

19TH JUDICIAL DISTRICT COURT  
PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

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DOCKET NO.: \_\_\_\_\_ DIVISION: \_\_\_\_\_

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LOUISIANA CHEMICAL ASSOCIATION  
VERSUS  
LOUISIANA PILOTAGE FEE COMMISSION

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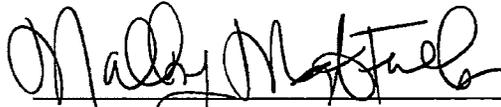
ON APPLICATION FOR SUPERVISORY WRIT  
FROM THE LOUISIANA PILOTAGE FEE COMMISSION

November 13, 2018 Louisiana Pilotage Fee Commission Meeting  
Notice and Agenda Item III. *Report by Special Counsel on At-large  
Commissioner Nomination Issues*

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ORIGINAL APPLICATION FOR SUPERVISORY WRIT FILED ON  
BEHALF OF LOUISIANA CHEMICAL ASSOCIATION

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not been approved by the PFC, and the PFC has requested  
that the transcript not be circulated at this time. Therefore,  
the transcript is not attached as an Appendix hereto.  
However, LCA submits this Appendix 8 as a placeholder for  
the transcript. LCA believes the transcript is essential to the  
review of this Writ Application and urges the Court to  
request the transcript be provided. The next scheduled PFC  
meeting at which the transcript will be presented for  
approval by the PFC is March 12, 2019.)

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Louisiana Chemical Association (“LCA”) submits this Application for Supervisory Writ (“Writ Application”) to review a decision of the Louisiana Pilotage Fee Commission (“PFC”) finding that: (1) appointments of the three Independent Commissioners to the PFC are valid, and (2) there is no basis for recusal of the Independent Commissioners on matters before the PFC going forward.<sup>1</sup>

### **SUMMARY OF THE ARGUMENT**

In a vote that clearly exceeded its statutory authority under La. R.S. 34:1121 and 1122, the PFC voted that the appointments of the three Independent Commissioners, who were appointed by the Governor upon the improper recommendation of one of the river pilot associations regulated by the PFC, were valid. La. R.S. 34:1121 and 1122 set forth the PFC’s authority, and the self-serving vote on the validity of the appointments of the Independent Commissioners of the PFC is not included in the legislative mandate.

Exacerbating the situation, the PFC then attempted to pre-determine the outcome of any potential motion to recuse the Independent Commissioners by voting that there was no basis to recuse them. This premature action by the PFC violates the due process rights of parties appearing before the PFC by denying them the opportunity for discovery, hearing, or presentation of evidence on a motion to recuse.

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<sup>1</sup> November 13, 2018 Meeting Transcript, Pages 10, 72, 77. The transcript has not been approved by the PFC, and the PFC has requested that the transcript not be circulated at this time. Therefore, the transcript is not attached as an Appendix hereto. However, LCA has submitted Appendix 8 hereto as a placeholder for the transcript and requests that it be obtained by the Court.

All three Independent Commissioners whose appointments are being questioned and the four Pilot Commissioners voted in favor of the decision. The four Industry Commissioners opposed the decision.<sup>2</sup>

LCA seeks review and, for the reasons set forth herein, requests that this Court vacate the vote and decision of the PFC.

### **STATEMENT OF JURISDICTION**

Article V, Section 16(B) of the Louisiana Constitution, Louisiana Revised Statutes 34:1122D(11), and Louisiana Code of Civil Procedure article 2201 provide supervisory jurisdiction in this matter. In addition, this case satisfies the factors set forth in *Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc.*, 396 So. 2d 878 (La. 1981), for granting a writ application. The PFC's decision is invalid as a matter of law, there is no material issue of fact to be resolved, and judicial efficiency and fundamental fairness to LCA dictate that the merits of this Writ Application should be decided. While there is no ongoing litigation or proceeding for which a reversal will terminate the litigation, LCA submits that this Writ Application satisfies the *Herlitz* standard. While the exercise of supervisory jurisdiction is discretionary, failure to exercise jurisdiction would result in judicial inefficiency and fundamental unfairness, which is the standard to grant a writ. Absent a grant of the Writ Application, LCA will be required to acquiesce to: (1) the validity of the Independent Commissioner appointments, in violation of the fairness and neutrality mandated and guaranteed by La. R.S. 34:1121B(3), and (2) the inability to seek recusal of the Independent Commissioners in future PFC proceedings, in violation of the PFC Rules and due process. Therefore, judicial efficiency and fundamental fairness dictate that this Writ Application be granted.

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<sup>2</sup> November 13, 2018 Meeting Transcript, Pages 76–78.

