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May 2, 2006

Re: Davcon Packaging Services, Ltd., t/d/b/a Davcon Relocation Services,
A.00117540, F.3

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

DOCUMENT
FOLDER

Dear Mr. McNulty:

Enclosed you will please find an original and nine (9) copies of the Main Brief of the Applicant, Davcon Packaging Services, Ltd., t/d/b/a Davcon Relocation Services. A copy of the Brief, together with cases which are unreported Commission decisions has been served upon Administrative Law Judge Candace F. Melillo and James D. Campbell, Jr., Esquire, counsel for the Protestants.

An electronic copy of the Brief has, as well, been served by way of e-mail on Administrative Law Judge Melillo and Mr. Campbell.

Very truly yours,

RHOADS & SINON LLP

By:

J. Bruce Walter

Enclosure

cc: Administrative Law Judge Candace Melillo
James D. Campbell, Jr., Esquire
Davcon Packaging Services, Ltd.
Attn: Mr. David Burkholder, President

RJP

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Before the
Pennsylvania Public Utility Commission

A.00117540, F.3

Application of Davcon Packaging Services, t/d/b/a Davcon Relocation Services

MAIN BRIEF OF APPLICANT

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I. STATEMENT OF THE CASE

Applicant filed an application seeking authority docketed at A.00121698, Folder 3, which was published on May 14, 2005. Four Protestants filed a protest to the application, i.e., Jack Treir, Inc., Shelly Moving & Storage, Inc., Charles E. Groff & Sons, Inc., Phillip J. Mertz and John M. Mertz, t/a Mertz's. The application proceeded to hearing on March 28, 2006.

The record consists of the Notes of Testimony, Applicant's Statement No. 1 and Attachments 1-8, Exhibit 2 and 3, and Protestant's Exhibits 1-5.

II. STATEMENT OF QUESTIONS

1. Has Applicant met its burden under 52 Pa. Code § 41.14(a) and (b) for the grant of a Certificate of Public Convenience?
2. Has Protestant met its burden of proving that a grant of authority would be contrary to the public interest under § 41.14(c)?

III. SUMMARY OF EVIDENCE

Witness, David Burkholder, N.T. 7, introduced Applicant's Exhibit 1 and eight attachments that were identified for the record, N.T. 10. Witness stated that he applied for the operating authority because the carrier known as World Wide Transportation Services, known locally as Fritz Moving & Storage or Lancaster Storage Company had gone out of business and, with his existing company, it would, with a major mover out of the market, provide an opportunity. He met with the Lancaster Planning Commission who indicated that the growth had been "unbelievable in Lancaster" and the statistics included home sales, new home sales, new construction, all of which indicated this was the correct time to apply, N.T. 13, Applicant's Exhibit 1, Attachment 8. Witness identified Applicant's Exhibit 2 which consists of the common policy declarations or insurance coverages of Davcon Packaging Services, N.T. 14. The attachment to Exhibit 1, 7, which is the Initial Safety Rating of Davcon is the last one done, N.T. 16. Witness described the packing services that it provides with the driver and truck being provided by the customer, N.T. 17. Witness described the three trucks currently owned, 24' straight truck, year 2003 International, a 26' straight truck and a Chevy II Van which is a 2003 and a 48' trailer that is a year 1998. Witness currently rents tractors, N.T. 20. Witness currently employs six (6) people full-time and four (4) part-time, N.T. 21. Witness describes background checks required by Wheaton Van Lines because he is an agent for Wheaton Van Lines in Interstate Household Moving, N.T. 23. There is an investigation involved and a background check and the drivers are drug tested and have to pass physical and related matters.

Statement of Applicant, Applicant's Exhibit 1. Applicant's Exhibit 1 at paragraph 2 identifies the President of the Applicant and his extensive experience in the household goods

industry, including being an agent for Wheaton Van Lines (Wheaton Interstate Moving). Applicant has received Wheaton's Quality Agent Award, Exhibit 1, pg. 2. Applicant holds authority to transport property from the Public Utility Commission and authority to transport household goods in use from the Federal Bureau of Highways, Applicant's Exhibit 1, paragraph 5. See, Attachment 2. Applicant occupies sufficient office space and has sufficient equipment to provide the service in question, Applicant's Exhibit 1, paragraph 8. Applicant has some equipment, Applicant's Exhibit 1, paragraph 9, but will be required to lease additional equipment. Applicant's service, as currently provided, is fully detailed at paragraph 10 of Applicant's Exhibit 1. It includes interstate and international service as well as local office relocation type services where the crating, packing and so-forth is provided, but the truck must be leased and driven by the customer. Applicant's financial status is detailed at paragraph 12 and attachment 6 of Exhibit 1. Applicant's insurance is current with the Public Utility Commission. Applicant has a satisfactory safety rating and a safety program, Applicant's Exhibit 1, paragraph 13.

Public Witness, Pastor David Lamar Long. Pastor Long currently resides in Stroudsburg, but formerly resided in Brownstown, Lancaster County, N.T. 26. Pastor Long moved at the end of June using Jack Treir, N.T. 27. Pastor Long had a very difficult experience trying to get estimates so that he could meet his denominational requirement to get three moving estimates, N.T. 27. Although Treir estimated and did a good job on the move, he had "a great difficulty" in getting the second or third estimate. One of the companies he called recently went out of business, N.T. 27. Davcon explained to Pastor Long that they could not provide the move, N.T. 27, and although a second estimate was received from McGarrity Moving, he was unable to get a

third estimate, N.T. 27-28. Pastor Long, if he is to return to Lancaster County, would utilize the services of Davcon. Pastor Long was surprised by the difficulty of obtaining of estimates, N.T. 28. In seeking estimates, Pastor Long went through the phone book and called everyone listed as a moving company, N.T. 30.

Witness, Matthew Samley, N.T. 31. Witness resides in Manheim Township, Lancaster County, and was testifying on behalf of his law firm Reese, Pugh, Samley, Wagenseller & Mecum. Their offices are in downtown Lancaster, N.T. 32. The law firm anticipates hiring an associate or two and anticipates of some senior members cutting back services or retiring, N.T. 32. The law firm has also hired law clerks and paralegals, N.T. 33. The anticipated hirings would be from the areas of Harrisburg or Carlisle Dickinson School of Law, N.T. 33. Each of these situations is a potential move. Witness had experience using Davcon in 2002 on an office move, N.T. 33, and was quite pleased.

Witness, Bruce Myers, N.T. 35. Witness resides at 4 Creekwood Drive in Lancaster County and testified representing the Blue Ball Division of Community Bank. The Blue Ball main office is 1060 Main Street, Blue Ball, PA, N.T. 36. Community Banks has over 1,000 people with 70 offices located mostly in Pennsylvania, N.T. 36-37. Bank policy provides for transfers within the Bank and moving for executive recruiting for some of the positions of the Bank, N.T. 37. Davcon is a customer of the Bank and Mr. Myers has visited the location of Davcon, seen the trucks and toured the facility, N.T. 38. There are twelve Community Bank branches within Lancaster County, N.T. 38.

Witness, Thomas Becker, N.T. 41, residing at 22A Nolt Avenue, Willow Street, Lancaster County. Witness anticipates moving in the near future, N.T. 41, would include moving

to Manor Township, Lancaster County, N.T. 41-42. Witness is familiar with the services of Mr. Burkholder and feels they are very professional, N.T. 42. Witness, in its anticipated move, would use Davcon if the certificate were granted, N.T. 41-42.

Witness, Williams V. Hecker, N.T. 45, resides at 161 East Hemlock Road, Ephrata, Lancaster County. Witness is currently retired from the concrete pipe industry, has been President of the Ephrata Borough Council and member of the Council for twenty years. The chairman of the Water Authority for three municipalities and chairman of the Economic Development Corporation for Ephrata Borough, served on the Advisory Board of Millersburg University and on the Executive Board of the Pennsylvania Train Museum in Stroudsburg, N.T. 45-46. Witness anticipates moving in the relatively near future as a result of his downsizing, N.T. 46. Witness would like to have the ability to use Davcon Relocation that move as a result of the downsizing will to be within another Pennsylvania location, probably very close to the Borough of Ephrata, N.T. 47. The location probably would be Ephrata Township, N.T. 48.

Witness, Clifford Lish, 23 Cedar Creek Lane, Toms River, New Jersey, N.T. 52, representing Wheaton World Wide Moving whose corporate address is Indianapolis, IN as Director of Sales, N.T. 53. Witness reflected that Wheaton, in terms of intrastate service, has a large number of referrals ("quite a few", N.T. 54) that come in through the corporate office, that they prefer to submit those to the nearest agent in the Commonwealth of Pennsylvania, N.T. 54. Witness indicated Wheaton has business relationships with large corporations and they will get a call from that corporation asking to do local or intrastate moves. Assuming the grant of authority, the referrals would be made to Davcon Relocation within their service area, N.T. 55.

