IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
EXTRACTION OIL & GAS, INC. *et al.*,[1]	Case No. 20-11548 (CSS)
Debtors.	(Jointly Administered)
	Hearing Date: **September 30, 2020, at 10:00 a.m. (ET)**

PLATTE RIVER MIDSTREAM, LLC, DJ SOUTH GATHERING, LLC, AND PLATTE RIVER HOLDINGS, LLC'S JOINDER IN AND STATEMENT IN SUPPORT OF GRAND MESA PIPELINE, LLC'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY

Platte River Midstream, LLC ("PRM"), DJ South Gathering, LLC ("DJS"), and Platte River Holdings, LLC ("PRH") (individually, a "Company" and collectively, the "Companies"), creditors and parties-in-interest in the above-captioned cases (the "Chapter 11 Cases") of the above-captioned debtors and debtors in possession (collectively, the "Debtors"), by and through their undersigned counsel, filed this Joinder in and Statement in Support of ("Joinder") Grand Mesa Pipeline, LLC's ("Grand Mesa") *Motion for Order Confirming that the Automatic Stay Does Not Apply or, in the Alternative, for Relief from the Automatic Stay* (D.I. 364) ("Stay Relief Motion").

[1] The Debtors in the 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.

JOINDER AND STATEMENT IN SUPPORT

1. PRM, DJS, and Extraction Oil & Gas, Inc. ("XOG") are parties to certain Transportation Services Agreements ("TSAs") which set forth the terms and conditions for the transportation of XOG's crude petroleum through the Companies' gathering systems. The TSAs are filed rate contracts governed and approved by the Federal Energy Regulatory Commissions ("FERC") under the Interstate Commerce Act (49 U.S.C. App. § 1 *et seq*., the "ICA").

2. The Companies join in and incorporate by reference the Stay Relief Motion filed by Grand Mesa and the arguments made in the Stay Relief Motion, including: (a) that a declaratory petition before FERC would not implicate the automatic stay; (b) proceedings before FERC would fall within the police and regulatory powers exception to the automatic stay under section 362(b)(4) of Title 11 of the United States Code (11 U.S.C. §§ 101 *et seq*., the "Bankruptcy Code"); or, alternatively, that (x) the Companies are entitled to relief from the automatic stay for "cause" under section 362(d)(1), and that (i) the TSAs have the force of law under the ICA and cannot be changed, modified, or abrogated under the filed rate and *Mobile-Sierra* doctrines unless required by the public interest, (ii) FERC has exclusive jurisdiction to determine the "public interest," (iii) the court should lift the automatic stay to permit the Companies to petition FERC for a determination of whether rejection of the TSAs is consistent with the public interest under the ICA, and (iv) even if the Court determines that FERC approval under the ICA is not required for the TSA to be rejected, it should lift the automatic stay, or declare it is inapplicable, to permit the Companies to petition FERC to provide the Court with its opinion as to whether rejection of the TSAs is consistent with the public interest under the ICA.

3. The Companies further incorporate by reference: (a) FERC's June 22, 2020 and August 21, 2020 Orders confirming the concurrent, exclusive jurisdiction of FERC and this

Court, granted under Titles 49 and 11 of the United States Code. *See ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 (2020), *reh'g denied*, 171 FERC ¶ 61,155 (2020), attached as **Exhibits A and B**; (b) the *Response by FERC to Court's July 6 Order* [Bankr. S.D. Tex; D.I. 439], attached as **Exhibit C**, filed by FERC on July 20, 2020 in *Ultra Petroleum Corp. Inc.*, Case No. Case No. 20-32631 (MI), U.S. Bankruptcy Court, Southern District of Texas (Houston Division) ("Ultra Case"), in which FERC explained its limited ability to participate in bankruptcy cases, including those matters under section 365 of the Bankruptcy Code; and (c) the *Limited Objection by the Federal Energy Regulatory Commission to 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* [Bankr. S.D. Tex; D.I. 445], attached as **Exhibit D**, filed by FERC on July 21, 2020 in the Ultra Case, in which FERC did not oppose rejection under section 365, but opposed entry of an order purporting to retain exclusive jurisdiction over the future implementation, interpretation, and enforcement of a rejection order.

CONCLUSION

WHEREFORE, the Companies respectfully request that this Court grant the relief requested in this Joinder and enter an order: (a) confirming that the declaratory proceeding that the Companies seek to commence at FERC in respect of the TSAs does not implicate the automatic stay or is subject to the police and regulatory exception of section 362(b)(4) of the Bankruptcy Code; or, in the alternative; (b) granting relief from the automatic stay to allow the Companies to petition for an order from FERC regarding whether rejection of the TSAs is consistent with the public interest and ICA; and (c) granting such other relief as is just and proper.

Dated: September 16, 2020
Wilmington, Delaware

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EXHIBIT A

171 FERC ¶ 61,248

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

ETC Tiger Pipeline, LLC Docket No. RP20-881-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued June 22, 2020)

1. On May 19, 2020, ETC Tiger Pipeline, LLC (ETC Tiger or Petitioners) filed, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,[1] a petition for declaratory order (Petition) requesting a finding that the Commission has concurrent jurisdiction with United States Bankruptcy Courts under sections 4 and 5 of the Natural Gas Act (NGA)[2] with respect to ETC Tiger's transportation agreements with Chesapeake Energy Marketing, L.L.C. (Chesapeake) and that Commission approval of any abrogation or modification of these agreements is statutorily required. In this order, we grant the Petition in part and deny it in part.

I. **Background**

2. ETC Tiger states that it is a subsidiary of Energy Transfer LP and a natural gas company as defined in the NGA. ETC Tiger states that it owns a 197-mile bidirectional pipeline, which was constructed pursuant to section 7 of the NGA, with a capacity of 2.4 billion cubic feet per day that extends through the Haynesville Shale and ends near Delhi, Louisiana, where it interconnects with multiple interstate pipelines. ETC Tiger states that it has been providing service to Chesapeake since 2016 under two transportation agreements: (1) a firm transportation agreement, with a term of April 1, 2016 through December 31, 2030, providing for a maximum daily quantity of 500,000 dekatherms (Dth) per day at the fixed negotiated monthly reservation rate of $9.5813 per Dth; and (2) an interruptible transportation agreement, with a term of April 1, 2016 through

[1] 18 C.F.R. § 385.207(a)(2) (2019).

[2] 15 U.S.C. §§ 717c and 717d (2018).

December 31, 2025, providing for a maximum daily quantity of 500,000 Dth per day at a discounted rate. Based on Chesapeake's May 11, 2020 10-Q filing with the Securities and Exchange Commission, ETC Tiger states that it believes it must prepare for the imminent possibility that Chesapeake may file for bankruptcy under Chapter 11 of the United States Bankruptcy Code and move to reject its Commission-jurisdictional transportation agreements with ETC Tiger.[3]

II. Petition

3. ETC Tiger seeks three specific Commission declarations: (1) the above-referenced natural gas firm transportation agreements entered into between ETC Tiger and Chesapeake are Commission-jurisdictional agreements reflecting filed rates approved by the Commission pursuant to its exclusive jurisdiction under the NGA; (2) if Chesapeake seeks to reject such Commission-jurisdictional agreements in bankruptcy court, Chesapeake must petition this Commission for approval to abrogate, modify, or amend the filed rate pursuant to Section 5 of the NGA and show that such abrogation, modification, or amendment is in the public interest; and (3) if a party to a Commission-jurisdictional contract under the NGA seeks to reject such agreement in bankruptcy court, that party must receive NGA Section 5 approval before a bankruptcy court can determine whether to reject the agreement.[4] ETC Tiger's arguments in support follow.

4. ETC Tiger states that the Commission has recently affirmed that it has concurrent jurisdiction with the bankruptcy courts in connection with the disposition of Commission-jurisdictional wholesale power contracts,[5] finding that "to give effect to both the [Federal Power Act (FPA)] and the Bankruptcy Code, a party to a Commission-jurisdictional wholesale power contract must obtain approval from both the bankruptcy court and the Commission to reject the contract and modify the filed rate, respectively."[6] ETC Tiger asserts that the Commission's findings in those orders are equally applicable to Commission-jurisdictional transportation agreements under the NGA.[7]

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[3] Petition at 3-5.

[4] *Id.* at 3.

[5] *Id.* at 6-7 (citing *NextEra Energy, Inc. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,049 (2019) (*NextEra*) and *Exelon Corp. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,053 (2019) (*Exelon*), *order on reh'g, NextEra, Inc. v. Pac. Gas & Elec. Co.*, 167 FERC ¶ 61,096 (2019) (Rehearing Order)).

[6] Rehearing Order, 167 FERC ¶ 61,096 at P 3.

[7] Petition at 7.

5. ETC Tiger also argues that the majority of courts that have addressed this issue have found that the Commission has at least concurrent jurisdiction and reasonable opportunity to provide an opinion on whether rejection of the contracts at issue is in the public interest, and have acknowledged the Commission's exclusive jurisdiction and proper role in determining the public-interest implications prior to permitting a debtor to reject a Commission-jurisdictional agreement. In particular, ETC Tiger highlights *In re Calpine Corp.*,[8] in which the court held that "the Bankruptcy Code does not expressly limit FERC's jurisdiction and [instead] contemplates agency action during the pendency of a reorganization," and that "FERC's vast authority over filed rate energy contracts" is superior to the bankruptcy court's jurisdiction.[9] ETC Tiger notes that the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) also recently found that the Commission and the bankruptcy courts have concurrent jurisdiction but that the bankruptcy court's jurisdiction is superior.[10] Further, ETC Tiger contends that *Boston Generating*[11] addressed the question of the Commission's jurisdiction in bankruptcy proceedings with respect to agreements under the NGA. According to ETC Tiger, *Boston Generating* provides judicial precedent upon which the Commission can rely, in addition to its numerous rulings with respect to contracts under the FPA, to grant the Petition.[12]

6. ETC Tiger asserts that the rationale discussed in the Commission's orders finding that the Commission has exclusive, or at least concurrent, jurisdiction over whether the rejection of a jurisdictional contract or filed rate under the FPA is in the public interest is interchangeable with, and applies equally to, such a determination under the NGA. ETC Tiger contends that the NGA was intended to regulate interstate sales of natural gas for resale in much the same way as the FPA regulates interstate sales of power. For example, ETC Tiger states that the language used in the NGA regarding the requirement to file rates and the Commission's power to fix unjust and unreasonable rates is almost an exact replica of the language used in the FPA. Thus, ETC Tiger argues that the parity between the FPA and NGA extends to the Commission's application of the filed-rate doctrine, which means that rates must be filed with the Commission and the rates filed for sale and transportation are lawful only if they are just and reasonable and the Commission "alone is empowered to make that judgment [of reasonableness], and until it has done so, no

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[8] *In re Calpine Corp.*, 337 B.R. 27, 33, 35 (Bankr. S.D.N.Y 2006) (*Calpine*).

[9] *Id.* at 35-36.

[10] Petition at 8 (citing *FirstEnergy Sols. Corp.*, 945 F.3d 431, 445-46 (6th Cir. 2019) (*FirstEnergy*)).

[11] *Boston Generating*, 2010 WL 4616243 (S.D.N.Y. 2010).

[12] Petition at 7-9.

other rate other than the one on file may be charged."[13] Further, ETC Tiger asserts that "[o]nce filed with FERC, a 'filed rate' becomes an obligation external to the contract, with the independent force of law."[14]

7. ETC Tiger also argues that the *Mobile-Sierra* public interest presumption[15] applies equally to jurisdictional contracts under both the NGA and FPA. ETC Tiger asserts that the *Mobile-Sierra* doctrine "holds that the rate set out in a freely negotiated contract presumptively meets the 'just and reasonable' requirement imposed by the FPA statute unless FERC concludes that the rate will 'seriously harm the public interest.'"[16] Because both the FPA and NGA require just and reasonable rates, ETC Tiger contends that the *Mobile-Sierra* presumption applies equally under both statutes. ETC Tiger asserts that the logical conclusion to the application of the presumption to natural gas contracts is that a pipeline shipper must receive the Commission's approval to abrogate, modify, or amend the filed rate pursuant to section 5 of the NGA by seeking to terminate a contract through bankruptcy by showing that such action is in the public interest.[17]

8. ETC Tiger argues that, in addition to some courts recognizing that the Commission has a role in determining whether a contract under the FPA or NGA can be rejected in bankruptcy, the Commission has a long-standing practice of considering the public interest regarding NGA-jurisdictional contracts of pipelines in bankruptcy proceedings. ETC Tiger states that in *Columbia Gas Transmission Corp.*,[18] the

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[13] *Id.* at 11 (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 964 (1952)).

