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INTRODUCTION

In response to an increase in bankruptcy-related litigation, the Federal Energy Regulatory Commission (FERC or Commission) has declared, as of late, that it has concurrent jurisdiction with bankruptcy courts regarding the rejection of filed rates due to its exclusive jurisdiction over such rates, which purportedly "carry the force of law."[1] The bankruptcy courts,[2] district courts,[3] and circuit courts[4] that have addressed whether a FERC regulated filed rate is subject to rejection in bankruptcy have yet to establish a consistent analysis or ruling on the issue. To date, the only United States Courts of Appeals to have definitively ruled on the matter are the Fifth and Sixth circuits, and the two have reached somewhat different results.[5] In 2020, the issue evaded determination in the Ninth Circuit when Pacific Gas & Electric's (PG&E) case on appeal from the

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1. ETC Tiger Pipeline, LLC, 172 FERC ¶ 61,155 at PP 20, 33 (2020) (citing Cal. *ex rel.* Lockyer v. Dynegy, Inc. 375 F.3d 831, 853 (9th Cir. 2004)).

2. *See, e.g.*, *In re* PG&E Corp., 603 B.R. 471 (Bankr. N.D. Cal. 2019), *vacated and appeal dismissed*, PG&E v. FERC, 829 F. App'x 751 (9th Cir. 2020) (holding that the bankruptcy court has exclusive jurisdiction over rejection).

3. *See, e.g.*, *In re* Calpine Corp., 337 B.R. 27, 32 (S.D.N.Y. 2006) (holding that the courts are preempted by the FPA regarding rejection of a filed rate).

4. *See, e.g.*, *In re* FirstEnergy Sols. Corp., 945 F.3d 431 (6th Cir. 2019) (holding that the bankruptcy court has concurrent but superior jurisdiction).

5. *Compare In re* Mirant Corp., 378 F.3d 511 (5th Cir. 2004), *with In re FirstEnergy*, 945 F.3d 431.

bankruptcy court was vacated as moot.[6] In December 2020, Ultra Petroleum Corporation's bankruptcy case was certified for appeal in the Fifth Circuit.[7] Additionally, ETC Tiger Pipeline, LLC petitioned for bankruptcy in the Southern District of Texas in June 2020; that case is still pending.[8] Although the Fifth Circuit has binding precedent on the issue, the court has not addressed the issue since it first arose over 16 years ago.[9] Further, in November 2020, the busiest[10] and presumably most experienced bankruptcy court in the country, the District of Delaware, weighed in on the issue for the first time.[11] Because only two circuits have addressed this issue, and because both circuits based their decisions, in part, on their own circuit precedent, this Comment seeks to resolve the jurisdictional conflict, irrespective of circuit precedent, based on the accompanying statutes of the Federal Power Act (FPA) and Bankruptcy Code, as well as Supreme Court precedent. Specifically, this Comment will examine and weigh the competing arguments concerning whether a filed rate, and its performance thereon, is subject to rejection, and if so, the standard of review to be used in approving such rejection.

Part I of this Comment explores the background information and relevant points of law governing FERC, including the FPA, the filed rate doctrine, and the *Mobile-Sierra* doctrine. Additionally, Part I lays out the relevant portions of the Bankruptcy Code. Part II analyzes the effect of rejection in bankruptcy in light of the Supreme Court's 2019 ruling in *Mission Product Holdings, Inc. v. Tempnology, LLC*.[12] Further, Part II examines relevant jurisprudence interpreting whether rejection results in a mere breach of contract, or rather, whether it results in abrogation or modification of the contract. Part III briefly presents the varying approaches courts have taken when analyzing the issue of whether a filed

6. *PG&E*, 603 B.R. 471, *vacated and appeal dismissed*, *PG&E*, 829 F. App'x 751.

7. *In re* Ultra Petroleum Corp., 621 B.R. 188 (Bankr. S.D. Tex. 2020); Rockies Express Pipeline LLC v. Ultra Res., Inc., No. 4:20-CV2306, 2020 WL 7323356 (5th Cir. Dec. 10, 2020).

8. *See generally* ETC Tiger Pipeline, LLC, 172 FERC ¶ 61,155 at PP 20, 33 (2020).

9. *See generally In re Mirant*, 378 F.3d 511.

10. Zoë Read, *Prominence of Delaware Bankruptcy Court Threatened*, WHYY (Jan. 10, 2018), https://whyy.org/articles/prominence-delaware-bankruptcy-court-threatened/ [https://perma.cc/3RVD-H94R] (explaining that according to a 2017 U.S. District Court of Delaware report, "Delaware's Bankruptcy Court has the highest weighted caseload per judge in the country").

11. *In re* Extraction Oil & Gas, 622 B.R. 608 (Bankr. D. Del. 2020).

12. Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652 (2019).

rate is simply a contract, subject to rejection in bankruptcy, or whether it is a *de jure* regulation, subject only to FERC's jurisdiction. Building on that background, Part IV confronts arguments supporting the belief that a filed rate is a *de jure* regulation that carries the force of law by examining FERC's statutory authority and relevant cases and their applicability in bankruptcy. Assuming bankruptcy courts have either exclusive or concurrent jurisdiction in the rejection of filed rates, Part V addresses the proper standard of review that should apply when determining whether a filed rate should be rejected—namely, whether the business judgment rule or a heightened standard of review applies. Last, Part VI concludes that the power to reject a filed rate is vested exclusively in bankruptcy courts.

I. BACKGROUND

A. The Federal Power Act

In 1935, Congress enacted the Federal Power Act (FPA) for the purpose of protecting and supplying consumers with a plentiful supply of electricity at reasonable prices.[13] Historically, the interstate transmission of electricity was found to be susceptible to natural monopoly[14] and thus subject to abuses of power.[15] Congress found that the sale and transmission of electricity was affected with a public interest and deemed it necessary to protect that public interest through federal regulation.[16] Accordingly, the FPA brought the transmission of wholesale and interstate electricity under the jurisdiction of the Federal Power Commission, the predecessor

13. *In re* Calpine Corp., 337 B.R. 27, 32 (S.D.N.Y. 2006).

14. Albert A. Foer & Diana L. Moss, *Electricity in Transition: Implications for Regulation and Antitrust*, 24 ENERGY L. REV. 89, 92 (2005) ("Natural monopoly means that a single firm can serve the market at the least cost." Essentially, electricity is more price efficient when an integrated public utility controls the generation, transmission, and distribution of electricity. "Therefore, regulating the natural monopolist balances the efficiency garnered by least-cost production . . . against the inefficiency of monopoly pricing.").

15. Morgan Stanley Cap. Grp. Inc., v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 530 (2008); *see* Richard Campbell, *The Federal Power Act (FPA) and Electricity Markets*, CONGRESSIONAL RESEARCH SERVICE, at 2 n.6 (Mar. 10, 2017), https://crsreports.congress.gov/product/pdf/R/R44783 [https://perma.cc/AD4Z-PZT8] (describing the "shady business practices" and noting that three holding companies controlled almost half of the industry prior to the enactment of the FPA).

16. 16 U.S.C. § 824(a); s*ee also* 15 U.S.C. § 717(a) for the corollary statute of the Natural Gas Act.

of the current FERC.[17] FERC's power and regulatory oversight does not extend, however, to matters of intrastate transmission or retail sales.[18]

In addition to FERC's power over interstate and wholesale rates, it also has authority over rules and practices affecting these rates.[19] The Supreme Court has adopted a "common-sense" interpretation of the term "affecting" to mean rules that "directly" affect the wholesale rate.[20] Moreover, FERC has the power to "perform any and all acts" and to issue, amend, or rescind any rules, regulations, or orders that it finds necessary to carry out its power.[21]

To further the objectives of the FPA, § 205 of the FPA requires that all rates and charges in connection with the interstate transmission and wholesale sales of electricity, as well as all rules and regulations affecting such rates and charges, be "just and reasonable."[22] To satisfy this standard, every public utility[23] subject to FERC's jurisdiction is prohibited from granting any undue preference or maintaining any unreasonable difference in rates amongst different localities or classes of service.[24] So that FERC may ensure compliance, every public utility must file its rates and charges with FERC, creating what is known as a filed rate.[25] Further, § 206 of the FPA provides that if FERC, on its own motion or upon complaint, finds that a rate or rule is unlawful because it is "unjust, unreasonable, unduly discriminatory or preferential," FERC shall replace that rate with a lawful one.[26]

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17. *Id.* § 824(b)(1); Ark. La. Gas Co. v. Hall, 453 U.S. 571, 573 n.3 (1981).

18. 16 U.S.C. § 824(a).

19. *Id.* §§ 824(b), 824e(a); *In re* FirstEnergy Sols. Corp., 945 F.3d 431, 444–56 (6th Cir. 2019) (Griffin, J., concurring in part and dissenting in part) (quoting FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 766 (2016)).

20. *In re FirstEnergy*, 945 F.3d at 444–56 (Griffin, J., concurring in part and dissenting in part) (quoting FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 766 (2016)).

21. 16 U.S.C. § 825h; *see also* Boston Edison Co. v. FERC, 856 F.2d 361, 369–70 (1st Cir. 1988) (stating that the "necessary and appropriate" provision is "far from an unbounded grant of remedial authority."); *cf.* 11 U.S.C. § 105(a) (granting bankruptcy courts similar power to carry out the provisions of its authority).

22. 16 U.S.C. § 824d(a).

23. *Id.* § 824(e) defines public utility as any juridical person who owns or operates facilities subject to the jurisdiction of FERC.

24. *Id.* § 824d(b).

25. *Id.* § 824d(c).

26. *Id.* § 824e(a); *see* Morgan Stanley Cap. Grp. Inc., v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 531–32 (2008).

Sections 205 and 206 of the FPA "are in all material respects substantially identical" to §§ 4 and 5 of the Natural Gas Act (NGA).[27] Accordingly, the Supreme Court has a longstanding and "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes."[28] For purposes of this Comment, unless stated otherwise, cases and arguments for the FPA and NGA will likewise be used interchangeably.

1. Filed Rate Doctrine

The determination of just and reasonable rates is an administrative discretionary determination of lawfulness.[29] The statutory mandate that rates be just and reasonable is not defined or further explained in the accompanying statutes of the FPA, and the Supreme Court has noted that just and reasonable rates are "incapable of precise judicial definition."[30] Accordingly, significant deference is afforded to FERC's determination, but FERC must choose a method of determination that best balances the interests of the investor and consumer.[31]

Once a rate is filed, it is the only rate a public utility can charge or collect.[32] Therefore, what a party merely perceives as just and reasonable does not give rise to a justiciable right, meaning a party cannot typically litigate in a court of law that the rate being charged is not just and reasonable.[33] Pursuant to its authority, only FERC can decide whether a

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27. FPC v. Sierra Pac. Power Co., 350 U.S. 348, 353 (1956).

28. Ark. La. Gas Co. v. Hall, 453 U.S. 571, 576 n.7 (1981).

29. *See* Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246 (1950).

30. *Morgan Stanley*, 554 U.S. at 532; *see also Mont.-Dakota Utils. Co.*, 341 U.S. at 251 ("To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission.").

31. *Morgan Stanley*, 554 U.S. at 532.

32. *Ark. La. Gas Co.*, 453 U.S. at 577.

33. *Mont.-Dakota Utils. Co.*, 341 U.S. at 248–52. The parties in this case had contracts filed with the Federal Power Commission. Subsequently, the petitioner sought judicial relief in the form of reparations from what it alleged to be "unreasonably high prices," which were the product of "fraudulent and unlawful" means. According to the petitioner, this violated its "federally conferred right" to just and reasonable rates. The Court concluded that the petitioner could not "claim [a] rate as a legal right that is other than the filed rate," and held that:

> the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or more reasonable one.

Id.

rate is just and reasonable, and the only legal right a party may claim is to the rate that has been filed with FERC.[34] This preserves FERC's primary jurisdiction over rates and ensures that FERC is cognizant of the rates being charged.[35]

This deference, in turn, created the so-called filed rate doctrine, which prohibits courts from interfering with filed rates, and instead preserves FERC's exclusive jurisdiction over the rates, terms, and conditions of interstate or wholesale sales of electricity.[36] Accordingly, because FERC has exclusive jurisdiction over the reasonableness of rates, filed rates may not be collaterally attacked in courts,[37] and courts will not substitute their own judgment for that of FERC.[38] Despite FERC's exclusive jurisdiction over determining whether a rate is just and reasonable, FERC does not have an affirmative duty to actually determine whether a filed rate is just and reasonable.[39] Instead, filed rates are presumed to be just and reasonable, and thus lawful, unless challenged on a party's request or on FERC's own initiative.[40]

34. *Ark. La. Gas Co.*, 453 U.S. at 577.

35. *See id.* at 582 (quoting Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915)) ("This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress . . . .")).

36. *See* Miss. Power & Light v. Miss. *ex rel.* Moore, 487 U.S. 354, 372 (1988); *In re* Mirant Corp., 378 F.3d 511, 518 (5th Cir. 2004); *In re* Calpine Corp., 337 B.R. 27, 32 (S.D.N.Y. 2006).

37. *Miss. Power & Light*, 487 U.S. at 375.

38. *See id.* (citing Mo. Pac. R.R. Co. v. Stroud, 267 U.S. 404, 408 (1925)) ("There 'can be no divided authority over interstate commerce . . . the acts of Congress on that subject are supreme and exclusive.'"); *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968) ("A presumption of validity therefore attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequence.'"); *Mont.-Dakota Utils. Co.*, 341 U.S. at 251–52; *In re Mirant*, 378 F.3d at 518.

39. 18 C.F.R. § 35.4 (2021); *see* Gen. Motors Corp. v. FERC, 613 F.2d 939, 944 (D.C. Cir. 1979); Algonquin Gas Transmission Co., 84 FERC ¶ 61,174 at p. 61,912 (1998).

40. Boston Edison Co. v. FERC, 856 F.2d 361, 369–70 (1st Cir. 1988) (quoting *Mont.-Dakota Utils. Co.*, 341 U.S. at 248–52 (Frankfurter, J., dissenting)).

2. Mobile-Sierra *Doctrine*

As explained in greater detail below, filed rates can arise through a unilateral tariff rate or a bilateral contractual rate. Although FERC determines whether a filed rate is just and reasonable, FERC itself does not establish or predetermine the rates arising out of contracts; the contracts and rates therein are freely negotiated between private parties and then subsequently filed with FERC.[41] The *Mobile-Sierra* doctrine is a judge-made rule based on the Supreme Court's interpretation of the FPA, which maintains that when parties enter into a freely negotiated contract, FERC must presume the contract rate meets the just-and-reasonable requirement of the FPA; that presumption may be overcome only upon a showing of "serious[] harm to public interest."[42] This presumption of reasonableness is premised on the belief that when two sophisticated business parties enter into a contract, the ensuing negotiations will presumptively lead to a just and reasonable price.[43]

This presumption, in conjunction with FERC's inability to modify or abrogate the terms of the filed rate absent serious harm to the public interest, can result in unprofitable outcomes.[44] In fact, FERC can mandate that a party continue performance under the terms of a money-losing contract.[45] In *Federal Power Commission v. Sierra Pacific Power Co.*, the Court noted that although FERC is not at liberty to impose an unprofitable rate, it does not necessarily follow that FERC may rescue a party from its improvident bargain just because a party negotiated for an unprofitable rate. Instead, the "sole concern of the Commission would seem to be 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

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41. *In re* FirstEnergy Sols. Corp., 945 F.3d 431, 444 (6th Cir. 2019).

42. Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008); *see also* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956).

43. *Morgan Stanley*, 554 U.S. at 545 (quoting Verizon Commc'ns Inc. v. FCC, 535 U.S. 467, 479 (2002)).

44. Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577 (1981); *In re* Calpine Corp., 337 B.R. 27, 32 (S.D.N.Y. 2006) (quoting *Sierra*, 350 U.S. at 355 ("FERC may not change a filed rate solely because the rate affords a public utility 'less than a fair return,' because the purpose of the power given to the FERC is the protection of the public interest, as distinguished from the private interests of the utilities . . . .")); *In re FirstEnergy*, 945 F.3d at 444 (citing *Sierra*, 350 U.S. at 355 ("[I]t is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility.")).

45. *In re FirstEnergy*, 945 F.3d at 443–44 (citing *Sierra*, 350 U.S. 348).

discriminatory."[46] Accordingly, absent serious harm to the public, FERC cannot find a freely negotiated contract rate to be unjust or unreasonable.[47]

B. The Bankruptcy Code

When a party to a FERC regulated contract petitions for bankruptcy, a new set of laws comes into play—serving as the catalyst to the jurisdictional turf war at issue.[48] Congress enacted Title 11, Chapter 11 of the United States Code so that failing businesses could restructure and reorganize in an attempt to once again become successful.[49] Congress concluded that it would be better to rehabilitate a business and allow it to continue providing jobs, satisfying debts, and producing profits than to force it into liquidation.[50] Accordingly, Congress granted comprehensive jurisdiction to bankruptcy courts to "deal efficiently and expeditiously with all matters connected with the bankruptcy estate."[51]

Congress enshrined the rules of bankruptcy in what is commonly referred to as the Bankruptcy Code. It is worth noting that Congress expressly gave district courts original and exclusive jurisdiction of all cases under title 11 to avoid constitutional issues.[52] Additionally, the district court has exclusive jurisdiction over all property of the debtor and all property of the estate.[53] However, if any act of Congress grants exclusive jurisdiction to another court concerning a civil proceeding[54]

46. *Id.*; *see also In re* Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968) ("The regulatory system created by the [FPA] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.").

47. *Morgan Stanley*, 554 U.S. at 545–46.

48. *See generally In re* NRG Energy, Inc., No. 03-3754, 2003 WL 21507685 (S.D.N.Y June 30, 2003); *In re* Mirant Corp., 378 F.3d 511 (5th Cir. 2004); *In re Calpine*, 337 B.R. 27; *In re* Boston Generating, LLC, No. 10-6528, 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010); *In re FirstEnergy*, 945 F.3d 431; *In re* PG&E Corp., 603 B.R. 471 (Bankr. N.D. Cal. 2019).

49. *In re Mirant*, 378 F.3d at 517 (citing United States v. Whitting Pools, Inc., 462 U.S. 198, 203 (1983)).

50. *Id.*; *see also* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984); 14 COLLIER ON BANKRUPTCY § 1.01 (16th ed. 2020).

51. *In re Mirant*, 378 F.3d at 517 (citing Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995)).

52. 28 U.S.C. § 1334(a).

53. *Id.* § 1334(e).

54. 14 COLLIER ON BANKRUPTCY § 3.01 (16th ed. 2020):

arising under title 11 or relating to cases under title 11, the district court will have original but not exclusive jurisdiction.[55] This broad grant of authority means that even when Congress has granted another court exclusive jurisdiction on a matter, it nonetheless intended that the matter should first be brought to the bankruptcy court, regardless of any statute to the contrary.[56]

As noted, jurisdiction over bankruptcy cases is granted to the district courts.[57] The words "bankruptcy court" and "bankruptcy judge" appear nowhere in the statute conferring jurisdiction.[58] Instead, bankruptcy courts and judges constitute a "unit" of the district court.[59] Once a petition for bankruptcy is filed with the district court, an estate is automatically created comprising of all property and legal and equitable interests of the debtor[60]—including contracts—which the district court judge will then procedurally refer to the bankruptcy judge.[61] Following a referral, the bankruptcy court, as a unit of the district court, likewise has original and exclusive jurisdiction over the case, as well as the property of the debtor and estate.[62] This conferred authority includes the power to "hear and determine all cases under title 11 and all core proceedings under title 11."[63]

When an individual debtor petitions for bankruptcy, the court appoints a trustee, who must then act as a quasi-agent or fiduciary, making decisions utilizing the business judgment rule on behalf of the debtor.[64] For businesses, the court does not typically appoint a trustee; instead, the

> [A]nything that occurs within a case is a proceeding. Thus, proceeding here is used in the broadest sense, and would encompass what are now called contested matters, adversary proceedings, and plenary actions under bankruptcy law. It also includes any disputes related to administrative matters in a bankruptcy case.

55. 28 U.S.C. § 1334(b). It is unclear whether this jurisdictional split pertains only to courts or to administrative bodies as well. *See In re* Calpine Corp., 337 B.R. 27, 34 n.5 (S.D.N.Y. 2006).

56. 14 COLLIER ON BANKRUPTCY § 3.01 (16th ed. 2020).

57. 28 U.S.C. § 1334(a).

58. *See id.*

59. *Id.* § 151 ("[T]he bankruptcy judges . . . shall constitute a unit of the district court to be known as the bankruptcy court . . . Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding . . . .").

60. 11 U.S.C. § 541; *see also* Mission Prod. Holdings, Inc., v. Tempnology, LLC, 139 S. Ct. 1652, 1658 (2019).

61. 28 U.S.C. § 157.

62. *Id.*

63. *Id.* § 157(b)(1).

64. *See* 11 U.S.C. §§ 1101–1107.

debtor company becomes what is known as a debtor-in-possession (debtor).[65] To further facilitate the process of restructuring and rehabilitation, § 365(a) of the Bankruptcy Code permits the debtor of an estate to assume or reject any executory contracts,[66] subject to the court's approval[67] and the enumerated exceptions.[68] This power promotes the basic purpose of restructuring, thus allowing a debtor to reject an onerous contract that would otherwise prevent successful reorganization.[69] In fact, rejection is "vital" to a successful reorganization.[70] Therefore, § 365(a) allows a debtor to choose whether a particular contract is prudent or beneficial to the estate moving forward.[71] As § 365(g) of the Bankruptcy Code and Supreme Court jurisprudence make clear, rejection of an executory contract results in a breach of contract.[72] The resulting breach is deemed to have occurred at the time of the filing of the petition for bankruptcy, thus giving the nonbreaching party a claim for damages as an unsecured creditor.[73]

Conflicting with this ability to reject any contract, though, are the aforementioned filed rate and *Mobile-Sierra* doctrines. On the one hand, the Bankruptcy Code allows a debtor to reject any executory contract for any economic purpose;[74] yet, on the other hand, courts are prohibited from collaterally attacking a filed rate that is subject to FERC's exclusive jurisdiction.[75] These seemingly conflicting statutes of the Bankruptcy

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65. *Id.* §§ 1101(1), 1107(a).

66. The statute does not define "executory contract," but the courts indicate that the legislative history surrounding the statute suggests that the term means a contract "on which performance is due to some extent on both sides." *In re* Mirant Corp., 378 F.3d 511, 518 n.3 (5th Cir. 2004) (first quoting NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522 n.6 (1984); and then quoting Mission Prod. Holdings, Inc., v. Tempnology, LLC, 139 S. Ct. 1652, 1658 (2019)).

67. 11 U.S.C. § 365(a); *see also Tempnology*, 139 S. Ct. at 1658.

68. *See generally* 11 U.S.C. § 365.

69. *In re Mirant*, 378 F.3d at 518; see *Tempnology*, 139 S. Ct. at 1658 for the proposition that § 365(a) also allows a debtor to assume an executory contract to continue performance and accept the benefits of the counterparty's performance.

70. *Bildisco & Bildisco*, 465 U.S. at 528; *In re Mirant*, 378 F.3d at 518.

71. *Tempnology*, 139 S. Ct. at 1658; *see also In re Mirant*, 378 F.3d at 520 (citing *In re* Topco, Inc., 894 F.2d 727, 741 (5th Cir. 1990) ("In effect, Section 365 allows debtors to pick and choose among their agreements and assume those that benefit their estates and reject those that do not.")).

72. 11 U.S.C. § 365(g); *Tempnology*, 139 S. Ct. 1652.

73. 11 U.S.C. § 365(g).

74. *Tempnology*, 139 S. Ct. at 1663.

75. *See generally* Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246 (1950).

Code and FPA are at the heart of the ongoing jurisdictional turf war between them.[76] Adding further complication to the debate is the courts' duty to give effect to both congressionally enacted sets of statutes.[77]

II. REJECTION OF AN EXECUTORY CONTRACT

As stated, the filed rate doctrine prohibits courts from collaterally attacking a filed rate.[78] Additionally, once a rate has been filed with FERC, FERC itself is not permitted to modify or abrogate that filed rate unless it seriously harms the public interest.[79] Based on these doctrines, FERC asserts that allowing a debtor to reject a filed rate contract in bankruptcy is an impermissible collateral attack on the filed rate and allows a court to do that which FERC itself cannot do.[80] Therefore, the first step in resolving this jurisdictional debate is understanding the effect of rejection in bankruptcy and whether it gives rise to an impermissible collateral attack on a filed rate.

A. Mission Product Holdings, Inc. v. Tempnology, LLC

In 2019, in a resounding majority opinion, the Supreme Court addressed the scope and impact of Bankruptcy Code § 365(a).[81] The case, *Mission Product Holdings, Inc. v. Tempnology, LLC*,[82] dealt with the scope of § 365(a) in the context of a trademark licensing agreement, specifically, Mission's exclusive right to distribute Tempnology's product and Mission's non-exclusive right to use Tempnology's trademark.[83] Ultimately, Tempnology filed for bankruptcy and sought to reject its

76. *See In re* FirstEnergy Sols. Corp., 945 F.3d 431, 442 (6th Cir. 2019); *cf.* Ark. La. Gas Co. v. Hall, 453 U.S. 571, 580 (1981) ("It would surely be inconsistent with [the FPA's] congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.").

77. *In re* Mirant Corp., 378 F.3d 511, 517 (5th Cir. 2004) (quoting Motrin v. Mancari, 417 U.S. 535, 551 (1974)) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.")).

78. Miss. Power & Light v. Miss. *ex rel.* Moore, 487 U.S. 354, 375 (1988).

79. FPC v. Sierra Pac. Power Co., 350 U.S. 348, 354–55 (1956).

80. *See Ark. La. Gas Co.*, 453 U.S. at 580.

81. Mission Prod. Holdings, Inc., v. Tempnology, LLC, 139 S. Ct. 1652 (2019) (8–1 decision).

82. *Id.*

83. *Id.* at 1657.

licensing agreement with Mission.[84] The Court laid out some of the basic rules of bankruptcy, stating that a petition for bankruptcy creates an estate of the debtor's assets and rights; that, in the context of a business, the estate is administered by the debtor; and that § 365(a) permits a debtor to assume or reject any executory contract based on whether the contract is a "good deal" moving forward, and if it is not, the debtor can refuse continued performance of its duties under such contract.[85] Moreover, the Court explained that § 365(g) declares that rejection of an executory contract results in a breach of contract.[86] Accordingly, the breach creates a pre-petition claim of damages for the counterparty and places the claim with the other unsecured creditors, all of whom will be paid from the assets of the estate.[87] As the Court noted, the counterparty, as an unsecured creditor, will often only receive pennies on the dollar.[88]

The parties in *Tempnology* did not deny these rules; rather, the issue was Tempnology's misplaced belief that upon rejecting its licensing agreement with Mission, it could also terminate Mission's right to use the license.[89] Essentially, Tempnology believed that if it rejected the licensing contract, then Mission would no longer be able to use the trademark. In directly addressing the competing theories of what effect § 365(a) has on a contract, the Court expressly rejected the interpretation that § 365(a) results in rescission of the contract; instead, the Court held that "both Section 365's text and fundamental principles of bankruptcy law command" that rejection is merely a breach of contract.[90]

The Court based its theory on the premise that although the Bankruptcy Code does not define the term "breach," like a breach of contract outside of bankruptcy, a breach of contract during bankruptcy does not terminate the rights of the nonbreaching party.[91] To illustrate its conclusion, the Court used an analogy to explain the effect of a breach of contract outside of a bankruptcy setting between a photocopier dealer and a lessee of the photocopier.[92] The Court explained that the dealer leased the photocopier to the lessee, while also agreeing to conduct a monthly service, in consideration of a monthly fee.[93] One day, the dealer quit

84. *Id.* at 1658.
85. *Id.*; *see also* 11 U.S.C. §§ 1101–1174.
86. *Tempnology*, 139 S. Ct. at 1658.
87. *Id.*
88. *Id.*
89. *Id.* at 1659.
90. *Id.* at 1661.
91. *Id.* at 1659 (citing Field v. Mans, 516 U.S. 59, 69 (1995)).
92. *Id.* at 1662.
93. *Id.*

servicing the photocopier, thereby breaching the contract.[94] At this point, the Court explained, the lessee has two options: it can continue using the photocopier and sue for damages resulting from the breach of service, or alternatively, it can quit using the photocopier altogether and sue for any resulting damages.[95] Contrary to what Tempnology believed, the Court emphasized that the choice belongs to the lessee, not the breaching party; the same is true in bankruptcy, as well.[96] Therefore, although Tempnology could reject its executory contract and halt the exclusive distribution provision, it could not unilaterally withdraw Mission's right to use the trademark.

B. In re Mirant*'s Application of § 365*

The plain language interpretation of § 365(a) and § 365(g) of the Bankruptcy Code, as espoused in *Tempnology*, is not novel or new.[97] Long before the Supreme Court decided *Tempnology*, the Fifth Circuit, in *In re Mirant*, applied its interpretation of § 365(a) and § 365(g) to a FERC regulated filed rate.[98] The debtor, Mirant, claimed that its authority as a debtor and the court's statutory authority to authorize rejection allowed Mirant to reject its purchase-power agreement subject to the court's approval.[99] FERC objected, asserting that pursuant to the FPA, FERC has exclusive jurisdiction over the modification or abrogation of a filed rate, and therefore, the court was preempted from rejecting the agreement because it would result in an unauthorized collateral attack on the filed rate.[100] As the Fifth Circuit correctly noted, though, § 365(g) speaks in terms of breach, not modification, abrogation, or rescission.[101] Subsequent to a debtor's rejection, the nonbreaching party receives a pre-petition claim of damages, as an unsecured creditor, for damages *equal* to the amount of

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94. *Id.*

95. *Id.* (citing R. LORD, 13 WILLISTON ON CONTRACTS § 39:32, pp. 701–02 (4th ed. 2013) ("[W]hen a contract is breached in the course of performance, the injured party may elect to continue the contract or refuse to perform further.")).

96. *Id.* ("[M]ost important[ly], it means that assuming [the lessee] wants to keep using the copier, the dealer cannot take it back.").

97. *See generally In re* Mirant Corp., 378 F.3d 511 (5th Cir. 2004).

98. *See id.*

99. *Id.* at 518.

100. *Id.* at 519 (citing Miss. Power & Light v. Miss. *ex rel.* Moore, 487 U.S. 354, 375 (1988)).