Witness, John Martine, residing at 433 Cornerstone Way, Ephrata, PA, N.T. 56. Mr. Martine is a real estate agent, N.T. 56. Witness last used an intrastate mover in 1998 or 1999, N.T. 56. Witness has clients who need service providers in a moving industry and can provide lists of providers to them, N.T. 57. While witness cannot represent the entire industry, Lancaster County has a lot of homes being sold and a lot of people moving. There were over 6,000 homes sold in 2005, N.T. 57. Witness believes that there is a real need for more household goods providers, N.T. 58.

Witness, Scott Gentry, residing at 121 Cornerstone Way, Brownstown, PA 17508, in Lancaster County, N.T. 62. Witness could anticipate moving as either an upgraded house or job relocation, N.T. 63. Witness believes there should be no barriers to entry in terms of being able to market yourself and provide service to customers, including the household goods industry, N.T. 64.

Witness, Michael Corrado, resides at 118 Cornerstone Way, Brownstown, PA, Lancaster County, N.T. 65. Although there was a possibility of an intrastate move by witness, his wife's health recently indicates they would move on an interstate basis, N.T. 66.

Witness, Elaine Burkholder, resides at 2613 Stagecoach Lane, Neffsville, Manheim Township, PA, N.T. 67. Witness is the mother of David Burkholder and is anticipating moving within Pennsylvania, N.T. 67.

IV. SUMMARY OF ARGUMENT

Under current Commission decisions, Applicant has more than met its burden under 52 Pa. Code § 41.14(a). Approval of the Application will serve a useful public purpose, responsive to public demand or need. Applicant has provided sufficient representative proof of need throughout the limited territory applied for through testimony of ten (10) public witnesses, including testimony that existing service is, at times, unavailable or non-responsive. The public witnesses included individuals, businesses like banks, law firms and real estate agents and the Wheaton Van Lines System. Applicant has supplemented this public testimony with statistics on population and growth in Lancaster County, testimony confirmed by at least one public witness.

Applicant is a fit applicant and has established, by positive evidence under 52 Pa. Code § 41.14(b), that it possesses a technical and financial ability to provide the proposed service. As a certificated carrier, Applicant is presumed to be fit. Applicant has established by positive evidence that it will operate safely and legally. There is evidence of a single complaint concerning illegal service, promptly resolved. The evidence therefore does not permit a finding that the applicant lacks the propensity to operate legally, especially in view of its extensive experience.

The Protestant has made no effort to establish that the entry of a new carrier would endanger or impair the existing operations of carriers to such an extent that, on balance, the granting of authority would be contrary to the public interest. The Protestant provided no financial information nor any estimate of what traffic might be diverted or what affect any of that could have on the public. There is no evidence of record to support Protestant's burden in this regard.

V. ARGUMENT

1. APPLICANT HAS MET ITS BURDEN OF PROOF UNDER §41.14(a).

A. The Current State Of The Applicable Law Requires Finding That Applicant Has Provided Sufficient Evidence Of Public Demand Or Need.

In this proceeding, the applicant, Davcon Relocation Services seeks to provide household goods in use service between points in Lancaster County and from points in Lancaster County to points in Pennsylvania and vice versa. Applicant has the burden of proving, by a preponderance of the evidence, that the application satisfies the criteria of §41.14(a) of Title 52 of the Pennsylvania Code. Section 41.14(a) provides as follows:

- (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.

Applicant has more than met this burden under current law. In Application of Blue Bird Coach Lines, Inc., 72 Pa. P.U.C. 262 (1990), the Commission clarified the type of evidence which an applicant must present to satisfy its burden of proof under §41.14(a) to demonstrate that the proposed service will serve a useful public purpose, responsive to a public demand or need. In Blue Bird, the Commission held:

The witnesses supporting a motor common carrier application must be legally competent and credible, e.g., D. F. Bast Inc.; Merz Whiteway Tours v. Pennsylvania Public Utility Commission, 204 Pa. Super. 43, 201 A.2d 446 (1964), and their testimony must be probative and relevant to the application proceeding.

The evidence here establishes need by testimony of ten (10) public witnesses. These witnesses include individuals, businesses, such as banks and law firms, real estate agents and referrals from the entire Wheaton Van Lines System. It also establishes some dissatisfaction with the

availability of service from existing carriers and at least the occasional inability of existing carriers to provide the service desired by the testifying public, (N.T. 27-2, 84).

The Commission has repeatedly held that an applicant is not required to establish a public demand/need for proposed transportation in each and every point within the proposed service territory. It is sufficient if an applicant establishes representative public demand/need for the proposed service generally throughout the proposed service territory. Morgan Drive Away, Inc. v. Pa. P.U.C., 99 Pa. Cmwlt. 420, 512 A.2d 1359 (1986); Purolator Courier Corp. v. Pa. P.U.C., 51 Pa. Cmwlt. 377, 414 A.2d 450 (1980); Eagle Courier & Call and demand Service, Inc., 57 Pa. P.U.C. 404 (1983). Re Boro Buses Co., 70 Pa. PUC 108 (1989). Blue Bird Coach Lines, 72 Pa. PUC 262 (1990). It is clear from Blue Bird that the Commission intended to establish a precedent for granting broader, rather than narrower authority, by holding that a representative sampling of witnesses may establish a need throughout the territory sought to be served.

The Commission journeyed even further into what amount of evidence constitutes proof of need/demand within a certain geographic authority in Application of O. D. Anderson, Inc., Docket A.00096222, F.1, Am-E (Second Corrected Opinion and Order entered April 19, 1994). Confirming the Commission's stated policy to grant broad authority, rather than narrow, O. D. Anderson, Inc. is a case in which the applicant sought authority to provide group and party service between all points in Pennsylvania lying on and west of a line which is five statute miles east of U.S. Highway 219, to all points in Pennsylvania. Applicant, O. D. Anderson presented no evidence of need at all for service from many of the counties encompassed in the base territory. Notwithstanding this fact, the Commission granted statewide authority from the entire

application territory. The Protestant argued that the evidence of need or demand should have been determined by examining the evidence on a county-by-county basis. The Commission rejected this argument, concluding that "support is not required for each and every point which could be served; rather, a representative sampling of the territory sought generally is sufficient." (Opinion and Order, page 8). The Commonwealth Court, in affirming the Commission's decision in O. D. Anderson, cited Purolator Courier and held:

Demand or need for the proposed service may be proven through witnesses comprising a representative sampling of the public that will use the proposed service within the territory encompassed by the application. The applicant is not required to show a demand for its service at every point within the proposed territory; it is sufficient to show that need exists generally within the territory. Purolator Courier Corp. v. Pa. P.U.C., 51 Pa. Cmwlth. 377, 414 A.2d 450 (1980).

G. G. & C. Bus Company, Inc., et al. v. Pa. P.U.C., No. 707 C. D. 1994, No. 708 C. D. 1994, No. 734 c. D. 1994, No. 1289 C. D. 1994, No. 1297 C. D. 1994, No. 1298 C. D. 1994, Opinion not Reported, filed May 18, 1995.

Following the Blue Bird and O. D. Anderson decisions, the Commission has established a liberal course in determining the extent to which authority should be granted geographically where individuals, as consumers, rather than professional traffic managers are involved. Indeed, it may be argued that such authority has always been more liberally granted because the Commission has recognized that true public witnesses are not professional traffic managers. For example, in Application of ATM Corporation of America. t/d/b/a Classic Call and demand Transportation, Docket A.00112166 (Opinion and Order entered September 24, 1996), an Administrative Law Judge found that the testimony of three (3) witnesses was credible on the issue of the actual demand/need for the proposed call and demand service under the standards

articulated in Blue Bird. The ATM applicant was granted authority to transport, as a common carrier by motor vehicle, persons, in call and demand service, from points in Allegheny County to all points in Pennsylvania, and return. The Commission upheld the Administrative Law Judge's decision and noted that the number of witnesses required to support proof of demand/need will vary according to the circumstances of each proceeding. This is so even in the face of the obvious argument that Allegheny County is among the most heavily populated counties in the Commonwealth. In the ATM Corporation case, the Commission cited Application of Primo Call and demand Company, Inc., Docket No. A.00111548 (Opinion and Order entered November 29, 1995), where it was determined that the testimony of only one witness was sufficient to support a grant of authority to provide service from all points in Allegheny County to points in Pennsylvania, since the witness in that proceeding represented a reasonable cross-section of the public's need for the proposed service. Similar representative testimony was received in the current application case from the ten (10) public witnesses. Several of the witnesses established significant public demand, beyond individual needs (N.T. 33, 37, 54, 57).

