

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:

EXTRACTION OIL & GAS, INC., *et al.*,¹

Debtors.

CIVIL ACTION No. 20-cv-01411
CIVIL ACTION No. 20-cv-01521

Bankruptcy Case No. 20-11548 (CSS)
Bankruptcy BAP No. 20-53

FEDERAL ENERGY REGULATORY
COMMISSION,

Appellant,

v.

EXTRACTION OIL & GAS, INC.,

Appellee.

MOTION TO INTERVENE OUT OF TIME

The Federal Energy Regulatory Commission (“FERC” or the “Commission”) respectfully moves to intervene in the above captioned proceedings. The Commission is aware that this request is late under Rule 8013(g) of the Federal Rules of Bankruptcy Procedure (Rule 8013(g)).²

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 The notice of appeal for case number 20-cv-1411 was docketed on October 21, 2020, (D.I. 864). Under Rule 8013(g) this intervention would have been timely filed on or before November 20, 2020. The notice of appeal of 20-cv-1521 was docketed on November 11, 2020, (D.I. 1048). Under Rule 8013(g) this intervention would have been timely filed on or before December 11, 2020.



However, as set forth more fully below, the Commission respectfully states that its interests in the appeals by Grand Mesa of the above captioned dockets and the grounds for intervention weigh in favor of this Court's granting the Commission's late motion to intervene.

BACKGROUND

A. Procedural Background

On June 14, 2020, Extraction Oil & Gas and certain of its affiliates (the "Debtors") filed petitions under Chapter 11 of the Bankruptcy Code. (D.I. 1).³ On November 2, 2020, the Bankruptcy Court entered a bench ruling preventing Appellant Grand Mesa from seeking the Commission's consideration of the public interest impacts of rejecting a jurisdictional contract. (D.I. 942). On November 10, 2020, the Bankruptcy Court granted the motions to reject certain executory contracts related to Transportation Services Agreements (TSAs). (D.I. 1038). Appellant Grand Mesa filed notices of appeal on October 21, 2020, (D.I. 864), and November 11, 2020, (D.I. 1048). The Commission filed notices of appeal on October 21, 2020, November 6, 2020, and November 20, 2020, (D.I. 816, 1016, 1138).

On December 7, 2020, the Commission and Appellant Grand Mesa jointly requested that this Court consolidate their respective appeals relating to the rejection of the TSAs.⁴ On December 11, 2020, the Commission and Appellant Grand Mesa jointly requested certification for a direct appeal to the United States Court of Appeals for the Third Circuit.⁵

³ Please note that "D.I." citations reference docket numbers in the underlying bankruptcy proceeding.

⁴ *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1411, Doc. No. 18; *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1521, Doc. No. 14.

⁵ *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1411, Doc. No. 21; *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1521, Doc. No. 20.

B. Legal Framework

In 1977, Congress transferred authority over interstate oil pipelines to the then newly created FERC, the 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 clarified that FERC would regulate oil pipelines in accordance with the 1977 version of the Interstate Commerce Act (“ICA”). *See* Pub. L. No. 95-473, § 4(c), 92 Stat. 1466-1470 (1978). Under the ICA, FERC is charged with ensuring just and reasonable rates, a mandate that parallels its obligations under the Natural Gas Act and Federal Power Act. *Compare* 49 U.S.C. § 5 with 15 U.S. Code § 717c; 16 U.S. Code § 824d.

FERC does not seek to limit the jurisdiction granted to the bankruptcy courts by Congress. However, the Bankruptcy Code does not displace the Commission’s own jurisdiction over filed rate contracts under its statutory authority. *ETC Tiger Pipeline, LLC*, 171 FERC ¶61,248, ¶22, *reh’g denied*, 172 FERC ¶61,155 (2020) (discussing this issue in the Natural Gas Act context). Rather, the Commission and the bankruptcy courts have parallel, exclusive jurisdiction.

