

FILE

CONTINUED

RUBIN QUINN MOSS & HEANEY

ATTORNEYS AT LAW

1800 PENN MUTUAL TOWER

510 WALNUT STREET

PHILADELPHIA, PA 19106-3619

(215) 925-8300

DIRECT DIAL NUMBER

931-0604

September 13, 1989

ALEXANDER N. RUBIN, JR.
JERROLD V. MOSS
JAMES W. PATTERSON
DANIEL B. PIERSON, V.
ALAN KAHN
WILLIAM D. PARRY
ROBERT SZWAJKOS
JOHN R. KENNEL, II
ERIC M. HOCKY
JOSEPH F. MESSINA
PETER C. CILIO
RICHARD A. FRANKLIN
JOAN F. JAFFE
VICKIE E. LEDUC
CHERYL A. GALLAGHER
KARIN LEIGH MOSS

WILLIAM P. QUINN
TERENCE K. HEANEY
MALCOLM L. LAZIN
DENIS JAMES LAWLER
ROBERT P. STYLE
G. BRADLEY RAINER
DON P. FOSTER
MARY ELLEN O'LAUGHLIN
EDWARD L. CIEMNIECKI
MICHAEL D. BUTLER
CHRISTOPHER C. CARR
ANNA HOM
ELLEN B. JUCKETT
JOHN A. RODA
HOWARD H. SOPFER
JANET I. MOORE

ORIGINAL
KING OF PRUSSIA OFFICE
5100 ARDRETT BOULEVARD
GENERAL WASHINGTON BUILDING
KING OF PRUSSIA, PA 19406
(215) 337-4080

JENKINTOWN OFFICE
SUITE 421
BENJAMIN FOX PAVILION
JENKINTOWN, PA 19046
(215) 884-4600

OF COUNSEL
ROBERT B. EINHORN
GOFF & RUBIN

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

RECEIVED
SEP 13 1989
SECRETARYS OFFICE
Public Utility Commission

Re: Application of Central Transport, Inc.
Docket No. A-108155

Dear Secretary Rich:

Enclosed please find the original and nine (9) copies of the Responding Brief of Protestant, Matlack, Inc., filed in the above-captioned matter.

Copies of the enclosed are being served upon all active parties of record.

Very truly yours,

James W. Patterson
JAMES W. PATTERSON

JWP/jal
enclosure

cc: William A. Chesnutt, Esquire
Ronald Malin, Esquire
Henry Wick, Jr., Esquire
Kenneth Olsen, Esquire
William O'Kane, Esquire
Christian V. Graf, Esquire
Martin C. Hynes, Jr., Vice President-Marketing

**DOCUMENT
FOLDER**

CERTIFICATE OF MAILING ENCLOSED

ORIGINAL

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF
CENTRAL TRANSPORT, INC.

:
:

DOCKET NO.
A-108155

RESPONDING BRIEF OF PROTESTANT,
MATLACK, INC.

RECEIVED

SEP 13 1989

SECRETARYS OFFICE
Public Utility Commission

DOCKETED
SEP 19 1989

JAMES W. PATTERSON, ESQUIRE
EDWARD L. CIEMNIECKI, ESQUIRE
Attorneys for Matlack, Inc.

Of Counsel:

RUBIN QUINN MOSS & HEANEY
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106
(215) 925-8300

**DOCUMENT
FOLDER**

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF : DOCKET NO.
CENTRAL TRANSPORT, INC. : A-108155

RESPONDING BRIEF OF PROTESTANT,
MATLACK, INC.

COMES NOW, Matlack, Inc., ("Matlack" or "Protestant") through its attorneys and files this Brief in response to the Main Brief filed by Central Transport, Inc. ("Central" or "Applicant") in the above-captioned matter.

I. STATEMENT OF THE CASE

By application published in the Pennsylvania Bulletin on June 11, 1988, Central requested common carrier authority to transport property in bulk, in tank and hopper-type vehicles, between points in Pennsylvania.

Numerous protests were filed in opposition to the application. In response, Central amended its application so as to eliminate the transportation of certain specified commodities. As amended, Central seeks the following authority:

Property in bulk, in tank and hopper-type vehicles, between points in Pennsylvania.

Provided that no right, power or privilege is granted to transport asphalt, cement, cement mill waste, dolomitic limestone and dolomitic limestone products, dry litharge, fly ash, limestone and limestone products, mill scale, roofing granules, salt, sand, scrap metal and stack dust.

Provided that no right, power or privilege is granted to transport aviation gasoline, butane diesel fuel, fuel oil (grades 2, 4, 5 and 6), gasoline, kerosene, motor fuel, propane, turbo fuel, cryogenic liquids, dispersants and refrigerant gases.

Provided that no right, power or privilege is granted to transport corn syrup and blends of corn syrup, flour, honey, milk and milk products, molasses, sugar and sugar substitutes.

Provided that no right, power or privilege is granted to perform transportation in dump vehicles.

Provided that no right, power or privilege is granted to provide services from the facilities of PENNWALT Corporation, located in the city and county of Philadelphia, or in the county of Bucks, to points in Pennsylvania, and vice versa.

As a result of the restrictive amendment, all but six (6) of the Protests were withdrawn.

Hearings were held before Administrative Law Judge Michael Schnierle on November 1, 2, 9 and 18, 1988, February 7, 8, 14 and 15, 1989, and June 28, 1989. At the hearings, two (2) witnesses presented evidence on behalf of Central and eight (8) public witnesses testified in support of Central's application. Witnesses appeared on behalf of each active Protestant with the exception of Oil Tank Lines, Inc.

Judge Schnierle directed that the parties file briefs in sequential order, with Central's Brief to be followed by Briefs of the Protestants. This Brief is submitted in response to the Main Brief of Central Transport, Inc.

II. DIGEST OF TESTIMONY

Attached hereto as Appendix A is a summary of the evidence presented by Central and Matlack in this proceeding. The Digest of Testimony will be referred to throughout the argument portion of this Brief.

III. SUMMARY OF ARGUMENT

Central's application seeks statewide authority to transport property in bulk, in tank or hopper-type vehicles, subject to limited commodity restrictions. Despite the breadth of the authority request, only eight (8) shipper witnesses offered testimony regarding the existence of a public need for Central's proposed service.

Conspicuously, Central's Brief offered no discussion regarding the evidence of need present in this record. Central attempts instead to argue that the "alternatives to inadequacy" discussed in Application of Richard C. Kinard, Inc., 58 Pa. PUC 548 (1984) may be utilized as a substitute for evidence of public need. Central's interpretation of the Kinard decision and of the burden imposed upon an applicant by 52 Pa. Code §41.14(a) is clearly erroneous. Central is required to present substantial evidence of a public need for its proposed service. Its failure to do so must result in a denial of its application before reaching the level of its success in establishing any or all of the Kinard alternatives.

Central similarly misinterprets the burden imposed upon it, as applicant, by 52 Pa. Code §41.14(b). Although it is beyond

question that an applicant has the burden of proving its fitness, Central dedicates seventeen (17) pages of its Brief - over one-half of the Argument section - to its contention that Matlack and the other protestants failed to establish that Central lacked the ability to operate safely and legally. Matlack is not required to prove Central is unfit. On the contrary, Central must establish - by substantial evidence, its technical, financial and regulatory fitness to render the service proposed herein. The evidence presented raises serious questions whether Central possesses the requisite-fitness questions which remain strangely unanswered by the evidence it produced.

Matlack presented substantial and credible evidence regarding the manner in which Central's authorization may result in terminal closings and, consequently, negatively impact upon the level and responsiveness of the service Matlack supplies to its Pennsylvania customers.

Matlack requests that the application of Central be denied in its entirety.

IV. ARGUMENT

A. Central Has Failed To Present Substantial Evidence Of A Need For Its Proposed Service

The Argument portion of Central's Brief lacks any discussion of the testimony or other evidence of need for the proposed service presented by the eight (8) shippers whose representatives testified in support of Central's application. Instead, Central contends that it sustained the burden of

demonstrating that approval of its application "will serve a useful public purpose responsive to a public demand or need" by satisfying several of the "alternatives to inadequacy" discussed in Application of Richard L. Kinard, Inc., 58 Pa. PUC 548 (1984). Central's position is erroneous. Under 52 Pa. Code §41.14(a) Central still bears the traditional burden of proving that its proposed service is needed by the shipping public within the application territory.

As noted by Central, Kinard is the seminal decision interpreting the Commission's policy statement at 52 Pa. Code §41.14. In discussing the burden imposed upon an applicant under Section 41.14(a), the Commission in Kinard made the following observation:

The mere introduction of shipper support testimony would not be enough to satisfy solely on this basis the section 41.14(a) burden. While granting the application may respond to "public demand or need", it would not necessarily "serve a useful public purpose" or provide a "public benefit". City of York v. Pennsylvania Public Utility Commission (1972) 449 Pa. 136, 96 PUR3d 354, 295 A2d 825. Therefore, we find ourselves in agreement with the ALJ's interpretation of the section 41.14(a) standard which utilizes alternatives to "inadequacy" as criteria for establishing that the "approval of the application will serve a useful public purpose". Kinard, 58 Pa. PUC at 552.

The above quotation makes it evident that Section 41.14(a) actually places a two-fold burden upon an applicant. Rather than proving "need" and "inadequacy" as was required before the adoption of Section 41.14, an applicant must now establish the

existence of a need for the proposed service and prove that a grant of authority will serve a public purpose or provide a public benefit. The first burden is to be satisfied through shipper testimony that the applicant's service is needed and will be utilized following a grant of authority. The "useful public purpose" or "public benefit" standard is met by satisfying one or more of the enumerated "alternatives to inadequacy."

The logic behind the requirement that an applicant produce testimony by shipper witnesses regarding their need for the proposed transportation service is clear. In order to determine that a proposed service will be responsive to a public demand or need, the Commission must first ascertain the scope and nature of the public demand or need. The transportation requirements of shippers in a particular industry or located in a particular territory, or as in this case, bulk shippers statewide, can only be ascertained by obtaining evidence from a representative cross-section of those shippers. The Commission can then identify the nature and scope of the public need or demand and then weight the applicant's proposal against the shippers' demonstrated transportation needs to determine if the applicant's proposal will be responsive.

The principle that an applicant for a Certificate of Public Convenience has the burden of proving a need for the additional service it proposes is well-established in Pennsylvania law. 52 Pa. Code §41.14; Follmer Trucking Company v. Pennsylvania Public Utility Commission, 189 Pa. Super. 204, 215, 150 A.2d 163

(1959); Motor Freight Express v. Pennsylvania Public Utility Commission, 188 Pa. Super. 80, 85, 146 A.2d 323 (1958). While it is not necessary for an applicant to present proof of need relating to every point in the territory requested, the Commission is still duty-bound to withhold issuing a favorable order "without a basis in evidence having rational probative force." Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 (1938), cited in Leaman Transportation Corporation v. Pennsylvania Public Utility Commission, 153 Pa. Super. 303, 308, 33 A.2d 721 (1943). Therefore, before a Certificate of Public Convenience may be issued by the Commission, the applicant must present substantial evidence that a need for the proposed service exists in the application territory. Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission, 19 Pa. Commw. 1, 7, 337 A.2d 922 (1975)(emphasis added). Not even Central has argued that the evidence of need it produced is a sufficient basis for a finding of public need for the statewide authority sought.

Matlack does not dispute that Central's evidence appears to satisfy several of the "alternatives to inadequacy" and has likely sustained its "public benefit" burden. The reason Central's Brief avoids any discussion of "public need" is quite obvious: Central has fallen far short of establishing the existence of public need for its proposed statewide service.

The evidence presented by the supporting shipper witnesses can best be characterized as reflecting a desire to have Central available as a "backup" or "fill-in" carrier. Only two

(2) shippers of the eight testifying shippers indicated that their companies would actually utilize Central's service; neither was willing to indicate the extent to which Central's service would be used. No evidentiary basis exists for a finding that Central established a need for the statewide service it proposes. On the contrary the record is clear that not even all the testifying shippers need or will use Central's service, let alone the statewide market Central seeks to access.

To illuminate this seemingly stern position, it is useful to review relevant portions of the testimony of the supporting witnesses in order to evaluate the "strength" of their support for Central's application.

Witco Chemical's Pennsylvania intrastate traffic is handled in private carriage, via customer pickup and by such carriers as Chemical Leaman, Crossett, Kendall, Leaseway (Refiner's Transport and Fleet), Matlack, Maust, Oil Tank Lines, Paul Miller, Quality Carriers, Zappi and Bulkmatic... (Exhibits A-9, A-10; T.153-155). Witco was supporting Central's application so that it could be "fully covered with all viable carriers" and "more choosy about carriers being on time." (T.157, 159).¹ Matlack submits that having eleven (11) carriers already available enables Witco to be quite "choosy" about the carriers it utilizes

¹ Although the witness indicated a desire to become "more choosy about carriers being on time" he offered no testimony regarding any late pick-ups, lack of responsiveness or other service failures.

for its intrastate transportation. Although Witco's witness stated that Central's service would be utilized if this application is approved, no information was offered regarding the extent to which this twelfth carrier would be employed by Witco. (T.159). As noted by the Commission is Kinard, (somewhat paraphrased) to establish need for its service an applicant must do more than be successful in putting speaking humans on the stand.

Pennzoil Products testimony was similar to that offered by Witco. Intrastate outbound traffic from Karns City is handled in private carriage, via customer pickups and by Fleet, Montgomery and Matlack. Inbound service is supplied by Pennzoil's own vehicles, Refiners, Crossett and Fleet. The inbound routings employed by Pennzoil will remain unchanged regardless of the outcome of this proceeding. (Exhibit A-12; T.165-168, 186-189). The basis for Pennzoil's support of Central's application is a desire to ensure adequate available equipment to transport Pennzoil's products. (T.170).

The witness from McCloskey Corporation testified that due to certain problems with service supplied by Matlack, he felt that only Chemical Leaman was available to meet his intrastate transportation requirements. Central will become involved in handling a certain percentage of McCloskey's annual volume of 35 intrastate shipments. (Exhibit A-15, p.7; T.212-213).

As for Para-Chem Southern, Inc., all intrastate outbound traffic is handled in private carriage while inbound service is

arranged for by a broker named Backhaul. In fact, Para-Chem has not requested service from a common carrier in Pennsylvania for two or three years. (T.295, 297). The routines used in routing Para-Chem's traffic are expected to continue regardless of the outcome of this proceeding. (T.304-305, 308).

The testimony of the remaining four (4) shippers indicates that they have no definite intentions of utilizing Central's service if this application is approved. E.F. Houghton & Co. will utilize Central as a "fill-in" carrier (T.265) while the witness from Harry Miller Corporation characterized the potential use of Central as that of a back-up carrier. (T.290). Similarly, all of Calgon Corporation's intrastate traffic is handled by Schneider National Bulk Carriers, Inc. and Calgon is looking to Central to become the fourth available carrier to play a backup role to Schneider. (T.321, 324, 327-328). Finally, Valspar Corporation is supporting Central's application solely in order to obtain its availability as a backup to the service supplied by Matlack. (T.336).

In substance, it is clear that the essence of the supporting shippers' testimony is that they are each satisfied with the intrastate service presently available to them. Of the supporting shippers only two - Witco Corporation and McCloskey Corporation - offered a definite indication that they will utilize Central's service if this application is approved. Of these two shippers, one will employ Central as its twelfth carrier while the other will tender "a certain percentage" of its 35 intrastate

shipments per year to Central. The remaining shippers will continue having their traffic handled as it is at present. Their use of Central's service - if any - will occur only when existing service is unavailable.

No matter how puffed or distended, this is hardly the stuff of statewide applications or grants. The evidence presented by Central does not rise to that level of evidence of public need for proposed carrier service normally judged as acceptable to the Commission (and referred to as "substantial evidence") to support the grant of operating authority of even lesser breadth than that sought by Central. It is weak and uncommitted. It is far too sparse to be judged as representative of all shippers of the included bulk products throughout the Commonwealth.

Preference or desire for the availability of additional service is insufficient to support a finding that a public need for a proposed service exists. Wiley v. Pennsylvania Public Utility Commission, 186 Pa. Super. 309, 317-318, 142 A.2d 763 (1958); Application of Chapman Johnson, Sr. t/a Johnson Trading Company, 50 Pa. PUC 696 (1977).

A few of the supporting shippers desire that another carrier be available as a supplementary carrier, even though there are already other carriers available. As stated in Coastal Tank Lines, Inc. et al. v. Pennsylvania Public Utility Commission (1960), 193 Pa. Super. 22, 25:

". . . Under the established law, the Commission cannot grant additional authority for the sole purpose of creating competition and without reference to need "

In Motor Freight Express et al. v. Pennsylvania Public Utility Commission (1958), 188 Pa. Super. 80, the Commission said: ". . . This record is barren of any evidence that the existing carriers are either unable or unwilling to meet any reasonable demands for service that may be made upon them. And while applicant, quite naturally, desires to perform the service requested and the shipper desires to obtain the services of the applicant, neither the desire to serve nor the desire to obtain the applicant's services is sufficient to grant the application." Application of Silver Line, Inc., 50 Pa. PUC 500 (1978).

The cases cited above were decided prior to the adoption of 52 Pa. Code §41.14. However, 41.14 did not alter the requirement that the applicant present substantial evidence of a bona fide need for the service proposed.

An applicant must go considerably further than Central has gone in order to establish the existence of a public need. It appears to Matlack that Central has paraded a few of its Pennsylvania based interstate customers before this Commission and prevailed upon them to testify that they need additional backup service. Even then, only two of the shippers were willing to testify that they would actually use the service if Central were to receive the requested authority. To allow a carrier to obtain authority (especially statewide authority) based upon evidence of this nature is to effectively eliminate any motor carrier entry control by the de facto elimination of yet another of applicant's evidentiary burdens - the burden of establishing public need. The Commission, in enacting 52 Pa. Code 41.14, elected not to go so

far in easing entry into this regulated industry. The Public Utility Code will not allow it to do so. Central has not carried its "public need" burden. Its application must be denied.

Central, apparently recognizing the dearth of need testimony present in this record, concludes the "public need" portion of its Brief by reciting a litany of what it terms "long-established legal and regulatory policy principles" which, on their face, appear to lessen Central's evidentiary burden. There is no disagreement with many of these "principles" - ie., that Central need not show 1. that its proposed service is indispensable, 2. that there exists a need for the service "in every square mile of territory certificated", 3. that the level of competition that should be allowed "is an administrative question left to the discretion of the Commission", 4. that "no existing carrier has an absolute right to be free from competition", and 5. that wide "geographical grants" are justified in "specialized service" applications. However, the proposition silently adopted by Central in its Brief and in its theory of the case - Central's unspoken major premise - is that, because of this whirl of policies, pronouncements and principles, Central's application can be granted absent adequate proof of public need does not pass muster. Policy does not replace proof and Central is woefully short of proof.

