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HOW TO KEEP THE LIGHTS ON: AN EXPLORATION OF THE ABROGATION OF WHOLESALE ENERGY CONTRACTS

BRIAN BASSETT*

I. INTRODUCTION

We use it constantly, every day of the year. When we work, travel, even when we sleep, we rely on it for our livelihood and well-being. Yet we seem only to appreciate its invisible presence when it disappears from our lives. “We learn most about power when we lose it and are left eating cereal by candlelight on the front stoop. Or helping the waiter and the hairdresser and the deaf man direct traffic at the intersection.”¹ Rarely do we question where this integral part of our lives comes from, or how it is even created.

However, as a result of the energy crises in recent years,² the recent bankruptcies of giant energy corporations,³ and the massive blackout on August 14, 2003, people have begun to ask questions concerning the reliability of power supply and how it might adversely affect them one day.⁴ Specifically, they are looking at

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1. Nancy Gibbs, *Lights Out*, TIME, Aug. 25, 2003, at 31. On August 14, 2003, the northeastern United States, along with portions of Canada, experienced the largest blackout in North American history. *Id.* at 31-32.

2. See Steven Ferrey, *2002 Energy Law Symposium: The Eagles of Deregulation: The Role of the Courts in a Restructured Environment*, 32 ENVTL. L. 297, 302 (2002) (concluding that California's rolling blackouts of 2001 pejoratively affected the social and political atmosphere of the time). See also Alan Ramo, *California's Energy Crisis-The Perils of Crisis Management and a Challenge to Environmental Justice*, 7 ALB. L. ENVTL. OUTLOOK 1, 2 (2002) (suggesting that deregulation in California eventually resulted in blackouts and an increase in electric bills).

3. See Jennifer Key, *Developments in Regulatory Preemption in Bankruptcy Proceedings*, INFRASTRUCTURE, Summer 2003, at 7 (suggesting that the recent bankruptcies of giant energy corporations are bringing electric industry bankruptcy issues to the forefront of the energy sector).

4. Gibbs, *supra* note 1, at 37. The blackout of August 14, 2003 “affected

governmental authorities for assurance that their lights will be kept on.⁵

One of the main reasons that reliability is being questioned is the financial peril that many energy corporations find themselves in today.⁶ This Comment will explore two such companies and the legal conflicts that arise as a result of questions of financial survival, energy reliability, and legal predictability.

Part I of this Comment will discuss the emerging conflict between energy suppliers and energy distributors by looking at two contemporary examples of the issue. It will also review the decisions made by the courts and regulatory agencies, along with the legal authorities used to reach those decisions. Part II will explore the resulting inconsistencies that specific cases have brought to the forefront of the energy and legal communities by highlighting the fundamental discrepancy between federal bankruptcy law as governed by the Bankruptcy Code⁷ and federal energy regulatory laws laid out in the Federal Power Act.⁸ Part III will propose that the Federal Energy Regulatory Commission ("FERC")⁹ obtain exclusive control in order to preclude any conflicts surrounding the abrogation of executory electric supply contracts.

II. BACKGROUND

A. *The NRG Issue*

On October 29, 1999, NRG Energy, Inc. ("NRG")¹⁰ entered into a power sales agreement to provide energy to Connecticut Light & Power ("CL&P") at a fixed price for four years.¹¹ Despite a

eight states and 50 million people and could cost up to \$5 billion." *Id.*

5. See generally *id.* (observing that numerous commercial sectors and residential neighborhoods were frustrated with the fourth large-scale failure of a power grid in the last decade).

6. Key, *supra* note 3, at 7.

7. 11 U.S.C. § 365 (2000).

8. 16 U.S.C. §§ 824, 824d.

9. FERC is a federal agency with powers delegated by Congress to regulate the transmission of electricity as well as natural gas and oil through interstate commerce. FERC, *About FERC: What FERC Does*, at <http://www.ferc.gov/about/ferc-does.asp> (last visited Mar. 14, 2004). FERC is not empowered with the ability to regulate retail electricity sales to consumers, nor is it responsible for the construction of electric facilities. *Id.*

10. NRG is the owner and operator of various power generating facilities, including "competitive energy production and cogeneration facilities, thermal energy production and energy resource recovery facilities." *NRG Energy, Inc. Files Voluntary Chapter 11 Petition to Implement Negotiated Restructuring Plan*, at http://biz.yahoo.com/bw/030514/145613_1.html (May 14, 2003) [hereinafter *NRG Files Voluntary Chapter 11*].

11. *NRG Energy, Inc. v. Blumenthal*, No. 03 Civ. 3754, 2003 WL 21507685, at *1 (S.D.N.Y. June 30, 2003). The contract required NRG to supply CL&P

subsequent dispute over who would pay for certain congestion charges, NRG provided energy service to CL&P on a consistent basis until May 14, 2003, when it notified CL&P that it intended to terminate the agreement based on CL&P's default.¹² Later that day, NRG filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code.¹³

The original contract between NRG and CL&P represented a disaster for NRG since it forced the energy company to sustain losses of an estimated \$500,000 per day.¹⁴ The company filed for Chapter 11 bankruptcy protection in an attempt to mitigate the already substantial financial damages it incurred as a result of its contract with CL&P and a number of other energy supply contracts.¹⁵ Filing for Chapter 11 was a practical solution as it "often serves as an intermediate step offering a struggling company the opportunity to become a viable entity or to be

with a fixed amount of energy from January 1, 2000 until December 31, 2003. *Id.* The energy supplied by NRG is used by CL&P to serve forty five percent of its customers. *Connecticut Groups Ask FERC to Require NRG to Uphold CL&P Contract*, at http://biz.yahoo.com/djus/030721/1852001294_1.html (July 21, 2003).

12. *NRG Energy, Inc.*, 2003 WL 21507685, at *1. The issue arising in the case does not concern how, or even if, CL&P breached the contract in any manner; this was only the initial explanation given by NRG in its attempt to effectively terminate its duties under the original contract. *Id.*

13. *NRG Files Voluntary Chapter 11*, *supra* note 10. Chapter 11 filings, used primarily by business debtors, function to allow a corporation to reorganize its business affairs. 7-1100 COLLIER ON BANKRUPTCY ¶1100.01 (15th ed. 2004). "Chapter 11 embodies a policy that it is generally preferable to enable a debtor to continue to operate and to reorganize its business rather than simply to liquidate a troubled business." *Id.* Upon initiation of a Chapter 11 claim, the debtor is protected by a stay of any third-party action to collect any debt or property from the debtor. *Id.* The debtor is also provided with the capacity "to use, sell, or lease property of the estate, even if the property is subject to the interest of another entity." *Id.*

14. *Judge Won't Stay FERC's Order Against NRG*, at http://biz.yahoo.com/rf/030630/energy_nrg_2.html (June 30, 2003). It is worth noting that the energy contract with CL&P was not the sole reason for NRG's substantial financial problems. Instead, the debt accumulated over a five-year period as a result of failed business ventures and acquisitions. *NRG Files Voluntary Chapter 11*, *supra* note 10.

