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

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 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.

Protestant MTS has raised several matters which must be separately addressed in connection with this issue.

A. EXISTING COMMON CARRIER SERVICE IS NOT "SATISFACTORY AND ADEQUATE".

In Coastal Tank Lines, Inc. v. Pennsylvania Public Utility Commission, 189 Pa. Super. 53, 57, 149 A.2d 581, 583 (1959), the Superior Court stated:

> The commission in disposing of an application for a contract carrier permit must consider existing common carrier service applicable 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...." Wiley v. Pennsylvania Public Utility Commission, 186 Pa. Super. 309, 318, 142 A.2d 763, 767 (1958)

The protestant first asks the Commission to find that its service is "satisfactory and adequate". There is no legitimate factual basis on which to make such a finding. In fact, the

protestant has admittedly never transported a single shipment of "white cement" in a tank vehicle. All of the supporting shipper's shipments in this case in tank vehicles involves "white cement", which cannot under any circumstances be contaminated through the use of equipment which is also used to transport other commodities, including gray cement. The protestant asks the Commission to assume that it can provide "satisfactory and adequate" service in connection with the transportation of "white cement", when in fact it has never transported "white cement" before. The protestant asks the Commission to make this assumption because the protestant has transported other commodities which the protestant contends requires specialized service. The Commission should reject the protestant's argument that it "would be able" to provide "satisfactory and adequate" service to the supporting shipper if it were only given the chance, particularly where, as here, the protestant never made any effort to secure the supporting shipper's business. The fact of the matter is that the protestant has come up with one excuse after the other for failing to ever solicit the supporting shipper's business and has now come forward after the supporting shipper had made tentative arrangements with another carrier, i.e. the applicant, and said that it would like to provide service to the supporting shipper. One must surely question the protestant's present motives when it has utterly failed to ever solicit either the interstate or intrastate business of the supporting shipper at this facility which

is only four or five miles from the protestant's facilities. The "excuses" offered by the protestant, i.e. that (1) it had entered into a "gentleman's agreement" with Cement Express not to solicit the intrastate business and (2) it did not feel that it would be able to secure the interstate business since that business was being handled by another company, should be rejected by the Commission as unacceptable excuses.

The protestant attempts to explain away its failure to ever transport "white cement" at page 9 of its Main Brief, stating:

> It is true that MTS has never carried white cement in bulk, however, that it 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.

The protestant seems to be saying that it has not had the "opportunity" to handle "white cement", which has in fact resulted because of the protestant's utter failure to try to solicit the supporting shipper's business. Apparently, the protestant wants opportunity to find it rather than it finding opportunity.

The protestant states at page 10 of its Main Brief as follows:

> 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.

If the Commission were to accept the argument advanced by MTS, contract carrier applications would <u>never</u> be granted if there

was common carrier service available. The Commission has rejected this argument previously and has, in fact, rejected the argument that a common carrier who is available and who is providing a satisfactory service to the supporting shipper must be protected. For example, in Application of Holt Hauling & Warehousing System, Inc., 45 P.U.C. 563 (1971), the Commission specifically determined that the protestant, Pennsylvania Truck Lines, was rendering satisfactory transportation service to the supporting shipper under its common carrier rights and the Commission, despite this fact, granted the contract carrier application. Therefore, the Commission has not only rejected the argument that "availability" by a common carrier is sufficient to defeat a contract carrier application but also that "availability and providing a satisfactory service to the supporting shipper" may not be sufficient to defeat a contract carrier application. Of course, in this case, the protestant made no effort whatsoever to try to secure the business of the supporting shipper until the supporting shipper had already committed to the applicant.

During April, 1985, the supporting shipper had discussions with nine (9) different motor carriers, including Schwerman, Nubulk (a division of Chemical Leaman) and Fleet Transport, concerning the possibility of replacing the service of Cement Express. The only company that was able to meet the emergency needs of the supporting shipper was the applicant.

There is no basis whatsoever to conclude that the existing common carrier service available to applicant is "satisfactory and adequate".

