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August 30, 1993

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AUG 30 1993

SECRETARY'S OFFICE
Public Utility Commission

Secretary of the Commonwealth
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: J.C. Services, Inc., Protestant
Tad's Delivery Service, Inc., Applicant
Docket No. A-00109244
F001-Am.A.

Dear Sir:

Enclosed please find an original and nine (9) copies of the Exceptions of Protestant, J.C. Services, Inc. to the application of Tad's Delivery Service, Inc. at the above-captioned docket number for filing with the Commission.

Kindly provide a time-stamped copy for our records.

Sincerely yours,

LIEDERBACH, HAHN, FOY & PETRI

Scott A. Petri

By: Scott A. Petri

SAP/ccm

Enclosures

cc: Administrative Law Judge Marlane R. Chestnut (w/enclosure)
Donald M. Davis, Esquire (w/enclosure)
Administrative Law Judge Allison K. Turner (w/enclosure)

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

AUG 30 1993

SECRETARY'S OFFICE
Public Utility Commission

In Re: : Docket No. A-00109244
: F001-Am.A.
APPLICATION OF :
TAD'S DELIVERY SERVICE, INC. :

EXCEPTIONS OF J.C. SERVICES, INC., PROTESTANT

J.C. Services, Inc., Protestant, files these Exceptions to Initial Decision of Marlane R. Chestnut, A.L.J., and Protestant excepts to the following finding of fact and conclusions of law:

1. Protestant excepts to the finding that the applicant's illegal shipments were pursuant to a good faith, reasonable misunderstanding as same is against the great weight of evidence in the record.

In Bunting Bristol Transfer, Inc. v. Pa. P.U.C., 418 Pa. 286, 210 A.2d 201 (1965) it was stated:

"The first point has to do with the problem of burden of proof. The burden of proving good faith is on the applicant. He can acquit the burden only through the submission of proper evidence which is both clear and convincing." (Protestant's Brief, 17)

"Here, I find that applicant's admittedly illegal service (transporting electronic equipment intrastate not connected to commercial moves) was provided pursuant to a good faith, reasonable misunderstanding of the terms of its ICC authority." (Decision, 9)

a. The record establishes a disregard for the authority of the P.U.C. The P.U.C. should not allow carriers to act in such a way as to disregard its authority. The Initial Decision, if not overturned, will encourage other carriers to willfully operate illegally.

The Applicant continually flaunts the Public Utility Code. Such a course of conduct should not be encouraged by casually overlooking it otherwise the signal is given to industry that the rules and regulations mean nothing and that shippers can accept shipments without authority, risking only fines, when, and if, they are caught. (Protestant's Brief, 18)

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b. The applicant did not produce any testimony in support of confusion. In fact, when questioned on cross-examination, the Applicant admitted that he was not confused.

The Applicant does not attempt to explain its actions as the result of mistake or confusion, or, in the alternative does so in an inadequate manner. (Protestant's Brief, 17)

Applicant did not state at hearing, after having actual knowledge that it did not have the certificated right to do so, that it would immediately cease and desist from performing such transportation. This clearly negates any "good faith" argument which Applicant might assert. Applicant's conduct amounts to intentional, wilful and "bad faith" conduct. (Protestant's Brief, 18)

c. Protestant excepts to the finding that the applicant has met the criteria under 52 Pa. Code §41.14 in determining whether there is positive evidence of fitness independent of applicant's admission of unlawful activities.

"18. The illegal moves (which involved the transportation of electronic equipment not in connection with commercial moves) was done pursuant to a good-faith, reasonable misunderstanding of the scope of applicant-transferee's ICC and PUC authority." (Decision, 16)

2. Protestant excepts to the finding that the applicant lacks a propensity to operate safely and legally. For the reason as stated above, it is clear from the record that the Applicant was not concerned with its lack of authority to operate legally and operated from March 1992 to the date of hearing, November 4, 1993 illegally.

3. Protestant excepts to the finding that the payment of a fine and the ceasing of illegal operations is evidence of good faith by the applicant.

"Further evidence of applicant's good faith, and propensity to act legally, is found in the fact that when its illegal activities were brought to the Commission's attention (by the protestant), applicant paid the fine and ceased the operations in question." (Decision, 10)

The Commission customarily allows a violating carrier to pay a fine for each violation charged in its process of resolving complaints. The Protestant asserts that a fine alone is an insufficient remedy as a fine represents a fraction of the revenues derived by the

carrier, particularly where the charged violations, Eleven (11), in this case are a fraction of the shipments that the Applicant candidly admitted that it performed. (Protestant's Brief, 18)

Finally, the Applicant argues, in the alternative, that consideration of the illegal shipments is only one factor of fitness to be considered and that if the Applicant performed illegal shipments, this fact is outweighed by other "positive evidence" of the carrier's fitness. Such evidence, Applicant argues, is found in the fact that the Applicant is already a "certified" common carrier. If this were the applicable test, then any carrier with existing authority could transport any commodity intrastate without proper authority. (Protestant's Reply, 3)

a. Protestant excepts to the finding that the applicant's failure to be fined in 1991 or 1992 bears any relevance in that the applicant became incorporated and began operations in March of 1992.

b. Protestant excepts to the finding that the applicant, by paying a fine, has demonstrated a propensity to act legally.

4. Protestant excepts to the conclusion that applicant has sustained its burden of proof of establishing it possesses a propensity to operate safely and legally.

5. Protestant excepts to the finding that applicant ceased its illegal activities.

"...the Complaint was resolved by payment of the \$3,000.00 fine, and that applicant has ceased performing such transportation pending resolution of this Application." (Decision, 16)

Given the pending investigations by the PA PUC into the shipments by the Applicant, the Protestant is confident that evidence of significant and frequent violations of Applicant's authority will be forthcoming. (Protestant's Reply, 3)

6. Based upon information and belief and as is more fully set forth in the Motion for Reconsideration of J.C. Services, Inc., Protestant, it is averred that the applicant continues to perform illegal shipment intrashipments. A copy of the Motion is attached as Exhibit "A".

Applicant has come before the Commission having admittedly performed services which it understood to be

unlawful and apparently intends to continue to perform this unauthorized service. Stated...are numerous record references to support this position and there are additional statements in the record too numerous to recount here in full.(Protestant's Brief, 16)

7. Protestant excepts to the finding that the applicant has adequate financial resources or operational background.

In the Applicant's Summary of Testimony and Evidence, the Applicant states, without citing any portion of the record other than the Applicant and the Applicant's "financial statements", that the applicant has the requisite technical and operational experience and the necessary financial resources to conduct its operation. (Protestant's Reply Brief, 1)

a. Protestant excepts to reliance as to financial worthiness based on an unverified financial statement as establishing fitness.

The Applicant failed to introduce any testimony at hearing from a qualified financial officer or representative of the Applicant. (Protestant's Brief, 5)

Moreover, the Applicant did not introduce any evidence pertaining to current sales figures or current expenses. The Applicant's evidence consisted only of projected figures. (See Applicant 1).(Protestant's Brief, 5)

The Applicant failed to provide any competent evidence that the Applicant had paid or was able to pay the purchase price for the authority sought. The list of equipment attached to Applicant 1 does not indicate whether the equipment is leased or owned and there was no evidence in this regard. The Applicant failed to introduce evidence relating to the numbers of employees it maintains, either office staff or drivers, helpers, warehousemen or management. The Applicant offered no testimony regarding its facility other than its location in Cinnaminson, New Jersey, its safety procedures, its method of protecting warehoused merchandise, insurance coverages, its drug testing policy, its method of communication with its customers, the nature of its equipment and any matters pertaining to its method of providing service where items require specialized handling.(Protestant's Brief, 5-6)

The Projected Cash Flow attached as part of Applicant 1 projects \$9500.00 in entertainment expenses for a

entertainment and that this expenditure is for "Flyers tickets, Phillies tickets, things of that nature". (R.70). In fact, the Applicant testified that such expenditures were "standard in the industry". (R.70). The Protestant testified that such expenditures were not customary and that his company maintains policies against entertaining customers. (R.126-129). The Protestant testified that its entertainment budget consisted of lunches with customers representatives only when the customer representative did not otherwise have time to meet. (R.126-127). Further testimony was provided that other companies such as Xerox, DuPont, CoreStates and Pitney Bowes have policies against entertaining. (R.128).(Protestant's Brief, 6)

Q: Well, do you have any knowledge as to the amount of monthly gross revenues that are generated from customers in the nature of these movements that we've been discussing?

A: It could be somewhere in the neighborhood of 5 to \$7,000.00 a month.(Protestant's Brief, 9)

The financial information was in the form of projections and was not bolstered by either a Financial Officer of the Applicant or a Certified Public Accountant. Furthermore, the Applicant failed to identify how these projections were formulated.(Protestant's Reply Brief, 1)

b. Protestant excepts to the finding that applicant possesses any operational experience as applicant's principals have no managerial experience having been employed only in sales and dispatch.

c. Protestant excepts to the finding that the applicant can be, on the one hand, confused about its ICC-PUC authority and, on the other hand, experienced in sales and operations.

In the Discussion section to follow, the Protestant will argue that this testimony establishes that the Applicant has operated without proper authority and with knowledge that its operation is without proper authority and with a disregard for obtaining proper authority.

Q: Under what authority do you transport intrastate in the electronic area?

A: My present PUC authority which states that if I originate out of Philadelphia, I

can transport those goods within 100 miles of Philadelphia. So, for example, if I want to move from one building to another in Philadelphia electronics goods which in most cases are part of a commercial move, my authority allows me to do that.

Q: Do you have that existing authority with you?

A: No, I don't.

Q: Okay.

JUDGE CHESTNUT: Excuse me, is that the authority that was granted by the terms of Applicant's Exhibit 3?

THE WITNESS: Yes.
(Protestant's Brief, 9)

Q: I've marked a document which I just handed to you as Protestant Exhibit Number 1 and ask you if that is a copy of part of your tariff filed with the PUC as pertains to your current authority?

A: Yes.

Q: Can you please point to the provision in this certificate of authority which allows you to make the movements that you've just been testifying with regard to?

A: It's not stated.

Q: So then you do not have authority to make the movements that you have testified that you have been making since you started operations in March of this year?

[N.T. P. 22-23]
[emphasis added]

Q: Were you concerned about whether you were within your existing PUC certificated rights?

A: I was in my existing PUC authority.

Q: And what led you to believe that?

A: To be honest with you, I thought I could carry within 100 miles of Philadelphia. (Protestant's Brief, 11)

Q: So you assumed because it says you have the right to transport as a Class D carrier household goods and office furniture, in use and new furniture uncrated from points in the City and County of Philadelphia to points within an airline distance of 100 statutory miles of Philadelphia City Hall and vice versa that gave you authority to make intrastate PUC movements?

A: It was my understanding that I could handle that type of equipment within the 100 miles.

Q: Then why would your company pay \$7,500.00 for the rights that it's seeking today?

A: To expand that authority.

[N.T. p.27-28]
[emphasis added]

(Protestant's Brief, 12)

Q: Now knowing that you do not carry authority to make the movements that we've been describing today, the electronic movements which are intrastate for various customers which are unconnected to commercial moves, will you now cease immediately?

A: You're claiming that I don't have the authority.

Q: No. You told me today that you see that you don't have the authority unless I totally misunderstood the last half hour.

A: I don't see it mentioned here but it was my belief that we had the authority to move equipment.

Q: Do you still believe that?

A: Yeah, I do believe it, yes.

Q: And what portion of Protestant 1 gives you that authority?

[N.T. p. 39-40]

gives you that authority?

[N.T. p. 39-40]
[emphasis added]

THE WITNESS: I basically know the question. It was my belief that we had the authority to do electronic moves within the mileage as listed here and I've been doing so based on my belief. (Protestant's Brief, 11-12)

Q: Is there something in particular about paragraph 3 of Protestant 1 that is confusing to you?

A: No.

[N.T. p. 41-42]
[emphasis added]

(Protestant's Brief, 12)

d. Protestant excepts to the finding that the record establishes adequate financial ability to operate the proposed service or contains any reliable information pertaining to financial ability.

"Exhibit I is described as a statement of financial position/balance sheet dated March 1, 1992 (it was not indicated who prepared this document, or whether the information contained in it was verified in any way)..." (Decision, 11)

e. Protestant excepts to the conclusion that applicant has sustained its burden of proof of establishing it possesses technical or financial ability to provide the service.

"Although the evidence on operational fitness was extremely skimpy, I find that applicant has sustained its burden of proof on this issue." (Decision, 12)

The Applicant's burden of proof requires that more than "skimpy" evidence be presented. The PA Public Utility Commission is cloaked with the responsibility of protecting the public against Carriers who do not possess the necessary financial ability or the technical ability to operate properly. Furthermore, it is the Applicant's burden, and not

the burden of the Protestant, to introduce competent evidence of its fitness. The Applicant has failed to meet its burden, and therefore the application for transfer must be denied.

Respectfully submitted,

LIEDERBACH, HAHN, FOY & PETRI

By: Scott Andrew Petri
SCOTT A. PETRI, ESQUIRE
Attorney for Protestant
J.C. Services, Inc.

CERTIFICATE OF SERVICE

I, SCOTT A. PETRI, ESQUIRE, certify that on the 30th day of August, 1993, I did serve a true and correct copy of the Exceptions of J.C. Services, Inc., Protestant upon the following persons in the manner indicated:

RECEIVED

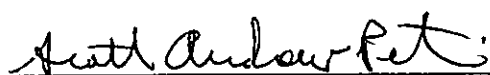
VIA FIRST CLASS U.S. MAIL, POSTAGE PREPAID:

SEP 1 1993

MARLANE R. CHESTNUT
Administrative Law Judge
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
Philadelphia State Office Building
1400 West Spring Garden Street
Philadelphia, PA 19130

SECRETARY'S OFFICE
Public Utility Commission

DONALD M. DAVIS, ESQUIRE
Attorney for Applicant
4th Floor, Curtis Center
Independence Square West
Philadelphia, PA 19106-3304


SCOTT A. PETRI, ESQUIRE
Attorney for Protestant

Dated: August 30, 1993

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: : Docket No. A-00109244
: F001-Am.A.
APPLICATION OF :
TAD'S DELIVERY SERVICE, INC. :

ORDER

AND NOW, this ____ day of _____, 1993, upon consideration of the within Petition, it is hereby **ORDERED** that the record on the above-captioned matter is opened and a hearing be held on the ____ day of _____, 1993 for the purpose of presentation of evidence by Protestant of Applicant's alleged illegal activity since November 4, 1992.

