Docket #0507 Date Filed: 08/21/2020

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)

DEBTORS' OBJECTION TO 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

[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.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

The above-captioned debtors and debtors in possession (collectively, the "Debtors") respectfully state as follows in support of their objection to Grand Mesa Pipeline, LLC's ("Grand Mesa" or "GMP") Motion for Order Confirming that the Automatic Stay Does Not Apply or, in the Alternative, for Relief from the Automatic Stay (the "Motion" or the "Lift Stay Motion") [Docket No. 364]:

PRELIMINARY STATEMENT

1. Numerous courts—including the Fifth and Sixth Circuits as well as a bankruptcy court in the Ninth Circuit—have concluded that FERC could be enjoined from commencing or continuing proceedings related to rejection of contracts because it would interfere with a bankruptcy court's jurisdiction over the assumption or rejection of contracts. Under the Bankruptcy Code, rejection amounts to a breach, which gives rise to a claim for damages that must be calculated based on the applicable rate or rates on file with FERC. As a result, rejection does not implicate FERC's jurisdiction over "filed rates." Nonetheless GMP seeks a declaration that the automatic stay either does not apply or should be lifted to allow it to commence a FERC proceeding under the Interstate Commerce Act in a deliberate effort to thwart this Court's plain authority under the Bankruptcy Code to determine whether executory contracts may be rejected. Any proposed proceeding before FERC related to whether rejection is permissible necessarily would usurp this Court's authority. Moreover, FERC easily could participate in the proceedings before this Court to the extent it wishes to provide input, just as it has done in other cases, including in the *Ultra Petroleum* case in the Bankruptcy Court for the Southern District of Texas that issued its decision today after full participation by FERC, which examined witnesses and argued.

2. First, there is no legitimate question that the automatic stay applies here. GMP is is stayed from commencing a proceeding because it is seeking to exercise authority over debtor property. Moreover, the police and regulatory exception does not apply. The exception only

exempts actions "commenced or continued by a governmental unit," not a third party such as GMP. This exception also does not apply because this course of action would fail both the pecuniary purpose and public policy tests since GMP is seeking to vindicate its private interests.

3. Second, there is no cause for lifting the automatic stay to allow GMP to take action that would usurp this Court's authority. Virtually all courts to have considered the issue have determined that FERC proceedings may be enjoined to prevent their interference with the bankruptcy court's exercise of jurisdiction over the assumption and rejection of contracts. Rejection amounts to a breach of contract that gives rise to a claim for damages in the bankruptcy court that is premised on, and therefore vindicates, the applicable filed-rate. Further, contrary to GMP's contention that a separate FERC proceeding is required to advise the bankruptcy court of FERC's position since FERC speaks only through its orders, FERC has demonstrated in recent proceedings in bankruptcy courts that, if it chooses, FERC may participate in a bankruptcy proceeding to advise the court on issues related to rejection of contracts involving rates filed with the FERC.

4. Moreover, aside from the fact that FERC's jurisdiction is not implicated here, GMP did not even attempt to show that the traditional factors this Court considers in deciding whether to lift a stay tilt in its favor. That is because they decidedly do not. The potential harm to the Debtors is serious: they could lose a basic right of contract rejection provided to debtors under the Bankruptcy Code and they could suffer a serious threat to their ability to reorganize. And at the same time, GMP cannot demonstrate any likelihood of success on the merits of ultimately showing that the Debtors will be unable to prove that it is a proper exercise of their business judgment to reject the contracts at issue.

5. For these reasons, the Court should deny the Lift Stay Motion and let the Debtors continue the hard work of working to confirm their plan of reorganization and emerge from chapter 11 as a viable company.

BACKGROUND

I. THE DEBTORS AND THEIR BANKRUPTCY PROCEEDINGS

6. Headquartered in Denver, Colorado, the Debtors are an oil and gas company focused on the acquisition, development and production of oil, natural gas and natural gas liquids reserves in the Rocky Mountain region—primarily in the Wattenberg Field in the Denver-Julesburg Basin (the "DJ Basin") of Colorado. The Debtors operate primarily in the "upstream" oil and gas sector and conduct their exploration and production activities across approximately 295,000 net acres, approximately 169,000 net acres of which are in some of the most productive areas of the DJ Basin.

7. On June 14, 2020 (the "Petition Date"), each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On June 16, 2020, the Court entered an order [Docket No. 79] authorizing the joint administration and procedural consolidation of the chapter 11 cases pursuant to Bankruptcy Rule 1015(b). On June 30, 2020, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the "Committee") [Docket No. 155]

II. PROCEDURAL BACKGROUND

8. On June 15, 2020, the Debtors filed their *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* (the

"Rejection Motion") [Doc. No. 14]. The Debtors moved to reject certain unexpired leases and executory contracts including the Transportation Services Agreements at issue in Grand Mesa's Lift Stay Motion.

9. Grand Mesa filed the present Lift Stay Motion and an objection to the Debtors' Rejection Motion [Doc. No. 363] on August 4, 2020.

III. RELEVANT FACTUAL BACKGROUND

A. The Grand Mesa Pipeline.

10. The Debtors are a shipper on the Grand Mesa Pipeline which transports oil and gas out of the Wattenberg Field in Weld County, Colorado approximately 550 miles southeast to Cushing, Oklahoma. The Grand Mesa Pipeline can transport up to 150,000 bpd of crude oil. From a basin-wide perspective, there is currently significant excess capacity for long-haul transportation of forecasted oil production from the DJ Basin to Cushing. (Decl. of M. Foschi, attached hereto as **Ex.** A, at ¶ 7)

B. The Debtors' FERC-Regulated Transportation Service Agreements.

11. XOG's oil in the DJ Basin is collected from the wellhead in tank batteries and then transported by the purchaser by truck or pipeline (pursuant to transportation services agreements) to a tank farm, another pipeline or a refinery. (*Id.* at ¶ 8)

12. Relevant to Grand Mesa's Lift Stay Motion are two transportation service agreements:

a. the Amended and Restated Transportation Services Agreement, dated February 19, 2016, by and between Grand Mesa Pipeline, LLC and Extraction Oil & Gas, LLC (the "Grand Mesa TSA"); and

b. the Amended and Restated Transportation Services Agreement, dated as of June 21, 2016, by and between Grand Mesa Pipeline, LLC and Extraction Oil & Gas,

Inc. (as successor by assignment from Bayswater Exploration & Production, LLC) (the "Bayswater TSA").

(jointly, the "TSAs").

13. In the TSAs, Grand Mesa agrees to transport XOG's oil production, and in exchange XOG agrees to (1) pay Grand Mesa for transportation at certain rates per barrel (the "TSA Rates"), and (2) to supply a minimum volume of oil production per day ("MVC"). (Foschi Decl. at ¶ 10)

14. The TSA Rates are maintained in tariffs on file with the Federal Energy Regulatory Commission ("FERC"), which regulates rates and terms and conditions of service on interstate transportation of liquids, including oil and NGL, under the Interstate Commerce Act ("ICA"), as it existed on October 1, 1977. FERC's "jurisdiction over the oil markets is limited to the setting of interstate pipeline transportation rates and ensuring open access to the interstate pipeline system."[2] FERC's regulation of oil pipeline transportation "is more light-handed . . . compared to the regulation of the electric, hydroelectric, and natural gas pipeline industries."[3]

15. It is undisputed that because the TSAs contain material obligations on the parts of both XOG and Grand Mesa that remain unperformed, the TSAs fall within the definition of an "executory contract" that XOG may potentially reject under section 365 of the Bankruptcy Code.

C. The TSAs are Substantially Burdensome to XOG

16. The TSAs are substantially burdensome to XOG in two significant ways. First, at

[2] April 2020 Federal Energy Regulatory Commission Staff Report, *Energy Primer: A Handbook for Energy Market Basics*, page 108.

[3] *See, e.g., SFPP L.P.* 137 FERC ¶ 61,220 n. 20 (2011) (explaining FERC's different practices in natural gas pipeline and oil pipeline rate proceedings "result from the Commission's light-handed regulation of oil pipeline rates under the Interstate Commerce Act and a different regulatory scheme under the Natural Gas Act."); *see also* Lawrence R. Greenfield, Associate General Counsel, Office of the General Counsel for the Federal Energy Regulatory Commission, Presentation: An Overview of the Federal Energy Regulatory Commission and Federal Regulation of Public Utilities (June 2018), page 19.

$4.48 per barrel on a blended basis, the TSA Rates are ***over double*** the current market rates for long haul transportation in the DJ Basin. (Foschi Decl. at ¶ 12) The Grand Mesa TSA Rate is $4.40 per barrel, and the Bayswater TSA Rate is $5.68 per barrel. (Foschi Decl. at ¶ 12) XOG sought three alternative bids for long haul transportation of its production in the DJ Basin, and determined that the current market rate for such services is in the range of $1.60 to $1.95 per barrel. (*Id*.)

17. Second, the TSAs provide that XOG must pay the TSA Rates for the entire MVC, regardless of whether XOG actually delivers the oil. (Foschi Decl. at ¶ 13) XOG's current oil production levels are below the MVC, and it anticipates continued shortfalls throughout the remaining terms of the TSAs. (*Id*.) In seeking alternative bids, XOG determined that it could obtain similar pipeline transport of its production from one of these alternative providers with a significantly lower or no MVC. (*Id*.)

18. Each day that XOG is required to continue operating under the burdensome terms of the TSA, the estates' resources are drained to the detriment of the reorganization process and the Debtors' creditors. (*Id*. at ¶ 15). Absent rejection of the TSAs, the Debtors stand to lose over $300 million over the life of the contracts, between (i) anticipated shortfalls on the MVC and (ii) increased oil transportation cost of the TSAs relative to alternatives, equating to an average of approximately $4 million per month. (*Id*.)

19. Extended administrative proceedings and litigation over whether the Debtors may reject the TSAs also pose other devastating consequences to the Debtors' restructuring efforts. (*Id*. at ¶ 16) The Debtors would be forced to expend time and workforce and monetary resources to opposing any FERC determination that may limit the Debtors' ability to reject the TSAs under Section 365 of the Bankruptcy Code. (*Id*. at ¶ 16) Moreover, to the extent the Debtors market

certain of their assets, there will be substantial bidder uncertainty as to the value of the assets burdened by the TSAs.

OBJECTION

20. As this Court is aware, bankruptcy courts regularly consider debtors' proposed rejection of contracts under Section 365 of the Bankruptcy Code. Other than in a couple of limited circumstances, which do not apply here, debtors are entitled to reject any executory contract as long as the decision satisfies the defined test for being a proper exercise of business judgment. As GMP has pointed out, however, by statute, the rates for certain contracts, including for interstate oil transportation service contracts, are filed with and approved by FERC. FERC has jurisdiction over the modification or abrogation of such rates. As such, courts have grappled with jurisdictional issues over rejection of contracts that involve filed rates subject to the jurisdiction of FERC.

21. But virtually all courts to have considered the issue have determined that rejection—as defined in the Bankruptcy Code—is a breach, which gives rise to damages premised on the filed rate, leading to the conclusion that rejection does not constitute a modification or abrogation of the filed rate. For this reason, courts repeatedly have said that the bankruptcy courts have jurisdiction to decide whether a debtor may reject contracts with filed rates and have precluded FERC interference with the bankruptcy court's determination. Here, the automatic stay precludes GMP from initiating a FERC proceeding and the stay should not be lifted to allow GMP to pursue a proceeding designated to usurp this Court's determination of whether rejection was proper under the Bankruptcy Code.

I. THE AUTOMATIC STAY PROHIBITS GMP—NOT A GOVERNMENTAL UNIT—FROM COMMENCING A REGULATORY PROCEEDING BY FILING A PETITION TO VINDICATE ITS PRIVATE INTERESTS.

22. When a debtor files for bankruptcy, Section 362(a) of the Bankruptcy Code imposes an automatic stay of "any act to . . . exercise control over property of the estate." 11 U.S.C. §

362(a)(3); *see also In re THG Holdings LLC*, 604 B.R. 154, 160 (Bankr. D. Del. 2019) (describing the automatic stay as "very broad" and "one of the most fundamental protections provided by the Bankruptcy Code").

23. In this case, GMP argues that the automatic stay does not apply because (1) the "declaratory proceeding" before FERC would not constitute a petition against the Debtors; and (2) the proceeding would otherwise fall within the police and regulatory powers exception to the automatic stay. (Bankr. Dkt. 364, Mot. ¶¶ 26-31.) GMP is wrong on both counts, and for the reasons set forth below, the Court should deny GMP's request for an order confirming that the automatic stay does not apply.

A. The automatic stay applies because GMP seeks to exercise control over property of the Debtors and is trying to use a FERC petition as a backdoor for recovering a claim against Debtor.

24. GMP argues that the Court need not consider whether an exception to the automatic stay applies because GMP does not seek to assert a pre-petition claim and does not seek to exercise control over debtor property. But GMP is trying to prevent the Debtors from rejecting the TSAs. GMP does not dispute this. (*Id*. ¶ 13.) Nor does it dispute that the TSAs are "property of the estate." *See* 11 U.S.C. § 541(a)(1) ("property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case"); *Acands, Inc. v. Travelers Cas. and Sur. Co.*, 435 F.3d 252, 260 (3d Cir. 2006) (holding that "property of the estate" includes contractual rights); *Majestic Star Casino, LLC v. Barden Dev., Inc.*, 716 F.3d 737, 750-51 (3d Cir. 2013) ("[W]e have emphasized that Section 541(a) was intended to sweep broadly to include all kinds of property, including tangible or intangible property, [and] causes of action[.]"); *In re Fruehauf Trailer Corp.*, 444 F.3d 203, 211 (3d Cir. 2006) (observing that "the term 'property' has been construed most generously [in chapter 11 contexts]").

25. Instead, GMP argues that the automatic stay does not apply to its intended "declaratory proceeding" because the proceeding "[would] not be styled as, or in fact constitute, a petition against" the Debtors. (Bankr. Dkt. 364, Mot. ¶ 26.) But this is of no import. As a threshold matter, the "style" of the proceeding is inapposite; a declaratory proceeding is no less subject to the automatic stay than any other proceeding if the debtor's property is at issue. *See, e.g., In re Kaiser Aluminum Corp., Inc.*, 315 B.R. 655, 659 (D. Del. 2004) ("KGI essentially seeks a declaratory judgment that any recovery Kaiser Aluminum might obtain from Monument must be paid to KGI. In these circumstances, the Court is persuaded that the [action] is an action 'to obtain possession of . . . or to exercise control over property of the estate,' and therefore, the Court concludes that the protection of the automatic stay . . . also applies.").

26. Moreover, and to the extent GMP argues that it could not "exercise control over property of the estate" through a declaratory proceeding, it is equally mistaken. GMP is seeking to enjoin the Debtors from rejecting the TSAs and to require the Debtors to continue to ship certain volumes of crude oil through the Grand Mesa Pipeline. This is precisely the kind of action that the Fifth Circuit has said could be enjoined. In *Mirant*, the Fifth Circuit agreed that it would "negate Mirant's rejection of an executory power contract" if FERC were to "order[] Mirant to continue performing under the terms of the rejected contract." *In re Mirant Corp.*, 378 F.3d 511, 523 (5th Cir. 2004). The court concluded that this would "certainly [be] a legitimate basis for injunctive relief." *Id.* The only purpose of the kind of proceeding GMP seeks to initiate would be to exercise "control" over debtor property, and the Court should deny GMP's attempt to use FERC as a backdoor means of recovering against the Debtors. *See, e.g., In re Spansion, Inc.*, 418 B.R. 84, 94, n.7 (Bankr. D. Del. 2009) ("[I]f Samsung's position is upheld, immediate injunctive relief directed against Spansion's ability to import its products would follow. Thus, the Samsung Action not only

implicates the stay of 362(a)(1), but also the stay of 362(a)(3), which prevents any act to exercise control over property of the estate.").

B. The police power exception does not apply because GMP seeks to commence an action but GMP is not a governmental unit.

27. Perhaps recognizing the shortcomings of its first argument, GMP also argues that the declaratory proceeding falls within the "police power exception" to the automatic stay. (Bankr. Dkt. 364, Mot. ¶¶ 27-31.) But this exception clearly does not apply. As a threshold matter, and by its own terms, the exception only encompasses "the commencement or continuation of an action or proceeding *by a governmental unit* . . . to enforce such governmental unit's . . . police and regulatory power[.]" *See* 11 U.S.C. § 362(b)(4) (emphasis added). This is not a situation where a third party initiated an action with a regulatory authority pre-petition and that regulatory authority decided to continue the action. Here, no action was commenced pre-petition and GMP, not a governmental unit, seeks to initiate the action.

28. But GMP does not (and cannot) argue that it is a governmental unit, which only includes the following:

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(27); *see also In re Nortel Networks, Inc.*, 669 F.3d 128, 138 (3d Cir. 2011) ("'[D]epartment, agency, or instrumentality' does not include entities that owe their existence to state action such as the granting of a charter or a license but that have no other connection with a State or local government or the Federal Government. The relationship must be an active one in which the department, agency, or instrumentality is actually carrying out some governmental function.").

29. Nor can GMP argue that FERC is the relevant governmental unit for purposes of this exception. Though GMP appears to suggest that FERC would be exercising its regulatory power once *GMP* commenced a declaratory proceeding (Bankr. Dkt. 364, Motion ¶ 27), this is insufficient. The exception provides that it applies only to actions "commence[d] or continu[ed]" by a governmental unit, and FERC has not commenced any such action. *See In re Nortel Networks, Inc.*, 669 F.3d at 139 ("[I]t appears that TPR is a governmental unit for the purposes of determining the applicability of the police power exception to the U.K. proceedings. However, TPR is not a party to the pending bankruptcy proceedings. unlike the Trustee and PPF, it did not file a claim and therefore cannot assert the police power exception."); *see also In re Halo Wireless, Inc.*, 684 F.3d 581, 592 (5th Cir. 2012) (exception applies to actions or proceedings "continued by a governmental unit[] without regard to who initially filed the complaint"); *In re First Florida Living Options, LLC*, No. 3:19-BK-2764-JAF, 2020 WL 3053135, at *7 (Bankr. M.D. Fla. June 5, 2020) (exception applies to actions or proceedings "originally commenced by a governmental unit"); *In re Edison Mission Energy*, 502 B.R. 830, 836-37 (Bankr. N.D. Ill. 2013) (exception applies to actions or proceedings commenced "under the directive" of a governmental unit).

30. Allowing GMP to make the proposed filing under the regulatory exception simply because the filing would be made with a regulatory governmental unit that would render a decision, would expand the regulatory exception to the automatic stay so much that the exception would swallow the rule. Using the same reasoning, any private party could then justify filing suit with a court (undoubtedly a governmental unit) that would be tasked with rendering a decision.

C. The police power exception does not apply because GMP seeks to vindicate its private interests, not to enforce police or regulatory powers.

31. Even if GMP *were* a governmental unit (it is not), the police power exception still would not apply. As set forth above, this exception only encompasses actions in which the

government is seeking "to enforce . . . [its] police and regulatory power." *See* 11 U.S.C. § 362(b)(4). To determine whether a party is seeking to enforce such power, courts apply two "related, and somewhat overlapping" tests: the pecuniary purpose test and the public policy test. *In re Nortel Networks, Inc.*, 669 F.3d at 139. As the Third Circuit has explained:

> The pecuniary purpose test asks whether the government primarily seeks to protect a pecuniary governmental interest in the debtor's property, as opposed to protecting the public safety and health. The public policy test asks whether the government is effectuating public policy rather than adjudicating private rights. If the purpose of the law is to promote public safety and welfare or to effectuate public policy, then the exception to the automatic stay applies. If, on the other hand, the purpose of the law is to protect the government's pecuniary interest in the debtor's property or primarily to adjudicate private rights, then the exception is inapplicable. The complementary tests are designed to sort out cases in which the government is bringing suit in furtherance of either its own or certain private parties' interest in obtaining pecuniary advantage over other creditors.

Id. at 139-40; *see also id.* at 140, n.13 ("[T]he legislative history expressly supports a narrow construction of the police power exception.").

32. GMP satisfies neither test.[4] It is not seeking to "protect[] the public health and safety," or "effectuat[e] public policy" through the proposed declaratory proceedings. *See, e.g.*, *id*. at 141 (preventing violations of regulatory laws concerning environmental protection, consumer protection, safety, and fraud are paradigm examples of police power). It is seeking to protect its own interest in a private contract by enjoining the Debtors from rejecting or otherwise modifying that contract. The police power exception does not extend this far. *See id*. at 142 (police power exception did not apply because "these particular proceedings are focused on the pecuniary interests of [one of the plaintiffs] and the members of NNUK's pension scheme); *In re THG*

[4] In its Motion, GMP argues that "[s]atisfaction of either test will suffice to exempt the action from the reach of the automatic stay[,]" (Bankr. Dkt. 364, Motion n.29) (citing *Dingley v. Yellow Logistics, LLC,* 852 F.3d 1143, 1146 (9th Cir. 2017)), but the Third Circuit has said that "[i]t is unclear whether the government action must meet both tests to fall within" the exception. *See In re Nortel Networks, Inc.*, 669 F.3d at 139, n.12 (citing *Chao v. Hosp. Servs., Inc.*, 270 F.3d 374, 389, 394 (6th Cir. 2001) (finding suit filed by the Secretary of Labor passed the pecuniary interest test but failed the public policy test, and therefore did not fall within the police power exception).

Holdings LLC, 604 B.R. at 161 (rejecting argument for police power exception where "[n]othing in the record suggests that the Defendants' withholding of the post-petition Medicare payments [was] for any purpose other than protecting its pecuniary interest . . . [or] that the Defendants' actions are in an effort to enforce public policy").

33. For this reason, in addressing whether the exception to the automatic stay applied, the Sixth Circuit did not disagree with the bankruptcy court's conclusion "that a FERC action would only 'incidentally serve public interest but more substantially adjudicate private rights,' . . . and therefore fail the public-interest test necessary to avoid the stay." *In re FirstEnergy Solutions Corp.*, 945 F.3d 431, 448 (6th Cir. 2019) (quoting *Chao v. Hosp. Staffing Servs.*, 270 F.3d 374, 382 (6th Cir. 2001)).

II. GMP HAS FAILED TO SHOW CAUSE FOR RELIEF FROM THE AUTOMATIC STAY TO PURSUE A PROCEEDING TO USURP THIS COURT'S JURISDICTION.

34. GMP did not even attempt to address the relevant standard for granting relief from the automatic stay in Delaware. Instead, GMP argues the stay should be lifted to allow it to file a petition with FERC to obtain FERC's views on whether rejection of its contracts with XOG is consistent with the public interest, which would mean this Court is precluded from determining whether these contracts may be rejected. GMP argues this is warranted on the theory that rejection of these contracts amounts to a collateral attack on FERC's jurisdiction over interstate transportation rates charged oil pipelines. But the only Federal Circuit Courts of Appeals that have addressed the issue have soundly rejected this contention, as have other courts. The Bankruptcy Code defines rejection as a breach, which gives rise to a claim for damages that would be calculated using the rates on file with FERC. Thus, while bankruptcy court consideration of rejection has no implications for FERC jurisdiction, any proceeding by FERC regarding rejection of contracts necessarily would usurp the bankruptcy court's plain jurisdiction.

35. The sole purported justification GMP appears to offer for lifting the stay to allow it to file a declaratory petition with FERC is that "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." (Bankr. Dkt. 364, Mot. at 4.) GMP contends then that it must be allowed to "commence with FERC seeking a determination whether rejection of the TSAs is consistent with the public interest and the [Interstate Commerce Act]" and that FERC's determination must be obtained "through its own procedures and process" since "FERC is an agency that 'speaks' solely through its orders". (*Id.* at 3-4, 26.)

36. Despite mouthing agreement that it is the province of the Bankruptcy Court, not FERC, to determine whether an executory contract may be assumed or rejected, GMP misses the point in urging that FERC issue a determination on the "propriety of rejecting the TSAs"—FERC is not supposed to be issuing an order rendering a determination. (*Id.* at 3.) That determination is within *this* Court's jurisdiction, and GMP's attempt to obtain an adjudicative order by FERC would undermine that jurisdiction. *See Mirant*, 378 F.3d at 519-20 (concluding that the Federal Power Act "does not preempt Mirant's rejection"); *In re FirstEnergy Sols., Corp.*, 945 F.3d 431, 446 (6th Cir. 2019) (bankruptcy court jurisdiction is "primary or superior to FERC's position"); *id.* (debtor may "reject the contracts subject to proper bankruptcy court approval and FERC cannot independently prevent it"); *In re PG&E Corp.*, 603 B.R. 471, 486-87 (Bankr. N.D. Cal. 2019) ("FERC has no jurisdiction over the rejection of contracts").[5]

[5] *See also* 28 U.S.C. § 1334(a) (providing district court with exclusive jurisdiction over bankruptcy cases); 28 U.S.C. § 1334(e) (providing that district court "shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and property of the estate"); *Tenn. Gas Pipeline Co.*, 103 FERC ¶ 61,275 at ¶ 93 (2003) ("Once a shipper has filed for bankruptcy, the Bankruptcy Court has jurisdiction," and tariff provisions may not "circumvent the jurisdiction of the Bankruptcy Court."); Ex. B, *In re Ultra Petroleum Corp.* 5/29/2020 Hr'g Tr. at 45:3-10 (FERC: "We have not asserted any authority to interfere

37. As the Bankruptcy Court for the Southern District of Texas explained recently in *Ultra Petroleum*, if the stay were lifted "FERC would not be participating in this case as a party-in-interest, but would be adjudicating a key issue that the Fifth Circuit has determined is within this Court's exclusive jurisdiction. That relief, if granted, would be inconsistent with the Fifth Circuit's directives." *In re Ultra Petroleum Corp.*, Case No. 20-32631, ECF No. 454 at 1 (Bankr. S.D. Tex. July 22, 2020).

38. This Court must decide whether rejection should be authorized, including with respect to each and every element of the claim. FERC may provide input to this Court (as may other parties in interest, third-party witnesses, independent expert witnesses, amici, etc.), if it chooses to do so, but it cannot, as GMP requests, render a "determination" regarding "whether rejection of the TSAs is consistent with the public interest and the ICA"—rather, questions of rejection are for this Court to decide. (Mot. at 4.)

39. The Bankruptcy Code's automatic stay provisions represent "one of the fundamental debtor protections provided by the bankruptcy laws." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986). Section 362(a)(1) of the Bankruptcy Code automatically stays "the commencement or continuation . . . of a judicial . . . or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under [the Bankruptcy Code], or to recover a claim against the debtor that arose before the commencement of the case. . . ." 11 U.S.C. § 362(a)(1) (emphasis added). The purpose of the automatic stay is threefold: "to prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending

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with what happens in a bankruptcy court rejection. . . . It's not our business to tell the bankruptcy court whether to reject a contract or not reject a contract.").

proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor." *Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1036 (3d Cir. 1991).