B. THE INTERJECTION OF THE APPLICANT'S SERVICE WILL NOT BE DETRIMENTAL TO THE PUBLIC INTEREST.

As noted above, the Superior Court in Coastal Tank Lines, Inc. v. Pennsylvania Public Utility Commission, supra, citing Wiley v. Pennsylvania Public Utility Commission, supra, stated that if the Commission determined that existing common carrier service was "satisfactory and adequate", then the Commission must consider whether the interjection of the contract carrier in competition with the "satisfactory and adequate" common carrier service would be detrimental to the public interest. Applicant strenuously contends that existing common carrier service is not "satisfactory and adequate". However, assuming arguendo that such service is "satisfactory and adequate", this application must be granted since the interjection of the applicant's service in competition with existing common carrier service would not be detrimental to the public interest. In fact, on the contrary, the granting of this application will be in the public interest, just as the granting of emergency temporary authority and temporary authority was in the public interest. The Commission specifically found that the granting of both of these applications was in the public interest.

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 erroneously argues in its Main Brief that the granting of this application will be detrimental to the "public interest".

The protestant argues at page 14 of its Main Brief that the granting of this application would be detrimental to the "public interest" since it would further reduce the "special services" provided by protestant to cement shippers. This argument is ludicrous. The protestant has never enjoyed the business of the supporting shipper, in large part because it has never desired to enjoy the business, and therefore there is no business for the protestant to lose if this application is granted. If the protestant is unable to provide "special services" to the shipping public, it is caused by protestant's own failures and cannot be attributed in any manner to this case.

The protestant argues at page 16 of its Main Brief that it has sufficient idle equipment to provide the service required by the supporting shipper. The evidence submitted by the protestant in this regard was only a bare statement by Mr. Taylor that the protestant had 25 pieces of equipment sitting idle every day this year. It is respectfully submitted that there is a strong likelihood that this statement is false. Protestant had the opportunity to support the statement with its vehicle utilization reports which it maintains and it failed to do so. Furthermore, it would be horrible business judgment to have 25

pieces of equipment sitting idle every day for almost a year. If these pieces of equipment have, in fact, been sitting idle for such a long period of time, why have they not been sold? The only conclusions that can be drawn are either that the protestant does not have the idle equipment that it states or that the protestant will soon be in bankruptcy as a result of its questionable business judgment.

The granting of this application will in fact be in the "public interest" and will clearly not be detrimental to the "public interest". A more complete discussion of this issue is set forth in the applicant's Main Brief at pages 24 through 28 and will not be repeated herein.

C. THE GRANTING OF THIS APPLICATION WILL NOT RESULT IN "HARMFUL COMPETITION" TO PROTESTANT.

The protestant argues at pages 12 and 13 of its Main Brief that "harmful competition" will result to it, which will be contrary to the public interest, since it has already had a reduction in business.

In Brinks, Inc. v. Pennsylvania Public Utility Commission, 56 Pa. Cmwlth. 371, 424 A.2d 1010 (1981), the Commonwealth Court stated:

> Clearly, the General Assembly intended to provide for the regulation of contract carriers only to the extent that such regulation is necessary to protect common carriers from harmful competition by contract carriers. (emphasis added)

The Commonwealth Court in Brinks, Inc. v. Pennsylvania Public Utility Commission, supra, defined "harmful competition" as competition which resulted to a common carrier where there was no legitimate need for the additional service. The simple answer to protestant's argument in connection with this issue is that, as discussed more fully above, there is clearly a legitimate need for the service requested by this application. In fact, the Commission in its Tentative Decision approving temporary authority in this case specifically found that the granting of the temporary authority application "will meet an immediate need". This need existed at the time that emergency temporary authority was granted and has continued to exist up to the present time. No other carriers, including the protestant, have established that they could meet this need, a fact obviously recognized by the Commission in granting emergency temporary authority and then temporary authority.

