IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
AKRON DIVISION

In re:	)	Chapter 11
FIRSTENERGY SOLUTIONS CORP., *et al.*,[1]	)	Case No. 18-50757 (Request for Joint Administration Pending)
Debtors.	)	Hon. Judge Alan M. Koschik
FIRSTENERGY SOLUTIONS CORP.; FIRSTENERGY GENERATION, LLC,	)	
Plaintiffs,	)	Adversary Proceeding No.
v.	)	
FEDERAL ENERGY REGULATORY COMMISSION,	)	
Defendant.	)	

COMPLAINT FOR DECLARATORY JUDGMENT, PRELIMINARY AND PERMANENT INJUNCTION AGAINST THE FEDERAL ENERGY REGULATORY COMMISSION

Plaintiffs FirstEnergy Solutions Corp. ("FES") and FirstEnergy Generation, LLC ("FG" and together with FES, "Plaintiffs"), two of the above-captioned debtors (together with their affiliated debtors, the "Debtors"), as Debtors and debtors-in-possession in the above-captioned

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: FE Aircraft Leasing Corp. (9245), case no. 18-50759; FirstEnergy Generation, LLC (0561), case no. 18-50762; FirstEnergy Generation Mansfield Unit 1 Corp. (5914), case no. 18-50763; FirstEnergy Nuclear Generation, LLC (6394), case no. 18-50760; FirstEnergy Nuclear Operating Company (1483), case no. 18-50761; FirstEnergy Solutions Corp. (0186); and Norton Energy Storage L.L.C. (6928), case no. 18-50764. The Debtors' address is: 341 White Pond Dr., Akron, OH 44320.

chapter 11 cases, allege for their Complaint against Defendant the Federal Energy Regulatory Commission ("FERC"), upon knowledge of their own acts and upon information and belief as to all other matters, as follows:

SUMMARY OF ACTION

1. This is an adversary proceeding brought pursuant to 28 U.S.C. § 2201, 11 U.S.C. §§ 105, 106(a), 365 and Federal Rules of Bankruptcy Procedure 7001(7), (9) and 7065, for declaratory judgment, and preliminary and permanent injunctive relief. Plaintiffs seek a declaratory judgment that this Court is vested with both subject matter jurisdiction and statutory and equitable powers to permit Plaintiffs to reject certain long-term power purchase agreements, *see* 11 U.S.C. § 365(a), and that there is no conflict between the Bankruptcy Court's jurisdiction and powers in such regard and the jurisdiction and powers allocated to FERC under the Federal Power Act, 16 U.S.C. § 824, *et seq*. On that basis, Plaintiffs seek to enjoin FERC from issuing any order that might wrongfully impede or divest this Court's exclusive jurisdiction to permit the rejection of the Executory PPAs (as defined below) or otherwise administer the reorganization of the Debtors' estates as any such loss of jurisdiction would irreparably harm the Plaintiffs and their stakeholders.

2. In a separate contested matter (the "Rejection Motion"), Plaintiffs have moved, under section 365 of chapter 11 of the United States Code (the "Bankruptcy Code"), for authority to reject nine burdensome executory power purchase agreements (the "PPAs").[2] In a second separate contested matter (the "OVEC ICPA Rejection Motion" and together with the Rejection Motion, the "Rejection Motions"), Plaintiffs have moved, under section 365 of the Bankruptcy

[2] Of these nine agreements, eight are renewable energy PPAs. The other is a power purchase agreement with Forked River Power, LLC, a dual-fuel fired cycle combustion turbine power producer.

Code, for authority to reject a certain multi-party power purchase agreement with the Ohio Valley Electric Corporation (as amended and restated, the "OVEC ICPA" and together with the PPAs, the "Executory PPAs"). Plaintiffs have no need for the wholly burdensome Executory PPAs, which will cause collectively the Debtors to lose approximately $765 million over their respective remaining terms on an undiscounted basis, and more than $475 million on a net present value basis.[3] As such, the Executory PPAs present an archetypical case of contracts that should be rejected in bankruptcy, for a host of salient reasons. As the Supreme Court has made clear, "the authority to reject an executory contract is vital to the basic purpose [of] a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Rejection of the contracts at issue is essential both to facilitate the Debtors' reorganization process and to ensure fairness and equality of treatment to the Debtors' unsecured creditors.[4]

3. The Executory PPAs, entered into between Plaintiffs and various power producers, including wind and solar power producers, are subject in certain respects to defendant FERC's jurisdiction over wholesale electric rates. Whether FERC actually reviews or approves rates in a specific agreement or, alternatively, grants a party authority to enter contracts at negotiated rates without contract-specific FERC review, the subject prices are deemed "filed rates" under the filed-rate doctrine, and courts may not fix a different rate.

[3] The damages calculations do not include those associated with the Master Power Purchase & Sale Agreement between FES and Forked River Power, LLC. That contract will terminate by its own terms on April 17, 2018.

[4] The Debtors have sought and/or likely will seek to reject other contracts as well, including uranium, coal and rail transport contracts.

4. Under the Federal Power Act, FERC has jurisdiction over rates, terms and conditions for transmitting or selling wholesale electric energy. The rates, terms and conditions are required to be just and reasonable and not unduly discriminatory or preferential, a quintessential regulatory function. This is referred to as the "just and reasonable" standard. If FERC finds that the rates, terms or conditions being charged under a contract are no longer just and reasonable, FERC has authority to modify the rate or to outright terminate, or "abrogate," the wholesale power contract. The standards governing FERC's exercise of such power, generally referred to today as the "*Mobile-Sierra* test," were first set forth in two 1956 Supreme Court cases: *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The *Mobile-Sierra* test requires FERC to "presume a…contract [rate] for [wholesale energy] is just and reasonable" and prohibits FERC from setting aside that rate unless FERC finds that the rate "seriously harm[s] the public interest." *S.C. Pub. Serv. Auth. v. FERC,* 762 F.3d 41, 81 (D.C. Cir. 2014). If and when FERC exercises such authority to abrogate a contract, the contract is deemed terminated, without liability to either party, regardless of the remaining term. Alternatively, FERC can impose new rates or conditions on the parties. But FERC has no authority to adjudicate rejection motions, whereby a debtor terminates an executory contract and the counterparty receives an allowed unsecured claim for damages.

