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THE BANKRUPTCY OF FIRSTENERGY: YOU'RE TOO CLOSE TO THE SUN, ICARUS!

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April 2024

which becomes, in part:

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Cast of Characters

The Debtors[3]

FirstEnergy Solutions Corporation

FirstEnergy Solutions ("FES"), an Ohio Corporation, provided "energy-related products and services to retail and wholesale customers."[4] FES also owned and operated, through its subsidiaries, fossil and nuclear generating facilities.[5] FES was wholly owned by non-debtor FirstEnergy Corporation ("FE Corp" or "FirstEnergy"),[6] a public utility holding company with power generation, transmission, and distribution subsidiaries.[7] FES, along with non-debtor, unregulated generation affiliate, Allegheny Energy Supply Company, LLC, constituted FE Corp's Competitive Energy Services segment.[8] FES became Energy Harbor LLC during the bankruptcy proceedings.[9]

FirstEnergy Generation, LLC

FirstEnergy Generation ("FG"), an Ohio limited liability company, was a wholly-owned subsidiary of FES that owned and operated non-nuclear generating facilities.[10] FG wholly owned Units 2 and 3 at the Bruce Mansfield Power Plant in Shippingport, Ohio ("BMP") and approximately 6% of Unit 1.[11] FG was the original lessee of the remaining ~94% of BMP Unit 1 under a sale-leaseback transaction (the "Mansfield Sale Lease-Back Transaction," which is discussed in detail below).[12] FG became Energy Harbor Generation LLC during the bankruptcy proceedings.[13]

---

[3] Collectively, the "Debtors." **Note*** that post-confirmation, almost every Debtor changes their name, which is reflected in the Order Approving Debtors' Motion to Change Case Caption, entered on April 28, 2020. *See* Order Approving Debtors' Motion to Change Case Caption, [Docket #4008] [elsewhere, the "Name Change Order"]; *see also* Debtor Name Change Chart, [Link].

[4] Voluntary Petition of FirstEnergy Solutions Corp., at 6, [Docket #1].

[5] *Id.*

[6] *Id.*; *see also* Declaration of Donald R. Schneider in Support of Chapter 11 Petitions and First Day Motions, at 6, [Docket #55] [elsewhere, the "Schneider First Day Declaration"]. **Note*** that all page numbers throughout reference the page of the PDF and not the page number of the actual document, except for law review and case citations.

[7] Schneider First Day Declaration, at 6.

[8] Motion for Entry of an Order Authorizing FirstEnergy Solutions Corp. and FirstEnergy Generation, LLC to Reject A Certain Multi-Party Intercompany Power Purchase Agreement with the Ohio Valley Electric Corporation as of the Petition Date, at 9, [Docket# 44] [elsewhere, the "Motion to Reject Intercompany/OVEC Executory Contract"].

[9] Name Change Order, at 2.

[10] Schneider First Day Declaration, at 16–17.

[11] *Id.*

[12] *Id.* at 18.

[13] Name Change Order, at 2.

FirstEnergy Generation Mansfield Unit 1 Corporation

FirstEnergy Generation Mansfield Unit 1 ("FGMUC"), an Ohio corporation, was "a wholly-owned subsidiary of FG, which owned various leasehold interests in Bruce Mansfield Unit 1, assigned by FG."[14] Under a power purchase agreement ("PPA"), FGMUC sold all power produced in Unit 1 to FG; FGMUC had no employees.[15] FGMUC became Pleasants Corp. during the bankruptcy proceedings.[16]

FirstEnergy Nuclear Operation, LLC

FirstEnergy Nuclear Operation ("NG"), an Ohio limited liability company, owned three nuclear generation plans, namely (i) Beaver Valley Power Station in Shippingport, Pennsylvania ("Beaver Valley"); (ii) Davis-Besse Nuclear Power Station in Oak Harbor, OH ("Davis-Besse"); and (iii) the Perry Nuclear Power Plant in Perry, Ohio ("Perry").[17] Under the terms of a PPA, FES purchased all power generated by NG; NG had no employees.[18] NG became Energy Harbor Nuclear Generation LLC during the bankruptcy proceedings.[19]

FirstEnergy Nuclear Operating Company

FirstEnergy Nuclear Operating Company ("FENOC"), an Ohio corporation, was an affiliate of FES and a direct subsidiary of FE Corp.[20] FENOC operated the nuclear generation stations owned by NG "pursuant to a Master Nuclear Operating Agreement and NRC requirements."[21] FENOC has 2,333 employees.[22] FENOC became Energy Harbor Nuclear Corp. during the bankruptcy proceedings.[23]

Norton Energy Storage L.L.C.

Norton Energy Storage ("NES"), a Delaware limited liability company, was a direct subsidiary of FG with no employees.[24] "NES [was] a non-operating entity that own[ed] 92 acres

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[14] FirstEnergy 2016 10-K, at iii, [Link] [elsewhere, the "FirstEnergy 2016 10-K"].

[15] Schneider First Day Declaration, at 20.

[16] Name Change Motion, at 2.

[17] Schneider First Day Declaration, at 20.

[18] *Id.*

[19] Name Change Motion, at 2.

[20] Schneider First Day Declaration, at 23.

[21] *Id.*

[22] *Id.*

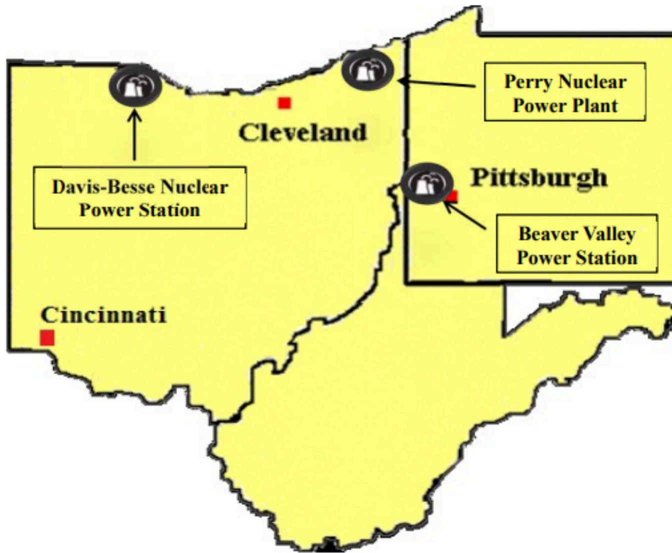
[23] Name Change Motion, at 2.

[24] Schneider First Day Declaration, at 20.

of surface property in Norton, Ohio, and the rights to use the Norton Mine for compressed air storage."[25]

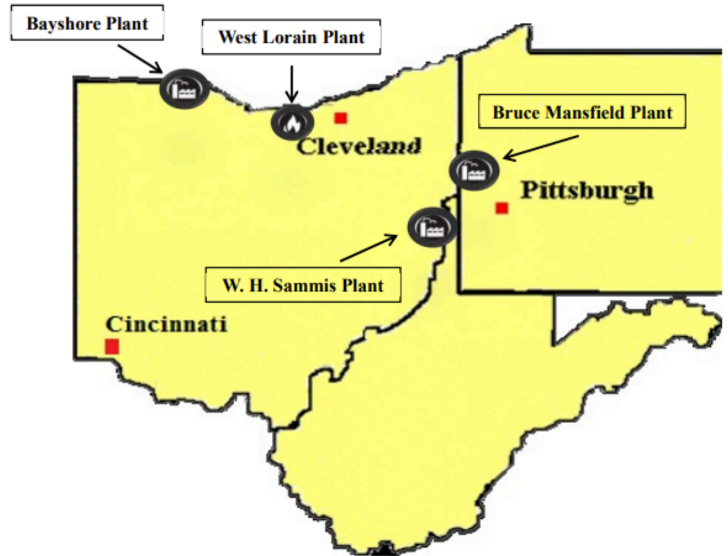
FE Aircraft Leasing Corporation

FE Aircraft Leasing Corp. ("FEALC"), an Ohio Corporation, "own[ed] one airplane which it lease[d] to non-Debtor FESC."[26]



Power plants associated with NG and FENOC.

Schneider First Day Declaration, at 21.



Power plants associated with FG and FGMUC.

Schneider First Day Declaration, at 17.

<u>The Non-Debtor Affiliates</u>

FirstEnergy Corporation

FE Corp was organized under the laws of Ohio and operated as the ultimate corporate parent of the Debtor entities and other non-debtor entities.[27]

FirstEnergy Services Company

FirstEnergy Services Company ("FESC" and, together with FE Corp and other non-debtor corporate subsidiaries, the "FE Non-Debtor Parties") was a non-debtor affiliate of FES and

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[25] *Id.* at 19.

[26] *Id.*

[27] *Id.* at 14.

subsidiary of FE Corp.[28] FESC provided corporate services (legal, financial, etc.) for the Debtors, FE Corp, and other non-debtor affiliates pursuant to shared services agreements (each, individually, an "SSA").[29] Specifically, FESC facilitated the integrated cash management system ("Cash Management System") between the FE Non-Debtor Parties and the Debtors.[30]

The Bondholders

As more specifically setout below, the "Bondholders" represented the primary creditors of the Debtors, and those who were expressly given the option to receive pro rata new equity in the reorganized Debtors. The Bondholders represented the parties with whom the Debtors and the FE Non-Debtor Parties negotiated with heavily in pre-and-post- petition, and up through the initial Plan Settlement.

Mansfield Parties

The "Mansfield Parties" are the parties involved in the Mansfield Sale Lease-back Transaction, and specifically includes (i) the ad hoc group of certain holders of pass-through certificates (such group, the "Mansfield Certificateholders Group") issued in connection with the Mansfield Sale-Leaseback Transaction; (ii) Wilmington Savings Fund Society, FSB, (the "Indenture Trustee") in its capacity as indenture trustee and pass-through trustee in connection with lessor notes issued as part of the Mansfield Sale-Leaseback Transaction; (iii) U.S. Bank Trust National Association (in its capacity as Owner Trustee for Mansfield 2007 Trusts A-E (together with its successors and assigns, the "Owner Trustee")); and (iv) MetLife Capital, Limited Partnership (in its capacity as Owner Participant of Mansfield 2007 Trusts A-E) ("MetLife").[31]

Ad Hoc Noteholders Group

The "Ad Hoc Noteholders Group" includes the certain holders of (i) pollution control revenue bonds supported by notes (the "PCNs" and any claims arising from the PCNs, the "PCN Claims") issued by FG and NG and (ii) certain unsecured notes (the "FES Notes" and any claims arising from the FES Notes, the "FES Notes Claims" and collectively with the PCN Claims, the "Noteholder Claims") issued by FES.[32]

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[28] Schneider First Day Declaration, at 24; FirstEnergy 2016 10-K, at iii.

[29] *Id.*

[30] *Id.*

[31] Notice Of Positions Of Certain Mansfield Parties With Respect To Debtors' Proposed Rejection Of Documents Designated In The Motion Of The Debtors For Entry Of An Order Authorizing The Debtors To Reject Certain Lease Agreements [Docket No. 64], at 3, [Docket #260].

[32] Process Support Agreement, at 1, [Docket #55-4] [elsewhere, "Process Support Agreement"].

The Regulators[33]

Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission (the "FERC") is responsible for regulating "the transmission and wholesale sale of electricity in internet commerce."[34]

Nuclear Regulatory Commission

The Nuclear Regulatory Commission (the "NRC") regulates the civilian use of radioactive materials "through licensing, inspection, and enforcement."[35]

Department of Energy

The Department of Energy (the "DOE") regulates United States energy policy and manages nuclear infrastructure.[36]

The Professionals

Donald R. Schneider

President and Chairman of the Board of FES and a Director of FENOC, FG, NG, FGMUC, and FEALC.[37]

Charles M. Moore

Appointed Chief Restructuring Officer for Debtors and serves as Managing Director of Alvarez and Marsal, a financial consulting firm.[38]

Kevin Wavell

Vice President, Chief Financial Officer, Treasurer and Corporate Secretary of FES, FG, NG, FENOC, FGMUC, and FEALC.[39]

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[33] *See* Schneider First Day Declaration, at 27 (listing all agencies regulating the Debtors).

[34] *What FERC Does*, FEDERAL ENERGY REGULATORY COMMISSION (last visited Apr. 12, 2024), [Link]; Schneider First Day Declaration, at 27.

[35] Schneider First Day Declaration, at 27; *About NRC*, UNITED STATES NUCLEAR REGULATORY COMMISSION (last visited Apr. 12, 2024), [Link].

[36] Schneider First Day Declaration, at 27.

[37] *Id.* at 5.

[38] Declaration Of Charles M. Moore In Support Of The Debtors' Critical Vendor Motion; Shippers, Warehousemen, and Materialmen Motion; Intercompany Agreements Motion; and Cash Management Motion, at 1, [Docket #24].

[39] Declaration of Kevin Warvell in Support of the Debtors' Hedging and Trading Motion, at 1, [Docket #15].

The Other Key Players

Unsecured Creditors Committee

Formed on April 12, 2018, the Unsecured Creditors Committee consisted of (i) BNSF Railway Company; (ii) Enerfab Power & Industrial, Inc.; (iii) International Brotherhood of Electrical Workers, Local 272; (iv) PKMJ Technical Services, Inc. dba Rolls-Royce; (v) Schwebel Baking Company; (vi) The Bank of New York Mellon Trust Company, N.A.; and (vii) Wilmington Savings Fund Society, FSB, as trustee. [40]

[40] Notice of Appointment of Creditors' Committee Filed by United States Trustee, [Docket #279].

KEY DOCUMENTS

There were more than 4,000 documents filed throughout the Debtors' bankruptcy. The following three are some of the most cited throughout this case study.

"Schneider First Day Declaration"

Declaration of Donald R. Schneider in Support of Chapter 11 Petitions and First Day Motions, [Docket #55].

"Disclosure Statement for Joint Plan"

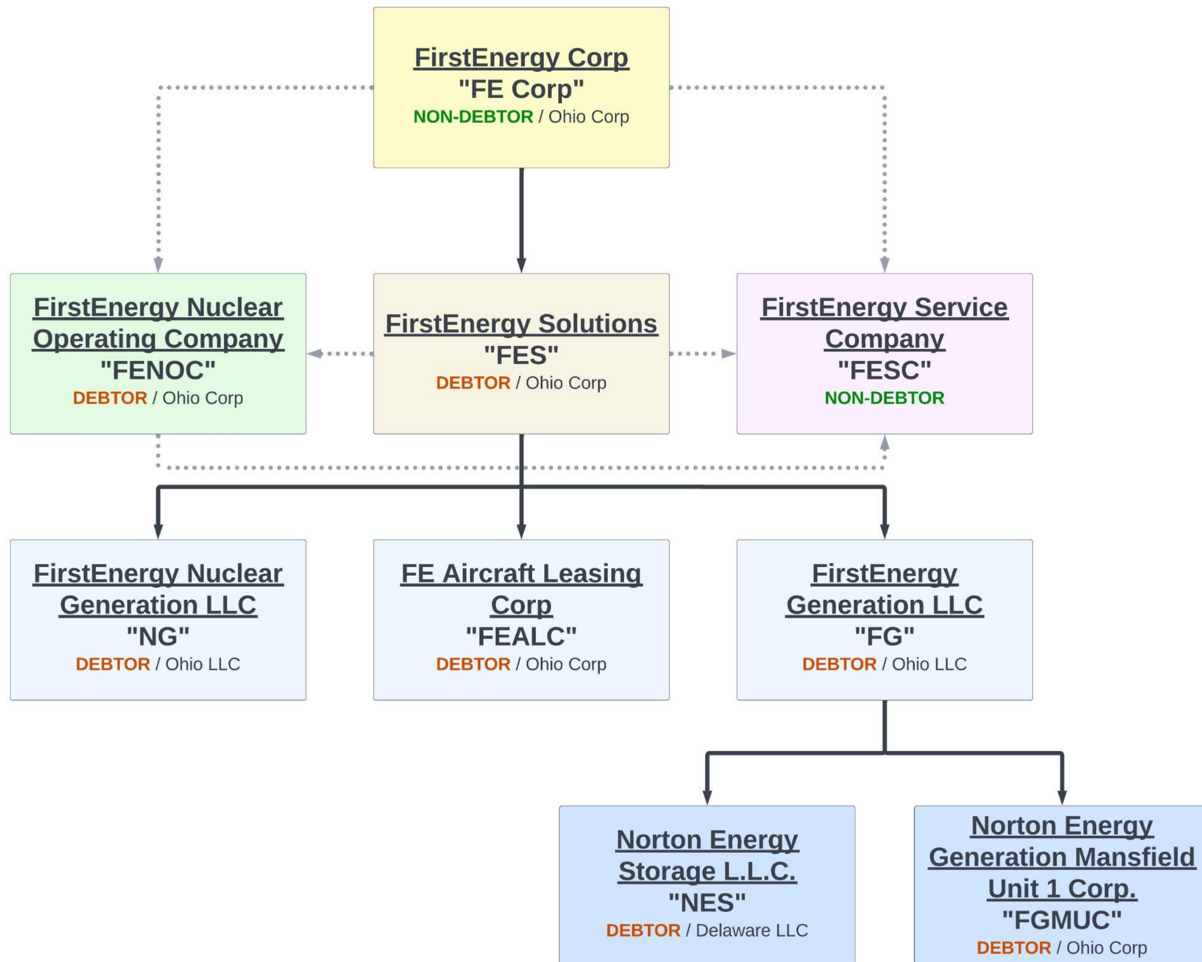
Disclosure Statement for the Joint Plan of Reorganization of FirstEnergy Solutions Corp., *et al.*, Pursuant to Chapter 11 of The Bankruptcy Code, [Docket #2119].

