# IS THE END OF FERC VS. THE BANKRUPTCY COURTS UPON US?

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TABLE OF CONTENTS

## INTRODUCTION

For nearly two decades, the debate over competing jurisdiction between United States bankruptcy courts and the Federal Energy Regulatory Commission ("FERC") over the rejection of wholesale electricity and natural gas contracts continued unabated. The most salient judicial and agency decisions were mixed, with some favoring the bankruptcy courts,[1] some ruling that jurisdiction should be concurrent between the bankruptcy courts and FERC,[2] and one court deciding squarely in favor of FERC.[3] The analyses in many of these cases, including two of recent vintage, appear to allow for a resolution without necessarily having to tip the disparity in circuits in one direction or the other.[4] And yet, rather than potentially reconciling the conflicting arguments into a harmonized outcome at the earliest possible opportunity, the judicial decisions for too long chose a side and allowed the battle to continue. What made for intellectually stimulating discourse about the tension between these government arms also created uncertainty for stakeholders—namely, market participants and the practitioners who advised them.

This author thinks there is an opportunity to close the debate. Recent cases have sharpened the analysis and provided a framework for review that may not require congressional action or a Supreme Court decision to settle the matter. The author nevertheless invites such action if it will enshrine into law an unambiguous standard of review that clears the path for future decision-making without the risk of, and actual, litigation. This Article submits that embedded in prior decisions were signals to future courts that a one-size-fits-all outcome—where either the bankruptcy courts *or* FERC had authority—is not the correct endgame. Rather, the orderly and efficient reorganization of distressed companies—overseen by expert judges in a single forum—coupled with a consideration of important public policy matters, should dictate that one body has primary jurisdiction over these disputes, with the other being called on to approve decisions that impact the public interest.

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[1] *See* Off. Comm. of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Corp. (*In re* Mirant Corp.), 378 F.3d 511, 525–26 (5th Cir. 2004); *In re* PG&E Corp., 603 B.R. 471, 476 (Bankr. N.D. Cal. 2019); *In re* Ultra Petroleum Corp., 621 B.R. 188, 205 (Bankr. S.D. Tex. 2020).

[2] *See In re* Bos. Generating, LLC, No. 10 Civ. 6528, 2010 WL 4616243, at *3 (S.D.N.Y. Nov. 12, 2010); Federal Energy Regulatory Commission v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 437 (6th Cir. 2019); *In re* ETC Tiger Pipeline, LLC, 171 FERC 61.248 (2020).

[3] *See In re* Calpine Corp., 337 B.R. 27, 39 (S.D.N.Y. 2006).

[4] *See In re* FirstEnergy Sols. Corp., 945 F.3d at 440; *In re* PG&E Corp., 603 B.R. at 476.

## I. RESPECTIVE PURVIEWS AND POLICY GOALS OF U.S. BANKRUPTCY COURTS AND FERC

Well settled is the principle that U.S. bankruptcy courts exercise plenary jurisdiction over the bankruptcy process.[5] They oversee and approve nearly every decision made with respect to debtors and their properties from the moment a chapter 11 petition is filed until the debtors' assets are sold or a plan of reorganization becomes effective. This singular jurisdiction brings to bear the proper subject matter expertise—in the bankruptcy judge—and the efficiency of having troubled companies' reorganizations overseen by a single arbiter. The policy goals of bankruptcy are to ensure that "distressed corporations remain going concerns."[6] Bankruptcy courts therefore consider and, within reason, defer to the business judgment of the debtor and also strive to allow a debtor the ability to reorganize via a plan that will succeed and not require a future reorganization.[7]

Also well settled is FERC's power to regulate wholesale sales of electricity and natural gas under the Federal Power Act and the Natural Gas Act, respectively.[8] Congress intended as such when it granted this authority, with a view to creating an efficiently functioning market for two critical building blocks of modern society—electricity and natural gas.[9] FERC regulates these industries pursuant to a dual statutory mandate: "(1) that the rates and practices subject to its jurisdiction be 'just and reasonable and not unduly discriminatory or preferential' and (2) that its decisions be consistent with the 'public interest.'"[10] To ensure compliance with these standards, "every public utility must file its rates and charges with FERC,

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[5] 28 U.S.C. § 1334(a) (2018). *See* Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (1984)) ("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.").