5. FERC's exclusive authority under the Federal Power Act and the filed-rate doctrine does not extend to any other aspects of wholesale power agreements and disputes arising thereunder, including breach of contract actions and contract rejection as permitted by the Bankruptcy Code. In rejection proceedings, the bankruptcy court simply determines whether the debtor has properly exercised its business judgment in seeking to cease performing—and thereby

breach—an executory agreement. If so, and absent agreement of the parties, the bankruptcy court also determines the non-debtor's rejection damages *based on the terms of the contract itself*. Hence, in connection with the Rejection Motions, *the Court has not been and will not be asked to or need to determine whether the rates in the various Executory PPAs are just or reasonable and/or whether the Executory PPA's are harmful to the public interest.* Nor have Plaintiffs asked the Bankruptcy Court to allow them to simply abrogate the Executory PPAs, with no further liability under *Mobile-Sierra.* Rather, Plaintiffs' rejection of the Executory PPAs will operate as a breach of such contracts. 11 U.S.C. § 365(g) ("[T]he rejection of an executory contract . . . constitutes a breach of such contract . . . ."). Such a breach then results in unsecured claims against the estate based on, *inter alia*, the unaltered rates and other terms of the subject contracts and expected future performance. Plaintiffs' counterparties' claims for damages will then be treated the same as other unsecured creditors.

6. Properly understood then, there is no conflict between the powers and jurisdiction accorded FERC to modify rates or abrogate a wholesale power contract in the public interest, and the rejection powers and jurisdiction of this Court, as they are based on wholly different standards and result in wholly different consequences for the parties. Indeed, when construing two potentially related federal statutes, a court must give effect to each if that can be done without damage to their sense and purpose. Here, that is an easy judicial task, as the Federal Power Act does not give FERC exclusive authority over the breach of a wholesale power agreement, or provide anything whatsoever concerning the treatment of wholesale power contracts in bankruptcy. Conversely, the Bankruptcy Code's rejection provisions contain no exception for wholesale power contracts. This last point is critical because *the Bankruptcy Code*

does contain express exceptions and qualifications for other kinds of contracts, such as certain types of securities and commodities contracts.

7. The Bankruptcy Code, including section 365, was enacted 58 years after the Federal Power Act, and 36 years after the issuance of the *Mobile-Sierra* opinions, yet it explicitly allows a debtor to reject "*any*" executory contract not specifically excluded in the Bankruptcy Code, and contains no exception for any kind of power agreements. It is legally unsupportable to suggest that the Federal Power Act reflects congressional intent to override the Bankruptcy Code (a chronological impossibility). It is equally unsupportable to suggest that Bankruptcy Code section 365 reflects an unspoken congressional intent to *exclude* wholesale power agreements from the bankruptcy courts' jurisdiction under section 365—particularly when the Code specifically denotes the types of contracts that *are* excluded.

8. Plaintiffs' position is squarely supported by the only appellate level case to directly address the issues presented by this Complaint. In it, the Fifth Circuit held that the Federal Power Act does not preclude the bankruptcy court's rejection jurisdiction under section 365, does not prevent the rejection of a wholesale power agreement, and that a bankruptcy court *can enjoin FERC* to preserve the status quo until the court rules on the debtor's motion to reject:

> [T]hat FERC could negate [the debtor's] rejection of an executory power contract by ordering Mirant to continue performing under the terms of the rejected contract—is certainly a legitimate basis for injunctive relief . . . [A] bankruptcy court can clearly grant injunctive relief to prohibit FERC from negating [the debtor's] rejection by requiring continued performance [of power contracts] at the pre-rejection filed rate.

In re Mirant Corp., 378 F.3d 511, 523 (5th Cir. 2004).

9. On the most recent occasion that defendant FERC issued an order addressing the matters in paragraphs 3–8 above, FERC stated it intended to follow the Fifth Circuit's decision.

See Cal. Elec. Oversight Bd. v. Calpine Energy Servs., L.P., No. EL 06-30-000, 114 F.E.R.C. ¶ 61,003 (Jan. 3, 2006) (copy attached hereto as Exhibit A) ("2006 FERC Order"). On two earlier occasions, however, FERC attempted to prevent debtors from obtaining relief under section 365 by issuing an order compelling the debtor to continue performing under a burdensome contract, and/or convening a proceeding to determine whether the contract could be abrogated. In one such instance, questions arose about the bankruptcy court's jurisdiction to determine a rejection motion involving the same contracts simply because FERC had acted first. *NRG Power Mktg. Inc. v. Blumenthal (In re NRG Energy, Inc.)*, No. 03 Civ. 3754, 2003 WL 21507685, at *2 (S.D.N.Y. June 30, 2003).

10. The same danger to the Debtors exists here if FERC attempts to revert to its pre-2006 position on the scope of its powers under the Federal Power Act. If FERC were to issue an order purporting to compel the Plaintiffs to continue performing the Executory PPAs or initiate or continue an agency proceeding concerning the Executory PPAs, whether on request or *sua sponte*, and this Court subsequently concluded that it lacked the jurisdiction to review that decision or allow Plaintiffs to reject the contracts at issue as a consequence of the pending FERC matter, the Debtors (and derivatively, their estates and creditors) would be deprived of their rights under the Bankruptcy Code. Plaintiffs' only means of challenging the FERC order would be to await final FERC action and then appeal to the U.S. Court of Appeals for the D.C. Circuit.[5] A final FERC order in such a proceeding and subsequent appeal could take years. If the Plaintiffs were forced to perform under the Executory PPAs in the meantime, costing the estate approximately $5 million monthly in the near term and close to $58 million annually in losses on

[5] For the avoidance of any doubt, FES disputes that FERC has the statutory authority to compel FES to continue purchasing power under the Executory PPAs, even in the absence of pending rejection proceedings respecting such contracts.

average over the next ten years, the ability of the Debtors to reorganize would be jeopardized and their estates would be irreparably damaged in several ways, discussed *infra*.

