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, Appellant, v. EXTRACTION OIL & GAS, INC. Appellee.	)	Civil Action No. 20-cv-01411-CFC Civil Action No. 20-cv-01521-CFC Bankruptcy Case No. 20-11548 (CSS) Bankruptcy BAP No. 20-43 Bankruptcy BAP No. 20-53

APPELLEE EXTRACTION OIL & GAS, INC.'S RESPONSE IN OPPOSITION TO FEDERAL ENERGY REGULATORY COMMISSION'S MOTION TO INTERVENE OUT OF TIME

Pursuant to Federal Rule of Bankruptcy Procedure 8013(a)(3)(A), Appellee Extraction Oil & Gas, Inc. (Extraction) respectfully submits this response in opposition to the Federal Energy Regulatory Commission's (FERC) motion to intervene out of time in the two above-captioned bankruptcy appeals, which

[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.

Appellant Grand Mesa Pipeline, LLC (Grand Mesa) initiated over nine weeks ago (20-cv-01411) and six weeks ago (20-cv-01521), respectively.

FERC's Motion is remarkably flawed at every turn. Among other things, FERC filed the Motion long after the due date, but it does not even try to explain its delay or offer any theory as to why this Court has the authority to grant the tardy Motion. Further, the Motion inexplicably fails to mention that FERC *itself* has appealed from the *same* orders that are under review in the two appeals in which it seeks to intervene. *See* Case Nos. 20-cv-01411, 20-cv-01506, 20-cv-01564. Moreover, the Bankruptcy Court has approved a settlement agreement between Grand Mesa and Extraction, which will soon lead to the *dismissal* of the very two appeals in which FERC seeks to intervene. In short, this Court does not even have the power to grant the Motion, and even if it did, there is simply no logical reason to do so given that the appeals in which FERC seeks to intervene will soon be dismissed and FERC can present its arguments in its own appeals.

BACKGROUND

1. Extraction is an independent exploration-and-production company that is focused on the acquisition, development, and production of oil, natural gas, and natural gas liquids reserves in the Rocky Mountain region. *See* D.I.1023 at 5. In recent years, Extraction faced significant challenges from volatility in the commodities markets—volatility that the COVID-19 pandemic and tensions

between OPEC and Russia only exacerbated in 2020. *See id.* Accordingly, on June 14, 2020, Extraction voluntarily filed for Chapter 11 bankruptcy. *See* D.I.1.

2. Pursuant to 11 U.S.C. §365, Extraction thereafter moved to "reject" certain executory contracts—*i.e.*, contracts under which "performance" remains "due to some extent on both sides." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984). As relevant here, on June 15, 2020, Extraction moved to reject two "transportation service agreements" (TSAs) between it and Grand Mesa, which addressed the shipment of crude petroleum on Grand Mesa pipelines. *See* D.I.14.

3. Grand Mesa and FERC opposed these efforts. In particular, Grand Mesa filed a motion arguing that, before rejection could proceed, Extraction first had to obtain approval from FERC. Grand Mesa's motion contended that Chapter 11's automatic-stay provision, *see* 11 U.S.C. §362, did not prohibit such a proceeding before FERC and that, regardless, good cause existed to lift the automatic stay. *See* D.I.364. FERC filed a five-page statement in support of Grand Mesa's lift-stay motion, but *did not* seek intervention. *See* D.I.653.

4. In addition to filing the lift-stay motion, Grand Mesa also filed a separate objection to Extraction's rejection motion. *See* D.I.363. In its objection, Grand Mesa asserted, among other things, that Extraction could not lawfully reject the TSAs because those contracts contained covenants running with the land under Colorado law—an issue, it insisted, that required an adversary proceeding in the

Bankruptcy Court to resolve. *See, e.g.*, D.I.363 at 5-6, 31-38. Consistent with that demand, Extraction initiated an adversary proceeding and sought summary judgment on the claim that the TSAs did not contain covenants running with the land under Colorado law. *See Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline, LLC*, Adv. Pro. No. 20-50816.

5. The Bankruptcy Court ruled in Extraction's favor on all rejection-related issues. First, the court denied the lift-stay motion, explaining, among other things, that "[i]t would be a violation of [the bankruptcy courts'] exclusive jurisdiction over the rejection of executory contracts for FERC to purport to decide the [rejection] issue." D.I.770 at 2; *see also* D.I.781. Next, the court granted summary judgment to Extraction in the adversary proceeding, concluding that the Grand Mesa TSAs did not contain covenants running with the land that impeded rejection. *See* Adv. Pro. No. 20-50816 D.I.45. Finally, the court gave full authorization for Extraction to reject the Grand Mesa TSAs, observing (among other things) that, "although Congress knew how to craft exceptions to rejection, Congress declined to except FERC approved contracts," and also that §365 of the Bankruptcy Code permitted rejection "even if the TSAs contain covenants running with the land, which they do not." D.I.942 at 4, 19.