Moreover, La. R.S. 34:1127 provides that “[p]roceedings may be brought before courts of competent jurisdiction under state law for the purpose of contesting the validity of any decision of the commission hereunder.”

### **ISSUE OF LAW PRESENTED FOR DETERMINATION**

Did the PFC err, as a matter of law, in making a determination that:

(1) the appointments of the three Independent Commissioners to the PFC are valid, and (2) there is no basis for recusal of the Independent Commissioners on matters before the PFC going forward, in violation of the PFC’s statutory authority, the PFC Rules, and due process?

### **ASSIGNMENTS OF ERROR**

1. The PFC erred in deciding that appointments of the three Independent Commissioners to the PFC are valid because such a decision exceeds the statutory authority granted to the PFC pursuant to La. R.S. 34:1121 and 1122.

2. The PFC erred in deciding that there is no basis for recusal of the Independent Commissioners on matters before the PFC going forward without affording an opportunity for discovery, hearing, and presentation of evidence because to do so violates the PFC Rules and due process of law pursuant to Article I, Section 2 of the Louisiana Constitution.

### **STATEMENT OF THE CASE**

This Writ Application arises out of a decision of the PFC made at the PFC’s regular meeting on November 13, 2018 (the “November Meeting”). The decision was made with no contested matter pending. Following a report by the PFC’s attorney on a request from the PFC at an earlier meeting that the PFC be provided options on how to resolve objections to the manner in which the Independent Commissioners were appointed, the PFC approved a motion to validate the appointments and determine there was no basis for recusal of those Commissioners, by a vote of seven to four. All three Independent Commissioners whose appointments are being questioned and

the four Pilot Commissioners voted in favor of the motion. The four Industry Commissioners opposed the motion.<sup>3</sup>

### **BACKGROUND**

The genesis of the issues presented in LCA's Writ Application is information first learned by Industry Commissioners in May 2018 that one of the river pilot associations regulated by the PFC - - the New Orleans-Baton Rouge Steamship Pilots Association ("NOBRA") - - sent a letter to the Governor setting forth Recommendations for the At-Large Pilotage Fee Commission Members and Chairman.<sup>4</sup> All three of NOBRA's recommendations were appointed as At-Large Members of the PFC, two of whom continue to serve on the PFC today and one of the two serves as Chairman, as recommended by NOBRA.

The enabling legislation for the PFC, La. R.S. 34:1121, states that the PFC shall exist to "establish pilotage fees,"<sup>5</sup> and the PFC is required to be comprised of: four members appointed by the Governor from nominees submitted by the pilotage associations (the "Pilot Commissioners"), four members appointed by the Governor from nominees submitted by industry associations (the "Industry Commissioners"), and three at-large members, who are appointed by the Governor with a requirement that they "shall sign and maintain a statement of neutrality" (the "Independent Commissioners").<sup>6</sup>

The requirement of "neutrality" for the Independent Commissioners is so important that there is a requirement in La. R.S. 34:1121 that no Independent Commissioner is allowed to have any ex parte communication with any member of any pilot association, or with any member of any industry group, or with any person or entity that has any interest in any issue

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<sup>3</sup> November 13, 2018 Meeting Transcript, Pages 76-78.

<sup>4</sup> Appendix 1: March 16, 2016 Letter from NOBRA to Governor Edwards.

<sup>5</sup> La. R.S. 34:1121A.

<sup>6</sup> La. R.S. 34:1121B(1)-(3).

pending before the PFC, except for educational purposes, and even then, both the Pilot Commissioners and Industry Commissioners must be afforded an opportunity to attend.<sup>7</sup>

After learning of the NOBRA letter and recommendations, the Industry Commissioners, as representatives of industry, who purchase pilotage services and/ or are impacted by those who purchase such services, wrote to the Governor to express that the trust and confidence in the process had been violated, and asked that the Governor request the resignation of the current Independent Commissioners and appoint replacements.<sup>8</sup> The Industry Commissioners emphasized in the letter that questions and concerns would arise regarding whether Independent Commissioners serving on the PFC based on a recommendation of a pilot association could provide truly neutral determinations in cases where the pilots are seeking rate increases. The letter also emphasized that it would be difficult to imagine that future ratemaking determinations would not invoke questions, concerns and potential litigation regarding whether the Independent Commissioners could truly serve as neutral and independent arbiters.

For example, in a recent proceeding where one pilot association was seeking a 40% increase in its transportation tariff rates, the three Independent Commissioners, whose appointments are being questioned, voted with the Pilot Commissioners to strike all of the defenses to the rate increase asserted by LCA as an industry association, including that the pilots had not provided proof of actual incurred expenses, the pilots were already making more than \$98,000 above approved target average compensation, and the pilots were recovering costs for excess pilots that did not exist. LCA

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<sup>7</sup> La. R.S. 34:1121B(3).

