UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

Rover Pipeline, LLC, Energy Transfer Partners, L.P.	)	Docket No. IN17-4-000

SURREPLY OF ROVER PIPELINE, LLC AND ENERGY TRANSFER LP TO ORDER TO SHOW CAUSE AND NOTICE OF PROPOSED PENALTY

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There is no factual or legal basis to hold either Rover Pipeline, LLC ("Rover") or Energy Transfer L.P.[1] ("Energy Transfer" and, together with Rover, "Respondents") liable for the intentional wrongdoing of others that is alleged in the Staff Report.[2] To this day, Enforcement Staff have not identified a single piece of evidence showing that anyone at either Respondent even knew about that wrongdoing, much less directed or condoned it.[3] In fact, Enforcement Staff's own witnesses admit they consciously hid their unlawful conduct because they knew it was wrong.[4] No precedent supports holding a company liable for the intentional unlawful conduct by employees of third parties. And no policy rationale supports holding Respondents responsible for the intentional misconduct of third parties, because Enforcement Staff concede that the wrongdoers themselves can be held liable, either by the Commission[5] or otherwise.[6]

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[1] Energy Transfer, L.P., is the successor of named Respondent, Energy Transfer Partners, L.P.

[2] Rover Pipeline, LLC, 177 FERC ¶ 61,182, App. A, Enforcement Staff Report and Recommendation (2021) [hereinafter "Staff Report" or "Report"].

[3] *See generally* Reply to Rover Pipeline, LLC and Energy Transfer L.P.'s Answer to Order to Show Cause, Rover Pipeline, LLC, Docket No. IN17-4-000 (Apr. 20, 2022) [hereinafter "Reply"]. Rover hereby moves for leave to reply to the Enforcement Staff's Reply. Although surreplies are generally not permitted, the Commission regularly allows such replies where it assists in the Commission's decisionmaking process. 18 C.F.R. § 385.213(a)(2). *See also, e.g., Alliance Pipeline, L.P*, 151 FERC ¶ 61,271 at P 10 (2015) ("[T]he Commission will accept Alliance's answer because it assisted the Commission in its decision-making process."); *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 at P 17 (2020) (accepting answers that "provide information that has assisted in our decision-making process"). As explained further below, Enforcement Staff have raised new points, new legal theories, and new precedents for the first time in their Reply.

Respondents also note that the Sunshine Notice for the May 19, 2022 Commission meeting contains an agenda item under Certificates titled: "C-3 IN19-4-001 Rover Pipeline, LLC and Energy Transfer Partners, L.P." The docket number corresponds to a different Rover matter. Respondents note this in the event the agenda item is instead a reference to the Order to Show Cause in this matter.

[4] *See* Answer and Denial of Rover Pipeline, LLC and Energy Transfer LP to Order to Show Cause and Notice of Proposed Penalty at 2, 35, *Rover Pipeline LLC*, Docket No. IN17-4-000 (Mar. 21, 2022) [hereinafter "Answer"].

[5] Enforcement Staff state that they sent "three . . . witnesses letters which stated that if the witness testified truthfully, Enforcement Staff do not intend to recommend that the Office of Enforcement pursue civil penalties against the witness for any violations of the Natural Gas Act." Reply at 32. Unless Enforcement Staff are prepared to admit they made illusory promises to these witnesses, Enforcement Staff had a basis to bring an enforcement action against the persons who actually engaged in the wrongdoing, and that basis vanished only because Enforcement Staff gave the power away.

[6] Reply at 32.

Enforcement Staff want to ignore all of this and hold Respondents liable for others' intentional misconduct. They believe the outcome here is preordained, that any hearing would be pro forma, and that the Commission should dispense with the hassle of actually requiring Enforcement Staff to prove their case. Enforcement Staff take the remarkable and unprecedented position that the Commission should impose a $40,000,000 fine on Respondents without any opportunity for discovery or a hearing especially when they still are withholding documents and materials they are required to produce.[7] They arrive at this unconstitutional conclusion by ignoring the substance of Respondents' Answer and asserting that "the factual record is not in material dispute" and that "the only argument that Respondent makes—that it cannot be held liable for the violations of its own Certificate—is a purely legal argument."[8]

