IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: EXTRACTION OIL & GAS, INC., *et al.*, Debtors.	CIVIL ACTION NO. 20-CV-01412 CIVIL ACTION NO. 20-CV-01506 CIVIL ACTION NO. 20-CV-01564 CIVIL ACTION NO. 21-CV-00012 BANKRUPTCY CASE NO. 20-11548 (CSS) BANKRUPTCY BAP NO. 20-44 BANKRUPTCY BAP NO. 20-52 BANKRUPTCY BAP NO. 20-56 BANKRUPTCY BAP NO. 21-01
FEDERAL ENERGY REGULATORY COMMISSION, Appellant, v. EXTRACTION OIL & GAS, INC., Appellee.	

STATUS REPORT, RENEWED MOTION FOR CERTIFICATION, AND RENEWED MOTION FOR CONSOLIDATION OF FEDERAL ENERGY REGULATORY COMMISSION

The Federal Energy Regulatory Commission ("FERC" or the "Commission") respectfully submits this status report in response to the Court's January 4, 2021 Oral Order directing the Commission to submit a report regarding (i) the pending appeals, (ii) the parties' Joint Request for Certification of Direct Appeal of Bankruptcy Court Orders, and (iii) the parties' Joint Motion to Consolidate Bankruptcy Appeals and Conform Briefing Schedules.

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BACKGROUND

A. Procedural Background

On June 14, 2020, Extraction Oil & Gas and certain of its affiliates (the "Debtors")[1] filed petitions under Chapter 11 of the Bankruptcy Code. (D.I. 1).[2] On September 17, 2020, the Commission filed a Statement in Support of the Motion of Grand Mesa Pipeline, LLC ("Grand Mesa"), for an Order Confirming that the Automatic Stay Does Not Apply or, in the Alternative, for Relief from the Automatic Stay. (D.I. 653). On October 14, 2020, the Bankruptcy Court entered a Bench Ruling preventing Grand Mesa from seeking the Commission's consideration of the public interest impacts of rejecting a jurisdictional contract, (D.I. 831) ("Order Denying the Lift-Stay Motion"), and then granted Debtor's motions for summary judgment against various counterparties. (D.I. 832-34). On November 2, 2020, the Bankruptcy Court entered a Bench Ruling granting the Debtor's Motions to Reject. (D.I. 942). On November 10, 2020, the Bankruptcy Court issued an Order Granting Motions to Reject Certain Executory Contracts related to FERC-jurisdictional Transportation Services Agreements ("TSA"). (D.I. 1038). On December 11, 2020, the Commission filed an Objection to Confirmation of the Debtors' Joint Chapter 11 Plan of Reorganization. (D.I. 1310). On December 23, 2020, the Bankruptcy Court entered its Findings of Fact, Conclusions of Law, and Order Confirming the Sixth Amended Joint Plan of

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

[2] In this pleading, D.I. citations reference docket numbers in the underlying bankruptcy proceeding. Doc. No. citations reference docket numbers in this Court.

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Reorganization of Extraction Oil & Gas, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code. (D.I. 1509) ("Order Confirming the Plan").

Grand Mesa filed notices of appeal on October 21, 2020, (D.I. 864), and November 11, 2020, (D.I. 1048). The Commission filed notices of appeal on October 21, 2020, November 6, 2020, November 20, 2020, and January 5, 2021. (D.I. 816, 1016, 1138, 1587). The Commission filed a Notice of Appeal of the Bankruptcy Court's October 14, 2020 Order Denying the Lift-Stay Motion, (D.I. 816), the Bankruptcy Court's November 2, 2020 Bench Ruling, (D.I. 1016), the Bankruptcy Court's November 10, 2020 Order Granting Motions to Reject Certain Executory Contracts, (D.I. 1138), and the Bankruptcy Court's December 23, 2020, Order Confirming the Plan, (D.I. 1587). These appeals resulted in civil case No. 20-cv-1412, No. 20-cv-1506, 20-cv-1564, and 20-cv-0012, respectively.

