

170 FERC ¶ 61,278  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

Energy Harbor LLC

Docket No. EL20-35-000

ORDER INSTITUTING SECTION 206 PROCEEDING  
AND ESTABLISHING PAPER HEARING PROCEDURES

(Issued March 30, 2020)

1. This order, establishing paper hearing procedures, is issued pursuant to section 206 of the Federal Power Act (FPA)<sup>1</sup> as a consequence of the issuance of the mandate of the Sixth Circuit Court of Appeals (Sixth Circuit) making effective its December 12, 2019 decision in *FirstEnergy Solutions*.<sup>2</sup> As described below, we institute this proceeding to consider Energy Harbor LLC's (Energy Harbor) proposed rejection in bankruptcy court of certain contracts that are subject to the Commission's jurisdiction (Jurisdictional Contracts).<sup>3</sup>

**I. Background**

2. On March 31, 2018, FirstEnergy Solutions Corp. (FES) and each of its direct and indirect subsidiaries filed petitions for relief under Chapter 11 of the Bankruptcy Code

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<sup>1</sup> 16 U.S.C. § 824e (2018).

<sup>2</sup> *In re FirstEnergy Solutions Corp.*, 945 F.3d 431 (Sixth Cir. 2019).

<sup>3</sup> The Jurisdictional Contracts are: Wind Power Purchase Agreements between FES and Allegheny Ridge Wind Farm, LLC (Phase 1 and Phase 2); Power Purchase Agreement between FES and Blue Creek Wind Farm LLC; Wholesale Purchase and Sale Agreement for Wind Energy between FES and Casselman Windpower LLC; Renewable Resource Power Purchase Agreement between FES and High Trail Wind Farm, LLC; Power Purchase Agreement between FES and Krayn Wind LLC; Power Purchase Agreement between FES and Maryland Solar LLC; Master Power Purchase and Sale Agreement between FES and Meyersdale Windpower LLC; Wind Power Purchase Agreements between FES and North Allegheny Wind LLC (Phase 3 and Phase 4); Master Power Purchase & Sale Agreement between FES and Forked River Power, LLC; and Multi-Party Intercompany Power Agreement with Ohio Valley Electric Corporation.

with the United States Bankruptcy Court for the Northern District of Ohio. FES sought, among other things, to reject in bankruptcy the Jurisdictional Contracts, contending that the contracts committed FES or certain of its subsidiaries to purchase energy they no longer wanted. The next day, FES initiated an adversary proceeding in the bankruptcy court against the Commission, seeking to prevent the continuation of a Commission proceeding initiated by Ohio Valley Electric Corporation (OVEC),<sup>4</sup> and seeking to prevent the Commission from entering any order requiring FES to continue compliance with its obligations under the Jurisdictional Contracts.<sup>5</sup> On April 2, 2018, the bankruptcy court issued a temporary restraining order against the Commission.<sup>6</sup>

3. On May 18, 2018, the bankruptcy court issued a preliminary injunction, barring the Commission from initiating or continuing proceedings to determine if modification or abrogation of the Jurisdictional Contracts would be permissible under the FPA or if continued compliance was instead required.<sup>7</sup> The bankruptcy court also approved the proposed rejection of the Jurisdictional Contracts.<sup>8</sup>

4. The Commission directly appealed the preliminary injunction to the Sixth Circuit. The Commission's appeal was consolidated with appeals made by OVEC and other parties of two orders of the bankruptcy court that granted FES's motions to reject the agreements with OVEC and Maryland Solar LLC.

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<sup>4</sup> *Ohio Valley Elec. Corp.*, Docket No. EL18-135-000 (filed Mar. 26, 2018).

<sup>5</sup> *FirstEnergy Solutions Corp. v. FERC*, No. 5:18-ap-05021 (Bankr. N.D. Ohio) (filed Apr. 1, 2018).

<sup>6</sup> *FirstEnergy Solutions Corp. v. FERC*, No. 5:18-ap-05021, Docket Entry 11 (Bankr. N.D. Ohio Apr. 2, 2018).

<sup>7</sup> *In re FirstEnergy Solutions Corp.*, 2018 WL 2315916 (Bankr. N.D. Ohio May 18, 2018).

