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In PG&E Bankruptcy, FERC Reasserts Concurrent Jurisdiction over the Disposition of Wholesale Power Contracts

With the May 1 order, the Commission reaffirms its view that it has concurrent jurisdiction over debtors' efforts to reject their FERC-jurisdictional contracts in bankruptcy. Further developments in judicial proceedings in the Sixth and Ninth Circuits are expected.

On May 1, 2019, the Federal Energy Regulatory Commission ("FERC" or "the Commission") denied Pacific Gas and Electric Company's ("PG&E") requests for rehearing of two Commission orders asserting concurrent jurisdiction with bankruptcy courts over the disposition of wholesale power contracts PG&E seeks to reject through bankruptcy.¹

In its Rehearing Order, the Commission acknowledged a circuit split regarding the relative authorities of the Commission under the Federal Power Act ("FPA") and the bankruptcy courts under the Bankruptcy Code as they relate to the review and disposition of FERC-jurisdictional contracts in bankruptcy proceedings. However, the Commission affirmed its prior holdings that "the way to give effect to both the FPA and the Bankruptcy Code is for a party to a Commission-jurisdictional wholesale power contract to obtain approval from both the Commission and the bankruptcy court to modify the filed rate and reject the contract, respectively."²

BACKGROUND

On January 29, 2019, PG&E filed for bankruptcy, primarily in connection with liabilities arising from California wildfires. In anticipation of PG&E's filing, NextEra Energy, Inc. and NextEra Energy Partners, L.P. (collectively "NextEra") filed a petition for declaratory order and complaint with the Commission, requesting a determination that PG&E may not, through its bankruptcy proceedings, abrogate, amend, or reject any rates, terms, and conditions of its FERC-jurisdictional wholesale power contracts without Commission approval.³ NextEra explained that several of its subsidiaries sell wind and solar renewable energy to PG&E and other utilities under power purchase agreements pursuant to market-based rate tariffs filed with and approved by the Commission. In a separate proceeding, Exelon Corporation ("Exelon") filed a similar petition for declaratory order and complaint.⁴ Like NextEra, Exelon's solar power subsidiary makes wholesale sales to PG&E at market-based rates.

In response to both petitions, the Commission acknowledged that precedent analyzing the interplay between the FPA and Bankruptcy Code is currently unsettled.⁵ The Commission interpreted the rejection of a contract by a bankruptcy court as altering the contract's essential terms and conditions and the filed rate, which brings the issue within FERC's exclusive jurisdiction. In an attempt to give effect to both statutes, the Commission concluded that parties to FERC-jurisdictional power contracts must seek approval from the Commission to modify the filed rate, as well as approval from the bankruptcy court to reject the contract.⁶

In response, PG&E filed a complaint for declaratory judgment and injunctive relief against the Commission, in addition to filing for bankruptcy, in the Bankruptcy Court for the Northern District of California.⁷ On April 10, 2019, the bankruptcy court held a hearing to consider, among other things, whether FERC has concurrent jurisdiction over the disposition of wholesale power contracts. The bankruptcy court has not yet issued a determination on this issue.

PG&E'S REQUEST FOR REHEARING

PG&E filed requests for rehearing of the Commission's orders on the NextEra and Exelon petitions. According to PG&E, by concluding that it has concurrent jurisdiction with bankruptcy courts over the disposition of wholesale power contracts, the Commission erred on several grounds. The Commission's determination with respect to each of PG&E's arguments is analyzed below.

1. *Does FERC's Concurrent Jurisdiction Conflict with the Bankruptcy Code?*

The Commission acknowledged the bankruptcy court's exclusive authority over rejection motions. Nonetheless, the Rehearing Order dismissed PG&E's claim that FERC's concurrent exercise of jurisdiction would contradict the key purposes of the Bankruptcy Code (*i.e.*, to enable the rehabilitation of debtors and prevent the negative consequences of liquidation) by impeding debtors' ability to reject executory contracts. As the Commission explained, the FPA and the Bankruptcy Code have two distinct goals and sets of procedures that are not mutually exclusive.