On December 7, 2020, the Commission and then-Appellant Grand Mesa jointly requested that this Court consolidate their respective appeals relating to the rejection of the TSAs.[3] On December 11, 2020, the Commission and then-Appellant Grand Mesa jointly requested certification of a direct appeal to the United States Court of Appeals for the Third Circuit.[4] On January 8, 2021, Grand Mesa and Extraction filed a Joint Stipulation Of Voluntary Dismissal, dismissing Grand Mesa's appeals.[5]

[3] *Grand Mesa Pipeline, LLC. v. Extraction Oil & Gas, Inc.*, No. 20-cv-1411, Doc. No. 18; *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1521, Doc. No. 14. Please note that the Commission is using this long form for citations to filings in this Court.

[4] *Grand Mesa Pipeline, LLC. v. Extraction Oil & Gas, Inc.*, No. 20-cv-1411, Doc. No. 21; *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1521, Doc. No. 20.

[5] *Grand Mesa Pipeline, LLC. v. Extraction Oil & Gas, Inc.*, No. 20-cv-1411, Doc. No. 28; *Grand Mesa Pipeline, LLC. v. Extraction Oil & Gas, Inc.*, No. 20-cv-1521, Doc. No. 27.

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B. Legal Framework

In 1977, Congress transferred authority over interstate oil pipelines from the Interstate Commerce Commission to FERC, the successor agency to the Federal Power Commission. *See* 49 U.S.C. § 60502; Department of Energy Organization Act, 42 U.S.C. §§ 7101 *et seq*. One year later, Congress clarified that FERC would regulate oil pipelines in accordance with the 1977 version of the Interstate Commerce Act. *See* Pub. L. No. 95-473, § 4(c), 92 Stat. 1466-1470 (1978). Under the Interstate Commerce Act, FERC is charged with ensuring just and reasonable rates, a mandate that parallels its obligations under the Natural Gas Act and Federal Power Act. *Compare* 49 U.S.C. § 5 *with* 15 U.S.C. § 717c; 16 U.S.C. § 824d.

FERC does not seek to limit the jurisdiction granted to the bankruptcy courts by Congress. However, the Bankruptcy Code does not displace the Commission's own jurisdiction over filed rate contracts. *See ETC Tiger Pipeline, LLC*, 171 FERC ¶61,248, at ¶22, *reh'g denied*, 172 FERC ¶61,155 (2020) (discussing this issue in the Natural Gas Act context). Rather, the Commission and the bankruptcy courts have parallel, exclusive jurisdiction.

Just as the bankruptcy courts have exclusive authority over the rejection of a debtor's executory contracts as private obligations, the Commission has exclusive jurisdiction under the Interstate Commerce Act to accept or modify filed rates as public law obligations. *See* 49 U.S.C. § 60502 (transferring authority over interstate oil pipelines to FERC); Pub. L. No. 95-473, § 4(c), 92 Stat. 1466-1470 (1978) (clarifying that FERC regulates oil pipelines in accordance with the 1977 Interstate Commerce Act). This includes the modification or abrogation of the public law obligations that those contracts create once the Commission accepts the contracts as filed rates that carry the force of law. *See Penn. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 422 (1952) (finding that, once a contract is approved by FERC, the duty to comply with its contractual terms "springs from the Commission's authority, not from the law of private contracts"); *Cal. ex*

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rel. Lockyer v. Dynegy, Inc., 375 F.3d 831, 839 (9th Cir. 2004) (finding that electric tariffs are "the equivalent of federal regulation"); *Boston Edison Co. v. FERC*, 856 F.2d 361, 372 (1st Cir. 1988) (finding that the filed rate was "to be treated as though it were a statute, binding upon both the seller and the purchaser alike").

Rates for interstate oil transportation service are filed with and approved by FERC. *See* 49 U.S.C. § 3(1); *see e.g.*, *Enbridge Energy, Ltd. P'ship*, 152 FERC ¶61,047 (2015). The terms and conditions of such service are included in tariffs that are also filed with and approved by FERC. Accordingly, any challenge to a rate for, or term and condition of providing, interstate oil transportation service must be made before FERC. *See* 49 U.S.C. § 3(1).