[6] Humphrey R. Kweminyi, *Resolving Jurisdictional Tussle Over Power Purchase Agreements in Electricity Utility Bankruptcy: Lessons from PG&E's Recent Chapter 11 Reorganization*, 49 CAP. U. L. REV. 277, 313 (2021).

[7] Bradley G. Oster, *Reigning in Regulatory Overreach: FERC's Role in Bankruptcy*, 82 LA. L. REV. 625, 659 (2022).

[8] 16 U.S.C. § 824(a) (2018) (providing that federal regulation of wholesale sale of electricity "is necessary in the public interest"); *see also In re* Calpine Corp., 337 B.R. at 32 (citing the Federal Power Act 16 U.S.C. § 824(a)); *see also* Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 153 (2016) (same). 15 U.S.C. § 717(a) (2018) (similarly providing that federal regulation of wholesale sales of natural gas "is necessary in the public interest"); *see also In re* Ultra Petroleum Corp., 621 B.R. at 195 (citing United States Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 339 (1956)) ("[T]he Natural Gas Act 'permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with [FERC] and made public.'") (alteration in original).

[9] *See* Hugh M. McDonald and Neil H. Butterklee, *FERC vs. Bankruptcy Courts—The Battle over Jurisdiction Continues*, 17 PRATT'S J. BANKR. L., 62, 64 (2021) (citing various provisions of the Natural Gas Act and Federal Power Act).

[10] Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L.J. 1, 4–5 (2019).

creating what is known as a filed rate."[11] Thus, FERC has exclusive authority to ensure, for example, "that all of the terms of a wholesale power contract are and remain 'just and reasonable.'"[12] FERC's policy goals—implemented through these powers—are to ensure a competitive wholesale electricity market, require reasonable contract rates, and promote contract stability.[13] Outside the bankruptcy process there is scant evidence of any challenge to FERC's authority over filed rates and contracts in which they are embedded—indeed, participants in the energy sector not only acknowledge this comprehensive authority but also benefit from it as a limitation on individual states' ability to interfere in their business.[14]

Enter the potential conflict between these government branches the moment a wholesale seller of electricity or natural gas seeks relief under the Bankruptcy Code. Electric power generators and natural gas producers very often sell their output under wholesale contracts, i.e., to entities that in turn sell the commodities to end users.[15] These contracts are subject to the approval of, and oversight by, FERC pursuant to the authority vested in it by the Federal Power Act and the Natural Gas Act.[16] Once approved by the regulator, these contracts assume the mantle of federal regulation rather than mere bilateral agreements between private parties.[17] When these companies experience financial distress, they will often claim that a source of such distress was a sale contract that was once profitable but is now a burden to their bottom lines.[18] As part of the process of restructuring their liabilities, the Bankruptcy Code offers these companies the ability to assume (continue performing) or reject (terminate) their executory (not fully performed) contracts, including their commodity sales agreements.[19] The Bankruptcy Code allows debtors to choose which of those contracts they will continue performing and which they will effectively cancel, leaving the counterparty with nothing but a claim in the bankruptcy process—and most often an unsecured claim.[20]

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[11] Oster, *supra* note 7, at 629.

[12] McDonald & Butterklee, *supra* note 9, at 65.

[13] *See* Kweminyi, *supra* note 6, at 300; *see also* Oster, *supra* note 7, at 667.

[14] *See* McDonald & Butterklee *supra* note 9, at 64 (acknowledging that "FERC is vested with exclusive authority to regulate rates for the interstate transportation and sale of natural gas, and it is authorized by Congress to establish rules and regulations governing such rates").

[15] *See, e.g.*, Federal Energy Regulatory Commission v. FirstEnergy Sols. Corp (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 437 n.1 (6th Cir. 2019).

[16] *See* 16 U.S.C. §§ 824(a)–(b), 824d(a), (c) (2018); 15 U.S.C. § 717(a)–(b) (2018).

[17] *See, e.g.*, ETC Tiger Pipeline, 171 FERC 61.248, ¶ 22 (2020) (footnote omitted); McDonald & Butterklee, *supra* note 9, at 66 ("Once a FERC jurisdictional contract is executed, the counterparties have a duty to comply with the FERC-governed tariff—the rates, terms, and conditions of that contract—independently of any duties under the contract itself."); Mark Haskell, Frederick Lowther & Lamiya Rahman, *PG&E Oversight Battle Looms for FERC, Bankruptcy Court*, LAW 360, May 10, 2019, available at https://law360.com/articles/1158144/print?section=bankruptcy.

