

PATRICIA E. SCHMID (#4908)
JUSTIN C. JETTER (#13257)
Assistant Attorney Generals
Counsel for the DIVISION OF PUBLIC UTILITIES
SEAN D. REYES (#7969)
Attorney General of Utah
160 E 300 S, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
Telephone (801) 366-0380
pschmid@agutah.gov
jjetter@agutah.gov

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Docket No. 18-2602-01

**DIVISION OF PUBLIC UTILITIES'
RESPONSE OPPOSING DEAD HORSE
OIL COMPANY'S MOTION FOR
REHEARING**

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, the Division of Public Utilities (Division) submits its response opposing the “Dead Horse Oil Company Motion for Rehearing” (Response, Dead Horse, and Motion, respectively) filed with the Public Service Commission of Utah (Commission) on February 20, 2020. The Motion is without merit and is not supported by fact or law.¹ The Division urges the Commission to deny the Motion.

¹ Many “facts” set forth by Dead Horse are inaccurate or unsupported by the record and are disputed by the Division. See Motion at pp. 1-4. These inaccurate and contested facts include the assertion that the Division requested the pipeline be “dismantled.” See Motion at p. 3. Also, to the extent that any argument in the Motion is not specifically addressed in the Division’s Response, the Division asserts that any such argument is without merit and does not support granting rehearing.

I. INTRODUCTION

Dead Horse's due process rights have not been violated. Early in June 2019, Dead Horse began to voluntarily and actively participate in this docket as the operator of the Paradox Pipeline. Ample and sufficient notice and opportunity to participate have been afforded Dead Horse. Dead Horse's ability to participate fully was never questioned or challenged but instead was recognized by the Commission and the Division. JMD Resources, Inc. (JMD) and Entrada Enterprises LLC (Entrada) too have been given notice and an opportunity to participate.

The Motion's claim that the Commission denied Dead Horse due process or representation at the hearing is unequivocally contradicted by the facts. No one other than Dead Horse's manager Mr. Dean H. Christensen had acted on behalf of Dead Horse and Mr. Christensen was physically present at the hearing. He answered only "no" when the Presiding Officer asked if Dead Horse intended to participate. Only the day after the hearing was adjourned was an email sent providing notice that Dead Horse had engaged an attorney to represent it at the hearing and that the attorney was unable to appear. The hearing was fair and equitable.

The Second HFO is supported by substantial evidence and Dead Horse's claims to the contrary are both unpersuasive and fail to withstand legal scrutiny. The Division's testimony was credible and well supported. In addition, the Division's testimony was tested by cross examination from both the attorney for the Board of Oil, Gas and Mining (Board) and the attorney for the Bankruptcy Trustee as well as by questions from the Presiding Officer.

Ineffectual arguments claim that alleged actions or inactions by Pacific Energy & Mining Company's (PEMC) counsel Mr. Terry R. Spencer, Ph.D. before and at the hearing deprived the Commission of information required to make a decision and that those actions harmed Dead

Horse. The Commission was not deprived of essential information by the conduct of others at the hearing. No evidence of an attorney client relationship or a third party beneficiary relationship between PEMC and Dead Horse has been presented. No evidence was shown that Mr. Spencer owed Dead Horse the duty to obtain a conflict waiver so he could represent Dead Horse. Equally unfounded is any claim that the Bankruptcy Trustee had a duty to act for Dead Horse's benefit.²

The Motion also impermissibly attempts to revisit issues already finally resolved by the Commission. These issues include whether any of the 11 violations found outstanding by the April 10, 2019 Hazardous Facility Order (HFO) had been cured and the competency and qualifications of the Division's inspectors.³ The exhibits attached to the Motion also have already been considered by the Commission. The Commission has issued a final order concerning these and other issues.

For the reasons set forth above and for other good cause shown, the Commission should deny the Motion.

II. BACKGROUND

This proceeding stems from a 2016 letter from the Division informing PEMC, then operator of the Paradox Pipeline, that the Division's audit had found 13 probable violations of specific pipeline safety regulations.⁴

² PEMC filed a voluntary petition for Chapter 11 bankruptcy on July 10, 2019. On November 7, 2019 that proceeding was converted to a Chapter 7 proceeding and later a Bankruptcy Trustee, and his own counsel, were appointed to represent the estate of the debtor (PEMC).