[14] Petition at 11 (quoting *FirstEnergy*, 945 F.3d at 456-57).

[15] *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (holding that under the NGA, natural gas companies cannot unilaterally change contract rates) (*Mobile*); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (holding that under the FPA, the Commission had no power to change a contract rate without first finding the existing rate unjust, unreasonable, unduly discriminatory, or preferential) (*Sierra*).

[16] Petition at 11-12 (quoting *FirstEnergy*, 945 F.3d at 444 (quoting *NRG Power Mktg., LLC v. Me. Pub. Util. Comm'n,* 558 U.S. 165, 167 (2010) (quotation marks omitted); *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530 (2008)).

[17] *Id.* at 12.

[18] *Columbia Gas Transmission Corp.*, 66 FERC ¶ 61,374 (1994) (*Columbia Gas*), *reh'g denied*, 67 FERC ¶ 61,269 (1994).

Commission recognized that Columbia's rejection of its contracts with upstream suppliers in a bankruptcy proceeding was governed by the provisions of the Bankruptcy Code and, thus, had to be decided in bankruptcy court, but also found that these contracts were fully subject to the Commission's jurisdiction under the NGA and therefore within the Commission's authority to modify or terminate those contracts if they were contrary to the public interest. ETC Tiger also asserts that, more recently, in *Boston Generating*, the parties agreed that the debtors should seek Commission approval of the gas transportation contracts at issue, but disagreed over whether the bankruptcy court and Commission should consider the rejection motion concurrently or whether the bankruptcy court must wait until the Commission had ruled.[19] ETC Tiger states that the court found the question was irrelevant because "[i]f either the bankruptcy court or FERC does not approve the Debtor's rejection of the [agreement], the Debtors may not reject the contract."[20]

9. Finally, ETC Tiger argues that the issue of a debtor rejecting a Commission-jurisdictional agreement in bankruptcy raises a public policy issue. ETC Tiger asserts that the filed rate doctrine applies not only to the rate, but to the terms and conditions of service, including the term of the agreement. ETC Tiger contends that the abrogation of a contract, by definition, affects the term of the contract and the rate received by the pipeline. Further, ETC Tiger reiterates that, pursuant to the filed rate doctrine, a Commission-jurisdictional agreement is not a private contract but has the force of law and only the Commission has the right to determine whether the abrogation, modification, or amendment of a filed rate harms the public interest. Thus, ETC Tiger argues that the Commission should grant this Petition and assert its exclusive jurisdiction to ensure that any move to reject a Commission-jurisdictional agreement would not harm the public interest.[21]

III. Notice and Responsive Pleadings

10. Notice of the Petition was published in the *Federal Register*, 85 Fed. Reg. 32,378 (2020), with interventions and protests due on or before June 18, 2020. Timely motions to intervene were filed by Enbridge (U.S.) Inc. and American Public Gas Association. Stagecoach Pipeline & Storage Company LLC and Arlington Storage Company, LLC (collectively, Stagecoach and Arlington) jointly filed a timely motion to intervene and comments in support of ETC Tiger's Petition. Chesapeake filed a timely motion to intervene and protest.

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[19] Petition at 13 (citing *Boston Generating*, 2010 WL 4616243 at *3).

[20] *Id.*

[21] *Id.* at 14-15.

11. Stagecoach and Arlington argue that a debtor's motion to reject a Commission-jurisdictional contract in bankruptcy directly implicates the filed rate doctrine because the debtor is seeking to substitute its judgment on filed rates for that of the Commission. Stagecoach and Arlington assert that the Commission alone, consistent with the filed rate doctrine under both the NGA and FPA, has the authority to determine whether a debtor's proposed rejection of a Commission-jurisdictional contract is just and reasonable.[22]

12. Chesapeake argues that the Commission should deny the Petition. Chesapeake asserts that ETC Tiger erroneously seeks (1) a remedy for a situation that has not occurred, (2) to elevate the Commission's jurisdiction over the filed rate above the jurisdiction of the bankruptcy courts to determine whether a contract should be rejected, and (3) to reverse the Commission's policies with respect to natural gas transportation contracts.[23]

13. Chesapeake contends that the NGA and the Commission's regulations treat natural gas companies differently from shippers on the natural gas pipelines. According to Chesapeake, the Commission has not, nor should it, infer from the NGA any duty to perform for shippers such as Chesapeake. Chesapeake asserts that, unlike certified interstate natural gas pipelines, shippers on natural gas pipelines do not need to request abandonment authority from the Commission under section 7(b) of the NGA[24] in order to stop performing under a transportation service agreement. Further, Chesapeake argues that Congress expressly limited the scope of section 7(b) abandonment authority to the provision of certificated services by interstate pipelines by removing producers from the definition of "natural gas company" in the Wellhead Decontrol Act of 1989.[25] Thus, given that Congress has imposed specific limits on the scope of section 7(b) of the NGA, Chesapeake contends that the Commission should deny ETC Tiger's attempts to evade those limits by requiring the Commission to infer a duty to perform under the NGA where none exists.[26]

14. Chesapeake also argues that the bankruptcy courts have primary and exclusive jurisdiction over the rejection of contracts. Chesapeake highlights the court's finding in *FirstEnergy*, where the Sixth Circuit held that the bankruptcy court's jurisdiction, although concurrent with the Commission's jurisdiction, is "nonetheless primary or

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[22] Stagecoach and Arlington Comments at 3-5.

[23] Chesapeake Protest at 1.

[24] 15 U.S.C. §717f(b) (2018).

[25] Pub. L. No. 101-60 (1989); 15 U.S.C. § 3431(b)(1).

[26] Chesapeake Protest at 4-8.

superior to FERC's position,"[27] and that the debtor-in-possession can reject the contracts subject to proper bankruptcy court approval and the Commission "cannot independently prevent it."[28] Further, Chesapeake asserts that the United States Court of Appeals for the Fifth Circuit has determined that the rejection of an executory contract allows for the non-breaching party to receive an unsecured claim against the bankruptcy estate for an amount equal to the damages from the breach, which are calculated based upon the filed rate.[29] Chesapeake contends that bankruptcy courts have also determined that they hold exclusive jurisdiction over rejection of executory contracts, including Commission-jurisdictional ones,[30] and that the Commission has consistently deferred to the bankruptcy courts where natural gas pipeline transportation agreements are at issue.[31] Chesapeake also notes that another pipeline company, Rockies Express LLC (Rockies Express), filed a petition for declaratory order with the Commission seeking similar relief but withdrew the petition after a hearing before the bankruptcy court. Chesapeake states that, in that case, the bankruptcy court held that "proceeding with the petition before FERC . . . or FERC's ruling on the petition . . . would violate the automatic stay under section 362(a)

[27] Chesapeake Protest at 9 (quoting *FirstEnergy*, 945 F.3d at 446).

[28] *Id.* at 10 (quoting *FirstEnergy*, 945 F.3d at 446).

[29] *Id.* (citing *In re Mirant Corp*., 378 F.3d 511, 520 (5th Cir. 2004) (*Mirant*)).

[30] *Id.* (citing *In re PG&E Corp.*, No. 19-30088-DM (Bankr. N.D. Cal. 2019) (appeal pending in the Ninth Circuit)).

[31] *Id.* at 11 (citing *In re Vanguard Natural Resources, LLC*, No. 17-30560 (MI) (Bankr. S.D. Tex. Mar. 1, 2017) (natural gas pipeline companies did not object to debtor's rejection of their respective firm transportation agreements; no FERC involvement); *In re Linn Energy, LLC*, No. 16-60040 (DRJ) (Bankr. S.D. Tex. Jun. 27, 2016) (several counterparties did not object to debtors' rejection of their transportation service agreements; no FERC involvement); *In re Edgemarc Holdings, LLC*, No. 19-11104 (Bankr. D. Del. Jun. 25, 2019) (counterparty expressly did not object to the debtors' rejection of firm transportation service agreements; no FERC involvement); *In re Bonanza Creek Energy, Inc.*, No. 17-10015 (Bankr. D. Del. Apr. 7, 2017) (neither counterparty nor FERC objected to rejection effectuated through plan of reorganization); *In re Mirant Corp.*, No. 03-46590 (Bankr. N.D. Tex. Aug. 14, 2003) (neither counterparty nor FERC objected to debtors' rejection of firm natural gas transportation agreement)).

of the Bankruptcy Code"[32] and any ruling by the Commission during the chapter 11 case would be void because it would violate the automatic stay.[33]

15. Chesapeake asserts that while bankruptcy courts have exclusive jurisdiction regarding the rejection of contracts, the Commission may play a role in the process by providing advice and guidance to the bankruptcy courts regarding whether rejection would harm the public interest. Further, Chesapeake contends that bankruptcy courts may consider, in accordance with the business judgment rule, whether there is a public interest that should be taken into account in considering rejection of an executory contract. However, Chesapeake maintains that with or without Commission participation, the bankruptcy courts retain the jurisdiction to consider whether to authorize rejection of a natural gas transportation contract through a shipper in chapter 11 bankruptcy. In contrast, Chesapeake claims that the Petitioners would have the Commission create exclusive Commission jurisdiction to make this determination without any input from the bankruptcy courts. Chesapeake argues that such an outcome would render the Bankruptcy Code meaningless and would place the Commission's jurisdiction over and above any jurisdiction the bankruptcy courts might have.[34]

16. Chesapeake argues that the Commission has already articulated a public policy determination regarding its position on contract defaults by shippers in its 2005 Creditworthiness Policy Statement.[35] According to Chesapeake, the Creditworthiness Policy Statement determined that, in the event of a shipper default, the risk of loss belongs with the natural gas pipeline, and found that the compensation for this risk is factored into determining the pipeline's return on equity when it seeks approval for new jurisdictional service rates and also allows for pipelines to request up to three months of reservation charges from existing shippers as collateral for a non-creditworthy shipper as a means of mitigating risk.[36] Chesapeake also asserts that the Creditworthiness Policy Statement addresses the process pipelines can use for suspending or terminating service

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[32] Chesapeake Protest at 12-13 (citing *In re Ultra Petroleum Corp.*, Hr'g Tr. 53: 25-54: 4 (Bankr. S.D. Tex. May 29, 2020)).

[33] *Id.* (citing *In re Ultra Petroleum Corp.*, Hr'g Tr. 55: 6-7 (Bankr. S.D. Tex. May 29, 2020)).

[34] *Id.* at 13-14.

[35] *Creditworthiness Standards for Interstate Natural Gas Pipelines*, 111 FERC ¶ 61,412 (2005) (Creditworthiness Policy Statement).

