



FERC v. The Bankruptcy Court: The Latest In a Decades-Long Jurisdictional Turf War

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The Fifth Circuit recently weighed in on the hotly contested issue of whether the Federal Energy and Regulatory Commission (FERC) or the bankruptcy court has controlling jurisdiction when it comes to the question of a bankruptcy debtor's ability to reject contracts regulated by FERC. FERC-regulated contracts include electricity power purchase contracts, as well as transportation services agreements involving oil and gas. The issue arises in Chapter 11 business reorganization bankruptcy actions, which are designed to enable troubled businesses to restructure so that they might operate successfully in the future.

In the quest to reorganize, the U.S. Bankruptcy Code entitles a debtor to exercise its discretion in assuming and rejecting its executory contracts. The Chapter 11 debtor is given the ability to cull through its contracts, identifying those which are beneficial to the debtor and those which are burdensome. Those which are beneficial are typically assumed, while those which are burdensome are typically rejected. The bankruptcy court then must confirm the assumption or rejection using the Business Judgment standard of review. In this manner, the debtor can rid itself of burdensome contracts in order to successfully reorganize.

This situation has perpetuated a decades-old jurisdictional battle between FERC and the bankruptcy courts when the contracts involved are energy-related contracts over which FERC has regulatory jurisdiction. FERC has taken the position that it has, at a minimum, concurrent jurisdiction with the bankruptcy court, possessing the authority to thwart a debtor's rejection of an energy-related contract coming within its regulatory scope if it determines rejection would endanger the public interest.

There is a dearth of jurisdictional and legislative guidance on the issue. This has led to shifting decisions and inconsistent outcomes, setting off alarm bells when a party to a FERC-regulated contract

files for bankruptcy. The counterparty to the contract is faced with questions such as whether its contract can be rejected by the debtor, whether it can fight rejection, and whether it can seek relief with FERC. The issue has yet to be conclusively decided, and the decisions range from a holding at one end of the spectrum that FERC's jurisdiction exclusively controls (*In re Calpine, Corp.*, 337 B.R. 27 (S.D.N.Y. 2006)), to a holding at the other end of the spectrum that the bankruptcy court's jurisdiction exclusively controls (*In re PG&E Corp.*, 603 B.R. 471 (Bankr. N.D. Cal. June 7, 2019)[[1](#)]. In the middle are a number of decisions finding that FERC and the bankruptcy court have concurrent jurisdiction. See *In re Boston Generating, LLC*, 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010); and *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 (2020), reh'g denied, 172 FERC ¶ 61,155 (Aug. 21, 2020).

The most recent circuit court decisions, however, have taken a slightly different view of FERC's role, finding that the bankruptcy court has the sole and final say, but requiring that FERC have input as a party-in-interest with respect to the public interest. Thus, under those recent decisions, FERC's role has shifted from that of a decision maker to a litigant weighing in on the issue. A recent decision from the Fifth Circuit, *In re Ultra Petroleum Corp.*, decided this spring, joins with that view, finding there is a role for FERC to play, but the bankruptcy court's jurisdiction prevails.

The debtor in the *Ultra Petroleum* case was a producer of oil and natural gas. The debtor had a pipeline contract for transportation of the gas pursuant to which the debtor was obligated to pay \$169 million over the seven-year term of the contract, regardless of whether any gas was actually transported. After filing for bankruptcy, the debtor moved to reject the contract as it was no longer producing and shipping gas. FERC objected on the basis that its approval was required for rejection of the contract. The bankruptcy court authorized the rejection, confirmed the debtor's plan of reorganization, and FERC appealed. The court drew upon an earlier Fifth Circuit decision, *In re Mirant Corp.*, 378 F.3d 511 (Fifth Cir. 2004), for the following three principles:

- The bankruptcy court's power to authorize rejection of a rate-filed contract does not conflict with FERC's authority to

regulate rates for the sale of electricity, as long as the rejection does not represent a collateral attack on the rate contained in the agreement. The rate is not deemed to be the subject of a collateral attack if the debtor's reasons for the rejection of the contract are unrelated to the rate. That is, the debtor is not rejecting the contract simply because it wants a lower rate. In the case of the *Ultra Petroleum* debtor, the debtor was no longer producing and shipping gas and therefore no longer needed the contract. Thus, the reason for its rejection was unrelated to the rate and did not constitute a collateral attack.

- When a contract is rejected, the counterparty is entitled to assert a "rejection" claim based on the damages it would have been entitled to upon a breach of the contract. The contract's filed rate must be given full effect when determining those breach of contract damages.
- In ruling on the debtor's rejection request, the bankruptcy court must consider "whether rejection harms the public interest or disrupts the supply of energy, and must weigh those effects against the contract's burden on the bankruptcy estate."

The Fifth Circuit went one step further than *Mirant* this time around, expressly adding that the bankruptcy court "must invite FERC to **participate** in the bankruptcy proceedings as a party-in-interest." The court rejected the notion that full FERC proceedings must precede any rejection decision. Thus, FERC may weigh in on the impact of rejection upon the public interest. But the bankruptcy court gets to scrutinize that information and make the final decision.

This decision falls in line with the Sixth Circuit's 2019 opinion, which addressed the very same issue. *In re FirstEnergy Solutions Corp.*, 945 F.3d 431 (6th Cir. 2019), reh'g denied, No. 18-3787 (6th Cir. 2020). In that decision, the Sixth Circuit ruled that the rejection of certain FERC-regulated wholesale power contracts requires a heightened standard of review above that of the business judgment standard. The bankruptcy court must additionally consider the impact of the rejection upon the public interest, and in doing so,

must invite FERC to participate in that process by providing an opinion on the issue. But it is the bankruptcy court which makes the final decision.

While courts have reached, and continue to reach, mixed decisions regarding the interplay of the FERC's jurisdiction with that of the bankruptcy court when it comes to authorizing the rejection of FERC-regulated contracts in the bankruptcy sphere, the two circuit courts to address the issue have agreed that FERC should play some role. FERC continues to take the position that its role should be that of a decision maker, while the circuit courts have relegated FERC's role to that of a party-in-interest litigant with the right to weigh in on the issue of public interest. The bankruptcy court retains sole jurisdiction as the final decision maker.

[\[1\]](#) Amended and direct appeal certified, 2019 WL 2477433 (Bankr. N.D. Cal. June 12, 2019), permission to appeal granted, No. 19-71615 (9th Cir. Sept. 17, 2019), vacated as moot, D.C. No. 3:19-bk-30088 (9th Cir. Oct. 7, 2020).

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