

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

DOCKET TS-160479

POST-HEARING BRIEF OF
ARROW LAUNCH SERVICE, INC.

April 12, 2017

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I. PRELIMINARY STATEMENT

A. Procedural Overview

1 On May 6, 2016, MEI Northwest LLC (“MEI”) applied for a certificate of public convenience and necessity under RCW 81.84 to operate ship launch and freight service in furnishing commercial passenger ferry service. After considerable interaction between the Applicant and Staff,¹ the application was duly published on the Commission’s June 28, 2016 docket and noticed to interested parties and existing certificate holders. On or about July 22, 2016, Arrow Launch Service, Inc. (“Arrow Launch” or “Arrow”), pursuant to its existing certificate BC-97, filed a protest to the above application. Following notice and a pre-hearing conference in Olympia on September 1, 2016, a pre-hearing conference order was entered setting forth Applicant and responsive testimony filing dates and Applicant rebuttal testimony filing dates. On or about December 8, 2016, Protestant Arrow Launch filed a Motion to Strike Applicant’s Rebuttal Testimony on the premise that it included a shipper support statement that should have been filed with the original Applicant testimonial filing of October 5, 2016. Following hearing on the Motion to Strike on December 23, 2016, Administrative Law Judge Marguerite Friedlander denied the Motion to Strike Rebuttal Testimony but allowed additional discovery and rebuttal testimony by Arrow Launch to respond to the purported “rebuttal” testimony of MEI who had submitted a shipper support statement from one prospective customer. In addition, at the proceeding on December 23, 2016, apart from allowing that additional discovery and answering testimony by Arrow Launch, the scheduled hearing was extended from January 4 and 5, 2017 to February 14 and 15, 2017. The hearing in this matter concluded

¹ TR. 81:17-21.

on February 15, 2017 and the Parties are now submitting post-hearing briefs summarizing the evidence, facts, and law in this proceeding. Arrow Launch's submission thus follows.

II. CONTROLLING AUTHORITY

A. Standards Generally Applicable to Applications for Certificate of Public Convenience and Necessity Under RCW 81.84

2 As noted, MEI applied for a certificate of public convenience and necessity under RCW 81.84. The Commission previously held in Order S.B.C. No. 364, *In re Application B-263 of Island Mariner, Inc.* (Sept. 1997), that launch service² is subject to regulation by the Commission, falling within the meaning of "ferry" as used within RCW 81.84 because it operates between fixed termini (between fixed landings and ships within recognized anchorage zones) and on a schedule (fixed by the ships owners' agents or captains). *See*, Order S.B.C. No. 363-A, *In re Application B-263 of Island Mariner, Inc.*, Proposed Order Granting Application (June 1977). Thus, the provisions of RCW 81.84 control this proceeding. Specifically, RCW 81.84.010 requires that any person who operates a vessel or ferry for the public use between fixed termini or over a regular route on the rivers, lakes and Puget Sound first obtain a certificate of public convenience and necessity from the Commission.

3 Launch service certainly operates for the "public use" as used in RCW 81.84.010. "Public use" as defined in RCW 81.84.010 does not mean "everybody, all the time."³ Instead, a launch service is available for public use if it is accessible on a nondiscriminatory basis to all who desire its use. Launch vessels provide transportation to anyone who requires such transportation between the dock and vessels at anchor in public anchorage zones. This often

² "Launch service" is defined in Commission rules at WAC 480-51-020(9), as meaning the "... transportation of passengers and/or freight to or from a vessel underway, at anchor or at a dock."

³ *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 36 S. Ct. 538, 60 L. Ed. 984 (1916).

includes ship crew members, chandlers, technicians, the Department of Ecology, the Department of Agriculture, spouses and children of ship crew.⁴ Although launch vessels do not provide transportation to literally everyone, as not everyone has permission to board a vessel at anchor, anyone with the means to purchase, operate or travel upon a vessel and which drops anchor in a public anchorage zone may use regulated launch service.

4 Applicant proposes a service which would offer service to all persons authorized to board and/or disembark from vessels in the public anchorage zones requested and which operate between fixed termini:

The commission may, after notice and an opportunity for a hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate any terms and conditions as in its judgment the public convenience and necessity may require...⁵

5 As argued more specifically below, a certificate may only be issued when the public convenience and necessity require such service. Indeed, in transportation application cases in general, the Commission requires that an applicant demonstrate that a public need for the proposed service exists. *See*, Order M.V. No. 144104, *In re Application P-74878 of Gerald O. Williams* (Oct. 1991). Additionally, evidence of need must come through the form of testimony of shippers demonstrating that they cannot obtain the transportation they require, despite reasonable efforts to do so. *Id.*

B. Standards Applicable to a Certificate Application when an Incumbent Ferry Service Objects

6 Under RCW 81.84.020(1), the Commission also may not grant a certificate to operate between districts or any territory already served “unless the existing certificate holder has failed or

⁴ TR 454: 15 – 455: 12.

⁵ RCW 81.84.020.

refused to furnish reasonable and adequate service” or “has not objected to the issuance of the certificate as prayed for.” Here, Arrow has objected to the application of MEI because all anchorage zones and territory applied for fall within the territory for which Arrow holds overlapping certificated authority to provide launch service. Thus, the Commission may only grant the application of MEI based on evidence demonstrated on this record that Arrow failed or refused to provide reasonable and adequate service.

