



COMMONWEALTH OF PENNSYLVANIA
 PENNSYLVANIA PUBLIC UTILITY COMMISSION
 P. O. BOX 3265, HARRISBURG, Pa. 17120
 September 16, 1985

IN REPLY PLEASE
 REFER TO OUR FILE
 A-00102471,
 F.1, Am-F

William J. Lavelle, Esquire
 2310 Grant Building
 Pittsburgh, PA 15219



Re: Application of Pitt-Ohio Express, Inc.

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge James D. Porterfield.

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

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

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

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

cc: ALJ Porterfield/Office of ALJ/Bureau of Trans./Law Bureau/Mr. Bramson/OSA
 Chairman/Commissioners/our file Very truly yours, Correspondence

1g
 Encls.

Certified Mail
 Receipt Requested

William H. Smith
 William H. Smith
 Chief Administrative Law Judge

Similar letter to: See attached list.

A-00102471, F.1, Am-F

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EVANS DELIVERY COMPANY, INC., PROTESTANT

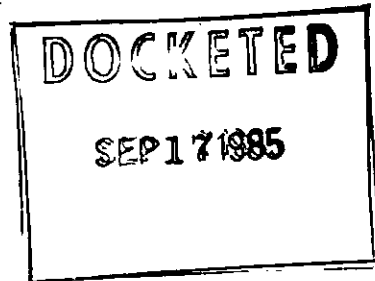
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NEWCOMER TRUCKING, INC.

PittOhio Express, Inc.
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SELF

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Pitt-Ohio Express, Inc., a corporation of the Commonwealth of Pennsylvania, for amendment to its common carrier certificate, which grants the right, inter alia, to transport, by motor vehicle, property for H. J. Heinz Company, U.S.A. between points in Pennsylvania; subject to the following condition: That no right, power or privilege is granted to transport commodities in bulk; SO AS TO PERMIT the transportation of property, except commodities in bulk and household goods and office furniture in use, for G. C. Murphy Company between points in Pennsylvania

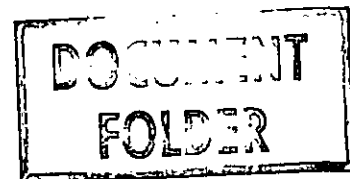
A-00102471,
F.1, Am-F



INITIAL DECISION

Before

James D. Porterfield
Administrative Law Judge



History of the Proceedings

The application of Pitt-Ohio Express, Inc., at Docket No. A-00102471, F.1, Am-F, is before the Pennsylvania Public Utility Commission as a result of an application filed on November 8, 1984. The application seeks the following authority:

To transport, as a Class D carrier, property, except commodities in bulk and household goods and office furniture in use, for G. C. Murphy Company between points in Pennsylvania.

After notice of the application was published in the Pennsylvania Bulletin on December 15, 1984 (14 Pa.

B. 4566), a protest was filed on behalf of Newcomer Trucking Inc., by Pillar and Mulroy, P.C., and a protest was filed on December 24, 1984, on behalf of Evans by Albert L. Evans, Jr., President. By letter dated February 12, 1984, and addressed to the Commission, Albert L. Evans, Jr., President, withdrew the protest filed on behalf of Evans.

A hearing on the application was held in Pittsburgh, Pennsylvania, on March 25, 1985. William J. Lavelle, Esquire, appeared on behalf of the Applicant and offered the testimony of Robert Francis Hammel, Secretary of the Applicant corporation, who identified and sponsored Applicant's Exhibits 1, 2, 3, 4, 5, and 6. The testimony of Charles C. Perrin, General Traffic Manager, for the supporting shipper, G. C. Murphy Company, was also offered; Mr. Perrin identified and sponsored Applicant's Exhibits 7, 8, 9, and 10 in support of the application. John A. Pillar, Esquire, appeared on behalf of the Protestant, Newcomer Trucking, Inc., and offered the testimony of Sam Brusceci, "owner" of the Protestant firm, who sponsored Protestant's Exhibit A (an equipment list); testimony of Robert W. Culbertson, General Manager of Newcomer Trucking, Inc., was also offered. The presiding officer sponsored the application, as filed with the Commission, as ALJ's Exhibit A.

The record in this proceeding consists of the above-referenced exhibits and a one hundred and seventy-five page transcript. On or about May 8, 1985, Applicant's Exhibit 5 (Applicant's balance sheet as of December 31,

1984) and Applicant's Exhibit 6 (Applicant's income statement for 1984) were late filed by Applicant's counsel. Main and reply briefs were filed on behalf of both the Applicant and the Protestant is extracted from the main brief submitted on behalf of the Protestant.

Summary of Evidence*

Summary of Evidence Presented
on Behalf of Applicant

1. Pitt-Ohio Express, Inc.

Robert Francis Hammel, Secretary, testified on behalf of the Applicant and his testimony is set forth in transcript pages 5-58. Mr. Hammel also sponsored Applicant's Exhibits 1, 2, 3, 4, 5, and 6.

Pitt-Ohio Express, Inc. is a closely held Pennsylvania corporation. Its sole shareholders, officers and directors are three brothers who are also minority shareholders and directors of Hammel's Express, Inc., a motor common carrier which holds authority from this Commission.

(5-9)

* That portion of the Summary of Evidence pertaining to the evidence offered on behalf of the Applicant is extracted from the main brief submitted on behalf of the Applicant. That portion of the Summary of Evidence pertaining to the evidence offered on behalf of the Protestant is extracted from the main brief submitted on behalf of the Protestant. These extracts have been reviewed as against the record and fairly represent and summarize the record. Numbers in parentheses preceded by "Ex." refer to the exhibits. All other numbers in parentheses refer to the transcript of testimony.

Applicant holds authority from this Commission at Docket No. A.102471 and various amendments thereto. At Folder 1, Am-B it is authorized to transport property, with certain exceptions not here pertinent, between points in 15 western Pennsylvania counties (Allegheny, Armstrong, Beaver, Butler, Clarion, Crawford, Erie, Fayette, Greene, Indiana, Lawrence, Mercer, Venango, Washington and Westmoreland), subject to a restriction which prohibits service from points in Allegheny County to points in Armstrong, Butler, Clarion, Greene and Indiana Counties, and vice versa.

(Ex. A-2) (10-11, 49-50) Among its other authorities are two grants which authorize service to and from all points in Pennsylvania in connection with base points, and one grant for H. J. Heinz Company, U.S.A. which authorizes service between all points in Pennsylvania. (Ex. A-2)

Applicant was granted emergency temporary authority on August 13, 1984 to lease a portion of the operating authority of Breman's Express Company pending approval of a transfer application. Under that authority Pitt-Ohio can operate between various points in the counties of Allegheny, Butler, Beaver and Lawrence. (11-12) The additional authority permits service from points in Allegheny County to and/or from most of the major cities and towns in Butler County. (53-60)

Applicant has pending an application before this Commission at Folder 1, Am-G to transport property for

R. A. Hiller Company between points in Pennsylvania.

(12-13)

Applicant does not seek any duplicating authority nor dual operating authority by means of this application.

