**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| IN RE:<br><br>GULFPORT ENERGY CORPORATION, *et al.*,[1]<br><br>Debtors. | Chapter 11<br><br>Case No. 20-35562 (DRJ)<br><br>(Jointly Administered) |

**OBJECTION OF TC ENERGY TO THE DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING REJECTION OF CERTAIN NEGOTIATED RATE FIRM TRANSPORTATION AGREEMENTS AND RELATED CONTACTS EFFECTIVE AS OF THE PETITION DATE AND (II) GRANTING RELATED RELIEF**
**[RELATED TO DKT. 58]**

ANR Pipeline Company, Columbia Gas Transmission, LLC, and Columbia Gulf Transmission, LLC (collectively, "TC Energy") object to the *Motion of Gulfport Energy Corporation for Entry of an Order (I) Authorizing Rejection of Certain Negotiated Rate Firm Transportation Agreements and Related Contracts Effective as of the Petition Date and (II) Granting Related Relief* (Dkt. 58). In support, TC Energy respectfully states the following:

## INTRODUCTION

1. Gulfport seeks to reject certain filed-rate firm transportation service agreements ("TSAs"), which allow Gulfport to transport natural gas on TC Energy's interstate system of pipelines. The problem is that Gulfport already made—and already lost—this same argument in front of the Federal Energy Regulatory Commission ("FERC" or "the Commission").

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Gulfport Energy Corporation (1290); Gator Marine, Inc. (1710); Gator Marine Ivanhoe, Inc. (4897); Grizzly Holdings, Inc. (9108); Gulfport Appalachia, LLC (N/A); Gulfport MidCon, LLC (N/A); Gulfport Midstream Holdings, LLC (N/A); Jaguar Resources LLC (N/A); Mule Sky LLC (6808); Puma Resources, Inc. (6507); and Westhawk Minerals LLC (N/A). The location of the Debtors' service address is: 3001 Quail Springs Parkway, Oklahoma City, Oklahoma 73134.

2. Gulfport effectively asks this Court to overturn those decisions. But "a losing litigant deserves no rematch after a defeat fairly suffered." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 US. 104, 107 (1991). FERC's orders are issue-preclusive as to the issues raised in Gulfport's rejection motion. Gulfport's motion also proposes a rejection standard that the Supreme Court and the Fifth Circuit have already vetoed. Where, as here, the underlying statute requires that a rejection decision adequately account for the public's interest, the Bankruptcy Code's general business-judgment standard does not apply. Even if it did, however, Gulfport still cannot prevail because it has failed to show that rejection is a sound exercise of its business judgment. For either or both of these reasons, Gulfport's motion should be denied.

3. First, Gulfport claims that this Court has exclusive authority under Chapter 11 to approve the rejection of the firm TSAs, even though all TSAs must be filed with and approved by FERC, and the "filed rates" specified in TSAs may be modified only with FERC's approval. 15 U.S.C. § 717c(c)–(d); *see Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 545–46 (2008). But Gulfport's argument suffers from a threshold flaw: FERC has parallel, exclusive jurisdiction over requests to reject these TSAs, and FERC has already determined that alteration or modification of the TSAs here is unwarranted. Because all the "ordinary elements of issue preclusion are met," FERC's decisions are preclusive, and this Court is bound by them. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 160 (2015).

4. Second, Gulfport's jurisdictional counterargument fails on its own terms. When a party seeks to alter a filed rate because it no longer wishes to pay that rate, it must obtain approval from *both* FERC and, if applicable, a court. *In re Mirant*, 378 F.3d 511 (5th Cir. 2004), is not to the contrary. Indeed, *Mirant* recognized that any court ruling concerning a filed rate must adequately account for FERC's judgment. And *Mirant* went out of its way to distinguish a claim

that a filed-rate contract was no longer necessary from a claim that the filed rate was burdensomely high. The former was the case in *Mirant*; the latter is the case here. *Mirant* accordingly does not control here, nor does it mandate the result that Gulfport claims.

5. Finally, rejection is not warranted here under any potentially applicable standard. Gulfport's claim that this Court should apply the usual business-judgment standard cannot be squared with cases from the Supreme Court, Fifth Circuit, and other courts holding that any rejection must adequately account for the "public interest" inherent in the regulation of utilities, including natural gas. And in any event, Gulfport cannot succeed under the business-judgment standard, either.

6. Gulfport's alternative arguments fare no better. Section 554 does not permit abandonment as an alternative to rejection, and because Gulfport continued using TC Energy's pipelines *after* filing for bankruptcy, it is not entitled to retroactive relief as of the Petition date.

## SUMMARY OF RELIEF REQUESTED

7. This Court should deny Gulfport's motion to reject. FERC has already determined that it has parallel, exclusive jurisdiction over this question, and that alteration or modification of the TSAs is unwarranted. That decision is preclusive and correct on its own terms, as Gulfport seeks to modify a filed rate. And even if this Court were to analyze the issue anew, Gulfport cannot prevail under any potentially applicable test. Finally, Gulfport's alternative abandonment argument misunderstands the scope of Section 554, and its request for *nunc pro tunc* relief ignores the factual realities of this case.

## BACKGROUND

8. TC Energy's subsidiaries collectively operate approximately 25,000 miles of pipelines that traverse 17 states. Ex. 1 (FERC Order on Pet. for Decl. Order) at ¶ 2. These

companies have entered into 16 firm TSAs with Gulfport allowing it to transport 483,700 dekatherms of natural gas per day using TC Energy's pipeline systems. *Id.* at ¶ 3.

9. In its second quarter 2020 SEC Form 10-Q, Gulfport disclosed "substantial doubt about" its "ability to continue as a going concern." Gulfport Energy Corp., Quarterly Report (Form 10-Q), at 7–8 (Aug. 7, 2020); *see* Ex. 1 at ¶ 4 & n.11. To protect its interests, TC Energy sought a declaration from FERC that, if Gulfport were to file for bankruptcy, the Commission would have parallel, exclusive jurisdiction with the Bankruptcy Court over the TSAs pursuant to the Natural Gas Act ("NGA"), and that the public interest—the applicable standard under the NGA—would favor Gulfport's continued performance. Ex. 1 at ¶¶ 6–7. Gulfport intervened, and asked the Commission to deny TC Energy's petition. *Id.* at ¶¶ 11–23.

10. FERC granted TC Energy's petition. The Commission held that the TSAs constitute "filed rates" and therefore cannot be rejected or modified absent FERC's approval. *Id.* at 14. The Commission based its decision on the NGA, which mandates that all TSAs be filed with and approved by FERC, 15 U.S.C. § 717c(c), and that FERC may approve only those TSAs with rates that are "just and reasonable," *id.* § 717c(a). Once FERC makes that determination, the TSA becomes a "filed rate" and "must be given binding effect." *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003) (internal quotation marks omitted); *see E. Tenn. Nat. Gas Co. v. FERC*, 631 F.2d 794, 800 n.10 (D.C. Cir. 1980). A court may modify or set aside a filed rate under the NGA only on direct review of a FERC order, *see Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) ("*Arkla*"); *E. Tenn. Nat. Gas*, 631 F.2d at 800 n.10, and only then if the court finds that FERC's order was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 407 (D.C. Cir. 2000) (quoting 5 U.S.C. § 706(2)(A)). And under the Supreme Court's *Mobile-Sierra* doctrine, FERC may

authorize a party to unilaterally modify a "filed rate" only if the "public interest" so requires. *Snohomish*, 554 U.S. at 545–46; *see United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956)*; FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

11. FERC determined that, because the "TSAs constitute filed rates under the NGA," if Gulfport filed for bankruptcy, the Commission would have parallel, exclusive jurisdiction with the Bankruptcy Court over any filed-rate contracts. Ex. 1 at ¶¶ 26–27.[2] And because rejecting such a contract amounts to an alteration of "the essential terms and conditions of a contract that is also a filed rate," the bankruptcy court could not "modify or abrogate the filed rate" via rejection absent FERC's approval. *Id.* at ¶¶ 27–28 ("In other words, a bankruptcy court's approval of a rejection of a debtor's private obligation does not eliminate the debtor's public obligation to comply with the filed rate."). Gulfport petitioned for rehearing, which FERC denied. Ex. 3 (FERC Order Denying Rehearing).

12. The Commission then held a separate "paper" hearing and considered evidence to determine whether rejection or modification would be appropriate under the Supreme Court's *Mobile-Sierra* doctrine. Ex. 2 (FERC Order on Paper Hearing) at ¶ 34;[3] *see Snohomish*, 554 U.S. at 545–46 (2008); *Mobile*, 350 U.S. 332; *Sierra*, 350 U.S. 348. TC Energy and Gulfport submitted evidence and briefs on whether the filed rates meet the *Mobile-Sierra* test, which looks to whether the filed rate (1) "impair[s] the financial ability of the public utility to continue its service"; (2) "cast[s] upon other consumers an excessive burden"; or (3) is "unduly discriminatory." Ex. 2 at

[2] Once a rate expressed in an agreement is filed, it becomes an independent source of law, *Sunray Mid-Con. Oil Co. v. FPC*, 364 U.S. 137, 155 (1960), and FERC has exclusive jurisdiction over that regulatory obligation. Meanwhile courts, including the bankruptcy court, continue to have jurisdiction over the underlying contractual obligations. FERC and the bankruptcy court therefore, together, have parallel, exclusive jurisdiction over the TSAs. *See infra* ¶¶ 37–42.

[3] FERC determined that a paper hearing was appropriate because "[t]he facts involved in this proceeding [were] limited to Gulfport TSAs" and there was "no reason to believe that an in-person hearing before an ALJ would be necessary to examine witness credibility." Ex. 1 at 20.

¶ 31 (quoting *Sierra*, 350 U.S. at 354–55); *see Morgan Stanley*, 554 U.S. at 545–46 (clarifying that this doctrine applies to a rate that is allegedly too high).

13. Measuring the evidence against those factors, FERC held that it could not approve modification or abrogation of the filed rates in the Gulfport TSAs. Ex. 2 at ¶¶ 34–48. First, FERC determined that maintaining the existing rates would "not impair the financial ability of the public utility—here, the pipeline—to continue its service." *Id.* at ¶ 34. In fact, Gulfport acknowledged that "the gas pipeline will remain in service regardless of whether the Gulfport TSAs are modified, abrogated, or kept intact." *Id.* at ¶ 36. And because the public utilities are the *pipelines*, any potential financial distress that *Gulfport* might suffer from continuing the existing rates was not relevant under the first *Mobile-Sierra* factor. *Id.* at ¶¶ 37–38. Nevertheless, the Commission considered the evidence Gulfport had presented about its own finances and found that, too, was "insufficient to support a conclusion that Gulfport will suffer sufficient financial harm as a result of the contracts remaining in effect to satisfy the first prong of the *Sierra* test." *Id.* at ¶ 38.

14. Second, the Commission found "that the Gulfport TSAs do not 'cast upon other consumers' any excessive burden" warranting "modification or abrogation" of the filed rates. *Id.* at ¶ 40. Gulfport contended that "abrogating the contracts would not necessarily impose any excessive burdens on *TC Energy Pipelines* shippers or the public." *Id.* (emphasis added). But the standard is whether abrogation would affect *consumers*, and Gulfport had conceded that "even if the Gulfport TSAs were maintained, there is no reason to expect any undue burdens on consumers." *Id.* at ¶ 41. Gulfport also failed to present evidence showing that *maintaining* these contracts would "adversely affect[ ] the public interest." *Id.* at ¶ 44. Thus, Gulfport likewise could not prevail under the second *Mobile-Sierra* factor.

15. Third, the Commission concluded that the Gulfport TSAs are not unduly discriminatory. Indeed, Gulfport had *conceded* that these contracts "were executed . . . following competitive bidding." *Id.* at ¶ 46. And even if the rates here differed from those charged to other shippers, Gulfport had not presented any evidence demonstrating that they were *unduly* discriminatory—"some differences" would not suffice. *Id.*[4] Gulfport petitioned for rehearing of this order, which FERC denied by operation of law. Ex. 4 (FERC Notice of Denial of Rehearing).

16. On November 13, 2020—nine days after Gulfport argued in its petition for rehearing that any bankruptcy and rejection motion were purely hypothetical, and four days after FERC concluded that Gulfport could not abrogate or modify the filed rates—Gulfport filed a voluntary Chapter 11 bankruptcy petition in this Court. *See* Dkt. 1. Shortly thereafter, Gulfport moved to reject its filed-rate TSAs, notwithstanding FERC's conclusion that the Natural Gas Act did not permit Gulfport's TSAs to be modified or abrogated.[5] FERC objected to the rejection motion, opposing any "order that purports to divest other tribunals of jurisdiction." Dkt. 290 at 2.

17. On January 11, 2021, Gulfport filed a petition in the Fifth Circuit for review of FERC's October 5 order and denial of rehearing. Pet. for Review, *Gulfport Energy Corp. v. FERC*, No. 21-60016 (5th Cir. Jan. 11, 2021).

18. TC Energy has also moved to withdraw the reference of this case to the Bankruptcy Court with respect to Gulfport's rejection motion. Dkt. 296. This Court recommended against

[4] The Commission also rejected Gulfport's other arguments, including that the proceeding was flawed, that the *Mobile-Sierra* standard did not apply and that the Commission's actions constituted "jurisdictional overreach." Ex. 2 at ¶¶ 50–52. These issues were either addressed in the Commission's prior order or were baseless. *Id.* at ¶¶ 53–56.

[5] Gulfport also filed an adversary proceeding against FERC seeking a declaratory judgment that, contrary to the Commission's decision, the Bankruptcy Court has exclusive jurisdiction to determine whether Gulfport may reject its firm contracts, and asking the Court to enjoin FERC from interfering with that jurisdiction. Dkt. 61; *Gulfport Energy Corp. v. FERC*, No. 20-03464 (Bankr. S.D. Tex. Nov. 15, 2020). Gulfport later voluntarily dismissed that proceeding. *Id.*, Dkt. 12.

withdrawal, Dkt. 661, and TC Energy objected to the recommendation, *In re Gulfport Energy Corp.*, No. 4:21-cv-00232 (S.D. Tex. Feb. 4, 2021), Dkt. 9. Nothing in this filing constitutes a waiver of TC Energy's motion to withdraw the reference, and TC Energy incorporates by reference all arguments from that motion and the associated hearing.

## JURISIDICTION AND VENUE

19. The Bankruptcy Court has non-exclusive subject-matter jurisdiction over this contested matter under 28 U.S.C. § 1334.

20. Although rejection of executory contracts is a core proceeding under 28 U.S.C. § 157(b)(2)(B), the presence of substantial questions of federal non-bankruptcy law requires withdrawal of the reference to the District Court under 28 U.S.C. § 157(d). TC Energy does not consent to entry of final orders or judgment by the Bankruptcy Court concerning this dispute.

21. Venue is proper in this district under 28 U.S.C. § 1409.

## OBJECTION

22. Gulfport asks this Court to unilaterally relieve Debtors of their filed-rate obligations, without regard to the strictures of the Natural Gas Act and without the involvement of the federal agency Congress has vested with jurisdiction to administer that statute—and even though FERC has already issued a preclusive judgment on the same issues. Gulfport also insists that this Court must apply the business-judgment test in evaluating Gulfport's motion to reject, contrary to longstanding precedent requiring that any rejection of a filed-rate contract must adequately account for the "public interest" inherent in the regulation of utilities like natural gas. Gulfport has not met its burden to establish that rejection is a sound exercise of Debtors' business judgment in any event. Gulfport's alternative arguments for relief under Section 554 and a *nunc pro tunc* order fare no better. This Court should reject Gulfport's motion, not the TSAs.

## I. <u>FERC's order has preclusive effect.</u>

23. FERC has declared that it has parallel, exclusive jurisdiction over the review of any filed rates and that the TSAs here may not be modified or abrogated. Those orders preclusive as to the issues in Gulfport's motion. "[T]he general rule is that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Hargis*, 575 U.S. at 148 (internal quotation marks omitted). This doctrine safeguards parties' and courts' resources, and discourages "parties who lose before one tribunal to shop around for another." *Id.* at 140.

### A. FERC's determination is entitled to preclusive effect.

24. "Both [the Supreme] Court's cases and the Restatement make clear that issue preclusion is not limited to those situations in which the same issue is before two *courts*." *Id.* at 148 (original emphasis). Rather, agency decisions also have preclusive effect, "unless it is 'evident' that Congress does not" so desire. *Id.* at 153 (quoting *Astoria*, 501 U.S. at 108). An agency decision on an issue "properly before it" has preclusive effect if the agency "act[s] in a judicial capacity" and affords parties "an adequate opportunity to litigate." *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421–22 (1966); *Pauma v. NLRB*, 888 F.3d 1066, 1072 (9th Cir. 2018) ("[T]he federal common law rules of preclusion . . . extend to . . . administrative adjudications of legal as well as factual issues, even if unreviewed." (internal quotation marks omitted)); *see also Hargis*, 575 U.S. at 148 (collecting cases). Thus, "a federal administrative agency acting in a judicial capacity is considered a court of competent jurisdiction." *Kelso v. Paulson*, 3:08-CV-961-B, 2010 WL 2163124, at *6 (N.D. Tex. May 4, 2010), *report and recommendation adopted*, 3:08-CV-961-B, 2010 WL 2163911 (N.D. Tex. May 26, 2010).

### 1. The Natural Gas Act does not override the preclusive effect of FERC's adjudications.

25. FERC's orders satisfy these standards. Nothing in the NGA offers a reason to depart from *Hargis*'s rule that administrative orders are preclusive. Like the Lanham Act at issue in *Hargis*, the NGA's "text certainly does not forbid issue preclusion." *Id.* at 151; *compare* 15 U.S.C. § 16(a) ("in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission"); *see, e.g.*, *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision" by doing so in other statutes.)

26. "Nor does the Act's structure" forbid FERC determinations from having preclusive effect. *Hargis*, 440 U.S. at 151. To the contrary, the NGA provides that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive," 15 U.S.C. § 717r, and grants the courts of appeals "exclusive" jurisdiction to affirm, modify, or set aside such findings on direct review. *Id.*; *accord* RESTATEMENT (SECOND) OF JUDGMENTS § 83, cmt. c. (1982) (observing that availability of "judicial review . . . is a factor that supports giving [administrative decisions] preclusive effect"); *U.S. Dep't of Commerce v. FLRA*, 672 F.3d 1095, 1106–07 (D.C. Cir. 2012) (same); *cf. Hargis*, 575 U.S. at 152-153 (holding that decisions of the Trademark Trial and Appeal Board have preclusive effect even where the applicable statute provided for *de novo* district court review).

### 2. FERC determined issues that were properly before it.

27. FERC also resolved issues that were "properly before it"—the question of its own jurisdiction and whether modifying the filed rates would be in the public interest. *Utah Constr.*, 384 U.S. at 422; *see* Ex. 1 at 15 ("The rejection of a Commission-jurisdictional contract in

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."). Administrative agencies have "the right to determine the question of [their] own jurisdiction." *Fontaine v. SEC*, 259 F. Supp. 880, 884 (D.P.R. 1966) (collecting cases). That jurisdictional decision itself has preclusive effect. *Seatrain Lines, Inc. v. Pa. R. Co.*, 207 F.2d 255, 259 (3d Cir. 1953); *Pac. Seafarers, Inc. v. Pac. Far E. Line*, 404 F.2d 804, 809 (D.C. Cir. 1968); *McCulloch Interstate Gas Corp. v. FPC*, 536 F.2d 910, 913 (10th Cir. 1976). And "[t]he mode of challenging an agency's jurisdictional decision is by direct attack." *Id.* at 913 (citing *Callanan Rd. Imp. Co. v. United States*, 345 U.S. 507, 512 (1953)). If Gulfport wishes to challenge FERC's decision that it had the power to resolve the issues before it, Gulfport must do so in the court of appeals. 15 U.S.C. § 717r(b).

28. The propriety of abrogating or modifying the filed-rate TSAs was properly before FERC. Indeed, the NGA gives FERC exclusive jurisdiction over "[a]ll rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas." 15 U.S.C. § 717c(a). That includes authority to make changes in such rates. *Id.* § 717c(d). And when the rates originate in a contract, FERC's authority extends to "the contract relating thereto." *Id.* The "[B]ankruptcy Code does not displace the Commission's jurisdiction." Ex. 1 at ¶ 27. FERC correctly ruled that it had jurisdiction to resolve the issues before it.

29. *Mirant* confirms that FERC had jurisdiction to decide those issues. There, the Fifth Circuit recognized that the Federal Power Act "does not *preempt* a district court's jurisdiction to authorize the rejection of an executory contract subject to FERC regulation." 378 F.3d at 522 (emphasis added). But the panel was careful to observe that "[t]he Bankruptcy Code clearly anticipates ongoing governmental regulatory jurisdiction while a bankruptcy proceeding is

pending." *Id.* at 523. The Sixth Circuit agrees, explaining that "the bankruptcy court's jurisdiction is not exclusive"—even if "its position in the concurrent jurisdiction is nonetheless primary or superior to FERC's position."[6] *In re FirstEnergy Sols. Corp.*, 945 F.3d 431, 446 (6th Cir. 2019). Even where bankruptcy courts have a role, then, FERC still retains jurisdiction.

**3. FERC's procedures were fair and extensive.**

30. Nor is there a "categorical reason to doubt the quality, extensiveness, or fairness of the agency's procedures." *Id.* at 158 (internal quotation marks and citation omitted). As the Supreme Court explained in *Hargis*, to satisfy this test, an agency need only use procedures that are not "fundamentally poor, cursory, or unfair"; it need not mirror judicial proceedings. *Id.* (citing *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979)); *see also Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483 (1982) (explaining that a full and fair opportunity to litigate does not require any "single model of procedural fairness, let alone a particular form of procedure"). Thus, in *Hargis*, the Supreme Court found that a decision of the Trademark Trial and Appeal Board ("TTAB") had preclusive effect, even though TTAB proceedings are usually conducted in writing and "there is no live testimony." 575 U.S. at 144. Noting that "[p]rocedural differences, by themselves, . . . do not defeat issue preclusion," it was enough for the Supreme Court that TTAB's procedures mirrored federal judicial procedures "in large part." *Id* at 158.

31. Another consideration is whether the losing party can seek review of the agency's determination. *See Gibson v. U.S. Postal Serv.*, 380 F.3d 886, 889 (5th Cir. 2004) (applying

[6] In *Mirant* itself, FERC had not issued an order concerning its jurisdiction (or any order) at the time Mirant requested rejection in the bankruptcy court. *Chesapeake* is distinguishable on similar grounds. Unlike here, FERC did not issue an order concluding that modification was not in the public interest *before* the debtor filed for bankruptcy. *See* Mot. ¶ 16 n.5; R. & R. at 3, *In re Chesapeake Energy Corp.*, No. 20-33233 (Bankr. S.D. Tex. Sept. 3, 2020), Dkt. 1092. This Court thus had no occasion to determine the preclusive effect of an existing FERC order declining to modify or abrogate the filed rate, how much deference to accord that determination, or what tribunal's jurisdiction was "primary or superior." In *Ultra*, FERC likewise had not acted before the debtor sought rejection. 621 B.R. 188 (Bankr. S.D. Tex. 2020).

preclusion in part because "any errors by the [agency] can be corrected on appeal"); *compare Herrera v. Churchill McGee, LLC*, 680 F.3d 539, 548 (6th Cir. 2012) (finding preclusive effect where agency procedures provided the right to submit "[a] short, plain, and concise statement," allowed an investigator to hold a fact-finding conference and request access to documents, and provided for agency and judicial review), *with Griffen v. Big Spring Indep. Sch. Dist.*, 706 F.2d 645, 655–56 (5th Cir. 1983) (denying preclusive effect where agency denied one party an opportunity to respond, appeared to have finalized its decision before the agency meeting took place, and inexplicably reversed credibility determinations made by the hearing examiner who listened to live testimony); *accord Monteleone v. Univ. of Ariz. Dean of Student's Office*, CV2000189TUCJASMSA, 2021 WL 120905, at *3 (D. Ariz. Jan. 11, 2021) (state administrative agency procedures were fair when plaintiff was allowed to give statement before adjudication and decision could be appealed in state courts), *report and recommendation adopted*, CV2000189TUCJASMSA, 2021 WL 461948 (D. Ariz. Feb. 9, 2021).

32. The Restatement (Second) of Judgments—which the Supreme Court "regularly turns to . . . for a statement of the ordinary elements of issue preclusion," *Hargis*, 575 U.S. at 148—is in accord. It, too, looks to whether the agency's procedures reflect the "essential elements of adjudication" in determining whether an agency's decision has preclusive effect. RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982). This includes whether the agency affords the parties "adequate notice," the right to "present evidence and legal argument," and "a fair opportunity to rebut evidence and argument by opposing parties," the "formulation of issues of law and fact" applicable to the parties, whether there is a "final decision," and "[s]uch other procedural elements" as necessary to account "for the magnitude and complexity of the matter in question [and] the urgency with which the matter must be resolved." *Id.* Courts have accordingly applied these

factors to find that agency decisions have preclusive effect, including the U.S. Department of Agriculture, *Johnson v. Vilsack*, 833 F.3d 948, 951 (8th Cir. 2016); a state Sanitation Department, *Crot v. Byrne*, 957 F.2d 394, 396 (7th Cir. 1992); a state Oil Conservation Commission, *Amoco Prod. Co. v. Heimann*, 904 F.2d 1405, 1416 (10th Cir. 1990); and a local school board, *Yancy v. McDevitt*, 802 F.2d 1025, 1029–30 & n.4 (8th Cir. 1986).

33. FERC's procedures easily satisfy both *Hargis* and the Restatement. FERC's publicly available Rules of Practice and Procedure set out formal notice and service requirements, 18 C.F.R. § 385.2009, .2010; allow parties to file complaints, motions, and answers, *id.* § 385.206, .212, .213; and permit petitions for summary disposition proceedings, *id.* § 285.217; *see also id.* § 385.403(a) (detailing FERC's discovery procedures). Parties may appeal FERC's orders to the courts of appeals, which review for substantial evidence. 15 U.S.C. § 717r. And courts routinely reject claims by litigants seeking to circumvent these usual procedures. *E.g.*, *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) (rejecting attempt to seek "what amounts to a second round of collateral review of FERC's order" outside of the NGA's direct-review route); *Woodrow v. FERC*, No. CV 20-6, 2020 WL 2198050, at *6 (D.D.C. May 6, 2020) (rejecting attempt to "circumnavigate the statutory scheme to achieve remedies" not available on direct review); *N.J. Conserv. Found. v. FERC*, 353 F. Supp. 3d 289, 299 (D.N.J. 2018).

34. FERC followed its usual fair procedures in this case. The parties had a chance to brief whether FERC has jurisdiction and whether Gulfport was permitted to modify or abrogate the filed rate, to present direct and rebuttal evidence, and to provide declarations in support of their briefing. *See* Ex. 1 at 3–14; Ex. 2 at 5–13. And FERC applied the usual, mandatory *Mobile-Sierra* standard set out by the Supreme Court. Ex. 2 at 14–23. As an additional safeguard, 15 U.S.C. § 717r(b) provides for review in the federal courts of appeals. There is thus no "reason to doubt

the quality, extensiveness, or fairness" of FERC's procedures. *Hargis*, 575, U.S. at 158 (quoting *Montana*, 440 U.S. at 164 n.11).

**B. FERC's determination is preclusive of the issues here.**

35. Because FERC's prior orders satisfy all of the *Hargis* requirements, they have the same preclusive effect as any judicial opinion. And FERC's orders resolve the questions Gulfport is raising here: Is FERC's approval required before Gulfport is released from its obligations to pay under the TSAs? FERC said "yes"; it concluded that a "bankruptcy reorganization plan or other action in a bankruptcy proceeding that purports to authorize the modification or rejection of the Gulfport TSAs cannot be confirmed unless and until the Commission agrees, or the plan or other such action is made contingent on Commission approval, as reflected in a Commission order." Ex. 1 at ¶ 28.[7] Gulfport still says "no"; it wants this Court to enter an order rejecting the TSAs that is not contingent on FERC's approval. *See, e.g.*, Mot. ¶ 33. But FERC ruled first, and Gulfport cannot escape the Commission's judgment simply by suggesting that the Fifth Circuit might apply the same standard differently than FERC. *Hargis*, 575 U.S. at 154 ("[P]arties cannot escape preclusion by simply litigating anew in tribunals that apply one standard differently.").

36. If Gulfport is disappointed with the results of the FERC proceedings, the proper course is to seek direct judicial review of FERC's orders in the court of appeals. *Id.* at 157; *see* 15

[7] FERC took the same position in its prior orders: Filed-rate contracts "are unlike other private contracts that a debtor may seek to reject through bankruptcy" because "rejection of [such] a . . . contract amounts to more than a simple breach in the typical sense." *NextEra Energy, Inc. & NextEra Energy Partners, L.P.*, 167 FERC ¶ 61,096, at 61,554–55 (2019) (dismissing argument that "rejection . . . is entirely different from the abrogation of a [filed-rate] contract . . . and thus does not implicate the filed-rate doctrine"). Thus, "a bankruptcy court's authorization to reject a contract subject to this Commission's jurisdiction is not a license to cease or modify performance in whatever manner the debtor wishes. Performance under such contracts remains subject to this Commission's review." *Id.* at 61,554; *see id.* 61,558 & n.76 (explaining that this is not a "departure" from *CEOB* or *US Gen. New England, Inc.*, 116 FERC ¶ 61,285 (2006)). Or as FERC put it here, "the Bankruptcy Code does not displace the Commission's jurisdiction over filed rate contracts under the NGA. Rather, the Commission and bankruptcy court have parallel, exclusive jurisdiction." Ex. 1 at ¶ 27.

U.S.C. § 717r(b). And Gulfport has done so; it recently filed in the Fifth Circuit a petition for review of FERC's October 5 order and corresponding denial of rehearing. *See supra* ¶ 17. That makes Gulfport's collateral attack before this Court doubly improper, as it is asking this Court to both displace FERC's considered judgment and to ignore Congress's decision to vest exclusive jurisdiction over the review of FERC orders in the courts of appeals. This Court should decline Gulfport's invitation on both counts and deny the rejection motion.

## II. <u>FERC has exclusive jurisdiction over filed rates.</u>

37. Preclusion aside, FERC has parallel, exclusive jurisdiction over the TSAs because Gulfport is seeking to reject them merely because they are—in Gulfport's view—overpriced.[8]

### A. FERC has exclusive jurisdiction to reject or modify filed rates.

38. The NGA "long has been recognized as a comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (internal quotation marks omitted); *see* 15 U.S.C. § 717(b). Under the NGA, FERC has "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce." *Schneidewind*, 485 U.S. at 300–01. All TSAs must be filed with and approved by FERC. 15 U.S.C. § 717c(c). "[N]o change" can be made "in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto" without leave from

[8] A petition for a direct appeal of this issue is currently pending before the Fifth Circuit. *See* Pet. for Auth. of Direct Appeal, *Rockies Express Pipeline LLC v. Ultra Res., Inc.*, No. 21-90003 (5th Cir. Jan. 12, 2021) (asking the Fifth Circuit to grant direct review to resolve "how a bankruptcy court should proceed when a debtor seeks to reject an executory contract that falls within the jurisdiction of" FERC). The Fifth Circuit has also granted a direct appeal of a plan confirmation order that presents a similar question. Order, *FERC v. Ultra Res., Inc.*, No. 20-90046 (5th Cir. Nov. 30, 2020); *see* Joint Pet. for Auth. of Direct Appeal, at 10, *FERC v. Ultra Res., Inc.*, No. 20-90046 (5th Cir. Nov. 20, 2020) (presenting question of "whether the bankruptcy court, having approved Ultra's rejection of a pipeline contract, erred in confirming Ultra's plan of reorganization notwithstanding §1129(a)(6)" of the Bankruptcy Code).

FERC. *Id.* § 717c(d). "Until changed, tariffs bind both carriers and shippers with the force of law." *Crancer v. Lowden*, 315 U.S. 631, 635 (1942) (internal citation omitted).

39. FERC's exclusive jurisdiction "applies not only to rates" but also to the terms and conditions of energy contracts that "affect . . . rates." *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988);[9] *see Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 953–54 (1986) (explaining that "the filed rate doctrine is not limited to 'rates' per se"); *FirstEnergy*, 945 F.3d at 443 (same); *see also N. Nat. Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963) ("The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." (citation omitted)).

40. That is true even though the parties first set the applicable rate by contract. "Once filed with FERC, a 'filed rate' becomes an obligation external to the contract, with the independent force of law." *FirstEnergy*, 945 F.3d at 456 (Griffin, J., concurring in part); *see also, e.g., Sunray Mid-Con. Oil Co. v. FPC*, 364 U.S. 137, 155 (1960); *Mobile*, 350 U.S. at 334; *Penn. Water & Power Co. v. FPC*, 343 U.S. 414, 422 (1952). "An approved tariff has the force and effect of law." *DFW Metro Line Servs. v. Sw. Bell Tel. Co.*, 901 F.2d 1267, 1268 (5th Cir. 1990); *see also Fla. Gas Transm'n Co., LLC v. Bay Gas Storage Co.*, CIV.A. H-08-3472, 2009 WL 361592, at *3 (S.D. Tex. Feb. 11, 2009) ("Importantly, once filed, tariffs take on the force of federal law.").[10] There

[9] *Mississippi Power* analyzed FERC's jurisdiction under the Federal Power Act. Because of the similarities between the Federal Power Act and the Natural Gas Act, however, the Supreme Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkla*, 453 U.S. at 576 n.7.

[10] Circuit courts came to the same conclusion as early as 1950. *See Nw. Pub. Serv. Co. v. Montana-Dakota Utils. Co.*, 181 F.2d 19, 22 (8th Cir. 1950) (explaining that once a rate has been filed with FERC, it "is to be treated as though it were a statute"); *Bos. Edison Co. v. FERC*, 856 F.2d 361, 372 (1st Cir. 1988) (same); *AT&T v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996) ("[F]ederal tariffs have the force of law and are not simply contractual."); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998) ("A tariff filed

are, then, "two sources of price and supply stability inherent in the regulatory system established by the Natural Gas Act—the provisions of private contracts and the public regulatory power." *Sunray*, 364 U.S. at 155.

41. A straightforward corollary of that principle is that a party seeking to modify its obligation to pay a filed rate must obtain both contractual relief—through negotiation or court order—*and* regulatory relief—from FERC. Absent both forms of relief, that party must pay the rate in full. Any other interpretation would allow courts to "usurp[ ] a function that Congress has assigned to" FERC. *Arkla*, 453 U.S. at 582. Indeed, because even FERC cannot modify a filed rate unless the "public interest" so requires, *Morgan Stanley*, 554 U.S. at 545–46, granting courts exclusive jurisdiction over such rates would "permit a . . . court to do through a breach-of-contract action what the Commission itself may not do," *Arkla*, 453 U.S. at 580; *accord Mirant*, 378 F.3d at 519 (acknowledging that a bankruptcy court would have jurisdiction to reject a wholesale power contract only if so doing does not violate the filed-rate doctrine); *FirstEnergy*, 945 F.3d at 456 ("The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission" on direct review of "[its] order." (quoting *Miss. Power*, 487 U.S. at 371)); *In re Calpine Corp.*, 337 B.R. 27, 32 (S.D.N.Y. 2006) (same). The Fifth Circuit recently articulated the proper jurisdictional inquiry: "'[W]hen the plaintiff's claims—at least on their face—do not attempt to challenge a filed rate,' do the claims 'implicate the parties' rights and liabilities under that rate?'" *Medco Energi US, LLC v. Sea Robin Pipeline Co.*, 729 F.3d 394, 399 (5th Cir. 2013)

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with a federal agency is the equivalent of a federal regulation."); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004) (same). This Circuit is no different. *Carter v. AT&T*, 365 F.2d 486, 496 (5th Cir. 1966) ("[A] tariff, required by law to be filed, is not a mere contract. It is the law.").

(quoting *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1315 (11th Cir. 2004)). If so, FERC has exclusive jurisdiction. *Id.*

42. *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019), further proves this point. As the Court explained, bankruptcy decisions must follow "a general bankruptcy rule: The estate cannot possess anything more than the debtor itself did outside bankruptcy." *Id.* at 1663. Put another way, "[w]hatever limitations on the debtor's property apply outside of bankruptcy apply inside of bankruptcy as well. A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either." *Id.* (brackets and internal quotation marks omitted). The question, then, is what would have happened had Gulfport breached the TSAs outside the bankruptcy context? The answer is clear: The breaching party would have to pay the full filed rate as damages or ask FERC to modify that rate. 15 U.S.C. § 717c(d) ("Unless the Commission otherwise orders, no change shall be made . . . in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto."). These principles demonstrate that "in allowing rejection of those contractual duties, Section 365 does not grant the debtor an exemption from all the burdens that generally applicable law . . . imposes on property owners." *Mission Prod.*, 139 S. Ct. at 1665–66.

**B. A Chapter 11 debtor cannot use rejection to modify or abrogate a filed rate.**

43. Gulfport ignores these "widely recognized" principles. *Calpine*, 337 B.R. at 32. Instead, Gulfport contends that this Court can relieve Gulfport of *all* its payment obligations because it "has authority to reject the Firm Transportation *Agreements*," Mot. at 17 (emphasis added)—even where, as here, FERC has already held that Gulfport is not entitled to modify or reject the *filed rates*, Ex. 3 at 23. In other words, Gulfport seeks to "expand" its rights "by happenstance of bankruptcy," contrary to *Mission Product.* 139 S. Ct. at 1663. Gulfport claims that *Mirant* "held that the Bankruptcy Code does not limit a bankruptcy court's authority to reject

contracts that are subject to FERC regulation" because "a simple rejection . . . in bankruptcy is merely a breach of the agreement [and] not a challenge to the FERC-filed rate." Mot. at 15–16 (citing *Mirant*, 378 F.3d at 526).

44. Nothing in *Mirant* leads to Gulfport's categorical conclusion. The applicant in *Mirant* sought to reject a filed-rate power purchase agreement because, among other things, it simply did *not need* "the electricity purchased under the [agreement] to fulfill its obligations to supply electricity," *no matter the rate* it had to pay. 378 F.3d at 520. The Fifth Circuit held that, in those circumstances, the filed-rate doctrine did "not preempt Mirant's rejection of the [agreement] because [rejection] would only have an *indirect* effect upon the filed rate." *Id.* at 519–20. Mirant, in other words, sought rejection because of the *quantity* it had to purchase "at the filed rate," not because the filed rate itself was too high.[11] *Id.* at 519 (explaining that this did "not convert [the bankruptcy court's] decision into a prohibited collateral attack on the filed rate")

45. In so holding, however, *Mirant* was careful to explain the limits of its holding: if the debtor "can fulfill its purchase obligations at [a] lower rate," a bankruptcy court *cannot* permit rejection of the contract. In those circumstances, the debtor "merely seeks rate relief not available in district court," and, by extension, not available in the bankruptcy court. *Id.* (quoting *Gulf States Utils. v. Ala. Power Co.*, 824 F.2d 1465, 1472 (5th Cir. 1987)) (alterations in original); *see also Calpine Corp.*, 337 B.R. at 38 (reading *Mirant* to "find [Federal Power Act] preemption" where a debtor seeks rejection only because it "is forced to sell energy at rates far below market" and "does not offer another rationale" (internal quotation marks and citation omitted)). *But see FirstEnergy*, 945 F.3d at 451 (interpreting *Mirant* to allow the bankruptcy court to enjoin FERC from issuing

[11] Mirant also challenged the agreement on the basis "that the filed rate exceeded the market rate for electricity." 378. F.3d at 520. Indeed, that it is why the district court directed Mirant to FERC. The Fifth Circuit reversed because Mirant's "excess capacity" argument was an independent ground for rejection. *Id.*

contradictory orders "once [it] determined that the anticipated FERC action would directly interfere with [debtor's] request to reject the contracts").[12]

### C. Gulfport is seeking to modify or abrogate a filed rate.

46. Gulfport here requests precisely what *Mirant* and *Gulf States* say the NGA forbids: rejection of the TSAs because it no longer wishes to pay the filed rate. In Gulfport's view, "the Firm Transportation Agreements burden the estate" by "charging [Gulfport] its capacity reservation charges regardless of whether [Gulfport] ships any natural gas *and by locking* [*Gulfport*] *into above-market shipping rates*." Mot. 22 (emphasis added). To be sure, Gulfport briefly suggests (at 8) that it may use alternative pipelines in the future or execute contracts that allow for a more tailored payment structure. But aside from that one passing mention, which does not even identify which specific contracts Gulfport deems unnecessary, Gulfport's justifications for rejection all boil down to the filed rate itself. *See, e.g.*, *id.* at 6 (stating that the "transport costs" associated with the TSAs "creat[e] an uneconomic situation for the Debtors"); *id.* at 8 ("[b]ased

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[12] *Mirant* does not categorically hold that rejection of a contract in bankruptcy *never* directly affects the filed rate because any such effect stems "not from the rejection itself, but from the application of the terms of a confirmed reorganization plan to the unsecured breach of contract claims," *Mirant*, 378 F.3d at 521—such that jurisdiction lies *exclusively* in the Bankruptcy Court. TC Energy reserves its right to challenge such a construction of *Mirant* before the Fifth Circuit on appeal. As explained, such a broad interpretation of *Mirant* would discard longstanding Supreme Court precedent holding that a filed rate is an obligation external to the contract, with the independent force of law. *See supra* n.10; *Sunray*, 364 U.S. at 155 (1960); *Mobile*, 350 U.S. at 334; *Penn. Water*, 343 U.S. at 422. Thus, although a bankruptcy court can reject the underlying contract, that holding "has no effect—direct or indirect—on a filed rate or the obligations that stem from it." *FirstEnergy*, 945 F.3d at 462 (Griffin, J., concurring in part); *see Calpine*, 337 B.R. at 34–35 (similar); *see also* Ltd. Obj. by FERC, Dkt. 290 (Dec. 4, 2020) (although "FERC does not oppose the Court approving rejection of executory contracts under 11 U.S.C. § 365," the agency "does oppose entry of an order that purports to divest [it] of jurisdiction").

Granting exclusive jurisdiction to the bankruptcy court would also run afoul of the duty to "harmonize" the Bankruptcy Code and the NGA as two coequal acts of Congress. *Traynor v. Turnage*, 485 U.S. 535, 548 (1988); *see also FirstEnergy*, 945 F.3d at 462 (Griffin, J., concurring in part). That approach "is no less lopsided than authorizing FERC to consider a motion to reject a private contract and enjoin a bankruptcy court from holding hearings or entertaining such a motion itself." *Id.* Parallel, exclusive jurisdiction gives *both* the Bankruptcy Court and FERC veto power to require a debtor to continue paying the filed rate. This approach thus implements both statutes "in full at the same time." *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 118 (2014).

on today's pricing for natural gas, it is no longer economical to maintain" the TSAs); *id.* at 22 ("there are viable alternatives that provide [Gulfport] with any needed capacity at more economic rates"). Likewise, in the First Day Declaration, Gulfport explained that it was "filing rejection motions" in the hopes of achieving "significant cost savings" by "reduc[ing] their contractual future demand reservation fees." Decl. of Quentin R. Hicks In Support of Chapter 11 Petitions and First Day Motions, Dkt. 40 at ¶ 24. Its filings before FERC echo the same refrain: "the Gulfport TSAs are no longer in line with current market realities" and "Gulfport is locked into rates under its TSAs with the TC Energy Pipelines that exceed the current market value of the capacity." Ex. 5 at 50–51.

47. There are other indicators that Gulfport's real quarrel is with above-market rates. Gulfport acknowledged that contract rates were one consideration in deciding which contracts to reject. Ex. 6, Gulfport (Rajcevich) Dep. at 59:21–60:7 ("[redacted]).[13] Gulfport also continued using substantial capacity on the TC Energy Pipelines after filing its petition for relief under chapter 11. That belies Gulfport's assertion that these contracts are "unnecessary." *Mirant*, 378 F.3d at 520. And if Gulfport's real concern is with capacity, it can divest itself of any unneeded capacity by selling it on "secondary capacity markets" or selling the entirety of each TSA "to a replacement shipper." Ex. 2 at 20.

48. Instead, Gulfport seeks to reject these contracts because it believes the filed rates are, in its words, "no longer economical." Mot. 8. Rejection here thus would not "'indirectly effect' the filed rate; it [would be] a collateral attack on it." *Calpine*, 337 B.R. at 38. To approve rejection on the ground Gulfport offers, the Court would need to find that the rates in the TSAs are

[13] Pursuant to ¶ 16 of the Confidentiality Agreement and Proposed Stipulated Protective Order, Dkt. 838-1, TC Energy is filing under seal those portions of the deposition testimony Debtors have designated as "Highly Confidential."

unjust and unreasonable under the circumstances—the very determination that the NGA reserves to FERC. *See Schneidewind*, 485 U.S. at 301 (Commission has "authority to determine" whether rates are "just and reasonable" (citing 15 U.S.C. § 717c)).

49. Finally, Gulfport's argument (at 17) that rejecting a TSA is not the same as rejecting the filed rate in that agreement would also run afoul of *Medco*, where the Fifth Circuit held—after *Mirant*—that FERC's jurisdiction and the filed-rate doctrine stretch past the regulation of rates themselves to the terms and conditions of rate contracts. 729 F.3d at 399. As *Medco* explained, filed rates "do not exist in isolation" and modifying the terms of rate contracts will often "conflict with the filed rate," impermissibly "enlarge [the debtor's] rights," and undercut "the broad authority granted to agencies and not to the courts to determine whether the rates, including the services, classifications, and practices included in the filing, are reasonable." *Id.*[14]

50. So too here. Rejecting the TSAs would "implicate [TC Energy's] rights and liabilities under [the filed] rate," unlawfully "enlarge [Gulfport's] rights," and strip FERC's authority to regulate the terms and conditions of rate contracts. *Medco*, 729 F.3d at 399 (internal quotation marks and citation omitted). The TSAs set forth a specific filed rate that Gulfport must pay to TC Energy, and Gulfport must abide by that rate absent FERC modification. That TC Energy would have an unsecured claim for the filed rate cannot change that analysis if TC Energy ultimately receives less than the full amount of that claim. "[N]o regulated seller of natural gas may collect a rate other than the one filed with the Commission." *Arkla*, 453 U.S. at 577. Rejection

[14] It is of no moment that *Medco* was not a bankruptcy case. As the Supreme Court has recently reiterated, "Section 365 does not grant the debtor an exemption from all the burdens that generally applicable law . . . imposes." *Mission Prod.*, 139 S. Ct. at 1665 (citation omitted). The Bankruptcy Code no more authorizes a debtor to violate its filed-rate obligations than the criminal code or securities laws. *See id.*; *FirstEnergy*, 945 F.3d at 463 (Griffin, J., concurring in part).

"would give inordinate importance to the role of contracts between buyers and sellers in the federal scheme for regulating the sale of natural gas." *Id.* at 582.

51. This Court should therefore hold that FERC has exclusive parallel jurisdiction to determine the rate owed to TC Energy—even if this court can independently relieve Gulfport of its *contractual* obligations. Because FERC has already decided that rejection or modification of the filed rate is not permissible, Gulfport must continue to pay the filed rate stated in the TSAs.

## III. <u>Rejection is not warranted here.</u>

52. Even if this Court determines that FERC's prior decisions are not preclusive and that the filed-rate doctrine does not independently foreclose Gulfport's arguments, this Court should still find that rejection is not warranted.

### A. The Court's rejection analysis should give due regard to the public interest.

53. As explained, the Natural Gas Act provides that a filed rate may be modified or set aside only when the public interest so requires—FERC may not "change a filed rate based upon the purely private concern that the rate 'is unprofitable to the public utility.'" *Mirant*, 378 F.3d at 525 (quoting *Sierra*, 350 U.S. at 355); *see supra*, ¶¶ 38–50. In bankruptcy, by contrast, "[t]he rejection decision . . . is generally left to the business judgment of the bankruptcy estate." *Mirant*, 378 F.3d at 524 n.5; *see, e.g.*, *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985) (per curiam). Gulfport contends that the business judgment standard applies here. Mot. 17–22. Gulfport is incorrect.

#### 1. Rejection of a filed-rate contract requires consideration of the public interest.

54. *Mirant* rejected the business-judgment standard as "inappropriate" where, as here, a comprehensive regulatory regime "and the filed rate doctrine protect the public interest." 378 F.3d at 525. Just as with the FPA in *Mirant*, the NGA "does not allow FERC to change a filed rate based upon the purely private concern that the rate 'is unprofitable to the public utility.'" *Id.*

As in *Mirant*, therefore, "[u]se of the business judgment standard would be inappropriate in this case because it would not account for the public interest inherent in the transmission and sale of electricity." *Id.*

55. *Mirant* stopped short of defining the precise standard that district courts should apply when assessing rejection of filed-rate contracts that Congress has determined are "affected with a public interest." 15 U.S.C. § 717(a). But there is no need for judicial innovation in this area: the well-developed *Mobil-Sierra* doctrine provides a ready standard against which to measure a party's attempt to unilaterally alter the terms of a filed-rate contract. *Mobile-Sierra* permits modification or abrogation of a filed rate only if it threatens to (1) "impair the financial ability of the public utility [here, the pipeline] to continue its service"; (2) "cast upon other consumers an excessive burden"; or (3) "be unduly discriminatory." *Sierra*, 350 U.S. at 354–55. The Court should apply that standard here.[15]

56. Even if this Court declines to apply *Mobile-Sierra*, however, it should at minimum apply a heightened standard like those set forth in *Mirant*, *Ultra*, and *FirstEnergy*. Although the precise formulation varies somewhat, those courts all look to the same set of factors in considering whether rejection of a fixed-rate TSA is appropriate: (1) the comments and findings of FERC on the effect rejection would have on the public interest, which deserve significant weight; (2) whether the existing agreement burdens the debtor such that rejection would aid its successful rehabilitation; and (3) the balance of equities. *See FirstEnergy*, 945 F.3d at 454; *Mirant*, 378 F.3d at 525; *In re Ultra Petrol. Corp.*, No. 20-32631, 2020 WL 4940240, at *8 (Bankr. S.D. Tex. Aug. 21, 2020), *direct appeal granted*, No. 20-90046 (5th Cir. Nov. 30, 2020); *Mirant*, 318 B.R. at 108.

[15] As explained above, FERC has already conducted this analysis and denied Gulfport's request.

**2. The business judgment standard is inappropriate.**

57. Gulfport's contrary argument that the Court should apply the business judgment rejection standard suffers from two major flaws. To start, it cannot be squared with *Mirant*. Gulfport argues that *Mirant* "did not reject the use of the business judgment standard in all cases involving the rejection of FERC-regulated contracts," and "did not determine or mandate that a heightened standard was applicable." Mot. 18–19. That is not accurate. Although *Mirant* did not set forth the specific standard for evaluating a motion to reject a fixed-rate contract, it plainly foreclosed Gulfport's argument that the business-judgment standard applied. *See Mirant*, 378 F.3d at 524–25.

58. Unsurprisingly, then, courts in this district and beyond routinely recognize that *Mirant rejected* the use of the business-judgment standard in cases involving FERC's regulation of public utilities. For example, Judge Isgur has explained that, "[i]n *Mirant*, the Fifth Circuit held that a bankruptcy court must 'carefully scrutinize the impact of rejection upon the public interest,' before rejecting a FERC approved power purchase agreement." *Ultra*, 2020 WL 4940240, at *7 (quoting *Mirant*, 378 F.3d at 525)); *see In re Pilgrim's Pride Corp.*, 403 B.R. 413, 421 (Bankr. N.D. Tex. 2009) (recognizing that *Mirant* "held that certain executory contracts are so significant in terms of public policy that a court, in determining whether a chapter 11 debtor should be permitted to reject such a contract pursuant to section 365(a) of the Bankruptcy Code (the "Code"), must take that policy into account." (footnote omitted)).[16] Indeed, the only other circuit to address

[16] *Accord In re Extraction Oil & Gas*, No. 20-11548 (CSS), 2020 WL 6389252, at *11 (Bankr. D. Del. Nov. 2, 2020) ("*Mirant* set forth a more rigorous standard for rejecting a contract for the purchase of electricity"); *In re Fin. Oversight & Mgmt. Bd.*, 618 N.R. 349, 358 (D.P.R. 2020) (citing *Mirant* for the proposition that "courts have applied a stricter standard that scrutinizes a broader range of equities in determining whether a contract may be rejected pursuant to Section 365(a)"); *In re Noranda Aluminum, Inc.*, 549 B.R. 725, 729 (Bankr. E.D. Mo. 2016) (*Mirant* "demonstrat[es] the narrow circumstances in which a higher standard applie[s] to the rejection decision"); *In re Old Carco LLC*, 406 B.R. 180, 189 (Bankr. S.D.N.Y. 2009) ("*Mirant* . . . found that a heightened standard for contract rejection was warranted because the authority to

this issue reached the same conclusion as *Mirant*: the usual business-judgment standard does not apply in cases concerning the regulation of public utilities. *FirstEnergy*, 945 F.3d at 452.

59. Gulfport's argument is also incorrect on its own terms. Gulfport claims that the standard rules for rejection in bankruptcy govern here because Congress has not indicated otherwise. Mot. 18–19. But although Section 365 does not expressly provide for an exception for natural-gas contracts, or contracts that are closely related to the public interest, "[i]t is a commonplace rule of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quoting *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992)). That rule applies with full force here. The Bankruptcy Code sets forth *general* rules regarding the rejection of contracts, with Section 365(a) providing that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Section 365(a) "does not provide specific guidance on when a court should approve a proposed rejection." *Ultra*, 2020 WL 4940240, at *6. To fill that gap, courts created a common-law "business judgment" standard. *Group of Inst'l Inv'rs v. Chi., Milwaukee, St. Paul & Pac. R.R.*, 318 U.S. 523 (1943); *see, e.g.*, Judith Demeester Nichols, *Rejection of Collective Bargaining Agreements by Chapter 11 Debtors: The Necessity Requirement Under Section 1113*, 21 GA. L. REV. 967, 1006 n.8 (1987) (explaining that "the judicially created 'business judgment' test" predated Section 365(a)'s enactment). The NGA, by contrast, sets forth a specific standard for fixed-rate transmission contracts: the rates must be "just and reasonable," 15 U.S.C. § 717c(a), and may not be altered or modified unless that is in the "public interest," *see id.* 15 U.S.C. § 717(a); *Mobile*, 350 U.S. at 344–45 (explaining that this

reject under § 365(a) conflicted with the policies designed to protect the national public interest underlying other federal regulatory schemes.").

standard derives from the text of the NGA). Thus, to the extent that these provisions conflict, the NGA's more stringent standard controls. *RadLAX*, 566 U.S. at 645.

60. At minimum, however, this Court should "harmonize" these two conflicting statutes by adopting a hybrid standard, like that articulated in *First Energy*, *Mirant*, and *Ultra*, that gives effect to both the NGA and Section 365 by adequately accounting for the public interest. *See Traynor*, 485 U.S. at 548; *supra*, ¶¶. 53–56 (describing this standard). That is the approach the Supreme Court took in *NLRB v. Bildisco & Bildisco*, a case involving the standard for rejection of a collective-bargaining agreement. 465 U.S. 513 (1984), *abrogated on other grounds by* 11 U.S.C. § 1113. The Court held that "[a]lthough there is no indication in § 365 . . . that rejection of collective-bargaining agreements should be governed by a [different] standard," a "stricter standard should" apply to account for their "special nature," including the National Labor Relations Act's policies "of avoiding labor strife and encouraging collective bargaining." *Id.* at 524–25. The Court therefore imposed a specific negotiation requirement—found nowhere in Section 365—to account for the National Labor Relation Act's labor-peace goals. *Id.* at 526; *cf. In re Caribbean Petrol. Corp.*, 444 B.R. 263, 269 (Bankr. D. Del. 2010) (distinguishing *Bildisco* and applying the business-judgment rule where the relevant non-bankruptcy statute "does not express as its purpose a concern for any public policy interest").

61. This same reasoning applies to filed-rate TSAs. *Mirant*, 378 F.3d at 525; *FirstEnergy*, 945 F.3d at 453–54. Contracts for the interstate sale of utilities like natural gas are "unique" because of the public interest "in the transmission and sale of" those utilities. *Mirant*, 378 F.3d at 525. And any standard for rejection of those contracts must accordingly account for their "special nature," too—that is, the public interest in the utilities' continued availability. Thus, just as the business-judgment standard is inappropriate for collective-bargaining agreements

because it fails to consider the policies underlying the National Labor Relations Act, "use of the business judgment standard would be inappropriate in this case because it would not account for the public interest inherent in the transmission and sale of" natural gas. *Mirant*, 378 F.3d at 525; *accord FirstEnergy*, 945 F.3d at 453–54.

62. Applying a public-interest standard also comports with cases directing bankruptcy courts to adequately account for the Commission's views. *See FirstEnergy*, 945 F.3d at 454–55 (recognizing that a bankruptcy court "must invite FERC to participate and provide an opinion in accordance with the ordinary [NGA] approach (e.g., under the *Mobile-Sierra* doctrine)" when the court considers whether to reject a contract filed with FERC); *Gulf States*, 824 F.2d at 1472 (acknowledging the doctrine of "primary jurisdiction," which "recognizes that an administrative agency, such as the FERC, should be able to participate in decisions affecting a regulated industry, even when the agency does not have exclusive jurisdiction"); *see also Mirant*, 378 F.3d at 526 (conditioning its jurisdictional ruling on "FERC's participation").

63. At bottom, any standard this Court applies in adjudicating Gulfport's motion to reject the TSAs must account for the public interest. Because the business-judgment standard does not adequately take that into consideration, it does not apply. The Court should instead apply either the *Mobile-Sierra* test or the hybrid standard articulated in *Mirant*, *Ultra*, and *FirstEnergy*.

**B. Rejection is not in the public interest.**

64. Applying either the usual *Mobile-Sierra* public-interest test or the hybrid standard, rejection is not warranted.

65. Start with *Mobile-Sierra*. Under that test, a filed rate may be modified or abrogated only if it threatens to (1) "impair the financial ability of the public utility [here, the pipeline] to continue its service"; (2) "cast upon other consumers an excessive burden"; or (3) "be unduly discriminatory." *Sierra*, 350 U.S. at 354–55. None of those standards are met here. Indeed,

Gulfport does not even attempt to argue otherwise. For good reason: As the Commission explained, there is no evidence that failure to reject the filed rates would harm the pipelines or consumers or be unduly discriminatory. *See supra*, ¶¶ 10–15; Ex. 2 at 16–23.

66. Rejection is also improper under the heightened, hybrid test, which looks to: (1) FERC's comments and findings with respect to the effect rejection would have on the public interest, which deserve significant weight; (2) whether the existing agreement burdens the debtor such that rejection would aid its successfully rehabilitation; and (3) the balance of equities. *See supra*, ¶¶ 56–62

67. First, FERC has already concluded that failure to reject the fixed-rate TSAs would not "seriously harm the public interest." Ex. 2 at 16. That finding deserves "significant weight." *Mirant*, 318 B.R. at 108. As the Sixth Circuit has explained:

> [W]hen 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 and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach (e.g., under the *Mobile–Sierra* doctrine), within a reasonable time.

*FirstEnergy*, 945 F.3d at 454–55 (discussing *Mirant*); *see also Mirant*, 378 F.3d at 526 (explaining that FERC should "be able to assist the court in balancing these equities"). Gulfport does not address the Commission's findings on this front. It instead claims that the public interest would not be affected because *TC Energy* has not presented any evidence that rejection would threaten to disrupt the supply of natural gas. *See* Mot. 23–24.

68. That inverts the relevant standard—the burden is on *Gulfport* to show that rejection *is warranted*, not on *TC Energy* to show that it is *unwarranted*. *See Bildisco*, 465 U.S. at 526 ("[T]he Bankruptcy Court should permit rejection . . . under § 365(a) . . . if the *debtor* can show that the [agreement] burdens the estate, and that after careful scrutiny, the equities balance in favor

of rejecting the labor contract" (emphasis added)). And Gulfport has not introduced any evidence supporting its claim that rejection would not affect the supply of natural gas or otherwise impact the public interest. *Cf. Ultra*, 2020 WL 4940240, at *9–*10 (explaining that rejection was warranted because the *debtor* demonstrated that it would not harm the public interest by disrupting the supply of natural gas or threatening the pipeline as a going concern). Indeed, Gulfport testified only that [redacted] Gulfport (Rajcevich) Dep. at 69:11–19, and that [redacted] *Id.* at 70:11–75:7.