"Eighth Amended Plan"

Eighth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., *et al.*, Pursuant to Chapter 11 of The Bankruptcy Code, [Docket #3278].

PRE-PETITION ORGANIZATIONAL STRUCTURE[41]

The dark line indicates a parent relationship. The dotted lines indicate a relationship, but not parent relationship. FENOC is a direct subsidiary of FE Corp. and an affiliate of FES. FESC is a subsidiary of FE Corp. and an affiliate of FES and FENOC.



[41] Motion of FirstEnergy Solutions Corp., *et al.*, For Entry of an Order Directing Joint Administration of the Debtors' Chapter 11 Cases, at 3–4, [Docket #3]; *see also* Disclosure Statement for The Joint Plan of Reorganization of FirstEnergy Solutions Corp., *et al.*, Pursuant to Chapter 11 of The Bankruptcy Code, at **Exhibit C**, [Docket #2119-3] [elsewhere, the "Disclosure Statement for Joint Plan"].

INTRODUCTION: IS ICARUS A UTILITY COMPANY?

On April 1, 2018 ("Petition Date"), FirstEnergy voluntarily filed its competitive generation and operation subsidiaries for Chapter 11 bankruptcy. This was no surprise. Plunging FES, its subsidiaries, and FENOC into bankruptcy was just a "milestone in [FirstEnergy's] previously announced strategy to exit the competitive generation business and become a fully regulated utility company."[42]

If you are a fan of theater, you might be inclined to label the bankruptcy of FirstEnergy as a tragedy. Maybe there is some truth to that. Centerior and Ohio Edison, floundering northern-Ohio utility companies, began FirstEnergy as optimistic suitors with hopes that combining the companies could save them both from the brutal reality of unregulated electricity markets. This optimism turned to pessimism once it became apparent that the only path to survival for the heavily indebted conglomerate was through two acquisitions: GPU Inc. and Allegheny Energy. One merger proved successful, one provided headaches. The 2008 financial crisis only amplified FirstEnergy's problems, and FirstEnergy's overreliance on coal and nuclear fuel did not pair well with a changing marketplace. New supplies of natural gas and renewable energy caused massive shifts in energy prices as FirstEnergy delicately balanced its regulated and unregulated businesses. The story of FirstEnergy even has tales of backroom deals and political jockeying that have been billed as the "largest corruption scandal in Ohio history."[43] All great ingredients for tragic theater.

Nevertheless, the bankruptcy of FirstEnergy doesn't have to be seen as a tragedy. Instead, FirstEnergy's bankruptcy can be celebrated as a comedy, a story with an optimistic end. Thanks to the protections and processes of Chapter 11 bankruptcy, FirstEnergy was able to identify its strategic shortcomings, drastically reorganize, and continue serving its customers. Of further note, this bankruptcy saved thousands of jobs that would have certainly been lost if FirstEnergy was left to wither to dust. If bankruptcy was not available to FirstEnergy, who knows what would have happened to one of the nation's largest utility companies.

While bankruptcy may still have a stigma in our society, the truth of the matter is that bankruptcy can, and should, be viewed as a tool for companies and individuals alike who find themselves in tough situations. We hope this report helps you see this potential. The narrative and legal proceedings of FirstEnergy's bankruptcy are complicated, but we hope that in the end you see how bankruptcy can be a source of new beginnings—not a tragic end.

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[42] Press Release – FirstEnergy's Transformation to Fully Regulated Utility Company with Stronger Financials and Customer-Focused Growth Moves ahead, (Mar. 3, 2018), [Link] [elsewhere, "FirstEnergy's 2018 Press Release Announcing Voluntary Bankruptcy"].

[43] Denise Callahan, *A timeline of the largest corruption scandal in Ohio history*, JOURNAL-NEWS (Jan. 20, 2023), [Link].

FERC AND ENERGY REGULATION IN THE UNITED STATES

The Federal Energy Regulatory Commission and the Rise of RTOs

Historically, utilities in the United States generated, transmitted, and distributed power to captive customers.[44] Often, a single utility provider was vertically integrated, meaning that it owned every asset along the value chain, from generation stations all the way to the consumer utility connections. These natural monopolies restricted customer choice by locking customers into the provider who just so happened to have transmission lines in their area.[45]

For a time, this system provided reliable power at an affordable price.[46] But, in the 1960s and 70s, blackouts[47] and energy crises prompted federal intervention. This led to the creation of the FERC.[48] The FERC's goal was to provide affordable and reliable energy via regulation of wholesale energy markets.[49] In the 1980s and 90s, amid reliability and carbon emissions concerns, and with the rise of natural gas and renewables, the FERC sought to increase competition in the energy market and promote alternative energy sources. Efforts culminated in FERC Orders 888[50] and 889[51] (collectively, the "Deregulation[52] Orders"),[53] which ended natural monopolies by requiring equal access to transmission infrastructure for all power-generating entities.[54]

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[44] Electric Utilities, Deregulation Electric Utilities, Deregulation and Restructuring of U.S. and Restructuring of U.S. Electricity Markets, Purdue University [elsewhere, the "Purdue Slides"], at 39, [Link]; R. Richard Geddes, *A Historical Perspective on Energy Utility Regulation*, CATO REV. BUS. & GOV'T, 75 Regulation, Winter (1992), [Link] [elsewhere, "Geddes, A Historical Perspective on Energy Utility Regulation"]; *See* Black's Law Dictionary, [Link] (defining "captive consumer" as "[a] customer who does not have realistic alternatives to buying power from the local utility, even if that customer had the legal right to buy from competitors").

[45] Geddes, A Historical Perspective on Energy Utility Regulation, at 76.

[46] David P. Tuttle, et al., *The History and Evolution of the U.S. Electrical Industry*, U. OF TEXAS ENERGY INSTITUTE (2016), at 1, [Link].

[47] *See generally "Night of Terror" Blackout – 1977*, NYCDATA, [Link]; *The Northeast Blackout – 1965*, NYCDATA, [Link].

[48] *Frequently Asked Questions (FAQs) About FERC*, FEDERAL ENERGY REGULATORY COMMISSION, at No. 13, [Link].

[49] Schneider First Day Declaration, at 8; *see also* Complaint For Declaratory Judgment, Preliminary And Permanent Injunction Against The Federal Energy Regulatory Commission, at 13, [FERC Adversary Proceeding Docket #1] [elsewhere, the "FERC Complaint"] (citing *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371–75 (1988)).

[50] Order No. 888, Final Rule, 75 FERC 61,080 (Apr. 24, 1996), [Link] [elsewhere, "Order 888"].

[51] Order No. 889-A, 78 FERC 61,221 (Mar. 4, 1997), [Link]; Order No. 889-B, 81 FERC 61,253 (Nov. 25, 1997), [Link] [collectively, elsewhere, "Order 889"].

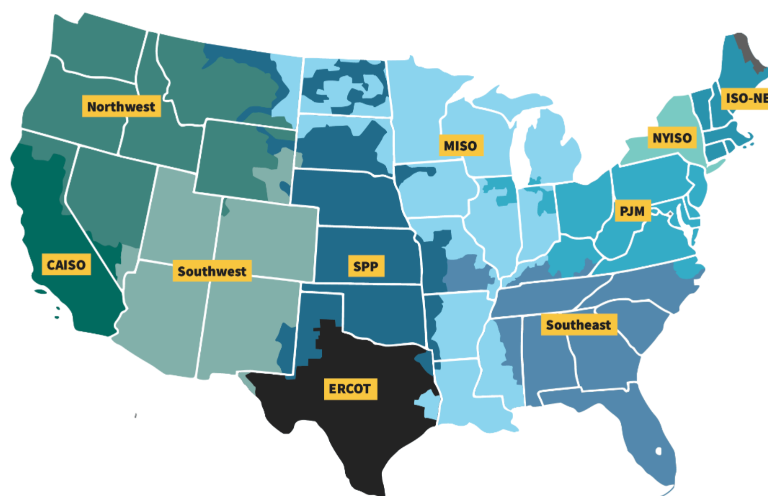
[52] "Deregulation" does not refer to the complete deregulation of the energy market. As discussed below, FERC, among other federal agencies, has and will continue to play an active role in energy regulation in the United States. "Deregulation" in this instance is used to refer to the "substitution of market forces for [cost of service] generation rates."

[53] *See* Purdue Slides, at 39; Schneider First Day Declaration, at Footnote 3.

[54] Purdue Slides, at 39; *see also* R. E. Burns, *et al.*, *Research Report: Summary of key state issues of FERC orders 888 and 889*, THE NATIONAL REGULATORY RESEARCH INSTITUTE AT THE OHIO STATE UNIVERSITY, (Jan. 1, 1997), [Link] [elsewhere, the "NRRI Research Report"].

The Deregulation Orders called for the breakup of natural monopolies by requiring equal access to transmission networks for all energy generators.[55] The Deregulation Orders created wholesale power markets, now known as regional transmission organizations ("RTOs"), which create markets where generating companies sell their power to transmitters and distributors via auction.[56] Some RTOs operate two markets: energy markets and capacity markets.[57] Energy markets deal in current power needs while capacity markets deal in pledges to supply power in the future.[58] To understand energy markets, it is critical to understand that consumer energy demands must be met in real time.[59] Energy cannot be stored for later use and must be created on an as-needed basis to meet exact consumer demand. While energy markets deal in the real time, capacity markets permit regulators, generators, and distributors to put some semblance of predictability into the electricity market.[60]

In 1999, to boost the prevalence of RTOs, FERC issued Order 2000, which "encouraged utilities to join [RTOs]."[61] Today (in 2024), two-thirds of the nation's electricity load is served in RTO regions.[62] In the map below, the "Southeast," "Northwest," and "Southwest" regions still operate in traditional wholesale energy markets where utilities are "responsible for system operations and management, and, typically, for providing power to retail consumers."[63]



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[55] *See* Order 888; Order 899; NRRI Research Report.

[56] Schneider First Day Declaration, at 8.

[57] *Id.* at 8–10.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Electric Power Markets*, FEDERAL ENERGY REGULATORY COMMISSION (last visited Apr. 15, 2024), [Link].

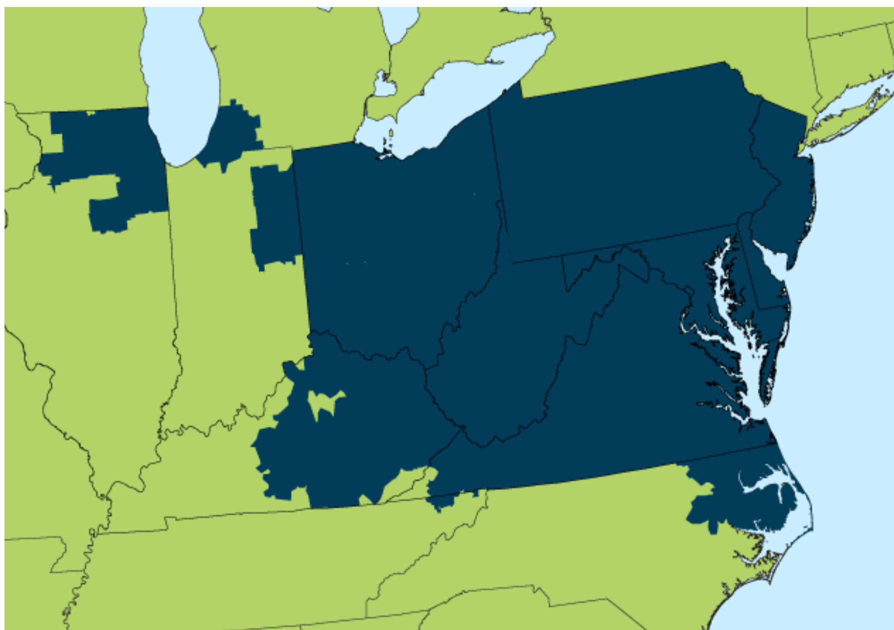
[62] *Id.*

[63] *Id.*

In these FERC directed RTO marketplaces, power is allocated from the lowest cost provider first, meaning that baseload generators, at times, cannot charge enough to recuperate costs.[64] At the same time, state and federal initiatives may require generators to supply certain percentages of their power from renewable sources, leading to the required purchase of renewable energy credits ("RECs").[65] Managing these power supplies to meet demand is a delicate balance that requires some level of guarantee from the generators, which FERC obtains through PPAs.

Participants in capacity markets determine rates, enter into PPAs, and submit those PPAs and rates to the FERC for approval.[66] As will be discussed below, many of the PPAs that drive revenue for the Debtors are subject to the FERC's approval.[67] The FERC has exclusive jurisdiction over these PPAs and exercises it's "'exclusive authority to determine the reasonableness of wholesale [electricity] rates' under the Federal Power Act"[68] by approving or rejecting proposed PPAs or suggests a renegotiation.

The Debtors are generators who supply power to the wholesale energy and capacity markets operated by the PJM Interconnection ("PJM"), an RTO servicing Ohio, Pennsylvania, West Virginia, and other states.[69] Below is a more detailed map of the PJM region.[70]



[64] *Id.*

[65] *Id.*

[66] Schneider First Day Declaration, at 8–10.

[67] Schneider First Day Declaration, at 10–11, 27.

[68] FERC Complaint, at 13 (citing *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371–75 (1988)).

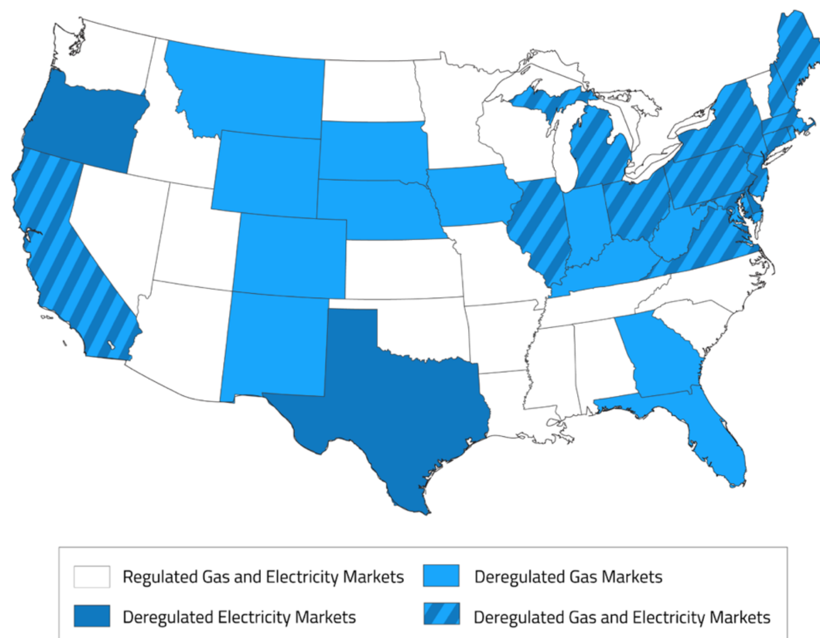
[69] Schneider First Day Declaration, at 10.

[70] *Map of PJM Territory Served*, PJM INTERCONNECTION (last visited Apr. 15, 2024), [Link].

Regulated and Unregulated State Energy Markets

Historically, the electric utility industry has supported instances of utilities enjoying monopoly power. Many utility monopolies were deemed essential to supplying power in some communities and were allowed to proliferate under the watchful eye and blessing from all levels of governments. But the Deregulation Orders charted the nation on a path towards deregulation and offered states the ability to decide how best to meet the electricity needs of their citizens.

