FERC vs. Bankruptcy Courts—The Battle over Jurisdiction Continues

By Hugh M. McDonald and Neil H. Butterklee*

In energy industry bankruptcies, the issue of whether a U.S. bankruptcy court has sole and exclusive jurisdiction to determine a debtor's motion to reject an executory contract has mostly involved a jurisdictional struggle involving the Federal Energy Regulatory Commission. The dearth of judicial (and legislative) guidance on this issue has led to shifting decisions and inconsistent outcomes leaving counterparties to contracts in still uncertain positions when a contract counterparty commences a bankruptcy case. The authors of this article discuss the jurisdiction conundrum.

The COVID-19 pandemic has put pressure on all aspects of the United States economy, including the energy sector. Counterparties to energy-related contracts, such as power purchase agreements ("PPAs") and transportation services agreements ("TSAs"), may need to commence bankruptcy cases to restructure their balance sheets and, as part of such restructuring, may seek to shed unprofitable or out-of-market contracts. However, this situation has created a new stage for the decades-old jurisdictional battle between bankruptcy courts and energy regulators.

The U.S. Bankruptcy Code allows a debtor to assume or reject executory contracts with the approval of the bankruptcy judge presiding over the case.[1] The standard employed by courts when assessing the debtor's request to assume or reject is the business judgment standard. A debtor merely has to demonstrate that assumption or rejection is in the best interest of the estate and the debtor's business. However, most energy-related contracts are subject to regulatory oversight by federal and/or state regulatory bodies, which, depending on the type of contract that is being terminated, apply different standards—most of which take into account public policy concerns.

The issue of whether a U.S. bankruptcy court has sole and exclusive jurisdiction to determine a debtor's motion to reject an executory contract has

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[1] 11 U.S.C. § 365.

mostly involved a jurisdictional struggle involving the Federal Energy Regulatory Commission ("FERC") and has yet to be conclusively decided. As expected, bankruptcy courts have consistently found that they have exclusive jurisdiction while FERC has consistently found that it has concurrent jurisdiction with the bankruptcy courts. The outcome of disputes on jurisdiction has depended on which circuit the debtor has commenced its case.

This inconsistent caselaw has led to different outcomes from FERC being enjoined from exercising any jurisdiction to FERC being given an advisory role by holding a hearing and issuing an advisory opinion. In some earlier cases, courts have determined that they cannot exercise jurisdiction without the matter first being determined by FERC.

Recent cases addressing this issue include *PG&E*, *FirstEnergy Solutions*, *Ultra Petroleum*, *Chesapeake Energy*, *Extraction Oil & Gas*[2] and the recent *Gulfport Energy Corp*.[3] Prior to these cases, only a few cases addressed the issue of the FERC and bankruptcy court jurisdiction with respect to FERC jurisdictional contracts.

Notably, only two of these cases was decided at the circuit court level and none has been decided by the U.S. Supreme Court. As discussed below, the dearth of judicial (and legislative) guidance on this issue has led to shifting decisions and inconsistent outcomes leaving counterparties to contracts in still uncertain positions when a contract counterparty commences a bankruptcy case.

Moreover, allowing bankruptcy courts alone to approve the rejection of FERC-jurisdictional agreements will create a significant uncertainty for developers and impede the development of new electric transmission and gas transportation facilities including new renewable electric supplies. Future contracts for these facilities will be more expensive because of the need to price in the previously unknown exposure to possible abrogation by bankruptcy courts.

THE NATIONAL GAS ACT AND THE FEDERAL POWER ACT

Before diving into the jurisdiction issues, it is important to understand the basis of each tribunal's jurisdiction. At the federal level, FERC is charged with

[2] The Extraction Oil & Gas, Inc. case is currently pending in the U.S. Bankruptcy Court for the District of Delaware. Motions to reject FERC-jurisdictional TSAs were granted on November 2, 2020 (*see* discussion below). *In re Extraction Oil & Gas, Inc.*, Case No. 20-11548 (CSS) (Bankr. D. Del.).

[3] Case No. 20-35562 (Bankr. S.D. Tex.).

overseeing compliance with the National Gas Act ("NGA") and the Federal Power Act ("FPA").[4] Both acts contain similar provisions concerning public policy and rates as well as any changes to the rates, terms or conditions of FERC jurisdictional contracts.[5]

The NGA provides that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."[6] In furtherance of its public policy mission under the NGA, FERC is vested with exclusive authority to regulate rates for the interstate transportation and sale of natural gas, and it is authorized by Congress to establish rules and regulations governing such rates.[7]

FERC is charged with ensuring that all rates and charges for or in connection with interstate transportation and sale of natural gas must be "just and reasonable" and not "unduly discriminatory or preferential."[8] Regulated entities must file their proposed rates and charges for interstate transportation and sale of natural gas with FERC at least 30 days before the rate takes effect.[9] To safeguard the public interest, the NGA grants FERC "an opportunity in every case to judge the reasonableness of the rate."[10]

Similarly, the FPA was enacted to regulate interstate transmission and wholesale sales of electricity. As with the NGA, Congress declared that "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest," and that federal regulation of those matters was "necessary in the public interest."[11] FERC is also vested with

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[4] FERC is also charged with overseeing compliance with the Interstate Commerce Act ("ICA"), 49 App. U.S.C. §§ 1, *et. seq*., as it relates to interstate pipelines and the regulation of rates.

[5] The similarities between the NGA and FPA have been noted by the U.S. Supreme Court, which has repeatedly stated that the relevant substantive provisions of the FPA are "substantially identical" to the equivalent provisions of the NGA. *See, e.g., Ark. La. Gas Co. v. Hall,* 453 U.S. 571, n.7 (1981) *("Arkla")* (*citing Fed. Power Comm'n v. Sierra Pac. Power Co*., 350 U.S. 348, 353 (1956) ("*Sierra*")). Thus, much of the applicable caselaw cites to decisions under both acts.

[6] 15 U.S.C. § 717.

[7] *See* 15 U.S.C. §§ 717, 717c, 717d.

[8] 15 U.S.C. §§ 717c(a), 717c(b), 717d(a).

[9] 15 U.S.C. § 717c(d).

[10] *Arkla,* 453 U.S. at 582.

[11] 16 U.S.C. § 824(a).

exclusive jurisdiction to regulate and protect the public interest in interstate transmission and wholesale sales of electricity.[12]

Under Sections 205 and 206 of the FPA,[13] FERC is charged with ensuring that all of the terms of a wholesale power contract are and remain "just and reasonable." FERC must approve any "change" to any "rates, charges, classification, or service," or "any rule, regulation, or contract relating thereto."[14] FERC's statutory duty to regulate a wholesale power contract therefore "is not limited to 'rates' per se."[15] While the pricing in a wholesale power contract is relevant, so too are other terms like the duration of the contract, the continuation of performance, the volumes to be bought, and the point of delivery.