It is respectfully submitted by the applicant that the protestant's stated decline in business is the result of protestant's own prior business practices, including its business practices involving the supporting shipper. Incredibly, the protestant never saw fit to solicit either the interstate or intrastate business of the supporting shipper until after the supporting shipper had experienced an emergency situation and had entered into a tentative agreement with the applicant to resolve this situation. As discussed more fully above, the "excuses" offered by the protestant for its failure

to ever attempt to secure the business of the supporting shipper, one of the country's largest cement producers, are absurd. It is no small wonder that the protestant has seen its business decline where, as here, it has shown little interest in attempting to secure additional business over the years.

In any event, the Commission has granted contract carrier applications even where the protestant is providing satisfactory service to the supporting shipper and where the protestant would suffer loss of revenues if the contract carrier application were granted. Application of Holt Hauling & Warehousing System, Inc., supra. The Commission in the Holt case, supra, relied upon the fact that the protestant had other substantial common carrier rights from the Commission, stating:

> It would appear, therefore, that while loss of the PLCB contract may affect its operations somewhat, Pennsylvania Truck Lines' operations remain substantial. (page 575)

The situation in the present case is even more favorable to the applicant's position than was the situation in the Holt case. Here, the protestant has never provided any transportation whatsoever to the supporting shipper and there is therefore no potential loss of revenues. In addition, the protestant here has very broad common carrier rights, both ICC and PUC, which it can utilize to secure other business. Obviously, judging from the record in this case, the protestant does not undertake very substantial efforts to secure new business.

In disposing of the "harmful competition" argument raised by the protestant in the Holt case, supra, the Commission further stated at page 573 that "...no certificated carrier has the right to be guaranteed absolute freedom from competition." (citations omitted)

In addition, as noted above, there is no basis in the record for concluding that the protestant could, in any event, meet the highly specialized needs of the supporting shipper.

The granting of this application will not result in "harmful competition" to the protestant or to other common carriers.

IV. 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 and the policy declared in Section 2501 of the Act. The application should be granted in its entirety.

Respectfully submitted,

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

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Of Counsel

Due Date: December 2, 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 27th day of November, 1985.

William A. Gray

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December 5, 1985

RECEIVED

SECRETARY'S OFFICE
Public Utility Commission

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

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

Dear Mr. Rich:

Enclosed for filing with your office please find the original and nine copies of the Reply 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

JAB:mmd

Enclosures

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

DOCUMENT FOLDER

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

IN RE: BULK, INC. 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.	)))))))	Docket No. A-00106205

REPLY BRIEF OF PROTESTANT

MATERIALS TRANSPORT SERVICE, INC.

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Attorney for Protestant
Materials Transport Service, Inc.

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DATED: December 5, 1985

TABLE OF CONTENTS

I. STATEMENT OF THE CASE

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.

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. Main briefs have been submitted by both parties. This reply brief is now 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.

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[1] The 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 APPLICANT BULK, INC., HAS FAILED TO EITHER RECOGNIZE OR FULFILL THE STANDARD OF PROOF NECESSARY FOR THE GRANT OF PERMANENT CONTRACT CARRIER AUTHORITY WHERE COMMON CARRIER AUTHORITY ALREADY EXISTS?

Answer: Yes.

(B) WHETHER APPLICANT BULK, INC. HAS FAILED TO ACCURATELY APPLY THE EVIDENCE OF RECORD IN ITS CONTENTION FOR PERMANENT CONTRACT CARRIER AUTHORITY?

Answer: Yes.

III. DISCUSSION

A. APPLICANT BULK, INC., HAS FAILED TO EITHER RECOGNIZE OR FULFILL THE STANDARD OF PROOF NECESSARY FOR THE GRANT OF PERMANENT CONTRACT CARRIER AUTHORITY WHERE COMMON CARRIER AUTHORITY ALREADY EXISTS.