(13-140)

Pitt-Ohio holds authority from the Interstate Commerce Commission at Docket No. MC-30136, Sub-No. 2, to transport general commodities, with the usual exceptions, between all points in 18 states and the district of Columbia, including Pennsylvania. (Ex. A-1) (9-10)

Pitt-Ohio leases a 26 door terminal and office in Pittsburgh from Hammel's Express. (14) This terminal is used as a break-bulk facility for line-haul traffic, and as the hub for pickup and delivery operations in western Pennsylvania, northern West Virginia and eastern Ohio. Thirty-five vehicles are presently assigned to the Pittsburgh terminal which is also the location of its central dispatch operations. (14-16, 20)

Applicant has three other operational terminals at Cleveland, Ohio, Charleston, West Virginia, and an owned facility at Paulsboro, New Jersey. (17, 75-76) The Paulsboro terminal serves eastern Pennsylvania as far north as Scranton and as far west as Harrisburg, and points in New Jersey and Delaware. (29-30, 78)

Pitt-Ohio recently purchased a 20 door terminal at Norristown in eastern Pennsylvania. The terminal will be

renovated and will be operational during the summer of 1985.
(38-40, 75)

Applicant maintains direct telephone lines between all terminals. (17-18) All drivers are instructed to check in periodically during each day in order to obtain instructions for new pickup orders, changes in itineraries, and other pertinent information. (18-19)

Pitt-Ohio employs 75 drivers, 25 administrative and clerical personnel, 5 mechanics all located in Pittsburgh and 6 salesmen. (19)

Applicant operates a total of 34 tractors, 33 straight trucks which are 21 feet in length, and 76 closed van trailers. The owned equipment consists of 33 tractors, 20 straight trucks, 10-45 foot vans, 6-48 foot vans and 6-25 foot pup trailers. The leased equipment consists of 1 tractor, 13 straight trucks, and 54 vans either 42 feet or 45 feet in length. (Ex. A-3) (20-22) All of the leased equipment is obtained from Martera, Inc., which is owned by other members of the Hammel family. None of this equipment is leased with drivers. (23-24)

Pitt-Ohio has a comprehensive equipment maintenance program. At the end of each day each driver turns in an equipment report describing any defects which are repaired during the evening. No truck is dispatched until the defect has been fully corrected. Every outbound trailer is checked by mechanics prior to departure for tires, lights, brakes, etc. Each vehicle also is subjected to more extensive

maintenance on a regular mileage schedule. All vehicles are also inspected by outside contractors for state inspection purposes. (24-25)

Quarterly safety meetings are held with each driver in conjunction with the company's insurance carrier. Safety awards are given for accident-free driving as an incentive to safe driving. (25)

As a motor carrier of general property, Pitt-Ohio offers a full range of services. It provides scheduled pickup and scheduled delivery service. (28) Ordinarily deliveries are made within one or two days following pickup unless there are unusual circumstances or specific customer requirements involved. (28) Service is normally available 5 days per week, 24 hours per day, with service available on weekends and holidays as needed. (16-17) All terminals are equipped to handle both less-than-truckload and truckload traffic. (16, 33) Split pickup and multiple stop-off delivery service are provided as needed. (33) In western Pennsylvania Pitt-Ohio operates 15-20 daily peddle runs from Pittsburgh to points beyond the city, and 10-12 daily peddle runs within the city of Pittsburgh. Shipments are currently handled on an interstate basis to and from points in Pennsylvania which are outside the Applicant's intrastate authority. (28-29)

In 1984 Pitt-Ohio had gross revenues of \$6,852,720 of which about 8-10% was derived from Pennsylvania intrastate operations. Its net income after taxes was \$434,860. It

had retained earnings on December 31, 1984 of \$982,986. It had an operating ratio of approximately 86%. (Ex. A, 5-6) (26, 63-64)

Pitt-Ohio has provided service for G. C. Murphy, the supporting shipper, for approximately six years. (62) This has included intrastate service in western Pennsylvania within the Applicant's present authority, and interstate traffic to and from various states including Pennsylvania. (27-28)

During February 1985 Pitt-Ohio transported 24 intrastate shipments from vendors to G. C. Murphy stores or warehouses in western Pennsylvania. A variety of commodities were transported and individual shipments ranged in weight from 96 pounds to 5,992 pounds. (Ex. A-4, p. 1) (34-35, 66)

During February 1985 Pitt-Ohio transported 52 interstate shipments from vendors to G. C. Murphy stores and warehouses, and one shipment from its McKeesport warehouse to a vendor in eastern Pennsylvania via the Paulsboro, New Jersey terminal. A variety of commodities were transported, with all shipments being of an LTL size. (Ex. A-4, p. 2-3) (35-37)

G. C. Murphy's warehouses, both private and public, require appointments prior to delivery. An appointment is required at its McKeesport warehouse and deliveries are made every two or three days after arranging the appointment. (69-70, 72) In February 1985 the Helms Express ADSI warehouse at Irwin was being used by G. C. Murphy for

distribution purposes in Pennsylvania. Before delivering inbound shipments to that warehouse, Pitt-Ohio was required to mail the shipping documents to Irwin and wait for them to be returned with specific delivery dates and times prior to making delivery. This procedure required that the shipments be held by the Applicant for several days. (70-72, 80-82) Due to the limited dock space at G. C. Murphy stores, some trucks cannot get into the store to make delivery the first day and must go back the following day to complete delivery. (68)

Pitt-Ohio is requesting this authority to serve G. C. Murphy for several reasons. It desires to eliminate the restrictions against the service it can provide for G. C. Murphy with respect to Allegheny, Armstrong, Butler, Clarion, Greene and Indiana counties as set forth in its Folder 1, Am-B certificate. (40) It desires to broaden its western Pennsylvania authority for G. C. Murphy as well as expand its service statewide for G. C. Murphy so that its Pennsylvania intrastate and interstate service areas will be coextensive. (41) Pitt-Ohio would be able to combine the G. C. Murphy intrastate traffic with the interstate freight of Murphy and other shippers moving to and from points in Pennsylvania. (42) Applicant's service will be a replacement for the distribution operations of the Helms Express ADSI warehouse which have been discontinued. (80) Service between two points in western Pennsylvania will ordinarily be conducted by way of the Pittsburgh terminal, the service

between two points in eastern Pennsylvania will normally be conducted by way of the new Norristown terminal. On freight moving between eastern and western Pennsylvania one or both of those terminals would normally be involved. (42-43)

2. G. C. Murphy Company

Charles C. Perrin, General Traffic Manager, testifies in support of the application and his testimony is set forth in transcript pages 85-140. Mr. Perrin also sponsored Applicants Exhibits 7, 8, 9, and 10.

