IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: EXTRACTION OIL & GAS, INC., *et al.*,[1] Debtors.	
GRAND MESA PIPELINE, LLC, and the FEDERAL ENERGY REGULATORY COMMISSION, Appellants, v. EXTRACTION OIL & GAS, INC., Appellee.	CIVIL ACTION NO. 20-cv-01411-CFC CIVIL ACTION NO. 20-cv-01521-CFC CIVIL ACTION NO. 20-CV-01412-CFC CIVIL ACTION NO. 20-cv-01506-CFC CIVIL ACTION NO. 20-cv-01564-CFC Bankruptcy Case No. 20-11548 (CSS) Bankruptcy BAP No. 20-53

APPELLANTS GRAND MESA PIPELINE, LLC AND THE FEDERAL ENERGY REGULATORY COMMISSION'S JOINT MOTION FOR CERTIFICATION OF A DIRECT APPEAL OF BANKRUPTCY COURT ORDERS TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

1. Appellants Grand Mesa Pipeline, LLC ("**Grand Mesa**") and the Federal Energy Regulatory Commission ("**FERC**") (collectively, "**Appellants**") move, pursuant to 28 U.S.C. § 158(d)(2) and Federal Rule of Bankruptcy Procedure 8001(f), for direct appeal to the United States Court of Appeals for the Third Circuit of two related sets of rulings from the United States Bankruptcy Court for the District of Delaware ("**Bankruptcy Court**"). Pending before this Court are Appellants' motions for consolidation of their appeals from these rulings, which consist of: (1) the Bench Ruling of October 2, 2020 (D.I. 781), the Letter Clarifying the Oral Ruling of

[1] The Debtors in these chapter 11 cases (collectively, "Debtors") include Extraction Oil & Gas, Inc.; 7N, LLC; 8 North, LLC; Axis Exploration, LLC; Extraction Finance Corp.; Mountaintop Minerals, LLC; Northwest Corridor Holdings, LLC; Table Mountain Resources, LLC; XOG Services, LLC; and XTR Midstream, LLC.

October 2, 2020 (D.I. 770), and the Order Denying the Motion for Grand Mesa Pipeline, LLC for an Order Confirming that the Automatic Stay Does Not Apply or, in the alternative, For Relief from the Automatic Stay dated October 14, 2014 (D.I. 831) (together, the "**Lift-Stay Order**"); and (2) the Bench Ruling entered on November 2, 2020 (D.I. 942), and the Order Granting Motions to Reject Certain Executory Contracts dated November 10, 2020 (D.I. 1038) (together, the "**Rejection Order**," and, with the Lift-Stay Order, the "**Orders**").

PRELIMINARY STATEMENT

2. These related appeals involve issues of major public importance that neither the U.S. Supreme Court nor the Third Circuit has addressed, regarding the interplay between the authority of FERC, which is mandated by Congress to regulate interstate oil pipelines, and the jurisdiction of a bankruptcy court to approve a debtor's rejection of FERC-approved rates, terms and conditions ("**Filed Rates**") for pipeline shipments. The public importance of the issues is confirmed by FERC's involvement in the underlying bankruptcy proceedings to advocate for its authority over Filed Rates, pursuant to the Interstate Commerce Act ("**ICA**"). *See* Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584 (1906); Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq*. The Bankruptcy Court ruled that, contrary to Appellants' positions, rejection of a contract that is also a Filed Rate does not require a FERC determination that the public interest would be harmed in the absence of a change to the Filed Rates. This created a clear conflict between the primary federal regulator's expressed view of its jurisdiction over Filed Rates for interstate oil pipelines and the Bankruptcy Court's holdings.

3. Grand Mesa is the owner of the Grand Mesa Pipeline, which transports crude oil and other fuels from the Denver-Julesburg Basin in Colorado to Cushing, Oklahoma. Grand Mesa entered into two transportation services agreements ("**TSAs**") with Debtors. The rates, terms and

conditions in those TSAs were accepted for filing by FERC as "just and reasonable" under the authority and criteria set forth in the ICA. As Filed Rates, the TSAs are not merely commercial contracts, but are public obligations carrying the force of agency regulation. *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004) (tariffs approved by FERC are "the equivalent of federal regulation").

4. In this bankruptcy proceeding, Debtors moved to reject their TSAs with Grand Mesa. Grand Mesa objected to the rejection and filed a motion to lift the automatic stay, to commence a proceeding before FERC to determine whether Debtors' noncompliance with the TSAs as a result of rejection would be valid under the ICA and further the public interest. FERC submitted a statement in support of the Lift-Stay Motion and otherwise participated in the proceedings in opposition to Debtors' efforts to reject the TSAs without FERC evaluating the public interest ramifications in accordance with its agency procedures. The Bankruptcy Court denied Grand Mesa's motion to lift the stay and granted Debtors' motion to reject. Grand Mesa and FERC have appealed from the Bankruptcy Court's orders.