[36] Chesapeake Protest at 15 (citing Creditworthiness Policy Statement, 111 FERC ¶ 61,412 at PP 11, 14).

in response to a shipper's deteriorating creditworthiness.[37] Further, Chesapeake claims that, in the Creditworthiness Policy Statement, the Commission cited favorably to previous decisions where the Commission acknowledged the primacy of bankruptcy court jurisdiction. Thus, Chesapeake contends that the Creditworthiness Policy Statement demonstrates the Commission's understanding that rejection under the Bankruptcy Code would be available to a shipper in bankruptcy without Commission involvement.[38]

17. In addition, Chesapeake asserts that the Petitioners would have the Commission apply the wrong standard for contract rejection in bankruptcy. Chesapeake argues that the *Mobile-Sierra* doctrine only applies where a party is attempting to unilaterally modify a contract rate. However, Chesapeake asserts that contract rejection is a breach of contract that does terminate or rescind the contract such that the filed rate remains intact.[39]

18. Finally, Chesapeake argues that the Petitioners seek to have the Commission take action that would be inconsistent with the requirements of ETC Tiger's tariff. Chesapeake states that ETC Tiger's tariff provides that ETC Tiger may unilaterally suspend and terminate a shipper's contract where the shipper has failed to pay an invoice on a timely basis and/or where the shipper fails to maintain creditworthiness. Thus, Chesapeake contends that it strains credulity for ETC Tiger to argue that a shipper breach of contract through the bankruptcy process would require a *Mobile-Sierra* finding by the Commission when ETC Tiger's decision to terminate a contract due to the shipper's bankruptcy would not. Moreover, Chesapeake claims that ETC Tiger's tariff contains several references to bankruptcy courts and recognizes the primacy of those courts' jurisdiction in certain situations. For example, Chesapeake cites two provisions of the ETC Tiger tariff that prohibit ETC Tiger from taking any actions that conflict with any order of a bankruptcy court.[40] Thus, Chesapeake asserts that, if the bankruptcy court were to authorize rejection of one or both of the contracts between Chesapeake and ETC Tiger, ETC Tiger must comply with those orders and may not take any actions that would conflict with those orders, such as requesting a contrary determination from the Commission.[41]

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[37] Chesapeake Protest at 16 (citing Creditworthiness Policy Statement, 111 FERC ¶ 61,412 at PP 32-35).

[38] *Id.* at 16-17.

[39] *Id.* at 17.

[40] *Id.* at 18-19 (citing ETC Tiger, FERC Gas Tariff, §§ 2.8, 12.1).

[41] Chesapeake Protest at 19.

IV. Commission Determination

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Substantive Matters

20. We grant the Petition and find that the principles the Commission articulated in *NextEra* and *Exelon* with respect to the FPA apply with equal force under the NGA. Where a party to a Commission-jurisdictional agreement under the NGA seeks to reject the agreement in bankruptcy, that party must obtain approval from both the Commission and the bankruptcy court to modify the filed rate and reject the contract, respectively.[42]

21. As a threshold matter, the filed rate doctrine and the *Mobile-Sierra* presumption apply equally to contracts regulated under sections 4 and 5 of the NGA and contracts regulated under sections 205 and 206 of the FPA.[43] As noted by ETC Tiger,[44] the language used in the NGA regarding the requirement to file rates and the Commission's power to remedy unjust and unreasonable rates "'are in all material respects substantially identical.'"[45] Courts have held that the parity between the FPA and NGA extends to the Commission's application of the filed rate doctrine. Indeed, due to the similarities between the two statutory schemes, the Supreme Court has a longstanding and

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[42] *NextEra*, 166 FERC ¶ 61,049 at P 28; *Exelon*, 166 FERC ¶ 61,053 at P 25. The Commission's initial orders and its consolidated rehearing order are currently pending on judicial review before the Ninth Circuit.

[43] Indeed, the *Mobile-Sierra* doctrine is derived from the Supreme Court's twin decisions issued the same day under the NGA, and the FPA. *See supra* note 14 (citing *Mobile* and *Sierra*); *see also, e.g.*, *Morgan Stanley*, 554 U.S. at 544-45 (applying the *Mobile-Sierra* doctrine to rates under the FPA); *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) (applying the *Mobile-Sierra* doctrine to rates under the NGA).

[44] Petition at 11.

[45] *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7. (1981) (*Arkla Gas*) (quoting *Sierra,* 350 U.S. at 353).

"established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes."[46]

22. Consistent with the foregoing precedent, we find that the Bankruptcy Code does not displace the Commission's jurisdiction over filed rate contracts under the NGA. As filed rates, such contracts are not typical commercial contracts but rather establish public obligations that carry the force of law.[47] As the Supreme Court explained with specific regard to Commission-jurisdictional contracts, filed rate obligations exist independently of private contractual duties and continue to bind the counterparties, regardless of one party's breach of contract, or even a determination that a contract may not be enforced at all.[48] More recently, the Supreme Court held in *Mission Product Holdings, Inc. v. Tempnology*[49] that a debtor cannot grant itself an exemption from "all the burdens that generally applicable law . . . imposes" by breaching a contract through the bankruptcy process. *Mission Product* supports the principle that a debtor does not extinguish its filed rate obligations under the NGA by rejecting a contract in bankruptcy.

23. As the Commission stated in *Exelon*, "the Commission determines the filed rate and 'except for review of the Commission's orders, the courts can assume no right to a different one.'"[50] Rejection of a Commission-jurisdictional contract in a bankruptcy court alters the essential terms and conditions of a contract that is also a filed rate; therefore, the Commission's approval is required to modify or abrogate the filed rate.[51]

24. Bearing in mind the foregoing principles, we turn to ETC Tiger's requested declarations. In response to the first and second questions posed by ETC Tiger, whether the above-referenced agreements constitute filed rates and whether Chesapeake must petition this Commission for approval to abrogate, modify, or amend the filed rate, the

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[46] *Arkla Gas*, 453 U.S. at 577 n.7.

[47] *See, e.g.*, *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004) (filed rates "are considered to be 'the law'") (citation omitted).

[48] *Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 422 (1952) (power company's duty to comply with filed rate "springs from the Commission's authority, not from the law of private contracts").

[49] 139 S. Ct. 1652, 1665 (2019) (*Mission Product*).

[50] *Exelon*, 166 FERC ¶ 61,053 at 26 (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. at 252).

[51] *NextEra*, 166 FERC ¶ 61,049 at P 29; *Exelon*, 166 FERC ¶ 61,053 at P 26.

Commission's answer is yes.[52] The natural gas transportation agreements at issue here, like the wholesale power purchase agreements at issue in *NextEra* and *Exelon*, constitute filed rates. As such, in order to give effect to both the NGA and the Bankruptcy Code, Chesapeake may not modify the rates, terms, or conditions of its transportation agreements with ETC Tiger by rejecting those contracts in bankruptcy; Chesapeake must obtain approval from the Commission to do so.

25. In response to the third question posed by ETC Tiger, whether a party to a Commission-jurisdictional contract under the NGA must receive Commission approval *before* a bankruptcy court can determine whether to reject the agreement, our answer is no, at least to the extent ETC Tiger appears to suggest that a shipper cannot move to reject a contract in bankruptcy court without the Commission's approval. As the Commission has previously explained, "the Commission neither presumes to sit in judgment of rejection motions nor seeks to arrogate the role of adjudicating bankruptcy proceedings. The Commission recognizes that rendering a determination on rejection motions is solely within the province of the bankruptcy court."[53] However, as we have also explained, a bankruptcy court's decision to approve rejection of a FERC-jurisdictional contract cannot modify the filed rate or excuse a violation of the filed rate; only the Commission has the authority to modify the public law duties set forth in the filed rate.[54] Moreover, a reorganization plan that purports to authorize the modification or abrogation of a FERC-jurisdictional filed rate cannot be confirmed unless the Commission agrees to any rate change provided in the reorganization plan or confirmation is made contingent on the Commission's approval.[55] Such an agreement from the Commission can only occur via a Commission order.

26. We find that Chesapeake's reliance on section 7(b) of the NGA is misplaced. As Chesapeake states, section 7(b) of the NGA pertains to the requirements for an interstate natural gas pipeline company to abandon jurisdictional service authorized by the Commission. This case does not implicate the obligations arising under section 7(b) of the NGA, but instead raises questions about the rights and obligations of parties to

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[52] Based upon the record in this proceeding, we do not opine on whether the *Mobile-Sierra* presumption applies to the agreements at issue.

[53] Rehearing Order, 167 FERC ¶ 61,096 at P 16.

[54] *See id.*

[55] Specifically, the Bankruptcy Code provides that "[t]he court shall confirm a plan only if all of the following requirements are met: . . . Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6) (2018).

Commission-jurisdictional contracts under sections 4 and 5 of the NGA. Thus, by granting the relief requested by ETC Tiger, the Commission is not inferring a shipper's duty to perform under section 7(b) of the NGA. Rather, the Commission is giving proper effect to the filed rate doctrine, which unquestionably applies to the contracts at issue here.

27. Although Chesapeake cites instances where courts have taken a position contrary to our finding here,[56] the law is unsettled in this area.[57] And, as noted, the Supreme Court's recent decision in *Mission Product* supports our position. Further, contrary to Chesapeake's assertions, the Commission's inaction in other bankruptcy cases involving natural gas shippers[58] is inapposite to the question of jurisdiction. That the Commission did not act in certain cases does not imply the absence of jurisdiction, and Chesapeake points to no precedent to support such a proposition.

28. Chesapeake's reference to the Rockies Express matter also is misplaced because the factual circumstances presented in that case are distinguishable from those presented here. There, unlike here, the relevant debtor had filed for bankruptcy, triggering the automatic stay provision in the Bankruptcy Code. Assuming *arguendo* that the automatic stay would have prevented the Commission from acting on the Rockies Express petition before the Commission,[59] which we do not concede, here, Chesapeake has not filed a

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[56] Chesapeake Protest at 9-10 (citing *FirstEnergy*, 945 F.3d at 446; *Mirant*, 378 F.3d at 520).

[57] Federal courts have come to varying conclusions regarding the interaction between the Bankruptcy Code and either the FPA or NGA. *Compare FirstEnergy*, 945 F.3d 431 (6th Cir. 2019) (district court and Commission share concurrent jurisdiction but district court jurisdiction is superior and district court must consider Commission's views in considering rejection motion) *and Mirant*, 378 F.3d 511 (FPA does not preempt the bankruptcy court's jurisdiction to authorize rejection of an executory contract because rejection of wholesale power purchase agreement would only have an indirect effect upon the filed rate) *and In re PG&E Corp.*, 603 B.R. 471 (Bankr. N.D. Cal. 2019) (debtor need not obtain Commission approval or input to authorize rejection of Commission-regulated contract) *with Calpine Corp.*, 337 B.R. 27 (owing to Commission's exclusive jurisdiction under FPA, bankruptcy court may not authorize rejection of Commission-regulated contract) *and Boston Generating, LLC*, No. 10 Civ. 6258, 2010 WL 4616243 (recognizing parties' agreement that debtor must obtain approval from both bankruptcy court and Commission to reject Commission-regulated agreement).

[58] *See supra* note 30.

[59] Docket No. RP20-822-000.

bankruptcy petition. Thus, the automatic stay provision of the Bankruptcy Code is inapplicable.

29. We find that Chesapeake's claim that the Petitioners seek to create exclusive Commission jurisdiction to make this determination without any input from the bankruptcy courts mischaracterizes the Commission's interpretation of its jurisdiction. The Commission has consistently emphasized that its jurisdiction is concurrent with, not superior to, that of the bankruptcy courts.[60] The Commission has held that, "to give effect to *both* the FPA and the Bankruptcy Code,"[61] a party to a Commission-jurisdictional contract must obtain approval from the bankruptcy court to reject the contract in bankruptcy and must also obtain approval from the Commission to modify or abrogate the filed rate.

30. The application of a separate legal standard by the Commission does not elevate the Commission's jurisdiction to a superior position in relation to the bankruptcy court and does not render the Bankruptcy Code meaningless.

31. We find no merit in Chesapeake's assertions regarding the Creditworthiness Policy Statement. The Creditworthiness Policy Statement addresses different issues than those raised in this context. In the Creditworthiness Policy Statement, the Commission addressed the types of credit a pipeline may require of a non-creditworthy shipper and the ability of a pipeline to terminate a pipeline-shipper relationship, in part to hedge against the risk that the shipper might file for bankruptcy.[62] In this case, ETC Tiger is not attempting to require Chesapeake to provide additional collateral or security or to terminate the pipeline-shipper relationship. Thus, the Creditworthiness Policy Statement is inapplicable here.

32. Chesapeake's assertion that the Petitioners seek to have the Commission apply the wrong standard for contract rejection in bankruptcy court is likewise without merit. Chesapeake's argument on this point conflates the roles of the Commission and the bankruptcy court.

33. Finally, we find that granting the relief requested here does not conflict with any provision of ETC Tiger's tariff. The fact that ETC Tiger's tariff provides that ETC Tiger may unilaterally suspend and terminate a shipper's contract under certain circumstances is not relevant to the question of whether Chesapeake may unilaterally modify or

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[60] *E.g.*, *Exelon*, 166 FERC ¶ 61,053 at P 25.