G. C. Murphy Company is a retail merchandiser with three distribution centers and 400 retails variety stores located in 22 states. (86) The stores are operated under the name G. C. Murphy Marts and G. C. Murphy. (87)

G. C. Murphy deals in hundreds of individual items which are sold through the following store departments

(Ex. A-7) (87-88):

Health & Beauty Aids	Gift Wrap & Books
Hair Accessories	Notions
Jewelry	Fabrics
Stationery	Sweets & Eats
Cards	Smoke Shop
Toys	Sporting Goods
Hardware	Automotive
Home Improvements	Paint
Housewares	Season Goods
Pets	Irregulars & Closeouts
Electronics	Music & Cameras
Kitchen & Dinnerware	Curtains & Drapes
Home Furnishings	Novelties
Domestics	Apparel & Accessories
Hosiery	Men's Wear
Boy's Wear	Infants & Toddlers
Intimate Apparel	Accessories

Footwear
Dresses, Coats & Jackets
Girls' Fashions

Pants, Skirts & Sportswear
Blouses, Sweaters & Coordinates

G. C. Murphy has one distribution center in Pennsylvania located in McKeesport. (Ex. A-9) (90-92) Prior to March 6, 1985, G. C. Murphy also used Helms Express ADSI warehouse at Irwin to receive inbound freight from vendors throughout nation, segregate the incoming merchandise by store, and then reship to 100-120 stores on a set schedule. (90-91) Due to a change in the operations of Helms Express, the use of the ADSI facility as well as the actual motor carrier transportation service of Helms was terminated. (98, 105-106, 113)

G. C. Murphy has 115-120 retail stores located in 91 cities across Pennsylvania. The larger cities such as Pittsburgh, Philadelphia and Harrisburg have more than one store each. (Ex. A-8) (88-89)

Merchandise is received by G. C. Murphy currently from vendors located at 161 Pennsylvania cities. The larger cities such as Pittsburgh and Philadelphia have many individual vendors. (Ex. A-9) (92) All vendors ship to all stores in the Murphy chain. (121)

The annual volume of traffic from Pennsylvania based vendors to the McKeesport distribution center is between 4,000,000 and 5,000,000 pounds. (95) The total annual volume of traffic from the Pennsylvania based vendors direct to Pennsylvania retail stores is between 3,000,000 and 4,000,000 pounds. (96)

In 1984 the total volume of traffic shipped from the McKeesport and Irwin distribution facilities to retail stores located in the western half of Pennsylvania amounted to 33,997,423 pounds. The volume of traffic that was shipped in 1984 from the distribution centers to 97 individual Pennsylvania stores is set forth in Applicant's Exhibit 10. (Ex. A-10) (96-99, 100, 116, 119) The total volume is expected to be higher in 1985. (119)

Of the almost 34,000,000 pounds of freight shipped outbound from the Pennsylvania distribution centers to Pennsylvania retail stores, between 4,000,000 and 5,000,000 pounds originated at vendors in Pennsylvania. The balance of about 29,000,000 pounds originated at points outside Pennsylvania. (100) Of the traffic inbound from vendors located outside Pennsylvania, approximately 60% was destined to retail stores known at the time the interstate shipment originated, arguably making 17,400,000 pounds of that freight interstate in nature. (101-104) The balance of 40%, or 11,600,000 pounds was consigned to the distribution center to replenish inventories and was later reshipped to individual stores as needed. (102, 104-105) This 11,600,000 pounds of freight from the distribution centers to Pennsylvania retail stores was intrastate traffic since there was a break in the movement.

G. C. Murphy would use the Applicant's service in a variety of situations. It would be heavily used on the major volume movements from vendors to stores and vendors to

distribution center. (89-90, 110, 120) On this traffic G. C. Murphy selects the carrier and pays the freight on 65-70% of the traffic. (94, 96, 122, 139) It intends in the near future to publish a routing guide showing preferred carriers in each traffic lane and expects the percentage of traffic it controls to increase above 70%. (94, 123)

On the heavy volume traffic moving from the distribution center to the retail stores, which is entirely controlled by G. C. Murphy, Applicant would be used as a backup carrier to several contract carriers presently used. (90, 95, 110, 119-120) The freight would consist of overflow traffic that would not fit on the contract carrier's vehicles and traffic moving to stores which for one reason or another did not have sufficient traffic to justify use of the contract carrier vehicle on an exclusive use basis. (110)

G. C. Murphy would use Pitt-Ohio service also on the following additional types of movements: retail store to retail store (91, 129); retail store to distribution center (91, 126); retail stores to vendors (99); and distribution center to vendors which occurs daily and is totally controlled by G. C. Murphy (91, 95, 99)

G. C. Murphy's individual shipments range from 50 pounds to 40,000 pounds. (92-93) On shipments moving from vendors direct to retail stores, G. C. Murphy looks for second day delivery service. (108-109) Since shipments into the distribution center are by appointment only, the time is generally extended by two or three days. (108)

There are times when emergency service is required such as when a vendor gets behind in shipping merchandise. (107) There is a scheduled day for delivery from the distribution center to each store and the merchandise must be delivered to this distribution center by the proceeding day. (91, 109)

At one time Jones Motor was the primary common carrier used in Pennsylvania. When that company closed its Pittsburgh operations and discontinued handling LTL shipments, G. C. Murphy turned to Motor Freight Express as its primary intrastate Carrier. (106) When Motor Freight Express went out of business, it turned to Helms Express as its primary intrastate carrier and successfully supported it for statewide service. (106) When the restructuring of the Ryder/P-I-E/Helms Express operations took place, and that company discontinued handling short-haul freight in Pennsylvania, G. C. Murphy turned to Pitt-Ohio based on its more than five years experience with the Applicant on intrastate and interstate traffic. (109-110) Applicant has provided good to excellent service, maintains competitive rates, and is a carrier with which G. C. Murphy is familiar. (110, 134)

G. C. Murphy has used several other carriers on intrastate traffic. However, Halls has financial problems (133), and Preston does not have competitive rates (133-134). Newcomer is not directly used by G. C. Murphy and in 1984 handled only three inbound shipments from vendors to the McKeesport distribution center. (112-113)

G. C. Murphy supports Pitt-Ohio for statewide operating authority since this would ease the task of routing intrastate shipments and would limit the number of carriers needed to make delivery at the retail stores which usually have only one dock for loading and unloading motor vehicles. (107, 132-133) In addition to tendering to the Applicant the above types of traffic, G. C. Murphy would also be able to coordinate through the Applicant inbound interstate shipments moving direct from vendors to retail stores and outbound intrastate shipments moving from the distribution center to the same retail stores. (112) It would also be able to coordinate through the Applicant inbound shipments to the McKeesport distribution center from several vendors located in the same geographical area. (135)

Summary of Evidence on
Behalf of Protestant

1. Newcomer Trucking, Inc.

Sam Brusceci, President, testified on behalf of the Protestant and his testimony is set forth in transcript pages 140-172. Mr. Brusceci also sponsored Protestant's Exhibit 1.

Newcomer Trucking, Inc. operates from a twenty-two door trailer facility located at 1200 Island Avenue, McKees Rocks, Stowe Township, Pennsylvania 15136, employing four terminal personnel, fifteen drivers and two mechanics.

