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Pacific Energy & Mining Company

DOCKET NO. 18-2602-01

ORDER DENYING DEAD HORSE OIL  
COMPANY'S MOTION FOR REHEARING

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ISSUED: March 11, 2020

On January 31, 2020, the Public Service Commission of Utah (PSC) issued its Second Hazardous Facility Order (“Second Hazardous Order”) in this docket. On February 20, 2020, Dead Horse Oil Company (“Dead Horse”) filed a Motion for Rehearing (“DH Motion”). On March 6, 2020, the Division of Public Utilities (DPU) filed its Response Opposing Dead Horse Oil Company’s Motion for Rehearing (“DPU’s Response”).

Based on the DH Motion and the DPU’s Response, and pursuant to §§ 63G-4-301 and 54-7-15 and Utah Admin. Code R746-1-801, the PSC denies the DH Motion. However, based on further review of the record, the PSC changes the name of its Second Hazardous Order to “Compliance Review Order.” For all of the reasons enumerated and discussed in the Compliance Review Order, we affirm our findings and conclusions in the Compliance Review Order.

**1. Dead Horse had due process in this proceeding, including the opportunity to fully participate in the proceeding and the opportunity to issue discovery.**

Dead Horse had ample notice and an opportunity to participate in this proceeding. The hallmarks of due process are notice and an opportunity to be heard. *Utah County v. Ivie*, 2006 Utah 33, ¶ 22, 137 P.3d 797, 802 (Utah 2006). (“The hallmarks of due process are notice and an opportunity to be heard, but not all proceedings demand the same level of process.”) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). Further, due process standards are situational. *V-1 Oil Co. v. Dep’t of Env’tl. Quality*, 939 P.2d 1192, 1196 (Utah 1997) (“[T]he Court of

Appeals’ analysis fails to account for relevant distinctions between administrative and judicial proceedings. The requirements of due process depend upon the specific context in which they are applied because unlike some legal rules due process is not a technical conception with a fixed content unrelated to time, place, and circumstances.”) (internal quotations omitted). There is substantial evidence in the record showing that Dead Horse had due process in this proceeding. Beginning June 14, 2019 with the PSC’s “Notice of Hazardous Facility Order, Order to Provide Confirmation of Compliance, and Action Request to the Division of Public Utilities” (“Notice of HFO”), and continuing through all post hearing filings, notices, and other correspondence, Dead Horse was included in the filings’ service lists and, therefore, had the opportunity to review the substance of the proceeding. The Notice of HFO was issued specifically to put Dead Horse, and others, on notice regarding the Hazardous Facility Order, issued April 10, 2019 (“HFO”), including the finding that the Paradox Pipeline was in violation of the pipeline safety requirements set forth in Utah Code Ann. § 54-13-3 and 49 C.F.R. § 192, as referenced and fully described in the HFO, and to direct PEMC, “or any successor operator” to provide confirmation of compliance.<sup>1</sup>

In addition, as stated in the DPU’s Response, Dead Horse began participating in this proceeding in June 2019,<sup>2</sup> and actively participating several months before the December 19, 2019 hearing. On October 3, 2019, counsel for Pacific Energy & Mining Company (PEMC) filed correspondence stating that Dead Horse, along with PEMC, and the owners (JMD Resources

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<sup>1</sup> See Notice of HFO, at 2-3.

<sup>2</sup> See, e.g., Dead Horse’s letter filed with the PSC June 13, 2019 (labeled “Miscellaneous Correspondence on the PSC’s docket sheet for this docket on the PSC’s website).