Previously, all information regarding the components of a FERC jurisdictional contract was filed with FERC in a "tariff" often known as the "filed rate."[16] Now, however, FERC has approved a regulatory approach where FERC approves so-called "market-based rate tariffs," which authorize specific wholesale power contracts to be entered into without being filed in advance with FERC.[17] Those wholesale power contracts are part of the filed rate just as if they had been filed in advance with FERC.[18]

Energy supply agreements usually have long terms that lock in parties to supply and purchasing commitments that can go out as long as 20 years. Indeed, FERC has encouraged parties to enter into long term agreements to avoid market volatility in the spot markets.[19] Long term agreements also enable project developers and owners to obtain long term financing at reduced rates. Additionally, long term agreements enable purchasers to obtain the benefit of a long-term supply without having operational and maintenance responsibilities. Finally, in states that are encouraging the development of renewable resources,

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[12] *Id.* § 824(b).

[13] 16 U.S.C. § 824d, 824e.

[14] 16 U.S.C. § 824d(d). *See, e.g., FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773–74 (2016); *Pub. Serv. Comm'n v. Fed. Power Comm'n*, 543 F.2d 757, 785 (D.C. Cir. 1974).

[15] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966–67 (1986).

[16] *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 531 (2008).

[17] *Pub. Util. Dist. No 1 v. Idacorp Inc.*, 379 F.3d 641, 650 (9th Cir. 2004).

[18] *See id.* at 651; *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004); *see also Morgan Stanley*, 554 U.S. at 537–38.

[19] *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.,* 93 F.E.R.C. ¶ 61,294, at 61,993 (2000).

the ability of a renewable resource developer to enter into a long-term agreement subject to FERC's jurisdiction increases the ability of that developer to obtain attractive financing and reduces the risks associated with developing a newer type of resource.

Thus, the Supreme Court has held that the FPA and NGA also require FERC to consider "the stabilizing force of contracts."[20] That is because the statutes rest on the understanding that "contract stability ultimately benefits consumers."[21] In the *Morgan Stanley* decision, the Supreme Court also stated that the "uncertainties regarding rate stability and contract sanctity can have a chilling effect on investments and a seller's willingness to enter into long-term contracts and this, in turn, can harm consumers in the long run."[22]

While private contractual obligations are critical to the statutory scheme, the FPA's and NGA's regulatory reach is not limited to what a contract itself provides as a matter of contract. Once a FERC jurisdictional contract is executed, the counterparties have a duty to comply with the FERC-governed tariff—the rates, terms, and conditions of that contract—independently of any duties under the contract itself. Unlike typical executory contracts, these FERC-jurisdictional contracts give rise to distinct regulatory obligations that only FERC can modify. These regulatory obligations are part of the filed rate and are the "equivalent of a federal regulation."[23] The Supreme Court has stated that these regulatory obligations spring "from the Commission's authority, not from the law of private contracts."[24] Because the regulatory obligations regarding FERC-jurisdictional contracts are created by both the FPA and the NGA and exist independently of any contractual obligations, those regulatory obligations are not extinguished even if the contract expires or is rejected.

Under the FPA, FERC alone has authority to determine if these independent regulatory obligations should be modified. This is because Congress has entrusted FERC, and not the bankruptcy courts, to protect the public interest

[20] *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165, 168 (2010).

[21] *Morgan Stanley*, 554 U.S. at 551. *See also United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956) ("*Mobile*") ("By preserving the integrity of contracts, [the NGA] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry.").

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

[23] *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004).

[24] *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 423 (1952) ("*Penn Water*"). *See also Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 155 (1960) (the duty to comply with the continuing regulatory obligations after the contract term ends "will not be one imposed by contract but by the Act").

with respect to wholesale power purchase agreements, electric transmission service agreement, and natural gas transportation and storage agreements.[25]

If a counterparty to a FERC jurisdictional contract desires to change any of the rates, terms or conditions of such contract or cease performance thereunder, it must initiate a proceeding before FERC under FPA Section 206 or NGA Section 5—depending upon the type of contract. All parties to the contract as well as any parties that may be impacted by the cessation of performance or contract changes will have the opportunity to participate in the FERC proceeding.

One of the issues bankruptcy courts are weighing when faced with a motion to reject a FERC jurisdictional contract is whether the rejection effects a change to the rates, terms and conditions of such contract. It is clear, however, that once a contract is rejected, as discussed in more detail below, it is breached and the debtor will be relieved of future performance under the contract.

THE BANKRUPTCY CODE AND BANKRUPTCY COURTS

The Bankruptcy Code was enacted in 1978 along with complimentary provisions that established the current bankruptcy court system and defined the scope of its jurisdiction.[26] Under Section 1334(a), bankruptcy courts were granted "original and exclusive jurisdiction of all cases under title 11."[27] Section 1334(b) provides that "notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."[28]

Chapter 11 of the Bankruptcy Code establishes a framework for reorganizing a bankrupt business.[29] The commencement of a bankruptcy case triggers the application of the automatic stay, which prevents, among other things, the commencement or continuation of any judicial or administrative proceedings against the debtor, the enforcement of judgments and any effort to obtain

[25] *See* 16 U.S.C. § 824(a), (b); 15 U.S.C. §§ 717, 717c, 717d; *see also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 791 (1968) (FERC's responsibility is to "assess the requirements of the broad public interests entrusted to its protection by Congress").

[26] *See* 11 U.S.C. §§ 101, *et seq.*; 28 U.S.C. §§ 151–159, 1334.

[27] 28 U.S.C. § 1334(a).

[28] 28 U.S.C. § 1334(b).

[29] *See* 11 U.S.C. §§ 1101-1174.

control over any assets of debtor's estate.[30] A debtor's bankruptcy "estate" is comprised generally of all the debtor's rights, interests, and assets as of the petition date.[31]

The debtor (often referred to as a debtor-in-possession) will need to assess its business, determine whether a reorganization is feasible and work with parties in interest to reach a resolution that ultimately will be embodied in a plan. A critical part of this process is determining which assets and liabilities will be included in the reorganized entity. The Bankruptcy Code enables debtors to sell assets free and clear of liens, claims and encumbrances.[32] In addition, Section 365 of the Bankruptcy Code allows the debtor to assume, assume and assign or reject executory contracts and unexpired leases.[33]

As noted above, when evaluating whether to reject or assume a contract in bankruptcy, a debtor generally considers "whether the contract is a good deal for the estate going forward," and the bankruptcy court generally reviews that decision "under the deferential 'business judgment' rule."[34] The ability to reject a contract is "vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization."[35]

If a debtor rejects an executory contract, the contract is deemed to have been breached and the non-debtor counterparty has the ability to file a claim against the estate for any resulting damages.[36] Such claims are treated as pre-petition unsecured claims.

