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The Intersection of the Bankruptcy Courts and FERC

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Introduction

In the past, the bankruptcy courts and the Federal Energy Regulatory Commission (“FERC”) have been involved in a power struggle with one another.¹ Congress has granted bankruptcy courts exclusive authority to allow debtors to reject executory contracts in chapter 11 reorganization cases.² Additionally, Congress has granted FERC authority to govern over utility entities’ filed-rates, which are sometimes contained in executory contracts.³ It is in this intersection, regarding executory contracts containing filed-rates, where the power struggle between the two exists.⁴

An executory contract is a contract where both parties still have material obligations to perform under the contract.⁵ Filed-rates may be contained in executory contracts. Under the filed-rate doctrine, a federally regulated seller of natural gas, oil, and energy is prohibited from charging rates higher than those filed with FERC.⁶ FERC is an independent agency within the

¹ See Bradley G. Oster, *COMMENT: Reigning in Regulatory Overreach: FERC’s Role in Bankruptcy*, 82 LA. L. REV. 625, 626–27 (2022).

² See 11 U.S.C. § 365.

³ See 16 U.S.C. § 824d.

⁴ See *COMMENT: Reigning in Regulatory Overreach: FERC’s Role in Bankruptcy*, 82 LA. L. REV. at 626–27.

⁵ See Vern Countryman, *Executory Contracts in Bankruptcy: Part 1*, 57 MINN. L. REV. 439, 460 (1973).

⁶ See *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 573 (1981).

Department of Energy that regulates the interstate transmission of electricity, natural gas, and oil.⁷

Most recently, the U.S. Court of Appeals for the Fifth Circuit held that FERC cannot interfere with the bankruptcy court's power to permit the rejection of executory contracts.⁸ While the Fifth Circuit's approach to this issue dominates, one jurisdiction has held that during a chapter 11 case, debtors additionally need FERC's approval to reject an executory contract containing a filed-rate.⁹

This article analyzes whether the bankruptcy courts and FERC share parallel jurisdiction to permit rejection of a debtor's executory contract containing a filed-rate. Part I explains Congress's delegation of power between the bankruptcy courts and FERC regarding executory contracts and the filed-rate doctrine, and explores the intersection between the courts and FERC. Part II examines the competing views of the issue and explains the public interest considerations concerning the intersection of the bankruptcy courts and FERC.

Discussion

I. Congress's Delegation of Power Between the Bankruptcy Courts and FERC Regarding Executory Contracts and the Filed-Rate Doctrine

Congress has provided the bankruptcy courts and FERC with their own respective powers; however, the separation of these powers can be muddied through chapter 11, when the debtor is a federally regulated seller or transporter of electricity, natural gas, or oil.¹⁰ This section explains the bankruptcy courts' and FERC's respective authorities, and their intersection during chapter 11.

⁷ See *Federal Energy Regulatory Commission*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/federal-energy-regulatory-commission>.

⁸ See *Gulfport Energy Corp. v. FERC*, 41 F.4th 667, 681 (5th Cir. 2022).

⁹ See *In re Calpine Corp.*, 337 B.R. 27, 33 (S.D.N.Y. 2006); see also *In re Bos. Generating, LLC*, 2010 U.S. Dist. LEXIS 120347, at *7 (S.D.N.Y. Nov. 12, 2010).

¹⁰ See *Gulfport Energy Corp.*, 41 F.4th at 672.

a. *The Role of Executory Contracts Containing Filed-Rates in Chapter 11 Reorganization*

Under section 365 of title 11 of the United States Code (the “Bankruptcy Code”) “the trustee, subject to the court’s approval, may assume or reject any executory contract . . . of the debtor.”¹¹ An executory contract is “a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.”¹² In chapter 11, a debtor must assume or reject all executory contracts they are a party to.¹³ If the debtor rejects an executory contract, the nonbreaching party receives a claim against the debtor for an amount equal to its damages from the breach.¹⁴

When utility entities contract to transport and sell gas, electric, and oil they are required to file the charged rates with FERC.¹⁵ The filed-rate doctrine prohibits federally regulated sellers and transporters of utilities from charging higher rates than those they filed with FERC.¹⁶ Filed-rates become subject to bankruptcy proceedings when they are contained in an executory contract that is subject to a reorganization plan.¹⁷

b. *FERC has Exclusive Authority to Approve Filed-Rates in Utility Contracts*

Congress has granted FERC sole authority to approve utility entities’ filed-rates. Therefore, no entity may collect a rate other than the one filed with FERC.¹⁸ To be approved, a filed-rate must be “just and reasonable.”¹⁹ Consequently, all approved filed-rates are deemed

¹¹ 11 U.S.C. § 365(a).

