



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

July 3, 1986

IN REPLY PLEASE
REFER TO OUR FILE
A-00065936,
Folder 3,
Am-A

Arthur J. Diskin, Esquire
402 Law & Finance Building
Pittsburgh, PA 15219



Application of Norman M. Earhart, t/d/b/a Earhart Trucking

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Robert P. Meehan.

If you do not agree with any part of this Decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-18, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17120, within fifteen (15) days of the date of this letter. This exception period is fixed by statute. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must be served on each party of record and to the Administrative Law Judge whose address is Pennsylvania Public Utility Commission, Pittsburgh State Office Building, Room 1103, 300 Liberty Avenue, Pittsburgh, Pennsylvania 15222.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40 page limit for exceptions and the 25 page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (Name of Party) - (protestant, complainant, staff, etc)".

If no exceptions are received within fifteen (15) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

cc: ALJ Meehan/Office of ALJ/Bureau of Trans./Law Bureau/Chairman/Commissioners
OSA/Mr. Bramson

OFFICE OF ADMINISTRATIVE LAW JUDGE

jr
Encls.

Certified Mail
Receipt Requested

Similar letter to: William J. Lavelle, Esquire, 2310 Grant Building
Pittsburgh, PA 15219

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Norman M. Earhart, :
t/d/b/a Earhart Trucking, for :
amendment to his common carrier :
certificate which grants the :
right, inter alia, to transport, :
by motor vehicle, property for :
the Pennsylvania Department of :
Highways, building materials, :
excavated materials and road and :
building construction materials, :
such as are usually transported :
in dump trucks, between points in :
the counties of Indiana, Westmore- :
land and Armstrong, provided no :
haul shall exceed a distance of :
thirty-five (35) miles from point :
of origin to points of destina- :
tion: SO AS TO PERMIT the trans- :
portation of coal, for North :
Cambria Fuel, Inc., from its mines :
and tipples, in the counties of :
Cambria, Jefferson, Indiana and :
Clearfield, to other points in :
said counties. :

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A-00065936, F. 3, Am-A

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INITIAL DECISION

Before Robert P. Meehan
Administrative Law Judge

History of the Proceeding

On November 4, 1985, Norman Earhart, t/d/b/a Earhart Trucking (Applicant) filed an application for an amendment to his common carrier certificate. The application was captioned as set forth above. Notice of the filing of the application was published in the Pennsylvania Bulletin on November 30, 1985. Protests to the application, if any, were to be filed

no later than December 23, 1985. At this same docket, Applicant also applied for a grant of temporary authority of the rights sought herein.

Timely protests to both this application and the application for temporary authority were filed by the following common carriers: Thomas H. Loughry; C. L. Feather, Inc.; Wayne W. Sell Corporation; Ritchey Trucking, Inc.; and Bulk Transportation Services, Inc. On January 6, 1986, the protest of Thomas H. Loughry was withdrawn. By Tentative Decision, entered February 13, 1986, the Commission denied the application for temporary authority. As no exceptions were filed, the Tentative Decision became final. Thereafter, the protests of C. L. Feather, Inc., Wayne W. Sell Corporation, and Ritchey Trucking, Inc., were withdrawn. The protest of Bulk Transportation Services, Inc., has not been withdrawn.

The hearing on this matter was held before the undersigned on April 9, 1986, in Pittsburgh, PA. Both parties were represented by counsel. Applicant testified on his own behalf, and presented the testimony of a witness on behalf of his supporting shipper. One exhibit was submitted by the Applicant. One witness testified, and four (4) exhibits were submitted on behalf of the Protestant.

Main and reply briefs have been filed by both parties. The record in this proceeding, consisting of 102 pages of transcribed testimony and the five (5) exhibits, was closed by order of the undersigned issued June 4, 1986.

