IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*, [1]	Case No. 20-11548 (CSS)
Debtors.	(Jointly Administered)
	Objection Deadline: August 18, 2020 at 4:00 p.m. **Hearing Date: September 3, 2020 at 11:00 a.m.**

MOTION OF GRAND MESA PIPELINE, LLC FOR ORDER CONFIRMING THAT THE AUTOMATIC STAY DOES NOT APPLY OR, IN THE ALTERNATIVE, FOR RELIEF FROM THE AUTOMATIC STAY

Grand Mesa Pipeline, LLC ("**Grand Mesa**") hereby moves (the "**Motion**"), pursuant to section 362(d) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "**Bankruptcy Code**"), and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), for entry of an order (i) confirming that a declaratory petition that Grand Mesa intends to file at the Federal Energy Regulatory Commission ("**FERC**" or the **"Commission**") regarding FERC's concurrent jurisdiction with this Court over transportation service agreements (collectively, the "**TSAs**"[2]) discussed herein does not implicate the automatic stay or falls within police and regulatory exception to the automatic stay or, in the alternative, (ii) granting relief from the automatic stay to allow Grand Mesa to petition for an order from FERC regarding whether rejection of the TSAs during this bankruptcy proceeding is consistent with the public interest and the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.* (the "**ICA**"). In support of this Motion, Grand Mesa respectfully states as follows:

[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] As defined below, the two TSAs are the Extraction TSA and the Bayswater TSA.

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PRELIMINARY STATEMENT

1. The TSAs between Grand Mesa and Debtor Extraction (as defined below) relate to an interstate crude oil pipeline—the Grand Mesa Pipeline—that is regulated by FERC under the ICA. Through the ICA, Congress conferred upon FERC exclusive jurisdiction over the rates and other terms and conditions of interstate oil pipeline agreements to ensure that interstate oil pipeline rates, terms and conditions of transportation services are "just and reasonable." The statutory framework and interpretive case law provide that FERC alone is empowered to regulate the rates and terms of service for interstate oil pipelines. FERC also applies its specialized regulatory expertise to evaluate such issues.

2. The TSAs are not ordinary private contracts. Rather, each TSA includes "filed rates" and terms and conditions subject to the exclusive jurisdiction of FERC—that have the force and effect of law. Once approved by FERC, the duty to comply with the TSA's contractual terms "springs from [FERC's] authority, not from the law of private contracts."[3] Each TSA is subject to FERC's jurisdiction, which section 365 of the Bankruptcy Code does not, and was not intended to, override.

3. While this Court undisputedly has jurisdiction to determine whether an executory contract may be assumed or rejected, under the ICA, the only forum in which a party may seek to challenge the filed rate or other contractual terms of a FERC-jurisdictional agreement is before FERC or a court authorized to review FERC's order. This a separate and distinct inquiry, and one outside the scope of the traditional assumption or rejection analysis performed regularly by this Court. As such, the Debtors may not ignore, and as a result collaterally attack, FERC-approved transportation agreement terms, including the filed rates in such agreements, under the guise of a

[3] *Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 422 (1952).

routine rejection motion. Nor can this Court alone proceed under a traditional rejection analysis without FERC having had the opportunity to formally determine through a FERC order whether the effects of rejection of the TSAs are consistent with the public interest under the ICA.

4. To be clear, Grand Mesa does not seek through this Motion to limit the jurisdiction or adjudicatory authority granted to this Court by Congress. The ICA and the Bankruptcy Code provide FERC and this Court with separate authorities over separate domains, which are to be harmonized as two co-equal acts of Congress.[4] In contrast, allowing rejection of the TSAs, without appropriate FERC review and approval, would amount to an unlawful termination of the regulatory obligations under the TSAs because it would disregard FERC's independent jurisdiction under the ICA. Rejection of a FERC-jurisdictional contract in bankruptcy "alters the essential terms and conditions of a contract that is also a filed rate; therefore, [FERC's] approval is required to modify or abrogate the filed rate."[5] Accordingly, the effect of rejection of the TSAs goes well beyond that of a simple contract rejection and any determination of the propriety of rejecting the TSAs must, therefore, include a review and determination by FERC that abrogation or modification of the TSAs is consistent with the public interest under the ICA.[6]

5. FERC is an agency that "speaks" solely through its orders such that a review of, and determination on, these issues can only be achieved through filing a petition with the Commission.[7] Given the concurrent and significant federal interest associated with the Debtors'

[4] *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (stating that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").
[5] *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248, at P 23 (2020) ("*ETC Tiger Pipeline*").
[6] As explained herein, the "public interest" standard has a specialized meaning under FERC precedent and the ICA, establishing an extremely high bar to any attempt to modify or abrogate a freely negotiated FERC-jurisdictional agreement such as the TSAs.
[7] *ETC Tiger Pipeline,* at P 25 ("Such an agreement from the Commission can only occur via a Commission order."); *Indianapolis Power & Light Co.*, 48 FERC ¶ 61,040 at 61,203, n. 29 ("The Commission speaks through its orders."), *order on reh'g*, 49 FERC ¶ 61,328 (1989); *see also Seminole Energy Services, LLC, et al.*, 126 FERC ¶ 61,041 at Appx. p. 6, n. 41 (2009) (Enforcement Staff Report and Recommendation, Docket No. IN09-9-000) (FERC Staff report stating that "it is a well-settled principle that the Commission speaks through its orders, and not the absence

request to reject the TSAs, this Court should defer to FERC to determine whether rejection of the TSAs is consistent with the public interest. As explained fully herein, Grand Mesa submits that rejection of the TSAs by this Court cannot occur without also obtaining approval from FERC. At a minimum, the Court must consider FERC's informed determination on the impact that rejection of the TSAs would have on the public interest under the ICA.

6. Grand Mesa, therefore, intends to file a declaratory petition to enable FERC to make such a review and determination regarding the TSA. The filing of the petition will not implicate the automatic stay and, even if it does, the proceeding before FERC would fall within the police and regulatory powers exception to the automatic stay under 11 U.S.C. § 362(b)(4). Accordingly, Grand Mesa seeks entry of an Order from this Court confirming that the stay does not apply to any action it may commence with FERC seeking a determination whether rejection of the TSAs is consistent with the public interest and the ICA.

7. Alternatively, and even if the stay applies, Grand Mesa submits that "cause" exists for the Court to lift the automatic stay, so that Grand Mesa may file a petition with FERC seeking an expedited determination with respect to the TSAs[8]—a process under which Grand Mesa would file its petition before FERC within 30 days of this Court determining that the stay does not apply or granting relief from stay and FERC would make its determination within 180 days of the filing of that petition.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 1334(b) and

thereof") (citing *Mid-American Energy Holdings Co.*, 118 FERC ¶ 61,003 at P 19, n.45 (2007) ("The Commission, a five-member agency, acts through its written orders, which are 'issued' following a favorable vote of the majority. Phrased differently, in the absence of such orders . . . the Commission cannot be said to have acted." (citations omitted)).

[8] If this Court grants Grand Mesa the relief requested herein, Grand Mesa would request in its petition to FERC that FERC issue an order regarding whether the public interest requires abrogation or modification of the TSAs within 180 days.