[61] *NextEra*, 166 FERC ¶ 61,049 at P 28; *Exelon*, 166 FERC ¶ 61,053 at P 25 (emphasis added).

[62] *See generally* Creditworthiness Policy Statement, 111 FERC ¶ 61,412.

abrogate the rates, terms, or conditions of its natural gas transportation agreements with ETC Tiger. Aside from obtaining approval from the bankruptcy court to reject its contracts with ETC Tiger, Chesapeake must seek a determination from the Commission as to whether a filed rate may be modified or abrogated under the NGA. Chesapeake's remaining arguments about the restrictions in ETC Tiger's tariff are inapplicable here because the bankruptcy court has not issued any orders on the matter; therefore, ETC Tiger's Petition cannot, by definition, conflict with any order of the bankruptcy court.

The Commission orders:

We conclude that this Commission and the bankruptcy courts have concurrent jurisdiction to review and address the disposition of the natural gas transportation agreements sought to be rejected through bankruptcy, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

EXHIBIT B

172 FERC ¶ 61,155
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

ETC Tiger Pipeline, LLC Docket No. RP20-881-001

ORDER DENYING REHEARING

(Issued August 21, 2020)

1. On June 22, 2020, the Commission issued a declaratory order holding that it and the United States Bankruptcy Courts have concurrent jurisdiction to review and address the disposition of two natural gas firm transportation agreements between Chesapeake Energy Marketing, L.L.C. (Chesapeake) and ETC Tiger Pipeline, LLC (ETC Tiger).[1] In this order, we deny Chesapeake's request for rehearing of the June 22 Order, as discussed below.

I. **Background**

2. On May 19, 2020, in anticipation of Chesapeake's filing a petition for bankruptcy, ETC Tiger sought an order from the Commission declaring that the Commission has concurrent jurisdiction under sections 4 and 5 of the Natural Gas Act (NGA)[2] with the bankruptcy courts with regard to the disposition of its transportation agreements with Chesapeake. ETC Tiger sought three specific Commission declarations: (1) that the natural gas firm transportation service agreements entered into between ETC Tiger and Chesapeake are Commission-jurisdictional agreements reflecting filed rates approved by the Commission pursuant to its exclusive jurisdiction under the NGA; (2) that if Chesapeake sought to reject such Commission-jurisdictional agreements in bankruptcy court, Chesapeake must petition this Commission for approval to abrogate, modify, or amend the filed rate pursuant to section 5 of the NGA and show that such abrogation, modification, or amendment is in the public interest; and (3) that, if a party to a Commission-jurisdictional contract under the NGA seeks to reject such agreement in

[1] *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 (2020) (June 22 Order).

[2] 15 U.S.C. §§ 717c and 717d (2018).

bankruptcy court, that party must receive NGA section 5 approval before a bankruptcy court can determine whether to reject the agreement.[3]

3. In the June 22 Order, the Commission cited its recent orders[4] addressing the relationship between the Bankruptcy Code and sections 205 and 206 of the Federal Power Act (FPA).[5] The Commission found that the principles articulated in those orders apply with equal force under the NGA and therefore held that, "[w]here a party to a Commission-jurisdictional agreement under the NGA seeks to reject the agreement in bankruptcy, that party must obtain approval from both the Commission and the bankruptcy court to modify the filed rate and reject the contract, respectively."[6]

4. The Commission stated that, due to the parity between the FPA and NGA, the filed rate doctrine and the *Mobile-Sierra*[7] public interest presumption apply equally to contracts under both statutes. The Commission also found that the rejection of a Commission-jurisdictional contract in bankruptcy court alters the essential terms and conditions of a contract that is also a filed rate and, as such, the Commission's approval is required to modify or abrogate the filed rate. Thus, the Commission held that the

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[3] June 22 Order, 171 FERC ¶ 61,248 at P 3.

[4] *NextEra, Inc. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,049 (2019) (*NextEra*) and *Exelon Corp. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,053 (*Exelon*), *order on reh'g, NextEra, Inc. v. Pac. Gas & Elec. Co.*, 167 FERC ¶ 61,096 (2019) (*NextEra* Rehearing Order) (holding that the Commission and the bankruptcy courts have concurrent jurisdiction to review and address the disposition of wholesale power contracts sought to be rejected through bankruptcy).

[5] 16 U.S.C. §§ 824d and 824e (2018).

[6] June 22 Order, 171 FERC ¶ 61,248 at P 20.

[7] *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*) (holding that under the NGA, natural gas companies cannot unilaterally change contract rates); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*) (holding that under the FPA, the Commission has no power to change a contract rate without first finding the existing rate unjust, unreasonable, unduly discriminatory, or preferential). *Mobile* and *Sierra* formed the basis for the "*Mobile-Sierra* doctrine," which prohibits one party to Commission-regulated contract from unilaterally changing the mutually agreed-upon contract rate without a finding from the Commission that the contract rate "seriously harms the consuming public." *Morgan Stanley Capital Grp. Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 545 (2008).

Bankruptcy Code does not displace the Commission's jurisdiction over filed rate contracts under the NGA.[8]

5. With regard to the first and second declarations sought by ETC Tiger, the Commission found that the natural gas transportation agreements at issue, like the wholesale power purchase agreements at issue in *NextEra* and *Exelon*, constitute filed rates. Therefore, in order to give effect to both the NGA and the Bankruptcy Code, the Commission found that Chesapeake may not modify the rates, terms, or conditions of those agreements by rejecting those contracts in bankruptcy without also obtaining Commission approval to modify the filed rate. Regarding ETC Tiger's third request, the Commission held more generally that, although rendering a determination on a rejection motion is solely within the province of the bankruptcy court, a bankruptcy court's decision to approve rejection of a Commission-jurisdictional contract cannot modify a filed rate or excuse violation of the filed rate; only the Commission has the authority to modify the public law duties set forth in the filed rate.[9]

6. As relevant to Chesapeake's rehearing request, the June 22 Order also rejected several objections raised by Chesapeake. First, the Commission disagreed with Chesapeake's contention that granting the requested relief would be inconsistent with relevant court precedent and what Chesapeake characterized as the Commission's previous deference to the bankruptcy courts where natural gas pipelines are at issue. The Commission acknowledged instances where the courts have taken a position contrary to its finding of concurrent jurisdiction,[10] but highlighted that the law is unsettled in this area.[11] The Commission also stated that its inaction in other bankruptcy cases involving

[8] June 22 Order, 171 FERC ¶ 61,248 at PP 21-22.

[9] *Id.* PP 24-25.

[10] *Id.* P 27 (citing *In re FirstEnergy Sols. Corp.*, 945 F.3d 431, 446 (6th Cir. 2019) (*FirstEnergy*); *In re Mirant Corp.*, 378 F.3d 511, 520 (5th Cir. 2004) (*Mirant*)).

[11] *Id.* (noting that Federal Courts have come to varying conclusions regarding the interaction between the Bankruptcy Code and either the FPA or NGA). *Compare FirstEnergy*, 945 F.3d 431 (holding that district court and Commission share concurrent jurisdiction but district court jurisdiction is superior and district court must consider Commission's views in considering rejection motion) *and Mirant*, 378 F.3d 511 (holding that that FPA does not preempt the bankruptcy court's jurisdiction to authorize rejection of an executory contract because rejection of wholesale power purchase agreement would only have an indirect effect upon the filed rate) *and In re PG&E Corp.*, 603 B.R. 471 (Bankr. N.D. Cal. 2019) (*PG&E*) (holding that the debtor need not obtain Commission approval or input to authorize rejection of Commission-regulated contract) *with Calpine Corp.*, 337 B.R. 27 (Bankr. S.D.N.Y. 2006) (*Calpine*) (finding that due to the

natural gas shippers[12] is inapposite to the question of jurisdiction.[13] Second, the Commission found no merit in Chesapeake's assertion that the Commission's Creditworthiness Policy Statement[14] evidences the Commission's understanding that rejection of a Commission-jurisdictional contract under the Bankruptcy Code does not require Commission involvement, finding that the Creditworthiness Policy Statement is inapplicable here.[15] Third, the Commission rejected Chesapeake's claim that ETC Tiger's tariff includes provisions that conflict with or restrict the Commission's ability to grant the requested relief. The Commission found that the fact that ETC Tiger's tariff provides the pipeline the ability to unilaterally suspend and terminate a shipper's contract under certain circumstances is not relevant to the question of whether Chesapeake may unilaterally modify or abrogate the rates, terms, or conditions of its natural gas transportation agreements with ETC Tiger. The Commission also found Chesapeake's remaining arguments regarding ETC Tiger's tariff were inapplicable, including the argument that ETC Tiger's tariff prohibits ETC Tiger from taking any action that is inconsistent with an order of a bankruptcy court. The Commission noted that, at that time, Chesapeake had not filed for bankruptcy; thus, there were no bankruptcy court orders of relevance.[16]

7. On June 28, 2020, Chesapeake filed a petition for bankruptcy in the United States Bankruptcy Court for the Southern District of Texas and a motion for an order from that court authorizing rejection of one of its firm natural gas transportation agreements with ETC Tiger.[17]

Commission's exclusive jurisdiction under FPA, bankruptcy court may not authorize rejection of Commission-regulated contract) *and Boston Generating, LLC*, No. 10 Civ. 6258, 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010) (recognizing parties' agreement that debtor must obtain approval from both bankruptcy court and Commission to reject Commission-regulated agreement).

[12] *See* Chesapeake Rehearing Request at note 37 (collecting cases).

[13] June 22 Order, 171 FERC ¶ 61,248 at P 27.

[14] *Creditworthiness Standards for Interstate Natural Gas Pipelines*, 111 FERC ¶ 61,412 (2005) (Creditworthiness Policy Statement).

[15] June 22 Order, 171 FERC ¶ 61,248 at P 31.

[16] *Id.* P 33.

[17] Chesapeake Energy Corp., Motion of Chesapeake Energy Corporation for Entry of an Order (I) Authorizing Rejection of the Negotiated Rate Firm Transportation

8. On July 22, 2020, Chesapeake filed a request for rehearing of the June 22 Order. On August 4, 2020, ETC Tiger filed an answer to Chesapeake's rehearing request.

II. Chesapeake Rehearing Request

9. Chesapeake argues that the Commission erred in the June 22 Order by failing to follow clear statutory language in the Bankruptcy Code, relevant court decisions, and the Commission's own precedent. Thus, Chesapeake asserts that the Commission should grant rehearing and determine that the bankruptcy courts have exclusive jurisdiction in determining whether to accept a request to reject a Commission-jurisdictional contract in bankruptcy.[18]

10. Chesapeake explains that section 365(a) of Chapter 11 of the Bankruptcy Code states that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."[19] Chesapeake states that while section 365(a) includes some exceptions to this authority, none of them reference the Commission's filed rate authority or a requirement for Commission approval of the rejection of Commission-jurisdictional contracts.[20]

11. Chesapeake also highlights the *FirstEnergy* decision, in which the United States Court of Appeals for the Sixth Circuit held that once Commission-jurisdictional contracts become part of a bankruptcy proceeding, they "are not de jure regulations but, rather, ordinary contracts susceptible to rejection in bankruptcy,"[21] and that the bankruptcy process is superior to the Commission's authority to regulate energy contracts and markets.[22] Chesapeake contends that the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) came to the same conclusion that the Commission must "rely upon the provisions of the Bankruptcy Code" to limit a debtor's ability to reject a Commission-jurisdictional contract.[23] Further, Chesapeake asserts that the bankruptcy court in *PG&E*

Agreements and Related Contracts Effective as of July 1, 2020, and (II) Granting Related Relief, Case No. 20-33233 (Bankr. S.D. Tex.) (June 28, 2020).

[18] Chesapeake Rehearing Request at 5-8.

[19] *Id.* at 5 (citing 11 U.S.C. § 365(a) (2018)).

[20] *Id.* at 5-6.

[21] *Id.* at 6 (quoting *FirstEnergy*, 945 F.3d at 446).

