

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17120
May 15, 1989

In Re: A-00108155

(See letter dated 2/6/89)

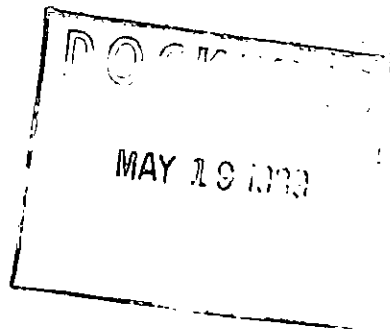
Application of Central Transport, Inc.

A Corporation of the State of North Carolina, for the right to transport, as a common carrier, property, in bulk, in tank and hopper-type vehicles, between points in Pennsylvania.

NOTICE

This is to inform you that further hearings on the above captioned case will be held Tuesday and Wednesday, June 27 and 28, 1989, at 10:00 a.m., in available hearing room, Ground Floor, North Office Building, North Street and Commonwealth Avenue, Harrisburg, Pennsylvania.

cc: Judge Schnierle
Mr. Bramson
Mrs. Pappas
Mrs. Howell
File Room



Kenneth A. Olsen

Attorney at Law

P. O. Box 357

Gladstone, New Jersey 07034-0357

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MAY 24 1989

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MAY 19 1989

SECRETARYS OFFICE
May 17, 1989 PUBLIC UTILITY

Hon. Michael C. Schnierle, Administrative
Law Judge
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, Pennsylvania 17120

Dear Judge Schnierle:

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

As the records will indicate, I represent protestant Marshall Service, Inc. in the above captioned proceeding. I am today in receipt of advice from your Commission that further hearings in this proceeding have been scheduled for June 27 and 28, 1989 in Harrisburg, Pennsylvania. It is my assumption that the purpose of these further hearings is to allow protestant, Matlack, Inc., to present witnesses in support of its case in opposition to this application. Since my client presented testimony in opposition to this application on February 7, 1989, in Philadelphia, Pennsylvania. I respectfully request that my appearance at the June 27 and 28, 1989 hearings be excused. If my aforesaid assumption as to the purpose of the further hearings is incorrect, please advise me accordingly.

Kindly acknowledge receipt on the duplicate of this letter attached, showing thereon your advice. A self-addressed stamped envelope is enclosed for your convenience. Your cooperation in this matter is and has been greatly appreciated.

Very truly yours,

Kenneth A. Olsen

KAO:jnw

Enc.

cc: Mr. Jerry Rich, Secretary ✓
William A. Chesnutt, Esq.
Christian V. Graf, Esq.
William J. O'Kane, Esq.
Henry M. Wick, Esq.
Ronald W. Malin, Esq.
James W. Patterson, Esq.
Marshall Service, Inc.

**DOCUMENT
FOLDER**

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May 31, 1989

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Hon. Michael C. Schnierle
Pennsylvania Public Utility Commission
Bureau of Transportation
P.O. Box #3265
Harrisburg, Pennsylvania 17120

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JUN 2 1989

SECRETARYS OFFICE
Public Utility Commission

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

Dear Judge Schnierle:

I represent Crossett, Inc. as a protestant to the above referenced application. As Crossett, Inc. has already presented its evidence and as I believe that the hearings to be held in Harrisburg, PA on June 27 and 28, 1989 have been scheduled for the purpose of Matlack, Inc. presenting witnesses in support of its opposition to the application, please be advised that I will not be attending the scheduled hearings.

Very truly yours,



RONALD W. MALIN

RWM:knw

C/C TO: William A. Chestnutt, Esq.
McNees, Wallace & Nurick
100 Pine Street
P.O. Box #1166
Harrisburg, Pennsylvania 17108-1166

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

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JUN 2 1989

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OF COUNSEL

GILBERT NURICK
EDWARD C. FIRST, JR.
ROBERT H. GRISWOLD
JEFFERSON C. BARNHART
SAMUEL A. SCHRECKENGAUST, JR.

June 19, 1989

Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
New Filing Section, Room B-18
North Office Building
P. O. Box 3265
Harrisburg, PA 17120

RECEIVED
JUN 21 1989
SECRETARY'S OFFICE
Public Utility Commission

Re: **Application of Central Transport, Inc.**
PA PUC Docket No. A.00108155
Our File: 12558-001-9


Dear Secretary Rich:

In accordance with 52 Pa. Code §5.342(d), I am filing the required Certificate of Service.

Respectfully submitted,

MCNEES, WALLACE & NURICK

By



William A. Chesnutt
Counsel for Applicant
Central Transport, Inc.

WAC/law

Enclosure

cc: Attached Certificate of Service
W. David Fesperman (w/enclosure)



FRANCIS B. HAAS, JR.
G. THOMAS MILLER
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OF COUNSEL

GILBERT NURICK
EDWARD C. FIRST, JR.
ROBERT H. GRISWOLD
JEFFERSON C. BARNHART
SAMUEL A. SCHRECKENGAUST, JR.

June 20, 1989

Honorable Michael C. Schnierle
Administrative Law Judge
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17120

Re: Application of Central Transport, Inc.
PA PUC Docket No. A.108155
Our File: 12558-001-9

Dear Judge Schnierle:

This will confirm my telephone conversation with you today in which I informed you that counsel for Matlack, James W. Patterson, Esquire and I, as counsel for applicant Central Transport, Inc., have agreed that only one day's hearing time will be required for presentation of the remaining evidence in this matter. The two days of Tuesday, June 27 and Wednesday, June 28 have been set aside for that purpose. Mr. Patterson and I agree that Wednesday, June 28 is the appropriate day for this presentation, and you kindly agreed to have the schedule changed to reflect that.

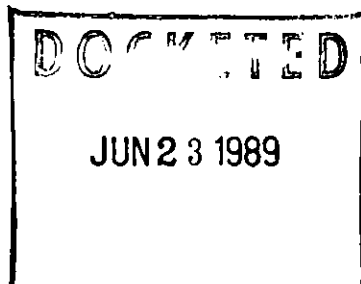
A copy of this letter is going to all other counsel of record as a matter of information. Also, as counsel for applicant, I am using this letter to inform those other counsel that no evidence will be offered by applicant in rebuttal of evidence presented by protestants other than Matlack.

Respectfully submitted,

MCNEES, WALLACE & NURICK

By

William A. Chesnutt
William A. Chesnutt
Counsel for Applicant
Central Transport, Inc.



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cc: All counsel of record
W. David Fesperman

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17120
June 20, 1989

In Re: A-00108155

(See letter dated 5/15/89)

Application of Central Transport, Inc.

A Corporation of the State of North Carolina, for the right to transport, as a common carrier, property, in bulk, in tank and hopper-type vehicles, between points in Pennsylvania.

NOTICE

Our notice of May 15 announced two days of hearings in the above matter - Tuesday and Wednesday, June 27 and 28, 1989, in Harrisburg. We have been informed by applicants counsel that only one day will be required. Therefore, Tuesday, June 27 is hereby cancelled. A further hearing will take place on Wednesday, June 28, 1989, at 10:00 a.m., in Harrisburg.

Please change your records accordingly.

cc: Judge Schnierle
Mr. Bramson
Mrs. Pappas
Mrs. Howell
File Room

DOCUMENT
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DOCUMENTED
JUN 23 1989

APPEARANCE SHEET

ALJ HEARING REPORT

DOCKET NO. A-00108155
 CASE NAME Central Transport, Inc.
 HEARING LOCATION Harrisburg, PA.
 HEARING DATE June 27 & 28, 1989
 ALJ Schnierle

CHECK THOSE BLOCKS WHICH APPLY:

Hearing held YES NO

Testimony taken YES NO

Hearing concluded YES NO

Further hearing needed YES NO

Estimated add'l days _____

RECORD CLOSED YES _____ NO

Date _____

Briefs to be filed YES NO

Date _____

BENCH DECISION YES _____ NO

REMARKS: Record closes on receipt of transcript; briefs to be filed per 52 Pa. Code § 5.501, 5.502.

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 JUN 29 1989
 Office of A. L. J.
 Utility Commission

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 JUL 06 1989

NAMES, ADDRESSES AND TELEPHONE NUMBERS OF PARTIES OR COUNSEL OF RECORD
 PLEASE PRINT CLEARLY
 INCOMPLETE INFORMATION MAY RESULT IN DELAY OF PROCESS

DOCUMENT FOLDER

NAME and TELEPHONE NUMBER	ADDRESS	APPEARING FOR
MENDES, WALLACE & MURPHY by William A. Cheavath Telephone No. (717) 232-8000	P.O. Box 1166 City: H.B.G. State: PA Zip: 17108	APPLICANT Central Transport, Inc.
James W. Patterson Telephone No. (215) 925-8300	1800 Penn Mutual Tower City: Phila. State: PA Zip: 19106	MATLACK, Inc.
HENRY M. WICK JR Telephone No. (412) 7651600	1450 Two Chatter Cts City: Pottsville State: PA Zip: 15219	Refiners Transport & Terminal Corp.

CHECK THIS BOX IF ADDITIONAL PARTIES OR COUNSEL OF RECORD APPEAR ON BACK.

Jan H. Johnston
 Reporter

WILLIAM J. O'KANE

Address

105 PICKERING W.

CHEMICAL LEAMAN

TANK LINES, INC

City

State

Zip

Telephone No. (215) 363422

ELTON

PA

19371

Address

City

State

Zip

Telephone No. ()

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COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P. O. BOX 3265, HARRISBURG, Pa. 17120

July 25, 1989

IN REPLY PLEASE
REFER TO OUR FILE

TO: All Parties of Record

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JUL 26 1989

SECRETARY'S OFFICE
Public Utility Commission

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

The transcript of testimony taken in the above-entitled proceeding indicates that the parties will file briefs.

In accordance with the Commission's Rules of Practice, the Applicant's brief shall be filed by August 24, 1989, and the Protestants' briefs shall be filed by September 13, 1989. If briefs are not received within the allotted time, they shall not be accepted for filing, except by special permission of the presiding officer.

An original and nine (9) copies of each main brief must be filed with the Secretary of the Commission, a copy must be served on the presiding Administrative Law Judge and three copies on each party of record.

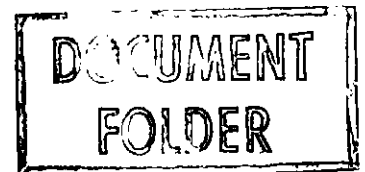
Very truly yours,

MICHAEL C. SCHNIERLE
Administrative Law Judge

MCS:mem

cc: New Filing
Annette Shelley

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JUL 27 1989



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AUG 24 1989

SECRETARYS OFFICE OF COUNSEL
Public Utility Commission

ALBERT NURICK
EDWARD C. FIRST, JR.
ROBERT H. GRISWOLD
JEFFERSON C. BARNHART
SAMUEL A. SCHRECKENGAUST, JR.

August 24, 1989

Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
New Filing Section, Room B-18
North Office Building
P. O. Box 3265
Harrisburg, PA 17120

HAND DELIVERY

Re: Application of Central Transport, Inc.
PA PUC Docket No. A.00108155
Our File: 12558-001-9

Dear Secretary Rich:

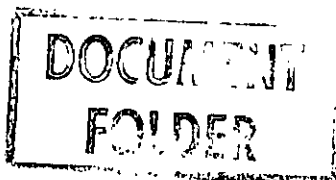
Enclosed for filing with the Commission please find an original and nine (9) copies of the Main Brief on Behalf of Applicant Central Transport, Inc. in the above-referenced proceeding.

Three copies have also been served on all parties of record as well as one on Administrative Law Judge Michael C. Schnierle as ordered in Judge Schnierle's letter of July 25, 1989.

Please kindly date stamp the additional copy of this letter of transmittal for return to my office verifying your receipt of these documents.

Respectfully submitted,

MCNEES, WALLACE & NURICK



By

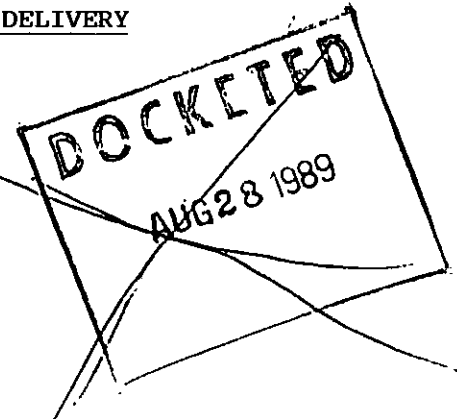
William A. Chesnutt

William A. Chesnutt
Counsel for Applicant
Central Transport, Inc.

WAC/law

Enclosures

cc: Attached Certificate of Service (w/enclosures)
Honorable Michael C. Schnierle (w/enclosure)
W. David Fesperman (w/enclosure)



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AUG 24 1989

Before the
Pennsylvania Public Utility Commission

SECRETARYS OFFICE
~~Public Utility Commission~~

Docket No. A-00108155

MAIN BRIEF
ON BEHALF OF APPLICANT
CENTRAL TRANSPORT, INC.

DOCKETED
AUG 28 1989

William A. Chesnutt
McNEES, WALLACE & NURICK
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000

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FOLDER

Counsel for Applicant
Central Transport, Inc.

Dated: August 24, 1989

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

MAIN BRIEF ON BEHALF OF
APPLICANT CENTRAL TRANSPORT, INC.

Applicant Central Transport, Inc. ("Central"), by its counsel McNees, Wallace & Nurick, respectfully files this brief to Administrative Law Judge Michael C. Schnierle, in accordance with 52 Pa. Code §5.501(a). The Presiding Officer did not direct either partial or full compliance with the provisions of 52 Pa. Code §5.501(b) (see ALJ's Notice to Parties dated July 25, 1989; Tr. 700).*

STATEMENT OF THE CASE

The subject application for motor carrier operating authority was filed March 21, 1988. Notice of the filing was published in the Pennsylvania Bulletin of June 11, 1988. As finally amended, applicant seeks authorization to transport:

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.

*References to the record in this proceeding will be governed by the following abbreviations:

Exh. -- Exhibits received into evidence
Tr. -- Transcript of oral hearing

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.

(Supplemental Exh. 5).

As finally amended, the application remains opposed by six (6) motor common carriers whose evidentiary presentations are summarized in Appendix B accompanying this brief. The application is supported by eight (8) shippers and receivers of bulk commodities, whose evidentiary presentations are summarized in Appendix A accompanying this brief.

SUMMARY OF ARGUMENT

It is applicant's position that it has fully satisfied the evidentiary criteria used to decide motor common carrier applications, as those criteria are set forth at 52 Pa. Code §41.14. Specifically, applicant has satisfied the "burden of demonstrating that approval of the application will serve a useful public purpose, responsive to a public demand or need" 52 Pa. Code

§41.14(a). Secondly, applicant has satisfied "the burden of demonstrating that it possesses the technical and financial ability to provide the proposed service" 52 Pa. Code §41.14(b). There has been no showing on the record that "applicant lacks a propensity to operate safely and legally"; accordingly, there is no reason to withhold a grant of authority on that basis. See 52 Pa. Code §41.14(b).

The Commission's general order promulgated at 52 Pa. Code §41.14 provides that motor common carrier authority commensurate with a demonstrated public need will be granted "unless it is established that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers to an extent that, on balance, the granting of authority would be contrary to the public interest" 52 Pa. Code §41.14(c). No such showing has been made by the six motor common carriers who remain in opposition to this application.

ARGUMENT

A. Central Is Technically And Financially Capable Of Providing The Proposed Service

Central is an existing motor common carrier of bulk commodities operating in interstate and foreign commerce pursuant to an ICC certificate authorizing nationwide operations (Exh. No. 1, p. 2). In addition, Central Transport operates in intrastate commerce in the states of Georgia, North Carolina, South Carolina, Tennessee and West Virginia (Exh. 1, pp. 2-3). Central qualified as a foreign corporation in the Commonwealth of Pennsyl-

vania on March 23, 1984 and remains "in good standing" (see Application, paragraph 8).

Applicant has followed a practice of seeking intrastate operating authority in states where it is already operating terminals and where it is originating and terminating traffic moving in interstate and foreign commerce (Exh. 1, pp. 4-5). In Pennsylvania, Central has a facility at Karns City (Butler County), as well as facilities at Paulsboro, New Jersey and Baltimore, Maryland. From the latter two facilities, tractor-trailer units may readily be dispatched to origins in eastern and south central Pennsylvania. The Karns City terminal is well situated to provide service to origins in western Pennsylvania (Exh. 1, p. 5).

Applicant now holds no authorization from the Pennsylvania Public Utility Commission; however, applicant's involvement in interstate and foreign commerce shipments originating and terminating in Pennsylvania has been substantial. During calendar year 1987, applicant transported 3,370 loads originating at Pennsylvania points destined to points outside the state. For the same time period, applicant delivered at points in the Commonwealth (from points outside the state) 2,128 loads. For 1987 total revenues derived from traffic originating at and/or destined to points in Pennsylvania totalled \$6,302,242 (Exh. 1, pp. 5-6). A comparable level of activity involving Pennsylvania origins and destinations continued during the first six months of 1988 (Exh. 1, p. 6).

From a territorial diversity standpoint, Central's interstate and foreign commerce service to and from points in Pennsylvania involved 50

of the Commonwealth's 67 counties (Exh. 1B). In addition to the territorial diversity of Central's interstate and foreign commerce to and from Pennsylvania points, the number of different products transported numbered 180 (Exh. 3).

Applicant's commitment to Pennsylvania shippers and receivers is consistent and regular. During a 366-day period, applicant averaged eight loads per day outbound from Pennsylvania origins and six loads per day delivered to Pennsylvania destinations. During the 366 days, there were only 17 dates on which a load was neither originated or delivered at a Pennsylvania point. As many as 21 loads were originated on a single day and on two occasions 17 loads were dispatched on a single day (Exh. 1, p. 8). Interstate and foreign commerce service to and from Pennsylvania points involved each of the trailer types operated by applicant for the handling of bulk commodities (Exh. 1, pp. 8-9).

In framing the commodity description being sought in this application, and more particularly the exclusions therefrom, applicant took into account the nature of traffic now being handled in interstate and foreign commerce to and from Pennsylvania points, as well as the type of trailer equipment applicant is in a position to make available to the shipping and receiving public (Exh. 1, pp. 9-10).

As pertinent to this application, 41 of applicant's 490 linehaul tractor units are domiciled at the Karns City terminal location. An additional 14 linehaul tractor units are located at the Baltimore and Paulsboro facilities, and 24 linehaul tractor units are stationed at Charleston, West

Virginia (Exh. 1C, p. 1). Those four terminal facilities also have an ample supply and variety of trailer units available (Exh. 1D). Trailer equipment is obviously in constant motion throughout the Central system and will be available for loading after it has been unloaded at Pennsylvania destinations (Exh. 1, pp. 10-11). Cleaning of trailer equipment is accomplished at either Central's Karns City terminal or at commercial cleaning facilities depending on the following factors: "The location of the unit when it is unloaded; the location of the loading point for the next load; the scheduled loading and unloading times...; the driver's hours of service available; and the product that needs to be cleaned." Central intends to continue its policy of providing equipment where it is needed by the shipping and receiving public without any extra deadhead or out-of-route charge to the customer (Exh. 1, p. 11).

Central also will continue its basic responsibility of meeting shipper and consignee schedules with respect to pickup and delivery performance. In general, Central believes that over-the-road transit times of 45-miles per hour can be achieved with the recognition that weather, road conditions, construction projects and the status of drivers' hours-of-service compliance ultimately impact delivery performance (Exh. 1, p. 13).

Central has a policy commitment for persistent upgrading of the equipment made available to the shipping public. During 1988 Central placed in service forty 1988 or 1989 model power units, including five such units stationed at the Karns City terminal. Similarly, there were forty-two 1988 model year trailers placed in the fleet during the 12 months prior to

September 26, 1988 (Exh. 7, p. 4). The Karns City terminal represents a capital investment of \$463,077 with annual property taxes of \$2,279. On behalf of 37 employees who reside in Pennsylvania, Central paid, during the first nine months of 1988 payroll, state withholding and city tax withholding of approximately \$86,000. In addition, during that same period, Central paid Pennsylvania road taxes totalling \$13,355 and bulk fuel taxes of \$18,440 (Exh. 7, pp. 3-4). As of June 30, 1988 applicant had total assets of \$29,716,899, with total liabilities of \$3,967,978 -- thus maintaining an equity position well in excess of \$25 million (Exh. 1H, pp. 4, 5). Applicant has consistently conducted operations at a profit (Exh. 1H, pp. 6-8). In sum, applicant has fully satisfied its burden under 52 Pa. Code §41.14(b) of demonstrating technical and financial ability to provide the proposed service.