157(a) and (b). This is a core proceeding arising under chapter 11 of the Bankruptcy Code, pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (G). Under Local Rule 9013-1(f), Grand Mesa consents to entry of a final order by the Court in connection with this Motion to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

9. The statutory predicate for the relief requested herein is Bankruptcy Code section 362(d). The relief is also appropriate under Bankruptcy Rule 4001 and Rule 4001-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "**Local Rules**").

10. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

PROCEDURAL BACKGROUND

11. On June 14, 2020 (the "**Petition Date**"), the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "**Court**").

12. On June 15, 2020, the Debtors filed the *Debtors' Omnibus Motion for Entry of an Order (I) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts Effective as of the Dates Specified Herein and (II) Granting Related Relief* [D.I. 14] (the "**Rejection Motion**"). Pursuant to the Rejection Motion, the Debtors seek entry of an order authorizing rejection of various agreements, including the TSAs to which Grand Mesa is a counterparty.

13. Contemporaneously herewith, Grand Mesa has filed an objection to the relief sought in the Rejection Motion, as it relates to the TSAs.

RELEVANT FACTUAL BACKGROUND

A. The Grand Mesa Pipeline.

14. Grand Mesa operates the Grand Mesa Pipeline, an interstate oil pipeline that originates in Weld County, Colorado and extends approximately 550 miles southeast. Given its capacity to transport up to 150,000 barrels per day, the pipeline provides critical takeaway capacity for crude oil producers in the Denver-Julesburg Basin. Additionally, the pipeline's convenient position affords shippers access to the U.S. Midcontinent markets and the Texas Gulf Coast refinery complex. The Grand Mesa Pipeline not only supports the continued growth and production in the area but does so in a cost-effective and environmentally responsible way by reducing the current utilization of rail and truck transportation.

B. An Overview of FERC.

15. FERC is the federal agency charged with specific regulatory oversight over the interstate transportation of energy (i.e., natural gas, oil, refined petroleum products, and electricity), wholesale power transactions, and the authorization of certain energy infrastructure, including liquefied natural gas (LNG) terminals, interstate natural gas pipelines, and hydropower projects.

16. For well over 100 years, oil pipelines providing interstate transportation service have been subject to regulation of their services and rates under the ICA. *See* Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584 (1906). In 1977, Congress transferred authority over interstate oil pipelines to the then newly created FERC, the newly-reconstituted 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 ICA.[9]

17. All rates for interstate oil transportation service are filed with and approved by FERC. *Enbridge Energy, Ltd. P'ship*, 152 FERC ¶ 61,047 (2015). All 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. 49 U.S.C. § 3(1). Because FERC is granted exclusive jurisdiction to regulate interstate oil pipeline rates as well as the terms and conditions of interstate oil pipeline transportation service and services, a court's role in reviewing FERC's actions is limited. *Ass'n of Oil Pipe Lines v. FERC*, 876 F.3d 336, 339 (D.C. Cir. 2017).

C. The Transportation Services Agreements.

18. On February 19, 2016, Grand Mesa and a shipper—Extraction Oil & Gas, LLC, the predecessor to one of the above-captioned Debtors, Extraction Oil & Gas, Inc. ("**Extraction**")—entered into an Amended and Restated Transportation Services Agreement (the "**Extraction TSA**").[10] A generic TSA containing the same terms as the Extraction TSA, and which Grand Mesa offered to all potential shippers, was filed with FERC on August 9, 2016. As explained below, FERC approved the key terms of the TSA on September 8, 2016, in Docket No. OR16-12. The Extraction TSA accounts for a substantial amount of the total capacity of Grand Mesa's pipeline.[11]

19. Under the Extraction TSA, Grand Mesa undertook the obligation to construct, own,

[9] Public Law No. 95-473, § 4(c), 92 Stat. 1466-1470 (1978).

[10] The Extraction TSA supersedes two prior agreements between the parties—namely: (1) the Five-Year Transportation Agreement; and (2) the Ten-Year Transportation Agreement. Rather than terminating the Five-Year Transportation Agreement and separately amending the Ten-Year Transportation Agreement, the parties chose to enter into the TSA with the intent of forming a single contract governing the rights and responsibilities running between Grand Mesa and Extraction.

[11] Extraction TSA at p. 1; *Grand Mesa Pipeline, LLC*, Petition for Declaratory Order by Grand Mesa Pipeline, LLC, Docket No. OR16-12, at p. 1 (Mar. 11, 2016) ("*Grand Mesa PDO*").

operate and maintain the Grand Mesa Pipeline—an interstate crude oil pipeline and certain associated appurtenant facilities.[12] In exchange for Grand Mesa's commitment to construct the Grand Mesa Pipeline, and to secure a share of the capacity on the pipeline for its volumes of crude oil, Extraction committed to ship specified volumes of crude petroleum through the pipeline once it became operational and agreed to pay a minimum, fixed payment each month in addition to a fee applicable to any incremental volumes shipped through the Grand Mesa Pipeline.[13]

20. The Extraction TSA expressly contemplates the involvement of FERC in connection with pipeline rates and certain related matters. The thirty-five-page Extraction TSA mentions FERC at least thirty times, leaving no doubt regarding the central role FERC plays in regulating interstate oil pipelines and related agreements such as the Extraction TSA.

21. Grand Mesa is also a party to an Amended and Restated Transportation Services Agreement with Bayswater Exploration & Production, LLC, dated June 21, 2016 (assigned by Bayswater Exploration & Production, LLC to Extraction Oil & Gas, Inc.[14] pursuant to an Assignment, Bill of Sale and Conveyance dated October 3, 2016 effective July 1, 2016, the "**Bayswater TSA**"). Like the Extraction TSA, the terms of the Bayswater TSA are the same as the generic TSA approved by FERC. Pursuant to a letter dated August 12, 2016, Grand Mesa consented to such assignment. Extraction is, therefore, the current contract counterparty to Grand Mesa under the Bayswater TSA.[15]

D. FERC's Approval of the TSAs in 2016.

22. Grand Mesa filed a Petition for Declaratory Order with FERC on March 11, 2016 for approval of the TSAs that it offered to all potential shippers on a non-discriminatory basis, and

[12] Extraction TSA at pp. 1, 5.
[13] *Id.* at pp. 5-6.
[14] Successor by conversion to Extraction.
[15] Grand Mesa PDO at p. 1.

associated rules and regulations governing transportation service set forth in its tariff, which is incorporated as part of the TSA. Like other oil pipelines contemplating major investments in new pipeline capacity, Grand Mesa filed its Petition for Declaratory Order with FERC to obtain FERC's "advance approval . . . regarding the application, reasonableness and lawfulness of the structure" of the proposed rates and terms of the TSA.[16] Grand Mesa explained in its Petition that due to the major investment involved in constructing its pipeline, both Grand Mesa and its shippers (including Extraction, which filed comments in support of Grand Mesa's Petition) needed confirmation, prior to the commencement of service of the project, that the rates and key terms agreed to in its TSA would be acceptable to the Commission and that those shippers would have access to pipeline capacity as provided in the TSA.[17] In short, the regulatory certainty provided by advance FERC approval of the TSA was critically important to Grand Mesa's decision to construct the Grand Mesa Pipeline. Such pre-approval by FERC provides both shippers and pipelines confidence that their negotiated agreements will be honored without modification, provides the rate and contract certainty needed to obtain financing to construct the pipeline, and protects shippers from unilateral rate increases by the pipeline.