15. *See NRG Files Voluntary Chapter 11*, *supra* note 10 (suggesting that the company's objective under Chapter 11 protection is to satisfy its debt with creditors and restructure the company with a limited impact on its business operations). Chapter 11 has been perceived as an essential tool to financially desolate corporations because they would not have the capability of surviving liquidation bankruptcy. BRIAN A. BLUM, BANKRUPTCY AND DEBTOR/CREDITOR, EXAMPLES AND EXPLANATIONS 463 (1993). Chapter 11 cases require the debtor to "file a schedule of assets and liabilities, a statement of financial affairs, and a statement of executory contracts . . ." *Id.* Corporate debtors are then required to compile a list of the twenty largest unsecured creditors so that the United States Trustee can assemble a creditors' committee. *Id.*

acquired by a stronger participant.”¹⁶

Along with its Chapter 11 filing, NRG requested that the United States Bankruptcy Court for the Southern District of New York grant it the right to abrogate the energy supply contract with CL&P before the established termination date.¹⁷ NRG claimed that the Bankruptcy Code explicitly gave it the authority to take this action.¹⁸

In a separate proceeding, the Connecticut Attorney General successfully requested that FERC delay NRG's termination of the contract in order to maintain the power supply in the area.¹⁹ Realizing the possible adverse effects of NRG's action, CL&P intervened in order to protect its own interests in the action.²⁰

Following hearings, and without taking any action regarding FERC's declaration, the bankruptcy court found that the character for the contract satisfied the standards for rejection and

16. John F. Lomax, Jr., *Future Electric Utility Bankruptcies: Are They on the Horizon and What Can We Learn from Public Service Co. of New Hampshire's Experience?*, 12 BANKR. DEV. J. 535, 535 (1996). This Comment suggests that the overall pursuit of competition (as was the case with deregulation in the energy industry) often results in fewer industry participants as a result of mergers or acquisitions. Filing for Chapter 11 protection, as NRG did here, will allow a company to stay financially afloat until they unilaterally recover or are saved by another market participant. *Id.*

17. *NRG Energy, Inc.*, 2003 WL 21507685, at *1. Among other things, NRG requested that the United States District Court for the Southern District of New York enjoin the Connecticut attorney general from requesting FERC to take any action regarding the contract and it also requested that the court stay any declaration requiring NRG to comply with a FERC order. *Id.*

18. *Id.* See 11 U.S.C. § 365(a) (providing that “the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor”).

19. *NRG Energy, Inc.*, 2003 WL 21507685, at *1. FERC did not effectively eliminate NRG's ability to terminate the energy supply contract; instead, it only delayed such a final decision until it had sufficient time to evaluate the merit and subsequent consequences of the proposed abrogation. *Blumenthal v. NRG Power Mktg., Inc.*, No. EL03-123-000, 2003 WL 21130626 (F.E.R.C. May 16, 2003) (order requiring compliance with contract).

20. *NRG Energy, Inc.*, 2003 WL 21507685, at *2. In its motion to intervene, CL&P predicted NRG's forthcoming argument suggesting that FERC lacked jurisdiction to hear the case at hand. Motion to Intervene and Comments of the Connecticut Light and Power Company in Support of FERC's Jurisdiction over Filed Rate Schedule at 1, *Blumenthal v. NRG Power Marketing, Inc.*, 2003 WL 21130626 (F.E.R.C. May 16, 2003) (No. EL03-123-000). CL&P then went on to assert that the contract at issue was a rate schedule, putting it within the purview of FERC. *Id.* at 2. CL&P claimed that NRG's actions amounted to nothing more than a dissatisfied party who was attempting to be “relieved of its improvident bargain.” *Id.* at 4 (citing *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956) (holding that a contract rate is not unreasonable and the Commission should not alter the contractual terms in any way simply because the contract “yields less than a fair return on the net invested capital”)).

subsequently approved the rejection of the contract.²¹ CL&P appealed the decision of the bankruptcy court claiming that the court does not have jurisdiction over contracts that deal with the wholesale of energy.²² Instead, CL&P claimed that it was solely within FERC's jurisdiction to make such a declaration.²³ The conflict came before the United States District Court for the Southern District of New York, which addressed the issue regarding "the interrelationship of bankruptcy and federal energy regulatory laws and whether the proper authority to address the issues raised here is a federal district court or FERC—with a subsequent appeal of a FERC order lying with a court of appeals."²⁴

The court sided with CL&P, holding that this area of law is subject to the exclusive jurisdiction of FERC as directed by the Federal Power Act.²⁵ Consequently, it prohibited NRG from

21. *NRG Energy, Inc.*, 2003 WL 21507685, at *2. The court found that the essence of the contract satisfied the "business judgment standard for rejection of an executory contract under 11 U.S.C. § 365." *Id.* See *In re Tilco, Inc.* 558 F.2d 1369, 1372 (10th Cir. 1977) (holding that the decision of whether an executory contract is to be rejected or upheld is one of "business judgment" for the court). See also *King v. Baer*, 482 F.2d 552, 557 (10th Cir. 1973) (holding that "[t]he law is clear that before an executory contract should be rejected, a judicial hearing and inquiry, at which interested parties might be heard, should be held, and that an executory contract could be rejected only with the permission of the court"). A bankruptcy court implements this standard by looking at the executory contract itself along with any surrounding circumstances, and then it uses its best business judgment to see if the termination would be beneficial or harmful for the estate if the parties were forced to continue with the contract. *Orion Pictures Corp. v. Showtime Networks*, 4 F.3d 1095, 1099 (2d Cir. 1993). It is the bankruptcy court's duty to accept a debtor's decision to reject an executory contract pursuant to the business judgment rule, unless it is determined that the debtor's decision is unreasonable and based on "bad faith, or whim or caprice." *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985). In general, the effect of the termination on the counterparty is not a material issue in deciding whether the rejection is proper. *In re T.W.A. Airlines, Inc.*, 261 B.R. 103, 123 (Bankr. D. Del. 2001).

22. The sale of energy at wholesale explicitly means the "sale of electric energy to any person for resale." 16 U.S.C. § 824(d).

23. *NRG Energy, Inc.*, 2003 WL 21507685, at *2 n.2. Specifically, the appeal stated that the authority to modify such energy contracts lies within FERC's exclusive jurisdiction as indicated by the Federal Power Act. Motion to Intervene and Comments of the Connecticut Light and Power Company in Support of FERC's Jurisdiction over Filed Rate Schedule at 1-2 *Blumenthal v. NRG Power Mktg., Inc.*, 2003 WL 21130626 (F.E.R.C. May 16, 2003) (No. EL03-123-000).

24. *NRG Energy, Inc.*, 2003 WL 21507685, at *2.

25. *Id.* at *4. The court held that "the business of . . . selling electric energy for ultimate distribution is affected with a public interest . . . and that Federal regulation of . . . the sale of such energy at wholesale in interstate commerce is necessary in the public interest . . ." *Id.* at *3 (citing 16 U.S.C. § 824(a)). Therefore, the Federal Power Act grants jurisdiction over the sale of wholesale

terminating its service agreement as originally allowed by the bankruptcy court.²⁶ NRG subsequently requested and received a rehearing concerning FERC's order to continue supplying energy pursuant to the contract.²⁷ Before that issue could be officially adjudicated in court, the parties entered into a settlement agreement that provided for the continuance of service with some alterations in the contractual terms, leaving the jurisdictional quandary unresolved.²⁸

B. The Mirant Issue

Similar to NRG, Mirant Corporation ("Mirant"), headquartered in Atlanta, Georgia, is a producer and seller of

energy in interstate commerce to FERC. *Nanthala Power & Light v. Thornburg*, 476 U.S. 953, 966 (1986). In the present case, the court held, the contract between NRG and CL&P was designated as a wholesale power contract and was therefore subject to FERC's jurisdiction. *NRG Energy, Inc.*, 2003 WL 21507685, at *3. The court unequivocally rejected NRG's contention that the contract represented a simple bankruptcy issue that involved a financial agreement between two parties. *Id.* The court held that the regulatory paradigm of such cases removes it from the general bankruptcy sphere and into the realm of FERC's established authority. *Id.*

26. *Id.* at *4. The court held that FERC does not have to justify its decisions to the bankruptcy court because it obtained sole jurisdiction in the case. *Id.* at *3. If any party was offended by a FERC order, then the proper procedure would involve filing for a review of that order in the United States Court of Appeals for the circuit in which the debtor found himself. *Id.* at *4.

