



Signed and Filed: June 7, 2019

*Dennis Montali*

DENNIS MONTALI  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

In re	)	Bankruptcy Case
	)	No. 19-30088-DM (Lead Case)
PG&E CORPORATION; PACIFIC GAS	)	
AND ELECTRIC COMPANY,	)	Chapter 11
	)	
Debtors.	)	(Jointly Administered)
	)	
PG&E CORPORATION; PACIFIC GAS	)	Adv. Proc. No. 19-03003
AND ELECTRIC COMPANY,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
FEDERAL ENERGY REGULATORY	)	
COMMISSION,	)	
	)	
Defendant.	)	

**MEMORANDUM DECISION ON ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF**

**I. INTRODUCTION**

In its May 1, 2019, Order Denying Rehearing ("the FERC Denial", the Federal Energy Regulatory Commission ("FERC") made two remarkable statements. First, it said:

"Wholesale power contracts are not simple run-of-the-mill contracts between two private parties, rather, these contracts, while privately negotiated, implicate the public's interest in the orderly production of plentiful supplies of electricity at just and reasonable rates  
...."

1 *NextEra Energy, Inc. V. Pac. Gas and Elec. Co.*, 167 FERC ¶ 61,096  
2 (2019) at Para 13.

3 Second, it stated:

4 "To be clear, the [FERC] neither presumes to sit in  
5 judgment of rejection motions nor seeks to arrogate the  
6 role of adjudicating bankruptcy proceedings".

6 *Id.* at Para. 16.

7 The problem is that the first statement, while true, is  
8 completely contrary to the congressionally created authority of the  
9 bankruptcy court to approve rejection of nearly every kind of  
10 executory contract. This includes "run-of-the-mill" types,  
11 whatever that means, or the other kind, including power purchase  
12 agreements and others that implicate the public's interest, but  
13 excluding certain types not relevant here.

14 The second problem is that FERC, despite its denial, has  
15 chosen to interfere with bankruptcy courts' decisions. Without  
16 statutory or supreme court authority to support its position, it in  
17 fact "presumes to sit in judgment" and second-guess - no overrule -  
18 decisions of the bankruptcy court.

19 To deal with what it correctly identifies as unsettled law  
20 with different court interpretations (one circuit court, one  
21 district court and one bankruptcy court now on direct appeal to  
22 another circuit court)<sup>1</sup> FERC purports to settle the law by  
23 announcing its own interpretation of bankruptcy law and decree  
24 something found nowhere in the statute it interprets. This is not  
25 the way that unsettled law is to be developed. That is the role of  
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27 <sup>1</sup> See *In the matter of Mirant Corp.*, 378 F.3d 511 (5th Cir.  
28 2004) ("*Mirant*"); *In re Calpine Corp.*, 337 B.R. 27 (S.D.N.Y. 2006)  
 ("*Calpine*"); *In re FirstEnergy Solutions Corp. v. FERC*, 2018 WL  
 2315916 (Bankr. N.D. Ohio May 18, 2018) ("*FirstEnergy*").

1 the courts.

2 To this court, FERC's decision was not only unauthorized, but  
3 has and continues to have the effect of undermining the function of  
4 the bankruptcy court in its role of ensuring that the goals and  
5 purposes of bankruptcy law and policy are properly served and  
6 properly executed. Despite FERC's lip service to what it describes  
7 as "concurrent jurisdiction" to carry out differing and perhaps  
8 competing policies, the effect of its decision guts and renders  
9 meaningless the bankruptcy court's responsibilities in this area of  
10 the law.

11 For this reason, FERC must be stopped and the division and  
12 balance of power and authority of the two branches of government  
13 restored. Accordingly, and for the reasons that follow, the court  
14 declares FERC's decision announcing its concurrent jurisdiction  
15 unenforceable in bankruptcy and of no force and effect on the  
16 parties before it. If necessary in the future it will enjoin FERC  
17 from perpetuating its attempt to exercise power it wholly lacks.

18

19 **II. PROCEDURAL BACKGROUND**

20 On April 10, 2019, the court held a hearing on Pacific Gas and  
21 Electric Company and PG&E Corporation's (collectively, "Debtors")  
22 Motion For Preliminary Injunction (the "Motion").<sup>2</sup> Debtors were  
23 initially seeking a preliminary injunction to prevent FERC from  
24 issuing any rulings that would impact rejection of a power purchase

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28 <sup>2</sup> See, *Debtors' Complaint For Declaratory Judgment And Preliminary And Permanent Injunctive Relief* ("Complaint"), Dkt. #1.

1 agreement ("PPA") under Section 365 of the Bankruptcy Code<sup>3</sup>  
2 ("Section 365") and to establish that the bankruptcy court has sole  
3 authority over Debtors' rights to reject any of its PPAs.  
4

5 **III. PREPETITION EVENTS**

6 Debtors announced their intent to file for bankruptcy  
7 protection on January 14, 2019. California law mandated a 15-day  
8 notice period before filing.<sup>4</sup> Various PPA Counterparties<sup>5</sup> initiated  
9 two administrative actions before FERC against Debtors. They were  
10 concerned that Debtors would try to reject PPAs in their  
11 forthcoming bankruptcy. As a result, they asked FERC to rule that  
12 the bankruptcy court and FERC both must approve rejection of a PPA  
13 for rejection to have effect. Promptly thereafter, on January 25  
14 and 28, 2019, FERC ruled "that this Commission and the bankruptcy  
15 courts have concurrent jurisdiction to review and address the  
16 disposition of wholesale power contracts sought to be rejected  
17 through bankruptcy." *NextEra Energy, Inc. V. Pac. Gas and Elec.*  
18 *Co.*, 166 FERC ¶ 61,049 (2019); *Exelon Corp. V. Pac. Gas and Elec.*  
19 *Co.*, 166 FERC ¶ 61,053 (2019) (emphasis added).

20 Debtors had unsuccessfully opposed those attempts and promptly  
21 sought relief in this adversary proceeding on the first day they  
22 filed for bankruptcy, January 29, 2019.

23 Debtors listed three causes of action in the Complaint: (1)

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24 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

27 <sup>4</sup> Cal. Pub. Util. Code § 854.2.

28 <sup>5</sup> For simplicity the court uses this term to describe those  
entities who proceeded before FERC in January 2019, and those who  
later intervened in this adversary proceeding.

1 declaratory relief confirming the bankruptcy court's exclusive  
2 jurisdiction under Section 365; (2) enforcement of the automatic  
3 stay under section 362; and (3) a preliminary and permanent  
4 injunction under section 105. The second cause of action sought an  
5 order stating that FERC could not proceed with any action against  
6 Debtors because the automatic stay was in place. The third cause  
7 of action, in case the court found the automatic stay did not  
8 apply, was for injunctive relief to ensure that FERC would not take  
9 any action that would harm Debtors' rights to reject any of the  
10 PPAs.

