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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re: **PG&E CORPORATION** **Debtor.** **Tax I.D. No. 94-3234914**	Case Nos. 19 -_____ (___) 19 -_____ (___) Adv. Pro. No. 19-_____ (___) Chapter 11
In re: **PACIFIC GAS AND ELECTRIC COMPANY** **Debtor.** **TAX I.D. NO. 94-0742640**	
PG&E CORPORATION, PACIFIC GAS AND ELECTRIC COMPANY, **Plaintiffs,** **v.** **FEDERAL ENERGY REGULATORY COMMISSION** **Defendant.**	**DEBTORS' COMPLAINT FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

In accordance with 28 U.S.C. § 2201, 11 U.S.C. §§ 105, 106(a), 362(a), and 365, and Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") 7001(7), (9) and 7065, PG&E Corporation ("**PG&E Corp.**") and Pacific Gas and Electric Company (the "**Utility**"), as debtors and debtors in possession (collectively, "**PG&E**" or the "**Debtors**") in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), and as Plaintiffs in the above-captioned adversary proceeding, allege for their complaint ("**Complaint**") for declaratory judgment and preliminary and permanent injunctive relief against the Federal Energy Regulatory Commission ("**FERC**"), upon knowledge of their own acts and upon information and belief as to other matters, as follows:

NATURE OF THE ACTION

1. Aware from required public filings that the Debtors would be seeking Chapter 11 protection on January 29, 2019, beginning on January 18, 2019, several counterparties to wholesale power purchase agreements with the Debtors initiated proceedings before FERC requesting—on an expedited basis—that FERC order that "if it files a petition for bankruptcy, PG&E may not abrogate, amend or reject in bankruptcy any of the rates, terms and conditions of its wholesale power purchase agreements subject to [FERC]'s jurisdiction without first obtaining approval from [FERC]" (the "**FERC Proceedings**"). On January 25, 2019, FERC issued an order concluding that "this Commission and the bankruptcy courts have concurrent jurisdiction to review and address the disposition of wholesale power contracts sought to be rejected through bankruptcy," (the "**NextEra Order**"). A copy of the NextEra Order is attached as **Exhibit 1**. On January 28, 2019, FERC issued an order, in a separate proceeding, reaching a substantially similar conclusion (the "**Exelon Order**," and together with the NextEra Order, the "**FERC Order**"). A copy of the Exelon Order is attached hereto as **Exhibit 2**.

2. This adversary proceeding arises out of the Debtors' request that this Court: (i) issue a declaratory judgment confirming its exclusive jurisdiction over the Debtors' rights to reject certain executory power purchase agreements or other FERC-regulated agreements (collectively "**PPAs**") under section 365 of title 11 of the United States Code (the "**Bankruptcy Code**"), and further declaring that FERC does not have "concurrent" jurisdiction, or any jurisdiction, over the

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determination of whether the Debtors' rejection of any of their PPAs should be authorized, and that the Debtors do not need to obtain approval from FERC to reject any of their PPAs; and (ii) pursuant to section 362 of the Bankruptcy Code, issue an order enforcing the automatic stay as to the FERC Proceedings, any entity's attempt to enforce the FERC Order, and any action by FERC, or any other entity, that would attempt to divest or otherwise nullify or impede this Court's exclusive authority to approve or deny the Debtors' requests to assume or reject executory contracts under section 365 of the Bankruptcy Code (collectively, "**FERC Action**"); and (iii) to the extent the automatic stay does not apply, exercise its powers under section 105 of the Bankruptcy Code to preliminarily and permanently enjoin any FERC Action, in order to preserve the Bankruptcy Court's jurisdiction, as well as to prevent irreparable harm to the Debtor's estates and the reorganizational goals of the Bankruptcy Code. To be clear, the Debtors have not made any decisions yet regarding whether to assume or reject any PPAs in these Chapter 11 Cases.

THE PARTIES

3. PG&E Corp. is a holding company whose primary operating subsidiary is the Utility, a public utility operating in northern and central California. The Utility provides natural gas and utility services to approximately 16 million customers. As of September 18, 2018, the Debtors, on a consolidated basis, had reported book value of assets and liabilities of approximately $71.4 billion and $51.7 billion, respectively.

4. Upon information and belief, defendant FERC is a federal administrative agency with its headquarters at 888 First Street, N.E., Washington, DC 20426. FERC has certain authority under section 824 of title 16 of the United States Code (the "**Federal Power Act**") to regulate the sale of electric energy at wholesale in interstate commerce.

JURISDICTION AND VENUE

5. This adversary proceeding arises in and relates to the Chapter 11 Cases. The Court has jurisdiction to consider this adversary proceeding and over the claims against FERC pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). The Debtors consent to the entry of a final order by the Court in connection with this adversary proceeding to the

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extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

6. Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

FACTUAL BACKGROUND

The Chapter 11 Cases

7. The Debtors' decision to seek relief under chapter 11 followed a comprehensive review of a variety of factors and the issues facing the Debtors. It represents the only viable alternative under the stark circumstances with which the Debtors are faced, and is in the best interests of all of the Debtors' stakeholders, including their millions of customers, employees, wildfire claimants, other creditors, employees, and shareholders. The Chapter 11 Cases were necessitated by a confluence of factors resulting from the catastrophic and tragic wildfires that occurred in Northern California in 2017 and 2018, and the Debtors' potential liabilities arising therefrom. The multitude of pending claims and lawsuits, and the thousands of additional claims that will be asserted, made it abundantly clear that the Debtors could not continue to address those claims and potential liabilities in the California state court system, continue to deliver safe and reliable service to its 16 million customers, and remain economically viable. As noted in the Debtors' Form 8-K filed on January 14, 2019 with the United States Securities Exchange Commission, the Debtors' potential liability with respect to the 2017 and 2018 Northern California wildfires could exceed $30 billion, without taking into account potential punitive damages, fines and penalties or damages with respect to "future claims." Under certain circumstances, the Debtors' potential liability could be substantially greater.

8. The Chapter 11 Cases represent the best means to preserve and maximize the value of the Debtors' business enterprise and are in the best interests of all of their economic stakeholders, including wildfire claimants, the Debtors' other creditors, and their business partners. Chapter 11 will provide the Debtors and all parties in interest with one forum to comprehensively address and resolve the Debtors' wildfire liabilities in a fair and expeditious manner, and will assure equality of treatment among all similarly-situated creditors of the Debtors. Additionally, the Chapter 11 Cases will assure that the Debtors have the resources—financial and otherwise—to sustain their operations,

provide critical utility services safely and reliably, and continue its efforts to rebuild and restore the communities which it serves.

9. The Debtors have already made tangible progress towards reorganization. For example, they have secured $5.5 billion in DIP financing that will allow them to continue to operate as they reorganize, and will ensure the continual income of significant cash flow from a customer base that in some instances has no other option but to rely upon the Debtors for critical services, such as electricity and natural gas. Indeed, as a utility, the Debtors effectively must reorganize for the benefit of both the community and the people that they serve.

The Debtors' FERC-Regulated PPAs

10. Recent changes in the energy landscape have significantly altered the Debtors' electricity procurement needs going forward. Specifically, the Debtors' current electricity supply portfolio, decreasing bundled electric load, mandated procurement beyond bundled customer needs, and continuing regulatory oversight now requires that the Debtors comprehensively assess how each PPA fits within the Debtors' energy portfolio.

11. As of December 2017, the Utility's PPAs represent contractual commitments aggregating approximately $42 billion. The Utility's $42 billion in PPA commitments are approximately three times the Debtors' 2017 gross revenues and represent the total undiscounted future obligations under PPAs that have been approved by the California Public Utilities Commission (the "**CPUC**"), as well as other future payment obligations. As of January 2019, the Utility is a counterparty as buyer under at least three hundred eighty seven (387) PPAs, which involve approximately three hundred fifty (350) counterparties, for a total of approximately 13,668 Megawatts of contracted capacity.

12. The majority of the wattage the Utility is currently obligated to purchase is pursuant to PPAs it has entered into to satisfy renewable energy requirements propounded by the State of California. Over the past approximately fifteen years, California has pursued aggressive reductions in greenhouse gas emissions from its electric sector in support of a broader state goal to transition to a sustainable, low-carbon economy. To that end, the Utility entered into hundreds of PPAs as a buyer of renewable energy to comply both with California's Renewables Portfolio Standard Program

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("**RPS**"), as well as with additional mandates specific to the Debtors, which are independent of their specific bundled service load requirements or need to procure renewable technologies or small-scale renewable generation.

13. As of January 2019, the Utility is a counterparty as buyer to two hundred ninety eight (298) PPAs eligible to satisfy the State of California's RPS requirements, equivalent to approximately 7,779 Megawatts of contracted capacity. In addition to RPS-eligible contracts, the State of California has required the Utility to enter into energy storage contracts. The Utility is a buyer under nine (9) energy storage agreements, totaling 540 Megawatts of contracted capacity. In total, in order to achieve this broader state policy objective, and at the direction of the CPUC, the Utility committed billions of dollars by signing hundreds of PPAs for renewable or energy storage resources, thereby creating the infrastructure needed to support California's policy objectives.

14. The Utility's entrance into these PPAs has financed the building of thousands of Megawatts of renewable energy generation resources, and in so doing contributed to significant price reductions for renewable energy resources currently available in the market. As a result, many of the Utility's agreements to procure renewable energy resources, which are typically long-term—15 to 20-plus years in length—obligate the Debtors at rates that are significantly higher rates than are currently available in the renewable resources market. On the contrary, other load serving entities, *i.e.*, the Debtors' competitors, are able to procure required renewable energy resources at those lower rates.

15. The Debtors' contracted portfolio of non-RPS-eligible generating resources includes qualifying facilities, irrigation districts, and tolling agreements, and including electric transmission agreements is comprised of eighty (80) PPAs, totaling approximately 5,349 Megawatts of contracted capacity (excluding those energy storage resources discussed *supra* at ¶ 13). In addition, the Utility has built or contracted for utility-owned generating ("**UOG**") facilities.

16. Given that many of the Utility's power supply contracts are at above-market rates, and in light of the decrease in their bundled electric load, as discussed *infra* at ¶¶ 19-24, the Debtors have undertaken significant efforts to reduce their supply portfolio in recent years. For example, the Debtors have worked with legislators and regulators to consider the Debtors' current position when

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proposing or adopting RPS and other energy storage mandates. Specifically, in regulatory proceedings at the CPUC, the Debtors have consistently raised concerns regarding continued procurement in a declining load environment, and have requested the reduction or elimination of certain procurement mandates. The Debtors' specific actions in this regard have included developing and submitting in long-term procurement proceedings before the CPUC alternative load forecasts more reflective of the market-wide declining bundled load, advocating against unneeded RPS procurement, and proposing a framework to allocate or sell to CCA and DA providers (discussed *infra* at ¶¶ 19-22) excess electricity and capacity products.