[18] *See, e.g., In re* FirstEnergy Sols. Corp., 945 F.3d at 437–38 (debtor losing an estimated $46 million annually on its power purchase agreements).

[19] 11 U.S.C. § 365(a) (2018).

[20] *Id.* § 365(a), (g).

In the vast majority of circumstances, the bankruptcy courts alone have the right to affirm a debtor's decision to assume or reject an executory contract.[21] This is consistent with the broad authority over a debtor's affairs granted under the Bankruptcy Code. However, what if that contract is for the sale of electric power or natural gas at a federally regulated rate? This is when FERC claims to have dominion—at least parallel with the courts, if not sole—over the rejection of that contract. A brief review of the most significant cases addressing this topic follows.[22]

## II. PRECEDENT OFFERED LITTLE CLARITY

The seminal case addressing this tension is *In re Mirant Corp*., in which the Fifth Circuit ruled that bankruptcy courts have exclusive control over a debtor's election to reject contracts approved by FERC.[23] The court held that, in determining whether to allow rejection, the bankruptcy court must decide whether rejection harms the public interest.[24] If rejection does not harm the public interest—for example, by "caus[ing] any disruption in the supply of electricity to other public utilities or to consumers"—the bankruptcy court may approve rejection of the contract.[25] The Fifth Circuit remanded the case to the district court and instructed it to "carefully scrutinize the impact of rejection upon the public interest and . . . ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or consumers."[26] This public interest standard was analyzed and invoked by subsequent courts in decisions that followed *Mirant*.[27]

In *In re Calpine Corp.*, the Southern District of New York two years later took a different view, holding that FERC had exclusive jurisdiction as it and it alone is charged with oversight of wholesale electricity rates embedded in FERC-approved sale contracts.[28] Hence, any changes to contracts that set such rates, including a rejection of that contract in bankruptcy, could only be effectuated with FERC's approval.[29] The court considered the breach resulting from this contract rejection not to "create a typical dispute over the terms of a contract, but the unilateral termination of a regulatory obligation[,]" thus requiring FERC's approval.[30]

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[21] *See* 28 U.S.C. § 1334(e)(1) (2018).

[22] *See infra* notes 23–44 and accompanying text.

[23] Off. Comm. of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Corp., 378 F.3d 511, 522 (5th Cir 2004) ("The FPA does not preempt a district court's jurisdiction to authorize the rejection of an executory contract subject to FERC regulation as part of a bankruptcy proceeding.").

[24] *Id.* at 525.

[25] *Id.*

[26] *Id.*

[27] *See infra* text accompanying notes 32–44.

[28] 337 B.R. 27, 36 (S.D.N.Y. 2006) (the court holding it "lack[ed] jurisdiction to authorize the rejection . . . because doing so would directly interfere with FERC's jurisdiction over the rates, terms, conditions, and duration of wholesale energy contracts").

[29] *Id.*

[30] *Id.*

Furthermore, "[b]y holding that FERC has exclusive jurisdiction to modify or terminate the Power Agreements in this case, an issue of great public interest will be heard in a branch . . . that specializes in considering the public interest."[31]

Next came *In re Boston Generating, LLC*, where the Southern District of New York held that FERC and the bankruptcy court had *concurrent* jurisdiction over the rejection of wholesale power contracts.[32] This creates a conundrum whereby one body might conclude that the efficient administration of a bankruptcy case counsels in favor of rejection, and the other body concludes that rejection will harm the public interest. If both FERC and bankruptcy courts must approve rejection yet cannot agree, how is the matter to be resolved?

In *PG&E Corp. v. Federal Energy Regulatory Commission*, the United States Bankruptcy Court for the Northern District of California held that the bankruptcy court has exclusive jurisdiction over potential rejection.[33] The court in *PG&E* carefully remained faithful to the original jurisdiction of bankruptcy courts on matters of rejection of executory contracts,[34] while taking into consideration the effects of rejection on the public interest.[35] It ultimately concluded that the bankruptcy court was capable of factoring public policy in its decision without "a second inquiry by a separate non-judicial body . . . ."[36] Yet, with this fourth significant decision addressing the subject matter—with prior rulings and analysis on which to build—the court's ruling did nothing to harmonize the precedents. It merely rendered its own conclusion with respect to the instant case and perpetuated conflicting outcomes.

