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August 18, 2000

VIA FEDERAL EXPRESS
Honorable James J. McNulty, Secretary
Public Utilities Commission
North Office Building, Room B-20
Corner of North and Commonwealth Avenues
Harrisburg, PA 17105-3265

Re: Gardner Moving Company
Docket No. A-00108945, F.1, Am-A

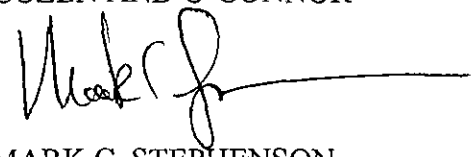
Dear Sir:

Enclosed for filing is an original and nine copies of Applicant's Exceptions to Initial Decision of the Administrative Law Judge in support of Application for Additional Authority.

A copy of these exceptions have been served on all parties of record. Thank you.

Very truly yours,

COZEN AND O'CONNOR



MARK C. STEPHENSON

MCS/pm
Enclosures

cc: John A. Pillar, Esquire (w/enclosure) (express mail)
William A. Gray, Esquire (w/enclosure) (express mail)

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

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DOCKET NO. A-00108945, F. 1, Am-A

GARDNER MOVING COMPANY

APPLICANT'S EXCEPTIONS TO THE
INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE
IN SUPPORT OF APPLICATION FOR ADDITIONAL AUTHORITY

Applicant Gardner Moving Company hereby respectfully submits its Exceptions and arguments in support of the grant of its application for additional authority, and respectfully requests that the Commission uphold Applicant's exceptions and reverse the decision of the Administrative Law Judge so as to grant the additional authority that the Applicant seeks.

I. PROCEDURAL BACKGROUND

On November 6, 1998, Gardner Moving Company ("Gardner" or "Applicant") filed with the Commission an application to amend its certificate of public convenience to obtain additional authority. Gardner seeks additional authority to allow it to transport, among other things, household goods in use between points within an airline radius of seventy-five (75) miles of the Allegheny Courthouse.

Hearings were held over three days, during which Applicant introduced evidence to establish that a regional market for the moving of household goods in use exists in the Greater

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Allegheny region. Further Applicant presented undisputed evidence that it provides a very high quality of service that distinguishes it in the marketplace. Finally, Applicant provided persuasive evidence that it provides services not available at the time of the hearing, which a protestant offered only after becoming aware of the service need. Applicant submits that the protestant did so, on advice of counsel, solely as a tactic to hinder this application.

On August 3, 2000, the Secretary issued the Initial Decision of Administrative Law Judge John H. Corbett, Jr. The Initial Decision denies the application. Under the Commission's procedural rules, Applicant's exceptions to the Initial Decision are due to be filed with the Secretary on or before Wednesday, August 23, 2000.

I. APPLICANT'S EXCEPTIONS

A. The Administrative Law Judge erred in failing to find that Gardner Moving will provide household good moving services at lower rates not presently available.

During the hearings on this application, Gardner Moving demonstrated that, unlike its competitors, it charges no minimum amount for labor in its moving services. *See* Tr. 22. Standard in the regional market, Gardner Moving charges a flat rate of one-hour travel time. *See* Tr. 22. It has no minimum labor charge. Other companies in the region -- for example, in Washington County -- do charge minimum labor rates, some with as high as a four-hour minimum labor charge. *See* Tr. 23. What this means is simple. Regardless whether the movement takes one hour of work or four, if there is a four-hour minimum labor charge the consumer pays for four hours.

Just before the first day of hearings on this application, Joseph P. Gardner contacted protestants Fife, Anderson and All Ways and confirmed that each charges a multi-hour minimum labor charge for a property movement. *See* Tr. 56. This is uncontroverted. However,

in error, the Administrative Law Judge failed to accept and give proper weight to this uncontroverted testimony.

Attempting to blunt the value of Gardner Moving's proposed service and confuse the issues presented, on advice of counsel, Anderson contacted Applicant's witness shortly after her testimony because she was "looking for a mover." *See* Tr. 341. The Anderson representative stated that it was Anderson's understanding that she was looking for a mover, *see* Tr. 141, and told her that "we now have, we don't have the four-hour minimum[. We] have a flat rate." Prior to this time, Ms. Lison was aware that Anderson did not offer a flat rate or a less than four-hour charge on a movement. *See* Tr. 142. By doing this, Anderson admitted two things. If left to itself, it will continue to charge a multi-hour, minimum labor charge. Also, faced with the Gardner Moving's competition, it was willing in one instance to reduce its rates and provide a service that did not otherwise exist. There is no record evidence that Gardner actually charges a no-minimum labor rate.