5. Certification to the Third Circuit is clearly warranted under 28 U.S.C. § 158(d)(2). In an analogous, ongoing case involving the same intersection between FERC and bankruptcy court jurisdiction, the same lawyers who represent Debtors here, in representing different debtors, sought direct certification to the Fifth Circuit on grounds that the bankruptcy court's rulings in that case involved "*a matter of public importance*," and the "same issues" were "being litigated in numerous proceedings," even citing this very litigation in support of their position. *Rockies Express Pipeline LLC v. Ultra Resources, Inc.*, Nos. 20-cv-2306, 20-cv-2847, 20-cv-3043 (S.D. Tex. Oct. 20, 2020), D.I. No. 47 at 16 (emphasis added). Earlier today, the United States District Court for the Southern District of Texas granted certification, agreeing with the debtors that the

"issue may indeed transcend the dispute between [the parties] currently before this Court, and therefore, is of public importance." *Rockies Express*, No. 20-cv-2306, D.I. 71 at 3 (granting certification). No meritorious basis exists for a different approach in this case. Consistent with Debtors' counsel's position in *Rockies Express*, the subject appeals here clearly meet all of the statutory grounds for certification, even though satisfaction of each factor is not required:

- First, these appeals present specific questions that neither the Supreme Court nor the Third Circuit has addressed. The questions whether a bankruptcy court must defer to FERC, or at least seek guidance from FERC, in deciding whether to reject a FERC-approved contract embodying Filed Rates has not been previously presented to either court. Nor has the question whether a heightened public interest standard applies to a bankruptcy court's determination of rejection of a contract that also constitutes a Filed Rate with regulatory force.
- Second, these appeals present issues of public importance, as acknowledged elsewhere by Debtors' own counsel. The interstate pipeline sector is one of the few fields in which Congress mandates price regulation to protect the public interest. The appeals involve questions delineating the scope of the jurisdictions of FERC, which is tasked with protecting the public interest, and the Bankruptcy Court, which is primarily concerned with the private interests affecting the administration of a debtor's resources. Reflecting the importance of these questions, FERC, as the agency charged with oversight of interstate oil pipelines, itself joined in Grand Mesa's Lift-Stay Motion, participated in the proceedings below, appealed both the Lift-Stay Order and Rejection Order, and now joins in this certification request.

- Third, these appeals involve questions of law requiring resolution of conflicting decisions. The Bankruptcy Court's Lift-Stay Order conflicts with decisions of this Court acknowledging "FERC's exclusive jurisdiction and regulatory authority over" contracts that are also Filed Rates. *In re Kaiser Aluminum Corp.*, 365 B.R. 447 (D. Del. 2007). As further addressed below, the Rejection Order likewise conflicts with the only two Courts of Appeals to specifically address rejection of Filed-Rate contracts, as well as at least two district court decisions.
- Finally, direct appeals will serve the interests of efficiency and judicial economy by streamlining the rounds of appeals and accelerating an ultimate disposition. Given both the substantive significance and financial materiality of the issues at stake, a losing party before the District Court would almost certainly appeal to the Third Circuit. And since the appeals present a number of legal questions, the Third Circuit's review in large part would be *de novo*.

BACKGROUND

A. FERC's Congressional Mandate to Regulate Interstate Oil Pipeline Rates.

6. Oil pipelines providing interstate transportation service have long been subject to regulation of their services and rates under the ICA. *See* Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584 (1906). In 1977, Congress transferred authority over interstate oil pipelines to FERC, the then-newly created successor agency to the Federal Power Commission. *See* 49 U.S.C. § 60502; Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq*. One year later, Congress confirmed that FERC would regulate oil pipelines in accordance with the 1977 version of the ICA.[2] FERC is charged with specific regulatory oversight over the interstate transportation

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

of energy (*i.e.*, natural gas, oil, refined petroleum products, and electricity), wholesale power transactions, and the authorization of certain energy infrastructure, including liquefied natural gas terminals, interstate natural gas pipelines, and hydropower projects.

