

1
2
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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
POST-HEARING BRIEF OF APPLICANT
MEI NORTHWEST, LLC

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. INTRODUCTION4

II. STATEMENT OF FACTS4

A. MEI’s operators have extensive experience providing launch services4

B. MEI is a financially viable company with more than enough resources to operate in the Puget Sound over the next 12 months5

C. The need for launch service in the Puget Sound continues to grow6

D. Arrow is inadequately serving its customers7

III. ARGUMENT10

A. The legislature permits the Commission to issue overlapping certificates of authority10

B. MEI Northwest is financially fit to operate its proposed service for at least 12 months11

1. MEI will generate at least \$700,000 in gross revenues from regulated and nonregulated services during its first year of operation11

a. Revenue and Ridership Forecast11

b. Costs of MEI’s proposed service12

2. MEI Northwest has \$300,000 cash-on-hand and does not have any current liabilities14

3. MEI’s assets are sufficient to operate its proposed launch service in the Puget Sound for at least 12 months15

4. MEI’s principal has extensive experience operating a successful multi-vessel, multi-port launch service in California15

C. Granting MEI’s application is in the public interest16

1. Mr. Aikin was a competent witness who was fully-authorized to testify on Crowley’s behalf16

2. Crowley supports MEI’s application and its representative testified to a present and future need for MEI’s services18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

D. Arrow Launch Services is underserving the Anacortes and Port Angeles markets20

1. The Commission should grant overlapping certificates to serve the Anacortes and Port Angeles areas20

2. The weight of the witness’s testimony should tip in MEI’s favor21

3. MEI is not “cherry-picking” the Anacortes and Port Angeles Markets22

4. MEI has produced sufficient proof that Arrow is underserving the Anacortes and Port Angeles markets23

IV. CONCLUSION24

1 **I. INTRODUCTION**

2 MEI Northwest LLC (“MEI”) requests that the Commission grant its application to
3 provide launch service in the Puget Sound. The current exclusive provider, Arrow Launch
4 Services, Inc. (“Arrow”), is underserving the market. MEI is financially fit and willing to
5 operate its proposed service for the next 12 months. The shipping public will benefit from
6 MEI’s application being granted because it will no longer suffer costly delays and timing
7 problems. Allowing another provider to enter the market will spur innovation and promote
8 increased customer service. For these reasons, the Commission should grant MEI’s
9 application.

10 **II. STATEMENT OF FACTS**

11 **A. MEI’s operators have extensive experience providing launch services.**

12 MEI is a newly formed limited liability company that was created for the purpose of
13 operating a launch service in Puget Sound. MEI is a wholly owned subsidiary of its parent
14 company, Marine Express, Inc. (“Marine Express”). Marine Express operates as a launch
15 service provider in California. It serves ports in the Bay Area, Long Beach, and Stockton.
16 Marine Express was formed in 1982 with one 26-foot fiberglass boat. In the intervening years,
17 Marine Express has expanded its fleet to 13 vessels and 5 barges, and has become a staple of
18 the California maritime industry.

19 Randy (“Troy”) Esch is a partner and Vice President of Marine Express. He is also the
20 President and Manager of MEI. Mr. Esch has extensive experience in the maritime industry
21 and grew up helping his father and grandfather run Marine Express. Mr. Esch holds a 200 Ton
22 Master of Towing License with Radar Unlimited and has been a specialty and relief captain
23 for the past 10 years in both San Francisco and Long Beach, California.

24 Mr. Esch has extensive experience operating a launch company. As a partner and Vice
25 President of Marine Express, he is responsible for the day-to-day management of a multi-port,
26 multi-vessel launch service provider. Mr. Esch is responsible for the operations, finances,

1 legal affairs, along with sales, marketing, and business development for Marine Express.
2 Under his watch, Marine Express has become a leader in innovation and environmental
3 responsibility. Marine Express has developed a cutting-edge preventative maintenance
4 program, which is run by a custom software program specifically tailored to Marine Express's
5 equipment list. Marine Express is forward-thinking and environmentally responsible. It has
6 completely repowered many of its vessels with new, environmentally-friendly propulsion
7 systems. And it has modernized standard Detroit 71 propulsion systems with environmentally-
8 friendly tier-2 kits on its other vessels. Marine Express believes that in order to preserve the
9 ocean—that is, the natural resource upon which Marine Express operates its business—it is
10 necessary to operate its fleet in a sustainable way.

11 **MEI is a financially viable company with more than enough resources to operate**
12 **in the Puget Sound over the next 12 months.**

13 When MEI submitted its application to the Commission, it indicated that it had
14 \$300,000 cash on hand and another \$105,000 in equipment-based assets. During the
15 evidentiary hearing, Mr. Esch referred to the \$300,000 in cash as a “loan” between Marine
16 Express and MEI. During cross-examination, Mr. Esch was not asked to clarify what he meant
17 by the term “loan” or whether the funds should better be characterized as a “capital
18 contribution.” Post-hearing, Mr. Esch produced a copy of the paperwork between Marine
19 Express and MEI and clarified that the \$300,000 was, in fact, a capital contribution from
20 Marine Express—the sole owner of MEI. That is, the \$300,000 is not a true “loan” because
21 MEI is under no obligation to repay the \$300,000 to Marine Express. There is no interest on
22 the capital contribution and MEI has no corresponding liability attached to the \$300,000.
23 Rather, the \$300,000 represents Marine Express's equity interest in MEI.

24 The information contained in the pro forma financial statement submitted by MEI in
25 conjunction with its application continues to be accurate. It has \$300,000 cash on hand and
26 another \$105,000 in equipment-based assets.

