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)

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

Grand Mesa Pipeline, LLC ("**Grand Mesa**") submits this reply (the "**Reply**") in support of the *Motion of Grand Mesa Pipeline, LLC for Order Confirming that the Automatic Stay Does Not Apply or, in the Alternative, for Relief from the Automatic Stay* [D.I. 364] (the "**Lift Stay Motion**") and in response to *Debtors' Objection to Motion of Grand Mesa Pipeline, LLC for Order Confirming that the Automatic Stay Does Not Apply or, in the Alternative, For Relief from the Automatic Stay* [D.I. 507] (the "**Objection**") filed by the above-captioned debtors and debtors in possession (collectively, the "**Debtors**"). In support of this Reply, Grand Mesa states:[2]

PRELIMINARY STATEMENT

1. The Objection is premised substantially on mischaracterizations of the Lift Stay Motion and the positions asserted by Grand Mesa therein. Throughout the Objection, the Debtors contend that Grand Mesa is attempting to interfere with this Court's jurisdiction over the assumption or rejection of contracts.[3] That contention is incorrect. Indeed, the Preliminary

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.
[2] Capitalized terms used but not otherwise defined herein have the meanings given in the Lift Stay Motion.
[3] *See* Objection, ¶¶ 1, 3, 24, 41, 44 and Conclusion. The Debtors go as far as stating that Grand Mesa does not dispute this, citing paragraph 13 of Grand Mesa's Lift Stay Motion. To the contrary, Grand Mesa does in fact dispute the

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Statement to the Lift Stay Motion sets forth in plain terms Grand Mesa's position:

> To be clear, Grand Mesa does not seek through this Motion to limit the jurisdiction or adjudicatory authority granted to this Court by Congress. The ICA and the Bankruptcy Code provide FERC and this Court with separate authorities over separate domains, which are to be harmonized as two co-equal acts of Congress.[4]

2. Grand Mesa's position, made clear in the Lift Stay Motion and once again here, is that while the Bankruptcy Court has the exclusive jurisdiction over the assumption or rejection of contracts to fulfill its statutory mandate to facilitate a reorganization in bankruptcy, FERC has the exclusive jurisdiction under the Interstate Commerce Act (the "**ICA**") over contracts for the interstate transportation of oil and the rates and terms and conditions of such service. In other words, both this Court and FERC have independent and concurrent jurisdiction to enforce the laws delegated to them by Congress. Consequently, both this Court and FERC must approve a debtor-shipper's request to unilaterally reject (in the case of the Court) or abrogate or modify (in the case of FERC) the TSAs.[5] At a minimum, the Court must obtain FERC's determination, through its own procedures and process, as to whether rejection of FERC-jurisdictional agreements would adversely affect the public interest that FERC is mandated to protect under its governing statutes.[6]

3. Similarly, the Debtors appear to rebut the argument that FERC has jurisdiction over the Debtors' motion to reject the TSAs filed in this Court.[7] Grand Mesa, however, made no such argument. Grand Mesa explicitly acknowledges this Court's jurisdiction over the Rejection Motion. The issue is how to harmonize two statutes that provide both this Court and FERC with

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Debtors' contention. As for the Bayswater TSA, Grand Mesa contends that it cannot be rejected, but that is for an altogether different reason—it contains real property rights that run with the land.

[4] *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (stating that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

[5] Lift Stay Motion, ¶ 54.

[6] *See* Lift Stay Motion, ¶¶ 57-60; *In re FirstEnergy Solutions Corp. v. FERC*, 945 F.3d 431, 454-55 (6th Cir. 2019); *In re Mirant Corp*., 378 F.3d 511, 523-26 (5th Cir. 2004)

[7] *See* Objection, ¶ 48. ("The notion, however, that FERC has jurisdiction over the Rejection Motion is unsustainable.").

independent jurisdiction over the TSAs for the purpose of achieving different statutory public interest objectives.

4. The TSAs are not ordinary private contracts. Rather, each TSA constitutes a "filed rate" subject to the exclusive jurisdiction of FERC, that has the force and effect of law. Once approved by FERC, the duty to comply with the TSA's contractual terms "springs from [FERC's] authority, not from the law of private contracts."[8] Each TSA is subject to FERC's jurisdiction, which section 365 of the Bankruptcy Code does not, and was not intended to, override.

5. While this Court undisputedly has jurisdiction under the Bankruptcy Code to determine whether an executory contract may be assumed or rejected, the only lawful forum in which a contracting party may seek to modify or abrogate a FERC-jurisdictional agreement that FERC has accepted under the ICA is before FERC itself or a court authorized to review FERC's order.[9] No court may collaterally attack FERC's orders approving a filed rate, or modify a filed rate. If Grand Mesa is permitted to petition FERC, and if FERC determines (as it has recently in other proceedings discussed herein) that rejection of the TSAs in bankruptcy would constitute a modification or abrogation of the contract under the ICA, then FERC's determination is only subject to review by the federal circuit court of appeals authorized to review FERC's orders directly (and would be entitled to deference under the U.S. Supreme Court's opinion in *Chevron*).[10] This is a separate and distinct inquiry, and one outside the scope of the traditional assumption or rejection analysis performed regularly by this Court. As such, the Debtors may not ignore, and as a result collaterally attack, FERC-approved transportation agreement terms, including the filed

[8] *Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 422 (1952).
[9] *See, e.g.,* Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 391 (2003); Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354 (1988); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); and Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951).
[10] *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837 (1984).