<sup>8</sup> Appendix 2: May 31, 2018 Letter from Industry Commissioners of the PFC to Governor Edwards.

pursued review by the Nineteenth Judicial District Court, which found that the action of the PFC was an “abuse of its discretion.” According to the Court:

To refuse to take evidence of the effect of the standing rates for the other factors in making a determination on whether the transportation tariff can be increased creates a situation where they are basically deciding something without having all the knowledge they need to decide the situation. They do not have the evidence that they need to make a reasoned and informed decision.<sup>9</sup>

Notably, the Court’s ruling occurred prior to LCA learning of the letter from NOBRA recommending appointment of the Independent Commissioners.

The Governor has not formally responded to the letter from the Industry Commissioners, and the Industry Commissioners are not aware of any independent investigation of this matter having occurred.

A copy of the Industry Commissioner letter was provided to the PFC Administrator and attorney on August 24, 2018.<sup>10</sup>

The decision of the PFC at its November Meeting was based on the opinion of its attorney that the appointments of the Independent Commissioners are valid and there is no basis for recusal going forward.

Through questions by Industry Commissioners at the November Meeting, it was learned that the opinion of the PFC attorney was based solely on legal research - - the opinion did not include any investigation and did not include any facts or determination of facts.<sup>11</sup>

Based on introductions at the initial PFC meeting they attended after being appointed by the Governor, one of the Independent Commissioners indicated he was “solicited” to serve on the PFC, and the other two

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<sup>9</sup> *Judgment on Application for Supervisory Writ*, April 25, 2018, 19th Judicial District Court, Civil Docket 666537, Division F22, including oral reasons set forth at hearing.

<sup>10</sup> Appendix 3: August 24, 2018 Transmittal of May 31, 2018 Letter from Industry Commissioners of the PFC to Governor Edwards to PFC Administrator and Attorney.

<sup>11</sup> November 13, 2018 Meeting Transcript, Pages 13, 25–26, 28, 42.

Independent Commissioners indicated they were “approached” to serve on the PFC.<sup>12</sup> However, no investigations or fact inquiries have occurred to explore and determine how they came to be “solicited” or “approached,” or by whom, in light of the recent discovery of the NOBRA letter.

On the Agenda for the November Meeting, the Item at issue is Item III - - Report by Special Counsel on At-large Commissioner Nomination Issues.<sup>13</sup> There is no docket or public record for the Item III at issue other than the transcript of verbal discussion at the PFC meeting. However, during verbal discussions, the attorney for the PFC referred to information provided to the Commissioners as attorney-client privileged research and conclusions.<sup>14</sup>

The opinion of the PFC attorney was presented in response to being asked at the previous meeting of the PFC by an Industry Commissioner to:

. . . make a determination on what the Commission should do, whether that’s to receive an opinion from the Ethics Board or an opinion from the Attorney General or some other type of declaratory statement that gives guidance to this Commission on how to handle this so that we do not have those issues presented to us going forward.<sup>15</sup>

The PFC attorney was not asked to provide an opinion or conclusion on the validity of the appointments. Rather, the PFC attorney was only asked to determine the options for the PFC to seek resolution of the validity of the appointments by a third-party.

The vote of the PFC was based on a substitute motion offered by the Pilot Commissioner representing the Crescent River Port Pilotage

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<sup>12</sup> Appendix 4: August 4, 2016 Meeting Transcript, Pages 10–12.

<sup>13</sup> Appendix 5: November 13, 2018 Notice and Agenda.

<sup>14</sup> November 13, 2018 Meeting Transcript, Pages 13–14.

<sup>15</sup> Appendix 6: August 14, 2018 Meeting Transcript, Page 50.

Association (“CRPPA”) and seconded by the Pilot Commissioner representing NOBRA.<sup>16</sup>

The substitute motion was offered in lieu of a vote on a motion offered by the Industry Commissioner representing LCA, which proposed that the matter be referred to the Attorney General for review and opinion as the chief legal officer for the State of Louisiana.<sup>17</sup>

While PFC Rules 13201–13202 provide rules for preparation of all Orders of the PFC, it is the understanding of counsel for LCA from discussions with the PFC Administrator that the PFC does not intend to issue an Order with respect to its decision that is the subject of this Writ Application. LCA has submitted a letter to the PFC providing notice of and requesting a return date for this Writ Application.<sup>18</sup>

## LAW AND ARGUMENT

### **I. Standard for Review.**

The appropriate standard for review of the PFC decision at issue is *de novo*, as the PFC committed legal error<sup>19</sup> by exceeding its legislative grant of authority and violating LCA’s due process rights. A review of a decision regarding legal issues such as jurisdiction, procedure, or interpretation of laws is not limited to the abuse of discretion standard.<sup>20</sup> “Instead, on legal issues, appellate courts give no special weight to the findings of the trial court, but exercise their constitutional duty to review questions of law and render judgment on the record.”<sup>21</sup>

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<sup>16</sup> November 13, 2018 Meeting Transcript, Pages 72, 77.