101. *Id.* (citing *In re* Cont'l Airlines, 981 F.2d 1450, 1459 (5th Cir. 1993)); *see also Tempnology*, 139 S. Ct. at 1662–65.

damages stemming from the filed rate.[102] Therefore, because damages resulting from rejection will be calculated using the filed rate, rejection is not an attack on the rate itself;[103] the court is not imposing a new rate, nor is it substituting its judgment as to the reasonableness of the rate for that of FERC.[104]

C. Initial Application of the Tempnology *Opinion*

Due to the relative infancy of the *Tempnology* decision, there has yet to be any definitive circuit court ruling on its application to FERC regulated contracts, but naturally, it has been adopted and advanced by both sides of the jurisdictional debate, with each arguing that the case

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102. *In re Mirant*, 378 F.3d at 520; *see also* 11 U.S.C. §§ 365(g)(1), 502(g).

103. *See In re Mirant*, 378 F.3d at 519–20 ("Presumably, a contract's filed rate will be a relevant factor to the bankruptcy estate when it makes [its] determination [to reject] . . . [but] [a] debtor's use of the filed rate as a criteria . . . does not convert that rejection decision into a prohibited collateral attack on the filed rate . . . ."); *but see In re* Calpine Corp., 337 B.R. 27, 32–33 (S.D.N.Y. 2006) (for the proposition that a change in the duration of a filed rate contract would be a collateral attack to FERC's jurisdiction) (citing *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 822 (1968) ("The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation . . . only in circumstances of unequivocal public necessity.")). However, as the Supreme Court in *Tempnology* made clear, rejection is not abrogation. *See generally Tempnology*, 139 S. Ct. 1652.

104. *Compare In re Mirant*, 378 F.3d at 519 ("It is clear that" the court has authority to rule on a Section 365(a) motion to reject "so long as that rejection does not constitute a challenge to that agreement's filed rate."), *with* Ark. La. Gas Co. v. Hall, 453 U.S. 571 (1981) (The issue in this case revolved around a "favored nations clause." According to the contractual clause, if the natural gas customer, Arkla, bought gas from another producer at a higher price, then the seller would be allowed to increase its selling price to match that of the other. Arkla bought natural gas from another producer at a higher rate, thus triggering the favored nations clause. However, Arkla never paid the increased pay rate, so petitioner sought damages for the difference in the amount it should have been paid. The Court held that it was preempted by the NGA and could not award damages based on a rate other than that which is filed with the Commission.), *and In re Calpine*, 337 B.R. at 30–31 (finding that the district court was preempted from rejecting a filed rate in bankruptcy because even though the agreement was "the most financially burdensome" of them all because the debtor expressed that it was "'ready and willing to supply the same amount of power–but at competitive market prices.'").

supports its position.[105] First, there is disagreement regarding *Tempnology*'s applicability concerning the statutory exceptions to § 365(a) rejection. Second, there is disagreement concerning whether the general law surrounding filed rate obligations prevents a debtor from rejecting the filed rate.

1. Exceptions to Rejection

The Bankruptcy Code does indeed carve out numerous exceptions to § 365(a) and (g).[106] Yet, despite the multitudinous array of exceptions, the Bankruptcy Code fails to include any exception for a FERC regulated rate.[107] Nevertheless, although FERC admits that § 365 does not expressly carve out an exception to the general rule—that a debtor can reject any executory contract—for FERC regulated contracts, it maintains that the lack of a specific exception is not sufficient grounds for denying its concurrent jurisdiction.[108] FERC posits that, as *Tempnology* suggests, Congress did not list "the full universe of exceptions," but instead, enacted exceptions to § 365(a) when necessary to reinforce or clarify that contractual rights survive rejection.[109] Therefore, FERC argues that the lack of an exception is not dispositive.[110]

FERC's assertion that the absence of a specific exception to rejection does not in itself deny concurrent jurisdiction is misplaced.[111] Although it is true that there is no exception for trademark contracts, the *Tempnology* Court found that the rights granted to a licensee cannot be unilaterally withdrawn during a debtor's rejection, but this is because of the

105. *Compare In re* PG&E Corp., 603 B.R. 471 (Bankr. N.D. Cal. 2019), *with In re* FirstEnergy Sols. Corp., 945 F.3d 431, 454 n.6 (6th Cir. 2019), *and* ETC Tiger Pipeline, LLC, 171 FERC ¶ 61,248 (2020).

106. *Tempnology*, 139 S. Ct. at 1662–65; *In re Mirant*, 378 F.3d at 521–22; *see, e.g.*, 11 U.S.C. § 365(o) (commitments to a Federal depository regulatory agency); *id.* § 1113 (collective bargaining agreements); *id.* § 1169 (railroad leases); *id.* §§ 365(d), 1110 (aircraft leases); *id.* § 365(h)(1) (real property leases); *id.* §§ 365(h)(2), (i) (timeshare interests); *id.* § 365(n) (intellectual property).

107. *In re Mirant*, 378 F.3d at 521; *In re* Extraction Oil & Gas, 622 B.R. 608, 614 (Bankr. D. Del. 2020).

108. ETC Tiger Pipeline, LLC, 172 FERC ¶ 61,155 at PP 20, 33 (2020) (quoting *Tempnology* to explain that "the list of exceptions included in section 365 is 'anything but' a 'neat, reticulated scheme of narrowly tailored exceptions.'").

109. *ETC Tiger Pipeline*, 172 FERC ¶ 61,155 at PP 22–23; *see also Tempnology*, 139 S. Ct. at 1664.

110. *ETC Tiger Pipeline*, 172 FERC ¶ 61,155 at P 22.

111. *Id.*

implications of rights and property of the estate, as described below, which is not a concern when rejecting a filed rate. Instead, "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."[112]

Moreover, this lack of an exception for FERC regulated filed rates was not a congressional oversight.[113] As multiple bankruptcy courts have noted, the numerous exceptions to § 365(a) and § 365(g) exemplify the fact that Congress is capable of enacting special rules for special circumstances.[114] Further, the Supreme Court has noted that although the general rule is that rejection results in a breach of contract, when a judicial decision arose wherein the Court failed to properly interpret Congress's intent regarding the effect of rejection, "Congress sprang into action" and codified an exception.[115] Congress has now had over 16 years to respond to the Fifth Circuit's decision denying FERC's exclusive or concurrent jurisdiction when rejecting filed rates,[116] yet it has not done so. Moreover, in 2005, the year following the *Mirant* decision, Congress materially amended the Bankruptcy Code. In fact, it even amended § 365.[117] By withholding any exception for FERC or filed rates, Congress made itself clear—it did not intend to limit a FERC regulated debtor's ability to reject a filed rate.[118]

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112. United States v. Johnson, 529 U.S. 53, 58 (2000).

113. *In re* Mirant Corp., 378 F.3d 511, 521 (5th Cir. 2004).

114. *See In re* PG&E Corp., 603 B.R. 471 (Bankr. N.D. Cal. 2019); *In re* Extraction Oil & Gas, 622 B.R. 608, 614 (Bankr. D. Del. 2020).

115. Mission Prod. Holdings, Inc., v. Tempnology, LLC, 139 S. Ct. 1652, 1664 (2019); *see, e.g.*, Lubrinzol Enters. v. Richmond Metal Finishers, 756 F.2d 1043, 1045–48 (4th Cir. 1985) (where the Fourth Circuit held that rejection of an executory contract involving a patent revoked the license to that patent; Congress subsequently enacted § 365(n)); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528–29 (1984) (where the Supreme Court held that a debtor may unilaterally reject a collective bargaining contract because, if not, it would undermine a debtor's authority to rejectl Congress subsequently enacted § 1113).

116. *See In re Mirant*, 378 F.3d 511; *see also In re* FirstEnergy Sols. Corp., 945 F.3d 431, 440 (6th Cir. 2019) ("in the fourteen years since *Mirant* was decided by the Fifth Circuit, Congress has not provided any exception to [a bankruptcy court's] rejection of regulated power contracts pursuant to Section 365(a).").

117. *See* 11 U.S.C. § 365(b)(1)(A), (d)(4).

118. *In re Mirant*, 378 F.3d at 521; *In re PG&E*, 603 B.R. 471 (quoting FCC v. NextWave Pers. Commc'ns, Inc., 537 U.S. 293, 302 (2003) ("[W]here Congress has intended to provide regulatory exceptions of the Bankruptcy Code, it has done so clearly and expressly.")).

2. Generally-Applicable-Law Exception to Rejection

Additionally, FERC has quoted *Tempnology* to aver that although rejection relieves a debtor of its future obligations and contractual duties, it does not exempt the debtor "from all the burdens that generally applicable law . . . imposes on parties."[119] According to FERC, filed rate obligations exist independently of contractual obligations because they are "public obligations that carry the force of law."[120] Because these public obligations exist independently of private contractual obligations, FERC argues that the obligations continue to bind the parties, regardless of a breach.[121] Therefore, according to FERC, because filed rates create a public obligation, § 365(a) rejection does not relieve a debtor of the burdens imposed by a rate obligation.[122] Accordingly, it is FERC's position that the general law surrounding filed rates demands that FERC review a debtor's ability to cease performance on its filed rate notwithstanding a rejection in bankruptcy.[123]

FERC is not alone in this position. In the months following *Tempnology*, the Sixth Circuit, in *In re FirstEnergy Solutions Corp.*, delivered an opinion on appeal from the bankruptcy court concerning the rejection of a filed rate.[124] In a footnote, the majority noted that several appellants cited *Tempnology* for the proposition that rejection does not necessarily relieve a debtor of all of its contractual duties.[125] The court, however, was not convinced that *Tempnology* was analogous to the case under review and suggested the parties argue it on remand.[126] Despite the majority's dismissive response to the appellants' argument, the sole dissenting judge concluded that filed rates are akin to *de jure* regulations, and therefore, in a one-paragraph aside, declared that *Tempnology*

119. ETC Tiger Pipeline, LLC, 172 FERC ¶ 61,155 at P 27 (2020) (quoting *Tempnology*, 139 S. Ct. at 1665).

120. *Id.* at P 22.

121. *Id.*

122. *Id.*

123. *Id.* at PP 19–27.

124. *In re* FirstEnergy Sols. Corp., 945 F.3d 431 (6th Cir. 2019).

125. *Id.* at 454 n.16.

126. *Id.* FERC petitioned for rehearing en banc, arguing, *inter alia*, that the Sixth Circuit panel's decision was at odds with *Tempnology*. Petition of Federal Energy Regulatory Commission for Rehearing En Banc, *In re* FirstEnergy Sols. Corp., 945 F.3d 431 (6th Cir.2019) (No. 18-3787). In the response to the petition, the Sixth Circuit denied rehearing and rejected FERC's assertion.

prohibits a debtor from evading its obligations arising from "generally applicable law."[127]

But in quoting *Tempnology*'s statement concerning rejection and its relationship with "generally applicable law," both FERC and the Sixth Circuit dissenting judge left a subtle, yet vital, phrase out of the sentence.[128] The quote is properly read as: "Section 365 does not grant the debtor an exception from all the burdens that generally applicable law—whether involving contracts or trademarks—imposes *on property owners*."[129] The importance of this phrase, "on property owners," becomes more apparent when considering the thrust of the Court's reasoning.[130] The Court determined that Tempnology could not unilaterally withdraw Mission's right to use the trademark because "[t]he estate cannot possess anything more than the debtor itself did outside bankruptcy."[131] This is relevant because, as previously addressed, the Bankruptcy Code declares that the filing of a petition for bankruptcy creates an estate comprising of "all legal or equitable interests of the debtor in property as of the commencement of the case."[132] Therefore, Tempnology could not acquire the right to its own trademark through bankruptcy because it did not have that property right at the commencement of the bankruptcy case.[133] Thus, according to the Court, a rejection pursuant to § 365(a) must result in a breach of contract, rather than contract rescission, to prevent a debtor from recapturing interests it had given up.[134]

Whether it be a photocopier or a trademark, the Court's rationale does not extend to a filed rate in the way FERC urges; in fact, the rationale runs

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127. *In re FirstEnergy*, 945 F.3d at 462–63 (Griffin, J., concurring in part and dissenting in part).

128. *See ETC Tiger Pipeline*, 172 FERC ¶ 61,155 at P 27 (quoting Mission Prod. Holdings, Inc., v. Tempnology, LLC, 139 S. Ct. 1652, 1665 (2019)); *In re FirstEnergy*, 945 F.3d at 462–63 (Griffin, J., concurring in part and dissenting in part).

129. *Tempnology*, 139 S. Ct. at 1665–66 (emphasis added).

130. *See* Response to Petitions for Rehearing En Banc at 10, *In re* FirstEnergy Sols. Corp., 945 F.3d 431 (6th Cir. 2019) (No. 18-3787).

131. *Tempnology*, 139 S. Ct. at 1663 (quoting a "bankruptcy scholar," D. BAIRD, ELEMENTS OF BANKRUPTCY 97 (6th ed. 2014), for the proposition that "whatever 'limitation[s] on the debtor's property [apply] outside of bankruptcy[] appl[y] inside of bankruptcy as well. A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either.'").

132. 11 U.S.C. § 541(a)(1) (emphasis added); *see also Tempnology*, 139 S. Ct. at 1663.

133. *See Tempnology*, 139 S. Ct. at 1663–66.

134. 11 U.S.C. § 541(a)(1); *see also Tempnology*, 139 S. Ct. at 1663.

counter to FERC's assertion.[135] A FERC regulated debtor who seeks to reject its filed rate through the proper channels of bankruptcy does not seek to acquire what it had not previously possessed.[136] Instead, the debtor simply seeks to reject its performance on the contract. Both Mission and Tempnology agreed, and the Court made clear, that Tempnology's performance on the contract could be rejected.[137]

Nevertheless, despite the clear language of the Bankruptcy Code declaring that a debtor can reject any executory contract, that rejection results in a breach of contract, and that there are no exceptions to the rejection of a FERC regulated filed rate[138]—in addition to the Supreme Court and Fifth Circuit affirming that § 365(a) and § 365(g) apply broadly to any executory contract[139]—the *FirstEnergy* Sixth Circuit court began its analysis by stating that an analogy to a breach of contract outside of bankruptcy would be inappropriate.[140] Assuming *arguendo* that the *FirstEnergy* court was correct in that *Tempnology* was an inapt analogy to a FERC regulated rate, then the crux of the issue comes down to the contentious analysis of whether a filed rate is a "simple run-of-the-mill"

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135. *See* Response to Petitions for Rehearing En Banc at 12, *In re* FirstEnergy Sols. Corp., 945 F.3d 431 (6th Cir. 2019) (No. 18-3787).

136. *See generally In re* Ultra Petroleum Corp., 621 B.R. 188, 197–98 (Bankr. S.D. Tex. 2020).

137. *See Tempnology*, 139 S. Ct. at 1658–59 (The Court explained that Tempnology sought to reject its executory contract, and the bankruptcy court approved it. This meant "two things on which the parties agree. First, Tempnology could stop performing under the contract. And second, Mission could assert (for whatever it might be worth) a pre-petition claim in the bankruptcy proceeding for damages resulting from Tempnology's nonperformance. But Tempnology thought still another consequence ensued."); *see also id.* at 1662 ("The debtor can stop performing its remaining obligations under the agreement. But the debtor cannot rescind the license already conveyed.").

138. 11 U.S.C. §§ 365(a), (g).

139. *Tempnology*, 139 S. Ct. at 1662.