11. The Plaintiffs therefore seek a declaratory judgment confirming this Court's exclusive jurisdiction over their ability to reject the Executory PPAs, and a narrowly tailored preliminary and permanent injunction that would prevent FERC from nullifying this Court's authority under the Bankruptcy Code by initiating or continuing, or encouraging any person or entity to initiate or continue, a proceeding concerning the Executory PPAs. Contemporaneous with the filing of this Complaint, Plaintiffs are filing a motion for an *ex parte* temporary restraining order ("TRO") and preliminary injunction. Such relief will ensure that the Debtors' Rejection Motion and OVEC ICPA Rejection Motion can be heard and determined on the merits.

12. Plaintiffs have satisfied the requirements of Federal Rule of Civil Procedure 65(b), made applicable through Rule 7065 of the Bankruptcy Rules, for relief to be granted on an *ex parte* basis.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157 and 1334. This adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) and (O).

14. The plaintiffs in this adversary proceeding are FES and FG, two of the above-captioned Debtors in the underlying bankruptcy case filed concurrently with this Complaint. The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

15. FES is an Ohio corporation and a wholly-owned subsidiary of non-debtor FirstEnergy Corp. ("FE Corp."). FE Corp. is a public company with several non-debtor affiliates.

16. FG is an Ohio limited liability company and a wholly-owned subsidiary of FES.

17. The defendant in the proceeding is the Federal Energy Regulatory Commission.

18. The Debtors confirm their consent, pursuant to Bankruptcy Rule 7008, to the entry of a final order by the Court in connection with this Action to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

FACTUAL BACKGROUND

a. Background To The Rejection Motion and OVEC ICPA Rejection Motion

19. FES is an Ohio-based power company that provides energy-related products and services to retail and wholesale customers. FES owns and operates, through its subsidiary FG, certain fossil-generating facilities. FES also owns and operates nuclear-generating facilities through its subsidiary FirstEnergy Nuclear Generation, LLC ("NG"). FES purchases the entire output of both FG and NG, as well as the output of other FE Corp. subsidiaries, all at market rates, and sells that output to a combination of retail clients, FE Corp. affiliates, and in the spot market. This represents the great majority of FES's power purchases and sales, totaling close to 10,000 megawatts ("MWs").

20. Between 2003 and 2011, to ensure a long-term supply of renewable energy credits ("RECs") needed to meet various state requirements for businesses in the retail power industry, FES entered into eight "bundled" PPAs. (A list of all energy contracts subject to FES's Rejection Motions is annexed hereto as Exhibit B.) These eight energy contracts together involve

approximately 500 megawatts of capacity, and in 2017 resulted in the generation of a total 1.3 terawatt hours ("TWh") of electricity.[6] Pursuant to the PPAs, FES purchases power and the accompanying renewable energy credits, as well as capacity and ancillary services, from certain wind and solar generating facilities.[7] Upon information and belief, those facilities (*i.e.*, FES's counterparties on the PPAs) are owned by large energy-sector financial investors or operators, such as Duke Energy and First Solar.[8]

21. At the time that FES entered into the PPAs between 2003 and 2011, its retail sales were far greater and its resulting REC requirements were more demanding than today. Further, the supply of RECs was more limited and a bundled power purchase agreement was typically the only way to contract for RECs in the long-term at a fixed price. Finally, energy and capacity prices were much higher and expected to remain at elevated levels. Since then, many REC requirements have been relaxed and there is an abundance of RECs available for purchase, and energy and capacity prices are far lower. While the PPAs made sense to FES at the time they were entered into, a dramatic downturn in the energy market and REC prices now renders these contracts extremely burdensome and uneconomic to FES. FES has no business or regulatory need for the RECs procured under these contracts and is losing $46 million a year by performing

[6] That 500 MW of capacity, however, has an effective capacity of only 75 MW because renewable capacity is more intermittent than non-renewable capacity. This further illustrates the non-existent impact that rejection of the Executory PPAs will have on grid reliability because total installed resources in PJM—the relevant regional transmission organization—are approximately 200,000 MW. In other words, the Executory PPAs count for less than .04% of PJM's total installed resources.

[7] Generally, renewable energy producers are entitled to sell one REC for each megawatt-hour (MWh) they generate.

[8] Three of the PPAs were also entered to satisfy certain obligations of a FES affiliate, Ohio Edison Company, under a consent decree with the United States Environmental Protection Agency, dated March 18, 2005, to enter contracts for 93 MW of renewable power. Neither FES nor any of the other Debtors is a party to that agreement.

these contracts. Further, FES has already commenced a sale process and expects to sell its retail business in the near term.

22. For example, pursuant to its power purchase agreement with Krayn Wind LLC for 2018, FES is obligated to pay a fixed amount of $91.02 per MWh (and associated REC), escalating to $105.13 per MWh (and associated REC) by 2030. This is nearly three times today's market value of $36.00 for such power and REC. Based on current expectations, FES will lose approximately $103 million over the remaining term of this one power purchase agreement alone. Honoring the PPAs will cost the Debtors more than $152 million through 2020 on an aggregate, undiscounted basis and (together with the OVEC ICPA) approximately $765 million over the lifetime of the PPAs.

23. The OVEC ICPA is a multi-party intercompany power purchase agreement pursuant to which FG and several other power companies "sponsor" and purchase power generated by fossil fuel from the Ohio Valley Electric Corporation ("OVEC"). The OVEC ICPA obligates FG to purchase 4.85% of the power that OVEC's fossil-fuel plants generate at an uneconomic rate until either the year 2040 or until OVEC ceases to operate.[9] In 2017, FES bought approximately 0.6 TWh of energy from OVEC at a loss in the millions of dollars. Based on current expectations, FG will lose approximately $268 million on an undiscounted basis over the remaining term of the OVEC ICPA.

