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A Kafkaesque Process? FERC Jurisdiction during Chapter 11 Bankruptcy

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A KAFKAESQUE PROCESS? FERC JURISDICTION DURING CHAPTER 11 BANKRUPTCY

Richard E.B. Dornfeld* and Cory J. Marsolek**

> [A] correct understanding of a matter and a misunderstanding of the same matter are not mutually exclusive.[1]

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[1] FRANZ KAFKA, THE TRIAL 122 (DER PROZESS) (David Wyllie trans., Dover Thrift Editions ed. 2009) (1925) (detailing a surreal account of an ordinary person's prosecution by a mindless and incomprehensible legal system); *see infra* note 241, Mem. Decision on Action for Declaratory & Injunctive Relief at 19; *In re* PG&E Corp., 603 B.R. 471, 484 (Bankr. N.D. Cal. 2019) ("Imagine the absurdity of the exclusive appeal route espoused by FERC . . . . Kafka might have designed it[.]").

I. INTRODUCTION

Wildfires have ravaged California in recent years. In 2018, blazes across the state killed eighty-six people and caused more than $9 billion in property damage.[2] The year before, in 2017, wildfires killed forty people and caused at least $10 billion in property damage.[3] California's inverse condemnation law holds Pacific Gas & Electric Company (PG&E), the state's largest gas and electric utility, liable for much of the damage.[4] Yet, California's adverse regulatory environment makes cost recovery from customers unlikely.[5] As a result, PG&E, along with its parent company, filed for Chapter 11 bankruptcy in January 2019 for debts anticipated to exceed $51 billion.[6] Fire victims and shareholders, however, are not the only ones who could suffer. At the time of filing bankruptcy, PG&E had more than 380 long-term contracts with independent power producers worth $42 billion.[7] Under Chapter 11, PG&E could "reject" any of these contracts as part of its bankruptcy, leaving its suppliers with unsecured claims.[8] This

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[2] Andrew Scheeler, *These Three 2018 California Wildfires Caused More Than $9 Billion in Damage*, SACRAMENTO BEE (Dec. 12, 2018), https://www.sacbee.com/news/politics-government/capitol-alert/article222997430.html [https://perma.cc/KCC8-H3NJ].

[3] *See* Rong-Gong Lin II & Paige St. John, *From Extreme Drought to Record Rain: Why California's Drought-to-Deluge Cycle Is Getting Worse*, L.A. TIMES (Apr. 12, 2017), https://www.latimes.com/local/lanow/la-me-record-rains-20170410-story.html [https://perma.cc/UQ4X-ANUK]; Lauren Tierney, *The Grim Scope of 2017's California Wildfire Season Is Now Clear. The Danger's Not Over.*, WASH. POST (Jan. 4, 2018), https://www.washingtonpost.com/graphics/2017/national/california-wildfires-comparison/ [https://perma.cc/RS3Z-U23T].

[4] Zach Wichter, *California's Largest Utility Says It Is Bankrupt. Here's What You Need to Know.*, N.Y. TIMES (Jan. 29, 2019), https://www.nytimes.com/2019/01/29/business/pge-bankruptcy.html [https://perma.cc/P4JB-KU3S].

[5] Hudson Sangree, *California Wildfire Bill Goes to Governor*, RTO INSIDER (Sept. 1, 2018), https://www.rtoinsider.com/california-sb-901-wildfire-jerry-brown-99037/ [https://perma.cc/YJ22-BSVV] (leaving California's doctrine of inverse condemnation that "holds utilities strictly liable for fire damage" undisturbed and providing only one-time relief to utilities).

[6] PG&E's Voluntary Pet. for Non-Individuals Filing for Bankruptcy at 5, *In re* PG&E Corp. and Pac. Gas and Elec. Co., No. 19-30088 (Bankr. N.D. Cal. Jan. 29, 2019).

[7] Gavin Blade, *FERC Reasserts Authority Over PG&E Contracts in Bankruptcy Court Filing*, UTILITYDIVE.COM (Feb. 19, 2019), https://www.utilitydive.com/news/ferc-reasserts-authority-over-pge-contracts-in-bankruptcy-court-filing/548701/ [https://perma.cc/P5Y3-BMF6].

[8] PG&E recently expressed its commitment to retain these contracts, despite suggestions that the company "likely would reject some of its legacy renewable energy contracts signed at above-market prices." Garrett Hering, *PG&E Provides Glimpse of Restructuring Plan, Keeping All Energy Contracts*, S&P GLOBAL MARKET INTELLIGENCE (Aug. 7, 2019), https://www.spglobal.com/marketintelligence/en/news-insights/trending/FVFVuk6ctyU-

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concern is not hypothetical. In fact, some PG&E suppliers saw their credit ratings reduced to "junk status" in anticipation that their long-term contracts could be discarded during bankruptcy.[9]

To avoid that outcome, NextEra Energy (NextEra), one of PG&E's contract suppliers, petitioned the Federal Energy Regulatory Commission (FERC or Commission) to order PG&E to obtain Commission approval prior to rejecting any wholesale power purchase agreements.[10] Both PG&E and the Bankruptcy Court for the Northern District of California assert that the bankruptcy court has exclusive jurisdiction over the matter.[11] FERC, on the other hand, has argued it retains concurrent or exclusive jurisdiction over the contracts.[12] This dispute is the focus of this article; namely, whether FERC can exercise jurisdiction over wholesale power purchase contracts when a public utility or independent power producer declares bankruptcy.

This article argues that FERC has exclusive jurisdiction over wholesale power purchase contracts because Congress intended for the Commission, pursuant to the Federal Power Act (FPA), to exercise plenary authority over interstate energy markets. Moreover, *Mission Product Holdings Inc. v. Tempnology, LLC* suggests the Bankruptcy Code should not be read to the exclusion of other fonts of federal law. This article also argues that to the extent federal courts fail to respect FERC's exercise of jurisdiction, Congress should enact legislation that clearly demarcates the boundaries between the Federal Power Act and the Bankruptcy Code.

Me_dZIGOtA2 [https://perma.cc/W3QZ-AYNT]. Regardless of the outcome in PG&E's case, this issue will likely remain relevant as climate change increases the frequency and severity of adverse weather events. The Wall Street Journal, among others, has described PG&E's predicament as "the first climate-change bankruptcy" though "probably not the last." Russell Gold, *PG&E: The First Climate-Change Bankruptcy, Probably Not the Last*, WALL ST. J. (Jan. 18, 2019), https://www.wsj.com/articles/pg-e-wildfires-and-the-first-climate-change-bankruptcy-11547820006 [https://perma.cc/R6M7-9HQT] ("PG&E Corp.'s bankruptcy could mark a business milestone: the first major corporate casualty of climate change. Few people expect it will be the last.").

[9] Jeffrey Ryser, *Topaz Solar, A Top Power Supplier to PG&E, Downgraded to Junk*, S&P GLOBAL MARKET INTELLIGENCE (Jan. 11, 2019), https://www.spglobal.com/marketintelligence/en/news-insights/trending/MJKZ4w6iUad3zMBuR_JyZA2 [https://perma.cc/6Y6W-DMB9].

[10] Pet. for Declaratory Order & Compl. ¶ 61,049, NextEra Energy, Inc. v. Pac. Gas & Elec. Co., 166 FERC (Jan. 18, 2019) (No. EL19-35-000).

[11] *In re* PG&E Corp., 603 B.R. 471, 479 (Bankr. N.D. Cal. 2019).

[12] NextEra Energy, Inc. v. Pac. Gas & Elec., 166 FERC ¶ 61,049 (Jan. 25, 2019); Br. for Appellant FERC at 38, *In re* PG&E Corp., Nos. 19-16833, 19-16834 (9th Cir. Nov. 20, 2019) ("The Federal Power Act gives the Commission exclusive authority to regulate the sale of [electric] energy at wholesale in interstate commerce[.]" (citing 16 U.S.C. §§824(a), 824d(a))).

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Ultimately, the preservation of FERC authority is important to ensure uniform interpretation of FPA jurisdictional contracts and, conversely, to avoid the risks associated with bankruptcy courts across the country exclusively rendering judgment without reference to the Federal Power Act. The *ex post* elimination of FERC jurisdiction would allow defaulting parties, with the assistance of the bankruptcy courts, to engage in unanticipated risk allocation shifting. Although the practical consequences are uncertain, the possibility of risk shifting could hinder the further decline of renewable energy prices by injecting fresh uncertainty into capital investment decision making.[13] In turn, higher costs and greater market uncertainty presumably would disincentivize investment at a time when many states and public utilities are relying on independent power producers to help achieve renewable energy mandates.

In order to provide a framework for these arguments, this article first provides a brief overview of the Bankruptcy Code, the Federal Power Act, and wholesale energy markets.[14] Second, this article discusses the filed rate and *Mobile-Sierra* doctrines that inform the scope of FERC's jurisdiction.[15] Third, this article reviews prior cases involving disputes between FERC and bankruptcy courts.[16] Fourth, this article explains why FERC may exercise exclusive jurisdiction and why the Supreme Court's holdings in *NextWave* and *Bildisco* provide little guidance for resolving jurisdictional disputes between FERC and the bankruptcy courts.[17] Finally, this article concludes that exclusive FERC jurisdiction over wholesale power purchase contracts is warranted as both a matter of law and policy.[18]

II. THE BANKRUPTCY CODE, FEDERAL POWER ACT, AND ENERGY MARKETS

This section is intended to provide a brief outline of the Bankruptcy Code and the Federal Power Act. These federal statutory schemes respectively grant the bankruptcy courts and FERC jurisdiction over their relevant subject matters. Additionally, this section gives an overview of wholesale energy markets.

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[13] HJ Mai, *Renewable Energy Prices Keep Falling: When Do They Bottom Out?*, UTILITY DIVE (May 30, 2019), https://www.utilitydive.com/news/renewable-energy-prices-keep-falling-when-do-they-bottom-out/555822/ [https://perma.cc/3G3T-K2LX].
[14] *Infra* Part II.
[15] *Infra* Part III.
[16] *Infra* Part IV.
[17] *Infra* Part V.
[18] *Infra* Part VI.

A. The Bankruptcy Code

The Bankruptcy Code is broad in its scope. The Supreme Court has explained, "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate."[19] To that end, the Code grants district courts exclusive jurisdiction over "all the property, wherever located, of the debtor as of the commencement of . . . [a bankruptcy] case, and of property of the estate."[20] It also provides the district court original, albeit not exclusive, jurisdiction over civil proceedings arising under Chapter 11.[21] However, this conferral of jurisdiction does not preclude an agency from commencing or continuing a proceeding to enforce its regulatory power.[22]

Most relevant to this article is the Chapter 11 business reorganization. Chapter 11's ultimate purpose "is to permit successful rehabilitation of debtors."[23] It allows the debtor to serve as a "debtor-in-possession" and act as a bankruptcy estate's trustee.[24] Chapter 11 directs the trustee to formulate a "plan," that is, a blueprint for how creditors will be paid.[25] As part of a reorganization, section 365(a) allows the debtor to reject "all executory contracts," meaning contracts that have not yet been fully performed, "except those expressly exempted,"[26] subject to approval by the bankruptcy court.[27] It also is important to note that Chapter 11 plans divide creditors into various "classes" that provide for when and how the creditors will be

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[19] Celotex v. Edwards, 514 U.S. 300, 308 (1995) (quoting Pacor, Inc. v. Higgins, 43 F.2d 984, 994 (3d Cir. 1984)).
[20] 28 U.S.C. § 1334(e)(1) (2017).
[21] *Id.* § 1334(b).
[22] *See* 11 U.S.C. § 362(b)(4) (2018); *see also* Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32, 39–40 (1991).
[23] N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984).
[24] *See* JOAN N. FEENEY ET AL., Bankruptcy Law Manual § 11:8 (5th ed. 2019) ("The debtor in possession has the power to operate the debtor's business with the protection of the automatic stay without a court order, has the powers given to a trustee, including avoidance powers and rejection of burdensome executory contracts, and is obligated to perform the functions and duties of a trustee.").
[25] *See* WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, Norton Bankr. L. & Prac. 3d § 3:14 (2019) ("[T]he ultimate objective of the debtor in a Chapter 11 case is to have the court confirm the plan of reorganization it proposes . . . . The plan of reorganization becomes the contract between the debtor and its creditors in respect of all obligations the debtor has as of the date of confirmation . . . . [T]herefore, [it] will subsume those terms and conditions which allows for a return to prepetition terms and conditions.").
[26] *Bildisco & Bildisco*, 465 U.S. at 521.
[27] 11 U.S.C. § 365(a) (2018).

paid.[28] While Chapter 11 bankruptcy entails other complexities, the bottom line, for the purposes of this article, is that a debtor may discard contracts and the bankruptcy estate creditor may only receive a fraction of the contract value following rejection.[29]

The final Bankruptcy Code provision that warrants consideration is the automatic stay under section 362(a).[30] The automatic stay stops all collection efforts against a debtor once the debtor files a bankruptcy petition.[31] The stay, with exceptions not relevant to this article,[32] applies to "[a]ny postpetition act to collect a prepetition claim . . . whether the act is direct against the debtor, property of the debtor, or property of the estate."[33] The stay, however, is not invincible. It does not apply to governmental entities enacting or continuing enforcement actions under their regulatory authority.[34]

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[28] *See* FEENEY ET AL., *supra* note 24, at § 11:48 ("A plan must designate classes of claims and interests . . . . Claims and interests are separated into different classes depending on their legal characteristics. Classification must be based on the nature of the claims or interests and the members of each class must have claims or interests that are substantially similar to the others in that class so that voting on the plan will be representative.").

