

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In re Application of

MEI NORTHWEST LLC

For a Certificate of Public Convenience
and Necessity to Operate Vessels in
Furnishing Passenger Ferry Service

DOCKET TS-160479

ORDER 03

INITIAL ORDER DENYING
APPLICATION

BACKGROUND

- 1 On May 6, 2016, MEI Northwest LLC (MEI or Company) filed with the Washington Utilities and Transportation Commission (Commission) an Application for Commercial Ferry Certificate (Application) in accordance with RCW 81.84. On June 29, 2016, the Commission issued a Notice of Application, which allowed thirty days to protest the Application. On July 22, 2016, Arrow Launch Service, Inc. (Arrow) filed a protest.
- 2 On September 2, 2016, the Commission entered Order 01, Prehearing Conference Order, granting intervention to Pacific Cruises Northwest, Inc. (PCNW) and establishing a procedural schedule. The Commission conducted evidentiary hearings before Administrative Law Judge Marguerite Friedlander on February 14-15, 2017.¹ MEI, Commission regulatory staff (Staff),² Arrow, and PCNW each presented testimony in support of their positions.

¹ Judge Friedlander is on extended leave from the Commission. Accordingly, Gregory J. Kopta, Director, Administrative Law, has substituted for her, reviewed the record in this docket, and prepared this order.

² In formal proceedings such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

3 MEI presented the testimony of Randy S. Esch, its president and LLC manager. He is also a partner and Vice-President of Marine Express, Inc. (Marine Express), MEI's parent company. He described the experience he and Marine Express have had operating launch service in California since 1982. He compared the markets in San Francisco, where they currently operate, and Puget Sound. He concludes that Puget Sound is underserved and can support a second service provider.

4 Mr. Esch explained the basis for the assumptions and calculations on which MEI relies in the financial statements included in the Application. He testified that the revenue assumptions are very conservative and based on market information he and Marine Express have gathered, including indications of interest from companies they currently serve in California. On the expense side, he stated that the estimates reflect average or above-average costs associated with operating a launch service based on their experience. The Company has \$405,000 in assets, including \$300,000 cash on hand, and will be chartering two launch vessels from its parent company to provide the service.

5 Mr. Esch also testified that Arrow is failing to furnish reasonable and adequate service. Based on his observations, Arrow does not deploy enough boats to serve multiple ships in a single area, frustrating customers who have no alternatives. He stated, "We have heard from our clients that Arrow Launch is not providing the level of services that they receive in other ports up and down the West Coast."³ He specifically referred to an incident in 2000 in which Arrow allegedly was overextended and arranged to use another company's boat to provide launch service resulting in personal injuries. He testified that he has had at least five customers approach him about providing service in Puget Sound, complaining that they have no alternative to Arrow and "that there are many occasions when they are required to work around Arrow Launch's schedule, which causes delays and harms their business."⁴ He stated, "I have also heard numerous complaints about Arrow Launch's lack of communication with its customers."⁵ He did not identify any of those customers by name because he claimed that they are afraid to speak out for fear of retribution by Arrow. At the hearing, however, he testified that MEI is not relying on any of the customer complaints to which he referred other than those from Crowley Maritime,

³ Esch, Exh. RSE-1T at 16:18-20.

⁴ *Id.* at 19:8-9.

⁵ *Id.* at 19:26 – 20:1.

a subsidiary of Crowley Petroleum Services, Inc. (collectively Crowley), to demonstrate that Arrow has failed or refused to furnish reasonable and adequate service.⁶

6 In response to other witnesses' criticisms of MEI's financial statement, Mr. Esch provided additional information in support of the Company's estimates. He stated, "MEI's principals have extensive knowledge and experience operating and crewing a launch service. The figures that we have outlined in our pro forma statement are not the result of some ad hoc guesswork, but are the result of honed experience operating in this industry."⁷ He also reiterated his prior statements that Arrow is underserving the Puget Sound region and that customers are unhappy with Arrow's service. He further testified that Arrow's revenue growth and untapped market potential demonstrate that authorizing an additional service provider is in the public interest and that "MEI's entry into the region would help spur innovation and reduce our impact on the environment."⁸

