

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:)	Chapter 11
)	
FIRSTENERGY SOLUTIONS CORP., <i>et al.</i> , ¹)	Case No. 18-50757
)	
Debtors.)	Hon. Judge Alan M. Koschik
)	

**OBJECTION OF FEDERAL ENERGY REGULATORY COMMISSION
TO CONFIRMATION OF SIXTH AMENDED JOINT PLAN
OF REORGANIZATION OF FIRSTENERGY SOLUTIONS CORP., *ET AL.*
PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE**

The Federal Energy Regulatory Commission (Commission or FERC) joins in and adopts the objections of the United States to confirmation of the Debtors' Sixth Amended Joint Plan of Reorganization (Docket No. 2934) (Sixth Amended Plan).² In addition, as set forth below, the Sixth Amended Plan cannot be confirmed because it does not comply with 11 U.S.C. § 1129(a)(6), and further contains overly broad language concerning the Court's jurisdiction.³

¹ The Debtors in these jointly administered 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), Norton Energy Storage L.L.C. (6928), Case No. 18-50764.

² Any capitalized term not defined here shall have the meaning ascribed to it in the Sixth Amended Plan.

³ The Commission is in negotiations with Debtors to resolve the issues raised here, and files this objection to preserve its rights in case the issues are not resolved.

BACKGROUND

A. FERC Regulatory Proceedings Contemplated in the Proposed Plan

1. The Sixth Amended Plan requires Debtors to initiate or participate in regulatory proceedings before the Commission with respect to certain matters. For example:

2. Article IV.I provides that FERC-Jurisdictional Debtors, along with certain consenting creditors, must obtain approval from the Commission for certain restructuring transactions under section 203 of the Federal Power Act, 16 U.S.C. § 824b, and specifically identifies transfer of ownership of the “Mansfield Facility.”

3. Articles IV.B.3 and B.4 provide that the “Mansfield Settlement” authorizes the parties thereto “to take any actions necessary in furtherance of [a transfer of ownership], including any necessary regulatory filings or filings with FERC.”

4. Article IX.B.11 lists certain FERC regulatory approvals as “Conditions Precedent to the Effective Date.”

B. Adversary Proceeding and Sixth Circuit Appeal

5. The outcome of the PPA Appeal Proceeding in the Sixth Circuit Court of Appeals will determine whether additional regulatory proceedings occur before the Commission concerning the power purchase agreements (“PPAs”) and related regulatory obligations that are the subject of this Court’s May 11, 2018 Preliminary Injunction Order and May 18, 2018 Memorandum Decision Supporting Order Granting Preliminary Injunction. Adv. Pro. No. 18-5021, Docket Nos. 114 & 125. Briefing is complete in the Court of Appeals, and oral argument was heard on June 26, 2019. 6th Cir. Nos. 18-3787, *et al.*

6. As the Commission has explained, the PPAs establish filed rates subject to FERC jurisdiction under the Federal Power Act, 16 U.S.C. § 824, *et seq.*

ARGUMENT

A. **The Sixth Amended Plan Cannot Be Confirmed Because It Does Not Comply With 11 U.S.C. § 1129(a)(6)**

7. 11 U.S.C. § 1129(a)(6) provides that the Court may confirm a plan “only if . . . [a]ny 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.”

8. Here, the Sixth Amended Plan does not comply with section 1129(a)(6) because the Plan does not contain any statement that the Debtors have obtained such approval for any rate change, nor that any rate change is expressly conditioned on such approval. In particular, the Plan does not contain any statement that the Debtors have obtained FERC approval for changes to any rates over which FERC has jurisdiction.

9. The Sixth Amended Plan references FERC approvals related to certain “Restructuring Transactions.” Sixth Amended Plan at 79 (Article IV.I) (requiring certain FERC approvals under section 203 of the Federal Power Act, 16 U.S.C. § 824b); *id.* at 73 (Article IV.B.3) (noting that the “Mansfield Settlement” authorizes the parties thereto “to take any actions necessary in furtherance of [a transfer of ownership], including any necessary regulatory filings or filings with FERC”); *id.* at 74 (Article IV.B.4) (same); *id.* at 105 (Article IX.B.11) (listing certain FERC approvals as “Conditions Precedent to the Effective Date”).

10. FERC’s determination whether to grant those necessary approvals likely will include rate considerations—a fact that the Sixth Amended Plan does not acknowledge. Under section 203 of the Federal Power Act, proposed dispositions, consolidations, acquisitions, or changes in control require Commission approval, based on its determination that the proposed

transaction will be consistent with the public interest. 16 U.S.C. § 824b(a)(4). The Commission’s analysis of whether a proposed transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation. *See Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,111 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997). In 2005, the statute was amended to add an inquiry into cross-subsidization, now codified at Federal Power Act section 203(a)(4), 16 U.S.C. § 824b(a)(4). Though the Commission recognizes that an increase in rates “can be consistent with the public interest if there are countervailing benefits that derive from the transaction” (*id.* at 30,123), the Commission has rejected proposed transactions based on finding an adverse effect on rates. *See, e.g., GridLiance High Plains LLC*, 166 FERC ¶ 61,171 (2019).