While Applicant makes the rather bald assertion that the burden of proof for a contract carrier authority application is somehow less than for a common carrier authority application, Applicant cites absolutely no Pennsylvania authority to support such a claim. That Applicant cites no Pennsylvania authority for such a claim is not surprising since that is in fact not the law in Pennsylvania. Rather, the Wiley case has set forth the standard of review for applications for contract carrier authority -- a standard which, as Wiley makes clear, is actually more difficult to satisfy than common carrier authority applications. Applicant does not even cite Wiley, or for that matter any case involving a contract carrier application where common carrier authority already exists, apparently in an attempt to avoid the fact that the law in Pennsylvania places such a higher burden on contract carrier authority applicants than common carrier authority applicants.

Applicant goes on to take selected exerpts from several cases in an attempt to demonstrate a so-called more liberal view involving a purported re-evaluation of the

standards for granting authority in Pennsylvania. However, in attempting to do so, Applicant again makes reference solely to cases involving common carrier authority applications. None of the cited cases involve the application for contract carrier authority where common carrier authority already exists. In fact, the advantages of competition between common carriers has long been recognized. See, e.g., Modern Transfer Co., Inc. v. Pa. P.U.C., 139 Pa.Super. 197 (1939). However, the same concerns have never been applied in favor of contract carriers and against existing common carriers. This is because the legislature has explicitly recognized the advantages of common carriers and stated a preference for such common carriers over contract carriers in 66 Pa.C.S.A. Section 2501. Applicant's attempted transfer of the law between common carriers to situations such as the one at hand of a contract carrier attempting to secure authority already covered by existing common carrier authority is without precedence (which is why it is, again, not suprising that Applicant's Brief does not contain a single case involving the standard for entry of contract carrier authority when there is existing common carrier authority) and without merit.

In fact, even in Motor Freight Express, another case cited by Applicant involving only common carriers, the Court concluded that it would not have granted approval of the application for common carrier rights "if applicant were

simply a new company seeking authority to carry traffic between Erie County and southeastern Pennsylvania." 54 P.U.C. at 53. Rather, the Court granted the application due to the fact that the applicant already had established authority to transport commodities and had applied only for additional authority. Thus the supposedly more "liberal" view purportedly applied to competition between common carriers has itself been limited with regard to new applicants, such as Bulk, Inc.

When the Applicant does finally address one part of the Wiley test which controls the instant application, Applicant claims it would be in the public interest to grant it contract authority. However, Applicant merely recites in support this claim the events of late April and early May, 1985, which supposedly created the need for ETA and TA. We are no longer presented with any issue of supposed emergency conditions therefore these alleged facts are of no merit at all to the present action. What Applicant fails to allege are substantial facts which now at the permanent authority application stage would affect the public interest. Instead, Applicant sets forth only a "laundry list" (Brief at pp. 26-27) of points which really have no relation at all to the public interest. Instead, they are simply a recital of the reasons why Bulk, Inc. would like to serve Lehigh Portland and what some of the difficulties would be if a transporter

were to serve Lehigh Portland which did not have the experience or equipment necessary to do so.

For example, Bulk states that "the shipper has never used a common carrier for its tank movements from its York County facility to points in Pennsylvania." (Brief at 27). Bulk does not explain why it would not be in the public interest for a common carrier like MTS which has the experience, equipment and ability to transport Lehigh Portland's cement to do so now. All one can imagine is why it would not be in Bulk's interest.

Bulk also states that "the shipper did not lose a single order as a result of the transition of service from Cement Express to the applicant." (Brief at 27). While this may have been relevant to the grant of TA or ETA, there is neither a showing nor any suggestion that MTS would cause loss of shipments.

Bulk then asserts that Lehigh Portland requires equipment dedicated to its use and that the equipment must not contaminate in any way Lehigh Portland's white cement. MTS has already stated as well as demonstrated its ability and willingness to utilize one idled portion of its fleet to ensure that no contamination takes place. Again, Bulk fails to indicate how these factors affect the public interest, rather than solely Bulk's interest.

