NOTE

CREATURES OF CONGRESS COLLIDE: DEFENDING FERC'S RATEMAKING AUTHORITY IN ELECTRIC UTILITY BANKRUPTCIES

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In the recent PG&E and FirstEnergy bankruptcies, the Ninth and Sixth Circuits were faced with a difficult issue that has created confusion and uncertainty for electric utility debtors: does the Federal Energy Regulatory Commission (FERC) have jurisdiction concurrent with the bankruptcy courts to decide whether an electric utility debtor can reject power purchase agreements (PPAs) under § 365 of the Bankruptcy Code? The answer has billion-dollar implications for renewable generation companies that depend on the stability of long-term PPAs and for electric utilities, which increasingly are filing for Chapter 11 bankruptcy due to competition from alternative energy sources and natural disasters.

This Note explores this issue in four parts. First, it provides an overview of the debtor's rejection power, the applicable energy law, and the factual and procedural contexts in which this issue recently arose. In the next two parts, it resolves doctrinal confusion by analyzing the relevant cases and identifying the heightened standard for rejection of PPAs that the circuit courts have universally endorsed. Finally, it argues

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that—absent FERC's approval—rejection should not relieve electric utility debtors of their public rate obligations.

I. Introduction 298
II. Background 301
A. The Debtor's Rejection Power 302
B. Applicable Energy Law 304
1. The Regulation of Energy Markets 304
2. The Federal Power Act and FERC's Traditional Rate Authority 306
III. Overview of the FirstEnergy and PG&E Bankruptcies 313
A. The Bankruptcies 314
1. Competition from Natural Gas and Renewables and the FirstEnergy Bankruptcy 314
2. Enhanced Risk of Natural Disasters and the PG&E Bankruptcy 316
B. Circumstances of the Disputes 318
1. FirstEnergy's Power Purchase Agreements and the Inter-Company Power Agreement 319
2. PG&E's Power Purchase Agreements 321
IV. Resolving Doctrinal Confusion 324
A. The Filed-Rate Doctrine and Its Implications 325
1. The Filed-Rate Doctrine 325
2. The Implications of the Filed-Rate Doctrine 330
B. Rejecting Wholesale Power Rates in Bankruptcy 331
1. *Bildisco* and the Argument Against Creating Doctrinal Exceptions to the Debtor's Rejection Power 332
2. Applying a Heightened Rejection Standard to PPAs 336
3. Reconciling *Mirant* and *Calpine* 338
V. Rejection Should Not Relieve the Debtor of its Regulatory Rate Obligations 340
A. The Debtor-in-Possession Must Comply with Its Public Rate Obligation 341
B. The Bankruptcy Code Requires FERC To Approve Any Rate Changes 343

C. The Bankruptcy Court's Authority Is Limited by Article III and the Supreme Court's Bankruptcy Doctrine 344
1. Constitutional Limits on the Authority of the Bankruptcy Court To Decide Non-Bankruptcy Issues...345
2. Doctrinal Limits on the Bankruptcy Court's Power 347
VI. Conclusion...349

I. INTRODUCTION

The Federal Energy Regulatory Commission (FERC) and the bankruptcy courts both serve distinct and important public interests, and they rarely collide. Congress created FERC—which was originally called the Federal Power Commission (FPC)—in the 1920s as a "small federal agency that controlled hydropower dams."[1] In the 1930s, Congress passed the Federal Power Act (FPA), which greatly expanded the agency's authority by charging the agency with the regulation of wholesale electricity markets.[2] As the regulator of wholesale energy markets, FERC oversees energy prices, which are typically set by power purchase agreements (PPAs) between electric utilities and various energy producers.[3]

Bankruptcy courts, on the other hand, trace their history back much further. In the United States, the federal bankruptcy system is rooted in the Constitution, which gave Congress the power to establish federal bankruptcy law.[4] The

[1] *What Is FERC?*, PBS: FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/blackout/regulation/ferc.html#:~:text=When%20FERC%20was%20established%20in,refunds%20for%20overcharges%20to%20ratepayers [https://perma.cc/JBW6-3MQD] (last visited Nov. 17, 2020).

[2] *See id.*

[3] For an overview of the energy markets, see *infra* Section II.B.1.

[4] U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States"). The Framers gave Congress the bankruptcy power ostensibly because they believed it was "intimately connected with the regulation of commerce." THE FEDERALIST No. 42, at 208 (James Madison) (Terence Ball, ed. 2003).

Bankruptcy Act of 1898 established the foundation of a bankruptcy system that endured, making the U.S. district courts the courts of bankruptcy with original jurisdiction and providing the Supreme Court and courts of appeals with appellate jurisdiction.[5]

FERC's and the bankruptcy courts' jurisdictions rarely overlap because utilities rarely file for bankruptcy.[6] With little precedent for determining the appropriate role for FERC in electric utility bankruptcies, two recent cases that reached the Sixth and Ninth Circuit Courts of Appeals—*FirstEnergy*[7] and *PG&E*[8]—revealed the uncertainties that exist for litigants in these massive bankruptcies.[9] The text of the Bankruptcy Code

[5] *Bankruptcy Act of 1898*, FED. JUD. CTR. (on file with the Columbia Business Law Review), https://www.fjc.gov/history/timeline/bankruptcy-act-1898 (last visited Nov. 17, 2020).

[6] *See infra* note 44 and accompanying text.

[7] Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431 (6th Cir. 2019). In April 2018, FirstEnergy Solutions and some of its affiliates (collectively referred to as FirstEnergy) filed for Chapter 11 bankruptcy protection after competition from renewables and natural gas sources undercut the economics of its nuclear and coal plants. *See infra* Section III.A.1. FirstEnergy sought to reject eight long-term PPAs. *See* David Henry, *FirstEnergy Nuclear, Coal Plant Units File for Bankruptcy Protection*, REUTERS, https://www.reuters.com/article/us-firstenergy-bankruptcy/firstenergy-nuclear-coal-plant-units-file-for-bankruptcy-protection-idUSKCN1H81GX [https://perma.cc/WY62-MTNR] (last updated Apr. 1, 2018, 3:49 PM).

[8] Pac. Gas & Elec. Co. v. Fed. Energy Regul. Comm'n, 829 F. App'x 751 (9th Cir. 2020).

In January 2019, California's largest electric utility—Pacific Gas and Electric Corporation (PG&E)—filed for Chapter 11 bankruptcy protection after state fire regulators linked five destructive wildfires to the utility's electric network. *See* Ivan Penn, Peter Eavis & James Glanz, *How PG&E Ignored Fire Risks in Favor of Profits*, N.Y. TIMES, (March 18, 2019), https://www.nytimes.com/interactive/2019/03/18/business/pge-california-wildfires.html [https://perma.cc/D7Q5-ED75]. Current California legal standards result in more financial risk for electric utilities as wildfires become more frequent. *See* Peter Eavis & Ivan Penn, *The Struggle To Control PG&E*, N.Y. TIMES, (Feb. 13, 2019), https://www.nytimes.com/2019/02/13/business/energy-environment/pge-wildfire-bankruptcy-control.html [https://perma.cc/J9VP-77Y7].

[9] At the time of its filing, PG&E's bankruptcy represented one of the largest bankruptcies in U.S. history and possibly the largest electric utility bankruptcy ever. *See* Pac. Gas & Elec. Co. v. Fed. Energy Regul. Comm'n

does not contemplate electric utility bankruptcies.[10] Yet utilities are dominated by federal and state regulation, making these reorganizations uniquely complex.[11] And to make matters worse, there is an apparent conflict between FERC's and the bankruptcy courts' interpretations of their respective authorities under the FPA and the Bankruptcy Code to approve rejection of PPAs.[12]

While FERC thinks that it and the bankruptcy courts have concurrent jurisdiction to decide whether an electric utility should be able to reject wholesale PPAs, bankruptcy courts have argued that their jurisdiction to allow rejection of PPAs is exclusive.[13] This has led to confusion among the federal courts over whether FERC's ratemaking authority must be preserved during the pendency of electric utility reorganizations.[14] Outside of bankruptcy, FERC has primary jurisdiction over any unilateral attempt to modify or abrogate

(*In re* PG&E Corp.), No. 19-03003, 2019 WL 2477433, at *1 (Bankr. N.D. Cal. June 12, 2019), *vacated*, 829 F. App'x 751.

[10] *See* Theodore Eisenberg, *Bankruptcy in the Administrative State*, LAW & CONTEMP. PROBS., Spring 1987, at 3, 9 ("Bankruptcy law deals with these regulation-dominated industries through a mixture of express exclusion from coverage by bankruptcy law, of highly specific interaction, and of nearly complete silence. . . . [U]tilities illustrate the theme of silence.").

[11] *See id.* at 12.

[12] *Compare* NextEra Energy, Inc. v. Pac. Gas & Elec. Co., 167 F.E.R.C. (CCH) ¶ 61,096, para. 1 (May 1, 2019) ("[FERC] and bankruptcy courts have concurrent jurisdiction to review and address the disposition of wholesale power contracts sought to be rejected through bankruptcy"), *with* PG&E Corp. v. Fed. Energy Regul. Comm'n (*In re* PG&E Corp.), 603 B.R. 471, 476 (Bankr. N.D. Cal. 2019) (stating that "FERC must be stopped" and holding that FERC did not have concurrent jurisdiction with the bankruptcy court), *vacated sub nom. Pac. Gas & Elec.*, 829 F.App'x 751.

[13] *Id.*

[14] *See, e.g.*, Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 519 (5th Cir. 2004) (holding that bankruptcy courts have exclusive jurisdiction to rule on rejection without FERC's involvement); Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 446 (6th Cir. 2019) (holding that FERC and the bankruptcy courts have concurrent jurisdiction, but also that bankruptcy courts occupy a "primary or superior" position); Cal. Dep't of Water Res. v. Calpine Corp. (*In re* Calpine Corp.), 337 B.R. 27, 30 (S.D.N.Y. 2006) (holding that FERC has exclusive jurisdiction).

PPAs that set wholesale rates.[15] Section 365 of the Bankruptcy Code, however, provides that debtors-in-possession have the ability to reject *any* executory contract with the bankruptcy court's approval.[16]

This Note argues that the courts should not allow electric utilities to evade their regulator by rejecting wholesale PPAs in bankruptcy. Part II offers background on the debtor's rejection power, FERC's ratemaking authority, and the factors that brought these in conflict in the FirstEnergy and PG&E bankruptcies. Part III examines the agreements that FirstEnergy and PG&E sought to reject, and Part IV explores the relevant federal precedent.

Finally, Part V offers a functional assessment of what should follow from the rejection of wholesale PPAs in bankruptcy and argues that even if bankruptcy courts have exclusive jurisdiction to approve these rejections, bankruptcy judges and federal judges should not allow electric utilities to exploit the rejection power to effectively evade their regulator in bankruptcy.

II. BACKGROUND

This Part provides background on the complex legal landscape that led to confusion among the federal courts over whether FERC should have a say when the bankruptcy courts are considering debtors' attempts to reject PPAs. Section II.A

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[15] *See* 16 U.S.C. § 824(b), (d)–(e) (2018). Under the filed-rate doctrine, the courts cannot—in the first instance—allow a party to abrogate or modify rates that have been filed with and approved by an agency. *See* Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251–52 (1951) ("Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the *filed rate*, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." (emphasis added)).

[16] *See* 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.").

details the applicable bankruptcy law—the debtor's "rejection power." Section II.B then describes the applicable energy law, including sections 205 and 206 of the FPA and the *Mobile-Sierra* doctrine.

A. The Debtor's Rejection Power

Bankruptcy is attractive to many financially distressed corporations because § 365 of the Bankruptcy Code (the rejection provision) mitigates the harm that results from a debtor breaching underperformed contracts.[17] The rejection power may be appealing for electric utility debtors,[18] who are often burdened by expensive, long-term PPAs because these agreements are challenging to modify or abrogate outside of bankruptcy.[19]

Section 365 of the Bankruptcy Code provides the debtor-in-possession with the power to either "assume" or "reject" executory contracts.[20] Although the Bankruptcy Code does not define the term "executory contract," most courts adopt the view that a contract is executory when the "obligation[s] of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach."[21] Under the

[17] *See id.*

[18] While a debtor may not file a bankruptcy petition merely to exploit a provision of the Bankruptcy Code, if the filing also serves some other "valid bankruptcy purpose," there is no problem with debtors filing for the "tactical litigation advantage" of the rejection power. *See* NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (*In re* Integrated Telecom Express, Inc.), 384 F.3d 108, 119–20 (3d Cir. 2004).

[19] For a discussion of utility debtors' financial challenges, see *infra* Section II.B.2.

[20] *See* 11 U.S.C. § 365(a).

[21] Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973); *see also* Mission Prod. Holdings v. Tempnology, LLC, 139 S. Ct. 1652, 1658 (2019) ("A contract is executory if 'performance remains due to some extent on both sides.'" (quoting NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522 n.6 (1984))). Some courts have suggested that when the only performance remaining is the payment of money there is no executory contract. *See, e.g.*, Lubrizol Enters. v. Richmond Metal Finishers, 756 F.2d 1043, 1046 (4th Cir. 1985) ("[I]f Lubrizol had owed RMF nothing more than a duty to make fixed payments or cancel specified

Code, the debtor-in-possession can reject any executory contract, subject to some limited statutory exceptions.[22] The bankruptcy court then has discretion to approve the rejection,[23] but it typically applies a relaxed business judgment standard that is highly deferential to the debtor, allowing rejection whenever it is in the interest of the debtor and its creditors.[24]

In *Mission Product Holdings v. Tempnology*, the Supreme Court recently emphasized that when a debtor rejects an executory contract, the non-breaching party has the same rights that it would have in the event of a breach outside of bankruptcy.[25] In addition, the debtor's "breach" is deemed to have occurred before the filing of the bankruptcy petition.[26] This means the non-breaching party has a prepetition, unsecured claim against the debtor. The non-breaching party is placed "in the same boat as the debtor's unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar."[27]

In an electric utility bankruptcy, if the utility debtor rejects agreements to purchase wholesale power under the rejection provision, the supplier will have a prepetition, unsecured claim against the debtor. The supplier's unsecured claim will be for damages in an amount that would compensate them at the filed rate.[28] But if utilities are like other debtors, their

indebtedness under the agreement, the agreement would not be executory as to Lubrizol.").

