessity to Operate Vessels in Furnishing Passenger Ferry Service )  
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HEARING  
Volume II, Pages 15-49  
ADMINISTRATIVE LAW JUDGE MARGUERITE E. FRIEDLANDER

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9:00 a.m.

December 23, 2016

Washington Utilities and Transportation Commission  
1300 South Evergreen Park Drive Southwest  
Olympia, Washington 98504-7250

REPORTED BY: ANITA W. SELF, RPR, CCR #3032

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## 1                   A P P E A R A N C E S

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A P P E A R A N C E S

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ALSO PRESENT:

MR. & MRS. JACK HARMON

\* \* \* \* \*

1 OLYMPIA, WASHINGTON; DECEMBER 23, 2016

2 9:00 A.M.

3  
4 JUDGE FRIEDLANDER: Good morning. This is  
5 Marguerite Friedlander. I am the administrative law  
6 judge assigned to this proceeding, which has been  
7 designated by the Commission as Docket TS-160479, an  
8 application by MEI Northwest, LLC, for commercial ferry  
9 authority.

10 We're here today to take oral arguments on  
11 the motion to strike filed by Arrow Launch Service, and  
12 the motion to allow witness Marc Aikin to testify  
13 telephonically on behalf of MEI.

14 Let's begin by taking appearances. I'd like  
15 you to state your name, spell your last name, and  
16 indicate who you represent.

17 And we will begin with Mr. Bentson.

18 MR. BENTSON (via phone): This is Dan  
19 Bentson. Bentson is spelled B-E-N-T-S-O-N. And I  
20 represent MEI Northwest.

21 JUDGE FRIEDLANDER: Thank you.

22 Mr. Wiley?

23 MR. WILEY: Yes. Good morning, your Honor.  
24 David Wiley. I am the attorney for Protestant Arrow  
25 Launch Service, Inc., and with me in the hearing room

1 today are Mr. and Mrs. Jack Harmon, who are the owners  
2 of Arrow Launch Service, Inc., and my colleague,  
3 Mr. Fassburg, Blair Fassburg, who has just joined us  
4 from the state of Texas, and is going to be helping me  
5 in WUTC proceedings.

6 JUDGE FRIEDLANDER: Could you spell --  
7 Harmon, I think, is probably fairly common for the court  
8 reporter, but Fassburg.

9 MR. WILEY: Yes. F-A-S-S-B-U-R-G.

10 JUDGE FRIEDLANDER: Okay. Thank you.

11 And appearing today on behalf of Staff?

12 MR. BEATTIE: Good morning,  
13 Judge Friedlander. Julian Beattie, B-E-A-T-T-I-E,  
14 Assistant Attorney General on behalf of Commission  
15 Staff.

16 JUDGE FRIEDLANDER: Thank you.

17 And appearing today on behalf of Pacific  
18 Cruises Northwest?

19 MR. SCHMIDT (via phone): Yes. This is Drew  
20 Schmidt, S-C-H-M-I-D-T.

21 JUDGE FRIEDLANDER: Okay. And Mr. Schmidt,  
22 you're coming across with a very low voice in this, so  
23 if you could please make sure you speak up when you do  
24 so, that would be great.

25 MR. SCHMIDT: I will do my best.

1 JUDGE FRIEDLANDER: All right. Thank you.

2 Let's go into the motion to strike first,  
3 and we'll begin with Mr. Wiley. I have read the initial  
4 motion and the response to it by MEI, so I would  
5 appreciate it if you didn't go into the exact same  
6 arguments you've already made, but if you could maybe  
7 just kind of re- -- you know, give me some -- give me an  
8 oral argument for the motion. Thank you.

9 MR. WILEY: Yes, your Honor. I'll try not  
10 to repeat our written argument. I want to make a few  
11 comments today as the moving party about the motion to  
12 strike.

13 An applicant for operating authority from  
14 the WUTC must make a prima facie demonstration of need  
15 regardless of whether a protest is filed. A  
16 demonstration of need involves evidence that the  
17 existing service is in some way insufficient for the  
18 shipper's requirements.

19 The Commission has ruled in numerous motor  
20 carrier cases, for instance, In re: Jobbers Freight  
21 Service, Order MV No. 136348, a case from August 1987,  
22 that testimony that equipment or trucks are not  
23 available when needed does not demonstrate a need for an  
24 additional carrier.

25 When an application is protested, a higher

1 standard of proof -- prima facie proof is required. The  
2 Commission, under Title 81 RCW, has a varying standard  
3 for entry. The original and lowest standard was, for  
4 motor carriers, public convenience and necessity under  
5 81.80.070. That standard, of course, has been affected  
6 by federal preemption, but there's a substantial body of  
7 case law that the Commission looks to for analyzing need  
8 and entry.