7. All rates for interstate oil transportation service must be filed with and accepted by FERC. *Enbridge Energy, Ltd. P'ship*, 152 FERC ¶ 61,047 (2015). All terms and conditions of such service are included in tariffs that are also filed with and accepted by FERC as "just and reasonable." *See, e.g.*, *Grand Mesa Pipeline, LLC*, 156 FERC ¶ 61,163, at P14 (2016). Once approved by FERC, the duty to comply with those terms and conditions "springs from [FERC's] authority, not from the law of private contracts." *Penn. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 422 (1952). Accordingly, any challenge to a rate for, or the term and condition of, providing interstate oil transportation service is within the purview of FERC's statutory authority. 49 U.S.C. § 3(1). FERC can only modify or abrogate a Filed Rate when it concludes that the rate would "seriously harm the public interest." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530, 547, 548, 553 (2008); *see also United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45 (1956) ("***Mobile***"); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 354-55 (1956) ("***Sierra***," and, together with *Mobile*, forming the *Mobile-Sierra* doctrine holding that FERC has no power to change a contract rate without first finding the existing rate unjust, unreasonable, or unduly discriminatory or preferential). Because FERC is granted exclusive jurisdiction to regulate interstate oil pipeline rates, terms and conditions, decisions that involve both "technical understanding and policy judgment," a court's role in reviewing FERC's actions is limited "to ensur[ing] that the Commission engaged in reasoned decisionmaking." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016).

B. Grand Mesa and the Debtors Enter Into FERC-Approved TSAs.

8. Prior to completing the Grand Mesa Pipeline, Grand Mesa entered into two FERC-approved agreements that Debtors sought to reject: (1) an Amended and Restated Transportation Services Agreement (the "**Extraction TSA**") dated February 19, 2016, with Extraction Oil & Gas, LLC, pursuant to which Debtors are committed to ship 58,000 barrels of crude oil per day at a contractual rate and (2) a separate TSA (the "**Bayswater TSA**," and, together with the Extraction TSA, the "**TSAs**") dated June 21, 2016, and assigned to Debtors on August 12, 2016, pursuant to which Debtors are committed to ship 6,000 barrels a day. In exchange for assuming these obligations, which represented more than a third of the total available capacity on the Grand Mesa Pipeline, Grand Mesa would construct, own, operate and maintain the pipeline, which would span approximately 550 miles from Weld County, Colorado to Cushing, Oklahoma.

9. On March 11, 2016, Grand Mesa filed a petition for declaratory order with FERC for approval of the TSAs that it offered to all potential shippers on a non-discriminatory basis, and associated rules and regulations governing transportation services set forth in its tariff, which is incorporated as part of the TSA. Grand Mesa explained in its Petition that, due to its major investment involved in constructing its pipeline, both Grand Mesa and its shippers needed confirmation, prior to the project's commencement of service, that the rates and key terms agreed to in its TSA would be acceptable to FERC and that those shippers would have access to pipeline capacity as provided in the TSA. *Grand Mesa Pipeline, LLC*, 156 FERC ¶ 61,163, at PP10-11 (2016).

10. On August 9, 2016, Grand Mesa filed a petition for a declaratory order with FERC, seeking a declaration that the terms of the Extraction TSA were "just and reasonable." Debtors filed "comments in support" of Grand Mesa's petition and requested that FERC grant the petition.

FERC granted the petition, finding that the terms of the Extraction TSA were just and reasonable, on September 8, 2016. *Id*. at P14.

11. The regulatory certainty provided by advance FERC approval of the TSA led to Grand Mesa's decision to construct the Grand Mesa Pipeline. After Debtors' firm commitment and FERC's declaratory order approving the TSAs as just and reasonable, Grand Mesa invested $650 million in the construction of the Grand Mesa Pipeline.

C. Procedural History.

12. On June 14, 2020, Debtors filed for bankruptcy. (D.I. 1.) On the next day, Debtors moved to reject the TSAs, together with a multitude of other agreements, most of which are, in contrast to the TSAs, ordinary commercial contracts (the "**Rejection Motion**," D.I. 14).

13. On August 4, 2020, Grand Mesa filed an objection to Debtors' Rejection Motion. (D.I. 363.) Grand Mesa argued that (a) the Rejection Motion should not be considered until FERC was permitted to exercise its Congressionally mandated role and evaluate whether rejection of the TSAs would harm the public interest; (b) even if the Bankruptcy Court determined that FERC approval under the ICA was not required for the TSAs to be rejected, FERC should be permitted to provide its assessment as to whether rejection of the TSAs was consistent with the public interest under the ICA; and (c) even under a lower, inapplicable business judgment standard, as distinct from a public interest standard, Debtors' motion to reject still failed. (*Id.*)

14. Grand Mesa also filed, on the same day, a motion for an order confirming that the automatic stay does not apply to a declaratory petition that Grand Mesa intended to file at FERC or, in the alternative, for relief from the automatic stay (the "**Lift-Stay Motion**," D.I. 364). Grand Mesa argued that, as a predicate matter, the stay did not apply because the proposed petition to FERC would not be "against" Extraction as an adverse party but rather would be an outreach to an

administrative agency to invite an inquiry as to public interest matters within its jurisdiction. *Id.* at 11. Even, however, if the stay were found to apply to the proposed petition, Grand Mesa further argued that the petition then would fall within the regulatory exception to the stay because it did not advance a pecuniary interest of the government but would advance the public policies set forth in the ICA. *Id.* Further, even if the stay applied, it should be lifted for cause in order to harmonize coordinate governmental bodies and enable FERC to bring its institutional expertise to bear on the question of whether Debtors' rejection of the TSAs was in the public interest. *Id.* at 14.