[22] *See* 11 U.S.C. § 365.

[23] *See id.* § 365(a).

[24] *See, e.g.*, Grp. of Inst. Invs. v. Chi., Milwaukee, St. Paul & Pac. R.R. Co., 318 U.S. 523, 550 (1943) ("[T]he question whether a [contract] should be rejected . . . is one of business judgment.").

[25] *Mission Prod. Holdings*, 139 S. Ct. at 1657–58 ("A rejection breaches a contract but does not rescind it. And that means all the rights that would ordinarily survive a contract breach . . . remain in place."). The non-breaching party can either elect to continue the contract or refuse to perform further. 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:32, Westlaw (database updated Nov. 2020).

[26] 11 U.S.C. § 365(g)(1).

[27] *Mission Prod. Holdings*, 139 S. Ct. at 1658.

[28] *See* 24 LORD, *supra* note 25, § 64:6 ("It is sometimes said that the law regards a breach of contract as in effect a destruction of the contract by

unsecured creditors will probably only receive a fraction of that rate. On the other hand, if the debtors assume the agreements, the obligations will get priority to be paid in full as administrative obligations.[29]

B. Applicable Energy Law

This Section provides a brief overview of the structure of the energy industry and the traditional regulatory scheme for the industry. It explains the applicable provisions of the FPA and the relevant administrative rules that have guided courts' interpretations of FERC's jurisdiction.

1. The Regulation of Energy Markets

Utilities are regulated by both state and federal agencies. At first, state and local public utility commissions (PUCs) were the sole regulators of traditional public utilities.[30] But as electricity markets began to cross state lines, the resulting regulatory gap required that the federal government get involved with regulating interstate electricity sales.[31] In

the wrongdoer, for which the law substitutes a cause of action for damages in favor of the injured party, and that, therefore, the appropriate measure of damages is the value of the contract.").

[29] 2 WILLIAM L. NORTON III, NORTON BANKRUPTCY LAW AND PRACTICE § 46:27, Westlaw (database updated Oct. 2020) ("If an executory contract or unexpired lease is assumed after the case is commenced, the assumption creates a new administrative obligation[.]"); 11 U.S.C. § 507(a)(1)(C) (establishing that administrative obligations have first priority to be paid). "[A]n assumed obligation is [also] a postpetition obligation that is not discharged, and which therefore continues to be an obligation of the reorganized debtor." 2 NORTON, *supra*, § 46:27.

[30] *See* DAVID P. TUTTLE ET AL., THE HISTORY AND EVOLUTION OF THE U.S. ELECTRICITY INDUSTRY 3 (2016), https://energy.utexas.edu/sites/default/files/UTAustin_FCe_History_2016.pdf [https://perma.cc/LGV6-2MWJ] ("To protect customers from monopolistic prices, electricity rates started to be regulated first by municipal, then by state governments.").

[31] *See* Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927) (concluding that states cannot regulate the sale of electricity interstate). The so-called "*Attleboro* gap" resulted from the *Attleboro* case**.** Without any federal regulatory regime, the *Attleboro* gap left interstate sales of electricity unregulated. *See* LINCOLN L. DAVIES ET AL., ENERGY LAW AND POLICY 331 (2018). In 1935, Congress closed the gap by enacting the

response, the FPA created the FPC, which was charged with overseeing the federal regulation of interstate transmission and wholesale sales of electricity.[32]

The wholesale and retail markets are the two basic electric power markets. States regulate retail markets, and FERC regulates wholesale markets.[33] The wholesale market consists of the initial sales of electricity produced by generators for resale.[34] The buyers then "step-down" the voltage of the electricity and resell it to local customers.[35] These resales constitute the retail market, which is governed exclusively by state PUCs.[36] This Note is focuses on the rejection of wholesale PPAs by large electric utility debtors.

Traditional electric utilities (like PG&E and FirstEnergy) were once completely vertically integrated,[37] meaning that the three main segments of the electricity production and delivery system (generation at the power plant, high voltage transmission—including "stepping up" and "stepping down" the voltage of electricity—and distribution of the stepped down lower voltage electricity to the consumer)[38] were all operated by one utility. Since vertically integrated utilities

FPA. *Id.* ("Part II of the Federal Power Act, adopted in 1935, eventually sought to fill [the *Attleboro* gap], granting the FPC authority to regulate wholesale sales of electricity and drawing bright lines around which parts of the electricity industry the federal and state governments regulate.").

[32] *See* 16 U.S.C. § 792 (2018) ("A commission is created and established to be known as the Federal Power Commission[.]"); *see also id.* § 824(a) (declaring that the Commission's regulatory authority extends to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce").

[33] DAVIES ET AL., *supra* note 31, at 284

[34] *Id.*

[35] *See Electricity Explained: How Electricity Is Delivered to Consumers*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/electricity/delivery-to-consumers.php [https://perma.cc/9Q7X-ADDQ] (last updated Oct. 22, 2020) ("Transformers at substations increase (step up) or reduce (step down) voltages to adjust to the different stages of the journey from the power plant on long-distance transmission lines to distribution lines that carry electricity to homes and businesses.").

[36] DAVIES ET AL., *supra* note 31, at 284.

[37] *See* TUTTLE ET AL., *supra* note 30, at 2.

[38] *See Electricity Explained: How Electricity Is Delivered to Consumers*, *supra* note 35.

could exercise monopoly power to the disadvantage of customers, price regulation was justified. Today, as then, the government provides traditional, regulated electric utilities with exclusive sales territories and economic stability in exchange for allowing FERC to set prices.[39]

2. The Federal Power Act and FERC's Traditional Rate Authority

FERC requires traditional utilities to submit tariffs—including the prices, terms, and conditions of providing energy—for regulatory oversight.[40] Section 824d(a) of the FPA grants FERC the power to ensure that "[a]ll rates . . . made . . . or received by any public utility . . . subject to the jurisdiction of [FERC] . . . are just and reasonable."[41] And under § 824e(a), FERC has the authority to modify a filed rate upon finding that it is "unjust, unreasonable, unduly discriminatory or preferential."[42] FERC traditionally determined "just and reasonable" rates on the basis of the "cost-of-service," aiming to "replicate the outcome a competitive market would produce, by examining utilities' costs . . . and then allowing the company to earn a 'reasonable' return on its investment."[43]

This regulatory system ensured that traditional utilities were able to recover their costs of service, and for much of the twentieth century it kept electric utilities out of bankruptcy.[44]

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[39] DAVIES ET AL., *supra* note 31, at 289–90.

[40] *See* FED. ENERGY REGUL. COMM'N, FY 2014 CONGRESSIONAL PERFORMANCE BUDGET REQUEST 11–12 (2013), https://www.ferc.gov/sites/default/files/2020-04/fy14-budg.pdf [https://perma.cc/HQS7-JUZ2].

[41] 16 U.S.C. § 824d(a) (2018).

[42] *Id.* § 824e(a).

[43] DAVIES ET AL., *supra* note 31, at 380 (emphasis deleted).

[44] In the 1930s, fifty-three utility holding companies filed for bankruptcy. Bonnie Robinson, In re Blackacre Power and Light*: The Bankruptcy of a Public Utility*, 50 ALB. L. REV. 641, 641 n.3 (1986) (citing DOUGLAS W. HAWES, UTILITY HOLDING COMPANIES § 2.04 (1985)). The utility industry experienced widespread financial distress when the Great Depression exacerbated problems that resulted from bad practices associated with large, convoluted utility holding companies. *See id.* Many of the problems that led to industry disaster were either attributable to the Great Depression or corrected by the Public Utility Holding Company Act

Beginning in the early 1980s, however, state PUCs began denying rate recovery where the utility's assets were not "used and useful," increasing risk and uncertainty in the industry.[45] Without the opportunity for relief from ratepayers for failed investments in nuclear power, several financially-distressed utilities were pushed toward bankruptcy[46] despite the advantages gained from vertical integration.

Many utilities are no longer vertically integrated. The generation segment is increasingly competitive and decentralized,[47] which has created more financial risk for traditional, vertically integrated utilities. In the 1980s and

of 1935, which Congress enacted in the wake of the crisis. *See id.* Indeed, after the bankruptcies of the 1930s, over fifty years passed before another utility filed for bankruptcy. *See id.* at 641.

[45] *See* Phillip L. Poirier, Jr., *Cancelled Utility Plant and Traditional Ratemaking Theories: Are Either Used and Useful?*, 22 SAN DIEGO L. REV. 669, 692–94 (1985); Robinson, *supra* note 44, at 642 n.6 (explaining that Indiana law prevented the Wabash Valley Power Association "from charging ratepayers for the costs of a plant not in service" (citing Nicholas D. Kristof, *Chapter 11 for Indiana Electricity Group*, N.Y. TIMES, May 24, 1985, at D3); *In re* Pub. Serv. Co. of N.H., 88 B.R. 521, 532 (Bankr. D.N.H. 1988) ("One of the principal causes of Public Service's financial difficulties has been the effect of [a New Hampshire statute], which excludes investment in construction work in progress from retail rate base until the construction is completed and the plan is operating and prohibits recovery of investment in cancelled or abandoned plants.").

[46] In 1988, the Public Service Company of New Hampshire (Public Service) became the first electric utility to file for bankruptcy in over 50 years. *See In re Pub. Serv. Co. of N.H.*, 88 B.R. at 522. Public Service was one of several electric utilities that encountered financial distress in the 1980s after state PUCs determined that they could not recover for "overexpensive, incomplete, and possibly unnecessary nuclear power plants" that were ultimately cancelled. *See* Robinson, *supra* note 44, at 641 & n.4, 642 n.6.

[47] *See* DAVIES, *supra* note 31, at 27 ("Over time, regulators have increasingly treated electricity generation and, to some extent, certain aspects of transmission and distribution, as capable of supporting competitive markets.").

1990s, FERC[48] and state PUCs[49] began encouraging this competition. After the 1970s energy crisis,

> Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA) . . . to promote the development of new generating facilities and to conserve the use of fossil fuels. Because the traditional utilities controlled the transmission lines and were reluctant to purchase power from nontraditional facilities, PURPA directed FERC to promulgate rules requiring utilities to purchase electricity from qualifying cogeneration and small power production facilities.[50]

PURPA disrupted the monopoly market structure by enabling certain nontraditional wholesale sellers, like renewable energy companies, to compel traditional public utilities to purchase their generation capacity and energy.[51] Then, in 1996, FERC issued Order No. 888, requiring all transmission-owning public utilities to offer access to their transmission lines "on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system."[52] Thus, the utilities that dominated transmission no longer could discriminate against outside generators, eliminating a barrier to entry in the

[48] *See* Wholesale Competition in Regions with Organized Electric Markets, 119 F.E.R.C. (CCH) ¶ 61,306, para. 15 (advance notice June 22, 2007) ("Beginning in the 1980s, the Commission allowed independent power producers to sell electric energy at wholesale at negotiated rates instead of the traditional cost-based rates.").

[49] *See* FRANCISCO FLORES-ESPINO ET AL., COMPETITIVE ELECTRICITY MARKET REGULATION IN THE UNITED STATES 10 (2016), https://www.nrel.gov/docs/fy17osti/67106.pdf [https://perma.cc/78X6-2GT2].

[50] New York v. F.E.R.C., 535 U.S. 1, 9 (2002) (internal quotation marks omitted) (quoting Fed. Energy Regul. Comm'n v. Mississippi, 456 U.S. 742, 751 (1982)).

[51] *Id.*

[52] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540, 21,548 (May 10, 1996) (codified at 18 C.F.R. § 35.28 (2019)) (internal quotation marks omitted) (quoting Am. Elec. Power Serv. Corp., 67 F.E.R.C.(CCH) ¶ 61,168, 61,490 (May 11, 1994)).

generation segment. And in the twenty-first century, natural gas and renewable generation sources (in the forms of wind and solar) are increasingly cost competitive with traditional generation sources.[53]

The prospect of more competitive wholesale generation markets also ushered in an era of deregulation,[54] which has created even more financial risk for traditional, vertically integrated utilities. In 1988, FERC began considering "market-based" rate proposals in wholesale markets.[55] The market-based model suggests that the market itself should set the price of wholesale electricity. It is rooted in the theory that—in a sufficiently competitive market—the market price should be more efficient than the administratively-established price.[56] Under the market-based model, if FERC determines that there is enough competition in the market, a market-based tariff is filed, and the suppliers are free to independently negotiate contracts with buyers.[57] As long as the parties comply with FERC's established rules for market-based rates, any contract that a supplier enters into under its market-based authority is presumptively "just and

[53] *See* BRUCE USHER, RENEWABLE ENERGY: A PRIMER FOR THE TWENTY-FIRST CENTURY 17, 21 (2019).

[54] Regulation of the public utility industry was justified because the market was dominated by regional monopolies. *See supra* text accompanying notes 37–39. So when the generation segment became more competitive, the justification for price regulation weakened.

[55] Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 71 Fed. Reg. 33,102, 33,102 (proposed June 7, 2006) (to be codified at 18 C.F.R. pt. 35) ("In 1988, the Commission began considering proposals for market-based pricing of wholesale power sales.").

[56] *See* DAVIES ET AL., *supra* note 31, at 380–81. Before allowing a seller to engage in market-based pricing, FERC conducts a market-power analysis to determine whether (1) the seller and its affiliates lack (or have adequately mitigated) market power in generation and transmission; (2) the seller will not erect barriers to entry; and (3) there is no evidence involving the seller or its affiliates of affiliate abuse or reciprocal dealing. 18 C.F.R. § 35.37(b), (e).