9           The next gradation of authority under Title  
10 81 is for auto transportation under 81.68.040. Under  
11 that statute, the Commission will not authorize service  
12 unless the existing provider is not providing service to  
13 the satisfaction of the Commission. However, that  
14 standard has been modified by a 2013 rulemaking that  
15 allows the Commission to grant authority if the  
16 incumbent provider is not providing the same service as  
17 the applicant.

18           Solid waste is the next standard, 81.87.040,  
19 which allows the Commission to grant new authority if an  
20 overlapping applicant's incumbent carrier is not  
21 providing service to the satisfaction of the Commission.

22           The most stringent standard for entry under  
23 Title 81 RCW is for commercial ferries. There, under  
24 81.84.020, the Commission is not authorized by the  
25 legislature to provide any overlapping service unless



1 the incumbent provider has failed or refused to provide  
2 reasonable and adequate service. That is the most  
3 stringent standard.

4 The Commission has contrasted the standards  
5 for solid waste entry and commercial ferry entry  
6 recently in a case from 2013, Docket No. TC-120033, in  
7 Order No. 10, which is the Waste Management health care  
8 services case. And there, the Commission found that,  
9 under RCW 81.84.020, the commercial ferry entry statute,  
10 the legislature intended for a single provider.

11 Because ferries are at the most stringent  
12 end of the spectrum for entry over an incumbent's  
13 objection, greater quantum of proof is required to  
14 authorize overlap.

15 Now, permitting a shipper support statement  
16 to be submitted in rebuttal obviously inverts the  
17 orderly presentation of evidence that authorizes and  
18 requires an efficient and fair process. Washington  
19 courts have discussed rebuttal evidence, and the  
20 appellate court has said as follows regarding rebuttal  
21 evidence: Rebuttal evidence is admitted to enable the  
22 plaintiff to answer new matter presented by the defense.  
23 Genuine rebuttal evidence is not simply a reiteration of  
24 evidence in chief, but consists of evidence offered in  
25 reply to new matters.

1           The plaintiff, in this case the applicant,  
2 therefore, is not allowed to withhold substantial  
3 evidence supporting any of the issues which it has the  
4 burden of proving in the case in chief merely in order  
5 to present this evidence cumulatively at the end of  
6 defendant's case. That's *Kremer v. Audette*,  
7 *A-U-D-E-T-T-E*, 35 Wn. App. 643, 1983. If a matter is  
8 never raised in direct, it should not be allowed in  
9 rebuttal.

10           It's important to note, your Honor, that MEI  
11 did not actually file shipper testimony. It didn't file  
12 shipper support to establish need. It filed the  
13 applicant principal's self-serving assessment of the  
14 market in an attempt to show need.

15           The statement that's at issue in this motion  
16 is not actually testimony. It's a pre-printed shipper  
17 support statement. The testimony from the applicant  
18 principal involves an attempt to evade the rules of  
19 presentation of evidence and is not the type of evidence  
20 the Commission has allowed in the past.

21           Now, going to the statement, your Honor,  
22 first of all, on page two of the statement, or page  
23 three, rather, it says that this statement should reach  
24 the WUTC within 30 days of the application -- or the  
25 application, rather, may be dismissed. It obviously

1 wasn't produced in that timeframe.

2           The applicant claims it's rebuttal to  
3 Arrow's testimony about customer service, but the  
4 statement doesn't mention Arrow whatsoever. It makes  
5 some vague references, for instance, to what the shipper  
6 requires in order to obtain service, but doesn't say it  
7 hasn't been able to obtain that service.

8           It also comes from a company who actually is  
9 a competitor in the tug passenger transportation  
10 business. It also -- it never again, your Honor,  
11 identifies any launch service whatsoever that it is  
12 making vague reference to. We have in this record  
13 already testimony from the staff that there are a number  
14 of extant launch certificate operations. We don't know  
15 to whom this might refer.

16           Let me just conclude on the rebuttal point.  
17 MEI claims that it's permitted to file shipper support  
18 during rebuttal because it's not specifically disallowed  
19 in the Commission's procedural rules. Well, your Honor,  
20 there are many issues that are not addressed in the  
21 procedural rules, but this doesn't mean that they're  
22 permitted.

23           The -- it cites to an order from the  
24 Commission, WUTC vs. US West from 1997, saying that it  
25 supports that it can file new evidence in rebuttal.