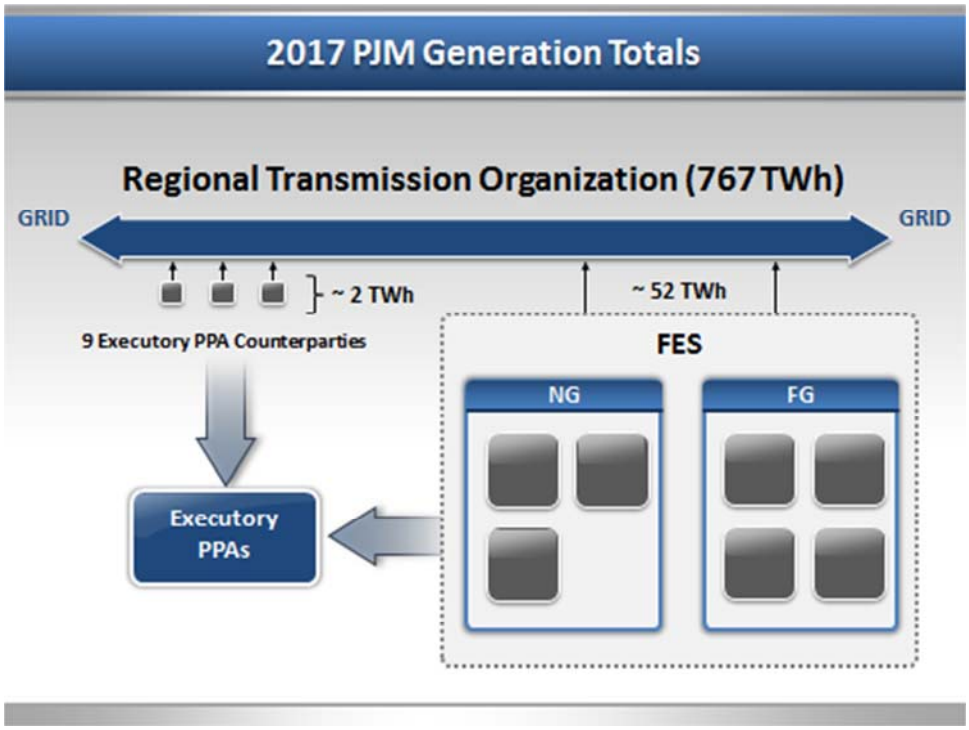
24. The Executory PPAs are all the more burdensome to the Debtors' estates, and directly detrimental to other stakeholders, because the Debtors have no need for the power, the RECs or the standby capacity that the Debtors receive under the Executory PPAs. In 2013, FES sold more than 110 TWh of power. In 2017, FES sold less than half of that amount. Crucially,

[9] Approximately 110 MW.

FES's need for RECs is tied directly to its retail business. Today, FES is seeking to exit the retail business entirely, but even if it were not selling this business FES would have enough of a surplus of RECs in inventory to engage in its retail business for years. Once FES has fully exited that business at the conclusion of its sale process, the company will have no need for any RECs. In other words, under the Executory PPAs, FES is obligated to buy power, capacity and RECs it does not need at a monetary loss for years to come. To relieve the estate from the burden of these long-term money losing contracts, the Plaintiffs have filed the Rejection Motions.

25. The Debtors can operate their businesses without the Executory PPAs and will remain in full compliance with their regulatory obligations. FES will continue to obtain more than enough power to supply its retail customers and already has on its balance sheet an excess number of RECs, sufficient to satisfy state regulatory requirements for at least the next three years. No FES customer—or any consumer for that matter—will go without power if FES is permitted to reject the Executory PPAs. In 2017, the power generated under the Executory PPAs and sold to and by FES into PJM totaled 1.9 TWh—just 0.2% of the total 767 TWh generated from all power plants selling in PJM. Further, OVEC and each of the power providers under the PPAs will be able to sell their power to other wholesale purchasers or into the regional wholesale electric spot markets (in this case, the markets operated by PJM).

26. The Rejection Motion and the OVEC ICPA Rejection Motion are necessary to the Debtors' restructuring efforts, as are a number of other motions to reject economically unfeasible contracts across a variety of industries. The Debtors have already filed a motion to reject certain uranium contracts and will likely seek to reject certain coal and rail contracts as well as certain lease agreements.



b. The Bankruptcy Code and Federal Power Act are Wholly Compatible

27. The Federal Power Act grants FERC the power to regulate the interstate sale of electricity by ensuring the wholesale rates charged by utility companies are "just and reasonable." *Sierra Pac. Power Co.*, 350 U.S. at 350 n.1 (citing 16 U.S.C. § 824). FERC has "exclusive authority to determine the reasonableness of wholesale [electricity] rates" under the Federal Power Act. *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371-75 (1988). Under the filed-rate doctrine, "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts." *Id*. at 375. Under this framework, FERC has exclusive authority to determine whether a contract rate is just and reasonable, but only in the context of an application to approve, modify or abrogate a filed-rate contract.

28. Further, FERC's authority under the Federal Power Act is granted in part to ensure reliability of power supply in the national interest. If the Court permits the rejection of

the Executory PPAs, there will be no disruption in the supply of power, capacity, or renewable energy credits to the relevant markets, as the counterparties to the Executory PPAs can sell their capacity, power and RECs to other buyers. Thus, this FERC concern is not implicated by the rejection of the Executory PPAs.

29. The Bankruptcy Code grants bankruptcy courts jurisdiction over the debtors' bankruptcy estate, including executory contracts. A debtor has great latitude to reject burdensome executory contracts under Bankruptcy Code section 365(a). For those obligations which are not anticipated to be profitable, the right to reject executory contracts and leases allows the estate to relieve itself of the burdensome obligation. The ultimate purpose behind section 365 is to allow a debtor or trustee to pick and choose among the debtor's agreements and assume those which benefit the estate and reject those which do not. Debtors need only meet the business judgment standard to be allowed to reject a burdensome contract. No creditor or other party in interest can force the estate to assume or reject an executory contract or lease under section 365. Whether the estate should seek to assume or reject an executory contract or lease lies within the sole discretion of the trustee or the debtor-in-possession, as the case may be.

30. Rejection of an executory contract under section 365(a) constitutes a *breach* of the contract—not a modification, and not an abrogation. *Osprey-Troy Officentre, LLC v. World All. Fin. Corp.*, 502 F. App'x 455, 456 (6th Cir. 2012); *see also In re N. Am. Royalties, Inc.*, 276 B.R. 860, 865 (Bankr. E.D. Tenn. 2002) ("Rejection is independent of the contract terms."). Breach of a contract is distinct from the abrogation of a contract. When a contract is abrogated, it is annulled or repealed—the parties no longer can enforce that agreement against one another. *See Abrogation*, BLACK'S LAW DICTIONARY (10th ed. 2014). On the other hand, a breach is simply a violation of a contract. The contract remains in force and parties to a breached contract

can seek damages for that violation. *See Breach*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also In re Nw. Airlines Corp.*, 366 B.R. 270, 272 (Bankr. S.D.N.Y. 2007) (distinguishing breach and abrogation).