[22] *Id.*

[23] *Id*. at 6-7 (quoting *Mirant*, 378 F.3d at 521).

also affirmed that the debtor has the power to assume or reject most executory contracts under section 365(a) of the Bankruptcy Code without Commission involvement.[24] Chesapeake claims that the Commission has previously adopted a similar stance, finding that "once a shipper is in bankruptcy, the bankruptcy court has jurisdiction over its contracts. The Commission cannot interfere with this jurisdiction."[25]

12. Chesapeake states that it recognizes that the court in *Calpine* came to a different conclusion but argues that *Calpine* does not fully support the Commission's position. Chesapeake asserts that *Calpine* implicitly acknowledges that the Commission's filed rate authority does not cover all situations when a shipper has entered bankruptcy and seeks rejection of a Commission-jurisdictional contract.[26]

13. In addition, Chesapeake argues that the Commission erred in the June 22 Order by finding that rejection of a Commission-jurisdictional contract in bankruptcy constitutes a modification of the filed rate. Chesapeake contends that, in making this determination, the Commission mistakenly defined what rejection means in bankruptcy and, accordingly, this finding is inconsistent with judicial precedent, the Commission's own precedent, and the plain language of the Bankruptcy Code.[27]

14. Chesapeake reiterates that section 365(a) of Chapter 11 of the Bankruptcy Code does not include exceptions that pertain to the Commission's authority over filed rates. Rather, Chesapeake asserts that the only exceptions in the statute concern the possession and rejection of a timeshare interest in real property. Further, Chesapeake contends that the Supreme Court has held that rejection of a contract in bankruptcy constitutes a breach and, therefore, the debtor can stop performing its remaining obligations under the agreement. According to Chesapeake, in reaching this holding, the Supreme Court specifically rejected the Commission's position that rejection alters the terms and conditions of the contract.[28] Chesapeake contends that the June 22 Order reflects a misunderstanding of the *Mission Product* holding and the applicability of the filed rate doctrine to contract breach and rejection of a contract in bankruptcy. Chesapeake asserts that the Bankruptcy Code provides the bankruptcy court with the authority to reject a

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[24] *Id.* (citing *PG&E*, 603 B.R. at 486).

[25] *Id.* at 7 (quoting *Tenn. Gas Pipeline Co.*, 102 FERC ¶ 61,075, at P 71 (2003) (*Tennessee*)).

[26] *Id.* at 7-8.

[27] *Id.* at 9.

[28] *Id.* at 9-10 (citing *Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1666 (2019) (*Mission Product*)).

contract, permitting the non-breaching party to receive an unsecured claim against the bankruptcy estate for an amount equal to damages from the breach.[29] Chesapeake contends that the Commission previously followed the same course in finding that actions taken in a bankruptcy proceeding do not implicate the filed rate doctrine.[30] Chesapeake argues that the June 22 Order provides no explanation as to why Commission-jurisdictional contracts should be treated differently in this case.[31]

15. Chesapeake also challenges the Commission's acknowledgement that "rendering a determination on rejection motions is solely within the province of the bankruptcy court"[32] while also determining that the Commission alone has "the authority to modify the public law duties set forth in the filed rate."[33] Chesapeake argues that these holdings are inconsistent and the June 22 Order's failure to address this inconsistency is reversible error. Chesapeake also argues that the June 22 Order fails to explain why rejection of a contract in bankruptcy court requires a higher standard of scrutiny from the Commission than a shipper that simply breaches its contract in the ordinary course of business. Chesapeake asserts that the Commission has routinely declined to exercise jurisdiction over contract breaches under the *Ark. La. Gas Co. v. Hall*[34] precedent.[35]

16. Additionally, Chesapeake argues that the June 22 Order erred by departing without adequate explanation from its own precedent. Chesapeake asserts that the Commission

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[29] *Id.* at 10 (citing *Mirant*, 378 F.3d at 521).

[30] *Id.* at 10-11 (citing *USGen New England, Inc.*, 116 FERC ¶ 61,285, at P 32 (2006) (*USGen*) (finding that mitigation that reduced the amount the shipper in bankruptcy might have otherwise owed under the contract does not change the filed rate)).

[31] *Id.* at 11.

[32] June 22 Order, 171 FERC ¶ 61,248 at P 25.

[33] *Id.*

[34] 7 FERC ¶ 61,175, at 61,322 (1979) (*Arkla*) (explaining that the Commission's decision to exercise jurisdiction "over contractual issues otherwise litigable in state courts, depends . . . on three factors . . . : (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission").

[35] Chesapeake Rehearing Request at 12.

previously stated its intention to follow *Mirant*,[36] in which the Fifth Circuit determined that the Commission had no jurisdiction over the rejection of contracts in bankruptcy. Further, Chesapeake contends that the Commission failed to acknowledge many other orders where it stated that when a shipper enters bankruptcy, its contracts are subject to the jurisdiction of the bankruptcy courts and the Commission may not interfere.[37] Chesapeake also notes that the Commission has taken no action in numerous bankruptcy proceedings involving natural gas pipelines.[38] Chesapeake asserts that the June 22 Order's finding that the Commission's inaction in one proceeding is "inapposite to the

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[36] *Id.* (citing *Cal. Elec. Oversight Board v. Calpine Energy Servs., L.P.*, 114 FERC ¶ 61,003 (2006) (*CEOB*)).

[37] *Id.* at 13 (citing *Tennessee*, 102 FERC ¶ 61,075 at P 71; *see also Transwestern Pipeline Co.*, 103 FERC ¶ 61,066, at P 11 (2003) (*Transwestern*) (citing *Tennessee* for the proposition that the Commission "cannot interfere" with the Bankruptcy Court's jurisdiction); *N. Nat. Gas Co.*, 102 FERC ¶ 61,076, at P 71 (2003) (*Northern Natural Gas*); Creditworthiness Policy Statement, 114 FERC ¶ 61,412).

[38] *Id.* at 13. As described by Chesapeake, these cases include the following: *In re Vanguard Nat. Res., LLC*, No. 17-30560 (MI) (Bankr. S.D. Tex. Mar. 1, 2017) (natural gas pipeline companies did not object to debtor's rejection of their respective firm transportation agreements; no FERC involvement); *In re Linn Energy, LLC*, No. 16-60040 (DRJ) (Bankr. S.D. Tex. Jun. 27, 2016) (several counterparties did not object to debtors' rejection of their transportation service agreements; no FERC involvement); *In re Edgemarc Holdings, LLC*, No. 19-11104 (Bankr. D. Del. June 25, 2019) (counterparty expressly did not object to the debtors' rejection of firm transportation service agreements; no FERC involvement); *In re Bonanza Creek Energy, Inc.*, Case No. 17-10015 (Bankr. D. Del. Apr. 7, 2017) (neither counterparty nor FERC objected to rejection effectuated through plan of reorganization); *In re Mirant Corp.*, No. 03-46590 (Bankr. N.D. Tex. Aug. 14, 2003) (neither counterparty nor FERC objected to debtors' rejection of firm natural gas transportation agreement); *In re Calpine Corp.*, No. 05-60200 (Bankr. S.D.N.Y. Dec. 6 & 19, 2007) (multiple natural gas pipeline companies settled their objections to debtor's repudiation and/or rejection of their respective firm transportation agreements without FERC involvement); *In re Linn Energy, LLC*, No. 16-60040 (DRJ) (Bankr. S.D. Tex. June 27, 2016) (FERC did not object or otherwise involve itself in debtor's rejection, or the claims allowance process relating to the rejection, of transportation service agreement, which automatically terminated a month before court ruled on debtor's rejection motion); *USGen New England, Inc.*, 118 FERC ¶ 61172 (2007) (FERC declined to involve itself in the determination of damages relating to debtor's rejection of firm transportation service agreements governed by NGA where contracts were already terminated).

question of jurisdiction,"[39] misses the point that the Commission has not provided a reasoned explanation for its departure from the position it has historically taken.[40]

17. Finally, Chesapeake argues that the June 22 Order erred by failing to address the implications of ETC Tiger's tariff now that Chesapeake is in bankruptcy. Chesapeake notes that the June 22 Order found that "because the bankruptcy court has not issued any orders on the matter . . . ETC Tiger's petition cannot, by definition, conflict with any order of the bankruptcy court."[41] Chesapeake states that it has since filed a petition for bankruptcy, and thus argues that the Commission must now consider the implications of ETC Tiger's tariff provisions that prohibit ETC Tiger from taking any actions that conflict with any order of a bankruptcy court. According to Chesapeake, if the bankruptcy court determines that Chesapeake may reject the contracts at issue, ETC Tiger's tariff would control ETC Tiger's actions and would prohibit ETC Tiger from taking actions that conflict with the order on rejection.[42]

III. Discussion

A. Procedural Matters

18. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2019), prohibits an answer to a request for rehearing. Accordingly, we deny ETC Tiger's motion to answer and reject ETC Tiger's answer to Chesapeake's rehearing request.

B. Substantive Matters

19. We deny rehearing. We disagree with Chesapeake's contention that the June 22 Order fails to follow the plain language of the Bankruptcy Code. As the Supreme Court has long recognized, the primary purpose of the NGA is the protection of consumers,[43]

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[39] June 22 Order, 171 FERC ¶ 61,248 at P 27.

[40] Chesapeake Rehearing Request at 13-14.

[41] June 22 Order, 171 FERC ¶ 61,248 at P 33.

[42] Chesapeake Rehearing Request at 14-15.

[43] *See, e.g.*, *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959) (the NGA was "framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges"); *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944) (primary purpose of the NGA was to protect consumers from exploitation by natural gas companies).

and the Commission's role in evaluating the rates, terms, and conditions of contracts governed by the NGA is to protect the public interest. In contrast, the purpose of the Bankruptcy Code is to provide a path to rehabilitate bankrupt debtors.[44] These are two distinct, yet vitally important, roles, and we conclude that it is necessary to give effect to both.[45]

20. The firm natural gas transportation agreements at issue here are not mere executory contracts between two private parties; rather, these contracts, while privately negotiated, implicate the public interest and, as filed rates, carry the force of law.[46] Whether the rates in a Commission-jurisdictional contract are just and reasonable, and whether the abrogation or modification of such contract is necessary to protect the public interest, is a question that the Commission is statutorily obligated and exclusively authorized to consider.[47] The Commission's unique role neither subsumes nor is subsumed by the Bankruptcy Code.

21. We also find no conflict between the Commission's obligations under the NGA and the Bankruptcy Code. Although section 365(a) does not carve out an express exception for Commission-jurisdictional contracts, section 1129(a)(6) of the Bankruptcy Code expressly contemplates the Commission's role in a bankruptcy proceeding by providing that the bankruptcy court shall confirm a reorganization plan only if "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any such rate change provided for in the plan, or such rate change is expressly conditioned on such approval."[48] The role of the Commission– executing its exclusive authority to protect the public interest outside of the bankruptcy context – is consistent with section 1129's recognition that debtors must seek regulatory approval of rate changes.

22. Further, *Mission Product* makes clear that the specified exemptions of section 365 of the Bankruptcy Code are not intended to imply the negative inference urged by

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[44] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984).

[45] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments" and must instead strive "to give effect to both.'" (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

[46] *See, e.g.*, *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004) (filed rates "are considered to be 'the law'" (citation omitted)).

[47] *NextEra* Rehearing Order, 167 FERC ¶ 61,096 at P 13.

[48] 11 U.S.C. § 1129(a)(6) (2018).

Chesapeake. As the Supreme Court explained in *Mission Product*, the list of exceptions included in section 365 is "anything but" a "neat, reticulated scheme of narrowly tailored exceptions."[49] The Supreme Court noted that the exceptions listed in the Bankruptcy Code were added over time by Congress in response to discrete rulings attempting to limit the survival of contractual rights post-rejection under bankruptcy. The Court stated that, rather than presenting the full universe of exceptions, "Congress enacted the provisions, as and when needed, to reinforce or clarify the general rule that contractual rights survive rejection."[50] Thus, the lack of a specific exception for FERC-jurisdictional contracts within the Bankruptcy Code is not alone a basis to limit our findings here.

