

**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

ORDER 02

ORDER GRANTING IN PART AND
DENYING IN PART MEI'S MOTION TO
STRIKE PORTIONS OF THE PREFILED
SURREBUTTAL TESTIMONY OF JACK
HARMON

MEMORANDUM

- 1 On February 1, 2017, MEI Northwest, LLC (MEI or the Applicant) filed its Motion to Strike Portions of the Prefiled Surrebuttal Testimony of Jack Harmon (Motion). Specifically, MEI requests that the Washington Utilities and Transportation Commission (Commission) “strike Mr. Harmon’s testimony appearing on the following pages and lines:¹

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

- 2 The Applicant argues that Arrow Launch Service, Inc. (Arrow) filed the surrebuttal testimony of Mr. Harmon, which “venture[d] outside the confines of the narrow issue to which Arrow was authorized to respond.”² MEI contends that that “narrow issue” was limited to the content of Exhibit No. RSE-8, the Crowley shipper support

¹ MEI’s Motion, ¶ 3.

² *Id.*, ¶ 11.

statement sponsored by Randy S. Esch,³ and did not include answering “Mr. Esch’s rebuttal testimony filed in conjunction with the Crowley support statement.”⁴ The Applicant also points to Mr. Harmon’s discussion of an informal survey conducted by the Commission’s regulatory staff (Staff) as an example of Arrow’s attempt to expand the scope of the authorized surrebuttal.⁵ MEI contends that it will be prejudiced unless Arrow’s improper testimony is stricken.⁶

3 Arrow filed its Response to MEI’s Motion (Response) on February 8, 2017. In its Response, Arrow quotes Administrative Law Judge Marguerite Friedlander who presided over the December 23, 2016, motion hearing where the Commission authorized Mr. Harmon’s surrebuttal:

So in that regard, I’m amenable to allowing Arrow Launch the opportunity to file additional testimony, which would be limited to replying to Mr. Aikin’s shipper support statement in Exhibit No. RSE-8, and the portions of Exhibit No. RSE-7T where Mr. Esch discusses Mr. Aikin’s statement.⁷

Arrow argues that MEI is incorrect in stating that the Commission only allowed surrebuttal on the shipper support statement, and not on Mr. Esch’s rebuttal testimony relating to the shipper support statement.⁸

4 With regard to the first portion of surrebuttal in question, Arrow cites Mr. Harmon directly:

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?”

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

³ *Id.*, ¶ 11. This exhibit, according to MEI, “is a succinct, 3-paragraph statement authored by Marc Aikin of Crowley Petroleum Services.” *Id.*, ¶ 17.

⁴ *Id.*

⁵ *Id.*, ¶ 18.

⁶ *Id.*, ¶ 20.

⁷ Arrow’s Response, ¶ 4 (transcript line numbers omitted).

⁸ *Id.*, ¶ 6.

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.⁹

5 Arrow contends that “it is obvious that [the surrebuttal] is responding to the testimony of Mr. Esch which related to the late-filed shipper support statement.”¹⁰ Arrow asserts that Mr. Esch’s testimony on page 13, as referenced in the above quote, discusses the Crowley shipper support statement.¹¹

6 The second reference within Mr. Harmon’s surrebuttal at issue in the Motion is as follows:

Q: But what about Mr. Esch’s reference to “untapped potential in the market?”

A: I found this to be one of the flimsiest declaratory statements in his testimony. This appears to be a classic “build it and they will come” justification for granting an application on unspecified future need. In other words, this apparently is also an admission that there is an absence of need shown here but that we should trust him that the market can absorb another provider based on future need. Untapped potential is thus code for “failure to prove need” in my view. And surely, if there were an unmet need for service on the scale of what Mr. Esch estimates, any failure to meet that need would have resulted in a complaint to the Commission.¹²

7 Arrow points to Mr. Esch’s testimony in Exh. No. RSE-7T where he specifically states, “[T]here is untapped potential in the market.”¹³ As Arrow notes, this statement is followed by Mr. Esch’s identification of the Crowley shipper support statement in Exh. No. RSE-8 as evidence of Arrow’s service quality issues.¹⁴

⁹ *Id.*, ¶ 8 (italics and bolding in original).

¹⁰ *Id.*

¹¹ *Id.*

¹² Harmon, Exh. No. JLH-10T at 6:1-10 (bolding in original).

¹³ Arrow’s Response, ¶ 9 (quoting Esch, Exh. No. RSE-7T at 15:3-16:4).

¹⁴ *Id.*

8 Lastly, Arrow addresses Mr. Harmon's critique of an informal shipper survey conducted by Staff. Mr. Harmon testifies:

Q: Does Mr. Esch refer to any other source for his conclusion that the market would support another entrant?

A: Yes, the informal telephonic survey staff witness Mr. Sevall alluded to in his testimony.

Q: Where is this reference in Mr. Esch's testimony?