31. This Court has exclusive authority to allow rejection of the Executory PPAs; nothing in the Federal Power Act gives FERC authority over rejection or contract damages, or the ability to direct and control priorities in a chapter 11 case. *See* 11 U.S.C. § 365(a); *see also Bildisco*, 465 U.S. at 522; *Mirant*, 378 F.3d at 521. The contracts at issue, for which "performance [remains]…due on both sides," are executory contracts under section 365. *Bildisco*, 465 U.S. at 522–23. The Debtors, following an internal review and consultation with their advisors and acting in their best business judgment, have identified the Executory PPAs, among other contracts, as highly burdensome to the estates and have properly sought relief in the Rejection Motion and the OVEC ICPA Rejection Motion. *In re Albrechts Ohio Inns, Inc.*, 152 B.R. 496, 501 (Bankr. S.D. Ohio 1993) (debtors need only meet the business judgment standard to be allowed to reject a burdensome contract).

32. An attempt by FERC or the counterparties to the Executory PPAs to preclude the Rejection Motions from being heard on the merits and to instead force the Debtors to seek outright abrogation of the Executory PPAs before FERC, subject to the *Mobile-Sierra* standard, as Plaintiffs' only possible remedy, would irreparably harm the Debtors, and improperly elevate those counterparties to the contracts to special status as preferred creditors. Specifically, subjecting the Debtors' desire to shed the Executory PPAs to a different legislative scheme, not required by the Bankruptcy Code, could result in the Debtors having ongoing obligations under these contracts—which are legally and commercially no different than any other executory contract to which the Debtors are parties, including unsecured debt obligations. Adherence to

state law rights and priorities, along with equality of distribution among creditors is one of the primary goals of the Bankruptcy Code. Accordingly, such an action by FERC would threaten the equality of creditors as well as the integrity of the reorganization process.

33. Rejection therefore allows for ratable treatment of a debtor's unsecured lenders/creditors and its counterparties on executory contracts. *In re Albrechts*, 152 B.R. at 501–02 (noting the business judgment rule is satisfied for rejection purposes where "rejection will result in benefit to the debtor's general unsecured creditors"). Here, ensuring ratable treatment amongst such parties is essential to an equitable outcome. Precluding the Plaintiffs from seeking to reject the Executory PPAs, thereby forcing them to perform the remaining up to 22 years, essentially directs payment to those counterparties in full, and would be incredibly unfair and inequitable to the Debtors' other stakeholders.

34. It is the Court's job to harmonize federal statutes to give effect to each if that can be done without damage to the statutes' sense and purpose. The authority to reject an executory contract is vital to the basic purpose of a chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization. With that tenet in mind, the only logical reading of these two statutes in harmony results in no jurisdictional conflict—FERC has jurisdiction over the modification and abrogation of a filed-rate contract, relief not being sought by Plaintiffs, and the bankruptcy court has jurisdiction over rejection, the relief Plaintiffs are seeking, an action that accepts the contracted-for rates as a given. Any other reading would do damage to the very purpose of a chapter 11 reorganization.

35. The Plaintiffs have filed this adversary proceeding to ensure that FERC does not take any action that would negate this Court's authority to grant the Rejection Motion and the OVEC ICPA Rejection Motion under Bankruptcy Code section 365 or otherwise improperly

impede the Debtors' ability to reorganize and make distributions to its stakeholders in accordance with the Bankruptcy Code.

c. The Need for Declaratory and Injunctive Relief

36. In a handful of cases from 2003 - 2006, FERC and/or parties to executory power purchase agreements with a debtor argued that FERC has the authority to foreclose the bankruptcy court's exercise of its rejection powers. In its most recent public pronouncement on the issue, and consistent with Plaintiffs' position herein, in 2006, FERC acknowledged that it could not take action under the Federal Power Act that impacts a debtor's ability to reject an executory contract. Plaintiffs do not, however, know what FERC's current position is. Nevertheless, Plaintiffs have, by this proceeding, sought a declaratory judgment and essential injunctive relief in case FERC decides to take a different position than it most recently took in 2006.

A. *In re NRG Energy, Inc.*

37. In the first case on this issue, *In re NRG Energy Inc.*, FERC issued an *ex parte* order only two days after NRG filed for bankruptcy. In its order, FERC directed NRG to perform under a burdensome power sales contract unless and until the agency had the chance to determine whether a breach of the contract would serve the "public interest" under the Federal Power Act. *See In re NRG Energy, Inc.*, 2003 WL 21507685, at *2. In *NRG Energy*, the debtor had filed a motion to reject the contract in question on the first day of the bankruptcy case. The debtor, however, failed to seek a TRO protecting the bankruptcy court's jurisdiction and FERC issued its *ex parte* order before the bankruptcy court had an opportunity to rule on the rejection motion.

38. The bankruptcy court later held that the debtor should have been able to reject the contract, but because FERC had already issued an order directed to NRG, the court had no authority to relieve the debtor from its obligation to perform, because only a Court of Appeals could review a FERC order. *See id.* at *4.

39. Thus, in *NRG*, FERC successfully, adversely and unnecessarily impaired the estate's rights under Bankruptcy Code section 365. That is the result Plaintiffs are seeking to prevent today, with this adversary complaint and accompanying motion for a TRO and preliminary injunction.

B. *In re Mirant Corp.*

40. The following year, in *In re Mirant Corp.*, in advance of its bankruptcy, the debtor recognized the threat posed by potential FERC action and moved for an injunction concurrently with the filing of the petition (as Plaintiffs have done here) to prevent FERC from ever asserting jurisdiction over the property of the estate. FERC fought that motion, arguing that, as in *NRG Energy*, it had the authority to prevent the rejection of energy contracts. The bankruptcy court, however, granted both the TRO and the preliminary injunction, recognizing that the case was distinct from *NRG* because in the latter case, "the Commission order was already in effect," and therefore, "the horse was already out of the barn." *In re Mirant Corp.*, 299 B.R. 152, 168 (N.D. Tex. 2003). By contrast, in *Mirant*, FERC had not yet acted, and therefore, an injunction was "needed to protect the reorganization process because any regulatory action FERC took with regard to a particular contract would divest the court of its jurisdiction over the contract." *See In re Mirant Corp.*, 378 F.3d at 516.