1. These positions are baffling. Respondents devoted dozens of pages of the Answer to detailing facts that flatly refute Enforcement Staff's allegations. To take just one example, Enforcement Staff claim that no genuine issue of material fact underlies their allegation that Respondents failed to adequately monitor the right-of-way.[9] But the overwhelming evidence shows that Respondents did in fact monitor the right-of-way, including inspecting it for inadvertent returns (IRs),[10] and Enforcement Staff ignore that evidence. For example, the Answer pointed to evidence that the Night Utility Inspector inspected both sides of the river "generally every night"

[7] Letter from William Scherman, Gibson, Dunn & Crutcher LLP to FERC Chairman and Commissioners, Re: Action Requested on Rover Pipeline LLC's and Energy Transfer, L.P.'s Long Pending Brady Motions (Tuscarawas) IN17-4 (May 3, 2022).

[8] Reply at 3.

[9] *Id.* at 24-27.

[10] Answer at 41-48.

and "would generally drive around to both sides periodically" where he could "watch the progress and . . . make sure things were being done properly."[11] Enforcement Staff did not contest this.

When the drill at the Tuscarawas site began losing returns, the inspectors, as well as other employees, walked the right of way daily to check for signs of any inadvertent IR.[12] The Lead Environmental Inspector Spread A confirmed seeing inspectors or drillers walking the line, as did the Day Crew Foreman.[13] Day Crew Laborer #2 testified that after they started losing returns, "[s]omebody was walking it anywhere between three and four times a day," and that he would "walk it first thing and in the morning and in the evening, and any other time [he] was free."[14] And the Day Utility Inspector testified that "everybody started looking . . . combing the area."[15] Respondents also trained and gave guidance to the inspectors.[16] Enforcement Staff completely overlook or refuse to acknowledge this evidence undercutting their allegations. It is one thing for

[11] *Id.* at 43 (quoting Night Utility Inspector Test. at 29:24–30:4).

[12] *Id.* (quoting Day Crew Driller Test. at 94:3–11 ("Q. But you had lost returns for the vast majority of the time; right? A. Yep. So we had somebody walking, he kept track of that. Q. What do you mean, walking? A. To check for IRs. Q. Who did you have doing that? A. Alex, Derek would walk sometimes. I walked once or twice."); *see also* Night Utility Inspector Test. at 21:17–22:1.

[13] Answer at 43 (quoting Lead Environmental Inspector Spread A Test. at 56; *see also* Day Crew Foreman Test. at 62:20–24 ("We walked the right-of-way. I mean pretty much, I mean, me, [the Day Utility Inspector], my inspector, I'm sure Alex went for a walk, Keith probably, [the Night Crew Foreman] did, whoever. I mean, pretty much everybody would, but me and [the Day Utility Inspector], [the Day Utility Inspector] was really adamant about it.").

[14] *Id.* (quoting Day Crew Laborer #2 Test. at 31:13–18).

[15] *Id.* (quoting Day Utility Inspector Test. at 68:1–3).

[16] *See, e.g.,* Answer at 42 ("These inspectors received clear guidance at the start of the Project on their roles and responsibilities. The Night Utility Inspector and Day Utility Inspector did not begin their inspection work until they received a series of FERC compliance documents to review, including the FERC Certificate and the HDD Contingency Plan. They also received training on their day-to-day duties and how to submit daily compliance and progress reports. The Inspectors also attended daily safety meetings."); *id.* at 44 ("Both the Day Utility Inspector and the Night Utility Inspector understood environmental compliance, and they made the requirements clear to the workers. Their responsibilities included observing and reporting environmental issues. Far from failing to monitor and report them, the inspectors raised compliance issues with the crews and escalated them up to the Lead Environmental Inspector."); *id.* at 46-47.

Enforcement Staff to urge a different conclusion based on their cramped view of the record, but quite another for Enforcement Staff to pretend this other evidence does not even exist.