In making this call, Anderson, Fife and All Ways confirmed what Gardner Moving has independently proved. There is a standard minimum labor charge that Anderson, Fife and All Ways charge. The Administrative Law Judge erred when he failed to find that no-minimum labor charge service did not exist in this geographic area but for Gardner Moving.

In his Initial Decision, the Administrative Law Judge confused the one-hour travel minimum with the four-hour labor minimum that Gardner Moving's competitors charge. The Initial Decision fails to deal in any regard with the impact of minimum labor charges on the public consuming household goods transportation services. It is not the one-hour travel charge that Gardner identifies as presently unavailable service. Rather, Gardner Moving identifies no-minimum labor charge transportation as not presently available and offers to perform. In making

this error, the Administrative Law Judge failed to understand "the useful public purpose, responsive to a public demand or need" that Gardner is ready, willing and able to provide, and which presently is lacking. *Re Blue Bird Coach, Lines, Inc.*, 72 Pa PUC 262 (1990) (emphasis supplied.)

Despite pointed cross-examination, Ms. Lison was adamant that a no-minimum working time rate to move small amounts of property was valuable to her and a service she wanted to use. See Tr. 87. Consumers want to pay for the moving services they actually use, not a three-hour labor charge minimum for one hour of work. See Tr. 23.

Simply by making this application, Gardner Moving was able to cause a more effective rate structure for consumers. It is critical to note that no other protestant suggested that they provide a similar no-minimum rate service. There is no reason to anticipate that any protestant will continue to offer this rate if the application is not approved and the additional authority granted. Rather, it is highly likely that the public will be injured by inflated rates if there is no pro-consumer competitive pressure that compels motor carriers to adopt cost-effective rates.

The Commission has held that a useful public purpose is met by evidence that establishes that the applicant will be offering the public lower rates. *Re: Richard L. Kinard*, 58 Pa. P.U.C. 548, 552 (1984). Gardner Moving has met this burden and the application should be granted.

- B. The Administrative Law Judge erred in failing to find that Gardner Moving's high quality service is unique and coupled with its willingness to provide the most cost effect rates to consumers serves to force the protestants to render a higher level of service.**

The Administrative Law Judge erred by failing to give appropriate weight to the unopposed testimony of Applicant's witnesses, Gina Lison and Gloria Honeygowsky, regarding Gardner Moving's uniquely excellent service. The Administrative Law Judge failed to consider

the testimony of each witness that protestants had failed to provide adequate service or provided service at much higher rates. The witnesses demonstrated a strong public need for safe and careful moving services, and for the most cost-effective rates to consumers.

Gardner Moving has demonstrated that it does provide a uniquely excellent level of service, and does so with no-minimum labor charge. This combination serves further to establish that a public demand/need exists for the proposed service Applicant seeks.

The Commission has clearly indicated that it intends to regulate the motor carrier industry so as

to eliminate monopolistic protection of existing motor carriers and to promote healthy competition among motor carriers for the purpose of assuring the availability of transportation service commensurate with the demonstrated public demand/need.

Re Blue Bird Coach, Lines, Inc., supra. It would be counter-intuitive, contrary to public policy and the Commission's expressed intentions to argue that consumers do not deserve the highest quality of service at a price that accurately reflects the time worked.

However, to adopt the Administrative Law Judge's Initial Decision and protestants' arguments is to reach this unacceptable result.

The force of Gardner's evidence is most quickly demonstrated by observing that Anderson Moving sought to create the same type of evidence on its own behalf as a protestant. It is entirely fair to ask whether Anderson Moving would have offered Ms. Lison a lower rate if Gardner Moving were not just ready, willing but also *able* to do so. It is far more sensible to conclude that if Gardner Moving were unable to offer this valuable service, none of the protestants would ever make available the no-minimum labor rate that Gardner Moving will provide if this application is approved.

IV. CONCLUSION


Applicant has demonstrated met is burden of proof to demonstrate that it's applicant serves the useful public purpose of lower rates. By their admissions and conduct, protestants admit that that there exists a void for moving services that do not charge minimum labor rates, one that consumers want filled. Gardner Moving Company is the first certificated carrier willing to step up to the task. The Initial Decision fails to recognize this useful purpose and confuses both the manner in which protestants charge for labor and the nature of Gardner's proposed lower rated service.

By granting this application, the Commission will improve service to consumers immediately and in a way that will affect those most needing such services. The promotion of healthy competition, recognition and satisfaction of the public need and implementation of the Commission's sound transportation policy merge to militate that the Commission grant the application and order that a certificate of public convenience be issued to Gardner Moving for the additional authority requested in its application.