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12 **IV. POST-PETITION EVENTS**

13 On February 25, 2019, Debtors sought rehearing of the two FERC  
14 orders. FERC consolidated the requests for rehearing into one final  
15 decision and denied the rehearings on May 1, 2019 in the FERC  
16 Denial.

17 FERC and several PPA Counterparties moved to withdraw the  
18 reference from this court to the district court under 28 U.S.C. §  
19 157(d); Debtors opposed the motions. On March 11, 2019, the  
20 district court denied the motions to withdraw the reference,  
21 ruling this was a core proceeding.<sup>6</sup> No party appealed.

22 During the April 10 hearing, the court asked why it could not  
23 decide all of the issues presented by the adversary proceeding,  
24 particularly because there did not appear to be any material facts  
25 in dispute. Promptly after the FERC Denial, the parties filed a  
26 stipulation regarding the disposition of this adversary proceeding

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28 <sup>6</sup> See *Order Denying the Motions to Withdraw the Reference*.  
Dkt. #135 at 4.

1 ("the May 3 Stipulation") (Dkt. No. 149). The May 3 Stipulation  
2 stated that the parties were unable to reach agreement on terms of  
3 a final judgment and that the court could enter final judgment  
4 based upon the current record without any further briefing, oral  
5 argument, or other evidence, except for the FERC Denial. This  
6 allows this court to enter final judgment at this point.

7 On May 20, 2019, the United States Supreme Court decided  
8 *Mission Product Holdings, Inc. v. Tempnology, LLC*, 587 U.S. \_\_\_\_  
9 (2019) ("*Tempnology*"). The court preserved the right of a  
10 trademark licensee to retain the use of the trademark following the  
11 licensor's rejection of the trademark license as an executory  
12 contract. The court repeatedly stated basic principles relevant to  
13 this case:

14 "Section 365 provides that 'a debtor's rejection of  
15 a contract "constitutes a breach of such contract.'"  
16 *Slip opn.*, P.1.

17 "Rejection of a contract--any contract--in bankruptcy  
18 operates not as a rescission but as a breach."  
19 *Id.*, at 8.

20 "Rejection 'constitutes a breach of [an executory]  
21 contract,' deemed to occur 'immediately before the date of  
22 the filing of the petition' ... Or said more pithily for  
23 current purposes, a rejection is a breach.'"  
24 *Id.*

25 "Sections 365(a) and (g) speak broadly, to 'any  
26 executory contract[s].'"  
27 *Id.*, at 10.

28 The Bankruptcy Code includes several specific provisions  
important in Chapter 11 reorganization cases where Congress altered  
those principles in some way. Relevant to *Tempnology* are  
intellectual property rights under Section 365(n). Other such

1 provisions are found in Section 365(h) and (i) (purchasers and lessees  
2 of real property and timeshare interests). And the trustee is  
3 deemed to have assumed (not rejected) obligations for maintenance of  
4 capital requirements of a Federal insured depository. Section  
5 365(o).

6 Outside of Section 365, rejection of collective bargaining  
7 agreements are dealt with great particularity in Section 1113.<sup>7</sup>

8 From this it is clear that Congress know how to craft special  
9 rules for special circumstances.<sup>8</sup> Similarly, debtors such as  
10 Debtors who are regulated by commissions or other authorities such  
11 as FERC must comply with rate change approvals in order to achieve  
12 confirmation of Chapter 11 plans. 11. U.S.C. § 1129(a)(6).

13 *Tempnology*, at a granular level, is about the rights of parties  
14 to a trademark license rejected in bankruptcy.<sup>9</sup> But on a macro  
15 level, it says much about policy decisions that influence the  
16 outcome here. Consider the following messages from the opinion:

17 "Today we hold that both Section 365's text and  
18 *fundamental principles of bankruptcy law* command the  
19 ...rejection as breach approach."

19 Slip opn, p. 8 (emphasis added).

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22 <sup>7</sup> There is also specific attention to the duties of a trustee  
23 in Chapter 7 found in Sections 765 and 766 not relevant here.

24 <sup>8</sup> See *Tempnology*, at Slip opn. P. 12; and *Mirant* at 521:  
25 "Section 365, along with other Bankruptcy Code sections, details a  
26 number of specific limitations on and exception to the § 365(a)  
27 general rejection authority . . . ."

28 <sup>9</sup> The decision aligns the rights of a counterparty to a  
rejected trademark license to the rights of similarly situated  
parties to copyright and patent licenses, etc. Upon rejection -  
breach - they retain the option of keeping the entitlements that  
they bargained for, viz., the continued use of the intellectual  
property licensed to them.

1 And referring in contrast to a trustee's avoidance powers that  
2 can be invoked in only narrow circumstances, the court added:

3 "...unlike the power of rejection, which may be exercised  
4 for any plausible reason."

5 *Id.* (emphasis added).

6 The opinion describes in detail the exceptions (referred to in  
7 *Mirant*) added to Section 365 over several decades to address what  
8 and how Congress dealt with specific problems that arose for various  
9 reasons, including judicial interpretations. That includes the 1988  
10 amendments to deal with *Lubrizol Enterprises v. Richmond Metal*  
11 *Finishers*, 756 F.2d 1043 (4th Cir. 1985)) and protect the rights of  
12 some, but not all counterparties to rejected intellectual property  
13 licenses. All of them deal with various remedies to protect  
14 counterparties' rights. Nothing in the opinion has any bearing on  
15 what FERC seeks in these bankruptcy cases, with one exception. That  
16 is, as the supreme court pointed out:

17 "...Section 365 does not grant the debtor an exception  
18 from all of the burdens that generally applicable law - whether  
19 involving contracts of trademarks - impose on property owners.  
20 See 28 U.S.C. § 959(b)(requiring a trustee to manage the estate  
21 in accordance with applicable law)."

22 Slip opn, at 16.

## 23 **V. DISCUSSION**

24 What remains following the May 3, 2019 Stipulation is Debtors'  
25 request for a declaratory judgment pursuant to 28 U.S.C. § 2201  
26 confirming the court's exclusive jurisdiction over their right to  
27 reject any PPA under Section 365, and further declaring that FERC  
28 does not have "concurrent jurisdiction" to grant or deny Debtors'  
rejection of any of their PPAs.

The enforcement of the automatic stay (Complaint, Court Two) is

1 not an issue because there has been no violation of the stay. The  
2 two FERC orders that prompted this adversary proceeding were in  
3 response to proceedings brought against Debtors prior to  
4 bankruptcy.<sup>10</sup> Debtors have not filed a single motion to reject, so  
5 there is no reason to imagine why FERC would take any action.