While the debtor is relieved from performing under the rejected contract, the Supreme Court in the *Mission Product* decision held that Section 365 does not operate to relieve a debtor from complying with applicable non-bankruptcy law. "[I]n allowing rejection of those contractual duties, Section 365 does not grant

[30] *See* 11 U.S.C. § 362(a).

[31] *See* 11 U.S.C. § 541(a).

[32] *See* 11 U.S.C. § 363(b).

[33] 11 U.S.C. § 365. The Bankruptcy Code does not contain a definition of "executory contract." However, "legislative history of § 365(a) defines the term to mean a contract on which performance remains due on both sides[.]" *Sharon Steel Corp. v. Nat'l Fuel Gas Distribution Corp.*, 872 F.2d 36, 39 (3d Cir. 1989) (*citing N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 522 n. 6 (1984) ("*Bildisco*")).

[34] *Mission Product Holdings, Inc. v. Tempnology, LLC*, 587 U.S. ___, 139 S. Ct. 1652, 1658 (2019) ("*Mission Product*").

[35] *Bildisco*, 465 U.S. at 528.

[36] 11 U.S.C. §§ 365(g), 502(g).

the debtor an exemption from all the burdens that generally applicable law—whether involving contracts or trademarks—imposes on property owners."[37] While the *Mission Product* decision addressed the ability of a non-debtor party to continue to use a trademark after the bankruptcy court allowed the debtor-licensor to reject the trademark license, the Supreme Court made it clear that its decision is intended to apply to all executory contracts, thereby extending the reach of its impact far beyond trademark licenses.[38]

If a debtor chooses to assume an executory contract, the debtor must cure all defaults under the contract and provide the counterparty with adequate assurance that it can perform under the contract in the future.[39] Once the contract is assumed, all amounts due to cure any defaults as well as all amounts due under the contract before the debtor confirms a plan of reorganization become administrative expense claims.

If the debtor subsequently breaches the assumed contract, any damages also are treated as administrative expense claims. This status elevates payment of such claims over the claims of general unsecured creditors.[40]

REJECTION OF A FERC JURISDICTIONAL CONTRACT IN BANKRUPTCY

The commencement of a bankruptcy case by a party to a FERC jurisdictional contract sets off alarm bells for the non-debtor counterparty. The common questions that are raised are:

- Can the debtor reject my contract?
- What is the standard used to evaluate a proposed rejection?
- Can I fight the rejection?
- Can I file a petition with FERC?
- What happens if the bankruptcy court authorizes the rejection?
- What will my lenders say and do?[41]

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[37] *See* 28 U. S. C. § 959(b) (requiring a trustee to manage the estate in accordance with applicable law)." 139 S. Ct. at 1665–66.

[38] *Id.* at 1666.

[39] 11 U.S.C. § 365 (b)(1).

[40] *See* 11 U.S.C. §§ 503(b), 507(a)(2).

[41] In the case of electric energy suppliers, many counterparties have financed their generating facility, including clean energy facilities (like solar or wind) based on the existence of their power purchase agreement ("PPA"). If the PPA is rejected, then the developer's lending institution may seek to call the loan putting the existence of the facility at risk. In this case, not only will the

In several recent cases, which are discussed in more detail below, non-debtor counterparties have commenced proceedings at FERC both before and after the bankruptcy cases were commenced seeking declarations from FERC that FERC still had to review the cessation of performance under the contract. Thus far, in each instance, the bankruptcy court determined that it alone had the ability to decide the issue of rejection of the contract—in two instances to the exclusion of FERC and in the recent *Ultra Petroleum* case, invited FERC to participate in the bankruptcy case as a litigant. The bottom line is that certain bankruptcy courts have taken the position that they have exclusive jurisdiction to determine whether a debtor can reject a FERC jurisdictional contract and that FERC and the non-debtor counterparties have no ability to enforce the contract or seek a review of the cessation of performance.

As discussed below, there have been several situations recently where counterparties either knew of, or suspected, an imminent bankruptcy filing and were able to commence proceedings before FERC and, in the *PG&E* case, have FERC issue orders.

The situation, however, raises several issues that the courts are considering, including the impact of the automatic stay on any FERC proceeding, the ability of the court to enjoin the commencement or continuation of a FERC proceeding, whether there can be "concurrent" jurisdiction over a rejection motion and how to, if at all, assess and address public policy concerns when deciding a motion to reject a FERC jurisdictional contract.

THE AUTOMATIC STAY AND INJUNCTIONS

Perhaps one of the greatest protections a debtor obtains at the commencement of its bankruptcy case is the immediate imposition of the automatic stay upon the filing of the petition. While there are numerous exceptions to the stay, in general the commencement or continuation of any action that impacts property of the debtor's estate is subject to the stay. There is an exception to the stay that is potentially applicable to a proceeding at FERC—the police and regulatory exception set forth in Section 362(b)(4). If a regulatory proceeding is determined to be an "action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . regulatory power," then the proceeding is exempt from the application of the automatic stay.[42] Section 362(b)(4) was meant to avoid the need for bankruptcy courts to "scrutinize the validity of

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facility be put at risk but so too will the consumers who depend on the electricity generated by that plant. A large-scale rejection of clean energy PPAs could chill the future development of clean power.

[42] 11 U.S.C. § 362(b)(4).

every administrative . . . action brought against a bankrupt entity" and "determine whether the proposed exercise of . . . regulatory power is legitimate."[43]

In addition to enforcing the automatic stay, bankruptcy courts have the ability to issue injunctions to enjoin proceedings that interfere with their jurisdiction. Under Bankruptcy Code Section 105(a), a "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[44] However, two appellate courts have concluded that injunctions issued by bankruptcy courts that enjoined any action by FERC were overbroad and were thus vacated.[45]

In *Mirant*, the U.S. Court of Appeals for the Fifth Circuit ruled that FERC's authority over the filed rate under the FPA did not bar a bankruptcy court from authorizing rejection of a PPA, provided that the filed rate was not altered. The court, however, rejected the application of the business judgment standard for a motion to reject a PPA, concluding that: "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."[46]

Similar to the *Mirant* court, the bankruptcy court in *FirstEnergy Solutions* concluded that the FERC proceeding commenced pre-petition by a contract counterparty was commenced to preserve the private contract rights of the

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[43] *Bd. of Governors v. MCorp Fin., Inc.*, 502 U.S. 32, 40 (1991) ("*MCorp*").