Date: August 18, 2000

Respectfully submitted,

COZEN AND O'CONNOR



BY: MARK C. STEPHENSON
Attorney for Gardner Moving Company

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Exceptions to Initial Decision of the Administration Law Judge In Support of Application for Additional Authority on the following parties of record by express mail this 18th day of August, 2000.

William A. Gray, Esquire (2 copies)
Vuono & Gray
2310 Grant Building
Pittsburgh, PA 15219

John A. Pillar, Esquire
Pillar, Mulroy and Ferber, P.C.
1106 Frick Building
Pittsburgh, PA 15219



MARK C. STEPHENSON, ESQUIRE

Act 294

Case Identification:

A-00108945F0001AmA;
Application of Gardner Moving
Company, A Corporation of the
Commonwealth of PA

Initial Decision By:

ALJ John H. Corbett, Jr.

Deadline for Return to OSA:

August 17, 2000

This decision has not been reviewed by OSA.

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AUG 21 2000

OFFICE OF SPECIAL ASSISTANTS

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Commissioner

Date

I do not want full Commission review of this decision.

X *John H. Corbett, Jr.*
Commissioner

8-21-00
Date

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Act 294

Case Identification:

A-00108945F0001AmA;
Application of Gardner Moving
Company, A Corporation of the
Commonwealth of PA

Initial Decision By:

ALJ John H. Corbett, Jr.

Deadline for Return to OSA:

August 17, 2000

This decision has not been reviewed by OSA.

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AUG 17 2000

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OFFICE OF SPECIAL ASSISTANTS

I want full Commission review of this decision.

Commissioner

Date

I do not want full Commission review of this decision.

Robert K. Bloom
Commissioner

8/17/00
Date

Act 294

Case Identification:

A-00108945F0001AmA;
Application of Gardner Moving
Company, A Corporation of the
Commonwealth of PA

Initial Decision By:

ALJ John H. Corbett, Jr.

Deadline for Return to OSA:

August 17, 2000

This decision has not been reviewed by OSA.

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OFFICE OF SPECIAL ASSISTANTS

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Commissioner

Date

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Nora Mae Brownell

Commissioner

8/17/00

Date

sw

Act 294

Case Identification:

A-00108945F0001AmA;
Application of Gardner Moving
Company, A Corporation of the
Commonwealth of PA

Initial Decision By:

ALJ John H. Corbett, Jr.

Deadline for Return to OSA:

August 17, 2000

This decision has not been reviewed by OSA.

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OFFICE OF SPECIAL ASSISTANTS

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Commissioner

Date

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Commissioner

8/17/00

Date sw

Act 294

Case Identification: A-00108945F0001AmA;
Application of Gardner Moving
Company, A Corporation of the
Commonwealth of PA

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

Deadline for Return to OSA: August 17, 2000

This decision has not been reviewed by OSA.

* * * * *

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Commissioner

Date

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Terrence J. Fitzgerald
Commissioner

8-17-00
Date



PILLAR · MULROY & FERBER

August 25, 2000

Re: Gardner Moving Company
Docket A-00108945, F.1, Am-A
File No. 2894

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AUG 25 2000

Hon. James J. McNulty, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

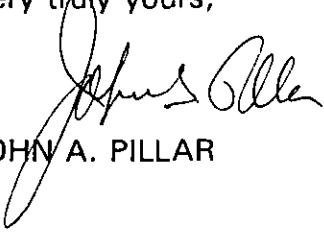
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Dear Sir:

We enclose for filing the original and 9 copies of Reply to Applicant's Exceptions in connection with the above docketed proceeding.

Please acknowledge receipt of the enclosures on the duplicate of this letter of transmittal and return it in the stamped, self-addressed envelope provided.

Very truly yours,


JOHN A. PILLAR

sw

Enclosures

cc: Mark C. Stephenson, Esq. (w/encl.)
William A. Gray, Esq. (w/encl.)
Debo Moving and Storage, Inc. (w/encl.)
George Transportation Company (w/encl.)

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Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

AUG 25 2000

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Application of
GARDNER MOVING COMPANY

Docket No. A-00108945, F.1, Am-A

REPLY TO APPLICANT'S EXCEPTIONS

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JOHN A. PILLAR, ESQ.

Attorney for
DEBO MOVING AND STORAGE, INC.,
THE SNYDER BROTHERS MOVING,
INC., t/a GEORGE TRANSPORTATION
COMPANY, Protestants

Pillar, Mulroy & Ferber, P.C.
1106 Frick Building
Pittsburgh, PA 15219
412/471-3300

Dated: August 25, 2000

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of
GARDNER MOVING COMPANY

Docket No. A-00108945, F.1, Am-A

ORIGINAL

I. INTRODUCTORY STATEMENT

By Initial Decision dated July 26, 2000, Administrative Law Judge John H. Corbett, Jr. granted the motion of the Protestants to dismiss the application of Gardner Moving Company (hereinafter Gardner). After summarizing all of the evidence and discussing the applicable law, Judge Corbett held that "it is readily apparent that the applicant has failed to produce the slightest scintilla of evidence of a public demand/need for the transportation service proposed in this application" (I.D., page 38-39).

