

**LOUISIANA PUBLIC SERVICE COMMISSION
GENERAL ORDER**

**LOUISIANA PUBLIC SERVICE COMMISSION
EX PARTE.**

DOCKET R-30297 - *Louisiana Public Service Commission, ex parte.* In re: Discussion and possible vote on the exemption of motor carriers of waste from having to prove public convenience and necessity when applying for a common carrier certificate or contract carrier permit, but maintaining the requirement that said carriers register with the Commission and satisfy all rules, regulations and requirements of the Commission, including proof of fitness to operate. In addition, discussion on the burden of proof required in proving public convenience and necessity and Rule 33 of the Rules of Practice and Procedure of the Louisiana Public Service Commission, Special Rules Applicable to Contested Operating Authority Cases and possible vote on changes in the present burden of proof and Rule 33 and any other rule applicable to the trial of public convenience and necessity cases.

(Decided at the June 28, 2012 Business and Executive Meeting)

PURPOSE

This General Order was adopted by the Louisiana Public Service Commission (the "Commission" or "LPSC") to repeal and reenact Rule 33 of the Rules of Practice and Procedure of the Louisiana Public Service Commission, whereby the burden of proof was changed for all waste carriers having to prove Public Convenience and Necessity prior to obtaining operating authority and certain procedural changes were also adopted.

BACKGROUND

At the March 21, 2012 Business and Executive Session, the Commission instructed Staff to re-open this Rulemaking to again examine exempting waste carriers from having to prove Public Convenience and Necessity ("PC&N") to obtain operating authority. Staff was also instructed to review the burden of proof and the procedural provisions of Commission Rule 33 applicable to PC&N hearings and to determine if the application process could be made less onerous. The Rulemaking was again published in the Commission Bulletin dated March 30, 2012 and parties were given 25 days to intervene.

The issues presented in this Rulemaking were first considered by Staff in 2007 and 2008, when the Commission issued directives similar to the one issued on March 21, 2012. Numerous parties intervened at that time and a Technical Conference was held on October 16, 2007 and on September 22, 2008. At the October 15, 2008 Business and Executive Session Staff

recommended that waste carriers be exempted from proving PC&N and instead be ordered to register and prove their fitness to operate in a public hearing. Commissioner Manuel moved to accept Staff's recommendation, but the motion failed for lack of a second.

In the Commission Bulletin dated April 13, 2012, Staff published two different options for consideration by the Commission. The public was again given until April 25, 2012, to intervene and parties were given until that date to file specific comments regarding the options being presented. Simply, Option One exempts waste carriers from proving PC&N, but requires registration with the Commission, proof of insurance and a fitness hearing. Option Two retains PC&N, but provides that the requirement is satisfied by proving a "public need." Under Option Two, the failure to prove "service failures" does not defeat the application. In addition, the Commission recognizes that PC&N is "dynamic and flexible" and therefore, repudiates the test established in Pan-American Bus Lines Operations, 1 M.C.C. 190 (1936) finding that it is no longer applicable to the trucking industry and shipper needs as it exists today. Option Two also levels the playing field in the discovery process in hearings by applying the Louisiana Code of Civil Procedure. It also makes it easier to obtain testimony by authorizing trial depositions if they are properly noticed and all parties are given the opportunity to appear and cross-examine the witness. Both options are applicable to pending applications that have not yet gone to hearing on the merits.

The options were as follows:

OPTION 1:

Rule 33 of the Rules of Practice and Procedure of the Louisiana Public Service Commission is hereby repealed and reenacted as follows:

- A. Motor carriers of waste as defined in LA R.S.45:162 shall not be required to prove public convenience and necessity when applying for a Common Carrier Certificate or Contract Carrier Permit.
- B. All motor carriers of waste shall be required to register with the Louisiana Public Service Commission, apply for and secure a Common Carrier Certificate or Contract Carrier Permit and shall satisfy all the insurance requirements of the Commission, prior to engaging in any activities related to the transporting of waste for disposal.
- C. A Common Carrier Certificate or Contract Carrier Permit shall be issued to a motor carrier of waste only after a written application has been filed, a public hearing, due notice given to applicant and the public, and a finding by the commission that the motor carrier of waste is fit and qualified to operate, proof having been made that the carrier has fully satisfied the following requirements:
 - a) All insurance requirements of the commission;