Just as the bankruptcy courts has exclusive authority over the rejection of a debtor’s executory contracts as private obligations, the Commission has exclusive jurisdiction under the ICA⁶ 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. *See 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*,

⁶ 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).

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.”).

Rates for interstate oil transportation service are filed with and approved by FERC. *Enbridge Energy, Ltd. P’ship*, 152 FERC ¶61,047 (2015). The terms and conditions of such service are included in tariffs that are also filed with and approved by FERC. Accordingly, any challenge to a rate for, or term and condition of providing, interstate oil transportation service must be made before FERC. *See* 49 U.S.C. § 3(1).

ARGUMENT

In accordance with Rule 8013(g) of the Federal Rules of Bankruptcy Procedure, the Commission offers the following in support of this Motion:

A. FERC has a substantial interest in and the proper grounds for intervention in this case.

The Commission has a substantial interest in this matter, as these cases relate to the Commission’s jurisdiction and statutory mandate under the ICA, and, by extension, the Natural Gas Act and Federal Power Act.⁷ Under these respective statutes, the Commission is charged with ensuring that rates charged for oil, natural gas, and electricity for wholesale in interstate commerce are just and reasonable. To that end, the Commission has exclusive jurisdiction over such rates.

These cases also relate to the Commission’s litigation concerning its jurisdiction in ongoing bankruptcy-related proceedings throughout the nation, including the United States Court of Appeals for the Fifth Circuit, the United States District Court for the Southern District of Texas, and the

⁷ *See* 49 U.S.C. § 5; *see also* 15 U.S. Code § 717c; 16 U.S. Code § 824d.

United States Bankruptcy Courts for the District of Delaware, the Southern District of Texas, and the Eastern District of Michigan.⁸ The same jurisdictional questions at issue in this case have also been addressed by several orders issued by the Commission regarding the effect of contract rejection in bankruptcy on the filed rate.⁹

B. Intervention was sought in the Bankruptcy Court.

Although the Commission itself did not have the chance to adequately participate in the underlying bankruptcy proceeding, Commission staff made certain filings in the underlying bankruptcy proceeding. (D.I. 642, 653, 866, 1016, 1138, 1310). For example, the Commission: (i) filed a statement in support of Appellant's motion for an order confirming that the automatic stay does not apply or, in the alternative, for relief from the automatic stay (D.I. 653); noticed appeal of the bankruptcy court's order denying stay relief, (D.I. 866); and (iii) noticed appeal of the bankruptcy court's rejection of two FERC-jurisdictional contracts (D.I. 1016, 1138).¹⁰ Commission staff filed appearances in the case, (D.I. 642), asked questions of witnesses, and made arguments before the judge. (D.I. 942). The Commission also has pending before the Bankruptcy

⁸ *FERC v. Ultra Res., Inc.*, No. 20-20623 (5th Cir. filed Nov. 30, 2020); *FERC v. Ultra Res., Inc.*, No. 20-90045 (5th Cir. filed Nov. 20, 2020) (appeal denied Dec. 9, 2020); *FERC v. Ultra Res., Inc.*, No. 20-90046 (5th Cir. filed Nov. 20, 2020) (appeal granted Nov. 30, 2020); *Chesapeake Energy Mktg., L.L.C. v. FERC*, No. 20-60970 (5th Cir. filed Oct. 22, 2020); *FERC*, Nos. 20-3095, 20-3096 (S.D. Tex. filed Sept. 3, 2020); *Chesapeake Energy Corp.*, No. 20-3125 (S.D. Tex. filed Sept. 3, 2020); *Rockies Express Pipeline, LLC*, No. 20-2306 (S.D. Tex. filed June 30, 2020); *FERC v. Extraction Oil & Gas, Inc.*, Nos. 20-1412, 20-1506, 20-1564 (D. Del. first filed Oct. 21, 2020); *Gulfport Energy Corp.*, No. 20-35562 (Bankr. S.D. Tex. filed Nov. 13, 2020); *In re Boyce Hydro, LLC*, No. 20-21214 (Bankr. E.D. Mich. filed July 31, 2020); *In re Chesapeake Energy Corp.*, No. 20-33233 (Bankr. S.D. Tex. filed Jun 28, 2020); *In re Extraction Oil & Gas, Inc.*, No. 20-11548 (Bankr. S.D. Tex. filed June 14, 2020).