[29] Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1658 (2019) ("Section 365(g) places that party in the same boat as the debtor's unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar."). According to a study published by the American Banking Institute, "[f]or businesses with assets above $5 million, unsecured creditors typically collect half of what they are owed. Where the business's assets are worth less than $200,000, ordinary general creditors usually recover nothing." Douglas Baird et al., *The Dynamics of Large and Small Chapter 11 Cases: An Empirical Study* 1 (Nov. 2005), http://commission.abi.org/sites/default/files/priority.pdf [https://perma.cc/5279-EEZL].

[30] 11 U.S.C. § 362(a) (2018).

[31] *See id.*; FEENEY ET AL., *supra* note 24, at § 11:33 ("An important benefit that a Chapter 11 debtor receives upon the filing of the petition is the automatic stay . . . . The purposes of the automatic stay are to: 1) prevent harassment and the financial pressures of indebtedness; 2) avoid the dissipation of assets and interference with the estate; and 3) ensure that similarly situated creditors are treated equally."); Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 17 (1995) ("Under 11 U.S.C. § 362(a), [the debtor's] bankruptcy filing gave rise to an automatic stay of various types of activity by his creditors.").

[32] *See, e.g.*, 11 U.S.C. § 362(b)(2)(ii) (allowing the post-petition collection of spousal and child support); 11 U.S.C. § 362(b)(3) (authorizing the filing of a U.C.C. article 9 continuation statement for a secured creditor to maintain perfection of a security interest).

[33] STEPHEN L. SEPINUCK & GREGORY M. DUHL, PROBLEMS AND MATERIALS ON BANKRUPTCY LAW AND PRACTICE 272 (3d ed. 2017) (emphasis omitted); *see* 11 U.S.C. §§ 362(a)(1)–(7).

[34] *See* 11 U.S.C. § 362(b)(4); *see also* Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32, 39–40 (1991).

B. The Federal Power Act

The Federal Power Act provides the competing body of law at the heart of the jurisdictional conflict between FERC and the bankruptcy courts. The FPA's origins provide some insight into FERC's broad authority in the context of wholesale power purchase contracts. Electric service initially was a local affair with generation facilities serving customers in their immediate vicinity.[35] As a result, state and municipal governments took a leading role in regulating the nascent industry. Local regulation eventually experienced challenges as transmission systems matured and urban development brought previously distinct communities—particularly in the northeastern United States—into contact with each other.[36] These changes meant that a utility based and regulated in one state could sell its electricity to a second state that lacked the authority to regulate its prices.[37]

In 1927, the issue reached the Supreme Court in *Public Utilities Commission v. Attleboro Steam & Electric Co.*[38] A decade earlier, Rhode Island-based Narragansett Electric Lighting Company (Narragansett) entered into a twenty-year contract to provide Massachusetts-based Attleboro Steam & Electric Company (Attleboro) with "all the electricity required by the Attleboro Company . . . at a specified basic rate."[39] Narragansett filed with Rhode Island regulators "a schedule setting out the rate and general terms of the contract and was authorized . . . to grant the Attleboro Company the special rate."[40] However, by 1924, Narragansett became dissatisfied with the rate and successfully secured approval from Rhode Island to increase it.[41] Understandably, Attleboro was unhappy with the new arrangement and challenged the authority of Rhode Island regulators to dictate prices of electricity transmitted in interstate commerce.[42]

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[35] New York v. FERC, 535 U.S. 1 (2002) ("When the Federal Power Act (FPA) became law in 1935, most electric utilities operated as separate, local monopolies subject to state or local regulation . . . there was little competition among utility companies.").

[36] Sam Kalen, *Muddling Through Modern Energy Policy: The Dormant Commerce Clause and Unmasking the Illusion of an Attleboro Line*, 24 N.Y.U. ENVTL. L. J. 283, 291–92 (2017) (describing how electrical grids expanded from urban centers into surrounding areas and nearby states).

[37] Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 408–409 (2016).

[38] Pub. Util. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927), *abrogated by* Arkansas Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375 (1983).

[39] *Id.* at 84.

[40] *Id.* at 84–85.

[41] *Id.* at 85.

[42] *Id.* at 86.

Ultimately, the Supreme Court agreed with Attleboro.[43] The Court held, "[t]he transmission of electric current from one state to another . . . is interstate commerce."[44] The Court explained, "'the commerce clause . . . restrains the states from imposing direct burdens upon interstate commerce,' and a state enactment imposing such a 'direct burden' must fall.'"[45] However, there was a catch: "[t]he forwarding state obviously has no more authority than the receiving state to place a direct burden upon interstate commerce."[46] Thus, a regulatory gap was created that neither state could fill.

Congress eventually passed the Federal Power Act of 1935 to fill the "*Attleboro* gap."[47] However, the FPA does more than fill space created by *Attleboro*. The FPA extends FERC jurisdiction beyond interstate transmission (the issue in *Attleboro*) to all wholesale contracts.[48] To that end, section 201 of the FPA grants "[t]he Commission . . . jurisdiction over all facilities for such transmission or sale of electric energy" at wholesale in interstate commerce.[49] Section 203 provides that FERC must approve a proposed disposition if it finds that the disposition "will be consistent with the public interest."[50] Moreover, Congress directed the Federal Power Commission (FERC's predecessor) in section 205 to ensure "[a]ll rates and charges made, demanded, or received . . . in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . be just and reasonable."[51] Additionally, in section 206, Congress gave the Federal Power Commission authority to revise contracts "[w]henever the Commission . . . [finds] that any rate . . . or contract affecting such rate . . . is unjust, unreasonable, unduly discriminatory or preferential[.]"[52] As the D.C. Circuit Court of Appeals explained, "the Act . . . entrusts a broad subject-matter to administration by the Commission,

[43] *Id.*
[44] *Id.*
[45] *Id.* at 88 (quoting Minnesota Rates Cases, 230 U.S. 352, 396 (1913)).
[46] *Id.* at 90.
[47] 16 U.S.C. § 824(b)(1) (2018); *see* Rossi, *supra* note 37 at 409 (explaining that the "*Attleboro* gap" is "a regulatory void where neither the forwarding state nor the receiving state could regulate the pricing of electricity sold across state lines.").
[48] New York v. FERC, 535 U.S. 1, 17 (2002) ("There is no language in the statute limiting FERC's *transmission* jurisdiction to the wholesale market, although the statute does limit FERC's *sale* jurisdiction to that at wholesale.").
[49] 16 U.S.C. § 824(b).
[50] 16 U.S.C. § 824b(a)(4) (2018).
[51] 16 U.S.C. § 824d(a) (2018).
[52] 16 U.S.C. § 824e(a) (2018).

subject to Congressional oversight," to achieve Congress' policy objectives.[53] The Supreme Court has similarly interpreted the FPA to eliminate any question regarding FERC's primacy with regards to wholesale energy in interstate commerce. Indeed, the Court has repeatedly held that FERC "has exclusive authority to regulate 'the sale of electric energy at wholesale in interstate commerce.'"[54]

C. *Wholesale Energy Markets*

Traditionally, the *Attleboro* example aside, electric utilities owned and operated all of the facilities they needed to generate, transmit, and distribute electricity to retail customers. However, in response to a series of energy shortages in the 1970s, Congress enacted the Public Utility Regulatory Policies Act (PURPA) of 1978 to spur the development of new generation facilities.[55] PURPA section 210 directs FERC to adopt rules requiring electric utilities to: "(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and (2) purchase electric energy from such facilities."[56] FERC subsequently adopted rules that require electric utilities to purchase "any energy and capacity which is made

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[53] Niagara Mohawk Power Corp. v. Fed. Power Comm'n, 379 F.2d 153, 158–59 (D.C. Cir. 1967) ("[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives.").

[54] Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1292 (2016) (quoting 16 U.S.C. § 824(b)(1) (2015)); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986) ("FERC clearly has exclusive jurisdiction over the rates to be charged Nantahala's interstate wholesale customers."); New York v. FERC, 535 U.S. 1, 22 (2002) (explaining that "the FPA contains such 'a clear and specific grant of jurisdiction' to FERC over interstate transmissions" that a mere policy declaration cannot nullify it) (quoting Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964)); FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 776 (2016) ("[A] FERC regulation does not run afoul of [the Federal Power Act] just because it affects—even substantially—the quantity or terms of retail sales. It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other.").

[55] *Public Utility Regulatory Policy Act (PURPA)*, UNION OF CONCERNED SCIENTISTS (July 15, 2002), https://www.ucsusa.org/clean_energy/smart-energy-solutions/strengthen-policy/public-utility-regulatory.html [https://perma.cc/UM9Q-KHK5] ("The Public Utility Regulatory Policy Act (PURPA) was passed in 1978, in the midst of the energy crises that ripped through industrial world economies. Faced with predictions that the price of oil would rise to $100 a barrel, Congress acted to reduce dependence on foreign oil, to promote alternative energy sources and energy efficiency, and to diversify the electric power industry.").

[56] 16 U.S.C. § 824a–3(a) (2018).

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available from a qualifying facility" that is listed at a certain price.[57] This price is known as the "avoided costs" rate.[58] The avoided costs rate is a rate not exceeding the incremental cost that the utility would incur by generating the next unit of energy or capacity itself or purchasing it from another source.[59] Thus, under PURPA as originally enacted, an independent power producer could construct a generation facility and require an electric utility to enter a wholesale contract to purchase the electricity, assuming the price does not exceed the avoided cost rate and the new facility meets PURPA's Qualifying Facility (QF) requirements.

Wholesale power purchase contracts may include a variety of provisions intended to address matters beyond price. These agreements often address issues including performance standards for construction; commercial operation deadlines; allocation of the risk of loss during transmission to a delivery point; reliability and technical standards; the issues of curtailment, excess capacity, and output guarantees; limitation of the remedies available following a default; allocation of taxes and other expenses; and which party will receive benefits, such as renewable energy production credits, air-quality and emissions-reduction credits, offsets, and allowances.[60] Even within the price or quantity provisions, wholesale power purchase contracts may not employ flat-rate or per capita terms. Instead, prices and quantities may be intended to float based on factors such as time of day, time of year, forecasted or real-time market demand, or capacity.[61]

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[57] 18 C.F.R. § 292.303 (2019).

[58] 18 C.F.R. § 292.101(b)(6) (2019). Economic theory suggests that "[a] firm desiring to maximize its profits will . . . determine its level of output by continuing production until the cost of the last additional unit produced (marginal cost) just equals the addition to revenue (marginal revenue) obtained from it." *Cost*, ENCYCLOPEDIA BRITANNICA (Jun. 18, 2008), https://www.britannica.com/topic/cost [https://perma.cc/NYR4-YXZM]. The avoided cost rate is intended to spur additional capacity development by requiring utilities to purchase energy from independent producers when the contract price is below the amount at which the marginal cost and revenue intersect.

[59] 18 C.F.R. § 292.101(b)(6) (2019).

[60] *See, e.g.*, *Power Purchase Agreement for the Purchase of Renewable Energy*, GOLDEN SPREAD ELEC. COOP. (last visited Sept. 4, 2019), https://www.gsec.coop/getmedia/08b27ad0-534d-4a7c-b8be-80843f8dba57/ERCOT-QF-PPA.aspx [https://perma.cc/TEA5-AJV6]; *PG&E Form of Power Purchase Agreement*, PACIFIC GAS & ELEC. CO. (last visited Oct. 14, 2019), https://www.pge.com/includes/docs/word_xls/b2b/wholesaleelectricsuppliersolicitation/RPS2011/Attachment_H1_PGE_RPS_PPA_05112011.doc [https://perma.cc/8EHB-MM97]; *Model Wind Energy Purchase Agreement*, XCEL ENERGY (last visited Sept. 4, 2019), https://www.xcelenergy.com/staticfiles/xe/Corporate/Corporate%20PDFs/Model_Power_Purchase_Agreement.pdf [https://perma.cc/U97B-CRC8].