(140-148)

Newcomer Trucking operates ten straight trucks, nine tractors and fifteen trailers consisting of 45' van trailers, pup van trailers for local deliveries, 42' van trailers, 40' van trailers, 45' open top trailers and two flatbed trailers. (Protestant's Exhibit 1; 150-151) Newcomer also utilizes ten to twelve trailers under an equipment arrangement with seven major carriers with whom it interlines and acts as a local cartage agent. (151, 141-142)

Protestant Newcomer holds authority from the Commission at Docket No. A-102265, pursuant to which it serves Allegheny County and the surrounding Counties of Armstrong, Beaver, Butler, Clarion, Forest, Fayette, Jefferson, Washington, Westmoreland and Greene. (142) From Allegheny County points, Newcomer can serve all of Allegheny, Armstrong, Butler, Clarion, Forest, Greene and Jefferson Counties, and vice versa. (143-144)

Newcomer's Class C authority authorizing service from Pittsburgh and points within ten miles to points within thirty miles by the usually traveled highways also permits service to Beaver, Fayette, Washington and Westmoreland Counties. (145)

Newcomer has five to six trucks which concentrate on Allegheny County pick ups of cross-dock segregation at its Stowe Township terminal facility for deliveries throughout its authorized territory. (149) Daily service is provided to Clarion, Butler, Armstrong, Greene, Washington and Westmoreland Counties. (153-154)

During the period from January 1, 1985 through March 19, 1985, Newcomer transported twenty-six shipments from Allegheny County based vendors to Murphy stores situated at Butler, Mt. Pleasant, Connellsville, Waynesburg, Greensburg, Pittsburgh, McMurray, North Huntingdon and Washington. Next day service was provided on the overwhelming majority of these vendor to store movements. (157-161)

Newcomer has not been tendered freight out of Murphy's McKeesport distribution center although its rates are competitive with the rates charged by the applicant, and there have been no complainants from Murphy regarding Newcomer's service on vendor to store shipments. (162, 165)

Ninety-nine percent of Newcomer's traffic is less-than-truckload shipments, and each less-than-truckload shipment is vital to Newcomer's continued operation as it is presently running vehicles at less than full capacity.

(162-163) Newcomer cannot afford to lose the vendor to Murphy's store traffic which it can presently handle. (164)

2. Newcomer Trucking Inc.

Robert W. Culbertson, General Manager, testifies on behalf of the Protestant and his testimony is set forth in transcript pages 172-174.

Newcomer has solicited Murphy on at least two prior occasions, the latest being November 7, 1984, at which time the witness for Murphy informed the General Manager of

Newcomer that he did not need any carriers but would check Newcomer's rates. (172-173)

Findings of Fact

1. Applicant is a closely held Pennsylvania corporation that holds certificates of public convenience as a motor common carrier from both the Pennsylvania Public Utility Commission and the Interstate Commerce Commission. (5-10; Ex. A-1, Ex. A-2)

2. As relevant to the authority sought, Applicant leases a twenty-six door terminal and an office facility in Pittsburgh, Pennsylvania, where thirty-five vehicles are assigned and dispatched, has a terminal in Paulsboro, New Jersey, and owns a twenty door terminal in Norristown, Pennsylvania, that will be operational in the summer of 1985. (14-16, 29-30, 38-40)

3. Applicant employs 75 drivers, 25 administrative and Clerical persons, 5 mechanics, and 6 salespersons. (19)

4. Applicant owns and leases (without drivers) 34 tractors, 33 straight trucks, and 76 closed van trailers. (20-22; Ex. A-3)

5. Applicant has a comprehensive maintenance program for its operating equipment. (24-25)

6. In conjunction with Applicant's insurance carrier, Applicant holds safety meetings with each of its drivers approximately four times a year. (25)

7. Applicant is a motor common carrier of general property and all of its terminals are equipped to handle both less-than-truckload and truckload traffic. (16, 33)

8. Of Applicant's 1984 gross revenues of \$6,852,720, approximately 8-10% was derived from Pennsylvania intrastate operations; Applicant had an overall operating ratio of 86% in 1984. (Ex. A-5, Ex. A-6; 26, 63-64)

9. Applicant has provided substantial transportation services both interstate and Pennsylvania intrastate for the supporting shipper for approximately six years. (27-28, 62)

10. G. C. Murphy Company is a retail merchandiser with three distribution centers and 400 retail outlets located in 22 states; one distribution center and approximately 115 retail outlets are located in Pennsylvania. (Ex. A-8, Ex. A-9; 86, 88-90)

11. After March 6, 1985, G. C. Murphy lost a major western Pennsylvania based warehouse and transportation service. (90-91, 98, 105-106, 113)

12. G. C. Murphy has vendors located in 161 Pennsylvania cities and all vendors ship to all G. C. Murphy retail outlets. (Ex. A-9; 92, 121)

13. G. C. Murphy annually receives from between 4 and 5 million pounds of intrastate freight at its McKeesport, Allegheny County, Pennsylvania, distribution center and it annually receives from between 3 and 4 million pounds of

intrastate freight at its Pennsylvania retail outlets.

(95-96)

14. In 1984, G. C. Murphy shipped approximately 15,000,000 pounds of intrastate freight from its western Pennsylvania distribution center to its retail outlets in western Pennsylvania; this volume of freight is expected to increase in 1985. (Ex. A-10; 96-99, 100, 102, 104-105, 116, 119)

15. G. C. Murphy selects the motor carrier to be used for transporting a substantial amount of its intrastate traffic. (94, 96, 122-123, 139)

16. G. C. Murphy will use Applicant's proposed service as a backup service for traffic moving from its western Pennsylvania distribution center to its retail outlets. (90, 95, 110, 119-120)

17. In the recent past and for various reasons, unrelated to G. C. Murphy, G. C. Murphy has lost the services of three major motor common carriers. (106, 109-110)

18. Because of the present intrastate and interstate services provided to G. C. Murphy by the Applicant, it would be a considerable convenience to G. C. Murphy to have the proposed services of the Applicant also available.

(107, 112, 132-133, 135)

19. Newcomer, Protestant, last solicited the business of G. C. Murphy on November 7, 1984. (162, 172-173)

20. The transportation services provided by Newcomer, Protestant, between January 1, 1985, and March 19,

1985, that are relevant to this proceeding were performed at the request of G. C. Murphy's vendors. (155-161)

Discussion^{*}

I.

Legal Issues and Evidentiary Criteria
For Resolving Motor Common Carrier Applications

A person who or which proposes to provide, or proposes to provide additional, non-exempt, intrastate transportation services to the public for compensation must obtain from the Pennsylvania Public Utility Commission either a certificate of public convenience or an amendment to a certificate of public convenience, previously granted by the Commission. 66 Pa. C.S. §§102, 1101, and 1103. "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." 66 Pa. C.S. §1103(a).

The evidentiary criteria by which the ultimate finding, set forth above, is made are codified at 52 Pa. Code §41.14:

* The second part of this Discussion (i.e., II.) is for the most part extracted from the main brief submitted on behalf of the Applicant. Counsel's language, to the extent of the extraction here adopted, mirrors our thinking as required for applying the applicable law to the facts in this proceeding.

§41.14. Evidentiary criteria used to decide motor 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.

Subsection 41.14(a), 52 Pa. Code §41.14, expressly raises four issues to be considered in every motor common carrier application:

- (1) Whether a public need for the proposed service has been demonstrated;
- (2) Whether a public demand for the proposed service has been demonstrated;
- (3) Whether the proposed service will serve a demonstrated useful public purpose; and
- (4) Whether the demonstrated useful public purpose is responsive to the demonstrated public demand or need.