17. The Debtors also continue to evaluate the Utility's UOG facilities and have been engaged in efforts to auction certain hydroelectric assets in order to reduce the size of their supply portfolio. For example, in 2016, the Utility and a number of other stakeholders filed a proposal with the CPUC to retire the Utility's 2,200 Megawatt Diablo Canyon facility at the end of its current operating license in 2024-2025. The CPUC approved this proposal and the Utility intends to shut down Diablo Canyon when the relevant licenses expire. The Utility also filed with the CPUC the proposed sale of the Utility's Merced Falls and Narrows hydroelectric facilities. Moreover, the Utility is engaged in activities to divest additional hydroelectric facilities, including those facilities associated with the DeSabla-Centerville and Miocene projects, Kern and Tule projects, and the Deer Creek project (a portion of the Drum-Spaulding project).

18. Additional steps taken by the Debtors to reduce their energy supply portfolio on a go-forward basis include suspending voluntary procurement of RPS resources, conducting periodic sales solicitations to sell their excess RPS capacity products and electricity, and engaging in prudent contract administration practices including amending, restructuring, and terminating contracts where appropriate. Specifically, as of January 2019, the Utility is counterparty to sixty-eight (68) wholesale contracts to sell capacity products and electricity. Forty-six (46) of these contracts involve the sale of capacity products, and twenty-two (22) contracts involve the sale of electricity, including RPS-eligible electricity products.

19. In recent years, there has been a significant decrease in demand for the Debtors' electric supply service, which has resulted in the Debtors providing less electricity to fewer

customers. There are three primary reasons for this significant bundled electric load decrease: (i) the rapid expansion of retail choice programs available to customers in California, including Direct Access ("**DA**") and Community Choice Aggregation ("**CCA**"); (ii) increases in distributed generation ("**DG**"), primarily in the form of rooftop solar; and (iii) the ongoing success of California's energy efficiency ("**EE**") programs.

20. Direct Access, or DA, has become a significantly more prevalent alternative to the Debtors' services in recent years. As it does the Debtors, the CPUC regulates DA providers, which can sell electric supply directly to customers including industrial, commercial, and in some cases residential customers. While DA providers began to bring retail competition to the California electric power markets beginning in 1998, during the California energy crisis, new DA service was suspended until 2009 when California adopted California Public Utilities Code section 365.1(b), allowing the limited reopening of DA service up to a certain annual kilowatt-hour limit. As a result, the DA load in the Debtors' service territory increased from 5,574 annual gigawatt-hours ("**GWh**") in 2009 to 9,833 GWh in 2015. Moreover, while DA load has remained relatively consistent since 2015, new legislation passed in 2018 requires the CPUC to increase the current DA cap by 4,000 GWh statewide, apportioned among investor-owned utility ("**IOU**") service territories, including those of the Debtors, by June 1, 2019. While the CPUC has not yet implemented this statute, the Debtors expect that the DA load in its service area will grow when it does.

21. A significant number of consumers in the Debtors' service area also have the option of obtaining their electricity via Community Choice Aggregation, or CCA. The CPUC regulates certain aspects of CCA programs, which allow cities, counties, and other qualifying governmental entities within the Debtors' service territory to purchase and/or generate electricity for their residents and businesses. Unlike DA service, which serves only specific customers and can in turn be scattered, if a city or county elects to offer CCA service, the CCA provider generally ends up serving most of the customers in that geographic area. The CPUC has stated that its expectation is that CCA programs will serve a substantial portion of the electric load in the Debtors' service area by 2020.

22. The amount of bundled electric load serviced by DA and CCA providers has increased significantly in recent years. For example, from 2016 and 2017, the percentage of total

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load in the Debtors' service territory served by DA and CCA providers increased by 8%, from 17% to 25%. From 2017 to 2018, the Utility estimates that DA and CCA load increased by another 14%, to 39%, and expects that DA and CCA providers will service 55% of the total bundled electric load in the Debtors' service area by 2020.

23. The amount of distributed generation, or DG, in the Debtors' service area has increased considerably over the last decade, primarily from the installation of residential and commercial solar energy systems driven by the Investment Tax Credit and California's Net Energy Metering structure. In 2010, the amount of bundled electric load served by DG in the Debtors' service area was 429 Megawatts. By the end of 2015, the amount of load served by DG had increased by 340% percent to 1,847 Megawatts. Additionally, in 2018, the California Energy Commission adopted regulations requiring all new California single-family homes, and apartment and condominium complexes of three stories or less, to be equipped with solar panels. This requirement will significantly further increase the load served by DG in the Debtors' service area.

24. In 2017, Energy Efficiency, or EE, projects in the Debtors' service area represented savings of 1,487 gross GWh. Moreover, while EE programs have long been a top priority for California, two 2015 bills that establish annual targets for statewide EE savings and endorse EE programs to bring existing buildings up to current energy consumptions standards are projected to continue to reduce California's energy consumption.

25. All of the Debtors' major supply portfolio decisions are subject to review by the CPUC. Under California statutory law, IOUs are required to submit specific procurement plans to the CPUC for its review and approval. To this end, the CPUC has generally initiated biennial proceedings in which IOUs submit their procurement plans, which include proposals for procurement of third-party contracted power supply. Through these proceedings, the CPUC reviews and approves each IOUs' respective procurement authority and considers the amount of procurement needed based on bundled electric load forecasts. The CPUC approved the Utility's current procurement plan in October 2015, and the Utility files periodic updates to this plan with the CPUC, including most recently in January 2019 to reflect changes in circumstances related to declining load and excess capacity products.

26. Notably to the Debtors' assessment of their PPAs, the CPUC recently indicated that it will consider the portfolio optimization activities of California's IOUs, all of which are losing substantial electric load, including allocation of third-party contracts to DA and CCA providers and auctioning off excess resources, as part of its 2019 rulemaking process.

27. The CPUC further oversees the Utility's procurement activities via various other regular proceedings, including the Energy Resource Recovery Account (ERRA) Forecast Application proceeding, which includes a forecast of procurement activities and costs for the upcoming calendar year. This proceeding involves a review of the Utility's proposed procurement and approves rates for the next calendar year. As of January 28, 2019, the CPUC has not issued a final decision with respect to the Utility's ERRA Forecast Application for 2019. The Debtors expect to evaluate the effect of that ruling on their electric supply portfolio upon its issue.

<u>The Necessity of this Adversary Proceeding</u>

28. The Debtors' "authority to reject executory contracts is vital to the basic purpose of a Chapter 11 reorganization." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("rejection can release the [D]ebtor[s'] estate[s] from burdensome obligations that can impede a successful reorganization."). The Bankruptcy Code provides a debtor the right to make assumption and rejection decisions "at any time before the confirmation of a plan." 11 U.S.C. § 365(d)(2).

29. Due to the incontrovertible economic significance of the Debtors' PPAs, as well as the continuously evolving competitive and regulatory factors affecting these agreements, the Debtors' PPA rejection and assumption decisions under section 365 of the Bankruptcy Code will play a vital role in the reorganized Debtors' post-emergence operations and financial profile. As such, it is vital to a successful reorganization that the Debtors' determinations regarding whether to assume or reject their PPAs be assessed by this Court pursuant to the business judgment standard to which any other debtor is subject.

30. As discussed *supra* at ¶ 1, on January 25, 2019, and again on January 28, 2019, FERC proclaimed that it shares with this Court so-called "concurrent jurisdiction to review and address the disposition of wholesale power contracts sought to be rejected through bankruptcy." **Exhibit 1** (NextEra Order) at 12; **Exhibit 2** (Exelon Order) at 12. According to FERC, "a party to a

Commission-jurisdictional wholesale power purchase agreement must obtain approval from both the Commission and the bankruptcy court to modify the filed-rate and reject the contract, respectively." **Exhibit 1** (NextEra Order) at 12; **Exhibit 2** (Exelon Order) at 11. Because, in FERC's view, rejection of a Commission-jurisdictional contract in bankruptcy "alters the essential terms and conditions of the contract and the filed rate," FERC believes that its "approval is required" in order for the Debtors to reject any of their PPAs. **Exhibit 1** (NextEra Order) at 13; **Exhibit 2** (Exelon Order) at 12. In other words, according to FERC, this Court's judgment is insufficient to render decisions under section 365 with respect to the Debtors' PPAs and is subject to FERC's further review and potential nullification.

31. Absent the relief sought herein, the FERC Order could very well deprive the Debtors of their congressionally-granted right to evaluate their PPAs in the context of their ongoing business operations, and to ultimately determine in their business judgment whether to assume or reject such agreements, as contemplated by section 365 of the Bankruptcy Code. The Debtors cannot take this risk given the significance of their PPAs.

<u>This Court Has Exclusive Jurisdiction Over the Debtors' Section 365 Rights</u>

32. The Debtors' PPAs are executory contracts and are property of the estate, over which this Court has exclusive jurisdiction. *See* 28 U.S.C. §§ 157, 1334(e). This Court has exclusive jurisdiction over the Debtors' rights to reject any of its PPAs under section 365 of the Bankruptcy Code. Indeed, while Congress has set forth specific exceptions to a Debtors' general section 365 authority to reject contracts, including for contracts subject to extensive regulations, the absence of any exception for contracts subject to FERC jurisdiction demonstrates that Congress intended section 365 of the Bankruptcy Code to apply to contracts subject to FERC regulation.

33. FERC does not have "concurrent" jurisdiction over this Court's exclusive authority to approve or deny the Debtors' requests to assume or reject executory contracts under section 365 of the Bankruptcy Code. In fact, FERC Action raises serious constitutional questions affecting this Court's exclusive jurisdiction over the Debtors' estate. "FERC is a creature of statute, having no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Atl. City Elec. Co. v. F.E.R.C.*, 295 F.3d 1, 8 (D.C. Cir. 2002). Congress has never given

FERC the authority to review this Court's section 365 decisions. Rather, the Federal Power Act "charges FERC with ensuring, that "[a]ll rates and charges made, demanded, or received' by power wholesalers be 'just and reasonable." 16 U.S.C. § 824.

34. FERC's exclusive authority under the Federal Power Act, on its face, does not extend to a debtor's rights to reject PPAs under section 365. In rejection proceedings, the Bankruptcy Court simply determines whether the debtor has properly exercised its business judgment in seeking to cease performing executory agreements such as the Debtors' PPAs here. The Bankruptcy Court does not determine whether the rates in contracts subject to rejection are just or reasonable, nor does it attempt to modify any other terms or conditions of any such agreements. Rather, a debtors' rejection of an executory contract results in its breach, resulting in a damages claim against the estate like any other general unsecured creditor.