7 Finally, the Supreme Court of Washington, in construing the original steamboat certificate law, which was re-codified as RCW 81.84, has interpreted that provision as also granting an incumbent certificate holder certain rights, which includes the opportunity to correct any deficiency in its service before a new application in the same territory may be granted. *Kitsap Cty. Transp. Co. v. Dep’t of Pub. Works*, 170 Wash. 396, 403, 16 P.2d 828, 830 (1932).

III. ARGUMENT IN OPPOSITION TO GRANT OF AUTHORITY TO MEI

A. This is Not a Close Case - - the Applicant Failed to Establish Any Need for New or Additional Service Reflected in the Aggregate Record Here

8 A review of the testimony and evidence submitted in this proceeding demonstrates two critical points: first, that the testimony submitted in favor of MEI failed to demonstrate either any actual need for new or additional service, or any service failures or refusals by Arrow, and second, that the testimony proffered by MEI on those points carries absolutely no weight.

9 As noted in the preliminary statement, the applicant would have the Commission accept an isolated and generalized shipper support statement (RSE-8) and a sponsoring witness, Marc Aikin, Director of Engineering, West Coast, Crowley Maritime, (“Crowley”), who lacked sufficient foundation to testify, for the critical need evidence here. In fact, that statement and Mr. Aikin’s own words indicated quite the contrary, that the service relationship with Arrow

Launch was: “a...very strong relationship with Arrow. We’ve used Arrow for many years. We’ve been happy with their service.”⁶

10 Other than the written statement of Mr. Aikin and his cross-examination testimony, the only other purported evidence of need for the proposed service came from the Applicant President himself. Arrow Launch formally objected to this testimony on the proffer of it into the record on the first day of hearing on the basis of hearsay which objections the administrative law judge overruled, but noted that the weight to which it would be afforded was another matter.⁷

11 Unquestionably, the weight to be allowed Mr. Esch’s testimony about others’ needs for service is appropriately zero. Indeed, on the issue of an Applicant supplying testimony of need through Applicant’s principal’s own words, the Commission has historically been very clear:

Applicant’s President... testified about asserted needs of shippers. The Initial Order disregarded that testimony, and the Commission believes the ruling to be proper. An applicant may not present testimony about the needs of others for its own services. Every applicant would present such testimony, if allowed to do so. Cross examination could not adequately explore the details of shippers’ need nor perhaps even its truth. Fundamental fairness requires that the shipper appear to describe its experiences in person. The Commission will disregard an applicant’s testimony about others’ need for its service. Order M.V. No. 143916, *In re Safco Safe Transport, Inc.*, App. P-73623 (Oct. 1991) (emphasis added).⁸

12 Similarly, in Order M.V.C. No. 2139, *In re Apple Blossom Lines, Inc.*, App. D-78198 (Jan. 1996), the Commission noted it does not accept self-serving statements of an applicant, and requires that an application be supported by independent witnesses with knowledge about the

⁶ TR. 383:20-22, (emphasis added).

⁷ TR. 75, 76: 24-4.

⁸ Accord: *Taylor-Edwards Warehouse and Transfer Company v. The Department of Public Service*, 22 Wn. 2d 565, 570 (1945): “[I]n addition, we think it is clear from the evidence that Appellants’ application is prompted primarily to subserve its own convenience and interests. There is no evidence of any demand, or even desire on part of the shipping public in the area for any additional service of the character appellant would give.”

traffic at issue and will only grant authority consistent with proof of need within the specific geographic territory in which any such need is demonstrated.⁹

13 It is irrefutable then that the only independent evidence even the applicant itself alludes to as supporting grant of this application is from Crowley. Despite sporadic vague references to other customers “supporting him,” Mr. Esch also admitted, on cross examination, that any such unspecified critiques by any other unnamed party constituted “... things that were said so long ago that probably could have changed or are not relevant anymore.”¹⁰

14 Thus, the Commission is left with its evaluation of (RSE-8) and the testimony at hearing of Marc Aikin as the *only* possible source of a showing for a grant of overlapping commercial ferry authority under RCW 81.84.020. While explored in more detail below, even a cursory analysis of RSE-8 and the record testimony of Marc Aikin unquestionably fail to support that MEI’s proposed service is required by the public convenience and necessity and is consistent with the public interest, and overwhelmingly demonstrates instead that Arrow has never “failed or refused to furnish reasonable and adequate service” within the meaning of the statute. This application then simply fails, collapsing on its complete lack of proof. The application should therefore be denied.

⁹ Order M.V.C. No. 2139, *In re Apple Blossom Lines, Inc.* App., D-78198 (Jan. 1996) at ¶¶2, 3. That case also notes that “[in] a protested proceeding, an applicant must present live witnesses to demonstrate that the public convenience and necessity require the service it provides,” reinforcing the correctness of the administrative law judge’s ruling on December 23, 2016 denying the motion to allow telephonic testimony of the single supporting shipper in this proceeding (*See* ¶1, p.5).

¹⁰ TR. 198:13-15.