Following the Deregulation Orders, states started deciding whether, or to what extent, their energy markets should be deregulated. For example, some states, like Ohio, permit consumers to select their generator company.[71] Unlike a marketplace system, where consumers are provided with the lowest cost electricity, regardless of source, Ohio permits consumers to shop generator companies by individual preference.[72] Below is a map of the status of regulated/unregulated markets in the United States as of 2024.[73]



What is critical to understand is that the utility industry is extremely capital intensive and financial planning projections speak in terms of years and decades, not merely quarters. The Deregulation Orders brought massive changes to the United States' energy markets, which was moderately stable and predictable before the orders came into effect. The Deregulation Orders

[71] Schneider First Day Declaration, at 10–11.

[72] *Id.* However, this system only permits residents to select a generator.

[73] *Deregulated Energy States*, ELECTRIC CHOICE (last visited Apr. 15, 2024), [Link].

caused problems for energy utilities who were forced to scramble and reconsider their business practices and strategies if they found themselves operating in a state that was deregulating its energy markets.

The regulatory environment for energy generation, transmission, and distribution in the United States is endlessly complex and constantly changing as market needs and energy supplies shift. This is a report on the bankruptcy proceeding of an electric utility, not the intricacies of energy regulation in the United States. This section provided a high-level primer and overview of the key factors at play in this area but be aware that many other factors that were not discussed serve a role in the development and operation of energy markets.

THE HISTORY OF FIRSTENERGY

A Flicker of Hope: The Creation of FirstEnergy Corp

FirstEnergy was formed in 1997 through the merger of Centerior Energy Corporation ("Centerior") and the Ohio Edison Company ("Ohio Edison").[74] The merger created the 11th largest investor-owned utility company in the United States and served 2.1 million customers in Ohio and western Pennsylvania.[75] The transaction started off on rocky, yet optimistic grounds. Commentators noted that both firms needed to cut costs and shed debt to compete in the newly deregulated landscape of federal and state electric utilities.[76]

Initially, the fear of what a deregulated energy market would look like prompted Centerior and Ohio Edison to look at a strategic merger. Two years before the merger, Centerior's management was "keenly aware of the magnitude of the problems that face[d]" the company.[77] Centerior recognized it was "not yet positioned to compete in a less regulated electric utility industry,"[78] and even requested a rate increase with regulators in 1995 to boost cash flow and pay down its mounting debt and preferred stock obligations.[79] Threats to its monopoly power were not the only issues with Centerior's business model. Centerior had "substantial"[80] investments in nuclear power generation assets, which became costly to operate in the wake of the Three Mile Island nuclear accident in 1979.[81] The increased operating costs made nuclear generation assets essentially infeasible investments in a deregulated market. Worse still, in 1993, Centerior took a $1.02 billion charge to write-down its investment in a half-built nuclear power plant and other nuclear power assets on its books.[82] Simply put, Centerior, which operated as a monopoly in a pre-deregulated world, could no longer sustain its business model of charging above competitive prices for electricity generated from its nuclear assets.

Ohio Edison was similarly situated in 1995, albeit financially stronger than Centerior due to its smaller holdings in nuclear assets. Still, fears of a deregulated electric utility market served a

[74] *Company History*, FIRSTENERGY CORPORATE WEBSITE (last visited Apr. 15, 2024), [Link] [elsewhere, "History of FirstEnergy"].

[75] *$4.8 Billion Utility Merger*, CNN MONEY (Sep. 16, 1996), [Link]; Agis Salpukas, *Ohio Edison Plans to Buy Another Utility for $1.6 Billion*, THE NEW YORK TIMES (Sep. 17, 1996), [Link].

[76] Emily Nelson & Benjamin A. Nelson, *Ohio Edison to Buy Centerior In Deal Valued at $1.5 Billion*, THE WALL STREET JOURNAL (Sep. 17, 1996), [Link] [elsewhere, the "1996 Wall Street Journal Article"].

[77] Centerior Energy 1995 Annual Report, at 10, [Link] [elsewhere, the "Centerior Energy 1995 Annual Report"].

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Costs of Nuclear Power Plants – What Went Wrong?*, [Link] [elsewhere, the "Costs of Nuclear Power Plants"].

[82] *Company News; Centerior Cuts Dividend and Plans $1 Billion Charge*, THE NEW YORK TIMES (Jan. 5, 1994), [Link].

chilly undertone in Ohio Edison's 1995 Annual Report.[83] While Centerior begged for rate increases to service its debt load, Ohio Edison got defensive, requesting a rate reduction and rate freeze[84] in preparation for competition in a newly deregulated electric utility market.[85] Forthcoming competition in local electric markets yielded cost cutting, and in 1995, Ohio Edison boasted about reducing headcount by 2,000 employees, cutting some capital spending, and "aggressively" reducing debt.[86] Trimming debt obligations was nothing short of an obsession for Ohio Edison. Even small wins, such as reducing the average cost of outstanding debt by 1.28% over five years, were celebrated by management in their discussion of the Ohio Edison's financial condition in 1995.[87]

Sparks flew in 1996 when the merger of Centerior and Ohio Edison was announced. Now that FirstEnergy was born, was light at the end of the tunnel? Senior leadership sure thought so. Centerior's management labeled 1996 an "exciting, eventful year"[88] and noted that the merger with Ohio Edison "represent[ed] the best opportunity" for Centerior to achieve "competitiveness and enhanced share owner value."[89] Ohio Edison considered 1996 a "landmark year."[90]

However, work still needed to be done. Ohio Edison reaffirmed its commitment to "cut debt by 40 percent through the year 2000."[91] Centerior noted its continued focus on *totally* reducing its $1.3 billion indebtedness by the year 2000.[92] Optimism on Wall Street was muted as financial markets had mixed reactions to the merger. Standard & Poor and Moody's upgraded the credit ratings of Centerior's subsidiaries,[93] but Ohio Edison's stock price slid to account for the "high price" it paid for Centerior.[94] Moody's even considered downgrading Ohio Edison's credit rating since the company assumed Centerior's debt laden balance sheet when FirstEnergy was

[83] Ohio Edison 1995 Annual Report, at 2, 3, [Link] [elsewhere, the "Ohio Edison 1995 Annual Report"].

[84] A rate freeze is when prices are frozen for a period of time.

[85] Ohio Edison 1995 Annual Report, at 2.

[86] Ohio Edison 1995 Annual Report, at 2; *see also* Reuters, *Company News; Ohio Edison to Trim 227 Jobs at 3 Plants*, THE NEW YORK TIMES (Feb. 24, 1995), [Link] (noting that Ohio Edison was cutting 227 jobs at three coal-fired plants in 1995 "in an effort to cut costs and improve operations" and "lower annual operating costs by $13 million").

[87] Ohio Edison 1995 Annual Report, at 14.

[88] Centerior Energy 1996 Annual Report, at 2, [Link].

[89] *Id.* at 3.

[90] Ohio Edison 1996 Annual Report, at 2, [Link] [elsewhere, the "Ohio Edison 1996 Annual Report"].

[91] *Id.*

[92] Centerior Energy 1996 Annual Report, at 5.

[93] FirstEnergy 1997 Annual Report, at 83, 116, [Link].

[94] 1996 Wall Street Journal Article.

created.[95] Ohio Edison could simply not hide that it paid a premium for a utility with an upside down balance sheet—Centerior's retained earnings in 1995 totaled negative $336,000,000.[96]

Centerior and Ohio Edison rebuffed investor efforts to short-circuit the news of the merger. The new FirstEnergy was set to save the conglomerate some $1 billion over the following 10 years through "enhanced cash flow, elimination of duplicative activities, reduced operating expenses and cost of capital, and the elimination of or deferral of certain capital expenditures."[97] The merger was also set to reduce debt by $2.5 billion through the year 2000.[98] These were lofty aspirations coming from utilities that were up against the proverbial ropes twelve months earlier.

But success came fast. By 1998, FirstEnergy reported it was already exceeding its "aggressive cost cutting goals" and was redeeming or refinancing large portions of its debt.[99] Customers and corporate management were buzzing. Not only was FirstEnergy reducing its heavy debt liabilities, but Ohio Edison had pushed its rate reduction onto Centerior, so all of FirstEnergy's customers now enjoyed lower, more competitive rates.[100] Everyone seemed to be winning at the moment. FirstEnergy was glowing, but danger still lurked in the shadows—and the balance sheet.

Watt's up, New Jersey?!: Dot-Com Haze or Electric Shock?

With the ink barely dry on the FirstEnergy deal, the conglomerate announced in 2000 that it agreed to acquire GPU Inc. out of Morristown, New Jersey.[101] The acquisition doubled FirstEnergy's revenue to more than $12 billion and increased the number of customers it served to more than 4.3 million.[102] The GPU acquisition made FirstEnergy the sixth-largest energy company in the United States.[103] Accolades matter, but the real purpose for the acquisition was clear: help FirstEnergy "produce and distribute energy more efficiently."[104]

Initially, the deal appeared to be a no-brainer for FirstEnergy, at least financially. By combining with GPU, FirstEnergy "anticipated annual cost savings of approximately $150 million

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[95] *Id.*

[96] Centerior Energy 1995 Annual Report, at 24.

[97] Centerior Energy 1996 Annual Report, at 2.

[98] 1996 Wall Street Journal Article.

[99] FirstEnergy 1998 Annual Report, at 4, [Link].

[100] *Id.* at 25.

[101] Neela Banerjee & Andrew Ross Sorkin, *FirstEnergy Acquires GPU in $4.5 Billion Cash-Stock Deal*, THE NEW YORK TIMES (Aug. 9, 2000), [Link] [elsewhere, the "Banerjee & Sorkin, 2000 New York Times Article"].

[102] History of FirstEnergy.

[103] Banerjee & Sorkin, 2000 New York Times Article.

[104] *Id.*

through improved operating efficiencies."[105] In addition to cost savings, FirstEnergy was looking to find revenue streams outside of energy generation and transmission, noting that merging with GPU would "help further expand the market for [FirstEnergy's] diverse mix of products and services."[106] In theory these plans made sense since FirstEnergy was looking for growth outside of regulated electricity markets, but undertones of uncertainty sparked concern.

FirstEnergy was at a strategic crossroads. Notably, FirstEnergy stressed in its 2000 Annual Report that "[w]hile electricity remains [FirstEnergy's] core business, growth in other areas is important because adding new sources of revenues will help replace revenues [FirstEnergy] will lose in Ohio's competitive [(unregulated)] market."[107] These new revenue sources included "natural gas, mechanical contracts, and telecommunications,"[108] such as "high-speed, fiber optic based network services."[109]

Businesses must adapt to seek financial growth in a changing marketplace, but FirstEnergy appeared desperate.[110] This desperation was only exacerbated by the fact that Ohio's deregulation efforts called for "20 percent of [FirstEnergy's] electric customers" to switch to new suppliers over the course of five years.[111] As such, FirstEnergy was legally mandated to lose customers. Worse still, because FirstEnergy was growing through mergers and acquiring a mix of regulated and unregulated operations, FirstEnergy found itself stuck in strategic limbo. FirstEnergy committed to taking part in both the "competitive [(unregulated)] and regulated retail electric services" markets.[112] Deregulation was spelling havoc for FirstEnergy as the company chased additional revenues. The GPU merger offered a respite for the moment.

However, other details about the GPU merger raised eyebrows. For instance, GPU's Chairman, President, and CEO noted that GPU's "access to FirstEnergy's generation and its expertise in providing cost-effective supply options in competitive markets will be a tremendous advantage."[113] This was an interesting comment considering FirstEnergy was struggling with cost control in the years leading up to the GPU merger. Also, the GPU deal would see FirstEnergy

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[105] FirstEnergy 2000 Annual Report, at 6, [Link].

[106] *Id.* at 7 (noting that this "mix" of products included "natural gas, mechanical electrical contracts, and telecommunications," (at 9) which included "high-speed, fiber optic based network services" (at 11)).

[107] *Id.* at 7.

[108] *Id.* at 9.

[109] *Id.* at 11.

[110] *Id.* at 6, 9. Ohio become an unregulated energy market on January 1, 2001.

[111] *Id.* at 6.

[112] *Id.* at 27; *see also id.* at 27 ("Since our regionally-focused retail sales strategy envisions the continued operation of both regulated and competitive operations, our transition plan included details for our corporate separation.").

[113] *FirstEnergy Buys GPU*, CNN MONEY (Aug. 8, 2000), [Link].

assume "about $7.4 billion of GPU's debt and preferred stock."[114] Such a revelation indicates that FirstEnergy's dire need to boost revenues and expand its network outweighed prudent service of the already tremendously high outstanding debt on FirstEnergy's balance sheet. Another bizarre detail about the GPU merger: GPU was the previous owner of Three Mile Island,[115] the site of the "most serious accident in U.S. commercial [nuclear] power plant operating history."[116] There is a special irony in the fact that the very nuclear power plant, whose infamous meltdown in 1979 had initially escalated the costs of building and operating nuclear power plants to unsustainable levels,[117] became an asset of FirstEnergy—a company created to rescue struggling utilities entangled in debt due to their own nuclear power plant investments.

However, by 2004, FirstEnergy had amped up its business and had largely proved the naysayers wrong. That year, FirstEnergy's board increased the company's quarterly dividend[118] and FirstEnergy continued making the necessary moves to make the most of its acquisition of GPU. FirstEnergy retired, refinanced, or restructured more than $2.8 billion in long-term debt in 2004 alone, which assisted in reducing FirstEnergy's "adjusted debt-to-capitalization ratio to 57 percent from 65 percent" over a three-year period.[119] Moreover, FirstEnergy's increase in net income from $646 million in 2001 to $878 million in 2004 was due to organic growth in the business, rather than inorganic acquisition growth.[120]

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[114] *FirstEnergy Confirms GPU Deal*, OIL & GAS JOURNAL (Aug. 8, 2000), [Link].

[115] *Who Owns the Island? Corporate History of Three Mile Island*, THREE MILE ISLAND ALERT (last visited Apr. 15, 2024), [Link].

[116] *Background on the Three Mile Island Accident*, UNITED STATES NUCLEAR REGULATORY COMMISSION, (last visited Apr. 15, 2024), [Link].

[117] *See* Costs of Nuclear Power Plants, ("In response to escalating public concern, the NRC began implementing some of these options in the early 1970s, and quickened the pace after the Three Mile Island accident." "Plants nearing completion at the time of the Three Mile Island accident were delayed up to 2 years while the NRC was busy absorbing the lessons learned from that accident and deciding how to react to them."); *see Economics of Nuclear Power*, WORLD NUCLEAR ASSOCIATION (Aug. 2022), [Link] ("The EIA cited increased regulatory requirements (including design changes that required plants to be backfitted with modified equipment), licensing problems, project management problems and misestimation of costs and demand as the factors contributing to the increase during the 1970s."); *see The Urge to Merge*, POWER: NEWS AND TECHNOLOGY FOR THE GLOBAL ENERGY INDUSTRY (June 1, 2011), [Link] ("FirstEnergy was the result of merger mania that escalated in the 1980s and peaked in the 1990s. That episode was largely driven by structural changes in the electricity business that resulted in the creation of competitive wholesale and retail markets serving about half of the states, plus the unique need to deal with troubled, high-cost nuclear plants.").

[118] FirstEnergy 2004 Annual Report, at 7, [Link] [elsewhere, the "FirstEnergy 2004 Annual Report"].

[119] *Id.* at 7–8.

[120] *Id.* at 15; *see also id.* at 19 ("Electric sales by FES increased by $751 million primarily from additional sales to the wholesale market that increased $680 million in 2004. Higher electric sales to the wholesale market were possible due in part to a 13% increase in generation resulting from record production from our generating fleet. Retail sales increased $71 million, with nearly half of the revenue increase from customers within our franchise areas switching to FES.").

Flickering Future?: Natural Gas Divestment, Embrace of Coal and Nuclear

The sun was shining after FirstEnergy's acquisition of GPU, but dark clouds continued to brew on the horizon. In 2004, FirstEnergy (through FES) decided to discontinue its natural gas business,[121] opting to stick with coal and nuclear-powered electric production. At the time of the divestment, FirstEnergy only served 1,900 natural gas customers[122] and natural gas sales contributed only $4 million to FirstEnergy's bottom line in 2004.[123] FirstEnergy thought it was doing the prudent thing in cutting an ancillary service in natural gas and allowing management to "focus on its core electric business."[124]

As such, natural gas was nowhere to be seen at FirstEnergy in the mid-2000s. At FirstEnergy during this time, coal and nuclear were king. By 2008, FirstEnergy was generating 82.4 million MWH: 50.2 million MWh came from fossil fuel generation plants, with the remaining 32.2 million MWH coming from nuclear power.[125] Nothing came from natural gas. Also, around this time, upgrades to nuclear power plants were scheduled to add 150 MW of nuclear capacity and FirstEnergy made a "strategic investment" in a Montana coal mine that would see a 170 MW increase in coal capacity.[126]

With the benefit of hindsight, divesture from natural gas was a colossal mistake. Between 2001 and 2014, coal's share of the electrical net generation mix in Ohio dropped from 87% to 67%.[127] Over that same time period, the share from natural gas grew from 1% to 18%.[128] Unbeknownst to FirstEnergy at the time, its decision to move away from natural gas set the company on a course destined for dark times.