**B. No Showing Has Been Made Of Any Propensity
By Applicant To Operate In Other Than A
Lawful And Safe Manner**

It is to be anticipated that protestants will contend that this record contains evidence demonstrating that applicant "lacks a propensity to operate safely and legally". It is expected that protestants will rely on five different shreds of evidence as the basis for their contention.

1. FBI Investigation Of Hazardous Substance Law Violations --
Record evidence concerning this item consists of the following cross-examination by counsel for Matlack:

Q. [by Mr. Patterson]. Mr. Fesperman, are you aware of any FBI investigation of Central

Transport with respect to violations of any hazardous substance law since January 1 of 1986?

A. [by Mr. Fesperman]. Yes, sir.

Q. What violations or alleged violations did the FBI investigation deal with?

A. You were talking about specific allegations?

Q. Yes, sir.

A. I do not know.

Q. Are you aware of any investigations involving Central's Charlotte, North Carolina terminal?

A. Yes, sir.

Q. Are you aware of whether that investigation had to do with the alleged dumping of hazardous substances into a local stream or body of water?

* * *

A. No, sir.

* * *

Q. Are you aware of any FBI investigation of the dumping of hazardous waste at the Charlotte terminal into the sewer system?

A. Alleged dumping?

Q. Yes, sir.

A. Yes, sir.

(Tr. 26-28).

With further reference to the FBI investigation at the Charlotte terminal, the following evidence was admitted:

Q. [by Mr. Patterson]. Were you at all familiar with water samples taken downstream from that facility?

A. [by Mr. Skidmore]. No.

Q. Were you familiar at the time that such samples were being taken?

A. No.

* * *

Q. ...Has the government withdrawn any investigation? Have you admitted anything with respect to this? Has anything occurred in connection with that subject matter?

A. Not to my knowledge.

(Tr. 693-694).

The foregoing "evidence" forms no basis for any conclusion that applicant Central lacks a propensity to operate legally and safely. An investigation commenced by the FBI which has led neither to any civil or criminal proceeding, much less a conviction, has never been held by this Commission to be an indication of a fitness deficiency. The Judge has called to counsel's attention an Opinion and Order by the Commission in Application of Xpress Truck Lines, Inc., Docket No. A-00104745 (entered September 24, 1985) in which it was the Judge's recollection that an application had been denied on the basis that the trucking company had "either pleaded guilty to or [been] found guilty of mail fraud violations in connection with their trucking activities" (Tr. 19). Based on that recollection of the Xpress Truck Lines decision, the Judge concluded that questions "involving the violation of the environmental laws or transportation law as to hazardous substances transportation are relevant" (Tr. 19).

Much later in this proceeding, the Judge acknowledged that the ALJ's decision in Xpress was not addressed on the merits by either the Commission or the Commonwealth Court. Instead, the ALJ's decision became final "because the applicant's attorney failed to file exceptions on time..." (Tr. 569).

It is Central's contention that the ALJ, in Xpress, was wrong in his reading of the Pennsylvania Supreme Court's decision in D. F. Bast, Inc. v. PUC, 397 Pa. 246, 154 A.2d 505 (1959) to allow the PUC's examination of fitness to extend to violations of law other than those administered by the PUC or affecting "safety of operations." A fair reading of the Bast decision leaves no doubt that the only violations "resulting from a deliberate disregard of the...law" 397 Pa. at 251, being discussed by the Supreme Court were violations of the Public Utility Law. Not only has the Commission not affirmed the ALJ in Xpress on the merits, but it very recently has reinforced the focus of the fitness as being on public utility laws -- not environmental, labor or areas of law left to other adjudicative bodies. In an exhaustive discussion of fitness issues in Application of Friedman's Express, Inc., Docket Nos. A-00024369, Folder 9, Am-B, Folder 10, Am-I (Order entered August 17, 1989), the Commission cited with approval its decision in Re Perry Hassman, 55 Pa.PUC 661 (1982) as follows:

Propensity to operate safely and legally -- in this regard, lack of fitness is demonstrated by persistent disregard for, flouting, or defiance of the public utility law and the Commission's order and regulations...; and by violations in matters affecting the safety of operations...

The Judge should reconsider his ruling allowing the evidence on FBI investigations, OSHA citations and environmental matters.

Relying on the above language quoted from the D. F. Bast decision, the Administrative Law Judge in Xpress nevertheless concluded that the Commission should not grant a certificate of convenience "to an applicant convicted of four counts of mail fraud (a crime involving moral turpitude) ten days after filing the application under consideration in the case at bar." Application of Xpress Truck Lines, Inc. (Ruling on Applicant's Exceptions, p. 9, dated April 17, 1985).

With respect to the allegations concerning applicant's Charlotte terminal, there has been no allegation of criminal conduct, and certainly no conviction of a crime "involving moral turpitude". In contrast to the absence of any record evidence showing any responsibility by Central for hazardous substance cleanup, protestant Chemical Leaman recorded a pretax charge of \$4,702,314 during the quarter ended October 2, 1988, "as estimated environmental cleanup costs at several locations, including two Superfund sites" (Central Exh. 25, p. 11).

2. OSHA Citations -- On September 15, 1986, the OSHA Division of the North Carolina Department of Labor issued to Central a Citation and Notification of Proposed Penalty alleging certain serious and non-serious violations of the Occupational Safety and Health Act of North Carolina (Matlack Exh. 3, sheet 8). OSHA and Central entered into a Stipulation and Notice of Settlement, which resolved the Citation and Notification of Proposed Penalty (Matlack Exh. 3, sheets 8-12). OSHA and Central as the

parties to that Stipulation and Notice of Settlement agreed that the document "shall not be construed as an admission by respondent of the validity of the allegations in the complaint and citation" (Matlack Exh. 3, sheet 11). The Safety and Health Review Board of North Carolina, the agency having jurisdiction over the issues raised in the Notice of Complaint, found the Stipulation and Notice of Settlement entered into by the parties to be "reasonable and supported by the underlying facts" (Matlack Exh. 3, sheet 13). The Safety and Health Review Board of North Carolina further concluded, as a matter of law, that the Stipulation and Notice of Settlement "is reasonable and ensures future compliance with the Act" (Matlack Exh. 3, sheet 14).

On January 29, 1987 the OSHA Division of the South Carolina Department of Labor issued a Citation and Notification of Penalty alleging violations of the Occupational Safety and Health regulations of the state of South Carolina (Matlack Exh. 3, sheet 25). OSHA and Central entered into a Settlement Agreement, which included the following salient points:

- [1] In the last five years [Central] has had one inspection with no serious violations;
- * * *
- [2] [Central] has demonstrated its good faith by abating all items while under protest...; [and]
- [3] by entering into this agreement, [Central] does not admit the truth of any alleged facts, any of the characterizations of [Central's] alleged conduct or any of the conclusions set forth in the citations issued in this matter; further, neither this agreement nor any order by the Occupational Health and Safety Review Board pursuant to it shall be offered, disclosed,

used or admitted into evidence in any proceeding, whether civil, criminal or administrative now pending or hereinafter brought except such proceeding as may be hereinafter brought by the Division of Occupational Safety and Health of the South Carolina Department of Labor in enforcement of the laws of this State.

(Matlack Exh. 3, sheets 25, 26).

The Settlement Agreement between OSHA and Central was affirmed by the Occupational Safety and Health Review Board of the state of South Carolina in an order observing "that the proposed settlement is in the best interests of the parties and is consistent with the provisions and objectives of the South Carolina Occupational Safety and Health Act...." (Matlack Exh. 3, sheet 29).

On April 14, 1988 the OSHA Division of the North Carolina Department of Labor issued a Notice of Failure To Abate Alleged Violation, which related back to the order entered by the Safety and Health Review Board of North Carolina on May 20, 1987, which had terminated the citation originally issued September 15, 1986 (Matlack Exh. 3, sheets 13-15, 47-50). On January 23, 1989 Administrative Law Judge R. Joyce Garrett of the Safety and Health Review Board of North Carolina dismissed the citation and the complaint based thereon, concluding, as a matter of law, that the follow-up inspection upon which the citation was based was "improper". (Matlack Exh. 4, pp. 8-9).

The three OSHA citations discussed immediately above form no evidentiary basis for a finding in this proceeding that applicant lacks a propensity to operate safely and legally. The activities on which the OSHA

citations were based neither occurred in Pennsylvania, nor directly involved an act of transportation. Even if one accepts the expansion of the fitness inquiry adopted by ALJ Farber in Xpress -- which Central, of course, does not -- the OSHA citations are not fatal to applicant's case because: (a) Applicant has not been convicted of a crime; (b) the citations made against applicant are not criminal in nature, and certainly do not involve acts of "moral turpitude"; and (c) most importantly, the agencies having jurisdiction over the activities involved have entered orders absolving Central of any responsibility for the alleged violations.

3. Pa. DER Notice of Violation -- On April 22, 1987, the Commonwealth of Pennsylvania's Department of Environmental Resources issued a Notice of Violation alleging failure by Central to comply with hazardous waste generator, transporter and treatment facility requirements (Matlack Exh. 3, sheets 30-45). The notice expressly stated that it shall "not be construed as a final action of the Department of Environmental Resources" (Matlack Exh. 3, sheet 32).^{1/} Instead, the notice requested that Central respond, in writing, within ten days of receipt of the notice (Matlack Exh. 3, sheet 31).

Central responded, in writing, to the DER notice one day after it was issued (Matlack Exh. 3, sheets 46, 51), and also met face-to-face with the author of the DER notice, within one week of the notice having issued (Matlack Exh. 3, sheets 46, 58).

^{1/} Compare and contrast the Pa. DER letter of March 1, 1988, addressed to protestant Crossett, Inc. concerning a diesel fuel spill into waters in Indiana County (Central Exh. 29, pp. 4-5).

Within eight days of issuance of the DER notice, Central had furnished to DER a six-point program designed to achieve full compliance by Central with DER Hazardous Waste Regulations (Matlack Exh. 3, sheets 58-59, 62-65). The record is devoid of any evidence suggesting that the violations alleged in the DER notice were proved or that any fine or civil penalty was assessed with respect thereto. As Central's Director of Cleaning and Wastewater Systems testified, Central cleans, at the Karns City facility, no hazardous materials categorized as P or U materials under the DER regulations (Tr. 691).

In contrast to the absence of any such evidence concerning Central's encounter with DER, protestant Refiners Transport and Terminal paid a civil penalty of \$5,600 for violating the effluent limitations in its National Pollutant Discharge Eliminations System (NPDES) permit for a terminal facility in Cornplanter Township, Venango County (see Central Exh. 30, sheets 2, 3, 6; Tr. 559-560). Crossett likewise paid fines totaling \$2,500 for diesel fuel spilling (Central Exh. 29, p. 3). The violations for which Refiners Transport paid a civil penalty in 1988, came four years after Refiners Transport was found to have transported 136 shipments of toxic waste, seven shipments of ignitable waste, two shipments of reactive waste and seven shipments of wastes both toxic and ignitable -- all without a proper license (Central Exh. 31, pp. 7-9).

Finally, with respect to the Karns City terminal and its compliance with DER regulations, it is worth noting that following institution of the six-point remedial program described in the letter of April 30, 1987, pro-

testant Refiners Transport called upon Central to clean Refiners' trailers on 23 separate occasions between November 1987 and September 1988, for which Refiners was charged a total of \$3,117.50. Leaseway Transportation -- an affiliate of Refiners -- also utilized Central's Karns City trailer-cleaning facilities in that same time period (Central Exh. 7, p. 3). The witness for Matlack also acknowledged that he could not argue with the proposition that Matlack trailers have been cleaned at terminal facilities operated by Central (Tr. 645). Certainly, if there were any serious question about the capability and responsibility of Central in providing trailer-cleaning services, protestants would not be utilizing and paying for such services.

4. Pennsylvania-to-Pennsylvania Service -- Central, in the direct testimony of its principal witness, acknowledged that among the more than 8,000 loads originated and/or delivered to Pennsylvania points in the 18-month period January 1987 through June 1988, 37 of those loads were both originated and terminated at Pennsylvania points (Central Exh. 1, pp. 5-6). Detailed shipping documents concerning the 22 loads both originated and terminated at Pennsylvania points during the first six months of 1988 were furnished for the record (Matlack Exh. 1).

Of the 22 shipments, 18 had identical characteristics -- originated at Unitank Terminal Service in Philadelphia and delivered at points in Pennsylvania. The ultimate shipper was Air Products & Chemicals, Inc. (Tr. 49). Central's witness described Unitank Terminal Service as being "a storage facility" (Tr. 49). Interstate rates were applied to the shipments (Tr. 50). Central's Sales and Operating Departments verified with Unitank

personnel that the product had a prior movement by water (Tr. 50).

Central's witness did not know the ultimate origin of the product; when it moved by water; how long the product came to rest at the Unitank Terminal Service facilities in Philadelphia; who owned the product when it was moved by water; or when the product was sold by the original manufacturer to the ultimate consignee (Tr. 50-51). On this type of traffic, Central has sought the advice of counsel, and in reliance on that advice, believed and continues to believe this traffic to be interstate in nature^{2/} (Tr. 52).

Two of the 22 shipments were movements of water transported during the period when the collapse of an Ashland Oil fuel tank in the Pittsburgh area created an emergency situation with respect to water contamination (Tr. 54, 55). Central moved that water between two points in Pennsylvania in the belief that during the emergency the Public Utility Commission "authorized tank carriers to provide that type of service." The Judge commented "I think he's correct." Examining counsel for Matlack commented "I just didn't know about it" (Tr. 55). One of the 22 shipments involved transportation performed entirely within the confines of private property owned by Koppers Company (Tr. 55-56). At no point in time were the public highways traversed under load (Tr. 56). Refiners Transport likewise considers such service as non-transportation revenue (Tr. 578).

^{2/} Protestant Refiners Transport holds similar beliefs about Pennsylvania-to-Pennsylvania traffic generating \$1,500,000 in annual revenues which it excludes from the Pennsylvania intrastate revenues on which it pays its annual assessment to the PUC (see Tr. 579-582).

One of the 22 shipments was admittedly transported without appropriate authority (Tr. 56-57). On May 11, 1989, Central loaded a tank trailer with phosphoric acid at Morrisville, Pennsylvania in the expectation that delivery was to be accomplished in Brookfield, Ohio. After loading was completed, Central was notified that the load had been reconsigned to the same consignee in West Middlesex, Pennsylvania. Because the product was already in the tank trailer, Central concluded to complete the delivery (Tr. 57). Compare a similar decision made by protestant Marshall Service (Tr. 382-383).

Central's conduct in handling the 22 loads just described, forms no basis whatever for a conclusion that applicant lacks a propensity to operate lawfully and safety. Two of the 22 loads -- the water movements during the Ashland Oil emergency -- were apparently authorized and lawful. The intra-plant move for Koppers and the reconsigned load handled for Interstate Chemical were isolated aberrations, and certainly disclose no pattern of unlawful activity. The 18 loads from the Unitank Terminal Service facility in Philadelphia fall into a category of shipments which have increasingly become the subject of litigation and confusion on the question of whether they are interstate or intrastate in character (See, for example, Tr. 51, 581-582). In 1987, Matlack, Inc. obtained a ruling from the Interstate Commerce Commission concerning shipments of this type. Matlack, Inc. - Transportation Within Missouri -- Petition For Declaratory Order, ICC Docket No. MC-C-10999 (Slip Opinion issued June 1, 1987). The ICC decision was upheld in Middlewest Motor Freight Bureau v. ICC, 867 F.2d 458 (C.A.8, 1989).

As noted by the 8th Circuit Court of Appeals, Missouri officials had been issuing citations to Matlack "claiming the movements were intrastate transportation requiring state approval", 867 F.2d at p. 459. A commentator has described the ICC's Matlack decision as follows:

On June 17, 1987, the ICC served its decision in No. MC-C-10999, Matlack, Inc. - Transportation Within Missouri, in which it concluded that motor carrier movements of chemicals from bulk storage facilities to points in the same state are interstate in nature. The subject movements originated at out-of-state points, were transported in large quantities to the shipper's Missouri storage facility by barge, truck, and rail, placed in storage, and subsequently reshipped to Missouri destinations. Finding that the shipper intended its shipments to be in interstate commerce, the Commission deemed significant that in most cases shipments moved from the storage facility within thirty days of the prior out-of-state journey; that in most cases, due to supply contracts and projected demand, the shipper knew the final destination from the moment the shipment left the out-of-state origin; that no processing occurred at the facility; and that the temporary storage served as a convenient means of converting large inbound volume movements into smaller outbound volumes to fulfill customer needs. The Commission indicated that the fungibility of bulk commodities or the absence of a storage-in-transit tariff provision did not destroy the continuity of the movement from the out-of-state origin.

Central's witness acknowledged that for the transportation from Unitank Terminal Service validly to be interstate in character, the prior movement by water would have to be "from an out-of-state or foreign point" (Tr. 130).

Shortly after the 8th Circuit Court of Appeals upheld the ICC's determination in the Matlack case, the United States Court of Appeals for the 5th Circuit upheld a similar ruling in Armstrong World Industries, Inc.

-- Transportation Within Texas -- Petition For Declaratory Order, 2 I.C.C. 2d 63 (1986), noting that the ICC found it unimportant "that the ultimate destination and consignee of each particular Armstrong shipment was not known at the time the carpet left Georgia, separate bills of lading were issued for the prior and subsequent movements of the carpet, the carpet returned to Armstrong's possession at the Arlington warehouse, and some of the carpet was cut at the warehouse" State of Texas v. United States, 866 F.2d 1546, 1556 (C.A.5 1989).

After its decisions in Matlack and Armstrong World Industries, the Interstate Commerce Commission revisited the subject of in-state movements of interstate character and observed that "it is well settled that, where a warehouse serves only as a temporary storage to permit orderly and convenient transfer of goods in the course of what is intended as a continuous movement to destination, the continuity of the movement is not broken at the warehouse" James River Corporation of Virginia -- Transportation Through Woodland, California -- Petition For Declaratory Order, ICC Docket No. MC-C-30044 (Decision served July 15, 1988, at p. 9).

In sum, the controversy between state regulation and Interstate Commerce Commission decisions on in-state movements having an interstate character continues to evolve, with more and more emphasis on the interstate nature of such transportation. The 18 loads handled by Central from the Unitank Terminal Service facilities in Philadelphia, even if they cannot clearly be established as interstate in character, are nevertheless sufficiently few in number and have reasonable legality, so as not to support any

finding that Central lacks a propensity to operate legally and safely. The difficulty in making judgments about whether shipments properly may be handled under intrastate or interstate operating authorities affects protestant carriers, as well as applicant Central (see Matlack Exh. 2, pp. 9-10; Tr. 379-382).

5. Miscellaneous Infractions -- The evidentiary record in this proceeding discloses six violations of transportation regulations involving four tractor-trailer units of applicant Central during the period January 1, 1986 through June 30, 1988 (see Refiners Exh. 1; Matlack Exh. 3, sheet 16). Three of the tractor-trailer units were involved in transporting three of the more than 12,000 loads moved into or out of Pennsylvania by Central during that time period (Refiners Exh. 1). The other Central unit involved was performing transportation from Forest Park, Georgia to Sumter, South Carolina (Matlack Exh. 3, sheet 16).

A fine of \$517.50 was assessed for transportation of corrosive material through a tunnel on the Pennsylvania Turnpike on July 15, 1986 (Refiners Exh. 1, sheets 1-4). A fine of \$67.56 was assessed against a Central unit apprehended on May 12, 1988 with no vehicle report in the driver's possession (Refiners Exh. 1, sheets 5-8). The third Pennsylvania incident involved a unit stopped on December 23, 1986 in which a placard was displayed vertically, rather than horizontally, the pads on the left front brakes were not making contact with the drum upon application of the brakes and no prior vehicle inspection report was in the possession of the driver (Refiners Exh. 1, sheets 9-17). Finally, on July 31, 1986 a Central unit

operating between Forest Park, Georgia and Sumter, South Carolina was cited for transporting a shipment of hazardous material without having placed an "X" in the proper block of the accompanying shipping papers (Matlack Exh. 3, sheet 16).