7 Marc Aikin is Director of Engineering for the ATB Fleet for Crowley, and he also testified on behalf of MEI. In his written shipper support statement, Mr. Aikin stated that the availability of only a single launch service provider "has created timing and reliability issues for us as our customers (i.e. major oil companies) work on a tight schedule."⁹ He testified that Crowley "need[s] a vendor who is able to provide prompt and reliable service on a 24 hour basis to and from our vessels. . . . This need is not currently being met. Delays in transporting crew to our vessels have occurred in the past."¹⁰ He expressed his belief that "allowing another company into the market would lower the price charged to all customers in the area and would cause the current service provider to improve its performance."¹¹

8 During the hearing, Mr. Aikin testified that "Arrow Launch has always done a good job for us. I can't say that they have not done a good job."¹² He added, "I can say that they

⁶ Esch, TR. 198:10-22.

⁷ Esch, Exh. RSE-7T at 6:22-25.

⁸ *Id.* at 16:7-8.

⁹ Aikin, Exh. RSE-8.

¹⁰ *Id.*

¹¹ *Id.*

¹² Aikin, TR. 350:1-3.

have delayed services, but I cannot say that they've ever refused services" or failed to provide reasonable and adequate service.¹³

9 Scott Sevall, a Regulatory Analyst in the Water and Transportation Section of the Commission's Regulatory Services Division, testified on behalf of Staff. He reviewed the Application and believes the estimated annual revenues and expenses are appropriate for a start-up company and are comparable to other companies providing similar marine services. Even adjusted to account for the issues Mr. Burton identified, Mr. Sevall found that the \$300,000 MEI has in cash on hand would more than offset the resulting \$93,000 loss in the first year of operations. Accordingly, he concludes that MEI has the financial resources to operate the proposed service for 12 months. Based on these finances and Marine Express' and Mr. Esch's experience in the industry in California, Mr. Sevall believes MEI is fit, willing, and able to provide the service described in the Application.

10 Mr. Sevall, however, did not take a position on whether Arrow is providing reasonable and adequate service. He investigated MEI's claims that some of Arrow's customers are dissatisfied with the service they receive and found that Commission records reflect no customer complaints against Arrow. He conducted an informal survey of six Arrow customers, none of whom were hesitant to speak with him about Arrow. He found that "two customers had positive comments about Arrow, three had no issues with Arrow but supported competition, and one was dissatisfied."¹⁴ He concluded that there is some customer support for increased competition, but he was "not prepared to conclude that Arrow Launch has failed or refused to furnish reasonable and adequate service within the meaning of the statute."¹⁵ He nevertheless described some of the benefits of competition and believes that there would be no barrier to the Commission authorizing overlapping certificates for launch service based on Commission precedent.

11 Arrow presented the testimony Jack Harmon, Weldon Burton, Doug S. Coburn, Debi Collins, and Brian Westad.

12 Jack Harmon is an owner and president of Arrow. He described that company's operations, assets, and services, and he corrected what he considers to be erroneous assumptions underlying Mr. Esch's testimony. Mr. Harmon testified that Arrow has

¹³ *Id.* 350:8-11 & 383:14-25.

¹⁴ Sevall, Exh. SS-1T at 7:7-8.

¹⁵ *Id.* at 7:15-16.

sufficient boats and other facilities to provide exemplary service throughout its service territory, no part of which is underserved. He stated that Arrow has never refused or failed to provide regulated service: “Arrow prides itself on providing exemplary customer service and holds its customer needs second only to safety.”¹⁶ To his knowledge, the Commission has never received a customer complaint about Arrow’s service.

- 13 Mr. Harmon took issue with information MEI provided in support of its Application. He expressed serious doubts about the accuracy of MEI’s financial information, including what he considers to be inadequate costs and expenses for operations, professional services, labor, maintenance, and insurance. He also believes the market in San Francisco is not comparable to Puget Sound. He testified that, contrary to MEI’s projections, vessel activity is decreasing in this region, undermining MEI’s claims that the market is expanding and can accommodate more than one launch service provider.
- 14 Mr. Harmon also investigated the assertions in Mr. Aikin’s shipper support statement on behalf of Crowley. Mr. Harmon reviewed the 932 invoices Arrow sent to Crowley and other communications documented during the relevant time period and found that Arrow’s “services were absolutely offered and provided to Crowley consistently on a 24/7/365 basis and no service delays were ever documented or otherwise identified.”¹⁷ He also discovered no complaints from Crowley about lack of availability or service.
- 15 Weldon Burton is a certified public accountant who has been licensed to practice in Washington for 41 years and has been providing accounting services to Arrow since 2013. He reviewed the financial information in the Application and found what he considered or calculated to be deficiencies, including (1) no listing of liabilities or capital (net worth), indicating an incomplete financial statement; (2) no verifiable customer demand for regulated or ancillary services or other support for projected revenues; (3) understated fuel, labor, and vessel costs; and (4) an operating ratio of 79 percent, which is substantially higher than the Commission allows for ratemaking purposes. He also calculated that if Arrow loses the revenue MEI proposes to generate, “Arrow would have to recoup that amount of lost revenue by raising rates across the board to all remaining customers, not only in Anacortes but throughout its certificated territory or otherwise be