1 That order clearly dealt with a tariff filing, not with  
2 an application. And in that case, specifically on page  
3 three of that case, your Honor, the Commission found  
4 that the new evidence on which rebuttal was going to be  
5 challenged actually regarded critical public policy  
6 issues, which, while generally inappropriate for tariff  
7 cases, the Commission felt the parties had raised as an  
8 issue, and the Commission wanted more information on  
9 that public policy issue following the presentation of  
10 the case in chief. This case is hardly -- hardly stands  
11 for the proposition that you can make a prima facie case  
12 in rebuttal in a certificate application.

13 One other point to raise, your Honor, and  
14 that is, you set a schedule for discovery in this  
15 matter, which cut off on December 9th. The statement at  
16 issue was submitted on December 5th. There was  
17 obviously no ability to inquire of the applicant  
18 anything about the foundation or statement of --  
19 statement in this document prior to cut-off, so it was  
20 untimely as well from that standpoint.

21 We will reserve our comments for the  
22 telephonic motion later, but those are our summary of  
23 the issues on the motion to strike.

24 JUDGE FRIEDLANDER: Okay. Thank you.

25 I know that Arrow Launch has raised the

1 question of an opportunity to reply to Mr. Aikin's  
2 statement, and the fact that discovery was cut off four  
3 days following the filing of that statement. If I were  
4 to allow Arrow Launch to file supplemental testimony  
5 dealing with the narrow issues raised by the shipper's  
6 statement, would Arrow Launch still propose to strike  
7 their testimony and exhibit?

8 MR. WILEY: Your Honor, yes. I mean, our  
9 first premise and first position is clearly this is  
10 untimely, this is improper evidence, it is not genuine  
11 rebuttal, but is an attempt through the back door to put  
12 on a prima facie case after -- out of sequence.

13 JUDGE FRIEDLANDER: Okay. Thank you.

14 I'd like to hear from MEI, so Mr. Bentson,  
15 would you also please respond to what Mr. Wiley has  
16 said? And again, I caution, with all things, that you  
17 not repeat what you've already filed in written form.

18 MR. BENTSON: Thank you, your Honor. This  
19 is Dan Bentson for MEI. And I apologize in advance, I  
20 have a head cold right now, so if my voice is a little  
21 froggy, that's what accounts for it.

22 But with respect to opposing counsel's  
23 argument, you know, a good bit of the intro was spent  
24 talking about the various standards of proof, which  
25 really -- which really are independent of what we're

1 talking about here.

2 I mean, the question is, is what was -- what  
3 was MEI -- what evidence did MEI put on? MEI made its  
4 initial prima facie case. It showed -- it demonstrated  
5 a need in a variety of ways in the region by showing  
6 comparative number of Puget Sound versus other regions,  
7 by showing evidence that Arrow had been subcontracting  
8 that didn't have adequate personnel and equipment to  
9 meet the need in the area. And in addition, it  
10 referenced customer complaints.

11 Now, to undercut that prima facie case,  
12 Arrow presented evidence and said there weren't  
13 unsatisfied customers in the region, and they presented  
14 evidence of different -- you know, three different  
15 customers in the region who testified that they  
16 weren't -- that they were pleased with the level of  
17 launch services that were being provided by Arrow.

18 To rebut that, to preserve the case that was  
19 already made, to rebut that directly, a shipper support  
20 statement was submitted from Crowley Marine, and it  
21 was -- and it was referenced in MEI's principal's  
22 rebuttal testimony. That's -- it's not a new matter.  
23 That's squarely rebuttal testimony. One side said there  
24 were unhappy customers, the other side said there  
25 weren't, and then an unhappy customer was presented. So

1 I think that's squarely within the realm of rebuttal  
2 testimony. It directly addressed the attempt by Arrow  
3 to undercut MEI's prima facie case.

4 I think as far as the -- you know, when you  
5 have the argument that somehow it's vague what the  
6 shipper support statement is saying and so we don't  
7 really know if it's even applicable, I think there's  
8 really two responses to that.

9 The first is, Arrow is a monopoly service  
10 provider of launch services in the region. It seems  
11 somewhat disingenuous to say we don't know who the  
12 shipper support statement's talking about. But in any  
13 event, as your Honor has indicated already, there's  
14 other ways in which we could get to this information  
15 that would cure any prejudice possible that Arrow's --  
16 that Arrow claims to suffer from here.

17 So for example, Mr. Aikin has agreed to  
18 participate, Crowley has agreed to produce him  
19 telephonically to testify. He can be cross-examined.  
20 All of these questions that Mr. Wiley raises could be  
21 asked of him at the cross-examination hearing on  
22 January 5th and 6th.

23 Likewise, as your Honor already suggested,  
24 if the problem is not having adequate time to submit  
25 additional discovery or find additional information

1 about this, MEI would be happy to join in a stipulation  
2 to permit such discovery that Arrow feels is necessary.