B. The Applicant Never Even Clarified the Geographic Scope of its Application which Fails to Conform to the Scope of the Application as Docketed

15 The application for commercial ferry/launch authority as published on the Commission's docket on June 28, 2016, sought the following authority:

Ship Launch & Freight Service Between Various Mainland Ports And Following Anchorage Zones:

PASSENGER AND FREIGHT SERVICE
BETWEEN:

Anacortes to Anacortes Anchorage

Anacortes to Bellingham Anchorage

Anacortes to Bellingham

Anacortes to Sandy Point/Cherry Point/Ferndale

Anacortes to Vendovi Island Anchorage

Bellingham to Bellingham Anchorage

Bellingham to Vendovi Island Anchorage

Bellingham to Anacortes Anchorage

Restriction: This authority is restricted against invading jurisdiction of Washington State ferries under Chapter 47.60 RCW.

16 The application Exhibit (RSE-4), its original proposed rates, and its substituted tariff and accompanying service map of June 30, 2010 Exhibit (RSE-10X), all contain territorial variations on the docketed application. When questioned about that fundamental inconsistency, Mr. Esch acknowledged that RSE-10 and its accompanying map clearly exceeded the scope of the application docket.¹¹

¹¹ TR. 82:8.



Despite acknowledging that the docketed application was considerably narrower in scope, Mr. Esch nevertheless surprisingly still maintained that the tariff, not the docket, controlled the application scope¹² and the fact that his proposed tariff, and (not even the application), naming service in Port Angeles meant that that port was within the current application's scope.¹³

17 This threshold misconception about precisely what the application seeks raises material notice/due process concerns, notwithstanding the abject lack of shipper support for the referenced ports, including Port Angeles.

¹² TR. 83:19.

¹³ TR. 84:8-15.

18 The Commission has also long admonished parties to application proceedings that it cannot grant authority in excess of what is docketed/published to all interested parties:

It is not proper to authorize a grant of authority which has not been docketed to provide the opportunity for protest ... Restrictive amendments may be accomplished, in which less authority is proposed for grant than was docketed, but when that happens, all the authority which is granted has been previously docketed. Order M.V. No. 127558, *In re Jon S. Pansie d/b/a Tri-Pan Services*, App. P-65704 (May 1983).

19 “Sound regulatory policy demands that each application be interpreted as docketed. The principle of full notice to affected persons would be undermined were the Commission to read a docketed application in a manner inconsistent with its plain published language.” Order M.V. No. 136052, *In re Cartin Delivery Service*, App. E-19099 (Jun. 1987) ¶3 at 4. Consequently, as a matter of due process, the scope of MEI’s instant application must be limited to the termini included within the noticed docket.

C. The Controlling Law in this Proceeding Requires More than a Showing of Need for Service; it Requires Evidence of “Failure or Refusal” by the Existing Provider

20 Further, it is important to recognize that even a finding of need for service (which is unquestionably not established on this record) would be insufficient here for the Commission to grant overlapping commercial ferry authority. In contrast, in the absence of an existing certificate holder, under RCW 81.84.020, the Commission need only find that the application is in the public interest and required by the present or future public convenience and necessity to grant a commercial ferry certificate such as was the previous standard for entry for a motor freight carrier under RCW 81.80.070. Here, however, there *is* an objecting overlapping certificate holder. Thus, the statute requires, in addition in this circumstance, that the Commission find that that existing certificate holder has “failed or refused to furnish

reasonable and adequate service.”¹⁴ MEI has woefully failed to establish both or either precondition in RCW 81.84.020 to grant overlapping commercial ferry/launch authority.

21 Moreover, the “failure or refusal” standard to grant overlapping commercial ferry certificate authority is the most stringent entry standard for transportation applications in Title 81 RCW. The Commission recently contrasted entry standards for both solid waste collection (RCW 81.77.040) and auto transportation (RCW 81.68.040) which feature an analysis of whether existing service is provided “to the satisfaction of the Commission,” with the entry standard of “failed or refused to furnish reasonable and adequate service,” in RCW 81.84.020.

22 In Order 10, *In re Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington*, Docket No. TG-120033 (July, 2013), it summarized:

The legislature knew how to confine the Commission’s inquiry to service quality provided by a single provider if it had intended to do so. The statutory provision for limiting competitive entry for ferry service, for example, states that the Commission may not grant a new entrant authority unless the existing certificate holder has failed or refused to furnish reasonable and adequate service. We interpret as intentional the difference in these two sections of RCW Chapter 81 and construe RCW 81.77.040 accordingly. The legislature did not create a “presumption” of monopoly or limit competitive entry to instances of service failures in that section.¹⁵

23 Again, RCW 81.84.020 is in contrast to the statutory provision to that which controlled entry in the *WM Healthcare Solutions of Washington* case. Washington appellate courts have similarly long been in accord on the conditions under which overlapping commercial ferry authority can issue and/or on whether invasion of an existing commercial ferry franchise is allowable.

24 For instance, in *King County Transp. Co. v. Manitou Beach Agate Pass Ferry Ass’n*, 176 Wash. 486, 30P. 2d 233 (1934), the Washington Supreme Court enjoined an overlapping

¹⁴ RCW 81.84.020. Order S.B.C. No. 510, *In re Mosquito Fleet Enterprises, Inc.*, App. B-78232 (May 1995).

