BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| 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-160479MEI NORTHWEST LLC’S MOTION TO STRIKE PORTIONS OF THE PREFILED SURREBUTTAL TESTIMONY OF JACK HARMON FILED JANUARY 26, 2017 (EXHIBIT NO. \_\_\_ (JLH-10T)) |
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# motion to strike

1. MEI Northwest, LLC (“MEI”) hereby moves the Commission, under WAC 480-07-375(1)(d), for an Order striking portions of the prefiled Surrebuttal Testimony of Jack Harmon, Exhibit No. \_\_\_ (JLH-10T), filed on January 26, 2017.
2. Specifically at issue in this motion is testimony provided by Mr. Harmon that exceeds the narrow scope of testimony authorized by Judge Friedlander during the parties’ telephonic hearing on December 23, 2016, and subsequent Notice of Revised Procedural Schedule, issued on December 29, 2016.

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1. MEI moves to strike Mr. Harmon’s testimony appearing at the following pages and lines:

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| **Page** | **Line** |
| 5 | 5-14 |
| 6 | 1-10 |
| 7 | 1-25 |

1. MEI moves to strike the testimony identified above because it exceeds the scope of rebuttal testimony authorized by Judge Friedlander. Specifically, the testimony identified above is not responsive to “the narrow issue raised by Exh. No. RSE-8,” and, instead, is an improper attempt to substantively respond to the testimony of MEI’s principal, Randy S. Esch.

II. procedural background

1. The following paragraphs 6-12 set forth the procedural filings relevant to this motion.
2. MEI filed its rebuttal testimony on December 5, 2016. Attached to MEI’s rebuttal testimony as an exhibit was a shipper support statement signed by Marc Aikin of Crowley Petroleum Services.
3. In response to MEI’s rebuttal testimony, Arrow Launch Service, Inc. (“Arrow”) filed a Motion to Strike the shipper support statement (Exhibit No. \_\_\_ RSE-8) and any mention of the statement in MEI’s rebuttal testimony.
4. MEI filed a Reply to Arrow’s motion on December 16, 2016, and Judge Friedlander held a telephonic Hearing on Procedural Motions on December 23, 2016.
5. Arrow’s Motion to Strike was denied.
6. Judge Friedlander did, however, provide Arrow the opportunity to serve discrete Data Requests on MEI pertaining to the Crowley Shipper Support Statement, and allowed Arrow to file “additional testimony on the ***narrow issue*** raised by Exh. No. RSE-8.” (emphasis added).
7. That is, in order to cure any potential prejudice Arrow may have suffered by not having an opportunity to respond to the content of the ***shipper support statement***, Judge Friedlander allowed Arrow to submit additional rebuttal testimony that would respond ***only*** to the content of that statement. Judge Friedlander’s order did not permit Arrow to provide surrebttual testimony to Mr. Esch’s rebuttal testimony.
8. Large portions of the prefiled Surrebuttal Testimony of Jack Harmon venture outside the confines of the narrow issue to which Arrow was authorized to respond. Accordingly, the Commission should strike the improperly filed portions of Mr. Harmon’s surrebuttal testimony.

III. argument

1. It is improper and contrary to Commission precedent to introduce testimony beyond the scope authorized by the presiding officer.
2. While Commission procedural requirements are not inflexible, “Parties who do not comply with procedural requirements and deadlines do so at their own peril.” *In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Sixth Supplemental Order, Docket No. UT-003013 (Aug. 2000), at ¶ 18. “Accordingly, the Commission will act to strike evidence that does not comply with established procedures and unfairly prejudices other parties.” *Id.* at ¶ 19.
3. When a party submits prefiled testimony that is broader than a procedural order allows, the portions of the testimony that violate the procedural order should be stricken. *See In the Matter of the Petition of Verizon Northwest, Inc.*, Ninth Supplemental Order, Docket No. UT-011439 (Nov. 2002).
4. The testimony identified by page and line above violates Judge Friedlander’s ruling allowing Arrow to file testimony “on the ***narrow issue*** raised by Exh. No. RSE-8.” (emphasis added).
5. Exhibit No. \_\_\_ RSE-8 is a succinct, 3-paragraph statement authored by Marc Aikin of Crowley Petroleum Services. Judge Friedlander, in the December 23, 2016 procedural hearing allowed Arrow to submit testimony in response to this statement. Importantly, the scope of the allowable testimony was confined just to the shipper support statement, not to Mr. Esch’s rebuttal testimony filed in conjunction with the Crowley support statement.
6. Instead of simply submitting testimony as authorized, Arrow has taken this opportunity to present additional testimony that enlarges the scope allowed by Judge Friedlander. This is evident when reading the testimony submitted by Arrow. Although some portions of Arrow’s newly-filed testimony attempt to rebut RSE-8 (*see*, *e.g*., Surrebutal Testimony of Jack Harmon (JLH-10T) at pp. 3:5-5:4), other portions attempt to rebut testimony by Mr. Esch, which is unrelated to RSE-8 (*see* *id*. at pp. 5:5-14; 6:1-10; and 7:1-25). Mr. Harmon’s surrebutal testimony, for example, contains a lengthy discussion of an informal survey conducted by the UTC Staff (*id*. at p. 7:1-25). This testimony is clearly not responding to RSE-8.
7. This is not the only example. All of the pages and lines referenced above are attempts by Arrow to expand the scope of its allowable testimony and efforts to undermine the testimony unrelated to RSE-8. This testimony does not respond the narrow issue to which Judge Friedlander permitted Arrow to respond—i.e., the Crowley support statement contained in RSE-8. This improper attempt to enlarge the scope of testimony allowed by Judge Friedlander should be rejected.
8. Allowing Arrow the opportunity to rebut Mr. Esch’s testimony prejudices MEI. Throughout the course of these proceedings, since the initial prehearing conference, Arrow has maintained that MEI has the burden of proof. Along with that burden come certain procedural advantages—namely the ability to submit the last word in testimony. Despite this well-established procedural form, Arrow has consistently attempted to ensure that it is heard last. This is yet another attempt to circumvent well-established procedural norms.

# conclusion

1. Arrow’s prefiled Surrebuttal Testimony of Jack Harmon is overbroad. It is not confined to the narrow issue raised by RSE-8 and is an improper attempt to provide surrebuttal testimony to Mr. Esch’s rebuttal testimony. Judge Friedlander’s order did not allow Arrow to provide testimony responsive to Mr. Esch; it only allowed testimony responsive to RSE-8.
2. Because Arrow’s testimony is overbroad it violates the procedural directive of Judge Friedlander. Further, allowing Arrow an opportunity to rebut portions of Mr. Esch’s rebuttal testimony prejudices MEI. Accordingly, MEI respectfully requests an Order be issued striking Mr. Harmon’s testimony at the pages and lines listed above.

DATED: February 1, 2017

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4831-9602-1825.1