<sup>8</sup> *In re FirstEnergy Solutions Corp.*, No. 5:18-50757, Docket Entry 502 (Bankr. N.D. Ohio May 9, 2018); *In re FirstEnergy Solutions Corp.*, No. 5:18-50757, Docket Entry 731 (Bankr. N.D. Ohio Jun. 12, 2018); *In re FirstEnergy Solutions Corp.*, No. 5:18-50757, Docket Entry 732 (Bankr. N.D. Ohio Jun. 12, 2018); *In re FirstEnergy Solutions Corp.*, No. 5:18-50757, Docket Entry 733 (Bankr. N.D. Ohio Jun. 12, 2018); *In re FirstEnergy Solutions Corp.*, No. 5:18-50757, Docket Entry (Bankr. N.D. Ohio Jun. 12, 2018); *In re FirstEnergy Solutions Corp.*, No. 5:18-50757, Docket Entry 770 (Bankr. N.D. Ohio Jun. 18, 2018); *In re FirstEnergy Solutions Corp.*, No. 5:18-50757, Docket Entry 989 (Bankr. N.D. Ohio Jul. 18, 2018); *In re FirstEnergy Solutions Corp.*, No. 5:18-50757, Docket Entry 1080 (Bankr. N.D. Ohio Jul. 31, 2018).

5. On December 12, 2019, the Sixth Circuit issued its opinion in *FirstEnergy Solutions*,<sup>9</sup> in which it addressed the nature and extent of jurisdiction between the bankruptcy court and the Commission,<sup>10</sup> reversed the injunction entered by the bankruptcy court,<sup>11</sup> and reversed the rejection of the Jurisdictional Contracts, and remanded the rejection proceedings to the bankruptcy court for further consideration.<sup>12</sup>

6. The Sixth Circuit first considered the competing jurisdictional arguments offered by the parties concerning the bankruptcy court's and Commission's roles in reviewing the proposed rejection of the Jurisdictional Contracts. After reviewing relevant precedent, the Sixth Circuit held "that the public necessity of available and functional bankruptcy relief is generally superior to the necessity of FERC's having complete or exclusive authority to regulate energy contracts and markets."<sup>13</sup> The Sixth Circuit then concluded that, "for present purposes, the [Jurisdictional Contracts] are not de jure regulations but, rather, ordinary contracts susceptible to rejection in bankruptcy," and that "if the bankruptcy court's jurisdiction is not *exclusive* – and as will be explained, it is not – its position in the *concurrent* jurisdiction is nonetheless primary or superior to FERC's position."<sup>14</sup> Ultimately, the Sixth Circuit held that the "bankruptcy court has jurisdiction to decide whether [FES], as a Chapter 11 debtor-in-possession, may reject the [Jurisdictional Contracts], meaning that [FES] can reject the contracts subject to proper bankruptcy court approval and FERC cannot independently prevent it."<sup>15</sup>

7. The Sixth Circuit then turned to the bankruptcy court's injunction and held that "the bankruptcy court had the limited authority (jurisdiction) to enjoin FERC from 'issuing any order . . . [that would] require or coerce [FES] to continue performing [the contracts] or limit[ ] [FES] to seeking abrogation . . . under the [FPA].'"<sup>16</sup> However, the Sixth Circuit determined that the broad injunction issued by the bankruptcy court against the Commission went too far. "[T]he bankruptcy court exceeded its authority by

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<sup>9</sup> *In re FirstEnergy Solutions Corp.*, 945 F.3d 431.

<sup>10</sup> *See id.* at 446.

<sup>11</sup> *See id.* at 452.

<sup>12</sup> *See id.* at 454-55.

<sup>13</sup> *Id.* at 446.