In the context of the total transportation performed by applicant Central during the time period involved, neither the frequency nor the character of these violations is sufficiently significant to warrant a conclusion that applicant has demonstrated a propensity not to operate safely and legally. Protestant Crossett, Inc., a carrier one-fourth the size of applicant (Compare Central Exh. 1H, p.7 with Crossett Exh. 5, p. 2), had seven infractions in the same time frame, including one unit that was cited for "no stop lights" on February 14, 1987 and again on August 18, 1987 (see Central Exh. 29, p. 3).

Not even the Commission's reference to "matters affecting the safety of operations" in the recent Friedman's order, at pp. 47, 48, would encompass the issues of FBI investigations, OSHA citations and Pennsylvania DER Notice of Violations that protestants have attempted to inject into the examination of Central's fitness. The quotation from Re Perry Hassman, 55 Pa.PUC 661 (1982) as reiterated in Friedman's, also stresses characteristics of "persistent disregard for, flouting, or defiance of" laws, orders and regulations. Neither the 22 Pennsylvania-to-Pennsylvania shipments transported by applicant Central in the first six months of 1988, nor the six miscellaneous infractions of safety regulations rise to the level of "persistent disregard...flouting, or defiance".

The Commission went on in the recent Friedman's order to stress that even violation "of a court order or the Commission's authority does not preclude a carrier from obtaining lawful authority in a subsequent proceeding before the Commission", citing Brinks, Inc. 500 Pa. 387, 456 A.2d 1342 (1983) (see Friedman's Order, at p. 54). The Commission, in Friedman's, again quoting extensively from the Supreme Court's decision in Brinks, made clear that the fitness inquiry is not undertaken with a punitive objective:

[t]he justification for the rule permitting the acquisition of...carrier rights despite past unlawful operations is evident. The essence of public utility regulation is to assure the public's needs are best served at the most reasonable rates. If past unlawful operations were deemed conclusive of an applicant's fitness, the Commission would be powerless to grant the application of a carrier who, despite its past unlawful activities, has otherwise demonstrated its present fitness to perform services beneficial to the public. Such an automatic disqualification, moreover, would improperly view the Commission's statutory obligation to determine an applicant's fitness...as a punitive measure directed against the individual wrongdoer rather than as a safeguard, the primary purpose of which is the protection of the public.

(Friedman's, at p. 54.)

Analysis of the five areas that protestants are expected to assert as the basis for a conclusion that Central lacks the propensity to operate lawfully and safely, measured against the discussion in the Commission's recent decision in Friedman's, simply will not support a conclusion by the Judge that denial of this application is required because of applicant's lack of a propensity to operate safely and legally. Rather than a "lack" of propensi-

ty to operate safely and legally, applicant has furnished ample evidence of its propensity to do so (see Central Exhs. 1E, 1F, 1G, 6, 7, p. 7).

Finally, even if the Judge were disposed to give consideration to the OSHA and Pennsylvania DER matters, such items could not serve as the basis for a finding that applicant lacks a propensity to operate safely and legally, because any problems that may be inferred from the record evidence about those issues have been resolved by remedial action supervised by the agencies having jurisdiction over those activities.

Insofar as the 22 shipments transported by Central between points in Pennsylvania, applicant does not rely on that transportation as evidence of its ability technically to perform the transportation proposed, nor are any of the shippers or consignees for whom that transportation was performed appearing here citing that transportation service as a basis for need of applicant's future services. See Friedman's, Order at p. 61, fn. 17.

C. The Record Evidence Demonstrates That Approval Of The Application Will Serve A Useful Public Purpose Responsive To A Public Demand Or Need

The seminal decision interpreting the Commission's policy statement at 52 Pa. Code §41.14, is Application of Richard L. Kinard, Inc., 58 Pa.PUC 548 (1984). In that decision, the Commission adopted an analysis of its new policy as articulated in an initial decision by an Administrative Law Judge. The Commission noted that the judge "considered Section 41.14(a) to be the cornerstone of the new policy, by imposing upon the applicant a 'burden of demonstrating that approval of the application will serve a useful public

purpose, responsive to a public demand or need'" Kinard, 58 Pa.PUC at 551. The Commission adopted nine "alternatives" to the discarded requirement of proving inadequacy in the existing services as a means for satisfying the burden imposed by 52 Pa. Code §41.14(a). Those alternatives are:

- | | |
|-----------------------|--------------------------------|
| (1) Different Service | |
| (2) Efficiency | (6) Shipper Competition |
| (3) Lower Rates | (7) ICC Authority |
| (4) Future Need | (8) Certification of Authority |
| (5) Backup Service | (9) Benefit to Applicant |

(Kinard, 58 Pa.PUC at 551).

Enumerated criteria (7) through (9) from the Kinard decision are interrelated and directly applicable to the application proposal of Central. Going behind the printed decision in Kinard to the Initial Decision of Administrative Law Judge Robert H. Christianson dated January 5, 1984, which of course was adopted by the Commission, criteria (7) through (9) are further explained. The underlying decision states with respect to criteria (7): "If Pennsylvania points and shippers are served under ICC authority perhaps corresponding Pennsylvania authority would be appropriate to grant under §41.14" (Kinard Initial Decision, p. 28). Criteria (8) addresses the issue of an incomplete or unduly restricted authorization to conduct Pennsylvania intrastate operations. (Ibid.) Criteria (9) specifically relates to the benefit of increased efficiency in applicant's operations. (Ibid.)

The evidentiary record in this proceeding leaves no doubt that the efficiencies of Central's operations would be enhanced by having the carrier authorized to operate between points in Pennsylvania, a territory throughout

which Central already conducts substantial operations in interstate commerce (see Exh. 1, pp. 5-8; Exh. 1B; Exhs. 3, 7, pp. 3). When asked what effect Central expected that a grant of this application would have on its operations and its ability to furnish service to the shipping and receiving public, Central's Director of Traffic Services responded as follows:

A grant of authority from the Pennsylvania Public Utility Commission will allow Central Transport to offer a more efficient service to its customers in Pennsylvania and the surrounding area. For example, Central may have a unit unloading in the Karns City area, but there are no interstate shipments available to be loaded. An intrastate shipment to Philadelphia is available. Without intrastate authority, Central would have to turn down the Philadelphia load and send its unit home empty. With intrastate authority, Central could accept the Philadelphia load, and after unloading in Philadelphia, the unit would be available for a load from the Philadelphia or New Jersey area. Empty miles would have been reduced. This example is an illustration of a general proposition that equipment terminating at Point X in Pennsylvania will have the potential of being moved under load to Point Y in Pennsylvania, rather than being run empty to Point Y, prior to moving outbound from Point Y (or another point near Point Y). Also, we believe we will be in a position to offer a more comprehensive and complete service to those Pennsylvania shippers and receivers we are now serving on interstate moves who also have moves in intrastate commerce between two points in Pennsylvania.

(Central Exh. 7, pp. 7-8).

The Kinard criterion of "Different Service" can encompass a difference in quality of effort, as well as a service distinctive from that offered by other carriers (Kinard, Initial Decision, p. 24). Closer terminal proximity is a factor in this regard (see Tr. 158, 172-173).

The Kinard criterion of "Lower Rates" was not directly addressed by any specific proposal of Central stating a level of rates; however, Central's Director of Traffic Services noted that "Central competes effectively in interstate commerce and in intrastate commerce in other states with many of the carriers opposing this application and would expect to be competitive in price terms for Pennsylvania intrastate shipment[s]" (Central Exh. 1, p. 14). Central's witness went on to note as follows:

If the authority were in effect today, Central would apply its tariff respecting accessorial services as it now applies for interstate commerce, as well as intrastate commerce in other states. Based on charges for cleaning, detention, use of pumps, extra drivers, weekend layovers, Sunday service, spotting of trailers and stop offs, those accessorial charges are more favorable than those currently maintained in Pennsylvania intrastate commerce by Matlack.

(Central Exh. 1, p. 14).

The foregoing comparison of accessorial charges as between Central and Matlack was not contradicted by any evidence presented by Matlack.

The Kinard criterion of "Future Need" certainly encompasses increasing volumes of traffic (see Kinard, Initial Decision, p. 26). Several shippers appearing in support of this application expressed reasonably grounded expectations for growth in future traffic needs. For example, Witco has just completed a \$27 million project "dramatically" increasing its future shipping requirements (Tr. 150). Pennzoil traffic needs have also been growing (Tr. 170).

Six of the eight supporting shippers specifically expressed a need to have Central available for "Backup Service" (Tr. 213, 264-265, 290, 295-296,

321, 336). This is another specific criterion recognized by the Kinard decision.

The "Notes of Decisions" associated with 52 Pa. Code §41.14 cite Morgan Driveaway, Inc. v. Pa.PUC, 512 A.2d 1359, 1360 (Pa. Commw. 1986), for the proposition that "motor common carrier applicants need not show inadequacy in the existing services..." Indeed, the Kinard criteria were articulated expressly for the purpose of establishing alternatives to elimination of the prior requirement that an applicant show "inadequacy of existing service" Kinard, 58 Pa.PUC at 551. Nevertheless, this record is not devoid of unrebutted allegations of inadequacies in the services of existing carriers. (Central Exh. 14; Tr. 212-213).

In sum, the witnesses appearing in support of the application of Central have provided the requisite demonstration that approval of the application will serve a "useful public purpose, responsive to a public demand or need", as that phrase is used in 52 Pa. Code §41.14, and further amplified in the Kinard decision.

Other long-established legal and regulatory policy principles also lead to the conclusion that this application should be granted. First, it has been consistently held that an applicant need not show that there is an absolute necessity for the proposed service, rising to a level of indispensability John Benkart & Sons Co. v. Pa.PUC, 137 Pa. Super. 5, 7 A.2d 584, 586 (1939); Application of Ward Trucking Corp., 43 Pa.PUC 689, 700 (1968). As expressed in the Commission's recent decision in Friedman's (Order entered August 17, 1989), at p. 40: "to establish a need for its

proposed service, an applicant need not establish an absolute necessity for the service, but rather, the application must establish that the service is reasonably necessary for the accommodation and convenience of the public.

Re Ray A. Walker, 50 Pa.PUC 531 (1977)."

The issue of whether, and to what extent, there should be competition in the intrastate transportation of freight is an administrative question left to the discretion of the Commission. Benkart supra., at 586; GG&C Bus Co., Inc. v. Pa.PUC, 400 A.2d 941, 944 (1979).

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. Commw., Pa.PUC v. Purolator Corp., 24 Pa. Cmwlth. 301, 355 A.2d 850, 852 (1976). Broad territorial authorization is warranted in the circumstances presented here. "The 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." Application of Allied Asphalt Co., Inc., 43 Pa.PUC 622, 626 (1968). In this connection, protestant Refiners was awarded statewide authority for the transportation of liquid bulk commodities based on testimony from five supporting shipper witnesses. Application of Refiners, Docket No. A-00093117, F.1, Am-A (Initial Decision of Administrative Law Judge Michael A. Nemeck dated October 15, 1984), at p. 3).

As a corollary to the proposition discussed in the preceding paragraph, 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. Kulp v. Pa.PUC, 153 Pa. Super. 379, 383 (1943); and Ward, supra. at 703. This principle was noted by Administrative Law Judge Holland in his recent decision in Application of Matlack, Inc., Docket No. A-00067250, F.21, Am-G (Initial Decision of Administrative Law Judge Wendell F. Holland, dated May 22, 1989), at p. 41: "[I]t is logical, in Matlack's opinion, to infer that that the benefits referred to by its shipper-witnesses would apply to similarly situated witnesses."

Finally, in the realm of older established principles, and as a transition to the new environment represented by adoption of the Transportation Regulatory Policy in late 1982, the courts and the Commission have historically recognized that no existing carrier has an absolute right to be free from competition. Noerr Motor Freight, Inc. v. Pa.PUC, 181 Pa. Super. 332, 338, 124 A.2d 393 (1956). Subsequent to the Noerr decision, but prior to adoption of the 1982 Transportation Regulatory Policy, the Commission made the following statement in Application of Eazor Express, Inc., 53 Pa.PUC 374 (1979):

This commission, and other commissions including the Interstate Commerce Commission, have recently been in the process of re-examining the motor carrier industry and re-evaluating policies concerning motor carrier application proceedings. We are placing increasing emphasis on economic analysis and commission discretion over the level of competition which appears to best serve the public interest. At the same time we are placing less emphasis on the

protection of existing carriers from additional competition.

D. The Protestant Carriers Have Not Demonstrated That A Grant Of The Application Would Significantly Endanger Or Impair Their Operations

The six remaining protestant carriers have failed, individually and collectively, to discharge the burden of proof imposed upon them by 52 Pa. Code §41.14(c). In short, there is no showing on this record that authorization for applicant Central to perform Pennsylvania intrastate services in the transportation of liquid bulk commodities (with numerous specific exceptions) on a statewide basis would have an adverse impact on the existing carrier network -- as represented by the six protestants -- in a manner and to an extent contrary to the public interests.

Three of the protestant carriers -- Chemical Leaman Tank Lines, Inc., Matlack, Inc. and Refiners Transport & Terminal Corporation -- hold statewide or virtually statewide authorization to transport bulk commodities, many of which commodities have been deleted from those for which Central seeks authorization. Matlack and Chemical Leaman are each four times the size of Central Transport, are headquartered in Pennsylvania, and have the financial resources, as well as advantages of geographical proximity that would enable them to withstand the entry of Central into the Pennsylvania intrastate market. The other three carriers -- Crossett, Inc., Marshall Services, Inc. and Oil Tank Lines, Inc. -- have each carved out a commodity and/or territorial niche characterized by a high degree of product speciali-

zation and customer loyalty that has served, and will continue to serve, those carriers well in competing with bulk carriers holding broader authorization. The ability of these three carriers to compete in the Pennsylvania intrastate market against giants such as Chemical Leaman, Matlack and Refiners Transport, is a testament to their ability to survive.

Only Crossett, Matlack and Refiners made any credible attempt to define the volume of traffic "subject to diversion" (see Appendix B hereto; ¶¶.3 for each of the protestant carriers). An Administrative Law Judge at this Commission has expressed justifiable skepticism about allegations of traffic diversion:

First, despite their alleged fears about diversion of traffic, it is significant that the protestants have not consistently and actively opposed each other's applications which poses the same theoretical threat....

* * *

The second deficiency in protestants' position lies in the fact that they...did not establish either that such traffic would in fact be diverted upon approval of this application, or that diversion, if it did occur, would have a material adverse effect on their operations. Protestants' fears as to diversion of traffic are speculative at best and do not justify denial of this application.

Application of Arrow Carrier Corporation
Docket No. A-20044, F.11 (Initial
Decision of Administrative Law Judge
George Kashi dated May 8, 1986, adopted
by Commission Order entered July 2,
1986), at pp. 81-83.

Both deficiencies are applicable here. Matlack did not oppose to conclusion the application of Refiners leading to that carrier's statewide liquid bulk

authorization (see Refiners Initial Decision by Judge Nemeec, supra., at pp. 1, 2). Refiners now generates more Pennsylvania intrastate revenues than Matlack (compare Refiners Exh. 9 with Tr. 642), even though Matlack's overall revenues are almost four times greater than Refiners' (compare Tr. 640 with Refiners Exh. 10).

Even if protestants had demonstrated a realistic expectation of traffic diversion, that would not be enough to warrant denial of the application. "The mere diversion of traffic volume is not sufficient to satisfy the burden under subsection 41.14(c)" Application of Amram Enterprises, Ltd., Docket No. A-330237 (Opinion and Order of the Commission entered February 25, 1985), at p. 8. The Commission went on to state in Amram, at page 8:

We are of the opinion that injury to existing carriers through competition becomes relevant only when there is corresponding injury to the public.

CONCLUSION

WHEREFORE, the application of Central Transport, Inc. should be granted, as finally amended.

Respectfully submitted,

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Dated: August 24, 1989

SUMMARY OF PUBLIC WITNESS EVIDENCE

WITCO CORPORATION (Exhs. 8-10; Tr. 146-162)

- .1 Oral testimony was offered and documentary exhibits were sponsored by George L. Keller, Central Regional Traffic Manager, whose business address is 77 North Kendall Avenue, Bradford, PA. (Exh. 8; Tr. 146).
- .2 Applicant presently provides Witco with interstate service from three Pennsylvania origins -- Bradford (McKean County), Petrolia (Butler County) and Trainer (Delaware County). During the 12-month period October 1987 through September 1988 applicant handled: 84 loads from Bradford destined to 11 different states; 431 loads from Petrolia destined to 21 different states; and 26 loads from Trainer destined to 3 different states. (Exh. 8).
- .3 At Bradford, Witco operates a petroleum refinery producing, as pertinent to this application, motor (lubricating) oils, waxes and petrolatums. In order of volumes shipped from Bradford lubricating oils predominate followed by petrolatums and wax (Tr. 149). Witco also operates a petroleum refinery at Petrolia where white (petroleum) oil in addition to waxes and petrolatums are produced (Tr. 148).
- .4 This shipper's trailer equipment requirements are slightly different at the two plants. At Petrolia the principal requirement is for single-compartment, insulated stainless steel MC-307 tank trailers, and secondarily, compartment trailers of the same caliber (Tr. 151). The trailer equipment requirement at Petrolia is driven by the fact that most of the product shipped from that location is food-grade quality requiring scrupulously clean trailers. The white (petroleum) oil is a colorless, odorless, tasteless petroleum used as a base in pharmaceuticals and cosmetics such as lipstick and baby oil. Petrolatums are used in bakery goods and chewing gum wrappings. Contamination of these products during transportation must be avoided (Tr. 152). At Bradford, the material shipped is not food-grade. The trailers must still be clean, but not necessarily stainless steel. However, at Bradford, the availability of compartment trailers is more important than at Petrolia (Tr. 151).
- .5 The witness presented an exhibit of certain traffic moved during the period July through September 1988, consisting of 87 loads from Petrolia to 17 different Pennsylvania destinations located in 13 different counties (Exh. 9). Witco has just completed a \$27 million project which has increased production "dramatically", necessitating more shipments (Tr. 150). The 87 loads from Petrolia during the three-month period were divided as follows among participating carriers, excluding one load picked up by the customer:

<u>Carrier</u>	<u>No. of Loads</u>
Bulkmatic	1
Leaseway	68
Matlack	8
Quality	<u>9</u>
	86

(Exh. 9)

For the same three-month period of time, the witness detailed the destinations and means of transport for 942 loads from Bradford to 52 different Pennsylvania destinations located in 32 different counties (Exh. 10). Of those 942 loads, 709 were transported by motor common carriers, as follows:

<u>Carrier</u>	<u>No. of Loads</u>
Chemical Leaman	47
Crossett	327
Leaseway	194
Matlack	14
George M. Maust Co.	96
Oil Tank Lines	1
Quality Carriers	2
Zappi	<u>28</u>
	709

The detailed summaries of traffic are representative of the territorial pattern and Witco's use of carrier service (Tr. 155). Other evidence of record establishes, however, that Witco's total volume of traffic to points in Pennsylvania is far greater than what would be suggested by annualizing the loads detailed on the two summaries. For example, the 262 loads handled for Witco by Leaseway^{1/} would result in 1,060 loads being handled by Refiners and Fleet on an annualized basis. The record evidence establishes that Refiners alone handles four times that volume of Pennsylvania intrastate traffic for Witco annually even when only the commodities included within the scope of Central's application are included (RT&T Exh. 9, p. 2). Similarly, the participation by Crossett from Bradford (McKean County) would annualize to 1,308 loads compared with Crossett's evidence that for calendar year 1988, it originated 2,239 loads in McKean County (Crossett Exh. 6), most, if not all, of which were tendered to it by Witco (Tr. 479-481).

.6 The witness expressed Witco's support of Central's application as follows:

^{1/} The witness explained that his use of the term "Leaseway" covered two carriers which are wholly owned subsidiaries of a holding company, the full name of which is Leaseway Transportation Corp. (See Refiners Transport & Terminal Corporation Exh. 10: Tr. 588-589). The two carriers referred to are RT&T and Fleet (Tr. 154).