Finally, the Commission further expanded the concept of public testimony in the Harrisburg Yellow Cab case, The Application of Harrisburg Taxicab & Baggage Company, t/a Yellow Cab, A.0079143. F.8. Am-E. Harrisburg Yellow Cab sought authority in Cumberland County, Dauphin County and York County, representing the bulk of suburban Harrisburg. The Commission granted the entire application based upon the testimony of 10 public witnesses. (The order states 13 witnesses, however, 2 of these were applicant's witness and the 13th of which was the witness for Protestant West Shore Taxi Company, who obviously did not support

the public need of the applicant). After reviewing the provisions of Blue Bird Coach Lines, 72 Pa. PUC 262 (1990) and the regulations found at 52 Pa. Code §41.14, the Commission, at page 7 of the Harrisburg Yellow case, quoted its Blue Bird Coach Lines opinion for the proposition that,

"such a liberal view of public need/demand is consonant with our avowed reason for promulgating the transportation regulatory policy statement at 52 Pa. Code §41.14, namely, to eliminate monopolistic protection of existing motor carriers and to promote health competition among order carriers for the purpose of assuring the availability of transportation service commensurate with the demonstrative public demand/need". (Emphasis Added).

See, Yellow Cab at pg. 7 quoting from Blue Bird Coach Lines, *infra*. The Commission then stated, at page 8 of the Yellow Cab decision,

"in looking for evidence of public demand or need, our review of the record indicates that the witnesses sponsored by the applicant in support of the application were a mix of persons who (1) testified as to their existing use of, and satisfaction with, the applicant's certified service; (2) testified as to their existing use of the applicant's uncertificated service; (3) testified as their need for new service; (4) testified as to the inadequacy of existing service; and (5) did not know, in some cases what counties or municipalities were involved".

Commission decision at pgs. 8-9. The application was granted in full despite the mixed record. The record established by Applicant, Davcon, is considerably stronger.

Additional Commission cases which would confirm that the evidence in this case supports a grant of authority, as applied for, include:

Edenfield Stages, Inc., 74 Pa. PUC 559 (1991), six witnesses who testified as to "their own requirements" and "of their knowledge of other persons who would find the availability of this service a convenient and desirable means", 72 Pa. PUC at 561 for an area covering several western Pennsylvania counties.

E. Rosman Company, Inc., 69 Pa. PUC 101 (1988), six witnesses supported a household goods application covering the Philadelphia metropolitan area and this testimony “has established a need”, 69 Pa. PUC 104.

Blue Bird Coach Lines, 72 Pa. PUC 262 (1990), countywide authority was granted by testimony of a limited number of witnesses: Venango County (4 witnesses), Mercer County (6 witnesses), Crawford County (2 witnesses).

Lucille R. Jones, t/d/b/a Al’s Wholesale Fruit and Produce, granted authority for the City and County of Philadelphia supported by only one statement, although that was on behalf of the U.S. Defense Department, 80 Pa. PUC 745 (1993).

The record in the instant case for Davcon Relocation Services is extensively stronger than any of these cases. Each of the public witnesses who testified in support of Davcon Relocation Services testified with relative accuracy as to their demand or need for service. These witnesses understood and supported the proposed grant of operating authority. Each was representative of the public in Lancaster County and some specifically testified as to the representative nature of their evidence. Several witnesses specifically testified on behalf of greater numbers of potential users than their individual use and others affirmatively stated that existing carriers cannot and do not have the ability to provide the desired service at all times.

In the Application of Hagey Coach, Inc., A. 00111703, F. 1, Am-A, entered August 26, 1997, the Commission again discussed the question of amount of proof of public need:

We note that the number of witnesses appearing on behalf of the Applicant in this proceeding is a small number, in light of the fact that the Application area includes the greater Philadelphia area, having a population of over two million people. However, many of the witnesses represented larger organizations and groups having need or demand for the proposed service throughout the

Application territory. We find this testimony to be competent under the criteria set forth in our decision at Met-Ex, supra.

Furthermore, in our opinion, this evidence of record in this proceeding is adequate to meet the Applicant's burden of establishing a useful public demand or need for the service within the entire Application territory, consistent with our decision at Blue Bird, supra. This is also consistent with our action in Application of Krapf's Coach Inc., Docket No. A-00104504FOO01, Am-D, (Order entered on March 13, 1997).

Moreover, there is no evidence of record establishing that the existing carriers will be harmed to such an extent that, on balance, it would be detrimental to the public interest. Accordingly, we conclude that granting the Application is in the public interest and would promote the goal of healthy competition which we enunciated in Blue Bird, supra. Hagey Coach at 15.

It has been stated many times since the beginning of regulation of transportation that the primary object of public utility regulation is not to establish a monopoly or to guarantee the security of investment in public service corporations, but first, and at all times, the Commission's power will be exercised to determine who shall serve the public interest in a given area. See Pottsville Union Traction Co. v. P.S.C., 67 Pa. Superior Ct. 301, 204, (1917); Hoffman v. P.S.C., 99 Pa. Superior Ct. 417, 429 (1930); Columbo v. Pa. P.U.C., 159 Pa. Superior Ct. 483, 487, 48 A.2d 59 (1946); Sayre v. Pa. P.U.C., 161 Pa. Superior Ct. 182, 184, 54 A.2d 95 (1947); Reeder v. Pa. P.U.C., 192 Pa. Superior Ct. 298, 304, 162 A.2d 231 (1960); Pennsylvania Railroad Company v. Pa. P.U.C., 199 Pa. Superior Ct. 158, 169, 184 A.2d 111 (1962).

The interest of the public, not the protesting carriers, is the primary and paramount consideration; no common carrier has the right to a guaranty of protection from competition: Motor Freight Express v. Pa. P.U.C., 180 Pa. Superior Ct. 622, 630, 121 A.2d 617 (1956); Leaman Transportation Company v. Pa. P.U.C., 175 Pa. Superior Ct. 533, 559, 106 A.2d 901

(1954); Phila.-Pitt. Carriers. Inc. v. Pa. P.U.C., 185 Pa. Superior Ct. 588, 597, 138 A.2d 693 (1958).

Moreover, in Pa. P.U.C. v. Purolator Courier Corp., 24 Pa. Cmwlt. Ct. 301, 306-307, 355 A.2d 850 (1976), the Commonwealth Court emphasized:

"We do not believe the legislature, in enacting the Public Utility Law, intended to benefit established carrier by erecting artificial barriers to the entry of new competitors. It is, rather, the public interest and convenience, which the law seeks to protect. The amount of competition which will best serve that interest in a matter within the discretion of the PUC. Merz White Way Tours v. Pennsylvania Public Utility Commission, 204 Pa. Superior Ct. 43, 201 A.2d 446 (1964); New Kensington City Lines, Inc. v. Pennsylvania Public Utility Commission, 200 Pa. Superior Ct. 490, 190 A.2d 179 (1963)".

The principles enunciated heretofore have special significance in this limited proceeding. Ten (10) public witnesses testified. A record has been fully developed showing that there is a substantial public need for additional household goods service, which is not now being met by the protesting carriers. There is no proof, even if it were relevant, that the protesting carriers could meet all of the expressed service needs of the traveling public. At least one protesting carrier confirmed seasonal difficulties (N.T. 84). The testimony of Protestants also establish that a significant carrier in Lancaster County has gone out of business and, despite sale of that operating authority, the purchasers do not currently appear as competitive service providers. (N.T. 75).

Common sense, expressed regulatory policy and the public interest each dictate that consideration cannot be given to protecting the protestant in view of the demands of the public, when another enterprising carrier, such as Davcon Relocation Services, seeks to render additional service in a manner required by the public, as established by public testimony. See Hall's Motor Transit Co. v. Pa. P.U.C., 150 Pa. Superior Ct. 60, 65-66, 27 A.2d 428 (1942); Phila.-Pitt.

Carriers, Inc. v. Pa. P.U.C., 185 Pa. Superior Ct. 588, 596, 138 A.2d 693 (1958). As stated in Davidson Transfer & Storage Co. v. U.S. et al., 42 F. Supp. 215, 219 (1942) by the United States District Court, Eastern District, Pennsylvania:

“We think that one of the weapons in the Commission's [Pennsylvania Public Utility Commission] arsenal is the right to authorize competition where it is necessary in order to compel adequate service ...”.

It is difficult to conceive of a stronger case for the exercise of such discretion by the Commission than the case at hand where several witnesses testified that existing carriers cannot always meet the public need and the representative public testimony as to need is extensively greater than just the ten (10) persons who appeared. The extensive growth of Lancaster County established on the record, would, in and of itself, be substantial evidence of future public need.

B. The Evidence In This Case Warrants A Grant Of Authority As Requested.

The evidence of public need established by applicant in the area in Lancaster County is substantial. The County is a growing, even booming, area with housing (Applicant's Exhibit 1, Attachment 8, N.T. 13, 57) and population growth indicative of a much larger public demand. (Applicant's Exhibit 1, Attachment 8).

