

# Client Alert

June 2020

## FERC Declares It Has Concurrent Jurisdiction With Bankruptcy Courts When Debtor Seeks To Reject Natural Gas Transportation Agreements

### Summary

On June 22, 2020, the Federal Energy Regulatory Commission (“Commission”) issued an Order on Petition for Declaratory Order finding that it has concurrent jurisdiction with bankruptcy courts to review and address the disposition of Commission-jurisdictional natural gas transportation agreements sought to be rejected through bankruptcy.<sup>1</sup> Specifically, the Commission found that, “Where a party to a Commission-jurisdictional agreement under the [Natural Gas Act] seeks to reject the agreement in bankruptcy, that party must obtain approval from both the Commission and the bankruptcy court to modify the filed rate and reject the contract, respectively.”<sup>2</sup> This is the first time the Commission has made such a finding with regard to jurisdictional agreements pursuant to the Natural Gas Act (“NGA”) and it did so in a well-supported, clear and convincing way.

### Petition for Declaratory Order

The Order was issued in response to a Petition for Declaratory Order filed by ETC Tiger Pipeline, LLC (“Tiger”) on May 19, 2020, in which Tiger respectfully requested that the Commission issue a declaratory order to remove the uncertainty as to whether Chesapeake Energy Marketing, L.L.C. (“Chesapeake”), the counterparty to Tiger’s natural gas transportation agreements at issue in the Petition, must receive the Commission’s approval under Section 5 of the NGA prior to rejection of such Commission-jurisdictional agreements in anticipated bankruptcy proceedings.<sup>3</sup> Specifically, Tiger requested three rulings in the Petition:

1. The natural gas firm transportation agreement dated April 1, 2016, and the natural gas interruptible transportation agreement dated April 1, 2016, entered into between Tiger and [Chesapeake] are Commission-jurisdictional agreements reflecting filed rates approved by the Commission pursuant to its exclusive jurisdiction under the NGA.
2. If Chesapeake seeks to reject such Commission-jurisdictional agreements in bankruptcy court, Chesapeake must petition this Commission for approval to abrogate, modify, or amend the filed rate pursuant to Section 5 of the NGA and show that such abrogation, modification, or amendment is in the public interest.

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<sup>1</sup> *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 (2020) (“Order”).

<sup>2</sup> Order at P 20 (citations omitted).

<sup>3</sup> *ETC Tiger Pipeline, LLC*, Petition for Declaratory Order and Request for Expedited Action of ETC Pipeline, LLC, Docket No. RP20-881 (filed May 19, 2020) (“Petition”).

3. If a party to a Commission-jurisdictional contract under the NGA seeks to reject such agreement in bankruptcy court, that party must receive NGA Section 5 approval before a bankruptcy court can determine whether to reject the agreement.<sup>4</sup>

Tiger argued that the Commission recently affirmed that it has concurrent jurisdiction with the bankruptcy courts in connection with the disposition of Commission-jurisdictional wholesale power contracts pursuant to the Federal Power Act (“FPA”), and that the Commission’s findings are equally applicable to Commission-jurisdictional transportation agreements under the NGA.<sup>5</sup> Tiger stated that despite uncertainty surrounding the jurisdictional issue, the majority of courts that have addressed the issue have found that the Commission has at least concurrent jurisdiction and reasonable opportunity to provide an opinion on whether rejection of the contracts at issue is in the public interest, and have acknowledged the Commission’s exclusive jurisdiction and proper role in determining the public-interest implications prior to permitting a debtor to reject a Commission-jurisdictional agreement.<sup>6</sup> Finally, Tiger argued that the parity between the FPA and NGA extends to the Commission’s application of the filed-rate doctrine, which applies equally under both statutes, and that the *Mobile-Sierra* public interest presumption applies equally to jurisdictional contracts under both the FPA and NGA.<sup>7</sup> Thus, Tiger argued that the issue of a debtor rejecting a Commission-jurisdictional agreement in bankruptcy raises a public policy issue because, pursuant to the filed rate doctrine, a Commission-jurisdictional agreement is not a private contract but has the force of law and only the Commission has the right to determine whether the abrogation, modification, or amendment of a filed rate harms the public interest.<sup>8</sup>