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

6. To be clear, Grand Mesa does not seek through the Lift Stay Motion to limit the jurisdiction or adjudicatory authority granted to this Court by Congress. The ICA and the Bankruptcy Code provide FERC and this Court with separate authorities over separate domains, which are to be harmonized as two co-equal acts of Congress.[11] In contrast, allowing rejection of the TSAs, without appropriate FERC review and approval of the filed rate, would amount to an unlawful termination of the regulatory obligations under the TSAs because it would disregard FERC's independent jurisdiction under the ICA. Rejection of a FERC-jurisdictional contract in bankruptcy "alters the essential terms and conditions of a contract that is also a filed rate; therefore, [FERC's] approval is required to modify or abrogate the filed rate."[12] Accordingly, the effect of rejection of the TSAs goes well beyond that of a simple contract rejection and any determination of the propriety of rejecting the TSAs must, therefore, include a review and determination by FERC that abrogation or modification of the TSAs is consistent with the public interest under the ICA.[13]

7. Despite the Debtors' suggestion, inviting FERC to take a position in these Chapter 11 Cases is not a solution. FERC is an agency that "speaks" solely through its orders such that a review of, and determination on, these issues can only be achieved through filing a petition with

[11] *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (stating that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").
[12] *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248, at ¶ 23 (2020) ("***ETC Tiger Pipeline***").
[13] As explained herein, the "public interest" standard has a specialized meaning under FERC precedent and the ICA, establishing an extremely high bar to any attempt to modify or abrogate a freely-negotiated FERC-jurisdictional agreement such as the TSAs.

the Commission.[14] Given the concurrent and significant federal interest associated with the Debtors' request to reject the TSAs, this Court should defer to FERC to determine whether rejection of the TSAs is consistent with the public interest under the ICA. As explained fully herein, Grand Mesa submits that rejection of the TSAs by this Court cannot be implemented without also obtaining approval from FERC of any modification or abrogation of the TSAs. At a minimum, the Court must consider FERC's informed determination on the impact that rejection of the TSAs would have on the public interest under the ICA.

8. Upon securing this Court's approval, Grand Mesa, therefore, intends to file a declaratory petition to enable FERC to make such a review and determination regarding the TSAs. The filing of the petition will not implicate the automatic stay and, even if it does, the proceeding before FERC would fall within the police and regulatory powers exception to the automatic stay under 11 U.S.C. § 362(b)(4).

9. The Debtors interpret the police and regulatory exception to the automatic stay much too narrowly. The distinction between public and pecuniary interests that underlies this exception is intended to allow government agencies to achieve public policy objectives. Allowing FERC to consider the public policy ramifications of an abrogation or rejection of the TSAs falls squarely within this exception. The fact that Grand Mesa is seeking to initiate this inquiry through a request for a declaratory order from FERC is simply the procedural vehicle for invoking FERC's public interest determination. The Debtors' narrow interpretation of this exception ignores, and is

[14] *ETC Tiger Pipeline*, at ¶ 25 ("Such an agreement from the Commission can only occur via a Commission order."); *Indianapolis Power & Light Co.*, 48 FERC ¶ 61,040 at 61,203, n. 29 ("The Commission speaks through its orders."), *order on reh'g*, 49 FERC ¶ 61,328 (1989); *see also Seminole Energy Services, LLC, et al.*, 126 FERC ¶ 61,041 at Appx. p. 6, n. 41 (2009) (Enforcement Staff Report and Recommendation, Docket No. IN09-9-000) (FERC Staff report stating that "it is a well-settled principle that the Commission speaks through its orders, and not the absence thereof") (citing *Mid-American Energy Holdings Co.*, 118 FERC ¶ 61,003 at ¶ 19, n.45 (2007) ("The Commission, a five-member agency, acts through its written orders, which are 'issued' following a favorable vote of the majority. Phrased differently, in the absence of such orders . . . the Commission cannot be said to have acted." (citations omitted)).

inconsistent with, the purpose and intent of the exception. Accordingly, Grand Mesa seeks entry of an Order from this Court confirming that the stay does not apply, or that an exception to the automatic stay applies, to any action it may commence with FERC seeking a determination whether rejection of the TSAs is consistent with the public interest and the ICA.

10. Alternatively, and even if the stay applies, Grand Mesa submits that "cause" exists for the Court to lift the automatic stay, so that Grand Mesa may file a petition with FERC seeking an expedited determination with respect to the TSAs[15]—a process under which Grand Mesa would (a) file its petition before FERC within 30 days of this Court determining that the stay does not apply or granting relief from stay and (b) request FERC to make its determination within 180 days of the filing of that petition.

REPLY

I. THE FERC PROCEEDING PROPOSED BY GRAND MESA IS APPROPRIATE AND NOT SUBJECT TO THE AUTOMATIC STAY.

A. The Automatic Stay is Not Implicated by the Commencement of a FERC Proceeding.

11. The declaratory petition that Grand Mesa intends to commence at FERC does not implicate the automatic stay.[16] Rather, the petition is the procedural vehicle by which FERC may initiate its public interest review as to whether rejection of FERC-jurisdictional agreements would adversely affect the public interest that FERC is mandated to protect under its governing statutes.

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

[16] Not only does the proposed petition not implicate the automatic stay, but Grand Mesa has a constitutional right to petition the Government. "The First Amendment guarantees 'the right of the people ... to petition the Government for a redress of grievances.' U.S. Const., amend. I. … '[T]he right to petition extends to all departments of the Government,' including 'administrative agencies.'" *Arneault v. O'Toole*, 513 F. App'x 195, 198 (3d Cir. 2013) (quoting *California Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). Moreover, the rules that apply to private contracts do not preclude federal agencies from discharging their mandates. *See, e.g., E.E.O.C. v. Waffle House, Inc*., 534 U.S. 279, 290 (2002) (confirming EEOC's "independent statutory authority" despite parties' private contract to arbitrate).