[61] *Id.*

Overall, PURPA had the desired effect.[62] Independent power producers have added more than 1.4 billion megawatt hours in generation capacity, approximately a 4500% increase, since 1990.[63] In particular, for renewables, PURPA helped spur independent power producers to add 263 million megawatt hours of wind and solar generation capacity, an approximately 8300% increase, during the same time period.[64] These are significant developments—one megawatt is sufficient to power approximately 750 to 1000 average American homes.[65] These figures

[62] In addition to PURPA, wholesale energy market development was fostered by the passage of the Energy Policy Act of 1992. Energy Policy Act of 1992, Pub. L. No. 102–486, 106 Stat. 2776. Section 721 granted FERC authority to require wholesale market participants to provide transmission services when it would be consistent with the Federal Power Act and the public interest. Energy Policy Act of 1992, Pub. L. No. 102–486, title VII, § 721. In addition, the legislation took steps to eliminate regulatory barriers to greater wholesale competition. Energy Policy Act of 1992, Pub. L. No. 102–486, § 721 (abolishing the Federal Power Act, § 211(c)(1)). Subsequently, in the mid-to-late 1990s, FERC issued a series of orders, most notably Order No. 888 and Order No. 2000, which were intended to improve competition through improved transmission facility access. FERC Order No. 888, 18 C.F.R. §§ 35, 385, 75 FERC ¶ 61,080 (1996) (promoting wholesale competition through open access non-discriminatory transmission services by public utilities and recovery of stranded costs by public utilities); FERC Order No. 2000, 18 C.F.R. § 35, 89 FERC ¶ 61,285 (1999) (requiring that public utilities that own, operate, or control facilities for the transmission of electric energy in interstate commerce make certain filings with respect to forming and participating in a regional transmission organization). Then again, after the enactment of the Energy Policy Act of 2005, FERC issued Orders No. 681, 679, and 890, which further reformed transmission service regulations to support wholesale market competition. Energy Policy Act of 2005, Pub. L. No. 109–58 § 1231; FERC Order No. 681, 18 C.F.R. § 42, 116 FERC ¶ 61,077 (2006) (requiring transmission organizations that are public utilities with organized electricity markets to make available long-term firm transmission rights in accordance with the rule); FERC Order No. 679, 18 C.F.R. § 35, 116 FERC ¶ 61,057 (2006) (establishing incentive-based rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion); FERC Order No. 890, 18 C.F.R. §§ 35, 37, 72 FERC ¶ 12,266 (2007) (amending the regulations and the pro forma open access transmission tariff to ensure that transmission services are provided on a basis that is just, reasonable, and not unduly discriminatory or preferential).

[63] U.S. Energy Information Administration, *Net Generation by State by Type of Producer by Energy Source (Annual Data 1990-2018)* (Oct. 12, 2018), https://www.eia.gov/electricity/data/state/ [https://perma.cc/MC7K-FA2W].

[64] *Id.*

[65] U.S. Energy Information Administration, *How Much Electricity Does an American Home Use?* (Oct. 26, 2018), https://www.eia.gov/tools/faqs/faq.php?id=97&t=3 [https://perma.cc/6GS4-5AQC] ("In 2018, the average annual electricity consumption for a U.S. residential utility customer was 10,972 kilowatt-hours (kWh), an average of about 914 kWh per month.").

illustrate the important role that independent power producers and wholesale power purchase contracts have played in the diversification of the American electricity industry and the development of renewable energy resources.[66]

On the whole, independent power producers and wholesale power purchase contracts have become ubiquitous features of the American electric industry. Independent power producers are often smaller than traditional utilities, lightly regulated (at least relative to traditional utilities), and better able—or more willing—to accept market risk.[67] It is likely that independent power producers and wholesale power purchase contracts will be an essential component of any state or traditional utility's renewable energy strategy. Thus, an independent power producer may make an investment in a new solar or wind generation facility to support a traditional

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[66] Despite PURPA's impact, the legislation faces criticism. Both industry groups, such as the Edison Electric Institute (EEI) and associations representing state regulators, like the National Association of Regulatory Utility Commissioners (NARUC), have urged Congress and FERC to adopt reforms that would make PURPA more compatible with modern, competitive energy markets. In particular, both groups have expressed concern that PURPA needlessly increases costs. For example, as a result of the avoided cost rate connection requirement, EEI reports "Pacificorp and Duke Energy customers are expected to pay $1.2 billion and $1 billion, respectively, above market price for their energy" over the next decade. Iulia Gheorghiu, *EEI Presses FERC for Faster, Streamlined PURPA Review*, UTILITY DIVE (Feb. 6, 2019) https://www.utilitydive.com/news/eei-presses-ferc-for-faster-streamlined-purpa-review/547741/ [https://perma.cc/SA3N-9FMJ]. In response, NARUC, and groups like it, have proposed that "regulations that move away from the use of administratively determined avoided costs to their measurement through competitive solicitations or market clearing prices." Abby Harvey, *NARUC Calls on FERC to Prioritize PURPA Reform*, POWER MAGAZINE (Dec. 20, 2017) https://www.powermag.com/naruc-calls-on-ferc-to-prioritize-purpa-reform/ [https://perma.cc/865Y-28Y8]. As this article was being written, FERC issued a notice of proposed rulemaking intended to modernize PURPA. Press Release, FERC, FERC Proposes to Modernize PURPA Regulations (Sept. 19, 2019), https://www.ferc.gov/media/news-releases/2019/2019-3/09-19-19-E-1.asp [https://perma.cc/R7WM-EH5N].

[67] Ezra Hausman, Rick Hornby & Allison Smith, *Bilateral Contracting in Deregulated Electricity Markets, in* A REPORT TO THE AMERICAN PUBLIC POWER ASSOCIATION, 1 (Apr. 18, 2008), http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=D312AF0B9279226D4D0EDC653CFAD604?doi=10.1.1.179.1344&rep=rep1&type=pdf [https://perma.cc/N59W-8V8F] ("A bilateral contract in an electricity market is an agreement between a willing buyer and a willing seller to exchange electricity, rights to generating capacity, or a related product under mutually agreeable terms for a specified period of time. Most economists agree that such arrangements are crucial to the functioning of electricity markets, because they allow both parties to have the price stability and certainty necessary to perform long-term planning and to make rational and socially optimal investments.").

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utility's compliance with a state renewable energy mandate.[68] In turn, the independent power producer relies on a long-term contract with the utility to recoup its investment over an extended term.[69] However, these features, which make independent power producers more responsive to changing market and regulatory demands, place them at a greater risk of adverse financial consequences when a wholesale power purchase contract is rejected during a utility bankruptcy.[70]

III. FILED RATE AND MOBILE-SIERRA DOCTRINES

A. *Filed Rate Doctrine*

Against this regulatory backdrop, utilities in the United States historically have operated as government-sanctioned monopolies; namely, in recognition that a single firm may be able to more efficiently allocate electric, gas, and telecommunication capital costs than a competitive market.[71] In return for this monopoly power, utilities generally are subject to duties that firms engaged in market competition can avoid. Chief among

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[68] *Id.* at 11 ("Bilateral contracts are particularly important to the development of utility-scale renewable resources. These resources tend to be extremely capital intensive, and hence heavily weighted towards up-front costs, since they have no or limited fuel and emissions costs during their operating lives. The absence of fuel and emissions costs makes these resources particularly attractive for hedging future fuel and emissions price risks as part of a portfolio of resources to serve load. However, this avoided risk only benefits ratepayers if they are passed through—i.e., through long-term, fixed-price contracts. In many cases, approval of new environmentally attractive resources hinges on a contract structure that offers this benefit to ratepayers.").

[69] *Id.* at 12 ("Contracts of at least [five years] (and more likely ten years or more) are required to provide the level of revenue guarantee that developers need to finance new resources, which is one of the most important functions of these contracts."). *See also id.* at 17 ("Because most of the cost of renewables is up-front capital cost, renewable resources are particularly dependent on long-term contracts for energy, capacity, and RECs.").

[70] *Id.*

[71] However, single firm control is not always a given, particularly in the context of generation and transmission. *See supra* Section II.C. (discussing the development of independent power producers after the passage of Public Utility Regulatory Policies Act of 1978). Additionally, thirteen states have "deregulated" or restructured their energy markets to break previously vertically integrated utilities into their component parts. U.S. Energy Info. Admin, *Electricity Residential Retail Choice Participation Has Declined Since 2014 Peak* (Nov. 8, 2018), https://www.eia.gov/todayinenergy/detail.php?id=37452 [https://perma.cc/N2AN-HFHB] ("Currently, 13 states and the District of Columbia have active, statewide residential retail choice programs . . . . Four other states—Michigan, Nevada, Oregon, and Virginia—each have a form of limited retail choice that is mostly available to non-residential customers.").

these responsibilities are the duties to serve and to set reasonable prices.[72] Accordingly, utilities typically must secure regulatory approval of their contracts, called tariffs, with retail customers and wholesale suppliers. Once the tariff is approved, utilities, customers, and suppliers must act consistently with it because deviations could unjustly benefit one party at the expense of another.

The filed rate doctrine arises from this paradigm by "requir[ing] the courts to respect the public agency's control over market prices and industry practices[.]"[73] The file rate doctrine, thus, establishes a regulatory duty or obligation arising from the filed rate that is separate and superior to any private contractual duty.[74] As a result, after the filed rate is approved, an aggrieved party's primary remedy is any process provided by the administrative agency. While the filed rate doctrine was first employed in the context of the Interstate Commerce Act, which subjected railroads to federal regulation, it is now widely applied by state and federal agencies to regulated utilities.[75] The Supreme Court has recognized FERC's authority to employ the doctrine in the context of wholesale electricity contracts filed with the Commission under FPA section 201(b)(1) for more than sixty

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[72] *See, e.g.*, Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1236 (1998) ("[P]ublic utilities are obligated—largely as conditions of their monopoly franchises—to provide service to all customers within their service territories, sometimes even when the cost of providing service to a customer is in excess of the anticipated revenue from that customer.").

[73] Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 144–45 (1990) ("[M]oreover, it significantly reduces the temptation of regulated parties to deviate from the market-wide rules formulated by the agency."); Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 375 (1988) ("The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order."); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981) (holding that the filed rate doctrine forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority).

[74] *See, e.g.*, New York Cent. & Hudson River R.R. Co. v. York & Whitney Co., 256 U.S. 406, 408 (1921) ("The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge[:] [the rate filed with the Interstate Commerce Commission[.]"); Pennsylvania R.R. Co. v. International Coal Min. Co., 230 U.S. 184, 197 (1913) ("The tariff, so long as it was of force," was "to be treated as though it had been a statute, binding as such upon railroad and shipper alike," and "the shipper was . . . bound to pay and the carrier to retain what had been paid.").

[75] *Arkansas Louisiana Gas Co.*, 453 U.S. at 577. ("The filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act . . . and has been extended across the spectrum of regulated utilities.").

years.[76] The Court has explained, consistent with other agency deference doctrines,[77] "[t]he considerations underlying the [filed rate] doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant."[78]

The meaning of "rate" in the filed rate doctrine is expansive. Wholesale power purchase contracts, which are the focus of this article, include a variety of terms not directly related to per unit costs, including facility siting and construction, delivery and interconnection arrangements, forced outages, capacity and service guarantees, third-party sales, and renewable energy credit ownership.[79] Along these lines, the Supreme Court has made clear, "the filed rate doctrine is not limited to 'rates' *per* se[.]"[80] The Court subsequently reasoned, "[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa."[81] Thus, for wholesale power purchase contracts subject to FERC approval, the doctrine may provide an additional barrier to state regulatory interference, anti-trust claims, and challenges by contracting parties with regret or the benefit of hindsight.

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[76] 16 U.S.C. § 824(b)(1) (2018); Montana-Dakota Util. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251 (1951) ("[T]he right to a reasonable rate [under the Federal Power Act] is the right to the rate which the Commission files or fixes[.]").

[77] *See, e.g.*, Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) (holding agency interpretations should be upheld by the courts when a statute is ambiguous and the agency's construction is permissible or reasonable); Skidmore v. Swift & Co., 323 U.S. 134 (1944) (holding a federal agency's determination is entitled to judicial respect according to the interpretation's persuasiveness).

[78] *Arkansas Louisiana Gas Co.*, 453 U.S. at 577–78.

[79] *See supra* Section II.C., notes 54–55. Similarly, for retail customers, the filed rate, encompassed in the filed rate doctrine, often addresses matters such as service territory, technical terms and conditions, rules and regulations, consumer rights, cogeneration and distributed resources in addition to per unit price paid for natural gas or electricity. *See, e.g.*, *Rate Books,* XCEL ENERGY (2019), https://www.xcelenergy.com/company/rates_and_regulations/rates/rate_books [https://perma.cc/25WT-Z5QS].

[80] Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986) ("'[O]ur inquiry is not at an end because the orders do not deal in terms of prices or volumes of purchases.'") (quoting N. Natural Gas Co. v. Kansas Corp. Comm'n, 372 U.S. 84, 90–91 (1963)); *see* Mississippi Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 371 (1988) ("FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates.").

[81] Am. Tel. & Tel. Co. v. Cent. Off. Tel., 524 U.S. 214, 223 (1998).

B. Mobile-Sierra Doctrine

Since its introduction, the filed rate doctrine has continued to evolve. The doctrine may even be applied when FERC does not specifically set or approve the rate. FERC and its predecessor, the Federal Power Commission, originally acted as a national government analog to state public utilities commissions by directly reviewing contracts to ensure compliance with the "just and reasonable" standard.[82] Gradually, FERC has transitioned from direct regulation to ensuring adequate market competition. This trend has accelerated in the past few decades, coinciding with the passage of the Public Utility Regulatory Policies Act in 1978.[83] The Supreme Court in *FERC v. Electrical Power Supply Association* explained:

> In this new world, FERC often forgoes the cost-based rate-setting traditionally used to prevent monopolistic pricing. The Commission instead undertakes to ensure "just and reasonable" wholesale rates by enhancing competition—attempting . . . "to break down regulatory and economic barriers that hinder a free market in wholesale electricity."[84]

The *Mobile–Sierra* doctrine, which has its genesis in two 1956 cases, helps accommodate this "new world." In the first case, the Supreme Court considered whether a natural gas transmission company under a long-term contract with a distribution company could unilaterally "change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission."[85] The Court ultimately held that because "the Natural Gas Act gives a natural gas company no power to change its contracts unilaterally, it follows that the new schedule . . . was a nullity insofar as it purported to change the rate set by its [original] contract . . . and that [original] contract rate remained the only lawful rate."[86]

The Court came to the same conclusion in the second case involving a contract with a fifteen-year term between Sierra Pacific Power Company and PG&E. When the parties entered the contract in 1948, PG&E provided Sierra with "a special low rate" in an attempt to secure the business. By 1953,

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[82] 16 U.S.C. § 824e(a) (2018).