Summary of the Evidence

Applicant's Evidence

Norman M. Earhart, the Applicant, testified in his own behalf. He is operating as Earhart Trucking, with a business address of R. D. 1, New Alexandria, PA (Tr. 4). He is requesting additional operating rights to transport coal for North Cambria Fuel, Inc. (North Cambria), from the mines and tipples of North Cambria in the counties of Cambria, Jefferson, Indiana and Clearfield to other points in these counties. Applicant's Ex. No. 1 is a copy of his current operating rights at A-65936, F. 3. His gross revenue in 1984 was \$941,000, and around \$880,000 in 1983. He has received an extension in which to file his 1985 annual report, but expects his gross revenues for that year to be around \$900,000 (Tr. 5-6). Applicant operates 17 dump vehicles under leases. He owns two (2) dump trucks and two (2) tractors and dump trailers in his individual name. All vehicles are garaged and repaired at R. D. 1, New Alexandria, where he has a 40 x 100 foot building and the necessary tools for repair work. Major repairs are performed by Mack Watt Sales in New Alexandria (Tr. 6-7). All vehicles operated by Applicant are inspected daily under his safety program. Since 1974 when he began operations, he has not been involved in any serious, major, or fatal accident. He has never been accused of violations of any safety regulations. In January of 1986 he paid two (2) fines of \$100 each for violations of his operating rights (Tr. 7-9).

He has been providing service to North Cambria since 1974. All the vehicles which he operates are used in the service for North Cambria. Seventeen of the vehicles he operates are permanently leased

to him from owner-operators. He provides service to North Cambria five to five and one-half days a week, and also provides emergency service and service on weekends and holidays. He is presently paid about \$70,000 per month by North Cambria (Tr. 9-10). North Cambria participated in the selection of the additional territory sought by this application. If the application is granted, there will not be an immediate need to increase his fleet of vehicles. However, he is ready, willing, and able to do so, if necessary, by purchasing or leasing additional equipment. He anticipates a 25% increase in revenues from North Cambria if the application is approved (Tr. 11-13). Triaxle dump trucks are preferred over dump trailers in strip mine operations. Of the 17 vehicles he leases, 15 are triaxle dump trucks. He currently hauls about 120 loads a day for North Cambria, with a single truck making about four to five trips per day (Tr. 17-20).

On cross-examination, he provided a further explanation of the service he performs for North Cambria (Tr. 20-26). The fines, which he paid in January of 1986, were for two instances of hauling coal for North Cambria from Cambria County to Indiana County in 1985 (Tr. 26-27).

Girard Bloom testified in support of the application. He is Vice-President of Quality Control for North Cambria, and is responsible for selecting the carriers used by North Cambria. He participated in the preparation of the additional rights sought by Applicant. He has used Applicant's services since 1974. North Cambria's main offices are at 936 Philadelphia Street, Indiana, PA, and it is a coal, surface mining company (Tr. 28-30). He described North Cambria's mining operations, and its loading facilities in Clearfield and Indiana Counties. In order

to meet quality specifications, coal from different mines must be blended. Because Applicant is close to North Cambria's shipping office in Blairsville, Indiana County, he can switch Applicant's trucks from one mine to another so that a certain blend can be achieved. North Cambria has active mines in all four counties named in the application. He pays Applicant about \$70,000 to \$80,000 per month, and has found the service to be terrific (Tr. 31-37).

In addition to Applicant, North Cambria also uses the services of Loughry, and Ritchey Trucking, two of the protestants who withdrew. He does not give them the same level of business that he gives Applicant. He has not used the services of Protestant Bulk, and last used Protestant's predecessor, Merlo, in 1974 or 1975. He was not contacted or solicited by Protestant for any business until April 4, 1986. He is not familiar with Protestant's service territory, how many vehicles it has, or the rates it charges (Tr. 38-42). If the application is approved, he expects Applicant's revenues from North Cambria will increase by about 25%. The granting of the application would not adversely affect any trucker. He will continue to use other truckers as a standby (Tr. 44-46).