STATUS REPORT

A. The Commission Intends to Move Forward with the Pending Appeals

Grand Mesa's TSAs were not the only FERC-jurisdictional TSAs impacted by the bankruptcy proceedings. Colorado Interstate Gas (CIG) has filed a limited objection to the Plan, noting that their TSA is jurisdictional. (D.I. 1286). The Bankruptcy Court entered an order rejecting CIG's TSA without seeking input from the Commission. (D.I. 1168). This rejection purports to alleviate the debtor of its public law obligations under the TSA.

Although the Bankruptcy Court maintains that it did not intend to cause any rate changes, the Commission has found that, under the jurisdictional approach advocated by Extraction and other recent debtors, "rejection of a contract in bankruptcy is broader than a breach in the ordinary course of business, as rejection is a court-ordered breach that may result in cessation of the entire contract."[6] As the Sixth Circuit explained, "an analogy to breach of contract outside of

[6] *E.g.*, *Rover Pipeline LLC*, 173 FERC ¶61,019, *order on public interest*, 173 FERC ¶61,133, *reh'g denied*, 173 FERC ¶61,138, at ¶15 (2020); *ANR Pipeline Co.*, 173 FERC ¶61,018, *order on public interest*, 173 FERC ¶61,131, *reh'g denied*, 173 FERC ¶61,137, at ¶15 (2020); *Midship*

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bankruptcy is also inapt inasmuch as Supreme Court caselaw . . . gives FERC authority to compel specific performance of an unprofitable or even illegal contract." *In re FirstEnergy Solutions Corp.*, 945 F.3d 431, 444 (6th Cir. 2019).[7]

In the Commission's view, as illuminated by the Supreme Court's recent ruling in *Mission Product*, "a debtor cannot grant itself an exemption from 'all the burdens that generally applicable law . . . imposes' by breaching a contract through the bankruptcy process." *ETC Tiger Pipeline, LLC*, 171 FERC ¶61,248, at P 22 (2020) (quoting *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1666 (2019)); *see* 11 U.S.C. § 365(g). Those surviving obligations under generally applicable law include the obligations to comply with the filed rate accepted by the Commission because that "duty springs from the Commission's authority, not from the law of private contracts." *Penn. Water*, 343 U.S. at 422; *see FirstEnergy*, 945 F.3d at 444.

The Plan, however, does not make confirmation contingent on regulatory approval by the Commission. This violates section 1129(a)(6) of the Bankruptcy Code which requires that "(a)ny governmental regulatory commission with jurisdiction, after confirmation of the plan,

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Pipeline Co., LLC, 173 FERC ¶61,011, *order on public interest*, 173 FERC ¶61,130, *reh'g denied*, 173 FERC ¶61,136, at ¶17 (2020); *Rockies Express Pipeline LLC*, 172 FERC ¶61,279, *order on public interest*, 173 FERC ¶61,099, *reh'g denied*, 173 FERC ¶61,135, at ¶15 (2020).

[7] *See also, e.g.*, *Rover Pipeline LLC*, 173 FERC ¶61,019, *order on public interest*, 173 FERC ¶61,133, *reh'g denied*, 173 FERC ¶61,138, at ¶15 (2020); *ANR Pipeline Co.*, 173 FERC ¶61,018, *order on public interest*, 173 FERC ¶61,131, *reh'g denied*, 173 FERC ¶61,137, at ¶15 (2020); *Midship Pipeline Co., LLC*, 173 FERC ¶61,011, *order on public interest*, 173 FERC ¶61,130, *reh'g denied*, 173 FERC ¶61,136, at ¶17 (2020); *Rockies Express Pipeline LLC*, 172 FERC ¶61,279, *order on public interest*, 173 FERC ¶61,099, *reh'g denied*, 173 FERC ¶61,135, at ¶15 (2020).

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over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6).