6 This is a matter of first impression: Is an order issued by a  
7 Federal agency purporting to affect (arrogate) a decision by a  
8 bankruptcy court in a future bankruptcy case binding on that  
9 bankruptcy court or the parties before it?

10 Here are the different ways courts have dealt with this issue  
11 in the only reported decisions. None began with FERC issuing orders  
12 before the bankruptcy cases were filed as it did here. In *Mirant*,  
13 the court of appeals adhered to the theory the court applies here.  
14 Instead of applying the "business judgment" test, the court  
15 remanded, stating:

16 "Therefore, upon remand, the district court should  
17 consider applying a more rigorous standard to the  
18 rejection of the [subject contract]. If the district  
19 court decides that a more rigorous standard is  
20 required, then it might adopt a standard by which it  
21 would authorize rejection of an executory power  
22 contract only if the debtor can show that it "burdens  
23 the estate, [] that, after careful scrutiny, the  
24 equities balance in favor of rejecting" that power

25 \_\_\_\_\_  
26 <sup>10</sup> The Debtors sought rehearing by FERC after bankruptcy but  
27 without seeking relief from the automatic stay in this court. FERC  
28 did not mention that in the FERC Denial nor have the parties done  
so here. The court expresses no opinion whether such relief should  
have been requested. See *Parker v. Bain*, 68 F.3d 1131, 1135-36 (9th  
Cir. 1995) ("[t]his Court, as well as seven other courts of  
appeals, has concluded that the automatic stay can operate to  
prevent an appeal by a debtor when the action or proceeding below  
was against the debtor"); *Ingersoll-Rand Fin. Corp. v. Miller  
Mining Co., Inc.* 817 F.2d 1424, 1426 (9th Cir. 1987) ("section 362  
should be read to stay all appeals in proceedings that were  
originally brought against the debtor, regardless of whether the  
debtor is the appellant or appellee").

1 contract, and that rejection of the contract would  
2 further the Chapter 11 goal of permitting the  
3 successful rehabilitation of debtors.”

4 *Mirant*, 378 F.3d at 525 (emphasis added).<sup>11</sup>

5 The district court in *Calpine* accepted the argument advanced by  
6 FERC here. One day before Calpine’s bankruptcy, PPA counterparties  
7 (including Pacific Gas and Electric Company) commenced a proceeding  
8 before FERC to obtain an order requiring Calpine to continue to  
9 perform under PPAs. The district court, after several interim  
10 steps, concluded that it lacked subject matter jurisdiction over the  
11 motions to reject the energy contracts before it. *Calpine* at 39.

12 Finally, the *FirstEnergy* court ruled as follows:

13 “This Court holds that rejection, including the  
14 attendant cessation of performance, does not intrude  
15 on FERC’s jurisdiction over filed rates. If  
16 Plaintiffs were solvent and simply stopped making  
17 payments ... the counterparties could not reasonably  
18 argue that [the debtors] had somehow modified or  
19 abrogated those agreements; they would seek damages  
20 for the breaches of those contracts .... Those  
21 breaches would lead to claims. If the Plaintiffs then  
22 filed bankruptcy, the claims would become claims  
23 against the estate. Treatment of those claims are  
24 governed by the Bankruptcy Code, including the  
25 confirmation of a reorganization plan in ....”

26 *In re FirstEnergy Solutions Corp.* (Bankr. N.D. Ohio, May 18, 2018,  
27 No. 18-50757) 2018 WL 2315916, at \*17.<sup>12</sup>

28 *FirstEnergy* discusses at length the applicability, *vel non*, of  
the police power exception of Section 362(b)(4) and the merits of a  
request for injunctive relief. While this court agrees generally

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<sup>11</sup> This court believes that this test is subsumed within the  
good faith and business judgment tests that are implicit in  
rejection decisions, as in Part G, 3.

<sup>12</sup> Before long the Sixth Circuit is expected to weigh in, as  
the appeal is scheduled for oral argument there on June 26, 2019  
(Case. No. 18-3788).

1 with its analysis of the court's exclusive jurisdiction to apply  
2 Section 365 without any concurrent involvement by FERC, the decision  
3 here in Count One is dispositive, an option not presented to that  
4 court.

5 This "unsettled" law should develop this way, through judicial  
6 analysis and decision, and not by fiat or decree as FERC has  
7 attempted in this case.<sup>13</sup>

8 **A. Case and Controversy; Standing**

9 FERC and the PPA Counterparties question whether there is a  
10 pending case or controversy and question Debtors' standing. They  
11 ask that this adversary proceeding be dismissed.

12 To establish standing, a plaintiff must establish injury,  
13 causation and redressability. Injury requires a plaintiff to show  
14 that it

15 "Has sustained or is immediately in danger of  
16 sustaining some direct injury as the result of the  
17 challenged official conduct and the injury or threat  
of injury must be both real and immediate, not  
conjectural or hypothetical."

18 *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

19 The United States Supreme Court has ruled that "where  
20 threatened action by *government* is concerned, we do not require a  
21 plaintiff to expose himself to liability before bringing suit to  
22 challenge the basis for the threat." *MedImmune, Inc. v. Genentech,*  
23 *Inc.*, 549 U.S. 118, 128-29 (2007) (emphasis in original).

24 The PPA Counterparties rushed to FERC and instituted an  
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26 <sup>13</sup> *In re Boston Generating, LLC* 2010 WL 4616243 (S.D.N.Y. 2010)  
27 is not on this short list because it was disposed of by consent of  
28 the parties. Nor is *NRG Power Marketing v. Blumenthal (In re NRG  
Energy, Inc.)*, WL 21507685, (S.D.N.Y., 2003) that involved a race-  
for-jurisdiction dispute where FERC obtained an order for  
performance of a contract while a motion to reject was pending.

1 expedited proceeding before Debtors were able to file bankruptcy.  
2 It was they, not Debtors, who initiated the controversy, and FERC's  
3 disposition, that has caused Debtors to need this declaratory  
4 relief.

5       Here, there is a threatened injury that is certainly impending.  
6 While it is true that Debtors have not yet moved to reject any PPAs,  
7 they have been under pressure from various sources to move these  
8 complex cases along and deal with billions of dollars of wildfire  
9 claims and billions of dollars of contractual liabilities. Already  
10 the court has granted in part but denied in part their request to  
11 extend plan exclusivity under Section 1121(d). This has been with  
12 opposition from the two official creditors' committees and the  
13 Governor of California pressing for a prompt and viable  
14 reorganization. If and when either Debtor moves to reject any PPAs  
15 they need to know promptly whether this court will grant or deny  
16 such requests. If they are forced to seek a second and possibly  
17 dispositive decision from FERC based on FERC's stated policy goals,  
18 and not just those found in the Bankruptcy Code, there could be a  
19 real and significant impact on the reorganization effort and the  
20 millions of Northern Californians adversely affected by it. Under  
21 these circumstances there can be no doubt that Debtors have standing  
22 right now to invoke this court's authority and jurisdiction to  
23 facilitate these reorganization efforts.