69. Second, failure to reject the TSAs will impose only a minimal burden on Gulfport. Before the Commission, Gulfport did not submit any evidence showing that failure to alter or modify the filed rates would cause it "financial distress." Ex. 2 at 17; *id.* at 19 (finding "th[e] record evidence is insufficient to support a conclusion that Gulfport will suffer sufficient financial harm as a result of the contracts remaining in effect"). That is not surprising. Indeed, even after filing for Chapter 11 protection, Gulfport continued to ship under the TSAs. Thus, it is not clear how performing the TSAs would saddle Gulfport with "costly, unnecessary Contracts." Mot. 23.[17]

70. Third, in light of FERC's finding that rejection would not threaten the public interest, and the minimal potential harm that would result to Gulfport absent rejection, the equities favor continued enforcement of these TSAs. Because the first and third factors favor denying rejection, and the second at best only weakly favors granting it, rejection is not warranted here.

[17] Gulfport also claims that failure to permit it to reject these contracts will potentially jeopardize its exit financing. Mot. 23. The total alleged excess annual costs of these contracts is approximately 1.7% of Gulfport's 2020 annual operating revenue. *See id.* at 3–6. It strains credulity that such a minor amount would derail the restructuring of a company that can support in excess of $1.1 billion of debt upon exit.

*See Ultra*, 2020 WL 4940240, at *11 (permitting rejection where the balance weighed in favor of the debtor).[18]

### C. Debtors have not established that rejection is a sound exercise of their business judgment.

71. Although the business-judgment standard does not apply to this case, rejection is not warranted under that standard, either. Under the Bankruptcy Code, to reject an executory contract, the debtor must show that it "will be advantageous to the estate" and that the decision is "based on sound business judgment." *In re Idearc Inc.*, 423 B.R. 138, 162 (Bankr. N.D. Tex. 2009), *aff'd*, 662 F.3d 315 (5th Cir. 2011); *see* 11 U.S.C. § 365(a). But "the business judgment rule does not provide [debtors] unfettered freedom to use the power" to reject a contract "however they will." *Pilgrim's Pride*, 403 B.R. at 426. A court is therefore not required "to blindly accept" a debtor's assertion that a particular decision reflects its "business judgment." *Id.* at 426. Rather, it should consider whether the decision in question and the process by which it was reached are "rational[ ]," "sensible," and based on "logic," or whether they are the result of "whim, caprice or bad faith." *Id.* at 427 & n.33 (internal quotation marks omitted).

72. Gulfport has not met that bar. Perhaps most fundamentally, Gulfport has not articulated its "go-forward business plan" so as to allow for meaningful assessment of whether the rejection of any executory contract is a sound exercise of Debtors' business judgment. *See* Ex 7, Gulfport (Maginniss) Dep. at 123:16–126:3.

73. Nor has Gulfport established that rejection "will be advantageous to the estate." *In re Idearc Inc.*, 423 B.R. at 162. There are significant uncertainties regarding Gulfport's ability to market its production. [redacted]

[18] For the avoidance of doubt, contracts that Gulfport has not listed on its Schedule of Rejected Contracts appended to the Motion are obviously not rejected.

[redacted] Ex. 7, Gulfport (Maginniss) Dep. at 129:21–130:8; *see also id.* at 158:11–15 ([redacted]); Ex. 6, Gulfport (Rajcevich) Dep. at 144:15–145:5 ([redacted]). Gulfport identified four potential options for disposing of those excess volumes: (1) interruptible transportation agreements; (2) in-basin sales; (3) paying for capacity released by another shipper; and (4) signing new firm transportation agreements, potentially on the same pipelines subject to the present rejection motions. *Id.* at 132:9–133:19. The first three options, in Gulfport's words, [redacted] *Id.* at 133:20–134:11. [redacted] Ex. 7, Gulfport (Maginniss) Dep. at 133:20–134:13. Simply put, Gulfport failed to demonstrate why rejecting stable delivery channels set aside specifically for Gulfport is in the estate's interest.

74. That issue is all the more serious because Gulfport delivers essential public goods to customers. For example, [redacted] *See id.* at 74:22–78:25. [redacted] Ex. 6, Gulfport (Rajcevich) Dep. at 135:3–25. Gulfport has not explained how it intends to fulfill existing sales obligations at those points, or what analysis it has conducted to assess the costs and benefits of abandoning those markets, [redacted] Ex. 7, Gulfport (Maginniss) Dep. at 79:15–23; *see id.* at 136:3–19 ([redacted]

[redacted]). [redacted] *Id.* at 137:14–25.

75. Finally, Gulfport has not demonstrated that it has taken into account the cost of rejecting its TSAs in exercising its business judgment. [redacted] *see id.* at 166:17–168:14—[redacted] *Id.* at 102:5–104:21. [redacted] *Id.* at 171:3–19. [redacted] *E.g.*, Ex. 6, Gulfport (Rajcevich) Dep. at 143:22–144:14, 145:6–22; Ex. 8, Hicks Dep. at 45:17–46:25.

76. Because Gulfport's motion to reject fails under any potentially applicable standard, it should be denied.

**IV. <u>Section 554 does not permit abandonment as a substitute for rejection.</u>**

77. Gulfport briefly argues in the alternative that, should rejection not be permissible, the Court should simply sidestep rejection procedures and allow Gulfport to "abandon" its obligations to TC Energy—and the public—under Section 554 of the Bankruptcy Code. Mot. 25–26. In Gulfport's view, abandonment would in the future render the TSAs no longer executory and result in TC Energy receiving a prepetition claim for damages. Mot. 25–26. Gulfport cannot cite any case that has applied Section 554 in that way. So, instead, it points to one unpublished case about an agreement providing that "any future transfer of the patents could be subject to . . .

royalty rights." *In re Particle Drilling Techs., Inc.*, No. 09-33744, 2009 WL 2382030, at *4 (Bankr. S.D. Tex. July 29, 2009).

78. This argument cannot be squared with the definition of an executory contract: "[A] contract is executory if performance remains due to some extent on both sides and if *at the time of the bankruptcy filing*, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party.'" *Matter of Provider Meds, LLC*, 907 F.3d 845, 851 (5th Cir. 2018) (emphasis added) (internal quotation marks omitted). Because the firm TSAs "contemplate continued performance by both Debtors and [TC Energy]" in that Gulfport is obligated to continue paying TC Energy for use of its pipelines, and TC Energy is required to continue permitting Gulfport to use its pipelines, "they are executory." *In re Mirant Corp.*, 299 B.R. 152, 161 (Bankr. N.D. Tex. 2003), *vacated on other grounds*, No. 4-03-CV-1242-A, 2004 WL 1621186 (N.D. Tex. Jan. 6, 2004), *aff'd*, 378 F.3d 511. Accordingly, the TSA must either be assumed or rejected by Gulfport. But in no case should this Court allow Gulfport to end-run around its burden under Section 365.

**V. <u>The Debtors Are Not Entitled To Retroactive Relief.</u>**

79. Finally, Gulfport requests a *nunc pro tunc* order rejecting the TSAs "as of the Petition Date." Mot. 27. "[N]unc pro tunc orders are not some Orwellian vehicle for revisionist history—creating 'facts' that never occurred in fact." *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696, 700–01 (2020) (per curiam). Only in limited circumstances can a court of equity permit a retroactive rejection date if the balance of the equities favors such a solution and such relief does not conflict with the Bankruptcy Code. *See BP Energy Co. v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 2002 WL 31548723, at *2 (S.D.N.Y. Nov.

15, 2002) (finding that a bankruptcy court can assign a retroactive rejection date when "the balance of equities favors such a solution").

80. Here, no such equitable factors exist. Gulfport claims that rejection is warranted because it no longer needs TC Energy's pipelines. But Gulfport voluntarily continued using TC Energy's pipelines for a period of time *after* filing its rejection motion. Gulfport also continues to benefit from capacity it has released to third parties. *Cf. In re Cafeteria Operators, L.P.*, 299 B.R. 384, 394 (Bankr. N.D. Tex. 2003) (permitting retroactive rejection where debtor was "receiving no benefit from the" contract but denying it where debtors continued to benefit from the contracts after filing for bankruptcy). Further, pursuant to FERC regulations, as well as the plain reading of the firm transportation agreements, TC Energy is required to reserve the entirety of such firm capacity for Gulfport on each respective pipeline, and TC Energy cannot resell that firm capacity to other shippers—regardless of whether Gulfport uses that firm capacity—as long as the firm transportation agreements remain in effect.

81. Gulfport's request for a *nunc pro tunc* order should therefore be denied. Any rejection should be dated as of the order so authorizing and not before.

82. Moreover, should this Court disagree with TC Energy and permit rejection, TC Energy is entitled to—and expressly reserves its right to file for—an administrative-expense claim under Section 503 for any and all charges during the post-petition period, particularly given Gulfport's affirmative and voluntary continued use of the TSAs post petition.

## <u>CONCLUSION</u>

83. For the foregoing reasons, Gulfport's motion to reject should be denied.

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## CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2021, a copy of this document was served on counsel for Debtors' by electronic mail.

*/s/ S. Lee Whitesell*
S. Lee Whitesell

# EXHIBIT 1

173 FERC ¶ 61,018
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

| | |
|---|---|
| ANR Pipeline Company<br>Columbia Gas Transmission, LLC<br>Columbia Gulf Transmission, LLC | Docket Nos. RP20-1204-000<br>RP20-1236-000 |

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued October 5, 2020)

1. On September 21, 2020, ANR Pipeline Company (ANR), Columbia Gas Transmission, LLC, (Columbia Gas) and Columbia Gulf Transmission, LLC (Columbia Gulf) (collectively, TC Energy Pipelines or Petitioners) filed a petition for declaratory order, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,[1] seeking a Commission order holding that if Gulfport Energy Corporation (Gulfport) files for bankruptcy, the Commission will have concurrent jurisdiction under sections 4 and 5 of the Natural Gas Act (NGA), 15 U.S.C. §§ 717c and 717d, with United States Bankruptcy Courts with respect to each of the TC Energy Pipelines' respective firm transportation service agreements with Gulfport (Gulfport TSAs). The petition also requests that the Commission exercise its jurisdiction to establish an adjudicative proceeding to affirm that continued performance under the Gulfport TSAs does not seriously harm the public interest and that any party wishing to abrogate the Gulfport TSAs carries the burden of establishing that the public interest mandates such abrogation. In this order, the Commission grants TC Energy Pipelines' petition and establishes a new proceeding to determine whether the public interest requires abrogation or modification of the Gulfport TSAs.

## I. Background

2. ANR, Columbia Gas, and Columbia Gulf are natural gas pipeline companies as defined in the NGA. ANR states that it operates approximately 9,400 miles of interstate pipeline extending from Texas and Oklahoma, as well as the producing areas in the

[1] 18 C.F.R. § 385.207 (2020).

Gulf Coast, to points in Wisconsin and Michigan.[2] Columbia Gas states that it operates approximately 12,000 miles of pipeline that traverse ten states: Delaware, Kentucky, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia, and West Virginia.[3] Columbia Gulf states that it operates an approximate 3,300-mile natural gas transmission system extending from Louisiana through the states of Mississippi and Tennessee to northeastern Kentucky.[4]

3. ANR entered into fourteen firm transportation service agreements with Gulfport.[5] These agreements are all recourse rate contracts entered into pursuant to ANR's Rate Schedule FTS-1 included in ANR's Gas Tariff, Third Revised Volume No. 1 (ANR Tariff). Although not filed with the Commission individually, these contracts are still considered "filed rates" within the meaning of NGA sections 4(c) and (d).[6] In total, these contracts provide 283,700 dekatherms (Dth)[7] per day of firm transportation service. Columbia Gas and Gulfport entered into a negotiated rate contract as part of Columbia Gas's Leach XPress project (Contract No. 173274) for 100,000 Dth per day of capacity. The

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[2] Petition at 4.

[3] *Id.* at 4-5.

[4] *Id.* at 5.

[5] Contract Nos. 123253-123255, 123625-123629, 124156-124158, 124160, 124690 and 132342. The petition originally referred to sixteen firm transportation service agreements between ANR and Gulfport. However, on October 2, 2020, TC Energy submitted a letter noting that, as of October 1, 2020, Contract Nos. 124159 and 128708 between Gulfport and ANR have been permanently released by Gulfport to another entity. TC Energy states that ANR has accepted the releases. As a result, TC Energy Pipelines no longer requests that those contracts be subject to the petition.

[6] *Filing and Reporting Requirements for Interstate Natural Gas Company Rate Schedules and Tariffs*, Order No. 582, FERC Stats. & Regs. ¶ 31,025, at 31,385 (1995) ("[A] contract that conforms to a pro forma service agreement need not be filed with the Commission because the Commission has already considered and determined that the pro forma service agreement is just and reasonable.").

[7] A dekatherm (Dth) is a measurement of heat content of natural gas. One dekatherm is approximately equal to 1000 cubic feet of natural gas. Pipeline contracts use Dth to express the quantity of natural gas transported. The average household consumes approximately 175 cubic feet of natural gas per day, or 63.875 Dth per year. *See* https://www.aga.org/globalassets/2019-natural-gas-factsts-updated.pdf. Thus, Gulfport's contracts would provide natural gas supplies to serve the annual needs of approximately 1,621,143 homes.

Commission accepted the contract for filing with a term of 15 years from the in-service date.[8] Columbia Gulf and Gulfport entered into a negotiated rate contract as part of Columbia Gulf's Rayne XPress project (Contract No. 174460) for 100,000 Dth per day of capacity. The Commission accepted the contract for filing with a term of 15 years from the in-service date.[9]

4. TC Energy Pipelines argues that Gulfport's SEC Form 10-Q filing for the quarter that ended June 30, 2020 shows "that a bankruptcy filing by Gulfport may be imminent."[10] TC Energy Pipelines quotes Gulfport's statement that "decreased demand for oil and natural gas as a result of the COVID-19 pandemic and the accompanying decrease in commodity prices has significantly impaired the Company's ability to access capital markets and to refinance its existing indebtedness."[11] It further notes that Gulfport's report concluded that "[a]s a result of these uncertainties and other factors, management has concluded that there is substantial doubt about the Company's ability to continue as a going concern."[12]

## II. <u>Petition</u>

5. TC Energy Pipelines has two specific requests: (1) a declaration that if Gulfport files for bankruptcy, the Commission will have concurrent jurisdiction under sections 4 and 5 of the NGA with the United States Bankruptcy Court with respect to TC Energy Pipelines' firm transportation service agreements with Gulfport, consistent with the *ETC Tiger* proceedings,[13] and (2) that the Commission establish an expedited adjudicatory hearing on the *Mobile-Sierra* public interest implications of continued performance under

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[8] *Columbia Gas Transmission, LLC*, 163 FERC ¶ 61,185, at P 10 (2018); *see also Columbia Gas Transmission, LLC*, Negotiated Rate Filing, Docket No. RP18-811-000, at Appendix A (filed May 10, 2018).

[9] *Columbia Gulf Transmission, LLC*, Docket No. RP17-1116-000 (Oct. 26, 2017) (delegated order); *see also Columbia Gulf Transmission, LLC*, Negotiated Rate Filing, Docket No. RP17-1116-000, at Appendix A (filed Sept. 29, 2017).

[10] Petition at 3.

[11] *Id.* at 2 & n.17 (quoting Gulfport Energy Corp., Quarterly Report (Form 10-Q), at 7-8 (Aug. 7, 2020) ("Gulfport Q2 2020 10-Q")).

[12] *Id.* at 2, 7 & n.18 (quoting Gulfport Q2 2020 10-Q at 8).

[13] *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 (2020) (*ETC Tiger*), *order denying reh'g*, 172 FERC ¶ 61,155, at P 4 (2020) (*ETC Tiger Rehearing Order*).

the Gulfport TSAs, consistent with *Energy Harbor*.[14] TC Energy Pipelines states that recent experiences in other producer bankruptcy proceedings indicates that, if the Commission does not act promptly, it may be denied of means to exercise its jurisdiction and protect the public interest during the bankruptcy process.[15]

6. TC Energy Pipelines requests that the Commission reaffirm its finding in *ETC Tiger* that it has concurrent jurisdiction with bankruptcy courts and the Commission's determination in *Energy Harbor* that the proper course for reviewing rejection of jurisdictional contracts is to hold an adjudicatory proceeding to evaluate the public interest merits of any modification of a filed rate contract.[16] TC Energy Pipelines cites the *ETC Tiger Rehearing Order* for the proposition that such a hearing would not conflict with the Bankruptcy Code but would be in harmony with it.[17] TC Energy Pipelines states that the Supreme Court recently explained in *Mission Product Holdings v. Tempnology, LLC*[18] that the list of exceptions to rejection included in section 365 of the Bankruptcy Code is "anything but" a "neat, reticulated scheme of narrowly tailored exceptions" and the exceptions listed in the Bankruptcy Code were added over time by Congress in response to discrete rulings attempting to limit the survival of contractual rights post-rejection under bankruptcy.[19] Thus, TC Energy Pipelines contends that the lack of a specific exception for Commission-jurisdictional contracts within the Bankruptcy Code is not a basis for the Commission to limit its role in evaluating whether a bankruptcy rejection is mandated by the public interest.[20] TC Energy Pipelines states the Commission has repeatedly found that rejection of a Commission-jurisdictional agreement "alters the essential terms and conditions of the contract and the filed rate" and implicates the Commission's jurisdiction, requiring the Commission to approve of any abrogation of the filed rate.[21] Accordingly,

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[14] *See* Petition at 2 & n.5 (citing *Energy Harbor LLC*, 170 FERC ¶ 61,278 (2020)).

[15] *Id.* at 3.

[16] *Id.* at 8-9.

[17] *Id*. at 7 & n.22 (citing *ETC Tiger Rehearing Order*, 172 FERC ¶ 61,155 at P 21).

[18] 139 S. Ct. 1652 (2019) (*Mission Product*).

[19] Petition at 8 (citing *Mission Product*, 139 S. Ct. at 1664).

[20] *Id.*

[21] *Id*. at 8 & n.26 (citing *NextEra Energy, Inc. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,049, at P 29 (2019) (*NextEra*), and *Exelon Corp. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,053, at P 26 (2019) (*Exelon*)). The Commission denied rehearing of both the

TC Energy Pipelines requests that the Commission issue an order affirming that it has concurrent jurisdiction with the bankruptcy courts to approve any modification to the Gulfport TSAs.[22]

7. TC Energy Pipelines states that the broad scope of the NGA confers upon the Commission the authority to conduct fact finding on whether abrogation or modification of the Gulfport TSAs is in the public interest.[23] TC Energy Pipelines argues that such a fact finding will establish (i) that the Gulfport TSAs are in the public interest and (ii) abrogation or modification not only is not mandated by the public interest but would actually harm the public interest.[24] Further, TC Energy Pipelines argues that pursuant to *Energy Harbor*, "the proper course for reviewing the public interest in the context of potential rejection of jurisdictional contracts is to hold a hearing to evaluate the public interest implications of modifying a filed rate contract."[25] TC Energy Pipelines states that the Commission's obligation to follow a deliberative process, recognized in *Mirant* and *First Energy*'s application of *Mirant*, accords with Supreme Court and Fifth Circuit jurisprudence granting federal agencies a reasonable opportunity to follow their statutory processes to inform a court's judicial determination.[26] TC Energy Pipelines notes that, in contrast to *Energy Harbor*, no bankruptcy proceeding has yet been initiated. It argues that an expedited hearing procedure in this case is "necessary in order to ensure that the Commission's determination as to the public interest implications of modification or abrogation of the Gulfport FTSAs can be made in advance of any bankruptcy court action."[27] For these reasons, TC Energy Pipelines requests that the Commission institute a proceeding similar (but more expedited) to the proceedings initiated by the Commission in *Energy Harbor* to decide whether the public interest requires that the Gulfport TSAs

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*NextEra* and *Exelon* orders in *NextEra Energy, Inc. v. Pacific Gas & Electric Co.*, 167 FERC ¶ 61,096 (2019).

[22] Petition at 8-9.

[23] *Id.* at 9.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 10 (citing *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952)).

[27] *Id*. at 10-11 & n.33.

remain in effect as on file at the Commission or whether the public interest requires that they should be abrogated or modified.[28]

8. TC Energy Pipelines states that when the Commission establishes an expedited proceeding to evaluate the public interest implications of abrogating or modifying the Gulfport TSAs, the Commission should confirm that the filed rate doctrine and the *Mobile-Sierra* presumption apply, and that the Gulfport TSAs remain in the public interest.[29] In considering the public interest standard applicable to the proposed modification or abrogation of the Gulfport TSAs, TC Energy Pipelines requests that the Commission apply the *Mobile-Sierra* doctrine, including the subsequent precedents, as applicable, and initiate an expedited paper hearing to consider the public interest factors that may or may not weigh in favor of Gulfport's abrogation or modification of its TSAs with TC Energy Pipelines.[30]

9. TC Energy Pipelines notes that they provide service to Gulfport on the same terms and conditions that are available to other shippers.[31] They argue that if Gulfport were permitted to abrogate its firm transportation service agreements, "this could potentially harm other shippers who could be forced in the future to pay higher rates than they would have paid absent Gulfport's abrogation."[32] This has the potential, according to TC Energy Pipelines, to negatively affect consumers and the public interest.[33] According to TC Energy Pipelines, Gulfport carries the burden of proving that abrogation is mandated by the public interest.[34]

10. TC Energy Pipelines requests expedited action so that the Commission may issue a ruling before Gulfport files for bankruptcy, which TC Energy Pipelines anticipates is

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[28] *Id.* at 10-11 (citing *Energy Harbor*, 170 FERC ¶ 61,278 at P 16).

[29] *Id.* at 11 (citing *ETC Tiger*, 171 FERC ¶ 61,248 at P 24).

[30] *Id.* at 12 (citing *NextEra Energy, Inc. v. Pac. Gas and Elec. Co.*, 167 FERC ¶ 61,096, at P 23 (2019) (quoting *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 530 (2008)).

[31] *Id.* at 13-14.

[32] *Id.* at 14.

[33] *Id.*

[34] *Id.* at 13.

imminent.[35] TC Energy Pipelines states that expedited action is needed "to foreclose the possibility that Gulfport could seek to enjoin or otherwise prevent the Commission from exercising its NGA jurisdiction to review Gulfport's potential rejection of the Gulfport FTSAs."[36] TC Energy Pipelines requests a shortened comment period of five days and Commission action granting its petition and establishing an expedited paper hearing within two weeks of the date of its petition.[37] TC Energy Pipelines further requests that the Commission establish a procedural schedule for such paper hearing requiring simultaneous filing of direct evidence by participants within two weeks of the date of this order, simultaneous filing of rebuttal evidence within one week of the filing of direct evidence and a Commission decision within two weeks thereafter.[38]

## III. Notice and Responsive Pleadings

11. Notice of the petition was published in the *Federal Register*, 85 Fed. Reg. 61743-01 (Sep. 30, 2020), with interventions and protests due on or before September 29, 2020. EQT Energy, LLC, Midship Pipeline, LLC, Virginia Natural Gas, Inc., Wisconsin Gas, LLC, Cheniere Energy, Inc, and Gulfport Energy Corporation filed motions to intervene. Gulfport filed a motion to intervene and protest.

12. On September 25, 2020, Gulfport filed a motion for extension of time until October 12, 2020, to file a response to TC Energy Pipelines's petition for declaratory order. In addition to arguing it lacked timely notice of the proceeding, Gulfport attached and incorporated by reference its Opposition to Request for Shortened Comment Period and in the Alternative, Motion for Extension of Time to Answer, Answer, and Request for Shortened Comment Period and Expedited Consideration, which it filed in Docket No. RP20-1195 in response to a similar request filed by Rockies Express Pipeline LLC in that case.[39] On September 28, 2020, TC Energy Pipelines filed an answer to Gulfport's opposition.

13. In its protest, Gulfport requests the Commission deny TC Energy Pipelines' petition, arguing that (1) there is no question before the Commission that could provide a basis for the requested relief of a hearing under the NGA or a public interest determination, (2) the

[35] *Id*. at 3 and 14.

[36] *Id.* at 14.

[37] *Id*. at 3.

[38] *Id.*

[39] Gulfport Energy Corporation (Gulfport) September 25, 2020 Motion for Extension of Time.

relief requested in the petition asking for a declaratory order assigning the burden at hearing or making a finding as to whether that burden can be met is not ripe for Commission decision, and (3) the expedited procedural schedule and limited paper hearing requested in the petition would constitute a deprivation of parties' rights.[40] Gulfport requests that if the Commission decides to initiate an adjudicatory proceeding, it establish an evidentiary proceeding before an Administrative Law Judge with a procedural schedule that would permit it and other parties a fair opportunity to address the complex factual and legal issues in a *Mobile-Sierra* public interest proceeding.[41]

14. Furthermore, Gulfport contends that TC Energy Pipelines mischaracterizes its August 7, 2020, Form 10-Q filing, stating that "there is substantial doubt about [Gulfport's] ability to continue as a going concern."[42] Gulfport states that it has neither filed for bankruptcy nor publicly announced any intention to do so. Gulfport asserts that the reliance on its August 7, 2020 Form 10-Q filing to demonstrate an intent to file for bankruptcy is erroneous because the term "substantial doubt," as defined by the Financial Accounting Standards Board, is used when an entity may not be able to meet its obligations as they become due within one year following the availability of the financial statements.[43] Gulfport contends that because no party has proposed to modify or abrogate a Commission-jurisdictional rate, there is no question for the Commission to set for hearing and, therefore, no reason to initiate the requested hearing.

15. Gulfport argues that TC Energy Pipelines incorrectly relies on recent Commission cases that set forth the Commission's view of its jurisdiction but has not provided a basis for the Commission to establish a hearing in this petition. Gulfport argues that the Commission order in *NextEra*[44] is distinguishable in two ways.[45] First, prior to NextEra's petition for declaratory order filing on January 18, 2019, PG&E submitted a filing to the SEC and issued a public statement explicitly stating its intention to file for bankruptcy on January 29, 2019. Gulfport contends that PG&E's statement of intent to file, including a date for the filing, is materially different from the statement made by Gulfport, in its

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[40] Gulfport Protest at 2.

[41] *Id.* at 4 (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*)).

[42] *Id.* at 7-8.

[43] *Id.* at 8.

[44] 166 FERC ¶ 61,049.

[45] Gulfport Protest at 10.

August 7, 2020 filing.[46] Second, Gulfport states NextEra did not request, and the Commission did not grant, an expedited public interest hearing to address speculative questions that might be raised in a future, hypothetical filing, as requested in the petition.[47] Gulfport states that the Commission has already affirmed its view regarding the scope of its jurisdiction over NGA contracts that become the subject of a motion to reject in a bankruptcy filing and argues it is not necessary for the Commission to reaffirm its view.[48]

16. Gulfport asserts that TC Energy Pipelines' reliance on *ETC Tiger* for authority also fails because ETC Tiger did not request, and the Commission did not order, a hearing under sections 4 or 5 of the NGA to address questions of the public interest in an anticipated bankruptcy filing with anticipated rejection motions, as in the petition.[49] Furthermore, Gulfport states that, contrary to TC Energy Pipelines' representations, *ETC Tiger* and a related petition for declaratory order filed by Stagecoach Pipeline Company, LLC (Stagecoach) demonstrate why a hearing over anticipated rejection motions that may be filed in an anticipated bankruptcy is not a good use of Commission resources and should not be entertained.[50] Gulfport states that in the petition for declaratory order that preceded the *ETC Tiger* orders, the pipeline speculated not just that Chesapeake Energy Marketing, L.L.C. (Chesapeake) would file for bankruptcy, but also that Chesapeake would move to reject two TSAs. Similarly, Stagecoach speculated that Chesapeake would file for bankruptcy and would move to reject three Commission-jurisdictional TSAs between the two companies. Ultimately, Chesapeake sought to reject in bankruptcy just one of the five contracts about which ETC Tiger and Stagecoach speculated. Consequently, Gulfport argues that it would have been a waste of resources for the Commission to undertake a public interest hearing over four contracts that no party sought to modify or abrogate, and which would never become the subject of a rejection motion in bankruptcy.[51]

17. Gulfport requests that the Commission deny TC Energy Pipelines' petition because the Commission has stated that "[p]etitions for declaratory order, and orders granting those

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[46] *Id.*

[47] *Id.*

[48] *Id.* at 10-11.

[49] *Id.* at 11.

[50] *Id.* at 11-12.

[51] *Id.*

petitions, 'are based on the specific facts and circumstances presented.'"[52] Gulfport states that TC Energy Pipelines' petition is based entirely on hypothetical, anticipated actions, and not on actual facts or circumstances that could establish an issue ripe for decision by the Commission in a declaratory order proceeding. Gulfport states that in comparable circumstances to those presented in the petition, the Commission dismissed a petition for declaratory order filed by Flint Hills Resources Alaska LLC (Flint Hills) as premature because the petitioner requested a ruling from the Commission that certain yet-to-be-filed, revised interstate oil pipeline tariff provisions would be unjust and unreasonable under the Interstate Commerce Act. Gulfport avers that the Commission also noted that any ruling on the Flint Hills petition would be inapplicable to any future tariff filing that differed from the scenario described in the petition.[53] Accordingly, Gulfport argues that this petition also requests a Commission ruling despite the absence of any concrete proposal to modify or abrogate the TSAs. Moreover, even if a proposal to modify or abrogate the TSAs is submitted at some later date, it is likely that any ruling in this proceeding would be inapplicable to the highly specific factual circumstances that the Commission would need to analyze at that time.[54] Gulfport argues that because there was no proposed rate change, the Commission cannot in the abstract find that *no* rate change would be in the public interest. Moreover, Gulfport asserts that there is not a single "just and reasonable" rate, but rather the Commission will approve a rate that falls within a "zone of reasonableness" as therefore being just and reasonable and in the public interest. Gulfport asserts that the Commission must address the specific rate change proposed in order to make a reasoned decision. Thus, Gulfport finds it premature, improper, and meaningless for the Commission to hold a hearing and make any ruling regarding a hypothetical future proposal to modify or abrogate the TSAs at issue when there is no certainty regarding (1) whether any proposal will ever be made, and (2) what the specific rate, terms and conditions of any such proposal would be.[55] Moreover, Gulfport states that the petition relies heavily upon speculation regarding a bankruptcy court's future actions in a hypothetical future bankruptcy proceeding, which cannot be predicted.[56]

18. Gulfport states that there is no case or controversy presented in the petition, because there is no pending proposal to abrogate or modify the TSAs and there is no challenge

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[52] *Id.* at 12 (quoting *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206, at P 45 (2016) (citing *Puget Sound Energy Inc.*, 139 FERC ¶ 61,241, at P 12 (2012))).

[53] *Id.* at 13 (citing *In re Flint Hills Res. Alaska, LLC*, 136 FERC ¶ 61,021, at PP 26-27 (2011)).

[54] *Id.* at 14.

[55] *Id.*

[56] *Id.* at 15.

made to the Commission's jurisdiction over the TSAs.[57] According to Gulfport, absent such claims, there is no term or condition of service with respect to the TSAs requiring a Commission determination as to its justness or reasonableness and therefore no basis for the Commission to initiate a hearing of any kind.[58] Furthermore, Gulfport states that TC Energy Pipelines' attempt to analogize its requested adjudicatory proceeding to the Commission's initiation of a Federal Power Act (FPA) section 206 proceeding in *Energy Harbor* is inapt as the present facts and circumstances are wholly inconsistent with those presented in *Energy Harbor*.[59]

19. Gulfport asserts that there is no open question for the Commission to address with respect to the parties' obligations to perform under the TSAs and that no Commission action is needed.[60] According to Gulfport, the Commission has reviewed and approved TC Energy Pipelines' currently effective FERC Gas Tariff, including the *pro forma* TSAs, and found them to be just and reasonable. Accordingly, Gulfport states that the terms and conditions of the tariff and the TSAs already create binding obligations for the parties and it is unnecessary for the Commission to repeat that examination here, where no party has proposed a change to the conditions previously approved by the Commission.[61] Moreover, Gulfport states that the Commission has accepted TC Energy Pipelines' filings relating to the TSAs with Gulfport and no party has filed a proposal with the Commission to request approval to modify or abrogate any aspect of the TSAs.[62] Gulfport states that if Gulfport fails to perform any of its obligations under the TSAs, TC Energy Pipelines' tariff and TSAs provide Commission-approved remedies.[63]

20. Gulfport states that there is no question for the Commission to address with respect to the Commission's jurisdiction over the TSAs.[64] According to Gulfport, no party disputes that the TSAs between TC Energy Pipelines and Gulfport are currently Commission-jurisdictional agreements reflecting filed rates approved by the Commission

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[57] *Id.* at 15-16.

[58] *Id.* at 16.

[59] *Id.* at 16-17.

[60] *Id*. at 18.

[61] *Id.* at 18-19.

[62] *Id.*

[63] *Id.* at 19.

[64] *Id.* at 20.

pursuant to its NGA jurisdiction that cannot be unilaterally abrogated or modified absent a public interest finding by the Commission.[65] Gulfport acknowledges the Commission' position is explained in the *ETC Tiger* orders issued earlier this year, and while Gulfport states it does not necessarily agree with every conclusion stated by the Commission, Gulfport recognizes the Commission's view on this matter and states that there is thus no controversy or uncertainty that is ripe for the Commission to address.[66] Furthermore, Gulfport states that to the extent TC Energy Pipelines seeks a ruling from the Commission holding that the Commission views its jurisdiction to be concurrent with that of the U.S. Bankruptcy Courts with respect to the TSAs, the requested finding is unnecessary as the Commission recently stated its position in *ETC Tiger* and the current petition does not present any new facts or circumstances that require re-evaluation.[67]

21. Gulfport states that TC Energy Pipelines' assertion that its proposed schedule and request for expedited action are needed so that the Commission can issue a ruling "before Gulfport files for bankruptcy"[68] is contrary to the Commission's recent ruling in *ETC Tiger*, where the Commission found that it is not necessary for a debtor to obtain Commission approval before a bankruptcy court can determine whether to reject a Commission-jurisdictional agreement.[69] Gulfport also states that TC Energy Pipelines failed to demonstrate any measure of urgency, and the only evidence it cites is a filing Gulfport submitted to the U.S. Securities and Exchange Commission on August 7, 2020.[70]

22. Gulfport asserts that if the Commission initiates a hearing to address the public interest questions, the only adequate option is an evidentiary hearing before an Administrative Law Judge with the availability of discovery, cross-examination of witnesses, and other procedures required by the Commission's rules.[71] According to Gulfport, TC Energy Pipelines' requested paper hearing proceeding has the potential to raise a significant number of complex issues, many of which will present issues of

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[65] *Id.*

[66] *Id.*

[67] *Id.* 20-21 (citing *ETC Tiger Rehearing Order*, 172 FERC ¶ 61,155 at P 23).

[68] *Id.* at 22 (citing Petition at 3).

[69] *Id.* (citing *ETC Tiger*, 171 FERC ¶ 61,248 at P 25).

[70] *Id.*

[71] *Id.* at 23.

first impression.[72] According to Gulfport, while some of these circumstances and related issues were addressed by the Commission in the context of the FPA in 2003, they have never been addressed by the Commission under the NGA in an adjudicatory proceeding.[73] Therefore, Gulfport asserts that a paper hearing would be insufficient in this case given the numerous complex issues of material fact to be resolved.[74]

23. Gulfport states that initiating a paper hearing on the accelerated timeline proposed in the petition is further objectionable because it would raise substantial due process concerns.[75] According to Gulfport, the Supreme Court held that the specific dictates of due process generally require consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[76] According to Gulfport, examination of those factors here leads to the conclusion that it would be a due process violation in the circumstances of this petition for the Commission to initiate a paper hearing with the accelerated timeline proposed by TC Energy Pipelines.[77] Gulfport also states that if the Commission decides not to order an evidentiary proceeding and instead establishes a paper hearing, the parties will be deprived of the opportunity to conduct discovery and cross-examine witnesses, a process that provides valuable safeguards inherent in an evidentiary hearing.[78] Furthermore, Gulfport states that TC Energy Pipelines' proposed schedule is inadequate as it does not provide Gulfport enough time to address the issues in a public interest proceeding.[79] At a minimum, Gulfport requests that the Commission provide a

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[72] *Id.*

[73] *Id.* at 24 (citing *Blumenthal v. NRG Power Mktg., Inc.*, 104 FERC ¶ 61,210 (2003)).

[74] *Id.* at 26.

[75] *Id.*

[76] *Id.* (citing *Matthews v Eldridge*, 424 U.S. 319, 335 (1976)).

[77] *Id.* at 27-28.

[78] *Id.*

[79] *Id.*

75-day comment period for TC Energy Pipelines' requested adjudicatory proceeding, as it did in the procedural schedule for the *Energy Harbor* proceeding.[80]

## IV. Discussion

### A. Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

25. We decline Gulfport's request to extend the comment date. We responded to the arguments in Gulfport's motion in our order on the earlier-filed Rockies Express petition,[81] and our position has not changed.

### B. Commission Determination

26. We grant the petition. Under the Administrative Procedure Act and Rule 207 of the Commission's Rules of Practice and Procedure, the Commission may "in its sound discretion . . . issue a declaratory order to terminate a controversy or remove uncertainty."[82] As TC Energy Pipelines notes, Gulfport has indicated that there is "substantial doubt" about Gulfport's ability to continue as a going concern.[83] Accordingly, uncertainty exists regarding the status of TC Energy Pipelines' firm TSAs with Gulfport and the treatment of those Gulfport TSAs should Gulfport file for bankruptcy.

27. We hold that the Gulfport TSAs constitute filed rates under the NGA and the Commission's regulations, subject to the filed rate doctrine and the *Mobile-Sierra* presumption.[84] We also hold that if Gulfport were to file for bankruptcy, the Commission

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[80] *Id.* at 28.

[81] *Rockies Express LLC*, 172 FERC ¶ 61,279, at P 25 (2020).

[82] 5 U.S.C. § 554(e); *accord* 18 C.F.R. § 385.207(a)(2).

[83] Petition at 7 (citing Gulfport Q2 2020 10-Q at 7-8).

[84] *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 *passim* (2008) (reviewing and applying the doctrine originally established in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *Sierra*, 350 U.S. 348); *Texaco Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998) ("The law is quite clear: absent contractual language 'susceptible to the construction that the rate may be

will have concurrent jurisdiction under sections 4 and 5 of the NGA and with the United States Bankruptcy Court with respect to the Gulfport TSAs. As the Commission found in *ETC Tiger* and in *Rockies Express Pipeline LLC*,[85] the Bankruptcy Code does not displace the Commission's jurisdiction over filed rate contracts under the NGA.[86] Rather, the Commission and the bankruptcy court have parallel, exclusive jurisdiction. The rejection of a Commission-jurisdictional contract in 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.[87] Gulfport does not challenge the Commission's determination regarding our concurrent jurisdiction in its protest. Gulfport argues that a Commission statement here is unnecessary because the Commission's prior holdings speak for themselves, but TC Energy Pipelines has asked us to apply those holdings to the Gulfport TSAs here, which we now do. Gulfport argues that a declaratory order is unnecessary here prior to any bankruptcy filing, but the Commission has issued similar orders prior to bankruptcy filings in the past.[88]

28. In addition, we reiterate that this Commission's approval is required to abrogate, modify, or amend the filed rate pursuant to Section 5 of the Natural Gas Act.[89] We further reiterate that any bankruptcy reorganization plan or other action in a bankruptcy proceeding that purports to authorize the modification or rejection of the Gulfport TSAs cannot be confirmed unless and until the Commission agrees, or the plan or other such action is made contingent on Commission approval, as reflected in a Commission order.[90]

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altered while the contract[ ] subsist[s],' the *Mobile–Sierra* doctrine applies.") (citation omitted).

[85] 172 FERC ¶ 61,279, at P 27 (2020).

[86] *ETC Tiger*, 171 FERC ¶ 61,248 at P 22.

[87] *See id.* P 23. In other words, a bankruptcy court's approval of a rejection of a debtor's private obligation does not eliminate the debtor's public obligation to comply with the filed rate.

[88] *See NextEra*, 166 FERC ¶ 61,049 at P 30; *Exelon*, 166 FERC ¶ 61,053 at P 27; *ETC Tiger*, 171 FERC ¶ 61,248 at PP 12, 28; *Rockies Express Pipeline LLC*, 172 FERC ¶ 61,279 at P 27.

[89] *Id.* at P 28 n.87; *ETC Tiger*, 171 FERC ¶ 61,248 at P 24.

[90] *See* ETC *Tiger*, 171 FERC ¶ 61,248 at P 22 n.25 ("Specifically, the Bankruptcy Code provides that '[t]he court shall confirm a plan only if all of the following requirements are met: . . . Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change

29. We also establish a proceeding pursuant to NGA section 5 to hear evidence regarding the Gulfport TSAs and to determine whether the public interest presently requires that those filed rates should be abrogated or modified.[91]

30. TC Energy Pipelines and Gulfport shall have the opportunity to present direct evidence regarding the Gulfport TSAs at issue within two weeks of this order. Parties will be able to file rebuttal evidence within one week after the submission of direct evidence. The Commission anticipates a final ruling within 14 days of the final submission by the parties.

31. Gulfport raises a variety of objections to the establishment of a hearing. We find that a hearing is appropriate, and believe it is prudent and most administratively efficient to initiate that hearing immediately consistent with the Commission's recent holding in *Rockies Express*.

32. We disagree with Gulfport that TC Energy Pipelines' request is premature because Gulfport has not filed for bankruptcy. Gulfport has issued a public statement indicating that there is "substantial doubt about the Company's ability to continue as a going concern."[92] This statement creates a reasonable expectation that Gulfport could soon file for bankruptcy and then seek to reject the Gulfport TSAs. Requiring TC Energy Pipelines to wait to come to the Commission until that bankruptcy filing is made would place TC Energy Pipelines in an untenable position, as it would face the possibility of a bankruptcy court-ordered stay preventing TC Energy Pipelines from asking the Commission to conduct any assessment on the contracts at issue. As TC Energy Pipelines stated in its petition, this possibility is not merely hypothetical, as recent experience in other producer bankruptcy proceedings shows.[93] If TC Energy Pipelines wants a

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provided for in the plan, or such rate change is expressly conditioned on such approval.'") (quoting 11 U.S.C. § 1129(a)(6) (2018)).

[91] To the extent TC Energy Pipelines seeks a Commission declaration that any party wishing to abrogate the Gulfport TSAs carries the burden of establishing that the public interest mandates such abrogation, we agree that where a party to Commission-jurisdictional, NGA-regulated contract seeks to unilaterally abrogate such contract, that party bears the burden of showing that continuation of such contract would harm the public interest. However, as of the date of this order, Gulfport has neither filed a bankruptcy petition nor submitted a filing with the Commission seeking to modify or abrogate any agreements with TC Energy Pipelines.

[92] Petition at 2 & 7 (quoting Gulfport Q2 2020 10-Q at 8).

[93] *See, e.g.*, *In re Ultra Petroleum Corp.*, et al., Case Nos. 20-32631, et al., Order Denying Motion for Relief from Stay (MI) (Dkt. #454) (Bankr. S.D. Tex. July 22, 2020).

Commission ruling on the Gulfport TSAs, which the pipeline is entitled to seek under our precedent, then it is prudent to begin proceedings now.

33. Gulfport argues that there is no need to issue a Commission decision on the public interest prior to a bankruptcy filing, because the Commission found in *ETC Tiger* that it is not necessary for a debtor to obtain Commission approval before a bankruptcy court can determine whether to reject a Commission-jurisdictional agreement.[94] As we have consistently stated, "the Commission neither presumes to sit in judgment of rejection motions nor seeks to arrogate the role of adjudicating bankruptcy proceedings."[95] However, Gulfport misses the mark in claiming that this makes a hearing before the Commission unnecessary or useless. The purpose of holding a hearing now is not to prevent the bankruptcy court from acting on any potential motion to reject contracts between Gulfport and TC Energy Pipelines, but instead to accomplish two other purposes.

34. First, to the extent a bankruptcy proceeding concerning these Commission-jurisdictional contracts is initiated in the near future, holding an evidentiary hearing now will allow the Commission to issue an opinion prior to the potential imposition of a stay by a bankruptcy court. The decisions in *Mirant* and *FirstEnergy Solutions* both call for a public interest analysis, rather than the standard business judgement analysis, when a debtor seeks to reject a Commission-jurisdictional contract.[96] As the Commission recently explained to the bankruptcy court in the Ultra bankruptcy proceeding, the Commission is a deliberative body that speaks through its orders: the Commission cannot take a position on the merits of a public interest inquiry in a bankruptcy proceeding without first examining the relevant evidence and issuing an order based on that evidence.[97]

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[94] Gulfport protest at 20-21 (citing *ETC Tiger*, 171 FERC ¶ 61,248 at P 25).

[95] *ETC Tiger*, 171 FERC ¶ 61,248 at P 25 (quoting *NextEra, Inc. v. Pac. Gas & Elec. Co.*, 167 FERC ¶ 61,096, at P 16 (2019)).

[96] *See FirstEnergy*, 945 F.3d at 454-55 ("To recap, when a Chapter 11 debtor moves the bankruptcy court for permission to reject a filed energy contract that is otherwise governed by FERC, via the FPA, the bankruptcy court must consider the public interest and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach (e.g., under the *Mobile–Sierra* doctrine), within a reasonable time."); *In the Matter of Mirant Corp.*, 378 F.3d 511, 525 (5th Cir. 2004) ("When considering these issues, the courts should carefully scrutinize the impact of rejection upon the public interest and should, *inter alia,* ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers.").

[97] *See In re Ultra Petroleum Corp.*, et al., Case Nos. 20-32631, et al., Emergency Motion for Reconsideration by Federal Energy Regulatory Commission (Dkt. #315),

35. Second, and far more important to the Commission at this time, Gulfport has publicly announced that, like many other shippers, it is experiencing serious financial distress during this period of unprecedented demand destruction.[98] In light of these extraordinary circumstances, it is entirely possible that the Commission may conclude that a change to the filed rates at issue in this proceeding is required to avoid serious harm to the public interest.[99] If so, then the Commission, unlike a bankruptcy court, has the authority and expertise to modify the filed rates in a manner that may prevent the need for a bankruptcy proceeding at all, allow both Gulfport and TC Energy Pipelines to move forward through this difficult period, and thus better serve the long-term interests of the consuming public and the natural gas industry.

36. Gulfport also argues that there is no material issue of fact to be addressed in a hearing because no bankruptcy filing has been made, and that the hearing would thus not be specific to the facts of any potential future bankruptcy proceedings. We disagree that this is a fatal objection. Again, our first priority is to investigate whether the public interest requires modification to the existing filed rates so that damage to the parties, the consuming public, and the industry may be avoided or mitigated. Moreover, the contracts at issue are known and discrete; the hearing would be limited to the firm transportation service agreements between TC Energy Pipelines and Gulfport that TC Energy Pipelines identified in its petition. Parties should be able to address whether the public interest requires modification or abrogation of these filed-rate contracts without a pending bankruptcy proceeding.[100] If factual circumstances change such that new findings are

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(Bankr. S.D. Tex. June 25, 2020) (responding to *In re Ultra Petroleum Corp.*, et al., Case Nos. 20-32631, et al., Order Requesting FERC Participation (MI) (Bankr. S.D. Tex. June 15, 2020)).

[98] *See* Gulfport Q2 2020 10-Q at 8.

[99] *See Morgan Stanley*, 554 U.S. 554 U.S. 527, 530, 547, 548, 553. The *Mobile-Sierra* test is not an "insurmountable" obstacle. *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 408 (D.C. Cir. 2000); *Ne. Utils. Serv. Co. v. FERC*, 55 F.3d 686, 692 (1st Cir.1995), *aff'g Ne. Utils. Serv. Co.*, 66 FERC ¶ 61,332, at 62,076 (1994). The Commission has previously found, and the Supreme Court has affirmed, that sweeping changes to natural gas contracts were required by "unequivocal public necessity." *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968), *quoted in Morgan Stanley*, 554 U.S. at 534, 550, 551.

[100] We are not prescribing the manner in which the public interest issues may be briefed. For example, the parties could choose to approach briefing structured around the original three-part test described in *Sierra*, 350 U.S. at 355, or choose to use a more detailed approach similar to the one the Commission directed in *PacifiCorp*, 103 FERC ¶ 61,355, at P 34 (2003). All parties should address the question whether the public

required, the Commission may address those changes at the time they occur. Such factual changes could occur before or during the pendency of a bankruptcy proceeding, and do not justify delaying a Commission proceeding here, especially given the possibility that a bankruptcy court may seek to enjoin the Commission from holding a proceeding altogether if we decline to act now.

37. Moreover, contrary to Gulfport's assertions, *Flint Hills* does not support a finding that the petition is premature, as Gulfport claims.[101] In that case, the Commission dismissed a petition for declaratory order requesting that an anticipated pipeline tariff change violated the Interstate Commerce Act. First, in that case it was unclear whether the tariff filing would be made and whether it would differ from the predictions of the petitioner.[102] Here, as described above, TC Energy Pipelines has demonstrated that there is a reasonable expectation that Gulfport may soon file for bankruptcy and seek to reject the Gulfport TSAs based on Gulfport's own public statements.[103] Second, in *Flint Hills* the Commission found that the petitioner retained the ability to protest any future tariff filing by the pipeline before the Commission,[104] whereas here we may not have the opportunity to address the issues raised by TC Energy Pipeline's petition unless those issues are addressed prior to the potential imposition of a stay by a bankruptcy court. The fact that TC Energy Pipelines raises an issue that necessitates a paper hearing—that is, whether the public interest requires that the filed rates should be abrogated or modified—further supports our decision to exercise our discretion to provide declaratory relief.

38. Gulfport notes that the prior Commission orders cited by TC Energy Pipelines are distinguishable because they did not involve the hearing proceeding that we are establishing here. However, those petitions did not request a hearing.

39. Finally, Gulfport argues that the procedural schedule suggested by TC Energy Pipelines is unfairly truncated and raises substantial due process concerns. Gulfport argues that unlike the other proceedings where the Commission ordered paper hearings on

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interest requires modification of the existing filed rates because that is what the *Mobile-Sierra* analysis requires. *See, e.g.*, *Morgan Stanley*, 554 U.S. at 530. However, the parties may also choose to examine the question from the opposite perspective—that is, whether modification or abrogation of the filed rates would harm the public interest—if the parties think that additional analysis is useful.

[101] Protest at 13 (citing *Flint Hills*, 136 FERC ¶ 61,021).

[102] *Flint Hills*, 136 FERC ¶ 61,021 at P 27.

[103] Petition 2 & 7 (quoting Gulfport Q2 2020 10-Q at 7–8).

[104] *Flint Hills*, 136 FERC ¶ 61,021 at P 26.

contract abrogation, there is no record here because Gulfport has not filed for bankruptcy or to reject any contracts. We disagree. The facts involved in this proceeding are limited to Gulfport TSAs with TC Energy Pipelines; extensive discovery is not necessary for the Commission to reach a determination and we have no reason to believe that an in-person hearing before an ALJ would be necessary to examine witness credibility. Given our desire to assess whether some form of rate modification may mitigate further distress to Gulfport or prevent the disruption of gas supplies, as well as our interest in reaching a determination prior to a potential stay order, we find that a shortened process is warranted.

The Commission orders:

(A) We hold that the Gulfport TSAs constitute filed rates under the NGA and Commission regulations, subject to the filed rate doctrine and the *Mobile-Sierra* presumption. We also hold that if Gulfport were to file for bankruptcy, the Commission will have concurrent jurisdiction under sections 4 and 5 of the NGA with the U.S. Bankruptcy Court with respect to the Gulfport TSAs, as discussed further above.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Natural Gas Act, particularly section 5 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Natural Gas Act, the Commission hereby institutes proceedings in Docket No. RP20-1236-000, as discussed in the body of this order.

(C) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the section 5 proceedings in Docket No. RP20-1236-000.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

# EXHIBIT 2

173 FERC ¶ 61,131
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

ANR Pipeline Company
Columbia Gas Transmission, LLC
Columbia Gulf Transmission, LLC

Docket No. RP20-1236-000

ORDER ON PAPER HEARING

(Issued November 9, 2020)

1. On October 5, 2020,[1] the Commission established a proceeding pursuant to section 5 of the Natural Gas Act (NGA), 15 U.S.C. § 717d, to hear evidence regarding fourteen firm transportation service agreements between Gulfport Energy Corporation (Gulfport) and ANR Pipeline Company (ANR), Columbia Gas Transmission, LLC, (Columbia Gas) and Columbia Gulf Transmission, LLC (Columbia Gulf) (collectively, TC Energy Pipelines) (Gulfport TSAs). Specifically, the Commission instituted this proceeding to determine whether the public interest presently requires that the Gulfport TSAs must be abrogated or modified.[2] Based on our examination of the record developed in this proceeding, including the parties' direct and rebuttal briefs and testimony, we find that the record does not support a finding that the public interest presently requires abrogation or modification of the Gulfport TSAs, as discussed more fully below.

## I. Background

### A. Procedural History

2. This proceeding originated with a petition for declaratory order filed by TC Energy Pipelines,[3] pursuant to Rule 207 of the Commission's Rules of Practice and

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[1] *ANR Pipeline Co.,* 173 FERC ¶ 61,018, at P 27 (2020) (October 5 Order).

[2] *Id.* P 29.

[3] Petition for Declaratory Order, Motion for Shortened Comment Period, and Request for Expedited Action of TC Energy Pipelines, Docket No. RP20-1204-000 (Sept. 21, 2020) (Petition for Declaratory Order).

Procedure,[4] seeking a Commission order holding that if Gulfport files for bankruptcy, the Commission will have concurrent jurisdiction under sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c and 717d, with United States Bankruptcy Courts with respect to the Gulfport TSAs.[5] The petition also requested that the Commission exercise its jurisdiction to establish an adjudicative proceeding to determine whether continued performance under the Gulfport TSAs does not seriously harm the public interest and that any party wishing to abrogate the Gulfport TSAs carries the burden of establishing that the public interest mandates such abrogation.[6]

3. In its October 5 Order, the Commission granted TC Energy Pipelines' petition.[7] The Commission held that the Gulfport TSAs constitute filed rates under the NGA and the Commission's regulations and are subject to the filed rate doctrine and the *Mobile-Sierra* presumption.[8] The Commission also held that if Gulfport were to file for bankruptcy, the Commission will have concurrent jurisdiction with the bankruptcy court to address the Gulfport TSAs: the bankruptcy court would have jurisdiction to address the potential rejection of the Gulfport TSAs as private obligations between contract counterparties pursuant to 11 U.S.C. § 365, while the Commission would have jurisdiction to address the potential modifications or abrogation of the Gulfport TSAs as public obligations to a federal filed rate under sections 4 and 5 of the NGA.[9]

4. In addition, the Commission established this paper hearing under section 5 of the NGA to determine whether the public interest requires abrogation or modification of the Gulfport TSAs.[10] The Commission afforded TC Energy Pipelines and Gulfport the opportunity to present direct evidence regarding the Gulfport TSAs at issue two weeks

[4] 18 C.F.R. § 385.207 (2020).

[5] October 5 Order, 173 FERC ¶ 61,018 at P 1.

[6] *Id.*

[7] *Id.* P 26.

[8] *Id.* P 27 (citing *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008) (*Morgan Stanley*) (reviewing and applying the doctrine originally established in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*) and *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*)).

[9] *Id.*

[10] *Id.*

after the October 5 Order, and rebuttal evidence one week after the submission of direct evidence.

5. The Commission gave the parties wide latitude to make their respective cases, stating:

> We are not prescribing the manner in which the public interest issues may be briefed. For example, the parties could choose to approach briefing structured around the original three-part test described in *Sierra*, 350 U.S. at 355, or choose to use a more detailed approach similar to the one the Commission directed in *PacifiCorp*, 103 FERC ¶ 61,355, at P 34 (2003). All parties should address the question whether the public interest requires modification of the existing filed rates because that is what the *Mobile-Sierra* analysis requires. *See, e.g., Morgan Stanley*, 554 U.S. at 530. However, the parties may also choose to examine the question from the opposite perspective—that is, whether modification or abrogation of the filed rates would harm the public interest—if the parties think that additional analysis is useful.[11]

6. TC Energy Pipelines and Gulfport filed motions to intervene, briefs in support of their direct cases, and declarations on October 19, 2020. On October 26, 2020, each party filed briefs in support of their rebuttal cases and rebuttal declarations.

### B. <u>The Gulfport TSAs</u>

7. The Commission's October 5 Order identifies and describes the Gulfport TSAs. To summarize, ANR, Columbia Gas, and Columbia Gulf are natural gas pipeline companies as defined in the NGA. ANR states that it operates approximately 9,400 miles of interstate pipeline extending from Texas and Oklahoma, as well as the producing areas in the Gulf Coast, to points in Wisconsin and Michigan.[12] Columbia Gas states that it operates approximately 12,000 miles of pipeline that traverse 10 states: Delaware, Kentucky, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia and West Virginia.[13] Columbia Gulf states that it operates an approximate

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[11] *Id*. P 36 n.100.

[12] Petition at 4.

[13] *Id.* at 4-5.

3,300-mile natural gas transmission system extending from Louisiana through the states of Mississippi and Tennessee to northeastern Kentucky.[14]

8. ANR entered into 14 firm transportation service agreements with Gulfport.[15] These agreements are all recourse rate contracts entered into pursuant to ANR's Rate Schedule FTS-1 included in ANR's Gas Tariff, Third Revised Volume No. 1 (ANR Tariff). Although not filed with the Commission individually, these contracts are still considered "filed rates" within the meaning of NGA sections 4(c) and (d).[16] In total, these contracts provide 283,700 dekatherms (Dth) per day of firm transportation service. Columbia Gas and Gulfport entered into a negotiated rate contract as part of Columbia Gas's Leach XPress project (Contract No. 173274) for 100,000 Dth per day of service. The Commission accepted the contract for filing with a term of 15 years from the in-service date.[17] Columbia Gulf and Gulfport entered into a negotiated rate contract as part of Columbia Gulf's Rayne XPress project (Contract No. 174460) for 100,000 Dth per day

[14] *Id.* at 5.

[15] Contract Nos. 123253-123255, 123625-123629, 124156-124158, 124160, 124690 and 132342. As explained in the October 5 Order, TC Energy Pipelines' petition in Docket No. RP20-1204-000 originally referred to 16 firm transportation service agreements between ANR and Gulfport. However, on October 2, 2020, TC Energy Pipelines submitted a letter in that proceeding noting that, as of October 1, 2020, Contract Nos. 124159 and 128708 between Gulfport and ANR have been permanently released by Gulfport to another entity. TC Energy Pipelines stated that ANR accepted the releases. As a result, TC Energy Pipelines stated that it was no longer requesting that those contracts be subject to the petition. October 5 Order, 173 FERC ¶ 61,018 at P 3 n.5.

[16] *Filing and Reporting Requirements for Interstate Natural Gas Company Rate Schedules and Tariffs*, Order No. 582, FERC Stats. & Regs. ¶ 31,025, at 31,385 (1995) (cross-referenced at 72 FERC ¶ 61,300) ("[A] contract that conforms to a pro forma service agreement need not be filed with the Commission because the Commission has already considered and determined that the pro forma service agreement is just and reasonable.").

