

FERC vs. Bankruptcy Court

Jurisdictional Battle of the Titans

February 11, 2020

Mark Sherrill

Partner



Agenda

- Issue
- Why Does This Matter?
- Relevant Authorities
- Past Decisions
- New *FirstEnergy Solutions* Decision
- On the horizon: *PG&E*
- Policy and Practical Considerations

Issue

- When a party to FERC-jurisdictional contract goes bankrupt, who gets to decide whether it can be rejected, FERC or the bankruptcy court?

Why Does It Matter?

Your company, GenCo, develops solar and wind generation

- GenCo spent \$400 MM building a wind generation facility
- GenCo has a 20-year PPA with Big Utility to supply all electricity produced at the facility
- The PPA is in Year 5. The market price for electricity is now significantly lower than the contract rate.
- You just heard that Big Utility declared bankruptcy and wants to reject out-of-market contracts.

Why Does It Matter?

— Bankruptcy Policy

- Primary goals: foster rehabilitation of the debtor, maximize value of bankruptcy estate for benefit of creditors
- Rejection recognized as key tool for both policy goals

— FERC Policy

- Public interest
 - E.g., FERC can revise a filed contract only upon finding that it seriously harms the public interest
 - Public interest for FERC:
 - Primarily protecting against monopolies
 - Secondarily other protections of consumers and energy markets

Relevant Authorities

- Bankruptcy Code: trustee, “subject to the court’s approval, may assume or reject *any* executory contract or unexpired lease of the debtor.”
- District court/bankruptcy court has “exclusive jurisdiction of all of the property, wherever located, of the debtor... and of property of the estate.”
- District court/bankruptcy court has “original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code].”

Relevant Authorities

- Federal Power Act (FPA): FERC has “exclusive authority to determine the reasonableness of wholesale rates.”
- Filed Rate Doctrine: utility’s “right to a reasonable rate [under FPA] is the right to the rate which [FERC] files”
 - “reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts.”
- “FERC has plenary and exclusive jurisdiction over wholesale power rates, terms, and conditions of service for any rate filed with FERC.”

Backdrop

- California Energy Crisis 2000-2001 perceived as being caused by overreliance on spot markets; FERC officially encouraged long-term PPAs
- 2003: requirement to purchase renewable energy credits
- In years since:
 - Most utilities' sales declined, leading to lower REC requirements
 - Supply of RECs much greater
 - Electricity prices declined
 - Cost of building some types of facilities reduced
 - Government relaxed REC requirements

Past Decisions

- *NRG* and *Calpine* – both in SDNY district court
- *NRG* (2003)
 - Bankruptcy court approved rejection, but declined to enjoin FERC or vacate FERC order requiring NRG to continue performing
 - NRG sought injunction in district court against FERC and the counterparty, Connecticut Light & Power
 - District court: “given the unique regulatory framework for the business of selling electric energy and the pending FERC proceeding, the Court lacks jurisdiction to grant [NRG’s] requested relief.”

Past Decisions

"This is a case about power, in several senses of the word."

— *Calpine* (2006)

- Emphasis on "FERC's plenary authority over wholesale energy contracts"
- "Against FERC's vast authority over filed rate energy contracts, the Court searches the Bankruptcy Code and finds little evidence of congressional intent to limit FERC's regulatory authority."

Past Decisions

- *Mirant* (5th Circuit, 2004)
 - “We conclude that the FPA does not preempt Mirant’s rejection of the [contract] because it would only have an indirect effect upon the filed rate.”
 - But: “Use of the business judgment standard would be inappropriate in this case because it would not account for the public interest inherent in the transmission and sale of electricity.”

Past Decisions

- *FirstEnergy Solutions* (Bankr. N.D. Ohio, 2018)
 - Automatic Stay applies to existing FERC proceeding
 - Exception for “police and regulatory powers” cannot be used to elevate claims of certain prepetition creditors over others
 - Injunctive relief warranted to preserve bankruptcy court’s jurisdiction
 - “FERC’s imprimatur in accepting a contract as a filed rate contract might give that contract the force of federal regulation in the sense of requiring further FERC action to modify or abrogate it, but it does not follow that the obligation in question is then a true regulation.”

Past Decisions

- *PG&E* (Bankr. N.D. Cal. 2019)
 - Granted declaratory judgment that
 - 1.) FERC does not have concurrent jurisdiction over rejection
 - 2.) Prior FERC rulings on the issue are of no force and effect and are not binding on PG&E
 - “FERC, despite its denial, has chosen to interfere with bankruptcy courts’ decisions. Without statutory or supreme court authority to support its position, it ... presumes to sit in judgment and second-guess – no overrule – decisions of the bankruptcy court.”

FirstEnergy – 6th Circuit Opinion

- Unlike many of past cases, very balanced treatment
 - “In short, there are legitimate and significant competing concerns here that require careful consideration.”
- Emphasis on certain facts:
 - Reorganization, not liquidation
 - More to certain of the contracts than just providing electricity
 - Contracts were for very small quantity of FES’s total electricity needs (0.75%) or overall PJM market (0.04%)

FirstEnergy – 6th Circuit Opinion

- “Based on the particular facts of this case... the bankruptcy court was not necessarily wrong in concluding that a FERC action would only incidentally serve public interests but more substantially adjudicate private rights.”
- Bankruptcy court may enjoin FERC from issuing order, but not from doing anything more
- FERC has petitioned to have the matter reheard by the entire Circuit

On the Horizon (?)

- *PG&E* (9th Circuit)

- In process of being briefed
- May become moot because of PG&E Plan

- Supreme Court

- Unlikely without split of circuits
- But feels like the type of issue that could reach Supreme Court eventually

Policy and Practical Considerations

- Authorities really could cut either way
- How much do factual variations matter?
 - Getting in front of FERC first
 - Liquidation vs. Reorganization
 - Percentage of utility's supply being rejected
- Should it matter if you have a contractual termination right?
- Practical consideration which party is in White House?
- GenCo and Big Utility





FERC vs. Bankruptcy Court

Mark Sherrill

(713) 470-6106

1001 Fannin Street
Suite 3700
Houston, Texas 77002

eversheds-sutherland.com

© 2020 Eversheds Sutherland (US) LLP

All rights reserved.

This communication cannot be used for the purpose of avoiding any penalties that may be imposed under federal, state or local tax law.