The next opportunity arose in *Federal Energy Regulatory Commission v. FirstEnergy Solutions*, where, similar to the Southern District of New York's ruling in *Boston Generating*, the Sixth Circuit concluded that the bankruptcy courts and FERC had concurrent jurisdiction.[37] The court cited *Mirant* to support its holding that courts must take into account the public interest when considering rejection.[38] Rather than conclude a bankruptcy court could do this, or that such determination is squarely in FERC's bailiwick, the court merely said FERC must be invited to participate in the bankruptcy proceeding.[39] Again, how is this to be administered if

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[31] *Id.* at 38.

[32] No. 10 Civ. 6528, 2010 WL 4616243, at *3 (S.D.N.Y. Nov. 12, 2010).

[33] *In re* PG&E Corp., 603 B.R. 471, 488 (Bankr. N.D. Cal. 2019) ("Congress gave exclusive jurisdiction over bankruptcy cases to this court. . . . There is no reason why this bankruptcy court should not apply exclusive jurisdiction in the same way.").

[34] *See id.* at 486 ("The rejection of an executory contract is solely within the power of the bankruptcy court, a core matter exclusively this court's responsibility.") (citing 28 U.S.C. § 157(b)(2) (2018)).

[35] *See id.* at 489 (quoting Off. Comm. of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Corp. (*In re* Mirant Corp.), 378 F.3d 511, 525 (5th Cir. 2004)).

[36] *Id.* at 490.

[37] *In re* FirstEnergy Sols. Corp., 945 F.3d 431, 454 (6th Cir. 2019).

[38] *Id.* at 453 ("[T]he court[ ] should carefully scrutinize the impact of rejection upon the public interest and should . . . ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers.") (alteration in original) (citation omitted).

[39] *See id.* at 454–55.

each body claims legitimate interests in rejection or non-rejection? To whom should a debtor and its contract counterparties make their strongest case, the courts or FERC? Interesting here is Judge Griffin's dissent, in which he contends compellingly that FERC should have exclusive jurisdiction.[40]

In *ETC Tiger Pipeline, LLC*, FERC unsurprisingly held that it has concurrent power with the federal bankruptcy courts.[41] *ETC Tiger* involved the prospective rejection in bankruptcy of a contract for the sale of natural gas by the party providing gas transportation services.[42] Citing precedent that addressed similar issues in the wholesale electric power sector, FERC held that parties must seek both bankruptcy court and FERC approval to reject wholesale power and/or gas contracts.[43] It further noted that "a reorganization plan that purports to authorize the modification or abrogation of a FERC-jurisdictional filed rate cannot be confirmed unless the Commission agrees to any rate change provided in the reorganization plan or confirmation is made contingent on the Commission's approval. Such an agreement from the Commission can only occur via a Commission order."[44]

The uncertainty continued. Market participants and their counsel lacked clarity.

## III. A REBUTTAL OF FERC'S ASSERTION THAT REJECTION EQUATES TO AMENDMENT

Courts addressing the instant controversy acknowledge FERC's power to regulate contracts for the wholesale sale of electricity under the Federal Power Act,[45] which would include any amendments to those contracts.[46] FERC in certain

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[40] *See id.* at 460 ("Bankruptcy courts are less powerful than district courts, not more so, and they certainly do not have any special authority to invade a federal agency's exclusive jurisdiction—or enjoin a federal agency from carrying out its statutory mandate . . . .").

[41] 171 FERC § 61.248, ¶ 29 (2020) ("[A] party to a Commission-jurisdictional contract must obtain approval from the bankruptcy court to reject the contract in bankruptcy and must also obtain approval from the Commission to modify or abrogate the filed rate.").

[42] *Id.* at ¶ 2–3.

