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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

**IN THE MATTER OF PACIFIC ENERGY &
MINING COMPANY**

Docket No. 18-2602-01

**UTAH DIVISION OF PUBLIC
UTILITIES' RESPONSE TO THE
NOVEMBER 18, 2019 FILINGS**

On October 18, 2019, the Public Service Commission of Utah (Commission) issued a scheduling order and notice of hearing in this docket (Scheduling Order). The Scheduling Order called for “each of the Pipeline Parties and the DPU” to file on or before November 18, 2019, “a Statement of Facts to be Established, Legal Issues to be Resolved, and Relief Sought at Hearing.”¹ The Scheduling Order also established December 10, 2019 as the date for “All Parties to File a Response to Opposing Parties’ November 18, 2019 Filings.”² Below is the Division of Public Utilities’ (Division) Response to the November 18, 2019 filings (Response).

¹ Scheduling Order at p. 2 (emphasis in the original).

² Id.

The Division below also addresses the appointment of the bankruptcy trustee and its possible effect upon this hearing and the Commission's jurisdiction. The Division urges the Commission to address now the safety issues before it and not delay issuing an order because a bankruptcy trustee has been appointed.³ The Bankruptcy Code's automatic stay does not preclude the Commission addressing these safety issues because of the explicit exemption for governmental units and police power and public safety issues.⁴

The Division emphasizes that the matter before the Commission right now concerns public safety – pipeline safety is public safety. The public safety issues specifically include the Division's request for a deactivation order. PEMC and now Dead Horse have had ample opportunity to cure the violations and have failed to do so, even after the Pipeline ceased normal operation and the imposition of a civil penalty.⁵ The Division has no confidence that absent a determinative Commission order Dead Horse, the pipeline owners (whomever they may be), or others involved with the Pipeline will make the changes necessary for the Pipeline to resume normal, lawful operation. The December 19-20, 2019 hearing provides the opportunity for the Commission to order deactivation of the Pipeline and to resolve timely other issues properly before it.

I. Background

Pacific Energy & Mining Company (PEMC), Dead Horse, and the Division submitted filings to the Commission on November 18, 2019.⁶ That same day Mr. George Hofmann, Esq.,

³ See the discussion, *infra*.

⁴ See the discussion, *infra*.

⁵ Selected filings are discussed herein. For a comprehensive list of all filings, see the Commission's docket sheet for this matter which can be found at <https://psc.utah.gov/2018/04/12/docket-no-18-2602-01-2/>.

⁶ See the Commission's docket sheet at <https://psc.utah.gov/2018/04/12/docket-no-18-2602-01-2/>.

the appointed Chapter 7 Trustee (Trustee) “of the bankruptcy estate of Pacific Energy & Mining Company,” submitted a filing entitled “Notice of Appointment of Bankruptcy Trustee, Ongoing Investigation, and Reservation of Rights”(Trustee Filing) to the Commission.⁷

II. Division’s Response to Other Parties’ and the Trustee’s Filings

A. Dead Horse Filing

1. Subjects to be Inquired upon During the Hearing

In its November 18, 2019 filing, Dead Horse stated it was the operator of the Pipeline and provided “the following subjects to be inquired upon during the Hearing.”⁸ These subjects were (1) “status of the violation,” (2) “status of the Monitoring report,” and (3) “Certification of the inspectors for the inspection in 2013, 2014, 2015, 2016, 2017 and 2018.”⁹ The Division addresses each of these subjects in turn.

a. Status of the Violations

The current status of the violations has already been determined by the Commission. In its April 10, 2019 Hazardous Facility Order (HFO), the Commission found that there were 11 outstanding violations stemming from the Division’s 2016 inspection of the Pipeline. The HFO stated, “PEMC shall suspend its pipeline operations until it demonstrates to the PSC that it has materially remedied the violations under its control.”¹⁰ In its June 14, 2019 “Notice of the

⁷ Certain issues and concerns are raised by the November 18, 2019 filing from PEMC and Mr. Terry Spencer, a filing made after the appointment of the Trustee. Those issues and concerns are discussed infra. Relatedly, Mr. Dean Christensen, who has signed for Dead Horse here and is a creditor in his personal capacity in the bankruptcy proceeding, filed in the bankruptcy court both an appeal concerning the conversion of PEMC’s bankruptcy case from a Chapter 11 to a Chapter 7 proceeding and a request for stay. See document numbers 104 and 114 both filed November 21, 2019, by Mr. Christensen In re: Pacific Energy & Mining Company, debtor, Bankruptcy No. 19-25030, in the United States Bankruptcy Court for the State of Utah.