³ PEMC has appealed the HFO to the Utah Supreme Court.

⁴ See the Division's Request for Agency Action on Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order Against Pacific Energy & Mining Company, filed April 12, 2018. For additional information about this docket, see the Commission's website at <https://psc.utah.gov/2018/04/12/docket-no-18-2602-01-2/> (Commission's Docket Sheet).

On December 18, 2018, a hearing was held where Mr. Spencer represented PEMC, Mr. Tariq Ahmad testified as PEMC's President, and Mr. Dana (Dan) Green testified as a consultant for PEMC. The Division was represented by Ms. Patricia E. Schmid. Mr. Jimmy Betham testified for the Division and was cross examined by Mr. Spencer and questioned by the Hearing Officer.

On April 10, 2019, the Commission issued its Hazardous Facility Order (HFO). The Commission found that PEMC "remains in violation" of 11 pipeline safety regulations⁵⁶ and stated, "we find that PEMC's violations create a facility that is hazardous to life or property."⁷ The Commission ordered "Within sixty (60) days of this order, PEMC shall cease operation of its pipeline and it may not recommence operation until it successfully petitions the PSC to discontinue the order to cease operation."⁸ The Commission also ordered that "PEMC shall pay a civil penalty in the amount of \$100,000, payable to the State of Utah, within 120 days of the date of this order."⁹ Subsequently, numerous reports and pleadings, along with multiple pieces of correspondence, were filed with the Commission.¹⁰

In May 2019, PEMC filed a notice with the Pipeline and Hazardous Materials Safety Administration (PHMSA) that effective May 14, 2019 pursuant to the owners' request, PEMC was no longer going to be the operator of the Paradox Pipeline.¹¹ Dead Horse later claimed to be

⁵ See HFO at p. 25.

⁶ See HFO at p. 25.

⁷ HFO at p. 29.

⁸ HFO at p. 30.

⁹ HFO at p. 30. PEMC challenged the HFO at the administrative level then appealed the HFO to the Utah Supreme Court.

¹⁰ See, generally, the Commission's Docket Sheet.

¹¹ See 2019 Hearing Transcript at pp. 15-16. PEMC's notice to PHMSA was admitted as Hearing Exhibit No. 3.

the operator of the pipeline and the Division served a letter on Dead Horse notifying it of the HFO and its requirement to cease operations on June 10, 2019.¹²

The actual date upon which the pipeline ceased operation was contested.¹³ On June 14, 2019, the Commission issued its Notice of Hazardous Facility Order, Order to Provide Confirmation of Compliance, and Action Request to the Division of Public Utilities. This notice provided “express notice of the HFO to Dead Horse and any of its or PEMC’s successor operators.”¹⁴ The order also said, “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.”¹⁵ On July 9, 2019, the Division filed its report responding to the Commission’s June 14, 2019 order.

On July 30, 2019, PEMC and the Division notified the Commission that PEMC had filed a Chapter 7 bankruptcy petition on July 10, 2019.

On August 1, 2019, the Division responded to the Commission’s July 26, 2019 notice and requested that the Commission order PEMC, Dead Horse, or the owners of the pipeline, JMD and Entrada, to file a “regulatory compliant monitoring plan for the Pipeline for the duration of this shut-in phase . . . with the Commission no later than August 21, 2019.”¹⁶ On August 22, 2019, PEMC filed what was called “Certificate of Service for Interim Pipeline Monitoring Program for Paradox Pipeline” containing an Interim Pipeline Monitoring Program of “approximately a half page explaining the steps that will be taken on a monthly basis to monitor

¹² See the Division’s June 12, 2019 Status Report. See also the Division’s July 9, 2019 Report Responding to the PSC’s June 14, 2019 order.

¹³ See the Division’s June 12, 2019 Status Report. See also the Commission’s website for correspondence from June 12, 2019 through June 17, 2019. See also the Division’s July 9, 2019 Report responding to the Commission’s June 14, 2019 order.

¹⁴ See the Commission’s June 14, 2019 order at pp. 2-3.

¹⁵ Commission’s June 14, 2019 order at p. 3.