<sup>14</sup> *Id.* (emphasis in original).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 452.

enjoining FERC from ‘initiating or continuing any proceeding’ or ‘interfer[ing] with [its] exclusive jurisdiction,’ particularly because the bankruptcy court did not have exclusive jurisdiction.”<sup>17</sup> As a consequence:

through this rash and unnecessary overreach, the bankruptcy court has prevented FERC from timely completing an investigation into or holding a hearing about the public interest in the proposed rejection of these contracts, which . . . would have been appropriate and might have been valuable or beneficial to the ultimate determination.<sup>18</sup>

8. The Sixth Circuit went on to hold that the bankruptcy court must reconsider the proposed rejection of the Jurisdictional Contracts using a standard that is higher than the business judgment standard that ordinarily applies in bankruptcy cases. The bankruptcy court instead must consider the impact of rejection on the “public interest.”<sup>19</sup>

9. With respect to the bankruptcy court’s consideration of the proposed rejection of the Jurisdictional Contracts on remand, the Sixth Circuit required that the bankruptcy court give the Commission “a *reasonable* accommodation” in providing the Commission’s views to the bankruptcy court with respect to whether the rejection is consistent with the public interest.<sup>20</sup> The Sixth Circuit went on to note that, because the bankruptcy court’s injunction prevented the Commission from taking any steps to consider the public interest, “a ‘reasonable’ delay in this remand may be much longer than it would be in an ordinary case.”<sup>21</sup>

10. Ultimately, the Sixth Circuit found that when a Chapter 11 debtor moves the bankruptcy court for permission to reject a filed energy contract that is otherwise governed by the Commission, via the FPA, the bankruptcy court “must consider the public interest and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach (e.g., under the *Mobile–Sierra* doctrine), within a reasonable time.”<sup>22</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 454.

<sup>20</sup> *Id.* (emphasis in original).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 455.

11. Notwithstanding the reversal of the proposed rejection of the Jurisdictional Contracts, FES went forward with the reorganization approved by the bankruptcy court, which involved FES converting the debt of certain FES creditors into equity of a newly-established corporation (New HoldCo), and merging FES into New HoldCo, leaving FES as the surviving corporation owned by its former creditors instead of FirstEnergy Corp. The Commission issued its FPA section 203 approval on February 14, 2020,<sup>23</sup> the reorganization closed on February 27, 2020, and FES emerged from Chapter 11 bankruptcy protection, renamed as Energy Harbor.

12. On March 23, 2020, the Sixth Circuit's mandate was issued, putting into effect its reversal of the bankruptcy court's injunction and its reversal of the bankruptcy court's rejection of the Jurisdictional Contracts.

## II. Discussion

13. As explained above, the Sixth Circuit ordered that the bankruptcy court must apply a public interest standard to the proposed rejection of the Jurisdictional Contracts and must take the Commission's views on the public interest of such rejection into account.<sup>24</sup> In order to provide the Commission's views, we are now initiating a hearing and investigation under section 206 of the FPA.

14. The question of whether the public interest requires the modification or abrogation of jurisdictional agreements has been addressed on numerous occasions since 1956, when the Supreme Court issued two related decisions establishing what has come to be known as the *Mobile-Sierra* doctrine.<sup>25</sup> More recently, in *Morgan Stanley* and *NRG Power Marketing*, the Supreme Court described the *Mobile-Sierra* doctrine as follows:

Under the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission (FERC or Commission) must presume that the rate set out in a freely negotiated wholesale-energy contract meets the “just and reasonable”

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<sup>23</sup> *FirstEnergy Solutions Corp.*, 170 FERC ¶ 61,096 (2020).

<sup>24</sup> *See In re FirstEnergy Solutions Corp.*, 945 F.3d at 452-55.

<sup>25</sup> *See United Gas Pipeline Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332 (1956) (*Mobile*); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.<sup>26</sup>

15. In *Sierra*, the Court identified three circumstances in which the public interest would mandate revising or terminating a jurisdictional contract: “[1] where it might impair the financial ability of the public utility to continue its service, [2] cast upon other consumers an excessive burden, or [3] be unduly discriminatory.”<sup>27</sup> In the 64 years since, the Supreme Court and the Courts of Appeals have issued numerous decisions interpreting and refining the requirements of the *Mobile-Sierra* doctrine. In considering the public interest standard applicable to the proposed rejection of the Jurisdictional Contracts, we intend to apply the *Mobile-Sierra* doctrine, including the subsequent precedents, as applicable.<sup>28</sup>

16. We now are initiating a paper hearing to consider these public interest factors. We direct Energy Harbor to submit a filing in this docket no later than 30 days from the date of this order. This filing shall identify each Jurisdictional Contract Energy Harbor proposes to reject in bankruptcy court and, for each Jurisdictional Contract, shall include the following information:

- a. The status of any negotiations with the Jurisdictional Contract counterparty regarding rejection.<sup>29</sup>
- b. An explanation as to why the rejection of the contract satisfies the public interest standard.