Inc./Entrada), would have a representative at the hearing.<sup>3</sup> On October 4, 2019, Dead Horse filed a request for a hearing and listed witnesses it deemed necessary for that hearing.<sup>4</sup> Dead Horse then participated in the Scheduling Conference which ultimately resulted in the scheduling of the December 2019 hearing.<sup>5</sup> On November 18, 2019, Dead Horse submitted a list of issues for the hearing.<sup>6</sup> In December 2019, Dead Horse twice submitted hearing exhibits before the hearing.<sup>7</sup> Dead Horse was also present at the hearing and was asked by the Presiding Officer specifically if it intended to participate in the hearing and Mr. Christensen, on behalf of Dead Horse, responded “no.”<sup>8</sup> Throughout the proceedings beginning in June 2019, Dead Horse has been an active participant in the docket. In addition, since June 2019, when Dead Horse was notified of this proceeding, Dead Horse had the opportunity to request information from the DPU, i.e., to issue discovery. Accordingly, the PSC denies the DH Motion based on the claim that Dead Horse was deprived of due process and was denied the opportunity to issue discovery.

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<sup>3</sup> See Correspondence from Spencer & Jensen, PLLC on the PSC’s docket sheet for this docket on the PSC’s website, and the DPU’s Response, p. 11, n.40.

<sup>4</sup> See Correspondence from Dead Horse Oil Company on the PSC’s docket sheet for this docket on the PSC’s website, and the DPU’s Response, p. 11, n.41.

<sup>5</sup> See the DPU’s Response, n.42.

<sup>6</sup> See Correspondence from Dead Horse Oil Company, and *id.*, n.43.

<sup>7</sup> See Correspondence from Dead Horse Oil Company, dated December 9 and 11, 2019 on the PSC’s docket sheet in the docket.

<sup>8</sup> See Dec. 19, 2019 Hr’g Tr. at 10:20-25.

- 2. Dead Horse may be represented by counsel at any PSC hearing, but such representation is not required by the PSC's Administrative Procedures Act Rules. Representation by counsel is also not required by the procedures governing the enforcement authority exercised for achieving and maintaining pipeline safety and compliance, 49 C.F.R. § 190.201, incorporated by reference in Utah's procedures in Utah Code Ann. § 54-13-2.**

The PSC's Administrative Procedures Act Rules, Subsection R746-1, govern and control proceedings before the PSC regarding pipeline safety, with a few exceptions that are not related to representation of counsel. Utah Admin Code R746-1-107(1) allows a person that is not an individual, such as Dead Horse, to represent itself in a hearing through an officer or an employee. Throughout the proceedings, Mr. Dean H. Christensen has (1) made representations to the PSC and to the DPU that he was an employee of Dead Horse, and (2) attended meetings on behalf of Dead Horse.<sup>9</sup> He has also filed, on behalf of Dead Horse, the vast majority of the documents with the PSC. Mr. Christensen has also participated in the proceedings since it became public knowledge that Dead Horse purported to be the operator of the Paradox Pipeline. Finally, Mr. Christensen was also present at the hearing and was given the opportunity to participate in the hearing, although he declined to do so when specifically asked by the Presiding Officer. Thus, Mr. Christensen has had numerous opportunities to mention that Dead Horse was represented by counsel or that Dead Horse desired legal representation, but didn't do so. When asked whether Mr. Christensen intended to participate in the hearing by the Presiding Officer, he

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<sup>9</sup> For e.g., in correspondence filed with the PSC on October 4 and 15, 2019, Mr. Christensen signed both letters as "Manager" of Dead Horse Oil Company. *See also* the Status and Scheduling Conference Sign-in Sheet in the PSC's docket sheet for this docket on the PSC's website.

could have mentioned that his attorney had intended to appear but was in the hospital. Instead, Mr. Christensen responded “no.”

The federal regulations that govern the enforcement authority exercised for achieving and maintaining pipeline safety and compliance, 49 C.F.R. § 190.201, incorporated by reference in Utah Code Ann. § 54-13-2, state that “a person who is the subject of action pursuant to this subpart may be represented by legal counsel at all stages of the proceeding.” While representation by counsel is mentioned, it is not mandated.

Based on the law and because there was no mention of Mr. Christensen’s desire for legal representation for Dead Horse at any time before or during the hearing,<sup>10</sup> the PSC denies the DH Motion based on the claim that failure of counsel for Dead Horse to make an appearance deprived Dead Horse of representation.