On cross-examination, he testified that coal from any of the mines of North Cambria can be shipped to its loading facilities at either Blairsville, Indiana County, or Sheriff's Pride, near Glen Campbell, Clearfield County. Currently, 98% of the coal being shipped to Clearfield County is handled by Loughry, and Ritchey Trucking. The remaining 2% is carried by D & G of Tyronne. Applicant does not transport coal to Clearfield County. No trucker will lose any business as a result of the approval of the application because the additional business, and associated revenues, which Applicant will receive will come from new mine

sites of North Cambria (Tr. 50-56). He is not aware of any contact by Protestant with a Mr. Carlinsey (phonetic) to obtain business from North Cambria. This individual is an employee of North Cambria, and was Weigh Master at the Scale House (Tr. 56-57).

On redirect, he testified that even if Mr. Carlinsey had been contacted by Protestant, that individual had no control over the selection of truckers. Although he uses other truckers, he is supporting the application because he has received good service from Applicant since 1974, and does not need anyone else (Tr. 59-60).

Protestant's Evidence

Robert Rorabaugh, testified for Protestant, Bulk Transportation Services, Inc. He is the dispatcher of trucking and purchasing for Protestant. He has been employed by Protestant, or its predecessor, for 29 years. He is familiar with Protestant's operating authority, its equipment, and the service it offers. Protestant's Ex. No. 1 is a copy of its current operating rights. The first two pages set forth its original authority. The third and fourth pages are the rights Protestant acquired from Charles J. Merlo, Inc. (Merlo) by transfer in January of 1986. Protestant's Ex. No. 2 is a map of Pennsylvania showing the counties in Protestant's original territory outlined by dark, black borders, and the rights acquired from Merlo designated by a dark black circle. Protestant and Merlo are owned by the same family. The loading facilities, mine sites, and destination points of North Cambria, as testified to by Applicant and his supporting witness, are within the service territory of Protestant (Tr. 64-70).

All of Protestant's facilities are at R. D. 1, Mineral Point, PA, about five (5) miles north of Johnstown. Protestant's Ex. No. 3 is a list of the equipment it operates. Protestant operates about 88 tri-axle dump trucks. All vehicles shown on this Exhibit are operated under leases. Merlo owns 14 of the dump trucks, seven (7) of the tractors, and three (3) of the dump trailers. These will be acquired by Protestant at the expiration of the licensing periods. The remaining equipment is leased from owner-operators who have been with Protestant for a number of years. Protestant currently operates five (5) days a week, but could operate seven (7) days a week. It has operated 24 hours a day, and can provide service on weekends, holidays, etc. Protestant has the ability to switch its equipment from point to point to meet the needs of shippers (Tr. 70-73).

He spoke with Mr. Carlinsey toward the end of 1985, and with Mr. Bloom on April 4, 1986, to solicit business from North Cambria. He began contacting North Cambria because Protestant will be losing business when one of its customers closes its mines. He anticipates this will occur in four to six months. When those mines close, he will have about 20-25 trucks available to serve North Cambria. Protestant's Ex. No. 4 shows traffic and revenues of Protestant for three shippers between September, 1985 and March, 1986 (Tr. 73-81).

On cross-examination, he acknowledged that Protestant does not have authority to serve all of Clearfield and Jefferson counties, two of the counties named in the application. Protestant cannot serve all of Armstrong County. If he were contacted to provide service in the parts of those counties outside his authorized service territory, he

would have to decline the business (Tr. 86-88). He does not know what Protestant's annual revenues are. Since 1976, Protestant has not received any revenues from North Cambria (Tr. 93-94).

Applicant's Rebuttal

Girard Bloom, recalled for rebuttal, testified that if Protestant desired any of his business, it should have been solicited a long time ago, and that he does not need Protestant (Tr. 100).

Findings of Fact

1. The Applicant is Norman M. Earhart, t/d/b/a Earhart Trucking (Tr. 4).
2. Applicant holds a certificate of public convenience at A-00065936, F. 3, to transport various commodities, including coal, between points in the counties of Indiana, Westmoreland, Armstrong, and Allegheny, no haul to exceed a distance of 35 miles from point of origin to point of destination (Tr. 5; Applicant's Ex. No. 1).
3. Applicant has a terminal and maintenance facility at New Alexandria, Westmoreland County. Applicant performs all minor repair work at his facility. Major repair work is performed by Mack Watt Sales in New Alexandria (Tr. 7).
4. All vehicles operated by Applicant are checked daily for lights, tires, brakes, air hoses, etc., and Applicant has not been involved in any serious, major or fatal accident (Tr. 7).
5. Applicant owns two (2) triaxle dump trucks, and two (2) tractor-trailer dump units. He also operates 15 triaxle dump trucks and

two (2) tractor-trailer dump units under leases from owner-operators and one fleet owner (Tr. 6, 9, and 20).