¹⁶ See the Division’s August 1, 2019 response at p. 2.

the pipeline in less than 50 words and a second page consisting of a single table, which the operator presumably intended to fill in as evidence it performed the steps enumerated on the previous page each month.”¹⁷

On September 6, 2019 the Division filed its response to the Commission’s August 22, 2019 action request. In that report, the Division reported it had reviewed the August 22, 2019 Interim Monitoring Pipeline Program and found “it does not include all of the minimum recommendation set forth [in] the Division’s August 1, 2019 response.”¹⁸ The Division then said, “In addition, the Interim Program is insufficient, incomplete, and noncompliant with applicable pipeline safety regulations.”¹⁹ The Division’s response provided detailed reasons for the Division’s statements. The Division recommended that the pipeline be “deactivated by October 14, 2019 pursuant to 49 C.F.R. § 192.727 – Abandonment or deactivation of facilities.”²⁰ Also, the Division recommended and requested that if the pipeline was not deactivated by that day, “the Commission impose the maximum penalty pursuant to Utah Code Ann. Section 54-13-8 until the pipeline has been deactivated consistent with 49 CFR Part 192.727.”²¹

On September 16, 2019 PEMC filed a request for hearing. Later, JMD and Dead Horse each filed requesting a hearing.²²

On October 4, 2019, the Commission issued its Notice of Status and Scheduling Conference for this docket. Dead Horse was present at and participated in the conference. PEMC was present, participated, and was represented by Mr. Spencer. JMD Resources

¹⁷ See Second HFO at p. 5.

¹⁸ See the Division’s September 6, 2019 Response at p. 2.

¹⁹ See the Division’s September 6, 2019 Response at p. 2.

²⁰ See the Division’s September 6, 2019 Response at p. 2.

²¹ See the Division’s September 6, 2019 Response at p. 2.

²² See the Commission’s Docket Sheet.

participated by phone and was represented by Mr. Ahmad, its registered agent in Nevada. Mr. Ahmad stated that Mr. Spencer did not represent him. The Commission's resulting Scheduling Order and Notice of Hearing (Scheduling Order) provides not only the information recited above but also additional perspectives on the participants and proceedings.²³

In response to the Scheduling Order, on November 18, 2019, PEMC and the Division filed statements of facts to be established, legal issues to be resolved, and relief sought at hearing, and Dead Horse filed similar correspondence.²⁴ Also on November 18, 2019, PEMC's Bankruptcy Trustee filed its "Notice of Appointment, Ongoing Investigation, and Reservation of Rights."²⁵

On December 2, 2019, PEMC filed exhibits to be used at the hearing. On December 9, 2019, Dead Horse filed the same exhibits as those filed December 2nd by PEMC. On December 10, 2019, the Division filed its responses to the November 18, 2019 filings.²⁶ Also on that day, the Bankruptcy Trustee filed its "Response to Purported Filing of Pacific Energy & Mining Company." On December 11, 2020, Dead Horse filed additional exhibits for the hearing. On December 11, 2019, the Division filed a motion requesting the Commission order witnesses to be physically present in the hearing room.²⁷ On December 12, 2019 the Commission issued an order giving notice that witnesses must be physically present unless granted permission otherwise. On December 18, 2019, the Utah Board of Oil, Gas & Mining (Board) filed a petition to intervene.²⁸

²³ See the Scheduling Order, generally.

²⁴ See Attachment A which contains the November 18, 2019 filings from the Division, PEMC, and Dead Horse.

²⁵ See Commission's Docket Sheet.

²⁶ See Attachment B.

²⁷ The Division also requested expedited treatment for this motion.

²⁸ See the Commission's Docket Sheet.

On December 19, 2019, the hearing was held as scheduled by the October 18, 2019 Scheduling Order. Ms. Schmid represented the Division and Mr. Betham testified on its behalf. PEMC participated through the Bankruptcy Trustee's attorney Mr. Jeffery L. Trousdale. The Board's motion to intervene was granted and it participated through its attorney Michael Beagley. Mr. Spencer and Mr. Christensen were present in the hearing room on December 19, 2019. Because of the appointment of the Bankruptcy Trustee, Mr. Spencer could not represent PEMC and he did not represent any other party.²⁹ Mr. Christensen stated that Dead Horse was not going to participate.³⁰ The next day, an email indicated that Dead Horse's attorney retained for hearing purposes had been unable to attend the hearing.³¹

On January 31, 2020, the Commission issued its Second Hazardous Facility Order (Second HFO). Among other things, the Second HFO found that the Paradox Pipeline was in violation of the Deactivation Rule and found the Culpable Parties³² subject to penalties as set forth therein.³³

On February 11, 2020, Dead Horse, through Mr. Christensen, filed a motion to deviate from the Commission's electronic filing requirements and filed certain correspondence. Dead Horse's motion to deviate was granted that same day.