<sup>17</sup> November 13, 2018 Meeting Transcript, Pages 53, 71.

<sup>18</sup> Appendix 7: December 10, 2018 Request for Return Date.

<sup>19</sup> *Orazio v. Dept’ of Police*, 17-1035 (La. App. 4th Cir. 5/23/18), 248 So. 3d 745, 750 (“A legal error occurs when a trial court applies the incorrect principles of law and such errors are prejudicial”).

<sup>20</sup> *Id.* at 745.

<sup>21</sup> *Id.*

## **II. The PFC Does Not Have Authority to Determine Whether Appointments of Independent Commissioners to the PFC are Valid.**

Louisiana jurisprudence recognizes that “[a]n administrative agency has only the power and authority expressly granted by the constitution or statutes.”<sup>22</sup> Therefore, the authority of the PFC is provided for and limited by statute.

Pursuant to its legislative grant of authority, the PFC is authorized to establish pilotage fees, and to fix and establish reasonable and just fees and rates.<sup>23</sup>

“[I]n order to be valid, the actions of administrative agencies must be taken in accordance with valid legislative authority,” and an administrative agency lacks authority to act in the absence of an express grant of authority.<sup>24</sup> Because a decision regarding the validity of the Independent Commissioners’ appointments is not expressly granted to the PFC by statute, the PFC is not authorized to make such a determination. The PFC exceeded its statutory authority. The decision that the appointments of the three Independent Commissioners to the PFC are valid constitutes an unauthorized and invalid action by the PFC.

The PFC decision was made even worse by being made without any investigation or determination of facts, as is required by due process.

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<sup>22</sup> *La. Horsemen’s Benev. & Protective Ass’n 1993, Inc. v. Fair Grounds Corp.*, 95-1702 (La. App. 1st Cir. 4/4/96), 672 So. 2d 340, 342, *writ denied*, 96-1163 (La. 6/7/96), 674 So. 2d 968 and 96-1125 (La. 6/7/96), 674 So. 2d 969 (citing *Hawkins v. State*, 613 So. 2d 229, 234 (La. App. 1st Cir. 1992)).

<sup>23</sup> La. R.S. 34:1121 and 1122.

<sup>24</sup> *Eads Operating Co., Inc. v. Thompson*, 93-2155 (La. App. 1st Cir. 10/7/94), 646 So. 2d 948, 951, *writ denied*, 95-0226 (La. 4/7/95), 652 So. 2d 1345. *See also Realty Mart, Inc. v. La. Bd. Of Tax Appeals*, 336 So. 2d 52, 54 (La. App. 1st Cir. 1976) (citing *Hunter v. Hussey*, 90 So. 2d 429 (La. App. 1st Cir. 1956, *writ granted*, January 21, 1957, but unreported)).

### **III. The PFC Cannot Decide There is No Basis for Recusal of Independent Commissioners from Future Proceedings Without Opportunity for Due Process Discovery, Hearing and Opportunity to Present Evidence.**

The PFC Rules of Practice and Procedure (the “PFC Rules”) set forth certain procedural rights and requirements with respect to proceedings brought before the PFC:

PFC Rule 12302 allows for Requests for Action (“RFA”) to be filed with the PFC, including requests by pilots for increases in pilotage rates and fees.

PFC Rule 12402 provides a means for stakeholders such as industry representatives to intervene in an RFA proceeding, and thereby have the matter assigned to a contested docket for a hearing procedure.

PFC Rules 12112, 12301 and 12303 allow for the filing of motions to be considered by the PFC in RFA proceedings.

PFC Rules 12501–12505 provide for written and deposition discovery in PFC proceedings pursuant to the Louisiana Code of Civil Procedure.

PFC Rule 12807 allows parties to request the issuance of subpoenas by the PFC, including for attendance of witnesses and for the production of documents, for good cause.

As an administrative agency, the PFC is bound by its own rules.<sup>25</sup> The PFC erred in failing to follow its own procedural rules in making its decision that there is no basis for recusal of the Independent Commissioners on future matters before the PFC.