SO ORDERED:

J.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: : Docket No. A-00109244
: F001-Am.A.
APPLICATION OF :
TAD'S DELIVERY SERVICE, INC. :

PETITION TO RECONSIDER INITIAL DECISION
AND/OR RE-OPEN RECORD

J.C. SERVICES, INC., Protestant, files this Petition to Reconsider Initial Decision and/or Re-open Record under and in support thereof, avers the following:

1. An initial hearing was held on November 4, 1992.
2. An initial decision was rendered by Administrative Law Judge Marlane R. Chestnut on July 21, 1993, a copy of which is attached hereto.
3. Paragraph 4 of the Order states "That applicant shall not engage in any transportation granted by this Order until it has complied with the requirements of the Pennsylvania Public Utility Code and the rules and regulations of the Commission relative to the filing of insurance and acceptance of a tariff establishing just and reasonable rates".
4. Paragraph 6 of the Order states "That in the event 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 will be dismissed without further proceedings".
5. Protestant has discovered new information which it believes establishes that Applicant has since November 4, 1992, the date of the initial hearing and continues to provide intra-state shipments without authority.
6. The initial decision granting the transfer of rights to Applicant is based upon the finding that the Applicant was confused about the distinction between its PUC and ICC rights and that the Applicant ceased its illegal activities. A full and complete copy of the Initial Decision of Administrative Law Judge Marlane R. Chestnut is attached hereto as Exhibit "A".
7. Protestant seeks the approval to re-open the Record and/or for reconsideration of the Initial Decision in accordance with Section 5.571 in order to present additional testimony concerning illegal activities by Applicant following the date of

hearing and prior to the final granting of the transfer of authority.

8. An Affidavit in support of the new evidence by Protestant is attached hereto as Exhibit "B" and incorporated herein by reference.

WHEREFORE, Protestant seeks the approval to re-open the Record and/or for reconsideration of the Initial Decision in accordance with Section 5.571 in order to present additional testimony concerning illegal activities by Applicant following the date of hearing and prior to the final granting of the transfer of authority.

LIEDERBACH, HAHN, FOY & PETRI

By: Scott Andrew Petri
SCOTT A. PETRI, ESQUIRE
Attorney for Protestant

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Tad's Delivery :
Service, Inc. t/a T&N Van Service : Docket No. A-00109244
: F.1, Am-A

INITIAL DECISION

Before
MARLANE R. CHESTNUT
Administrative Law Judge

I. HISTORY OF THE PROCEEDING

By Application docketed on June 15, 1992, and amended on July 7, 1992, Tad's Delivery Service, Inc. t/a T&N Van Service (T&N, transferee or applicant) requested that the Pennsylvania Public Utility Commission (Commission) amend applicant's certificate of public convenience A-00109244 to reflect the transfer of the operating authority held by Domenic Cristinzio, Inc. at Docket No. A-0086551, F.2. Applicant's existing certificate would be amended to include as Amendment A:

SO AS TO PERMIT the transportation of (1) tabulating and office machines for the International Business Machine Corporation between points in the city of Philadelphia, Philadelphia County, and from points in the said city to points within an airline distance of twenty-five (25) miles of the City Hall in the said city, and vice versa; (2) cases for the International Business Machine Corporation from points within an airline distance of twenty-five (25) miles of the City Hall in the city of Philadelphia, Philadelphia County, to points in the said city, and vice versa; (3) office machines and electronic or mechanical equipment, including

but not limited to, copiers, computers, x-ray machines and inserting machines, from the warehouse of Domenic Cristinzio, Inc., at 3328 Amber Street, in the city and county of Philadelphia, to points within thirty-five (35) miles thereof, and vice versa; (4) office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, from the warehouse of Domenic Cristinzio, Inc., at 2073 Bennett Road, in the city and county of Philadelphia, to points within thirty-five (35) miles thereof, and vice versa; (5) uncrated office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, between points in the counties of Bucks, Chester, Delaware, Montgomery, Philadelphia, and from said counties to points in Pennsylvania, and vice versa; (6) business and office machines, electronic manufacturing systems, parts and supplies thereof, that are manufactures, sold, leased, distributed or dealt in by International Business Machines Corporation, for International Business Machines Corporation between points in the counties of Adams, Berks, Bucks, Carbon, Centre, Chester, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntingdon, Juniata, Lancaster, Lebanon, Lehigh, Mifflin, Montgomery, Montour, Northampton, Northumberland, Perry, Philadelphia, Schuylkill, Snyder, Union and York; and (7) business and office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines, and inserting machines, and new office furniture, between points in the counties of Luzerne, Lackawanna, Monroe, Carbon, Northampton, Lehigh, Berks, Schuylkill, Columbia and Montour, and from points in said counties, to points in Pennsylvania, and vice versa.

Notice of the Application was published in the June 27, 1992 Pennsylvania Bulletin. The only protest was filed by J.C. Services, Inc. (J.C. or protestant).

An initial hearing was held on November 4, 1992. Applicant was represented by H. Marc Tepper, Esq., and protestant was represented by Scott A. Petrie, Esq. Applicant presented the testimony of two witnesses and five exhibits and protestant presented two witnesses and five exhibits.¹ The record consists of these exhibits plus a transcript of 141 pages. Main and Reply Briefs were filed by both parties.

II. DISCUSSION

Any entity proposing to provide intrastate transportation service to the public for compensation must first obtain from the Commission a certificate of public convenience. Pursuant to the Public Utility Code, 66 Pa.C.S. §1103(a), this certificate should be granted only if the Commission finds "that the granting of such certificate is necessary or proper for the

¹ Protestant sponsored four exhibits at the hearing. After the briefs were filed, protestant filed a Motion for Leave to Supplement the Record with its fifth exhibit, a copy of the Complaint adopted by the Commission upon its own Motion charging applicant with various instances of illegal intrastate service. This Motion will be granted. Also admitted into the record will be applicant's February 2, 1993 letter to Secretary Alford which resolves that Complaint. This resolution of the Complaint renders moot protestant's motion to hold proceedings open pending resolution of the Complaint.

service, accommodation, convenience or safety of the public." In order to make these determinations, the Commission has issued regulations codifying the evidentiary criteria to be taken into consideration. These factors, contained in 52 Pa. Code §41.14, are:

§41.14 Evidentiary criteria used to decide motor common carrier applications-statement of policy

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

These evidentiary criteria were discussed in more detail by the Commission in Application of Bluebird Coach Lines, Inc., 72 Pa. P.U.C. 262, 294 (1990)..

This proceeding involves the proposed transfer of existing operating rights granted at Docket No. A-0086551, F.2 from Domenic Cristinzio, Inc. to applicant. These rights were placed in "voluntary suspension" on March 4, 1992 pending their purchase. In cases of this nature, the Commission applies the doctrine of "presumption of continuing necessity." First articulated in Re: Louis L. Grimm, 17 Pa. P.U.C.25 (1937), this doctrine provides that an applicant for transfer of existing authority is not required to show that the underlying service authorized by the rights being transferred is necessary or proper for the convenience of the public. It is assumed that the convenience supporting the original grant of the authority continues until the contrary is shown by a protestant. Re: Byerly, 440 Pa. 521, 270 A.2d 186 (1970); Re: Erie Transportation Services, Inc., 72 Pa. P.U.C. 113, 118 (1990). Accordingly, the applicant here does not have the burden of proof specified in 52 Pa. Code §41.14(a), that approval of the Application will serve a useful public purpose, responsive to a public demand or need.

Similarly, the protestant in a proceeding involving the transfer of existing authority need not meet the burden of proof

established in §41.14(c), that entry of a new carrier into the field would endanger or impair the operations of existing carriers to such an extent that granting the authority would be contrary to the public interest. Although a transferee-applicant is technically a "new carrier," the operating authority sought to be transferred is not new authority. The Commission previously has determined this issue. Therefore, a protestant should not be expected to submit evidence that exercise of those rights by a different carrier would be contrary to the public interest.

What remains to be proven by an applicant in transfer proceedings is that it, as the transferee, possesses the technical and financial ability, or fitness, to provide the proposed service, and, does not lack a propensity to operate safely and legally.

In this proceeding, J.C. essentially has challenged applicant's fitness on two grounds. First, it points to the instances of illegal intrastate service which were the subject of the Complaint adopted by the Commission at A-00109244C9301, which it claims were performed in bad faith and to a significant degree. In addition, protestant asserts that applicant has failed to present substantial evidence of operational or financial fitness, in that it presented no evidence as to its current financial position, facilities and equipment, number of employees, safety procedures, drug testing program, insurance

coverage, or communications system. The third argument made by protestant J.C. goes to its fear that it will suffer significant economic harm. Each of these contentions will be addressed below.

A. Illegal Acts

As the result of cross-examination, applicant agreed that it appeared that certain moves it had performed were not within the scope of either its existing PUC or ICC authority. Subsequently, at Docket No. A-00109244C9301, a Complaint was adopted by the Commission upon its own Motion charging applicant with 12 instances of illegal intrastate service. Applicant's February 2, 1993 letter to Secretary Alford indicates that the Complaint was resolved by payment of the \$3,000.00 fine, and that applicant has ceased performing such transportation pending resolution of this Application.

There is ample administrative and legal precedent on the issue of prior illegal service as it relates to fitness. It is well-settled that while the misconduct is a factor for the Commission to consider when determining fitness, it is not conclusive. An applicant may present offsetting evidence to prove its present legal fitness to provide a proposed service. The Commission has discretionary authority to grant an application as long as there is evidence of present fitness independent of the evidence relating to the unlawful activities.

Most recently, in Hercik v. Pa. P.U.C., 137 Pa. Commonwealth Ct. 377, 586 A.2d 492, 494-95 (1991), the Commonwealth Court, citing Brinks, Inc. v. Pa. P.U.C., 500 Pa. 387, 456 A.2d 1342 (1983), found that:

Thus, under Brinks, it is clear that the incidents of Conaway's past unlawful operations are not conclusive of the question of Conaway's present fitness and such prior unlawful operations do not preclude Conaway from obtaining an authority. It is in the discretion of the PUC to determine whether authority must be withheld considering other evidentiary criteria under 52 Pa. Code §41.14. This Court must then examine the record to decide whether the PUC's decision was based upon the positive evidence of Conaway's fitness independent of the evidence of prior unlawful operations. (citations omitted)

The Commonwealth quoted extensively, at 586 A.2d 494, from the Pennsylvania Supreme Court's decision in Brinks, supra:

Our case law is clear that, although a favorable finding of fitness may not be based upon evidence of the quality of service conducted in wilful violation of a court order or the Commission's authority, the mere fact of prior operation in violation of a court order or the Commission's authority does not preclude a carrier from obtaining lawful authority in a subsequent proceeding before the Commission . . . Thus, while WFB's continuing to haul money in deliberate disregard of the Commonwealth Court's Order gave

rise to a negative inference concerning Brooks' fitness, the Commission could still have granted the requested contract carrier authority without abusing its discretion so long as the Commission had before it positive evidence of Brooks' fitness independent of the evidence relating to the period of unlawful operations.

The justification for the rule permitting the acquisition of contract carrier rights despite past unlawful operations is evident. The essence of public utility regulation is to assure that the public's needs are best served at the most reasonable rates. If past unlawful operations were deemed conclusive of an applicant's fitness, the Commission would be powerless to grant the application of a carrier who, despite its past unlawful activities, has otherwise demonstrated its present fitness to perform services beneficial to the public. (citations omitted)

See also, W.C. McQuaide v. Pa. P.U.C., 137 Pa. Commonwealth Ct. 282, 585 A.2d 1151, 1154 (1991); Re: Action Deliveries, Inc., 75 Pa. P.U.C.463, 474 (1991).

Here, I find that applicant's admittedly illegal service (transporting electronic equipment intrastate not connected to commercial moves) was provided pursuant to a good faith, reasonable misunderstanding of the terms of its ICC authority. Further evidence of applicant's good faith, and propensity to act legally, is found in the fact that when its

illegal activities were brought to the Commission's attention (by the protestant), applicant paid the fine and ceased the operations in question. Also, the Commission's files show that no complaints were filed against applicant in 1991 or 1992. Therefore, I do not find that applicant lacks a propensity to operate safely and legally.

B. Operational Fitness

Protestant's second argument is that applicant failed to demonstrate its operational and technical fitness to perform the proposed service. The requirement of technical fitness was explained and clarified by the Commission in Application of Ige t/a/ Globe Limousine Service, 75 Pa. P.U.C. 45, 47 (1991):

Technical expertise - An applicant must have the technical capacity to meet the need for the proposed service in a satisfactory fashion. An applicant must possess sufficient staff and facilities or operating skills to make the proposed service feasible, profitable, and a distinct service to the public.

The Commission went on to note that to satisfy the requirement of "financial ability," an "applicant should own or should have sufficient financial resources to obtain the equipment needed to perform the proposed service." Id.

Here, protestant has alleged that applicant has failed to sustain its burden of establishing technical or operational fitness. It asserts that applicant failed to present testimony

from "a qualified financial officer or representative of the applicant," did not adduce evidence relating to current sales and expenses or verifying its projected financial statement, and did not establish that it was able to pay the purchase price for the proposed authority, did not indicate whether its equipment was leased or owned, and did not address the number of employees, facilities, safety procedures, drug testing program, or insurance coverage.

Applicant relies on Exhs. I and L, attached to its Application (which was admitted into the record as Exh. 1) as evidence of fitness. It also relies on a presumption of fitness arising out of its status as a certificated carrier, and notes that applicant's principals have over 30 years combined experience in the transportation industry.

Exhibit I is described as a statement of financial position/balance sheet dated March 1, 1992 (it was not indicated who prepared this document, or whether the information contained in it was verified in any way) which purports to show assets of \$48,900 (cash) and \$40,000 (authority), no liabilities, \$128,950 in owner's equity, and projected net income of \$150,000. It also included a projected cash flow for the 12-month period ended February 28, 1993 which purports to show a positive cash flow position for each quarter.

Exhibit L is a "statement of experience" which indicates that the officers of the corporation have "over 30 years experience and involvement in the trucking industry." Exhibit G is an equipment list, although it does not indicate which, if any, of the vehicles are currently used or would be used to provide the proposed service.

In addition, applicant witness Nelson testified that the operation is currently insured, although he gave no specific coverage level (Tr. 5), and that current monthly sales are \$125,000. (Tr. 21.) While he does have 12 years experience in the trucking field, he has no managerial experience since he worked in sales and dispatch (Tr. 36). Each of the other principals has 4-5 years experience in sales and dispatch. Tr. 37-38.