40. Given these protections and purposes, GMP bears a heavy burden in seeking to modify or eliminate the automatic stay. GMP must establish "cause" in the first instance, and in so doing show that "'the balance of hardships from not obtaining relief tips significantly in [its] favor.'" *Atl. Marine, Inc v. Am. Classic Voyages, Co.* (*In re American Classic Voyages, Co.*), 298 B.R. 222, 225 (D. Del. 2003) (quoting *In re FRG*, 115 B.R. 72, 74 (E.D. Pa. 1990)). And in balancing the hardships, the courts focus on three factors in determining whether "cause" exists: "1. Whether any great prejudice to either the bankrupt estate or the debtor will result from a lifting of the stay; 2. Whether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship to the debtor; and 3. The probability of the creditor prevailing on the merits." *In re Downey Fin. Corp.*, 428 B.R. 595, 609 (Bankr. D. Del. 2010).

A. FERC proceedings interfere with this Court's authority over rejection of Grand Mesa's contracts.

41. The only Federal Courts of Appeals to have addressed the issue have determined that bankruptcy courts have jurisdiction over the rejection of contracts that contain FERC jurisdictional rate. And those courts confirm that it is appropriate to *enjoin* FERC action related to contract rejection because it would interfere with a bankruptcy court's plain jurisdiction over this fundamental debtor right. *See In re Mirant Corp.*, 378 F.3d 511, 523 (5th Cir. 2004) (approving bankruptcy courts injunctions as warranted "to prevent FERC from negating Mirant's rejection decisions", which would include the ability to enjoin FERC from "requiring continued performance at the pre-rejection filed rate"); *In re FirstEnergy Solutions Corp.*, 945 F.3d 431, (6th Cir. 2019) (holding that "bankruptcy court may, based on the particular facts and circumstances before it, enjoin FERC from issuing an order (or compelling an action) that would directly conflict

with the bankruptcy court's orders or interfere with its otherwise-authorized authority" such as the approval of contract rejection).

42. This is not surprising because a bankruptcy court's jurisdiction over the putative rejection of executory contracts is unimpaired by FERC's regulatory powers to modify or abrogate contracts. *Mirant*, 378 F.3d at 522 ("The [Federal Power Act ('FPA')] does not preempt a district court's jurisdiction to authorize the rejection of an executory contract subject to FERC regulation as part of a bankruptcy proceeding."); *In re FirstEnergy Sols. Corp.*, 945 F.3d 431, 446 (6th Cir. 2019) (bankruptcy court jurisdiction to reject executory contract "is primary or superior to FERC's position . . . and FERC cannot independently prevent it."); *see also In re PG&E Corp.*, 603 B.R. 471, 486 (Bankr. N.D. Cal. 2019) ("The rejection of an executory contract is solely within the power of the bankruptcy court, a core matter exclusively this court's responsibility."); Ex. C, *In re Ultra Petroleum Corp.*, Case No. 20-32631, ECF No. 721, at 24 (S.D.Tex. Aug. 21, 2020) ("The Code and the Supreme Court make it clear that by authorizing rejection, the Court is neither modifying nor abrogating the Agreement. Nothing about rejection changes the terms of the Agreement or alters Ultra's shipping rates along the REX Pipeline. Nor does rejection abrograte the Agreement. Rejection only relieves the estate of the burdens of the Agreement, and allows Rockies Express to recover a bankruptcy claim against Ultra based on the full amount of its damages. FERC's jurisdiction concerning rate setting is unaltered by rejection.").

43. Indeed, despite its untenable position that the stay should be lifted to allow it to pursue FERC action, GMP acknowledges that "[t]hese 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." (Mot. at 25.)

44. Despite overwhelming precedent making clear that FERC may not interfere with the bankruptcy court's jurisdiction over the assumption and rejection of contracts and the exercise of this jurisdiction does not conflict with FERC's rate jurisdiction, GMP seeks to thwart this Court's jurisdiction on the basis of two cases it contends support its view. But the first, *In re Boston Generating, LLC*, has no import because in that case "the parties agree[d] that the Debtors should seek FERC approval of their rejection". 2010 WL 4616243, No. 10 Civ. 6528 (DLC) *3 (S.D.N.Y. Nov. 12, 2010). The one case that contravenes the decisions in the Fifth and Sixth Circuits, as well as a district court in the Ninth Circuit, and on which GMP relies. is *In re Calpine Corp.*, 337 B.R. 37 (S.D.N.Y. 2006). In fact, in *Calpine* the court explicitly noted that its holding was an outlier, however, which was "in obvious conflict with the holding of the Fifth Circuit in *Mirant*" as well as "the conclusions of the FERC Order" in which the FERC itself "adopt[ed] as its policy the position of the Fifth Circuit" in *Mirant*. *Id.* at 31, 37.

45. In *Mirant*, the debtor-power producer sought to reject a power purchase agreement, a FERC-regulated contract governed by the FPA. While the rejection motion was pending, the bankruptcy court entered two injunctions enjoining FERC from taking any action to require the debtor to continue performing under the agreement or any of the debtor's other agreements. *Mirant*, 378 F.3d at 516; *see also In re Mirant Corp.*, 299 B.R. 152, 170 (Bankr. N.D. Tex. 2003). The district court withdrew the reference, vacated the bankruptcy court's injunctions, and denied the debtor's motion to reject, holding that such motion was a prohibited "attempt to avoid [its] . . . obligations . . . at the filed rates FERC has found to be just and reasonable." *In re Mirant Corp.*, 303 B.R. 304, 314 (N.D. Tex. 2003). The Fifth Circuit reversed and remanded. *Mirant*, 378 F.3d at 526.

46. The Fifth Circuit "conclude[d] that the FPA does not preempt Mirant's rejection." *Id.* at 519-20. The court further opined that "a bankruptcy court can clearly grant injunctive relief to prohibit FERC from negating Mirant's rejection by requiring continued performance at the prerejection filed rate." *Id.* at 523 ("The concern that the bankruptcy court expressed—that FERC could negate Mirant's rejection of an executory power contract by ordering Mirant to continue performing under the terms of the rejected contract—is certainly a legitimate basis for injunctive relief."). In sum, the District (or Bankruptcy) Court is the sole arbiter of rejection under section 365 of the Bankruptcy Code.

47. In so holding, and contrary to GMP's contention that this ruling was "errant," the Fifth Circuit did no violence to FERC's jurisdiction, acknowledging that "FERC has the exclusive authority to determine the reasonableness of wholesale electricity rates under the FPA," and that under the filed rate doctrine applicable to rates under the FPA, "the reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts." *Id.* at 518 (quoting *Miss. Power & Light Co. v. Miss. Ex rel. Moore*, 487 U.S. 354, 371, 375 (1988).

48. The notion, however, that FERC has jurisdiction over the Rejection Motion is unsustainable. *Mirant* distinguished the concepts of (i) breach, and (ii) rate modification/challenge, noting that, outside of bankruptcy, FERC's jurisdiction over the former is not exclusive. *Id.* at 519-20 (*citing Gulf States Utilities. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1472 (5th Cir. 1987) (district court permitted to grant relief on FERC governed contracts where breach caused an increase in quantity purchased at the filed rate, and permitted to set aside energy contract altogether, even though this remedy would affect the filed rate by eliminating it entirely, so long as damages are calculated using the filed rate, noting that Congress did not mean for the FPA "to preempt such

indirect effects" on filed rates)). FERC has acknowledged its jurisdictional limitations outside of bankruptcy.[6]

49. The Fifth Circuit held that an injunction was "needed to protect the reorganization process because any regulatory action FERC took with regard to a particular contract would divest the court of its jurisdiction over the contract." *Mirant*, 378 F.3d at 516. The court also noted the bankruptcy court's worry that "FERC could negate Mirant's rejection of an executory power contract by ordering Mirant to continue performing under the terms of the rejected contract[] *is certainly a legitimate basis for injunctive relief*." *Id*. at 523 (emphasis added).

50. Similarly, in *FirstEnergy*, the Sixth Circuit was faced with the question whether FERC could compel the debtor to assume FERC-regulated electricity-purchase contracts in chapter 11. 945 F.3d at 443. The court concluded that the bankruptcy court's jurisdiction was "primary or superior to FERC's position." *Id.* at 446. Moreover, the Sixth Circuit held that the debtor could "*reject the contracts subject to proper bankruptcy court approval and FERC cannot independently prevent it*." *Id.* (emphasis added).

51. In a recent decision on the issue of FERC's jurisdiction over the rejection of executory contracts, a bankruptcy court in the Ninth Circuit held that "FERC has no jurisdiction over the rejection of contracts." *In re PG&E Corp.*, 603 B.R. at 486-487 (Bankr. N.D. Cal. 2019) ("[I]f an executory contract does not fall into the exceptions set forth by Congress in the Bankruptcy Code, only the Bankruptcy Court can issue a ruling on rejection."). Like *Mirant*, the court accepted the premise that FERC has broad statutory jurisdiction over rates, terms, and

[6] "[B]reach of contract issues … are matters better dealt with by courts of competent jurisdiction rather than through Commission review." *Southern Co. Energy Mktg, L.P.*, 86 FERC ¶ 61,131 at 61,459 (1999); *see also Nevada Power Co*., 111 FERC ¶ 61,111, at ¶ 15 (2005) (breach of a service contract is a "straightforward matter of contract interpretation" that "is not important in relation to the regulatory responsibilities of the Commission" and is "better left to a court").

conditions of wholesale electricity sales and power contracts, including changes to those contracts and that, under the filed rate doctrine, a party may claim no rate as a legal right other than the filed rate. *Id.* at 484. However, "[t]he issue here is Section 365 and not any of the permutations and applications of the filed rate doctrine." *Id.* at 486. Simply put, "[t]he rejection of an executory contract is solely within the power of the bankruptcy court, a core matter exclusively [the] court's responsibility." *Id.* The court stated:

> FERC must be stopped and the division and balance of power and authority of the two branches of government restored. Accordingly, and for the reasons that follow, the court declares FERC's decision announcing its concurrent jurisdiction unenforceable in bankruptcy and of no force and effect on the parties before it. If necessary in the future it will enjoin FERC from perpetuating its attempt to exercise power it wholly lacks.

Id. at 476.

52. These holdings are unsurprising. After all, rejection is merely a breach of contract. *See Mission Product Holdings, Inc. v. Tempnology*, 139 S.Ct. 1652, 1661-62 (2019) ("[A] rejection is a breach" and is "neither a defined nor a specialized bankruptcy term. It means in the Code what it means in contract law outside bankruptcy."). GMP does not contest that "[o]utside of the bankruptcy context, . . . [nothing] provide[s] FERC with exclusive jurisdiction over the breach of a FERC approved contract." *Mirant*, 378 F.3d at 519. Thus, there is no justification to arrive at a different answer in bankruptcy where the term rejection stands in for breach.

53. Additionally, 28 U.S.C. § 1334(a) provides this Court with exclusive jurisdiction over bankruptcy cases and 28 U.S.C. § 1334(e) provides that the Court "shall have exclusive jurisdiction [] of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." In addition, section 365(a) applies to "any" executory contract. 11 U.S.C. §365(a); *see also Mission Product*, 139 S.Ct. at 1662 ("Sections 365(a) and (g) speak broadly to any executory contracts.") (internal quotations omitted); *Dep't of Housing and*

Urban Development v. Rucker, 535 U.S. 125, 131 (2002) ("As we have explained, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (some internal quotation marks omitted); *In re Hydro-Action, Inc.*, 266 B.R. 638, 645 (Bankr. E.D. Tex. 2001) ("'Any' means any.").

54. A debtor's contract rights are of course property of the estate. *See In re Edgeworth*, 993 F.2d 51, 55 (5th Cir. 1993). And a motion to reject under section 365 falls squarely within a bankruptcy court's core jurisdiction. 28 U.S.C. § 157(b)(2). Therefore, a debtor's ability to assume or reject an executory contract is a "fundamental right authorized within the original *and exclusive* jurisdiction conferred upon the district courts." *In re Texaco, Inc.*, 77 B.R. 433, 438 (Bankr. S.D.N.Y. 1987) (emphasis added); *see also In re Corp. de Servicios Medicos Hosp.*, 805 F.2d 440, 444 n. 3 (1st Cir. 1986) (Commonwealth of Puerto Rico "could not obtain subject matter jurisdiction" to terminate debtor's contract); *In re Webster Place Athletic Club, LLC*, 605 B.R. 526, 531 (Bankr. N.D. Ill. 2019) ("lease assumption issues can only arise in the context of bankruptcy cases"); *In re Transcolor Corp.*, 258 B.R. 149 (Bankr. D. Md. 2001) ("propriety of [debtor's] rejection of its executory lease" is a "core matter[] firmly 'within the original and exclusive jurisdiction' of the bankruptcy court"); *In re Owen-Johnson*, 115 B.R. 254, 257 (Bankr. S.D. Cal. 1990) ("The issue of whether a contract is executory, and whether it may be assumed or rejected by the debtor, is a matter of bankruptcy law over which the state court has no power to rule."); *see also In re Sandridge Energy, Inc.*, 2016 Bankr. LEXIS 4622, at *28 (Bankr. S.D. Tex. Sep. 20, 2016) ("The Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed and to enter a final order with respect thereto.").

55. In an opinion issued today, in *In re Ultra Petroleum Corp.*, the Bankruptcy Court for the Southern District of Texas ruled that the Debtors were entitled to reject a contract that included rates approved by and subject to the jurisdiction of FERC. **(**Ex. C, *In re Ultra Petroleum Corp.*, Case No. 20-32631, ECF No. 721 (S.D.Tex. Aug. 21, 2020).) In its closing argument in *Ultra*, FERC acknowledged, contrary to the position taken here by GMP, that "FERC's position is that a contract rejected in bankruptcy does not change the FERC filed rate. Only FERC can change the filed rate." (Ex. D, *In re Ultra Petroleum Corp.* 8/6/2020 4:00pm H'ring Tr. at at 65:23-25.)

56. In its opinion, the court identified specific statutory exceptions and then explained that "[i]t is noteworthy that when Congress chose to create exceptions to assumption and rejection of contracts, it did not choose to create a general exception for contracts that are regulated by FERC. That omission suggest that, although Congress knew how to craft exceptions to rejection, Congress declined to except FERC approved contracts." (Ex. C, *In re Ultra Petroleum Corp.*, Case No. 20-32631, ECF No. 721, at 13 (S.D.Tex. Aug. 21, 2020).) The court then underscored this view by quoting a unanimous U.S. Supreme Court opinion explaining that when a statute includes some exceptions that "it does not follow that courts have authority to create others" but rather the court must conclude "that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." (*Id.* at 13 (quoting *United States v. Johnson*, 529 U.S. 53, 58 (2000)).

57. Not surprisingly, the court determined that "whatever rates are charged on the pipeline are totally up to FERC, and I'm not authorizing Ultra to in any way violate or change any regulation." (Ex. D, *In re Ultra Petroleum Corp.* 8/6/2020 4:00pm H'ring Tr. at at 76:7-12.) The court authorized the rejection, but made clear:

> The Code and the Supreme Court make it clear that by authorizing rejection, the Court is neither modifying nor abrogating the Agreement. Nothing about rejection changes the terms of the Agreement or alters Ultra's shipping rates along the REX Pipeline. Nor does rejection abrograte the Agreement. Rejection only relieves the estate of the burdens of the Agreement, and allows Rockies Express to recover a bankruptcy claim against Ultra based on the full amount of its damages. FERC's jurisdiction concerning rate setting is unaltered by rejection.

Ex. C, *In re Ultra Petroleum Corp.*, Case No. 20-32631, ECF No. 721, at 24 (S.D.Tex. Aug. 21, 2020).

B. Debtors will be harmed if the stay is lifted.

58. Since the automatic stay exists as a "fundamental debtor protection[]," the "most important factor" in determining whether to modify the stay and allow litigation to proceed "'is the effect of such litigation on the administration of the estate.'" *In re W.R. Grace & Co.*, No. 01 01139 JFK, 2007 WL 1129170, at *2 n.7 (Bankr. D. Del. Apr. 13, 2007) (quoting *In re Curtis*, 40 B.R. 795, 806 (Bankr. D. Utah 1984)). Thus, "[e]ven slight interference with the administration may be enough to preclude relief in the absence of a commensurate benefit." *Id.*

59. If FERC is allowed to decide whether XOG can reject the TSAs, XOG would be deprived of this fundamental debtor protection. In addition, as a direct consequence, XOG's ability to reorganize as allowed by the Bankruptcy Code would be threatened. Losing the ability to effectively reorganize would harm the Debtors and their stakeholders. In the Rejection Motion, through the careful exercise of informed business judgment, XOG has identified the TSAs as highly burdensome to its estate. Indeed, the Debtors stand to lose $300 million over the life of the TSAs, and rejection is clearly necessary for the Debtors' successful reorganization.

60. As discussed above, the ability to reject an executory contract "is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *Mirant*, 378 F. 3d at 517. Rejection is "vital" because in many cases, the debtor could not emerge from bankruptcy as a

going concern, if it were forced to specifically perform under burdensome executory contracts. *Leasing Serv. Corp. v. First Tenn. Bank Nat'l Ass'n*, 826 F.2d 434, 436 (6th Cir. 1987) ("Rejection denies the right of the contracting creditor to require the bankrupt estate to specifically perform the then executory portions of the contract.").

61. Indeed, the Fifth Circuit has already concluded that the prospect of FERC seizing control over contracts clearly constitutes not just harm but irreparable harm under the Bankruptcy Code:

> The concern that the bankruptcy court expressed—that FERC could negate Mirant's rejection of an executory power contract . . . is certainly a legitimate basis for injunctive relief. For example, a bankruptcy court can clearly grant injunctive relief to prohibit FERC from negating Mirant's rejection by requiring continued performance at the pre-rejection filed rate.

Mirant, 378 F.3d at 523.

62. If the stay were lifted to allow proceedings to be commenced with FERC, XOG could be required towait for FERC's opinion "on the merits" of rejection or assumption, a process that would take place outside the bankruptcy court, that would certainly give rise to competing (and at a minimum, confusing) jurisdictional issues, and on a timetable wholly divorced from these bankruptcy cases.[7] Grand Mesa states that it would "request FERC to issue its ruling no later than within 180 days of the initiation of the proceeding." (Bankr. Dkt. 364, Mot. at 26) Such a prolonged proceeding would harm the Debtors' reorganization in two ways.

63. **First,** the Debtors could be forced by FERC order to continue paying under the burdensome requirements of the TSAs until FERC issued its determination. As a result, the estates stand to be drained of millions of dollars each month, to the detriment of the reorganization process and the Debtors' creditors.

[7]

64. **Second**, the reorganization process likely would be delayed for a significant time as no plan could be finalized prior to FERC issuing its determination. To the extent the Debtors opted to participate in the FERC proceedings, their estates and their creditors would be greatly prejudiced because the Debtors would be forced to divert critical time and resources away from their reorganization efforts in order to defend against Movants' litigation. *See In re United States Brass Corp.*, 173 B.R. 1000, 1006 (Bankr. E.D. Tex. 1994) ("When balancing the hardships in lifting the stay, the most important factor is the effect of such litigation on the administration of the estate; even slight interference with the administration may be enough to preclude relief.") (citing *In re Curtis*, 40 B.R. at 806); *In re Perlstein Enterprises, Inc.*, 70 B.R. 1005, 1009 (Bankr. E.D. Pa. 1987) (recognizing the need of "a debtor to devote its likely-limited financial resources and energies to the formulation of a plan to treat all of its similarly-classified creditors equitably in bankruptcy court, as opposed to being required to expend its resources and energies in defending cases brought by certain of its creditors against it in other forums").

65. Moreover, once FERC did ultimately rule "on the merits' of rejection, an adverse ruling from FERC (at some unknown time in the future) could leave XOG forced to appeal to a federal Court of Appeals for relief (or to defend such appeal if filed by GMP)—a process that could take several years to complete. 15 U.S.C § 717r ("Any party to a [FERC] proceeding . . . aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States."); *see also, e.g., Atlanta Gas Light Co. v. FPC*, 476 F.2d 142, 150 (5th Cir. 1973) (affirming district court dismissal of declaratory action because, under the NGA, "[FERC] and, on review, the court of appeals were the proper forums"); *see also Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) ("Exclusive means exclusive, and the [NGA] nowhere permits an aggrieved party otherwise to pursue collateral

review of a FERC certificate in state court or federal district court."); *Hunter v. FERC*, 348 Fed.Appx. 592, 593 (D.C. Cir. 2009) ("Congress has vested exclusive jurisdiction in the courts of appeals to review FERC's orders, pursuant to section 19(b) of the Natural Gas Act.") (citation omitted).

66. That is the sort of harm suffered by the debtors in *NRG Energy*. There, before any injunction was issued, FERC compelled the debtor's performance under an executory power agreement the debtor sought to reject. *In re NRG Energy, Inc.*, 2003 No. 03 CIV.3754 RCC, 2003 WL 21507685, at *3-5 (S.D.N.Y. June 30, 2003). Even after the bankruptcy court granted the debtor's motion to reject the contract, FERC entered a second order requiring the debtor to perform under the *rejected* contract, effectively disregarding the bankruptcy court's order. *Id.* at *2. The plaintiff sought an injunction from the district court, but the district court held that "were the issues before the Court not to affect FERC's regulatory authority, the Court would properly possess jurisdiction," but because FERC acted first "within its legal authority . . . when it ordered Plaintiff to continue to comply with its obligations under the Agreement," plaintiff's only "appropriate remedy [is] [to] seek review of FERC's order by a federal court of appeals. This Court, however, is not the proper forum for Plaintiff to challenge FERC's regulatory action." *Id*. at *4.

67. Again, seeking relief from a federal court of appeals could mean that XOG would have to continue accumulating liabilities under the burdensome requirements of the TSAs through the entire appellate process. And the reorganization process would likely be delayed during that period.

C. Grand Mesa does not even allege any harm that it will experience if the stay is maintained, much less demonstrate that its harm would outweigh any hardship to the Debtors of lifting the stay.

68. GMP would not be harmed if the automatic stay is not lifted. Not surprisingly, then, GMP does not even allege any harm that would outweigh the harm to XOG. GMP will be

allowed to oppose the Rejection Motion (as it currently is doing), and it will be entitled to assert a proof of claim based on applicable breach of contract damages. *Mirant*, 378 F.3d at 522 ("A motion to reject an executory power contract is not a collateral attack upon that contract's filed rate because that rate is given full effect when determining the breach of contract damages resulting from the rejection.")). This will leave GMP in the same position as all of the Debtors' other unsecured creditors, as contemplated under the Bankruptcy Code. *Id.*

69. Moreover, the stay would leave FERC unharmed as well because its exclusive authority to regulate the oil market would be left fully intact. Specifically, FERC's power to regulate filed rates for the transportation of oil—which has been FERC's basis in the past for claiming jurisdiction over the rejection of contracts—will be unaffected by the automatic stay. Indeed, the court in *Mirant* found that rejection of a filed rate contract was not a collateral attack on the filed rate. *Id.*; *see also In re PG&E Corp.*, 603 B.R. 471, 486 (Bankr. N.D. Cal. 2019) (rejecting argument that contract rejection motion was an "improper collateral attack on FERC's orders" because "[t]he issue here is Section 365 and not any of the permutations and applications of the filed rate doctrine. This is the only issue before this court, and there is nothing collateral or indirect about the attack. It is direct because it goes to the precise bankruptcy issue of exclusive authority under 28 U.S.C. § 1334(a)."). Rather, any rejection of FERC-regulated contracts would actually reinforce the FERC jurisdictional rates set forth in the TSAs by allowing damages based on thoserates through the claims process. *See, e.g., US Gen. New England, Inc.*, 116 FERC ¶ 61,285 at P 32 (2006) (FERC finds that mitigation which reduced the amount the gas pipeline shipper might otherwise have owed in damages under a FERC-jurisdictional agreement that was rejected in a bankruptcy proceeding "does not change the filed rate; it only changes the net amount owed as an equitable remedy for the breach of contract").

D. Grand Mesa does not even allege that it is likely to succeed on the merits of any claim.

70. GMP does not allege—much less present evidence—that it is likely to succeed in thwarting the Debtors' rejection motion by filing its FERC petition. Under federal law, "[t]he general rule is that the decision to reject a given contract should be left to the trustee's (or debtor in possession's) sound business judgment." *In re Pilgrim's Pride Corp.*, 403 B.R. 413, 422 (N.D. Tex. 2009); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985) ("it is well established that the question [of] whether a lease should be rejected . . . is one of business judgment."); *In re Pisces Energy, LLC*, Nos. 09-36591-H5-11, 09-36593-H5-11, 2009 WL 7227880, at *6 (S.D. Tex. Dec. 21, 2009) ("In the absence of a showing of bad faith or an abuse of business discretion, the debtor's business judgment will not be altered.").

71. The Debtors were clearly exercising such business judgment in this case. As previously discussed, the TSAs impose rates that are about double the current market rates, and provide that the Debtors must pay these rates for the entire MVC, regardless of whether the Debtors actually deliver the oil. (Foschi Decl. at ¶ 13.) This is especially problematic here, given that the Debtors are currently unable to meet the MVC, and anticipate continued shortfalls throughout the remaining term of the TSA. (*Id*. at ¶ 13,) Based on these facts, the Debtors were acting within their business judgment when they decided to reject the TSA, and GMP has not argued otherwise.

72. Because GMP has presented no evidence that it is likely to succeed on the merits in pursuing challenge to rejection by instituting a proceeding with FERC, and because GMP has otherwise failed to satisfy its burden with respect to the other relevant factors, GMP is not entitled to relief from the automatic stay. *See, e.g.*, *BDA Design Group, Inc. v. Official unsecured Creditors' Committee*, No. 3:13-cv-01568-O, 2013 WL 12100467, at * (N.D. Tex. Sept. 2, 2013) (upholding bankruptcy court's decision not to lift the automatic stay where movant did not show,

among other things, that it was likely to succeed on the merits of its claim); *In re W.R. Grace & Co.*, Nos.01-01139 (JFK), 2007 WL 1129170, at *3 (Bankr. D. Del. Apr. 13, 2007) (finding that movant failed to satisfy its burden under three-factor test and denying motion for relief from the automatic stay).

III. THE AUTOMATIC STAY DOES NOT PROHIBIT FERC FROM PARTICIPATING IN THE COURT'S DECISION ON THE REJECTION MOTION, AS RECENTLY DEMONSTRATED BY FERC'S PARTICIPATION IN THE *ULTRA* MATTER.

73. GMP argues that it must be allowed to petition FERC because "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." (Mot. at 3.) But this argument is entirely belied by full FERC participation in similar proceedings, including most recently in the *Ultra Petroleum* case in the Bankruptcy Court for the Southern District of Texas.

