

FERC Declares Concurrent Jurisdiction with Bankruptcy Courts Over Rejections of Natural Gas Transportation Agreements

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On June 22, 2020, the Federal Energy Regulatory Commission (“FERC”) issued an order in response to a Petition for Declaratory Order (“Petition”) filed by ETC Tiger Pipeline, LLC (“ETC Tiger”), finding that FERC has concurrent jurisdiction with United States Bankruptcy Courts to review and dispose of natural gas transportation agreements sought to be rejected through bankruptcy.^[1]

The Petition, filed on May 19, 2020, requested that FERC find that it has concurrent jurisdiction with Bankruptcy Courts under sections 4 and 5 of the Natural Gas Act (“NGA”) with respect to natural gas transportation agreements between ETC Tiger and Chesapeake Energy Marketing, L.L.C. (“Chesapeake”) and that FERC approval of any abrogation or modification of the agreements is statutorily required. Specifically, ETC Tiger requested three Commission declarations:

1. The natural gas transportation agreements between ETC Tiger and Chesapeake are FERC-jurisdictional agreements reflecting filed rates approved by FERC pursuant to its exclusive jurisdiction under the NGA;
2. If Chesapeake seeks rejection of the agreements in bankruptcy court, Chesapeake must seek FERC approval to abrogate, modify, or amend the filed rate pursuant to section 5 of the NGA and must demonstrate that abrogation, modification, or amendment of the filed rate is in the public interest;
3. If a party to a FERC-jurisdictional contract under the NGA seeks rejection of such an agreement in bankruptcy court, FERC approval pursuant to NGA section 5 is required before a bankruptcy court can determine whether to reject the agreement.^[2]

Chesapeake protested the Petition arguing, among other things, that ETC Tiger’s Petition sought to elevate FERC’s jurisdiction over the filed rate above the bankruptcy court’s jurisdiction to determine whether a contract should be rejected.

FERC agreed with ETC Tiger's first and second requested declarations and granted the Petition in part. FERC confirmed that the filed rate doctrine and the *Mobile-Sierra* presumption apply equally to contracts regulated under sections 4 and 5 of the NGA and contracts regulated under sections 205 and 206 of the Federal Power Act ("FPA"). Accordingly, FERC concluded that the natural gas transportation agreements between ETC Tiger and Chesapeake constituted filed rates and that Chesapeake cannot modify the rates, terms, or conditions of the agreements by rejecting the contracts in bankruptcy without FERC approval.

With respect to ETC Tiger's third requested declaration, FERC clarified that a party to a FERC-jurisdictional contract under the NGA does not need to receive FERC approval before a bankruptcy court can determine whether to reject the agreement. However, a bankruptcy court's decision to approve rejection of a FERC-jurisdictional contract cannot modify the filed rate. Similarly, a reorganization plan that involves modification or abrogation of FERC-jurisdictional agreements cannot be confirmed unless FERC agrees or confirmation of the plan is made subject to FERC's approval (FERC's agreement can only occur through a FERC order).

In response to Chesapeake's argument that ETC Tiger sought to create exclusive FERC jurisdiction over a determination involving such contracts, FERC reiterated that its jurisdiction is "concurrent with, not superior to, that of the bankruptcy courts."^[3] FERC distinguished the role of the bankruptcy court, explaining that "the Commission neither presumes to sit in judgment of rejection motions nor seeks to arrogate the role of adjudicating bankruptcy proceedings," and that "[t]he Commission recognizes that rendering a determination on rejection motions is solely within the province of the bankruptcy court."^[4] However, the "Bankruptcy Code does not displace the Commission's jurisdiction over filed rate contracts under the NGA."^[5] Because rejection of a FERC-jurisdictional contract in bankruptcy "alters the essential terms and conditions of a contract,"^[6] and the contract is a filed rate, FERC approval is required to modify or abrogate a contract. A party to a FERC-jurisdictional contract must obtain approval from the bankruptcy court to reject the contract in bankruptcy and must also obtain approval from FERC to modify or abrogate the filed rate.

FERC's Order will be a crucial consideration for shippers at risk of filing for bankruptcy and shippers considering seeking rejection of FERC-jurisdictional natural gas transportation agreements in bankruptcy. Shippers seeking rejection of FERC-jurisdictional natural gas transportation agreements should take into account the *ETC Tiger* decision in assessing the likelihood of success at both the Bankruptcy Court and FERC level, as well as the time and resource expenditure in seeking approval at both levels. Further developments in the *ETC Tiger* proceeding are possible, as the period for filing requests for rehearing of the Order is pending. Also, on June 28, Chesapeake filed for bankruptcy protection and has requested bankruptcy court approval to cancel several pipeline contracts. If you have questions about the *ETC Tiger* decision and how it impacts you, contact Pierce Atwood's energy infrastructure attorneys Randy Rich, Valerie Green, Keith Cunningham, Ryan Kelley, and Kayla Grant.

[1] [*ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 \(2020\) \("Order"\)](#).

[2] Order at P 3.

[3] Order at P 29.

[4] Order at P 25 (quoting *NextEra, Inc. v. Pac. Gas & Elec. Co.*, 167 FERC ¶ 61,096, at P 16 (2019)).

[5] Order at P 22.

[6] Order at P 23.

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