[44] 11 U.S.C. § 105(a); *see also* Fed. R. Bankr. Proc. 7065.

[45] *See In re Mirant Corporation*, 378 F.3d 511, 523 (5th Cir. 2004) (while finding that "a bankruptcy court can clearly grant injunctive relief to prohibit FERC from negating [a debtor's] rejection [of a filed contract]", the court vacated the injunctions issued by the bankruptcy court as being overbroad by restricting any action by FERC); *In re FirstEnergy Solutions Corp.,* 945 F.3d 431, 451 (6th Cir. 2019) (Section "105(a) did not give the bankruptcy court unlimited power—i.e., 'to act as roving commission to do equity'—to prohibit FERC from taking *any* action whatsoever or to enjoin all of FERC's regulatory functions").

Bankruptcy court injunctions that prevent the enforcement of FERC orders potentially implicate the *Chevron* deference doctrine. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). "This deference to FERC on matters of its technical expertise in the ratemaking process is 'simply an acknowledgment that the principles set forth by the Supreme Court in *Chevron*, extend to all areas in which an agency has been delegated power by Congress to act.'" *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 553 (5th Cir. 2014) (quoting *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998)); *see also Williams Nat. Gas Co. v. FERC*, 3 F.3d 1544, 1549 (D.C. Cir. 1993) ("FERC's interpretation of the contracts is entitled to deference under the principles articulated in *Chevron*.").

[46] 378 F.3d at 525–26. The *Mirant* decision turned on a negative inference argument that the absence of an exception for PPAs in Section 365 demonstrated Congressional intent that PPAs were not to be excluded from rejection under 365. *Mirant*, 378 F.3d at 521.

counterparty and would be "only incidentally related to the core public policy of the Federal Power Act and would be more substantially about litigating who gets what from the insolvent enterprise, which is the primary domain of this Court, not FERC."[47]

The court then issued a preliminary injunction enjoining any further proceedings at FERC over the rejection of the contract. The case was certified for a direct appeal to the U.S. Court of Appeals for the Sixth Circuit.

In December 2019, the Sixth Circuit issued a split decision in a direct appeal from the bankruptcy court's decision. The majority (two out of three judges) affirmed, in part, the bankruptcy court's broad injunction against FERC from taking any action regarding the rejection of PPAs and a related agreement by FirstEnergy Solutions. The majority reversed, however, the bankruptcy court's overly broad injunction to the extent it proscribed any role by FERC.

The majority noted that while the bankruptcy court relied on the *Mirant* decision, the court only adopted parts of the *Mirant* decision "that gave it more power (i.e., authority to enjoin FERC) and ignored or rejected the parts that did not (i.e., limits on its ability to enjoin FERC, the careful tailoring of that injunction, the higher public-interest standard for rejecting contracts, etc.)."[48] The majority noted that the bankruptcy court also:

> expressly rejected the only federal court case that disagreed with *Mirant*, namely, *In re Calpine Corp.* 337 B.R. 27 (S.D.N.Y. 2006) (holding that the rejection of a filed contract was a collateral attack on the filed rate and thus within FERC's exclusive jurisdiction, not the jurisdiction of the bankruptcy court).[49]

The majority ruled that the determination of the rejection of an executory contract, including a PPA, is within the jurisdiction of the bankruptcy court and an injunction preventing FERC interference with that jurisdiction was appropriate and therefore was affirmed.[50]

The majority reversed the bankruptcy court to the extent it prohibited FERC from conducting any proceeding to determine if a proposed rejection comports with the public interest. The majority found that FERC should have been given a "reasonable" amount of time to make its own assessment regarding the public interest, and then the bankruptcy court should have taken that assessment and

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[47] Bankr. N.D. Ohio May 18, 2018.

[48] 945 F.3d at 440.

[49] *Id.*

[50] *Id.* at 452.

included it in the balance of equities in deciding whether to authorize or deny rejection.[51] The majority remanded the case to the bankruptcy court to allow for such a FERC proceeding.[52]

Judge Griffin concurred in part and dissented in part. He agreed that the bankruptcy court has jurisdiction to decide rejection issues but dissented from the majority opinion that the bankruptcy court can decide or weigh public interest standards under the FPA and the filed rate doctrine, concluding that this is FERC's exclusive role.

> Thus, the Bankruptcy Code does not authorize a debtor to violate its obligations under the FPA or a filed rate any more than the criminal code or securities laws. A debtor might emerge from bankruptcy more quickly and successfully if he or she were allowed to engage in insider trading or armed bank robbery, but the 'generally applicable laws' proscribing such conduct have the same force inside of bankruptcy as outside of it.[53]

Judge Griffin then cited to the Supreme Court's decision in the *Mission Product* case for the proposition that non bankruptcy laws are in no way trumped by the desire to enable successful reorganizations.[54] He found that the bankruptcy court is no more able to enjoin FERC in its regulatory role than FERC is able to enjoin the bankruptcy court from its allotted role. "Chapter 11 provides a shield against an insolvent company's creditors, not its regulators."[55]

The recent *PG&E* bankruptcy case also involved a request by the debtor to enjoin proceedings before FERC concerning the potential rejection of PPAs during the bankruptcy case. The difference between the *PG&E* case and *FirstEnergy* case is that FERC had already issued orders concerning its jurisdiction over the cessation of performance of a FERC jurisdictional PPA before PG&E commenced its bankruptcy case.[56]

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[51] *Id.* at 452–53.

[52] A petition for rehearing and rehearing *en banc* was denied by the Sixth Circuit and the case was remanded to the bankruptcy court. Case No. 18-3787 (6th Cir. Mar. 13, 2020). Following remand to the bankruptcy court, the parties settled the matter, with the reorganized debtor (now known as Energy Harbor) assuming the contract at issue.

[53] 945 F.3d at 463.

[54] *Id.*

[55] *Id.*

[56] *NextEra, Inc. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,049 (2019) (*NextEra*) and *Exelon Corp. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,053 (*Exelon*), *order on reh'g, NextEra, Inc. v. Pac. Gas & Elec. Co.*, 167 FERC ¶ 61,096 (2019) ("*NextEra* Rehearing Order").

