



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

September 11, 1989

IN REPLY PLEASE  
REFER TO OUR FILE

John A. Pillar  
Attorney at Law  
Suite 700  
312 Boulevard of the Allies  
Pittsburgh, PA 15222

In re: Bilateral Contract - A-00108100, F.1, Am-A

Dear Mr. Pillar:

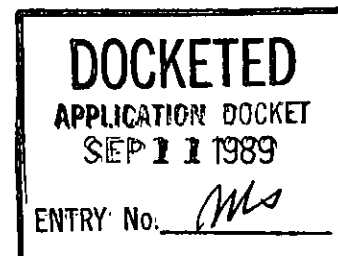
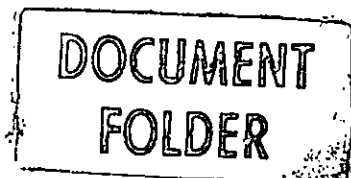
This will acknowledge receipt of the bilateral contract between Edward R. Rathway Trucking, Inc., and Panther Coal Sales Company in compliance with our order adopted July 20, 1989.

The contract is in compliance with the provisions prescribed in Title 52, Pa. Code §31.45 and will be placed in the applicant's record accordingly. Thank you.

Very truly yours,

Richard H. White  
Technical Review Section  
Bureau of Transportation

cc: E. Ditzler  
Tariff Section  
Document Folder



dw

AGREEMENT

THIS AGREEMENT is made this 27th day of April, 1989, between EDWARD R. RATHWAY TRUCKING, INC., a Pennsylvania corporation with its principal place of business in Perryopolis, PA (Carrier) and PANTHER COAL SALES COMPANY, of Jennerstown, PA (Shipper).

I. PREMISES

1. Carrier has requested authority from the Pennsylvania Public Utility Commission (PUC) at Docket No. A-103854, F.1, Am-I, as follows:

*Redocketed to A-108100  
F1 Am A*

To transport, as a contract carrier, by motor vehicle, coal, for Panther Coal Sales Company, between points in Pennsylvania.

2. Shipper desires to use the services of Carrier in accordance with the authority granted by the PUC.

3. The parties wish to comply with the regulations of the PUC.

II. TERMS AND CONDITIONS

In consideration of the mutual covenants and promises herein contained, the parties hereto, intending to be legally bound hereby, agree, represent and warrant as follows:

1. Shipper will tender to Carrier for transportation

DOCUMENT  
FOLDER

DOCKETED  
APPLICATION DOCKET  
SEP 08 1989  
ENTRY No. *MA*

within the scope of the operating authority granted by the PUC, a minimum of 100,000 pounds of freight per each year this contract is in effect, unless prevented from doing so by reason of strikes, labor disturbances, plant shutdowns, Acts of God, or for other reasons beyond Shipper's control.

2. Carrier will charge Shipper, and Shipper will pay to Carrier for any transportation performed under this Agreement in accordance with conditions, rates and charges, as specified in Carrier's currently effective schedule of rates on file with the PUC, and designated Contract Pa. P.U.C. No. 3, and successive supplements thereto and reissues thereof, which are incorporated herein by reference.

3. Carrier will accept for transportation such shipments as Shipper shall, pursuant to the terms of this Agreement and within the capabilities and legal rights of Carrier call upon Carrier to transport.

4. This Agreement shall become effective upon the date that the PUC issues to Carrier its permit authorizing Carrier to perform the described transportation and shall continue in effect until terminated by either party giving to the other thirty (30) days' written notice of termination.

5. This Agreement constitutes the entire agreement between the parties and cancels or replaces any other Agreement or arrangement heretofore in existence.

6. This Agreement shall be binding upon the successors,

assigns, administrators and executors of the parties hereto.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have hereunto set their hands and seals the day and year first above written.

