

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
EXTRACTION OIL & GAS, INC., <i>et al.</i> , ¹)	
Reorganized Debtors.)	
FEDERAL ENERGY REGULATORY COMMISSION,)	Civil Action No. 20-cv-01412-CFC
Appellant,)	Civil Action No. 20-cv-01506-CFC
v.)	Civil Action No. 20-cv-01564-CFC
EXTRACTION OIL & GAS, INC.)	Civil Action No. 21-cv-00012-CFC
Appellee.)	
)	Bankruptcy Case No. 20-11548 (CSS)
)	Bankruptcy BAP No. 20-44
)	Bankruptcy BAP No. 20-52
)	Bankruptcy BAP No. 20-56
)	Bankruptcy BAP No. 21-01
)	
)	
)	

**APPELLEE EXTRACTION OIL & GAS, INC.'S RESPONSE IN
OPPOSITION TO APPELLANT FEDERAL ENERGY REGULATORY
COMMISSION'S AMENDED MOTION FOR CERTIFICATION OF A
DIRECT APPEAL OF BANKRUPTCY COURT ORDERS TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

¹ The Reorganized 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 Reorganized Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.



INTRODUCTION

Pursuant to Federal Rule of Bankruptcy Procedure 8006(f)(3), Appellee Extraction Oil & Gas, Inc. (“Extraction”) respectfully submits this response in opposition to the amended motion for certification of a direct appeal to the Third Circuit (“Amended Certification Motion”) filed by Appellant Federal Energy Regulatory Commission (the “Commission” or “FERC”).² The Amended Certification Motion follows a joint motion for certification of a direct appeal to the Third Circuit that FERC filed together with Grand Mesa Pipeline, LLC (“Grand Mesa”) on December 11, 2020 (“Original Certification Motion”).³ The Original Certification Motion sought immediate Third Circuit review of five appeals—three from FERC and two from Grand Mesa—that were pending in this Court at that time.

Since the Original Certification Motion, however, Grand Mesa has dismissed its two appeals referenced in that motion, and FERC has filed a fourth appeal—namely, Civ. No. 21-12-CFC, which is an appeal from the Bankruptcy Court’s December 23, 2020 order confirming Extraction’s Chapter 11 plan of reorganization.

² See *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1412-CFC, Dkt. 25; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1506-CFC, Dkt. 23; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1564-CFC, Dkt. 24; *FERC v. Extraction Oil & Gas, Inc.*, 1:21-cv-0012-CFC, Dkt. 18.

³ See *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1411-CFC, Dkt. 21; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1412-CFC, Dkt. 13; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1506-CFC, Dkt. 1; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1521-CFC, Dkt. 20; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1564-CFC, Dkt. 13.

The Amended Certification Motion seeks immediate Third Circuit review of the four FERC appeals, and it identifies several questions presented, one of which is entirely new and pertains only to FERC's fourth appeal.

This Court should deny FERC's Amended Certification Motion, which is fundamentally misguided on many levels. First, FERC did not even have authorization to file the Amended Certification Motion. This Court permitted such a motion only if the parties disagreed that FERC's fourth appeal "may be considered within the scope of the relief requested in" the Original Certification Motion—and the parties do not disagree on that point. Second, FERC's request to certify its fourth appeal for direct review is untimely, which bars the Third Circuit from exercising jurisdiction over that direct appeal and, at a minimum, creates a significant vehicle problem impeding this Court's certification or the Third Circuit's acceptance of direct appeal. Third, as was the case with its Original Certification Motion, FERC's Amended Certification Motion presents numerous defects that render direct appeal inappropriate. Indeed, if anything, there are even more complications now than before.

FERC's Amended Certification Motion confirms what Extraction has argued since December: FERC's appeals are a procedural and substantive quagmire, and they are exceedingly poor candidates for direct appeal to the Third Circuit. Accordingly, this Court should deny the Amended Certification Motion, and it

should resolve all four FERC appeals in the ordinary course and in a single decision. Once the appeal proceedings in this Court are over, either FERC or Extraction may then seek review in the Third Circuit in an orderly fashion.