15. Recognizing the importance of these issues, FERC joined in the Lift-Stay Motion. (D.I. 653.) To accommodate the bankruptcy process, FERC further offered to complete its hearing on public interest matters relating to any noncompliance or rejection of the TSAs within "five to six weeks and without causing undue interference or delay in this proceeding." (*Id.* at 5.[3])

16. During hearings on the Lift-Stay Motion on September 30, 2020, through October 2, 2020, Grand Mesa presented testimony from two former FERC commissioners who explained, among other things, the factors and procedures involved in FERC's assessment of the public interest in relation to any proposed noncompliance with Filed Rates. (D.I. 776, 781.) Debtors proffered an expert witness who opined on the public interest impact from rejection of the TSAs. (*Id*.) On October 2, 2020, the Bankruptcy Court ruled from the bench, denying Grand Mesa's motion, and "clarif[ied]" the ruling in a letter dated October 4, 2020. (D.I. 770.) The Court ruled that the stay applied, and that the Bankruptcy Court and FERC maintained "parallel exclusive jurisdiction," a phrase that has never appeared in any other state or federal judicial opinion, rather

[3] Since making that representation in this matter, FERC has conducted four public interest hearings with regard to other bankruptcy proceedings and completed each hearing, from issuing initial notice to issuing an order on the merits, in less than six weeks. *See Midship Pipeline Co., LLC*, 173 FERC ¶61,011 (2020*); Rockies Express Pipeline LLC*, 172 FERC ¶61,279 (2020); *Rover Pipeline LLC*, 173 FERC ¶61,019 (2020); *ANR Pipeline Co.*, 173 FERC ¶61,018, (2020).

than concurrent jurisdiction. *Id*. at 2. The Court also rejected Grand Mesa's arguments that the stay did not apply because (a) it fell within the police or regulatory exception; (b) it did not implicate debtor's "property"; or, (c) even if the stay applied, it should be lifted for cause. (D.I. 781 at 148-56.)

17. The Court heard further testimony and argument during the Rejection Motion phase on October 7, October 20, and October 27-28, 2020, which included fact witnesses and two of the three expert witness from the Lift-Stay Motion phase (including, again, a former FERC commissioner), who addressed public interest issues. (D.I. 812, 877, 926, 923.) Other experts also testified, including as related to the public interest impact. The Court granted the Rejection Motion after concluding that the public interest standard did not apply to the rejection motion, and, even if it did, it would be more limited under the ICA than under either the Federal Power Act or Natural Gas Act[4] and that, under that more limited standard, rejection would therefore be in the public interest. (D.I. 942.)

QUESTIONS PRESENTED

18. Appellants both seek to raise several related questions for appellate review, including:

(a) whether the Bankruptcy Court erred by precluding FERC from exercising its statutory mandate in respect of the impact of the Debtors' proposed rejection of the TSAs on the public interest, consistent with the United States Court of Appeals for the Sixth Circuit's decision in *In re FirstEnergy Solutions Corp. v. FERC*, 945 F.3d 431 (6th Cir. 2019); and

[4] The Bankruptcy Court stated that the "*Mobile-Sierra* doctrine, which originated from two Supreme Court decisions issued in 1956, prohibits FERC from modifying or abrogating existing contracts under the Federal Power Act ('FPA') and [Natural Gas Act] unless required to protect the public interest (*not* the ICA)." (D.I. 942 at 25 n.79.) FERC, however, has applied the *Mobile-Sierra* doctrine standard to agreements submitted for approval under the ICA. *See B.P. Prods. N.A. v. Sunoco Pipeline L.P.*, 166 FERC ¶ 61,197, at PP14-15 (2019); *Buckeye Pipe Line Co., L.P.*, 167 FERC ¶ 61,042, at P13 (2019).