41. On appeal, the Fifth Circuit upheld the injunction of FERC and allowed rejection. The Court of Appeals in *Mirant* held:

a. "The [Federal Power Act] does not preempt a district court's jurisdiction to authorize the rejection of an executory contract subject to FERC regulation as part of a bankruptcy proceeding"—precisely the declaration the Plaintiffs seek here. *Id.* at 522.

b. The bankruptcy court's decision to permit the debtor to reject an existing energy contract did not implicate FERC's exclusive determination that the contract rate was reasonable at the time of formation.

c. Although Congress exempted several specific types of contracts from section 365, it "did not intend to limit the ability of utility companies to reject an executory power contract . . . [because] the Bankruptcy Code does not . . . include an exception prohibiting rejection of, or providing other special treatment for, wholesale electric contracts subject to FERC jurisdiction." *Id.* at 521.

d. The bankruptcy court's concern that "FERC could negate Mirant's rejection of an executory power contract by ordering Mirant to continue performing under the terms of the rejected contract [] is certainly a legitimate basis for injunctive relief." *Id.* at 523.

C. *In re Calpine Corp.*

42. Following *Mirant*, the debtor in *In re Calpine Corp.* also moved to reject various burdensome power purchase agreements at the outset of the bankruptcy case and, at the same time, sought a TRO to prevent FERC from exercising jurisdiction over the contracts the debtor sought to reject. *In re Calpine Corp.*, 337 B.R. 27, 30 (S.D.N.Y. 2006). The bankruptcy court granted Calpine's request for a TRO against FERC, but prior to the hearing on the rejection of the contracts, the reference was withdrawn and the case transferred to the district court. *Id.* at 31. During the pendency of the TRO, FERC issued an "Order Providing Interim Guidance" which embraced the differing roles and the jurisdictional divide of FERC and the bankruptcy court, as determined by the Fifth Circuit in *Mirant*. 2006 FERC Order. The 2006 FERC order acknowledges that, "the Commission is precluded from taking action under the [Federal Power

Act] that impacts a debtor's ability to reject a [FERC-jurisdictional contract] . . . ." *Id.* at ¶ 61,005.[10] Again, this is the exact declaration Plaintiffs seek here.

43. However, despite the Fifth Circuit's ruling in *Mirant* and the acknowledgment of FERC itself, the district court in *Calpine* took a narrow and erroneous view of the bankruptcy court's jurisdiction, and an expansive and erroneous view of FERC's jurisdiction, finding that FERC had plenary jurisdiction over the energy contracts, to the exclusion of the Bankruptcy Code. *Calpine*, 337 B.R. at 33. The debtors' contract counterparties in *Calpine* then returned to FERC and asked that the Commission vacate the Interim Guidance Order or, in the alternative, order rehearing and further clarification of said order. The Commission refused to do so, denying those requests as moot because the contract counterparties had withdrawn their FERC complaint. Thus, FERC's Interim Guidance Order embracing the *Mirant* view of the bankruptcy court's jurisdiction over FERC regulated contracts remains in effect and is the last official statement FERC has made on the legal issue presented by this Complaint.

44. Calpine and the official committee of unsecured creditors in those chapter 11 cases appealed the district court's ruling, but the rejection matters were settled before the United States Court of Appeals for the Second Circuit could rule. The Plaintiffs contend that *Calpine* was wrongly decided and would have been reversed on appeal. *Mirant* remains the only Court of Appeals ruling on the subject.[11]

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[10] The 2006 FERC Order qualifies as an admission and should be binding on FERC.

[11] *Mirant* was clearly rightly decided insofar as it held that the debtor's rejection motion could proceed and that FERC was properly enjoined from interfering with such proceedings. Plaintiffs do not, however, necessarily agree with or adopt the entirety of the Fifth Circuit's rationale or related rulings, including the Fifth Circuit's suggestion that a heightened standard of review should apply to a debtor's rejection of a contract otherwise subject to FERC regulation. However, the standard of review to be applied when considering rejection of a FERC-regulated contract is distinct from the question that is relevant here, *i.e.*, whether the district court has

D. *Boston Generating*

45. The most recent litigation to touch on this issue arose in the bankruptcy of Boston Generating, LLC, where the debtor sought to reject a contract for the transportation of natural gas. *See In re Boston Generating, LLC*, No. 10 Civ. 6528, 2010 WL 4288171 (S.D.N.Y. Nov. 1, 2010) (withdrawing reference); *In re Boston Generating, LLC*, 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010). The rates charged for interstate gas transportation fall within FERC's jurisdiction under the Natural Gas Act. 15 U.S.C. § 717 *et seq*.

46. However, in *Boston Generating*, the court was not required to and did not adjudicate the ultimate question of bankruptcy court jurisdiction versus FERC jurisdiction because the debtor and counterparty to the gas transportation contract *agreed* to present the rejection issue to the bankruptcy court and the public interest/filed rate question to FERC. *See In re Boston Generating, LLC*, 2010 WL 4616243 at *2-3. Nor was FERC even a party to the case.

E. Other Events

47. Plaintiffs are unaware of any other FERC order or court decision considering the interplay of the Bankruptcy Code and the Federal Power Act addressed by this action. In a related vein, however, FERC has recently confirmed its continued support for market-based outcomes in the field of wholesale power generation and sales, along with the gains and losses to individual participants that go hand-in-hand with competition. The Debtors' need to invoke the protections of the Bankruptcy Code and to, *inter alia*, reject the Executory PPAs, is part of the very market-based outcomes FERC has just ratified.