6. If necessary to meet any additional transportation needs of North Cambria Fuel, Inc., Applicant is ready, willing and able to increase his fleet through either the purchase of additional vehicles or leasing additional vehicles from owner-operators (Tr. 11-12, and 19).

7. Applicant has been serving North Cambria Fuel, Inc., since 1974, and all vehicles operated by Applicant are used in the service for North Cambria Fuel, Inc. (Tr. 9).

8. Applicant serves North Cambria Fuel, Inc., five and one-half days a week, and also provides service to that shipper on weekends, holidays, evenings and in emergencies (Tr. 10).

9. Applicant has no Interstate Commerce Commission operating rights (Tr. 10-11).

10. Applicant's gross revenue in 1983 was about \$880,000. In 1984 it was about \$914,000, and in 1985 about \$900,000 (Tr. 5-6).

11. Applicant is paid about \$70,000 per month, or approximately \$800,000 per year by North Cambria Fuel, Inc. Approval of the application may result in a 25% increase in revenue from this shipper (Tr. 10, 12-13, and 44).

12. Applicant transports about 120 truckloads of coal per day for North Cambria Fuel, Inc., with each vehicle making about four or five trips per day (Tr. 18).

13. There are no Commission complaints currently pending against Applicant. However, in January, 1986, Applicant paid two (2) \$100 fines for violations of his operating rights (Tr. 8-9, and 26-27).

14. North Cambria Fuel, Inc. (North Cambria) is supporting this application (Tr. 28).

15. North Cambria participated in drafting the description of the additional operating rights sought by Applicant in this proceeding (Tr. 11 and 28).

16. North Cambria has been in business since 1953. It employs 350 people, 300 of whom are in the mining fields (Tr. 30-31).

17. North Cambria operates coal loading facilities at Blairsville, Indiana County, and Sheriff's Pride, Clearfield County. Coal from a number of its mines is blended at these facilities to meet the specifications of its only customer, Pennsylvania Power & Light Company (PP&L) (Tr. 29-30; and 31-34).

18. North Cambria currently loads about five to six coal trains a month at its Blairsville facility for PP&L's power plant at Brunner's Island near Harrisburg, PA (Tr. 34-35).

19. North Cambria has been able to switch Applicant's vehicles to different mines about four times a day to make a certain blend of coal in order to meet PP&L and Conrail time schedules (Tr. 34-35).

20. The lead time given Applicant by North Cambria for pickups and deliveries varies from one to three or four hours. Applicant has always performed within those time limits. North Cambria has not had any problems with Applicant and has found his service to be terrific (Tr. 37, and 44).

21. North Cambria has a loading facility and a mine in Clearfield County. It also has active mines in Jefferson, Indiana, and Cambria counties. It also has leases to open additional mines in these

counties, and could use the service proposed by Applicant now (Tr. 31-32, and 36).

22. The life span of a strip mine varies from three months to ten years, with two years as about average (Tr. 36).

23. It is not possible for North Cambria to predict where or when in these four counties additional mines may be opened until it has obtained the permits. However, as it has been in business for a long time, it has a reasonable expectation that additional mines will be opened (Tr. 45, and 61).

24. At the present time, North Cambria uses three other carriers to transport coal to its loading facility in Clearfield County (Tr. 38, 52, and 54).

25. None of these other carriers will lose any business from North Cambria if this application is approved. Applicant's increased business will come from North Cambria's additional mines it intends to open (Tr. 45 and 56).

26. Although North Cambria does use other carriers, it is supporting this application because Applicant has given it the kind of service it needs since 1974, and North Cambria has no need for any other carriers (Tr. 60).