¹² *Executory Contracts in Bankruptcy: Part 1*, 57 MINN. L. REV. at 460.

¹³ *See id.* at 439.

¹⁴ *See In re Mirant Corp.*, 378 F.3d 511, 520 (5th Cir. 2004) (citing 11 U.S.C. §§ 365(g)(1), 502(g)).

¹⁵ *See Gulfport Energy Corp.*, 41 F.4th at 672 (citing 15 U.S.C. § 717(c)–(e)).

¹⁶ *See Ark. La. Gas Co.*, 453 U.S. at 573.

¹⁷ *See COMMENT: Reigning in Regulatory Overreach: FERC’s Role in Bankruptcy*, 82 LA. L. REV. at 633.

¹⁸ *See Ark. La. Gas Co.*, 453 U.S. at 576–77.

¹⁹ *Id.* at 577.

“per se reasonable and unassailable in judicial proceedings.”²⁰ No court is allowed to substitute its own judgement of a “just and reasonable” rate, for that of FERC’s.²¹

The Mobile-Sierra doctrine limits FERC’s authority to decide which filed-rates are “just and reasonable.”²² Under this doctrine, FERC presumes any rate set by a “freely negotiated wholesale-energy contract” meets the “just and reasonable” standard.²³ FERC can countermand this standard if they conclude “the contract seriously harms the public interest.”²⁴ This doctrine assumes parties to wholesale energy contracts are typically “sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a ‘just and reasonable’ rate as between the two of them.”²⁵

c. Congress has Granted the Bankruptcy Courts the Power to Allow Debtors to Reject Executory Contracts in Chapter 11

Through section 365 of the Bankruptcy Code, Congress grants the bankruptcy courts power to determine whether a debtor may assume or reject an executory contract during chapter 11.²⁶ The bankruptcy court reviews a debtor’s decision to either assume or reject an executory contract under the “deferential ‘business judgment’ standard.”²⁷ To determine if this standard is met, courts consider whether assumption or rejection will benefit or “enhance a debtor’s estate.”²⁸

Overall, Congress granted extensive jurisdiction to the bankruptcy courts so that they could comprehensively deal with all matters connected to “the bankruptcy estate,” and help

²⁰ Alexander v. Glob. Tel Link Corp., 816 F. App’x 939, 943 (5th Cir. 2020).

²¹ See *id.* at 577 (citing 15 U.S.C. § 717).

²² See NRG Power Mktg., LLC v. Me. PUC, 558 U.S. 165, 167 (2010).

²³ See *id.*

²⁴ *Id.*

²⁵ Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 545 (2008) (citing Verizon Communs., Inc. v. FCC, 535 U.S. 479 (2002)).

²⁶ See *In re Mirant Corp.*, 378 F.3d at 517; see also 11 U.S.C. § 365(a).

²⁷ See *In re J. C. Penney Direct Mktg. Servs., L.L.C.*, 50 F.4th 532, 534 (5th Cir. 2022).

²⁸ See *id.*

“troubled enterprises” continue operations.²⁹ Additionally, Congress granted the bankruptcy courts authority to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of chapter 11.³⁰ These broad powers indicate Congress’s intent for the bankruptcy courts to have authority over executory contracts, without significant interference from regulatory agencies.³¹

d. The Intersection Between the Bankruptcy Courts and FERC: Whether the Bankruptcy Court’s Approval of Rejection of an Executory Contract Constitutes a Collateral Attack on FERC’s Authority

During chapter 11, the debtor’s rejection of an executory contract constitutes “a breach,” giving the non-breaching party a claim for an amount equal to the damages from the breach.³² Therefore, when an executory contract containing a filed-rate is rejected, the non-breaching party is entitled to damages equal to the amount of the FERC-approved filed-rate.³³ The question that arises is if this constitutes a collateral attack on FERC’s authority, regardless of the damages being equal to the FERC-approved filed-rate.³⁴

Conflict arises when FERC attempts to assert parallel jurisdiction over these executory contracts containing filed-rates, claiming that debtors need FERC’s approval before they can opt to reject the contract.³⁵ Generally, FERC argues that rejection wrongfully modifies and abrogates a filed-rate.³⁶ With both the bankruptcy courts and FERC attempting to assert jurisdiction over

²⁹ See *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995); see also *In re Mirant Corp.*, 378 F.3d at 517.

³⁰ See 11 U.S.C. § 105(a).

³¹ See *COMMENT: Reigning in Regulatory Overreach: FERC’s Role in Bankruptcy*, 82 LA. L. REV. at 633.

