

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application TS-160479 of
MEI NORTHWEST, LLC
for a Certificate of Public Convenience and
Necessity to Operate Vessels in Furnishing
Passenger Ferry Service

DOCKET TS-160479
POST-HEARING BRIEF ON
BEHALF OF COMMISSION STAFF

I. SUMMARY

1 After reviewing the full evidentiary record, Commission Staff respectfully recommends that the Commission grant Arrow Launch Service’s protest and deny MEI Northwest’s application for a commercial ferry certificate. In Staff’s opinion, MEI failed its burden to prove that “the existing certificate holder [Arrow Launch] has failed or refused to furnish reasonable and adequate service.” RCW 81.84.020.

II. ARGUMENT

A. Jurisdiction

2 The Commission asserted jurisdiction over launch services in Orders S.B.C. 363A and 364 (1977), by concluding that launches were a form of commercial ferry regulated under RCW 81.84.¹ Under RCW 81.84.010(1), the Commission has authority to regulate commercial ferries that operate “between fixed termini or over a regular route.” In Orders S.B.C. 363A and 364, the Commission specifically decided that launches operate “between fixed termini” because they transport people and freight between docks and ships at anchor in “anchorage zones.” The Commission was satisfied that “anchorage zones” qualified as

¹ Sevall, Exh. No. SS-3; *see* Sevall, Exh. No. SS-1T at 8:7-14.

“fixed termini” within the meaning of RCW 81.84.010(1) because they were sufficiently “well known” to the shipping industry.²

3 At the time the Commission issued Orders S.B.C. 363A and 364, multiple launch providers were operating in Puget Sound.³ The Commission eventually asserted jurisdiction over each provider but made no attempt to create or recognize exclusive service territories.⁴ Today, Arrow Launch and Argosy LP hold overlapping certificates. Both have authority to provide launch service in Elliott Bay.⁵

B. Nature of Launch Service

4 Under RCW 81.84.010, the Commission has authority to regulate boat transportation services that operate “for the public use.” Orders S.B.C. 363A and 364 contain no real analysis of this criterion.

5 At the cross-examination hearing in this docket, Staff questioned whether launches truly operate “for the public use.” MEI and Arrow Launch largely acknowledged that launches operate as private charters, since they:

- operate on demand, i.e., without a fixed schedule;⁶
- charge hourly rates;⁷
- sell no individual tickets;⁸
- cater almost exclusively to maritime professionals;⁹
- and serve private ships.¹⁰

² Sevall, Exh. No. SS-3 at 14 (Order S.B.C. No. 364, pg. 2).

³ Sevall, Exh. No. SS-1T at 8:7-14.

⁴ *Id.*; see Sevall Exh. No. SS-2.

⁵ Sevall, TR. 293:2-20.

⁶ Esch, TR. 203:25-204:10; Harmon, TR.461:13-463:20.

⁷ Esch, TR. 202:16-203:19; Harmon, TR. 461:5-8.

⁸ Esch, TR. 202:1-3; Harmon, TR. 455:23-456:6; 461:9-12.

⁹ Esch, TR. 201:5-16; 203:14-23; 206:22-207:10; Aikin, TR. 385:2-9; Harmon, TR. 454:15-455:12.

¹⁰ Esch, TR. 207; Aikin, TR. 385:10-17.

6 To be clear, Staff does not contend that the Commission should deregulate launch services in this docket. But Staff does believe it is important that launch service be clearly distinguished from passenger ferry service, even though both types of service are currently regulated under RCW 81.84. The nature of launch service is relevant to the main question in this case—namely, whether Arrow Launch has “failed or refused to furnish reasonable and adequate service” within the meaning of RCW 81.84.020(1). When the Commission evaluates the reasonableness and adequacy of Arrow Launch’s service, it should bear in mind that launches provide an essentially *private* service. Staff believes that the convenience and necessity of the “general public” is not at stake in this case.

C. Financial Review

7 Under RCW 81.84.020(2), the Commission may not grant a ferry certificate without first determining that “the applicant has the financial resources to operate the proposed service for at least twelve months, based upon the submission by the applicant of a pro forma financial statement of operations.” This determination is known as a “financial review.”

8 Staff witness Scott Sevall reviewed MEI’s pro forma financial statement and concluded that the company has the financial resources to operate for at least 12 months.¹¹ Mr. Sevall’s conclusion was primarily supported by evidence that MEI has enough cash on hand—\$300,000—to absorb a substantial first-year operating loss.¹² Cash is a liquid asset that can be used to secure other assets, reduce incurred liabilities, and pay for operating costs. Therefore, the availability of cash is key to financial fitness.

¹¹ Sevall, Exh. Nos. SS-1T at 3:3-5:16 and SS-4T at 3:5-11; *see also* Staff analyst Mike Young’s informal financial review, which was filed in this docket on June 9, 2016.

¹² Sevall, Exh. No. SS-4T at 2:16-3:3; Esch, TR. 99:22-100:3.

