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November 15, 1985

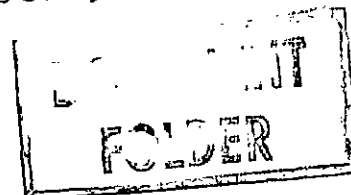
Re: Bulk, Inc.
Docket No. A-00106205
Our File 3116-1

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NOV 15 1985

SECRETARY'S OFFICE
PUBLIC UTILITY COMMISSION

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



Dear Mr. Rich:

We enclose for filing with the Commission the signed original and nine (9) copies of the Brief for Applicant, Bulk, Inc.

A copy of the Brief has been sent to Administrative Law Judge John K. Clements and to all parties of record.

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

Very truly yours,

VUONO, LAVELLE & GRAY


William A. Gray

cas

Enclosures

cc: The Honorable John K. Clements (w/enc.)
Joseph A. Bubba, Esq. (w/enc.)
Bulk, Inc.

~~CONFIDENTIAL~~

ORIGINAL

BEFORE THE
Pennsylvania Public Utility Commission

RECEIVED

DOCKET NO. A-00106205

NOV 15 1985

BULK, INC.

SECRETARY
Public Utility Commission

BRIEF FOR APPLICANT

DOCKET
FOLDER

WILLIAM A. GRAY, ESQ.
Attorney for BULK, INC.,
Applicant

DC
NOV 13 1985

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Due Date: November 18, 1985

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Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO. A-00106205

BULK, INC.

BRIEF FOR APPLICANT

I. STATEMENT OF THE CASE

By this application, as amended, Bulk, Inc. (Bulk or applicant) seeks authority to operate as a contract carrier by motor vehicle, transporting:

Cement, for Lehigh Portland Cement Company, from its facilities located in the township of West Manchester, York County, to points in Pennsylvania, and vice versa.

Subject to the following condition:

That no right, power or privilege is granted to transport cement in bulk and/or by the use of special equipment, to or from the facilities of New Enterprise Stone & Lime Co., except for the transportation of white cement to the facilities of New Enterprise Stone & Lime Co. in the borough of New Holland, Lancaster County.

A hearing was held in this case in Pittsburgh, PA on September 26, 1985 before Administrative Law Judge John K. Clements.

The only protestant that presented testimony in opposition to the application was Materials Transport Service, Inc. (MTS or protestant).

The Commission granted emergency temporary authority to the applicant by Order entered May 3, 1985 to provide the following service:

To transport, as a contract carrier, cement, for Lehigh Portland Cement Company, from its facility in West Manchester Township, York County, to points in Pennsylvania, and vice versa.

By Tentative Decision entered July 29, 1985, the Commission granted regular temporary authority to applicant to provide the same service as it had authorized applicant to provide under the above grant of emergency temporary authority. Exceptions were filed to this Tentative Decision by MTS. By Order entered October 8, 1985, the Commission denied the Exceptions filed by MTS to this Tentative Decision.

Applicant now submits its main brief in support of the application.

II. STATEMENT OF THE QUESTIONS INVOLVED

The questions involved are (1) whether the proposed service will be consistent with the public interest and (2) whether the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle.

III. ABSTRACT OF TESTIMONY

1. TESTIMONY ON BEHALF OF APPLICANT.

A. Jerome Mulroy, General Manager, Bulk, Inc.

(Exs. 1-6; 4-56)¹

Bulk is a Nebraska corporation which has a terminal, as relevant hereto, in York, Pa. (5)

By Order entered May 3, 1985, the Commission granted emergency temporary authority to the applicant to transport, as a contract carrier, cement, for Lehigh Portland Cement Company, from its facility in West Manchester Township, York County, to points in Pennsylvania, and vice versa. (Ex. 2)

By Tentative Decision entered July 29, 1985, the Commission granted the applicant regular temporary authority to provide the same service as was authorized in the grant of emergency temporary authority. (Ex. 3)

The applicant has provided continuous service to the supporting shipper under the grants of emergency temporary authority and regular temporary authority since the grants of those authorities. (10)

During the period from July 1 through July 15, 1985, applicant handled 35 shipments from the supporting shipper's York County facility to points in Pennsylvania. Sixteen different destinations were served during this period of time. (Ex. 4)

¹ Numbers in parentheses refer to Exhibits (if preceded by "Ex.") and pages of the Transcript of Testimony.

The applicant dedicates 21 tractors and 26 trailers to the exclusive use of the supporting shipper at its York County facility. (Ex. 5; 15)

It is necessary to have equipment dedicated to the exclusive use of the supporting shipper because of the type of material that is shipped from the involved facility. The material shipped is "white cement", which is subject to contamination if equipment other than dedicated equipment is used. It would also be far too costly to clean out each tank trailer which had a prior movement of gray cement. (15-16)

Concerning the need to utilize only specially dedicated equipment for the transportation of "white cement", the witness for the applicant stated:

The tank equipment, again, has to be dedicated solely to hauling of white cement. It's possible, in the cement industry, to take a white tank -- a tank utilized for white cement -- and if it has been thoroughly unloaded, to utilize it on gray cement operations. However, it is not acceptable to take a gray tank and even though it's been blown out completely, put it over on white cement service because the demands or the peculiarity of the white cement is such that any contamination would be reflected in the finished product. A white cement tank has to be kept on white cement. If you were to load it with another bulk material regardless of what the other material was, you could not really completely eliminate remnants of that material which would show up in the end result of the customer using the white cement. When a trailer is put on to white cement service, the entire area is extensively cleaned. All of the valves are removed and cleaned. The unloading airpads, as we call them, have to be removed, cleaned and more often than not, replaced, because the fabric will still hold remnants of other materials hauled. Piping must be thoroughly cleaned. Therefore, the time, expense,

and what have you of taking a unit from -- whether it be gray cement service or fertilizer service or any other bulk materials or grain or what have you -- and putting it over on bulk cement, it's just not feasible to do so. Therefore, the tanks are dedicated to the use of white cement only. (21-22)

When the emergency temporary authority was granted on May 3, 1985, the applicant provided 12 tractors and 15 trailers to the supporting shipper at its York County facility. Since then, additional equipment has been added to bring the number to 21 tractors and 26 trailers. (16-17)

The applicant provides both tank trailers and flatbed trailers to the supporting shipper at its York County facility at the present time. Seventeen tank trailers and nine flatbed trailers are provided. (Ex. 5; 17)

The flatbed trailers are used to carry package cement, i.e. cement in bags, from the facilities of the supporting shipper in York County. (18)

The applicant leases its equipment from Leasco, Inc., its parent company. (19)

The applicant's terminal in York County is located approximately a quarter mile from the facility of the supporting shipper, which makes it very easy to dispatch equipment to the supporting shipper when it is required. (20)

Applicant's terminal in York County is also leased from Leasco, Inc., its parent company. (21)

The applicant has effective safety and maintenance programs at its York County facility. (23-24)

The applicant's communications system is tied into the supporting shipper's office, giving it direct hookup to the supporting shipper's loading facility. (24)

The applicant's service is available 24 hours a day and 7 days a week to the supporting shipper. (25)

Applicant's parent company (Leasco, Inc.) put \$100,000 in applicant to begin this operation for the supporting shipper. The applicant has not had any financial problems in getting this operation started and does not believe that it will have any financial problems in the future. (26-27)

The applicant is affiliated with another licensed carrier named Herman Bros., Inc. The parent company of applicant is Leasco, Inc., which is a subsidiary of Varwood, Inc. Herman Bros. is also a subsidiary of Varwood. Herman Bros. is strictly a contract carrier, having authority to serve certain named shippers, but does not have authority to serve the supporting shipper. (27-28)

The applicant is in compliance with all PUC regulations and there are no pending PUC complaints against the applicant. (28)

The applicant is familiar with the transportation needs of the supporting shipper as a result of having provided service to the supporting shipper under the grants of emergency temporary authority and regular temporary authority. (29)

The terminal facility and some of the equipment used by the applicant was previously owned by Cement Express, the

contract carrier that provided service to the supporting shipper at its York County facility prior to May 1, 1985. (47)