In the absence of the requisite public need evidence, Central is not entitled to any authority, let alone the statewide authorization sought herein.

Finally, Central adopts the position that "an inference can reasonably be drawn that the advantages of an applicant's proposed service, as appreciated by the witnesses appearing in support of the application, would also devolve to the benefit of other shippers in the application territory." (Central Brief, p.30). In order for an inference of this nature to be made in this proceeding, Central must first establish that the shippers who testified in support of its application are representative of other, similarly-situated shippers. See, Application of Ward Trucking Corp., 43 Pa. PUC 689, 703 (1968). There is no evidence that the 8 shipper witnesses are "representative". In the absence of that proof any influence that they are, is unjustified and gratuitous.

Central's own evidence indicated that during the period October, 1987 through September, 1988 Central served 84 Pennsylvania shippers and 242 Pennsylvania consignees on interstate traffic moving to and from Pennsylvania. This interstate service was classified by Central's operating witness as being similar in nature to that proposed herein. (Exhibit A-1, p.9). Despite this broad pool from which it could draw support, Central in acquitting its burden was able to produce only eight (8) shippers. It cannot be sustained, by any statistical or sampling method or test of reason, that the successes, difficulties, methodologies, desires, needs or requirements of 8 shipper witnesses are representative of a group of 326 Pennsylvania shippers/receivers of bulk products.

Central has not sustained its burden of proving a public need for the service it proposes. Viewing this record in a light most favorable to Applicant, the only authority that could justifiably be granted as a result of this proceeding is authority to serve McCloskey Corporation and Witco Corporation - the only two (2) shippers who indicated their intention to utilize Central's service if this application is approved. To grant authority more extensive would be "extravagant, capricious and arbitrary and not in conformity with law." Kulp v. Pennsylvania Public Utility Commission, 153 Pa. Super. 379, 384, 33 A.2d 724 (1943).

B. Central Has Failed To Establish Its Fitness To Provide The Proposed Service

The major portion of Central's Brief is dedicated to a discussion of Central's "regulatory fitness" - Central's ability to operate safely and legally.² The focus of Central's discussion is in support of its contention that Protestants have failed to present clear and convincing evidence of Central's "unfitness". This misstates the burdens imposed upon the parties relative to an applicant's regulatory fitness.³

In its brief, Central identifies five (5) categories of allegations and violations raised during the course of this

² The term "regulatory fitness" will be utilized to refer to Central's willingness and ability to operate safely and legally.

³ Although not conceding Central's financial and technical fitness, those issues will not be addressed in this Brief.

proceeding: 1. FBI investigation of hazardous substance law violations; 2. OSHA citations; 3. PA. DER Notice of Violation; 4. Pennsylvania-to-Pennsylvania Service; and 5. Miscellaneous infractions. Central's response to each category of violation was to either argue that another Protestant was guilty of an equally serious violation or that the Protestants have failed to clearly establish that Central was guilty of the alleged violations.

Matlack submits that Central's argument misses the mark. It misplaces the burden of proof regarding Central's fitness. Matlack presented evidence that brought into question Central's ability to provide the service proposed herein in a safe and lawful manner. The Matlack proofs indicate that Central has been investigated by several of the agencies to which it is subject (particularly agencies charged with the responsibility of environmental quality) and that it performed transportation between points in Pennsylvania without the requisite authority from this Commission... Matlack submits that the presentation of this evidence is sufficient to present a bona fide issue as to Central's regulatory fitness. It was Central's responsibility not only to respond to the questions raised by those proofs, but also to establish its fitness to receive the requested authority. That Matlack did not prove Central to be unfit is true, but that dodges the question. The question is: In light of the general allegations, investigations and other fitness matters touched on, has Central adequately, fully and openly responded and adduced evidence of its own so that the Commission can conclude that

Central is fit? The answer is NO, we submit.

In considering whether to grant the instant application, it is incumbent upon the Commission to scrutinize Central's fitness. Byham v. Pennsylvania Public Utility Commission, 165 Pa. Super. 253, 258, 67 A.2d 646 (1949). This is particularly true in a proceeding of this nature wherein the applicant proposes a service that includes the transportation, in bulk, of large quantities of hazardous materials, the mishandling of which could have catastrophic consequences for the environment and residents of this Commonwealth.

Central seems to request that the Commission ignore Central's past regulatory difficulties and issue a Certificate based solely upon its assertions that the problems will not recur and that it will operate in compliance with all applicable regulations. Matlack suggests that the stakes are too high especially in the tank carrier business to allow a carrier to receive statewide authorization...absent...a clear and convincing showing of its regulatory fitness, especially since "the primary purpose of the fitness criteria is to protect the public." (Order of ALJ Schnierle, February 2, 1989, p.9).

Questions regarding Central's fitness were raised early in this proceeding. Central has had substantial opportunity to respond. Rather than offering evidence of remedial measures undertaken to cure past ills or to offer proof that any perceptions of regulatory or safety difficulties are erroneous, Central fought to have evidence of its past regulatory problems

kept from this record. The adage that "Thou doth protest too much" is undeniably applicable. This Commission is entitled to more, before granting the first piece of operating authority to Central. Central (not Matlack) is in possession of the best evidence of Central's fitness.⁴ That it chose to advance only the most rudimentary of evidence on its own behalf cannot be seen as a shortcoming of protestants or the Commission. Central should be fixed with the results of its failure - after all the burden is upon it. The public interest implications of a grant in the absence of a clear and convincing showing by Central should result in a finding that Central has not carried the burden of establishing its fitness to receive the authority it seeks herein.

C. Approval Of This Application Will Adversely Affect The Operations Of Matlack Contrary To The Public Interest

As stated by the Superior Court of Pennsylvania in Yellow Cab Company v. Pennsylvania Public Utility Commission, 161 Pa. Super. 41, 51, 54 A.2d 301, (1947), "it is a general principle of utility law that competition will not be permitted among public utilities to such an extent as would defeat the purpose of the grant of the franchise and injure the public interest." Furthermore, 52 Pa. Code §41.14 requires that the Commission consider the extent to which "the entry of a new carrier into the field would endanger or impair the operations of existing common

⁴ Although "(t)he Commission staff is always available to challenge an applicant's fitness," (Order of ALJ Schnierle February 28, 1989, p.15), Matlack is unaware of any such attempt.

carriers. Protestant submits that the record indicates that approval of this application would affect its operations "contrary to the public interest." 52 Pa. Code §41.14.

Matlack presented substantial, credible evidence regarding the manner in which the authorization of Central to the extent requested herein will impact upon its existing intrastate operation and adversely affect the quality of service Matlack supplies to its Pennsylvania-based shippers.

For the twelve months ending September 30, 1988, operations at Matlack's Pennsylvania terminals resulted in a net operating loss of \$525,435 and a total net loss of \$589,992. (Matlack Exhibit 2, Appendix 9). Moreover, Matlack's trailer utilization in Pennsylvania for May, 1989 was as low as 30% at Matlack's Pittsburgh terminal, and reached only 48%, 53% and 55% respectively at Matlack's York, Bensalem and Martins Creek terminals, and averaged 55.5% (52.5% weighted) at the seven (7) terminals primarily responsible for providing equipment for Pennsylvania intrastate service. (Matlack Exhibit 2, Appendix 8). These figures indicate that slightly less than one-half of the equipment based at these Matlack terminals remained idle on any given week day in May, 1989. The introduction of another competitive carrier will only further aggravate Matlack's already critical financial situation and equipment utilization problems relative to its Pennsylvania operation.

The effect of additional competition upon Matlack's operation becomes particularly significant when viewed in

conjunction with the impact that such competition has upon Matlack's ability to serve the shipping public within Pennsylvania. Within the past four (4) years, Matlack has closed terminals in New Castle, St. Petersburg, Beaver and Greensburg due to lack of sufficient traffic to support continuing operations there. This impacts upon the public by adversely affecting the responsiveness of the service Matlack can supply. The authorization of Central to the extent requested herein will divert additional traffic from Matlack and potentially result in the closing of additional terminal facilities - a consequence that will result in yet a further diminution in the quality of service available to Pennsylvania-based shippers. (Matlack Exhibit 2, pp.10-11). All this in light of the absence of any undertaking by Central to open additional Pennsylvania facilities, to employ additional Pennsylvanians or in some other way to make a material commitment to Pennsylvania.

Central poses a very real threat to the intrastate operations of Matlack and other authorized carriers. Central has modified the authority it is seeking in this proceeding to eliminate certain commodities. However, the commodities for which authority is presently sought include the more exotic - and more financially rewarding - products. To the extent the transportation of these commodities is diverted by Central, Matlack and other certificated carriers are left to compete for traffic that will generate considerably less revenue. This "cherry picking" by an out-of-state carrier seeking access to

Pennsylvania intrastate traffic should not be countenanced.

Central holds an advantageous position with respect to the single largest component of the cost of providing motor carrier service - labor. Matlack is an "old line" carrier, with labor contracts negotiated through the collective bargaining process, that provide substantial wage and benefit advantages to its personnel. (T.629). Matlack's largest single cost is its cost of labor. (T.628). In contrast Central is a non-union carrier unencumbered by any collective bargaining agreements. (T.57). Moreover, Central's drivers are compensated based upon a percentage of the revenue derived from the service provided - the less revenue derived the lower the labor cost, with no compensation for periods when the vehicle is not being operated. (T.59-60). Because of these cost advantages Central can afford to reduce its rates below those of Matlack and other competitors since it is still guaranteed a fixed percentage of the revenue derived. It may be that this Commission will choose to reward the lower cost carrier no matter why it is lower cost - but the issue should not be ignored. There is sufficient warrant in the Public Utility Code and the Commission's regulations compelling attention to organized labor in matters coming before the Commission that the Commission may be justified in stating, in effect, that pricing advantages based on significantly lower labor costs and shipper support pinioned on the favorable pricing will not support the grant of new or additional operating rights.

In any event there is, quite clearly, something for certificated carriers to fear from the authorization of Central. When balanced against the dearth of evidence of a public need for the proposed service, the negative effect that the authorization of Central will have upon Matlack's operation and its ability to serve the public must result in the finding that approval of this application will be contrary to the public interest.

V. PROPOSED FINDINGS OF FACT

1. Central Transport presently holds no Pennsylvania intrastate operating authority. It holds nationwide common and contract carrier authority from the Interstate Commerce Commission. Central also operates in intrastate commerce in Georgia, North Carolina, South Carolina, Tennessee and West Virginia. (Exhibit A-1, pp.2-3).

2. Central maintains a terminal facility in Karns City, Pennsylvania with additional terminals situated in Paulsboro, New Jersey and Baltimore, Maryland....Forty-one tractors and thirty-nine trailers are assigned to Central's Karns City terminal. (Exhibit A-1, Exhibit 1C; Exhibit A-2).

3. Central has provided extensive service in interstate commerce in connection with traffic moving to and from points in Pennsylvania. Of its Pennsylvania-related interstate traffic, approximately 45% either originated at or was destined to four locations: Karns City, Petrolia, Philadelphia and Rochester. (Exhibit A-7, pp.2-3; T.37-38).

4. In excess of 50% of the liquid bulk commodities transported by Central are designated as hazardous. Central intends to provide in intrastate commerce a service similar to that presently supplied in interstate commerce. (T.29; Exhibit A-1, pp.9-10).

5. On May 11, 1988, Central transported a shipment from Morrisville, PA to Western Middlesex, PA without requisite intrastate operating authority. (T.57).

6. Central's employees are not party to a collective bargaining agreement. As compensation for their services, Central's line-haul drivers receive a percentage of the revenue derived by Central for the transportation services being provided. (T.57, 59-60).

7. Central has been involved in numerous proceedings relating to alleged violations of various federal and state regulations. Two incidents involved the failure to require employees to wear appropriate protective equipment while cleaning tank trailers. One of these incidents resulted in multiple fatalities. (T.677-678, 687-689).

8. Witco Corporation refines petroleum products and manufactures such end-products as petroleum oil, wax, petrolatums, white oil, lubricating oils and gasolines. (T.148-149; Exhibit A-9). Witco's present intrastate transportation requirements are met by its private carriage operation, by customer pick-ups, and by 11 intrastate carriers. (Exhibits A-9, A-10; T.153-155).

9. Witco is supporting Central's application in order to ensure that it is "fully covered with all viable carriers." Central will be utilized if this application is approved but Witco offered no evidence regarding the extent of such anticipated use. (T.157-159).

10. Pennzoil Products Company operates a petroleum refinery in Karns City from which it ships white oil and petrolatums. During the period January through October, 1988, Pennzoil shipped to 22 Pennsylvania destinations from Karns City, utilizing Fleet, Montgomery, Matlack and its own vehicles. (Exhibit A-12; T.165-166). Inbound traffic from 6 enumerated origins was all handled by Refiners Transport, Fleet and in private carriage. (T.166-168; Exhibit A-13).

11. The witness from Pennzoil noted his expectation that the existing routings of his inbound traffic will continue regardless of the outcome of this application proceeding. (T.186-189).

12. From its facility in Philadelphia, McCloskey Corporation ships industrial resins and solvents utilized by manufacturers in the paint and coating industries. Twelve Pennsylvania destinations were identified with total intrastate volume moving to these destinations amounting to 35 shipments per year. (T.208-209; Exhibit A-15; pp.5, 7).

13. McCloskey intends to tender an unspecified percentage of its intrastate traffic to Central if this application is approved. (T.212-213).

14. E. F. Houghton & Co. maintains a facility at Fogelsville where it manufactures and distributes oils and greases. Houghton has a total of approximately 80 to 90 intrastate shipments per year. (T.259-261).

15. Matlack, Chemical Leaman, Crossett and Oil Tank Lines have been utilized to handle Houghton's intrastate traffic.

16. Houghton anticipates utilizing Central as a "fill-in" carrier. (T.265).

17. Harry Miller Corporation ships cleaning compounds and petrolubes from Philadelphia to Reading and petrolubes from Philadelphia to Allenport. Shipments to Reading occur approximately once every two months while traffic to Allenport moves approximately once every three months. (T.282-283).

18. Harry Miller was interested in utilizing Central as a backup carrier, affording the shipper an additional option for the handling of last minute shipments. (T.283-284, 290; Exhibit A-19).

19. Para-Chem ships from its facility in Philadelphia to other points in the city and county of Philadelphia as well as to Hazelton, PA. The sole product shipped on an outbound basis is liquid latex while inbound shipments originate in Neville Island and consist of a resin solution.

20. Para-Chem's outbound traffic is all handled in private carriage while inbound shipments are all arranged by a property broker, Backhaul Transporters. (T.295). It is Para-Chem's intention to continue both its private carriage operation and

utilizing Backhaul Transporters to broker its inbound shipments. (T.304-305, 308).

21. Para-Chem has not requested service from a motor carrier for approximately 2 to 3 years. (T.297).

22. Calgon Corporation's primary manufacturing facility is located in Elwood City. This facility produces water treatment chemicals, primarily synthetic resins and polymers. (T.318, 322). Calgon's principal intrastate destination is Pittsburgh. Calgon also has occasional shipments to 5 additional destinations. (T.319-320).

23. All of Calgon's intrastate traffic is handled by Schneider National Bulk Carriers, Inc. Calgon supported Central's application so as to have Central available as a backup carrier to Schneider. Calgon already has 3 other available backup carriers. (T.321,324, 327-328).

24. Valspar Corporation manufactures a can coating utilized by the food and beverage industry. This product is manufactured in both Pittsburgh and Rochester with Rochester acting as a distribution point to such destinations as Lebanon, Fogelsville and Philadelphia. (T.333). All of Valspar's intrastate traffic is presently being handled by Matlack. (T.335).

25. Valspar supported the application of Central so as to have Central's service available as a backup to that presently provided by Matlack. (T.336).

26. Matlack, Inc. holds and operates actively pursuant to authority issued by this Commission at A-67250, Folders thereunder

and Amendments thereto. Matlack's application at A-67250, F.21, Am-G was recently approved by the Initial Decision of Administrative Law Judge Wendell Holland. Judge Holland's Decision granted Matlack authority to transport dry bulk commodities in tank or hopper type vehicles, between points in Pennsylvania. (Matlack Exhibit 2, p.2).

27. Matlack holds nationwide common and contract carrier authority from the Interstate Commerce Commission authorizing the transportation of general commodities, except classes A and B explosives and household goods. Matlack also holds and operates pursuant to operating authority from 34 states authorizing intrastate service in those jurisdictions. (Matlack Exhibit 2, pp.2-3).

28. During the period January 1, 1989 through May 31, 1989 Matlack handled a total of 853 shipments for the 8 shippers that support Central's application. This traffic generated revenues of \$872,487. Of these totals, .92 shipments and \$113,105 in revenues resulted from service rendered in Pennsylvania intrastate commerce. During the same 5 month period, Matlack transported a total of 1,645 shipments, generating revenue of \$1,064,005, within the scope of the authority requested by Central in this proceeding. (Matlack Exhibit 2, pp.2-3; Appendix 2).

29. Matlack maintains terminals throughout Pennsylvania at Bensalem, Bradford, Martins Creek, Norristown, Pittsburgh and York. It also maintains a terminal in Swedesboro, New Jersey utilized to dispatch equipment to provide Pennsylvania intrastate

service. (Matlack Exhibit 2, p.4). Matlack's Bensalem, Norristown, and Pittsburgh terminals possess tank cleaning capabilities. (Matlack Exhibit 2, pp.4-5).

30. Matlack is reopening its St. Petersburg, PA. terminal, in response to a significant increase in the volume of traffic tendered to Matlack by one of Central's supporting shippers, Witco Corporation. (Matlack Exhibit 2, p.5).

31. Matlack employs a total of 297 employees at its 6 Pennsylvania terminals, with an additional 79 employees being utilized at its Swedesboro, NJ facility. (Matlack Exhibit 2, p.6).

32. Among the some 4,500 vehicles it operates nationwide, Matlack has 220 tractors and 354 trailers stationed at its Pennsylvania and Swedesboro, NJ terminals. These vehicles are underutilized and available to handle additional Pennsylvania intrastate traffic. (Matlack Exhibit 2, p.6).

33. Matlack has an excellent safety rating and a comprehensive safety program. Matlack has a rigorous preventive maintenance program, a Loss Control Management Program designed to eliminate vehicle accidents and spills, and company-wide Hazardous Materials and Emergency Response Procedures designed to minimize the adverse effects that an accident will have on the surrounding environment. (Matlack Exhibit 2, pp.7-8).

34. Within the past four years, Matlack has closed four terminals within Pennsylvania due to a lack of sufficient traffic to support their continuing operations. The closing of these

terminals has adversely affected the responsiveness of Matlack's service in the territory proximate to those facilities. (Matlack Exhibit 2, p.10).