[57] *See* Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 538 (2008) ("[W]hen a seller files a market-based tariff . . . contracts no longer need to be filed with FERC (and subjected to its investigatory power) before going into effect.").

reasonable" and is treated the same as a traditional filed tariff.[58]

Some critics of market-based pricing contend that the scheme violates the FPA since FERC does not review each contract to ensure that the rates are "just and reasonable."[59] Market-based rates do not, however, free suppliers from regulation.[60] FERC engages in ongoing oversight of market-based rate authorizations and market conditions.[61] For example, sellers with market-based rate authority are required to file post-transaction electric quarterly reports containing specific information about contracts and transactions.[62] FERC may also institute a § 824e "proceeding to revoke a seller's market-based rate authorization if it determines that the seller may have gained market power since its original" authorization.[63] Therefore, the advent of

[58] *See* Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 72 Fed. Reg. 39,904, 40,013 (July 20, 2007).

[59] *Cf., e.g.*, Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1622–24 (2003) (discussing the limits of FERC's authority). Although the courts have generally held that market-based pricing does not contravene the FPA, the Supreme Court has explicitly refused to express an opinion on the lawfulness of the market-based model. *Morgan Stanley Cap. Grp.*, 554 U.S. at 538 ("We have not hitherto approved, and express no opinion today, on the lawfulness of the market-based-tariff system, which is not one of the issues before us.").

[60] *See* Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 455–56 (6th Cir. 2019) (Griffin, J., concurring in part and dissenting in part).

[61] Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 72 Fed. Reg. at 39,906 ("[T]he Commission, through its ongoing oversight of market-based rate authorizations and market conditions, may take steps to address seller market power or modify rates.").

[62] *Id.* at 40,019; *see also* Electric Quarterly Reports, 18 C.F.R. § 35.10b (2019); FED. ENERGY REGUL. COMM'N, ELECTRIC QUARTERLY REPORT FILING REQUIREMENTS GUIDE 4 (2017), https://www.ferc.gov/docs-filing/eqr/eqr-requirements-guide.pdf [https://perma.cc/XXL2-T933].

[63] Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 72 Fed. Reg. at 40,019; *see also* 16 U.S.C. § 824e(a) (2018) (permitting the Commission to hold a hearing "upon its own motion").

market-based rate regulation did not eliminate FERC's oversight, though it did substantially reduce it.

Indeed, the *Mobile-Sierra* doctrine limits FERC's power to allow parties to modify the rates established by privately-negotiated PPAs.[64] The doctrine is named for a pair of 1956 Supreme Court cases involving the Mobile Gas Service Corporation (Mobile)[65] and the Sierra Pacific Power Company (Sierra).[66] Mobile entered into a contract to purchase natural gas from United Gas.[67] Sierra entered into a contract to purchase electricity from PG&E.[68] Both contracts were approved by the FPC.[69] And both suppliers later instituted FPC proceedings, seeking to raise prices above the contract rate.[70] The FPC denied United Gas's request but not PG&E's.[71] But in both cases, the Court prevented the suppliers from unilaterally modifying the contractual rates.[72]

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[64] Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 545–46 (2008) (holding that the *Mobile-Sierra* doctrine applies even when FERC did not initially review the rate for reasonableness, as when a seller has market-based rate authority).

[65] 350 U.S. 332 (1956).

[66] 350 U.S. 348 (1956).

[67] *Mobile*, 350 U.S. at 336.

[68] *Sierra Pac. Power Co.*, 350 U.S. at 352.

[69] *Id.*; *Mobile*, 350 U.S. at 336.

[70] *Sierra Pac. Power Co.*, 350 U.S. at 352; *Mobile*, 350 U.S. at 336. The doctrine applies to both natural gas and electricity contracts even though FERC's jurisdiction over the contracts is derived from different statutes. *Sierra Pac. Power Co.*, 350 U.S. at 350–51 ("The pertinent provisions of the [FPA] are §§ 205(c), (d), and (e), and 206(a), which are substantially identical to §§ 4(c), (d), and (e), and 5(a), respectively, of the Natural Gas Act."). In addition, although United Gas and PG&E were both suppliers, the courts have applied the *Mobile-Sierra* doctrine where the buyer is the party requesting modification from FERC. *See* Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 548 (2008) ("The standard for a buyer's challenge must be the same, generally speaking, as the standard for a seller's challenge: The contract rate must seriously harm the public interest.").

[71] *Compare Mobile*, 350 U.S. at 347, *with Sierra Pac. Power Co.*, 350 U.S. at 353–55 (remanding to the FPC).

[72] *See Sierra Pac. Power Co.*, 350 U.S. at 355 ("When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility."); *Mobile*, 350 U.S. at 347 ("From our conclusion that the

In doing so, the Court found that such modification was not justified under the "unjust, unreasonable, or unduly discriminatory" standard set out in the FPA.[73] The Court unanimously agreed that the purpose of the FPA is to protect the public interest.[74] When an electric utility seeks relief for its own "improvident bargain," FERC's "sole concern . . . [is] 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."[75] Thus, outside of bankruptcy, utilities cannot get out of their agreements to buy or sell power unless it would threaten their ability to provide their services. "The courts have largely come to the conclusion that [FERC] has less authority to modify rates set by contract, as compared to unilaterally-filed tariff rates, when the contract is the result of arm's length negotiations between sophisticated parties of equal bargaining power, unless the contract indicates otherwise."[76]

The *Mobile-Sierra* public interest standard is stringent. As Judge Posner explained:

> [I]f a power company makes a contract that turns out to be disadvantageous to it but does no harm to the broader public, a regulatory commission has no business bailing the company out. It's a big boy; it took

Natural Gas Act gives a natural gas company no power to change its contracts unilaterally, it follows that the new schedule filed by United was a nullity[.]").

[73] *See* DAVIES ET AL., *supra* note 31, at 322.

[74] *Sierra Pac. Power Co.*, 350 U.S. at 355 ("[T]he purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities[.]").

[75] *Id.*

[76] John M. White, *The Federal Power Act's Double Standard: Unwinding the* Mobile-Sierra *Doctrine after* Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1, 61 AM. U. L. REV. 677, 677 (2012) (emphasis deleted).

> a risk; the risk materialized; . . . there is no occasion for regulatory intervention.[77]

In "a number of cases involving the *Mobile-Sierra* doctrine," the D.C. Circuit, for example, "has repeatedly emphasized the importance of contractual stability," establishing a heavy presumption in favor of preserving PPAs.[78]

In sum, the market-based rate system and the *Mobile-Sierra* doctrine have reduced FERC's authority over privately negotiated PPAs. Sellers with market-based rate authority are free to enter into PPAs without FERC approval and FERC cannot allow modification of the rates established by market-based PPAs unless doing so would satisfy the stringent public interest standard. Thus, if a utility is burdened by overpriced PPAs, it may prefer to reorganize in bankruptcy, where it has the power to reject executory contracts.

III. OVERVIEW OF THE FIRSTENERGY AND PG&E BANKRUPTCIES

Before analyzing the relevant circuit court decisions, this Part briefly offers factual context, with attention to the FirstEnergy and PG&E bankruptcies.[79] In the twenty-first century, utility bankruptcies are more common.[80] As the generation segment becomes increasingly competitive and regulators take a step back, several electric utilities have looked to the bankruptcy courts for relief. At the same time,

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[77] MISO Transmission Owners v. Fed. Energy Regul. Comm'n, 819 F.3d 329, 335 (7th Cir. 2016).

[78] *See* Potomac Elec. Power Co. v. Fed. Energy Regul. Comm'n, 210 F.3d 403, 409 (D.C. Cir. 2000).

[79] For a more in-depth discussion of this issue in the context of earlier electric utility bankruptcies (*Mirant* and *Calpine*), see Michael Kohler, Note, *The Ambit of FERC Jurisdiction Over Electricity Contracts During Insolvency: Bankruptcy Jurisdiction and the "Just and Reasonable" Directive*, 104 COLUM. L. REV. 1947, 1955–59 (2004) and William Wallander et al., *Energy Restructuring and Reorganization*, 10 TEX. J. OIL, GAS & ENERGY L. 1, 71–75 (2014).

[80] USHER, *supra* note 53, at 145–46 (describing the failures of traditional power companies).

climate change is "intensifying natural disasters,"[81] threatening the long-term viability of traditional, vertically integrated electric utilities.[82]

A. The Bankruptcies

1. Competition from Natural Gas and Renewables and the FirstEnergy Bankruptcy

Competition from natural gas and renewables is now threatening the viability of traditional generation sources. As Professor Bruce Usher explains, "[t]he growth of renewable energy in the twenty-first century will create winners and losers. Incumbent fossil fuel companies risk losing trillions . . . in shareholder value; some . . . will develop strategies to join the energy transition, while the less nimble will face bankruptcy."[83]

A mix of regulatory incentives and innovation enabled new generation sources (natural gas, wind, and solar) to become cost competitive with traditional generation sources (nuclear and coal).[84] Cost is key in the generation segment.[85] The levelized cost of electricity (LCOE) is a standard metric used to compare the costs of producing electricity from different

[81] BO MACINNIS & JON A. KROSNICK, CLIMATE INSIGHTS 2020, at 1 (2020), https://media.rff.org/documents/Climate_Insights_2020_Natural_Disasters.pdf [https://perma.cc/9Y53-7X2Z] ("According to natural scientists, climate change is intensifying natural disasters like wildfires and floods, making them increasingly devastating.").

[82] *See* Sarah Brody, Matt Rogers & Giulia Siccardo, *Why, and How, Utilities Should Start To Manage Climate-Change Risk*, MCKINSEY & CO. (Apr. 24, 2019), https://www.mckinsey.com/industries/electric-power-and-natural-gas/our-insights/why-and-how-utilities-should-start-to-manage-climate-change-risk# [https://perma.cc/ZE25-DK4D].

[83] USHER, *supra* note 53, at 3–4.

[84] *See id.* at 17, 21.

[85] *See id.* at 19 ("[B]asic economic principles, primarily cost, are the main drivers of energy transitions.").

generation sources.[86] Natural gas[87] and "[r]enewable energy, in the form of wind and solar power,"[88] are now cost-competitive with traditional generation sources on an LCOE basis. As a result, the Energy Information Administration expects that, this century, the share of generation from nuclear and coal will continue to decrease while the share from natural gas and renewables will continue to increase.[89]

The declining prices of new generation sources have already reduced demand for coal-generated electricity. As Usher explains, "[t]he lower LCOE of electricity generated using advanced combined-cycle natural gas technologies encourage utilities to transition away from coal."[90] By 2016, natural gas accounted for twenty-nine percent of new energy generation built.[91] Analysts expect forty-two percent of existing coal-fired capacity to retire by 2050.[92] And the coal industry is already feeling the effects of reduced demand: "nearly half of all [U.S.] coal companies have gone bankrupt since 2012."[93]

FirstEnergy, for example, "filed for bankruptcy . . . [after being] dragged down by its [failing] nuclear and coal plants."[94]

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[86] *Id.* at 13 ("The LCOE provides an 'apples-to-apples' comparison of cost. The LCOE for a power plant equals the cost of building and operating the plant divided by the electrical output forecast over the life of the plant, discounted at the cost of capital required to invest in the plant." (footnote omitted)).

[87] *See id.* at 18.

[88] *See id.* at 21.

[89] U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2019 WITH PROJECTIONS TO 2050, at 22 (2019). The economic crisis resulting from the COVID-19 pandemic has only reduced the demand for traditional generation sources. According to Dr. Wal van Lierop, in the wake of the crisis demand for oil "will continue to decrease as low-cost renewables keep pushing the energy transition." Wal van Lierop, *After COVID-19, The Oil Industry Will Not Return to "Normal"*, FORBES (Apr. 5, 2020, 7:06 PM), https://www.forbes.com/sites/walvanlierop/2020/04/05/after-covid-19-the-oil-industry-will-not-return-to-normal/ [https://perma.cc/4FTA-DTL9].

[90] *See* USHER, *supra* note 53, at 17.

[91] *Id.* at 105.

[92] U.S. ENERGY INFO. ADMIN., *supra* note 89, at 96.

[93] USHER, *supra* note 53, at 145.

[94] Will Wade, *Coal Unit at Center of Trump Bailout Bid To Shut 19 Months Early*, BLOOMBERG (Aug. 9, 2019, 11:29 AM) (on file with the

Before FirstEnergy filed for bankruptcy, it sought relief from the federal government.[95] FERC, however, rejected a proposed rule to subsidize the uncompetitive plants.[96] Although the Ohio legislature subsequently passed legislation that requires ratepayers to subsidize some of the state's coal and nuclear plants,[97] many of the utility's other plants are still in financial distress. While FirstEnergy was in bankruptcy, for example, it shut down its Bruce Mansfield coal power plant, citing economic distress.[98]

2. Enhanced Risk of Natural Disasters and the PG&E Bankruptcy

Natural disasters pose an existential threat to the electric utility industry. Rising sea levels threaten energy infrastructure in coastal communities.[99] The U.S. Department

Columbia Business Law Review), https://www.bloomberg.com/news/articles/2019-08-09/firstenergy-solutions-to-shut-coal-fired-plant-19-months-early.

[95] Andrew Scurria & Becky Yerak, *FirstEnergy Generation Units File for Bankruptcy After Seeking Federal Bailout*, WALL ST. J. (Apr. 1, 2018, 12:01 PM), https://www.wsj.com/articles/firstenergy-generation-units-file-for-bankruptcy-after-seeking-federal-bailout-1522598514 [https://perma.cc/Y6WT-MYV6].

[96] Camila Domonoske, *Federal Regulator Rejects Energy Department's Bid To Prop up Coal, Nuclear*, NPR (Jan. 9, 2018, 12:00 PM), https://www.npr.org/sections/thetwo-way/2018/01/09/576742270/federal-regulator-rejects-energy-departments-bid-to-prop-up-coal-nuclear [https://perma.cc/VGL4-JKQQ].

[97] *See* OHIO REV. CODE ANN. §§ 3706.40–.65 (West 2019). Ohio's public utilities commission "determine[s] the proper rate design for recovering or remitting the prudently incurred costs related to a legacy generation resource" subject to a cap. *Id.* § 4928.148(A)(2); *see also id.* § 4928.01(A)(41) ("'Legacy generation resource' means all generating facilities owned directly or indirectly by a corporation that was formed prior to 1960 by investor-owned utilities[.]").