ATTEST:

EDWARD R. RATHWAY  
TRUCKING, INC. (Carrier)

\_\_\_\_\_

By: Edward R. Rathway

ATTEST:

PANTHER COAL SALES COMPANY  
(Shipper)

\_\_\_\_\_

By: James D. Porter

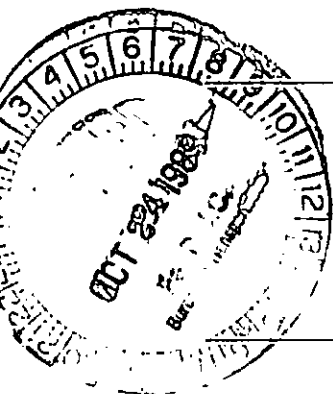
RECEIVED

Before the  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

OCT 23 1989  
SECRETARY'S OFFICE  
Public Utility Commission

Application of  
EDWARD R. RATHWAY TRUCKING, INC.

Docket No. A-00108100



PETITION TO CONVERT BUYER'S PERMIT  
TO A CERTIFICATE OF PUBLIC CONVENIENCE

NOW COMES Edward R. Rathway Trucking, Inc., by its attorneys, Pillar and Mulroy, P.C., and respectfully petitions this Honorable Commission to convert its contract carrier permit to a Certificate of Public Convenience and, in support hereof, petitioner states as follows:

1. By application to which this petition is attached, Edward R. Rathway Trucking, Inc. seeks to purchase the operating rights of Anne Louise Rathway t/d/b/a A.L.R. Trucking, issued by the Pennsylvania Public Utility Commission at Docket No. A.105382. The operating authority to be acquired is a common carrier certificate of public convenience.

2. Edward R. Rathway Trucking, Inc. presently holds authority, as a contract carrier, at Docket A-00108100. Pursuant to § 2504 of the Public Utility Code, 66 Pa. P.S.A. § 2504, Edward R. Rathway Trucking, Inc. may not hold both a Certificate

of Public Convenience and a Permit "unless for good cause shown, the Commission shall find that the Certificate and Permit may be held consistently with the public interest."

3. As a condition to the transaction between the buyer and seller, the parties have agreed to petition the Commission to convert the contract carrier permit of the buyer to a Certificate of Public Convenience so that the acquisition of the operating rights here involved of the seller by the buyer will not violate § 2054.

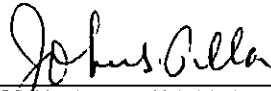
4. It is the buyer's intention to operate pursuant to the operating rights of the seller as a common carrier. Petitioner/buyer is presently authorized to transport property as a contract carrier for nine shippers to, from or between points in Pennsylvania, and it presently has the equipment and facilities available to service many other shippers as a common carrier. Petitioner/buyer's own operations have developed into a service that is more precisely that of a common carrier since its equipment is used interchangeably by its various customers. The relief requested here will enable petitioner/buyer to further diversify its business which has been its trend over the years.

WHEREFORE, Edward R. Rathway Trucking, Inc. respectfully petitions this Honorable Commission that its operating rights

at Docket No. A-108100 and all folders thereto be converted to a certificate of public convenience so that approval of the above referenced transaction will not violate § 2504 of the Pennsylvania Public Utility Code.

Respectfully submitted,  
PILLAR AND MULROY, P.C.

By: \_\_\_\_\_

  
JOHN A. PILLAR  
Attorney for  
EDWARD R. RATHWAY  
TRUCKING, INC.



ORIGINAL

LAW OFFICES

**VUONO, LAVELLE & GRAY**

2310 GRANT BUILDING

PITTSBURGH, PA. 15219-2383

(412) 471-1800

JOHN A. VUONO  
WILLIAM J. LAVELLE  
WILLIAM A. GRAY  
MARK T. VUONO  
RICHARD R. WILSON  
DENNIS J. KUSTURISS  
CHRISTINE M. DOLFI

TELECOPIER  
(412) 471-4477

December 10, 1990

• ALSO MEMBER OF FLORIDA BAR

Re: Edward R. Rathway Trucking, Inc.  
Docket No. A-00108100, Folder 3  
Our File 1773P-109

MAILED WITH U.S. POSTAL SERVICE  
CERTIFICATE OF MAILING FORM 3817

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

DOCP  
FOLDER

Dear Mr. Rich:

We enclose for filing with the Commission the original and nine copies of Exceptions of David Tesone Trucking, Inc., Protestant.

Copies of the Exceptions have been served on all parties of record.