Although the evidence on operational fitness was extremely skimpy, I find that applicant has sustained its burden of proof on this issue. It seems to have adequate financial resources, and the applicant's principals appear to be well-experienced in the trucking industry.

I must specifically reject, however, applicant's statement in its Reply Brief at unnumbered p. 2 that "as an existing certificated carrier, it is presumed that T&N possesses the requisite abilities. Further as an existing carrier, the PUC is fully cognizant of T&N's insurance retention, facilities,

equipment and methods of operation." First, "the Commission" is not an "existing carrier." In addition, there is absolutely no legal basis for this statement, which (I assume) is why no support was cited. The Commission "knows" only what was presented on the record of the initial certification proceeding when it made its determination that applicant was fit to provide that service. There is no way that the Commission can be "cognizant" of what equipment is currently used by applicant, or what employees are available to applicant, or how applicant intends to provide the proposed service. Will additional vehicles be required? If so, will they be purchased or leased? These and similar questions must be answered before the Commission can make any determination that an applicant will actually be able to provide a proposed service.

C. Harm To Protestant

Protestant alleges that it has lost sales to applicant and that, if the Application is granted by the Commission, protestant will experience significant economic harm.

As I explained above, this issue is not relevant in a transfer application proceeding. When the Commission awarded the initial grant of authority to the transferror, it considered the competitive impact of allowing an additional carrier into the field. The only question in this proceeding is which entity

should be permitted to provide the proposed service, not whether the service should be provided.

III. FINDINGS OF FACT

1. Transferror Domenic Cristinzio, Inc. received common carrier authority by Commission Order at Docket No. A-0086551, F.2.

2. Transferror ceased jurisdictional operations in March 1992, and, by letter dated March 4, 1992 (App. Exh. 5), the Commission permitted the authority to be placed in voluntary suspension pending sale of the rights. Tr. 81-82.

3. Applicant-transferee Tad's Delivery Service, Inc. t/a T&N Van Service entered into an agreement with transferror to purchase the operating authority listed at Docket A-0086551, F.2, in order to expand its service territory. Tr. 29-32, 43.

4. This agreement, dated May 8, 1992 and amended by addendum dated July 7, 1992, contained a sales price of \$7,500. for all of the rights listed at Docket A-0086551, F.2. App. Exhs. 1, 2.

5. Applicant-transferee T&N currently is certificated by the Commission to perform common carrier transportation service at Docket A-00109244.

6. The authority at Docket A-00109244 was issued by the Commission to Domenic F. Taddei by certificate of public convenience dated July 6, 1990. Subsequently, by Order adopted

November 29, 1990, the Commission permitted the certificate to be changed to stand in the name of Tad's Delivery Service, Inc. App. Exh. 1.

7. Applicant-transferee T&N currently is certificated by the State of New Jersey at Docket No. PC00651. App. Exh. 1.

8. Applicant-transferee T&N currently is certificated by the Interstate Commerce Commission at Docket No. MC-214617 Sub. 3. App. Exh. 1.

9. Applicant-transferee is a stock corporation incorporated in Delaware. App. Exh. 1, Tr. 6.

10. The officers and shareholders of applicant-transferee T&N are David Nelson, Don Taddei, Russell Taddei and Kenneth Taddei. App. Exh. 1; Tr. 5, 15.

11. Applicant-transferee was purchased by David Nelson, Don Taddei, Russell Taddei and Kenneth Taddei from Domenic Taddei. Tr. 9-11.

12. Applicant-transferee operates a moving and storage business, which includes commercial office moving, electronic moving, automatic teller machine installation and rigging, and household moves. Tr. 5.

13. Applicant-transferee has its principle place of business in Cinnaminson, New Jersey. App. Exh. 1; Tr. 5.

14. David Nelson is President of applicant-transferee T&N and was employed at transferrer Domenic Cristinzio, Inc. until February 1992. Tr. 4, 13, 14.

15. Mr. Nelson has 12 years experience in the trucking industry; the other principals of T&N have 4-5 years experience each. Tr. 36-37.

16. At Docket No. A-00109244C9301, a Complaint was adopted by the Commission upon its own Motion charging applicant-transferee with 12 instances of illegal intrastate service. Prot. Exh. 5.

17. Applicant-transferee's February 2, 1993 letter to Secretary Alford indicates that the Complaint was resolved by payment of the \$3,000.00 fine, and that applicant has ceased performing such transportation pending resolution of this Application.

18. The illegal moves (which involved the transportation of electronic equipment not in connection with commercial moves) was done pursuant to a good-faith, reasonable misunderstanding of the scope of applicant-transferee's ICC and PUC authority.

19. Applicant-transferee has the financial ability to operate the proposed service. App. Exh. 1; Tr. 5, 21.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding.

2. In proceedings seeking the transfer of existing motor carrier operating authority, an applicant does not have to establish that approval of the application will serve a useful public purpose, responsive to a public demand or need.

4. In proceedings seeking the transfer of existing motor carrier operating authority, the burden of proof is on applicant to establish that it possesses the technical and financial ability to provide the proposed service, and does not possess a propensity to operate unsafely and/or illegally.

5. Applicant sustained its burden of establishing that it possesses the technical and financial ability to provide the proposed service, and does not possess a propensity to operate unsafely and/or illegally.

6. In proceedings seeking the transfer of existing motor carrier operating authority, a protestant should not be permitted to submit evidence that entry of a new carrier into the field would endanger or impair the operations of existing carriers to an extent that, on balance, the granting of the authority would be contrary to the public interest.

VII. ORDER

THEREFORE,

IT IS ORDERED:

1. That the application for transfer of the rights held by Domenic Cristinzio, Inc. at Docket No. A-0086551, F.2, is hereby approved and that the Certificate issued to Applicant be amended to include the following rights:

To transport as a Class D carrier (1) tabulating and office machines for the International Business Machine Corporation between points in the city of Philadelphia, Philadelphia County, and from points in the said city to points within an airline distance of twenty-five (25) miles of the City Hall in the said city, and vice versa; (2) cases for the International Business Machine Corporation from points within an airline distance of twenty-five (25) miles of the City Hall in the city of Philadelphia, Philadelphia County, to points in the said city, and vice versa; (3) office machines and electronic or mechanical equipment, including but not limited to, copiers, computers, x-ray machines and inserting machines, from the warehouse of Domenic Cristinzio, Inc., at 3328 Amber Street, in the city and county of Philadelphia, to points within thirty-five (35) miles thereof, and vice versa; (4) office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, from the warehouse of Domenic Cristinzio, Inc., at 2073 Bennett Road, in the city and county of Philadelphia, to points within thirty-five (35) miles thereof, and vice versa; (5) uncrated office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, between points in the counties of Bucks, Chester, Delaware,

Montgomery, Philadelphia, and from said counties to points in Pennsylvania, and vice versa; (6) business and office machines, electronic manufacturing systems, parts and supplies thereof, that are manufactures, sold, leased, distributed or dealt in by International Business Machines Corporation, for International Business Machines Corporation between points in the counties of Adams, Berks, Bucks, Carbon, Centre, Chester, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntingdon, Juniata, Lancaster, Lebanon, Lehigh, Mifflin, Montgomery, Montour, Northampton, Northumberland, Perry, Philadelphia, Schuylkill, Snyder, Union and York; and (7) business and office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines, and inserting machines, and new office furniture, between points in the counties of Luzerne, Lackawanna, Monroe, Carbon, Northampton, Lehigh, Berks, Schuylkill, Columbia and Montour, and from points in said counties, to points in Pennsylvania, and vice versa.

2. This grant of authority is subject to the following conditions:

A. That the approval hereby given is not to be understood as committing this Commission, in any proceedings that may be brought before it for any purpose, to fix a valuation on the rights to be acquired by applicant from the present certificate holder equal to the consideration to be paid, or equal

to any value that may be placed on them by applicant, or to approve or prescribe rates sufficient to yield a return thereon.

B. That applicant shall not record in its utility accounts any amount representing the rights granted by this Order in excess of the actual cost of such rights to the original certificate holder.

C. That applicant charge to Account 1550, Other Intangible Property, \$7,500., being the amount of consideration payable by it for the rights granted by this Order, less any amount recorded under Condition B, above.

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

4. That applicant shall not engage in any transportation granted by this Order until it has complied with the requirements of the Pennsylvania Public Utility Code and the

rules and regulations of the Commission relative to the filing of insurance and acceptance of a tariff establishing just and reasonable rates.

5. That issuance of a Certificate of Public Convenience will become final only upon submission of transferror's assessments due.

6. That in the event 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 will be dismissed without further proceedings.

7. That upon compliance with this Order, the rights granted to the transferror, Domenic Cristinzio, Inc. at Docket No. A-0086551, F.2, are hereby cancelled.

8. That Protestant Exh. 5 and applicant's February 2, 1993 letter to Secretary Alford are admitted into the record.

Date:

July 21, 1993

Marlane R. Chestnut

MARLANE R. CHESTNUT
Administrative Law Judge

AFFIDAVIT OF STEVEN J. MCGARY

I, STEVEN J. MCGARY, President of Protestant, J.C. SERVICES, INC., being duly sworn according to law, hereby provide this Affidavit in support of the Petition to Reconsider Initial Decision and/or Re-open Record and in support thereof, aver the following:

1. Upon information and belief, it is averred that the Applicant transported office equipment and furnishings, in use, for Monroe Business Systems, Inc. from Horsham, Pennsylvania to Blue Bell, Pennsylvania in late May of 1993; and

2. Upon information and belief, it is averred that the Applicant has, since the date of the hearing on November 4, 1992, transported on numerous occasions electronic equipoment for Monroe Business Systems, Inc. intrastate; and


3. It is believed and averred that these shipments are illegal and not within the Applicant's existing authority.

4. These shipments bear directly upon the finding of confusion and, if it is found that shipments have been made by the Applicant since November 4, 1992 without proper Authority, the Applicant cannot demonstrate either confusion or good faith.



STEVEN MCGARY

Sworn to and subscribed
before me this 30th day of
August, 1993.



Notary Public

Notarial Seal
Cathyann C. Milanese, Notary Public
Northampton Twp., Bucks County
My Commission Expires Feb. 8, 1995


CERTIFICATE OF SERVICE

I, SCOTT A. PETRI, ESQUIRE, certify that on the 30th day of August, 1993, I did serve a true and correct copy of the Petition to Reconsier Initial Decision and/or Re-open Record upon the following person in the manner indicated:

VIA FIRST CLASS U.S. MAIL, POSTAGE PREPAID:

MARLANE R. CHESTNUT
Administrative Law Judge
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
Philadelphia State Office Building
1400 West Spring Garden Street
Philadelphia, PA 19130

DONALD M. DAVIS, ESQUIRE
Attorney for Applicant
4th Floor, Curtis Center
Independence Square West
Philadelphia, PA 19106-3304



SCOTT A. PETRI, ESQUIRE
Attorney for Protestant

Dated: August 30, 1993

LAW OFFICES
LIEDERBACH, HAHN, FOY & PETRI
A PROFESSIONAL CORPORATION
892 SECOND STREET PIKE
RICHBORO, PA. 18954

ORIGINAL

RJR

EDWARD D. FOY, JR.
CARL G. HAHN
SCOTT A. PETRI
—
DENNIS R. DENARD
—
HARRY J. LIEDERBACH
(1916-1982)

RICHBORO LINE
322-8300
—
PHILADELPHIA LINE
677-0919
—
DOYLESTOWN LINE
343-9310
—
FAX 215-322-7646

August 30, 1993

RECEIVED

SEP 1 1993

SECRETARY'S OFFICE
Public Utility Commission

Secretary John G. Alford
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Application of Tad's Delivery Service,
Inc. - Docket No. A-001092~~85~~, F001-Am.A.
#4

Dear Secretary Alford:

Enclosed please find an original and two (2) copies of A Petition to Reconsider Initial Decision and/or Re-open Record for filing with the Commission.

Kindly return a time-stamped copy for our records.

Sincerely yours,

LIEDERBACH, HAHN, FOY & PETRI

Scott A. Petri

By: Scott A. Petri

SAP/ccm

Enclosures

cc: Administrative Law Judge Marlane R. Chestnut (w/enclosure)
Donald M. Davis, Esquire (w/enclosure)
Administrative Law Judge Allison K. Turner (w/enclosure)

DOCUMENT
FOLDER

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: : Docket No. A-00109244
: F001-Am.A.
APPLICATION OF :
TAD'S DELIVERY SERVICE, INC. :

RECEIVED

SEP 1 1993

SECRETARY'S OFFICE
Public Utility Commission

ORDER

AND NOW, this ____ day of _____, 1993, upon consideration of the within Petition, it is hereby ORDERED that the record on the above-captioned matter is opened and a hearing be held on the ____ day of _____, 1993 for the purpose of presentation of evidence by Protestant of Applicant's alleged illegal activity since November 4, 1992.

SO ORDERED:

J.

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: : Docket No. A-00109244
: F001-Am.A.
APPLICATION OF :
TAD'S DELIVERY SERVICE, INC. :

RECEIVED

SEP 1 1993

SECRETARY'S OFFICE
Public Utility Commission

PETITION TO RECONSIDER INITIAL DECISION
AND/OR RE-OPEN RECORD

J.C. SERVICES, INC., Protestant, files this Petition to Reconsider Initial Decision and/or Re-open Record under and in support thereof, avers the following:

1. An initial hearing was held on November 4, 1992.

2. An initial decision was rendered by Administrative Law Judge Marlane R. Chestnut on July 21, 1993, a copy of which is attached hereto.

3. Paragraph 4 of the Order states "That applicant shall not engage in any transportation granted by this Order until it has complied with the requirements of the Pennsylvania Public Utility Code and the rules and regulations of the Commission relative to the filing of insurance and acceptance of a tariff establishing just and reasonable rates".

4. Paragraph 6 of the Order states "That in the event 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 will be dismissed without further proceedings".

5. Protestant has discovered new information which it believes establishes that Applicant has since November 4, 1992, the date of the initial hearing and continues to provide intra-state shipments without authority.

6. The initial decision granting the transfer of rights to Applicant is based upon the finding that the Applicant was confused about the distinction between its PUC and ICC rights and that the Applicant ceased its illegal activities. A full and complete copy of the Initial Decision of Administrative Law Judge Marlane R. Chestnut is attached hereto as Exhibit "A".