35. For the twelve month period ending September 30, 1988, operations at Matlack's six Pennsylvania terminals resulted in a net operating loss of \$525,435 and a total net loss of \$589,992. (Matlack Exhibit 2, p.11; Appendix 9).

VI. PROPOSED CONCLUSIONS OF LAW

1. The Pennsylvania Public Utility Commission has jurisdiction over the parties and subject matter of this proceeding.

2. Central has failed to sustain its burden of establishing the existence of a public need for the proposed service.

3. Applicant has failed to sustain its burden of establishing that it possesses the ability to render the proposed service safely and legally.

4. Approval of the instant application will adversely affect the operations of Matlack, Inc., contrary to the public interest.

5. Applicant has failed to sustain its burden of proving that approval of this application is necessary or proper for the service, accommodation, convenience or safety of the public.

VII. CONCLUSION

In attempting to establish the existence of a public need for its proposed service, Central presented the testimony of only eight (8) public witnesses. Of these, only two (2) testified that

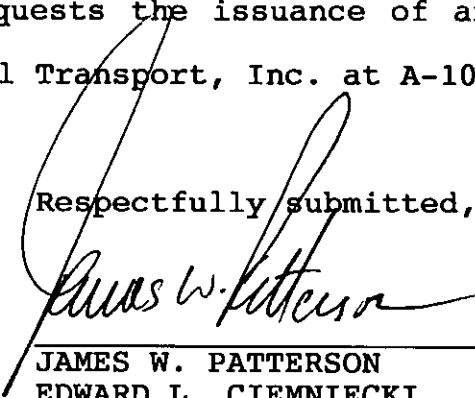
they would actually use Central's service if this application is approved. The remaining shippers look to Central to act as a backup to their existing private fleets and carriers. This evidence does not justify a grant of the statewide authority sought by Central in this proceeding.

Central has failed to sustain its burden of establishing its regulatory fitness. This Commission, when asked to authorize statewide tank truck service, is entitled to far more than it has been given by Central in the way of detailed evidence of regulatory fitness. Because proof of its fitness is Central's affirmative burden - it seeks the privilege of operating - the application should be denied.

Finally, Central poses a substantial threat to the operations of certificated intrastate carriers, including Protestant Matlack. Authorization of Central to the extent requested herein will likely divert traffic and revenues from Matlack. This, in turn, may result in terminal closings and a diminution in both the quantity and quality of service available to the public. The public interest will not be served by such a result. Central's application must be denied.

WHEREFORE, Matlack, Inc. requests the issuance of an Order denying the application of Central Transport, Inc. at A-108155 in its entirety.

Respectfully submitted,



JAMES W. PATTERSON
EDWARD L. CIEMNIECKI
Attorneys for Matlack, Inc.

Digest of Testimony

I. OPERATING WITNESSES

1. W. David Fesperman
Director of Traffic Services
Central Transport, Inc.

Central Transport, Inc. is a motor common and contract carrier of bulk commodities holding authority from the Interstate Commerce Commission at MC-118831. Central also operates in intrastate commerce in Georgia, North Carolina, South Carolina, Tennessee and West Virginia. (Exhibit A-1, pp.2-3).

As relevant to its Pennsylvania operations, Central maintains terminal facilities at Karns City, Pennsylvania, Paulsboro, New Jersey and Baltimore, Maryland. (Exhibit A-1, pp.5-7). Central operates 392 company owned tractors and 121 tractors that are owned by owner-operators. Central also operates a total of 778 trailers systemwide. (Exhibit A-1, Exhibit 1D).

Of this equipment, 31 company owned tractors and 10 owner-operator tractors are stationed at its Karns City facility. Two company owned tractors and 7 owner-operator tractors are based in Baltimore while Paulsboro, New Jersey is assigned 1 company owned tractor and 4 owner-operator tractors. (Exhibit A-1, Exhibit 1C). The Karns City facility also has tank cleaning equipment for the cleaning of tank trailers. (Exhibit A-1, p.12). Karns City utilizes the services of seven full-time employees, in its Karns City trailer cleaning operations. (T.40).

Central has a total of 39 trailers assigned to its Karns City terminal, 14 trailers assigned to Paulsboro, New Jersey and 20 trailers assigned to its Baltimore, Maryland terminal facility. (Exhibit A-2). Of this trailer equipment, 2 of the trailers stationed at Paulsboro are dry bulk trailers while 1 dry bulk trailer is assigned to the Karns City facility. (T.38-39).

Central proposes to provide intrastate service similar in nature of that presently provided in interstate commerce. Central is seeking to focus its service on a distinct segment of the bulk carrier transportation market - namely the chemical industry - and therefore agreed to restrictively amend its application so as to eliminate certain commodities. (Exhibit A-1, pp.9-10; T.32).

During the period October, 1987 through September, 1988, Central transported 5,095 loads moving to or from Pennsylvania points in interstate commerce. This service reflected transportation for 84 different shipper/consignors located in

Pennsylvania while 242 different consignees were served on the traffic delivered to Pennsylvania destinations. (Exhibit A-7, pp.2-3). Of the shipments handled into and out of Pennsylvania in interstate commerce by Central, approximately 45 percent originated at or were destined to Karns City, Petrolia, Philadelphia and Rochester. (T.37-38).

Mr. Fesperman estimated that in excess of 50 percent of the liquid bulk commodities transported by Central are designated as hazardous. (T.29). Central's operations people estimate that approval of this Application would add a minimum of \$1 million of revenues per year to Central's operations. (T.30).

In most instances, Central includes the cost of cleaning the trailer in the rate charged to the shipper. There are certain commodities for which the cleaning costs are somewhat higher than normal and Central therefore charges an additional fee when the tank cleaning involves the elimination of those commodities. (T.44).

Evidence was presented regarding shipments handled by Central between two points within Pennsylvania. Mr. Fesperman testified that the shipments originating in Philadelphia all had a movement by water prior to their arrival in Philadelphia. The witness was unable to testify as to the initial origin of the shipments, the length of time they rested in Philadelphia, the owner of the products while they were being transported by water, or when the products were sold to the ultimate consignees. (T.49-51). There were also shipments of water handled by Central that were transported during a water crisis in Western Pennsylvania. Certain shipments were also transported by Central over roads that were entirely within the complex of Koppers. Finally, there was a shipment from one Pennsylvania point to another Pennsylvania point that was handled despite knowledge that it involved an intrastate shipment and was being transported without proper authority. (T.54-57).

Central's employees are not unionized. Line-haul drivers are paid a percentage of revenue with the actual percentage depending upon the seniority of the driver. Accessorial charges are, under certain circumstances, included in the calculation of revenue to be paid to the driver. (T.57, 59-60).

2. Jerry Skidmore
Director of Cleaning and Waste Treatment Systems
Central Transport, Inc.

It is Mr. Skidmore's responsibility to ensure that tank cleaning is completed and that waste treatment is handled in an economical and approved method. (T.661).

Central does not have any type of rapid response team with the responsibility of dealing with spills or other environmental hazards. Rather, it is Central's procedure to contract that work out to organizations that are in close proximity to the incident. (T.663).

Mr. Skidmore acknowledged that two Central employees were killed in 1986 at Central's tank cleaning facility in Charlotte, North Carolina. The employees died of asphyxiation as a result of the inhalation of methylene chloride. These employees were not wearing oxygen masks or any type of protective equipment at the time of their deaths. (T.677-678).

There have been four other incidents where Central employees were injured in connection with Central's tank cleaning operation. However, none of the injuries were serious enough to require hospitalization of the employee. (T.684).

A citation was issued to Central on January 29, 1987 alleging a violation of OSHA regulations dealing with the cleaning of tanks and the exposing of individuals to hazards associated with working in confined spaces. (T.687-688). This instance was similar to the circumstances surrounding the Charlotte fatalities in that it also involved Central's failure to require its employees to wear appropriate protective equipment and respirators while cleaning trailers. (T.689).

Central also encountered some difficulty with the Pennsylvania Environmental Protection Agency relative to the handling of waste materials generated by the tank cleaning operation at Karns City. (T.690-691).

II. SUPPORTING SHIPPER WITNESSES

1. George L. Keller Central Regional Traffic Manager Witco Corporation

During the period October 1987 through September 1988 Central handled 431 loads for Witco from Witco's Petrolia facility, 84 loads from the shipper's Bradford facility and 26 loads from Witco's Trainer location. All of these loads were destined to out-of-state points. (Exhibit A-8, p.1-2).

Witco's Petrolia facility is involved in the refining of petroleum products and produces such end-products as petroleum oil, wax, petrolatums and white oil (petroleum oil) with the white oil and petroleum products predominating. In September, 1988 the Petrolia location had 29 shipments moving in Pennsylvania intrastate commerce. Thirty-two such shipments were shipped from Petrolia in August of 1988 while 26 shipments moved to Pennsylvania destinations from Petrolia in July 1988. (T.148-149; Exhibit A-9).

In Bradford, Witco manufactures motor oils which are classified as lubricating oils, gasolines, waxes and petrolatums. Lubricating oil is the primary product shipped from Bradford, followed by petrolatums and wax. (T.149).

The Petrolia facility requires single compartment stainless steel insulated equipment - MC-307's. The Bradford location does not require food grade trailers but requires more compartmentalized tank trailers than is needed at the Petrolia location. (T.151).

Mr. Keller offered an exhibit reflecting the tank truck shipments that originated at Witco's Bradford facility and moved to destinations within Pennsylvania. The intrastate shipments were handled in private carriage, by customer pick-up, and by such carriers as Chemical Leaman, Crossett, Kendall (Witco's own carrier division), Leaseway (Refiners Transport and Fleet), Matlack, Maust, Oil Tank Lines, Paul Miller, Quality Carriers and Zappi. (Exhibit A-10; T.153-155). Leaseway, Quality, Matlack and Bulkmatic are involved in handling the intrastate traffic originating at Witco's Petrolia location. (Exhibit A-9).

Mr. Keller indicated that he was supporting the application of Central so as to ensure that he is "fully covered with all viable carriers." He is also interested in obtaining the availability of Central because the applicant has a new cleaning facility and terminal located in close proximity to his Petrolia plant. The nearest Matlack facility to the Petrolia location is approximately one hour and ten minutes away in Neville, Ohio. Matlack does have a terminal in Bradford that is approximately 1/4 mile from Witco's facility. (T.157-158).

The authorization of Central to the extent requested by this application would enable Witco to be more selective in their use of carriers and would likely force his existing carriers to provide more timely service. Central would be utilized if the application is approved but the witness offered no indication as to the extent of such use. (T.158-159).

2. Valgene Frye
Traffic Manager
Pennzoil Products Company

Pennzoil operates a petroleum refinery in Karns City from which it ships white oil and petrolatums. The witness identified twenty-two Pennsylvania destinations to which it shipped from Karns City during the period January through October 1988. Fleet, Montgomery and Matlack have been utilized to handle this intrastate traffic. (Exhibit A-12; T.165-166). Pennzoil has utilized its own equipment to handle traffic moving to Rouseville. (T.166). Inbound intrastate shipments for the period January through September 1988 originated in Rouseville, Petrolia, Bradford, Emlenton, Pittsburgh and Freeport. The inbound traffic was handled

by Refiners Transport, Fleet and in private carriage. Of 3,762 loads that originated in Rouseville, only 530 loads moved via common carriers, with 95% of this traffic consisting of kerosene. The inbound traffic originating in Petrolia was shipped by Witco. (T.166-168; Exhibit A-13).

Pennzoil requires MC-307 stainless steel insulated trailers that are clean, dry and odor free. Pennzoil requires both compartmentalized and single unit trailers. (T.168-169).

Pennzoil is supporting the application of Central Transport because it is continually growing and is interested in ensuring that it has adequate equipment available. (T.170).

Central's Karns City facility is about 1/2 mile from Pennzoil's terminal locations. The proximity of Central's terminal to Pennzoil's facility will assist in Pennzoil receiving short notice service. (T.171). (Exhibit A-14).

The witness estimated that 5 to 10% of his Pennsylvania intrastate outbound traffic requires compartmentalized trailers. (T.177). Mr. Frye indicated further that he averages approximately 50 outbound loads per month to destinations within Pennsylvania, approximately 10 of which involve customer pick-ups. (T.178).

Central has been utilized by Pennzoil to handle 480 interstate loads originating at Karns City and 61 interstate shipments originating at Rouseville. (Exhibit A-11).

The references to Fleet Transport in the testimony of Mr. Frye includes service rendered by Refiners Transport. (T.185).

The customer in West Elizabeth designates Fleet or Refiners Transport as the carrier to handle its traffic, while the customer in Carnegie directs Pennzoil to utilize either Fleet or Matlack to handle traffic that is not picked up in its own vehicles. Pennzoil will continue to honor the carrier requests of the customer in Carnegie regardless of the outcome of this application. (T.186-187).

With respect to inbound traffic, Refiners is designated by the shipper as the carrier to handle shipments moving from Rouseville, while 90 to 95% of the traffic moving from Petrolia, Emlenton and Freeport was handled in Pennzoil's own vehicles. Shipments originating in Bradford are handled either in Witco's vehicles or via Crossett while Refiners has handled all the loads originating in Pittsburgh. The witness expects these routings to continue regardless of the status of this application proceeding. (T.186-189).

3. Thomas F. McGrath
Corporate Traffic Manager
McCloskey Corporation

McCloskey ships industrial resins and solvents utilized by manufacturers in the paint and coating industries. It requires insulated tank trailers for this transportation and prefers to have compartmentalized units which allow McCloskey to ship more than one product to a single customer. Compartmentalized units also allow for stop-off shipments to more than one customer. (T.208-209). The trailers need to be insulated in order to maintain the high temperature of the product during transportation and in order to prevent the product from coagulating. (T.210).

The witness identified customers situated in the following Pennsylvania locations: Allentown, Cecil, Sinking Springs, Philadelphia, Montoursville, Conshohocken, Pittsburgh, New Britain, Darby, Harrisburg, Norristown and New Ringgold. (Exhibit A-15, p.5). During McCloskey's fiscal year - December 1, 1987 through November 30, 1988 - McCloskey had a total of 35 shipments moving to these customer locations. (Exhibit A-15, p.7).

Matlack had been utilized to handle a portion of McCloskey's traffic. However, because service supplied by Matlack had missed pickups, late pickups and late deliveries, McCloskey discontinued its use of Matlack due to customer complaints and pressure from the sales department. Consequently, Mr. McGrath felt that McCloskey was limited to the service of one carrier, Chemical Leaman, and would therefore want the availability of Central Transport. Central Transport would become involved in the transportation of a certain percentage of McCloskey's intrastate traffic. (T.212-213).

Central Transport has handled one outbound and four inbound interstate shipments for McCloskey. (Exhibit A-15, p.1). On interstate traffic, McCloskey has also utilized the services of Chemical Leaman, Matlack, Tripamak, Liquid Transporters, Dana Transport Systems, Schwerman and Quality Carriers. (T.214-215).

On an outbound basis, McCloskey's intrastate volume is approximately 30% of its total volume. Mr. McGrath estimated that he requires compartmentalized trailers for approximately 70-75% of his intrastate shipments. (T.219-220). However, of the 35 intrastate shipments that McCloskey had during fiscal year 1987, only 16 involved stop off shipments or multiple deliveries. (Exhibit A-15).

Mr. McGrath complained that late pickups may result in McCloskey having to pay its personnel overtime in order to load a particular shipment. However, he further testified that McCloskey actually loads shipments on a 24 hour per day basis (except from midnight Saturday until 7 a.m. Sunday morning) and that he has personnel available during that entire period to handle the loading

of a tank trailer. (T.211-212, 224-225).

Mr. McGrath expects a carrier to arrive within 1/2 hour of its appointed time in order to make a pickup. If the carrier does not arrive within that 1/2 hour of the appointed time, McCloskey considers it to be a late pickup. Mr. McGrath offered an exhibit showing that Matlack provided late pickup service on 10 separate occasions from December 23, 1987 through May 27, 1988. On five of those occasions, Matlack arrived less than 75 minutes after its appointed pickup time. (Exhibit A-17). Mr. McGrath could not indicate any instances that he received customer complaints regarding Matlack's late pickups. (T.228).

McCloskey terminated its use of Matlack's intrastate service after Matlack imposed what he felt was an unreasonable rate increase. Mr. McGrath advised Matlack if they pursued the rate increase that he would have to change carriers. Following imposition of the increase by Matlack, McCloskey began utilizing McNulty Bulk Transport to handle traffic previously handled by Matlack. (T.234).

Mr. McGrath's familiarity with Central's service is based principally on Central's handling of five interstate loads for McCloskey. Mr. McGrath did not know where Central's terminals were located or if Central has compartmentalized trailers situated at its nearest terminals. (T.236-237).

Mr. McGrath's investigation of available intrastate bulk carriers has been limited to discussions with his existing carriers, an examination of the Philadelphia Yellow Pages and a discussion with a transportation consultant who recommended that he utilize McNulty. (T.245-246).

Mr. McGrath prefers to use carriers that have a terminal situated within 50 to 75 miles of his facility. (T.248).

4. William S. Dahms, Sr.
Manager, Traffic & Distribution
E.F. Houghton & Co.

E.F. Houghton maintains a facility at Fogelsville, Lehigh County where it manufactures and distributes oils and greases. Points to which Houghton has intrastate traffic include Emigsville, Marietta, Steelton, York, Frazer, Red Lion, Ransome, Mahoopany, Downingtown, Hanover, Jenkintown, Corry, Lancaster, Harrisburg, Reading, Oil City and Erie. Houghton has a total of approximately 80 to 90 shipments to these points during the course of a year. Inbound shipments moving to Fogelsville originate in Bradford, Oil City, Petrolia and Marcus Hook. These shipments involve chemicals, raw materials and oils. (T.259-261).

Houghton requires single shell stainless steel insulated trailers for the movement of its goods. Mr. Dahms was aware that Central has this type of equipment available. (T.262).

Matlack and Chemical Leaman have been handling Houghton's Pennsylvania outbound traffic. Crossett has provided inbound service to Houghton's facility. Oil Tank Lines has been utilized in connection with movements from Marcus Hook. (T.263-264).

Mr. Dahms was supporting Central's application because he feels he needs an additional carrier to handle last minute requests for his products. (T.264). Houghton anticipates utilizing Central as a "fill-in" carrier. (T.265).

Central has never handled any outbound traffic for Houghton. It has been utilized in an inbound basis, handling seven loads from Cincinnati, OH, one load from Sewaren, NJ, one load from Savannah, GA and one load from Charleston, SC. (T.267; Exhibit A-18).

The witness was familiar with Refiners Transport as a result of a sales call made by a representative of Refiners. (T.268-270). Mr. Dahms was not aware of any traffic Refiners is handling inbound to Fogelsville from Pennsylvania intrastate origins. (T.271-272).