[43] *See id.* at ¶ 29 n.61 (citing NextEra Energy, Inc. v. Pac. Gas & Elec. Co., 166 FERC 61.049, ¶ 28 (2019) and Exelon Corp. v. Pac. Gas & Elec. Co., 166 FERC 61.053, ¶ 25 (2019)) ("The Commission has held that, 'to give effect to *both* the FPA and the Bankruptcy Code,' a party to a Commission-jurisdictional contract must obtain approval from the bankruptcy court to reject the contract in bankruptcy and must also obtain approval from the Commission to modify or abrogate the filed rate.") (emphasis in original).

[44] *Id.* at ¶ 25 (footnote omitted).

[45] *See, e.g.*, Off. Comm. of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F. 3d 511, 518 (5th Cir. 2004) (citing Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 375 (1988)) ("Under the filed rate doctrine, '[t]he 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.'"); *see also In re* Calpine Corp., 337 B.R. 27, 33 (S.D.N.Y. 2006) ("A solvent company could not choose to stop performance [under a filed-rate contract] and expect anything other than swift FERC action. There are no provisions in the FPA that specifically limit FERC jurisdiction in the bankruptcy context."); *see also* Federal Energy Resource Commission v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 444–45 (6th Cir. 2019) (citing *Miss. Power & Light Co.*, 487 U.S. at 371–72) (explaining that the "'filed-rate doctrine' . . . holds that FERC has plenary and exclusive jurisdiction" in this context).

instances proffered that the rejection of such contracts equated to an amendment that required its approval,[47] and in others went so far as to argue the contracts had effectively become statute and, as such, could not be "rejected" without its approval.[48] One wonders if courts in the cases discussed above should have probed deeper into whether rejection would actually constitute an amendment of said contracts (or statutes) such that FERC had a legitimate basis for intervention and defense of the public interest. Regardless, the Supreme Court issued a clear ruling on this in *Mission Product Holdings, Inc. v. Tempnology, LLC*,[49] and its holding should have a dispositive effect on future cases.

Surprisingly, only one of the prominent cases addressing the subject matter of this Article, and decided prior to *Mission Product*, opined on the essential effect of contract rejection.[50] This is a critical component of FERC's argument that rejection per se modifies a filed-rate contract and thus requires FERC's consultation, if not its consent.[51] If rejection is not a modification, presumably FERC would have no grounds for claiming ownership of such responsibilities.[52] Thus, the simple but powerful holding in *Mission Product*—that "[r]ejection is [a] breach and has only its consequences"[53]—is a most welcome clarification in this discussion. If courts prior to *Mission Product* were inclined to read more into rejection than they should have,[54] this case leaves no doubt in future controversies as to the proper interpretation of rejection. It is nothing more than a breach of contract resulting in an unsecured claim of the non-breaching party.[55] This means that any subsequent argument by FERC or by a market participant seeking such a declaration from FERC, that rejection in and of itself equates to modification, should fail on its face. This would leave the bankruptcy court free to carry out its statutory duty of allowing or disallowing such rejection.[56]

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[46] *See* 16 U.S.C. § 825h (2018) ("[FERC] shall have power to perform any and all acts, and to prescribe, issue, make, *amend*, and rescind such orders, rules, and regulations as it may find necessary or appropriate . . . .") (emphasis added).

[47] *See In re* PG&E Corp., 603 B.R. 471, 486 (Bankr. N.D. Cal. 2019) (quoting FERC's statement on justness and reasonableness of performance modification) (citation omitted).

[48] *See In re* FirstEnergy Sols. Corp., 945 F.3d at 444; *see also In re* Calpine Corp., 337 B.R. at 37 (in which the court agreed with such an assertion by FERC).

[49] 139 S. Ct. 1652, 1661 (2019).

[50] *See* Off. Comm. of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Corp. (*In re* Mirant Corp.), 378 F.3d 511, 520 (5th Cir. 2004) ("When an executory contract is rejected in bankruptcy, the non-breaching party receives an unsecured claim against the bankruptcy estate for an amount equal to its damages from the breach.") (citation omitted).

[51] *See* Gulfport Energy Corp. v. Federal Energy Regulatory Commission, 41 F.4th 667, 672–73 (5th Cir. 2022) (explaining that under the Federal Power Act any modification or abrogation of filed-rates require FERC approval).

[52] *See id.* at 672.

[53] *Mission Prod*., 139 S. Ct. at 1663.