27. North Cambria has no intention of dropping its support of Applicant and giving business to Protestant, Bulk Transportation Services, Inc. North Cambria does not need Protestant's services (Tr. 41, and 100-101).

28. The Protestant is Bulk Transportation Services, Inc.

29. Protestant holds authority from the Commission at A-00101351, and A-00101351, F. 1, Am-A (Tr. 65-66; Protestant's Ex. No. 1).

30. Protestant is authorized to transport, inter alia, coal, in all of Cambria and Indiana counties, and in parts of Clearfield and Jefferson counties, subject to the conditions set forth in the certificates (Tr. 67-69; Protestant's Ex. Nos. 1 and 2).

31. All of the existing mines and loading facilities of North Cambria in Cambria, Clearfield, Indiana, and Jefferson counties are within Protestant's authorized service territory, so that Protestant could pick up coal at these mines and deliver to either loading facility (Tr. 69-70).

32. Protestant's main office is R. D. 1, Mineral Point, PA, five miles north of Johnstown, PA. Protestant's dispatching and administrative offices are at this address (Tr. 70-71).

33. Protestant operates 95 dump trucks, of which 88 are tri-axles; 38 tractors; and 33 dump trailers. All equipment is owned by either Charles J. Merlo, Inc., or independent owner-operators, and leased to Protestant (Tr. 71; Protestant's Ex. No. 3).

34. Charles J. Merlo, Inc., owns 14 of the dump trucks, seven of the tractors, and three of the dump trailers. These will be purchased by Protestant at the expiration of the licensing periods (Tr. 71-72; Protestant's Ex. No. 3).

35. At the present time, Protestant operates five days a week, but it has and can provide service seven days a week, 24 hours a day (Tr. 72).

36. Protestant normally requires shippers to contact it the night before service is desired. However, Protestant can respond to shipper requests during the course of a day. Protestant can also divert

trucks from one point of origin to another to meet the needs of shippers (Tr. 73).

37. Protestant has not provided service to North Cambria since 1974 or 1975 (Tr. 39, 41, and 84).

38. At the end of 1985 and on April 4, 1986, Protestant contacted North Cambria to solicit business (Tr. 39-40, 73-74, and 83-84).

39. Protestant began soliciting business from North Cambria, as Protestant was going to be losing some business (Tr. 73-75, 83-86, and 93).

40. Protestant has not received any revenues from North Cambria since at least 1976 (Tr. 94).

41. North Cambria knows of no other carrier than can give it the same type of service it has received from Applicant (Tr. 44).

Discussion

In their respective briefs, both parties acknowledge that this proceeding is governed by Section 41.14 of the Commission's regulations, 52 Pa. Code §41.14 (pertaining to evidentiary criteria used to decide motor common carrier applications). Additionally, each party finds support for its position in the Commission's decision in Application of Richard L. Kinard, Inc., Docket No. A-00095829, F. 1, Am-D, entered October 22, 1984.

Section 41.14 provides as follows:

§41.14 Evidentiary criteria used to decide motor common carrier applications.

(a) An applicant seeking motor common carrier authority has a burden of demonstrating that approval of the application will serve a useful public 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.

Paragraphs (a) and (b) clearly and explicitly impose the burden of proof upon an applicant with respect to the essential elements of a motor common carrier application proceeding. However, it must be noted that no burden is placed on an applicant to demonstrate that it has a propensity to operate safely and legally. Only in those application proceedings where the record fairly suggests that an applicant lacks such a propensity, would a burden attach to an applicant to demonstrate that such is not the case. Lastly, it is the burden of a protestant to establish that the operations of existing common carriers would be endangered or impaired to such an extent that approval of the application would be contrary to the public interest. Kinard, supra.

The Applicant currently holds a certificate of public convenience, at A-65936, F. 3, authorizing him, inter alia:

To transport, as a Class D carrier, coal, pit posts, lime and cinders between points in the counties of Indiana, Westmoreland, Armstrong and Allegheny, provided no haul shall exceed a distance of thirty-five (35) miles from point of origin to point of destination.