¹⁶ Harmon, Exh. JH-1T at 18:14-15.

¹⁷ Harmon, Exh, JH-10T at 4:16-18.

forced to sell off operating assets, reduce its work force and considerably scale back its regulated operations.”¹⁸

16 Doug Coburn is Assistant Vice President for General Steamship Corporation (General), a ship agent that arranges all of a vessel’s requirements during its stay in Puget Sound and sometimes up and down the West Coast. He has worked extensively with Arrow since 1989, and he testified that he and his company have never had a problem with Arrow. He testified that Arrow provides excellent service and “is consistently reliable, professional and is completely committed to safety and efficiency of operations for the benefit of us and our customers and principals.”¹⁹ General is “concerned that any reduction in annual revenues for Arrow could potentially reduce service and increase costs. Any adverse impact on Arrow would potentially pose a risk to General’s safety protocols, of which Arrow is an integral part.”²⁰

17 Since 2004, Debi Collins has been a ship’s agent with Blue Water Shipping Company (Blue Water), which represents and arranges services for vessel charters loading grain at elevators in Seattle and Tacoma. She testified that Arrow “has provided excellent and responsive service to Blue Water and we have never had a problem with that service.”²¹ She also stated that “any reduction in the resources or service availability of Arrow is a concern for us.”²²

18 Brian Westad is the Port Manager for Inchcape Seattle, a shipping agent that coordinates services for vessels visiting Puget Sound. He described his experience over the past four and a half years with Arrow and the services it provides. He testified that Arrow is highly reliable and provides excellent service. He also expressed his concern “that a potential reduction in customer base or revenues could potentially increase costs.”²³

19 Drew Schmidt, the owner and president of PCNW, testified on behalf of that party. He described his experience with competition in the market for ferry service and concluded

¹⁸ Burton, Exh. WB-1T at 6:24 – 7:1.

¹⁹ Coburn, Exh. DSC-1T at 5:19-21.

²⁰ *Id.* at 5:6-9.

²¹ Collins, Exh. DC-1T at 2:4-5.

²² *Id.* at 4:23-24.

²³ Westad, Exh. BW-1T at 4:25 – 5:1.

“based on the margins on which we operate, and the extensive capital investment required of a ferry or launch service, I don’t see how two services can viably operate in competition with each other.”²⁴

20 The parties filed simultaneous post-hearing briefs on April 12, 2017. The Discussion and Decision section below includes a summary of the parties’ positions and arguments.

21 Daniel R. Bentson, Bullivant Houser Bailey PC, Seattle, Washington represents MEI. Julian Beattie, Assistant Attorney General, Olympia, Washington represents Staff. David Wiley, Williams Kastner & Gibbs PLLC, Seattle, Washington, represents Arrow. Judy Endejan, Garvey Shubert Barer, Seattle, Washington, represents PCNW.

DISCUSSION AND DECISION

22 MEI seeks Commission authority to provide “launch service,” which is “a boat service from docks to ships lying in anchorage areas operating on fixed schedules set by the captains or shipping company’s agents in providing passenger and freight service to the ships.”²⁵ Since 1977, the Commission has considered such service to be regulated commercial ferry service pursuant to RCW 81.84.010.²⁶ No party challenges that interpretation. Accordingly, we accept for purposes of this proceeding that launch service is commercial ferry service subject to Commission jurisdiction.