7. Protestant seeks the approval to re-open the Record and/or for reconsideration of the Initial Decision in accordance with Section 5.571 in order to present additional testimony concerning illegal activities by applicant following the date of

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SEP 03 1993

hearing and prior to the final granting of the transfer of authority.

8. An Affidavit in support of the new evidence by Protestant is attached hereto as Exhibit "B" and incorporated herein by reference.

WHEREFORE, Protestant seeks the approval to re-open the Record and/or for reconsideration of the Initial Decision in accordance with Section 5.571 in order to present additional testimony concerning illegal activities by Applicant following the date of hearing and prior to the final granting of the transfer of authority.

LIEDERBACH, HAHN, FOY & PETRI

By: Scott Andrew Petri
SCOTT A. PETRI, ESQUIRE
Attorney for Protestant

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Tad's Delivery :
Service, Inc. t/a T&N Van Service : Docket No. A-00109244
F.1, Am-A

INITIAL DECISION

Before
MARLANE R. CHESTNUT
Administrative Law Judge

I. HISTORY OF THE PROCEEDING

By Application docketed on June 15, 1992, and amended on July 7, 1992, Tad's Delivery Service, Inc. t/a T&N Van Service (T&N, transferee or applicant) requested that the Pennsylvania Public Utility Commission (Commission) amend applicant's certificate of public convenience A-00109244 to reflect the transfer of the operating authority held by Domenic Cristinzio, Inc. at Docket No. A-0086551, F.2. Applicant's existing certificate would be amended to include as Amendment A:

SO AS TO PERMIT the transportation of (1) tabulating and office machines for the International Business Machine Corporation between points in the city of Philadelphia, Philadelphia County, and from points in the said city to points within an airline distance of twenty-five (25) miles of the City Hall in the said city, and vice versa; (2) cases for the International Business Machine Corporation from points within an airline distance of twenty-five (25) miles of the City Hall in the city of Philadelphia, Philadelphia County, to points in the said city, and vice versa; (3) office machines and electronic or mechanical equipment, including

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Tad's Delivery :
Service, Inc. t/a T&N Van Service : Docket No. A-00109244
F.1, Am-A

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Notice of the Application was published in the June 27, 1992 Pennsylvania Bulletin. The only protest was filed by J.C. Services, Inc. (J.C. or protestant).

An initial hearing was held on November 4, 1992. Applicant was represented by H. Marc Tepper, Esq., and protestant was represented by Scott A. Petrie, Esq. Applicant presented the testimony of two witnesses and five exhibits and protestant presented two witnesses and five exhibits.¹ The record consists of these exhibits plus a transcript of 141 pages. Main and Reply Briefs were filed by both parties.

II. DISCUSSION

Any entity proposing to provide intrastate transportation service to the public for compensation must first obtain from the Commission a certificate of public convenience. Pursuant to the Public Utility Code, 66 Pa.C.S. §1103(a), this certificate should be granted only if the Commission finds "that the granting of such certificate is necessary or proper for the

¹ Protestant sponsored four exhibits at the hearing. After the briefs were filed, protestant filed a Motion for Leave to Supplement the Record with its fifth exhibit, a copy of the Complaint adopted by the Commission upon its own Motion charging applicant with various instances of illegal intrastate service. This Motion will be granted. Also admitted into the record will be applicant's February 2, 1993 letter to Secretary Alford which resolves that Complaint. This resolution of the Complaint renders moot protestant's motion to hold proceedings open pending resolution of the Complaint.

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These evidentiary criteria were discussed in more detail by the Commission in Application of Bluebird Coach Lines, Inc., 72 Pa. P.U.C. 262, 294 (1990)..

This proceeding involves the proposed transfer of existing operating rights granted at Docket No. A-0086551, F.2 from Domenic Cristinzio, Inc. to applicant. These rights were placed in "voluntary suspension" on March 4, 1992 pending their purchase. In cases of this nature, the Commission applies the doctrine of "presumption of continuing necessity." First articulated in Re: Louis L. Grimm, 17 Pa. P.U.C.25 (1937), this doctrine provides that an applicant for transfer of existing authority is not required to show that the underlying service authorized by the rights being transferred is necessary or proper for the convenience of the public. It is assumed that the convenience supporting the original grant of the authority continues until the contrary is shown by a protestant. Re: Byerly, 440 Pa. 521, 270 A.2d 186 (1970); Re: Erie Transportation Services, Inc., 72 Pa. P.U.C. 113, 118 (1990). Accordingly, the applicant here does not have the burden of proof specified in 52 Pa. Code §41.14(a), that approval of the Application will serve a useful public purpose, responsive to a public demand or need.

Similarly, the protestant in a proceeding involving the transfer of existing authority need not meet the burden of proof

established in §41.14(c), that entry of a new carrier into the field would endanger or impair the operations of existing carriers to such an extent that granting the authority would be contrary to the public interest. Although a transferee-applicant is technically a "new carrier," the operating authority sought to be transferred is not new authority. The Commission previously has determined this issue. Therefore, a protestant should not be expected to submit evidence that exercise of those rights by a different carrier would be contrary to the public interest.

What remains to be proven by an applicant in transfer proceedings is that it, as the transferee, possesses the technical and financial ability, or fitness, to provide the proposed service, and, does not lack a propensity to operate safely and legally.

In this proceeding, J.C. essentially has challenged applicant's fitness on two grounds. First, it points to the instances of illegal intrastate service which were the subject of the Complaint adopted by the Commission at A-00109244C9301, which it claims were performed in bad faith and to a significant degree. In addition, protestant asserts that applicant has failed to present substantial evidence of operational or financial fitness, in that it presented no evidence as to its current financial position, facilities and equipment, number of employees, safety procedures, drug testing program, insurance

coverage, or communications system. The third argument made by protestant J.C. goes to its fear that it will suffer significant economic harm. Each of these contentions will be addressed below.

A. Illegal Acts

As the result of cross-examination, applicant agreed that it appeared that certain moves it had performed were not within the scope of either its existing PUC or ICC authority. Subsequently, at Docket No. A-00109244C9301, a Complaint was adopted by the Commission upon its own Motion charging applicant with 12 instances of illegal intrastate service. Applicant's February 2, 1993 letter to Secretary Alford indicates that the Complaint was resolved by payment of the \$3,000.00 fine, and that applicant has ceased performing such transportation pending resolution of this Application.

There is ample administrative and legal precedent on the issue of prior illegal service as it relates to fitness. It is well-settled that while the misconduct is a factor for the Commission to consider when determining fitness, it is not conclusive. An applicant may present offsetting evidence to prove its present legal fitness to provide a proposed service. The Commission has discretionary authority to grant an application as long as there is evidence of present fitness independent of the evidence relating to the unlawful activities.

Most recently, in Hercik v. Pa. P.U.C., 137 Pa. Commonwealth Ct. 377, 586 A.2d 492, 494-95 (1991), the Commonwealth Court, citing Brinks, Inc. v. Pa. P.U.C., 500 Pa. 387, 456 A.2d 1342 (1983), found that:

Thus, under Brinks, it is clear that the incidents of Conaway's past unlawful operations are not conclusive of the question of Conaway's present fitness and such prior unlawful operations do not preclude Conaway from obtaining an authority. It is in the discretion of the PUC to determine whether authority must be withheld considering other evidentiary criteria under 52 Pa. Code §41.14. This Court must then examine the record to decide whether the PUC's decision was based upon the positive evidence of Conaway's fitness independent of the evidence of prior unlawful operations. (citations omitted)

The Commonwealth quoted extensively, at 586 A.2d 494, from the Pennsylvania Supreme Court's decision in Brinks, supra:

Our case law is clear that, although a favorable finding of fitness may not be based upon evidence of the quality of service conducted in wilful violation of a court order or the Commission's authority, the mere fact of prior operation in violation of a court order or the Commission's authority does not preclude a carrier from obtaining lawful authority in a subsequent proceeding before the Commission . . . Thus, while WFB's continuing to haul money in deliberate disregard of the Commonwealth Court's Order gave

rise to a negative inference concerning Brooks' fitness, the Commission could still have granted the requested contract carrier authority without abusing its discretion so long as the Commission had before it positive evidence of Brooks' fitness independent of the evidence relating to the period of unlawful operations.

The justification for the rule permitting the acquisition of contract carrier rights despite past unlawful operations is evident. The essence of public utility regulation is to assure that the public's needs are best served at the most reasonable rates. If past unlawful operations were deemed conclusive of an applicant's fitness, the Commission would be powerless to grant the application of a carrier who, despite its past unlawful activities, has otherwise demonstrated its present fitness to perform services beneficial to the public. (citations omitted)

See also, W.C. McQuaide v. Pa. P.U.C., 137 Pa. Commonwealth Ct. 282, 585 A.2d 1151, 1154 (1991); Re: Action Deliveries, Inc., 75 Pa. P.U.C.463, 474 (1991).

Here, I find that applicant's admittedly illegal service (transporting electronic equipment intrastate not connected to commercial moves) was provided pursuant to a good faith, reasonable misunderstanding of the terms of its ICC authority. Further evidence of applicant's good faith, and propensity to act legally, is found in the fact that when its

illegal activities were brought to the Commission's attention (by the protestant), applicant paid the fine and ceased the operations in question. Also, the Commission's files show that no complaints were filed against applicant in 1991 or 1992. Therefore, I do not find that applicant lacks a propensity to operate safely and legally.

B. Operational Fitness

Protestant's second argument is that applicant failed to demonstrate its operational and technical fitness to perform the proposed service. The requirement of technical fitness was explained and clarified by the Commission in Application of Ige t/a/ Globe Limousine Service, 75 Pa. P.U.C. 45, 47 (1991):

Technical expertise - An applicant must have the technical capacity to meet the need for the proposed service in a satisfactory fashion. An applicant must possess sufficient staff and facilities or operating skills to make the proposed service feasible, profitable, and a distinct service to the public.

The Commission went on to note that to satisfy the requirement of "financial ability," an "applicant should own or should have sufficient financial resources to obtain the equipment needed to perform the proposed service." Id.

Here, protestant has alleged that applicant has failed to sustain its burden of establishing technical or operational fitness. It asserts that applicant failed to present testimony

from "a qualified financial officer or representative of the applicant," did not adduce evidence relating to current sales and expenses or verifying its projected financial statement, and did not establish that it was able to pay the purchase price for the proposed authority, did not indicate whether its equipment was leased or owned, and did not address the number of employees, facilities, safety procedures, drug testing program, or insurance coverage.

Applicant relies on Exhs. I and L, attached to its Application (which was admitted into the record as Exh. 1) as evidence of fitness. It also relies on a presumption of fitness arising out of its status as a certificated carrier, and notes that applicant's principals have over 30 years combined experience in the transportation industry.

Exhibit I is described as a statement of financial position/balance sheet dated March 1, 1992 (it was not indicated who prepared this document, or whether the information contained in it was verified in any way) which purports to show assets of \$48,900 (cash) and \$40,000 (authority), no liabilities, \$128,950 in owner's equity, and projected net income of \$150,000. It also included a projected cash flow for the 12-month period ended February 28, 1993 which purports to show a positive cash flow position for each quarter.

Exhibit L is a "statement of experience" which indicates that the officers of the corporation have "over 30 years experience and involvement in the trucking industry." Exhibit G is an equipment list, although it does not indicate which, if any, of the vehicles are currently used or would be used to provide the proposed service.

In addition, applicant witness Nelson testified that the operation is currently insured, although he gave no specific coverage level (Tr. 5), and that current monthly sales are \$125,000. (Tr. 21.) While he does have 12 years experience in the trucking field, he has no managerial experience since he worked in sales and dispatch (Tr. 36). Each of the other principals has 4-5 years experience in sales and dispatch. Tr. 37-38.

Although the evidence on operational fitness was extremely skimpy, I find that applicant has sustained its burden of proof on this issue. It seems to have adequate financial resources, and the applicant's principals appear to be well-experienced in the trucking industry.

I must specifically reject, however, applicant's statement in its Reply Brief at unnumbered p. 2 that "as an existing certificated carrier, it is presumed that T&N possesses the requisite abilities. Further as an existing carrier, the PUC is fully cognizant of T&N's insurance retention, facilities,

equipment and methods of operation." First, "the Commission" is not an "existing carrier." In addition, there is absolutely no legal basis for this statement, which (I assume) is why no support was cited. The Commission "knows" only what was presented on the record of the initial certification proceeding when it made its determination that applicant was fit to provide that service. There is no way that the Commission can be "cognizant" of what equipment is currently used by applicant, or what employees are available to applicant, or how applicant intends to provide the proposed service. Will additional vehicles be required? If so, will they be purchased or leased? These and similar questions must be answered before the Commission can make any determination that an applicant will actually be able to provide a proposed service.

C. Harm To Protestant

Protestant alleges that it has lost sales to applicant and that, if the Application is granted by the Commission, protestant will experience significant economic harm.

As I explained above, this issue is not relevant in a transfer application proceeding. When the Commission awarded the initial grant of authority to the transferror, it considered the competitive impact of allowing an additional carrier into the field. The only question in this proceeding is which entity

should be permitted to provide the proposed service, not whether the service should be provided.

III. FINDINGS OF FACT

1. Transferror Domenic Cristinzio, Inc. received common carrier authority by Commission Order at Docket No. A-0086551, F.2.

2. Transferror ceased jurisdictional operations in March 1992, and, by letter dated March 4, 1992 (App. Exh. 5), the Commission permitted the authority to be placed in voluntary suspension pending sale of the rights. Tr. 81-82.

3. Applicant-transferee Tad's Delivery Service, Inc. t/a T&N Van Service entered into an agreement with transferror to purchase the operating authority listed at Docket A-0086551, F.2, in order to expand its service territory. Tr. 29-32, 43.

4. This agreement, dated May 8, 1992 and amended by addendum dated July 7, 1992, contained a sales price of \$7,500. for all of the rights listed at Docket A-0086551, F.2. App. Exhs. 1, 2.

5. Applicant-transferee T&N currently is certificated by the Commission to perform common carrier transportation service at Docket A-00109244.

6. The authority at Docket A-00109244 was issued by the Commission to Domenic F. Taddei by certificate of public convenience dated July 6, 1990. Subsequently, by Order adopted

November 29, 1990, the Commission permitted the certificate to be changed to stand in the name of Tad's Delivery Service, Inc. App. Exh. 1.

