



COMMONWEALTH OF PENNSYLVANIA
 PENNSYLVANIA PUBLIC UTILITY COMMISSION
 P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
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ISSUED: November 16, 1993

LDA

A-00102306,
 F0001, Am-K

JOHN A PILLAR ESQUIRE
 312 BOULEVARD OF THE ALLIES
 SUITE 700
 PITTSBURGH PA 15222 1916

DOCUMENT
 FOLDER

APPLICATION OF KLAPEC TRUCKING COMPANY
 TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge John H. Corbett, Jr. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-18, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within twenty (20) days of the issuance date of this letter. 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)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions.

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 twenty (20) 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 Corbett/Office of ALJ/Law Bureau/OSA/PIO/S&C Lauver/Bureau of Trans
 Chairman/Commissioners/ New file
 Our File

MEH
 Encls.

Certified Mail
 Receipt Requested

See attached for additional parties

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X MO 7/8

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(w/o P.V.P.)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Klapec Trucking Company, :
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, steel :
castings for Venango Metallurgical :
Products, from the facility of said :
shipper in the city of Oil City, :
Venango County, to points in :
Pennsylvania: SO AS TO PERMIT the :
transportation of (1) iron and steel and :
iron and steel articles and materials :
used in the manufacture of iron and :
steel and iron and steel articles :
(excluding commodities in bulk) for :
First Miss Steel, Inc., between points :
in Pennsylvania and, (2) paper and :
paper products, plastic and plastic :
products, and materials, equipment and :
supplies used in the manufacture and :
distribution of such commodities, for :
IVEX Corporation, from its facilities :
located in the Township of Pine, Mercer :
County, to points in Pennsylvania. :

Docket No.
A-00102306,
F0001, Am-K

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INITIAL DECISION

Before
John H. Corbett, Jr.
Administrative Law Judge

I. History of the Proceeding

On February 16, 1993, Klapec Trucking Company
("Applicant" or "Klapec") filed with the Pennsylvania Public
Utility Commission ("Commission") an application seeking to amend
its existing common carrier certificate so as to permit the

transportation of certain specified property for First Miss Steel, Inc., between points in Pennsylvania and specified property for IVEX Corporation, from its facilities located in the Township of Pine, Mercer County, to points in Pennsylvania. Notice of the application was published in the Pennsylvania Bulletin on March 20, 1993. Protests were due to be filed on or before April 20, 1993. 52 Pa. Code §3.381(d).

Timely protests were filed on behalf of certificated carriers having authority in conflict with at least a part of the authority the Applicant seeks in this proceeding. The Protestants are: Dunlo Transfer Company ("Dunlo"); W. C. McQuaide, Inc. ("McQuaide"); and Dailey Express, Inc. ("Dailey"). On July 6, 1993, Dunlo withdrew its opposition to the application based upon a proposed restrictive amendment.

Hearings were held in Pittsburgh on July 6 and July 30, 1993. These hearings generated 99 pages of notes of testimony. The Applicant submitted three exhibits for inclusion in the record. During presentation of its case-in-chief on July 30, 1993, the Applicant offered a further restrictive amendment, which satisfies the interests of McQuaide and Dailey.

On August 4, 1993, the Applicant offered a corrected restrictive amendment, which properly identified the location of the facilities of First Miss Steel, Inc., which was inadvertently stated incorrectly in the original restrictive amendment and in

the further restrictive amendment. As now amended correctly, the Applicant seeks authority:

To transport, as a common carrier,

(1) iron and steel and iron and steel articles and materials used in the manufacture of iron and steel and iron and steel articles (excluding commodities in bulk), for First Miss Steel, Inc., between points in Pennsylvania; subject to the following restrictions:

PROVIDED that no right, power or privilege is granted to transport commodities which, because of size or weight, require special equipment, except for hot ingots moving to or from the facilities of First Miss Steel, Inc. located in the Township of Quemahoning, Somerset County;

PROVIDED FURTHER that no right, power or privilege is granted to provide service from the Township of Quemahoning, Somerset County, to the City of Johnstown, Cambria County, and those townships and boroughs contiguous to said city, and vice versa;

PROVIDED FURTHER that no right, power or privilege is granted to provide service from the Township of Quemahoning, Somerset County, to the facilities of Phoenix Pipe & Tube, located in Phoenixville, Chester County, and vice versa; and

PROVIDED FURTHER that no right, power or privilege is granted to provide service for First Miss Steel, Inc. in van trailers.

(2) paper and paper products, plastic and plastic products, and materials, equipment

and supplies used in the manufacture and distribution of such commodities, for IVEX Corporation, from its facilities located in the Township of Pine, Mercer County, to points in Pennsylvania.

This further restrictive amendment, as amended, satisfies the interests of all Protestants. Accordingly, no briefs were filed.

This matter is now before the undersigned Administrative Law Judge for disposition.

II. Findings of Fact

1. The Applicant is Klapec Trucking Company, a Pennsylvania corporation, with its business office located at P.O. Box 1278, Oil City, Venango County, Pa. 16301-5278 (N.T. 7).

2. J. Bernard Klapec is the founder and current President of Klapec Trucking located at the foregoing address, where it has been situated for about seven years (N.T. 7).

3. Klapec was established by Mr. Klapec in 1949. Klapec Trucking Company was incorporated in 1979 (N.T. 7).

4. The Klapec facility on Route 8 consists of a 10,000 square foot office structure, a 23,000 square foot garage, built in 1985, and a parking area on twenty acres of land (N.T. 7, 8).