Initially, when emergency temporary authority was granted, the applicant concentrated primarily on tank shipments because of the need for specialized equipment to handle tank shipments. As time went on, the number of shipments increased because of the additional of the package shipments on flatbed equipment. (54-55)

B. Lee Cummings, Vice President, Lehigh Portland Cement Company.

(Exs. 7-13; 57-116; 170-174)

The principal corporate offices of Lehigh Portland Cement Company (Lehigh Cement) are located in Allentown and, as relevant hereto, Lehigh Cement has facilities in York County located in West Manchester Township. (57-58)

The applicant dedicates to the exclusive use of Lehigh Cement 21 tractors and 26 trailers at its York County facility. The traffic needs of Lehigh Cement are such that it requires the services of a carrier that can provide it with approximately this amount of equipment on an exclusive use basis. (58)

Lehigh Cement produces "white cement" at its York County facility. White cement is a highly specialized product which is manufactured at only three plants in the United States, of which Lehigh owns two. (59)

The applicant has provided the quality of service that Lehigh Cement requires under its grants of emergency temporary authority and temporary authority. (61)

Lehigh Cement has shipments from its York County facility to points throughout Pennsylvania, including to western Pennsylvania points. Exhibit No. 7 is a representative list of points to which Lehigh requires service and includes 58 points. (Ex. 7; 62)

The transportation of white cement requires specialized equipment used only for transporting white cement. It is totally unsatisfactory insofar as Lehigh Cement is concerned for a carrier to utilize the same equipment to transport its white cement that it utilizes to transport gray cement, even if the equipment would be cleaned after transporting the gray cement. Any contamination of white cement with gray cement or any other colored products is absolutely unacceptable. (63)

Lehigh Cement previously used Cement Express to provide service to it and Cement Express, like the applicant, dedicated equipment to the exclusive use of Lehigh Cement. (63-64)

During the past five years, Lehigh Cement has not used any carriers for its tank movements from its York County facility except for Cement Express and the applicant. (66)

Concerning the inability of Lehigh Cement to use common carriers for this service, the witness testified:

This is a special purpose product. It is not gray cement. It has to be guarded carefully against contamination. We cannot use anybody that says they're ready to provide service when they have not been in the business before. (66)

Emergency temporary authority was granted to the applicant in this case because of the fact that Cement Express terminated

service to Lehigh Cement on one day's notice, effective May 1, 1985. Lehigh Cement learned of this decision by Cement Express on April 30 through its shipping people stating that Cement Express was refusing business for May 1. (74)

There were certain events that transpired before the cessation of service by Cement Express on May 1. The first thing that happened was that there was a meeting on March 28, 1985 between representatives of Cement Express and Lehigh Cement at which some of the owners of Cement Express advised Lehigh Cement that they were considering the sale of the company and that they were going to begin looking around for a buyer. The next relevant development was that Lehigh Cement received a letter on April 22 from Cement Express indicating that Cement Express intended to terminate service on May 1. (Ex. 8; 68-69) Although this letter was dated April 1, it was not received until April 22 and the postmark on the envelope is April 21. (Ex. 8; 69)

Concerning the reaction of Lehigh Cement to the letter received on April 22, the witness testified:

- Q. So, you get this letter on April 22. What was your reaction?
- A. Shocked, dismayed, since the context of the March 28 meeting was so general. My immediate reaction was to call Mrs. Stickel -- who was actually running the company -- and inform her that we have a contract -- we had a contract -- which stipulated that they had to give us a 90-day termination notice, and that with her relative inexperience in the business, that I simply wanted to inform her that Lehigh could suffer substantial financial damages if they went through with the May 1 termination. (70)

Lehigh Cement advised Cement Express by phone and by letter on April 23, 1985 that there was in fact a 90-day written notice requirement in the contract for termination of service. (Ex. 9; 70-71)

Lehigh Cement never contemplated that Cement Express would cease providing service on less than 90 days' notice because of the contract between Lehigh Cement and Cement Express. Concerning this matter, the witness stated:

I had no thought. They were quite responsible people, I thought. We had a contract. (72)

On April 29, 1985, Lehigh Cement received a letter from Cement Express cancelling the previously announced May 1 termination date and indicating that Cement Express would comply with the 90-day termination notice and that service would be provided by Cement Express until July 25, 1985. (Ex. 10; 72-73)

Despite the fact that Lehigh Cement had received the letter from Cement Express on April 29 indicating that service would be provided until July 25, Lehigh Cement learned on April 30 that Cement Express was in fact refusing business for May 1, which was the next day. (74)

Concerning the emergency situation confronting Lehigh Cement on April 30, 1985, the witness testified:

Q. So, you got a letter on April 29 saying they are going to keep providing service until July 25. And again, on April 30, you get a call saying they are not accepting pick-ups?

A. Rather shockingly true.

Q. What did you do?

A. We had a first-class emergency because of the fact that we had to provide continuing service to our customers. We had to move as quickly as we could to find a hauler.

Q. And what did you do?

A. We were able to make successful arrangements with Bulk, Inc. to provide some service. We appealed to the PUC for emergency temporary authority. We didn't. The trucker did, but through our support. (74)

Lehigh Cement's letter of support was hand-delivered to the Commission because of the emergency situation confronting Lehigh Cement. (75)

Lehigh Cement had discussions with a total of nine carriers, including Schwerman, Nubulk (a division of Chemical Leaman) and Fleet Transport, concerning the possibility of replacing the service of Cement Express. (Ex. 11; 77-78)

Lehigh Cement received a letter from Nubulk, a division of Chemical Leaman, indicating that that company could not provide the required service to Lehigh Cement. (Ex. 12; 80)

Both Schwerman and Fleet Transport also negatively responded concerning providing the required service to Lehigh Cement at its York County facility. (81)

Since being granted emergency temporary authority, the applicant has been able to provide the type of service and the type of equipment that Lehigh Cement requires. (84)

Despite the fact that Lehigh Cement is one of the largest cement companies in the United States, it was never solicited by the protestant MTS prior to late April, 1985. (85)

Concerning the failure of MTS to ever contact Lehigh Cement, the witness testified:

Q. How far is MTS -- their offices -- from yours?

A. I must tell you, I don't know anything about MTS except that I have seen some of their trucks on the highway.

Q. According to their protest, if I might find it, they are located in Northampton, PA?

A. Yes.

Q. Are you familiar with Northampton?

A. Yes.

Q. How far are they from you?

A. I don't know. Maybe four or five miles.

Q. You mean to tell me that you have a company located four or five miles from your facility and you have never heard from this company? And you're the major cement company in the area?

A. Yes.

Q. And they are four or five miles from your company, and you have never heard from them?

A. That's absolutely the truth. (86-87)

Mr. Taylor of MTS did call Mr. Cummings on April 29 to indicate an interest in participating in the York business. Concerning why negotiations were not commenced with MTS subsequent to Mr. Taylor's phone call on April 29, the witness testified:

But to begin negotiations with a company that never paid any attention to us and who came in at the end of the line and started to profess an interest in our business, I really didn't have the time to fool around and deal with them at that juncture. (88)

Lehigh Cement did not negotiate with MTS on April 29, when Mr. Taylor called, because of the fact that it had been negotiating with companies that it thought could replace Cement Express and Mr. Cummings did not feel that he had the time at this late date to negotiate with anyone else. (98)

The emergency stated in Lehigh Cement's letter of support to the Commission (Ex. 11) arose on April 30 when Lehigh Cement was advised that Cement Express would not be making pickups the next day. (100) On April 30, Lehigh Cement made the necessary arrangements to secure service from the applicant, subject to the applicant being granted the proper authority. (101)

On May 1, Lehigh Cement was forced to lease equipment from Cement Express, which had terminated its service, in order to obtain service that day. (102)

On cross-examination, Mr. Cummings elaborated concerning the MTS situation and the reason for his decision not to negotiate with MTS on April 29, stating:

I was negotiating with other truckers and was far enough down the line that I was reasonably satisfied that I had the situation in hand. As a businessman, you don't have time to take each person who wants to do business with you and have extensive discussions. The time of these extensive discussions during this thing had passed. And MTS had come in quite late. If they had come in earlier in April, perhaps the business decision would have been to engage in negotiations as we did with Schwerman and Bulk and some others. (104)

Lehigh Cement did not lose a single order as a result of the transition of service from Cement Express to the applicant. (105)

The applicant is handling interstate shipments of Lehigh Cement as well as the intrastate shipments, although Lehigh Cement does not know under what legal arrangements the applicant is handling the interstate shipments. (112)

The cement industry has enjoyed its third largest year in history in 1985 and, specifically, Lehigh Cement has had a fantastic year. (170-171)

2. TESTIMONY ON BEHALF OF PROTESTANT.

A. Ronald Taylor, Materials Transport Service, Inc.

(Exs. P1-P5; 117-174)

MTS never solicited the business of the supporting shipper because of a "gentleman's agreement" between Cement Express and MTS. Concerning this matter, the witness testified:

Q. Before we go any further, let's get something straight. There were statements during Mr. Cummings' testimony that you had never solicited business from Lehigh Portland, a large manufacturer of cement for a great number of years. Is that correct?