²⁹ See the statements of Mr. Spencer and the Presiding Officer at 2019 Hearing Transcript, p. 10 at lines 10 – 19. See also the statements of Mr. Trousdale regarding PEMC and Mr. Spencer at 2019 Hearing Transcript, p. 11 at lines 7-14.

³⁰ See the statements of Mr. Christensen and the Presiding Officer at 2019 Hearing Transcript, p. 10 at lines 10-13 and 20-25.

³¹ See discussion, *infra*.

³² The Second HFO defined the Culpable Parties as “(1) the Pipeline's current operator; (2) any future operators until and unless the PSC has issued an order relieving the operator(s) from the order; (3) the current owner or owners of the Pipeline, and (4) any future owner(s) until and unless the PSC has issued an order relieving the owner(s) from this order.” See Second HFO at pp. 26-27.

³³ See, e.g., the Second HFO at p. 29.

On February 20, 2020, Dead Horse, also through Mr. Christensen, filed this Motion for Rehearing.

III. ARGUMENT

A. Dead Horse, JMD, and Entrada Were Not Denied Due Process

Due process was not denied Dead Horse.³⁴ Additionally, JMD and Entrada were given notice and opportunity to participate. Due process must be evaluated in light of relevant actions and circumstances and an evaluation reveals no denial. The less formal nature of this proceeding as compared to traditional court proceedings has benefitted, not harmed, Dead Horse. The Motion's due process arguments are dubious at best and when examined prove to be unsupported by the facts and legal precedent. The Motion should be denied.

Due process is addressed by the U.S. Constitution and the Utah Constitution. The 14th Amendment of the U.S. Constitution extends its 5th Amendment to the States. Article 1, section 7 of Utah's Constitution also addresses due process.

³⁴ The Motion primarily addresses issues concerning Dead Horse, but Dead Horse somewhat obliquely indicates that JMD and Entrada, along with future owners and operators, were also denied due process. Although the Division's response focuses on Dead Horse, JMD and Entrada are discussed separately and more specifically below. Future owners and operators are also discussed below. While not conceding that there was any harm, to the extent that Dead Horse, JMD, or Entrada, or future operators and owners, were denied due process, there was no showing of prejudice.

Many people have roles in more than one company involved with the Paradox Pipeline and this docket.³⁴ For example, Mr. Ahmad is both President of PEMC and registered agent for JMD, an owner of the pipeline. Mr. Green also serves multiple roles. In the beginning of this docket, he was Vice President of PEMC but later transitioned to PEMC's consultant. Mr. Green also is a member of Entrada, an owner of the pipeline. In addition, Mr. Spencer and Ms. Stephanie M. Jensen, the attorney apparently Dead Horse retained to represent it at the hearing, are members of Spencer & Jensen, PLLC.

Dairy Product Services, Inc. v. City of Wellsville, 13 P.3d 581 (Utah 2000) (Dairy Products) succinctly summarizes many important Utah cases addressing due process and provides a valuable path for examining whether Dead Horse's, JMD's, or Entrada's due process rights were violated. Dairy Products stated:

. . . 'due process is not a technical conception with a fixed content unrelated to time, place, and circumstances.' Instead, due process is flexible and, being based on the concept of fairness, should afford the "procedural protections that the given situation demands . . . The minimum requirements are adequate notice and an opportunity to be heard in a meaningful manner.'³⁵

The Commission too has addressed due process. "A party before the Commission is 'entitled to the essential elements of due process of law . . . notice, and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.'"³⁶ Constitutional analysis reveals that Dead Horse, JMD, or Entrada have not been denied due process.³⁷

1. Dead Horse

Examining the "time, place, and circumstances" and the Commission's actions reveal that Dead Horse was not denied due process. Dead Horse stepped into PEMC's shoes, assumed the duty to comply with pipeline safety laws and regulations, and began to participate in this docket. If a subsequent operator were relieved of the duty to comply with pipeline safety laws and regulation merely because it was not the operator when, for example, a hazardous facility order was issued against the pipeline, achieving pipeline safety could be thwarted forever by merely

³⁵ Dairy Products at 593 (internal citations omitted).