27. Request for Rehearing and Clarification of *NRG Power Marketing Inc. at 1, Blumenthal v. NRG Power Mktg., Inc.*, 2003 WL 21480251 (F.E.R.C. June 25, 2003) (Nos. EL03-123-001, EL03-134-000, EL03-129-000, EL03-135-000 (not consolidated)). NRG's request plainly accuses FERC of incorrectly requiring NRG to continue to supply power pursuant to the original contract despite the bankruptcy court's ruling to the contrary. *Id.* NRG then asked FERC to do one of three things: (1) completely terminate the proceedings before it, thereby granting the bankruptcy court jurisdiction over the case; (2) find that NRG has satisfied the "Mobile-Sierra public interest test" and should therefore be free from the original agreement; or (3) find that, according to the facts at issue, NRG had a right to terminate the contract with CL&P. *Id.* at 2. FERC has the authority, under the Mobile-Sierra doctrine, to alter the rates set out by a contractual provision only if it is required by the public interest. *Exxon Corp. v. FERC*, 206 F.3d 47, 49 (D.C. Cir. 2000). The purpose of the Mobile-Sierra doctrine is "to strike a balance between private contractual rights and the regulatory power to modify contracts when necessary to protect the public interest." *Northeast Utils. Serv. Co. v. FERC*, 55 F.3d 686, 689 (1st Cir. 1995). Circumstances which may implicate the protections of the Mobile-Sierra standard involve those cases where "the rate might impair the financial ability of the utility to continue to supply electricity, force electricity consumers to bear an excessive burden, or be unduly discriminatory." *Id.* at 690.

28. *NRG to Continue Supplying Connecticut Light and Power*, THE HARTFORD COURANT, Nov. 7, 2003, at E2. The settlement between the parties required an alteration in the contract rate price, but it did not force the customers to pay a higher rate. *Id.*

electricity in the energy industry.²⁹ In 2000, Mirant purchased four energy-producing power plants from Potomac Electric Power Company ("Pepco").³⁰ The agreement required Mirant to provide Pepco with all the electricity it needed to service its customers.³¹ Mirant was also contractually bound to provide energy to a number of other energy corporations.³²

Mirant, much like NRG, incurred a number of financial problems as a result of its contractual obligations.³³ As of July 10, 2003, the company had \$8.9 billion in debt, but hoped to refinance without having to file bankruptcy.³⁴ However, Mirant quickly realized its dire business status and, following in the steps of NRG, filed for Chapter 11 protection on July 14, 2003.³⁵

29. *We've Got the Power*, at <http://www.mirant.com/> (Sept. 26, 2003). Mirant is involved in the energy industry in North America, the Caribbean, and the Philippines. *Id.* The corporation possesses over 21,000 megawatts of electric generating capacity on a global level. *Id.*

30. Kristen McNamara, *Mirant Could Further Test Co.'s Ability to Shed Contracts*, at http://biz.yahoo.com/djus/030716/2037001711_1.html (July 16, 2003). The details of the power supply agreement have not been disclosed, but records show that Pepco has committed about \$615 million per year to Mirant. *Id.* Merrill Lynch found that Pepco pays approximately thirty-four dollars per megawatt-hour to Mirant, which is much less than the amount Mirant would be able to collect on the wholesale market. *Id.*

31. *Id.* Mirant entered into two separate fixed price service contracts with Pepco, one for service to Maryland and the other to Washington. *Id.* The contract for service to Maryland runs until June 2004 and the service to the Washington area terminates in January of 2005. *Id.* Mirant also entered into a contract to pay Pepco for electricity provided to Pepco pursuant to power contract with numerous third parties. *Pepco Responds to Mirant's Move to Cancel Pepco Agreements and Block FERC Review*, at http://www.pepcoholdings.com/news/news_release_26.html (Aug. 29, 2003) [hereinafter *Pepco Responds to Mirant's Move*].

32. See *Objection of Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, and NSTAR Gas Company to Debtors' Motion for an Order Pursuant to Section 365 and 554 of the Bankruptcy Code Authorizing and Approving a Procedure for the Rejection of Certain Executory Contracts at 4, In re Mirant Corp.*, 43 Bankr. Ct. Dec. 119 (Bankr. N.D. Tex. 2003) (No. 03-46590-DML-11) (indicating that there are a number of other energy corporations that have encountered Mirant's attempt to abrogate an existing energy service contract, such as Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, and NSTAR Gas Company).

33. *Analyst Says Mirant Likely to File for Bankruptcy*, at http://biz.yahoo.com/rc/030710/utilities_mirant_1.html (July 10, 2003).

34. *Id.* While Mirant aspired to restructure its debt out of court, it also realized that there was a good possibility that it would have to file for Chapter 11 protection as indicated by its request to bondholders and bank lenders to approve a prepackaged bankruptcy plan. *Id.*

35. Press Release, Mirant Corporation, *Mirant Files Chapter 11 Petitions to Facilitate Financial Restructuring* (July 14, 2003), available at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=MIR&script=416&layout=0&item_id=431070. When Mirant filed for bankruptcy on July 14, 2003, they held \$20.6 billion in assets countered with \$11.4 billion in debt,

Understanding its need to minimize its mounting debt, Mirant immediately explored the option of rejecting some of its executory contracts.³⁶ The company paid close attention to NRG's emerging court battle, as its own situation appeared to parallel that of NRG.³⁷ Mirant eventually decided to take action on August 28, 2003, by filing a motion requesting that the energy company be allowed to reject its duties delineated by its contract with Pepco.³⁸ Mirant also moved to abrogate a number of executory contracts with other energy supply companies.³⁹

amounting to the 10th largest bankruptcy by assets in United States history. *Mirant Files 10th Largest Bankruptcy*, at http://money.excite.com/ht.nw/bus/20030715/hle_bus-n15228270.html (July 15, 2003). The primary causes of Mirant's exorbitant financial problems were "[f]alling power prices and overly ambitious expansion plan . . ." McNamara, *supra* note 30. As impressive as it may seem, Mirant's bankruptcy filing paled in comparison to Enron's massive Chapter 11 filing of \$63 billion. Ken Silverstein, *Mirant Collapses*, at <http://www.gasandoil.com/goc/company/cnn33489.htm> (July 17, 2003).

36. Silverstein, *supra* note 35. Experts immediately predicted that Mirant would encounter the same problems that NRG did if it tried to abrogate any of its current contracts. *Id.*

37. See *NRG Power Contract Seen Affecting Other Bankruptcy Firms*, at http://biz.yahoo.com/rc/030721/utilities_nrg_1.html (July 21, 2003) (suggesting that if NRG is permitted to abrogate its contract with CL&P, a number of other bankrupt energy corporations would most likely follow suit).

38. *Pepco Responds to Mirant's Move*, *supra* note 31. Mirant filed in the United States Bankruptcy Court for the Northern District of Texas requesting only to abrogate the contract that required them to reimburse Pepco; it did not attempt to reject the contracts that required Mirant to provide power at a fixed price to Pepco. *Id.* Mirant requested that the court allow it to reject the contract on five business day's written notice to Pepco. Objection of Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company, and NSTAR Gas Company to Debtors' Motion for an Order Pursuant to Section 365 and 554 of the Bankruptcy Code Authorizing and Approving a Procedure for the Rejection of Certain Executory Contracts at 4, *In re Mirant Corp.*, 43 Bankr. Ct. Dec. 119 (Bankr. N.D. Tex. 2003) (No. 03-46590). If Mirant was granted the right to abrogate the contract, Pepco would then be forced to purchase energy from the market, which would effectively eliminate its chances of purchasing power at a price where it would be able to make a profit upon sale to its customers. *Mirant Could Further Test Co.'s Ability to Shed Contracts*, at http://biz.yahoo.com/djus/030716/2037001711_1.html (July 16, 2003) [hereinafter *Mirant Tests Ability to Shed Contracts*].