[98] Paul J. Gough, *Bruce Mansfield Deactivation Begins*, PITTSBURGH BUS. TIMES, https://www.bizjournals.com/pittsburgh/news/2019/11/08/bruce-mansfield-deactivation-begins.html [https://perma.cc/9ZEH-DKY2] (last updated Nov. 8, 2019, 8:35 AM).

[99] Storms leave energy infrastructure vulnerable to wind damage, flood damage, fuel supply issues, and evacuations and shutdowns. *See*

of Energy estimates that climate change will increase hurricane storm-surge exposure for power plant assets by up to sixty-seven percent.[100] Utilities must account for the enhanced risk of natural disaster to avoid financial disaster.

California utilities are financially vulnerable to climate change risk also because they can be held strictly liable when their power lines spark destructive wildfires.[101] From 1972 to 2018, the annual burned area of California increased 405%.[102] The effects of climate change (i.e., increased temperatures, earlier snowmelt, and more intense summer droughts) exacerbate wildfire damage.[103] And utility powerlines sparked at least eight of the twenty most destructive fires in

Brody et al., *supra* note 82 ("In the United States, nine nuclear-power plants are located within two miles of the ocean.").

[100] *See* JAMES BRADBURY, MELISSA ALLEN & REBECCA DELL, U.S. DEPT. OF ENERGY, CLIMATE CHANGE AND ENERGY INFRASTRUCTURE EXPOSURE TO STORM SURGE AND SEA-LEVEL RISE 3 (2015) (comparing 1992 exposure to projected 2060 exposure).

[101] CAROLYN KOUSKY, KATHERINE GREIG & BRETT LINGLE, FINANCING THIRD PARTY WILDFIRE DAMAGES: OPTIONS FOR CALIFORNIA'S ELECTRIC UTILITIES 2 (2019), https://riskcenter.wharton.upenn.edu/wp-content/uploads/2019/02/Financing-Third-Party-Wildfire-Damages-Options-for-Californias-Electric-Utilities.pdf [https://perma.cc/Q9SC-76TN] ("Under a unique legal regime in the state of California (inverse condemnation), electric utilities are held strictly liable for property damage associated with any wildfire where utility infrastructure is found to have been a significant cause of ignition, even if the utility was not negligent in their risk management actions.").

[102] A. Park Williams et al., *Observed Impacts of Anthropogenic Climate Change on Wildfire in California*, 7 EARTH'S FUTURE 892, 896 (2019).

[103] *See* JOHN J. MACWILLIAMS, SARAH LA MONACA & JAMES KOBUS, COLUMBIA CTR. ON GLOB. ENERGY POL'Y, PG&E: MARKET AND POLICY PERSPECTIVES ON THE FIRST CLIMATE CHANGE BANKRUPTCY 6 (2019). Climate change dries out "fuel"—trees, shrubs, etc.—causing fires to spread faster and leading to more damage. Jill Cowan, *Are Wildfires Cause by Utilities or Climate Change? Yes*, N.Y. TIMES (Oct. 23, 2019), https://www.nytimes.com/2019/10/23/us/wildfires-utilities-climate-change.html [https://perma.cc/QU2J-TV2X].

California's history.[104] Six of these fires have occurred since 2015.[105]

The wildfire liability faced by PG&E prompted the utility to file for bankruptcy in 2019.[106] PG&E's bankruptcy was a wake-up call for the electric utility industry. While the main concern for utilities was once regulatory risk, they must now "worry about sudden, and potentially unexpected, impacts to their core assets and liabilities."[107] Although PG&E may be considered "the first climate change bankruptcy," it probably will not be the last.[108]

B. Circumstances of the Disputes

When PG&E and FirstEnergy filed for bankruptcy, both utilities were burdened by long-term PPAs that they had entered into at a time when renewable energy was low in supply and high in demand.[109] As renewable generation sources proliferated, however, these long-term agreements became highly overpriced.[110] In addition, FirstEnergy sought to reject an overpriced inter-company power agreement (ICPA).[111] While outside of bankruptcy the utilities would

[104] GABRIEL PETEK, LEGIS. ANALYST'S OFF., ALLOCATING UTILITY WILDFIRE COSTS: OPTIONS AND ISSUES FOR CONSIDERATION, 2019-20 Sess., at 4 (Cal. 2019).

[105] *Id.*

[106] The Associated Press, *PG&E: California Utility Firm Files for Bankruptcy After Deadly 2018 Wildfires*, GUARDIAN (Jan. 29, 2019, 3:15 PM) (on file with the Columbia Business Law Review), https://www.theguardian.com/us-news/2019/jan/29/pge-bankruptcy-california-wildfires-utilities#:~:text=PG%26E%3A%20California%20utility%20firm%20files%20for%20bankruptcy%20after%20deadly%202018%20wildfires,-This%20article%20is&text=PG%26E%20cited%20hundreds%20of%20lawsuits,planned%20to%20file%20for%20bankruptcy.

[107] Russell Gold, *PG&E: The First Climate-Change Bankruptcy, Probably Not the Last*, WALL ST. J. (Jan. 18, 2019, 9:00 AM) (on file with the Columbia Business Law Review), https://www.wsj.com/articles/pg-e-wildfires-and-the-first-climate-change-bankruptcy-11547820006.

[108] *Id.*

[109] *See infra* note 139 and accompanying text (discussing the change in the price of renewable energy).

[110] *See infra* note 139 and accompanying text.

[111] *See infra* notes 121–22 and accompanying text.

have had a very hard time getting out of these purchase agreements,[112] FirstEnergy and PG&E maintained that, as debtors-in-possession, they were entitled to reject all money-losing purchase agreements under section 365 of the Bankruptcy Code.[113]

1. FirstEnergy's Power Purchase Agreements and the Inter-Company Power Agreement

During bankruptcy, FirstEnergy sought to reject eight long-term renewable energy purchase agreements.[114] FirstEnergy entered into three of these agreements to comply with an EPA consent decree.[115] It entered into the other five agreements to meet various state renewable energy credit (REC) requirements for businesses in the retail power industry.[116] According to FirstEnergy, since the time it entered into the PPAs (between 2003 and 2011), three changes in the market rendered the agreements money-losing at the time of its bankruptcy filing:

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[112] *See supra* Section II.B.2.

[113] 11 U.S.C. § 365 (2018).

[114] Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 437–38 (6th Cir. 2019). With an effective capacity of 75 megawatts, FirstEnergy's eight PPAs accounted for only 0.75% of its overall capacity and less than 0.04% of the regional market. *Id.* at 437 n.2. Although the PPAs were for a total gross capacity of 500 megawatts, the effective capacity was only 75 megawatts because of the intermittency of renewable energy. *Id.* at 437. FirstEnergy anticipated losing $46 million per year on the eight PPAs. *Id.*

[115] *See* Objection & Rsrv. of Rts. of Krayn Wind LLC to Motion for Entry of an Ord. Authorizing FirstEnergy Sols. Corp. and FirstEnergy Generation, LLC to Reject Certain Energy Conts. as of Petition Date at 2–3, FirstEnergy Sols. Corp. v. Fed. Energy Regul. Comm'n (*In re* FirstEnergy Sols. Corp.), No. 18-50757, 2018 WL 2315916 (Bankr. N.D. Ohio May 18, 2018), *aff'd in part, rev'd in part and remanded*, 945 F.3d 431.

[116] *See In re FirstEnergy Sols. Corp.*, 945 F.3d at 437. "RECs are . . . paper certificates that represent each [megawatt-hour] of renewable energy sold." U.S. ENV'T PROT. AGENCY, EPA CLEAN ENERGY-ENVIRONMENT TECHNICAL FORUM 1 (2008), https://www.epa.gov/sites/production/files/2016-03/documents/background_paper_3.pdf [https://perma.cc/GM8J-DNLH].

> (1) [FirstEnergy's] retail electricity sales were much greater, so its REC requirements were correspondingly greater; (2) the supply of RECs was more limited, so [FirstEnergy] was compelled to enter long-term contracts to get enough RECs at an agreeable price; and (3) electricity prices were much higher and were expected to remain high.[117]

Crucially, Ohio's REC requirements are tied to retail sales.[118] FirstEnergy claimed that it was planning to sell off its retail business and that once it fully exited that business at the conclusion of its reorganization, it would "have no need for any RECs."[119] It also maintained that even without these RECs it would "continue to obtain more than enough power to supply its retail customers and already ha[d] on its balance sheet an excess number of RECs, sufficient to satisfy state regulatory requirements for at least the next three years."[120] Basically, FirstEnergy claimed it sought to reject these renewable energy purchase agreements because it no longer needed the power.

FirstEnergy was also party to an ICPA, "pursuant to which [FirstEnergy] and . . . other power companies ha[d] both the right and obligation to purchase power from" the Ohio Valley Electric Corporation (OVEC).[121] Before FirstEnergy filed for bankruptcy, OVEC asked FERC to find that FirstEnergy's "then-anticipated breach of the ICPA . . . 'would amount to a termination of [FirstEnergy's] purchase obligation in violation of the filed rate doctrine and the ICPA.'"[122]

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[117] *In re FirstEnergy Sol. Corp.*, 945 F.3d at 437.

[118] *See* OHIO REV. CODE ANN. § 4928.643 (West 2019). States only have jurisdiction over the retail market and therefore cannot impose emissions requirements on the basis of a utility's sales in the wholesale market. *See supra* note 33 and accompanying text.

[119] Complaint for Declaratory Judgment, Preliminary & Permanent Injunction Against the Fed. Energy Regul. Comm'n at 12, *In re FirstEnergy Sols. Corp.*, 2018 WL 2315916.

[120] *Id.*

[121] *In re FirstEnergy Sol. Corp.*, 2018 WL 2315916, at *3.

[122] *Id.* at *4. For a discussion of the filed-rate doctrine and its implications, see *infra* Section IV.A.

Then, right after FirstEnergy filed for bankruptcy, it filed an adversary proceeding against FERC seeking a declaratory judgment and injunctive relief preventing FERC from interfering with the bankruptcy court's jurisdiction to consider motions to reject the PPAs.[123] The Northern District of Ohio Bankruptcy Court held that the automatic stay applied to the FERC proceeding[124] and decided that a preliminary injunction was justified.[125] Both parties appealed to the Sixth Circuit, which affirmed in part and reversed in part, holding that the injunction "was overly broad" and the standard for deciding whether to allow rejection of PPAs "was too limited."[126] The Sixth Circuit's decision became the settled law in that circuit when the parties' certiorari deadline passed in March 2020.[127]

2. PG&E's Power Purchase Agreements

In anticipation of PG&E filing for bankruptcy, two of PG&E's suppliers—NextEra and Exelon—petitioned FERC for an order declaring that PG&E may not "abrogate, amend, or reject in a bankruptcy proceeding any rates, terms and conditions of its wholesale [PPAs] . . . without first obtaining approval from the Commission under FPA sections 205 and 206."[128] NextEra is the largest utility holding company in the United States.[129] it owns two utility companies in Florida and the world's largest wind and solar energy generation

[123] *Id.* at *1.

[124] *Id.* at *6.

[125] *Id.* at *19.

[126] Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 437 (6th Cir. 2019).

[127] *In re FirstEnergy Sols. Corp.* was decided on December 12, 2019. *Id.* at 432. Per Supreme Court Rule 13, parties have ninety days to file "a petition for a writ of certiorari to review a judgment in any case . . . entered by . . . a United States court of appeals." Sup. Ct. R. 13.

[128] *See* NextEra Energy, Inc. v. Pac. Gas & Elec. Co., 166 FERC ¶ 61,049, para. 1 (Jan. 25, 2019); Exelon Corp. v. Pac. Gas & Elec. Co., 166 FERC ¶ 61,053, para. 1 (Jan. 28, 2019).

[129] *See Company Overview*, NEXTERA ENERGY, http://www.investor.nexteraenergy.com/company-overview [https://perma.cc/5TUT-DSU4] (last visited Nov. 20, 2020).

company.[130] Several of NextEra's subsidiaries sold wind and solar energy to PG&E under various PPAs pursuant to its market-based rate authority.[131] Exelon is a holding company that owns transmission and distribution systems and generation companies.[132] One of its generation companies, AV Solar Ranch 1, sold its entire output to PG&E under a PPA.[133]

When FERC issued orders on NextEra's and Exelon's petitions, PG&E had not actually filed for bankruptcy, let alone rejected or assumed any executory contracts.[134] In both orders, FERC found that it had concurrent jurisdiction with the bankruptcy courts to "review and address the disposition of wholesale power contracts sought to be rejected."[135] When PG&E filed for bankruptcy, it immediately brought an adversarial proceeding against FERC, seeking a motion for a preliminary injunction against the agency.[136] As a result, the bankruptcy court issued a "declaratory judgment that (1) FERC d[id] not have concurrent jurisdiction over its decision to permit Debtors to reject (or assume) executory contracts under Section 365; and (2) that the FERC . . . rulings [were] of no force and effect and [were] not binding on Debtors in these cases."[137]

NextEra and Exelon had reason to believe that PG&E intended to reject their agreements. In a court filing, PG&E

[130] *Id.*

[131] *NextEra*, 166 FERC ¶ 61,049, para. 2.

[132] *See America's Leading Energy Provider*, EXELON, https://www.exeloncorp.com/company/about-exelon [https://perma.cc/J4TK-5V55] (last visited Nov. 20, 2020).

[133] *Exelon*, 166 FERC ¶ 61,053, para. 2.

[134] FERC issued orders on the *NextEra* and *Exelon* petitions on January 25, 2019 and January 28, 2019 respectively. *See id.*; *NextEra*, 166 FERC ¶ 61,049. PG&E filed for bankruptcy on January 29, 2019. The Associated Press, *supra* note 106.

[135] *Exelon*, 166 FERC ¶ 61,053, para. 25; *NextEra*, 166 FERC ¶ 61,049, para. 31.