The Louisiana Code of Civil Procedure provides rules and grounds for motions for recusal, which provide guidance here. La. C.C.P. art. 151 sets forth the grounds for recusal, which include that the arbiter “shall be recused” where he “[i]s biased, prejudiced, or interested in the cause or its

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<sup>25</sup> *Cent. La. Elec. Co., Inc. v. La. Pub. Serv. Comm’n*, 377 So. 2d 1188, 1195 (La. 1979) (“It is clear, however, that the weight of opinion is to the effect that administrative agencies are bound by their own rules, at least by their own rules which are promulgated to affect the rights and liabilities of members of the public.”)

outcome or biased or prejudiced toward or against the parties or the parties' attorneys or any witness to such an extent that he would be unable to conduct fair and impartial proceedings."<sup>26</sup> Moreover, the Louisiana Code of Civil Procedure provides that a party desiring to recuse an arbiter at the trial or hearing level "shall file a written motion therefor assigning the ground for recusation."<sup>27</sup>

LCA has the right to challenge the Independent Commissioners by filing a motion to recuse them on grounds of bias or prejudice in future RFA proceedings before the PFC seeking increases in pilotage rates and fees. LCA also has the right to conduct discovery, have a hearing, and present evidence on its motion, as required by due process and the PFC Rules.

Pursuant to Article I, Section 2 of the Louisiana Constitution, "[a] person cannot be deprived of life, liberty, or property without due process of law." Procedural due process requires "prior notice and a chance to be heard," including the chance to present evidence.<sup>28</sup> The PFC failed to afford these basic due process rights to LCA in approving a motion that pre-determines the outcome of a possible motion to recuse the Independent Commissioners.

The PFC committed legal error in deciding that there is no basis for recusal of the Independent Commissioners on future matters before the PFC, without allowing for any discovery, hearing, or an opportunity to present evidence, as required by due process.

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<sup>26</sup> La. C.C.P. art. 151A(4).

<sup>27</sup> La. C.C.P. art. 154.

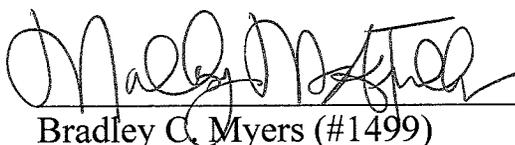
<sup>28</sup> *Dep't of Labor, Office of Emp't Sec. v. Leonards*, 498 So. 2d 178, 181 (La. App. 1 Cir. 1986).

**CONCLUSION & PRAYER FOR RELIEF**

Considering the above, LCA submits that the PFC decision was a legal error that prejudiced the substantial rights of LCA. Accordingly, LCA requests that this Court vacate the vote and decision of the PFC finding that: (1) appointments of the three Independent Commissioners are valid, and (2) there is no basis for recusal of the Independent Commissioners on future matters before the PFC.

Respectfully submitted, this 13th day of December, 2018.

**Respectfully submitted,**



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**VERIFICATION AND AFFIDAVIT OF SERVICE**

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared:

**MALLORY MCKNIGHT FULLER**

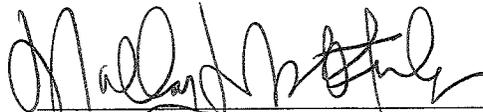
who, after being duly sworn, did depose and state as follows:

1. She is counsel of record for Louisiana Chemical Association in this matter;
2. She has prepared and read the above and foregoing Application for Supervisory Writ of Louisiana Pilotage Fee Commission Proceedings filed on behalf of Applicant, Louisiana Chemical Association, and all statements contained therein are true and correct to the best of his knowledge, information and belief;
3. A copy of this Application for Supervisory Writ has been duly served upon the Louisiana Pilotage Fee Commission through its Administrator, as listed below, by electronic mail and/or U. S. Mail, postage pre-paid, this 13th day of December, 2018.

**Louisiana Pilotage Fee Commission**

Larry McNutt, Jr., Administrator  
Two United Plaza, Suite 702  
Baton Rouge, Louisiana 70809  
[mcnutt@lpfc.la.gov](mailto:mcnutt@lpfc.la.gov)

Baton Rouge, Louisiana, this 13th day of December, 2018.

  
\_\_\_\_\_  
**Mallory McKnight Fuller**

Sworn to and Subscribed before me  
this 13th day of December, 2018.

  
\_\_\_\_\_  
Notary Public

**Maxwell B. Kallenberger**  
Notary Public  
La. Bar Roll #37137  
East Baton Rouge Parish  
My Commission is for Life