23. On September 8, 2016, based on "the requirements of the provisions of the ICA and Commission precedent applying those provisions," FERC granted Grand Mesa's Petition.[18] FERC found that Grand Mesa's proposal was "consistent with precedent, just and reasonable and not unduly discriminatory or preferential" under the ICA.[19] FERC stated that its order "confirms that the key provisions of the TSA and amended TSA will be upheld during the term of the

[16] *Grand Mesa Pipeline, LLC*, 156 FERC ¶ 61,163, at P 10 (2016) ("*Order on Grand Mesa PDO*").
[17] Grand Mesa PDO at pp. 3-4.
[18] Order on Grand Mesa PDO at P 14.
[19] *Id*.

agreement."[20] Accordingly, FERC approved the specific provisions of the TSA, including, *inter alia*: (1) Grand Mesa's requested tiered discounts for longer-term shipper commitments,[21] (2) Grand Mesa's request that shippers signing the TSA may have priority access to up to ninety percent of the pipeline's capacity,[22] (3) Grand Mesa's request that initial TSA rates and adjustments to such rates be treated as settlement rates under the Commission's regulations during the term of the TSA,[23] and (4) contract extension rights in Grand Mesa's proposed TSA allowing shippers signing the TSA to make a one-time election to extend the term by an additional five years.[24]

RELIEF REQUESTED

24. Grand Mesa respectfully requests entry of an order (i) confirming that the declaratory petition that Grand Mesa intends to commence at FERC regarding FERC's concurrent jurisdiction with this Court over the TSAs does not implicate the automatic stay or falls within the police and regulatory power exception to the automatic stay, or, in the alternative, (ii) granting relief from the automatic stay to allow Grand Mesa to petition for an order from FERC regarding whether modification of the TSAs due to any rejection of the TSAs in this case is consistent with the public interest and the ICA.

25. Grand Mesa also requests that any order granting relief become immediately effective notwithstanding the provisions of Bankruptcy Rule 4001(a)(3) in order to expedite FERC's consideration of these important issues and minimize delay or disruption to the Debtor's reorganization efforts.

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[20] *Id.* at P 15.
[21] *Id.* at P 16 ("The Commission has also recognized that shippers making longer-term commitments incur greater costs and undertake more significant risks than shippers that do not make longer-term commitments and are therefore not similarly situated.")
[22] *Id.* at P 17.
[23] *Id.* at P 19.
[24] *Id.* at P 20.

BASIS FOR RELIEF REQUESTED

A. The Automatic Stay Does Not Apply.

(i) Grand Mesa's Declaratory Petition Before FERC Would Not Implicate the Automatic Stay.

26. The declaratory proceeding that Grand Mesa seeks to commence at FERC does not implicate the automatic stay. The action that Grand Mesa intends to initiate will not be styled as, or in fact constitute, a petition against Extraction. Thus, it will not be an action "to recover a claim against the debtor," 11 U.S.C. § 362(a)(1), nor will it seek to "exercise control over property of the estate," 11 U.S.C. § 362(a)(3). Accordingly, the automatic stay, by its terms, does not apply.

(ii) Proceedings Before FERC Would Fall Within the Police and Regulatory Powers Exception to the Automatic Stay.

27. The petition and proceedings before FERC would also fall squarely within the regulatory powers exception to the automatic stay "to allow governmental agencies to remain unfettered by the bankruptcy code in the exercise of their regulatory powers."[25] This exception applies to governmental units seeking to enforce their police and regulatory power, which would include the proceeding before FERC that Grand Mesa seeks to commence over the TSAs.[26] In determining whether a government action falls within that exception, the courts have applied two overlapping tests: the "pecuniary purpose test" and the "public policy test."[27] The pecuniary interest test asks whether the government "primarily seeks to protect a pecuniary governmental interest in the debtor's property," whereas the public policy test asks whether the government is

[25] *In re Commerce Oil Co.*, 847 F.2d 291, 295 (6th Cir. 1988); *see* 11 U.S.C. § 362(b)(4).
[26] *See* 11 U.S.C. § 362(b)(4); *In re Cajun Elec. Power Coop., Inc.,* 185 F.3d 446, 453-54 (state rate making authority proceeding comes under police and regulatory power exception to automatic stay); *In re Pacific Gas and Elec. Co.*, 263 B.R. 306 (Bankr. N.D. Cal. 2001) (denying debtor-utility's request for preliminary injunction of state ratemaking proceedings and dismissing adversary proceeding; rate-making proceeding falls within police and regulatory powers exception).
[27] *See In re Nortel Networks, Inc.*, 669 F.3d 128, 139 (3d Cir. 2011)*; Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294, 1297 (9th Cir. 1997); *In re Phillips*, 368 B.R. 733, 739 (Bankr. N.D. Ind. 2007) (internal quotation and citation omitted).

enforcing public policy as opposed to private rights.[28] Here, both the pecuniary purpose test and the public policy test are satisfied.[29]

a. *The FERC Action Satisfies the Pecuniary Purpose Test.*

28. Under the pecuniary purpose test, the relevant inquiry is whether the action is pursued principally to advance a pecuniary interest of the governmental unit, in which case the stay will be imposed.[30]

29. In determining whether rejection of the TSAs as requested by the Debtors would be consistent with the public interest and the ICA, FERC would not be seeking to redress private wrongs or acting as a consuming participant in the national economy. Rather, FERC's role would be limited to making a determination as to the proposed modification or abrogation of filed rates and TSAs that it has previously approved. These matters are firmly (and exclusively) within its purview in compliance with its explicit mandate under the ICA to oversee the interstate transportation of oil. In addition, FERC would not be seeking a remedy for a private contract breach. Only the TSA counterparties have a pecuniary interest in the Debtors' rejection of the TSA and use of the Grand Mesa Pipeline; FERC does not. These considerations make it plain that the proposed FERC action satisfies the pecuniary purpose test.

b. *The FERC Action Satisfies the Public Policy Test*.

30. The exercise of FERC's regulatory authority under the ICA also satisfies the public

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[28] *Nortel*, 669 F.3d at 139-40.

[29] Although "[s]atisfaction of either test will suffice to exempt the action from the reach of the automatic stay." *Dingley v. Yellow Logistics, LLC (In re Dingley)*, 852 F.3d 1143, 1146 (9th Cir. 2017) (quoting *City & Cnty. of S.F. v. PG&E Corp*., 433 F.3d 1115, 1124 (9th Cir. 2006)); *see also City & Cnty. of S.F*., 433 F.3d at 1125 ("Given that the governmental entities have satisfied the pecuniary interest test, it is unnecessary for us to reach the question of whether the restitution claim also satisfies the 'public policy' test."); Collier on Bankruptcy ¶ 362.05[5][a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011) (if action satisfies either test "then the exception applies").