24       If FERC's view prevails, it could effectively veto the court's  
25 decision to permit rejection under the business judgment test.  
26 Instead, it would permit rejection only if the affected rate is no  
27 longer just and reasonable and as long as the abrogation or  
28 modification is necessary to protect the public

1 interest.<sup>14</sup> This means a PPA Counterparty who is unable to persuade  
2 the bankruptcy court to deny rejection, but able to persuade FERC to  
3 do so, will be left with its "bankruptcy-rejected" contract (treated  
4 as breached, resulting in a pre-petition claim) in place, fully  
5 enforceable, the same as an assumed executory contract. In other  
6 words, the reorganization goals will be replaced by FERC's public  
7 policy goals, giving the PPA Counterparty the same treatment as  
8 post-petition administrative claim to be paid in full. This is a  
9 quintessential controversy - the clash of two competing policies and  
10 goals.

11 Ripeness is determined at the time the complaint is filed.  
12 *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1061 (D. Ariz. (2001),  
13 *dismissed*, 55 F. App'x 411 (9th Cir. 2002). Ripeness has a  
14 constitutional and prudential component. "The constitutional  
15 ripeness of a declaratory judgment action depends upon whether the  
16 facts alleged . . . show that there is a substantial controversy,  
17 between parties having adverse legal interest, of sufficient  
18 immediacy . . . warrant the issuance of a declaratory judgment."  
19 *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003).  
20 Prudential ripeness requires the fitness of issues for judicial  
21 decision and the hardship to the parties if the court withholds  
22 consideration. *Braren*, 338 F.3d at 975.

23 Here, constitutional ripeness is met because there is a  
24 substantial controversy between FERC and Debtors. The parties have  
25 adverse legal interests that are immediate because Debtors cannot  
26 proceed with rejecting contracts subject to this court's  
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28 <sup>14</sup> FERC Denial, Para. 13.

1 authorization under the cloud of FERC's adverse position.

2 Accordingly, constitutional ripeness is met.

3       The first element of prudential ripeness requires the claim to  
4 be primarily legal and does not require any further factual  
5 development. *Braren*, 338 F.3d at 975. Here, the concurrent  
6 jurisdiction issue with FERC needs no factual determination or  
7 development. The second element of prudential ripeness focuses on  
8 the hardship to the parties. Debtors face an immediate hardship  
9 for the reasons stated above.

10       The requirements for prudential ripeness are met. As a result,  
11 FERC's and the PPA Counterparties' arguments involving ripeness lack  
12 merit and must fail.

13       **B. Sovereign Immunity**

14       FERC contends that the United States has not waived sovereign  
15 immunity so the adversary proceeding should be dismissed. However,  
16 Section 106(a) abrogates sovereign immunity for governmental  
17 entities under several sections of the Bankruptcy Code. *In re DBSI,*  
18 *Inc.*, 869 F.3d 1004, 1013 (9th Cir. 2017). Section 365 is one of  
19 the enumerated sections. FERC's sovereign immunity argument lacks  
20 merit.

21       **C. Non-Consent to Final Judgment**

22       FERC and the PPA Counterparties both declined to consent to  
23 final judgment in this adversary proceeding in their respective  
24 oppositions to the motion for preliminary injunction. Bankruptcy  
25 courts may enter appropriate orders and judgments in core  
26 proceedings. In non-core proceedings, a bankruptcy court must only  
27 submit proposed findings of fact and conclusions of law to the  
28 district court for *de novo* review. Fed. R. Bankr. P. 9033.

1 Here, the focus of the adversary proceeding is on Section 365.  
2 Motions to reject are core proceedings under 28 U.S.C. §  
3 157(b)(2)(A). *In re Turbowind, Inc.*, 42 B.R. 579, 583 (Bankr. S.D.  
4 Cal. 1984). The district court has ruled so here. *See, also*, the  
5 May 1 Stipulation. This court can and will issue a final judgment  
6 regardless of FERC's and the PPA Counterparties' non-consent.

7 For the same reason, the court will deny the PPA  
8 Counterparties' request for abstention under *In re Tucson Estates*,  
9 912 F. 2d 1162 (9th Cir. 1990).

10 **D. Judicial Estoppel**

11 FERC asserts that judicial estoppel prevents the Debtors from  
12 arguing that this court has exclusive jurisdiction over motions to  
13 reject due to a prior case where they made arguments to the  
14 contrary. The purpose of the doctrine is to protect the integrity  
15 of the judicial process. The doctrine is invoked when a party makes  
16 a representation to a court, that court accepts it, rules in the  
17 party's favor, and then the party makes a contrary argument on that  
18 same position to the same court or a different court.

19 First, a party's later position must be clearly  
20 inconsistent with its earlier position. Second, courts  
21 regularly inquire whether the party has succeeded in  
22 persuading a court to accept that party's earlier  
23 position, so that judicial acceptance of an inconsistent  
24 position in a later proceeding would create the perception  
25 that either the first or the second court was misled. A  
26 third consideration is whether the part seeking to assert  
27 an inconsistent position would derive an unfair advantage  
28 or impose an unfair detriment on the opposing party if not  
estopped.

25 *Ah Quin v. Cty. of Kauai Dep't of Transp.* 733 F.3d 267, 270 (9th  
26 Cir. 2013) (supporting citations omitted).

27 FERC argues this occurred in *In re Calpine Corp.* Case N. 05-  
28 10861, Dkt. #15 (S.D.N.Y. Jan. 19, 2006). While this may be so,

1 judicial estoppel may not be invoked where jurisdiction is at issue.  
2 Many courts have found that where a party is arguing contrary  
3 positions on subject matter jurisdiction, judicial estoppel will not  
4 be applicable. *Bonzel v. Pfizer, Inc.*, 439 F.3d 1358, 1363  
5 (Fed.Cir.2006); *E-Pass Techs. v. Moses & Singer, LLP*, 2011 WL  
6 5357912, at \*7 (N.D. Cal. Nov. 4, 2011). In *Bonzel*, the plaintiff  
7 had previously successfully argued for remand before the Federal  
8 Circuit because there was no substantial patent law question. Then,  
9 after that action was dismissed, the plaintiff brought another  
10 lawsuit claiming federal patent jurisdiction. The court declined to  
11 apply judicial estoppel and noted "it was questionable whether  
12 estoppel could even apply to jurisdictional question." *E-Pass*  
13 *Techs*, 2011 WL 5357912 at \*7-8 (citing *Bonzel*, 439 F.3d at 1363).