- b) The applicant has the financial ability to operate all transportation functions authorized by the applied for authority;
 - c) Applicant has obtained all of the necessary permits required by any and all other state and federal agencies for the transportation and disposal of waste;
 - d) Applicant has adequate equipment and man power for hauling and disposal of waste.
 - e) Applicant and its employees have been adequately trained in the safe hauling and disposal of waste.
- D. Any carrier domiciled outside of Louisiana and providing the intrastate transportation of waste for disposal in Louisiana shall register the company's name, address and telephone number with the Louisiana secretary of state and the Louisiana Public Service Commission. Service of process with respect to all civil, criminal, or administrative proceedings brought before any court or administrative agency located in the state may be served on the registered agent as filed with the Louisiana secretary of state by any means provided by the applicable rules or procedure for that court or agency providing service of process.

The provisions of this rule are applicable to all applications for Common Carrier Certificate and Contract Carrier Permits of waste and all applications for expansion of existing waste authority, *including those applications which are presently pending before the Commission but have not yet gone to hearing on the merits.*

OPTION 2:

Rule 33 of the Rules of Practice and Procedure of the Louisiana Public Service Commission is hereby repealed and reenacted as follows:

A. Burden of Proof

An applicant applying for a Common Carrier Certificate or Contract Carrier Permit of waste or seeking an expansion of existing waste authority shall prove public convenience and necessity in said proceeding by proving:

- 1) A public need for the applicant's service and that the grant of authority is in the public interest;
- 2) That the grant of authority will not adversely affect existing carriers. An adverse effect must be substantial and present a detrimental impact upon the capital investment of existing LPSC certificated or permitted carriers. The mere addition of competition is not sufficient to defeat an application for authority;
- 3) The failure to present antidotal evidence of service failures is not grounds for the *denial of the application.*

B. Repudiation of the Pan American Test and Its Progeny

The Commission has found that public convenience and necessity is "dynamic and flexible" and that the test established in *Pan-American Bus Lines Operations*, 1 M.C.C. 190 (1936) is no longer applicable to the trucking industry as it exists today and to the needs of the shippers for the transportation and disposal of waste in Louisiana. Therefore, the test for evaluating and proving public convenience and necessity found in *Pan American* and subsequently followed by the Louisiana Supreme Court in *Mallack, Inc. v. LPSC*, 622 So.2d 640 (La. 1993) and its progeny is hereby rejected.

C. Discovery

Any party may conduct discovery regarding any issue that is relevant to the subject matter of the docketed proceeding, as long as the requested information is not privileged. The scope of discovery includes, but is not limited to, all information related to any books, documents, or other tangible items, and the identity and location of any person having knowledge of any discoverable information. A party shall not object to

any discovery request if the information sought is reasonably calculated to lead to the discovery of evidence that would be admissible at a hearing.

D. Trial Depositions

Any deposition of any witness, including a deposition of a party, which was duly noticed and all parties were provided an opportunity to cross examine the witness, shall be *admitted into evidence in lieu of live testimony at a hearing, if introduced by any party.*

E. Fitness

In addition to proving public convenience and necessity the applicant shall provide proof of its fitness to operate by satisfying the following requirements:

- 1) All insurance requirements of the commission;
- 2) The applicant has the financial ability to operate all transportation functions authorized by the applied for authority;
- 3) Applicant has obtained all of the necessary permits required by any and all other state and federal agencies for the transportation and disposal of waste;
- 4) Applicant has adequate equipment and man power for hauling and disposal of waste.
- 5) Applicant and its employees have been adequately trained in the safe hauling and disposal of waste.

The provisions of this rule are applicable to all applications for Common Carrier Certificate and *Contract Carrier Permits of waste and all applications for expansion of existing waste authority,* including those applications which are presently pending before the Commission but have not yet gone to hearing on the merits.

