

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER

**LOUISIANA PUBLIC SERVICE COMMISSION
EX PARTE**

Docket Number R-31479 - Louisiana Public Service Commission, ex parte. In re: Amendment to Rule 34 and Rule 43 of the Rules of Practice and Procedure of the Louisiana Public Service Commission, to provide that under Rule 34, in an uncontested application for waste authority, the burden of proof on the issue of public convenience and necessity can be met through the testimony of the applicant and need not be supported by shipper affidavits and under Rule 43, a Commission Order granting waste authority is effective immediately upon issuance and a Petition for Rehearing is not allowed when the Order was issued upon a unanimous vote of the Commission.

(Decided at the September 15, 2010 Business and Executive Meeting)

Purpose

This General Order was adopted by the Louisiana Public Service Commission (the “Commission” or “LPSC”) to amend Rule 34 of the Rules of Practice and Procedure of the Louisiana Public Service Commission to allow the burden of proof on the issue of public convenience and necessity in an uncontested application for waste authority, to be met through the testimony of the applicant, if he/she/it is knowledgeable about the transportation services available, the needs of the shipping public and the capability and fitness of the applicant and that the application need not be supported by shipper affidavits and to amend Rule 43 the Rules of Practice and Procedure of the Louisiana Public Service Commission to provide that a Commission Order granting waste authority is effective immediately upon issuance and that a Petition for Rehearing is not allowed when an Order granting waste authority is issued pursuant to a unanimous of the Commission.

This Rulemaking was established pursuant to the following Constitutional and authority:

Article IV, Section 21 (B) of the Louisiana State Constitution provides that:

The [public service] commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.

Background

Staff was directed to open a rulemaking to examine and recommend possible amendments to Rule 34 and Rule 43 of the Rules of Practice and Procedure of the Louisiana Public Service Commission. Staff was directed to draft amending language to Rule 34, which would allow the burden of proof on the issue of public convenience and necessity in an uncontested application for waste authority, to be met through the testimony of the applicant and to provide that the application need not be supported by shipper affidavits.

Staff was further directed to draft amending language to Rule 43 which would provide that a Commission Order granting waste authority is effective immediately upon issuance and that a Petition for Rehearing is not allowed when an Order granting waste authority is issued pursuant to a unanimous vote of the Commission.

The following amended rules were published in Bulletin 964, August 6, 2010. Staff requested specific comments on the proposed amendments no later than September 1, 2010. The proposed changes are in bold.

RULE 34: EVIDENCE IN UNCONTESTED PROCEEDINGS.

In any uncontested proceeding, the Commissioner shall receive, without regard to the legal rules of admissibility, any evidence of a form and character which would ordinarily be relied upon by a prudent person in an ordinary business transaction, including, without limitation, affidavits, documents and other forms of hearsay testimony deemed by him to be reliable.

In an uncontested application for waste authority, the burden of proof on the issue of public convenience and necessity may be met through the testimony of the applicant and need not be supported by shipper affidavits.

RULE 43: REHEARING.

Where the Commission concludes that substantial errors of procedure or the exclusion of evidence have so affected the record as to render it impracticable to determine the case justly and fairly upon the record, it may order a rehearing on its own motion; it may also order a rehearing on motion of any party provided said motion is received within ten (10) days of the mailing of the order, rule, or other action complained of. The granting of a motion or setting of a matter for rehearing shall suspend the operation of the rule or order in question unless otherwise provided by the Commission. Otherwise, the rule or order complained of shall be suspended with the filing of an appropriate motion to rehear until the motion to rehear is denied; provided that, any order or rule of the Commission which specifically sets a date for the effectiveness of such shall not be suspended by the filing of a motion to rehear. Where no motion to rehear is timely filed, orders shall become effective ten (10) days after issuance.

A Commission Order granting waste authority is effective immediately upon issuance and a Petition for Rehearing is not allowed when the Order was issued upon a unanimous vote of the Commission.

On September 1, 2010, comments were received from the Vacuum Truck Carriers of Louisiana, Inc., Vanguard Vacuum Trucks, Inc., Stranco, Inc., Custom Ecology, Inc. and Cactus Express, L.P. However, those comments only addressed the proposed changes to Rule 34, the burden of proof in uncontested waste applications. No comments were received with regards to the proposed changes to Rule 43, whereby an Order granting waste authority is effective immediately and no right to rehearing lies where waste authority is granted pursuant to a unanimous vote of the Commission.

In an uncontested application for waste authority, where no one intervened or when all Protestants have withdrawn their opposition after reaching restrictive amendments, the applicant must still prove public convenience and necessity in a common carrier application or that the grant of authority is in the public interest in a contract carrier application. Presently, under Rule 34, in an uncontested matter, the applicant can provide corroborating evidence on the issue of need through the introduction of affidavits. The

applicant need not bring live witnesses to corroborate or support his testimony on the need for his services. The proposed amendment would relieve the applicant of the need to corroborate his testimony in an uncontested matter. The change states that **“in an uncontested application for waste authority, the burden of proof on the issue of public convenience and necessity may be met through the testimony of the applicant and need not be supported by shipper affidavits.”**

In the filed comments, it was noted that in *Vacuum Truck Carriers of Louisiana, Inc. v. Louisiana Public Service Commission*, 12 So.2d. 932 (La. 5/5/09), the Louisiana Supreme Court affirmed the Commission’s grant of waste authority in a *contested* case, where the testimony of only one public witness was offered. The comments point out that the burden in an uncontested case should be less and should be met through the testimony of the applicant, if he is knowledgeable about the totality of the transportation services available, the needs of the shipping public and the capability and fitness of the applicant.