140. *In re* FirstEnergy Sols. Corp., 945 F.3d 431, 442 (6th Cir. 2019); *see also In re* Calpine, 337 B.R. 27, 36 (S.D.N.Y. 2006) (citation omitted):

> It is of no moment that rejection in the bankruptcy court constitutes a breach. Calpine . . . argue[s] bankruptcy courts have a broad power to reject executory contracts, rejection constitutes breach, FERC has exclusive jurisdiction over approval, modification, or termination of wholesale energy contracts, not over breaches, and as such rejection is outside of FERC's jurisdiction. The elegance of this argument is betrayed by the fact that the 'breach' here does not create a typical dispute over the terms of a contract, but the unilateral termination of a regulatory obligation.

contract subject to rejection, or whether it is a *de jure* regulation that carries the force of law.[141]

III. COURTS' VARYING APPROACHES TO REJECTION OF A FILED RATE

Because the Supreme Court has held that FERC can compel performance on a money-losing contract[142] and on a contract that violates anti-trust laws,[143] in addition to general rules of FERC's exclusive jurisdiction pursuant to the filed rate doctrine, some courts, and FERC, have inferred that a filed rate should be treated as a federal regulatory statute that carries the force of law.[144] In light of the fact that "[s]everal courts have read the FPA and Bankruptcy Code *in pari materia* and reached different conclusions,"[145] it is necessary to provide a brief overview describing the varying courts' interpretations of the two.

A. Southern District of New York Analysis

In 2003, after two days of hearings, the bankruptcy court in *In re NRG Energy, Inc.* found that the money-losing character of NRG's filed rate contract satisfied the business judgment rule, and therefore the court approved NRG's rejection of the filed rate contract pursuant to § 365(a).[146] Despite this, the bankruptcy court refused to enjoin FERC or vacate its order demanding continued performance, which NRG then appealed to the district court.[147] Subsequently, FERC issued a second order requiring continued performance until it could determine whether termination of the contract was consistent with the public interest pursuant to FERC's regulatory responsibilities.[148]

On appeal, the Southern District of New York rejected NRG's argument that the matter was merely a bankruptcy case and disputed the financial arrangement.[149] Instead, the court concluded that the contract was

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141. *See, e.g.*, *In re* PG&E Corp., 603 B.R. 471 (Bankr. N.D. Cal. 2019).

142. Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348 (1956).

143. Penn. Water & Power Co. v. FPC, 343 U.S. 414, 422 (1952).

144. *In re FirstEnergy*, 945 F.3d at 444 (citing Nw. Pub. Serv. Co. v. Mont.-Dakota Utils. Co., 181 F.2d 19, 22–23 (8th Cir. 1950), *aff'd*, 341 U.S. 246 (1951)); *see also* Boston Edison Co. v. FERC, 856 F.2d 361, 372 (1st Cir. 1988).

145. NextEra Energy, Inc., 166 FERC ¶ 61,049 at P 23 (2019), *vacated*, PG&E v. FERC, 829 F. App'x 751 (9th Cir. 2020).

146. *In re* NRG Energy, Inc., No. 03-3754, 2003 WL 21507685, at *2 (S.D.N.Y June 30, 2003).

147. *Id.*

148. *Id.*

149. *Id.* at *3.

a wholesale power contract and therefore within FERC's exclusive jurisdiction in accordance with the FPA.[150] Additionally, the district court concluded that it lacked jurisdiction because the FPA states that only a federal court of appeals can review FERC actions.[151]

A few years later, in 2006, the same district court judge who authored the *NRG* opinion presided over *In re Calpine*.[152] The judge noted the opposing policies and rules between the filed rate doctrine and the Bankruptcy Code, but concluded that "where there is conflict, the power of the bankruptcy court must yield to that of the federal agency."[153] Additionally, the judge stated that "[i]t is of no moment that rejection in the bankruptcy court constitutes a breach[]" because a FERC regulated purchase power agreement is not "a run-of-the-mill contract";[154] it is a regulatory obligation. Accordingly, the district court held that it lacked jurisdiction to reject the contract because rejection would infringe on FERC's exclusive jurisdiction over the rates and terms of a filed rate.[155]

The same court, under a different judge than the two prior cases, slightly altered its analysis in *In re Boston Generating, LLC*.[156] This case is unique in that both the debtor and the counterparty agreed that the debtor should seek FERC's approval to reject the contract.[157] Additionally, both agreed that if FERC approved the rejection, the bankruptcy court could determine whether it would approve the rejection.[158] The parties disagreed, however, as to whether FERC's approval was a condition precedent or whether such determinations could be made concurrently.[159] Ultimately, the district court concluded that the disagreement was immaterial because rejection would be prohibited without the approval of both FERC and the bankruptcy court.[160]

150. *Id.*
151. *Id.*; *see also* 16 U.S.C. § 825(b).
152. *In re* Calpine, 337 B.R. 27, 31 (S.D.N.Y. 2006).
153. *Id.* at 34.
154. *Id.* at 36.
155. *Id.*
156. *See In re* Boston Generating, LLC, No. 10-6528, 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010).
157. *Id.* at *2–3.
158. *Id.*
159. *Id.*
160. *Id.*

Under the analysis adopted by the Southern District of New York, one thing is certain: FERC's approval of rejection is necessary.[161] In accordance with *NRG* and *Calpine*, FERC has exclusive jurisdiction regarding whether a party to a filed rate contract can reject said contract in bankruptcy and whether performance thereon can be terminated.[162] Pursuant to *In re Boston Generating, LLC*, though, FERC and the courts have concurrent jurisdiction, wherein a debtor's ability to successfully reject a filed rate is necessarily dependent upon congruous outcomes from both FERC and the court.[163]

B. Fifth Circuit Analysis

In 2004, the Fifth Circuit, in *Mirant*, was the first circuit court to address this jurisdictional debate.[164] Therein, the court acknowledged that FERC does in fact have exclusive jurisdiction over determining whether filed rates are just and reasonable.[165] It further acknowledged that pursuant to the filed rate doctrine, courts may not collaterally attack a FERC approved rate by imposing a rate other than the rate FERC has approved.[166] Nevertheless, the court emphasized that FERC does not have exclusive jurisdiction over a breach of contract outside of bankruptcy and therefore reasoned that FERC's jurisdiction is only implicated if rejection challenges the filed rate.[167] Relying on Fifth Circuit precedent, the court concluded that the FPA did not preempt the court so long as damages were calculated using the filed rate and so long as the effects only indirectly affected the filed rate.[168]

More recently, in 2020, a Texas bankruptcy court in *In re Ultra Petroleum Corporation* abided by *Mirant*'s precedent and held that FERC's regulatory involvement with filed rate contracts did not create an exception to rejection[169] and noted that the court was not authorized to

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161. *See generally In re* NRG Energy, Inc., No. 03-3754, 2003 WL 21507685 (S.D.N.Y June 30, 2003); *In re* Calpine, 337 B.R. 27 (S.D.N.Y. 2006); *In re Boston Generating, LLC*, 2010 WL 4616243.

162. *See NRG Energy*, 2003 WL 21507685, at *2; *In re Calpine*, 337 B.R. at 36.

163. *See In re Boston Generating, LLC*, 2010 WL 4616243, at *2–3.

164. *See generally In re* Mirant, 378 F.3d 511, 518 (5th Cir. 2004).

165. *Id.*

166. *Id.*

167. *Id.* at 519.

168. *Id.* at 519–20 (citing Gulf States Utils. Co. v. Ala. Power Co., 824 F.2d 1465 (5th Cir. 1987)).

169. *In re* Ultra Petroleum Corp., 621 B.R. 188, 197–98 (Bankr. S.D. Tex. 2020).

create such an exception.[170] Supporting its position, the court noted, as did *Mirant*, that rejection is merely a breach of contract and that the contract could have been breached just as easily outside of bankruptcy.[171] Because the debtor would not recapture any rights that it did not have prior to bankruptcy, rejection was appropriate.[172]

C. Sixth Circuit Analysis

In 2019, the Sixth Circuit in *FirstEnergy* directly addressed the tension between the FPA and Bankruptcy Code concerning whether a filed rate carries the independent force of law, external to that of the contract.[173] In reviewing the bankruptcy court's decision, the Sixth Circuit rebuked the bankruptcy court's approach, stating that the bankruptcy court presupposed that it had exclusive jurisdiction and that the contracts were ordinary contracts.[174] The majority noted that the bankruptcy court treated the filed rate contracts at issue as ordinary contracts subject to rejection, "which it could *not* do with a regulation or statute and which would appear to be contrary to [the *Mobile*-]*Sierra* [doctrine] and *Pennsylvania Water*."[175] Nevertheless, although the split panel ultimately held that the bankruptcy court has concurrent jurisdiction with FERC, it found the bankruptcy court's jurisdiction to be primary or superior because bankruptcy creates an "unequivocal public necessity," thus overcoming the *Mobile-Sierra* doctrine.[176] Accordingly, the majority concluded that, based on the particular facts of the case, the filed rate contracts were merely executory contracts subject to rejection, not *de jure* regulations.[177]

Conversely, the dissenting judge argued that precedent "makes clear" that FERC's authority to compel performance stems not from the law of private contracts but, rather, from its statutory authority.[178] The dissenting judge also stated that the majority reached its conclusion based on a flawed

170. *Id.*
171. *Id.* at 204.
172. *See id.*
173. *In re* FirstEnergy Sols. Corp., 945 F.3d 431 (6th Cir. 2019); *cf In re* Calpine, 337 B.R. 27, 33–37 (S.D.N.Y. 2006) (for the proposition that the duty to perform on a filed rate derives not from private contract but from FERC itself).
174. *In re FirstEnergy*, 945 F.3d at 441.
175. *Id.* at 445 (emphasis omitted) (citing *Sierra* and *Pennsylvania Water* to contend that "FERC can compel performance of money-losing contracts and illegal contracts, respectively.").
176. *Id.* at 446.
177. *Id.* at 445–46.
178. *Id.* at 445 (Griffin, J., concurring in part and dissenting in part).

understanding of how filed rates operate under the FPA and instead averred that filed rates carry an independent legal obligation.[179] Accordingly, to give effect to both the FPA and Bankruptcy Code, he urged that the debtor must seek approval to reject from both FERC and the bankruptcy court.[180]

D. Conflicting Analyses

As outlined above, the methods in which courts approach the issue of rejecting a filed rate vary. The Fifth Circuit *Mirant* court focused on the effect of rejection and whether rejection violates the filed rate doctrine as an impermissible collateral attack, whereas the Southern District of New York *Calpine* court and the Sixth Circuit *FirstEnergy* court addressed whether a filed rate is merely a contract or a *de jure* regulation that carries the force of law. Despite the fact that *Mirant* was decided two years before *Calpine*, and despite the fact that the *Mirant* court found that rejection did not directly interfere with FERC's exclusive jurisdiction, the *Calpine* court declined to adopt *Mirant's* rationale.[181]

One reason the *Calpine* court declined to extend *Mirant* to the situation was because the two cases were materially distinguishable.[182] In *Mirant*, the Fifth Circuit determined that rejection did not result in a collateral attack upon FERC's authority because Mirant did not need the electricity it was purchasing in order to fulfill its obligations to supply electricity to its customers.[183] Thus, rather than merely seeking to reject the contract due to excessive prices, Mirant sought to reject the contract because it did not need the electricity at all; therefore, the Fifth Circuit found that rejection did not result in a collateral attack.[184]

That was not the case, however, in *Calpine*.[185] There, the debtor sought "rejection based on dissatisfaction with the rates"[186] but was "ready and willing to supply the same amount" of electricity "at competitive market prices."[187] As the *Calpine* court noted, "[t]he only thing separating Mirant's rejection . . . from being an unlawful collateral attack on the

179. *Id.*
180. *Id.* at 459 (Griffin, J., concurring in part and dissenting in part).
181. *In re* Calpine, 337 B.R. 27, 38 (S.D.N.Y. 2006).
182. *Id.* at 37–38.
183. *In re* Mirant Corp., 378 F.3d 511, 520 (5th Cir. 2004).
184. *Id.* at 519–20.
185. *In re Calpine*, 337 B.R. at 36–38.
186. *Id.* at 36.
187. *Id.* at 37.

[filed] rate was the fact that [Mirant] did not want the energy at all."[188] Therefore, even if the *Calpine* court had adopted *Mirant*, based on the facts of the case, the court could not have authorized rejection.

Second, and more importantly, the *Calpine* court did not adopt *Mirant's* rationale of authorizing rejection because it believed it lacked jurisdiction; authorizing rejection "would directly interfere with FERC's jurisdiction over the . . . duration" of the contract, which could not otherwise be accomplished outside of FERC's exclusive jurisdiction, thus constituting a collateral attack.[189] Further, the court stated that it was immaterial that rejection in bankruptcy constitutes a breach because rejection of a filed rate was not a typical breach, but rather a "unilateral termination of a regulatory obligation."[190] This was also the position of the dissenting judge in *FirstEnergy*.

IV. FILED RATES: SUBJECT TO REJECTION OR *DE JURE* REGULATION?

Similar to the *Calpine* and *FirstEnergy* dissenting opinions, FERC asserts that once a rate has been filed, that contract "become[s] the equivalent of a federal regulation, imposing obligations on the parties that extend beyond private contract law."[191] Because FERC believes that filed rates "implicate the public interest and . . . carry the force of law," it asserts that it is "statutorily obligated and exclusively authorized to consider" the abrogation or modification of such rates.[192] Accordingly, this Part will specifically address FERC's statutory authority, as well as two cases frequently cited for the assertion that once a rate has been filed, that rate gives rise to a public obligation distinct from the underlying contract, thus necessitating FERC's approval before a public utility can abandon its performance thereon.

A. FERC's Statutory Authority

FERC uses §§ 205 and 206 of the FPA to support its position that a public utility cannot abandon service under a filed rate without prior

188. *Id.* at 38.
189. *Id.* at 36.
190. *Id.*
191. ETC Tiger Pipeline, LLC, 172 FERC ¶ 61,155 at P 26 (2020) (quoting NextEra, Inc., 167 FERC ¶ 61,096 at P 22 (Rehearing Order) (2019) (internal quotations omitted)).
192. *Id.* at P 20.

approval.[193] Section 205(c) requires that every public utility file a schedule "showing all rates and charges" as well as any contract that "affect[s] or relate[s] to such rates, charges, classifications, or services."[194] This is required for both initial schedule filings and changes thereon.[195] The filing of an initial schedule will take effect automatically and immediately.[196] Conversely, the filing of a schedule change requires a notice period.[197] Accordingly, § 205(d) states that "no change shall be made . . . in any such rate . . . or service . . . or contract relating thereto, except after sixty days' notice."[198] Upon notification of a schedule change, § 205(e) allows FERC to conduct a hearing and issue an order regarding the lawfulness of such change.[199] FERC interprets § 205's change-in-service notice requirement to include "[c]ancellation or notice of termination."[200] Accordingly, a public utility wishing to reject its filed rate and cease performance thereon must satisfy the notice and approval requirements of § 205(d) and § 205(e).[201]

Pursuant to § 206(a), FERC is authorized to determine whether a rate, charge, or classification, or contract relating thereto, is just and reasonable.[202] If FERC determines that a "rate, charge, classification, rule, regulation, [or] practice" is unjust and unreasonable, it is authorized to "fix the same" "to be thereafter observed and in force."[203] Unlike § 205, § 206 does not list "service" as an item subject to FERC's determination.[204]

B. Pennsylvania Water & Power Co. v. Federal Power Commission

Advocates arguing that filed rates carry the force of law rely, in part, on the Supreme Court case *Pennsylvania Water & Power Co. v. Federal*

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193. Floyd L. Norton IV & Mark R. Spivak, *The Wholesale Service Obligation of Electric Utilities*, 6 ENERGY L.J. 179, 187 (1985); *see also* 16 U.S.C. §§ 824d, 824e.
194. 16 U.S.C. § 824d(c).
195. Boston Edison Co. v. FERC, 856 F.2d 361, 368 (1st Cir. 1988).
196. *Id.*
197. *Id.*
198. 16 U.S.C. § 824d(d).
199. *Id.* § 824d(e).
200. 18 C.F.R. § 2.4(c)(4) (2021).
201. Ind. & Mich. Elec. Co., 12 FERC ¶ 61,007 at p. 61,015 (1980).
202. 16 U.S.C. § 824e(a).
203. *Id.*
204. Norton & Spivak, *supra* note 193, at 188; *compare* 16 U.S.C. § 824d, *with* 16 U.S.C. § 824e.

