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**Circuit Split as to Whether Rejection of Power Purchasing Agreements are Subject to
Bankruptcy Court or FERC Jurisdiction**

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Introduction

Chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) enables troubled enterprises to be restructured, so that they can operate successfully in the future.¹ Under section 365 of the Bankruptcy Code, a debtor in possession may reject a contract subject to bankruptcy court approval. The Federal Energy Regulatory Commission (“FERC”), however, has “exclusive jurisdiction” over the transmission of electric energy in interstate commerce, including power purchase agreements (“PPAs”). Accordingly, there is a dispute as to whether the rejection of a PPA is subject to bankruptcy court or FERC approval.

This memorandum addresses how courts have addressed the conflict between FERC and the bankruptcy courts. If a utility company files for bankruptcy, FERC’s exclusive jurisdiction over the modification of filed contracts could be interpreted to be preemptive over the bankruptcy court’s exclusive jurisdiction to authorize the rejection of an executory contract. In reconciling these statutes two theories have formed between the courts. Part I examines the Exclusive Jurisdiction Theory, where courts are even further divided as to whether it is the FERC

¹ *United States v. Whiting Pools, Inc.* 462 U.S. 198, 203 (1983) (“Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if ‘sold for scrap.’”).

or the bankruptcy court that has exclusive jurisdiction. Part II discusses the Concurrent Jurisdiction Theory.

Discussion

I. Exclusive Jurisdiction Theory

Some courts have found that one authority preempts the other's jurisdiction when it comes to rejecting PPAs in bankruptcy. However, courts disagree whether it is the bankruptcy court or FERC that has exclusive jurisdiction governing energy purchasing agreements. There is a clear conflict between which entity is controlling in the rejection of PPAs in bankruptcy, given Congress' intent in the creation of Bankruptcy Code and the Federal Power Act (the "FPA"). By creating chapter 11 in the Bankruptcy Code, "Congress sought to protect debtors by permitting liberal restructuring in bankruptcy," whereas with the FPA "Congress sought to protect energy markets and consumers" from monopolistic public utilities by "putting them under the governance of a commission of experts."²

A. The Bankruptcy Court Has Exclusive Jurisdiction

To facilitate restructuring, section 365(a) of the Bankruptcy Code allows "trustees" or "debtors in possession" to reject "any executory contract," subject to bankruptcy court approval³ and to treat rejection as a breach of contract.⁴ Rejection of a contract relieves the debtor in possession of its obligations to continue to perform under unfavorable contracts, something necessary in a successful reorganization process. The United States Court of Appeals for the Fifth Circuit in *In re Mirant Corp* first determined that a court is permitted to hear breach of contract claims where the proposed rejection does not represent a challenge to the agreement's filed rate.⁵ The court held that rejection would only have an indirect effect on the filed rate

² See *In re FirstEnergy Solutions Corp.*, No. 18-3787, WL 6767004, at *24.

³ 11 U.S.C. § 365(a).

⁴ 11 U.S.C. § 365(g).

⁵ See *In re Mirant Corp.*, 378 F.3d 519 (5th Cir. 2004).

because even though the debtor's desire to reject the agreement was partially motivated by a lower market rate, its justification was based on the excess supply and lack of need for any energy covered by the contract.⁶ The court also relied on the structure of the Bankruptcy Code, which it found indicates "that Congress did not intend to limit the ability of utility companies to reject an executory power contract."⁷ The Fifth Circuit found that the lack of exception for contracts subject to FERC regulation was intentional by Congress, and section 365(a) also applies to contracts subject to FERC regulation, which allows debtors to reject PPAs in bankruptcy.⁸

The Bankruptcy Court for the Northern District of California declared that under section 365 of the Bankruptcy Code, a bankruptcy court, not the FERC, had exclusive jurisdiction over the right to determine whether a debtor would be allowed to reject executory PPAs.⁹ Following PG&E's announcement of its intent to file for relief under chapter 11 of the Bankruptcy Code, PPA counterparties asked FERC to rule that the bankruptcy court and FERC must both approve rejection of PPA for rejection to have effect.¹⁰ Thereafter, FERC found that it had concurrent jurisdiction with bankruptcy courts to review whether PPAs could be rejected through bankruptcy.¹¹ Following the aforementioned hearings, the debtor filed for bankruptcy and was denied a rehearing by the FERC.¹² The bankruptcy court started its analysis stating that the "Bankruptcy Code is the proper and only authority to apply and not any aspect of the FPA. . . . The beginning and end of the analysis is in the Bankruptcy Code."¹³ The court found that section

⁶ *See id.*

⁷ *See id.* at 521.