According to the Commission, the FPA imposes an independent obligation on a debtor to perform under its wholesale power contracts, distinct from its obligations under private contract law. This is because, from the Commission's perspective, wholesale power contracts are not "run-of-the-mill" contracts. Despite being privately negotiated, wholesale power contracts are filed with the Commission, carry the force of law, and implicate the public interest. The Commission considered these contracts to remain FERC-jurisdictional even if a party files for bankruptcy. Therefore, the Commission found it has the exclusive and statutory obligation, as well as the necessary technical expertise, to evaluate whether the wholesale rates of these contracts are just and reasonable, and whether any abrogation or modification of such contracts is necessary to protect the public interest. Even if a bankruptcy court approves the rejection of a wholesale power contract, the Commission concluded that it must make its own determination as to whether abrogation or modification is appropriate under the FPA before the debtor can be relieved from the contract.

2. *Does Rejection of a Wholesale Power Contract Amount to an Abrogation or Modification Requiring FERC Review?*

Next, PG&E argued that rejection of a wholesale power contract is simply a breach of contract that does not rise to the level of an abrogation or modification requiring FERC review. PG&E claimed that during a breach, unlike an abrogation, the terms of the contract still bind the parties. PG&E asked the Commission to identify the essential terms and conditions of a contract that are altered in the event of a rejection and to clarify the legal import of the Commission's approval to modify such terms. In this regard, PG&E argued that rejection of a contract does not in fact alter any essential terms and conditions of the contract because it does not change the price, duration or quantity of electric energy, which terms are still used to calculate the damages the debtor must pay to its counterparty as a result of the breach. PG&E further accused the Commission of discriminating against parties in bankruptcy by requiring FERC approval to cease performance of a contract during bankruptcy proceedings, but not requiring such approval when a breach occurs outside of the bankruptcy context.

On rehearing, the Commission confirmed that the relevant essential terms and conditions are the price, duration, and quantity. The Commission also clarified that the legal effect of any Commission approval to modify such terms would be to allow the modification of a jurisdictional filed rate. However, the Commission disagreed that rejection of a wholesale power contract is merely a simple breach of contract. Rather, the Commission emphasized that rejection of a contract is a court-authorized act that may lead to a total cessation of performance. Moreover, the Commission reiterated that wholesale power contracts are not like other contracts that a debtor may seek to reject because they implicate the public interest, are “equivalent [to] a federal regulation,” and involve rates that are recoverable from ratepayers.⁸

Citing the Supreme Court’s *Mobile-Sierra* doctrine, the Commission concluded that a party may not unilaterally abrogate or modify its FERC-jurisdictional contracts without a determination by the Commission that “the contract seriously harms the public interest.”⁹ Accordingly, unless the relevant contract has a clause permitting unilateral modification, a debtor must file a complaint with the Commission under section 206 of the FPA to modify the contract. The Commission would then determine whether the *Mobile-Sierra* presumption applies and whether modification is required by the public interest. In this regard, the Commission noted it does not discriminate against PG&E as a debtor, which is being treated similarly to any other entity seeking to modify or abrogate a jurisdictional contract in a section 206 proceeding.

3. Should FERC Limit Its Review to Specific Circumstances Implicating the Filed Rate Doctrine?

The Commission rejected PG&E’s suggestion that there are less “disruptive” ways to protect the public interest under the FPA than concurrent FERC jurisdiction, such as allowing parties to raise the filed-rate doctrine in the bankruptcy court or to file petitions with the Commission *after* the bankruptcy court has taken an action that is inconsistent with the filed rate doctrine. The Commission did not agree that it should only step in when specific circumstances implicating the filed-rate doctrine arise, because “the question here is one of general applicability—*i.e.*, whether

the Commission has jurisdiction to review and approve the modification or abrogation of wholesale power contracts that are the subject of rejection in bankruptcy.”¹⁰ The Commission concluded that it must assert concurrent jurisdiction to ensure that it has the opportunity to review any attempts to modify filed rates.

4. Did the Commission Make an Unexplained Departure from Precedent?

The Rehearing Order dismissed claims that the Commission’s assertion of concurrent jurisdiction is inconsistent with prior precedent, pointing to an “emerging split” among federal courts that has prompted the Commission to reconsider its position in this area.