14 Here, Debtors' assertion of different positions does not  
15 warrant the application of judicial estoppel. The primary focus of  
16 this lawsuit is this court's exclusive jurisdiction under 28 U.S.C.  
17 § 1334(a) and whether it alone or FERC concurrently has authority  
18 under Section 365. This is the first and only time the Debtors have  
19 been forced to defend the authority of their "home" court. No such  
20 issue has confronted them before.

21 More importantly, Debtors are now debtors-in-possession under  
22 the Bankruptcy Code. Accordingly, they are given substantial  
23 rights, duties and powers under numerous sections, including  
24 Sections 1107 that import the duties of a trustee in Section 1106.  
25 It is a fundamental principle of bankruptcy law that a Chapter 11  
26 trustee or debtor-in-possession is considered a new legal entity and  
27 as such, has the power to assume or reject most executory contracts  
28 under Section 365. It would be inconsistent to this grant of power

1 to inhibit the authority and powers of Debtors because of conduct  
2 they took in their individual capacities in which they acted as  
3 counterparties to a bankruptcy debtor who was acting adverse to them  
4 prior to their bankruptcy cases.

5 In addition, while FERC is not bound by the principle of  
6 judicial estoppel, it has reversed its own position on the issue of  
7 concurrent jurisdiction. In 2006, FERC announced it would follow  
8 the Fifth Circuit in *Mirant*, which stated that a debtor can reject a  
9 PPA that is filed with FERC, without concurrent approval of the  
10 rejection by FERC. However, the FERC Denial states that after the  
11 *Calpine* court ruled contrary to *Mirant*, FERC was no longer obligated  
12 to follow the prior reasoning.<sup>15</sup>

13 Accordingly, it is only fair to let Debtors, as Debtors-in-  
14 Possession, use all the tools Congress has provided which they did  
15 not have prior to their bankruptcy. Judicial estoppel does not  
16 prevent the court from deciding the merits of the case.

17 **E. Automatic Stay**

18 In the Complaint, Debtors are seeking an order "pursuant to  
19 section 362 of the Bankruptcy Code . . . enforcing the automatic  
20 stay as to any FERC Action."

21 The automatic stay went into effect on the day of the  
22 bankruptcy. Debtors petitioned for rehearing after bankruptcy and  
23 FERC responded with the FERC Denial. The central issue addressed by  
24 FERC in denying rehearing is the same that was decided in the two  
25 January, 2019, rulings. No party raised the issue of the automatic  
26 stay (see footnote 10) so the court does not infer that the stay was

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28 <sup>15</sup> *California Electricity Oversight Board v. Calpine Energy Services, L.P. (CEOB)*, 114 FERC ¶ 61,003 at ¶ 11.

1 violated or the FERC Denial is void. Nothing else has been brought  
2 to the court's attention to show the stay has been violated by any  
3 party. If a violation of the stay does occur in the future, either  
4 Debtor may move for contempt under Rule 9020. As the automatic stay  
5 is already in place, no further order is necessary. Because the  
6 court is granting Debtors' request for a Declaratory Judgment  
7 (discussed, *infra*) there is no need to debate and decide whether or  
8 nor FERC could act within any Section 362(b)(4) exception. Count  
9 Two of the Complaint will be DISMISSED.

10 **F. There Is No Need for an Injunction under Section 105(a)**

11 A party seeking a preliminary injunction under § 105(a) must  
12 show:

13 (1) a strong likelihood of success on the merits, (2) the  
14 possibility of irreparable injury to plaintiff if  
15 preliminary relief is not granted, (3) a balance of  
16 hardships favoring the plaintiff, and (4) advancement of  
17 the public interest (in certain cases). Alternatively, a  
18 court may grant the injunction if the plaintiff  
19 demonstrates *either* a combination of probable success on  
20 the merits and the possibility of irreparable injury or  
21 that serious question are raised and the balance of  
22 hardships tips sharply in his favor.

19 *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1093 (9th Cir. 2007).

20 In addition, likelihood of success in reorganization must also  
21 be proven. *Excel*, 502 F.3d at 1095.

22 Given the parties' consent in the May 3 Stipulation, to either  
23 grant or denial of the Debtors' request for declaratory relief as to  
24 the effect of FERC's ruling, there is no need for a separate  
25 injunction. Declaratory relief on the First Claim will provide the  
26 basis for FERC not having the authority to pursue any type of action  
27 that supports concurrent jurisdiction over a motion to reject any  
28 PPA. There is no need to enjoin anyone or any action now. Count

1 Three of the Complaint will be DISMISSED.

2 **G. Basis for Declaratory Judgment**

3 Countless courts have noted and accepted the broad scope of  
4 FERC's statutory jurisdiction over rates, terms and conditions of  
5 wholesale electricity sales and power contracts, including changes  
6 to those contracts. That authority has led to the evolution and  
7 development of the filed-rate doctrine that provides that a party  
8 may claim no rate as a legal right other than the filed rate,  
9 whether fixed or accepted by FERC. Not even a court may authorize  
10 other terms. All of this is black-letter law that is not in doubt  
11 here. The briefs before the court are replete with citations that  
12 do not need to be repeated.

13 Thus, because all the parties agree that the Federal Power Act  
14 ("FPA") means what it says, and FERC can do what it usually does, no  
15 purpose would be served by discussing further the filed-rate  
16 doctrine or FERC's exclusive jurisdiction over rates and related  
17 matters.

18 **1. This is not an improper attack on FERC's January 25 and 28,  
19 2019, rulings nor on the FERC Denial.**

20 Imagine the absurdity of the exclusive appeal route espoused by  
21 FERC and the PPA Counterparties. Kafka might have designed it:

22 *Parties not in bankruptcy are subjected to an involuntary  
23 process by their opponents before a non-judicial,  
24 administrative body.*

25 *Just a few days later they are told by that body that if  
26 they file bankruptcy, one of the basic and critically  
27 important tools placed there by Congress and available  
28 only in bankruptcy will be unavailable.*

*And if they don't like it, they'll have to appeal via a  
29 procedure outside of the bankruptcy system with its  
30 exclusive subject-matter jurisdiction.*

*One day later they file bankruptcy, where myriad rights  
31 and duties (and obligations) come in to play and a*

1 bankruptcy court, experienced in bankruptcy matters, is  
2 there to preside.

3 Now that bankruptcy is a reality and not an intention, the  
4 agency repeats its prior ruling, that it has concurrent  
5 jurisdiction with the bankruptcy court, but that court  
6 will not be available to vindicate one of their  
7 fundamental and critical bankruptcy rights.