1 **C. The need for launch service in the Puget Sound continues to grow.**

2 Puget Sound is a dynamic market that continues to grow. The history of Arrow
3 demonstrates the growth and demand for launch service in the Puget Sound. When Jack
4 Harmon, the President and owner of Arrow, purchased Arrow's predecessor company in 1989,
5 the company had gross annual revenues of \$169,000 and operated three launch vessels.¹ Arrow
6 now grosses approximately \$6.5 million per year, it operates 12 vessels, and it employs at least
7 42 people.² Arrow projects that its business will continue to expand. Arrow recently entered
8 into three new leases with the Port of Port Angeles for facilities for a total cost of \$5,525 per
9 month.³ When entering into these leases, Arrow represented to the Port of Port Angeles that
10 it currently had 40 employees and anticipated that it would grow the number of employees to
11 50 within the next three years.⁴

12 Crowley Petroleum Services also believes that the Puget Sound market continues to
13 grow. Crowley is one of the largest consumers of launch services in Puget Sound, representing
14 15% of the regulated market.⁵ Its representative, Marc Aikin, testified at the evidentiary
15 hearing that the Puget Sound is a growing market for Crowley and anticipates that its
16 operations in Puget Sound will continue to expand:

17 Our market sector continues to grow. We are adding more
18 vessels. We utilize the anchorages in Anacortes to a great
19 extent. We have multiple vessels at anchor at any given time in
20 the north Puget Sound all needing to be serviced. We have
21 vessels in Port Angeles. We have more vessels coming to this
22 coast.⁶

23 This growth is consistent with what MEI President Troy Esch has experienced with
24 Marine Express in other West Coast ports. Mr. Esch provided vessel arrival data for the Bay

24 ¹ Harmon, JLH-1T. 2:8-14.

25 ² *Id.*

25 ³ See JLH-1 CX at 29-37.

26 ⁴ *Id.* at 35.

26 ⁵ Sevall, TR. 271:2-6.

26 ⁶ Aikin, TR. 349:16-23.

1 Area and Puget Sound.⁷ These vessel statistics show that both the Bay Area and the Puget
2 Sound continue to thrive and continue to be visited by hundreds of ships every year requiring
3 launch services.

4 **D. Arrow is inadequately serving its customers.**

5 With one minor exception,⁸ Arrow is the sole launch service provider in the Puget
6 Sound. It has authority to operate launch service throughout the entire Puget Sound, as well
7 as Grays Harbor. Arrow also provides nonregulated services to customers within the Puget
8 Sound, and often offers a mixture of regulated and nonregulated services to a customer during
9 a single launch.⁹

10 During the application process, the Commission Staff conducted an informal survey of
11 Arrow's customers. The Commission Staff looked at Arrow's customer list and selected the
12 six largest customers to survey.¹⁰ Those six customers represent 70% of Arrow's regulated
13 revenue.¹¹ Of those six customers, four openly supported increased competition in the Puget
14 Sound.¹² The majority of Arrow's largest customers support competition in the Puget Sound
15 for launch services.¹³

16 Mr. Esch has also heard a number of complaints about Arrow's customer service over
17 the years. While many of the complaints date back years, complaints from Crowley are current
18 and substantial. Crowley is one of the biggest utilizers of launch services in the Puget Sound.¹⁴

21 ⁷ Esch, RSE-1T. 6:1-7:26.

22 ⁸ Argosy has limited overlapping authority to provide launch service in Elliott Bay.

23 ⁹ For example, Arrow will provide regulated launch services to a company like Crowley, but then will
24 also provide nonregulated services such as crane service when loading or unloading goods for Crowley.

25 *See, e.g.,* Aikin, TR. 392:16-393:4.

26 ¹⁰ Sevall, TR. 269:7-13.

¹¹ *Id.* at 269:16-18.

¹² Sevall, SS-1T. 7:1-8; Sevall, TR. 270:21-271:1.

¹³ Also noteworthy is that one of the customers that did not openly support competition, Blue Water
shipping, does not directly utilize launch services. Blue Water Shipping acts as a middleman between
ship owners and the launch provider; Blue Water Shipping does not itself utilize Arrow services.
Collins, TR. 476:20-477:6.

¹⁴ Sevall, TR. 271:2-6.

1 As mentioned above, Crowley currently represents 15% of the total launch service market in
2 the Puget Sound.¹⁵

3 Crowley is dissatisfied by timing and delay issues associated with Arrow's services,¹⁶
4 as well as the lack of an alternative service provider.¹⁷ Crowley's frustration with Arrow's
5 services reached a tipping point in 2013.¹⁸ Over the years, Crowley has experienced timing
6 problems with Arrow's service and has experienced situations where there were not enough
7 Arrow launches available to timely serve its vessels.¹⁹ While Arrow purports to keep 4 vessels
8 in Anacortes to serve the north Puget Sound, Marc Aikin, Crowley's representative, testified
9 that there have been occasions where his vessels were delayed because Arrow only had one
10 launch available to serve Crowley's two vessels.²⁰ Crowley has also been frustrated with the
11 ancillary, nonregulated charges that Arrow invoices to Crowley.²¹ Because Arrow is the sole
12 launch provider in the area, it is able to charge high ancillary charges on crane and other
13

14 ¹⁵ *Id.*

15 ¹⁶ *See, e.g.,* Aikin, TR. 350:8 ("I can say they [Arrow] have delayed services . . ."); Aikin, TR. 362:14-
16 19 (" . . . but if I call the [Arrow] dispatch and the dispatcher says, well, you want to get there at 03, but
17 we don't have a launch because I have to get a guy there, so about 04 will be okay, that's a delay.
18 That's not a delay of record. It's a delay to my operation.").

17 ¹⁷ *See, e.g.,* Aikin, TR. 356:13-22 ("We use launch services up and down the West Coast in every port.
18 San Francisco, if I call Marine Express and they say, I'm sorry, I don't have a launch available, I can
19 call across the bay and get the same service provided to Anchorage 9 without any delay to my
20 operation. So if I have a machinist that earns \$250 an hour, it's important for me to get him on the
21 vessel, and I have a vessel that earns \$35,000 a day. I need to get him out there.").