Interventions and comments supporting Option 2 were filed by Kyle Marionneaux and Kara Kantrow on behalf of the following:

1. Renae G. Stanford d/b/a Stanford Truck Line
2. Sprint Waste Services-Louisiana, LLC
3. SKY Vacuum Services, LLC
4. Rene's Trucking, Inc.
5. Pinnergy, Ltd.
6. G.L. Simmons, Inc.
7. Pelichem Industrial Cleaning Services, LLC
8. Tanmar Rentals, LLC and Tanner Serices, LLC
9. *Environmental Safety & Health Services, Inc.*
10. Southern Specialties Transportation, LLC
11. Gator Environmental & Rentals, Inc.
12. S&A Trucking, LLC
13. J&A Transport, LLC
14. Joe's Environmental Contractors, Inc.
15. Southern Solid Waste, LLC

These comments basically took the position that Option One was in direct conflict with La. R.S. 45:164 and the exempting of waste carriers from proving PC&N by Commission Order would result in litigation, while Option Two provides a balance between the existing rule and the reality of the current trucking industry.

Bigfoot Energy Services, LLC filed an intervention and comments supporting Option One, but argued that PC&N should be retained but simply define it as being satisfied by

proving fitness. Interventions without comment were filed by Acc Services and Transportation, LLC and First Response, Inc.

Janet Boles filed interventions and comments on behalf of the Vacuum Trucks Carriers of Louisiana, Inc., Vanguard Vacuum Trucks, LLC, Stranco, Inc., Steve Kent Trucking, Inc. and Stafford Transport of Louisiana, Inc. d/b/a C&E. This group of intervenors argued that the Commission can select neither Option One, nor Option Two. They took the position that only the legislature can exempt waste carriers from proving PC&N and that only the Louisiana Supreme Court can alter the burden of proof.

A Technical Conference was held on May 3, 2012 which was attended by Commissioner Holloway, Staff, Adams and Reese, Janet Boles, Emory Belton, Randy Young, Gayle Kellner, Jim Ellis, Kyle Marionneaux and Kara Kantrow. Kyle Marionneaux stated his support for Option Two. Jim Ellis stated his support for Option One. Janet Boles again took the position that the Commission can choose neither Option One, nor Option Two, in that it is powerless on these issues and must wait upon the legislature and courts to address the issues under consideration by this Rulemaking.

PERTINENT LEGAL PROVISIONS:

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.

La. R.S. 45:164 provides, in pertinent part:

[N]o motor carrier shall operate as a common carrier without first having obtained from the commission a certificate of public convenience and necessity, which shall be issued only after a written application made and filed, a public hearing, due notice given to applicant and all competing common carriers, and a finding by the commission that public convenience and necessity require the issuance of a certificate. No new or additional certificate shall be granted over a route where there is an existing certificate, unless it be clearly shown that the public convenience and necessity would be materially promoted thereby.

DISCUSSION:

The issue in this rulemaking is whether the Commission should adopt Option One, whereby waste carriers are exempted from proving PC&N, although La. R.S. 45:164 requires said showing prior to the issuance of a common carrier certificate or contract carrier certificate authorizing the transportation of waste or whether the Commission should adopt Option Two which lowers the burden of proof and eases certain procedural rules in PC&N hearing. At the outset, it must be noted that as a result of federal deregulation and preemption, the Commission has been left with only five classes of carriers which it regulates, namely, carriers of passengers, household goods carriers, waste carriers, salt water carriers and towing and recovery professionals engaged in nonconsensual towing. Through a series of Louisiana legislative provisions, only carriers of waste have to prove PC&N, while ALL other carriers have been exempted. This rulemaking examines whether it is in the public interest to continue requiring waste carriers to prove PC&N and whether the Commission, as the body MANDATED by the Louisiana Constitution to REGULATE common carriers, can exempt waste carriers from making said showing, although La. R.S. 45:164 requires same and the legislature has not chosen to exempt waste carriers in the same manner as all other carriers have been exempted.

Many shippers, especially in the oil and gas industry, have expressed their concerns about a shortage of available waste carriers. This concern is especially true with the *natural gas discovery in Northwest Louisiana and the recent activity in the Tuscaloosa Shale*. As a result of the Haynesville Shale discovery, Staff received a dramatic increase in the number of applications filed from 2008 to the present and recognizes the substantial public need for such services. Beginning in 2008, witnesses began testifying that millions of barrels of waste were being transported from Louisiana to Texas, due to a shortage of LPSC waste carriers. Waste disposal in Texas has imposed a severe financial burden upon shippers and has resulted in a substantial economic loss to Louisiana.