## Protest to the Petition

On June 18, 2020, Chesapeake filed a protest to the Petition, arguing that the Commission should deny the Petition because Tiger allegedly erroneously sought: (i) “a remedy for a situation that has not occurred,” (ii) “to elevate FERC’s jurisdiction over the filed rate above the jurisdiction of the bankruptcy courts to determine whether a contract should be rejected,” and (iii) “to reverse FERC’s policies with respect to natural gas transportation contracts.”<sup>9</sup> Relying on NGA Section 7(b), Chesapeake argued that the NGA and the Commission’s regulations treat natural gas companies differently from shippers on the natural gas pipelines and that the Commission should not infer any duty to perform for shippers such as Chesapeake.<sup>10</sup> Chesapeake also argued that: (i) with or without Commission participation, the bankruptcy courts retain the jurisdiction to consider whether to authorize rejection of a natural gas transportation contract through a shipper in chapter 11 bankruptcy;<sup>11</sup> (ii) the Commission’s Creditworthiness Policy Statement demonstrates the Commission’s understanding that rejection under the Bankruptcy Code would be available to a shipper in bankruptcy without Commission involvement;<sup>12</sup> (iii) the *Mobile-Sierra* doctrine only applies where a party is attempting to unilaterally modify a contract rate and that a contract rejection is a breach of contract that does terminate or rescind the contract such that the filed rate

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<sup>4</sup> Petition at 3.

<sup>5</sup> Petition at 6-7 (citing *NextEra Energy, Inc. v. Pacific Gas & Elec. Co.*, 166 FERC ¶ 61,049 (2019) (“*NextEra*”) and *Exelon Corp. v. Pacific Gas & Elec. Co.*, 166 FERC ¶ 61,053 (2019) (“*Exelon*”), order denying reh’g, *NextEra, Inc. v. Pacific Gas & Elec. Co.*, 167 FERC ¶ 61,096 (2019).

<sup>6</sup> Petition at 7-9.

<sup>7</sup> Petition at 9-15 (citing *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (holding that under the NGA, natural gas companies cannot unilaterally change contract rates) (“*Mobile*”); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (holding that under the FPA, the Commission had no power to change a contract rate without first finding the existing rate unjust, unreasonable, unduly discriminatory, or preferential) (“*Sierra*”)).

<sup>8</sup> Petition at 14-15.

<sup>9</sup> *ETC Tiger Pipeline, LLC*, Protest and Answer of Chesapeake Energy Marketing, L.L.C. in Opposition to Petition for Declaratory Order, Docket No. RP20-881, at 1 (filed June 18, 2020) (“Protest”).

<sup>10</sup> Protest at 4-8.

<sup>11</sup> Protest at 9-14.

<sup>12</sup> Protest at 14-17.

remains intact;<sup>13</sup> and (iv) granting the Petition would be inconsistent with the requirements of Tiger's tariff.<sup>14</sup>

### **Declaratory Order Grants Requested Rulings Based on Parity Between NGA and FPA**

In response to the three requested rulings, the Commission clearly and concisely responded with a "yes" as to the first two and a qualified yes to the third. In granting the Petition, the Commission found, as a threshold matter, that the filed rate doctrine and the *Mobile-Sierra* presumption apply equally to contracts regulated under Sections 4 and 5 of the NGA and contracts regulated under Sections 205 and 206 of the FPA.<sup>15</sup> The Commission noted that the "language used in the NGA regarding the requirement to file rates and the Commission's power to remedy unjust and unreasonable rates 'are in all material respects substantially identical,'" and that the parity between the FPA and NGA extends to the Commission's application of the filed rate doctrine.<sup>16</sup> The Commission also held that the principles articulated in *NextEra* and *Exelon* with respect to the FPA apply with equal force under the NGA.<sup>17</sup> Thus, the Commission held that "the Bankruptcy Code does not displace the Commission's jurisdiction over filed rate contracts under the NGA. As filed rates, such contracts are not typical commercial contracts but rather establish public obligations that carry the force of law."<sup>18</sup>

The Commission also found that the Supreme Court's decision in *Mission Product Holdings, Inc. v. Tempnology* supports the principle that a debtor does not extinguish its filed rate obligations under the NGA by rejecting a contract in bankruptcy.<sup>19</sup> Thus, the Commission held that "[r]ejection of a Commission-jurisdictional contract in a bankruptcy court alters the essential terms and conditions of a contract that is also a filed rate; therefore, the Commission's approval is required to modify or abrogate the filed rate."<sup>20</sup>