[17] *Columbia Gulf Transmission, LLC*, Docket No. RP17-1116-000 (Oct. 26, 2017) (delegated order); *see also* Columbia Gulf Transmission, LLC, Negotiated Rate Filing, Docket No. RP17-1116-000, at Appendix A (filed Sept. 29, 2017).

of capacity. The Commission accepted the contract for filing with a term of 15 years from the in-service date.[18]

## II. Responsive Pleadings

### A. Direct

#### 1. TC Energy Pipelines

9. On October 19, 2020, TC Energy Pipelines filed its Direct Case[19] asserting that continued performance by Gulfport under the Gulfport TSAs remains in the public interest. TC Energy Pipelines notes that, consistent with the Commission's October 5 Order, the burden to show that abrogation or modification is in the public interest lies with the party seeking to abrogate or modify the TSAs.[20] TC Energy Pipelines asserts that it is not seeking to abrogate or modify the Gulfport TSAs and therefore bears no burden in its Direct Case. However, TC Energy Pipelines contends that the evidence clearly demonstrates that abrogation or modification of the Gulfport TSAs would harm the public interest. In support, TC Energy Pipelines included direct testimony from Kyle Bundy and David Haag.[21]

10. In its Direct Case, TC Energy Pipelines states that per the *Mobile-Sierra* doctrine, continued performance under the Gulfport TSAs is presumptively in the public interest and that the harm to the public interest from abrogation or modification of the Gulfport TSAs would outweigh any alleged harm to the public interest resulting from continued performance under these contracts.[22] TC Energy Pipelines states that under the *Mobile-Sierra* doctrine, parties to a Commission-jurisdictional contract are prevented from modifying or abrogating the contract unilaterally, and the Commission may only abrogate or modify a contract if it "seriously harms the public interest."[23] TC Energy Pipelines

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[18] *Columbia Gulf Transmission, LLC*, Docket No. RP17-1116-000 (Oct. 26, 2017) (delegated order); *see also Columbia Gulf Transmission, LLC*, Negotiated Rate Filing, Docket No. RP17-1116-000, at Appendix A (filed Sept. 29, 2017).

[19] TC Energy Pipelines' Motion to Intervene and Initial Brief, Docket No. RP20-1236-000 (filed October 19, 2020) (TC Energy Pipelines Direct Br.).

[20] *Id.* at 1-2 (citing October 5 Order, 173 FERC ¶ 61,018).

[21] *Id.*

[22] *Id.* at 2.

[23] *Id.* at 10 (citing *Morgan Stanley*, 554 U.S. at 530).

states that there are three circumstances in which the public interest would mandate revisions to an existing, jurisdictional contract: (1) where the existing contract "might impair the financial ability of the public utility to continue its service," (2) where the existing contract creates "an excessive burden" for other consumers, or (3) where the existing contract is unduly discriminatory.[24] However, TC Energy Pipelines avers that these circumstances are not the exclusive components of the public interest test. TC Energy Pipelines states that when a private entity seeks to abrogate or modify its contracts with a Commission-regulated entity, the private entity must additionally show that "requiring [the private entity] to continue service . . . would have adverse impacts on the public interest that would outweigh the adverse impacts of premature service termination on" the public utility and its customers.[25] Thus, in conducting a public interest analysis under *Mobile-Sierra*, TC Energy Pipelines asserts that the Commission must examine the impact modification or termination of a contract would have on third parties, not just the contracting parties themselves.[26]

11. TC Energy Pipelines notes that the October 5 Order did not prescribe "the manner in which the public interest issues may be briefed," and that the Commission has previously stated that it will simply look to "[a]ll data and other evidence" supporting the conclusion that rejection of the contract is in the public interest.[27] TC Energy Pipelines proposes that relevant factors include those with an effect and impact on:

> (i) the public health, safety, and welfare, (ii) financial impacts on the regulated pipeline entity and its shippers, (iii) implications to the entity seeking to abrogate or modify its contract, (iv) effects on competitor pipelines (including shippers on those pipelines) as well as the competitive conditions on these pipeline systems, (v) impacts on equity capital cost and availability to the entity as well as the industry, (vi) impacts on debt and refinancing costs for the impacted pipelines and the broader industry, (vii) environmental impacts, and (viii) market impacts.[28]

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[24] *Id.* at 10-11 (citing *Sierra*, 350 U.S. at 355).

[25] *Id.* at 11.

[26] *Id.*

[27] *Id*. (citing *Energy Harbor LLC*, 170 FERC ¶ 61,278, at P 16 (2020)).

[28] *Id.* at 11-12 (citing Haag Declaration at ¶ 18).

TC Energy Pipelines states that its Direct Case demonstrates that any abrogation or modification of the Gulfport TSAs would harm the public interest based on these factors.[29]

12. TC Energy Pipelines states that allowing Gulfport to abrogate or modify its commitments under the TSAs would result in financial harm to TC Energy Pipelines, its shippers and the public interest generally. TC Energy Pipelines explains that abrogation of the Gulfport TSAs would leave the TC Energy Pipelines with less internally generated cash to safely operate, maintain, and expand its pipeline systems. Moreover, TC Energy Pipelines contends that abrogation of the Gulfport TSAs would lead to potentially higher recourse rates for service on each of the TC Energy Pipelines in future rate proceedings, as the pipelines would need to recover their cost of service based on reduced levels of billing determinants.[30] TC Energy Pipelines also notes that any increase in recourse rates would go unrecovered from negotiated fixed rate shippers, causing reduced income for TC Energy Pipelines and therefore a reduced return for investors.[31]

13. In addition to the impact on TC Energy Pipelines and its shippers, TC Energy Pipelines contends that abrogation of the Gulfport TSAs would adversely impact future capital investments in the natural gas pipeline industry as a whole, which ultimately harms the consumer. TC Energy Pipelines discusses the importance of contract stability, including its role for investment in natural gas pipeline infrastructure development as well as the Commission's determination that a project is in the public convenience and necessity. According to TC Energy Pipelines, permitting the abrogation of established firm transportation service contracts would therefore harm the public interest, including consumers who benefit from the safe and economic development of needed pipeline infrastructure. Further, TC Energy Pipelines explains that long-term firm transportation agreements provide revenue certainty which intertwines with the Commission's obligation under *Hope Natural Gas* to ensure that every regulated pipeline company has an opportunity to earn a reasonable rate of return.[32] TC Energy Pipelines contends that abrogation of the Gulfport TSAs will likely be viewed by lenders and equity investors as increasing overall relative risk, causing them to demand higher returns, to the detriment of the consuming public.[33]

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[29] *Id.* at 12.

[30] *Id.* at 12-14.

[31] *Id.* at 14 (citing Haag Declaration at ¶ 35).

[32] *Id.* at 17 (citing *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)).

[33] *Id.* at 14-18.

14. Accordingly, TC Energy Pipelines requests that the Commission issue a finding that the Gulfport TSAs as currently on file and in effect remain in the public interest. Finally, TC Energy Pipelines asserts that the Commission should find that, based on the facts and circumstances before it, the harm to the public interest of abrogation or modification of the Gulfport TSAs would outweigh any harm to the public interest that Gulfport may allege to be associated with continued performance on the Gulfport TSAs.[34]

### 2. Gulfport

15. Gulfport states that TC Energy Pipelines, not Gulfport, bears the burden of proof because TC Energy Pipelines is the one asking the Commission to take action.[35] Gulfport also argues that no evidence can be offered to demonstrate that abrogation or modification of the Gulfport TSAs would bring about any of the three *Sierra* circumstances. Regarding the first factor, Gulfport states that TC Energy Pipelines' operating costs are low, there are abundant supplies of natural gas near the pipeline, and Gulfport is but one of many active shippers on TC Energy Pipelines.[36] As for the second *Sierra* circumstance, Gulfport asserts that abrogation or modification of the TSAs would not impose any excessive burden on TC Energy Pipelines' other shippers or the ultimate consumers of natural gas.[37] Gulfport argues that the only way TC Energy Pipelines could reallocate costs associated with unsubscribed or underutilized capacity would be in a full rate proceeding, which would likely be unsuccessful because neither the Commission nor TC Energy Pipelines' shippers are likely to agree to any such proposal. Moreover, Gulfport argues that there would be little, if any, impact on natural gas consumers because the rates paid by TC Energy Pipelines' shippers likely will not change, so no additional costs will be passed on to consumers.[38]

16. Regarding the third *Sierra* circumstance, Gulfport argues that abrogation or modification of the TSA would not result in undue discrimination because it is unlikely that TC Energy Pipelines would be able to reallocate the costs associated with potential unsubscribed or underutilized capacity resulting from a modification or abrogation of the Gulfport TSAs. Additionally, Gulfport notes that it is a party to negotiated rate

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[34] *Id.* at 1-2, 19.

[35] Motion to Intervene and Initial Submission of Gulfport Energy Corp., Docket No. RP20-1236-000 (filed October 19, 2020) (Gulfport Direct Br.).

[36] Gulfport Direct Br. at 40-41.

[37] *Id.* at 42-44.

[38] *Id.*

agreements and that other similarly situated shippers with negotiated rate agreements will not be impacted.[39] In contrast, Gulfport argues that inhibiting the future modification or abrogation of the Gulfport TSAs would shield TC Energy Pipelines from the risk of unsubscribed or underutilized capacity, running afoul of the Commission's Certificate Policy Statement and its "no-subsidy" policy.[40] Gulfport also states that the Commission's Creditworthiness Policy Statement already has established the right allocation of risks among pipeline and shipper entities.[41]

17. Gulfport argues that TC Energy Pipelines' petition actually threatens the public interest because it asks the Commission to single out "anchor shippers" for special burdens that would only raise the cost of becoming an anchor shipper in the first place, thereby reducing the competitiveness of the shipper market, and making it more difficult *ex ante* for pipelines to recruit anchor shippers.[42] Moreover, Gulfport argues that requiring continued performance under the Gulfport TSAs would worsen an already precarious financial situation by forcing Gulfport to continue operating under the burden of agreements that Gulfport claims exceed the current market value of the capacity.[43]

18. Gulfport argues that the public interest is served by promoting competitive markets and allowing shippers, when necessary, to avail themselves of the protections provided by the Bankruptcy Code and emerge as a going concern. Gulfport states that TC Energy Pipelines seeks an order that could adversely impact its customers' ability to avail themselves of their rights under the Bankruptcy Code, which was designed to protect and subordinate that public interest to TC Energy Pipelines' private interest. Gulfport also contends that the order TC Energy Pipelines seeks would contravene the Commission's longstanding policy of exercising its authority to protect the public interest by promoting competition in the natural gas industry, and the experience of recent decades demonstrates that the public interest in the natural gas industry is closely linked with competition. Gulfport further argues that the public interest would suffer from the anticompetitive order TC Energy Pipelines requests by potentially restricting the ability of shippers to access bankruptcy protection when they qualify for it. Gulfport states that

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[39] *Id.* at 44-45.

[40] *Id.* at 45-46 (citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,747 (1999) (Certificate Policy Statement)).

[41] *Id.* at 47-49 (citing *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, 111 FERC ¶ 61,412 (2005) (Creditworthiness Policy Statement)).

[42] *Id.* at 52-53.

[43] *Id.* at 50-51.

an order potentially restricting a shipper's access to bankruptcy protection in favor of the private interest of a pipeline would only harm the public interest by thwarting the ability of the bankruptcy laws to preserve jobs and companies and by eliminating the ability of competitive markets to price the risk of bankruptcy into their contracts.[44]

## B. Rebuttal

### 1. TC Energy Pipelines

19. TC Energy Pipelines argues on rebuttal that Gulfport's Direct Case fails to provide the Commission the basis by which it could reasonably determine if the public interest requires abrogation or modification of Gulfport's TSAs pursuant to this proceeding. Consequently, TC Energy Pipelines requests that the Commission find that the Gulfport TSAs remain in the public interest without modification or abrogation.[45]

20. TC Energy Pipelines contends that Gulfport fails to satisfy the three *Sierra* standards for contract abrogation or modification. TC Energy Pipelines argues that changes in market conditions do not demonstrate that the Gulfport TSAs "seriously harm[] the public interest" under the *Mobile-Sierra* doctrine.[46] Further, TC Energy Pipelines states that vague claims about financial performance do not rise to the level of financial harm necessary to justify abrogation or modification of the Gulfport TSAs. In addressing the second *Sierra* factor, burden on consumers, TC Energy Pipelines states that Gulfport provides no evidence that continued performance of the Gulfport TSAs would adversely impact anchor shipper agreements supporting new pipeline construction. In contrast, TC Energy Pipelines states that abrogation of the Gulfport TSAs would eliminate the revenues associated with the negotiated rate agreements, to the detriment of pipelines and their investors, as well as other shippers who did not seek out the benefits of the expansion projects. Finally, in addressing the third *Sierra* factor, TC Energy Pipelines argues that Gulfport does not attempt to demonstrate that the Gulfport TSAs are unduly discriminatory. According to TC Energy Pipelines, Gulfport argues that shippers will not likely be excessively burdened by abrogation or modification of the Gulfport TSAs because TC Energy Pipelines will not be able to reallocate costs in a rate proceeding. TC Energy Pipelines disputes Gulfport's claim, noting that Commission policy encourages pipelines to contract for capacity at a discount rather than leave the capacity unsubscribed, which results in the pipeline's other shippers paying a higher rate

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[44] *Id.* at 53-56.

[45] TC Energy Pipelines Rebuttal Br. at 16.

[46] *Id.* at 6 (citing *Morgan Stanley*, 554 U.S. at 530).

than they would have paid if the capacity had continued to be subscribed at the maximum applicable rates.[47]

21. TC Energy Pipelines argues that Gulfport also fails to demonstrate that the public interest would not be harmed by abrogation or modification of the Gulfport TSAs. TC Energy Pipelines asserts that it does not have the burden to demonstrate that abrogation or modification of the Gulfport TSAs would bring about any of the three *Sierra* circumstances.[48] However, TC Energy Pipelines reiterates that the evidence from its Direct Case demonstrates that abrogation or modification of the Gulfport TSAs would be harmful to the public interest.[49] Further, TC Energy Pipelines states that the no-subsidy policy in the Certificate Policy Statement[50] does not justify abrogation or modification of the Gulfport TSAs. According to TC Energy Pipelines, the purpose of the policy is to ensure that existing customers do not subsidize the costs of building new capacity that is unsubscribed. However, TC Energy Pipelines argues that Commission policy does not rigidly impose on pipelines the entire risk associated with unsubscribed capacity, and shippers may bear some portion of those costs. Additionally, TC Energy Pipelines states that Gulfport's reference to the Commission's 2005 Creditworthiness Policy Statement[51] is not relevant to whether performance by Gulfport under its TSAs continues to be in the public interest.[52]

### 2. <u>Gulfport</u>

22. Gulfport reiterates that TC Energy Pipelines, not Gulfport, bears the burden of proof because TC Energy Pipelines is the one asking the Commission to take action. Gulfport also states that a private entity such as Gulfport does not face a higher, additional burden than Commission-regulated entities such as TC Energy Pipelines when seeking to modify or abrogate TSAs.[53]

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[47] *Id.* at 7-11.

[48] *Id.* at 11.

[49] *Id.* at 11-14.

[50] *Certificate Policy Statement*, 88 FERC ¶ 61,227, *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000).

[51] *Creditworthiness Policy Statement*, 111 FERC ¶ 61,412.

[52] TC Energy Pipelines Rebuttal Br. at 14-16.

[53] Gulfport Rebuttal Br. at 4-6.

23. Gulfport argues that there is no evidence that abrogation or modification of the Gulfport TSAs would harm the public interest under the *Sierra* factors, nor that the public interest requires continued performance under the agreements. Gulfport claims that TC Energy Pipelines has not shown that abrogation or modification of the Gulfport TSAs would impair TC Energy Pipelines' financial ability to continue providing service. While a future abrogation or modification of the Gulfport TSAs may reduce the TC Energy Pipelines' revenue, Gulfport contends that such a potential reduction has little bearing on the public interest itself. In contrast, Gulfport states that the public interest does not foreclose the possibility of abrogation or modification in this proceeding because Gulfport is facing significant financial difficulties. Moreover, regarding the second factor of *Sierra*, Gulfport argues that its TSAs account for such a small percentage of revenue associated with all of TC Energy Corporation's pipeline assets in the United States that it would not impact TC Energy Pipelines' ability to continue operating its pipeline systems in a safe manner. Finally, Gulfport argues that even if TC Energy Pipelines could increase its recourse rates to account for the potential unsubscribed capacity resulting from modification or abrogation of the agreements, TC Energy Pipelines fails to demonstrate that such a rate increase would result in excessive burdens on third parties or undue discrimination.[54] Accordingly to Gulfport, TC Energy Pipelines provides no discussion of whether a future rate increase would result in excessive burdens on its other pipeline shippers or natural gas consumers. Further, Gulfport states that other shippers that pay negotiated rates, like Gulfport, will not be impacted regardless of any hypothetical future increase in applicable recourse rates that may result from the modification or abrogation of the Gulfport TSAs.

24. Gulfport argues that investors would not view a potential modification or abrogation of the Gulfport TSAs as a new risk that must be considered going forward when making investment decisions. According to Gulfport, TC Energy Pipelines does not explain why the general value of stable long-term contracts to the natural gas industry requires the Commission to intervene here with respect to the Gulfport TSAs and potentially disrupt a hypothetical, future bankruptcy proceeding.[55] Gulfport also states that TC Energy Pipelines fails to acknowledge how competitive markets and sophisticated investors already account for risks associated with bankruptcy.[56]

25. Gulfport states that TC Energy Pipelines' requested order requiring continued performance of Gulfport's TSAs would represent a reversal of the Commission's longstanding policy of declining to intervene to protect individual competitors from the

[54] *Id.* at 7-12.

[55] *Id.* at 14-15.

[56] *Id.* at 16-17.

results of competition.[57] As a result, Gulfport states that rational shippers will either decline to sign contracts or pass those costs to pipelines through lower rates or better contract terms, which will in turn raise the pipelines' costs and slow pipelines' abilities to access capital markets and build pipelines.[58] Additionally, Gulfport states that the Commission's involvement in bankruptcy proceedings involving shippers on Commission-jurisdictional natural gas pipelines is a relatively new phenomenon that has the potential to alter the prospects of gas pipeline shippers and their investors and their decisions going forward.[59] Gulfport asserts that this would negatively impact both domestic natural gas consumers and Commission-regulated natural gas pipeline companies.[60]

## III. Discussion

### A. Procedural Matters

26. This proceeding was directed in the Commission's October 5 Order and the Commission issued a separate notice of this proceeding on the same day. Pursuant to Rule 214,[61] all timely filed motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance date of this order are granted. TC Energy Pipelines and Gulfport filed motions to intervene and initial responses on October 19, 2020.

27. On October 28, 2020, after the briefing deadline, Brian Host submitted a letter suggesting that the Commission "order immediate rate relief and good faith negotiation toward settlement," which might include "an emergency order to stay and toll all Gulfport [transportation service agreements]."[62]

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[57] *Id.* at 18.

[58] *Id.*

[59] *Id.* at 19.

[60] *Id.*

[61] 18 C.F.R. § 385.214 (2020).

[62] Brian Host Letter, Docket No. RP20-1237-000, at p. 1.

**B. Substantive Matters**

28. As noted above, the public interest standard of review under the *Mobile-Sierra* doctrine governs our analysis in this proceeding,[63] which examines one question: whether the public interest presently requires the Gulfport TSAs to be modified or abrogated as filed rates. In applying the *Mobile-Sierra* standard, the Commission may abrogate or modify those agreements only if it concludes the evidence indicates that the continuation of those filed rate agreements will "seriously harm the public interest."[64]

29. We provided both parties the opportunity to present evidence on whether the public interest would require modification or abrogation of these TSAs. Regardless of which party challenges a contract, the Commission cannot find that a filed rate contract seriously harms the public interest without evidence in the record to make the required conclusion.[65]

**1. *Mobile-Sierra* Standard**

30. Under the *Mobile-Sierra* standard, the Commission must presume that the rates, terms, and conditions of jurisdictional contracts that are freely negotiated between willing buyers and sellers meet the statutory "just and reasonable" standard.[66] The Supreme

[63] *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998) ("The law is quite clear: absent contractual language 'susceptible to the construction that the rate may be altered while the contract[ ] subsist[s],' the *Mobile–Sierra* doctrine applies." (quoting *Appalachian Power Co. v. FPC*, 529 F.2d 342, 348 (D.C. Cir. 1976)). Precedent subsequent to *Texaco* has identified certain other constraints on application of the *Mobile-Sierra* presumption, *see, e.g.*, *Okla. Gas & Elec. Co. v. FERC*, 827 F.3d 75, 79-80 (2016), but those constraints are not relevant here.

[64] *E.g.*, *Morgan Stanley*, 554 U.S. at 547-78 ("[T]he ordinary mode for evaluating contractually set rates is to look to whether the rates seriously harm the public interest, not to whether they are unfair to one of the parties that voluntarily assented to the contract."); *id.* at 548 ("The standard for a buyer's challenge must be the same, generally speaking, as the standard for a seller's challenge: The contract rate must seriously harm the public interest."); *accord NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 167 (2010) (*NRG*).

[65] *See* 5 U.S.C. § 706(2)(E); *see also* 15 U.S.C. § 717r(b) ("The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.").

[66] *Morgan Stanley*, 554 U.S. at 530; *see also* 15 U.S.C. § 717c(a) (requiring filed rates, terms, and conditions to be "just and reasonable"); 15 U.S.C. § 717d(a)

Court has instructed that the presumption that a jurisdictional contract is just and reasonable "may be overcome *only* if the Commission concludes that the contract seriously harms the public interest."[67] The "public interest" presumption demands a more stringent application of the statutory "just and reasonable" standard.[68]

31. In *Sierra*, the Court identified three circumstances in which the Commission could find that the contract rate may be abrogated or modified under the public interest standard:

> [T]he sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might [1] impair the financial ability of the public utility to continue its service, [2] cast upon other consumers an excessive burden, or [3] be unduly discriminatory.[69]

32. Both *Mobile* and *Sierra* addressed sellers' challenges to contract rates that were alleged to be too low. *Morgan Stanley* and other cases applied the *Mobile-Sierra* standard to purchasers' challenges to contract rates that were alleged to be too high.[70]

33. In *Morgan Stanley*, the Supreme Court further elaborated that "*Sierra* was grounded in the commonsense notion that '[i]n wholesale markets, the party charging the

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(authorizing complaints to modify rates, terms, and conditions that have become "unjust, unreasonable, unduly discriminatory, or preferential").

[67] *Morgan Stanley*, 554 U.S. at 530 (emphasis added); *see also NRG*, 558 U.S. at 173-74 (reiterating the holding in *Morgan Stanley* and finding that the presumption applies even to non-contracting parties).

[68] *See Morgan Stanley*, 554 U.S. at 535 (noting that "the 'public interest standard' refers to the differing application of that just-and-reasonable standard to contract rates"): *see also Devon Power LLC*, 137 FERC ¶ 61,073, at P 29 (2011) ("[R]ather than being an extra-statutory test, separate and apart from the 'just and reasonable' standard, the 'public interest' presumption represents a point on a broad continuum of approaches employed to meet the [NGA's] requirement that rates, terms and conditions be just and reasonable.").

[69] *Sierra*, 350 U.S. at 354-55.

[70] *See Morgan Stanley*, 554 U.S. at 541; *id.* at 548 ("The standard for a buyer's challenge must be the same, generally speaking, as the standard for a seller's challenge: The contract rate must seriously harm the public interest."); *see also, e.g.*, *Pub. Serv. Comm'n of N.Y. v. FPC*, 543 F.2d 757, 798 (D.C. Cir. 1974) (altering the first *Sierra* factor in the context of a high rate challenge by a natural gas producer against a pipeline).

rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them.'"[71] Therefore, "only when the mutually agreed-upon contract rate seriously harms the consuming public" can such an arm's length contract be declared not to be just and reasonable.[72] This standard applies "regardless of when the contract is reviewed."[73]

### 2. Application of *Mobile-Sierra* Standard to Gulfport TSAs

34. We now turn to the question whether the Gulfport TSAs, as currently on file and in effect, seriously harm the public interest. In rendering our determination, we are guided by the above-referenced considerations articulated in *Sierra*, while recognizing that, here, TC Energy Pipelines seeks to enforce the Gulfport TSAs and Gulfport argues that it would not harm the public interest to abrogate them.[74] Based on our review of the record evidence presented here, we conclude that the filed rates, terms, and conditions of the Gulfport TSAs do not seriously harm the public interest. Accordingly, we hold that the Gulfport TSAs remain just and reasonable.

#### a. Whether the Gulfport TSAs impair the financial ability of the pipeline to continue service or impair the financial ability of the producer to remain in business

35. With respect to the first *Sierra* factor, we find that the Gulfport TSAs do not impair the financial ability of the public utility—here, the pipeline—to continue its service. Gulfport asserts that TC Energy Pipelines' operating costs are low, that there are abundant supplies of natural gas near the pipeline, and that there are many other active shippers on the pipeline.[75] Gulfport concludes that, based on TC Energy Pipelines'

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[71] *Morgan Stanley*, 554 U.S. at 545 (quoting *Verizon Commc'ns. Inc. v. FCC*, 535 U.S. 467, 479 (2002)).

[72] *Id*. at 545-46.

[73] *Id*. at 546.

[74] *See id.* at 548-49 ("We are again in agreement with the Ninth Circuit on a starting premise: It is clear that the three factors we identified in *Sierra* . . . are not all precisely applicable to the high-rate challenge of a purchaser (where, for example, the relevant question is not whether "other customers" [of the utility] would be excessively burdened, but whether any customers of the purchaser would be); and that those three factors are in any event not the exclusive components of the public interest.").

[75] Gulfport Direct Br. at 40.

financials, "the only rational inference is that TC Energy Pipelines will continue to operate regardless of whether the Gulfport TSAs are modified or abrogated."[76] Gulfport further argues if "Gulfport exits or reduces its presence in the market, numerous others stand ready to take its place."[77]

36. Gulfport argues that the Gulfport TSAs can be modified or abrogated so long as the natural gas pipeline can continue to operate financially (i.e., the pipeline is not impaired to the point of no longer providing service). But the first factor of the *Mobile-Sierra* test prohibits the Commission from changing the filed rate *unless* the filed rate impairs the financial health of the public utility to the point it affects its ability to provide service.[78] Gulfport argues the opposite—namely, that the gas pipeline will remain in service regardless of whether the Gulfport TSAs are modified, abrogated, or kept intact.[79]

37. Alternatively, Gulfport could have argued that its own financial distress was sufficient to satisfy the first *Sierra* factor in the context of a high-rate challenge, which the Commission and reviewing courts have both permitted in the past.[80] The

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[76] *Id*. at 41.

[77] *Id*.

[78] For its part, TC Energy Pipelines offers evidence that it would suffer a substantial $58 million loss if Gulfport were able to abrogate the Gulfport TSAs, which in turn would result in an unjust and unreasonable return on equity for TC Energy Pipelines. TC Energy Pipelines Direct Br. at 12; Bundy Declaration at PP 7, 9, 11; Haag Declaration at P 28. While TC Energy Pipelines does not indicate whether such a financial loss would impair its ability (as the public utility) to continue its service, we do not need to make any such finding here because, as noted in this paragraph, Gulfport fails this prong of *Sierra* in any event.

[79] If TC Energy Pipelines will be able to provide service even if the Gulfport TSAs are modified or abrogated, then it will also be able to continue service if the TSAs remain in place, as Gulfport will pay the contractual reservation charges, resulting in additional revenues to TC Energy Pipelines as compared to rate reduction or abrogation.

[80] *See, e.g.*, *Pacificorp v. Reliant Energy Servs., Inc.*, 103 FERC ¶ 61,355, at P 7 & n.11 ("Both *Mobile* and *Sierra* addressed seller challenges to contract rates alleged to be too low. In later cases, the *Mobile-Sierra* doctrine was applied to contracts containing rates that allegedly were too high.") (citing, *inter alia*, *Pub. Serv. Comm'n of N.Y.*, 543 F.2d at 798 (applying a modified version of the *Mobile-Sierra* in the context of a high-rate complaint between a pipeline and producers, where the pipeline was on the purchasing side of the agreement)); *id.* P 7 (encouraging the parties "to present evidence on: (1) the effect of the contracts on the financial health of Complainants . . . .").

Commission is acutely aware that the natural gas industry is experiencing a period of unprecedented demand destruction and depressed commodity prices. We stood ready to find that the public interest requires modification or abrogation of the Gulfport TSAs,[81] provided that record supported doing so.[82] However, instead, Gulfport submitted

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[81] As we explained:

> Second, and far more important to the Commission at this time, Gulfport has publicly announced that, like many other shippers, it is experiencing serious financial distress during this period of unprecedented demand destruction. In light of these extraordinary circumstances, it is entirely possible that the Commission may conclude that a change to the filed rates at issue in this proceeding is required to avoid serious harm to the public interest. If so, then the Commission, unlike a bankruptcy court, has the authority and expertise to modify the filed rates in a manner that may prevent the need for a bankruptcy proceeding at all, allow both Gulfport and TC Energy Pipelines to move forward through this difficult period, and thus better serve the long-term interests of the consuming public and the natural gas industry.

October 5 Order, 173 FERC ¶ 61,018 at P 35 (footnotes omitted).

[82] For example, Gulfport could have submitted evidence that (i) TC Energy Pipelines needs the Gulfport TSAs to meet the pipelines' financial obligations and maintain reliable operations over the long term, and that (ii) Gulfport, facing solvency issues, needs to reduce the contract rates for a period of time to allow both Gulfport and TC Energy Pipelines to endure this period of extraordinary demand destruction until the market recovers or stabilizes. We note that this is an illustrative, hypothetical discussion of potential record evidence that no party submitted here, and that depending on the facts and circumstances, may or may not have been sufficient to support a finding of harm to the public interest under *Mobile-Sierra*. However, we also note that this illustrates a type of modification—i.e., altering payment schedules to adjust for time value of money—that has been judicially endorsed in previous high-rate *Mobile-Sierra* disputes between producers and shippers. As the D.C. Circuit explained in *Public Service Commission of New York*:

> Every member of the Commission has come to recognize the producers' plight demands rectification, but we see no need for a remand to the Commission for its accomplishment. . . . With these holdings, which the Commission deems unavoidable and which we have no basis for disturbing, the

evidence to demonstrate that TC Energy Pipelines will be able to operate due to the existence of other shippers and potential shippers, i.e., evidence supporting a finding that the Gulfport TSAs do not need to be modified to enable TC Energy Pipelines to continue its service.[83]

38. Moreover, given Gulfport's position as a purchaser under the filed rate, we considered whether the record demonstrated with particularity the harm Gulfport or third parties will suffer from continuation of the Gulfport TSAs and how such continuation would seriously harm both Gulfport's continued operations and the public interest.[84] But Gulfport argues only that the long-term filed rate contracts are above current market rates and asserts that a Commission order finding that the Gulfport TSAs should be performed would exacerbate Gulfport's financial issues.[85] We agree with TC Energy Pipelines that this record evidence is insufficient to support a conclusion that Gulfport will suffer sufficient financial harm as a result of the contracts remaining in effect to satisfy the first prong of the *Sierra* test.[86] Accordingly, we find that the record evidence does not

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> only alternative legally available to the Commission is an increase in Texas Eastern's payments beyond the aggregate $134 million contract price by an amount equal to the time value of the money to be paid on the Commission-rearranged payment schedule. That would confer on the producers the full equivalent of their contract price, and would impose on Texas Eastern no more than the equivalent of its contract cost; and the economic positions of both parties would then be harmonized with *Mobile–Sierra* requirements.

543 F.2d at 798.

[83] Gulfport Direct Br. at 38-45. We decline to grant the relief suggested by Mr. Host in his late-filed letter, as Gulfport itself did not request that relief and the record here does not support it.

[84] *See Blumenthal v. NRG Power Mktg., Inc.*, 104 FERC ¶ 61,210, at P 64 (2003); (finding that the party with the burden failed to show "with particularity" that there would be "definite harm" to third parties caused by continued performance under the contract); *Nev. Power Co. v. Enron Power Mktg, Inc.*, 101 FERC ¶ 63,031, at P 212 (2002) (finding that the party bearing the burden of proof "failed to adduce any evidence of specific financial distress for the companies or their ratepayers as a result of the contracts at issue").

[85] Gulfport Direct Br. at 50.

[86] *See* TC Energy Pipelines Rebuttal Br. at 2.

establish that the Gulfport TSAs seriously harm the public interest under the first *Sierra* factor, even when the test is modified to better fit the perspective of a purchaser, under more recent precedent.

39. The first *Sierra* factor also is not met here because Gulfport merely asserts financial injury without connecting that evidence to the public interest. Specifically, Gulfport argues that if it "exits or reduces its presence in the market, numerous others stand ready to take its place."[87] As an initial matter, if that were the case, then Gulfport would not need the Commission to modify or abrogate the Gulfport TSAs. Rather, if the market is as robust as Gulfport contends, then Gulfport could avail itself of the secondary capacity markets and sell its transportation agreements to a replacement shipper. Moreover, such evidence does not speak to whether the public interest presently requires modification or abrogation. The fact that the Gulfport TSAs contain rates, terms, and conditions that make the contracts less attractive than available alternatives[88] may be evidence of potential financial hardship for Gulfport, but is insufficient for the Commission to make the requisite public interest finding under the first *Sierra* factor.[89]

**b. <u>Whether the Gulfport TSAs cast upon other consumers an excessive burden</u>**

40. With respect to the second *Sierra* test, we find that the Gulfport TSAs do not "cast upon other consumers" any excessive burden to warrant modification or abrogation under the public interest standard. Gulfport first asserts that "there is no evidence to suggest

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[87] Gulfport Direct Br. at 41.

[88] Gulfport concedes that it entered into contracts that were economic at first, but that, over time, became less lucrative. Gulfport explains that the contracts were executed "between the fourth quarter of 2013 and the first quarter of 2017, when . . . natural gas production from the Marcellus and Utica shale production area was growing rapidly." Gulfport Direct Br. at 37. At that time, Gulfport concedes, there were "concerns among natural gas producers that there would be an inadequate supply of pipeline capacity that would be unable to keep pace with the expected increase in natural gas production from the Marcellus and Utica shale basins." *Id.* Gulfport states that the market has now changed such that competition has increased and natural gas prices have declined. As a result, Gulfport argues that it is "locked into" rates for transportation that are higher than the current market conditions. *Id*. at 37-38.

[89] *Sierra*, 350 U.S. at 372 (explaining that a complaining party must show more than buyer's remorse for an "improvident bargain."); *Pub. Utils. Comm'n of Cal. v. Sellers of Long Term Contracts to the Cal. Dep't of Water Res.*, 103 FERC ¶ 61,354, at 62,410 (2003) ("The fact that a contract becomes uneconomic over time does not render it contrary to the public interest.").

that abrogation or modification of the Gulfport TSAs would impose any burdens on TC Energy Pipelines' other shippers or the ultimate consumers of natural gas 'excessive' enough to raise concerns under *Sierra*."[90] Gulfport reiterates that there are numerous other active shippers on TC Energy Pipelines and thus no reason to believe that there will be any increased costs on the public or consumers.[91] Gulfport also argues that even if TC Energy Pipelines could not remarket the capacity subject to the hypothetically modified or abrogated Gulfport TSAs, shippers or natural gas consumers would not likely be impacted because any attempt to reallocate those costs in a full rate proceeding would be unsuccessful.[92]

41. However, under this factor, a filed rate cannot be modified or abrogated unless the rate is found to impose excessive burdens on consumers. Gulfport simply states that abrogating the contracts would not necessarily impose any excessive burdens on TC Energy Pipelines shippers or the public. In fact, Gulfport argues that, because there are other active shippers on the pipeline, there is no reason to anticipate that there will be natural gas shortages "[*w*]*ith or without*" Gulfport.[93] In other words, Gulfport concedes that even if the Gulfport TSAs were maintained, there is no reason to expect any undue burdens on consumers in the form of gas shortages.

42. Gulfport also argues that Commission intervention in this process will "set a precedent that only raises the cost of becoming an 'anchor shipper' in the first place" because "[o]nce shippers know, ex ante, that signing up as 'anchor shippers' may restrict their options in the event of a bankruptcy filing, those shippers will either hesitate to sign 'anchor shipper' contracts, or will pass the additional cost to the pipelines in the bargaining process by demanding better rates or better terms."[94] Gulfport argues that additional costs will then be passed on to consumers in the form of fewer pipelines or higher transportation costs.[95]

43. We do not find these arguments to be persuasive. These arguments would, if accepted, render the *Mobile-Sierra* requirement a nullity because every party that executes a filed rate may potentially file for bankruptcy, and thus the higher consumer

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[90] Gulfport Direct Br. at 42.

[91] *Id.* at 38.

[92] *Id.* at 42-43.

[93] *Id*. at 44 (emphasis added).

[94] *Id*. at 53.

[95] *Id*.

costs asserted by Gulfport would apply to every filed rate. If we were to hold that those higher contracting costs are sufficient to satisfy the excessive-burden-on-consumers factor on their own, then all contracts could be modified or abrogated without any other showings. We cannot merely assume that all filed rates have embedded harm to consumers that satisfies the second *Sierra* factor. Even if the Commission were to assume that Gulfport's argument about increased costs were correct, Gulfport has not shown that those cost impacts would be excessive, which is a critical part of the test, not mere surplusage.

44. Finally, Gulfport makes a similar argument that the public interest is served by promoting competitive markets, which includes allowing shippers, when necessary, to avail themselves of bankruptcy protections.[96] This argument does not establish anything about whether maintaining the Gulfport TSAs adversely affects the public interest. Because *Sierra* requires us to find that the Gulfport TSAs *do in fact result* in excessive public burdens, generalized arguments about how the bankruptcy process enhances competition are insufficient to meet this requirement. We therefore conclude that the record evidence fails to satisfy the second *Sierra* factor.

### c. Whether the Gulfport TSAs are unduly discriminatory

45. Under the third *Sierra* factor, the public interest standard may be met if the rates seriously affect the public interest by being unduly discriminatory. Gulfport suggests that such undue discrimination would not exist because the negotiated rate agreements of other similarly situated shippers who subscribe to capacity on TC Energy Pipelines' projects will not be impacted. Further, Gulfport argues that abrogation or modification of the TSA would not result in undue discrimination because it is unlikely that TC Energy Pipelines would be able to reallocate the costs associated with potential unsubscribed or underutilized capacity resulting from a modification or abrogation of the Gulfport TSAs.[97]

46. To prevail on the third factor, there must be evidence that the Gulfport TSAs are unduly discriminatory. Gulfport provides no such record evidence. Indeed, as noted above, Gulfport concedes that the Gulfport TSAs were entered into at a time when Gulfport, as natural gas producer, was concerned about accessing markets to sell its gas.[98]

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[96] *Id.* at 53-56.

[97] *Id.* at 44-45.

[98] *Id.* at 37 (explaining there were "concerns among natural gas producers that there would be an inadequate supply of pipeline capacity that would be unable to keep pace with the expected increase in natural gas production from the Marcellus and Utica shale basins").

The Gulfport TSAs were executed following an open season, and thus were entered into following competitive bidding.[99] There is no record evidence to show that the Gulfport TSA rates resulting from the open season are unduly discriminatory, and thus this factor is not satisfied here.

47. Even assuming that there were some differences in rates among similarly situated shippers, the court in *Maine Pub. Serv. Co. v. FERC* held that the "mere fact of a rate disparity . . . does not establish unlawful rate discrimination under" the Federal Power Act.[100] According to the court, this "does not mean that contractually determined rates may never be discriminatory." Rather, "[r]ate disparities resulting from a private arrangement are lawful only when the agreement was reached through fair conduct and good faith by the parties."[101] Thus, even assuming that there were some disparities in the rates of similarly situated shippers, Gulfport has not argued that the Gulfport TSAs resulted from bad faith or unfair conduct.

48. In conclusion, for the reasons set forth in this section, we find no evidence that the Gulfport TSAs seriously harm the public interest under any of the three tests set forth in *Sierra*. Thus, we are not persuaded that the public interest presently requires modification or abrogation of the contracts.

### 3. Gulfport's Other Arguments

49. Gulfport makes several additional arguments that we now address.

50. Regarding its procedural arguments, Gulfport argues that this proceeding suffers from "serious procedural flaws" including that the paper hearing is premature and addresses a purely hypothetical question.[102] Gulfport asserts that there is currently no proposal to modify or abrogate the Gulfport TSAs. Gulfport also asserts that the Commission does not have the authority to initiate this proceeding, citing the Administrative Procedure Act and Commission regulations. Gulfport also argues that a hearing is not practical at this time without a proposal to modify or abrogate the Gulfport TSAs. Additionally, Gulfport argues that this proceeding raises due process concerns

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[99] *See* Bundy Declaration PP 4-5; *see also* TC Energy Pipelines Direct Br. at 2, 5, 7-8.

[100] 964 F.2d 5, 10 (D.C. Cir. 1992) (quoting *Cities of Bethany v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984).

[101] *Id*. (citing *Cities of Bethany v. FERC*, 727 F.2d at 1139).

[102] Gulfport Direct Br. at 10-13.

because it does not know what a proposal to modify or abrogate the contract would say.[103]

51. Gulfport also argues that the *Mobile-Sierra* standard is inapplicable here. Gulfport argues that the *Mobile-Sierra* standard applies to modifying or abrogating contracts, while the rejection of a contract in bankruptcy is neither of those. Rather, Gulfport asserts that rejection of a contract in bankruptcy is akin to a breach, not a rescission.[104]

52. Finally, Gulfport argues that this proceeding constitutes jurisdictional overreach by undermining the fundamental purposes of the Bankruptcy Code, which Gulfport argues is to rehabilitate debtors, taking into account all of the facts and circumstances of the debtor in a single forum. Gulfport asserts that the bankruptcy courts would be the proper forum to consider whether rejection of the contracts are in a debtor's best interest.[105]

53. We disagree with Gulfport's arguments and characterizations of this process and the Commission's role in bankruptcy proceedings. Although we find that Gulfport's arguments were largely addressed and rejected in the October 5 Order, or are beyond the scope of this proceeding, we include our prior rulings here for completeness. As the Commission explained in the October 5 Order, this proceeding is within our authority and appropriate:

> [T]o the extent a bankruptcy proceeding concerning these Commission-jurisdictional contracts is initiated in the near future, holding an evidentiary hearing now will allow the Commission to issue an opinion prior to the potential imposition of a stay by a bankruptcy court. The decisions in *Mirant* and *FirstEnergy Solutions* both call for a public interest analysis, rather than the standard business judgement analysis, when a debtor seeks to reject a Commission-jurisdictional contract.[106] However, as the

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[103] *Id*. at 11.

[104] *Id*. at 13-22.

[105] *Id*. at 22-33.

[106] October 5 Order, 173 FERC ¶ 61,018 at P 34 (citing *In re FirstEnergy Sols. Corp.*, 945 F.3d 431, 454-55 (6th Cir. 2019) ("To recap, when a Chapter 11 debtor moves the bankruptcy court for permission to reject a filed energy contract that is otherwise governed by FERC, via the FPA, the bankruptcy court must consider the public interest and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach (e.g., under the *Mobile–Sierra* doctrine), within a reasonable time."); *In re Mirant Corp. v. Potomac Elec. Power Co.,* 378 F.3d 511, 525 (5th Cir. 2004) ("When

> Commission recently explained to the bankruptcy court in the Ultra bankruptcy proceeding, the Commission is a deliberative body that speaks through its orders: the Commission cannot take a position on the merits of a public interest inquiry in a bankruptcy proceeding without first examining the relevant evidence and issuing an order based on that evidence.[107]

54. Furthermore, as the Commission held in the October 5 Order, this proceeding is relevant to the Commission's role in examining the public interest:

> In light of these extraordinary circumstances, it is entirely possible that the Commission may conclude that a change to the filed rates at issue in this proceeding is required to avoid serious harm to the public interest.[108] If so, then the Commission, unlike a bankruptcy court, has the authority and expertise to modify the filed rates in a manner that may prevent the need for a bankruptcy proceeding at all, allow both Gulfport and TC Energy Pipelines to move forward through this difficult period, and thus better serve the long-term interests of the consuming public and the natural gas industry.[109]

55. In that regard, the Commission explained that its "first priority is to investigate whether the public interest requires modification to the existing filed rates so that damage to the parties, the consuming public, and the industry may be avoided or mitigated."[110] In addition, because "the contracts at issue are known and discrete," the Commission found that the "[p]arties should be able to address whether the public interest requires modification or abrogation of these filed-rate contracts without a pending bankruptcy

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considering these issues, the courts should carefully scrutinize the impact of rejection upon the public interest and should, *inter alia,* ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers").

[107] *Id.* (citing *In re Ultra Petroleum Corp.*, *et al.*, Case Nos. 20-32631, *et al.*, Emergency Motion for Reconsideration by Federal Energy Regulatory Commission (Docket #315), (Bankr. S.D. Tex. June 25, 2020) (responding to *In re Ultra Petroleum Corp.*, *et al.*, Case Nos. 20-32631, *et al.*, Order Requesting FERC Participation (MI) (Bankr. S.D. Tex. June 15, 2020)).

[108] *Id.* P 35 (citing *Morgan Stanley*, 554 U.S. at 530, 547, 548, 553) (remainder of citation omitted).

[109] *Id.*

[110] *Id.* P 36.

proceeding."[111] The Commission has the authority to consider hypothetical scenarios, and while we have declined to exercise that discretion in other cases, here we found it appropriate to allow the parties—in particular, Gulfport—to seek some form of relief from the Agreement. Unfortunately, Gulfport declined that opportunity.

56. Finally, we reject Gulfport's procedural arguments. The facts involved in this proceeding are limited to the Gulfport TSAs; thus, we find that extensive discovery is not necessary for the Commission to reach a determination regarding the question before us. We have no reason to believe that an in-person hearing before an ALJ would be necessary to examine witness credibility.[112] Furthermore, we provided each party with an opportunity to show why the Gulfport TSAs should be modified or abrogated under the longstanding *Mobile-Sierra* standard. Gulfport and TC Energy Pipelines are the parties most well situated to present evidence from which the Commission can make a determination concerning any serious harm to the public interest. We do not believe that making such a case in the time frame provided and in these circumstances presents an undue burden on either party.

The Commission orders:

We find, based on the record in this proceeding, that the public interest does not presently require the modification or abrogation of the Gulfport TSAs under the *Mobile-Sierra* standard. Accordingly, we find that the Gulfport TSAs as currently on file and in effect remain just and reasonable, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[111] *Id.*

[112] *Id.* P 39.

Document Content(s)

# EXHIBIT 3

173 FERC ¶ 61,137
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

| | | |
|---|---|---|
| ANR Pipeline Company | Docket Nos. | RP20-1204-001 |
| Columbia Gas Transmission, LLC | | RP20-1236-001 |
| Columbia Gulf Transmission, LLC | | |

ORDER DENYING REHEARING

(Issued November 12, 2020)

1. On October 5, 2020, the Commission issued a declaratory order holding that if Gulfport Energy Corporation (Gulfport) files for bankruptcy, the Commission will have concurrent jurisdiction under sections 4 and 5 of the Natural Gas Act (NGA), 15 U.S.C. §§ 717c and 717d, with United States Bankruptcy Courts with respect to Gulfport's firm transportation service agreements (Gulfport TSAs) with ANR Pipeline Company (ANR), Columbia Gas Transmission, LLC, (Columbia Gas) and Columbia Gulf Transmission, LLC (Columbia Gulf) (collectively, TC Energy Pipelines).[1] The order also established a new proceeding to determine whether the public interest requires abrogation or modification of the Gulfport TSAs. In this order, we deny Gulfport's request for rehearing of the October 5 Order, as discussed below.

## I. **Background**

2. On September 21, 2020, TC Energy Pipelines filed a request for declaratory order in anticipation of a potential bankruptcy filing by Gulfport. The petition had two specific requests: (1) a declaration that if Gulfport files for bankruptcy, the Commission will have concurrent jurisdiction under sections 4 and 5 of the NGA with the United States Bankruptcy Court with respect to TC Energy Pipelines' firm transportation service agreements with Gulfport, consistent with the *ETC Tiger* proceedings;[2] and (2) that the

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[1] *ANR Pipeline Co.*, 173 FERC ¶ 61,018 (2020) (October 5 Order).

[2] *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 (2020) (*ETC Tiger*), *order denying reh'g*, 172 FERC ¶ 61,155, at P 4 (2020) (*ETC Tiger Rehearing Order*).

Commission establish an expedited adjudicatory hearing on the *Mobile-Sierra*[3] public interest implications of continued performance under the Gulfport TSAs, consistent with *Energy Harbor*.[4]

3. In the October 5 Order, the Commission granted TC Energy Pipelines' request. The Commission found that uncertainty exists regarding the status of TC Energy Pipelines' firm TSAs with Gulfport and the treatment of those Gulfport TSAs should Gulfport file for bankruptcy. The Commission held that the Gulfport TSAs constitute filed rates under the NGA and the Commission's regulations, subject to the filed rate doctrine and the *Mobile-Sierra* presumption.[5] The Commission also held that if Gulfport were to file for bankruptcy, the Commission would have concurrent jurisdiction with the United States Bankruptcy Court regarding change or termination of the Gulfport TSAs because those contracts are also filed rates governed by sections 4 and 5 of the NGA.[6]

4. The Commission rejected Gulfport's argument that TC Energy Pipelines' petition was premature. The Commission found that requiring TC Energy Pipelines to wait to come to the Commission until that bankruptcy filing is made would place TC Energy Pipelines in an untenable position, as it would face the possibility of a bankruptcy court-ordered stay preventing TC Energy Pipelines from asking the Commission to conduct any assessment on the contracts at issue. The Commission found that holding a hearing now would accomplish two purposes: First, to the extent a bankruptcy proceeding concerning these Commission-jurisdictional contracts is initiated in the near future, holding an evidentiary hearing now would allow the Commission to issue an order prior to the potential imposition of a stay by a bankruptcy court and therefore allow the Commission to take a position on the public interest impacts of any proposed rejection of the Gulfport TSAs.[7] Second, the Commission noted that it, unlike a bankruptcy court, has the authority and expertise to modify the filed rates in a manner that may prevent the need for a bankruptcy proceeding at all, allow both Gulfport and TC Energy Pipelines to move

[3] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

[4] *See* Petition at 2 & n.5 (citing *Energy Harbor LLC*, 170 FERC ¶ 61,278 (2020) (*Energy Harbor*)).

[5] October 5 Order, 173 FERC ¶ 61,018 at P 27 (citing *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008)).

[6] *See id.*

[7] *Id.* P 34.

forward through this difficult period, and thus better serve the long-term interests of the consuming public and the natural gas industry.[8]

5. The Commission also rejected the argument that there was no material issue of fact to be determined at a hearing because no bankruptcy filing had been made. The Commission found that the contracts at issue are known and discrete, and that parties should be able to address whether the public interest requires modification or abrogation of these filed-rate contracts without a pending bankruptcy proceeding. The Commission noted that if factual circumstances change such that new findings are required, the Commission may address those changes at the time they occur.[9]

6. The Commission also rejected Gulfport's argument that the procedural schedule suggested by TC Energy Pipelines was unfairly truncated and raised substantial due process concerns. The Commission noted that the facts involved in this proceeding are limited to the Gulfport TSAs with TC Energy Pipelines. Therefore, extensive discovery was not necessary for the Commission to reach a determination and there was no reason to believe that an in-person hearing before an ALJ would be necessary to examine witness credibility. The Commission found that a shortened process was warranted given the desire to assess whether some form of rate modification may mitigate further distress to Gulfport or prevent the disruption of gas supplies, as well as the Commission's interest in reaching a determination prior to a potential stay order.[10]

7. The Commission held a paper hearing in Docket No. RP20-1236-000, where it evaluated parties' direct and rebuttal briefs and testimony. Based upon that information, the Commission issued an order on November 9, 2020 holding that the record does not support a finding that the public interest presently requires abrogation or modification of the Gulfport TSAs.[11]

## II. Gulfport Rehearing Request

8. Gulfport raises several arguments on rehearing. First, it argues that the Commission's order not only prematurely assumes that Gulfport will file for bankruptcy, but also further assumes that Gulfport will seek to reject the Gulfport TSAs, all based solely on a statement made in a Gulfport securities filing that Gulfport was struggling financially due to the COVID-19 pandemic and related factors. Gulfport argues that the

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[8] *Id.* P 35; *accord id.* PP 36, 39.

[9] *Id.* P 36.

[10] *Id.* P 39.

[11] *See ANR Pipeline Co.*, 173 FERC ¶ 61,131 (2020).

Commission's practice is to avoid instituting proceedings on petitions that do not present a specific controversy with a specific factual record.[12]

9. Second, Gulfport argues that the Commission erred in establishing a proceeding to apply the *Mobile-Sierra* doctrine to the Gulfport TSAs, as there has been no request to abrogate or modify a FERC-jurisdictional contract. Gulfport argues that the *Mobile-Sierra* doctrine is a framework for adjudicating a party's actual request to the Commission for a change in the filed rate, not a tool for the Commission to favor the interests of creditors over debtors.

10. Third, Gulfport argues that by establishing a new proceeding, the Commission implicitly and erroneously held that a rejection impacts the essential terms of a filed rate contract. Gulfport argues that courts have held that the Bankruptcy Code permits bankruptcy courts to authorize rejection of FERC-jurisdictional contracts, based on the finding that rejection does not constitute an abrogation or modification of the filed rate regulated by the Commission.[13] Thus, Gulfport argues that there was no basis for the Commission to establish this proceeding and apply *Mobile-Sierra* to the hypothetical rejection of the Gulfport TSAs.

11. Fourth, Gulfport states that by ordering a paper hearing rather than a trial-type evidentiary hearing, the Commission abused its discretion, violated the Administrative Procedure Act, and denied Gulfport's right to due process. Gulfport argues that a paper hearing is inadequate to address the relevant issues, and at the minimum the Commission should have permitted a full adjudicatory proceeding overseen by an Administrative Law Judge who could assess the credibility of witnesses. Gulfport argues that the hearing initiated by the Commission has the potential to raise a significant number of complex issues, many of first impression, and that Commission precedent in dealing with such matters is to hold a formal evidentiary hearing. Indeed, Gulfport states that by disregarding Commission precedent and practice without explanation, the Commission's October 5 Order was arbitrary and capricious, and not the product of reasoned decision

[12] Request for Rehearing at 10-11 (citing 5 U.S.C. § 554(e); 18 C.F.R. § 385.207(a)(2) (2020); *New England Ratepayers Ass'n*, 172 FERC ¶ 61,042, at P 36 (2020)).

[13] *Id.* at 15-18 (citing *In re Mirant*, 378 F.3d 511, 521-22 (5th Cir. 2004); *In re Ultra Petroleum*, No. 20-32631, 2020 WL 4940240, at *11 (Bankr. S.D. Tex. Aug. 21, 2020), *appeals pending*, S.D. Tex. Nos. 20-cv-2306, -2847, -3043 (consolidated); *In re FirstEnergy Solutions Corp.*, 945 F.3d 431, 446 (6th Cir. 2019) (*FirstEnergy*); *Osprey-Troy Officentre, LLC v. World All. Fin. Corp.*, 502 F. App'x 455, 456–57 (6th Cir. 2012); *In re Extraction Oil & Gas, Inc.*, No. 20-11548-CSS (Bankr. D. Del. Oct. 4, 2020), ECF No. 770 at 2).

making, in violation of the Administrative Procedure Act.[14] Gulfport argues that the rushed proceedings, including the three-week briefing period, provided inadequate time for Gulfport to prepare. Gulfport states that holding a hearing on a hypothetical abrogation of contracts also violates Gulfport's due process rights under the United States Constitution, as it fails to give Gulfport fair notice of the specific proposal of abrogation or modification at issue. Gulfport argues that due process issues are heightened by the failure to provide an ability for cross-examination of witnesses.[15]

12. Finally, Gulfport argues that the Commission's October 5 Order invaded the jurisdictional realm that Congress expressly reserved for bankruptcy courts. Gulfport argues that the Bankruptcy Code is designed to rehabilitate debtors, and that a bankruptcy court is best positioned to determine whether a rejection will be in the best interests of the public and the debtor's estate.[16] Gulfport argues that the bankruptcy court has exclusive jurisdiction over rejection of a contract, and that none of the exceptions in the Bankruptcy Code limit a debtor's ability to reject a FERC-approved contract.[17] Gulfport argues that Congress did not intend for the Natural Gas Act to override the Bankruptcy Code. Accordingly, Gulfport argues, the Commission's October 5 Order invades the bankruptcy courts' well-established exclusive province over the rejection of contracts and undermines the purposes of the Bankruptcy Code.

## III. <u>Discussion</u>

13. We deny rehearing. We disagree that the October 5 Order was unlawfully premature or administratively imprudent. As the Commission explained, TC Energy Pipelines had a reasonable expectation that a bankruptcy filing could be imminent based upon Gulfport's public statements.[18] In addition, as recent experience in other producer

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[14] *Id.* at 22 (citing 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Encino Motorcars, LLC. v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *PacifiCorp v. Reliant Energy Servs. Inc.*, 103 FERC ¶ 61,355 (2003); *Energy Harbor LLC*, 170 FERC ¶ 61,278 (2020); *Nevada Power Co. v. Enron Power Marketing, Inc.*, 101 FERC ¶ 63,031 (2002)).

[15] *Id.* at 27-28 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

[16] *Id.* at 30 (citing *Bildisco*, 465 U.S. 513, 528 (1984); *see also B.D. Int'l Disc. Corp. v. Chase Manhattan Bank (In re B.D. Int'l Disc. Corp.)*, 701 F.2d 1071, 1075 n.8 (2d Cir. 1983)).

[17] *Id.* at 32 (citing *In re Ultra Petroleum*, 2020 WL 4940240, at *6; *In re Mirant Corp.*, 378 F.3d at 521).

[18] October 5 Order, 173 FERC ¶ 61,018 at P 32. TC Energy Pipelines was hardly alone in having that expectation. Similar petitions were contemporaneously filed by

bankruptcies indicates, the Commission needed to act prior to a bankruptcy filing in order to avoid the potential imposition of a stay by a bankruptcy court that could prevent the Commission from opining on the potential abrogation of the Gulfport TSAs.[19] More importantly, setting a hearing prior to a bankruptcy filing gave the Commission the potential to modify the Gulfport TSAs in a way that would benefit all parties involved and potentially vitiate the need for a bankruptcy filing altogether.[20]

14. We also disagree that the Commission improperly applied the *Mobile-Sierra* doctrine to the hearing process in the absence of a requested abrogation by Gulfport. Gulfport essentially claims that the Commission acted prematurely, an argument we reject above. Further, Gulfport cites no authority for the proposition that a *Mobile-Sierra* determination cannot be made in advance of an anticipated abrogation.

15. Gulfport argues that by establishing a hearing, the Commission has "implicitly" held that a rejection of a FERC-jurisdictional filed rate contract impacts its essential terms, which Gulfport argues is incorrect.[21] However, the Commission has already found that "rejection of a contract in bankruptcy is broader than a breach in the ordinary course of business, as rejection is a court-ordered breach that may result in cessation of the entire contract."[22] We see no reason to revise that holding here. Although Gulfport cites to *FirstEnergy*, that decision explicitly rejected the argument that a rejection is analogous to a breach of contract, finding that: "an analogy to breach of contract outside of bankruptcy is also inapt inasmuch as Supreme Court caselaw . . . gives FERC authority to compel specific performance of an unprofitable or even illegal contract."[23]

16. We reject Gulfport's arguments that the Commission violated its due process rights. As Gulfport itself noted in its Protest, the Commission has broad discretion over the establishment of hearing proceedings.[24] The issue set for hearing here was limited to

three other pipelines. *See Rockies Express Pipeline, LLC*, 172 FERC ¶ 61,279 (2020), *Midship Pipeline Co., LLC*, 173 FERC ¶ 61,011 (2020); *Rover Pipeline LLC*, 173 FERC ¶ 61,019 (2020).

[19] October 5 Order, 173 FERC ¶ 61,018 at P 32 & n.93.

[20] *Id.* PP 35, 36, 39.

[21] Request for Rehearing at 14.

[22] *ETC Tiger Rehearing Order*, 172 FERC ¶ 61,155 at P 30.

[23] *FirstEnergy*, 945 F.3d at 442.