There is no definitive list of categories of evidence by which a public need for the proposed service may be shown. Two common categories of evidence that will

support a finding of a public need for the proposed service are requests to the applicant for the proposed service (Cf., 52 Pa. Code §3.382) and a showing of the inadequacy of existing motor carrier services. Although the Commission has said that it intended to "encourage competition through the proposed rulemaking [Transportation Regulatory Policy, infra] by excluding the 'inadequacy' evidentiary standard previously adhered to," [underscoring supplied] this is believed to be an ill-chosen expression of its intent or contrary to law.^{1/} It may be safely assumed that the Commission did not intend to forbid an applicant from undertaking to show an inadequacy of existing services in order to demonstrate a public need for the proposed service.

Assuming that an applicant may undertake to prove an inadequacy of existing motor carrier services, there is no prescribed manner for providing such proof. Evidence of an inadequacy of existing services must be sufficiently specific and detailed to support a finding of inadequacy. An applicant need not prove either that the proposed service is an absolute necessity or that the proposed service is indispensable. D. F. Bast, Inc. et al. v. Pa. P.U.C., 185 Pa. Superior Ct. 487, 138 A.2d 270, 274 (1958); Pittsburgh & L.E.R. Co. v. Pa. P.U.C., 170 Pa. Superior Ct. 411, 85 A.2d

^{1/} Opinion and Order, Application of Richard L. Kinard, Docket No. A-95829, F.1, Am-D, adopted October 19, 1984, and entered October 22, 1984, at page 4 (mimeograph edition).

646 (1952); and Pennsylvania R.R. Co. v. Pa. P.U.C., 199 Pa. Superior Ct. 158, 184 A.2d 111 (1962). A finding of future need for the proposed service has traditionally been a basis for establishing a public need for the proposed service. However, evidence of a future need for the proposed service is more properly considered as establishing a demand, as contrasted with a need, for the proposed service, under the current evidentiary criteria. (Cf., Kinard, supra)

The significance, for the applicant, of demonstrating a public need for the proposed service is that the same evidence which proves a public need will also demonstrate a useful public purpose for the proposed service. In these circumstances, the responsiveness of the useful public purpose to the demonstrated need is evident and inferable. 52 Pa. Code §41.14(a).

If the applicant undertakes to prove a public demand for the proposed service, this evidence will take the form of an expressed and defined desire on the part of some portion of the public for the applicant's proposed service. The basis for the desire to use the applicant's proposed service is not critical for the purpose of demonstrating the public demand, but the basis or bases for the public demand for the applicant's proposed service may be relevant and

critical for establishing a useful public purpose for the applicant's proposed service.

Whether the applicant undertakes to prove public need or demand for the proposed service, some or all of the following types of evidence may be necessary to support a grant of the application: (a) evidence of the specific commodities or passenger classifications involved, (b) evidence of representative points from, to, or between which the public demands or needs the service, (c) evidence of the volume (quantity in the case of commodities and numbers in the case of passengers) and frequency of and with which the public demands or needs transportation service, (d) evidence of the extent to which the applicant's proposed service will be utilized, and (e) evidence of the means by which the (presently) existing demand or need of the public is (however inadequately) satisfied.

When an applicant undertakes to prove a public demand for the proposed service rather than a public need, the same evidence that establishes the public demand will not necessarily demonstrate the useful public purpose of the proposed service, as is true when an applicant demonstrates a public need for the proposed service.

As stated above, proof of the inadequacy of existing motor carrier services will demonstrate a useful public purpose for the proposed services. If the applicant is relying on public demand for the proposed service, the applicant has the burden of proving a useful public purpose

for the proposed service. The Commission, in its Opinion and Order in Application of Richard L. Kinard, Docket No. A-95829, F.1, Am-D, adopted October 19, 1984, and entered October 22, 1984, approved nine categories of proof by which an applicant may demonstrate a useful public purpose for the proposed service (e.g., applicant proposes a different service, applicant will offer lower rates, there is a demonstrated future need, etc.). Kinard, supra, at page 5. As stated both in the Commission's Opinion and Order and in the underlying Initial Decision in Kinard, supra, these categories of proof are neither mutually exclusive nor jointly exhaustive of all possible categories of proof.

As an additional option for satisfying its burden of proof under Subsection 41.14(a), 52 Pa. Code §41.14, an applicant may prove both a public need and a public demand for the proposed service, with the same evidentiary consequences that are discussed above.

Finally, in order for an applicant to satisfy its burden of proof under Subsection 41.14(a), 52 Pa. Code §41.14, it must be demonstrated or at least inferable that the demonstrated useful public purpose for the proposed service is responsive to the public need or demand.

An applicant's prima facie burden of proof consists of satisfying the requirements of Subsection 41.14(a), discussed above, and by demonstrating that it possesses the technical and financial ability to provide the proposed

service, as required by Subsection 41.14(b), 52 Pa. Code §41.14.

Subsection 41.14(b), 52 Pa. Code §41.14, expressly raises four issues to be considered in every motor common carrier application:

- (a) Whether the applicant has demonstrated that it possesses the technical ability to provide the proposed service;
- (b) Whether the applicant has demonstrated that it possesses the financial ability to provide the proposed service;
- (c) Whether the record demonstrates that the applicant lacks a propensity to operate safely; and
- (d) Whether the record demonstrates that the applicant lacks a propensity to operate legally.

As noted above, the first two issues, along with the four issues raised by Subsection 41.14(a), pertain to the applicant's prima facie presentation. With respect to the latter two issues, above, there is no particular burden of proof placed on any party. It is part of the presiding officer's decision making process to monitor the record, as a whole, in the public interest and in the interest of maintaining the integrity of the regulatory structure and to discern whether the applicant lacks a propensity to operate either safely or legally, and, then, if the record affirmatively demonstrates such a deficiency in the applicant, the presiding officer exercises discretion regarding whether the application is to be approved or denied in its entirety.

A protestant or other party may undertake to show that the applicant lacks the propensity to operate either safely or legally, pursuant to Subsection 41.14(b). 52 Pa. Code §41.14. Alternatively or in conjunction with the foregoing proof, a protestant may undertake to show that a grant of the application will endanger or impair its operations, pursuant to Subsection 41.14(c). 52 Pa. Code 41.14.

If an applicant has successfully carried its prima facie burden of proof and a protestant, or other party, demonstrates that the applicant lacks a propensity to operate either safely or legally, then the Commission will exercise its discretion in determining whether the applicant's conduct, which gave rise to the demonstrated lack of a propensity to operate safely or legally, justifies withholding approval of the application. 52 Pa. Code §41.14(b).

On the other hand, if an applicant has successfully carried its prima facie burden of proof and a protestant demonstrates that approval of the application will endanger or impair the operations of the protestant(s), then the Commission must, in order to dispose of the application, balance the potential harm to the protestant(s) against the potential benefit to the public, resulting from the grant of the application. 52 Pa. Code §41.14(c).

Finally, the Commission suggests in its Transportation Regulatory Policy (Order at M-820319, adopted November 19, 1982, entered November 22, 1982, and published in the Pennsylvania Bulletin at 12 Pa. B. 4282 [December 18, 1982])

that Section 41.14 shall be construed and applied with the goal of promoting healthy competition among motor common carriers.

II.