[83] Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified at 16 U.S.C. §§ 2601–2645) (2018)); *see supra* Section II.C.

[84] FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 768 (2016) (quoting Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 536 (2008)).

[85] United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 333–34 (1956). It is important to note that in *Arkansas Louisiana Gas Co. v. Hall*, the Supreme Court recognized that the Federal Power Act and Natural Gas Act are "substantially identical" and subject to "interchangeabl[e]" precedent. 453 U.S. 571, 578 n.7 (1981).

[86] *United Gas Pipe Line Co.*, 350 U.S. at 347.

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PG&E was no longer able to profitably provide electricity at this special rate. Like the transmission company in *Mobile*, PG&E unilaterally "filed with the Commission under § 205(d) of the Federal Power Act a schedule purporting to increase its rate to Sierra by approximately 28%."[87] Again, the Supreme Court rejected the attempt to revise the contract by invoking the Federal Power Commission's responsibility to ensure "just and reasonable" rates. The Court explained:

> [T]he Commission holds that the contract rate is unreasonable solely because it yields less than a fair return on the net invested capital. But, while it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain.[88]

Thus, the *Mobile-Sierra* doctrine, in many ways, is an extension of basic contract law principles: parties are only entitled to the value of the bargain they strike. *Mobile-Sierra* ensures that parties are not able to accomplish through an administrative process what they could not achieve through contract law. As the Court put it, "a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility."[89] Instead, the Commission's only duty in the case of an "improvident bargain" is to consider "whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[90]

In re Permian Basin Area Rate Cases later clarified that *Mobile-Sierra* creates a presumption that authorized wholesale rates are "just and reasonable" and that FERC may only abrogate such contracts "in circumstances of unequivocal public necessity."[91] More recently, *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County* explained that setting aside a wholesale contract requires a finding of "'unequivocal public necessity,' or 'extraordinary circumstances,'" regardless of whether the supplier or purchaser believes the rate is

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[87] Fed. Power Comm'n v. Sierra Pacific Power Co., 350 U.S. 348, 352 (1956).
[88] *Id.* at 354–55.
[89] *Id.* at 355.
[90] *Id.*; *see* 16 U.S.C. § 824e(a) (2018).
[91] *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968).

excessive.[92] Moreover, the Court has extended *Mobile-Sierra* to bar challenges by third parties to an approved rate.[93]

The ultimate effect of the Supreme Court's FPA jurisprudence is to extend "FERC['s] plenary authority over interstate wholesale rates" to matters well beyond the traditional conception of a rate as "[a] price fixed according to a ratio."[94] This is true even in cases where the Commission has limited its wholesale contract review to an evaluation of each party's relative market power.[95]

IV. FERC AND THE BANKRUPTCY COURTS

During the 1990s and early 2000s, state legislatures and public utility commissions began to restructure retail electricity markets.[96] Similarly, during the same time period, Congress and FERC began enacting reforms intended to increase market competition and reduce customer prices.[97] The result of this activity was enhanced market volatility that, in some cases, resulted in bankruptcy.[98] The following section discusses several jurisdictional disputes between FERC and bankruptcy courts arising out of these market changes. Most notably, this section discusses the Fifth Circuit Court of Appeals' *In re Mirant* decision.[99]

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[92] Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 550–51 (2008) (quoting *In re* Permian Basin, 390 U.S. at 822 (1968); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 582 (1981)).

[93] NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n, 558 U.S. 165, 168 (2010) ("The 'venerable Mobile–Sierra doctrine' rests on 'the stabilizing force of contracts.' To retain vitality, the doctrine must control FERC itself, and, we hold, challenges to contract rates brought by noncontracting as well as contracting parties.") (quoting *Morgan Stanley Capital Grp. Inc.*, 554 U.S. at 548 (2008)); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 953 (1986); New York v. FERC, 535 U.S. 1 (2002).

[94] *Rate*, MERRIAM-WEBSTER (11th ed. 2003) ("[A] price fixed according to a ratio[.]").

[95] *Thornburg*, 476 U.S. at 953.

[96] Katie Johnson, *You Can't Manage What You Can't Measure: Exploring Restructuring's Impact on Retail-Electric Markets*, 38 VT. L. REV. 199, 202 (2013).

[97] *Id.* at 202–04 (2013) (summarizing energy market restructuring legislation).

[98] *See In re* Mirant, 378 F.3d 511, 516 (5th Cir. 2004).

[99] *Id.* at 511. The most recent case addressing the intersection between the Bankruptcy Code and the Federal Power Act, prior to the PG&E bankruptcy, is *In re FirstEnergy Solutions Corp.* The *FirstEnergy* court relied largely on the reasoning from *Mirant* by concluding "cessation of performance, does not intrude on FERC's jurisdiction over filed rates." No. 18-50757, 2018 WL 2315916 at *17 (Bankr. N.D. Ohio, May 18, 2018) ("If Plaintiffs were solvent and simply stopped making payments . . . the counterparties could not reasonably argue that [the debtors] had somehow modified or abrogated those agreements; they would seek damages for the breaches of those contracts . . . . Those breaches would lead to claims. If the Plaintiffs then filed bankruptcy, the claims would become claims against the estate.

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A. Mirant*'s Argument*

In 2004, the Fifth Circuit Court of Appeals was asked to consider whether the Mirant Corporation (Mirant), a competitive energy company, could reject a contract that it had previously entered into with Potomac Electric Power Company (Pepco) incident to a broader transaction to acquire Pepco's electric generation facilities.[100] The *Mirant* court ultimately relied on two related arguments. First, Mirant could reject the contract because it did not implicate the filed rate.[101] Second, executory contract rejection in bankruptcy results in a breach of contract beyond FERC's jurisdiction.[102] Each of these arguments is discussed below.

1. Mirant*'s Consideration of the Filed Rate Doctrine*

The Fifth Circuit Court of Appeals first considered whether the FPA preempted rejection of the contracts due to FERC's exclusive authority to determine wholesale rates.[103] The court concluded, "the FPA does not preempt Mirant's rejection of the [contract] because it would only have an indirect effect upon the file rate."[104] The court explained that FERC's argument was "unpersuasive because it . . . does not challenge Mirant's ability to breach the [contract] generally, nor does it challenge the calculation of damages from that breach."[105] In reaching this decision, the *Mirant* court relied on its *Gulf States* reasoning, where the debtor was allowed to seek damages based on certain provisions of a wholesale agreement related to "the amount purchased."[106] In *Gulf States*, the court repeatedly drew distinctions between rates, in the traditional sense,[107] and other contract terms such as quantity.[108] Similarly, the *Mirant* court explained, "courts are not preempted from awarding breach of contract damages based upon a theory that the breach increased the amount that was

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Treatment of those claims are governed by the Bankruptcy Code, including the confirmation of a reorganization plan . . . ."); *see infra* Section IV.B.1.

[100] *See In re Mirant*, 378 F.3d at 511. Pepco was unable to assign all of its existing power purchase contracts associated with the generation facilities as part of the sale. *Id.* at 515. To resolve this issue, Pepco and Mirant entered into a "back-to-back" agreement where "Mirant agreed to purchase from Pepco an amount of electricity equal to Pepco's obligation under those unassigned PPAs at the rates set in those contracts." *Id.*

[101] *Id.* at 518.

[102] *Id.* at 525.

[103] *Id.* at 519–20.

[104] *Id.*

[105] *Id.* at 521–22.

[106] Gulf States Util. Co. v. Ala. Power Co., 824 F.2d 1465, 1471–72 (5th Cir. 1987).

[107] *Rate*, MERRIAM-WEBSTER (11th ed. 2003) ("[A] fixed ratio between two things.").

[108] *Gulf States Util. Co.*, 824 F.2d at 1471–72

purchased, so long as damages are calculated using the filed rate."[109] With these distinctions drawn, the Fifth Circuit held that the non-debtor party, following the contract's rejection, receives an "unsecured claim against the bankruptcy estate . . . based upon the amount of electricity it would have otherwise sold to Mirant under that agreement *at the filed rate*."[110]

2. Mirant*'s "Rejection as Breach" Framework*

After deciding that damages based on the contemplated electricity purchases did not violate the filed rate doctrine, the *Mirant* court concluded that a rejected contract results in a breach of contract claim that is beyond FERC's jurisdiction.[111] This conclusion rests on a statutory interpretation of the Bankruptcy Code.[112] The Code provides that a bankruptcy estate trustee (a debtor-in-possession) may, subject to the court's approval, "assume or reject any executory contract."[113] Federal courts have explained that this provision "enable[s] 'the trustee to maximize the value of the debtor's estate by assuming executory contracts . . . that benefit the estate and rejecting those that do not.'"[114] The rejection gives the non-breaching party a damages claim against the bankruptcy estate[115] but does not terminate the parties' rights under the contract.[116]

The rejection-as-breach determination is supported by two bankruptcy law principles. First, the bankruptcy estate cannot possess any more rights

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[109] *In re Mirant*, 378 F.3d at 519.

[110] *In re Mirant*, 378 F.3d at 520 (emphasis added).

[111] *Id.* at 525 (stating that "FERC can only approve a change to a filed rate 'if the rate is so low as to adversely affect interest'" and that the filed rate doctrine "does not allow FERC to change a filed rate based upon the purely private concern that the rate 'is unprofitable to the public utility.'" (quoting Fed. Power Comm'n v. Sierra Pac. Power Co., 35 U.S. 348, 355 (1956))).

[112] *In re Mirant*, 378 F.3d at 519 ("Under the Bankruptcy Code . . . Mirant's rejection of the Back-to-Back Agreement is a breach of contract." (citing 11 U.S.C § 365(g))).

[113] 11 U.S.C. § 365(a) (2018). A contract is executory when "performance remains due to some extent on both sides." Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1658 (2019) (quoting N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 522 n.6 (1984)). The Bankruptcy Code's plain terms specify that the rejection of an executory contract constitutes a breach of contract. 11 U.S.C. § 365(g) (2018); *see Mission Prod.*, 139 S. Ct. at 1658.

[114] Cinicola v. Scharffenberger, 248 F.3d 110, 119–20 (3d Cir. 2001) (quoting L.R.S.C. Co. v. Rickel Home Ctr., 209 F.3d 291, 298 (3d Cir. 2000)).

[115] *See Mission Prod.*, 139 S. Ct. at 1658; RESTATEMENT (SECOND) OF CONTRACTS § 236 cmt. a (1981).

[116] *See Mission Prod.*, 139 S. Ct. at 1661 ("Rejection of a contract—any contract—in bankruptcy operates not as a rescission but as a breach.").

than the debtor itself had outside of bankruptcy.[117] Second, terms undefined in the Bankruptcy Code retain the definitions that are established at common law.[118] In this instance, the term "breach of contract" in section 365(g), as incorporated by section 365(a), has a well-established meaning at common law: "When performance of a duty under a contract is due any non-performance is a breach."[119] In addition, under the common law, a total breach occurs when the breach "discharges the injured party's remaining duties to render such performance."[120] Repudiation, similar to non-performance, also is generally considered a total breach.[121] A total breach gives the non-breaching party a claim for damages.[122] It also paves the way for the non-breaching party to choose whether to continue to perform or to refuse to perform further.[123] Consistent with these provisions, *Mirant* explained that the Bankruptcy Code "permit[s] a business to reorganize instead of liquidating [thus] . . . allow[ing] it to 'continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners.'"[124]

Mirant's embrace of the Bankruptcy Code makes its statutory analysis relatively straightforward. First, the Fifth Circuit recognized that rejection under Bankruptcy Code section 365 constitutes a breach of contract that transforms the non-breaching party into an unsecured creditor with a pre-petition claim against the estate.[125] The Fifth Circuit's decision is supported

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[117] *Id.* at 1663 (citing Bd. of Trade of Chic. v. Johnson, 264 U.S. 1, 14 (1924)); 11 U.S.C. § 541(a)).

[118] *Mission Prod.*, 139 S. Ct. at 1662 (citing Field v. Mans, 516 U.S. 59, 69 (1995)); *see also, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992) (articulating the well-established principle that where Congress uses terms that have accumulated a settled meaning under the common law, courts must infer that Congress intended to incorporate that settled common law understanding).

[119] RESTATEMENT (SECOND) OF CONTRACTS § 235.

[120] *Id.* §§ 235, 243(1).

[121] *See id.* § 253.

[122] *See infra* note 125.

[123] *See Mission Prod.*, 139 S. Ct. at 1662 (citing 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:32 (4th ed. 2013) (footnote omitted)).

[124] *In re Mirant*, 378 F.3d 511, 517 (5th Cir. 2004) (quoting United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983)).