[24] *See* Protest at 24-25.

fourteen specific TSAs; a lengthy proceeding involving live witness testimony was unnecessary to reach a determination. Gulfport was able to submit both direct and rebuttal testimony for review by the Commission in reaching its determination in Docket No. RP20-1236-000. As noted above, the Commission's need for prompt action was driven by our desire to provide Gulfport with the opportunity to seek rate relief before the potential imposition of an automatic stay in a bankruptcy proceeding. The balancing of interests in setting proceedings for hearing is a proper exercise of Commission discretion.

17. Finally, Gulfport argues that the Commission has infringed on the jurisdiction of the bankruptcy courts in granting the petition. We disagree. The Commission has addressed our jurisdiction over the abrogation or modification of filed rates in prior proceedings and we see no reason to revise those findings here.[25] .

The Commission orders:

The Commission denies Gulfport's Request for Rehearing, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[25] *See ETC Tiger Rehearing Order*, 172 FERC ¶ 61,155 at P 3 (citing *NextEra, Inc. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,049 (2019) and *Exelon Corp. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,053, *order on reh'g*, *NextEra, Inc. v. Pac. Gas & Elec. Co.*, 167 FERC ¶ 61,096 (2019)). The *NextEra* and *Exelon* orders were recently vacated as moot in an unpublished decision after the debtor utility emerged from bankruptcy without seeking to reject Commission-jurisdictional contracts. *Pac. Gas & Elec. Co. v. FERC*, Nos. 19-71615, *et al.*, 2020 WL 5946721 (9th Cir. Oct. 7, 2020) (Mem.). In making that determination, the panel concluded that vacating the Commission's orders would "not especially harm FERC" because the Commission's jurisdictional determinations had already been reaffirmed in the *ETC Tiger* orders. *Id.* at *2.

Document Content(s)

# EXHIBIT 4

174 FERC ¶ 62,017
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ANR Pipeline Company
Columbia Gas Transmission, LLC
Columbia Gulf Transmission, LLC

Docket No. RP20-1236-002

NOTICE OF DENIAL OF REHEARING BY OPERATION OF LAW

(January 11, 2021)

Rehearing has been timely requested of the Commission's order issued on November 9, 2020, in this proceeding. *ANR Pipeline Co.*, 173 FERC ¶ 61,131 (2020).

In the absence of Commission action on the request for rehearing within 30 days from the date the request was filed, the request for rehearing may be deemed to have been denied. 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(f) (2020); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

Kimberly D. Bose,
Secretary.

Document Content(s)

# EXHIBIT 5

**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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| | ) | |
| **ANR Pipeline Company** | ) | |
| **Columbia Gas Transmission, LLC** | ) | **Docket No. RP20-1236-000** |
| **Columbia Gulf Transmission, LLC** | ) | |
| | ) | |

**MOTION TO INTERVENE AND INITIAL SUBMISSION OF**
**GULFPORT ENERGY CORPORATION**

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**Attachments:**
**Declaration of Daniel W. Haynes**
**Declaration of Jeff D. Makholm, Ph.D.**

Pursuant to to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. §§ 385.212 and 385.214, Gulfport Energy Corporation ("Gulfport") submits this Motion to Intervene and Initial Submission in response to the order issued by the Commission in the captioned docket on October 2, 2020,[1] responding to the Petition for Declaratory Order filed by ANR Pipeline Company ("ANR"), Columbia Gas Transmission, LLC ("Columbia Gas"), and Columbia Gulf Transmission, LLC ("Columbia Gulf" and collectively with ANR and Columbia Gas, the "TC Energy Pipelines") on September 21, 2020 in FERC Docket No. RP20-1204-000,[2] and initiating this "paper hearing."

## I. Background

In the underlying Petition, the TC Energy Pipelines requested the Commission to make the following specific rulings: (1) that if Gulfport files for bankruptcy, the Commission will have concurrent jurisdiction with the U.S. Bankruptcy Courts under Sections 4 and 5 of the Natural Gas Act ("NGA") over the 16 transportation service agreements between the Gulfport and the TC Energy Pipelines (the "Gulfport TSAs"), consistent with *ETC Tiger*;[3] and (2) consistent with

1 *ANR Pipeline Co. et al.*, Order on Petition for Declaratory Order, 173 FERC ¶ 61,018 (2020) ("Order on Petition").

2 Petition for Declaratory Order, Motion for Shortened Comment Period, And Request for Expedited Action of The TC Energy Pipelines, *ANR Pipeline Co. et al.*, Docket No. RP20-1204-000 (filed Sept. 21, 2020) ("Petition").

3 *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248, P 25 ("*ETC Tiger*"); *order on reh'g,* 172 FERC ¶ 61,155 (2020) To the extent the TC Energy Pipelines rely on the ETC Tiger rehearing order, the Commission has confirmed that the only "legally operative portion" of the ETC Tiger order on rehearing (172 FERC ¶ 61,155 (2020)) was the ordering paragraph denying rehearing of the Commission's prior order (*ETC Tiger Pipeline LLC*, 171 FERC ¶ 61,248 (2020)). See Response by the Federal Energy Regulatory Commission, *In re Chesapeake Energy Corp.*, Case No. 20-33233 (Bankr. S.D. Tex.) at 5 [ECF 1379]; see also, *In re Chesapeake Energy Corp.*, 10/15/2020 Hr'g Tr. at 15:5-8. Accordingly, neither TC Energy Pipelines nor the Commission should rely on the *dicta* in the ETC Tiger rehearing order in this or any other proceeding.

*Energy Harbor*,[4] that the Commission establish an expedited adjudicatory hearing on *Mobile-Sierra*[5] public interest considerations of continued performance under the TSAs.[6] The TC Energy Pipelines filed the Petition out of concern that Gulfport could file for bankruptcy soon and could seek to reject the Gulfport TSAs in bankruptcy.[7]

On October 5, 2020, the Commission issued its Order on Petition. After denying Gulfport's opposition to the shortened comment period for responding to the Petition and its request that the Commission extend the comment period to October 12, 2020,[8] the Commission granted the TC Energy Pipelines' requests. First, the Commission held the Gulfport TSAs constitute filed rates under the NGA and were subject to the filed rate doctrine and the *Mobile-Sierra* presumption, and that the Commission will have concurrent jurisdiction under NGA Sections 4 and 5 with the U.S. Bankruptcy Court if Gulfport files for bankruptcy.[9] The Commission also held that any bankruptcy reorganization plan or other action in a bankruptcy proceeding that purports to authorize the modification or rejection of the Gulfport TSAs cannot be confirmed until the Commission agrees, unless the plan or such other action is made contingent upon Commission approval, as reflected in a Commission order.[10] The Commission also initiated a paper hearing under NGA Section 5 to

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4 *Energy Harbor LLC*, 170 FERC ¶ 61,278 (2020) ("*Energy Harbor*")

5 *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) ("*Mobile*"); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) ("*Sierra*").

6 Order on Petition at P 5.

7 Petition at 6.

8 Order on Petition at P 27.

9 Order on Petition at P 29. The Commission also states that "the Commission and the bankruptcy court have parallel, exclusive jurisdiction." *Id.*

10 *Id*. at P 28.

determine whether the public interest presently requires that the Gulfport TSAs should be abrogated or modified.[11]

The Commission provided the TC Energy Pipelines and Gulfport two weeks from the date of the order to submit "direct evidence," one week to submit "rebuttal evidence," and the Commission announced an intent to issue a final ruling within 14 days after the submission of rebuttal evidence.[12] The Commission stated it was not prescribing the manner in which the public interest issues may be briefed, providing the parties flexibility to structure their briefs around the three-part test in *Sierra* or the more detailed approach similar to the one in *PacifiCorp*.[13] The Commission noted, however, that all parties should address whether the public interest currently requires modification of the Gulfport TSAs[14] and may choose to address whether abrogation or modification of the Gulfport TSAs would harm the public interest.[15]

**II. Summary of Argument**

As detailed below, Gulfport objects because the very nature of this proceeding constitutes a serious deprivation of Gulfport's right to due process under the law. Gulfport cannot adequately protect its interests when the rate that the Commission would consider or impose is undefined and the opportunity to present evidence and be heard is so woefully inadequate. Gulfport further objects to the extent that the Commission intends, though this proceeding, to attempt to invade the jurisdictional purview of the U.S. Bankruptcy Courts by attempting to pre-empt, pre-judge, or

11 *Id*. at P 29.

12 *Id*. at P 20.

13 103 FERC ¶ 61,355, at P 34 (2003).

14 Order on Petition at n.100.

15 *Id*.

otherwise limit the ability of a debtor in bankruptcy to reject executory contracts or to receive approval of a proposed plan of reorganization—matters that are within the exclusive jurisdiction of the U.S. Bankruptcy Courts under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This unprecedented paper hearing under the NGA suffers from serious procedural flaws, and thus is unlawful and should be terminated. If the Commission chooses to move forward with this patently unlawful proceeding, it runs the serious risk of firm rejection by a federal court of appeals on judicial review.

If the Commission nevertheless proceeds, notwithstanding these fatal procedural deficiencies, Gulfport contends that there is no legitimate basis for application of the *Mobile-Sierra* standard. This is necessarily true because this proceeding is operating on a hypothetical plane: no one has proposed to modify or abrogate the rates in the Gulfport TSA, so there is no proposed rate change against which the public interest may be measured, and thus no valid conclusions about the public interest which may be drawn or sustained. This would remain true even if Gulfport were to file for bankruptcy and seek to reject any of the Gulfport TSAs.[16]

And, if despite the glaring absence of foundation, the Commission insists on pressing forward in making a public interest determination, the Commission should find: (1) that there is no evidence that abrogation or modification of the Gulfport TSAs would harm the public interest; and (2) that it would harm the public interest if Gulfport was required to continue performance under the Gulfport TSAs.

16 Gulfport notes that, while it has not filed for bankruptcy, it has filed a Form 8-K with the Securities and Exchange Commission informing that the company is in a period of forbearance with its lenders and is in discussions with creditors about a potential restructuring. Gulfport Energy Corp., Current Report (Form 8-K) (Oct. 16, 2020), available at https://ir.gulfportenergy.com/all-sec-filings/content/0001213900-20-031652/0001213900-20-031652.pdf.

Gulfport does not believe evidence can be offered to demonstrate that abrogation or modification of the Gulfport TSAs would bring about any of the three *Sierra* circumstances: (1) no regulated utility would cease operation, (2) no consumers would be harmed, and (3) no party would suffer undue discrimination.

Conversely, an order from the Commission attempting to restrict access to, or otherwise interfere with, the bankruptcy process both thwarts Congress's purpose in enacting the Bankruptcy Code and thwarts the public interest underlying the NGA by restricting competition. FERC has created competitive wholesale natural gas sales and transportation markets through various policy initiatives over the last three decades that allow pipelines, shippers, and investors to price the risk of shipper bankruptcies into their contracts, and mitigate or allocate it as the market dictates.

The Commission's pro-competition policies are reflected in its Certificate and Creditworthiness Policy Statements, both of which reflect purposeful decisions by the Commission on how to allocate risks among pipelines and their shippers. These policies have successfully facilitated the expansion of the nation's pipeline grid while sending proper pricing signals in the market, and domestic natural gas consumers have benefitted. FERC should not take action in this proceeding that would run afoul of its effective policies on pipeline certificates and pipeline shipper creditworthiness criteria.

Rather, the Commission should let the market price the risks of pipeline shipper bankruptcies as it deems appropriate. Under basic economic principles and consistent with FERC rules and policies, the TC Energy Pipelines, Gulfport, and the TC Energy Pipelines' investors have already done this. If the risk of bankruptcy materializes for a party, that is an unfortunate, but legitimate, consequence of competitive markets that have benefitted consumers and FERC should let a lawful bankruptcy process run its course. For these reasons, all as more fully explained below, the Commission must decline to find that continued performance under the Gulfport TSAs is required by or would not seriously harm the public interest.

## III. Motion to Intervene

Gulfport moves to intervene in this proceeding. Gulfport is a shipper on the TC Energy Pipelines pursuant to the Gulfport TSAs which are the subject of this paper hearing. This paper hearing could result in a Commission order regarding the rights and obligations of the TC Energy Pipelines and Gulfport as parties to the Gulfport TSAs. Gulfport's interests will be impacted by the outcome of this proceeding and cannot be represented by any other party. Therefore, Gulfport's participation satisfies the requirements of 18 C.F.R. § 385.214, is in the public interest, and should be granted.

## IV. Correspondence and Communication

Gulfport respectfully requests that the names of the following persons be placed on the official service list compiled by the Secretary in this proceeding:

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* Gulfport requests that the Commission include each of the listed persons on the official service list. However, if, pursuant to 18 C.F.R. § 385.203(b)(3), the Commission limits service to two persons, Gulfport designates the persons denoted with an asterisk (*) for service.

## V. This Paper Hearing Suffers From Serious Procedural Flaws.

As an initial matter, Gulfport respectfully submits that this paper hearing suffers from serious procedural flaws, and that any conclusions the Commission may reach or any orders it may issue likely will be invalid as a result. By Gulfport's participation (under protest) in this improper and unnecessary proceeding, it does not waive its objections to those procedural flaws, and Gulfport specifically reserves the right to argue that those procedural flaws invalidate in whole or in part any order the Commission may issue in this proceeding.

Most obviously (and most problematically), this paper hearing is a premature attempt to address a purely hypothetical question. The Commission has established this proceeding "to determine whether the public interest presently requires that the Gulfport TSAs should be abrogated or modified."[17] At this point, however, there is no proposal before the Commission to abrogate or modify the Gulfport TSAs in any way. At most, there is only speculation by the TC Energy Pipelines that Gulfport may file for bankruptcy and that, if it does, Gulfport may seek to abrogate or modify the Gulfport TSAs.[18] The Commission cannot reasonably evaluate the public interest in abrogating or modifying a filed-rate contract without specific information on how and why that rate would be abrogated or modified—and no such information is available here, because there is no pending proposal to abrogate or modify the Gulfport TSAs.

That flaw vitiates this proceeding in multiple ways. First, under the Administrative Procedure Act and the Commission's own regulations, the Commission's authority to issue

[17] Order on Petition at P 29.

[18] *E.g.*, Petition at 2-3.

declaratory orders extends only to orders "to terminate a controversy or remove uncertainty."[19] No statute or regulation gives the Commission the authority to do what it proposes here: to establish a paper hearing and issue a declaratory order on hypothetical facts that are not tied to any actual real-world controversy.[20] Indeed, the Commission has apparently (and correctly) recognized that it has never instituted any comparable hearing on hypothetical speculation, rather than real-world "specific facts and circumstances," in the past.[21] These considerations raise obvious concerns under the Administrative Procedure Act.[22]

Second, even if the Commission did have the necessary statutory and regulatory authority, it abused its discretion by instituting this proceeding. Given the absence of any specific proposal to abrogate or modify the Gulfport TSAs, there is no meaningful way for the Commission to

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[19] 5 U.S.C. § 554(e); 18 C.F.R. § 385.207(a)(2); *see, e.g.*, *New England Ratepayers Ass'n*, 172 FERC ¶ 61,042, at P 36 (2020) (dismissing petition due to a failure to "identify a specific controversy or harm that the Commission should address in a declaratory order to terminate a controversy or to remove uncertainty").

[20] *See, e.g.*, *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206, at P 45 (2016) (declaratory orders are "based on the specific facts and circumstances presented") (citing *Puget Sound Energy Inc.*, 139 FERC ¶ 61,241, at P 12 (2012)).

[21] *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206, at P 45 (2016) (citing *Puget Sound Energy Inc.*, 139 FERC ¶ 61,241, at P 12 (2012)); *see also e.g.*, Order on Petition at P 31 (incorporating by reference the *Rockies Express* order, which did not dispute that the prior Commission orders cited by Gulfport "did not involve the hearing proceeding that [the Commission is] establishing here," *Rockies Express*, 172 FERC ¶ 61,279 at P 35); *Advanced Energy Econ. Sustainable FERC Project*, 167 FERC ¶ 61,032, at P 18 (2019) (noting the Commission's "common practice" of "dismiss[ing] a petition for declaratory order that is not ripe for consideration or is otherwise premature") (citing to *S. Md. Elec. Coop., Inc.*, 162 FERC ¶ 61,048, at P 13 (2018)); *Flint Hills Res. Alaska, LLC*, 136 FERC ¶ 61,021, at PP 26-27 (2011); *Comm. of Certain Members of Cajun Elec. Power Coop., Inc.*, 87 FERC ¶ 61,129, at p. 61,509 (1999) (declining to issue an order declaring that certain elements of a proposed bankruptcy plan of reorganization are contrary to the FPA, Commission precedent, and Section 32 of the Public Utility Holding Company Act, because it was not the only proposed plan of reorganization before the bankruptcy court and it was "impossible to know" how the bankruptcy court would act).

[22] *See* 5 U.S.C. § 706(2)(C) (courts shall set aside agency action "in excess of statutory jurisdiction, authority, or limitations"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Encino Motorcars, LLC. v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (unexplained inconsistency constitutes "an arbitrary and capricious change from agency practice").

determine whether any such proposal is in the public interest. After all, the Commission can hardly review and consider every conceivable abrogation or modification to the Gulfport TSAs to determine whether any such hypothetical abrogation or modification *might* be in the public interest. Moreover, any decision the Commission might reach now on such hypothetical facts is almost certainly wasted effort. As the Commission in its Order on Petition, "[i]f factual circumstances change such that new findings are required"—which "could occur before or during the pendency of a bankruptcy proceeding"—then the Commission may "address those changes at the time they occur."[23]

Third, the Commission's decision to hold its hearing based on speculation rather than any definite proposal to abrogate or modify the Gulfport TSAs also raises serious due process concerns.[24] In order for Gulfport to meaningfully present evidence on whether abrogating or modifying the Gulfport TSAs is in the public interest, it must have fair notice of the specific proposal of abrogation or modification at issue. Gulfport cannot reasonably support or oppose a proposal to abrogate or modify the Gulfport TSAs unless it knows the specific details of the proposal.[25] The Commission's decision to evaluate the abstract question of whether *any conceivable* abrogation or modification of the Gulfport TSAs *might* be in the public interest thus

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[23] Order on Petition at P 34.

[24] *See* 5 U.S.C. § 706(2)(B) (courts shall set aside agency action that is "contrary to constitutional right").

[25] Nevertheless, Gulfport will respond as directed by the Commission in the Order on Petition to the best of its abilities in this submission.

effectively denies Gulfport the meaningful notice and opportunity to be heard that due process requires.[26]

Those due process concerns are only heightened by the indefensible limitations that FERC has placed on this paper hearing. Determining whether the public interest warrants a proposed abrogation or modification of a filed-rate contract—or, as here, whether the public interest *might* warrant some *possible* abrogation or modification of a filed-rate contract—is a fact-intensive exercise that should be conducted in a full adjudicatory proceeding overseen by an Administrative Law Judge who can assess the credibility of testifying witnesses. In the past, the Commission has ordered full evidentiary hearings in comparably complex cases.[27] In light of the numerous issues of first impression this proceeding presents, the Commission's decision to instead resolve the complex issues presented here through a paper hearing, with a total briefing period of only *three weeks*, is both an abuse of discretion and a violation of due process.[28]

## VI. If The Commission Moves Forward With This Proceeding, It Should Not Apply The *Mobile-Sierra* Standard.

If the Commission decides to move forward with this paper hearing despite the serious procedural flaws described above, it should at a minimum refrain from applying the *Mobile-Sierra* doctrine. The *Mobile-Sierra* doctrine is triggered only under certain conditions, and none of those conditions has occurred here. The notion that the Commission may forge ahead with a *Mobile-*

[26] *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (due process requires "notice and an opportunity to be heard … 'at a meaningful time and in a meaningful manner'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[27] *See, e.g.*, *New York Ass'n of Pub. Power v. Niagara Mohawk Power Corp.*, 148 FERC ¶ 61,176 at P 25 (2014); *Seminole Elec. Cooperative Inc.*, 147 FERC ¶ 61,237 (2014); *Coakley v. Bangor Hydroelec. Co.*, 139 FERC ¶ 61,090 (2012).

[28] *See, e.g.*, *Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993) (formal hearings are necessary when disputed issues cannot be resolved by examination of written submissions); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

*Sierra* hearing based on concerns about potential future contract rejection misunderstands basic principles of bankruptcy law and is irreconcilable with well-established judicial precedent.

The *Mobile-Sierra* doctrine "guard[s] against" a very specific problem: "where one party to a rate contract on file with FERC attempts to effect a unilateral rate change by asking FERC to relieve its obligations under a contract whose terms are no longer favorable to that party."[29] Changes to FERC-jurisdictional contracts come in only two varieties: abrogation or modification.[30] Instead of permitting a party to a FERC-jurisdictional contract to unilaterally abrogate or modify the contract, the *Mobile-Sierra* doctrine provides that the Commission may authorize such a change "only" if it determines that the "public interest" "require[s]" it[31]—that is, only if the existing rate "seriously harms the public interest."[32]

Because the predicate for the application of the *Mobile-Sierra* doctrine is a request to abrogate or modify a FERC-jurisdictional contract, the Commission cannot legitimately apply that doctrine in this proceeding. As already explained, no party here has proposed to abrogate or modify the Gulfport TSAs. Instead, this entire proceeding hinges on nothing more than the TC Energy Pipelines' speculation that Gulfport may seek to abrogate or modify the Gulfport TSAs during a future bankruptcy proceeding.[33] As the Commission itself correctly recognized two weeks ago, "Gulfport has neither filed a bankruptcy petition nor submitted a filing with the

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29 *Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 284 (D.C. Cir. 2006); *see also, e.g.*, *Pub. Serv. Co. of N.M. v. Fed. Power Comm'n*, 557 F.2d 227, 229 (10th Cir. 1977).

30 *See, e.g.*, *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002).

31 *Id.*

32 *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527, 530 (2008).

33 *E.g.*, Petition at 2-3.

Commission seeking to modify or abrogate any agreements with TC Energy Pipelines."[34] That statement remains equally accurate today. Applying the *Mobile-Sierra* doctrine at this stage thus would be profoundly inconsistent with the whole premise of that doctrine.

To the extent that the TC Energy Pipelines (or the Commission) are worried that Gulfport may seek to reject the Gulfport TSAs in a hypothetical future bankruptcy proceeding, that concern is misplaced.[35] It is axiomatic as a matter of bankruptcy law that the rejection of a contract is not equivalent to the abrogation or modification of the contract.[36] Accordingly, any hypothetical future rejection of the Gulfport TSAs in a future bankruptcy proceeding would still not be occasion to trigger *Mobile-Sierra* scrutiny in a FERC proceeding.

The plain text of the Bankruptcy Code confirms the point. Under the Bankruptcy Code, unless an enumerated exception applies (and no exception applies to FERC-jurisdictional contracts), a debtor may "reject any executory contract"—*i.e.*, a contract where "performance remains due to some extent on both sides"[37]—so long as it obtains "the [bankruptcy] court's

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[34] Order Petition at P 29 n.91.

[35] *E.g.*, Petition at 2-3.

[36] *See In re Ultra*, No. 20-32631, 2020 WL 4940240, at *12 (Bankr. S.D. Tex. Aug. 21, 2020) (concluding that "by authorizing rejection, the Court is neither modifying nor abrogating the Agreement. Nothing about rejection changes the terms of the Agreement or alters Ultra's shipping rates along the Rockies Express Pipeline. Nor does rejection abrogate the Agreement."). *See also In re Mirant Corp.*, 378 F.3d 511, 519–20 (5th Cir. 2004) (distinguishing the concepts of (i) breach and (ii) rate modification/challenge, noting that breach is not a modification of the filed rate, but rather gives effect to it because the amount of damages would be based upon the filed rate); *Osprey-Troy Officentre, LLC v. World All. Fin. Corp.*, 502 F. App'x 455, 456–57 (6th Cir. 2012) (explaining that rejection of a contract pursuant to section 365 of the Bankruptcy Code operates as a breach of the contract and not as a modification or termination).

[37] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984).

approval."[38] Of central relevance here, the Bankruptcy Code expressly defines the consequences of rejection: "the rejection of an executory contract … of the debtor *constitutes a breach of such contract*," which is deemed to have occurred "immediately before the filing of the [bankruptcy] petition."[39] As the Supreme Court explained just last year in a decision relying on "fundamental principles of bankruptcy law," "[a] rejection breaches a contract *but does not rescind it*."[40] Said otherwise, a rejection breaches a contract but does not abrogate or modify its terms.[41] As a result, even if Gulfport were seek rejection of the Gulfport TSAs, the TC Energy Pipelines would have unsecured breach-of-contract damages claims against Gulfport's estate, and those claims would be calculated under the *unabrogated and unmodified* terms of the Gulfport TSAs. That result would "in no way contravene[] the filed rate doctrine; in fact, it [would] further[] the doctrine's purpose."[42]

Consistent with the understanding that contract rejection is fundamentally distinct from contract abrogation or modification, courts have consistently declined to assess rejection through the lens of the "extraordinarily" demanding *Mobile-Sierra* doctrine (whether in the context of

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38 11 U.S.C. § 365(a); *see also Bildisco*, 465 U.S. at 521 ("This language by its terms includes all executory contracts except those expressly exempted[.]").

39 11 U.S.C. § 365(g)(1) (emphasis added).

40 *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1657-58, 1661 (2019) (emphasis added); *see also id.* at 1661 ("Rejection of a contract—any contract—in bankruptcy operates not as a rescission but as a breach.").

41 *See, e.g.*, 3 *Collier on Bankruptcy* ¶ 365.10[1] (16th ed. 2020) ("Rejection and section 365(g)'s deemed breach do not affect the parties' substantive rights under the contract[.]"); 2 *Norton Bankruptcy Law Practice* § 46:24 (3d ed. 2019) ("The Bankruptcy Code instructs us that rejection is a breach of the executory contract. It is not avoidance, rescission, or termination." (footnotes omitted)).

42 *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 582 n.12 (1981).

contracts subject to the NGA or the Federal Power Act).[43] Rather, courts have acknowledged that the Bankruptcy Code plainly permits them to authorize the rejection of FERC-jurisdictional contracts, and that FERC may not invoke its much different authority over the abrogation or modification of such contracts to prohibit that outcome. To be sure, courts have also determined that, as part of their holistic process when evaluating potential contract rejection, they should account for the public interest (including the Commission's own views) before authorizing such rejection—but under a standard different from the one enshrined in the *Mobile-Sierra* doctrine, given the differing interests at stake during Chapter 11 proceedings as compared to FERC proceedings.

The Fifth Circuit's decision in *In re Mirant Corp.* is illustrative. *Mirant* addressed whether a bankruptcy court "may authorize the rejection of an executory contract for the purchase of electricity as part of a bankruptcy reorganization, or whether Congress granted [FERC] exclusive jurisdiction over these contracts."[44] As the Fifth Circuit recounted, the debtor in *Mirant* did "not contest that it would need FERC approval to either modify the rates in the [relevant contract] or to completely abrogate that agreement," but the court recognized that "*rejection*" presents a different issue, for rejection is merely a "*breach* of that contract."[45] The Fifth Circuit then proceeded to hold that the debtor could legitimately reject the FERC-jurisdictional contract under 11 U.S.C. § 365(a) without obtaining FERC approval, emphasizing that rejection "is not a collateral attack

[43] *Morgan Stanley*, 554 U.S. at 551.

[44] 378 F.3d at 514.

[45] *Id.* at 519.

upon that contract's filed rate because that rate is given full effect when determining the breach of contract damages resulting from the rejection."[46]

After making that determination, the Fifth Circuit next concluded that, in light of "the public interest inherent in the transmission and sale of electricity," courts "should consider applying a more rigorous standard to the rejection of" FERC-jurisdictional contracts than the "business judgment standard" that typically governs in the rejection context.[47] More precisely, after invoking a Supreme Court decision that never even mentions *Mobile* or *Sierra*, the Fifth Circuit noted that a bankruptcy court "might adopt a standard by which it would authorize rejection of an executory power contract only if the debtor can show that it 'burdens the estate, [] that, after careful scrutiny, the equities balance in favor of rejecting' that power contract, and that rejection of the contract would further the Chapter 11 goal of permitting the successful rehabilitation of debtors."[48] The court explained that, "[w]hen considering these issues, the courts should carefully scrutinize the impact of rejection upon the public interest and should, *inter alia,* ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers."[49] The Fifth Circuit also stated that courts could enlist FERC's "assist[ance]" when "balancing these equities."[50] But the court never stated that the public-interest standard that governs in the context of rejection of FERC-jurisdictional contracts should be the *Mobile-Sierra* standard, that the bankruptcy court must perform a *Mobile-Sierra* analysis, or that FERC's

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46 *Id.* at 521-22.

47 *Id.* at 525.

48 *Id.* (quoting *Bildisco,* 465 U.S. at 526).

49 *Id.*

50 *Id.*

"assist[ance]" to the bankruptcy court must come in the form of a *Mobile-Sierra* evaluation or determination (much less one after a truncated proceeding addressing hypothetical facts).[51]

Notably, the U.S. Bankruptcy Court for the Southern District of Texas recently applied this form of "*Mirant* scrutiny"—not the *Mobile-Sierra* doctrine—in a case in which a debtor sought to reject one of its FERC-jurisdictional agreements with a pipeline company similar to the TC Energy Pipelines.[52] After quickly dispatching arguments from the pipeline company and the Commission that it should "rule in a manner contrary to" the Fifth Circuit's "controlling authority" in *Mirant*[53] (a request that came from counsel for the Commission even though FERC had long embraced *Mirant*),[54] the court concluded that it undoubtedly had the ability to authorize the rejection of the contract under 11 U.S.C. § 365(a) without invading FERC's territory,[55] reasoning that "rejection is not rate modification or abrogation."[56] Hence, the "sole issue … [was] whether the [c]ourt should deny the rejection based on public policy reasons."[57] As to that public-interest inquiry, the court observed that, under *Mirant*, it had to "scrutinize the impact of rejection on the public interest and on the supply of natural gas to consumers," and then "weigh those concerns against the [contract's] burden on [the debtor's] reorganization."[58] After considering evidence and arguments

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51 *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983).

52 *Ultra*, 2020 WL 4940240, at *8.

53 *Id.* at *1.

54 *See, e.g.*, *Cal. Elec. Oversight Bd. v. Calpine Energy Servs.*, 114 FERC ¶ 61,003 (2006).

55 *Ultra*, 2020 WL 4940240, at *6-*8.

56 *Id.* at *11 (capitalization altered).

57 *Id.* at *1.

58 *Id.* at *8.

from the debtor, the pipeline company, and FERC[59]—which the parties presented in a multi-day court hearing with live witnesses, not in a rushed FERC paper hearing without any discovery, any cross-examination, or any ability to assess the credibility of witnesses—that exercise proved straightforward: "there [was] no evidence that rejection would harm the public interest,"[60] and the contract "plainly burden[ed] the [debtor's] estate."[61] Thus, because "the equities plainly favor[ed] approving rejection,"[62] the court "authorize[d] rejection."[63]

Nor is this approach unique to the Fifth Circuit. In *In re FirstEnergy Solutions Corp.*, for instance, the Sixth Circuit likewise concluded that a "bankruptcy court has jurisdiction to decide whether [a debtor] may reject [FERC-jurisdictional] contracts, meaning that [a debtor] can reject the contracts subject to proper bankruptcy court approval and FERC cannot independently prevent it."[64] And after citing *Mirant*, the court additionally explained that, before authorizing the rejection of such contracts, a bankruptcy court should "consider[] and decid[e] the impact of the rejection of these contracts on the public interest … to ensure that the 'equities balance in favor of rejecting the contracts.'"[65] That description reveals that, as in the Fifth Circuit, the public-interest inquiry

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[59] Although the Commission "examined witnesses, argued, and was a full participant" in the public-interest phase of the proceedings, it declined to "take a position on the public interest implications of rejecting th[e] specific [a]greement" at issue. *Id.* at *3.

[60] *Id.* at *9.

[61] *Id.* at *11.

[62] *Id.*

[63] *Id.* at *13.

[64] 945 F.3d 431, 446 (6th Cir. 2019); *see also id.* at 451 ("[B]ankruptcy reasonably serves as an 'overriding necessity' to permit such [FERC-jurisdictional] contracts to be treated as ordinary contracts.").

[65] *Id.* at 454 (quoting *Mirant*, 378 F.3d at 525).

that governs in the Sixth Circuit when debtors seek to reject FERC-jurisdictional contracts does not resemble the one reflected in the *Mobile-Sierra* doctrine.

Most recently, the U.S. Bankruptcy Court for the District of Delaware signaled its support for this approach in a dispute over the Bankruptcy Code's automatic stay. Approximately two weeks ago, in *In re Extraction Oil & Gas, Inc.*, that court described as "incorrect" the Commission's view "that the '[r]ejection of a Commission-jurisdictional contract in bankruptcy court alters the essential terms and conditions of [the] contract.'"[66] As the court explained, rejection "does no such thing": rejection merely "'constitutes a breach of such contract,'" and the counterparty's rights under that contract remain "intact."[67] The court added that the fact that "filed rate obligations are subject to the *Mobile-Sierra* doctrine," which precludes parties from "unilaterally abrogat[ing] or modify[ing] their [filed rate obligations]," is "completely irrelevant" when debtors seek to reject FERC-jurisdictional contracts in bankruptcy under 11 U.S.C. § 365.[68] The court thus concluded that it would not grant relief from the automatic stay to allow the counterparty to the FERC-jurisdictional contract to undertake "irrelevant litigation" implicating the *Mobile-Sierra* doctrine before the Commission.[69]

As all of this underscores, there is no basis in law or logic to apply the *Mobile-Sierra* doctrine here. Gulfport has not attempted to abrogate or modify any of the Gulfport TSAs, rendering application of that standard unwarranted in the first place. Conjecture about Gulfport's potentially rejecting its TSAs with the TC Energy Pipelines in future Chapter 11 proceedings does

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66 No. 20-11548-CSS (Bankr. D. Del. Oct. 4, 2020), ECF No. 770 at 2.

67 *Id. (*quoting *Tempnology*, 139 S. Ct. at 1661).

68 *Id.* (last alteration in original).

69 *Id.* at 2-3.

not change the calculus, for rejection is not abrogation or modification. Even if such rejection ever came to pass, courts have concluded that FERC should have an opportunity to advise the bankruptcy court about the effect of rejection on the public interest as part of a judicial inquiry that does not employ the *Mobile-Sierra* standard, obviating the need for a *Mobile-Sierra* evaluation in a formal FERC proceeding.

## VII. FERC's Jurisdictional Overreach Undermines the Fundamental Purposes of the Bankruptcy Code.

In issuing the Order on Petition and establishing this paper hearing, moreover, the Commission risks undermining the fundamental purpose of the Bankruptcy Code, which is to rehabilitate debtors, taking into account all of the facts and circumstances of the debtor's affairs and resolving all claims against the debtor in a single forum. Consistent with this purpose, the bankruptcy courts would be the proper forum to consider whether rejection of an executory contract is in a debtor's best interest.

### (a) The purpose of the Bankruptcy Code is to rehabilitate a debtor.

The underlying purpose of Chapter 11 of the Bankruptcy Code is to enable a distressed business to reorganize and continue as a going-concern.[70] This rehabilitation is made possible, in

[70] *See In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985) ("The requirement of good faith must be viewed in light of the totality of circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code to give debtors a reasonable opportunity to make a fresh start."); *see also B.D. Int'l Disc. Corp. v. Chase Manhattan Bank (In re B.D. Int'l Disc. Corp.)*, 701 F.2d 1071, 1075 n.8 (2d Cir. 1983) (stating "the two major purposes of bankruptcy [are] achieving equality among creditors and giving the debtor a fresh start"); *In re C-TC 9th Ave. P'ship*, 113 F.3d 1304, 1310 (2d Cir. 1997) ("[t]he purpose of Chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state.") (quoting *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985)); *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 119 (3d Cir. 2004) ("The Supreme Court has identified two of the basic purposes of Chapter 11 as (1) 'preserving going concerns' and (2) 'maximizing property available to satisfy creditors.'") (quoting *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 453 (1999)); *Mirant*, 378 F.3d at 517 (5th Cir. 2004) ("Congress intended Chapter 11 to permit troubled enterprises to be restructured so that they could operate successfully in the future.") (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983)).

part, because chapter 11 of the Bankruptcy Code provides a corporate debtor with a single forum before which it may adjudicate all claims and causes of action, restructure its balance sheet, reorganize its business operations, and avoid the adverse economic effects associated with disposing of assets at their liquidation value.[71] Given the goal of rehabilitating a debtor in a holistic manner, the scope of the Bankruptcy Code is intentionally broad. As the Supreme Court explained, "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate."[72]

(b) **The bankruptcy court is the only forum to decide whether rejection of a contract is in the best interests of a debtor's estate.**

The Bankruptcy Code grants the bankruptcy court exclusive jurisdiction over the property of a debtor's estate, including executory contracts.[73] Pursuant to section 365(a) of the Bankruptcy Code, a debtor, in its sole discretion, may "reject any executory contract"[74] upon a showing that such rejection is a proper exercise of the debtor's business judgment.[75] The ultimate purpose

[71] *See Bildisco*, 465 U.S. 513, 528 (1984); *see also B.D. Int'l Disc. Corp. v. Chase Manhattan Bank (In re B.D. Int'l Disc. Corp.)*, 701 F.2d 1071, 1075 n.8 (2d Cir. 1983) (stating "the two major purposes of bankruptcy [are] achieving equality among creditors and giving the debtor a fresh start").

[72] *Celotex v. Edwards*, 514 U.S. 300, 308 (1995) (quoting *Pacor, Inc. v. Higgins*, 43 F.2d 984, 994 (3d Cir. 1984)).

[73] 28 U.S.C. § 1334(e)(1) ("The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."). *See also In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 687, 702 (Bankr. S.D.N.Y. 1992) ("[W]e hold that executory contracts are property of the estate within the meaning of § 541."); *In re Rickel Home Centers, Inc.*, 209 F.3d 291, 300 (3d Cir. 2000) ("Unexpired leases, like executory contracts, are included in the definition of 'property of the estate' under section 541.") (quoting *Krebs Chrysler–Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490 (3d Cir. 1998)).

[74] 11 U.S.C. § 365(a).

[75] A debtor's rejection of an executory contract or unexpired lease is ordinarily governed by the "business judgment" standard. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985) ("It is well established that 'the question whether a lease should be rejected . . . is one of business

behind section 365 of the Bankruptcy Code is to allow a debtor to reject those agreements which are no longer beneficial to a debtor's business and to assume those agreements that have go-forward value. As noted by the Supreme Court, a debtor's right to reject executory agreements in bankruptcy "is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization."[76]

The Bankruptcy Code enumerates certain exceptions to a debtor's ability to reject any contract. However, none of these exceptions "limit[s] a debtor's ability to reject a FERC approved contract."[77] As noted by the Supreme Court in *Bildisco*, "Congress knew how to draft an exclusion . . . when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply."[78] Given the absence of an explicit exception to § 365 of the Bankruptcy Code for FERC-jurisdictional agreements and the Supreme Court's earlier decision in *Bildisco* under analogous circumstances, the hypothetical future rejection of the Gulfport TSAs would fall squarely within the exclusive jurisdiction of the bankruptcy court.

By contrast, FERC has exclusive jurisdiction over the modification and abrogation of the firm transportation agreements between interstate natural gas pipelines and their shippers. FERC maintains this exclusive jurisdiction regardless of whether a party to a FERC-jurisdictional

judgment.'" (quoting *Grp. of Institutional Inv'rs v. Chicago, M., St. P. & P. R. Co.*, 318 U.S. 523, 550 (1943)).

76 *Bildisco*, 465 U.S. at 528 (1984).

77 *Ultra*, 2020 WL 4940240, at *6. *See also Mirant*, 378 F.3d at 521 (5th Cir. 2004) ("The fact that Congress did not create an exception from § 365(a) rejection for contracts subject to FERC regulation does not appear to be an accident or oversight. It is clear from other Bankruptcy Code provisions that Congress was aware that a debtor's bankruptcy reorganization could implicate the authority of a regulatory rate-setting commission with jurisdiction over that debtor.").

78 *Bildisco*, 465 U.S. at 523 (1984).

agreement is a Chapter 11 debtor. Allowing this proceeding to continue sets a dangerous precedent as it will encourage parties to FERC-jurisdictional agreements to race to FERC at the first sign of a company's distress. This would lead to the very race to the courthouse and "first-come, first-served"[79] system the Bankruptcy Code was designed to prevent through the operation of the automatic stay.[80] If FERC allows parties to commence proceedings to beat the clock and the implementation of the automatic stay, it will undercut a pillar of the Bankruptcy Code. three pipelines other than the TC Energy Pipelines have already raced to FERC to seek various forms of relief based on a single line in Gulfport's 10-Q, and FERC quickly issued three additional declaratory orders and established three other paper hearings.[81]

By permitting and encouraging such behavior, FERC will undermine an overarching principle of the Bankruptcy Code—equal distribution amongst similarly situated creditors.[82] The

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79 *NLRB v. Martin Arsham Sewing Co.*, 873 F.2d 884 (6th Cir. 1989) (concluding that the Bankruptcy Code is designed to "avoid the incoherent dismemberment of the debtor which would occur under a "first-come-first-served" scheme"). *See also GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985) ("The automatic stay takes effect under 11 U.S.C. § 362(a)(1) upon the filing of a petition in bankruptcy and acts to stay any judicial "proceeding against the debtor." Its purposes are to protect the debtor's assets, provide temporary relief from creditors, and further equity of distribution among the creditors by forestalling a race to the courthouse."); *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 700–01 (2d Cir. 1989) ("When considering the automatic stay provision, the House Report stated that the stay 'provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors.'") (quoting H.R.Rep. No. 595, 95th Cong., 2nd Sess. 340, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5963, 6297).

80 *See* Order on Petition at P 32 ("[T]o the extent a bankruptcy proceeding concerning these Commission jurisdictional contracts is initiated in the near future, holding an evidentiary hearing now will allow the Commission to issue an opinion prior to the potential imposition of a stay by a bankruptcy court.").

81 *Rockies Express Pipeline Co., LLC,* 172 FERC ¶ 61,279 (2020); *Midship Pipeline Co., LLC,* 173 FERC ¶ 61,011 (2020); *Rover Pipeline LLC*, 173 FERC ¶ 61,019 (2020).

82 *Buchanan v. Smith*, 83 U.S. 277, 301 (1873) ("Equal distribution of the property of the bankrupt … is the main purpose which the Bankruptcy Act seeks to accomplish…."); *see also Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 459 (2d Cir. 1985) ("The guiding premise of the Bankruptcy Code, like its predecessor, the Bankruptcy Act, is the equality of distribution of assets among creditors."); *NLRB v. Martin Arsham Sewing Co.*, 873 F.2d 884 (6th Cir. 1989) (concluding that the

purpose of a chapter 11 reorganization in a single forum—before a bankruptcy court—is to deal with the affairs of a debtor in a holistic, comprehensive manner. Rejection through the Bankruptcy Code allows for ratable treatment of a debtor's creditors and its counterparties on executory contracts.[83] Effectively forcing parties such as Gulfport to participate in hearings such as this one before FERC, subject to the *Mobile-Sierra* standard, would irreparably harm entities who might become debtors and improperly elevate FERC-jurisdictional contract counterparties to a special status as preferred creditors. FERC should not incentivize such unfair treatment of a debtor's creditors and should not seek to replace, or interfere with, bankruptcy courts in matters that Congress clearly designated within their sole province. Put simply, FERC should not threaten the equality of creditors or the integrity of the bankruptcy process.

If Gulfport were to file for bankruptcy and move to reject any of the Gulfport TSAs, or any other FERC-jurisdictional agreements, FERC would not have the authority to determine whether Gulfport may reject those executory contracts. That determination is solely within the province of the bankruptcy courts.[84] Bankruptcy courts are equipped to efficiently and effectively adjudicate the rejection of a debtor's contracts, because they can review all of the debtor's contracts and the other property of the estate in a holistic manner that allows for an efficient and fair resolution.

If Gulfport does file for bankruptcy in the future and does move to reject any of its FERC-jurisdictional contracts, a bankruptcy court's adjudication of rejection would not impede on

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Bankruptcy Code is designed to "avoid the incoherent dismemberment of the debtor which would occur under a "first-come-first-served" scheme").

83 *See In re Albrechts Ohio Inns, Inc.*, 152 B.R. 496, 501–02 (Bankr. S.D. Ohio 1993) (noting the business judgment rule is satisfied for rejection purposes where "rejection will result in benefit to the debtor's general unsecured creditors").

84 *ETC Tiger*, 171 FERC ¶ 61,248 at P 25; ("[R]endering a determination on rejection motions is solely within the province of the bankruptcy court.").

FERC's rights. Congress was explicit that rejection of a contract "constitutes a breach."[85] As noted above, according to the Supreme Court, "[a] rejection breaches a contract but does not rescind it."

In practice, this means that all rights arising under a contract that would ordinarily survive a contract breach remain in place.[86] The Bankruptcy Code, the Supreme Court, and a litany of case law make it clear that when a bankruptcy court authorizes the rejection of a FERC-jurisdictional contract, the court is not abrogating, modifying, or terminating the contract.[87] Rather, breach of a contract is distinct from the abrogation of a contract. When a contract is abrogated, it is annulled or repealed and the parties can no longer enforce that agreement against one another.[88] In contrast, when a contract is breached, it is simply violated and the contract remains in force.[89] Thus, the hypothetical rejection of the Gulfport TSAs does not fall within the scope of FERC's jurisdiction. The question of rejection of a debtor's executory contracts can only be properly heard before a bankruptcy court.

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85 11 U.S.C. § 365(g).

86 *Tempnology*, 139 S. Ct. at 1657–58.

87 *See Ultra*, 2020 WL 4940240, at *12 (holding that "by authorizing rejection, the Court is neither modifying nor abrogating the Agreement. Nothing about rejection changes the terms of the Agreement or alters Ultra's shipping rates along the Rockies Express Pipeline. Nor does rejection abrogate the Agreement."). *See also Mirant*, 378 F.3d at 519–20 (5th Cir. 2004) (distinguishing the concepts of (i) breach and (ii) rate modification/challenge, noting that breach is not a modification of the filed rate, but rather gives effect to it because the amount of damages would be based upon the filed rate); *Osprey-Troy Officentre, LLC v. World All. Fin. Corp.*, 502 F. App'x 455, 456–57 (6th Cir. 2012) (explaining that rejection of a contract pursuant to section 365 of the Bankruptcy Code operates as a breach of the contract and not as a modification or termination).

88 *See Abrogation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

89 *See Breach*, BLACK'S LAW DICTIONARY (10th ed. 2014).

(c) **The NGA cannot replace the Bankruptcy Code.**

The Bankruptcy Code was designed to accomplish the following principal purpose: the orderly and fair distribution of the debtor's property to creditors in a manner that enables a distressed business to reorganize.[90] This includes a debtor's rejection of its executory contracts. If FERC intervenes in the carefully curated processes Congress established in the Bankruptcy Code, FERC will undermine the fundamental purposes of bankruptcy, and ultimately threaten the chance of a successful reorganization for any debtor affected. Furthermore, counterparties to FERC-jurisdictional contracts, such as the TC Energy Pipelines, should not be permitted to escape the confines of the Bankruptcy Code and avail themselves of privileges not afforded to other similarly situated parties. This would undermine the carefully crafted balance and equality that tethers the entire Bankruptcy Code.

The Commission has exclusive authority under the NGA and the filed-rate doctrine does not extend to any other aspects of the transportation service agreements and disputes arising thereunder. FERC has absolutely no authority to adjudicate a debtor's rejection of its executory contracts pursuant to the Bankruptcy Code. Bankruptcy courts have exclusive jurisdiction over property of the estate, which includes executory contracts.[91] In rejection proceedings, pursuant to

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[90] *Buchanan*, 83 U.S. at 301 (1873) ("Equal distribution of the property of the bankrupt … is the main purpose which the Bankruptcy Act seeks to accomplish…."); *see also Cunard*, 773 F.2d at 459 (2d Cir. 1985) ("The guiding premise of the Bankruptcy Code, like its predecessor, the Bankruptcy Act, is the equality of distribution of assets among creditors."); *Martin Arsham Sewing*, 873 F.2d 884 (6th Cir. 1989) (concluding that the Bankruptcy Code is designed to "avoid the incoherent dismemberment of the debtor which would occur under a "first-come-first-served" scheme"); H.R.Rep. No. 95–595, at 177–178, U.S. Code Cong. & Admin. News 1978, pp. 6137, 6138 (explaining the provisions of the Bankruptcy Code that are designed to "deter 'the race of diligence' of creditors to dismember the debtor before bankruptcy"); *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985) ("The requirement of good faith must be viewed in light of the totality of circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code to give debtors a reasonable opportunity to make a fresh start.").

[91] 28 U.S.C. § 1334(e)(1) ("The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all property, wherever located, of the debtor as of the

the Bankruptcy Code, the bankruptcy court simply determines whether the debtor has properly exercised its business judgment in seeking to reject[92]—and thereby breach—the executory contracts in question. Such a breach then results in unsecured claims against the estate based on the unaltered rates and other terms of the contracts and expected future performance. Importantly, Congress did not intend for the NGA to override the Bankruptcy Code. The Bankruptcy Code's grant of authority to bankruptcy courts and debtors is vital to the principal purpose of a debtor's reorganization because it releases a debtor from burdensome obligations that would otherwise impede its rehabilitation. Congress intended for bankruptcy courts to wield this sword, as can be seen by the fact that the Bankruptcy Code, including section 365, was enacted decades after the enactment of the NGA and the issuance of the *Mobile-Sierra* opinions.[93]

Against that backdrop, the Bankruptcy Code explicitly provides for debtors to reject "*any*" executory contract not specifically excluded, and contains no exception for any kind of FERC-jurisdictional agreements. Thus, there is a clear lack of Congressional intent for the NGA to override the Bankruptcy Code, because: (1) there is no exception carved out of section 365 that excludes FERC-jurisdictional contracts; (2) the later-in-time enactment of the Bankruptcy Code,

commencement of such case, and of property of the estate."). *See also In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 687, 702 (Bankr. S.D.N.Y. 1992) ("[W]e hold that executory contracts are property of the estate within the meaning of § 541."); *In re Rickel Home Centers, Inc.*, 209 F.3d 291, 300 (3d Cir. 2000) ("Unexpired leases, like executory contracts, are included in the definition of 'property of the estate' under section 541.") (quoting *Krebs Chrysler–Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490 (3d Cir. 1998)).

92 As noted above, in the context of FERC-jurisdictional agreements under the NGA, some courts have examined whether rejection should be denied due to public policy concerns. *See e.g.*, *Ultra*, 2020 WL 4940240, at *1.

93 The Bankruptcy Code was enacted in 1978. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2594 (1978). The NGA was passed in 1938. *See* Natural Gas Act, 75 Cong. Ch. 556 , 52 Stat. 821 (1938). The Supreme Court decided both *Mobile* and *Sierra* in 1956. *See Mobile*, 350 U.S. 332 (1956); *Sierra*, 350 U.S. 348 (1956).

including section 365, suggests that Congress intentionally refrained from enacting any such exception; and (3) FERC's intervention in rejection would undermine the well-established purposes of the Bankruptcy Code

(d) **FERC agreement with or approval of a bankruptcy plan of confirmation is not required.**

In the Order on Petition, the Commission reiterated its position that any bankruptcy reorganization plan or other action in a bankruptcy proceeding that purports to authorize the modification or rejection of the Gulfport TSAs cannot be confirmed until the Commission agrees, unless the plan or such other action is made contingent upon Commission approval, as reflected in a Commission order.[94] The Commission is mistaken. Even if Gulfport were to file for bankruptcy relief, reject the Gulfport TSAs pursuant to section 365 of the Bankruptcy Code, and seek confirmation of a chapter 11 plan of reorganization, neither the Bankruptcy Code nor any other applicable law would make FERC's agreement with or approval of such plan necessary.

Section 1129(a)(6) of the Bankruptcy Code permits confirmation of a plan of reorganization only if any regulatory commission that has or will have jurisdiction over a debtor after confirmation has approved any rate change of the debtor provided for in the plan.[95] This section applies only in instances where the plan specifically calls for a prospective change in rate,[96] *i.e.*, when there is evidence that the plan would actually provide a different rate structure going forward.[97]

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94 Order on Petition at P 28.

95 11 U.S.C. § 1129(a)(6).

96 7 Collier on Bankruptcy P. 1129.02[6] (16th ed. 2020).

97 *See In re Shenandoah Realty Partners, L.P.*, 248 B.R. 505, 514-15 (W.D. Va. 2000) (noting that the objecting party introduced no evidence at confirmation that the plan would provide for a different rate structure than any other similarly situated and regulated entity).

As noted above, rejection of any of the Gulfport TSAs pursuant to section 365 of the Bankruptcy Code would not constitute abrogation or modification. Congress was explicit that rejection of a contract "constitutes a breach."[98] And as explained above, the Supreme Court has made clear that "[a] rejection breaches a contract but does not rescind it. In practice, this means that all rights arising under a contract that would ordinarily survive a contract breach remain in place."[99] The Bankruptcy Code, the Supreme Court, and a litany of case law make it clear that when a bankruptcy court authorizes the rejection of a FERC-jurisdictional contract, the court is not abrogating, modifying, nor terminating the contract.[100] Breach of a contract is distinct from the abrogation of a contract. When a contract is abrogated, it is annulled or repealed and the parties can no longer enforce that agreement against one another.[101] In contrast, when a contract is breached, it is simply violated and the contract remains in force.[102]

The Fifth Circuit has already recognized in *Mirant* that the bankruptcy court (and not FERC) has the power to authorize a motion to reject a FERC-jurisdictional contract, because doing so is not a collateral attack on the filed rate. Given that holding, it would be nonsensical to

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[98] 11 U.S.C. § 365(g).

[99] *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1657–58 (2019).

[100] *See In re Ultra*, No. 20-32631 (MI) (Bankr. S.D. Tex. Aug. 21, 2020) [ECF 721] (holding that "by authorizing rejection, the Court is neither modifying nor abrogating the Agreement. Nothing about rejection changes the terms of the Agreement or alters Ultra's shipping rates along the REX Pipeline. Nor does rejection abrogate the Agreement."). *See also In re Mirant Corp.*, 378 F.3d 511, 519–20 (5th Cir. 2004) (distinguishing the concepts of (i) breach and (ii) rate modification/challenge, noting that breach is not a modification of the filed rate, but rather gives effect to it because the amount of damages would be based upon the filed rate); *Osprey-Troy Officentre, LLC v. World All. Fin. Corp.*, 502 F. App'x 455, 456–57 (6th Cir. 2012) (explaining that rejection of a contract pursuant to section 365 of the Bankruptcy Code operates as a breach of the contract and not as a modification or termination).

[101] *See Abrogation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[102] *See Breach*, BLACK'S LAW DICTIONARY (10th ed. 2014).

nevertheless require a debtor to obtain FERC approval of its chapter 11 plan on the basis that section 1129(a)(6) of the Bankruptcy Code requires FERC approval because the rejection did change the filed rate after all.

In any event, section 1129(a)(6) of the Bankruptcy Code is inapplicable here. To the extent that FERC may continue to insist that there is a "rate change" at issue with respect to a contract rejection—an argument that Gulfport does not concede—it could not be a rate "of the debtor" because Gulfport is not rate-regulated by FERC.

Under the NGA, FERC has jurisdiction over the rate charged by natural gas pipelines operating in interstate commerce (*i.e.*, the TC Energy Pipelines).[103] This conclusion is confirmed by the fact that the Gulfport TSAs were entered into under the terms and conditions of service of the TC Energy Pipelines' FERC-approved tariffs.[104] FERC does not regulate the price that a purchaser must pay for natural gas transportation services; rather, a purchaser such as Gulfport simply pays the rate that the pipeline is approved by FERC to charge.[105] In this case, those are *TC*

[103] *See* 15 U.S.C. § 717(b) (FERC regulates the transportation of natural gas in interstate commerce by natural gas companies); *see also* 15 U.S.C. § 717a(6) (natural gas company is a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale) and 15 U.S.C. § 3431(a)(1) (excluding from the definition of natural gas company any entity, such as a producer like Gulfport, which is a natural gas company solely by reason of any "first sale" of natural gas).

[104] *See See* FERC Gas Tariff Third Revised Volume No. 1 of ANR Pipeline Company, available at: http://ebb.anrpl.com/tariff/ANRTariff.pdf; FERC Gas Tariff Fourth Revised Volume No. 1 of Columbia Gas Transmission LLC, available at: http://hostedtariffs.com/tco/pdf/tariff.pdf; FERC Gas Tariff of Columbia Gulf Transmission LLC Third Revised Volume No. 1, available at: http://www.hostedtariffs.com/cgt/pdf/tariff.pdf.

[105] As noted above, there is no rate change as a result of rejection. Rather, the rate pursuant to the [TSA] as duly filed with and approved by FERC will provide the basis for calculation of rejection damages. *See, e.g., US Gen. New England, Inc.*, 116 FERC ¶ 61,285 at P 32 (2006) (determining that mitigation which reduced the amount the gas pipeline shipper might otherwise have owed in damages under a FERC-jurisdictional agreement that was rejected in a bankruptcy proceeding "does not change the filed rate; it only changes the net amount owed as an equitable remedy for the breach of contract"). Rejection does not impair FERC's power to regulate filed rates for contracts subject to FERC jurisdiction.

*Energy Pipelines* rates, not *Gulfport's*. Thus, section 1129(a)(6) by its plain language would not apply even in the event that Gulfport sought to (i) reject the Gulfport TSAs and (ii) confirm a chapter 11 plan of reorganization.

Finally, section 1129(a)(6) of the Bankruptcy Code pertains to debtor-utility reorganizations to ensure that the regulated entity does not attempt to impose new rates on its own customers through a chapter 11 plan and, as a result, bypass the generally-applicable energy regulatory commission approval of rate changes.[106] That confirms that section 1129(a)(6) of the Bankruptcy Code is inapplicable here, because there are no concerns in the instant proceeding of a FERC-regulated entity attempting to circumvent the Commission's jurisdiction.

## VIII. The TC Energy Pipelines have the burden to justify their request that FERC make a finding under *Mobile-Sierra* in this proceeding.

The impetus for this proceeding was the TC Energy Pipelines' Petition, so the TC Energy Pipelines must bear the burden of justifying their request for Commission action. Gulfport did not request the initiation of this proceeding, nor is it requesting any Commission action at this time. To the contrary, as explained above, Gulfport objects to the very nature of this proceeding.

If the Commission moves forward with this proceeding over Gulfport's objections, then the TC Energy Pipelines, not Gulfport, must bear the burden of proof, because the TC Energy Pipelines are requesting the Commission to take action. Under the Administrative Procedure Act, "the proponent of a rule or order has the burden of proof."[107] This is only logical, and is entirely

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[106] *See, e.g.*, *In re Cajun Elec. Power Corp.*, 185 F.3d 446, 451-452 (5th Cir. 1999) (discussing 1129(a)(6) in the context of public utility commission approvals of debtor-utility rates) (citations omitted); *In re Public Service Co. of New Hampshire*, 88 B.R. 521, 530 (Bankr. D.N.H. 1988) ("Except in the context of an industry as heavily regulated as the utility industry, any suggestion that a state agency could nullify bankruptcy court approval of any of these transactions or interfere with the implementation of a plan would be ludicrous.") (citing *Perez v. Campbell*, 402 U.S. 637, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971); U.S. Const. Art. VI; 11 U.S.C. § 525).

[107] 5 U.S.C. § 556(d); *see also Maryland v. EPA*, 958 F.3d 1185, 1196 (D.C. Cir. 2020).

consistent with the longstanding default rule in litigation before the courts. As the Supreme Court has explained, "[p]erhaps the broadest and most accepted idea is that the person who seeks court action should justify the request."[108] The one who "seeks to change the present state of affairs … naturally should be expected to bear the risk of failure of proof or persuasion."[109] As the Commission noted in its Order on Petition, "Gulfport has neither filed a bankruptcy petition nor submitted a filing with the Commission seeking to modify or abrogate any agreements with [the] TC Energy Pipelines."[110] On the other hand, the TC Energy Pipelines requested the Commission to initiate this proceeding, and the TC Energy Pipelines requested the Commission to enter an order at its conclusion. The TC Energy Pipelines thus must have the burden of substantiating their request.