[30] *United States v. Nicolet, Inc*., 857 F.2d 202, 209 (3rd Cir. 1988) ("The pecuniary purpose test asks whether the governmental proceeding relates principally to the protection of the government's pecuniary interest in the debtor's property, rather than to its public policy interest in the general safety and welfare.").

policy test. The ICA has historically been considered a common carriage statute, with an emphasis in its administration on rate uniformity and service on non-discriminatory terms.[31] In recent years, FERC has interpreted the ICA to permit the approval of non-discriminatory oil pipeline transportation contracts, such as the TSAs, to support the construction of needed oil pipeline infrastructure FERC has determined to be in the public interest.[32] Thus, the Commission has stated that it has approved a number of oil pipeline transportation contracts "to support pipelines' efforts to attract shippers that will make long-term volume commitments to support the construction of new facilities"[33] and that absent approval of such contracts in a particular case, "the [pipeline] project might not be built at all."[34] FERC's approval of and continued oversight over oil pipeline transportation contracts is, therefore, vital to the public interest. Where a law is expressly intended to safeguard the public interest, regulatory actions by the government pursuant to that law are a legitimate exercise of its regulatory power, and are excepted from the automatic stay under section 362(b)(4).

31. FERC's exercise of jurisdiction over oil pipeline contracts has the principal purpose and effect of enforcing the important public policies embodied in the ICA, including ensuring that rates, terms and conditions of service for the interstate transportation of oil through pipelines are "just and reasonable" and non-discriminatory. FERC adjudicates disputes with a view toward

[31] *Keogh v. Chicago & Nw. R.R. Co.*, 260 U.S. 156, 163 (1922) ("The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier…This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated.") ("*Keogh*"); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc..*, 497 U.S. 116, 126 (1990) ("The duty to file rates with the Commission, and the obligation to charge only those rates, have always been considered essential to preventing price discrimination and stabilizing rates.") (internal citations omitted) ("*Maislin*").

[32] *See, e.g.*, *TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025, at P 21 (2008); *Colonial Pipeline Co.*, 116 FERC ¶ 61,078, at P 44 (2006) ("The Commission has recognized the need for investment in energy transportation infrastructure, whether for electric power, natural gas or oil, to meet the nation's growing demand for energy.") (citing *Shell Oil Co. v. FPC*, 520 F.2d 1061, 1081 (5th Cir. 1975) (encouraging increased exploration and production)).

[33] 125 FERC ¶ 61,025, at P 21 (2008).

[34] *Id.* (quoting *Express Pipeline P'ship*, 77 FERC ¶ 61,188, at 61,756 (1996)).

protecting the public interest, including the stability of freely negotiated contracts, which are of vital economic and environmental importance.[35] Accordingly, any FERC action here would be to safeguard public interests in the stability of markets and the reliability of oil pipeline transportation service, not to adjudicate private rights.[36] The proceeding that Grand Mesa seeks to commence before FERC would, therefore, fall squarely within the exception to the automatic stay under section 362(b)(4).

B. Relief from the Automatic Stay is Appropriate "for cause"

32. Relief from the automatic stay is warranted here under section 362(d)(1) of the Bankruptcy Code. Section 362(d)(1) provides, in relevant part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –
>
> (1) for cause…

11 U.S.C. § 362(d)(1).

33. As set forth herein, Grand Mesa is entitled to relief from the automatic stay for "cause". The term "cause" is not defined in the Bankruptcy Code and must be determined on a case-by-case basis, balancing competing interests of the debtor and movant. The standard for determining cause is not subject to a rigid test.

34. Cause is an intentionally broad and flexible concept that permits a bankruptcy court to respond to inherently fact sensitive circumstances.[37] The totality of the facts and circumstances

[35] *See Bos. Edison Co. v. FERC*, 856 F.2d 361, 370 (1st Cir. 1988) ("[A] salient purpose of the [FPA] was to preserve the integrity of contract [thereby permitting] the stability of supply arrangements.") (internal quotation omitted).
[36] *See In re Pac. Gas & Elec. Co.*, 263 B.R. 306, 319 (Bankr. N.D. Cal. 2001) (finding that the California Public Utilities Commission rate-setting function implements public policy and therefore is excepted from the automatic stay under section 362(b)(4)).
[37] *In re Tribune Co.*, 418 B.R. 116, 126 (Bankr. D. Del. 2009) (internal citations omitted) ("'Cause is a flexible concept and courts often conduct a fact intensive, case-by-case balancing test, examining the totality of the circumstances to determine whether sufficient cause exists to lift the stay.'"); *In re Continental Airlines, Inc.*, 152 B.R. 420, 424 (D.

in this case—especially when considering FERC's concurrent jurisdiction and obligations under the ICA—support granting relief from the automatic stay.

(i) Oil Transportation Contracts and the Rates Included in Such Contracts That Have Been Filed with FERC Have the Force of Law Under the ICA and Cannot be Changed Under the Filed Rate and *Mobile-Sierra* Doctrines Unless Required by the Public Interest.

35. Oil transportation contracts, such as the TSAs, the "approved rates" in such contracts, and the tariff governing service provided under such contracts, bind the shipper and pipeline with the force of law.[38] Like natural gas transportation contracts under the Natural Gas Act[39] ("**NGA**") and wholesale power contracts under the Federal Power Act[40] ("**FPA**"), interstate oil transportation contracts cannot be changed or abrogated without FERC approval under the ICA.[41] In 1906, Congress amended the ICA to include the regulation of oil pipelines, based upon the public interest in ensuring that transporting oil in interstate commerce was conducted in a "just

Del. 1993) ("There is no rigid test for determining whether sufficient cause exists to modify an automatic stay."); *Peerless Ins. Co. v. Rivera*, 208 B.R. 313, 315 (D.R.I. 1997) (granting relief from the automatic stay for "cause" where a declaratory judgment against the debtor was sought).

[38] *See, e.g., In re FirstEnergy Solutions Corp. v. FERC* ("*FirstEnergy*") 945 F.3d 431, 443-44 (6th Cir. 2019), which states as follows:

> The "filed-rate doctrine," as applied in the FPA, holds that FERC has plenary and exclusive jurisdiction over wholesale power rates, terms, and conditions of service for any such rate filed with FERC. *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371-72, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988). This is not limited to only "rates," but includes all contractual provisions, methodologies, restrictions, or any quantity or price terms. *Id.*

While the case quoted above arose under the FPA, it addressed ratemaking provisions of the FPA that are materially identical to the ratemaking provisions of the ICA, and thus applies with equal force here. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 ("*Arkla*") ("The filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act…and has been extended across the spectrum of regulated utilities."); *Concord v. FERC*, 955 F.2d 67, 71 (citing *Maislin*, 497 U.S. 116); *Pa. Water & Power Co. v. FPC*, 193 F.2d 230, 235 (D.C. Cir. 1951). Thus, subsequent decisions under the Federal Power Act and Natural Gas Act applying the filed rate doctrine are based upon the foundational jurisprudence interpreting the ICA and are applicable to cases involving the ICA.

[39] 15 U.S.C. §§ 717 *et seq*.

[40] 16 U.S.C. §§ 791(a) *et seq*.