6. Grand Mesa and FERC each appealed—separately—from the Bankruptcy Court's ruling denying Grand Mesa's lift-stay order, *see* D.I.864;

D.I.866, giving rise to Case Nos. 20-cv-01411 (Grand Mesa) and 20-cv-01412 (FERC) in this Court. Grand Mesa and FERC also each appealed—separately—from the Bankruptcy Court's contract-rejection order, *see* D.I.1016; D.I.1048; D.I.1138, giving rise to Case Nos. 20-cv-01521 (Grand Mesa), 20-cv-01506 (FERC), and 20-cv-01564 (FERC) in this Court. Furthermore, Grand Mesa—but not FERC—appealed from the Bankruptcy Court's adversary-proceeding order, giving rise to Case No. 20-cv-01458 in this Court.

7. On December 7, 2020, Grand Mesa and FERC moved to consolidate their five lift-stay and contract-rejection appeals. They did not acknowledge, however, that Grand Mesa had also filed its adversary-proceeding appeal, which involves the same ultimate issue as the lift-stay and contract-rejection appeals (namely, the propriety of contract rejection).[2] Nor did it acknowledge that another party had filed two other appeals raising that same ultimate issue, too.

8. On December 11, 2020, Extraction filed a response to that consolidation motion and a cross-motion regarding consolidation, which argued that the Court should consolidate Grand Mesa's and FERC's five lift-stay and contract-rejection appeals with Grand Mesa's adversary-proceeding appeal and the two other appeals.

[2] FERC also fails to acknowledge Grand Mesa's adversary-proceeding appeal in the Motion here.

9. Also on December 11, 2020, Grand Mesa and FERC moved for certification of a direct appeal of their five lift-stay and contract-rejection appeals to the Third Circuit (but not Grand Mesa's adversary-proceeding appeal or the two other related appeals).

10. Approximately one week later, on December 19, 2020, Extraction and Grand Mesa finalized a settlement agreement that obviates all of Grand Mesa's appeals, including its lift-stay and contract-rejection appeals. *See* D.I.1427. The Bankruptcy Court approved that settlement agreement in an order dated December 21. D.I.1464.

11. Nonetheless, later on December 21, 2020, FERC filed the instant Motion to intervene out of time in Grand Mesa's lift-stay and contract-rejection appeals.

ARGUMENT

12. This Court should deny FERC's Motion, which has zero basis in law or logic.

13. As a threshold matter, and as FERC recognizes, *see* Mot.1, its opportunity to intervene in Grand Mesa's lift-stay and contract-rejection appeals has already lapsed. Under Federal Rule of Bankruptcy Procedure 8013(g), "an entity that seeks to intervene in an appeal pending in the district court … *must* move for leave to intervene and serve a copy of the motion on the parties to the appeal …

within 30 days after the appeal is docketed." Fed. R. Bankr. P. 8013(g) (emphases added). This Court docketed Grand Mesa's lift-stay appeal (20-cv-01411) on October 21, 2020, *see* Dkt.1, thus requiring FERC to file any motion to intervene by November 20. Furthermore, this Court docketed Grand Mesa's contract-rejection appeal (20-cv-01521) on November 12, 2020, *see* Dkt.1, thus requiring FERC to file any motion to intervene by December 12, 2020 (a Saturday, so until December 14, 2020 *see* Fed. R. Bankr. P. 9006(a)(1)(C)). Accordingly, the instant Motion, which FERC filed on December 21, 2020 is *late by 31 days and 7 days*, respectively.

14. FERC insists that "its interests" in Grand Mesa's lift-stay and contract-rejection appeals "weigh in favor of this Court's granting [its] late motion to intervene." Mot.2. But FERC never cites any legal authority authorizing this Court to grant its requested relief on that basis (or any other). That deficiency is disqualifying in and of itself. *See, e.g.*, Fed. R. Bankr. P. 8013(a)(2)(A) ("A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it."); *cf. Ampex Corp. v. Eastman Kodak Co.*, 461 F. Supp. 2d 232, 234 (D. Del. 2006) ("Since Ampex has not … provided any relevant legal authority, I will not address the issue.").