Power Commission (*Penn Water*).[205] In *Penn Water*, the contractual parties petitioned the Commission to investigate Pennsylvania Water's allegedly excessive rates.[206] The Commission found that Pennsylvania Water had been charging its customers almost thrice what it should have been charging, and pursuant to its authority, the Commission ordered the filing of a new, lawful rate.[207] The Commission likewise rejected Pennsylvania Water's subsequently filed rate and instead imposed a rate of its own.[208] Pennsylvania Water then appealed the Commission's order requiring a new rate.[209]

During the pendency of this appeal, in a separate lawsuit, the Fourth Circuit Court of Appeals held that the underlying contract between Pennsylvania Water and one of its customers, Consolidated, subjected Pennsylvania Water to the control of Consolidated in violation of the Sherman Act.[210] Based on this Fourth Circuit decision, Pennsylvania Water argued to the Supreme Court on its other appeal, *Penn Water*, that the Commission could not require continued performance with the newly imposed rate on an otherwise illegal contract.[211] The Court, however, disagreed and concluded that the Commission could require that Pennsylvania Water continue performance notwithstanding the fact that the Fourth Circuit had found some of the underlying provisions to be in violation of anti-trust law.[212] This is because, according to the Court, the duty to perform "springs from the Commission's authority, not from the law of private contracts."[213] Based on this, FERC and like-minded courts

205. *See e.g.*, *In re* FirstEnergy Sols. Corp., 945 F.3d 431, 456–57 (6th Cir. 2019) (Griffin, J., concurring in part and dissenting in part) (referring to *Penn Water* as "instructive"); *In re* Calpine, 337 B.R. 27, 36–37 (S.D.N.Y. 2006) (Although the court cited *Penn Water* to state that once a rate is filed, "the FPA, not contract law, controls," this case should be given little credence because the debtor in this case sought to reject the filed rate contract solely because it was dissatisfied with the rate—"thus constituting a collateral attack."); ETC Tiger Pipeline, LLC, 171 FERC ¶ 61,248 at P 22 (2020).

206. Penn. Water & Power Co. v. Fed. Power Comm'n, 343 U.S. 414, 416 (1952).

207. *Id.* at 416–17.

208. *Id.* at 417.

209. Penn. Water & Power Co. v. Fed. Power Comm'n, 193 F.2d 230 (D.C. Cir. 1951).

210. *Penn. Water & Power Co.*, 343 U.S. at 421.

211. *Id.*

212. *Id.* at 422–23; *see also* Sunray Mid-Con. Oil Co. v. FPC, 364 U.S. 137, 155 (1960) ("The obligation that petitioner will be under after the contract term will not be one imposed by contract but by the [NGA].").

213. *Penn. Water & Power Co.*, 343 U.S. at 422–23.

assert that FERC's authority to compel performance on a filed rate, notwithstanding rejection, is independent of and distinct from any obligation based on a contract alone.[214]

But *Penn Water* does not create the categorical proposition that a filed rate creates a *de jure* obligation subject to FERC's demand of specific performance.[215] Moreover, it does not support the belief that FERC can compel performance in every situation.[216] In fact, the Court declined to address "what, if any, power the Commission has . . . to compel parties to carry out" an otherwise illegal contract because the Commission had not exercised such power.[217] Instead, the Court based its conclusion on the facts of the case under §§ 206 and 202 of the FPA.[218]

As outlined above, § 206 authorizes FERC to prescribe and impose a new, lawful rate upon determining that the rate in place is unlawful.[219] This allowed the Commission to impose a new rate after finding Pennsylvania Water's existing rate to be three times that of a just and reasonable rate. Further, § 202 enables FERC to compel interconnection and coordination of utility facilities and to "prescribe the terms and conditions of the arrangement to be made between the persons affected."[220] This, in turn, allowed the Commission to compel continued coordination. In conjunction, these statutes gave the Commission ample statutory authority to compel Penn Water and Consolidated to continue their long-existing operational practice of integrating their power output.[221] However, § 206 alone does not authorize FERC to compel performance. Therefore, absent

214. *See In re* FirstEnergy Sols. Corp., 945 F.3d 431, 457 (6th Cir. 2019) (Griffin, J., concurring in part and dissenting in part); Blumenthal v. NRG Power Mktg., Inc., 104 FERC ¶ 61,211, at p. ¶ 61,743 (2003); *In re* Calpine, 337 B.R. 27, 33 (S.D.N.Y. 2006).

215. *See* Response to Petitions for Rehearing En Banc at 7, *In re* FirstEnergy Sols. Corp., 945 F.3d 431 (6th Cir.2019) (No. 18-3787).

216. *See* Norton & Spivak, *supra* note 193, at 191–95.

217. *Penn. Water & Power Co.*, 343 U.S. at 421; *cf.* Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 253 (1951) ("We need not decide what action the Commission is empowered to take if it believes that a fraud has been committed on itself, for it has taken no action which gives rise to or affects this controversy.").

218. *Penn. Water & Power Co.*, 343 U.S. at 422–23.

219. *Id.*; Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 353 (1956) ("The Commission has undoubted power under s[ection] 206(a) to prescribe a change in contract rates whenever it determines such rates to be unlawful. . . . [T]his power is limited to prescribing the rate 'to be thereafter observed' . . . .").

220. 16 U.S.C. § 824a(b).

221. *Penn. Water & Power Co.*, 343 U.S. at 422.

facts that indicate the coordination of facilities, FERC does not have the authority to compel a debtor's continued performance on a filed rate.[222]

C. Northwestern Public Service Co. v. Montana-Dakota Utilities Co.

Additionally, those supporting the position that a filed rate amounts to a *de jure* regulation quote the Eighth Circuit to declare that once a rate has been filed, that rate "is to be treated as though it were a statute."[223] But this selectively chosen quote misconstrues the true meaning of that case.[224] In *Northwestern Public Service Co. v. Montana-Dakota Utilities Co.* (*MDU I*), Montana-Dakota Utilities Co. (MDU) alleged that it was being charged unreasonably high rates, that it had a statutory right to just and reasonable rates, and that it was therefore entitled to reparations.[225] The district court agreed, ruling in favor of MDU; however, the Eighth Circuit reversed.[226]

The Eighth Circuit found that filed rates, as understood under the analogous Interstate Commerce Act, vest the Commission with the authority to determine the reasonableness of rates.[227] From this premise, the court stated that once a rate has been filed, it is "the lawful rate[] until changed in the way provided by the [FPA]."[228] Therefore, although MDU believed it had been charged an unreasonable rate, the court would not impede on the Commission's authority by imposing reparations on a Commission-approved rate because the determination of reasonableness is a matter of administrative function.[229] Accordingly, "[s]o long as the filed rate is not changed in the manner provided by the [FPA] it is to be

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222. However, § 207 also allows FERC to compel performance if a public utility's service is inadequate or insufficient. *See* 16 U.S.C. § 824f.

223. *In re* FirstEnergy Sols. Corp., 945 F.3d 431, 458 (Griffin, J., concurring in part and dissenting in part) (quoting Nw. Pub. Serv. Co. v. Mont.-Dakota Utils. Co., 181 F.2d 19, 22 (8th Cir. 1950)).

224. Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 563 (2008) (Stevens, J., dissenting) (quoting *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 791 n.60 (1968) ("The Commission's exercise of its regulatory authority must be assessed in light of its purposes and consequences, and not by references to isolated phrases from previous cases.")).

225. *Mont.-Dakota Utils. Co.*, 181 F.2d at 20-22.

226. *Id.* at 22–23.

227. The Eighth Circuit stated that the FPA's filed rate requirements are analogous to the Interstate Commerce Act's (ICA) similar filed rate requirements and that cases from the ICA are controlling for the FPA as well. Therefore, "[t]he rates filed and approved by the Commission are the lawful rates *until changed in the way provided by the Act*." *Id.* at 22.

228. *Id.*

229. *Id.*

treated as though it were a statute, binding upon the seller and the purchaser alike."[230]

With this context, the partial use of a quotation from the Eighth Circuit for the assertion that filed rates are akin to *de jure* regulations is inapt and misleading.[231] The court was not categorically declaring that, in general, the filed rate was in fact a *de jure* regulation; it merely declared that a party to a FERC regulated contract could not circumvent the purview of FERC's authority by demanding a different rate in a court of law than that which is filed with FERC.[232]

This interpretation is further supported by the Supreme Court's opinion on appeal (*MDU II*).[233] Affirming the Eighth Circuit, the Court noted that "[a party] cannot litigate . . . 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 . . . considerable . . . discretion."[234] In light of this reasoning, the Court held that "the right to a reasonable rate is the right to the rate which the Commission files or fixes"; thus, "the courts can assume no right to a different [rate] on the ground that, in its opinion, [the different rate] is the only or the more reasonable one."[235]

Viewed in conjunction and with the proper context, *MDU I* and *MDU II* merely give rise to the filed rate doctrine and prevent a court from imposing a rate other than that which has been filed with FERC. The cases do not, as some assert, create a categorical rule that filed rates are in all respects to be treated as a statute.

D. A Filed Rate Is Not (Always) Akin to a De Jure *Regulation*

In the sense that courts are prohibited from awarding damages based on a rate other than that which is filed with FERC, or from imposing a new rate, the filed rate is indeed akin to a *de jure* regulation.[236] Allowing courts to base damages on a rate other than that which has been filed with FERC would undermine the congressional scheme of uniform rate regulation and

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230. *Id.* (emphasis added).

231. *See id.* at 22–23.

232. *See id.*; *cf.* Penn. Water & Power Co. v. Fed. Power Comm'n, 343 U.S. 414, 423–24 (1952) (stating that Pennsylvania Water could not use the Sherman Act in an attempt to nullify a Commission imposed rate reduction).

233. *See generally* Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246 (1951).

234. *Id.* at 251.

235. *Id.* at 252–53.

236. *In re* Mirant Corp., 378 F.3d 511, 519 (5th Cir. 2004).

permit a court to do that which FERC itself could not do.[237] But that is not what occurs in bankruptcy[238] and is likely the reason why no circuit court has found the filed rate doctrine to preclude a bankruptcy court from rejecting a contract.[239] The argument that rejection "alters the essential terms and conditions of a contract that is also a filed rate"[240] mischaracterizes the effect of rejection[241] because damages resulting from the rejection are calculated using the filed rate.[242] Thus, rejection does not result in a collateral attack on the filed rate.[243] Even FERC itself has acknowledged in the past that in bankruptcy, the filed rate doctrine is not violated so long as damages are based on the filed rate.[244]

Although it is true that the nonbreaching party, as an unsecured creditor, will likely only receive a fraction of the full amount owed, that is

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237. Ark. La. Gas Co. v. Hall, 453 U.S. 571, 579-80 (1981).

238. *See In re Mirant*, 378 F.3d at 519–21.

239. *See generally id.* at 511; *In re* FirstEnergy Sols. Corp., 945 F.3d 431 (6th Cir. 2019); *but see In re* Calpine, 337 B.R. 27 (S.D.N.Y. 2006).

240. *See* ETC Tiger Pipeline, LLC, 171 FERC ¶ 61,248 at P 23 (2020).

241. *See In re* FirstEnergy Sols. Corp., No. 18-50757, 2018 WL 2315916, at *13 (Bankr. N.D. Ohio May 18, 2018) (holding that rejection and cessation of performance does not "intrude on FERC's jurisdiction over filed rates."):

> If Plaintiffs were solvent and simply stopped making payments under the [contract] . . . the counterparties could not reasonably argue that Plaintiffs had somehow modified or abrogated those agreements; they would seek damages for the breaches of those contracts in court . . . under the terms of the contracts as written. Those breaches would lead to claims. If the Plaintiffs then filed bankruptcy, the claims would become claims against the estate. Treatment of those claims are governed by the Bankruptcy Code. . . . Rejection has exactly the same effect (breach) and the same result (a claim against the estate).

242. *In re Mirant*, 378 F.3d at 519.

243. *Id.*

244. *See* USGen New England, Inc., 118 FERC ¶ 61,172 at P 26 (2007):

> [M]itigation does not change the filed rate; it only changes the net amount owed as an equitable remedy for the breach of the contract. Accordingly, while it is correct that the Bankruptcy Court had no jurisdiction to use a rate other than the filed rate to determine damages, that truism begs the question of whether the court was being asked to change the filed rate or use a rate other than the filed rate when USGen sought additional mitigation.

The Commission went on to note that mitigation damages would not violate the filed rate doctrine because the damages "would be calculated starting with the filed rates, and then subtracting revenues to be expected to be received." *Id.*

the nature of bankruptcy and a function of law.[245] This fact likewise does not serve as a collateral attack on the filed rate.[246] FERC's jurisdiction over rates, terms, and conditions extends only to those things that directly affect the filed rate.[247] Though rejection undoubtedly affects the filed rate, the effects are merely indirect because it is the Bankruptcy Code, not the court, that provides the classifications and priority rankings of creditors.[248]

E. Priority of Claims

The Bankruptcy Code provides that when a debtor rejects an executory contract under § 365, the nonbreaching party receives a pre-petition claim for damages as an unsecured creditor.[249] Claim, in this context, is defined as a "right to an equitable remedy for breach of performance."[250] Therefore, the Bankruptcy Code envisions and has preemptively addressed the result of rejection concerning future performance on contracts.[251] The ultimate result may not seem fair,[252] but in balancing the burdens and expectations of the debtor and its counterparties, Congress carefully crafted the burdens a debtor may reject.[253]

Additionally, because the value of a bankrupt estate is limited, the Bankruptcy Code also ranks the priority of creditors and other claimants with an interest in the estate.[254] Allowing FERC to compel performance will place the filed rate counterparty in a better position than Congress

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245. *In re Mirant*, 378 F.3d at 521 (citing 11 U.S.C. § 1129); *In re* Extraction Oil & Gas, 622 B.R. 608, 625 (Bankr. D. Del. 2020) ("[T]o be clear, nothing is affecting the rate charged – the Rejection Counterparties . . . file claims at the rates approved by FERC and this Court is doing nothing to abrogate those approved rates.").

246. *In re Mirant*, 378 F.3d at 519–20.

247. FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 766 (2016).

248. *See In re Mirant*, 378 F.3d at 520–21.

249. 11 U.S.C. §§ 502(c)(2), 502(g)(1).

250. *Id.* § 101(5).

251. *See* Blumenthal v. NRG Power Mktg., Inc., 104 FERC ¶ 61,210 at P 3 (2003) (Brownell, Commissioner, dissenting) (stating that if a breach of contract in bankruptcy can be resolved financially, the Commission should not interfere).