[41] *See, e.g.*, *Arkla*, 453 U.S. at 577 ("'The considerations underlying the [filed rate] doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.'" (citing *City of Cleveland v. FPC*, 525 F.2d 845, 854 (1976)); *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) ("*Louisville & Nashville R.R. Co.*") ("Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge."); *Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 788 (D.C. Cir. 2006) (citing 49 U.S.C. App. § 6(7) as establishing the filed rate doctrine in the ICA); *OXY USA v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995) (applying filed rate doctrine to request to change rates of Trans Alaska Pipeline System oil pipeline) (citing *Moss v. CAB*, 430 F.2d 891, 897 (D.C. Cir. 1970)).

and reasonable" manner and without discrimination.[42] The ICA provides for "comprehensive and detailed regulation" of the industries subject to its authority.[43] Under the comprehensive regulatory framework established by the ICA, FERC has exclusive jurisdiction over the transportation of oil in interstate commerce.[44]

36. Pursuant to the ICA, an oil pipeline must file its oil transportation contracts with FERC, including the rates, terms and conditions contained in such contracts, for such contracts to have the force of law. Under Section 6 of the ICA,[45] a pipeline may not change its rates or terms of service without prior notice to the public and FERC. Section 15(7)[46] of the ICA gives FERC the authority to suspend a pipeline's rate filing for up to seven months and set a hearing to determine its lawfulness. Section 13(1)[47] of the ICA also authorizes FERC to investigate the lawfulness of any existing rate, set a new "just and reasonable" rate, and award reparations for overcharges.

37. The prohibition on an oil pipeline charging rates that differ from those filed with FERC is known as the "filed rate doctrine," which is codified by the aforementioned sections of the ICA and implemented by FERC's regulations.[48] While the filed rate doctrine is often associated with the FPA and NGA, [49] courts have traced the filed rate doctrine's *origin* to the ICA itself and numerous cases arising under the ICA.[50]

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[42] The Hepburn Act of 1906, 34 Stat. 584 (1906). Prior to its amendment, the ICA had focused largely on railroads.
[43] *Pa. Water & Power Co*, 193 F.2d at 235.
[44] *Id.*
[45] 49 U.S.C. App. § 6 (1988).
[46] *Id.* at § 15(7).
[47] *Id.* at § 13(1).
[48] 18 C.F.R. § 341.0 *et seq.* (2020).
[49] *Arkla*, 453 U.S. at 573. While *Arkla* was decided under the NGA, cases under the NGA or ICA are applicable to cases under the other statute where their provisions are similar. *Flint Hills Resources Alaska, LLC v. FERC*, 627 F.3d 881, 887 (D.C. Cir. 2010) ("First, we note that the carriers' *reliance, in an ICA proceeding*, on a Natural Gas Act case such as *Sea Robin is orthodox and presumptively permissible*.") (emphasis added)).
[50] *See Arkla*, 453 U.S. at 578 ("The filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act . . . and has been extended across the spectrum of regulated utilities.").

38. The Supreme Court unequivocally confirmed the applicability of the filed rate doctrine under the ICA in *Maislin*.[51] The case arose out of a trucking company's bankruptcy filing, and the estate's claims against a shipper for the difference between the filed rate and the rate actually charged. According to the Supreme Court, "the filed rate governs the legal relationship between shipper and carrier":

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.... This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated.[52]

39. The Supreme Court also emphasized the "classic statement of the 'filed rate doctrine'",[53] as set forth in a prior ICA case, which held as follows:

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers [] are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable…This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."[54]

Accordingly, the Supreme Court stated that it "has long understood that the filed rate governs the legal relationship between shipper and carrier." *Id.*

40. Thus, for oil pipeline transportation rates and contracts to be lawful under the ICA, including rates under a pipeline transportation contract, they must be filed with FERC. Pipelines are then prohibited from charging a different rate than that which is on file, and any change to a

[51] 497 U.S. 116.
[52] *Id.* at 126 (quoting *Keogh*, 260 U.S. at 163).
[53] *Id.*
[54] 497 U.S. at 126 (quoting *Louisville & Nashville R.R. Co.*, 237 U.S. at 97).

rate or contract approved by FERC can only be accomplished by obtaining the approval of FERC under the applicable provisions of the ICA.[55] As noted above, the ICA contains the sole and exclusive procedures for modifying or abrogating a filed rate or transportation contract, which contract is already under FERC's oversight and regulation, including pursuant to a Commission investigation or a complaint, and after a hearing.[56]

41. Importantly, the TSAs "are not typical commercial contracts but rather establish public obligations that carry the force of law."[57] The breach that will be caused by the proposed rejection here does not create "a typical dispute over the terms of a contract, but the unilateral termination of a regulatory obligation."[58] As the Supreme Court has explained "with specific regard to [FERC]-jurisdictional contracts, filed rate obligations exist independently of private contractual duties and continue to bind the counterparties, regardless of one party's breach of contract, or even a determination that a contract may not be enforced at all."[59] Accordingly, there are threshold issues in respect of the TSAs that are outside the scope of the traditional assumption or rejection analysis routinely performed by this Court, and which are beyond the scope of this Court's jurisdiction.

42. Consistent with the long history of the filed rate doctrine under the ICA, and as more fully described below, this Court should recognize FERC's authority over the administration of filed rates and contracts under its jurisdiction by lifting the automatic stay, so that Grand Mesa may petition FERC for a hearing regarding the TSAs, prior to ruling on the Debtors' rejection

[55] *Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 788 (D.C. Cir. 2006) (citing 49 U.S.C. App. § 6(7)). Courts have "justified the doctrine as necessary to enforcement of the underlying statute, [including] the Interstate Commerce Act." *Concord*, 955 F.2d at 71 (citing *Maislin*, 497 U.S. 116).
[56] *Id.*; 49 U.S.C. App. §§ 8, 15(1), 15(3), 15(6)-(7).
[57] *ETC Tiger Pipeline,* at P 22 (citing *Cal. ex rel. Lockyer v. Dynegy, Inc.,* 375 F.3d 831, 853 (9th Cir. 2004) (filed rates "are considered to be 'the law'")).
[58] *See In re Calpine Corp.*, 337 B.R. 27, 36 (S.D.N.Y. 2006) ("*Calpine*").
[59] *ETC Tiger Pipeline,* at P 22 (citing *Pa. Water & Power*, 343 U.S. at 422).

request. [60]

43. Through the Rejection Motion, the Debtors effectively seek to abrogate or modify the FERC-approved TSAs with Grand Mesa, including the filed rates in these TSAs. Rejection of a FERC-jurisdictional contract in bankruptcy "alters the essential terms and conditions of a contract that is also a filed rate; therefore, the Commission's approval is required as rejection would modify or abrogate the filed rate."[61] Under the ICA, however, only FERC can authorize the parties to abrogate or modify the TSAs. Accordingly, to comply with the filed rate doctrine and the requirements of the ICA, the Court should grant Grand Mesa relief from stay to seek a determination from FERC, after a proceeding pursuant to FERC's normal procedures, regarding whether a change to filed rates, terms and conditions of FERC-approved agreements—the elimination of regulatory duties—caused by a rejection in bankruptcy is consistent with the public interest.