74. Thus, FERC demonstrated that, if it chooses to do so, it may participate precisely as contemplated by *Mirant*. *See Mirant*, 378 F.3d at 525-26 ("welcome[ing]" inclusion of "FERC as a party in interest for all purposes in this case under 11 U.S.C. § 1109(b) and Fed. R. Bankr. P. 2018."); *In re Ultra Petroleum Corp.*, Case No. 20-32631 (Bankr. S.D. Tex.), Order Denying FERC's Emergency Motion (ECF No. 318), ¶ 4 ("The Court's invitation for FERC's participation is not intended to alter FERC's procedures or operations. FERC may determine its participation in accordance with statutory requirements and its own rules and procedures.").

75. In *Ultra*, the Court requested that FERC to participate in the Rejection Motion proceedings as a party-in-interest. (*Ultra Petroleum*, ECF No. 274.) "FERC ultimately accepted the Court's request and fully participated in the proceedings before the Court. It examined witnesses, argued, and was a full participant." Ex. C, *In re Ultra Petroleum Corp.*, Case No. 20-32631, ECF No. 721, at 6 (S.D.Tex. Aug. 21, 2020); *see also* Ex. E, *In re Ultra Petroleum Corp.*

7/24/2020 9:29am H'ring Tr. at 31:15-39:6, 101:7-104:19, 147:22-184:25; Ex. F, *In re Ultra Petroleum Corp.* 8/5/2020 1:46pm H'ring Tr. at 18:1-29:18, 86:12-98:12; Ex. D, *In re Ultra Petroleum Corp.* 8/6/2020 4:00pm H'ring Tr. at 63:4-72:11.) In fact, in his closing argument, counsel for FERC thanked the court "for the opportunity to participate here" and outlined that through the proceeding FERC was "able to contribute" by fulsomely addressing "First, whether you should apply a public interest test. Second, where you might go to get some guidance on that subject. And third, . . . how the expert witness testimony in this case aligns with [FERC's] recommendations on that front." (Ex. D, *In re Ultra Petroleum Corp.*, 8/6/2020 4:00pm H'ring Tr. at 63:7-14.)

76. Moreover, elsewhere, FERC has repeatedly accepted requests to submit pleadings as *amicus*. *See Electric Power Supply Ass'n v. Star*, 904 F.3d 518, 522 (7th Cir. 2018) ("[W]e decided to ask [FERC] to give us its views as an *amicus curiae*. The Commission and the United States then filed a joint brief concluding that Illinois' program does not interfere with interstate auctions and is not otherwise preempted, arguing federal law didn't preempt state emissions scheme."); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 249 (3d Cir. 2014) ("At the Court's invitation, the United States and FERC, acting amicus curiae, also briefed the preemption questions in support of the appellees."); *Allco Renewable Energy Ltd. v. MA ELEC. CO.*, 208 F. Supp. 3d 390, 392 n.1 (D. Mass. 2016) (where the court "relie[d] extensively on the Brief of Amicus Curiae Federal Energy Regulatory Commission"). There is no reason why FERC cannot do the same with respect to the Rejection Motion here—if it so chooses.

CONCLUSION

GMP asks this Court to allow it to commence a proceeding with FERC in a direct effort to usurp this Court's jurisdiction over the rejection of contracts. First, the automatic stay clearly applies to GMP's efforts and the police and regulatory action exception does not apply because

GMP is proposing that it commence an action to vindicate its private interests. Second, this Court should not lift the automatic stay to allow this action to proceed. Numerous courts have made clear that the FERC may not interfere with a bankruptcy court's exercise of its jurisdiction over rejection of a contract, which in no way conflicts with FERC's jurisdiction over filed rates. In addition, GMP did not even attempt to meet the traditional standard for a lift stay motion because the Debtors face greater potential harm if the stay is lifted and GMP cannot show any likelihood of success on the merits.

Dated: August 21, 2020
Wilmington, Delaware

/s/ *Richard W. Riley*

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Proposed Co-Counsel to the Debtors and Debtors in Possession

[8] Whiteford, Taylor & Preston LLC operates as Whiteford Taylor & Preston L.L.P. in jurisdictions outside of Delaware.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August 2020, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the District of Delaware and/or via email to all counsel of record.

/s/ Richard W. Riley

Exhibit A

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.	)	(Joint Administration Requested)

DECLARATION OF MARIANELLA FOSCHI, VICE PRESIDENT, FINANCE OF THE DEBTORS, IN SUPPORT OF THE DEBTORS' OBJECTION TO 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

I, Marianella Foschi, hereby declare under penalty of perjury:

1. I am the Vice President, Finance of Extraction Oil & Gas, Inc. ("XOG"), as well as of the above-captioned debtors and debtors in possession (collectively, the "Debtors" or the "Company") and have held that position since September 2019. Prior to that, I served as XOG's Director of Finance starting in 2015, and prior to that, I worked in energy finance at other companies, including with Blackstone's GSO Capital Partners as well as with Credit Suisse in its Oil and Gas Investment Banking group. I hold a Bachelor of Business Administration degree in Finance from the University of Texas at Austin.

2. I am generally familiar with the Debtors' day-to-day operations, business, financial affairs, and books and records. I submit this declaration (this "Declaration") in support of the *Debtors' Objection to the Motion of Grand Mesa Pipeline, LLC for Order Confirming that 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.

Automatic Stay Does Not Apply or, in the Alternative, For Relief From the Automatic Stay (the "Lift Stay Objection") (Doc. 364).

3. Except as otherwise indicated herein, all facts set forth in this Declaration are based upon my personal knowledge of the Debtors' employees and operations and finances, information learned from my review of relevant documents, information supplied to me by other members of the Debtors' management and their advisors, or my opinion based on my experience, knowledge, and information concerning the Debtors' operations, financial affairs, and restructuring initiatives.

4. I am over the age of 18 and am authorized to submit this Declaration on behalf of the Debtors. If called upon to testify, I could and would testify competently to the facts set forth in this Declaration.

5. Headquartered in Denver, Colorado, XOG and its Debtor affiliates are an independent oil and gas company focused on the acquisition, development and production of oil, natural gas and natural gas liquids reserves in the Rocky Mountain region—primarily in the Wattenberg Field in the Denver-Julesburg Basin (the "DJ Basin") of Colorado. The Debtors operate primarily in the "upstream" oil and gas sector and conduct their exploration and production activities across approximately 295,000 net acres, approximately 169,000 net acres of which are in some of the most productive areas of the DJ Basin.

6. The Debtors' current operations are located in the DJ Basin, primarily in the Wattenberg Field where the Debtors target the oil- and natural gas liquids-weighted Niobrara and Codell formations.

7. The Debtors are a shipper on the Grand Mesa Pipeline which transports oil and gas out of the Wattenberg Field in Weld County, Colorado approximately 550 miles southeast to Cushing, Oklahoma. The Grand Mesa Pipeline can transport up to 150,000 bpd of crude oil. From

a basin-wide perspective, there is currently significant excess capacity for long-haul transportation of forecasted oil production from the DJ Basin to Cushing.

8. XOG's oil in the DJ Basin is collected from the wellhead to tank batteries and then transported by the purchaser by truck or pipeline (pursuant to transportation services agreements) to a tank farm, another pipeline or a refinery.

9. Relevant to Grand Mesa's Lift Stay Motion are two transportation service agreements:

a. the Amended and Restated Transportation Services Agreement, dated February 19, 2016, by and between Grand Mesa Pipeline, LLC and Extraction Oil & Gas, LLC (the "Grand Mesa TSA"); and

b. the Amended and Restated Transportation Services Agreement, dated as of June 21, 2016, by and between Grand Mesa Pipeline, LLC and Extraction Oil & Gas, Inc. (as successor by assignment from Bayswater Exploration & Production, LLC) (the "Bayswater TSA").

(jointly, the "TSAs").

10. In the TSAs, Grand Mesa agrees to transport XOG's oil production, and in exchange XOG agrees to (1) pay Grand Mesa for transportation at a certain rate per barrel (the "TSA Rates"), and (2) to supply a minimum volume of oil production per day ("MVC").

11. The TSA Rates are maintained in tariffs on file with the Federal Energy Regulatory Commission ("FERC").

12. The TSAs are substantially burdensome to XOG in two significant ways. First, at $4.48 per barrel on a blended basis, the TSA Rates are over double the current market rates for long haul transportation in the DJ Basin. The Grand Mesa TSA Rate is $4.40 per barrel, and the Bayswater TSA Rate is $5.68 per barrel. XOG sought three alternative bids for long haul transportation of its production in the DJ Basin, and determined that the current market rate for such services is in the range of $1.60 to $1.95 per barrel.

13. Second, the TSAs provide that XOG must pay the TSA Rates for the entire MVC, regardless of whether XOG actually delivers the oil. XOG's current oil production levels are below the MVC, and it anticipates continued shortfalls throughout the remaining terms of the TSAs. In seeking alternative bids, XOG determined that it could obtain similar pipeline transport of its production from one of these alternative providers with a significantly lower or no MVC.

14. Additionally, under the TSAs, XOG is required to maintain 300,000 barrels of its oil in the pipe as line fill obligation (*i.e.* oil that XOG has in inventory in the pipe at all times that it cannot sell). This results in a burden to XOG of $10 million (one time), as this oil is XOG production that it is prohibited from selling until the end of the TSAs' terms. At least one of the alternative proposals XOG has received has explicitly provided that XOG would not be under any line fill obligations.

15. Each day that XOG is required to continue operating under the burdensome terms of the TSA, the estates' resources are drained to the detriment of the reorganization process and the Debtors' creditors. Absent rejection of the TSAs, the Debtors stand to lose over $300 million over the life of the contracts, between (i) anticipated shortfalls on the MVC and (ii) increased oil transportation cost of the TSAs relative to alternatives, equating to an average of approximately $4 million per month.

16. Extended administrative proceedings and litigation over whether the Debtors may reject the TSAs also poses other devastating consequences to the Debtors' restructuring efforts. The Debtors would be forced to expend time and workforce and monetary resources to opposing any FERC determination that the Debtors may not reject the TSAs. Moreover, to the extent the Debtors market certain of their assets to potential merger counterparties, there will be substantial bidder uncertainty as to the value of the assets burdened by the TSAs.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

Dated: August 21, 2020

/s/ Marianella Foschi

Name: Marianella Foschi
Title: Vice President, Finance
Extraction Oil & Gas, Inc.

Exhibit B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

IN RE:	.	Case No. 20-32631
ULTRA PETROLEUM CORP. and ULTRA RESOURCES, INC.,	.	Chapter 11
Debtor.	.	(Jointly Administered)
ULTRA RESOURCES, INC.,	.	Adv. No. 20-03167
Plaintiff,	.	
v.	.	
FEDERAL ENERGY REGULATORY COMMISSION,	.	515 Rusk Street Houston, TX 77002
Defendant.	.	Friday, May 29, 2020 10:30 a.m.

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE THE HONORABLE MARVIN P. ISGUR VIA VIDEOCONFERENCE
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For Ultra Resources, Inc.: Quinn Emanuel, et al
BY: BENJAMIN I. FINESTONE, ESQ.
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000

TELEPHONIC APPEARANCES CONTINUED.

Audio Operator: Courtroom ERCO Personnel

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TELEPHONIC APPEARANCES (Continued):

For the Debtors:	Jackson Walker LLP BY: ELIZABETH FREEMAN, ESQ. 1401 McKinney Street, Suite 1900 Houston, TX 77010 (713) 752-4200 Kirkland & Ellis LLP BY: BRAD WEILAND, ESQ. DAVID R. SELIGMAN, ESQ. 300 North LaSalle Chicago, IL 60654 (312) 862-2000
For Rockies Express Pipeline, LLC:	Sidley Austin LLP BY: KENNETH W. IRVIN, ESQ. 1501 K Street Northwest Washington, DC 20005 (202) 736-8256
For the Federal Energy Regulatory Commission:	Federal Energy Regulatory Commission: By: JOHN SHEPHERD, ESQ. 888 First Street Northeast Washington, DC 20426 (202) 502-6025
For the United States:	U.S. Attorney's Office By: RICHARD ALAN KINCHELOE, ESQ. 1000 Louisiana Street, Suite 2300 Houston, TX 77002-5010

THE COURT: Well, it's just a little broader than that. It's not just the one word. It's all of those words run directly afoul of what Mirant has said that we could do. What, in fact, I think that Rockies Express has expressed today is that they're going to request that the Commission express a view on whether it is in the public interest to allow this contract to be rejected in bankruptcy.

MR. SHEPHERD: I don't understand them to ask that question, Your Honor. They would need -- that is a whole different proceeding. I understand them to have asked -- so far only to say that whenever -- if there is going to be a rate change, that we're the only people who could make the rate change.

THE COURT: Well, that's easy.

MR. SHEPHERD: I think that's (indiscernible) --

THE COURT: I'm not ordering a rate change. Period. End of sentence.

MR. SHEPHERD: Well, I -- understood, Your Honor. I think I radically simplify a lot of the discussion that's happened before you today because it is -- it is somewhere in between the pole of FERC has no role whatsoever in dealing with this contract through perhaps on the other extreme end of REX adding, you know, no one else can reject a contract without FERC approval.

Again, without prejudging anything pending before us

now, I can summarize what FERC has said on this subject quite recently, with the current members of their Commission still on it, which is this. We have not asserted any authority to interfere with what happens in a bankruptcy court rejection. What we have said is that the rejection of a contract in bankruptcy cannot itself change the filed rate before us.

So we've -- the Commission can do whatever it is going to do. What it has said most recently is it's not our business to tell the bankruptcy court whether to reject a contract or not reject a contract. We'd certainly like to be involved and -- in the public interest implications of the Court's consideration of that. I understand that in bankruptcy that you follow the business judgment rule. The Fifth Circuit has sort of given different directions on remand to this Court and I think it's fair to say that the Fifth Circuit allowed the district court to adopt a higher standard.

That was one of the questions that you asked Mr. Finestone earlier. Do you have the ability to do that? I can't claim enough expertise about bankruptcy law to know whether or not you could (indiscernible) that authority, but certainly it's not going to be make FERC upset if you wish to try to look through the -- whether or not this contract should be rejected through a more difficult lens than the normal business judgment rule.

I don't know enough about the bankruptcy precedent to

know whether or not that is something that you can feel comfortable doing.

THE COURT: Right.

MR. SHEPHERD: It is a -- general law, but -- and so I'm going to withhold any opinion on that subject. That's for you to decide.

I do think, however, that FERC would say that the real final arbiter of the public interest has to be us because of our statutory duty. Because when we're looking at this, we're not looking at this through the lens of two private parties having a fight. We're looking at it through what is filed with us, which then assumes (indiscernible) regulation.

And so next -- so I think with that explanation, that we have -- again, I can't bind the Commission, but I don't think that the Commission has any intent of issuing an order that says anything about what bankruptcy court can do vis-a-vis rejection. Our orders don't say that. What they say is for anyone who's seeking rejection in the bankruptcy court, understand that even if you prevail in getting a rejection from the bankruptcy court, that doesn't do anything to change the filed rate in front of us.

That correlates to another question Your Honor asked about -- I understand it and why you were talking about the fact you were bound by Mirant, I agree that if I were in your position I would certainly feel so bound as well. I see no

Exhibit C

IN THE UNITED STATED BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
ULTRA PETROLEUM CORP., *et al*	§	**CASE NO: 20-32631**
	§	
	§	
ULTRA RESOURCES, INC.	§	**CASE NO: 20-32632**
	§	
KEYSTONE GAS GATHERING LLC	§	**CASE NO: 20-32633**
	§	
UPL THREE RIVERS HOLDINGS, LLC	§	**CASE NO: 20-32634**
	§	
ULTRA WYOMING, LLC	§	**CASE NO: 20-32635**
	§	
UP ENERGY CORPORATION	§	**CASE NO: 20-32636**
	§	
UPL PINEDALE, LLC	§	**CASE NO: 20-32637**
	§	
ULTRA WYOMING LGS, LLC	§	**CASE NO: 20-32638**
	§	**Jointly Administered Order**
Debtors	§	
	§	**CHAPTER 11**

MEMORANDUM OPINION

This Memorandum Opinion addresses whether Ultra Resources, Inc., may reject an executory contract with Rockies Express Pipeline LLC for the transportation of Ultra's natural gas through the Rockies Express Pipeline. The contract has been approved by the Federal Energy Regulatory Commission ("FERC"). It is undisputed that rejection would be in the Estates' best interest. The sole issue litigated by the parties is whether the Court should deny the rejection based on public policy reasons.

Both Rockies Express and FERC ask the Court to rule in a manner contrary to controlling authority from the Fifth Circuit Court of Appeals. *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004). Their requests are denied; the Court will apply *Mirant*. The Court concludes that:

- The Court is not authorized to graft a wholesale exception to § 365(a) of the Bankruptcy Code (the "Code") preventing rejection of FERC approved contracts.

- Public policy may, in certain circumstances, be considered when determining whether to authorize the rejection of a FERC approved pipeline contract.

- The public policy consequences of rejection that may be considered must be specific to the contract to be rejected and must evaluate whether the rejection would cause (i) any disruption in the supply of natural gas to other public utilities or to consumers; or (ii) other material harm to the public health, safety or welfare. The public policy analysis must not include generic concerns of the macroeconomic effect of bankruptcy rejections generally.

- There is no evidence that the rejection of this contract would cause (i) any disruption in the supply of natural gas to other public utilities or to consumers; or (ii) other harm (material or not) to the public health, safety or welfare.

- Only two public policy issues are seriously raised by Rockies Express. The first argues that FERC—and not the Bankruptcy Court—is the proper entity to determine whether rejection of an executory FERC contract is good or bad public policy. That is a question for Congress and not for this Court or for FERC to decide.

- The second public policy issue is that FERC's anti-discrimination policy would allow Ultra to take advantage of rejection by becoming a "free rider" on the pipeline. That issue may be addressed to and by FERC. The order issued along with this Memorandum Opinion leaves Rockies Express free to pursue an amendment to FERC's policy.

- The rejection of the contract does not violate § 1129(a)(6) of the Code. FERC's rate setting authority will remain intact following rejection and potential confirmation of the plan.

- The rejection of the contract is approved.

BACKGROUND

Ultra primarily engages in natural gas exploration and production in western Wyoming. (ECF No. 14 at 2). Ultra develops "long-life natural gas reserves in the Pinedale and Jonah fields located in the Green River Basin." (ECF No. 14 at 2). In order to transport its natural gas to market, Ultra has entered various gathering agreements with midstream service providers. (ECF No. 7 at 3). One such provider is Rockies Express. (ECF No. 7 at 4).

Rockies Express transports natural gas along the Rockies Express Pipeline (the "REX Pipeline"). (ECF No. 7 at 4). The REX Pipeline enables Rockies Express to transport gas from southwestern Wyoming to eastern Ohio, and vice versa. (ECF No. 7 at 4). Ultra was one of the original anchor shippers on the REX Pipeline when it was constructed. (ECF No. 7 at 4). FERC regulates the REX Pipeline pursuant to the Natural Gas Act, as it does all interstate natural gas pipelines. (ECF No. 325 at 9). FERC determined that REX Pipeline construction would be in the public interest because it would "benefit consumers across the nation by providing access to new, competitive supplies of domestic natural gas." (ECF No. 325 at 10).

On June 5, 2008, Ultra and Rockies Express entered into Firm Transportation Negotiated Rate Agreement No. 553082 (the "Original Agreement"). (ECF No. 7 at 4). The Original Agreement required Rockies Express to reserve space for and transport up to 200,000 MMBtu/day of Ultra's natural gas. (ECF No. 7 at 4). In exchange, Ultra agreed to pay a fixed monthly reservation charge. (ECF No. 7 at 5). Although it could have legally demanded security, REX did not receive any security from Ultra to assure payment of Ultra's obligation. The term of the Original Agreement lasted from November 2009 through November 2019. (ECF No. 7 at 4-5).

As an anchor shipper, Ultra's financial commitment helped induce construction of the REX Pipeline. (ECF No. 325 at 4). Ultra benefitted significantly from construction of the REX Pipeline because the Pipeline brought "the Rocky Mountain prices available to Ultra in line with the much higher national prices." (ECF No. 325 at 4). Prior to completion of the REX Pipeline, natural gas at the Opal Hub in Wyoming traded at an average annual price that was $2.88/MMBtu below the prices at the Henry Hub in Louisiana. (ECF No. 325 at 5). By 2010, Opal gas traded at only $0.40/MMBtu below Henry Hub. (ECF No. 325 at 5). Although there was a slight dispute as to

how much of the price differential was due to the REX Pipeline, the Court finds that Ultra received material benefits from the construction of the REX Pipeline.

Pursuant to the Original Agreement, Ultra made regular payments to Rockies Express totaling over $625 million. (ECF No. 7 at 5). Those funds provided financial support for the construction of the REX Pipeline. (ECF No. 7 at 5). However, on March 28, 2016, Rockies Express asserted that the Original Agreement terminated on account of Ultra failing to meet creditworthiness requirements. (ECF No. 7 at 5). Rockies Express then filed a $300 million breach of contract action against Ultra in Texas state court. (ECF No. 7 at 5).

That lawsuit was stayed when Ultra filed its first chapter 11 petition (Case No. 16-32202) on April 29, 2016. (ECF No. 7 at 5). During Ultra's first bankruptcy, Ultra and Rockies Express negotiated a settlement of the breach of contract action. The settlement gave Rockies Express a $150 million general unsecured claim, which was paid in full pursuant to Ultra's confirmed plan of reorganization. (ECF No. 7 at 6). Additionally, on February 23, 2017, Ultra and Rockies Express executed a new Transportation Service Agreement and Firm Transportation Negotiated Rate Agreement (the "Agreement"). (ECF No. 7 at 6). The term of the Agreement runs from December 1, 2019 through December 31, 2026. (ECF No. 7 at 7).

Without requiring Ultra to dedicate any of its natural gas to the REX Pipeline, the Agreement created a firm capacity reservation on the REX Pipeline at a set rate. (ECF No. 7 at 7). Ultra must pay for the capacity reservation whether or not it utilizes the pipeline. (ECF No. 7 at 7). Over time, the Agreement requires Ultra to pay approximately $169 million for the reservation. (ECF No. 7 at 8). Although Ultra had just concluded a bankruptcy case, Rockies Express again did not obtain any security for Ultra's $169 million obligation.

Ultra and Rockies entered the Agreement in early 2017, but the Agreement did not take effect until December 2019. By the time the Agreement's term began, commodity prices were materially lower than when the parties entered the Agreement. (*E.g.*, ECF No. 7 at 7). Ultra suspended its drilling program in September 2019 and has never shipped natural gas on the REX Pipeline pursuant to the Agreement. (ECF No. 7 at 7). Instead, Ultra has released its REX Pipeline capacity to other natural gas shippers. From December 2019 until March 2020, Ultra released its capacity to four separate shippers. (ECF No. 7 at 8). From April 2020 until October 31, 2020, Ultra has released its entire capacity to Occidental Energy Marketing, Inc. (ECF No. 7 at 8). Ultra is required to pay Rockies Express the difference between the released rates and the rate under the Agreement. (ECF No. 7 at 8). Ultra has not yet released any capacity for natural gas to be shipped after October 31, 2020. (ECF No. 7 at 8).

On April 29, 2020, Rockies Express filed a petition with FERC seeking a declaratory ruling that Ultra may not reject the Agreement in bankruptcy without FERC's prior approval. (Petition for Declaratory Order and Request for Expedited Action of Rockies Express Pipeline LLC, dated April 29, 2020, FERC Docket No. RP20-822-000). FERC established May 29, 2020 as the comment due date for the petition. (ECF No. 7 at 12). On May 14, 2020, prior to the comment due date, Ultra filed its present chapter 11 bankruptcy petition. (ECF No. 1). Ultra filed this rejection motion that same day. (ECF No. 7). At a hearing on May 29, 2020, the Court informed Rockies Express that pursuing the FERC petition for declaratory order would violate the automatic stay.

Consistent with the Fifth Circuit's teachings in *Mirant*, the Court requested that FERC "participate as a party-in-interest in these proceedings to argue and to comment on whether"

rejection of the Agreement "would harm the public interest." (ECF No. 274). FERC ultimately accepted the Court's request and fully participated in the proceedings before the Court. It examined witnesses, argued, and was a full participant. Although FERC participated in the proceedings, FERC's stated that it would not take a position on the public interest implications of rejecting this specific Agreement.

Rockies Express moved for relief from the automatic stay on June 29, 2020, in order to pursue a declaratory judgment action with FERC regarding the public interest impact of rejection. (ECF No. 349 at 2). FERC supported that motion. (ECF No. 439 at 3). On July 22, 2020, the Court denied the motion for relief from the automatic stay. (ECF No. 454).

The Court held an evidentiary hearing on the rejection motion and heard testimony from David Honeyfield and Dr. Jeff Makholm on July 24, 2020. (ECF No. 503). The Court continued the hearing to August 5, 2020, when the Court heard the conclusion of Dr. Makholm's testimony, as well as testimony from Crystal Heter, and Dr. Richard Bergin. (ECF No. 562). Dr. Bergin concluded his testimony on August 6, 2020. (ECF No. 591). The Court orally issued its ruling authorizing Ultra to reject the Agreement at the conclusion of the August 6, 2020 hearing. The Court issues this memorandum opinion in accordance with its oral ruling.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. The issue of whether to permit the rejection of an executory contract is a core proceeding under 28 U.S.C. § 157(b).

DISCUSSION

Ultra seeks to reject the Agreement pursuant to 11 U.S.C. § 365(a). No party questions that the Agreement is an executory contract or that rejection of the Agreement is an appropriate exercise of Ultra's business judgment. Instead, Rockies Express opposes rejection based on the special nature of FERC approved natural gas pipeline contracts, the public interest implications of rejection, and Ultra's ability to "free ride" on the REX Pipeline, post-rejection. For the reasons that follow, the Court holds that FERC's regulatory involvement does not except the Agreement from rejection. The Court authorizes rejection because the uncontroverted evidence demonstrates that rejection of this Agreement does not harm the public interest. Rejection will not cause (i) any disruption in the supply of natural gas to other public utilities or to consumers; or (ii) other material harm to the public health, safety or welfare.

FERC's Regulatory Responsibility

Before discussing whether rejection is appropriate, it is helpful to understand FERC's role in regulating interstate natural gas pipelines. FERC is tasked with protecting the public interest by regulating rates and terms for interstate natural gas transport. When FERC approves a pipeline contract, the filed rate is given the force of law. The parties may not modify or abrogate the filed rate without obtaining FERC approval. Separately, FERC regulations also prohibit Rockies Express from operating the REX Pipeline in a discriminatory or preferential manner. This gives Rockies Express little to no discretion over which natural gas shippers have access to the REX Pipeline.

FERC's jurisdiction over the Agreement derives from the Commission's authority to enforce the Natural Gas Act. "The Natural Gas Act has the fundamental purpose of protecting

interstate gas consumers from pipelines' monopoly power." *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 995 (D.C. Cir. 1987). Congress "declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest," when it passed the Natural Gas Act. 15 U.S.C. § 717(a). Accordingly, the Natural Gas Act "permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with [FERC] and made public." *United States Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 339 (1956).