Absent an Injunction, the Debtors will Suffer Irreparable Harm

35. Absent the injunctive relief sought herein, FERC Action would irreparably harm the Debtors by potentially stripping this Court of its exclusive jurisdiction over the Debtors' estate, threatening the integrity of the bankruptcy process, and otherwise burdening the Debtors.

36. As discussed *supra* at ¶ 32, this Court has exclusive jurisdiction over the Debtors' decision to reject any of their PPA's agreements under section 365 of the Bankruptcy Code. The FERC Order explicitly decreeing that it has "concurrent jurisdiction to review and address the disposition of wholesale power contracts sought to be rejected through bankruptcy," is a direct threat to the Court's exclusive authority in this regard, as are the FERC Proceedings and any other FERC Action.

37. The FERC Order and any FERC Action also threaten the integrity of the Bankruptcy Code. In order to promote a successful reorganization, section 365 of the Bankruptcy Code provides debtors with a right, subject to Bankruptcy Court approval, to rid themselves of burdensome obligations in order to facilitate a successful reorganization. Under FERC's theory of "concurrent" jurisdiction, however, the Debtors could meet all of the requirements to reject under section 365 of the Bankruptcy Code, as well as prevailing Ninth Circuit law, only to have FERC impose a higher burden than the Bankruptcy Code requires. Such FERC Action, including as reflected in the FERC

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Order, would amount to little more than an administrative repeal of section 365 by divining a statutory exception that was never enacted by Congress.

38. The FERC Order and FERC Action would also threaten the integrity of the Bankruptcy Code by allowing the Debtors' PPA counterparties to seize an undue advantage over other creditors. Specifically, any attempt by FERC to force the Debtors to perform under any particular PPA would convert that PPA counterparty's prepetition, unsecured rejection damages claims into first priority administrative expense claims. Such a result would threaten the equality of creditors as well as the proper functioning of the reorganization process, and would be incredibly inequitable to the Debtors' other stakeholders. The Debtors' PPA counterparties' windfall would come directly from other general unsecured creditors, *e.g.*, general unsecured creditors, including the victims of the 2017 and 2018 wildfires.

39. Moreover, the FERC Order, or other FERC Action, could very well impede confirmation of a plan of reorganization. "The bankruptcy court ha[s] an affirmative duty to ensure that [any debtor-proposed] Plan satisfie[s] all 11 U.S.C. § 1129 requirements for confirmation." *In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 653 (9th Cir. 1997). One of those requirements mandates compliance with "a priority scheme dictating the order in which various creditors' claims will be satisfied in the course of bankruptcy proceedings." *In re Holly Marine Towing, Inc.*, 669 F.3d 796, 800 (7th Cir. 2012). That scheme "favors equal (and simultaneous) treatment of equal allowed claims." *In re CoServ, L.L.C.*, 273 B.R. 487, 494 (Bankr. N.D. Tex. 2002). By elevating the priority of the Debtors' PPA counterparties' claims against the Debtors from general unsecured status to administrative expense status, FERC's proposed "concurrent" jurisdiction could upset this priority scheme and potentially impact plan confirmation.

40. Indeed, even the prospect that FERC could essentially vacate this Court's orders authorizing the Debtors to reject their PPAs could undermine the Debtors' plan formulation process. Specifically, the specter that FERC might attempt to exercise what it believes is its "concurrent" jurisdiction at any moment would complicate the economics of any proposed business plan and undermine related negotiations, thereby threatening the integrity of the reorganization process contemplated by Chapter 11, and irreparably harm the Debtors.

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41. FERC Action would also impair the Debtors' reorganization efforts by forcing the Debtors to litigate their post-petition performance obligations in multiple fora—*i.e.*, before FERC regarding the Debtors' PPAs and before this Court regarding all other executory contracts. Further, because FERC contends its regulatory review decisions are reviewable only by a federal court of appeals, this Court could very well be powerless to remedy the lengthy and costly procedural delay FERC may cause if left to its own devices. In short, the Debtors need to know whether any rejection decision by this Court is the final word on rejection, or if they will be compelled to also seek review by FERC, which could result in an entirely incongruous outcome.

42. Given the very complicated and extensive nature of the Debtors' PPA portfolio, as well as the implications for the Debtors' business and their ongoing regulatory relationship with the CPUC, it is imperative that the Debtors make informed and thoughtful decisions regarding their energy portfolio going forward. While it is entirely possible that the Debtors ultimately decide to reject none, or a very limited number, of their PPAs, the Debtors would sustain irreparable harm if FERC were to compel a different outcome than that which the Debtors, in their business judgment, subject to the Bankruptcy Court's approval, determine is most likely to result in their successful reorganization. For example, if FERC were to compel the Utility to perform under a particular PPA that the Debtors believed—in their business judgment and after assessing their entire, interrelated PPA portfolio, bundled electric load, and regulatory obligations—was not necessary, and the Bankruptcy Court agreed, the impact across the Debtors' business would be substantial.

Injunctive Relief would Harm Neither FERC nor the Debtors' PPA Counterparties

43. Granting the injunctive relief sought by the Debtors would not harm FERC nor the Debtors' PPA counterparties in any way.

44. As discussed *supra* at ¶ 34, neither the requested injunctive relief, nor the Debtors' potential future rejection of any of their PPAs, would require this Court to modify a filed-rate contract, or to otherwise determine whether the rates therein are just and reasonable, in derogation of FERC's exclusive jurisdiction over such matters. Rather, any rejection of a PPA by the Debtors would give full effect to the FERC-approved rates therein by allowing breach of contract damages at those filed rates through the claims process.

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45. Nor would the relief sought herein harm the Debtors' PPA counterparties. Such counterparties will still be able to challenge any rejection motion the Debtors may submit and, if unsuccessful, will be entitled to breach of contract damages claims based on the FERC-approved rates therein.

COUNT ONE

(Declaratory Judgment Pursuant to 28 U.S.C. § 2201)

46. The Debtors incorporate by reference their allegations in Paragraphs 1-45 as if set forth fully herein.

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

48. Courts possess jurisdiction to issue declaratory relief where "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 127 (2007).

49. There is a substantial controversy between the Debtors and FERC of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

50. A declaratory judgment confirming this Court's exclusive jurisdiction over the Debtors' rights to reject any of their PPAs under section 365 of the Bankruptcy Code, and further declaring that FERC does not have "concurrent" jurisdiction, or any jurisdiction, over the determination of whether the Debtors' rejection of any of their PPAs should be authorized, and that the Debtors do not need to obtain approval from FERC to reject any of their PPAs, is therefore both necessary and appropriate.

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COUNT TWO

(Enforcement of Section 362 Automatic Stay)

51. The Debtors incorporate by reference their allegations in Paragraphs 1-50 as if set forth fully herein.

52. The Debtors' existing PPAs are executory contracts under section 365 of the Bankruptcy Code.

53. Executory contracts automatically become property of the bankruptcy estates once the bankruptcy is filed. 11 U.S.C. § 365(a).

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

55. FERC Action would constitute an exercise of "control" over the Debtors' property.

56. The Debtors' potential rejection or breach of their PPAs does not implicate the police or regulatory powers exception to the automatic stay. Rather, any potential rejection or breach here purely concerns the economic interests of private parties.

57. Any FERC Action would thus be a violation of the automatic stay.

58. Issuing an order enforcing the automatic stay as to any FERC Action is therefore necessary and appropriate.

COUNT THREE

(Section 105 Preliminary and Permanent Injunction)

59. The Debtors incorporate by reference their allegations in Paragraphs 1-58 as if set forth fully herein.

60. A Bankruptcy Court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

61. A Bankruptcy Court may, therefore, in its discretion, issue injunctive relief under section 105 of the Bankruptcy Code in order to restrain activities that threaten the reorganization process or impair the court's jurisdiction with respect to the case before it.

62. The Debtors are reasonably likely to reorganize successfully.

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63. FERC Action would irreparably harm the Debtors and their stakeholders by threatening this Court's exclusive jurisdiction over the Debtors' estates, as well as the integrity of the Debtors' reorganization process, and otherwise burden the Debtors.

64. This Court's issuance of relief enjoining any FERC Action would not harm FERC or the Debtors' PPA counterparties in any way.

65. The requested injunctive relief will serve the public interest by allowing this Court to retain its exclusive jurisdiction over these Chapter 11 Cases and the Debtors' estate, facilitating the Debtors' successful reorganization, and by treating all general unsecured creditors equally.

66. Preliminary and permanent injunctive relief pursuant to section 105 of the Bankruptcy Code enjoining any FERC Action is therefore necessary and appropriate.

WHEREFORE, the Debtors respectfully request relief as follows:

a. That this Court issue a declaratory judgment confirming its exclusive jurisdiction over the Debtors' rights to reject any of its PPAs under section 365 of the Bankruptcy Code, and further declaring that FERC does not have "concurrent" jurisdiction, or any jurisdiction, over the determination of whether the Debtors' rejection of any of their PPAs should be authorized, and that the Debtors do not need to obtain approval from FERC to reject any of their PPAs;

b. That this Court, pursuant to section 362 of the Bankruptcy Code, issue an order enforcing the automatic stay as to any FERC Action;

c. That this Court, to the extent the automatic stay does not apply, exercise its powers under section 105 of the Bankruptcy Code and preliminarily and permanently enjoin any FERC Action.

Dated: January 29, 2019

WEIL, GOTSHAL & MANGES LLP

KELLER & BENVENUTTI LLP

By: */s/ Peter J. Benvenutti*
Peter J. Benvenutti

Proposed Attorneys for Debtors and Debtors in Possession

Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153-0119

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS PG&E Corporation, Pacific Gas and Electric Company	**DEFENDANTS** Federal Energy Regulatory Commission
ATTORNEYS (Firm Name, Address, and Telephone No.) Weil, Gotshal & Manges LLP 767 Fifth Avenue New York, NY 10153-0119 Tel: 212 310 8000 Keller & Benvenutti LLP 650 California Street, Suite 1900 San Francisco, CA 94108	**ATTORNEYS** (If Known)
PARTY (Check One Box Only) ☒ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☒ Other ☐ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

Pursuant to 28 U.S.C. § 2201, 11 U.S.C. §§ 105, 106(a), 362(a), and 365, Plaintiffs bring this adversarial proceeding for declaratory judgment and preliminary and permanent injunctive relief against the Federal Energy Regulatory Commission.