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

[55] *See Mission Prod*., 139 S. Ct. at 1658.

[56] *See* 11 U.S.C. § 365(a) (2018).

## IV. COALESCING INTO A CLEARER STANDARD OF REVIEW

With the plethora of analyses that came before it, the bankruptcy court had an opportunity in *In re Ultra Petroleum Corp.*[57] to reconcile longstanding differing views and eliminate future uncertainty. It did not have to declare that either the bankruptcy court *or* FERC should govern *in all circumstances*. It could have instead accepted the bankruptcy courts as the long-recognized adjudicators of all matters relating to corporate reorganizations, with FERC owning concurrent jurisdiction only when the public interest is called into question.[58] In other words, the court could have held that bankruptcy courts govern, but FERC must be brought on board if rejection implicates serious enough public policy issues. Efforts to declare one governmental branch the clear winner are unnecessary, as the analyses in *In re Ultra Petroleum* and prior cases suggest.[59] Such cases, even if in dicta, support the notion of primary jurisdiction of bankruptcy courts, with FERC having consultative rights, if not concurrent jurisdiction, when there is clearly a modification of a filed-rate contract or when the public interest is at stake.

In *In re Ultra Petroleum Corp.*, Ultra Resources, Inc., a natural gas producer ("Ultra"), contracted with Rockies Express Pipeline, LLC ("Rex") for the shipment of its gas on Rex's interstate pipeline.[60] Ultra suspended drilling activity around the time the contract was to take effect due to depressed gas prices.[61] In anticipation of Ultra's impending distressed state and potential chapter 11 filing, Rex sought a declaration from FERC that would require Ultra to receive FERC's approval to reject the transportation contract.[62] Approximately two weeks later, Ultra filed for bankruptcy protection and simultaneously rejected the contract; it then instructed

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[57] 621 B.R. 188 (Bankr. S.D. Tex. 2020).

[58] FERC has asserted that it never claimed exclusive dominion over rejection of filed-rate contracts; instead it only seeks concurrent jurisdiction. *See* ETC Tiger Pipeline, LLC, 171 FERC 61.248, ¶ 29 (2020).

[59] *See* 621 B.R. at 200:

> Congress tasked FERC with substantial responsibility to oversee pipeline contracts in order to protect the public interest. That delegation of responsibility suggests that Congress viewed pipeline contracts as having a particularly sensitive effect on public welfare. As Congress set out heightened oversight for pipeline contracts, it is similarly appropriate for a bankruptcy court to apply heightened scrutiny when a debtor moves to reject a pipeline contract. Consistent with *Mirant*, the Court must determine the public interest and natural gas supply implications of rejection and weigh them against the Agreement's burden on reorganization.

*Id.*

*See also* Off. Comm. of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 525–26 (5th Cir. 2004); *In re* PG&E Corp., 603 B.R. 471, 490 (Bankr. N.D. Cal. 2019) (providing that in considering a rejection motion, courts can assess both the appropriate business judgment standard and any public policy concerns).

[60] 621 B.R. at 192–93.

[61] *Id.* at 193.

[62] *Id.* at 194.

Rex that any attempt to prosecute the FERC petition would violate the Bankruptcy Code's section 362 automatic stay.[63]

The *Ultra Petroleum* court did not break new ground in its approach to the question of competing jurisdiction over rejection of regulated contracts.[64] It instead turned to *Mirant* for a crisp articulation of the standard of review:

> First, the Agreement is not excepted from rejection under § 365(a) [of the Bankruptcy Code]. Second, the Court must scrutinize the impact of rejection on the public interest and on the supply of natural gas to consumers. Third, after determining the public interest and supply concerns, the Court must weigh those concerns against the Agreement's burden on Ultra's reorganization.[65]

The court then analyzed, with the assistance of expert testimony, both the effect of debtor Ultra's rejection of the transportation contract on the supply of natural gas to public utilities and consumers[66] and the burden to Ultra's estate of keeping the contract in place.[67] The court succinctly stated its conclusion as follows:

> *Mirant* instructs the Court to balance the equities of Ultra's decision to reject with rejection's impact on the public interest and natural gas supply. Here, that balancing weighs in Ultra's favor. Ultra may reject the Agreement [over any FERC objection].[68]