Nothing in the proposed FERC proceeding would entitle Grand Mesa, FERC, or anyone else to recover anything from the Debtors.

12. Arguing that a declaratory action cannot be commenced against a chapter 11 debtor without relief from the automatic stay, the Debtors once again contort Grand Mesa's position on an important issue. Grand Mesa is not seeking to commence a traditional declaratory action against the Debtors in a *court* proceeding outside of the bankruptcy court. Rather, Grand Mesa is simply seeking to commence a regulatory proceeding that will facilitate the involvement of, and enable, the statutorily ascribed federal regulator to assess public interest concerns, as it is mandated to do under the ICA and related federal regulations. The FERC proceeding that Grand Mesa seeks to commence thus does not involve any effort to "recover" on a "claim" against the Debtors.[17]

13. A FERC proceeding initiated by Grand Mesa would also not seek to "exercise control over property of the estate."[18] Neither Grand Mesa nor FERC is seeking possession or control of the Debtors' property, despite the Debtors' assertions to the contrary. Even if FERC were ultimately to conclude that the Debtors failed to meet the public interest standard required to abrogate or modify a filed rate, that would not hand Grand Mesa or FERC possession or control of any property of the estate, and thus would not bring the proceedings within section 362(a)(3).

14. Courts have been particularly reluctant to construe regulatory proceedings as coming within the scope of sections 362(a)(1) and (a)(3).[19] After all, "[m]any governmental actions clearly within the police or regulatory power destroy some or all of the value that property has to an estate."[20] Yet Congress made clear in section 362(b)(4) that such actions may proceed

[17] 11 U.S.C. § 362(a).
[18] *Id*.
[19] *See, e.g., In re Javens*, 107 F.3d 359, 370-71 (6th Cir. 1997); *In re Yellow Cab Co-op. Ass'n*, 132 F.3d 591, 596 (10th Cir. 1997).
[20] *Javens*, 107 F.3d at 370-71.

in conjunction with a bankruptcy case.[21] Accordingly, "the universe of actions that trigger an automatic stay under section 362(a)(3) does not include those governmental actions entitled, under section 362(b)(4), to an exception from an automatic stay."[22]

B. The Automatic Stay Does Not Prohibit Necessary and Appropriate Regulatory Proceedings.

15. Properly understood, the regulatory proceedings contemplated here do not implicate the automatic stay. But even if they did, they would fall squarely within the exemption for "an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police and regulatory power."[23] That conclusion follows directly from a straightforward reading of the statute. FERC proceedings are plainly "proceeding[s] by a governmental unit," that seek to "enforce" FERC's "regulatory power." Indeed, FERC's regulatory power often includes conducting public proceedings to review proposals to make changes to the rates, terms, and conditions of, for example, wholesale power contracts.[24] For precisely those reasons, courts have concluded that the kind of FERC regulatory proceedings at issue here are exempt from the automatic stay.[25] Even the bankruptcy court and Fifth Circuit in *Mirant*, which otherwise (incorrectly) limited FERC's jurisdiction in the rejection context, recognized that a FERC public interest proceeding is exempt from the automatic stay.[26]

16. Despite the Debtors' attempt to limit the scope of the police and regulatory powers exception, the Court of Appeals for the Third Circuit has interpreted the police powers and regulatory exception broadly and applied it liberally. In *Penn Terra Ltd. v. Department of*

[21] 11 U.S.C. §362(b)(4).
[22] *Javens*, 107 F.3d at 369.
[23] 11 U.S.C. §362(b)(4).
[24] *See, e.g.*, 16 U.S.C. § 824d(d) ("no change shall be made" to any wholesale "rate, charge, classification, or service ... except after sixty days' notice to the Commission and to the public").
[25] *See, e.g.*, *In re Calpine Corp.*, 337 B.R. 27, 34-35 (S.D.N.Y. 2006).
[26] *Mirant Corp.*, 378 F.3d at 523; *In re Mirant Corp.*, 299 B.R. 152, 157 (Bankr. N.D. Tex. 2003).

Environmental Resources, Commonwealth of Pennsylvania,[27] the court held that an injunction secured by the Commonwealth to enforce a consent decree to remediate damage caused by violations of state antipollution laws was exempt from automatic stay under section 362(b)(4.). Although it arose in the context of the state's authority to protect its citizens from environmental risks, *Penn Terra* clearly envisioned a broad role for regulatory exceptions. [28]

17. As more fully set forth in the Lift Stay Motion, there are two commonly-accepted tests for determining whether the government's actions qualify for the police powers exception: the "pecuniary purpose" test and the "public policy" test. The Debtors contend that the police and regulatory exception is inapplicable because Grand Mesa seeks to vindicate its private interests. Once again, the Debtors are incorrect.