³⁶ See *In Re All-American Telephone Company*, Docket No. 08-2469-01, 2010 WL 4823682 citing *R.W. Jones Trucking, Inc. v. Public Service Comm'n*, 649 P.2d 628, 629 (Utah 1982) (internal citations omitted).

³⁷ Insofar as Dead Horse's "denial of representation" argument claims due process violations, if any, they are addressed below.

substituting successive operators. In addition, the Commission's June 14, 2019 order expressly stated that the HFO was not only applicable to PEMC, but also to successor operators.³⁸

Highlighting Dead Horse's and the Commission's actions related to the December 2019 hearing demonstrate that under the criteria set forth in Dairy Products above, Dead Horse was not denied due process. Without a doubt, Dead Horse had "adequate notice and an opportunity to be heard in a meaningful manner." Just a few examples follow.

Dead Horse began participating in this docket in June 2019.³⁹ Dead Horse also was active closer to the hearing date. On October 3, 2019, PEMC counsel filed correspondence stating that Dead Horse, along with PEMC, JMD, and Entrada, would have a representative at the hearing.⁴⁰ On October 4, 2019, Dead Horse itself filed, requesting a hearing and listing witnesses it deemed necessary for that hearing.⁴¹ Dead Horse then participated in the Scheduling Conference, which resulted in the December 2019 hearing.⁴² On November 18, 2019, Dead Horse submitted a list of issues for the hearing.⁴³ In December 2019 Dead Horse twice submitted hearing exhibits prior to the hearing.⁴⁴ Dead Horse was present at the hearing.⁴⁵ The Presiding Officer explicitly asked Dead Horse if it intended to participate in the hearing and Dead Horse's answer of "no" was recorded in the transcript.⁴⁶ Only the day after the hearing

³⁸ See Commission's June 14, 2019 order at pp. 2-3.

³⁹ See, e.g., the Dead Horse's letter filed with the Commission June 13, 2019 (labeled as Miscellaneous Correspondence on the Commission's Docket Sheet).

⁴⁰ See Attachment C.

⁴¹ See Attachment D.

⁴² See Scheduling Order at p. 1.

⁴³ See Attachment A.

⁴⁴ See the Commission's Docket Sheet.

⁴⁵ See discussion, *supra*.

⁴⁶ See discussion, *supra* and 2019 Hearing Transcript at p. 10, lines 20-25 . It was only the day after the hearing that notice was given that Dead Horse had retained an attorney to represent it at the hearing and that she was unable to participate in the hearing. See discussion, *infra*.

was it communicated that Dead Horse had retained an attorney and she was unable to attend the hearing.⁴⁷ Finally, Dead Horse filed this request for rehearing.

2. *JMD and Entrada*

JMD and Entrada have participated in this docket, although they have not been as active as PEMC or Dead Horse. Nonetheless, the record should be read as showing that JMD and Entrada were each given notice and an opportunity to participate.

JMD's actions in particular demonstrate that it was afforded notice and an opportunity to participate. For instance, JMD filed correspondence dated October 1, 2019, stating, "This is to confirm that JMD Resources Inc. will have a representative present to participate in the requested hearing by Pacific Energy in reference to the Monitoring plan and the violations as determined by the Division. JMD requests that the Division have its engineers and supervisors present at the hearing."⁴⁸ In addition, JMD's participation was confirmed by correspondence dated October 3, 2019 from Mr. Spencer.⁴⁹ Next, JMD participated at the Scheduling Conference.⁵⁰ JMD's eventual failure to participate in the hearing was surprising.

Entrada was a less active participant than JMD. However, as noted above, Entrada's member Mr. Green has participated in this docket from practically its beginning, at least on behalf of PEMC so he, as an Entrada member, had actual notice that enforcement actions were being taken against the pipeline. Mr. Green represented Entrada at the Scheduling Conference.⁵¹ Entrada's participation at the hearing also was confirmed by Mr. Spencer's correspondence.⁵²

⁴⁷ See discussion, *infra*.