The public witnesses totaled ten (10) and the evidence indicated need from various areas. These witnesses are, in fact, representative of a much larger number of individuals. They testified on behalf of businesses, such as the entire Wheaton Van System, law offices, real estate offices and banks, as well as personal needs. It must also be recognized, at the outset, that the scope of this application has been narrowly drawn. Lancaster County is a relatively less populated area, at least by comparison to certain metropolitan areas of Pennsylvania. No public

policy reason or rule of law exists to treat this Applicant differently from the many applicants who have been granted extensive authority, including those cited in this brief.

The general trend of recent Commission decisions is to grant broader authority to afford the public the availability of service. In Hagey Coach, for instance, the Commission specifically stated that the number of witnesses was "small" for an application territory of two million people. The Commission still, however, granted authority to all points in the Commonwealth, as applied for. Both in quantity and quality Applicant Davcon Relocation Services has exceeded the Hagey Coach parameters. There is testimony by witnesses concerning calling providers who indicated they were not authorized to serve this witness (N.T. 28). Applicant has clearly met its burden of proof under §41.14(a). The territory here is considerably smaller and less populated than that in Hagey. Since the public benefit would clearly outweigh any unproven adverse impact on the protestants,¹ the authority, as applied for, should be granted.

2. APPLICANT HAS DEMONSTRATED THAT IT POSSESSES THE TECHNICAL AND FINANCIAL ABILITY TO PROVIDE THE PROPOSED SERVICE; THE EVIDENCE REQUIRES A CONCLUSION THAT APPLICANT DOES NOT LACK A PROPENSITY TO OPERATE SAFELY AND LEGALLY.

The second criteria to be considered in this case is contained in §41.14(b) of Title 52 of the Pennsylvania Code. Section 41.14(b) provides as follows:

(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.

Under the evidence submitted, this applicant should be found to be fit to provide new service, especially where there is no real challenge to applicant's financial or technical fitness.

Harrisburg Yellow Cab, supra. at 11. Applicant is a currently certificated carrier and is therefore presumed to be fit. Re Klassic Kids, Inc., 74 Pa. PUC 779 (1991) at 783; VIP Travel Service, Inc., 56 Pa. PUC 625; Frederick's Express, 70 Pa. PUC 402 (1989). No evidence was presented to overcome this presumption.

The evidence clearly demonstrates that Applicant proposes a safe, reliable, financially sound carrier. Its personnel, maintenance programs and safety program are consistent with Commission requirements. Its current safety rating is satisfactory (Applicant's Exhibit 1, Attachment 7). Interstate and international operations, operations as a Wheaton Agent and current packing services all reinforce this conclusion. No question of operational safety has been presented on this record. The evidence of financial fitness is clear (Applicant's Exhibit 1, Attachment 6). The experience of the Applicant's owner in the transportation arena is unequivocal and extensive (Applicant's Exhibit 1, Attachments 4, 5).

The evidence in this case does not permit a finding that Applicant has demonstrated a persistent disregard for, flouting or defiance of the Public Utility Code. There is no evidence on the record at all of any current illegal transportation. A single complaint has been presented, characterized as a mistake and the response to the complaint by Applicant to insure no repeat complaint was extensive. The Commission took no further action beyond a small fine.

The certificate of public convenience, as applied for, should be granted. Applicant has met its burden of proof under §41.14(b).

3. PROTESTANT HAS PROVIDED NO EVIDENCE THAT THE GRANT OF MOTOR COMMON CARRIER AUTHORITY TO APPLICANT WILL ENDANGER OR IMPAIR ITS OPERATIONS TO SUCH AN EXTENT THAT, ON BALANCE, THE

¹ See Section 3, supra.

GRANTING OF AUTHORITY WOULD BE CONTRARY TO THE PUBLIC INTEREST.

The final criteria to be considered in this application proceeding is contained in 52 Pa.

Code §41.14 (c). That section provides:

(c) The Commission will grant motor common carrier authority commensurate with the demonstrated public need unless it is established that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers to such an extent that, on balance, the granting of authority would be contrary to the public interest.

There simply is no such evidence on the record in this regard. The Protestants did not attempt to carry this burden. They really presented no such evidence. They did not even attempt to prove they could or would adequately serve all of Lancaster County. The burden of subsection (c), however, is quite heavy. As stated in Myers Chemical Transport, Ltd., 73 Pa. PUC 24 (1990) at 30 and 31:

“[7] Subsection 41.14(c) emphasizes the advantages of healthy competition in the motor carrier industry and recognizes that “[t]he legislature in enacting the Public Utility Code did not intend to benefit established carriers by erecting artificial barriers to the entry of new competitors. It is the public interest and convenience which the law seeks to protect.” Mobilfone of Northeastern Pennsylvania v. Pennsylvania Public Utility Commission, 73 Pa. Cmwith. 340, 346, 458 A.2d 1030, 1034 (1983). An existing common carrier/protestant carries a heavy burden of proof under subsection 41.14(c), namely, the existing carrier must show that the entry of a new carrier into the transportation field would endanger or impair the existing carrier’s operations to such an extent that, on balance, the granting of the requested authority would contravene the public interest. Seaboard Tank Lines, Inc.

[8] Only the threat of unrestrained and destructive competition which is inimical to the public interest precludes the grant of an application pursuant to subsection 41.14(c). Seaboard Tank Lines, Inc. Whether the proffer of competition by a particular motor carrier applicant will constitute a benefit or a detriment to the public interest is a decision legislatively entrusted to the Commission’s sound judgment and discretion. Seaboard Tank Lines, Inc.; Mobilfone of Northeastern Pennsylvania, Inc.; Application of Blue Bird Coach Lines, Inc.

The existence of adequate service by existing carriers does not, by itself, preclude the granting of a certificate to an applicant. Seaboard Tank Lines, Inc.; Application of Blue Bird Coach Lines, Inc. Thus, the mere potential for diversion of traffic volume from existing carriers to an applicant is insufficient to sustain the protesting carriers' burden of proof under subsection 41.14(c). Railway Express Agency, Inc. v. Pennsylvania Public Utility Commission, 195 Pa. Super. 394, 39 PUR3d 477, 171 A.2d 860 (1961); Application of Blue Bird Coach Lines, Inc.; Re Perkiomen Airways, Ltd., 51 Pa. PUC 267 (1977).

This record does not permit a finding that a grant of this application would result in destructive competition. There is no quantification of traffic which might be considered "diverted" or of any substantiated claimed financial harm, nor was there any attempt on the record whatsoever to equate any perceived harm to any Protestant to damage to the public interest. Protestants apparently want to restrict competition, but presented no evidence to justify doing so. Mere proof of additional competition by a new carrier does not meet protestant's burden under § 41.14(c). This must especially be found to be the case in a growing market like Lancaster County.

VI. REQUESTED CONCLUSIONS OF LAW

Applicant respectfully requests that the Administrative Law Judge, based on all of the evidence of record, make the following conclusions of law:

1. This Commission has jurisdiction over the subject matter and the parties by virtue of Section 1101 of the Public Utility Code, 66 Pa. C.S.A., Section 1101.

2. The application is properly before the Commission pursuant to Section 1103 of the Public Utility Code, 66 Pa. C.S.A., Section 1103.

3. Applicant has met its burden of proof under 52 Pa. Code §41.14 (a) and (b).

4. Protestant has not met its burden under 52 Pa. Code §41.14(c).

5. The approval of this application for motor common carrier authority in the nature of household goods in use service will serve a useful public purpose and will respond to a demonstrated public demand or need.

6. Under the statutory mandates set forth in Section 1103 of the Public Utility Code, the evidence in this case establishes that a grant of a Certificate of Public Convenience is necessary or proper.

7. Sufficient evidence has been presented to show a public need for call and demand motor carrier service between points in Lancaster County as applied for by Applicant, Davcon Relocation Services.

8. In order to establish need, it is not necessary to prove an absolute necessity or present demand for the service in every part of the territory involved. Pa. P.U.C. v. Purolator Courier, 24 Pa. Cmwlth. 301 (1976).

9. The amount of competition which will best serve the public interest and convenience is a matter within the discretion of the Public Utility Commission. Merz White Way Tours v. Pa. P.U.C., 204 Pa. Super. 490, 201 A.2d 446 (1964).

10. Consideration should not be given to a protesting carrier, which has not been consistently furnishing the public service to a significant segment of the traveling public when another enterprising carrier seeks to render competitive service in the manner demanded by the traveling public. Daily Motor Express, Inc. et al. v. Pa. P.U.C., 183 Pa. Super. 120 (1957), Hall's Motor Transit Co. v. Pa. P.U.C., 150 Pa. Super. 60, 27 A.2d 428.

11. The approval of the application for motor common carrier authority is proper as applicant has demonstrated that it possesses the technical and financial fitness and ability to provide the proposed service.

12. As a certificated carrier, the Applicant is presumed to be a fit applicant, Klassic Kids, Inc., 74 Pa. PUC 779 (1991) at 783.