[136] Debtors' Motion for Preliminary Judgment & Memorandum of Points and Auths. in Support at 1–2, PG&E Corp. v. Fed. Energy Regul. Comm'n (*In re* PG&E Corp.), 603 B.R. 471 (Bankr. N.D. Cal. 2019) (No. 19-03003), *vacated sub nom.* Pac. Gas & Elec. Co. v. Fed. Energy Regul. Comm'n, 829 F. App'x 751 (9th Cir. 2020).

[137] *In re PG&E Corp.*, 603 B.R. at 490.

estimated that its approximately 387 PPAs were worth over $42 billion.[138] And its long-term PPAs to procure renewable energy resources (such as those with NextEra and AV Solar Ranch 1) were uniquely attractive candidates for rejection. As PG&E itself explained in its motion for the bankruptcy court to issue a preliminary injunction against FERC:

> Many of the Utility's PPAs are long-term contracts to procure renewable energy resources, which the Utility entered into to satisfy renewable energy requirements set by the State of California. These contracts obligate the Debtors to purchase energy at rates that are *significantly higher rates* than are currently available to their competitors. [139]

In September 2019, however, PG&E decided to assume all of its existing PPAs in its first plan of reorganization.[140] The agreements can still be "voluntarily modified," which some of the counterparties have already agreed to.[141] Despite proposing to retain all existing PPAs, PG&E chose to appeal the bankruptcy court's decision, which suggested that it still had an interest in rejecting these agreements.[142]

FERC and PG&E agreed that the cases became moot on July 1, 2020 "when the bankruptcy court confirmed a reorganization plan requiring PG&E to assume, rather than reject, the contracts at issue."[143] But on August 14, 2020, the Ninth Circuit heard oral argument on the question of whether

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[138] Debtor's Motion for Preliminary Judgment & Memorandum of Points and Auths. in Support, *supra* note 136, at 16.

[139] *Id.* (emphasis added) (citation omitted).

[140] *See* Keith Goldberg, *PG&E Pledge Won't End FERC-Bankruptcy Court Tug of War*, LAW360 (Sept. 13, 2019, 8:07 PM), https://www.law360.com/articles/1198527/pg-e-pledge-won-t-end-ferc-bankruptcy-court-tug-of-war [https://perma.cc/WZY7-ATJN].

[141] Julian Spector, *PG&E Pledges To Keep All Power Purchase Agreements Despite Bankruptcy*, GTM: (Aug. 9, 2019), https://www.greentechmedia.com/ articles/read/pge-pledges-to-keep-all-power-purchase-agreements-but-some-already-took-a-h [https://perma.cc/H9GX-ZZJ9].

[142] Goldberg, *supra* note 140.

[143] Pac. Gas & Elec. Co. v. Fed. Energy Regul. Comm'n, 829 F. App'x 751, 755 (9th Cir. 2020).

the court should vacate FERC's orders asserting its concurrent jurisdiction over the PPAs in bankruptcy.[144] The Ninth Circuit issued a Memorandum Order on October 7, 2020, vacating all three underlying orders—the two FERC orders and the bankruptcy court order—under the *Munsingwear* doctrine.[145]

IV. RESOLVING DOCTRINAL CONFUSION

Informed by the legal background in Part II and factual background in Part III, this Part clarifies the existing doctrine concerning the role for FERC in determining whether an electric utility should be allowed to reject PPAs in bankruptcy. FERC clearly has jurisdiction when an electric utility seeks to modify or abrogate a wholesale PPA outside of bankruptcy.[146] But when an electric utility seeks to do the same in the bankruptcy context, the answer is less clear. In the 2004 and 2019 bankruptcies of Mirant Corporation and FirstEnergy Solutions Corporation, the Fifth and Sixth Circuits, respectively, held that the bankruptcy courts had either "exclusive" or "primary" jurisdiction to approve debtors' rejections of wholesale PPAs under section 365 of the Bankruptcy Code.[147] But in the bankruptcy of Calpine Corporation, the Southern District of New York agreed with FERC that the courts should defer to the agency on this issue.[148]

Section IV.A will first detail the filed-rate doctrine, which typically governs the termination of a PPA outside

[144] *See id.* at 751.

[145] *See id.* at 755 ("*Munsingwear* holds that '[w]hen a case becomes moot on appeal, the "established practice" is to reverse or vacate the decision below with a direction to dismiss.'" (alteration in original) (quoting NASD Disp. Resol., Inc. v. Jud. Council of Cal., 488 F.3d 1065, 1068 (9th Cir. 2007)).

[146] *See infra* Section IV.A.1 (discussing the filed-rate doctrine).

[147] Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 519–20 (5th Cir. 2004); Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 452–53 (6th Cir. 2019).

[148] Cal. Dep't of Water Res. v. Calpine Corp. (*In re* Calpine Corp.), 337 B.R. 27, 37–38 (S.D.N.Y. 2006).

bankruptcy. Section IV.A also considers the argument that the courts should apply the doctrine in bankruptcy. Section IV.B. then considers how the courts have resolved the rejection issue in the bankruptcy context.

A. The Filed-Rate Doctrine and Its Implications

This Section explains why FERC has exclusive jurisdiction to decide whether a debtor should be allowed to breach or terminate a PPA outside bankruptcy. Under the traditional regulatory system, filed rates have the force of law[149] and an attempt by an electric utility to unilaterally modify or abrogate a PPA would be quite challenging. Outside of bankruptcy, if a utility's modification or abrogation of these agreements resulted in any change to the filed rate, then under the long-standing filed-rate doctrine, the courts would defer to FERC.

1. The Filed-Rate Doctrine

The filed-rate doctrine has long protected FERC's jurisdiction over interstate rate regulation.[150] The doctrine emerged outside of the energy law context in the nineteenth century as part of a program to regulate railroads.[151] Originally enacted in 1887, the Interstate Commerce Act required motor common carriers to publish their rates with the Interstate Commerce Commission (ICC) and prohibited

[149] Courts have gone so far as to say the filed-rate is to be treated as though it were a statute. *See, e.g.*, Nw. Pub. Serv. Co. v. Montana-Dakota Utils. Co., 181 F.2d 19, 22 (8th Cir. 1950), *aff'd*, 341 U.S. 246; Bos. Edison Co. v. Fed. Energy Regul. Comm'n, 856 F.2d 361, 372 (1st Cir. 1988); *cf. also* Cahnmann v. Sprint Corp., 133 F.3d 484, 488 (7th Cir. 1998) ("A tariff filed with a federal agency is the equivalent of a federal regulation[.]" (first citing Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 520 (1939); then citing W. Union Int'l, Inc. v. Data Dev., Inc., 41 F.3d 1494, 1496 (11th Cir. 1995); and then citing MCI Telecomms. Corp. v. Garden State Inv. Corp., 981 F.2d 385, 387 (8th Cir. 1992))).

[150] *See* Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251–52 (1951) (applying the filed-rate doctrine to protect FERC's primary jurisdiction over interstate rate regulation for the first time).

[151] Maislin Indus., U.S. v. Primary Steel, Inc., 497 U.S. 116, 138 (1990) (Stevens, J., dissenting).

carriers from deviating from those rates.[152] The Court established the filed-rate doctrine to preserve the ICC's primary jurisdiction over the reasonableness of published rates.[153] The filed-rate doctrine also is not limited to "rates" as in prices charged: courts have applied the doctrine not only to prices but also to the terms and conditions approved by regulators, such as service quality terms included in tariffs.[154]

The filed-rate doctrine emerged from primary jurisdiction doctrine. Under primary jurisdiction doctrine, the Court has long held "that in cases raising issues of fact not within the conventional experience of judges or . . . requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over."[155] The doctrines rest on the premise that, given the agencies'

[152] *Id.* at 120 (majority opinion).

[153] The filed-rate doctrine also is not limited to "rates" as in prices charged: courts have applied the doctrine not only to prices but also to the terms and conditions approved by regulators, such as service quality terms included in tariffs. SCOTT HEMPLING, REGULATING PUBLIC UTILITY PERFORMANCE 318 (2013) ("The . . . 'filed-rate doctrine' . . . . applies also to 'the services, classifications, charges, and practices included in the rate filing.'" (quoting E. & J. Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1040 (9th Cir. 2007))); *see also* Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 462 (6th Cir. 2019) (Griffin, J., concurring in part and dissenting in part) ("[T]he concept of a filed rate includes much more than merely the price of power, and FERC's authority to enforce filed-rate obligations extends much further than setting that price."); Rossi, *supra* note 59, at 1593.

[154] HEMPLING, *supra* note 153, at 318 ("The . . . 'filed-rate doctrine' . . . . applies also to 'the services, classifications, charges, and practices included in the rate filing.'" (quoting E. & J. Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1040 (9th Cir. 2007))); *see also* Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 462 (6th Cir. 2019) (Griffin, J., concurring in part and dissenting in part) ("[T]he concept of a filed rate includes much more than merely the price of power, and FERC's authority to enforce filed-rate obligations extends much further than setting that price."); Rossi, *supra* note 59, at 1593.

[155] Far E. Conf. v. United States, 342 U.S. 570, 574 (1952); *see also* Great N. Ry. Co. v. Merchs. Elevator Co., 259 U.S. 285, 291 (1922) ("Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. . . . To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function.").

expertise over the rates they set, the courts should not, in the first instance, allow parties to abrogate or modify rates that have been filed with and approved by rate-setting agencies like the ICC and FERC. And if a court finds that a rate is unjust or unreasonable on appeal from the agency proceeding, it "will remand to [the agency] for . . . review and reexamination of the rate."[156]

The filed-rate doctrine does not bar litigants from ever seeking judicial review of FERC action. It just creates an issue of timing. The doctrine simply means that "when an agency and a court have concurrent jurisdiction, a court may abstain to allow the agency to first address the matter."[157] As Justice Stephen Breyer explained in his partial concurrence in *Pharmaceutical Research & Manufacturers of America v. Walsh*:

> No fixed formula exists' for the doctrine's application. Rather, the question in each instance is whether a case raises 'issues of fact not within the conventional experience of judges,' but within the purview of an agency's responsibilities; whether the 'limited functions of review by the judiciary are more rationally exercised, by preliminary resort' to an agency 'better equipped than courts' to resolve an issue in the first instance[.][158]

And while the agency's decision does get substantial deference, it is not determinative for the court that has stayed its proceedings.[159]

[156] DAVIES ET AL., *supra* note 31, at 320.

[157] PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1417 (Robert C. Clark et al. eds., 12th ed. 2018) (describing the primary jurisdiction doctrine).

[158] Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 673 (2003) (Breyer, J., concurring in part and concurring in the judgment) (citation omitted) (first quoting United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956); and then quoting Far E. Conf. v. United States, 342 U.S. 570, 574–75 (1952)).

[159] *Cf.* Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68 (1970) (describing the primary jurisdiction doctrine as a means of "rout[ing] [a] threshold decision as to certain issues to the agency").

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, the Supreme Court determined that the filed-rate doctrine protected the FPC's jurisdiction over filed wholesale power rates.[160] In that case, Montana-Dakota Utilities Company sued the Northwestern Public Service Company, claiming that "Northwestern . . . overcharged and underpaid for wholesale power."[161] The district court found that the previous wholesale rates were unreasonable and awarded Montana-Dakota damages to make up the difference.[162] The Supreme Court disagreed and held that, by awarding damages, the district court imposed on the FPC's exclusive jurisdiction:

> [T]he right to a reasonable rate is the right to the rate which the utility files or fixes, and . . ., except for review of the [FPC's] orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one. [163]

The Court did not completely rid the judiciary of the authority to reverse a regulator's rate decision if the decision is unlawful.[164] But as the D.C. Circuit has explained, any effort of the courts to award damages to compensate utilities for unreasonable rates would "undermine the Commission's primary jurisdiction by bringing the court into the adjudication of the lawfulness of rates in advance of administrative consideration."[165] If a court finds that a rate is unreasonable, it must remand to FERC to determine the reasonable rate. Outside of bankruptcy, the filed-rate doctrine

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[160] Montana-Dakota Utils. Co. v. Pub. Serv. Co., 341 U.S. 246 (1951).

[161] HEMPLING, *supra* note 153, at 305–06.

[162] *Id.*

[163] Montana-Dakota Utils. Co., 341 U.S. at 251–52.

[164] *See* HEMPLING, *supra* note 153, at 306 ("The [filed-rate] doctrine prohibits the court from *setting* a rate (or awarding damages based on the court's view of the appropriate rate). But it does not prevent the court from *reversing* a regulator's rate decision if the decision is unlawful.").

[165] Papago Tribal Util. Auth. v. Fed. Energy Regul. Comm'n, 628 F.2d 235, 242 (D.C. Cir. 1980) (internal quotation marks omitted) (quoting S. Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 460 (1979)).

thus empowers FERC by giving it primary jurisdiction to determine what constitute just and reasonable rates.

Many suppliers have market-based rate authority, enabling them to set rates freely according to market conditions.[166] But the rates are all still filed with FERC.[167] And outside of bankruptcy, FERC has primary jurisdiction over any unilateral attempt to modify or abrogate these rates.[168] Thus, the courts treat the privately-negotiated rate as the filed rate and defer to FERC.

Although some energy law scholars have called the filed-rate doctrine into question—particularly because of the proliferation of market-based tariffs—the federal courts have continued to apply it.[169] As the First Circuit held in *Town of Norwood v. New England Power*, "it is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed-rate doctrine."[170] Under the current market-based model, the rates are still filed with FERC. As a result, while some scholars may contend that the filed-rate doctrine is less justified when rates are set freely in a competitive market, this position is not rooted in the current law.

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[166] *See supra* text accompanying notes 54–63.

[167] Utilities with market-based tariffs must file electric quarterly reports with FERC containing a summary of the "contractual terms and conditions" in every effective service agreement for "all jurisdictional services." FED. ENERGY REGUL. COMM'N, *supra* note 62, at 4; *see also* Electric Quarterly Reports, 18 C.F.R. § 35.10b (2019).