⁴⁸ See Attachment E.

⁴⁹ See Attachment C.

⁵⁰ See the Scheduling Order at p. 1.

⁵¹ See Scheduling Order at p. 1.

⁵² See Attachment C.

3. Administrative and traditional judicial proceedings do not have identical standards; due process was not denied

There are also important distinctions between administrative and traditional judicial proceedings, which are notable when examining due process. “It is well settled that administrative hearings need not possess the formality of judicial proceedings.”⁵³ Further, “The strict rules of evidence and procedure that apply in a courtroom, however, need not apply in an administrative hearing.”⁵⁴ Hearsay too may be considered in an administrative proceeding.⁵⁵ Thus, the failure, if any, of Dead Horse to be joined pursuant to URCP Rule 19 does not violate its due process rights if the touchstones of notice and an opportunity to be heard are met.⁵⁶

Administrative hearings are more flexible than judicial proceedings too. Dead Horse has benefitted from this flexibility. For example, Mr. Christensen is permitted to represent Dead Horse under the Commission’s rules, which a court would not have allowed.

4. Making Dead Horse and others subject to the Second HFO does not violate due process rights

The Motion alleges that “the PSC order [the Second HFO] cannot and should not be applicable to Dead Horse and others without joining these parties through a motion and a hearing.”⁵⁷ For the reasons set forth above, the Second HFO did not deprive Dead Horse or others their due process rights.⁵⁸

⁵³ Tolman v. Salt Lake County Attorney, 818 P.2d 23, 28 (Utah Ct. App.1991) (citation omitted).

⁵⁴ See, e.g., Nelson v. Department of Employment Sec., 801 P.2d 158, 163 (Utah Ct. App.1990).

⁵⁵ See In re PacifiCorp, Docket Nos. 01-035-29, 01-035-23, 01-035-36, 2002 WL 1058355, May 1, 2002.

⁵⁶ The remedy, if any is required, is to join Dead Horse now.

⁵⁷ See Motion at p. 7.

⁵⁸ To the extent, if any, that JMR and Entrada have been harmed by not being joined, the remedy, if any is required, is to join them now. Future owners and operators should be on notice of the Paradox Pipeline’s noncompliance because even cursory due diligence will reveal that the Paradox Pipeline, its operators, and its owners have a well-documented history of noncompliance with pipeline safety laws.

B. Dead Horse Was Not Deprived of Representation at the Hearing, the Hearing Was Fair and Equitable, and the Second HFO Is Supported by Substantial Evidence

Dead Horse's arguments regarding the hearing and its resulting Second HFO are without merit.⁵⁹ The Commission should deny the Motion.

1. Representation at the hearing.

Contrary to its argument, Dead Horse was not deprived of representation at the hearing. Mr. Christensen was present when the hearing began on Thursday, December 19, 2019. When he was specifically questioned about Dead Horse's participation by the Presiding Officer Mr. Christensen answered only that Dead Horse did not intend to participate.⁶⁰ He did not state that Dead Horse had retained an attorney to represent it at the hearing.⁶¹

Only on the afternoon of December 20, 2019, *the day after the hearing concluded*, did the firm of Spencer and Jensen inform the Commission, Ms. Schmid, and Mr. Betham (and only these three) that Dead Horse had retained one of Spencer and Jensen's attorneys for the hearing and that she was unable to attend. The belated, not filed, and not served, email stated:

Please note that Stephanie Jensen was not able to attend the PSC hearing, as counsel for Dead Horse Oil, held on December 19, 2019 due to being admitted to the hospital on December 15, 2019. Stephanie is still in the hospital with the expectation of being released at some point today.⁶²

Before Ms. Jensen apparently was retained for the hearing, Dead Horse had been represented by Mr. Christensen and it was he who made filings, submitted correspondence, and participated in this docket on Dead Horse's behalf. Contrary to the allegations in the Motion, Mr. Christensen on behalf of Dead Horse could have himself called witnesses and cross

⁵⁹ The Division incorporates here its arguments supra concerning due process.

⁶⁰ See 2019 Hearing Transcript at p. 10, lines 10-25.

⁶¹ See 2019 Hearing Transcript at p. 10, lines 10-25.