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[121] *Id.* at 22, 52.

[122] Brandon Glenn, *FirstEnergy Sells Gas Unit*, CRAIN'S CLEVELAND BUSINESS (Mar. 18, 2005), [Link].

[123] FirstEnergy 2004 Annual Report, at 52.

[124] *Id.* at 71.

[125] FirstEnergy 2008 Annual Report, at 5, [Link] [elsewhere, the "FirstEnergy 2008 Annual Report"]. **Note*** that MWH is a measure of *volume/quantity* of energy, whereas MW is a measure of the *rate* of energy production, consumption, or transfer. *See* Paul Mcardle, *Analytical Challenge (or Beginner Mistake!) – Understanding the Difference Between a MW and a MWH*, WATTCLARITY (Oct. 9, 2022), [Link].

[126] FirstEnergy 2008 Annual Report, at 5.

[127] *Ohio Energy Trends: Comparing Old and New Energy Development*, OHIOLINE (June 23, 2016), [Link].

[128] *Id.* ("While this transition is influenced by a number of factors including economics, market conditions and technology, the growing environmental concerns of greenhouse gas emissions from the electric power generation sector has also led to additional regulations on the industry. For example, the Mercury and Air Toxics Standards, Cross State Air Pollution Rule, and Cooling Water Intake Structure Rule are designed to reduce the environmental impact of the electric power generation sector and expected to result in the increased retirement of coal fired electric generation facilities.").

Interestingly, in early 2008, FirstEnergy attempted to re-enter the natural gas market by acquiring a partially complete natural gas firing generating plant in Fremont, Ohio from Calpine Corporation, ironically through Calpine's bankruptcy.[129] However, FirstEnergy delayed the completion of the Fremont natural gas plant due to the 2008 financial crisis.[130] FirstEnergy's ambitions to re-establish a natural gas presence were essentially wiped out overnight and its embrace of coal and nuclear power supply was absolute during the 2008 financial crisis.

Grounded Ambitions: The 2008 Financial Crisis

FirstEnergy continued to show resilience through the late 2000s, despite all the operational and strategic headaches following the GPU acquisition and the concern that deregulation caused in many of FirstEnergy's key markets. In 2008, FirstEnergy reported net income of $1.342 billion,[131] up from $878 million in 2004. FirstEnergy also increased its dividend from $1.80 per share in 2006 to $2.20 per share in 2008.[132] However, the 2008 financial results largely captured the picture of FirstEnergy's performance during a time of great expansion in the economy. A crisis was brewing that would short-circuit FirstEnergy's assent to powerhouse status.

In late 2008, the economy of the United States was sent into a seemingly never-ending downward spiral. Low interest rates combined with relaxed underwriting requirements in the early and mid-2000s led to an alarmingly high amount of home loans that required unsustainable mortgage payments. What made matters worse was that these toxic home loans were bundled and sold as investment vehicles to the world's largest financial institutions—meaning that toxic, unsustainable home loans were spread around to nearly every bank in the form of collateralized debt investment instruments. Upside down home loans had infected the financial system, and once the bubble burst, there was no stopping until the economy hit rock bottom.

The switch on financial freewheeling had been flipped to economic standstill. Financial outlooks and market predictions were dimmed immediately as every industry grappled with the reverberations of a paranoid and paralyzed economy. Even the utility sector, which was classically understood as a "recession proof" industry due to the necessity of things like water and electricity and the government's willingness to support utilities through regulations and subsidies during recessions, felt the squeeze.[133]

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[129] FirstEnergy 2008 Annual Report, at 18; *see also FirstEnergy Completes Sale of Fremont Energy Center to AMP*, PR NEWSWIRE (July 28, 2011), [Link] ("FirstEnergy acquired the partially complete plant in January 2008 from Calpine Corporation in that company's bankruptcy proceeding.").

[130] FirstEnergy 2008 Annual Report, at 22.

[131] *Id.* at 3.

[132] *Id.*

[133] Julie Cannell, *The Financial Crisis and Its Impact on the Electric Utility Industry*, EDISON ELECTRIC INSTITUTE 9 (Feb. 2009), [Link].

Debt financing for utilities was drastically impacted. Utilities needed short-term cash infusions to continue operations, but credit markets were essentially frozen early in the crisis.[134] The scarcity of lenders looking to make deals increased the average cost of debt for utilities from 6% in the second quarter of 2008 to over 8% by the third quarter of 2008.[135] Another painful reality for utilities in late 2008: demand in both the industrial and residential segments dipped.[136] This hit to demand decreased cash-flows, which only added to the urgency of the situation. Further, since electric utilities are incredibly "capital-intensive in nature,"[137] utilities are always in the need for financing to assist with operations and fund the capital projects critical for growth. This was a two-pronged nightmare. Not only did utilities need emergency financing to plug gaps caused by decreased demand and cash-flows, but now emergency financing was more expensive due to the heightened uncertainty caused by a spiraling economy.[138]

FirstEnergy was caught in this storm. Here is how the company fashioned its financial outlook in its 2008 Annual Report:

> In response to the recent unprecedented volatility in the capital and credit markets, we continue to assess our exposure to counterparty credit risk, our access to funds in the capital and credit markets, and market-related changes in the value of our postretirement benefit trusts, nuclear decommissioning trusts and other investments. We have taken several steps to strengthen our liquidity position and provide additional flexibility to meet our anticipated obligations and those of our subsidiaries.[139]

Allegheny Acquisition: Appalachian Power Play? or Dimming Prospects?

In its first major acquisition since GPU in the early 2000s, FirstEnergy announced on February 11, 2010, that it planned to acquire Allegheny Energy, Inc.[140] This acquisition would see FirstEnergy become a behemoth holding company of utility assets. FirstEnergy would become the parent to ten distribution companies and serve "more than six million customers in Pennsylvania,

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[134] *Id.*

[135] *Id.* However, the cost of financing did decrease early in 2009, but this increase in the cost of debt came at a time of great uncertainty, adding to its importance.

[136] *Id.* at 12 ("The degree to which residential and commercial demand has weakened in some regions, however, presents a new twist. With many consumers overextended on their mortgage payments, customers likely are viewing their electric usage as an area in which they can save. This translates into reduced revenues for many utilities.").

[137] *Id.* at 16.

[138] *Id.*

[139] FirstEnergy 2008 Annual Report, at 22.

[140] Joint Press Release – FirstEnergy and Allegheny Energy to Combine in $8.5 Billion Stock-For-Stock Transaction, (Feb. 11, 2010), [Link].

Ohio, Maryland, New Jersey, New York, Virginia[,] and West Virginia."[141] The new conglomerate would generate annual revenues of about $16 billion and FirstEnergy would gain access the Allegheny's unregulated power generation assets, which FirstEnergy viewed as sources of growth.[142]

FirstEnergy touted the Allegheny merger as yet another feather in its cap. When announcing the acquisition in its 2009 Annual Report FirstEnergy stated that the combination with Allegheny was a move "consistent" with its strategy to "build a balanced, integrated, and diversified portfolio of assets."[143]

This could not have been further from the truth. Just like at FirstEnergy, coal was also king at Allegheny. If FirstEnergy was the king of coal, Allegheny was the queen. As reported in Allegheny's 2009 10-K, coal power plants accounted for 77% of the company's total MW capacity.[144] Only 9% of Allegheny's MW capacity in 2009 came from natural gas.[145]

Critically, Allegheny was never in the position to build any meaningful portfolio of production methods even remotely close to what FirstEnergy claimed. Allegheny knew it had a coal reliance problem all the way back in 2001, when it stated in the business risk section of its 10-K for that year, that the company was "heavily exposed to changes in the price and availability of coal because most of [Allegheny's] generating capacity is coal-fired."[146] Allegheny even hinted at its efforts to "diversify[] [its] dependence on coal-fired facilities through the acquisition and construction of natural gas-fired facilities."[147] But these efforts failed to really take off, and in 2005, a staggering 82% of Allegheny's electric generating capacity came from coal, 16% from natural gas.[148] Alas, in 2009, Allegheny noted its dependence "on coal for much of its electric generation capacity."[149]

FirstEnergy's corporately optimistic claim to diversify its generation capacity was a gambit that failed to fool investors and industry commentators. Upon the merger's announcement, *Forbes*

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[141] *FirstEnergy-Allegheny Would Be Coal, Nuclear Powerhouse*, NATURAL GAS INTELLIGENCE (Feb. 15, 2010), [Link] [elsewhere, "Natural Gas Intelligence 2010 Article"].

[142] *Id.*

[143] FirstEnergy 2009 Annual Report, at 4, [Link] [elsewhere, the "FirstEnergy 2009 Annual Report"].

[144] Allegheny Energy, Inc. 2009 10-K, at 13, [Link] [elsewhere, the "Allegheny 2009 10-K"] (adding up Total MW for coal fired plants).

[145] *Id.*

[146] Allegheny Energy, Inc. 2001 10-K, at 12, [Link].

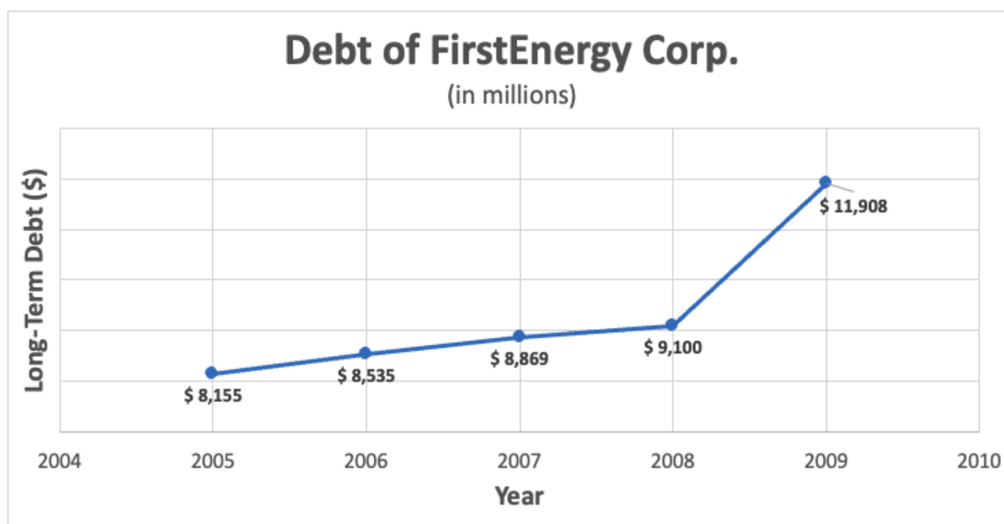
[147] *Id.*

[148] *Allegheny Energy*, GLOBAL ENERGY MONITOR WIKI, (last edited July 14, 2021), [Link].

[149] Allegheny 2009 10-K, at 91.

dryly noted that 80% of the power generated by the combined entity would come from nuclear and coal plants, which were the most expensive fuel types for electricity generation.[150] Industry commentators were quick to point out that, although the "particular combination" of FirstEnergy and Allegheny made sense, it was merely a "special situation tied to the specifics of the PJM wholesale market and the evolving deregulation of the Pennsylvania and Maryland retail power markets."[151] In essence: this deal made sense only circumstantially.

But even in FirstEnergy's circumstances the combination with Allegheny had a big issue for FirstEnergy's balance sheet: FirstEnergy would assume about $3.8 billion of Allegheny's debt.[152] In 2009, the year before the Allegheny merger was announced, FirstEnergy announced that it had obtained $1.5 billion in long-term financing for its competitive subsidiary, FES.[153] In the years leading up to the Allegheny merger FirstEnergy was increasingly taking on long-term debt, notably debt that went to building out the unregulated business operations that were the subject of FirstEnergy's voluntary bankruptcy in 2018.[154]



FirstEnergy's debt level increased steadily in the years leading up to the Allegheny acquisition.

What's worse, in 2009, FirstEnergy issued about $3.7 billion in long-term debt that was primarily used to repay "long-term debt of $1.9 billion and short-term borrowings of $1.2 billion" and to "finance capital expenditures for other general corporate purposes."[155] While the financing

[150] *FirstEnergy Swallows Rival Allegheny*, FORBES (Feb. 11, 2010), [Link].

[151] Natural Gas Intelligence 2010 Article.

[152] *FirstEnergy to Buy Allegheny in $4.7 Billion Merger*, DEALBOOK (Feb. 11, 2010), [Link].

[153] FirstEnergy 2009 Annual Report, at 4.

[154] *Id.* at 16.

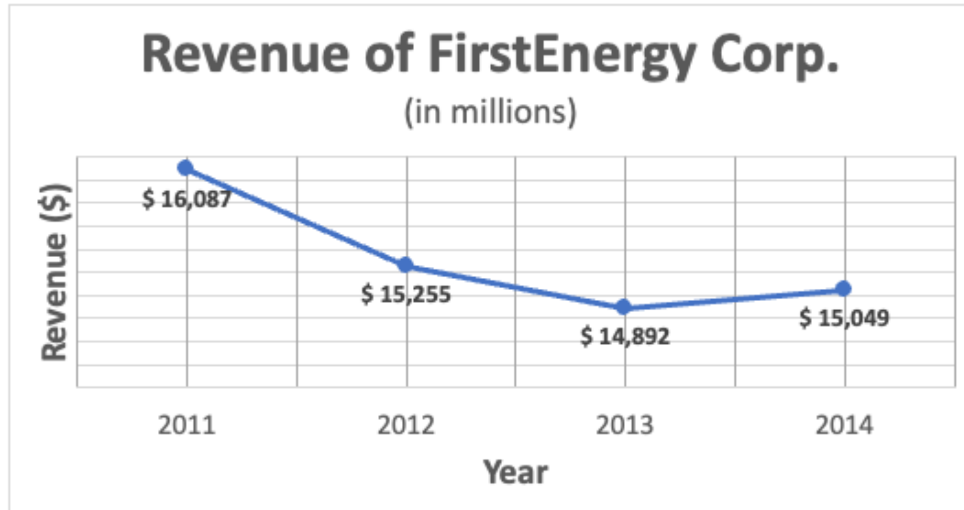
[155] *Id.* at 19.

of capital expenditures is not uncommon, the issuance of more debt to pay already existing debt signals dimming future outlooks and warrants a cause for concern.

Wall Street was not amused with the Allegheny merger and FirstEnergy's ballooning debt. On February 11, 2010, Standard & Poors lowered the credit rating of FirstEnergy and its subsidiaries, apparently "in response to the announcement of the proposed merger with Allegheny."[156] Not only did this signal wavering confidence in FirstEnergy, but the credit downgrade put FirstEnergy on the edge of a trigger that would require it to "post up to $48 million of collateral."[157] While $48 million may seem like pocket change when talking in terms of billions of dollars, the general consensus was that FirstEnergy was slowly sinking into a hole that it could not dig itself out of.

Strategic Belt-Tightening: Regulated Distribution Takes the Limelight

FirstEnergy hit a slump in the years following the Allegheny merger. Immediately after Allegheny joined FirstEnergy the conglomerate's revenues began to slow down.[158] In its 2014 10-K, FirstEnergy noted that continued "weak economic condition[s] and depress[ed] energy prices across [its] multistate business territory" played a substantial role in the deteriorating financial performance of FirstEnergy.[159]



FirstEnergy's revenues began declining after Allegheny joined the conglomerate.

[156] *Id.*

[157] *Id.* at 28.

[158] FirstEnergy 2014 10-K, at 51, [Link] [elsewhere, the "FirstEnergy 2014 10-K"].

[159] *Id.* at 34.