5. Klapec employs sixty-two (62) drivers, eleven (11) office personnel and fourteen (14) mechanics at the same location (N.T. 7, 8).

6. Klapec currently holds operating authority from the Pennsylvania Public Utility Commission at Docket No. 102306 (N.T. 9, 11).

7. Klapec first received operating authority from the Commission in 1956. That authority increased over time upon subsequent applications to the Commission. The Commission last granted authority for Klapec to serve, as a common carrier transporting property to, from and within, Forest County at Docket No. A-00102306, F.1, AM-J (N.T. 9, 11; Applicant's Exh. 1).

8. There is some overlap between existing authority and authority applied for in the current application, but Applicant understands only one authority will be granted if this application is approved (N.T. 12-14).

9. Klapec currently owns a fleet of vehicles consisting of: 63 tractors, 124 trailers, and 9 trucks, as well as 11 vehicles in the "small equipment" area, including pick-up trucks, cars, small utility vehicles and a van (N.T. 15-17, Applicant's Exh. 2).

10. In addition to the above-listed equipment, Applicant has ordered a new trailer and six new tractors (N.T. 20).

11. Applicant has the experience and equipment necessary for hauling hot ingots. Applicant has hauled hot ingots for the Ellectralloy Corporation (N.T. 18-19).

12. Klapec has successfully hauled hot ingots as far as 268 miles (N.T. 50).

13. Applicant owns all of its own equipment and maintains it using mechanics at its facility (N.T. 19).

14. Applicant follows a safety program consisting of quarterly meetings for the drivers and awards for safe driving. A board consisting of drivers, mechanics and a safety department representative meets to discuss disciplinary measures for drivers with safety problems (N.T. 21-22).

15. Applicant has a DOT safety rating of "satisfactory," which is the highest rating achievable (N.T. 22-23).

16. The Applicant's trucks are inspected by the state every six months. The drivers are required to inspect the vehicles before leaving on every trip (N.T. 23).

17. Most of Applicant's drivers are assigned to the same truck all the time (N.T. 23).

18. The Applicant carries liability insurance with policy limits of one million dollars with a five million dollar umbrella. This insurance coverage is in excess of that required by the Commission (N.T. 23).

19. Three employees dispatch drivers and vehicles from Applicant's office in Venango County (N.T. 24).

20. The dispatch department is open from 8:00 AM to 7:00 PM. Mr. Klapac handles the off-hour calls (N.T. 25).

21. The Klapac garage is open six days each week. The Klapac trucks run seven days per week (N.T. 25).

22. The Applicant tailors the service it provides to the needs and requests of its customers (N.T. 25-26).

23. Klapac expects to serve IVEX by light load or by dropping a trailer and having IVEX preload it (N.T. 27).

24. Klapac expects to serve First Miss at either its facility in Hollsopple or wherever First Miss' products are in need of transportation (N.T. 27-28).

25. Approval of this application will allow Klapac to better utilize its equipment so its trucks run fewer empty miles (N.T. 28).

26. Klapac's drivers generally return to the garage each night. They stay away from the terminal overnight, if they have a morning pick-up near their last stop of the day (N.T. 28-29).

27. Under ICC authority, Klapac trucks carry cargo from coast to coast in the United States and also to Canada (N.T. 15, 29).

28. The cash deficit of \$25,371 shown on the 1992 cash flow statement and reflected in the 1992 balance sheet resulted from the timing of the posting of accounts payable payments (N.T. 30, 31; Applicant's Exh. 3).

29. Klapec's current accounts receivable is \$716,000.00. This figure excludes more than \$177,906.00 that may not be collected (N.T. 31).

30. Both Klapec's gross profits and gross revenue increased in 1992 as compared to 1991 (N.T. 32).

31. At year end 1992 Klapec's total current assets were \$951,421.00. The total current liabilities were \$653,858.00 and the retained earnings were \$740,055.00 (N.T. 32).

32. Klapec generated roughly six million dollars in gross revenues in 1992. Of that amount, roughly ten percent or \$600,000 were revenues from intrastate Pennsylvania service (N.T. 33).

33. Klapec has not had trouble borrowing money for equipment. It pays cash and uses credit to obtain new equipment (N.T. 33).

34. Klapec has two outstanding loans listed as long term debt: one for \$221,000.00 and one for \$437,000.00. Both loans funded equipment purchases and were secured with equipment purchased with the funds (N.T. 35).

35. Klapec currently hauls for First Miss under its ICC authority and limited Commission-granted authority (N.T. 36).

36. Klapec transports products from the facility of First Miss in Hollsopple, PA, making deliveries to Corry and Titusville in Pennsylvania, as well as interstate points (N.T. 37).

37. Stony Creek Steel, and Steel Castings and Engineers operate out of Hollsopple. They are interrelated companies. One is merely a trade name and the other bears similar officerships to First Miss (N.T. 37-38).

38. Klapec has not leased any equipment and/or drivers to First Miss Steel (N.T. 39).

39. Jack Simmons, on behalf of First Miss Steel, asked that the present application be filed (N.T. 39-40).

40. Klapec has filed an expedited service tariff (N.T. 42).

41. The cars listed on Applicant's equipment list do not have Klapec's PUC number listed on the side. (N.T. 40-41; Applicant's Exh. 2).