⁸ The Dead Horse Filing was signed by Mr. Christensen “for Dead Horse Oil Company.”

⁹ Dead Horse Filing.

¹⁰ HFO at p. 30.

Hazardous Facility Order, Order to Provide Confirmation of Compliance, and Action Request to the Division of Public Utilities,” (June Notice), the Commission stated “The PSC’s HFO applies *to the Pipeline*. While the HFO contained directives and penalties specific to PEMC, anyone who operates the Pipeline without successfully petitioning the PSC to discontinue the HFO could face new fines and penalties.”¹¹

The HFO placed the burden to demonstrate to the Commission that violations have been upon the Pipeline operator. Nothing the Division has reviewed cures the outstanding violations and neither PEMC nor Dead Horse previously petitioned the Commission as required by the HFO. Accordingly, no showing that the violations have been cured has been made to the Commission, and no Commission order or order on appeal changes or rescinds the HFO.¹² Therefore, currently there are 11 outstanding violations.

If Dead Horse wishes now to present new evidence to the Commission that certain, or all, of the violations have been cured, the Division welcomes such new information and the opportunity to address it at hearing. The Division urges the Commission to order Dead Horse to provide the information to the Division in time for the Division to meaningfully assess and evaluate that information prior to the hearing. In the past, information has been provided on the eve of hearings, too late for effective review. Given the amount of time that has already passed in this matter, post-hearing review of late-filed materials should not be allowed. The Commission should decide on the record before it at hearing whether the violations are cured and whether a deactivation order is appropriate.

¹¹ June Notice at pp. 2-3 (emphasis in the original).

¹² PEMC did appeal the HFO but did not request a stay of that order. After it filed bankruptcy, PEMC did assert that the appellate docket is subject to the automatic stay of the U.S. Bankruptcy Court. See also the Docket Sheet for Case No. 19-25030 in the United States Bankruptcy Court for the District of Utah, Central Division, for filings relating to PEMC.

b. Status of the Monitoring Report

On August 13, 2019 in a letter dated August 12, 2019, Mr. Dan Green submitted correspondence to the Commission stating, “In reference to “Notice of Motion and Accelerated Time to Respond” Issued August 2, 2019. Dan Green will prepare a monitoring plan by August 21, 2019 on behalf of Pacific Energy and Mining Company.” Later, PEMC, through its attorney Mr. Terry Spencer, Ph.D., filed a monitoring program with the Commission.¹³ On September 6, 2019, the Division filed a report on the monitoring program at the request of the Commission. Dead Horse did not file a response to the Division’s filing. PEMC filed a “Request for Hearing.” Important questions demanding answers include the relationship between Dead Horse and PEMC concerning the development, performance, and responsibility of and for a monitoring program.

c. Certification of the Inspectors

Dead Horse’s request concerning “certification of the inspectors” for specified years presents either an irrelevant issue, an issue that has been already addressed by the Commission, or an issue that is untimely. The “certification of the inspectors” for inspections in 2013, 2014, and 2015 is irrelevant. It was the 2016 inspection done by a qualified inspector, assisted, and supervised by inspectors also qualified in 2016, that gave rise to this docket. Inspectors involved in this docket after 2016 are qualified as well.

PEMC had been provided information concerning the inspectors’ qualifications for the relevant years and sought to challenge the qualifications of only Mr. Chien Hwang. After the Commission reviewed PEMC’s challenge to the qualifications of Mr. Hwang, filed by PEMC in

¹³ The filing is entitled, “Certificate of Service for Interim Pipeline Monitoring Program for Paradox Pipeline” and is dated August 20, 2019 but appears to have been filed August 22, 2019. See the Commission’s docket sheet at <https://psc.utah.gov/2018/04/12/docket-no-18-2602-01-2/>.

its “Motion to Reconsider Order Dated April 10, 2019,” the Commission said, “The Motion contains several references to PEMC’s allegation that former DPU employee Mr. Chien Hwang was not qualified to conduct inspections of PEMC’s facilities. Nowhere in this proceeding has PEMC made any motion to exclude or strike any evidence based on the qualifications of Mr. Hwang.”¹⁴ The Order on Review continued, stating, “Accordingly, we decline to reconsider our Order based on PEMC’s allegations regarding Mr. Hwang’s qualifications.”¹⁵ He was qualified and no proper objection to his inspection qualifications was made.