20 ¹⁸ Aikin, TR. 390:6-24 ("The source of the frustration was that the ancillary billing charges were fairly
21 high and inconsistent in the billings. The director of operations at the time put some onus on her to
22 look into it and get a handle on it, because it was just a total—it was the cost of our business. She
23 wanted to manage that cost. She was asked to look into it, and she became frustrated trying to get
24 answers and address the details of the invoice.").

22 ¹⁹ *Id.* at 350:7-9 (stating Arrow has delayed services); 362:6-19 (discussing unavailable launches);
23 364:17-365:6 (discussing delayed launch provisions from Arrow).

23 ²⁰ *Id.* at 364:17-365:6 ("The circumstances were launch delivery for stores to vessels in Puget Sound.
24 And it was multiple vessels were loaded and delivered to vessels because there was not two vessels
25 available [from Arrow] for the two requests we made.").

24 ²¹ *Id.* at 392:16-393:4 ("The crane that's located there was—there's a port crane that is in Anacortes,
25 the Cap Sante Marina, and that port crane had a—if I—as a business within Anacortes, I could get the
26 key and operate it through a monthly charge at the port. Arrow was charging a fairly high rate. I don't
27 know off the top of my head what that was, but I was told it was a high rate for that use of that crane.
28 And, yet, as—the crew had used that crane, but they would also use their boom truck. It was
29 inconsistent as to what was being used and the charges that were being incurred.").

1 dockside services.²² When Arrow is providing a mixture of regulated and nonregulated
2 services, it takes advantage of that fact and charges high and inconsistent rates for the ancillary
3 services.²³ For example, Arrow pays the Port of Anacortes \$30 per month for access to the
4 port crane, but charges Crowley a significantly higher amount for the service.²⁴ Arrow is not
5 passing along any of its savings to Crowley.²⁵

6 As a result of the timing and delay issues, as well as excessive ancillary costs, Crowley
7 representatives began communicating with the Commission in 2013 to determine what other
8 options it had for launch services.²⁶ Eventually Crowley published a solicitation for launch
9 services through its procurement group.²⁷ Crowley was seeking to have a direct relationship
10 with a launch service provider “to provide consistent services in each of the ports [it operates
11 in].”²⁸ Mr. Aikin testified that the request was sent out due to the frustration Crowley had with
12 Arrow’s charging for ancillary services and delays.²⁹

13 Mr. Aikin testified that the timing and ancillary charge problems are unique to Puget
14 Sound.³⁰ Mr. Aikin testified that on all ports Crowley operates in on the West Coast, Crowley

16 ²² *Id.*

17 ²³ *Id.*

18 ²⁴ *Id.* at 395:9-19 (“The concern was with the equipment charge, and because it was equipment that
19 Arrow, basically, didn’t pay for—that doesn’t pay for other than a \$30-a-month charge to utilize that
20 crane. Yet, there were no savings passed on. There was no—anyway, there was no savings passed on.
21 Let’s put it that way.”).

22 ²⁵ *Id.*

23 ²⁶ *Id.* at 386:4-21 (“I know that Lindy Evans has communicated with the UTC about a variety of
24 concerns, but I don’t think they were complaints. She was trying to understand the process, the system.
25 . . . Part of her inquiry was around a solicitation that we put out on the street. She wanted to make sure
26 that what we were doing was legal. So we put out a solicitation for launch services in the Northwest—
27 actually, up and down the coast.”).

28 ²⁷ *Id.* at 395:20-396:4 (“The solicitation was published through our procurement group to seek launch
29 services up and down the West Coast. So what we were looking to do was to have a direct relationship
30 with a launch provider to provide consistent services in each of the ports.”).

²⁸ *Id.*

²⁹ *See id.* at 397:24-398:1 (“[The solicitation] was—initiated out of the frustration that Lindy had in
2013.”).

³⁰ *See id.* at 356:8-357:1 (“Well, let me approach it from a slightly different angle. We use launch
services up and down the West Coast in every port. San Francisco, if I call Marine Express and they
say, I’m sorry, I don’t have a launch available, I can call across the bay and get the same service
provided to Anchorage 9 without any delay or disruption to my operation. So if I have a machinist

1 has options for its launch services.³¹ If Crowley contacts one launch service provider in San
2 Francisco, such as Marine Express, and Marine Express does not have a launch available,
3 Crowley can contact another provider and receive the launch service with no delay or
4 disruption to its operations.³² The same is not true in Puget Sound.³³ If Crowley contacts
5 Arrow and asks for launch service at a particular time and Arrow tells Crowley it is not
6 available until an hour or two later, Crowley has no other option but to wait.³⁴ This impacts
7 Crowley's business operations because it puts its vessels behind schedule and makes it incur
8 additional costs, such as continuing to pay the hourly rate for skilled tradesmen who are forced
9 to wait idly on the vessel until the launch is available.³⁵

10 **III. ARGUMENT**

11 **A. The legislature permits the Commission to issue overlapping certificates of** 12 **authority.**

13 Launch service in Washington is regulated by the Commission. Before a commercial
14 ferry (or launch service provider) may operate in the Puget Sound for the public use and hire,
15 it must first apply for and obtain from the Commission a "certificate declaring that public
16 convenience and necessity require such operation."³⁶

17 In order to obtain a certificate of public convenience and necessity for territory that is
18 already served, the applicant must demonstrate that certain conditions are satisfied. The
19 applicant must demonstrate to the Commission that it has the financial resources to operate its

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21 _____
22 that earns \$250 an hour, it's important for me to get him on the vessel, and I have a vessel that earns
23 \$35,000 a day. I need to get him out there.").

24 ³¹ *Id.*

25 ³² *Id.*

26 ³³ *Id.* at 362:6-19 ("I know that on several occasions—and, you know, I can document—I think Jack
has probably done a good job of documenting those invoices, and they're very accurate. And we don't
have any issue with that, but if I call the dispatch and the dispatcher says, well, you want to get there
at 03, but we don't have a launch because I got to get a guy there, so 04 will be okay, that's a delay.
That's not a delay of record. It's a delay of my operation.").

