

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 MOTION TO STRIKE PORTIONS OF THE PREFILED SURREBUTTAL TESTIMONY OF JACK HARMON FILED JANUARY 26, 2017 (EXHIBIT NO. ___ (JLH-10T))

I. 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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3 MEI moves to strike Mr. Harmon's testimony appearing at the following pages and
lines:

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

4 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

5 The following paragraphs 6-12 set forth the procedural filings relevant to this motion.

6 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.

7 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.

8 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.

9 Arrow's Motion to Strike was denied.

10 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).

11 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 surrebuttal
testimony to Mr. Esch's rebuttal testimony.

12 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

13 It is improper and contrary to Commission precedent to introduce testimony beyond
the scope authorized by the presiding officer.

14 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.

15 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).

16 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).

17 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.

18 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.

19 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.

20 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.

II. CONCLUSION

21 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.

22 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

BULLIVANT HOUSER BAILEY PC

By 
Daniel R. Bentson, WSBA #36825
Mac Brown, WSBA #49722

Attorney for MEI Northwest, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2017, 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
P.O. 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:

For Arrow Launch Service, Inc.:

David W. Wiley
Williams, Kastner & Gibbs, PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Phone: (206) 628-6600
Email: dwiley@williamskastner.com

For Washington Utilities and Transportation Commission Staff:

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

For Pacific Cruises Northwest, LLC:

Judy Endejan, Attorney
Garvey Schubert Barer
1191 Second Avenue, Suite 1800
Seattle, WA 98101
Direct Dial: (206) 816-1351
Email: jendejan@gsblaw.com

Administrative Law Judge:

Judge Marguerite E. Friedlander
Washington Utilities and Transportation Commission
Email: mfriedla@utc.wa.gov

Signed at Seattle, Washington this 1st day of February, 2017.



Freida Mason, Legal Assistant
Bullivant Houser Bailey PC
Email: Freida.Mason@bullivant.com

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