42. Klapec has not used a car for expedited service pickups or deliveries (N.T. 42).

43. Klapec has a drug testing program (N.T. 42).

44. The program involves a preemployment drug screening, as well as a computer generated random testing requirement after employment (N.T. 42-43).

45. When a driver is found to have an illicit drug present in his blood system, the driver is pulled off the road (N.T. 43).

46. When a driver is pulled off the road, further tests are run to ensure the driver was in fact involved in illegal drug use (N.T. 46).

47. In the event the driver is found to have abused illegal drugs, the driver will be terminated (N.T. 46).

48. In the event a driver volunteers information that she or he has a drug problem, Klapec will take that driver off the road and allow the driver back on the road only after medical testimony establishes the driver is completely drug free (N.T. 48).

49. Klapec follows the law for maximum driving hours in a period without an eight hour break and total driving hours over an eight day span (N.T. 48-49).

50. IVEX Corporation is located at 600 Barkeyville Road, Grove City, Pennsylvania (N.T. 52).

51. IVEX manufactures plastic and paper items for food and material packaging (N.T. 53).

52. IVEX has another facility in Hazleton and it ships materials between its Hazleton and Grove City facilities. The Grove City facility receives shipments once or twice each week (N.T. 54, 57).

53. IVEX currently uses Klapec for interstate shipping services (N.T. 56).

54. IVEX supports this application, because it has a large number of intrastate shipments and wants as many options as possible for shipping within Pennsylvania (N.T. 55-56).

55. IVEX currently ships and expects to continue shipping to destinations including, but not limited to, Reading, Philadelphia, North Huntingdon, Wilkes-Barre, York, Scranton and Erie (N.T. 58).

56. IVEX requires state-wide delivery services (N.T. 59).

57. IVEX ships between twenty and twenty-five intrastate loads each week (N.T. 60).

58. IVEX anticipates using Klapec for at least two loads per day and as many as five loads per day. IVEX requires van trailers for its shipping needs (N.T. 61).

59. In addition to other intrastate carriers, IVEX also uses its own company trucks, a practice it will continue, if this application is granted (N.T. 65).

60. There have been times when IVEX has been unable to secure a carrier for immediate intrastate deliveries to locations including, but not limited to, Philadelphia, York and Reading, causing shipments to wait at the loading dock (N.T. 66).

61. IVEX requires trailer spotting service from its carriers (N.T. 68).

62. First Miss Steel, Inc. is located at Route 601, Hollsopple, PA, in Somerset County (N.T. 83).

63. John (Jack) H. Simmons is a small business unit manager for First Miss and knows the transportation needs of First Miss Steel (N.T. 83).

64. First Miss is not a fully integrated steel mill. It uses the services of local converters throughout Pennsylvania to further process the ingots it produces into the products it finally sells (N.T. 84).

65. First Miss produces heavy steel products in Hollsopple, PA (N.T. 85).

66. First Miss ships between 9,000 and 10,000 tons of finished steel products to its customers each month. Mr. Simmons does not know the percentage of these shipments that go to points in Pennsylvania (N.T. 88).

67. First Miss uses converters for the value-added product line. The First Miss' value-added product line is two years old and has grown to the point that 500 tons of steel are

shipped in and out of the Hollsopple plant each month for conversion purposes alone. The majority of these shipments are to points within Pennsylvania (N.T. 85-86).

68. First Miss ships from Hollsopple to Pennsylvania locations including, but not limited to, Corry, Bravern, New Kensington, Zelienople, Eighty-Four, Irvine, Erie, Bridgeville, Bethlehem, Coatesville, Lenape, Burnham, New Castle, McKeesport and Aliquippa (N.T. 85, 90, 91).

69. First Miss ships both hot and cold ingots (N.T. 87).

70. First Miss requires flatbed trucks for 90% of the product shipped from its facility in Hollsopple to and between converters in Pennsylvania (N.T. 87, 89).

71. First Miss currently ships hot ingots on lowboy trailers (N.T. 87).

72. First Miss moves products from its plant in Hollsopple to customers and converters within Pennsylvania on a daily basis (N.T. 92).

73. First Miss supports this application, because it has had problems moving loads on a timely basis due to a shortage of available carriers (N.T. 93).

74. First Miss uses Ray Trans to dispatch its shipping needs (N.T. 93).

75. Mr. Simmons previously used Klapac, when he worked at another company and is confident Klapac can provide the service he now requires (N.T. 95).

76. First Miss does not operate any private trucks (N.T. 96).

77. First Miss expects its intrastate transportation needs to expand and requires service throughout the state of Pennsylvania (N.T. 97).

78. First Miss will use Klapac, if this application is granted (N.T. 97).

III. Discussion

A. The Burden of Proof

Section 332(a) of the Public Utility Code ("Code"), 66 Pa. C.S. §332(a), provides generally for the party seeking affirmative relief from the Commission to bear the burden of proof. In this proceeding, the Applicant has applied to the Commission to amend its existing certificate of public convenience to permit it to transport property as a common carrier for different shippers and to permit it to ship that property to and from areas in addition to those for which it currently holds authority. Thus, it is clear the Applicant is the party seeking affirmative relief from the Commission and, therefor, is the party bearing the burden of proof.

In Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950), the Pennsylvania Supreme Court held the term "burden of proof" means a duty to establish a fact by a preponderance of the evidence. The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest degree, than the evidence presented by the other party. Upon an applicant's submission of evidence sufficient to establish a prima facie case, the burden of going forward with the evidence, sometimes called the burden of persuasion, shifts to protestants. If protestants fail to rebut such evidence, then the applicant prevails. However, if protestants have placed into the record evidence to rebut that of the applicant, the burden of going forward with the evidence has shifted back to the applicant. In order to now satisfy the burden of proof, an applicant must rebut protestants' evidence by a preponderance of the evidence. Although the burden of going forward with the evidence may shift from one party to another during a proceeding, the "burden of proof" never shifts. It always remains on an applicant, consistent with the Commission's regulations at 52 Pa. Code §41.14(a) and (b). Cf., Replogle v. Pennsylvania Electric Company, 54 Pa. P.U.C. 528 (1980), and Waldron v. Philadelphia Electric Company, 54 Pa. P.U.C. 98 (1980).

In addition to determining whether the applicant has satisfied the burden of proof, care must be exercised to ensure that the decision of the Commission is supported by substantial evidence in the record. See, e.g., Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704. The term "substantial evidence" has been defined by the Pennsylvania Supreme, Superior and Commonwealth Courts as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. P.U.C., 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and Murphy v. Comm., Dept. of Public Welfare, White Haven Center, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382 (1984).

B. The Evidentiary Criteria

An applicant, who proposes to provide intrastate carriage service to the public for compensation, must obtain from the Commission a certificate of public convenience. 66 Pa. C.S. §§102, 1101 and 1103. The Commission will grant a certificate of public convenience "...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 the Commission uses in deciding applications seeking motor common carrier authority are set forth in Section 41.14 of the Commission's regulations, 52 Pa. Code §41.14. These criteria are:

(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 an extent that, on balance, the granting of authority would be contrary to the public interest.

Subsections (a) and (b) clearly place on the applicant the burden of proving its proposed service will serve a useful public purpose, responsive to a public need or demand, and that it is financially and technically fit to provide the proposed service.

The Commission clarified the type of evidence an applicant may provide to satisfy its burden of proof under Section 41.14(a) in Application of Blue Bird Coach Lines, Inc., 72 Pa. P.U.C. 262, 274 (1990), when it stated in pertinent part:

When, through relevant, probative, competent and credible evidence of record, a motor common carrier applicant has shown that the applicant's proposed service will satisfy the supporting witnesses' asserted transportation demand/need, the applicant has sustained its burden of proof under subsection 41.14(a) by establishing that "approval of the application will serve a useful public purpose, responsive to a public demand or need."...

* * *

The witnesses supporting a motor common carrier application must be legally competent and credible, ... and their testimony must be probative and relevant to the application proceeding. ... The supporting witnesses must articulate a demand/need for the type of service embodied in the application. ... Moreover, the supporting witnesses must identify Pennsylvania origin and destination points between which they require transportation, and these points must correspond with the scope of the operating territory specified in the application. ... (Citations and footnotes omitted).

An applicant is not required to establish a public demand/need for the proposed transportation service in each and every point within the proposed service territory. It is sufficient, if an applicant establishes a public demand/need for the proposed service generally throughout the proposed service territory. Morgan Drive Away, Inc. v. Pa. P.U.C., 99 Pa. Commonwealth Ct.

420, 512 A.2d 1359 (1986); Purolator Courier Corp. v. Pa. P.U.C., 51 Pa. Commonwealth Ct. 377, 414 A.2d 450 (1980); Pa. P.U.C. v. Purolator Courier Corp., 24 Pa. Commonwealth Ct. 301, 355 A.2d 850 (1976); and Eagle Courier and Limousine Service, Inc., 57 Pa. P.U.C. 404 (1983).

The provisions of subsection 41.14(b) are generally referred to as an applicant's "fitness" to hold motor common carrier authority. In Re Perry Hassman, 55 Pa. P.U.C. 661, 662-663 (1982), the Commission provided the following definition of "fitness" and indicated the type of evidence that would satisfy the definition:

1. Technical expertise - applicant must have technical capacity to meet the need in a satisfactory fashion. ... Applicant must possess sufficient staff, facilities, and operating skills, to make the proposed service feasible, profitable, and a distinct service to the public. ...
2. Financial capacity - applicant should possess the financial ability to give reliable and respectable service to the public. ... Applicant should own or should have sufficient financial resources to obtain the equipment needed to perform the proposed service.
3. Propensity to operate safely and legally - in this regard, lack of fitness is demonstrated by persistent disregard for, flouting, or defiance of the Public Utility Law and commission's orders and regulations...; and by violations in matters affecting the safety of operations. ... In the case of applicants who already possess operating authority, past performance should be analyzed to determine whether applicant

has obeyed the Public Utility Code and commission regulations, particularly those regulations dealing with public safety. For applicants who do not possess operating authority, the commission may consider any evidence which would bear upon the applicant's propensity to operate a public utility safely and legally. (Citations omitted).

An applicant for motor common carrier authority does not bear the burden of proving it will operate legally and safely. Rather, the language of §41.14(b) appears to presume that applicants will operate legally and safely. However, it is the duty of the presiding Administrative Law Judge to monitor the record as a whole, in the public interest and in the interest of maintaining the integrity of the regulatory process, to discern whether an applicant lacks such a propensity. Once the record fairly suggests an applicant lacks a propensity to operate legally or safely, then the applicant does have the burden of showing such is not the case. When the record, as a whole, affirmatively demonstrates an applicant lacks a propensity to operate legally, administrative discretion must be exercised to determine whether, and to what extent, the application should be granted.