13. There is no evidence to warrant a conclusion that applicant lacks a propensity to operate legally or to demonstrate a persistent disregard or flouting of the law or a defiant attitude toward the Public Utility Code or the Commission's orders and regulations.

14. One instance of past unauthorized operation is not such evidence as to necessarily preclude the applicant from obtaining the sought for operating authority. Hercik v. Pa. P.U.C., 137 Pa. Cmwlth. Ct. 377, 586 A.2d 492 (1991).

15. Under the statutory test of necessity set forth in Section 1103 of the Public Utility Code and 52 Pa. Code 41.14, the evidence in this case adduced by the Applicant supports a determination that Applicant be granted a certificate of public convenience to provide household

goods service between the stated points in the County of Lancaster and from said points to points in Pennsylvania and vice versa.

16. The Commission, in its policy statement now found at 52 Pa. Code §41.14, and as explained in Blue Bird Coach Lines, intends to encourage competition, not permit its procedures to be used to eliminate competition.

VII. PROPOSED FINDINGS OF FACT

1. Applicant has established that the public convenience or necessity would be served by the grant of this application, as amended, through the testimony of ten (10) public witnesses (N.T. 26, 31, 35, 41, 45, 52, 56, 62, 66, 67).
2. Applicant has established technical fitness (Applicant's Exhibit 1 at ¶10, Attachment 4, 5).
3. Applicant has established financial fitness (Applicant's Exhibit 1, Attachment 6).
4. Protestant has not established of record any evidence which would permit a finding that the grant of this application would be contrary to the public interest.

VIII. PROPOSED ORDERING PARAGRAPHS

Upon consideration of the foregoing, we now issue this ORDER:

1. That the Application of Davcon Relocation Services, published on May 14, 2005, be and is hereby approved, as amended, and that a certificate be issued granting the following rights:


“To transport, as a common carrier by motor vehicle, household goods in use between points in the County of Lancaster and from points in said county to points in Pennsylvania and vice versa”.

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

Respectfully submitted,

RHOADS & SINON LLP

By: _____


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Services

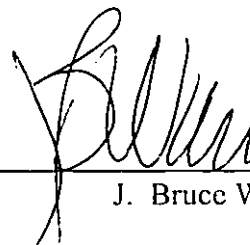
CERTIFICATE OF SERVICE

I hereby certify this day that a copy of the foregoing Brief of Davcon Packaging Services, t/d//b/a Davcon Relocation Services has been served upon the following, via first class mail, postage prepaid:

Administrative Law Judge Kandace Melillo
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

James D. Campbell, Jr., Esquire
Caldwell & Kearns
3631 North Front Street
Harrisburg, PA 17110

A copy of this Brief has been transmitted electronically (via e-mail) to Administrative Law Judge Melillo and Attorney Campbell.



J. Bruce Walter

Dated: May 2, 2006

cc: Davcon Packaging Services, t/d/b/a Davcon Relocation Services

ORIGINAL

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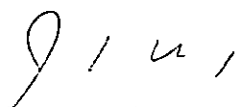
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FOLDER

Re: Application of Davcon Packing Services, Ltd., t/d/b/a Davcon Relocation Services
Docket No. A-00117540F0003

Dear Secretary McNulty:

Please find enclosed herewith the original and nine (9) copies of the Brief on behalf of Protestants, Charles E. Groff & Sons, Inc., Jack Treier, Inc.; Philip J. and John M. Mertz t/d/b/a Mertz's, and Shelly Moving & Storage, Inc. in the above matter. In accordance with the Certificate of Service, copies have been served upon the Administrative Law Judge and the attorney for Applicant.

Very truly yours,


James D. Campbell, Jr.
CALDWELL & KEARNS

JDC:ml

Enclosures

cc: Honorable Kandace F. Melillo (2 copies)
J. Bruce Walter, Esquire (2 copies)
Protestants

101556

2006 MAY -4 PM 3:14
SECRETARY'S BUREAU

53

ORIGINAL

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE: APPLICATION OF DAVCON PACKING SERVICES, LTD., T/D/B/A DAVCON
RELOCATION SERVICES, A CORPORATION OF THE COMMONWEALTH OF
PENNSYLVANIA

DOCUMENT
FOLDER

ORIGINAL

DOCKET NO. A-00117540F0003

BRIEF ON BEHALF OF PROTESTANTS, CHARLES E. GROFF & SONS, INC., JACK
TREIER, INC.; PHILIP J. AND JOHN M. MERTZ T/D/B/A MERTZ'S, AND SHELLY
MOVING & STORAGE, INC.

DOCKETED
MAY 05 2006

James D. Campbell, Jr., Esquire
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SECRETARY'S BUREAU
2006 MAY -4 PM 3:15

I. STATEMENT OF THE CASE

By the present Application, Davcon Packing Services, Ltd., t/d/b/a Davcon Relocation Services (hereinafter "Davcon" or "Applicant"), seeks authority to begin to transport, as a common carrier, by motor vehicle, household goods in use, between points in the County of Lancaster, and from points in said County to points in Pennsylvania, and vice versa.

Protests having been filed, the case was assigned for hearing to Administrative Law Judge Kandace F. Melillo, and a hearing was duly scheduled and held in Harrisburg March 28, 2006. At the conclusion of the testimony, it was agreed that briefs would be filed.

II. REVIEW OF TESTIMONY

A. **APPLICANT'S OPERATING TESTIMONY**

David Burkholder, Applicant's President, testified as Applicant's operating witness. He sponsored Applicant's Exhibit 1, a "Statement of Applicant", representing his direct testimony, with various schedules attached. Mr. Burkholder started his company in 1999 and in 2003 became a Wheaton Agent. Wheaton Van Lines is a van line providing interstate household goods transportation. (Applicant's Exhibit 1.) Mr. Burkholder is the owner of Davcon. (R.11)

He testified that he felt Lancaster County was a growing community. He added that last year there was a company that went out of business in the Lancaster market, Worldwide Transportation Services, which did business under the names Fritz Moving & Storage as well as Lancaster Moving & Storage. (R.12) This Company, Mr. Burkholder stated, had been in business in Lancaster County for decades. When it closed its doors last year, Burkholder felt that a need was created in the Lancaster County market. (R.12) He met with Rose Long at the

Lancaster Planning Commission. She provided the statistical information concerning Lancaster County which is attached to Applicant's Exhibit 1. (R.12-13) Mr. Burkholder felt that there was a lot of new construction as well as, new market sales of residential properties, and these factors, plus the loss of a major mover in the market prompted the present Application.

Applicant's Exhibit 2, a current Certificate of Insurance was presented next.

On cross-examination, Mr. Burkholder admitted that his company had been fined for unlawful transportation of household goods without holding requisite authority from the Commission. (R.16-17) His company also provides labor, blankets, hand trucks, etc. to assist customers who rent their own trucks to move their household goods. (R.17)

Although he testified that Fritz/Lancaster Storage had closed its doors, he was unaware of the exact status of that company's operating authority from the Commission and whether or not it had been transferred. (R.18-19)

Daveon presently operates two straight trucks, one cube van, and a trailer. He owns no tractor but rents one when it is necessary to pull the trailer in connection with a move. (R.20-21) The company has six fulltime employees and uses four part-time employees as needed. (R.21) Applicant's Exhibits 1 and 2, as well as the schedules to attachment 1 were admitted into the record without objection. (R.22)

B. SUPPORTING WITNESS TESTIMONY

David Long, a Pastor, of Stroudsburg, Pennsylvania, testified that he formerly lived in Brownstown, Lancaster County. (R.26) He had moved from Brownstown at the end of June, 2005. Jack Treier, Inc. handled the move and "they did an excellent job." Although Treier was prompt in all respects, Pastor Long testified that he had trouble getting two additional estimates

which his denomination requested him to obtain. In the end he had only two to present. (R.27-28) Other than Treier and McGarrity, he could not remember what companies he had called for quotes. (R.30)

Matthew Samley, of Manheim Township, Lancaster County, testified that he was appearing in behalf of his law firm, Reese, Pugh, Samley, Wagenseller and Mecum, with offices in downtown Lancaster. There are five members of the firm, and they anticipate bringing in new members. (R.32-33) Mr. Samley had used Davcon for an office move within Lancaster City. (R.33) He would consider moving a new associate to Lancaster and paying the expenses of such a move. (R.34)

Bruce Myers appeared as office manager of the Blue Ball office, a division of Community Banks located in Blue Ball, Pennsylvania. He testified that if the need arose for an executive relocation his bank would use Applicant's service. He really could not say whether that would happen in the relatively near future. (R.37) Davcon is a customer of the bank. (R.38) If a need for executive relocation occurred (which it had not during the last 7 or 8 years) the individual being hired would be the one to select the household goods carrier. (R.39) Mr. Myers was aware that other carriers presently have the authority to provide household goods service in Lancaster County, and he had no complaint to make concerning the service of any existing carrier. (R.40)