23 An applicant for commercial ferry service authority must demonstrate that it is fit, willing, and able to provide that service and that “public convenience and necessity require such operation.”²⁷ The Commission may not grant a certificate to provide commercial ferry service if the territory the applicant proposes to serve “is already served by an existing certificate holder, unless the existing certificate holder has failed or refused to furnish reasonable and adequate service.”²⁸

24 We find that MEI has demonstrated sufficient financial, technical, and operational resources to provide the service described in the Application and thus conclude the

²⁴ Schmidt, Exh. DS-1T at 3:25 – 4:1.

²⁵ Sevall, Exh. SS-3 (Commission Order S.B.C. No. 363A) at 3.

²⁶ *Id.*

²⁷ RCW 81.84.010(1).

²⁸ RCW 81.84.020(1).

Company is fit, willing, and able to offer that service. MEI, however, has not proven that Arrow has failed or refused to furnish reasonable and adequate service. Absent such proof, the Commission cannot grant a certificate to MEI. The Commission, therefore, denies the Application.

MEI's Fitness

25 “Before issuing a certificate, the commission shall determine that the applicant has the financial resources to operate the proposed service for at least twelve months, based upon the submission by the applicant of a pro forma financial statement of operations.”²⁹ MEI included the requisite financial statement in the Application and supported its figures with substantial testimony.³⁰ Staff reviewed the financial statement and concluded that the Company has the financial resources to operate the proposed service for at least 12 months. Arrow witnesses, however, testified that MEI overestimates the revenues it would be likely to generate and understates the costs, resulting in an unrealistic picture of the Company’s startup finances.³¹

26 We agree with Staff. Estimating the costs and revenues of a start-up operation requires predictive judgment. MEI is a new company, but its parent, Marine Express, has extensive experience providing launch services in California and thus has a solid basis for predicting the costs MEI will incur and the revenues it may receive during its initial year in business. Arrow, too, has a long history of operating launch services, which is specific to Puget Sound, and Arrow’s witnesses take issue with MEI’s figures. Arrow, however, did not offer evidence of its own costs to support its criticisms. Rather, it relies on the opinions of its accountant, Mr. Burton, who has limited experience with launch service operations, and of its president, Mr. Harmon, who provides only unsupported conclusions. We find such testimony to be of minimal value in assessing the reasonableness of MEI’s financial projections.

²⁹ RCW 81.84.020(2).

³⁰ Esch, Exh. RSE-1T at 8-14; Esch, Exh. RSE-7T at 3-11.

³¹ Burton, Exh. WB-1T at 1-6; Harmon, Exh. JH-1T at 25-27. Arrow, however, does not argue in its post-hearing brief that MEI has failed to demonstrate its fitness to provide the proposed service or otherwise address this issue. Arrow thus has waived such arguments. The Commission, however, has an independent obligation to ensure that an applicant is fit, willing, and able to provide the service in its application, and thus we must determine whether MEI has satisfied the statutory requirements.

- 27 We find Staff’s objective analysis to be the most credible and reliable. Staff found the Company’s projections to be “reasonable estimates of expected annual revenue for a startup company,” and “the expenses listed by the company are appropriate for the level of service and the type of business while reflecting costs comparable to other companies providing similar marine services.”³² Staff concluded that with the Company’s \$300,000 cash on hand, “even with the pro forma adjustments provided by Mr. Burton, MEI maintains the financial wherewithal to provide launch service for the required minimum 12-month period.”³³
- 28 MEI has satisfied the statutory prerequisite that it have the financial resources to operate the proposed service for at least 12 months. No party disputes the evidence MEI presented on its technical and operational experience and ability to provide launch service. We conclude, therefore, that MEI is fit, willing, and able to provide the services described in the Application.

Public Interest, Convenience, and Necessity

- 29 MEI must demonstrate that the public interest, convenience, and necessity require the commercial ferry service the Company has applied to provide.³⁴ As part of that demonstration, “the commission may not grant a certificate to operate [in] territory . . . already served by an existing certificate holder, unless the existing certificate holder has failed or refused to furnish reasonable and adequate service.”³⁵
- 30 MEI contends that Puget Sound is underserved and that there is a present and future need for the launch services MEI has applied to provide. Arrow holds the certificate to provide launch service in the territory described in the Application,³⁶ and MEI claims that Arrow is not furnishing reasonable and adequate service. The Company relies primarily on the

³² Sevall, Exh. SS-1T at 4:9-13.

³³ Sevall, Exh. SS-4T at 3:9-11.

³⁴ RCW 81.84.010(1).

³⁵ RCW 81.84.020(1).