By this application, Applicant seeks additional authority to transport coal from the mines and tipples of a single shipper, North Cambria Fuel, Inc., between points in the counties of Cambria, Jefferson, Indiana and Clearfield, without any mileage limitation. However, it must be noted that the existing 35 mile limitation between points in Indiana County would be eliminated only with respect to transportation services provided to this single shipper. Service provided to other shippers between points in Indiana County would still be subject to the 35 mile limitation.

Approval of this application is dependent on a determination that Applicant has satisfied his burden under 52 Pa. Code §41.14(a) & (b). If so, it must then be determined whether Protestant has satisfied its burden under 52 Pa. Code §41.14(c). See, Kinard, supra.

1. Has the Applicant satisfied his burden of demonstrating that the proposed service would serve a useful public purpose, responsive to a public need or demand?

Whether Applicant has demonstrated that the proposed service would be responsive to a public need or demand, depends primarily on the testimony of Girard Bloom, Vice-President of Quality Control, North Cambria Fuel, Inc. (North Cambria), Applicant's supporting shipper.

Mr. Bloom described North Cambria's active coal mining operations in Clearfield, Cambria, Indiana and Jefferson counties, and testified that it had leases or other arrangements to open additional mines in these counties after the present ones are depleted (Tr. 29-30, 32, 36-37, 56, and 61). North Cambria also operates two blending and loading facilities; one in Clearfield County and one in Indiana County (Tr. 32). In order

to meet contract quality specifications, coal from several mines is blended at either facility prior to being loaded onto "unit trains" (Tr. 32-33). According to Mr. Bloom, coal from any one of North Cambria's mines could be shipped to either Clearfield or Indiana County for blending and loading (Tr. 53-54).

With respect to this application, Mr. Bloom participated in formulating the language used to describe the operating rights being sought (Tr. 28). He has used the services of Applicant since 1974. He desires that the application be granted in its entirety, because, until the necessary permits are received, it is not known where new mines in this four-county area will be opened (Tr. 42 and 45). North Cambria intends to use Applicant to transport coal from its new mines which it intends to open in these counties (Tr. 56).

Evidence tending to establish a public demand for the proposed service is usually in the form of an expressed and defined desire on the part of some portion of the public for the proposed service. In my opinion, the testimony of Mr. Bloom is sufficient to establish a public demand for Applicant's proposed service. Thus, I am satisfied that Applicant has demonstrated that the proposed service would be responsive to a public demand. Whether the proposed service would serve a useful public purpose, requires a further examination of the record.

It is my understanding of Section 41.14 and the Commission's decision in Kinard that an applicant may demonstrate that the proposed service would serve a useful public purpose by showing either that existing service was inadequate or that the proposed service would constitute a recognized alternative to "inadequacy." There is no evidence in this

record which would support a finding of inadequacy of existing service. However, I am satisfied that the proposed service comes within one of the alternatives to inadequacy set forth in Kinard.

In his Initial Decision in Kinard, the ALJ analyzed nine alternatives to inadequacy. In its Order, the Commission noted that the ALJ provided a well-reasoned analysis of each alternative supported by case law precedent.

One of the alternatives analyzed by the ALJ was "future need." With respect to this alternative the ALJ stated, at page 26 of his Initial Decision:

(4) Future need looks to what the shipper will require rather than to specific past service failures. Of course, this alternative would be based on a projection that either shipper need will change (increasing volume of traffic or a new plant under construction are obvious examples) or existing carrier service will change. This alternative, or variant, is not new. Tranter v. Pa. P.U.C., 4 Pa. Commonwealth Ct. 585 (1972), Highway Express Lines, 195 Pa. Superior Ct. at 101-103.

Mr. Bloom testified as to North Cambria's leases or other arrangements to open new mines in the four-county area covered by this application. He was unable to indicate where in this area it might open a mine due to the required paperwork, and the necessity to obtain permits. However, as North Cambria has been in business since about 1952, and has expanded "ten fold" since then, he reasonably expects that new mines will be opened (Tr. 36-37, 45, 56, and 61). I am satisfied that Applicant's proposed service will serve a future need of the supporting shipper.