Finally, what significance exists in the fact that MTS has never solicited Lehigh Portland's business before is beyond comprehension. Bulk, Inc. again does not provide any analysis of why it involves the public interest or how it affects the public interest in any way. Rather, Applicant simply supplies another conclusory point in the laundry list of reasons why Bulk would like to serve Lehigh Portland.

The Applicant never addresses the true public policy concerns of 66 Pa. C.S.A. Section 2501 which are cited as a requirement for the granting of contract carrier authority in 66 Pa. C.S.A. Section 2503(b). The Applicant also fails to address the first part of the Wiley Court's standard which concerns the satisfactory and adequate service of common carriers applicable to the shipper. It is significant to note that the uncontested record testimony is that MTS has the ability and experience to carry cement, and the ability and experience to transport special commodities like white cement in particular. These are the crucial concerns. That is, the Wiley standard does not require an existing common carrier to have actually transported white cement in particular, but only demonstrate that the common carrier service already available is satisfactory and adequate. For example, the Court in Coastal Tank Lines v. Pa. P.U.C., 189 Pa.Super. 53, 149 A.2d 581 (1959), recognized that the Commission "must consider existing common carrier service available to the

shipper" (189 Pa.Super. at 57, emphasis added), not service actually provided to the particular shipper involved in the application at hand. Once the service is found to be available, then the Commission must consider the satisfactory and adequate nature of the available transporter's service. Again, MTS has placed unrefuted evidence on the record of its ability, experience and willingness to serve Lehigh Portland's needs.

Applicant's final assertion in support of its permanent contract carrier authority application is that it is "fit, willing and able to provide the proposed service." (Brief at 29). Initially, it is worthy of note that again Applicant's claims center around the events of late April and early May, 1985, which supposedly warranted the granting of ETA and TA. Applicant fails again, significantly, to relate its argument to the pending application for permanent authority. In any event, the obvious and well-known fact remains that Bulk, Inc., had not carried a single shipment of any commodity whatsoever nor had any carrier rights whatsoever prior to the granting of ETA and TA in this very case. Furthermore, Applicant began operations without any funds of its own and without ownership of any equipment at all. Rather, its operating funds consisted of a loan from its parent company and its equipment was leased from Leasco, Inc.

B. APPLICANT BULK, INC. HAS FAILED TO ACCURATELY APPLY THE EVIDENCE OF RECORD IN ITS CONTENTION FOR PERMANENT CONTRACT CARRIER AUTHORITY.

Initially, it should be noted that the Applicant, both by implication and statement, (See Brief of Applicant, pp. 5, 9 and 27) has contended that MTS would alternate its trucks between white and gray cement service. In fact, MTS clearly stated that it would specifically clean out its trucks exactly in accordance with the method described by the General Manager of Bulk, Inc., Jerome Mulroy, and then utilize those same trucks solely in the transportation of white cement (Tr. at 140-41). Thus, following the procedures outlined by Bulk, Inc.'s own General Manager for preparing tank trucks for white cement service, utilizing its own extensive experience in transporting a variety of substances requiring protection from contamination, and dedicating the trucks necessary for Lehigh Portland's white cement service, MTS renders Applicant's repeated claims of concern with contamination specious at best. After hearing the evidence can one honestly decide that MTS could not provide the requested service?

Moreover, there is no indication on the record that the tank trailers Bulk, Inc. is using to transport white cement under their current temporary authority had previously been used only for white cement. Bulk did not own the tanks from the date they were manufactured forward and it is entirely

possible that at some time the same cleaning technique was necessary to purge the vehicles utilized by Bulk. Only now that MTS is entirely capable and willing to perform that same technique has Bulk, Inc., suddenly proclaimed the same to be of such great difficulty. Obviously, such claims represents Bulk, Inc.'s grasping for straws in light of the reality that a company like MTS, which has the experience and ability to handle all kinds of substances while protecting against contamination could effectively provide such service with its existing common carrier rights.