Evidence Adduced and 52 Pa. Code §41.14

A. Demand or Need for Service

By this application, Pitt-Ohio is requesting the right to transport property limited to G. C. Murphy Company between points in Pennsylvania. The first question to be answered is whether or not the evidence of record shows that there is a public demand or need for the proposed transportation service. Inasmuch as service will be provided only for G. C. Murphy, it is the evidence presented by the supporting shipper which is determinative.

G. C. Murphy operates a major distribution center in McKeesport, Allegheny County. (Ex. A-9; 90-91) It has vendors of various types of merchandise at 161 Pennsylvania locations, with more than one vendor in the major cities such as Pittsburgh and Philadelphia. (Ex. A-9; 92) A review of Applicant's Exhibit 9 shows that those vendors are not concentrated in any one part of the state but rather are located throughout Pennsylvania.

G. C. Murphy currently operates approximate 115 retail stores in 91 Pennsylvania cities and towns. The larger cities such as Pittsburgh, Philadelphia and Harrisburg have more than one store each. (Ex. A-8; 88-89)

The more than 161 Pennsylvania vendors each ship merchandise to the McKeesport distribution center and to each of the approximately 115 retail stores in Pennsylvania. (89-90, 121) The collective volume of traffic from the vendors to the distribution center is between 4,000,000 and 5,000,000 pounds a year (95) The collective volume of traffic from the 161 Pennsylvania vendors to the more than 115 Pennsylvania retail stores is between 3,000,000 and 4,000,000 pounds a year. (96) G. C. Murphy currently controls the motor carrier selection with respect to 65-70% of this traffic and expects to control an even greater percentage in the near future. (94, 96, 122-123, 139)

In addition, there is a very heavy volume of traffic moving from the McKeesport distribution center to the individual retail stores. The annual volume in 1984 was 33,997,423 pounds. (Ex. A-10) (96-99, 100, 116, 119) Of that amount, between 4,000,000 and 5,000,000 pounds originated with Pennsylvania vendors as indicated above. The balance of approximately 29,000,000 pounds originated at points outside Pennsylvania. About 40% of that traffic, or 11,600,000 pounds, was consigned to the McKeesport distribution center to replenish inventories. At a later date it was reshipped to individual retail stores in Pennsylvania. (100-105)

Freight transported for hire between points in two states is in interstate commerce and subject to the jurisdiction of the Interstate Commerce Commission. However, if the

freight is delivered to a warehouse facility in the second state and there is no fixed intention on the part of the shipper to move that traffic to any specific further destination, there is a break in the movement and any subsequent transportation from the warehouse facility constitutes a separate movement for regulatory purposes. Applicant's evidence shows there was a break in the transportation service when the 11,600,000 pounds of freight was placed into the distribution center inventory at McKeesport. The subsequent movement of that freight to Pennsylvania retail stores was a separate movement in Pennsylvania intrastate commerce. As a consequence, in 1984 the total volume of intrastate freight shipped from the McKeesport distribution center to retail stores in Pennsylvania was approximately 16,000,000 pounds. G. C. Murphy controls the selection of the motor carrier on all of that traffic. (95)

In addition, to the above, G. C. Murphy has freight moving between the following additional combinations of points: from one retail store to another retail store (91, 129); from the retail stores back to the distribution center (91, 126); from the retail stores back to the vendors (99); and from the distribution center back to the vendors (91, 95, 99).

From the above it is clear that G. C. Murphy has in excess of 20,000,000 pounds of freight moving annually in Pennsylvania intrastate commerce. That freight moves from 161 vendor locations to 91 retail store locations and

1 distribution center, and vice versa; from the distribution center to the 91 retail stores locations and vice versa; and between the 91 retail store locations. (Ex. A-8; 9, 10)

With respect to the commodities to be transported, the G. C. Murphy retail stores are divided into 38 separate departments and each department sells a wide range of items. Applicant's Exhibit 7 shows the several hundred generic categories of merchandise involved. This is not all inclusive. For example, the sporting goods department shows golf, football, baseball and basketball items. There are numerous individual items under each of these general categories. (Ex. A-7; 87-88)

The evidence presented by G. C. Murphy clearly establishes that there is a public demand for motor carrier service throughout Pennsylvania on a wide variety of commodities.

Although Applicant has established that the supporting shipper has lost the services of three major motor common carriers in the recent past, Applicant has failed to establish a need for the proposed service, i.e., the record fails to demonstrate a need, in the pre-Kinard legal sense of "need", for the proposed service.

B. Useful Public Purpose

c. Useful Public Purpose Responsive to Demand

In Application of Richard L. Kinard, Inc., Docket No. A.00095829, Folder 1, Am-D (Order entered October 22,

1984), the Commission stated that the second aspect of an Applicant's burden of proof is to show that approval of the application will serve a useful public purpose, in addition to responding to a public demand or need. The so-called alternatives to the inadequacy criterion are methods by which the useful public purpose criterion is met. Applicant has presented evidence with respect to a number of these alternatives.

The evidence shows that the proposed service would be efficient and provide a significant benefit to both the Applicant and the supporting shipper. Pitt-Ohio is currently providing a limited amount of intrastate service for G. C. Murphy in western Pennsylvania. (27-29, 42) Approval of this application will make the Applicant's service more efficient and beneficial to this shipper in several ways.

First, interstate shipments being handled by Pitt-Ohio from a non-Pennsylvania origin direct to a Pennsylvania retail store could be coordinated at Pittsburgh with freight which is moving from the McKeesport distribution center to the same retail stores. This would involve the co-loading of interstate and intrastate freight at Applicant's Pittsburgh terminal. Currently, the Applicant is able to serve all of the retail stores in Pennsylvania under its interstate authority but it can only serve a limited number of those stores in western Pennsylvania under its intrastate authority. G. C. Murphy testified that it would not be

difficult for it to coordinate its interstate and intrastate shipments in this manner. (112) The result would be that the Applicant could combine a larger number of shipments of the shipper moving to its retail stores throughout the state. This would improve the efficient use of the Applicant's equipment. In addition, it would be beneficial to the shipper since most of its retail stores have only one unloading dock and cannot accommodate more than one vehicle at a time. (107, 132) Pitt-Ohio, by combining interstate and intrastate shipments for a given store, would reduce the number of vehicles necessary and relieve the congestion that can occur.

The second way in which the operations of the Applicant could be made more efficient to the benefit of the shipper is in connection with the more than 17,000,000 pounds of interstate freight that is annually received inbound at the McKeesport distribution center which is already consigned to a specific retail store. Under those circumstances, the traffic remains in interstate commerce even though the through movement is temporarily interrupted. G. C. Murphy testified that about 25% of the interstate traffic has a preconsigned store as the ultimate destination, and another 35%, while consigned to the distribution center, has a specific store destination. (101-104)

Pitt-Ohio today can transport that 17,000,000 pounds of interstate freight from the McKeesport distribution center to any retail store in Pennsylvania. Approval of

this application would enable it to combine that interstate traffic with the 16,000,000 pounds of intrastate traffic generated by the distribution center. This again will result in better utilization of the Applicant's equipment and an efficient distribution service for G. C. Murphy.