[125] 11 U.S.C. § 365(a) (2018) ("[T]he trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."); 11 U.S.C. § 365(g) (2018) ("[T]he rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract[.]"); *see, e.g., Mission Prod.*, 139 S. Ct. at 1658; *In re* Murphy, 694 F.2d 172, 174 (8th Cir. 1982) ("[R]ejection of an executory contract in accordance with applicable provisions of the Bankruptcy Act is not the equivalent of rescission . . . . [R]ejection constitutes a breach of contract, and a person injured thereby is deemed a creditor and is entitled to assert a claim for damages."); *In re* Lavigne, 114 F.3d 379, 386–87 (2d Cir. 1997) ("While rejection is treated as a breach, it does not completely terminate the

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by bankruptcy case law, which provides that parties are generally left with the rights and remedies available outside of bankruptcy law following rejection.[126] To that end, federal courts elsewhere have explained, "rejection operates as a breach of an existing and continuing legal obligation of the debtor, not as a discharge or extinction of the obligation itself."[127]

Second, the Fifth Circuit concluded that FERC jurisdiction does not extend to common law breach of contract claims arising from wholesale power purchase contracts subject to FPA regulation.[128] Indeed, FERC itself has held that energy contract sales disputes "negotiated [at] market-based rates are more appropriately resolved in court or by arbitration."[129]

State courts also have successfully asserted jurisdiction over FPA related contracts. For example, in *Airco Alloys Div., Airco, Inc. v. Niagara Mohawk Power Corp.*, a group of industrial customers alleged that Niagara Mohawk breached its contract with the Power Authority of the State of New York (Power Authority).[130] The contract was mandated by an order pursuant to the Federal Power Act that directed the Power Authority to make low-cost hydropower available to Niagara Mohawk.[131] In return, Niagara

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contract."); Pub. Serv. Co. of N.H. v. N.H. Elec. Coop., Inc., 884 F.2d 11, 15 (1st Cir. 1989) (The Code "afford[s] breathing space to decide which contracts [debtors] wish to assume [or reject].").

[126] Butner v. United States, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law."); *see also* Clean Burn Fuels, LLC v. Purdue BioEnergy, LLC, 492 B.R. 445, 457 (Bankr. M.D.N.C. 2013) ("When hearing a case under diversity jurisdiction, federal courts apply the law of the forum state . . . . Thus, 'in the absence of a compelling federal interest which dictates otherwise, [state law applies] where a federal bankruptcy court seeks to determine the extent of a debtor's property interest.'") (quoting *In re* Merritt Dredging Co., 839 F.2d 2013, 206 (4th Cir. 1988)); Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U. COLO. L. REV. 845, 848, 863, 888 (1988) (explaining that rejection excludes that property and those substantive rights from the bankruptcy estate).

[127] *In re* Modern Textile, Inc., 900 F.2d 1184, 1191 (8th Cir. 1990); *see also In re* Midwest Polychem, Ltd., 61 B.R. 559, 563 (Bankr. N.D. Ill. June 9, 1986) ("Rejection of the contract constitutes a breach and the injured party is entitled to assert a claim for damages."); *see also In re* Federated Dep't Stores, Inc., 131 B.R. 808, 812 (S.D. Ohio 1991) ("[I]t is not true that solvent debtors may petition for bankruptcy and then obtain a windfall by rejecting their executory contracts . . . . Such a view ignores the fact that in the event of liquidation the party whose contract is rejected must have his claim satisfied before the debtor may obtain recovery.") (quoting *In re* Chi-Feng Huang, 23 B.R. 798, 803 (B.A.P. 9th Cir. 1982) (internal quotation marks omitted)).

[128] *In re Mirant*, 378 F.3d 511, 521–22 (5th Cir. 2004).

[129] PPL Mont., LLC, 96 F.E.R.C. ¶ 61,313, 62,208 (2001).

[130] Airco Alloys Div., Airco, Inc. v. Niagara Mohawk Power Corp., 65 A.D.2d 378, 381 (N.Y. App. Div. 1978).

[131] *Id.*

Mohawk was required to sell this power to a class of industrial customers.[132] In response to a defense raised by Niagara Mohawk and the Power Authority that the court lacked jurisdiction to hear the claims, a New York intermediate appellate court concluded that it retained jurisdiction because "traditional common-law claims do not lose their character because it is common knowledge that there exists a related, and perhaps relevant, scheme of federal regulation."[133]

Likewise, in *KN Energy, Inc. v. Great Western Sugar Co.*, Colorado state courts resolved allegations that a natural gas supplier had breached a FERC jurisdictional contract with a customer by unilaterally "changing the standard under which it determined when to interrupt delivery."[134] There, the Great Western Sugar Company ultimately was awarded damages arising from the breach of the parties' service agreement without involvement of FERC, despite KN Energy's argument that the change was mandated by FERC.[135]

Similarly, in *Hartman v. El Paso Natural Gas Co.*, the New Mexico Supreme Court held that neither the Natural Gas Act nor the Natural Gas Policy Act precluded a state court from deciding contractual issues involving gas purchase contracts, which were regulated tangentially and peripherally by federal statutes.[136]

Finally, in *Cleveland v. Cleveland Electric Illuminating Co.*, the Ohio Court of Appeals cited FERC for the proposition that "[t]he Commission has no special expertise in applying relevant contract law to divine the intent of the contracting parties as to the degree of firmness contemplated in their contract" for the purposes of contract interpretation.[137] Cases like these likely

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[132] *Id.* at 383.

[133] *Id.* at 384 (citing Pan American Corp. v. Superior Court of Delaware, 366 U.S. 656, 663 (1961)). In addition, the New York court concluded that "[e]qually well established is the principle that exclusive jurisdiction provisions do not divest the state courts of the power to decide questions arising under the laws of the United States, but only 'cases' arising under those laws." *Id.* at 383–84 (citing Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255, 259 (1897)).

[134] 698 P.2d 769, 775 (Colo. 1985).

[135] *Id.* at 775, 781.

[136] 107 N.M. 679, 684 (1988).

[137] 684 N.E.2d 343, 349 (Ohio Ct. App. 1996) (quoting Puget Sound Power & Light Co., 74 F.E.R.C. ¶ 61,192, 61,659 (1996)) (internal citation marks omitted)). *See also* Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, 56 N.E.3d 38, 44 (Ind. Ct. App. 2016) (holding that a claim for breach of contract for generation and transmission of electricity accrued at time that cooperative submitted to jurisdiction of Federal Energy Regulatory Commission); Pogo Producing Co. v. Sea Robin Pipeline Co, 493 So. 2d 909 (La. Ct. App.), *writ denied*, 497 So. 2d 310 (La. 1986) (granting a preliminary injunction in favor of producer to enforce specific performance against pipeline arising out of six gas purchase contracts);

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allowed the *Mirant* court to conclude it was on firm ground when it determined that both the Bankruptcy Code and FERC appear to funnel traditional common law contract claims—like breach—to the courts.

The third and final step for the Fifth Circuit was to characterize Mirant's rejection as a traditional breach of contract that transformed the other party, Pepco, into an unsecured creditor. To that end, the Fifth Circuit's conclusion, "Mirant may choose to reject this agreement as unnecessary to its reorganized business because it represents excess capacity in its system to supply electricity" reasonably follows from this Bankruptcy Code interpretation.[138]

B. Mirant *is Unpersuasive*

Ultimately, *Mirant*'s arguments should be unpersuasive to other courts. *Mirant* appears to rest on a filed rate doctrine misreading and an expansive view of the Bankruptcy Code that eliminates any possibility for continuing FERC jurisdiction over wholesale power purchase contracts. Both of these issues are addressed below.

1. Mirant *Drew Improper Distinctions Between the Contract Terms*

Mirant relied, in part, on a distinction between the "rate" in a traditional sense and the other contractual terms.[139] This distinction appears impermissible in light of a trio of Supreme Court cases suggesting that the filed rate requires courts to consider all of the contract provisions instead of the interplay between the price and quantity terms.

First, *Northern Natural Gas Co. v. Kansas Corp. Commission* considered whether the Kansas State Corporation Commission could require an interstate pipeline company to purchase gas from all wells connecting with its pipeline system without encroaching upon the exclusive

RJB Gas Pipeline Co. v. Colo. Interstate Gas Co., 813 P.2d 1, 5–6 (Okla. Civ. App. 1989) (holding that there was no usurpation of Federal Energy Regulatory Commission's jurisdiction when a state court resolved a natural gas seller's claim against the buyer for amounts allegedly due under the contract for the sale of interstate gas); Doswell Ltd. P'ship v. Va. Elec. & Power Co., 468 S.E.2d 84 (Va. 1996) (exercising jurisdiction in an action brought by independent power producer against electric utility for breach of power purchase agreement).

[138] *In re Mirant*, 378 F.3d 511, 520 (5th Cir. 2004).

[139] *Id.* at 515 ("While the FPA does not preempt breach of contract claims that challenge a filed rate, district courts are permitted to grant relief in situations where the breach of contract claim is based upon another rationale.").

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regulatory jurisdiction of the Federal Power Commission.[140] There, the Court held that the filed rate doctrine applied even though "the orders do not deal in terms of prices or volumes of purchases[.]"[141] The Court explained that the Natural Gas Act leaves no room for direct or indirect regulation of interstate wholesale contracts because it "directly affect[s] the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation."[142]

Second, *Arkansas Louisiana Gas Co. v. Hall* evaluated whether the filed rate doctrine barred a state court from calculating damages in a breach-of-contract action based on an assumption that FERC would have approved a different rate had it known about material facts that were withheld.[143] The basic issue was a contract provision that required the Arkansas Louisiana Gas Company to pay the same rate for gas from the Sligo Gas Field as it was paying a different supplier. Eventually, the respondents—natural gas producers—discovered they were being paid less than the other supplier and sought contract damages in Louisiana state court based on the clause. The Louisiana Supreme Court upheld the damages award.[144] However, the U.S. Supreme Court reversed that decision, concluding, "[i]t would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission" even when the provision entitling that party to damages was included in the previously approved contract.[145] The Court's decision was buttressed by the filed rate doctrine's fundamental purpose of "granting the Commission an opportunity in every case to judge the reasonableness of the rate."[146]

Third, *AT&T v. Central Office Telephone* explained that "[r]ates . . . do not exist in isolation."[147] Instead, "[t]hey have meaning only when one knows the services to which they are attached."[148]

The upshot of these cases is that FERC is obligated to exercise oversight over changes to jurisdictional contracts because of its comparative competence, the desire for uniform decision making, and the regulatory obligation created by the filed rate. For the contracts themselves, these cases suggest that FERC jurisdictional contracts should be treated holistically and

[140] 372 U.S. 84, 85–86 (1963).
[141] *Id.* at 90–91.
[142] *Id.* at 91–92.
[143] 453 U.S. 571, 573 (1981).
[144] *Id.* at 574–76.
[145] *Id.* at 579.
[146] *Id.* at 582.
[147] 524 U.S. 214, 223 (1998).
[148] *Id.* at 223.

that attempts to isolate price and quantity terms are likely inconsistent with the filed rate doctrine and the FPA.[149] Indeed, even the *Arkansas Louisiana Gas Co.* attempt to award damages for failing to comply with a FERC approved equal payment contract provision was deemed a violation.[150] Accordingly, FERC unsuccessfully argued in *Mirant*:

> FERC's reasonableness calculus [under 16 U.S.C. § 824d(a)] included a factor that the parties would honor all their obligations throughout the duration of the applicable contractual term. Mirant's proposed rejection would remove that factor from the calculus. Without FERC review and approval, Mirant would be able to retain . . . [those] benefits . . . without the corresponding . . . obligations[.][151]

FERC found a more sympathetic court for this argument two years later. In *In re Calpine*, a debtor "filed a motion in the Bankruptcy Court for entry of an order authorizing debtors to reject certain energy contracts" because the "electricity prices fixed in the [power agreements] are significantly lower than prevailing electricity prices."[152] For its part, the district court recognized "FERC's jurisdiction and the filed rate doctrine stretches past regulation of rates . . . and extends to the terms and conditions of wholesale energy contracts."[153] Moreover, "[a] change to the duration of a filed rate energy contract, would also come under FERC's jurisdiction."[154] Thus, the court explained:

[149] *Central Office Telephone* is a case adjudicating an issue under the Telecommunications Act. Nevertheless, filed rate doctrine analysis remains similar under the acts governing FCC and FERC jurisdiction. *See id.* at 221–22; Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 477–89 (2002) (tracing the history of tariffs and the filed rate doctrines back to the Interstate Commerce Commission).

[150] *Arkansas Louisiana Gas Co.*, 453 U.S. at 579.

[151] Br. of Appellee FERC at 36, *In re* Mirant, 378 F.3d 511 (5th Cir. 2004); *see also* Federal Power Act, § 205, 16 U.S.C. § 824d(a) (2012) (requiring "[a]ll rates and charges made, demanded, or received . . . in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . be just and reasonable.").

[152] 337 B.R. 27, 30–31 (S.D.N.Y. 2006).

[153] *Id.* at 32.

[154] *Id.* at 33 (citing *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968) ("The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.")); *see* Pennsylvania Water & Power Co. v. Fed. Power Comm'n, 343 U.S. 414, 423 (1952) (holding that if an energy supplier "wishes to discontinue some or all of the services [the FPA] has rendered for the past twenty years, the Act . . . opens up a way provided [the supplier] can prove that its wishes are consistent with the public interest.").