3           So it's -- and with respect to  
4 distinguishing the case law on grounds that the prior  
5 order dealt with a critical issue of public policy in  
6 the US West matter, this deals with an issue (buzzing  
7 sound on bridge line) as to whether or not Arrow Launch  
8 is adequately serving the region as a monopoly service  
9 provider, or whether or not there's room in the market  
10 for MEI to also come in and offer similar services, and  
11 introduce that competition in the marketplace to improve  
12 the quality of services provided to customers in the  
13 region.

14           So for those reasons, we oppose Arrow's  
15 motion to strike and request that it be denied.

16           JUDGE FRIEDLANDER: All right. Thank you.

17           Mr. Wiley, something that Mr. Bentson  
18 mentioned actually raises an additional question that I  
19 have for you, which is that you did go into a great deal  
20 of discussion on the standard of proof that is required  
21 in a prima facie case.

22           MR. WILEY: Um-hmm.

23           JUDGE FRIEDLANDER: But you are not  
24 suggesting, then, that this case be dismissed, are you?

25           MR. WILEY: Well, your Honor, if there's no



1 evidence of need, I don't believe the Commission can go  
2 forward with -- with an application. The burden to  
3 prove need is on the applicant. The burden is not on  
4 the protestant to prove that there is no need.

5           And the Commission's -- unlike Mr. Bentson,  
6 who made a statement that there's no body of authority  
7 on prima facie case and demonstration of shipper need, I  
8 completely take issue with that, and I can give you a  
9 whole line of cases from the motor carrier field, again,  
10 where the entry standard is far more lenient, where the  
11 Commission says, no shipper support, application  
12 dismissed, and the burden is totally on the applicant.

13           As a matter of fact, your Honor, if there  
14 wasn't a protest here, this applicant would still have  
15 to demonstrate need.

16           JUDGE FRIEDLANDER: Okay. But what I'm  
17 asking is, are you procedurally proposing that the  
18 application be dismissed? Because I've got nothing  
19 before me, I've had no indication that that was part of  
20 the argument today.

21           MR. WILEY: Yeah, your Honor, we have not  
22 put that forward. We realize -- and obviously I want to  
23 discuss that with my client, and we can take a break  
24 right now if you want me to.

25           JUDGE FRIEDLANDER: No.

1 MR. WILEY: It's not before you today.

2 JUDGE FRIEDLANDER: Right. Okay. That's  
3 all that I wanted to know.

4 MR. WILEY: Yeah. Yeah.

5 JUDGE FRIEDLANDER: And I wouldn't be able  
6 to consider it today because we've not had adequate  
7 notice.

8 MR. WILEY: Yep. I think that's a fair  
9 statement. We would -- based on your ruling, we would  
10 take that under advisement and then possibly approach  
11 the Commission later.

12 JUDGE FRIEDLANDER: All right. Thank you.  
13 I'd like to hear something from Staff on  
14 whether they have a position on the motion to strike  
15 filed by Arrow Launch.

16 MR. BEATTIE: Yes. Thank you, your Honor.  
17 Staff opposes the motion to strike. I'll make two quick  
18 points, because I believe that Mr. Bentson already  
19 adequately covered the law in this area.

20 Mr. Wiley used the words "evade" and "back  
21 door," and I believe he was trying to suggest that MEI  
22 has been withholding this evidence intentionally. A  
23 phrase that you might hear is "sandbagging."

24 Now, I know that remarks of counsel are not  
25 evidence, but for what it's worth, I have spoken to both

1 parties, MEI and Arrow, about this issue, and it's my  
2 impression that MEI is not sandbagging, that they did  
3 not intentionally withhold this evidence only to spring  
4 it upon the parties at the last minute. I instead agree  
5 with Mr. Bentson's assessment of why and how this  
6 evidence came in.

7           The second point I want to make is, I agree  
8 that there is minimal to no prejudice to Arrow at this  
9 point, but I do say that conditionally. The condition  
10 is that the -- that the witness actually appear at the  
11 hearing, whether telephonically or otherwise, and be  
12 subject to cross-examination.

13           And MEI understands Staff's position, as  
14 we've already related to them that, should the witness  
15 not be available at the hearing for some reason, and  
16 therefore not be available for cross-examination, at  
17 that point Staff would agree that the testimony should  
18 be stricken as there's been no opportunity to  
19 cross-examine.

20           JUDGE FRIEDLANDER: Okay. Thank you.

21           MR. WILEY: Your Honor, if I could make one  
22 point in response to Mr. Beattie.

23           JUDGE FRIEDLANDER: Yes, please.

24           MR. WILEY: I do note that the statement at  
25 issue is dated the 31st of October. That statement was

1 not submitted until December 5th, so I think we do have  
2 some factual evidence that there were some delays or  
3 something held in reserve in this circumstance.