44. In addition to the filed rate doctrine, changes to contracts subject to FERC jurisdiction are subject to a principle that has come to be known as the *Mobile-Sierra* doctrine. Under *Mobile-Sierra*, the Supreme Court has held that parties "may not unilaterally abrogate or modify their voluntarily negotiated, arms'-length contracts subject to the Commission's jurisdiction unless the Commission first 'concludes that the contract seriously harms the public interest.'"[62] Parties seeking to avoid their contractual obligations under the *Mobile-Sierra* "public interest" standard may do so only after FERC makes a "finding of 'unequivocal public necessity' or 'extraordinary circumstances'" where "the public interest will be severely harmed" by allowing

[60] *Mirant*, 378 F.3d at 523("The Bankruptcy Code clearly anticipates ongoing governmental regulatory jurisdiction while a bankruptcy proceeding is pending.") (citing *Louisiana PSC v. Mabey (In re Cajun Elec. Power Coop., Inc.)*, 185 F.3d 446, 453 (9th Cir. 1999)).
[61] *ETC Tiger Pipeline*, at P 23.
[62] *NextEra Energy, Inc. and NextEra Energy Partners, L.P. v. Pacific Gas and Electric Co.; Exelon Corp. v. Pacific Gas and Electric Co.*, 167 FERC ¶ 61,096 at P 23 (quoting *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530, 534 (2008) ("*Morgan Stanley*").

the existing filed rate to continue.[63]

45. In recent years, FERC has approved bilateral oil transportation agreements under the ICA. The existence of these bilateral, FERC-jurisdictional agreements triggers the application of *Mobile-Sierra* to efforts to modify or abrogate such agreements. Indeed, FERC has recently applied the *Mobile-Sierra* public interest standard to agreements submitted for approval under the ICA to resolve disputes over rate and tariff issues between oil pipelines and their shippers. Under the *Mobile-Sierra* public interest standard, there is a presumption that freely negotiated contracts such as the TSAs will not be modified or abrogated absent a showing that the contracts seriously harm the public interest. Accordingly, the *Mobile-Sierra* public interest standard also supports lifting the stay to enable FERC to consider the effect on the public interest of the proposed rejection of the TSAs.

46. The Rejection Motion is also an impermissible collateral attack on the filed rate and the Grand Mesa PDO, the FERC order approving that rate.[64] FERC has exclusive authority over the rates, terms and conditions set forth in the TSAs such that the Debtors cannot in this Court seek to abrogate or modify those rates—an objective that the Debtors are attempting to accomplish through rejection.[65] For this reason as well, the Court should grant relief from stay to permit FERC to determine whether the attempt to reject the TSAs amounts to a collateral attack on both FERC's orders and the filed rate.

(ii) FERC Has Exclusive Jurisdiction to Determine the "Public Interest".

47. The intersection between the Bankruptcy Code and the jurisdiction of FERC over

[63] *Morgan Stanley*, 554 U.S. at 550-51.
[64] *See Pac. Gas & Elec. Co. v. FERC*, 464 F.3d 861, 868 (9th Cir. 2006) (courts "may not entertain a petition for review that collaterally attacks a prior FERC order"). *Cf. NextWave Pers. Commc'ns, Inc.*, 200 F.3d 43, 55 (2d Cir. 1999) (explaining that the debtor "may not collaterally attack or impair in the bankruptcy courts the license allocation scheme developed by the FCC").
[65] *See Calpine*, 337 B.R. at 36 (stating that the debtor could not through rejection cease performance under the rates, terms, and conditions of a filed rate in the hopes of getting a better deal).

the provision of energy services has recently been the subject of considerable litigation. To date, such litigation has focused on the potential rejection in bankruptcy of contracts for the sale and transportation of electricity and natural gas regulated by and approved by FERC under FPA and NGA, respectively, which are governed by the filed rate and *Mobile-Sierra* doctrines.

48. The TSAs, which have now also been accepted as federally-approved filed rates, are subject to FERC's exclusive jurisdiction under the ICA and may not be modified or abrogated through the rejection process without FERC approval. The Debtors, therefore, may not reject the TSAs without FERC approval. Accordingly, this Court should recognize FERC's authority over the administration of filed rates and contracts under its jurisdiction by lifting the automatic stay, so that Grand Mesa may petition FERC for a hearing regarding the TSAs, prior to ruling on the Debtors' rejection request.

49. Federal courts that have addressed the concurrent jurisdictions of FERC and bankruptcy courts have recognized FERC's statutory obligation to review the effect of proposed contract rejections on the public interest under the FPA and the NGA. In several instances, courts have held that FERC has exclusive jurisdiction to determine whether a rejection of a FERC-jurisdictional contract harms the public interest, and that such contracts may be rejected only if FERC approves the rejection.[66] For example, in *Boston Generating*,[67] a district court found that the debtor must obtain a ruling from FERC that abrogation of a FERC-jurisdictional contract does not contravene the public interest and without such approval the debtor may not reject the contract. Similarly, in *Calpine*,[68] a district court concluded that the bankruptcy court may not authorize rejection of FERC-jurisdictional power purchase agreements because to do so would directly

[66] *See, e.g., In re Boston Generating LLC*, No. 10-6528, 2010 U.S. Dist. LEXIS 120347 (S.D.N.Y. Nov. 12, 2010); *Calpine*, 337 B.R. 27.
[67] 2010 U.S. Dist. LEXIS 120347.
[68] 337 B.R. 27.

interfere with the Commission's jurisdiction over the rates, terms, conditions, and duration of wholesale energy contracts. The court found "little evidence [in the Bankruptcy Code] of congressional intent to limit FERC's regulatory authority," absent which "the Bankruptcy Code should not be read to interfere with FERC jurisdiction" over wholesale power agreements.[69]

50. While other courts have reached a different conclusion regarding the scope of FERC's authority, they have still acknowledged FERC's crucial role. In *Mirant*, the U.S. Court of Appeals for the Fifth Circuit determined that there were no exceptions in the Bankruptcy Code prohibiting rejection of contracts subject to FERC regulation.[70] The court found that the bankruptcy court's rejection of a contract did not invade FERC's exclusive jurisdiction because such rejection only indirectly affected the filed rate.[71] Notwithstanding this conclusion, the Court required the bankruptcy court to impose a higher standard than the typical business judgment standard applied to contract rejections, and contemplated FERC's input in making such determinations. Specifically, the Court required the bankruptcy court to balance the equities, carefully scrutinize the impact of rejection upon the public interest, and allow FERC's participation to assist it in balancing the equities.[72]

51. More recently, in *FirstEnergy*,[73] the Sixth Circuit reversed the bankruptcy court's finding that it had exclusive and unlimited jurisdiction over the FERC-jurisdictional contracts.

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[69] *Id.* at 33. *See also NRG Energy, Inc.*, No. 03-3754, 2003 U.S. Dist. LEXIS 11111 at *9-10 (S.D.N.Y. June 30, 2003).

[70] 378 F.3d 511.