Gardner has filed exceptions to the Initial Decision. This reply is filed on behalf of Debo Moving and Storage, Inc. and The Snyder Brothers Moving, Inc., t/a George Transportation Company.

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II. REPLY TO EXCEPTIONS

Exception No. 1 – Applicant contends that Judge Corbett erred in failing to find that Gardner will provide household goods moving services at lower rates not presently available. This exception should be denied.

Applicant argued on brief before Judge Corbett that its “lower” rates and charges, which are allegedly not presently available, should justify approval of its application. Gardner’s alleged “lower” rates are based on the premise that it charges *no minimum amount for labor in its moving services*. This is not an accurate statement of the evidence Gardner presented. Actually, Gardner presented evidence that it charges a minimum rate of 1 hour “travel time” for any move regardless of the amount of time actually expended in completing the transportation (NT 22, 44-46, 60). Judge Corbett noted that at least two protestants also claim to have a 1 hour minimum charge (I.D. at page 36). Judge Corbett concluded, therefore, that Gardner’s 1 hour minimum rate is not unique to the Applicant, but even if it were, this fact alone does not establish a public demand/need for the proposed transportation service.

Gardner argues that Judge Corbett misconstrued Applicant’s burden of proof and failed to understand that its evidence of lower rates establishes proof of a “useful public purpose, responsive to a public demand or need,” which warrants approval of the application. Protestants submit that Judge Corbett correctly concluded that while evidence by an applicant offering lower rates, if accepted as true, may tend to establish a “useful public purpose”, it does not demonstrate “a public demand/need” for the proposed service. Judge Corbett correctly concluded

that Gardner's allegation of lower rates, which Protestants do not concede and Judge Corbett did not conclude were unique in the application area, does not establish a public demand or need but, instead, is an attempt to present evidence of inadequacy of existing service which the Commission has unequivocally held may not be substituted for evidence of public demand/need for the proposed service. Application of Blue Bird Coach Lines, Inc., 72 Pa. P.U.C. 262, 273 (1990).

There is no evidence to connect Gardner's alleged lower rates with any actual movement of household goods for which a public need has been established. Without connecting evidence of lower rates to some actual need or demand for service in the application area, the evidence of lower rates is merely self-serving. Moreover, since household goods are usually transported on an hourly rate basis, and a certain minimal amount of time is required by all carriers, there is no evidence of record to warrant a conclusion that Gardner will charge less than other movers. Furthermore, there is no guarantee that the Applicant will continue to charge lower rates if this application is granted. If the application were granted, Gardner could file a new tariff naming rates and charges on the same level as those being charged by the many competitive carriers in Allegheny County.

Finally, Gardner's contention that by filing this application, Gardner was able to "cause a more effective rate structure for consumers" is, at best, theoretical and, at worst, nonsense. Gardner's argument that no other protestant suggested that they provide a similar, no-minimum rate service is contrary to the evidence of record (I.D. at 36). In fact, Gardner's argument that there is "no reason to

anticipate that any protestant will continue to offer this rate if the application is not approved” concedes that Protestants are offering similar rates.

Applicant’s arguments in connection with its first exception not only do not square with the facts, but the contention is unsupported by the applicable law.

Exception No. 2 – Gardner argues that Judge Corbett erred in failing to find that Gardner’s high quality service is unique, as well as cost effective, and that its proposed service, if approved, will force Protestants to render a higher level of service. Applicant’s second exception must also be denied.

Gardner’s argument in support of its second exception begins with the premise that Gardner’s service is uniquely excellent, and that Judge Corbett failed to consider the testimony of the two public witnesses who had used the Applicant’s service in the past and so testified. What Gardner does not indicate in its argument is that neither public witness presented any evidence of present or future need for Gardner’s proposed service beyond Gardner’s present scope of authority.

Gardner’s argument that approval of its application would tend to improve service to the public by providing a higher quality of service simply is not supported by the facts. Protestants presented evidence that they offer a high quality of service and there are no facts of record to justify a conclusion that there is a monopolistic condition in the household goods industry in the application area.

Judge Corbett concluded that even if the testimony of the two public witnesses as to Gardner’s excellent service is considered in a light most favorable

to Gardner, this testimony lacks probative value on the issue of whether a public demand/need exists for the proposed service. The critical point as noted by Judge Corbett is (I.D. at p. 35):

Nothing in this record establishes a public demand/need exists for the proposed service that the applicant cannot presently provide.