7. Applicant-transferee T&N currently is certificated by the State of New Jersey at Docket No. PC00651. App. Exh. 1.

8. Applicant-transferee T&N currently is certificated by the Interstate Commerce Commission at Docket No. MC-214617 Sub. 3. App. Exh. 1.

9. Applicant-transferee is a stock corporation incorporated in Delaware. App. Exh. 1, Tr. 6.

10. The officers and shareholders of applicant-transferee T&N are David Nelson, Don Taddei, Russell Taddei and Kenneth Taddei. App. Exh. 1; Tr. 5, 15.

11. Applicant-transferee was purchased by David Nelson, Don Taddei, Russell Taddei and Kenneth Taddei from Domenic Taddei. Tr. 9-11.

12. Applicant-transferee operates a moving and storage business, which includes commercial office moving, electronic moving, automatic teller machine installation and rigging, and household moves. Tr. 5.

13. Applicant-transferee has its principle place of business in Cinnaminson, New Jersey. App. Exh. 1; Tr. 5.

14. David Nelson is President of applicant-transferee T&N and was employed at transferror Domenic Cristinzio, Inc. until February 1992. Tr. 4, 13, 14.

15. Mr. Nelson has 12 years experience in the trucking industry; the other principals of T&N have 4-5 years experience each. Tr. 36-37.

16. At Docket No. A-00109244C9301, a Complaint was adopted by the Commission upon its own Motion charging applicant-transferee with 12 instances of illegal intrastate service. Prot. Exh. 5.

17. Applicant-transferee's February 2, 1993 letter to Secretary Alford indicates that the Complaint was resolved by payment of the \$3,000.00 fine, and that applicant has ceased performing such transportation pending resolution of this Application.

18. The illegal moves (which involved the transportation of electronic equipment not in connection with commercial moves) was done pursuant to a good-faith, reasonable misunderstanding of the scope of applicant-transferee's ICC and PUC authority.

19. Applicant-transferee has the financial ability to operate the proposed service. App. Exh. 1; Tr. 5, 21.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding.

2. In proceedings seeking the transfer of existing motor carrier operating authority, an applicant does not have to establish that approval of the application will serve a useful public purpose, responsive to a public demand or need.

4. In proceedings seeking the transfer of existing motor carrier operating authority, the burden of proof is on applicant to establish that it possesses the technical and financial ability to provide the proposed service, and does not possess a propensity to operate unsafely and/or illegally.

5. Applicant sustained its burden of establishing that it possesses the technical and financial ability to provide the proposed service, and does not possess a propensity to operate unsafely and/or illegally.

6. In proceedings seeking the transfer of existing motor carrier operating authority, a protestant should not be permitted to submit evidence that entry of a new carrier into the field would endanger or impair the operations of existing carriers to an extent that, on balance, the granting of the authority would be contrary to the public interest.

VII. ORDER

THEREFORE,

IT IS ORDERED:

1. That the application for transfer of the rights held by Domenic Cristinzio, Inc. at Docket No. A-0086551, F.2, is hereby approved and that the Certificate issued to Applicant be amended to include the following rights:

To transport as a Class D carrier (1) tabulating and office machines for the International Business Machine Corporation between points in the city of Philadelphia, Philadelphia County, and from points in the said city to points within an airline distance of twenty-five (25) miles of the City Hall in the said city, and vice versa; (2) cases for the International Business Machine Corporation from points within an airline distance of twenty-five (25) miles of the City Hall in the city of Philadelphia, Philadelphia County, to points in the said city, and vice versa; (3) office machines and electronic or mechanical equipment, including but not limited to, copiers, computers, x-ray machines and inserting machines, from the warehouse of Domenic Cristinzio, Inc., at 3328 Amber Street, in the city and county of Philadelphia, to points within thirty-five (35) miles thereof, and vice versa; (4) office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, from the warehouse of Domenic Cristinzio, Inc., at 2073 Bennett Road, in the city and county of Philadelphia, to points within thirty-five (35) miles thereof, and vice versa; (5) uncrated office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines and inserting machines, between points in the counties of Bucks, Chester, Delaware,

Montgomery, Philadelphia, and from said counties to points in Pennsylvania, and vice versa; (6) business and office machines, electronic manufacturing systems, parts and supplies thereof, that are manufactures, sold, leased, distributed or dealt in by International Business Machines Corporation, for International Business Machines Corporation between points in the counties of Adams, Berks, Bucks, Carbon, Centre, Chester, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntingdon, Juniata, Lancaster, Lebanon, Lehigh, Mifflin, Montgomery, Montour, Northampton, Northumberland, Perry, Philadelphia, Schuylkill, Snyder, Union and York; and (7) business and office machines and electronic or mechanical equipment, including, but not limited to, copiers, computers, x-ray machines, and inserting machines, and new office furniture, between points in the counties of Luzerne, Lackawanna, Monroe, Carbon, Northampton, Lehigh, Berks, Schuylkill, Columbia and Montour, and from points in said counties, to points in Pennsylvania, and vice versa.

2. This grant of authority is subject to the following conditions:

A. That the approval hereby given is not to be understood as committing this Commission, in any proceedings that may be brought before it for any purpose, to fix a valuation on the rights to be acquired by applicant from the present certificate holder equal to the consideration to be paid, or equal

to any value that may be placed on them by applicant, or to approve or prescribe rates sufficient to yield a return thereon.

B. That applicant shall not record in its utility accounts any amount representing the rights granted by this Order in excess of the actual cost of such rights to the original certificate holder.

C. That applicant charge to Account 1550, Other Intangible Property, \$7,500., being the amount of consideration payable by it for the rights granted by this Order, less any amount recorded under Condition B, above.

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

4. That applicant shall not engage in any transportation granted by this Order until it has complied with the requirements of the Pennsylvania Public Utility Code and the

rules and regulations of the Commission relative to the filing of insurance and acceptance of a tariff establishing just and reasonable rates.

5. That issuance of a Certificate of Public Convenience will become final only upon submission of transferror's assessments due.

6. That in the event 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 will be dismissed without further proceedings.

7. That upon compliance with this Order, the rights granted to the transferror, Domenic Cristinzio, Inc. at Docket No. A-0086551, F.2, are hereby cancelled.

8. That Protestant Exh. 5 and applicant's February 2, 1993 letter to Secretary Alford are admitted into the record.

Date:

July 21, 1993

Marlane R. Chestnut
MARLANE R. CHESTNUT
Administrative Law Judge

AFFIDAVIT OF STEVEN J. MCGARY

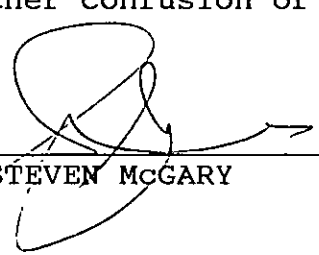
I, STEVEN J. MCGARY, President of Protestant, J.C. SERVICES, INC., being duly sworn according to law, hereby provide this Affidavit in support of the Petition to Reconsider Initial Decision and/or Re-open Record and in support thereof, aver the following:

1. Upon information and belief, it is averred that the Applicant transported office equipment and furnishings, in use, for Monroe Business Systems, Inc. from Horsham, Pennsylvania to Blue Bell, Pennsylvania in late May of 1993; and

2. Upon information and belief, it is averred that the Applicant has, since the date of the hearing on November 4, 1992, transported on numerous occasions electronic equipomnt for Monroe Business Systems, Inc. intrastate; and

3. It is believed and averred that these shipments are illegal and not within the Applicant's existing authority.

4. These shipments bear directly upon the finding of confusion and, if it is found that shipments have been made by the Applicant since November 4, 1992 without proper Authority, the Applicant cannot demonstrate either confusion or good faith.



STEVEN MCGARY

Sworn to and subscribed
before me this 30th day of
August, 1993.



Notary Public

Notarial Seal
Cathyann C. Milanese, Notary Public
Northampton Twp., Bucks County
My Commission Expires Feb. 6, 1995

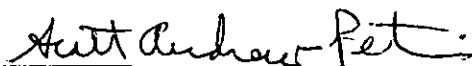
CERTIFICATE OF SERVICE

I, SCOTT A. PETRI, ESQUIRE, certify that on the 30th day of August, 1993, I did serve a true and correct copy of the Petition to Reconsier Initial Decision and/or Re-open Record upon the following person in the manner indicated:

VIA FIRST CLASS U.S. MAIL, POSTAGE PREPAID:

MARLANE R. CHESTNUT
Administrative Law Judge
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
Philadelphia State Office Building
1400 West Spring Garden Street
Philadelphia, PA 19130

DONALD M. DAVIS, ESQUIRE
Attorney for Applicant
4th Floor, Curtis Center
Independence Square West
Philadelphia, PA 19106-3304



SCOTT A. PETRI, ESQUIRE
Attorney for Protestant

Dated: August 30, 1993

September 9, 1993

OUR FILE 81955-1

2138

The Honorable John G. Alford, Secretary
Public Utility Commission
Commonwealth of Pennsylvania
P.O. Box #3265
Harrisburg, PA 17105-3265

RE: Application of Tad's Delivery Service,
trading as T & N Van Service
Docket #A-00109244F.1, Am-A

Dear Secretary Alford:

Enclosed please find an original and two copies of Applicant, Tad Delivery Service, Inc., trading as T & N Van Service's Motion to Strike Protestant's Petition to Reconsider Initial Decision and/or Reopen the Record for filing of record in the above-captioned matter.

Also, enclosed is a copy which we would appreciate your time-stamping and returning to us in the self-addressed stamped envelope provided.

Thank you for your attention to this matter.

Very truly yours


MICHAEL J. BURNS

MJB/fae
Enclosures

cc: Administrative Law Judge Allison K. Turner (with enclosure)
Administrative Law Judge Marlane R. Chestnut (with enclosure)
Scott A. Petri, Esquire (without enclosure)

VIA FEDERAL EXPRESS

DOCUMENT
FOLDER

RECEIVED
SEP 9 1993

SECRETARY'S OFFICE
Public Utility Commission

RECEIVED
SEP 9 1993
SECRETARY'S OFFICE
Public Utility Commission

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Tad's Delivery : Docket No. A-00109244
Service t/a T&N Van Service : F.1, Am-A

MOTION TO STRIKE PROTESTANT'S PETITION TO RECONSIDER
INITIAL DECISION AND/OR RE-OPEN THE RECORD

Applicant Tad's Delivery Service, Inc. t/a T&N Van Service (T&N) by and through its attorneys Margolis, Edelstein & Scherlis hereby move the Commission to strike Protestant's Petition to Reconsider Initial Decision and/or Re-Open the Record and in support thereof aver:

1. On August 11, 1993 the Initial Decision of the Honorable Marlane R. Chestnut granting and approving the Application of T&N for the transfer of certain authority, as captioned above, was issued by the Commission. Attached hereto and incorporated herein as Exhibit "A" is a true and correct copy of the Honorable Allison K. Turner, Chief Administrative Law Judge's correspondence of August 11, 1993 issuing Judge Chestnut's Initial Decision.

2. On August 30, 1993 Counsel for Protestant via regular mail filed with the Commission and served upon counsel for Applicant Protestant's Petition to Reconsider Initial Decision and/or Re-Open the Record. Attached hereto and incorporated herein as Exhibit "B" is a true and correct copy of the August 30, 1993 correspondence of Scott A. Petri, Esquire counsel for Protestant.

DOCUMENT DOCKETED
FOLDER SEP 14 1993

3. While terming its Petition a Petition for Reconsideration and/or to Re-Open the Record, in Paragraph 7 and the prayer for relief clause of Protestant's Petition, Protestant bases its Petition on 52 Pa. Code Section 5.571 (1985). Specifically;

7. Protestant seeks the approval to re-open the Record and/or for reconsideration of the Initial Decision in accordance with Section 5.571 in order to present additional testimony...

Wherefore, Protestant seeks the approval to re-open the Record and/or for reconsideration of the Initial Decision in accordance with Section 5.571 in order to present additional testimony ...

4. By its own terms and relief requested, Protestant's Petition is solely and exclusively based on 52 Pa. Code Section 5.571 (1985), not 52 Pa. Code Section 5.572 (1985). [Emphasis added.]

5. By its own terms, the relief requested, and the fact that it is solely and exclusively on 52 Pa. Code Section 5.571 (1985), Protestant's Petition states only a request to seek a re-opening or rehearing of the proceedings to set forth its additional evidence and does not state a petition for reconsideration of the Initial Decision of August 11, 1993.

6. The Commission has recognized and held that there is a clear and distinct difference between petitions seeking a rehearing, a reopening of the record "(more properly one for rehearing)" and for reconsideration. Philip Duick v. Pa. Gas and Water Co., 56 Pa. PUC 553, 558-9 (1982).

7. 66 Pa.C.S.A. Section 703(f) entitled "Rehearing", which controls the Commissions Rule at 52 Pa. Code Section 5.571 (1985), requires that any petition seeking a rehearing on an order made by the Commission must be filed within 15 days after the service of the order.

8. Protestant filed and served its Petition for Reconsideration and/or to Re-Open the Record, more appropriately its Petition for Rehearing, on August 30, 1993 which is exactly 19 days after the Initial Decision was issued and served by the Commission. See Exhibits "A" and "B".

9. Protestants's Petition for Reconsideration and/or to Re-Open the Record, appropriately a Petition for Rehearing, was untimely filed pursuant to 66 Pa.C.S.A. Section 703(f) and therefore must be dismissed and stricken with prejudice.

10. Even assuming arguendo that Protestant's Petition for Reconsideration and/or to Re-Open the Record was timely filed, the Petition does not meet the standards under the law for granting a rehearing/reopening of the record.

11. A Petition for Rehearing, as Protestant's Petition is appropriately termed, under 66 Pa.C.S.A. 703(f) must allege newly discovered evidence not discoverable through the exercise of due diligence prior to the close of the record. Philip Duick v. Pa. Gas and Water Co., 56 Pa. PUC 553, 558-9 (1982); Michael Dayton t/a Tailored Promotions v. AT&T Communications of Pa., Inc., 70 Pa PUC 138 (1989).

12. Protestant's Affidavit to its Petition alleges that upon information and belief T&N conducted operations outside the scope of its authority with a Monroe Business Systems, Inc. "in late May 1993".

13. Protestant's Petition Paragraph 5 relates that this is "discovered new information" yet apparently in a direct attempt to avoid any issues of timeliness or diligence fails to identify any specific information, the source of the information, the date or even a general time period that the "new" information was discovered, inter alia.

14. Protestant did not timely present or show any exercise of due diligence in stating, let alone discovering, its alleged "new information" and therefore, Protestant's Petition does not meet the standard set forth by the Commission for consideration of Petition for Rehearing.