FERC appealed the bankruptcy court's decision to the Fifth Circuit,[69] but to no avail.[70] The Fifth Circuit's affirmation of the lower court decision, again citing *Mirant*, included clear guidance for future courts to follow in order to break through the years-long jurisdictional impasse:

> *Mirant* makes clear that '*courts* should carefully scrutinize the impact of rejection upon the public interest,' *not FERC*. . . . To be sure, FERC's insight is highly beneficial when a court is weighing the complex and interwoven questions at the heart of the decision of whether to reject a filed-rate contract. Therefore, . . . we make

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[63] *Id.*

[64] *Id.* at 199 (discussing the Fifth Circuit's approach to tackle these issues).

[65] *Id.* at 199–200.

[66] For a discussion of the testimony of Dr. Jeff Makholm see *id.* at 201–02.

[67] *See id.* at 203 ("The Agreement plainly burdens the Ultra estate by requiring substantial monthly payments, whether or not Ultra utilizes its volume reservation, and locking Ultra into above market shipping rates.").

[68] *Id.* at 204.

[69] Federal Energy Regulatory Commission v. Ultra Res., Inc. (*In re* Ultra Petroleum Corp.), 28 F.4th 629, 634 (5th Cir. 2022).

[70] *Id.*

> clear here that a bankruptcy court must invite FERC to participate in the bankruptcy proceedings as a party-in-interest. Whether FERC ultimately decides to participate is up to it, but the court must at least extend the invitation.[71]

The Fifth Circuit essentially said that bankruptcy courts, without FERC's assistance, are capable of analyzing the balance of equities prescribed by *Mirant* in allowing or prohibiting contract rejection.[72] It in turn mandated that, if the public interest is implicated and potentially outweighs the benefit to the debtor of unburdening itself of the contract, the courts invite FERC's participation to help determine the impact and permissibility of rejection.[73] Whether this is interpreted as a holding of the court or dicta, it brings us a step closer toward a clear delineation of judicial and agency responsibility while leaving intact the separate but equal powers of these critical government bodies.

## V. TILTING EVEN MORE TOWARD THE BANKRUPTCY COURTS

*Gulfport Energy Corp. v. Federal Energy Regulatory Commission*[74] marks the latest in the saga of bankruptcy court versus FERC jurisdiction. In this case, Rover Pipeline ("Rover") agreed to transport natural gas produced by Gulfport Energy Corporation ("Gulfport") under various transportation services agreements ("TSAs"), executory contracts that established the maximum daily quantity of gas that Rover was obligated to transport for Gulfport and the fee payable by Gulfport for such transportation.[75] Fears about Gulfport's financial wherewithal, prompted by COVID-19-related reductions in demand for natural gas, led Rover to believe Gulfport might be unable to honor its payment obligations under the TSAs.[76] As a result, Rover sought from FERC a declaration of FERC's exclusive jurisdiction over the TSAs, such that FERC's approval would be required for a rejection of the TSAs.[77] FERC granted the request, asserted "parallel, exclusive jurisdiction over [the TSAs]", declared that "'rejection' of a filed-rate contract 'in bankruptcy court alters the essential terms and conditions' of that contract", and essentially ordered that Gulfport continue performing the contracts.[78] Soon after, Gulfport filed for bankruptcy, challenged the FERC order purporting to require continued performance, and sought permission from the bankruptcy court to reject the TSAs.[79]

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[71] *Id.* at 642–43 (emphasis in original) (internal citation omitted).
[72] *See supra* text accompanying note 59.
[73] *See In re* Ultra Petroleum Corp., 28 F.4th at 642.
[74] 41 F.4th 667 (5th Cir. 2022).
[75] *Id.* at 673.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 674 (internal marks omitted).
[79] *Id.*

The Fifth Circuit had little patience for FERC's argument that rejection of a filed-rate contract amends that contract.[80] The court cited authorities too numerous to repeat here in support of the notion that rejection is nothing more than a breach, while FERC cited only itself in asserting otherwise.[81] Readers might conclude from the court's emphatic, repetitive language that the Fifth Circuit indeed sought in this case to have the final word on a debate that appeared as perplexing to it as it does to this author:

> Rejection does not change or rescind a contract. It breaches that contract . . . converting it into a claim for damages. . . .
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> 'Rejection of a contract . . . in bankruptcy operates not as a rescission but as a breach.' And so say every federal circuit, the leading bankruptcy treatises, and respected bankruptcy scholars. Against that crush of contrary authority, FERC cited only *itself* [to assert otherwise] . . . .
>
> The hornbook law of rejection yields a clear answer. Rejection is just a breach of contract . . . .
>
> With filed-rate contracts, as with others, rejection is a breach and has only its consequences.[82]

Coupled with its unambiguous conclusions in *In re Ultra Petroleum* (which in turn rested on the sound logic of the *Mirant* decision), the Fifth Circuit's decision in *Gulfport* offers compelling arguments for the primacy of bankruptcy court jurisdiction over the rejection of executory contracts for wholesale sales of electricity or natural gas, inviting FERC's participation only when necessary to protect the public interest.[83]

## CONCLUSION

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[80] *Id.* at 683 (the court stating, "[t]hat assumption is wrong. It flouts the Bankruptcy Code, Supreme Court precedent, and the caselaw of every federal circuit").

[81] *Id.* at 683–84 n.33.

[82] *Id.* (footnotes omitted) (citations omitted).

[83] See Ben Hoch & Marsha Sukach, *Fifth Circuit Vacates FERC Orders, Reaffirming Contract Rejection Powers in Bankruptcy*, WILSON SONSINI (July 26, 2022) for a practitioner's view of the significance of the Gulfport ruling available at https://www.wsgr.com/en/insights/fifth-circuit-vacates-ferc-orders-reaffirming-contract-rejection-powers-in-bankruptcy.html.

The signs appear clear that the friction between bankruptcy court and FERC jurisdiction over the rejection of filed-rate contracts in bankruptcy has seen its final days. As noted and accepted: (1) bankruptcy courts have plenary authority over all matters relating to a debtor's estate, including the assumption or rejection of executory contracts;[84] (2) the rejection of a filed-rate contract is not an amendment to that contract requiring FERC's approval in all instances;[85] (3) none of the exceptions to section 365 of the Bankruptcy Code limits a debtor's ability to reject a FERC-approved contract;[86] and (4) per *Mirant*, and as emphasized by *In re Ultra Petroleum*, bankruptcy courts must invite FERC to opine in cases where such rejection affects the public interest.[87] Going forward, courts may therefore hold with conviction that approving the rejection of such contracts rests, with few exceptions, exclusively in the province of the bankruptcy court. In cases where wholesale sales of natural gas and electricity touch the public interest, FERC's subject matter expertise must also be factored into the decision-making. Adherence to this protocol will serve to uphold the policy goals of both FERC and the bankruptcy courts, while ensuring that reorganizations are supervised in the proper venue with the proper expertise brought to bear in the form of the bankruptcy judge.

Furthermore, the courts have made clear that rejection of a filed-rate contract in bankruptcy is not an amendment to that contract requiring FERC's per se approval. Rather, it is a breach—deemed to have occurred the moment prior to the debtor's chapter 11 filing—entitling the counterparty to the same damages such party would have enjoyed had the breach occurred outside of bankruptcy. The stage is set for congressional action or a Supreme Court ruling that cements the ability of debtors to exercise their business judgment and assume or reject filed-rate contracts without fear of agency overreach and resulting litigation.



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[84] *See supra* text accompanying note 5.

[85] 11 U.S.C. § 365(g) (2018); *see also* Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1661 (2019) (referencing section 365(g) of the Bankruptcy Code and stating "a rejection is a breach. . . . It means in the Code what it means in contract law outside bankruptcy"); Gulfport Energy Corp. v. Federal Energy Regulation Commission, 41 F.4th 667, 684 (5th Cir. 2022) ("Rejection is just a breach of contract; it transforms the debtor's future performance into an unsecured claim for damages.") (citations omitted).

[86] *See In re* Ultra Petroleum Corp., 621 B.R. 188, 198 (Bankr. S.D. Tex. 2020).

[87] *See* Off. Comm. Of Unsecured Creditors of Mirant Corp. v. Potomac Elec. Power Corp. (*In re* Mirant Corp.), 378 F.3d 511, 525 (5th Cir. 2004); *see also In re* Ultra Petroleum Corp., 621 B.R. at 195.