³² See 11 U.S.C. § 365(g).

³³ See *In re Mirant Corp.*, 378 F.3d at 520; see also *Ark. La. Gas Co.*, 453 U.S. at 584–85 (holding district courts are preempted from awarding an amount of damages different from the rate filed with FERC).

³⁴ See *In re Mirant Corp.*, 378 F.3d at 520.

³⁵ See *Gulfport Energy Corp.*, 41 F.4th at 673.

³⁶ See *id.*

executory contracts containing filed-rates, there lies a question of whether a debtor needs only the bankruptcy courts' approval to reject such contract, or if they also need FERC's approval.³⁷

II. Jurisdictions Vary on Whether a Debtor Needs FERC's Approval to Reject an Executory Contract Containing a Filed-Rate

Currently, few courts have heard the issue of whether bankruptcy courts have exclusive jurisdiction to allow rejection of a debtor's executory contract containing a filed-rate, or if they also need FERC's approval. The Fifth Circuit has answered this question the most robustly, holding that bankruptcy courts have exclusive jurisdiction over rejection of executory contracts.³⁸ Other courts have issued opinions agreeing with the Fifth Circuit.³⁹ However, one jurisdiction answered this question in the negative, holding that a debtor looking to reject an executory contract containing a filed-rate additionally needs FERC's approval.⁴⁰

a. General Rule: The Bankruptcy Court has Exclusive Jurisdiction to Allow a Debtor to Reject an Executory Contract During Chapter 11 Reorganization

In 2004, for the first time, the Fifth Circuit answered the question of whether the federal courts could allow rejection of an executory contract containing a filed-rate or if the debtor also needed FERC's approval.⁴¹ In *Mirant*, the debtor, a public utility entity, filed for chapter 11 and sought to reject an agreement with PEPCO, another public power entity.⁴² The court held that federal courts may allow rejection of executory contracts during reorganization without infringing on FERC's authority over filed-rates.⁴³ The court explained the rejection of the executory contract resulted in a breach of contract claim, so the non-breaching party received a

³⁷ *See id.* at 672.

³⁸ *See Gulfport Energy Corp.*, 41 F.4th at 684.

³⁹ *See In re FirstEnergy Sols., Corp.*, 945 F.3d 431, 454–55 (6th Cir. 2019).

⁴⁰ *See In re Calpine Corp.*, 337 B.R. at 33; *see also In re Bos. Generating, LLC*, 2010 U.S. Dist. LEXIS 120347, at *7.

⁴¹ *In re Mirant Corp.*, 378 F.3d at 514.

⁴² *Id.* at 515.

⁴³ *Id.* at 522.

claim for damages equal to that of the FERC-approved filed-rate.⁴⁴ Therefore, the rejection is not a collateral attack on FERC’s authority and is not a change to the filed-rate.⁴⁵ Further, the court reasoned that, in general, the Federal Power Act does not provide FERC with exclusive jurisdiction over the breach of FERC-approved filed-rates.⁴⁶ Lastly, the court stated that “in light of the numerous specific exceptions to the general § 365(a) authority to reject contracts that Congress chose to include in the Bankruptcy Code, . . . the absence of any exceptions for contracts subject to FERC jurisdiction, it is clear that Congress intended § 365(a) to apply to contracts subject to FERC regulation.”⁴⁷

The Fifth Circuit reaffirmed this holding in *In re Ultra Petro Corp.*⁴⁸ During chapter 11, the debtor, Ultra, sought the bankruptcy court’s approval to reject its gas shipping contract with REX.⁴⁹ REX asked FERC to issue an order asserting that Ultra could not reject the contract.⁵⁰ The court reaffirmed *In re Mirant*, holding that the bankruptcy court had authority to permit rejection without FERC’s approval, that rejection simply constitutes a breach of contract, not an alteration to the rate, and therefore it is not a collateral attack on FERC’s authority over filed-rates.⁵¹

Most recently, in *Gulfport Energy Corp.*, the Fifth Circuit again reaffirmed *In re Mirant*.⁵² In *Gulfport*, the debtor signed a gas transportation agreement with Rover, where Rover would transport the debtor’s gas through its pipelines.⁵³ Due to the debtor’s potential bankruptcy, FERC approved Rover’s request that FERC have exclusive jurisdiction over the transportation contract,

⁴⁴ *Id.* at 519–20.

⁴⁵ *Id.*

⁴⁶ *Id.* at 519.

⁴⁷ *Id.* at 522.

⁴⁸ *In re Ultra Petro. Corp.*, 28 F.4th 629, 636–39 (5th Cir. 2022).

