April 2, 2020

FERC/Bankruptcy Court Concurrent Jurisdiction

A new chapter has begun in the ongoing saga to clarify the role of the Federal Energy Regulatory Commission (FERC) in bankruptcy proceedings involving FERC-jurisdictional contracts. In a March 30 order, the FERC identified how it will exercise its jurisdiction under the Federal Power Act (FPA) concurrently with the Bankruptcy Court with regard to the proposed rejection of FERC-jurisdictional contracts in bankruptcy.[1]

By way of history and context, this latest FERC order is in response to a December 12, 2019, Sixth Circuit Court of Appeals opinion that held, among other things, that the Bankruptcy Court has concurrent but superior jurisdiction to the FERC regarding energy contracts that the debtor sought to reject in bankruptcy, but the Bankruptcy Court is obligated to "consider the public interest and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach (e.g., under the *Mobile–Sierra* doctrine)." [2] The *Mobile-Sierra* doctrine has been interpreted to require that contracts freely negotiated at arms' length be honored unless "FERC concludes that the contract seriously harms the public interest." [3] The FERC responds in its March 30 order to the Sixth Circuit's direction by instituting a complaint proceeding and setting forth instructions for conducting a paper hearing on application of the public interest standard to rejection of the applicable contracts in bankruptcy.

Leading up to the Sixth Circuit Court's decision and the FERC's March 30 order, there had been several inconsistent court decisions and a recent comprehensive FERC order[4] regarding the competing jurisdiction of the FERC and bankruptcy courts, particularly related to the rejection of wholesale energy contracts in bankruptcy. The Fifth Circuit Court of Appeals in *In the Matter of Mirant Corp*., 378 F.3d 511 (5th Cir. 2004) held that the Bankruptcy Court's approval of the rejection of a FERC-jurisdictional contract does not inappropriately interfere with the FERC's jurisdiction under the FPA. In later cases in the Southern District of New York, *In re Calpine Corp*., 337 B.R. 27 (S.D.N.Y. 2006) and *In re Boston Generating, LLC*, No. 10 Civ. 6258, 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010), those Courts reached a different conclusion than in *Mirant,* holding that rejection of FERC-jurisdictional contracts does interfere with the FERC's jurisdiction and should be subject to FERC review and approval.

The essence of FERC's position has been that, once contracts are on file with and accepted by the FERC, they are filed rates with the force of law or regulation and the FERC has plenary jurisdiction over them, including their revision or termination, regardless of whether they are subject to a bankruptcy proceeding. On this point, one of the three Sixth Circuit Court judges agreed in a partial dissent. The FERC, along with other parties, has sought *en banc* review of the Sixth Circuit opinion, and that appeal is pending.

In the meantime, the FERC in its March 30 order has initiated a process whereby it can make a public interest determination to provide to the Bankruptcy Court in considering the potential rejection of each of the FERC-jurisdictional energy contracts at issue. In doing so, the FERC has indicated that it will apply the *Mobile-Sierra* doctrine and subsequent precedent for its analysis. The entity seeking rejection of jurisdictional contracts must file with the FERC within 30 days of the March 30 order its explanation of why the rejection of each of the contracts satisfies the public interest standard. No later than 30 days after that filing, each of the counterparties to the contracts at issue will have an opportunity to file a response, opposing rejection. The FERC then will allow 15 days for responsive pleadings. The FERC intends to act "within a reasonable time" after the paper hearing but does not have a specific time by which it has to act. However, given the urgent need of the parties for some certainty, we expect the FERC to act relatively quickly after the paper hearing to provide its input to the Bankruptcy Court.

The March 30 order, the paper hearing, and the additional FERC order that follows, will provide more guidance for navigation through the complicated and sometimes hazardous intersection between FERC jurisdiction and the jurisdiction of bankruptcy courts. As directed by the Sixth Circuit, the Bankruptcy Court must consider the additional FERC order from the paper hearing when it rules on the debtor's request to reject the energy contracts at issue. Subject to further guidance from the courts in future cases, entities seeking bankruptcy protection in the future, at least in the Sixth Circuit, may be required during bankruptcy to litigate both at the FERC and before the Bankruptcy Court whether they can reject FERC-jurisdictional contracts in bankruptcy. Parties seeking to prevent rejection of those contracts will have an additional forum in which to make their arguments for retaining the contracts.

Day Pitney energy and bankruptcy attorneys will continue together to monitor this evolving jurisdictional guidance and work with clients when and where needed to advance their unique interests in bankruptcy matters.

---

[1] *Energy Harbor LLC,* 170 FERC ¶ 61,278, (Docket No. EL20-35-000, March 30, 2020) (March 30 Order). Notably, since approving rejection of those agreements, the bankruptcy court has approved a plan of reorganization and the debtor has emerged from bankruptcy.

[2] *In re FirstEnergy Solutions Corp*., 945 F.3d 431, at 455.

[3] See *Morgan Stanley Capital Group Inc. v. Publ. Util. Dist. No.1 of Snohomish Cnty.,* 554 U.S. 527, 530 (2008); *accord NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 167 (2010).

[4] *NextEra Energy, Inc. and NextEra Energy Partners, L.P. v. Pacific Gas and Elec. Co.*, 166 FERC ¶ 61,049 Order on Petition for Declaratory Order and Complaint (Docket No. EL19-35-000) January 25, 2019 (concluding FERC and the bankruptcy courts have concurrent jurisdiction and rejection of a FERC jurisdictional contract in bankruptcy requires approval from both the FERC and the bankruptcy court.) The Bankruptcy Court for the Northern District of California disagreed, concluding instead that "FERC has no jurisdiction over the rejection of contracts." *PG&E Corp. v. FERC*, No. 19-03003 (Bankr. N.D. Cal. June 7, 2019).

Authors



David T. Doot
Of Counsel

Hartford, CT | (860) 275-0102

dtdoot@daypitney.com



Eric K. Runge
Counsel

Boston, MA | (617) 345-4735

ekrunge@daypitney.com



Evan C. Reese III
Partner

Washington, D.C. | (202) 218-3917

ereese@daypitney.com



Joseph H. Fagan
Partner

Washington, D.C. | (202) 218-3901

jfagan@daypitney.com



Joshua W. Cohen
Partner

New Haven, CT | (203) 752-5008

jwcohen@daypitney.com



Paul N. Belval
Partner

Hartford, CT | (860) 275-0381

pnbelval@daypitney.com



Sebastian M. Lombardi

Partner

Hartford, CT | (860) 275-0663

slombardi@daypitney.com