The third aspect of achieving greater efficiency involves the interstate traffic being handled by the Applicant for shippers other than G. C. Murphy. That traffic is handled through the Pittsburgh terminal and moves to points throughout Pennsylvania. By being able to co-load G. C. Murphy's intrastate traffic with this other interstate traffic, Applicant's operations will be much more efficient. (28-29)

There is also evidence that the Applicant's service is required to meet the anticipated greater future needs of the shipper. G. C. Murphy shipped almost 34,000,000 pounds of freight in 1984 from the McKeesport distribution center to the Pennsylvania retail stores. After the distribution center is remodeled, it expects to divert certain traffic from Columbus, Ohio back to McKeesport which will result in a greater volume of traffic in 1985 and subsequent years. (118-119) In Judge Christianson's Initial Decision in the Kinard case, he specifically stated that "this alternative would be based on a projection that either shipper need will change (increasing volume of traffic or a new plant under construction are obvious examples) or existing carrier service will change". (p. 26)

Applicant has presented evidence consistent with this alternative approach.

The Applicant's service is also demanded as a backup to the two contract carriers that are presently handling the bulk of the traffic from the distribution center to the retail stores. This would involve handling overflow traffic that would not fit on the contract carrier vehicle, or small shipments that did not justify use of the contract carrier at all. (110, 119-120)

Other alternatives include ICC authority and rectification of authority. The relationship of Applicant's ICC authority to more efficient operations has already been discussed above. Approval of this application will rectify to some extent Pitt-Ohio's present operating authority at Folder 1, Am-B which prohibits service from points in Allegheny County to points in Armstrong, Butler, Clarion, Greene and Indiana Counties, and vice versa. (Ex. A-2) (10-11, 49-50) G. C. Murphy has retail stores in all of those counties. Applicant cannot presently handled intra-state shipments from the distribution center at McKeesport or vendors in Allegheny County to stores in those outlying five counties. Approval of this application will eliminate that prohibition to the benefit of both the Applicant and G. C. Murphy.

Based on the evidence, Applicant has proven that approval of the application will serve a useful public purpose.

It is evident that the demonstrated useful public purpose is responsive to the demonstrated public demand for the proposed service.

D. Technical and Financial Ability

E. Propensity to Operate Safely and Legally

Under the Transportation Regulatory Policy, 52 Pa. Code §41.14(b), an applicant for motor common carrier authority also must demonstrate that it has the technical and financial ability to provide the proposed service.

Pitt-Ohio is a financially strong motor common carrier. Its operating ratio in 1984 was approximately 86% on a gross revenue of \$6,852,720. Its net income after taxes in 1984 was \$434,860 and it has a net worth in excess of \$1,000,000. (Ex. A-5; Ex. A-6; 26, 63-64) Clearly Applicant is financially capable of undertaking the service being proposed for G. C. Murphy.

Applicant has a comprehensive safety and equipment maintenance program. Its equipment is kept in good operating condition by five mechanics. Independent inspections are also made of the equipment. (19, 24-25) There is no evidence that the Applicant does not operate in a safe manner.

There is no evidence of record to suggest that the Applicant lacks a propensity to operate legally. Newcomer has filed a complaint against the Applicant alleging improper operations but there have been no decisions in connection

with that complaint. There are no complaints against the Applicant by the Commission. (82-83)

Applicant's ability to provide the proposed service is amply demonstrated. Applicant is obviously a successful carrier since its total revenues almost doubled from 1983 to 1984. (Ex. A-6) It has six years of experience in serving the supporting shipper on both interstate and intrastate traffic. (62) It has a 26 door terminal in Pittsburgh and has just recently purchase a 20 door terminal in Norristown in eastern Pennsylvania. (14, 38-40, 75) These terminals will anchor local eastern and western Pennsylvania operations as well as long haul service between the two ends of the state.

Pitt-Ohio operates 34 tractors, 76 van trailers and 33 straight trucks, all of which are suitable for transporting the shipper's traffic. The van equipment includes 25 foot pup trailers and regular vans of 42, 45 and 48 foot lengths. (Ex. A-3) (20-22) The company employs 75 drivers. (19)

All of the service required by G. C. Murphy is available from Pitt-Ohio. It provides scheduled pickup and scheduled delivery service, split pickup and multiple stop-off delivery service, and handles both truckload and less-than-truckload traffic. (16, 28, 33) From its Pittsburgh terminal it operates between 25 and 37 daily peddle runs in western Pennsylvania. (28-29) It is familiar with the shipper's method of doing business and has been specifically selected by the shipper to replace the discontinued service

of the Helms Express division of Ryder/P-I-E Nationwide.
(109-110, 134)

The record amply demonstrates that Applicant possesses the technical and financial ability to provide the proposed service and there is no adequate indication, in the record, to show that Applicant lacks a propensity to operate either safely or legally.

F. Adverse Impact

In the Kinard case, the Commission at page 4, specifically states that "protestants assumed the burden of establishing that the entry of a new carrier would impair the operations of existing common carriers, contrary to the public interest". At page 5 the Commission agreed with Judge Christianson's interpretation of §41.14(c) of the Transportation Regulatory Policy in that the burden on protestants is quite heavy and it is not satisfied merely by showing a possible diversion of traffic. Newcomer has failed to carry its burden of proof.

During the first 2 1/2 months of 1985, Newcomer transported only 26 shipments of G. C. Murphy traffic. The shipments originated at three vendor locations in Crafton, Blawnox and Pittsburgh, Allegheny County and were all destined for retail stores in Westmoreland, Fayette, Greene and Allegheny Counties. All of the shipments were prepaid by the vendors, which selected Newcomer as the carrier.
(155-161) Consequently, approval of this application should

not divert any of that traffic from Newcomer to the Applicant, since it is controlled by the vendor. If Newcomer provides adequate service it should not lose the business. On the other hand, if its service becomes unsatisfactory the vendor should have an alternative service available to it. It should also be noted that of the 26 shipments handled by Newcomer, Pitt-Ohio has authority currently to transport the 14 shipments that moved to points in Westmoreland, Fayette and Allegheny Counties. Newcomer actually has at stake only the 3 shipments which it handled to Butler and the 9 shipments it handled to Waynesburg, Greene County.

Newcomer's continued operations certainly do not depend on the 12 shipments that would theoretically be subject to diversion if this application were approved. It should also be noted that G. C. Murphy is supporting Pitt-Ohio as a replacement for the previous service provided by the Helms Express division of Ryder/P-I-E. The freight that Pitt-Ohio will receive is therefore not going to be at the expense of any existing carrier.

There is no evidence to support any finding that approval of this application will endanger or impair the operations of Newcomer or any other existing carrier contrary to the public interest.

III.

Conclusion

It is difficult to imagine a more complete record to support statewide motor common carrier authority for a single shipper than is in evidence in this proceeding. The Applicant is an experienced, financially stable motor common carrier having adequate facilities and equipment to provide the proposed service. Applicant provides interstate transportation services for the supporting shipper and provides Pennsylvania intrastate services for the supporting shipper within the limits of its present Pennsylvania authority. The supporting shipper is a major retailer of general merchandise with one distribution center located in Pennsylvania and with approximately 115 retail outlets throughout Pennsylvania.

The record amply supports a finding that the witness for the supporting shipper has offered sufficient testimony to define a substantial public demand for the proposed service.