23. We disagree with Chesapeake's argument that the June 22 Order failed to follow existing court precedent. As the Commission acknowledged in the June 22 Order[51] and has explained in other proceedings that concerned the Commission's role in bankruptcy proceedings,[52] the law is unsettled regarding the interaction between the Bankruptcy Code and the Commission's jurisdiction.[53] Against this background, the Commission has had the opportunity to reevaluate and clarify its position with regard to this issue. Based on an analysis of the relevant precedent, the Commission has concluded that, in order to harmonize and give effect to both the NGA (or FPA) and the Bankruptcy Code, a debtor seeking to reject a Commission-jurisdictional contract through bankruptcy must obtain approval from the bankruptcy court to reject the contract and from the Commission to abrogate or modify the filed rate.[54]

24. Chesapeake's attempt to limit *Calpine*'s holding is unpersuasive. Chesapeake makes the vague claim that the decision somehow implicitly acknowledges[55] limits on the Commission's filed rate authority when a shipper has entered bankruptcy, but

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[49] *Mission Product*, 139 S. Ct. at 1664.

[50] *Id.* We note that the Supreme Court's holding in *Mission Product* is consistent with its earlier finding in *Penn Water* that public obligations survive the breach of a private contract. *See Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 422 (1952) (*Penn Water*).

[51] June 22 Order, 171 FERC ¶ 61,248 at P 27.

[52] *See, e.g.*, *NextEra* Rehearing Order, 167 FERC ¶ 61,096 at PP 29-35.

[53] *See supra* note 11.

[54] June 22 Order, 171 FERC ¶ 61,248 at P 20; *see also NextEra*, 166 FERC ¶ 61,049 at P 28; *Exelon*, 166 FERC ¶ 61,053 at P 20.

[55] Chesapeake Rehearing Request at 8.

Chesapeake makes no attempt to explain the contours of any such limits or how the alleged limits apply here. In *Calpine*, the United States District Court for the Southern District of New York found that it lacked jurisdiction to authorize rejection of wholesale power contracts "because doing so would directly interfere with [the Commission's] jurisdiction over the rates, terms, conditions, and duration of wholesale energy contracts."[56] The court rejected arguments that tried to distinguish between a breach of a contract through rejection and the termination of wholesale energy contracts, stating that a "breach" through rejection is not a typical breach where parties dispute the terms of a contract, but rather "the unilateral termination of a regulatory obligation."[57] The court acknowledged the conflict with *Mirant*, but also concluded that, even if it were "to adopt and apply *Mirant* faithfully, it would still find that FERC has exclusive jurisdiction over the fate of the Power Agreements."[58]

25. We also reject Chesapeake's argument that the Commission erred in finding that the rejection of a Commission-jurisdictional contract in bankruptcy court alters the essential terms of a contract that is also a filed rate. Chesapeake argues that the Bankruptcy Code allows the bankruptcy court to reject (i.e., allow for a breach of a contract) giving the non-breaching party an unsecured claim against the bankruptcy estate for the damages from the breach. However, the Commission addressed this argument on rehearing in the *NextEra* proceeding, finding that "rejection of a wholesale power contract amounts to more than a simple breach in the typical sense, in that rejection is a court-authorized breach that may result in the complete cessation of performance under contract."[59] Although the *NextEra* proceeding involved the FPA, the analysis applies equally to contracts governed by the NGA.[60] Further, the Supreme Court has held that a

[56] *Calpine*, 337 B.R. at 36.

[57] *Id.*

[58] *Id.* at 37. We note that this conclusion is consistent with the position taken by the dissent in *FirstEnergy*. *FirstEnergy*, 945 F.3d at 463 (Griffin, J., concurring in part and dissenting in part) ("As a practical matter, the majority's approach undercuts FERC's decision-making power over filed rates almost entirely, as its only recourse would be to go to the bankruptcy court on bended knee and ask it to modify or abrogate the 'filed-rate contract' that the majority describes. This has the potential to upend the statutory scheme carefully set up by Congress in the FPA, as a power company could not dream of such insulation from FERC's regulation in any other scenario."). Further, review of the *FirstEnergy* decision was rendered moot by settlements among the private parties that resulted in no change to rates filed with the Commission.

[59] *NextEra* Rehearing Order, 167 FERC ¶ 61,096 at P 21.

[60] *See* June 22 Order, 171 FERC ¶ 61,248 at P 21.

state court cannot alter, by awarding damages for breach of contract, the filed rate established in a Commission-jurisdictional contract.[61] Moreover, contrary to the Fifth Circuit's determination in *Mirant* that awarding a portion of the rate as damages does not alter the rate,[62] the Supreme Court explained in *Arkla Gas*, "under the filed rate doctrine, the Commission alone is empowered to make that judgment, and until it has done so, no rate other than the one on file may be charged."[63] Therefore, the Court determined that, by speculating about what rate may have been deemed reasonable in order to award damages, the lower court had usurped a function that Congress has reserved for the Commission.[64]

26. The Commission in *NextEra* explained that "although wholesale power contracts are privately negotiated, such contracts must be filed with the Commission in accordance with its regulations to be lawful under the FPA, and once filed, wholesale power contracts become the 'equivalent of a federal regulation,' imposing obligations on the parties that extend beyond private contract law."[65] The Commission found that wholesale power contracts were thus unlike other contracts that may be sought to be rejected in bankruptcy in that they were affected by the public interest and subject to regulatory review of changes to their rates, terms or conditions.[66]

27. Contrary to Chesapeake's argument, the Commission's approach on these matters is supported by the Supreme Court's decision in *Mission Product*, where the Court determined that a rejection of a private contract in bankruptcy did not rescind rights previously granted under the contract. Importantly, the Court determined that although bankruptcy allows a debtor to escape its future contract obligations, it "does not grant the

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[61] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, at 578-79 (1981) ("It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the [NGA].") (*Arkla Gas*).

[62] *Mirant*, 378 F.3d at 520-21.

[63] *Arkla Gas*, 453 U.S. at 581.

[64] *Id.* at 582.

[65] *NextEra* Rehearing Order, 167 FERC ¶ 61,096 at P 22; *see also Penn Water*, 343 U.S. at 422 ; *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004).

[66] *NextEra* Rehearing Order, 167 FERC ¶ 61,096 at P 22; *see also Calpine*, 337 B.R. at 37 ("[J]ust as regulatory action was required to transform the terms and conditions of the Power Agreements from mere contracts into regulated duties, so also is regulatory action from FERC required to eliminate those duties . . . ,") (citations omitted).

debtor an exemption from all the burdens that generally applicable law . . . imposes" on parties.[67] This is entirely consistent with the Commission's findings in the June 22 Order: the bankruptcy court has concurrent jurisdiction to address a contract under bankruptcy law, but its findings do not extinguish or modify the public law duties set forward in the filed rate approved by the Commission. The burdens under the NGA to seek Commission approval for modification or abrogation of a filed rate survive bankruptcy, as supported by *Mission Product*.

28. Chesapeake argues that the Commission provided no explanation for why rejection of a Commission-jurisdictional contract in bankruptcy should be treated differently from mitigation, citing to the Commission's order in *USGen. New England, Inc*.[68] This argument is not properly before the Commission as Chesapeake did not make this argument in its protest. Chesapeake cited to *USGen* as part of its argument that the Commission failed to intervene in prior gas pipeline provisions, but made no arguments regarding mitigation.[69] The Commission has long held that it will not consider new arguments on rehearing that could have been made originally.[70] Nevertheless, nothing in the *USGen* order conflicts with the June 22 Order. In fact, in *USGen* the Commission affirmed that it had concurrent jurisdiction over the contracts at issue in that proceeding, then provided guidance on the element under Commission jurisdiction: the filed rate.[71] The Commission found that mitigation was not addressed under the tariff at issue and that mitigation did not affect the filed rate. By contrast, the rejection of a contract in bankruptcy affects the rates, terms, and conditions of a filed rate.[72]

29. Chesapeake also claims that the Commission is being inconsistent in finding that both the bankruptcy court and the Commission have elements of jurisdiction over filed

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[67] *Mission Product*, 139 S. Ct. at 1665.

[68] Chesapeake Rehearing Request at 10-11 (citing *USGen*, 116 FERC ¶ 61,285 at P 32).

[69] *See* Protest and Answer of Chesapeake Energy Marketing, L.L.C., Docket No. RP20-881-000, at 12 n.35.

[70] *Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,203, at P 12 (2016); *see also Nev. Power Co.*, 111 FERC ¶ 61,111, at P 10 (2005).

[71] *See USGen*, 116 FERC ¶ 61,285 at PP 32-33 ("We clarify that the filed rate doctrine does not preclude the additional mitigation USGen is seeking, just as it did not bar the mitigation Tennessee already agreed to provide for reservation charges it expects to receive from the sale of USGen's turnback capacity.").

[72] *See NextEra* Rehearing Order, 167 FERC ¶ 61,096 at P 21.

rates, arguing that the Commission "cannot have it both ways."[73] But as the Commission explained in the June 22 Order,[74] this is exactly the system of concurrent jurisdiction established by Congress through the Bankruptcy Code and the Natural Gas Act. A bankruptcy court may render its determination on the rejection of the private obligations involved in a contract; the public law duties involved with a filed rate are solely the province of the Commission. As noted above, this system of concurrent jurisdiction is explicitly contemplated in section 1129(a)(6) of the Bankruptcy Code.[75]

30. We also reject Chesapeake's analogy between a rejection in bankruptcy and a breach of contract by a shipper in its ordinary course of business. As we noted in *NextEra*, a rejection of a contract in bankruptcy is broader than a breach in the ordinary course of business, as rejection is a court-ordered breach that may result in cessation of the entire contract. Regardless, even outside of the bankruptcy context, the analogy is flawed because, contrary to Chesapeake's claims, a breach of contract may indeed implicate the filed rate doctrine.[76] *FirstEnergy* similarly rejected the analogy raised by Chesapeake, stating that "an analogy to breach of contract outside of bankruptcy is also inapt inasmuch as Supreme Court caselaw . . . gives FERC authority to compel specific performance of an unprofitable or even illegal contract."[77]

31. We also reject Chesapeake's contention that the June 22 Order departs, without explanation, from the Commission's *Arkla* precedent. As an initial matter, the Commission's *Arkla* analysis is inapplicable to the jurisdictional question before us. We reiterate our position that rejection of a Commission-regulated contract is not a simple breach in the typical sense, because rejection is a court-authorized breach that may result in complete cessation of performance coupled with a damages award that materially departs from the filed rate.[78] Such unilateral abrogation or modification of a filed rate

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[73] Chesapeake Rehearing Request at 11.

[74] June 22 Order, 171 FERC ¶ 61,248 at P 25.

[75] 11 U.S.C. § 1129(a)(6) (2018).

[76] *See, e.g.*, *Alliance Pipeline L.P.*, 153 FERC ¶ 61,195, at P 27 (2015) (asserting jurisdiction under *Arkla* over a contract interpretation case that affected the filed rate of the pipeline owner); *Rockies Express Pipeline LLC*, 145 FERC ¶ 61,179, at P 31 (2013) (asserting primary jurisdiction under *Arkla* over a contractual dispute over a Most Favored Nations clause that affected FERC-jurisdictional rates).

[77] *FirstEnergy*, 945 F.3d at 442.

[78] *See supra* P 24 (discussing the Supreme Court's holding in *Arkla Gas* that an award of damages by a state court for breach of a Commission-jurisdictional contract

contract remains subject to the Commission's exclusive regulatory review; only the Commission may approve changes to a debtor's public law duties embodied in a filed-rate.

32. In any case, Chesapeake's characterization of the Commission's decisions to decline to assert primary jurisdiction as "routine"[79] is misleading. To characterize these decisions as routine matters erroneously implies that decisions declining to exercise primary jurisdiction under *Arkla* are made as part of a broader general policy and without examining the particular facts of each case. Contrary to this characterization, *Arkla*, by its nature, is a fact-specific inquiry that requires analysis of how three factors apply to facts presented in each case: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.[80] In applying these factors to specific cases involving bankruptcy issues, the Commission has reached different conclusions.[81]

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directly implicates the filed rate and usurps the Commission's exclusive jurisdiction over that rate).

[79] Chesapeake Rehearing Request at 12.

[80] *Arkla*, 7 FERC at 61,322.