FERC ruled that when a party seeks to reject a wholesale power contract, the bankruptcy court and FERC have distinct but complementary roles. While recognizing the bankruptcy court's role in deciding whether a debtor may reject its contractual obligations, FERC ruled that "a bankruptcy court's authorization to reject a wholesale power contract does not relieve a debtor of its separate regulatory obligations under the FPA."[57] Because those regulatory obligations arise from the FPA, FERC concluded that it must "determine whether any cessation or modification of performance is just and reasonable, and not unduly discriminatory or preferential under the FPA."[58]

On the day PG&E filed for bankruptcy (January 29, 2019), it commenced an adversary proceeding against FERC seeking a declaratory judgment that the bankruptcy court had exclusive jurisdiction over PG&E's rights to reject any of its PPAs and that FERC did not have concurrent jurisdiction over motions to reject any of PG&E's PPAs. PG&E also sought an injunction to prevent the enforcement of the pre-petition FERC orders.

In June 2019, the bankruptcy court issued a memorandum opinion and a declaratory judgment, rejecting FERC's assertion that it had authority over PG&E's regulatory obligations regarding the wholesale power contracts.[59] The bankruptcy court ruled that it had exclusive jurisdiction to administer executory contracts in a bankruptcy case under Section 365 of the Bankruptcy Code, including the wholesale power contracts at issue.[60] The court reasoned that Congress "knew how to grant exceptions to the power to reject executory contracts and PPAs governed by the FPA were not included."[61] And the absence of any express "exemption," in the court's view, "means that FERC has no jurisdiction over the rejection of contracts."[62] The court stated that "the beginning and the end of the analysis is in the Bankruptcy Code."[63]

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[57] *NextEra* Rehearing Order at 16.

[58] *Id.*

[59] *In re PG&E Corp.*, 603 B.R. 471 (Bankr. N.D. Cal. 2019) ("*PG&E*"). By Memorandum dated October 7, 2020, the U.S. Court of Appeals for the Ninth Circuit dismissed the pending appeals from the orders issued by the bankruptcy court and FERC and ordered the vacatur of all the orders. Case Nos. 19-71615, 19-16833 & 19-16834, Dkt. No. 164-1 (9th Cir. Oct. 7, 2020).

[60] *Id.* at 486.

[61] *Id.* at 487.

[62] *Id.* at 486.

[63] *Id.*

While acknowledging that a request to reject wholesale power contracts might well require special consideration of the "public interest,"[64]—a requirement derived from the FPA, not the Bankruptcy Code—the court concluded that it was competent to provide that highly specialized consideration, concluding that "[t]here is no need or right for a second inquiry by a separate non-judicial body to be involved."[65]

With respect to the application of the automatic stay, the bankruptcy court noted that the FERC orders were issued pre-petition and thus did not implicate the stay. However, the court noted: "If a violation of the stay does occur in the future, either Debtor may move for contempt under Rule 9020. As the automatic stay is already in place, no further order is necessary. Because the court is granting Debtors' request for a Declaratory Judgment . . . there is no need to debate and decide whether or not FERC could act within any Section 362(b)(4) exception."[66]

The recent *Ultra Petroleum* case again raises the issue of jurisdiction and the application of the automatic stay. Prior to the commencement of the *Ultra* case, Rockies Express Pipeline, LLC, commenced a proceeding at FERC for a determination that a motion by Ultra to reject a FERC-regulated gas transportation contract with Rockies would harm the public interest.

After the commencement of its case, Ultra commenced a proceeding seeking a declaratory judgment and issuance of a temporary restraining order from the bankruptcy court, enjoining FERC from impinging on the bankruptcy court's jurisdiction over the rejection motion.

The bankruptcy judge initially ruled that the prepetition FERC petition and any resulting order would violate the automatic stay. Rockies then withdrew its petition at FERC. Rockies then requested that it be permitted to re-file the petition with FERC to allow FERC to determine whether rejection of Rockies' contract would harm the public interest.

At a hearing held on June 15, 2020, the bankruptcy court declined to permit the re-filing of a petition at FERC and instead issued an order inviting FERC to participate in the bankruptcy case "as a party-in-interest in these proceedings to argue and to comment on whether the rejection of Ultra's contract with Rockies Express would harm the public interest." It appears that the bankruptcy court was trying to follow the *Mirant* decision.

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[64] *Id.* at 489.

[65] *Id.* at 490.

[66] *Id.* at 484.

However, as the *FirstEnergy* majority decision noted, under *Mirant* FERC should be given the opportunity to make an assessment of the public interest implications of rejection of the contract. The *Ultra* court's invitation to FERC to become a litigant and argue and comment on the public interest is a step beyond what was contemplated by the *Mirant* and *FirstEnergy* courts. The question that this approach raises is whether FERC can discharge its obligations under the FPA by being a litigant instead of its traditional role as an adjudicative body.

On August 2, 2020, the bankruptcy court entered an order authorizing the rejection of the Rockies Express agreement. An appeal of the order has been filed and is currently pending in the U.S. District Court for the Southern District of Texas.

Following the *Ultra Petroleum* case, Chesapeake Energy Corp. ("Chesapeake") commenced a bankruptcy case in the same court and requested the same relief with respect to FERC's ability to consider Chesapeake's motion to reject gas supply contracts.

Prior to the commencement of the bankruptcy case, a contract counter-party, ETC Tiger Pipeline LLC ("ETC"), filed petitions with FERC on May 19, 2020 seeking findings that "(i) FERC has concurrent jurisdiction with U.S. bankruptcy courts under sections 4 and 5 of the Natural Gas Act ("NGA") with respect to ETC Tiger's transportation agreements with Chesapeake, and (ii) Chesapeake must petition FERC for approval to abrogate, modify, or amend the filed rate pursuant to section 5 of the NGA and show that such abrogation, modification, or amendment is in the public interest."

On June 22, 2020, FERC issued a declaratory order holding that it and the bankruptcy courts have concurrent jurisdiction to review and address the disposition of two natural gas firm transportation agreements between Chesapeake and ETC.[67] On June 28, 2020, Chesapeake commenced its bankruptcy case and, concurrent with the filing, filed a motion to reject the agreement with ETC. ETC objected to the motion and asserted that the bankruptcy court lacked exclusive subject matter jurisdiction over the rejection request due to FERC's authority over rates. ETC also filed a motion to withdraw the reference and have the motion heard by the district court.

On July 22, 2020, Chesapeake filed a request for rehearing of the June 22 FERC Order. By order issued August 21, 2020, FERC denied Chesapeake's rehearing request.[68] FERC stated that:

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[67] *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 (2020).