48. Specifically, by Order dated January 8, 2018, FERC rejected the Trump Administration's formal proposal for a rulemaking that would have imposed on the market

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jurisdiction to authorize rejection and whether FERC may be enjoined from interfering with that jurisdiction.

substantially higher non-market rates for certain coal and nuclear generating facilities to ensure their continued viability. Order Terminating Rulemaking Proceeding, 162 F.E.R.C. ¶ 61,012 (Jan. 8, 2018). In declining to intervene, FERC strongly endorsed the continued operation of market forces in the wholesale power generation sector, despite the resulting plant closures, terminated contracts, and economic losses associated with such actions. *Id.* at 4-5. The Commissioners specifically stated that it is not FERC's job to interfere with markets, but rather to support them, noting, "for more than two decades now, support for markets and market-based solutions has been a core tenet of Commission policy . . . the Commission has adopted a largely pro-market regulatory model, wherein the Commission relies on competition in approving market rules and procedures that, in turn, determine the prices for the energy, ancillary services, and capacity products." *Id.* at *3.

49. For the same reasons, FERC should not seek to obstruct the normal functioning of the Bankruptcy Code's rejection powers, designed to spread the impact of market consequences and equalize recoveries among the Debtors' lenders and counterparties. Attempting to force Plaintiffs to continue performing under the Executory PPAs would be to impose a non-market outcome on the affected parties.

F. Harm to FES

50. This Court presently has before it Plaintiffs' motions to reject the Executory PPAs that are causing material harm to the Debtors and their estates because of their substantial impact on the Debtors' ability to operate their businesses and preserve the value of those estates for the benefit of all stakeholders and ultimate reorganization value. To survive the bankruptcy process, it is imperative that Plaintiffs have access to the value that will be preserved by the rejection of the Executory PPAs. Thus, the Plaintiffs' ability to reject these contracts is essential to the

success of their reorganization. A FERC order or proceeding challenging the Plaintiffs' rights during bankruptcy with respect to the Executory PPAs would threaten the Plaintiffs with irreparable harm by potentially divesting this Court of jurisdiction to grant such relief and thereby impeding the Debtors' ability to reorganize. Accordingly, to protect this Court's jurisdiction and prevent irreparable harm to their reorganization, the Plaintiffs seek a declaratory judgment and the injunctive relief requested below.

G. March 26, 2018 OVEC Complaint

51. On March 26, 2018, in anticipation of the Debtors' bankruptcy filing, OVEC filed a Complaint, Or In The Alternative, Request For Declaratory Order with FERC ("OVEC Complaint") (copy attached hereto as Exhibit C). In it, OVEC alleged that a bankruptcy filing by FES, coupled with an effort to reject the OVEC ICPA, was likely to occur. OVEC Compl. at 2, 8-9. OVEC alleges that that would be a breach of the OVEC ICPA—a point Plaintiffs agree with—and that OVEC will be harmed on account of not being able to collect in full from FES what it allegedly is entitled to under the OVEC ICPA. *Id.* at 1-2, 13, 22.

52. The OVEC Complaint is a patent effort to usurp this Court's jurisdiction over the OVEC ICPA and the Plaintiffs' Rejection Motions, and to preclude this Court in advance from deciding the question of its own jurisdiction in favor of having FERC decide for it. Nowhere does OVEC dispute that the OVEC ICPA can be rejected by FES pursuant to the normal functioning of section 365, or that rejection would be in the best interests of the estate.

53. Instead, the OVEC Complaint largely asserts the same arguments rejected by the Fifth Circuit in the *Mirant* case (*e.g.*, that contract rejection is akin to termination and an attack on a filed rate), and to the extent the OVEC Complaint makes other arguments, they are factually wrong and/or without legal support. For relief, the OVEC Complaint asks FERC to order

(incorrectly) that FES's "termination" of the OVEC ICPA is precluded by the *Mobile-Sierra* standard, which is applicable to abrogation and not rejection. *Id.* at 4. The OVEC Complaint also asks FERC to declare (incorrectly) that FERC, not the Court, has exclusive jurisdiction over the OVEC ICPA Rejection Motion. *Id.*

54. The OVEC Complaint has no effect on the relief sought herein. On March 28, 2018, FERC formally took notice of the OVEC Complaint and scheduled a comment date of April 16, 2018. Notice of Compl., *Ohio Valley Electric Corp. v. First Energy Sols. Corp.*, No. EL18-135-000 (F.E.R.C. Mar. 28, 2018) (copy attached hereto as Exhibit D). As of today, FERC has issued no order purporting to grant OVEC any relief, no order purporting to foreclose the OVEC ICPA Rejection Motion, and no order asserting exclusive jurisdiction over these issues. Further, even if FERC does issue such an order, such order should not operate to divest this Court from deciding the issues raised in this adversary proceeding, or from enjoining further proceedings pursuant to Bankruptcy Code sections 105 and 362. The subject matter jurisdiction of a bankruptcy judge or Article III judge acting in a bankruptcy case should be decided by a judge, not an agency of the executive branch.

PLAINTIFFS' FIRST CLAIM FOR RELIEF
(Declaratory Judgment Pursuant to 28 U.S.C. § 2201)

55. The Plaintiffs repeat and reallege the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

56. Pursuant to the Declaratory Judgment Act, "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Bankruptcy courts, as units of the district court, have the authority to issue declaratory judgments to settle legal rights and remove uncertainty and

insecurity from legal relationships without awaiting violation of rights or disturbance of relationships.

57. Due to the actual or likely controversy between the Plaintiffs and FERC and/or the counterparties to the Executory PPAs as to this Court's jurisdiction and authority, a declaration of rights is both necessary and appropriate to establish that this Court has jurisdiction over the rejection of the Executory PPAs.

58. A declaratory judgment would settle the controversy, ensure that the Rejection Motion and the OVEC ICPA Rejection Motion would be heard on the merits, and permit the Debtors to pursue their reorganization efforts via a comparatively speedy chapter 11 process, rather than risk waiting years for FERC to issue a final decision and for the Debtors to appeal such a decision if necessary.

PLAINTIFFS' SECOND CLAIM FOR RELIEF
(Section 105 Preliminary and Permanent Injunction)

59. The Plaintiffs repeat and reallege the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

60. This Court has the power under Bankruptcy Code sections 105 and 106 to enjoin FERC from interfering with the Debtors' rights to reject wholesale electricity contracts pursuant to Bankruptcy Code section 365. Section 105(a) empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

61. FERC is not entitled to assert a defense of sovereign immunity as to claims under section 105, 362 or 365 of the Bankruptcy Code. Congress has specifically abrogated sovereign immunity as to those sections. *See* 11 U.S.C. § 106(a)(1).