Primarily, I'm here to protect those interests to see that we are fully covered with all viable carriers. We also have, as I said, a very close function on delays. And if a carrier becomes very regular on delays or rejects, we wish to have a choice for other viable carriers, especially a carrier similar to Central Transport who has a new cleaning facility and who also have a terminal where adequate equipment is very, very near us as far as the Petrolia plant is concerned and not that far away from Bradford.

(Tr. 157).

The witness noted that Central's Karns City terminal is approximately one mile from Witco's Petrolia plant (Ibid.). That is much closer than the terminals from which Chemical Leaman and Matlack furnish equipment (Tr. 158). The prospect of Central's availability for Pennsylvania intrastate service produced this reaction from the witness:

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.

(Tr. 159).

Central would be utilized by Witco to Pennsylvania destinations if the application is granted (Ibid.).

PENNZOIL PRODUCTS COMPANY (Exhs. 11-14; Tr. 163-195)

- .1 Oral testimony was offered and documentary exhibits were sponsored by Valgene Frye, Traffic Manager, whose business is R. D. #2, Box 1, Karns City, PA 16041 (Exh. 11, p. 1; Tr. 163). Pennzoil operates a petroleum refinery at the Karns City location (Tr. 165).
- .2 During the period October 1987 through September 1988 applicant Central handled, on behalf of Pennzoil, 484 loads from Karns City to 19 states (Exh. 11, p. 1). During that same period of time, Central also originated 61 loads for Pennzoil at Rouseville destined to nine states (Exh. 11, p. 2).
- .3 From the Karns City location, Pennzoil ships white oil and petrolatums outbound to points in Pennsylvania (Tr. 165). In addition, Pennzoil is a receiver at Karns City of various products originating at other points in Pennsylvania -- naphtha from Bradford; neutral oil from Freeport and Pittsburgh; and petrolatums from Emlenton, Petrolia and Rouseville (Exh. 13; Tr. 167-168).

- .4 For the traffic originating at Karns City, the shipper requires MC-307 stainless steel, insulated trailers that are very clean, very dry, odor-free (Tr. 168). Such trailers may be either single or multi-compartment (Tr. 168-169). The witness acknowledged that Central operated 79 stainless steel MC-307s and 396 compartmentalized stainless steel 307s (Exh. 1D; Tr. 169).
- .5 The witness estimated that approximately 50 loads per month moved outbound from the Karns City facility destined to points in Pennsylvania. Of those 50 loads, approximately 40 were handled by common carrier (Tr. 174-176). Very little, if any, of that traffic consists of kerosene, which has been excluded from the Central request for authority (Tr. 176). Documentary evidence was produced concerning 434 loads handled outbound from Karns City during the period January through October 1988 destined to 22 specific Pennsylvania destinations (Exh. 12). In addition, the witness noted that deliveries had been made in the past to seven additional specific destinations and that the Company "could be called on to make deliveries to any point in Pennsylvania" (Exh. 12). Common carriers utilized on the traffic outbound from Karns City include Fleet, Montgomery and Matlack (Tr. 165). With respect to traffic inbound to the Karns City location, common carriers utilized have been Refiners Transport & Terminal and Fleet (Tr. 166); however, most of the inbound traffic -- 95% or more -- is handled by the shipper's private carriage (Tr. 167).
- .6 Based on the shipper's experience with Central in performing interstate transportation, it is recognized that Central has the type of trailers necessary for the transportation of this shipper's product. In addition, the witness noted that drivers of Central have demonstrated an ability to accomplish safe loading, transport and unloading of the product. The witness testified that the availability of Central's service to Pennzoil for the handling of Pennsylvania intrastate traffic would be a "benefit to the transportation needs and convenience of Pennzoil" (Exh. 11, p. 2). The witness further observed that Pennzoil has experienced consistent growth, and in looking out for the best interests of the Company, he wishes to make sure that there is adequate equipment available to transport the material being produced and sold by Pennzoil (Tr. 170). The Central terminal facility is within a half-mile of Pennzoil's Karns City facility, and that is attractive to the shipper because Central is able to respond quickly to short-notice situations. That feature of Central's proposed service is especially attractive in light of difficulties the shipper has experienced in obtaining prompt supply of suitable trailer equipment for the pickup of its traffic at Karns City (Exh. 14; Tr. 172-173).

THE McCLOSKEY CORPORATION (Exhs. 15-17; Tr. 205-256)

- .1 Oral testimony was offered, and documentary evidence was sponsored, by Thomas F. McGrath, Corporate Traffic Manager for the McCloskey Corporation, whose business address is 7600 State Road, Philadelphia,

PA 19136 (Exh. 15, p. 1; Tr. 205). McCloskey Corporation is in the business of manufacturing industrial resins and solvents at the Philadelphia location. Those products are used by manufacturers in the paint and coating industries (Tr. 207-208). As pertinent to the transportation of liquid commodities in bulk, loading is accomplished by pipes that extend from eight storage tanks at the back of the State Road facility (Tr. 224).

- .2 During the period October 1987 through September 1988, applicant Central handled one load outbound from Philadelphia to Somerset, Massachusetts and four loads inbound during July and August 1988 -- one from Cincinnati and three from Baltimore (Exh. 15, p. 1).
- .3 For the first ten months of 1988, the resins and solvents shipments made by McCloskey from the Philadelphia location constituted 80 percent of the tonnage shipped and 70 percent of the freight dollars expended for transportation (Exh. 16). All of this traffic originated at the Philadelphia facility (Tr. 209, 248).
- .4 McCloskey utilizes insulated and compartmentalized trailers for traffic moving between points in Pennsylvania (Exh. 15, pp. 1-2). "Compartmentalized trailers allow us to combine loads moving to different destinations into a single trailer for stopoffs enroute for partial unloading at two or more destinations" (Exh. 15, p. 2; Tr. 209). The witness offered specific illustrations of combination deliveries (Exh. 15, pp. 3-4). Of the Company's Pennsylvania intrastate traffic, 70-75 percent moves in compartmentalized trailers (Tr. 220). Pennsylvania intrastate traffic constitutes 30 percent of McCloskey's total outbound volume (Tr. 219).
- .5 McCloskey identifies 12 specific destinations at which its Pennsylvania customers are located (Exh. 15, pp. 5, 6). For the period December 1987 through October 1988, the equivalent of 35 truckloads of resins and solvents were moved to those destinations (Exh. 15, p. 7). Carriers utilized for those movements were Chemical Leaman and Matlack (Exh. 17).
- .6 The witness testified that McCloskey "would benefit by having access to the insulated and compartmentalized trailers operated by Central Transport, in order to use that equipment on moves between points in Pennsylvania" (Exh. 15, pp. 1-2). The witness was well aware of the fact that Central operates the type of trailer equipment needed by McCloskey (Tr. 209). Protestants Crossett, Oil Tank Lines and Refiners Transport have not solicited McCloskey (Tr. 211). The witness identified specific pickup delays by Matlack and Chemical Leaman and explained that delays in making pickup can congest the shipper's dock with respect to unloading inbound raw materials and thus creating a situation where personnel must be kept on overtime (Tr. 211-212). Matlack has not been utilized by this shipper since May 1988 because, as the witness explained: "We had so many missed pickups and late pickups and late deliveries on the part of Matlack that we had to discontinue their service as a result of customer complaints and pressure

from the sales department" (Tr. 212-213). In summary, the witness stated the feeling that the Company was now "limited to the services of basically one carrier, which would be Chemical Leaman and we would like to have the services of other carriers available to us" (Tr. 213). If Central were awarded the operating authority the witness testified, a determination would be made of some percentage share of the business that would be awarded to Central (Tr. 213).

E. F. HOUGHTON & CO. (Exh. 18; Tr. 258-279)

- .1 Oral testimony was presented and documentary evidence was sponsored by William F. Dahms, Sr., Manager, Traffic and Distribution, whose business address is Madison & VanBuren Avenues, Valley Forge, PA 19482 (Exh. 18; Tr. 259). Houghton manufactures and distributes oils and greases (Tr. 259). These products are sold exclusively to industrial firms -- the Company does not deal with consumer, commodity firms (Tr. 261).
- .2 For the period October 1987 through September 1988, Central transported seven loads of fatty acid and fatty acid esters inbound to Houghton's facilities at Fogelsville (Lehigh County). During the same period, Central also transported one load of petroleum naphtha from New Jersey and two loads of tall oil inbound to the Fogelsville facility (Exh. 18).
- .3 Houghton makes shipments of oils and greases from the Fogelsville facility to points in Pennsylvania (Tr. 259-260). It also receives at the Fogelsville facility chemicals, raw materials and oils inbound from origins at Bradford, Oil City, Petrolia and Marcus Hook (Tr. 261).
- .4 For the outbound transportation Houghton requires single shell, stainless steel, insulated trailers, which the witness is aware that Central operates (Tr. 262).
- .5 Destinations to which shipments have been made by Houghton from Fogelsville are Emigsville, Marietta, Steelton, York, Frazer, Red Lion, Ransom, Mehoopany, Downingtown, Hanover, Jenkintown, Corry, Lancaster, Harrisburg, Reading, Oil City and Erie. Over a year's period of time 80 to 90 shipments are made to those destinations. Chemical Leaman and Matlack are the carriers used for this transportation (Tr. 263).
- .6 Based on the demonstrated capability of Central to supply appropriate trailer equipment and to perform the type of service required by Houghton, the shipper stated it would be a benefit to its transportation needs to have access to the service of Central on loads moving within the Commonwealth (Exh. 18). This shipper has been satisfied with service provided by Central (Tr. 262-263). Neither Marshall Service nor Crossett has solicited Houghton seeking to provide service

(Tr. 263). The witness stated he would utilize Central "as a fill-in carrier" (Tr. 264-265).

HARRY MILLER CORPORATION (Exh. 19; Tr. 281-292)

- .1 Oral testimony was presented and documentary evidence was sponsored by Betty McKay whose responsibilities in the Order Department of this shipper include selecting carriers for transportation of outbound traffic to points in Pennsylvania. Ms. McKay's business address is 4th & Bristol Streets, Philadelphia, PA 19140 (Exh. 19; Tr. 281).
- .2 During the period October 1987 through September 1988, Central transported 10 loads of cleaning compounds outbound from this shipper's facilities in Philadelphia to interstate destinations. During the same period, Central transported three inbound loads of lubricating oil to the Philadelphia facility from Florence, Kentucky (Exh. 19).
- .3 Harry Miller Corporation ships cleaning compound and petrolubes from the Philadelphia origin (Tr. 282).
- .4 The shipper requires a tank trailer having a capacity of at least 5,000 gallons (Tr. 283).
- .5 Shipments of both cleaning compound and petrolubes are made to Reading and shipments of petrolubes are made to Allenport (Tr. 282). A shipment is made to Reading on a frequency of once every two months and to Allenport on a frequency of once every three months (Tr. 282-283). Service has been provided on these shipments by Matlack (Tr. 283).
- .6 The witness is persuaded on the basis of experience with Central that the availability of Central between points in Pennsylvania would be a benefit to the transportation needs and convenience of Harry Miller Corporation (Exh. 19). Central would be used as a backup carrier (Tr. 290). The shipper has not been solicited by Crossett, Marshall Services, Oil Tank Lines or Chemical Leaman (Tr. 284).

PARA-CHEM SOUTHERN, INC. (Exh. 20; Tr. 292-308)

- .1 Oral testimony was presented and documentary evidence was sponsored by William M. Hansbury, Plant Manager, whose business address is Ontario & Rorer Streets, Philadelphia, PA 19134 (Exh. 20; Tr. 293).
- .2 During the period October 1987 through September 1988, Central transported 36 loads inbound to Para-Chem's facility in Philadelphia from Charlotte, North Carolina and 36 loads inbound from Simpsonville, South Carolina (Exh. 20).
- .3 Shipments of liquid latex are made from Para-Chem's facility at Philadelphia to points within the City of Philadelphia and also to

Hazleton (Tr. 293, 294). In addition, Para-Chem receives inbound at Philadelphia, shipments of a resin solution from Neville Island in the Pittsburgh area (Tr. 294).

- .4 Both inbound and outbound transportation requires single compartment insulated trailers with a capacity of 5,000 gallons (Tr. 295).
- .5 Inbound loads to Philadelphia from Neville Island occur with a frequency of five per month. Outbound shipments to Philadelphia are made once every five weeks (Tr. 294). Shipments to Hazleton occur on a frequency of twice per week (Tr. 294-295). Inbound traffic is transported by Beeline (Tr. 295, 298-299). Deliveries to the Philadelphia area are accomplished with Para-Chem's own equipment, and 95 percent of the loads to Hazleton are handled in the same manner (Tr. 297).
- .6 The shipper's own equipment is used not only for deliveries in Pennsylvania but also to customers from the New England area down into Baltimore. Because its own equipment is not always available, and based on experience with Central at Para-Chem's facilities in South Carolina, the shipper would utilize Central as a supplement to its private carriage (Tr. 295-296).

CALGON CORPORATION (Exh. 21; Tr. 317-331)

- .1 Oral testimony was presented and documentary evidence was sponsored by Joseph R. Knouse, Manager of Transportation, whose business address is Post Office Box 1346, Pittsburgh, PA 15230 (Exh. 21; Tr. 317-318). The Company's primary plant is located in Ellwood City where water treatment chemicals are manufactured (Tr. 318-319).
- .2 During the period October 1987 through September 1988, Central handled 42 loads outbound from Calgon's plant at Ellwood City to points in 19 different states (Exh. 21).
- .3 The water treatment chemicals shipped outbound from Ellwood City are primarily synthetic resins (Tr. 322). The commodity is not considered a petroleum product (Tr. 323).
- .4 The appropriate trailer equipment for transportation of these commodities are insulated, stainless steel trailers, for the most part, single compartment, "but occasionally there may be a need for a multi-compartment trailer" (Tr. 320).
- .5 Approximately 15 to 20 truckloads per month move outbound from Ellwood City to the city of Pittsburgh where Calgon has a contract with ALCOSAN (Tr. 319). In addition, there is one load per month moving to each of five other destinations: Mehoopany, Spring Grove, Bradford, New Castle, and Whitehall (Tr. 319-320). At the present time Calgon tenders a majority of this intrastate traffic to Schneider National (Tr. 321).

- .6 Central, in performing interstate service for Galgon, has furnished the type of trailer equipment required by the shipper (Tr. 320). The presence of Central as a Pennsylvania intrastate carrier would be welcomed by the shipper as a backup to existing service and for purposes of increasing competitive choices (Tr. 321).

VALSPAR CORPORATION (Exh. 22; Tr. 331-344)

- .1 Oral testimony was presented and documentary evidence was sponsored by Mary Ann Noga, Traffic Manager, whose business address is 2000 Westhall Street, Pittsburgh, PA 15233 (Exh. 22; Tr. 331).
- .2 During the period October 1987 through September 1988, Central transported, for the account of Valspar, seven shipments inbound to Rochester (Beaver County) from origins in Alabama, Georgia and South Carolina and four shipments inbound to Pittsburgh from points in Georgia and New Jersey. During the same period, Central transported 20 loads outbound from Pittsburgh and 318 loads outbound from Rochester (Exh. 22, p. 1). The outbound traffic Central handled for Valspar was destined to points in 15 different states (Exh. 22, p. 2).
- .3 Valspar makes a coating for cans that are used for packaging by the food and beverage industry (Tr. 332-333). The coating is a thick and viscous liquid which is applied to the inside of a can and baked onto the surface by an ultraviolet drying process (Tr. 337-338). The product is originated at both the Pittsburgh and Rochester facilities of Valspar (Tr. 333).
- .4 Because the product is utilized in the food industry, the stainless steel, insulated trailers supplied for transportation of the product must be cleaned to a standard that insures no contamination of the product being transported (Tr. 334).
- .5 From Rochester shipments are made to Fogelsville, Lebanon and Philadelphia, with the possibility of shipments from Pittsburgh in the future (Tr. 334-335). Matlack is the carrier being used for this traffic (Tr. 335). On an annual basis, the shipments to Lebanon would accumulate approximately 14, and from Rochester to Pittsburgh the shipments would be approximately 10 to 16 per year (Tr. 339). Both Fogelsville and Philadelphia remain viable accounts for this shipper, but as of November 1988 there had been no shipments to those destinations in that calendar year (Tr. 338-339).
- .6 Central has been responsive in providing appropriately cleaned stainless steel, insulated trailers -- both single compartment and occasionally three compartment configuration (Tr. 334). Because Central is aware of the nature of Valspar's product and has proved capable of providing the service required, the shipper supports Central as a backup carrier, thus giving it additional competitive options for service within Pennsylvania (Tr. 336).

PROTESTANT CARRIER EVIDENCE SUMMARY

CHEMICAL LEAMAN TANK LINES, INC. (Central Exhs. 24-27; Tr. 391-442)

- .1 Oral testimony was offered by John B. Repetto, Vice President of Pricing & Traffic Services, whose business address is 102 Pickering Way, Lionville, PA 19353. The witness sponsored no documentary evidence.
- .2 No copies of the certificates of public convenience issued by the Pennsylvania Commission were made available. The witness testified that Chemical Leaman specializes in bulk transportation of both liquid and dry commodities on an intrastate and interstate basis serving shippers and consignees in Pennsylvania (Tr. 392-393). No evidence was presented concerning this protestant's vehicular equipment. Eight terminals offering transportation services are located in Pennsylvania (Tr. 394-398).
- .3 No evidence of traffic handled within Pennsylvania was presented. No contention was made that traffic would be diverted. The following colloquy occurred on direct examination:
 - Q. [by Mr. O'Kane]. If this application is granted, will you expect it to have a significant, adverse impact on Chemical Tank Lines immediately?
 - A. [by Mr. Repetto]. No, I would not. It would not have a significant impact.
- .4 The carrier Chemical Leaman Tank Lines is owned by Chemical Leaman Corporation. The witness expected the parent corporation to have revenues of \$245 million in 1988 of which protestant would be responsible for approximately \$225 million (Tr. 399). That would continue a pattern of growth in protestant's revenues that commenced in 1985 when revenues were \$161 million. In each of the subsequent years, revenues increased at a rate of approximately \$20 million per year. As of 1987, Pennsylvania intrastate revenues were approximately 5 percent of the total (Central Exh. 24).
- .5 Although Pennsylvania intrastate revenues remained essentially level from 1986 to 1987, protestant opened three new terminals in 1988 and one in 1987 at locations outside Pennsylvania (Tr. 435-436). As of December 31, 1987, the carrier was committed to a \$1,111,000 program for purchase of revenue equipment and improvement of operational facilities (Tr. 433-434). The witness claimed that parent Chemical Leaman Corporation ceased paying dividends in 1982 because "there was not enough money to pay the stockholders a dividend" (Tr. 406). However, on cross-examination, the witness admitted that during 1987 parent Chemical Leaman Corporation took out a term loan in the amount

of \$9 million for purposes of using the proceeds to repurchase its common stock (Tr. 431). The requirements of that loan drained from the Corporation \$2,250,000 for each of the next four years in principal payments plus interest at the rate of 11 percent (Tr. 433). These below-the-line expenditures are responsible for draining away the very healthy total carrier operating income that Chemical Leaman Tank Lines, Inc. has earned in full calendar year 1986, 1987 and the first half of 1988 (see Central Exh. 26, pp. 23).

CROSSETT, INC. (Crossett Exhs. 1-7; Central Exhs. 28, 29; Tr. 448-509)

- .1 Oral testimony was offered and documentary evidence was sponsored by Mr. Wallin, Traffic Manager, whose business address is in Warren, PA 16365 (Tr. 449-450).
- .2 Crossett holds various grants of authority from this Commission (Crossett Exh. 1) but the witness candidly stated that "our main business comes from Warren, McKean and Venango Counties, and that is our principal interest in this case" (Tr. 456). Further, the commodity focus of Crossett is on petroleum and petroleum products which the witness felt is "a specialty in the liquid bulk business" (Tr. 455). The carrier operates suitable tractor-trailer equipment, facilities and personnel necessary to conduct its business as a "regional carrier of petroleum and petroleum products in bulk in tank vehicles" (Crossett Exhs. 2, 3, 4; Tr. 450-454).
- .3 After excluding commodities for which Central is not seeking authorization, Crossett identified 6,201 loads producing \$1,690,889 in revenues transported from the three counties of McKean, Venango and Warren to points in Pennsylvania (Crossett Exh. 7; Tr. 477-478). The following colloquy occurred concerning this traffic:

Q. [by Mr. Malin]. Sir, if you were to lose all or part of the \$1,690,888.56 of the revenue, would that have an adverse affect [sic] upon Crossett's operations, employment and business?