[168] *See, e.g.*, Pub. Util. Dist. No. 1 of Grays Harbor Cty. Wash. v. IDACORP Inc., 379 F.3d 641, 651 (9th Cir. 2004) ("[W]hile market-based rates may not have historically been the type of rate envisioned by the filed-rate doctrine, we conclude that they do not fall outside of the purview of the doctrine.").

[169] Motion of Energy L. Scholars for Leave To File Brief as Amici Curiae in Support of Petitioner at 8 n.3, Pac. Gas & Elec. Co. v. Fed. Energy Reg. Comm'n, 829 F.App'x 751 (9th Cir. 2020) (Nos. 19-71615, 19-16833 & 19-16834).

[170] Town of Norwood v. New Eng. Power Co., 202 F.3d 408, 419 (1st Cir. 2000) ("[I]f . . . rates were truly left to the market, with no filing requirement or FERC supervision at all, the filed rate doctrine would by its terms no longer operate.").

In sum, outside of bankruptcy, under the filed-rate doctrine, FERC has primary jurisdiction to authorize the unilateral modification of a filed rate—even when it is set by a privately negotiated PPA—upon a finding that the rate is "unjust, unreasonable, unduly discriminatory or preferential."[171] The only wrinkle is that if the rate was set by a privately-negotiated agreement, the stringent *Mobile-Sierra* public-interest standard applies.[172] Under the public interest standard, unilateral modification is even more difficult because it is prohibited unless "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."[173] Applied in the context of a utility debtor's reorganization, the *Mobile-Sierra* doctrine may suggest that the debtor-in-possession should only be allowed to reject the rate, terms, and conditions of their purchase agreements if doing so is necessary for a successful reorganization.

2. The Implications of the Filed-Rate Doctrine

The filed-rate doctrine and the primary jurisdiction doctrine that it emerged from may reinforce the argument that the district courts should exercise their "discretionary abstention" power and grant FERC the initial authority to review issues related to the rejection—and possibly even the confirmation—of the reorganization plan. A student note by Michael Kohler addressing the jurisdictional dispute between FERC and the bankruptcy courts in the wake of the Fifth Circuit's decision in *Mirant* argued that "a court's discretionary abstention under the doctrine of primary jurisdiction would allow FERC the initial authority to approve issues related to rejection but would preserve the district court's ultimate authority over reorganization decisions."[174] Under this theory, FERC could subsequently "decline to

[171] 16 U.S.C. § 824e(a) (2018).

[172] *See supra* Section II.B.2.

[173] Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956).

[174] Kohler, *supra* note 79, at 1979.

exercise primary jurisdiction if rejection and confirmation merely deprive the counterparty of the benefits of its bargain but do not compromise any other regulatory goals."[175] While there is appeal to this approach under long-standing principles of energy and administrative law, it (for the most part) does not reflect the approaches that the district and circuit courts have taken to the PPA rejection issue since Kohler's note was published in 2005.

B. Rejecting Wholesale Power Rates in Bankruptcy

FERC clearly has primary jurisdiction when a utility seeks to modify or abrogate a wholesale power rate outside of bankruptcy.[176] But in the bankruptcy context, most of the federal and bankruptcy courts that have considered the issue have held that the bankruptcy court has exclusive jurisdiction to approve debtors' rejections of wholesale PPAs.[177] On appeal in the FirstEnergy bankruptcy, the Sixth Circuit held (in line with the Fifth Circuit in *Mirant*)[178] that the bankruptcy court

[175] *Id.*

[176] *See supra* note 15 and accompanying text.

[177] Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 523 (5th Cir. 2004) (holding that the bankruptcy court can grant injunctive relief to restrain FERC); Pac. Gas & Elec. Co. v. Fed. Energy Regul. Comm'n (*In re* PG&E Corp.), No. 19-03003, 2019 WL 2477433, at *18 (Bankr. N.D. Cal. June 12, 2019) (similar), *vacated*, 829 F. App'x 751 (9th Cir. 2020); FirstEnergy Sols. Corp. v. Fed Energy Regul. Comm'n (*In re* FirstEnergy Sols. Corp.), No. 18-50757, 2018 WL 2315916, at *17 (Bankr. N.D. Ohio May 18, 2018) (similar), *aff'd in part, rev'd in part and remanded*, 945 F.3d 431 (6th Cir. 2019); *cf. also* Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 446 (6th Cir. 2019) (holding that bankruptcy courts and FERC have concurrent jurisdiction, but also that bankruptcy courts still have "primary or superior" jurisdiction). *But see* Cal. Dep't of Water Res. v. Calpine Corp. (*In re* Calpine Corp.), 337 B.R. 27, 30 (S.D.N.Y. 2006) (holding that FERC has exclusive jurisdiction).

[178] Mirant Corporation (Mirant) filed for bankruptcy in the summer of 2003 in the Northern District of Texas. Kohler, *supra* note 79, at 1955. As the purchaser, Mirant sought to reject certain overpriced power purchase agreements. *Id.* at 1955–56. Providing one of the key appellate precedents on the rejection issue, the Fifth Circuit held that the bankruptcy courts have exclusive jurisdiction to approve the rejection of such agreements. *In re Mirant Corp.*, 378 F.3d at 519–20.

has jurisdiction to approve the rejections, albeit under a stricter standard than the usual, relaxed business judgment standard.[179] On the other hand, in the 2006 bankruptcy of Calpine Corporation, the Southern District of New York held in favor of FERC's jurisdiction.[180] In *PG&E*, the Ninth Circuit never decided the jurisdiction issue on its merits.[181]

1. *Bildisco* and the Argument Against Creating Doctrinal Exceptions to the Debtor's Rejection Power

Section 365 of the Bankruptcy Code allows the rejection of *any* executory contract, subject to limited exceptions.[182] From a textual perspective, it is evident that Congress did not intend to create an exception to § 365 for PPAs. Unlike § 362 and § 1129, § 365 does not contain a provision to accommodate the interests of the regulatory agency.[183] Section 362(b)(4) contains a regulatory exception to the automatic stay.[184] Section 1129(a)(6) conditions plan confirmation on regulatory approval of any rate changes.[185]

In addition to the other provisions that specifically contemplate agency action, the Bankruptcy Code also

[179] *In re FirstEnergy Sols. Corp.*, 945 F.3d at 452–54 (concluding that the bankruptcy court must apply a more stringent standard when deciding whether to authorize the rejection of a power purchase agreement); *accord In re Mirant Corp.*, 378 F.3d at 522, 525 (holding that the FPA does not preempt a court's jurisdiction to authorize the rejection of a power purchase agreement but also that the court should consider applying a more rigorous standard that takes into account the public interest).

[180] *In re Calpine Corp.*, 337 B.R. at 36 ("The Court holds that it lacks jurisdiction to authorize the rejection of the Power Agreements because doing so would directly interfere with FERC's jurisdiction over the rates, terms, conditions, and duration of wholesale energy contracts.").

[181] *See supra* notes text accompanying notes 143–145.

[182] *See* 11 U.S.C. § 365 (2018).

[183] *See id.*

[184] *Id.* § 362(b)(4).

[185] *Id.* § 1129(a)(6) (permitting the confirmation of a reorganization plan only when "[a]ny 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").

contains numerous "specific limitations and exceptions to the § 365(a) general rejection authority."[186] These exceptions include provisions prohibiting rejection of certain obligations imposed by regulatory authorities.[187] One particularly salient exception is § 1113, which sets forth requirements for the assumption or rejection of collective bargaining agreements.[188] The exception for collective-bargaining agreements was enacted by Congress in direct response to the Supreme Court's first interpretation of the newly revised Bankruptcy Code in *NLRB v. Bildisco & Bildisco*.[189] Section 1113 overturned *Bildisco*.[190]

In *Bildisco*, the Court held that there was no exception to the debtor's rejection power for collective-bargaining agreements governed by the National Labor Relations Act (NLRA), citing the "statutory design of § 365(a) and" the exception in § 1167.[191] The Court reasoned that Congress purposely drafted § 365(a) to limit the debtor-in-possession's power of rejection in certain circumstances—"[y]et none of the express limitations on the debtor-in-possession's general power under § 365(a) apply to collective-bargaining agreements."[192] In particular, § 1167 expressly exempts

[186] Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 521 (5th Cir. 2004) (identifying 11 U.S.C. §§ 365(d)(5), 365(o), 1113, 1169).

[187] *See, e.g.*, 11 U.S.C. § 365(o) (requiring a trustee to assume "any commitment by the debtor to a Federal depository institutions regulatory agency . . . to maintain the capital of an insured depository institution" and granting priority to any claim of a subsequent breach of this obligation); *id.* § 1113 (setting forth requirements for the assumption or rejection of collective bargaining agreements); *id.* § 1169 (providing special treatment for the rejection of a railroad lease); *id.* § 365(d)(5) (describing the special conditions for deemed rejection of an air carrier's unexpired lease of an airport terminal or aircraft gate); *cf. also id.* § 1110 (setting forth special requirements for the assumption of executory contracts relating to aircraft equipment and vessels).

[188] *Id.* § 1113.

[189] RONALD J. MANN, BANKRUPTCY AND THE U.S. SUPREME COURT 120–21 (2017).

[190] *Id.* at 121; 11 U.S.C. § 1113(c).

[191] NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522 (1984).

[192] *Id.*

collective-bargaining agreements subject to the Railway Labor Act, but (at the time) there was no similar exemption for agreements subject to the NLRA.[193] From this, the Court concluded that "Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA."[194] This reasoning in *Bildisco* clearly influenced the Fifth Circuit's decision in *Mirant*.[195]

The implication of the *Bildisco* decision (and the subsequent enactment of § 1113 which effectively overturned the decision) is that if FERC desires an exception to the rejection power, it must look to Congress to amend the Bankruptcy Code. The Fifth Circuit reasoned along these lines in *Mirant*, arguing:

> The fact that Congress did not create an exception from § 365(a) rejection for contracts subject to FERC regulation does not appear to be an accident or oversight. It is clear from other Bankruptcy Code provisions that Congress was aware that a debtor's bankruptcy reorganization could implicate the authority of a regulatory rate-setting commission with jurisdiction over that debtor.[196]

The *Bildisco* reasoning is not, however, perfectly applicable to the rejection of PPAs. In *Calpine*, the Southern District of New York rejected *Mirant*'s interpretation of

[193] 11 U.S.C. § 1167.

[194] *Bildisco*, 465 U.S. at 522–23.

[195] Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 521 (5th Cir. 2004) ("The structure of the Bankruptcy Code . . . indicates that Congress did not intend to limit the ability of utility companies to reject an executory power contract. Section 365, along with other Bankruptcy Code sections, details a number of specific limitations on and exceptions to the § 365(a) general rejection authority, including exceptions prohibiting rejection of certain obligations imposed by regulatory authorities. The Bankruptcy Code does not, however, include an exception prohibiting rejection of, or providing other special treatment for, wholesale electric contracts subject to FERC jurisdiction." (citation omitted)).

[196] *Id.* at 521.

Bildisco and the Bankruptcy Code.[197] In reaching this conclusion, the court noted that, unlike with collective-bargaining agreements, the Bankruptcy Code does not contemplate PPAs whatsoever.[198] There is no exception equivalent to § 1167—i.e., one that limits the rejection of PPAs governed by one statute but not those governed by the FPA.[199] Rather, PPAs are not mentioned in any provision of the Bankruptcy Code.

The Southern District of New York went further, however, disputing the conventional interpretation of the *Bildisco* holding.[200] The court described *Bildisco* as holding

> *that where there is no conflict with a federal regulatory regime*, a bankruptcy court should be allowed the fullest expression of its power and jurisdiction, including the power to authorize rejection, *but where there is conflict*, the power of the bankruptcy court must yield to that of the federal agency.[201]

According to the court, in electric utility bankruptcies the rejection power directly conflicts with the FPA, so *Bildisco* can be distinguished, and the bankruptcy court must yield to FERC.[202]

In sum, the courts are split on both their interpretations of the text of the Bankruptcy Code and the applicability of *Bildisco*. While the Fifth Circuit relied heavily on *Bildisco* and reasoned from the absence of an exception to the debtor's § 365 rejection power for PPAs, the Southern District of New York concluded that other sections of the Code indicate that Congress contemplated a role for agencies during an electric utility bankruptcy. In *FirstEnergy*, the Sixth Circuit did not

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[197] Cal. Dep't of Water Res. v. Calpine Corp. (*In re* Calpine Corp.), 337 B.R. 27, 34 (S.D.N.Y. 2006).

[198] *See id.* In *Bildisco*, the Court leaned on the existence of § 1167, which "expressly exempts collective-bargaining agreements subject to the Railway Labor Act." 465 U.S. at 522.

[199] *See In re Calpine Corp.*, 337 B.R. at 34.

[200] *Id.*

[201] *Id.* (emphasis added).

[202] *Id.* at 35–36.

discuss *Bildisco*, except when considering whether a heightened rejection standard was appropriate.[203]

2. Applying a Heightened Rejection Standard to PPAs

As discussed earlier, the bankruptcy court typically applies the business judgment standard when deciding whether to approve a rejection.[204] When considering whether to allow the rejection of PPAs, however, the circuit courts have consistently held that a heightened standard ought to apply.[205]

Applying a heightened standard to the rejection of special executory contracts is not unprecedented. In *Bildisco*, the Court held that "a somewhat stricter standard" than the business judgment standard should govern the bankruptcy court's decision to allow rejection of a collective-bargaining agreement.[206] Thus, when deciding whether to allow the rejection of a collective-bargaining agreement under *Bildisco*, the bankruptcy court balanced the equities, considering "the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees."[207] In other words, instead of deferring broadly to the debtor's judgment, the court needed to determine that the equities balanced in favor of rejection.

Following *Bildisco*, the Fifth and Sixth Circuits carved out a similar exception for the rejection of PPAs. In *Mirant*, the Fifth Circuit found that the business judgment standard was inappropriate "because it would not account for the public interest inherent in the transmission and sale of

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[203] Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 452–53 (6th Cir. 2019).

[204] *See supra* notes 23–24 and accompanying text.

[205] *See* Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 524 (5th Cir. 2004); *In re FirstEnergy Sols. Corp.*, 945 F.3d at 454.