39. *Mirant Tests Ability to Shed Contracts*, *supra* note 38. Countering Mirant's motion, the energy supply companies involved claimed that permitting Mirant to take such action would not only be unreasonably harmful towards their interests, but it also would have the potential to leave certain utility customers with a limited ability to obtain energy without high energy replacement costs. *Id.* These companies also argued that the executory contracts at issue were subject to FERC's exclusive jurisdiction as indicated by the Federal Power Act. *Id.* To provide direct support to their proposition, the energy supply companies cited the decision in the NRG case which held that whether or not to allow the rejection of such executory contracts was only to be left to FERC. *Id.*

In a significant move, the Bankruptcy Court for the Northern District of Texas issued a temporary restraining order that prohibited Pepco from initiating any claim before FERC regarding the contract termination.⁴⁰ The order also temporarily enjoined FERC from taking any action that would require Mirant to continue to abide by the terms of its original contract with Pepco.⁴¹ Pepco and FERC responded by requesting that the district court remove jurisdiction to hear the case.⁴² While the case was pending, Mirant and Pepco entered into a settlement agreement that effectively eliminated the portion of the contracts that required Mirant to supply Pepco with energy at below-market prices.⁴³ The settlement alleviated some of the financial pressure on Mirant by boosting energy prices while maintaining reliable electricity service to retail customers at the same price they were paying prior to the settlement.⁴⁴

The dispute concerning the portion of the agreement that required Mirant to assume Pepco's purchase contracts with other energy corporations continued on its path to the district court.⁴⁵ In its opinion resolving the issue, the court cited numerous cases and statutes that supported FERC's jurisdictional claim, including the district court's opinion in *In re NRG Energy, Inc.*⁴⁶ The Texas district court held that the statutory provisions of the FPA make any filed rate change subject to FERC's approval, and that an appropriate appeal of that FERC decision lies with a federal court

40. *Pepco Responds to Mirant's Move*, *supra* note 31.

41. *Id.* This portion of the order was the most significant, as it attempted to preemptively prohibit the same type of obstruction that NRG encountered in its attempt to terminate its contract with CL&P.

42. Press Release, Pepco Holdings, Inc., Pepco, FERC Seek Federal Court Intervention in Mirant Case (Sept. 5, 2003), *available at* http://www.pepcoholdings.com/news/news_release_27.html. The parties sought resolution of the conflict in the United States District Court for the Northern District of Texas. *Id.*

43. Debtors' Motion for Approval of (1) Settlement Agreement Under Federal Rule of Bankruptcy Procedure 9019, (2) Allowed, Prepetition General Unsecured Claims by Pepco in the Amount of \$105 Million Against Each of Mirant and MAEM, and (3) Assumption of Certain Transition Power Agreements, *In re Mirant* (No. 03-46590-DML-11). The October 27, 2003 settlement agreement set out a number of things—most importantly it maintained the service that Mirant would provide but altered the pricing structure to allow the companies to continue to provide power to consumers. *Id.*

44. Press Release, Mirant Corporation, Mirant and Pepco Reach Settlement on Electricity Supply Contracts; No Effect on Pepco Customer Rates, Increased Value for Mirant, (Oct. 27, 2003), *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=MIR&script=415&layout=0&item_id=463100 (last visited Oct. 27, 2003) [hereinafter *Mirant and Pepco Reach Settlement*].

45. *In re Mirant Corp.*, 303 B.R. 304 (Bankr. N.D. Tex. 2003).

46. *Id.* at 311-13.

of appeals.⁴⁷ As there was little possibility of the parties settling this portion of the dispute,⁴⁸ Mirant accordingly appealed to the Court of Appeals for the Fifth Circuit.⁴⁹

In its opinion, the Fifth Circuit agreed with Mirant and the bankruptcy court for two principal reasons.⁵⁰ First, Mirant's abrogation of the entire contract constituted a breach under the Bankruptcy Code, which is altogether different from a contract alteration, something rightfully reserved to FERC.⁵¹ The court decided that any abrogation in this case would "only have an *indirect* effect upon the filed rate," which does not go far enough to subject the issue to FERC's approval.⁵² Therefore, jurisdiction lies in the bankruptcy court.⁵³ Second, the court found that Congress, in the creation of the Bankruptcy Code, laid out a number of exceptions to the rights of a Chapter 11 petitioner to reject executory contracts.⁵⁴ However, Congress failed to cite an explicit statutory exception that gives special treatment to wholesale energy contracts.⁵⁵ The absence of any such exception, proclaimed the court, indicates that "Congress intended § 365(a) to apply to contracts subject to FERC regulation."⁵⁶ Whether FERC will bring a petition to the United States Supreme Court remains to be seen.

C. The Conflict

The recent histories of these two energy corporations present the issue of whether the Federal Power Act or the Bankruptcy Code explicitly define the jurisdictional boundaries in their respective fields such that courts will be able to determine who controls in making the important decisions posed by the *NRG* and

47. *Id.* at 313.

48. Kristen McNamara, *Pepco to Argue Power Contract Dispute with Mirant in May*, at http://biz.yahoo.com/djus/040227/1213000730_2.html (Feb. 27, 2004).

49. Jon Kamp, *Mirant to Appeal Court Ruling in Pepco Contract Dispute*, DOW JONES NEWSWIRES, Dec. 29, 2003, available at http://www.prophet.net/quotes/stocknews.jsp?symbol=POM&article=20031229460_82bc000ebfd64d12. Mirant knew it had an uphill battle awaiting in the Fifth Circuit as the court previously asserted the principle that the FPA gives FERC exclusive jurisdiction over such contracts. *Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1468 (5th Cir. 1987).

50. *See In re Mirant Corp.*, Nos. 04-10001, 04-10004, 04-10094, 2004 U.S. App. LEXIS 16108 (5th Cir. Aug. 4, 2004) [hereinafter *In re Mirant Corp. II*] (holding that the district court had jurisdiction to authorize the rejection of the executory contract).

51. *Id.* at *16.

52. *Id.* at *18.

53. *Id.* at *23.

54. *Id.* *See also* 11 U.S.C. §§ 365(d)(5), 365(o), 1110, 1113, 1169, (enumerating exceptions to rights of Chapter 11 petitioners).

55. *In re Mirant Corp II*, 2004 U.S. App. LEXIS 16108, at *24.

56. *Id.* at *25-26.

Mirant cases. At first blush, the points of authority are not clearly spelled out, and the court will have to explore the need to reconcile one against the other in order to bring about a fair and just result.⁵⁷ Determining the appropriate result involves an exploration of the statutory text itself, a court's duties when presented with two conflicting laws, and previous court decisions that might indicate some sort of precedent in this area, all of which will be examined in Part III.