A: At lines 24-26, p. 15 and lines 1-4 of p. 16 of (Ex. No. __ (RSE-7T).

Q: Do you agree with Mr. Esch's characterization of the results of that informal staff survey in his rebuttal testimony?

A: Obviously not. Mr. Esch needs to reread that testimony more closely in my view. Rather than 66% of the six polled customers "supporting an additional service provider," what the staff telephone survey actually found instead was that five out of six (83%) had no issues with Arrow. While three of those five might have been receptive to more competition (which customers in all industries are typically supportive of in concept), only one of those customers (which the record will identify as Crowley) had anything but favorable comments. In fact, that survey also corroborated that there was "no Commission record of failed or refused service by Arrow Launch." (Ex. No. __ (SS-1T), p. 6, line 3).

Q: On that basis, what are your conclusions about the staff survey and its bearing on whether a new entrant ought to be authorized in this market?

A: Again, there is nothing in that staff testimony directed to analysis of whether the market should accommodate another provider, and the staff is careful not to allow any such conclusion. There is also nothing in that informal survey demonstrating a service failure or inadequacy whatsoever, even to the alleged "dissatisfaction" now attributed to Crowley. Based on the survey and Mr. Sevall's initial testimony of a complete absence at the Commission of records demonstrating service

deficiencies or complaints, 100% of the surveyed customers must have received the service they requested.¹⁵

9 Mr. Esch's testimony points out that Staff's survey results were "what [Mr. Esch has] been hearing from [his] customers in the region."¹⁶ Arrow argues that Mr. Harmon's discussion of the survey relate to Exh. Nos. RSE-7T and RSE-8¹⁷

DISCUSSION AND DECISION

10 Arrow correctly states that the Commission allowed it the opportunity to file limited surrebuttal relating to Mr. Aikin's shipper support statement in Exhibit No. RSE-8 and the portions of Mr. Esch's rebuttal testimony discussing Mr. Aikin's statement in Exhibit No. RSE-7T. Specifically, Judge Friedlander noted that:

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

11 The first portion of Mr. Harmon's testimony at issue in MEI's Motion, at page 5, lines 5 through 14, attempts to counter allegations Mr. Esch makes at page 13 of his own testimony. Mr. Esch, on page 13 of his rebuttal testimony, argues that Arrow's claim of having more boats to serve the area does not change Mr. Esch's opinion about Arrow's service availability. Mr. Esch states that, "[i]t is clear to me that Arrow still is underserving the region...my customers have told me so and *Crowley's shipper support statement* further backs this point up."¹⁹ As Mr. Harmon's testimony directly responds to Mr. Esch's reference to the shipper support statement, MEI's Motion is denied.

12 At page 6, lines 1 through 10 of his surrebuttal, Mr. Harmon responds to Mr. Esch's claim of "untapped potential in the market." In fact, Mr. Esch directly quotes Crowley's statement at Exhibit No. RSE-8 as showing "that one of the major shipping customers in the Puget Sound believes that there is currently an untapped market that

¹⁵ Harmon, Exh. No. JLH-10T at 7:1-25 (bolding in original).

¹⁶ Esch, Exh. No. RSE-7T at 16:4.

¹⁷ Arrow's Response, ¶ 10.

¹⁸ Friedlander, TR 35:14-21.

¹⁹ Esch, Exh. No. RSE-7T at 13:16-18 (emphasis added).

another provider could take advantage of.”²⁰ This portion of Mr. Harmon’s testimony clearly relates to the limited subject matter on which the Commission authorized Arrow to draft surrebuttal testimony, and MEI’s Motion is denied.

13 Finally, we examine page 7, lines 1-25 of Mr. Harmon’s surrebuttal testimony. Mr. Harmon references Mr. Esch’s conclusion that Staff’s informal shipper survey demonstrated Arrow’s customers’ dissatisfaction. He argues that the survey revealing one dissatisfied customer refers to Crowley’s now-public shipper support statement in Exhibit No. RSE-8. However, neither Mr. Sevall nor Mr. Esch reference Crowley by name as the dissatisfied customer. Arrow’s assumption goes too far in this regard, and we cannot make that connection with the information Arrow has provided. As a result, MEI’s Motion is granted and page 7, lines 1 through 25 of Mr. Harmon’s surrebuttal is stricken.

ORDER

THE COMMISSION ORDERS that:

- 14 (1) MEI Northwest, LLC’s (MEI’s) Motion to Strike Portions of the Prefiled Surrebuttal Testimony of Jack Harmon (Motion) is DENIED as to page 5, lines 5 through 14 and page 6, lines 1 through 10.
- 15 (2) MEI’s Motion is GRANTED as to page 7, lines 1 through 25. This testimony is stricken.

DATED at Olympia, Washington, and effective February 10, 2017.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Administrative Law Judge

²⁰ Esch, Exh. No. RSE-7T at 15:16-17.