(b) whether the bankruptcy court applied the incorrect standard in granting the motion to reject:

(i) whether the bankruptcy court erred by applying the business judgment standard in granting the motion to reject; and (ii) whether the bankruptcy court erred in determining the "heightened scrutiny," public interest standard announced in *In re Mirant Corp*., 378 F.3d 511, 524 (5th Cir. 2004) and its progeny is not "warranted" in this case. (D.I. 942 at 25.[5])

ARGUMENT

I. THIS COURT HAS AUTHORITY TO CERTIFY THE BANKRUPTCY COURT'S ORDERS FOR DIRECT APPEAL.

19. A request for a certification for a direct appeal must be made "not later than 60 days after the entry of the judgment." 28 U.S.C. § 158(d)(2)(E). Federal Rule of Bankruptcy Procedure 8001 provides in pertinent part:

> A certification that a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists shall be filed in the court in which a matter is pending for purposes of 28 U.S.C. § 158(d)(2) and this rule. A matter is pending in a bankruptcy court until the docketing, in accordance with Rule 8007(b), of an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the grant of leave to appeal under 28 U.S.C. § 158(a)(3). A matter is pending in a district court or bankruptcy appellate panel after the docketing, in accordance with Rule 8007(b), of an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the grant of leave to appeal under 28 U.S.C. § 158(a)(3).

Fed. R. Bankr. P. 8001(f). "Docketing" is a term of art under Bankruptcy Rule 8007(b). Collier on Bankruptcy ¶ 8001.14[2] (15th ed. rev. 2011). An appeal is docketed once the record is

[5] Relatedly, the other questions presented by Grand Mesa for appeal include (a) whether Grand Mesa's proposed petition was subject to the automatic stay; (b) whether the Bankruptcy Court erred in finding that the proposed petition did not fall within the police and regulatory powers exception; (c) whether the Bankruptcy Court erred in finding that cause did not exist to lift the stay; (d) whether the Bankruptcy Court erred in finding that payment of claims through the plan and confirmation process is not an abrogation of FERC-approved rates; (e) whether the Bankruptcy Court erred in determining the TSAs do not contain covenants running with the land, and ruling that, even if they did, such covenants are contractual in nature and may be rejected; and (f) whether the Bankruptcy Court erred in authorizing *nunc pro tunc* rejection of the TSAs.

complete for purposes of appeal, which occurs when the clerk of the bankruptcy court has transmitted a copy of the record, and the district court clerk receives and dockets the record. *Id.*

20. Thus, a district court has the authority to certify an appeal so long as the request is made within 60 days of entry of the judgment and the certification is filed after the Clerk of the Bankruptcy Court transmits the completed record for appeal to the District Court. This test is met here. The request for certification has been made within 60 days of entry of the judgment. The record for purposes of appeal is complete and has been transmitted. Accordingly, the Court has authority to certify a direct appeal in this matter.

II. THIS COURT SHOULD CERTIFY THE APPEALS TO THE THIRD CIRCUIT BECAUSE APPELLANTS HAVE SATISFIED EACH OF THE CONDITIONS FOR DIRECT APPEAL OUTLINED IN 28 U.S.C. § 158(d)(2)(A).

21. Under 28 U.S.C. § 158(d)(2)(A), certification of these appeals is required if *any* of the conditions outlined in sections (i)-(iii) is met. As detailed below, Appellants' appeals clearly satisfy *each* of the conditions.

A. The Orders Being Appealed Present Issues of Law as to Which There Is No Controlling Decision of the Third Circuit or United States Supreme Court.

22. Section 158 requires certification where "the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States." 28 U.S.C. § 158(d)(2)(A)(i); *see also IRS v. Davis*, No. 15-cv-5601, 2016 WL 3567039, at *2 (D.N.J. June 28, 2016) (certifying appeal to the Third Circuit where the appeal presented a question of law not previously addressed by the Third Circuit or Supreme Court). "A 'controlling decision' of the Third Circuit for the purposes of § 158(d)(2)(A)(i) is one that admits of no ambiguity in resolving the issue." *In re Conex Holdings, LLC*, 534 B.R. 606, 611 (D. Del. 2015) (citing cases).

23. Central to these related appeals is the TSAs' status for bankruptcy purposes as Filed Rates incorporating public obligations, with terms and conditions that can only be modified or abrogated by FERC after a determination that doing so is in the public interest. *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) ("Congress here has granted exclusive authority over rate regulation to the Commission.").