FERC's supervisory role often requires the agency to evaluate the public interest implications when parties seek to modify or abrogate FERC approved contracts. Abrogation or modification of a FERC filed rate contract is only appropriate where the existing rates and terms harm the public. *Id.* Before expressing its view of the public interest implications, FERC must hear from both sides and come to a determination "on the record, after an opportunity for an agency hearing." 42 U.S.C. § 7172(d).

Rockies Express provides service along the REX Pipeline as an "open access" system. FERC regulations require that Rockies Express provide service that is not unduly discriminatory or preferential. *See Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665, 50 Fed. Reg. 42408-01 (1985) (prescribing open access requirements). Rockies Express operates the REX Pipeline under a tariff approved by FERC that allows Rockies Express to contract with shippers to provide transportation service and to terminate service at the end of a contract. (ECF No. 162 at 6). FERC requires an open access interstate pipeline to allow any shipper that meets minimal creditworthiness requirements (ordinarily

consisting of three months of advance charges) to transport gas on the pipeline. 18 C.F.R. §§ 284.7(b); 284.9(b) (implemented in the Rockies Express Tariff, GT&C Section 17.1); *see also Creditworthiness Standards for Interstate Natural Gas Pipelines*, 111 FERC ¶ 61,412 (2005). Obtaining bankruptcy relief does not cause a shipper to become uncreditworthy under FERC regulations. *See id.* Shippers must simply adhere to the rules set out in the Rockies Express tariff in order to access the REX Pipeline. *See* Rockies Express Tariff, GT&C Section 13.1(B)(1).

The Free Rider Problem

The thrust of the Rockies Express and FERC objections does not relate to whether the Agreement qualifies as an executory contract or whether the Agreement burdens the Ultra estate. Instead, their concerns are both based in general public policy and whether FERC regulations may unfairly favor Ultra if rejection is approved. The public policy objection is dealt with extensively later in this opinion. The latter objection focuses on Ultra's access to the REX Pipeline following rejection. FERC's open access pipeline regulations prevent Rockies Express from discriminating against natural gas shippers. Rockies Express must charge uniform prices for use of the REX Pipeline and cannot pick and choose which shippers may access the REX Pipeline. In light of these regulatory constraints, Rockies Express argues that, post-rejection, Ultra will still be able to ship natural gas along the REX Pipeline, only for substantially less than the cost imposed under the Agreement. Rockies Express contends that it has no recourse against that outcome.

Rockies Express' concerns are bolstered by the fact that Ultra was an anchor shipper on the REX Pipeline. Ultra's financial promises in the Original Agreement partially induced Rockies Express to construct the REX Pipeline. Therefore, according to Rockies Express, Ultra is attempting to free ride on the REX Pipeline. Rockies Express alleges that Ultra hopes to realize

the benefits of the REX Pipeline infrastructure without having to pay what amounts to its promised share of construction costs.

Subsumed in this issue is the position that Ultra will be allowed to both reject the Agreement and then, in bad faith, use the pipeline at favorable rates. FERC prohibits Rockies Express from discriminating against a shipper entity based on debts that have been discharged in bankruptcy. However, FERC allows pipelines to discriminate against a similarly situated shipper entity who has breached a FERC regulated contract by non-payment outside of bankruptcy.

Even if Ultra itself does not ship natural gas along the pipeline, Rockies Express believes "that rather than pay a transporter itself to ship gas on the [REX] Pipeline under the rates set forth in the [Agreement], Ultra can instead sell its gas to marketers at the nearby Opal Hub in Lincoln County, Wyoming, who then act as shippers on the [REX] Pipeline to move Ultra's gas downstream to financially attractive markets in the Midcontinent and Eastern United States." (ECF No. 325 at 3-4).

Rockies Express describes the dilemma as Ultra using "the bankruptcy rejection power as a sword to cease performance under its existing rate, while using FERC's open access policy as a shield to maintain access to the pipeline at a lower rate—either directly or through an intermediary—all while obtaining the unquestionable benefits that have existed from the moment the pipeline was built." (ECF No. 325 at 22). This issue does not arise from the Bankruptcy Code, the proposed bankruptcy plan in this case, or the proposed rejection of the contract. Instead, the issue arises from the FERC regulations. The Bankruptcy Code is explicit in two ways:

- The rejection of the contract "constitutes a breach of such contract . . . immediately before the date of the filing of the petition." 11 U.S.C. § 365(g)(1).

- The antidiscrimination provisions of the Bankruptcy Code, contained in § 525, do not bar a private entity from discriminating from doing business with another business entity based on discharged debt. 11 U.S.C. § 525.

If Ultra's rejection of the Agreement constitutes a sword, it is a sword that the Bankruptcy Code explicitly provides. Rejection is a tool that Congress provided for all debtors. As this opinion will discuss, rejection is merely a breach of the contract. Ultra could have breached the Agreement outside of bankruptcy. Rejection here does not provide Ultra with greater rights to access the REX Pipeline than it possessed outside of bankruptcy.

There is, of course, a benefit to Ultra from rejection. Rejection will entitle Rockies Express to a general unsecured claim in Ultra's case, and Rockies Express will be treated on the same basis as all other holders of unsecured claims. But, that is only fair. Rockies Express does not hold a secured claim, and Congress dictated the consequences of rejection. Rockies Express may not elevate its unsecured status to obtain a greater recovery than other holders of unsecured claims.

Rockies Express' concern lies not with Ultra's rights under the Bankruptcy Code, but with how FERC regulations may favor Ultra, post-rejection. The concerns do not derive from this Court's application of the Bankruptcy Code. The Court is tasked with applying the Bankruptcy Code and determining whether rejection is appropriate under § 365(a). For the reasons below, Ultra may reject the Agreement. After explaining why rejection is appropriate, the Court will return to its discussion of the free rider issue.

Legal Standard for Rejection

A) Executory Contracts are Broadly Defined

The Code permits debtors to assume or reject executory contracts. 11 U.S.C. § 365(a). Rejection helps "relieve the bankruptcy estate of burdensome agreements." *Stewart Title Guar.*

Co. v. Old Republic Nat'l Title Ins. Co., 83 F.3d 735, 741 (5th Cir. 1996). Executory contracts are those contracts where both parties have material obligations yet to be performed. *See Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1657 (2019). Rejection of an executory contract is authorized by 11 U.S.C. § 365(a), which states:

> Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

Rejection of an executory contract "constitutes a breach of such contract." 11 U.S.C. § 365(g). "A rejection breaches a contract but does not rescind it." *Tempnology*, 139 S. Ct. at 1657-58. Although the Code does not provide specific guidance on when a court should approve a proposed rejection, the general standards are well-established in the case law. An executory contract may normally be rejected under the deferential business judgment rule. *E.g.*, *id.* at 1658 (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984)). The business judgment rule requires that a court approve the debtor's business decision unless the decision is the product of "bad faith, or whim, or caprice." *See In re Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del. 2001).

By its terms, § 365(a) applies broadly to "any executory contract." Congress, however, crafted a handful of exceptions to rejection. Those exceptions are of particular interest in this proceeding. The exceptions are:

Exception	**Description**	**Applicability to Issue Before Court**
§ 765	An exception dealing with the Commodity Exchange Act	None
§ 766	A second exception dealing with the Commodity Exchange Act	None

§ 365(b)	The § 365(b) exceptions all are exceptions to the ability to assume a contract. They do not limit the ability to reject a contract.	None
§ 365(c)	The § 365(c) exceptions all are exceptions to the ability to assume and assign contracts. They do not limit the ability to reject a contract.	None

Tellingly, none of the exceptions to § 365(a) limit a debtor's ability to reject a FERC approved contract. It is noteworthy that when Congress chose to create exceptions to assumption and rejection of contracts, it did not choose to create a general exception for contracts that are regulated by FERC. That omission suggests that, although Congress knew how to craft exceptions to rejection, Congress declined to except FERC approved contracts. Justice Kennedy, writing for a unanimous Supreme Court, explained how a court should approach its interpretation of statutory exceptions:

> When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.

United States v. Johnson, 529 U.S. 53, 58 (2000).

Indeed, the Supreme Court previously applied the same analysis to § 365 of the Bankruptcy Code:

> Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA.

N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 522–23 (1984). *Bildisco* looms large over the Court's decision today. The Supreme Court held that the decision whether to except collective bargaining contracts from rejection in a chapter 11 bankruptcy case belongs to Congress, not the

judiciary. Although *Bildisco* dealt with a collective bargaining agreement, as opposed to a FERC contract, the Supreme Court specifically addressed rejection under § 365(a). The Supreme Court dismissed the argument that special aspects of collective bargaining agreements place them outside the scope of § 365(a). *Id.* at 522. Instead, the Supreme Court instructed that § 365(a) "by its terms includes all executory contracts except those expressly exempted." *Id.* at 521. Like collective bargaining agreements, the FERC approved contract at issue here falls within the broad scope of "all executory contracts." *See id.* Thus, the Agreement is subject to rejection. The remaining issue is whether the business judgment rule, or something more, applies to rejection of a FERC approved contract.

B) Certain Contracts Require Heightened Scrutiny

The Fifth Circuit relied on both *Johnson* and *Bildisco* when it issued its controlling authority on that issue. *In re Mirant Corp.*, 378 F.3d 511, 522 (5th Cir. 2004). In *Mirant*, the Fifth Circuit held that a bankruptcy court must "carefully scrutinize the impact of rejection upon the public interest," before rejecting a FERC approved power purchase agreement. *Id.* at 525. Contrary to Ultra's arguments, the teachings of *Bildisco* and *Mirant* are not that a Bankruptcy Court should ignore public policy considerations. Far from it. Instead, both *Bildisco* and *Mirant* authorize a bankruptcy court to conduct a fact specific inquiry into whether the specific rejection at issue has significant public interest implications.

In *Bildisco*, after stating that collective bargaining agreements fall within the purview of § 365(a), the Supreme Court considered whether authorizing rejection was appropriate. Because of the unique importance of collective bargaining agreements, the Supreme Court applied a more rigorous rejection standard than the business judgment rule. Although urged to do so by the NLRB,

the Supreme Court declined to adopt a stringent standard requiring a bankruptcy court to allow rejection only if the debtor "can demonstrate that its reorganization will fail unless rejection is permitted." *Bildisco*, 465 U.S. at 524; *see also Brotherhood of Railway Emps. v. REA Express, Inc.*, 523 F.2d 164 (2d Cir. 1975). Instead, the Supreme Court instructed that a heightened standard should be applied to determine if rejection should be authorized on a review of whether the collective bargaining agreement "burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract. The standard which we think Congress intended is a higher one than that of the 'business judgment' rule, but a lesser one than that embodied in the *REA Express* opinion of the Court of Appeals for the Second Circuit." *Bildisco*, 465 U.S. at 526. Thus, *Bildisco* instructed courts to balance the financial burden of an executory collective bargaining agreement with the harm caused by rejection.

The Fifth Circuit, applying *Bildisco* and other precedent to power contracts, instructed that "it is clear that Congress intended § 365(a) to apply to contracts subject to FERC regulation." *Mirant*, 378 F.3d at 522. The Fifth Circuit recognized that the "usual business judgment standard" typically applies to the rejection of executory contracts. *Id.* at 524. However, based on Supreme Court precedent, a "more rigorous standard" should be applied to the rejection of the FERC contract at issue. *Id.* Although Ultra suggests that the Fifth Circuit did not actually mandate the use of a more rigorous standard, this Court disagrees. While the Fifth Circuit politely suggested that the district court "should consider" applying a more rigorous standard, that suggestion came after the Fifth Circuit instructed that "[u]se of the business judgment standard would be inappropriate in this case because it would not account for the public interest inherent in the transmission and sale of electricity." *Id.* at 525.

Mirant did not define the precise rigor with which a bankruptcy court should scrutinize rejection of a power purchase contract. But the Fifth Circuit did state that "the courts should carefully scrutinize the impact of rejection upon the public interest and should . . . ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers." *Id.* at 525. The court must then decide whether "the equities balance in favor of rejecting that [] contract." *Id.*

C) Rejection of This Agreement Satisfies Mirant Scrutiny

This Court finds that *Mirant* is controlling authority on three points. First, the Agreement is not excepted from rejection under § 365(a). Second, the Court must scrutinize the impact of rejection on the public interest and on the supply of natural gas to consumers. Third, after determining the public interest and supply concerns, the Court must weigh those concerns against the Agreement's burden on Ultra's reorganization.

FERC approved natural gas agreements can have sizable public interest considerations. Pipeline contracts have a determinative effect on the price and availability of natural gas to consumers. Absent FERC regulation, pipelines might exercise monopoly power and demand higher shipping costs. *See Associated Gas Distributors*, 824 F.2d at 995. Congress placed gas pipeline contracts within FERC's jurisdiction to protect the public from that harm. *Id.* Rockies Express and FERC argue that—as a matter of public policy—FERC regulated contracts should not be rejected because of potential long-term effects on pricing and stability. *Bildisco* and *Mirant* prohibit this Court from crafting such a wholesale exception to § 365(a). An argument that applies to an entire category of rejections must be addressed to Congress—not to this Court. *See Bildisco*, 465 U.S. at 523.

However, the potential public interest implications of rejection in this case warrant *Mirant* scrutiny. Although Congress did not except pipeline contracts from rejection, Congress tasked FERC with substantial responsibility to oversee pipeline contracts in order to protect the public interest. That delegation of responsibility suggests that Congress viewed pipeline contracts as having a particularly sensitive effect on public welfare. As Congress set out heightened oversight for pipeline contracts, it is similarly appropriate for a bankruptcy court to apply heightened scrutiny when a debtor moves to reject a pipeline contract. Consistent with *Mirant*, the Court must determine the public interest and natural gas supply implications of rejection and weigh them against the Agreement's burden on Ultra's reorganization.

Over the course of a multi-day evidentiary hearing, the Court heard extensive testimony on the public interest implications of rejection. That testimony generally fell into two categories. The first category addressed the implications stemming from rejection of *this* Agreement. Testimony falling within the first category included expert opinions regarding how rejection of the Agreement would increase or decrease natural gas prices, how it would alter the amount of natural gas flowing through the REX Pipeline, and whether rejection might harm public health or safety. The second category of testimony dealt with the generic macroeconomic effects of rejecting pipeline contracts. Testimony in that category discussed how rejection of these contracts might chill infrastructure investment, increase the economic risk shouldered by natural gas transporters, and increase transactional costs for natural gas pipeline development.

The evidence in the second category is unrelated to the specifics of this Agreement. Instead, Rockies Express presents the macroeconomic costs as evidence that natural gas pipeline contracts should not be rejected as a matter of public policy. In other words, because a debtor's

ability to reject might adversely affect future investments in currently unplanned pipelines, rejection is contrary to the public interest. That logic applies to any rejection of a FERC contract under § 365(a). Rejection allows debtors to breach contracts and treat the resulting damages as unsecured claims, typically paying out only cents on the dollar. Rejection itself presents considerable risk to a debtor's contractual counterparties. Even if macroeconomics should be considered, the evidence shows that concern about rejection's macroeconomic effects on future pipeline investment is unfounded.

If the Court were to supplant Congress's role as a policy-maker for FERC contracts, where would the Court draw the line on its policy-making? Social policy would impact most bankruptcy decisions. For example, it cannot be disputed that the policy of the United States favors a robust housing supply. Nor can it be disputed that landlords would be in an improved economic position if tenants could not reject residential leases. Yet the policy decision of whether to allow rejection of residential leases is not the Court's to make. Despite these types of macroeconomic effects, Congress allows debtors to reject burdensome executory contracts. The Court finds that the macroeconomic evidence presented by Rockies Express relates to the providence or improvidence of an Act of Congress, and not to the providence or improvidence of the rejection of this Agreement. The Court's role is to apply the law and determine whether rejection of this Agreement is consistent with *Mirant*.

The testimony that properly dealt with the effects of rejecting this Agreement shows that there is no evidence that rejection would harm the public interest. The Court asked Dr. Jeff Makholm, Ultra's expert witness, "is there anything that makes the Ultra Rockies contract unique in its effect on the public interest from other transmission contracts with Rockies or with other

transmission-pipeline transmission companies? What's unique here about the public interest?" In response, Dr. Makholm stated "not in my perspective. It is another—just one of many, many natural gas interstate transmission contracts that flow gas tethering on throughout the United States. In that respect, to me it is not unique." (ECF No. 606 at 33-34). No party submitted any evidence suggesting that Ultra's rejection threatens the public health, safety, or welfare. Rejecting the Agreement effects the economic relationship between Ultra and Rockies Express, but poses no threat to the public.

Crystal Heter, the President of Rockies Express, was questioned about the public interest impact of rejecting the Agreement. FERC's counsel asked "would the rejection of this contract cast a burden on other customers, whether they be shippers or ultimate customers?" (ECF No. 606 at 92). To which Ms. Heter replied "at this point in time, with the contractual makeup that we have in negotiated rate agreements, no. It would not." (ECF No. 606 at 92-93).

The evidence also shows that rejection will have no negative effect on the supply of natural gas to public utilities or consumers. David Honeyfield, Ultra's Chief Financial Officer, testified that Ultra has not shipped any natural gas on the REX Pipeline since the Agreement became effective. (ECF No. 516 at 83 ("We've not shipped any gas. Certainly we've contracted all our sales at Rockies' delivery points and that's where we get paid and where title transfers. So, at this point, we released our capacity.")). Additionally, Mr. Honeyfield stated that rejection would neither increase nor decrease Ultra's overall natural gas production in the near term. (ECF No. 516 at 99 ("I think under our current business plan, which is to merely produce developed reserves, I don't know that really changes the amount of gas that we'll produce.")). Thus, rejection will

neither reduce the volume of natural gas travelling along the REX Pipeline nor decrease the volume of natural gas that Ultra produces.

Dr. Makholm also testified that rejection would not disrupt the supply of natural gas. (ECF No. 606 at 34). That testimony was uncontroverted and illustrates that rejection cannot diminish the REX Pipeline's supply of natural gas. Ultra's contribution of natural gas to the REX Pipeline—already at zero—cannot dip below zero. There is simply no evidence in the record suggesting that the supply of natural gas traveling along the REX Pipeline would decrease post-rejection. Nor would rejection threaten Rockies Express as a going concern. Crystal Heter testified that there is no risk that rejection of the Agreement would cause the REX Pipeline to shut down. (ECF No. 606 at 74).

Importantly, the Agreement does not require Ultra to commit any natural gas to the REX Pipeline, and Ultra has not directly shipped any of its natural gas along the REX Pipeline under the current Agreement. (ECF No. 516 at 83). It is difficult to envision how rejection of a contract which sets above market shipping rates without requiring Ultra to utilize any pipeline volume would diminish the public supply of natural gas.

As set forth above, the Court does not believe that macroeconomic issues concerning the general effect of the rejection of FERC contracts are the proper focus for a court. Nevertheless, for the purpose of completeness, the Court concludes that there is an absence of credible evidence that would justify a wholesale, or macroeconomic, exception under § 365.

The macroeconomic evidence shows that the public is more likely to benefit (rather than be harmed) by allowing the rejection of FERC regulated pipeline contracts. Dr. Makholm offered two relevant conclusions on this point. First, rejection of the Agreement will not have a material

effect on the natural gas market. (ECF No. 516 at 119). Second, Ultra's rejection would further the public interest by promoting competition in the natural gas market. (ECF No. 516 at 119). Elaborating on the second conclusion, Dr. Makholm said:

> that creating a barrier through a rejection of a contract in a bankruptcy proceeding like this in my opinion would raise the cost of exit. And raising the cost of exit from industry for a bankrupt firm like Ultra could inherently raise the cost of entry. Because if it means that any firm like Ultra that solved barrier to exit and hence would make it profitable to operate even at a loss because of those barriers, would inherently raise the cost of entry. And that kind of entry barrier if widely applied could raise the cost of new transport in the U.S. and damage the gas market.

(ECF No. 516 at 125). Further, when asked if rejection would disrupt natural gas markets, Dr. Makholm replied that it would not. (ECF No. 516 at 119). Dr. Makholm went on to explain that the market would expect Ultra to reject this Agreement because shipping eastward from the Opal Hub is not economic under present conditions. (ECF No. 606 at 23 (describing shipping eastward as "bringing sand to the beach")). The Court accepts Dr. Makholm's testimony.

Dr. Richard Bergin, testifying as an expert on behalf of Rockies Express, offered the contrasting view that approving rejection will discourage future investment in pipelines. The Court rejects that conclusion. Dr. Bergin was not a credible witness. He exaggerated his qualifications, gave unreliable testimony, and routinely engaged in hyperbole. The Court gives no weight to Dr. Bergin's testimony.

Dr. Bergin testified that the REX Pipeline was responsible for closing the price gap between the Opal and Henry Hubs. Rather than relying on a *Daubert* qualifying analysis of this issue, Dr. Bergin simply relied on a public statement by Steven Malcolm, the President and CEO of The Williams Company, crediting the REX Pipeline for closing the gap. (ECF No. 606 at 172); *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Based on the cumulative evidence

before the Court, Dr. Bergin's conclusion was correct. But, Dr. Bergin reached that conclusion in a manner unsuitable for an expert witness. Dr. Bergin was an expert on an advocacy mission. An economist would not rest his conclusions about a price differential on the statement of a marketplace participant. Expert opinions should reflect reasoned and objectively sustainable views. Dr. Bergin's conclusions, even when correct, were based on inexplicable bias.

Dr. Bergin also routinely described the harmful effects of rejecting pipeline contracts as "extremely significant" or having a "profound impact." (ECF No. 606 at 149). When pushed, Dr. Bergin was unable to quantify how or why rejection would cause such extreme effects. For example, Dr. Bergin testified that rejection would have a "chilling effect on future shippers to invest." (ECF No. 606 at 150). Ultra's counsel then asked "and you don't have an opinion on how big the increased chance that investors may not invest in pipelines is, correct?" (ECF No. 606 at 150). To which Dr. Bergin replied "that's correct." (ECF No. 606 at 150). Ultra's counsel next asked "and you haven't done any analysis to determine how investors in pipelines have historically factored in the risk of rejection by shippers into their investment decisions, correct?" (ECF No. 606 at 150). Dr. Bergin again replied "that's correct." (ECF No. 606 at 150). His testimony was not based on any reliable methodology. Moreover, even if the Court accepted his testimony in total, the testimony failed to demonstrate any material likelihood of harm to the public interest.

Despite the alleged chilling effect that rejection would have on pipeline investment, Dr. Bergin also testified that since 2004, the year the Fifth Circuit issued *Mirant*, there has been "$92 billion spent on building [] pipelines." (ECF No. 606 at 129). The Court then asked the witness "if having [the contracts] rejectable still has led to billions of dollars of investments, what's the

problem?" (ECF No. 606 at 129). Dr. Bergin had no satisfactory answer. He dismissively responded "yeah, I'm not sure if [pipeline investors] knew." (ECF No. 606 at 129).

Rejection of this Agreement will not harm the public interest or disrupt the supply of natural gas. The Court heard no evidence suggesting rejection of this Agreement would cause any concrete public harm. Mr. Honeyfield testified that rejection would not affect the supply of natural gas along the REX Pipeline because Ultra is not currently utilizing the REX Pipeline. Viewing supply disruption more generally, Mr. Honeyfield also testified that rejection will not cause Ultra to produce less natural gas. The Court credits Dr. Makholm's testimony that barring rejection of pipeline contracts would create barriers to exit for shippers, which might increase costs to consumers and diminish supply. The Court entirely rejects Dr. Bergin's testimony.

Having determined that rejection will not harm the public interest or decrease the supply of natural gas, the Court must weigh those effects against the burden the Agreement places on Ultra's reorganization. The Agreement plainly burdens the Ultra estate by requiring substantial monthly payments, whether or not Ultra utilizes its volume reservation, and locking Ultra into above market shipping rates. Balanced against the alleged, but unproven effects that are likely to benefit the public interest, the equities plainly favor approving rejection.

Rockies Express contends that "[a] balancing of the equities must also consider that Ultra has benefitted greatly from the existence of the [REX] Pipeline, and the [REX] Pipeline was constructed based on the expectation that Ultra would honor its long-term commitments." (ECF No. 325 at 6). Rockies Express is correct that Ultra benefits from the REX Pipeline and that Rockies Express relied on Ultra's promise when it built the REX Pipeline. However, *Mirant* does not require the Court to balance a debtor's decision to reject against the fairness to the contractual

counterparty. Nothing in § 365(a) suggests that a court may limit a debtor's right to reject simply because rejection seems unfair to the rejected party. *Every* opposed rejection of a contract probably meets that criteria. Like other unsecured creditors, counterparties rarely get paid in full. Bankruptcy is fair because it requires parties to share the burden of economic loss ratably and in known and predictable ways. Fairness is a Congressional consideration. Congress has determined that all holders of unsecured claims should bear the same burden. *Mirant* instructs the Court to balance the equities of Ultra's decision to reject with rejection's impact on the public interest and natural gas supply. Here, that balancing weighs in Ultra's favor. Ultra may reject the Agreement.

Rejection is not Rate Modification or Abrogation

The Court is compelled to answer an additional argument that the rejection of the Agreement impermissibly infringes upon FERC's exclusive jurisdiction to modify or abrogate filed rates. As set forth above, Congress has declared that the rejection of a contract "constitutes a breach." 11 U.S.C. § 365(g). Rejection does not 'have the effect of a breach,' nor is it 'deemed to be a breach.' Rejection is, simply, a breach. The only difference between rejection and a breach outside of bankruptcy is that following rejection, the rejected party will have an allowed unsecured claim equal to the damages from the debtor's breach. In most cases, that claim will not be paid in full.

What is clear is that "[a] rejection breaches a contract but does not rescind it. And that means all the rights that would ordinarily survive a contract breach . . . remain in place." *Tempnology*, 139 S. Ct. at 1657-58. Rejection does not abrogate, rescind, or terminate a contract. *See id.* Nor does rejection modify the terms of a contract. "A debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy." *Id.* at 1666.

The Code and the Supreme Court make it clear that by authorizing rejection, the Court is neither modifying nor abrogating the Agreement. Nothing about rejection changes the terms of the Agreement or alters Ultra's shipping rates along the REX Pipeline. Nor does rejection abrogate the Agreement. Rejection only relieves the estate of the burdens of the Agreement, and allows Rockies Express to recover a bankruptcy claim against Ultra based on the full amount of its damages. FERC's jurisdiction concerning rate setting is unaltered by rejection. Because rejection does not modify the filed rate, rejection does not implicate 11 U.S.C. § 1129(a)(6), which requires regulatory approval before a court may confirm a chapter 11 plan that includes a "rate change."