¹⁵ Order 10, Docket No. TG-120033 at ¶9.

private, noncertificated ferry association from serving the route of the existing provider, finding that the nonregulated overlapping service was essentially a subterfuge to avoid the need to obtain a certificate of public convenience and necessity, which invaded the rights of the existing certificate holder. That decision, and those in many other state and federal courts, have historically reinforced the rights of existing providers faced with unauthorized or prospective competitors where the statutory basis is not established for overlapping certificate grants. *See for instance, Vallejo Ferry Co. v. Solano Aquatic Club*, 165 Cal. 255, 131 P. 864 (Ca. 1913), where the California Supreme Court affirmed a permanent injunction against a group which had used a launch service between Vallejo and Mare Island in the San Francisco Bay and which overlapped with the existing certificated provider, finding:

...[i]t is the duty of the government, which has thus invited private capital to aid in the comforts and convenience of its citizens, to safeguard the rights which it has bestowed and to see that the enjoyment of those rights is coextensive with the grant of them.¹⁶

IV. THE CROWLEY “EVIDENCE” AND RSE-8

- 25 Apart from the disputes about the timing and characterization of the Exhibit RSE-8 and whether it should be treated as “rebuttal” when no testimony of need for service aside from Applicant owner Randy Esch’s own references were introduced on filing of the application case-in-chief on October 5, 2016, there are numerous flaws both in RSE-8 and the live testimony of Mr. Aikin at the hearing on February 15.
- 26 The judge’s ruling on December 23, 2016 left the “shipper support statement,” RSE-8, as the sole avenue of substantive and procedural inquiry on the basis of any testimonial support of Crowley Petroleum Services for the MEI application. However, detailed analysis of both that

¹⁶ Id. at 868.

exhibit and the testimonial “support” for the statements therein by Mr. Aikin at the hearing reveals that there simply is no appreciable basis upon which to construe Crowley’s testimony as evidencing need for service, let alone any indicia of “fail[ure] or refus[al] to furnish reasonable and adequate service.”

A. RSE-8 and the Sponsorship Thereof by Marc Aikin also Reveal a Lack of Foundation for Mr. Aikin’s Testimony.

27 At the outset of cross examination, Mr. Aikin was asked about the background to the preparation of RSE-8 and its rather “veiled” (vague) critiques of Arrow Launch’s service. At TR. 348, Mr. Aikin acknowledged the majority of the information in that statement implicitly critiquing Arrow came from a subordinate, Lindy Evans, and was drafted by in-house counsel with input by Ms. Evans.¹⁷

28 After then being asked what Crowley is specifically seeking in supporting MEI’s application, Mr. Aikin stated:

So we’re concerned long-term that we need to have quality service delivered in a timely fashion. And let me say that Arrow Launch has always done a good job for us. I can’t say that they have not done a good job.¹⁸

29 When asked about RSE-8’s pointed reference to purported “past” delays in transporting crews to their vessels, Mr. Aikin once again did not have any specific knowledge about any such circumstances. Again, that was supposedly from Ms. Evans who also failed to supply Mr. Aikin any specifics as to date, time, or vessels involved in that reference to past delays.¹⁹ In fact, even in this esoteric prior isolated occasion alleged to have involved a stores (freight)

¹⁷ TR. 349: 9-12.

¹⁸ TR. 349: 24-25, 350: 1-3. As for Crowley’s long-term requirements, Mr. Aikin also later admitted, at TR. 378:2-8, that neither he nor anyone else had ever discussed those prospective growth requirements with Arrow or an Arrow representative. There is thus absolutely no basis to conclude Arrow could not meet any and all such future fleet or service requirements for Crowley.

¹⁹ TR. 365: 7-19.

delivery job, Mr. Aikin could not tell the tribunal whether the delay in that instance relayed by Ms. Evans was even attributable to Arrow²⁰ and frankly acknowledged, shortly thereafter, that Crowley itself “certainly” can play a role in scheduling delays.²¹ Clearly, Mr. Aikin’s testimony was unspecific, based largely on hearsay, lacked foundation and is subject to objection under Federal Rules of Evidence (“FRE”) Rule 602 as insufficient to support a finding that the witness has personal knowledge of the matters to which he was being asked to testify.

B. The Parties and the Administrative Law Judge Discussed the Crowley Evidence Insufficiencies at Length on the Hearing Record

30 Recognizing the fundamental shortcomings of MEI’s case, Arrow objected to some of the redirect examination of Mr. Aikin. At TR. 399, Arrow makes its first objection to that testimony on foundational and hearsay grounds that Mr. Aikin’s testimony was again relying on topics discussed with Lindy Evans who was not presented as a witness or representative. While the testimony about Ms. Evans’ critiques appeared to be directed to ancillary (nonregulated) charges dealing with forklifts and cranes,²² in overruling these initial objections, the administrative law judge first noted:

...so I will allow the questioning, but I think we need to have a conversation after this about why Ms. Evans is not here. Because it does appear she was the one mainly responsible for the interaction...[w]ith Arrow.²³

Later, she was even more persuaded:

It would appear that the company MEI’s case is based almost entirely on Crowley’s testimony and statements, and I need to hear from Ms. Evans...²⁴

²⁰ TR. 370: 24-25; 371:1.

²¹ TR. 370: 24-25; 371:1.