⁹ See, e.g., *Rover Pipeline LLC*, 173 FERC ¶61,019, *order on public interest*, 173 FERC ¶61,133, *reh 'g denied*, 173 FERC ¶61,138 (2020); *ANR Pipeline Co.*, 173 FERC ¶61,018, *order on public interest*, 173 FERC ¶61,131, *reh 'g denied*, 173 FERC ¶61,137 (2020); *Midship Pipeline Co., LLC*, 173 FERC ¶61,011, *order on public interest*, 173 FERC ¶61,130, *reh 'g denied*, 173 FERC ¶61,136 (2020); *Rockies Express Pipeline LLC*, 172 FERC ¶61,279, *order on public interest*, 173 FERC ¶61,099, *reh 'g denied*, 173 FERC ¶61,135 (2020); *ETC Tiger Pipeline, LLC*, 171 FERC ¶61,248, *reh 'g denied*, 172 FERC ¶61,155 (2020).

¹⁰ These appeals are reflected by Case Nos. 20-cv-1412, 20-cv-1506, 20-cv-1564.

Court, an objection to confirmation of the reorganization plan which the Bankruptcy Court has not yet ruled on. (D.I.1310).

The Commission has issued orders involving similarly situated parties in bankruptcy proceedings that may be relevant to this Court's disposition of the matters on appeal.¹¹

C. Intervention is being sought at this stage of the proceeding in the event that consolidation and certification are not granted.

On December 7, 2020 the Commission and Appellant Grand Mesa jointly requested that this Court consolidate their respective appeals.¹² On December 11, 2020, the Commission and Appellant Grand Mesa jointly requested certification for a direct appeal to the United States Court of Appeals for the Third Circuit.¹³ Intervention is being sought at this stage of the proceeding in the event that these above captioned appeals are neither consolidated with the Commission's own appeals in this matter that are pending before this Court nor certified for direct appeal to the United State Court of Appeals for the Third Circuit.

Additionally, the Commission believes that, given the early stage of the proceedings, granting late intervention would not cause undue delay or burden on the district court proceeding or the parties to the appeal.

D. Participating as an *amicus curiae* would not be adequate because the Commission would not be able to fully present its position.

Participation as *amicus curiae*, under Rule 8017 of the, would restrict the Commission's ability to fully present its position, and we believe this Court would benefit from a full briefing by

¹¹ See *supra* n.8.

¹² *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1411, Doc. No. 18; *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1521, Doc. No. 14.

¹³ *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1411, Doc. No. 21; *Grand Mesa Pipeline, LLC, v. Extraction Oil & Gas, Inc.*, No. 20-cv-1521, Doc. No. 20.

the Commission. The Commission also feels that intervention is appropriate because the Commission's jurisdiction is squarely at issue here.

The Commission has conferred with local counsel for the parties to the appeal, as required by Local Rule 7.1.1. Grand Mesa does not object to this Motion but reserves its right to object upon review. The Commission asked counsel for Extraction if they were opposed to this Motion to Intervene on Friday, December 18, 2020. Counsel for Extraction responded that they needed more time to answer, so the Commission held off on filing this Motion. On Monday, December 21, 2020, counsel for Extraction notified the Commission that Appellee opposes this Motion.

In closing, for the aforementioned reasons, FERC respectfully requests this Court grant FERC's motion for intervention.

Dated: December 21, 2020

Respectfully submitted,

Federal Energy Regulatory Commission

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 21, 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.

/s/ Daniel M. Vinnik

Daniel M. Vinnik (DC Bar No. 1672729)

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