The TC Energy Pipelines would continue to have the burden of substantiating their request even in the event of a bankruptcy filing and even in the event of a motion in bankruptcy to reject any of the Gulfport TSAs. To state the obvious, a bankruptcy filing and any potential motion to reject any of the Gulfport TSAs would seek relief from the bankruptcy court; they would not request the Commission to take any action. To the extent that the TC Energy Pipelines suggest that a rejection motion in bankruptcy is a collateral attack on the filed rates in the Gulfport TSAs, such that FERC's jurisdiction is implicated, legal precedent rejects such a suggestion.[111] And even setting aside whether that suggestion had any merit, the fact remains that the TC Energy Pipelines

[108] *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (quoting Mueller & Kirkpatrick evidence treatise).

[109] *Id.* (quoting McCormick evidence treatise).

[110] Order on Petition at P 29 n.91.

[111] *In re Mirant Corp.*, 378 F.3d 511, 518-22 (5th Cir. 2004).

are requesting Commission action in a preemptive strike against hypothetical filings that the TC Energy Pipelines anticipate will be made in the future.

The TC Energy Pipelines, not Gulfport, have requested the Commission to take action by ordering continued performance by Gulfport under the Gulfport TSAs. As a result, the TC Energy Pipelines must bear the burden of demonstrating that the public interest—as contrasted from the TC Energy Pipelines' private interest—requires continued performance and forbids the entire universe of future hypothetical proposals to modify or abrogate the Gulfport TSAs. Gulfport respectfully submits that the TC Energy Pipelines cannot meet this burden in this proceeding.

### IX. If FERC Addresses Public Interest Considerations Under *Mobile-Sierra*, There Is no Evidence that Abrogation or Modification of the Gulfport TSAs Would Harm the Public Interest.

If FERC insists on proceeding with this paper hearing to address a hypothetical scenario under an irrelevant legal standard, it should conclude that abrogating or modifying the Gulfport TSAs would not harm the public interest. The Commission's order does not "prescrib[e] the manner in which the public interest issues may be briefed." And states that the parties may address the public interest in terms of "whether the public interest requires modification of the existing filed rates" or "from the opposite perspective [of] whether modification or abrogation of the filed rates would harm the public interest."[112]

In light of the unusual posture of these proceedings, Gulfport will address the public interest from both perspectives. As explained in this section, there is no evidence to suggest the hypothetical abrogation or modification of the Gulfport TSAs would harm the public interest. As explained in Section X, *infra*, the threat to the public interest would result from the Commission

[112] Order on Petition at P 36 n.100.

requiring Gulfport to continue performing under the Gulfport TSAs and hindering Gulfport's ability to pursue its rights in the event of a bankruptcy filing.

(a) **The Gulfport TSAs and the Natural Gas Market.**

The "Gulfport TSAs" are 16 firm transportation service agreements between Gulfport and the TC Energy Pipelines—specifically, ANR, Columbia Gulf and Columbia Gas. Gulfport entered into the Gulfport TSAs to transport its production from the Utica production area to markets along the TC Energy Pipelines.[113] Gulfport primarily entered into the Gulfport TSAs between the fourth quarter of 2013 and the first quarter of 2017.[114] Fourteen of the Gulfport TSAs are between ANR and Gulfport, and these agreements provide Gulfport the right to transport a combined maximum daily quantity of 283,700 Dth/day.[115] Under the agreements between ANR and Gulfport, Gulfport pays the applicable maximum recourse tariff rate, and the terms of the ANR-Gulfport agreements range from 10 years to over 20 years (from their original effective dates.[116] The Gulfport TSAs also include a negotiated rate agreement between Gulfport and Columbia Gas and a negotiated rate agreement between Gulfport and Columbia Gulf, both of which provide Gulfport the right to transport 100,000 Dth/day each.[117] The parties executed the Gulfport-Columbia Gas TSA in connection with the Columbia Gas's Leach XPress Project, and the TSA includes a reservation rate of $0.60 Dth/day.[118] The parties executed the Gulfport-

113 Declaration of Daniel W. Haynes (Gulfport) (Oct. 19, 2020) at PP 6-7 ("Haynes Decl.).

114 *Id*. at P 9.

115 *Id*. at P 6.

116 *Id*.

117 *Id*. at P 7.

118 *Id*.

Columbia Gulf TSA in connection with Columbia Gulf's Rayne XPress project, and the TSA includes a reservation rate of $.20/Dth/day.[119] Both the Gulfport-Columbia Gas and Gulfport-Columbia Gulf TSAs have 15 year terms, from the date the pipeline projects associated with each agreement went in-service.[120]

As the accompanying declaration of Daniel Haynes explains, in between the fourth quarter of 2013 and the first quarter of 2017, when Gulfport and the TC Energy Pipelines executed the vast majority of the Gulfport TSAs, natural gas production from the Marcellus and Utica shale production areas was growing rapidly.[121] This resulted in fierce competition among natural gas producers and created concerns among natural gas producers that there would be an inadequate supply of pipeline capacity that would be unable to keep pace with the expected increase in natural gas production from the Marcellus and Utica shale basins.[122] In anticipation of future needs and in light of the then-limited supply, natural gas producers purchased significant amounts of takeaway capacity even if it meant signing up for capacity rights above their anticipated production levels.[123] Market conditions, however, have vastly changed. Natural gas prices have decreased, and competition—both among shippers and pipelines—has increased.[124] Not only are there more pipelines available to ship natural gas from the Marcellus

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[119] *Id*.

[120] *Id*.

[121] *Id*. at P 9.

[122] *Id*.

[123] *Id*.

[124] Haynes Decl. at PP 10-11.

and Utica shale basins, but there are more shippers available to purchase that capacity.[125] As a result, the TC Energy Pipelines have numerous shipper customers and are able to sell most of their capacity at market rates.[126] Gulfport, on the other hand, is locked into outdated rates under its TSAs with the TC Energy Pipelines.[127]

(b) **There is no evidence to suggest that abrogation or modification of the Gulfport TSAs would bring about any of the harms to the public interest recited in *Sierra*.**

Section 1 of the NGA provides that regulation by the Commission in matters relating to interstate transport and sale of natural gas "is necessary in the public interest."[128] NGA Section 5 authorizes the Commission to implement NGA Section 4's requirement that "[a]ll rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas" subject to the Commission's jurisdiction "shall be just and reasonable."[129]

The "*Mobile-Sierra* doctrine" refers to *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and the rule emerging from those cases that "FERC may abrogate a valid contract only if it harms the public interest."[130] *Mobile-Sierra*'s reference to the "public interest" "*defines* 'what it means for a rate to satisfy the

125 Declaration of Jeff D. Makholm, Ph.D. at 22-26, National Economic Research Associates, Inc. (NERA) (Oct. 9, 2020) ("Makholm Decl.").

126 *Id*.

127 Haynes Decl. at PP 15-16.

128 15 U.S.C. § 717(a).

129 15 U.S.C. § 717c(a) (Section 4, stating "just and reasonable" requirement); 15 U.S.C. § 717e(a) (authority to address rates that have become unjust, unreasonable, unduly discriminatory or preferential).

130 *Morgan Stanley*, 554 U.S. at 548.

just-and-reasonable standard in the contract context'"[131]—*i.e.*, in the context of filed rates contained in FERC-jurisdictional contracts—as opposed to generally applicable tariff rates. *Sierra* explained that the question whether a filed rate in a FERC-jurisdictional contract is "just and reasonable" turns on the effect of the rate on the public interest, and stated three circumstances where a rate adversely affects the public interest:

> In such circumstances the sole concern of the Commission would seem to be whether the rate is so low *as to adversely affect the public interest—as where* [1] it might impair the financial ability of the public utility to continue its service, [2] cast upon other consumers an excessive burden, or [3] be unduly discriminatory.[132]

Those three circumstances are sometimes called the "*Sierra* test" or "*Sierra* factors." Although the *Sierra* factors are "illustrative and not exclusive"[133] of when a rate may harm the public interest, it is also true that the "public interest" in the NGA is "not a broad license to promote the general public welfare."[134] The "public interest" in the NGA is the interest of the consuming public in "the orderly development of plentiful supplies of electricity and natural gas at reasonable prices."[135] While the TC Energy Pipelines' Petition invokes the *Mobile-Sierra* doctrine, there is

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131 *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165, 174 (2010) (internally quoting *Morgan Stanley*, 554 U.S. at 546 (2008)); *see also Energy Harbor* at P 15 (2020) (*Sierra* "identified three circumstances in which the public interest would mandate revising or terminating a jurisdictional contract.").

132 *Sierra*, 350 U.S. at 355 (emphasis and bracketed numbers added).

133 *Midwest Independent Transmission Sys. Operator, Inc.*, 141 FERC ¶ 63,021, at P 520 (2012); *see also Morgan Stanley*, 554 U.S. at 549 ("[T]hose three factors are in any event not the exclusive components of the public interest.").

134 *NAACP v. FPC*, 425 U.S. 662, 669 (1976), *quoted in* Notice of Inquiry, *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042, at P 6 (2018).

135 *Id.*

no evidence to suggest that abrogation or modification of the Gulfport TSAs would harm the public interest in any of the three ways contemplated in *Sierra*.[136]

(i) **There is no evidence to suggest that abrogation or modification of the TSAs would impair the ability of any of the TC Energy Pipelines to continue providing service.**

The first way *Sierra* states that a rate may "adversely affect the public interest" is if it "might impair the financial ability of the public utility to continue its service."[137] No evidence suggests that abrogation or modification of the Gulfport TSAs would have that effect on the TC Energy Pipelines. The TC Energy Pipelines' operating costs are low relative to their sunk costs, there are abundant supplies of natural gas near the TC Energy Pipelines, and Gulfport is but one of many active shippers on the TC Energy Pipelines' systems.

As described in Dr. Makholm's Declaration, the TC Energy Pipelines' operating costs are low in relation to the sunk costs already spent to construct their pipelines.[138] ANR's operating cost to gas transmission plant ratio is approximately 7.21 percent annually.[139] Columbia Gas's operating cost to gas transmission plant ratio is approximately 3.93 percent annually.[140] Columbia Gulf's operating cost to gas transmission plant ratio is approximately 2.64 percent annually.[141] Going forward, the TC Energy Pipelines' incremental earnings from continued operation will

136 Indeed, as explained in Section X, *infra*, a Commission order mandating continued performance by Gulfport would *harm* the public interest.

137 *Sierra*, 350 U.S. at 355.

138 Makholm Decl. at 31 n.55.

139 *Id*.

140 *Id*.

141 *Id*.

continue to be far greater than their incremental costs.[142] Thus, the only rational inference is that the TC Energy Pipelines will continue to operate regardless of whether the Gulfport TSAs are modified or abrogated.

Gulfport, moreover, is one of approximately 30 active shippers on the TC Energy Pipelines, and is by no means the largest,[143] and is one of many more shippers in the region. Gulfport's TSAs account for approximately 14 percent of ANR's daily revenues, about 7 percent of Columbia Gas's daily revenues from the Leach XPress project, and approximately 10 percent of Columbia Gulf's daily revenues from the Rayne XPress project.[144] Moreover, the Gulfport TSAs account for *less than 2%* of the natural gas shipped in the Appalachia region.[145] The natural gas supply and transportation market for shippers has expanded considerably, such that if Gulfport exits or reduces its presence in the market, numerous others stand ready to take its place.

Based on the foregoing, there is no rational reason for the Commission to conclude that abrogation or modification of Gulfport's TSAs would threaten the ability of the TC Energy Pipelines to continue providing service.

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142 *Id*. at 31.

143 *See* Makholm Decl. at 27-30 tbls. 8-10, (for purposes of this calculating number of shippers, Gulfport only considered Columbia Gas's Leach XPress shippers and Columbia Gulf's Rayne XPress shippers).

144 Makholm Decl. at 27.

145 *Id*. at 22 tbl. 6.

(ii) **There is no evidence to suggest that abrogation or modification of the Gulfport TSAs would cast "excessive burdens" on the TC Energy Pipelines' other shippers or the ultimate consumers of natural gas.**

The second way *Sierra* states a rate may "adversely affect the public interest" is if it would "cast upon other consumers an excessive burden."[146] An immediate rate increase or a longer-term, "down-the-line" rate increase can each be a "burden" on consumers within the meaning of *Sierra*.[147] An *excessive* burden, however, is a "high bar," and does not "mean merely the burden caused when one set of consumers is forced to pay above marginal cost to compensate for below-marginal-cost rates charged other consumers."[148] Here, there is no evidence to suggest that abrogation or modification of the Gulfport TSAs would impose any burdens on TC Energy Pipelines' other shippers or the ultimate consumers of natural gas "excessive" enough to raise concerns under *Sierra*.

As discussed above, the TC Energy Pipelines operate in an area full of active shippers that could take Gulfport's place in the event of a hypothetical future abrogation or modification of the Gulfport TSAs. Because of this, and Gulfport's small capacity commitments relative to the TC Energy Pipelines' combined throughput, it's entirely possible that there would be little, if any, decline in throughput on the TC Energy Pipelines' systems if the Gulfport TSAs were to be modified or abrogated in the future.

And even if the TC Energy Pipelines could not remarket the capacity subject to the hypothetically modified or abrogated Gulfport TSAs, it's still unlikely that their shippers or natural

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146 *Sierra*, 350 U.S. at 355.

147 *Nevada Power Co. v. BP Energy Co.*, 128 FERC ¶ 61,185, at P 6 (2009).

148 *Tri-State Gen. & Transmission Ass'n, Inc.*, 171 FERC ¶ 61,202, P 50 (2020) (quoting *Morgan Stanley*, 554 U.S. at 550); *see also Morgan Stanley*, 554 U.S. at 551 n.6.

gas consumers would be impacted. This is necessarily true, because the only way the TC Energy Pipelines could reallocate costs associated with the unsubscribed or underutilized capacity would be in a full rate rate proceeding under NGA section 4 and Part 154 of the Commission's regulations.[149] Any attempt to reallocate costs in a rate proceeding likely would be unsuccessful, because neither the Commission nor the TC Energy Pipelines' shippers are likely to agree to any such proposal. Shipper consent is particularly important for natural gas pipelines like the TC Energy Pipelines, because, as the Commission has noted, the vast majority of pipeline rate proceedings culminate in settlements.[150] Indeed, the TC Energy Pipelines note in their Petition that ANR's current maximum recourse tariff rates were established by a settlement approved by the Commission in 2016.[151] Further, ANR's shippers who are not transporting their gas under long-term agreements can pivot to utilizing the many other pipelines in the area if it becomes economically advantageous for them to do so because of potential rate increases on the TC Energy Pipelines. Accordingly, TC Energy Pipelines' other shippers will not be excessively burdened by a hypothetical abrogation or modification of the Gulfport TSAs.

Finally, there will also be little, if any, impact on natural gas consumers by any hypothetical modification or abrogation of the Gulfport TSAs. As discussed above, the rates paid by Gulfport's shippers likely will not change, so there likely will be no additional costs passed on to consumers. There also will not be any shortage in gas supplies if the Gulfport TSAs are abrogated or modified in the future, because of the significant number of natural gas producers in the areas served by the

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149 15 U.S.C. § 717c; 18 C.F.R. Part 154.

150 Policy Statement on Determining Return on Equity for Natural Gas and Oil Pipelines, *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 171 FERC ¶ 61,155, at P 70 (2020).

151 *See* Petition at 13 n. 44 (citing to *ANR Pipeline Co.*, 157 FERC ¶ 61,205 at P 2 (2016)).

TC Energy Pipelines. With or without Gulfport, there is no reason to believe a shortage of natural gas in the areas served by the TC Energy Pipelines could occur.

Rational natural gas market participants would be able to account for any shortages, regardless of size, of natural gas along the TC Energy Pipelines' systems. If natural gas supply shortages were ever to occur, these shortages would cause the price of natural gas to increase. This would then spur additional natural gas production from the Marcellus and Utica production areas, and this natural gas would then be transported on the TC Energy Pipelines and other pipelines in the area to consumers that needed it. In sum, market conditions are such that natural gas consumers will not face supply shortages due to a potential modification or abrogation of the Gulfport TSAs.

(iii) **There is no evidence to suggest that abrogation or modification of the TSA would result in undue discrimination.**

The third way *Sierra* states that a rate may "adversely affect the public interest" is if it might "be unduly discriminatory."[152] The Commission has explained that "[o]nly undue discrimination is prohibited," which "can only occur when two similarly situated customers are treated differently, and there is no justification for the differing treatment."[153] As discussed above, it's very unlikely that the TC Energy Pipelines would be able to reallocate the costs associated with the capacity under the Gulfport TSAs if they were to modified or abrogated in the future.

Furthermore, Gulfport is a party to negotiated rate agreements with both Columbia Gas and Columbia Gulf that were executed in connection with the Leach XPress and Rayne XPress projects respectively.[154] Thus, in order for shippers to be similarly situated to Gulfport on

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[152] *Sierra*, 350 U.S. at 355.

[153] *TranSource, LLC v. PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,119, at P 240 (2019) (quoting *PacifiCorp*).

[154] Haynes Decl. at P 7.

Columbia Gas and Columbia Gulf, shippers must have similarly executed negotiated rate agreements in connection with the projects. The negotiated rate agreements of the other shippers who subscribed to capacity on the Leach XPress and Rayne XPress projects will not be impacted, so there is no risk of undue discrimination on the Columbia Gas and Columbia Gulf pipeline systems.

(c) **FERC's Certificate Policy Statement places the risk of unsubscribed or unutilized capacity squarely on pipelines.**

In addition, the Commission should not attempt to inhibit the future modification or abrogation of the Gulfport TSAs, because doing so would effectively shield Columbia Gas and Columbia Gulf from the risk of unsubscribed or underutilized capacity on their respective Leach XPress and Rayne XPress projects. Any such attempt would run afoul of the Commission's Certificate Policy Statement.[155]

In the Certificate Policy Statement, the Commission created a threshold requirement that all pipelines must be prepared to financially support proposed projects without subsidization from existing customers who would not benefit from the new facilities.[156] The Commission reasoned that:

> *The requirement helps to address all of the interests that could be adversely affected.* Existing customers of the expanding pipeline should not have to subsidize a project that does not serve them. Landowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace. Existing pipelines should not have to compete against new entrants into their markets whose projects receive a financial subsidy (via rolled-in rates), and neither pipeline's captive customers should have to shoulder the costs of unused capacity that results from competing projects that are not financially viable. *This is the only condition that uniformly serves to avoid adverse effects on all of the relevant interests and therefore should be a test for all proposed expansion*

155 *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at p. 61,747 (1999) ("Certificate Policy Statement").

156 *Id*. at p. 61,746.

> *projects by existing pipelines. It will be the predicate for the rest of the evaluation of a new project by an existing pipeline*.[157]

This Commission policy is often referred to as the "no-subsidy policy", and it resulted in a preference for incrementally pricing new facilities.[158] The Commission reasoned that incremental pricing would send proper price signals in the market by requiring pipelines to bear:

> the risk for any new capacity that is under-utilized, unless, as recommended by a number of commenters, it contracts with the new customers to share that risk by specifying what will happen to rates and volumes under specific circumstances. If the pipeline finds that new shippers are unwilling to share this risk, this may indicate to the pipeline that others do not share its vision of future demand.[159]

Thus, the Certificate Policy Statement places pipelines at risk for recovering the costs associated with unsubscribed or unutilized capacity. As described above, the goal of this policy was to protect the many interests that could be impacted by the outcome of FERC certificate proceedings, and the Commission has successfully applied its policy in countless proceedings.

Due to the no-subsidy policy, FERC must avoid any action in this proceeding that would effectively shield Columbia Gas and Columbia Gulf from risk by subsidizing the Leach XPress and Rayne XPress projects.[160] Any such action would eviscerate the no-subsidy policy, which underpins FERC's Certificate Policy Statement. Any such ruling for Columbia Gas and Columbia Gulf in this proceeding would run counter to FERC's Certificate Policy Statement, which has successfully facilitated the expansion of the nation's natural gas pipeline system while guarding

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[157] *Id* (emphases added).

[158] *Id*.

[159] *Id*. at p. 61,747.

[160] Gulfport notes that Columbia Gas and Columbia Gulf received a pre-determination supporting rolled-in rate treatment for small portions of both the Leach XPress and Rayne XPress projects. *See Columbia Gas Transmission, LLC et al.*, 158 FERC ¶ 61,046, at PP 41, 49 (2017).

against overbuilding and allowing the Commission to balance the countless interests implicated in individual certificate proceedings.

Further, the TC Energy Pipelines and their investors are the very definition of sophisticated natural gas market participants and economic actors that willingly accepted the risk of building new pipeline projects to serve natural gas producers and marketers. In the competitive and transparent market that FERC's regulations and policies have facilitated, pipeline companies and their investors are able to account for the risk of shipper bankruptcies by pricing it into their contracts and through contract provisions such as creditworthiness terms. The Commission should not attempt to provide relief to sophisticated natural gas market participants, such as the TC Energy Pipelines and their investors, because they have already accounted for the risk of shipper bankruptcies, especially when attempting to do so would run counter to the Commission's no-subsidy policy.

(d) **The Creditworthiness Policy Statement already has established the right allocation of risks among pipeline and shipper entities.**

The Commission's prior issuance of the Creditworthiness Policy Statement[161] provides yet another reason why modification or abrogation of the Gulfport TSAs would not harm the public interest. The Commission issued the Creditworthiness Policy Statement in 2005 in direct response to a wave of credit downgrades among interstate natural gas pipeline shippers and a mounting concern about interstate natural gas pipelines' credit exposure.[162] The Commission made purposeful decisions in the Creditworthiness Policy Statement on how it wished to balance the risks between interstate natural gas pipelines and their shippers. This allocation of risk has proved

161 *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, 114 FERC ¶ 61,412 (2005) ("Creditworthiness Policy Statement").

162 Creditworthiness Policy Statement at P 2.

successful, and the Commission would not harm the public interest by continuing to follow the principles detailed in the Creditworthiness Policy Statement.

For example, the Commission stated that pipelines could require shippers to post collateral equal to three months' worth of reservation charges, and could require more collateral from shippers subscribing to expansion projects that require new construction to support the shippers' service.[163] The Commission also stated that credit status could be a factor in evaluating shippers' bids for available capacity and in determining the appropriate amount of collateral a shipper may be required to provide.[164] Furthermore, the Commission has directly addressed the process pipelines must undertake to suspend or terminate service when a shipper's credit deteriorates.[165] The Commission's Creditworthiness Policy Statement is reflected in TC Energy Pipelines' currently-effective FERC Gas Tariffs.[166]

Gulfport submits that the Creditworthiness Policy Statement remains a valid policy that properly balances the interests of natural gas pipelines and their shippers. However, if the Commission believes changes should be made to its Creditworthiness Policy Statement due to changed circumstances in the industry, it would not be appropriate for the Commission to make such changes in this proceeding involving only Gulfport, the TC Energy Pipelines, and the

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163 Creditworthiness Policy Statement at PP 14, 17.

164 *Id*. at P 15.

165 *Id*. at PP 32-35.

166 *See* FERC Gas Tariff Third Revised Volume No. 1 of ANR Pipeline Company at Section 6.18.5, available at: http://ebb.anrpl.com/tariff/ANRTariff.pdf; FERC Gas Tariff Fourth Revised Volume No. 1 of Columbia Gas Transmission LLC at Sections 9.6-9.7, available at: http://hostedtariffs.com/tco/pdf/tariff.pdf; FERC Gas Tariff of Columbia Gulf Transmission LLC Third Revised Volume No. 1 at Sections 9.5-9.6, available at: http://www.hostedtariffs.com/cgt/pdf/tariff.pdf.

Gulfport TSAs. Rather, the Commission may initiate a notice of proposed rulemaking or a notice of inquiry to examine whether any aspects of its policy should be updated.

In recent years, there are multiple examples of the Commission initiating industry-wide notice of inquiry proceedings to examine whether its policies remain effective in light of intervening changes in the interstate natural gas pipeline industry.[167] An industry-wide rulemaking or notice of inquiry is the proper way to approach a broad issue like creditworthiness, as the Commission rightfully noted in issuing the Creditworthiness Policy Statement.[168] Thus, it would be inappropriate for the Commission to address industry-wide policy concerns regarding pipeline shipper creditworthiness in this proceeding.

### X. If FERC Addresses Public Interest Considerations Under *Mobile-Sierra*, FERC Would Harm the Public Interest by Requiring Gulfport to Continue Performing Under the Gulfport TSAs.

The threat to the public interest in these proceedings stems from the possibility that the Commission could require Gulfport to continue performing under the Gulfport TSAs and could impact Gulfport's ability to pursue its rights in the event of a bankruptcy filing. Such an order would threaten harm to *Gulfport*'s financial health. It also would set a precedent that would harm the public interest by raising the price of becoming an anchor shipper on FERC-regulated natural gas pipelines, and interfering with the competitive markets that FERC has successfully facilitated through years of targeted policy decisions.

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[167] *E.g.*, *Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 163 FERC ¶ 61,042 (2018); *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (2019).

[168] *See* Creditworthiness Policy Statement at P 4 (noting the value of developing generic standards for creditworthiness determinations across the pipeline industry).

(a) **Gulfport's financial health may be harmed by any requirement to continue performing under the Gulfport TSAs, which are above market.**

Precedent applying the *Mobile-Sierra* doctrine distinguishes between contracts that are merely bad deals and contracts that threaten a contracting party's financial health. A contract is not contrary to the public interest if it is merely "improvident," "afford[s] less than a fair return," or "becomes uneconomic over time."[169] On the other hand, one of the *PacifiCorp* factors is "the effect of the contracts on the *financial health* of [the] Complainants."[170] Part one of the *Sierra* test reflects a similar concern, as it considers that a rate is contrary to the public interest if it "might impair the financial ability of the [utility] to continue its service."[171] As explained above, there is no evidence to suggest that abrogating or modifying the Gulfport TSAs would impair the ability of the TC Energy Pipelines to continue providing service. But a Commission order requiring Gulfport to continue performance threatens harm to *Gulfport*'s financial health and thus harms the public interest.

*First*, as Haynes' declaration explains, and as discussed in greater detail above, the Gulfport TSAs are no longer in line with current market realities, nor will they be for the foreseeable future.[172] When Gulfport the TC Energy Pipelines executed the various Gulfport

[169] *See, e.g.*, *Sierra*, 350 U.S. at 372 (Although the Commission does not generally set rates that produce less than a fair return, "it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain."); *Pub. Utils. Comm'n of Cal. v. Sellers of Long Term Contracts to Cal. Dep't of Water Resources*, 103 FERC ¶ 61,354, 62,410 (2003) ("The fact that a contract becomes uneconomic over time does not render it contrary to the public interest.").

[170] *PacifiCorp*, 103 FERC ¶ 61,355, at P 34 (emphasis added).

[171] *Sierra*, 350 U.S. at 355.

[172] Haynes Decl. at PP 15-16.

TSAs, natural gas production in the Marcellus and Utica production area was growing rapidly.[173] Natural gas producers like Gulfport bought more capacity than they needed, anticipating that pipeline capacity would be necessary to keep pace with the expected increase in natural gas production in the area.[174] However, in the intervening period, market conditions changed. Natural gas prices have fallen, natural gas production in the Marcellus and Utica production area has declined, and there is now an excess of takeaway pipeline capacity in the area.[175] As a result, Gulfport is locked into rates under its TSAs with the TC Energy Pipelines that exceed the current market value of the capacity.[176]

*Second*, the Commission and the TC Energy Pipelines acknowledge Gulfport's precarious financial position. The TC Energy Pipelines reference Gulfport's 10-Q filing and state that they believe "a bankruptcy filing by Gulfport may be imminent."[177] The Commission also acknowledges Gulfport's precarious financial position, and states its "first priority is to investigate whether the public interest requires modification to the existing filed rates so that damage to the parties, the consuming public, and the industry may be avoided or mitigated."[178] A Commission order *mandating* continued performance under the Gulfport TSAs would only worsen that situation by forcing Gulfport to continue operating under the burden of agreements that are exacerbating its troubled financial position.

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[173] *Id*. at P 9.

[174] *Id*.

[175] *Id*. at PP 10-14.

[176] *Id*. at PP 15-16.

[177] Petition at 3.

[178] Order on Petition at P 36.

(b) **Potential "anchor shippers" on future pipeline projects may be more hesitant to sign up for capacity on new projects if they believe rejection of contracts in bankruptcy will be complicated by FERC conducting such *Mobile-Sierra* proceedings.**

A Commission order in this proceeding to require Gulfport to continue performing under the Gulfport TSAs would skew the natural gas markets by unfairly raising the price of becoming an "anchor shipper". Shippers on pipeline expansion projects are generally referred to as "anchor shippers." Precisely because of the value "anchor shippers" provide to the pipeline grid, the Commission should *not* set a precedent singling them out for extra burdens. Congress made the bankruptcy process available as a last resort to debtors who meet statutory requirements. Bankruptcy is costly and burdensome to debtors by design, and procedures such as rejection under 11 U.S.C. § 365 are available only to eligible debtors who shoulder the burdens of the bankruptcy process. And even considered in isolation, rejection under § 365 is not a freestanding right to "walk away" from a contract. Rejection is a breach, not a rescission, and the counterparty retains a breach-of-contract claim against the debtor's estate.[179] And if unsecured creditors—including those with rejection-induced claims for breach of contract—are not paid in full, bankruptcy's absolute priority rule prevents the debtor's equity holders from retaining their equity interests.[180] The Bankruptcy Code, and the rejection procedure in particular, reflect Congress's judgment about when and how insolvent debtors should be permitted to reject contracts in bankruptcy.

As explained in greater detail below, pipelines and their financial backers are rational actors who understand the future is not certain and are more than capable of accounting for the risk of an "anchor shipper's" bankruptcy in their contracts' terms and prices. That is the normal

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179 11 U.S.C. § 365(g); *Tempnology*, 139 S. Ct. at 1658, 1662-63.

180 *French v. Linn Energy, LLC*, 936 F.3d 334, 341 n.1 (5th Cir. 2019); 11 U.S.C. § 1129(b)(2)(B).

operation of a competitive market, and there is no public-interest reason for the Commission to intervene for the TC Energy Pipelines' benefit. If the Commission intervenes, it will set a precedent that only raises the cost of becoming an "anchor shipper" in the first place. Once shippers know, *ex ante*, that signing up as "anchor shippers" may restrict their options in the event of a bankruptcy filing, those shippers will either hesitate to sign such contracts, or will pass the additional cost to the pipelines in the bargaining process by demanding better rates or better terms. Pipeline companies who cannot find "anchor shippers," or who can only market expansion capacity to them with additional financial concessions, will find it more expensive to build pipelines, and more difficult to secure necessary financing at reasonable rates. As a result, either fewer pipelines will be built, or the additional cost of marketing expansion capacity to potential anchor shippers will be passed on to the consuming public. Either way, the public interest will suffer. The Commission should not place additional burdens on "anchor shippers" in this proceeding.

(c) **The public interest is served by promoting the competitive natural gas market and allowing shippers, when necessary, to avail themselves of the protections provided by the Bankruptcy Code and emerge as a going concern.**

The Bankruptcy Code furthers "public as well as private interest" by providing a fresh start for the "honest but unfortunate debtor" who does what the bankruptcy laws require.[181] Chapter 11 implements Congress's judgment that the public interest is served when the Bankruptcy Code's protections permit an insolvent company to emerge as a going concern.[182] Chapter 11 facilitates

181 *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

182 *In re Chateaugay Corp.*, 201 B.R. 48, 72 (Bankr. S.D.N.Y. 1996) ("Public policy, as evidenced by chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilitation of troubled companies and the concomitant preservation of jobs and going concern values."); *Trenwick Am. Lit. .v. Ernst & Young*, 906 A.2d 168, 204 (Del. Ch. 2006) ("Chapter 11 of the Bankruptcy code expresses a societal recognition that an insolvent corporation's creditors (and society as a whole) may benefit if the corporation continues to conduct operations in the hope of turning things around.").

reorganizations that preserve jobs and assets, "based on the accepted notion that a business is worth more to everyone alive than dead."[183] That accepted notion applies equally to natural gas pipeline shippers.

As explained above, *PacifiCorp* and *Sierra* recognize that the public interest is ill-served when market participants' face threats to their overall financial health. For similar reasons, the public would be ill-served by denying eligible market participants access to a procedure Congress enacted to permit them to continue as going concerns. To the extent that a FERC order in this proceeding requiring continued performance could adversely impact Gulfport's ability to avail itself of its rights under the Bankruptcy Code, it would harm the public interest that Congress specifically designed the Bankruptcy Code to protect and subordinate that public interest to the TC Energy Pipelines' private interest. That result would thwart Congress's intent.

More fundamental to the Commission's jurisdictional authority, a FERC order requiring continued performance under the Gulfport TSAs would contravene the Commission's longstanding policy of exercising its authority to protect the public interest by promoting *competition* in the natural gas industry. As Dr. Makholm's declaration explains, through several major orders issued between 1985 and 2008, the Commission successfully enhanced competition in the natural gas industry, including encouraging pipelines to offer transportation service on an open-access, non-discriminatory basis, unbundling commodity and transportation services, and removing price ceilings.[184] Through decades of policies enacted to bring more competition to the

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[183] *Kittay v. Atl. Bank of N.Y.*, 316 B.R. 451, 460 (Bankr. S.D.N.Y. 2004).

[184] Makholm Decl. at 11 tbl. 2; *see also* Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 50 Fed. Reg. 42,408 (Oct. 18, 1985) (open-access); Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 59 FERC ¶ 61,030 (1992) (unbundling); Order No. 637, *Regulation of Short–Term Natural Gas Transportation Services And Regulation of Interstate Natural Gas Transportation*

pipeline and shipping markets, FERC successfully facilitated the emergence of a system of pipelines and shippers that supplies the nation's abundant natural gas cheaply to consumers.[185] As discussed above, that is consistent with the "public interest" that underlies the NGA—"the orderly development of plentiful supplies of electricity and natural gas at reasonable prices."[186] The experience of recent decades demonstrates that the public interest in the natural gas industry is closely linked with *competition*.

Conversely, the public interest would suffer from any anticompetitive order in this proceeding by potentially restricting the ability of shippers to access bankruptcy protection when they qualify for it. Because of the competitive market that the Commission has successfully fostered, the risk of individual shippers filing for bankruptcy is already priced into the Gulfport TSAs and into the TC Energy Pipelines' agreements with their investors.[187] Just like any other sophisticated market participant who enters into a long-term contract, the TC Energy Pipelines and their investors understand the future is uncertain, and risks such as changed market conditions, or a counterparty's bankruptcy (or a counterparty's customer's bankruptcy) may affect the degree to which one can rely on full performance of a long-term contract. Contracts can account for long-term risks in terms like prices and creditworthiness provisions. A pipeline may try to mitigate the long-term risk of a shipper's bankruptcy by offering rates that it believes will continue to be economic over time. But if that risk nonetheless materializes and a contract rate becomes

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*Services*, FERC Stats. & Regs. (CCH) ¶ 31,091 (2000) (waiving price ceilings); Order No. 712, *Promotion of a More Efficient Capacity Release Market*, 123 FERC ¶ 61,286 (2008) (removing price ceilings).

185 Makholm Decl. at 13-17.

186 *NAACP v. FPC*, 425 U.S. 662, 669 (1976), *quoted in* Notice of Inquiry, *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042, at P 6 (2018).

187 Makholm Decl. at 3.

uneconomic to the point of contributing to an individual shipper's bankruptcy, that is a natural consequence of competition.

The public interest is served when that process run its course, and harmed when FERC interferes for the private benefit of parties like the TC Energy Pipelines. The Bankruptcy Code's protections complement, rather than frustrate, competition by accounting for that contingency and permitting debtors and their creditors to address insolvency in the way most consistent with the public interest. An order potentially restricting a shipper's access to bankruptcy protection in favor of the private interest of a pipeline would only harm the public interest by thwarting the ability of the bankruptcy laws to preserve jobs and companies and by eliminating the ability of competitive markets to price the risk of bankruptcy into their contracts. Therefore, the Commission must not issue an order in this proceeding that would require continued performance under the Gulfport TSAs.

## CONCLUSION

For the reasons described above, this unprecedented paper hearing under the NGA should be terminated. It is contrary to law, and any determination the Commission makes will run the risk of an emphatic rejection by a federal court of appeals. If the Commission nevertheless determines to proceed, there is no legitimate basis for application of the *Mobile-Sierra* standard to the present case. If, despite this circumstance, the Commission determines to make findings about the public interest, the Commission should find: (1) that there is no evidence that the hypothetical abrogation or modification of the Gulfport TSAs would harm the public interest; and (2) that it would harm the public interest if Gulfport was required to continue performance under the Gulfport TSAs.

Respectfully submitted,

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October 19, 2020

# ATTACHMENT A

## DECLARATION OF DANIEL W. HAYNES

**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

| | | |
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| | ) | |
| **ANR Pipeline Company** | ) | |
| **Columbia Gas Transmission, LLC** | ) | **Docket No. RP20-1236-000** |
| **Columbia Gulf Transmission, LLC** | ) | |
| | ) | |

**DECLARATION OF DANIEL W. HAYNES ON BEHALF OF GULFPORT ENERGY CORPORATION**

1. My name is Daniel W. Haynes, and I am the Vice President, Midstream and Marketing of Gulfport Energy Corporation ("Gulfport"), a corporation organized under the laws of the State of Delaware.

2. I have been employed by Gulfport since 2016. I was hired to manage all of Gulfport's contractual commitments for downstream natural gas pipeline capacity out of the natural gas production areas in which Gulfport operates and to develop a downstream book of business. I also serve as a member of Gulfport's Hedge Committee.

3. I have over 20 years of experience in the upstream, midstream and downstream oil and natural gas business. Prior to my tenure at Gulfport, I held various roles in natural gas marketing and trading, including over 11 years as a Senior Natural Gas Trader at Devon Energy and approximately two years as a Gas Marketing Manager at American Energy Partners. I hold a Bachelor of Business Administration degree in Management Information Systems, and a Bachelor of Arts degree in Political Science, with a minor in Economics, all from the University of Central Oklahoma.

4. I am familiar with Gulfport's day-to-day operations and business affairs, including the sixteen transportation service agreements between Gulfport and ANR Pipeline Company ("ANR"), Columbia Gas Transmission, LLC ("Columbia Gas"), and Columbia Gulf Transmission, LLC ("Columbia Gulf", and together with ANR and Columbia Gas, the "TC Energy Pipelines") at issue in this proceeding (the "TSAs"), as described below.

5. I submit this declaration in support of the Initial Submission of Gulfport, filed contemporaneously herewith.

## I. Background on the TSAs and Relevant Market Conditions

6. The TSAs include fourteen agreements between ANR and Gulfport for a combined contracted maximum daily transportation quantity of 283,700 Dth/day. Gulfport is paying ANR's applicable maximum recourse tariff rate under each of the Gulfport-ANR agreements, and the terms for the Gulfport-ANR agreements range from approximately 10 years to over 20 years (from their original effective dates).

7. In addition, the TSAs include a negotiated rate agreement between Columbia Gas and Gulfport and a negotiated rate agreement between Columbia Gulf and Gulfport, both of which have maximum daily transportation quantities of 100,000 Dth/day. The Gulfport-Columbia Gas TSA was executed in connection with the Leach XPress Project and includes a rate of $0.60 Dth/day. The Gulfport-Columbia Gulf TSA was executed in connection with the Rayne XPress project, and includes a rate of $.20/Dth/day. Both the Gulfport-Columbia Gas and Gulfport-Columbia Gulf TSAs have 15 year terms, from the date the pipeline projects associated with each agreement went in-service.

8. From November 2020 onward, the sixteen TSAs obligate Gulfport to pay approximately $598.5 million in combined reservation charges through their remaining terms.

9. Gulfport and the TC Energy Pipelines entered into the TSAs primarily between the third quarter of 2013 and the first quarter of 2017, a period when natural gas production from the Marcellus and Utica production areas was growing rapidly. During that time, competition among natural gas producers, such as Gulfport, increased dramatically, prompting widespread concern that there would be inadequate takeaway capacity to ensure access to attractive natural gas markets. In many Northeastern markets, especially Ohio, production was quickly overrunning local summer demand, increasing the risk of shut-ins. Natural gas producers were under a high degree of pressure to ensure available takeaway capacity rights to accommodate the expected continuing growth in production. Thus, while it is not uncommon for natural gas producers to hold transportation contracts for some margin of pipeline capacity beyond what is needed to meet their anticipated production, the difference between producers' production plans and capacity rights became more pronounced during this time period.

## II. The Impacts of Intervening Changes in the Gas Commodity and Transportation Markets

10. In the intervening years since Gulfport and the TC Energy Pipelines entered into the TSAs, numerous pipeline projects in the Northeast have been completed, adding billions of cubic feet per day of takeaway capacity in the vicinity of Gulfport's production wells. Review of readily-available information from the Energy Information Administration shows, for example, that takeaway capacity in the Northeast more than doubled from 2014 to 2018[1] in response to expected increases in unconventional natural gas production in the area.

11. The increase in takeaway capacity has resulted in increased access to low-cost interstate pipeline capacity that was not available when Gulfport entered into the TSAs. As a result, Gulfport now has access to firm, interruptible, and short-term firm capacity on numerous pipelines in the vicinity of its wells.

12. In addition, the demand for natural gas declined significantly throughout North America for a variety of reasons, including the COVID-19 pandemic and the associated financial recession. Historically, natural gas price volatility in the U.S. has centered around supply and demand fundamentals on the U.S. pipeline grid (production levels, storage levels and weather).

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1 *See* https://www.eia.gov/naturalgas/data.php#pipelines.

However, since the U.S. has become a net exporter of natural gas, price volatility has increased as billions of cubic feet per day of natural gas demand is now linked to global price spreads (primarily the Japan Korean Marker, the UK's National Balancing Point and the Dutch Title Transfer Facility). This relatively new dynamic has made the negative impacts associated with COVID-19 more severe in nature.

13. Also, it is my understanding that there has been an influx over the last decade of cheap, accessible capital for both regulated public companies and non-regulated, private equity-backed companies. This capital infusion has furthered the production growth and pipeline buildout in the Northeast, generally to the benefit of U.S. consumers in the form of increased competition and lower commodity prices. Pipelines have been situated between this capital influx and the commodity price risk, effectively insulated by a steady revenue stream from shippers paying the pipelines' recourse rates or negotiated, fixed reservation rates. Producers, on the other hand, have been unequally burdened during this time with managing the cost of capital to produce and the commodity price risk fluctuations.

14. It is my view that the recent COVID-19 pandemic has burst the natural gas demand bubble, bringing to light the underlying symptoms that were years in the making. The associated decline in demand for natural gas has resulted in a surplus of natural gas production, which has caused a corresponding, sustained decrease in natural gas commodity prices

15. In light of the increase in takeaway capacity throughout the Northeast region and the decreased demand for natural gas, there has been a decline in the market value of capacity rights throughout the Northeast region, including capacity rights on the TC Energy Pipelines, since Gulfport entered into the TSAs. The current market value of Gulfport's capacity on the TC Energy Pipelines is significantly less than the reservation rates Gulfport is obligated to pay under the TSAs.

## III. Conclusion

16. For the above reasons, I believe that it is not economical for Gulfport to pay the reservation rates in the TSAs for pipeline capacity on the TC Energy Pipelines, capacity that Gulfport will not need to utilize at its present volume commitment level—and may not need to utilize at all—in order to meet its current and anticipated future production levels. Furthermore, due to the expected availability of pipeline capacity throughout the Northeast for the next several years, I am confident that Gulfport could satisfy its future pipeline capacity needs by receiving service on an interruptible or short-term firm basis at a significantly lower cost.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 19, 2020

Daniel W. Haynes

Daniel W. Haynes

# ATTACHMENT B

## DECLARATION OF JEFF D. MAKHOLM, PH.D.

# UNITED STATES OF AMERICA

## Before the

# FEDERAL ENERGY REGULATORY COMMISSION

| | | |
|---|---|---|
| **ANR Pipeline Company** | **)** | |
| **Columbia Gas Transmission, LLC** | **)** | **Docket No. RP20-1236-000** |
| **Columbia Gulf Transmission, LLC** | **)** | |

# DECLARATION OF


**Jeff D. Makholm, Ph.D.**

**National Economic Research Associates, Inc. (NERA)**


**October 19, 2020**

# I. Introduction

I am a Managing Director at NERA. Working at National Economic Research Associates, Inc. (NERA) since 1984, I am an experienced senior member of NERA's energy practice with a close connection to the history and development of the role of the Federal Energy Regulatory Commission (the FERC) and the nation's gas pipelines in facilitating the uniquely competitive and productive US gas market. I hold a Ph.D. in Economics from the University of Wisconsin, and was an Adjunct Professor in the Graduate Business School at Northeastern University prior to my latest full-time economic consulting activities.

I first participated in the FERC's interstate gas pipeline proceedings 38 years ago and have submitted more than 40 written testimonies or statements before the FERC on gas pipeline, oil pipeline, and electricity regulatory and market matters. Pending before the FERC is a statement that I submitted in Docket No. PL18-1-000 (*In the matter of the FERC Notice of Inquiry Regarding Certificaiton of New Interstate Gas Facilities*), sponsored by the Interstate Natural Gas Association of America (INGAA), the US gas pipeline industry association. In that statement, I review what I call "the FERC's elegant regulatory framework, including its 1999 Policy Statement, that supports the highly competitive interstate gas transport industry upon which America's competitive gas industry depends."[1]

Among other roles at NERA, since the late 1980s I have led NERA's participation in two major innovations involving the world's gas industries. The first was my extensive involvement before the Commission in the creation of the competitive market for legal capacity entitlements for gas transportation that facilitiated North America's singularly competitive gas market. The second was the worldwide privatization wave of the late 1980s and 1990s, where I worked directly with the owners or regulators of many of the world's major gas and pipeline systems, including those in North and South America, Europe, Africa, Australia, New Zealand, and China.

My first-hand knowledge of the development of US gas pipeline transport markets and the gas industries they support is reflected in my monograph *The Political Economy of Pipelines: A Century of Comparative Institutional Development*, published in 2012 by the University of Chicago Press (and released in Chinese by Beijing's Petroleum Institute Press in 2016). My book describes, in considerable detail with historical and international examples, the success of the Commission in regulating interstate

[1] Before the Federal Energy Regulatory Commission, Comments in the Matter of the FERC Notice of Inquiry Regarding Certification of New Interstate Gas Facilities, Docket No. PL18-1-000, July 25, 2018. p. 2.

gas pipelines in a way that facilitated a new competitieve market in secondary transport rights and a robustly competitive gas market. My C.V., listing all of my appearances before the Commisison since 1982, is attached to these comments as Appendix A.

As stated by the Commission, "uncertainty exists regarding the status of TC Energy Pipelines' firm TSAs with Gulfport and the treatment of those Gulfport TSAs should Gulfport file for bankruptcy."[2] As the Commission stated in its order initiating this proceeding, its goals include (1) wishing to act expeditously before any court-ordered stay in any possible Gulfport bankruptcy proceeding, (2) rendering an order on the public interest inquiry; and (3) determining whether some form of rate modfication with respect to the agreements between Gulfport and the TC Energy Pipelines can avoid or mitigate "futher distress to Gulfport or prevent the disruption of gas supplies."[3]

Before I go on to the body of my Declaration, let me summarize my conclusions with respect to the issues that the Commission has raised in this proceeding regarding the agreements between Gulfport and the three pipeline companies at issue in this proceeding: ANR Pipeline Company (ANR), Columbia Gas Transmission, LLC (Columbia Gas), and Columbia Gulf Transmission, LLC (Columbia Gulf), collectively "TC Energy Pipelines."

Since being given charge of the US interstate gas industry in 1938, the Commission has overseen the rapid and valuable growth of the US gas industry—not only in the regulated era before the late 1970s but in the competitive era that began with Congressional actions to deregulate commodity gas pricing (in 1978) followed by Commission action to restructure pipeline regulation (in the 1980s/1990s). Nothing that may happen in the context of the TC Energy Pipelines/Gulfport Agreements at issue in this case—rejection, abrogation or modification—will have any noticeable impact on (1) the safety and reliability of gas service to consumers, or (2) the post-restructuring competitive gas market that has spurred new technology in gas production and driven gas prices down to the great benefit of US gas consumers and competitive US electricity markets.

Any abrogation or modification that may be approved by the Commision as a result of this proceeding would not, of itself, lead to any additional burden on TC Energy Pipelines' other shippers or natural gas consumers. To the extent that the TC Energy Pipelines cannot replace Gulfport as a shipper with another shipper willing to pay Gulfport's current prices and terms, the burden will fall on TC Energy

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[2] FERC, Order on Petition for Declaratory Order, Docket Nos. RP20-1204 and RP20-1236, 5 October 2020, paragraph 26.
[3] FERC, Order on Petition for Declaratory Order, Docket Nos. RP20-1204 and RP20-1236, 5 October 2020, paragraphs 29 and 39.

Pipelines, not on other shippers or the public. In that respect, there is no practical ability for TC Energy Pipelines simply to shift cost responsibility to its other existing shippers.

The result of modern FERC interstate gas pipeline regulation is that all major new gas pipelines are financed by investor-owners under the expectation that each pipeline will pay for itself over its useful life. But with any such investment, and as the Commission has itself stated in its own *Creditworthiness Statement*,[4] pipeline investments embody risk. Production patterns shift; technology changes; demand changes; producers fail. Such factors affect the competitive positions of US interstate gas pipelines once built—some more than others (positively or negatively).

Capital markets understand how evolving US gas markets affect the various pipelines that serve its various supply basins and population centers. Rejection, modification or abrogation of contracts for one particular shipper on one particular pipeline, which may incrementally reduce that pipeline owner's returns, does not threaten the contracts or returns of other pipeline/shipper relationships that have maintained their respective competitive advantages. As such, there is no basis for claiming that abrogation/modification or contract rejection threatens capital formation for the interstate pipeline sector generally.

# II. The Public Interest Standard

In this section, I describe the public interest standard the Commission pursues in the natural gas industry which includes: (1) the various regulation-based factors emanating from the Natural Gas Act (NGA) as originally conceived by Congress in the 1930s; and (2) a relatively new competition-based factor, emanating from the Commission's successful restructuring in the 1980s/1990s of interstate pipeline regulation consistent with the NGA and the direction from Congress in the Natural Gas Policy Act (NGPA) in 1978. It is important to recognize the difference between the regulation-based and competition-based factors as they are conceptually different and draw on different kinds of evidence to support the Commission's success in pursuing each.

[4] FERC, *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding,* Docket No. PL05-8, 16 June 2005.

### A. The Regulation-Based Factors[5]

Congress wrote the NGA in the 1930s, when the already extensive US interstate gas pipeline system was mostly vertically integrated into multi-state utility holding companies. Those holding companies' books were closed to outsiders, unregulated by the federal government and widely considered a public scandal due to the holding companies' anticompetitive and acquisitive practices.[6] Two actions of Congress restructured the industry and provided for federal regulation with a public interest standard targeting the regulation of both interstate pipelines and (as eventually determined by the US Supreme Court) the gas flowing through those lines.

First was the Public Utility Act in 1935. Title I of that Act (known as the Public Utility Holding Company Act of 1935) gave the Securities and Exchange Commission ("SEC") jurisdiction over public utility securities with the ultimate power to break up the companies along state and federal jurisdictional lines and to oversee the securities transactions of any holding companies that remained. An economist of the era called the Act "the most stringent, corrective legislation that ever was enacted against an American industry… [a] remedy well suited to the patient."[7] The industry resisted the breakup. John Foster Dulles (then a senior lawyer at Sullivan and Cromwell) thought that Congress had overreached and that the Act was unconstitutional and therefore unenforceable. He advised his clients: "Do not comply, resist the law with all your might, and soon everything will be right."[8] But the Act survived legal challenge.[9] By the early 1950s the SEC had completed most of its holding company restructurings and only a few holding companies remained, subject to the SEC's oversight.[10]

Second, after more years of negotiation, Congress then passed the NGA (the final bill proposal was introduced in January 1937).[11] Many thousands of captive energy consumers, taking service through state-regulated utilities, already existed in many northern states. The "Cities Alliance," a group of one hundred midwestern city and town governments, which had organized in the 1930s to press Congress for

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[5] This section draws partly from two sources of mine; *The Political Economy of Pipelines*, Chapter 7 ("Transacting with Private Carriage: The Gas Pipeline Regulations of 1938); and "The Politics of US Oil Pipelines: The First Born Struggles to Learn from the Clever Younger Sibling," *Energy Law Journal*, November 11, 2016, (with Laura T.W. Olive). pp. 409-427.

[6] Cudahy, R.D., and Henderson, W.D., "From Insull to Enron: Corporate (Re)Regulation after the Rise and Fall of Two Energy Icons," *Energy Law Journal*, Vol. 26, No. 1 (2005), pp. 35-110.

[7] *See* Troxel, E., *Economics of Public Utilities,* Rinehart & Company, New York (1947), p.172.

[8] *A Law Unto Itself: The Untold Story of the Law Firm Sullivan & Cromwell* by Nancy Lisagor, Frank Lipsius, William Morrow and Company, New York, p. 115.

[9] North American Co. v. Securities and Exchange Commission, 327 U.S. 686 (1946).

[10] Curlee, H., "Examining the EPAct 2005: A Prospective Look at the Changing Regulatory Approach of the FERC," WASHINGTON AND LEE LAW REVIEW, 63 (4), 2006, p. 1664.

[11] Troxel, E., "*Regulation of Interstate Movements of Natural Gas,*" *THE JOURNAL OF LAND & PUBLIC UTILITY ECONOMICS,* February 1937, pp. 29, 30.

federal gas pipeline regulation, was a prime mover of the NGA.[12] As a result, when the House Commerce Committee drafted the NGA, it wrote in Section 1 of its bill that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest."[13] Such a public interest standard includes plentiful and uninterrupted supplies of fuel to the public. The Act's sponsor, Representative Lea of California, stated that this was "regulation along recognized and more or less standardized lines. There is nothing novel in its provisions."[14] Afterwards, in the landmark *Phillips Petroleum Co. v. Wisconsin,* the US Supreme Court directed the FPC to regulate all gas prices, even those at arm's length between pipelines and producers.[15]

The NGA, in its drafting before Representative Lea's committee, settled the interests between contending parties. Existing pipeline companies were satisfied with the accounting rules and pushed for certification provisions to guard against "destructive competition." Consumers (represented by the Cities Alliance) wanted both to cap the price of gas delivered to cities and to foster competition between pipelines in order to lower prices and provide better service. The Cities Alliance yielded on the pipeline competition matter at the time (cities and local distribution utilities got that some decades later, by the year 2000). But they never would have accepted the risk of less than privileged access to the pipelines whose construction their credit—flowing from their multitudes of captive utility customers—had underwritten and upon which their constituencies would absolutely depend for their heating fuel.

### B. Evidence of Success Pursuing Regulation in the Public Interest in the Gas Industry

Here, I document the success in the rapid development of the regulated US gas industry from 1938 up to 1978—the year that Congress signaled that it wished a change in direction to a more competitive gas market with the NGPA. Under the NGA, the US natural gas industry grew quickly in the late 1940s through the early 1970s. Much of that growth was funded by the US insurance industry, which determined that the new elements of Commission regulation of the industry (including regulated

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[12] *See The Political Economy of Pipelines*, pp. 124-25.

[13] Natural Gas Act of 1938, 52 Stat, pp. 821-833, Section 1.

[14] Representative Lea had been a member of the Public Utility Commission of California before his tenure in Congress. See: Sanders, M.E., *The Regulation of Natural Gas*, Temple University Press (1981), p. 42.

[15] *Phillips Petroleum v. State of Wisconsin*, 347 US 672 (1954). The *Phillips Petroleum* case began when the Wisconsin Public Service Commission and the City of Detroit petitioned the FPC to assert jurisdiction over sales by Phillips Petroleum Co. to the Michigan-Wisconsin Pipeline Company, the principal supplier of gas to the region at the time. The FPC declined to assert jurisdiction, holding that the production by Phillips was "so closely connected" with the production and gathering process that federal rate regulation would encroach on state jurisdiction over gas production. The state of Wisconsin, along with the cities of Milwaukee and Detroit, appealed the decision to the Court of Appeals for the District of Columbia, which reversed the FPC's decision. The Appeals Court found that the sales by Phillips took place after the production and gathering process and did not interfere with the producing states' regulation of those activities. The Supreme Court upheld the Appeals Court decision. See: Sanders, M.E., *The Regulation of Natural Gas*, p. 95.

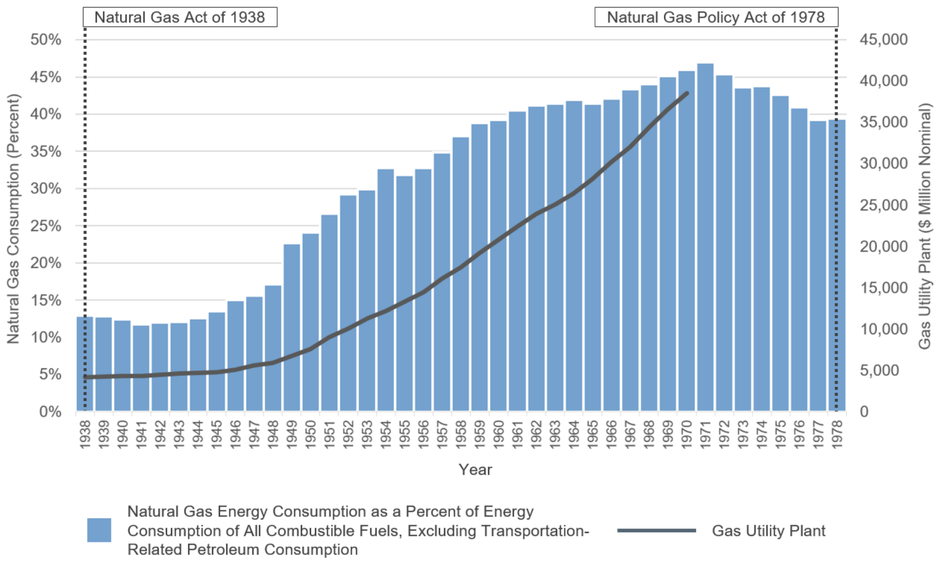
accounting, administrative procedures and constitutional protection for property under the *Hope Natural Gas* decision) provided a new, solid basis for long-term public utility bonds.[16] Natural gas as a component of all fuels, and gas utility plant generally, rose sharply during this period.

It was, as shown in Figure 1, a period of rapid penetration of natural gas—not only into the gas distribution companies that had served major US cities with manufactured gas since the early 19th century, but the rapid displacement of other heating fuels.[17] Solving the problem stemming from the holding company era, and finding a method to fund new interstate gas pipelines on the back of solid Commission ratemaking institutions, was a great advance in pushing the US gas industry, shipping a uniquely difficult-to-transport, and difficult-to-store commodity, to lead the world in making natural gas a key part of the nation's energy infrastructure. I show the dominance of the North American gas pipeline industry from a worldwide perspective, below in Table 1. About 94 percent of North American gas pipelines are in the United States.

[16] See: Hooley, R.W., *Financing the Natural Gas Industry*, AMS Press, New York (1968).
[17] See: Tussing, A.R. and Barlow, C.C., *The Natural Gas Industry: Evolution, Structure and Economics*, Ballinger, Cambridge, Massachusetts (1984).