A. [by Mr. Wallin]. Yes, it would. The atmosphere for trucking has been extremely competitive over the last several years, and more and more so. The last [\$]1,700,000 is important.

(Tr. 479).

The record does not disclose the level of Crossett's Pennsylvania PUC revenues for 1988 but revenue data for 1985 through 1987 show a steady growth from \$3,573,150 in 1985 to \$4,409,987 in 1986 to \$5,611,717 in 1987 (Central Exh. 28). The carrier has employed more drivers in 1988 than in 1987 (Tr. 490-491), and has withstood the introduction of additional competitors within the past several years (Tr. 493-494).

- .4 For calendar years 1986 and 1987 and the first half of 1988, Crossett has transferred an increasing amount of funds to retained earnings -- \$78,246 in 1986, \$117,699 in 1987 and \$354,805 for the first half of 1988 (Crossett Exh. 5).
- .5 During the two-year period August 19, 1986 through June 6, 1988, Crossett paid four fines of \$67.50 each for vehicles with a tank leaking, brakes out of adjustment, unbalanced steering brakes and no stop lights, plus three fines of \$117.50 each, two of which were for vehicles with no stop lights and one with unbalanced steering brakes. In calendar year 1988, Crossett also paid a fine of \$100 to the United States Department of Transportation, Coast Guard, for a spill resulting from a vehicle accident and two fines relating to a spill from a vehicle accident -- one of \$1,000 to the Pennsylvania Fish Commission and one of \$1,500 to the Pennsylvania Clean Water Fund (see Central Exh. 29).

MARSHALL SERVICE, INC. (Marshall Exhs. 1-5; Central Exh. 23; Tr. 351-290)

- .1 Oral testimony was offered and documentary evidence was sponsored by Everett Marshall, III, Vice President, whose business address is Pearl Street, Newfield, NJ (Tr. 351-352).
- .2 The territorial focus of this protestant's opposition to the Central application is between points in the city and county of Philadelphia and within an airline distance of 35 statute miles of the limits thereof (Marshall Exh. 1, p. 2; Tr. 362). The commodity focus is exclusively "petroleum products" (see Marshall Exh. 3). Despite the broad commodity authorization granted to Marshall Service, Inc. at A-00101153, Folder 1, Am-D, the witness acknowledged the Judge's observation that the carrier does not "exercise that authority to its full extent" (Tr. 388). This protestant has the terminal facilities, vehicular equipment and employees necessary to conduct the transportation services it chooses to perform within the scope of its Pennsylvania certification (Marshall Exh. 2; Tr. 353-360).
- .3 The witness presented a summary of certain traffic handled during the last half of 1988 (Marshall Exh. 3). There is no way of ascertaining what portion of protestant's traffic for this time period is included, or whether shipments are listed for transportation of products not being sought for authorization by Central (Tr. 373-374, 378-381). The witness testified that every dollar of intrastate revenue is important to protestant because "the more money you make, the better it is" (Tr. 370).
- .4 On an overall basis -- both intrastate and interstate -- Marshall Service showed a profit for both 1986 and 1987 (Marshall Exh. 4, p. 3). For the first 10 months of 1988, Marshall Service incurred a loss of \$14,000 notwithstanding a net profit from operations of \$76,000. The overall net loss was occasioned by below-the-line deductions

increasing by 42 percent over the comparable period in 1987, even though freight revenues showed an increase of approximately two percent (Marshall Exh. 5, p. 2). For the three-year period 1985 through 1987, Pennsylvania intrastate revenues accounted for slightly less than seven percent of this protestant's overall revenues (Central Exh. 23).

- .5 The witness acknowledged existing competition from protestants Chemical Leaman, Matlack and Oil Tank Lines, as well as from non-protestant Seaboard Tank Lines (Tr. 377). Although the witness claimed that trailer equipment of the Company is not being operated "at full capacity at the present time" (Tr. 356-357), the Company nevertheless just purchased five additional trailers with no intentions of retiring, selling or otherwise disposing of any existing trailer units! (Tr. 376).

MATLACK, INC. (Matlack Exhs. 2; Tr. 611-659)

- .1 Oral testimony was presented and documentary evidence was sponsored by Martin C. Hynes, Jr., Vice President-Marketing, whose business address is One Rollins Plaza, Wilmington, DE 19899 (Matlack Exh. 2, p. 1; Tr. 615).
- .2 Matlack holds broad Pennsylvania intrastate operating authority including one grant for the transportation of "liquids (excluding milk) and liquified gases in bulk in tank vehicles, between points in Pennsylvania." (Matlack Exh. 2, Appendix 1, sheet 3). In an initial decision served June 15, 1989, Administrative Law Judge Wendell F. Holland recommended that Matlack be granted authority, inter alia to transport dry bulk commodities in tank or hopper-type vehicles, between points in Pennsylvania (see Holland Initial Decision, p. 64; Matlack Exh. 2, p. 2). Matlack operates suitable terminal facilities and vehicular equipment, and has the employees and other facilities necessary to conduct the operations authorized (Matlack Exh. 2, Apps. 5-7, pp. 4-6).
- .3 During the period January 1 through May 31, 1989, Matlack identified 1,645 loads generating \$1,064,005 in revenues (Matlack Exh. 2, App. 4), which the witness stated "would be subject to diversion to Central if this application is granted in its entirety" (Matlack Exh. 2, p. 4). The witness further stated that the "principal reason Matlack is opposing Central's application" is because "the introduction of another competitive carrier...will only further aggravate Matlack's already critical financial situation relative to its Pennsylvania operation" (Matlack Exh. 2, p. 11).
- .4 "Matlack's already critical financial situation relative to its Pennsylvania operation" was supposedly demonstrated by a profit and loss statement from Matlack's Pennsylvania terminals for the 12-months ending September 30, 1988 showing a net operating loss of \$525,435

(Matlack Exh. 2, App. 9, p. 11). The witness acknowledged that the Appendix 9 exhibit was prepared for purposes of obtaining an increase in Matlack's Pennsylvania intrastate rates, which was granted and became effective January 15, 1989 (Tr. 641). Matlack's Pennsylvania intrastate operating revenues increased from \$6,661,000 in 1987 to \$6,900,000 in 1988 (Tr. 642). On a company-wide basis for the fiscal year ending September 30, 1988, Matlack Systems, Inc. had total revenues of \$230,227,000 and net earnings of \$1,412,000 (Tr. 640).

- .5 In the Initial Decision of Administrative Law Judge Wendell F. Holland served June 15, 1989 in Application of Matlack, Inc., Docket No. A-00067250, F.21, Am-G, this same witness is quoted as having testified that Matlack's "vehicles presently stationed in Pennsylvania are underused and able to provide service under the authority requested, but if additional equipment is required, Matlack will assign vehicles from terminals in surrounding states or purchase additional equipment" (Holland Initial Decision, p. 7).

OIL TANK LINES, INC. (Oil Tank Lines Exh. 1; Tr. 350-351)

[This stipulated exhibit, unaccompanied by the testimony or exhibits of any live witness, is an insufficient evidentiary basis on which the requisite finding for a protestant under 52 Pa. Code §41.14(c) could be made.]

REFINERS TRANSPORT & TERMINAL CORPORATION (Refiners Exhs. 2-12; Central Exhs. 30, 31; Tr. 513-602)

- .1 Oral testimony was presented and documentary evidence was sponsored by Keith B. Wilson, Regional Manager, whose business address is Post Office Box 273, Oil City, PA 16301; David L. Michalsky, Director of Pricing for the Northern Bulk Group, whose business address is 6500 Pearl Road, Cleveland, OH; Gerald L. Hoover, Group Financial Manager of the Bulk Materials Group, whose business address is the same as Mr. Michalsky's; and Richard L. Frieze, Territory Sales Manager, whose business address is Cleveland, OH (Tr. 515-516, 571, 587, 598).
- .2 By Order entered December 13, 1984, Refiners obtained statewide authorization to transport property, in bulk, in tank vehicles, subject to an exclusion against transportation of "dry commodities in bulk" (Refiners Exh. 2, sheet 5). Refiners has the terminals, equipment and personnel necessary to conduct the operations just described (Refiners Exhs. 3-6).
- .3 Witness Michalsky identified 11,058 loads transported by Refiners in calendar year 1987, which involved commodities being sought to be transported by Central, and which produced total revenues of \$3,624,960. For the first half of 1988 the data were 5,162 loads producing revenues of \$1,717,871 (Refiners Exh. 9, p. 1). More than

52 percent of the Pennsylvania intrastate traffic identified for the two periods is attributable to Witco Corporation and Pennzoil Company (Refiners Exh. 9, p. 2). Witness Wilson testified that Witco and Pennzoil are important shippers for Refiners: "We've really had strong ties, as far as business is concerned, to both of those companies for as long as I've been with the company, and I'm sure prior to that" (Tr. 533). Indeed, in the 1970's, Refiners made very special concessions to Witco that apparently were not available to other shippers (Tr. 536, 555-557). Witness Wilson testified that if Refiners were to lose any significant amount of intrastate traffic of Pennzoil or Witco, it would be very detrimental to Refiner terminals located at Oil City and Butler (Tr. 535). That traffic loss may have already occurred with the announcement by Matlack's witness -- four months after the Refiners witness had testified -- that "Matlack is in the process of reopening a terminal situated in St. Petersburg, Clarion County. This terminal is being reopened because of a significant increase in the volume of traffic being tendered to Matlack by Witco Corporation" (Matlack Exh. 2, p. 4). The witness acknowledged that not only Matlack, but protestants Chemical Leaman, Oil Tank Lines, Marshall Service, Erie Petroleum, Five Star Trucking, Frenz Petroleum, Zappi and Crossett were competitors for Pennsylvania intrastate traffic (Tr. 541-542, 547). Specifically, with respect to the traffic of Pennzoil and Witco, the witness acknowledged that on interstate moves, Refiners has "innumerable" competitors (Tr. 548-549).

- .4 Witness Hoover presented a summary profit and loss statement for the year ended December 31, 1988 for Refiners, as "a subsidiary of Leaseway Transportation Corp." (Refiners Exh. 10, p. 2). No financial data were presented on behalf of Leaseway Transportation Corp., on a consolidated basis with all its subsidiaries (Tr. 593). Although the summary statement shows total costs and expenses of \$71,256,198 against Refiners' revenues of \$69,039,167 for calendar year 1988, those costs and expenses include "administrative and selling expenses" of \$6,815,402 which may or may not be a reasonable allocation of such expenses among Refiners' parent Leaseway and its various subsidiaries (see Refiners Exh. 10, p. 2).

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September 11, 1989

RECEIVED

SEP 11 1989

**SECRETARYS OFFICE
Public Utility Commission**

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

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

Dear Mr. Rich:

Enclosed please find the original and nine (9) copies of a Brief on Behalf of Protestant, Crossett, Inc., in opposition to the above referenced application.

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

Copies of this Brief have been sent to all parties as shown on the Certificate of Service annexed to the Brief.

Respectfully submitted,


RONALD W. MALIN

RWM:knw

Enclosures

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ORIGINAL

BEFORE.
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO. A-00108155

APPLICATION OF
CENTRAL TRANSPORT, INC.

RECEIVED

SEP 11 1989

SECRETARYS OFFICE
Public Utility Commission

BRIEF ON BEHALF OF PROTESTANT,
CROSSETT, INC.

DOCUMENT
INDEX

SEP 11 1989

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Dated: September 11, 1989.

BEFORE
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO. A-00108155

APPLICATION OF
CENTRAL TRANSPORT, INC.

BRIEF ON BEHALF OF PROTESTANT,
CROSSETT, INC.

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BEFORE
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO. A-00108155

APPLICATION OF
CENTRAL TRANSPORT, INC.

BRIEF ON BEHALF OF PROTESTANT,
CROSSETT, INC.

Protestant, Crossett, Inc. (Crossett), by its attorneys,
Johnson, Peterson, Tener & Anderson, Ronald W. Malin, Esq., of
counsel, respectfully files this Brief, setting forth its position
as it relates to the above entitled matter.

STATEMENT OF THE CASE

In the instant application, as finally amended, Central
Transport, Inc. (Applicant or Central Transport), seeks authority
to transport:

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 (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.

Crossett is one of the six motor common carriers protesting and opposing the instant application.

PRELIMINARY STATEMENT

IDENTIFICATION OF CROSSETT

Crossett is a common carrier, specializing in the transportation of petroleum and petroleum products in bulk. Crossett is headquartered in Warren, Pennsylvania, with equipment based in Warren (Warren County) and Bradford (McKean County). As to the transportation service of Crossett, it should be sufficient to state that the shipper testimony does not reveal any transpor-

tation service deficiency stemming from Crossett. Obviously, Crossett has the experience, personnel, equipment and facilities necessary to satisfactorily conduct its business as a regional carrier of petroleum and petroleum products in bulk (Crossett Exhibits 2, 3 & 4; Transcript 450-454).

As it pertains to the instant statewide bulk commodities application of Central Transport, Crossett set forth its primary geographic area of concern and testified that its opposition related primarily to petroleum and petroleum products in bulk, originating from the Counties of Warren, McKean and Venango (Transcript 456).

From the Counties of Warren, McKean and Venango, after excluding all commodities for which Central Transport is not seeking authority, Crossett identified 6,201 loads, producing \$1,690,889 in revenues, transported from the Counties of Warren, McKean and Venango to points in Pennsylvania (Crossett Exhibit 7; Transcript 477-478). This traffic is essential to Crossett's financial stability (Transcript 479).

GENERAL POSITION OF CROSSETT

It is the position of Crossett that the instant application of Central Transport should be analyzed, not only on statewide basis, but, specifically as to the Counties of Warren, McKean and Venango, as if the Applicant were only applying for authority to transport various petroleum and petroleum products in bulk from origins in

the Counties of Warren, McKean and Venango. After all, the Applicant is applying for authority to transport various petroleum and petroleum products in bulk from origins in the Counties of Warren, McKean and Venango. Just because the Applicant is seeking additional origin counties (in fact, the whole state), should not lessen the Applicant's burden of proof requirement as to the Counties of Warren, McKean and Venango. Otherwise, the more "greedy" the applicant, territorially, the lesser its burden of proof would become as to duplicating the authority and operations of a regional carrier, such as Crossett. The geographic area of primary concern of a regional carrier must be specifically analyzed as to whether or not the applicant has sustained its burden of proof if a regional carrier, such as Crossett, is to be afforded a level playing field in transportation regulation.

It is respectfully submitted that it is the burden of Central Transport to prove its application as to each major geographic area involved in the instant application, including the geographic area of importance to Crossett, being the Counties of Warren, McKean and Venango.

It is the position of Crossett that the instant application should be denied as to the transportation of petroleum and petroleum products in bulk as to the Counties of Warren, McKean and Venango.

ARGUMENT

THE APPLICANT HAS NOT SUSTAINED ITS BURDEN OF PROOF
THAT THE APPROVAL OF THE INSTANT APPLICATION
WILL SERVE A USEFUL PUBLIC PURPOSE,
RESPONSIVE TO A PUBLIC DEMAND OR NEED
AS IT PERTAINS TO THE COUNTIES OF
WARREN, MCKEAN AND VENANGO

It is incumbent upon an applicant to prove either the inadequacy of existing service (and such is not proved as it pertains to Crossett) or that its application meets the "alternative" criteria set forth in the Application of Richard L. Kinard, Inc. (58 PA PUC 548 (984)), with a clear demonstration (by shipper witness testimony) that granting the application will serve a useful public purpose, responsive to a public demand or need.

The Kinard alternatives are: (1) different service, (2) efficiency, (3) lower rates, (4) future need, (5) back-up service, (6) shipper competition, (7) ICC authority, (8) rectification of authority, and (9) benefit to applicant.

It is respectfully submitted that the evaluation of the Kinard alternatives is not to be done in a vacuum but taking into consideration the evidence of record found in the shipper witness testimony.

In this regard, the evidence consisted of shipper witness testimony from Witco Corporation (Exhibits 8-10; Transcript 146-162), Pennzoil Products Company (Exhibits 11-14; Transcript 163-

195), The McCloskey Corporation (Exhibits 15-17; Transcript 205-256), E.F. Houghton & Company (Exhibit 18; Transcript 258-279), Harry Miller Corporation (Exhibit 19; Transcript 281-292), Para-Chem Southern, Inc. (Exhibit 20; Transcript 292-308), Calgon Corporation (Exhibit 21; Transcript 317-331), and Valspar Corporation (Exhibit 22; Transcript 331-344).

Of the eight shipper witnesses presented by the Applicant, only one shipper witness (Witco Corporation) operates a petroleum product facility within the Counties of Warren, McKean and/or Venango, to wit: the Witco Bradford facility in McKean County. (Even then, as it pertains to Witco, it is respectfully submitted, that Witco's primary purpose in supporting the instant application related to its petroleum product facility at Petrolia (Butler County), which is located within one mile of Central Transport's Karns City terminal). As to the other seven shipper witnesses, all are located outside of the Counties of Warren, McKean and Venango, and they either testified as to commodities which were not petroleum products (ie., Calgon Corporation, for water treatment chemicals; Transcript 323), or, if they testified as to petroleum product transportation, emphasized that their shipper support related to Pennsylvania facilities located at Pennsylvania points other than in the Counties of Warren, McKean and/or Venango (ie., Harry Miller Corporation, being concerned with Philadelphia as an origin point; Transcript 282). Except for a possible "bare bones" mention that a bulk material may be obtained by private carriage from a point such as Bradford (ie., Pennzoil Products

Company; Exhibit 13; Transcript 167-168), it is obvious that Central Transport's entire shipper witness proof as it pertains to its request for authority from origins in the Counties of Warren, McKean and Venango rests upon the testimony of Witco as to its Bradford facility located in McKean County. (No shipper witness testified as to any petroleum product facility operated by them in Warren or Venango County).

As to Witco at Bradford, Witco already is using eight existing carriers presently available and authorized. From Bradford, Witco tendered existing carriers the following loads for a three month period for Pennsylvania destinations: Crossett (327), Leaseway (194), George M. Maust (96), Chemical Leaman (47), Zappi (28), Matlack (14), Quality Carriers (2) and Oil Tank Lines (1), as well as utilizing private carriage (Exhibit 10; Transcript 155).

Crossett, which handled most of the Bradford loads, has vehicles stationed right in Bradford, convenient to Witco's Bradford facility. Witco, of course, prefers a carrier to have equipment based close to its facility (Transcript 157). In fact, it can be reasonably concluded that Witco's support of Central Transport's instant application relates more to Central Transport's terminal at Karns City being locally based as compared to Witco's facility located in Petrolia (Butler County), rather than a need for service at Witco's Bradford facility. The witness emphasized that Central Transport's Karns City terminal was only one mile from its Petrolia facility (Transcript 158). As to Bradford, Crossett is the carrier which is locally based.

From the foregoing, it is respectfully submitted that the following findings of fact can be made: (1) that the Applicant produced only one shipper witness with a McKean County facility (none from Warren or Venango Counties) in support of its instant application; (2) that the sole supporting shipper (Witco as to its Bradford facility) is utilizing eight existing common carriers presently available to it for the transportation of various petroleum products in bulk to points in Pennsylvania (plus private carriage); (3) that the sole shipper (Witco as to its Bradford facility) testified to no specific inadequacies of the existing carrier service; (4) that the Applicant has no terminal located within the Counties of Warren, McKean and Venango; and (5) that the existing carrier, Crossett, being locally based as to Witco's Bradford facility, is better situated to serve Witco as to its Bradford facility than the Applicant.

Upon such factual findings, it is respectfully submitted that it would be proper to conclude that the Applicant did not sustain its burden of proof under the Kinard alternatives that the instant application as it pertains to the Counties of Warren, McKean and Venango is within the public interest or responsive to a public demand or need.