³⁶ Arrow observes that the service territory depicted in MEI’s substituted tariff and accompanying service map in Exh. RSE-10 covers a broader area than the description of the territory in the Application. Arrow objects to that expansion as a violation of adequate notice and due process requirements. We sustain that objection and limit the service territory MEI proposes to serve for purposes of this docket to the area described in the Application.

shipper statement Crowley made in support of the Application in which Crowley states that being able to use only a single launch service provider has created timing and reliability issues, resulting in delays in transporting crew to Crowley's vessels.³⁷ Mr. Esch also testified that his analysis of the market, Arrow's operations, and complaints from other customers demonstrate that MEI's entry into Puget Sound would serve the public interest, convenience, and necessity.

31 Arrow and PCNW maintain that no credible record evidence supports MEI's claims. They argue that Mr. Aikin, who represented Crowley, had no knowledge of any instances in which Arrow's service was deficient,³⁸ and to the contrary, he testified that Crowley is happy with that service. Arrow also presented testimony from three shipping agents, all of whom praised the service that Arrow provides to their customers. In addition, Arrow's owner and president testified that he found no instances of delayed service in any of the more than 900 invoices Arrow had sent to Crowley and that Mr. Esch's analysis does not accurately reflect the market for launch services in Puget Sound or Arrow's operations and relationships with its customers.

32 Staff in its post-hearing brief takes the position that MEI has not met its burden to prove that Arrow is not furnishing reasonable and adequate service.³⁹ Like Arrow and PCNW, Staff points out that Mr. Aikin identified no specific instance in which Arrow provided unreasonable or inadequate service and acknowledged that Arrow has done a good job for Crowley. Staff also found no customer complaints or other evidence that Arrow has failed or refused to provide service as a result of Staff's independent investigation. Staff recommends that the Commission grant Arrow's protest and deny the Application.

³⁷ Aikin, Exh. RSE-8.

³⁸ Arrow also objects to Mr. Aikin's testimony as based on hearsay and lacking foundation sufficient to demonstrate that he has personal knowledge of the matters on which he testified. Arrow brief ¶ 29. We deny the objection. We agree with MEI that Mr. Aikin is qualified to testify as Crowley's representative concerning matters of company record. We also find, however, that Mr. Aikin was not aware of any specific instances in which Crowley has had a problem with Arrow's services, and accordingly we give his conclusory testimony little weight.

³⁹ Staff maintains that in determining the reasonableness and adequacy of Arrow's service, the Commission "should bear in mind that launches provide an essentially *private* service. Staff believes that the convenience and necessity of the 'general public' is not at stake in this case." Staff brief ¶ 6 (emphasis in original). Based on the record before the Commission, we need not, and do not, review the application of RCW 81.84.020(1) to the facts of this case through the narrower lens that Staff proposes.

- 33 The Commission derives its authority from statute and must act within the parameters the legislature has established. The applicable statute here precludes the Commission from granting a certificate to offer commercial ferry service to a competing provider unless the existing company “has failed or refused to furnish reasonable and adequate service.”⁴⁰ The common meaning of “reasonable” is “moderate, fair,”⁴¹ while “adequate” is “of a quality that is good or acceptable.”⁴² The plain language of the statute, therefore, precludes the Commission from granting the Application unless MEI proves that Arrow is not providing fair and acceptable service.
- 34 MEI has not done so. The record lacks any credible evidence that Arrow is not providing fair and acceptable regulated service. MEI refers to several customers who it claims have issues with Arrow, but for purposes of assessing Arrow’s service quality, the Company relies solely on Mr. Aikin’s testimony on behalf of Crowley.⁴³ MEI characterizes Crowley’s shipper support statement as “indicat[ing] that its transportation needs were not currently being met and that if MEI’s request for a certificate were denied, it would have a negative impact on Crowley’s business.”⁴⁴ MEI contends that “Crowley is encountering delay and timing issues which, in turn, cause its customers to run behind schedule. This has been occurring since 2013, continues to this day, and, as Crowley’s business continues to grow in Puget Sound, will only increase in the future.”⁴⁵
- 35 Mr. Aikin’s testimony, however, does not support a finding that Arrow has failed or refused to furnish reasonable and adequate service. The shipper support statement itself

⁴⁰ RCW 81.84.020(1).

⁴¹ <https://www.merriam-webster.com/dictionary/reasonable>.