ARGUMENT

A. The Amended Certification Motion Is Unauthorized.

The first problem with FERC’s Amended Certification Motion is that it is unauthorized. The only authority that FERC invokes to file the Amended Certification Motion is this Court’s “January 13, 2021 Order re Status Report” (“January 13 Order”). Am.Cert.Mot.15.⁴ As relevant here, the January 13 Order states that, “[i]f the parties ... agree” that FERC’s fourth appeal (Civ. No. 21-12-CFC) “may be considered within the scope of the relief requested in” the Original Certification Motion, “they shall file a joint status report indicating same.” Jan.13.Order.3. It further states that, “[i]f the parties do not agree,” FERC has 14 days to file “an amended Certification Motion to address the inclusion of Civ. No. 21-12-CFC within the scope of the relief requested.” *Id.*

Here, however, the parties *agree* that Civ. No. 21-12-CFC “may be considered within the scope of the relief requested in” the Original Certification Motion. The Amended Certification Motion acknowledges as much: “The parties agreed that the

⁴ See *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1412-CFC, Dkt. 19; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1506-CFC, Dkt. 17; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1564-CFC, Dkt. 19; *FERC v. Extraction Oil & Gas, Inc.*, 1:21-cv-0012-CFC, Dkt. 11.

Commission’s most recent appeal, Civ. No. 21-12-CFC, may be considered within the scope of the relief requested in the Commission’s pending Motion for Certification insofar as the Commission continues to request certification of a direct appeal to the United States Court of Appeals for the Third Circuit.” Am.Cert.Mot.13-14. So too does the parties’ February 9 Joint Status Report. *See* Feb.9.Joint.Status.Rpt.5 (“Extraction agrees that the appeal pending at Civ. No. 21-12-CFC may be considered within the scope of the relief requested in the Commission’s pending Motion for Certification.”); *id.* (“The Commission also agrees that the appeal pending at Civ. No. 21-12-CFC may be considered within the scope of the relief requested in the Commission’s pending Motion for Certification insofar as the Commission continues to request certification of a direct appeal to the United States Court of Appeals for the Third Circuit[.]” (footnote omitted)).⁵ Given the parties’ agreement that Civ. No. 21-12-CFC “may be considered within the scope of the relief requested in” the Original Certification Motion—which, after all, requested the relief of certification of a direct appeal, just like the Amended Certification Motion—it follows that the Amended Certification Motion is unauthorized.

⁵ *See FERC v. Extraction Oil & Gas, Inc.*, No. 20-cv-1412, Dkt. 23; *FERC v. Extraction Oil & Gas, Inc.*, No. 20-cv-1506, Dkt. 21; *FERC v. Extraction Oil & Gas, Inc.*, No. 20-cv-1564, Dkt. 23; *FERC v. Extraction Oil & Gas, Inc.*, 1:21-cv-0012-CFC, Dkt. 16.

FERC attempts to sidestep this problem by implausibly bifurcating its response to the straightforward condition that this Court set forth: although it “agree[s]” that its fourth appeal “may be considered within the scope of the relief requested in” its previous motion “insofar as [FERC] continues to request certification of a direct appeal ... and [FERC’s] substantive legal arguments for certification continue to apply,” it does “not agree” that the fourth appeal “may be considered entirely within the scope of the relief requested” because “the questions previously presented” in the Original Certification Motion “do not conform to that appeal.” Am.Cert.Mot.13-14; *see also* Feb.9.Joint.Status.Rpt.5. It is unclear exactly what FERC is contending—or why “continu[ing] to request certification of a direct appeal” with the same “substantive legal arguments” does not constitute being “within the scope of the relief requested in” its previous motion. But to the extent that FERC believes that it is necessary to add a third question presented to allow the Third Circuit to conduct appellate review, *see* Am.Cert.Mot.14-15, that argument is a *non sequitur*, as it simply has nothing to do with the condition under which this Court permitted an amended certification motion.

Confirming that FERC is impermissibly attempting to circumvent this Court’s prior order, the Amended Certification Motion contains a number of modifications from FERC’s Original Certification Motion that have nothing to do with Civ. No. 21-12-CFC. For example, FERC tries to explain why the settlement between Grand

Mesa and Extraction—which Extraction previously identified as a barrier to granting the Original Certification Motion, *see* Jan.11.FERC.Status.Rpt.7⁶—does not affect its ability to continue to litigate on appeal. *See, e.g.,* Am.Cert.Mot.3 (“Although Grand Mesa has settled with Debtor, other entities with jurisdictional TSAs have had their contracts rejected by the Bankruptcy Court, such as Colorado Interstate Gas[.]”); *see also id.* at 11 (similar). Similarly, in its Amended Certification Motion, FERC has deleted references to Federal Rule of Bankruptcy Procedure 8001(f), which FERC cited in its Original Certification Motion as authority for obtaining direct review—before Extraction responded in opposition that Rule 8001(f) no longer exists. *Compare* Original.Cert.Mot.11-12, *with* Am.Cert.Mot.15; *see also* Original.Cert.Opp.11-12.⁷