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

Sincerely yours,

VUONO, LAVELLE & GRAY

*William J. Lavelle*  
William J. Lavelle

RECEIVED  
DEC 10 1990  
SECRETARYS OFFICE  
Public Utility Commission

pz

Enclosure

cc: Honorable Ky Van Nguyen (with Postal Receipt)  
Dwight L. Koerber, Jr., Esq. (with Postal Receipt)  
David Tesone Trucking, Inc.

RRR

---

---

ORIGINAL

BEFORE THE  
**Pennsylvania Public Utility Commission**

---

---

DOCKET NO. A-00108100, F. 3

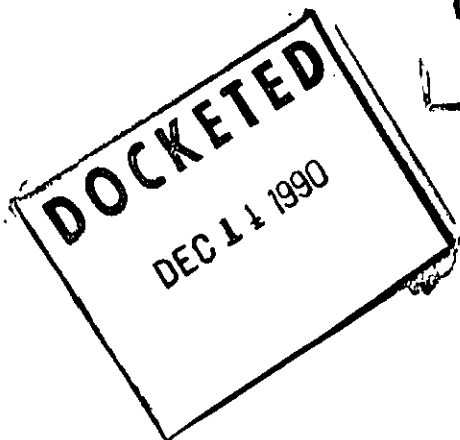
EDWARD R. RATHWAY TRUCKING, INC.

---

---

EXCEPTIONS OF  
DAVID TESONE TRUCKING, INC.  
PROTESTANT

---



**RECEIVED**

DEC 10 1990

SECRETARYS OFFICE  
Public Utility Commission

WILLIAM J. LAVELLE, ESQ.  
Attorney for  
DAVID TESONE TRUCKING, INC.  
Protestant

Of Counsel:  
VUONO, LAVELLE & GRAY  
2310 Grant Building  
Pittsburgh, Pennsylvania 15219

Due Date: December 10, 1990

---

---

Before the  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

---

DOCKET NO. A-00108100, F. 3

EDWARD R. RATHWAY TRUCKING, INC.

---

EXCEPTIONS OF  
DAVID TESONE TRUCKING, INC.  
PROTESTANT

I. STATEMENT OF THE CASE

By this application, as amended, Edward R. Rathway Trucking, Inc. (Rathway or Applicant) seeks authority to operate as a contract carrier, by motor vehicle, as follows:

To transport, as a contract carrier, salt for Morton Salt, Division of Morton International, Inc., between points in the county of Allegheny, and from points in said county to points in Pennsylvania; with the right to return refused, rejected, damaged and returned shipments to point of origin.

Notice of this application was published in the Pennsylvania Bulletin on May 27, 1989. Protests were filed by David Tesone Trucking, Inc. (Tesone or Protestant) and Seaboard Tank Lines, Inc. Upon amendment of the application at the hearing held in Pittsburgh, PA on September 14, 1989, before Administrative Law Judge Ky Van Nguyen, which limited the application to the transportation of salt, the protest of Seaboard Tank Lines, Inc. was withdrawn.

At the conclusion of the hearing, the Judge granted the parties an opportunity to file briefs. Both Applicant and Protestant filed Main Briefs and Reply Briefs.

By Initial Decision dated January 17, 1990 and served on February 15, 1990 (January Initial Decision), the Judge denied the application on the basis that Applicant had not demonstrated that it is fit, willing and able to properly perform the service sought by the application, specifically, that it had not established its financial fitness.

Applicant then submitted Exceptions to the Initial Decision and Tesone replied to each of the five individual exceptions. By Opinion and Order adopted on May 10, 1990, and entered on May 16, 1990, the Commission granted in part and denied in part the Applicant's Exceptions, remanded the case to the Office of Administrative Law Judge for reevaluation of the evidence and directed that the Judge make a recommendation in the form of an Initial Decision on Remand as to the appropriate disposition of the application following a hearing on remand.

In accordance with the Commission's Opinion and Order, the application was assigned for further hearing on June 13, 1990, at which Applicant presented additional financial evidence. At the conclusion of the hearing on remand, the Judge granted the parties an opportunity to file Supplemental Briefs. Both Applicant and Protestant filed Supplemental Main Briefs and Protestant filed a Supplemental Reply Brief.