It appears well settled that evidence of an applicant's unlawful operations, in and of itself, does not preclude the approval of a subsequent application for proper authority. Rather, when presented with such evidence, a determination must

be made as to whether the unlawful operations resulted from a bona fide misunderstanding of the Code and the rules and regulations of the Commission, or whether the unlawful operations were performed in a deliberate disregard of the law. If the applicant's unlawful operations resulted from a bona fide misunderstanding, the evidence of such operations can be considered on the question of whether there is a need for the proposed service. However, if an applicant's unlawful operations were the result of a deliberate disregard for the law, then such operations cannot be considered in determining whether there is a need for the proposed service. Brink's, Inc. v. Pa. P.U.C., 500 Pa. 387, 456 A.2d 1342 (1983); Bunting Bristol Transfer, Inc., et al. v. Pa. P.U.C., 418 Pa. 286, 210 A.2d 281 (1965); and D.F. Bast, Inc., et al. v. Pa. P.U.C., 397 Pa. 246, 154 A.2d 505 (1959). Further, even when presented with evidence that an applicant deliberately performed unauthorized transportation, it is for the Commission to determine if the acts of unauthorized transportation are sufficiently serious violations to justify the denial of the entire application. Re Erie Enterprises, Inc., 63 Pa. P.U.C. 108 (1987).

The burden under subsection 41.14(c) to prove the entry of a new carrier will so endanger or impair the operations of existing carriers that, on balance, the granting of authority will be contrary to the public interest, is on a protestant.

That burden is a heavy one. Evidence consisting merely of a diversion of traffic volume from the protestants is insufficient to sustain this burden of proof. Blue Bird, supra. The Commission is vested with the discretion to determine whether, and the extent to which, competition between public utilities may be permitted. Yellow Cab. Co. v. Pa. P.U.C., 161 Pa. Superior Ct. 41, 54 A.2d 301 (1947); John Benkhart & Sons v. Pa. P.U.C., 137 Pa. Superior Ct. 13, 7 A.2d 588 (1939); Collins v. Pa. P.S.C., 84 Pa. Superior Ct. 58 (1924); Application of the Harmony Electric Company, 1 Pa. P.S.C. 75 (1914); and Application of Wilkes-Barre Light Company, 2 Pa. P.S.C. 913 (1915). Only the threat of unrestrained and destructive competition, which is inimical to the public interest, precludes a grant of an application pursuant to subsection 41.14(c). Blue Bird, supra. See also, Harmony Electric Company v. Pa. P.S.C., 78 Pa. Superior Ct. 271 (1922); Yellow Cab of Pittsburgh v. PA P.U.C., 105 Pa. Commonwealth Ct. 513, 524 A.2d 1069 (1987), and Seaboard Tank Lines, Inc. v. Pa. P.U.C., 93 Pa. Commonwealth Ct. 601, 502 A.2d 762 (1985).

The term "destructive competition", though referenced in decisions of the Commonwealth Court, does not appear to have been defined by any court in Pennsylvania. The Commonwealth Court did, however, provide the following definitions of "harmful competition" and "unfair competition" in Brinks, Inc. v. Pa.

P.U.C., 56 Pa. Commonwealth Ct. 371, 424 A.2d 1010, 1012, note 2
(1981):

In this opinion, we use the terms "unfair competition" and "harmful competition" to mean different things. "Harmful competition" refers to competition with a common carrier where there is insufficient need for additional service to warrant a grant of authority to another common carrier or a contract carrier. "Unfair competition" refers to competition between two carriers where one of those carriers is forced, by the terms of its grant of authority, to operate under more burdensome conditions than the other.

Competition, which is either "harmful" or "unfair", by definition appears to be "destructive". Additionally, competition in the guise of "unfair trade practices" or "predatory pricing" through unreasonable tariff rates also appears to constitute "destructive competition". In short, competition, which threatens the future existence and availability of public utility service to the public, should also be regarded as "destructive". Cf., Application of the Harmony Electric Company, 1 Pa. P.S.C. 75 (1914). Whether a grant of authority in a particular case may give rise to a competitive situation that may be destructive is a matter the Commission must decide on the basis of the record before it. Having established which party bears the burden of proof and the appropriate evidentiary criteria, we turn now to review the merits of the case.

C. Public Demand or Need

In this proceeding, the Applicant is seeking to amend its current authority so that it may transport different types of property for different shippers within a territory different than that for which it is now authorized to operate. In the context of Section 1103(a) of the Code, an applicant may prove a public demand/need for its proposed transportation service through witnesses comprising a representative sampling of the public that will use its proposed services within the application territory. Blue Bird, supra at 274.

The witnesses supporting a motor common carrier application must be legally competent and credible, and their testimony must be probative, as well as relevant to the application. The supporting witnesses must articulate a demand/need for the type of service embodied in the application. Moreover, the supporting witnesses must identify Pennsylvania origin and destination points between which they require transportation. These points must correspond with the scope the operating authority requested in the application. The particular circumstances of a case determine what constitutes sufficient evidence of a public demand/need for an applicant's proposed service. The number of witnesses, which will comprise a cross section of the public on the issue of the public demand/need for

an applicant's proposed service, will necessarily vary with the circumstances of each case. One may consider such factors as the breadth of the applicant's intended operating territory, the population density in the intended operating authority and the scope of the requested operating authority. Id. at 274-275.¹

In the case sub judice, the Applicant presents two witnesses in addition to its operating witness to support this application. The application requests authorization for transportation of property for two shippers. Klapac seeks authority to transport property between points in Pennsylvania for First Miss Steel, Inc. and to carry outbound shipments from the Township of Pine, Mercer County, for IVEX Corporation to points within Pennsylvania.