The bottom line is that Applicant had three days of hearing, and could have had more, to present evidence of a public demand or need for the proposed service and Applicant failed to do so. Two witnesses were called in support of this application. One witness (Honeygosky) testified only as to a need for service from Allegheny County, which is a service Gardner can presently provide. Witness Lison testified vaguely as to a possible future need for a movement from a point in Washington County to a point in Allegheny County within 6 months after the date she first testified in August of 1999. Witness Lison testified again in April, 2000, more than 6 months after the first date she testified, and the alleged need for transportation never materialized. In fact, witness Lison never testified in April, 2000 that the need for a move to Allegheny County of a small amount of furniture she held in her basement for her mother would ever materialize. The Applicant has utterly failed to meet its burden of proof in this case and Judge Corbett's Initial Decision to dismiss the application was fully warranted by the evidence and the law.

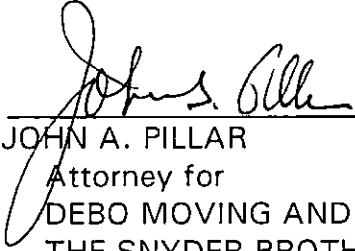
III. CONCLUSION

Protestants respectfully submit that Applicant's exceptions be denied and that Judge Corbett's Initial Decision to dismiss the application be affirmed.

Respectfully submitted,

PILLAR, MULROY & FERBER, P.C.

By: _____


JOHN A. PILLAR

Attorney for

DEBO MOVING AND STORGE, INC.,

THE SNYDER BROTHERS MOVING

INC., t/a GEORGE TRANSPORTATION

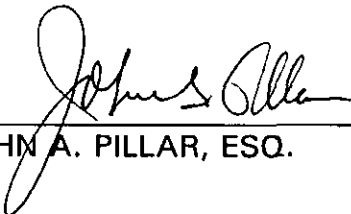
COMPANY, Protestants

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing **Reply to Applicant's Exceptions** on the following parties of record, by first-class mail, postage prepaid, this 25th day of August, 2000:

MARK C. STEPHENSON, ESQ.
Cozen & O'Connor
1900 Market Street
Philadelphia, PA 19103

WILLIAM A. GRAY, ESQ.
Vuono & Gray
2310 Grant Building
Pittsburgh, PA 15219



JOHN A. PILLAR, ESQ.

Pillar, Mulroy & Ferber, P.C.
1106 Frick Building
Pittsburgh, PA 15219
412/471-3300

Law Offices

VUONO & GRAY, LLC

John A. Vuono
William A. Gray
Mark T. Vuono*
Dennis J. Kusturiss
Christine M. Dolfi
Louise R. Schrage
*Also Admitted in Florida

2310 Grant Building
Pittsburgh, PA 15219-2383
(412) 471-1800

Richard R. Wilson
of Counsel

Facsimile
(412) 471-4477

September 1, 2000

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Re: Gardner Moving Company
Docket No. A-00108945, F.1, Am-A

SEP 01 2000

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Mr. James J. McNulty
Secretary
Pennsylvania Public Utility Commission
North Office Building
P. O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Mr. McNulty:

We enclose for filing with the Commission the signed original and nine (9) copies of the Reply to Exceptions in connection with the above-captioned proceeding.

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

Very truly yours,

VUONO & GRAY, LLC

William A. Gray

60

CW/11941

Enclosures

cc: Mark C. Stephenson, Esq.
John A. Pillar, Esq.

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Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO. A-00108945, F. 1, Am-A
GARDNER MOVING COMPANY

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PA PUBLIC UTILITY COMMISSION
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REPLY TO EXCEPTIONS

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SEP 05 2000

WILLIAM A. GRAY, ESQ.
Attorney for
ANDERSON TRANSFER, INC.
FIFE MOVING & STORAGE CO.
BEST MOVING & STORAGE CO.
FOREST HILLS TRANSFER AND
STORAGE, INC.
McKEAN & BURT, INC. t/d/b/a ALL WAYS
MOVING & STORAGE
TIMOTHY M. MOORE, t/d/b/a
MOORE MOVERS
B. H. STUMPF CO., INC.
VESELY BROS. MOVING & STORAGE,
INC.
CENTURY III MOVING SYSTEMS, INC.
t/d/b/a CLAIRTON TRANSFER COMPANY
and PLEASANT HILLS VAN & STORAGE
WELESKI TRANSFER, INC.