⁴⁹ *Id.* at 635.

⁵⁰ *Id.*

⁵¹ *Id.* at 636–39.

⁵² *Gulfport Energy Corp.*, 41 F.4th at 671.

⁵³ *Id.* at 673.

making it so the bankruptcy court could not confirm any reorganization plan involving such contract without FERC’s approval.⁵⁴ Eventually, the debtor filed for bankruptcy and the court allowed them to reject the contract.⁵⁵ The court followed the precedent of *In re Mirant*, and further strengthened the bankruptcy court’s authority, stating FERC “cannot usurp the bankruptcy court’s power to decide” whether to allow rejection of an executory contract, regardless of if it contains a filed-rate.⁵⁶ The court stated FERC was incorrect in saying rejection would change the filed-rate, because it is settled law that rejection amounts to a breach resulting in a claim for damages equal to that of the amount of the filed-rate.⁵⁷

In *In re FirstEnergy Solutions Corp.*, the Sixth Circuit agreed with Fifth Circuit precedent.⁵⁸ In *FirstEnergy*, the debtor filed for chapter 11 and sought to enjoin FERC from interfering with its plan to reject certain contracts with filed-rates, but FERC opposed the action.⁵⁹ The court held the bankruptcy court had jurisdiction to decide whether a chapter 11 debtor could reject an executory contract with a filed-rate because they are ordinary contracts subject to claim for breach.⁶⁰ However, the court limited this power by holding courts may only enjoin FERC from compelling a debtor to continue performance on a contract with a filed-rate if FERC’s actions “would directly conflict with the bankruptcy court’s . . . authority.”⁶¹

The Bankruptcy Court for the Northern District of California held similarly in *In re PG&E Corp.*⁶² Here, the debtor, PG&E, sought to prevent FERC from issuing a ruling against rejection of a power purchase agreement, and they sought to establish the bankruptcy court’s sole

⁵⁴ *Id.* at 673–74.

⁵⁵ *Id.* at 675.

⁵⁶ *Id.* at 685.

⁵⁷ *Id.* at 683.

⁵⁸ See *In re FirstEnergy Sols., Corp.*, 945 F.3d at 452.

⁵⁹ *Id.* at 436.

⁶⁰ See *id.* at 446.

⁶¹ *Id.* at 452.

⁶² *In re PG&E Corp.*, 603 B.R. 471, 487 (Bankr. N.D. 2019).

authority over the agreement.⁶³ The court followed *In re Mirant*, holding bankruptcy courts have exclusive jurisdiction to allow rejection of debtors’ executory contracts, and further, “Section 365’s lack of an exception for FERC simply means that FERC has no jurisdiction over the rejection of contracts.”⁶⁴ Further, in *In re Extraction Oil & Gas*, the Bankruptcy Court for the District of Delaware also held that Congress explicitly declined to except FERC approved contracts from 11 U.S.C. § 365, and that rejection is not an “abrogation of FERC approved rates.”⁶⁵

b. Outlier Jurisdiction: During Chapter 11 Reorganization Debtors Need FERC’s Approval to Reject an Executory Contract Containing a Filed-Rate

To date, there is one outlier jurisdiction which holds in opposition of the general rule. Through two decisions, the District Court for the Southern District of New York (“S.D.N.Y.”) has held that debtors need FERC’s approval to reject an executory contract containing a filed-rate.⁶⁶ However, these two cases differ in reasoning and have varying nuances to their holdings.

In *In re Calpine Corp.*, the S.D.N.Y. held that FERC has exclusive jurisdiction over the disposition of “energy contracts,” even when they are subject to rejection in chapter 11.⁶⁷ In *In re Calpine*, the day before the debtor, Calpine, filed for chapter 11, the California State Parties petitioned to FERC to enforce their power purchase agreement with Calpine.⁶⁸ The court held FERC has plenary authority over filed-rates, and when the bankruptcy court asserts exclusive jurisdiction over executory contracts containing filed-rates, it constitutes a collateral attack on

⁶³ *Id.* at 476.

⁶⁴ *Id.* at 486–87.

⁶⁵ *In re Extraction Oil & Gas*, 622 B.R. 608, 614 (Bankr. D. Del. 2020).

⁶⁶ *See In re Calpine Corp.*, 337 B.R. at 33; *see also In re Bos. Generating, LLC*, 2010 U.S. Dist. LEXIS 120347, at *7.

⁶⁷ *In re Calpine Corp.*, 337 B.R. at 30–33.

⁶⁸ *Id.* at 30.