⁸ *See id.* at 522 (further explaining that nothing in the Bankruptcy Code "limits a public utility's ability to choose to reject an executory contract subject to FERC regulation as part of its reorganization process," therefore finding that the district court had jurisdiction to reject the debtor's PPAs.).

⁹ *See In re PG&E Corp. Pacific Gas and Electric Co. v. Fed. Energy Regulatory Comm'n, Adv. (In re PG&E Corp.)*, 603 B.R. 471, 490 (Bankr. N.D. Cal. June 7, 2019).

¹⁰ *See id.* at 476–77.

¹¹ *See id.*

¹² *See id.* at 485.

¹³ *See id.* at 486.

365 of the Bankruptcy code is subject to exceptions, but no exceptions involve FERC.¹⁴ The bankruptcy court interpreted the absence of reference to FERC and FPA within any of exceptions, to mean that FERC has no jurisdiction over the rejection of contracts.¹⁵ This is significant because if Congress intended to provide regulatory exceptions to the Bankruptcy Code it would have expressly done so, as it previously has done. Although courts can defer to regulatory agencies while analyzing provisions governing the federal agency, the bankruptcy court held that courts have the final say and the ultimate decision-making authority.¹⁶

B. FERC has Exclusive Jurisdiction

Congress has stated that federal regulation of wholesale electric energy prices is necessary to protect the public interest.¹⁷ While energy contracts are privately negotiated, parties must file those contracts with FERC and they must be certified as “just and reasonable” to be lawful under the FPA.¹⁸ The act of filing these contracts with the FERC transforms them into becoming federal regulations and only FERC can modify these contracts, if it concludes the contract will result in a serious harm to the public interest.¹⁹

Unlike the foregoing courts, the district court for the Southern District of New York in *In re Calpine Corp.*, explained that when there “is [jurisdictional] conflict, the power of the bankruptcy court must yield to that of the federal agency.”²⁰ The court found that it lacked the jurisdiction to authorize the rejection of PPAs because doing so would interfere with FERC’s exclusive jurisdiction over the rates, terms, conditions, and duration of the wholesale energy

¹⁴ See *id.* at 478 (highlighting the fact that “Congress knows how to craft special rules for circumstances”).

¹⁵ See *id.* at 487 (explaining that the Supreme Court itself has said Congress knows exactly how to grant exceptions to the power to reject executory contracts and PPAs governed by the FPA were not included).

¹⁶ See *id.* at 486.

¹⁷ 16 U.S.C. § 824(a).

¹⁸ 16 U.S.C. § 824d(a).

¹⁹ See *In re FirstEnergy Solutions Corp.*, No. 18-3787, WL 6767004, at *24 (6th Cir. Dec. 12, 2019) (explaining that “[t]he Supreme Court has held that the FERC may compel a party to continue to perform even a money losing contract”).

²⁰ See *In re Calpine Corp.*, 337 B.R. 27, 34 (S.D.N.Y. 2006).

contacts.²¹ The utility company there sought bankruptcy court approval to reject the PPAs because they were the “most financially burdensome” of its energy contracts, following California’s 2000 energy crisis. Unlike the debtors in *In re Mirant*, the debtor’s rationale for rejecting the PPAs was based on the reasonableness of the rates. Since FERC has exclusive jurisdiction to determine whether filed rates are reasonable, the district court held in favor of FERC. The district court looked to the Bankruptcy Code but found “little evidence of congressional intent” to limit FERC’s authority, observing that “[a]bsent overriding language, the Bankruptcy Code should not be read to interfere with FERC jurisdiction.”²² Accordingly, a debtor cannot achieve in Bankruptcy Court to “cease performance under the rates, terms, and conditions of filed rate wholesale energy contracts” without seeking FERC approval.²³

According to the district court in *In re Calpine Corp.*, the dispositive issue is whether rejection of the PPAs would directly interfere with FERC’s exclusive jurisdiction over the wholesale power contracts constitutes a collateral attack on the filed rate.²⁴ The district court rejected the bankruptcy court’s argument that rejection in the bankruptcy court constitutes a breach which is outside of FERC’s exclusive jurisdiction since FERC only has exclusive jurisdiction over the approval, modification, or termination of wholesale energy contracts not breaches.²⁵ The district court reasoned that here, “breach” does not create a typical dispute over the terms of a contract but rather the “unilateral termination of a regulatory obligation.”²⁶ The district court took the view that once the energy contracts were filed, the FPA controls rather

²¹ *See id.* at 36.