24. Neither the Supreme Court nor the Third Circuit has resolved the questions presented by these appeals regarding (a) whether the bankruptcy court or FERC has jurisdiction to decide if a debtor can escape its obligations under a contract that is also a Filed Rate, or (b) regardless of which entity makes the determination, what standard should be applied.[6] In the Rejection Order, the Bankruptcy Court cites no Third Circuit or Supreme Court precedent with respect to whether a FERC-jurisdictional contract can be rejected in bankruptcy, with or without FERC's input, or the standard under which rejection should be considered. In fact, the Bankruptcy Court, across both orders, cites no authority on Filed Rates in bankruptcy at all—because there is none. Rather, the Bankruptcy Court cites Third Circuit[7] and Supreme Court[8] precedent only to

[6] Reflecting the dearth of precedent in support of its holdings, the Bankruptcy Court's Lift-Stay Order cites a single Supreme Court case for the proposition "that '[a]ccording to Section 365(g), "the rejection of an executory contract[] constitutes a breach of such contract…"' *Mission Product Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1659 (2019)." (D.I. 770 at 2.) However, *Mission Product Holdings*, which involved a clothing trademark license, does not address the status of contracts that are also Filed Rates, carrying the force of law, or otherwise concern FERC-jurisdictional contracts in any way.

[7] From the Third Circuit, the Bankruptcy Court cites *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp*., 872 F.2d 36, 39–40 (3d Cir. 1989), for the proposition that "[c]ourts generally authorize debtors to assume or to reject executory contracts and unexpired leases where the debtors appropriately exercise their 'business judgment,'" and cites *In re Exide Techs*., 607 F.3d 957, 967 (3d Cir. 2010), for the definition of an executory contract. (D.I. 942 at 3, 4.) Neither case, however, concerns contracts that are also Filed Rates or the competing claims to jurisdiction by FERC and the Bankruptcy Court.

[8] As to Supreme Court authority, the Bankruptcy Court cites *Mission Products* for the same general definition of executory contracts. (*See* D.I. 942 at 4, 15, 20.) It also cites *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527-28

reference general legal principles unconnected to the FERC jurisdictional issues or to seek to distinguish the novel aspects of its holdings from prior precedent.[9]

B. The Orders Being Appealed Involve Matters of Public Importance.

25. Appellants' appeals present issues of public importance that "transcend the litigants and involve a legal question the resolution of which will advance the cause of jurisprudence to a degree that is usually not the case." *In re Essar Steel Minnesota LLC*, No. 16-11626 (BLS), 2020 WL 3574743, at *6 (D. Del. July 1, 2020) (quoting *In re Am. Home Mortg. Inv. Corp.*, 408 B.R. 42, 44 (D. Del. 2009)). Under the ICA, the interstate pipeline market is one of the very few industries for which Congress has mandated ongoing price regulation. FERC's ability to effectively carry out the ICA's directives, and the disagreement between FERC and the Bankruptcy Court as to how to do so, is therefore directly implicated by these appeals.

26. Because of the public importance of the matters at stake, FERC, as the federal agency tasked by Congress with the enforcement of the ICA, intervened in support of Grand Mesa's Lift-Stay Motion to "[a]llow[] the Commission to consider the public interest." (D.I. 653 at 5.) FERC argued, citing Supreme Court authority, that it "has exclusive jurisdiction under the Interstate Commerce Act (ICA) 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." *Id*. at 5 (citing *Penn. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 422 (1952)). Given the public significance of interstate oil pipelines, as recognized in the ICA, delineating and harmonizing the jurisdictions of FERC and a bankruptcy court over FERC-

(1984), for the proposition that "allowing rejection in order for companies in bankruptcy to reorganize *is in the public interest*." (D.I. 942 at 24 (emphasis added by the Bankruptcy Court).) However, *Bildisco*, like *Mission Products*, does not concern Filed Rates or FERC jurisdictional issues.

[9] The Bankruptcy Court cites *Mobile* and *Sierra* for the sole purpose of limiting the *Mobile-Sierra* doctrine to the Federal Power Act and Natural Gas Act. That limitation is not found in any cited precedent and, in fact, is contrary to FERC's own holdings. *See supra* n.4.

approved Filed Rates is important to protect a safe and reliable energy supply, which has public impact that extends beyond the private parties to this bankruptcy proceeding.