According to PG&E, the Commission departed from its decision in *California Electricity Oversight Board v. Calpine Energy Services, L.P.* (“*CEOB*”) without providing adequate explanation.¹¹ In *CEOB*, the Commission evaluated a petition for specific performance of a wholesale power contract that the debtor sought to reject through bankruptcy. The Commission determined that the bankruptcy court must “carefully scrutinize the impact of rejection upon the public interest and . . . ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers.”¹²

Yet, in a subsequent case involving the same parties and facts as in *CEOB*, the U.S. District Court for the Southern District of New York held that it lacked jurisdiction to authorize rejection of wholesale power contracts, which are subject to the Commission’s plenary jurisdiction.¹³ However, the Commission also acknowledged a recent preliminary injunction issued by the Bankruptcy Court for the Northern District of Ohio that enjoined the Commission from requiring a debtor to continue performing under wholesale power contracts that it sought to reject through bankruptcy.¹⁴ Given this circuit split, the Commission reasoned that the caselaw interpreting the relationship between the FPA and Bankruptcy Code is currently unresolved. The Commission concluded that asserting concurrent jurisdiction would provide a means to effectuate to the requirements of both statutes.

5. Can FERC Enforce a Filed Rate against a Buyer?

Finally, the Commission addressed PG&E's claim that the Commission cannot assert its jurisdiction over the contract rejection because it is not authorized under the FPA to order a purchaser, like PG&E, to buy power or take physical service. The Commission clarified that the action it would take in this context is to enforce a wholesale power contract (*i.e.*, the filed rate), as opposed to requiring a customer to buy power. The Commission noted that, although the regulatory obligations relating to contract filing and market-based rate authority are directed at sellers, the Commission's wholesale sale jurisdiction is tied to the actual *contract*. Accordingly, the Commission

determined that it has authority to enforce wholesale power contracts, including to require purchasers to continue performing under such contracts.

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1. *NextEra Energy, Inc., et al. v. Pac. Gas and Electr. Co.*, 167 FERC ¶ 61,096 (2019) ("Rehearing Order").
 2. *Id.* at P 35 (internal quotations omitted).
 3. Petition for Declaratory Order and Complaint of NextEra Energy, Inc. and NextEra Energy Partners, L.P. against Pacific Gas and Electric Co. and Request for Expedited Action, *NextEra Energy, Inc.*, Docket No. EL19-35-000 (Jan. 18, 2019).
 4. Petition for Declaratory Order and Complaint of Exelon Corporation against Pacific Gas and Electric Co. and Request for Expedited Action, *Exelon Corp.*, Docket No. EL19-36-000 (Jan. 22, 2019).
 5. *NextEra Energy, Inc.*, 166 FERC ¶ 61,049 (2019); *Exelon Corp.*, 166 FERC ¶ 61,053 (2019).
 6. 166 FERC ¶ 61,049 at P 28; 166 FERC ¶ 61,053 at P 25.
 7. Complaint for Declaratory Judgment & Preliminary & Permanent Injunctive Relief, *In re: PG&E Corp.*, Adv. Pro. No. 19-03003 (Bankr. N.D. Cal. Jan. 29, 2019).
 8. Rehearing Order at P 22.
 9. *Id.* at P 23.
 10. *Id.* at P 27.
 11. 114 FERC ¶ 61,003 (2006).
 12. *Id.* at P 11. In CEOB, the Commission acknowledged that it was reaching a different result from a prior case in which it required specific performances of a contract that the seller sought to reject through bankruptcy. See *Blumenthal v. NRG Power Mkg., Inc.*, 104 FERC ¶ 61,210, at P 2 (2003). The CEOB decision noted that since *Blumenthal*, the U.S. Court of Appeals for the Fifth Circuit issued a decision on this issue. See *In re: Mirant Corp.*, 378 F. 3d 511 (5th Cir. 2004) ("*Mirant*"). In *Mirant*, the Fifth Circuit held that the FPA does not preempt the debtor's rejection of an agreement because it would only have an indirect effect on the filed rate. Although the CEOB decision quoted certain language in *Mirant*, the Rehearing Order indicated that this did not signal an endorsement by the Commission of *Mirant's* substantive holding.
 13. See *In re Calpine Corp.*, 337 B.R. 27 (S.D.N.Y. 2006) (Calpine).
 14. See *In re FirstEnergy Solutions Corp. v. FERC*, 2018 WL 2315916 (Bankr. N.D. Ohio May 18, 2018). The Bankruptcy Court of the Northern District of Ohio's Preliminary Injunction Order, as well as an order permitting the debtor, FirstEnergy Solutions Corp., to reject wholesale power contracts are currently on appeal before the U.S. Court of Appeals for the Sixth Circuit. See *In re: FirstEnergy Solutions Corp.*, Case Nos. 18-3787, 18-3788, 18-4095, 18-4097, 18-4107 and 18-4110.