⁶² See Attachment F.

examined Mr. Betham. In light of the facts, there was no reason to even speculate that Dead Horse had retained an attorney to represent it at the hearing.

2. The fact that Dead Horse did not participate in the hearing did not make the hearing unfair and inequitable

For the reasons stated above, Dead Horse was not denied representation at the hearing and Dead Horse's willful lack of participation did not make the hearing unfair and inequitable. In its October 4, 2019 filing, Dead Horse stated it was going to call Mr. Al Zadeh, Mr. Betham, and Ms. Schmid, all employees of the State of Utah, as its witnesses.⁶³ Mr. Jimmy Betham testified as the Division's witness and was available for Dead Horse to cross examine or to call as its witness. Mr. Al Zadeh was present in the hearing room and was available to be called as a witness by Dead Horse.

3. The Second HFO is supported by substantial evidence

The Division's testimony and exhibits appropriately support the Commission's decision to issue the Second HFO. The Motion improperly asserts that the "PSC presiding officer had no choice but to grant the request of the Division as [the] PSC only had evidence submitted by the Division."⁶⁴ To the contrary, the Commission did have a choice. "Substantial evidence" is required to support a Commission order.⁶⁵ The Commission could have determined that the evidence failed to support a finding in the Division's favor. The fact that evidence was uncontested is insufficient by itself to sustain a Commission decision – there must be "substantial evidence."

⁶³ Ms. Schmid objected to being called as a witness because she was the Division's litigation counsel. See the Division's December 10, 2019 Response to the November 18, 2019 Filings at p. 6.

⁶⁴ Motion at p. 6.

⁶⁵ See, e.g. *Deseret Power LP v. Public Service Commission*, 173 P.3d 218 (Utah Ct. App. 2007), rehearing denied (*Deseret Power*).

Substantial evidence is defined as, “. . . that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.”⁶⁶ Mr. Betham’s testimony at the hearing was adequate, actually more than adequate, to satisfy this requirement. He provided “relevant evidence” in “that quantum and quality” that was “adequate to convince a reasonable mind to support a conclusion.”⁶⁷

Mr. Betham is a credible witness. He participated in the 2016 audit report that initiated this Docket and continues to participate on behalf of the Division. He holds an engineering degree and has completed the PHMSA required courses qualifying him to perform operations and maintenance audits such as the 2016 audit that gave rise to this proceeding.⁶⁸

Not only is Mr. Betham qualified to testify, but also the testimony he provided was robust and well supported, satisfying the quantum and quality requirements for substantial evidence. For example, Mr. Betham discussed site visits that he had made to the Paradox Pipeline and he described photographs that had been taken during those visits.⁶⁹

Mr. Betham also testified that the Division found the Interim Pipeline Monitoring Program “insufficient” because, in part, the Division had issues with “how they were going to perform the deactivation of the pipeline and the type of equipment that they needed to use, the type of procedure that they were supposed to perform, and to have the documentation record evolved [probably “involved”] to perform the shutdown of the pipeline.”⁷⁰ Additionally he said that that the Interim Program’s procedures to take pressures at certain points was not enough. He said that:

⁶⁶ See *Deseret Power* at p. 222 quoting *WWC Holding Company v. Public Service Commission*, 44 P.3d 714 Utah 2002 (internal citation omitted).

⁶⁷ See *Deseret Power* at p. 222.

⁶⁸ See December 18, 2018 Hearing Transcript at p. 9, lines 22-25 and p. 10, lines 1-15.

⁶⁹ See 2019 Hearing Transcript, generally, and at pp. 27-38. The photographs were entered as Exhibit Nos. 23 and 24 at the 2019 Hearing.

⁷⁰ 2019 Hearing Transcript at p. 21, lines 20-15 and p. 22, lines 1-7.