27. The significance of these issues is further confirmed by the multiple, recent instances in which debtors have sought to escape their Filed Rate obligations through bankruptcy. As acknowledged by Debtors' counsel in their representation in *Rockies Express*, "the same issues presented in this appeal – regarding how a bankruptcy court should proceed when a debtor in bankruptcy seeks to reject a filed-rate contract – are currently being litigated in numerous proceedings, both in the federal courts and before FERC itself." *Rockies Express*, D.I. 47 at 16; *see also* D.I. 71 at 3 (order granting certification because the appeal presents issues of public importance);[10] *see, e.g.*, *In re Chesapeake Energy Corp*., No. 20-33233 (Bankr. S.D. Tex. filed July 17, 2020); *Midship Pipeline Co., LLC*, 173 FERC ¶61,011 at P29-30 (2020*)*; *Rockies Express Pipeline LLC*, 172 FERC ¶61,279 at P27 (2020); *ETC Tiger Pipeline, LLC*, 171 FERC ¶61,248 at P22 (2020); *see also Davis*, 2016 WL 3567039, at *3 (finding an issue to be of public importance when it had already been addressed by a number of Courts of Appeals, "affect[s] a significant proportion of individuals and [is] likely to arise repeatedly"). Those issues, in the words of Debtors' counsel, "are *plainly imbued with public importance*, involving critical questions regarding the interplay between bankruptcy courts and FERC and what role FERC should play when it comes to rejection of FERC-jurisdictional contracts." *Rockies Express*, D.I. 47 at 17 (emphasis added).

[10] In *Rockies Express*, the Fifth Circuit granted FERC's and the debtors' joint motion for certification of the appeal from the bankruptcy court's confirmation order, but denied their motion for certification of the appeal from the bankruptcy court's order rejecting certain TSAs. *See FERC v. Ultra Resources, Inc*., No. 20-90046 (5th Cir. Nov. 30, 2020) (granting certification of the confirmation order); *FERC v. Ultra Resources, Inc*., No. 20-90045 (5th Cir. December 9, 2020) (denying certification of the rejection order). Unlike in the Third Circuit, there is authority that is controlling on the bankruptcy court in the Fifth Circuit, *Mirant*, regarding rejection of contracts that contain filed rates. There is no such authority in the Third Circuit; nor did the Bankruptcy Court here even follow *Mirant*.

28. The Lift-Stay Motion and Rejection Motion both present issues of profound public importance, including: the practical ability of a federal agency, FERC, to exercise its statutory authority to regulate interstate oil pipelines; the authority of the bankruptcy court to approve rejection of FERC-jurisdictional contracts; and the differences between the ICA and the Federal Power and Natural Gas Acts in regard to the proper standards for rejection. As such, certification is proper given the public importance of the issues to parties outside of this case and the primary federal regulator for interstate oil pipelines.

C. The Orders Present Questions of Law Requiring Resolution of Conflicting Decisions.

29. While the precise questions presented by Appellants' appeals—specifically, the relative jurisdiction and authority of the Bankruptcy Court and FERC in the context of rejection of oil pipeline TSAs—have not been addressed by courts within the Third Circuit, this Court has affirmed the general principle of "FERC's exclusive jurisdiction and regulatory authority over wholesale power contracts." *In re Kaiser Aluminum Corp.*, 365 B.R. 447, 450 (D. Del. 2007). *Kaiser Aluminum* agreed with the holding of *In re Calpine Corp.,* 337 B.R. 27 (S.D.N.Y. 2006), that FERC should determine rejection of a contract that contains a Filed Rate, but distinguished the situation before it on the grounds that it already "follow[ed] disposition of the merits of the claims by the appropriate administrative agency," *i.e.*, FERC. *Id*. In contrast to this Court's holding in *Kaiser Aluminum*, the Bankruptcy Court claimed for itself "exclusive jurisdiction over the rejection of executory contracts," with no carveout or allowance for FERC-jurisdictional contracts. Lift-Stay Order at 2.

30. Beyond the Third Circuit, the Bankruptcy Court's Orders are inconsistent with the only two Courts of Appeals to specifically address rejection of executory contracts that are also Filed Rates. In *In re Mirant Corp.*, 378 F.3d 511, 524 (5th Cir. 2004), the Fifth Circuit concluded

that "Supreme Court precedent supports applying a more rigorous standard" than the business-judgment standard when evaluating a request to reject an agreement regulated by FERC. By contrast, the Bankruptcy Court "d[id] not believe that a heightened scrutiny, including consideration of the public interest, [wa]s warranted." (D.I. 942 at 24.) In 2019, the Sixth Circuit addressed the same question and concluded that, "when a Chapter 11 debtor moves the bankruptcy court for permission to reject a filed energy contract that is otherwise governed by FERC . . . the bankruptcy court must consider the public interest." *In re FirstEnergy Solutions Corp. v. FERC*, 945 F.3d 454, 454-55 (6th Cir. 2019). The Sixth Circuit went beyond the Fifth Circuit by stating that the bankruptcy court "must invite FERC to participate and provide an opinion in accordance with the ordinary [Federal Power Act] approach (*e.g.*, under the *Mobile–Sierra* doctrine), within a reasonable time." *Id*. at 454-55.[11] Here, the Bankruptcy Court did not invite FERC to participate and provide an opinion, despite FERC's offer of a streamlined procedure.