That is far from Enforcement Staff's only misrepresentation about the supposed absence of material factual disputes. Respondents dispute the extent to which anyone, including the witnesses Enforcement Staff identify solely by job title, added diesel fuel or other unapproved additives to the drilling mud, and Respondents contest whether the Diesel Range Organics (DROs) found at the site of the IR were connected to the misconduct that Enforcement Staff allege. As Respondents explained in the Answer, the trace amounts of petroleum hydrocarbons identified at the site of the IR are inconsistent with widespread contamination, and no contamination was detected at the drilling location itself.[17] The trace amounts of DROs that were discovered could have been the result of spills in the ordinary course (much of the equipment used diesel fuel), as opposed to intentional malfeasance. Enforcement Staff offer no evidence disproving any of these theories—indeed, no scientific evidence ties the petroleum hydrocarbons to the diesel fuel that was located at the site.[18]

Rather than rely on physical evidence, Enforcement Staff cherry-pick testimony of various third-party employees, *none of whom Respondents have yet had an opportunity to depose or cross-examine*. Even the currently incomplete record shows that Enforcement Staff's factual assertions are "marred by witness-credibility concerns,"[19] not the least of which is that their key witnesses denied to Rover and its attorneys that they used unapproved additives during Rover's initial

[17] *Id.* at 21-23.

[18] *Id.* at 23.

[19] *Id.* at 3.

investigation.[20] Much of Enforcement Staff's supposed evidence is unreliable hearsay within hearsay; it suffers from internal inconsistencies; or it conflicts with the testimony of other witnesses. There are also material disagreements on the extent to which the wrongdoers concealed their conduct from Respondents, inspectors, and all others outside of their small group.[21] Unless the Commission closes this matter by rejecting Enforcement Staff's allegations as legally infirm, as the Answer explains that it should and as discussed further below, Respondents should have the ability to conduct discovery and examine Enforcement Staff's witnesses under oath.[22]

2. Respondents also deny the other core components of Enforcement Staff's case. The Answer devoted *an entire section* to proving that no one at either Respondent knew of, condoned, directed, or was in any complicit in the alleged actions of its independent subcontractor's employees.[23] Another section showed that Rover did not pressure anyone to prioritize speed over compliance or to sacrifice compliance efforts.[24] Enforcement Staff still have not pointed to any evidence that anyone at either Respondent was aware of the alleged use of unapproved additives, or any evidence that Respondents improperly pressured its contractors or encouraged them to prioritize speed at the expense of compliance. Although Enforcement Staff now try to backtrack from these allegations by labelling them "irrelevant,"[25] they are in fact highly relevant, which is

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[20] *Id.* at 23 (noting that "Pretec employees denied such conduct. It was only much later that some of the them admitted to using unapproved additives.").

[21] *Id.* at 26-31.

[22] As also explained in the Answer, that process should occur in federal district court. *See id.* at 55-70.

[23] *Id.* at 26-31.

[24] *Id.* at 31-34. Enforcement Staff repeat the error in the Staff Report of supporting their "time pressure" argument with texts from the wrong time period: weeks before the alleged violations by Pretec employees. At the time of the texts, there was delay in starting the drill. But once the drilling began, the progress at the Tuscarawas site was ahead of schedule. Answer at 14-15. Enforcement Staff ignore this unrefuted evidence and, with no facts from the correct time period, all they can muster is that their factually flawed theory "makes sense." Reply at 29.

[25] Reply at 19.

why both issues play so prominently in their Report and Recommendation: they are the key facts that Enforcement Staff uses as a hook to hold Respondents responsible for the alleged actions of the independent subcontractor's employees, as well as to justify the outsized penalty.[26]

Rather than point to any wrongdoing by either Respondent, Enforcement Staff instead seek to hold Respondents *strictly liable* for the alleged intentional wrongdoing of independent subcontractor employees. Enforcement Staff's theory that certificate holders should be strictly liable for the intentional misconduct of an independent subcontractor's employee is unprecedented. To counsel's knowledge, the Commission has *never* imposed liability on a certificate holder for the intentional unlawful acts of third parties—especially those twice removed from the certificate holder—without evidence that the certificate holder was complicit in the illegal conduct. As explained in detail in the Answer, none of the three cases Enforcement Staff cite—*Berkshire Power Co. LLC*,[27] *City of Dover, New Hampshire*,[28] and *Trafalgar Power, Inc.*[29]—support the position that a certificate holder is responsible for the intentional misconduct of a third party's employee.[30]