**Figure 1: Rapid Growth in the Regulated Gas Industry Up to 1978**

*Sources: U.S. Department of Commerce, U.S. Bureau of the Census, Historical Statistics*




*of the U.S. Colonial Times to 1970, Series Q 148-162, Series S 205-218; Resources for the Future/Johns Hopkins Press: Baltimore, MD, USA, 1960, Table VII, pp. 510-512; U.S. Energy Information Administration, Primary Energy Consumption by Source (accessed 8 October 2020).*

**Table 1: More than 70 percent of the World's Natural Gas Pipelines are in North America**

| Continent | Gas Pipelines (miles) | Percent of World Gas Pipelines | Pipeline miles per 100 sq miles | First Major Gas Pipeline |
|---|---|---|---|---|
| North America | 1,311,545 | 71.8% | 16.94 | 1904 |
| Europe | 276,501 | 15.1% | 4.06 | Early 1970s |
| Asia | 113,323 | 6.2% | 1.77 | 1969 |
| South America | 39,197 | 2.1% | 1.01 | 1949 |
| Middle East | 39,405 | 2.2% | 2.81 | 1997 |
| Africa | 25,634 | 1.4% | 0.51 | 1964 |
| Australia/NZ | 20,335 | 1.1% | 0.74 | 1969 |
| **Total** | 1,825,940 | 100.0% | | |

*Note: gas pipelines account for 81.8 percent of the world's pipeline mileage, oil and refined products pipelines 19.19 percent.*

*Sources: CIA World Factbook - Field Listing: Pipelines. Available at https://www.cia.gov/library/publications/the-world-factbook/fields/2117.html*

### C. Pivoting to Embrace Competition in Interstate Gas Pipeline Capacity[18]

It is important to recognize that the NGA, as originally applied to interstate gas pipelines, was about regulation—not competition. It was distinct from the legislation that Congress had applied to oil pipelines in 1906 in an attempt to control the market power of Standard Oil Company (which, at the time, controlled all of the major interstate oil pipelines). That is, the 1906 Hepburn Amendment to the 1887 Interstate Commerce Act, providing for interstate oil pipeline regulation, included the public interest goal of promoting the broader public welfare through a competitive petroleum market. Such was not the focus of the NGA or the Federal Power Commission (FPC) under the NGA, as it was applied in its first four decades.

The FERC recognizes this distinction. In its 2018 Notice of Inquiry for Docket No. PL18-1-000, the Commission quoted the US Supreme Court's finding that the NGA itself gives meaning to the words "public interest" in the nation's gas industry: to provide for the orderly development of plentiful supplies of natural gas for ultimate distribution to the public through the nation's regulated utilities. Thus, for gas pipelines (to quote the Commission in that docket), "[t]he words 'public interest' … are 'not a broad license to promote the general public welfare.'"[19] To be sure, as the FERC oversaw a transition in its regulation of interstate gas pipelines in the 1980s/1990s, ultimately ridding itself of the responsibility for regulating the price of the commodity, it placed new emphasis on competitive gas pipeline transportation that would support competitive commodity markets in gas—which can be fairly labeled its "competitive" public interest focus to go along with its traditional regulated focus on plentiful supplies to the public.[20]

The story of the 62 years that passed between the adoption of the NGA in 1938 and the resolution of the rules for competitive gas pipeline transport in 2000 can be condensed into some important unscripted choices and changes. Neither Congress nor its advisors in the 1930s foresaw the type of competitive pipeline transport capacity market that resulted. Important points in that pivot to the inclusions of a competition-based factor in the public interest standard at the FERC are these:

- Congress's choice to regulate gas pipelines as public utilities was problematic, as the existing pipeline companies were not natural monopolies but semi-rivals who bought gas in the producing fields in a race to win new certifications from the Commission. The problem, according to Professor Alfred Kahn (who was deeply involved with litigating

[18] My comments in PL18-1 were directed to reciting the way in which Commission regulation pivoted during the 1980s/1990s to promote vigorous competition in interstate pipeline transportation and the gas that serves US consumers. Below, I paraphrase my comments in that docket, which are adapted from *The Political Economy of Pipelines*, pp. 151-2.

[19] FERC Docket No. PL-18-1-000, April 19, 2018, para. 6 (pp. 5-6).

[20] "The Commission sought 'to foster competitive markets protect captive customers, and avoid unnecessary environmental and community impacts while serving creasing demands for natural gas.'" FERC, PL-18-1-000, para. 16.

those problems before the Commission in the 1950s and 1960s), was that the "upward thrust" of prices in the fields was driven by the necessity of finding uncommitted fields given the race to obtain certification.[21]

- The NGA originally required pipelines to obtain a Certificate of Public Convenience and Necessity (CPCN) only when entering a market already served by another pipeline—opening the door to disputes over markets that fell outside the Commission's ability practically or quickly to resolve. Thus, in 1942, the Act was amended to require a CPCN for all new construction, extension, or acquisition.[22]

- There was never any chance that the gas distributors or successors to the Cities Alliance would permit pipeline companies free reign to purchase gas under those circumstances—and the Supreme Court, in *Phillips Petroleum Co. v. Wisconsin* (1954), directed the Commission to regulate all gas prices, even those at arm's length between pipelines and producers.

- Regulating gas prices was itself a problem, however, for as reliable as the Commission was in regulating cost-based pipeline prices, it proved no good at regulating the price of gas. Costly shortages or surpluses in volatile gas markets were inevitable.[23]

- Freeing gas prices from federal regulation required pipeline companies to exit the gas commodity sales business and provide transport only—no easy task, as that had never been a mode of business for major pipeline companies anywhere in the world.

- Serendipitously, the same volatile gas market that had caused expensive shortages also threatened the creditworthiness of the interstate gas pipeline companies. By 1986, the financial exposure of US gas pipeline companies to "take-or-pay" charges of gas producers totaled about approximately $11.7 billion, threatening their financial integrity.[24] The problem allowed the FERC to offer financial incentives for pipeline companies to *volunteer* to adopt that new "contract open-access" mode of business.[25]

- Providing contract-based open access was one thing; competitive transport quite another, and it took about 15 years of steady work and litigation (from 1985 to 2000) to accomplish the transition.[26] For example, shipper rights needed better definition, a clearer cost basis, and the ability to sell without friction in transparent "sub-let" markets without pipeline company interference. The task required practical operational and accounting

[21] Kahn, Before the Federal Power Commission in the Matter of *Champlin Oil & Refining Co., et al*., Docket Nos. G-9277, *et al*. (1959), Testimony of Dr. Alfred E. Kahn, pp. 70-71. Kahn maintained that securing reserves sufficient to enable pipeline promoters to get FPC certification was for them a "license to coin money," which conferred great market power on the producers who were in a position to lease large blocks of reserves.

[22] 77th Congress, 2nd Session – Chapter 49, February 7, 1942

[23] See: Pierce (1988)., R.J., "Reconstituting the Natural Gas Industry, from the Wellhead to the Burnertip."

[24] "Pipeline Take or Pay Costs Continue to Mount," *Oil & Gas Journal*, August 10, 1987, p. 20.

[25] Under FERC Order No. 436 (50 Fed. Reg. 42,208), pipelines offering transportation services were required to provide such services on a non-discriminatory basis. Order No. 436 offered a means for pipelines to spread part of their take-or-pay liabilities through fixed surcharges to their customers, if those pipelines embraced open access. A succeeding Order No. 500 (52 Fed. Reg. 30334) was required to address legal obstacles to the implementation of this policy, offering pipeline companies a mechanism to recover roughly half of their uneconomic take or pay gas costs.

[26] FERC Order No. 636, 59 F.E.R.C.¶ 61, 030; FERC Order No. 637, 90 F.E.R.C.¶ 61,109. Also see Makholm (2012), Political Economy of Pipelines, pp. 140-9.

work, overseen by the FERC, to turn pipeline capacity contracts into tradable property reflecting a bundle of specific legal entitlements; in other words, to make sure that shippers (long-term pipeline "tenants") could use or sell their contract rights in useful competitive markets.[27]

- By 2000 the Commission specified the requisite practical elements of competitive contract carriage among shippers on interstate gas pipelines (with the various versions of FERC Order No. 637) along with the framework that would permit competitive additions to the interstate system by pipeline companies through "incremental pricing" (*Policy Statement on Certification of New Pipelines*).[28]

As a result of these changes in law as well as FERC's rules and policies, the gas pipeline industry has been transformed into a competitive business both for the daily use and construction of new certificated transport capacity; it made robust competition in wholesale gas commodity markets possible. Interstate gas pipelines transitioned from the dominant buyers and re-sellers of gas in the United States to owning essentially none of the gas they shipped in interstate commerce. For its part, the FERC's main job had once been regulating gas pipeline entry and establishing cost-based rates. Now it has another task—preserving the value of tradable entitlements for those who hold them and making sure they trade effectively—letting competitors take over decisions on pipeline market entry and exit.[29]

The result is what I described in my PL18-1 comments to the Commission as a "masterpiece of regulatory restraint and effectiveness:"

> There is nothing in the world like it. Using the far-sighted provisions of the NGA, the Commission has written a rule book that permits the regulated, investor-owned interstate pipeline system—composed of over two thirds of the world's major gas pipelines—to be used and expanded competitively. That is, all interstate pipelines are subject to the exacting rules of accounting and cost-based ratemaking established by the NGA. And yet, the rules on "subletting" capacity rights on the interstate system, and adding capacity to the system through the certification procedures that are the subject of this NOI, permit robust competition both within that cost-based pipeline system and in the market for the production and use of gas. The result is tremendous for the users and producers of gas, for those who pay power prices determined by those gas prices in regional wholesale power markets, and in the wider economy that can anticipate further US exports.[30]

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[27] 59 FERC 61,030, 18 CFR Part 284 (Order No. 636), April 8, 1992.
[28] FERC Docket No. PL99-3-000 (1999).
[29] For example, to enhance competition in the secondary capacity release market, in 2008 FERC removed the rate ceiling on short-term capacity release transactions of one year or less. FERC Order No. 712, 123 FERC 61,286 (2000).
[30] Comments of Jeff D. Makholm, Ph.D., FERC Docket No. PL18-1-000, p. 28.

In Table 2, I list some of the key FERC orders in which it pursued a competitive interstate gas pipeline transportation—specifically citing how the Commission sought to pursue its competition-based public interest goal.

**Table 2: The FERC Worked to Promote Competition in Gas and Transport through Major Orders between 1985 and 2008**

| FERC Document | Year | Description | Stated Goal |
|---|---|---|---|
| Order No. 436 | 1985 | Establishes open access encouraging pipelines to voluntarily elect to offer transport service on a non-discriminatory basis. | "…the final rule adjusts...those aspects of our current regulations that now **appear to hinder the development of competition in those areas where competition will better protect the public interest than will traditional public utility regulatory rules**." |
| Order No. 636 | 1992 | Unbundles gas commodity and transportation sales. | "The Commission's primary aim in adopting the instant regulations is to **improve the competitive structure of the natural gas industry** and at the same time maintain an adequate and reliable service...**to ensure that all shippers have meaningful access to the pipeline transportation grid so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible**..." |
| Policy Statement PL99-3 | 1999 | Provides guidance to the industry about how the Commission will evaluate new construction projects. | "...the Commission's goal is to appropriately consider **the enhancement of competitive transportation alternatives**… |
| Order No. 637 | 2000 | Waives price ceilings on short-term capacity for a two-year period, changes to rate structure and other regulations, and develops reporting requirements to improve price transparency. | "The changes adopted in this rule are designed to **improve the efficiency of the market and increase competition** while continuing cost-of-service regulation to protect against the exercise of market power by pipelines." |
| Order No. 712 | 2008 | Entirely removes price ceilings on short-term capacity and facilitates asset management arrangements (AMAs) by relaxing tying prohibitions. | "The Commission finds that [removing price ceilings] will **improve shipper options and market efficiency**, particularly during peak periods, **by allowing the prices of short-term capacity release transactions to reflect short-term variations in the market value of that capacity**." |

*Sources: Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (Oct. 18,1985), p.8; Order No. 636, Pipeline Service Obligations and Revisions to Regulations Under Part 284; Regulation of Natural Gas pipelines after Partial Wellhead Decontrol, 59 F.E.R.C. ¶ 61,030 (1992), p. 10; Order No. 637 Regulation of Short-Term Natural Gas Transportation Service, and Regulation of Interstate Natural Gas Transportation Services, 90 F.E.R.C. ¶ 61,109 (2000), p.40; Policy Statement, Certification of New Interstate Natural Gas Pipelines, 64 Fed. Reg. 51,309, 51,315 (Sept. 22, 1999), p.2; Order No. 712, Promotion of a More Efficient Capacity Release Market, 123 F.E.R.C. ¶ 61,286 (2008), p.28.*

By such means, the Commission succeeded (after its 1980s/1990s pipeline restructuring) in making a market in pipeline capacity that overcame the inherent difficulties in reliably transacting that have traditionally beset pipelines around the world. I described that transition in my comments in PL-18-1 as follows:

> Interstate gas transportation stands in sharp contrast to airlines and other forms of rail or road transport. Pipelines are not "marginal costs with wings" as Alfred Kahn's airlines, but *marginal costs with a ball* and *chain*.[31] Pipeline capital is land-bound and immobile—the antithesis of deployable capital in air transport. Pipelines are built from one spot to another distant one. By far the most efficient method of inland fuel transport, gas pipelines serve producers at one end and gas distributors or power plants at the other—often a continent away. Uncertainty or commercial opportunism at either end of the pipe, by the gas pipelines or their users, can strand facilities and wreck the value of the invested capital. The challenges are so great that most gas pipeline systems in the world were built by governments with public funds. If investors build pipelines, they make interlocking alliances with gas suppliers and gas users. Promoting competitive pipeline transport, in the face of the immobility of capital and those resulting alliances, was much more difficult than promoting competition in air travel. And yet the FERC accomplished that aim, by about the year 2000, after a long period of contention and discernment among the parties involved in the US gas industry.[32]

In that respect, the Commission overcame, by its actions, the problems of "[u]ncertainty or commercial opportunism" that would impede a genuinely competitive interstate transporation capacity market. Importantly also, the term "opportunism" should not be misinterpreted or confused as hypothetical abrogation, modification potential rejection under the bankruptcy code. I define in my book "opportunism" as follows:

> self-interest seeking with guile, to include calculated efforts to mislead, deceive, obfuscate, and otherwise confuse. Opportunism should be distinguished from simple self-interest seeking, according to which individuals play a game with fixed rules that they reliably obey.[33]

The Commission succeeded (after its 1980s/1990s pipeline restructuring) in making a market in pipeline capacity that overcame the inherent difficulties in reliably transacting that have traditionally beset pipelines around the world. In other words, the Commission by its actions overcame the problems of "[u]ncertainty or commercial opportunism" that would impede a genuinely competitive interstate transporation capacity market.

[31] Such is how I refer to pipelines in *The Political Economy of Pipelines*, p. 2.
[32] Comments of Jeff D. Makholm, Ph.D., FERC Docket No. PL18-1-000, pp. 25-26.
[33] *The Political Economy of Pipelines*, p. 289 note 14, quoting Williamson, O. *The Mechanisms of Governance*, New York: Oxford University Press, 1996, p. 378.

### D. Public Interest Benefits Flowing from the Commission's Movement to Competition in Gas and Pipeline Transport Capacity

Competitive interstate pipeline transport made possible the uniquely competitive US gas market, with huge benefits for individuals and firms, both in lower gas costs and electricity prices in those parts of the country served by competitive power markets. Evidence of such benefits has been the vigorous competitive entry of new gas supplies from new fields, made possible by the application of unconventional extraction technology that has changed the relationship between oil and gas prices in the United States.

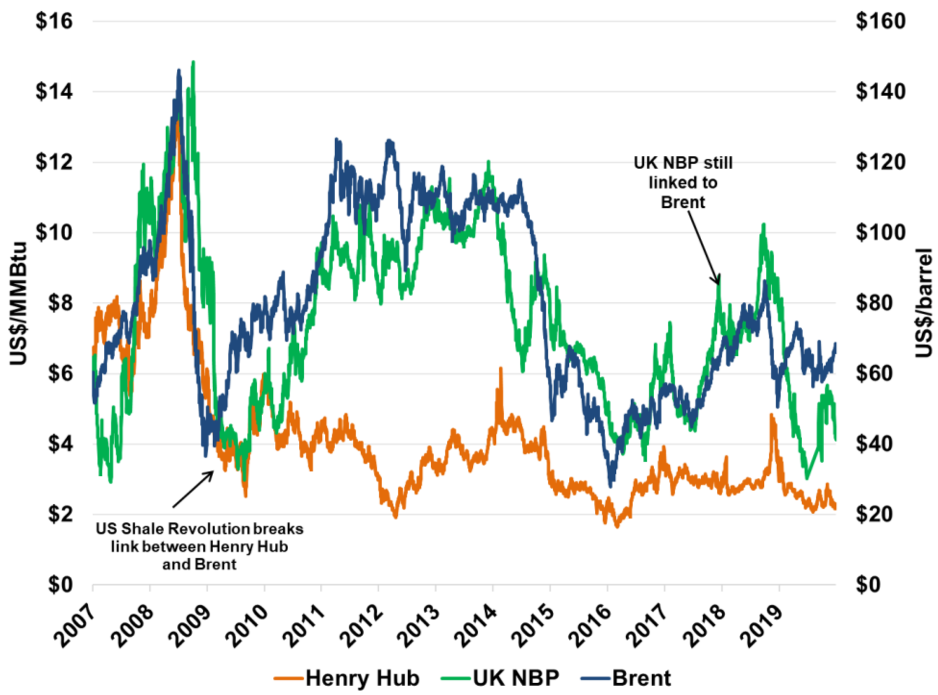
Natural gas prices in the United States split from oil prices immediately after the 2008 run-up and subsequent collapse of oil prices that followed the 2007-2008 credit crisis (see Figure 2). Such was the time when gas prices in the United States broke away from the expectation (so evident in 2008) that they should somehow follow the gyrations in the oil price. In other words, it took from the year 2000 (when the FERC essentially finalized the competitive pipeline capacity market) to 2008 for that traditional link between gas and oil prices to break in the United States.

US gas prices hovered around the $4/MMBtu throughout 2013, in contrast to comparable oil-equivalent energy prices of around $10/MMBtu. These trends contrast sharply with Europe (see Figure 2), where the price of gas is linked under long-term contracts to oil price equivalents.[34] Table 3 shows how, from 2007 through 2019, US gas consumers have paid about $1.132 trillion less than they would have if gas prices had remained linked to the oil price (as they were in the United States prior to 2009 and still are in Europe).[35] A great deal of discussion occurs in Europe regarding these facts. But that European gas market, apart from any resource and supply limitations, has not yet overcome an institutional history that makes difficult the kind of pipeline and gas industry reforms that have contributed to the robust competitive gas commodity markets in the US.

[34] In traditional European commercial gas negotiations, prices are generally set on the basis of oil product prices in the preceding 6-9 months. *See* Stern, J., and Rogers, H., "The Transition to Hub-Based Gas Pricing in Continental Europe," The Oxford Institute for Energy Studies, NG49, March, 2011.

[35] Any such computations dealing with counterfactual price changes should acknowledge that there would be a demand elasticity effect—which I have not computed here, but which would mean a somewhat lower net result associated with such a major change in consumer energy costs. A 2018 study of 300 million California gas residential consumer bills found price elasticity of demand to be between -0.23 and -0.17. *See* Auffhammer, M. and E. Rubin, "Natural Gas Price Elasticities and Optimal Cost Recovery Under Consumer Heterogeneity: Evidence from 300 Million Natural Gas Bills," NBER Working Paper 24295, available at https://www.nber.org/papers/w24295.pdf.

**Figure 2: Relative Gas and Oil Prices in the United States and Europe**




*Source: Bloomberg (NG1 Comdty; CO1 Comdty, NBPG1MON SPEC Index, GBPUSD Curncy downloaded June 2020).*

*Notes: The Henry Hub (in Erath, Louisiana) is the principal trading point for U.S. natural gas. The National Balancing Point (NBP) is the UK gas trading hub, and Brent is a major benchmark for worldwide oil prices, taking its name from the Brent Field in the North Sea.*

**Table 3: Cost of Gas in the United States v. Europe**

| | Average Price* per MMBtu | | U.S. Consumption | Average Cost Differential Per Unit | Cost Differential | Cumulative (Since 2007) |
|---|---|---|---|---|---|---|
| Year | U.S. | European Union | (Million MMBtu) | (US$/MMBtu) | (Billion US$) | (Billion US$) |
| [1] | [2] | [3] | [4] | [5] = [3] - [2] | [6] = [5] * [4] | [7] |
| 2007 | $ 7.11 | $ 6.14 | 22,571 | $ (0.98) | $ (22.02) | $ (22.02) |
| 2008 | $ 8.90 | $ 11.43 | 22,681 | $ 2.53 | $ 57.36 | $ 35.35 |
| 2009 | $ 4.16 | $ 4.95 | 22,336 | $ 0.79 | $ 17.61 | $ 52.95 |
| 2010 | $ 4.38 | $ 6.43 | 23,441 | $ 2.05 | $ 47.96 | $ 100.91 |
| 2011 | $ 4.03 | $ 9.34 | 23,803 | $ 5.32 | $ 126.57 | $ 227.48 |
| 2012 | $ 2.83 | $ 9.39 | 24,817 | $ 6.56 | $ 162.83 | $ 390.31 |
| 2013 | $ 3.73 | $ 10.50 | 25,569 | $ 6.77 | $ 173.18 | $ 563.49 |
| 2014 | $ 4.26 | $ 8.38 | 26,120 | $ 4.12 | $ 107.59 | $ 671.08 |
| 2015 | $ 2.63 | $ 6.51 | 26,891 | $ 3.88 | $ 104.42 | $ 775.50 |
| 2016 | $ 2.55 | $ 4.73 | 27,016 | $ 2.18 | $ 58.85 | $ 834.36 |
| 2017 | $ 3.02 | $ 5.85 | 26,741 | $ 2.83 | $ 75.81 | $ 910.16 |
| 2018 | $ 3.07 | $ 7.88 | 29,550 | $ 4.81 | $ 142.25 | $ 1,052.42 |
| 2019 | $ 2.52 | $ 5.11 | 30,618 | $ 2.58 | $ 79.11 | **$ 1,131.53** |

*Sources: Bloomberg, BP Statistical Review of World Energy 2020.*
*Notes: *For the United States, annual average price at Henry Hub; for Europe, annual average price at UK NBP.*

With a growing share of US electricity generation coming from gas, electricity consumers in those states that have "unbundled" competitive power markets see benefits other than simply the lower price of gas.[36] In those "unbundled" states that reside in regional electricity markets, the price of electricity is set by the variable cost of the most expensive of the electricity generation facilities—often gas-fired units—necessary to meet rapidly-changing electricity demand.[37] Under the illustration that I used above (gas prices remained linked to the oil price, as they were in the United States prior to 2009 and still are in Europe), electricity consumers in those "unbundled" power markets would have incurred an additional cost of $405 billion after 2008, as I show in Table 4.[38] The impact of higher natural gas prices is to shift the generation supply curve upward such that the market-clearing price for a given level of demand is higher than it would have been if natural gas prices had been at their historical US levels. In short, this illustrates the additional benefits to the public of competitive gas markets in the regional electricity generation markets.

[36] Those regional electricity markets are the California Independent System Operator (CAISO), the Electricity Reliability Council of Texas (ERCOT), the Independent System Operator-New England (ISO-NE), the New York Independent System Operator (NYISO), the Midcontinent Independent System Operator (MISO), PJM Interconnection LLC (PJM), and the Southwest Power Pool (SPP).
[37] In the "bundled" states, gas for utility-owned power generation is part of the regulated cost of service, the effect of which is part of Table 3.
[38] I describe in Appendix B the methodology I use to estimate the values in Table 4.

### Table 4: Cost of Electricity (Net of Gas Fuel Costs) in Unbundled States, at US and European Gas Prices

| | US Electricity Demand in Unbundled States* | Average US Marginal Electricity Price† in Unbundled States (per MWh) | | Total US Cost of Electricity in Unbundled States (Billion US$) | | US Cost of Gas Fuel for Electricity Generation in Unbundled States (Billion US$) | | US Cost of Electricity Net of Gas Fuel Costs in Unbundled States (Billion US$) | | Cost Differential | Cumulative Since 2007 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Year | Million MWh | At US Gas Prices | At European Gas Prices | At US Gas Prices | At European Gas Prices | At US Gas Prices | At European Gas Prices | At US Gas Prices | At European Gas Prices | (Billion US$) | (Billion US$) |
| [1] | [2] | [3] | [4] | [5] ≈ [2] * [3] | [6] ≈ [2] * [4] | [7] | [8] | [9] = [5] - [7] | [10] = [6] - [8] | [11] = [10] - [9] | [12] |
| 2007 | 2,535 | $ 30.88 | $ 34.36 | $ 75.23 | $ 82.44 | $ 9.75 | $ 9.52 | $ 65.48 | $ 72.92 | 7.44 | $ 7.44 |
| 2008 | 2,542 | $ 30.87 | $ 34.36 | $ 75.41 | $ 82.63 | $ 9.77 | $ 9.53 | $ 65.64 | $ 73.10 | 7.46 | $ 14.90 |
| 2009 | 2,463 | $ 30.32 | $ 33.69 | $ 71.00 | $ 77.57 | $ 8.72 | $ 8.40 | $ 62.29 | $ 69.18 | 6.89 | $ 21.79 |
| 2010 | 2,609 | $ 32.88 | $ 41.78 | $ 80.84 | $ 97.50 | $ 8.54 | $ 9.30 | $ 72.30 | $ 88.21 | 15.91 | $ 37.70 |
| 2011 | 2,629 | $ 32.60 | $ 54.95 | $ 82.43 | $ 125.21 | $ 10.50 | $ 12.72 | $ 71.92 | $ 112.49 | 40.56 | $ 78.26 |
| 2012 | 2,611 | $ 27.15 | $ 55.20 | $ 70.35 | $ 128.59 | $ 13.95 | $ 12.27 | $ 56.41 | $ 116.32 | 59.91 | $ 138.18 |
| 2013 | 2,637 | $ 34.27 | $ 62.85 | $ 84.02 | $ 144.51 | $ 12.10 | $ 14.98 | $ 71.92 | $ 129.53 | 57.61 | $ 195.78 |
| 2014 | 2,843 | $ 39.83 | $ 57.70 | $ 102.90 | $ 143.51 | $ 11.85 | $ 13.66 | $ 91.05 | $ 129.86 | 38.81 | $ 234.59 |
| 2015 | 2,742 | $ 27.71 | $ 42.94 | $ 72.29 | $ 107.30 | $ 14.47 | $ 9.00 | $ 57.82 | $ 98.29 | 40.47 | $ 275.06 |
| 2016 | 2,716 | $ 22.55 | $ 31.52 | $ 61.64 | $ 83.67 | $ 13.13 | $ 9.06 | $ 48.51 | $ 74.61 | 26.10 | $ 301.17 |
| 2017 | 2,685 | $ 24.88 | $ 34.86 | $ 65.55 | $ 90.15 | $ 11.17 | $ 7.37 | $ 54.39 | $ 82.79 | 28.40 | $ 329.56 |
| 2018 | 2,690 | $ 29.00 | $ 47.33 | $ 74.35 | $ 117.38 | $ 12.01 | $ 10.48 | $ 62.34 | $ 106.90 | 44.57 | $ 374.13 |
| 2019 | 2,721 | $ 22.01 | $ 32.68 | $ 61.94 | $ 89.14 | $ 12.84 | $ 9.57 | $ 49.10 | $ 79.57 | 30.47 | **$ 404.61** |

*Sources: S&P Global Market Intelligence, U.S. Energy Information Administration.*
*Notes: *States within the seven US regional electricity markets: CAISO, ERCOT, ISO-NE, MISO, NYISO, PJM, and SPP. †Average of hourly energy market-clearing prices in the seven regional electricity markets in the US.*

## E. Deregulation of Other Modes of Interstate Transportation[39]

In my 2018 statement to the Commission, I summarized federal deregulatory actions across a number of interstate transport businesses, as consistent with restructuring and the movement to competition in interstate gas pipeline transport. The rail and trucking markets pursued their own a path to competitive markets in the 1970s after many years of indifferent or even destructive regulatory control by the ICC. Economist Darius Gaskins, ICC Chairman during the deregulation period, in some ways mirrored in rail and road transport the role that Alfred Kahn played in the pursuit of competition in fares and routes in air transport. The Staggers Rail Act of 1980 left some room for regulatory oversight and Gaskins pursued nearly full deregulation by deferring to market outcomes whenever possible, resulting in lower freight transportation costs and a more profitable industry as a whole.[40] In roadway trucking, Gaskins interpreted the Motor Carrier Act of 1980 to completely removing trucking from ICC overview.[41] In 1992, the Department of Transportation calculated that the savings from the deregulation of the trucking industry were equal to around $10 billion annually.[42]

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[39] This section draws closely from my comments in PL18-1.
[40] Gale Moore, T., "Clearing the Track: The Remaining Transportation Regulations," *Regulation*, Vol. 18, No. 2, 1995, p. 77.
[41] Caves, D., *et al.*, "The Staggers Act, 30 Years Later," Regulation, Winter 2010-2011 p. 30, https://object.cato.org/sites/cato.org/files/serials/files/regulation/2010/12/regv33n4-5.pdf.
[42] Gale Moore, T., "Clearing the Track: The Remaining Transportation Regulations," p. 82.

The principal thrust of federal action in these various modes of US interstate transportation was to free the federal government from decades of regulatory intervention in transportation markets that could, in many ways, discipline themselves through contracts or other less restrictive means. Some industries, like rail and road transport, could benefit from "flash cut" deregulation—as the capital involved could be redeployed from one market to another (as with airlines—*marginal costs with wings*). Gas pipeline transport, however, required a continued regulatory rule book because of the essentially non-re-deployable capital involved. The overall impetus to all such reforms was that the federal government was widely—and rightly—considered an ineffective "active" regulator of interstate transportation. With considerable legal and political effort, such reforms freed the federal government from such counterproductive forms of transport regulation.

The FERC, since the gas pipeline regulatory reforms of the 1980s/1990s, consistent with federal involvement in interstate transportation generally, is effectively out of the business of being closely involved in whether any particular interstate gas pipeline transport contract is marketable or worthwhile.

# III. Application of the Public Interest Standard to TC Energy Pipelines' Agreements with Gulfport

In this section I describe the Gulfport contracts on the TC Energy Pipelines and how they compare to all shipper contracts on the TC Energy Pipelines. I also describe the nature of the various sorts of shipper contracts that supported rapid growth in interstate gas pipeline capacity after 2000, the market concentration of interstate pipeline companies in the "origin market" where Gulfport produces natural gas that is shipped on the TC Energy Pipelines and TC Energy Pipelines' abilities to operate notwithstanding abrogation, modification, or rejection of the contracts.

## A. The Gulfport Contracts

Gulfport produces natural gas, natural gas liquids (NGLs), and oil in the Utica shale region of the Appalachia Basin and in the South Central Oklahoma Oil Province (SCOOP) play in the Anadarko Basin. Approximately 77 percent of Gulfport's production came from Utica in the second quarter of 2020 with the remaining 23 percent derived from the SCOOP play.[43] Gulfport has 14 firm transportation service agreements with ANR, one with Columbia Gas, and one with Columbia Gulf.

[43] Gulfport Energy, Operations, available at https://www.gulfportenergy.com/operations.

ANR operates approximately 10,600 miles of interstate pipeline that extend from Texas and Oklahoma to points in the Midwest, with a peak capacity of more than 6,000 MMcf/day.[44] ANR ships natural gas produced in the Utica shale region via interconnections in western Ohio and elsewhere with pipelines that directly serve producers the Utica region, including Columbia Gas, Rockies Express Pipeline LLC, Rover Pipeline LLC, and others. The capacity on ANR to transport natural gas from interconnection receipt points in western Ohio to delivery points in the Midwest is approximately 1,400 MMcf/day.[45] Gulfport entered into 14 firm transportation service agreements with ANR between 2013 and 2019 (Table 5).

**Table 5. Gulfport Entered into 14 Firm Transportation Service Agreements with ANR between 2013 and 2019**

| | Contract No. | Contract or Amendment Date | Start Date | End Date | Receipt Point | Delivery Point | Quantity |
|---|---|---|---|---|---|---|---|
| **1** | 123255 | 10/07/2013 | 04/09/2014 | 04/30/2024 | Lebanon/Dominion | Farwell | 30,000 |
| **2** | 123625 | 10/30/2013 | 08/01/2014 | 07/31/2024 | Lebanon/Dominion | Willow Run (to Michcon) | 20,000 |
| **3** | 123626 | 10/30/2013 | 08/01/2014 | 07/31/2024 | Lebanon/Dominion | **Summer**: Overisel Int. No. 1<br>**Winter**: Stag Lake (St Joseph CO) | 20,000 |
| **4** | 123627 | 10/30/2013 | 08/01/2014 | 07/31/2024 | Lebanon/Dominion | Crown Point/NIPSCO | 20,000 |
| **5** | 123629 | 10/30/2013 | 08/01/2014 | 07/31/2024 | Lebanon/Dominion | Farwell | 13,700 |
| **6** | 124157 | 03/10/2014 | 11/01/2014 | 03/31/2036 | REX Shelbyville | **Summer**: Overisel Int. No. 1<br>**Winter**: Stag Lake (St Joseph CO) | 20,000 |
| **7** | 124158 | 03/10/2014 | 11/01/2014 | 03/31/2036 | REX Shelbyville | Farwell | 10,000 |
| **8** | 124160 | 03/10/2014 | 11/01/2014 | 03/31/2036 | REX Shelbyville | S E CDP | 50,000 |
| **9** | 124690 | 04/29/2014 | 06/01/2014 | 04/30/2024 | Lebanon/Dominion | **Summer**: Overisel Int. No. 1<br>**Winter**: Stag Lake (St Joseph CO) | 20,000 |
| **10** | 123253 | 04/30/2014 | 06/01/2014 | 04/30/2024 | Lebanon/Dominion | Willow Run (to Michcon) | 30,000 |
| **11** | 123254 | 04/30/2014 | 06/01/2014 | 04/30/2024 | Lebanon/Dominion | Detroit A | 20,000 |
| **12** | 123628 | 10/21/2016 | 11/01/2016 | 10/31/2024 | Lebanon/Dominion | Green Bay | 15,000 |
| **13** | 124156 | 02/28/2019 | 03/01/2019 | 03/31/2036 | REX Shelbyville | Green Bay | 5,000 |
| **14** | 132342 | 09/11/2019 | 11/01/2019 | 03/31/2036 | REX Shelbyville | Fond Du Lac | 10,000 |
| **Total** | | | | | | | **283,700** |

Columbia Gulf operates approximately 3,340 miles of pipeline that connects producers in the Gulf of Mexico to the Columbia Gas pipeline network near Huntington, West Virginia.[46] Columbia Gulf

[44] TC Energy, ANR Pipeline, available at https://www.anrpl.com/company_info/.
[45] U.S. Energy Information Administration, U.S. State-to-State Capacity, 22 January 2020.
[46] TC Energy, Columbia Gulf Transmission Pipeline, available at https://www.tcenergy.com/operations/natural-gas/columbia-gulf-transmission-pipeline/.

has a capacity of about 2,300 MMcf/day.[47] Gulfport entered into a firm transportation service agreement with Columbia Gulf in connection with the pipeline's Rayne XPress reversal project that went into service on December 1, 2017.[48]

Columbia Gas operates approximately 11,500 miles of natural gas pipeline in ten states in the US East, Midwest, and Southeast.[49] It serves the Utica region with an extensive pipeline network that transports volumes up to 3,200 MMcf/day from Kentucky and West Virginia to producing regions in southeastern Ohio and to points of interconnection with ANR in western Ohio.[50] Gulfport entered into a firm transportation service agreement with Columbia Gas in connection the Leach XPress Project, a pipeline reversal project that went into service on January 1, 2018.[51]

Figure 3 shows the locations and approximate capacities of each of the TC Energy Pipelines, the locations of the two receipt points on ANR associated with Gulfport contracts, the locations of the two compressor stations on Columbia Gulf associated with the Rayne XPress Project, and the location of the pipelines associated with the Columbia Gas Leach XPress Project.

[47] U.S. Energy Information Administration, U.S. State-to-State Capacity, 22 January 2020.

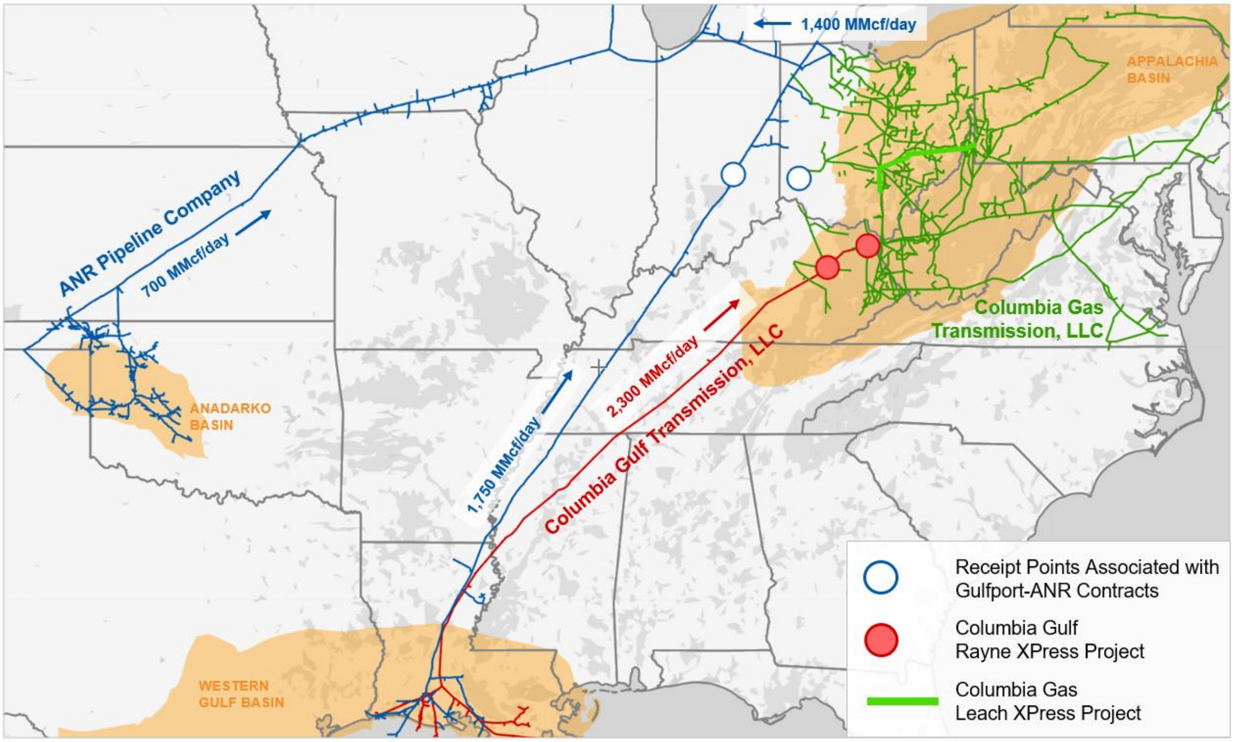
[48] FTS-1 Service Agreement between Columbia Gulf Transmission LLC and Gulfport Energy Corporation, Service Agreement No. 174460, 1 June 2016; FERC, Letter order granting Columbia Gulf Transmission, LLC's 10/26/2017 request for the filing to be placed into service re the Rayne XPress Expansion Project under CP15-539, 2 November 2017.

[49] TC Energy, Columbia Gas Transmission, available at https://www.tcenergy.com/operations/natural-gas/columbia-gas-transmission/.

[50] U.S. Energy Information Administration, U.S. State-to-State Capacity, 22 January 2020.

[51] FTS Service Agreement between Columbia Gas Transmission and Gulfport Energy Corporation, Service Agreement No. 173274, 1 June 2016; FERC, Letter order granting Columbia Gas Transmission, LLC's 12/13/17 request re the Authorization to Commence Service for the Leach XPress Project under CP15-514, 28 December 2017.

**Figure 3. Locations and Capacities of TC Energy Pipelines, and Locations of Gulfport-ANR Contracts, Rayne XPress Project, and Leach XPress Project**




*Sources: U.S. Department of Homeland Security, Homeland Infrastructure Foundation-Level Data (HIFLD), Natural Gas Pipelines, Updated 23 August 2019; U.S. Energy Information Administration, U.S. State-to-State Capacity, 22 January 2020; FERC, Draft Environmental Impact Statement, Docket Nos. CP15-514 and CP15-539, April 2016.*

*Notes: The two Gulfport-ANR receipt points are REX Shelbyville and Lebanon/Dominion. For ANR northbound capacity from Anadarko Basin, approximate state-to-state capacity from Kansas to Nebraska, as reported by EIA; for ANR northbound capacity from Western Gulf Basin, approximate state-to-state capacity from Mississippi to Tennessee, as reported by EIA; for ANR westbound capacity from Appalachia Basin, approximate state-to-state capacity from Ohio to Indiana and Michigan, as reported by EIA; for Columbia Gulf northbound capacity, approximate state-to-state capacity from Mississippi to Tennessee, as reported by EIA.*

As I stated in my introduction, rejection of Gulfport's contracts, by itself, may well affect the returns to the owners of ANR, Columbia Gas, and Columbia Gulf, but it will have no discernible effect on either local or national gas markets (which is the focus of FERC gas pipeline rate regulation).

Table 6 shows the volumes of the Gulfport contracts as shares of total pipeline capacity, total production in the Appalachia shale basin (which includes the Utica region), all US tight shale gas production, and total US gas production.[52] The shares of Appalachia production, US tight shale production, and total US production represented by Gulfport's 14 contracts with ANR are about 0.8 percent, 0.3 percent, and 0.2 percent, respectively (

[52] Production from the Appalachia shale comes primarily from Ohio and Pennsylvania. Tight Shale includes natural gas production from the seven major shale plays in the continental U.S.: Appalachia, Anadarko, Bakken, Eagle Ford, Haynesville, Marcellus, and Permian. US Gross Withdrawals includes all natural gas production in the seven major shale plays plus gas production outside of those shale basins.

Table 6 (a)). Those shares represented by Gulfport's contracts with each of Columbia Gas and Columbia Gulf are about 0.3, 0.1, and 0.1 percent (

Table 6 (b) and (c)).

These data show that the Gulfport contracts are not of a size to damage the gas transport “origin market” in that region of the United States (as pictured, below, in Figure 4). Even then, any disruption in the Gulfport contracts will not remove the TC Pipelines’ capacities from those regions. That is, the transport market is unaffected by any change in the contract terms for one of the contract holders on the capacity emanating from those gas producing regions.

## Table 6: Gulfport Shipping Quantity on TC Energy Pipelines as Shares of Various Production Quantities

(a) ANR

| Shipping Period* | Contract Volume | ANR Capacity | ANR Contract Share | Appalachia Production | Appalachia Contract Share | US Tight Shale Production | US Tight Shale Contract Share | US Gross Withdrawals Production | US Gross Withdrawals Contract Share |
|---|---|---|---|---|---|---|---|---|---|
| | (MMcf/d) | (MMcf/d) | (%) | (MMcf/d) | (%) | (MMcf/d) | (%) | (MMcf/d) | (%) |
| | [A] | [B] | [C] = [A]/[B] | [D] | [E] = [A]/[D] | [F] | [G] = [A]/[F] | [F] | [G] = [A]/[F] |
| 3/1/2014 - 5/31/2014 | 60 | 5,435 | 1.10% | 14,741 | 0.41% | 44,313 | 0.14% | 85,229 | 0.07% |
| 6/1/2014 - 7/31/2014 | 80 | 5,435 | 1.47% | 15,725 | 0.51% | 46,152 | 0.17% | 85,068 | 0.09% |
| 8/1/2014 - 10/31/2014 | 169 | 5,435 | 3.10% | 16,848 | 1.00% | 47,930 | 0.35% | 89,299 | 0.19% |
| 11/1/2014 - 2/28/2019 | 254 | 5,614 | 4.52% | 23,666 | 1.07% | 59,000 | 0.43% | 93,616 | 0.27% |
| 3/1/2019 - 7/31/2020 | 264 | 6,000 | 4.40% | 32,750 | 0.81% | 85,226 | 0.31% | 112,233 | 0.23% |

*The shipping periods shown correspond to the Firm Transportation Service Agreements between ANR Pipeline and Gulfport Energy Corp. The shipping period, 3/1/2019 - 7/31/2020 does not reflect the full shipping period for any of the transportation service agreements which extend beyond 2020.

(b) Columbia Gas Leach XPress Project

| Shipping Period* | Contract Volume | Leach Xpress Capacity | Leach Xpress Contract Share | Appalachia Production | Appalachia Contract Share | US Tight Shale Production | US Tight Shale Contract Share | US Gross Withdrawals Production | US Gross Withdrawals Contract Share |
|---|---|---|---|---|---|---|---|---|---|
| | (MMcf/d) | (MMcf/d) | (%) | (MMcf/d) | (%) | (MMcf/d) | (%) | (MMcf/d) | (%) |
| | [A] | [B] | [C] = [A]/[B] | [D] | [E] = [A]/[D] | [F] | [G] = [A]/[F] | [F] | [G] = [A]/[F] |
| 12/28/2017 - 12/27/2018 | 100 | 1,530 | 6.54% | 28,587 | 0.35% | 70,246 | 0.14% | 102,132 | 0.10% |
| 12/28/2018 - 12/27/2019 | 100 | 1,530 | 6.54% | 32,178 | 0.31% | 85,549 | 0.12% | 111,953 | 0.09% |
| 12/28/2019 - 7/31/2020 | 100 | 1,530 | 6.54% | 33,238 | 0.30% | 83,550 | 0.12% | 111,868 | 0.09% |

*The shipping periods shown correspond to the Firm Transportation Service Agreement between Columbia Gas Transmission LLC and Gulfport Energy Corp., 1 June 2016. The shipping period, 12/28/2019 - 7/31/2020 does not reflect the full first shipping period which extends to 12/27/2032.

(c) Columbia Gulf Rayne XPress Project

| Shipping Period* | Contract Volume | Rayne Xpress Capacity | Rayne Xpress Contract Share | Appalachia Production | Appalachia Contract Share | US Tight Shale Production | US Tight Shale Contract Share | US Gross Withdrawals Production | US Gross Withdrawals Contract Share |
|---|---|---|---|---|---|---|---|---|---|
| | (MMcf/d) | (MMcf/d) | (%) | (MMcf/d) | (%) | (MMcf/d) | (%) | (MMcf/d) | (%) |
| | [A] | [B] | [C] = [A]/[B] | [D] | [E] = [A]/[D] | [F] | [G] = [A]/[F] | [F] | [G] = [A]/[F] |
| 11/2/2017 - 11/1/2018 | 100 | 1,100 | 9.09% | 27,874 | 0.36% | 68,306 | 0.15% | 100,298 | 0.10% |
| 11/2/2018 - 11/1/2019 | 100 | 1,100 | 9.09% | 31,725 | 0.32% | 83,383 | 0.12% | 110,780 | 0.09% |
| 11/2/2019 - 7/31/2020 | 100 | 1,100 | 9.09% | 33,446 | 0.30% | 85,043 | 0.12% | 112,852 | 0.09% |

*The shipping periods shown correspond to the Firm Transportation Service Agreement between Columbia Gulf Transmission LLC and Gulfport Energy Corp., 1 June 2016. The shipping period, 11/2/2019 - 7/31/2020 does not reflect the full first shipping period which extends to 11/1/2032.

*Sources: EIA, Drilling Productivity Report, 13 October 2020; EIA, US Natural Gas Pipeline Projects; ANR Pipeline Index of Customers, available at http://ebb.anrpl.com/; ANR Pipeline Company Notice of Commencement of Service for the Sulphur Springs Compression Project under CP14-514, 3 November 2015; ANR Pipeline Company Collierville Expansion Project Notice of Commencement of Service under CP16-64, 16 November 2017; Notification of Commencement of Service of ANR Pipeline Company under CP17-9, 5 November 2018; FERC, Letter order granting Columbia Gas Transmission, LLC's 12/13/17 request re the Authorization to Commence Service for the Leach XPress Project under CP15-514, 28 December 2017; FTS Service Agreement between Columbia Gas Transmission, LLC and Gulfport Energy Corporation, 1 June 2016; FERC, FTS-1 Service Agreement between Columbia Gulf Transmission, LLC and Gulfport Energy Corporation, 1 June 2016; FERC, Letter order granting Columbia Gulf Transmission, LLC's 10/26/2017 request for the filing to be placed into service re the Rayne XPress Expansion Project under CP15-539, 2 November 2017.*

### B. US Interstate Gas Pipeline Shipper Types Since 2000

As a result of the FERC's regulatory changes to encourage competition among interstate gas pipeline companies, the type of shipper signing long-term contracts broadened from the traditional gas distribution company to producers, marketers, and others. Agreements between producers and pipelines have the effect of essentially moving various new basins closer to market. The pipeline entrants and the shippers that sign long-term contracts to support capacity embody the type of competitive entry that FERC intended to foster with its actions beginning in 1985.

Table 7 shows total transport capacity approved by the FERC from 2000 through 2020 to date.[53] The FERC has approved construction of 221,283 MMcf/d of transport capacity over the last 20 years showing the entry of competitive pipelines and shippers and thus the success of FERC's efforts to create competition in the market for gas pipeline capacity.

[53] I describe in Appendix C the data gathered to create this table.

**Table 7: The FERC Approved Over 200,000 MMcf/d of Gas Pipeline Capacity for 7 Shipper Types between 2000-2020 (with ANR entries noted in blue, Columbia Gas in green, and Columbia Gulf in red)**

| Year | Approved Capacity (MMcf/d) [1] | Observed Contracted Capacity (MMcf/d) [2] | Approved Distance (Miles) [3] | Producers (MMcf/d) [4] | Regulated Utilities (MMcf/d) [5] | Electric Generators (MMcf/d) [6] | Marketers (MMcf/d) [7] | LNG Facilities (MMcf/d) [8] | Industrial Customers (MMcf/d) [9] | Connected Pipelines (MMcf/d) [10] |
|---|---|---|---|---|---|---|---|---|---|---|
| 2000 | **2,252** [1] | 834 | 1,103 | 52 | 446 | 120 | 182 | 0 | 35 | 0 |
| 2001 | 8,810 | 2,868 | 2,700 | 735 | 946 | 457 | 709 | 0 | 22 | 0 |
| 2002 | **5,824** [2] | 4,212 | 1,590 | 20 | 464 | 3,212 | 506 | 0 | 10 | 0 |
| 2003 | **1,837** [3] | 946 | 388 | 140 | 602 | 201 | 0 | 0 | 2 | 0 |
| 2004 | **8,292** [4] | 6,611 | 619 | 295 | 243 | 96 | 245 | 5,732 | 0 | 0 |
| 2005 | **14,399** [5,6] | 11,433 | 901 | 290 | 697 | 524 | 1,671 | 8,243 | 8 | 0 |
| 2006 | **14,253** [7] | 5,072 | 1,410 | 2,670 | 1,392 | 550 | 0 | 160 | 0 | 300 |
| 2007 | 22,969 | 10,167 | 2,782 | 2,467 | 853 | 1,367 | 2,320 | 2,300 | 0 | 810 |
| 2008 | 10,215 | 5,687 | 2,084 | 1,510 | 253 | 874 | 700 | 2,300 | 0 | 0 |
| 2009 | 12,603 | 6,958 | 1,037 | 1,695 | 1,599 | 1,125 | 2,040 | 0 | 0 | 500 |
| 2010 | 9,096 | 6,079 | 1,551 | 1,085 | 725 | 536 | 2,375 | 810 | 0 | 548 |
| 2011 | 4,023 | 1,635 | 305 | 1,170 | 72 | 223 | 170 | 0 | 0 | 0 |
| 2012 | **4,223** [8] | 2,909 | 192 | 978 | 416 | 0 | 1,425 | 0 | 90 | 0 |
| 2013 | **7,069** [9] | 5,554 | 269 | 844 | 325 | 355 | 2,500 | 1,530 | 0 | 0 |
| 2014 | **10,410** [10,11] | 6,450 | 388 | 600 | 1,220 | 539 | 1,351 | 2,680 | 60 | 0 |
| 2015 | **14,617** [12,13] | 9,408 | 420 | 5,838 | 146 | 546 | 46 | 2,700 | 132 | 0 |
| 2016 | 17,394 | 11,440 | 1,063 | 4,095 | 1,927 | 2,930 | 222 | 1,695 | 336 | 235 |
| 2017 | **17,980** [14,15,16] | 8,271 | 1,697 | 4,119 | 1,260 | 502 | 629 | 1,685 | 76 | 0 |
| 2018 | **7,240** [17] | 4,718 | 635 | 688 | 1,058 | 1,679 | 888 | 0 | 405 | 0 |
| 2019 | 25,227 | 21,475 | 751 | 190 | 585 | 650 | 5,577 | 14,470 | 3 | 0 |
| 2020 | **2,550** [18] | 2,189 | 342 | 500 | 0 | 239 | 0 | 1,450 | 0 | 0 |
| **Total** | 221,283 | 134,913 | 22,226 | 29,980 | 15,229 | 16,723 | 23,557 | 45,754 | 1,177 | 2,393 |

*Sources: FERC Natural Gas Act Section 7(c) Orders, Environmental Assessments, and Final Environmental Impact Statements; S&P Global Market Intelligence, Bloomberg, Company Websites*

*Notes:*

*[1]ANR Pipeline Company 194 MMcf/d project represents 8.6% of total approved capacity in 2000.*

*[2]Columbia Gas Transmission Corporation 270 MMcf/ Rock Springs Expansion project and 135 MMcf/d Delaware Valley Energy Expansion project represent 7.0% of total approved capacity in 2002.*

*[3]ANR Pipeline Company 220 MMcf/d West Leg Expansion project represents 12.0% of total approved capacity in 2003.*

*[4]ANR Pipeline Company 143.4 MMcf/d EastLeg Project and 107.2 MMcf/d NorthLeg project represents 3.0% of total approved capacity in 2004.*

*[5]Columbia Gas Transmission Corporation 171.6 MMcf/d project represents 1.2% of total approved capacity in 2005.*

*[6]ANR Pipeline Company 168.2 MMcf/d Wisconsin 2006 Expansion project represents 1.2% of total approved capacity in 2005.*

*[7]Columbia Gas Transmission Corporation 2.6 MMcf/d project represents 0.02% of total approved capacity in 2006.*

*[8]Columbia Gas Transmission, LLC 246 MMcf/d project represents 5.8% of total capacity in 2012.*

*[9]Columbia Gas Transmission, LLC 444 MMcf/d Smithfield III Expansion project represents 6.3% of total capacity in 2013.*

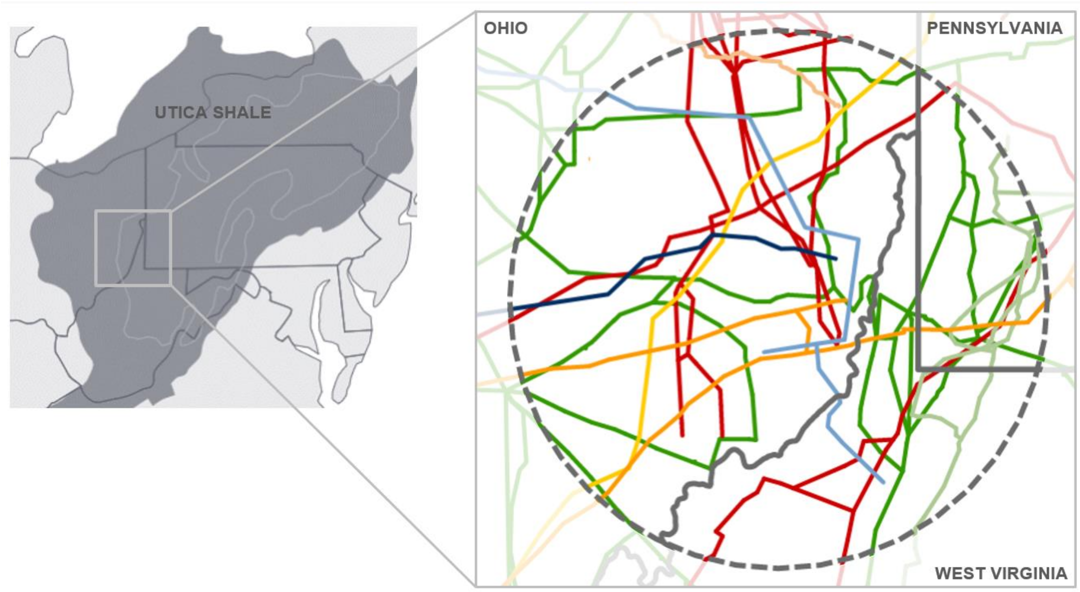
*[10]Columbia Gas Transmission, LLC 312 MMcf/d East Side Expansion project and 15.7 MMcf/d project*

*represent 3.1% of total approved capacity in 2014.*
*[11]ANR Pipeline Company 133.6 MMcf/d Sulphur Springs Compressor Project represents 1.3% of total approved capacity in 2014.*
*[12]Columbia Gas Transmission, LLC 205 MMcf/d Utica Access Project represents 1.4% of total approved capacity in 2015.*
*[13]Columbia Gulf Transmission, LLC 800 MMcf/d project represents 5.5% of total approved capacity in 2015.*
*[14]Columbia Gas Transmission, LLC, 2,600 MMcf/d Mountaineer XPress project, 1,300 MMcf/d WB Express project, 45 MMcf/d Central Virginia Connector project and 1,530 MMcf/d Leach XPress project represent 31.0% of total approved capacity in 2017.*
*[15]ANR Pipeline Company, Wisconsin 230.95 MMcf/d South Expansion represents 1.3% of total approved capacity in 2017.*
*[16]Columbia Gulf Transmission, LLC 860 MMcf/d Gulf XPress project and 621 MMcf/d Rayne Express Expansion project represent 8.2% of total approved capacity in 2017.*
*[17]Columbia Gas Transmission, LLC, 47.5 MMcf/d Eastern Panhandle Expansion project represents 0.7% of total approved capacity in 2018.*
*[18]Columbia Gas Transmission, LLC, 275 MMcf/d Buckeye XPress project represents 10.8% of total approved capacity in 2020.*

Figure 4 shows the concentration of "origin market" gas pipelines in the region in the Utica basin in which Gulfport operates. ANR indirectly serves Gulfport and other producers in the Utica basin via its REX Shelbyville, Lebanon/Dominion, and other receipt points. Columbia Gulf indirectly serves producers in the Utica basin via its interconnections with Columbia Gas and other pipeline operators that directly serve the region. The origin market areas in Figure 4 accord with traditional metrics for pipeline market analysis specified by the foundational 1986 study by the US Department of Justice (DOJ) that framed the analysis of pipeline market power generally in the United States.[54] Those origin markets in Figure 4 are packed with pipelines with concentration measures well below the levels that would cause the DOJ to be concerned about the presence of market power.

[54] U.S. Department of Justice, Antitrust Division, "Oil Pipeline Deregulation: Report of the U.S. Department of Justice, May 1986 ("Oil Pipeline Deregulation"). See also, *The Political Economy of Pipelines*, pp. 72-75.

**Figure 4: Interstate Natural Gas Transport in the Utica Region in Which Gulfport Operates is Highly Competitive**




*The radius of the circle with a dashed grey line is 72 miles. Solid grey lines denote state boundaries. Colored lines denote natural gas pipelines.

| Pipeline Company | Maximum Capacity (Dth/d) | Capacity Share (%) | HHI |
|---|---|---|---|
| | [A] | [B] = [A] / sum[A] | [C] = [B*100]^2 |
| Equitrans | 3,897,459 | 22% | 502 |
| ET Rover Pipeline | 3,331,283 | 19% | 367 |
| Rockies Express Pipeline LLC | 3,267,000 | 19% | 353 |
| Columbia Gas Transmission | 1,779,587 | 10% | 105 |
| Spectra Energy (NEXUS) | 1,537,515 | 9% | 78 |
| Dominion Transmission | 1,440,161 | 8% | 69 |
| Tennessee Gas Pipeline Co | 1,188,591 | 7% | 47 |
| Texas Eastern Transmission | 951,320 | 5% | 30 |
| **Total** | **17,392,917** | **100%** | **1,550** |

*Sources: U.S. Department of Homeland Security, Homeland Infrastructure Foundation-Level Data (HIFLD), Natural Gas Pipelines, Updated August 23, 2019; S&P Global Market Intelligence, Industry Data, Operationally Available Capacity, for the gas day 30 September 2020 (accessed 8 October 2020); U.S. Energy Information Administration, U.S. Natural Gas Pipeline Projects, updated 13 July 2020 (accessed 8 October 2020).*

*Notes: For Equitrans, Rockies Express Pipeline LLC, Columbia Gas Transmission, Dominion Transmission, Tennessee Gas Pipeline Co, and Texas Eastern Transmission, maximum capacity determined as the sum of the maximum capacities of supply lateral lines that originate in counties that reside in the 72-mile radius area in Figure 3, as reported by S&P Global Market Intelligence. For ET Rover Pipeline and Spectra Energy (NEXUS), capacity additions as reported by the U.S. Energy Information Administration.*

### C. The TC Energy Pipelines Will Continue to Operate Regardless of Whether the FERC Modifies or Abrogates the Gulfport Transportation Agreements

Gulfport is one of 15 shippers with transportation agreements with ANR, one of nine shippers with transportation agreements related to the Columbia Gas Leach XPress Project, and one of six shippers with transportation agreements related to the Columbia Gulf Rayne XPress Project.