31. The Bankruptcy Court's Lift-Stay Order likewise is in conflict with other courts that have considered the question. In instructive, persuasive holdings, other courts that have addressed the proper forum to consider rejection of agreements that contain Filed Rates have deferred to FERC's institutional expertise. *See, e.g.*, *Calpine*, 337 B.R. at 39 (holding that because "the fate of wholesale power contracts cannot be determined without consideration of the public interest, the executive agency FERC should determine that interest [rather than the bankruptcy court]"); *In re Boston Generating LLC*, No. 10-cv-6528, 2010 WL 4616243, at *3 (S.D.N.Y. Nov.

[11] In *Mirant*, the Fifth Circuit "presume[d] that the district court would also welcome FERC's participation, if this case is not referred back to the bankruptcy court. Therefore, FERC will be able to assist the court in balancing these equities." *Mirant*, 378 F.3d at 526. The District Court then "g[ave] significant weight to comments and findings of the FERC relative to the effect such a rejection would have on the public interest." *In re Mirant Corp*., 318 B.R. 100, 108 (S.D. Tex. 2004). Here, FERC was not given the opportunity to provide comments and findings.

12, 2010) ("If either the bankruptcy court or FERC does not approve the Debtors' rejection of the HSA, the Debtors may not reject the contract.").

32. Critically, the Bankruptcy Court's rulings are also in direct conflict with FERC's recent rulings on the same questions. For example, in *ETC Tiger Pipeline, LLC*, 171 FERC ¶61,248 (2020), FERC ruled "that the Bankruptcy Code does not displace the Commission's jurisdiction over filed rate contracts under the [Natural Gas Act]. As filed rates, such contracts are not typical commercial contracts but rather establish public obligations that carry the force of law," and that an executory contract that was a Filed Rate could not be rejected in bankruptcy unless both FERC and the Bankruptcy Court authorized the debtor to do so. *Id*. at P22, 24. In the Lift-Stay Order, the Bankruptcy Court wrote that "FERC's recent statement in *ETC Tiger Pipeline, LLC* that the '[r]ejection of a Commission-jurisdictional contract in bankruptcy court alters the essential terms and conditions of a contract that is also a filed rate' is incorrect. It does no such thing." (D.I. 770 at 2.)

D. Certification Will Materially Advance the Progress of the Case.

33. Finally, certification of these appeals to the Third Circuit is appropriate because an immediate appeal will materially advance the progress of this case.

34. First, a direct appeal will greatly serve the interests of efficiency and judicial economy by eliminating the time and cost of multiple levels of appeals and accelerating the ultimate disposition of the issues in dispute. As reflected by FERC's participation (and Debtors' counsel's own statements in another litigation), the public implications of these issues are significant. Further, the financial magnitude for the private parties involved is also significant, with the TSAs providing for future payments in excess of $600 million. (*See* D.I. 1158, Ex. B (Debtors' Motion to Estimate Rejection of Claims, estimating Grand Mesa's undiscounted gross

claim at $636.6 million).) If the appeals were heard first in the District Court, the unsuccessful party almost certainly would appeal the decision to the Third Circuit. *See In re: Nortel Networks Inc., et al*., Nos. 15-196 (LPS), 15-197 (LPS), 2016 WL 2899225, at *5 (D. Del. May 17, 2016) (finding certification to be warranted when it was "nearly certain" that any district court decision would be appealed to the Third Circuit). Appealing only then to the Third Circuit would necessarily result in a far longer and costlier course. That is particularly problematic here, where Debtors themselves, at other stages in the case, have objected to protracting the case because it would deplete the Debtors' estate to the detriment of their creditors as professional fees mount due to the litigation costs.

35. Second, Grand Mesa's appeals present significant questions of law subject to the Third Circuit's *de novo* review. *In re Telegroup, Inc*., 281 F.3d 133, 136 (3d Cir. 2002) ("Because the District Court sat below as an appellate court, this Court conducts the same review of the Bankruptcy Court's order as did the District Court. … As the relevant facts are undisputed, this appeal presents a pure question of law, which we review *de novo*."). The balance of benefits strongly weighs in favor of the efficiency of a direct appeal to the Third Circuit.

CONCLUSION

36. Section 158(d)(2)(B)(ii) mandates that this Court certify Appellants' appeals to the Third Circuit because Appellants have satisfied each of the prerequisite conditions for certification. Accordingly, Appellants respectfully request that this Court certify the appeals of the Lift-Stay Order and Rejection Order to the Third Circuit.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 11, 2020, I electronically filed the foregoing document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record on the service list below, via transmission of Notices of Electronic Filing generated by CM/ECF, electronic mail, and/or first-class U.S. mail.

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