³⁴ *Id.*

³⁵ *See id.* at 356:4-22.

³⁶ RCW 81.84.010(1).

1 proposed service for at least 12 months,³⁷ that granting the certificate is in the public interest,
2 and that the current certificate holder has failed to provide reasonable and adequate service.³⁸
3 All of these conditions are met in this case.

4 **B. MEI Northwest is financially fit to operate its proposed service for at least 12**
5 **months.**

6 All parties agree that MEI has enough capital to operate its proposed service for at least
7 12 months. When determining financial fitness, the Commission should consider the
8 following factors: (1) ridership and revenue forecasts; (2) the cost of service for the proposed
9 operation; (3) an estimate of the cost of the assets to be used in providing the service; (4) a
10 statement of the total assets on hand of the applicant that will be expended on the proposed
11 operation; and (5) a statement of prior experience, if any, in such field by the applicant.³⁹

12 **1. MEI will generate at least \$700,000 in gross revenues from regulated and**
13 **nonregulated services during its first year of operation.**

14 **a. Revenue and Ridership Forecast**

15 Mr. Esch, based on his experience operating a successful launch service in California,
16 reasonably estimates that MEI will generate \$500,000 in regulated launch services during its
17 first year in operation.⁴⁰ This estimate is also based on the market its customers who operate
18 in California and Washington have informed Mr. Esch is available.⁴¹ Based on Mr. Esch's
19 experience, the market his customers have told him is available, and the testimony presented
20 at the evidentiary hearing, MEI anticipates that during its first year of operation it will provide
21 regulated launch services three-to-four times per week for four-to-eight hours per day.⁴²
22
23

24 ³⁷ RCW 81.84.020(2).

³⁸ RCW 81.84.020(1).

³⁹ RCW 81.84.020; *In re Pacific Boat Enterprises*, 2000 WL 1673088, at 2 (2000).

⁴⁰ Esch, RSE-1T. 8:16-22; 9:1-9.

⁴¹ *Id.* at 9:1-9. See also Aikin, TR. 356:8-357:1 (Mr. Aikin describing how Crowley would utilize
26 more than one launch provider if given the option).

⁴² Esch, RSE-1T. 9:10-13.

1 MEI will also generate approximately \$200,000 in its first year from nonregulated
2 services, such as accessorial and project management services.⁴³ Based on Mr. Esch's
3 experience, accessorial services, such as handling cargo or waste for vessels, is involved in
4 between 30% and 50% of the launch services it provides.⁴⁴ Mr. Esch reasonably believes that
5 vessels in the Puget Sound will require accessorial services on a similar basis. Mr. Esch also
6 included project management fees in its estimate of nonregulated services. Marine Express
7 offers those services in California, and it has become a staple of Marine Express's California
8 operations. The project management services are often offered to cruise ship customers,⁴⁵ and
9 based on the relationships Marine Express has created with those customers in California, it
10 reasonably anticipates that those same customers will utilize those services in Puget Sound.

11 b. *Costs of MEI's proposed service*

12 In its application, MEI projected the costs of operating its proposed service at
13 \$552,636.⁴⁶ The pro forma financial statement supplied by MEI contained a detailed
14 breakdown of the estimated costs of doing business in the Puget Sound. In estimating these
15 costs, Mr. Esch relied upon his years of experience operating a similar launch service in
16 California. Based on the estimated revenues MEI reasonably believes it will generate during
17 its first year of operation, MEI estimates it will net \$145,364 in profit during its first year from
18 regulated and nonregulated services.⁴⁷

19 Arrow's personal CPA, Weldon Burton, attempted to undermine the calculations Mr.
20 Esch provided to the Commission. Mr. Burton opined that MEI had overestimated its profits
21 (by not demonstrating verified customer need) and underestimated the costs that it would incur
22 during its first year of operation. Mr. Burton's biased testimony is flawed. First, and perhaps
23

24 ⁴³ *Id.* at 8:22-25.

25 ⁴⁴ *Id.* at 10:11-17.

26 ⁴⁵ *Id.* at 11:19-24; EH Vol. III at 143:12-18.

⁴⁶ See TS-160479 Docket, Initial Filing, MEI Northwest LLC Application for Commercial Ferry Certificate, at 7.

⁴⁷ *Id.*

1 most importantly, Mr. Burton applied the incorrect standard when analyzing MEI's pro forma
2 financial statement. During cross-examination, Mr. Burton testified that he applied "a
3 reasonable business standard" during his review of MEI's pro forma.⁴⁸ He did not apply the
4 *statutory standard* that looks only at whether the applicant can operate its proposed service for
5 12 months.

6 Second, Mr. Burton's specific criticisms of MEI's pro forma are unsupported by facts
7 or data. In his direct testimony, Mr. Burton specifically took exception with MEI's fuel
8 calculations and labor costs.⁴⁹ Mr. Burton's assumptions about fuel consumption are
9 fundamentally flawed. He assumed that MEI's launches would be using a 75% throttle rate
10 during every hour an MEI vessel operated.⁵⁰ As Mr. Esch explained, this is simply not the
11 case. There are many times when a launch is operating that it is simply idling or operating at
12 a much lower throttle rate and thus is burning significantly less fuel.⁵¹

13 Further, Mr. Burton's estimates regarding how much MEI would need to pay its
14 captains and deckhands were flawed and unreasonable. Mr. Burton provided estimates for
15 captain and deckhand labor based on the 2016 Marine Employees' Compensation Survey
16 published by the Office of Financial Management for the State of Washington.⁵² This survey
17 is published for collective bargaining purposes for employees of the Washington State Ferry
18 System and explicitly states that salary figures collected from less than 15 organizations should
19 be interpreted with discretion because of a less than adequate sample size.⁵³ The salary figures
20 for both captains and deckhands provided in the survey had much less than 15 organizations

22 ⁴⁸ Burton, TR. 425:18-22.

23 ⁴⁹ Burton, WB-1T. 3:19-5:5.