15. In any event, this Court does not have the authority to grant FERC's considerably out-of-time Motion. Under Federal Rule of Bankruptcy Procedure 9006(b)(1), "when an act is required … to be done at or within a specified period by

these rules … , the court for cause shown may at any time in its discretion (1) … order the period enlarged *if the request therefor is made before the expiration of the period originally prescribed* or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of *excusable neglect*." Fed. R. Bankr. P. 9006(b)(1) (emphases added). FERC has satisfied neither of these options. FERC never submitted an extension request within the 30-day period for filing a motion to intervene. And FERC has not even attempted to chalk up its tardiness to "excusable neglect," instead simply offering the conclusory assertion that it just "feels that intervention is appropriate" at this stage. Mot.7. FERC's failure to justify its out-of-time filing (or even attempt to do so) alone warrants denying the Motion.

16. Even if the Motion were timely, FERC's request is still unavailing. Indeed, it does not make any apparent sense. The Motion conspicuously fails to mention that FERC has *already* filed its *own* appeals from the *same* Bankruptcy Court orders that gave rise to the two Grand Mesa appeals in which FERC seeks to intervene. *See* Case No. 20-cv-0412 (FERC lift-stay appeal); Case Nos. 20-cv-01506 & 20-cv-01564 (FERC contract-rejection appeal). On top of that, Grand Mesa has *settled* these two appeals with Extraction, and the Bankruptcy Court has recently approved that settlement. Thus, FERC never had any reason to intervene in Grand Mesa's appeals in the first place in light of its own identical appeals, and it

has even less reason to do so now given that Grand Mesa's appeals are slated for imminent dismissal.

17. Rather than grapple with those clearly material (and dispositive) facts, FERC claims that its Motion is "[i]n accordance with Rule 8013(g) of the Federal Rules of Bankruptcy Procedure," Mot.4, which requires a party seeking to intervene in a bankruptcy appeal (in a timely manner, unlike FERC) to "concisely state [1] the movant's interest, [2] the grounds for intervention, [3] whether intervention was sought in the bankruptcy court, [4] why intervention is being sought at this stage of the proceeding, and [5] why participating as an amicus curiae would not be adequate." Fed. R. Bankr. P. 8013(g). FERC's efforts to comply with these requirements only further underscore that the Motion should be denied.

18. FERC first claims that it "has a substantial interest in and the proper grounds for intervention in this case" because Grand Mesa's appeals "relate to" its "jurisdiction and statutory mandate." Mot.4-5. Quite obviously, however, FERC can seek to address its interests in its "jurisdiction and statutory mandate" in its own appeals from the very same orders.

19. FERC next claims that "[i]ntervention was sought in the Bankruptcy Court.," Mot.5, but that assertion is simply not true. To be sure, as FERC itself explains, it made "certain filings in the underlying bankruptcy proceeding." Mot.5. More precisely, FERC filed notices of appearance, *see* D.I.642; a five-page

statement in support of Grand Mesa's lift-stay motion, *see* D.I.653; three notices of appeal, *see* D.I.866, D.I.1016, D.I.1138; and an objection to Extraction's plan of reorganization, *see* D.I.1310. Conspicuously absent from that list, however, is any motion to *intervene*, which is the relevant action in question. *See* Fed. R. Bankr. P. 2018 (discussing intervention).

20. FERC next argues that "[i]ntervention is being sought at this stage of the proceeding in the event that consolidation and certification are not granted." Mot.6. That is a *non sequitur*. If consolidation of FERC's appeals with Grand Mesa's appeals is denied, and/or certification of its appeals (and/or Grand Mesa's appeals) to the Third Circuit is denied, FERC will still have, before this Court, its own appeals from the same orders at issue in the two Grand Mesa appeals in which it is seeking to intervene, resulting in no need for intervention in the Grand Mesa appeals.

21. Finally, FERC's assertion that "[p]articipating as an *amicus curiae* would not be adequate because the Commission would not be able to fully present its position" is equally misguided. Mot.6. Even putting aside that FERC presented its position on Grand Mesa's lift-stay motion below through the equivalent of an amicus brief (specifically, a five-page statement supporting Grand Mesa's lift-stay motion), *see* D.I.653, there is no better place for FERC to "fully present its position"

than in its *very own appeals* from the *very same orders* that are at issue in these appeals.

22. In sum, and as the foregoing underscores, FERC's Motion is flawed from start to finish. Accordingly, this Court should deny it.

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Dated: December 28, 2020
Wilmington, Delaware

/s/ *Richard W. Riley*

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Certificate of Service

I, Richard W. Riley, certify that on December 28, 2020, I caused an electronic filed copy of the (i) foregoing document using the Court's CM/ECF which reflects that an electronic notification of filing was served on all registered users of the CM/ECF System that have requested such notification; and (ii) a copy to be served overnight delivery on the party listed below.

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