A. That's correct.

Q. Why don't you tell the Court why?

A. When MTS purchased H.C. Gabler's PUC authority, we had a hearing. And at that time my father made a gentleman's agreement with Dick Stickel not to raid his work. And at that time the plant was a Medusa plant; not a Lehigh plant.

Q. Your father was a predecessor in this corporation?

A. He was deceased as of August, 1977. Yes.

Q. When was that gentleman's agreement struck? Do you know?

A. 1967.

Q. And for 10 years while your dad ran the business, you did not -- MTS did not raid the business?

A. That's correct.

Q. Subsequent to your father's death, have you attempted to raid the business?

A. No, I have not.

Q. Why is that?

A. Honoring the same agreement.

Q. You were honoring your father's and Mr. Stickel's agreement?

A. Correct.

Q. Have the people at MTS, on different occasions, made any statements to you regarding your honoring of that agreement?

A. Yes. My market department wanted to pursue contacts with that mill for at least back haul or continuous movement stuff on package work.

Q. And they made those comments to you?

A. Yes, they did.

Q. And you refused?

A. Yes, I did.

Q. Based on that agreement?

A. Based on the agreement between Dick Stickel and my father. (117-119)

MTS has four terminals, three of which are located in Pennsylvania and one in New Jersey. (119)

MTS employs in excess of 175 drivers, in excess of 25 mechanics and approximately 25 clerical employees. (121)

MTS is the largest cement carrier in the Lehigh Valley.
(122)

MTS has in excess of 175 tractors, in excess of 200 tank trailers and in excess of 75 flatbed trailers. (122)

MTS has both common and contract carrier authority from the Interstate Commerce Commission. (Exs. P2-P3; 123-125)

MTS first secured authority from the PUC in 1967 and its PUC authority includes authority to provide service from York County to points in Pennsylvania. (Ex. P4; 126)

Until 1967, MTS transported strictly cement. Since then, MTS has secured authority to transport general commodities. (127)

MTS contends that it has had 25 trailers parked and out of service because of lack of work since the spring of 1985. (129)

MTS has fewer drivers and fewer mechanics now than it had in the 1970's. (128-130)

The number of loads of cement hauled by MTS has been declining. (132-133)

A phone call report prepared by MTS indicates that Lou Chiesa made a telephone call to a Jay Young at Lehigh Cement on April 24, 1985, where Mr. Chiesa allegedly inquired about Lehigh Cement losing Cement Express as its carrier at York and where Mr. Young allegedly indicated that although no discussions were going on, no carrier had yet been chosen to replace Cement Express. (Ex. P5; 135-136)

Mr. Taylor of MTS called Lee Cummings of Lehigh Cement on April 29 and Mr. Cummings indicated that he had a tentative agreement, or an informal or handshake agreement, with another carrier. (138-139)

MTS contends that it would have been able to supply twelve tank trailers to Lehigh Cement within a few days and that it would have made every effort to do that if it had been chosen to provide service. (140-141)

The agreement between MTS and Cement Express, where MTS agreed not to pursue the business at the Medusa Cement facility now operated by Lehigh Cement was never brought to the attention of the PUC. (148)

MTS has never transported any cement whatsoever anywhere for Lehigh Cement. (148)

MTS has never solicited the business of Lehigh Cement anywhere. (149)

MTS admits that it has always had rights which would have enabled it to serve Lehigh Cement but despite this fact it has never attempted to secure any business from Lehigh Cement at any of its locations, other than the telephone calls made on April 24, 1985 and April 29, 1985. (150)

MTS has never handled a single shipment of white cement in a tank trailer at any time. (151)

Mr. and Mrs. Stickel of Cement Express called Mr. Taylor this past winter to ask him if he was interested in purchasing their company. (157)

MTS has utilization reports which are done on a daily basis and which show the equipment being utilized on any given day by MTS but MTS failed to bring these utilization reports to the

hearing to substantiate its claim that it had at least 25 pieces of equipment idle every single day during 1985. (160-161)

MTS has filed PUC applications in the past, including an application in 1985. (154-156)

MTS serves in excess of 24 shippers at the present time.
(164)

IV. ARGUMENT

1. THE BURDEN OF PROOF IN A CONTRACT CARRIER APPLICATION IS LESS THAN IN A COMMON CARRIER APPLICATION.

The granting of contract carrier authority is governed by 66 Pa. C.S.A. §2503(b), which provides, inter alia:

A permit shall be issued by the Commission to any qualified applicant therefor authorizing in whole or in part the service covered by the application, if it appears from the application, or from any hearing held thereon, that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful orders or regulations of the Commission thereunder, and that the proposed service to the extent authorized by the permit will be consistent with the public interest and the policy declared in section 2501 (relating to declaration of policy and definitions); otherwise such application shall be denied.

The standard of proof for common carrier applications is different from the burden for contract carrier applications. The burden for common carrier applications is set forth in 66 Pa. C.S.A. §1103 as follows:

A certificate of public convenience shall be granted by order of the Commission, only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public.

The regulations of the Commission governing motor common carrier applications are set forth at 52 Pa. Code §41.14 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.

The Commission has within the past year recognized an important difference between the standard of proof for contract carrier applications as opposed to common carrier applications. In unopposed contract carrier applications, the applicant no longer needs to provide a verified statement from the supporting shipper(s). In unopposed common carrier applications, the applicant must still provide verified statements from shipper(s) to establish need for service. The Commission has apparently recognized that the involved contract carrier statute does not require proof of need for service, whereas the common carrier statute and regulations do require such proof.³

³ If the Administrative Law Judge determines that contract carriers are required to prove need for service, applicant submits that it has in fact proved such need in this case.

2. RECENT COMMISSION DECISIONS.

The Commission since 1979 has substantially relaxed entry standards for motor carrier applications. In Application of Eazor Express, Inc., 53 Pa. P.U.C. 374 (1979), the Commission enunciated the need to re-examine entry requirements, stating:

This Commission, and other Commissions including the Interstate Commerce Commission, have recently been in the process of reexamining the motor carrier industry and reevaluating 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. This process of reexamination had led federal courts and the Interstate Commerce Commission to change policies which had remained fundamentally unchanged for decades. See P.C. White Truck Lines, Inc. v. Interstate Commerce Commission, 551 F.2d 1326 (D.C. Cir., 1977), Liberty Trucking Company Extension - General Commodities, 130 MCC 243 (1978), affirmed and clarified 131 MCC 573 (1979), B.J. McAdams, Inc., Extension, Russellville Frozen Foods, 130 MCC 294 (1978) and Colonial Refrigerated Transportation, Inc., Extension - Florida to 32 States, 131 MCC 63 (1978). (Emphasis added)

The Commission further recognized this more liberal view of motor carrier regulation in Application of Motor Freight Express, 54 Pa. P.U.C. 48 (1980), where the Commission stated:

Commission policy and court precedent tend to protect common carriers from competition and have established a showing that existing carriers are providing inadequate service as the standard prerequisite for approval of additional motor carrier operating authority. However, the developing law in Pennsylvania has not established an applicant's proof of service inadequacies as the determinative element in all circumstances and does not require the Commission to always favor protection over competition. (citations omitted)

The Commission further explained:

This broader view of motor carrier entry control is reflected in various recent Commission decisions and can be found in early court precedents. See, for instance, Modern Transfer Co., Inc. v. Pa. P.U.C., 139 Pa. Superior Ct. 197 (1939), where the court recognized efficiency as a valued element in Commission control of motor carrier competition and noted that the legislature, in enacting the Public Utility Law, undertook not only to regulate utilities but also to regulate the use of the highways.