24 ⁵⁰ *Id.* at 3:25-4:8.

25 ⁵¹ Interestingly, Mr. Burton attempted to support his 75% throttle estimate at the evidentiary hearing
26 by discussing his experience operating his personal trawler. *See* Burton, TR. 445:14-446:15. While
this personal anecdote was interesting, Mr. Burton admits that he has never operated a launch service
before and does not know from personal experience what percentage of the time a launch vessel is
idling or operating at a lower throttle rate. Burton, TR. 433:18-22.

⁵² Burton, WB-1T. 4:9-19.

⁵³ Burton, TR. 436:1-21.

1 contributing.⁵⁴ Further, Mr. Burton readily admits that Arrow pays the vast majority of its own
2 employees an hourly rate below the figure he cites to in the survey.⁵⁵ Mr. Burton's critiques
3 related to salary miss the mark, as he is saying that MEI underestimated its expenses because
4 it was not going to pay its employees at an hourly rate that even Arrow does not pay to 80%
5 of its deckhands and captains.

6 Even if the Commission were to take Mr. Burton's flawed critiques at face value, he
7 opined that MEI would operate at a maximum loss of approximately \$90,000 during its first
8 year of operation.⁵⁶ As MEI provided in its application (and as discussed in more detail below),
9 MEI has \$300,000 of cash-on-hand with no corresponding liabilities attached to it. Thus, even
10 if Mr. Burton's analysis were correct (which it is not), MEI has sufficient resources to absorb
11 this operating loss and continue to operate its proposed service.

12 **2. MEI Northwest has \$300,000 cash-on-hand and does not have any current**
13 **liabilities.**

14 During the evidentiary hearing, Mr. Esch referred to the capital that MEI had on hand
15 as a "loan" from MEI's parent company, Marine Express.⁵⁷ After this testimony, Judge
16 Friedlander made a bench request for the documents supporting this transaction.⁵⁸ MEI
17 produced the supporting documents on February 21, 2017.⁵⁹ The documents record the terms
18 of the agreement between MEI and Marine Express, and show that Mr. Esch could have better
19 characterized the \$300,000 as a "capital contribution" during the evidentiary hearing. The
20 transaction between the parties was not truly a "loan." Marine Express, Inc. made a capital
21 contribution to MEI in the amount of \$300,000. This is not a loan and MEI is not required to
22 pay this sum back. MEI correctly described its assets and liabilities in its initial application.
23 And Mr. Esch was never asked to clarify his understanding of the difference between a "loan"

24 ⁵⁴ *Id.* at 438:1-5; 438:25-439:8.

25 ⁵⁵ *See id.* at 441:19-442:15.

26 ⁵⁶ *Id.* at 424:5-10.

⁵⁷ Esch, TR. 99:22-100:4.

⁵⁸ Esch, TR. 220:18-20.

⁵⁹ *See* Email date February 21, 2017, from Dan Bentson to all parties enclosing MEI's documents.

1 and a “capital contribution” during his cross examination. MEI has \$300,000 cash-on-hand
2 and another \$105,000 worth of support vehicles and equipment. It has no current liabilities.

3 **3. MEI’s assets are sufficient to operate its proposed launch service in the**
4 **Puget Sound for at least 12 months.**

5 Approximately one month after MEI filed its application, the Commission Staff
6 submitted its financial review.⁶⁰ The financial review noted that MEI had access to a large
7 amount of cash. According to the Commission Staff: MEI “has (access to) adequate resources
8 and therefore staff concludes the company is financially fit to provide the applied for
9 service.”⁶¹ The Commission Staff, in both its direct testimony and its cross-answering
10 testimony, affirmed that it believed MEI was financially fit to operate its proposed service for
11 12 months.⁶² Further, during cross-examination, Mr. Sevall testified on behalf of the
12 Commission Staff that even if the capital available to MEI was in the form of a loan (which it
13 is not), his analysis regarding financial viability would not change.⁶³

14 **4. MEI’s principal has extensive experience operating a successful multi-**
15 **vessel, multi-port launch service in California.**

16 Mr. Esch is an experienced launch service provider and business owner. He has
17 managed the day-to-day activities of a successful multi-vessel, multi-port launch service in
18 California for the past 10 years. His knowledge and experience operating Marine Express will
19 inform his business judgment and choices if allowed to operate in the Puget Sound.

20 MEI is financially fit to operate its proposed service in the Puget Sound for 12 months.
21 MEI has satisfied its burden under RCW 81.84.020(2) and produced sufficient evidence that
22 it is has the necessary financial resources. The Commission Staff believes that MEI has met
23 its burden, and the Commission should likewise conclude that this statutory prerequisite is met.
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25 ⁶⁰ See Docket TS-160479, Filing dated June 9, 2016, Report, MEI Northwest LLC’s Financial Review.

26 ⁶¹ *Id.*

⁶² Sevall, SS-1T. 3:11-14; Sevall, SS-4T. 2:3-7.

⁶³ Sevall, TR. 284:18-25.

1 **C. Granting MEI's application is in the public interest.**

2 "The Commission evaluates the public convenience and necessity of the application by
3 considering whether there is a present and future need for the proposed services."⁶⁴ Public
4 need is determined through testimony of people who will use the applicant's proposed services,
5 as well as through testimony of the applicant's personnel.⁶⁵ Generally, then, an applicant can
6 demonstrate that its application will serve public convenience and necessity by calling
7 "shipper-support witnesses."⁶⁶ These witnesses testify as to the proposed routes and how they
8 know that the public will benefit from them, either from their own anticipated use of the route
9 or from their knowledge that certain portions of the public would use such a route.⁶⁷

10 **1. Mr. Aikin was a competent witness who was fully-authorized to testify on**
11 **Crowley's behalf.**

12 In his pre-filed direct testimony, Mr. Esch testified that significant customers were
13 dissatisfied with Arrow's launch services in the Puget Sound. Arrow challenged the grounds
14 for Mr. Esch's assertion and, in response, Mr. Esch provided substantial evidence: a shipper-
15 support statement from Crowley's Director of West Coast Engineering, Marc Aikin. Arrow
16 then moved to have Mr. Aikin's testimony stricken, but when Judge Friedlander denied
17 Arrow's motion to strike, Arrow contended that it would be prejudiced if Mr. Aikin failed to
18 testify at the evidentiary hearing in person. Accordingly, Judge Friedlander required Mr. Aikin
19 to testify in person at the hearing.