In 2014, FirstEnergy knew it was time for a strategic overhaul. FirstEnergy no longer wanted to play in both the regulated and unregulated markets of energy generation and distribution. FirstEnergy's corporate strategy had included both regulated and unregulated markets ever since its creation in 1997. FirstEnergy even expressed concern over its strategy to stay in both markets all the way back in 2000 when FirstEnergy swallowed GPU in a merger.[160] But in 2014, FirstEnergy's regulated business was contributing to 80%+ of the conglomerate's earnings-per-share—with that contribution growing.[161] On the contrary, FirstEnergy's competitive (unregulated) operations were predicted to drag down company earnings by some 10% in 2014.[162]

The following graphic from FirstEnergy's 2014 Earnings Guidance and Strategic Outlook, highlights just how important regulated operations had become to FirstEnergy's financial performance.[163]

Basic Operating Earnings	$/Share	% of EPS Contribution
Regulated Distribution	$1.85 - $2.05	73%
Regulated Transmission	0.52 - 0.58	21%
Sub-Total	$2.37 - $2.63	94%
Competitive Energy Services	0.35 - 0.49	6%
Corporate/Other	(0.27)	
FirstEnergy Corp. Consolidated	$2.45 - $2.85	

Note FirstEnergy's staggering reliance on regulated operations for financial performance.

By 2014 it was clear that the regulated market was the future of FirstEnergy. In a 2014 investor presentation, FirstEnergy embraced a strategy of repositioning its competitive operations and growing its regulated operations.[164] FirstEnergy planned to reduce and change its mix of competitive assets while still "retain[ing] upside potential [in the event] markets improve."[165] FirstEnergy also wanted to "limit downside" from competitive markets stemming from the "continued depressed conditions" in the energy market.[166] FirstEnergy stated a basic goal for beefing up its regulated operations: "Increase transmission investments."[167]

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[160] FirstEnergy 2000 Annual Report, at 27 ("Since our regionally-focused retail sales strategy envisions the continued operation of both regulated and competitive operations . . . .").

[161] FirstEnergy FactBook 2014, (Aug. 5, 2014), at 5, [Link] [elsewhere, "FirstEnergy FactBook 2014"].

[162] Ethan Howland, *Why is FirstEnergy Going 'back to basics'?*, UTILITY DIVE (Feb. 4, 2014), [Link] [elsewhere, the "Utility Dive 2014 Article"].

[163] FirstEnergy 2014 Earnings Guidance Letter, (Jan. 21, 2014), at 1, [Link] [elsewhere, the "FirstEnergy 2014 Earnings Guidance Letter"].

[164] FirstEnergy FactBook 2014, at 5.

[165] *Id.*

[166] *Id.*

[167] *Id.*

FirstEnergy began a back-to-basics campaign in 2014 that would culminate with FirstEnergy plunging its remaining unregulated business assets into a voluntary Chapter 11 bankruptcy filing in 2018. When FirstEnergy first announced this strategy change, market commentators added FirstEnergy to a growing list of utilities that had to backtrack on hopeful plans for finding growth in unregulated markets.[168] As one commentator quipped, "[w]hen utilities pull out a "back to basics" strategy, you know their drive for growth from unregulated operations didn't work out and the steady earnings from regulated operations suddenly look appealing."[169] It was FirstEnergy's stated intention in 2014 to retain some "competitive supply operations in hopes the market will rebound" but FirstEnergy ultimately elected to become a fully regulated electric utility in the end.[170]

In the early days of its back-to-basics campaign, FirstEnergy made it a top priority to shed a substantial amount of its unregulated business assets. In 2014, FirstEnergy deactivated certain unregulated assets and sold certain unregulated "hydro assets" for $394 million.[171] Following these and other efforts to pull back from the unregulated market, FirstEnergy's "competitive fleet [became] more cost-effective, efficient[,] and environmentally sound."[172]

While FirstEnergy was selling off assets in its unregulated operations segment, the company also kicked off an ambitious investment plan designed to build-out the company's regulated operations. This plan was dubbed *Energizing the Future*.[173] The initial phase of the *Energizing the Future* plan included "$4.2 billion in investments through 2017 to modernize the transmission system owned by FirstEnergy's Regulated Transmission segment."[174] The

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[168] Utility Dive 2014 Article, ("Several utility companies reversed some of their more head-scratching moves. Alliant Energy decided to sell unregulated businesses, which included a planned resort in Mexico, and Allete, parent to Minnesota Power, dropped plans for making money in the Florida real estate market. Recently, Ameren sold its unregulated power business in Illinois to Dynegy so the company could focus on its regulated utilities.").

[169] *Id.*

[170] *Id.*

[171] FirstEnergy 2014 10-K, at 57.

[172] *Id.*

[173] *Id. see also id.* at 58. For context, the *Energizing the Future* plan "is focused on a large number of small projects within the existing 24,000 mile service territory that improve service to customers. The projects within the program are either regulatory required or support reliability enhancement. Regulatory required projects include those requested by PJM to support grid reliability, generator deactivations, or shale gas expansion activities. The second category of projects, those that support reliability enhancement, focus on replacing aging equipment; increasing automation, communication, and security within the system; and increasing load serving capability. In the initial years of the program, the majority of the projects are located within the ATSI system, with expectations to move east across FirstEnergy's service territory over time. FirstEnergy currently expects to fund these investments through a combination of debt and previously announced equity issuances through its stock investment plan, to the extent available, employee benefit plans, and cash."

[174] *Id.* at 56.

announcement of this investment plan was on the heels of $1.4 billion worth of investments in FirstEnergy's regulated transmission system in 2014 alone.[175]

FirstEnergy's *Energizing the Future* plan was the tip of the iceberg and, thereafter, FirstEnergy's path to Chapter 11 bankruptcy was all but inevitable.

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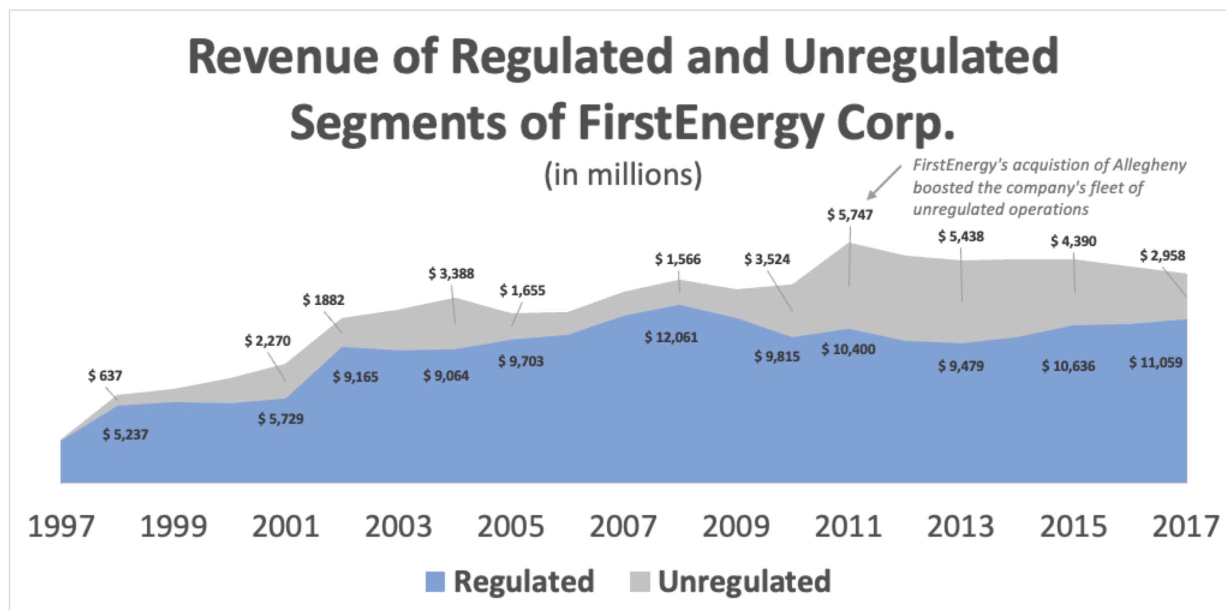
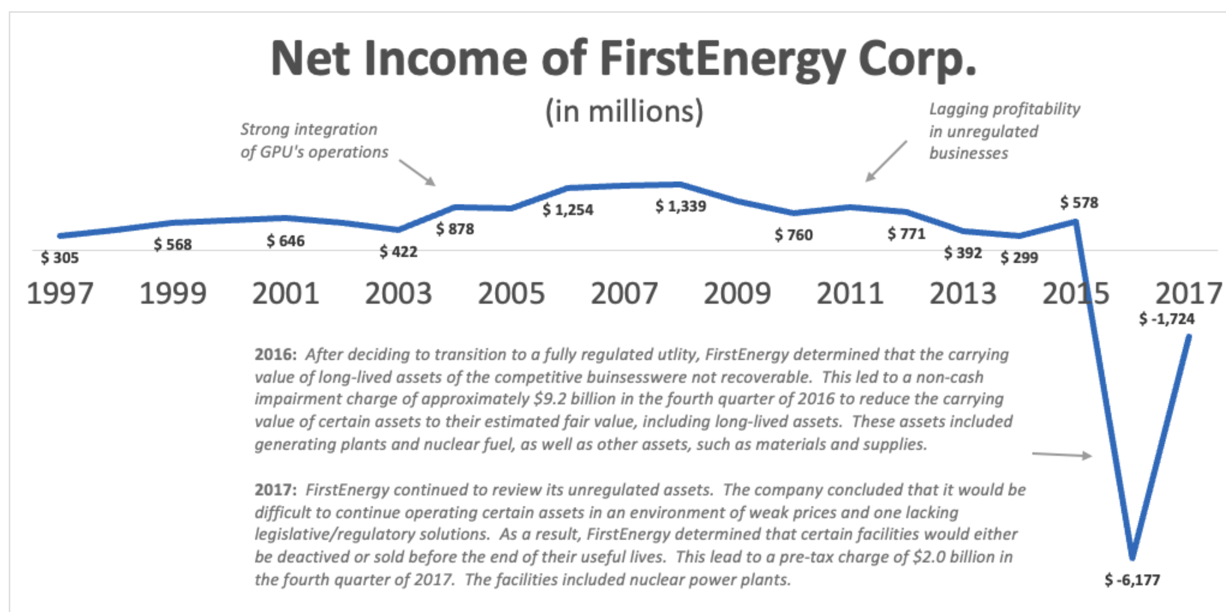
[175] *Id.*

GRAPHIC ILLUSTRATION OF FIRSTENERGY'S PATH TO BANKRUPTCY



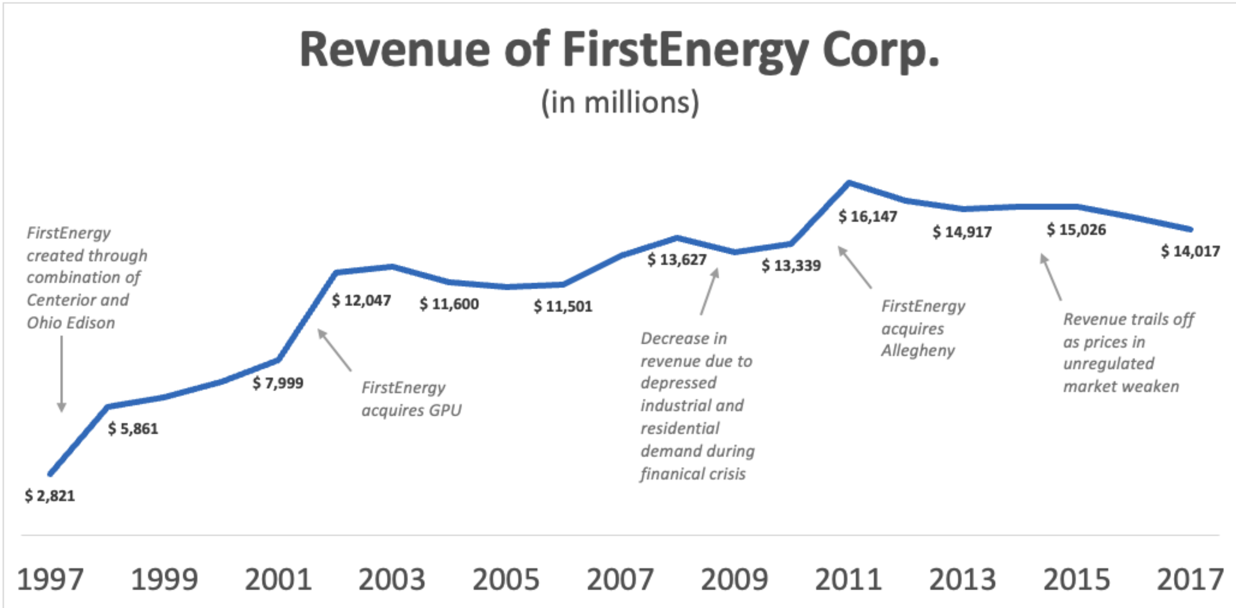
Note how FirstEnergy always had regulated and unregulated business operations and that FirstEnergy's issues with its unregulated business began accelerating around 2011, just after its acquisitions of Allegheny.

See Link for compilation of financial data.

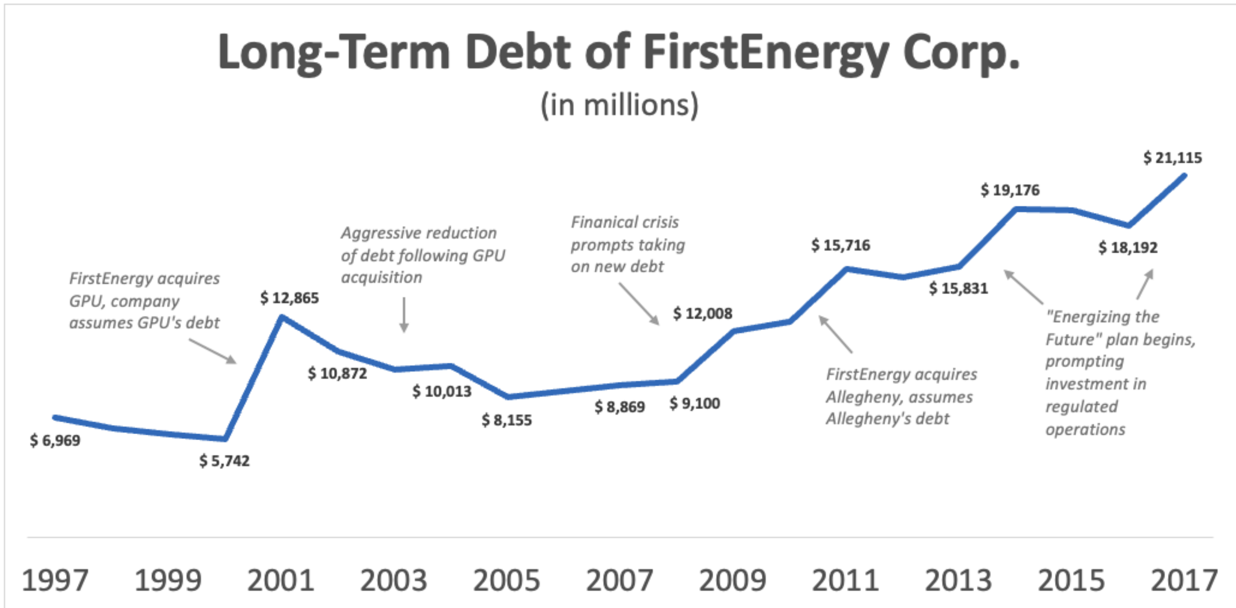


Note how FirstEnergy always earned a profit, but that its decision to exit the unregulated generation market triggered non-cash impairments stemming from its shedding of unregulated/competitive assets which impacted financial performance, at least from an accounting perspective.

See Link for compilation of financial data.



FirstEnergy primarily saw inorganic growth in revenue due to its acquisitions of GPU and Allegheny.
See Link for compilation of financial data.



Note how FirstEnergy's debt levels skyrocketed just before its bankruptcy petition as it still had debt from its unregulated operations and was aggressively taking on debt to fund its investments in regulated operations.
See Link for compilation of financial data.

DARKEST BEFORE DAWN: THE EVENTS LEADING UP TO CHAPTER 11

FirstEnergy's bout with bankruptcy came as no surprise.[176] Putting its competitive generation subsidiary, FES, into bankruptcy along with all other FES's subsidiaries and FENOC, was just a "milestone in [FirstEnergy's] previously announced strategy to exit the competitive generation business and become a fully regulated utility company."[177] In the spirit of disclosure, which is greatly encouraged in bankruptcy, the Debtors provided a number of factors that led to their bankruptcy filing and noted other pertinent developments.

Financial

Although FirstEnergy planned to use Chapter 11 of the Bankruptcy Code as a strategic tool to aid its overall reorganization and transformation into a fully regulated utility, the company, via the Debtors, noted several financial factors that led the Debtors to bankruptcy.