[71] *Id.* at 519-520. In reaching this conclusion, the court relied on a Fifth Circuit decision in *Gulf States Utils. Co. v. Ala. Power Co*., 824 F.2d 1465, 1471-73 (5th Cir. 2004), which, according to the court, held that a court may alter a FERC-jurisdictional contract when the breach of contract claim is based on "another rationale" other than a challenge to the rate and the claim only indirectly affects the rate. *Id.* The court in *Calpine* did not construe the filed rate doctrine as narrowly as the Fifth Circuit and found that there was no corollary in the Second Circuit. 337 B.R. at 38. Thus, this rationale appears to be unique to the Fifth Circuit.

[72] *Id.* at 525.

[73] 945 F.3d 431. As recently as June 22, 2020, and consistent with similar FERC rulings under the FPA, FERC held that "[w]here a party to a Commission-jurisdictional agreement under the NGA seeks to reject the agreement in bankruptcy, that party must obtain approval from both the Commission and the bankruptcy court to modify the filed rate and reject the contract, respectively." *ETC Tiger Pipeline*, at P 20.

The court found that FERC and the bankruptcy court had concurrent jurisdiction, and that the best way to harmonize the two statutes was to allow the bankruptcy court to apply a higher standard that requires the court to consider the impact of rejection on the public interest, including the consequential impact on consumers. To this end, the Court held that the bankruptcy court must consider the public interest and ensure that the equities balance in favor of rejecting the contract, and it must permit FERC to provide an opinion in accordance with its ordinary approach under the FPA.[74]

52. While the cases discussed above involved the FPA and NGA, the instant case involves materially identical issues under a related statute that FERC is also responsible for administering: the ICA.[75] As discussed earlier, the ICA is a seminal ratemaking and regulatory statute that served, in relevant part, as a model for subsequent ratemaking statutes such as the FPA and NGA.

(iii) The Court Should Lift the Automatic Stay to Permit Grand Mesa to Petition FERC For a Determination of Whether Rejection of the TSAs is Consistent with the Public Interest Under the ICA.

53. To the extent the Court finds that the automatic stay applies, the appropriate next step for the Court is to grant relief from the automatic stay to permit Grand Mesa to petition FERC to obtain its determination regarding rejection of the TSAs. Consistent with the discussion above, FERC has exclusive jurisdiction to determine whether rejection of a FERC-jurisdictional contract harms the public interest.

54. As courts have held, agreements subject to FERC's jurisdiction may be rejected only if FERC finds that abrogation or modification of the contract is in the public interest.[76] In

[74] *Id.* at 454.
[75] 49 U.S.C. App. § 1 *et seq.* (1988).
[76] *See, e.g., Boston Generating*, 2010 U.S. Dist. LEXIS 120347; *Calpine*, 337 B.R. 27; *see also ETC Tiger Pipeline*, at P 23.

other words, both FERC and this court have independent and concurrent jurisdiction to enforce the laws delegated to them by Congress. It is not necessary to decide whether the jurisdiction of FERC or a bankruptcy court is superior, nor is it appropriate or lawful to relegate either to providing an advisory opinion to the other for the purpose of upholding their statutory obligations and addressing whether a contract may be abrogated, modified or rejected. Rather, FERC must continue to protect the public interest under the ICA through enforcement of the filed-rate doctrine and the principles of *Mobile-Sierra* based on the sanctity of contracts. Concurrently, the bankruptcy court must consider the impact of a proposed contract rejection on the debtor's estate. FERC's and this Court's respective roles under their enabling statutes demonstrate that each must approve a debtor-shipper's request to unilaterally reject (in the case of the Court), or abrogate, or modify (in the case of FERC) its obligations under a FERC-jurisdictional contract, before a contract rejection can take effect.

55. Congress could not have intended, for example, that FERC should determine the impact that a rejection of a contract would have on the goal of achieving a successful reorganization in bankruptcy. By the same token, Congress could not have intended that bankruptcy courts be the final arbiter of whether the rejection, abrogation or modification of an interstate oil transportation contract would pose a threat to the public interest in providing consumers access to available oil supply at just and reasonable rates under the ICA. Given its familiarity and expertise in respect of matters affecting interstate oil, natural gas and wholesale electric markets, and the regulatory scheme applicable to these industries, FERC is best qualified to determine the impact that abrogation or modification of transportation contracts would have on the public interest in ensuring the availability of energy at affordable rates. Precluding a federal regulatory body from discharging its congressionally mandated duty to consider implications of

rejection on a FERC-approved filed rate and transportation agreement cannot be what the law requires.

56. In fact, given the possibility, if not likelihood, of multiple companies seeking to utilize the bankruptcy process to reject FERC-jurisdictional contracts in this economic downturn, FERC is the appropriate and best suited forum in which the cumulative impact of proposed contract rejections on the public interest can be evaluated.[77] Accordingly, this Court should, and indeed must, defer to FERC's consideration and determination of the unique public interest that FERC alone is statutorily mandated to protect.

(iv) Even if the Court Determines that FERC Approval under the ICA is Not *Required* for the TSA to be Rejected, it Should Lift the Automatic Stay, or Declare it is Inapplicable, to Permit Grand Mesa to Petition FERC to Provide the Court with its Opinion as to Whether Rejection of the TSAs is Consistent with the Public Interest Under the ICA.

57. While every court that has addressed the issue has acknowledged FERC's jurisdiction over wholesale power and interstate natural gas transportation contracts that a debtor seeks to reject in bankruptcy, Grand Mesa acknowledges that both the Fifth and Sixth Circuits have reached different conclusions as to how to harmonize the interests protected by the Bankruptcy Code and FERC's governing statutes.[78] These courts have ruled that FERC's approval of a contract rejection need not be obtained as a prerequisite to bankruptcy courts' authority to reject the executory contracts in proceedings before them. However, these courts have required

[77] As set forth above, "[t]he Bankruptcy Code clearly anticipates ongoing governmental regulatory jurisdiction while a bankruptcy proceeding is pending." *Mirant*, 378 F.3d at 523 (citation omitted).

[78] Grand Mesa also acknowledges the recent ruling in the *Ultra Petroleum Corp., et al.* chapter 11 cases denying a request to modify the automatic stay filed by a counterparty to a firm transportation service agreement with one of the debtors and which was seeking to file a petition before FERC for a determination whether the debtors' proposed rejection of the firm transportation service agreement is in the public interest. *Ultra Petroleum Corp.*, Case No. 20-32631, D.I. 454 (Bankr. S.D. Tex. July 22, 2020). The Court in *Ultra Petroleum*, however, is confined to the errant ruling of the Fifth Circuit in *Mirant*, a limitation that this Court does not have. In addition, the court in *Ultra Petroleum* failed to appropriately consider FERC's exclusive jurisdiction over a filed rate and the importance of securing a formal determination from FERC in respect of the public interest before making any determination on rejection.

bankruptcy courts to obtain FERC's determination, through its own procedures and process, whether rejection of FERC-jurisdictional agreements would adversely affect the public interest that FERC is mandated to protect under its governing statutes.[79]