III. ANALYSIS

A. *The Text of the Laws*

The issue presented to the courts involves a conflict between two statutes. An obvious starting point for any court in resolving a discrepancy in the meaning of statutes is the text itself.⁵⁸ In fact, courts have repeatedly held that the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."⁵⁹ If the court decides that the language in the statute is unambiguous, it assumes that the legislature intended the statute to be implemented through the plain meaning of its provisions.⁶⁰

1. *The Federal Power Act*

FERC asserts its claim to jurisdiction from the Federal Power Act, which requires a public utility to:

file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and

57. See *FCC v. Nextwave Pers. Communications Inc.*, 537 U.S. 293, 304 (2003) (holding that "[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

58. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). This case involves a plaintiff suing his former employer, Shell Oil Co., for retaliatory discrimination under section 704(a) of Title VII of the Civil Rights Act of 1964. *Id.* at 339. While the issue presented to the Court does not involve a conflict between two statutes, it is indicative of the means employed by the courts in determining the rights granted by a federal statute. *Id.* at 340.

59. *Id.* In addition to a statute being unambiguous, a court's examination of a provision ceases when the "statutory scheme is coherent and consistent." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989).

60. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). This case specifically held that once a court holds a statute's terms to be unambiguous, then the "judicial inquiry is complete." *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981) (holding that where statutory text is deemed unambiguous, the court's examination of legislative intent or purpose is complete except for a few "rare and exceptional circumstances")).

charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.⁶¹

In other words, all public utilities must file a rate schedule with the Commission for any agreement contemplating wholesale electricity service.⁶² Congress found that delegating authority to regulate entities involved in the transportation of electricity over state lines was essentially "necessary for the public interest."⁶³ Therefore, the rate established by any contract governing an interstate electricity service agreement is subject to FERC's jurisdiction.⁶⁴

Once a rate has been filed with the Commission, a public utility has no means of altering a contract relating to that rate without FERC's approval.⁶⁵ The Federal Power Act specifically allows the alteration of an electricity rate through two different means: (1) the seller may propose the modification, subject to FERC's approval of its justness and reasonableness; or (2) FERC may adjust the contractually negotiated rates if it finds they are "unjust, unreasonable, unduly discriminatory or preferential."⁶⁶

The purpose of this provision is twofold: (1) it allows FERC to act as a "referee" in assuring that the rate prescribed by a service contract is fair to the parties of the contract as well as the public

61. 16 U.S.C. § 824d(c). The original purpose of this legislation was to allow a federal regulatory agency to review proposed or agreed upon electricity rates between a utility in the business of selling power (like NRG or Mirant) and a buyer of that energy (like CL&P and Pepco). *Borough of Lansdale v. Phila. Elec. Co.*, 517 F. Supp. 218, 222 (E.D. Pa. 1981). The agency is entrusted with the responsibility of assuring that those rates are not only fair and equitable for the parties involved, but they also cannot contain any anticompetitive elements. *Id.*

62. *Fla. Power & Light Co. v. FERC*, 617 F.2d 809, 811-12 (D.C. Cir. 1980).

63. *Appalachian Power Co. v. Public Serv. Comm'n of W. Va.*, 630 F. Supp. 656, 662 (S.D. W. Va. 1986). Because Congress holds the power to regulate interstate commerce, and Congress delegated the power of "regulat[ing] facilities used for the transmission of electric energy from one state for consumption in another" to FERC, then FERC can claim jurisdiction over those cases in which a filed rate is "unreasonable" and adjust it accordingly. *Id.* The "public interest" that FERC must use to determine a rate's reasonableness is the interests of all fifty states, not simply the state or states involved in the transaction at issue. *Id.*

64. *Id.* See also *W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999) (explaining that even a contract that "relates to" those rates associated with the transmission of energy will be sufficient to give FERC jurisdiction over the contract).

65. 16 U.S.C. § 824d(d).

66. *Sierra Pac. Power Co.*, 350 U.S. at 353. See also *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 952-53 (D.C. Cir. 1983) (holding that these routes are available under sections 205 and 206 of the Federal Power Act).

in general;⁶⁷ and (2) it functions to notify the public of pending rate changes.⁶⁸

The plain meaning of this statute suggests that FERC has exclusive jurisdiction over any alteration of wholesale electricity supply contracts that are filed pursuant to the Federal Power Act.⁶⁹ The legislature intended to ensure that rates spelled out in contracts are fair to both the parties involved as well as the public.⁷⁰

As the legislation is not dispositive on matters of complete abrogation of contracts and elimination of contractual duties, it does not appear that the legislature implemented the provision for the sole purpose of assuring that utilities would not be able to eliminate their contractual duties without FERC's approval.⁷¹ On the other hand, the terms of the legislation do not limit its application to certain instances or fact patterns. Instead, the Federal Power Act explicitly assures its applicability to *all* rates filed by *any* public utility; the statute lacks any qualifying language.⁷² Therefore, it stands to reason that if a utility wanted to alter a contract (and through the contract, its rates), it would have to submit its request to FERC's authority.⁷³

67. See *La. Energy and Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) (stating that all rates proposed by "utilities for the transmission or sale of electric energy [must] be 'just and reasonable'"). FERC's approval of these contractually governed rates is dependent upon the seller's absence of "market power in the generation and transmission of such energy[.]" and the seller's inability to obstruct entry of any potential competitors. *Id.*

68. *City of Groton v. FERC*, 584 F.2d 1067, 1073 (D.C. Cir. 1978). FERC assures its ability to notify the public through the provisions in its regulations that mandate providing notice of a rate change to FERC along with its well-established filing requirements. *Id.* Written notice consists of filing a schedule with FERC that states in plain terms the specific alterations to be made to the existing filed rate. *Fla. Power & Light Co.*, 617 F.2d at 812. Subsequent to the filing of the schedule, FERC has the authority pursuant to the Federal Power Act to conduct hearings to determine the legality of the new rate and to suspend the operation of a new rate for up to five months if unjust or unreasonable. *Id.*

69. See 16 U.S.C. § 824 (asserting FERC's jurisdiction over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce . . ."). See also *Fla. Power & Light Co.*, 617 F.2d at 813 (holding that even though a FERC review and subsequent decision is not subject to alteration by the courts, a court may still examine whether FERC exceeded its statutorily delegated authority).

70. *La. Energy & Power Auth.*, 141 F.3d at 365.

71. Again, this is a reference to legislative intent, which seemingly dealt with the benefit to the public by assuring rates that are "just and reasonable." *Id.* (quoting 16 U.S.C. § 824d(a)). While it remains true that the legislation does refer to the modification of "[a]ll rates and charges[.]" it would appear that modification or alteration are different, although not completely dissimilar, from abrogation or contract termination. 16 U.S.C. § 824d(a).

72. 16 U.S.C. § 824d(a).

73. The proposition is consistent with the "filed rate doctrine" which

2. *The United States Bankruptcy Code*

The federal bankruptcy courts claim jurisdiction over the abrogation of contracts between Chapter 11 bankruptcy petitioners and electrical companies through the United States Bankruptcy Code.⁷⁴ Specifically, § 365(a) states, with certain exceptions, that “the trustee, subject to the court’s approval, may assume or reject *any* executory contract or unexpired lease of the debtor.”⁷⁵

The essential purpose of § 365 is to allow a Chapter 11 debtor to reject those executory contracts⁷⁶ that prevent the debtor’s solvency, while simultaneously forcing businesses that would otherwise eliminate their relationship with the debtor to abide by their contractual obligations with the debtor.⁷⁷

Similar to the broad based application of the Federal Power Act, this piece of legislation appears to apply to instances involving most, if not all, Chapter 11 petitioners.⁷⁸ The Act does make certain exceptions; however, none of the exceptions function to subject a bankrupt entity’s right to abrogate contracts to the power of any other federal authority or agency.⁷⁹ Therefore, by looking only at the terms of the Bankruptcy Code, it would seem that *any* bankrupt corporation has the right, subject to the

imposes a prohibition on regulated entities to charge rates that are different from those rates that have been filed with the appropriate federal regulatory agency. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). The filed rate doctrine was originally formulated by the courts in their interpretation of the Interstate Commerce Act and has been expanded to apply to all regulated utilities. *Id.* The rationale of the doctrine rests in the maintenance of the agency’s “primary jurisdiction over reasonableness of rates” as well as its ability to assure that those regulated companies charge only those rates that have been filed with the regulatory agency. *City of Cleveland v. Fed. Power Comm’n*, 525 F.2d 845, 854 (D.C. Cir. 1976).