In Application of A-P-A Transport Corp. at Docket No. A. 91795, F.2 (Order entered September 21, 1983), the Commission adopted the Initial Decision of the Administrative Law Judge granting statewide authority to A-P-A to transport property. In his Ruling on Exceptions dated July 26, 1983, Administrative Law Judge Robert A. Christianson stated:

"I also join a considerable body of precedent and conclude that it is better to grant the application essentially as filed (and amended) in the expectation that Pennsylvania's transportation system will be improved by this action than to deny the application (in whole or in part) to protect existing carriers in the public interest." Yellow Cab Co. of Pittsburgh v. Pa. P.U.C., 50 Pa. Commonwealth Ct. 448 (1980). (p.22)

Judge Christianson also noted:

"I do not want outmoded regulatory patterns (traditionally, balkanization of Pennsylvania had to be accepted by shippers as a price of regulation) to hamper Pennsylvania commerce and put Pennsylvania shippers at a disadvantage with respect to interstate shippers or shippers operating in other states." (p.18)

In Application of Richard L. Kinard, Docket No. A. 95829, F.1, Am-D (Order entered October 22, 1984), the Commission stated:

We considered monopoly regulation to inhibit the industry's operational and marketing flexibility, propagate inefficient allocation of economic resources, and, with the increasing divergence of Federal and State regulation, cause additional regulatory burdens for motor carriers. In view of these factors, we proposed to encourage competition through the proposed rulemaking by excluding the "inadequacy" evidentiary standard previously adhered to.

3. APPROVAL OF THE APPLICATION WILL BE CONSISTENT WITH THE PUBLIC INTEREST AND THE POLICY DECLARED IN SECTION 2501 OF THE ACT.

The supporting shipper, Lehigh Cement, found itself in a crisis situation on April 30, 1985 when it learned that its contract carrier, Cement Express, was refusing business for the next day, May 1, and that it was ceasing all operations as of that date. (74) This was in direct contradiction to a letter received by Lehigh Cement on April 29, 1985 from Cement Express indicating that Cement Express would comply with the 90-day termination notice set forth in its contract with Lehigh Cement and that service would not be terminated until July 25, 1985. (Ex. 10; 72-73) Lehigh Cement never contemplated that Cement Express would cease providing service on less than 90 days' notice because of the contract between Lehigh Cement and Cement Express, which required such notice. (72)

Upon learning on April 30 that Cement Express was in fact not going to be providing service beyond April 30, Lehigh Cement urged the applicant with whom it had been negotiating to permanently replace Cement Express, to file an application for emergency temporary authority with the Commission. In fact,

the applicant did file such an application and Lehigh Cement supported that application by discussing the emergency with the Commission staff and by delivering a letter of support to the Commission.

The Commission, recognizing that Lehigh Cement was confronted with an emergency, granted emergency temporary authority to the applicant by Order entered May 3, 1985. In granting emergency temporary authority, the Commission stated:

The emergency situation arises through a discontinuance of service of Cement Express, Inc., which currently holds contract carrier authority to render service to West Manchester Township facility of Lehigh Portland Cement. Lehigh Portland Cement has attempted to obtain service from existing carriers but they are unable to provide equipment on such short notice. With the discontinuance of service of Cement Express and the inability of existing carriers to provide equipment, Lehigh Portland's West Manchester facility is left without any transportation service.

We find that an emergency situation exists and that approval of the ETA is in the public interest... (emphasis added)

The Commission subsequently made a similar determination that the granting of long-term temporary authority was also in the public interest. By Tentative Decision entered July 29, 1985, the Commission stated:

The application for temporary authority is supported by Lehigh Portland Cement Company (Lehigh), which sets forth in its letter of support (also submitted in support of the application for emergency temporary authority) that its house carrier, Cement Express, Inc., had terminated service on one day's notice, effective May 1, 1985. Lehigh stated that it had attempted to acquire service from a number of currently certificated carriers, but was

unsuccessful. By our order adopted May 3, 1985, we found that the applicant had demonstrated that an emergency situation existed and that a grant of emergency temporary authority was in the public interest. The applicant, Bulk, Inc., now seeks a grant of temporary authority that would authorize it to render service pending disposition of its permanent authority application.

Although there have been protests filed to the granting of temporary authority to the applicant, we believe that the record demonstrates that a grant of temporary authority is in the public interest. None of the protestants have been providing any transportation for Lehigh Portland Cement Company, from the facility involved, therefore, approval of the instant application will not result in any diversion of traffic from the protestants. (emphasis added)

The protestant in this case filed Exceptions to the Tentative Decision of the Commission entered July 29, 1985, granting long-term temporary authority to the applicant. These Exceptions were denied by the Commission by Order entered October 8, 1985.

The granting of permanent authority is in the public interest just as it was in the public interest to grant emergency temporary authority and long-term temporary authority.

The transportation needs of the shipper in this case are highly specialized and the transportation is truly contract carriage. The following facts are pertinent:

1. The shipper produces "white cement" at its York County facility. "White cement" is a highly specialized product which is manufactured at only three plants in the United States, of which the shipper owns two. (59)

2. The transportation of "white cement" requires specialized equipment used only for transporting "white cement". It is totally unsatisfactory insofar as the shipper is concerned, for a carrier to utilize the same equipment to transport its "white cement" that it utilizes to transport gray cement, even if the equipment would be cleaned after transporting the gray cement. Any contamination of "white cement" with gray cement or any other colored products is absolutely unacceptable. (63)

3. The shipper requires that it have dedicated to its exclusive use 21 tractors and 26 trailers at its York County facility. (58)

4. The shipper has never used a common carrier for its tank movements from its York County facility to points in Pennsylvania. Only contract carriers, i.e. Cement Express and the applicant, have been used. (66)

5. The protestant, MTS, has never even solicited the business of the shipper, either at its York County facility or at any of its other facilities. (85)

6. The shipper did not lose a single order as a result of the transition of service from Cement Express to the applicant. (105)

In view of the above facts and in view of the Commission's prior determinations that the granting of emergency temporary authority and long-term temporary authority were in the public interest, there can be no serious dispute but that the granting of permanent authority is also in the public interest.

The granting of this application would not be contrary to the public interest as a result of "endangering or impairing" the operations of the protestant. The protestant has admittedly never handled a single shipment for the supporting shipper. In fact, the protestant has never even attempted to solicit the supporting shipper's business. Protestant's explanation for its failure to ever attempt to do business with the supporting shipper was outrageous and clearly a violation of public policy. The explanation was that the protestant and Cement Express "made a deal" at a PUC hearing that MTS would not "raid" the work of Cement Express at this facility. (117-119) Not surprisingly, this agreement was not brought to the attention of the PUC. (148) It is submitted by the applicant that such an agreement is clearly contrary to public policy and the Commission should consider opening an investigation to determine whether the protestant has made it a practice of making other such "agreements" with its competitors. In any event, it is obvious that the operations of the protestant will not be endangered or impaired to such an extent that, on balance, it would be contrary to the public interest where the protestant has never handled any shipments for the supporting shipper.

For all of the reasons set forth above, it is respectfully submitted that the approval of this application will be consistent with the public interest.