NATURE OF SUIT

(Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)

FRBP 7001(1) – Recovery of Money/Property

☐ 11-Recovery of money/property - §542 turnover of property
☐ 12-Recovery of money/property - §547 preference
☐ 13-Recovery of money/property - §548 fraudulent transfer
☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien

☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property

☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge

☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation

☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability

☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)

☐ 61-Dischargeability - §523(a)(5), domestic support
☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
☐ 63-Dischargeability - §523(a)(8), student loan
☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief

☒ 71-Injunctive relief – imposition of stay
☒ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest

☐ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment

☒ 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action

☐ 01-Determination of removed claim or cause

Other

☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
☐ 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☐ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ Check if a jury trial is demanded in complaint	Demand $
Other Relief Sought	

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR PG&E Corporation and Pacific Gas and Electric Company	BANKRUPTCY CASE NO. 19-30088; 19-30089	
DISTRICT IN WHICH CASE IS PENDING Northern District of California	DIVISION OFFICE San Francisco	NAME OF JUDGE Montali
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) /s/ Peter J. Benvenutti		
DATE January 29, 2019	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Peter J. Benvenutti	

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and **Defendants.** Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

EXHIBIT 1

166 FERC ¶ 61,049
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

NextEra Energy, Inc. and NextEra Energy Partners, L.P. Docket No. EL19-35-000

v.

Pacific Gas and Electric Company

ORDER ON PETITION FOR DECLARATORY ORDER AND COMPLAINT

(Issued January 25, 2019)

1. On January 18, 2019, NextEra Energy, Inc. and NextEra Energy Partners, L.P. (collectively, NextEra) filed, pursuant to sections 206 and 306 of the Federal Power Act (FPA)[1] and Rules 206 and 207 of the Commission's Rules of Practice and Procedure,[2] a petition for declaratory order and complaint (Petition) against Pacific Gas and Electric Company (PG&E) requesting that the Commission find that, if PG&E files for bankruptcy, PG&E may not abrogate, amend, or reject in a bankruptcy proceeding any rates, terms and conditions of its wholesale power purchase agreements subject to the Commission's jurisdiction without first obtaining approval from the Commission under FPA sections 205 and 206.[3] In this order, the Commission addresses NextEra's Petition for a declaratory order and clarifies its position with regard to bankruptcy filings that seek to reject Commission-jurisdictional wholesale power purchase agreements.

I. Background

2. NextEra states that several of its subsidiaries sell wind and solar energy to PG&E, pursuant to market-based rate authority, under various wholesale power purchase

[1] 16 U.S.C. §§ 824e, 825e (2012).

[2] 18 C.F.R. §§ 385.206, 385.207 (2018).

[3] 16 U.S.C. §§ 824d, 824e (2012).

agreements.[4] NextEra states that PG&E recently announced that it will file for bankruptcy protection due to, among other reasons, liabilities relating to wildfires in California and that it will make that filing on or about January 29, 2019.[5] In order to protect its wholesale power purchase agreements, NextEra requests that the Commission issue an order finding PG&E may not abrogate, amend, or reject its Commission-jurisdictional wholesale power purchase agreements with NextEra in any bankruptcy proceedings that may be initiated by PG&E without first obtaining approval from the Commission under FPA sections 205 or 206.[6]

3. NextEra argues that this Commission has exclusive jurisdiction to regulate the rates, terms, and conditions of PG&E's wholesale power purchase agreements.[7] NextEra asserts that, when enacting the FPA, Congress created a comprehensive regulatory framework for protecting the public interest and entrusted the Commission with the sole authority to implement that framework. According to NextEra, the core of the Commission's regulatory responsibilities under the FPA is the exclusive authority to regulate the rates, terms and conditions for interstate transmission and wholesale sales of electric energy under FPA sections 205 and 206.[8]

4. NextEra states that the Commission's broad and exclusive jurisdiction over rates has led to the filed-rate doctrine, which provides that a party "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other

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[4] NextEra Petition at 2. NextEra notes that the subsidiaries with wholesale power purchase agreements with PG&E include: Desert Sunlight Holdings, LLC, Shafter Solar, LLC, Genesis Solar, LLC, Westside Solar, LLC, Vasco Wind, LLC, North Sky River Energy, LLC, FPL Energy Montezuma Wind, LLC, and NextEra Energy Montezuma II Wind, LLC.

[5] *Id.* (citing Current Report on Form 8-K of Pacific Gas and Electric Corp. and PG&E (Jan. 13, 2019)).

[6] NextEra also requests an order no later than January 25, 2019 to reduce the risk that PG&E may attempt to obtain a restraining order or injunction in order to disable this Commission from exercising its jurisdiction over filed rates. *Id.*

[7] *Id.* at 3-7.

[8] *Id.* at 3-4.

terms."[9] NextEra asserts that once the Commission accepts or approves a filed rate as just and reasonable, the filed rate has the force of law and is the "equivalent of a federal regulation."[10] In other words, NextEra explains that "the filed rate . . . is to be treated as though it were a statute, binding upon the seller and purchaser alike."[11] NextEra states that the filed-rate doctrine protects more than just the rate, but also the terms and conditions, including the duration of a filed contract. NextEra also argues that wholesale electricity contracts may be filed directly with the Commission under the FPA or may be negotiated under a filed and approved market-based rate tariff that does not require the utility to separately file each individual contract, but either way, the Commission's authority to regulate the rates, terms and conditions of the contract is exclusive and subject to the filed-rate doctrine.[12]

5. NextEra further argues that a bankruptcy court's authority to reject contracts cannot deprive this Commission of its exclusive authority to determine whether rates, terms and conditions of wholesale power purchase agreements should be amended or abrogated.[13] NextEra states that section 365(a) of the Bankruptcy Code[14] authorizes a bankruptcy court to assume or reject any executory contract of a debtor. NextEra notes that, under the Bankruptcy Code, rejection acts as a breach that gives counterparties a general, unsecured claim for damages against the estate, and that, while the debtor has the initial responsibility for determining which contracts should be assumed and which should be rejected, and the debtor's decisions are generally reviewed by the bankruptcy court under the business judgement rule.[15]

6. NextEra acknowledges that the Bankruptcy Code gives the bankruptcy court broad authority over a bankrupt entity's estate, but argues that the court cannot exercise its

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[9] *Id.* at 4-5 (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (*Montana-Dakota Utilities*) (internal quotations omitted)).

[10] *Id.* at 5 (quoting *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004) (internal quotations omitted)).

[11] *Id.* (quoting *Bos. Edison Co. v. FERC*, 856 F.2d 362, 372 (1st Cir. 1988) (internal quotations omitted)).

[12] *Id.* at 6-7.

[13] *Id.* at 7-15.

[14] 11 U.S.C. § 365(a) (2012).

[15] NextEra Petition at 7.

authority in a way that invades on the Commission's exclusive jurisdiction under the FPA. Specifically, NextEra argues that a bankruptcy court cannot divest this Commission of its exclusive jurisdiction over the rates, terms and conditions in a wholesale electricity contract.[16]

7. While acknowledging the United States Court of Appeals for the Fifth Circuit's (Fifth Circuit) decision in *In the Matter of Mirant Corp.*,[17] where the court found that rejection of a contract in bankruptcy does not amount to an invasion of this Commission's jurisdiction under the FPA, NextEra notes that, in subsequent years, federal courts have declined to follow *Mirant*.[18] Specifically, NextEra states that in *Calpine*, the court rejected *Mirant*'s argument that the bankruptcy court does not interfere with the Commission's jurisdiction when it rejects a wholesale contract and authorizes an unsecured breach of contract claim. NextEra states that the *Calpine* court also found that the Fifth Circuit decision in *Mirant* relied on precedent that had no corollaries in the United States Court of Appeals for the Second Circuit.[19] Similarly, NextEra states that in *Boston Generating*, the court recognized that the bankruptcy court had the authority to reject a contract but held that debtors must also receive approval from the Commission for abrogation of the contract.[20] In short, NextEra argues that the Commission should decline to follow *Mirant* and, instead, rely on *Calpine* and *Boston Generating* because the later decisions are better-reasoned and more respectful of the filed-rate doctrine and this Commission's regulatory responsibilities.

8. NextEra summarizes *Mirant* as holding that the rejection of a contract in bankruptcy does not invade the Commission's exclusive jurisdiction because it merely constitutes a breach of the agreement, giving rise to a claim for contract damages—albeit an unsecured claim that must be asserted among all the other competing claims against the bankrupt estate.[21] But NextEra states that there are at least two flaws with this

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[16] *Id.* at 8 (citing *Blumenthal v. NRG Power Mktg., Inc.*, 103 FERC ¶ 61,344, *reh'g denied*, 104 FERC ¶ 61,211 (2003)).

[17] 378 F.3d 511 (5th Cir. 2004) (*Mirant*).

[18] NextEra Petition at 9-11 (citing *In re Calpine Corp.*, 337 B.R. 27 (S.D.N.Y. 2006) (*Calpine*); *In re Bos. Generating, LLC*, No. 10 Civ. 6258, 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010) (*Boston Generating*)).

[19] *Id.* at 10.

[20] *Id.* at 11.

[21] *Id.* at 12 (citing *Mirant*, 378 F.3d at 520).

reasoning. First, NextEra argues that the rejection of a wholesale power contract in bankruptcy is more than a simple breach of that contract. The rejection terminates the contract before the agreed upon term has expired, and, therefore, effectively amends or modifies the obligation to deliver wholesale power for the term of the contract.[22] Second, NextEra argues that when a bankruptcy court rejects a contract, it authorizes, as the exclusive form of relief, the counterparty to bring an unsecured claim against the bankrupt estate. NextEra asserts that this has a direct effect on the rate charged under the agreement, because there is a substantial risk (indeed, a near certainty) that the counterparty to a wholesale contract will recover a rate that is different from the Commission-approved rate in its contract. In other words, NextEra argues that for the counterparty, there is no practical difference between an order that directly changes the lawful rate and an order that changes the lawful rate by rejecting the contract and requiring the counterparty to assert an unsecured claim against the bankrupt estate.[23]

9. NextEra also argues that the *Mirant* decision improperly relies on the absence in the Bankruptcy Code of any provision expressly stating that rates subject to the Commission's jurisdiction are exempt from rejection.[24] Instead, NextEra asserts that, in light of the extensive precedent regarding the Commission's vast and exclusive authority to regulate wholesale rates, terms and conditions, if Congress had intended to divest the Commission of this long-recognized authority in bankruptcy proceedings, then it would have included such language in the Bankruptcy Code. However, NextEra argues that no such language or stated intent exists in the text or is apparent in the legislative history of the Bankruptcy Code.