It appears that a tenth alternative has recently been added to the list approved in Kinard, supra. In Application of Raymond C. Hayes

Trucking, Inc., Docket No. A-101487, F. 1, Am-E, the Administrative Law Judge focused on the convenience to the single shipper sought to be served by that applicant in determining that that application should be granted. The decision of the Administrative Law Judge in Hayes became final by operation of Act 294 on February 26, 1986.

The testimony of the witness for the supporting shipper establishes that he has used Applicant's services since 1974. Additionally, Applicant has been able to vary his schedule throughout any given day to meet the shipper's changing needs. Having become familiar with Applicant's service and being satisfied with the Applicant's past service, the shipper desires the use of Applicant's services to serve the shipper's future mining operations. I am satisfied that approval of the application will be of convenience to the single shipper.

2. Has the Applicant satisfied his burden of demonstrating that he possesses the technical and financial ability to provide the proposed service, and does the record demonstrate that the Applicant lacks a propensity to operate safely and legally?

- a. Applicant's Technical and Financial Ability

The Applicant testified that he presently operates a fleet of 21 dump vehicles, four of which are owned by Applicant in his own name, and 17 of which are leased (Tr. 6). The vehicles are garaged and repaired in Applicant's terminal facilities, R. D. 1, New Alexandria, PA. Applicant's safety program calls for the vehicles to be inspected daily for tires, brake lights, air hoses, etc. He has never been involved in any serious, major or fatal accident. He has never been accused by any regulatory agency of any violations of safety regulations (Tr. 7-8).

With respect to his finances, Applicant testified to his gross revenues for the years 1983, 1984, and 1985 (Tr. 5-6). In addition, he is able to purchase more trucks to serve the increased needs of the supporting shipper (Tr. 11-12). Applicant files annual reports with the Commission (Tr. 6 and 21).

Applicant's annual reports are public documents within the meaning of 52 Pa. Code §5.406(a)(1). Pursuant to the provisions of 52 Pa. Code §5.408(a), official notice may be taken of the information set forth in those annual reports. Applicant's annual report filed with the Commission for 1985, shows that he had gross operating revenues of \$1,604,396. His operating ratio, both before and after income taxes, was 6%.

I am satisfied that Applicant has demonstrated a technical and financial ability to provide the proposed service.

b. Safe and Legal Operations

There is no evidence in this record to suggest that Applicant lacks a propensity to operate safely. In fact, the evidence conclusively demonstrates the contrary, i.e. Applicant will operate safely.

The Applicant did testify that in January of 1986 he paid two fines of \$100 each. The fines pertained to Applicant's transportation of coal for North Cambria in 1985 from Cambria County, a point of origin not authorized by his present certificate (Tr. 8-9, 26-27). I agree with the observation made by Protestant at page 17 of its main brief that this evidence does not demonstrate a lack of propensity to operate legally on the part of the Applicant.

3. Would the operations of existing common carriers be endangered or impaired to such an extent that, on balance, the granting of this application would be contrary to the public interest?

As noted by the Commission in Kinard, protestants bear the burden of proof with respect to the provisions of 52 Pa. Code §41.14(c).

It appears from the record that, in addition to Applicant, North Cambria utilizes the services of three other carriers (Tr. 38, 52, and 54); it also appears that these carriers are used in part of the territory being applied for herein (Tr. 51-52, 54-55). North Cambria intends to continue using the services of these other carriers. Any increase in revenues paid to Applicant, as a result of the approval of this application, will not result in a decrease in revenues paid to the other carriers. The additional business and revenues which Applicant will receive will come from North Cambria's new mining operations (Tr. 45-46, 56). With respect to Protestant, neither it nor its predecessor Charles J. Merlo, Inc., have performed any transportation services for or received any revenues from North Cambria since at least 1976 (Tr. 94). Protestant only recently began soliciting business from North Cambria, because Protestant was losing business as two of its accounts were closing operations (Tr. 85-86).