252. *See In re* Ultra Petroleum Corp., 621 B.R. 188 (Bankr. S.D. Tex. 2020) (stating that bankruptcy does not need to be fair to the counterparty because it is fair by requiring parties to share the burden).

253. *See* Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1666 (2019).

254. 11 U.S.C. §§ 502, 1129.

intended.[255] In crafting the priority scheme of distribution, Congress had the foresight to include possible future tort claims, environmental damages, and a host of other potential future creditors.[256] Yet, it did not place a filed rate on a pedestal.[257] Indeed, "Congress established the bankruptcy waterfall of distribution, much like it created FERC, and nothing in the Bankruptcy Code nor the FERC regulation excepts or prioritizes either of the statutes."[258]

Moreover, allowing a filed rate counterparty to receive priority status, which will necessarily diminish the amount of recovery for similarly situated unsecured creditors, runs counter to Congress's intent and results in discriminatory and preferential treatment[259]—which, ironically, is what the FPA's purpose seeks to prevent.[260] But once again, Congress had the foresight to curtail such preferential acts.[261] As bankruptcy scholar and United States Senator Elizabeth Warren explained:

> The Code's treatment of the debtor's executory contracts illustrates another distributional objective of bankruptcy: treating creditors alike. . . . [If a debtor could not reject its contracts], some contract creditors might be able to jump the priority queue and extract payments in excess of their unsecured claims by forcing performance on economically infeasible obligations. Instead . . . [t]he requirement that unsecured creditors be classified together and receive pro rata distributions is another attempt to create creditors with similar characteristics alike.[262]

In sum, FERC's statutory authority, subject to very limited circumstances, does not extend to demanding specific performance on a filed rate. Moreover, a close reading of *Penn Water*, *MDU I*, and *MDU II* reveals that those cases do not create a categorical rule that filed rates in all circumstances—and especially in bankruptcy—carry the force of law. Thus, because a filed rate in a bankruptcy proceeding does not carry the weight of a federal regulation, it is subject to rejection, which by operation

255. *See Blumenthal*, 104 FERC ¶ 61,210 at P 3 (Brownell, Commissioner, dissenting).
256. Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 786–87 (1987).
257. *See generally* 11 U.S.C. §§ 502, 1129.
258. *In re* Extraction Oil & Gas, 622 B.R. 608, 625 (Bankr. D. Del. 2020).
259. Warren, *supra* note 256, at 785–87.
260. *See* 16 U.S.C. § 824d(a); *see also In re* FirstEnergy Sols. Corp., 945 F.3d 431, 446 (6th Cir. 2019).
261. *See* Warren, *supra* note 256, at 791.
262. *Id.*

of the Bankruptcy Code results in a breach and a pre-petition claim for damages.

V. STANDARD OF REVIEW FOR REJECTION

Regardless of how the jurisdictional debate is settled, circuit courts and FERC agree that a bankruptcy court at least has concurrent authority to reject a contract.[263] Proceeding from that premise, it is still necessary to establish the court's standard of review for determining whether rejection is appropriate. When a party petitions for bankruptcy, the court will typically base its decision to approve or disapprove rejection using the deferential business judgment rule.[264] Pursuant to that standard of review, a court should presume that a debtor is making its decision to reject based on a prudent, good faith belief that rejection is in the best interest of the estate.[265] Conversely, if a party to a filed rate petitions FERC to modify or abrogate its rate, the party will have to overcome the *Mobile-Sierra* doctrine. Under the *Mobile-Sierra* standard of review, a FERC regulated party must demonstrate that modification or abrogation of the filed rate is necessary in order to prevent serious harm to public interest.[266]

A. Fifth and Sixth Circuits' Standard-of-Review Solutions

The Fifth Circuit in *Mirant* did not affirmatively state whether the bankruptcy court has exclusive or concurrent jurisdiction regarding rejection.[267] It did, however, hold that although FERC has exclusive jurisdiction over filed rates, rejection does not result in a collateral attack on the filed rate, and therefore the FPA does not preempt the bankruptcy court.[268] Additionally, the court acknowledged that the filed rate and *Mobile-Sierra* doctrines prohibit FERC from altering a rate purely based on private concerns of unprofitability, and, therefore, it would be inappropriate to use the business judgment rule to consider rejection.[269] On

263. *See, e.g.*, *In re* Mirant, 378 F.3d 511 (5th Cir. 2004); *In re FirstEnergy*, 945 F.3d at 43; ETC Tiger Pipeline, LLC, 172 FERC ¶ 61,155 at P 33 (2020); *but see In re* Calpine, 337 B.R. 27 (S.D.N.Y. 2006).

264. Mission Prod. Holdings, Inc., v. Tempnology, LLC, 139 S. Ct. 1652, 1668 (2019); *In re* Ultra Petroleum Corp., 621 B.R. 188 (Bankr. S.D. Tex. 2020).

265. *In re* PG&E Corp., 603 B.R. 471,486 (Bankr. N.D. Cal. 2019).

266. Morgan Stanley Cap. Grp. Inc., v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008).

267. *See generally In re Mirant*, 378 F.3d 511.

268. *Id.* at 518.

269. *Id.* at 525.

remand, the Fifth Circuit suggested in dicta that the bankruptcy court should scrutinize whether to approve rejection utilizing a more stringent standard than the business judgment rule.[270] In reaching its conclusion, the Fifth Circuit panel noted that FERC would be able to provide its input because the bankruptcy court had already indicated that it would welcome FERC's participation.[271] By stating that the court was not preempted and that the bankruptcy court "should consider applying a more rigorous" standard of review, it impliedly held the court's authority to reject was exclusive.[272]

On remand, the bankruptcy court denied rejection on other grounds but nevertheless made its views on the proper standard of review known for future purposes.[273] The bankruptcy court in the Northern District of Texas affirmatively adopted the Fifth Circuit's suggestion and stated that it would carefully scrutinize the impact of rejection on the public interest and only allow rejection if it would not cause any disruption in the supply of electricity or lead to unjust or unreasonable rates. If rejection would result in such negative impacts on the public interest, the court would not allow rejection unless the debtor could show that it could not reorganize otherwise.[274]

In 2020, the Southern District of Texas likewise adopted, and applied, *Mirant*'s suggestion as controlling.[275] Over the course of a multi-day hearing, the bankruptcy court heard expert testimony as to whether rejection of a natural gas agreement would implicate the public interest.[276] The court noted that neither party submitted evidence that rejection would threaten public health, safety, or welfare, and therefore allowed rejection.[277]

Unlike the Fifth Circuit, the Sixth Circuit in *FirstEnergy* held that "the public necessity of available and functional bankruptcy relief is generally superior to the necessity of FERC's having complete or exclusive authority to regulate energy contracts," and therefore, in choosing between the competing necessities, it concluded that the bankruptcy court had concurrent but "primary or superior" jurisdiction.[278] To accommodate its

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270. *Id.*
271. *Id.* at 525–26.
272. *See id.* at 525.
273. *In re* Mirant, 318 B.R. 100, 108 (Bankr. N.D. Tex. 2004).
274. *Id.*
275. *In re* Ultra Petroleum Corp., 621 B.R. 188, 199 (Bankr. S.D. Tex. 2020).
276. *Id.* at 200.
277. *Id.* at 201.
278. *In re* FirstEnergy Sols. Corp., 945 F.3d 431, 445–46 (6th Cir. 2019).

holding of concurrent jurisdiction, on remand the Sixth Circuit required that the bankruptcy court use a higher standard of review.[279]

Despite the difference between the two opinions concerning the appropriate standard of review, the outcome, in effect, is the same. Quoting Supreme Court precedent, the Fifth Circuit suggested that the bankruptcy court adopt a standard that would approve of rejection only if the debtor can show the contract "burdens the estate" and that "after careful scrutiny, the equities balance in favor of rejecting" the contract.[280] The Sixth Circuit quoted *Mirant*'s suggestion in making its holding.[281] Thus, courts within the Fifth and Sixth circuits utilize a heightened standard of review, but this standard is not as onerous as the *Mobile-Sierra* doctrine.

B. FERC's Use of the Mobile-Sierra *Doctrine as a Standard of Review*

The public-interest standard of review of the *Mobile-Sierra* doctrine governs FERC's determination as to whether a regulated party can modify or abrogate its filed rate.[282] Accordingly, FERC posits that the best way to harmonize the FPA and Bankruptcy Code, rendering each of the respective statutes effective, is to allow a debtor to reject a contract pursuant to § 365(a) using the business judgment rule and to allow FERC to assess, and to veto if necessary, the rejection based on the *Mobile-Sierra* public-interest standard.[283] FERC asserts that this model of "concurrent" jurisdiction allows a bankruptcy court to sit in judgment of rejection, which is solely within the province of the bankruptcy court, while also allowing FERC to exercise its sole province over filed rates.[284]

The FPA finds its roots in the Interstate Commerce Act (ICA).[285] Like the ICA, the FPA requires regulated public utility companies to unilaterally file tariffs with FERC, which will then serve as the rates and terms of general applicability to any potential customer.[286] Alternatively, unlike the ICA, the FPA departed from a purely tariff-based scheme by

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279. *Id.* at 454.
280. *In re* Mirant Corp., 378 F.3d 511, 525 (5th Cir. 2004).
281. *In re FirstEnergy*, 945 F.3d at 454.
282. Rockies Express Pipeline LLC, 173 FERC ¶ 61,099 at P 34 (2020).
283. *In re FirstEnergy*, 945 F.3d at 451.
284. ETC Tiger Pipeline, LLC, 171 FERC ¶ 61,248 at P 25 (2020).
285. Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 531 (2008).
286. *Id.*; *see also* Michael Keegan, *Bargaining For Power: Resolving Open Questions From* NRG Power Marketing LLC v. Maine Public Utilities Commission, 65 ME. L. REV. 99, 100 (2002).

also allowing public utilities to set rates through bilateral contracts.[287] Regardless of the method chosen, the rate must be filed with FERC, and the rate must be just and reasonable.[288] FERC can then choose to investigate the rate or decline investigation, in which case the rate will go into effect immediately.[289] FERC, however, does not have an affirmative duty to investigate.[290] Nevertheless, FERC's decision to decline investigation does not deem a rate to be just and reasonable;[291] FERC may still challenge and replace an unlawful rate with a lawful rate at a later date in response to a complaint or of its own volition.[292]

Under a traditional tariff-based review, FERC utilizes a cost-of-service standard that ensures a seller recovers costs of service while allowing sufficient profit to attract investors.[293] Under a contract-based review, though, a judicially created standard of review is utilized.[294] In a pair of cases decided on the same day, the Supreme Court declared that a freely negotiated contract is presumptively just and reasonable, that a bilateral contract rate may not be unilaterally modified or abrogated, and that the just-and-reasonable presumption may only be overcome if it seriously harms public interest.[295] These twin cases gave rise to the so-called *Mobile-Sierra* doctrine.[296]

1. United Gas Pipe Line Co. v. Mobile Gas Service Corp.

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, the Court held that a party to a bilateral contract filed rate cannot unilaterally change its rates.[297] The case arose when United Gas unilaterally filed a new rate

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287. *Morgan Stanley*, 554 U.S. at 531; United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 338 (1956).

288. 16 U.S.C. § 824d(a)–(c).

289. Boston Edison Co. v. FERC, 856 F.2d 361, 368 (1st Cir. 1988) (quoting Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 255–56 (1951)).

290. *Morgan Stanley*, 554 U.S. at 532; *see also* 16 U.S.C. § 824d(e); 18 C.F.R. §35.4 (2021).

291. 18 C.F.R. § 35.4 (2021).

292. *Morgan Stanley*, 554 U.S. at 532 (citing 16 U.S.C. § 824e(a)).

293. *Id.*

294. *See* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348 (1956).

295. *Id.*

296. *Morgan Stanley*, 554 U.S. at 532–33; *but see id.* at 551 n.6 (noting that although *Mobile* and *Sierra* arose in 1956, the Supreme Court had not adopted the phrase until 2008).

297. *Mobile Gas Serv.*, 350 U.S. at 337.

increase for a Commission-regulated contract rate.[298] United Gas was under the impression that the NGA allowed rate changes with 30-days' notice to the Commission.[299] The Court, however, disagreed, stating that the Act merely provides a notice provision, not a rate-making procedure.[300] Because the Act does not define rate-making and rate-changing powers, "[t]he obvious implication" is that those powers are the same as those absent the Act.[301] Since a party cannot unilaterally change a contract rate in general, a party cannot change a contract rate simply because it is regulated. This in turn furthers the public interest by preserving the integrity of contracts and creating stability in the industry.[302] Additionally, the Court noted that although a party may not unilaterally change a contract rate to further its private interests, it was not precluded from seeking relief if those interests align with the public interest.[303]

2. Federal Power Commission v. Sierra Pacific Power Co.

In *Federal Power Commission v. Sierra Pacific Power Co.*, the Court built upon *Mobile* and held that because a party to a contract could not unilaterally change its rate, the Commission likewise could not provide relief to a party merely because it yielded less than a fair rate of return.[304] The Commission had found that the contract rate at issue was unreasonably low and therefore unlawful, and thus permitted the party to unilaterally increase its rate.[305] The Commission's actions were justified under the traditional cost-of-service standard of review; a less-than-fair return would not have been just and reasonable, and thus would be subject to modification or abrogation. But where parties enter into a freely negotiated contract, the Court stated that the "sole concern" of the Commission is whether the rate is "so low as to adversely affect the public interest."[306] The Court then provided three nonexclusive factors on which

298. *Id.* at 336.
299. *Id.* at 339–41.
300. *Id.* at 341–43.
301. *Id.* at 343; *cf.* discussion *supra* Section II.A. describing the *Tempnology* Court's assertion that a breach of contract pursuant to § 365(a) and § 365(g) has the same effect in bankruptcy as a breach of contract outside of bankruptcy.
302. *Id.* at 344.
303. *Id.*
304. Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956).
305. *Id.* at 354–55.
306. *Id.* at 354–55; *see also* Morgan Stanley Cap. Grp. Inc. v. Publ Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 546–47 (2008) ("[I]n a proper regulatory scheme, the ordinary mode for evaluating contractually set rates is to look to

the Commission could make such a determination: if the rate (1) would impair the public utility's financial ability to continue service, (2) would create an excessive burden for other customers, or (3) was unduly discriminatory.[307]

This judicially created test arising out of *Mobile* and *Sierra* weighs heavily in favor of contracts and significantly limits the Commission's authority to regulate rates arising out of contracts.[308] As applied over the years, this standard of review has since been described as "practically insurmountable,"[309] providing for abrogation only in "extraordinary circumstances"[310] of "unequivocal public necessity,"[311] with a possibility of overcoming that is "hardly worthy of recognition."[312] However, as applied, this onerous standard for contract rates cannot be reconciled with the plain language of the FPA.

C. The Mobile-Sierra *Doctrine is Incompatible with the Goals of Bankruptcy*

Whether a rate is set unilaterally through tariff, or bilaterally through contract, the rate must be just and reasonable.[313] But the *Mobile-Sierra* doctrine, as applied, creates a bifurcated analysis with no textual support in the accompanying statutes.[314] The Supreme Court has acknowledged that two standards of review exist; one for unilateral tariff rates based on the statutory just-and-reasonable standard, and one for bilateral contract rates based on the public-interest standard pursuant to the judge-made *Mobile-Sierra* presumption.[315] Yet, the Court has attempted to justify this "obviously indefensible proposition that a standard different from the statutory just-and-reasonable standard applies to contract rates" by contending that the public-interest standard is simply a differing

whether the rates seriously harm the public interest, not to whether they are unfair to one of the parties that voluntarily assented to the contract.").