[68] 172 FERC ¶ 61,155 (2020). On October 22, 2020, Chesapeake filed a petition for review

> The firm natural gas transportation agreements at issue here are not mere executory contracts between two private parties; rather, these contracts, while privately negotiated, implicate the public interest and, as filed rates, carry the force of law. Whether the rates in a Commission-jurisdictional contract are just and reasonable, and whether the abrogation or modification of such contract is necessary to protect the public interest, is a question that the Commission is statutorily obligated and exclusively authorized to consider. The Commission's unique role neither subsumes nor is subsumed by the Bankruptcy Code.[69]

FERC also found that there is "no conflict between the Commission's obligations under the NGA and the Bankruptcy Code" and that "[a]lthough section 365(a) does not carve out an express exception for Commission-jurisdictional contracts, section 1129(a)(6) of the Bankruptcy Code expressly contemplates the Commission's role in a bankruptcy proceeding. . . ."[70]

On September 3, 2020, the bankruptcy judge overseeing the *Chesapeake* case issued a report and recommendation to the district court in which the judge recommended denying the motion to withdraw the reference. While the rejection motion was still *sub judice*, the bankruptcy judge clearly indicated where he was leaning on the issue:

> The Court is guided by the Fifth Circuit's instructions in *In re Mirant Corp*., 378 F.3d 511 (5th Cir. 2004). The Court declines to enter the fanciful world painted by ETC that equates a contract rejection under the Bankruptcy Code with rate modification under the FERC regulatory structure. *See In re Ultra Petroleum Corp.*, No. 20-32631 (MI) (S.D. Tex. June 15, 2020). Nor is the Court persuaded that the prebankruptcy maneuvers undertaken by ETC by racing to FERC have any bearing on this Court's jurisdiction and authority. Congress defines the jurisdiction and authority of federal courts—not an administrative agency.[71]

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of the FERC order with the U.S. Court of Appeals for the Fifth Circuit.

[69] *Id.* at ¶ 20.

[70] *Id.* at ¶ 20.

[71] *In re Chesapeake Energy Corporation, et al.,* Case No. 20-33233 (Bankr. S.D. Tex.) (Docket No. 1092 at p.3); *The Gulfport Energy Corp*. case is also pending in the same court. Case No. 20-35562 (Bankr. S.D. Tex.). Prior to the commencement of its case, Rockies Express Pipeline, LLC, a TSA counterparty, filed a Petition for Declaratory Order and Request for Expedited Action with FERC. On September 25, 2020, FERC granted Rockies Express' Petition and established a formal inquiry pursuant to NGA Section 5 (15 U.S.C. § 717d). Gulfport

PUBLIC POLICY CONCERNS AND WHY JURISDICTION MATTERS

Both FERC and the bankruptcy courts that have addressed the jurisdictional issue have advanced competing sets of public policy concerns in support of their respective assertions of jurisdiction. These competing concerns can be summarized as follows:

FERC:

- Reliability—determining if cessation of service will impact reliability in the impacted area. Will the lights stay on and will there be enough gas supply.
- Infrastructure investment—promoting investment in infrastructure through reliance on contract terms.
- Pricing—ensuring that the prices charged are just and reasonable.
- Market stability—ensuring that the termination of a contract will not have an adverse effect on the stability of the impacted market.
- Clean energy development—the ability of clean energy resources to be financed, developed, and have access to the market (a position also advocated by state regulators).
- Public Interest—most importantly, FERC is required by statute to look out for the overall interest of the public with respect to energy-related issues.

Bankruptcy Courts:

- Automatic stay—ensure that debtors have breathing space at the start of their case.
- Property of the estate—exercise jurisdiction over all property of a debtor's estate.
- Business judgment—allow debtors to exercise business judgment in determining how best to reorganize and which obligations need to be

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participated in the FERC proceeding and presented evidence to support its position that modification or abrogation of its TSA with Rockies Express was required in the public interest. On October 28, 2020, FERC entered its Order on Paper Hearing Rockies Express Pipeline LLC, 173 FERC ¶ 61,099 (2020), in which it rejected Gulfport's position and found that public interest did not require modification or abrogation of the TSA and that the rates were just and reasonable. Gulfport subsequently commenced its bankruptcy case on November 13, 2020 and filed a motion to reject the Rockies Express TSA. That motion and a motion by Rockies Express to withdraw the reference are currently *sub judice*.

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- Reorganization—promote the reorganization of a debtor via a plan that is feasible and not likely to require future financial reorganization.

FERC has asserted that it alone is in a position to assess the overall public interest concerns that arise in the context of a rejection motion. FERC, however, has taken the position that its jurisdiction is concurrent with the bankruptcy court when considering the proposed rejection of a FERC-jurisdictional contract.

That is, the bankruptcy court will determine if the rejection of the contract is appropriate under Section 365 of the Bankruptcy Code and FERC will decide whether the cessation of service is appropriate under the applicable statutory provisions and caselaw concerns. This is what is at the heart of the jurisdictional issue; the fact that the choice of jurisdiction presents a choice in the standard used to evaluate the rejection of a contract.

When evaluating whether to approve a debtor's decision to reject or assume a contract in bankruptcy, the bankruptcy court generally reviews that decision "under the deferential 'business judgment' rule."[72] While the bankruptcy court is properly focused on the private interests of the debtor and its estate, the Supreme Court has stated that FERC is charged with evaluating the "public interest" which is "distinguished from the private interests of the utilities."[73]

As such, FERC is charged with evaluating the impact that the cessation of performance of the independent regulatory obligations associated with Commission-jurisdictional agreements from the point of view of the public interest, including the potential impacts on the reliability of the electric and natural gas systems, the continued availability of electric and natural gas supplies, and electric and natural gas rates.

Because FERC must evaluate a wider breadth of issues and look at the concerns of many stakeholders than a bankruptcy court, a debtor's proposed rejection of a contract must clear a higher hurdle to obtain FERC approval. These differing jurisdictional standards make the bankruptcy courts a more attractive venue for debtors and FERC a more attractive venue for the contract counterparties.

Before delving into the jurisdiction issue, there is fundamental issue that needs to be addressed—can one statutory scheme take priority over another?

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[72] *Mission Product*, 136 S. Ct. at 1658.

[73] *Sierra*, 350 U.S. at 355. *See also NAACP v. FPC*, 425 U.S. at 670 (Use of the words "public interest" in the FPA, "is a charge to promote the orderly production of plentiful supplies of electric energy . . . at just and reasonable rates.").