This Court’s January 13 Order was not an invitation for FERC to improve upon its Original Certification Motion or to respond to Extraction’s previous arguments against direct review. FERC’s attempt to have its cake and eat it too by bifurcating its response to this Court’s order and submitting a motion that both raises

⁶ *See FERC v. Extraction Oil & Gas, Inc.*, No. 20-cv-1412, Dkt. 18; *FERC v. Extraction Oil & Gas, Inc.*, No. 20-cv-1506, Dkt. 16; *FERC v. Extraction Oil & Gas, Inc.*, No. 20-cv-1564, Dkt. 18; *FERC v. Extraction Oil & Gas, Inc.*, 1:21-cv-0012-CFC, Dkt. 10.

⁷ *See FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1411-CFC, Dkt. 27; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1412-CFC, Dkt. 16; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1506-CFC, Dkt. 14; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1521-CFC, Dkt. 26; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1564-CFC, Dkt. 16.

additional questions for appeal and attempts to fix defects in its prior motion should be rejected. On that basis alone, this Court should deny the Amended Certification Motion.

B. FERC’s Request for Certification of Its Fourth Appeal Is Untimely.

Even if the Amended Certification Motion were authorized, FERC’s addition of another question presented to “conform to the issue appealed in Civ. No. 21-12-CFC,” Am.Cert.Mot.15—the very reason why FERC claims that it is authorized to file the motion—introduces a second significant hurdle: FERC’s request for certification of Civ. No 21-12-CFC is not timely. As noted, Civ. No 21-12-CFC is FERC’s appeal from the plan confirmation order, which the Bankruptcy Court entered on December 23, 2020. *See* D.I. 1509. Under the bankruptcy-appeal statute (as well as Federal Rule of Bankruptcy Procedure 8006(f)(1)), FERC had to submit any request for a direct appeal from that plan confirmation order within 60 days of the order. *See* 28 U.S.C. §158(d)(2)(E) (“Any request [to a district court] for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.”); Fed. R. Bankr. P. 8006(f)(1) (“A request by a party for certification that a circumstance specified in 28 U.S.C. §158(d)(2)(A)(i)-(iii) applies ... must be filed with the clerk of the court where the matter is pending within 60 days after the entry of the judgment, order, or decree.”).

FERC's request in the Amended Certification Motion fails to comply with the 60-day deadline. That 60-day deadline expired on February 22, 2021, but FERC elected not to file the Amended Certification Motion until February 23, 2021—one day late.⁸ Critically, because the 60-day deadline is *jurisdictional*, FERC's untimeliness is fatal to its efforts to seek a direct appeal in Civ. No. 21-12-CFC. *See, e.g., In re Holloway*, 425 F. App'x 354, 355 (5th Cir. 2011) ("After consideration of our jurisdiction over this appeal, we must dismiss, as we find that the sixty-day time period imposed on certification requests by 28 U.S.C. §158(d)(2)(E) is jurisdictional, and the parties did not abide by that time frame."); W. Homer Drake Jr. & Karen Visser, *Bankr. Prac. for Gen. Practitioner* §4:16 n.15 (2020) ("The requirement of filing the request within 60 days has been held to be jurisdictional, such that the failure to file within the stated time deprives the appellate court of jurisdiction.").

FERC may protest that a one-day delay is immaterial or excusable—indeed, FERC apparently (but mistakenly) believes that the January 13 Order permitted its February 23 submission, *see* Am.Cert.Mot.13-14—but such arguments are categorically irrelevant when it comes to jurisdictional statutes (like the one here), which provide no authorization for a delay of any kind. *See, e.g., Holloway*, 425 F. App'x 354 at 358 ("As the sixty-day time period limits our jurisdiction, we also note

⁸ Sixty days after December 23, 2020 is February 21, 2021, but FERC had until February 22, 2021 by operation of Federal Rule of Bankruptcy Procedure 9006(a)(1)(C).