18. Through commencement of a proceeding before FERC, Grand Mesa would not be seeking to protect its own "private interests." Rather, it would be facilitating a process through which FERC—a governmental agency—could consider the public interest associated with the rejection of the TSAs, which falls within the statutory mandate of FERC under the ICA. Moreover, FERC's charge is not to vindicate the pecuniary interests of any particular party. Rather, FERC must determine whether proposed changes to an agreement subject to the Commission's jurisdiction are consistent with the public interest in an efficient and reliable market—i.e., whether the new terms would continue to be just and reasonable and not unduly discriminatory or preferential.[29] To that end, a FERC contract review proceeding is primarily a policy-making or policy-clarifying proceeding, not an adjudication that considers solely the interests of the parties to the agreement. Indeed, in a FERC proceeding, any interested party may share its views on the

[27] 733 F.2d 267 (3d Cir. 1984).
[28] *See also Brock v. Morysville Body Works, Inc.*, 829 F.2d 383 (3d Cir. 1987) (OSHA citation enforceable against debtor notwithstanding automatic stay, pursuant to police powers exception of section 362(b)(4)).
[29] *Penn. Water*, 343 U.S. at 422-24.

public policy question FERC will resolve, and the agency must take all of those views into account in reaching its determination.

19. Finally, the policies underlying the "police or regulatory power" exception are intended to protect the public through enforcement of regulatory laws, not contractual rights. Under the circumstances, it is of no moment that Grand Mesa would file the petition to commence the FERC proceeding. Instead, the Court should look past the petition itself to the proceeding, so that FERC may exercise its police or regulatory function that *must be carried* out to determine—and, if necessary, protect—the public interest.

II. THE DEBTORS' OBJECTION GENERALLY MISCHARACTERIZES GRAND MESA'S POSITION.

20. The Debtors' Objection repeatedly rebuts an argument that Grand Mesa has never made. Throughout the Objection, the Debtors construct and knock down the "straw man" that Grand Mesa is seeking to divest the Court of its bankruptcy jurisdiction and its authority to reject contracts under the Bankruptcy Code. For example, according to the Debtors, Grand Mesa "argues the stay should be lifted to allow it to file a petition with FERC to obtain FERC's views on whether rejection of its contracts with XOG is consistent with the public interest, *which would mean this Court is precluded from determining whether these contracts may be rejected*."[30] From this erroneous premise, the Debtors leap to the conclusion that "while bankruptcy court consideration of rejection has no implications for FERC jurisdiction, any proceeding by FERC regarding rejection of contracts *necessarily would usurp the bankruptcy court's plain jurisdiction*."[31] The Debtors repeat this argument, in various forms, throughout their Objection.

21. The Debtors' arguments badly misconstrue and mischaracterize Grand Mesa's

[30] Objection, ¶ 34 (emphasis added).
[31] *Id.*

position. Contrary to what the Debtors contend, even if the Court grants the relief requested by Grand Mesa and permits Grand Mesa to file a petition at FERC, this Court would still retain full jurisdiction to determine whether the TSAs should be rejected under the Bankruptcy Code. In no way would the Court be "precluded from determining whether these contracts may be rejected." Regardless of FERC's role and jurisdiction under the ICA, the Debtors would still have to obtain this Court's approval to reject the TSAs, or any other contracts. That would not change. However, pursuant to the filed rate and *Mobile-Sierra* doctrines discussed in the Lift Stay Motion, the Debtors would also be required to obtain approval from FERC to abrogate or modify the filed rate and terms of the TSAs that have been approved by FERC. Recognizing FERC's concurrent jurisdiction and complimentary role—which the Debtors would usurp and ignore—in no way detracts from, much less usurps, this Court's jurisdiction over the rejection of contracts under section 365 of the Bankruptcy Code.

22. The Debtors' arguments misperceive and deny the parallel roles that the bankruptcy courts and FERC have as a matter of federal law. FERC recently explained these complimentary roles as follows, in rejecting arguments by another debtor/pipeline shipper (Chesapeake Energy Marketing, L.L.C.) that are virtually identical to those advanced here by the Debtors:

> As the Supreme Court has long recognized, the primary purpose of the NGA is the protection of consumers, 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. These are two distinct, yet vitally important roles, and we conclude that it is necessary to give effect to both.[32]

23. FERC's role in regulating oil pipelines under the ICA includes the protection of consumers, incentivizing the construction of sufficient pipeline infrastructure, and ensuring that

[32] ETC Tiger Rehearing Order, ¶ 19.

the rates and terms of service for oil pipeline transportation are non-discriminatory, just and reasonable. Under the Bankruptcy Code and the ICA, both the bankruptcy courts and FERC have important but distinct roles. The Debtors, however, would divest FERC of its role.

24. In this regard, the Debtors completely ignore the critical distinguishing characteristic of the TSAs: they are filed rates that were approved by FERC in 2016 and are thus subject to the filed rate doctrine.[33] Contrary to what the Debtors suggest, under well-established case law, the TSAs are not mere private executory agreements; they are contracts that have the force of a law or regulation, which cannot be abrogated or changed without FERC's approval.[34] In no way does this system of dual jurisdiction divest the bankruptcy court of its jurisdiction under the Bankruptcy Code. Rather, as FERC recently stated: "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."[35]

25. The Debtors argue that, at most, FERC should be relegated to providing the Court with its input regarding whether the Court should authorize rejection of the TSAs.[36] But the Debtors have ignored not only FERC's parallel role, but also FERC's specialized expertise to determine whether the abrogation and modification of the TSAs sought by the Debtors is in the public interest under the ICA. FERC's approval of the TSAs in 2016 under the ICA furthered its policy of encouraging the development of oil pipeline infrastructure, providing the parties with certainty that the terms of the TSAs would not be modified during the contractual term, and thus providing the basis for financing of the construction of the Grand Mesa pipeline. Such approval