10. Lastly, NextEra argues that there are sound policy reasons to embrace *Calpine* and *Boston Generating*. Specifically, NextEra claims that the Commission's review of PG&E's wholesale contracts are greater than the policy concerns generally considered by a bankruptcy court.[25] NextEra explains that in bankruptcy, the primary concern is to preserve the assets of the debtor so that they can be fairly divided among the creditors, but here, rejecting PG&E's wholesale contracts (at least its wholesale contracts with NextEra) will not have a significant impact on PG&E's estate. According to NextEra, this is because PG&E's purchased power costs are generally passed through to its

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[22] *Id.*

[23] *Id.* at 13.

[24] *Id.* at 14.

[25] *Id.*

customers and therefore, those costs do not shrink PG&E's estate.[26] Conversely, NextEra states that rejection of the wholesale contracts by a bankruptcy court will directly and adversely impact the Commission's ability to promote rate certainty and facilitate the development of adequate power supplies. NextEra argues that, if bankruptcy courts are allowed unilaterally to reject Commission-approved wholesale power contracts, it will create significant uncertainty for developers of new electric supplies, which will impede the development of new supplies. Thus, NextEra requests that the Commission issue an order consistent with *Calpine* and *Boston Generating* and holding that PG&E cannot reject its wholesale power purchase agreements in bankruptcy, without the Commission's approval of the contract abrogation or modification under the standards of FPA sections 205 and 206.[27]

II. Notice and Responsive Pleadings

11. Notice of NextEra's Petition was issued by the Commission, with PG&E's answer, interventions, and comments, due on or before January 22, 2019. Timely motions to intervene were filed by Allco Finance Limited, American Wind Energy Association (AWEA), Avangrid Renewables, LLC, BP Energy Company, California Municipal Utilities Association, California Department of Water Resources, Cogentrix Energy Power Management, LLC, D.E. Shaw Renewable Investments, L.L.C., Diablo Winds, LLC, Dominion Energy Services, Inc., EDP Renewables North America LLC, El Dorado Hydro, LLC, First Solar, Inc., KES Kingsburg, L.P., Kingston Energy Storage, LLC, MC Shiloh IV Holdings LLC, Middle River Power, LLC, Modesto Irrigation District, Mojave Solar LLC, Northern California Power Agency, NRG Power Marketing LLC, Ruby Pipeline, L.L.C., the City of Santa Clara, California and M-S-R Public Power Agency, the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California, State Water Contractors, Transmission Agency of Northern California, and Vistra Energy Corporation and Dynegy Marketing and Trade, LLC. Algonquin Power Company, Algonquin Power Sanger LLC, Algonquin SKIC 20 Solar, LLC, Brookfield Renewable Partners L.P., Calpine Corporation, Capital Dynamics, Inc., Clearway Energy Group LLC and Clearway Energy, Inc.,[28] Consolidated Edison Development, Inc.,

[26] *Id.*

[27] *Id.* at 15.

[28] Clearway Energy Group LLC's and Clearway Energy, Inc.'s comments were joined by Sand Drag LLC, Sun City Project LLC, El Dorado Hydro, LLC, Rock Creek Hydro, LLC, Cascade Energy Storage, LLC, Kingston Energy Storage, LLC, Sierra Energy Storage, LLC, First Solar, Inc., MC Shiloh IV Holdings LLC and NRG Power Marketing LLC.

Exelon Corporation, Solar Energy Industries Association, Southern Power Company,[29] TerraForm Companies, Topaz Solar Farms LLC, Vantage Wind Energy, and Western Power Trading Forum filed timely motions to intervene and comments in support of NextEra's Petition.

12. Burney Forest Products, California Public Utilities Commission, Chevron Power Holdings Inc., Citizens Sunrise Transmission LLC, the City and County of San Francisco, Earthjustice, EDF Renewables, Inc., Fresno Cogeneration Partners, LP, FTP Power LLC, National Rural Electric Cooperative Association, Natural Resources Defense Council, Panoche Energy Center, LLC, PSEG Energy Resources & Trade LLC, PSEG Power LLC, Sacramento Municipal Utility District, Sustainable FERC Project, Turlock Irrigation District, Wellhead Electric Company, Western Area Power Administration, and Yuba City Cogen, Inc. filed motions to intervene out-of-time. American Council on Renewable Energy and Sunray Energy 2, LLC and Westlands Solar Farms LLC filed motions to intervene out-of-time and comments in support of NextEra's Petition on January 23, 2019. Also on January 23, 2019, AWEA filed comments out-of-time supporting the Petition. Bayerische Landesbank New York Branch submitted a letter in support of NextEra's Petition on January 23, 2019.

13. On January 22, 2019, PG&E filed an answer to the Petition. On January 23, 2019, NextEra filed a motion for leave to answer and an answer to PG&E's answer.

A. Answer and Answer to Answer

14. PG&E argues that the Commission should deny NextEra's Petition. According to PG&E, a Commission order limiting PG&E's rights prior to its bankruptcy filing would violate the FPA and the Bankruptcy Code. It would also contravene the terms of the agreements between NextEra and PG&E. PG&E offers three reasons in support of its position: First, PG&E argues that NextEra's Petition is speculative and hypothetical because PG&E's bankruptcy has not yet occurred and no action has been taken with regard to any particular contract. Additionally, PG&E claims that the Commission's jurisdiction under the FPA applies to the sale, but not the purchase, of power, and by extension, to sellers, but not buyers, of power. Accordingly, PG&E states that the Commission is not authorized to order a buyer to continue to purchase power. According to PG&E, such Commission action, as well as the Commission's potential involvement in

[29] Southern Power Company moved to intervene and filed comments on behalf of itself and its affiliates Morelos Solar, LLC, Blackwell Solar, LLC, Lost Hills Solar, LLC, North Star Solar, LLC, and Parrey, LLC.

the bankruptcy of any company involved in purchasing power, would represent a significant expansion of the Commission's authority.[30]

15. Second, PG&E argues that the bankruptcy court will have jurisdiction over the issues raised in the Petition and that the Bankruptcy Code does not list wholesale power purchase agreements among the specific obligations that cannot be discharged in bankruptcy. PG&E contends that there is no precedent to support the argument that the Commission has exclusive jurisdiction over breaches of wholesale power purchase agreements or that parties must receive permission from the Commission before breaching. PG&E states that the rejection of a contract in bankruptcy is simply a breach of contract and cites the Court of Appeals conclusion in *Mirant* that debtors may reject wholesale power contracts in bankruptcy without Commission approval. PG&E further argues that breaching a contract is not a violation of the filed rate doctrine, but rather a failure to perform under a Commission-approved performance obligation, subject to claims for damages.[31]

16. Third, PG&E asserts that the Commission should disclaim jurisdiction in this proceeding in light of the specific contracts at issue. PG&E contends that the Commission's argument in *FirstEnergy* that *Mobile-Sierra* gave the Commission a role in ensuring that any contract rejection was consistent with the public interest is not relevant here. PG&E claims that the parties to the wholesale power purchase agreements with PG&E either declined to apply *Mobile-Sierra* or waived the right to make the type of Commission filing contemplated by the Petition. Specifically, PG&E states that every single NextEra contract either expressly disclaims *Mobile-Sierra* protection, or includes a waiver provision indicating that they would not seek the Commission's modification of the contracts. PG&E argues that these contractual provisions represent choices by the parties that the Commission should respect.[32]

17. Additionally, PG&E asserts that, even if the Commission has concurrent jurisdiction with the bankruptcy court, the Commission should decline to exercise that jurisdiction. According to PG&E, this proceeding does not satisfy the conditions that the Commission has previously applied to determine whether to exercise jurisdiction. PG&E argues that (1) this dispute does not draw upon the Commission's special expertise, (2) Commission action would create regulatory uncertainty, and (3) these cases are

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[30] PG&E Answer at 2, 3, 12.

[31] *Id.* at 3, 17.

[32] *Id.* at 5, 22.

unimportant in relation to the Commission's regulatory responsibilities.[33] For these reasons, PG&E requests that the Commission deny NextEra's Petition.

18. In its answer, NextEra first argues that PG&E's procedural arguments should be rejected. Noting the split between courts on the issue, NextEra argues that Rule 207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207, gives the Commission the authority to resolve the current controversy and remove uncertainty relating to whether a bankruptcy court may approve the rejection of a wholesale power contract.[34] NextEra also argues that PG&E misconstrues the issues raised and relief requested in NextEra's Petition in arguing that the Commission has no jurisdiction over buyers; instead, NextEra asserts that it is asking the Commission to assert its jurisdiction over wholesale contracts, to which both sellers and buyers are parties.[35]

19. With regard to the merits of its Petition, NextEra argues that rejection in bankruptcy is not like a run-of-the-mill contract breach. Rather, according to NextEra, rejections are different because they require bankruptcy court approval and they establish bankruptcy court jurisdiction over the resolution of payments under the contract. Additionally, NextEra asserts that a rejection modifies the duration of the contract and abrogates or terminates the obligation to deliver wholesale power under it.[36] NextEra thus argues that these distinctions bring rejection within the scope of the filed rate doctrine, and under the Commission's exclusive jurisdiction. Lastly, NextEra argues that PG&E's arguments concerning the *Mobile-Sierra* presumption, the Commission's lack of specialized expertise with rejection of wholesale power contracts in bankruptcy, and other related arguments are without merit.[37]

III. Commission Determination

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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[33] *Id.* at 25-28.

[34] NextEra Answer at 3-4.

[35] *Id.* at 5-6.

[36] *Id.* at 6 (citing *Calpine*, 337 B.R. at 36-37).

[37] *Id.* at 8-10.

21. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2018), the Commission will grant the late-filed motions to intervene given the entities' interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept NextEra's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

23. In this order, we provide clarification on the Commission's position with respect to the issues raised in the Petition. In so doing, we acknowledge that the law in this area is unsettled. Several courts have read the FPA and the Bankruptcy Code *in pari materia* and reached different conclusions.[38]

24. In *Mirant*, the Fifth Circuit concluded that the FPA does not preempt the Bankruptcy Code because rejection of the wholesale power purchase agreement in that proceeding would only have an indirect effect upon the filed rate.[39] The court explained that rejection of an executory contract amounts to a breach of contract, providing the non-breaching party with an unsecured claim against the bankruptcy estate for an amount equal to its damages from the breach. The court further determined that such a breach does not amount to a modification of the filed rate, but rather gives effect to it because the award of damages due to the breach would be based on the filed rate.[40] The court also stated that the structure of the Bankruptcy Code indicates that Congress did not intend to limit the ability of utility companies to reject an executory power contract.[41] Thus, the court concluded that the FPA does not preempt a district court's jurisdiction to

[38] *See Mirant*, 378 F.3d 511; *Calpine*, 337 B.R. 27; *Boston Generating*, 2010 WL 4616243.