I show in

Table 8 the rate schedules, start and end dates, receipt and delivery points, and rates associated with each contract for each of ANR's 15 shippers, as reported in ANR's index of customers. The daily revenue to ANR associated with the Gulfport agreements is $76,588, or about 60 percent of the daily revenues that accrue to ANR associated with transportation agreements with receipt points at either REX Shelbyville or Lebanon/Dominion.

I show in Table 9 and Table 10 the same types of information for the Columbia Gulf Rayne XPress Project and the Columbia Gas Leach XPress Project, respectively. With respect to the Columbia Gulf Rayne XPress Project, the daily revenue to Columbia Gulf associated with the Gulfport agreement is $36,600, about 10 percent of the daily revenues that accrue to Columbia Gulf associated with that project. With respect to the Columbia Gas Leach XPress Project, the daily revenue to Columbia Gas associated with the Gulfport agreement is $83,190, about 7 percent of the daily revenues that accrue to Columbia Gas associated with that project.

**Table 8: Contract, Rate, and Revenue Data Pertaining to Shippers on ANR**

| Shipper | Contract Dates | | Capacity | Applicable Recourse | |
|---|---|---|---|---|---|
| | Start | End | | Rate | Revenue |
| | | | (Dth/day) | ($/Dth/day) | ($/day) |
| [A] | [B] | [C] | [D] | [G] | [H] = [D] x [G] |
| ASCENT RESOURCES - UTICA, LLC | 5/1/2014 | 4/30/2024 | 33,000 | $0.266 | $8,780 |
| ASCENT RESOURCES - UTICA, LLC | 5/1/2014 | 4/30/2024 | 33,000 | $0.266 | $8,780 |
| ATMOS ENERGY CORPORATION | 3/1/2014 | 3/31/2022 | 8,000 | $0.288 | $2,306 |
| CIMA ENERGY, LP | 4/1/2020 | 3/31/2021 | 3,000 | $0.266 | $798 |
| CNX GAS COMPANY LLC | 11/1/2015 | 10/31/2025 | 27,143 | $0.266 | $7,221 |
| CNX GAS COMPANY LLC | 11/1/2015 | 10/31/2025 | 20,000 | $0.266 | $5,321 |
| EQT ENERGY, LLC | 10/1/2014 | 9/30/2035 | 5,000 | $0.266 | $1,330 |
| EQT ENERGY, LLC | 10/1/2014 | 9/30/2035 | 5,000 | $0.266 | $1,330 |
| EQT ENERGY, LLC | 11/1/2015 | 10/31/2025 | 11,500 | $0.266 | $3,060 |
| EQT ENERGY, LLC | 11/1/2015 | 10/31/2025 | 10,000 | $0.266 | $2,661 |
| EXELON GENERATION COMPANY, LLC | 11/1/2015 | 3/31/2021 | 167 | $0.266 | $44 |
| EXELON GENERATION COMPANY, LLC | 11/1/2007 | 10/31/2022 | 365 | $0.266 | $97 |
| EXELON GENERATION COMPANY, LLC | 11/1/2015 | 10/31/2022 | 150 | $0.266 | $40 |
| GULFPORT ENERGY CORPORATION | 3/1/2014 | 4/30/2024 | 30,000 | $0.266 | $7,982 |
| GULFPORT ENERGY CORPORATION | 3/1/2014 | 4/30/2024 | 30,000 | $0.266 | $7,982 |
| GULFPORT ENERGY CORPORATION | 3/1/2014 | 4/30/2024 | 20,000 | $0.266 | $5,321 |
| GULFPORT ENERGY CORPORATION | 8/1/2014 | 7/31/2024 | 15,000 | $0.266 | $3,991 |
| GULFPORT ENERGY CORPORATION | 11/1/2014 | 3/31/2036 | 5,000 | $0.266 | $1,330 |
| GULFPORT ENERGY CORPORATION | 3/1/2019 | 3/31/2036 | 10,000 | $0.266 | $2,661 |
| GULFPORT ENERGY CORPORATION | 6/1/2014 | 4/30/2024 | 20,000 | $0.266 | $5,321 |
| GULFPORT ENERGY CORPORATION | 11/1/2014 | 3/31/2036 | 20,000 | $0.266 | $5,321 |
| GULFPORT ENERGY CORPORATION | 11/1/2014 | 3/31/2036 | 10,000 | $0.266 | $2,661 |
| GULFPORT ENERGY CORPORATION | 11/1/2014 | 3/31/2036 | 50,000 | $0.288 | $14,411 |
| GULFPORT ENERGY CORPORATION | 8/1/2014 | 7/31/2024 | 20,000 | $0.266 | $5,321 |
| GULFPORT ENERGY CORPORATION | 8/1/2014 | 7/31/2024 | 20,000 | $0.266 | $5,321 |
| GULFPORT ENERGY CORPORATION | 8/1/2014 | 7/31/2024 | 20,000 | $0.266 | $5,321 |
| GULFPORT ENERGY CORPORATION | 8/1/2014 | 7/31/2024 | 13,700 | $0.266 | $3,645 |
| NORTHERN INDIANA PUBLIC SERVICE COMPANY LL | 11/1/2017 | 3/31/2025 | 33,000 | $0.266 | $8,780 |
| REPSOL ENERGY NORTH AMERICA CORPORATION | 9/1/2020 | 10/31/2020 | 5,000 | $0.266 | $1,330 |
| **Total** | | | | | **$128,466** |

*Sources: ANR Pipeline Company - Index of Customers, October 1 2020,available at http://ebb.anrpl.com/; FERC Gas Tariff Third Revised Volume No. 1 of ANR Pipeline, Statement of Rates, available at http://ebb.anrpl.com/; FERC eTariff ANR Pipeline Company, available at https://etariff.ferc.gov/TariffBrowser.aspx?tid=2220.*

**Table 9: Contract, Rate, and Revenue Data Pertaining to Shippers on Columbia Gulf Associated with the Rayne XPress Project[1]**

| Shipper | Contract Dates | | Capacity | Applicable Shipper[2] | | Applicable Recourse | |
|---|---|---|---|---|---|---|---|
| | Start | End | | Rate | Revenue | Rate | Revenue |
| | | | (Dth/day) | ($/Dth/day) | ($/day) | ($/Dth/day) | ($/day) |
| [A] | [B] | [C] | [D] | [E] | [F] = [D] * [E] | [G] | [H] = [D] x [G] |
| Gulfport Energy Corporation | 11/01/2017 | 10/31/2032 | 100,000 | $0.200 | $20,000 | $0.166 | $16,600 |
| Noble Energy, Inc. | 11/01/2017 | 12/31/2020 | 100,000 | $0.200 | $20,000 | $0.166 | $16,600 |
| Piedmont Natural Gas Company, Inc. | 11/01/2017 | 10/31/2022 | 64,263 | $0.166 | $10,668 | $0.166 | $10,668 |
| Range Resources - Appalachia, LLC | 11/01/2017 | 10/31/2032 | 200,000 | $0.200 | $40,000 | $0.166 | $33,200 |
| Range Resources - Appalachia, LLC | 11/01/2017 | 10/31/2032 | 200,000 | $0.166 | $33,200 | $0.166 | $33,200 |
| EQT Energy, LLC | 01/01/2018 | 10/31/2032 | 50,000 | $0.200 | $10,000 | $0.166 | $8,300 |
| Kaiser Marketing Appalachian, LLC | 01/01/2018 | 12/31/2033 | 400,000 | $0.200 | $80,000 | $0.166 | $66,400 |
| **Total** | | | | | **$213,868** | | **$184,968** |

*Sources: Columbia Gulf Transmission - Index of Customers, October 1 2020, available at http://www.columbiapipeinfo.com/infopost/Default.aspx?assetid=51#; FERC Gas Tariff Third Revised Volume No. 1 of Columbia Gulf Transmission, LLC, Currently Effective Rates, available at http://www.columbiapipeinfo.com/infopost/Default.aspx?assetid=51#; FERC eTariff Columbia Gulf Transmission, LLC, available at https://etariff.ferc.gov/TariffBrowser.aspx?tid=721; FERC, Order Issuing Certificates and Approving Abandonment, Docket No. CP15-539, January 19 2017.*

*Notes:*
*[1]The Columbia Gulf Transmission, LLC, 621 MMcf/d Rayne Xpress Expansion project went into service November 1 2017. The shippers included in this table are ones that started their contract with Columbia Gas Transmission to ship on Rayne Xpress.*
*[2]Negotiated or recourse rate depending on shipper contract.*

**Table 10: Contract, Rate, and Revenue Data Pertaining to Shippers on Columbia Gas Associated with the Leach XPress Project[1]**

| Shipper | Contract Dates | | Capacity | Applicable Shipper[2] | | Applicable Recourse | |
|---|---|---|---|---|---|---|---|
| | Start | End | | Rate | Revenue | Rate | Revenue |
| | | | (Dth/day) | ($/Dth/day) | ($/day) | ($/Dth/day) | ($/day) |
| [A] | [B] | [C] | [D] | [E] | [F] = [D] * [E] | [G] | [H] = [D] x [G] |
| Ascent Resources - Utica, LLC | 01/01/2018 | 12/31/2032 | 200,000 | $0.619 | $123,800 | $0.232 | $46,380 |
| Ascent Resources - Utica, LLC | 01/01/2018 | 12/31/2032 | 161,759 | $0.619 | $100,129 | $0.232 | $37,512 |
| CNX Gas Company LLC | 01/01/2018 | 12/31/2032 | 50,000 | $0.550 | $27,500 | $0.232 | $11,595 |
| EQT Energy, LLC | 01/01/2018 | 12/31/2032 | 50,000 | $0.611 | $30,525 | $0.232 | $11,595 |
| Greylock Production, LLC | 01/01/2018 | 10/31/2060 | 700 | $0.232 | $162 | $0.232 | $162 |
| Greylock Production, LLC | 01/01/2018 | 12/31/2099 | 600 | $0.232 | $139 | $0.232 | $139 |
| Greylock Production, LLC | 01/01/2018 | 12/31/2022 | 5,000 | $0.232 | $1,160 | $0.232 | $1,160 |
| Greylock Production, LLC | 01/01/2018 | 07/31/2022 | 5,000 | $0.232 | $1,160 | $0.232 | $1,160 |
| Greylock Production, LLC | 01/01/2018 | 12/31/2022 | 500 | $0.232 | $116 | $0.232 | $116 |
| Greylock Production, LLC | 01/01/2018 | 03/31/2023 | 500 | $0.232 | $116 | $0.232 | $116 |
| Greylock Production, LLC | 01/01/2018 | 03/31/2023 | 500 | $0.232 | $116 | $0.232 | $116 |
| Greylock Production, LLC | 01/01/2018 | 04/03/2041 | 50 | $0.232 | $12 | $0.232 | $12 |
| Greylock Production, LLC | 01/01/2018 | 12/31/2099 | 496 | $0.232 | $115 | $0.232 | $115 |
| Greylock Production, LLC | 01/01/2018 | 12/31/2024 | 45,000 | $0.232 | $10,436 | $0.232 | $10,436 |
| Greylock Production, LLC | 01/01/2018 | 12/31/2022 | 4,400 | $0.232 | $1,020 | $0.232 | $1,020 |
| Greylock Production, LLC | 01/01/2018 | 12/31/2022 | 36,000 | $0.232 | $8,348 | $0.232 | $8,348 |
| Greylock Production, LLC | 01/01/2018 | 10/31/2021 | 2,900 | $0.232 | $673 | $0.232 | $673 |
| Greylock Production, LLC | 01/01/2018 | 03/21/2028 | 2,650 | $0.232 | $615 | $0.232 | $615 |
| Greylock Production, LLC | 01/01/2018 | 04/30/2021 | 1,504 | $0.232 | $349 | $0.232 | $349 |
| Greylock Production, LLC | 01/01/2018 | 03/31/2039 | 1,300 | $0.232 | $301 | $0.232 | $301 |
| Greylock Production, LLC | 01/01/2018 | 10/31/2024 | 112 | $0.232 | $26 | $0.232 | $26 |
| Greylock Production, LLC | 01/01/2018 | 04/30/2021 | 1,000 | $0.232 | $232 | $0.232 | $232 |
| Greylock Production, LLC | 01/01/2018 | 03/31/2026 | 1,000 | $0.232 | $232 | $0.232 | $232 |
| Greylock Production, LLC | 01/01/2018 | 05/31/2027 | 100 | $0.232 | $23 | $0.232 | $23 |
| Gulfport Energy Corporation | 01/01/2018 | 12/31/2032 | 100,000 | $0.600 | $60,000 | $0.232 | $23,190 |
| Kaiser Marketing Appalachian, LLC | 01/01/2018 | 12/31/2033 | 400,000 | $0.606 | $242,400 | $0.232 | $92,760 |
| Mercuria Energy America, LLC | 01/01/2018 | 03/31/2023 | 39,376 | $0.232 | $9,131 | $0.232 | $9,131 |
| Noble Energy, Inc. | 01/01/2018 | 12/31/2020 | 100,000 | $0.615 | $61,500 | $0.232 | $23,190 |
| Range Resources - Appalachia, LLC | 01/01/2018 | 12/31/2032 | 300,000 | $0.565 | $169,500 | $0.232 | $69,570 |
| **Total** | | | | | **$849,835** | | **$350,273** |

*Sources: Columbia Gas Transmission - Index of Customers, October 1 2020,available at http://www.columbiapipeinfo.com/infopost/; FERC Gas Tariff Third Revised Volume No. 1 of Columbia Gas Transmission, LLC, Currently Effective Rates, available at http://www.columbiapipeinfo.com/infopost/; FERC eTariff Columbia Gas Transmission, LLC, available at https://etariff.ferc.gov/TariffBrowser.aspx?tid=581; FERC, Order Issuing Certificates and Approving Abandonment, Docket No. CP15-514, January 19 2017; FERC, FERC Gas Tariff, Original Volume No. 1.1, Columbia Gas Transmission, LLC.*

*Notes:*
*[1]The Columbia Gas Transmission, LLC, 1,530 MMcf/d Leach Xpress project went into service January 1 2018. The shippers included in this table are ones that started their contract with Columbia Gas Transmission on this date to ship on Leach Xpress.*
*[2]Negotiated or recourse rate depending on shipper contract.*

As is the case for all such pipelines, the TC Energy Pipelines' operating costs are small in relation to their sunk investments (about 2 to 8 percent annually). This makes the incremental earnings of continuing to operate far greater than the incremental cost.[55]

# IV. The Access to Capital Problem

The prospect that the TC Energy Pipelines' revenues may ultimately drop if a particular shipper rejects a contract in bankruptcy bears on the return that TC Energy Pipelines' owners will see on their investments in those specific pipeline projects. But any drop in TC Energy Pipeline revenues (and thereby lower return to TC Energy Pipelines' owners) that such a rejection portends is not material to the wider competitive US gas markets, the continued success of FERC regulation that promotes those markets, or the prospect that other new pipeline entrants, serving other shippers and markets, will secure capital financing.

The United States has a 100-year history of regulating investor-owned utilities; an experience different from almost all of the rest of the world, where the appearance of investor-owned utilities came only with the privatization wave of the late 20th century. For decades, longstanding US regulatory institutions have been helping to square the public interest goals of regulation with the need that enterprises subjected to regulatory control remain "going concerns" with sufficient creditworthiness to attract capital.

Private capital thus plays a key role in the development of major infrastructure projects like utilities and pipelines—driving a wedge between the regulatory experience in the United States and almost everywhere else in the world. Outside the United States, governments financed major public utilities and pipelines with public funds until the late 20th century. Drawing upon such funds, governments were able to do what they wished with public property and the rates charged, since they were not bound (or disciplined) by financing constraints in the same way as investor-owners. Governments can build infrastructure projects that investors would never support, and governments can charge customers either more or less then what those services ultimately cost.

In my many filed testimonies before the FERC and other US regulators regarding the cost of capital (for pipelines, utilities and other companies), as well as my publications on the subject (including

[55] The average annual operating cost ratios (total transmission operating and maintenance expenses divided by end-of-year total transmission plant) for ANR, Columbia Gas, and Columbia Gulf, during the period 2010 to 2019, are 7.21%, 3.93%, and 2.64%, respectively. The average operating cost ratio for all interstate gas transmission pipelines is 4.47% (2010-2019), 5.52% (2000-2019), and 6.10% (1990-2019). Source: FERC Form No. 2, Annual Report of Major Natural Gas Companies.

my book, *The Political Economy of Pipelines*), I have written at length about the very long history of private capital formation for US infrastructure projects (going back to the Erie Canal in 1839-1842, when New York willingly defaulted on its canal bonds—thereafter major infrastructure developers looked to more reliable private capital).[56]

The most defining characteristics of modern US gas pipelines is that they have all been financed by investor-owners under the expectation that *each pipeline would pay for itself*. Having a payment scheme in place for a new pipeline is key. It is the capital market's independent check on the wisdom of any particular line—including its route, size and potential shippers. Furthermore, such pipelines are private property, and in the US, the Constitution prohibits any actions—either by the executive or legislative branches of government—that diminish the value of that private property without due process. None of these underlying institutions defining the substance and credibility of regulation of US utilities and pipelines (among other regulated businesses) is at all threatened by abrogation or modification of the TC Energy Pipelines/Gulfport agreements.

The competitive pipeline transport market that the Commission has fostered in the last two decades has served the public interest very well. Inhibiting rejection of contracts by shippers—particularly when the market is so well informed of shipper problems in contemporary gas markets—would add a component of risk and cost to the decision to exit the market. Costly exit burdens competitive markets. Costly exit harms competition because, by raising costs of exit, it forces competitors to avoid such costs by operating at a loss rather than exit. This, in turn, depresses market prices below the long-run costs of capital. The upshot is that, fearing that capital will be too difficult to repurpose (which is a particular problem for sunk-cost pipelines), putative competitors will not enter without the expectation of above-average returns on the capital invested. Such additional returns compensate for the losses incurred for costly exit.

[56] *See The Political Economy of Pipelines*, pp. 22-25.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 19, 2020

Jeff D. Makholm, Ph.D.

**JEFF D. MAKHOLM, Ph.D.**
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Dr. Makholm concentrates on the issues surrounding the regulation of energy, mining and transportation industries—those that operate networks (such as oil and gas pipelines, electricity transmission and gas distribution systems, telecommunications and water utility systems) and those operating infrastructure business at specific sites, such as mines, hydrocarbon rigs, oil refineries, electricity generation plants, oil and gas storage facilities, gas treatment plants, sewage treatment plants and airports. These issues include the broad categories of project valuation, efficient pricing, market definition and the components of reasonable regulatory practices. Specific valuation issues in the extractive industries include the value of permits for include the right to explore and develop natural resources. Specific pricing issues include tariff design, incentive ratemaking, and the unbundling of prices and services, and analysis of energy commodities markets (including derivative markets comprising forwards, futures and swaps for commodities and liquefied natural gas--LNG). Issues of market definition include assessments of mergers, including the identification and measurement of market power. Issues of reasonable regulatory practices include the creation of credible and sustainable accounting rules for ratemaking as well as the establishment of administrative procedures for regulatory rulemaking and adjudication. On such issues among others, Dr. Makholm has prepared expert testimony, reports and statements, and has appeared as an expert witness in many states, federal and U.S. district court proceedings as well as before courts, international arbitrations and regulatory bodies and Parliamentary panels abroad.

Dr. Makholm's clients in the United States include privately held oil, gas and utility corporations, public corporations and government agencies. He has represented dozens of gas and electric distribution utilities, as well as both intrastate and interstate oil and gas pipeline companies and oil, gas and electricity producers. Dr. Makholm has also worked with many leading law firms engaged in issues pertaining to the local and interstate regulation of energy utilities.

Internationally, Dr. Makholm has directed an extensive number of projects in the mining, utility and energy transportation businesses in 20 countries on six continents. These projects have involved work for investor-owned and regulated business as well as for governments and the World Bank. These projects have included advance pricing and regulatory work prior to major gas, railroad and toll highway privatizations (Poland, Argentina, Bolivia, Mexico, Chile and Australia), gas industry restructuring and/or pricing studies (Canada, China, Spain, Morocco, Mexico and the United Kingdom), utility mergers and market power analyses (New Zealand), gas development and and/or contract and financing studies (Tanzania, Egypt, Israel and Peru), regulatory studies (Chile, Argentina), and oil pipeline transport financing and regulation (Russia). As part of this work, Dr. Makholm has prepared reports, drafted regulations and conducted training sessions for many government, industry and regulatory personnel.

Dr. Makholm has published many papers in various peer-reviewed and editor-reviewed publications (*Review of Environmental Economics and Policy, Economics of Energy & Environmental Policy, Public Utilities Fortnightly*, *Natural Gas and Electricity*, *The Electricity Journal*, *The Energy Law Journal, and Competition and Regulation in Network Industries*)—involving a wide range of subjects pertaining to his research work. He is a frequent speaker in the U.S., Europe and elsewhere at conferences and seminars addressing market, pricing and regulatory issues for the energy, commodity and transportation sectors. His latest book, *The Political Economy of Pipelines: A Century of Comparative Institutional Development*, was published by the University of Chicago Press in 2012 and re-issued in Chinese in 2016 by Beijing's Petroleum Institute Press.

**EDUCATION**

UNIVERSITY OF WISCONSIN-MADISON,
MADISON, WISCONSIN
Ph.D., Economics, 1986
Dissertation: Sources of Total Factor Productivity in the Electric Utility Industry
M.A., Economics, 1985

BROWN UNIVERSITY
PROVIDENCE, RHODE ISLAND
Graduate Study, 1980-1981

UNIVERSITY OF WISCONSIN-MILWAUKEE
MILWAUKEE, WISCONSIN
M.A., Economics, 1980
B.A., Economics, 1978

**EMPLOYMENT**

| | |
|---|---|
| 1996-present | Senior Vice President/Managing Director. National Economic Research Associates, Inc., (NERA) Boston, Massachusetts. |
| 1986-1996 | Vice President/Senior Consultant. National Economic Research Associates, Inc., (NERA) Boston, Massachusetts. |
| 1987-1989 | Adjunct Professor. College of Business Administration, Northeastern University, Boston, Massachusetts |
| 1984-1986 | Consulting Economist. National Economic Research Associates, Inc., (NERA) Madison, Wisconsin. |
| 1983-1984 | Consulting Economist. Madison Consulting Group, Madison, Wisconsin. |
| 1981-1983 | Staff Economist. Associated Utility Services, Inc., Moorestown, New Jersey. |

**TESTIMONY SINCE 1981**

Before the United States Bankruptcy Court for the District of Delaware, Declaration in support of Extraction Oil & Gas, Inc's Omnibus Motion for Entry of An Order (1) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts, Case No. 20-11548, September 21, 2020. Subject: Response to objection to reject oil pipeline transportation services agreements with Grand Mesa Pipeline, LLC in bankruptcy.

Before the United States Bankruptcy Court for the District of Delaware, Declaration in support of Extraction Oil & Gas, Inc's Omnibus Motion for Entry of An Order (1) Authorizing Rejection of Unexpired Leases of Nonresidential Real Property and Executory Contracts, Case No. 20-11548, September 18, 2020. Subject: Response to objection to reject oil pipeline transportation services agreements with Platte River Midstream, LLC and DJ South Gathering, LLC in bankruptcy.

Before the United States Bankruptcy Court Southern District of Texas Houston Division, Declaration in support of Ultra Petroleum Inc.'s Reply in Support of Motion for Entry of an Order Authorizing Rejection of the Firm Transportation Negotiated Rate Agreement with Rockies Express Pipeline LLC Effective as of the Petition Date, Case No. 20-32631, July 2, 2020. Subject: Response to objection to reject a gas pipeline firm transportation agreement in bankruptcy.

Before the United States District Court for the District of Columbia, Second Declaration in Support of Dakota Access, LLC Brief of the Question of Remedy in Standing Rock Sioux Tribe v. United States Army Corps of Engineers, Case No. 1:16-cv-1534-JEB (and Consolidated Case Nos. 16-cv-1796 and 17-cv-267), May 27, 2020. Subject: Response to motion to vacate an easement while the Army Corps of Engineers conducts an environmental impact statement.

Before the Illinois Commerce Commission, Declaration in Support of Motion of Dakota Access, LLC and Energy Transfer Crude Oil Company, LLC. Answer in Opposition to the Petition for Interlocutory Review, Docket No. 19-0673, May 19, 2020. Subject: Authority to expanding pumping capacity on Certificated Pipelines in the State of Illinois.

Before the United States District Court for the District of Columbia, Declaration in Support of Dakota Access, LLC Brief of the Question of Remedy in Standing Rock Sioux Tribe v. United States Army Corps of Engineers, Case No. 1:16-cv-1534-JEB (and Consolidated Case Nos. 16-cv-1796 and 17-cv-267), April 29, 2020. Subject: Response to motion to vacate an easement while the Army Corps of Engineers conducts an environmental impact statement.

Before the United States District Court for the District of Nebraska, Expert Report in Laredo Ridge Wind, LLC; Broken Bow Wind, LLC; and Crofton Bluffs Wind, LLC v. Nebraska Public Power District, Case No. 8:19-cv-45. Subject: Change of control/assignment of contract right provisions in a contract for wind generation.

Before the Illinois Commerce Commission, Supplemental Surrebuttal Testimony on behalf of Dakota Access, LLC and Energy Transfer Crude Oil Company, LLC., Docket No. 19-0673, February 25, 2020. Subject: Authority to expanding pumping capacity on Certificated Pipelines in the State of Illinois.

Before the United States District Court for the District of Nebraska, Declaration in Opposition to the Project Entities' Motion for Summary Judgment in Laredo Ridge Wind, LLC; Broken Bow Wind, LLC; and Crofton Bluffs Wind, LLC v. Nebraska Public Power District, Case No. 8:19-cv-45, February 11, 2020. Subject: Change of control/assignment of contract right provisions in a contract for wind generation.

Before the Illinois Commerce Commission, Surrebuttal Testimony on behalf of Dakota Access, LLC and Energy Transfer Crude Oil Company, LLC., Docket No. 19-0673, January 17, 2020. Subject: Authority to expanding pumping capacity on Certificated Pipelines in the State of Illinois.

**TESTIMONY SINCE 1981 CONTINUED**

Before the Public Service Commission of the State of North Dakota, Direct Testimony on behalf of Dakota Access, LLC, November 13, 2019. Subject: Siting Application for new pumping facilities to expand capacity.

Before the Illinois Commerce Commission, Rebuttal Testimony on behalf of Dakota Access, LLC and Energy Transfer Crude Oil Company, LLC., Docket No. 19-0673, October 22, 2019. Subject: Authority to expanding pumping capacity on Certificated Pipelines in the State of Illinois.

Before the Illinois Commerce Commission, Surrebuttal Testimony on behalf of NextEra Energy Transmission MidAtlantic, Inc., Docket No. 18-0843, June 21, 2019. Subject: Certificate of Public Convenience and Necessity for electricity transmission asset purchase.

In the United States District Court for the Eastern District of New York, Case No.: 17 CIV. 5787 (WFK) (SJB), Expert Declaration on behalf of Just Energy Group, Inc., April 30, 2019. Subject: Pricing for retail energy supply.

Before the Massachusetts Department of Public Utilities, Case No. D.P.U. 18-150 (Massachusetts Electric Company and Nantucket Electric Company), Sur-Rebuttal Testimony on behalf of Cumberland Farms, Global Partners, etc., April 30, 2019. Subject: Electric vehicle charging incentive program.

Before the Illinois Commerce Commission, Rebuttal Testimony on behalf of NextEra Energy Transmission MidAtlantic, Inc., Docket No. 18-0843, March 28, 2019. Subject: Certificate of Public Convenience and Necessity for electricity transmission asset purchase.

Before the Massachusetts Department of Public Utilities, Case No. D.P.U. 18-150 (Massachusetts Electric Company and Nantucket Electric Company), Direct Testimony on behalf of Cumberland Farms, Global Partners, etc., March 22, 2019. Subject: Electric vehicle charging incentive program.

In the United States District Court for the District of Puerto Rico, PROMESA Title III, Case No. 17 BK 3283-LTS and Case No 17 BK 4780-LTS, Expert Declaration on behalf of Movants, February 25, 2019. Subject: Value of receiver in the bankruptcy of the Puerto Rico Electric Power Authority (PREPA).

In the Matter of the Arbitration and Conciliation Act, Cap. A18 Laws of the Federation of Nigeria, 2004, Addax Petroleum Development (Nigeria) Limited**,** Claimant, vs. Chevron Nigeria Limited, Respondent, Expert Report on behalf of Chevron Nigeria Limited, February 22, 2019. Subject: Value of crude oil.

Before the Federal Energy Regulatory Commission, Comments in the Matter of the FERC Notice of Inquiry Regarding Certification of New Interstate Gas Facilities, Docket No. PL18-1-000, July 25, 2018.

Before the Ontario Energy Board, Expert Report and Direct Testimony in case EB-2017-0307 on behalf of Enbridge Gas Distribution and Union Gas Limited regarding support of the productivity offset (the *X-factor*) to be used in the price cap formula that will apply to the two distribution businesses for the upcoming deferred rebasing periods, November 23, 2017.

Before the International Court of Arbitration, Case No. 19576/CA/ASM, Drummond Coal Mining LLC (DCM), et al, Respondents/Counterclaimants, vs. Ferrocarriles del Norte de Colombia S.A.., Claimant/Counter-Respondent, Third Expert Report, 1 November 2017. Subject: Market values of mining export losses due to imposed constraints on capacity.

**TESTIMONY SINCE 1981 CONTINUED**

Before the New York State Public Service Commission, Rebuttal Testimony on behalf of the Retail Energy Supply Association (RESA). October 27, 2017. Subject: Provide perspective regarding the operation of retail energy markets in New York state.

Before the New York State Public Service Commission, Direct Testimony on behalf of the Retail Energy Supply Association (RESA). September 15, 2017. Subject: Provide perspective regarding the operation of retail energy markets in New York state.

Before the International Court of Arbitration, Case No. 19576/CA/ASM, Drummond Coal Mining LLC (DCM), et al, Respondents/Counterclaimants, vs. Ferrocarriles del Norte de Colombia S.A.., Claimant/Counter-Respondent, Second Expert Report, 29 August 2017. Subject: Response to alleged damages claimed as a result of failure to meet contractual rail shipment obligations.

Before the Michigan Public Service Commission, Direct Testimony on behalf of Constellation NewEnergy Inc., Case No U-18248. DTE Electric Company. July 21, 2017. Subject: Economic analysis of proposed charges for electricity capacity in Michigan.

Before the Michigan Public Service Commission, Direct Testimony on behalf of Constellation NewEnergy Inc., Case No U-18239. Consumer's Energy Company. July 17, 2017. Subject: Economic analysis of proposed charges for electricity capacity in Michigan.

Before the International Court of Arbitration, Case No. 19576/CA/ASM, Drummond Coal Mining LLC (DCM), et al, Respondents/Counterclaimants, vs. Ferrocarriles del Norte de Colombia S.A.., Claimant/Counter-Respondent, Expert Report, 20 June 2017. Subject: Market values of mining export losses due to imposed constraints on capacity.

Before the National Energy Board, Expert Report and Reply Testimony on behalf of Plains Midstream Canada ULC. Hearing Order RH-002-2016, May 15, 2017. Subject: Proper cost allocation for liquid fuel pipeline tariffs.

Before the National Energy Board, Expert Report and Direct Testimony on behalf of Plains Midstream Canada ULC. Hearing Order RH-002-2016, November 2016. Subject: Proper cost allocation for liquid fuel pipeline tariffs.

Before the Supreme Court of the State of New York, County of New York, Expert Testimony on behalf of plaintiffs in: S.A. de Obras y Servicios, Copasa and Cointer Chile, S.S. and Azvi Chile, S.A. Agencia en Chile, Plaintiffs v. The Bank of Nova Scotia and Scotiabank Capital, IAS Part 49, Index No. 651649/2013 and 651555/2012. August 10, 2016, Subject: Value of P3 toll road enterprise in Chile.

Before the National Energy Board, Expert Testimony on behalf of FortisBC Energy Inc., Hearing Order Number GH-003-2015, March, 2016. Subject: Tolling for pipeline extensions

Before the Superior Court of the State of Delaware in and for New Castle County, Expert Report on behalf of Deere & Company, in C.A. No. N13C-07-330 MMJ CCLD. December 2, 2015. Subject: Value of Power Purchase Agreements in the wind power industry.

Before the Superior Court of the State of California for the County of Los Angeles in the Matter of GAF Materials Corporation v. Paramount Petroleum Corporation, Opinion given September 3, 2015. Case No: BC 481673. Subject: Oil price indexing to set asphalt prices.

Before the United States District Court for the Northern District of Oklahoma, Expert Report on behalf of SFF-TIR, LLC, the Stuart Family Foundation (et al), Case No. 14-CV-369-TCK-FHM, June 30, 2015. Subject: Fair value of shares in a pipeline industry services firm.

**TESTIMONY SINCE 1981 CONTINUED**

Before the International Chamber of Commerce Expert Report on behalf of STP Energy Pte Ltd. Subject: Valuation of offshore oil and gas exploration permit, April 29, 2015.

Before the Régie de l'énergie, Written Evidence on behalf of Gaz Métro. Subject: Pricing of gas distribution system expansion, January 20, 2015

Before the Supreme Court of Western Australia, Filed Statement on behalf of North West Shelf Pty Ltd, Subject: Value and interpretation of gas swaps agreement, December 24, 2014.

Before the District Court of Tarrant County, Texas, 17th Judicial District, Expert Report of Jeff D. Makholm on behalf of OAO Gazprom, et al, Subject: Valuation of failed LNG import project, November 14, 2014.

Before the National Energy Board, Expert Report and Direct Testimony on behalf of MAS (Market Area Shippers Group), Hearing Order RH-001-2014, July 2014. Subject: Effectiveness of toll design//regime in settlement.

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Before the National Energy Board, Expert Testimony on behalf of Alliance Pipeline, May 22, 2014. Subject: Restructuring services/tolls.

Before the Economic Regulation Authority of Western Australia on behalf of ATCO Gas Australia, March 2014. Subject: Cost accounting for gas pipeline regulation.

Before the 298th Judicial District Court of Dallas County, Texas, Expert Testimony on behalf of plaintiff in Energy Transfer Partners, L.P., and Energy Transfer Fuel, L.P. v. Enterprise Products Partners, L.P., Enbridge (US) Inc., and Enterprise Products Operating LLC, Cause No. 11-12667, February 2014. Subject: Assessment of causation and valuation of damages from lost crude oil pipeline opportunity.

Before the National Energy Board, Expert Testimony on behalf of Enbridge Gas Distribution Inc. and Union Gas limited, Hearing Order MH-001-2013, November 1, 2013. Subject: Tolling issues involving pipeline abandonment.

Before the National Energy Board, Expert Report and Direct Evidence on behalf of MAS (Market Area Shippers Group), Hearing Order RH-001-2013, July 26, 2013. Subject: Contract renewal provisions.

Before the 298th Judicial District Court of Dallas County, Texas, Supplemental Report on behalf of plaintiff in Energy Transfer Partners, L.P., and Energy Transfer Fuel, L.P. v. Enterprise Products Partners, L.P., Enbridge (US) Inc., and Enterprise Products Operating LLC, Cause No. 11-12667, July 24, 2013. Subject: Causation and damages in abandoned joint oil-pipeline venture

Before the 298th Judicial District Court of Dallas County, Texas, Rebuttal Expert Report on behalf of plaintiff in Energy Transfer Partners, L.P., and Energy Transfer Fuel, L.P. v. Enterprise Products Partners, L.P., Enbridge (US) Inc., and Enterprise Products Operating LLC, Cause No. 11-12667, March 2013. Subject: Causation and damages in abandoned joint oil-pipeline venture

Before the 298th Judicial District Court of Dallas County, Texas, Direct Expert Report on behalf of plaintiff in Energy Transfer Partners, L.P., and Energy Transfer Fuel, L.P. v. Enterprise Products Partners, L.P., Enbridge (US) Inc., and Enterprise Products Operating LLC, Cause No. 11-12667, January 2013. Subject: Causation and damages in abandoned joint oil-pipeline venture

**TESTIMONY SINCE 1981 CONTINUED**

Before the Alberta Public Utility Commission, Direct Testimony on behalf of ATCO Electric and ATCO Gas, Proceeding ID #2131, December 2012. Subject: Analysis of ATCO Electric's and ATCO Gas' capital tracker proposals

Before the American Arbitration Association, Expert Report with Dr. Victor P. Goldberg, Case No. AAA No. 16 132 Y 00502 11. December 17, 2012. Subject: Confidential Arbitration.

Before the National Energy Board, Written Evidence on behalf of FortisBC Energy Inc., Hearing Order GH-001-2012, May 29, 2012. Subject: Tariff treatment for pipeline extensions to new Canadian gas production regions.

Before the National Energy Board, Expert Report and Direct Testimony on behalf of Market Area Shippers Group, Hearing Order RH-003-2011, March 2012. Subject: Assessment of TransCanada's omnibus restructuring proposal and commentary on Market Area Shippers Group's alternative solution.

Before the Alberta Public Utility Commission (with Agustin J. Ros). Reply Expert Report. Application No. 1606029, AUC Proceeding 566. February 22, 2012. Subject: Update to TFP analysis and review of PBR plans for the Commission's performance-based regulation initiative.

Before the State Corporation Commission of the State of Kansas, Testimony on Behalf of Coffeyville Resources Refining & Marketing, LLC, Docket No. 12-MDAP-068-RTS. October 25, 2011. Subject: Reasonable ratemaking methodology.

Before the United States Federal Energy Regulatory Commission, Prepared Direct Testimony in Public Utilities Commission of Nevada and Sierra Pacific Power Company v Tuscarora Gas Transmission Company, Docket No. RP11-1823-000. October 17, 2011. Subject: Reasonable interstate gas pipeline tariff levels.

Before the Public Utilities Commission of Nevada, Pre-filed Rebuttal Testimony on behalf of Nevada Power Company and Sierra Pacific Power Company d/b/a NV Energy. Docket Nos. 11-03003, 11-03004 & 11-03005. August 3, 2011. Subject: Prudence of hedging practices.

Before the United States Federal Energy Regulatory Commission, Affidavit in Public Utilities Commission of Nevada and Sierra Pacific Power Company v Tuscarora Gas Transmission Company, Docket No. RP11-1823-000. February 28, 2011. Subject: Reasonable interstate gas pipeline tariff levels.

Before the Public Utilities Commission of Nevada, Prepared Direct on behalf of Nevada Power Company d/b/a NV Energy, 2011 Gas and Electric Deferred Energy Proceeding, Docket No. 11-03___. February 24, 2011. Subject: Prudence of hedging practices.

Before the Public Utilities Commission of Nevada, Prepared Direct on behalf of Sierra Pacific Power Company d/b/a NV Energy, 2011 Gas Deferred Energy Proceeding, Docket No. 11-03___. February 24, 2011. Subject: Prudence of gas hedging practices.

Before the Federal Energy Regulatory Commission and the State of Alaska Regulatory Commission, Prepared Direct Testimony on behalf of Trans Alaska Pipeline System. Docket No. IS09-348-004, *et al*. January 21, 2011. Subject: Prudence of capital rehabilitation costs.

Expert report filed before the Alberta Public Utility Commission (with Agustin J. Ros). Application No. 1606029, AUC Proceeding 566. December 30, 2010. Subject: Total factor productivity study for use in the Commission's performance-based regulation initiative.

**TESTIMONY SINCE 1981 CONTINUED**

Before the Commonwealth of Kentucky, Edmonson Circuit Court. Opinion on behalf of plaintiff in Honeycutt vs. Atmos Energy Corporation. Docket No. 09-CI-00198 and 10-CI-00040. September 10, 2010. Subject: Valuation of natural gas for royalty computations.

Before the Régie de l'Energie, Direct Testimony on behalf of Hydro-Québec TransÉnergie. Demande R-3738-2010. August 2, 2010. Subject: Economic analysis of issues related to the regulatory policies for network upgrades.

Before the Public Utilities Commission of Nevada, Pre-Filed Supplemental Direct Testimony on behalf of Nevada Power Company, Sierra Pacific Power Company d/b/a NV Energy (electric and gas departments), Docket No: 10-03003, 10-03004, 10-03005. May 5, 2010. Subject: Gas hedging.

Before the Arkansas Public Service Commission, Rebuttal Testimony on behalf of Entergy Arkansas, Inc., Docket No. 09-084-U. March 24, 2010. Subject: Justification of the operation of a multi-year formula rate plan.

Before the Public Utilities Commission of Nevada, Pre-Filed Direct on behalf of Nevada Power Company, Docket No. 10-03003. February 26, 2010. Subject: Prudence of gas purchase costs.

Before the New York State Public Service Commission, Rebuttal Testimony on behalf of Rochester Gas and Electric Corporation, Case 09-E--07717 Case 09-G-0718 and New York State Electric & Gas Corporation, Case 09-E-0715, Case 09-E-0716. February 12, 2010. Subject: Cost of equity capital.

Before the Public Utilities Commission of Nevada, Pre-Filed Direct Testimony on behalf of Sierra Pacific Power Company , Docket No. 09-09001. December 15, 2009. Subject: Gas hedging plan.

Before the Public Utilities Commission of Nevada, Pre-Filed Direct Testimony on behalf of Nevada Power Company , Docket No. 09-07003. December 15, 2009. Subject: Gas hedging plan.

Before the New York State Public Service Commission, Direct Testimony on behalf of Rochester Gas and Electric Corporation, Case 09-E--07717 Case 09-G-0718. September 17, 2009. Subject: Cost of capital and capital structure.

Before the New York State Public Service Commission, Direct Testimony on behalf of New York State Electric & Gas Corporation, Case 09-E-0715, Case 09-E-0716. September 17, 2009. Subject: Cost of capital and capital structure.

Before the Arkansas Public Service Commission, Direct Testimony on behalf of Entergy Arkansas, Inc., Docket No. 09-084-U. September 4, 2009. Subject: Justification of the operation of a multi-year formula rate plan.

Submission before the New Zealand Commerce Commission, on behalf of Orion New Zealand Limited, July 31, 2009. Subject: Theory and practice of price cap regulation.

Before the Hawaii Public Utilities Commission, Testimony on behalf of Hawaiian Electric Company Inc., Docket No. 2008-0083. July 2009. Subject: Energy cost adjustment clause.

Before the Public Utilities Commission of Nevada, Pre-Filed Direct Testimony on behalf of Nevada Power Company , Docket No. 09-02____. February 27, 2009. Subject: Prudence of gas purchase costs.

**TESTIMONY SINCE 1981 CONTINUED**

Before the Public Utilities Commission of Nevada, Pre-Filed Direct Testimony on behalf of Sierra Pacific Power Company, Docket No. 09-02_____. February 27, 2009. Subject: Prudence of gas purchase costs.

Before the Department of Public Utility Control of Connecticut, Direct Testimony on behalf of Connecticut Natural Gas Corporation. Docket No. 08-12-06. January 11, 2009. Subject: Cost of capital.

Before the Department of Public Utility Control of Connecticut, Direct Testimony on behalf of Southern Connecticut Gas Corporation. Docket No. 08-12-06. January 11, 2009. Subject: Cost of capital.

Before the Public Utility Commission of Texas, Rebuttal Testimony on behalf of Lone Star Transmission, LLC. Docket No. 35665. November 14, 2008. Subject: Licensing of new electricity transmission projects.

Before the Public Utilities Commission of Ohio, Direct Testimony on behalf of The Dayton Power and Light Company. Case No. 08-1094-EL-SSO. October 10, 2008. Subject: Cost of capital.

Before the Illinois Commerce Commission, Rebuttal Testimony on behalf of Northern Illinois Gas Company, Case No. 08-0363. September 25, 2008. Subject: Cost of capital.

Before the Illinois Commerce Commission, Testimony on behalf of Northern Illinois Gas Company, Case No. 08-0363. April 29, 2008. Subject: Cost of equity.

Before the Illinois Commerce Commission, Rebuttal Testimony on behalf of Shelby Coal Holdings, LLC, Christian Coal Holdings, LLC and Marion Coal Holdings, LLC. Docket No. 07-0446. April 7, 2008. Subject: Pipeline certification and competition in pipeline transport market.

Before the New York State Public Service Commission, Rebuttal Testimony on behalf of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation, Case No. 07-M-0906. January 31, 2008. Subject: Regulatory philosophy/ merger issues.

Before the Public Utilities Commission of Nevada, Rebuttal Testimony on behalf of Sierra Pacific Power Company, Docket No. 07-09016. January 14, 2008. Subject: Stand-alone costs and cost allocation issues.

Before the Public Utilities Commission of Nevada, Rebuttal Testimony on behalf of Sierra Pacific Power Company. Docket No. 07-09016. January 11, 2008. Subject: Allocation of pipeline transport costs.

Before the Illinois Commerce Commission, Testimony on behalf of Shelby Coal Holdings, LLC, Christian Coal Holdings, LLC and Marion Coal Holdings, LLC. Docket No. 07-0446. January 7, 2008. Subject: Pipeline certification and competition in pipeline transport market.

Before the Federal Energy Regulatory Commission, Affidavit on behalf of Consolidated Edison Company of New York, Docket No. OA08-13-000. January 7, 2008. Subject: Planning and allocation of electric transmission costs.

Before the Public Utilities Commission of Nevada, Direct Testimony on behalf of Sierra Pacific Power Company, Docket No. 07-09016. December 14, 2007. Subject: Stand-alone costs and cost allocation issues.

**TESTIMONY SINCE 1981 CONTINUED**

Before the New Hampshire Public Service Commission, Docket No. DE 07-064, invited appearance on an expert panel to present perspectives and answer questions on policies and practices regarding retail gas and electric distribution rate "decoupling," November 7, 2007.

Before the Public Utilities Commission of Nevada, Prefiled Direct Testimony on behalf of Sierra Pacific Power Company, Docket No. 07-05019. May 15, 2007. Subject: Prudence of gas purchase costs.

Before the United States Bankruptcy Court, Southern District of New York, Supplemental Report on behalf of Solutia, Inc., *et al*., Debtors, Case No. 03-17949 (PCB) (Jointly Administered), April 20, 2007. Subject: Discount rate for contract rejection damages.

Before the Public Utilities Commission of Nevada, Rebuttal Testimony on behalf of Sierra Pacific Power Company, Docket No. 06-12001. April 19, 2007. Subject: Stand-alone costs and cost allocation issues.

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Before the United States District Court, District of Kansas, Expert Report on behalf of J.P. Morgan Trust Company, *et al*. in the matter of J.P. Morgan Trust Company, *et al*. V. Mid-America Pipeline Company, *et.al*., Docket No. 05-CV-2231-CM/JPO. March 21, 2007. Title: “Harm to Farmland’s Coffeyville Refinery Expert Report”, by Jeff. D. Makholm.

Before the Public Utilities Commission of Nevada, Prefiled Direct Testimony on behalf of Nevada Power Company, Docket No. 07-01022. January 16, 2007. Subject: Prudence of gas purchase costs.

Before the Public Utilities Commission of the State of Hawaii, Supplemental Testimony on behalf of Hawaii Electric Light Company, Inc., Docket No. 05-0135. December 29, 2006. Subject: Energy cost adjustment clause.

Before the Public Utilities Commission of the State of Hawaii, Testimony on behalf of Hawaiian Electric Company, Inc., Docket No. 2006-0386. December 22, 2006. Subject: Energy cost adjustment clause.

Before the Public Utilities Commission of Nevada, Pre-filed Direct Testimony on behalf of Sierra Pacific Power Company, Docket No. 06-12001. December 1, 2006. Subject: Stand-alone costs and cost allocation issues.

Before the State of New Jersey Board of Public Utilities, Prepared Reply Testimony on behalf of Public Service Electric & Gas, OAL Docket No. PUC1191-06 and BPU Docket No. EO05111005. November 3, 2006. Subject: Unregulated contract prices for telecommunication conduit rental contracts.

Before the State of New Jersey Board of Public Utilities, Rebuttal Testimony on behalf of the New Jersey American Water Company, Case No. WR06030257, October 10, 2006. Subject: Cost of Capital.

Before the Public Utilities Commission of Nevada, Rebuttal Testimony on behalf of Sierra Pacific Power Company, Docket No. 06-05016. October 2, 2006. Subject: Prudence of gas purchase costs.

**TESTIMONY SINCE 1981 CONTINUED**

Before the Federal Energy Regulatory Commission, Reply Testimony on behalf of the State of Alaska, Docket No. OR05-2-001, August 11, 2006. Subject: Relative risk and capital structure for the Trans Alaska Pipeline System (TAPS).

Before the Maine Public Utilities Commission, Response to the Bench Analysis on behalf of Central Maine Power Company, Docket 2005-729. May 19, 2006. Subject: Specification of productivity offset for price cap formula.

Before the Public Utilities Commission of Nevada, Rebuttal Testimony on behalf of Sierra Pacific Power Company, Docket No. 05-12001. May 17, 2006. Subject: Prudence of the company's gas hedging strategy.

Before the Public Utilities Commission of Nevada, Prefiled Direct Testimony on behalf of Sierra Pacific Power Company (Gas Division, WestPac Gas), Docket No. 06-0516. May 15, 2006. Subject: Prudence of the company's gas hedging strategy.

Before the State of New Jersey Board of Public Utilities, Testimony on behalf of the New Jersey American Water Company, Case No. WR06030257, March 29, 2006. Subject: Cost of Capital.

Before the Public Utilities Commission of Nevada, Direct Testimony on behalf of Nevada Power Company, Docket No.06-01016. January 17, 2006. Subject: Prudence of the company's gas hedging costs.

Before the New Brunswick Board of Commissioners of Public Utilities, Rebuttal Testimony on behalf of the Public Intervenor, Board Reference 2005-002. December 30, 2005 (original filing), January 23, 2006 (updated filing). Subject: Cost of capital.

Before the Public Utilities Commission of Nevada, Pre-Filed Direct Testimony on behalf of Sierra Pacific Power Company, Docket No.05-12001. December 1, 2005. Subject: Prudence of the company's gas hedging costs.

Before the Public Utilities Commission of Nevada, Pre-Filed Rebuttal Testimony on behalf of Sierra Pacific Power Company, Docket No.05-9016. December 2, 2005. Subject: Prudence of the company's energy supply plan.

Before the Public Utilities Commission of Nevada, Pre-Filed Rebuttal Testimony on behalf of Nevada Power Company, Docket No.05-9017. December 2, 2005. Subject: Prudence of the company's energy supply plan.

Before the Public Utilities Commission of Ohio, Supplemental Testimony on behalf of The Dayton Power and Light Company. Case No. 05-276-EL-AIR. September 26, 2005. Subject: Cost of capital.

Before the Illinois Commerce Commission, Surrebuttal Testimony on behalf of Northern Illinois Gas Company d/b/a Nicor Gas Company. Case No. 04-0779. May 12, 2005. Subject: Cost of capital.

Before the United States Bankruptcy Court, Northern District of Texas, Fort Worth Division, Reply Report on behalf of Mirant Corporation, et al, Debtors. Case No. 03-46590 (Jointly Administered). April 12, 2005. Subject: Pipeline capacity valuation.

Before the Public Utilities Commission of Nevada, Rebuttal Testimony on behalf of Sierra Pacific Power Company. Docket No 05-1028. April 12, 2005. Subject: Prudence of gas purchase costs.

**TESTIMONY SINCE 1981 CONTINUED**

Before the Illinois Commerce Commission, Rebuttal Testimony on behalf of Northern Illinois Gas Company d/b/a Nicor Gas Company. Case No. 04-0779. April 5, 2005. Subject: Cost of capital.

Before the United States Bankruptcy Court, Northern District of Texas, Fort Worth Division, Report on behalf of Mirant Corporation, et al, Debtors. Case No. 03-46590 (Jointly Administered). March 22, 2005. Subject: Pipeline capacity valuation.

Before the Public Utilities Commission of the State of Oregon, Direct Testimony and Exhibits on behalf of Portland General Electric. Docket No.UE-88 Remand. February 15, 2005. Subject: The cost consequences of abandoning the regulatory compact in Oregon on prudent invested capital.

Before the Louisiana Public Service Commission, testimony on behalf of Entergy Gulf States, Ind., and Entergy Louisiana, Inc., in Re: Analysis of Competitive Implications, Consolidated Docket No. U-21453, et al, January 13, 2005. Subject: Retail electricity competition.

Before the Public Utilities Commission of Nevada, Testimony and Exhibits on behalf of Sierra Pacific Power Company. Docket No 05-1028. January 5, 2005. Subject: Prudence of gas purchase costs.

Before the Public Utility commission of Oregon, Direct Testimony on behalf of Portland General Electric. Docket No. UE-165. November 17, 2004. Subject: Power supply risk related to PGE's hydroelectric generation sources.

Before the Public Utilities Commission of Nevada, Testimony on behalf of Nevada Power Company. Docket No. 04-11028. November 10, 2004. Subject: Examination of the prudence of gas purchase and hedging decision in the Company's 2004 deferral case.

Before the Illinois Commerce Commission, Testimony on behalf of Nicor Gas Company. Docket No. 04-0779. November 1, 2004. Subject: Cost of Capital.

Rebuttal Report for an ad-hoc arbitration on behalf of CITIBANK, N.A. in their case against NEW HAMPSHIRE INSURANCE COMPANY. Policy No. 576/ MF5113500. October 15, 2004. Subject: Claimants right to collect on a political risk insurance policy as a result of the expropriation of a toll-road concession's assets in Argentina.

Before the International Center for the Settlement of Investment Disputes, Testimony on behalf of Azurix Corp., in the case of Azurix Corp v. Government of Argentina in Paris, France, October 11th, 2004. Subject: Expropriation of a water utility concession in the province of Buenos Aires.

Before the Circuit Court of Fairfax, Virginia, Testimony on behalf of Upper Occoquan Sewage Authority in the case against Blake Construction Co., Inc., Poole and Kent, a Joint Venture. Case No. 206595. October 1, 2004. Subject: Valuation of capacity expansion project.

Expert Report for an ad-hoc arbitration on behalf of CITIBANK, N.A. in their case against NEW HAMPSHIRE INSURANCE COMPANY. Policy No. 576/ MF5113500. October 1, 2004. Subject: Claimants right to collect on a political risk insurance policy as a result of the expropriation of a toll-road concession's assets in Argentina.

Before the London Courts of International Arbitration, Rebuttal Report on behalf of CITIBANK, N.A. AND DRESDNER BANK AG in their case against AIG EUROPE (UK) LTD. AND SOVEREIGN RISK INSURANCE. Arbitration No. 3473. September 17, 2004. Subject: Claimants right to collect on a political risk insurance policy as a result of the expropriation of electric utility assets in Argentina.

**TESTIMONY SINCE 1981 CONTINUED**

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**TESTIMONY SINCE 1981 CONTINUED**

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**TESTIMONY SINCE 1981 CONTINUED**

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Before the Kansas Corporation Commission, Prepared Rebuttal Testimony Regarding the Fair Rate of Return on behalf of Kansas Pipeline Partnership and Kansas Natural Partnership, Docket No. 190,362-U, September 23, 1994. Subject: Cost of capital.

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**TESTIMONY SINCE 1981 CONTINUED**

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Before the New Jersey Board of Public Utilities, Prepared Direct Testimony on behalf of South Jersey Gas Company, BRC Docket No. GR91071243J, July 19, 1991. Subjects: Cost of capital and the benefits of weather normalization for gas distribution companies.

Before the Federal Energy Regulatory Commission, Prepared Rebuttal and Additional Supplemental Answering Testimony and Direct Testimony on Behalf of the Algonquin Customer Group of 14 Natural Gas Distribution Companies, Docket No. RP88-67-000, et al., (Texas Eastern Transmission Corporation) July 17, 1991. Subject: Gas pipeline rate design.

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**TESTIMONY SINCE 1981 CONTINUED**

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Before the Federal Energy Regulatory Commission, Prepared Rebuttal Testimony on behalf of the New England Customer Group of 16 Natural Gas Distribution Companies, Docket No. RP88-228-000, et al. (Tennessee Gas Pipeline Company), January 18, 1991. Subjects: Gas pipeline, cost allocation and rate designs.

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**TESTIMONY SINCE 1981 CONTINUED**

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Before the Public Service Commission of the State of New York, Prepared Direct Testimony on behalf of The Brooklyn Union Gas Company, Case No. 89-G-1050, November 22, 1989. Subject: Cost of capital.

Before the Federal Energy Regulatory Commission, Prepared Direct Testimony on behalf of the Algonquin Customer Group of 14 Natural Gas Distribution Companies, in Docket No. RP88-67 000 (Texas Eastern Gas Transmission Corporation), November 21, 1989. Subject: Gas pipeline cost allocation and rate design.

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Before the Public Service Commission of the State of New York, Prepared Rebuttal Testimony on behalf of Empire State Pipeline, Case No. 88-T-132, September 6, 1989. Subject: Gas pipeline market power and evaluation of the economic benefits of new pipeline entry.

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"Regulatory Assessment of the Turkish Electricity Sector." Report prepared for Prisma Energy on the examination of the economic and regulatory risks facing investors in the privatization of the energy infrastructure of Turkey. December 6, 2006.

"Calculation of the X-Factor in the 2nd Reference Report of the Bundesnetzagentur." Report prepared for E. ON Ruhrgas, Germany: Design of a regulatory method based on comparison of average tariffs, consistent with new German legislation on the regulation of gas transmission networks. April 21, 2006. (with Graham Shuttleworth and Michael Kraus).

"Cargo Access Charges for the Jorge Chavez International Airport in Lima, Peru." A report prepared for OSITRAN (Public Transport Infrastructure Regulator) on behalf of Lima Airport Partners S.R.L. February 19, 2004.

A Critique of CEPA's Report on "Productivity Improvements in Distribution Network Operators:" A report for EDF Energy (with Graham Shuttleworth). December 16, 2003.

Advised on Fare Regulation Issues related to the Impending Merger of the MTRC and KCRC Railroad Companies in Hong Kong, Mercer Consulting on behalf of MTRC, 2003-2004.

"Natural Gas Pipeline Access Regulation". Report prepared for BHP Petroleum Pty Ltd., May 31, 2001.

"Manual de Procedimientos para el Sistema Uniforme de Cuentas Regulatorias Eléctricas (SUCRE) de México" (April 2000). The report includes an explanation of each of the accounts needed for regulation, recording procedures and the structure the information should take when reporting to the regulator.

"Investigation into Petronets' Liquid Fuels Pipeline Tariffs: Final Report" (March 9th, 2000). This report presents NERA opinions in the quasi-arbitration of the tariffs disputes in the oil industry in South Africa for their liquids pipelines.

"Seeking Genuine Gas Competition in NSW", prepared for BHP Petroleum Pty. Ltd., February 18, 2000.

"Análisis y Revisión del Recurso de Revocatoria Interpuesto por la Compañía Boliviana de Energía S.A. (COBEE) a la Resolución SSDE Nº 92/99 de la Superintendencia de Electricidad" (September 6, 1999). This report represents NERA's opinion on COBEE's appeal in the electricity tariff review process in Bolivia (report in Spanish).