However, just reading the pressure is not enough to perform a leak survey. A leak survey encompasses a lot more steps as far as just reading pressure gauges. You have to literally walk over the pipeline, use approved equipment to pick up any natural gas along the line, and be able to identify those areas that if you do come across a leak along the pipeline, that you know what you need to do in case of an emergency situation.⁷¹

Mr. Betham's testimony regarding the need to deactivate the Paradox Pipeline is another example of how substantial evidence supports the Second HFO. He testified that deactivation of the pipeline is "required and our only option that we had."⁷² He testified that the Division recommended the pipeline be deactivated as soon as possible.⁷³

He explained why a Commission order requiring deactivation was necessary. He testified that "typically, we would have records of the work that's being done, such as the maintenance and work that was done. Because none of those records have been provided to us, we don't have that confidence that this pipeline is operated in a safe manner."⁷⁴ He testified that "If they [pipeline operators] have good procedures of operating the pipeline, once we inspect that, we move forward to how well are they following those procedures though their records."⁷⁵ He testified that "And if the records are not provided at the time of inspection, it doesn't give us an indication or confidence, again, to know they are operating this pipeline safely."⁷⁶ He testified that having records and following procedures is essential to protect the public.⁷⁷ He emphasized that "it is more than paperwork. Actually, there's the work that needs to go into – on the operator side to

⁷¹ 2019 Hearing Transcript at p. 23, lines 5-18.

⁷² 2019 Hearing Transcript at p. 29, lines 2-4.

⁷³ 2019 Hearing Transcript at p. 36, lines 15-17.

⁷⁴ See 2019 Hearing Transcript at p.30, lines 5-20.

⁷⁵ 2019 Hearing Transcript at p. 31, lines 2-5.

⁷⁶ 2019 Hearing Transcript at p. 31, lines 12-15.

⁷⁷ See 2019 Hearing Transcript at p. 48, lines 19-25 and p. 49.

perform that work according to their procedures.”⁷⁸ He also addressed concerns raised by the Board.⁷⁹

In addition, Mr. Betham’s testimony withstood scrutiny in the hearing room. He was cross examined by counsel for the Bankruptcy Trustee and counsel for the Board. He also was questioned by the Presiding Officer.⁸⁰

D. Actions of PEMC’s Counsel

Here, Dead Horse makes unique but unquestionably flawed arguments that fail to support its Motion. Dead Horse contends Mr. Spencer’s actions or inactions deprived the Commission of evidence necessary for the Commission to make its decision.⁸¹ Dead Horse also at least implies that PEMC and Mr. Spencer had a legal duty to represent or assist Dead Horse.

Mr. Spencer’s actions when he was PEMC’s counsel prior to the appointment of the Bankruptcy Trustee or his inability to participate at the hearing as PEMC’s counsel did not deprive the Commission of the ability to acquire evidence from the “Pipeline’s operator.”⁸² PEMC ceased being the pipeline operator in May 2019. Any failure to provide the Commission evidence from the pipeline operator, Dead Horse, was due solely to Dead Horse’s own actions. Importantly, as discussed above, sufficient evidence was presented at the hearing to allow the Second HFO to be properly supported by substantial evidence.

The Motion seems to claim that PEMC, through Mr. Spencer, had a duty to Dead Horse.⁸³ There was no showing that Dead Horse was a third party beneficiary of PEMC.

⁷⁸ 2019 Hearing Transcript at p.48, line25 and p. 49 at lines 1-4.

⁷⁹ See 2019 Hearing Transcript at p. 46.

⁸⁰ See 2019 Hearing Transcript at pp. 44-47.

⁸¹ See Motion at p. 7.

⁸² It also appears as though the Motion may be claiming that the Bankruptcy Trustee’s actions deprived the Commission of necessary evidence. For the same reasons that Dead Horse’s claims against PEMC and Mr. Spencer fail, its assertions against the Bankruptcy Trustee fail too.

⁸³ See Motion at p. 3.

Dead Horse also implies that Mr. Spencer had a duty to obtain a conflict of interest waiver so that he could represent Dead Horse when Mr. Spencer no could no longer represent PEMC.⁸⁴ Dead Horse has offered no evidence that Mr. Spencer owed Dead Horse a duty to obtain a conflict of interest waiver.

Moreover, to the extent that Dead Horse is implicitly arguing in this section that Mr. Spencer has committed malpractice, even if such a claim were valid, relief could not be granted by the Commission. Malpractice issues are outside the Commission's jurisdiction.⁸⁵

IV. CONCLUSION

For the reasons set forth above, the Division respectfully requests that the Commission issue an order denying the Motion.

Submitted this 6th day of March 2020.



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

⁸⁴ Motion at p. 7.

⁸⁵ See Motion at p. 7.