By Initial Decision on Remand dated October 29, 1990 and served on November 20, 1990 (October Initial Decision), the Judge has found that the applicant is fit, willing and able to perform the service proposed and he has recommended that the application be granted.

Tesone now files its Exceptions to the Judge's October Initial Decision.

## II. STATEMENT OF EXCEPTIONS

Protestant respectfully submits that the Administrative Law Judge erred in the following respects:

1. In finding that the Applicant is financially fit and is therefore qualified to receive a grant of contract carrier authority.

2. In failing to address any of the other issues involved in the proceeding.

3. In concluding that the application should be approved, as amended.

As will be explained below, it is the position of Tesone that there is no evidence to support the Judge's conclusion after the hearing on remand that Rathway is financially fit and therefore entitled to a further grant of authority from the Commission. All of the Judge's findings with respect to the financial fitness issue reveal the Applicant to be unfit. The sudden about face in the Judge's October Initial Decision is unsupported by any evidence and is not sustainable.

This case involves an application for motor contract carrier authority which is being opposed by a motor common carrier. There are court and Commission cases which clearly state that under these circumstances the absence of need for the proposed contract carrier service is evidence per se that harmful competition would result from approval of the application. The creation of harmful competition is a statutory basis for denial of a contract carrier application.

In this case in his January Initial Decision, the Judge denied the application on the basis that the Applicant was not financially fit. In doing so, the Judge declined to consider other aspects of the Applicant's burden of proof. Applicant itself took exception to that procedure in its own Exceptions to the January Initial Decision (see Applicant's Exception No. 5). Now, following the further hearing on remand, the Judge has reversed his finding with respect to the financial fitness issue but has still not addressed the other issues involved in the proceeding, the critical ones of which are whether there is proof of need for the proposed service and, if not, the effect of the harmful competition that would result from approval of the application.

It is the position of Protestant that this proceeding must again be remanded to the Judge to make findings on all of the issues involved before the case can properly be presented to the Commission for consideration on the merits.

### III. ARGUMENT

1. THE JUDGE HAS ERRED IN GRANTING THE APPLICATION WITHOUT MAKING ANY FINDINGS WITH RESPECT TO A NUMBER OF CRITICAL ISSUES INVOLVED IN THIS PROCEEDING.

At page 14 of his January Initial Decision, the Judge, after determining that the Applicant was not financially fit, declined to consider any of the other issues in this proceeding with the following comment:

Because the Applicant has not established its financial capacity to provide the proposed service, further considerations of other elements of the test are not needed. (Emphasis supplied.)

In his October Initial Decision, the Judge has again considered only the issue of Applicant's financial fitness. There is still no consideration or analysis of the evidence pertaining to the issue of need for the proposed service as that issue is presented in the context of an application for motor contract carrier authority which is opposed by a motor common carrier. Nor are there any conclusions of law by the Judge pertaining to this and directly related issues.

Consequently, regardless of whether or not the Commission might agree with the Judge's conclusion with respect to the financial fitness issue, it has no basis upon which either to affirm or reverse the Judge's ultimate decision since there are no findings with respect to these other issues. A determination of need and whether or not approval of this application would create harmful competition is required to be made in the first

instance by the Administrative Law Judge. The Commission on Exceptions cannot make those determinations on its own for the first time. If it were to do so, the Commission would be depriving one of the parties, in this case Protestant, to its statutory and procedural right to have two independent decisions rendered by this Commission on each issue.

Section 2503(b) of the Public Utility Code, 66 Pa. C.S.A. §2503(b) states, inter alia, that a permit shall be issued if it will be consistent with the public interest and the policy declared in Section 2501 of the Code. The Policy Statement makes motor contract carriage subject to regulation by the Commission in order to protect motor common carriers from harmful competition by motor contract carriers. Certain guidelines and criteria have been established for determining when such harmful competition will result from a grant of contract carrier authority.

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

"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.

In Footnote 3 of the same decision, the Court indicated that the absence of need for the proposed contract carrier service is evidence per se that harmful competition would result when it stated:

Findings of fact concerning the need for additional service would be necessary to support a grant of contract carrier authority where it is shown that the application will result in competition with a common carrier. Clearly, competition without need for additional service would be harmful to the common carrier. (Emphasis supplied.)