20 Following Mr. Aikin's testimony, however, Arrow took the opposite position.⁶⁸ For
21 the first time, Arrow argued that Mr. Aikin's testimony was insufficient and that only the
22 testimony of another employee, Lindy Evans, could establish Crowley's position regarding the

24 ⁶⁴ *In re Application No. B-079240 of Pacific Cruises Northwest, Inc., Order No. 4, Initial Order*
25 *Granting Application for Certificate of Public Convenience and Necessity with Conditions*, at 3.

25 ⁶⁵ *Id.* at 3-4.

26 ⁶⁶ *See In re Dutchman Marine, LLC* 2001 WL 1873073, at 8 (2001).

26 ⁶⁷ *See id.*

26 ⁶⁸ Aikin, TR. 412:15-413:4.

1 sufficiency of Arrow’s launch services.⁶⁹ According to Arrow, Mr. Aikin was not qualified to
2 testify on Crowley’s behalf—even though Mr. Aikin is the Direct of Engineering for all West
3 Coast Ports (including the Puget Sound) and Crowley had selected him.

4 This is wrong. With respect to a certificate application, the Commission may look to
5 the Washington State Rules of Evidence for guidance.⁷⁰ Under CR 30(b)(6), a corporation
6 (which is a legal fiction that can *only* testify through its representatives) can designate an
7 individual to testify on its behalf. Rule 30(b)(6) allows a corporation to select a corporate
8 representative that will “testify as to matters known or reasonably available to the
9 organization.”⁷¹ Under rule 30(b)(6), corporate designees are allowed to testify to matters on
10 which they have no personal knowledge, based on their review of documents and
11 conversations with other people in the organization.⁷²

12 Here, Crowley selected Mr. Aikin to articulate its position regarding Arrow’s launch
13 services in Puget Sound and express Crowley’s dissatisfaction with Arrow. As Crowley’s
14 corporate designee, Mr. Aikin had the opportunity to review documents and confer with other
15 Crowley employees, which he did.⁷³ Mr. Aikin, for example, testified expressly that he had
16 discussed the matter with Ms. Evans, was familiar with her complaints, and was familiar with
17 the timing and delay issues caused by Arrow’s inadequate service.⁷⁴

18 Moreover, it was up to Crowley to select the appropriate representative to testify on its
19 behalf. Crowley, through its own internal decision-making process, selected Mr. Aikin. Other
20 Crowley employees, like Ms. Evans, report to Mr. Aikin. And Mr. Aikin is in charge of launch
21 services across the West Coast. He is therefore in a superior position to Ms. Evans to describe

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23 ⁶⁹ *Id.*

⁷⁰ WAC 480-07-495(1) (presiding officer will consider rules of evidence applicable to nonjury civil trials in Washington superior courts).

⁷¹ *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App 759, 766, 82 P.3d 1223 (2004).

⁷² *See Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 40-41, 111 P.3d 1192 (2005) (discussing how an individual representative’s lack of personal knowledge is irrelevant and the representative must take steps to learn all that the corporation knows regarding requested topics).

⁷³ *See Aikin*, TR. 348:7-15.

⁷⁴ *See, e.g., Aikin*, TR. 348:21-23.

1 Crowley's experience in the Puget Sound when compared to other ports that Crowley operates
2 in. He testified on behalf of Crowley in the same way that a witness testifies on a corporation's
3 behalf in civil litigation. And it was Crowley's prerogative to choose who would represent the
4 company before the Commission. Accordingly, the Commission should attribute Mr. Aikin's
5 testimony to Crowley.

6 Importantly, Crowley is the Arrow customer at issue—not Crowley's individual
7 employees. Mr. Aikin was selected by one of Arrow's largest customers to provide testimony
8 on its behalf. The Commission should consider the testimony provided by Mr. Aikin, in which
9 he fully explained the grounds for Crowley's dissatisfaction with Arrow's services, its support
10 for MEI's application, and the need for multiple launch service providers in Puget Sound.

11 **2. Crowley supports MEI's application and its representative testified to a**
12 **present and future need for MEI's services.**

13 In its support statement, Crowley indicated that its transportation needs were not
14 currently being met and that if MEI's request for a certificate were denied, it would have a
15 negative effect on Crowley's business.⁷⁵ Mr. Aikin testified consistently with this statement
16 during the evidentiary hearing.

17 As to present need, Mr. Aikin discussed timing issues with Arrow's services, which
18 have resulted in delays for Crowley and Crowley's customers. Mr. Aikin noted that Crowley
19 has experienced numerous situations where it needed launch service at a certain time, but that
20 Arrow (despite holding itself out as a "24/7/365" operator) did not have a launch available in
21 the immediate area, which resulted in a delay before the service could be performed.⁷⁶ In
22 Crowley's experience, these delay and timing issues are unique to the Puget Sound. Mr. Aikin
23 testified that in every other port Crowley operates in, if one provider is unavailable to provide
24 the service when Crowley needs it, Crowley can simply call the other provider to perform the
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26 ⁷⁵ RSE-8.

⁷⁶ See, e.g., Aikin, TR. 362:6-19.