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<sup>26</sup> *Morgan Stanley Capital Group Inc. v. Publ. Util. Dist. No.1 of Snohomish Cnty.*, 554 U.S. 527, 530 (2008); *accord NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 558 U.S. 165, 167 (2010).

<sup>27</sup> *Sierra*, 350 U.S. at 355.

<sup>28</sup> The Sixth Circuit opinion expressly contemplated that the *Mobile-Sierra* presumption would apply to the contracts FES sought to reject and it appears that no party contended otherwise in litigation before the bankruptcy court or on appeal. *See FirstEnergy Solutions Corp.*, 945 F.3d at 438-39 & n.7, 444, 454-55.

<sup>29</sup> We understand that Energy Harbor has reached agreement with a number of the counterparties to the Jurisdictional Contracts on the termination of their contracts. In some instances, the counterparties have moved forward as a consequence of their agreement regarding rejection. *See, e.g., Krayn Wind LLC*, 170 FERC ¶ 62,072 (2020) (approving sale of assets used in a rejected power sales agreement where the rejection by FES caused the counterparty to enter receivership).

- i. To the extent that such explanation relies on the standard that the contract might impair Energy Harbor's financial integrity, include a discussion of the effect of the completed bankruptcy reorganization and Energy Harbor's emergence from Chapter 11 bankruptcy protection on the application of this standard.
- c. All data and other evidence supporting the conclusion that rejection of the contract is in the public interest.
- d. Any other argument or evidence that Energy Harbor believes is relevant to the Commission's consideration.

17. No later than 30 days after Energy Harbor's filing, each counterparty to a contract that opposes rejection may submit a response, including argument and evidence, as to why rejection of that contract is not permitted under the public interest standard. To the extent that a counterparty requests compensation for any period of non-compliance with its contract, that counterparty shall detail the applicable contractual provisions and provide a calculation of the requested compensation. Any counterparty that does not submit such a response shall be deemed to acquiesce in the rejection of its contract for the purpose of the Commission's public interest determination. Other entities that are not counterparties also may submit filings supporting or opposing the rejection of one or more of the contracts Energy Harbor proposes to reject.

18. No later than 15 days after the responses have been submitted, Energy Harbor and any other interested party may submit a reply to one or more of such responses.

19. We acknowledge that the parties' ability to comply with the above schedule may be affected by the COVID-19 pandemic. We are open to considering requests for extensions of time as required for parties to make a full and complete submission. To avoid the need for in-person contact when preparing pleadings or testimony in this proceeding, electronic signatures are sufficient and notarization of sworn declarations is not necessary.

20. It is the Commission's intention to, within a reasonable time after responses have been submitted, take action consistent with the Sixth Circuit's *FirstEnergy Solutions* decision.

21. We note that the Sixth Circuit reversed the bankruptcy court's rejection of the Jurisdictional Contracts. Consequently, we deem such contracts to be in effect unless and until terminated or amended in accordance with applicable law.

22. In cases where, as here, the Commission institutes a proceeding under FPA section 206(b), the Commission must establish a refund effective date that is no earlier than publication of notice of the Commission's initiation of the proceedings in the

*Federal Register*, and no later than five months subsequent to that date.<sup>30</sup> Consistent with Commission precedent,<sup>31</sup> we will establish a refund effective date at the earliest date allowed, i.e., the date the notice of the initiation of this proceeding is published in the *Federal Register*.

23. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. We expect to issue a final order in these proceedings within the 180-day period contemplated under section 206(b).

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), the Commission hereby institutes proceedings in Docket No. EL20-x-000, as discussed in the body of this order.

(B) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the section 206 proceedings in Docket No. EL20-35-000.

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<sup>30</sup> 16 U.S.C. § 824e(b).

<sup>31</sup> See, e.g., *PJM Interconnection, L.L.C.*, 90 FERC ¶ 61,137 (2000); *Cambridge Elec. Light Co.*, 75 FERC ¶ 61,177, *clarified*, 76 FERC ¶ 61,020 (1996); *Canal Elec. Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).



(C) The refund effective date established pursuant to section 206 of the FPA for the above-captioned proceedings shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (B) above.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.