[206] NLRB v. Bildisco & Bildisco, 465 U.S. 513, 514, 524 (1984).

[207] *Id.* at 527.

electricity."[208] The court suggested that the district court should apply a more rigorous standard, like the one the courts apply to collective-bargaining agreements, allowing rejection only if the debtor can show that the PPA "burdens the estate, [and] that, after careful scrutiny, the equities balance in favor of rejecting" it.[209]

Kohler maintained that this heightened standard could not be the same as the heightened *Mobile-Sierra* public interest standard: "Imposition of the orthodox *Mobile-Sierra* 'public interest' standard would seem to violate *Bildisco* because this demanding standard would almost invariably frustrate rejection."[210] But the application of a heightened standard akin to the one that the Supreme Court outlined in *Bildisco* would not be without precedent, and the Sixth Circuit followed the Fifth Circuit in adopting it.

In *FirstEnergy*, the Sixth Circuit agreed that the business judgment standard prevented the bankruptcy court from adequately considering the public interest implicated by the FPA and the harms that could result from rejection.[211] Citing *Mirant*, the majority concluded that the bankruptcy court must consider "the impact of the rejection of these contracts on the public interest—including the consequential impact on consumers and any tangential contract provisions concerning such things as decommissioning, environmental management, and future pension obligations—to ensure that the 'equities balance in favor of rejecting the contracts.'"[212] Judge Griffin concurred with the majority's holding on this point.[213] Thus, all the circuit judges who have considered whether the business judgment rule is appropriate have

[208] *In re Mirant Corp.*, 378 F.3d at 525.

[209] *Id.* at 525 (internal quotation marks omitted) (quoting *Bildisco*, 465 U.S. at 526–27).

[210] Kohler, *supra* note 79, at 1983 n.146.

[211] Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 454 (6th Cir. 2019) ("We conclude that an adjusted standard best accommodates the concurrent jurisdiction between, and separate interests of, the Bankruptcy Code (court) and the FPA (FERC).").

[212] *Id.* (footnote omitted) (quoting *In re Mirant Corp.*, 378 F.3d at 525).

[213] *Id.* at 455 (Griffin, J., concurring in part and dissenting in part).

agreed that the bankruptcy courts should apply a heightened standard instead.

3. Reconciling *Mirant* and *Calpine*

Despite the judges' universal agreement that a heightened standard should apply when debtors seek to reject PPAs, as explained in Section IV.B.1, there is an apparent conflict between the Fifth Circuit's holding in *Mirant* (granting the bankruptcy court exclusive jurisdiction)[214] and the Southern District of New York's decision in *Calpine* (granting FERC exclusive jurisdiction).[215] But in *Calpine* and *FirstEnergy*, the Southern District of New York and the Sixth Circuit, respectively, argued that it may be possible to reconcile the *Mirant* and *Calpine* opinions.[216]

Although the Southern District of New York recognized that its decision was in "obvious conflict" with *Mirant*, it also maintained that even if it "appl[ied] *Mirant* faithfully," it still could have found that FERC had exclusive jurisdiction.[217] The court pointed to language in the Fifth Circuit's decision distinguishing a situation in which the debtor claims that it cannot take the supplier's electricity regardless of price because it has no use for the power (like in *Mirant* and *FirstEnergy*) from a situation in which the debtor claims that it can fulfill its purchase obligation, just at a lower rate (like in *Calpine*).[218] The debtor's reason for rejection is significant because a district court could take jurisdiction over the former type of breach outside of bankruptcy.[219] On the other hand, if the electric utility sought to breach its PPA because it wanted a lower or higher market rate, under the filed-rate doctrine, the courts must defer to FERC.[220] According to the Southern

[214] *In re Mirant Corp.*, 378 F.3d at 521–22.

[215] Cal. Dep't of Water Res. v. Calpine Corp. (*In re* Calpine Corp.), 337 B.R. 27, 37 ("[W]hat FERC giveth, only FERC may taketh away.").

[216] *Id.*; *In re FirstEnergy Sols. Corp.*, 945 F.3d at 450.

[217] *In re Calpine Corp.*, 337 B.R. at 37.

[218] *See id.* at 37–38.

[219] *See In re Mirant Corp.*, 378 F.3d at 520.

[220] *See* Gulf States Utils. Co. v. Ala. Power Co., 824 F.2d 1465, 1472–74 (5th Cir. 1987).

District of New York, the Fifth Circuit did not think that the outcome should differ in the bankruptcy context.[221] Since Calpine was "ready and willing" to supply power at higher, competitive market prices, the Southern District of New York thought that even the Fifth Circuit would agree that rejection would constitute a collateral attack on the filed rate.[222]

In *FirstEnergy*, the Sixth Circuit identified this possible common ground between *Calpine* and *Mirant* and from it concluded that *FirstEnergy* was more similar to *Mirant*.[223] The Sixth Circuit explained that even if this possible reconciliation is derived from dicta in *Mirant* and *Calpine*, it "self-distinguishes" the two cases, and since FirstEnergy did "not want the energy at all," it was more like Mirant.[224]

Thus, an electric utility debtor's intent matters when a court is determining whether the bankruptcy court can allow PPA rejection without FERC's consent: If the debtor wants to buy (or sell) the energy at lower (or higher) market prices, then, like in *Calpine*, FERC may have a say. But if the debtor does not want the energy at all, then, like in *Mirant* and *FirstEnergy*, the bankruptcy court may have exclusive jurisdiction.

Even assuming the Fifth and Sixth Circuits were right that the bankruptcy courts should have had exclusive or superior jurisdiction to allow rejection,[225] it is still unclear whether the electric utility debtors must seek FERC's permission to stop complying with the publicly filed rates after the bankruptcy courts allows rejection.[226] The next Part argues that no matter where jurisdiction lies at the rejection stage, debtors should

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[221] *In re Calpine Corp.*, 337 B.R. at 38.

[222] *Id.* (internal quotation marks omitted).

[223] *See* Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 450 (6th Cir. 2019).

[224] *Id.*

[225] The Fifth and Sixth Circuits agreed that this was true, at least when the utility has no need for the electricity, rather than when it is willing to accept power at competitive market prices. *See supra* notes 178–179 and accompanying text.

[226] Rates are filed with FERC even if the parties negotiated the agreements privately pursuant to the supplier's market-based tariff. *See supra* text accompanying notes 166–168.

be required to seek FERC's approval to get out of the regulatory obligations associated with its PPAs before the bankruptcy court can approve the reorganization plan.

V. REJECTION SHOULD NOT RELIEVE THE DEBTOR OF ITS REGULATORY RATE OBLIGATIONS

Part IV found that all the circuit judges who have heard this issue agree that when electric utility debtors seek to reject PPAs, the bankruptcy court must apply a heightened rejection standard that accounts for the public interest,[227] and it may be possible to reconcile the Fifth Circuit's and Southern District of New York's conflict opinions. This Part argues that, even if an electric utility debtor is allowed to reject PPAs in bankruptcy, they must continue to comply with the filed tariffs (which are public obligations that exist separate from the electric utility's PPA obligations) until FERC says otherwise. Moreover, this conclusion may be consistent with § 1129(a)(6) of the Bankruptcy Code, which requires that any change to filed rates in a Chapter 11 reorganization plan be contingent on the regulator's approval.[228] At the very least, the limitations imposed on bankruptcy courts by Article III and principles derived from the Supreme Court's bankruptcy doctrines suggest that the district court should withdraw its reference.

[227] *See In re FirstEnergy Sols. Corp.*, 945 F.3d at 446 ("The bankruptcy court has jurisdiction to decide whether [FirstEnergy], as a Chapter 11 debtor-in-possession, may reject the ICPA and PPA contracts, meaning that [FirstEnergy] can reject the contracts subject to proper bankruptcy court approval and FERC cannot independently prevent it."); Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 522 (5th Cir. 2004) ("[T]here is nothing within the Bankruptcy Code itself that limits a public utility's ability to choose to reject an executory contract subject to FERC regulation as part of its reorganization process.").

[228] 11 U.S.C. § 1129(a)(6) (2018).

A. The Debtor-in-Possession Must Comply with Its Public Rate Obligation

Even if electric utility debtors can reject PPAs through the § 365 process, this should not release the reorganized utility from its pre-existing public rate obligations without FERC's consent. PPAs are commonplace in the modern system of market-based energy pricing, but they have not completely replaced the traditional pricing system, which requires FERC to set the rates.[229] While energy suppliers and purchasers often negotiate PPAs privately, they still must file the associated tariffs with FERC.[230] And although PPAs may be executory contracts that are not exempt from § 365, the filed tariffs are more akin to regulations, and, per the FPA, electric utilities can only modify or abrogate the filed tariffs with FERC's consent.[231]

Electric utilities should not be relieved of their public rate obligations in bankruptcy. As the Southern District of New York noted in *Calpine*, once a rate is filed with FERC, the rate has the force of law.[232] Outside of the bankruptcy context, the First and Eighth Circuits have gone so far as to say that, once filed with FERC, the rate is to be treated as though it is a statute.[233] "[T]he duty to perform under those contracts may be required, 'not from the private law of contract,' but" from the FPA and FERC's regulations.[234] In other words, the electric utility's public rate obligations exist separate from its contractual obligations.[235]

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[229] *See supra* Section II.B.2 (describing the transition to the market-based pricing system).

[230] *See supra* Section II.B.2.

[231] 16 U.S.C. § 824d (2018).

[232] Cal. Dep't of Water Res. v. Calpine Corp. (*In re* Calpine Corp.), 337 B.R. 27, 33 (S.D.N.Y. 2006) (citing California *ex rel.* Lockyer v. Dynegy, Inc., 375 F.3d 831, 839 (9th Cir. 2004)).

[233] *See supra* note 149.

[234] *In re Calpine Corp.*, 337 B.R. at 33 (citing Pa. Water & Power Co. v. Fed. Power Comm'n, 343 U.S. 414, 422 (1952)).

[235] *See* Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 456 (6th Cir. 2019) (Griffin, J., concurring in part and dissenting in part) ("Once filed with FERC, a 'filed

Judge Griffin emphasized this point in his partial dissent in *FirstEnergy*, arguing that "[a] filed rate imposes public-law obligations, like a federal regulation does, and a bankruptcy court 'could no more reject an actual regulation than it could reject the Constitution.'"[236] The FPA was enacted because the *Attleboro* Supreme Court case left wholesale markets unregulated.[237] The federal government needed to act, and so it did by enacting the FPA, believing "that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest."[238] Electric utilities should not be able to take advantage of bankruptcy in order to evade these fundamental principles of energy law.

There are good reasons to distinguish between the electric utility's private contractual obligations and its public rate obligations. It is one thing for the debtor to drag creditors down with it when the creditors were foolish enough to transact with the debtor in the marketplace. It's another thing entirely for a bankruptcy court to call a rate "unfair" or "not in the public interest" and allow the debtor to get out of its public rate obligations simply because the reorganized utility prefers to purchase energy at the current market rate. The *Calpine* and *FirstEnergy* courts seemed to agree with this when they reasoned that FERC should have a say when the debtor wants to reject its PPAs in order to obtain or sell the energy at market prices.[239]

rate' becomes an obligation external to the contract, with the independent force of law.").

[236] *Id.* at 458 (citing FirstEnergy Sols. Corp. v. Fed. Energy Regul. Comm'n (*In re* FirstEnergy Sols. Corp.), No. 18-50757, 2018 WL 2315916, at *15 (Bankr. N.D. Ohio May 18, 2018), *aff'd in part, rev'd in part and remanded*, 945 F.3d 431)).

[237] *See supra* note 31.

[238] 16 U.S.C. § 824(a) (2018).

[239] *See supra* Section IV.B.3.

B. The Bankruptcy Code Requires FERC To Approve Any Rate Changes

By its terms, § 1129(a)(6) of the Bankruptcy Code provides that any rate change is contingent on the regulator's approval:

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> . . . .
>
> (6) 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.[240]

It would be inconsistent with this section of the Bankruptcy Code for rejection to result in a modification or abrogation of the debtor's public rate obligations without FERC's approval.

But § 1129(a)(6) has not received much attention from the courts, perhaps because its language "falls short of articulating a relationship between the bankruptcy court and regulatory authority."[241] In addition, in electric utility bankruptcies, the courts have resolved the rejection issue in ways that render § 1129(a)(6) inapplicable later in the bankruptcy. When courts hold that no rate change results from rejection, § 1129(a)(6) does not apply. In *FirstEnergy*, for example, the bankruptcy court held that the filed rate was given full effect when determining the breach of contract damages resulting from the rejection.[242] FERC objected to the confirmation of FirstEnergy's plan, citing § 1129(a)(6) and arguing that "the Plan d[id] not contain any statement that the Debtors have obtained . . . approval for any rate change, nor that any rate change is expressly conditioned on such

[240] 11 U.S.C. § 1129(a)(6) (2018).

[241] Eisenberg, *supra* note 10, at 12–13 ("Indeed, the provision seems to leave to the bankruptcy court's discretion whether to condition plan approval upon subsequent regulatory approval or to require that regulatory approval be obtained prior to bankruptcy court approval.").

[242] *In re FirstEnergy Sols. Corp.*, 2018 WL 2315916, at *17.

approval."[243] But the bankruptcy court held that § 1129(a)(6) did not apply, because "[t]he Plan d[id] not contain any rate changes for the Debtors that would require approval of any governmental regulatory commission," leaving FERC with no opportunity to enforce its rate authority.[244]

The *FirstEnergy* bankruptcy court's conclusions were flawed, because they ignored that a claim for damages usually will not compensate the counterparties at the filed rate. This is because when the debtor-in-possession or trustee rejects a contract, the counterparty has a prepetition unsecured claim for damages, and unsecured creditors typically only receive "cents on the dollar" at the end of the reorganization.[245] Thus, by the terms of § 1129(a)(6), when the debtor-in-possession proposes to compensate the counterparty at less than the filed rate (as it likely would since counterparties of rejected contracts are unsecured creditors) FERC's approval should be required. And when the debtor-in-possession proposes to terminate the agreement entirely (effectively changing the rate by rendering it zero) FERC's approval should also be required.