The U.S. Supreme Court has held that courts must give effect to both statutes: "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[74]

The FPA and Bankruptcy Code both address the process contract counterparties must undertake to cease performance under executory contracts. However, bankruptcy courts in recent cases have taken the position that the FPA is not implicated as the rejection of the contract only creates a breach under the contract and does not change the rate. Additionally, courts routinely handle breach of contract issues involving energy agreements. The ability to file a claim calculated in accordance with the rate is viewed as satisfying the applicable rate and does not affect a modification. Thus, FERC review of the rejection of a contract is the equivalent of appellate review of a bankruptcy court order.

The counter from FERC and non-debtor counterparties is that the debtor will also cease performance under the contract and a claim paid out in bankruptcy dollars is not the equivalent of satisfying the filed rate. They further assert that a review of the implications of the cessation of performance is required by the FPA and NGA along with a determination if the rate is being modified as part of the rejection. Also, FERC does not always permit breach of contract disputes to proceed in other courts.[75] Finally, they have asserted that the injunctions issued by courts prohibiting enforcement of FERC orders are the equivalent of appellate review of FERC orders.[76]

With both tribunals asserting jurisdiction, can there actually be "concurrent" jurisdiction, as FERC has asserted? Black's Law Dictionary defines "concurrent jurisdiction" as: "Authority shared by two or more legislative, judicial, or administrative officers or bodies to deal with the same subject matter."[77]

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[74] *J. E. M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 143–44 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

[75] Under the *Arkla* case, FERC's decision to exercise jurisdiction "over contractual issues otherwise litigable in state courts, depends . . . on three factors . . .: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission." 7 FERC ¶ 61,175, at 61,322 (1979).

[76] Before an appeal can be taken from an order issued by FERC, a party must first request a rehearing before FERC, which both PG&E and Chesapeake pursued. An appeal from the rehearing order can be pursued in a circuit court of appeals. 16 U.S.C. § 8251.

[77] Black's Law Dictionary (5th Ed. 1979).

FERC's position is that a bankruptcy court should consider the contract rejection issue under the Bankruptcy Code, with the assessment of the public interest in the first instance (as opposed to appellate review) left to the appropriate regulatory body—FERC. But this position creates the situation that has led courts to enjoin FERC review—a bankruptcy court authorizes the rejection of the contract, but FERC finds that debtor should not be relieved of the performance of its independent regulatory obligations under the contract.

Given that FERC's public interest obligations include keeping the lights on, the requirement to continue to perform under a contract can best be seen in the context of a debtor who could be required to continue to purchase and pay for energy deliveries under a PPA in order to keep the lights on in a certain region of that utility's service area. While the debtor would be compelled to continue performance under a contract that may not be as beneficial to the debtor, that contract could be absolutely required for reliability.

This situation demonstrates why FERC's concurrent jurisdiction is appropriate in order to enforce the public good; keeping the lights on. This situation begs the question of whether there can be "concurrent" jurisdiction when the decision of one tribunal has the potential effect of nullifying the other tribunal's order.

Recently, the bankruptcy court in the *Extraction Oil & Gas, Inc.* case, in a letter ruling deciding a lift-stay motion by a non-debtor counterparty, stated that there is no "concurrent jurisdiction" between FERC and bankruptcy courts:

> This Court and FERC do not exercise concurrent jurisdiction, rather they exercise *parallel exclusive jurisdiction.* It would be a violation of this Court's exclusive jurisdiction over the rejection of executory contracts for FERC to purport to decide the issue Grand Mesa wishes to present; just as it would be a violation of FERC's exclusive jurisdiction for this Court to consider or to decide whether abrogation or modification of the filed rate obligations is consistent with the public interest and the ICA. They are two separate issues for two separate decision makers, each of which is exercising its exclusive jurisdiction.[78]

The "parallel exclusive jurisdiction" approach advanced by the *Extraction* court would work if the non-debtor counterparty was in fact able to commence a proceeding before FERC to have the filed-rate and public policy concerns reviewed. However, the court denied the ability of the counterparty to

[78] *In re Extraction Oil & Gas, Inc.*, Case No. 20-11548 (CSS), Docket No. 770 at p.2 (Bankr. D. Del.) (emphasis added).

commence such a review. While rejection of an executory contract results in a breach of such contract, as the Supreme Court stated in the *Mission Products* decision, "[s]uch an act cannot rescind rights that the contract previously granted."[79] The ability to file a proof of claim for damages is not the only right that a contract counterparty possesses when faced with non-performance of a FERC-jurisdictional contract. The stripping of these rights would seem inconsistent with the *Mission Products* holding.

By a bench ruling issued on November 2, 2020, the bankruptcy judge in the *Extraction Oil* case authorized the rejection of the TSAs at issue.[80]

The court concluded that the rejection of the TSAs did not impact the filed-rate because the payment of any rejection claims through a confirmed plan does impact the filed-rate.[81]

The court further concluded that there was no need to conduct a heightened scrutiny of public policy considerations and that to the extent any such review was needed, the equities tipped in the debtor's favor.[82]

Finally, the court rejected the expert testimony offered by the contract counterparties on public policy and safety concerns, and concluded that the rejection of the TSAs will not negatively impact the health, safety or welfare to the public at large nor affect the petroleum market more broadly.[83]

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[79] 139 S. Ct. at 1666.

[80] *See In re Extraction Oil & Gas, Inc.*, Case No. 20-11548 (CSS), Docket No. 942 (Nov. 2, 2020 Bankr. D. Del.).

[81] *Id.* at p.20–22.

[82] *Id.* at p.24. The bankruptcy court also distinguished the ICA's provisions from the FPA and NGA:

> It is important to note that the ICA was enacted to address monopoly power. Furthermore, the ICA applies a different "public interest" test than other federal statutes (interestingly, the ICA never uses the words "public interest"). In the ICA, the "public interest" encompasses "just and reasonable pipeline rates and terms" and "an efficient petroleum market." By contrast, for purposes of the Natural Gas Act (the "NGA"), the "public interest" encompasses "plentiful and uninterrupted supplies of fuel to the public." That the ICA and NGA would provide different standards for assessing the public interest is not surprising; these standards arise from the "different economic context[s]" in which Congress passed the statutes, and manifest themselves through FERC's corresponding and distinct regulatory approaches.

In re Extraction Oil & Gas, Inc., Case No. 20-11548 (CSS), Docket No. 942 at p. 23 (Nov. 2, 2020 Bankr. D. Del.) (footnotes omitted).

[83] *Id.* at p.30. The bankruptcy court also denied a motion for stay of the TSA rejection order pending appeal. An appeal to the U.S. Court of Appeals for the Third Circuit is likely and may provide a path to Supreme Court review of the jurisdictional issue.