15. This broad-based, undocumented, unsubstantiated, and self-serving allegation of "new information" as stated in Protestant's Petition clearly is not sufficient or specific enough to meet the standard set forth by the Commission or to warrant any action by the Commission.

16. The Commission may further deny a request for rehearing if the grounds alleged in the Petition, even if proven at the hearing, would not change the Commission's decision. Application of Susquehanna Mobile Communications, Inc., 47 Pa Puc 238, 242 (1973).

17. Even assuming arguendo that Protestant's allegations have any merit, T&N avers that there is sufficient independent positive evidence on the record of T&N's good faith and propensity to act legally and safely that said allegations would not establish or warrant a reversal of the Initial Decision.

18. Protestant's Petition for Reconsideration and/or to Re-Open the Record must be dismissed and stricken as it fails to meet the standards set forth by the Commission for addressing a Petition for Rehearing.

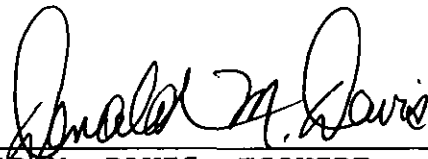
19. Applicant avers and believes that the filing of this Petition is yet another calculated, dilatory tactic by Protestant to delay the subject transfer of authority. Further, Applicant avers and believes that Protestant's motive in pursuing these dilatory tactics is grounded in personal animosity to the principals of T&N based on their prior employment and on Protestant's effort to defeat any existing competitive economic forces.

20. As Protestant's Petition for Reconsideration and/or to Re-Open the Record is based on grounds other than the public interest, as a matter of policy, Protestant's Petition must be dismissed and stricken.

WHEREFORE, T&N requests that the Commission dismiss and strike Protestant's Petition for Reconsideration and/or to Re-Open the Record with prejudice.

Respectfully submitted,

MARGOLIS, EDELSTEIN & SCHERLIS

BY: 
DONALD M. DAVIS, ESQUIRE
Attorney I.D. No.: 27546
The Curtis Center, 4th Floor
Independence Square West
Philadelphia, PA 19106-3303
(215) 922-1100

COUNSEL FOR APPLICANT
TAD'S DELIVERY SERVICE t/a
T&N VAN SERVICE



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

ISSUED: August 11, 1993

IN REPLY PLEASE
REFER TO OUR FILE

A-00109244
F0001, Am-A

DONALD M. DAVIS, ESQUIRE
CURTIS CENTER FOURTH FLOOR
INDEPENDENT SQUARE WEST
PHILADELPHIA PA 19106-3304

Application of Tad's Delivery Service,
Inc. t/a T&N Van Service

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Marlane R. Chestnut. 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.)".

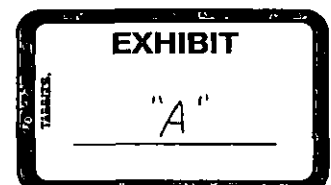
If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,

Allison K. Turner

Encls.
Certified Mail
Receipt Requested

Allison K. Turner
Chief Administrative Law Judge



LAW OFFICES
LIEDERBACH, HAHN, FOY & PETRI

A PROFESSIONAL CORPORATION

892 SECOND STREET PIKE

RICHBORO, PA. 18954

EDWARD D. FOY, JR.
CARL G. HAHN
SCOTT A. PETRI
DENNIS R. DENARD
HARRY J. LIEDERBACH
1916-1982

RICHBORO LINE
322-8300
PHILADELPHIA LINE
677-0919
DOYLESTOWN LINE
343-9310
FAX 215-322-7646

August 30, 1993

Secretary John G. Alford
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Application of Tad's Delivery Service,
Inc. - Docket No. A-00109255, F001-Am.A.

Dear Secretary Alford:

Enclosed please find an original and two (2) copies of A Petition to Reconsider Initial Decision and/or Re-open Record for filing with the Commission.

Kindly return a time-stamped copy for our records.

Sincerely yours,

LIEDERBACH, HAHN, FOY & PETRI

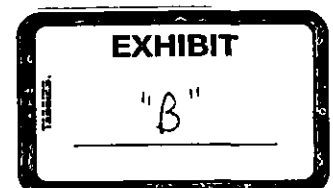
Scott A. Petri

By: Scott A. Petri

SAP/ccm

Enclosures

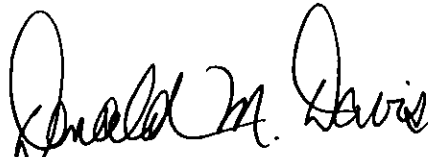
cc: Administrative Law Judge Marlane R. Chestnut (w/enclosure)
Donald M. Davis, Esquire (w/enclosure) ✓
Administrative Law Judge Allison K. Turner (w/enclosure)



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Applicant Tad's Delivery Service, Inc.'s t/ T&N Van Service's Motion to Strike Protestant's Petition to Reconsider the Initial Decision and /or Re-Open the Record was served via First Class Mail, postage pre-paid on September 9, 1993 on the following individual:

Scott A. Petri, Esquire
Liederbach, Hahn, Foy & Petri
892 Second Street Pike
Richboro, PA 18954
Counsel for Protestant


By: _____
DONALD M. DAVIS, ESQUIRE
The Curtis Center, 4th Floor
Independence Square West
Philadelphia, PA 19106-3303
(215) 922-1100

September 9, 1993

OUR FILE 81955-1

The Honorable John G. Alford, Secretary
Public Utility Commission
Commonwealth of Pennsylvania
P.O. Box #3265
Harrisburg, PA 17105-3265

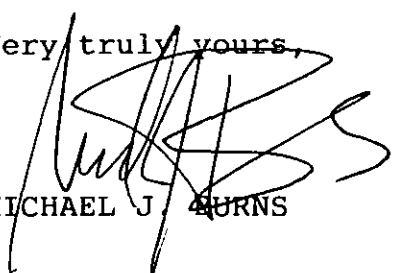
RE: Application of Tad's Delivery Service,
trading as T & N Van Service
Docket #A-00109244F.1, Am-A

Dear Secretary Alford:

Enclosed please find an original and nine copies of the Reply of Applicant, Tad Delivery Service, Inc., trading as T & N Van Service, to Protestant's Exceptions to the Initial Decision and Motion to Strike Exceptions 5 and 6 for filing in the above-captioned matter.

Also, enclosed is a copy which we would appreciate your time-stamping and returning to us in the self-addressed stamped envelope enclosed.

Very truly yours,



MICHAEL J. BURNS

MJB/fae
Enclosures

cc: Administrative Law Judge Allison K. Turner (with enclosure)
Administrative Law Judge Marlane R. Chestnut (with enclosure)
Scott A. Petri, Esquire (without enclosure)

VIA FEDERAL EXPRESS

DOCUMENT
FOLDER

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SECRETARY'S OFFICE
Public Utility Commission

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SEP 9 1993

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

SECRETARY'S OFFICE
Public Utility Commission

Application of Tad's Delivery : Docket No. A-00109244
Service t/a T&N Van Service : F.1, Am-A

REPLY OF APPLICANT TAD'S DELIVERY SERVICE, INC t/a T&N VAN SERVICE
TO PROTESTANT'S EXCEPTIONS TO THE INITIAL DECISION
AND MOTION TO STRIKE EXCEPTIONS 5 AND 6

Applicant Tad's Delivery Service, Inc. t/a T&N Van Service (T&N) hereby replies to the Exceptions filed by Protestant to the Initial Decision of the Honorable Marlane R. Chestnut granting and approving T&N's Application for the transfer of authority as captioned above as follows:

PREFATORY STATEMENT

T&N's subject transfer Application for Transfer Approval (Application) was filed with the Pennsylvania Public Utility Commission (PUC) on May 15, 1992. T&N's Application has now been pending before the Commission for over one year and several months. JC Services filed the only protest to this transfer.

T&N takes issue with Protestant's exceptions as they merely reassert the exact same issues addressed and overruled in the Initial Decision of Judge Chestnut. T&N asserts that the true motive behind the protest, the filing of these Exceptions, and the continued dilatory tactics of Protestant is not founded on public interest but instead is based on the Protestant's personal animosity to the Applicant (See N.T. 87) and Protestant's own efforts to defeat any existing competitive economic forces.

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Interestingly, Protestant did not and has not attempted to seek any restrictive covenants or otherwise attempt to negotiate with T&N but instead has chosen to contest in full the proposed transfer.

JC Services, the sole protestant's, primary tact in contesting the Application is not to address the merits but instead, as recognized by Judge Chestnut, is to continue to search out any activity it deems questionable conducted by T&N, complain to the PUC about T&N's activities and then argue in this protest that T&N's activities are not within the scope of T&N's existing operating authority. This tactic has successfully served to delay and stall the transfer application but under the law and based on public interest Protestant's tactics must fail.

In fact, now after the record has been closed and the Initial Decision handed down and close to one year after the hearing, Protestant raises Exceptions 5 and 6 again alleging conduct by T&N outside the scope of its authority. This obviously late and questionable tactic is apparently another effort by Protestant to further delay and affect this transfer application and prevent the Initial Decision of Judge Chestnut based on her review of the entire standing record from being finalized. See Reply 3.

The Exceptions (5 and 6) are based on a Protestant's filing of a Petition to Reconsider the Initial Decision and/or Re-Open the Record which was simultaneously (and at the same late time) filed with the Exceptions on August 30, 1993. Initially, as the Petition and thus all evidence thereto are not properly of record or before the Commission, these Exceptions are not ripe for consideration by

this tribunal and must be stricken. T&N further incorporates as Exhibit "A" its Motion to Strike Protestant's Petition and the reasons set forth therein as a basis to strike this rather late, questionable, and dubious Petition by Protestant. See Reply 3.

Consistent with Judge Chestnut's decision (p. 6) and the Exceptions filed, there are only two other Exceptions to which T&N must reply. In order to be concise and for the sake of brevity, T&N's Reply 1 responds to Protestant Exceptions 1-4 and their sub-parts and Reply 2 responds to Protestant's Exception 7 and its sub-parts.

REPLY

1. (To Exceptions 1-4) The record conclusively establishes that T&N has demonstrated its ability to operate safely and legally as a motor common carrier. The evidence indicates that T&N conducted certain operations under a good faith and reasonable, but mistaken, understanding of the scope of its operating authority. However and more significantly, the record contains sufficient positive evidence, independent of these operations, to conclusively prove and establish that T&N possesses the requisite fitness to serve as a carrier and has a propensity to act safely and legally. Upon recognition of its mistake in conducting the operations complained of by the Protestant, T&N acted positively, responsibly, and decisively to cure and correct the PUC Complaint. As noted by Judge Marlane R. Chestnut in her Decision, T&N's response further shows its good faith and propensity to act legally in abiding by the Public Utility Code.

Decision of Judge Marlane R. Chestnut (Decision) p. 7:
"There is ample administrative and legal precedent on the issue of prior illegal service as it relates to fitness. It is well-settled that while misconduct is a factor to consider when determining fitness, it is not conclusive ... The Commission has discretionary authority to grant an application as long as there is evidence of present fitness independent of the evidence relating to unlawful activities ... "

Decision pgs. 9-10: "Here, I find that applicant's admittedly illegal service ... was provided pursuant to a good faith, reasonable misunderstanding of the terms of its ICC authority. Further evidence of applicant's good faith, and propensity to act legally, is found in the fact that when its illegal activities were brought to the Commission's attention (by the protestant), applicant paid the fine and ceased the operations in question. Also, the Commission's files show that no complaints were filed against the applicant in 1991 or 1992. Therefore, I do not find that applicant lacks a propensity to operate safely and legally."

Reply Brief of Applicant to Protestant's Brief is incorporated by reference as though set forth herein at length and attached as Exhibit "B".

Brief of Applicant p. 21 : "Even assuming arguendo that T&N is found to have conducted any operations under a mistaken understanding as to the scope of its operating authority, it is well settled under Pennsylvania law that evidence of 'incidents of past unlawful operations are not conclusive on the questions of (Applicant's) present fitness and do not preclude (Applicant) from obtaining authority.' Hercik v. Public Utility Commission, 137 Pa. Cmwlth. 282, 586 A.2d 492, 494-5 (1991), citing, Brinks, Inc. v. Pa. Public Utility Com'n, 500 Pa. 387, 456 A.2d 1342 (1983). [Additional citations omitted.] In fact, consideration of alleged activities beyond authority is only one minor factor to be considered in determining fitness for operation and, even a finding that activities were conducted beyond authority can be outweighed by 'independent positive evidence' of the carrier's fitness. Hercik, Id., A.2d at 586; quoting, Brinks, Inc., Id., at 391-2, 456 A.2d at 1344."

Transfer Application of T&N: T&N is an existing PUC certificated carrier and also is certified as a common carrier with the ICC and the State of New Jersey.

Brief of Applicant pgs. 22-23: Applicant conducted certain operations for Konica, Core States, and Pitney Bowes under a good faith mistaken belief as to the scope of its operating authority. The extensive testimony and cross examination of Applicant's President David Nelson shows a good faith but

mistaken interpretation of T&N's existing ICC and New Jersey authority to include the operations complained of by the Protestant. Applicant's good faith is well documented in the record and therefore, its burden is met.

Applicant's February 2, 1993 correspondence to Secretary Alford admitted to the record as per the Decision p. 21: As noted in Judge Chestnut's Decision pgs. 9-10, when Protestant brought to the attention of the Commission its complaints on these operations, T&N acted promptly and responsibly to cure and correct the alleged violations. T&N's actions in this respect are strongly representative of T&N's good faith in the conduct of its business, and its ability and propensity to act legally.

Despite the "well-settled" law to the contrary, Protestant via Exceptions 1c, 2, and 4 continues to argue that T&N's operations alleged by Protestant to be outside T&N's authority and brought to the attention of the PUC by Protestant should serve conclusively and solely to deny this application. Protestant continues to ignore the law which plainly and clearly provides that such operations are only a factor to be considered in a transfer application and are not in and of themselves conclusive on the evidentiary criteria issue under 52 Pa.Code Section 41.14(b) or sufficient to preclude the approval of the transfer.

T&N submits that this issue has been extensively dealt with on the record. (See above, Hearing Transcript, T&N's Brief and Reply Brief.) Further, it is self evident from the decision of Judge Chestnut (pgs. 7-11, Section A) that this issue was specifically considered and addressed by Judge Chestnut in her decision. Accordingly, Judge Chestnut's decision must stand.