Looking at the Kinard alternatives, it should be clear that Central Transport would not be offering the shipper, Witco, a different or better service as it pertains to Witco's Bradford facility. If anything, Central Transport's service would be inferior, having a terminal at a greater distance from Bradford as compared

to Crossett. In any event, there is nothing unique or different in Central Transport's proposed transportation service as it pertains to McKean County that qualifies as meeting the alternative of "different service" under the Kinard test.

Clearly, Central Transport's application as it pertains to the Bradford facility of Witco would not offer any additional "efficiency" as compared, for example, to the service offered by Crossett to Witco at Bradford. To the contrary, Witco would have to deadhead vehicles from its Karns City terminal to Bradford as compared to Crossett having vehicles conveniently located in Bradford for pick up service for Witco. It, therefore, appears clear that the "efficiency" standard of the Kinard alternatives is not met by the Applicant as it relates to Witco Bradford facility.

The Applicant, similarly, does not meet the "lower rate" alternative mentioned in the Kinard Decision. Nowhere throughout the instant application does Central Transport make a proposal that its rates would be lower or better than those available to Witco at Bradford as compared to Crossett.

As to the "future need" alternative, it is respectfully submitted that the Applicant has not proven that the potential future needs of Witco at Bradford cannot be met by the existing carriers already serving Witco (and it must be remembered that the shipper listed eight such existing carriers on Exhibit 10) or why any additional "back-up service" is required by Witco as to Bradford (as the shipper already has eight carriers to use to back each other up), nor is there any indication that the "shipper compe-

tition" alternative of Kinard is involved (as, after all, Witco already has available eight existing common carriers in use).

As Central Transport holds no authority from PA PUC, the "rectification of authority" alternative mentioned in the Kinard Decision is not applicable. This criterion was a pronouncement that fragmented PA PUC authority could be "rounded out" and, as the Applicant holds no PA PUC authority, this proposed "rounding out" of existing PA PUC authority is not pertinent to the instant application.

Even the "benefit to applicant" Kinard alternative is suspect as it pertains to the territory of the Counties of Warren, McKean and Venango. As the Applicant has no terminal facility (or tank cleaning facility) located within these three Counties, it is clear that any Pennsylvania intrastate transportation to be performed by the Applicant as it pertains to origins in the Counties of Warren, McKean and Venango would generally require deadhead miles between the Applicant's Karns City terminal and the points of pick up. It is, therefore, impossible to conclude that, if the Applicant transported a Pennsylvania shipment from a point in Warren, McKean or Venango County to a point in Pennsylvania, the Applicant would be financially or logistically better off than compared to handling ICC traffic out of Karns City or an ICC move from a point nearer to its Karns City terminal. Additional traffic potentials do not always blend into existing traffic patterns.

Overall, the only Kinard alternative which Central Transport can cling to as it pertains to the instant application relating to

the Counties of Warren, McKean and Venango is that it does hold ICC authority for traffic originating from any point in the Commonwealth of Pennsylvania. Of course, since the de facto "deregulation" of the ICC, any carrier that ever bothered to apply for ICC authority can technically meet this criterion. It is unlikely, however, that the PA PUC is going to grant authority to every carrier that holds ICC authority from a point in Pennsylvania on the basis of the ICC alternative contained in the Kinard Decision. To do so, the PA PUC would be de facto "deregulating" its entire transportation regulatory process and delegating its decisions to the ICC. It is respectfully submitted that such is not the intent of the Kinard Decision.

Upon evaluation of the Warren, McKean and Venango County area, the shipper witnesses and the applicable legal principles, it is respectfully submitted that the Applicant failed to sustain its burden of proof and it is respectfully requested that the instant application of Central Transport be denied as it pertains to the transportation of petroleum and petroleum products in bulk from origins in the Counties of Warren, McKean and Venango.

CROSSETT HAS DEMONSTRATED
THAT THE GRANT OF THE INSTANT APPLICATION
AS TO PETROLEUM AND PETROLEUM PRODUCTS IN BULK
FROM THE COUNTIES OF WARREN, McKEAN AND VENANGO
WOULD ENDANGER OR IMPAIR CROSSETT'S OPERATIONS
CONTRARY TO THE PUBLIC INTEREST

As previously indicated in this Brief, Crossett, from the Counties of Warren, McKean and Venango, after excluding all com-

modities for which Central Transport is not seeking authority, identified 6,201 loads, producing \$1,690,889 in revenues, transported from the Counties of Warren, McKean and Venango to points in Pennsylvania (Crossett Exhibit 7; Transcript 477-478). This traffic is essential to Crossett's financial stability (Transcript 479).

All of the foregoing traffic would be subject to diversion if Central Transport were granted authority as it pertains to origins in the Counties of Warren, McKean and Venango. Clearly, the amount of traffic subject to such diversion is substantial, depicting that Crossett and its operations conducted for the benefit of the public would be endangered if such traffic is lost to the Applicant herein.

In essence, Central Transport concedes the \$1,690,889 amount of traffic "subject to diversion" from Crossett that would stem from granting Central Transport's application as to the Counties of Warren, McKean and Venango. See such admission on Page 32 of the Applicant's Brief that Crossett made a credible attempt to define the volume of traffic "subject to diversion" and the summary of facts set forth on Page 2, (.3) of Appendix B to the Applicant's Brief.

In essence, the Applicant argues that Crossett will not be endangered because it has demonstrated, in the past, customer loyalty and an ability to compete with larger bulk carriers holding broad authorizations (Applicant's Brief, Pages 31-32).

It is respectfully submitted that such an argument contains

fallacies. To begin with, "like the straw that broke the camel's back", Crossett's ability to survive in the past against difficult competition, competing with larger carriers holding broad authorizations, does not prove that Crossett can perpetually continue to survive in the future if additional large competitors (like Central Transport) are added to the already too large list of competitors which Crossett must contend with. At some point, one more burden becomes too much.

The argument that, because Crossett's customers are loyal, no traffic will be diverted to the Applicant is unsound. If the Applicant expects no traffic from Witco at Bradford (for example), then there is no public need for or public usefulness in granting Central Transport any authority to transport petroleum and petroleum products in bulk from the Counties of Warren, McKean and Venango.

If, on the other hand, Central Transport is going to divert traffic from Crossett as to the Counties of Warren, McKean and Venango, then the diversion of this traffic from Crossett to the Applicant will certainly endanger Crossett's existing operations and service to the public. Crossett has 6,201 loads, producing \$1,690,889 in revenues in jeopardy by the instant application.

Certainly, it is the duty of PA PUC in regulating transportation within the Commonwealth of Pennsylvania to balance or adjudicate the endangerment to a protestant's operations (such as Crossett) with the demonstrated public need (if any) for an applicant's proposed service (such as proposed by Central Transport).

Here, as previously argued, the Applicant has not demonstrated, as it pertains to the Counties of Warren, McKean and Venango, a public need for its proposed service, and, therefore, on balance, the proven endangerment to Crossett's operations as to the \$1,690,889 of revenues which is "subject to diversion", tips the balance in favor of protecting Crossett's operations and the benefit to the public flowing therefrom.

Put simply, Crossett's proof of its endangerment is greater than the Applicant's proof (or lack thereof) of public need.

For this additional reason, it is respectfully requested that the instant application of Central Transport be denied as it pertains to the transportation of petroleum and petroleum products in bulk from origins in the Counties of Warren, McKean and Venango.

CONCLUSION

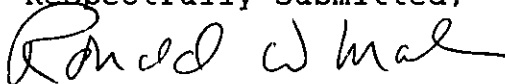
Crossett respectfully submits that any other issues raised in the Applicant's Brief not directly responded to herein should be adequately covered, commented on or corrected by reference to Briefs to be submitted by the other Protestants in the instant application matter. The lack of comment herein on the issue of the Applicant's fitness, for example, should not be construed to mean that Crossett agrees with the Applicant's contention that it is fit. Rather, the lack of comment herein is predicated upon the assumption that such issue will be better addressed by other

Protestants in their Briefs. The effort of this Brief on behalf of Crossett, was limited to the issues critical to Crossett and believed most appropriate for the PA PUC to consider in determining whether or not the Applicant should be granted authority to transport petroleum and petroleum products in bulk from origins in the Counties of Warren, McKean and Venango.

In this regard, it is respectfully submitted that the instant application of Central Transport should be denied as it pertains to the Applicant's request to transport petroleum and petroleum products in bulk from points in the Counties of Warren, McKean and Venango.

Dated: September 11, 1989.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 1989, I served copies of the foregoing Brief on Behalf of Protestant, Crossett, Inc., upon the following parties of record, by first-class mail, postage pre-paid:

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September 12, 1989
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SECRETARY'S OFFICE
Public Utility Commission

Gentlemen: Re: Application of Central Transport, Inc.
No. A-00108155

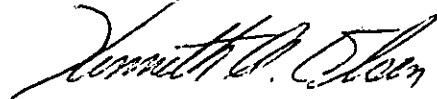
Attached hereto for filing with your Commission on behalf of my client, find original and nine copies of Brief of Protestant, Marshall Service, Inc. in the above captioned proceeding.

I hereby certify that I have served one copy of the attached Brief of Protestant on the Presiding Officer, and three copies of the attached Brief of Protestant on all counsel of record as noted on the Certificate of Service, in accordance with this Commissions Rules of Practice and the Presiding Officer's Briefing Letter dated July 25, 1989.

Kindly acknowledge receipt on the duplicate of this letter attached, showing thereon that this document was duly filed. A self-addressed stamped envelope is enclosed for your convenience.

Your cooperation and expedited handling are greatly appreciated.

Very truly yours,



Kenneth A. Olsen

KAO;jmf
Encl.

cc with Encl.: Hon. Michael C. Schnierle, ALJ
Pennsylvania Public Utility Commission
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All Parties of Record

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

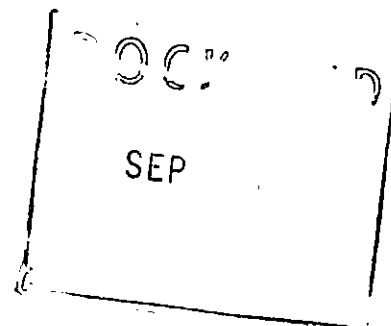
NO. A-00108155

APPLICATION OF
CENTRAL TRANSPORT, INC.

BRIEF
OF
PROTESTANT
MARSHALL SERVICE, INC.

RECEIVED

SEP 12 1989
SECRETARY'S OFFICE
Public Utility Commission



Dated: September 12, 1989

Due Date: September 13, 1989

Filed By:

Kenneth A. Olsen
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Service, Inc.
Protestant

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

NO. A-00108155

APPLICATION OF
CENTRAL TRANSPORT, INC.

BRIEF
OF
PROTESTANT
MARSHALL SERVICE, INC.

Comes now Marshall Service, Inc., (hereinafter called Marshall, or Protestant), in the above entitled proceeding, corporation of the State of New Jersey, with offices and principal place of doing business at Pearl Street, Newfield, New Jersey 08344, by its attorney, Kenneth A. Olsen, and submits this, its Brief in the above captioned proceeding.

I
STATEMENT OF THE CASE

Central Transport, Inc., (hereinafter called Central or Applicant), a motor carrier seeking operating authority from this Commission, filed an application on or about March 11, 1988, under Docket No. A-00108155, for the right to begin to transport property, in bulk in tank or hopper-type vehicles between points in Pennsylvania. This application had been published in the Pennsylvania Bulletin of June 11, 1988, Vol. 18, No. 24, Page 2643, together with notice that protests to said application were due to be filed with the Commission on or before July 5, 1988.

A schedule for evidentiary hearings for Applicant and its support public witness was established as follows:

On August 8, 1988, this Commission issued a Notice scheduling oral hearings for presenting Applicant's case. Oral hearings were held on November 1 and 2, 1988 in Harrisburg, Pennsylvania; on November 9, 1988 in Philadelphia, Pennsylvania and on November 18, 1988 in Pittsburgh, Pennsylvania.

By Notice dated November 14, 22, 1988, further hearings for the presentation of Protestants' cases in opposition to this application were scheduled for February 7, 1989 in Philadelphia, Pennsylvania and for February 15, 1989 in Pittsburgh, Pennsylvania. By Notice dated May 15, 1989, additional hearings for the presentation of Protestant's cases in opposition to this application were scheduled for June 27 and 28, 1989 in Harrisburg, Pennsylvania. All the aforesaid hearings were held according to the enumerated and amended schedule set forth above, except that the June 28, 1989 hearing in Harrisburg, Pennsylvania was cancelled.

By letter of the Hon. Michael C. Schnierle, ALJ, dated July 25, 1989, a schedule for the submission of Applicant's Brief by August 24, 1989, and the submission of Protestant's briefs by September 13, 1989 was established.

II SUMMARY OF TESTIMONY

Attached hereto as Appendix A is a Digest of Testimony which summarizes the testimony presented in this proceeding. The Digest of Testimony will be referred to throughout the Argument portion of this Brief.

III STATEMENT OF QUESTIONS INVOLVED

1. Whether Applicant's fitness has been established.
2. Whether the Applicant produced sufficient evidence of a public need for the proposed service to justify a grant of the authority requested in this proceeding.

3. Whether approval of this application will endanger or impair the operations of Marshall contrary to the public interest.

Protestants submit that Applicant has not established its fitness to conduct the proposed operation; Applicant has not demonstrated this application will serve a useful public purpose, responsive to a public demand and need; that Applicant has not demonstrated the existence of a public demand and need in the operating areas of interest to and in conflict with Protestant; and that the operations of Protestant will be endangered and impaired by a grant herein, contrary to the public interest.

IV
SUMMARY OF ARGUMENT

The instant application seeks authority to transport property, in bulk in tank or hopper-type vehicles, between points in Pennsylvania. In support of the application, Applicant presented the testimony of one (1) witness in support of its own company and eight (8) supporting party/shipper witnesses. A review of their testimony reveals that the Applicant has fallen far short of establishing its fitness and a public need for its proposed service. Applicant did not present any evidence of public need or support for the transportation of petroleum products; between points in the city and county of Philadelphia, and within an airline distance of thirty-five (35) statute miles of the limits thereof; or for Sun Refining and Marketing Company, between the facilities owned, leased, used, or utilized by said shipper, and from said facilities to points in Pennsylvania and vice versa. As a matter of fact, there is no showing in this record of public need or support for the transportation of petroleum products.

At most, the record in this proceeding basically reflects service requested by Applicant's supporting shipper witnesses, for their own respective commodities to or from various points actually named by these witnesses as

existing facility or customer locations.

Finally, Protestant submits that approval of this application will impair its operation contrary to the public interest. Protestant has idle equipment available to provide service of the nature proposed by Applicant within the scope of authority held by Marshall. Protestant is now providing sufficient service and equipment within the scope of its respective operating authorities to its present shipping and receiving customers, and would suffer diversion of revenues from a grant of the instant application, to the extent of endangering and impairing its present intrastate operations to the public.

Protestant submits that the evidence of record in this proceeding requires a denial of the instant application in its entirety, or, in the alternative, a grant of authority restricted against providing service for the transportation of petroleum products in bulk in tank vehicles, for Sun Refining & Marketing Company, between points in Pennsylvania; and the transportation of petroleum products between points in the city and county of Philadelphia and within an airline distance of thirty-five (35) statute miles of the limits thereof.

V.

ARGUMENT

A. APPLICANT'S FITNESS HAS NOT BEEN ESTABLISHED

In all proceedings, an initial determination must be made concerning the Applicant's fitness and ability to provide the proposed service. G.G. & C. Bus Co. v. Pa. PUC, 43 Pa. Cmwlth. Ct. 384, 400 A.2d 941 (1979), Pa. PUC v. Purolator Courier Corp., 24 Pa. Cmwlth. Ct. 301, 355 A.2d 850 (1976).

The Commission, in considering whether to grant the instant application, must scrutinize the fitness of the Applicant. Byham v. Pennsylvania Public Utility Commission, 165 Pa. Super. 253, 258, 67 A.2d 646 (1949); Morgan Drive Away, Inc. v. Pennsylvania Public Utility Commission, 6 Pa. Cmwlth. Ct. 229, 235, 293 A.2d 895 (1972). It is respectfully submitted that Applicant is unfit to receive additional authority from this Commission. Armour

Transportation v. Pennsylvania Public Utility Commission, 154 Pa. Super. 21, 23, 34 A.2d 821 (1943).

It is also recognized that this Commission cannot permit any unqualified motor carrier to receive operating authority in Pennsylvania. Therefore, technical and financial fitness are also prerequisites for obtaining the right to offer transportation services to the general public in Pennsylvania. In this vein, a controlling consideration in an application to render service as a public utility requires determining whether applicant is best fitted to carry out the duties imposed by the certificate, with such consideration to be given to matters of experience, fitness, managerial organization, financial resources, and kindred matters. Pittston Gas Co. v. Pennsylvania Public Utility Commission, 190 Pa. Super. 365, 154 A.2d 510 (1959). Applicant herein has not demonstrated that it possesses the technical and financial operational ability to operate lawfully in intrastate Pennsylvania commerce. What Applicant has described through the testimony of its operational and supporting party witnesses, is a program for non-compliance and disregard of applicable laws and regulations dealing with safety and fitness operating within the scope of its present operating authority.

Applicant has not demonstrated that it is operationally sound. In the past several years, it has conducted numerous Pennsylvania intrastate movements without the appropriate operating authority. Thus, it has failed to demonstrate that it has a propensity to operate in a lawful manner.

A question is also raised as to the quality of the service the Applicant is capable of providing. There is no showing of a claim prevention program by Applicant, with regard to OSHA and DER regulations, since Applicant has experienced some OSHA and DER violations in the past.

V
ARGUMENT

B. APPLICANT HAS FAILED TO PRESENT SUBSTANTIAL EVIDENCE OF A
NEED FOR ITS PROPOSED SERVICE

Since the within applications were filed on or about March, 1988, Applicant's requirements or burden of proof, which must be adhered to in this proceeding, is as follows:

(a) An applicant seeking motor common carrier authority has a burden of demonstrating that approval of the application will serve a useful purpose, responsive to a public demand or need.

(b) An applicant seeking motor common carrier authority has the burden of demonstrating that it possesses the technical and financial ability to provide the proposed service and, in addition, authority may be withheld if the record demonstrates that the applicant lacks a propensity to operate safely and legally.

(c) The Commission will grant motor common carrier authority commensurate with the demonstrated public need unless it is established that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers to such an extent that, on balance, the granting of authority would be contrary to the public interest.

The above evidentiary criteria appears in the Commission's Rules and Regulations at 52 Pa. Code § 41.14. Such was adopted in an Order of the Commission on November 19, 1982, entered November 22, 1982, and became effective January 1, 1984.

It is also well-established in Pennsylvania law that an applicant for a Certificate of Public Convenience has the burden of proving a need for the additional service. 52 PA. Code § 41.14; Follmer Trucking Company v. Pennsylvania Public Utility Commission, 189 Pa. Super 204, at 215, 150 A.2d 163 (1959); Motor Freight Express v. Pennsylvania Public Utility Commission, 188 Pa. Super. 80 at 85, 146 A.2d 323 (1958). While recognizing that 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), cite in Leaman Transportation Corporation v. Pennsylvania Public Utility Commission, 153 Pa. Super 303 at 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. Cmwlth. 1,7337 A.2d 922 (1975). This recognized principle of the primary consideration on a application for motor carrier authority being the general public interest evidenced by substantial evidence of need for the proposed service was also stated in Chemical Leaman Tank Lines, Inc. v. Pennsylvania Public Utility Commission, 201 Pa. Super. 196, 191 A.2d 876 (1963).