[33] *See In re Enron Corp.*, 326 B.R. 257, 260 (Bankr. S.D.N.Y. 2005) ("The filed rate doctrine is applicable where rates were filed with a federal regulatory agency . . .").
[34] *Id.* at 261 ("Under the filed rate doctrine, once FERC determines that a rate is 'just and reasonable,' the courts cannot authorize a departure from that rate."); *see also Entergy La.*, 539 U.S. 391 (2003); *Miss. Power & Light Co.*, 487 U.S. 354 (1988).
[35] ETC Tiger Rehearing Order, ¶ 29.
[36] Objection, ⁋ 38.

also ensured that the TSAs were consistent with the requirements of the ICA, including the prevention of discrimination and the requirement that all rates, terms and conditions of interstate crude oil transportation service be "just and reasonable." In making its determination to approve the TSAs, FERC necessarily relied on a body of precedent and decades of experience in regulating oil pipeline transportation rates, including its experience in considering and approving the key contract terms for oil pipeline projects. For example, in the past decade-plus, FERC has issued many declaratory orders similar to the one it issued in 2016 for the Grand Mesa pipeline project, approving the rates, terms and conditions of service for numerous new oil pipeline transportation systems.[37]

26. Just as only FERC was authorized and qualified to determine whether to approve the TSAs as it did in 2016, only FERC is authorized and qualified to determine under the ICA whether the Debtors should be permitted to abrogate and modify the TSAs. Under the *Mobile-Sierra* doctrine, a party seeking to abrogate or modify a freely-negotiated FERC-jurisdictional agreement bears a heavy burden to demonstrate the public interest requires such a change.[38] The Debtors must bear that burden in a proceeding at FERC, while also obtaining this Court's approval of rejection through the bankruptcy process.

27. Instead of addressing these arguments in the Lift Stay Motion, the Debtors resort to mischaracterizing FERC's clear position on these issues. In the Lift Stay Motion, Grand Mesa explained that FERC has clearly taken the position, including in recent orders, that a debtor that seeks to reject a FERC-approved contract must also obtain FERC's approval to abrogate or modify

[37] *See, e.g.*, *BridgeTex Pipeline Company,* LLC, 167 FERC ¶ 61,251 (2019) (approving the proposed tariff and overall rate structure and terms of service for a proposed expansion of the existing BridgeTex pipeline system); *EnLink Crude Pipeline, LLC,* 157 FERC ¶ 61,120 (2016) (approving the overall tariff and rate structure and policy for a new crude oil pipeline system); *Saddlehorn Pipeline Co., LLC*, 153 FERC ¶ 61,067 (2015) (approving rates and service terms for anchor shippers and terms for sale of remaining capacity and expansion capacity).
[38] *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530, 534 (2008).

such contract through rejection.[39] But the Debtors simply ignore FERC's clear orders, and actually imply that FERC concedes it has no concurrent jurisdiction with the bankruptcy court. Specifically, the Debtors assert that in the *Calpine* case, the court there asserted that FERC had adopted as its policy the position of the Fifth Circuit in *Mirant.*[40]

28. But FERC itself has flatly rejected this very suggestion. In recently-issued order on August 21, 2020 involving the Chesapeake bankruptcy and an argument by Chesapeake that similarly mischaracterized FERC's prior position in *Calpine*, FERC rejected the notion that it had ever endorsed *Mirant*'s substantive holding.[41] According to FERC:

> 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 interest inherent in the transmission and sale of electricity.'"[42]

FERC then proceeded to explain, in clear terms:

> Moreover, as noted above, 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.

Id. at P 36. To date, the Debtors have failed to bring this recent precedent to the attention of the Court, even though it directly contradicts their mischaracterization of FERC's policy.

29. Even worse, the Debtors mischaracterize FERC's position a second time,[43] contending that in the ongoing bankruptcy case of Ultra Petroleum pending in the Bankruptcy

[39] *See* Lift Stay Motion, ¶¶ 51-60 (noting FERC's recent order in ETC Tiger Pipeline).
[40] Objection, ⁋ 44.
[41] ETC Tiger Order Denying Rehearing, ¶ 6.
[42] ETC Tiger Rehearing, ¶ 34.
[43] Objection, ¶ 55 and Ex. D.

Court for the Southern District of Texas,[44] FERC allegedly conceded in oral argument that a rejection in bankruptcy does not alter the filed rate. In other words, the Debtors imply that in *Ultra*, FERC did not assert concurrent jurisdiction and has abandoned its jurisdictional position. In twisting the words of FERC's counsel in *Ultra* to fit their flawed narrative, the Debtors completely ignore the fact that in case after case, FERC has disagreed with the Fifth Circuit's opinion in *Mirant* and has asserted concurrent jurisdiction.[45] FERC's participation in the *Ultra* case does not change that fact. Given that the *Ultra* case is in the Fifth Circuit, which is governed by the *Mirant* precedent, both the bankruptcy court there and FERC had no choice but to follow *Mirant* in that particular case. In any event, in the *Ultra* oral argument cited by the Debtors, FERC clearly took the position that it has exclusive jurisdiction over an abrogation or modification of a filed rate, contrary to what the Debtors suggest.[46]

30. Unlike the bankruptcy court in *Ultra*, this Court is not in the Fifth Circuit and thus is not bound by the *Mirant* decision (or by the other cases from other Circuits also relied on by the Debtors). The issue raised here is a question of first impression in this Circuit. Grand Mesa respectfully submits that the Court should not follow the *Mirant* case for all the reasons discussed herein, including because *Mirant* failed to recognize FERC's unique authority, role and expertise, as the agency delegated by Congress to implement the ICA and its system of regulation over the rates, terms, and conditions of oil pipeline transportation service. At a minimum, but still short of the relief being sought by Grand Mesa, the Court should adopt the approach espoused by the Sixth Circuit in *FirstEnergy*—FERC must be permitted to provide an opinion on rejection of the TSAs