[81] *Compare Pub. Util. No. 1 of Snohomish County, Wash.*, 115 FERC ¶ 61,375, at PP 2, 48 (2006) (asserting jurisdiction over a termination of payment claim pursued by the debtor in bankruptcy court in spite of failing the *Arkla* test because the case presented a matter of first impression where the Commission "has been granted exclusive jurisdiction under section 1290 [of EPAct 2005] with respect to a termination payment claim"), *and Richard Blumenthal, Att'y Gen. of the State of Conn. v. NRG Power Marketing, Inc.*, 103 FERC ¶ 61,344, at PP 71-72 (2003) (asserting jurisdiction over contracts related to the contract the debtor sought to reject in bankruptcy after applying the *Arkla* test and finding it "appropriate for the Commission to resolve this matter"), *with City of Vernon, Cal.*, 115 FERC ¶ 61,374, at P 44 (2006) (stating, in its application of *Arkla*, that even if the Bankruptcy Code's "automatic stay and its exceptions were not at issue" the Commission would decline to exercise its primary jurisdiction over the contractual claims), *and Entergy Servs., Inc.*, 105 FERC ¶ 61,244, at P 12 (2003) (applying *Arkla*, the Commission declined to take jurisdiction of a contract dispute involving an entity that filed for bankruptcy), *and with Midwest Generation, LLC*, 157 FERC ¶ 61,016, at P 15 (2016) ("Applying the *Arkla* factors, we defer to the bankruptcy court regarding whether Midwest's liability for refunds that accrued prior to [the date that

33. Upon reflection of the importance of this matter, we note that to the extent the Commission's application of *Arkla* in previous cases involving issues related to bankruptcy is inconsistent with our finding of concurrent jurisdiction in this case, we depart from those decisions. Given the unsettled state of the law, noted in *NextEra*,[82] and also, the increase in bankruptcy-related litigation, we have reexamined the FPA, NGA, and Bankruptcy Code in light of the arguments raised, and conclude that the Commission and the bankruptcy courts have concurrent jurisdiction to review and address the disposition of Commission-jurisdictional contracts sought to be rejected through bankruptcy. Further, although we consider this case to be distinguishable from instances where the Commission has previously applied *Arkla*, we find that the application of the *Arkla* factors in this case further supports the Commission's exercise of jurisdiction over the contracts in dispute here. Given the need to evaluate the public interest implications of abrogating or modifying such a contract (through rejection in bankruptcy), the Commission possesses special expertise in this matter, thereby satisfying the first prong of the *Arkla* analysis. Regarding the second prong, we find that the current split in the courts on this issue demonstrates the need for uniformity of interpretation to promote regulatory certainty and ensure that the rules pertaining to contract rejection in bankruptcy do no vary on the basis of venue. Finally, we find that the third prong of the analysis is satisfied because this case is undeniably important in relation to the regulatory responsibilities of the Commission under which only the Commission can authorize abrogation or modification of a filed rate.

34. We disagree with Chesapeake's assertion that the Commission's decision in this proceeding is an unexplained departure from Commission precedent. In *CEOB*, the Commission provided interim guidance in response to a petition seeking specific performance of a wholesale power contract that the debtor sought to reject through bankruptcy. The Commission noted that it had reached a different conclusion in a previous case where the Commission required specific performance of a contract that the seller sought to reject through bankruptcy, but that the Fifth Circuit had issued the *Mirant* decision (then the most recent federal court decision on this issue), and the Commission stated that it intended to follow that decision.[83] However, *CEOB* cannot reasonably be read as an endorsement of *Mirant's* substantive holding. To the contrary, the Commission concluded that a "Bankruptcy Court cannot reject a FERC-jurisdictional contract under the business judgment rule 'because it would not account for the public

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Midwest emerged from bankruptcy] has been discharged, and thus decline to direct Midwest to pay such refunds here.").

[82] *NextEra*, 166 FERC ¶ 61,049 at P 28.

[83] *CEOB*, 114 FERC ¶ 61,003 at P 11.

interest inherent in the transmission and sale of electricity.'"[84] The Commission therefore stated that a bankruptcy court must "carefully scrutinize the impact of rejection upon the public interest and . . . ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers."[85] Moreover, subsequent to issuance of *CEOB*, the United States District Court for the Southern District of New York issued *Calpine*, which addressed the same circumstances involving the same parties. As noted, in *Calpine*, the court found that it lacked jurisdiction to authorize rejection of wholesale power contracts because doing so would directly interfere with the Commission's jurisdiction over filed rates.[86]

35. We find that Chesapeake's reliance on *Tennessee*, *Transwestern*, and *Northern Natural Gas* is misplaced. None of these cases required the Commission to consider its jurisdictional posture in the event that a shipper sought to reject a Commission-jurisdictional contract in bankruptcy. Instead, these cases address narrowly defined circumstances pertaining to specific creditworthiness provisions and do not stand for the general proposition that the Commission's authority over a filed rate evaporates with the filing of a bankruptcy petition, or that the Commission has disclaimed its jurisdiction in the context of rejection of a Commission-jurisdictional contract in bankruptcy.

36. Moreover, as noted above,[87] the federal courts are now split on this issue and that split has given the Commission opportunity to reevaluate and clarify its position. Chesapeake's rehearing request ignores that the precedent that the June 22 Order allegedly failed to address pre-dates the inconsistent conclusions reached by the courts. Since reevaluating its position on this issue, the Commission has consistently asserted the position that it has concurrent jurisdiction with the bankruptcy courts.

37. We continue to find that the Creditworthiness Policy Statement is inapplicable to the question of whether Commission approval is necessary to abrogate or modify a filed

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[84] *Id.*

[85] *Id.* On remand from the Fifth Circuit, the district court rejected the debtor's motion for rejection on other grounds, but concluded that, in considering whether to approve rejection of the contract, the court would need to scrutinize the impact of such rejection on the public interest and would need to allow the Commission an opportunity to participate in the proceedings and evaluate the effect that such a rejection would have on the public interest. *In re Mirant Corp.*, 318 B.R. 100 (Bankr. N.D. Tex. 2004). The Fifth Circuit affirmed the district court's findings. *In re Mirant Corp.*, 197 Fed.Appx. 285 (5th Cir. 2006).

[86] *Calpine*, 337 B.R. at 36.

[87] *See supra* P 22.

rate embodied in a Commission-regulated contract that a debtor seeks to reject through bankruptcy. As the Commission stated in the June 22 Order, "the Creditworthiness Policy Statement addresses different issues than those raised in this context."[88] While the Creditworthiness Policy Statement addresses the process for pipelines to terminate or suspend service in response to a shipper's loss of creditworthiness, it does not speak to the question of a shipper's right to unilaterally reject a contract through bankruptcy or the Commission's role in that process. The Creditworthiness Policy Statement does, however, expressly require a public interest determination by the Commission before a pipeline may terminate service,[89] and Chesapeake offers no argument as to why a similar determination would not be necessary when the shipper is the party seeking to reject a contract. Thus, we find no inconsistency between the policies discussed in the Creditworthiness Policy Statement and the Commission's findings in this proceeding. Moreover, in its rehearing request, Chesapeake offers no further explanation or arguments as to how the Creditworthiness Policy Statement constitutes relevant precedent. Accordingly, we find no reversible error in how the June 22 Order addressed the Creditworthiness Policy Statement.

38. We find that the Commission correctly determined in the June 22 Order that situations in which the Commission took no active role in a bankruptcy proceeding have no bearing on the question presented here. The cases cited by Chesapeake, as described by Chesapeake itself, involve situations where the counterparties agreed to the rejection of the contract and the Commission was not invited to opine on the public interest aspects of the contracts at issue.[90] When a party has requested Commission involvement, the Commission has consistently held that it has exclusive authority over the public law aspects of a private contract in bankruptcy.[91] Even in *CEOB*, although the Commission acknowledged that *Mirant* was, at that time, the highest available court's pronouncement on the issue, the Commission stated that a bankruptcy court must "carefully scrutinize the impact of rejection upon the public interest" and sought comment on whether rejection of the contract at issue would impact the public interest in order to develop a record and

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[88] June 22 Order, 171 FERC ¶ 61,248 at P 31.

[89] Creditworthiness Policy Statement, 111 FERC ¶ 61,412 at P 23 ("Termination of service is an abandonment of service, and the Commission's regulations, therefore, require a pipeline to provide 30 days notice to the Commission prior to terminating service. This notice ensures that the Commission has the opportunity to determine if termination is in the public convenience and necessity.").

[90] *Supra* note 38.

[91] *See, e.g.*, *NextEra*, 166 FERC ¶ 61,049 at P 29; *Exelon*, 166 FERC ¶ 61,053 at P 26.

inform the bankruptcy court of its views regarding the potential rejection of that contract.[92] Thus, we find that the Commission's holdings in the June 22 Order do not constitute an unexplained departure from the Commission's historical position on this issue.

39. Finally, Chesapeake argues that the Commission should address the implications of sections 2.8, 12.1 and 12.2 of ETC Tiger's tariff now that Chesapeake has petitioned for bankruptcy. The Commission found Chesapeake's arguments inapplicable previously because "the bankruptcy court has not issued any orders on the matter; therefore, ETC Tiger's Petition cannot, by definition, conflict with any order of the bankruptcy court."[93] We note initially that Chesapeake is still unable to identify an order of the bankruptcy court that conflicts with a Commission order; an argument that orders are "imminent" is insufficient to support its request for rehearing and the anticipated content of nonexistent orders is entirely speculative. We also disagree with Chesapeake's contention that ETC Tiger's tariff would prohibit ETC Tiger from taking actions that would conflict with an order on rejection. As Chesapeake notes, the provisions within sections 2.8, 12.1 and 12.2 of the tariff only prohibit ETC Tiger from taking any action *under those sections* that conflicts with an order of a bankruptcy court. Chesapeake is unable to identify a provision in the tariff that would invalidate the instant petition; as such, we deny rehearing. Nothing in this order prevents Chesapeake from raising concerns if ETC Tiger later makes a filing or seeks Commission action that Chesapeake views as inconsistent with ETC Tiger's tariff.

<u>The Commission orders</u>:

Chesapeake's request for rehearing of the June 22 Order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[92] *CEOB*, 114 FERC ¶ 61,003 at PP 11-14.

[93] June 22 Order, 171 FERC ¶ 61,248 at P 33.

Document Content(s)

EXHIBIT C

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

In re:	§	
	§	**Case No. 20-32631**
Ultra Petroleum Corp., *et al.*,	§	
	§	**Chapter 11**
Debtors.	§	

Response by FERC to Court's July 6 Order
(Related to Doc. No. 382)

To the Honorable Marvin Isgur,
United States Bankruptcy Judge:

The Federal Energy Regulatory Commission responds to the Court's order entered July 6.

Summary

FERC is not saying that it cannot participate in this bankruptcy case at all without a prior vote of its Commissioners. Instead, FERC is saying that it cannot take a position about whether rejection affects the public interest without a vote by its Commissioners. FERC appreciates that the Court has invited it to participate in these proceedings, but until and unless a party files a petition with FERC, FERC hears from both sides, FERC receives evidence, and FERC's Commissioners hold a vote based on the foregoing, FERC lacks an order on which it can rely. Without an order, FERC cannot opine about the potential effect of rejection on the public interest here.

Background

On May 14, 2020, Ultra Petroleum Corp., *et al.*, filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. [Doc. No. 1].

That same day, the Debtors filed their motion to reject the Negotiated Rate Firm Transportation Agreement with Rockies Express Pipeline LLC. [Doc. No. 7]. The Debtors' motion noted that the Court may need to consider "the impact of rejection on the public interest . . . ." [Doc. No. 7, p. 16, ¶ 36]; *see In re Mirant Corp.*, 378 F.3d 511, 525 (5th Cir. 2001) (instructing lower court to consider scrutinizing "the impact of rejection upon the public interest . . . ."). Rockies Express Pipeline ("REX") objected to the Debtors' motion by arguing, among other things, that rejecting the Agreement would harm the public interest. [Doc. No. 325, p. 2]. The Debtors replied to the objection arguing, among other things, that rejection of the Agreement "would not harm the public interest. [Doc. No. 373, p. 6].

On June 15, 2020, the Court entered an order requesting that FERC "participate as a party-in-interest in these proceedings to argue and to comment on whether" the proposed rejection "would harm the public interest."[1] [Doc. No. 274].