First Miss, located in Hollsopple, Pennsylvania, currently ships 500 tons of steel from its value-added steel product line for conversion, per month. The value-added line ships out for conversion ingots First Miss produces to other metal working facilities for further processing. A majority of that product is converted in Pennsylvania. The converted ingots are returned to First Miss' Hollsopple plant and then sold to First Miss' customers. First Miss ships between 9,000 and 10,000

¹In Blue Bird supra at 273, the Commission specifically overruled its prior decision in Re: Richard L. Kinard, Inc., 58 Pa. P.U.C. 548 (1984) in order to clarify the Commission's interpretation of its transportation regulatory policy statement at 52 Pa. Code §41.14(a).

tons of finished steel products per month from Hollsopple to customers both within and without Pennsylvania. Ninety percent of the products shipped from the Hollsopple facility requires movement by flat bed trailer (N.T. 87, 89). Shipments of hot ingots require lowboy flatbed trailers. First Miss ships its products and receives shipments at its plant in Hollsopple, for which it controls the carrier. It directs shipments to its converters daily, for which it also controls the carrier (N.T. 91).

First Miss uses converters within Pennsylvania. These converters are located in, among other places: Corry, Bravern, New Kensington, Zelienople, Eighty-Four, Irvine, Erie, Bridgeville, Bethlehem, Coatesville, Lenape, Burnham, New Castle, McKeesport, and Aliquippa. First Miss requires transportation from its Hollsopple facility to these locations, from these locations to its Hollsopple facility, and between these locations (N.T. 85, 90, 91).

First Miss does not operate any private trucks and relies for its shipping needs on outside carriers like Klapac. First Miss' value-added product line has been expanding and First Miss expects it to continue to do so. First Miss has experienced trouble moving loads on a timely basis due to a shortage of available carriers (N.T. 93). First Miss uses a dispatching service to arrange shipping for its Hollsopple facility. First

Miss remains the shipper and supplies the dispatcher with names of acceptable carriers. The witness for First Miss is familiar with Klapac's services. The witness used Klapac, when he worked for another company, for service similar to that for which Klapac is now seeking authorization (N.T. 95). First Miss requires common carrier service for both outbound and inbound shipments. First Miss will use Klapac, if this application is granted (N.T. 97).

An applicant is not required to establish a public need/demand for the proposed transportation service at each and every point within the proposed service territory. It is sufficient for an applicant to establish a public demand/need for the proposed service generally throughout the proposed service area. Morgan Drive Away, Inc. v. Pa. P.U.C., 99 Pa. Commonwealth Ct. 420, 512 A.2d 1359 (1986). The shipper need only show the applicant's proposed service will satisfy the shipper's asserted transportation demand/need, Blue Bird, supra at 274. The evidence presented here is sufficient to meet the Applicant's burden for demonstrating public need/demand to transport property as a common carrier for first Miss Steel between points in Pennsylvania.

IVEX Corporation, located at 600 Barkeyville Rd., Grove City, Pennsylvania, manufactures plastic and paper packaging items. IVEX supports this application. A great majority of its

product is shipped to Pennsylvania locations. IVEX currently uses Klapec for interstate shipments to Connecticut and Virginia (N.T. 52-54, 57). IVEX ships one or two truckloads per week to its facility in Hazleton, Pennsylvania. IVEX also ships to customers in Philadelphia, Reading, Scranton, Wilkes Barre, York, Erie, North Huntingdon and Somerset, as well as other Pennsylvania locations. IVEX ships an average of 20 to 25 truckloads each week to points within Pennsylvania (N.T. 58, 60). IVEX expects to use Klapec for two truckloads per day (N.T. 61). IVEX requires 48 or 53 foot van trailers for its shipments. The average load weighs seven thousand pounds. The heaviest loads are generally 22,000 pounds. All of these are full-truckload shipments. The weight varies due to the differing products and waste products.

IVEX maintains trucks and trailers of its own on a permanent basis. IVEX also uses other intrastate carriers. They are insufficient for IVEX's needs as IVEX has, from time to time, been left with freight sitting on the dock due to the unavailability of authorized carriers (N.T. 65, 66). Klapec's application seeks authority to provide common carrier service from IVEX's Grove City location to points in Pennsylvania. IVEX requires outbound transportation service to points in Pennsylvania. The evidence presented here is sufficient to meet the Applicant's burden for demonstrating a public need/demand to

transport property as a common carrier for IVEX to points in Pennsylvania.

D. Fitness

As noted at the inception of this discussion, the Applicant holds existing authority from this Commission (N.T. 9, 11). As a general rule, there exists a presumption of fitness of an applicant requesting additional certificate rights, as distinguished from an applicant initially requesting a certificate of public convenience. Re V.I.P. Travel Service, Inc., 56 Pa. P.U.C. 625, 631 (1982). Nevertheless, the Applicant presents evidence on this issue.