Mr. Dahms anticipated that Oil Tank Lines would continue to be utilized to supplement rail service on inbound shipments from Marcus Hook regardless of the outcome of this application proceeding. (T.276).

5. Betty McKay
Order Department
Harry Miller Corporation

Harry Miller Corporation ships cleaning compounds and petrolubes from Philadelphia to Reading and petrolubes from Philadelphia to Allenport. Shipments to Reading occur approximately once every two months while traffic to Allenport moves approximately once every three months. Harry Miller requires tank trailers with the capacity of 5,000 gallons each. (T.282-283).

Matlack has been utilized for transportation to Allenport and Reading. (T.283). Central has handled ten outbound shipments and three inbound shipments for Harry Miller in interstate commerce. The witness indicated that she would like to have Central available for those instances when she needs immediate service and Central would offer her an additional option for handling that traffic. (T.283-284; Exhibit A-19).

Mrs. McKay indicated that she was interested in utilizing the applicant as a back-up carrier when Central's service was needed. (T.290).

6. William M. Hansbury
Plant Manager
Para-Chem Southern Inc.

Para-Chem ships from its facility in Philadelphia to other points in the city and county of Philadelphia as well as to Hazelton, PA. The sole product shipped on an outbound basis is liquid latex. Inbound intrastate shipments originate in Neville Island and consist of a resin solution. Inbound shipments from Neville Island occur approximately five times per month, with outbound shipments to Philadelphia occurring once every five weeks and shipments to Hazelton occurring twice per week. (T.293-295). Transportation of inbound shipments originating in Neville Island have been arranged by a property broker, Backhaul Transporters. This broker has been utilizing a carrier named Beeline. Outbound traffic is all handled in private carriage. (T.295). Since Para-Chem's vehicles are also utilized in interstate commerce, this shipper would like to have Central's service available when Para-Chem's own equipment is otherwise occupied. (T.296).

The witness was uncertain as to the last time a common carrier had been utilized for a Pennsylvania intrastate service but estimated that it was likely two to three years ago. Since that time, all intrastate outbound traffic has been handled in private carriage. (T.297).

The tank trailers used to transport Para-Chem's products must be cleaned after each movement of liquid latex. Mr. Hansbury was uncertain as to where Central cleans its trailers following the interstate transportation of liquid latex that it has supplied to Para-Chem. (T.301-302). Para-Chem has a portion of its private carriage fleet cleaned at Matlack's Bensalem terminal. (T.302-303).

It is Para-Chem's intention to continue its existing private carriage operation. (T.304-305). Central may be utilized as a back-up to that operation and may also be used inbound from Pittsburgh or Neville Island. (T.306). However, its Para-Chem's present intention is to continue utilizing Backhaul to broker its inbound shipments. (T.308).

7. Joseph R. Knouse
Manager of Transportation
Calgon Corporation

Calgon's primary manufacturing facility is located in Elwood City which produces water treatment chemicals, primarily synthetic resins and polymers. (T.318,322). Calgon's principal intrastate destination is Pittsburgh. It also has occasional shipments to Mahoopany, New Castle, Bradford, Spring Grove and Whitehall. Volume to Pittsburgh amounts to approximately 15 to 20 truckloads per month with approximately one truckload per month moving to each of the other five locations. (T.319-320).

Calgon requires an insulated stainless steel trailer for the transportation of its products. Its primary need is for single compartment trailers, with an occasional need for multi-compartment trailers. (T.320).

All of the traffic that Calgon has moving within Pennsylvania is presently being handled by Schneider National Bulk Carriers Inc. Calgon is supporting Central's application so as to have Central available as a back-up carrier to Schneider. (T.321,324). Although the witness acknowledged that he already has three back-up carriers available to him, it was his position that he would like to have a fourth to play a back-up role to Schneider. (T.327-328).

8. Maryanne Noga
Traffic Manager
Valspar Corporation

Valspar manufactures a can coating utilized by the food and beverage industry. Valspar's products are manufactured in both Pittsburgh and Rochester. From Rochester, Valspar ships to such points as Lebanon, Fogelsville and Philadelphia. There are also shipments that move between the Pittsburgh and Rochester locations. (T.333). Valspar requires a stainless steel insulated trailer that is either single compartment or a three compartment trailer. Valspar insists that these trailers be spotless. (T.334).

The witness indicated that the potential exists for Valspar to ship to Lebanon, Fogelsville and Philadelphia from Pittsburgh. However, no such movements are occurring at the present time. (T.334-335).

Matlack is handling all of Valspar's intrastate transportation needs at the present time. (T.335).

Ms. Noga was supporting the application of Central so as to have Central's service available as a back-up to that presently provided by Matlack. (T.336).

The witness estimated that Valspar's outbound intrastate volume originating in Rochester averages between 24 and 30 shipments per year. Valspar had no shipments to Fogelsville or Philadelphia in the first ten and one half months of 1988. Approximately 14 shipments per year move to Lebanon with the remainder of Valspar's intrastate traffic - 10 to 16 shipments per year - moving to Valspar's facility in Pittsburgh. (T.337-339).

III. PROTESTANT WITNESS

Martin C. Hynes, Jr.
Vice President - Marketing
Matlack, Inc.

Matlack is a Pennsylvania corporation domiciled at One Rollins Plaza, Wilmington, Delaware 19899. Matlack is wholly-owned subsidiary of Matlack Systems which also controls, as a wholly-owned subsidiary, Rollins Terminals, a company specializing in the storage of bulk materials. (Matlack Exhibit 2, pp.1-2).

Matlack holds and operates actively pursuant to authority issued by this Commission at A-67250, Folders thereunder and Amendments thereto. By Initial Decision served June 15, 1989, Administrative Law Judge Wendell Holland approved Matlack's application at A-67250, F.21, Am-G which, as relevant to this proceeding, authorizes the transportation of dry bulk commodities in tank or hopper type vehicles, between points in Pennsylvania. Matlack is a specialist in the transportation of a diversified range of liquid and dry bulk traffic, including such commodities as chemicals, petroleum products, paints, latex, emulsions, resins, pharmaceuticals and edibles in liquid, gas, powder or pellet form. (Matlack Exhibit 2, p.2).

Matlack also holds operating authority from the Interstate Commerce Commission authorizing transportation of general commodities, except classes A and B explosives and household goods, between all points in the United States on a common and contract carrier basis. Matlack also holds and operates pursuant to operating authority from 34 states authorizing intrastate service in those jurisdictions. (Matlack Exhibit 2, pp.2-3).

During the period January 1, 1989 through May 31, 1989, Matlack handled a total of 853 shipments for the eight shippers that supported Central's application. This traffic generated total revenues of \$872,487 for this five month period. Of these totals, 92 shipments and \$113,105 in revenues resulted from service rendered in Pennsylvania intrastate commerce. During this same period, Matlack transported a total of 1,645 shipments, generating revenue of \$1,064,005, within the scope of the authority requested by Central in this proceeding. (Matlack Exhibit 2, pp.2-3; Appendix 2).

Matlack maintains a total of 93 terminals spread throughout the United States. Six of these are situated in Pennsylvania at Bensalem, Bradford, Martins Creek, Norristown, Pittsburgh and York. Matlack also maintains a terminal in Swedesboro, New Jersey that is utilized to dispatch equipment to provide Pennsylvania intrastate service, and sub-terminals at Stockertown and Highspire at which Matlack stations equipment for service for particular shippers. (Matlack Exhibit 2, p.4).

Matlack's Bensalem, Norristown and Pittsburgh terminals possess tank cleaning capabilities. (Matlack Exhibit 2, pp.4-5).

Matlack is in the process of reopening a terminal situated in St. Petersburg, Clarion County. This terminal is being reopened in response to a significant increase in the volume of traffic being tendered to Matlack by Witco Corporation.

Matlack operates a Central Dispatch system at Wilmington, Delaware which functions 24 hours a day, seven days a week and is designed to monitor and coordinate service and truck movements throughout Pennsylvania and nationwide. (Matlack Exhibit 2, p.5).

Matlack employs in excess of 2,000 employees systemwide. Of its total number of employees, 297 are employed at its six Pennsylvania terminals and an additional 79 employees are utilized at Matlack's Swedesboro, New Jersey facility. (Matlack Exhibit 2, p.6).

On a systemwide basis, Matlack utilizes 4,482 pieces of equipment, including 1,048 power units and 3,001 trailers. Of this equipment 220 tractors and 354 trailers are stationed at Matlack's Pennsylvania and Swedesboro, New Jersey terminals. Matlack's Pennsylvania-based vehicles are underutilized and are available to handle additional Pennsylvania intrastate traffic. (Matlack Exhibit 2, p.6). Trailer utilization for the 7 terminals during May, 1989 average 55.5% (52.5% weighted), with trailer utilization at Matlack's Pittsburgh terminal amounting only to 30.2%. (Matlack Exhibit 2, pp.6-7).

Matlack employs a full-time Director of Safety and Compliance who oversees its safety program and keeps Matlack's employees informed of all changes and new developments relative to safe operations. Matlack maintains a rigorous preventive maintenance program to ensure that its equipment is in peak operating condition. It also has a Loss Control Management Program designed to eliminate vehicle accidents and spills. Matlack has also implemented company wide Hazardous Materials and Emergency Response Procedures with the goal of minimizing the adverse effects than an accident will have on the surrounding environment. In calendar year 1988, Matlack's vehicles travelled a total of 113,668,577 miles and averaged only .55 accidents per million miles travelled. This enabled Matlack to achieve the third best safety ranking among interstate tank truck operators. (Matlack Exhibit 2, pp.7-8).

Matlack carries public liability and cargo insurance coverage in excess of that required by the Pennsylvania Public Utility Commission. (Matlack Exhibit 2, pp.8-9).

Within the past 4 years Matlack has closed terminals in New Castle, St. Petersburg, Beaver and Greensburg due to lack of sufficient traffic to support their continuing operations. These closures have affected the responsiveness of the service Matlack supplies to shippers situated in those areas by forcing Matlack's

vehicles to travel greater distances in order to provide service. (Matlack Exhibit 2, p.10).

For the twelve month period ending September 30, 1988, operations at Matlack's six Pennsylvania terminals resulted in a net operating loss of \$525,435 and a total net loss of \$589,992. (Matlack Exhibit 2, p.11; Appendix 9).

Most of Matlack's employees are unionized and operate under a set of wage standards and contracts which resulted from collective bargaining agreements. These contracts provide for substantial wage and employee benefits for senior employees. Matlack considers itself at a disadvantage to a carrier such as Central that is not encumbered by union contracts and the attendant wage and benefit programs. (T.628-629).

It was Matlack's position that there is no need for the additional service proposed by Central. Matlack's experience competing with Central in interstate commerce has led Matlack to the conclusion that the authorization of Central to the extent requested in this proceeding will have a serious detrimental impact upon Matlack's Pennsylvania intrastate operations. (T.630). Matlack believes that the authorization of Central would be detrimental to it as has been Matlack's experience with competition encountered with Central for interstate traffic. (T.630).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Responding Brief of Protestant, Matlack, Inc., were served upon the following by United States mail, postage prepaid.

Dated at Philadelphia, Pennsylvania this 13th day of September, 1989.

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120
(Original and 9 copies)

William A. Chesnutt, Esquire
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108
(2 copies)

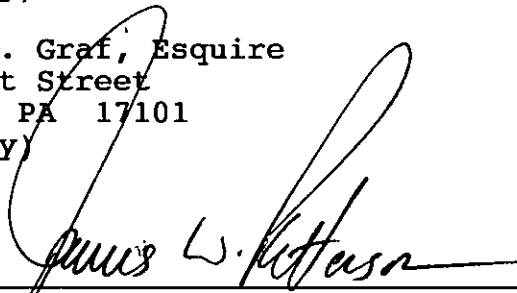
Ronald Malin, Esquire
Key Bank Building, 4th Floor
Jamestown, NY 14701
(1 copy)

Henry Wick, Jr., Esquire
1450 Two Chatham Center
Pittsburgh, PA 15219
(1 copy)

Kenneth Olsen, Esquire
P.O. Box 357
Gladstone, NJ 07934
(1 copy)

William O'Kane, Esquire
102 Pickering Way
Exton, PA 19341-0200
(1 copy)

Christian V. Graf, Esquire
407 N. Front Street
Harrisburg, PA 17101
(1 copy)



JAMES W. PATTERSON, ESQUIRE
EDWARD L. CIEMNIECKI, ESQUIRE
Attorneys for Matlack, Inc.

LAW OFFICES

WICK, STREIFF, MEYER, METZ & O'BOYLE

1450 TWO CHATHAM CENTER

PITTSBURGH, PA 15219-3427

(412) 765-1600

HENRY M. WICK, JR.
CHARLES J. STREIFF
CARL F. MEYER
LeROY L. METZ, II
DAVID M. O'BOYLE
VINCENT P. SZELIGO
LUCILLE N. WICK
PATRICIA LIPTAK-McGRAIL
M. BRADLEY DEAN
THOMAS M. CASTELLO

ARTHUR J. DISKIN
SENIOR COUNSEL

ORIGINAL
TELECOPIED
(412) 765-3133

September 13, 1989

RECEIVED

SEP 15 1989

Re: Application of Central Transport, Inc.
Docket No. A-00108155
Our File 2583.501

SECRETARYS OFFICE
Public Utility Commission

VIA CERTIFICATE OF MAILING

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

Dear Mr. Rich:

We enclose for filing with the Commission the original and nine copies of a Brief on behalf of Refiners Transport & Terminal Corporation.

Please acknowledge receipt and filing of the enclosed on the duplicate copy of this letter of transmittal and return it to us in the self-addressed, stamped envelope provided for that purpose.

Sincerely yours,

WICK, STREIFF, MEYER,
METZ & O'BOYLE




Henry M. Wick, Jr.

HMW/mec/3468w

cc: Honorable Michael Schnierle
All Parties of Record
Refiners Transport & Terminal Corporation

ORIGINAL

RECEIVED

SEP 15 1989

Before The

SECRETARYS OFFICE
Public Utility Commission

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Docket No. A.00108155

APPLICATION OF
CENTRAL TRANSPORT, INC.

BRIEF ON BEHALF OF
REFINERS TRANSPORT & TERMINAL CORPORATION,
PROTESTANT

DOCKETED

SEP 19 1989

Henry M. Wick, Jr.
Lucille N. Wick
Wick, Streiff, Meyer,
Metz & O'Boyle
1450 Two Chatham Center
Pittsburgh, PA 15219
(412) 765-1600

Attorneys for Protestant
Refiners Transport &
Terminal Corporation

Due Date: September 13, 1989

DOCUMENT
FOLDER

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE CASE	1
II. ABSTRACT OF EVIDENCE	2
A. Applicant's Operating Testimony	2
B. Testimony of Applicant's Supporting Shipper Witnesses	3
1. George L. Keller.	3
2. Valgene Frye	6
3. Thomas McGrath	8
4. William F. Dahms, Sr	10
5. Betty McKay	11
6. William M. Hansbury	12
7. Joseph R. Knouse	14
8. Mary Ann Noga	15
C. Testimony on Behalf of Protestant Refiners Transport & Terminal Corporation	17
1. Keith B. Wilson	17
2. David L. Michalsky	22
3. Gerald H. Hoover	24
4. Richard L. Frieze	25
III. STATEMENT OF THE QUESTION INVOLVED	25
IV. ARGUMENT	26
A. Introduction	26
B. Applicant Has Failed To Demonstrate That Approval Of The Application Will Serve A Useful Public Purpose, Responsive To A Public Demand Or Need	28
C. The Application Should Be Denied Because The Entry Of Central Transport, Inc. Will Endanger Or Impair The Operations of Existing Common Carriers, Including Refiners Transport & Terminal Corporation, To Such An Extent That, The Granting Of The Authority Would Be Contrary To The Public Interest	42
V. CONCLUSION	49
CERTIFICATE OF SERVICE	50

TABLE OF CASES

	<u>Pages</u>
<u>Application of Allied Asphalt Co., Inc.</u>	
43 Pa. PUC 622, 626 (1968)	33, 34
<u>Chemical Tank Lines, Inc. v. Pa. PUC</u>	
193 Pa. Super. Ct. 607, 619-620, 165 A.2d 668 (1960), aff'd 406 Pa 359, 178 A.2d 698 (1962)	36
<u>Commw., Pa. PUC v. Purolator Courier Corp.</u>	
24 Pa. Commw. Ct. 301, 355 A.2d 850, 852 (1966)	31, 32
<u>GG&C Bus Co., Inc. v. Pa. PUC</u>	
400 A.2d 941, 944 (1979)	39
<u>John Benkart & Sons Co. v. Pa. PUC</u>	
137 Pa. Super. Ct. 5, 7 A.2d 584 (1939)	39
<u>Kulp v. Pa. PUC</u>	
153 Pa. Super. Ct. 379 (1943)	29, 30
<u>Noerr Motor Freight v. Pa. PUC</u>	
191 Pa. Super. Ct. 322, 124 A.2d 393, 397 (1956)	29, 34
<u>Application of Refiners, Docket No. A-00093117</u>	
F.1, Am-A (Initial Decision of Judge Nemeč dated October 15, 1984)	33, 34
<u>Richard L. Kinard, Inc.</u>	
59 Pa. PUC 548 (1984)	28, 29, 37, 39, 40, 41, 42, 47
<u>Application of Ward Trucking Corp.</u>	
43 Pa. PUC 689, 701 (1968)	31

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Docket No. A.00108155

APPLICATION OF
CENTRAL TRANSPORT, INC.

BRIEF ON BEHALF OF
REFINERS TRANSPORT & TERMINAL CORPORATION,
PROTESTANT

I. STATEMENT OF THE CASE

Applicant Central Transport, Inc. (Central or Applicant) seeks authority to transport property in bulk, in tank and hopper - type vehicles, between points in Pennsylvania, subject to a variety of restrictions which are set forth in Applicant's Supplemental Exhibit No. 5.

The Application is opposed by six motor common carriers -- Refiners Transport & Terminal Corporation; Chemical Leaman Tank Lines, Inc.; Matlack, Inc.; Crossett, Inc.; Marshall Service, Inc.; and Oil Tank Lines, Inc.

The total public support for this statewide bulk application consists of 8 shippers - Witco Corporation; Pennzoil Products Company; The McCloskey Corporation; E. F. Houghton & Co.; Harry Miller Corporation; Para-Chem Southern, Inc.; Calgon Corporation and Valspar Corporation. The following brief on behalf of Refiners Transport & Terminal Corporation (Refiners) will summarize the testimony presented by the witnesses for Refiners and those public witnesses appearing in support of the application. This summary will be followed by Argument which

requests that the application be denied.