4 JUDGE FRIEDLANDER: I'm sorry. You said it  
5 was dated October --

6 MR. WILEY: 31st, Halloween.

7 JUDGE FRIEDLANDER: All right. And somebody  
8 remind me, when was cross -- well, the applicant  
9 wouldn't have filed cross-answering or response  
10 testimony. When was --

11 MR. BENTSON: Your Honor --

12 JUDGE FRIEDLANDER: Yes. I'm sorry,  
13 Mr. Bentson.

14 MR. BENTSON: Your Honor, just in response  
15 to that point, and this may answer where he's going with  
16 that. I think the information on the data is what you  
17 were just pointing out. MEI's direct testimony was due  
18 on October 4th, so our first chance -- MEI's first  
19 chance to present that rebuttal testimony was  
20 December 5th. And that's -- that would explain the  
21 dating issue.

22 JUDGE FRIEDLANDER: All right. Thank you.  
23 That was the clarification that I needed.

24 Mr. Schmidt, do you have anything to add as  
25 far as the motion to strike goes?

1 MR. SCHMIDT: I do not. Thank you.

2 JUDGE FRIEDLANDER: All right. Thank you.

3 Is there anything else that the parties wish  
4 to put before me? Otherwise, I'm prepared to rule on  
5 the motion to strike.

6 All right. Hearing nothing, I find that the  
7 testimony and exhibit of Randy S. Esch, and I'm probably  
8 mispronouncing that, I apologize, labeled as Exhibit  
9 Nos. RSE-7T and RSE-8, are proper rebuttal evidence in  
10 that it contradicts evidence offered by an adverse  
11 party.

12 Initially, Mr. Esch testified that he had  
13 heard from several customers that Arrow Launch's  
14 services were lacking. Mr. Esch did not identify these  
15 customers by name because, as he stated, these customers  
16 and supporters are afraid to speak out.

17 Jack Harmon, president of Arrow Launch,  
18 filed response testimony directly addressing the  
19 unidentified customers that Mr. Esch referenced in his  
20 initial testimony. Mr. Harmon called Mr. Esch's  
21 statements hearsay, speculation and supposition, that it  
22 knows cannot be refuted through cross-examination of  
23 those unidentified businesses or users of their proposed  
24 services. Mr. Harmon further called those fabricated  
25 pronouncements on our service completely untrue, drawing

1 into question the veracity of Mr. Esch's statement that  
2 these customers even exist.

3 Mr. Esch, on rebuttal, properly provided a  
4 witness to contradict Mr. Harmon's allegation that the  
5 statement concerning customer complaints was untrue.

6 The motion to strike filed by Arrow Launch  
7 is denied.

8 That said, I would say also that the  
9 30 days -- if you look at the shipper statement and the  
10 form, which is a template that is typically used by  
11 shippers in support of an application, it says that this  
12 statement should be filed within 30 days of the  
13 application. It's not a must.

14 I also, however, wish to develop a full and  
15 complete evidentiary record. So in that regard, I'm  
16 amenable to allowing Arrow Launch the opportunity to  
17 file additional testimony, which would be limited to  
18 replying to Mr. Aikin's shipper support statement in  
19 Exhibit No. RSE-8, and the portions of Exhibit  
20 No. RSE-7T where Mr. Esch discusses Mr. Aikin's  
21 statement.

22 I don't feel the need for either Staff or  
23 Pacific Cruises to file any response to this statement  
24 or those portions of Mr. Esch's testimony as they've not  
25 indicated that was necessary.

1           We can go off the record to discuss the  
2 timing of any additional discovery that might be needed,  
3 as well as additional timing for the filing of this  
4 response testimony.

5           Do we need to do that?

6           MR. WILEY: I think so.

7           JUDGE FRIEDLANDER: I assume so.

8           MR. WILEY: Yes.

9           JUDGE FRIEDLANDER: All right. Thank you.  
10 We'll be off the record now.

11                   (Brief discussion off the record.)

12           JUDGE FRIEDLANDER: All right. We'll go  
13 back on the record.

14           Mr. Wiley.

15           MR. WILEY: Yes, your Honor. The  
16 protestant's position is that the timing on the rebuttal  
17 should come after the ruling on the motion to allow or  
18 disallow telephonic testimony, and after we hear that  
19 testimony, which we've never heard.

20                   In other words, we want to know what the  
21 witness is going to say before we file rebuttal, and we  
22 want to know what you're going to rule about telephonic  
23 versus in-person testimony.

24           JUDGE FRIEDLANDER: Okay. I guess I'm a bit  
25 confused, because your response to Mr. Aikin's statement

1 will be limited to whatever additional discovery needs  
2 to be done based on that statement itself and whatever  
3 additional testimony you're going to be filing.

