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)
	)	

STATEMENT OF THE FEDERAL ENERGY REGULATORY COMMISSION 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

The Federal Energy Regulatory Commission ("FERC or "Commission") submits this statement in response to the Motion of Grand Mesa Pipeline, LLC for Order Confirming that the Automatic Stay Does Not Apply or, in the Alternative, for Relief from the Automatic Stay [Dkt. No. 364] (the "Lift Stay Motion"), to the 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 [Dkt. No. 507] (the "Objection"), and Grand Mesa's Reply [Dkt. No. 652]. The Commission generally agrees with the positions taken by Grand Mesa in its Lift Stay Motion and Reply. To avoid burdening the Court with duplicative arguments, the Commission writes separately to emphasize two points.

First, as the Commission's orders have repeatedly stated, FERC does not seek to limit the jurisdiction granted to the bankruptcy courts by Congress. The Commission does not dispute that this Court has exclusive authority over the rejection of the Debtor's executory contracts as private

[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.

obligations;[2] however, the Commission has exclusive jurisdiction under the Interstate Commerce Act (ICA)[3] over the modification or abrogation of the public law obligations that those contracts create once the Commission accepts the contracts as filed rates that carry the force of law.[4] The Bankruptcy Code and the ICA provide this Court and the Commission with separate authorities over separate domains.[5] Under the Supreme Court's *Mobile-Sierra* doctrine,[6] the Commission must presume that freely negotiated, arms-length contracts are just and reasonable, and a contracting party may not unilaterally modify or abrogate that contract absent a showing that

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[2] *See ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248, at P 25 (2020) ("*ETC Tiger Order*") ("[T]he 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.") (quoting *NextEra Energy, Inc. v. Pac. Gas & Elec. Co.*, 167 FERC ¶ 61,096, at P 16 (2019) (*PG&E Rehearing Order*), *reh'g denied*, 172 FERC ¶ 61,155, at P 29 (2020) ("*ETC Tiger Rehearing Order*") (explaining that, in "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.").

[3] 49 U.S.C. §§ 1 *et seq.*; *see* 49 U.S.C. § 60502 (transferring authority over interstate oil pipelines to FERC); Public Law No. 95-473, § 4(c), 92 Stat. 1466-1470 (1978) (clarifying that FERC regulates oil pipelines in accordance with the 1977 ICA).

[4] *Penn. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 422 (1952) (finding that once a contract is approved by FERC the duty to comply with its contractual terms "springs from the Commission's authority, not from the law of private contracts."); *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004) (finding that electric tariffs are "the equivalent of federal regulation"); *Boston Edison Co. v. FERC*, 856 F.2d 361, 372 (1st Cir. 1988) (finding that the filed rate was "to be treated as though it were a statute, binding upon both the seller and the purchaser alike.").

[5] *ETC Tiger Order*, 171 FERC ¶ 61,248, at P 20 ("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.") (quoting *PG&E Rehearing Order*, 166 FERC ¶ 61,049 at P 28).

[6] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341-45 (1956) (*Mobile*); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 354-55 (1956) (*Sierra*) (collectively, "*Mobile-Sierra*").

continuation of the existing contract would "seriously harm the public interest."[7] Only the Commission can modify or abrogate the filed rate because it alone has the authority to determine whether filed rates are just and reasonable or whether filed rates must be set aside to avoid serious harm to the public interest.[8] Those determinations "may not be collaterally attacked in state or federal courts."[9]

In the Commission's view, "a debtor cannot grant itself an exemption from 'all the burdens that generally applicable law . . . imposes' by breaching a contract through the bankruptcy process."[10] Therefore, to perfect a modification or termination of the terms and conditions of a filed tariff, a "party must obtain approval from both the Commission and the bankruptcy court to

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[7] *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530, 547, 548, 553 (2008); *see id.* at 545-46 (replacing the more common formulation "seriously harm the public interest" with a reference to the "consuming public," to hold that "only when the mutually agreed-upon contract rate seriously harms the consuming public may the Commission declare it not to be just and reasonable."); *id.* at 550-51 ("We have said that, under the *Mobile–Sierra* presumption, setting aside a contract rate requires a finding of "unequivocal public necessity," Permian Basin [Area Rate Cases], 390 U.S. [747,] 822 [(1968)], or "extraordinary circumstances," *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981)."") (parallel citations omitted); *accord NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165, 174 (2010) ("In unmistakably plain language, *Morgan Stanley* restated *Mobile–Sierra*'s instruction to the Commission: FERC 'must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.'") (quoting *Morgan Stanley*, 544 U.S. at 546).