307. *Sierra*, 350 U.S. at 352.

308. Carmen L. Gentile, *The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future*, 21 ENERGY L.J. 353, 362 (2000).

309. Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 954 (D.C. Cir. 1983).

310. Ark. La. Gas Co. v. Hall, 453 U.S. 571, 582 (1981).

311. *In re* Permian Basin, 390 U.S. 747, 822 (1968).

312. *Papago Tribal Util. Auth*., 723 F.2d at 954.

313. Morgan Stanley Cap. Grp. Inc. v. Publ Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 545 (2008) ("There is only one statutory standard for assessing whether wholesale–electricity rates, whether set by contract or tariff—the just-and-reasonable standard.").

314. *Id.* at 556–58 (Stevens, J., dissenting).

315. *Id.* at 534–35.

application of the just-and-reasonable standard[316] and that this public-interest standard simply defines what it means to be just and reasonable in the context of a contract.[317] But this justification is unpersuasive.[318]

Under the *Mobile-Sierra* interpretation of the FPA, public utilities can either (1) unilaterally file a tariff for prospective customers, which the public utility can change at will, or (2) enter into a bilateral contract with a specific customer, which can only be changed through mutual assent.[319] Therefore, a tariff can be changed at will,[320] but a contract, absent mutual assent, can only be changed if it is shown to seriously harm the public interest.[321] Likewise, if FERC determines that a rate is not just and reasonable, and is therefore unlawful, it may change a unilateral tariff rate; but if a contract rate is determined to be unjust and unreasonable, FERC must nonetheless presume that it is just and reasonable, abrogating the rate

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316. *Id.* at 535; NRG Power Mktg. v. Me. Public Util. Comm'n, 558 U.S. 165, 168 (2010).

317. *NRG Power Mktg.*, 558 U.S. at 174 (quoting *Morgan Stanley*, 554 U.S. at 546).

318. *See* Gentile, *supra* note 308, at 357 ("[W]ithout the *Sierra* requirement of public interest findings, the same just and reasonable standard would apply to both contract rate revisions and non-contract rate revisions." Without such requirements, "the Commission would be able to overturn contract rates as readily as non-contract rates."); *id.* at 368 (quoting Ne. Util. Serv. Co. v. FERC, 993 F.2d 937, 961 (1st Cir. 1993) (internal quotations omitted)) wherein the First Circuit described FERC's actions as

> conflat[ing] the just and reasonable and public interest standards, thereby circumventing the *Mobile–Sierra* doctrine. The distinction between the just and reasonable standard and public interest standards loses its meaning entirely if the Commission may modify a contract under the public interest standard where it finds the contract may be unjust [or] unreasonable.

319. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 343 (1956); *see also NRG Power Mktg.*, 558 U.S. at 171–72.

320. Keegan, *supra* note 286, at 127:

> Under a classic tariff scheme, customers do not negotiate with the utility the rates of service. Instead, the customer must accept the rates set forth in the tariff. The customer is protected because the regulatory agency, such as FERC, has found that the rates listed in the tariff are just and reasonable and not unduly discriminatory . . . . When the utility determines that the rates in the tariff no longer provide it with a sufficient return, the utility may unilaterally seek an increase by proposing a new rate to FERC. The rate goes into effect automatically so long as FERC does not find that the rate is not just and reasonable.

321. *Mobile Gas Serv.*, 350 U.S. at 343; *see also NRG Power Mktg.*, 558 U.S. at 171–72.

only if FERC determines that it seriously harms the public interest.[322] This heightened burden for contracts is not merely a differing application of the just-and-reasonable standard—it is an "obviously indefensible" heightened standard of review.[323]

Nevertheless, even if the public-interest standard is merely a different application of the just-and-reasonable standard, the statute does not provide for different applications of the just-and-reasonable standard of review depending on whether it is a unilateral tariff or bilateral contract, nor does it require a presumption of reasonableness.[324] Congress chose the broad language of "just and reasonable" to enable FERC to carry out its purpose by filling in the gaps as it saw fit.[325] Courts, however, have restrained FERC's ability to fulfill its duty by imposing restrictions despite acknowledging that "just and reasonable" is incapable of precise judicial definition, that administrative agencies should be granted significant deference, and that FERC is not constrained by any one ratemaking formula.[326]

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322. *See Morgan Stanley*, 554 U.S. at 548*; see also id.* at 565–66 (Stevens, J., dissenting) (quoting various FERC orders to argue that even if the *Mobile-Sierra* standard is a differing application of the just and reasonable standard, that is not how FERC interprets it:

> [I]f rates . . . become unjust and unreasonable and the contract at issue is subject to the *Mobile-Sierra* standard of review, the Commission under court precedent may not change the contract simply because it is no longer just and reasonable . . . . [T]he Commission is bound to a higher burden to support modification of such contracts.)

323. *Id.* at 557 (Stevens, J., dissenting).

324. *Id.*

325. *Id.* at 557–58 (Stevens, J., dissenting) (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)).

326. *Id*. at 532, 558–59 (Stevens, J., dissenting); *see also id.* at 568–69 (Stevens, J., dissenting):

> The Court has curtailed the agency's authority to interpret the terms "just and reasonable" and thereby substantially narrowed FERC's discretion to protect the public interest by means it thinks best. Contrary to Congressional intent, FERC no longer has the flexibility to adjust its review of contractual rates to account for changing conditions in the energy markets or among consumers.

In re Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968) ("The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors."); *id.* at 784 ("[A]dministrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances.").

When considering the context in which the filed rate and *Mobile-Sierra* doctrines arose, their continued application in the modern world is without merit.[327] Indeed, the *Mobile-Sierra* doctrine itself took the first step toward deregulation.[328] If a rate is created through a negotiated contract, FERC has no power to regulate absent extraordinary circumstances.[329] Quite frankly, the doctrine protects contracts rather than protecting consumers from unjust and unreasonable rates.[330] This is even more apparent when considering that just two years after *Mobile* was decided, the Supreme Court effectively held that a party can contractually draft out of the *Mobile-Sierra* presumption and unilaterally file a new rate change.[331] Courts of Appeals have taken this a step further, allowing contracts to grant FERC the authority to abrogate a rate if that rate does not provide a fair rate of return.[332] As a result, the *Mobile-Sierra* doctrine has created an arena whereby deference to freedom of contract has made FERC's role subservient.[333]

This arena of contractual deference is premised on the belief that preserving the integrity of contracts helps to maintain reasonable prices, thus protecting the public interest.[334] FERC has stated that "uncertainties regarding rate stability and contract sanctity can have a chilling effect on investments" and distribution.[335] And that may be true. Investors will likely feel more comfortable committing the necessary capital if they are

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327. Maslin Indus., U.S., Inc., v. Primary Steel, Inc. 497 U.S. 116, 150–51 (1990) (Stevens, J., and Rehnquist, C.J., dissenting).

328. Gentile, *supra* note 308, at 367.

329. *See id.* at 366–67.

330. *Id.* at 363; *see In re Permian Basin*, 390 U.S. at 882; Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527, 564 (2008) (Stevens, J., dissenting).

331. United Gas Pipe Line Co. vs. Memphis Light, Gas & Water Div., 358 U.S. 103, 110–13 (1958) (The Court noted that unlike in *Mobile*, the seller here "bound itself to furnish gas . . . not at a single fixed rate . . . but at what in effect amounted to its current 'going' rate." As a result, the seller was contractually "free to change its rates from time to time." Under such circumstances, "there is nothing in *Mobile* which suggests that [the seller] was not entitled to [unilaterally] file its new schedules under" § 4(d) of the NGA).

332. *See e.g.*, Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 953 (D.C. Cir. 1983); La. Power & Light Co. v. FERC, 587 F.2d 671, 675–76 (5th Cir. 1979).

333. *See* NRG Power Mktg. v. Me. Public Util. Comm'n, 558 U.S. 165, 180 (2010) (Stevens, J., dissenting); *Morgan Stanley*, 554 U.S. at 559 (Stevens, J., dissenting).

334. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344 (1956); *In re Permian Basin*, 390 U.S. at 822.

335. *Morgan Stanley*, 554 U.S. at 551.

confident that FERC will not modify or abrogate a filed rate absent extraordinary circumstances.[336] However, this rationale does not extend to bankruptcy; anyone who invests or extends credit assumes a risk of nonpayment in bankruptcy, and such risk is adequately structured in interest.[337] Additionally, this "chilling effect" was further rebuffed in *Ultra Petroleum*, wherein expert testimony revealed that from the time *Mirant* was decided in 2004, $92 billion had been spent on building pipelines.[338]

This criticism of the *Mobile-Sierra* doctrine is not absolute. Though the doctrine may be flawed, this Comment does not seek to uproot the doctrine's longstanding interpretation.[339] Rather, it contends that the *Mobile-Sierra* doctrine should not apply in the context of bankruptcy because it is "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code."[340]

Because of the atextual, nearly insurmountable standard required to prove that a contract rate seriously harms the public interest and is thus worthy of modification or abrogation, parties may become overburdened and projected into bankruptcy.[341] If a debtor cannot reject its burdensome contracts, efforts to successfully reorganize and emerge anew are thwarted from the outset.[342] In fact, FERC has found a debtor's claims that continued performance of a filed rate contract would preclude the debtor from receiving necessary loans insufficient to overcome the *Mobile-Sierra* doctrine when preclusion would result in liquidation.[343] Only upon liquidation could the debtor cease performance.[344] But the Supreme Court has expressly rejected a standard of review that merely asks whether rejection is necessary to prevent a debtor from liquidating.[345] Notably, the Court stated that although such a heightened burden "may not be insurmountable," it nevertheless "interfere[s] with the reorganization

336. *NRG Power Mktg.*, 558 U.S. at 174.

337. Warren, *supra* note 256, at 780.

338. *See In re* Ultra Petroleum Corp., 621 B.R. 188, 203 (Bankr. S.D. Tex. 2020).

339. *See Morgan Stanley*, 554 U.S. at 551 n.6 (explaining that although the Supreme Court had not adopted the phrase "*Mobile-Sierra* doctrine" until 2008, FERC and lower courts alike had been using the term for decades).

340. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 525 (1984).

341. *See, e.g.*, *In re* FirstEnergy Sols. Corp., 945 F.3d 431 (6th Cir. 2019).

342. *Bildisco & Bildisco*, 465 U.S. at 528; *In re* Mirant Corp., 378 F.3d 511, 518 (5th Cir. 2004).

343. *See generally* Blumenthal v. NRG Power Mktg., Inc., 104 FERC ¶ 61,210 (2003).

344. *Id.* at P 68 n.81.

345. *Bildisco & Bildisco*, 465 U.S. at 525.

process" and opposes the fundamental policies of the Bankruptcy Code.[346] Thus, if the Court rejected a standard of review that "may not be unsurmountable,"[347] *a fortiori*, a standard of review that is described as "practically insurmountable"[348] must likewise be rejected. FERC is inextricably bound to follow the practically insurmountable burden of the *Mobile-Sierra* doctrine; accordingly, granting FERC concurrent jurisdiction in matters concerning bankruptcy would interfere with the reorganization process and be but a façade to matters of equity.[349]

VI. HARMONIZING THE FPA AND THE BANKRUPTCY CODE

When courts are confronted with two competing Acts of Congress, they must attempt to interpret and harmonize the statutes in such a way as to regard each as effective if the two are capable of co-existence.[350] Despite the numerous interpretations concerning this "imagined conflict,"[351] the FPA and Bankruptcy Code provide explicit instructions.[352] Moreover, "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such result should follow. The intention must be clear and manifest."[353]

A. Administrative Agency Deference

FERC's solution—that it has concurrent jurisdiction with bankruptcy courts—fails to harmonize the FPA with the Bankruptcy Code; it renders rejection entirely ineffective, destroys a debtor's rights under the Bankruptcy Code, and supplants Congress's will.[354] Its idea of concurrent

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346. *Id.* (The Court then went on to adopt a standard of review that allows a court to reject a collective-bargaining agreement if, "after careful scrutiny, the equities balance in favor of reject[ion] . . . .").

347. *Id.*

348. Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 954 (D.C. Cir. 1983).

349. *See generally* Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008); NRG Power Mktg. v. Me. Public Util. Comm'n, 558 U.S. 165 (2010).

350. *In re* Mirant Corp., 378 F.3d 511, 517 (5th Cir. 2004).

351. *In re* PG&E Corp., No. 19-30088, 2019 WL 2183380, at *3 (Bankr. N.D. Cal. Mar. 1, 2019) (recommendation re motions to withdraw the reference).

352. *Id.*

353. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) (quoting Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995)).

354. *In re* FirstEnergy Sols. Corp., No. 18-50757, 2018 WL 2315916, at *13 (Bankr. N.D. Ohio May 18, 2018); *In re* PG&E Corp., 603 B.R. 471, 476 (Bankr.

jurisdiction "is, at best, a costly procedural delay of the final determination of the treatment rejection claims will receive in the bankruptcy case. At worst, it is an inappropriate violation of the Bankruptcy Code's priority scheme."[355]

As an administrative agency, courts must typically defer to FERC's interpretation of the FPA, including interpretations of its own statutory authority.[356] But granting FERC the ability to impede on a bankruptcy court's jurisdiction over the rejection of contracts "would allow the tail to wag the Doberman."[357] "FERC is a creature of statute," and unlike the bankruptcy court, it has "no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress."[358] No matter how hard or long FERC searches, it will not find authority in the FPA or the Bankruptcy Code permitting such usurpation of authority.[359] Instead, "Congress provided FERC limited regulatory jurisdiction over interstate" transmission of electricity, "and this limited regulatory jurisdiction is not a legitimate basis to usurp [a bankruptcy court's] authority to rule on [a] [d]ebtor's motion to reject."[360]

N.D. Cal. 2019); The *FirstEnergy* court was correct in rejecting this argument, but the court was incorrect in basing its holding on the belief that "the public necessity of available and functional bankruptcy relief is generally superior to the necessity of FERC's having complete or exclusive authority to regulate energy contracts." Instead, the court should have reached its conclusion based on the statutory authority granted to bankruptcy courts and FERC. *In re* FirstEnergy Sols. Corp., 945 F.3d 431 (6th Cir. 2019).

355. *See FirstEnergy Sols. Corp.*, 2018 WL 2315916, at *13.

356. Miss. Power & Light v. Miss *ex rel.* Moore, 487 U.S. 354, 380–81 (1988) (Scalia, J., concurring in judgment); *see generally* Chevron USA v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (creating the so-called *Chevron* doctrine); *but see* Michigan v. EPA, 576 U.S. 743, 760–63 (2015) (Thomas, J., concurring) (arguing that agency deference divests the judiciary of its constitutionally vested authority).

357. *See* Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1665 (2019).

358. *See In re PG&E*, 603 B.R. at 485; *see also* Warren, *supra* note 256, at 780 (noting that default, or nonpayment, has been an integral part of society dating back to Biblical jubilees).

359. *In re* Mirant Corp., 378 F.3d 511, 521–22 (5th Cir. 2004); *In re PG&E*, 603 B.R. 471.

360. *In re* Extraction Oil & Gas, 622 B.R. 608, 625 (Bankr. D. Del. 2020).