The present system, which allows certificated carriers to increase the size of their fleet by simply engaging in leasing arrangements, whereby carriers without LPSC authority are simply leased onto certificated carriers, is also troublesome. One of the goals of regulation and

the requirement that a new entrant prove PC & N is to protect the capital investment of the carriers who are already in the market. By limiting the number of new entrants, the capital investment of existing carriers is protected. That protection should allow existing carriers to improve and expand their fleets without fear of an overcrowded market. However, the leasing arrangement simply allows certificated carriers to increase the size of their fleets, with no or little additional capital investment. The capital investment of the carriers who are prevented from entering the market is being used through leases to fill the need for additional trucks. The capital investment of those being kept out is being used to fill the need for trucks, which certificated carriers argue time and again does not exist.

For the reasons stated herein, Staff was of the belief that public policy would be best served by the adoption of Option One whereby waste carriers would be exempted from having to prove PC&N, just as all other carriers, but would be required to register and prove fitness to operate in a public hearing. Staff recommended the adoption of Option One.

At the Commission's Open Session on May 23, 2012 Commissioner Holloway made a motion to accept Staff Recommendation and adopt Option One as proposed, the motion was seconded by Commissioner Campbell, with Commissioner Field concurring and Commissioners Boissiere and Skrmetta objecting. On May 30, 2012 the General Order was issued in this matter.

A Petition for Reconsideration of General Order dated May 30, 2012 was filed June 07, 2012 by Counsel for the parties, Janet Boles, on behalf of Vacuum Truck Carriers of Louisiana and its member carriers, Vanguard Vacuum Trucks, LLC, Stafford Transport of Louisiana, Inc. dba CEI and Stranco Inc.

STAFF RECOMMENDATION

Staff recommended the adoption of Option One which provides as follows:

Rule 33 of the Rules of Practice and Procedure of the Louisiana Public Service Commission is hereby repealed and reenacted as follows:

- A. Motor carriers of waste as defined in LA R.S.45:162 shall not be required to prove public convenience and necessity when applying for a Common Carrier Certificate or Contract Carrier Permit.
- B. All motor carriers of waste shall be required to register with the Louisiana Public Service Commission, apply for and secure a Common Carrier Certificate or Contract Carrier Permit and shall satisfy all the insurance requirements of the Commission, prior to engaging in any activities related to the transporting of waste for disposal.
- C. A Common Carrier Certificate or Contract Carrier Permit shall be issued to a motor carrier of waste only after a written application has been filed, a public hearing, due notice given to applicant and the public, and a finding by the commission that the motor carrier of waste is fit and qualified to operate, proof having been made that the carrier has fully satisfied the following requirements:
 - a. All insurance requirements of the commission;
 - b. The applicant has the financial ability to operate all transportation functions authorized by the applied for authority;
 - c. Applicant has obtained all of the necessary permits required by any and all other state and federal agencies for the transportation and disposal of waste;
 - d. Applicant has adequate equipment and man power for hauling and disposal of waste.
 - e. Applicant and its employees have been adequately trained in the safe hauling and disposal of waste.
- D. Any carrier domiciled outside of Louisiana and providing the intrastate transportation of waste for disposal in Louisiana shall register the company's name, address and telephone number with the Louisiana secretary of state and the Louisiana Public Service Commission. Service of process with respect to all civil, criminal, or administrative proceedings brought before any court or administrative agency located in the state may be served on the registered agent as filed with the Louisiana secretary of state by any means provided by the applicable rules or procedure for that court or agency providing service of process.

The provisions of this rule are applicable to all applications for Common Carrier Certificate and Contract Carrier Permits of waste and all applications for expansion of existing waste authority, including those applications which are presently pending before the Commission but have not yet gone to hearing on the merits.

COMMISSION ACTION

On motion of Commissioner Skrmetta, seconded by Commissioner Field, and unanimously adopted, the Commission voted to grant the Petition for Reconsideration filed on behalf of Vacuum Truck Carriers of Louisiana and its member carriers, Vanguard Vacuum Trucks, LLC, Stafford Transport of Louisiana, Inc. dba CEI and Stranco Inc.

On motion of Commissioner Field, seconded by Commissioner Skrmetta, with Commissioner Boissiere concurring and Commissioners Campbell and Holloway objecting, the Commission voted to rescind the Commission's vote of May 23, 2012, in which the Commission adopted Option One in this matter. It was further ordered that Option Two contained in Staff Recommendation be adopted and made effective immediately, with the following modifications:

- 1) The addition of the following sentence at the beginning of Part A. "An applicant applying for a Contract Carrier permit of waste shall prove that the grant of authority is in the public interest."
- 2) The replacement of Part A, Paragraph 2 with the following language: "The mere addition of competition is not sufficient to defeat an application for authority; however, an existing LPSC certificated or permitted carrier(s) may offer evidence that the proposed grant of authority will have a substantial and detrimental impact upon its capital investment and upon such a finding by the Hearing Examiner and/or ALJ the application can be denied."