II. ABSTRACT OF EVIDENCE

A. Applicant's Operating Testimony

Applicant provided testimony concerning its present operation in the prepared testimony and exhibits of W. David Fesperman, Director of Traffic Services (Central's Exh. No. 1 and Central's Exh. No. 7). Numerous exhibits concerning equipment, terminals, traffic, personnel and the like were referred to by Mr. Fesperman in his testimony and on cross-examination. Protestant Refiners does not believe that any purpose would be served in reciting that testimony which has already been summarized by Applicant in its Brief at pp. 3-7. Applicant's Brief is unique in that it devotes 17 pages of argument (pp. 7-24) to a discussion of whether evidence in the record demonstrates that Applicant "lacks a propensity to operate safely and legally". Protestant Refiners submits that the Commission is required to make a determination as to whether Applicant has met its burden of proof that it will operate safely and legally in the Commonwealth of Pennsylvania. Applicant Central appears to argue that Protestants have some burden of proving that Applicant Central is unfit because of the factual matters discussed by the Applicant relating to various law violations. However, Protestant Refiners suggests that, under the law, an Applicant for new authority must assume and prove that it does have the propensity to operate safely and legally; viewed from the standard of burden of proof, there is a serious question as to whether Applicant has made an appropriate

showing that it will operate in a lawful and safe manner. We understand that issue will be fully briefed by other Protestants; Refiners will devote the major part of its argument to the proposition that Applicant Central has failed to present evidence of a quality and a quantity which permits a finding that granting of the Application would serve a useful public purpose, responsive to a public demand or need.

B. Testimony of Applicant's Supporting
Shipper Witnesses

1. George L. Keller, Witco Corporation, Bradford, PA (146-163; Applicant's Exhs. 8, 9 & 10)¹

Keller is employed at the Witco Corporation (Witco) as Central Regional Traffic Manager. (146) Keller is in charge of the corporation's "traffic responsibilities" for Ohio, Pennsylvania and New Jersey. (147) Witco operates an oil refinery in Petrolia, PA, which produces petroleum oil, wax, petrolatums and white oil. (148) Most of the shipments from Petrolia are comprised of "petroleum or white oil." (149)

Witco also operates a petroleum refinery in Bradford, PA which manufactures motor oils. These motor oils are classified as "lubricating oils, gasolines, waxes and petrolatums." Keller stated that the "most predominant item" shipped from Bradford is lubricating oil with petrolatums and wax following in that order. (149)

Witco Corporation has realized an increase in product output

¹ Numbers in parentheses refer to pages of transcript of testimony; "Exh." refers to Exhibit Numbers.

which is the result of a 27 million dollar "project to increase production" at the Petrolia facility. (150)

Witco requires that carriers provide "single stainless steel insulated equipment--MC-307s" (151) and "compartment tanks of the same caliber, stainless steel." (151) These are used for the movement of petroleum, petrolatum and wax produced at the Petrolia facility.

Keller stated that the Petrolia products are considered "food grade material." Accordingly, the Petrolia plant needs trailers which are very "clean and dry." (152) The Petrolia trailers are subjected to a very rigorous inspection and those failing to pass the inspection are "rejected...cleaned and sent back, if possible." If it is not possible to send the trailer back, another carrier with clean equipment is contacted "because customers in this day and age can't stand that extra day delay." (153)

With respect to the Bradford plant, which predominantly ships lubricating oil, Witco needs "clean trailers." However, the corporation needs "many more compartment tanks (at the Bradford facility) than...at Petrolia." (151)

Keller stated that the scheduling procedures at the Petrolia plant are arranged so that "every carrier is scheduled principally with an hour's difference for each product." Moreover, as a result of the increase in production, "[s]cheduling is very tight" and delays in loading cannot be afforded "because it interrupts the schedule badly and possibly delays...shipments to the customer." (156)

During the course of his testimony, Keller stated that Witco

has used the following carriers: Chemical Leaman, Matlack, Crossett, Refiners, Maust, Quality, Oil Tank Lines, as well as several others, including Witco's own trucks. (157) Keller stated that the addition of Central as a viable intrastate carrier would protect his customer's interests because Witco "would have the ability to be more choosy about carriers being on time." (157-159) Keller also mentioned the location of Central's cleaning facility and its Karns City terminal as reasons for support of the application. Applicant's Exhibit 8 showed the number of interstate loads transported by Central for Witco from Petrolia, Bradford and Trainer, PA during the period October, 1987 through 1988.

Mr. Keller did not present any complaints of any nature against the numerous existing carriers which were used, including a number of Protestants. Applicant's Exhibits 9 and 10 showed, respectively, intrastate tank loads transported by existing carriers and specific loads to Pennsylvania destinations for Witco.

When asked (159) how the granting of the application would alter the pattern of carrier usage, Keller gave an equivocal answer which did not indicate any specific intention to change his use of existing carriers.

The following specific question was posed to Keller by Applicant's counsel:

Q. If the application of Central is to be granted, and they were authorized to provide services from these two origins for your company, how would you alter or would you alter the pattern of carrier usage that we are looking at here on Exhibits 9 and 10, if at all?

To which Keller responded:

A. We would have the ability then to be more choosy about carriers being on time which is one of our things that management is in demand that we make our schedule tighter. We would be more choosy. At this point with the business increase, we cannot have that luxury. (158-159).

Keller did state that he would use Central Transport if his application was granted, but gave no specifics as to volume, frequency or destinations. (159)

2. Valgene Frye, Pennzoil Refinery, Karns City, PA (163-205; Applicant's Exhs. 11, 12, 13, 18)

Frye testified on behalf of the Pennzoil Refinery located in Karns City, Pennsylvania. (164) The refinery produces white oil, which is described as "petroleum ONY," and petrolatums. (165) The following carriers were used to deliver these products to points in Pennsylvania during the months of January through October, 1988: Fleet, Montgomery and Matlack. (165; see Applicant's Exhibit 12).

Frye testified that the refinery shipped 144 loads to Carnegie, Pennsylvania and that 36 of these were shipped via common carrier. The remaining 108 shipments were customer pickups. (166) Frye did not specify the dates on which these deliveries occurred. Furthermore, 500 of the 530 shipments from Rouseville, Pennsylvania to the Karns City facility were handled via common carrier. Most were handled by Refiners (167; see Exhibit 13). The majority of the products originating from Rouseville were kerosene and a small amount of petrolatums and neutral oil. Frye estimated that at least 95% of the Rouseville

shipments consisted of kerosene.² (167)

With respect to the shipment of petroleum oil and petrolatums, Frye stated that Pennzoil expected carriers to provide "MC-307 stainless steel insulated trailers that are very clean, very dry and odor-free." (168) Furthermore, Pennzoil utilizes both compartmentalized and single compartmented trailers. (168-169) Frye stated that Central supplied the type of trailer equipment needed by Pennzoil to ship products to points outside of Pennsylvania, and it is also "supplied in the condition" desired by Pennzoil. (169)

Pennzoil uses Refiners Transport and Fleet Transport for inbound service, and Fleet, Matlack and Montgomery for outbound service. (170) Frye's basis of support for Central's application is that:

[The] company is continually growing and we have to look out for our best interests to make sure that we have adequate equipment to transport the material that we are producing and selling. (170)

Central's terminal and cleaning facility, which is located in Karns City, is "about half a mile from" the refinery. This proximity is beneficial to Pennzoil. Frye would have "apportioned" some traffic to Central if it had been authorized for service between the months of January and October, 1988. (171)

Approximately 50 loads per month were shipped outbound from Karns City (174-175) and for the same period of time anywhere

² Kerosene has been excluded from the application. (See Supp. Ex. No. 5; 172)

from 370 to 400 loads were shipped from points within Pennsylvania to the Karns City plant. (175)

Frye stated that Pennzoil has a company fleet of 12 tractors and 20 MC-307 trailers, none of which is compartmentalized. Only 5 to 10% of Pennzoil's Pennsylvania loads are sent out in compartmentalized trailers. (177) Pennzoil utilized the services of Matlack for intrastate shipments only 15 times during the period between January and October of 1988. Matlack was unable to provide service on only one occasion. (179)

3. Thomas McGrath, McCloskey Corporation, Philadelphia, PA
(203-259; Applicant's Exhs. 15, 16)

McGrath is employed by the McCloskey Corporation as its Corporate Traffic Manager. (205) McCloskey Corporation ships "industrial resins and solvents" from its Philadelphia location. These resins and solvents are used by manufacturers in the paint and coatings industry. (208) McGrath stated that McCloskey requires "insulated tank trailers" to ship its materials. Furthermore, many of these trailers are compartmentalized. McCloskey seeks the use of compartmentalized trailers because, at times, it ships more than one product to one customer. Furthermore, the trailers must be insulated because "the product is usually shipped at a temperature of somewhere in the range of 125 to 180 degrees, and that temperature (must) be maintained until it's delivered." (210) If the temperature does not remain constant, the product will not flow freely when it is being unloaded, thereby resulting in delays. (210) McGrath stated that the McCloskey Corporation

has used Central for interstate shipments and that he has found their service to be "excellent." (210) McGrath was unfamiliar with any of the protestant carriers except Chemical Leaman and Matlack. (210-211)

McCloskey discontinued using Matlack as a carrier because of customer complaints and pressure from the sales department. (212-213) If Central Transportation was granted operating authority, McCloskey would "determine some percentage share of the business that they would be involved in." (213)

On cross-examination, McGrath admitted he had used Central for outbound transportation only once within the past year. McGrath was unable to state the location of the nearest Central facility to his plant, and he did not know the type of equipment Central had at this facility. (218) He later admitted he was not familiar with Central's operations or whether it had compartmentalized trailers (237)

McGrath stated that he had never used Central for local shipments; he used Central only on a long-haul basis. (219) McGrath was unable to recall the circumstances surrounding McCloskey's single use of Central as a carrier within the past year. (223) McGrath agreed that he was aware that Matlack maintains a terminal at Bensalem, Pennsylvania, which is approximately five miles away from McCloskey's facility. (225) McGrath admitted that he did try to persuade Matlack's representative, John Orsini, to lower rates with respect to McCloskey's facility located in Los Angeles, California. (234)

McGrath also agreed that, if it could be demonstrated that Refiners has state-wide authority to serve the McCloskey

Corporation, and if the appropriate equipment can be provided, McGrath would consider using Refiners if Refiners had a terminal within 50 to 75 miles of the Philadelphia facility. (248) (Refiners has two terminals within that radius of Philadelphia - Wilmington, DE and Hammonton, NJ.) (See Mr. Wilson's testimony for Refiners at 518.)

4. William F. Dahms, Sr., E. F. Houghton & Company, Fogelsville, PA (259-281; Applicant's Exh. 18)

Dahms testified on behalf of E.F. Houghton & Company. E.F. Houghton manufactures and distributes oils and greases; it operates a facility at Fogelsville, Pennsylvania. (259) Dahms stated that the company makes about 80 to 90 shipments a year to various points within Pennsylvania. (260) All of the company's customers are industrial firms. The Fogelsville facility receives oils, chemicals and raw materials from Bradford, Oil City, Petrolia and Marcus Hook. (261)

Houghton uses Matlack and Chemical Leaman to ship products from the Fogelsville plant to points within Pennsylvania. (263) Dahms was familiar with Crossett, which has hauled inbound shipments for Houghton, and knew of Oil Tank Lines and Refiners Transport. (263-264) Dahms was unaware that Refiners had intrastate authority. (264)

Dahms testified that he supported Central's application because he believed that there is a need to have an extra carrier to furnish the equipment necessary for last minute orders. (264) Central would be utilized "as a fill-in carrier" if it received intrastate authority. (265)

Dahms admitted that Houghton has called upon Central for interstate service only a "couple times." (265) Dahms knew that Central's nearest facility with respect to the Fogelsville plant is located in Paulsboro, N.J., but he did not know whether the facility was "an actual terminal or proverbial shack equipped with a phone." (267) Central has never handled any loads outbound from Fogelsville to Dahms' knowledge. (267) Refiners has solicited his business in the last few months. (268-269)

Later Refiners sent him a list of rates to points he had requested; but he did not tender Refiners any traffic as a result of that rate submission. Dahms claimed that he became aware that Refiners had intrastate authority only a few days prior to his testimony. (270) Dahms, however, knew that Refiners had a terminal located in Allentown, Pennsylvania, just eight (8) miles from the Fogelsville facility. (270-271) He agreed that Central's Paulsboro, N.J. facility is about 60 miles from Fogelsville. (271) Dahms was asked:

Q. If you learn, as you have, that Refiners has the proper authority to provide statewide service to your company, has proper equipment, a terminal, service, would you think that would meet your needs for this additional carrier you're speaking of?

A. I would say it could. (271)

5. Betty McKay, Harry Miller Corporation, Philadelphia, PA
(281-292; Applicant's Exh. 20)

McKay works in the order department for the Harry Miller Corp., which ships to Reading and Allenport, Pennsylvania. Miller ships "cleaning compound and petrolubes" to Reading and

petrolubes to Allenport. (282) Miller makes one (1) shipment every two (2) months to Reading and one (1) shipment every three (3) months to Allenport. Miller requires a carrier to provide a tank that must "be able to hold a 5,000 gallon amount." (283)

Miller uses Matlack to haul these shipments (283), but Miller might change the handling of the shipments if Central's application is granted because:

[We] have customers who call in and want an immediate shipment and a lot of times Matlack might not have -- be able to cover that but we have to keep the customer happy, and Central -- he would have a choice then. (284)

McKay further testified that she was unfamiliar with the following carriers: Crossett, Marshall Service, and Oil Tank Lines. She was acquainted with Chemical Leaman, but had never used their services. (284)

McKay and her co-workers did little to find out whether any carriers, other than Matlack, could be used because "a lot of them (carriers) don't deliver from Pennsylvania, pick up and deliver." (286) She knew that Central's closest facility was in "upstate Jersey." (288) McKay was unable to relate the amount of her company's interstate business because it is "sporadic." (289)

McKay never heard of Refiners Transport. (290)

6. William M. Hansbury, Para-Chem Southern, Inc., Philadelphia, PA (292-317; Applicant's Exh. 20)

Hansbury testified that Para-Chem ships to points within Philadelphia as well as to Hazelton, PA. Para-Chem ships two (2) loads of liquid latex a week to Hazelton and receives five

(5) loads a month of a resin solution from Neville Island, PA.
(294)

Para-Chem requires the use of "an insulated 5,000 gallon single hold container "for both its inbound and outbound shipments. Para-Chem uses "Backhaul" or "Beeline" for its inbound shipments from Neville Island and uses its own equipment for the outbound material. (295) "Backhaul" is a property broker; Beeline is the underlying carrier used.
(298-299)

Para-Chem's support for Central's application arises from the fact that its own equipment is used to make deliveries to locations in Baltimore, New York, and New England. Para-Chem's own equipment isn't always available to run on those jobs within Pennsylvania. Para-Chem believes that Central has the type of equipment it needs. (296) However, Para-Chem used its own equipment about 95% of the time to ship liquid latex to Hazelton and almost 100% to points within Philadelphia. (297)

Latex has to be kept at a certain temperatures. Other than the need for keeping it at a cool temperature, the task of transporting latex is not difficult. The tankers must be cleaned after hauling latex. (301)

Hansbury stated that he did not know if Central had any cleaning facility at its Paulsboro facility. Para-Chem cleans its own equipment at Matlack's or Quality's Philadelphia locations. (302) Para-Chem had been using its own equipment (2 power units and 2 trailers) since "at least 1965 or '67" to transport latex. (304) Para-Chem plans to continue that operation. (305) Para-Chem "may" use Central inbound from

Pittsburgh or Neville Island if the application is granted. Moreover, Para-Chem "would consider anyone" (i.e. any carrier) who had authority to perform the required services. (306) It will also continue to use Backhaul's serves from Neville Island. (308)

7. Joseph R. Knouse, Calgon Corporation, Pittsburgh, PA (317-331; Applicant's Exh. 21)

Knouse is Calgon's manager of transportation. Calgon's primary plant, which is located in Ellwood City, Pennsylvania, manufactures water treatment chemicals. (318-319) Central has transported these products outside the state for Calgon. Calgon's Ellwood City facility ships the chemicals to various points within Pennsylvania, specifically to Mehoopany, New Castle, Spring Grove, Whitehall and Pittsburgh. (319) Knouse estimated that the Ellwood City plant ships "[a]pproximately 15 to 20 truckloads per month" to Pittsburgh. (319) With respect to the other Pennsylvania locations, Calgon ships "approximately one (1) truckload per month to each of these locations." (320)

According to Knouse, Calgon uses "[a]n insulated, stainless steel trailer [f]or the most part, single compartment, but occasionally . . . a multi-compartment trailer" to ship water treatment chemicals. Central has provided the desired equipment when it was utilized for interstate traffic (320) Currently Calgon uses Schneider National for its intrastate shipments. (321)

The basis of Calgon's support for Central's application is that Calgon would utilize Central "[a]s a potential backup

carrier and to increase competition." (321) Knouse was unfamiliar with Crossett and Oil Tank Lines, but was familiar with Refiners Transport, Chemical Leaman and Matlack. (321-322)

At present all of Calgon's traffic to points within Pennsylvania is handled by Schneider. (324) Refiners has not been used by Calgon on Pennsylvania intrastate shipments since 1987. Moreover, Knouse reiterated that Central would be used as "a potential backup carrier and to increase the competition." (327) According to Knouse, a backup carrier is expected to provide "clean equipment available to (the) plant on relatively short notice, 16 to 24 hour notice, and prompt delivery to (Calgon's) customers." (327)

Knouse acknowledged that Calgon has Refiners, Chemical Leaman and Matlack available as backup carriers, but supported Central because it presented them with "one more option from a competitive standpoint." Calgon would like to have four backup carriers. (327) Knouse agreed that Schneider National, its present carrier, is handling all its shipments in a satisfactory manner and apparently has done so since 1987. Under these circumstances, it has no need for a "backup" carrier. (330-331)

8. Mary Ann Noga, Valspar Corporation, Pittsburgh, PA.
(331-344; Applicant's Exh. 22)

Ms. Noga, Traffic Manager of the Valspar Corporation, testified that Valspar is located in Pittsburgh and produces protective coating for cans and packages of all sorts so that foods or beverages can be preserved in packaging. This protective coating is in liquid form when it is shipped.