[44] *In re Ultra Petroleum Corp.*, Case No. 20-32631 (Bankr. S.D. Tex.).
[45] *See, e.g.*, *ETC Tiger Pipeline*, 171 FERC ¶ 61,248 (2020), *order on reh'g*, 172 FERC ¶ 61,155 (2020), *NextEra Energy, Inc. v. Pac. Gas and Elec. Co.*, 166 FERC ¶ 61,049 (2019); *Exelon Corp. v. Pac. Gas and Elec. Co.*, 166 FERC ¶ 61,053 (2019).
[46] Objection, Ex. D, at 44-45.

in accordance with its ordinary approach.[47]

III. GRAND MESA HAS ESTABLISHED "CAUSE" TO LIFT THE STAY

31. Failing to see the forest for the trees, the Debtors urge the Court to strictly apply the traditional and discretionary stay relief factors, alleging that Grand Mesa has failed to satisfy them. Not only can Grand Mesa satisfy those factors, but the Objection fails to acknowledge the much larger issues at play.

32. Simply put, stay relief is appropriate here because Congress mandated that FERC should be permitted to conduct a public interest review and determination when a party seeks to modify or abrogate a filed rate, such as what the Debtors seek to accomplish here. FERC must, therefore, be permitted to exercise its critical statutory function under the ICA. The analysis need not go any further and certainly should not be constrained by discretionary stay relief factors.

33. But even considering a more traditional stay relief analysis, the Debtors' arguments are unpersuasive. For example, the Debtors argue that neither Grand Mesa nor FERC will suffer injury if the stay is enforced, and that conversely the Debtors will be harmed if the stay is lifted. First, while the Debtors may be inconvenienced by having to appear in two forums, that inconvenience alone cannot be the basis to eviscerate the important function of FERC under the ICA. Second, the Debtors ignore the substantial and irreparable harm that both FERC and Grand Mesa will experience if the stay is not lifted. Absent stay relief (or a determination that the stay does not apply), FERC will be deprived of its ability and authority to exercise concurrent jurisdiction with the Bankruptcy Court in determining whether a change to filed rates, terms and conditions of FERC-approved agreements—the elimination of regulatory duties—caused by a rejection in bankruptcy is consistent with the public interest. In other words, this Court would be

[47] 945 F.3d 431, 454.

stripping FERC of its exclusive authority under the ICA over federally-approved filed rates such that irreparable harm will occur to FERC, participants in the crude oil transportation industry (including Grand Mesa and the many other midstream parties opposing rejection of their respective agreements with the Debtors) and the public interest. In addition, denying the relief requested in the Motion would deny Grand Mesa's ability to have FERC, the statutorily appointed regulator, weigh-in on the modification or abrogation of the filed rate under the ICA. The harm to both Grand Mesa and FERC associated with the stay not being lifted is both personal and systemic and should not be overlooked or disregarded, as the Debtors suggest.

34. While there is some level of public interest associated with the Debtors resolving their Chapter 11 Cases efficiently, there is a greater public interest in upholding the statutory scheme created by Congress and allowing FERC to review and determine whether modification or abrogation of the TSAs (caused by rejection) is consistent with the public interest and the ICA. This is especially so where Grand Mesa is not seeking to prevent the Debtors from restructuring or maximizing the return for creditors, but rather is ensuring that the Debtors seek to do so in accordance with the Bankruptcy Code and other applicable laws, including FERC regulations governing agreements that fall squarely within the Commission's statutory mandate.

35. The Debtors also contend that they will be harmed if the Court grants the Lift Stay Motion and permits Grand Mesa to file a petition at FERC.[48] According to the Debtors,[49] the delay associated with participating in a FERC proceeding would be harmful,[50] protract the reorganization and require them to continue paying under the TSAs until FERC acts.[51] The

[48] Objection, ¶¶ 58-67.
[49] Objection, ¶¶ 63-64.
[50] Indeed, regulatory litigation is one of the burdens of a well-ordered society. *FTC v. Standard Oil*, 449 U.S. 232, 244 (1980) ("the expense and annoyance of litigation is 'part of the social burden of living under government.'") (quoting *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222 (1938)).
[51] The Debtors' argument that they will need to continue to pay under the TSAs until FERC acts rings hollow where the Debtors are currently refusing to pay Grand Mesa in accordance with the terms of the TSAs and as of the filing of

Debtors further point to the specter of further delay if a party exercises its statutory right to appeal FERC's orders.

36. What the Debtors refuse to acknowledge is that FERC involvement is inherently part of the process for any party to a FERC-regulated contract. This is especially true here. The Debtors gained the benefit of FERC involvement when, in 2016, FERC issued an order evaluating and approving the key provisions of the TSAs. FERC's approval gave the parties, including the Debtors, the certainty that the terms of the TSAs would be honored by FERC during the term of the agreements. The certainty provided by this ruling gave the parties a firm foundation on which they could design their respective facilities, and, in the Debtors' case, market their production and plan their future commercial activities on the proposed pipeline. Having benefitted from FERC's regulation and approval of the TSAs, the Debtors should be estopped from objecting to the requirement that FERC approval is needed to abrogate or modify those same TSAs.[52]

37. Similarly, the Debtors should not be heard to complain about any attendant delay, either at FERC or in the court of appeals on review of any FERC order on Grand Mesa's petition regarding the public interest issues entrusted to FERC under the ICA. In sum, the Debtors should not be permitted to enjoy the benefits of FERC regulation while avoiding the corresponding obligations imposed by such regulation, including the obligation under the *Mobile-Sierra* doctrine that any party seeking to escape its freely-negotiated contractual obligations must bear the heavy burden of demonstrating that abrogation or modification is in the public interest. Conversely, and

this Reply owe Grand Mesa in excess of $3 million for past-due postpetition invoices for crude oil transportation through Grand Mesa's pipeline.