Presently, under Rule 43, an Order of the Commission is suspended if an application for rehearing is filed within 10 days of mailing of the Order and if the Order does not provide a specific date upon which it becomes effective or does not provide that the Order is effective immediately. Therefore, in an application for waste authority, the Order is suspended if an application for rehearing is filed and remains suspended until acted upon by the Commission. While the Order is suspended, Staff cannot issue a Certificate to the carrier and the carrier is prohibited from operating. The suspension of the Order usually results in a large monetary loss to the applicant and can also result in the loss of future customers. The suspension of the Order is also contrary to the effect of the filing of an appeal to the district court, in that Commission orders are not stayed on appeal. Therefore, a successful applicant is prohibited from operating while the Commission is considering an application for rehearing, but can operate while the case is on appeal to the district court. That approach is inconsistent.

The proposed amendment to Rule 43 adds the following language to the rule:

A Commission Order granting waste authority is effective immediately upon issuance and a Petition for Rehearing is not allowed when the Order was issued upon a unanimous vote of the Commission.

RECOMMENDATION:

Staff recommended that Rule 34 be amended and that the following language be added to the rule:

In an uncontested application for waste authority, the burden of proof on the issue of public convenience and necessity may be met through the testimony of the applicant and need not be supported by shipper affidavits.

Staff also recommended that Rule 43 be amended and that the following language be added to the rule:

A Commission Order granting waste authority is effective immediately upon issuance and a Petition for Rehearing is not allowed when the Order was issued upon a unanimous vote of the Commission.

COMMISSION ACTION

On motion of Commissioner Field, seconded by Commissioner Holloway, and unanimously adopted, the Commission voted to accept the Staff Recommendation, with one modification by Commissioner Field, and amend Rule 34 to add the following language: In an uncontested application for waste authority, the burden of proof on the issue of public convenience and necessity may be met through the testimony of the applicant if he/she/it is knowledgeable about the transportation services available, the needs of the shipping public and the capability and fitness of the applicant and need not be supported by shipper affidavits. It was further ordered that Rule 43 be amended to add the following language: A Commission Order granting waste authority is effective immediately upon issuance and a Petition for Rehearing is not allowed when the Order was issued upon a unanimous vote of the Commission.

IT IS THEREFORE ORDERED THAT

Rule 34 of the Rules of Practice and Procedure of the Louisiana Public Service Commission be and is hereby amended to read as follows:

RULE 34: EVIDENCE IN UNCONTESTED PROCEEDINGS.

In any uncontested proceeding, the Commissioner shall receive, without regard to the legal rules of admissibility, any evidence of a form and character which would ordinarily be relied upon by a prudent person in an ordinary business transaction, including, without limitation, affidavits, documents and other forms of hearsay testimony deemed by him to be reliable.

In an uncontested application for waste authority, the burden of proof on the issue of public convenience and necessity may be met through the testimony of the applicant, if he/she/it is knowledgeable about the transportation services available, the needs of the shipping public and the capability and fitness of the applicant and need not be supported by shipper affidavits.

IT IS FURTHER ORDERED THAT

Rule 43 of the Rules of Practice and Procedure of the Louisiana Public Service Commission be and is hereby amended to read as follows:

RULE 43: REHEARING.

Where the Commission concludes that substantial errors of procedure or the exclusion of evidence have so affected the record as to render it impracticable to determine the case justly and fairly upon the record, it may order a rehearing on its own motion; it may also order a rehearing on motion of any party provided said motion is received within ten (10) days of the mailing of the order, rule, or other action complained of. The granting of a motion or setting of a matter for rehearing shall suspend the operation of the rule or order in question unless otherwise provided by the Commission. Otherwise, the rule or order complained of shall be suspended with the filing of an appropriate motion to rehear until the motion to rehear is denied; provided that, any order or rule of the Commission which specifically sets a date for the effectiveness of such shall not be suspended by the filing of a motion to rehear. Where no motion to rehear is timely filed, orders shall become effective ten (10) days after issuance.

A Commission Order granting waste authority is effective immediately upon issuance and a Petition for Rehearing is not allowed when the Order was issued upon a unanimous vote of the Commission.

**BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
October 8, 2010**

**/S/ LAMBERT C. BOISSIERE, III
DISTRICT III
CHAIRMAN LAMBERT C. BOISSIERE, III**

**/S/ JAMES M. FIELD
DISTRICT II
VICE CHAIRMAN JAMES M. FIELD**

**/S/ FOSTER L. CAMPBELL
DISTRICT V
COMMISSIONER FOSTER L. CAMPBELL**

**/S/ ERIC F. SKRMETTA
DISTRICT I
COMMISSIONER ERIC F. SKRMETTA**

**EVE KAHAO GONZALEZ
SECRETARY**

**/S/ CLYDE C. HOLLOWAY
DISTRICT IV
COMMISSIONER CLYDE C. HOLLOWAY**