On June 29, 2020, REX moved for relief from the automatic stay to pursue a petition for declaratory order with FERC. REX stated that it sought a determination from FERC as to whether rejection of the Agreement would harm "the public interest under the Natural Gas Act . . . ." [Doc. No. 349, p. 2].

[1] FERC unsuccessfully moved for reconsideration of the Court's order. [Doc. Nos. 320, 329, 335, and 343].

FERC replied in support of the motion for relief from stay to argue that FERC would benefit from someone filing a petition before it "that would enable FERC's Commissioners to consider and vote on the public interest issues." [Doc. No. 369, p. 1]. After making that vote, FERC would then be able to come to this Court and take a position on the public interest.

The Debtors responded in opposition to relief from stay. Their response cited a number of instances where FERC has participated as *amicus* and argued that FERC could "do the same with respect to the Rejection Motion", but the Debtors missed an important distinction. This Court did not invite FERC to participate merely as *amicus*—this Court invited FERC to opine about the *facts* of this case and whether rejection of the Agreement would affect the public interest.

On July 6, 2020, the Court invited FERC to respond to the Debtors' allegation that FERC sometimes participates in federal court "without having proceeded through an adjudicatory proceeding." [Doc. No. 382].

Argument

FERC participation as an amicus or intervenor is extremely rare. Sometimes FERC can take a position in court without a vote of its Commissioners, but sometimes it cannot. For issues that are purely legal, or for factual questions on which the Commission has already spoken, FERC can appear in court and state its position. However, for factual questions on which FERC has not yet entered an order—like whether rejection of the Agreement would harm the public interest—FERC must hear from both sides, take evidence, and hold a vote of its Commissioners before taking a position.

I. Authority Relevant to FERC's Ability to Take a Position

FERC is a multi-member independent administrative agency that acts through its orders, thereby creating precedent and policies. *See* 42 U.S.C. § 7171(b)(1). FERC's enabling statute requires that at least three Commissioners must be present to constitute a quorum to act and "[a]ctions of the Commission shall be determined by a majority vote of the members present." 42 U.S.C. § 7171(e); *Pub. Citizen Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016) ("These requirements comport with the 'almost universally accepted common-law rule' that only a 'majority of a collective body is empowered to act for the body'" and "an agency's authority runs to it as 'an entity apart from its members, and it is its institutional decisions—none other—that bear legal significance.'") (quoting *Fed. Trade Comm'n v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967) and *Pub. Serv. Comm'n of N.Y. v. Fed. Power Comm'n*, 543 F.2d 757, 776 (D.C. Cir. 1974)); *see also* 5 U.S.C. § 552b(a)(2) (defining an agency "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency"); 18 C.F.R. § 375.202(a)(1) (defining "[m]eeting" to be "the deliberations of at least a quorum of the Commission").

FERC must come to a determination "on the record, after an opportunity for an agency hearing," to come to a determination. 42 U.S.C. § 7172(d); 5 U.S.C. § 554. FERC lacks the statutory authority to determine *sua sponte* whether the rejection under 11 U.S.C. § 365 of the Agreement at issue in the Debtors' motion is required by, or contrary to, the public interest. FERC would not be complying with its enabling statute if it took a position about the public interest issues without providing both sides the opportunity to present their case, the appropriate vote, and an order.

II. Cases Cited by the Debtors

The cases cited by the Debtors are each federal preemption cases examining whether state rate programs conflicted with the Commission's jurisdiction. Those cases are distinguishable from this case because they presented straightforward questions of law and FERC was able to participate in each of them relying on its prior orders. Unlike a public interest inquiry into a specific contract or set of contracts, FERC did not need to receive additional evidence before taking a position.

The Debtors first cite *Electric Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018), which addressed the question whether an Illinois statute implementing Zero Emission Credit (ZEC) subsidy payments for certain state-selected generation facilities was preempted by the Federal Power Act following the Supreme Court's then-recent decision in *Hughes v. Talen Energy Marketing, L.L.C.*, 136 S. Ct. 1288 (2016). In that case, the Seventh Circuit invited the United States—not only the Commission—to submit an amicus brief. Indeed, FERC had declined an earlier request from the district court to take a position, noting that it was the subject of a pending complaint before the Commission and that the Commission lacked a quorum to address the pending complaint. *See* Exhibit A, p. 27 (discussing declination).

Moreover, the participation by the United States in *Electric Power Supply* was different than what FERC would have to do here. The United States' brief in *Electric*

Power Supply dealt with issues of law—not fact—meaning FERC did not need to consider additional evidence in taking a position. Moreover, that amicus brief did not take its position about the law in a vacuum. It relied both on the U.S. Supreme Court's decision in *Hughes v. Talen Energy Marketing, L.L.C.*, 136 S. Ct. 1288 (2016), and a well-established body of orders FERC had issued in separate proceedings concerning state subsidies that the Commission had already issued, detailed in Part III of that brief.[2] Exhibit A, pp. 28-33.

The Debtors next cite *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014). In this case also, utilities filed suit seeking declaratory judgment that the Federal Power Act preempted a New Jersey state statute. FERC submitted a brief on a legal question—whether FERC had exclusive jurisdiction to set the rates for electricity capacity in a certain context. The Commission's amicus brief is attached as Exhibit B. FERC was able to take a position about the scope of its jurisdiction by relying on prior orders it had issued. Indeed, the Commission's orders eliminating the state mandate exemption upon which New Jersey's subsidy program had relied were being simultaneously litigated before the Third Circuit itself in a parallel petition for review. *See N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3rd Cir. 2014) (affirming the Commission's orders).[3]

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[2] It also bears noting that the Second Circuit was simultaneously considering a preemption case addressing a New York ZEC program akin to the one adopted in Illinois. *See Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018). FERC did not participate in that case; nor was it invited to do so.

[3] Moreover, like the ZEC preemption cases that were simultaneously before the Seventh and Second Circuits, the New Jersey preemption case before the Third Circuit in *Solomon* occurred simultaneously with a Fourth Circuit preemption case involving a substantially similar Maryland rate program in *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *aff'd sub nom. Hughes v. Talen Energy*

Third, the Debtors point to *Allco Renewable Energy Ltd. v. MA ELEC. CO.*, 208 F. Supp. 3d 390 (D. Mass. 2016). This was a case where a solar generation developer filed suit to challenge state regulations. As with the previous two cases, FERC submitted a brief on a question of law. FERC provided legal authority about (a) whether regulations by the Massachusetts Department of Public Utilities conflicted with FERC regulations implementing the Public Utility Regulatory Policies Act, (b) the structure of contracts between facilities and utilities, and (c) whether obligations under federal law create private rights of action. FERC's brief was explanatory in nature limited to educating the court about how PUPRA regulation works in response to the Court's specific questions. The brief is attached as Exhibit C.

Conclusion

FERC is not saying that it can never take a position in court without conducting a prior administrative proceeding, but fairness requires limits. On a question that is purely legal in nature or on a question where FERC has previously issued an order, FERC can present its position to a court. However, where FERC must consider evidence and hear from competing parties, FERC cannot take a position without completing its own administrative process.

It would not be fair to either the Debtors or to REX for FERC to take sides before hearing the parties out. Until and unless both sides present their evidence and arguments to FERC, and until and unless the Commissioners vote, FERC cannot

Mktg., LLC, 136 S. Ct. 1288 (2016). The Commission did not participate in the Fourth Circuit proceeding, and was not invited to do so.

tell this Court whether or how it believes the public interest would be affected by rejection of the Agreement.

Dated: July 20, 2020.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that he served a true and correct copy of the foregoing Brief on the parties receiving ECF notification in this case on July 20, 2020, by ECF notice.

s/ Richard A. Kincheloe
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EXHIBIT D

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

In re:	§	
	§	**Case No. 20-32631**
Ultra Petroleum Corp., *et al.*,	§	
	§	**Chapter 11**
Debtors.	§	

Limited Objection by the Federal Energy Regulatory Commission to 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
(Related to Doc. No. 7)

To the Honorable Marvin Isgur,
United States Bankruptcy Judge:

The Federal Energy Regulatory Commission makes this limited objection to the motion by Ultra Resources, Inc., to reject the negotiated rate firm transportation agreement with Rockies Express Pipeline LLC.

Summary

FERC does not oppose the Court approving rejection of executory contracts as permitted under 11 U.S.C. § 365. However, FERC does oppose the Court entering an order that purports to retain "exclusive jurisdiction" over the future "implementation, interpretation, and enforcement" of an order.

Background

Ultra Petroleum Corp., *et al.*, filed voluntary chapter 11 bankruptcy petitions on May 14, 2020. [Doc. No. 1]. As part of the first-day motions, Ultra Resources, Inc., filed a Motion 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. [Doc. No. 7]. The proposed order included with this motion provided that:

> This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

[Doc. No. 7-4, p. 2].

Limited Objection

FERC does not oppose the Court approving rejection of one or more executory contracts under 11 U.S.C. § 365. FERC does oppose entry of an order that purports to divest other tribunals of jurisdiction.

While a "Bankruptcy Court plainly [may retain] jurisdiction to interpret and enforce its own prior orders," *Travelers Indemn. Co. v. Bailey*, 129 S. Ct. 2195, 2205, 557 U.S. 137, 151 (2009), it may not divest other courts of their concurrent jurisdiction to interpret bankruptcy court orders. *See In re Skyline Woods Country Club*, 636 F.3d 467, 471 (8th Cir. 2011) (discussing concurrent jurisdiction of a state court to interpret bankruptcy court's sale order). The jurisdiction held by bankruptcy courts under § 1334(b) is "original *but not exclusive* . . . ." 28 U.S.C. § 1334(b) (emphasis added); *see Skyline Woods Country Club*, 636 F.3d at 471 (discussing limits of exclusive jurisdiction); *Whitehouse v. LaRoche*, 277 F.3d 568, 576 (1st Cir. 2002). The Bankruptcy Court's exclusive jurisdiction is limited to presiding over the bankruptcy case itself, 11 U.S.C. § 1334(a), and it cannot divest other courts of concurrent jurisdiction to interpret this Court's orders.

A purported retention of exclusive jurisdiction is especially problematic in this context. The rejection of a pipeline contract constitutes a breach of that contract, but rejection does not necessarily eliminate all rights conferred under the contract. 11 U.S.C. § 365(g); *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661 (2019). Although this Court has jurisdiction to authorize rejection under 11 U.S.C. § 365, it cannot deprive FERC of its authority to make certain determinations under non-bankruptcy law. *See In re Mirant Corp.*, 378 F.3d 511, 518 (5th Cir. 2004) (discussing authority of FERC under the Federal Power Act).[1]

The concern is with the possibility that a party may in the future present a dispute to FERC that somehow implicates a rejected contract. If that happens, and if FERC is required to "implement[], interpret[], [or] enforce[]" the order approving the rejection, FERC should not have to contend with an order purporting to compel it to cede its authority under the Natural Gas Act to the Bankruptcy Court. That result would be contrary to the Fifth Circuit's decision in *Mirant*.

[remainder of page intentionally left blank]

[1] Although *Mirant* is currently binding on this Court, FERC does not necessarily agree with its holding. By citing *Mirant*, FERC does not waive any challenge to its holding in any appeal, whether arising in the context of this Bankruptcy Case or another.

Accordingly, FERC requests that the Court delete the paragraph purporting to retain exclusive jurisdiction in this Court from the proposed order and grant FERC such other and further relief as is equitable and just.

Dated: July 21, 2020.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that he served a true and correct copy of the foregoing Limited Objection on the parties receiving ECF notification in this case on July 21, 2020, by ECF notice.

s/ Richard A. Kincheloe
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

CERTIFICATE OF SERVICE

I, Brett S. Turlington, hereby certify that on September 16, 2020, I caused a copy of the following documents to be served in the manner indicated upon the parties identified in the attached service list:

i) *Platte River Midstream, LLC, DJ South Gathering, LLC, and Platte River Holdings, LLC's Joinder in and Statement in Support of Grand Mesa Pipeline, LLC's Motion for Relief from the Automatic Stay*

[Signature Page Follows]

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

Dated: September 16, 2020
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