Protestants

VUONO & GRAY, LLC
2310 Grant Building
Pittsburgh, PA 15219-2383
(412) 471-1800
Due Date: September 5, 2000

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO. A-00108945, F. 1, Am-A
GARDNER MOVING COMPANY

REPLY TO EXCEPTIONS

I. STATEMENT OF THE CASE

By this application, Gardner Moving Company (“Gardner” or “Applicant”) seeks the following authority:

Household goods, in use, between points within an airline radius of 75 statute miles of the Allegheny County Courthouse, located in the city of Pittsburgh, Allegheny County.

Hearings were held in this case in Pittsburgh on August 12, 1999 and April 6 and 7, 2000, before Administrative Law Judge John H. Corbett, Jr. (“the ALJ”). At the conclusion of the hearings, the protestants made a motion to dismiss the application based upon the Applicant’s failure to demonstrate that the approval of the application would serve a useful public purpose, responsive to a public demand or need.

By Initial Decision dated July 26, 2000, the ALJ dismissed the application for failure of the Applicant to meet its burden of proving that a public demand or need exists for the proposed service.

Exceptions to the Initial Decision of the ALJ were filed by the Applicant. This Reply to Exceptions is being filed on behalf of protestants Anderson Transfer, Inc., Fife Moving & Storage Co., Best Moving & Storage Co., Forest Hills Transfer and Storage, Inc., McKean & Burt, Inc. t/d/b/a All Ways Moving & Storage, Timothy M. Moore, t/d/b/a Moore Movers, B. H. Stumpf Co., Inc., Vesely Bros. Moving & Storage, Inc., Century III Moving Systems, Inc. t/d/b/a Clairton Transfer Company and Pleasant Hills Van & Storage and Weleski Transfer, Inc. (hereinafter jointly referred to as “the protestants”).

II. SUMMARY OF BASIS FOR ALJ DECISION

The Applicant in its Exceptions argues that the ALJ erred in finding that the Applicant failed to demonstrate a public demand or need for service. The protestants respectfully submit that the ALJ carefully reviewed and analyzed the Commission’s legal standards and the testimony of the two (2) public witnesses supporting the application and determined that those witnesses did not establish a public demand or need for service.

In reviewing the Commission’s standards to be applied in considering the demand or need issue, the ALJ stated in his Initial Decision at pages 28-29 as follows:

The Commission clarified the type of evidence an application 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, responsible 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 applicant 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); (emphasis added).

In applying the evidence in this case to the Commission's standards set forth above, the ALJ correctly determined that the Applicant failed to establish a public demand or need for the proposed service. As correctly noted by the ALJ, the Applicant only presented two (2) witnesses to support its very broad application request and the testimony of these witnesses clearly did not establish a public demand or need for the proposed service. In fact, the testimony of these witnesses was so weak that the ALJ, in his Summary at page 38, stated:

Upon careful consideration of the record and viewing all of the evidence in the light most favorable to the Applicant, it is readily apparent that the

Applicant has failed to produce the slightest scintilla of evidence of a public demand/need for the transportation service proposed in this application. For this reason, the Protestants' motion to dismiss this application must be granted. (emphasis added)

Concerning the testimony of Ms. Lison, one of the supporting witnesses, the ALJ stated at page 31 as follows:

On the important question of what demand/need she may have for the service proposed in this application, Ms. Lison testified at the hearing on August 12, 1999 that she anticipated hiring a carrier within the next six months to move furniture from her home in Washington County to the home of a relative, when she remodeled her basement (N.T. 79-80, 88, 90, 97). However, she failed to articulate a destination for the anticipated move. When Applicant's counsel asked how far the move would go, Ms. Lison stated "a half-hour, 40 minutes" (N.T."88). Presumably, a "half hour, 40 minutes" travel time from Washington County could include points within Ohio or West Virginia, which are obviously outside the proposed service territory. Moreover, this witness returned to testify on April 6, 2000 (nearly eight months later) about another carrier contacting her during the interim to solicit her transportation business (N.T. 141-142). At that second hearing, Ms. Lison failed to mention whether she had completed the earlier anticipated move or whether she still had any intention of moving her furniture.

Concerning the testimony of Ms. Honeygowsky, the other supporting witness, the ALJ stated at page 31 as follows:

The Applicant's second public witness, Patricia J. Honeygowsky, resides in Kennedy Township, Allegheny County (N.T. 120). . . . Ms. Honeygowsky never indicated she will require transportation of her household goods in the future. Presumably, if Ms. Honeygowsky requires such service in the future, the Applicant will be able to render the service under its existing authority, since the move will originate within Allegheny County.