As for the first two specific rulings requested by Tiger, the Commission held that yes, the natural gas transportation agreements at issue, like the wholesale power purchase agreements at issue in *NextEra* and *Exelon*, constituted filed rates and that, in order to give effect to both the NGA and the Bankruptcy Code, Chesapeake may not modify the rates, terms, or conditions of its transportation agreements with Tiger by rejecting those contracts in bankruptcy without obtaining approval from the Commission to do so.<sup>21</sup> As for the third ruling requested by Tiger, whether a party to a Commission-jurisdictional contract under the NGA must receive Commission approval before a bankruptcy court can determine whether to reject the agreement, the Commission held that its answer was no, "at least to the extent ETC Tiger appears to suggest that a shipper cannot move to reject a contract in bankruptcy court without the Commission's approval."<sup>22</sup> Interestingly, the Petition did not contend that Commission approval was needed before a party moved to reject a contract, but rather before the bankruptcy court could reject a contract. Therefore, although described as a "no," the Commission's qualified "to the extent" was sufficient to grant the relief sought. The Commission reiterated that while rendering a determination on rejection motions is solely within the province of the bankruptcy court, only the Commission has the authority to modify the public law duties set forth in the filed rate.<sup>23</sup> Thus, the Commission further held that "a reorganization plan that purports to authorize the modification or abrogation of a FERC-jurisdictional filed rate cannot be confirmed unless the Commission agrees to any rate change provided in the

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<sup>13</sup> Protest at 17-18.

<sup>14</sup> Protest at 18-19.

<sup>15</sup> Order at P 21.

<sup>16</sup> Order at P 21 (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7. (1981)).

<sup>17</sup> Order at P 20.

<sup>18</sup> Order at P 22.

<sup>19</sup> Order at P 22 (citing *Mission Product Holdings, Inc. v. Tempnology*, 139 S. Ct. 1652, 1665 (2019)).

<sup>20</sup> Order at P 23.

<sup>21</sup> Order at P 24.

<sup>22</sup> Order at P 25.

<sup>23</sup> Order at P 25 (citation omitted).

reorganization plan or confirmation is made contingent on the Commission's approval. Such an agreement from the Commission can only occur via a Commission order."<sup>24</sup>

In granting the relief sought, the Commission methodically rejected the arguments Chesapeake made in the Protest. For example, the Commission found that Chesapeake's reliance on NGA Section 7(b) to be misplaced because Section 7(b) of the NGA pertains to the requirements for an interstate natural gas pipeline company to abandon jurisdictional service authorized by the Commission, while the Petition instead raised questions about the rights and obligations of parties to Commission-jurisdictional contracts under Sections 4 and 5 of the NGA.<sup>25</sup> The Commission also stated that the automatic stay provision of the Bankruptcy Code is inapplicable because Chesapeake had not yet filed a bankruptcy petition and that, contrary to Chesapeake's arguments, the "application of a separate legal standard by the Commission does not elevate the Commission's jurisdiction to a superior position in relation to the bankruptcy court and does not render the Bankruptcy Code meaningless."<sup>26</sup> Additionally, the Commission found no merit in Chesapeake's assertions regarding: (i) the Creditworthiness Policy Statement, because it addresses issues different than those raised by the Petition; (ii) Tiger seeking to have the Commission apply the wrong standard for contract rejection in bankruptcy court, because that argument conflates the roles of the Commission and the bankruptcy court; and (iii) conflicts with Tiger's tariff, because such arguments are inapplicable where the bankruptcy court has not issued any orders on the matter, thus, granting the Petition cannot conflict with any order of the bankruptcy court.<sup>27</sup>

Therefore, the Commission concluded that the Commission and the bankruptcy courts have concurrent jurisdiction to review and address the disposition of the natural gas transportation agreements sought to be rejected through bankruptcy.

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<sup>24</sup> Order at P 25.

<sup>25</sup> Order at P 26.

<sup>26</sup> Order at PP 28-30.

<sup>27</sup> Order at PP 31-33.