Rapid Expansion in Natural Gas Supplies

FirstEnergy's core electricity generation assets were coal and nuclear power plants. Historically, coal and nuclear power is expensive to produce, which left FirstEnergy selling electricity with a higher average cost. This invariably made the cost of FirstEnergy's electricity more expensive and therefore less competitive in unregulated markets. At first, FirstEnergy's market position was protected by monopoly power, but once energy markets started moving towards deregulation, the company was stuck with generation assets that produced comparatively more expensive electricity.

The explosion of natural gas supplies put further pressure on FirstEnergy. The "substantial increase in the supply of natural gas . . . caused a significant reduction in natural gas prices."[178] This significant increase in the supply of natural gas (and thus a decrease in the price of electricity generated with natural gas), paired with the "growth of renewable energy producers," resulted in a "substantially lower wholesale price of electricity in the PJM market."[179]

Another factor making things difficult for FirstEnergy was that coal and nuclear power plants were (and are still) considered "baseload" generators, meaning they supply power to the

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[176] Utility Dive 2014 Article, (noting that the Chapter 11 bankruptcy filing by FirstEnergy's competitive generation subsidiary FirstEnergy Solutions was a "widely-anticipated move in the parent company's quest to transform itself into a fully-regulated utility company").

[177] FirstEnergy's 2018 Press Release Announcing Voluntary Bankruptcy.

[178] Schneider First Day Declaration, at 13.

[179] *Id.* at 13–14.

grid 24/7.[180] Because energy cannot effectively be stored in large quantities, 24/7 generation leads to 24/7 sales, and 24/7 sales lead to selling electricity when prices are at their lowest.[181] Essentially, FirstEnergy was selling its coal and nuclear generated electricity all the time and for the lowest price possible. This was not a recipe for financial success since the electricity from FirstEnergy's coal and nuclear power plants already carried a higher average cost.

In contrast, non-baseload generators can cease power production during non-lucrative hours and pick back up when generation is most profitable.[182] Since non-baseload generators do not need to recoup losses from non-lucrative operations, their timed operations can provide power at a lower cost than baseload generators during peak demand hours.[183] This competition creates price pressure for electricity generators like FirstEnergy, who are saddled with expensive power plants and who are forced to sell their power at the lowest possible prices.

For example, the PJM market, where FirstEnergy was a frequent player, was a market where baseload and non-baseload generates worked together to meet demand. This was what the FERC envisioned when it created, and aggressively advocated for, the RTO market system discussed above. The FERC's efforts proved effective and the availability and reliability of alternative energy sources, including natural gas and renewables, saw an increase in the 2000s.[184] Throughout the 2000s, the increased availability of these alternative fuels fundamentally changed the electricity market for the PJM region.

Specifically, the expansion of natural gas supplies created a double-whammy for FirstEnergy. First, because producing electricity with natural gas was less expensive, FirstEnergy was at a steep disadvantage in deregulated markets where FirstEnergy had little to no presence in natural gas production. Recall that FirstEnergy exited the natural gas market around 2004 and had its efforts to re-enter the natural gas market stifled by the 2008 financial crisis. Although FirstEnergy had a minimal presence in the natural gas segment by the time it filed for bankruptcy in 2018, this presence was not nearly enough to derive any sort of meaningful financial benefit.[185]

The second prong of the double-whammy was that FirstEnergy was essentially stuck with its expensive coal and nuclear power plants, making FirstEnergy virtually unable to compete with the extremely depressed electricity prices caused by increases in natural gas supplies. Think about

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[180] *Baseload Generation*, NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION (last visited Apr. 15, 2024), [Link].

[181] Schneider First Day Declaration, at 8.

[182] Schneider First Day Declaration, at 7–14.

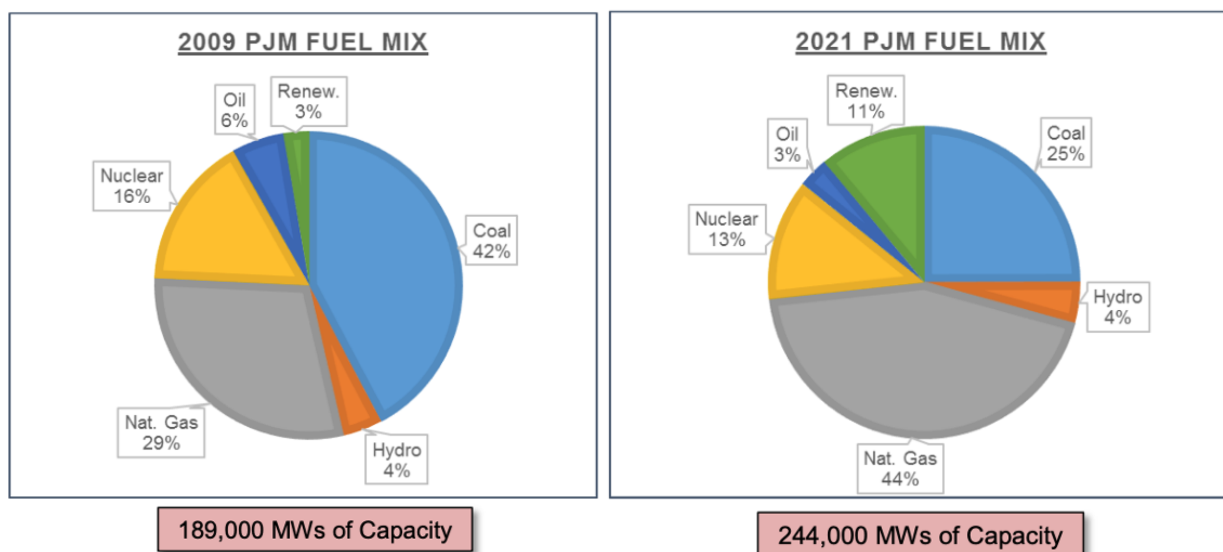
[183] *Id.*

[184] *Id.* at **Exhibit B**.

[185] *Id.* at 12 (noting that FG, a direct subsidiary of FES, owned and/or operated "four fossil generation plants throughout Ohio and Pennsylvania, which produce electricity using coal, oil and natural gas, or petroleum coke").

the phrase, "you cannot turn a warship on a dime." Because generating electric power is a capital intensive industry, it was infeasible for FirstEnergy to seek any rapid organic expedition into natural gas power generation. FirstEnergy's only hope was a possible acquisition of an already existing natural gas powered electric generation plant, a strategy which it tried around 2008. But this effort was dashed away by the financial realities of the 2008 financial crisis. FirstEnergy was stuck with expensive coal and nuclear power plants.

The Debtors provided the following graphics to illustrate how natural gas had come to dominate the PJM capacity fuel mix by 2021.[186] Note how coal's share of the fuel mix decreased by 18,746 MWs while natural gas' share of the fuel mix increased by 52,033 MWs.[187]



This influx of lower cost alternatives meant less revenue for the Debtors, and even required the Debtors to sell power at a loss in some circumstances.[188] These low cost alternatives, partnered with the fall of natural monopolies and the increase in regulatory compliance costs, caused the Debtors to fail to cover operating costs for the three years proceeding filing.[189] Ultimately, the increase in the supply of natural gas and "factors generally rendering coal and nuclear plants less competitive" caused the revenue of FES's competitive subsidiaries to "substantially decline[]" in the years leading up to the bankruptcy Petition Date.[190]

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[186] *Id.* at **Exhibit B**.

[187] *Id.*

[188] *Id.* at 11–12.

[189] *Id.*

[190] *Id.* at 13.

Cash Position and Liquidity Developments

Ever since its creation, FirstEnergy battled mounting debt obligations. The only period where FirstEnergy made any substantial progress in decreasing its debt obligations was the three to four year period following its acquisition of GPU at the turn of the century. However, starting in 2006, FirstEnergy's debt obligations began to skyrocket. This mounting debt did not pair well with FES's spiraling unsecured debt ratings, which made it difficult and expensive for FirstEnergy to issue more debt.[191] It is no surprise that FirstEnergy experienced a liquidity crisis in the months leading up to the bankruptcy Petition Date. In late 2017, approximately $2.2 billion of FES' debt was set to mature between 2018 and 2021:[192]

Debt Type	Amount	Maturity Date
Pollution Control Revenue Bonds	$516 million	Between April and December 2018[193]
Pollution Control Revenue Bonds	$1.3 billion	Between 2019 and 2021[194]
Unsecured Debt	$100 million	April 2018
Unsecured Debt	$300 million	April 2021

Per forecasts made by the Debtors, "based on its current senior unsecured debt rating and current capital structure, as well as the forecasted decline in wholesale forward market prices over the next few years, FES would be unable to refinance, even on a secured basis, these debt maturities, further stressing its anticipated liquidity."[195]

Impairments to the Value of the Debtor's Business

FirstEnergy's strategy of reorganizing into a fully regulated utility by mid-2018 required the company to make massive changes to its balance sheet and operations. FirstEnergy had an "ongoing process to evaluate its overall generation business" and engaged in a "strategic review of its competitive operations."[196] These ongoing strategic reviews led to three substantial non-cash pre-tax impairment charges to FirstEnergy:

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[191] *Id.* at 46 ("As of December 31, 2017, FES has unsecured debt ratings of Ca at Moody's, C at S&P and C at Fitch.").

[192] *Id.*

[193] Subject to automatic puts or maturing.

[194] Subject to automatic puts or maturing.

[195] Schneider First Day Declaration, at 46.

[196] *Id.* at 33.

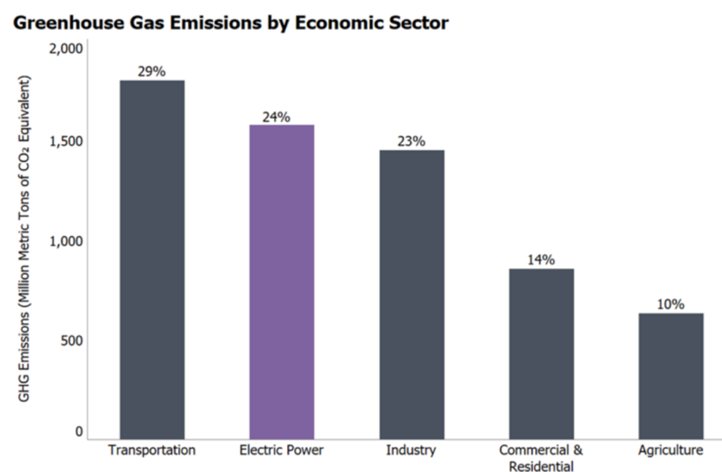
1. In July 2016, FirstEnergy announced its intention to exit the 136 MW Bay Shore Unit 1 generating station by October 2020 and to deactivate Units 1-4 of the W.H. Sammis generating station by May 2020.[197] This led to a $647 million non-cash pre-tax impairment charge in the second quarter of 2016.[198]

2. In its 10-K released in February 2017, FirstEnergy sought to "reduce the carrying value of certain assets to their estimated value, including long-lived assets, such as generating plants and nuclear fuel, as well as other assets such as materials and supplies." This resulted in a $9.2 billion non-cash pre-tax impairment charge in the fourth quarter of 2016.[199]

3. In its 10-K released in February 2018, FirstEnergy, through FES, "concluded that its nuclear facilities would likely be either deactivated or sold before the end of their estimated useful lives."[200] This resulted in a $2.0 billion pre-tax charge in the fourth quarter of 2017.[201]

High Costs to Keep Facilities in Compliance with Environmental Regulations

Electric utility companies are extremely capital intensive operations with environmental footprints that span continents. In 2022, electric power generation made up 24% of all greenhouse gas emissions in the United States (see graphic below).[202] In 2022, 60% of all the electricity generated in the United States came from "burning fossil fuels, mostly coal and natural gas."[203]



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[197] *Id.*

[198] *Id.*

[199] *Id.* at 34.

[200] *Id.*

[201] *Id.*

[202] *Sources of Greenhouse Gas Emissions*, ENVIRONMENTAL PROTECTION AGENCY (last visited Apr. 15, 2024), [Link].

[203] *Id.*

Because of the harmful effects of burning fossil fuels,[204] the Environmental Protection Agency ("EPA") has aggressively attempted to curb emissions in the electricity generation sector, namely by requiring upgrades and maintenance on coal burning power plants.[205] While these efforts were designed to increase air quality, the EPA's proposed rules would require "incremental capital expenditures of $85 billion to $129 billion" to meet increased emissions compliance standards.[206] Below is a table from a 2011 Congressional Research Service report which outlined the financial impact that several EPA rules would have on coal power plants in the years following their enactment.[207] Note the steep and ongoing financial impacts such rules impose of utility companies with coal powered electricity plants.

Table 1. Timing of EPA Rules and Impacts on Coal-Fired Utilities

Rule or Standard	Final Rule	EPA Estimate of Costs/Impacts[a]
Cross-State Air Pollution Rule	Finalized July 6, 2011	$2.4 billion/year[b]
Utility MACT Rule	Expected November 16, 2011	$10-$11 billion/year
National Ambient Air Quality Standard (NAAQS) for sulfur dioxide	Promulgated June 22, 2010	$1.5 billion/year for all sources, but limited impact on electric generating units (EGUs)[a]
NAAQS for ozone	Expected July 2011	$19-$25 billion/year for all sources but limited impact on EGUs[a]
NAAQS for particulate matter	Not yet proposed; expected in 2012	Unknown
New Source Performance Standards for Greenhouse Gases	Not yet proposed; expected May 26, 2012	Unknown
Cooling Water Intake Structure Rule	Expected July 27, 2012	$319 million/year
Clean Water Effluent Limitation Guidelines Rule	Not yet proposed; expected January 31, 2014	Unknown
Coal Combustion Waste Rule	Expected 2012 or later	$587 million-$1.5 billion/year

[204] *Fossil Fuels & Health*, HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH (last visited Apr. 15, 2024), [Link] ("But burning them creates climate change and releases pollutants that lead to early death, heart attacks, respiratory disorders, stroke, asthma, and absenteeism at school and work. It has also been linked to autism spectrum disorder and Alzheimer's disease.").

[205] *See generally* James E. McCarthy & Claudia Copeland, *EPA's Regulation of Coal-Fired Power: Is a "Train Wreck" Coming?*, CONGRESSIONAL RESEARCH SERVICE (Aug. 8, 2011), [Link].

[206] *Id.* at 5.

[207] *Id.* at 12.

Given that the Debtors were heavily reliant on coal powered electricity, these EPA rules had incredibly damaging effects on the viability and profitability of their coal powered electricity generation. Unsurprisingly, the Debtors noted that "the cost of upgrading and maintaining the Debtors' facilities to comply with additional environmental regulations has required significant capital expenditures."[208]

Burdensome Long-Term Power Purchase Agreements

PPAs provide for stability in the electricity market. The PPAs divide up generated power, dictate where it will go, and provide peace of mind to electric grid managers, communities, and businesses since they can be assured that a specified amount of power will be delivered to them at a specified price. Thus, PPAs support community development and business support.

However, there is a drawback to PPAs, especially for the generators. Because PPAs are a type of future contract, the price to be paid for an item is fixed under the contract. While this stability has its perks, this also means that, if market conditions change, the value of the product and the viability of supplying that product may fluctuate wildly over the course of the PPA. This business risk is exacerbated if the PPA does not provide for any re-negotiation or contingency plan if market conditions change.

FES identified nine long-term PPAs that were detrimental to its business (the, "Renewable Energy PPA(s)").[209] Under each Renewable Energy PPA, FES was required to pay an agreed upon contract price for electricity throughout the duration of the PPA. Here is a detailed breakdown of each burdensome Renewable Energy PPA.[210]

Description	Contract Price	Contract Date	Termination Date
Wind Power Purchase Agreements between FES and Allegheny Ridge Wind Farm, LLC (Phase 1 and Phase 2)	$65.00/MWh	March 21, 2006	December 31, 2030
Power Purchase Agreement between FES and Blue Creek Wind Farm LLC	$61.91-88.08/MWh	February 8, 2011	December 31, 2032

[208] Schneider First Day Declaration, at 6–7.

[209] Declaration of Kevin T. Warvell In Support of Rejecting Renewable PPAs and OVEC PPA, at 3–5, [Docket #47] [elsewhere, "Declaration of Kevin T. Warvell In Support of Rejecting Renewable PPAs and OVEC PPA"]; *see also id.* at 8 FES also identified an intercompany PPA, the OVEC ICPA. Under this agreement FES is obligated to purchase "4.85% of the power that OVEC's fossil-fuel plants generate at an uneconomic rate until either the year 2040 or until OVEC ceases to operate." It was calculated that FES would lose approximately $268 million if required to perform through the end of the contract.

[210] *Id.* at 3–5.