⁴² <https://www.merriam-webster.com/dictionary/adequate>.

⁴³ Esch, TR. 198:10-22. Mr. Esch also detailed an incident in 2000 in which Arrow contracted with another company to provide a boat and crew for launch services that Arrow could not provide using its own vessels, resulting in personal injuries. MEI does not rely on those facts in its brief to support its analysis and accordingly has waived the associated arguments. Even if that were not the case, the isolated occurrence 17 years ago is too remote in time to have any significant weight in the Commission’s determinations in this docket.

⁴⁴ MEI brief at 18:13-15.

⁴⁵ *Id.* at 23:19-21. MEI’s brief ignores Mr. Aikin’s testimony during the hearings that Crowley issued a request for proposals for launch service because of its concerns about Arrow’s service. MEI has therefore waived arguments based on that evidence, which in any event is too vague and conclusory to shed any light on the issue the Commission must resolve.

speaks only in generalities,⁴⁶ and Mr. Aikin, who sponsored that statement, could not identify any specific instance of a delay or other problem that Crowley has had with Arrow's services.⁴⁷ He also testified that "Arrow Launch has always done a good job for us."⁴⁸ More specifically, Mr. Aikin unambiguously stated that Arrow has not failed or refused to provide Crowley with adequate service:

Q. So, basically, you're not here today to state that Arrow has failed or refused to provide Crowley with adequate service so that this Commission would take action to allow another certificate holder to serve in the marketplace?

A. No. In fact, we have a very strong relationship with Arrow. We've used Arrow for many years. We've been happy with their service. There are periodic problems that we've had. Those are just problems of operation. I don't want in any way this to slander or blind my relationship with Arrow Launch. No, I don't have that knowledge.⁴⁹

MEI cannot plausibly claim that Crowley's experience proves that Arrow has failed or refused to furnish reasonable and reliable service when Crowley's representative testified directly to the contrary.

36 MEI also argues that Arrow's service is unreasonable because it bundles regulated and unregulated services and that Arrow leverages its sole provider status to charge inconsistent and inflated rates for unregulated services. Again, however, no record evidence supports this contention. Mr. Aikin testified that Crowley was frustrated that Arrow's invoiced charges for ancillary services, particularly crane service, were high and inconsistent without providing any specifics.⁵⁰ MEI offered no evidence that Arrow has combined regulated and unrelated services into a single offering or otherwise required

⁴⁶ See Aikin, Exh. RSE-8 (stating only that the existence of one launch service provider "has created timing and reliability issues for us," Crowley's need for "a vendor who is able to provide prompt and reliable service on a 24 hour basis to and from our vessels . . . is not currently being met," and "[d]elays in transporting crew to our vessels have occurred in the past").

⁴⁷ *E.g.*, Aikin, TR. 362:6-10.

⁴⁸ *Id.* 350:1-11.

⁴⁹ *Id.* 383:14-25.

⁵⁰ Aikin, TR. 390:6 – 395:19.

Crowley to use unregulated services to obtain regulated service. The Commission will not bootstrap one customer's dissatisfaction with the rates Arrow charges for *unregulated* service into a determination that Arrow is failing or refusing to furnish reasonable and adequate *regulated* commercial ferry service.

37 MEI nevertheless claims that Mr. Aikin's testimony demonstrates that Crowley "has a need for additional, timely service from another provider, both now and in the future."⁵¹ At most, this testimony reflects Crowley's belief that competition will result in lower rates and improved performance.⁵² Three other customers, who had no issues with Arrow, also expressed support for competition for launch services in response to Staff's informal survey,⁵³ and Mr. Sevall testified that "the existence of a competitor would incent all service providers, existing as well as new entrants, to provide better service and would spur innovation."⁵⁴ PCNW, on the other hand, argues that the statute reflects a legislative preference for monopoly provision of ferry service and that PCNW's experience with multiple ferry service providers demonstrates that "two commercial ferry services cannot operate in competition due to the slim margins and extensive capital investment involved."⁵⁵

38 The Commission has permitted new entrants into certain transportation markets when the applicable statute permits such entry and competition would result in demonstrated benefits to consumers without adversely impacting the incumbent's economic viability or ability to provide service.⁵⁶ Such circumstances do not exist here. RCW 81.84.020(1) authorizes competition only when the existing provider is not providing reasonable and adequate service, which MEI has failed to prove. The record also lacks substantial objective evidence that MEI's provisioning of launch services would result in demonstrated benefits to consumers without detriment to Arrow's economic and

⁵¹ MEI brief at 24:12-13.