A plain reading of the record and testimony of Applicant's and the supporting parties' witnesses in these proceedings clearly indicates that Central has fallen far short of producing substantial or sufficient evidence upon which to base a conclusion that the service it proposes is required by the shipping and receiving public, in all of the territory sought. As evidence of need for its proposed service, Applicant presented the testimony of eight (8) supporting witnesses. In these proceedings, there was neither quantity of testimony, not was there quality of testimony. A careful review of the testimony herein reveals that it is insufficient to support a find of public need for the entire service proposed by Applicant. Most, if not all, of the supporting party witnesses did not: present substantiated or sufficient proof of the tonnages their respective companies controlled, paid for, or transported within Pennsylvania; did not testify as to the extent (in terms of tonnage) they would utilize Applicant's proposed services if the subject application was granted; and did not establish any service failures with existing carriers. See the Digest of Testimony attached as

Appendix A. An empty promise by Applicant or a gratuitous supposition by a public witness that said witness's company may enjoy lower intrastate freight rates or obtain rate discounts if the application is granted, does not suffice for genuine proof of public need for the proposed services. There is even no evidence of the type or amount of freight rate discounts allegedly promised or anticipated by the supporting shippers. Yet this is the type of evidence which Applicant has presented in support of this application and attempts to convince us substitutes for public need for the proposed service. But it does not substitute for or establish public need, as defined by Commission regulation and case law, nor does the testimony of public witnesses for services, not even proposed by Applicant.

Protestants submit that all the aforesaid supporting witnesses' testimony fall far short of establishing a need for the additional service proposed by Applicant. As stated by the Commission in Application of C. Veneziale Trucking, Inc., 44 Pa. P.U.C. 170 (1960):

(W)hen the entire territorial scope of the application is reviewed, and the many points and places considered to which this application applies, it is apparent that the testimony presented is not sufficient or substantial enough to support the kind of rights applied for...

(R)ights such as are here sought may not be granted in the absence of substantial, competent evidence establishing need for additional service throughout the territory to which the order applies. While evidence of public necessity within every square mile need not be presented, there must be such representative testimony that would make it apparent that a need exists in the territory sought. In evaluating the quantum of evidence, such factors are to be taken into consideration, as the number and location of the points involved, the size and population, the nature of the traffic pattern, the existing array of common carrier service presently available, etc. The burden remained upon the applicant to prove a need for service in the territory it sought. For the most part, the evidence presented was completely devoid of testimony concerning many areas covered by the application territory and, moreover, the testimony produced was not sufficiently persuasive, quantitatively or qualitatively, to sustain the grant of rights in the wide territory applied for. Veneziale, supra at 181-182.

The testimony proffered by Lyons in support of the subject application also falls far short of the evidentiary burdens of public need set forth in Re Richard L. Kinard, Inc., 58 Pa. P.U.C. 548 (1984).

Consideration of the evidence of need presented in this proceeding must lead to the same conclusion - Applicant has failed to present substantial evidence of need for service so as to justify a grant of authority to serve the entire proposed application area. Moreover, it is important to note that no public testimony was received regarding need for transporting petroleum products for Sun Refining & Marketing Company or between points in the city and county of Philadelphia and within an airline distance of thirty-five (35) statute miles of the limits thereof. Furthermore, there was insufficient testimony for carte blanche statewide authority for named commodities for each of the supporting witnesses' companies. Not only has Applicant herein not shown necessity for every commodity and point in the territory for which it seeks operating authority, but it also has failed to offer proof of necessity for the general total area involved, and such is insufficient proof. Application of Lyons Transportation Lines, Inc., 42 Pa. P.U.C. 605 (1966); Application of C. Veneziale, *ibid.* Applicant and its public witnesses have not provided a representative picture of the needs of the shipping or receiving public in the entire territory sought for all the commodities applied for herein.

Such testimony does not substantially support a general application for Pennsylvania authority. Application of Samuel J. Lansberry, Inc., A. 99642, F.1, Am-P (Initial Decision of ALJ Turner, served December 2, 1988) On this record the Applicant has failed to establish need for its services as an additional bulk carrier in Pennsylvania or to establish that approval would be consistent with the public convenience and necessity.

Protestants have argued above that Applicant has failed to carry its burden of proof regarding fitness and need. Those are threshold questions and further consideration of subsequent issued by the Honorable Administrative Law Judge and this Commission is unnecessary. However, for completeness Protestant will brief additional issues which frequently arise in application proceedings.

The public utility code requires an Applicant to establish that the existing services are inadequate to meet the needs of the shipper. Samuel J. Lansberry, Inc. vs. Pa. PUC, 66 Pa. Cmwlth. Ct. 381, 444 A.2d 832 (1982). The shipper witnesses are generally satisfied with existing available service. In the absence of documentation regarding alleged service inadequacies, the record in this proceeding does not substantiate a charge of unsatisfactory service against these Protestants or any other carriers. Applicant has not met its burden and has not satisfied the test imposed by the Public Utility Code. 52 Pa. Code Section 41.14.

Applicant has also failed to make out a case with regard to any alternatives to the inadequacy test. It has not presented a foundation regarding the utilization level of its own facilities, those of its supporting witnesses, or any new type of service it offers which is not provided now and required by the public. Any effect by Applicant to rely upon alternatives to the inadequacy test would have to rely upon speculation and conjecture and would not be based upon substantial evidence in the record of this proceeding. Therefore, the broad scope of this application should again be considered as beyond the proof adduced by the Applicant.

In this context, and particularly in light of the flimsiness of the present record, the Commission should not lightly throw another competitor into the market. Even under the Transportation Regulatory Policy, an applicant must still establish need. In a recent decision, the Commission

sustained Administrative Law Judge Gesoff's ruling on exceptions in Application of B & D Transfer, A95587, F1, AM-B. In Judge Gesoff's ruling dated April 12, 1984, which was sustained by the full Commission, the following evaluation appears:

This is an application for general transportation rights between points in four counties, Bradford, Lycoming, Potter and Tioga, and from points in these counties to points in Pennsylvania and vice versa. Although the Commission's recent Transportation Regulatory Policy, 52 Pa. Code Section 41.14, has relaxed common carrier entry standards, an application still must demonstrate a public need for the requested authority. In addition, an applicant's grant of authority can and should be limited commensurate with the demonstrated need. (Ruling on exceptions, page 1).

Judge Gesoff went on to find that the testimony of only one shipper would not support the grant of an entire county.

Numerous cases decided prior to the Transportation Regulatory Policy have held that an applicant has the burden of proving by substantial evidence that a public need exists for the service proposed by the applicant in the general application territory, and that the Commission may limit any grant of authority to the extent to which evidence was presented. See McNaughton Bros. Inc. v. Pa. PUC, 2 Pa. Cmwlth. Ct. 319, 278 A.2d 186 (1971); Kulp v. Pa. PUC, 153 Pa. Superior Ct. 379, 33 A.2d 724 (1943); and Application of A.E. Trucks, Inc., A99183, F2 (Order entered November 4, 1979.)

In A.E. Trucks, Inc., supra, the applicant sought authority to transport between points in the Village of Weston, Black Creek Township, Luzerne County, and within an airline distance of 170 statute miles of the limits of said village. Judge Kranzel reviewed the evidence of the supporting witnesses and recommended a grant of authority to only three named shippers. His decision was later adopted by the Commission.

It is clear that the Applicant herein has failed to carry its burden of proving need throughout the entire application territory.

C. APPROVAL OF THIS APPLICATION WILL HAVE SERIOUS ADVERSE
CONSEQUENCES UPON THE OPERATIONS OF MARSHALL SERVICE, INC.
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 carriers." Protestants submit the record indicates that approval of these applications would affect their operations "contrary to the public interest." 52 Pa. Code § 41.14.

Marshall is presently providing a substantial amount of bulk carrier service of petroleum products in tank vehicles to the shipping and receiving public within the scope of this application and its operating authority, as shown on Marshall Exhibit Nos. 1 and 3. Attached hereto as Appendix B is a true and correct copy of additional authority recently granted Marshall by this Commission. Since such new grant of authority is a matter of this Commission's public record, Marshall respectfully requests that administrative notice be taken of such authority and added to Marshall's Exhibit No. 1 as an amendment thereto. In 1987 Marshall generated intrastate operating revenues of \$115,971.00 as shown on Applicant's Exhibit No. 23. Although such revenue figures may not appear to be significant to a large carrier such as Applicant, all revenue in this very competitive age, is extremely important and necessary to a small carrier like Marshall as the loss or diversion of any revenue will jeopardize Marshall's ability to continually serve the public and its customers. These persons require, at times, such services as same day pick-up and deliveries, Saturday and Holiday pick-ups and deliveries,

scheduled pick-ups and deliveries at various plant locations, pumping and hose attachments without customer assistance, etc. Marshall also provides the same type of services to the public as proposed by Applicant in its Exhibit No. 5 . These services, which are provided by Marshall in the normal course of business, in contrast to the operations of large carriers, would be subject to discontinuance if any presently realized intrastate revenue is lost or diverted from Marshall. Since the authority sought herein by Applicant encompasses the total scope of Marshall's presently authorized operations, all of Marshall's intrastate revenue is therefore subject to diversion if this application is approved, which is contrary to the public interest as endangering the continued intrastate operation of Marshall. It should be stated here that Applicant did not present any shipper witness testimony or evidence supporting traffic or tonnages tendered, or to be tendered Applicant for movements of petroleum products for Sun Refining & Marketing Company and between points in the city and county of Philadelphia and an airline distance of thirty-five (35) statute miles thereof. Such commodities and territory Marshall serves and it is its interest herein.

As shown on Marshall's Exhibit Nos. 1 and 3, Marshall presently operates throughout the scope of its operating authority transporting various petroleum products in truckload and less than truckload quantities to all members of the shipping and receiving public within the scope of its authority. As shown on Marshall's Exhibit No. 2, Marshall owns and operates approximately sixteen (16) power units and thirty-nine tank trailers throughout the scope of its operating authority for the public and its customers. Because of the over-saturated motor carrier market and existing destructive competition, Marshall is now experiencing idle equipment and empty miles even without the added competition of Applicant.

Marshall recognizes that it does not have a right to be free from competition. However, it is already competing with several carriers, to some limited commodity and territorial extent, for the ever-decreasing volume of motor carrier traffic. The introduction of additional competitors throughout their entire scope of operating authorities, particularly in view of the absence of any true need for the proposed service in the area of Protestant's interest, is simply unwarranted. The authorization of Applicant will divert more traffic from Marshall, thereby exacerbating the over-saturated motor carrier market and threatening Protestant's continuing viability. Marshall submits that such a result would be contrary to the public interest, and therefore requests that the application be denied in its entirety, or restricted against service for Sun Refining & Marketing Company or restricted against transporting petroleum products between points in the city and county of Philadelphia and within an airline distance of thirty-five (35) statute miles of the limits thereof, in conflict with Marshall's existing operating authority.

VI
PROPOSED
FINDING OF FACT

1. Central is a North Carolina corporation with offices and principal place of business at P. O. Box 7007, High Point, North Carolina 27264.

(Applicant's Exhibit No. 1).

2. Central presently holds authority from the Interstate Commerce Commission and presently transports bulk commodities, with exceptions, between points in the forty-eight (48) contiguous United States as a motor common and contract carrier. (Applicant's Exhibit No. 1, page 2).

3. Central does not presently hold operating authority from the Pennsylvania Public Utility Commission. (Applicant's Exhibit No. 1).

4. Central operates in intrastate commerce in the states of Georgia, North Carolina, South Carolina, Tennessee, and West Virginia. (Applicant's Exhibit No. 1, pages 2-3).

5. Central operates the equipment as shown on Applicant's Exhibit No. 1C and 1D, pages 2-12.

6. Central has terminals, offices or other described facilities at the points and places listed on Applicant's Exhibit No. 1C, page 1.

7. Central is currently serving members of the shipping and receiving public, in the territory listed and described on Applicant's Exhibit No. 5. (Applicant's Exhibit Nos. 1 and 1B).

8. Central's financial statements are shown on Applicant's Exhibit No. 1H.

9. Central has conducted intrastate Pennsylvania movements of traffic without the requisite operating authority and has, thereby, demonstrated its lack of propensity to operate in a lawful manner. (Applicant's Exhibit No. 1, pages 5-6), Tr. 8-134; 146-340).

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10. Collectively, the supporting shipper witnesses did not present sufficient or substantial evidence of public need for all or substantially all of Applicant's proposed service in all or most of the territory sought herein. (Tr. 146-344), (Applicant's Exhibit No. 8-22).

11. Collectively, the supporting shipper witnesses did not present any evidence of public need for Applicant's proposed service to transport petroleum products in bulk in tank vehicles. (Tr. 146-344), (Applicant's Exhibit Nos 8-22).

12. Collectively, the supporting shipper witnesses did not present any evidence of public need for Applicant's proposed service to transport petroleum products between points in the City and County of Philadelphia, and within an airline distance of thirty-five (35) statute miles of the limits thereof. (Tr. 146-344), (Applicant's Exhibit Nos. 8-22).

13. Protestant Marshall presently holds authority from this Commission to transport petroleum products in bulk in tank vehicles, with exceptions, for Sun Refining & Marketing Company and between points in the City and County of Philadelphia, and within an airline distance of thirty-five (35) statute miles of the limits thereof, which conflicts with that sought herein by Applicant. (Marshall Exhibit No. 1), (Tr. 352-353).

14. Protestant Marshall is presently providing an active service to the public throughout the scope of its operating authority. (Marshall Exhibit Nos. 1 and 3), (Tr. 353, 358-359, 360-361, 363-365).

15. Protestant Marshall owns and operates approximately sixteen (16) power units and forty-four (44) tank trailers, throughout the scope of its operations. (Marshall Exhibit No. 2), (Tr. 354-357).

16. Protestant Marshall presently provides the same type of service proposed by Applicant herein. (Tr. 353-361, 363-365).

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17. Protestant Marshall maintains a terminal with office, tank cleaning, maintenance and parking facilities in Newfield, New Jersey. (Tr. 354).

18. Protestant Marshall generated \$115,971.00 in intrastate revenues in 1987, which revenues are important to its operation and is all subject to diversion upon grant of the authority sought herein, impairing Marshall's operations contrary to the public interest. (Applicant's Exhibit No. 23), (Tr. 369-370).

19. There is no need for the additional service of Applicant in the conflicting authority and territory held and serviced by Marshall. (Tr. 369-370).

20. Protestant Marshall's equipment is presently not being operated or utilized to full capacity. (Tr. 356-357).

21. None of the supporting party witnesses contacted Marshall regarding need for present or additional service. (Tr. 363).

22. There is no need for the proposed service of Applicant in the conflicting authority and territory held and serviced by Marshall (Tr. 370).

VII
PROPOSED CONCLUSIONS OF LAW

1. The Pennsylvania Public Utility Commission has jurisdiction over the parties and subject matter in this proceeding.
2. Applicant has not established its fitness to conduct the proposed operation.
3. Applicant has failed to sustain its burden of establishing a need for the proposed service.
4. The instant application will result in harmful competition and will adversely affect the operations of Protestant Marshall Service, Inc., contrary to the public interest.

VIII
PROPOSED ORDER

In view of the foregoing, Protestant submits the following Proposed Order:

THEREFORE IT IS ORDERED:

1. That the within captioned application of Central Transport, Inc., at Docket No. A-00108155, be and is hereby in its entirety; (or in the alternative);

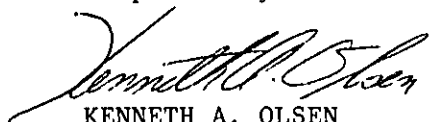
THEREFORE IT IS ORDERED:

1. That the within captioned application of Central Transport, Inc., at Docket No. A-00108155, be and is hereby restricted against providing transportation services within the scope of Protestant's conflicting authority, ie. that no right, power or privilege is granted to:
(1) transport petroleum products, in bulk, in tank vehicles, between points in the City and County of Philadelphia; and within an airline distance of thirty-five (35) statute miles of the limits thereof; and (2) transport petroleum products in bulk in tank vehicles, for Sun Refining & Marketing Company, between the Pennsylvania facilities owned, leased, used or utilized by said shipper, and from said facilities to points in Pennsylvania, and vice versa.

IX
CONCLUSION AND
REQUESTED RELIEF

WHEREFORE, Protestant respectfully prays the honorable administrative law judge find as follows: (1) That Applicant is not fit to perform the proposed service; that Applicant, through its supporting shippers and witnesses, has not shown any need for the proposed operations within the scope of Protestant's respective authorized territory; (2) That Applicant, through its supporting shippers and witnesses, has not shown any need for the proposed operations; (3) That approval of this application will not serve a useful public purpose, responsive to a public demand or need; (4) Protestant's possess the appropriate operating authority and equipment to perform any services required by the shipping and receiving public within the scope of their respective operating authorities and as proposed by Applicant; (5) That Protestant's operations, and that of other carriers, will be endangered or impaired by the grant of this application contrary to the public interest; (6) That the grant of the authority sought herein is contrary to the public interest; and (7) That the record overwhelmingly supports a find that the application as amended, be denied in its entirety, or in the alternative, restricted against service within the scope of Protestant's respective authority.

Respectfully submitted,



KENNETH A. OLSEN
P. O. Box 357
Gladstone, New Jersey 07934
Attorney for Marshall Service,
Inc.
Protestant

DIGEST OF TESTIMONY

Supporting Party Witnesses

1. George L. Keller
Central Region Traffic Manager
Witco Corporation (Witco)
71 North Kendall Ave.
Bradford, PA 16701

Witco is in the petroleum refining business refining such products as petroleum oil, wax, petrolatums, white oil, described as petroleum oil. These products are shipped from Petrolia or Bradford (Tr. 145,149). Shipments are made to various points in Pennsylvania from Petrolia. (Tr. 150), (A.Ex.9). A representative list of destinations from Petrolia are shown on Applicant's Exhibit No. 9. Petrolia requires different equipment than Bradford because of the products shipped. (Tr. 150-153). Shipments from Bradford appear on Applicant's Exhibit No. 10. Applicant's Exhibit Nos. 9 and 10 reflects carriers used, common and private, within the State of Pennsylvania (Tr. 153-156). Some shipments are prepaid, others collect. No percentage was shown. (Tr. 162). No tonnage was shown to be tendered to Applicant. No problems were shown with present carriers' service. (Tr. 159-160). No need was shown by this shipper for Applicants' service, and inasmuch as Applicant ships from two origins outside the area in which Marshall holds authority, any grant of authority should exclude the area which Marshall services. (Tr. 343). Certainly the shipper's testimony has not shown a need for additional service, and we ask no consideration be given to it.

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2. Valgene Frye
Corporate Manager
Transportation & Material Handling
Penzoil
R.D. 2, Box 1
Karns City, PA 16061

This shipper has a petroleum refinery at Karns City. It ships petroleum white oil. (Tr. 165). Shipments move to points in Pennsylvania via common and private carrier, and by customer pick up. (Tr. 165,166)(A.Ex. 12). Inbound shipments from origins on Applicant's Exhibit No. 12 to Karns City are transported via shippers own fleet. If shipper needs help it solicits outside carriers. (Tr. 166, 167). It appears suppliers also route this shipper's traffic. (Tr. 167, 168). You can see shipper depends upon customers' selection of carrier. It uses predominately its own equipment. It specifically has no problems with obtaining carriers equipment. It has carriers available and not used. (Tr. 185-196). It ships or receives no shipments to or from Philadelphia. It shows no tonnage to be tendered Applicant. It has not shown where it could not move its traffic. We ask no consideration be given to this shipper's testimony as it does not constitute support for bona fide public need of Applicant's service, especially in the area where Marshall holds authority.

3. Thomas McGrath
Corporate Traffic Manager
The McCloskey Corporation
7600 State Road
Philadephia, PA 19136

The McCloskey Corporation, hereinafter called McCloskey or Shipper, ships from Philadelphia, industrial resins and solvents to manufacturers in the paint and coating industries. (Tr. 207,208). Shipper has no knowledge of Applicant's service. Shipper has no knowledge of Applicant's facilities. (Tr. 236). Shipper has made no determination of his use of Applicant. (Tr. 213).

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Shipper in fact knows nothing about Applicant's equipment, nor is it familiar with their operations. (Tr. 236,237). The product Shipper ships is not a petroleum product. (Tr. 254,255). Therefore, any restrictions in Applicant's grant against the transportation of petroleum products between Philadelphia/and points in Pennsylvania within 35 miles of Philadelphia City/and County would have no effect on this Shipper. We pray the Marshall authority be excluded from any grant of authority to Applicant, as there has been shown no need for its such authority.