4 MR. WILEY: You're saying that you will  
5 allow discovery as well as testimony?

6 JUDGE FRIEDLANDER: Limited, yes.

7 MR. WILEY: Okay.

8 JUDGE FRIEDLANDER: Limited discovery.

9 MR. WILEY: Okay. We were not aware of that  
10 point when we discussed this, your Honor, so --

11 JUDGE FRIEDLANDER: Okay.

12 MR. WILEY: -- we may have to go off record  
13 again and talk. I'm sorry, but --

14 JUDGE FRIEDLANDER: That's fine.

15 MR. WILEY: -- the timing is very  
16 consequential here.

17 JUDGE FRIEDLANDER: Right. I understand  
18 completely. But again, I just want to caveat that with  
19 the fact that this will be very limited discovery. This  
20 is not going to be expanded beyond Exhibit No. RSE-8 and  
21 those portions of Mr. Esch's testimony in 7T.

22 MR. WILEY: Right. Yeah. And we're first  
23 going to try to identify if this, in fact, is directed  
24 to Arrow Launch. Despite what Mr. Bentson said, there's  
25 evidence in this record of other extant certificates for



1 launch service, so that's one of the threshold issues  
2 that we're going to try to clarify. But I just want to  
3 understand what you -- obviously we have a stay in the  
4 hearing then?

5 JUDGE FRIEDLANDER: Absolutely. We would  
6 have to revise the procedural schedule accordingly.

7 MR. WILEY: Yeah.

8 JUDGE FRIEDLANDER: Because next Friday, a  
9 week from today, we're scheduled to get  
10 cross-examination exhibits.

11 MR. WILEY: Exactly, yeah.

12 JUDGE FRIEDLANDER: So we would have to  
13 postpone that and postpone the hearing --

14 MR. WILEY: Right.

15 JUDGE FRIEDLANDER: -- pending any  
16 additional testimony and limited discovery.

17 MR. WILEY: Right.

18 JUDGE FRIEDLANDER: And being limited, I  
19 would expect that it should be conducted fairly quickly.

20 MR. WILEY: Yep. And it will be directed,  
21 as you say, to RSE-8 and RSE-7T, as I understand.

22 JUDGE FRIEDLANDER: Those portions of  
23 RSE-7T, yeah.

24 MR. WILEY: If I could have leave to go in  
25 the hallway again. Thank you.

1 JUDGE FRIEDLANDER: That's fine. That's  
2 fine. We're off the record.

3 (Brief pause in the proceedings.)

4 JUDGE FRIEDLANDER: All right. We'll go  
5 back on the record.

6 Mr. Wiley?

7 MR. WILEY: Yes, your Honor. We keep  
8 generating more questions, unfortunately, for you based  
9 on the ruling. And that is, again, this is unusual  
10 because it's not testimony, and you're allowing -- I  
11 assume you're not allowing testimony in addition to the  
12 statement, correct; is that your ruling?

13 JUDGE FRIEDLANDER: Testimony of whom?

14 MR. WILEY: Of Mr. Aikin. What I understood  
15 is that this statement is basically a substitute for  
16 testimony at this point, and that the discovery that  
17 you're allowing would be directed solely to the  
18 statement.

19 JUDGE FRIEDLANDER: Absolutely.

20 MR. WILEY: There's not going to be an  
21 expansion with pre-filed testimony --

22 JUDGE FRIEDLANDER: No. No.

23 MR. WILEY: -- that we'll have to -- okay.

24 JUDGE FRIEDLANDER: What is in the record  
25 right now with Mr. Aikin is going to stand as is.

1 MR. WILEY: Okay. Clearly we still want to  
2 address the live versus telephonic testimony --

3 JUDGE FRIEDLANDER: Absolutely. I  
4 understand that.

5 MR. WILEY: -- which is becoming even more  
6 important to us now. So what we understand your ruling  
7 to be would allow us to do some limited discovery on the  
8 statement and on Mr. Esch's references in his?

9 JUDGE FRIEDLANDER: Correct.

10 MR. WILEY: It's limited to that. And then  
11 we would then be able to put on, potentially, rebuttal  
12 testimony directed to -- to that limited inquiry.

13 JUDGE FRIEDLANDER: Yes.

14 MR. WILEY: Okay. Thank you.

15 JUDGE FRIEDLANDER: Yes.

16 MR. WILEY: And there would be a stay in the  
17 proceeding. We would obviously have to have that to --  
18 in order to determine this.

19 I think we still want to move -- before we  
20 say anything other than yes, we want to do that. We do  
21 want to get your ruling on the tele [sic], because  
22 that's a very important issue to us.