2. Witness List

Dead Horse incorporated its October 4, 2019 witness list “by reference.”¹⁶ Ms. Patricia Schmid is litigation counsel for the Division in this docket and as such is not subject to being called as a witness in this proceeding.

B. PEMC – Spencer Filing

1. PEMC and the Spencer Filing, and the Trustee’s Filing

In a filing dated November 18, 2019, PEMC and Mr. Spencer stated, “Pacific Energy & Mining Co. (“PEMC”), by and through its counsel of record, Terry R. Spencer and Stephanie Jensen, of the Law Office of Spencer & Jensen, PLLC, respectfully submits its document entitled, “Statement of Facts, Legal Issues to Be Resolved and Relief Sought at Hearing” (Spencer Filing).¹⁷ As mentioned above the Trustee also made a filing November 18, 2019.

¹⁴ See Order on Review, dated May 2, 2019, at p. 2.

¹⁵ See Order on Review, dated May 2, 2019 at pp. 2-3 (footnote omitted).

¹⁶ Dead Horse Filing.

¹⁷ See the Spencer Filing at p. 1.

The Division understands the Trustee is seeking, or will seek, to strike the Spencer Filing and to prevent PEMC via Mr. Tariq Ahmad, Mr. Green, and perhaps others and Mr. Spencer from appearing in front of the Commission on behalf of PEMC as they have been doing. In his November 18, 2019 filing, the Trustee stated, “The Trustee or his counsel intend to appear at the hearing to be held on December 19 and 20, and the Trustee reserves his right to make additional arguments or presentations of evidence at such time.” The Trustee also requested “that the PSC refrain from entering any order that might relate to property of the Estate, including any finding or conclusion as to the nature or extent of property of the Estate.”¹⁸ Out of an abundance of caution and due to this uncertainty, the Division submits this response to the Spencer Filing even though it may not have been an authorized filing.

2. Facts in the Spencer Filing

The Division challenges the accuracy of the Facts in the Spencer Filing or lacks information concerning whether such facts are stated accurately. The Division asserts that “Fact 7” presents both a factual and legal issue. The Commission has found that the Pipeline is subject to the Commission’s jurisdiction.

3. Hearing Subject Matter in the Spencer Filing

The Division also has reviewed the “Hearing Subject Matter” presented in the Spencer Filing. Each listed subject matter is addressed below.

The Spencer Filing’s subject matter 1 states, “whether or not one (1) or more of the eleven (11) violations of the contained [sic] in the Public Service Commission’s Order were satisfied by PEMC.”¹⁹ In response, the Division offers these comments. In its HFO, the

¹⁸ Trustee’s Filing at p. 3.

¹⁹ Spencer Filing p. 2. The Spencer Filing’s subject matter issue 1 is similar to Dead Horse’s issue 1.

Commission found there were 11 outstanding violations. No Commission order changes or rescinds the HFO. Nothing the Division has reviewed cures the outstanding violations. If PEMC, via Mr. Spencer, is permitted to make this filing and participate in the hearing,²⁰ and now wishes to present new evidence to the Commission that certain, or all, of the violations have been cured, the Division welcomes such new evidence concerning whether one or more of the violations have been satisfied by PEMC.²¹ The Division urges the Commission to order PEMC to provide the information to the Division in time for the Division to meaningfully assess and evaluate that information prior to the hearing. In the past, information has been provided on the eve of hearings, too late for effective review. Given the amount of time that has already passed in this matter, post-hearing review of late-filed materials should not be allowed. The Commission should decide on the record before it at hearing whether the violations are cured and whether a deactivation order is appropriate.

Subject matter issue 2 in the Spencer Filing is “Whether or not the DUP [sic] has continuing authority to regulate the subject Pipeline.”²² This is a legal matter, which will only be before the Commission if the Commission concludes that new factual evidence has changed the jurisdictional status of the Pipeline, eliminating the effect of the doctrine of res judicata stemming from the Commission’s August 9, 2019 “Order Denying PEMC’s Motion to Dismiss

²⁰ See the Division’s comments, supra, addressing the Trustee’s filing.