Concerning whether the testimony of Ms. Lison and Ms. Honeygowsky met the standards for demonstrating public demand or need for the proposed service as set forth in the Blue Bird case, the ALJ stated at page 32 as follows:

“Evidence tending to establish a public demand for the proposed service is usually in the form of an expressed and defined desire on the part of some portion of the public for the proposed service.” Blue Bird at 273. Public demand/need has customarily been demonstrated by witnesses’ testimony detailing requests for service. The relevant inquiry is what are the public’s needs. This element may be proven by the testimony of shippers or others having knowledge of that subject. Id. Neither Ms. Lison nor Ms. Honeygowsky expressed any demand/need for the Applicant’s proposed service.

The ALJ also determined that the testimony of these two public witnesses did not represent a “cross section of public demand or need” as required by the Blue Bird case.

Concerning this issue, the ALJ stated at page 32 as follows:

Moreover, these two public witnesses do not represent a “cross-section of the public on the issue of public demand/need for the [A]pplicant’s proposed service.” Id. at 274. The application territory consists of 75 miles surrounding Allegheny County, which encompasses all of southwestern Pennsylvania as far west as the Ohio line, as far south as the Maryland border, as far north as Meadville, and as far east as Bedford. The Applicant seeks to transport household goods between all points within this 75-mile radius. . . . The record is devoid of any evidence upon which one can find that there is a public demand/need for the transportation service throughout the broad territory proposed in this application.

Finally, the ALJ determined that the Applicant’s attempt to “supply the missing element of demand/need” through other stratagems such as service excellence and the minimum rate issue is misplaced since these matters, even if proven, do not establish a public demand or need for the proposed service. Concerning the minimum rate issue, the ALJ correctly determined that the Commission, in Blue Bird, had rejected attempts to substitute lower rates for evidence of public demand or need for proposed service. In that regard, the ALJ stated at pages 36-37 as follows:

If the Applicant is the sole carrier to offer a one-hour minimum charge, this fact, if accepted as true, may tend to establish “a useful public purpose”, but

it does not demonstrate “a public demand/need” for the proposed service. These terms are separate and distinct. *Re: Richard L. Kinard, Inc.*, 58 Pa. P.U.C. 548 (1984). In *Kinard*, the Commission declared that “[w]hile granting the application may respond to ‘public demand or need,’ it would not necessarily ‘serve a useful public purpose....’” *Id.* at 552. The Commission explained a useful public purpose could be shown by evidence establishing that the applicant will be offering the public a different service, greater efficiency, lower rates, satisfaction of future transportation needs, backup service, rectification of the applicant’s authority, or more economical operations through a combination of the applicant’s interstate and intrastate authorities. In addition, an applicant could prove a useful public purpose by evidence that shipper competition required an increase in the number of carriers available to serve the shippers or by evidence that certain benefits would accrue to the applicant, and concomitantly would pass to the public, if the application were granted. These nine suggested methods of demonstrating a useful public purpose were collectively referred to as “alternatives to inadequacy.”

The Commission in *Blue Bird, supra*, unequivocally rejected attempts to substitute “inadequacy of existing service” for evidence of a public demand/need for the proposed service. There, it stated:

During the intervening years since our decision in *Re: Richard L. Kinard, Inc.*, we have had many opportunities to confront difficulties in construing subsection 41.14(a) vis-à-vis *Re: Richard L. Kinard, Inc.* Chief among the interpretation problems has been a tendency among motor carriers, legal counsel representing motor carriers, and occasionally staff in various capacities throughout the Commission to substitute proof of one of the nine “alternatives to inadequacy” for proof of a supporting witness’s actual need for transportation between identified points in Pennsylvania that are within the scope of the applicant’s proposed operating territory. We unequivocally reject that attempted substitution and affirm that, without proof in the record of a public demand/need for an applicant’s proposed service between specified, intrastate points, an application for motor carrier authority cannot be validly approved pursuant to subsection 1103(a) of the Public Utility Code, and hence cannot be validly approved pursuant to our policy statement at 52 Pa. Code §41.14.

Id. at 273

From the present record, one gleans that the Applicant’s touting its one-hour minimum charge for travel time is nothing more than an attempt to

prove its lower rates will serve a useful public purpose. In other words, the Applicant challenges the adequacy of existing service. Such an alternative to inadequacy can not substitute as substantive evidence of a public demand/need for the proposed service as a matter of law. (emphasis added)

III. ARGUMENT RELATING TO SPECIFIC EXCEPTIONS

Exception 1

The Applicant argues in this Exception that the ALJ failed to find that the Applicant will provide household goods moving services at lower rates not presently available. In fact, the evidence does not support such a finding and, in any event, this would not establish a public demand or need for the Applicant's service.