Enforcement Staff does not seriously contest that the circumstances in all three cases are readily distinguishable from those here. So, having failed to cite a case that applies to these facts, Enforcement Staff's Reply switches to a new theory: the "non-delegation" doctrine.[31] Not once

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[26] The above recitation is not intended to be a complete list of the areas where Rover contends there are other material disputes, or in which the undisputed evidence actually favors Rover. Respondents' Answer provides a complete recitation of issues and facts where there is disagreement between the parties.

[27] 154 FERC ¶ 61,259, at P 22 (2016).

[28] 19 FERC ¶ 61,231, at 61,452 (1982).

[29] 49 FERC ¶ 61,140, at 61,597 (1989).

[30] Answer at 36-40.

[31] Reply at 12.

does the Staff Report mention this theory or cite a case to support it. In fact, the term "non-delegation" is nowhere to be found in that Report. Moreover, Enforcement Staff's own cases, newly cited in the Reply, limit liability under that doctrine to either the *negligent* acts of a third-party or *negligent supervision* of third parties.[32] Enforcement Staff's Reply admits this limitation: "Non-delegable duties are an exception to the general rule that employers are not liable for *negligent acts* of independent contractors."[33] The non-delegable duty doctrine does not apply when the third party (i.e., the "delegee") engages in *intentional misconduct*—much less intentional *criminal* conduct that employees of the third party *deliberately hid* from the accused.[34] Enforcement Staff allege failure to monitor the right-of-way, but that is a different type of negligence, and the record fails to support it in any event. Nowhere do they allege (nor could they show) that the intentional wrongdoing at the heart of the Staff Report resulted from Respondents' negligent supervision. Enforcement Staff's other theory—also raised for the first time in the Reply—fails too. There is no factual basis for calling Pretec Rover's agent given the latitude the contractor and subcontractor had in carrying out their work, and this new theory is undeveloped and confined to footnote.[35]

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[32] *See Pusey v. Bator*, 762 N.E.2d 968, 973 (Ohio 2002) ("the employer is not insulated from liability if the independent contractor's *negligence* results in a breach of the duty.") (emphasis added); *SRK Consulting, Inc. v. MMLA Psomas, Inc.*, 2009 WL 2450490, at *5 (D. Ariz. Aug. 11, 2009) ("When there is a non-delegable duty, the principal is vicariously liable for the *negligence* of an independent contractor") (emphasis added); *Clark v. Assocs. Com. Corp.*, 877 F. Supp. 1439, 1447 (D. Kan. 1994) ("[W]here an employer is required by statute to take certain precautions in performing certain work . . . engages an independent contractor to perform that work, and the independent contractor *fails to take the necessary precautions* resulting in injuries to a third person, the employer is liable even though there is no master/servant relationship between it and the independent contractor.") (emphasis added).

[33] Reply at 12 (emphasis added).

[34] *See, e.g., Castellanos v. Tommy John, LLC*, 321 P.3d 218, 233 (Utah 2014) ("Where the owner acted reasonably in hiring an independent-contractor security company and had no prior knowledge that the security company's employees were committing intentional torts against its patrons, we see no reason to expand the nondelegable duty exception to the nonliability rule for independent contractors.").

[35] Reply at 13, fn. 54.

3. Energy Transfer should be dismissed for yet another reason. It did not sign the Certificate Application, and it is not a certificate holder. Enforcement Staff points to prior Commission actions that "disregarded corporate form in the interest of public convenience, fairness, or equity and considered two entities as effectively one when necessary to fulfill the Commission's statutory and regulatory goals."[36] Enforcement Staff have not come close to satisfying the requirements for disregarding the corporate form.[37] In the case they cite, the Commission applied basic corporate veil-piercing principles that allow courts or agencies to disregard the corporate form when one company misuses the corporate form to avoid paying its debt obligations. The Commission found there that the two companies were essentially alter egos of one another—"both entities have the same contacts and administrators, similar addresses, are engaged in the same business in the same territory, and seek to serve the same customers"[38]—*and* it was necessary to disregard the "separate corporate forms to ensure that an entity that had incurred debts could not shift its business activities into a different corporate entity to continue to do business while avoiding paying those debts."[39] The Commission explained that treating the separate companies as one was important to "protect the organized wholesale electric markets, and

[36] Reply at 30 (quoting *Light Power & Gas of N.Y. LLC*, 167 FERC ¶ 61,232, at P 41 (2019)).