62. The Plaintiffs are likely to succeed on the merits with respect to this action. As discussed in detail above, there is no conflict or overlap between the Federal Power Act and the Bankruptcy Code. A reading that harmonizes the jurisdictional provisions of both the Bankruptcy Code and Federal Power Act places jurisdiction over rejection of the Executory PPAs squarely before this Court. The only Court of Appeals to ever address this issue held that FERC's exclusive jurisdiction to determine "reasonable" contract rates does not conflict with the Bankruptcy Court's jurisdiction to grant a rejection motion. *Mirant*, 378 F.3d at 521-22. Further, the 2006 FERC Order, which has never been withdrawn, constitutes an admission by FERC that it cannot legally interfere with the Plaintiffs' rights to seek rejection under the Code.

63. The Plaintiffs can also clearly demonstrate the likelihood that any FERC action would threaten the effective reorganization of the Debtors and impair this Court's jurisdiction. *See LTV Steel Co. v. Bd. of Educ. (In re Chateaugay Corp.)*, 93 B.R. 26, 29 (S.D.N.Y. 1988) (bankruptcy court "may enjoin proceedings in other courts when it is satisfied that such a proceeding would defeat or impair its jurisdiction with respect to the case before it"). FERC action would unduly interfere with the instant bankruptcy proceeding and wrest exclusive jurisdiction over the estates from this Court. Were FERC to issue an order attempting to force the Plaintiffs to continue to perform under the Executory PPAs subject only to their being abrogated under the Federal Power Act, as in *NRG Energy*, that order could seriously jeopardize the Debtors' ability to reorganize.

64. If the Plaintiffs could not exercise their rejection rights in this Court, then they would risk being required to perform under these money-losing contracts for months, if not years, as the Plaintiffs' only avenue for relief would be an appeal in the U.S. Court of Appeals for the D.C. Circuit. During that time, the estate's assets would be drained of $58 million per year

(amounts that may be entitled to administrative expense priority status) while the Debtors continue to operate under bankruptcy protection. Moreover, the uncertainty as to the Plaintiffs' obligation to perform the Executory PPAs would frustrate not only formulation but even negotiation of a plan of reorganization. If the Plaintiffs were forced to await final agency action and then challenge FERC in the D.C. Circuit, the reorganization process would undoubtedly be delayed by years because the Executory PPAs have an enormous impact on the reorganization value of the estates.

65. FERC would not be harmed in any respect by the issuance of an injunction. As discussed, *supra*, FERC's jurisdiction under the Federal Power Act is not impeded by the jurisdiction of the Bankruptcy Court over the rejection of the contracts because the Bankruptcy Court is not being asked to disregard or abrogate any of the Executory PPAs or determine a "just and reasonable" rate. Further, the counterparties to the contracts at issue will not be harmed by the issuance of the injunction because they will have their day in court on the Rejection Motion and the OVEC ICPA Rejection Motion and can oppose it on all lawful grounds. A general function of a TRO and preliminary injunction is to maintain the status quo pending a determination of an action on the merits. Accordingly, the Plaintiffs seek only a narrowly tailored order which protects this Court's power to authorize rejection but does not otherwise interfere with FERC's regulatory responsibilities under the Federal Power Act. If granted, the injunction here would merely maintain the status quo; it would not affect the merits of the Rejection Motion and the OVEC ICPA Rejection Motion.

66. The public interest is served by allowing bankruptcy courts to retain control over the administration of the bankruptcy estates. Further, an effective reorganization for the Debtors is in the public interest.

67. The Debtors cannot go forward with the reorganization process in an efficient and fair manner if FERC takes the Executory PPAs at issue outside the jurisdiction of this Court. To allow FERC to wrest from this Court its jurisdiction over the estate, and to deny the Debtors' rights under the Bankruptcy Code, would cause lasting and irreparable harm. Given the real and costly risk of FERC action, this Court should issue an injunction pursuant to Bankruptcy Code section 105.

PLAINTIFFS' THIRD CLAIM FOR RELIEF
(Automatic Stay Preliminary and Permanent Injunction)

68. The Plaintiffs repeat and reallege the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

69. The automatic stay prohibits "all entities" from taking any "act" to "exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

70. Under the Bankruptcy Code, executory contracts automatically become part of the bankruptcy estate once the bankruptcy is filed. There is no question that any effort by FERC to force the Plaintiffs to perform under the Executory PPAs, or to convene or continue a hearing to address the Plaintiffs' rights and obligations respecting such contracts, would clearly constitute an exercise of "control" over this property of the bankruptcy estates.

71. The Executory PPAs are private commercial arrangements that involve the supply of small amounts of wholesale power capacity, and RECs. The rejection or breach of these Executory PPAs does not implicate the police or regulatory powers contemplated by the exception to the automatic stay. Rather, rejection or breach here concerns the economic interests of private parties.

WHEREFORE, the Plaintiffs respectfully request relief as follows:

A. Declaring that (a) this Court has exclusive jurisdiction to adjudicate Plaintiffs' Rejection Motion and OVEC ICPA Rejection Motion, and (b) any action by FERC to initiate or continue, or encourage any person or entity to initiate or continue, any proceeding before FERC, or issue any order, attempting to require or coerce the Plaintiffs to continue performing under the executory contracts identified in Exhibit B or limit Plaintiffs to seeking abrogation of such contracts under the Federal Power Act shall constitute a violation of 28 U.S.C. § 1334(b), (e) and 11 U.S.C. §§ 105(a), 362(a), and 365.

B. Preliminarily and permanently enjoining FERC from initiating or continuing, or encouraging any person or entity to initiate or continue, any proceeding before FERC, or from issuing any order, to require or coerce the Plaintiffs to continue performing under the executory contracts identified in Exhibit B or limiting Plaintiffs to seeking abrogation of such contract under the Federal Power Act.

C. Preliminarily and permanently enjoining FERC from entering any order that would require or coerce the Plaintiffs to continue performing under the executory contracts identified in Exhibit B in a manner that would interfere with this Court's exclusive jurisdiction to hear and determine any motion pursuant to 11 U.S.C. § 365.

DATED: April 1, 2018

Respectfully submitted,

/s/ *Marc B. Merklin*

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