Resolution of the Free Rider Issue

Returning to the free rider issue, Rockies Express' inability to deny Ultra access to the REX Pipeline following rejection is not mandated by the Bankruptcy Code. FERC regulations prohibit open access pipelines from discriminating against shippers, including shippers who recently obtained bankruptcy relief. It appears that these FERC regulations may place Ultra in a better position than a typical party that breaches a contract. Absent FERC regulations, Rockies Express would be free to turn Ultra's business away. Section 525(a) of the Code prevents governmental units from discriminating against debtors on account of a bankruptcy filing. FERC is a governmental unit under § 525(a). However, no provision of the Code restricts a private party from declining to do business with a debtor on account of a bankruptcy filing or on account of a debt that was discharged in bankruptcy.

Today, FERC's open access pipeline regulations do not violate § 525(a) by discriminating against Ultra on account of Ultra's bankruptcy. In fact, FERC may provide Ultra with a benefit because its regulations allow Ultra to ship natural gas when other breaching parties might not be

able to do so. However, although the regulations do not run afoul of § 525(a), they limit Rockies Express' discretion to decline future business from a breaching party. There may be nothing improper about FERC extending Congressionally imposed antidiscrimination statutes to prevent bankruptcy discrimination on FERC regulated pipelines. FERC has made a decision forcing regulated pipeline operators like Rockies Express to take a credit risk that the Bankruptcy Code would not require. That policy decision may be sound and consistent with FERC's obligation to carry out the provisions of the Natural Gas Act. However, the consequences of that regulation create the "free rider" issue argued by Rockies Express and by FERC.

The remedy for the free rider issue is not asking the Court to prohibit rejection; the remedy lies with the policy choices made by FERC. This Court does not possess authority to craft exceptions to rejection, or to change or modify the parties' obligations to comply with FERC regulations. However, the Court acknowledges the free rider dilemma, and the difficult position in which it places Rockies Express and similarly situated pipeline operators. As such, the Court clarifies that FERC is free to modify its own regulatory scheme.

CONCLUSION

For the reasons set forth in the Court's oral ruling and this Memorandum Opinion, the Court will authorize rejection. A separate order will be entered.

Signed: August 21, 2020

Marvin Isgur
United States Bankruptcy Judge

Exhibit D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

IN RE:	.	Case No. 20-32631
	.	Chapter 11
	.	
	.	(Jointly administered)
ULTRA PETROLEUM CORP. and	.	
ULTRA RESOURCES, INC.,	.	
	.	515 Rusk Street
Debtors.	.	Houston, TX 77002
	.	
	.	Thursday, August 6, 2020
. . . . .	.	4:00 p.m.

TRANSCRIPT OF HEARING ON EXPEDITED MOTION TO APPOINT AN OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FILED BY INTERESTED PARTY, LOUIS C. TALARICO [378]; MOTION OF THE AD HOC EQUITY GROUP SEEKING ENTRY OF AN ORDER DIRECTING THE APPOINTMENT OF AN OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS [437]; MOTION OF ULTRA RESOURCES, INC. FOR ENTRY OF AN ORDER AUTHORIZING REJECTION OF THE NEGOTIATED RATE FIRM TRANSPORTATION AGREEMENT WITH ROCKIES EXPRESS PIPELINE LLC EFFECTIVE AS OF THE PETITION DATE [7]

BEFORE THE HONORABLE MARVIN ISGUR (VIA VIDEO CONFERENCE)
BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY COURT JUDGE

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Also Present:	CHARLES VISCITO

I N D E X
8/6/20

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
FOR THE CREDITOR:				
Richard Bergin	--	--	17/41	45

Ms. Chowdhury. That's okay. I've messed up the slides.

The slide was well-put-together by her and it said, "Did Congress really intend for parties to be able to induce pipeline development and then free-ride after a discharge?

I think that's what, ultimately, Mr. Finestone's argument is, is that the Bankruptcy Code trumps all of this, and that that somehow reflects Congress's intent to do this -- to allow the free-riding.

We believe that Congress, when it passed the Natural Gas Act, when it created FERC, and the Mirant decision, which found that taking into consideration the public interest is an important thing for you to do, reflected that the courts at least don't believe that Congress intended that the Bankruptcy Code trumps everything in this context. And so we believe, when you take into consideration the public interest, and you take into consideration the factors in Mirant, that they lean in favor of denying the rejection motion.

Thank you very much for your time, Your Honor. I know we've consumed a lot of it over the course of the last month.

THE COURT: Thank you.

I'm not sure who wants to take the lead for FERC, Mr. Shepherd or Mr. Kincheloe. But whoever wants to proceed, go ahead.

MR. SHEPHERD: I will, Your Honor. And Mr. Kincheloe

has asked if he could have a few moments at the very end to raise something unrelated to -- a related question pertaining to one of our motions.

THE COURT: You've got ten minutes. Use it however you want.

MR. SHEPHERD: Thank you.

Your Honor, first of all, I want to thank you for the opportunity to participate here, and I hope that you haven't found it distracting. And we're glad to have been able to contribute in some way. I hope to cover three things: First, whether you should apply a public interest test. Second, where you might go to get some guidance on that subject. And third, if time allows, how the expert witness testimony in this case aligns with our recommendations on that front.

But first a bit on context, because I'm surprised that this hasn't been mentioned more. This is a very -- this particular case is a very, very important case. Everyone is watching it. And the reason why everyone is watching it is because we're going through a period of enormous distress, and obviously now, particularly in the industry that we're dealing with here. Even prior to the COVID situation, we already had major bankruptcies with FirstEnergy and PG&E that are still being litigated. And COVID has done terrible things, along with other national developments, to the unprecedented level of demand destruction in our liquids markets that we're all going

to be grappling with.

And as we're all aware, Judge Jones has already signaled he's going to follow whatever approach you take here. So this case is enormously important. And as I will detail later, we are already receiving filings at FERC that are asking for rate increases based on market uncertainties inflicted by this bankruptcy in particular.

THE COURT: Mr. Shepherd, I'm not going to let you go beyond the record. This is closing argument.

MR. SHEPHERD: Okay. In thinking through whether or not and how to apply a public interest examination with the context in mind, I'd just direct your attention to Justice Scalia's statement in Morgan Stanley, that it would be a perverse rule that renders contracts less likely to be enforced when there is volatility in the market.

So turning now to the first question, which is whether or not you should apply a public interest standard. And Mr. Velevis has already covered this, but I want to endorse his approach. We think that it's clear that the Fifth Circuit decision in Mirant allows and even encourages the use of a public interest standard in this particular type of situation. We've encourage you to study Judge McBryde's opinion on remand that permitted contract rejection applying a balancing test, and note that the Fifth Circuit affirmed that -- the denial of rejection in its last opinion that's related to that case.

I'm not -- I don't need to instruct you how to read, and I'm sure you already have those in front of you. But that's our lead-in for why we believe you definitely can apply a public interest test.

In terms of -- just in closing, yes, we think that when the Fifth Circuit was talking about Bildisco it was the best context it could rely on at the time. There have since been other developments, including the Morgan Stanley and NRT decisions that would probably be more instructive about the way things have changed. And we'd also encourage Your Honor to look at the Sixth Circuit, which tried very hard to adhere to the Fifth Circuit's approach, and all those things should hopefully allow you to reach the conclusion that a public interest analysis here is appropriate and one that tends as closely as possible to Mobile-Sierra is the right way to go.

Now why would that be important beyond just adhering to the law? It has some practical significance in terms of conflict between the agency and your part of the court system. Because to the extent that there is daylight between the way FERC would approach this question and the way that you've approached the question, then there is going to be a risk of conflict at the rate level.

You're already aware that FERC's position is that a contract rejected in bankruptcy does not change the FERC filed rate. Only FERC can change the filed rate. So at some point

there's going to be a proceeding at FERC to deal with the existence or lack of existence of a rate or modification to the rates.

The risk of further disruption in the future by there being a different conclusion will be minimized to the extent that our tests look more like one another in that regard. And FERC is exceptionally well-suited to deal with this particular case -- this particular kind of question. All of the kinds of testimony you've listened to in the last two pieces of this hearing are the bread and butter of what we do. We have no trouble looking at basis differentials or when pipelines were built in order to be able to comprehend what those differences are. We know how to compute effects -- rate effects on other shippers. We know how to compute rate effects on other consumers. That is something that we exist to do.

For any other thing, other than trying to rid themselves of the contract in bankruptcy, one would go to FERC. They had to go to FERC to get this contract. If the contract is not being obeyed and Ultra wished to say they were being overcharged, in some other way abused, you would have to go to FERC to do it. If they wanted to get it changed, they would have to go to FERC to do it.

The only thing that makes this case come before this Court is the form through which the filed rate was created. But as we have explained in other courts, and I'll reiterate

here, that it's simply the form through which the contract was created, it does not change -- the fact that it becomes a filed rate after that does not allow the elimination of the private obligation to cause a transformation of the public obligation. Those are two completely separate things.

So turning now then to the question about what tests you'd apply. I don't think it's really that hard to look at the basic parameters of public interest tests. You have to then apply the facts as they seem to -- as they -- as they concern those big factors. Your Honor from the bench, apparently spontaneously, basically intuited the Mobile-Sierra test yesterday afternoon. The only thing that you didn't really delve into was undue discrimination claims, the third prong under Mobile-Sierra, but that's already presented to you in terms of the free-rider claim here.

So you have all the elements of the original Mobile-Sierra test before you. And I would encourage you to please try to follow that test, which after all is a judge-made test, imposed on FERC, very much against FERC's will, that FERC has been fighting since it was originally adopted in 1956.

So I guess I'd ask you to look to the Supreme Court's guidance on Mobile-Sierra and say, well, this is what the courts think the term "public interest" means under the Federal Power Act, and it's probably the best place to look, to figure out what the public interest impact would be in terms of a

change in a FERC jurisdictional contract.

If you wanted more precise guidance because things have evolved over time, I would like to encourage Your Honor to look at a FERC case called PacifiCorp v. Reliant which has a more robust multi-factor test as is seen over time. The citation is PacifiCorp v. Reliant, 103 FERC Paragraph 61,355 at P 33. I don't want to run into my time limit, so I'll just tell you there are seven factors there that go to more micro-concerns, what is going on between the specific contract counter-parties. And then we turn to the four macro concerns. And I'm staying away from the micro-level concerns and from the fact witnesses here, because we -- there may someday be a case in front of us, and I really don't want to in any way try to prejudge that. So I'll just cover the last four factors from the -- the less entity-specific ones.

The parties are all encouraged to present evidence on:

One, the effect of contract on the financial health of the complainants. That's basically Mobile-Sierra prong one.

Two, the effect of the contracts on wholesale and retail customers. That's prong two.

Third, the impact contract modifications have on the nation's energy markets -- that is effectively Makholm's entire test -- including but not limited to impacts on investment and new generation and transmission infrastructure. That is

Bergin's analysis. And effect on confidence in competitive markets. This is the chilling effect market.

And then, four, willingness of market participants to enter into long-term contracts in the future, and the prices and terms of such contracts.

And five, the potential modification of other existing contracts.

I think that's a useful framework that Your Honor should consider when trying to develop this test, should you choose to apply it, which of course we think that you should do.

Now turning to an application of the experts' testimony to what such a test would look like. Dr. Makholm's basic point of view is that the only thing that matters is impact to natural gas industry. Well, I mean, that is true, but it is such a generic and broad statement that it doesn't really have any value. Of course at some level that's something that you should be considering. But there are, as I've just read to you, much more precise way of going about measuring those impacts.

We do not, for example, find that in order to deal with the public interest arising from a contract in Maine that someone has to show there's impact on customers in Florida or California. I think your Honor has already intuited that line, yesterday, based on your questions about the Ohio and

California consumers, in your exchanges with Dr. Bergin. So I would ask you to continue to pursue that line of reasoning and disregard the very overbroad that Dr. Makholm raised in his first point.

As to Dr. Makholm's second point, which tries to argue that somehow it advances the public interest or advances competitive markets to permit rejection, I can only say that it was difficult to cross-examine him because we so -- we utterly lack any foundation for a mutually agreed upon discussion. There is no grounding for that in anything that our agency does. And I would encourage you to disregard that framework.

There was something, though, that Dr. Makholm said that was absolutely correct, both in his book and in his more narrow testimony here; and that is that the firm contract rates that are a basis for our certificates create the property rights that allow us to have a successful secondary market. All of those good things that have grown from -- that have grown out of FERC's regulatory process spring from the fact that people believe that those are concrete obligations that are not going to be altered.

So it cannot be true, as he reaches in his second point, that allowing rejection is something which is going to advance any of the regulatory interests that FERC believes that is important to protect here.

Dr. Bergin's testimony is useful to you primarily in

terms of raising the chilling effect question. Of course, you're going to have to decide the degree to which you give weight to his particular testimony. But it is a central concern -- I've just read to you an example out of PacifiCorp, whether or not there will be chilling effect on other investments.

Building on your colloquy yesterday, because you were talking about internal demand in the need for new pipelines, one of the other things that we're also concerned with is serving foreign demand for gas pipelines. So it's not limited only to domestic issues.

And did I understand you to say that --

THE COURT: Mr. Shepherd, you're sort of over on your time, but I -- and I know you want some time for Mr. Kincheloe, so let me get you to wrap it up.

MR. SHEPHERD: Well, I think you've already told me that you would not like me to read from the Columbia Gas filing that was just made at FERC yesterday, which asks for a 16 percent ROE based largely on the market risk to producer-push pipelines. But it answers the question you were raising yesterday: Is there any evidence that this is already have a chilling effect? And the answer is yes. And as that wasn't presented by a witness, of course you can feel free to disregard it, but I assure that there is plenty of material in the public sphere that would show you that a chilling effect is

already ongoing.

And with that, I'll yield to Mr. Kincheloe.

THE COURT: Thank you, Mr. Shepherd.

Mr. Kincheloe.

MR. KINCHELOE: Your Honor, very briefly, I just want to make sure the Court is aware that FERC filed a limited objection just to the form of proposed order by Ultra that's at Docket 445. Our complaint is the proposed language purporting to retain exclusive jurisdiction by this Court, just in case FERC needs to decide something related to this Court's order in the future. That's all.

THE COURT: Thank you.

All right. What I'm going to do today is I'm going to render the decision. I'm going to make some oral findings so that you know why I'm doing it. I'm then going to commit the decision to writing, which is not at this point finished.

I'm actually going to start in a different place than where I'd contemplated. So I'm going to announce the decision, then I'm going to go somewhere I hadn't contemplated talking about, until I heard the argument, and then I'll make the rest of the findings.

The decision is going to be that I'm going to authorize the rejection, but I'm going to do so with a possible injunction, and -- or "injunction" may be the wrong word -- a possible condition. And that condition is subject to FERC

approval, and I'll explain the reasons for that in a minute. But the condition that I will impose, assuming that -- but only if FERC approves it -- is that Rockies Express will be allowed, if FERC approves it, to treat Ultra the exact same way that it could treat any other party that had breached a transportation agreement, that was not in bankruptcy. So that they are in fact going to be allowed, if they could treat another breaching party -- as the testimony has been, by repeated witnesses, that someone that breaches a FERC contract can be prohibited from using the pipeline and using the system, but that because of bankruptcy and a FERC regulation they cannot, I'm going to allow the debtor to be treated exactly as those same people.

And that means I'm going to go and I'm going to talk for a few minutes about how Section 525 of the Bankruptcy Code works, and how the FERC regulation that is out there may be inconsistent with Section 525 -- not inconsistent in a manner that it is in any way illegal -- please don't misread me -- but it goes beyond what Section 525 requires. And that is what's causing some of the free-rider problem.

I don't think, though, that I can issue something that contradicts that FERC regulation with respect to the free rider, because there's nothing wrong with the regulation where I can somehow upset it. But if FERC can find a way to consent to this, I think it's legitimate under 525.

There is a second 525 problem, too. So we're going

Code doesn't mandate that. And so if FERC wants to waive its regulation or alter its regulation so that Rockies can refuse to do business with Ultra, I'm fine with that. And that is largely -- most of the injunction effect that Mr. Velevis wanted to have, and I'm going to approve it.

So if Rockies wants to do business, not do business, all that's just fine with me, and I'm going to make it quite specific. However, because of FERC's anti-discriminatory provision, I can't authorize front door or back door either by an injunction against Ultra or an injunction against Rockies or a command to Rockies any violation of that FERC reg. I'm going to authorize Rockies, assuming that FERC approves it.

The second problem deals a bit with Mr. Shepherd's closing argument.

And before I get to that, Mr. Shepherd, I do want to express my deep appreciation for FERC. I think that -- I invited FERC to participate. I know that y'all didn't really want to, in the sense of you didn't like that invitation. But I think you showed up and I think that you were quite helpful in the hearing and in your arguments. And I think FERC has participated on a heads-up basis to try and help me render my judgment.

And so to the extent that anyone thinks there's a turf war going on between FERC and this bankruptcy court, there is not. You guys were forthright, and I appreciated it. And

frankly, in my notes, the two most important questions that got asked were two questions that you asked. And I'll highlight those in a minute. But it's worth noting that I'm not here to pick an argument with FERC. And FERC, I don't think, is here to pick an argument with me. And I'm not quite sure why the media thinks it's the other way around.

There has been a discussion that the rates are still going to all be subject to FERC regulation, and no question in any confirmation order I'm going to make it quite clear that whatever rates are charged on the pipeline are totally up to FERC, and I'm not authorizing Ultra to in any way violate or change any regulation. But the reason I wanted to start time 525, having heard the closing arguments, is there's something else in 525. And it's sort of where I started of what 525 means. And it means that neither FERC nor any other government agency may treat someone that has been through bankruptcy differently than a similarly situated person that has not. You can't condition your treatment on them.

The Bankruptcy Code defines what it means to reject a contract. It doesn't say it will be treated as if it were or anything else. It is, in fact, a breach of the contract. And the discussion that is being had that FERC can treat a breach, which Congress has declared what 365 means -- it means a breach -- that FERC can treat a breach by someone in bankruptcy differently than a breach by someone out of bankruptcy, is a

mistaken view of the law.

525 prohibits FERC from treating a breach by someone in bankruptcy differently than someone that breaches out of bankruptcy. And because Congress has defined the consequence of a rejection as being a "breach," FERC cannot come back and treat Ultra differently than it would any other breaching party. It couldn't treat them less favorably.

Part of the problem I have, and where I started off on the injunction, is FERC is actually treating them more favorably right now. But the discussion that FERC could come back and do something to Ultra later is simply wrong if it's based on the fact that Ultra was in bankruptcy. If Ultra could do that to another breaching party, that may be a different story. But my understanding is that FERC doesn't get involved when people breach these contracts. They only get involved if there's a rejection. And I'm not at all certain that that's appropriate under Section 525.

I am convinced, from having heard the argument, having reviewed the relevant case law, that when there is an attempt to reject a FERC-regulated gas contract like this one that the Court must consider the public interest. I think that result is dictated by both Supreme Court opinions that deal with other regulated areas, as well as by the Fifth Circuit's Mirant opinion. I simply don't read the language the same way that Ultra reads it, to say that that is a dicta. I think

Exhibit E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

IN RE:	.	Case No. 20-32631
	.	Chapter 11
	.	
	.	(Jointly administered)
ULTRA PETROLEUM CORP. and	.	
ULTRA RESOURCES, INC.,	.	
	.	515 Rusk Street
Debtors.	.	Houston, TX 77002
	.	
	.	Friday, July 24, 2020
. . . . .	.	9:29 a.m.

TRANSCRIPT OF MOTION OF ULTRA RESOURCES, INC. FOR ENTRY OF AN ORDER AUTHORIZING REJECTION OF THE NEGOTIATED RATE FIRM TRANSPORTATION AGREEMENT WITH ROCKIES EXPRESS PIPELINE LLC EFFECTIVE AS OF THE PETITION DATE [7]; SEALED MOTION TO APPOINT AN OFFICIAL COMMITTEE OF EQUITY HOLDERS [379]
BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY COURT JUDGE

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Also Present:	CHARLES VISCITO

I N D E X
7/24/20

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
FOR THE DEBTORS:				
David Honeyfield	79	102	105	--
Jeff Makholm	118	127/147 155/171	--	--
FOR THE MOVANT:				
Jerald J. Stratton, Jr.	220	--	--	--

will give a headline conclusion that rejection will have a profound impact on the investment of capital in the pipeline industry; but upon cross-examination, he won't explain the profound impact. He will ultimately testify that there's merely the chance that the investment community will consider that, and we stipulate that whatever happens today will be considered by the investment community. He's done no analysis about the likelihood of a rejection order impacting investment in the pipeline community. He has a total conclusory conclusion. In addition and conversely, he concedes that an order forcing Rockies to assume this contract also could have an economic impact on the investment in the natural gas industry. And so he doesn't have any relative analysis. He concedes that that also could impact, but he's done no opinion or analysis on that side either.

So ultimately you have conjecture and speculation that what happens in court today could have a profound impact. Ultimately, we think the testimony will be a big strikeout, Your Honor.

Ari, can you turn to the next page?

This is -- I'm just going to be brief here. I was obviously very pleased to hear that Mr. Shepherd has joined us today. The point of this slide is just to show that from the beginning -- from the commencement of this contested matter, the debtors have invited FERC's participation. More

importantly, the Court has invited FERC's participation. Perhaps even more importantly, and confirmed by today, FERC has participated. And so the language in Mirant about FERC participating as a Section 1109(b) party in interest, with an opportunity to be heard, has been given life. And I think everybody's happy about that. No party, neither Ultra Resources nor Rockies, has ever wanted FERC not to participate. This is the way it's supposed to work. We will reach the right result today and feel great comfort that we are getting there.

That's the opening statement, Your Honor, subject to any questions.

THE COURT: Thank you.

And Mr. Shepherd, do you have any opening statement? And then we'll move to Rockies.

MR. SHEPHERD: Your Honor, the task that I'm going to try to perform today is to ask questions that are meant to indicate how FERC would be examining this case in the event that the (audio interference) attempting to change the contract at FERC. I'm aware that that's a different -- a very different standard than the one that this Court would apply. I think it's in fact why this proceeding is happening here and why we're seeing other bankruptcies being brought in other proceedings instead of being brought at FERC. It's why FERC has taken a very great interest in the way these cases are being resolved.

There are a number of underpinnings to the way that Ultra has just presented its position that are -- that don't fit very well within the FERC framework. I think those are probably best explored by asking questions. But in terms of their major themes, they are trying to describe a public interest analysis that is based on effects of the general natural gas industry, that is -- that's not the way that -- I mean, although that's always a background concern.

FERC is obliged by Supreme Court rulings which FERC has typically -- in fact, generally, historically, been very strongly resistant to because it constrains their authority -- to apply a higher standard of review to elimination of a contract -- a freely negotiated contract than it would to any unilateral rate. We have multiple different ways of setting rates. But chiefly, they are a unilateral rate that's subject to the rateholder coming in and asking for a periodic modification, or people can get around that process by signing a contract. If they do, the rule since 1956 has been that FERC's job is not to relieve either party of any improvident bargain, but instead to go through a specific checklist the Supreme Court set up in those cases for both the Natural Gas Act and the Federal Power Act, and that the Supreme Court has reminded us again and again is a test that they expect us to follow.

It is also correct to observe that FERC has done a

number of things, particularly in recent years, to try to make the Mobile Sierra standard a little bit more forgiving, to allow for a little bit more leeway to do various things. Permian Basin is something that -- a case that Dr. Makholm discusses -- is an example of the Supreme Court endorsing such a maneuver.

The last several times that FERC has been involved in Mobile Sierra disputes, lately focusing on rights of first refusal in transmission cases, FERC has been successful in creating new ways to look at whether or not a contract is the sort of thing that merits Mobile Sierra protection. I'm happy to detail those if you want to do them, if you'd like to discuss those, but I think I can probably best draw out those points by asking questions.

Ultimately, FERC's interest is really the protection of its jurisdiction. There's just a straightforward collision between two different statutory schemes, your scheme, which allows you to have jurisdiction over the rejection of the executory contract, and our scheme, which tells us that we're supposed to be exercising exclusive authority to the exclusion of any court, state or federal, in deciding whether or not rates will be accepted for filing in the first place or rejected or canceled or any other sort of thing, whether it's a complaint arguing that the existing filed rate is too high, or a complaint arguing that the existing filed rate is too low,

and we have a specialized way of looking at returns on equity and so forth, that's just not reflected in the tests that this -- that's being placed before you today. We just don't apply your straightforward business judgment rule. If the rule were simply is this a contract that just didn't work out, that is -- that's just not the standard that we apply. You just have a much more forgiving standard.

The motivating reason for holding people to their contracts in such a rigid way, as the Courts required us to do, is that it is the -- it accomplishes two different objectives. First it gets around the need to have rate cases -- this is something actually that Dr. Makholm talks about in his testimony -- because instead (indiscernible) contract rate. And because so much depends on the amount of money -- because there's so much money involved, and because there is -- and because whenever you are doing these sorts of things -- particularly in the pipeline industry, when we're certificating a pipeline and we depend on the anchor shippers to justify the enormous investment of money, plus also the invasion of public and private property in terms of provide a vital commodity for consumers who need it -- because it's the only way to get that commodity to them -- we rely on the need for those contracts to be there in order to -- in order to justify the kind of invasion that FERC undertakes.

I have a number of questions for Professor Makholm

about some of his assertions about how certificate proceedings work and about how ratemaking works, but those are probably best left for that time. I don't want to occupy too much more with this opening statement, except to say with regard to jurisdiction, and how it interacts with the Bankruptcy Code, the primary place that we're looking in terms of the Bankruptcy Code's interaction with FERC jurisdiction, is 1129(b) -- or (a)(6), which instructs the court at the confirmation stage to make sure that the regulatory agency with jurisdiction over the rates of the debtor following reorganization will either -- will either approve any rate change that's provided for in the plan, or if that you move forward with confirmation without regulatory approval that the plan is conditioned upon the agency's later approval.

So at some point FERC is going to have to be involved, even under the Bankruptcy Code's notions of how these things are done. And we intend to push very strongly toward the preservation of that role.

I think that's probably enough by way of an opening statement, and I look forward to the opportunity to question some of these witnesses.

THE COURT: Thank you, Mr. Shepherd. Let me just ask you a couple of questions. If the contract's rejected, does that terminate the contract or does it terminate the obligation of Ultra to perform under the contract? In other words,

wouldn't the contract and all of its rates still exist; it's just there would be no ability to force Ultra to ship or to pay?

MR. SHEPHERD: I think that's really two questions. I'm going to try to separate them.

THE COURT: Okay.

MR. SHEPHERD: The first place, I believe, that you're going is what is the effect of the rejection in bankruptcy of a contract and --

THE COURT: Right.

MR. SHEPHERD: -- and I don't want this to be disrespectful to the Court, but it has no impact -- it is probative evidence about whether or not a contract, you know, should be changed. It's certainly extremely relevant that Ultra simply doesn't have the money, apparently, to pay to maintain this contract. But the rejection here is a determination of a private obligation. But once that contract was filed and we accepted it for filing, with both parties agreeing that it was just and reasonable -- and this happened recently. This is a December 2019 filed rate contract. And here we are, just a very little bit later, looking at one of the parties trying to say oops, you know, we didn't really want to be involved in that contract.