²² Arrow actually sought to respond to the crane charge in Anacortes issue on the redirect of Mr. Harmon which objection was sustained and deflected in the anticipation that it could be addressed by prospective cross-examination of Ms. Evans. TR. 569.

²³ TR. 394:25, 395:1-4.

31 Further, on redirect, yet another example of the foundational problems with Mr. Aikin's testimony emerged when there was discussion about a recent Crowley launch services RFP (request for proposal). Here, Mr. Aikin offered new testimony when he testified twice (TR. 397:6, 7-13) that Arrow had never responded to that overture for launch service proposals. It should be noted that in and of itself, a failure to respond to the RFP from Crowley would not demonstrate any service failure or refusal by Arrow as that is not a specific request for service. Rather, it is the first step in the process of procuring agreements which are ultimately unnecessary to secure regulated launch service (as that is operated pursuant to terms in Arrow's tariff and certificate). On limited recross on the RFP topic, however, Mr. Aikin testified that now "he believed" that Arrow did respond, but that its response didn't meet "the intent of the proposal. I don't know."²⁵ When next asked who the source of that particular knowledge was, yet again he said, "[c]onversations with Lindy Evans who was the manager of that RFP."²⁶

C. The Crowley Request for Proposal Issue Typifies the Unreliability and Absence of Foundation in its Testimony

32 There is no better evidence of the inherent unreliability of hearsay testimony not meeting any exception and lacking in foundation in contravention of FRE 602, than Mr. Aikin's unexpected reference to the Crowley RFP. Mr. Harmon, in contrast, on redirect, disputed both the fact that Arrow had not submitted an RFP response and clarified Mr. Aikin's previous testimony. Mr. Harmon testified that Arrow did indeed submit a complete RFP response and that it had also asked a series of solicited questions about the RFP before submission, only to be informed by Crowley's in-house counsel via email that Crowley would not be answering any of those

²⁴ TR. 418:23-25.

²⁵ TR. 402:18, 19.

²⁶ TR. 402:23, 24.

invited questions.²⁷ Ultimately, Arrow Launch offered, marked and had admitted, as Exhibit JLH-16, into the record, an email memorandum duly attaching Arrow’s RFP response to Crowley’s launch services request, copied both to Lindy Evans and Mark Aikin and dated September 16, 2016, thus demonstrating the inherent lack of reliability of Mr. Aiken’s hearsay statements. Mr. Aikin’s testimony on the RFP issue is thus completely contravened.

33 The administrative law judge clearly sensed the cumulative deficiencies in that testimony when she pointedly asked MEI’s counsel upon close of the witness testimony:

Q. Do you disagree, though, that Mr. Aikin was unable to answer very basic cross-examination questions relating to his own shipper statement?²⁸

Counsel for the applicant then “doubled down” in response:

A. Respectfully your Honor, I don’t agree.”²⁹

Q. Again, just to clarify, you don’t think that Ms. Evans’s testimony is necessary?³⁰

34 MEI was repeatedly thrown a “life vest” on the Crowley testimony defects (admittedly over strenuous objections by Protestant, Intervenor and even, eventually, the Staff),³¹ but rebuffed the further unsolicited opportunity to attempt to cure the foundation and hearsay deficiencies in its so-called “supporting shipper statement.”

35 In truth, even if Crowley’s testimony had been bolstered by Lindy Evans’ subsequent “cameo,” its testimony, as it was, merely alluded to unexplained or inadequately explained complaints about charges for non-regulated services. And, regarding regulated services, remember Mr.

²⁷ TR. 56:14-25, 562:1-8

²⁸ TR. 577:9-12.

²⁹ TR. 577:13-14.

³⁰ TR. 580:3-5.

³¹ TR. 578:10-13.

Aikin actually praised the service history of Arrow in working with Crowley over the years (“...Arrow Launch has always done a good job for us”)... “we have a very strong relationship with Arrow. We’ve used Arrow for many years. We’ve been happy with their service.”³²

36 While there were admittedly generalized references in a few passages of Mr. Aikin’s testimony to unspecified “delays,” when asked to describe or detail those circumstances, Mr. Aikin alluded or defaulted to discussions with Lindy Evans, and could not provide any specifics whatsoever.³³ He also, as noted, variously indicated that blame for delays were difficult to apportion, could be a result of internal Crowley’s miscommunications and scheduling issues and/or numerous other variables including multiple departments within Crowley individually ordering launches that might necessarily also spawn delays.³⁴

37 Any expressed dissatisfaction even by Lindy Evans would certainly also come as a surprise to Arrow Launch’s President, who testified that Ms. Evans had not expressed any dissatisfaction to him...

Quite the contrary. Quite often she praised our services, thanks for the instant-on services. There was [sic] times she would call and say she had forgot to schedule this or that somebody else needed something right away and you guys are awesome. She recently raved about our slops removal and the process and specifically the rates.³⁵

³² TR. 383:19-21.

³³ Recall as well that the only indication of “dissatisfaction” in staff’s unprecedented October telephone summary of Arrow customers from a list provided staff in an unrelated Arrow general rate case, apparently was also sourced to Crowley’s Ms. Evans. Consistent with the pattern of generalized, indirect and total hearsay-based critiques by Ms. Evans in this record, she apparently did not indicate to staff any basis for her “dissatisfaction,” a classic attack by innuendo. (TR. 249:8-12). It is then again impossible for Arrow to probe the nature and accuracy of this apparent displeasure without any details supplied for the cause. *See also*, ¶29, discussion, above.