[37] Because the Natural Gas Act does not "speak directly" to the circumstances under which a parent can be held liable for the conduct of a subsidiary, basic principles of corporate law control. *See United States v. Bestfoods*, 524 U.S. 51, 62-63 (1998) ("Nothing in CERCLA purports to rewrite this well-settled rule [regarding parent-subsidiary liability], either. CERCLA is thus like many another congressional enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute, and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.") (internal quotation marks and citations omitted).

[38] *Light Power & Gas of N.Y. LLC*, 167 FERC ¶ 61,232, at P 41 (2019).

[39] *Id*.

ultimately customers, from default by market participants," consistent with the Commission's stated goals and policies.[40]

Enforcement Staff fail to show that these factors apply here. The Reply merely notes that the individuals who signed the Certificate on Rover's behalf were Energy Transfer employees too.[41] That overlap falls far short of what is required to pierce the corporate veil. Indeed, it is black letter law that a "subsidiary corporation will not be regarded as the alter ego of its parent merely because of . . . a duplication of some or all of the directors or officers" among the companies.[42] Nor do Enforcement Staff even try to allege the other requirement: that either Respondent misused the corporate form to avoid liability, escape payment, or for any other illegal or improper purpose, and nowhere have they explained how disregarding the corporate form is needed to promote any of the Commission's policies. If the Commission decides not to close this matter, Energy Transfer should still be dismissed.

4. There is a clear and troubling pattern in FERC enforcement cases. Throughout the process, starting with Enforcement Staff's preliminary views, when a respondent rebuts Enforcement Staff fully on the facts, Staff change the factual allegations. That is what has happened here. Several times. When a respondent exposes the fatal errors in Enforcement Staff's legal arguments, Staff make new arguments. That is what has happened here. Several times. Enforcement Staff keep moving the goal posts and the outcome is the same: the Commission

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[40] *Id.* at P 42.

[41] Reply at 30.

[42] *Nelson v. Int'l Paint Co., Inc.,* 734 F.2d 1084, 1092 (5th Cir. 1984); *see also Bestfoods,* 524 U.S. at 61-62 ("Thus it is hornbook law that the exercise of the 'control' which stock ownership gives to the stockholders will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication *of some or all of the directors or executive officers be fatal*.") (internal quotations and alterations omitted) (emphasis added).

approves the enforcement action. Every time. This isn't due process, and the process isn't fair. It falls far short of the Commission's recent commitment to "ensuring that the subjects of investigations receive due process, both in perception and reality.[43]

CONCLUSION

For all of the foregoing reasons, in addition to those in the Answer, the Commission should close this matter by declining to initiate an enforcement action. Should the Commission decide to initiate such an action, it must do so in federal district court.[44] And any assessment of a proposed penalty should be in accordance with the Penalty Guidelines; *i.e.*, no more than $80,000.[45]

Respectfully submitted,

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[43] *GreenHat Energy, LLC*, 178 FERC ¶ 61,002 at P 7 (Jan. 5, 2022) ("The Commission expects OE Staff to conduct themselves in accordance with the highest ethical standards and is committed to ensuring that the subjects of investigations receive due process, both in perception and reality.").

[44] Lead counsel for Respondents in this matter already have multi-week FERC ALJ hearings scheduled for June 2022, November 2022, and March 2023, in addition to obligations in other matters. Thus, no hearing in this matter should be scheduled before the fourth quarter of 2023.

[45] Recognizing the limited purpose of a surreply, Respondents have not tried to address every error in Enforcement Staff's Reply, and they therefore do not waive any other arguments made in their Answer.