4. APPLICANT IS FIT, WILLING AND ABLE TO PROVIDE THE PROPOSED SERVICE.

Applicant is fit, willing and able to provide the proposed service. Applicant was able to fill the void in service that was created by the cessation of service on one day's notice by Cement Express. In order to provide the service on such short notice, applicant had to initially dedicate 12 tractors and 15 trailers to the exclusive use of the supporting shipper at its York County facility. Since then, additional equipment has been added to bring the number of units of equipment dedicated to the exclusive use of the supporting shipper to 21 tractors and 26 trailers. (16-17)

The supporting shipper testified that it did not lose a single order as a result of the transition of service from Cement Express to the applicant. (105)

Applicant was able to provide this service on such short notice because of the financial stability of applicant's parent, Leasco., Inc., which provided an immediate infusion of \$100,000 cash to applicant. The applicant has not had any financial problems in getting this operation started and does not believe that it will have any financial problems in the future. (26-27)

Applicant maintains a terminal approximately a quarter mile from the facility of the supporting shipper, which makes it very easy to dispatch equipment to the supporting shipper when it is required. (20)

As a result of providing service to the supporting shipper under the grants of emergency temporary authority and regular

temporary authority, applicant is familiar with the transportation needs of the supporting shipper and is able to meet those needs. (29)

Applicant has effective safety and maintenance programs at its York County facility. (23-24)

Applicant's communications system is tied into the supporting shipper's office, giving it direct hookup to the supporting shipper's loading facility. (24)

Applicant is in compliance with PUC regulations and does not have any pending PUC complaints against it. (28)

Applicant has clearly demonstrated that it is fit, willing and able to provide the proposed service to the supporting shipper.

V. FINDINGS OF FACT AND CONCLUSIONS

The applicant respectfully submits that the Commission should find and conclude as follows:

Findings of Fact

1. Applicant does not presently hold any permanent operating authority from this Commission.
2. Applicant was granted emergency temporary authority by Order entered May 3, 1985 to provide the same service sought by this application.
3. Applicant was granted temporary authority by Tentative Decision entered July 29, 1985 to provide the same service sought by this application.
4. Applicant submitted a traffic study indicating that it handled 35 shipments from the supporting shipper's York County facility to points in Pennsylvania during the respective period from July 1 through July 15, 1985, involving 16 different destination points.
5. Applicant dedicates 21 tractors and 26 trailers to the exclusive use of the supporting shipper at its York County facility.
6. Applicant provides both tank trailers (17) and flatbed trailers (9) to the supporting shipper at its York County facility.
7. Applicant has a terminal in York County approximately a quarter mile from the facility of the supporting shipper.

8. Applicant has effective safety and maintenance programs at its York County facility.

9. Applicant's communication system is tied into the supporting shipper's office, giving it direct hookup to the supporting shipper's loading facility.

10. Applicant is financially fit to provide the requested service.

11. Applicant is in compliance with the PUC regulations and there are no pending PUC complaints against the applicant.

12. The supporting shipper is Lehigh Portland Cement Company, which has, as relevant to this application, facilities located in West Manchester Township, York County.

13. The supporting shipper produces "white cement" at its York County facility.

14. "White cement" is a highly specialized product which must be transported in equipment dedicated exclusively to the transportation of "white cement."

15. The supporting shipper requires the services of a contract carrier that will dedicate equipment to its exclusive use.

16. During the past five years, the supporting shipper has not used any carriers for its tank movements from its York County facility except for Cement Express, its previous contract carrier, and the applicant.

17. The supporting shipper always believed that it would have at least 90 days to find a new carrier if Cement Express

discontinued providing service to it because of a 90-day termination clause in its contract with Cement Express.

18. The supporting shipper learned on April 30, 1985 that Cement Express was terminating service to the supporting shipper effective the next day, May 1, 1985.

19. The supporting shipper had discussions with a number of carriers concerning providing service to it on short notice but these carriers were unable to provide service to the supporting shipper.

20. The applicant was able to provide service to the supporting shipper on short notice, effective May 3, 1985, and the supporting shipper did not lose a single order as a result of the transition of service from Cement Express to the applicant.

21. The protestant has four terminals, three of which are located in Pennsylvania and one in New Jersey.

22. The protestant employs in excess of 175 drivers, in excess of 25 mechanics and approximately 25 clerical employees.

23. The protestant has in excess of 175 tractors, in excess of 200 tank trailers and in excess of 75 flatbed trailers.

24. The protestant has common and contract carrier authority from the Interstate Commerce Commission and common carrier authority from this Commission.

25. The protestant has authority to provide service to the supporting shipper from its York County facility to points in Pennsylvania.

26. The protestant has never transported any cement anywhere for the supporting shipper and specifically has never transported any cement from the supporting shipper's York County facility.

27. The protestant has never solicited the business of the supporting shipper anywhere and specifically has never solicited the business of the supporting shipper at its York County facility.

28. The protestant did contact the supporting shipper in late April, 1985 but was advised by the supporting shipper that it had a tentative agreement with another carrier.

29. The protestant never solicited the business of the supporting shipper at its York County facility because of a "gentleman's agreement" between the protestant and Cement Express in 1967, in which protestant agreed not to raid the business of Cement Express at the involved facility.

Conclusions of Law

1. This Commission has jurisdiction over the subject matter and the parties in this proceeding.

2. The application is properly before the Commission.

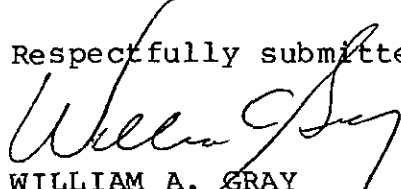
3. The applicant has demonstrated that it is fit, willing and able to properly perform the service sought by this application.

4. The applicant has demonstrated that the granting of this application will be consistent with the public interest and the policy declared in Section 2501 of the Act.

VI. CONCLUSION

The evidence in this proceeding has shown that applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle and that the granting of this application will be consistent with the public interest. The application should be granted.

Respectfully submitted,


WILLIAM A. GRAY
Attorney for BULK, INC.,
Applicant

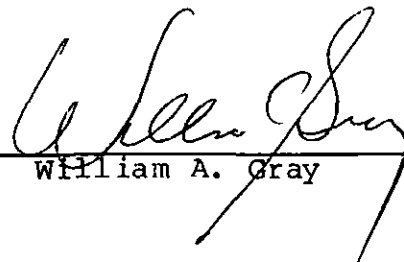
VUONO, LAVELLE & GRAY
2310 Grant Building
Pittsburgh, PA 15219
(412) 471-1800

Due Date: November 18, 1985

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing upon all parties of record in accordance with the Rules of Practice.

Dated at Pittsburgh, Pa. this 15th day of November, 1985.



William A. Gray

OR

LAW OFFICES
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November 15, 1985

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Jerry Rich, Secretary
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P.O. Box 3265
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RECEIVED

NOV 18 1985

Re: Docket No. A-00106205
Application of Bulk, Inc. Public Utility Commission

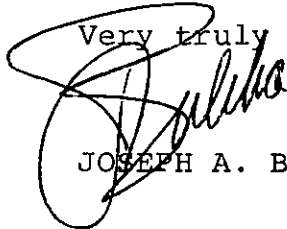
Dear Mr. Rich:

Enclosed for filing with your office please find the original and nine copies of the Brief of Protestant, Materials Transport Service, Inc.

By copy of this letter, I am serving duplicate true and correct copies of the Brief upon Administrative Law Judge John Clements and William Gray, attorney for applicant.

If you have any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,



JOSEPH A. BUBBA

DO NOT
FOLDER

JAB:mmd

Enclosures

cc: The Honorable John Clements
William Gray, Esquire
Mr. Ronald Taylor
Mr. Lou Chiesa

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

CONFIDENTIAL

IN RE: BULK, INC.,) Docket No. A-00106205
 Right to begin to transport)
 cement for Lehigh Portland)
 Cement Company from its)
 facilities located in the)
 Township of West Manchester,)
 York County, to points in)
 Pennsylvania and vice versa.)

RECEIVED

NOV 18 1985

SECRETARY
Public Utility Commission

BRIEF OF PROTESTANT
 MATERIALS TRANSPORT SERVICE, INC.