8 Their first recourse to an Article III court after all that  
9 is via appeal.

10 This process is unfair and should not be tolerated.

11 The FPA contains a provision dealing with the appeal of a  
12 decision from FERC. First, the losing party must request a  
13 rehearing before FERC. Second, a further appeal can be pursued in a  
14 circuit court of appeals. 16 U.S.C. § 8251. The FPA provides the  
15 only method for judicial review of rulings regarding the broad reach  
16 of FERC's exclusive jurisdiction over matters dealing with rates,  
17 terms and conditions of wholesale power contracts and the panoply of  
18 matters falling within the filed rate doctrine.

19 After the January 25 and 28, 2019 FERC orders, Debtors sought  
20 rehearing. But in between they filed bankruptcy and immediately  
21 filed this adversary proceeding challenging the fundamental assault  
22 on the bankruptcy court's exclusive jurisdiction.<sup>16</sup> FERC and the  
23 PPA Counterparties argue Debtors are trying an improper collateral  
24 attack on FERC's orders.

25 Although departure from that procedure just summarized is  
26 normally unassailable, "judicial intervention is authorized when an  
27 agency acts in 'brazen defiance' of its statutory authorization."  
28 *Philip Morris, Inc. v. Block*, 755 F.2d 368, 369 (4th Cir. 1985)

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<sup>16</sup> Had they not initiated this adversary proceeding, Debtors' only recourse would have been to prosecute their attempt at a successful rehearing; had FERC changed its position, this proceeding might have been rendered moot.

1 (citation omitted). "An ultra vires act of an administrative agency  
2 is either void or voidable." *Sierra Club v. Watt*, 608 F. Supp. 305,  
3 341 (E.D. Cal. 1985). Ultra vires acts occur when an agency acts  
4 outside of "its statutory authorization." *Phillip Morris*, 755 F.2d  
5 at 370.

6 "FERC is a creature of statute, having no constitutional or  
7 common law existence or authority, but only those authorities  
8 conferred upon it by Congress." *Atl. City Elec. Co. v. F.E.R.C.*, 295  
9 F.3d 1, 8 (D.C. Cir. 2002). See, also, *Civil Aeronautics Bd. v.*  
10 *Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961) (finding that an  
11 agency "is entirely a creature of Congress" and "the determinative  
12 question" is not what "[it] thinks it should do but what Congress  
13 has said it can do.").

14 FERC has acted outside of its statutory authority. Its  
15 decisions before bankruptcy were advisory in nature, have no impact  
16 on anyone; once the bankruptcy cases were filed they presented an  
17 immediate conflict with the Bankruptcy Code and can be challenged  
18 and dealt with in this court.

19 In addition, the United States Supreme Court has stated that  
20 courts have the ultimate decision-making authority when analyzing  
21 provisions governing a federal agency. While the courts can defer  
22 to the regulatory agency involved, the final decision is for the  
23 court alone to make. See *Gordon v. New York Stock Exch., Inc.*, 422  
24 U.S. 659, 686 (1975) (dealing with the court ruling on matters  
25 involving the Securities Exchange Act and the Securities Exchange  
26 Commission).

27 Nothing in the FPA or the Bankruptcy Code grants FERC  
28 concurrent jurisdiction with this court over Section 365 motions to

1 reject executory contracts covering federal power matters.<sup>17</sup> The  
2 issue here is Section 365 and not any of the permutations and  
3 applications of the filed rate doctrine. This is the only issue  
4 before this court, and there is nothing collateral or indirect about  
5 the attack. It is direct because it goes to the precise bankruptcy  
6 issue of exclusive authority under 28 U.S.C. § 1334(a). This court  
7 is not considering the FPA or reviewing any FERC decisions regarding  
8 any matter within its exclusive jurisdiction. The rejection of an  
9 executory contract is solely within the power of the bankruptcy  
10 court, a core matter exclusively this court's responsibility. 28  
11 U.S.C. § 157(b)(2).

12 The Bankruptcy Code is the proper and only authority to apply  
13 and not any aspect of the FPA. FERC did not draw on any specific  
14 provision of that law to reach its ultimate conclusion, nor does  
15 this court. The beginning and end of the analysis is in the  
16 Bankruptcy Code.

17 **2. FERC Acted in Excess of its Statutory Authority.**

18 The court disagrees with FERC's view that were it to authorize  
19 rejection of a PPA, that authorization would not be "a license to  
20 cease or modify performance in whatever manner [Debtors] wish[es]."  
21 FERC Denial, Para. 16 (emphasis added).

22 To the contrary, authorization of rejection under Section 365  
23 is authorization to breach - to cease...performance leaving the  
24 affected PPA Counterparty with a claim for damages as of the  
25 petition date. *Tempnology, supra*.

26 FERC makes the bold and unfounded statement that:  
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28 <sup>17</sup> *Mirant*, 378 F. 3rd at 521.

1 "Performance under [the rejected PPA] remains subject to  
2 [FERC's] review to determine whether any cessation or  
3 modification of performance is just and reasonable and not  
4 unduly discriminatory or preferential under the FPA."

5 FERC Denial, Para. 16.

6 The statement is wrong as a matter of law and is unenforceable  
7 in these cases. A court "owe[s] an agency's interpretation of the  
8 law no deference" where, as here, the "statutory provisions before  
9 [it] deliver unmistakable commands. *SAS Inst, Inc. Iancu*, 138 S.  
10 Ct. 1348, 1358 (2018). It would render meaningless the bankruptcy  
11 court's authority and responsibility to authorize rejection under  
12 the business judgment test.

13 Section 365's lack of an exception for FERC simply means that  
14 FERC has no jurisdiction over the rejection of contracts. See *FCC*  
15 *v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302 (2003) ("[W]here  
16 Congress has intended to provide regulatory exceptions to the  
17 Bankruptcy Code, it has done so clearly and expressly."

18 *In re Gruntz*, 202 F.3d 1074, 1082 (9th Cir. 2000), is a seminal  
19 Ninth Circuit decision that a state court's determination as to  
20 applicability of the automatic stay or actions that are done in  
21 violation of the automatic stay are void.

22 In sum, bankruptcy courts have the ultimate authority  
23 to determine the scope of the automatic stay imposed  
24 by 11 U.S.C. § 362(a), subject to federal appellate  
25 review. A state court does not have the power to  
26 modify or dissolve the automatic stay. Accordingly,  
27 the *Rooker-Feldman* doctrine does not render a state  
28 court judgment modifying the automatic stay binding  
on a bankruptcy court. Thus, if it proceeds without  
obtaining bankruptcy court permission, a state court  
risks having its final judgment declared void.

*Id.*, at 1037.