58. FERC recently provided a roadmap for making such determinations on an expedited basis. As a result of the Sixth Circuit's decision in *FirstEnergy*,[80] FERC issued an order establishing expedited paper hearing procedures to consider the positions of each counterparty to the FERC-jurisdictional contracts at issue there regarding how to apply *Mobile-Sierra* to such contracts (which were wholesale power contracts subject to the FPA).[81] Under the expedited procedures adopted by FERC, the debtor in *Energy Harbor* was required to submit a filing within 30 days explaining why rejection was in the public interest, with counterparties opposed to rejection required to provide a response within 30 days. The Commission stated that it anticipated issuing an order within 180 days of the initiation of the proceeding.[82]

59. For the reasons discussed above, Grand Mesa requests that the Court follow the rationale of the courts in the Second Circuit and find that a determination from FERC with respect to rejection and the attendant public interest is required before rejection under the Bankruptcy Code can be effective.[83] If the Court, however, is inclined instead to follow the procedures outlined by the Fifth and Sixth Circuits, it must allow FERC to determine under its own procedures and process whether the public interest under the ICA requires rejection of the TSAs, on a similar timeline FERC required in the *Energy Harbor* proceeding. Specifically, Grand Mesa would request FERC to issue its ruling no later than within 180 days of the initiation of the proceeding.

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[79] *See FirstEnergy,* 945 F.3d at 454-55; *Mirant*, 378 F.3d at 523-26.
[80] 945 F.3d at 454-55.
[81] *See Energy Harbor, LLC*, 170 FERC ¶ 61,278 (2020) ("*Energy Harbor*").
[82] *Energy Harbor*, at P 23.
[83] *See Boston Generating*, 2010 U.S. Dist. LEXIS 120347, at *7 ("If either the bankruptcy court or FERC does not approve the Debtors' rejection of the HSA, the Debtors may not reject the contract.").

This would provide sufficient time for the Court to factor FERC's ruling into its disposition of the issues in this case.

60. Whether this Court determines that (1) FERC approval is required for this Court to reject the TSAs, or (2) FERC's determination of the impact that such rejections would have on the public interest considerations under the ICA must be considered by the Court in ruling on requests for contract rejection, a declaration by this Court that the automatic stay does not preclude Grand Mesa from petitioning FERC for these determinations, or an order lifting the stay for this purpose, is appropriate and should be granted.

WAIVER OF THE FOURTEEN-DAY STAY OF RULE 4001(a)(3)

61. The Court should also exercise its discretion and waive the fourteen-day stay of Rule 4001(a)(3) because no prejudice will result from such a waiver, and FERC should be allowed to hear a petition as soon as possible to facilitate a speedy resolution of the threshold issues that will be raised before it. *See* Fed. R. Bankr. P. 4001(a)(3) advisory committee notes ("The court may, in its discretion, order that Rule 4001(a)(3) is not applicable so that the prevailing party may immediately enforce and implement the order granting relief from the automatic stay.").

CONCLUSION

WHEREFORE, Grand Mesa respectfully requests that the Court enter an order (i) confirming that the declaratory proceeding that Grand Mesa seeks to commence at FERC in respect of the TSAs does not implicate the automatic stay or is subject to the police and regulatory exception of 11 U.S.C. § 362(b)(4); or, in the alternative; (ii) granting relief from the automatic stay to allow Grand Mesa to petition for an order from FERC regarding whether rejection of the TSAs is consistent with the public interest and ICA; and (iii) granting such other relief as is just and proper.

Dated: August 4, 2020

Respectfully submitted,

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Counsel for Grand Mesa Pipeline, LLC

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*, [1]	Case No. 20-11548 (CSS)
Debtors.	(Jointly Administered)
	Ref. Docket No. ____

ORDER GRANTING MOTION OF GRAND MESA PIPELINE, LLC FOR ORDER CONFIRMING THAT THE AUTOMATIC STAY DOES NOT APPLY OR, IN THE ALTERNATIVE, FOR RELIEF FROM THE AUTOMATIC STAY

Upon consideration of the *Motion of Grand Mesa Pipeline, LLC for Order Confirming That the Automatic Stay Does Not Apply or, in the Alternative, For Relief from the Automatic Stay* [D.I. _____] (the "**Motion**")[2], seeking entry of an order (this "**Order**"), (i) confirming that a declaratory petition that Grand Mesa intends to file at FERC regarding FERC's concurrent jurisdiction with this Court over the TSAs does not implicate the automatic stay or falls within police and regulatory exception to the automatic stay or, in the alternative, (ii) granting relief from the automatic stay to allow Grand Mesa to petition for an order from FERC regarding whether rejection of the TSAs during this bankruptcy proceeding is consistent with the public interest and the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.* (the "**ICA**"), all as more fully described in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the

[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] Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

statements of counsel in support of the relief requested in the Motion at the hearing before the Court; and all of the proceedings had before the Court; and this Court having determined that the relief requested in the Motion is necessary and appropriate; and after due deliberation thereon; and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED and approved as set forth herein.

2. The declaratory petition that Grand Mesa intends to file at FERC in respect of the TSAs discussed in the Motion does not implicate the automatic stay and, even if it did, it falls within the police and regulatory powers exception to the automatic stay under 11 U.S.C. § 362(b)(4).

3. To the extent that Grand Mesa's filing of the petition could be determined to be a violation of the automatic stay under 11 U.S.C. § 362, relief from the automatic stay is hereby granted to allow Grand Mesa to petition for an order from FERC regarding whether rejection of the TSAs is consistent with the public interest and ICA.

4. Grand Mesa is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

5. Notwithstanding the relief granted herein, nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any party.

6. Notwithstanding Bankruptcy Rule 4001(a)(3), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

7. This Court shall retain jurisdiction with respect to any matters, claims, rights, or disputes arising from or related to the implementation of this Order.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*, [1]	Case No. 20-11548 (CSS)
Debtors.	(Jointly Administered)
	Objection Deadline: August 18, 2020 at 4:00 p.m. **Hearing Date: September 3, 2020 at 11:00 a.m.**

NOTICE OF MOTION

PLEASE TAKE NOTICE that on August 4, 2020, Grand Mesa Pipeline, LLC ("**Grand Mesa**") filed the *Motion of Grand Mesa Pipeline, LLC for Order Confirming That the Automatic Stay Does Not Apply or, in the Alternative, for Relief from the Automatic Stay* (the "**Motion**") with the U.S. Bankruptcy Court for the District of Delaware (the "**Court**").

PLEASE TAKE FURTHER NOTICE that any response or objection to the relief sought in the Motion must be filed with the Court, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801 on or before **AUGUST 18, 2020, AT 4:00 P.M. PREVAILING EASTERN TIME**.

PLEASE TAKE FURTHER NOTICE that at the same time, you must also serve a copy of the response or objection upon the undersigned counsel to Grand Mesa.

PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER THE RELIEF SOUGHT IN THE MOTION WILL BE HELD ON **SEPTEMBER 3, 2020 AT 11:00 A.M. PREVAILING EASTERN TIME** BEFORE THE HONORABLE CHRISTOPHER S. SONTCHI AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 5TH FLOOR, COURTROOM NO. 6, WILMINGTON, DELAWARE 19801.

[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.

Dated: August 4, 2020

Respectfully submitted,

GREENBERG TRAURIG, LLP

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