A useful public purpose for the proposed service has been established by showing the efficiency and benefit to both the Applicant and the supporting shipper resulting from the coordination of the Applicant's interstate and intrastate service for the supporting shipper with the proposed intrastate service. The convenience to the supporting shipper of having a carrier available that is capable of providing a complete service (including a back-up

service to the shipper's contract carriers) is also evidence. Moreover, there is some indication that the proposed service will assist the supporting shipper in meeting a reasonably anticipated future need for the type of service proposed by the Applicant. That the demonstrated useful public purpose of the proposed service is responsive to the public demand shown is evident.

The thrust of Protestant's argument against approval of the application generally and as to that portion of the application territory Protestant is authorized to serve, particularly, is summarized in the last paragraph of Protestant's main brief:

Based on Newcomer's interest, the evidence warrants a finding that (1) Murphy did not show the volume or the frequency of traffic, if any, from Allegheny County to Butler, Clarion, Greene, Armstrong, Forest or Jefferson Counties, or vice versa; (2) Newcomer is presently authorized to serve this territory; and (3) Newcomer solicited Murphy for this traffic and was advised that Murphy had no need for Newcomer's service. Since Pitt-Ohio cannot serve this area, it must be concluded that Murphy has service available from other carriers in Newcomer's territory or that Murphy has no traffic in this area. To find that Murphy has a need in Newcomer's service area that requires Pitt-Ohio's service would require the Administrative Law Judge to engage in conjecture.

One fallacy in Protestant's chain of reasoning is the erroneous premise that a "need", in the pre-Kinard sense, must be demonstrated in order for an application to be granted. To the contrary, a need for the proposed service does not have to be shown in order for an

application to be approved. A persuasive showing of a public demand coupled with a demonstrated useful public purpose that is responsive to the demonstrated public demand will support, in lieu of a shown public need, the approval of an application.

Although Applicant's counsel argues in his reply brief that the volume and frequency of traffic moving in the area of concern to the Protestant has been demonstrated, such evidence, regardless of the weight given to it, is merely cumulative on the record as it stands. Other evidence of record overwhelmingly establishes a demand and useful public purpose for a complete statewide service being available to the supporting shipper. Therefore, it is of no legal significance whether Applicant has demonstrated a defined need for the proposed service in the area of particular interest to the Protestant.

Significantly, no argument is made on brief, and the record supports no argument, that approval of the application will endanger or impair the Protestant's operation.

Conclusion of Law

1. The Commission has jurisdiction over the subject matter of this application and the Applicant.
2. The matter is properly before the Commission.
3. Applicant has demonstrated a public demand for the proposed service.

4. Applicant has demonstrated that a useful public purpose will be served by the proposed service by showing the benefit and efficiency, to both the Applicant and the supporting shipper, resulting from the coordination of the proposed service with the interstate and intrastate service Applicant is presently providing the supporting shipper.

5. Applicant has demonstrated that a useful public purpose will be served by the proposed service by showing the demand for and the availability of the proposed service as a backup service to those services from contract carrier by motor vehicle presently available to the supporting shipper and by showing the potential capability of the proposed service to satisfy a reasonably anticipated future need for additional motor carrier service.

6. Applicant has demonstrated that the useful public purpose of the proposed service is responsive to a public demand.

7. The record does not support a finding that the services offered by existing motor common carriers are inadequate.

8. The record does not support a finding that the service proposed by the Applicant is different from the services available to the supporting shipper.

9. The record supports a finding of a substantial future demand for the proposed services.

10. The record supports the finding that the Applicant's proposed service will provide a backup service for the convenience of the supporting shipper.

11. Applicant has demonstrated that it has the necessary equipment and possesses sufficient resources to obtain additional equipment, if necessary, to perform the proposed service.

12. Applicant has demonstrated that it possesses both the technical and financial ability to provide the proposed service.

13. There is nothing in the record to support the conclusion that Applicant lacks a propensity to operate safely and legally.

14. There is nothing in the record to support the conclusion that entry of Applicant into the application market will impermissibly endanger or impair the operations of existing common carriers.

15. The grant of a certificate as sought in the subject application is necessary or proper for the service, accommodation, convenience, or safety of the public.

Order

IT IS HEREBY ORDERED:

1. That the application of Pitt-Ohio Express, Inc. at Docket No. A.102471, F.1, Am-F, be and is hereby approved and that the certificate issued to Applicant at Docket No. A.102471, F.1, on March 4, 1981, be amended

to include the following operating authority as a motor common carrier:

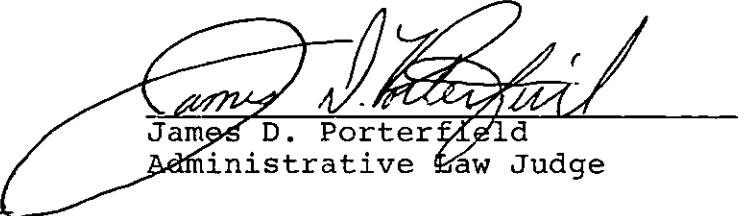
To transport, as a Class D carrier, property, except commodities in bulk and household goods and office furniture in use, for G. C. Murphy Company between points in Pennsylvania.

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

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

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

Dated: 8-23-85


James D. Porterfield
Administrative Law Judge

ACT 294

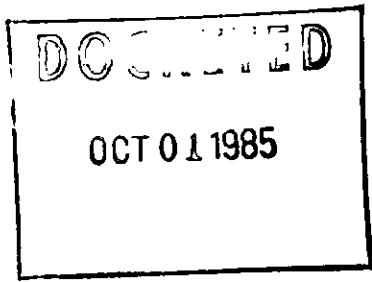
Case Identification: A-00102471, F. 1, Am-A; Application of Pitt-Ohio Express Inc.

Recommended Decision by: ALJ James D. Porterfield

Date Issued: September 16, 1985



ALJ Recommendation: That the Application, as amended, is approved.



* * * *

I want full Commission review of this decision.

Commissioner

DATE

~~I do not~~ want full Commission review of this decision.

Linda P. Saloferno

Commissioner

9-25-85

DATE

9/30

Case Identification: A-00102471, F. 1, Am-A; Application of Pitt-Ohio Express Inc.

Recommended Decision by: ALJ James D. Porterfield

Date Issued: September 16, 1985

ALJ Recommendation: That the Application, as amended, is approved.

* * * *

I want full Commission review of this decision.

Commissioner

DATE

I do not want full Commission review of this decision.

Bill Shane /sw
Commissioner

9-24-85
DATE

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COMMISSIONER SHANE'S OFFICE
PUBLIC UTILITY COMMISSION

ACT 294

Case Identification: A-00102471, F. 1, Am-A; Application of
Pitt-Ohio Express Inc.

Recommended Decision by: ALJ James D. Porterfield

Date Issued: September 16, 1985

ALJ Recommendation: That the Application, as amended, is
approved.

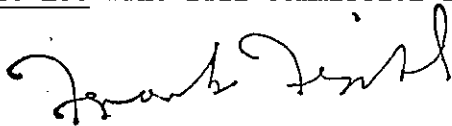
* * * *

I want full Commission review of this decision.

Commissioner

DATE

I do not want full Commission review of this decision.



Commissioner

9-24-85
DATE