The Ninth Circuit upheld a state court's determination that a  
criminal prosecution did not violate the automatic stay. Considered

1 narrowly, the decision has little bearing on this case because FERC  
2 is not a state court, it did not involve a criminal matter, it did  
3 not interpret the automatic stay, and at present there is no  
4 automatic stay issue pending. But considered broadly, and  
5 considering that the FERC Denial came after bankruptcy when the  
6 automatic stay went into effect, *Gruntz* very much applies. It  
7 warns that an interpretation of the Bankruptcy Code and the court's  
8 exclusive jurisdiction over core matters by another body that is in  
9 excess of its own jurisdiction, to be binding on the bankruptcy  
10 court, must be correct.

11 Before Debtors filed bankruptcy FERC made its January 25 and  
12 28, 2019 rulings against them. Those rulings were at best toothless  
13 advisory opinions that had no effect on anyone, especially debtors  
14 contemplating but not then having filed bankruptcy. Obviously there  
15 was no automatic stay in effect or even in existence. Equally  
16 obviously, *Gruntz* was of no concern. All that changed on January  
17 29, 2019. The Debtors' reorganizations were immediately impacted by  
18 the cloud of FERC's assertion of concurrent jurisdiction and its  
19 presumption that it could override a bankruptcy court's PPA  
20 executory contract rejection decision based upon policies embodied  
21 in the FPA, principally protection of the public interest.

22 Now that FERC has issued its FERC Denial, the full impact of  
23 *Gruntz's* reasoning applies. Section 365(a) and 28 U.S.C. § 1334,  
24 taken together, clearly lead to the inescapable conclusion that only  
25 the bankruptcy court can decide whether a motion to reject should be  
26 granted or denied, and under what standards.

27 The United States Supreme Court stated that Congress knew how  
28 to grant exceptions to the power to reject executory contracts and

1 PPAs governed by the FPA were not included. *N.L.R.B. v. Bildisco &*  
2 *Bildisco*, 465 U.S. 513, 523 (1984). *Tempnology, supra, footnote 8*  
3 *and accompanying text*. The right to reject is qualified for many  
4 exceptions under §§ 365(h), (i), (n), and (o). FERC and the FPA are  
5 not mentioned in any exceptions. Section 365's lack of an exception  
6 for FERC simply means that FERC has no jurisdiction over the  
7 rejection of contracts. See *FCC v. NextWave Pers. Commc'ns, Inc.*,  
8 537 U.S. 293, 302 (2003) ("[W]here Congress has intended to provide  
9 regulatory exceptions to the Bankruptcy Code, it has done so clearly  
10 and expressly."

11 As a result, if an executory contract does not fall into the  
12 exceptions set forth by Congress in the Bankruptcy Code, only the  
13 Bankruptcy Court can issue a ruling on rejection. The reasoning of  
14 *Gruntz* is directly applicable, just as the Bankruptcy Court was  
15 permitted to void a state court order that was issued in violation  
16 of the Bankruptcy Code. This court can declare FERC's attempt to  
17 interpret and apply the Bankruptcy void.

18 In addition and apart from *Gruntz* and the automatic stay, case  
19 law rejects any attempt by FERC to expand its jurisdiction to those  
20 matters not governed by the FPA. *Hunter v. FERC*, 711 F.3d 155, 159  
21 (D.C. Cir. 2013); *Atl. City Elec. Co. v. F.E.R.C.*, 295 F.3d 1, 8  
22 (D.C. Cir. 2002) (stating FERC is a creature of statute and only has  
23 authority specifically conferred by Congress with no constitutional  
24 or common law existence or authority). The court in *Hunter* found  
25 that FERC failed to meet its burden to show a repeal by implication.  
26 FERC argued that the FPA superseded a particular section of the  
27 Commodity Exchange Act, which is implemented by the Commodity  
28 Futures Trading Commission. *Hunter*, 711 F.3d at 160. Any order

1 issued by FERC stating concurrent jurisdiction is therefore void, as  
2 it attempts to divest jurisdiction from the bankruptcy court that  
3 was set forth by Congress.

4       The court's "virtually unflinching obligation . . . to exercise  
5 the jurisdiction given [it]," *Colorado River Water Conservation*  
6 *Dist. v. United States*, 424 U.S. 800, 817 (1976), compels the  
7 conclusion that it should hold that FERC's orders are prospectively  
8 void because they conflict with a core proceeding solely delegated  
9 to this court. The United States Supreme Court referred to its  
10 "original and exclusive" jurisdiction over disputes between the  
11 States, 28 U.S.C. § 1251(a), adding "the description of our  
12 jurisdiction as 'exclusive' necessarily denies jurisdiction of such  
13 cases to any other federal court." *Mississippi v. Louisiana*, 506  
14 U.S. 73, 77-78 (1992). In 28 U.S.C. § 1344(a) Congress gave  
15 exclusive jurisdiction over bankruptcy cases to this court (via a  
16 referral from the district court). There is no reason why this  
17 bankruptcy court should not apply exclusive jurisdiction in the same  
18 way.

19       In sum, the three FERC decisions discussed here were not the  
20 actions of a power regulator carrying out its statutory duties to  
21 police rates, terms and conditions of power contracts, and enforcing  
22 the filed-rate doctrine. To be blunt, they were unauthorized acts  
23 of the power regulator executing a power play (to use a hockey term)  
24 to curtail the role of the court acting within its authorized and  
25 exclusive role in these bankruptcy cases. Those decisions can not  
26 be applied or honored here.

### 27       **3. Proper standard for rejection of executory contracts**

28       To determine whether the Bankruptcy Court should approve the

1 rejection of an executory contract under Section 365, the business  
2 judgment rule must be applied. *In re Pomona Valley Med. Grp., Inc.*,  
3 476 F.3d 665, 670 (9th Cir. 2007). “[I]n evaluating the rejection  
4 decision, the bankruptcy court should presume that the debtor-in-  
5 possession acted prudently, on an informed basis, in good faith, and  
6 in the honest belief that the action taken was in the best interests  
7 of the bankruptcy estate.” *Pomona Valley*, 476 F.3d at 670; *In re At*  
8 *Home Corp.*, 292 B.R. 195, 199 (N.D. Cal. 2003), *aff’d*, 392 F.3d 1064  
9 (9th Cir. 2004) (stating the debtor must demonstrate that rejection  
10 will benefit the estate). This can include eliminating an executory  
11 contract that has become burdensome or where prompt elimination will  
12 positively impact the debtor’s ability to improve its financial  
13 condition. 9C Am. Jur. 2d Bankruptcy § 2311. Further, the debtor’s  
14 decision to reject cannot be based on “a gross abuse of debtor’s  
15 business discretion.” *Id.*

16 A primary issue in this determination is whether the rejection  
17 would benefit general unsecured creditors, which requires a  
18 balancing of interests. *In re Chi-Feng Huang*, 23 B.R. 798, 801  
19 (B.A.P. 9th Cir. 1982); *In re Turbowind, Inc.*, 42 B.R. 579, 584  
20 (Bankr. S.D. Cal. 1984). If rejection would lead to a third party  
21 benefitting substantially at the expense of unsecured creditors, the  
22 rejection cannot be approved. *Chi-Feng Huang*, 23 B.R. at 801.