Valspar ships this protective coating from the Rochester facility to Lebanon and "occasionally to Fogelsville and Philadelphia." (333) The last shipments to Fogelsville and Philadelphia were made in 1987. (338-339)

Valspar has to ship the protective coating in "stainless steel insulated single compartment" clean trailers; or occasionally uses a three-compartment tank. (334) Valspar requires that its carriers provide trailers that are "super and ecstatically clean." Trailers that do not meet this cleanliness standard are rejected. (334) Valspar selected Matlack as its primary carrier for its shipping. Noga stated that she has "knowledge of Chemical and Refiners." (336)

Noga stated that Valspar was supporting Central's application because of "competition...and for backup." Valspar has used Central for interstate shipments. (336) Noga stated that "the majority of Valspar shipments occur back and forth from the Rochester plant to the Pittsburgh plant." (339) Matlack has dedicated equipment specifically to the Valspar account. (340) Refiners solicited Valspar's Pennsylvania business in 1988 and provided information about rates and service, but Valspar has not tendered any business to Refiners. (341) Noga stated that she would be willing to consider using Refiners as a backup carrier provided that Refiners is able to show that it meets the qualifications Valspar seeks in a carrier. (342)

C. Testimony on Behalf of Protestant Refiners
Transport & Terminal Corporation

1. Keith B. Wilson (515-571); Refiners' Exhs. 2-8

Keith B. Wilson is Regional Manager of Refiners Transport & Terminal Corporation (Refiners). He is located at Oil City, PA. Mr. Wilson is in charge of all operations for an area including 12 terminals. The area begins at the Ohio/Pennsylvania state line and continues eastward to New Jersey, north to Boston, Massachusetts, and south to Baltimore, Maryland. Wilson is responsible for all operations in Pennsylvania. Refiners' statewide intrastate authority to transport property in bulk, in tank vehicles, is shown by Refiners' Exh. No. 2. (516-517)

Refiners' Pennsylvania terminals include Oil City, which is located on a 4-acre parcel of ground. The terminal has an office, a 10-bay maintenance facility, a tank cleaning facility and tractors and trailers. At the East Butler, PA terminal, Refiners has a 4-bay maintenance facility, a tank cleaning facility and an office, located on approximately 3 acres of land. The Sewickley terminal is located on approximately 3 acres of land with a maintenance facility and an office. The Duncansville and Devault terminals have offices, with management and dispatch. (517-518) (See Refiners Exh. 3)

Refiners has a terminal in Wilmington, Delaware, approximately 15 miles from Philadelphia, which is a 25-28 truck operation. Another terminal in Hammonton, New Jersey, (about 30 miles from Philadelphia) also has multi-service facilities. Both terminals provide intrastate service to Pennsylvania

shippers. (518)

Refiners has a total workforce numbering 852 full-time employees, of which 196 are located in Pennsylvania, or 23 percent of the workforce. (519, Refiners' Exh. 4)

Refiners' Exhs. 5 and 6 show tractors and trailers respectively, coded to show type of equipment, terminal location and other details. Refiners has 53 MC307 trailers serving Pennsylvania, many of which are compartmented. Most of them are insulated and are easily cleaned for cleaning for use between one product and another. In addition, they can be heated and, because of built in panels, products can be reheated. Refiners has 109 MC306 compartmented trailers serving Pennsylvania. This type of trailer is used primarily for gasolines, fuel oils, petroleum, lube oils and base stock, which do not require much cleaning between use for various products. (522-523) The equipment at Hammonton, NJ and Wilmington, DE is also available to provide Pennsylvania intrastate service. (523)

Terminals are open from 6:30 or 7:30 a.m. until 6:00 or 7:00 P.M., Monday through Friday, and until noon on Saturday. Many of the terminals have answering machines so that the person in charge can call in for messages. In addition, dispatchers carry pagers so that major customers can reach Refiners. (524)

All terminals have inbound WATS lines and fax machines so that shippers can place orders by either method. (525) Once the order is recorded, a driver and a tractor are assigned to the order. (526) Pennsylvania intrastate shipments are given either same day or overnight service. The majority of shipments are overnight, but in some instances same day service is

required and provided. (527)

Mr. Wilson has been with Refiners in operations since 1970. (530) Refiners bought Pennland Tankers, which was an Oil City based company, in the Spring of 1966. Refiners has been serving some of the supporting shippers since prior to 1970. In 1987 and the first six months of 1988, Refiners served supporting shippers Witco, Pennzoil, Harry Miller and Calgon in intrastate service. (531-532) On interstate shipments, Refiners served Witco, Pennzoil, E. F. Houghton and Calgon. (532)

Witco and Pennzoil are very important to Refiners as shippers in Western Pennsylvania. In 1987, Refiners carried 4,054 loads intrastate for Witco, producing revenue of \$722,023.89. For the first six months of 1988, Refiners carried 1,985 loads for Witco, producing \$360,076.80 in intrastate revenue. This is a significant amount of revenue for Refiners. Fifty percent of the total revenue of the Refiners East Butler terminal comes from Witco traffic. Refiners has up to 9 units providing inbound raw material transportation for Witco on an intrastate basis on a given day or week. These trucks operate 5 days a week, 24 hours a day. (534)

Refiners handled 4,583 loads intrastate for Pennzoil in 1987, with revenue of \$1,269,431.03. Refiners handled 1,682 loads intrastate in the first 6 months of 1988 with revenue of \$454,176.00. Pennzoil represents approximately 40 percent of the Refiners Oil City terminal business. Loss of any significant amount of Pennzoil and Witco intrastate traffic would be very detrimental to the Oil City or Butler terminals of Refiners. Loss of a significant amount of that traffic would

hamper Refiners' ability to serve the public and continue operations at those points. (534-535)

Refiners serves approximately 150 shippers on an intrastate basis in Pennsylvania on commodities involved in the application. Over the years, Refiners has made special efforts to service Witco and Pennzoil. In 1970, Refiners entered into a joint arrangement with Witco to increase productivity at the plant and productivity of Refiners. Refiners installed run-down tanks which allowed Refiners to unload tanks in 12 minutes, compared with the 45 minutes to 1 hour required prior to the installation of the run-down tanks. Refiners paid for the installation and Witco, over a period of time, bought the tanks from Refiners. (536) In addition, Refiners purchased new trailers which were dedicated to handling Witco's white oil. (536-537)

Pennzoil asked Refiners to provide special metered units for deliveries to Pennzoil's Jiffy Lube account. Refiners agreed to provide this service so that Refiners could make multi-stop deliveries to Jiffy Lube stations. (537)

Refiners provides service for a large number of major shippers for products involved in this application. These shippers include Ashland Oil, British Petroleum, Boler Petroleum, Exxon Company, Quaker Chemical, Quaker State Oil Refining, Texaco, Sun Oil, and Union Chemical.³ (538)

Refiners has an extensive program in securing drivers and maintaining safety of operations as shown by its Exh. 8.

³ None of these major shippers of bulk commodities appeared to support Central's application.

Refiners has a personnel policy requiring that the record of a driver be checked for the ten year period prior to date of hire. (539)

A number of the terminals of Refiners are subject to Union collective bargaining agreements including, specifically, the terminals at Butler and Oil City. Drivers are compensated on both an hourly and mileage basis depending on the trip. Today, the wage rate for drivers paid by the hour is \$10.60; this is less than the wage rate of \$12.68 per hour paid in 1982. (540)

Mr. Wilson explained that his company faced stiff competition in the early eighties from people coming in, cutting rates, (540) "most of it at that time being non-union." Refiners was having a difficult time operating and surviving under these conditions. In 1981, and continuing in 1982 and 1983, Refiners negotiated concessions since it could not continue to operate under the contractual provisions then existing. When its employees agreed to concessions, Refiners agreed with its employees to institute a Terminal Incentive Program where profits are shared with employees on a terminal by terminal basis. In Mr. Wilson's words:

We said if we survive and we make money,
we'll share it with you and we've operated
under that basic program ever since. (541)

Matlack, Chemical Leaman Tank Lines, Oil Tank Lines, Crossett and Marshall are the major competitors of Refiners for intrastate traffic in Pennsylvania. In addition, there are many small jobber-type competitors such as Erie Petroleum, Five Star Trucking, Frenz Petroleum and Zappi, to name a few. The oil companies also have their own fleets. (542)

Mr. Wilson testified that Refiners had approximately 25 drivers on lay-off at its Oil City, Butler, Sewickley and Altoona terminals. The total pool of drivers is approximately 135 persons. Between 10 and 20 percent of Refiners equipment has been idle at Butler and Oil City. (542)

Sewickley terminal has 22 units; on a daily basis, 5 units have been parked, or 22 percent. Oil City has 35 tractors; on a daily basis, 4 - 5 are parked, or 14 percent. East Butler has 21 tractors; on a daily basis 2 are parked, or 9 1/2 percent. Hammonton has 30 units; on a daily basis, 10 are parked, or 33 percent. (546)

Mr. Wilson stated that Refiners is in a position to handle the continuing transportation requirements of Witco and Pennzoil in intrastate commerce in Pennsylvania. Refiners will add additional equipment if requested to do so by either company. However, neither Witco nor Pennzoil has requested that Refiners secure any additional equipment of any type for intrastate transportation in the last year. Refiners is also willing and hopeful of providing service to the other shippers who supported the application. (543)

2. David L. Michalsky (571-586); Refiners' Exh. 9

David L. Michalsky is Director of Pricing for the Northern Bulk Group, which includes Refiners Transport. (571) Mr. Michalsky worked with Mr. Wilson in making a revenue report summary showing all liquid bulk commodities transported by Refiners in Pennsylvania either to or from a Pennsylvania point. Mr. Michalsky presented Refiners' Exh. No. 9 -- a two

sheet document for the year 1987 and the period January 1, 1988 through June 30, 1988, showing liquid bulk commodities handled by Refiners in intrastate Pennsylvania commerce and in interstate commerce to or from a Pennsylvania point. The Exhibit first showed all liquid bulk commodity traffic and then a section limited to the precise commodities included in the application.

Mr. Michalsky explained in detail how Refiners maintains its records so that it can show, by specific commodity code, traffic handled for each shipper and the revenue generated from that shipper. (573-576) Refiners puts the information from the freight bills into a computer in Cleveland, OH. Once they are billed to the customer, the information is microfilmed. This usually occurs 30 days after billing. When the microfilm is developed and approved, the original documents are destroyed. All of the transportation is by commodity codes, so that the revenue for specific commodities can be extracted from the computer. (573-574) It also can be sorted by shipper as to origin and destination. The printout includes special services performed for a shipper, such as moving a trailer in a customer's plant. (578)

Refiners Exh. 9 shows that Refiners has at risk in this proceeding approximately 3.6 million dollars of revenue from intrastate transportation of the involved commodities on an annual basis. Significantly, as shown on p. 2 of Refiners Exh. 9, Witco and Pennzoil accounted in total for 55 percent of the total intrastate transportation revenues earned on the involved commodities by Refiners in 1987, and 47 percent of Refiners

intrastate revenues in the first six months of 1988. None of the other supporting shippers tendered Refiners any traffic in 1988; only Calgon of the other shippers tendered Refiners' traffic in 1987. (Refiners Exh. 9, p. 2). Mr. Michalsky confirmed that Refiners did serve 150 shippers of the involved commodities in intrastate commerce since he actually counted the shippers served. (576-577)

3. Gerald H. Hoover (587-597); Refiners' Exh. 10

Gerald L. Hoover is employed by Mitchell Transport, Inc. He is Group Financial Manager of the Bulk Materials Group, which includes Refiners Transport. He has held this position for 3-1/2 years. Refiners Transport is a wholly-owned subsidiary of Leaseway Transportation. (587-588) Mr. Hoover testified that five management members of the Bulk Materials Group signed a letter of intent to acquire the group from Leaseway Transportation and the proposed acquisition was expected to occur during the first quarter of 1989. (588) Sixteen different subsidiaries comprise the Bulk Materials Group. Thirteen of those subsidiaries, including Refiners, are part of that acquisition. (588-589) When that transaction is final, the balance sheet of Refiners will be much stronger because the allocation methodologies now used do not show actual costs that would be incurred on a stand-alone basis. (590-591) Because Leaseway Transportation has a number of subsidiaries other than Refiners, the administrative and selling expenses of Refiners will be less under the revised structure. (591-592)

4. Richard L. Frieze (598-602)

Richard L. Frieze is employed by Refiners Transport as Territory Sales Manager. Mr. Frieze introduced Refiners Exh. 11, which is a letter from Mr. Frieze to witness William F. Dahms of the Houghton Company confirming that Refiners had made rate quotations, including those to intrastate points, available to Mr. Dahms by letter dated October 15, 1986. This letter indicates the inaccuracy of Mr. Dahms' testimony (268-269) that he was unaware of Refiners' intrastate service. Mr. Frieze further testified that Refiners has now begun to serve Mr. Dahms' company. (599)

Mr. Frieze also presented Refiners Exh. No. 12 showing a letter of March 4, 1987, from Mr. Frieze to Valspar Corporation submitting rates for service. Mr. Frieze stated he had made sales calls upon the Valspar witness, Ms. Noga, as late as January, 1988, but Refiners did not receive any transportation requests from Valspar in 1987 or 1988. Mr. Frieze has also solicited the Harry Miller Corporation for traffic without success. (600)

III. STATEMENT OF THE QUESTION INVOLVED

The question presented is whether Applicant has presented proof sufficient to support a grant of motor common carrier authority under the evidentiary criteria established by the Commission in 52 Pa. Code §41.14.

IV. ARGUMENT

A. Introduction

This proceeding must be judged for what it is -- namely, an aggressive initial application in which statewide authority is sought by the Applicant Central in an intensively competitive field, to transport property, in bulk, in tank and hopper type vehicles, between points in Pennsylvania, subject to certain restrictions.

In apparent recognition of the weakness of its evidentiary presentation, Applicant Central devotes the major part of its Brief (over 50 percent of the document) to a discussion of the various citations and proceedings and infractions in which Central has been involved from a fitness standpoint. It then argues that, under its present policies, the Commission should be willing to grant statewide bulk authority to such an Applicant based upon an extremely limited and sparse showing of evidentiary support from a total of eight public witnesses, of which only two - Witco and Pennzoil - had any significant volume of traffic.

In contrast, Protestant Refiners Transport presented substantial evidence of the scope and importance of the intrastate bulk service which it now provides to over 150 bulk shippers of the involved commodities between points in Pennsylvania. Refiners has provided tank truck service to Pennsylvania shippers and receivers for over 23 years. In addition, the evidence shows that there are other major tank truck carriers presently authorized to serve shippers and

receivers in Pennsylvania in wide geographical areas, including Protestants Matlack, Chemical Leaman, Crossett, Oil Tank Lines and Marshall. These carriers are major competitors of Refiners.

The evidence shows that Refiners has invested substantial sums of money in equipment, terminals and personnel in order to serve the shipping public in Pennsylvania. Refiners has very substantial intrastate revenues from the commodities in question; in 1987, Refiners' revenue from affected commodities on an intrastate basis was approximately \$3.6 million dollars, representing over 11,000 loads. In the first 6 months of 1988, Refiners' intrastate revenue from affected commodities was over \$1.7 million dollars, representing over 5100 loads. The evidence showed that the equipment of Refiners was not being fully utilized and that a significant number of its drivers were on lay-off because of the level of business and the extent of competition presently existing. Refiners and other carriers compete not only with each other, but with many private carriers who find it convenient to operate their own tank trucks between points in Pennsylvania.

The evidence shows that, beyond question, shippers and receivers, including those supporting the application, have an extremely wide variety of choices of common carrier service now available. None of these supporting shippers provided any substantial evidence of problems in securing service from either primary carriers or the numerous backup carriers which are present. Those shippers expressing an interest in backup carriers already had available various existing backup carriers (some as many as three) which had never been used.

In substance, Applicant Central presented an extremely weak showing of shipper support -- one which cannot be held to rise to the level of showing that approval of the application would show a useful public purpose, responsive to a public demand or need. There simply is no public need shown for the broad service which Applicant seeks to provide. Nor has there been a public need shown for even a limited grant of authority, shipper by shipper. Particularly, there has been no public need shown for Central Transport to serve the principal shippers, Witco Corporation and Pennzoil. Applicant failed to show that it has a propensity to operate safely and lawfully, which is a prerequisite to any grant of authority.

B. Applicant Has Failed To Demonstrate That Approval Of The Application Will Serve A Useful Public Purpose, Responsive To A Public Demand Or Need.

In order to be successful in an application for operating authority, the Applicant must demonstrate that the "approval of the application will serve a useful public purpose, responsive to a public demand or need." 52 Pa. Code §41.14(a). Applicant has failed to meet this burden of proof.

The decision in Richard L. Kinard, Inc., 59 Pa. PUC 548 (1984) has been discussed extensively in this case and other decisions. In the Kinard decision, the Commission noted that the Transportation Regulatory Policy retained the Applicant's "burden of demonstrating that approval of the application will serve a useful public purpose, responsive to a public demand or need." Id. at 550.

Applicant Central has not shown that the granting of this

application will "serve a useful public purpose, responsive to a public demand or need." While the Kinard decision set forth alternatives to the requirement that Applicant show inadequacy of existing service, those "alternatives" must still be weighed against a background of the breadth of the authority sought and the evidence needed to show a public demand or need in the application territory. The mere appearance of witnesses whose testimony parrots a desire for "potential backup carriers" or "more competition" or an opportunity to be more "choosy" does not support a finding of public demand or need even under Kinard.

The testimony of the eight shipper witnesses presented by Applicant falls far short of supporting a grant of statewide authority, or indeed any authority. Applicant has relied on a number of cases which do not support its claim that the testimony of 8 shippers provides the basis for a grant of statewide authority. A fair reading of those cases and other precedents demonstrates that the evidence presented by Applicant is too sparse and vague to support any grant.

For example, (at page 30 of its brief) Applicant has cited Noerr Motor Freight v. Pa. PUC, 191 Pa Super. Ct. 322, 124 A.2d 393, 397 (1956), for the proposition that no existing carrier has an absolute right to be free from competition. However, the court in Noerr also stated that "[w]hat may constitute a need for service, indicated in part by the number of requests, depends upon the locality involved and the particular circumstances of each case." Id. at 397.

In Kulp v. Pa. PUC, 153 Pa. Super. Ct. 379 (1943), (cited by Applicant at p. 30 of its brief) the Pennsylvania Superior

Court, upon reviewing a Commission grant of authority, found error in the Order and held that findings of fact by the Commission must be supported by substantial, competent evidence with "rational probative force." Id. at 384.

We believe that this statement in Kulp is still a fair statement of the law. Applicant seizes on language in the Kulp decision (at page 383) that it is not an "unreasonable inference" that advantages referred to by those witnesses appearing in support of the application would also apply to other shippers in the vicinity; however, neither that decision (nor any other decision) holds that the mere presentation of eight witnesses in support of a statewide application, supports an inference that other shippers in the entire application territory would be so benefitted that a grant of statewide authority is warranted. Indeed, if this illogical conclusion of Applicant were adopted, the Commission would become a mere rubber stamp authorizing statewide authority on testimony as sparse and vague as that presented in support of this application. We submit Applicant's view is not the law, and that the Commission should (and we are sure will) judge each application on its individual merits of the quantity and quality of proof presented.

While the Commission has held that it is not necessary that an Applicant present a demand for his service in every square mile of the territory to be certified, it has also stated that

[w]hat may constitute a need for service depends upon the locality involved and the particular circumstances of each case . . . Moreover, the sufficiency of the evidence to support a grant of authority is directly

related to the nature and extent of the authority granted.