³⁴ TR. 352:15-21. Mr. Aikin actually listed five separate departments within Crowley that have the independent ability to order launches. TR. 343, 344.

³⁵ TR. 534:1-7.

38 In the most optimistic light for MEI, there is at best a dispute even about Ms. Evans' critiques of Arrow's service which, coupled with Mr. Aikin's characterization of their long-term relationship with Crowley as "very strong" and being "very happy" with their service, leaves no room for doubt there is no evidence of need or service failure on this record.

39 Ultimately, even if somehow Mr. Aikin's testimony can be bootstrapped and attributed any weight by the presiding officer and the Commission, it must be understood at best for what it is – classic "shipper preference" testimony. Mere preference by shippers for the services of a particular carrier is not sufficient to support a grant of authority. Order M.V. No. 126084, *In re Tacoma Hauling, Inc.*, App. E-18498 (Aug. 1984); Order M.V. No. 144441, *In re Expedited Express, Inc.*, App. P-74573 (Jan. 1992).

D. Crowley's Avowed Purpose in Supporting MEI was Actually to Spur Competition to Reduce Ancillary Service Charges which Purpose Fails as a Matter of Law

40 When probed about the true basis of Crowley's support in this proceeding, Mr. Aikin revealed that that support was largely predicated (obviously) not on articulable service deficiencies by Arrow or even on regulated services as a whole, but on a dual goal of Crowley: increasing competition to reduce the cost of unregulated ancillary service charges. As Mr. Aikin offered near the end of his initial cross-examination testimony:

Creating competition in any environment creates more competitive pricing, and in this case, it's regulated. So the rate that will be charged won't change. So the number of launches times the number of hours will still be the same. It's all the other ancillary charges. All the other ancillary services is what we would anticipate.--³⁶

He is next asked:

³⁶ TR. 373: 20-25; TR. 374:1.

Q. So your point is the competition will mean that regulated rates will not change, but the ancillary service rates will; is that correct?

A. Correct.³⁷

41 Once again, under a considerably more relaxed entry standard in the previous Title 81 RCW setting for motor carriers, the Commission has had occasion to deal with just this very issue. In Order M.V. No. 133838, *In re Inland Empire Distribution Systems, Inc.*, App. P-69280 (Apr. 1986), the Commission rejected the argument that the grant of an application on an asserted demonstration of disadvantage in an unregulated activity could be the basis for a grant of authority. “The applicant has not demonstrated any reason why possible competitive advantage in an unregulated activity brings the applicant within the requirement of the existing [statute] that a grant of authority be made only upon a demonstration of showing that the proposed service is required by the public convenience and necessity for transportation services...”³⁸

42 Here, we have precisely that premise being proffered from the mouth of the single supporting shipper witness. Crowley is obviously posturing for further reductions in nonregulated ancillary service charges by supporting regulated competition. This has previously been found, as a matter of law, to be insufficient by the Commission.³⁹

43 Preference for an additional provider in simply favoring competition also did not support a grant of authority under traditional motor carrier case law either, which, unlike RCW 81.84.020, recognized in certain cases, that the Commission could consider the benefits of

³⁷ TR. 374:7-10.

³⁸ Order M.V. No. 133838, ¶2, p. 6.

³⁹ The deflection of testimony to the putative cross examination of Ms. Evans here was particularly detrimental to Arrow, who would have proffered testimony in response by Mr. Harmon, if permitted, directly addressing the ancillary service charge issues, the Port of Anacortes crane background and, at a minimum, likely made an offer of proof regarding those charges and their comparability to regulated services rates’ operating ratios.

competition where the evidence demonstrated some benefit beyond the mere authorization of another carrier. Order M.V. No. 138504, *In re Lynn Penfold*, App. P-71341, (Oct. 1988). As in *Penfold*, there was no such showing here, even if the Commission were statutorily authorized by RCW 81.84 to consider such asserted benefits which is noticeably absent from Title 81.84's directives.

E. Is There Even Any Evidence of Service Failures on This Record?

44 While Arrow has already demonstrated above the complete lack of need for additional service on this record, it necessarily feels compelled to address a couple of issues intermittently raised by applicant MEI in its testimony and in cross-examination. The first is the reference to alleged "billing issues" which were rather obliquely raised on the redirect examination of Mr. Aikin, referred to by the judge as one reason for Ms. Evans' necessary appearance (TR. 405) and the subject of redirect at some length of Mr. Harmon. In Arrow's view, as initially set forth in detail in its surrebuttal testimony (Exhibit JLH-10T), the "billing disputes" with Crowley all pertain to Crowley's resistance to paying late charges after 30 days of invoice date as set forth in Arrow's tariff.