Approval of the application should not adversely affect existing carriers. Protestant and other carriers would still be free to solicit business from North Cambria. Additionally, as the application is limited to a single shipper, Protestant and other carriers are protected against Applicant diverting traffic from their existing or potential customers.

4. Reconsideration of the Commission's
Order of February 13, 1986.

Subsequent to the hearing in this matter, Applicant filed, on or about April 18, 1986, applications for emergency temporary authority (ETA) and temporary authority (TA). The application for ETA was assigned to me, and by order issued May 9, 1986, I directed that hearings be held on the ETA application.

By letter dated May 9, 1986, Applicant filed a Petition for reconsideration of the Commission's Tentative Decision, entered February 13, 1986, which denied his initial application for TA. This letter also gave notice of the withdrawal of the April 18, 1986 applications for ETA and TA. By order issued May 14, 1986, further proceedings on the ETA application were stayed. Pursuant to 52 Pa. Code §5.94, the withdrawal of the applications for ETA and TA became effective 30 days after the filing of the letter of May 9, 1986.

Applicant's petition for reconsideration of the Commission's Tentative Decision of February 13, 1986, has been assigned to me, apparently as the application for permanent authority is still pending before me. As that order became final, the instant petition is in the nature of a request for relief following a final decision. 52 Pa. Code §5.572.

Pursuant to Section 703(g) of the Public Utility Code, 66 Pa. C.S. §703(g), the Commission may, at any time, following notice and an opportunity to be heard, amend or rescind any order made by it. The statutory powers of Administrative Law Judges are set forth at Sections 331(d), 332(g) & (h), and 333-335 of the Code, 66 Pa. C.S.

§§331(d), 332(g) & (h), and 333-335. No authority is conferred on an Administrative Law Judge by these Sections, either expressly or by necessary implication, to grant reconsideration of a final decision of the Commission. Section 331(d)(8) does authorize an Administrative Law Judge to "take any other action authorized by Commission rule." However, research has failed to disclose any rule of the Commission authorizing an Administrative Law Judge to decide petitions seeking relief from a final decision.

The petition has been addressed to the Commission. The relief requested can only be granted by the Commission. Accordingly, I decline to make any determination as to whether the petition should or should not be granted.

Conclusions of Law

1. The parties to and subject matter of this proceeding are properly before the Commission.
2. The Applicant has demonstrated that the proposed service would serve a useful public purpose, responsive to a public need or demand.
3. The Applicant has demonstrated that he possesses the technical and financial ability to provide the proposed service.
4. Protestant has failed to establish that the operations of existing common carriers would be endangered or impaired to such an extent that, on balance, the approval of this application would be contrary to the public interest.

ORDER

In consideration of the foregoing, it is ordered:

1. That the application of Norman M. Earhart, t/d/b/a Earhart Trucking, at Docket No. A-00065936, Folder 3, Amendment A, be approved, and that the certificate of public convenience issued to Applicant at A-65936, Folder 3, on December 6, 1974, be amended to include the following additional right:

To transport, as a Class D carrier, coal for North Cambria Fuel, Inc., from its mines and tipples in the counties of Cambria, Jefferson, Indiana, and Clearfield, to other points in said counties.


2. That the Applicant shall not engage in any transportation herein granted until it shall have complied with the requirements of the Public Utility Code and the rules and regulations of this Commission relative to the filing and acceptance of a tariff establishing just and reasonable rates.

3. That the authority granted herein, to the extent that it duplicates authority now held by or subsequently granted to the carrier shall not be continued as conferring more than one operating right.

4. That in the event said Applicant has not, on or before 60 days from the date of service of this Order, complied with the requirements set forth above, the application shall be dismissed without further proceedings.

5. That, pursuant to 52 Pa. Code §5.94, the applications for ETA and TA filed with the Commission by letter dated April 18, 1986, are withdrawn.

June 24, 1986


ROBERT P. MEEHAN
Administrative Law Judge

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1 w/d of 3 3/21
w/d 2 4/3

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Mr. J. Lavette, Esq.

4. Type of Service:	Article Number
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 X *N. Dananay*

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