"Gas Sector Regulation Consultancy Services" report prepared for the Vietnam Oil and Gas Corporation, August 10, 1999.

"Natural Gas Demand Estimation for Guatemala, Honduras and El Salvador" (July 19th, 1999). This report done for an international consortium of companies presents calculations of prices and volumes of natural gas demand for three Central American countries if a pipeline is built from Mexico.

"Comments on East Australian Pipeline Limited Access Arrangements: (July 15, 1999). Report prepared on behalf of Incitec Ltd.

"Supplementary Submission to IPART on AGLGN's Proposed Access Arrangements" on behalf of Incitec Limited (April 27th, 1999). This submission discusses reload practices, customer contributions, operating expenses and recalculates charges for a user of the distribution network in New South Wales, Australia.

"Supplementary Submission to IPART on AGLGN's Proposed Costs and Tariffs" on behalf of BHP (April 15th, 1999). This submission explains how NERA recalculated charges for AGLGN in New South Wales, Australia.

"Initial Comments on AGLGN's Revised Access Arrangement Information" on behalf of BHP (March 20th, 1999). This submission presents NERA's comment to AGLGN submission to IPART in New South Wales, Australia.

"International Restructuring Experience" (February 12th, 1999). This paper surveys a number of countries whose experience of restructuring and competition in the electricity sector is directly relevant to the proposed changes in Mexico – Argentina, Australia, Chile, Guatemala, New Zealand, Norway, Spain, the US and the UK

"Report I: Review of the Regulatory Framework" (January 18th, 1999). This report presents the options for a natural gas framework in Peru.

"Conceptual Framework for the Reform of the Electricity Sector in Mexico: White Paper" (November 24th, 1998). This report represents the White Paper for restructuring of the electricity sector in Mexico which is being used in Congress for debate.

"Precios del Gas Natural para la Generación de Electricidad en el Perú" (November 16th, 1998). This report analyzes different alternatives for the treatment of natural gas prices in the electricity tariff model (report in Spanish).
"Tariffs and Subsidies: Report for the Tariffs Group" (November 10th, 1998). This report presents recommendation on the path for tariffs and subsidies for 1999 to the Electricity Tariffs Group of the Government of Mexico.

"Gasoducto México-Guatemala: Informe Final" (October 22nd, 1998). This report analyzes the legal and regulatory framework in both Mexico and Guatemala and costs and volumes for the building of a natural gas pipeline connecting both countries. A copy of the report was given by President Zedillo (Mexico) to President Arzú (Guatemala) (report in Spanish).

"Checks and Balances in Regulating Power Pools: Seven case Studies. A Report for the Electricity Pool of England and Wales" (September 10th, 1998). This report surveys the regulation of power pools in electricity industries around the world.

"Fuels Policy Group: Recommendations" (September 11th, 1998). This report presents recommendations to the Government of Mexico on their fuels policies for the electricity sector.

"Análisis de Costos e Inversiones. Revisión Tarifaria de Transener" (August 25, 1998). Report given to ENRE (the Argentinean electricity regulator) on behalf of a Consortium of Generators on the analysis of costs and investments to be considered for the revenue requirement of the electricity transmission company (report in Spanish).

"Central America Pipeline: Regulatory Analysis and Proposal" (July 28, 1998). This report presents the regulatory analysis and development of a fiscal, legal and commercial framework proposal for gas import, transportation, distribution and marketing in El Salvador, Honduras and Guatemala regarding the proposed Central American Pipeline.

"Energy Regulation in El Salvador" (July 28, 1998). This report presents a deep analysis of the electricity and natural gas regulatory, legal and tax frameworks in El Salvador.

"Energy Regulation in Guatemala" (July 28, 1998). This report presents a deep analysis of the electricity and natural gas regulatory, legal and tax frameworks in Guatemala.

"The Cost of Capital for Gas Transmission and Distribution Companies in Victoria" (June 22, 1998). Report prepared for BHP Petroleum Pty Ltd.

"Principios Económicos Básicos de Tarificación de Transmisión Eléctrica. Revisión Tarifaria de Transener" (May 26, 1998). The main purpose for this report was to provide an economic and regulatory analysis of laws, decrees, license and documents of the tender to provide advise in the tariff review of Transener (the electricity transmission company in Argentina), to present an economic analysis of transmission tariffs and to provide an opinion on specific topics to be discussed in the public hearing. This report was written for a consortium of generators in Argentina (reports in English and Spanish)

"Asesoría en la Fijación de Tarifas de Transener y Normativa del Transporte, Benchmarking Study" (May 26, 1998). This report compares the costs of Transener (the electricity transmission company in Argentina) with those of other companies elsewhere for a consortium of generators (the electricity transmission company in Argentina).

"International Regulation Tool Kit: Argentina" (March 20, 1998). This document describes the natural gas regulatory framework in Argentina for BG.

"Tarificación de los Servicios Que Prestan las Terminales de Gas LP" (January 9, 1998). The final report given to PEMEX Gas y Petroquímica Básica (México) for the determination of rates for LPG terminals.

"NERA-Pérez Companc Distribution Tariff Model" (January 5, 1998). This report explains the methodology behind NERA's calculations of distribution tariffs for Pérez Companc in Monterrey.

"Monterrey Natural Gas Market Assessment," (January 5, 1998). A series of reports were written to present the results of the market study of the demand for natural gas in the geographic zone of Monterrey to a company interested in bidding for the natural gas distributorship.

"Resolving the Question of Escalation of Phases (bb) and (cc) Under the Maui Gas Sale and Purchase Contract", prepared for the New Zealand Treasury, December 16, 1997.

"Timetable and Regulatory Review for the Monterrey International Public Tender," (December 5, 1997). A description of the necessary steps to bid for a distribution company as well as an explanation and analysis of natural regulations in Mexico for Pérez Companc.

"Economic Issues in the PFR for 18.3.1(I)(bb) & (cc)", prepared for the New Zealand Treasury, November 17, 1997.

"NERA's Distribution Tariff Model" (October 29, 1997). This report explains the methodology behind NERA's calculations of distribution tariffs for MetroGas.

"Evaluation Design Standards for MetroGas," (October 24, 1997). This report dealt with the analytical support resulting from work with MetroGas to create a meticulously-documented security criterion analysis that supported its efforts to obtain due recognition—and appropriate tariff treatment—for its costs.

"Ghana Natural Gas Market Assessment," prepared for the Ministry of Mines and Energy, Ghana (March-July, 1997). A series of four reports assessing prospective gas demand usage and netback prices for a number of proposed pipeline project alternatives.

"Final Report for Russian Oil Transportation & Export Study: Commercial, Contractual & Regulatory Component," prepared for The World Bank, June 25, 1997.

Response to FIEL's criticisms regarding NERA's report "Cálculo del Factor de Eficiencia (X)" (June 2, 1997).

"Impacts on Pemex of Natural Gas Regulations" prepared for Pemex Gas y Petroquímica Básica México, May 21, 1997.

"Market Models for Victoria's Gas Industry: A Review of Options," April 1997, prepared for Broken Hill Proprietary (BHP) Petroleum, to propose an alternative model for gas industry restructuring in Victoria, Australia.

"New Market Arrangements for the Victorian Gas Industry," prepared for Broken Hill Proprietary Petroleum; March 13, 1997.

"CEG Privatization: Comments to the Regulatory Framework," prepared for Capitaltec Consultoria Economica SA describing our comments with respect to the regulatory framework and the license proposed in the privatization of Riogas and CEG in Rio de Janeiro, Brazil; March 7, 1997.

"Determination of the Efficiency Factor (X)," prepared for ENARGAS, Argentina, January 24, 1997.

"Determination of Costs and Prices for Natural Gas Transmission," prepared for Pemex Gas y Petroquímica Básica, México, December 19, 1996.

"Regulating Argentina's Gas Industry," a report prepared for The Ministry of Economy and The World Bank, November 26, 1996.

"Open Access and Regulation," prepared for Gascor, in the State of Victoria, Australia; (October 2, 1996).

"A Review and Critique of Russian Oil Transportation Tariffs (Russian Oil Transportation & Export Study; Commercial, Contractual & Regulatory Component)," prepared for The World Bank, June 13, 1996.

"Tariff Options for Transneft (Russian Oil Transportation & Export Study; Commercial, Contractual & Regulatory Component)," prepared for The World Bank, June 6, 1996.

"Comments on the Proposed Amendments to the Regulation of Airports in New Zealand," prepared for the New Zealand Parliament Select Committee hearings on the regulation of monopolies, March 13, 1996.

"Evaluating the Shell Camisea Project," prepared for Perupetro S.A., Government of Peru, December 8, 1995.

"Towards a Permanent Pricing and Services Regime," prepared for British Gas, London, England, November, 1995.

"Final Report: Gas Competition in Victoria," prepared for Gas Industry Reform Unit, Office of State Owned Enterprises, June 1995.

"Natural Gas Tariff Study," prepared for the World Bank, May 1995, consisting of:

*Principles and Tariffs of Open-Access Gas Transportation and Distribution Tariffs*
*Handbook for Calculating Open-Access Gas Transportation and Distribution Tariffs*

"Economic Implications of the Proposed Enerco/Capital Merger," prepared for Natural Gas Corporation of New Zealand, December 1994.

"Contract Terms and Prices for Transportation and Distribution of Gas in the United States," prepared for British Gas TransCo, November 1994.

"Economic Issues in Transport Facing British Gas," prepared for British Gas plc, December 1993.

"Overview of Natural Gas Corporation's Open-Access Gas Tariffs and Contract Proposals," prepared for Natural Gas Corporation of New Zealand, October 1993.

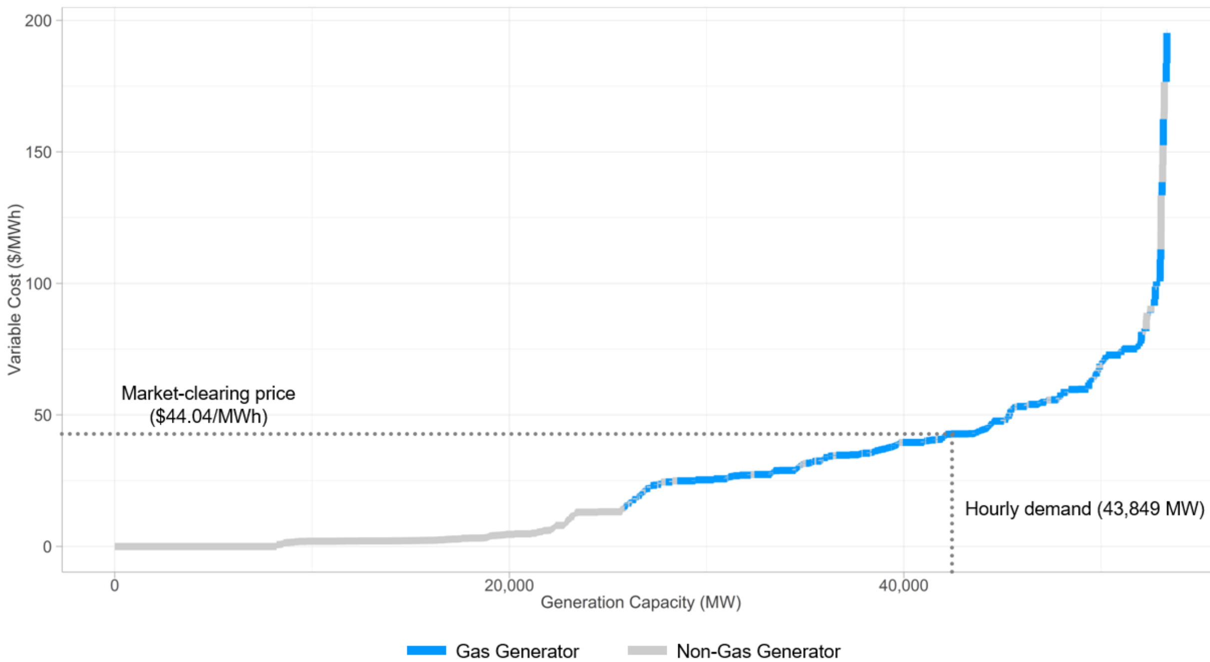
# Appendix B. Public Benefits in the Electricity Market

This appendix describes the methodology used to estimate the annual costs of electricity in unbundled states, net of the cost of consumption of gas for electricity generation, in a scenario with actual historical US gas prices and a scenario in which gas prices are linked to the price of crude as in Europe. This analysis focuses only on unbundled states (US states or portions of US states) that reside in any of the seven regional electricity markets in the US.[1]

In each of those electricity market regions, the price of electricity is set by the variable cost of the most expensive of the electricity generation facilities necessary to meet electricity demand. That "marginal" or "market-clearing" electricity price is determined by the intersection of the demand curve and the generation supply cost curve, where the generation supply cost curve is a monotonic step-wise function in which generation capacity is ordered from lowest to highest with respect to the variable cost of generation. The market-clearing electricity price is determined on an hourly or sub-hourly basis and is paid by electricity consumers in a given market region to all generators selling into those markets (whether gas, coal, nuclear or renewable). A generator earns profit to the extent that the market-clearing price exceeds the cost that it incurs to operate. Figure 1 illustrates a generator supply cost curve, the hourly demand, and the market-clearing price, for a given date and hour (August 16, 2019 01:00 AM) and a given electricity market region (CAISO).

[1] Those regional electricity markets are the California Independent System Operator (CAISO), the Electricity Reliability Council of Texas (ERCOT), the Independent System Operator-New England (ISO-NE), the New York Independent System Operator (NYISO), the Midcontinent Independent System Operator (MISO), PJM Interconnection LLC (PJM), and the Southwest Power Pool (SPP).

**Figure 1: Generator Supply Cost Curve, Hourly Demand, and Market-Clearing Price, CAISO August 16, 2019 01:00 AM[2]**




*Source: NERA analysis with data from the U.S. Energy Information Administration (EIA), S&P Global Market Intelligence, and Bloomberg.*

This analysis estimates the market-clearing price in each of the seven electricity market regions and in each hour for the period 2007 to 2019 by identifying the variable cost of the generator at the point at which the demand curve intersects the generation supply cost curve.

With respect to the demand curve, the analysis assumes that demand is inelastic to price, that is, that hourly demand would not change from its historical values even if prices had been higher or lower than actual historical prices.[3] The U.S. Energy Information Administration (EIA) reports historical hourly

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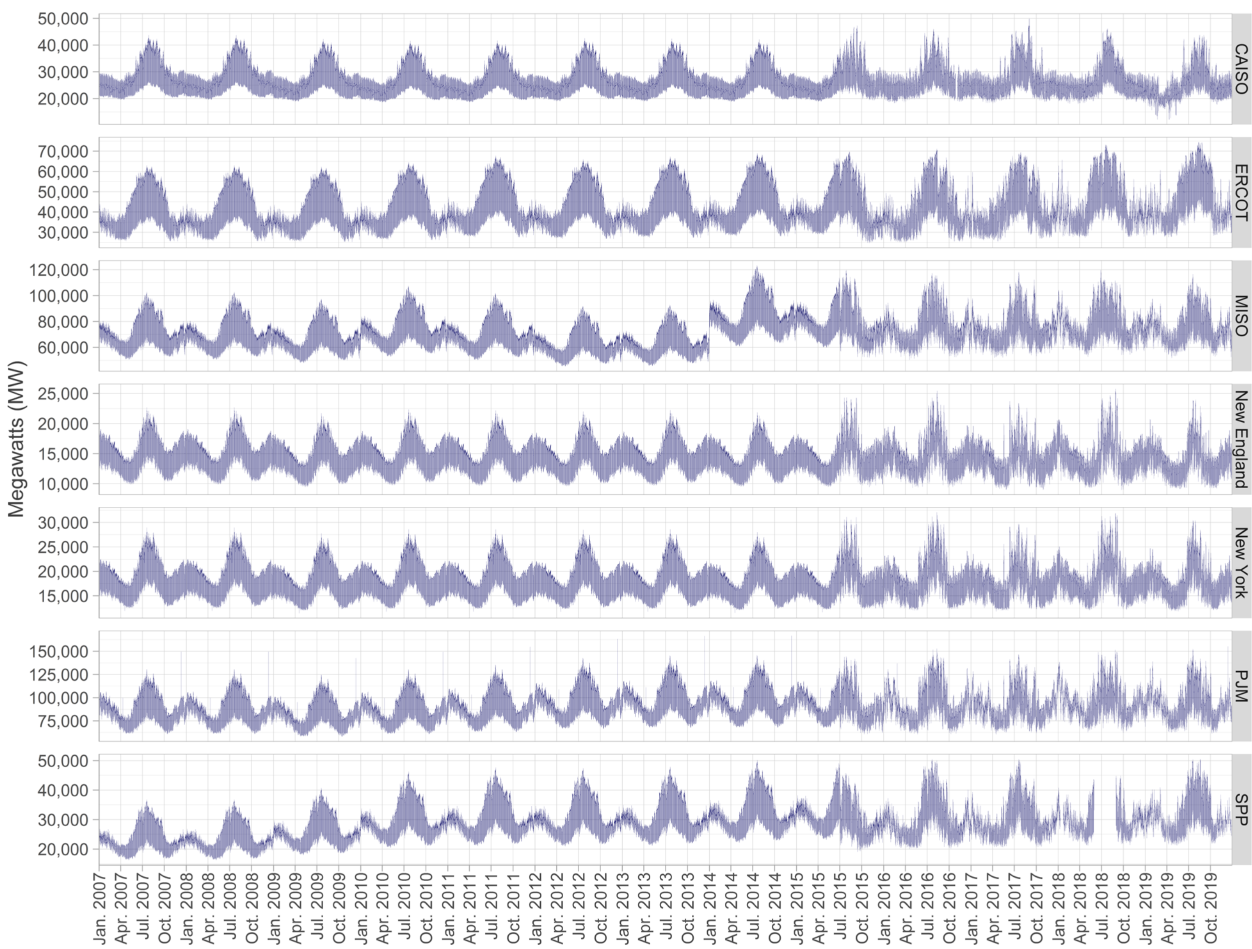
[2] As the highest hour of demand for CAISO in 2019, August 16/1AM provides a useful illustration of the analysis of hourly demand and generator supply conducted for each electricity market region between 2007 and 2019. Other hours/market regions could have also been used to illustrate this analysis.

[3] Any such computations dealing with counterfactual price changes should acknowledge that there would be a demand elasticity effect—which I have not computed here, but which would mean a somewhat lower net result associated with such a major change in consumer energy costs. A 2018 study of 300 million California gas residential consumer bills found price elasticity of demand to be between -0.23 and -0.17 (see Auffhammer, M. and E. Rubin, "Natural Gas Price Elasticities and Optimal Cost Recovery Under Consumer Heterogeneity: Evidence from 300 Million Natural Gas Bills," NBER Working Paper 24295, available at https://www.nber.org/papers/w24295.pdf).

demand in each region from July 1, 2015 to December 31, 2019. [4] For the period January 1, 2007 to June 30, 2015 (in which data are unavailable), I estimate hourly demand. Figure 2 shows, for each regional electricity market, the hourly demand profile used in my estimates of those hourly market-clearing prices.

**Figure 2: Hourly Electricity Demand in US Electricity Market Regions, January 1, 2007-June 30, 2015 (Estimates) and July 1, 2015 to December 31, 2019 (Actual)**




*Source: NERA analysis with data from EIA and S&P Global Market Intelligence.*

S&P Global Market Intelligence reports generator-unit specific supply cost curves.[5] Those data include annual information about the locations, variable operation costs, and fuel costs (which are a part of variable operation costs) for every electricity generation unit in the United States. I construct two sets of generation supply cost curves: one set of curves in which actual historical US natural gas prices

[4] U.S. Electricity Information Administration (Open Data, U.S. Electric System Operating Data, downloaded June 2020).

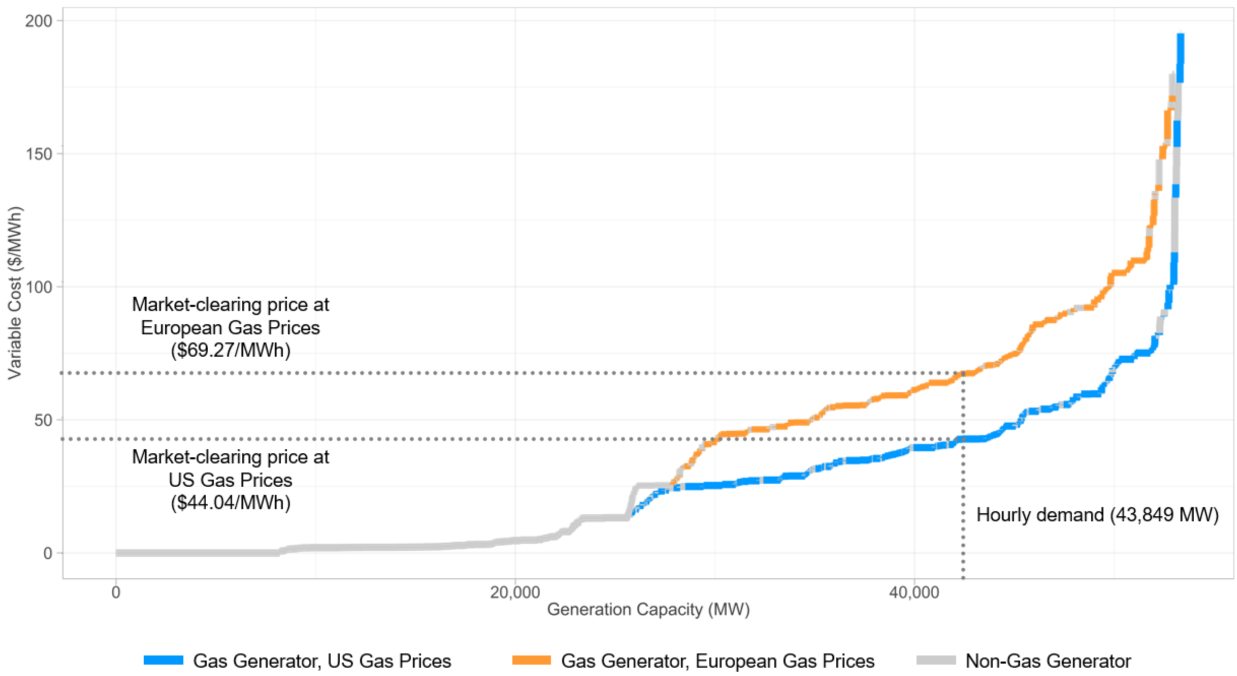
[5] S&P Global Market Intelligence (Asset Data, Power Plant Units, downloaded June 2020).

comprise a part of natural gas generators' variable costs; and another in which historical European-like natural gas prices comprise a part of natural gas generators' variable costs (defined by adding to actual US prices the difference between historical daily Henry Hub gas prices and historical daily U.K. National Balancing Point (NBP) gas prices).[6] Both sets of generation supply costs curves use a fixed stock of generation capacity.

Figure 3 illustrates the impact of European-like gas prices on the generation supply cost curve in CAISO in 2019. The impact on the supply curve of higher natural gas prices is to shift the curve upward such that the market-clearing price for a given level of demand is higher than it would have been if natural gas prices had been at their historical US levels. Figure 3 shows that higher natural gas prices would have resulted in greater total revenue for generators and a higher total cost to electricity consumers (as reflected by higher market-clearing prices).

[6]Henry Hub prices: Bloomberg (Ticker NG1 Comdty); NBP Prices: Bloomberg (Ticker NBPG1MON SPEC Index) converted to US dollars with (Ticker GBPUSD Curncy).

**Figure 3: Illustration of the Impact of Higher Gas Fuel Prices on a Generation Supply Cost Curve and Market-Clearing Price, CAISO August 16, 2019 01:00 AM[7]**




*Source: NERA analysis with data from EIA, S&P Global Market Intelligence, and Bloomberg.*

I estimate the market-clearing price for each hour and each electricity market region using two sets of generation supply cost curves: one set in which natural gas prices reflect actual historical US gas prices, and the other in which natural gas prices reflect European-like gas prices. The market-clearing price is the intersection of the demand curve and the generation supply cost curve.

To estimate the hourly cost to electricity consumers, I multiply the hourly market-clearing price by hourly electricity demand. Part of that cost to customers includes costs incurred by natural gas-fired generation units associated with those units' purchase and use of natural gas as generation fuel. Table 3 in my declaration describes cost savings from lower US prices as compared to European prices (in all sectors including electricity generation). To avoid including that cost again in this analysis, I subtract the cost of gas fuel consumption from the total cost to electricity consumers. Gas fuel costs are equal to the hourly generation of each gas-fired unit (MWh) multiplied by each unit's heat rate (MMBtu/MWh). That

[7] As the highest day of demand for CAISO in 2019, August 16/1AM provides a useful illustration of the analysis of hourly demand and generator supply conducted for each electricity market region between 2007 and 2019. Other hours/market regions could have also been used to illustrate this analysis.

product is then multiplied by the cost of gas fuel (in units of US$/MMBtu), whether that cost is the actual historical US cost of gas or the European-like cost of gas.

Table 1 below provides the results of my analysis (a reproduction of Table 4 in my declaration).[8]

## Table 1: Cost of Electricity (Net of Gas Fuel Costs) in Unbundled States, at US and European Gas Prices

| | US Electricity Demand in Unbundled States* | Average US Marginal Electricity Price† in Unbundled States (per MWh) | | Total US Cost of Electricity in Unbundled States (Billion US$) | | US Cost of Gas Fuel for Electricity Generation in Unbundled States (Billion US$) | | US Cost of Electricity Net of Gas Fuel Costs in Unbundled States (Billion US$) | | Cost Differential | Cumulative Since 2007 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Year | Million MWh | At US Gas Prices | At European Gas Prices | At US Gas Prices | At European Gas Prices | At US Gas Prices | At European Gas Prices | At US Gas Prices | At European Gas Prices | (Billion US$) | (Billion US$) |
| [1] | [2] | [3] | [4] | [5] ≈ [2] * [3] | [6] ≈ [2] * [4] | [7] | [8] | [9] = [5] - [7] | [10] = [6] - [8] | [11] = [10] - [9] | [12] |
| 2007 | 2,535 | $ 30.88 | $ 34.36 | $ 75.23 | $ 82.44 | $ 9.75 | $ 9.52 | $ 65.48 | $ 72.92 | 7.44 | $ 7.44 |
| 2008 | 2,542 | $ 30.87 | $ 34.36 | $ 75.41 | $ 82.63 | $ 9.77 | $ 9.53 | $ 65.64 | $ 73.10 | 7.46 | $ 14.90 |
| 2009 | 2,463 | $ 30.32 | $ 33.69 | $ 71.00 | $ 77.57 | $ 8.72 | $ 8.40 | $ 62.29 | $ 69.18 | 6.89 | $ 21.79 |
| 2010 | 2,609 | $ 32.88 | $ 41.78 | $ 80.84 | $ 97.50 | $ 8.54 | $ 9.30 | $ 72.30 | $ 88.21 | 15.91 | $ 37.70 |
| 2011 | 2,629 | $ 32.60 | $ 54.95 | $ 82.43 | $ 125.21 | $ 10.50 | $ 12.72 | $ 71.92 | $ 112.49 | 40.56 | $ 78.26 |
| 2012 | 2,611 | $ 27.15 | $ 55.20 | $ 70.35 | $ 128.59 | $ 13.95 | $ 12.27 | $ 56.41 | $ 116.32 | 59.91 | $ 138.18 |
| 2013 | 2,637 | $ 34.27 | $ 62.85 | $ 84.02 | $ 144.51 | $ 12.10 | $ 14.98 | $ 71.92 | $ 129.53 | 57.61 | $ 195.78 |
| 2014 | 2,843 | $ 39.83 | $ 57.70 | $ 102.90 | $ 143.51 | $ 11.85 | $ 13.66 | $ 91.05 | $ 129.86 | 38.81 | $ 234.59 |
| 2015 | 2,742 | $ 27.71 | $ 42.94 | $ 72.29 | $ 107.30 | $ 14.47 | $ 9.00 | $ 57.82 | $ 98.29 | 40.47 | $ 275.06 |
| 2016 | 2,716 | $ 22.55 | $ 31.52 | $ 61.64 | $ 83.67 | $ 13.13 | $ 9.06 | $ 48.51 | $ 74.61 | 26.10 | $ 301.17 |
| 2017 | 2,685 | $ 24.88 | $ 34.86 | $ 65.55 | $ 90.15 | $ 11.17 | $ 7.37 | $ 54.39 | $ 82.79 | 28.40 | $ 329.56 |
| 2018 | 2,690 | $ 29.00 | $ 47.33 | $ 74.35 | $ 117.38 | $ 12.01 | $ 10.48 | $ 62.34 | $ 106.90 | 44.57 | $ 374.13 |
| 2019 | 2,721 | $ 22.01 | $ 32.68 | $ 61.94 | $ 89.14 | $ 12.84 | $ 9.57 | $ 49.10 | $ 79.57 | 30.47 | **$ 404.61** |

*Sources: S&P Global Market Intelligence, U.S. Energy Information Administration.*
*Notes: *States within the seven US regional electricity markets: CAISO, ERCOT, ISO-NE, MISO, NYISO, PJM, and SPP. †Average of hourly energy market-clearing prices in the seven regional electricity markets in the US.*

[8] I conducted this analysis in "R," an open-source statistical programming language (see The R Project for Statistical Computing: https://www.r-project.org/). The input data files, output and program are available upon request.

# Appendix C. Competitive Entry of Pipelines

This appendix describes the methodology used to collect and analyze the shippers associated with every major pipeline project approved by the Federal Energy Regulatory Commission (the FERC) between 2000 and 2020. The FERC publishes a list of these projects on its website with docket number, company/project, capacity, miles of pipe, compression, states, application date, and order issue date.[1] For each project, NERA reviewed FERC Section 7(c) orders, environmental assessments (EAs), or final environmental impact statements (FEIS) to collect shipper names and contracted capacities, where available. Next, NERA assigned each identified shipper to one of seven categories that describe the company's primary line of business:[2]

1. **Producers**: Companies engaged in the exploration, development, and extraction of natural gas.
2. **Regulated Utilities**: Includes gas distributors, electric distributors, and combined gas/electric utilities. Gas distributors engage in the sale of natural gas to residential and/or non-residential customers through local distribution systems. Electric distributors engage in the sale, transmission, and delivery of electricity to customers through distribution wires. Combined utilities engage in both gas and electric distribution.
3. **Electric Generators**: Natural gas-fired electric generators.
4. **Marketers**: Companies that engage in the financial and physical trading of natural gas.
5. **LNG Facilities**: Shippers associated with liquified natural gas (LNG) import and export facilities.
6. **Industrial Customers**: Shippers that use natural gas as a factor of their production.
7. **Connected Pipelines**: Pipeline companies connecting to adjacent pipelines through traditional contracts or capacity leases.

NERA identified shippers and contracted capacity for 60 percent of the total FERC-approved capacity. This analysis does not include those projects whose shippers were not identified, either because they were classified as confidential by the FERC or otherwise not listed in the FERC Section 7(c) orders or other documents. Table 1 shows total transport capacity approved by FERC between 2000 and up until the latest data for 2020 available, with observed shippers classified according to the categories described.

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[1] *See* FERC Natural Gas Approved Major Pipeline Projects, last accessed 15 October 2020, available at https://ferc.gov/industries-data/natural-gas/approved-major-pipeline-projects-2015-present.

[2] See below for shippers' names, capacity, and category sources.

**Table 1: The FERC Approved Over 200,000 MMcf/d of Gas Pipeline Capacity for 7 Shipper Types between 2000-2020 (with Rover entry noted)**

| Year | Approved Capacity (MMcf/d) [1] | Observed Contracted Capacity (MMcf/d) [2] | Approved Distance (Miles) [3] | Producers (MMcf/d) [4] | Regulated Utilities (MMcf/d) [5] | Electric Generators (MMcf/d) [6] | Marketers (MMcf/d) [7] | LNG Facilities (MMcf/d) [8] | Industrial Customers (MMcf/d) [9] | Connected Pipelines (MMcf/d) [10] |
|---|---|---|---|---|---|---|---|---|---|---|
| 2000 | 2,252 | 834 | 1,103 | 52 | 446 | 120 | 182 | 0 | 35 | 0 |
| 2001 | 8,810 | 2,868 | 2,700 | 735 | 946 | 457 | 709 | 0 | 22 | 0 |
| 2002 | 5,824 | 4,212 | 1,590 | 20 | 464 | 3,212 | 506 | 0 | 10 | 0 |
| 2003 | 1,837 | 946 | 388 | 140 | 602 | 201 | 0 | 0 | 2 | 0 |
| 2004 | 8,292 | 6,611 | 619 | 295 | 243 | 96 | 245 | 5,732 | 0 | 0 |
| 2005 | 14,399 | 11,433 | 901 | 290 | 697 | 524 | 1,671 | 8,243 | 8 | 0 |
| 2006 | 14,253 | 5,072 | 1,410 | 2,670 | 1,392 | 550 | 0 | 160 | 0 | 300 |
| 2007 | 22,969 | 10,167 | 2,782 | 2,467 | 853 | 1,367 | 2,320 | 2,300 | 0 | 810 |
| 2008 | 10,215 | 5,687 | 2,084 | 1,510 | 253 | 874 | 700 | 2,300 | 0 | 0 |
| 2009 | 12,603 | 6,958 | 1,037 | 1,695 | 1,599 | 1,125 | 2,040 | 0 | 0 | 500 |
| 2010 | 9,096 | 6,079 | 1,551 | 1,085 | 725 | 536 | 2,375 | 810 | 0 | 548 |
| 2011 | 4,023 | 1,635 | 305 | 1,170 | 72 | 223 | 170 | 0 | 0 | 0 |
| 2012 | 4,223 | 2,909 | 192 | 978 | 416 | 0 | 1,425 | 0 | 90 | 0 |
| 2013 | 7,069 | 5,554 | 269 | 844 | 325 | 355 | 2,500 | 1,530 | 0 | 0 |
| 2014 | 10,410 | 6,450 | 388 | 600 | 1,220 | 539 | 1,351 | 2,680 | 60 | 0 |
| 2015 | 14,617 | 9,408 | 420 | 5,838 | 146 | 546 | 46 | 2,700 | 132 | 0 |
| 2016 | 17,394 | 11,440 | 1,063 | 4,095 | 1,927 | 2,930 | 222 | 1,695 | 336 | 235 |
| 2017 | **17,980** [1,2] | 8,271 | 1,697 | 4,119 | 1,260 | 502 | 629 | 1,685 | 76 | 0 |
| 2018 | 7,240 | 4,718 | 635 | 688 | 1,058 | 1,679 | 888 | 0 | 405 | 0 |
| 2019 | 25,227 | 21,475 | 751 | 190 | 585 | 650 | 5,577 | 14,470 | 3 | 0 |
| 2020 | 2,550 | 2,189 | 342 | 500 | 0 | 239 | 0 | 1,450 | 0 | 0 |
| Total | 221,283 | 134,913 | 22,226 | 29,980 | 15,229 | 16,723 | 23,557 | 45,754 | 1,177 | 2,393 |

*Sources: FERC Natural Gas Act Section 7(c) Orders, Environmental Assessments, and Final Environmental Impact Statements; S&P Global Market Intelligence, Bloomberg, Company Websites.*

*Notes:*

[1] Rover Pipeline 3,250 MMcf/d project and Rover Pipeline, 100 MMcf/d Majorsville Compressor 3 project represent 18.6% of total approved capacity in 2017.

[2] Rover Pipeline contracted for capacity on the Panhandle Backhaul Project (750 MMcf/d) and Trunkline Backhaul Project (750 MMcf/d), representing 8.3% of total approved capacity in 2017.

The type of project and associated shippers vary year-by-year. As such, the next sections describe the projects in each year in more detail.

## 2000

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2000 | 8 | 2,252 | 834 | 1,102.8 | 151,096 | AR, AZ, CA, CO, IA, IL, IN, LA, NM, UT, WI, WY |

The FERC approved eight projects with a total capacity of 2,252 MMcf/d and more than 1,100 miles of pipeline. NERA observed shippers for seven projects. Florida Gas Transmission adds the most mileage of any project, 205 miles, and has seven shippers: one gas distributor, three power producers, one power distributor, and two industrial consumers.

Across all projects for which we observed shipper names and categories there are three producers, eight gas distributors, six power producers, one power distributor, five combined utilities, five marketers, four industrial consumers, and one connected pipeline. Four projects have four or more shippers, and one project has unobserved shippers: ANR Pipeline Company (Wisconsin Market).

## 2001

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2001 | 28 | 8,810 | 2,868 | 2,700.3 | 891,767 | AL, AZ, CA, CO, FL, GA, IL, KS, MA, ME, MS, NC, NE, NJ, NM, NV, NY, PA, SC, TN, TX, UT, WA, WY |

The FERC approved 28 projects with a total capacity of 8,810 MMcf/d and about 2,700 miles of pipeline. NERA observed shippers for 22 projects. El Paso Natural Gas Company (Line No. 2000 Project) adds the most mileage of any project, 785 miles, and its shipper is unobserved. Gulfstream Natural Gas System, L.L.C. adds 753 miles.

Across all projects there are 24 producers, 16 gas distributors, 22 power producers, one power distributor, 14 combined utilities, 32 marketers, four industrial consumers, and one connected pipeline. Ten projects have four or more shippers, and six projects have unobserved shippers: Gulfstream Natural Gas System, L.L.C., El Paso Natural Gas Company, Maritimes & Northeast Pipeline, L.L.C., Tennessee

Gas Pipeline Company (Dracut Expansion), Maritimes & Northeast Pipeline, L.L.C. (Phase III Project), Iroquois Gas Transmission (Eastchester Extension).

## 2002

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2002 | 21 | 5,824 | 4,212 | 1,590 | 301,954 | AL, AZ, CA, CO, CT, GA, ID, LA, MS, NC, NJ, NV, NY, OH, OR, PA, SC, TN, TX, UT, VA, WA, WY |

The FERC approved 21 projects with a total capacity of 5,824 MMcf/d and about 1,500 miles of pipeline. NERA observed shippers for 19 projects. Kern River Gas transmission company adds the most mileage of any project, 716.7 miles and it has 17 shippers, most of which are power producers.

Across all projects there is one producer, 16 gas distributors, 49 power producers, one power distributor, six combined utilities, seven marketers, and five industrial consumers. Nine projects have four or more shippers, and three projects have unobserved shippers: Northwest Pipeline Corporation (Rockies Displacement Project), Algonquin Gas Transmission Company (Islander East Project) and National Fuel Gas Supply/Dominion Transmission/ Tennessee Gas (2002 Ellisburg-Leidy Joint Facilities Expansion/ Can-East Project) Pipeline Company.

## 2003

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2003 | 18 | 1,837 | 946 | 387.6 | 223,045 | AL, AZ, CO, DE, IL, MN, MT, ND, NM, NV, PA, TN, TX, VA, WA, WI, WY |

The FERC approved 18 projects with a total capacity of 1,837 MMcf/d and more than 300 miles of pipeline. NERA observed shippers for ten projects. The mileage added to pipelines in 2003 is lower than in previous years: most projects add less than 10 miles. Williston Basin Interstate Pipeline Company (Grasslands Pipeline Project) adds the most mileage of any project, 253 miles and it has unobserved shippers.

Across all projects there is one producer, 12 gas distributors, four power producers, two power distributors, six combined utilities, one marketer, and two industrial consumers. Four projects have four or more shippers, and eight projects have unobserved shippers: Northwest Pipeline Corporation, Transcontinental Gas Pipe Line Corp. Mobile Bay Replacement Project, El Paso Natural Gas Company Line 2000 Power-Up Project (Phase I) Phase I, El Paso Natural Gas Company Line 2000 Power-Up Project (Phase II) Phase II, El Paso Natural Gas Company Line 2000 Power-Up Project (Phase III) Phase III, Williston Basin Interstate Pipeline Company (Grasslands Pipeline Project), Northern Natural Gas Company Project MAX and Regent Resources Ltd.

## 2004

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2004 | 22 | 8,292 | 6,611 | 619.4 | 93,665 | AR, CO, CT, FL, KS, LA, MA, NM, NV, OK, RI, SC, TX, UT, WA, WI, WY |

The FERC approved 22 projects with a total capacity of 8,292 MMcf/d and more than 600 miles of pipeline. NERA observed shippers for 12 projects. Cheyenne Plains Gas Pipeline Company Cheyenne Plains Project adds the most mileage of any project, 387.2 miles and has 14 unobserved shippers.

Across all projects there are five producers, three gas distributors, four related to LNG facilities, two power producers, and three marketers. The LNG projects are in FL and LA and add a total of 134.2 miles of pipeline. Three projects have four or more shippers, and 10 projects have unobserved shippers: Paiute Pipeline Company, Trunkline Gas Company, LLC, Natural Gas Pipeline Company of America, Algonquin Gas Transmission Company I-8 System Uprate Project, ANR Pipeline Company NorthLeg Project, Discovery Gas Transmission LLC Market Expansion Project, Transcontinental Gas Pipe Line Corp., Colorado Interstate Gas Company Cheyenne Plains Jumper Compressor Project, Cheyenne Plains Gas Pipeline Company Cheyenne Plains Project and TransColorado Gas Transmission Corp. TransColorado Expansion.

## 2005

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2005 | 31 | 14,399 | 11,433 | 900.6 | 154,272 | AZ, CA, CO, DE, GA, IA, IL, KS, LA, MA, MD, MN, MS, NJ, OK, PA, TX, UT, VA, WA, WI, WV, WY |

The FERC approved 31 projects with a total capacity of nearly 15,000 MMcf/d and about 900 miles of pipeline. NERA observed shippers for 20 projects. Entrega Gas Pipeline Inc. EnCana Project (Rockies Express) adds the most mileage of any project, 327 miles and its shipper is EnCana. Most other projects add less than 30 miles of pipeline.

Across all projects there are six producers, 11 gas distributors, five related to LNG facilities, six combined utilities, eight marketers, and three industrial consumers. The LNG projects are TX, MA and LA. Four projects have four or more shippers, and 11 projects have unobserved shippers: Tennessee Gas Pipeline Company Triple-T Extension Project, ANR Pipeline Company Wisconsin 2006 Expansion Project, Northwest Pipeline Corporation Capacity Replacement Project, Maritimes & Northeast Pipeline, L.L.C. Haverhill Project, Northern Natural Gas Company, Cameron Interstate Pipeline, LLC, TransColorado Gas Transmission Corp. North Expansion Project, Transcontinental Gas Pipe Line Corp., Petal Gas Storage, L.L.C, Southern Natural Gas Company and Eastern Shore Natural Gas Company.

## 2006

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2006 | 32 | 14,253 | 5,072 | 1,410 | 352,455 | AL, CO, CT, FL, GA, IL, KS, KY, LA, MA, MD, MI, MO, NJ, NY, PA, TN, TX, VA, WV, WY |

The FERC approved 32 projects with a total capacity of 14,253 MMcf/d and about 1,400 miles of pipeline. NERA observed shippers for 20 projects. Williston Basin Interstate Pipeline Company (Grasslands Pipeline Project) adds the most mileage of any project, 253 miles and its shippers are unobserved.

Across all projects there are five producers, 15 gas distributors, four related to LNG facilities, three power producers, three combined utilities, and one connected pipeline. The LNG projects are in FL, GA, LA, TX and AL and together they add 327.7 miles of pipeline. Two projects have four or more shippers, and 12 projects have unobserved shippers: Iroquois Gas Transmission System, L.P. MarketAccess Project, Columbia Gas Transmission Corporation, Equitrans, L.P. Big Sandy Pipeline Project, Vector Pipeline L.P. 2007 Expansion Project, CenterPoint Energy Gas Transmission Co. Carthage to Perryville Project, Southern Natural Gas Company, Port Arthur Pipeline, L.P., Cheniere Creole Trail Pl Co, Florida Gas Transmission Company FL Turnpike Enterprise SR 91 Widening, Trunkline Gas Company, LLC, Texas Gas Transmission, LLC Haughton Compressor Station T-1 Turbine Proj and Transcontinental Gas Pipe Line Corp. Station 50 HP Replacement Project.

## 2007

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2007 | 35 | 22,969 | 10,167 | 2,781.5 | 854,841 | AL, AZ, CA, CO, FL, IA, IL, KS, LA, MA, ME, MN, MO, MS, NE, NJ, NM, NY, OH, PA, SC, SD, TX, UT, VA, WI, WY |

The FERC approved 35 projects with a total capacity of 22,969 MMcf/d and about 2,700 miles of pipeline. NERA observed shippers for 27 projects. Rockies Express Pipeline LLC (KM/Sempra) REX-West Project adds the most mileage of any project at 718 miles with 12 shippers: EnCana Marketing(USA) Inc., ConocoPhillips Company, Sempra Rockies Marketing, LLC, Ultra Resources, Inc., BP Energy Company, Yates Petroleum Corporation, U.S. Minerals Management Service, Bill Barrett Corporation EOG Resources, Inc., Berry Petroleum Company, Arrowhead Resources L.P, and Coral Energy Resources L.P. Eleven projects add more than 100 miles of pipeline.

Across all projects there are 21 producers, 12 gas distributors, five related to LNG facilities, 12 power producers, four industrial consumers, 11 marketers, six industrial consumers, and three connected pipelines. The LNG projects are in AZ, CA, GA, SC, MA, MS and together add a total of 327.7 miles of pipeline. Eight projects have four or more shippers, and eight projects have unobserved shippers: Gulf South Pipeline Co. LP Southeast Expansion Project, Southeast Supply Header, LLC/SoNat SESH Project (add CP07-45 for total proj), Gulfstream Natural Gas System, L.L.C. Phase IV Project/P/L, Sonora Pipeline, LLC (transp LNG) Burgos Hub Exp/Imp Proj (Mission/Progreso PL), Natural Gas Pipeline Co.

of America Louisiana Line Expansion Project, Gulf South Pipeline Company, LP East TX/North LA Exp Loop/MS Exp, CenterPoint Energy Gas Transmission Co. Carthage to Perryville Proj/Phase III Exp, and Southern Natural Gas Company.

## 2008

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2008 | 9 | 10,215 | 5,687 | 2,084 | 482,975 | AL, AR, CO, CT, IL, IN, LA, MO, MS, NJ, NY, OH, OK, OR, PA, TX, WA |

The FERC approved nine projects with a total capacity of more than 10,000 MMcf/d and about 2,000 miles of pipeline. NERA observed shippers for seven projects. Rockies Express Pipeline LLC/East adds the most mileage of any project, 638 miles and it has 12 shippers, nine of them are producers.

Across all projects there are 10 producers, five gas distributors, two related to LNG facilities, two power producers, three combined utilities, and two marketers. The LNG projects are in OR, WA and NY and together they add 58.3 miles of pipeline. Two projects have four or more shippers, and two projects have unobserved shippers: Midcontinent Express Pipeline LLC/Midcontinent and Gulf Crossing Pipeline Company, LLC.

## 2009

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2009 | 22 | 12,603 | 6,958 | 1,037.13 | 704,555 | AL, AR, CA, CO, CT, FL, GA, LA, MA, MD, MN, MS, PA, TX, WV, WY |

The FERC approved 22 projects with a total capacity of 12,600 MMcf/d and about 1,000 miles of pipeline. NERA observed shippers for 15 projects. Florida Gas Transmission Company, LLC/Phase VIII

Expansion Project adds the most mileage of any project with 483.2 miles and it has six shippers, five are unobserved and the observed shipper is a power producer.

Across all projects there are eight producers, four gas distributors, eight power producers, one combined utility, five marketers, and two connected pipelines. Six projects have four or more shippers, and seven projects have unobserved shippers: Florida Gas Transmission Company, LLC/Phase VIII Expansion Project, Dominion Transmission, Inc. Dominion Hub III Project, Oasis Pipeline LP and Oasis Pipeline Co. TX LP Clint Export Project, Kern River Gas Transmission Company 2010 Expansion Project, Transcontinental Gas Pipe Line Co. LLC Mobile Bay South Expansion Project, CenterPoint Energy Gas Transmission Co. and Northwest Pipeline GP Colorado Hub Connection Project.

## 2010

| Year | Total Projects | Total Approved Capacity (MMcf/d)) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2010 | 19 | 9,096 | 6,079 | 1,551.3 | 501,694 | AL, AR, CO, CT, IL, LA, MS, MT, ND, NJ, NV, OR, PA, TN, TX, UT, VA, WY |

The FERC approved 19 projects with a total capacity of more than 9,000 MMcf/d and about 1,500 miles of pipeline. NERA observed shippers for 17projects. Ruby Pipeline, LLC /Ruby Pipeline Project adds the most mileage of any project, 677.8 miles and it has 11 shippers, six are producers, one is a combined utility and four are marketers.

Across all projects there are 16 producers, three gas distributors, four related to LNG facilities, eight power producers, one power distributor, one combined utility, nine marketers, and one connected pipeline. The LNG projects are in AL, MS, NJ and CT and in total add 26.9 miles of pipeline. Five projects have four or more shippers, and two projects have unobserved shippers: National Fuel Gas Supply Corporation Line N Compressor Installation Proj, Bison Pipeline LLC / Bison Pipeline Project.

## 2011

| Year | Total Projects | Total Approved Capacity (MMcf/d)) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2011 | 14 | 4,023 | 1,635 | 305.4 | 267,995 | AL, GA, LA, NC, NY, OH, PA, UT, VA, WV |

The FERC approved 14 projects with a total capacity of about 4,000 MMcf/d and about 300 miles of pipeline. NERA observed shippers for eight projects. All projects add less than 25 miles of pipeline, except for Dominion Transmission, Inc. Appalachian Gateway Project, which adds 107.4 miles and has 22 shippers, 21 are unobserved and one is a producer.

Across all projects there are seven producers, three gas distributors, two power producers, two combined utilities, and four marketers. Three projects have four or more shippers, and six projects have unobserved shippers: Central New York Oil & Gas Company, LLC MARC I Project, Dominion Transmission, Inc. Ellisburg to Craigs Project, Equitrans, L.P. Sunrise Project, Dominion Transmission, Inc. Appalachian Gateway Project, Empire Pipeline, Inc. Tioga County Extension Project and Central New York Oil & Gas Company, LLC.

## 2012

| Year | Total Projects | Total Approved Capacity (MMcf/d)) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2012 | 16 | 4,223 | 2,909 | 192 | 145,920 | AZ, CO, IL, MD, MI, ND, NJ, NY, OH, PA, TX, VA, WV |

The FERC approved 16 projects with a total capacity of 4,223 MMcf/d and nearly 200 miles of pipeline. NERA observed shippers for 12 projects. Alliance Pipeline L.P. Tioga Lateral Project adds the most mileage of any project, 79.3 miles and has one shipper, a producer.

Across all projects there are 10 producers, two gas distributors, two combined utilities, nine marketers, and one industrial consumer. All projects have four or less shippers, and four projects have unobserved shippers: Millennium Pipeline Company, L.L.C. Minisink Compressor Project, Bluewater Gas Storage, LLC, Natural Gas Pipeline Company of America LLC and National Fuel Gas Supply Corporation Line N 2012 Expansion Project.

## 2013

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2013 | 16 | 7,069 | 5,554 | 268.5 | 183,063 | AL, CO, DE, LA, MS, NC, NJ, NY, OR, PA, TX, VA, WV |

The FERC approved 16 projects with a total capacity of 7,069 MMcf/d and more than 200 miles of pipeline. NERA observed shippers for 14 projects. Transcontinental Gas Pipe Line Co., LLC Virginia Southside Expansion Project adds the most mileage of any project, 98 miles and has 2 shippers, both are gas distributors.

Across all projects there are 14 producers, three gas distributors, one related to LNG facilities, three power producers, and nine marketers. The LNG project is in LA and adds zero miles of pipeline. Two projects have four or more shippers, and two projects have unobserved shippers: Gulf South Pipeline Company, LP Southeast Market Expansion Project and Dominion Transmission, Inc. Sabinsville to Morrisville Project.

## 2014

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2014 | 22 | 10,410 | 6,450 | 388.1 | 408,352 | AL, AZ, FL, IN, KY, LA, MD, NC, NJ, NY, OH, PA, TX, VA, WY |

The FERC approved 22 projects with a total capacity of more than 10,000 MMcf/d and nearly 400 miles of pipeline. NERA observed shippers for 18 projects. Constitution Pipeline Company, LLC adds the most mileage of any project, 124 miles and has 2 shippers, a producer, and a marketer.

Across all projects there are 11 producers, nine gas distributors, two related to LNG facilities, five power producers, three combined utilities, nine marketers, and one industrial consumer. The LNG projects are in TX and VA and add a total of 23 miles of pipeline. Four projects have four or more shippers, and four projects have unobserved shippers: Iroquois Gas Transmission System, LP, Cameron

Interstate Pipeline, LLC Cameron Interstate Pipeline Expansion Project, Equitrans, L.P. Jefferson Compressor Station Expansion Project and Houston Pipe Line Company LP Border Crossing Project.

## 2015

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2015 | 28 | 14,617 | 9,408 | 419.7 | 488,784 | AR, CT, IL, IN, KY, LA, MA, MD, MS, NV, NY, OH, PA, RI, SC, TN, TX, VA, WV |

The FERC approved 16 projects with a total capacity of 14,617 MMcf/d and more than 400 miles of pipeline. NERA observed shippers for 10 projects. Cheniere Creole Trail Pipeline, L.P. Liquefaction Exp and P/L Ext and Exp Project adds the most mileage of any project, 104.3 miles and with one shipper.

Across all projects there are 18 producers, 11 gas distributors, two related to LNG facilities, six power producers, five combined utilities, four marketers, and three industrial consumers. The LNG projects are in LA and add a total of 111.3 miles of pipeline. Four projects have four or more shippers, and six projects have unobserved shippers: Dominion Transmission, Inc. Monroe to Cornwall Project, Columbia Gas Transmission, LLC Utica Access Project, Roadrunner Gas Transmission, LLC, Columbia Gulf Transmission, LLC, Impulsora Pipeline, LLC, and National Fuel Gas Supply Corporation LLC Northern Access 2015 Project.

## 2016

| Year | Total Projects | Total Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2016 | 35 | 17,394 | 11,440 | 1,063.1 | 1,379,301 | AL, AZ, CT, FL, GA, IL, IN, KY, LA, MA, MD, MS, NC, NJ, NY, OH, PA, SC, TN, TX, VA, WA, WV |

The FERC approved 35 projects with a total capacity of more than 17,000 MMcf/d and about 1,000 miles of pipeline. NERA observed shippers for 30 projects. Sabal Trail Transmission LLC SE Mkt P/L Project adds the most mileage of any project, 516.2 miles and has 2 power producer shippers.

Across all projects there are 14 producers, 12 gas distributors, two related to LNG facilities, 14 power producers, eight marketers, two industrial consumers and one connected pipeline. The LNG projects are in LA and add a total of 5.1 miles of pipeline. Five projects have four or more shippers, and five projects have unobserved shippers: Dominion Transmission, Inc. Monroe to Cornwall Project, Columbia Gas Transmission, LLC Utica Access Project, Roadrunner Gas Transmission, LLC, Columbia Gulf Transmission, LLC, Impulsora Pipeline, LLC, and National Fuel Gas Supply Corporation LLC Northern Access 2015 Project.

## 2017

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2017 | 29 | 17,980 | 8,271 | 1,697 | 1,118,221 | CT, DE, IL, IN, KY, LA, MA, MD, MI, MN, MS, NC, NJ, NY, OH, PA, SC, TN, TX, VA, WI, WV |

The FERC approved 29 projects with a total capacity of more than 17,000 MMcf/d and nearly 1,700 miles of pipeline. NERA observed shippers for 21 projects. Atlantic Coast Pipeline Projects adds the most mileage of any project, 564.1 miles and has six shippers, four are gas distributors and two are power producers. There are two other projects that add more than 450 miles pipeline.

Across all projects there are 14 producers, 35 gas distributors, four related to LNG facilities, seven power producers, five combined utilities, eight marketers, and four industrial consumers. The LNG projects are in TX and LA and add a total of 2.33 miles of pipeline. Eight projects have four or more shippers, and eight projects have unobserved shippers: Columbia Gas Transmission, LLC, Columbia Gulf Transmission, LLC, Mountaineer/Gulf Xpress, ANR Pipeline Company, Wisconsin South Expansion, Valley Crossing Pipeline, LLC., Border Crossing Project, Rover Pipeline LLC Rover Pipeline Project, Panhandle Eastern Pipe Line Company, LP Panhandle Backhaul Project, Trunkline Gas Company, LLC Trunkline Backhaul Project, Columbia Gas Transmission, LLC Leach Xpress Project and Columbia Gulf Transmission, LLC Rayne Express Expansion.

## 2018

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2018 | 27 | 7,240 | 4,718 | 634.9 | 303,732 | AZ, FL, GA, IL, LA, MA, MD, ME, MN, MO, ND, NH, NJ, NV, OH, OK, PA, TX, VA, WV |

The FERC approved 27 projects with a total capacity of 7,240 MMcf/d and more than 600 miles of pipeline. NERA observed shippers for 25 projects. Cheniere Midstream Holdings, Inc., Midship Pipeline Company, LLC, Midcontinent Supply Header Interstate Pipeline Project adds the most mileage of any project, 233.3 miles and has four shippers, three are producers and one is related to LNG facilities.

Across all projects there are 12 producers, 14 gas distributors, one related to LNG facilities, 12 power producers, one power distributor, one combined utility, eight marketers, and three industrial consumers. The LNG project is in Oklahoma and adds a total of 233.2 miles of pipeline. Three projects have four or more shippers, and two projects have unobserved shippers: Portland Natural Gas Transmission System, Phase II of the Portland XPress Project, Portland Natural Gas Transmission System and Presidential Permit Amendment.

## 2019

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Observed Contracted Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2019 | 23 | 25,227 | 21,475 | 750.64 | 1424969 | AZ, CO, CT, DE, GA, LA, MA, MD, ME, MI, MN, NH, NJ, NM, NY, OH, PA, SC, TX, VA |

The FERC approved 23 projects with a total capacity of more than 25,000 MMcf/d and about 750 miles of pipeline. NERA observed shippers for 19 projects. PORT ARTHUR LNG, LLC, Port Arthur Pipeline, LLC, PALNG Common Facilities Company, LLC; Liquefaction Project, Pipeline Facilities Project, Louisiana Connector Project adds the most mileage of any project, 169.85 miles, and has one LNG shipper.

Across all projects there are two producers, 13 gas distributors, six related to LNG facilities, seven power producers, five combined utilities, five marketers, and one industrial consumer. The LNG projects are in LA, PA, NY and TX, and add a total of 540.35 miles of pipeline. Two projects have four or more shippers, and four projects have unobserved shippers: Cheniere Corpus Christi Pipeline, L.P., Corpus Christi Liquefaction, LLC, Corpus Christi Liquefaction Stage III, Stage 3 LNG Facilities, Stage 3 Pipeline, Sendero Carlsbad Gateway, LLC, Limited Jurisdiction Certificate, Portland Natural Gas Transmission System, Westbrook Xpress and Portland Natural Gas Transmission System, Portland XPress Project Phase III.

## 2020

| Year | Total Projects | Total Approved Capacity (MMcf/d) | Total Approved Capacity (MMcf/d) | Total Approved Miles | Total Approved Compression (HP) | Project States |
|---|---|---|---|---|---|---|
| 2020 | 6 | 2,550 | 2,189 | 342.09 | 114,190 | AL, FL, LA, MS, OH, OR, TX, WV |

Through March 2020, the FERC approved six projects with a total capacity of 2,550 MMcf/d and more than 300 miles of pipeline. NERA observed shippers for five projects. Jordan Cove Energy Project L.P., Pacific Connector Pipeline, Jordan Cove LNG adds the most mileage of any project, 229 miles, and has one shipper.

Across all projects there is one producer, two related to LNG facilities, and two power producers. The LNG projects are in OR and TX and add a total of 229 of pipeline. All five projects have one shipper and one project has unobserved shippers: Columbia Gas Transmission, LLC, Buckeye Xpress Project.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2019).

Dated at Washington, D.C., this 19th day of October, 2020.

Ammaar Joya