1. Financial Fitness

As evidence of its current financial standing, Klapec submits balance sheets, statements of retained earnings and income, and statements of cash flows for the years ending December 31, 1991 and 1992. The income statement discloses gross income of \$277,669 with net income of \$182,085 for 1992. The balance sheet discloses total assets of \$2,689,230 after depreciation, total liabilities of \$1,521,826 and total shareholders' equity of \$1,167,404 (Applicant's Exh. 3). The only questionable item on the statements is an overall deficit shown on the 1992 year end balance sheet. Mr. Klapec

satisfactorily explains that as a timing problem, since checks were written on the last day of the year to pay bills (N.T. 30, 31). Klapac has continually operated at a profit. As evidenced by a new equipment loan, Klapac has not had difficulty borrowing money to buy equipment (N.T. 33), and is able to obtain financing necessary for expansion.

No protestants challenge the financial fitness of Klapac. In view of the fact Klapac already possesses Commission authority, has been found to be financially fit in these prior proceedings and continues to operate at a profit, I conclude Klapac is sufficiently financially fit to provide the proposed service.

2. Operational Fitness

Klapac is located on Route 8 in the Village of Reno, Oil City, Venango County. At that location, the Applicant has an office, garage and a parking area (N.T. 7, 8).

Pursuant to its existing authority, Klapac transports property within Pennsylvania (N.T. 9, 10). Klapac submitted an equipment list disclosing it owns 63 tractors, 124 trailers, 9 trucks and 11 vehicles classified as small equipment (pick up trucks, station wagons and others) (Applicant's Exh. 2). In addition to its existing equipment, the Applicant has just purchased a new trailer and six new tractors (N.T. 20). Klapac

maintains all of its own equipment with a staff of fourteen mechanics (N.T. 7, 8).

Klapec has separate drug testing and safety programs (N.T. 21-22, 42). The safety program includes a committee of drivers, mechanics and someone from the safety department. The committee operates by reviewing violations and making decisions to remedy problems. Klapec is ranked as satisfactory by the DOT. Satisfactory is the highest rating achievable (N.T. 22, 23). Klapec's drivers routinely inspect their trucks before each trip (N.T. 23). Its drug testing program consists of a mandatory preemployment drug test and computer generated random testing after hiring. Drivers are removed from driving duty, if they are found to have illegal drugs in their blood (N.T. 42, 43, 46). Klapec carries insurance in excess of that required by the Commission. No evidence suggests any pending or past complaints (N.T. 23).

No one challenges the operational fitness of Klapec to provide the proposed service. Based upon this evidence, I conclude the Applicant possesses the operational fitness to provide the service it proposes.

3. Propensity to Operate Legally and Safely

The Applicant already possesses operating authority (N.T. 9, 11). No evidence suggests the Applicant currently

operates unlawfully or lacks the propensity to continue to operate legally. No complaints are pending before the Commission involving this Applicant. Since the language of §41.14(b) presumes that applicants will operate legally and safely and the evidence here shows the Applicant has done so, the Applicant carries insurance in excess of the amounts required by the Commission, and the Applicant has drug screening and safety programs, I conclude the Applicant possesses the requisite propensity to operate legally and safely.

E. Adverse Public Impact

With respect to the provisions of 52 Pa. Code §41.14(c), a protestant carries the burden of proving the entry of a new carrier will so endanger or impair the operations of existing carriers that, on balance, the granting of authority will be contrary to the public interest. That burden is a heavy one.

The Applicant was able to satisfy the interests of all original Protestants by amending its application. Since no one offers any evidence on this issue, I conclude granting this application will not endanger or impair the operations of existing common carriers to such an extent, that, on balance, it will be contrary to the public interest.

Since the Applicant has met all of the required criteria under 52 Pa. Code §41.14, the application, as amended, will be granted.

IV. Conclusions of Law

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

2. The Applicant has demonstrated the requisite need for the services proposed in this application.

3. The Applicant has demonstrated the necessary fitness to provide the service sought in the application.

4. Granting the proposed authority to the Applicant will not endanger or impair the operations of existing common carriers to such an extent that, on balance, the granting of authority will be contrary to the public interest.

V. ORDER

THEREFORE,

IT IS ORDERED:

1. That the application of Klapec Trucking Company, docketed with the Pennsylvania Public Utility Commission at No. A-00102306, F0001, Am-K, as amended, be and is hereby approved and that the certificate issued to the Applicant at Docket No.

A-0010236, F0001, be further amended to include the following rights:

(1) To transport, as a common carrier,

iron and steel and iron and steel articles and materials used in the manufacture of iron and steel and iron and steel articles (excluding commodities in bulk), for First Miss Steel, Inc., between points in Pennsylvania;

subject to the following conditions:

Provided that no right, power or privilege is granted to transport commodities which, because of size or weight, require special equipment, except for hot ingots moving to or from the facilities of First Miss Steel, Inc. located in the Township of Quemahoning, Somerset County;

Provided further that no right, power or privilege is granted to provide service from the Township of Quemahoning, Somerset County, to the facilities of Phoenix Pipe and Tube, located in Phoenixville, Chester County, and vice versa;

Provided further that no right, power or privilege is granted to provide service from the Township of Quemahoning, Somerset County, to the City of Johnstown, Cambria County, and those townships and boroughs contiguous to said city, and vice versa; and

Provided further that no right, power or privilege is granted to provide service for First Miss Steel, Inc. in van trailers.

and (2) to transport, as a common carrier,

paper and paper products, plastic and plastic products, and materials, equipment and supplies used in the manufacture and distribution of such commodities, for IVEX Corporation, from its facilities located in

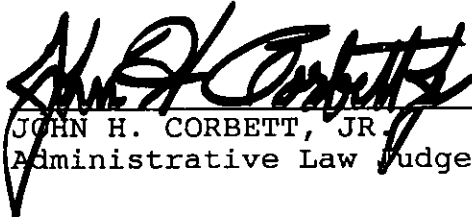
the Township of Pine, Mercer County, to points in Pennsylvania.

