

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

**RESPONSE OF ARROW LAUNCH  
SERVICE, INC. TO 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. INTRODUCTION**

*l* On February 1, 2017, MEI Northwest LLC (“MEI”) moved to strike portions of the Surrebuttal testimony of Jack L. Harmon filed January 26, 2017 which it alleges are not limited to the “content of the shipper support statement.”<sup>1</sup> MEI’s Motion misconstrues the Administrative Law Judge’s December 23 ruling, which rather than striking the late-filed shipper support statement and related testimony of Randy S. Esch as requested by Arrow Launch Service, Inc. (“Arrow”), permitted Arrow to provide surrebuttal testimony instead. As authorized by the Administrative Law Judge, Mr. Harmon’s surrebuttal testimony was appropriately limited to the content of the shipper support statement and the testimony of Mr. Esch which related to the shipper support statement. MEI’s Motion to Strike should therefore be denied.

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<sup>1</sup> MEI’s Motion to Strike, ¶11.

## **II. RELEVANT PROCEDURAL BACKGROUND**

2 Arrow filed its Motion to Strike Portions of the Rebuttal Testimony of Randy S. Esch  
of December 5, 2016 and Exhibit No. \_\_\_(RSE-8) on December 8, 2016. That motion asserted  
that the form shipper support statement of Marc Aikin filed as Exhibit No. \_\_\_ (RSE-8) was  
not rebuttal, but was instead evidence required to be filed during MEI's case in chief because  
the Commission requires shipper support to issue a Certificate of Public Convenience and  
Necessity, whether the commercial ferry application is opposed or not.

3 Indeed, as has Arrow learned through subsequent data request responses provided by  
MEI, the statement of Marc Aikin should not have been labeled as "rebuttal" to Arrow's  
testimony because it had been prepared in draft form and exchanged between counsel for  
Crowley and MEI well before Arrow filed the prefiled testimony of Jack L. Harmon, which the  
statement is, again, purportedly rebutting, on November 1, 2016.

4 On December 23, 2016, a hearing was held on Arrow's Motion to Strike. The  
Administrative Law Judge denied the motion, ruling the new testimony and shipper statement  
were proper rebuttal, but also orally ruled that Arrow could provide additional testimony in  
response:

15 ... 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.<sup>2</sup>

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<sup>2</sup> Hearing transcript, 35: 15-21.

### III. ARGUMENT

5 As a threshold matter, Arrow does not disagree with the standards outlined in MEI's  
Motion to Strike set forth in ¶¶ 13-15 therein. Those same standards apply to Exhibit No. \_\_\_\_  
(RSE-8) which again was prepared and exchanged before Arrow ever filed any testimony in  
this matter, as well as the testimony of Randy S. Esch relating to Exhibit No. \_\_\_\_ (RSE-8).

6 However, MEI also incorrectly characterizes the Administrative Law Judge's oral  
ruling at the December 23, 2016 hearing, which is set forth verbatim in paragraph 4, above.  
The Administrative Law Judge did not rule, as MEI contends, that "[t]he scope of the  
allowable testimony was confined to just the shipper support statement, not to Mr. Esch's  
rebuttal testimony filed in conjunction with the Crowley support statement."<sup>3</sup> Instead, as  
quoted above, the Administrative Law Judge ruled that Arrow could provide additional  
testimony with respect to the shipper statement and testimony of Esch relating to the statement.  
Thus, the premise on which MEI bases its motion is patently flawed.

7 While MEI's misconstruction of the ruling could be interpreted as a simple mistake by  
which MEI meant that Arrow should not be responding to testimony which does not relate to  
the shipper support statement filed at Exhibit No. \_\_\_\_ (RSE-8), the testimony MEI moved to  
strike (as is all Arrow's surrebuttal testimony) is squarely related to the October 31 shipper  
support statement.