²¹ The Facts section of the Spencer Filing states that “In April 2019, the responsibility for operation of the Pipeline in question was transferred from PEMC to Dead Horse Oil Company.” Spencer Filing at p. 2. The Division is unclear what the Spencer Filing means when it states, “satisfied by PEMC.” The Division does not know if the reference is to PEMC’s actions taken before the transfer of operation to Dead Horse (which according to the Division’s information occurred not in April 2109 but instead occurred on May 15, 2019 via PEMC’s filing, signed by Mr. Ahmad as PEMC’s president, with PHMSA) or later submissions PEMC has made, some “on behalf of” Dead Horse.

²² Spencer Filing at p. 2.

for Lack of Jurisdiction, and Notice of Hearing” (Order on Jurisdiction).²³ If there are new facts, there may be a new legal question presented. The Division incorporates by reference its comments above regarding “Fact 7.”

The Spencer Filing’s hearing subject matter issue 3 asks “Only if the DUP [sic] has continuing jurisdiction to regulate the subject Pipeline, whether or not the monitoring plan submitted by Dead Horse Oil is in conformance with the relevant Federal Regulations.”²⁴

C. PEMC – Chapter 7 Trustee Filing

On November 18, 2019, the Trustee filed its Notice with the Commission. Among other things, the Notice requested “additional time to continue his investigation of the Debtor and its Estate”²⁵ and reserved certain rights concerning the December hearing. In addition, the Trustee stated that he objected to “any findings and conclusions that might relate to the property of the Estate,” because those matters are before the Bankruptcy Court or are subject to the Bankruptcy Code’s “automatic stay.”²⁶ In particular, the Trustee requested “that the PSC refrain from entering any order that might relate to the property of the Estate, including any finding or conclusion as to the nature or extent of property of the Estate.”²⁷ The Trustee also said that he or his counsel would appear at the hearing and reserved rights to “make additional arguments or presentations of evidence at such time.”²⁸

²³ On August 29, 2019, the Commission issued an order denying reconsideration of the Order on Jurisdiction.

²⁴ Spencer Filing at p. 2. This question is similar to Dead Horse’s subject of inquiry 2.

²⁵ Notice at p. 2.

²⁶ See Notice at p. 3.

²⁷ Notice at p. 3.

²⁸ Notice at p. 3.

The appointment of the Trustee brings new issues, and certain benefits, to an already extremely complicated case. The Division asserts that this matter is properly before the Commission due to the “governmental unit policy and regulatory power” exception to bankruptcy’s automatic stay.²⁹

Notwithstanding the appointment of the Trustee, the Division emphasizes that the matter before the Commission is a public safety matter, and determinations need not be made here now concerning who owns the Pipeline or whether the transfer of operating rights from PEMC to Dead Horse was preferential and thus perhaps subject to being undone pursuant to the Bankruptcy Code. Instead, what is squarely before the Commission is that the Pipeline is subject to a Commission issued HFO and that the Division will present evidence at the hearing that decommissioning the Pipeline is required for public safety in the absence of full satisfaction of pipeline safety law. The Division urges the Commission to address the public safety issue in a timely order.

IV. Conclusion

The Division urges the Commission to address promptly the public safety concerns. Decisive action by the Commission is needed now – it was a 2016 inspection that precipitated this docket. PEMC and Dead Horse have had the ample opportunities to cure the violations and have not done so. Nothing the Division has reviewed to date cures the outstanding violations and the Commission has not issued an order superseding the HFO. Certain matters raised in the Dead Horse Filing and the Spencer Filing have been already ruled upon by the Commission. The Division has no confidence that absent a determinative Commission order, Dead Horse, the Pipeline owners, or others involved with the Pipeline will make the changes necessary for the

²⁹ See 11 U.S.C. § 362(b)(4).

Pipeline to resume normal, lawful operation and to come into compliance with applicable safety laws and regulations. Indeed, the Pipeline's normal operation has been legally suspended since around June 10, 2019, and the 11 violations remain outstanding. The public safety requires the Commission to determine on the record before it at hearing whether the violations have been resolved and to order deactivation of the Pipeline.

Submitted this 10th day of December 2019.

A handwritten signature in black ink, appearing to read 'Patricia E. Schmid', written over a horizontal line.

Patricia E. Schmid
Attorney for the Utah Division
of Public Utilities