2. That the Applicant shall not engage in any transportation granted herein until it 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 that 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.

Date: October 28, 1993



JOHN H. CORBETT, JR.
Administrative Law Judge

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Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

3. Article Addressed to:
 A-00102306
 Food, Am-K

4a. Article Number
 044555

4b. Service Type
 Registered Insured
 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery
 11/18/93

8. Addressee's Address (Only if requested and fee is paid)
 Rex W. McQuade Esquire

5. Signature (Addressee)
[Signature]

6. Signature (Agent)
[Signature]

Thank you for using Return Receipt Service.

Is your RETURN ADDRESS completed on the reverse side?

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 Certified COD
 Express Mail Return Receipt for Merchandise

7. Date of Delivery
 NOV 17 1993

8. Addressee's Address (Only if requested and fee is paid)
 William A. Chonut Esquire

5. Signature (Addressee)
 William A. Chonut Esquire

6. Signature (Agent)
 McNEES, GALLACE & NURICK LPA

Thank you for using Return Receipt Service.

PS Form 3811, December 1991 U.S. GPO: 1992-323-402. DOMESTIC RETURN RECEIPT

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
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- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

3. Article Addressed to:

A-00102306
F0001-AMKA

4a. Article Number

044556

4b. Service Type

- Registered
- Certified
- Insured
- Express Mail
- Return Receipt for Merchandise

7. Date of Delivery

11-18-93

8. Addressee's Address (Only if requested and fee is paid)

Sally Davren Esquin
Branca

5. Signature (Addressee)

Signature (Agent)

6. Signature (Agent)

PS Form 3811, December 1991 *U.S. GPO: 1992-323-402 DOMESTIC RETURN RECEIPT

I also wish to receive the following services (for an extra fee):

- 1. Addressee's Address
- 2. Restricted Delivery

Consult postmaster for fee.

4a. Article Number

044556

4b. Service Type

- Registered
- Certified
- Insured
- Express Mail
- Return Receipt for Merchandise

7. Date of Delivery

11-18-93

8. Addressee's Address (Only if requested and fee is paid)

Sally Davren Esquin
Branca

5. Signature (Addressee)

Signature (Agent)

6. Signature (Agent)

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3. Article Addressed to:

A-00102306
F0001-AMKA

4a. Article Number

044557

4b. Service Type

- Registered
- Certified
- Insured
- Express Mail
- Return Receipt for Merchandise

7. Date of Delivery

18 NOV 1993

8. Addressee's Address (Only if requested and fee is paid)

John A Pillaresque
Signature (Agent)

Signature (Agent)

PS Form 3811, December 1991 *U.S. GPO: 1992-323-402 DOMESTIC RETURN RECEIPT

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- 2. Restricted Delivery

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John A Pillaresque
Signature (Agent)

Signature (Agent)

Thank you for using Return Receipt Service.

PS Form 3811, December 1991 *U.S. GPO: 1992-323-402 DOMESTIC RETURN RECEIPT

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Act 294

Case Identification: A-00102306, F0001, Am-K; Applicant of Klapec Trucking Company

Initial Decision By: ALJ John H. Corbett, Jr.

Deadline for Return to OSA: November 30, 1993

This decision has not been reviewed by OSA.

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Commissioner

Date

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David M. Kolka, Jr.
Commissioner

11-22-93
Date

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OFFICE OF SPECIAL
ASSISTANTS

Act 294

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I want full Commission review of this decision.

Commissioner

Date

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Joseph P. Rucker, Jr.
Commissioner

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Date

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OFFICE OF SPECIAL ASSISTANTS

Act 294

Case Identification: A-00102306, F0001, Am-K; Applicant of Klapac Trucking Company

Initial Decision By: ALJ John H. Corbett, Jr.

Deadline for Return to OSA: November 30, 1993

This decision has not been reviewed by OSA.

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I want full Commission review of this decision.

Commissioner

Date

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J
John M. Quinn

Commissioner

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Act 294

Case Identification: A-00102306, F0001, Am-K; Applicant of Klapac Trucking Company

Initial Decision By: ALJ John H. Corbett, Jr.

Deadline for Return to OSA: November 30, 1993

This decision has not been reviewed by OSA.

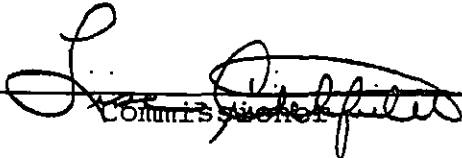
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Commissioner

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Commissioner

11/29/93

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Act 294

Case Identification: A-00102306, F0001, Am-
K;Applicant of Klapac Trucking
Company

Initial Decision By: ALJ John H. Corbett, Jr.

Deadline for Return to OSA: November 30, 1993

This decision has not been reviewed by OSA.

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Commissioner

Date

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X John Hunger
Commissioner

11-27-93
Date