The -- it just won't -- it cannot -- nothing that the bankruptcy court does can actually change the rate that is on

file before FERC. We're the only people that can -- we're the only entity that can accomplish that maneuver. The normal way we would expect that to happen is either through a consensual agreement between the parties, filed under Section 4 as the replacement for the contract they already have, or we'd expect the party that wants the contract to be changed to file a complaint under NGA Section 5, arguing -- and they could argue from either side, that the contract was too high or it was too low, at which point we encounter that in the Mobile Sierra test because this is a contract.

What is unusual about the interaction of these cases here is that if this were a unilateral rate, there's simply -- there'd be no way for this Court to be involved because there wouldn't be an executory contract. And that's the kind of rate case situation that most people are hoping to escape. Whenever they sign a contract, they're basically trading the -- trading being at the mercy of the rateholder coming in and saying that they want to -- typically it's to raise their rate -- very rarely do people come in and affirmatively offer to lower their rates -- and so in return for a firmer, flatter, rate over time, that's one reason why we hold them to their contracts.

Another theme which you'll hear me try to explore with Dr. Makholm today will be the idea that the extreme advantage in keeping rates under control through competition that we have -- through what he describes as secondary capacity

market -- depends in large part on the fact that there is already a firm contract in place from which people can negotiate.

Now the second thread of your question, Your Honor, I believe, went to what would or could FERC do in the event that someone wants to simply disobey a filed rate. We don't encounter that much. We often encounter people making mistakes that have to be corrected. We have an enforcement branch that examines people who are deliberately doing things that are designed to deceive the market or to do things that cause rates to -- that cause the default rate to be inaccurately applied. But we have not yet been in a position where we've had to force someone to remain participating in a contract as a customer.

It is not outside of FERC's authority, but internal when we discuss it, it always becomes something more like a nuclear option. And we certainly continue to have jurisdiction over the rateholder. So, for example, if let's say REX and Ultra consensually agree to reject their contract here, our next bit of correspondence would probably be with REX to say hey, you appear to have reached an agreement in front of the bankruptcy court that you want to change your filed rate. Were you planning on coming in and asking us to change default rate based on the fact you --

THE COURT: I'm going to interrupt you, Mr. Shepherd. You're awfully far away from the question I asked. I think

that your answer to the question that I asked was that the contract would remain.

MR. SHEPHERD: Yeah. That -- if that was your -- that was your first question. As it was --

THE COURT: Yeah, that was the question. All right.

MR. SHEPHERD: (Audio interference).

THE COURT: Thank you. All right.

So let me hear from Rockies, if Rockies wants to make an opening statement.

MR. VELEVIS: Yes, Your Honor, we would. And I would ask my colleague, Ms. Chowdhury to share her screen if she's able to. I'd like to apologize. I'm sitting in a room. I think it has six or seven screens, and I am not able to get any of them to actually have my video on. Thankfully -- thankfully, Ms. Heter's screen does. And so I think when we're -- when we have the witness on, she will -- you'll be able to see her face. But I just wanted you to have an understanding of that right now. So I apologize for that.

THE COURT: Let me actually apologize to you. It is one of the weaknesses of the join.me program that I can't control. It's just sort of a first come first serve. A week from today, we're changing and upgrading the system to one that will allow us to select whose screen we can see. If we're in a position where we have someone that needs to be seen -- for example, a witness, then I'll just start knocking people off

until I get to the witness and then let them get back on, where the witness would be first in line.

So, if we get there, let me know and I'll be sure that we see whoever you need to be seen. But I apologize of the weakness in the system, and that's really the principal reason why we're upgrading to a new system called gotomeeting.

So I can see her presentation fine and let's move ahead. But, again, if we have a problem of not being able to see a witness or if you want me to see you, let me know and we'll figure out a way around it.

MR. VELEVIS: Well, I think -- thank you very much, Your Honor. I think it's more important that you see the presentation for now. So -- and I think we will be able to move forward.

So, again, Robert Velevis from Sidley Austin on behalf of Rockies Express. We clearly understand here that this is not a typical opposition to a rejection motion. I'll tell you that the first conversation that I had with Mr. Finestone in this case, he said -- and I will just generally paraphrase him -- that the arguments that Rockies Express was making made his bankruptcy brain explode. And I have a lot of respect for Mr. Finestone. I have a lot of respect for his bankruptcy brain. And frankly, I had a lot of sympathy for his bankruptcy brain at the outset of this case, too. Because the argument that we're making was not intuitive

So currently it doesn't make sense for us to be drilling wells, but I sure hope that we see the natural gas price increase at some point in the future that would allow for it.

The part about that that I think is important to understand in this analysis is that the change in the natural gas price really doesn't change necessarily the economics on Column G or Column H in this graph because these are all relative points in terms of relative basis points. So probably a little more than the question you asked, but I certainly thought it was relevant.

Q Last question, Mr. Honeyfield. Can you describe, as CFO to Ultra Resources, what you have been seeing in terms of the western -- the western price markets?

A Generally speaking, I mean, the Northwest Rockies basis point is really one of the biggest indicators. So I've got the visibility of the forward market strips. What we see -- I mean, generally speaking, the Rockies is a declining basin. The investment there is not robust enough, and it hasn't been for several years, to sustain production.

So you know, with that, we hear a lot about switch to reducing carbon admissions in California and such. But what we've observed through looking at annual demand charge is that overall energy use continues to grow in the western markets. While the, you know, percentage of renewables continues to increase, we're still seeing more natural gas demand in total,

just because there's a bigger pool of people there in demand. So we continue to think that it will be a viable market for a long period of time.

MR. FINESTONE: Your Honor, subject to any redirect, nothing further.

THE COURT: Thank you.

Mr. Shepherd. Mr. Shepherd, did you have any questions for Mr. Honeyfield?

Mr. Shepherd, if you have your own line muted, we won't be able to hear you.

Well, let me see what's going on with that.

(Pause)

UNIDENTIFIED: I sent Mr. Shepherd an email, Your Honor.

THE COURT: He had disconnected and now is reconnected. So we've got him back on.

Mr. Shepherd, Mr. Kincheloe, y'all go ahead.

MR. SHEPHERD: I'm terribly sorry, Your Honor. I needed to speak with Mr. Kincheloe about time management and I had to drop the call before, and I was worried this would happen. Thank you. And I apologize for the delay.

I just have a very few questions.

THE COURT: All right.

MR. SHEPHERD: And to explain the reason that I'm asking them, I'm trying to (audio interference) determine how

we would apply --

THE COURT: Yeah, I don't want you to give me an explanation. You had your opening statement. Just ask your questions, please. We'll have people object on relevance if they don't agree.

MR. SHEPHERD: Yes, sir.

CROSS-EXAMINATION

BY MR. SHEPHERD:

Q Sir, is Ultra one of several anchor shippers on the REX pipeline?

A I believe so, based on what the -- Mr. Velevis showed earlier. It looked like we were one-ninth of that anchor shipper capacity.

Q And if you know, because I'll also ask this question of REX, who's probably in a better position to answer it, are other anchor shippers paying the same or approximately the same rate as Ultra?

A I don't know the answer to that.

Q Okay. So Ultra -- you've covered the fact that Ultra is now in its second bankruptcy, correct?

A That's accurate, yes.

Q And have the other anchor shippers also sought bankruptcy protection? You may not know, but I'm just trying to find out if you know.

A Yeah, I shouldn't respond to that. I don't know

factually.

Q Okay. Is there -- do you know if there's something -- is there anything that you could describe as unique about Ultra's situation that explains why Ultra seems to be having comparatively greater difficulty relative to other shippers?

THE WITNESS: Maybe if I can ask Your Honor a question? Certainly I was going to try to touch on the situation --

THE COURT: Actually, stop for a minute. You can either answer the question or you can tell him you don't know the answer, but those are your choices.

THE WITNESS: Okay. Thank you. Well, at risk of being objected to, I'll move forward with my response.

Certainly when Ultra was in a position -- and I do have general knowledge of this, having been in the industry for quite a while -- when Ultra was back in their position back in -- let's say call it 2007, 2008, yeah, there was a need -- there was a request for capital, et cetera.

When we moved through the first bankruptcy, the business plan at that point in time, as I understand it from reading documents that were published, was that Ultra was going to run a seven to eight-rig drilling program that -- and I know the commodity price was significantly higher there. So -- and I believe the status of the bankruptcy declared that Ultra was a solvent debtor. So Ultra agreed to the settlement at that

point, and that settlement was to pay its remaining ten-year term, basically, through a one-time payment of $150 million, and then to make a payment -- payments on a deferred basis with the start date here that we talked about, December 1 through 2026.

That was a very different price commodity environment, and when Ultra looked at affordability and ability to gain an economic return on its capital investment --

MR. VELEVIS: Your Honor, this is Robert Velevis --

THE WITNESS: -- that would be required --

MR. VELEVIS: -- I'm going to again object. I think that his testimony is the exact same thing that he was testifying about earlier that he didn't have a foundation for.

THE COURT: I'll sustain the objection.

Go ahead, Mr. Shepherd.

MR. SHEPHERD: All right. I think if he can't answer that, then I can't get to my next question. So I don't have any further questions (indiscernible). Thank you.

THE COURT: Thank you, Mr. Shepherd.

All right. Mr. Velevis, do you want to go ahead and take your lunch break starting now, or do you want to get started and you're going to get interrupted pretty quickly? It's up to you.

MR. VELEVIS: Well, I would rather take the lunch break then, if those are my two choices.

THE COURT: Unfortunately, that's it, because I've got a 12:30 hearing scheduled, so -- I'm going to go ahead and we'll adjourn till 1:35. We'll resume at 1:35 this afternoon and we'll start with Mr. Velevis's questions.

If y'all wish, you're welcome to disconnect from the phone and dial back in at that point. Whatever works best for y'all. You might want to keep your video going. Might make some sense.

All right. Thank you. We're in adjournment for four minutes. We'll come back at 12:30 for our other case, and then we'll recall this case at 1:35. Thank y'all.

(Recess taken at 12:25 p.m.)

(Proceedings resumed at 1:34 p.m.)

THE COURT: All right. We're going back on the record in the Ultra Petroleum case.

Mr. Velevis, go ahead with your questions to Mr. Honeywell [*sic*].

MR. VELEVIS: Thank you, Your Honor. Can you hear me?

THE COURT: Yes, sir. I can hear you fine.

MR. VELEVIS: Great.

CROSS-EXAMINATION

BY MR. VELEVIS:

Q Good afternoon, Mr. Honeyfield. I just want to ask you a few questions today.

A I'm not exactly --
Q That's true, right, Dr. Makholm?
A I'm not exactly sure what that means. Pipelines are limited to charging the cost of service, and in that respect, not being able to either price discriminate anti-competitively or charge a greater than cost anti-competitive tariff. In those contexts, the answer is yes.
Q That's right. And under FERC regulations, which you've observed your entire career you've testified, pipelines can't charge monopoly rents, either, can they?
A To the extent that they're more than the cost of service or highly discriminatory for any particularly situated consumer, the answer is yes.
Q Yeah. Importantly here, FERC regulations require that pipelines not unduly discriminate among shippers. Isn't that right?
A That's what I said.
Q And FERC regulations require pipelines to allow shippers to resell capacity, correct?
A In the secondary market, yes.
Q Okay. Well, I believe that you testified on direct that there was nothing that -- if rejection were permitted, there was nothing that could be done to prevent Ultra from purchasing release capacity in the open market, correct?
A If I didn't say it exactly like that, I would agree with

that characterization.
Q And you said I think that -- you agreed that gas from Ultra could find a way onto the Rockies Express in the future regardless of the decision with respect to the rejection in this proceeding, correct?
A Yes.
Q The bottom line is, Rockies Express can't keep Ultra's molecules off in the future, correct?
A Correct.
Q Okay.
MS. ZAMBRANO: Those are all the questions I have, Your Honor. I'll yield to Mr. Shepherd who may be able to ask a few more questions about FERC regulations. I moved past those in my outline.
THE COURT: Thank you.
Mr. Shepherd?
MR. SHEPHERD: Thank you, Your Honor. Can you hear me?
THE COURT: Yes, sir.
THE WITNESS: I can.

CROSS-EXAMINATION

BY MR. SHEPHERD:
Q Dr. Makholm, can you hear me?
A Yes.
Q All right. I think I'll try to keep the same sequence,

and that definitely did winnow down the things that I would have likely covered. In terms of your just generic expertise, because I didn't have the opportunity to engage in depositions and so forth, I wanted to discuss your familiarity --

THE COURT: Mr. Shepherd, I don't think any of us can understand the words you're saying. There's sound coming through, but it's quite muffled. I'm not sure what the problem is on the phone.

MR. SHEPHERD: Is that better, Your Honor?

THE COURT: Let's give it a shot.

MR. SHEPHERD: Your Honor, is that better?

THE COURT: I said, let's try it.

MR. SHEPHERD: Oh, okay. All right.

BY MR. SHEPHERD:

Q Doctor, I wanted to ask questions about your general qualifications since I didn't have the opportunity to do that before. Somewhat in line with the generic questions that the (indiscernible) asked you, in -- have you ever been involved in any of these proceedings that you list in a case where the question at issue was the modification or abrogation of an existing freight contract?

A Modification or abrogation, I cannot agree that I have been in a case like that.

Q Okay. I'll ask the question a different way. Have you ever been involved in a Section 5 complaint case under the

Natural Gas Act?
A Yes.
Q Okay. Have you been involved in a Section 4 rate proposal case under the Natural Gas Act?
A Yes.
Q Okay. I wanted to -- because these will become relevant to the terms that you used in your statement. Can you describe what the filed rate doctrine is?
A Yes. In general terms, it is that a rate finding on the part of the Commission has a force and a permanent and it will stay that way until the FERC finds that that -- or some other commissioner finds that rate, their own filed-found rates, be unjust and unreasonable and change it.
Q Okay. Is any other tribunal other than FERC able to change a filed rate?
A Not a FERC filed rate.
Q Thank you. In any of the cases you've been involved in the past, has the Mobile-Sierra Doctrine been at issue?
A It's always an issue to the extent that there is a rate proceeding and the desire to perhaps amend the rate either up or down in a Section 4 or a Section 5 case, respectively.
Q Okay. So you -- I'm just trying to establish your familiarity with the doctrine is all.
A Yeah. Okay.
Q And in any of the cases you've been involved in in the

past involved a rule against retroactive rate-making?
A That's always the case, generally, in U.S. regulation. It's a general term. I'm not sure it has a specific meaning, but the general meaning is limited.
Q Okay. And to return back to the Mobile-Sierra Doctrine, can you please describe, briefly, what that doctrine entails?
A Yes. Once the Commission finds the rate for a particular service to be just and reasonable, it's not going to change until the FERC finds, using new evidence, that the old rate is unjust and unreasonable and it finds a new rate. That's in general terms.
Q In terms specifically of changing a contract, because what you just described -- would it be fair to say that what you've just described is the generic way that FERC would approach any rate change, whether unilateral or by contract?
A I agree with that.
Q Okay. Is -- does the -- how does the Mobile-Sierra Doctrine change the general test?
A How does it change the general test? I'm not sure I know what you mean by that.
Q All right. I'll try it this way. Is the standard of review for modifications to unilateral rates different than it would be for a contract rate?
A I don't know.
Q Okay. Would you disagree with the statement that the

Mobile-Sierra Doctrine establishes a three-part test for examining the public interest when someone proposes to abrogate or modify an existing rate?

THE COURT: So I'm going to raise my own relevance objection. As I've said at least eight times in this proceeding, I'm not modifying any rates. So I need to understand how this relates to what we're doing today.

MR. SHEPHERD: Okay. Your Honor, what I'm trying to do, I thought that I was trying to fulfill your mission that I thought you gave us of trying to show for you how FERC would go about examining the public interests, and this is the way that I'm trying to do it, because I'm bringing out the concepts that we would be applying in the event that the public interest question were brought to us to eliminate or change an existing contract rate.

THE COURT: I'm not going to guess what decision FERC would make if that's what you're trying to get me to do. I need to understand why it is relevant to the decision before me who has the authority or how FERC would change rates when I'm not going to change a rate. So explain the relevance to me.

MR. SHEPHERD: Okay. I -- again, Your Honor, what I thought that I was here to do was to try to illuminate for you the degree to which there would be any difference in the way that you would approach examining the need to replace the contract at issue here and any differences in the way that FERC

would approached the same question. I'm not at all trying to ask you to guess how FERC would resolve the particular public interest at issue in this contract.

THE COURT: Yep. So tell me how --

MR. SHEPHERD: I can't --

THE COURT: Tell me how the question is relevant to the decision I need to make.

MR. SHEPHERD: When the Fifth Circuit and Sixth Circuit talk about referring public-interest questions to FERC and the test that would apply, whether that test is required or not has, of course, been very much fought over, and FERC (indiscernible) --

THE COURT: Wait, wait, wait, wait, wait, wait, wait, wait. The Fifth Circuit did not tell me to refer public interest questions to FERC.

MR. SHEPHERD: No. No, no, no. They didn't, and I was just trying to clarify that by (indiscernible) --

THE COURT: Well, tell me -- I want to know why the questions you're asking are relevant to the decision I need to make, and to tell me that the Fifth Circuit said something they didn't say as an explanation of relevance is not helpful.

MR. SHEPHERD: All right. Your Honor, I believe that the Fifth Circuit left open very much the question whether or not a proceeding before you could consider FERC's view of the public interest, but if you disagree, I'm perfectly happy to

move on.

THE COURT: No. No. I'm --

MR. SHEPHERD: The reason why I raised the question (indiscernible) --

THE COURT: No. No, no, no, no, no. I'm perfectly happy to hear FERC's position on public interest. But I am trying to understand why the question of rate change has to do with that, and -- since I'm not thinking of a rate change. That's -- my questions may be simpler than what you're answering.

MR. SHEPHERD: Okay.

THE COURT: Why is this relevant to the decision --

MR. SHEPHERD: Your Honor --

THE COURT: -- I'm going to make?

MR. SHEPHERD: Your Honor, when we get to the conclusion of this process and you're dealing with confirmation, then we're going to be examining whether or not there is a rate change for purposes 1129(a)(6) and if that is part of the plan that you're going to be confirming. And as I read that provision in the Bankruptcy Code, FERC, having a jurisdiction over the rates that the debtor would be charging later, needs to -- or be charged later, needs to either approve prior confirmation or post-confirmation, FERC has to agree to the rate change that's provided for a reorganization plan.

So I believe that that at some point --

THE COURT: There is a -- but I'm not going to change their rate in the reorganization plan, period.

MR. SHEPHERD: I (audio interference) -- or so I thought that what you were asking was for me to try to help you understand how we would approach the question differently. We would definitely regard any change in a -- in an existing rate as a changed rate. If the amount per volume changed, if the contract term changed, if the contract were eliminated, those would all be regarded as a rate change.

THE COURT: And I'm not --

MR. SHEPHERD: We have a filed rate on file.

THE COURT: I'm not doing any of those.

MR. SHEPHERD: Okay.

THE COURT: All that I'm doing, if we approve this today, is saying that the debtor would no longer need to perform its obligations, and that the damages for their nonperformance would be liquidated to fully capture the amount of those damages, Just as the Fifth Circuit described.

So tell me how authority over rate changes and rate change decisions has to do with the question that I'm answering today.

MR. SHEPHERD: Because we apply the public interest test at two different places. One, is when a new rate is proposed, and another one is when someone seeks to change it. We use a different test at each one of those steps, and it is a

more difficult and exacting process whenever someone wants to remove or change a rate that's already in place.

So I'm trying to help, through the testimony of this witness, who has tried to explain what he thinks FERC would view as a public interest, how that differs. I don't think we need to get to the question of whether or not there's a rate change now, and I'm sure that will be FERC's position later, and I'm aware very much that you disagree, but I'm simply trying to eliminate what the public interest test is that we would apply in a situation like this where a rate already was in place and someone was seeking to change it or eliminate it.

THE COURT: All right. Let me hear your next question.

MR. SHEPHERD: I don't -- I --

THE COURT: What's your next question?

MR. SHEPHERD: All right. Sorry. That got me a little bit off step.

I was trying to establish the familiarity with these concepts that the witness has before I asked him a number of questions about his declaration on that score, and -- and so I guess I can turn to those now, but I was -- I was -- let me -- let me, first, proceed through what this Mobile-Sierra test looked like at the risk of you're thinking that it's not relevant. So I'll ask the questions this way.

CROSS-EXAMINATION CONTINUED

BY MR. SHEPHERD:

Q Doctor, how would the continuation of this existing contract between Ultra and REX harm the public interest? That is, if the contract remained in place, would the public interest be harmed in any way?

A I've addressed that in my written comments, and by address, I say that preventing this debtor from rejecting this contract, the normal consequence of exiting competitive markets would raise the cost of exit. Raising the cost of exit, as a rule, would mean that companies seeking to exit would have to operate at a loss rather than exiting, and hence would work those potential losses into its cost of capital needed to enter. And in that way, it would harm entry. And harming entry would harm the competitive market by making baseline entry to serve that market more difficult. And I laid that out in relatively direct terms late in my statement, Footnote 28 on Page 20, I think.

Q All right. I'm going to raise -- approach again the same question, and I think you just answered this question.

So the way -- let me see if I -- if this is correct. Parties, other than Ultra, would be harmed by the continuation of this contract because the continuation of the contract would raise a barrier to exit?

A If it is true that firms in Ultra's situation seeking bankruptcy protection cannot reject pipeline contracts, then

that raises the cost of entry for building new pipelines for firms like Ultra that may want to avail themselves of the Bankruptcy Code in the future. That would raise that -- there is the cost of entry, and raise the cost of bottlenecking for the pipeline construction or any other way of entering the gas transport market in America to serve those who want to span the business between producers and consumers.

Q Okay. Can you point to any FERC rule-making or adjudicatory proceeding that reaches that conclusion?

A The issue of how the cost of -- raising the cost of exit raises the cost of entry is economic. That's the point of economic theory. I don't -- I believe that this is a relatively new issue before the FERC, and I don't think they've ever issued an opinion about this.

Q Okay. Well, that last part of your answer answered my question. Thank you.

All right. So asking the question from the opposite side, can you please explain when, and if so how, rejection of the REX-Ultra contract or its abrogation as a federal filed rate would harm the public interest, or would it?

A You did a premise in your question that rejection or application would harm -- would affect the filed rate, and I've said that it won't. So I don't agree with the premise of your question.

Q Okay. So we're beginning to establish some daylight

between your approach and FERC. Thank you. That's useful.

All right. Would rejection of -- and I think I know your answers to these questions, but I'm trying to move through them the way that -- that we would. Would rejection of the contract at issue here financially impair REX's ability to serve its shipping customers? I'm fairly certain that answer will be no.

A I'm sorry. That was a quick question, and I lost something in it. I don't understand the question yet.

Q Would rejection of the REX-Ultra contract at issue here financially impair REX's ability to serve its shipping customers?

A Its remaining customer?

Q Yeah.

A I don't see how. It would lower the return for REX not having the revenues coming under this contract with Ultra, but I do not see how that would impair their providing service to everybody else.

Q Okay. What's the loss of revenue associated with the rejection of this contract? Do you have a general familiarity with that?

A Sorry. Am I familiar with the loss of revenue that REX (indiscernible) --

Q Associated -- yeah. Associated with the rejection of this contract.

A Well, it -- the extent to which REX would lose revenues as

a result of the rejection would be a subject for working through unsecured creditors in the bankruptcy proceeding, including questions of mitigation.

Q All right. Now, I assume -- I'm asking you questions that I would also be asking of REX, so sometimes I'm going to ask you a question, even if I think the answer is no, and here is another example.

Would rejection of the -- of this contract cast a burden on Rex's other shipping customers? This differs in terms of the question here being excessive burden on other shipping customers.

A Pose a burden? No.

Q Okay. Would rejection of the contract at issue here cast a burden on the consuming public?

A No.

Q Okay. And this is -- those conclusions are based on your theory about economic exit and how it affects entry decisions and competition. Is that correct?

A No, not just that. It would be also that rejection of this contract on this pipeline would have an unmeasurable effect and be irrelevant to the market for gas in the United States. That was the first conclusion in my statement.

Q Okay. Well, I was going to move on to the third prong, but since you've raised that as part of your answer, the unmeasurable, and I assume you mean they are immeasurably

smaller de minimis effect on the natural gas market as a whole. Then we see that throughout your statement. We see it on Page 3 where you talk about any drop in REX revenues would not be material to the wider competitive U.S. markets, correct? Later on Page 20, you say that -- that when you're talking about Houghton (phonetic) Natural Gas, that the thing that matters is how gas supply competition will frame FERC's view of the public interest.

So my question for you is: Are you under the impression that a FERC public interest inquiry into the rejection of this contract will be measured by its effect on what you call, quote, "the wider competitive U.S. gas market"?

A I'm not sure what you mean by the FERC's public interest inquiry. I don't know if there would be one because who is hearing this is in front of the bankruptcy court? The -- to the extent that money, different amounts of money, pass back and forth between Ultra or its other unsecured creditors and REX, I'm concluding, has no effect on the U.S. gas market.

Q Okay. Are you aware of any FERC rule or any FERC adjudicatory order that measures the public-interest impact of the rejection or abrogation or modification of any contract based on its effect of the wider, competitive U.S. gas market, or is it instead that FERC applies the test that I was moving through earlier?

A Okay. That's a complex question. You said rejection. I

presume you're meaning the kind of rejection that we're talking about here in this bankruptcy court. Abrogation would be something different than rejection, so I don't know if you want to mix those in the same -- in the same sentence or in the same question.

Q Okay.

A But to the extent that that (indiscernible) --

Q Are you aware then -- I can reform --

A -- bankruptcy --

Q I can -- go ahead.

A I'm sorry. You talk.

Q No. I was going to reform the question for you. I was just going to ask if there was any case that you're aware of in which FERC was -- was considering any (indiscernible) rate, because we don't do rejection, right? We just do changes, and rejection happens only ever in bankruptcy court. We have nothing to do with it. We deal with rates; the bankruptcy court deals with rejection.

So I'm understanding that separation in your mind. I'm asking for the purposes of illuminating the difference between how FERC approaches these questions and how the Court approaches these questions whether there is any FERC order you can point to of any kind that indicates that FERC would rely on what you described as wider competitive U.S. gas market impacts rather than the public-interest analysis that I was walking you

through.
A All right. Your question had a long premise, and I don't agree with it, but I can deal with the last piece of your question. I don't know that FERC, in terms of the gas industry, has rendered an opinion with respect to issues of rejection and the public interest.
Q Okay. Let's return, then, to the Mobile-Sierra test and get to the third prong. So the third prong of FERC's traditional way of examining the public interest involved in rate modifications, I would ask whether or not, because is both part of the statute and part of the regulations, and, also, the third prong in the Mobile-Sierra test, so its in all three places, we have -- well, would you agree that -- that FERC has a statutory obligation to ensure that rates are not undue or discriminatory or preferential? I believe you already answered that question in response to an earlier question.
A Here, I'll answer it again. Yes.
Q All right. Okay. And can you describe -- can you describe for purposes, in particular, of getting to your gaming concerns later on how it is that FERC examines questions of undue discrimination or preference? Like, is there a sequence to the way that the questions are raised?
A You're tying this to the gaming issue. That's a stretch, and so I don't -- I'm not really sure I understand the context of your question.