At this time, it is also unclear to the Commission whether the settlements confirmed by the Plan will not require regulatory approval. The settlements are currently under seal and the Commission requires some opportunity to analyze those documents and consider their potential impact on the Commission's jurisdiction and its appeals. [8]

The Commission acknowledges that its appeals of the Bankruptcy Court's Bench Ruling and Order Granting Motions to Reject Certain Executory Contracts, case No. 1:20-cv-1506 and case No.1:20-cv-1564, may be deemed moot by the settlement between Extraction and Grand Mesa, provided that such settlements do not impermissibly purport to change the filed rates currently in effect. However, in that case, the Commission intends to move forward with its appeals of the Bankruptcy Court's Order Denying the Lift-Stay Motion, No. 1:20-cv-1412, and the Bankruptcy Court's Order Confirming the Plan, No. 1:21-cv-0012. These combined appeals demonstrate the Bankruptcy Court's error in refusing to comply with section 1129(a)(6) of the Bankruptcy Code.

B. The Commission Continues to Request Certification of a Direct Appeal

The Commissions continues to request certification of a direct appeal of the Bankruptcy Court orders to the United States Court of Appeals for the Third Circuit without Grand Mesa. The

[8] These settlements were filed under seal, and the Commission has not had the opportunity to adequately review them. Although counsel for Grand Mesa has stated to the Commission that they believe that their settlement will not result in any change to the filed rate, counsel for Platte River/DJ South has not confirmed either way. On January 8, 2021, the Commission reached out to counsels for Extraction, Grand Mesa, and Platte River/DJ South and requested permission to review the settlements.

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Commission also requests to certify its most recent appeal of the Bankruptcy Court's Order Confirming the Plan, No. 1:21-cv-0012.

Under 28 U.S.C. § 158(d)(2)(A), certification of these appeals is required if *any* of the conditions outlined in sections (i)-(iii) is met. As detailed fully in the Joint Motion for Certification,[9] the Commission's appeals satisfy *each* of the conditions. These conditions are also satisfied by FERC's most recent appeal, No. 1:21-cv-0012. These conditions remain satisfied after Grand Mesa's withdrawal.

In the event that the settlement between Extraction and Grand Mesa does not impermissibly purport to change the filed rates currently in effect, and the Commission's appeals in case No. 1:20-cv-1506 and case No.1:20-cv-1564 may be deemed moot, the Commission intends to move forward with its request for certification of the Bankruptcy Court's Order Denying the Lift-Stay Motion, No. 1:20-cv-1412, and the Bankruptcy Court's Order Confirming the Plan, No. 1:21-cv-0012.

C. The Commission Continues to Request Consolidation of its Appeals

The Commission continues to request consolidation of its appeals without Grand Mesa. FERC also requests consolidation of its most recent appeal of the Bankruptcy Court's Order Confirming the Plan, No. 1:21-cv-0012. As set forth fully in the Joint Motion to Consolidate Bankruptcy Appeals,[10] consolidation is appropriate because it would create no risk of inconvenience, delay, or expense. Given the common factual and legal issues predominant in the Appeals, consolidation would avoid significant repetitive briefing and argument involving

[9] *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1411, Doc. No. 21; *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1521, Doc. No. 20.

[10] *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1411, Doc. No. 18; *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1521, Doc. No. 14.

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overlapping factual and legal issues, and preserve the resources of both the Court and the parties. This is also true regarding FERC's most recent appeal in No. 1:21-cv-0012, which objects to the Bankruptcy Court's Order Confirming the Plan, and this remains true after Grand Mesa's withdrawal.

In the event that the settlement between Extraction and Grand Mesa does not impermissibly purport to change the filed rates currently in effect, and the Commission's appeals in case No. 1:20-cv-1506 and case No.1:20-cv-1564 may be deemed moot, the Commission intends to move forward with its request for consolidation of the Bankruptcy Court's Order Denying the Lift-Stay Motion, No. 1:20-cv-1412, and the Bankruptcy Court's Order Confirming the Plan, No. 1:21-cv-0012.

Dated: January 11, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 21, 2020, I electronically filed the foregoing document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record on the service list below, via transmission of Notices of Electronic Filing generated by CM/ECF, electronic mail, and/or first-class U.S. mail.

/s/ Daniel M. Vinnik
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