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FERC's Role in Bankruptcy

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FERC's Role in Bankruptcy

Barrett Block

The Federal Energy Regulatory Commission has authority over wholesale power contracts under the Federal Power Act.^[1] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn1) But the bankruptcy code grants bankruptcy courts the authority to authorize a debtor to accept and reject contracts to implement a successful reorganization.^[2] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn2) So, when a power company is in bankruptcy, who has the authority over its wholesale power contracts, FERC or the bankruptcy court? If the demeanor of the judges at the oral argument for *FirstEnergy Solutions Corp.* is any indicator, the best answer is "who the heck knows?"

Judge Bernice Donald mused that the bankruptcy court should maintain jurisdiction, otherwise FERC "could fundamentally alter the whole ambit of the Bankruptcy Code by frustrating or eliminating the reorganization provision."^[3] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn3) Judge Alice Batchelder seemed to agree, raising the question how rejection of a whole power contract impedes FERC's ability to regulate rates.^[4] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn4)

But Judge Eric Murphy, ostensibly sided with FERC.^[5] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn5) As he explained, § 1129 of the Code requires the approval of "any governmental regulatory commission with jurisdiction."^[6] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn6) Therefore, "Congress made clear it wants FERC to have that power [over wholesale power contracts]."^[7] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn7)

Respectfully, Judge Murphy is wrong. Perhaps he'd be right if FERC were a state and not a federal agency. As is the constant refrain of the bankruptcy code, bankruptcy law is enforceable only to the extent it is consistent with "appropriate nonbankruptcy law."^[8] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn8) But, instead, the question here is between two potentially conflicting federal laws.

As the appellee wrote, "the absence of any rejection-related exception in the Code for wholesale power contracts evinces Congress's clear intent that a bankruptcy court may authorize rejection of such contracts in the ordinary course, i.e., without FERC approval."^[9] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn9) Indeed, though the code makes a carve-out for some types of agreements dependent on regulatory approvals, it does not do so for wholesale power contracts.^[10] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn10) This is fatal for FERC's argument. According to the Supreme Court, § 365(a) "includes all executory contracts except those expressly exempted."^[11] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn11)

More fundamentally, the permitting FERC to have this power would be "at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code."^[12] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftn12) Put simply, § 365 is the Infinity Gauntlet (https://en.wikipedia.org/wiki/The_Infinity_Gauntlet) of Chapter 11, allowing the debtor to reverse time and turn burdensome contracts to dust, it would be disastrous to let FERC hijack it. Otherwise, power company debtors may not be able to get the fresh start promised by the Code. Given that it's unclear how FirstEnergy's rejections of these contracts would raise energy rates for consumers, it makes even less sense for FERC to intervene.

[1] (applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref1) See 16 U.S.C. §§ 824(b)(1), (d) (West 2019).

[2] ([applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref2](#))See 11 U.S.C.A. § 365(West 2019).

[3] ([applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref3](#))Oral Argument, FirstEnergy Solutions Corp. v. et al, No. 18-3787 (6th Cir. June 26, 2019) (http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=recent/06-26-2019%20-%20Wednesday/18-3787%203788%204095%204097%204107%204110%20FirstEnergy%20Solutions%20Corp%20v%20et%20al.mp3&name=18-3787%203788%204095%204097%204107%204110%20FirstEnergy%20Solutions%20Corp%20v%20et%20al)

[4] ([applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref4](#))Id.

[5] ([applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref5](#))Id.

[6] ([applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref6](#))Id.

[7] ([applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref7](#))Id.

[8] ([applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref8](#))See e.g. 11 U.S.C.A. § 106(a)(4) (West 2019).

[9] ([applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref9](#))Brief for Appellee at 20, FirstEnergy Solutions Corp. v. et al, No. 18-3787 (6th Cir. April 29, 2019) (<file:///C:/Users/bblock/Downloads/Appellee%20brief%20FERC.pdf>).

[10] ([applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref10](#))See 11 U.S.C.A. § 365(o) (West 2019).

[11] ([applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref11](#))N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 521, (1984).

[12] ([applewebdata://D74E7844-EA04-435E-B022-2A00BD2269D5#_ftnref12](#))Id. at 525.

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