C. The Bankruptcy Court's Authority Is Limited by Article III and the Supreme Court's Bankruptcy Doctrine

This Note argues that the bankruptcy courts should require FERC's authorization before allowing the debtor to modify or abrogate its rate obligation upon reorganization. But, at the very least, Article III and the Supreme Court's existing doctrine confining the jurisdiction of the bankruptcy

[243] Objection of Fed. Energy Regul. Comm'n to Confirmation of Sixth Amended Joint Plan of Reorganization of FirstEnergy Sols. Corp., et al. Pursuant to Chapter 11 of the Bankr. Code at 3, *In re FirstEnergy Sols. Corp.*, 2018 WL 2315916.

[244] Motion of Fed. Energy Regul. Comm'n To Certify Confirmation Ord. for Direct Appeal to the U.S. Ct. of Appeals for the Sixth Cir. at 5, 2018 WL 2315916 (first alteration in original) (internal quotation marks omitted).

[245] Mission Prod. Holdings v. Tempnology, LLC, 139 S. Ct. 1652, 1658 (2019).

courts demand that, from the rejection stage on, the district court should withdraw the reference of the bankruptcy court and assign the initial resolution of proposed modifications to FERC.[246]

1. Constitutional Limits on the Authority of the Bankruptcy Court To Decide Non-Bankruptcy Issues

The role for FERC in electric utility bankruptcies is complicated by the fact that bankruptcy courts are not Article III courts.[247] FERC, when acting as an adjudicator, also is not an Article III tribunal.[248] And although bankruptcy and FERC tribunals are housed in different branches, they are both creatures of Congress. Both the bankruptcy courts and FERC are, accordingly, confined to doing what is allowed by statute.[249] It does not make sense to allow one non-Article III tribunal to strip the jurisdiction of another non-Article III tribunal where Congress does not explicitly authorize it. Thus, bankruptcy courts should not be able to "stop" FERC from exercising its jurisdiction over wholesale power rates in the public interest,[250] particularly when there is no indication that this was Congress's intent.

[246] *See* Kohler, *supra* note 79, at 1949 (suggesting that abstention may solve the conflict between bankruptcy courts and FERC).

[247] *See* Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, with and Without Litigation Consent*, 33 EMORY BANKR. DEVS. J. 11, 13 (2016).

[248] FERC is an independent agency created by the FPA. *See What FERC Does*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/about/what-ferc/what-ferc-does [https://perma.cc/XDU9-F3S7] (last visited Apr. 26, 2021); 16 U.S.C. § 792 (2018) ("A commission is created and established to be known as the Federal Power Commission[.]"). It answers to Congress, and "[c]ommissioners and senior staff are routinely called to testify before various committees." *See Frequently Asked Questions (FAQs) About FERC*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/about/what-ferc/frequently-asked-questions-faqs/frequently-asked-questions-faqs-about-ferc [https://perma.cc/YD2U-9RDM] (last visited Apr. 26, 2021).

[249] *See* STRAUSS ET AL., *supra* note 157 , at 790.

[250] The bankruptcy judge in the PG&E case declared that "FERC must be stopped." *See* PG&E Corp. v. Fed. Energy Regul. Comm'n (*In re* PG&E Corp.), 603 B.R. 471, 476 (Bankr. N.D. Cal. 2019), *vacated sub nom.* Pac.

To be clear, bankruptcy courts also are not agencies. Agency interpretations of the law are granted broad deference by the federal courts.[251] In contrast, bankruptcy court interpretations are subject to de novo review.[252] The legislative history of the Bankruptcy Reform Act of 1978 makes clear that Congress rejected a proposal for a new bankruptcy agency.[253] Although there are two federal agencies that operate in the bankruptcy arena, "[t]he Bankruptcy Code is one of the few major federal civil statutory regimes administered almost exclusively through adjudication in the courts."[254] Indeed, Article III judges have the power to withdraw cases from bankruptcy courts or refuse to refer them to the bankruptcy courts in the first instance.[255]

Gas & Elec. Co. v. Fed. Energy Regul. Comm'n, 829 F. App'x 751 (9th Cir. 2020).

[251] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) ("When a challenge to an agency construction of a statutory provision . . . really centers on the wisdom of the agency's policy . . . the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978))).

[252] Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 429 (2012).

[253] MANN, *supra* note 189, at 26–27.

[254] Pardo & Watts, *supra* note 252, at 386 (footnote omitted). The two federal agencies are the United States Trustee (UST) and Bankruptcy Administration (BA) Programs. *See id.* at 394–99. The duties of the UST and BA programs "largely mirror each other," except that the BA Program operates in Alabama and North Carolina, and the UST Program operates everywhere else. *Id.* at 395–97. "[M]any of these duties involve reporting or monitoring functions." *Id.* at 397. In addition, "both USTs and BAs [can] raise any issue and . . . appear and be heard in any case or proceeding under the Bankruptcy Code." *Id.* (citing 11 U.S.C. § 307 (2006)).

[255] *See* 28 U.S.C. § 157(a) (2018) ("Each district court *may* provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." (emphasis added)); *id.* § 157(d) ("The district court may withdraw, in whole or in part, any case or proceeding

Withdrawal is mandatory "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce."[256]

In *Mirant* and *Calpine*, the district courts withdrew the reference of the debtors' motions to reject the FERC-regulated PPAs.[257] Kohler also argued "that district courts should take on the task of supervising the relationship between bankruptcy courts and other regulatory agencies through their discretionary authority to withdraw."[258]

2. Doctrinal Limits on the Bankruptcy Court's Power

The Supreme Court has consistently reaffirmed the limitations on the bankruptcy courts by confining their authority doctrinally. Professors Douglas Baird and Anthony J. Casey recently argued that three principal doctrinal strands of bankruptcy law limit the bankruptcy court's authority.[259] The first strand (coming from *Butner v. United States*)[260] "centers on the idea that the bankruptcy forum must vindicate nonbankruptcy rights";[261] the second "focuses on the limits of bankruptcy" judges, who "must . . . limit themselves to deciding issues central to the administration of the bankruptcy process";[262] and the third suggests that the

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referred under this section, on its own motion or on timely motion of any party, for cause shown.").

[256] *Id.* § 157(d).

[257] Cal Dep't of Water Res. v. Calpine Corp. (*In re* Calpine Corp.), 337 B.R. 27, 31 (S.D.N.Y. 2006); Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 516 (5th Cir. 2004).

[258] Kohler, *supra* note 79, at 1949.

[259] *See* Douglas G. Baird & Anthony J. Casey, *Bankruptcy Step Zero*, 2012 SUP. CT. REV. 203, 204–05 (identifying and discussing the three principal strands of the Supreme Court's bankruptcy jurisprudence).

[260] 440 U.S. 48 (1979).

[261] Baird & Casey, *supra* note 259, at 204.

[262] *Id.*; *cf. also* Stern v. Marshall, 564 U.S. 462, 497 (2011) (noting that a bankruptcy judge may only resolve matters "integral to the restructuring of the debtor-creditor relationship." (internal quotation marks omitted) (quoting Langenkamp v. Culp, 498 U.S. 42, 44 (1990))).

"Court reads ambiguous provisions of the Bankruptcy Code . . . [to] narrow the range of decisions over which the bankruptcy judge may exercise her discretion—at least when the exercise of that discretion might impact non-bankruptcy rights."[263]

All three of these strands support a finding that the bankruptcy court should not be able to decide unilaterally whether a reorganized electric utility can be relieved of its public rate obligations. First, *Butner* suggests that a debtor's position should not change merely by happenstance of bankruptcy. Outside of bankruptcy, if an electric utility sought to breach a PPA and refused to pay the filed rate, under section 205 of the FPA and the filed-rate doctrine, the utility would need to seek relief from FERC.[264] The federal courts do not allow unilateral modification or abrogation themselves under the filed-rate doctrine; they defer to FERC's judgment, and FERC would apply the stringent public-interest standard from *Mobile–Sierra*.[265] Thus, according to the *Butner* principle, an electric utility should not have a new right to evade the regulatory rate (and the high standard for modification or abrogation) merely because it has access to the rejection power by "happenstance of bankruptcy."[266]

Second, the bankruptcy court should limit itself to final judgment on the issues in front of it that are central to the administration of the bankruptcy process. While renegotiating rates may be a key facet of the utility's reorganization, it will also certainly affect energy markets in ways that directly implicate FERC's jurisdiction. A core tenet of energy policy is contractual stability, which is why outside of bankruptcy FERC applies the stringent public-interest standard when a party seeks to unilaterally modify or

[263] Baird & Casey, *supra* note 259, at 205 (citing RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012)).

[264] *See* 16 U.S.C. § 824d(f) (2018).

[265] As discussed *supra* Section II.B.2, the *Mobile–Sierra* doctrine established a foundational energy law principle, limiting FERC's ability to allow unilateral modification of PPAs.

[266] Butner v. United States, 440 U.S. 48, 55 (1979) (internal quotation marks omitted) (quoting Lewis v. Mfrs. Nat'l Bank of Detroit, 364 U.S. 603, 609 (1961)).

abrogate a PPA.[267] It is fairly obvious that the bankruptcy court would need to consider energy law when deciding whether to allow the debtor-in-possession to reject PPAs, particularly when it applies the heightened standard of rejection that requires the bankruptcy court to consider the public interest.[268] And as Kohler argued in his note, FERC is better suited to "address whether and to what extent rejection will compromise existing open-access tariffs or existing market-based ratemaking authorizations."[269] Since the bankruptcy court is only charged with interpreting bankruptcy law, it cannot allow the electric utility debtor to evade FERC's regulatory authority in contravention of the FPA.

Third, to the extent that the Bankruptcy Code is ambiguous regarding the effect of rejection on regulatory rates, the Supreme Court will likely narrow the discretion of the bankruptcy judge. In *RadLAX*, one of the sources of this third doctrinal strain, the Court established an "avoidance presumption" that limits the bankruptcy court's power "to alter nonbankruptcy rights or adjudicate them."[270] "If Congress intends to change . . . nonbankruptcy law, it does so explicitly."[271] Allowing utilities to change public rates unilaterally, without FERC's approval, would give the bankruptcy court a unique power—a power unavailable to the federal courts—to alter the federal statutory and regulatory ratemaking scheme.

VI. CONCLUSION

The opportunity to reject burdensome long-term agreements renders bankruptcy an increasingly attractive

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[267] *See* MISO Transmission Owners v. Fed. Energy Regul. Comm'n, 819 F.3d 329, 335 (7th Cir. 2016).

[268] All the circuit judges who have decided this issue agree that a more stringent standard than the business judgment standard is appropriate when deciding whether to allow a utility debtor to reject a PPA. *See supra* Section IV.B.2.

[269] Kohler, *supra* note 79, at 1988.

[270] Baird & Casey, *supra* note 259, at 226.

[271] *Id.*

option for financially distressed electric utilities.[272] But when the bankruptcy courts and FERC collide over an electric utility debtor's attempt to reject PPAs, the statutory scheme and the doctrine is murky.

This Note surveys the doctrinal landscape after the recent *FirstEnergy* and *PG&E* litigation. All the circuit judges who reached the jurisdiction question have agreed that a heightened rejection standard should apply,[273] but there is disagreement about who should apply it. In the Fifth Circuit, bankruptcy courts have jurisdiction to decide without FERC's involvement.[274] In the Sixth Circuit, FERC and the bankruptcy courts have concurrent jurisdiction, but the bankruptcy courts still occupy a "position . . . primary or superior to FERC's position."[275] The Ninth Circuit did not have a chance to decide on the jurisdiction question in the recent PG&E case, although it vacated the FERC orders asserting its jurisdiction and the bankruptcy court order asserting its jurisdiction.[276] In the Southern District of New York, however, FERC has exclusive jurisdiction over the contracts.[277] Among the federal courts, the common strain is that the bankruptcy court cannot allow the rejection of PPAs without taking the public interest into account.

This Note also presents arguments for granting FERC the exclusive jurisdiction to decide if a debtor can abrogate or modify its *public* rate obligations upon exiting bankruptcy. In doing so, it pushes against the existing circuit doctrine. But even if the text of the Bankruptcy Code allows a debtor to reject (or essentially breach) its *private* contractual rights and obligations, it should not allow the debtor to shirks its corresponding *public* rate obligations upon confirmation of the

[272] *See supra* Part II.

[273] *See supra* Section IV.B.2.

[274] Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 519 (5th Cir. 2004).

[275] Fed. Energy Regul. Comm'n v. FirstEnergy Sols. Corp. (*In re* FirstEnergy Sols. Corp.), 945 F.3d 431, 446 (6th Cir. 2019).

[276] Pac. Gas & Elec. Co. v. Fed. Energy Regul. Comm'n, 829 F.App'x 751, 755–56 (9th Cir. 2020).

[277] Cal. Dep't of Water Res. v. Calpine Corp. (*In re* Calpine Corp.), 337 B.R. 27, 30 (S.D.N.Y. 2006).

reorganization plan without its regulator's consent. There is also support for this accommodation of FERC in § 1129(a)(6) of the Bankruptcy Code.[278]

To be sure, there are some other ways to accommodate FERC; these could come from either the legislature or the courts. Congress could amend the Bankruptcy Code to create an exception to § 365, as it did with collective bargaining agreements after *Bildisco*.[279] Or, as Kohler argued (and this Note supports as an alternative to the proposed accommodation),[280] litigants who have faith in the district court to decide the issue could argue that withdrawal from the bankruptcy courts is mandatory because non-bankruptcy laws are implicated to a significant degree.[281] Instead, this Note argues that the bankruptcy courts should have jurisdiction over the debtors' private contractual obligations at the rejection stage, but FERC should have exclusive jurisdiction to release the debtors from their public rate obligations before the reorganization plan can be effectuated.

[278] *See supra* Section V.B.
[279] *See supra* Section IV.B.1.
[280] *See supra* Section V.C.
[281] Kohler, *supra* note 79, at 1979.