As noted above, when ruling on a motion to reject an executory contract, the bankruptcy court must determine that it is a reasonable exercise of the debtor's business judgment. In the case of FERC-jurisdictional contracts, some courts (e.g., *Mirant*, *FirstEnergy*, and *PG&E*) have stated that an additional review of the public policy implications may be undertaken by the court instead of FERC. The court in *PG&E* stated:

> The business judgment standard in regular rejection is more deferential than that given to contracts that are in the 'public interest.' But public interest may need to be considered in the context of a specific rejection of a specific PPA. That outcome will be fact-driven based on the particular motion to reject and the responses of the opposing party. That is for another day.[84]

As seen from the *PG&E* and *Extraction Oil* decisions, unfortunately there is little guidance as to what standards the courts will employ when undertaking a public interest review. Moreover, if the cessation of performance under a contract impacts reliability and market conditions, the court may need to involve third parties that may be impacted, such as customers, independent system operators and state regulatory authorities.

Thus, there is the possibility that consideration of the public interest implications could devolve into lengthy litigation with a battle of experts playing out in bankruptcy courts. Bankruptcy courts will then have to weigh the public interests against the reorganization goals of the debtor.

If the court permits the rejection and concomitant cessation of performance and the lights actually do go out, parties impacted have little or no recourse. Bankruptcy courts, however, do not have the experience, expertise, or staff to properly address these issues. FERC, on the other hand, possesses special expertise beyond that of a bankruptcy court to address the public interest issues associated with contract rejection including, but not limited to, the determination of the just and reasonable rates, terms, and conditions of the contracts at issue.

Prior to the recent cases restricting FERC review, as noted above, three courts in the Southern District of New York declined to rule on rejection motions until there was a determination by FERC.[85] The *Calpine* court was also clearly

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[84] 603 B.R. at 490.

[85] *See In re Calpine Corp.*, 337 B.R. 27 (Bankr. S.D.N.Y. 2006); *In re Boston Generating, LLC,* No. 10 Civ. 6258, (S.D.N.Y. Nov. 12, 2010); and *In re NRG Energy, Inc.*, No. 03-CV-3754 (RCC), (S.D.N.Y. June 30, 2003). *See also In re Enron Corp.*, 326 B.R. 257 (Bankr. S.D.N.Y. 2005) (sustaining objection to claims for damages from market manipulation on the

concerned with the accountability issue—i.e., what happens if the court does not properly apply the public interest standards and customers and/or markets are adversely impacted:

> The Court's conclusion in this case is consistent with general policy considerations, including the proper allocation of power in our system of separated powers. The Supreme Court has held that "[t]he clear assignment of power to a branch . . . allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Loving v. United States,* 517 U.S. 748, 758 (1996). This principle seems particularly applicable here. By holding that FERC has exclusive jurisdiction to modify or terminate the Power Agreements in this case, an issue of great public interest will be heard in a branch accountable to the electorate in a forum that specializes in considering the public interest.[86]

While there is no explicit exception in Section 365 of the Bankruptcy Code for regulatory review of motions to reject FERC-jurisdictional contracts, there are numerous instances where regulators either explicitly or implicitly review actions by a debtor.

For example, as noted above, the automatic stay has an explicit exception for the exercise of police and regulatory proceedings.[87]

Additionally, Section 1129(a)(6) provides that a bankruptcy court can only confirm a plan of reorganization that contains a change in rates if the governmental regulatory commission that will have jurisdiction over the debtor following confirmation approves such rate change.

Similarly, Section 363 specifically contemplates the review, if applicable, by the Federal Trade Commission of any sale of assets of debtor, albeit with a shortened time frame.

Also, in 2018, Congress codified the jurisdiction of the Committee on Foreign Investment in the United States ("CFIUS") to review any transactions (including Section 363 sales) arising from a bankruptcy proceeding.[88]

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basis that granting such relief would infringe on FERC's jurisdiction over filed rates).

[86] 337 B.R. at 38.

[87] Section 362(b)(4).

[88] *See* Foreign Investment Risk Review Modernization Act of 2018 (HR 5841); 31 CFR 800.208, 800.213.

Courts have also declined to permit bankruptcy courts to interfere with administrative proceedings.[89] Despite these precedents, bankruptcy courts continue to assert that they have sole and exclusive jurisdiction over motions to reject FERC-jurisdictional executory contracts.

CONCLUSION

The jurisdiction conundrum is not easily solved. Advocates on both sides continue to press for a clear delineation of the jurisdictional limits of each entity. As discussed above, nothing in the Bankruptcy Code stands in the way of FERC discharging its statutory responsibilities.

To the contrary, the Bankruptcy Code and long-standing precedent contemplate that agencies will exercise their regulatory authority with respect to bankruptcy debtors, just as FERC asserts it can do when FERC-jurisdictional contracts are at issue. What is needed is for the appellate courts to affirmatively and consistently recognize that these two competing jurisdictional paradigms can coexist.

Unfortunately, clear guidance has yet to develop on a national level and without such consistent guidance on a national level, inconsistent precedents will continue to result in forum shopping. Parties will be left with the uncertainty that an energy supply agreement or a gas transportation agreement can be terminated through a bankruptcy proceeding the moment there is a change in market conditions without any recourse at FERC.[90]

This risk will impact pricing, financing rates, the terms of contracts and market prices. The risk will also impact innovation in the clean energy sector with resulting pricing that may make innovation uneconomical and/or unattractive to financing and capital investment.

Jurisdictional boundaries will need to be addressed by Congress (as it did with CFIUS) or the Supreme Court. Until then, counterparties will need to carefully monitor the financial status of other contract parties, current market pricing and be prepared to take action quickly if there are signs of financial distress.

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[89] *See, e.g., MCorp,* 502 U.S. at 41 (holding that the bankruptcy court did not have jurisdiction to enjoin proceedings brought by the Board of Governors of the Federal Reserve System); *In re NextWave Personal Communs., Inc.,* 200 F.3d 43, 55 (2d Cir. 1999) (holding that while the bankruptcy court had jurisdiction over NextWave's debt to the FCC, the court had no jurisdiction to changes any of the conditions that attached to the licenses granted by the FCC).

[90] For example, a recent study has concluded that the average price for energy produced from solar facilities has declined by 89 percent from 2009 to 2019. Max Roser, *Why did renewables become so cheap so fast? And what can we do to use this global opportunity for green growth?*, Our World in Date (Dec. 1, 2020), accessed at https://ourworldindata.org/cheap-renewables-growth.

Similarly, parties entering into new energy supply agreements will need to account for the termination risk in pricing and any related financings.