²² *See id.* at 33.

²³ *See id.* at 36.

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See id.*

than contract law because the PPAs went from mere contracts to regulated duties, and as such, regulatory action from FERC is required to eliminate such duties.²⁷

II. Concurrent Jurisdiction Theory

The United States Court of Appeals for the Sixth Circuit's position in harmonizing the two opposing statutes is that the bankruptcy court's jurisdiction while concurrent with the FERC, is nonetheless primary or superior to the FERC's position.²⁸ In *In re FirstEnergy Solutions Corp.* the debtor, FES, wanted to file for chapter 11 and reject their executory PPAs because they were losing an estimated \$46 million per year on these contracts.²⁹ FES filed a chapter 11 petition under the Bankruptcy Code, and then filed a complaint seeking a declaratory judgement that the bankruptcy court's jurisdiction is superior to the FERC arguing that the PPAs were just a small part of its bankruptcy restructuring.³⁰ The Sixth Circuit noted that the PPAs were for a very small quantity of electricity in relation to FES's total electricity capacity, .75%, and viewed in this light the public interest in the fulfillment of these contracts was very small. Thus, no consumers will suffer electricity shortage, and counterparties can sell their electricity into the market at a minimal, if any, loss.³¹ The Sixth Circuit reasoned that the public necessity of the available functional bankruptcy relief is superior to the necessity of FERC's exclusive authority to regulate energy contracts and markets.³²

Additionally, the Sixth Circuit held that in some cases a bankruptcy court may enjoin FERC from issuing an order that would "directly conflict with the bankruptcy court's orders or interfere with its otherwise-authorized authority."³³ However, the Sixth Circuit stated that a

²⁷ See *id.* at 37. "[W]hat FERC giveth, only FERC may taketh away." *Id.*

²⁸ See *In re FirstEnergy Solutions Corp.*, No. 18-3787, WL 6767004, at *16.

²⁹ *Id.* at *4 (REC requirements were relaxed by the government resulting in an abundance of RECs available for purchase. FES no longer had commercial or regulatory need for the RECs from the PPAs).

³⁰ *Id.* at 11.

³¹ See *id.*

³² See *id.*

³³ See *id.*

bankruptcy court cannot issue an absolute injunction preventing FERC from conducting its regulatory mandated assessment and must instead “invite FERC to participate and provide an opinion” in accordance with the FPA.³⁴ This holding is highly fact dependent because in *In re FirstEnergy Solutions Corp.* the Sixth Circuit reasoned that to be effective, restructuring must be an expeditious process, which at times can result in unfair or harmful consequences to other concerned parties including the general public.³⁵ Thus, it would be unreasonable in *all cases* to permit public interest concerns to overrule a restructuring decision or to have to wait for “FERC to conduct a full hearing to identify, assess, and opine on those concerns.”³⁶ While courts generally defer to an agency’s jurisdiction, courts are also capable of considering public-interest issues.³⁷ More recently, the Sixth Circuit denied FERC’s rehearing position.

Conclusion

Courts and debtors are left with two opposing theories to determine whether bankruptcy courts or FERC have exclusive or concurrent jurisdiction in the rejection of executory PPAs in bankruptcy. These opposing theories have resulted in three different outcomes: bankruptcy court has exclusive jurisdiction, FERC has exclusive jurisdiction, or both share concurrent jurisdiction. The Ninth Circuit will be the next Circuit Court to consider this issue, as the *PE&G Corp.* bankruptcy court certified its decision for direct appeal. Regardless of which way the Ninth Circuit holds, there will continue to be a circuit split on the issue.

³⁴ *Id.* at *32.

³⁵ *See id.* at *24.

³⁶ *Id.*

³⁷ *Id.* (“FERC commissioners are not the only people capable of considering public-interest issues.”).