**3. As the current operator of the Paradox Pipeline, Dead Horse bears the burden of ensuring the Paradox Pipeline complies with the Natural Gas Pipeline Safety Act’s minimum safety requirements.**

Consistent with Utah Admin. Code R746-409-6(B), the central finding in the Compliance Review Order is that “*the intrastate pipeline facility* [the Paradox Pipeline] continues to be hazardous to life or property ... .”<sup>11</sup> The declared purpose of the Natural Gas Pipeline Safety Act, 49 U.S.C.S. § 60102 (“PSA”), as implemented by the minimum safety standards in the applicable regulations 49 C.F.R. §§ 190, 191, 192, 198, and 199, incorporated by reference in

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<sup>10</sup> It was only after the hearing that the PSC received email communication from Ms. Stephanie Jensen, a legal assistant with Spencer & Jensen, notifying the PSC and the DPU’s counsel that Dead Horse had retained an attorney to represent it at hearing and that she was unable to attend because she was in the hospital. *See* the DPU’s Response, Attachment F and DH Motion, at 4, ¶ 26.

<sup>11</sup> Compliance Review Order, at 22.

Utah Code Ann. § 54-13-2 and applicable to Utah intrastate pipelines, is to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities. In furtherance of this purpose, the statutes and regulations largely place the burden of compliance on the pipeline operator. For example, the PSA and implementing regulations provide as follows: The operator must take all practicable steps to protect each transmission line or main from washouts, floods, unstable soil, landslides, or other hazards that may cause the pipeline to move or to sustain abnormal loads. 49 C.F.R. § 192.317(a). Each operator of a buried pipeline must carry out a written program to prevent damage to that pipeline from excavation activities. 49 C.F.R. § 192.614(a). An operator must take additional measures beyond those already required by Part 192 to prevent a pipeline failure and to mitigate the consequences of a pipeline failure in a high consequence area. 49 C.F.R. § 192.935(a). The language under Utah law that imposes requirements and obligations for pipeline safety is broader and therefore includes the operator of the pipeline, stating, any “person[s] engaged in intrastate pipeline transportation ... .”<sup>12</sup>

Dead Horse appears to have filed an Operator Registry Notification form with the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration on August 21, 2019, registering Dead Horse as the Pipeline’s operator. (Hr’g Ex. 13). Dead Horse filed documents, notices, and other correspondence<sup>13</sup> with the PSC in the proceeding, holding itself out to be the operator of the Paradox Pipeline. Dead Horse also never challenged the DPU’s or the PSC’s characterization of Dead Horse as the operator of the Paradox Pipeline.

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<sup>12</sup> See e.g., Utah Code Ann. §§ 54-13-3(2), 54-13-5, and 54-13-8.

<sup>13</sup> *Supra* pp. 2-3.

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Accordingly, Dead Horse is the operator of the Paradox Pipeline and is responsible for ensuring the pipeline complies with the minimum safety requirements. Therefore, the PSC denies the DH Motion based on the claim that the [Compliance Review Order] against Dead Horse was improper and a violation of the due process clause of the United States Constitution and Utah Constitution.

DATED at Salt Lake City, Utah, March 11, 2020.

/s/ Yvonne R. Hogle  
Presiding Officer

Approved and confirmed March 11, 2020, as the Order of the Public Service Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg  
PSC Secretary  
DW#312497

Notice of Opportunity for Judicial Review

Judicial review of the PSC's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.



CERTIFICATE OF SERVICE

I CERTIFY that on March 11, 2020, a true and correct copy of the foregoing was delivered upon the following as indicated below:

By U.S. Mail:

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\* Documents previously mailed to this address have been returned to the PSC as undeliverable.

Dean H. Christensen  
Manager  
Dead Horse Oil Company  
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\* Documents previously mailed to this address have been returned to the PSC as undeliverable.

By Email:

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Administrative Assistant