1 launch service.⁷⁷ Mr. Aikin further testified that because of these delay issues, Crowley has a
2 present need for another launch service provider so that Crowley can eliminate these costly
3 delays.⁷⁸

4 Mr. Aikin also testified that Crowley has a future need for an additional service
5 provider. He testified that Crowley's business continues to grow and its presence in the Puget
6 Sound is getting larger.⁷⁹ Mr. Aikin specifically testified that Crowley is "concerned long-
7 term that [it] need[s] to have high quality service delivered in a timely fashion."⁸⁰ Mr. Aikin
8 reiterated that this future concern is based on Crowley's past experience with Arrow, and
9 extrapolating that experience forward worries Crowley: timing and delay issues will only
10 increase in the future.⁸¹ Because Crowley has a present need for another launch service
11 provider due to timing and delay issues, this need will only increase in the future as Crowley
12 continues to thrive and expand its business operations in the Puget Sound.

13 Crowley is one of Arrow's largest customers. Between June 2015 and May of 2016,
14 Arrow invoiced Crowley for services over 900 times.⁸² The Commission Staff testified that
15 Crowley alone represents 15% of the total market for launch services in the Puget Sound.⁸³
16 Arrow, however, is not currently providing reliable enough service to one of the largest
17 consumers of launch services or ensuring that Crowley does not encounter unnecessary delays.

18 Under the statutory framework set out in RCW 81.84.020 and the factors the
19 promulgated in *In re Application No. B-079240 of Pacific Cruises Northwest, Inc.*, MEI has
20 carried its burden of demonstrating a present and future need for additional launch services.
21 MEI presented a significant shipper support witness, Crowley, whose representative testified
22 to timing and delay issues and informed the Commission that it required the services of another

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24 ⁷⁷ *Id.* at 356:8-357:1.

⁷⁸ *See id.*

25 ⁷⁹ *Id.* at 349:13-25.

⁸⁰ *Id.* at 349:24-25.

26 ⁸¹ *Id.* at 380:17-381:1.

⁸² *Id.* at 354:5-19.

⁸³ Sevall, TR. 271:3-6.

1 provider so that its current and future launch service needs could be met. The Commission
2 should find that MEI has proved that the public convenience and necessity requires another
3 service provider in the Puget Sound.

4 **D. Arrow Launch Services is underserving the Anacortes and Port Angeles markets.**

5 The Commission must also determine “whether the territory at issue [in the application]
6 is ‘territory already served’ within the meaning of the statute.”⁸⁴ The factors the Commission
7 looks to when determining whether the territory is already served are: (1) the extent of the
8 authority of the current certificate holder; (2) whether the current certificate holder is serving
9 the territory to the extent of its authority to do so; and (3) whether the type of service provided
10 by the current certificate holder reasonably serves the market.⁸⁵ If the current provider is not
11 furnishing reasonable and adequate service, the Commission may grant an overlapping
12 certificate of authority.⁸⁶

13 “The grant of authority to one applicant does not preclude the simultaneous grant of
14 authority for competing service over the same or similar route, or a subsequent grant of such
15 authority, on proper grounds. The Commission may grant competing applications for authority
16 to conduct commercial passenger ferry service if it finds that the nature of the service, the level
17 of need, and the applicants’ ability to fully meet shippers’ needs, are consistent with a grant of
18 authority to more than one carrier.”⁸⁷ Further, when deciding whether to grant overlapping
19 certificates, “the Commission also considers the potential benefits of competition in the case
20 of contemporaneous applications for overlapping territories, or for subsequent applications to
21 serve in a territory, or over a route already served.”⁸⁸

22 **1. The Commission should grant overlapping certificates to serve the**
23 **Anacortes and Port Angeles areas.**

24 ⁸⁴ *In re Application of Pacific Cruises*, at 10.

25 ⁸⁵ *Id.*

26 ⁸⁶ RCW 81.84.020(1).

⁸⁷ *In re Dutchman Marine*, at 13 (citing *In re Jack Rood and Jack L. Harmon, Jr., d/b/a Arrow Launch Service, Order S.B.C. No. 468, In re Belairco, Inc., (May 1990)*).

⁸⁸ *Id.*

1 Mr. Aikin's testimony demonstrates that Arrow is not adequately serving its certificated
2 area, specifically in the Anacortes and Port Angeles territories. In addition to the timing and
3 reliability issues discussed in detail above, Arrow is not providing reasonable service by
4 bundling regulated and nonregulated services together, and then charging an unreasonable
5 price for the nonregulated services. As Mr. Aikin testified, Arrow routinely charges
6 inconsistent and inflated rates for its nonregulated services, such as its crane services and other
7 dockside services. Because Arrow is the only launch service provider, it can then use this to
8 its advantage and charge an unnecessarily high rate on nonregulated services, such as crane
9 services, when it bundles regulated and nonregulated services together. These ancillary
10 services can often add up to more than the cost of the launch service itself.⁸⁹ Crowley is left
11 in a no-win position when it comes to these services. Because Arrow is the only launch
12 provider that can put the cargo on or off the boat, Crowley is essentially required to use
13 Arrow's ancillary services as well.

14 The timing and delay issues described above cannot be overstated. Crowley is a large
15 consumer of launch services in the Puget Sound and when it suffers delays caused by the
16 unavailability of Arrow's launches, it puts Crowley's customers behind schedule.⁹⁰ "When a
17 petroleum tanker operated by a major oil company is behind schedule, it becomes a serious
18 problem for Crowley."⁹¹

19 **2. The weight of the witness's testimony should tip in MEI's favor.**

20 The Commission heard testimony related to the adequacy of Arrow's service from a
21 number of different witnesses in this case. MEI presented the shipper support statement of
22 Crowley, and Arrow presented three supporting witnesses, Brian Westad, Debra Collins, and
23 Doug Coburn. Of these witnesses, only Crowley is a direct customer of Arrow, and only
24 Crowley composed the content and form of its own statement. That is, all of three supporting
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26 ⁸⁹ Esch, TR. 218:6-10.

⁹⁰ RSE-8.

⁹¹ *Id.*

1 witnesses presented by Arrow acknowledged that Arrow's counsel had prepared their pre-filed
2 testimony.