Janet Boles, Counsel for the parties who filed the Request for Reconsideration, acknowledged her acceptance of Commissioner Field's motion and committed not to appeal the final order.

IT IS THEREFORE ORDERED THAT

The Commission's vote of May 23, 2012, in which the Commission adopted Option One in this matter, is hereby rescinded.

IT IS FURTHER ORDERED THAT

Option Two, as published, be adopted with modifications as follows:

Rule 33 of the Rules of Practice and Procedure of the Louisiana Public Service Commission is hereby repealed and reenacted as follows:

A. Burden of Proof

An applicant applying for a Contract Carrier permit of waste shall prove that the grant of authority is in the public interest. An applicant applying for a Common Carrier Certificate of waste or seeking an expansion of existing waste authority shall prove public convenience and necessity in said proceeding by proving:

- 1) A public need for the applicant's service and that the grant of authority is in the public interest;

- 2) *The mere addition of competition is not sufficient to defeat an application for authority; however, an existing LPSC certificated or permitted carrier(s) may offer evidence that the proposed grant of authority will have a substantial and detrimental impact upon its capital investment and upon such a finding by the Hearing Examiner and/or A L J the application can be denied;*
- 3) *The failure to present anecdotal evidence of service failures is not grounds for the denial of the application.*

B. Repudiation of the Pan American Test and Its Progeny

The Commission has found that public convenience and necessity is “dynamic and flexible” and that the test established in *Pan-American Bus Lines Operations*, 1 M.C.C. 190 (1936) is no longer applicable to the trucking industry as it exists today and to the needs of the shippers for the transportation and disposal of waste in Louisiana. Therefore, the test for evaluating and proving public convenience and necessity found in *Pan American* and subsequently followed by the Louisiana Supreme Court in *Matlack, Inc. v. LPSC*, 622 So.2d 640 (La. 1993) and its progeny is hereby rejected.

C. Discovery

Any party may conduct discovery regarding any issue that is relevant to the subject matter of the docketed proceeding, as long as the requested information is not privileged. The scope of discovery includes, but is not limited to, all information related to any books, documents, or other tangible items, and the identity and location of any person having knowledge of any discoverable information. A party shall not object to any discovery request if the information sought is reasonably calculated to lead to the discovery of evidence that would be admissible at a hearing.

D. Trial Depositions

Any deposition of any witness, including a deposition of a party, which was duly noticed and all parties were provided an opportunity to cross examine the witness, shall be admitted into evidence in lieu of live testimony at a hearing, if introduced by any party.

E. Fitness

In addition to proving public convenience and necessity the applicant shall provide proof of its fitness to operate by satisfying the following requirements:

- 1) All insurance requirements of the commission;
- 2) *The applicant has the financial ability to operate all transportation functions authorized by the applied for authority;*
- 3) Applicant has obtained all of the necessary permits required by any and all other state and federal agencies for the transportation and disposal of waste;
- 4) Applicant has adequate equipment and man power for hauling and disposal of waste.
- 5) *Applicant and its employees have been adequately trained in the safe hauling and disposal of waste.*

The provisions of this rule are applicable to all applications for Common Carrier Certificate and Contract Carrier Permits of waste and all applications for expansion of existing waste authority, including those applications which are presently pending before the Commission but have not yet gone to hearing on the merits.

IT IS FURTHER ORDERED THAT

This General Order is effective immediately.

**BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA**

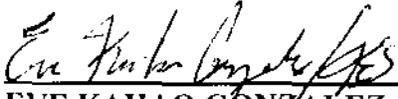
July 6, 2012

/S/ FOSTER L. CAMPBELL
DISTRICT V
CHAIRMAN FOSTER L. CAMPBELL

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

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

/S/ LAMBERT C. BOISSIERE
DISTRICT III
COMMISSIONER LAMBERT C. BOISSIERE, III


EVE KAHAO GONZALEZ
SECRETARY

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