Thomas T. Becker, of Willow Street, Lancaster County, testified that he anticipated making a move in the near future. (R.41) He is an in-law of Mr. Burkholder. He had made two previous household moves to new residences in Lancaster County, and each time he had not used a professional mover but had moved himself. He had no complaint to make concerning the service available from existing carriers but simply wanted "more choice". (R.43-44)

William Hecker, Ephrata, testified he is retired from the concrete pipe industry. (R.45) During his lifetime he had made one household move, 34 years ago. He anticipated a move in the near future due to downsizing. He supports the Application because he believes in the American Dream and free trade. The more people you have in a business, the better. (R.46) He was not aware of how many carriers might be available at the present time to provide a Lancaster County move, but was familiar with Jack Treier. (R.48)

Clifford Lish, of Tom's River, New Jersey, testified that he is Director of Sales for Wheaton Worldwide Moving, based in Indianapolis. Davcon is an agent of Wheaton. (R.53-54) As an international and interstate carrier affiliated with Davcon, Wheaton would refer intrastate Lancaster County business to Davcon to the extent that it was able to do so. (R.55)

John Martine, Ephrata, testified he is a real estate agent but was testifying as an individual and not in behalf of his agency. In 1998 or 1999 he had moved from Sayre, Pennsylvania to Ephrata, using a Mayflower agent. He has customers who inquire about moving companies. The Real Estate Commission prohibits him from making recommendations, but he can provide lists, and he would like to include Davcon in order to have a larger list. (R.56-57) Presently his list is limited to two of the Protestants, Jack Treier and Groff Red Ball, two that he has used in the past as referrals and received "positive feedback." (R.62) He knew of four or five others that have the authority but still supports this Application to add another carrier to his current list. (R.61)

Scott Gentry, of Brownstown, moved to Pennsylvania from Boston in 1998. He presently has no plans to move, but he could be relocated. He is a neighbor of Mr. Burkholder. (R.63) He has not used or called upon the Applicant nor any of the Protestants, for service. (R.63-64)

Michael Corrado, Brownstown, last used a mover more than seven years ago when he moved to Pennsylvania from Connecticut. If he would move again it would be back to Connecticut, not locally. (R.65)

Elaine Burkholder, Neffsville, testified that she is Mr. Burkholder's mother. She may move at some point in order to downsize. This is a possibility, but nothing definite, and if it would occur the move might be to a point outside the state. (R.67)

C. **PROTESTANTS' TESTIMONY**

Of the four Protestants, two presented representative testimony in their behalf.

Charles E. Morris, Director of Sales and Marketing for Shelly Moving and Storage, 4951 Lincoln Highway, York, Pennsylvania, testified he is familiar with Shelly's operations and facilities. Protestants' Exhibit I, Shelly's authority from the Pennsylvania Public Utility Commission, includes authority to serve Lancaster County. (R.71) Shelly is a Pennsylvania company with offices located in Harrisburg, York, and Malvern. (R.72) Shelly operates approximately 30 vehicles, a combination of tractor trailers, straight trucks, and pack vans. (R.72) It employs approximately 75 people fulltime and adds part-time employees as necessary. Both interstate and intrastate service are provided and the number of moves breaks down to about 50-50. (R.72-73)

There is presently considerable competition for the Lancaster County moving business. Competitors include Treier, Groff, Mertz's and Parks. Although Morris confirmed that Fritz Moving had ceased operations, he understood that its rights had been transferred to a company in Wilmington, Delaware. (R.73) Shelly has no difficulties in meeting all of the Lancaster County demands placed upon it. (R.74) Mr. Morris did not consider Fritz a "major player" in Lancaster

County. At the end, they were domiciled in Reading and not doing much business in Lancaster County. (R.74) Mr. Morris believes there is a sufficient number of carriers in Lancaster County at the present to meet the needs of the public. Any additional carriers would take away business and dilute the available revenues. (R.74-75)

Mr. Morris also testified that his company had moved the Blue Ball operations center (witness Myers' Bank) in the New Holland area. (R.78)

Stephen P. Treier testified that he is the President of Jack Treier, Inc. which is based at 1457 Manheim Pike, Lancaster. As President he is familiar with its facilities and operations. Treier is a full service moving company providing local, interstate, intrastate, international and commercial services. (R.80) It has facilities in Lancaster and Reading. The company operates twenty-five vehicles including straight trucks, tractor trailers and pack vans, and it employs forty persons fulltime. (R.82)

As in the case of Shelly Moving, about fifty percent of Treier's business is interstate, and fifty percent intrastate. (R.82) While there is significant competition for moving business in Lancaster County, Mr. Treier did not consider Fritz to have been a major competitor. (R.83)

Mr. Treier agreed with the previous testimony of Mr. Burkholder and Mr. Morris that there were peaks and valleys of demand in the moving business. The peak demand periods that present challenges for the number of available assets are very limited, only two or three weeks per year. (R.84)

Jack Treier, Inc. considers that it has a three fold mission: first is to serve the public; then its employees; and lastly the shareholders. Having another carrier in the market would not help Treier accomplish its mission. It would not help the public, the employees, or the shareholders.

He felt that the needs of the Lancaster County market are being met through the carriers that are in the market currently.

“Pastor Long, [a witness for the Applicant], I think, was a good example. We were able to help. We rarely say no to a customer. The services are there.” (R.84)

Another example is Mr. Martine’s real estate agency. Jack Treier, Inc. has provided service requested through that agency and had received a referral “yesterday” for a client of theirs. Treier had also moved one of Mr. Martine’s associates Ms. Lusk, when she relocated her own home within Lancaster County.

Jack Treier, Inc. stands ready and able to serve the needs of Lancaster County. (R.85)

At the conclusion of Mr. Treier’s testimony, the operating authorities of Mertz’s and Charles E. Groff and Sons, Inc. were admitted as Protestants’ Exhibits 3 and 4, respectively.

Subsequently, Protestants’ Exhibit 5, a summary of the order approving transfer of the Fritz authority, was admitted as a late filed Exhibit, by order of the presiding officer.

III. PROPOSED FINDINGS OF FACT

1. Applicant is a corporation based in Ephrata, Pennsylvania which holds general commodities authority from the Pennsylvania Public Utility Commission and also provides interstate moving services as a Wheaton agent (Applicant’s Exhibit 1).

2. Applicant has been fined for unlawful intrastate transportation of household goods without holding requisite authority from this Commission. (R.16-17)

3. None of Applicant’s supporting witnesses testified to any present need for the transportation of household goods between any two points in the Application territory. (R.23-67)

4. Pastor David Long received "excellent" service from Protestant Jack Treier, Inc. when he moved from Brownstown to Stroudsburg a year ago. (R.27-28)
5. Witness Samley would "consider" engaging a moving company should his law firm hire a new associate requiring such service. (R.34)
6. Davcon is a customer of the Blue Ball office of Community Banks. (R.38)
7. Mr. Myers, Office Manager of that office, supported Davcon's Application in the event that an executive relocation might be required; however, there had not been any such relocations in the last seven or eight years and if one should arise it would be up to the individual being relocated to select the carrier. (R.37, 40)
8. Witness Becker, a relative of Mr. Burkholder, supported the Application to have "more choice" available. In the past when he had moved, he did it himself and did not engage a moving company for service. (R.43-44)
9. Witness Hecker supported the Application based upon his belief in the American dream and free trade. (R.46)
10. Mr. Lish, Director of Sales, for Wheaton Worldwide Moving, supported the Application based upon his company's business relationship with Davcon. (R.53-55)
11. Witness Martine, a real estate agent, desired an additional carrier to add to the list of movers that he can pass on to his clients. His present list includes only Protestants Treier and Groff, as to whom he has received "positive feedback". He is aware of four or five other movers that have the authority at present. (R.56-57,61,62)
12. Mr. Gentry, of Brownstown, is a neighbor of Mr. Burkholder. He has no present plans to move. (R.63)

13. Mr. Corrado, also of Brownstown, had no present plans to move, but if he ever does it will be back to Connecticut. (R.65)

14. Elaine Burkholder, Neffsville, supports the Application of her son's company, although she has no definite plans to move. (R.67)

15. Protestant Shelly Moving and Storage, represented by witness Morris, holds authority to provide household goods moving service from Lancaster County to all points in Pennsylvania. It operates terminals in Harrisburg, York and Malvern, has seventy-five fulltime employees, and operates approximately thirty vehicles of various types in serving the public. (R.71-73)

16. There is presently substantial competition for the available household goods business in Lancaster County. Shelly has at least four major competitors at present, Treier, Groff, Mertz and Parks. It has no difficulties in handling the Lancaster County traffic tendered to it. (R.73-74)

17. Mr. Morris did not regard Fritz/Worldwide as a "major player" in Lancaster County. At the end, they were domiciled in Reading and not doing much business in Lancaster County. (R.74)