[8] *See, e.g.*, *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 375 (1988) ("The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts."); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 580 (1981) (*Arkla*) ("Congress here has granted exclusive authority over rate regulation to the Commission."); *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 252 (1951) ("except for review of the Commission's orders, the courts can assume no right to a different one").

[9] *Miss. Power & Light*, 487 U.S. at 375.

[10] *See ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248, at P 22 (2020) (quoting *Mission Product Holdings, Inc. v. Tempnology*, 139 S. Ct. 1652, 1665 (2019)).

modify the filed rate and reject the contract, respectively."[11] This result is appropriate given the Commission's exclusive jurisdiction over the filed rate and the Bankruptcy Code's requirement that "(a)ny 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."[12]

Second, the Commission agrees with Grand Mesa that this Court should permit Grand Mesa to initiate a proceeding before the Commission to examine how the public interest would be impacted by the modification or abrogation of the filed rate contracts that the Debtors seek to reject in this proceeding. In a pair of cases that examined the interaction between the Bankruptcy Code and the Commission's jurisdiction under the Federal Power Act (FPA), the federal courts of appeals have found that it is incumbent upon bankruptcy courts to provide the Commission with the opportunity to "carefully scrutinize the impact of rejection upon the public interest."[13] The Fifth Circuit found this would allow the lower courts to "ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers."[14] More recently, the Sixth Circuit held that "the bankruptcy court must consider the public interest and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach."[15]

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[11] *Id.* at P 20; *accord, e.g.*, *PG&E Rehearing Order*, 167 FERC ¶ 61,096 at P 3.

[12] 11 U.S.C. § 1129(a)(6).

[13] *In re Mirant Corp.*, 378 F.3d 511, 525 (5th Cir. 2004) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984)).

[14] *Id.*

[15] *In re FirstEnergy Solutions Corp.*, 945 F.3d 431, 454 (6th Cir. 2019).

Allowing the Commission to consider the public interest does not violate the automatic stay under 11 U.S.C. § 362. The petition Grand Mesa seeks to file with the Commission does not interfere with the bankrupt estate and the Commission's process would not interfere with this proceeding. On the contrary, an examination by the Commission's expert staff will facilitate this Court's ultimate determination regarding contract rejection. Furthermore, to the extent the court may determine that the FERC proceeding Grand Mesa contemplates implicates the automatic stay for some reason, the court should find that the Commission's public interest inquiry is subject to the police and regulatory exception of 11 U.S.C. § 362(b)(4) because it would be "an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power." In the alternative, this Court should grant relief from the automatic stay in order for the Commission to come to a determination regarding the public interest of contract rejection. Such relief would be consistent with the Bankruptcy Code[16] and the ratemaking regulatory scheme established by Congress through the ICA.[17]

For these reasons, FERC should be offered the opportunity to render an opinion on the public interest inquiry at this early stage of the proceeding. To come to such a determination, FERC must be given the time to conduct a hearing on the record.[18] The Commission believes this can be accomplished in approximately five to six weeks and without causing undue interference or delay in this proceeding.

[16] 11 U.S.C. § 1129(a)(6).

[17] 49 U.S.C. § 3(1).

[18] 42 U.S.C. § 7172(d); 5 U.S.C. § 554.

CONCLUSION

For the foregoing reasons, the Commission joins Grand Mesa in respectfully requesting that the Court enter an order either (i) confirming that the automatic stay does not apply to the declaratory order proceeding that Grand Mesa seeks to commence before the Commission or that such a proceeding would be 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 the Commission regarding whether rejection of certain FERC-jurisdictional contracts would be consistent with the public interest; and (iii) granting such other relief as is just and proper.

Dated: September 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel M. Vinnik, hereby certify that on September 17, 2020, I caused copies of the foregoing statement to be served upon the parties in this case via CM/ECF and the parties on the attached list in the manner indicated.

/s/ *Daniel Mitchell Vinnik*
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