23 A district court denied a debtor’s motion to reject where it  
24 found that debtor was trying to “create” a business rather than  
25 preserve one, and that debtor had filed bankruptcy solely to reject  
26 that contract. The court found that these facts meant the debtor  
27 was not exercising business judgment or operating in good faith. *In*  
28 *re S. California Sound Sys., Inc.*, 69 B.R. 893, 898 (Bankr. S.D.

1 Cal. 1987). Rejection is precluded where bankruptcy is filed with  
2 the sole purpose of trying to reject. *In re Safakish*, No. 18-50769  
3 MEH, 2018 WL 5621783, at \*6 (Bankr. N.D. Cal. Oct. 29, 2018).

4 Disproportionate damage to the aggrieved party is a ground to  
5 disapprove rejection. *In re Monarch Tool & Mfg. Co.*, 114 B.R. 134,  
6 137 (Bankr. S.D. Ohio 1990). Unfairness to the aggrieved party is  
7 not enough, however. See *In re Chi-Feng Huang*, 23 B.R. 798, 801  
8 (B.A.P. 9th Cir. 1982) (stating that the primary issue is whether  
9 rejection would benefit the general unsecured creditors).

10 The parties that are impacted will receive an unsecured claim  
11 for damages in the full amount of the rate listed in the PPAs.  
12 Creation an administrative priority claim, which means placement  
13 ahead of all unsecured creditors, will happen if FERC successfully  
14 orders performance under a rejected PPA. That would be inconsistent  
15 with the Bankruptcy Code's treatment of such a rejected claim. As  
16 noted, "a priority scheme dictating the order in which various  
17 creditors' claims will be satisfied in the course of bankruptcy  
18 proceedings." *In re Holly Marine Towing, Inc.*, 669 F.3d 796, 800  
19 (7th Cir. 2012).

20 That said, the court will not ignore what others have said  
21 about public interest and the need to take it into account while at  
22 the same time paying careful attention on the reorganization goals:

23 "If the district court decides that a more rigorous  
24 standard is required, then it might adopt a standard  
25 by which it would authorize rejection of an executory  
26 power contract only if the debtor can show that it  
27 "burdens the estate, [ ] that, after careful  
28 scrutiny, the equities balance in favor of rejecting"  
that power contract, and that rejection of the  
contract would further the Chapter 11 goal of  
permitting the successful rehabilitation of debtors.  
See *Bildisco*, 465 U.S. at 526-27, 104 S.Ct. 1188.  
When considering these issues, the courts should  
carefully scrutinize the impact of rejection upon the

1 public interest and should, inter alia, ensure that  
2 rejection does not cause any disruption in the supply  
3 of electricity to other public utilities or to  
4 consumers. Cf. *id.* at 527, 104 S.Ct. 1188. (requiring  
5 the bankruptcy court to balance the interests of the  
6 debtor, the creditors and the employees when  
7 determining what constitutes a successful  
8 rehabilitation)."

9 *Mirant*, at 525.<sup>18</sup>

10 Public policy does not need to be considered when applying the  
11 business judgment rule every time a federal statute is implicated.

12 "Congress did not intend the Code to be a shield  
13 behind which a debtor in possession might engage in  
14 conduct that would be improper in a non-bankruptcy  
15 context. Indeed, as a fiduciary holding its estate  
16 in trust and responsible to the court, a debtor in  
17 possession must administer its case and conduct its  
18 business in a fashion amenable to the scrutiny to be  
19 expected from creditor and court oversight."

20 *In re Pilgrim's Pride Corp.*, 403 B.R. 413, 424 (Bankr. N.D. Tex.  
21 2009).

22 The business judgment standard in regular rejection is more  
23 deferential than that given to contracts that are in the "public  
24 interest."<sup>19</sup> But public interest may need to be considered in the  
25 context of a specific rejection of a specific PPA. That outcome  
26 will be fact-driven based on the particular motion to reject and the  
27 responses of the opposing party. That is for another day.

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28 <sup>18</sup> *In re Caribbean Petroleum Corp.*, 444 B.R. 263, 269 (Bankr.  
Del 2010)(heightened scrutiny for rejection motions involving the  
protection of national public interest such as public safety,  
health or welfare (citing *In re Old Carco, LLC*, 406 B.R. 180, 189  
(Bankr. S.D.N.Y. 2009)).

<sup>19</sup> *Cf.*, *In re Old Carco LLC*, *supra* stating that the statutes  
there were enacted by state legislatures, not Congress, so they  
were protecting the public interest of the *states* rather than the  
national public interest and did not deny the rejection motion in  
the name of public interest.

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**VI. DISPOSITION**

Debtors are entitled to this court’s declaratory judgment that (1) FERC does not have concurrent jurisdiction over its decision to permit Debtors to reject (or assume) executory contracts under Section 365; and (2) that the FERC Denial and its two prior rulings described above are of no force and effect and are not binding on Debtors in these cases.<sup>20</sup>

Nothing will happen here until either of the Debtors moves to reject an executory PPA and the affected counterparty opposes that motion. At that time the court will consider the merits of any such motion and if consideration implicates public policy interests as well as reorganization goals, those interests can be considered as part of the higher standard for the rejection decision. It may well be that a particular motion seeks rejection of a contractual obligation of the debtor to purchase energy in the future. That likely will involve little if any public interests; on the other hand rejection of a PPA based on some other rights and obligations may trigger a more concrete and demonstrable consequence that may tip the balance the other way. Either way, or whatever set of facts apply, this court can make the assessment consistent with the principles expressed here. There is no need or right for a second inquiry by a separate non-judicial body to be involved. This court will exercise its exclusive jurisdiction as Congress directed.

The automatic stay still applies the same way it did on January 29, 2019, when these cases were commenced. If more relief is

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<sup>20</sup> The court takes no position as to what happens if Debtors appeal the FERC Denial to a court of appeal.

1 needed, the court's specific and inherent injunctive powers are  
2 available.

3       The motion of the Official Committee of Unsecured Creditors is  
4 GRANTED. If there is no appeal that grant is of no consequence; if  
5 there is an appeal, the committee's views should be considered.

6       Concurrent with this Memorandum Decision the court is issuing  
7 its Declaratory Judgment. In a few days it will issue a  
8 Certification for Direct Appeal.

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\* \* \* END OF MEMORANDUM DECISION \* \* \*

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