8 Specifically, MEI moved to strike the surrebuttal testimony of Jack L. Harmon located  
at p. 5, lines 5-14 of the testimony. That reference is as follows:

**Q. Mr. Esch, at Exhibit No. \_\_\_\_ (RSE-7T) p. 13, attempts to buttress his original testimony about service availability alleged limitation while acknowledging the fact your fleet in Anacortes and other areas is far larger than he originally testified. What is your response to the vessel availability issue on which he expressly doubles down in claiming it "doesn't change his opinion?"**

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<sup>3</sup> MEI's Motion to Strike, ¶ 17.

A. I would doubt the Commission would ever be swayed by an *applicant's* testimony on the adequacy of existing service. We would presume any certificate applicant would never gauge the market "overserved" or even "adequately served" in applying for authority. Thus, Mr. Esch's opinion surveying the market should be thoroughly discounted accordingly as self-serving, to say the least.<sup>4</sup>

When compared to the testimony to which that responded, it is obvious that it is responding to the testimony of Mr. Esch which related to the late-filed shipper support statement. That testimony, like most of Mr. Esch's testimony, intermingles the Exhibit No. \_\_\_(RSE-8) into his rebuttal testimony, for instance:

**Q: Mr. Harmon has testified that he has more boats serving the region than you initially believed. Does this fact cause you to change your belief that Arrow is underserving the region?**

A: No. Even though Arrow testifies that it has 4 boats in three different regions at any given time, this does not change my opinion. It is clear to me that Arrow still is underserving the region. As I stated before, my customers have told me so and Crowley's shipper support statement further backs this point up. Crowley stated that they often need to hire multiple vessels at the same time to service their oil clients and that their need is not currently being met. Exhibit No. \_\_\_(RSE-8). So the fact that Arrow has more boats than I originally believed doesn't change my opinion at all—they are still underserving their customers.<sup>5</sup>

As demonstrated above, Mr. Esch's testimony explicitly incorporates the late-filed shipper statement in supporting these conclusions. By now attempting to argue Mr. Harmon was not permitted to respond to those conclusions, despite the Administrative Law Judge's express ruling to the contrary, MEI again tries to preempt Arrow by filing evidence out of order and then attempts to deny Arrow an opportunity to provide an appropriate response.

9 The same tactic is employed by MEI with respect to the testimony of Jack Harmon located on pages 6 and 7 which it also asks be stricken. In that testimony, Mr. Harmon

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<sup>4</sup> Emphasis in original.

<sup>5</sup> Rebuttal Testimony of Randy S. Esch (Exhibit No. \_\_\_(RSE-7T)), p. 13 (emphasis added).

addresses Mr. Esch's testimony about "untapped potential" upon which he bases, in part, the shipper support statement. That testimony is as follows:

**Q: Well what makes you believe that this shows anything other than Arrow maximizing the market? That is, why do you think that this shows the Puget Sound can support, and that the Puget Sound public needs, another launch provider?**

A: First I think that this shows that the Puget Sound is still a vibrant market. Arrow has significantly increased its gross revenues and continued to add boats to its fleet over the years. Second, there is untapped potential in the market. As I discussed in my direct testimony, I have had numerous clients that I work with in California tell me that they are being underserved in the Puget Sound. And Crowley's support statement speaks to this as well. In Crowley's statement, Crowley makes the point that "[t]here is currently only one service provider for passenger ferry and freight service in the Puget Sound. This has created timing and reliability issues for us as our customers (i.e., major oil companies) work on a tight schedule. The lack of competition reduces our ability to meet the needs of our customers." Exhibit No. \_\_\_ (RSE-8).

This shows that one of the major shipping customers in the Puget Sound believes that there is currently an untapped market that another provider could take advantage of. Arrow's inability to provide reliable, around-the-clock service to its customers helps illustrate that the Puget Sound could indeed support another full-time provider. Crowley further states in its support statement that if MEI's application were denied, Crowley "would be less able to provide reliable, timely, and cost-effective service for [its] major oil customers." I believe that this illustrates that there is a currently unmet need for services and that allowing another service provider to enter the region will help meet the needs.