74. 11 U.S.C. § 365. While this Comment concentrates on the ability of an entity to terminate an executory contract, the Bankruptcy Code also provides for the assumption of certain executory contracts codified in 11 U.S.C. § 365. *Id.*

75. *Id.* (emphasis added).

76. The generally accepted definition of an “executory contract” is an agreement in which both parties have failed to fulfill, in their entirety, their obligations or duties as prescribed by the governing contract. H.R. REP. NO. 95-595, at 347-50 (1977).

77. *In re Chateaugay Corp.*, 10 F.3d 944, 954-55 (2nd Cir. 1993) (quoting *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1310 (5th Cir. 1985), which held that Chapter 11 is used primarily to relieve obligations that are preventing the financial stability of the petitioner). This section is also used as “a means whereby a debtor can force others to continue to do business with it when the bankruptcy filing might otherwise make them reluctant to do so.” *Id.* at 955.

78. *See* 11 U.S.C. § 365 (governing the executory contracts of Chapter 11 petitioners).

79. *Id.* § 365(a).

acceptance of the bankruptcy court, to eliminate its contractual duties in order to maintain any sort of financial viability.⁸⁰ Similar to the Federal Power Act, the Bankruptcy Code contains no qualifying language that would subject its power to another authority.⁸¹

On the other hand, there is a portion of the Bankruptcy Code that assists FERC in its claim:

The court shall confirm a plan only if all of the following requirements are met. . . . Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.⁸²

While this section in no way completely resolves the issue, it does suggest at least a slight amount of deference employed by the bankruptcy courts when subjecting debtors to Chapter 11 procedures.

The text of both provisions fails to indicate with any certainty which authority would prevail in the case of an inherent conflict similar to the situation facing both *NRG* and *Mirant*.⁸³ Resolving this discrepancy, therefore, will demand exploration of a court's responsibilities when two federal statutes conflict.

B. Resolving the Inherent Conflict

When a conflict arises between the terms of two statutes, it is the court's duty to consider each as effective unless there is a clearly expressed intent of Congress to the contrary.⁸⁴ The Supreme Court has held that when two statutes provide "different requirements and protections[.]" a court may regard each statute

80. *Id.* This premise is also contingent on the exceptions that are explicitly laid out in § 365.

81. *Id.* § 365.

82. *Id.* § 1129(a)(6). A court's interpretation of this portion of the statute may become essential in determining whether the Bankruptcy Code preempts FERC's regulation of the rate change. Key, *supra* note 3, at 9.

83. 11 U.S.C. §§ 365, 1129(a)(6). Indeed, both statutes fail to explicitly mention executory power contracts of any kind, the bankruptcy court's power to abrogate a contract irregardless of a federal agency's asserted jurisdiction, or FERC's authority over wholesale electricity contracts once one of the parties has filed for protection under Chapter 11.

84. *Nextwave*, 537 U.S. at 304 (citing *J.E.M. Agric. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143 (2001)). This issue obviously does not provide an example of preemption as the discrepancy involves two federal statutes, as opposed to a conflict between a legitimate federal law and a state law, in which case the federal law would prevail and the state would have to defer its power to the federal statute. See *Appalachian Power Co.*, 630 F. Supp. at 662-63 (holding that Congress may preempt a state law by explicitly asserting its intent to preempt state law, claiming jurisdiction over a whole area of the law, or where the state law is in direct conflict with the federal law).

as effective.⁸⁵

In examining the terms of the Bankruptcy Code and the Federal Power Act, the statutes appear to take completely different approaches to the alteration of contracts.⁸⁶ The Bankruptcy Code's requirements emphasize the elements an entity must satisfy before asserting the protections provided by the Act.⁸⁷ Specifically, it allows the court to decide whether an executory contract should be assumed or rejected, subject to a number of exceptions.⁸⁸

The Federal Power Act, on the other hand, establishes the jurisdiction of FERC over the modification of rates in wholesale energy contracts.⁸⁹ The Act requires that any utility file an application in order to modify a contract rate with FERC.⁹⁰ The requirements of contract abrogation according to the Bankruptcy Code and the methods of contract rate alteration governed by FERC seemingly provide "different requirements and protections."⁹¹

Even if there are some similarities between the two provisions, the court must still treat each as separate.⁹² The Supreme Court asserted its determination to give effect to two overlapping statutes only so long as those statutes are applied to

85. See *J.E.M.*, 534 U.S. at 143-44 (finding that the terms of The Plant Patent Act of 1830 (35 U.S.C. § 161) and the Plant Variety Protection Act (7 U.S.C. § 2321) did not conflict with each other because they provide for different "requirements and protections" and can be read alongside one another).

86. 11 U.S.C. § 365; 16 U.S.C. § 824d.

87. See 11 U.S.C. § 365(d)(2) ("In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan . . .").

88. *Id.* § 365. One exception spelled out in the statute is that an executory contract cannot be modified or terminated after an entity files for bankruptcy even if a contract provision is conditioned on the insolvency of the debtor or the instigation of a Chapter 11 case. *Id.* § 365(e)(1)(A)-(B).

89. 16 U.S.C. § 824d.

90. *Id.* § 824d(d). This section specifically provides that "[u]nless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public." *Id.*

91. *J.E.M.*, 534 U.S. at 144. While this case did not involve wholesale electric industry regulation, it did discuss the methods condoned by the Supreme Court when confronted with two statutes that could be applicable to the same case. *Id.* In this case, the Court held that each statute could retain its effectiveness because of the "different requirements and protections" analysis. *Id.*

92. *Id.* Applying both statutes with equal force to situations such as the ones involving Mirant and NRG would easily create a heated contradiction without a clear-cut winner. Therefore, courts must turn to alternative means of resolution.

distinct cases.⁹³ “[S]tatutes that overlap ‘do not pose an either-or proposition’ where each confers jurisdiction over cases that the other does not reach.”⁹⁴

Redundancies between statutes are not unusual, and it is the court’s duty to give effect to each so long as there are no “positive repugnanc[ies]” between the two.⁹⁵ The court also must avoid interpreting language in a manner that renders it superfluous.⁹⁶

By examining the language of the two provisions, there appears to be few similarities, but a number of specific differences. Both pieces of legislation deal with the modification of contracts, but the Federal Power Act specifies wholesale electricity service agreements while the Bankruptcy Code is more general in the contracts it governs.⁹⁷

On the surface, the Bankruptcy Code deals with a company’s right to completely extinguish all rights and duties under a contract subject to the court’s approval,⁹⁸ while the Federal Power Act specifically mandates that changes to an agreed-upon rate in an electricity supply contract must satisfy a step by step procedure in order to get FERC’s approval.⁹⁹ Despite these specific differences, the conflicts faced by *NRG* and *Mirant* suggest that the courts cannot give both statutes the same deference when dealing with such a case. Therefore, this situation does mandate that a court employ an “either-or”¹⁰⁰ framework.