In the earlier case of Wiley v. Pennsylvania Public Utility Commission, 142 A.2d 763, 766-767 (Super. Ct. 1958), the Superior Court of Pennsylvania held that the standard by which the Commission must act in determining whether a contract carrier applicant should be granted a permit is greater than the "mere determination of the desire of a particular shipper to have the service". The Court sustained the Commission's denial of a contract carrier permit on the ground that the supporting shipper "showed nothing more than a desire to have the service of Wiley notwithstanding the fact that adequate and satisfactory common carrier service was available".

The Commission followed this rationale in Re Dennis J. Davison, 68 Pa.P.U.C. 293 (1988). In Davison, the Commission denied an application for a contract carrier permit where existing common carrier service was found to be adequate and the evidence revealed that the choice of applicant was dictated only by a lower rate. The Commission's decision is significant in that it expressly found that the applicant was fit, willing and able, but denied the permit on the basis of harmful competition in a Wiley type analysis.

Inasmuch as need for the proposed contract carrier service must be established in order to avoid a finding of per se

harmful competition with a motor common carrier, it goes without saying that the Judge was required to make findings on these issues prior to recommending approval of the application. In order to make such a finding, the Judge was required to evaluate the evidence of the supporting shipper in terms of the Commission's most recent pronouncement concerning the demand/need criteria which is found in Application of Blue Bird Coach Lines, Inc., Docket No. A-00088807, F. 2, Am-K, adopted on March 15, 1990 and entered on April 27, 1990.

Since the Judge has yet to make any findings of any type with respect to the issues of need, harmful competition, consistency with the public interest, adverse impact on protestant, etc., we submit that the Commission must remand this proceeding once again to the Judge for appropriate findings on these issues.

2. THE JUDGE ERRED IN CONCLUDING THAT APPLICANT IS FINANCIALLY FIT TO RECEIVE A GRANT OF AUTHORITY.

At the hearing on remand, Applicant withdrew its initial financial evidence identified as Applicant's Exhibit 5. The Applicant also indicated at the same time that it was thereafter relying on Applicant's Exhibit A-10 for its proof of financial fitness. (Page 12 of the transcript of the hearing on remand) This fact is referred to by the Judge at the top of page 13 of his October Initial Decision.

The Judge has evaluated Applicant's Exhibit A-10 at pages 7-11 of the October Initial Decision, and has concluded at

page 11 that the exhibit is a "hearsay statement which does not fall within the business records exception to the hearsay rules".

The Judge then went on to consider the admissibility of Exhibit A-10 at pages 11 and 12 of the October Initial Decision and concluded, on the basis of 52 Pa. Code §5.403, that it should be excluded from the record.

The net effect of the withdrawal by the Applicant of Exhibit A-5 and the exclusion by the Judge of Exhibit A-10, is that there is no financial evidence of record to support any finding that the Applicant is financially fit. Absent such evidence, the Judge's ultimate conclusion that Rathway is financially fit is unsupportable and difficult to understand.

Assuming arguendo that Applicant's Exhibit A-10 should not have been excluded, it still does not support a finding that the Applicant is financially fit. Without belaboring the record, we would refer the Commission to the following comments by the Judge at page 5 of his October Initial Decision:

On cross-examination, the witness was unable to explain why the fixed assets changed from \$1,446,523.88 (Exhibit A-5) to \$1,5098,015.00 (Exhibit A-10) because the Financial Statements (Exhibit A-10) were prepared, not by her, but by her certified public accountant. She does not know why Exhibit A-10 shows account receivables and Exhibit A-5 does not. She also does not know what the book value or the fair market value means because she did not have any formal training; she just does the basic general ledger bookkeeping for the Applicant. For further questions about the Applicant's financial condition, the witness suggests that those questions should be referred to the accounting firm which prepared the Applicant's Financial Statements (Exhibit A-10).