⁵² See, e.g., Aikin, Exh. RSE-8 ("We believe that allowing another company into the market would lower the price charged to all customers in the area and could cause the current service provider to improve its performance."); Aikin, TR. 374:7-10 (agreeing that "competition will mean that regulated rates will not change, but the ancillary service rates will").

⁵³ Sevall, Exh. SS-1T at 7:7-8.

⁵⁴ *Id.* at 8:4-5.

⁵⁵ PCNW brief ¶ 13.

⁵⁶ E.g., *In re Application of Waste Management*, Docket TG-120033, Order 10, Final Order (July 10, 2013).

operational viability.⁵⁷ Neither the law nor the facts support authorizing MEI to provide launch services in competition with Arrow.

39 MEI has the financial, technical, and operational resources to provide commercial ferry
service in the geographic locations described in the Application. Arrow, however, is the
existing launch service provider in those locations, and MEI has not proven that Arrow
has failed or refused to furnish reasonable and adequate service. The Commission,
therefore, cannot grant MEI the certificate for which it has applied.

FINDINGS AND CONCLUSIONS

- 40 (1) The Commission is an agency of the State of Washington vested by statute with
authority to regulate commercial ferries.
- 41 (2) The Commission has jurisdiction over the subject matter of, and parties to, this
proceeding.
- 42 (3) MEI has the financial resources to operate the commercial ferry service described
in the Application for at least 12 months and is otherwise fit, willing, and able to
provide that service.
- 43 (4) Arrow holds a certificate of public convenience and necessity to provide
commercial ferry service in the geographic locations in which MEI has applied to
provide launch service, and Arrow protested the Application.
- 44 (5) The record contains no credible evidence that Arrow has failed or refused to
furnish reasonable and adequate commercial ferry service.
- 45 (6) MEI has not proven that Arrow has failed or refused to furnish reasonable and
adequate commercial ferry service in the territory MEI has applied to serve.

⁵⁷ In *Waste Management*, for example, the applicant provided evidence of actual consumer benefits resulting from its competitive entry into other territories in Washington without negatively impacting the incumbent's viability. *Id.* ¶ 16. MEI, on the other hand, offered only theoretical benefits and Mr. Esch's opinion based on his experience in California that the Puget Sound market could support two launch service providers. Esch, Exh. RSE-7T at 14-18. Such evidence in and of itself is insufficient and is outweighed by the testimony of Arrow and PCNW witnesses, all of whom have extensive experience in Washington, that MEI's entry into Puget Sound would adversely impact Arrow's ability to provide service. Harmon, Exh. JLH-1T at 4; Burton, Exh. WB-1T at 6:10 – 7:13; Schmidt, Exh. DS-1T at 3-4.

- 46 (7) The Commission does not allow competitive entry into commercial ferry markets in the absence of a demonstration that the existing certificate holder has failed or refused to provide reasonable and adequate service and that competition would result in actual benefits to consumers without adversely impacting the incumbent's economic viability or ability to provide service.
- 47 (8) Pursuant to RCW 81.84.020(1), the Commission cannot grant a certificate to MEI to provide commercial ferry service in competition with Arrow and should deny the Application.

ORDER

- 48 **THE COMMISSION ORDERS** that MEI Northwest LLC's Application for Commercial Ferry Certificate is **DENIED**.

Dated at Olympia, Washington, and effective August, 21, 2017.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

GREGORY J. KOPTA
Administrative Law Judge

NOTICE TO THE PARTIES

This is an initial order. The action proposed in this initial order is not yet effective. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this initial order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this initial order to file a *Petition for Administrative Review*. Section (3) of the rule identifies what you must include in any petition as well as other requirements for a petition. WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the petition.

WAC 480-07-830 provides that before the Commission enters a final order any party may file a petition to reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. The Commission will not accept answers to a petition to reopen unless the Commission requests answers by written notice.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion.

To file a Petition or Answer with the Commission, you must file electronically using the commission's records center web portal no later than 5:00 p.m. on the date the documents are required to be filed. You must serve on each party of record and the presiding administrative law judge any Petition or Answer filed with the commission.