23 JUDGE FRIEDLANDER: Okay. Then what we will  
24 do is we'll go through the oral arguments on the motion  
25 to allow Mr. Aikin to testify telephonically. And then,

1 I believe, with everyone's indulgence, we'll hear what  
2 Arrow Launch proposes as far as a discovery and  
3 additional testimony timeframe.

4 As this is MEI's motion, I would like to  
5 hear from Mr. Bentson a brief overview of some of his  
6 points, being careful not to replicate too much what has  
7 already been filed in the motion.

8 MR. BENTSON: Yes, your Honor. This is Dan  
9 Bentson again for MEI, and I'll be brief on the oral  
10 argument because the motion is pretty straightforward.

11 The witness for the representative Crowley,  
12 Mr. Aikin, who provided a shipper support statement, has  
13 other obligations that prohibit him from coming to the  
14 hearing. In addition, it just doesn't -- it doesn't  
15 make sense to burden him with requiring him to come down  
16 when he can be just as -- just as easily participate  
17 telephonically.

18 He's not a party, Crowley's not a party to  
19 this hearing, but they provided testimony. And we'd  
20 move to allow his telephonic participation so that we  
21 could cure any of the alleged prejudice that Arrow  
22 claimed it was going to suffer if it didn't have the  
23 opportunity to cross-examine the witness.

24 So for those reasons, your Honor, we think  
25 it makes the most sense, for the convenience of the

1 parties, and to give the -- the -- give the Commission  
2 the sufficient information it needs to make a  
3 determination, to allow his telephonic testimony.

4 JUDGE FRIEDLANDER: All right. Thank you.  
5 I'd like to hear from Mr. Wiley as well.

6 MR. WILEY: Yes, your Honor. This obviously  
7 looms an even larger issue now to the protestant,  
8 because it appears that the case really hangs upon this  
9 witness's statements, assertions and testimony.

10 First of all I would say, I don't know how  
11 Mr. Bentson can say it's an impermissible or unfortunate  
12 burden on a shipper, and that he has other obligations,  
13 when it now sounds like we are going to move the hearing  
14 date.

15 So in addition, again, harking back to the  
16 Commission's well-established body of case law, if a  
17 shipper does not appear in person, there's no ability to  
18 cross-examine that witness on demeanor and on other  
19 aspects of what they may be relying upon in giving  
20 testimony.

21 The only exception to telephonic testimony  
22 for need in application cases that I'm aware of is when  
23 there's a stipulation or agreement. We certainly don't  
24 stipulate, particularly with this pivotal a witness.

25 I want to know what he's looking at when

1 he's testifying. I have a right to examine anything  
2 that he might be relying upon. And I want you and I to  
3 be able to test demeanor, which you can't do  
4 telephonically.

5 So yes, shippers -- if this is such an  
6 important application to this witness, you would think  
7 that, given advance notice, he would make himself  
8 available to attest to that need.

9 This company has been built over 27 years,  
10 and is significantly threatened by this proposed new  
11 entrant. I think we owe it to both the Commission and  
12 the public interest to have full, fair and open  
13 testimony on pivotal issues like shipper need.

14 JUDGE FRIEDLANDER: Okay. Thank you.

15 Does Staff have a position on this? And if  
16 so, please let me know.

17 MR. BEATTIE: Staff has no objection to the  
18 telephonic appearance of this witness. In keeping with  
19 my comments earlier, I just remind everyone that this is  
20 an administrative hearing, and if not here, where else  
21 can we be flexible to allow this -- you know, give the  
22 flexibility to allow people to provide the testimony  
23 they need without interrupting their other obligations.

24 JUDGE FRIEDLANDER: Okay. Thank you.

25 And Mr. Schmidt, did you want to speak to

1 this issue?

2 MR. SCHMIDT: No, thank you, I do not.

3 JUDGE FRIEDLANDER: All right. Thank you.

4 I am ready to rule if none of the parties  
5 have anything further to say.

6 All right. Hearing nothing, as Mr. Wiley  
7 stated, it's generally allowed by the Commission for  
8 witnesses to appear telephonically and provide  
9 testimony, either cross-examination or direct, if it  
10 would not prejudice the Commission or the other parties.

11 I have heard the arguments put forth by  
12 Mr. Wiley on behalf of Arrow Launch, and I think that  
13 there would be significant prejudice to allowing  
14 Mr. Aikin to testify telephonically, and so I'm going to  
15 deny the motion by MEI to allow Mr. Aikin to testify  
16 telephonically, and he will need to appear in person at  
17 a time when we have scheduled -- rescheduled, I should  
18 say, the evidentiary hearing in this matter.