[52] *See In re Finova Capital Corp.*, 358 B.R. 113, 117 (Bankr. D. Del. 2006) ("where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.); *In re Integrated Health Servs., Inc.*, 304 B.R. 101, 109 (Bankr. D. Del. 2004) (judicial estoppel applies when a party's position is clearly inconsistent with a prior position that was accepted by the court, and allowing the newly inconsistent position would create an unfair advantage).

as described above, Grand Mesa will experience substantial harm if the Debtors are permitted to avoid their obligations under *Mobile-Sierra*.

38. In addition, the alleged harm associated with the Debtors continuing to pay the rates under the TSAs pending a FERC determination is grossly overstated. The TSAs include FERC-approved rates and terms that are "just and reasonable" under the ICA. As discussed in greater detail in connection with its opposition to the Rejection Motion, and despite their protestations to the contrary, the Debtors cannot secure comparable transportation services for rates lower than those set forth in the TSAs. The Debtors will, therefore, not suffer any harm by paying the FERC-approved negotiated rates and receiving fair value in return.

39. Finally, the Debtors assert that Grand Mesa failed to allege or demonstrate "that it is likely to succeed in thwarting the Debtors' rejection motion by filing its FERC petition."[53] Initially, the Debtors' argument is based on the flawed premise that Grand Mesa is seeking through the Lift Stay Motion to thwart the Rejection Motion.[54] Grand Mesa is merely seeking through the Lift Stay Motion to allow FERC to exercise its authority under the ICA, while this Court exercises its jurisdiction over rejection under the Bankruptcy Code.

40. In any event, in making their likelihood of success argument, the Debtors simply ignore the discussion of the *Mobile-Sierra* standard that Grand Mesa provided in its Motion. As discussed there, *Mobile-Sierra* establishes "an extremely high bar to any attempt to modify or abrogate a freely-negotiated FERC-jurisdictional agreement such as the TSAs."[55] Citing the U.S. Supreme Court's opinion in *Morgan Stanley* and other authorities, Grand Mesa stated:

> Under *Mobile-Sierra*, the Supreme Court has held that parties "may not unilaterally abrogate or modify their voluntarily negotiated,

[53] Objection, ¶ 70
[54] Grand Mesa is looking to thwart the Rejection Motion, but through its Rejection Objection and for the reasons set forth therein.
[55] Lift Stay Motion, ¶ 4 n.6.

> arms'-length contracts subject to the Commission's jurisdiction unless the Commission first 'concludes that the contract seriously harms the public interest.'" Parties seeking to avoid their contractual obligations under the *Mobile-Sierra* "public interest" standard may do so only after FERC makes a "finding of 'unequivocal public necessity' or 'extraordinary circumstances'" where "the public interest will be severely harmed" by allowing the existing filed rate to continue.[56]

41. While there has not yet been any discovery regarding the *Mobile-Sierra* issue, what can be said at this early stage is that FERC has been very reluctant to allow a party to abrogate a freely-negotiated contract absent an extraordinary showing, such as a showing that the contract was induced by fraud or market manipulation.[57] Given that the Debtors have not made and could not make any such allegation, Grand Mesa submits it is likely to prevail in any *Mobile-Sierra* proceeding at FERC, if the Court grants relief from the stay for Grand Mesa to petition FERC on this issue.

IV. FERC MUST BE PERMITTED TO EVALUATE THE PUBLIC POLICY CONSIDERATIONS IMPLICATED BY THE ABROGATION OF CONTRACTS AND RATES APPROVED BY FERC.

42. The Court should dismiss the Debtors' suggestion that the Court can satisfy the requirements of the ICA by simply allowing FERC to participate and provide its input in this proceeding as an amicus or a party in interest. While this Court is authorized and extremely qualified to address issues arising under the Bankruptcy Code, it lacks the specialized expertise to address issues involving filed rates, terms and conditions of oil transportation service and the unique public interest considerations under the ICA. Congress has entrusted FERC, and only FERC, with that role. Thus, FERC must be permitted to conduct its own proceeding regarding

[56] Lift Stay Motion, ¶ 44 (footnotes and citations omitted).
[57] *See, e.g.*, *Morgan Stanley*, 554 U.S. at 547 ("FERC has ample authority to set aside a contract where there is unfair dealing at the contract formation stage—for instance, if it finds traditional grounds for the abrogation of the contract such as fraud or duress.").

whether the Debtors can show that the public interest under the ICA requires abrogation or modification of the TSAs, which is functionally what the Debtors are trying to accomplish through rejection.

43. Similarly, while it is clear that FERC has exclusive jurisdiction under the ICA over abrogation and modification of FERC-jurisdictional transportation contracts, the doctrine of primary jurisdiction also counsels strongly in favor of granting relief from stay to permit commencement of a proceeding before FERC. Under the primary jurisdiction doctrine, FERC will assert primary jurisdiction depending 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."[58]

44. As FERC recently found in a case before it involving the Chesapeake bankruptcy, the application of these factors (also known as the *Arkla* factors) further supports FERC's exercise of jurisdiction over FERC-approved transportation agreements. In that proceeding, FERC stated:

> 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 not 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

[58] ETC Tiger Pipeline, 171 FERC ¶ 61,248 (2020), *order on reh'g*, 172 FERC ¶ 61,155 (2020) ("***ETC Tiger Rehearing Order***"), at ¶ 32 (citing *Arkla*, 7 FERC at 61,322).

