

FERC Appeals Bankruptcy Court Denial of Concurrent Jurisdiction Over Energy Contracts in Bankruptcy

June 25, 2019

On June 21, 2019, the Federal Energy Regulatory Commission (“FERC”) filed a notice of appeal of the decision and judgment by the United States Bankruptcy Court for the Northern District of California (the “Bankruptcy Court”) that the Bankruptcy Court has exclusive jurisdiction over the rejection of power purchase agreements by a debtor in bankruptcy under section 365 of the Bankruptcy Code.[1] Intervenors Consolidated Edison Development, Inc., NextEra Energy, Inc., NextEra Energy Partners, L.P., Calpine Corporation, Exelon Corporation, AV Solar Ranch 1, Clearway Energy, Inc., Clearway Energy Group LLC, MC Shiloh IV Holdings LLC, NRG Energy, Inc., TerraForm Power, Inc., Mojave Solar LLC, Diablo Winds, LLC, EDF Renewables, Inc., Vantage Wind Energy LLC, KES Kingsburg, L.P., Topaz Solar Farms LLC, Crockett Cogeneration, Middle River Power, LLC, MRP San Joaquin Energy, LLC and Southern Power Company, on behalf of itself and certain of its affiliates, including Parrey LLC, Lost Hills Solar, LLC, Blackwell Solar, LLC, Morelos Solar, LLC, and North Star Solar, LLC (collectively, the “Intervenors”) also each filed notices of appeal of the Judgment.

The Bankruptcy Court had previously certified the Judgment for direct appeal to the United States Court of Appeals for the Ninth Circuit (the “Ninth Circuit”).[2] Pursuant to 28 U.S.C. §158(d)(2)(B), the Bankruptcy Court may on its own motion certify a decision for appeal directly to the Ninth Circuit if any of the circumstances in 28 U.S.C. §158(d)(2)(A)(i), (ii) or (iii) exist. The Bankruptcy Court asserted that all of these circumstances exist: (i) the Judgment involves a question of law as to which there is no controlling decision of the Ninth Circuit or of the Supreme Court of the United States (the “Supreme Court”) and involves a matter of public importance; (ii) the Judgment involves a question of law requiring resolution of conflicting decisions; and (iii) an immediate appeal from the Judgment would materially advance the progress of the bankruptcy cases of PG&E Corporation and Pacific Gas and Electric Company.

Each of the Intervenors supported the Bankruptcy Court’s certification and agreed that there are bases under 28 U.S.C. § 158(d) for direct certification to the Ninth Circuit. FERC and all Intervenors also elected, if permission for a direct appeal is denied by the Ninth Circuit, pursuant to 28 U.S.C. §158(c)(1), to have the appeal heard by the District Court rather than by the Bankruptcy Appellate Panel for the Ninth Circuit.

It is now up to the Ninth Circuit to determine whether to hear a direct appeal of the Judgment. In its supporting memorandum, the Bankruptcy Court noted that of the three reported cases regarding the intersection of FERC’s

and the Bankruptcy Court's jurisdictions, one was a decision by the United States Appeals Court for the Fifth Circuit and one had been appealed to the United States Appeals Court for the Sixth Circuit and oral argument in that appeal is scheduled for June 26, 2019.[3] Conflicting decisions by multiple Circuit Courts on this issue would make it more likely that it advances to the Supreme Court.

Please note that this advisory is a general overview and is not intended as formal legal advice. If you have any questions please feel free to contact:

Michelle McMahon at (212) 510 - 2296 or via email at mmcmahon@CullenandDykman.com

Bruce Miller at (516) 296 - 9133 or via email at bmiller@CullenandDykman.com

[1] *PG&E Corporation and Pacific Gas and Electric Company v. Federal Energy Regulatory Commission*, Adv. Pro. No. 19-3003 (N.D.Ca. June 7, 2019) (the "Adv. Pro."), Memorandum Decision on Action for Declaratory and Injunctive Relief [Adv. Pro. Dkt No. 153] and Declaratory Judgment [Adv. Pro. Dkt No. 154] and Amended Declaratory Judgment entered on June 12, 2019 [Adv. Pro. Dkt No. 155] (collectively, the "Judgment").

[2] Adv. Pro. Dkt Nos. 156 and 158.

[3] Memorandum Regarding Certification for Direct Appeal to the Court of Appeals [Adv. Pro. No. 156], p. 6.

Practices

- Bankruptcy and Creditors' Rights

Attorneys

- Michelle McMahon
- Bruce V. Miller