Application of Ward Trucking Corp., 43 Pa. PUC 689, 701 (1968).

The Ward case (cited by Applicant at p. 28 of its Brief) was an application to provide transportation of property between points in eighteen Pennsylvania counties which were already served in part by Applicant; the application was supported by 49 public witnesses; the Commission granted authority to provide transportation of property, subject to numerous exceptions between 14 counties with a restriction against local service between points in the counties. This massive show of public support in the Ward case cannot serve as a precedent for Applicant Central seeking its initial authority on a statewide basis with eight shippers in a field in which there are literally hundreds of shippers moving intrastate traffic of the nature sought by Applicant. Protestant Refiners alone serves approximately 150 shippers on an intrastate basis on commodities involved in this application. (536)

Applicant carefully avoids any discussion of the limited nature of the testimony which it presented; it attempts to substitute argument for its lack of evidence. For example, Applicant (p. 29 of its Brief) cited Commw., Pa PUC v. Purolator Courier Corp., 24 Pa Commw. Ct. 301, 355 A.2d 850, 852 (1966) for the proposition that an Applicant is not required to establish a present need for the service in every square mile of territory certificated, but only to prove a need for service within the area generally. That statement of the case law may be accurate, but it does not provide support for a grant to

Applicant. The Purolator case involved a limited application to modify a certificate in order "to allow Lincoln Transport, Inc. to operate in two additional counties, Fayette and Armstrong, and, more importantly, to dispense with the necessity of beginning and ending each trip at the Three Rivers Bank." Id. at 851. The Three Rivers Bank is located in Jefferson Borough, Allegheny County. If granted, the application would have enlarged the existing intrastate five-county authority to seven counties, and would have permitted the Applicant to "cross haul" the specified commodities throughout seven counties of Western Pennsylvania. Id. at 851. Lincoln presented evidence of requests by nineteen persons for Lincoln's services for their firms located throughout the seven counties. In addition, eleven representatives of supporting shippers testified in person in support of the application. In summary, there was substantial evidence in support of a limited application to add two counties to the five already held by the Applicant and to permit "cross hauling" in those counties. That kind of support showed a useful public purpose, responsive to a public demand or need for the limited new authority sought by Lincoln.

In contrast, the testimony of eight witnesses presented by Applicant, six of whom have very limited traffic, does not constitute substantial evidence to support a grant of the authority sought by the Applicant.

Neither the Purolator case, supra, nor the later cases cited by Applicant support the generous approach taken by Applicant at p. 29 of its Brief when it argues that "broad territorial authorization is warranted in the circumstances presented

here." In support of this overstatement, Applicant makes the statement that this Commission has followed a policy of granting wide geographical rights to carriers engaged in hauling commodities where a specialized service is performed requiring special equipment. Two cases are cited in support of this proposition - Application of Allied Asphalt Co., Inc. 43 Pa. PUC 622, 626 (1968) and Application of Refiners, Docket No. A-00093117, F.1, Am-A (Initial Decision of Judge Nemec dated October 15, 1984). Neither case supports the proposition advanced by Applicant in support of its case; further, the characterization of the proceeding in Application of Refiners, is, we are sure, an unintentional inaccurate statement of the facts, as explained below.

Allied was a very limited territorial application which cannot support the statewide claim for authority made by applicant Central. Applicant Allied sought common carrier authority to transport liquid asphalt, in bulk, in tank trucks from points in the boroughs of Springdale, Allegheny County, Monaca, Beaver County, and Warren, Warren County, to points in that part of Pennsylvania located west of the eastern boundaries of the Counties of Potter, Clinton, Centre, Huntingdon and Fulton. Thus, the application was for authority to provide service from three specific municipalities to points in Western Pennsylvania. Eight witnesses testified on behalf of the Applicant for this relatively limited authority. The Commission stated that "[i]t may therefore be seen that Applicant had a fairly representative basis of testimony in Western Pennsylvania when the limited liquid asphalt market is itself considered."

Ibid at 625. Citing Noerr, supra.

All that Allied supports is a proposition that a carrier seeking to transport a limited commodity such as liquid asphalt in bulk, in tank vehicles, from points in three boroughs to points in a portion of Pennsylvania need only have support from a limited number of witnesses. It does not support Applicant Central's argument that its eight witnesses (six of whom have very limited traffic) can support a statewide grant of authority to serve hundreds of shippers moving many different bulk commodities.

Applicant makes the assertion (p. 29 of its Brief) that Protestant Refiners was awarded statewide authority for the transportation of liquid bulk commodities based on testimony from 5 supporting shipper witnesses. Application of Refiners, Docket No. A-00093117, F.1, Am-A (Initial Decision of Judge Nemec dated October 15, 1984). That characterization, as indicated above, is not an accurate statement of fact. At the time of the 1984 decision, Refiners had held extensive intrastate tank vehicle authority for many years. The fact is that Refiners, by order of the Pennsylvania Public Utility Commission, dated August 31, 1966, acquired the operating rights of Pennland Tankers, Inc. by transfer. That authority included rights, as follows:

To transport, as a Class D carrier, crude petroleum, liquid inorganic compounds and liquid organic compounds, in bulk in tank trucks, for the Pennzoil Company, Quaker State Oil Refining Company and the Freedom Oil Company, between points in Pennsylvania.

To transport, as a Class D carrier, crude petroleum, liquid inorganic compounds and

liquid organic compounds, in bulk in tank trucks, between points west of an imaginary line beginning at the Pennsylvania-New York state line thence south to Lawrenceville, Tioga County, thence to Williamsport, Lycoming County, thence south to Lewistown, Mifflin County, thence to Chambersburg, Franklin County, thence to the Pennsylvania-Maryland state line.

To transport, as a Class C carrier, crude petroleum, liquid inorganic compounds and liquid organic compounds, in bulk in tank trucks, from points west of an imaginary line beginning at the Pennsylvania-New York state line, thence south to Lawrenceville, Tioga County, thence to Williamsport, Lycoming County, thence south to Lewistown, Mifflin County, thence to Chambersburg, Franklin County, thence to the Pennsylvania-Maryland state line, to points in Pennsylvania.

To transport, as a Class D carrier, liquid inorganic compounds and liquid organic compounds requiring pressure control, in bulk in tank trucks, between points within thirty-five (35) miles by the usually traveled highways of the limits of the Philadelphia City Hall, City and County of Philadelphia;

See Refiners Exhibit "1" (Certificate of Authority)

At the time of the 1984 decision, cited by Applicant Central at p. 29 of its Brief, Refiners had been conducting intrastate operations in Pennsylvania for over 18 years under this extensive authority. The "statewide" authority granted Refiners in 1984 simply added the remainder of Pennsylvania not included in the authority secured by transfer in 1966. The authority granted to Refiners in 1984 was not an initial application for statewide authority, but was, in fact, an enlargement of the service which it had been providing within Pennsylvania for 18 years.

Thus, the Refiners 1984 case provides no support for the claim of Applicant Central that its meager evidentiary support

could warrant a grant of "statewide" authority or indeed any authority. Applicant presented eight witnesses, six of which have very limited needs for transportation of bulk commodities. Such a presentation requires a denial of the authority sought, considering the scope of commodities and territories sought. The sufficiency of the evidence to support a grant of authority is directly related to the nature and extent of the authority. Chemical Tank Lines, Inc. v. Pa. PUC, 193 Pa. Super. Ct. 607, 619-620, 165 A.2d 668 (1960), aff'd 406 Pa 359, 178 A.2d 698 (1962).

The testimony presented by Mr. Wilson on behalf of Refiners demonstrates the extremely broad scope of the authority sought and the shipping public which existing carriers now serve. Refiners serves about 150 shippers in Pennsylvania intrastate commerce on the commodities involved in the application. (536) The larger shippers include such major corporations as Ashland Oil, B.P. (British Petroleum), Boler Petroleum, Exxon Company, Quaker Chemical, Quaker State, Oil Refining, Texaco, Sun Oil and Union Chemical. (538) None of these major shippers appeared in support of the application of Central Transport.

The two major shippers which did appear in support of Applicant Central -- Witco Corporation and Pennzoil -- have been served by Refiners for many years, and their traffic is extremely important to Refiners' operations. For example, Refiners Exhibit No. 9 shows that, in 1987, Refiners transported 4,054 loads for Witco resulting in revenues of \$722,023.89; it transported 4,583 loads for Pennzoil with revenues of \$1,269,431.00. The same significant operations are shown for

the first 6 months of 1988 in which Refiners transported 1,985 intrastate loads for Witco with revenues of \$360,000.00 and 1,682 loads for Pennzoil with revenues of \$454,000.00. The same Exhibit No. 9 demonstrates that these two shippers represent approximately 50 percent of the total intrastate revenues of Refiners at risk in this application.

There is no doubt that both Witco and Pennzoil are very substantial shippers of the commodities involved in the application. However, Refiners submits that the testimony of Mr. Keller of Witco that a grant of authority to Central would allow him to be more "choosy" about carriers can hardly support a grant of authority even under the Kinard principle. Nor can Mr. Frye's testimony that Pennzoil is growing, and needs to look out for its "best interest" support a grant of authority for an additional carrier for Pennzoil, considering the quality and quantity of carriers now available, and the fact that Protestants such as Refiners have drivers on lay-off and equipment idle at Western Pennsylvania terminals. (542, 546) The testimony presented by all of the witnesses, including Witco and Pennzoil, did not reach the level required to show a useful public purpose, responsive to a public need for new authority, even under the Kinard standard. The testimony of Witco and Pennzoil must be compared with the substantial evidence of Refiners' Mr. Wilson of the extent and quality of Refiners' service to these two shippers; the magnitude of Refiners equipment, terminals and personnel used in that service, and the dependence of Refiners' service on traffic of Pennzoil and Witco. Judged in that light, the Commission must find that

there is no public need for Central's service as a new carrier in an already highly competitive field.

The other public witnesses had very limited traffic, were unaware of existing service, and presented only the supposedly magic phrases "backup carrier" and "more competition" as reasons for support of Applicant. For example, the witness for E. F. Houghton & Company, a supporting shipper, testified that the company makes about 80 - 90 shipments a year intrastate. Houghton has used Central for interstate shipments only a couple of times. (265) In addition, Central's nearest facility to Houghton's Fogelsville plant is sixty miles away in New Jersey (267) The witness was unaware that Refiners had intrastate authority and that its terminal was located only eight miles from the Fogelsville facility. (270-271)

This company has approximately seven or eight shipments a month and would utilize Central only as a fill-in carrier. It has now began to use Refiners. (600) No need for additional service has been demonstrated by this witness, let alone anything that would support statewide authority.

The witness for Harry Miller Corporation, located at Philadelphia, PA, testified that her company ships via Matlack every two months to Reading and every three months to Allenport, PA via Matlack. (282-283) Because Miller's business with Central is "sporadic", she was unable to state the amount of interstate business handled by Central. The witness was aware of Chemical Leaman, but was unfamiliar with the intrastate service of Crossett, Marshall, Oil Tank Lines and Refiners. (284, 290)

This type of evidence does not lend itself to fulfilling the requirement imposed by the Commission that an Applicant show that the proposed service serves a useful public purpose. The cases cited by Applicant in its Brief at p. 29, (John Benkart & Sons Co. v. Pa. PUC, 137 Pa. Super. Ct. 5, 7 A.2d 584 (1939); and GG&C Bus Co., Inc. v. Pa. PUC, 400 A.2d 941, 944 (1979), do not support a grant of authority for such a witness. To argue that more tank truck competition is needed by Miller is frivolous, since there are already four carriers, highly competitive with each other and as yet untried, who can and will fulfill the limited traffic needs of this shipper. A need for an additional carrier for even limited service, let alone intrastate authority, cannot be supported by this witness's testimony, or that of the witness for Houghton.

The witness for Para-Chem Southern, Inc., of Philadelphia, PA, stated that his company ships to points within Philadelphia, as well as two loads a week to Hazelton, PA. (294-295) However, Para-Chem uses its own equipment about 95 percent of the time to ship liquid latex to Hazelton and 100 percent of the time to points in Philadelphia. (297) This means that with two loads a week to Hazelton, (with 95 percent of those loads utilizing Para-Chem's own equipment), Para-Chem ships only five loads a year when it needs a common carrier. Para-Chem plans to continue its present carrier on intrastate moves and its proposed use of Central is pure speculation. (308) This testimony does not carry the burden of proving a useful public purpose, inadequacy of service (under the traditional standard) or any of the "alternatives" as set forth in Kinard.

The witness for Calgon Corporation, Pittsburgh, PA, a manufacturer of water treatment chemicals, testified that its primary plant is located in Ellwood City, PA. Approximately fifteen to twenty truckloads move to Pittsburgh each month. (319) These move via Schneider National. (321) Calgon ships approximately one truckload per month to each of the following locations: Mehoopany, New Castle, Spring Grove and Whitehall (in the Philadelphia area). Calgon would use Central as "a potential backup carrier." (327) Calgon has used Refiners, Chemical Leaman and Matlack as backup carriers, but supported Central because it presented them with "one more option from a competitive standpoint." (327) However, Calgon is satisfied with its present carrier. (330-331) The only "alternative" under the Kinard decision which that situation could approach, is that of "backup" carrier. However, with Refiners, Chemical Leaman, Matlack and others anxious to put their equipment in full use and their drivers to work, this shipper's testimony can hardly support a need for more service for a 4th "backup carrier", when the shipper admits it has not used the first three "backup" carriers.

Valspar, located in Pittsburgh, produces a protective coating for cans and packages. The coating is shipped from Pittsburgh and Rochester. (333) However, the majority of Valspar shipments occur between the Rochester and Pittsburgh plants. (329) Matlack has dedicated equipment specifically to handle the Valspar account. (340) The witness testified that she has knowledge of Chemical Leaman and Refiners (336) and would consider using Refiners as a backup carrier. (342)

Refiners specifically solicited Valspar's business by personal visits in 1987 and 1988, but received no business from Valspar. (600) Valspar supported Central's application on the basis of competition and backup. (336) Valspar has between twenty to forty shipments a year both inter and intrastate. (337) Between two and two one-half shipments a month cannot justify the granting of any intrastate authority when major carriers are available and unused for a relatively small number of shipments per year.

The traffic manager for McCloskey Corporation testified that his company ships industrial resins and solvents from its Philadelphia location. (208) While the witness claimed that McCloskey has used Central for a number of interstate shipments (210), the witness admitted on cross-examination that Central had been used for outbound transportation only once within the past year (218) and could not recall any particulars about that shipment. (223) The witness was aware that Matlack maintains a terminal approximately 5 miles away from McCloskey's facility (225), but did not know if Central has any terminals that could service McCloskey's plant. (236) He stated he would consider using Refiners if Refiners had a terminal within 50 - 70 miles of the Philadelphia facility. (248) Refiners has two terminals within 30 miles of Philadelphia. (518)

In summary, the Applicant has not made a case for any authority under the Kinard principles. Witnesses' desires for "potential backup carriers" or "one more option from a competitive standpoint" cannot support a grant of authority in the face of proof that shippers have only extremely limited

traffic, and have not made use of the numerous existing "backup carriers." Public witnesses who are completely unaware of the existence of intrastate service of major carriers such as Refiners, Chemical Leaman and Matlack cannot provide the support necessary to warrant a grant of new authority. Witnesses from major shippers such as Witco and Pennzoil should be required to provide more than conclusory statements about protecting a company's "best interests" or permitting a shipper to be "more choosy" about carriers.

Protestant Refiners submits that the evidence requires a denial of the application, because of lack of proof of need, and the impairment of existing service which will result from any grant.

- C. The Application Should Be Denied Because the Entry of Central Transport, Inc. Will Endanger Or Impair The Operations of Existing Common Carriers, Including Refiners Transport & Terminal Corporation, To Such An Extent That, The Granting Of The Authority Would Be Contrary To The Public Interest.

The foregoing argument refers to the substantial number of existing large intrastate tank carriers and the intense competition existing for the intrastate freight available. Refiners' realizes that in the Kinard decision, the Commission stated that the possibility of diversion of traffic is not sufficient to invoke protection on the Transportation Regulatory Policy. In this case, the evidence goes far beyond the possibility of mere diversion of traffic. The evidence shows beyond question that Central Transport will be in a position to divert substantial amounts of traffic from Refiners. Two of the

principal customers of Refiners -- Witco and Pennzoil -- have stated their intention to make traffic available to Central regardless of the satisfactory service now provided by Refiners and other carriers apparently without consideration of the adverse effect upon Refiners.

Refiners presented substantial evidence of the outstanding service which it has provided to its major customers Witco and Pennzoil. Mr. Wilson, the Regional Manager for Refiners in charge of its Pennsylvania operations, discussed the "strong ties" which his company has had with Witco and Pennzoil over many years. Witco traffic represents approximately 50 percent of the total revenue of Refiners East Butler Terminal; up to nine units a day are operating to serve Witco on a 24-hour a day basis (533-534).

Pennzoil is also a very important customer served from the Oil City terminal of Refiners; Pennzoil represents 40 percent of the Oil City terminal operation. (534-535)

The Witco and Pennzoil business really provide the base of the Refiners' operations. Mr. Wilson described the importance of the Witco -- Pennzoil traffic and the effect of any significant loss of this traffic as follows: (535)

[loss of traffic] would be very detrimental to either of those terminals. We consider that the Witco and Pennzoil business in Pennsylvania is a base -- really is a base for our operations there. They're big numbers. There's a tremendous amount of volume provided by those shippers that we feel that if any significant amount was lost, it would hamper our ability to serve the public and to continue operations in those points.

Mr. Wilson emphasized the importance of Refiners' service to

the public when he testified that about 150 Pennsylvania shippers are served by Refiners (536)

Refiners has made special efforts to meet the requirements of Witco and Pennzoil. These special efforts included joint arrangements with Witco which included the installation of 25,000 gallon tanks to improve delivery time. Refiners also purchased trailers brand new from the factory which never would handle any material other than Witco's white oil.