45 Indeed, Mr. Harmon testified on direct at page 3 of (Exhibit JLH-10), that of the 932 Crowley invoices from Arrow he reviewed from June 2015 – May 2016, 52 of the invoices were for late charges alone. That clearly would have been a topic in the long-desired meeting with Crowley which had been cancelled and not rescheduled by Crowley. Mr. Aikin seemed to know nothing about this, like many other issues regarding Arrow's communications with his

company⁴⁰ he lacked key information about Arrow contacts by and of Crowley personnel on the RFP proposal.⁴¹

46 Another possible area of “billing dispute” relates again, not to any specific service critique, but to an alleged industry practice rather furtively referred to as “triple booking/triple charging” that Mr. Aikin, on redirect, described in leading questioning as “a source of Crowley’s frustration.”⁴² Yet, on cross-examination, Mr. Harmon clarified that this had nothing whatsoever to do with service issues but related instead to rate design, wherein the approved regulated tariff is predicated upon service charges by vessel which rate design the applicant itself had replicated in its own proposed tariff!⁴³

47 Obviously this is neither a rate case nor a complaint proceeding. Nevertheless, the design of a tariff to apply charges by stop, by customer, or here, by vessel, is not an issue with which the Commission is unfamiliar. For instance, while residential solid waste collection service involves rates serving multiple adjacent residences in either city blocks or unincorporated territory, the accepted rate design is per customer, per week or an every-other-week charge. Again, there is nothing untoward or nefarious about such tariff design matters, nor has this been a subject of any previous complaint to the Commission on Arrow’s particular rate design. Ironically, also, tinkering with that type of rate design would actually trigger just the type of allocation dilemma to which Crowley’s witness referred in apportionment of cause for service delays to ships, above.

⁴⁰ TR. 353:14.

⁴¹ TR. 403:8-16.

⁴² TR. 391:15.

⁴³ TR. 526:6-21.

48 Neither is the *Island Commuter* incident, referenced in Applicant’s case in chief and addressed at length in cross-examination, evidence of any service failure. Not only is that incident too remote in time for any relevance to this present proceeding, it also says nothing about the veracity of Arrow’s principal’s testimony, despite MEI’s attempts to make it so on cross-examination. The lone finite example of alleged “service failure” on the record is apparently this reference in MEI’s initial filing about this incident of some 17 years ago in Bellingham Bay.⁴⁴ There, a vessel leased by Arrow Launch to address extraordinary demand circumstances caused by the temporary shutdown of the oil pipeline due to the 1999 explosion in Bellingham which caused a temporary spike in demand for vessel services was involved in a personal injury claim. Initially, MEI appears to have relied upon this extraneous incident referenced in Exhibit (RSE-1T), page 17, to purportedly demonstrate where Arrow had once been unable to provide service. In parsing through pleadings dealing with the on-the-job injury/tort claim stemming from that incident that MEI appended in its pre-filed testimony, it attempted to argue that had Arrow Launch been more attuned to its customers’ needs, it would not have had to contract with *Island Commuter*, speculating that the foot injury to the worker that ensued would likely not have occurred.⁴⁵

49 Arrow, in its responsive testimony, refuted all of these rather baseless assumptions at (JLH-1T), pp. 16, 17, and provided both chronological and background context to the incident

⁴⁴ The Commission measures existing service generally at the time of the filing of an application. *Superior Refuse Removal, Inc. v. Washington Utilities and Transportation Commission*, 81 Wn. App. 43, 913 P.2d 818 (1996). While this examination of existing service and operations can generally involve a look-back over a year (*see, i.e.,* WAC 480-30-140(3)(b), prescribing that period for auto transportation applications) or so before an application filing to develop relevant aspects of regulated service and obviously to adjust for any seasonality factors, a 17 year interval is clearly irrelevant and immaterial to measuring service actually existing at the time of a competitive overlap application.

⁴⁵ Exhibit No. ___ RSE-1T, 18:13-17.

demonstrating why, far from being reflective of a service failure by Arrow, it in fact reflected a proactive approach in recognizing that the pipeline shutdown would cause a temporary surge in regulated service requests that it could protect against by temporarily leasing a suitable vessel. Moreover, Arrow has not needed to replicate any such extra vessel lease arrangements since that time and which vessel lease has not occurred at least in the last 15 years.⁴⁶

50 Not only would an isolated incident of 17 years ago in which a tort injury claim arose fail to begin to demonstrate any “service failure” on Arrow’s part, the Commission has previously found that, allegations of service problems from a period 10 years before a hearing, was insufficient as a basis upon which to grant authority under RCW 81.80.070.⁴⁷ Undoubtedly recognizing the likelihood of that outcome however, the applicant appeared to shift its emphasis during cross-examination of Arrow on this incident, eventually, after challenge, asserting that the incident was now a question of Mr. Harmon’s veracity as to the issue of whether the captain of the vessel in the 2000 Bellingham Bay incident was or was not an Arrow employee. MEI suggested Arrow’s lawyers in court pleadings in 2002 had argued that the captain was “not Arrow’s employee,” while Arrow now was claiming the vessel operator was its employee at the time. For the ultimate answer, Mr. Harmon deferred to the courts and could only testify about who paid for the captain’s services.⁴⁸

51 Over objections, this line of testimony was also allowed, with the administrative law judge finally questioning whether valuable hearing time was wasted.⁴⁹ In retrospect, it clearly was not time well spent and brings full circle the question of what the 2000 injury incident and

⁴⁶ TR. 547:6.

⁴⁷ Order M.V. No. 129839, *In re Joseph & Robert Paduano d/b/a Juanita Heavy Hauling*, App. E-18912 (June 1984).