Q All right. Then I'll just change it.

In order for FERC to determine whether or not undue discrimination or preference has occurred, would the threshold question be whether or not you're dealing with similarly situated other parties?

A Generally, that's correct. The same place, the same context, the same size, the same capacity, those sorts of things that can be unique to any particular pipeline, but the FERC knows a due discrimination or undue discrimination when it sees it.

Q I hope our test is better than that, but a little bit better than (indiscernible), I guess.

But the question I would like to get then from -- the main thing I'd like to learn from you, then, is to what extent you would describe Ultra as being similarly situated or not similarly situated to other shippers generally and then specifically other anchor shippers?

A With respect to rejection, once it rejects and it's no longer bound by the terms, it is in a different position, meaning firm and non-firm or firm at one point and under one set of agreements, and someone who comes in later under another set of agreements. Those are certainly situated shippers.

Q Okay. So I'm going to try -- just -- I'm just going to try to restate what you just said so that I make sure I understand it.

The fact of rejection in bankruptcy is a reason to consider one entity differently situated than another entity for purposes of examining undue discrimination and preference?
A To the extent that one group, the rest of the anchor shippers, have not rejected and continue to perform under their contracts, and Ultra is no longer that kind of anchor shipper and is not performing, yes, they are differently situated.
Q Okay. And can you point to any FERC order, rule-making, or adjudicatory, take your pick, that says anything like that?
A That's part and parcel of FERC regulating of its pipeline contracts. Either interruptible and firm or different kinds of firm are differences for rate-making purposes and always have been before the FERC.
Q Okay. I am -- I wasn't asking you a question about the difference between interruptible and firm transportation contracts, although I'm glad to know what you think about them. I'm asking if FERC has ever held, in any order that you can point to, that rejection in bankruptcy renders entities no longer similarly situated for purposes of examining undue discrimination or preference?
THE COURT: And, again, tell me how this has to do with my decision today? I am really lost about what we're doing. We seem to be spending all of our time with me guessing about what FERC would do, and I don't see what that has anything to do with what I'm supposed to be doing.

MR. SHEPHERD: All right. Again, Your Honor, I -- I thought that -- that what I was supposed to do, based on your most recent order, was try by asking questions to illuminate the difference in the way that FERC would approach a public interest inquiry from the way that this gentleman has framed his declaration. There are --

THE COURT: Where in my order does it say that? I'm looking at my order, and I didn't mean to mislead you. I just -- I'm not going to guess at what FERC would do. I'm trying to figure out -- you know, I'm -- is this in the public interest, not what would FERC do.

MR. SHEPHERD: Okay. Your Honor, the only thing I'm really competent to ask questions about is the -- is how FERC would go about approaching the question of public interest. The witness here has described the public interest test that is very far afield from anything that our agency is familiar with. And I'm trying, by asking him questions about the way FERC normally approaches these questions, to reach the understanding that the public-interest inquiry he has described, and moreover, which he has argued that he believes FERC would adopt repeatedly throughout his declaration. I cannot find any reference in any FERC order anywhere that says anything like what he's saying. That's what I'm trying to --

THE COURT: So show me where this is in his declaration because that may actually answer the question. Let

me see that again, if I could, please.

MR. SHEPHERD: Okay. So just for -- two quick examples. On Page 3, he --

THE COURT: I'm sorry. This is 4-6 -- 4613, is that right?

MR. SHEPHERD: Let me see. The exhibit --

MS. ZAMBRANO: Your Honor --

MR. SHEPHERD: The exhibit number is 373, and its got kind of an overall pagination, but then it has individual pagination. My --

THE COURT: No. I've got it. What page are you on?

MR. SHEPHERD: So let's turn to 3, and this is really about his first conclusion, which you've heard him state several times.

THE COURT: Okay. I'm looking at Page 3.

MR. SHEPHERD: Okay. So on Page 3, he is talking about what his first conclusion is about -- about how FERC would go about examining the public interest. And the specific test that I wanted to point to, and he's -- the witness has said this several times today when he was summarizing his first conclusion, that his -- that the question about public interest is whether or not there is going to be an impact -- a impact on the -- it would not be material to the wider, competitive U.S. gas markets.

THE COURT: Wait. I'm on Page 3.

MR. SHEPHERD: (Indiscernible) any --

THE COURT: I'm on Page 3. Take me to the language where you're telling me that he is telling me what FERC would do.

MR. SHEPHERD: Any drop in REX revenues and thereby lower return to REX's owners such that a rejection foreshadowed is not material to the wider, competitive U.S. gas market.

THE COURT: Yeah. Yeah. What personal -- what --

MR. SHEPHERD: (Indiscernible) --

THE COURT: Hold on. Where did that say what FERC would do?

MR. SHEPHERD: Well, I -- it -- that comes later. Can -- let me -- let -- I need to -- I'm bouncing back and forth between the PDF with his testimony and my notes, which are in two different applications. So excuse me.

Later on, he will tell you that his conclusion is that it doesn't matter to the public interest, and he will also testify that FERC has written itself out of caring about what happens on this -- what happens with regard to the cancellation of contracts like this, based on his theory that cancelling contracts promotes competition.

THE COURT: Show me where we are.

MR. SHEPHERD: I'm trying to do a word search now to the places where he says that, but I have them in these notes here. I've talked about 3. On 4, he echoes the claim by

saying that FERC's public-interest test is driven by a vastly (indiscernible) --

THE COURT: Let me just have you slow down a minute, Mr. Shepherd. Take your time. Show me where he describes how FERC would make a decision, because you're telling me that's why these questions matter is you're impeaching on how FERC would make a decision. So show me where.

MR. SHEPHERD: All right. So we have -- heading number --

THE COURT: Take your time and find it, Mr. Shepherd.

MR. SHEPHERD: Heading number two on the top of Page 4, it talks about rejection. The FTSA will further the public interest and is consistent with FERC's goal of promoting competition in the natural gas markets. I think it's the linkage between FERC's goal and the public interest is pretty clear. If you look at the last sentence in the opening paragraph under Heading 2, he says:

> "FERC's well-documented intent mirrored by other congressional action during that time was to help pre-U.S. gas markets from decades of ineffective and highly inefficient federal intervention to volatile petroleum markets."

So he's trying to explain his ultimate conclusion, which you'll see at the top of the last paragraph before three on that page. The paragraph begins:

"The FERC's public interest goal in creating a contract base market and interstate pipeline transport with a competitive gas market to benefit the countries many millions of energy customers, a vastly wider perspective than any particular FTSA."

THE COURT: Okay. So link those back to -- link this back to how FERC would make this decision, and you're talking to me about discriminatory treatment. So take me where he talks about that. If you're impeaching him --

MR. SHEPHERD: That is --

THE COURT: If you're impeaching him, I'm going to let you impeach him, but beyond that what you're telling me is irrelevant to my decision. It's relevant only in that you can impeach him, and so I'm trying to figure out how this is impeachment somehow.

MR. SHEPHERD: I'm actually not trying to impeach him right now, Your Honor. I'm actually trying to understand what his position is and how he arrived at that based on anything FERC has ever said because there's a big gulf --

THE COURT: I don't --

MR. SHEPHERD: -- between what he's --

THE COURT: FERC can tell me what it said. You're FERC. He is explaining public interest. If you want to impeach what he's explaining as not being public interest or not impeach -- if you want to attack it, examine it, all that,

that's fine. But to ask him questions about how FERC would go about making the decision isn't helpful to me at all unless it impeaches his credibility. I don't care how FERC would go about making the decision. I do care about whether it's in the public interest, I think.

MR. SHEPHERD: Okay.

THE COURT: I'm not sure yet.

MR. SHEPHERD: All right, Your Honor. I'm simply not familiar with where this public-interest test that he's articulated comes from. I would like to understand that. It's not familiar territory for me or so far as I can tell anyone else at the agency. And so I just don't know the origin if it. Maybe I'll just ask the question that way. Where did this public-interest test that the witness is purporting to describe, where does it come from? Is it sheerly his opinion or does it come from some known or measurable or identifiable place that I can put my hands on?

THE WITNESS: Okay. That's a fair question. There is an open proceeding at the FERC right now in which I've already provided a statement that I referenced in my statement here called Docket PL 18-1, a 2018 document where the FERC was considering whether it was going to do any change in the way its certificated to do interstate gas pipeline facility. This has not to do with any filed rate -- it has not to do with any rate case or anything to do with Mobile-Sierra, but it does

have to do with how the FERC addresses the question of the certification of the pipeline.

And as part of that notice of inquiry, the action of the Commission opening that docket, it quoted how it considers the public interest. And in considering how it considered the public interest, it even quotes the Supreme Court telling the (audio interference) in a case in 1976 what the public interest meant for the Commission under the Natural Gas Act.

It's this context that is the sixth point, the North Star in a way, that I used in order to characterize what the public interest motive is for the FERC in dealing with its certificate and pipeline, having nothing to do with any particular rate case, having nothing to do with mobile or sierra, but having to do with the broader idea of plentiful supplies of electricity and natural gas at reasonable prices. That's my definition of public interest. It comes from the Commission and its own action.

CROSS-EXAMINATION CONTINUED

BY MR. SHEPHERD:

Q Okay. So is it fair to characterize your theory then that the public interest analysis turns solely on whether a particular action will promote or not promote competition?

A I'm quoting the Commission in that respect and its findings. I'm agreeing with the Commission in the way it opened its notice of inquiry to examine the way it certificates

new pipeline. I'm using their definition. It's not my theory. It's theirs.

Q All right. Well, now I know what you're resting upon, so thank you. I would have much more to ask about how you're linking those concepts together, but given the judge's feeling that we are already afield from things that he thinks are relevant, I'm going to decline to pursue those. I happen to be unusually familiar with the NOI that you're aiming to right now, but I'm going to move on to another place, if that's all right with you.

A It's going to be okay with me.

Q All right. You were just talking about your interest in FERC certification proceedings. And you wrote in your declaration -- hope I'm using the right terminology there -- that -- I'm sorry for the interruption that I couldn't hear for a second.

All right. You wrote about in your book, which you quote, and also separately in your testimony about the wonderful things associated with improving competition. And one of the things that you mentioned as a benefit is -- and this is at Page 6 of your testimony -- you talk about by the year 2000, FERC had ended the era of extensive evidentiary litigation related either to certification or gas pipeline rate cases.

Later on Page 7, you write that the pre-open access traditional style of how it (indiscernible)rate regulation and

certification are no longer particularly controversial. On Page 19, you write that having completed that work in 2000, FERC transforms and streamlines -- streamlined, downsized, and largely reactive agency, gas pipeline rate cases are now generally perfunctory affairs in licensing cases -- which I assume you mean by here certificate cases because licensing cases are really about hydroelectric dams -- one source of tremendous controversy and regulatory effort are uncontroversial. And then you note that you omitted a note that's this is from your book.

So I am curious because you've emphasized how much you follow what goes on at FERC whether or not you want to maintain your claim that certification cases are no longer contentious.

A I said particularly controversial relating to what the controversies were in the era before the modern era of certification. The document (indiscernible), and that is in my book. In particular, I -- I -- I give an example in my book about one particular case having to do with something called, you know, the Iroquois Pipeline to the Northeast that started out with dozens of projects sifted down to a dozen, sifted down to three. Over the course of five years of heavy fighting, FERC decided on a single (indiscernible) project.

That's the kind of heavy litigation I was referring to. I'm not talking about what happens with new certification proceedings when a pipeline enters like REX or others comes

before the Commission with a sheep of contract and a well laid-out path that minimizes the need to invoke eminent domain and get the proceeding that way, but it's funded by nobody else but the shippers involved and the pipeline company's doing the billing. My contrast between then and now is that contrast.

Q Okay. So you would agree that the question whether and how much a pipeline needs to demonstrate in terms of precedent agreement or anchor shippers, whichever term you want to use, remains not only critical to FERC's determination that a pipeline may be built but also that fight over what the amount of that support is remains right at the heart of FERC's concerns?

A I agree with that statement.

Q Okay. All right. Then I now understand better your notion that these things are not controversial. Let me turn now to another area of concern.

In your declaration, you talk about the importance of concrete and predictable rates. On Page 6, you write that competitive U.S. and interstate gas transport in that secondary market arose once the value of the intangible contract rights were point-to-point regulated pipeline transport capacity became so concrete and predictable that they rose to the level of tradeable property instead of simply service and un-FERC approved tariff.

A Yes.

Q All right. Sir, my question is if you believe that concrete and predictable contract rights are essential to the success of the market, then how do you reckon that the easy release of those rights through contract rejection in bankruptcy would serve the public interest --

A Well --

Q -- as part of your second overall conclusion?

A -- I think we've established that --

THE COURT: I'm sorry. Hold on. Wait a second. Hold on just a second. Did somebody -- I thought I heard someone speak up. Maybe not. I'm sorry. Go ahead.

THE WITNESS: I think we've established that my opinion is -- oh, I'm sorry.

THE COURT: No, go ahead.

THE WITNESS: If you could see me, you would see when I might be talking and you'd see the unmatched tie that put on for no good reason since no one can see me in the hearing room.

I think we've established that a rejection of this contract does not change the rate.

BY MR. SHEPHERD:

Q I think we've established you believe that. But whether or not this agency would agree is a whole different question. I'm asking a different question. Is it true that you think that -- you've spent a lot of time talking about the wonderful

development of secondary market in capacity to promote competition and that competition is good. Is it true that the foundation or the ability to have those trades, as you wrote in the quote that I just read to you from Page 6, is that you have to have concrete and predictable contract rights --

A Yes.

Q -- in order for people to be able to trade on them, right?

A Yes.

Q Okay. All right. And so then my question for you is if concrete and predictable contract rights are the foundation for a successful secondary market and capacity, then why would it promote the public interest to allow release of those rights through contract rejection bankruptcy using something like the business judgment rule?

A You used "release." Let's substitute "rejection" for that.

Q Okay. That's fine.

A There's nothing about the Bankruptcy Code that is a barrier to a continued competitive market for gas or for interstate transport capacity. There's nothing in the context of what we're talking about here today between Ultra and REX that deals with abstract (audio interference) or a new set of rules for the entire industry. We're talking about a particular pipeline that couldn't serve the purpose that it was

built for. And we're talking about a bankrupt construction company that wants to exit a contract under the normal Bankruptcy Code reasons.

None of this impairs the confidence that any shipper of any pipeline in the country has in the contracts that it has that are overseen by the FERC. This is simply one company on one unfortunate pipeline exiting its contract through rejection in bankruptcy.

Q Okay. That was interesting. It wasn't exactly responsive so I'll just try one more time. Can you have -- do you agree with me that you applaud the ability of firms to trade freely on available capacity through the second market, that that's a very important advancement in markets and in rates?

A I agree.

Q Okay. You seem to write on Page 6, and I could go on with some other quotations, that the -- that what made that possible is the value of the intangible contract rights for point-to-point regulated pipeline transport capacity becoming so concrete and predictable that they rose to the level of tradeable private property. So what I'm trying to explore with you is is it or is it not true that to the extent that you can no longer rely on concrete and predictable contracts, you then undermine your ability to have an effective competitive regime based on secondary trading?

A All right. First, I don't buy your premise.

Q Okay.

Q We're not talking about the general nature of no longer being able to rely on contracts. We have thousands of contracts throughout the United States that are not impaired by this proceeding, and those who hold those contracts know well the uniqueness of REX's situation and Ultra's bankruptcy with respect to REX. Ultra and REX's relationship bears not at all on the written consent of contracts with other pipelines that are more favorably situated around the country.

Furthermore, the implication in your question that not being able to avail of normal Bankruptcy Code procedures when a competitor fails and needs protection from its creditors would have other impairing implications in the market to transport capacity. That's a problem because, as I've said, that raises the cost of exit and entry.

Q Okay. So what I'm hearing is, we've kind of twisted in your first conclusion and your second conclusion, that your second conclusion and your first conclusion are interrelated to the extent that you think that the question about public interest that this Court should look at is solely the impact that the rejection of this one contract would have on the wider natural gas industry?

A Yes.

Q And that's the test you would have the Court adopt?

A Yes.

Q Sorry, I need to write something down real quick. All right. How does that relate to the normal test the bankruptcy court uses?
A I don't know.
Q Does the bankruptcy court -- is this bankruptcy court supposed to look at those wider impacts or are they just trying to look at the business judgment of the people involved right now?
A I don't know.
Q Okay.
A That's up to the Court to weigh.
Q Okay. So would it be fair then to describe the public-interest test that you're positing as something which doesn't really match with the bankruptcy court's general approach to when it's appropriate to reject a contract and also doesn't match the way that FERC does?
A I don't -- I wouldn't agree with that. The reason why I'm -- the reason why I'm here and appearing has to do with -- with witnesses and presenters from REX saying that rejecting this contract will cause the sky to fall with respect to all other contracts for pipeline capacity in the U.S., something that I think has no basis and no reasonable.

That's my reason for being here talking about the public interest saying that the rejection of this contract in this context supports the public interest. It doesn't damage the

public interest and certainly the sky isn't going to fall for contacting generally around the country as Mr. Seligman and Dr. Bergin have said to the extent that this Court acts to permit the rejection of this contract.

Q Okay. I think I understand. Let me try this then because I'm really not -- I'm just really trying to understand what it is that you're actually arguing. So you break the link then between public interest and any particular rejection proceeding at whether or not the effect of this particular rejection would have global impact on the entire industry?

A I reject that?

Q You don't think -- okay, well, then tell me why it's wrong, please.

A As I said in my statement, the investment analysis market in the U.S., which is the best developed in the world, knows exactly what's going on with every particular pipeline in the U.S. I included an exhibit to show (audio interference) with respect to the difficulties associated with REX. It was Figure 4. The market per capital in the U.S., which I'm very familiar with having dealt with cost of capital cases for pipelines and other utilities around the country for some decades, know well either the favorable or unfavorable circumstances of every major infrastructure project that they deal with.

And the knowledge that this would happen, that is the rejection of a contract on REX, not only is not a signal that

the sky is falling for capital aggregation for infrastructure projects generally, pipelines or anything else, but it's expected in the context of a very troubled oil and gas market in this time of difficult prices on a pipeline that everybody knows is burdened from being repurposed at lower rates than it was planned for when it was set out to do, which is all a way of saying the market knows what it's dealing with here and can well distinguish REX from other pipelines in the United States.

Q Okay. I think I at least understand your position. All right. If we can turn now to a different series of assertions that you make. You refer a number of times to FERC maintaining a rulebook. I just want to understand what -- you've got several quotations from a couple -- and then at Page 6, for example, or on Page 12 beneath Table 2, but I'll just give you one representative quote:

> "FERC now essentially maintains the rulebook that permits (audio interference) entry and exit in the market for capacity rights and interstate gas transport."

What do you mean by that?

A I think I described it more completely on Page 21 in a quote that I've drawn from the PL 18-1, the FERC proceeding regarding certification that I'm currently involved with, Page 27 of that filing. And I distinguish different interstate transport modes like airlines, rail, or road transport that I

say could benefit from flash cut fee regulations.

And those industries like pipeline that continue to need FERC oversight to make sure that certification is done in a reasonable basis when there's potential taking of public and private land by eminent domain -- that doesn't happen in those other businesses -- and that the Commission can make sure that there's no undue discrimination for those who hooked themselves up to a pipeline for the long term.

The rulebook is required so that the unique characteristics of -- of continental pipeline transport can't be used to damage the market or damage landowner interest in the taking of land under eminent domain unduly and that rates are reasonably set to avoid undue discrimination. That's the basis of the rulebook that I'm discussing that doesn't go along with the other sorts of interstate transport that were candidates for flash cut fee regulation that didn't need that kind of rulebook.

Q Okay. And just to be clear, when you were talking about the L18-1 proceeding at Page 28, were you talking about something FERC said or were you talking about something you said?

A 27. I was just quoting myself.

Q Okay. Thank you. Now with regard to your -- on this question of the rulebook, I wanted to contrast it with another statement you make in Page 12 right beneath Table 2 where you

say: "There's no regulatory or bureaucratic agency and no further regulatory requirements between the gas producer and the market once at the interstate pipeline." Can you reconcile that with your statement about FERC maintaining a rulebook that permits competitive entry and exit from the capacity market?

A Sure. Imagine yourself a Pennsylvania producer of fuel gas, and you need a five-mile spur to get to the Tennessee Gas Pipeline which runs right through that production area. Once you're on the Tennessee Gas Pipeline and through the tap and get into that pipeline, you can buy and sell transport capacity on the unregulated secondary market. Tennessee doesn't have to agree to that. The rules are already set. And you can sell your gas to anybody in that pipeline also on an unregulated market.

And so by that, I mean to say if you've got a package of gas, you can reach your interstate system, you can buy and sell that in competitive market and no regulator is involved in those decisions. You can sell to Boston Gas. You can sell to Con Edison. You can reserve pipe capacity to reverse it and ship it upstream. You can do whatever the pipeline is available, and you're doing it in competitive markets under the rulebook set up by the FERC.

Q Okay. So FERC maintains the rules, but in your view, the rules are essentially that there are no rules?

A No, no, no. The rules are that competition takes place

for gas, and competitions from secondary capacity takes place in an open and well-informed market. Those are rules. That's a rulebook. But within that rulebook, buying and selling happens in a competitive market.

Q Okay. And is the foundation of that competitive market that you have concrete and predictable contract rates for firm capacity or not?

A Yes.

Q Okay. Let's move to a different question. You have made --

THE COURT: Mr. Shepherd?

MR. SHEPHERD: Yes.

THE COURT: Mr. Shepherd, about how much longer do you think you're going to be with this examination?

MR. SHEPHERD: Given the pace so far, I think at least a half an hour.

THE COURT: Okay. I'm going to continue the hearing on the rejection matter until Friday, July 31 at 10:30 in the morning unless someone is not available then. I just don't think it's fair to keep the folks that have been waiting for the other hearing also in Ultra any longer. Is there anyone that is not available --

THE WITNESS: I'm not available, but that's fine, Your Honor.

THE COURT: You are not available?

THE WITNESS: No. This is Jeff Makholm. I'm not available on that date.

THE COURT: All right. Are you available on the 30th?

THE WITNESS: No, I'm sorry. Next week I am out all week.

THE COURT: Okay. Are you available --

THE WITNESS: (Audio interference) today.

THE COURT: No, no. We're going to find a time when everyone can do it. Are you available on --

THE CLERK: I'm sorry. Is that Dr. Makholm that's speaking?

THE COURT: Pardon me.

THE WITNESS: Yes.

THE CLERK: Who is speaking?

THE COURT: Can I ask the parties -- yes, we're hearing you -- are the parties available on August the 5th at 2 in the afternoon to continue this hearing?

UNIDENTIFIED: Your Honor, I believe Rockies Express is. I'm looking at my -- at Ms. Heter, and I'll confirm with Dr. Bergin but I'm pretty sure we can be available.

THE COURT: Thank you. Is there anyone not available on the 5th at two o'clock?

THE WITNESS: I am available, Your Honor. Thanks.

THE COURT: Thank you. All right. I'm going to

Exhibit F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

IN RE:	.	Case No. 20-32631
	.	Chapter 11
	.	
	.	(Jointly administered)
ULTRA PETROLEUM CORP. and	.	
ULTRA RESOURCES, INC.,	.	
	.	515 Rusk Street
Debtors.	.	Houston, TX 77002
	.	
	.	Wednesday, August 5, 2020
. . . . .	.	1:46 p.m.

TRANSCRIPT OF HEARING ON EXPEDITED MOTION TO APPOINT AN OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FILED BY INTERESTED PARTY, LOUIS C. TALARICO [378]; MOTION OF THE AD HOC EQUITY GROUP SEEKING ENTRY OF AN ORDER DIRECTING THE APPOINTMENT OF AN OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS [437]; MOTION OF ULTRA RESOURCES, INC. FOR ENTRY OF AN ORDER AUTHORIZING REJECTION OF THE NEGOTIATED RATE FIRM TRANSPORTATION AGREEMENT WITH ROCKIES EXPRESS PIPELINE LLC EFFECTIVE AS OF THE PETITION DATE [7]

BEFORE THE HONORABLE MARVIN ISGUR (VIA VIDEO CONFERENCE)
UNITED STATES BANKRUPTCY COURT JUDGE

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Also Present:	CHARLES VISCITO

I N D E X
8/5/20

THE COURT: Okay. I just didn't know if you had something you needed to do first.

Go ahead, Mr. Finestone.

MR. FINESTONE: I was just going to ask the Court to look out for a "five star" from my colleague, Ms. Scherling, who is defending the witness.

THE COURT: Oh, all right.

Mr. Makholm, I think we have your line active. Can you just say something to be sure that we can understand you, Doctor?

MR. MAKHOLM: Yes. This is Jeff Makholm here.

THE COURT: Thank you. You remain under oath from the prior hearing.

MR. MAKHOLM: Yes.

THE COURT: Mr. Finestone, I'm showing that you're seeking to be authorized -- maybe that's somebody else from the same number. Let me be sure I've got all these lines -- from 303-285-8094, who do we have on the telephone?

MR. VELEVIS: Hi, Your Honor. This is Robert Velevis from Sidley Austin.

THE COURT: Mr. Velevis, good afternoon.

MR. VELEVIS: Good afternoon.

THE COURT: All right. Dr. Makholm remains under oath.

Mr. Shepherd, let's go ahead.

MR. SHEPHERD: Thank you, Your Honor (audio interference).

THE COURT: Mr. Shepherd, your phone is not --

THE WITNESS: Excuse me, Mr. Shepherd. I'm not hearing your words --

THE COURT: -- understandable --

MR. SHEPHERD: (Audio interference) better?

THE COURT: No.

MR. SHEPHERD: Does this make it better?

THE COURT: That is a whole lot better. The other choice I'll give you is just disconnect and dial back in. Whatever you want to do.

MR. SHEPHERD: I'll just -- I'll try to do it this way. I'm going to have to put the phone down occasionally if I need to manipulate the computer in some way.

JEFF MAKHOLM, DEBTORS' WITNESS, PREVIOUSLY SWORN

CROSS-EXAMINATION CONTINUED

BY MR. SHEPHERD:

Q Dr. Makholm, you're not an attorney, correct?

A That's correct.

Q Yet you do comment on the interpretation and relevance of a number of Supreme Court cases and legal doctrines. Is that correct?

A Well, to the extent that it's pertinent to the statements I make in my declaration, that is correct.

Q Okay. I wanted to briefly review a discussion we had about something called a filed rate doctrine.

A Yes.