FERC's authority.⁶⁹ The court noted that in the Bankruptcy Code, there is "little evidence of congressional intent to limit FERC's regulatory authority," and further, the bankruptcy courts may not interfere with the jurisdiction of a federal agency, such as FERC.⁷⁰

A few years later, the S.D.N.Y. expanded its view through *In re Boston Generating, LLC*.⁷¹ Here, the debtor, Fore River, entered into an agreement with Algonquian for priority use of its gas pipeline, and the charged rates were filed and approved by FERC.⁷² The debtor filed for chapter 11 and sought to reject the contract with Algonquian.⁷³ The court held FERC and the bankruptcy courts have concurrent jurisdiction over executory contracts containing filed-rates and, therefore, before rejection, a debtor needs both to approve.⁷⁴ If either disapproves, the debtor must assume the executory contract.⁷⁵ The court reasoned that FERC's approval is needed to ensure "abrogation . . . does not contravene the public interest."⁷⁶

c. The Courts Recognize That Public Interest Should be Considered When Allowing Rejection of Executory Contracts Containing FERC-Approved Filed-Rates

Congress has recognized certain contracts, such as the ones considered in the aforementioned cases, affect the public interest in a unique way.⁷⁷ Consequently, through the Federal Power Act and the Natural Gas Act, FERC was given power to reject filed-rates if they were found to be "unjust, unreasonable, unduly discriminatory, or preferential," and therefore, would "seriously harm the public interest."⁷⁸ For example, a rate adversely affects the public

⁶⁹ *Id.* at 32–34.

⁷⁰ *Id.* at 33–36.

⁷¹ See *In re Bos. Generating, LLC*, 2010 U.S. Dist. LEXIS 120347.

⁷² *Id.* at *3–4.

⁷³ *Id.* at *4.

⁷⁴ See *id.* at *7.

⁷⁵ See *id.*

⁷⁶ *Id.* at *1.

⁷⁷ See COMMENT: *Reigning in Regulatory Overreach: FERC's Role in Bankruptcy*, 82 LA. L. REV. at 628.

⁷⁸ See 16 U.S.C. §824(a); see also 15 U.S.C. § 717(a); see also *id.* at 629, 636.

interest if it is so low it impairs the financial ability of the utility company to keep providing the service, or if it imposes an excessive burden on consumers.⁷⁹

In all the cases discussed in the prior two subsections, including the outliers, the courts considered the public interest implications of their ruling. The Fifth and Sixth Circuits state special considerations should be contemplated when rejecting utility contracts because they effect public interest.⁸⁰ While the bankruptcy courts use a business judgment standard to decide whether to permit a debtor's rejection of an executory contract, the Fifth and Sixth Circuits suggest a stricter standard should be used for contracts containing a filed-rate.⁸¹ Further, they suggest in assessing public interest, FERC should assist the court in determining whether such contracts should be rejected because it aligns with the authority Congress has granted FERC.⁸² The S.D.N.Y. has also agreed public policy should be taken into consideration when rejecting utility contracts.⁸³ Specifically, this court highlights FERC's role in public interest considerations.⁸⁴

Conclusion

In general, courts agree Congress gave the bankruptcy courts exclusive power to decide whether a debtor can reject an executory contract.⁸⁵ Thus, FERC does not have parallel jurisdiction over executory contracts, simply because they contain a filed-rate.⁸⁶ Despite this, FERC has exclusive power to approve filed-rates, and no court can infringe on this by altering a

⁷⁹ See *In re Mirant Corp.*, 378 F.3d at 518.

⁸⁰ See *In re Mirant Corp.*, 378 F.3d at 518; see also *In re FirstEnergy Sols., Corp.*, 945 F.3d. at 453–54.

⁸¹ See *id.*

⁸² See *In re Mirant Corp.*, 378 F.3d at 526–27; see also *In re FirstEnergy Sols., Corp.*, 945 F.3d. at 453–54.

⁸³ See *In re Calpine Corp.*, 337 B.R. at 39; see also *In re Bos. Generating, LLC*, 2010 U.S. Dist. LEXIS 120347, at *7.

⁸⁴ *Id.*

⁸⁵ See *Gulfport Energy Corp.*, 41 F.4th at 685.

⁸⁶ See *id.*

FERC-approved filed-rate.⁸⁷ However, rejection of an executory contract containing a filed-rate does not impede on FERC's authority because rejection converts to a breach resulting in a claim for damages equal to the FERC-approved filed-rate.⁸⁸

⁸⁷ See 15 U.S.C. § 717; *see also* 16 U.S.C. § 824d.

⁸⁸ See *Gulfport Energy Corp.*, 41 F.4th at 685.