Second, Applicant takes special note (Brief at p. 9) of the fact that MTS has not transported white cement in particular prior to this date by quoting from the testimony of Lee Cummings, that "we cannot use anybody that says they're ready to provide service when they have not been in the business before." (Tr. at 66). Any value this quotation may have had as a basis for rejecting MTS as a carrier is totally negated by the fact that Lehigh Portland at the very same time chose Bulk, Inc., a newly created corporation, which did not have experience transporting <u>anything</u> prior to its application for ETA. Bulk was not in the white cement transportation business or the business of transporting any commodity either in or outside of Pennsylvania. It held neither ICC or PUC rights of any kind. By contrast, MTS held

both ICC common and contract carrier rights as well as PUC common carrier rights which would allow it carry white cement for Lehigh Portland. MTS is the largest carrier of cement in the Lehigh Valley with extensive experience in transporting cement and cement products. Nevertheless, because of the harsh economic reality of the decline of the cement industry in Pennsylvania, MTS has secured authority and transported other commodities. However, the depressed condition of the cement industry has resulted in the lay off of MTS employees and idled MTS equipment with further layoffs and idled equipment the likely result of the admission of yet another carrier in an already over-burdened area.

Third, Applicant's Brief sets out (pp. 10-14) the sequence of events as related by Lee Cummings, President of Lehigh Portland, concerning the selection of Bulk, Inc., to serve as Lehigh Portland's carrier even though it held neither PUC nor ICC rights (Tr. at 34) of any kind and even though it had never hauled commodities of any kind, let alone the so-called specialized commodity of white cement. Applicant initially states that Lehigh Portland did not learn of Cement Express' termination of service until April 22 and that upon learning of this, Lehigh Portland was "shocked and dismayed." (Brief at 10.) Apparently, however, whatever shock and dismay Lehigh Portland experienced was not severe enough to cause

Lehigh Portland to talk to MTS about substitute service when MTS called Lehigh Portland to inquire about such service both on April 24 and April 29. (Tr. at 135-36, 138-39). Indeed, even when contacted on April 24, supposedly at Lehigh Portland's greatest time of shock, Lehigh Portland did not pursue MTS' contacts and never inquired at all about the availability of MTS for service at Lehigh Portland's facility. Rather, Lehigh Portland simply chose not to deal with MTS solely because it "preferred" Bulk, Inc.

Finally, while the Applicant devotes substantial attention in its Brief (Brief at 12-15) to the events surrounding the grant of Emergency Temporary Authority and Temporary Authority[1] the present application concerns permanent contract carrier certification and as such the particular events resulting in ETA and TA are irrelevant. If indeed an emergency ever existed, such emergency is no longer present and has no bearing on the permanent authority application. Furthermore, while the Applicant correctly points out that the Commission denied MTS' exceptions to the granting of TA to Bulk, Inc., the Applicant fails to point out that this ruling was based on a finding that at that time none of the

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[1]Again, MTS notes that the 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 is however plainly in error since Lehigh Portland did not contact Protestant MTS, only 4 miles away, who had experience and equipment suitable for Lehigh Portland's needs.

protestants had indicated an ability to provide the tank trucks necessary to haul Lehigh Portland's white cement. Since that fact has now been placed on the record for MTS, it no longer serves as a basis for granting authority to Bulk, Inc.

IV. CONCLUSION

Applicant's Brief has failed to identify or apply the standards of law in Pennsylvania governing the grant of permanent contract carrier authority when permanent common carrier authority already exists. Furthermore, Applicant has failed to substantiate either its claim that the "burden" is less in contract carrier applications than common carrier applications or that somehow public policy would favor the granting to Bulk, Inc. of the authority requested. Finally, Applicant has misapplied cases dealing solely with competing common carriers and failed to substantiate claims with the evidence of record. Therefore, the application for permanent contract carrier authority should be denied in its entirety.

BUTZ, HUDDERS, TALLMAN
STEVENS & JOHNSON

By: _____
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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:

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

William Gray, Esquire
2310 Grant Building
Pittsburgh, PA 15219

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

at the addresses show herein, via first class mail, postage prepaid on December 5, 1985.

Joseph A. Bubba