11. Furthermore, in these bankruptcy proceedings, FERC has consistently maintained that it has public interest obligations with respect to filed rates for wholesale electricity, independent of private contractual rights. The terms and conditions of a FERC-jurisdictional contract are part of the filed rate. *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966-67 (1986) (finding that FERC’s jurisdiction is not limited to rates per se, but extends to the terms and conditions that directly affect wholesale rates); *see also Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 355 (1988) (“The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts.”). Therefore, changes to such terms and conditions would be a “rate change” requiring FERC approval as a condition of plan confirmation under the Bankruptcy Code.

12. FERC, however, has not had the opportunity to consider whether to approve, under the Federal Power Act, changes to the terms and conditions of the PPA Appeal Proceeding

Contracts or any other FERC-jurisdictional agreements that Debtors may seek to assume or reject in connection with the plan confirmation. Nor does the Sixth Amended Plan expressly condition any other potential changes to FERC-jurisdictional filed rates on obtaining FERC approval.

13. For these reasons, the Sixth Amended Plan does not comply with 11 U.S.C. § 1129(a)(6) and cannot be confirmed as proposed. At a minimum, the Confirmation Order must be modified by providing as follows: “As to any rates of Debtors over which any governmental regulatory commission has jurisdiction, any rate change provided for in the Plan is expressly conditioned on the approval of such commission.”

B. Article XI of the Sixth Amended Plan Contains Overly Broad Language Concerning Retention of Jurisdiction

14. Article XI provides, “Notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, on and after the Effective Date, the Bankruptcy Court shall retain *exclusive jurisdiction* over all matters arising out of, or related to, the Chapter 11 Cases and the Plan pursuant to sections 105(a) and 1142 of the Bankruptcy Code to the extent provided under applicable law” (listing matters) (emphasis added).

15. In light of the provisions in the Sixth Amended Plan requiring FERC approval of certain transactions (discussed above), and the pending PPA Appeal Proceeding, the Commission respectfully submits that Article XI’s reference to “exclusive jurisdiction” should be modified to “jurisdiction.” The Bankruptcy Court’s jurisdiction will be defined by 28 U.S.C. § 1334. “[I]t is well-established that the bankruptcy court’s subject matter jurisdiction derives from 28 U.S.C. § 1334, and not from the terms of a confirmed plan.” *See In re Thickstun Bros. Equip. Co., Inc.*, 344 B.R. 515, 521-22 (B.A.P. 6th Cir. 2006) (“[I]f the bankruptcy court does not have post-confirmation jurisdiction under 28 U.S.C. § 1334, plan provisions purporting to create such

jurisdiction are ‘fundamentally irrelevant.’ . . . This is a logical extension of the general rule that ‘neither the bankruptcy court nor the parties can write their own jurisdictional ticket.’”) (citations omitted). *See also In re Wolverine Radio Co.*, 930 F.2d 1132, 1140 (6th Cir. 1991) (bankruptcy court jurisdiction over case involving nondebtors is “determined solely by 28 U.S.C. § 1334(b)”); *In re Middlesex Power Equip. & Marine, Inc.*, 292 F.3d 61, 66-67 (1st Cir. 2002) (28 U.S.C. § 1334 establishes two categories of bankruptcy cases over which federal courts have jurisdiction: “‘cases under title 11,’ over which the district court has original and exclusive jurisdiction, 28 U.S.C. § 1334(a), and ‘proceedings arising under title 11, or arising in or related to cases under title 11,’ over which the district court has original, but not exclusive jurisdiction, 28 U.S.C. § 1334(b).”). Regulatory proceedings before FERC, as contemplated in the Sixth Amended Plan, are not within the Bankruptcy Court’s jurisdiction.

16. Removal of the term “exclusive” would minimize ambiguity concerning the Commission’s authority to conduct the regulatory proceedings contemplated by the Sixth Amended Plan, and any future regulatory proceedings concerning the PPA Appeal Proceeding Contracts. *See Gupta v. Quincy Med. Ctr.*, 858 F.3d 657, 663 (1st Cir. 2017) (“Bankruptcy courts—like all federal courts—may retain jurisdiction to interpret and enforce their prior orders. However, a bankruptcy court may not ‘retain’ jurisdiction it never had”) (citation omitted).

CONCLUSION

For the foregoing reasons, the Court should not confirm the Sixth Amended Plan unless modifications are made to protect the rights of the Commission consistent with these objections.

Dated: August 2, 2019

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CERTIFICATE OF SERVICE

I certify that on August 2, 2019, a true and correct copy of this pleading and supporting declarations was served via electronic means through transmission facilities from the Court upon those parties authorized to participate and access the Electronic Filing System in the above-captioned action and through first class mail on the parties listed below.

/s/ Susanna Y. Chu
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