that we may not use equitable powers to relieve the parties here from the statutory requirements for proper certification.”); *see also Bowles v. Russell*, 551 U.S. 205, 206-07 (2007) (“[W]e hold that petitioner’s untimely notice—even though filed in reliance upon a District Court’s order—deprived the Court of Appeals of jurisdiction.”); *id.* at 214 (“[T]his Court has no authority to create equitable exceptions to jurisdictional requirements.”).⁹ FERC may also claim that the Third Circuit has not yet determined whether the 60-day deadline is jurisdictional. But in light of *Bowles*, it is highly unlikely that the Third Circuit would conclude otherwise and split from the Fifth Circuit’s decision in *Holloway*. In all events, the mere fact that the Third Circuit would have to confront this threshold jurisdictional question makes it unlikely that the Third Circuit would accept direct appeal of Civ. No. 21-12-CFC, making it an exceedingly unattractive candidate for certification by this Court.¹⁰

Because FERC is jurisdictionally precluded from seeking a direct appeal with respect to Civ. No. 21-12-CFC, it is limited to seeking a direct appeal with respect

⁹ Notably, FERC does not contend that it sought certification of Civ. No 21-12-CFC by means of any other filing prior to its Amended Certification Motion. Nor could it, since its entire theory is that the inclusion of an additional question presented is the basis for seeking certification of Civ. No 21-12-CFC, and prior filings did not include any such additional question presented or develop any argument as to why certification of Civ. No 21-12-CFC would be appropriate.

¹⁰ The consolidation of FERC’s four appeals for procedural purposes does not eliminate this jurisdictional defect as to FERC’s fourth appeal; again, there are no “exceptions to jurisdictional requirements.” *Bowles*, 551 U.S. at 214.

to first three appeals (Civ. No. 20-1412-CFC, Civ. No. 20-1506-CFC, and Civ. No. 20-1564-CFC). But FERC has been adamant that a court should resolve all of its appeals together—and Extraction agrees, which is precisely why this Court recently granted FERC’s unopposed motion to consolidate all of its appeals for procedural purposes. In light of the parties’ positions on consolidation and the obvious advantages to deciding all of the appeals together, and given the jurisdictional defect with direct appeal of Civ. No. 21-12-CFC, the appropriate course of action is thus for this Court to resolve all four FERC appeals together in the first instance.

C. The Appeals Contain Numerous Defects Making Them Poor Candidates for Direct Review.

As Extraction previously explained in opposition to the Original Certification Motion, FERC’s appeals implicate numerous aspects that make them exceptionally unattractive candidates for direct review by the Third Circuit, warranting denial of certification by this Court. The Amended Certification Motion does not rectify those flaws and in some cases compounds them.

For example, the two questions presented for certification that relate to FERC’s first three appeals—which are the same in both the Original Certification Motion and the Amended Certification Motion, *see* Am.Cert.Mot.14—remain just as confusing today as in December (*e.g.*, by containing multiple subsidiary questions); they also remain in stark contrast to the single, intelligible question that

Extraction’s counsel (repeatedly referenced by FERC, *see id.* at 4, 5, 18, 19, 22) successfully presented for certification in another court. *See* Original.Cert.Opp.12-13. Indeed, the problem has worsened since the Original Certification Motion. Not only has FERC also added yet another question presented (pertaining to its fourth appeal), but, in the introduction to its Amended Certification Motion, FERC states that “these appeals present three specific questions”—and then proceeds to offer three questions *different from* the questions that it later identifies in its “questions presented.” *Compare* Am.Cert.Mot.4, *with id.* at 14-15. FERC’s continuing inability to identify a discrete question for review—even offering inconsistent formulations within its own motion—reinforces that this Court should decide its appeals in the first instance, which would help crystallize the appellate issues for the Third Circuit, rather than leaving it for the Third Circuit to sort out.

As another example, FERC’s first three appeals all continue to relate to motions filed in the Bankruptcy Court by Grand Mesa, Platte River Midstream, LLC, and DJ South Gathering, LLC—*not* by FERC. But those other parties are no longer pursuing appellate relief, thus raising serious questions as to whether FERC has standing to litigate in their absence. This would be yet another threshold question that the Third Circuit would have to decide before addressing the merits of FERC’s appeals—and that no court has yet addressed in these proceedings—making it unlikely that the Third Circuit would accept direct review even if this Court granted

certification. *See Jerri v. Harran*, 625 F. App'x 574, 579 (3d Cir. 2015) (“[W]e are a court of review, not first view.”). As Extraction has explained, the far better course is for this Court to address FERC’s standing in the first instance. *See Original.Cert.Opp.2*, 10-11.