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> The [a]greements that Calpine seeks to reject have been filed with FERC and, under normal conditions, altering the rates, terms, conditions, or duration of the contracts would require FERC involvement and approval. A solvent company could not choose to stop performance and expect anything other than swift FERC action. There are no provisions in the FPA that specifically limit FERC jurisdiction in the bankruptcy context.[155]

Finally, the district court explained the Code's structure itself allows a regulatory agency to exercise its authority during "the pendency of a reorganization."[156]

Notably, unlike in *Mirant*, the *Calpine* court chose to avoid wading too deeply into the "rejection as a breach" versus "rejection as a modification subject to FERC approval" issue on which the *Mirant* decision ultimately turned.[157] Instead, the court characterized the rejection as a "unilateral termination" subject to FERC jurisdiction.[158] In this way, the *Calpine* court allowed the filed rate doctrine to extend fully into the bankruptcy context. First, *Calpine* recognized, unlike the *Mirant* court, that the filed rate means the entire contract including the regulatory obligation created by FERC approval of the original commercial agreement. Second, *Calpine* reasoned that Congress intended for the Bankruptcy Code to accommodate actions by regulatory agencies pursuant to section 1129(a)(6).

Similarly, *In re Boston Generating* considered FERC jurisdiction's effect on the bankruptcy court.[159] In that case, the debtor sought to reject a contract for natural gas transportation via a third-party pipeline to one of its power plants.[160] Separately, the debtor sought FERC approval to sell the power plant as part of its bankruptcy reorganization.[161] At issue was not whether FERC had *jurisdiction*, but the order in which the FERC and the bankruptcy court could exercise it. Both parties agreed, "FERC must make

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[155] *In re Calpine*, 337 B.R. at 33.

[156] *Id.* at 35 ("The Bankruptcy Code itself supports this conclusion by contemplating agency action during the pendency of a reorganization.") (citing 11 U.S.C. § 362(b)(4); 11 U.S.C. § 1129(a)(6)).

[157] *Id.* at 36 ("Because there is nothing in the Bankruptcy Code that limits FERC's jurisdiction, Calpine cannot achieve in Bankruptcy Court what neither it, nor any other party in this case, nor any other federally regulated energy company in the country could do without seeking FERC approval: cease performance under the rates, terms, and conditions of filed rate wholesale energy contracts in the hopes of getting a better deal.").

[158] *Id.*

[159] No. 10 Civ. 6528 DLC, 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010).

[160] *Id.* at *1.

[161] *Id.* at *2.

the public interest determination" before the contract could be rejected.[162] In its decision, the district court acknowledged that under the filed rate doctrine, "[o]nce filed with FERC, wholesale power contracts become the 'equivalent of a federal regulation.'"[163] The district court reasoned, "[w]hether the bankruptcy court and FERC review the proposed rejection concurrently or serially is of no consequence. If either the bankruptcy court or FERC does not approve the Debtors' rejection of the [pipeline service agreement], the Debtors may not reject the contract."[164] *Calpine* and *Boston Generating*, thus, demonstrate that the filed rate doctrine can accommodate both FERC and bankruptcy jurisdiction.

2. Rejection Marks a "Radical Departure" from Traditional Contract Law

In addition to misreading the filed rate doctrine, the Fifth Circuit relied on an expansive "rejection as a breach" argument to support its conclusion that Mirant could reject undesirable contracts without FERC review.[165] This position is made untenable by bankruptcy's "radical departure" from traditional contract law. Rejection encompasses powers that are not coextensive with common law contracts.[166] Professor Michael T. Andrew, in his leading article on the subject, explains:

> Courts describe the "power" to reject as permitting such things as the release, repeal, reconsideration, discharge, revocation, repudiation, alteration, voiding, cancellation or avoidance of contract or lease obligations . . . . Courts frequently use the vehicle of rejection to terminate rights in or to property that are otherwise good in bankruptcy. All of this suggests a radical departure from normal contract law.[167]

Rejection flows from the fact that the debtor and the bankruptcy estate are distinct legal entities.[168] This difference plays a role in determining which

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[162] *Id.*
[163] *In re* Boston Generating, LLC, Nos. 10 Civ. 6528 DLC, 10 Civ. 7208 DLC, 2010 WL 4288171, at *4. (S.D.N.Y. Nov. 1, 2010).
[164] *In re* Boston Generating, LLC, No. 10 Civ. 6528 DLC, 2010 WL 4616243, at *3 (S.D.N.Y. Nov. 12, 2010).
[165] *In re* Mirant, 378 F.3d 511, 522 (5th Cir. 2004).
[166] *See* Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U. COLO. L. REV. 845, 847–48 (1988).
[167] Andrew, *supra* note 166, at 847–48.
[168] Hall v. United States, 566 U.S. 506, 512 (2012) (differentiating between the debtor and the estate when determining the dischargeability of certain taxes); Andrew, *supra* note 166, at 851–52.

party is liable for the breach. Unlike a traditional contract obligor, the bankruptcy estate is not bound under the contract unless the trustee elects to assume it.[169] Because the debtor and the estate are two separate entities, bankruptcy differentiates between the debtor's obligations and the estate's obligations.[170] As a general rule, claims that arise pre-petition are the debtor's obligations, while claims that arise post-petition belong to the estate.[171] Since the rejection of the contract in bankruptcy is based on the legal fiction that the contract is considered rejected at the time the debtor files bankruptcy, rejection creates a pre-petition obligation of the debtor, not a post-petition obligation of the estate.[172] In the event that the bankruptcy trustee does not assume the contract, the non-breaching party does not obtain a claim against the bankruptcy estate, but rather an unsecured claim against the debtor.[173] This distinction is not an academic curiosity. The differing obligations of the debtor and estate create different rights and remedies based on those different claims, which have real world consequences for creditors.[174]

Unlike in a traditional contract breach, equitable relief is only allowed when "such breach gives rise to a right to payment."[175] In other words, specific performance is not an available remedy in bankruptcy, despite being an option in a garden-variety breach of contract action.[176] To that end,

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[169] *See id.* at 877–78; *see also id.* at 866 ("'Rejection,' at least in the context of the basic assume-or-reject election, is nothing more than the label for the election not to assume a contract.").

[170] *See, e.g.*, 11 U.S.C. §§ 502, 503, and 507 (2018).

[171] *See* 11 U.S.C. § 503 (allowing administrative expenses against the estate after the filing of the bankruptcy petition).

[172] *See* 11 U.S.C. § 502(g).

[173] *See* 11 U.S.C. § 507; Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1658 (2019) (citing NLRB v. Bildisco and Bildisco, 465 U.S. 513, 531–32 (1984); *cf. In re* Res. Tech. Corp., 662 F.3d 472, 476 (7th Cir. 2011). The practical implication is that the non-breaching party will struggle to recover more than a few cents on every dollar when attempting to recover from a bankrupt debtor stripped of his or her assets which are now held separately in the bankruptcy estate. *See Mission Prod.,* 139 S. Ct. at 1658 (citation omitted).

[174] *See* 11 U.S.C. § 507(a) (describing the priority of claims and expenses against the bankruptcy estate); *Mission Prod.,* 139 S. Ct. at 1658 (citation omitted).

[175] 11 U.S.C. § 101(5)(B) (2018); *see, e.g., In re* Nickels Midway Pier, LLC, 255 Fed. Appx. 633, 637–38 (3d Cir. 2007) (quoting *In re* Ben Franklin Hotel Assocs., 186 F.3d 301, 305–06 (3d Cir. 1999)), *cert. denied*, 555 U.S. 812 (2008).

[176] As mentioned, the provisions of the bankruptcy code allow equitable claims that give rise to a right of repayment. The bankruptcy discharge and plan confirmation provisions provide, respectively, for an injunction precluding the filing of any action on a claim that has been discharged and acting as *res judicata* on any claim that could have been brought. *See, e.g., In re* Ben Franklin Hotel Assocs., 186 F.3d 301, 304 (3d Cir. 1999). Nevertheless, when an equitable claim does not give rise to a right of repayment as a viable alternative, then some

the *Calpine* court recognized, "[i]t is of no moment that rejection in the bankruptcy court constitutes a breach . . . . [A] 'breach' here does not create a typical dispute over the terms of a contract, but the unilateral termination of a regulatory obligation."[177]

During the 2018–2019 term, the Supreme Court shed new light on bankruptcy rejection. *Mission Product Holdings Inc. v. Tempnology* considered whether contract rejection during a Chapter 11 bankruptcy proceeding results in a breach of contract or has "the effect of a contract rescission in the non-bankruptcy world."[178] The Court held that rejection results in a breach of contract that provides the aggrieved, non-breaching party a pre-petition claim for damages.[179] Although *Mission Product Holdings* adopted the rejection-as-a-breach framework, the Court explained that "[t]he Code of course aims to make reorganizations possible. But it does not permit anything and everything that might advance that goal."[180] To that end, *Mission Product Holdings* provides that rejection "does not grant the debtor an exemption from all the burdens that generally applicable law . . . imposes on private owners."[181] Instead, "Whatever 'limitation[s] on the debtor's property [apply] outside of bankruptcy[] appl[y] inside of bankruptcy as well. A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either.'"[182]

Elsewhere, executory contracts similarly have been described "as an asset coupled with a liability—the asset being the performance due the debtor and the liability being the obligation owed by the debtor."[183] Professor Andrew has written, "The debtor's obligations are unaffected, and provide

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courts construe the claim to fall outside of bankruptcy entirely, and an action may be maintained under state law. *See* Crafts v. Pitts, 162 P.3d 382, 387–89 (Wash. 2007); *see also In re* Udell, 18 F.3d 403, 406–08 (7th Cir. 1994).

[177] *In re* Calpine Corp., 337 B.R. 27, 36 (S.D.N.Y. 2006).

[178] *Mission Prod.*, 139 S. Ct. at 1661.

[179] *Id.* at 1661–63.

[180] *Id.* at 1665. Likewise, the Court has "rejected the notion that 'Congress had a single purpose in enacting Chapter 11.'" Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 51 (2008) (quoting Toibb v. Radloff, 501 U.S. 157, 163 (1991)).

[181] *Id.* at 1665.

[182] *Mission Prod.*, 139 S. Ct. at 1663 (quoting D. BAIRD, ELEMENTS OF BANKRUPTCY, 97 (6th ed. 2014)). *See also* Board of Trade v. Johnson, 264 U.S. 1, 11 (1924) (holding that a validly transferred property interest prior to the bankruptcy enters the bankruptcy estate subject to that interest).

[183] Christopher W. Frost, *Running the Asylum: Governance Problems in Bankruptcy Reorganizations*, 34 ARIZ. L. REV. 89, 99 (1992) (citing DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 234 (2d ed. 1990)).

the basis for a claim."[184] Courts have construed the term "obligation" broadly—consistent with its common meaning—as "[t]hat which a person is bound to do or forebear; any duty imposed by law, promise, contract, relations of society, courtesy, kindness, etc."[185] These explanations suggest that limitations on a debtor, such as the counterparty's license or lease of the debtor's property, persist following a rejection.

In the FERC context, wholesale power purchase contracts are authorized and subject to ongoing regulatory oversight. FERC's continuing jurisdiction over these contracts amounts to a limitation on the parties' rights to freely assign or modify their agreement. The failure of courts, such as in *Mirant*, to distinguish between the parties' commercial transaction and the ongoing regulatory obligation created by FERC's approval of that transaction has at least two problems. First, the filed rate doctrine commands that the regulatory obligation arising from the filed rate is separate and superior to any private contractual duty.[186] To that end, any regulatory obligation owed to FERC is independent of the executory contract and, thus, is beyond the bankruptcy court's jurisdiction. Second, even if the regulatory obligation was not separate from the underlying commercial transaction, allowing debtors to reject their regulatory obligations during bankruptcy would impermissibly expand their rights by providing a benefit that would not be available outside of bankruptcy; namely, the option to jettison an otherwise valid and ongoing duty.[187] In this way, disposal of a regulatory obligation incident to executory contract rejection is both inconsistent with FERC's jurisdiction and the fact that "'[a] debtor's property . . . does not expand'" during bankruptcy.[188] Though, to be clear, the regulatory obligation's independent nature is sufficient to resolve this issue in light of FERC's exclusive jurisdiction, as discussed immediately below.[189]

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[184] Andrew, *supra* note 166, at 931; *see also In re* Lavigne, 114 F.3d 379, 386–87 (2nd Cir. 1997) ("While rejection is treated as a breach, it does not completely terminate the contract . . . . Thus, '[r]ejection merely frees the estate from the obligation to perform; it does not make the contract disappear.'") (quoting *In re* The Drexel Burnham Lambert Group, 138 B.R. 687, 703 (Bankr. S.D.N.Y. 1992)).

[185] *In re* Montgomery Ward Holding Corp., 268 F.3d 205, 209 (3d Cir. 2001) (quoting BLACK'S LAW DICTIONARY 968–69 (5th ed. 1979)).

[186] *See supra* notes 73 – 76.

[187] *In re* Calpine Corp., 337 B.R. 27, 36 (S.D.N.Y. 2006).

[188] *Mission Prod.*, 139 S. Ct. at 1663 (quoting D. BAIRD, ELEMENTS OF BANKRUPTCY, 97 (6th ed. 2014)).

[189] *Infra* Part V.

V. FERC'S EXCLUSIVE JURISDICTION

This section explains why jurisdictional disputes between FERC and bankruptcy courts should be resolved by affirming FERC's exclusive authority under the FPA over filed rates. It further explains why the Supreme Court's frequently cited *Bildisco* and *NextWave* holdings provide limited guidance.[190] This section finally argues that Congress should consider enacting a legislative solution to the extent that courts do not allow FERC to exercise exclusive jurisdiction over wholesale power purchase contracts in the bankruptcy context.