18. The bank represented by Applicant's witness Myers had chosen Shelly to move its operations center, although Applicant already has the authority to perform office moves. (R.78, Applicant's Exhibit 1)

19. Mr. Morris felt that the addition of another household goods mover in Lancaster County was not necessary to meet the needs of the public and would only dilute the available revenues. (R.74-75)

20. Stephen P. Treier, President of Jack Treier, Inc., testified that his company is a Lancaster based company with authority to transport household goods from all points in Lancaster County to all points in Pennsylvania, operating twenty-five vehicles. It also provides interstate, international, and commercial service. Forty persons are employed fulltime. (R.80-82)

21. Fritz Worldwide was not a major competitor in Lancaster County. (R.83)

22. Mr. Treier testified that his company has a three fold mission; in order of priority, to serve the public, to serve its employees, and lastly to serve its shareholders. Approval of the Application would not help Treier accomplish its mission as the needs of the public are being met by the existing available carriers. (R.84)

23. Applicant's witness Long has used Treier's service and found it excellent. (R.27,84)

24. The real estate company of Applicant's witness Martine has successfully referred customers to Treier (as recently as the day before the hearing in this case) and in fact Treier had done a household move for one of Martine's associates in the company. (R.84-85)

25. The authority of Worldwide (which had done business under the names Fritz Moving and Lancaster Moving & Storage) was transferred to George B. Holman & Co., Inc. d/b/a Holman Moving Systems, Exton, Pennsylvania, by order of the Commission adopted February 9, 2006 at A.00122171. (Protestants' Exhibit 5)

26. The assessment report for Worldwide/Fritz for calendar year 2003 shows intrastate operating revenues of \$2,775,181.00. The report does not show how much of these revenues derived from operations in Lancaster County as opposed to operations in Berks County. (Applicant's Exhibit 3)

27. Worldwide/Fritz held authority from all points in Berks County to all points in Pennsylvania. Its Lancaster County origin territory was limited to points within 18 miles of the City of Lancaster. (Protestants' Exhibit 5)

28. The 2003 assessment report was the only financial information presented concerning Worldwide/Fritz operations.

29. In addition to Shelly and Treier, both Mertz's and Charles E. Groff and Sons, Inc. hold authority to provide household goods transportation services from points in Lancaster County to other points in Pennsylvania. (Protestants' Exhibits 3 and 4)

IV. ARGUMENT

A. **PRELIMINARY STATEMENT.**

The household goods transportation industry is a regulated industry. Although some of Applicant's witnesses had an understandable feeling that in a free enterprise economy all consumers should be entitled to unlimited choice, and all applicants should be permitted to pursue the American dream, such feelings do not change the law of this Commonwealth.

Certain portions of the transportation industry are essentially deregulated. The general commodities trucking companies and the charter bus companies are examples. Buy a vehicle, file an application, file evidence of insurance, and you are in business.

Unfortunately for this Applicant, however, neither the legislature, the courts, nor this Commission have determined to deregulate the household goods transportation industry in Pennsylvania. Philosophically, we may agree or disagree with the wisdom of their decision.

But until the law changes, this Applicant, Davcon Packing Service, Ltd., is subject to the statutory and decisional standards that apply in this Commonwealth to that portion of the transportation industry that remains subject to regulation. Neither the wish for free choice, the American dream, neighbors and in-laws wishing to be helpful, nor a mother's love for her son, will carry the legal burden of proof.

B. APPLICANT HAS FAILED TO ESTABLISH ITS FITNESS TO RECEIVE OPERATING AUTHORITY FROM THIS COMMISSION.

Under the Commission's Transportation Regulatory Policy, specifically, 52 Pa. Code §41.14(b), an applicant must establish 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.

Applicant is not unfamiliar with the Public Utility Commission and presently holds general commodity property authority from the Commission, pursuant to which, as Mr. Burkholder stated, it provides transportation for office moves and other types of property transportation that are not embraced within the classification of household goods in use. Applicant had also filed a previous application to transport household goods, which was subsequently withdrawn and closed nearly three years ago. Nevertheless, only last year, Applicant was fined by this Commission for the unlawful transportation of household goods without holding requisite authority from the Commission.

Under these facts and circumstances, it would appear that the Applicant lacks a propensity to operate safely and legally and that the Application should therefore be denied.

C. APPLICANT HAS FAILED TO ESTABLISH A NEED FOR THE PROPOSED SERVICE.

Apart from the issue of fitness, Applicant has clearly failed to present evidence having rational probative force of any need or demand for the service in this territory by a representative cross-section of the public requiring such service. Not one of the supporting witnesses expressed any tangible, present personal need for household goods transportation between any points in the application territory.

Section 1103(a) of the Public Utility Code, 66 Pa. C.S. §1103(a), expressly directs the Commission to grant a certificate of public convenience only if the Commission has determined that the issuance of such certificate is “necessary or proper for the service, accommodation, convenience or safety of the public”.

The Commission’s Transportation Regulatory Policy provides, at 52 Pa. Code §41.14(a), that an applicant seeking motor common carrier authority has the burden of demonstrating that approval of the application will serve a useful public purpose, responsive to a public demand or need.

This policy has been interpreted to require a certain level or standard of evidence, most significantly in Application of Blue Bird Coach Lines, Inc., 72 Pa. P.U.C. 262 (1990).

The Commission held in Blue Bird that the testimony of supporting witnesses must be probative and relevant to the application proceeding. Evidence which is not relevant to the scope of the application will be disregarded. Further, Blue Bird stands for the proposition that witnesses supporting an application must be legally competent and credible. They must testify with respect to tangible, concrete transportation needs between specific points of origin and destination. As the Commission stated:

[W]ithout proof in the record of a public demand/need for an applicant's proposed service between specified, intrastate points, an application for motor common carrier authority cannot be validly approved pursuant to subsection 1103(a) of the Public Utility Code, and hence cannot be validly approved pursuant to our policy statement at 52 Pa. Code §41.14. 72 Pa. P.U.C. 273.

Further, the concept of need requires more than mere desire or preference for one carrier over another. Re: Donald B. and Effie G. Fisher, 51 Pa. P.U.C. 735 (1978) It requires a preponderance of evidence that the public needs the proposed service, which in turn requires consideration of all of the evidence of record, including evidence with respect to the transportation services which are presently available. The Blue Bird standard is clear and specific:

The supporting witnesses must articulate a demand/need for the type of service embodied in the application. (Citations omitted) Moreover, the supporting witnesses must identify Pennsylvania origin and destination points between which they require transportation and these points must correspond with the scope of the operating territory specified in the application. (Citations omitted) (Emphasis added)

72 Pa. P.U.C. 274

The testimony presented by Applicant's supporting witnesses falls far short of the legal standard.

Basically, the evidence was presented by friends, neighbors, and relatives of Mr. Burkholder (Applicant's President) and Applicant's banker. Also presented was testimony in behalf of Wheaton Worldwide moving, which would obviously support the interest of one of its agents.

An objective review of the record leads to the conclusion that Applicant has presented absolutely no tangible evidence having rational probative force that any need exists for the approval of this Application.

D. THE FRITZ FACTOR.

Applicant presented evidence that a competitor known as Worldwide Transportation Experts, Inc. t/d/b/a Fritz Moving Company, Inc. had closed its doors and ceased operations in the application territory. As a consequence, Applicant would have us infer some sort of a vacuum has been created which requires the injection of another carrier into the Lancaster County market.

This argument does not hold water.

In the first place, Mr. Burkholder was not aware of the disposition of the Fritz operating rights, although the Commission's records show that the rights were transferred to George B. Holman and Co. t/d/b/a Holman Moving Systems, a New Jersey corporation, by order adopted at its public meeting on February 9, 2006.

Further, both Mr. Morris and Mr. Treier testified for their respective Protestants that Fritz was not in fact a major competitor in Lancaster County and toward the end of its operations was domiciled in Berks County. It may also be noted that Fritz's Berks County authority embraced all of that county while its Lancaster County authority was limited to points within 18 miles of the City of Lancaster.

Applicant presented as part of its Exhibit 3 an assessment report for Fritz showing its revenues during the year 2003. The assessment report does not disclose how much of Fritz's revenues were generated in Lancaster County; thus there is no inference to be drawn concerning

the effect of its service, or lack thereof, in Lancaster County. Holman Moving Systems may be a greater or lesser competitor in Lancaster County than Fritz, but whatever the case, both Mr. Morris and Mr. Treier testified clearly and unequivocally that the existing carriers are able to handle the available Lancaster County household goods traffic without difficulty.

The Fritz factor is really a non-factor.

V. PROPOSED CONCLUSIONS OF LAW

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

2. There are three broad issues attendant upon every motor vehicle application proceeding: (1) whether the applicant is fit; (2) whether there is a public need for the applicant's proposed service; and (3) whether the new competition with existing common carriers which would be created by the grant of the application would be injurious to the public.