DOCUMENT
FOLDER

Joseph A. Bubba
Attorney for Protestant
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DOCUMENTED
NOV 19 1985

DATED: November 18, 1985

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I. STATEMENT OF FACTS

Bulk, Inc. ("Bulk" or "Applicant"), a Nebraska corporation (Tr. at 5), has placed before the Public Utility Commission ("PUC" or the "Commission") its application for permanent authority as a contract carrier for Lehigh Portland Cement Company's ("Lehigh Portland") West Manchester Township, York County plant. Bulk currently holds neither ICC rights nor PUC rights except for the Temporary Authority ("TA") and Emergency Temporary Authority ("ETA") rights granted in this case. (Tr. at 34). The general manager of Bulk, Inc., is Jerome Mulroy, who previously had served as President of Cement Express, Inc. ("Cement Express") (Tr. at 37), and, in fact, the equipment used by Bulk to serve the Lehigh Portland plant had been in part leased, and later purchased, from Cement Express. (Tr. at 33). This application for permanent authority stems from the termination of service by Lehigh Portland's house carrier, Cement Express.

Cement Express had notified Lehigh Portland by letter dated April 1, 1985, that it intended to terminate service as of May 1, 1985 (Tr. at 69), although Lehigh Portland has stated it did not receive this letter until April 22, 1985 (Tr. at 69). Lee Cummings, President of Lehigh Portland, testified that on April 23, 1985 he had contacted Cement Express and secured their agreement to provide service for 90 more days, until July 25, 1985. (Tr. at 71-72). The

very next day, April 24, 1985, MTS had contacted Lehigh Portland to inquire about the possibility of providing service to Lehigh Portland, (Tr. at 135-36) and Lee Cummings was apprised of this fact. (Tr. at 97). At the same time, on or about April 25, 1985, it was Lee Cummings' testimony that an agreement had been reached with Bulk to replace Cement Express (Tr. at 109), even though Bulk had neither ICC nor PUC authority of any type and even though Bulk had never transported any type of commodity at all, let alone any type of cement. (Tr. at 34). Subsequently, on April 29, 1985, MTS' President, Ronald Taylor, telephoned Lehigh Portland to ask about providing service to Lehigh Portland, but was told by Lehigh Portland President, Lee Cummings, only that an agreement had already been reached with another carrier and that Lehigh Portland was not interested in MTS' services (Tr. at 138-39). Even though MTS had already been in contact with Lehigh Portland on April 24, 1985 and even though it was Lee Cummings' testimony that Lehigh Portland did not even learn until April 30, 1985 that Cement Express actually did not intend to cease accepting shipments on May 1, 1985 (Tr. at 74) Lee Cummings, incredibly, described MTS' contacts concerning the termination of Cement Express' service as "eleventh hour". (Tr. at 86). In fact, Mr. Cummings later admitted that the real reason Lehigh Portland did not contact MTS to provide service was simply because "I do not really have a warm spot in my heart for MTS" (Tr. at 98).

Indeed, at no time did Lehigh Portland contact MTS, even though MTS was located only 4 or 5 miles from Lehigh Portland's Manchester County plant (Tr. at 98), even though MTS had the necessary equipment and was willing and able to fulfill Lehigh Portland's need (Tr. at 129-30, 140-41), and even though MTS already held both contract and common carrier ICC rights as well as PUC common carrier rights that would have enabled MTS to serve Lehigh Portland (Tr. at 123-26). Moreover, MTS was well aware of the special handling needs of Lehigh Portland's white cement, (Tr. at 141) and was willing and able to employ their skill and experience in transporting white cement just as did with other commodities which had to be protected from contamination such as flour, resins, and much more critical substances (Tr. at 140).

On or about May 3, 1985, Bulk, Inc. contacted the Public Utility Commission by telephone to request emergency temporary authority, which was granted by the Commission on that date. Subsequently, on or about May 6, 1985, Bulk filed its applications for temporary authority and the application for permanent authority which is the subject of the present protest:

To transport, as a contract carrier, cement, for Lehigh Portland Cement Co., from its facilities in West Manchester Township, York County, to points in Pennsylvania and vice versa.

Protests to the application were filed by C. L. Feather, Inc., Schwerman Trucking Co. and Materials Transport Service, Inc., ("MTS"). On July 29, 1985, the Commission entered an order granting Bulk the temporary authority it had requested.¹ Meanwhile, the Protest of Schwerman Trucking Company had been withdrawn by letter dated July 25, 1985 (Tr. at 3). Subsequently, on September 26, 1985, the Protest of C. L. Feather, Inc. was withdrawn after a restrictive amendment was adopted by Bulk in their application for permanent authority (Tr. at 3-4).

This matter came to be heard on Thursday, September 26, 1985, before Administrative Law Judge John Clements. Upon termination of that hearing, briefs were requested and a briefing schedule was agreed upon. This brief is submitted on behalf of Protestant, Materials Transport Service, and in support of its position that the application of Bulk, Inc., for permanent contract carrier authority must, as a matter of law, be denied.

¹The Commission based its opinion to grant TA in part upon allegations of Lehigh Portland that contacts with currently certificated carriers had proven unsuccessful in obtaining service. This allegation however is plainly in error since Lehigh Portland did not contact Protestant MTS, only 4 miles away, who had equipment suitable for Applicant's needs.

II. QUESTIONS PRESENTED

(A) Whether Materials Transport Service is Ready, Willing and Able to Provide Adequate and Satisfactory Service Within the Scope of the Present Application?

Answer: Yes.

(B) Is the Grant of Contract Carrier Authority to Applicant Bulk, Inc., Contrary to the Public Interest?

Answer: Yes.

III. DISCUSSION

Initially, it should be noted that in considering an application for permanent contract carrier authority where an already existing common carrier is ready, willing and able to provide the services needed by the supporting shipper, it has been the long-standing policy of the legislature in Pennsylvania to "recognize and preserve the inherent advantages of, and foster sound economic conditions in . . . and among [common] carriers and forwarders in the public interest." Formerly, 66 Pa. C.S.A. Section 2501, currently, Purdon's Pocket Part -- Official Comment - 1978 to Section 2501. Thus the legislature has clearly recognized a preference for common carriers and provided that the Commonwealth must regulate contract carriers for the very reason that they often challenge this legislative mandate to preserve the benefits of common carriers.

In fact, the very statutory section which sets forth the standard for the issuance of contract authority, recognizes, inter alia, that the granting of contract authority is dependent upon a finding that the service proposed by the permit will be consistent with the legislative policy declared in Section 2501. 66 Pa. C.S.A. Section 2503(b). As a matter of law, therefore, applicant's permit to provide by contract carriage the same service that MTS has indicated

it has the necessary equipment and experience, and is ready and willing, to provide, is contrary to the expressed public policy of this Commonwealth.

This legislative intent has long been recognized by the courts of Pennsylvania. As the Court in Wiley v. Pennsylvania Public Utility Commission, 186 Pa.Super. 309, 142 A.2d 763 (1958) framed the issue: "The Commission in disposing of an application for a contract carrier permit, must consider existing common carrier service available to the shipper and, if that service is found to be 'satisfactory and adequate,' whether the interjection of the contract carrier in competition with the satisfactory and adequate common carrier service would be detrimental to the public interest . . ." 186 Pa.Super. at 318, 142 A.2d at 767 (emphasis in original). Moreover, the Wiley case is by no means an anomaly, but rather is recognized as setting forth the legal standard in this Commonwealth for contract carrier authority where common carrier authority already exists. See, e.g., Brink's, Inc. v. Pennsylvania Public Utility Commission, 56 Pa.Cmwlth. 371, 424 A.2d 1010 (1981) and Coastal Tank Lines, Inc. v. Pennsylvania Public Utility Commission, 189 Pa.Super. 53, 149 A.2d 581 (1959).

A. Materials Transport Service's Existing Common Carrier Rights Provide Satisfactory and Adequate Common Carrier Service.

Applicant, Bulk has made many reference during the hearing and throughout its quest to obtain PUC authority

to the fact that Lehigh Portland's white cement product requires specialized handling and Bulk seems to suggest it is the only carrier qualified to carry this white cement. However, it is difficult to understand how, in light of the facts, any such perception could be entertained.