Q It's in the previous transcript at Page 149, and I asked you if you could describe what the filed rate doctrine was. Reading back from Page 149, Lines 9 through 10, you said, In general terms, it is that a rate finding on the part of the Commission has the force and -- has a force and permanent -- I assume effect -- and it will stay that way until FERC finds the rate or some other Commissioner finds the rate, their own filed-found rates, be unjust and unreasonable and changes it.

The next question was, Okay. Is there another -- is there a tribunal other than FERC able to change a filed rate?

And you said, No, not a FERC filed rate.

So, given that previous discussion, I want to turn to your comments -- this is in Docket Number 373, your declaration, at the bottom of Page 19 and it drifts over to Page 20. You have a bullet point there about the filed rate doctrine. And let me give you a minute to find it, if you -- unless you -- tell me when you're ready to talk about it.

A I'm ready, Mr. Sherman [sic]. Thank you.

Q Thank you. All right. So there you say, REX contends the contract rejection violates the filed rate doctrine. And you say it does not. And you give these reasons: Because the rates paid by other REX shippers are unaffected by Ultra's

rejection of its REX anchor shipper contract.

Given your previous description of what the filed rate doctrine is, how does the question -- how does the filed rate doctrine in any way -- in any way implicated by whether or not the rates of other shippers will change?

A Well, to the extent that other shippers are paying rates that are accepted as filed rates, either negotiated rates or a recourse rate, the act, in my opinion, as I state, of losing a shipper who will no longer pay revenues does not affect those other rates as they've been found and adjudicated by the commission.

Q Okay. But what does that have to do with the application of filed rate doctrine with regard to the contract and promise? As you've described it yourself, the question is whether or not that rate will change. And this is leaving (audio interference) the question of whether or not anything (audio interference) the Court is going to change a rate, because the Judge has already spoken on that. But I'm asking about your use of the term, because it seems -- why is this not a non sequitur? They say that contract rejection will violate the filed rate doctrine. Your answer doesn't have anything to do with the filed rate at issue here. Instead, your response is that the filed rate -- you say that the filed rate doctrine is not implicated because the rates paid to other shippers wouldn't change if the contract were rejected. That seems to

be a non sequitur. Can you reconcile those statements?
A I am responding to what I conclude is a non sequitur. The idea that a rejection of the FTSA between Ultra and REX has Ultra not paying until there's some other resolution in this court for what it should pay, its (audio interference) revenues to REX. And the implication from the other side, from REX and its expert, is that that affects the filed rate. And my conclusion is that does not flow. That is the non sequitur. Because there is no new finding of a rate, the loss of a customer does not change the rate that the FERC has found. Only the FERC can do that. So it's my conclusion that the non sequitur is what I'm referring to and what I'm responding to.
Q All right. Well, I'm not sure I agree with your characterization the way that they were using it. I now at least understand what it is that you're trying to say, and will leave comments on that to some other argument or stage of this proceeding. But let's, if we could, just scroll down a little bit to your next statement. You're again responding to a position that REX takes, and you're objecting to their claim that pipeline contracts are to be fully performed except in circumstances of unequivocal public necessity. And you note that they cite the Permian Basin Area rate cases, which is a set of cases that you mention several times in your declaration. You then go on to say that the factual situation of the Permian Basin rate cases is not the same as the one

presented here. And that seems to be all you were trying to say. Are you trying to say that the Permian Basin area rate cases are no longer good law? With regard to the --

A That -- did you finish that question with the words "good law"?

Q Yes.

A I don't know what that means. I'm not a lawyer.

Q Okay. All right. Thank you. Do you think that the phrase "unequivocal public necessity" is part of the standard of review that is applied under the public interest doctrine, under the Mobile-Sierra doctrine, or any other doctrine that the Supreme Court applies to the modification of filed rates?

A I don't know --

Q (Audio interference) different way. Is the statement that the test to be met in order to change a filed rate is that the change is required by unequivocal public necessity?

A I don't know.

Q Okay. All right. Thank you. All right. Then turning to a different question, is it fair to say that an important theme of your declaration is that Ultra's business model -- the quality of Ultra's business model is in some way to be criticized because they've been unable to have customers who are willing to charge the FERC-approved recourse rate?

A I'm not sure I follow your question. You said Ultra's business model and then recourse rates. I don't connect those

two things together.

Q In order to save the Court time, I'm trying not to go through a whole bunch of individual quotations, but I will do that if it's necessary. You generally make the argument that Ultra was a bad bet when it was built?

A I make the argument, and one of your witnesses, they make the same argument.

Q Okay. And chief among your reasons for making that claim is that they have never been able to charge the FERC-approved recourse rate, but instead had to resort to negotiated rates. Is that right?

A No. No, that's not correct. Chief among them is the "bringing sand to the beach" argument, meaning shipping to a destination that literally had more gas underfoot by the time the pipeline was finished, in the character of unconventional gas extraction in Ohio and Pennsylvania. That's the principal reason for the plan -- for Rockies Express being upset, the competitive market for gas.

Q Okay. Let's turn to your declaration on Page 17 where you repeatedly underline that the rates that were charged there are negotiated rates rather than FERC's recourse rate. Do you see those in your chart there?

A Yes.

Q All right. And was it a contention in your declaration that the fact that REX charged negotiated rates rather than

recourse rates was an indication that the pipeline was not economic?

A No.

Q Okay. Well, if you're -- if that's no longer your claim, then that can radically simplify the questions that I need to ask you here.

A It was never -- it was never a part of the claim. It was just an observation. Don't confuse that with the idea that the gas market changed with the advent of unconventional gas extraction -- don't confuse that with recourse versus negotiated rate. We've already established that producer-push pipelines are typified by negotiated rates.

Q Okay. I was able to get access to your deposition and also had the opportunity to review the transcript from an earlier statement that you made in response to cross-examination in the previous hearing. I'm now going to refer back to the hearing transcript from the last hearing at Page 140 to 141 -- Page 140 Line 18 through 141 Line 8. I can read you the important part.

You were asked, Dr. Makholm, are you aware of any FERC regulated (audio interference). I'm not sure what that sound was. FERC -- are you aware of any FERC-regulated producer push pipelines in which the pipeline was able to charge anchor shipper recourse rates? Yes or no? And you said no. Does that ring a bell?

A Yes, that's what I just said.
Q Okay. All right. Well, I wanted to explore whether or not -- whether -- I wanted to take that out of the context of producer push pipelines and try to broaden that net. Would it be accurate to state that the overwhelming majority of business done on pipelines at this time is done through negotiated recourse -- is done through negotiated rates rather than recourse rates?
A I don't know if I would agree with that characterization. I'd rather go to what I described in Table 4 where I list the kinds of shippers that are signing contracts on new FERC-certificated pipeline projects. And it's that kind of listing, that kind of empirical listing -- took me some time to do because we had to go through a lot of applications, and this hadn't been done before, as far as I know -- to show that utilities are still signing a very large proportion of contracts for new pipeline service both for electricity and for natural gas service. And my understanding is that the majority of those, if not largely all of those, are at recourse rates.
Q Okay. I'm going to make some statements about the relative disposition between recourse rates and negotiated rates, and please tell me whether you have any reason to disagree with whether or not these are largely true.
A Okay, Mr. Sherman [sic]. Please could I implore you to slow down a little bit, because your words are still coming

through a little bit garbled to me.
Q Okay. All right. Do you think it is probably accurate that shippers on all pipeline expansions on average pay contract rates that are approximately 83.7 percent of the maximum recourse rate approved in FERC certificate applications?
A I don't know that to be a fact, but the idea -- it sounds like you may have done that calculation, and it wouldn't be surprising if you had, and if that were such a calculation, but I don't know that for a fact.
Q But in large -- it sounds like you've -- or at least I perceive to be an important part of your claim that somehow the predominance of negotiated rates rather than recourse rates on the REX pipeline, that that was some sort of indication of a lack of health in the REX pipeline and --
A No.
Q -- if that's --
A No.
Q -- no longer your claim --
A I'm sorry, Mr. Sherman [sic]. That's incorrect, Mr. Sherman [sic]. I observed --
Q Good.
A I observed that negotiated rates came along with this project, as they do with producer pipelines -- producer push pipelines generally, something that I've agreed with, as

opposed to utilities pull pipelines from the other end, electric and gas utilities. But that's not where I draw my conclusions that the competitive market changed underneath REX's sheet and made for a pipeline that was worth less than it cost to build by the time it was finished.

Q On that general question, it's not clear to me why that is part of your analysis about the rejection here. So just a broad question on that subject. Do you think that the -- is it your perception that the point of the FERC's regulatory effort in the 1990s in particular was designed to create competition between shippers or competition between pipelines?

A Pipelines.

Q Really? Well, you spend much of your declaration analogizing to the deregulatory efforts on the electric side. And I assume you're familiar with FERC Order 888, right?

A I participated in that. Yes, I'm familiar.

Q All right. And would you say that the point of Order 888 was to create open access to electric transmission lines in order to create competition between transmission lines or to create --

A No.

Q -- competition among generators?

A Obviously generators because transmission --

Q Okay.

A -- technology does not allow you to trace electrons from

one spot to another, as gas transmission technology allows you to trace gas from one spot to another. Therefore, electricity transmissions, because of the simple physics and the speed of light and the loop flows and the other imponderable and unpredictable aspects of electricity transmission, mean that you cannot on an AC power grid have different lines competing with each other. Technology does not permit that in electricity transmission, but it does permit it in gas transmission. That's the difference, focusing on --

Q All right.

A -- generators and electricity as opposed to pipelines and gas.

Q Okay. Is it a -- would it be fair to say that FERC engaged in an entirely different set of orders to try to create competition between transmission lines on the electric side?

A FERC does --

Q Totally and separate --

A FERC encourages entry into transmission, but it cannot -- by dint of the simple physics of AC electricity transmissions, have one AC line competing with another AC line within the same grid.

Q Okay. And your position is that somehow natural gas pipelines, once they're built, are different; that you could have a situation where Rockies was, say, competing with Tennessee?

A Of course, because gas flows in gas pipelines no faster than the speed of a galloping horse. And with gauges at either end of a point-to-point line, it's child's play in comparison to track whose gas is going where over the landscape. That cannot be done with electricity transmission. That requires a different kind of regulation of power transmission than in gas transmission.

Q All right. Well, I'm glad that I actually understand what it is that you're trying to communicate. Can't say that I agree with it, but that's for a different time and place.

MR. SHEPHERD: Your Honor, I'm not sure that asking further questions, given the gulf between our understandings about how these things work, is going to be very productive for the Court since (audio interference) patience with the quirkiness of my general line of questioning. So with that, I think that I'm probably just going to terminate the questions --

THE COURT: All right. Thank you, Mr. Shepherd.

Are there any redirect for Mr. -- for Dr. Makholm?

THE WITNESS: Thank you, Mr. Shepherd.

MS. SCHERLING: Yes, we have a few brief questions.

THE COURT: Go ahead, please.

MS. SCHERLING: Thanks.

REDIRECT EXAMINATION

BY MS. SCHERLING:

Q Dr. Makholm, I know that it was well over a week ago, but do you recall Ms. Zambrano asking you during your cross-examination whether you have ever worked for a state utility commission?

A Yes. And I asked her to clarify that and she said "employee of." And with that characterization, I said no.

Q Right. Have you ever worked on behalf of a state utility commission?

A Yes.

Q Which commission?

A Well, let me give you two examples. And they're not in the United States. One is in Alberta and one is in Victoria, Australia. Those are state commissions, and I was engaged by and hired by those commissions to advance particular cases in their state jurisdictions.

Q Okay. And do you recall Ms. Zambrano asking you questions relating to the statement that the REX pipeline has found itself in the position of essentially bringing sand to the beach?

A Yes.

Q And can you explain to me why you quoted this analogy in Figure 4 of your declaration despite the fact that the REX pipeline may have been fairly highly utilized in 2018?

A Yes. I quoted the trade press, and that statement came from Mr. Jim Magill, as I quote on Figure 4 on Page 17 of my

shipping that comes from Opal has been decreasing every year since 2017, correct?

A I do not doubt that is true. Generally true.

Q Part of that reason, Ms. Heter, is the fact that producers who have gas proximate to Opal, they can take advantage of supply pull from even further westward destinations like California, correct?

A Yes, they can take advantage of market demand in the west.

Q If you were an executive of Ultra, Ms. Heter, and you were looking at the REX agreement currently in place, and its 37-cent demand charge, you would not agree to enter into this contract today. Would you?

A That's a hard question to answer because as an executive of Ultra, the forward values reflected in the market as a function of basis differential between Opal and Zone 3 are not the only factors. And that was demonstrated through Ultra choosing to enter into this contract coming out of last bankruptcy when the value was even less than it is today. So I'm not an executive at Ultra, obviously, and I don't know the full compilation of risk and exposure and forward business planning, so I'm -- I won't -- I'm not willing to answer that.

Q You were able -- you were willing to answer it at your deposition. Were you not, Ms. Heter?

A Correct. Correct.

Q And it's true at your deposition, Ms. Heter, that you told

me that looking at the terms, the face of the contract, you would not commit to this contract today. Is that correct?

A All those other aspects aside that I'm not privy to on the face of the forward value, I would not enter into that contract today.

Q And one more question, Ms. Heter. If you were the COO of a new legal entity, a new legal entity about to be born for the first time, you also would not enter into this contract based on the terms on the face of the contract, would you, Ms. Heter?

A That's correct.

MR. FINESTONE: Nothing further, Your Honor.

THE COURT: Thank you.

Mr. Shepherd.

MR. SHEPHERD: Thank you.

CROSS-EXAMINATION

BY MR. SHEPHERD:

Q Good afternoon, Ms. Heter.

A Mr. Shepherd.

Q Hi. Okay. I'd like to turn first to some unexplored questions with regard to the nature of the contract itself. Does the contract between -- well, the particular fixed contract between you and Ultra constrain any form of control over rate modifications, usually described as either Mobile-Sierra or a Memphis clause?

A Not to my knowledge. I'm not sure I'm adequate to answer

that from a legal contract perspective.
Q But you are familiar with the contract, right?
A Yes.
Q Does the contract say anything about -- that authorizes either of the parties to seek unilateral changes or that requires them to only do so by agreement?
MR. VELEVIS: Your Honor, I'm going to object. I think the contract speaks for itself.
MR. SHEPHERD: Okay. That's fine.
BY MR. SHEPHERD:
Q Then I guess I would ask the -- I would ask if you -- do you have access to a copy of the Section 3.8 of your existing (audio interference) agreement? I'm asking --
A I'm generally familiar with it --
Q I'd like to ask a follow questions --
A Okay.
Q Okay. I'm looking -- I'm looking specifically at Section 3.8 of your general terms. It's entitled "Delinquency in Payment."
A Mm-hmm.
Q It's the portion where you describe the ability of the pipeline to suspend or terminate service whenever there's a creditworthiness failure. There was extensive discussion earlier about creditworthiness.
A Okay.

Q This is a section where your ability to suspend or terminate is laid out. Can you -- I'm wondering whether I need to -- if you have it in front of you, then I'd just direct your attention to 3.8(e). I'm going go read it to you right now. Section 3.8(e) says, "Transporter may not take any action under this Section 3.8 which conflicts with any order of the U.S. Bankruptcy Court."

A I'm (audio interference) --

Q Can you explain to me what --

A -- (audio interference) --

Q Can you explain to me what you think that means.

A I mean, clearly it means we can't take any action which would conflict. Again, I'm not an attorney and I would seek legal advice if there was any question as to whether it was going to conflict. But I do appreciate that it is our opinion that we have not conflicted with any bankruptcy action. We have abided by the automatic stay and we have withdrawn the PDO at the Court's request.

Q Okay. You have nothing further to add about what you think that phrase means?

A Relative to the granting of or honoring a request for service from a shipper as we discussed previously, that bankruptcy and emergence from bankruptcy is not a means to evaluate the creditworthiness of a potential shipper.

Q Okay. Do you -- would it be your position that the

rejection of this contract -- and once the calculated damages were paid, using the existing rate as a baseline, that any losses that were incurred there would be -- would be considered or not considered for purposes -- as a loss or purposes for suspension or termination?

A I would seek legal counsel --

Q Okay.

A -- advice as to --

Q Okay. All right. That's reasonable.

Is it your understanding that the rejection of a contract here would terminate the commercial relationship between REX and Ultra or are there other agreements with REX that -- between REX and Ultra that Ultra does not seek to reject?

A Can you repeat the question, please?

Q If the FTSA between REX and Ultra is rejected, are there any other contractual relationships between REX and Ultra that would still continue? I believe, for example, there is an interruptible service agreement as well.

A Yeah. Most shippers have interruptible service agreements on our pipeline in the event they're wanting to exceed their firm. So yes, there is an IT agreement, but there's no ongoing obligation on their part to us, through that IT agreement.

Q Okay. But you -- that contract is not being touched by this proceeding, correct?

A Correct.

Q All right. So in essence, would it be correct to say that Ultra is terminating its firm service for whatever season, perhaps demand destruction, but it wishes to continue to preserve its ability to use interruptible service?

MR. FINESTONE: Objection. Leading.

MR. SHEPHERD: All right. I'll ask --

THE COURT: I'm going to sustain the objection, the way it's worded.

MR. SHEPHERD: I'll ask the question this way. Well, it's really been asked and answered.

BY MR. SHEPHERD:

Q Is there a cap or other restriction on Ultra's use of interruptible service?

A IT agreements are set at some volume when they are entered into. So that would cap its use. But they -- you know, they could always increase it or request to increase the volume on an IT agreement.

Q Okay. But that would be -- that would need to be a consensual change or would it happen automatically?

A It would be consensual, that we would have no real basis for denying. So if they, you know, met the creditworthy requirements, of which we would not consider bankruptcy to influence.

Q All right. Is there -- do you know if there is any provision, either in the interruptible service agreement or the

firm one, that ties the two of them together in terms of volumes or prices? The cancellation of one would affect the other? Is there any relationship between the rights under those contracts, where the termination of one would affect the other?

A I don't believe there is.

Q Okay. Do you have a general idea of what the difference in the rates might be for firm and interruptible service?

A Sure. I mean, our firm rates have been negotiated in a variety of points, but the Ultra firm rate is just shy of 37 cents. IT rates are the tariff recourse rate, which is, you know, $1.65 approximately -- unless, which we do have the ability to -- and have discussed in the past, posting an IT discount. And so that's always, you know, something that is at our ability to do.

Q Okay. You had a number of questions exchanged with Mr. Finestone about the finance -- the financial impact here. I'm going to ask this question in terms of the way that we would raise under a Mobile-Sierra analysis. Would rejection of the REX-Ultra FTSA financially impair REX's ability to serve its shipping customers?

A The rejection of this one contract would not impair REX's ability to serve its other customers, no.

Q Okay. And I believe you testified earlier that REX is solvent, paying dividends, has the ability to continue to

provide service, even if this contract is rejected.
A Correct.
Q All right. The judge has also asked a series of questions about micro -- macroeconomic impact from a line rejection in a particular case. Is that -- does that mean that your notion of the financial impairment that REX would feel as a result of rejection -- is it limited to those macroeconomic concerns?
MR. VELEVIS: Objection, Your Honor. I think the question's vague and ambiguous.
THE WITNESS: Yeah, I'm not sure I understand that.
MR. SHEPHERD: Okay.
THE COURT: I'm not going to bother to rule on the objection to which -- she doesn't understand it, and he needs to re-ask it and see where we go then.
MR. SHEPHERD: Actually, I think the fact that she was unable to answer it is itself an answer, Your Honor. So I'd like to move on to the second prong.
BY MR. SHEPHERD:
Q One of the other things that will go into a FERC public interest examination would be an excessive burden on other customers. I believe this has been covered in other testimony, but is there -- does -- would the rejection of this contract cast a burden on other customers, whether they be shippers or ultimate consumers?
A At this point in time, with the contractual makeup that we

have in negotiated rate agreements, no. It would not.
Q All right. Next (audio interference) discussion earlier about the statutory and regulatory obligations regarding undue discrimination in rates and how those are enforced. It rests on a claim that the comparison is between similarly situated entities. What factors if any make Ultra differently situated from other shippers, whether they're anchor shippers or otherwise?
A I think having -- when a customer is an anchor shipper or a foundation shipper, that is a factor in them being not similarly situated. There are a number of things that are evaluated, the contractual path -- you know, if a shipper is situated in a different basin, accessing the pipeline. If they are looking for a contract that is ten times the size of another shipper. There's just a variety of aspects that we evaluate on a case-by-case basis.
Q All right. Does the fact of bankruptcy render someone no longer similarly situated to other shippers, whether they're anchor or otherwise?
A It is my understanding that we cannot factor that into an evaluation of similarly situated shippers.
Q Okay. As someone who's been in the industry for a great deal of time -- I'm not asking this -- not a legal conclusion, I'm asking as a businesswoman -- who's better situated to react to shift in demand conditions (audio interference) pipeline?

A I would say, if I understand your question right, that shippers are better able to respond. Pipelines are constructed at the desire of shippers, and they all -- and shippers also have the control of their gas and the ability to take contracts and transport their gas on the entire interstate pipeline network in order to respond to demand shift in the market.

Q Could I ask you -- you sort of answered slightly -- I think you were talking about the particulars of the REX pipeline as a producer-push pipeline. It could be that it could be the demand side that would also determine that, right?

MR. FINESTONE: Let me just object for the record, Your Honor. It's asking for, I think, expert opinion, and this witness, while knowledgeable in the industry, has not conducted this analysis.

THE COURT: Sustained.

MR. SHEPHERD: Okay. I'm scrolling down through questions that Mr. Finestone has already asked to get to new ones.

BY MR. SHEPHERD:

Q There's been a little bit of discussion about the release between -- from Ultra to OXY. What's the duration of that release?

A It goes through October of this year.

Q All right. There was an exchange between you and Mr. Finestone regarding the directional shift in the pipeline

flow, and that some shippers objected to that. Can you explain what the relevance of those objections might be here, and can you tell me whether, and if so how if at all, those objections might have been formally expressed? Was there ever a complaint along those lines, or was that all just business discussion?

MR. FINESTONE: Objection to the first half of the question. It's asking for legal conclusion.

THE COURT: I'm going to sustain that objection to the first half, primarily because I don't understand the relevance of what Mr. Finestone was asking. And I think asking Ms. Heter to explain it is not just very appropriate under the circumstances.

But the second half, let's go ahead and answer.

THE WITNESS: The latter part of the question --

MR. SHEPHERD: I'll just withdraw the question and rephrase it.

BY MR. SHEPHERD:

Q Was there any formal expression, by way of pleadings or complaints or any other place that I could go, for example, to find out where those objections were raised? Were they ever raised in a formal proceeding where I can find them there?

A Rockies Express filed a petition for declaratory order in -- I want to say early 2013. And that petition was to ask FERC to evaluate the merits of making Zone 3 bidirectional in the context of the most favored nations clauses in the original

contracts, which limited the pipeline's ability to sell capacity on the same path as those original shippers, so from Zone 1 to Zone 3, at a rate less than they were currently paying. And you know, the typical, most favored nations provisions were a part of that agreement with those shippers, that if we did sell that path, at a cheaper rate, their rate would be reduced. And so there was a bit of a debate around whether or not that most favored nations clause was applicable to a short haul coming out of the east on the pipe, and ultimately we reached -- we received the PDO, we also negotiated and did some revenue sharing with those shippers.

Q Thank you. Mr. Finestone asked you about the prior termination and noted that you would file a notice of termination and that FERC had not found a public interest reason to reject the notice of termination. Is there a reason why the analysis would be any different today than it was then?

A If we had filed a notice of termination with FERC?

Q Yeah. So then you filed a termination. I believe that -- I was trying in sort of earlier questions to ask if you understood the rejection of this agreement as effectively terminating the contract or instead allowing it to be sort of suspended and resumed later. I think the answer to that question -- in your perception, was that the contract would just end. And if that is true, then I'm -- really what I'm asking is what is -- the only apparent difference between a

shipper asking for rejection and a pipeline asking for termination is who is asking. Does that sound correct to you?

A It's my opinion that decisions as a non-lawyer related to bankruptcy are very complex. And every situation is different for both parties, potentially. Definitely for the shipper, and even for this shipper then versus now, as to the course that that is going to take. So those decisions on termination are based through consultation with legal counsel, with expertise in bankruptcy. I really don't know that I can answer if who's asking is truly the only difference.

Q Okay. I believe that it is unsettled, here at least, what is meant by a public interest examination in this context. But in -- based in your own perception of what those terms mean, can you explain whether, and if so how, the rejection of the REX-Ultra FTSA that's in place -- that's subject of this hearing -- would harm the public interest?

MR. FINESTONE: Objection, Your Honor.

THE COURT: What's the objection?

MR. SHEPHERD: What's the objection?

MR. FINESTONE: The question solicits a legal conclusion.

MR. SHEPHERD: I was trying to not solicit a legal conclusion. I was trying to ask -- and since I believe that I acknowledged at the beginning that we don't seem to have an agreement about what the public interest is -- but certainly

Ms. Heter has probably an opinion about what that is. She's a businesswoman in the industry.

BY MR. SHEPHERD:

Q And so in the absence of needing a legal opinion, do you -- can you express an opinion about how you think the public interest -- I'm not asking for legal examination. I'm asking you, as a businesswoman, how does the public interest -- how is the public interest affected by the rejection of the contract?

THE COURT: Same ruling. I'm sustaining the objection.

MR. SHEPHERD: All right. Then I have nothing further, Your Honor.

THE COURT: Thank you.

Ms. Heter, you've talked a few times about the anti-discrimination provision dealing with bankruptcy. I believe that's in the regs, not in the statute, if I'm correct. If that didn't exist, so you were free to discriminate against people that had been in bankruptcy, what would that -- economic effect of that be on your company? So let me assume that you're free to discriminate against people in bankruptcy, or that have been discharged in bankruptcy. Because you've talked about it, and I'm trying to figure out if there's a problem or just an interesting fact. Does that impair your company somehow?

THE WITNESS: I think it depends on the situation

we're in. In an original build, where a shipper is committing in a means -- in an effort for us to build and put significant capital in for their benefit, that's a bit different than if a party comes and says I would like one month of transport and we're going at risk for, you know, $300,000, and they've been in bankruptcy, those decisions could be very different. So to answer, you know -- I hope that somewhat answers.

THE COURT: So I'll divvy my question up then, and let's assume it's a highly economically material contract to you, and that the bankruptcy reg didn't exist. Would your company have more financial ability to maneuver itself and to protect itself without that bankruptcy provision, or is that bankruptcy provision inflicting some economic cost on y'all? If that's making sense.

THE WITNESS: Yes. Tell me if I'm getting to your -- really to your question. The inability to factor bankruptcy into decisions relative to requests for service by parties, and particularly in something substantial, substantial economic value, is a burden certainly and a risk that we have no choice but to take on under the open access, non-undue-discrimination regime.

THE COURT: Okay. No, that's a direct answer to my question. It's understood. Thank you, Ms. Heter. You're about the most credible witness I've ever had, so I felt free to ask you that question and that I was going to get a truthful