⁴⁸ TR. 546:3-20.

⁴⁹ TR. 548:2-9.

questioning of the employment status of the vessel operator was designed to accomplish from an evidentiary standpoint. Once again, the Applicant failed to demonstrate relevance by this incident and testimony and, if not stricken outright, there should again be absolutely no finding of any basis that a service failure of any kind whatsoever has been proven on this record.

52 Even assuming the 17-years'-prior personal injury incident could be afforded any credibility tantamount to "service failure evidence," the Commission has previously articulated, (again in the context of substantially more liberalized entry in the motor carrier field), that isolated service failure evidence does not support granting new authority:

...because no carrier can reasonably be expected to provide absolutely perfect service in all instances. Here, the references of these shippers failed to establish the existence of service failures except those which might be expected from a well-managed carrier earnestly seeking to provide satisfactory service.⁵⁰

F. Rather than Service Failures, There is, Instead, Abundant Testimony on this Record of Superiority of Service by Arrow Launch and a Unique, Symbiotic Relationship with its Customers

53 Indeed, the overwhelming, uncontroverted weight of evidence in this record on the reasonableness, adequacy, comprehensiveness and absence of service failures is completely to the contrary. The testimony of Inchcape Shipping, Exhibit (BW-1T), Blue Water Shipping Company, Exhibit (CD-1T) and General Steamship Agencies, Exhibit (DSC-1T), all corroborate Arrow's exemplary caliber of service. As Doug Coburn of General Steamship attested:

We have never had a problem with Arrow, and Arrow is very proactive and responsive in getting us details and resolving concerns or issues. Arrow is truly a partner with us in proactively working to solve complex logistical and operational issues for our principals in which we have saved considerable time and resources due to the creative problem-solving capacity of Arrow and its

⁵⁰ Order M.V. No. 126828, *In re Lynden Transport, Inc. d/b/a Milky Way, Inc.*, App. E-18534 (Jan. 1983), at 5.

management. They are truly an extension of our own brand of customer service.⁵¹

This high praise about service even translated rather surprisingly to testimony expressing concern about a potential overlapping certificate grant. As Brian Westad of Inchcape Shipping noted when posed the question of any potential “dilution effect” of duplicating service potential through grant of MEI’s application:

...I would be concerned that a potential reduction in [Arrow’s] customer base or revenues could potentially increase costs. In short, any reduction in the resources or service availability of Arrow is a concern for us which is why I’m pleased to support their impeccable service history before the Commission.⁵²

V. SUMMARY/CONCLUSION

54 Ever since the inception of Arrow Launch in 1989 and its concomitant provision of regulated launch service, it has built and expanded that service on the diligent “care and feeding” of customers such as the three companies who testified in support of Arrow in this proceeding.⁵³ As demonstrated above, under the governing statute, the applicant, MEI, has simply failed to carry its burden of proof to establish any public need for any overlapping service authorization, much less that Arrow Launch has ever “failed or refused to furnish adequate and reasonable service.” In its 27 year history, the Commission has never received any complaints about Arrow’s service.⁵⁴ As evidenced, Arrow is a 24-hour-a-day, seven-day-a-week, 365-days-a-year company which has built its service profile, reputation and customer base through investment in all necessary equipment, personnel and launch moorage facilities to perform over and above any of the statutory standards implicated in this proceeding, and is constantly

⁵¹ Exhibit No. ___ DC-1T, 2:14-20.

⁵² Exhibit No. ___ BW-1T, 4, 5.

⁵³ Not to mention supporting letters, emails and/or other testimonials from Alaska Tanker Company, Polar and other vessel owner-operator customers, all commending Arrow Launch’s stellar service history at Exhibit No. ___ JLH-6.



⁵⁴ TR. 275: 1, 2; Exhibit No. ___ SS-1T, 5, 6.

striving to improve. Arrow has not and will not rest on any such service accolades and laurels but, as it assured the Commission in its testimony at JLH-10T, the outcome of this application will “have no bearing on the quality, caliber and focus on service Arrow has or will provide all its customers.” In so doing, it is more than willing to address both ancillary nonregulated service charges and how communication can be broadened with all its customers. While the sole supporting witness in this case had similar accolades and a complete lack of specific critique of Arrow, Arrow will nevertheless constantly strive to match its customers’ reasonable expectations and growth requirements with continuing focus on the overall responsiveness of its personnel and equipment. There is thus no question but that application TS-160479 fails on numerous fronts as a matter of fact and law for the Commission to contemplate authorizing any invasion of the franchise certificate of Arrow Launch Service, Inc.

55 Arrow Launch therefore respectfully asks the administrative law judge and this Commission to deny this application in toto.

DATED this 12th day of April, 2017.

RESPECTFULLY SUBMITTED,

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DOCKET TS-160479
CERTIFICATE OF SERVICE

I certify that on April 12, 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
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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><i>For Washington Utilities and Transportation Commission Staff:</i> 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</p>	<p><i>For MEI Northwest, LLC:</i> Mr. Dan Bentson Bullivant, Houser, Bailey, PC 1700 Seventh Ave, Suite 1810 Seattle, WA 98101 Email: dan.bentson@bullivant.com</p>
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Signed at Seattle, Washington this 12th day of April, 2017.



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