Despite the record and Judge Chestnut's sound findings based on the law and record, Protestant continues to attempt to manipulate the record to infer that T&N acted in bad faith.

Protestant grounds its position on the apparent admissions by Nelson at the hearing that T&N conducted operations outside the scope of its authority, the inability of David Nelson to explain his "confusion" in his testimony, on Nelson's statement to Judge Chestnut at the hearing that it will cease and desist from the questionable operations, and finally on the broad allegation that "it is clear from the record that the Applicant was not concerned with its lack of authority to operate legally and operated from March 1992 to the date of the hearing, November 4, 1993 illegally." See Exceptions 1, 1b, 2, 3, 3a, and 3b. We first note that November 4, 1992 was the date of the hearing not November 4, 1993 as alleged by Protestant.

The record however simply shows that David Nelson candidly admitted that he mistakenly and incorrectly interpreted the scope of T&N's operating authority and that in an recognition of that mistaken belief, Nelson in an effort to comply with the law agreed to cease and desist from these questionable operations. Clearly, T&N's acknowledgment of its mistake and prompt efforts to cure and correct this mistake shows "good faith" efforts on the part of T&N and its principals. It also shows that T&N does not "disregard" the authority of the PUC.

Further, there has been no evidence whatsoever of any bad faith on the part of T&N and its principals put forth by Protestant to support their allegation. Plaintiff relies solely on inferences and supposition contrived from its self-serving interpretation of Nelson's testimony. This failure by Protestant to present evidence

in this respect shows that Protestant's position is mere allegation and supposition, not fact.

Interestingly, in Exception 3 Protestant argues that T&N's actions to cure its alleged operations outside the scope of authority (payment of fine and cease of illegal operations) should not be considered evidence of "good faith." Yet, in a blatant inconsistency, in Exception 1b Protestant relates that T&N's statement to Judge Chestnut at the hearing that it would cease and desist from the questionable operations shows that T&N did not act in "good faith." T&N's conduct in addressing the complaint shows its good faith and propensity to act legally and to abide by the PUC's rules and regulations.

Again, the issue of "good faith" was specifically addressed and considered by Judge Chestnut in her review of the record and decision and it is submitted that her decision on this issue must stand.

Finally, Protestant speculates in Exception 1a that if the PUC approves this transfer application given T&N's operations outside the scope of its authority, the entire PUC system will fall as other carriers will "willfully operate illegally." This argument has no credence let alone precedence in this matter. It is noted that the "well-settled" law and policy behind it, as above, as well as the Code in general address and prevent the problems forecast in this policy argument.

2. (To Exception 7) T&N's Application for Transfer Approval and the testimony of T&N President David Nelson clearly establish that T&N possesses the requisite operational and technical fitness to perform operations under and pursuant to the authority at issue in this matter.

Decision p. 12: "Although the evidence on operational fitness was extremely skimpy, I find that applicant has sustained its burden of proof on this issue. It seems to have adequate financial resources, and the applicant's principals appear to be well experienced in the trucking industry.

Brief of Applicant pgs. 13-14, Proposed Findings of Fact Nos. 48-51: Referencing the Application Exhibit "I" T&N's Financial Statement, T&N has capital resources to expand its operations to conduct the operations. T&N has no liabilities.

Brief of Applicant p. 20: T&N principals have over thirty years experience in the transportation industry. T&N President David Nelson has worked over twelve years in the transportation field and each of the remaining three principals of T&N has at least 4-5 years of experience.

See Application for Approval of Transfer: Attached as exhibits to its Application, T&N provided the list of equipment to be used to render service, a statement of financial condition, a statement of unpaid business debts (none listed), a statement of a safety program, a statement of transferee's experience, and its certifications to operate as a common carrier and corporate documents.

Decision p. 12: "In addition, applicant witness Nelson testified that the operation is currently insured, although he gave no specific coverage level and that the current monthly sales are \$125,000."

Reply Brief: T&N has successfully has operated a motor common carrier business since March 1992.

Application, Brief and Reply Brief: T&N is already certificated carrier under the PUC and further is certificated by the ICC and the State of New Jersey.

The record contains sufficient information and documentation on the financial and operation capacity and abilities of T&N and therefore, T&N has met its burden of proof on this issue.

REPLY AND MOTION TO STRIKE EXCEPTIONS 5 AND 6

3. (To exceptions 5 and 6) Under 52 Pa. Code section 5.431 (1984) "(O)nce the record is closed no additional evidence may be introduced or relied upon by a participant unless allowed for good cause shown by the Commission or presiding officer upon motion of a participant."

Exceptions 5 and 6 have no basis or support in the record despite Protestant's stating that there are "numerous record references" too "numerous to recount here in full." Protestant should not be allowed to continue to stall this Application and prevent the implementation of the Initial Decision by making broad, unsupported allegation which are not stated or supported by the record of the proceedings. Accordingly, as there is no accurate or concise statement documenting the applicable record references or their broad-based allegation, these exceptions must be stricken under and pursuant to 52 Pa. Code Section 5.431 (1984).

Exceptions 5 and 6 are solely based on Protestant's Petition to Reconsider Initial Decision and/or Re-Open Record. Protestant's Petition and the allegations contained therein is not of record in this proceeding and therefore, must be dismissed under 52 Pa. Code Section 5.431 (1984). Protestant's Petition was filed simultaneously with the Exceptions on August 30, 1993.

Despite Protestant's attempt, which attempt is quite late and based on vague, self-serving, and undocumented allegations by the Protestant, to make its allegations on record, the averments

contained in Exceptions 5 and 6 as based on Protestant's Petition are not in any way of record in this proceedings, properly before the Commission and thus, not ripe for Commission consideration let alone decision. Protestant's Exceptions 5 and 6 must be stricken in full.

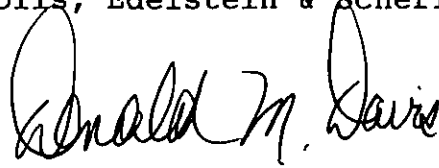
Frankly, this obviously late and questionable tactic is apparently another effort by Protestant to further delay and affect this transfer application and prevent the Initial Decision of Judge Chestnut based on her review of the entire standing record from taking effect. T&N takes issue with these dilatory tactics and, in particular, the potential prejudice to T&N that may be caused by the Protestant's allegations given the late stage of this proceeding. Protestant's motive in this respect is clearly not based on or in support of the public interest and therefore, T&N submits as a matter of policy Exceptions 5 and 6 should be stricken. Protestant's actions have already served to delay implementation of a routine transfer application for over one year.

T&N further incorporates as Exhibit "A" is Motion to Strike Protestant's Petition and the reasons set forth therein as a basis to strike this rather late, questionable, and dubious Petition by Protestant.

Respectfully submitted,

Margolis, Edelstein & Scherlis

BY:



DONALD M. DAVIS, ESQUIRE
Attorney I.D. #: 27546
The Curtis Center, 4th Floor
Independence Square West
Philadelphia, PA 19106
(215) 922-1100

COUNSEL FOR APPLICANT
TAD'S DELIVERY SERVICE t/a
T&N VAN SERVICE

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Tad's Delivery : Docket No. A-00109244
Service t/a T&N Van Service : F.1, Am-A

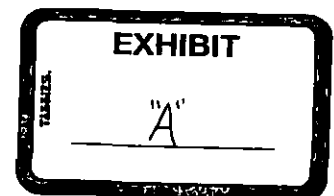
MOTION TO STRIKE PROTESTANT'S PETITION TO RECONSIDER
INITIAL DECISION AND/OR RE-OPEN THE RECORD

Applicant Tad's Delivery Service, Inc. t/a T&N Van Service (T&N) by and through its attorneys Margolis, Edelstein & Scherlis hereby move the Commission to strike Protestant's Petition to Reconsider Initial Decision and/or Re-Open the Record and in support thereof aver:

1. On August 11, 1993 the Initial Decision of the Honorable Marlane R. Chestnut granting and approving the Application of T&N for the transfer of certain authority, as captioned above, was issued by the Commission. Attached hereto and incorporated herein as Exhibit "A" is a true and correct copy of the Honorable Allison K. Turner, Chief Administrative Law Judge's correspondence of August 11, 1993 issuing Judge Chestnut's Initial Decision.

2. On August 30, 1993 Counsel for Protestant via regular mail filed with the Commission and served upon counsel for Applicant Protestant's Petition to Reconsider Initial Decision and/or Re-Open the Record. Attached hereto and incorporated herein as Exhibit "B" is a true and correct copy of the August 30, 1993 correspondence of Scott A. Petri, Esquire counsel for Protestant.

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3. While terming its Petition a Petition for Reconsideration and/or to Re-Open the Record, in Paragraph 7 and the prayer for relief clause of Protestant's Petition, Protestant bases its Petition on 52 Pa. Code Section 5.571 (1985). Specifically;

7. Protestant seeks the approval to re-open the Record and/or for reconsideration of the Initial Decision in accordance with Section 5.571 in order to present additional testimony...

Wherefore, Protestant seeks the approval to re-open the Record and/or for reconsideration of the Initial Decision in accordance with Section 5.571 in order to present additional testimony ...

4. By its own terms and relief requested, Protestant's Petition is solely and exclusively based on 52 Pa. Code Section 5.571 (1985), not 52 Pa. Code Section 5.572 (1985). [Emphasis added.]

5. By its own terms, the relief requested, and the fact that it is solely and exclusively on 52 Pa. Code Section 5.571 (1985), Protestant's Petition states only a request to seek a re-opening or rehearing of the proceedings to set forth its additional evidence and does not state a petition for reconsideration of the Initial Decision of August 11, 1993.

6. The Commission has recognized and held that there is a clear and distinct difference between petitions seeking a rehearing, a reopening of the record "(more properly one for rehearing)" and for reconsideration. Philip Duick v. Pa. Gas and Water Co., 56 Pa. PUC 553, 558-9 (1982).

7. 66 Pa.C.S.A. Section 703(f) entitled "Rehearing", which controls the Commissions Rule at 52 Pa. Code Section 5.571 (1985), requires that any petition seeking a rehearing on an order made by the Commission must be filed within 15 days after the service of the order.

8. Protestant filed and served its Petition for Reconsideration and/or to Re-Open the Record, more appropriately its Petition for Rehearing, on August 30, 1993 which is exactly 19 days after the Initial Decision was issued and served by the Commission. See Exhibits "A" and "B".

9. Protestants's Petition for Reconsideration and/or to Re-Open the Record, appropriately a Petition for Rehearing, was untimely filed pursuant to 66 Pa.C.S.A. Section 703(f) and therefore must be dismissed and stricken with prejudice.

10. Even assuming arguendo that Protestant's Petition for Reconsideration and/or to Re-Open the Record was timely filed, the Petition does not meet the standards under the law for granting a rehearing/reopening of the record.

11. A Petition for Rehearing, as Protestant's Petition is appropriately termed, under 66 Pa.C.S.A. 703(f) must allege newly discovered evidence not discoverable through the exercise of due diligence prior to the close of the record. Philip Duick v. Pa. Gas and Water Co., 56 Pa. PUC 553, 558-9 (1982); Michael Dayton t/a Tailored Promotions v. AT&T Communications of Pa., Inc., 70 Pa PUC 138 (1989).

12. Protestant's Affidavit to its Petition alleges that upon information and belief T&N conducted operations outside the scope of its authority with a Monroe Business Systems, Inc. "in late May 1993".

13. Protestant's Petition Paragraph 5 relates that this is "discovered new information" yet apparently in a direct attempt to avoid any issues of timeliness or diligence fails to identify any specific information, the source of the information, the date or even a general time period that the "new" information was discovered, inter alia.

14. Protestant did not timely present or show any exercise of due diligence in stating, let alone discovering, its alleged "new information" and therefore, Protestant's Petition does not meet the standard set forth by the Commission for consideration of Petition for Rehearing.

15. This broad-based, undocumented, unsubstantiated, and self-serving allegation of "new information" as stated in Protestant's Petition clearly is not sufficient or specific enough to meet the standard set forth by the Commission or to warrant any action by the Commission.

16. The Commission may further deny a request for rehearing if the grounds alleged in the Petition, even if proven at the hearing, would not change the Commission's decision. Application of Susquehanna Mobile Communications, Inc., 47 Pa Puc 238, 242 (1973).

17. Even assuming arguendo that Protestant's allegations have any merit, T&N avers that there is sufficient independent positive evidence on the record of T&N's good faith and propensity to act legally and safely that said allegations would not establish or warrant a reversal of the Initial Decision.

18. Protestant's Petition for Reconsideration and/or to Re-Open the Record must be dismissed and stricken as it fails to meet the standards set forth by the Commission for addressing a Petition for Rehearing.

19. Applicant avers and believes that the filing of this Petition is yet another calculated, dilatory tactic by Protestant to delay the subject transfer of authority. Further, Applicant avers and believes that Protestant's motive in pursuing these dilatory tactics is grounded in personal animosity to the principals of T&N based on their prior employment and on Protestant's effort to defeat any existing competitive economic forces.

20. As Protestant's Petition for Reconsideration and/or to Re-Open the Record is based on grounds other than the public interest, as a matter of policy, Protestant's Petition must be dismissed and stricken.

WHEREFORE, T&N requests that the Commission dismiss and strike Protestant's Petition for Reconsideration and/or to Re-Open the Record with prejudice.

Respectfully submitted,

MARGOLIS, EDELSTEIN & SCHERLIS



BY: _____

DONALD M. DAVIS, ESQUIRE
Attorney I.D. No.: 27546
The Curtis Center, 4th Floor
Independence Square West
Philadelphia, PA 19106-3303
(215) 922-1100

COUNSEL FOR APPLICANT
TAD'S DELIVERY SERVICE t/a
T&N VAN SERVICE



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

ISSUED: August 11, 1993

IN REPLY PLEASE
REFER TO OUR FILE

A-00109244
F0001, Am-A

DONALD M. DAVIS, ESQUIRE
CURTIS CENTER FOURTH FLOOR
INDEPENDENT SQUARE WEST
PHILADELPHIA PA 19106-3304

Application of Tad's Delivery Service
Inc. t/a T&N Van Service

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Marlane R. Chestnut. 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.)".