Initially, it is significant that the Applicant did not present any evidence whatsoever concerning what its rates would be in the application area if this application is granted. The Applicant did not even provide any evidence concerning what its rates are in Allegheny County, where it is presently authorized to provide service, and presented no comparison of its rates in Allegheny County vis-a-vis the rates of other licensed carriers in Allegheny County. The entire thrust of the Applicant's argument involving this issue is that the Applicant does not have a minimum charge in its tariff and it alleges that other carriers have such a minimum charge. The Applicant has totally misrepresented the facts concerning this issue. Initially, the Applicant does have a minimum charge of one hour, which it characterizes as "travel time" but which it admits is applicable regardless of the location of the origin or destination or the amount of time actually expended in completing the transportation. (See ALJ Finding of Fact No. 33) Furthermore, there is no factual basis in the record that would support a conclusion that

any other carrier has more than a one hour minimum in its tariff, except for Debo, which has a two hour minimum charge and Anderson, which has a one hour minimum charge for weekday moves and a four hour minimum charge for weekend moves. (See ALJ Finding of Fact Nos. 80 and 145) The attorney for the Applicant had the opportunity to cross-examine all of the other protestants concerning any minimum charge that they might have in their tariffs. The witnesses for the protestants either testified that they had no minimum charge in their tariffs or the attorney for the Applicant neglected to ask them whether they had a minimum charge in their tariffs. For example, as recognized by the ALJ, the witness for protestant All Ways testified that his company does not have a minimum charge in its tariff, although it does charge one hour travel time just as the Applicant does. (See ALJ Finding of Fact No. 129)

The ALJ correctly stated concerning this minimum rate issue:

Consequently, the Applicant contends, the value that its no-minimum rate structure confers upon the public demonstrates a demand/need exists for its proposed service. This argument is factually misleading and legally incorrect. (emphasis added)

The ALJ correctly determined that even if the Applicant was factually correct that it would have a lower minimum rate than other carriers, which is not factually correct, the Commission in the Blue Bird case unequivocally rejected the substitution of matters such as lower rates for evidence of a public demand or need for the proposed service.

Exception 2

The Applicant argues in this Exception that the ALJ failed to find that the Applicant's high quality service was unique and that if this application was approved, it would force the protestants to provide a higher level of service. This argument is absurd and is not supported by the facts.

In support of its argument that its service is uniquely excellent, the Applicant relies upon the testimony of the two public witnesses who testified in support of the application and who complimented the Applicant's service. These witnesses had no basis for comparing the Applicant's service with the service of the protestants filing this Reply to Exceptions. Neither of the witnesses had ever used the service of any of the Protestants filing this Reply to Exceptions. Therefore, there is no basis for concluding that the Applicant's service is any better than the service of any of the Protestants filing this Reply to Exceptions, much less that the Applicant's service is "uniquely excellent".

There is no testimony concerning the service of the protestants filing this Reply to Exceptions being anything but satisfactory. There was not a scintilla of evidence concerning any problems with any service provided by the protestants filing this Reply to Exceptions. The fact that the Applicant provides satisfaction service under its existing authority does not establish public demand or need for the Applicant's service in the application territory.

The ALJ correctly determined that even if it is true that the Applicant maintains a remarkable level of service performance, this fact does not establish a public demand or need for service.

IV. CONCLUSION

For the reasons set forth herein, the Exceptions filed by this Applicant should be denied.

Respectfully submitted,

VUONO & GRAY, LLC

By: _____

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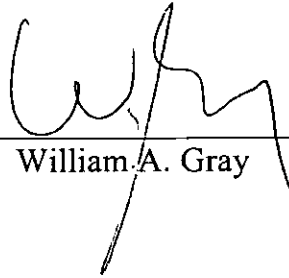
CERTIFICATE OF SERVICE

I hereby certify that I have this day served two (2) copies of the Reply to Exceptions on the following attorneys of record by first class mail, postage prepaid:

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Dated this 1st day of September, 2000.



William A. Gray

/11946

DATE: September 12, 2000

SUBJECT: A-00108945f0001AmA

TO: Cheryl W. Davis, Director
Office of Special Assistants

FROM: James J. McNulty
Secretary
nvl

DOCKETED
SEP 11 2000
DOCUMENT
FOLDER

APPLICATION OF GARDNER MOVING COMPANY,
A CORPORATION OF THE COMMONWEALTH OF PENNSYLVANIA...

Copies of the Initial Decision have been served upon all parties of interest.

Exceptions have been filed by:

APPLICANT

Reply Exceptions have been received from:

**DEBO MOVING/STORAGE & THE SNYDERS BROS MOVING
ATT WM GRAY FOR ANDERSON TRANSFER ET AL**

cc: Annette Shelley