Additionally, FERC's interpretation of its own jurisdictional authority concerning both bankruptcy[361] and general breach of contract claims[362] has been inconsistent, and, therefore, should not be granted any significant deference in this jurisdictional debate.[363] In 2002, FERC noted its long-standing policy of preserving the sanctity of contracts, departing from the *Mobile-Sierra* doctrine "only in extreme circumstances, such as . . . fundamental industry-wide restructuring . . . and the reorganization of a bankrupt utility."[364] But in 2003, in *NRG*, FERC addressed whether a debtor must continue to fulfill its service notwithstanding rejection and stated that although the Bankruptcy Code allows a debtor to reject a contract subject to the court's approval, "the utility still must meet its obligations under the FPA."[365]

The following year, in *Mirant*, FERC argued that the FPA preempted courts from rejecting a FERC regulated contract because rejection resulted in an unauthorized collateral attack on the filed rate.[366] The Fifth Circuit disagreed, and instead determined that the bankruptcy court had both the

361. *See, e.g.*, Cal. Elec. Oversight Bd., 114 FERC ¶ 61,003 (2006) (noting that FERC adopted the Fifth Circuit *In re Mirant* decision and that "the Commission is precluded from taking action under the FPA that impacts a debtor's ability to reject an executory contract."); ETC Tiger Pipeline, LLC, 172 FERC ¶ 61,155 at P 32 (FERC noted that "[i]n applying these [*Arkla*] factors to specific cases involving bankruptcy, the Commission has reached different conclusions."); ETC Tiger Pipeline, LLC, 172 FERC ¶ 61,155 P 16 nn.37–38; Transwestern Pipeline Co., 103 FERC ¶ 61,066 at P 11 (2003); N. Nat. Gas Co., 102 FERC ¶ 61,076 at P 71 (2003)); Kern River Gas Transmission Co., 101 FERC ¶ 61,374, at p. 62,556 (2002) ("[B]ecause [the contract] was an executory contract . . . [Enron had] the right to determine, at its sole discretion, whether to reject" or assume the contract.).

362. *See, e.g.*, S. Md. Elec. Coop. v. J.P. Morgan Ventures Energy Corp., 155 FERC ¶ 61,164 P 23 (2016); Sw. Power Pool, Inc., 150 FERC ¶ 61,091 at P 10 (2015); *see also, e.g.*, *In re* Enron Power Mktg. Inc., No. 01-7964, 2003 WL 68036, at *5, *10 (S.D.N.Y. Jan. 8, 2003); Masspower *ex rel.* BP MP Partners I, LLC v. Mass. Mun. Wholesale Elec. Co., No. 07-3243-BLS2, 2011 WL 477263, at *31 (Mass. Super. Ct. Jan. 31, 2011).

363. *Cf.* Miss. Power & Light v. Miss. *ex rel.* Moore, 487 U.S. 354, 388–89 (1988) (Brennan, J., dissenting).

364. Nev. Power Co., 99 FERC ¶ 61,047, at p. ¶ 61,190 (2002).

365. Blumenthal, 104 FERC ¶ 61,210 at P 21 (2003); *but see* Blumenthal 103 FERC ¶ 61,344 at P 4 (Brownell, Commissioner, dissenting in part) ("Prior Commissions have acknowledged [that rejection is vital to a debtor's ability to reorganize] and stated quite clearly that '[a bankrupt's] [sic] decision to reject its contracts is an issue to be resolved before the Bankruptcy Court and is not subject to the determination of the Commission.'").

366. *In re* Mirant Corp., 378 F.3d 511, 518 (5th Cir. 2004).

power to reject a FERC regulated contract and the power to enjoin FERC from demanding specific performance.[367] As a result, FERC changed its stance.[368]

In 2006, FERC declared in *California Electricity Oversight Board* (CEOB) that it was precluded from taking action under the FPA and that it would follow the ruling of the Fifth Circuit, despite the fact that FERC was litigating in the Ninth Circuit and thus not bound to the Fifth Circuit's decision.[369] Furthermore, FERC stated that because rejection only results in a breach of contract, parties need not be constrained by the restrictive *Mobile-Sierra* doctrine.[370] In fact, it even clarified that under the FPA, when a party seeks to modify or abrogate its filed rate,

> the issue is whether a party can terminate its obligations and *thereafter have no liability to its counterparty*. To obtain such approval, a party with a *Mobile-Sierra* clause must meet the very high burden under the public interest test. However, in rejection, the party does not seek to terminate its obligations and thereafter be free of liability . . . Rather, the issue is how the public interest bears on the Bankruptcy Court's determination of whether to permit [a party] to breach its obligations and, if so, to pay damages for such breach as determined by the Bankruptcy Court.[371]

FERC's reason for such inconsistency purportedly arose as a result of reexamining and reviewing the FPA and Bankruptcy Code in response to "the increase in bankruptcy-related litigation."[372] Based on its newfound understanding of the FPA and Bankruptcy Code, FERC declared concurrent jurisdiction with the bankruptcy courts, and insofar as its declaration was inconsistent with its past findings, FERC departed therefrom.[373] Unsurprisingly, FERC did not cite any statutory authority in either the FPA or Bankruptcy Code in making this assertion.[374]

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367. *Id.* at 519–23.
368. *See generally* Cal. Elec. Oversight Bd., 114 FERC ¶ 61,003 (2006).
369. *Id.* at P 11.
370. *Id.* at P 12.
371. *Id.* at P 13.
372. ETC Tiger Pipeline, LLC, 172 FERC ¶ 61,155 at P 33 (2020).
373. *Id.*
374. *See* NextEra Energy, Inc., 166 FERC ¶ 61,049 at P 28 (2019), *vacated*, PG&E v. FERC, 829 F. App'x 751 (9th Cir. 2020); *ETC Tiger Pipeline*, 172 FERC ¶ 61,155 at P 33; *see also In re* PG&E Corp., No. 19-30088, 2019 WL 2183380, at *3 (Bankr. N.D. Cal. Mar. 1, 2019).

B. The Bankruptcy Court's Jurisdiction

Paradoxical though it may seem, the best way to harmonize the statutes and policies of the FPA with the Bankruptcy Code is to give the bankruptcy court exclusive jurisdiction over the rejection of executory contracts because the Bankruptcy Code is the only proper authority to apply when rejecting an executory contract.[375] To recapitulate many of the aforementioned rules and arguments, Congress granted bankruptcy courts original and exclusive jurisdiction over all cases under title 11.[376] Pursuant to this power, bankruptcy courts may enter judgments in core proceedings.[377] As relevant here, rejection of an executory contract pursuant to § 365(a) is a core proceeding.[378] Moreover, bankruptcy courts have exclusive jurisdiction over all property of the debtor and of the estate, including executory contracts.[379] Therefore, bankruptcy courts have exclusive jurisdiction over both executory contracts and the rejection thereof. Referring to its own exclusive jurisdiction, the Supreme Court has expressed that "'exclusive' necessarily denies jurisdiction of such cases to any other federal court."[380]

Additionally, a bankruptcy court has original but not exclusive jurisdiction over civil proceedings arising under, arising in, or related to a bankruptcy case, notwithstanding any congressional act conferring exclusive jurisdiction to another court.[381] Accordingly, in such a case, a bankruptcy court has concurrent jurisdiction over the civil proceedings.[382] This grant of concurrent jurisdiction does not apply to FERC, though, because the statute confers concurrent jurisdiction to the bankruptcy court only when exclusive jurisdiction has been granted to another court.[383] Quite simply, an administrative agency is not a court.[384]

375. *In re* PG&E Corp., 603 B.R. 471, 486 (Bankr. N.D. Cal. 2019).

376. 28 U.S.C. § 1334(a).

377. *In re PG&E*, 603 B.R. at 482; *see also* 11 U.S.C. § 157(b)(2).

378. 11 U.S.C. § 157(b)(2); *see In re* Chesapeake Energy Co., No. 20-33233, ECF No. 1, P 14 (Bankr. S.D. Tex. Sept. 3, 2020).

379. 28 U.S.C. § 1334(e).

380. *In re PG&E*, 603 B.R. at 488 (quoting Mississippi v. Louisiana, 506 U.S. 73, 77–78 (1992)).

381. 28 U.S.C. § 1334(b).

382. Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32, 41–42 (1991).

383. *See* 28 U.S.C. § 1334(b); *In re* FirstEnergy Sols. Corp., No. 18-50757, 2018 WL 2315916, at *7 (Bankr. N.D. Ohio May 18, 2018).

384. *Bd. of Governors of Fed. Reserve Sys.*, 502 U.S. at 41–42.

Moreover, insofar as rejection is concerned, the Bankruptcy Code itself does much of the work.[385] Section 365(a) speaks plainly, allowing rejection of *any* executory contract, subject to *the court's* approval—not FERC's.[386] Conversely, neither the FPA nor the Bankruptcy Code grant FERC the authority to adjudicate a rejection in bankruptcy.[387]

Further, the text states in unequivocal terms that rejection results in a breach of contract,[388] not an abrogation or modification.[389] Despite arguments to the contrary, a filed rate contract is just that—a contract; it is not akin to a *de jure* regulation. Proceeding from this premise, the foundation for concurrent jurisdiction further crumbles in light of the fact that FERC does not even have exclusive jurisdiction over a filed rate breach-of-contract claim outside of bankruptcy.[390] This is because FERC's exclusive jurisdiction over filed rates is not triggered unless it necessitates an award for damages on an actual or presumed rate change.[391] And although the rejection counterparty would indeed receive less than a dollar-for-dollar amount of damages, "that is how bankruptcy works."[392] To be clear, a court's authorization of rejection does nothing to affect the rate charged.[393] The counterparty will file its pre-petition claim for damages based on the FERC-approved rates; "[h]ow and when those claims will be paid-out is an issue for the plan and confirmation

385. Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1661 (2019).

386. 11 U.S.C. § 365(a) (Congress conditioned rejection on the court's approval, not FERC's.); *see also Tempnology*, 139 S. Ct. at 1662 ("Sections 365(a) and (g) speak broadly, to 'any executory contract[s].'").

387. *See generally* 16 U.S.C. §§ 824; 28 U.S.C. § 1334(e) (vesting exclusive jurisdiction over property of the estate to the bankruptcy court); *In re* PG&E Corp., 603 B.R. 471 (Bankr. N.D. Cal. 2019).

388. 11 U.S.C. § 365(g).

389. Blumenthal 103 FERC ¶ 61,344 P 5 (2003) (Brownell, Commissioner, dissenting in part).

390. *In re* Mirant Corp., 378 F.3d 511, 519 (5th Cir. 2004); *see also* Ark. La. Gas Co. v. Hall, 453 U.S. 571, 579 n.6 (1981)**;** Blumenthal v. NRG Power Mktg., Inc., 105 FERC ¶ 61,292 at P 3 (2003) (Brownell, Commissioner, concurring); Blumenthal v. NRG Power Mktg., Inc., 103 FERC ¶ 61,344 at P 1 (2003) (Brownell, Commissioner, dissenting in part).

391. *Ark. La. Gas Co.*, 453 U.S. at 578–79 (allowing damages to stand that didn't affect rate); Gulf States Utils. Co. v. Ala. Power Co., 824 F.2d 1465, 1471–73 (5th Cir. 1987) (holding that courts are not preempted from awarding damages so long as damages were calculated using the filed rate).

392. *In re* Extraction Oil & Gas, 622 B.R. 608, 625 (Bankr. D. Del. 2020).

393. *Id.*

process."[394] Therefore, if FERC lacks exclusive jurisdiction over a filed rate breach of contract outside of bankruptcy, and if FERC's exclusive jurisdiction is not triggered so long as damages are calculated using the filed rate, then FERC's demand requiring approval before a party can cease performance on a rejected contract simply stems from the debtor's bankrupt status.[395] Such disparate treatment of a debtor contravenes the spirit of the Bankruptcy Code's protection against discriminatory treatment of a bankrupt debtor.[396]

C. Harmonizing the FPA with the Bankruptcy Code

As outlined above, whether FERC has exclusive or concurrent jurisdiction with the bankruptcy courts varies amongst the jurisdictions that have addressed the issue. Further, the proper standard of review to be used when determining whether a court should authorize rejection likewise varies amongst the jurisdictions. FERC's use of the *Mobile-Sierra* doctrine's public-interest standard of review is fundamentally at odds with the purpose and function of bankruptcy; therefore, it fails to properly harmonize the FPA with the Bankruptcy Code. The Fifth and Sixth circuits, in an attempt to harmonize the competing interests of the FPA and Bankruptcy Code, have adopted a heightened standard of review that will allow rejection only if, after careful scrutiny, the equities balance in favor of rejection. This Comment concludes, however, that neither attempt at harmony is necessary.

When courts are confronted with two competing acts of Congress, they must attempt to interpret and harmonize the statutes in such a way as to regard each as effective if the two are capable of co-existence.[397] As has been demonstrated, FERC's role is fundamentally at odds with the role of bankruptcy and incapable of harmony. As a result, the best way to render each statute as effective is to understand FERC's jurisdiction, in relation to the bankruptcy court's jurisdiction, as "having a parallel exclusive jurisdiction."[398] If a party seeks to reject a contract and performance thereon, that party must seek approval from the bankruptcy court, and only the bankruptcy court, for that is where exclusive jurisdiction lies. Alternatively, if a party wishes to modify or abrogate the rate it is paying,

394. *Id.*
395. *See In re Mirant*, 378 F.3d at 520–21.
396. See 11 U.S.C. §§ 525(a), 11 U.S.C. § 101(27).
397. *In re Mirant*, 378 F.3d at 517 (citing Morton v. Mancari, 417 U.S. 535, 551 (1974)).
398. *In re Extraction Oil & Gas*, 622 B.R. at 627.

but still continue performance on the contract, it must seek approval from FERC, and only FERC. The two are separate matters.[399]

With this solution, there is no longer a need to determine which standard of review is proper for a regulated debtor in bankruptcy. "Section 365 of the Bankruptcy Code does not mandate that the [c]ourt consider public policy or public interest."[400] Instead, the public interest is already taken into account by the very purpose of bankruptcy—allowing a debtor to reorganize and start anew so that it may avoid liquidation and continue to provide jobs and economic stimulus. Nevertheless, in the event that public interest considerations need to be taken into account, as a court of equity, the bankruptcy court is best suited to balance the impact on the public interest. Accordingly, FERC's role in bankruptcy should be limited to expressing its views as a party of interest, just as any other affected party would do.

CONCLUSION

FERC's attempt to usurp the bankruptcy courts' exclusive jurisdiction over bankruptcy proceedings and estates is an *ultra vires* assertion of authority. The Bankruptcy Code grants the courts exclusive jurisdiction over the estate of a debtor, including its executory contracts; it is in the court's sole discretion whether to allow rejection. Although it is true that courts are prohibited from collaterally attacking, modifying, or abrogating a filed rate, that is not what occurs in bankruptcy. The rate will remain intact because the rate will be used to calculate damages. Allowing FERC to impede on the bankruptcy process by requiring continued performance on a rejected filed rate is contrary to the Bankruptcy Code's priority of claims and inherently diminishes the total amount of the estate for other claimants. Additionally, FERC's mandate to utilize the *Mobile-Sierra* doctrine is incompatible with the nature of bankruptcy. As a court of equity, the bankruptcy court is well-suited and well-qualified to handle the multifaceted public interests involved. Accordingly, the authority to allow or deny the rejection of a filed rate rests solely and exclusively with the bankruptcy courts.

399. *Id.* at 625.
400. *Id.* at 627.