3 Arrow's three witnesses are all shipping agents that arrange for services on behalf of
4 different vessels entering the Puget Sound. None of those witnesses are direct consumers of
5 Arrow's services in that they are arranging for launch services for another party and not
6 utilizing those services themselves.⁹² Because they are not the direct recipients of Arrow
7 services, they are not in the best position to speak on the adequacy of the current service being
8 provided in the Puget Sound. Further, two of the three agents have only ever worked with
9 Arrow and have no frame of reference from which to compare Arrow's service.

10 Crowley, on the other hand, is a direct consumer of Arrow services and is in a better
11 position to properly assess the levels of service it has received over the years. Critically,
12 Crowley also operates in numerous other ports along the West Coast and has an understanding
13 of how launch service providers operate in the Puget Sound when compared to those other
14 ports. Thus, Crowley is in the best position to compare its customer service experiences it
15 receives in ports with multiple launch providers to a territory that is only served by one.

16 Crowley is also the only witness that independently drafted and prepared its own
17 statement. Counsel for MEI had no input or assistance in drafting Crowley's support statement
18 and did not prepare a set of questions for Crowley to answer. Rather, MEI simply provided
19 Crowley with a blank shipper support statement it obtained from the Commission website, and
20 Crowley returned a completed and signed statement after it had determined what testimony it
21 would provide in support of MEI's application. In contrast, all three witnesses presented by
22 Arrow acknowledged that Arrow's attorney prepared their pre-filed testimony.

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24
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26 ⁹² See Westad, TR. 470:11-14; Collins, TR. 476:17-477:6; Coburn, TR. 482:21-25.

1 When the Commission is presented testimony independently prepared and drafted from
2 a direct consumer of Arrow's services, this testimony should be given more weight than
3 testimony given by middlemen who do not directly use Arrow's launch services.

4 **3. MEI is not "cherry-picking" the Anacortes and Port Angeles markets.**

5 Counsel for Arrow spent a significant amount of time questioning witnesses during the
6 evidentiary hearing about "cherry-picking," or specifically selecting the highest-profit markets
7 that have the lowest associated costs. MEI denies that it is "cherry picking" or targeting the
8 highest-profit markets. MEI does not possess data as to the comparative profitability of the
9 various Puget Sound ports. Rather, MEI is responding to its customers' demands. Other MEI
10 customers, such as Crowley, have complained about the launch services in Anacortes and Port
11 Angeles and have asked MEI to operate in these two regions. During the hearing MEI
12 produced direct evidence that Crowley felt that it was receiving inadequate service. The fact
13 that Anacortes and Port Angeles may be Arrow's most profitable markets, is not an excuse to
14 underserve them.

15 **4. MEI has produced sufficient proof that Arrow is underserving the**
16 **Anacortes and Port Angeles markets.**

17 Based on the testimony of Crowley and Mr. Esch produced during the course of this
18 application proceeding, it is evident that Arrow is underserving the Anacortes and Port Angeles
19 markets. Crowley is encountering delay and timing issues which, in turn, cause its customers
20 to run behind schedule. This has been occurring since 2013, continues to this day, and, as
21 Crowley's business continues to grow in the Puget Sound, will only increase in the future.
22 Further, much to the displeasure of Crowley, Arrow is taking advantage of its sole provider
23 status and charging unnecessarily high rates on ancillary services that are offered in
24 conjunction with its regulated services. This demonstrates that Arrow is not currently
25 providing reasonable service to Crowley. The Commission should find that MEI has met its
26 burden in demonstrating that Arrow is underserving these two territories.

1 **IV. CONCLUSION**

2 MEI has met the three required factors for the Commission to grant it an overlapping
3 certificate of authority to serve the Anacortes and Port Angeles territories. First, MEI is
4 financially fit and able to provide its proposed service for 12 months. It has \$300,000 cash-
5 on-hand and even the most pessimistic outlook of its first year in operation concludes that MEI
6 would lose approximately \$90,000. While MEI completely disagrees with this assessment,
7 even if that happens, MEI has more than enough cash on hand to absorb the loss and continue
8 to operate. MEI is willing to make at least a three-year commitment to the Puget Sound and
9 has the financial wherewithal to do so.

10 Second, MEI has demonstrated that there is a present and future need for its services in
11 Anacortes and Port Angeles. MEI presented Crowley as its shipper support witness, and
12 Crowley's representative testified that it operates in both locations and has a need for
13 additional, timely service from another provider, both now and in the future. This need is not
14 currently being met by Arrow and Crowley reasonably believes that Arrow's failure to meet
15 its needs now indicates it will not be able to do so in the future.

16 Third, MEI has presented proof that Arrow is underserving these two territories. Delays
17 and other timing issues coupled with unnecessarily high charges on ancillary services has left
18 one of the Puget Sound's largest consumers of launch services dissatisfied and underserved.
19 Certificated launch providers should not be allowed to create timing and delay issues for their
20 customers and should not be allowed to take advantage of their sole provider status to charge
21 unreasonably high prices on ancillary and nonregulated services.

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1 MEI has met its burden of proof in this case and respectfully requests that the
2 Commission grant its application.

3 DATED: April 12, 2017

4 BULLIVANT HOUSER BAILEY PC

5
6 By 
7 Daniel R. Bentson, WSBA #36825

8 Attorney for Applicant MEI Northwest LLC

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1 Docket TS-160479
2 CERTIFICATE OF SERVICE

3 I hereby certify that on April 12, 2017, I caused to be served the original of the
4 foregoing document to the following address via FedEx to:

5 Steven V. King, Executive Director and Secretary
6 Washington Utilities and Transportation Commission
7 Attn.: Records Center
8 P.O. Box 47250
9 1300 S. Evergreen Park Dr. SW
10 Olympia, WA 98504-7250

11 I further certify that I have also provided to the Washington Utilities and Transportation
12 Commission's Secretary an official electronic file containing the foregoing document via the
13 WUTC web portal; and served a copy via email to the following parties:

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10 Signed at Seattle, Washington this 12th day of April, 2017.

11
12 

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15 4848-0451-0534.1