Description	Contract Price	Contract Date	Termination Date
Wholesale Purchase and Sale Agreement for Wind Energy between FES and Casselman Windpower LLC	$72.49-94.72/MWh	November 30, 2006	23rd Anniversary of Delivery Commencement Date
Renewable Resource Power Purchase Agreement between FES and High Trail Wind Farm, LLC	Varies by year, month and hour; average annual price is approximately $70.8/MWh	September 14, 2007	18th Anniversary of Facilities Completion Date/Facilities Completion Termination Deadline
Power Purchase Agreement between FES and Krayn Wind LLC	$91.02-105.13/MWh	August 20, 2008	December 31, 2030
Power Purchase Agreement between FES and Maryland Solar LLC	$230.00/MWh	October 14, 2011	20th Anniversary of Commercial Operation Date
Master Power Purchase and Sale Agreement between FES and Meyersdale Windpower LLC	$39.60/MWh	April 21, 2003	20 year anniversary of Commercial Operation Date
Wind Power Purchase Agreements between FES and North Allegheny Wind LLC (Phase 3 and Phase 4)	$74.00/MWh for years 1-12, $68.00/MWh thereafter	September 18, 2006	23rd Anniversary of Commercial Operation Date
Master Power Purchase & Sale Agreement between FES and Forked River Power, LLC	Variable based upon specified ratio	April 17, 2008	April 17, 2018

Each PPA identified by FES was with a renewable energy generator. FES contracted specifically with these renewable energy generators to satisfy certain requirements set out by Renewable Portfolio Standards ("RPS"). These RPS "obligate[ed] retail sellers of electricity to obtain a certain percentage or amount of their power supply from renewable energy sources."[211] It was (and still is) up to states to develop their own RPS, and each RPS had (and still has) its "own parameters, rules, and requirements."[212] Such RPS requirements could be met by "obtaining [RECs] that provide evidence that power has been generated by a qualifying renewable resource."[213] FES entered into the Renewable Energy PPAs to satisfy certain RPS requirements.

[211] *Id.* at 2.

[212] *Id.*

[213] *Id.* at 3.

When the Renewable Energy PPAs were entered into, between 2003 and 2011, they were "necessary and appropriate for FES' business."[214] FES noted a few reasons why the Renewable Energy PPAs were essential at the time they were entered into:

1. FES's actual and projected retail sales were greater than they are [as of Petition Date];

2. Market prices and outlook for power and RECs were materially greater than the current environment;

3. RPS mandates [back when the PPAs were entered into] were more demanding than today; and

4. The supply of RECs was more limited [back when the PPAs were entered into].[215]

But by 2018, the energy market had taken a "dramatic downturn" and prices in the energy market have rendered the Renewable Energy PPAs "extremely burdensome and uneconomic to FES."[216] To illustrate the negative impact that the Renewable Energy PPAs had on FES's business, consider the Krayn Wind LLC PPA. Leading up the Petition Date, FES was obligated to pay $91.02 per MWh, with that price escalating to $105.13 per MWh by 2030.[217] However, the market rate at the time of the bankruptcy filing for this energy was only $36.00 per MWh.[218] Thus, this PPA with Krayn Wind LLC forced FES to pay nearly three times the market rate, which would lead to FES losing about $103 million over the remaining term of this PPA alone.[219]

Also, FES had no future need for the Renewable Energy PPAs at the time of their Chapter 11 petition because of FirstEnergy's plan to transition to a fully regulated utility. FES' need for the RECs was "tied directly to its retail business,"[220] but since FirstEnergy was transitioning to a fully regulated utility, the company had essentially no need for contracts whose only purpose and benefit were in retail (unregulated) markets.[221] Making matters worse, the financial losses from the

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[214] *Id.* at 4.

[215] *Id.* at 4–5.

[216] *Id.* at 6; *see also* Expert Declaration of Judah Rose in Support Of Rejecting Renewable PPAs and OVEC PPA, at 4, [Docket #46] (identifying four drivers for this "collapse" in energy prices: "(1) Lower natural gas prices due to continued improvements in natural gas fracking; (2) Excess generating capacity due in part to lower than expected load growth; (3) Lower cost of construction for renewable technologies, and/or improved performance (e.g., higher capacity factors); and (4) Surplus of RECs").

[217] Declaration of Kevin T. Warvell in Support of Rejecting Renewable PPAs and OVEC PPA, at 6.

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

Renewable Energy PPAs were huge, whereas their overall impact on FES' business operations was small. The power purchased and sold under the Renewable Energy PPAs made up "*less than* 3% of FES's total wholesale business in 2017."[222] But, it was estimated that FES would lose approximately $500 million if FES performed under each of the Renewable Energy PPAs through their contract end dates.[223]

Procedural

Negotiations with Creditor Groups

Before the Petition Date, and on the advice of retained restructuring professionals, the Debtors began discussions with various creditors on the bankruptcy process and restructuring alternatives.[224] These discussions resulted in the Debtors and key creditors entering into a Process Support Agreement ("PSA") on March 30, 2018.[225] The purpose of the PSA was to "help guide the Debtors and the creditor groups through these Chapter 11 cases by ensuring the support and cooperation of key stakeholders in these Chapter 11 cases."[226] The PSA also provided a "framework for the Debtors to continue negotiations with their stakeholders around a plan designed to maximize recoveries for all creditors and preserve the value of the Debtors' business."[227]

The PSA incorporated the Mansfield Protocol, which "establishe[d] a process for resolving certain claims arising from the rejection of the Mansfield Unit 1 lease documents, as well as processes for consultation and cooperation with respect to the operation of Mansfield Unit 1 pending disposition of the Mansfield plant during the Chapter 11 cases and the insurance issues arising from the January 10, 2018, fire at the Mansfield plant."[228]

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[222] *Id.* at 7 (emphasis added).

[223] *Id.*

[224] Schneider First Day Declaration, at 41.

[225] Schneider First Day Declaration, at 41–42. The parties to the Process Support Agreement include the Debtors and "(a) certain members of the Ad Hoc Noteholder Group, (b) certain members of the Mansfield Certificateholders Group, (c) MetLife in its capacity as owner participant of 5 of the 6 owner-lessor trusts under the Bruce Mansfield Sale-Leaseback Transaction, (d) U.S. Bank Trust National Association, in its capacity as owner trustee of 5 of the 6 owner-lessor trusts under the Bruce Mansfield Sale-Leaseback Transaction and (e) Wilmington Savings Fund Society, FSB, solely in its capacity as indenture trustee for certain notes and certificates issued in connection with the Bruce Mansfield Sale-Leaseback Transaction." The full Process Support Agreement can be found at Docket #55-4.

[226] Schneider First Day Declaration, at 42.

[227] *Id.* ("The Process Support Agreement sets forth certain agreements and understandings with respect to the Debtors' and the Creditor Groups' conduct during the chapter 11 cases, including ensuring the Creditor Groups' support for the Debtors' First Day Motions (as defined herein), working cooperatively on the implementation of the Debtors' employee retention and severance programs, establishing a protocol for reorganization efforts relating to the Debtors' nuclear assets and potential sale processes for the Debtors' fossil and retail book assets, and confirming the payment of certain professional fees.").

[228] *Id.* at 42.

The Debtors, FE Corp, and certain creditor groups entered into a protocol (the "Intercompany Protocol") and an agreement (the "Standstill Agreement") "to establish a process for coordinated and orderly discovery regarding claims between the Debtors, on the one hand, and FE Corp and its affiliates on the other hand, and the resolution of such claims."[229] The Standstill Agreement prevented the parties from appointing "an examiner" or "commenc[ing] litigation" on any intercompany claims while the Standstill Agreement was in place.[230] Finally, the Intercompany Protocol created a "mechanism" that would allow the parties to consensually resolve claims or engage in mediation.[231]

In short, the PSA, Intercompany Protocol, and Standstill Agreement helped the Debtors maintain the status quo of business operations and ensure cooperative creditor-debtor relationships post-petition by putting in place procedures for negotiating the various settlements which would effectuate the Debtors' reorganization.

Pre-Petition Events/Developments

In the interest of complete disclosure, the Debtors made sure to draw attention to certain items of interest in their first day motions. Some items were disclosed seemingly for disclosure purposes and did not fall into categories of "Financial" or "Procedural." These included:

Disclosure of Miscellaneous Items

Bruce Mansfield Event – On January 10, 2018, a fire damaged Bruce Mansfield Units 1 and 2.[232] The fires were "controlled" and there were "no major injuries to plant personnel or the response team."[233] After the fire, the Debtors FES and FG created a recovery team to assess any damage, evaluate essential equipment, and take the necessary steps to prepare an insurance claim.[234]

Permanent Shutdown and Defueling of Nuclear Units in Advance of Decommissioning – When a licensee decides to shut down a nuclear power plant, the licensee must notify the NRC in advance of facility decommissioning.[235] On March 28, 2018, acting on behalf of NG and FENOC, FES notified the PJM and the NRC regarding the Debtors' decision to "permanently cease operations and deactivate their four nuclear power units."[236] To comply with decommissioning requirements

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[229] *Id.* at 43.

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.* at 44.

[236] *Id.*

the Debtors began taking "necessary steps to prepare for facility shutdown and defueling, and to commence facility decommissioning."[237]

Financial Outlook and Business Strategy Moving Forward – The Debtors were very transparent about the decision making processes that led them to decide that filing for Chapter 11 bankruptcy protection was the best option. The Debtors noted that they "considered a variety of potential strategic alternatives, including but not limited to: (i) legislative or regulatory solutions to increase revenue for generation assets, (ii) asset sales, (iii) plant deactivations, (iv) out-of-court debt restructuring transactions with creditors, and (v) chapter 11 bankruptcy protection."[238] The course of action the Debtors landed on was to "pursue a dual-path exit from chapter 11 in which they have the option to pursue a creditor supported chapter 11 plan of reorganization while maintaining the option of pursuing merger and acquisition efforts for some or all of the assets owned by the Debtors."[239]

Nuclear Regulatory Commission – The NRC's regulations subject nuclear operators to "rigorous nuclear safety requirements, including certain financial assurance programs."[240] One such financial requirement is that minimum funding must be set aside that would be available to decommission the nuclear site when the license expires.[241] NG had funded a $10 million trust since 2016 to "support the decommissioning of the spent storage facilities."[242] Since 2016, FES had "provided a parental support agreement to NG of up to $400 million," which the NRC required it to maintain.[243]

FERC Matter: Ohio ESP IV PPA – On April 1, 2016, FE Corp's Ohio companies entered into an agreement that included a "proposed rider retail rate stability provision [that] would flow through to customers [as] either charges or credits representing the net result of the price paid to FES through an eight-year FERC-jurisdictional PPA (the "ESP IV PPA") against the revenues received from selling such output into the PJM markets."[244] On April 27, 2016, certain parties filed a complaint with the FERC against FES and the Ohio companies requesting review of the ESP IV PPA, and the FERC subsequently granted the complaint.[245] By granting this complaint, the FERC

[237] *Id.* at 45.
[238] *Id.* at 48.
[239] *Id.*
[240] *Id.* at 34.
[241] *Id.*
[242] *Id.* at 35.
[243] *Id.*
[244] *Id.*
[245] *Id.* at 36.

"essentially eliminated the possibility of FES receiving generation support PPAs, which would have provided much-needed income and cash flow support to FES."[246]

Other Federal Developments – In April 2017, the DOE conducted a study to explore "critical issues central to protecting the long-term reliability of the electric grid."[247] The DOE's report concluded that "baseload generation retirements have occurred for a number of reasons, with low natural gas being a predominant cause."[248] The DOE submitted a proposed rule to the FERC "that would require [the] PJM and certain other RTOs to set wholesale prices for certain eligible generation resources at levels that would provide full recovery of costs and a return on equity."[249] The FERC denied this proposed rule and then implemented its own study.[250] Following the FERC's denial of adopting the DOE's proposed rule, FES submitted a request for emergency to the DOE requesting that the agency order that "certain existing nuclear and coal-fired generators in the PJM region enter into contracts with PJM that provide for recovery of costs through cost-based rates."[251] The DOE had not responded to this request at the time of the bankruptcy filing.

State Developments – In April 2017, the State of Ohio introduced legislation before its General Assembly that would "create a zero-emission nuclear credit to compensate nuclear power plants for environmental, energy security, and other attributes benefitting the state and its retail customers."[252] This initial proposal did not advance, but a similar proposal resurfaced in October 2017. The proposals were not signed into law at the time, but many other states who enacted similar laws (Illinois and New York) were faced with litigation challenging the laws.[253] Litigants against the programs argue that the "programs are preempted by [the] FERC's exclusive jurisdiction under the Federal Power Act."[254] Both lawsuits in Illinois and New York were dismissed but were being appealed at the time of the bankruptcy filing.[255]

Arbitration Proceeding with BNSF and CSX – FG has a coal transportation contract where the railroads BNSF and CSX would carry a "minimum of 3.5 million tons of coal annually through 2025 to certain coal-fired power plants owned by FG in Ohio."[256] In 2015, FG and BNSF entered into

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[246] *Id.*

[247] *Id.*

[248] *Id.* at 37.

[249] *Id.*

[250] *Id.*

[251] *Id.* at 37–38.

[252] *Id.* at 38.

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.* at 39.

arbitration to settle a dispute on whether the Mercury and Air Toxic Standards ("MATS"), a guidance tool from the EPA to "limit mercury and other air toxics emitted by power plants,"[257] "constituted a force majeure event that excused FG's performance under its coal transportation contract with these parties."[258] The arbitration panel found that FG's performance was not excused by force majeure and found that FG had breached and repudiated the contract.[259] In 2017, FG settled with BNSF and CSX for $109 million, with FE Corp guaranteeing the settlement.[260]

Arbitration Proceeding with BNSF and Norfolk Southern Corporation – FG and the BNSF and Norfolk Southern Corporation had coal transportation contracts "covering the delivery of 2.5 million tons annually through 2025, for FG's coal-fired Bay Shore Units 2-4, deactivated on or about September 1, 2012, as a result of the EPA's MATS and for FG's W.H. Sammis Plant."[261] The railways alleged that FG "breached the contract in 2015 and 2016 and breached and repudiated the contract for years 2017-2025."[262] Settlement offers were exchanged, but discussions were terminated prior to the Petition Date.[263]

[257] Jim Pew, *The Mercury & Air Toxic Standards*, EARTH JUSTICE (Apr. 5, 2023), [Link].

[258] Schneider First Day Declaration, at 39.

[259] *Id.*

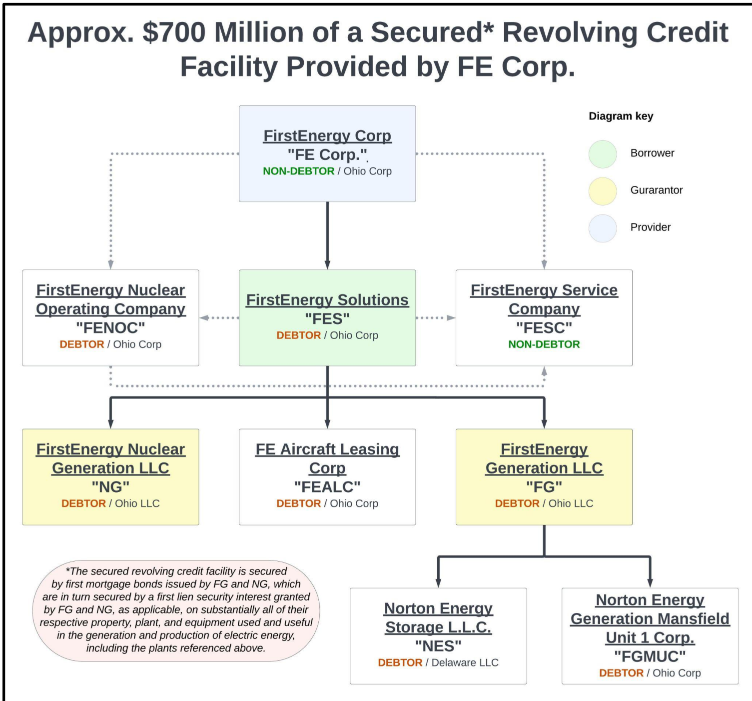
[260] *Id.*

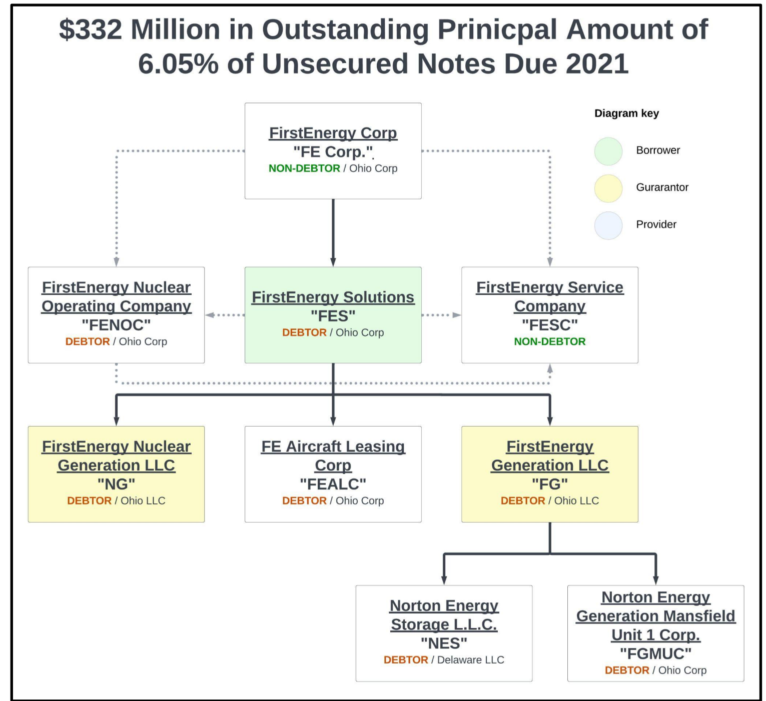
[261] *Id.* at 39–40.