A. Exclusive Jurisdiction

1. The Federal Power Act Demands Exclusive Jurisdiction

FERC's own view of its jurisdiction relative to the bankruptcy courts has evolved. The Commission first took the position that it had exclusive jurisdiction over wholesale power purchase contracts.[191] After *Mirant*, FERC concluded that the Fifth Circuit's holding was the applicable standard for the *Calpine* case.[192] Following the decisions in *Calpine* and *Boston Generating*, FERC initially took the position that it had concurrent jurisdiction over PG&E's bankruptcy.[193] On appeal to the Ninth Circuit, FERC came full circle by asserting that it retains exclusive regulatory jurisdiction over filed contracts.[194]

The PG&E bankruptcy court expressed vehement opposition to FERC's concurrent jurisdiction approach.[195] The court concluded that it would be unfair and vitiate the bankrupt party's rights:

> Parties not in bankruptcy are subjected to an involuntary process by their opponents before a non-judicial, administrative body. Just a few days later they are told by that body that if they file bankruptcy, one of the basic and critically important tools . . . will be unavailable. And if they don't like it, they'll have to appeal via

[190] *FCC v. NextWave*, 537 U.S. 293 (2003); *NLRB v. Bildisco & Bildisco,* 465 U.S. 513 (1984).
[191] Br. of Appellee FERC at 8–11, *In re* Mirant, (No. 04-10001), 2004 WL 2682161.
[192] *In re Calpine Corp.*, 337 B.R. at 31.
[193] NextEra Energy, Inc. v. Pac. Gas and Elec. Co., 167 FERC ¶ 61,096 (2019) (Nos. EL19-35-001, EL19-36-001), 2019 WL 2026800, at *1.
[194] Br. for Appellant FERC at 38, *In re* PG&E Corp., Nos. 19-16833, 19-16834 (9th Cir. Nov. 20, 2019) ("The Federal Power Act gives the Commission exclusive authority to regulate the sale of [electric] energy at wholesale in interstate commerce[.]" (citing 16 U.S.C. §§ 824(a), 824d(a))).
[195] NextEra Energy, Inc., 2019 WL 2026800, at *4.

a procedure outside of the bankruptcy system with its exclusive subject-matter jurisdiction.

One day later they file bankruptcy, where myriad rights and duties (and obligations) come into play and a bankruptcy court, experienced in bankruptcy matters, is there to preside. Now that bankruptcy is a reality and not an intention, the agency repeats its prior ruling, that it has *concurrent* jurisdiction with the bankruptcy court, but that court will not be available to vindicate one of their fundamental and critical bankruptcy rights.[196]

Although the bankruptcy court appropriately recognized the "absurdity" of this process,[197] the court erred in its conclusion that the bankruptcy court retains exclusive jurisdiction. To the contrary, FERC should exercise exclusive jurisdiction over the parties' wholesale power purchase contracts because the filed rate creates an ongoing regulatory obligation for the debtor governed by the FPA.

Although the contract and regulatory obligation tend to operate coterminously, once a contract is approved by FERC, the parties' obligations emanate from the rate filed with FERC, not their underlying commercial transaction.[198] These filed rates carry the force and effect of law.[199] Upon approval, they become the "equivalent of a federal regulation,"[200] and the duty to perform under those contracts arises, "not from the law of private contracts," but FERC itself.[201] In addition to creating the parties' obligations, the doctrine creates "an independent regulatory duty [for

[196] *In re* PG&E Corp., 603 B.R. 471, 484–85 (Bankr. N.D. Cal. 2019).

[197] *Id.* at 484.

[198] *See* Pennsylvania Water & Power Co. v. Fed. Power Comm'n, 343 U.S. 414, 422 (1952); *In re* Calpine Corp., 337 B.R. 27, 37 (S.D.N.Y. 2006); *cf.* Montana v. Egelhoff, 518 U.S. 37, 78 n.4 (1996) (Souter, J., dissenting) ("If you think you can think about a thing that is hitched to other things without thinking about the things that it is hitched to, then you have a legal mind." (quotation mark omitted)).

[199] *See infra* note 233; *see also* Nw. Pub. Serv. Co. v. Montana-Dakota Utils. Co., 181 F.2d 19, 22 (8th Cir. 1950) (Filed rates are "treated as though it were a statute, binding upon the seller and the purchaser alike." (citations omitted)); *cf.* Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'" (footnote omitted)).

[200] California *ex rel.* Lockyer v. Dynegy, Inc., 375 F.3d 831, 839 (9th Cir. 2004) (quoting Cahnmann v. Sprint Corp., 133 F.3d 484, 488 (7th Cir. 1998)).

[201] *Pennsylvania Water & Power Co.*, 343 U.S. at 422; *see also* Blumenthal v. NRG Power Mktg., Inc., 104 F.E.R.C. ¶ 61,211, 61,743 (2003) ("[T]he commission exercised . . . its authority under the FPA, which is independent of authority arising from the contract."); *cf.* Noble Energy, Inc. v. Jewell, 110 F.Supp.3d 5 (D.D.C. 2015) (concluding that discharging a party's contractual obligations did not also free them from obligations arising from an overlapping regulation), *aff'd*, 650 Fed.Appx. 9 (2016).

FERC] to remedy a utility's violation of its filed rate schedule."[202] As a result, FERC has plenary jurisdiction over the filed rates, meaning the entire agreement, not just the per-unit cost of electricity.

Considering FERC's expansive authority, the concurrent jurisdiction argument, as the PG&E bankruptcy court identified, leads to inefficient results. Even if the debtor first obtains bankruptcy court approval to reject the wholesale contract, the debtor must still obtain FERC approval to modify the filed rate because the filed rate ultimately controls the debtor's regulatory obligations.[203] On the other hand, if the debtor first obtains FERC approval for the desired modification or cancellation, then the need to obtain bankruptcy court approval for a rejection of the contract is obviated.[204] Finally, if FERC enforces the existing rate, then the bankruptcy court still cannot approve a contract rejection because the controlling filed rate remains the law that the parties must follow.[205]

As a policy matter, FERC should retain exclusive jurisdiction over the wholesale energy market. In other contexts, neither state[206] nor privately-enforced laws[207] can interfere with FERC's ability to set and control wholesale energy rates. FERC's exclusivity allows regulated entities to order their affairs around it, which may reduce marketplace uncertainty.[208] Allowing a regulated entity to reject a wholesale power purchase contract in bankruptcy court could upset this delicate balance. Finally, FERC is better-

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[202] Duke Power Co. v. FERC, 864 F.2d 823, 829 (D.C. Cir. 1989) ("[T]he enforcement of filed rate schedules is a matter distinctly within the Commission's statutory mandate[.]")

[203] *See Pennsylvania Water & Power Co.*, 343 U.S. at 422; *In re Calpine Corp.*, 337 B.R. at 37.

[204] 16 U.S.C. § 824d(d) (2018) ("Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public."); 16 U.S.C. § 824e(a) (2018) (granting FERC authority to revise contracts "[w]henever the Commission . . . [finds] that any rate . . . or contract affecting such rate . . . is unjust, unreasonable, unduly discriminatory or preferential[.]").

[205] *See Pennsylvania Water & Power Co.*, 343 U.S. at 422; *In re* Calpine Corp., 337 B.R. 27, 37 (S.D.N.Y. 2006).

[206] *See, e.g.*, FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782 (2016) ("We will not read the FPA, against its clear terms, to halt a practice that so evidently enables the Commission to fulfill its statutory duties of holding down prices and enhancing reliability in the wholesale energy market.").

[207] *See generally* Sandeep Vaheesan, *Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity*, 43 U. MICH. J.L. REFORM, 921, 923 (2013) ("Several circuits have invoked the filed-rate doctrine . . . to immunize power generators from private suits under the Sherman Act.").

[208] NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n, 558 U.S. 165, 174 (2010) ("Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty.").

suited with its agency expertise to understand whether "extraordinary circumstances" exist that justify modification or cancellation of a filed tariff under FPA section 206.[209] For these reasons, the logical and efficient solution is to require the parties to seek a modification (i.e., termination) of the tariff through a petition to FERC.[210]

2. Bankruptcy Code Section 1129(a)(6) Accommodates FERC

As a textual matter, the Bankruptcy Code expressly contemplates the interplay between bankruptcy courts and administrative agencies. Section 1129(a)(6) accounts for governmental regulatory commissions like FERC with rate oversight: "Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval."[211] Unfortunately, Congress appears to have provided little insight into the meaning of "rate" in section 1129(a)(6). The relevant legislative history simply, and somewhat self-evidently, explains that the section "permits confirmation only if any regulatory commission that will have jurisdiction over the debtor after confirmation of the plan has approved any rate change provided for in the plan. As an alternative, the rate change may be conditioned on such approval."[212]

Statutory interpretation principles are more instructive. As a general matter, statutes should be read harmoniously such that competing texts are made compatible.[213] Moreover, "where Congress borrows terms of art . . . which are accumulated [in] the legal tradition . . . it presumably knows and

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[209] 16 U.S.C. § 824e(a) (2018) (directing the Commission to "determine the just and reasonable rate . . . and shall fix the same by order.").

[210] *See* 16 U.S.C. § 824d(d) (2018) ("Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public."); 16 U.S.C. § 824e(a) (2018) (granting FERC authority to revise contracts "[w]henever the Commission . . . [finds] that any rate . . . or contract affecting such rate . . . is unjust, unreasonable, unduly discriminatory or preferential[.]").

[211] 11 U.S.C. § 1129(a)(6) (2018). In addition, bankruptcy courts cannot use the automatic stay to enjoin agency enforcement proceedings. 11 U.S.C. § 362(b)(4) (2018); Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32, 39–40 (1991).

[212] H.R. REP. NO. 95-595, at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6368; S. REP. NO. 95-989, at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912 (using identical language as the House Report).

[213] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 58 (1868) ("[O]ne part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together.").

adopts the cluster of ideas that were attached to each borrowed word."[214] Finally, "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute' is presumed to incorporate that interpretation."[215] Although not dispositive, these canons suggest that to the extent the filed rate doctrine was part of the legal landscape at the time section 1129(a)(6) was enacted and it promotes harmony between the Federal Power Act and the Bankruptcy Code, it is reasonable to interpret section 1129(a)(6)'s "rate" term as co-extensive with the filed rate doctrine.

Several factors suggest Congress anticipated, or reasonably should have anticipated, that FERC's broad authority arising from the FPA and filed rate doctrine would be imputed into section 1129(a)(6). First, the filed rate doctrine is widely applied by administrative agencies in the context of pervasively regulated industries such as electric and gas utilities, railroads, and telecommunications.[216] This history should support a finding that the doctrine is part of "the accumulated legal tradition."[217] Likewise, the doctrine's long history supports an inference that Congress borrowed, or expected courts to borrow, its definition of "rate" in the regulatory context. Second, Congress was likely aware of the interplay between the doctrine and the rejection of executory contracts during bankruptcy. The Bankruptcy Code has allowed the rejection of executory contracts that are "onerous" or "burdensome" to the estate of the debtor since the 1890s.[218] Third, by its very terms, section 1129(a)(6) assumes that a "regulatory commission" with rate regulatory authority will be involved in the reorganization process by exercising its normal authority. Since section 1129(a)(6) expressly grants authority to regulatory agencies, it suggests that Congress was aware that regulatory agencies would be involved in the reorganization process. It also

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[214] *See, e.g.*, Morissette v. U.S., 342 U.S. 246, 263 (1952); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 53 (2012).

[215] Armstrong v. Exceptional Child Center, Inc., 135 S. Ct. 1378, 1386 (2015) (quoting Bragdon v. Abbott, 524 U.S. 624, 645 (1998)).

[216] *See supra* note 149.

[217] *Supra* Section III.A.; *see also* Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156, 163 (1922) ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff . . . . The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.").

[218] *In re* Midwest Polychem, Ltd., 61 B.R. 559, 562 (Bankr. N.D. Ill. 1986). Though, it is possible Congress did not anticipate that utility bankruptcies would become more common. Indraneel Sur, *Jealous Guardians In The Psychedelic Kingdom: Federal Regulation of Electricity Contracts In Bankruptcy*, 152 PENN. L. REV. 1697, 1718 (2004) ("Given that utility bankruptcies in significant numbers are only a product of the last decade, it may be that when enacting the FPA, Congress did not anticipate the peculiar executory contract rejection that would apply.").

suggests Congress intended regulatory agencies to apply their respective bodies of law and did not want bankruptcy courts unilaterally supplanting agency authority.

Finally, other statutory interpretation principles may further support distinguishing between regulatory obligations arising from FERC jurisdictional contracts and the remainder of the bankruptcy estate. "Indeed, '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.'"[219] In addition to allowing both the FPA and the Bankruptcy Code to coexist, this division of labor—leaving wholesale power purchase contracts to FERC and everything else to the bankruptcy court—may be more consistent with Congress' intentions when it established a specialized commission for interstate energy contracts and specialized courts to address bankruptcy cases.

B. NextWave *and* Bildisco

An additional consideration is the effect of several Supreme Court bankruptcy cases cited by courts in decisions resolving conflicts between FERC and the bankruptcy courts. For reasons discussed in detail below—relating primarily to differences in the jurisdictional grants of authority given to each agency—these cases provide only limited guidance in the wholesale energy market context.