Furthermore, FERC’s first appeal, Civ. No. 20-1412-CFC, continues to relate to a Bankruptcy Court order that does not even involve a formal, written opinion that addresses all relevant issues. The absence of a written decision confirms that this Court should provide such an opinion before the Third Circuit weighs in. *See Original.Cert.Opp.16*.

Finally, a foundational component of any bankruptcy appeal is the record on appeal, which is comprised of the bankruptcy-court “items” that the parties to the appeal designate themselves. *See Fed. R. Bankr. P. 8009*. Here, however, FERC did not submit its record designations in *any* of its first three appeals until January 19, 2021, rendering them 76 days, 60 days, and 46 days late, respectively—as Extraction emphasized in its filings in response to those designations.¹¹ FERC has yet to offer any explanation for its complete disregard of the bankruptcy rules, and that dispute regarding the appellate record remains unresolved. Indeed, for all four appeals of which FERC seeks certification, the Bankruptcy Court has yet to transmit

¹¹ *See FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1412-CFC, Dkt. 22; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1506-CFC, Dkt. 20; *FERC v. Extraction Oil & Gas, Inc.*, 1:20-cv-1564-CFC, Dkt. 22; *FERC v. Extraction Oil & Gas, Inc.*, 1:21-cv-0012-CFC, Dkt. 14.

the record on appeal to this Court. It is thus not even clear whether those appeals can currently proceed even in this Court. At a minimum, the lack of any record on appeal, and FERC's failure to timely designate items for the appellate record in its first three appeals, presents yet another in a long list of reasons not to grant direct appeal.¹²

WHEREFORE, this Court should deny FERC's request for direct appeal and instead resolve all four of FERC's appeals a single decision, after which the parties may seek review in the Third Circuit.

[Remainder of page intentionally left blank]

¹² To be clear, and as explained in the opposition to the Original Certification Motion, procedural defects and vehicle problems are hardly the only flaws with FERC's request for direct appeal. For instance, FERC continues to assert that certification is warranted under 28 U.S.C. §158(d)(2)(A)(ii) to resolve "[c]onflicting [d]ecisions." See Am.Cert.Mot.19-22. But the "conflicting decisions" to which the statute refers are conflicting bankruptcy-court decisions within the same circuit, conflicting district-court decisions within the same circuit, or conflicting decisions of two panels within the same circuit. See 1 *Collier on Bankruptcy* ¶5.06[4][c] (16th ed. 2020); see also, e.g., *In re Aerogroup Int'l, Inc.*, BR No. 17-11962 (CSS), 2020 WL 757892, at *4 (D. Del. Feb. 14, 2020). FERC still has never identified such a conflict.

Dated: March 8, 2021
Wilmington, Delaware

/s/ Richard W. Riley

WHITEFORD, TAYLOR & PRESTON LLC¹³

Marc R. Abrams (DE No. 955)

Richard W. Riley (DE No. 4052)

Stephen B. Gerald (DE No. 5857)

The Renaissance Centre

405 North King Street, Suite 500

Wilmington, Delaware 19801

Telephone: (302) 353-4144

Facsimile: (302) 661-7950

Email: mabrams@wtplaw.com

rriley@wtplaw.com

sgerald@wtplaw.com

- and -

KIRKLAND & ELLIS LLP

**KIRKLAND & ELLIS INTERNATIONAL
LLP**

George W. Hicks, Jr. (*admitted pro hac vice*)

C. Harker Rhodes IV (*admitted pro hac vice*)

Andrew C. Lawrence (*admitted pro hac vice*)

1301 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Telephone: (202) 389-5000

Email: george.hicks@kirkland.com

harker.rhodes@kirkland.com

andrew.lawrence@kirkland.com

- and-

¹³ Whiteford, Taylor & Preston LLC operates as Whiteford Taylor & Preston L.L.P. in jurisdictions outside of Delaware.

Anna Rotman, P.C. (*admitted pro hac vice*)
Jamie Alan Aycock (*admitted pro hac vice*)
Kenneth Young (*admitted pro hac vice*)

609 Main Street

Houston, TX 77002

Telephone: (713) 836-3600

Facsimile: (713) 836-3601

Email: anna.rotman@kirkland.com
 jamie.aycock@kirkland.com
 kenneth.young@kirkland.com

*Co-Counsel to Appellee Extraction Oil & Gas,
Inc.*