[39] *Mirant*, 378 F.3d at 519-520. The court explained, however, that "the FPA does preempt breach of contract claims that challenge a filed rate." *Id.* at 519.

[40] *Id.* at 520.

[41] *Id.* at 521.

authorize the rejection of an executory contract subject to Commission regulation as part of a bankruptcy proceeding.[42]

25. In *Calpine*, the United States District Court for the Southern District of New York declined to follow *Mirant*; instead, it found that it lacked subject matter jurisdiction to authorize rejection of the energy contracts at issue and concluded that the Commission has exclusive jurisdiction over their disposition.[43] The court acknowledged this Commission's broad and exclusive jurisdiction over rates, terms, and conditions, and noted that nothing in the FPA limits the Commission's jurisdiction in the bankruptcy context.[44] The court further found that, upon examining the Bankruptcy Code, there is little evidence of congressional intent to limit the Commission's regulatory authority, and that "[a]bsent overriding language, the Bankruptcy Code should not be read to interfere with [Commission] jurisdiction."[45] The court thus concluded that it may not authorize rejection of the wholesale power purchase agreements at issue because to do so would directly interfere with the Commission's jurisdiction over the rates, terms, conditions, and duration of the wholesale energy contracts.[46]

26. In *Boston Generating*, the parties to the proceeding agreed that debtors should seek Commission approval of the wholesale contract at issue, but disagreed over whether the bankruptcy court or the Commission may consider the rejection motion concurrently or the bankruptcy court must wait until the Commission has ruled.[47] The court concluded that this disagreement was irrelevant because regardless of the order, "[i]f either the bankruptcy court or [the Commission] does not approve the Debtors' rejection of the [wholesale agreement], the Debtors may not reject the contract." Thus, the court ordered

[42] *Id.* at 522. Despite the Fifth Circuit's conclusion, the court stated that, given the unique nature of a wholesale power purchase agreements for electric energy, it may be appropriate for the district court to apply a heightened standard of review when determining whether to reject wholesale power purchase agreements. *Id.* at 525. On remand, the district court noted that it would apply a heightened standard of review above that of the typical business judgement rule. *See generally In re Mirant*, 318 B.R. 100 (N.D. Tex. 2004).

[43] *Calpine*, 337 B.R. at 29-30.

[44] *Id.* at 32-33.

[45] *Id.*

[46] *Id.* at 36, 39.

[47] *Boston Generating*, 2010 WL 4616243 at *3.

the debtor to obtain a determination from the Commission pursuant to the Natural Gas Act as to whether it may reject the wholesale contract.[48]

27. More recently, in *FirstEnergy Solutions Corp. v. FERC*,[49] the bankruptcy court in the United States District Court for the Northern District of Ohio (Ohio Bankruptcy Court) issued a preliminary injunction enjoining the Commission from requiring FirstEnergy Solutions Corporation (FirstEnergy), which had filed a petition for bankruptcy, to continue performing under certain wholesale power contracts that FirstEnergy sought to reject through bankruptcy. In defending against the injunction, the Commission argued that, reading the FPA and the Bankruptcy Code together, the Commission maintains concurrent jurisdiction with bankruptcy courts over wholesale power agreements. In other words, a debtor must seek bankruptcy court approval to reject a wholesale power agreement, as well as Commission approval to unilaterally change such agreement. Rejecting the Commission's position, the Ohio Bankruptcy Court found that the automatic stay provision of the Bankruptcy Code[50] and its power to grant equitable relief under the Bankruptcy Code[51] support its decision to issue the preliminary injunction. That opinion is currently pending appeal before the United States Court of Appeals for the Sixth Circuit.[52]

28. Against this background, and given the unsettled state of the law, we have reviewed the FPA and Bankruptcy Code in light of the arguments raised in the Petition, and conclude that this Commission and the bankruptcy courts have concurrent jurisdiction to review and address the disposition of wholesale power contracts sought to be rejected through bankruptcy. We find that to give effect to both the FPA and the Bankruptcy Code, a party to a Commission-jurisdictional wholesale power purchase agreement must obtain approval from both the Commission and the bankruptcy court to modify the filed rate and reject the contract, respectively.

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[48] *Id.*

[49] 2018 WL 2315916 (Bankr. N.D. Ohio May 18, 2018).

[50] 11 U.S.C. § 362(a) (2012).

[51] 11 U.S.C. § 105(a) (2012).

[52] *See In re FirstEnergy Solutions Corp.*, Case Nos. 18-3787, 18-3788, 18-4095, 181-4097, 18-4107, 18-4110, Briefing Schedule (6th Cir. filed Jan. 17, 2019) (requiring appellants' principal briefs to be filed by February 26, 2019).

29. Courts have repeatedly acknowledged the broad scope of the Commission's statutory jurisdiction over rates, terms, and conditions of wholesale electricity sales.[53] The Commission's exclusive authority to determine the reasonableness of wholesale electricity rates also extends to the rates, terms, and conditions of wholesale power agreements, as well as changes to those agreements.[54] The Commission's broad and plenary authority over wholesale electricity rates led to the development of the filed-rate doctrine, which holds a party "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."[55] First designed to "ensure that federal courts respect the decisions of federal administrative agencies," the filed-rate doctrine recognizes that "[the Commission] alone is empowered to make that judgment of reasonableness, and until it has done so, no rate other than the one [approved by the Commission] may be charged."[56] In short, under the FPA, the Commission determines the filed rate and "except for review of the Commission's orders, the courts can assume no right to a different one."[57] We find that a rejection of a Commission-jurisdictional contract in a bankruptcy court alters the essential terms and conditions of the contract and the filed rate; thus, this Commission's jurisdiction is implicated, and our approval is required.[58]

30. We disagree with PG&E's assertion that a Commission order addressing NextEra's Petition prior to PG&E's bankruptcy filing would violate the FPA and the

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[53] *E.g.*, *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016).

[54] *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527 (2008) (discussing the standard that the Commission applies when reviewing the modification of a wholesale power purchase agreement).

[55] *Montana–Dakota Utilities*, 341 U.S. at 251.

[56] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 964 (1986) (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981)).

[57] *Montana–Dakota Utilities*, 341 U.S. at 252.

[58] While this petition was pending, at least one other party to a wholesale power contract with PG&E has filed a petition seeking the same declaration that NextEra requests in this proceeding. Exelon Corporation, Petition for Declaratory Order and Complaint, Docket No. EL19-36-000 (filed Jan. 22, 2019). While the circumstances of individual contracts may vary—for example, to the extent *Mobile-Sierra* protections may or may not apply—the Commission's jurisdictional position is the same with regard to other wholesale power contracts PG&E may seek to terminate or modify through bankruptcy.

Bankruptcy Code. We are similarly unpersuaded by the argument that NextEra's Petition is without merit because it was filed in advance of PG&E's anticipated bankruptcy. Given that the law is unsettled, under the circumstances here, we find it appropriate for parties to raise concerns related to activities covered by the provisions of the FPA, including the rates, terms, and conditions of wholesale power agreements.

31. With regard to PG&E's statement that that the bankruptcy court will have jurisdiction over the issues raised in the Petition, we maintain that the Commission shares concurrent jurisdiction with bankruptcy courts over wholesale power agreements, as described above. Similarly, concerning PG&E's argument that the Commission should disclaim its authority due to provisions contained within specific contracts, these agreements are still subject to the Commission's jurisdiction and the Commission maintains discretion to exercise its authority. With respect to PG&E's arguments that the *Mobile-Sierra* doctrine does not apply to its power purchase agreements with NextEra, we are not reviewing the specific agreements here, but rather explaining the Commission's concurrent jurisdiction with respect to wholesale power agreements.

The Commission orders:

We conclude that this Commission and the bankruptcy courts have concurrent jurisdiction to review and address the disposition of wholesale power contracts sought to be rejected through bankruptcy.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

EXHIBIT 2

166 FERC ¶ 61,053
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

Exelon Corporation | Docket No. EL19-36-000

v.

Pacific Gas and Electric Company

ORDER ON PETITION FOR DECLARATORY ORDER AND COMPLAINT

(Issued January 28, 2019)

1. On January 22, 2019, Exelon Corporation (Exelon) filed, pursuant to sections 206 and 306 of the Federal Power Act (FPA)[1] and Rules 206 and 207 of the Commission's Rules of Practice and Procedure,[2] a petition for declaratory order and complaint (Petition) against Pacific Gas and Electric Company (PG&E) requesting that the Commission find that, if PG&E files for bankruptcy, PG&E may not abrogate, amend, or reject in a bankruptcy proceeding any rates, terms and conditions of its wholesale power purchase agreements subject to the Commission's jurisdiction without first obtaining approval from the Commission under FPA sections 205 and 206.[3] In this order, the Commission addresses Exelon's Petition for a declaratory order and clarifies its position with regard to bankruptcy filings that seek to reject Commission-jurisdictional wholesale power purchase agreements.[4]

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[1] 16 U.S.C. §§ 824e, 825e (2012).

[2] 18 C.F.R. §§ 385.206, 385.207 (2018).

[3] 16 U.S.C. §§ 824d, 824e (2012).

[4] As noted below, Exelon's Petition seeks relief similar to that requested by NextEra Energy, Inc. and NextEra Energy Partners, L.P. (collectively, NextEra) in a petition it filed on January 18, 2019 in Docket No. EL19-35-000. The Commission

I. Background

2. Exelon states that it is a holding company with several subsidiaries that own electric transmission and distribution systems, as well as electric generation companies throughout the United States, including AV Solar Ranch 1, LLC, a public utility that owns a solar photovoltaic project in the Antelope Valley area of the Western Mojave Desert that sells its entire output to PG&E under a wholesale power purchase agreement.[5] Exelon states that PG&E recently announced that it will file for bankruptcy protection due to, among other reasons, liabilities relating to wildfires in California and that it will make that filing on or about January 29, 2019.[6] In order to protect its wholesale power purchase agreement and those of others, Exelon requests that the Commission issue an order finding PG&E may not abrogate, amend, or reject its Commission-jurisdictional wholesale power purchase agreements with Exelon in any bankruptcy proceedings that may be initiated by PG&E without first obtaining approval from the Commission under FPA sections 205 or 206.[7]

3. Exelon argues that this Commission has exclusive jurisdiction to regulate the rates, terms, and conditions of PG&E's wholesale power purchase agreements.[8] Exelon asserts that the core of the Commission's regulatory responsibilities under the FPA is the exclusive authority to regulate the rates, terms and conditions for interstate transmission and wholesale sales of electric energy under FPA sections 205 and 206.[9] Exelon states that the Commission's broad and exclusive jurisdiction over rates has led to the filed-rate doctrine, which provides that a party "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court

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issued an order on NextEra's Petition on January 25, 2019. *NextEra Energy, Inc. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,049 (2019) (*NextEra v. PG&E*).