For an indication of which statute the courts will prefer, it is helpful to look at how specific each statute is when applied to the issue before the court.¹⁰¹ When a court is confronted with two statutes that it can apply to a single issue, and the results obtained are potentially inconsistent, priority will be given to the statute that deals specifically with the issue, rather than the legislation that is more general in nature and application.¹⁰² This principle of statutory interpretation appears to give preference to

93. *Id.*

94. *Id.* (quoting *Germain*, 503 U.S. at 253).

95. *Germain*, 503 U.S. at 253.

96. *Id.* The Supreme Court in this case made a point to recall that, when dealing with a statute, “canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others.” *Id.* The Court, as expected, was referring to the original words and phrases used by the legislature. *Id.*

97. 11 U.S.C. § 365; 16 U.S.C. § 824d.

98. 11 U.S.C. § 365.

99. 16 U.S.C. § 824d.

100. See *J.E.M.*, 534 U.S. at 144 (concluding that when courts are unable to apply partially overlapping statutes to a distinct case because of the different requirements, the court should employ an “either-or” framework).

101. *In re Churchill Props. III, L.P.*, 197 B.R. 283, 288 (Bankr. N.D. Ill. 1996).

102. *Id.*

the Federal Power Act as it deals specifically with the energy industry and wholesale contract rates.¹⁰³ Conversely, § 365 of the Bankruptcy Code governs the rights of Chapter 11 petitioners in a more general fashion.¹⁰⁴

C. Other Means of Resolution

Besides exploring methods used by courts to resolve statutory conflicts, it is important to look at other areas of the law that have dealt with similar issues and the courts' ultimate resolution in those cases. This will give an indication of not only the eventual outcome of such a case, but also the means by which the court reached its decision.

Courts have not shied away from their duty to grant power to one federal authority over another. Indeed, in *FCC v. Nextwave Personal Communications*,¹⁰⁵ the Supreme Court held that the conflict asserted by the parties was no more than an administrative preference.¹⁰⁶ "Such administrative preferences cannot be the basis for denying [a party the] rights provided by the plain terms of a law."¹⁰⁷ Consistent with this opinion, a court could find that the basis of FERC's asserted jurisdiction is solely its "preference" for controlling the abrogation of executory energy contracts, and therefore the bankruptcy court would have the authority to abrogate the contract in furtherance of the Bankruptcy Code without the approval of FERC.

On the other hand, the Supreme Court addressed a related issue in *Arkansas Louisiana Gas Co. v. Hall*.¹⁰⁸ In *Hall*, the parties entered into a service contract whereby the defendants were responsible for providing the plaintiffs with natural gas at a fixed price for a period of years.¹⁰⁹ The Supreme Court held that courts do not have the power to alter or modify an agreed-upon contractual rate that FERC already approved.¹¹⁰ Indeed, the Supreme Court has even gone as far as restricting collateral attacks on FERC-regulated contracts and rates.¹¹¹

103. 16 U.S.C. § 824d.

104. See 11 U.S.C. § 365 (governing all Chapter 11 petitioners and not dealing with any specific industry or party).

105. 537 U.S. 293 (2003).

106. *Id.* at 304. In *Nextwave*, the Court found that the issue involves the FCC's preference for "(1) selling licenses on credit and (2) canceling licenses rather than asserting security interests in licenses when there is a default." *Id.*

107. *Id.*

108. 453 U.S. 571 (1981).

109. *Id.* at 573-74.

110. *Id.* at 577.

111. *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 375 (1988). The Supreme Court held that while collateral attacks on FERC orders are inappropriate, an aggrieved party may challenge a FERC order before FERC

If the termination of the electricity service contract pursuant to the Bankruptcy Code is perceived as an alteration of the contract rate approved by FERC—which is very possible—then the bankruptcy court would be limited in its ability to save a company, such as NRG or Mirant, from financial ruin as a result of that contract rate.

Yet the question remains whether any authority has the ability to save those companies that find themselves in such financially desolate situations. The *Hall* Court held that FERC “lacks affirmative authority, absent extraordinary circumstances, to ‘abrogate existing contractual arrangements.’”¹¹²

While the relevant case law and statutes indicate a possibility that FERC will prevail in these developing conflicts, there is also authority available that will aid in the bankruptcy court’s argument.¹¹³ Therefore, it is not clear which authority will ultimately have the power to govern bankrupt energy corporations that wish to terminate “harmful” wholesale electricity supply contracts.

IV. PROPOSAL

The issue facing the United States bankruptcy courts and FERC contains more questions than answers. The extent of each authority’s jurisdiction creates no evident solution, however, there are important historical elements that indicate who should prevail. The two most important factors to examine when answering this question are the policy implications provided by a solution, and the legal ramifications created by that solution. My proposal to this issue will address both of those elements, and explain why FERC should ultimately decide the issue.

A. Policy Considerations

When addressing this subject, exploring the parties’ interests vis-à-vis the public policy implications of an eventual solution is important because that solution has a definite possibility of affecting the public welfare.¹¹⁴ In the cases of *NRG* and *Mirant*,

itself or in front of a court responsible for reviewing the commission’s decisions. *Id.* This case specifically applied to individual state action and prohibited states from modifying any FERC orders and substituting what they perceive is just and fair. *Id.* at 371. Because the Court could not allow state action to directly contravene a FERC order, it held that, when confronted with a direct conflict, the state’s regulation will submit to FERC’s adjudication. *Id.* at 377.

112. *Hall*, 453 U.S. at 582 (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 820 (1968)).

113. See *supra* text of Part III.A.2. (describing the specific provisions and purpose of § 365 of the Bankruptcy Code).

114. The resolution of this case could substantially impact residential energy rates, which obviously affects the public. Similarly, while the successful

the companies have an evident, self-serving interest in maintaining, or rather improving, their financial standing if the bankruptcy court was to prevail. As indicated, filing for Chapter 11 will facilitate this by ameliorating the financial strain imposed by certain executory contracts.¹¹⁵ However, if FERC were to succeed in obtaining jurisdiction, and if it forced continued service from both Mirant and NRG, the law would limit both companies in their abilities to maintain some sort of financial viability. This path, however, would provide the public with reliable energy service at a consistent price.¹¹⁶

Companies like CL&P and Pepco have a substantial stake in the outcome of this issue as well. Both entities are hoping that the energy supply companies abide by their original contracts. This will provide them with reliability and will also eliminate their need to enter into another contract that could potentially have adverse economic effects. If FERC prevails, the companies will also have the ability to continue to provide reliable, cost-consistent service to their customers. The interests of both corporations seem to parallel the general public good.

Finally—and most importantly—the public has a definite stake in the resolution of the issue at hand. Besides the obvious implications of the purchasing price of energy, the most important benefit lies in maintaining the energy service that CL&P and Pepco have agreed to provide. While the connection between power service to retail customers and wholesale energy contracts seems tenuous, it still should maintain a heavy presence in the court's eventual determination. If energy companies were granted the right to terminate executory contracts every time they filed for Chapter 11 protection,¹¹⁷ then it would make it very difficult on

abrogation of the executory contracts at issue here does not automatically indicate that residential power will go out or that it will be less reliable, such a conclusion is not out of the question. An alteration in the supply of electricity could alter the system, and such an alteration could end in disaster. If the blackout of August 14, 2003 taught us anything, it is that the electricity grids that we rely on so heavily are not immune to failure, and such a failure could have disastrous consequences. Gibbs, *supra* note 1, at 31.

115. *Chateaugay Corp.*, 10 F.3d at 954-55.