Recently Pennzoil requested special metering units for deliveries to a specific account with which Pennzoil had a 20 year supply agreement. Pennzoil asked Refiners to design and build units that would be acceptable to make multi-stop deliveries to the Pennzoil customer. Mr. Wilson and other personnel at Refiners meet with representatives of Pennzoil and Witco to discuss operations from time to time. (535-537)

At the request of Witco, Refiners has made arrangements to transfer work from one terminal to another; specifically, transportation was transferred between the Butler and Oil City terminals of Refiners at the request of Witco. Refiners worked out this transfer of work with its local Union. Neither Witco nor Pennzoil has asked Refiners to make any other change in its present services. (537-539)

Refiners has Union contracts at Butler and Oil City and compensates its drivers on an hourly and mileage basis. In fact, its present wage rate of \$10.60 is less than the wage rate existing in 1982. This reduction occurred because of the stiff competition faced by Refiners when other carriers, most of them non-union, cut rates. In order to survive, Refiners has

negotiated concessions with its employees since it simply could not operate in competition with non-union carriers. As part of the special agreements with its personnel, Refiners has instituted a Terminal Incentive Program under which Refiners agreed to share profits on a terminal by terminal basis with the drivers. Refiners made a good faith bargain that if it could survive and make money, it would share those profits with the employees. (539-541)

Refiners is forced to compete with not only the major carriers - Matlack and Chemical Leaman, but smaller carriers such as Oil Tank Lines and Marshall. In addition, the oil companies all have their own fleets, and there are small jobber type competitors such as Erie Petroleum, Five Star Trucking, Frenz Petroleum and Zappi who are competitors. (540-542)

The intense competition which Refiners faces at the present level of traffic is demonstrated by the fact that Refiners now has about 25 drivers laid-off in its Western Pennsylvania operations, which employ about 135 drivers. Approximately 10 - 20 percent of its trailer equipment is idle in its Butler and Oil City terminals. Mr. Wilson stated flatly that his company was able to handle the continuing transportation requirements of Witco and Pennzoil in Pennsylvania and would, in fact, acquire additional equipment if requested. Neither company has asked him to provide any additional equipment in the past year. (541-543)

Refiners Exh. No. 9, presented by witness Michalsky, demonstrates beyond question the significance of the traffic of Witco and Pennzoil to Refiners. That Exhibit shows that in 1987

the intrastate traffic combined of Witco and Pennzoil generated revenues for Refiners of almost \$2,000,000 out of the total intrastate revenue of \$3,600,000; that situation continued in the first six months of 1988 when the combined Witco-Pennzoil interstate traffic of Refiners represented revenues in excess of \$800,000 out of total Pennsylvania revenues of \$1,700,000. Thus, Witco and Pennzoil represent about 50 percent of the total Refiners traffic base in Pennsylvania.

The loss of any significant amount of that traffic will have an immediate and drastic effect upon Refiners' ability to continue its adequate service to the public. As Mr. Wilson emphasized, the Witco-Pennzoil traffic is the very basis of the ability of Refiners to serve the public. Furthermore, the loss of traffic by Refiners inevitably means that its employees -- Pennsylvania employees -- will be deprived of employment.

Applicant in its brief (pp. 32 and 33) attempts to dismiss lightly any possibility of an important diversion of traffic. However, the fact is that both Witco and Pennzoil have indicated by their support of the Central application that some traffic will be diverted to Central. The further fact which must be faced is that Central, an aggressive carrier, (without the labor contracts of Refiners) has the ability to establish a rate structure which will have immediate and adverse effect upon Refiners. The chief witness for Applicant, Mr. Fesperman, testified specifically that his company expected to add a minimum of \$1,000,000 of revenue each year from the proposed operation. (30) That revenue must come from Witco and Pennzoil.

Thus, Refiners' fear of loss of revenue as a result of a

grant to Applicant is based on fact and is not "speculative." The evidence of the witnesses for Refiners and the evidence presented by the shipper witnesses of Applicant Central require a finding that Protestant Refiners and other carriers are providing a more than adequate service to the public.

Judge Christianson, in his Initial Decision in the Kinard case (adopted by the Commission), stated specifically:

If a Protestant is providing adequate service, it certainly has a claim to protection, in the public interest. (Slip Opinion, p. 39).

Protestant Refiners has met its burden by providing evidence that loss of any significant revenue from the Witco-Pennzoil traffic to Applicant Central will impair its ability to continue to provide adequate service to the public. Mr. Wilson testified specifically that the loss of any significant amount of Witco-Pennzoil traffic would hamper Refiners' ability to serve the public and continue operations at Oil City and East Butler. (535)

Applicant Central has argued and no doubt will argue that Refiners' fears of diversion of traffic are speculative. Such an argument is fallacious. Applicant Central is a very aggressive carrier which in a few years has secured substantial volumes of interstate traffic from Witco and Pennzoil at its Oil City terminal. There can be no doubt about its intention to solicit aggressively the intrastate traffic of Witco and Pennzoil. Indeed, as indicated above, its own studies show that it would generate a minimum of \$1,000,000 of additional traffic from the intrastate operations. Obviously, it does not intend

to generate that revenue from the shippers such as Valspar, McCloskey, Para-Chem, and Miller, which have little or no traffic; it can only generate that million dollars from substantial shippers such as Witco and Pennzoil.

Not one shipper testified that it was handicapped in meeting its business needs or meeting competition by reason of the quality of existing service (or the rate levels) assessed by Refiners or other carriers. Rather, the testimony spoke of the nebulous concept of "being more choosy" (Witco) or looking out for a company's own interest (Pennzoil) or of multiple potential backup carriers (Calgon). This case provides an excellent opportunity for the Commission to articulate clearly its policy in regard to such applications as the instant one. Certainly, the alternatives to inadequacy suggested by Kinard require more substance than simply the appearance of a witness reciting the phrases from Kinard of "potential backup" or "more competition" or unspecified "future needs" or "conformity" of PUC authority to ICC authority.

Refiners submits that these concepts must be related to some expressed and substantial public need for transportation which is articulated in far more precise terms than those presented by the witnesses in this case. In reaching a conclusion to deny this application, the Commission can properly signal the transportation community that substantial proof is still required to support an application for wide authority. This is particularly true where there are existing carriers such as Refiners, which have invested over 20 years of existence in serving Pennsylvania -- with equipment, with terminals, with

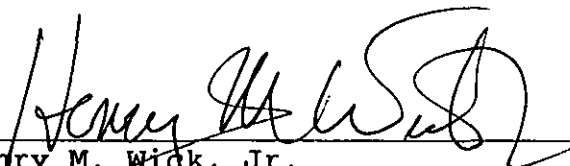
personnel and capital -- all dedicated to providing a quality tank truck service in which employees are paid decent wages and provided reasonable fringe benefits.

The Commission must find, on the evidence of this case, that the interests of all Pennsylvania shippers and receivers of tank truck commodities, outweigh the interest of Central Transport and those few shippers who seek to secure, even on a temporary basis, a supposed advantage from the aggressive operations of Central Transport.

V. CONCLUSION

For the foregoing reasons, Protestant Refiners Transport & Terminal Corporation requests that the application be denied.

Respectfully submitted



Henry M. Wick, Jr.
Lucille N. Wick
1450 Two Chatham Center
Pittsburgh, PA 15219
(412) 765-1600
Attorneys for Protestant
Refiners Transport & Terminal
Corporation

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing pleading has been served upon the following counsel, by first-class, U.S. Mail, postage prepaid, this 13th day of September, 1989, addressed as follows:

Hon. Michael Schnierle
Administrative Law Judge
PA Public Utility Commission
Bureau of Transportation
P. O. Box 3265
Harrisburg, PA 17120

James W. Patterson, Esq.
Rubin, Quinn, Moss & Heaney
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106

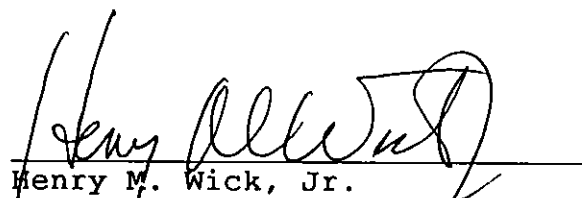
William A. Chesnutt, Esq.
100 Pine Street
P. O. Box 1166
Harrisburg, PA 17108

David H. Radcliff, Esq.
Graf, Andrews & Radcliff, P.C.
407 North Front Street
Harrisburg, PA 17101

William J. O'Kane, Esq.
Chemical Leaman Corporation
102 Pickering Way
Exton, PA 9431-0200

Ronald W. Malin, Esq.
Johnson, Peterson, Tener
& Anderson
Key Bank Building
P. O. Box 1379
Jamestown, NY 14702-1379

Kenneth A. Olsen, Esq.
P. O. Box 357
Gladstone, NJ 07934


Henry M. Wick, Jr.

LAW OFFICES
JOHNSON, PETERSON, TENER & ANDERSON

ORIGINAL

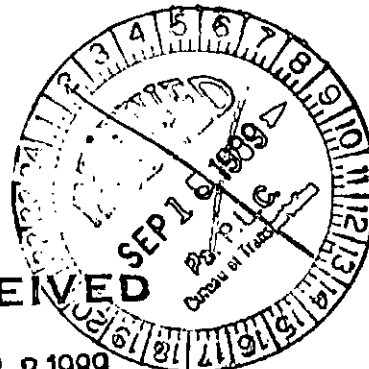
KENNETH T. JOHNSON
RAYMOND A. ANDERSON
RONALD W. MALIN
WARD W. WESTERBERG

KEY BANK BUILDING
P. O. BOX 1379
JAMESTOWN, NEW YORK 14702-1379
AREA CODE 716
TELEPHONE 664-5210

FAX (716) 664-1865
ALBERT J. TENER (OF COUNSEL)
JOHN A. PETERSON (1919-1971)
WILLIAM C. ARRISON (1925-1978)
CHARLES J. PHILLIPS (1919-1986)

September 13, 1989

Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
Bureau of Transportation
P.O. Box #3265
Harrisburg, Pennsylvania 17120



RECEIVED
SEP 13 1989
SECRETARY'S OFFICE
Public Utility Commission
RECEIVED
SEP 20 1989
Office of A.L. J.
Public Utility Commission

RE: Docket No. A-00108155
Application of Central Transport, Inc.

Dear Mr. Rich:

Enclosed please find the original and nine (9) copies of a Supplement to and Correction of Brief on Behalf of Protestant, Crossett, Inc., in opposition to the above referenced application, correcting an erroneous fact in the Brief which was filed on September 11, 1989.

Attached to this letter is U.S. Postal Service Form 3817, Certificate of Mailing, showing that the Supplement to and Correction of the Brief has been timely filed.

Copies of this Supplement and Correction have been sent to all parties as shown on the Certificate of Service annexed thereto.

Respectfully submitted,

Ronald W. Malin
RONALD W. MALIN

RWM:knw

Enclosures

C/C TO: Hon. Michael Schnierle
Administrative Law Judge
Pennsylvania Public Utility Commission
Bureau of Transportation
P.O. Box #3265
Harrisburg, Pennsylvania 17120

William A. Chesnutt, Esq.
100 Pine Street
P.O. Box #1166
Harrisburg, Pennsylvania 17108

William J. O'Kane, Esq.
Chemical Leaman Corporation
102 Pickering Way
Exton, Pennsylvania 19341-0200

Kenneth A. Olsen, Esq.
P.O. Box #357
Gladstone, New Jersey 07934

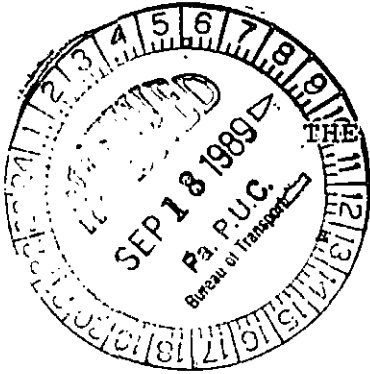
James W. Patterson, Esq.
Rubin, Quinn, Moss & Heaney
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, Pennsylvania 19106

David H. Radcliff, Esq.
Graf, Andrews & Radcliff, P.C.
407 North Front Street
Harrisburg, Pennsylvania 17101

Henry M. Wick, Jr., Esq.
1450 Two Chatham Center
Pittsburgh, Pennsylvania 15219

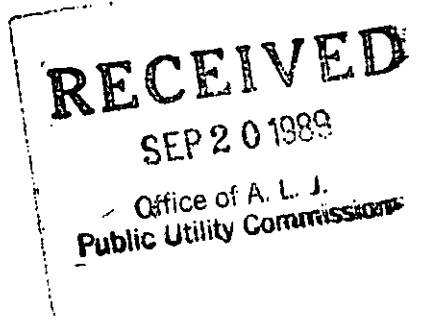
Mr. Gary P. Wallin
Crossett, Inc.
P.O. Box #946
Warren, Pennsylvania 16365

ORIGINAL



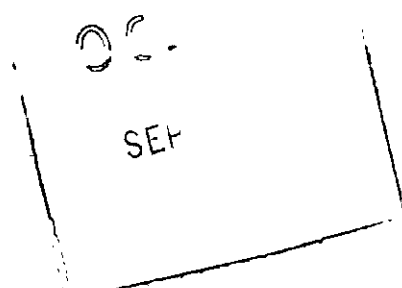
BEFORE
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO. A-00108155
APPLICATION OF
CENTRAL TRANSPORT, INC.



SUPPLEMENT TO AND CORRECTION OF
BRIEF ON BEHALF OF PROTESTANT,
CROSSETT, INC.

RECEIVED
SEP 13 1989
SECRETARY'S OFFICE
Public Utility Commission



RONALD W. MALIN, ESQ.
Attorney for Protestant,
CROSSETT, INC.
Office and Post Office Address
Johnson, Peterson, Tener & Anderson
P.O. Box #1379 - Key Bank Building
Jamestown, New York 14702-1379
Telephone: (716) 664-5210

Dated: September 13, 1989.

BEFORE
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO. A-00108155
APPLICATION OF
CENTRAL TRANSPORT, INC.

SUPPLEMENT TO AND CORRECTION OF
BRIEF ON BEHALF OF PROTESTANT,
CROSSETT, INC.

Protestant, Crossett, Inc. (Crossett), by its attorneys,
Johnson, Peterson, Tener & Anderson, Ronald W. Malin, Esq., of
counsel, filed its Brief in the instant matter by mailing with
attached certification of mailing on September 11, 1989.

Subsequent thereto, Crossett has pointed out to me that the
Brief, through my error, contains an error of fact, to wit: the
statements that only the shipper witness from Witco Corporation
worked for a company that had a petroleum products facility within
the Counties of Warren, McKean and Venango and that none of the
other shipper witnesses did.

In making such statements, I overlooked the fact that Rouse-
ville is located in Venango County and that Pennzoil Products Com-
pany has a petroleum products facility in Rouseville. Mr. Valgene
Frye of Pennzoil Products Company, of course, was a shipper witness.

However, as Mr. Frye of Pennzoil testified in support of the
instant application as it pertains to the Karns City (Butler Coun-
ty) facility of Pennzoil (Exhibits 11-14; Transcript 163-195), the

validity of the arguments contained in Crossett's Brief as filed on September 11, 1989 remain sound.

As to Rouseville, Mr. Frye's testimony reveals no need for intrastate transportation as to the Applicant, as Exhibit 13 depicts only "kerosene" transported (primarily by private carriage) from Rouseville to Pennzoil at Karns City.

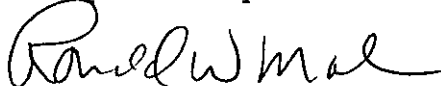
"Kerosene" is a commodity excluded from the commodity request of the Applicant in the instant application for authority, and, therefore, the "kerosene" movement from Rouseville is irrelevant to the instant application.

Therefore, although I committed an oversight as to the fact that Pennzoil has a facility at Rouseville in Venango County, and I apologize for such, the position of Crossett and the arguments submitted in Crossett's Brief filed September 11, 1989 remain the same.

This Supplement and Correction is being mailed to the Pennsylvania Public Utility Commission, together with U.S. Postal Service Form 3817, on September 13, 1989, and, therefore, is timely filed.

Dated: September 13, 1989.

Respectfully submitted,



RONALD W. MALIN, ESQ.
Attorney for Protestant,
CROSSETT, INC.
Office and P.O. Address
Johnson, Peterson, Tener & Anderson
P.O. Box #1379 - Key Bank Building
Jamestown, New York 14702-1379
Telephone: (716) 664-5210

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 1989,
I served copies of the foregoing Supplement to and Correction of
Brief on Behalf of Protestant, Crossett, Inc., upon the following
parties of record, by first-class mail, postage pre-paid:

Hon. Michael Schnierle
Administrative Law Judge
PA Public Utility Commission
Bureau of Transportation
P.O. Box #3265
Harrisburg, PA 17120

James W. Patterson, Esq.
Rubin, Quinn, Moss & Heaney
1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106

William A. Chesnutt, Esq.
100 Pine Street
P.O. Box #1166
Harrisburg, PA 17108

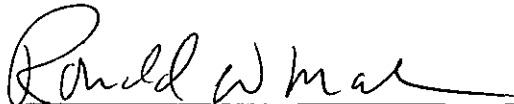
David H. Radcliff, Esq.
Graf, Andrews & Radcliff, P.C.
407 North Front Street
Harrisburg, PA 17101

William J. O'Kane, Esq.
Chemical Leaman Corporation
102 Pickering Way
Exton, PA 9341-0200

Henry M. Wick, Jr., Esq.
1450 Two Chatham Center
Pittsburgh, PA 15219

Kenneth A. Olsen, Esq.
P.O. Box #357
Gladstone, NJ 07934

Mr. Gary P. Wallin
Crossett, Inc.
P.O. Box #946
Warren, PA 16365



RONALD W. MALIN, ESQ.
Attorney for Protestant,
CROSSETT, INC.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet

1. <u>REPORT DATE:</u> December 4, 1989	:	2. <u>BUREAU AGENDA NO.</u> DEC-89-ALJ-181
3. <u>BUREAU:</u> ALJ	:	
4. <u>SECTION(S):</u>	:	5. <u>PUBLIC MEETING DATE:</u> December 14, 1989
6. <u>APPROVED BY:</u> Chief ALJ: Allison K. Turner Director: Ext. 7-6108 Supervisor:	:	
7. <u>MONITOR:</u>	:	
8. <u>PERSON IN CHARGE:</u> ALJ Chestnut, ALJ Fountain, ALJ Kashi & ALJ Schnierle	:	
9. <u>DOCKET NO:</u> See list below.	:	

10. (a) CAPTION (abbreviate if more than 4 lines)
 (b) Short summary of history & facts, documents & briefs
 (c) Recommendation

- (a) A-212845F500 Spring Run Water Company, Inc.
 C-871468 Info Connections v. The Bell Telephone
 Company of Pa.
 A-00108448 Empire Wecking Co. of Reading, Pa.
 A-00108155 Central Transport, Inc.

(b) In accordance with provisions of Act 1978-294 66 C.S.A., §332g. as summarized by Administrative Circular SEC-51, the ALJ must issue a decision within 90 days after the record is closed unless the Commission orders an extension for a period not to exceed an additional 90 days.

(c) The presiding Judges have requested an additional 90 days within which to issue decisions in the above cases after the records have been closed.

DOCUMENT FOLDER

11. MOTION BY: Commissioner Chm. Shane Commissioner Rhodes - Yes
 Commissioner Fischl - Yes
SECONDED: Commissioner Smith Commissioner

CONTENT OF MOTION: That the requests be granted.

DOCKETED
 JAN 30 1990