Further, the UTC Staff also determined that other shipping customers in the area support the entry of another provider into the marketplace. The UTC Staff apparently conducted an informal survey of shipping companies in the Puget Sound that are current customers of Arrow Launch. Six customers were interviewed. Of those 6, 1 customer was dissatisfied and 3 supported competition in the area. Exhibit No. \_\_\_ (SS-1T), 7:1-8. That means a total of 66% of the polled customers support an additional service provider in the Puget Sound. This supports what I have been hearing from my customers in the region.<sup>6</sup>

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The testimony to which Mr. Harmon thus responded not only expressly references the shipper support statement, it directly quotes from it. Mr. Esch obviously interweaves the statement into his multi-faceted testimony and conclusions. In turn, Mr. Harmon's responsive

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<sup>6</sup> *Id.* at p. 15: 3- p. 16: 4. (emphasis added).


testimony answered testimony which related to the shipper support statement, regardless of whether that testimony was a direct quote or a conclusion extrapolated from multiple sources including that statement.

#### **IV. CONCLUSION/PRAYER FOR RELIEF**

It is again unfortunate that MEI opted to wait to request shipper support for the instant application proceeding, misrepresented the statement as rebuttal when it was requested and prepared in draft before there was any testimony to rebut, and now advances this unfounded attempt to prevent Arrow from providing a full response which Arrow should have had the opportunity to provide when it filed original testimony on November 1, 2016. If Arrow were denied the opportunity to respond to all testimony relating to the shipper support statement, including the conclusions and opinions drawn from it by Mr. Esch, it would simply exacerbate the ellipsis of proof sequence described above and hinder the orderly presentation of evidence in this record. Finally, the Administrative Law Judge's oral order expressly authorized Arrow to provide additional testimony responding to the shipper support statement *and* Mr. Esch's testimony relating to that statement. Arrow's surrebuttal was limited to those subjects. Thus, Arrow Launch Service, Inc. respectfully requests that MEI Northwest LLC's Motion to Strike be denied in its entirety.

DATED this 8 day of February, 2017.

RESPECTFULLY SUBMITTED,

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Docket TS-160479  
CERTIFICATE OF SERVICE

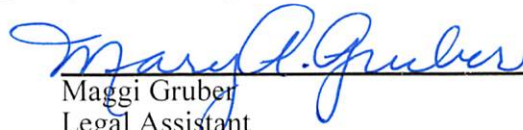
I certify that on February 8, 2017, I caused to be served the original and one copy of the foregoing document to the following address via FedEx to:

Steven V. King, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
Attn: Records Center  
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><b><i>For Washington Utilities and Transportation Commission Staff:</i></b> 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: <a href="mailto:jbeattie@utc.wa.gov">jbeattie@utc.wa.gov</a></p>	<p><b><i>For MEI Northwest, LLC:</i></b> Mr. Dan Bentson Bullivant, Houser, Bailey, PC 1700 Seventh Ave, Suite 1810 Seattle, WA 98101 Email: <a href="mailto:dan.bentson@bullivant.com">dan.bentson@bullivant.com</a></p>
<p><b><i>For Pacific Cruises Northwest, LLC:</i></b> Judy Endejan Garvey, Schubert, Barer Second &amp; Seneca Building 1191 Second Avenue 18<sup>th</sup> Floor Seattle, WA 98101-2939 Phone: 206-816-1351 Email: <a href="mailto:jendejan@gsblaw.com">jendejan@gsblaw.com</a></p>	<p><b><i>Administrative Law Judge</i></b> Judge Marguerite E. Friedlander WUTC 1300 S. Evergreen Park Dr. SW PO Box 47250-7250 Olympia, WA 98504 Email: <a href="mailto:mfriedla@utc.wa.gov">mfriedla@utc.wa.gov</a></p>

Signed at Seattle, Washington this 8<sup>th</sup> day of February 2017



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