116. In its argument to the court, CL&P asserted that NRG should be refused the right to terminate its contractual duties because it would place the entire financial burden on CL&P and its customers. Motion to Intervene and Comments of the Connecticut Light and Power Company in Support of FERC's Jurisdiction over Filed Rate Schedule at 19, *Blumenthal v. NRG Power Mktg., Inc.*, 2003 WL 21130626 (F.E.R.C. May 16, 2003) (No. EL03-123-000). Their essential argument was that "FERC-jurisdictional contracts cover myriad activities that are essential to the reliability and economic supply of electricity to consumers." *Id.* at 16-17.

117. While this is by no means an everyday occurrence, it is evident that in today's energy market more and more companies are finding themselves in financial peril, and so they, too, will attempt to mitigate their financial

energy suppliers to assure customers that they would continue to provide them with consistent service at a steady rate.

The exploration of these policy questions seems to come out in favor of FERC. While the function of filing for Chapter 11 bankruptcy is an important means of alleviating the serious economic problems facing struggling companies, it pales in comparison to the public policy consequences that could emerge should energy companies have the right to drop contracts on demand.¹¹⁸ Not only would wholesale energy consumers like Pepco and CL&P be deprived of their ability to rely on wholesale energy contracts, but it would also rob the public of its ability to rely on the energy industry at all.

B. Legal Implications

While the preceding policy considerations should function as an important part of the court's solution to the problem, the legal ramifications are a priority in this discussion. As previously demonstrated, there is no evident legal solution to this problem.¹¹⁹ However, given the relevant precedent in various legal fields, it would not be difficult to show that FERC should prevail when exploring the legal considerations.

While I have shown that the text of both pieces of legislation fail to indicate an express answer,¹²⁰ exploring the *inherent purpose* of the legislation may aid in this decision. The Federal Power Act, by its very name, invokes a right to supervise the electricity industry in interstate commerce.¹²¹ Its purpose includes the governance of the sale of wholesale energy and the rates thereof.¹²² Indeed, the Supreme Court has even granted exclusive jurisdictional authority over the transmission and sale of electric

problems through the termination of harmful executory contracts. Such contract termination could disrupt the balance provided by continued energy supply.

118. "On demand" implies that energy companies would first have to file for Chapter 11 protection, and then have their request approved by the bankruptcy court pursuant to the Bankruptcy Code. 11 U.S.C. § 365(a).

119. See *supra* text of Part III (suggesting that there is no established authority in this field).

120. 11 U.S.C. § 365(a); 16 U.S.C. § 824d.

121. 16 U.S.C. § 824(a). The transmission of electric energy to the public affects the public interest so much that federal regulation of the industry through FERC is essential. *Id.* This is meant to "apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." *Id.*

122. See *Northwestern Elec. Co. v. Fed. Power Comm'n*, 321 U.S. 119, 123 (1944) (holding that the FPA gives FERC explicit authority to regulate contract rates). See also *Borough of Lansdale*, 517 F. Supp. at 222 (holding that it is FERC's duty to examine proposed energy supply contracts and determine if they are anticompetitive in nature).

energy at wholesale to FERC.¹²³ If it were to fail in its assertions of jurisdiction over cases like this, FERC's essential purpose would also fail and it would be subject to attack from courts of various jurisdictions.¹²⁴ Indeed, its declarations and orders would carry little weight if it were found to be subservient to the mandates of any United States district court.

While the Bankruptcy Code functions to allow financially floundering companies to obtain reprieve from their detrimental contractual obligations, it by no means explicitly precludes any sort of collateral governance over those financially desolate corporations.¹²⁵ Congress's express intention to deliver the right to govern wholesale energy contracts to FERC would apparently function as an appropriate means of providing a federal authority with the right to govern the entire wholesale electricity sales industry, as opposed to only those cases that do not appeal to the bankruptcy court.¹²⁶

C. *The Courts' Proper Action*

When confronted with this issue, the most appropriate action for the court is to favor FERC. Historically, Congress has properly delegated some of its duties to administrative agencies, as they have more experience and presumably more expertise, in areas of general public concern.¹²⁷ FERC has the capability of providing for the integrity of the legal field, the benefit of the energy industry and its participants, and the assurance of public welfare.¹²⁸ Such a decision would in no way diminish the

123. *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). This Supreme Court case confirmed that FERC's exclusive control over the interstate regulation of wholesale energy transactions precluded any state action that interfered with that authority. *Id.* at 344. The rationale of this regulation, implemented in 1935, involved the limited ability of the states to adequately govern wholesale electricity sales between states. *Id.* at 340.

124. Pursuant to the FPA, FERC's jurisdiction extends to "the sale of electric energy at wholesale in interstate commerce." *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 454 (1972). If the bankruptcy court were to assert jurisdiction over this area, it would destroy FERC's established jurisdiction.

125. See 11 U.S.C. § 365 (asserting the right of a bankruptcy court to grant the termination of an executory contract but in no way eliminating the possibility that another federal law or agency will function to qualify this right). It seems counterintuitive that Congress would extend FERC's jurisdiction to contractual rates while intentionally subjecting its ability to govern those rates through bankruptcy law. As indicated earlier, there is no qualifying language to this section of the FPA, so its scope does not appear to be limited by the bankruptcy code.

126. See 16 U.S.C. § 824d (asserting FERC's jurisdiction over "*all rates . . . in connection with the transmission or sale of electric energy*" (emphasis added)).

127. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 694 (5th ed. 2000).

128. See FERC, *supra* note 9 (suggesting that FERC's responsibilities and oversight are far-reaching and encompass the legal and energy fields).

bankruptcy courts' jurisdiction over all other cases involving Chapter 11 petitioners; it would only allow FERC to maintain its legislatively mandated position of authority.

V. CONCLUSION

It is evident from the preceding exploration of this issue that the decision of a court will not be an easy one. There are numerous factors favoring both sides, along with numerous reasons to doubt each side's right to assert authority over this issue. The fact that the parties to each of these actions have settled at least portions of their respective disputes evinces the unclear nature of the issue.¹²⁹ Indeed, even the judges charged with resolving these cases have appeared unsure and hesitant at times to declare that one federal authority has a clear and unequivocal right to adjudication.¹³⁰

While it may not seem helpful in the legal context, the most equitable result often occurs when the parties to such a conflict enter into a settlement that alters the terms of their contractual relationship.¹³¹ For example, the agreement between Mirant and Pepco, which resolved the first part of their supply contract, satisfied a number of the important elements that this Comment identified as crucial for the court to consider. It satisfied the public policy considerations by maintaining the public's reliability on energy service while keeping rates at the same level.¹³² It also allowed the companies to continue with their business relationship without forcing one party to bear the brunt of the financial hardship.¹³³

The only court action that would come close to paralleling this successful resolution is to allow FERC to determine the appropriateness of a rate change and/or contractual termination. Its expertise in determining what is appropriate in the energy industry has the capability of providing financial stability, judicial equity, and, most importantly, energy reliability.

129. Pepco, for example, decided to increase its payments to Mirant by \$60 million for the two supply contracts because it did not want to risk losing its pending court battle. *U.S. Power Companies Suffering Contract Hangover*, at http://biz.yahoo.com/rf/031028/utilities_contracts_1.html (Oct. 28, 2003).

130. See *NRG Energy, Inc.*, 2003 WL 21507685, at *3 (finding both arguments persuasive but eventually holding that "given the unique regulatory framework for the business of selling electric energy and the pending FERC proceeding, the [Bankruptcy] Court lacks jurisdiction to grant [NRG's] requested relief").

131. When NRG and CL&P settled their dispute, victory was declared for not only the parties involved, but also for the consumers. *NRG to Continue Supplying Connecticut Light and Power*, *supra* note 28.

132. Mirant and Pepco Reach Settlement, *supra* note 44.

133. *Id.*