19 So with that, Mr. Wiley, I would like to  
20 know from you how long you think Arrow Launch is going  
21 to need for discovery.

22 MR. WILEY: Your Honor, I haven't been able  
23 to obviously talk with Mr. Beattie or Mr. Bentson about  
24 their schedules. Obviously I don't want to step on  
25 their conflicting toes on that either, and I've got a

1 discovery cut-off in a federal class action case on  
2 February 3rd that we'll have to go past now.

3 So if I could talk to Mr. Bentson on the  
4 bridge line and to Mr. Beattie in the break, and also my  
5 client, you know, if you give us maybe ten minutes, and  
6 you're welcome to stay here --

7 JUDGE FRIEDLANDER: Right. Right.

8 MR. WILEY: -- but it's not very  
9 interesting.

10 JUDGE FRIEDLANDER: Right. And I guess I  
11 don't have a problem with going off the record so that  
12 all can discuss this. But as I said before, I don't  
13 anticipate that Staff is going to have any additional  
14 discovery needs. I don't anticipate that Mr. Schmidt is  
15 going to want discovery.

16 MR. WILEY: Right.

17 JUDGE FRIEDLANDER: I think this is pretty  
18 much an Arrow Launch and MEI foray.

19 MR. WILEY: Okay.

20 JUDGE FRIEDLANDER: So with that, it's  
21 really up to you and your client how long you think  
22 discovery -- you would need for discovery. And again,  
23 this is a very narrow issue. We should not be going  
24 past February 3rd.

25 MR. WILEY: Yeah.



1 JUDGE FRIEDLANDER: We should not be going  
2 past January for discovery.

3 MR. WILEY: Yeah, I was thinking of the  
4 hearing, your Honor. I was thinking of the hearing.  
5 I'm sorry.

6 JUDGE FRIEDLANDER: That's fine.

7 MR. WILEY: I should have said that.

8 JUDGE FRIEDLANDER: And so obviously, yes,  
9 the hearing date will be impacted by how long discovery  
10 takes --

11 MR. WILEY: Sure.

12 JUDGE FRIEDLANDER: -- as well as the filing  
13 date for testimony and the requisite cross-examination  
14 filing date.

15 So with that, we'll go off the record for  
16 the parties to discuss.

17 (Brief discussion off the record.)

18 JUDGE FRIEDLANDER: We'll go back on the  
19 record. After some discussion with the parties, I think  
20 we've arrived at a schedule that will accommodate the  
21 decisions I've made on the record today. I'll just read  
22 them into the record. They'll be available in the  
23 transcript, but I'll also issue a notice later when all  
24 the parties have checked with their witnesses to verify  
25 that these times will work with their schedules.

1           So first, we have the time for additional  
2 discovery, which will run through -- January 16th will  
3 be the last day for Arrow Launch to propound any data  
4 requests to MEI only, and MEI will have until  
5 January 20th to respond to those last data requests.

6           On January 26th, we will have the deadline  
7 for any additional, very limited-scope testimony filed  
8 by Arrow Launch.

9           I should mention also that, as far as the  
10 data requests go, we will -- everyone has agreed to the  
11 five business day response time turnaround.

12           Cross-exam exhibits as well as cross-exam  
13 estimates, witness lists and the like will be due  
14 February 8th from all parties who plan on presenting  
15 witnesses and conducting cross-examination.

16           And we will have a hearing February 14th and  
17 15th. Have I missed anything?

18           MR. WILEY: I don't think so.

19           JUDGE FRIEDLANDER: Okay. Is there anything  
20 else that we need to discuss before we adjourn?

21           MR. WILEY: Your Honor, the hearing date  
22 being conditional -- finally conditional?

23           JUDGE FRIEDLANDER: Yes. And I should  
24 mention informally that the parties will get back to me  
25 early next week, taking into consideration the holiday

1 on Monday the 26th, with the availability of their  
2 witnesses.

3 MR. WILEY: Thank you, your Honor.

4 JUDGE FRIEDLANDER: Thank you. All right.

5 Hearing nothing, we are adjourned. Thank you.

6 MR. BENTSON: Thank you, your Honor.

7 MR. SCHMIDT: Thank you, your Honor.

8 (Hearing concluded at 10:04 a.m.)

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C E R T I F I C A T E

STATE OF WASHINGTON    )  
                                  ) ss.  
COUNTY OF KING        )

I, ANITA W. SELF, a Certified Shorthand Reporter  
in and for the State of Washington, do hereby certify  
that the foregoing transcript is true and accurate to  
the best of my knowledge, skill and ability.

IN WITNESS WHEREOF, I have hereunto set my hand  
and seal this 5th day of January, 2017.

\_\_\_\_\_  
ANITA W. SELF, RPR, CCR #3032