4. William F. Dahms, Sr.
Manager Traffic and Distribution
E.F. Houghton & Co.
Madison & Van Buren Aves.
Valley Forge, PA 19482

This shipper ships oils and greases. (Tr. 259). It receives chemicals, raw materials and oils. (Tr. 259-261). Applicant would be used as a fill-in carrier. (Tr. 264,265). No tonnage is shown to be given the Applicant. Much of its outbound shipments are collect. (Tr. 266). Applicant was never used by this shipper. (Tr. 267). This shipper has shown no movements of petroleum products and a grant of authority to Applicant restricted against the transportation of petroleum products between Philadelphia City and County, and points within 35 miles thereof, would have no adverse effect on this shipper. (Tr. 274, 275). No consideration should be given this shipper testimony as to a need for service.

5. Betty McKay
Harry Miller Corporation
Fourth & Bristol Streets
Philadelphia, PA 19140

Ms. McKay works in the Order Department of Harry Miller. This shipper ships cleaning compounds and petrolubes from Philadelphia. Shipper ships to Reading, one shipment every two months, and one shipment to Allenport every

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three months.) (Tr. 282, 283) Shipper is only supporting these two points. (Tr. 290). At times, this shipper does not pay the freight charges. (Tr. 291). With no tonnage shown to be tendered Applicant, and no showing of any problems with its present carriers, there has been shown no need for Applicant's service. We ask no consideration be given this shipper's testimony of need for service. This record is devoid of any shipments which this shipper would route or be available to Applicant. This testimony does not constitute need for service.

6. William M. Hansburg
Plant Manager
Para-Chem Southern, Inc.
Ontario and Rorer
Philadelphia, PA 19134

This shipper ships liquid latex from Philadelphia (Tr. 294) which it transports in its own equipment. (Tr. 295,296). It supports Applicant from Nevelle Island to Philadelphia and from Philadelphia to Hazelton as a backup carrier. (Tr. 306). Its products are not a petroleum product, and shipper has no objection if any authority granted to Applicant were restricted against the transportation of petroleum and petroleum products. (Tr. 307, 308). This record as can be seen is devoided of any need for Applicant's service and no consideration should be given this shipper's testimony as to a need for service for the conflicting authority held by Marshall.

7. Joseph R. Knouse
Manager of Transportation
Calgon Corporation
P. O. Box 1346
Pittsburgh, PA 15230

This shipper appeared in support of Applicant on behalf of his company which ships water treatment chemicals from Ellwood City, PA (Tr. 317,318). Shipper is supporting Applicant as a potential backup carrier and to increase

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competition. (Tr. 321,327,329). It does not ship a petroleum product. (Tr.323). Inbound shipments are primarily routed by the suppliers. (Tr. 324). Thus, this shipper does not control any motor carrier traffic. In short, this testimony shows nothing to be considered as public need of Applicant's proposed service and we, therefore, request no consideration be given this shipper's testimony in support of Applicant.

8. Mary Ann Noga
Traffic Manager
Valspar Corporation
Pittsburgh, PA 15233

Ms. Noga has been with her company for ten years. She is in charge of inbound and outbound transportation. Her company makes and ships protective coating for cans and packages. (Tr. 332,333), (A.Ex. 22). The product is shipped from Rochester, PA (Tr. 333-335). This is only 24 to 30 shipments per year. (Tr. 337-339). Shipments are very limited. (Tr. 342). The shipper has no need for inbound transportation. (Tr. 335). She is supporting Applicant as a potential back-up carrier and for competition. (Tr. 336). Present carriers meet her needs. There is no need for Applicant. (Tr. 336). There are no movements of petroleum products required. In fact, shipper is satisfied with its present carrier and the testimony given does not constitute need for service. We would ask no consideration be given the testimony of this shipper to show a need for Applicant's service.

PROTESTANT WITNESS

EVERETT MARSHALL, III

VICE PRESIDENT

MARSHALL SERVICE, INCORPORATED

Mr. Marshall is Vice President of Marshall Service, Inc. (Marshall). As Vice President, he has knowledge of and becomes involved in personnel, management, operations, sales and solicitation, equipment, and finances of Marshall. (Tr. 352).

Marshall is an irregular route common carrier holding both Interstate Commerce Commission and Pennsylvania Public Utility Commission authority. Copy of the Marshall authority is marked Marshall Exhibit No. 1. (Tr. 353, 371). You will note from the Marshall Exhibit No. 1 and Appendix B that Marshall holds operating authority to transport petroleum products, with exceptions, for Sun Refining & Marketing Company, between points in Pennsylvania and between points in the City and County of Philadelphia, and within an airline distance of thirty-five (35) statute miles of the limits thereof. You will note from Marshall Exhibit No. 1, and as supplemented by Appendix B, that all of the Marshall authority is in conflict with the authority sought by Applicant herein. (Marshall Exhibit No. 1), (Appendix B), (Tr. 362). Basically, Marshall's conflicting operating authority as shown in Marshall's Exhibit No. 1, is the transportation of petroleum products, with exceptions, for Sun Refining & Marketing Company, between points in Pennsylvania and between points in the City and County of Philadelphia, and within an airline distance of thirty-five (35) statute miles of the limits thereof. (Marshall Exhibit No. 1), (Appendix B). Marshall is presently providing an active service pursuant to its authority issued by this Commission as evidenced by Marshall Exhibit Nos. 1 and 3. (Tr. 353-361, 363-365). As far as this subject application is concerned, Marshall also

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presently holds authority from the Interstate Commerce Commission, which authorizes the transportation of commodities between points in the continental United States. (Tr. 371). As part of its business, Marshall transports interstate and intrastate shipments for a single shipper, inter-line shipments, provides direct and same day service, protects shipments from freezing, cooperates with consignees for scheduled and prearranged deliveries, cooperates with consignors in scheduling pick-ups (including off-hour, weekend, emergency, and daily call arrangements), provides multiple stop-offs in transit for pick-up and/or delivery in tank load shipments, provides stainless steel compartmentalized trailers for consignors or consignees convenience in loading or unloading, and performs all the services which Applicant proposes also. (Tr. 353-361, 363-365). Marshall transports all types of authorized commodities. (Tr. 353-361, 363-365).

Marshall operates the equipment shown on Marshall Exhibit No. 2, which consists of approximately sixteen (16) tractors and forty-four (44) tank trailers, many of which are stainless steel, compartmentalized, and contain heat coils to protect products from freezing. (Tr. 354-357), (Marshall Exhibit No. 2). Marshall owns all of its equipment. (Tr. 354-357). The type of equipment is similar to the type that Applicant proposes to provide pursuant to the authority requested in this matter. All equipment is stationed in Newfield, New Jersey where Marshall has an office, tank cleaning, maintenance and parking facilities. (Tr. 354). All of these facilities, are situated on approximately two (2) acres of land. (Tr. 354). Marshall has thirty (30) employees, consisting of sixteen drivers, eight (8) mechanics and shop personnel, and six (6) office staff. (Tr. 357). Marshall is always looking for new business. Marshall services the public

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seven days a week. (Tr. 353-361, 363-365, 369-371). As evidenced by Marshall Exhibit No. 3, Marshall has shown considerable operations within the scope of its authority. (Tr. 353-361, 363-365), (Marshall Exhibit No. 3). Marshall provides and can give shippers and/or receivers any kind of pick-up they want and just about any delivery they require in its authorized territory, in direct transportation as authorized. (Tr. 353-361, 363-365). The operations of Marshall are subject to diversion if this authority were granted as there is only a limited amount of available tank bulk business in Pennsylvania. (Tr. 363,369-370). Marshall generated intrastate operating revenues in 1987 of \$115,971.00, as shown on Applicant's Exhibit No.23. Marshall is a small family carrier operating primarily in the southeast section of Pennsylvania, and is striving to retain its business. Any more competition, especially from this large aggressive Applicant, would drastically limit the amount of revenues that Marshall could generate. Every dollar of intrastate revenue is important to his company. (Tr. 363, 369-370). Marshall needs every dollar it can get in order to remain in business and keep operating and be a viable carrier. (Tr. 363, 369-370). There is no need for Central's service whatsoever, because there is already competition there. Marshall operates throughout the scope of its operating authority and it is there to extend the local service. Marshall is not aware of anyone in its area of operations who is looking for petroleum product tank truck carriers. (Tr. 363, 369-370). In this record, there are no supporting shippers or consignees that testified to a present or past service need in the Marshall territory of the City and County of Philadelphia, and within an airline distance of thirty-five (35) statute miles thereof, of for Sun Refining & Marketing Company. It is very important that Marshall protect itself because there is not much additional or existing petroleum

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product tank truck business in this southeast section of Pennsylvania and the business in question is vital to Marshall's existence as they cannot stand the loss of even one percent of their revenue. (Tr. 363, 369-370).

APPLICANT'S WITNESSES
W. DAVID FESPERMAN
DIRECTOR OF TRAFFIC SERVICES
AS HE PERTAINS TO
PROTESTANT
MARSHALL SERVICE, INC.

Central Transport Incorporated, hereinafter called, Central, or Applicant is a non-union carrier and filed for authority (Tr. 57), as shown on Exhibit No. 5 admitted at hearing on November 2, 1988. (Tr. 57,146), (A.Ex.5). The application filed would increase business \$1,000,000.00. (Tr. 30,31). The fleet operated by Applicant is 4-1 ratio in favor of owner-operators. (Tr. 35). Central's Pennsylvania facility is located at Karns City. (Tr. 31). Shipments now originate at Karns City, Petrolia, Philadelphia and Rochester. (Tr. 37,38). This is defined as interstate traffic as Central holds no intrastate Pennsylvania authority. (Tr. 31). In this application, Central seeks common carrier authority. (Tr. 45). Presently, however, in its entire operation, fifty percent of its operations are contract carriage. (Tr. 45). Central is a North Carolina corporation with offices and principal place of business at P. O. Box 7007, High Point, North Carolina. (A.Ex.1). Central presently holds operating authority from the Interstate Commerce Commission as a motor common and contract carrier operating between points in the forty-eight (48) contiguous United States. (A.Ex.1). Central operates in intrastate Georgia, North Carolina, South Carolina, Tennessee, and West Virginia commerce. (A.Ex. 1). Applicant has several terminals and is currently serving members of the shipping and receiving public in the

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territory described in Applicant's Exhibit No. 5. (A.Ex. 1). Central has conducted intrastate Pennsylvania movements of traffic without the requisite operating authority. (A.Ex. 1), (Tr. 8-134, 146-340). Central's financial statements are shown on Applicant's Exhibit No. 1H. Central proposes to offer the shipping and receiving public service features which Protestant carriers already provide to the shipping and receiving public.

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held June 29, 1989

Commissioners Present:

Bill Shane, Chairman
William H. Smith, Vice-Chairman
Joseph Rhodes, Jr.
Frank Fischl

Application of Marshall Service, Inc., a corporation of the State of New Jersey, for amendment to its common carrier certificate, which grants the right, inter alia, to transport, by motor vehicle, petroleum products, in bulk, in tank vehicles, between points in the city and county of Philadelphia, and within an airline distance of thirty-five (35) statute miles thereof; subject to the following conditions: That no right, power or privilege is granted to transport gasoline, jet fuel, kerosene, asphalt, and Nos. 2, 4, 5, and 6 fuel oils (except No. 6 fuel oil for Haab Oil Company and Sun Refining & Marketing Company); and that no right, power or privilege is granted to transport transformer oil, naphthas, speciality oils, and lubricating oil for Sun Refining & Marketing Company: SO AS TO PERMIT the transportation of petroleum products, in bulk, in tank vehicles, between the Pennsylvania facilities used or utilized by Sun Refining & Marketing Company, and from said facilities to points in Pennsylvania, and vice versa.

A-00101153
Folder 1.Am-E

Kenneth A. Olsen for the applicant.
Peter G. Loftus for the Seaboard Tank Lines, Inc.

O R D E R

BY THE COMMISSION:

This matter comes before the Commission on an application filed March 29, 1988. Public notice of the application was given in the Pennsylvania Bulletin of April 30, 1988. A protest filed by Seaboard Tank Lines, Inc. was later withdrawn predicated our acceptance of a restrictive

amendment which excludes the transportation of petrochemicals, heating oils other than No. 6 fuel oil, diesel fuel, gasoline and jet fuel.

The now unopposed application, as amended, is certified to the Commission for its decision without oral hearing. The record consists of verified statements entered by Everett E. Marshall, III, vice president of the applicant and William Marsden, manager of bulk transportation for Sun Refining & Marketing Company.

DISCUSSION AND FINDINGS

The applicant seeks amendment to its common carrier certificate to permit transportation between the facilities of Sun Refining and Marketing Company and from those facilities to points in Pennsylvania and vice versa. The applicant currently specializes in the transportation of commodities in bulk in tank vehicles and holds authority to provide some service for the shipper in this proceeding.

Marshall operates from a main office at Newfield, New Jersey. It currently employs 18 drivers, two mechanics and three office persons. Its fleet of equipment is comprised of 16 tractors and forty tank trailers. All equipment is subject to routine maintenance and safety inspection. All drivers are participants in a safety program under the direction of a full time safety director.

The applicant has served the supporting party in both interstate and intrastate commerce within the scope of its current rights. By virtue of this service it is familiar with the shippers' requirements and is prepared to offer responsive transportation suited to its operations.

Sun Refining & Marketing Company manufactures and markets petroleum lubricating oils, waxes, rubber process oils, gasoline, kerosene, naphtha, distillate fuel oil, asphalt, jet fuel, various petrochemicals and various liquified petroleum gases. It operates four refineries having a total crude oil processing capacity of 443,100 barrels daily. The shipper now ships commodities to and receives commodities from numerous points located throughout the United States including points in Pennsylvania such as Marcus Hook, Philadelphia, Chester, Trainer and Lansdale. Due to changing sources of supply, manufacturers, warehouses and customers, the shipper seeks a carrier with the flexibility to meet its changing requirements. The shipper desires the availability of this experienced carrier to provide it with expanded Pennsylvania service.

The applicant has further amended this application by letter dated June 1, 1989, to limit service to that provided "for Sun Refinery & Marketing Company between the Pennsylvania facilities owned, leased, used or utilized by the shipper, and from those facilities to points in Pennsylvania, and vice versa". This further amendment to the application was made to conform with the Commission's current policy concerning a single shipper supported application which uses the terminology "facilities used or utilized by".

We find:

1. That the applicant has the necessary experience, equipment, facilities and capacity to properly render the proposed service, as amended.

2. The applicant has the unqualified support of the supporting shipper in this proceeding and that support is representative of a need for the service as amended, an accommodation and convenience to the public; THEREFORE,

IT IS ORDERED: That the application, as amended, be and is hereby approved and that the certificate issued December 19, 1979, as amended; be further amended to include the following right:

To transport, as a Class D carrier, petroleum products, in bulk in tank vehicles, for Sun Refinery & Marketing Company, between the Pennsylvania facilities owned, leased, used or utilized by the said shipper, and from said facilities to points in Pennsylvania, and vice versa.

subject to the following condition:

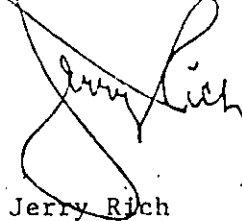
That no right, power or privilege is granted to transport petrochemicals, heating oils other than No. 6 fuel oil, diesel fuel, gasoline and jet fuel.

IT IS FURTHER ORDERED: That the authority granted herein to the extent that it duplicates authority now held by or subsequently granted to the carrier shall not be construed as conferring more than operating right.

IT IS FURTHER ORDERED: That the applicant shall not engage in any transportation granted herein until it shall have complied with the requirements of the Public Utility Code and the rules and regulations of the Commission relating to the filing and acceptance of a tariff establishing just and reasonable rates.

IT IS FURTHER ORDERED: That in the event the applicant has not, on or before sixty (60) days from the date of service of the order, complied with the requirements hereinbefore set forth, the application shall be dismissed without further proceedings.

BY THE COMMISSION,

A handwritten signature in cursive script, appearing to read "Jerry Rich", is written over a large, stylized, circular scribble or flourish.

Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: June 29, 1989

ORDER ENTERED: JUL 6 1989



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P. O. BOX 3265, HARRISBURG, Pa. 17120

September 6, 1989

IN REPLY PLEASE
REFER TO OUR FILE

A-101153
F. 1, Am-E

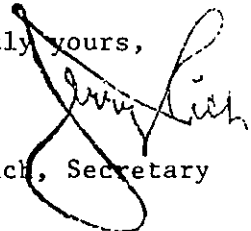
Kenneth A. Olsen, Esquire
P.O. Box 357
Gladstone, NJ 07934-0357

In re: A-101153, F.1, Am-E - Application of Marshall Service, Inc.

Dear Mr. Olsen:

Enclosed is a corrected Page 3 for the order adopted June 29, 1989 in the above referenced proceeding. The shipper's name has been corrected from Sun Refinery & Marketing Company to Sun Refining & Marketing Company. You may substitute this corrected Page 3 in the order now in your possession.

Very truly yours,


Jerry Rich, Secretary

lg
Encls.
Cert. Mail

We find:

1. That the applicant has the necessary experience, equipment, facilities and capacity to properly render the proposed service, as amended.

2. The applicant has the unqualified support of the supporting shipper in this proceeding and that support is representative of a need for the service as amended, an accommodation and convenience to the public;
THEREFORE,

IT IS ORDERED: That the application, as amended, be and is hereby approved and that the certificate issued December 19, 1979, as amended, be further amended to include the following right:

To transport, as a Class D carrier, petroleum products, in bulk in tank vehicles, for Sun Refining & Marketing Company, between the Pennsylvania facilities owned, leased, used or utilized by the said shipper, and from said facilities to points in Pennsylvania, and vice versa.

subject to the following condition:

That no right, power or privilege is granted to transport petrochemicals, heating oils other than No. 6 fuel oil, diesel fuel, gasoline and jet fuel.

IT IS FURTHER ORDERED: That the authority granted herein to the extent that it duplicates authority now held by or subsequently granted to the carrier shall not be construed as conferring more than one operating right.

IT IS FURTHER ORDERED: That the applicant shall not engage in any transportation granted herein until it shall have complied with the requirements of the Public Utility Code and the rules and regulations of the Commission relating to the filing and acceptance of a tariff establishing just and reasonable rates.



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P. O. BOX 3265, HARRISBURG, Pa. 17120

August 22, 1989

IN REPLY PLEASE
REFER TO OUR FILE

A. 00101153
P. 1, Am-E


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

Application of MARSHALL SERVICE, INC., a corp of the State of New Jersey

To Whom It May Concern:

Please be advised that the tariff requirement has been satisfied
in the above entitled proceeding and you may now utilize those rights.

Very truly yours,


Jerry Rich, Secretary

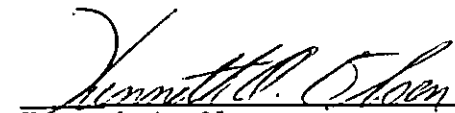
EMD

MARSHALL SERVICE, INC.
Pearl Street
Newfield, NJ 08344

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded three copies of the foregoing Brief of Protestant, Marshall Service, Inc., in this proceeding to the following counsel of record: William A. Chesnutt, Esq., McNeese, Wallace & Nurick, 100 Pine Street, P. O. Box 1166, Harrisburg, Pennsylvania 17108-1166; James W. Patterson, Esq., Rubin Quinn Moss & Heaney, 1800 Penn Mutual Tower, 510 Walnut Street, Philadelphia, PA 19106-3619; William J. O'Kane, Esq., 102 Pickering Way, Exton, Pennsylvania 19341-0200; Christian V. Graf, Esq. and David H. Radcliff, Esq., Graf, Andrews & Radcliff, P.C., 407 North Front Street, Harrisburg, Pennsylvania 17101; Henry W. Wick, Jr., Esq., Wick, Streiff, Meyer, Metz & O'Boyle, 1450 Two Chatham Center, Pittsburgh, Pennsylvania 15219-3427; and Ronald W. Malin, Esq., Johnson, Peterson, Tener & Anderson, Key Bank Building, 4th Floor, Jamestown, New York 14701, by first class mail, postage prepaid. I hereby certify that copies of the foregoing Brief of Protestant Marshall Service, Inc., in this proceeding, have been served upon the Secretary and presiding officer in accordance with the statements made in my cover filing letter dated this date.

Dated at Gladstone, New Jersey this 12th day of September, 1989.



Kenneth A. Olsen
Attorney for Marshall Service, Inc.,
Protestant

FILE

CONTINUED