[5] Exelon Petition at 3-5.

[6] *Id.* at 5 (citing Current Report on Form 8-K of Pacific Gas and Electric Corp. and PG&E (Jan. 13, 2019)).

[7] *Id.* at 7-8. Exelon also requests an order no later than January 28, 2019 to reduce the risk that PG&E may attempt to obtain a restraining order or injunction in order to disable this Commission from exercising its jurisdiction over filed rates. *Id.* at 2, 26.

[8] *Id.* at 8-11.

[9] *Id.* at 8.

can authorize commerce in the commodity on other terms."[10] Exelon asserts that once the Commission accepts or approves a filed rate as just and reasonable, the filed rate has the force of law.[11] In other words, Exelon explains that "the filed rate . . . is to be treated as though it were a statute, binding upon the seller and purchaser alike."[12]

4. Exelon states that the filed-rate doctrine protects more than just the rate, but also the terms and conditions, including the duration of a filed contract. Exelon also argues that wholesale electricity contracts may be filed directly with the Commission under the FPA or may be negotiated under a filed and approved market-based rate tariff that does not require the utility to separately file each individual contract, but either way, the Commission's authority to regulate the rates, terms and conditions of the contract is exclusive and subject to the filed-rate doctrine.[13]

5. Exelon further argues that a bankruptcy court's authority to reject contracts cannot deprive this Commission of its exclusive authority to determine whether rates, terms and conditions of wholesale power purchase agreements should be amended or abrogated.[14] Exelon states that section 365(a) of the Bankruptcy Code[15] authorizes a bankruptcy court to assume or reject any executory contract of a debtor. Exelon notes that, under the Bankruptcy Code, rejection acts as a breach that gives counterparties a general, unsecured claim for damages against the estate, but that nothing in the Bankruptcy Code permits a court to occupy the Commission's exclusive role under the FPA.[16]

6. Exelon argues that the Commission should find that any request made by PG&E to the bankruptcy court to reject a Commission-regulated wholesale power contract, if

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[10] *Id.* at 9 (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (*Montana-Dakota Utilities*) (internal quotations omitted)).

[11] *Id.* (quoting *Lowden v. Simonds-Shields-Lonsdale Grain Co*., 306 U.S. 516, 520 (1939); *Cal. ex rel. Lockyer v. Dynegy, Inc*., 375 F.3d 831, 839 (9th Cir. 2004) (internal quotations omitted)).

[12] *Id.* at 10 (quoting *Boston Edison Co. v. FERC*, 856 F.2d 361, 372 (1st Cir. 1988) (internal quotations omitted)).

[13] *Id.*

[14] *Id.* at 11-12.

[15] 11 U.S.C. § 365(a) (2012).

[16] Exelon Petition at 11.

granted, could put the court in the position of determining whether rejection would be contrary to the public interest and in violation of the *Mobile-Sierra* doctrine.[17] Exelon argues that courts are not in a position to make that judgment and the FPA charges the Commission with making that determination.[18] Exelon states that if PG&E is allowed to pick and choose which wholesale power purchase agreements it wants to perform, the affected sellers would need to recover their operating costs elsewhere to recover its operating and maintenance expenses and debt service. Without guaranteed recovery of its costs, Exelon claims that those sellers would likely incur increased debt and borrowing costs, creating a disproportionately adverse effect on their ability to meet their financial obligations.[19] Exelon asserts that all of these consequences would be adverse to the public interest, and without Commission review of the contract changes requested by PG&E, no review of the effect on the public interest would take place.[20]

7. Exelon argues that the Commission should follow the more recent precedent in *In re Calpine Corp.*[21] and *In re Boston Generating, LLC*[22] in rejecting *Mirant Corp. v. Potomac Elec. Power Co.*,[23] and concluding that it has authority to review wholesale power purchase agreements that are submitted for rejection in a bankruptcy proceeding.[24] Exelon argues that the *Mirant* decision fails to recognize the primacy of the Commission's plenary authority over the rates, terms, and conditions of wholesale power contracts under the FPA.[25] Exelon states that the rejection of a wholesale power contract

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[17] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (together creating the *Mobile-Sierra* presumption, which requires the Commission to presume that the rate set out in a freely negotiated wholesale-energy contract meets the "just and reasonable" requirement imposed by law).

[18] Exelon Petition at 13.

[19] *Id.*

[20] *Id.* at 14.

[21] 337 B.R. 27 (S.D.N.Y. 2006) (*Calpine*).

[22] 2010 WL 4616243 (S.D.N.Y. 2010) (*Boston Generating*).

[23] 378 F.3d 511 (5th Cir. 2004) (*Mirant*).

[24] Exelon Petition at 15-24.

[25] *Id.* at 21.

relieves the debtor of its obligation to perform the contract before its expiration, effectively amending or modifying its terms and conditions without Commission approval. Exelon argues that, in that manner, the effect of ignoring the Commission's exclusive jurisdiction following a PG&E bankruptcy filing would be to strip the Commission's statutorily-mandated oversight over wholesale power sales arrangements serving customers in Northern California and placing the specific rates, terms, and conditions of service to PG&E, and PG&E's customers, and replace it with the oversight of a bankruptcy court.

8. Exelon then argues that Commission review of PG&E's wholesale power contracts would not result in any irreparable harm to PG&E.[26] Specifically, Exelon states that PG&E can already seek to modify the wholesale power contracts through an FPA section 206 proceeding before the Commission. Exelon asserts that Commission action on such a filing could proceed in parallel with any bankruptcy case, and would likely be resolved well in advance of any bankruptcy resolution. Thus, Exelon argues that a final reorganization plan in PG&E's chapter 11 bankruptcy case would not be delayed and could take into consideration any Commission resolution of the FPA section 206 complaint. According to Exelon, an additional reason that PG&E would not suffer irreparable harm if the Commission provides the requested relief here is that PG&E's costs for wholesale power purchases are flowed through to PG&E's customers.[27]

9. Lastly, Exelon notes that section 1129(a)(6) of the Bankruptcy Code[28] specifically provides the Commission with the opportunity to review and approve any changes to rates during confirmation of the reorganization plan.[29] Exelon asserts that the requested relief here is entirely consistent with that role.

II. Notice and Responsive Pleadings

10. Notice of Exelon's Petition was issued by the Commission, with PG&E's answer, interventions, and comments, due on or before January 24, 2019. California Public Utilities Commission filed a notice of intervention. Timely motions to intervene were filed by Arlington Wind Power Project LLC, Avangrid Renewables, LLC, Blackspring Ridge I Wind Project LP, Brookfield Renewable Partners L.P., California Department of Water Resources State Water Project, California Municipal Utilities Association, Calpine

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[26] *Id.* at 24-25.

[27] *Id.* at 25.

[28] 11 U.S.C. § 1129(a)(6) (2012).

[29] *Id.* at 26.

Corporation, Chevron Power Holdings Inc., the City and County of San Francisco, the City of Santa Clara, California and M-S-R Public Power Agency, the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California, Citizens Sunrise Transmission LLC, D.E. Shaw Renewable Investments, L.L.C., Dominion Energy Services, Inc., EDF Renewables, Inc., EDP Renewables North America LLC, FTP Power LLC, KES Kingsburg, L.P., MC Shiloh IV Holdings LLC, Middle River Power, LLC, Modesto Irrigation District, National Rural Electric Cooperative Association, NextEra, Northern California Power Agency, NRG Power Marketing LLC, Panoche Energy Center, LLC, PSEG Companies,[30] Public Citizen, Inc., Rising Tree Wind Farm II LLC, Ruby Pipeline, L.L.C., Sacramento Municipal Utility District, State Water Contractors, Transmission Agency of Northern California, Turlock Irrigation District, and Western Area Power Administration. Capital Dynamics, Inc., Clearway Energy Group LLC and Clearway Energy, Inc., Consolidated Edison Development, Inc., Southern Power Company,[31] Sunray Energy 2, LLC and Westlands Solar Farms LLC, Topaz Solar Farms LLC, Vantage Wind Energy LLC, and Western Power Trading Forum, filed timely motions to intervene and comments in support of Exelon's Petition.

11. TerraForm Power, Inc. (TerraForm Power) filed a motion to intervene out-of-time on January 25, 2019.

12. On January 24, 2019, PG&E filed an answer to the Petition.

A. <u>Answer</u>

13. PG&E argues that the Commission should deny Exelon's Petition. According to PG&E, a Commission order limiting PG&E's rights prior to its bankruptcy filing would violate the FPA and the Bankruptcy Code. It would also contravene the terms of the agreements between Exelon and PG&E.

14. PG&E offers three reasons in support of its position: First, PG&E argues that Exelon's Petition is speculative and hypothetical because PG&E's bankruptcy has not yet occurred and no action has been taken with regard to any particular contract. Additionally, PG&E claims that the Commission's jurisdiction under the FPA applies to the sale, but not the purchase, of power, and by extension, to sellers, but not buyers, of

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[30] PSEG Companies consists of PSEG Power LLC and PSEG Energy Resources & Trade LLC. The PSEG Companies are each wholly owned, direct and indirect subsidiaries of Public Service Enterprise Group Incorporated.