In fact, while the shipper, Lehigh Portland, has supported Bulk, in its attempts to obtain P.U.C. Authority, Lehigh Portland has admitted that it did not even contact MTS to inquire about MTS' willingness to handle white cement only because Lehigh Portland "did not have a warm place in [its] heart for MTS". (Tr. at 98). Moreover, it is admitted that Bulk was inactive prior to hauling the first load of cement in May of 1985 for Lehigh Portland and had in fact never hauled any cement at all before that date (Tr. at 47). Bulk's general manager further testified that "as far as it was an inactive company, it couldn't have any expertise in anything for that matter." (Tr. at 47). Therefore, the decision to support Bulk, Inc., was clearly not based on any rational finding that the existing common carrier rights were not satisfactory. Rather, Bulk's application for contract carrier authority rights was based simply on a desire for a different carrier. As the court in Wiley, supra., stated: "Unquestionably the standard by which the Commission must act in determining whether a contract carrier applicant should be granted a permit is greater under the

law than the mere determination of the desire of a particular shipper to have the service." 186 Pa.Super. at 317.

In any event, the record demonstrates that MTS does have satisfactory and adequate service for Lehigh Portland's white cement. First and foremost, MTS is an experienced carrier. It is true that MTS has never carried white cement in bulk, however, that is due to the fact that there are only three white cement manufacturers in the entire country. It is a commodity rarely seen, it is not a commodity that Bulk has been able to prove MTS is unable to transport.

This is a little like a baseball manager with Mickey Mantle, Ted Williams and Roberto Clemente on his bench, choosing to pinch-hit a rookie because he wants to see a triple and Mantle, Williams and Clemente only have singles, doubles and homeruns between them. It is not the fact that they are incapable of hitting triples (in fact they are more capable) it is that triples occur less frequently.

MTS is very experienced with the transportation of various materials, such as resins and flour, which require the same or even greater care to prevent contamination as white cement. Mr. Ronald Taylor, President of MTS, stated:

Q. Do you know what's required in the industry to provide transportation services for white cement?

A. Yes, because we know what to provide for flour, for plastic pellets, for resins, and much more critical substances.

Q. That is that they can't be contaminate?

A. Yes. (Tr. at 140).

. . .

Q. What would you have done to get that fleet ready for white cement in bulk?

A. Basically, put tires on the trailers, clean the whole inside, change the pads, drop the pipes, clean the valves, and then it would be ready. (Tr. at 141).

Moreover, as the oft-cited opinion of the court in Wiley, supra., makes clear ". . . it is fundamental that the Commission consider the existing common carrier service available to the shipper who desires the services of a contract carrier . . ." 186 Pa.Super. at 318 (emphasis added). The standard the Court has adopted does not consider common carrier services utilized by the shipper, but only service available. Thus the fact that MTS has in fact not been utilized by Lehigh Portland in the past for white cement transport is of no moment. The crucial question is of MTS' availability for service.

Furthermore, Lehigh Portland asserted that not only did a carrier need specialized knowledge in handling

white cement, but due to the possibility of contamination from switching tank trucks from white cement to other commodities such as grey cement and back again, as well as the difficulty in cleaning, the tank trucks used to service Lehigh Portland needed to be dedicated to Lehigh Portland's exclusive use. (Tr. at 63). Again, however, it is clear that MTS has had available since the Spring of 1985 at least twenty-five trailers which have been idle. (Tr. at 129-30). MTS would have little difficulty segregating a portion of its bulk fleet for use in the carriage of white cement.

It must be kept in mind that Bulk seeks to transport white cement in bulk and bags. While MTS contends that it is able to transport white cement in bulk even Bulk admits that the very same flat-bed equipment can be utilized to transport white or grey cement. (Tr. at 16-18; 50-51).

MTS has stated that it is and was at the time the ETA and TA were sought ready, willing and able to provide service to Lehigh Portland. That fact has not been rebutted. The record is clear, that MTS under its existing common carrier authority is able to provide adequate and satisfactory transportation of white cement from Lehigh Portland's West Manchester Township plant and, in light of the Commonwealth legislature's expressed preference for common carrier, the application of Bulk, Inc., for permanent authority as a contract carrier must be denied.

B. The Interjection of Bulk, Inc. as a Contract Carrier in Competition with the Satisfactory and Adequate Common Carrier Service of MTS Would Be Detrimental to the Public Interest.

Not only would the grant of permanent contract authority to Bulk fly in the face of already existing adequate and satisfactory common carrier authority, but it would be contrary to the public interest, and therefore Bulk's application should be denied. Bulk's application for permanent contract authority is contrary to the public interest in several distinct ways each of which must be dealt with in turn.

1. The Granting to Bulk, Inc., of Permanent Contract Authority Will Lead Only to "Harmful Competition" and Will Be Contrary to the Public Interest.

In considering an application for contract carrier authority where common carrier authority already exists, contract carriers are regulated in large part to prevent harmful competition to common carriers. Brink's Inc., supra, A.2d at 1013. In Brink's the court defined "harmful competition" as "competition with a common carrier where there is insufficient need for additional service to warrant a grant of authority to another common carrier or a contract carrier", A.2d at 1012, and found that the potential of harmful competition is a clear basis upon which to deny a permit application.

In this case, the evidence of record has demonstrated just such a lack of need for additional authority. First, while only twenty years ago the Lehigh Valley had 14 cement

mills, today there are less than half that number (Tr. at 127, 131), which reflects a general trend in the decrease of cement production (Tr. at 127). At the same time, as Mr. Ronald Taylor testified at the hearing, there has been an increase in the number of carriers in the cement industry (Tr. at 128). As a result, while in 1970 MTS had no part of its fleet idle (Tr. at 128), at the present time at least 25 trailers capable of transporting cement and cement products are completely idle (Tr. at 130). Furthermore, even though MTS has successfully secured ICC and PUC authority for other commodities to compensate for this downturn in the cement industry (Tr. at 132-33), MTS has had to reduce its number of drivers from 200-240 to the present level of 160-170 and the number of mechanics from 45 to 25. In fact, the number of current loads just for the first six months of 1985 was down by 20,000 over the same period in 1984 (Tr. at 130-31). To grant contract carrier authority when MTS has the equipment to meet this specialized need of Lehigh Portland (Tr. at 133), when MTS has drivers (who are currently laid off) who would be able to operate this equipment, when MTS has the experience to handle Lehigh Portland's white cement (Tr. at 140) and when the market for cement hauling has

decreased² while the number of shippers has increased (Tr. at 133) would lead to the very type of "harmful competition" that the Brink's court was considering, and clearly be against the public interest.

2. Contract Carrier Authority for Bulk, Inc. Would Also Not Be in the Public Interest Since Such Authority Would Require Further Reduction in Special Services Provided to Shippers by MTS.

MTS over the years has provided special services to cement shippers such as providing loaders and pumpers for cement mills, as well as interplant transportation to "haul and pump off pneumatically raw material." (Tr. at 142-43). Moreover, MTS would provide "off-hours loading by jockeys and shuttlemen" (Tr. at 142) and move clinger and coal between plants for customers (Tr. at 143). However, due to the decrease in the cement industry over the past

²While Lee Cummings, President of Lehigh Portland Cement Co., testified on redirect examination at the Hearing on the permanent contract carrier application that the cement industry was having a "banner year", Cummings went on to testify that this was because of imports of cement from Indiana to North Carolina or Alabama" (Tr. at 171) (emphasis added). That other areas of the country may be producing large amounts of cement may be true, but here we are concerned with authority to transport cement in Pennsylvania, and on this point Mr. Cummings admitted on re-cross that he knew that Martin Marietta closed a plant in Northampton, Universal Atlas closed a plant in Northampton, Coplay Cement had closed a plant and National Cement Company had closed a plant (Tr. at 172-73). Mr. Cummings added that "It's a fundamental economic problem; nothing else." (Tr. at 173).

twenty years, these services have been reduced, and such services provided in the public interest and in the interest of the cement industry will have to be further reduced or eliminated with the introduction of contract authority in an area already adequately able to be served by existing common carrier authority. The testimony of Ronald Taylor, President of MTS:

BY MR. BUBBA:

Q. Does MTS provide specialized service to the public?

A. Yes.

Q. Are they currently decreasing those services?

A. Yes.

. . .