In *NLRB v. Bildisco & Bildisco*, a building supply company, Bildisco, filed for Chapter 11 bankruptcy.[220] As part of its reorganization, Bildisco rejected the collective-bargaining agreement with its employees. The union representing the employees protested with the National Labor Relations Board (NLRB).[221] The NLRB concluded that Bildisco had violated the National Labor Relations Act (NLRA) by unilaterally changing the collective-bargaining agreement terms and by refusing to negotiate with the union. The Court held, pursuant to Bankruptcy Code section 365(a), that Bildisco could reject the union contract.[222] It reasoned, "Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to."[223] Thus, in the absence of any such exception, the company could reject, like any other contract, the bargaining agreement.

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[219] J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 143–44 (2001) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).
[220] 465 U.S. 513, 517 (1984).
[221] *Id.* at 518.
[222] *Id.* at 518–19.
[223] *Id.* at 522–23.

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Later in *FCC v. NextWave*, the Federal Communications Commission (FCC) auctioned off certain broadband communications licenses to NextWave Personal Communications (NextWave).[224] "NextWave made a downpayment on the purchase price, signed promissory notes for the balance, and executed security agreements that the FCC perfected by filing under the Uniform Commercial Code."[225] NextWave was unable to obtain financing and missed its first payment deadline. The FCC, in turn, canceled the contract and made NextWave's licenses available for auction. The Supreme Court was asked to consider whether the FCC could simply cancel contracts with auction winners that went bankrupt instead of exercising its rights under the contract.[226] The Court explained, the FCC's desire to "(1) sell[] licenses on credit and (2) cancel[] licenses rather than assert[] security interests in licenses when there is a default" amounts "to nothing more than a policy preference."[227] Although the FCC had a "regulatory motive," it ultimately was acting as an unsecured creditor—not a third-party regulator. The Court concluded that the FCC was bound by the terms of its contract and could not attempt to avoid the bankruptcy court's jurisdiction over NextWave's bankruptcy estate.[228]

Although *Bildisco* and *NextWave* both addressed disputes between bankruptcy courts and federal agencies, there is a crucial difference between the agencies implicated in those cases and FERC. The NLRB and FCC do not approve contracts carrying the force of law. The NLRA provides the NLRB authority to regulate labor contract disputes affecting interstate commerce.[229] The NLRB neither approves the contracts themselves nor exercises exclusive jurisdiction over all employers, employees, or labor disputes.[230] To that end, the *Calpine* court reasoned, the NLRB "does not possess exclusive jurisdiction over the terms of collective bargaining agreements, thus, in *Bildisco*, there was no jurisdictional conflict."[231] The

[224] 537 U.S. 293 (2003).
[225] *Id.* at 296–97.
[226] *Id.* at 301 ("The FCC has not denied that the proximate cause for its cancellation of the licenses was NextWave's failure to make the payments that were due. It contends, however, that § 525 does not apply because the FCC had a 'valid regulatory motive' for the cancellation.").
[227] *Id.* at 304.
[228] *Id.* at 307
[229] *See generally* National Labor Relations Act, 29 U.S.C. § 151 (2017) (declaring a policy of encouraging and protecting the free flow of commerce).
[230] 29 U.S.C. § 157 (2017) (defining employee rights protected under the NLRA); 29 U.S.C. § 158 (2017) (establishing violations of the NLRA); 29 U.S.C. § 152(7) (2017) (providing the NLRA's definition of "affecting commerce"); 29 U.S.C. § 159(c) (2017) (providing NLRB authority to investigate and resolve questions about union representation).
[231] *In re* Calpine Corp., 337 B.R. 27, 34 (S.D.N.Y. 2006).

Supreme Court has further explained, "The [NLRB's authority] to deal with an unfair labor practice . . . is not exclusive and does not destroy the jurisdiction of the courts."[232] Likewise, *Textile Workers Union of America v. Lincoln Mills of Alabama* concluded that the NLRA merely created a new area of substantive federal law for the courts to interpret.[233] In this way, neither the NLRB nor the NLRA purports to exercise exclusive control over labor agreements. Likewise, the FCC does not approve spectrum contracts; it is a party to them by entering into agreements with spectrum auction winners. To that end, the FCC's failure to exercise its contractual rights was the basis of the Court's *NextWave* decision. Though the Court discussed bankruptcy jurisdiction exceptions, *NextWave* ultimately stands for the proposition that a government agency has no more rights as a creditor than a private party.[234]

Unlike the NLRB and the FCC, FERC aims to exercise plenary and exclusive authority over wholesale power purchase contracts. Courts, including the Supreme Court, have held, "[o]nce filed with a federal agency, such tariffs are the 'equivalent of a federal regulation.'"[235] In 2016, *Hughes v. Talen Marketing* affirmed FERC's "plenary authority over interstate wholesale rates."[236] *Hughes* involved a state's decision to construct a new

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[232] Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1962).

[233] 353 U.S. 448, 456 (1957) ("We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws."); *accord* Cynthia A. Bailey, *A Federal Subject Matter Jurisdiction Under § 301(a) of the Labor Management Relations Act: Wooddell v. International Brotherhood of Electrical Workers*, 34 B.C. L. REV. 343, 343–44 (1993) ("In the years following its enactment, the United States Supreme Court decided that § 301(a) created a new area of federal substantive law.").

[234] *NextWave*, 537 U.S. at 307 ("It is neither clear that a private party can take and enforce a security interest in an FCC license, nor that the FCC cannot . . . . As we described in our statement of facts, the FCC purported to take such a security interest in the present cases. What is at issue, however, is not the enforcement of that interest in the bankruptcy process, but rather elimination of the licenses through the regulatory step of 'revoking' them . . . .") (internal citations omitted).

[235] Cal. *ex rel.* Lockyer v. Dynegy, Inc., 375 F.3d 831, 839 (9th Cir. 2004) (citing Cahnmann v. Sprint Corp., 133 F.3d 484, 488 (7th Cir. 1998); *see* Evanns v. AT&T Corp., 229 F.3d 837, 840 & n.9 (9th Cir. 2000)); *see also* Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 520–21 (1939) (holding "tariffs bind both carriers and shippers with the force of law. Under § 6 of the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property.").

[236] 136 S. Ct. 1288, 1298 (2016). In *Hughes,* electricity regulators in Maryland were concerned about sufficient electric generation capacity, and further that the market price generated at the RTO capacity auctions would not spur the necessary development. *Id.* at 1294. In response, Maryland directly solicited bids for a new gas-fired power plant that would not be part of the RTO market. *Id.* Maryland then promulgated a state regulation that would

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power plant, which is notable because such decisions traditionally belong to states and are beyond FERC's purview. Yet, the Supreme Court concluded FERC had jurisdiction because the law would have resulted in indirect subsidization by interstate market participants.[237] In these ways, courts have read FPA section 824(b)(1), which grants FERC exclusive jurisdiction over "the sale of electric energy at wholesale in interstate commerce," more broadly than the NLRA or the Communications Act of 1934. Thus, in contrast to NLRB and FCC cases, *Calpine* concluded:

> There are no provisions in the FPA that specifically limit FERC jurisdiction in the bankruptcy context. Quite the contrary, FERC, in its charge to maintain reasonable rates and uphold the public interest, must also consider the financial ability of a utility to continue service under a filed rate, a responsibility that would include similar considerations to those in the bankruptcy court.[238]

In light of the differences between the FPA and other federal regulatory statutes, the reliance of the *Mirant* court—and more recently, the PG&E bankruptcy court—on the *NextWave* and *Bildisco* decisions is misplaced.

C. A Congressional Fix

Finally, if courts fail to find that FERC may exercise exclusive jurisdiction over wholesale power purchase contracts in the bankruptcy context, Congress should consider enacting a legislative solution to ensure FERC's authority over the regulatory obligation created by the filed rate. In 2005, Congress enacted reforms to clarify FERC's role in regulating energy derivatives following a dispute between FERC and the Commodity Futures Trading Commission (CFTC).[239] In that instance, Congress "expanded FERC's jurisdiction to include jurisdiction over manipulation in connection with the purchase or sale of electric energy or transmission services and the

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require other producers participating in the RTO market to buy electricity from the new power plant and pay the new power plant the difference between the capacity auction price and the new plant's set contract price. *Id.* at 1294–95.

[237] *Id.* at 1294.

[238] *In re* Calpine Corp., 337 B.R. 27, 34 (S.D.N.Y. 2006); *see* Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956).

[239] Energy Policy Act of 2005, 16 U.S.C. § 824v(a) (2018) ("It shall be unlawful for any entity . . . to use or employ, in connection with the purchase or sale of electric energy . . . subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.").

https://open.mitchellhamline.edu/mhlr/vol46/iss1/1

purchase or sale of natural gas or transportation services."[240] The CFTC, in turn, retained jurisdiction over energy derivatives.[241] Likewise, following *Bildisco*, Congress enacted legislation "to clarify the relationship between the debtor in possession and its unionized employees."[242]

Although the Federal Power Act and existing case law should provide a sufficient basis for exclusive FERC jurisdiction, Congress could act to revise or expand sections 1113 through 1116 of the Bankruptcy Code to account for wholesale power purchase contracts in addition to existing accommodations for collective bargaining agreements, retiree insurance benefits, estate property, and small businesses. Alternatively, or in conjunction with Bankruptcy Code reforms, Congress could revise FPA section 201 to affirm FERC's primacy over these agreements.

VI. CONCLUSION

Avoiding a "Kafkaesque" process to resolve jurisdictional disputes between FERC and the bankruptcy courts is an important goal.[243] The most appropriate solution is to grant FERC exclusive authority over wholesale power purchase contracts. This approach is supported by statute and case law. The Federal Power Act, and the cases interpreting it, extend FERC's jurisdiction beyond the "*Attleboro* gap" and grant the agency more authority over regulated entities than the NLRB and FCC in their respective realms. Allowing a debtor to reject its FERC jurisdictional contract gives that party the option to unilaterally do what it could not achieve in any other context: alter the terms of a filed rate without FERC approval.[244]

Moreover, the filed rate doctrine's application in combination with a bankruptcy proceeding contract rejection ultimately would be futile. Even if the bankruptcy court allowed the rejection, the parties would still be subject

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[240] Gary E. Kalbaugh, *FERC v. Barclays Bank PLC Shines a Light on CFTC and FERC Jurisdiction*, FUTURES AND DERIVATIVES LAW REPORT (Feb. 24, 2017), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2923262_code468680.pdf?abstractid=2923262&mirid=1 [https://perma.cc/Q638-YGNW].

[241] *Id.*

[242] Robert J. Flemma Jr., *Bankruptcy: Rejection of Collective Bargaining Agreements Before and After the 1984 Amendments. NLRB v. Bildisco and Bildisco, 104 S. Ct. 1188 (1984)*, 68 MARQ. L. REV. 351, 353 (1985).

[243] Mem. Decision on Action for Declaratory & Injunctive Relief at 19, *In re* PG&E Corp., 603 B.R. 471 (Bankr. N.D. Cal. 2019) (No. 19-03003), 2019 WL 2492147, at *14 ("Imagine the absurdity of the exclusive appeal route espoused by FERC and the PPA Counterparties. Kafka might have designed it.").

[244] *Arkansas Louisiana Gas Co.*, 453 U.S. at 582; United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 347 (1956); Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 352 (1956); *cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 768.

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to their FERC regulatory obligations because the filed rate is not a run-of-the-mill contract; rather, it is equivalent to a federal regulation.[245] Finally, perhaps to the PG&E bankruptcy court's chagrin, bankruptcy courts are not vested with the power to review the propriety of a FERC action.[246]

Exclusive jurisdiction also supports the Federal Power Act's underlying policy goals: more consistent decision-making, the application of specialized expertise, and greater regulatory certainty. Importantly, all is not lost for a financially distressed utility or independent power producer. Although a party may not escape an "improvident bargain," FERC still may set aside a wholesale power purchase contract when "'unequivocal public necessity' or 'extraordinary circumstances'" require it.[247]

Lastly, in addition to other climate change mitigation strategies,[248] FERC oversight results in more efficient industry management as markets experiment and adopt alternative energy technologies. Firms may be more willing to invest in emerging technologies—such as wind, solar, and battery storage—when they have the certainty provided by a filed rate. Put simply, we think affirming FERC's exclusive authority is the "answer" that helps facilitate continued emerging energy technology development and keeps market participants from "blowin' in the wind" of jurisdictional uncertainty.[249]

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[245] *See supra* notes 199–202.

[246] *See* 16 U.S.C. § 825L(b) (2018) (vesting review of FERC proceedings "in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia").

[247] Morgan Stanley Capital Group Inc. v. Pub. Utility Dist. No. 1 of Snohomish County, Wash., 554 U.S. 527, 550–51 (2008) (quoting *In re* Permian Basin, 390 U.S. 747, 822 (1968); *Arkansas Louisiana Gas Co.*, 453 U.S. at 582).

[248] *See generally* Mehmet K. Konar-Steenberg, *Root and Branch: The Thirteenth Amendment and Environmental Justice*, 19 NEV. L.J. 509 (2019) (discussing the negative environmental externalities including the "inequity in the distribution of environmental harms.").

[249] BOB DYLAN, *Blowin' in the Wind*, *on* THE FREEWHEELIN' BOB DYLAN (Columbia Records 1963).

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