[31] Southern Power Company moved to intervene and filed comments on behalf of itself and its affiliates Morelos Solar, LLC, Blackwell Solar, LLC, Lost Hills Solar, LLC, North Star Solar, LLC, and Parrey, LLC.

power. Accordingly, PG&E states that the Commission is not authorized to order a buyer to continue to purchase power. According to PG&E, such Commission action, as well as the Commission's potential involvement in the bankruptcy of any company involved in purchasing power, would represent a significant expansion of the Commission's authority.[32]

15. Second, PG&E argues that the bankruptcy court will have jurisdiction over the issues raised in the Petition and that the Bankruptcy Code does not list wholesale power contracts among the specific obligations that cannot be discharged in bankruptcy. PG&E contends that there is no precedent to support the argument that the Commission has exclusive jurisdiction over breaches of wholesale power contracts or that parties must receive permission from the Commission before breaching. PG&E states that the rejection of a contract in bankruptcy is simply a breach of contract and cites the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) conclusion in *Mirant* that debtors may reject wholesale power contracts in bankruptcy without Commission approval. PG&E further argues that breaching a contract is not a violation of the filed rate doctrine, but rather a failure to perform under a Commission-approved performance obligation, subject to claims for damages.[33]

16. Third, PG&E asserts that the Commission should disclaim jurisdiction in this proceeding in light of the specific contracts at issue. PG&E contends that the Commission's litigation position in *FirstEnergy Solutions Corp. v. FERC*[34] rests on the assumption that concurrent jurisdiction would be straightforward to implement because it was possible for the debtors to concurrently seek approval from the Commission to modify the Commission. However, PG&E argues that this assumption is not warranted here because the wholesale power contract includes a waiver provision under which the parties agreed they would not ask the Commission to modify the contracts.[35] PG&E argues that these contractual provisions represent choices by the parties that the Commission should respect, and asserts that the waiver provisions are likely protected by the *Mobile-Sierra* presumption.[36]

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[32] PG&E Answer at 2-3, 13.

[33] *Id.* at 3-4, 17-18.

[34] 2018 WL 2315916 (Bankr. N.D. Ohio May 18, 2018) (*FirstEnergy*)

[35] *Id.* at 22.

[36] *Id.* at 5, 23-24.

17. Additionally, PG&E asserts that, even if the Commission has concurrent jurisdiction with the bankruptcy court, the Commission should decline to exercise that jurisdiction. According to PG&E, this proceeding does not satisfy the conditions that the Commission has previously applied to determine whether to exercise jurisdiction. PG&E argues that (1) this dispute does not draw upon the Commission's special expertise, (2) Commission action would create regulatory uncertainty, and (3) these cases are unimportant in relation to the Commission's regulatory responsibilities.[37] For these reasons, PG&E requests that the Commission deny Exelon's Petition.

III. Commission Determination

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

19. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2018), the Commission will grant TerraForm Power's late-filed motion to intervene given its interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

B. Substantive Matters

20. Exelon's requested relief is very similar to that requested by NextEra in a separate petition filed in Docket No. EL19-35-000.[38] Consistent with the Commission's January 25, 2019 order on NextEra's petition, we provide here clarification on the Commission's position with respect to the issues raised in Exelon's Petition. In so doing, we acknowledge that the law in this area is unsettled. Several courts have read the FPA and the Bankruptcy Code *in pari materia* and reached different conclusions.[39]

21. In *Mirant*, the Fifth Circuit concluded that the FPA does not preempt the Bankruptcy Code because rejection of the wholesale power purchase agreement in that

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[37] *Id.* at 25-29.

[38] *See generally NextEra v. PG&E*, 166 FERC ¶ 61,049.

[39] *See Mirant*, 378 F.3d 511; *Calpine*, 337 B.R. 27; *Boston Generating*, 2010 WL 4616243.

proceeding would only have an indirect effect upon the filed rate.[40] The court explained that rejection of an executory contract amounts to a breach of contract, providing the non-breaching party with an unsecured claim against the bankruptcy estate for an amount equal to its damages from the breach. The court further determined that such a breach does not amount to a modification of the filed rate, but rather gives effect to it because the award of damages due to the breach would be based on the filed rate.[41] The court also stated that the structure of the Bankruptcy Code indicates that Congress did not intend to limit the ability of utility companies to reject an executory power contract.[42] Thus, the court concluded that the FPA does not preempt a district court's jurisdiction to authorize the rejection of an executory contract subject to Commission regulation as part of a bankruptcy proceeding.[43]

22. In *Calpine*, the United States District Court for the Southern District of New York declined to follow *Mirant*; instead, it found that it lacked subject matter jurisdiction to authorize rejection of the energy contracts at issue and concluded that the Commission has exclusive jurisdiction over their disposition.[44] The court acknowledged this Commission's broad and exclusive jurisdiction over rates, terms, and conditions, and noted that nothing in the FPA limits the Commission's jurisdiction in the bankruptcy context.[45] The court further found that, upon examining the Bankruptcy Code, there is little evidence of congressional intent to limit the Commission's regulatory authority, and that "[a]bsent overriding language, the Bankruptcy Code should not be read to interfere

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[40] *Mirant*, 378 F.3d at 519-520. The Court explained, however, that "the FPA does not preempt breach of contract claims that challenge a filed rate." *Id.* at 519.

[41] *Id.* at 520.

[42] *Id.* at 521.

[43] *Id.* at 522. Despite the Fifth Circuit's conclusion, the court stated that, given the unique nature of a wholesale power purchase agreements for electric energy, it may be appropriate for the district court to apply a heightened standard of review when determining whether to reject wholesale power purchase agreements. *Id.* at 525. On remand, the district court noted that it would apply a heightened standard of review above that of the typical business judgement rule. *See generally In re Mirant*, 318 B.R. 100 (N.D. Tex. 2004).

[44] *Calpine*, 337 B.R. at 29-30.

[45] *Id.* at 32-33.

with [Commission] jurisdiction."[46] The court thus concluded that it may not authorize rejection of the wholesale power purchase agreements at issue because to do so would directly interfere with the Commission's jurisdiction over the rates, terms, conditions, and duration of the wholesale energy contracts.[47]

23. In *Boston Generating*, the parties to the proceeding agreed that debtors should seek Commission approval of the wholesale contract at issue, but disagreed over whether the bankruptcy court or the Commission may consider the rejection motion concurrently or the bankruptcy court must wait until the Commission has ruled.[48] The court concluded that this disagreement was irrelevant because regardless of the order, "[i]f either the bankruptcy court or [the Commission] does not approve the Debtors' rejection of the [wholesale agreement], the Debtors may not reject the contract." Thus, the court ordered the debtor to obtain a determination from the Commission pursuant to the Natural Gas Act as to whether it may reject the wholesale contract.[49]

24. More recently, in *FirstEnergy* the bankruptcy court in the United States District Court for the Northern District of Ohio (Ohio Bankruptcy Court) issued a preliminary injunction enjoining the Commission from requiring FirstEnergy Solutions Corporation (FirstEnergy), which had filed a petition for bankruptcy, to continue performing under certain wholesale power contracts that FirstEnergy sought to reject through bankruptcy. In defending against the injunction, the Commission argued that, reading the FPA and the Bankruptcy Code together, the Commission maintains concurrent jurisdiction with bankruptcy courts over wholesale power agreements. In other words, a debtor must seek bankruptcy court approval to reject a wholesale power agreement, as well as Commission approval to unilaterally change such agreement. Rejecting the Commission's position, the Ohio Bankruptcy Court found that the automatic stay provision of the Bankruptcy Code[50] and its power to grant equitable relief under the Bankruptcy Code[51] support its

[46] *Id.*

[47] *Id.* at 36, 39.

[48] *Boston Generating*, 2010 WL 4616243 at *3.

[49] *Id.*

[50] 11 U.S.C. § 362(a) (2012).

[51] 11 U.S.C. § 105(a) (2012).

decision to issue the preliminary injunction. That opinion is currently pending appeal before the United States Court of Appeals for the Sixth Circuit.[52]

25. Against this background, and given the unsettled state of the law, we have reviewed the FPA and Bankruptcy Code in light of the arguments raised in the Petition, and conclude that the Commission and the bankruptcy courts have concurrent jurisdiction to review and address the disposition of wholesale power contracts sought to be rejected through bankruptcy. We find that to give effect to both the FPA and the Bankruptcy Code, a party to a Commission-jurisdictional wholesale power purchase agreement must obtain approval from both the Commission and the bankruptcy court to modify the filed rate and reject the contract, respectively.

26. Courts have repeatedly acknowledged the broad scope of the Commission's statutory jurisdiction over rates, terms, and conditions of wholesale electricity sales.[53] The Commission's exclusive authority to determine the reasonableness of wholesale electricity rates also extends to the rates, terms, and conditions of wholesale power agreements, as well as changes to those agreements.[54] The Commission's broad and plenary authority over wholesale electricity rates led to the development of the filed-rate doctrine, which holds a party "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."[55] First designed to "ensure that federal courts respect the decisions of federal administrative agencies," the filed-rate doctrine recognizes that "[the Commission] alone is empowered to make that judgment of reasonableness, and until it has done so, no rate other than the one [approved by the Commission] may be charged."[56] In short, under the FPA, the Commission determines the filed rate and "except for review of the Commission's orders, the courts can assume

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[52] *See In re FirstEnergy Solutions Corp.*, Case Nos. 18-3787, 18-3788, 18-4095, 181-4097, 18-4107, 18-4110, Briefing Schedule (6th Cir. filed Jan. 17, 2019) (requiring appellants' principal briefs to be filed by February 26, 2019).

[53] *E.g.*, *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016).

[54] *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527 (2008) (discussing the standard that the Commission applies when reviewing the modification of a wholesale power purchase agreement).

[55] *Montana–Dakota Utilities*, 341 U.S. at 251.

[56] *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 964 (1986) (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981)).

no right to a different one."[57] We find that a rejection of a Commission jurisdictional contract in a bankruptcy court alters the essential terms and conditions of the contract and the filed rate; thus, this Commission's jurisdiction is implicated, and our approval is required.[58]

27. We disagree with PG&E's assertion that a Commission order addressing Exelon's Petition prior to PG&E's bankruptcy filing would violate the FPA and the Bankruptcy Code. We are similarly unpersuaded by the argument that Exelon's Petition is without merit because it was filed in advance of PG&E's anticipated bankruptcy. Given that the law is unsettled, under the circumstances here, we find it appropriate for parties to raise concerns related to activities covered by the provisions of the FPA, including the rates, terms, and conditions of wholesale power agreements.

28. With regard to PG&E's statement that that the bankruptcy court will have jurisdiction over the issues raised in the Petition, we maintain that the Commission shares concurrent jurisdiction with bankruptcy courts over wholesale power agreements, as described above. Similarly, concerning PG&E's argument that the Commission should disclaim its authority due to provisions contained within specific contracts, these agreements are still subject to the Commission's jurisdiction and the Commission maintains discretion to exercise its authority.

<u>The Commission orders</u>:

We conclude that this Commission and the bankruptcy courts have concurrent jurisdiction to review and address the disposition of wholesale power contracts sought to be rejected through bankruptcy.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[57] *Montana–Dakota Utilities*, 341 U.S. at 252.

[58] As the Commission stated in *NextEra v. PG&E*, while the circumstances of individual contracts may vary, the Commission's jurisdictional position is the same with regard to other wholesale power contracts PG&E may seek to terminate or modify through bankruptcy. *NextEra. v. PG&E*, 166 FERC ¶ 61,049 at n.58.

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