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Arrow Launch witness Jack Harmon criticized Mr. Sevall for accepting MEI's claim of \$300,000 cash "without doing anything to confirm that the cash deposit exists."¹³ But under RCW 81.84.020(2), MEI was required to submit all documentation under penalty of perjury. Staff had no reason to suspect that MEI perjured itself in this case.¹⁴ Moreover, MEI confirmed in response to Judge Friedlander's bench request that Marine Express Inc. (MEI's parent company) made a \$300,000 capital contribution to MEI pursuant to a February 2016 operating agreement.

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Further, Mr. Harmon's criticism is misplaced because a financial review is not a formal financial audit. Rather, under RCW 81.84.020(2), a financial review is an analysis of the pro forma financial statement of operations *provided by the applicant*. The purpose of the review is not to verify the veracity of the financial statement. Rather, the purpose is to make reasonable predictions about the adequacy of the applicant's physical assets and its ability to pay for required insurance, consumables (e.g., fuel), and wages for operators and other employees. In this light, it would be extremely unusual for Staff to seek or demand independent proof of an applicant's claim.

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Arrow Launch also questioned whether MEI's parent company gifted or loaned the \$300,000 in question to MEI.¹⁵ But Staff is not concerned about the legal form of the cash. The asserted availability of the asset is all that matters.¹⁶ Based on MEI's application, Staff is confident that the company will be a "going concern" for at least 12 months.¹⁷

¹³ Harmon, Exh. No. JLH-9T at 3:5.

¹⁴ Sevall, TR. 294:22-295:1.

¹⁵ E.g., Esch, TR. 99:22-100:4; Esch, TR. 193:2-8.

¹⁶ Sevall, TR. 284:18-25.

¹⁷ Sevall, TR. 285:9-23.

D. Adequacy of Incumbent's Service

12 Because MEI is financially fit, the dispositive question is whether “the existing certificate holder [Arrow Launch] has failed or refused to furnish reasonable and adequate service.” RCW 81.84.020. The Commission cannot grant MEI overlapping authority unless it makes such a finding. *Id.* All parties agree that MEI has the burden of proof.

13 Staff concludes that MEI failed to meet its burden. The key witness was Marc Aikin of Crowley Petroleum Services, one of Arrow Launch's current customers. Because Arrow Launch emphatically denied any service failures,¹⁸ Mr. Aikin was the sole witness who could shed light on MEI's claim that “Arrow Launch's services are frequently lacking.”¹⁹

14 But rather than illuminate Arrow Launch's shortcomings, Mr. Aikin arguably bolstered Arrow Launch's case. To begin with, Mr. Aikin's shipper support statement identified no specific instance in which Arrow Launch provided unreasonable or inadequate service.²⁰ Then, at the cross-examination hearing, Mr. Aikin acknowledged that “Arrow Launch has *always done a good job for us.*”²¹ He also said that Crowley has been “*happy*” with Arrow Launch's service.²² Finally, he made clear that he would not “slander or blind [Crowley's] relationship with Arrow Launch.”²³

15 For its part, Staff also discovered no evidence of a service failure. Mr. Sevall testified unambiguously, “There is no Commission record of failed or refused service by Arrow Launch.”²⁴ Mr. Sevall did find some evidence through an informal survey that

¹⁸ *E.g.*, Harmon, Exh. No. JLH-1T at 3:19-25, 25:1-5.

¹⁹ Esch, Exh. No. RSE-1T at 19:25.

²⁰ Esch, Exh. No. RSE-8 (Crowley shipper support statement).

²¹ Aikin, TR. 350:1-2.

²² Aikin, TR. 383:21 (emphasis added).

²³ Aikin, TR. 383:24.

²⁴ Sevall, Exh. No. SS-1T at 6:3.

Crowley was dissatisfied with Arrow Launch's service.²⁵ But after listening to the testimony at the cross-examination hearing, Staff now believes the opposite is probably true—apparently, Crowley has been *satisfied* with Arrow Launch's service.

16 Staff is unmoved by evidence that, in January 2000, Arrow Launch hired a passenger ferry known as Island Commuter to provide launch service to one of Arrow Launch's customers.²⁶ Arrow Launch may have used a subcontractor because it was too busy to send a regulated launch. But the incident was isolated and occurred a very long time ago. It provides weak evidence—at best—of a service failure, and there is no evidence of any lingering issue.²⁷ In legal terms, the incident is relevant, but just barely.

III. CONCLUSION

17 The record fails to show that “the existing certificate holder [Arrow Launch] has failed or refused to furnish reasonable and adequate service.” RCW 81.84.020. For this reason alone, Staff recommends that the Commission **grant** Arrow Launch's protest and **deny** MEI's application.

Dated April 12, 2017.

Respectfully submitted,

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²⁵ Sevall, Exh. No. SS-1T at 7:8.

²⁶ Esch, Exh. No. RSE-5.

²⁷ Staff is unaware of any statutory or rule-based “test period” for assessing the adequacy and reasonableness of the incumbent's service.