> which only the Commission can authorize abrogation or modification of a filed rate.[59]

The same conclusion applies equally to the TSAs here. FERC clearly possesses special expertise in this matter, having approved the key terms of the TSAs in 2016 and having exclusive responsibility for the regulation of all interstate oil pipeline transportation agreements. The current split in the courts on the interplay between the jurisdiction of the bankruptcy courts and FERC demonstrates the need for uniformity of interpretation. Chaos would ensue if courts began reaching different conclusions about whether to abrogate and modify FERC-approved transportation agreements and other FERC-jurisdictional contracts. Finally, the issues in this case are clearly important to the regulatory responsibilities of FERC, given that only FERC can grant the relief that the Debtors must seek and obtain under the filed rate doctrine and *Mobile-Sierra* to avoid their freely-negotiated contractual obligations.

45. At their core, the Debtors' arguments fail to acknowledge that FERC is uniquely qualified to consider the broad public policy considerations implicated by the abrogation of contracts and rates approved by FERC, and has been granted the exclusive jurisdiction over these contracts and rates by Congress.

46. In addition, the Debtors argue that rejection merely "amounts to a breach, which gives rise to a claim for damages" that must be based on the filed rates approved by FERC.[60] Thus, based on the premise that the TSAs are simply garden-variety private contracts, the Debtors contend rejection does not violate the filed rate doctrine.

47. However, the law is clear that, once filed with the Commission, interstate oil transportation agreements such as the TSAs become the "equivalent of a federal regulation,"

[59] ETC Tiger Rehearing Order, ¶ 33.
[60] Objection, ⁋ 1.

imposing obligations on the parties that extend beyond private contract law."[61] Like wholesale power contracts and natural gas transportation agreements, FERC-approved oil pipeline transportation agreements are "unlike other contracts that may be sought to be rejected in bankruptcy in that they [are] affected by the public interest and subject to regulatory review of changes to their rates, terms or conditions."[62] Debtors simply ignore this fundamental difference between the FERC-approved TSAs and ordinary private executory contracts.

48. Moreover, as explained by FERC, the agency with special expertise that has been entrusted by Congress to regulate the interstate transportation of energy, "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."[63] FERC's conclusion is also supported by the Sixth Circuit's opinion in *FirstEnergy*.[64] In *FirstEnergy,* the Sixth Circuit rejected the analogy to a mere breach of contract, 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."[65]

49. In addition, it is misleading for the Debtors to contend that rejection gives rise to a claim for damages that must be based on the filed rates approved by FERC and requires nothing more. In its recent *ETC Tiger Rehearing Order*, FERC explained why the rejection of a FERC-jurisdictional transportation agreement without FERC approval of changes to filed rates violates the filed rate doctrine. According to FERC:

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[61] *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004) (quoting *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998)).
[62] ETC Tiger Rehearing Order, ¶ 26.
[63] *NextEra*, 166 FERC ¶ 61,049, *order denying reh'g*, *NextEra, Inc. v. Pacific Gas & Electric Co.*, 167 FERC ¶ 61,096, at ¶ 21 (2019) *("**NextEra Rehearing Order**").*
[64] *FirstEnergy*, 945 F.3d 431.
[65] *Id*. at 442.

> [C]ontrary to the Fifth Circuit's determination in *Mirant* that awarding a portion of the rate as damages does not alter the rate, 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." 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.[66]

Acceptance of the Debtors' arguments would similarly usurp the ratemaking and approval responsibilities that Congress has delegated exclusively to the Commission under the ICA.

50. Contrary to what the Debtors suggest, rejection necessarily modifies the filed rate. As FERC recently explained:

> [R]ejection 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.* Such unilateral abrogation or modification of a filed rate 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.[67]

51. Thus, instead of following the filed rate as the Debtors contend, awarding damages actually departs from the filed rate approved by FERC. Simply put, the filed rate doctrine bars the Debtors from seeking to alter a filed rate without FERC's approval.

52. The Debtors also rely on the statement by the bankruptcy court in the *Ultra* case that because the Bankruptcy Code does not contain a specific exception for FERC-approved contracts, courts do not have the authority to create other exceptions.[68] The Debtors thus effectively assert that because the Bankruptcy Code does not contain a specific FERC exception, FERC does not have concurrent jurisdiction under the ICA.

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[66] ETC Tiger Rehearing Order, ¶ 25.
[67] *Id.*, at ¶ 31 (emphasis added).
[68] Objection, ¶ 56.

53. But the Debtors' argument manufactures a conflict where none exists. As FERC recently emphasized, "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.'"[69] Moreover, the Supreme Court has recognized in *Mission Product* that a debtor cannot, simply by breaching a contract through the bankruptcy process, escape from "all the burdens that generally applicable law … imposes."[70] Thus, as FERC said in an analogous case under the Natural Gas Act, "*Mission Product* supports the principle that a debtor does not extinguish its filed rate obligations under the NGA by rejecting a contract in bankruptcy."[71]

CONCLUSION

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

[*Signature Page Follows*]

[69] *ETC Tiger Pipeline*, 172 FERC ¶ 61,155 (Aug. 21, 2020) ("***ETC Tiger Order Denying Rehearing***"), at ¶ 21 (quoting 11 U.S.C. § 1129(a)(6)).
[70] *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1665 (2019).
[71] ETC Tiger Pipeline, ¶ 22.

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Respectfully submitted,

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