Q. And will that trend continue if you are not given the opportunity to transport out of Lehigh Portland?

A. That continues to be happening and has continued to happen along with what has been going on in the industry, and in this case, I would say.

(Tr. at 146).

3. Permanent Contract Authority for Bulk, Inc.

Would Be Contrary to the Public Interest of Promoting Existing Common Carrier Service.

As previously pointed out, the longstanding public policy of this Commonwealth has been in favor of and recognized the inherent advantages of common carriers. 66 Pa. C.S.A. Section 2501. In fact, the applicant for contract authority with the PUC carries the burden of showing that the issuance of the permit would be in the public interest. Wiley v. Pennsylvania Public Utilities Commission, supra, 186 Pa.Super. at 322. In the instant case, applicant Bulk did not and indeed could not respond to the factual record established by MTS at the Hearing that MTS has suffered losses from the decrease in cement transportation, and that, as a result, twenty-five trailers capable of hauling white cement are idle, at least twenty drivers are currently laid off, the number of drivers employed by MTS has decreased from a high of 240 to the present level of approximately 165, the number of mechanics employed by MTS has decreased from 45 to 25, and the number of cement loads for the first six months of 1985 is down 20,000 from the number of loads during the same period in 1984. Furthermore, the loss of additional opportunities for hauling cement -- and the fact is that MTS is capable and willing to haul white cement with equipment dedicated to Lehigh Portland's use -- can only further contribute to the reduction in the currently existing common carrier authority.

The record testimony of Ronald Taylor, President of MTS, was as follows:

BY MR. BUBBA:

Q. What would be the effect on your business situation if you were able to provide service to Lehigh Portland?

A. Well, obviously it would probably increase our revenue and make us a little healthier.

Q. Are you constantly seeking additional cement customers?

A. Yes, we are.

Q. Are you constantly seeking additional work from your customers?

A. Yes, we are.

Q. If you are not able to get the additional work or get the additional customers, what impact does that have on your business?

A. It lessens our revenue and ability to work effectively. We have to make cutbacks.

(Tr. at 141-42.)

As a result, the "inherent advantages" of common carrier authority will be further undermined contrary to the policy set forth by the Pennsylvania legislature, and Applicant has not carried its burden of demonstrating anything to the contrary.

IV. CONCLUSION

For all the foregoing reasons, the application of Bulk, Inc., for permanent contract carrier authority to transport cement for Lehigh Portland Cement Company from its facilities located in the Township of West Manchester, York County, to points in Pennsylvania and vice versa, must, as a matter of law, be denied.

Respectfully submitted,

BUTZ, HUDDERS, TALLMAN,
STEVENS & JOHNSON

By: 

Joseph A. Bubba
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Materials Transport Service, Inc.

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CERTIFICATE OF SERVICE

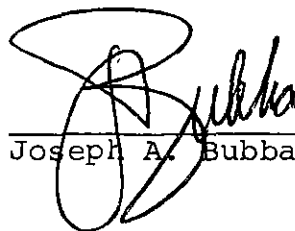
I, JOSEPH A. BUBBA, of the law firm of Butz, Hudders, Tallman, Stevens & Johnson, hereby certify that a true and correct copy of the foregoing Brief of Protestant was served upon:

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

William Gray, Esquire
2310 Grant Building
Pittsburgh, PA 15219

Administrative Law Judge John Clements
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

at the addresses shown herein, via first class mail, postage prepaid on November 15, 1985.



Joseph A. Bubba

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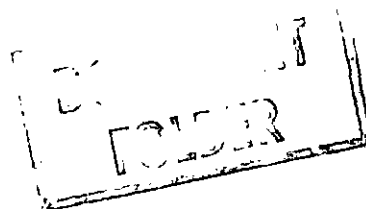
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November 27, 1985



Re: Bulk, Inc.
Docket No. A-00106205
Our File 3116-1

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

SECRETARY'S OFFICE
Public Utility Commission

Dear Mr. Rich:

We enclose for filing with the Commission the signed original and nine (9) copies of the Reply Brief of Applicant, Bulk, Inc.

A copy of the Reply Brief has been sent to Administrative Law Judge John K. Clements and to all parties of record.

Please acknowledge receipt and filing of the enclosed Reply Brief on the duplicate copy of this letter of transmittal and return it to the undersigned in the self-addressed, stamped envelope provided.

Very truly yours,

VUONO, LAVELLE & GRAY

William A. Gray

cas

Enclosures

cc: The Honorable John K. Clements (w/enc.)
Joseph A. Bubba, Esq. (w/enc.)
Bulk, Inc.

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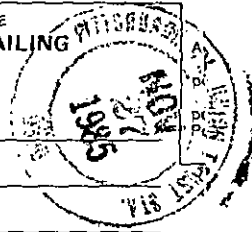
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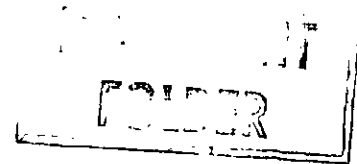
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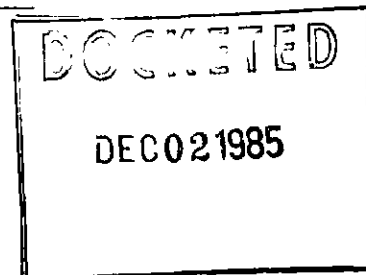
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Public Utility Commission

DOCKET NO. A-00106205

BULK, INC.



REPLY BRIEF OF APPLICANT



WILLIAM A. GRAY, ESQ.
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Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO. A-00106205

BULK, INC. \

REPLY BRIEF OF APPLICANT

I. STATEMENT OF THE CASE

By this application, as amended, Bulk, Inc. (Bulk or applicant) seeks authority to operate as a contract carrier by motor vehicle, transporting:

Cement, for Lehigh Portland Cement Company, from its facilities located in the township of West Manchester, York County, to points in Pennsylvania, and vice versa.

Subject to the following condition:

That no right, power or privilege is granted to transport cement in bulk and/or by the use of special equipment, to or from the facilities of New Enterprise Stone & Lime Co., except for the transportation of white cement to the facilities of New Enterprise Stone & Lime Co. in the borough of New Holland, Lancaster County.

A hearing was held in this case in Pittsburgh, PA on September 26, 1985 before Administrative Law Judge John K. Clements.

The only protestant that presented testimony in opposition to the application was Materials Transport Service, Inc. (MTS or protestant).

The Commission granted emergency temporary authority to the applicant by Order entered May 3, 1985 to provide the following service:

To transport, as a contract carrier, cement, for Lehigh Portland Cement Company, from its facility in West Manchester Township, York County, to points in Pennsylvania, and vice versa.

By Tentative Decision entered July 29, 1985, the Commission granted regular temporary authority to applicant to provide the same service as it had authorized applicant to provide under the above grant of emergency temporary authority. Exceptions were filed to this Tentative Decision by MTS. By Order entered October 8, 1985, the Commission denied the Exceptions filed by MTS to this Tentative Decision.

Main Briefs have been filed by the applicant and by the protestant.

This Reply Brief is filed on behalf of the applicant to respond to certain legal arguments and factual averments raised in the protestant's Main Brief.

II. APPLICANT IS FIT, WILLING AND ABLE
PROPERLY TO PERFORM THE SERVICE OF A CONTRACT
CARRIER BY MOTOR VEHICLE

The granting of contract carrier authority is governed by 66 Pa. C.S.A. §2503(b), which provides, inter alia:

A permit shall be issued by the Commission to any qualified applicant therefor authorizing in whole or in part the service covered by the application, if it appears from the application, or from any hearing held thereon, that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful orders or regulations of the Commission thereunder....

Not surprisingly, protestant in its Main Brief has not attempted to raise the issue of fitness. There is no question but that applicant meets the fitness requirements set forth in 66 Pa. C.S.A. §2503(b). This issue is discussed in more detail in applicant's Main Brief at pages 29 and 30.

FILE

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