3. Applicant in the present proceeding has failed to carry its burden of establishing its fitness to receive a certificate.

4. Applicant has failed to carry its burden of demonstrating that approval of the Application will serve a useful public purpose, responsive to a public demand or need.

5. The supporting witnesses who testified for the Applicant did not present substantial evidence having rational probative force of any need or demand for the service proposed by the Applicant.

6. In the absence of proof of need by the Applicant, the burden of proof does not shift to Protestants to establish that approval of the Application would endanger their operations

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

VI. PROPOSED ORDER

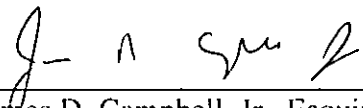
Upon consideration of the foregoing, we now issue this Order:

That the Application of Davcon Packing Services, Ltd., t/d/b/a Davcon Relocation Services, is denied for lack of fitness and necessity.

VII. CONCLUSION

Applicant has failed to establish that it is a fit and proper person to receive authority from this Commission and has similarly failed to establish need for the proposed service as required under the Commission's Transportation Regulatory Policy, and the cases which have interpreted that policy, specifically Blue Bird. The Application, therefore, should be denied.

Respectfully submitted,

By: 
James D. Campbell, Jr., Esquire
Sup. Ct. I.D. No. 07051
3631 North Front Street
Harrisburg, PA 17110-1533
(717) 232-7661 - Phone
(717) 232 - 2766 - Fax

Attorney for Charles E. Groff & Sons, Inc., Jack Treier, Inc.; Philip J. and John M. Mertz t/d/b/a Mertz's, and Shelly Moving & Storage, Inc.

Date: May 4, 2006

CERTIFICATE OF SERVICE

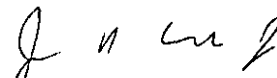
AND NOW, I hereby certify that I have this 4th day of May, 2006, served copies of the foregoing document upon the parties of record in this proceeding, as well as the Presiding Officer, as follows:

Honorable Kandace F. Melillo
Administrative Law Judge
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

J. Bruce Walter, Esquire
RHOADS & SINON, LLP
P.O. Box 1146
One South Market Square
Harrisburg, PA 17108-1146

2006 MAY -4 PM 3:15
PA PUC
SECRETARY'S BUREAU

Respectfully submitted,

By: 
James D. Campbell, Jr., Esquire
Sup. Ct. I.D. No. 07051
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(717) 232-7661 - Phone
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Attorney for Charles E. Groff & Sons, Inc., Jack Treier, Inc.; Philip J. and John M. Mertz t/d/b/a Mertz's, and Shelly Moving & Storage, Inc.

RHOADS & SINON LLP



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jwalter@rhoads-sinon.com

FILE NO: 9734/01

PLEASE DOCKET

July 17, 2006

Re: Davcon Packaging Services, Ltd., t/d/b/a Davcon Relocation Services,
A.00117540, F.3

Administrative Law Judge Kandace Melillo
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Dear Judge Melillo:

You have requested a copy of the Commonwealth Court Opinion in GG&C Bus Company, Inc., et alia, cited at page 11 of the Brief filed on behalf of Davcon Packaging Service. The citation for GG&C Bus Company, Inc. indicates the opinion is not reported and, although I did have a copy, I am having difficulty finding one. The case, as quoted, merely recites the general proposition found in Purolator Courier, Morgan Driveaway and Blue Bird Coach Lines, and the citation is primarily to show that the O.D. Anderson case was affirmed on appeal to the Commonwealth Court.

Accordingly, I would propose that the quotation in the middle of page 11 simply be removed or be deemed removed from the Brief with the shepherdized information indicating the Commonwealth Court's affirmation of the O.D. Anderson decision remaining.

My apologies for the inconvenience.

Very truly yours,
RHOADS & SINON LLP

By:


J. Bruce Walter

cc: James D. Campbell, Jr., Esquire

RECEIVED

JUL 19 2006

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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OFFICE OF CALL J.
06 JUL 18 AM 9:39
PA PUC

Act 294

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2006 AUG 24 PM 3:56

SECRETARY'S OFFICE

Case Identification:

A-00117540F0003; Application of Davcon Packing Services, Ltd., t/d/b/a Davcon Relocation Services, a corporation of the Commonwealth of PA

Initial Decision By:

ALJ Kandace F. Melillo

Deadline for Return to OSA:

August 23, 2006

This decision has not been reviewed by OSA.

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OFFICE OF SPECIAL ASSISTANTS

* * * * *

I want full Commission review of this decision.

Commissioner

Date

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

Kandace F. Melillo

AUG 19 2006

Commissioner

Date

DOCUMENT FOLDER

DOCKETED
AUG 25 2006

Act 294

Case Identification:

A-00117540F0003; Application of Davcon
Packing Services, Ltd., t/d/b/a Davcon
Relocation Services, a corporation of the
Commonwealth of PA

Initial Decision By:

ALJ Kandace F. Melillo

Deadline for Return to OSA:

August 23, 2006

This decision has not been reviewed by OSA.

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I do not want full Commission review of this decision.

James H Cawley

Commissioner

8/22/06

Date

Sharon

Act 294

Case Identification:

A-00117540F0003; Application of Davcon Packing Services, Ltd., t/d/b/a Davcon Relocation Services, a corporation of the Commonwealth of PA

Initial Decision By:

ALJ Kandace F. Melillo

Deadline for Return to OSA:

August 23, 2006

This decision has not been reviewed by OSA.

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Commissioner

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Bill Shero /pw

Commissioner

8/16/06

Date

Act 294

Case Identification: A-00117540F0003; Application of Davcon Packing Services, Ltd., t/d/b/a Davcon Relocation Services, a corporation of the Commonwealth of PA

Initial Decision By: ALJ Kandace F. Melillo

Deadline for Return to OSA: August 23, 2006

This decision has not been reviewed by OSA.

* * * * *

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Commissioner

Date

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Kim Fitzgerald

Commissioner

8-23-06

Date

Act 294

Case Identification:

A-00117540F0003; Application of Davcon
Packing Services, Ltd., t/d/b/a Davcon
Relocation Services, a corporation of the
Commonwealth of PA

Initial Decision By:

ALJ Kandace F. Melillo

Deadline for Return to OSA:

August 23, 2006

This decision has not been reviewed by OSA.

* * * * *

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I want full Commission review of this decision.

Commissioner

Date

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Terrance J. Fitzpatrick

Commissioner

8-18-06

Date

DATE: September 5, 2006

SUBJECT: A-00117540F0003

TO: Office of Administrative Law Judge
Susan Hoffner

DOCKETED
SEP 12 2006

FROM: James J. McNulty
Secretary
nvl

**DOCUMENT
FOLDER**

APPLICATION OF DAVCON PACKING SERVICES, LTD, T/D/B/A
DAVCON RELOCATION SERVICES, A CORPORATION OF THE COMMONWEALTH OF PENNSYLVANIA

The Initial Decision has been served upon all parties of interest.

Neither exceptions nor requests for review from the Commissioners have been received by the Commission. This matter is referred to your office for whatever action you deem necessary.

cc: Office of Special Assistants

P.S. Please note that exceptions or reply exceptions may come in timely with certificates of mailings. A second memo will not be released for these exceptions.

Docket # A-00117540 F0003
Davcon Packing Services, LTD
D/B/A Davcon Relocation Services

January 24, 2007

Commonwealth OF Pennsylvania
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

ORIGINAL


Dear Mr. James McNulty;

Today I talked to Mr. Dave Thompson – Compliance Specialist/Bureau of Transportation and Safety for the PUC. He asked to me to request this extension because my insurance company must provide a "FORM E" document for the "Carrier Authority" we recently were granted.

My insurance broker seems to think that the current "FORM E" is good enough and is checking with the insurance company to determine when another "FORM E" can be submitted per Mr. Thompson's request. Until this is resolved I'm asking you for approval to have a 30 day extension to get required document to you per the request above.

Thank you for your help in this matter. If anyone from your office has any questions please do not hesitate to call me. My cell number is (717) 629-3869.

Sincerely,



David P. Burkholder
President

CC:
Diane Long – The Selzer Company
David Thompson – Compliance PUC

RECEIVED
2007 JAN 26 AM 9:23
SECRETARY'S OFFICE

DOCUMENT
FOLDER

DOCKETED
JAN 30 2007

Wheaton
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15

DATE: January 30, 2007

SUBJECT: A-00117540F0003

TO: Bureau of Transportation and Safety

FROM: James J. McNulty, Secretary *KB*

Davcon Packing Services, LTD d/b/a Davcon Relocation Services

Attached is copy of Davcon Packing Services, LTD, d/b/a Davcon Relocation Services' Letter-Petition for Extension of Time to comply with insurance requirements filed in connection with the above docketed proceeding.

This matter is assigned to your Bureau for appropriate action.

Attachment

ksb

DOCKETED
JAN 30 2007

DOCUMENT
FOLDER