In addition, we direct the Commission's attention to the Judge's findings of fact numbers 4, 5, 6, 7, 8 and 9 at pages 6-7 of the October Initial Decision, and the findings of the Judge in the two full paragraphs on page 13 of the October Initial Decision. We also incorporate by reference pages 5-13 of Protestant's Supplemental Main Brief and pages 2-7 of Protestant's Supplemental Reply Brief for further analysis of why the Applicant failed to establish its financial fitness.

Ultimately, the Judge based his finding of financial fitness on two sentences in the Commission's decision in the unopposed case of Application of Becks Trucking Co., Inc., Docket No. A-00107276, F. 1, Am-A adopted on September 13, 1990. There was no fully developed record in that proceeding such as we have in the present case and the facts are significantly different. For example, in Becks its current assets exceeded its current liabilities by \$11,000 whereas in Rathway's case, with appropriate adjustments for accuracy, Rathway's current assets consist only of cash in the amount of \$7,284 and its current liabilities amount to a total of \$413,442. The Commission cannot legitimately equate these two cases and shower Rathway with sympathy in the form of a grant of authority based on the type of rationale applied in the Becks case. Contrary to any argument Applicant may assert in response, we submit that the Becks decision does not represent this Commission's definitive policy with respect to the issue of an applicant's financial fitness.

Finally, the Judge erred in stating at page 14 of the October Initial Decision that "the problem with the Applicant is not that it is financially unfit but that it has continued to offer in evidence incompetent documents". Having no financial evidence before him, as explained above, there is no basis for the Judge to conclude that the Applicant is financially fit. Since the burden of proof is on the Applicant, the absence of such competent, critical evidence should have resulted in a denial of the application. The Judge seems to be saying that even though he has excluded Exhibit A-10, he nevertheless is going to consider it favorably for the Applicant and merely reprimand it for not properly presenting the information in a competent manner. Such an approach flies directly in the face of all recognized rules of evidence. The Judge is obliged to make findings on the basis of admissible evidence only.

The deficiencies in Applicant's financial condition are not eliminated by declaring Exhibit A-10 inadmissible, so that they do not have to be dealt with directly, and then granting the application by reference to the Becks case as if there are no significant problems but only a technical procedural or evidentiary presentation issue.

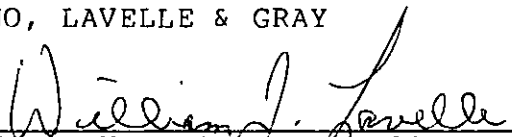
IV. CONCLUSION

For the reasons set forth herein, Protestant respectfully requests that the Commission remand this case to the Office of Administrative Law Judge so that the Administrative Law Judge may make a recommendation, in the form of an Initial Decision on Remand, to the Commission as to the appropriate disposition of this application with respect to all of the issues involved in this case including, but not limited to, the need for the proposed service, the harmful competition that would result from approval of this application, and the financial fitness of the Applicant. In the event that this application is not remanded to the Administrative Law Judge for some reason, we request that the Commission deny the application on the ground that the Applicant has failed to meet its burden of proof to establish that there is any public need for the proposed service, has failed to establish that approval of the application will not result in the type of harmful competition to the Protestant which is specifically prohibited by statute, and has failed to establish its financial fitness.

Respectfully submitted,

VUONO, LAVELLE & GRAY

BY:

  
WILLIAM J. LAVELLE, ESQ.

Attorney for

DAVID TESONE TRUCKING, INC.

Protestant

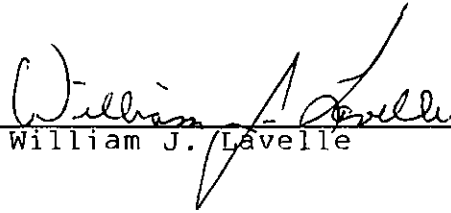
VUONO, LAVELLE & GRAY  
2310 Grant Building  
Pittsburgh, PA 15219  
(412) 471-1800

Due Date: December 10, 1990

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Exceptions of David Tesone Trucking, Inc., Protestant, on all parties of record by means of U.S. Postal Service Form 3817 Certificate of Mailing.

Dated at Pittsburgh, PA this 10th day of December, 1990.

  
\_\_\_\_\_  
William J. Lavelle