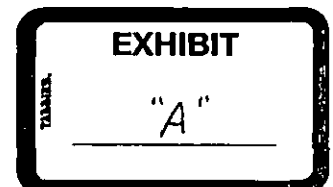
If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,

Allison K. Turner

Encls.
Certified Mail
Receipt Requested

Allison K. Turner
Chief Administrative Law Judge



LAW OFFICES
LIEDERBACH, HAHN, FOY & PETRI

A PROFESSIONAL CORPORATION

892 SECOND STREET PIKE

RICHBORO, PA. 18954

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DOYLESTOWN LINE
343-9310
FAX 215-322-7646

August 30, 1993

Secretary John G. Alford
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Application of Tad's Delivery Service,
Inc. - Docket No. A-00109255, F001-Am.A.

Dear Secretary Alford:

Enclosed please find an original and two (2) copies of A Petition to Reconsider Initial Decision and/or Re-open Record for filing with the Commission.

Kindly return a time-stamped copy for our records.

Sincerely yours,

LIEDERBACH, HAHN, FOY & PETRI

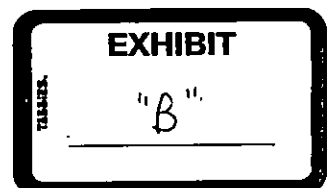
Scott A. Petri

By: Scott A. Petri

SAP/ccm

Enclosures

cc: Administrative Law Judge Marlane R. Chestnut (w/enclosure)
Donald M. Davis, Esquire (w/enclosure)
Administrative Law Judge Allison K. Turner (w/enclosure)



COPY

BEFORE THE PUBLIC UTILITY COMMISSION
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE:

A-00109244, F001-Am-A APPLICATION
of TAD'S DELIVERY SERVICE, INC. t/a
T&N VAN SERVICE for amendment so as
to permit . . . transfer of rights
at A-00086551 to Domenic Cristinzio,
Inc., subject to same limitations
and conditions.

REPLY BRIEF OF APPLICANT
TAD'S DELIVERY SERVICE, INC. t/a T&N VAN SERVICE

Donald M. Davis, Esquire
MARGOLIS, EDELSTEIN &
SCHERLIS
Counsel for Applicant

The Curtis Center - 4th Floor
Independence Square West
Philadelphia, Pa 19106-3304
Phone: (215) 922-1100



I. REPLY TO ARGUMENT

The pending action seeks approval by the PUC of the transfer of certain existing operating rights held by D. Cristinzio to another certificated carrier T&N which wishes to purchase said rights from Cristinzio to expand its operations and better serve the public.

The sole protestant to the transfer application's approval seeks to argue by innuendo that the approval should be withheld and thereby gain a competitive advantage it did not have when the rights were actively utilized by the proposed transferor.

There is sufficient competent, positive evidence on the record to find that Tad's Delivery Service t/a T&N Van Service (T&N), an existing certificated PUC carrier, is fit to conduct operations under the rights at issue in this transfer.

The Protestant recites a litany of evidence not of record but fails to address the evidence set forth in the Application and elicited at the Hearing which shows that T&N possesses the technical and operational skills and financial resources to conduct, as it has done for the last year, a transportation business. T&N's David Nelson testified that T&N's current sales are \$125,000 per month. (N.T. 21) The Protestant ignores T&N's Statement of Financial Position and the Statement of Liabilities to the Application which shows that T&N is financially fit.

Just as significantly on this matter, the Protestant produced no documentation, financial or otherwise, to show its alleged

business loss was due to T&N. ' Instead, as noted in T&N's Brief, the Protestant solely relied on self-serving testimony related to one account to attempt to show its diminishing sales and revenue. Of course, the purported loss occurred in the one account where Protestant recently lost its exclusive transportation agreement.

As the Protestant knows, as an existing certificated carrier, it is presumed that T&N possesses the requisite abilities. Further as an existing carrier, the PUC is fully cognizant of T&N's insurance retention, facilities, equipment, and methods of operation.

Protestant's Brief contradicts its own testimony with regard to the issue of reasonable entertainment expenses raised by the Honorable Marlane R. Chestnut. Steven McGarry stated that "the industry typically does what T&N does." (N.T. 127)

The Protestant even resorts to attempting to infer the Applicant's non-fitness by noting that the Applicant's witness, and President, is related to the transferor and other officers by marriage. Yet, his own client, the Protestant, purchased their business through family ties. (N.T. 89)

On a procedural matter, T&N notes that the Protestant, despite Judge Chestnut's specific instructions, fails to include Conclusions of Law in its Brief.

It is patently clear that the Protestant's single issue in attempting to dismiss T&N as a competitor is its allegations that T&N conducted business outside the scope of its existing operating authority. On January 20, 1993 T&N was served with a Complaint by the PUC which T&N will address accordingly. It is interesting to

In the case at hand, the applicant, as a holder of existing authority, is not seeking to rely on proof of any service which may be deemed to have been violative of its existing rights to prove that element. As set forth in applicant's Brief, absent proof offered to the contrary, there is a presumption of continuing necessity. Protestant offered no evidence in this regard.

The Protestant cites three PUC decisions to support its argument. Due to the lack of proper citation, the Applicant was only able to locate the Re Robert Gray's Sons, Inc., Pa. P.U.C. 246 (1947) and Re Northern Penn Transfer, Inc., 54 Pa. P.U.C. 585 (1981) cases. These cases are easily distinguished from the present Application. First, these cases involved applications for new authority, not the transfer of existing authority, and thus, significant questions of whether the public need would be served to warrant the approval of new authority.

In Re Robert Gray's Sons, Inc., Pa. P.U.C. 246, 259, the Commission based its decision on the fact that the only testimony presented for the proposed service need was based on the illegal operations. As these operations were deemed in bad faith, the testimony was excluded and in the absence of other proof to show that the "service is necessary for the accommodation and convenience of the public," the application was denied. Id.

Further, these cases dealt with extensive and flagrant violations over a number of years. In Re Robert Gray's Sons, Inc. the illegal operations had been conducted over twenty (20) years. Id. at 158. In Re North Penn Transfer, Inc., the evidence found that in one case there was 242 violative shipments handled by the

applicant in a one week period. North Penn, at 592.

Finally, T&N takes issue with the Protestant's allegation that T&N is operating under a fraudulent tariff and, after checking with its consultant on such matters, to the best of its knowledge, assures this court that Protestant's claim is unfounded. T&N also suggests that this allegation is indicative of the true motive behind this protest. This protest is not founded on the public interest but instead is based on the Protestant's personal animosity towards the Applicant and Protestant's own effort to defeat any existing competitive economic forces.

II. REPLY TO MOTION TO OPEN PENDING RESOLUTION OF COMPLAINT

As Applicant has argued, there is sufficient competent, positive evidence on the record to find that Tad's Delivery Service t/a T&N Van Service (T&N), an existing certificated PUC carrier, is fit to conduct operations under the rights at issue in this transfer. Accordingly, the recently served action by the PUC is an extraneous matter to this proceeding and will be responded to by T&N in an appropriate manner. That action apparently initiated following complaints by Protestant to the PUC enforcement division should not serve as a basis to deny approval of a transfer of existing authority to an otherwise fit carrier.

Applicant strongly objects to Protestant's request for any delay in the resolution of this matter. Applicant believes that this request is a dilatory tactic to continue to try to prevent the approval of the transfer of this authority, which as the record

notes, could potentially expire on March 31, 1993. (N.T. 85)

Respectfully submitted,

MARGOLIS, EDELSTEIN & SCHERLIS

By: 

Donald M. Davis
Donald M. Davis
The Curtis Center - 4th Floor
Philadelphia, PA 19106-3304
Phone: (215) 922-1100

COMMONWEALTH OF PENNSYLVANIA
PUBLIC UTILITY COMMISSION

IN RE:

A-00109244, F001-Am-A APPLICATION
of TAD'S DELIVERY SERVICE, INC. t/a
T&N VAN SERVICE for amendment so as
to permit . . . transfer of rights
at A-00086551 to Domenic Cristinzio,
Inc., subject to same limitations
and conditions.

CERTIFICATE OF SERVICE

I, DONALD M. DAVIS, ESQUIRE, do hereby certify that the
Reply Brief of Applicant Tad's Delivery Service, Inc., t/a T&N Van
Service's Brief in the above-captioned matter was served by First
Class Mail, on January 26, 1993, to the following individual:

Scott A. Petri, Esquire
Liederbach, Hahn, Foy & Petri, P.C.
892 Second Street Pike
Richboro, PA 18954.

In addition, this Brief was hand delivered to the
following individual on January 26, 1993:

The Honorable Marlane R. Chestnut
Administrative Law Judge
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
Philadelphia State Office Building
1400 West Spring Garden Street
Philadelphia, PA 19130.



DONALD M. DAVIS, ESQUIRE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Applicant Tad's Delivery Service, Inc.'s t/ T&N Van Service's Reply to Protestant's Exceptions to the Initial Decision and Motion to Strike Exceptions 5 and 6 was served via First Class Mail, postage pre-paid on September 9, 1993 on the following individual:

Scott A. Petri, Esquire
Liederbach, Hahn, Foy & Petri
892 Second Street Pike
Richboro, PA 18954
Counsel for Protestant

By: 

DONALD M. DAVIS, ESQUIRE
The Curtis Center, 4th Floor
Independence Square West
Philadelphia, PA 19106-3303
(215) 922-1100

ORIGINAL

LAW OFFICES
LIEDERBACH, HAHN, FOY & PETRI

A PROFESSIONAL CORPORATION

892 SECOND STREET PIKE

RICHBORO, PA. 18954

EDWARD D. FOY, JR.

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HARRY J. LIEDERBACH
1916-1982

RICHBORO LINE
322-8300

PHILADELPHIA LINE
677-0919

DOYLESTOWN LINE
343-9310

FAX 215-322-7646

September 14, 1993

RECEIVED
SEP 16 1993

Secretary John G. Alford
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

SECRETARY'S OFFICE
Public Utility Commission

RE: Application of Tad's Delivery Service
t/a T&N Van Service
Docket No. A-00109244, F.1, Am-A

Dear Secretary Alford:

Enclosed please find an original and three copies of an Answer of J.C. Services, Inc. to Motion to Strike Protestant's Petition to Reconsider the Initial Decision and/or Reopen the Record for filing with the commission. Kindly return a time-stamped copy of same in the envelope provided for our files.

Sincerely yours,

LIEDERBACH, HAHN, FOY & PETRI

Scott A. Petri

By: Scott A. Petri

SAP/ccm

DOCUMENT
FOLDER

Enclosures

cc: Administrative Law Judge Allison K. Turner (w/enclosure)
Administrative Law Judge Marlane R. Chestnut (w/enclosure)
Donald M. Davis, Esquire (w/enclosure)

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Tad's Delivery Service t/a T&N Van Service : Docket No. A-00109244
: F.1, Am-A

ANSWER OF J.C. SERVICES, INC. TO MOTION TO STRIKE
PROTESTANT'S PETITION TO RECONSIDER THE INITIAL DECISION
AND/OR REOPEN THE RECORD

DOCKETED

SEP 17 1993

RECEIVED
SEP 16 1993

1. Admitted.

2. Admitted.

3. Admitted in part, denied in part. It is admitted that the Petition

seeks Reconsideration and/or to Reopen the Record. It is denied that the Petition is based solely on Section 5.571.

4. Admitted in part, denied in part. It is admitted that the Petition seeks Reconsideration and/or to Reopen the Record. It is denied that the Petition is based solely on Section 5.571.

5. Admitted in part, denied in part. It is admitted that the Petition seeks Reconsideration and/or to Reopen the Record. It is denied that the Petition is based solely on Section 5.571.

6. Admitted.

7. Denied. It is denied that a Petition for Rehearing must be filed within fifteen (15) days after service of the Order. By way of further answer, it is averred that such a Petition must be filed within the timeframe for filing exceptions.

8. Admitted.

9. Denied. It is denied that Protestant's Petition for Reconsideration was not timely filed or that it must be dismissed.

DOCUMENT
FOLDER

SECRETARY'S OFFICE
Public Utility Commission

10. Denied. It is denied that Protestant's Petition for Reconsideration and/or to Reopen the Record does not meet the standards under the law for Rehearing or Reopening the Record.

11. Admitted.

12. Denied. The Affidavit alleges operational conduct outside of the Applicant's authority from the date of hearing to present. By way of further answer, the evidence that will be presented will be evidence of an ongoing, continuous conduct of operation outside of the Applicant's authority.

13.-14. Denied. It is denied that the Protestant's Petition does not meet the standards set for by the Commission for Reconsideration of Petition for Rehearing.

15. Denied. It is denied that Protetant's Petition is not sufficient or specific enough to meet the standard set forth by the Commission or to warrant any action by the Commission.

16. Admitted.

17. Denied. It is denied that Protestant's allegations do not have merit or that there is sufficient independent positive evidence on the record of Applicant's good faith and propensity to act legally and safely or that said allegations would not establish or warrant a reversal of the Initial Decision.

18. Denied. It is denied that Protestant's Petition for Reconsideration and/or to Reopen the Record must be dismissed and stricken as it does meet the standards set forth by the Commission for addressing a Petition for Rehearing.

19. Denied. It is denied that Protestant's Petition is a tactic by Protestant to delay the subject transfer of authority or that Protestant's motive is grounded in personal animosity to the principals of Applicant based on prior employment or to defeat any existing competitive economic forces.

20. Denied. It is denied that Protestant's Petition is based on grounds other than the public interest or that said Petition should be dismissed or stricken.

WHEREFORE, Protestant requests that the Motion of Applicant be denied and the relief originally sought by Protestant in its Petition be granted.

LIEDERBACH, HAHN, FOY & PETRI, P.C.

By: Scott Andrew Petri

SCOTT A. PETRI, ESQUIRE
Attorney I.D. No. 43749
892 Second St. Pike
Richboro, PA 18954
(215) 322-8300

Attorney for Protestant,
J.C. Services, Inc.


CERTIFICATE OF SERVICE

I, SCOTT A. PETRI, ESQUIRE, certify that a true and correct copy of the Answer of J.C. Services, Inc. to Motion to Strike Protestant's Petition to Reconsider Initial Decision and/or Reopen the Record was served via First Class Mail, postage prepaid upon the following on September 14, 1993:

Donald M. Davis Esquire
Attorney for Applicant
The Curtis Center, 4th Floor
Independence Square West
Phila., PA 19106-3303

Administrative Law Judge Allison K. Turner
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105

Administrative Law Judge Marlane R. Chestnut
Pennsylvania Public Utility Commission
Philadelphia State Office Building
1400 West Spring Garden St.
Phila., PA 19130



SCOTT A. PETRI, ESQUIRE
Attorney for Protestant
J.C. Services, Inc.

Dated: September 14, 1993