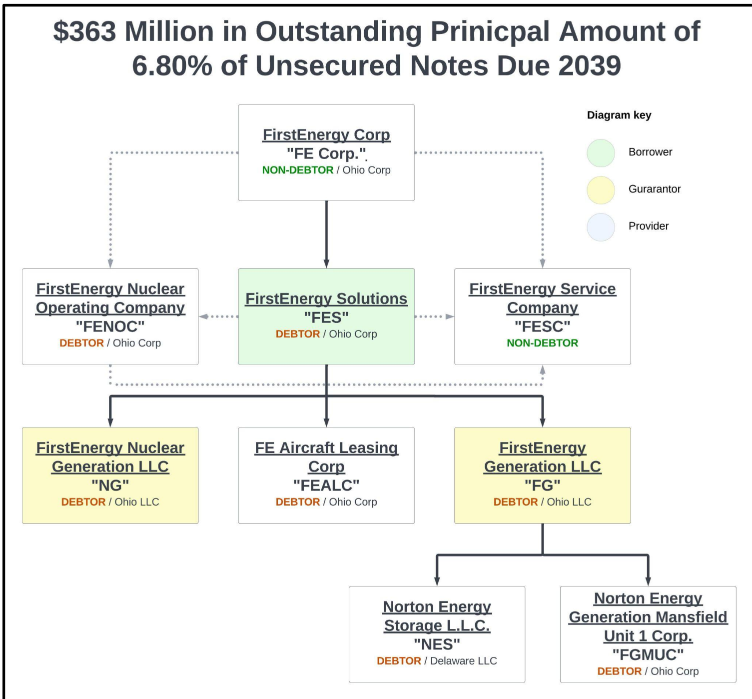
[262] *Id.*

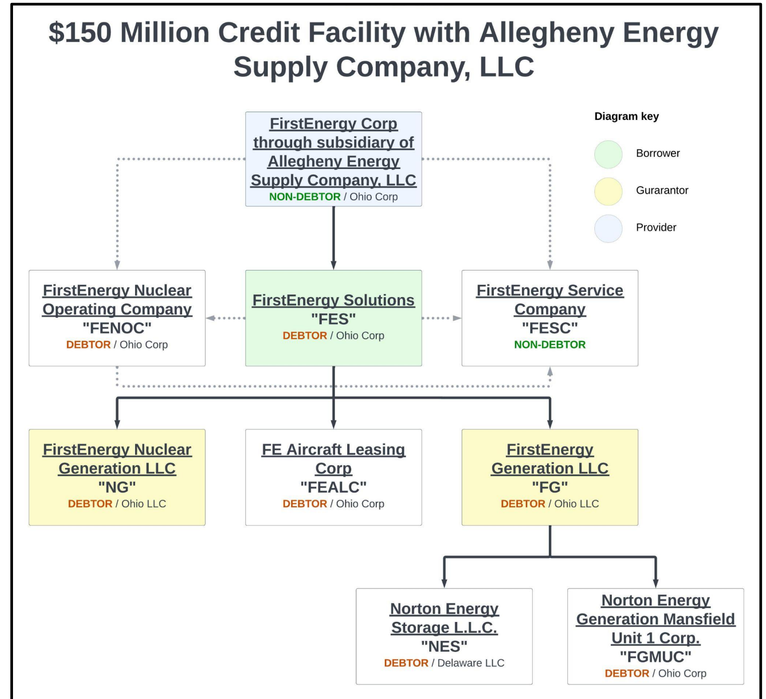
[263] *Id.*

PRE-PETITION INDEBTEDNESS[264]

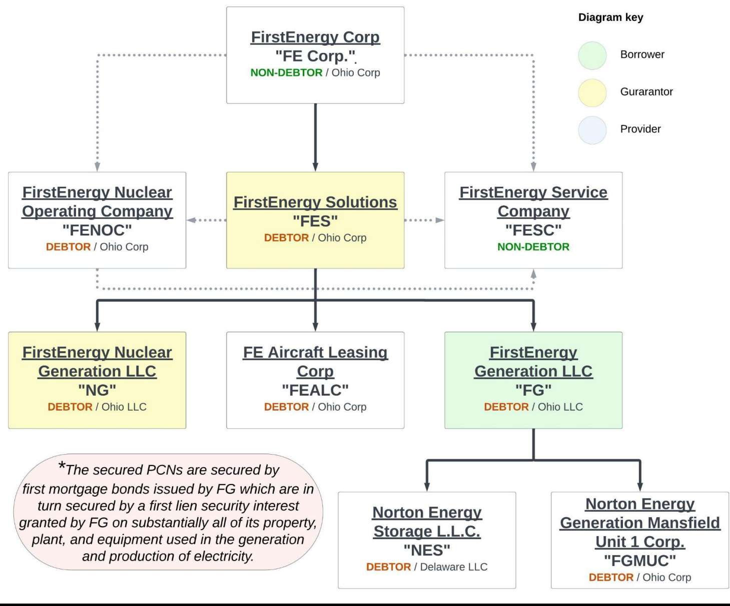


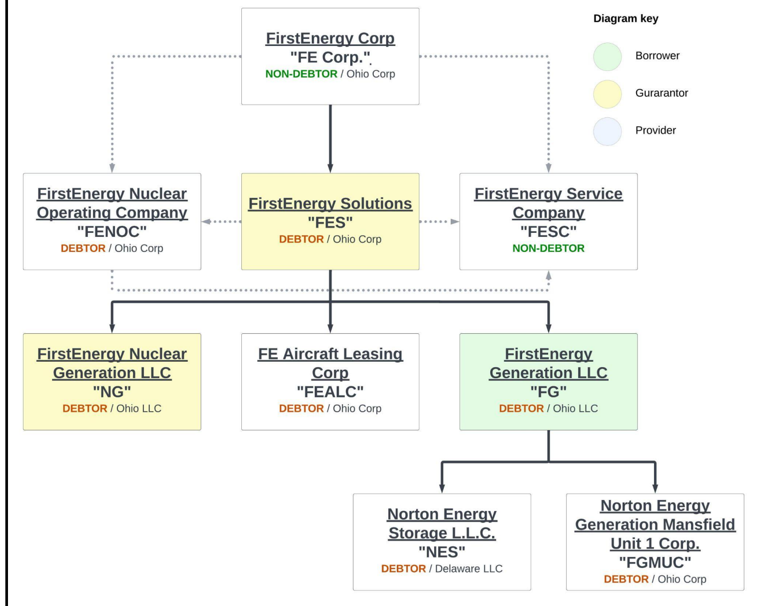


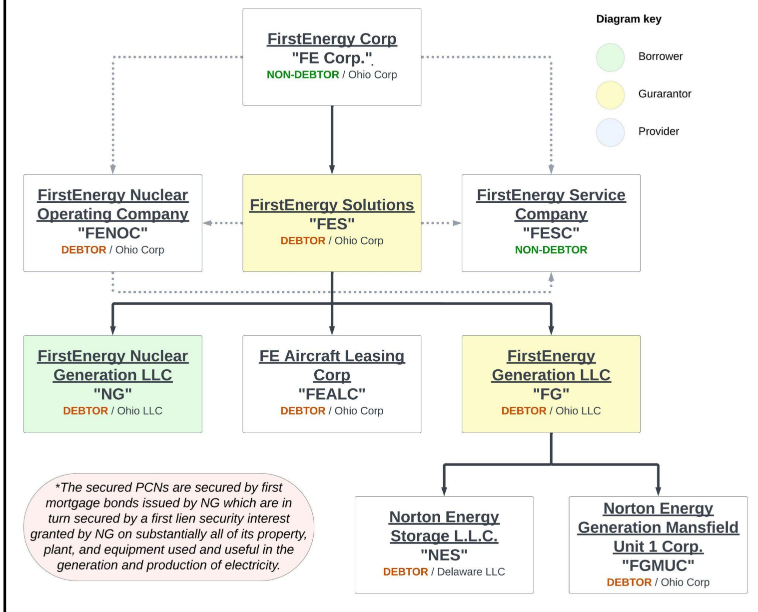


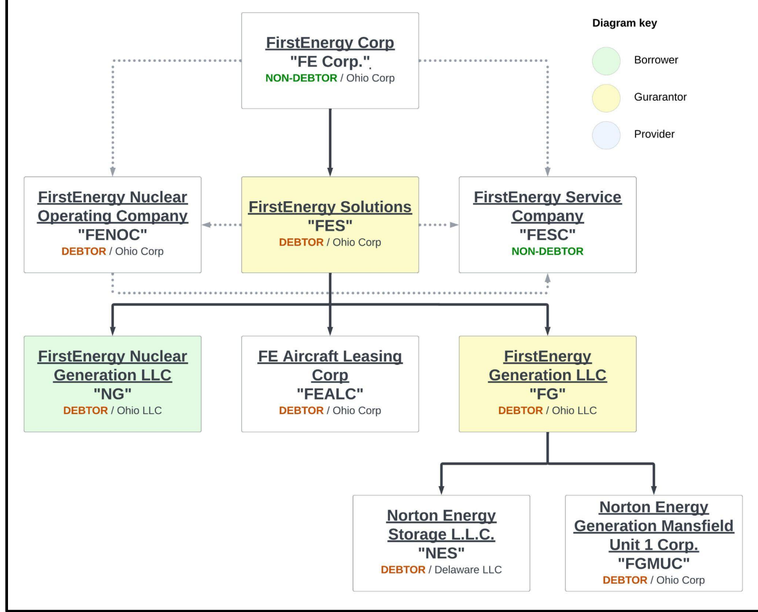


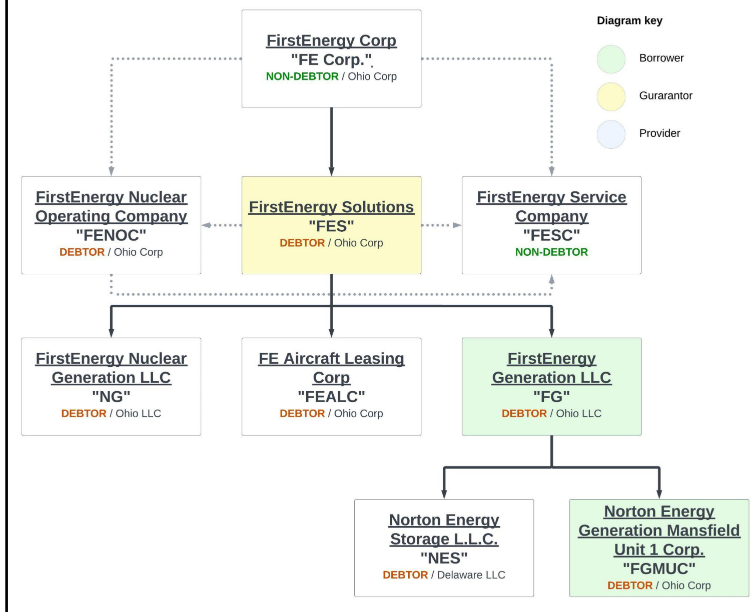
[264] Disclosure Statement for Joint Plan, at 42–43.


$328 Million in Outstanding Principal Amount of Secured* PCNs
Diagram key
Borrower
Gurarantor
Provider
FirstEnergy Corp
"FE Corp."
NON-DEBTOR / Ohio Corp
FirstEnergy Nuclear Operating Company
"FENOC"
DEBTOR / Ohio Corp
FirstEnergy Solutions
"FES"
DEBTOR / Ohio Corp
FirstEnergy Service Company
"FESC"
NON-DEBTOR
FirstEnergy Nuclear Generation LLC
"NG"
DEBTOR / Ohio LLC
FE Aircraft Leasing Corp
"FEALC"
DEBTOR / Ohio Corp
FirstEnergy Generation LLC
"FG"
DEBTOR / Ohio LLC
*The secured PCNs are secured by first mortgage bonds issued by FG which are in turn secured by a first lien security interest granted by FG on substantially all of its property, plant, and equipment used in the generation and production of electricity.
Norton Energy Storage L.L.C.
"NES"
DEBTOR / Delaware LLC
Norton Energy Generation Mansfield Unit 1 Corp.
"FGMUC"
DEBTOR / Ohio Corp


$677 Million in Outstanding Principal Amount of Unsecured Fixed-Rate PCNs that Support PCRBs
Diagram key
Borrower
Gurarantor
Provider
FirstEnergy Corp
"FE Corp."
NON-DEBTOR / Ohio Corp
FirstEnergy Nuclear Operating Company
"FENOC"
DEBTOR / Ohio Corp
FirstEnergy Solutions
"FES"
DEBTOR / Ohio Corp
FirstEnergy Service Company
"FESC"
NON-DEBTOR
FirstEnergy Nuclear Generation LLC
"NG"
DEBTOR / Ohio LLC
FE Aircraft Leasing Corp
"FEALC"
DEBTOR / Ohio Corp
FirstEnergy Generation LLC
"FG"
DEBTOR / Ohio LLC
Norton Energy Storage L.L.C.
"NES"
DEBTOR / Delaware LLC
Norton Energy Generation Mansfield Unit 1 Corp.
"FGMUC"
DEBTOR / Ohio Corp


$285 Million of Secured* PCNs that Support PCRBs
Diagram key
Borrower
Gurarantor
Provider
FirstEnergy Corp
"FE Corp."
NON-DEBTOR / Ohio Corp
FirstEnergy Nuclear Operating Company
"FENOC"
DEBTOR / Ohio Corp
FirstEnergy Solutions
"FES"
DEBTOR / Ohio Corp
FirstEnergy Service Company
"FESC"
NON-DEBTOR
FirstEnergy Nuclear Generation LLC
"NG"
DEBTOR / Ohio LLC
FE Aircraft Leasing Corp
"FEALC"
DEBTOR / Ohio Corp
FirstEnergy Generation LLC
"FG"
DEBTOR / Ohio LLC
*The secured PCNs are secured by first mortgage bonds issued by NG which are in turn secured by a first lien security interest granted by NG on substantially all of its property, plant, and equipment used and useful in the generation and production of electricity.
Norton Energy Storage L.L.C.
"NES"
DEBTOR / Delaware LLC
Norton Energy Generation Mansfield Unit 1 Corp.
"FGMUC"
DEBTOR / Ohio Corp


$842 Million of Unsecured PCNs that Support PCRBs
Diagram key
Borrower
Gurarantor
Provider
FirstEnergy Corp
"FE Corp."
NON-DEBTOR / Ohio Corp
FirstEnergy Nuclear Operating Company
"FENOC"
DEBTOR / Ohio Corp
FirstEnergy Solutions
"FES"
DEBTOR / Ohio Corp
FirstEnergy Service Company
"FESC"
NON-DEBTOR
FirstEnergy Nuclear Generation LLC
"NG"
DEBTOR / Ohio LLC
FE Aircraft Leasing Corp
"FEALC"
DEBTOR / Ohio Corp
FirstEnergy Generation LLC
"FG"
DEBTOR / Ohio LLC
Norton Energy Storage L.L.C.
"NES"
DEBTOR / Delaware LLC
Norton Energy Generation Mansfield Unit 1 Corp.
"FGMUC"
DEBTOR / Ohio Corp



$769 Million in Outstanding Principal Amount in Connection with Mansfield Sale-Leaseback Transaction
Diagram key
Borrower
Gurarantor
Provider
FirstEnergy Corp
"FE Corp."
NON-DEBTOR / Ohio Corp
FirstEnergy Nuclear Operating Company
"FENOC"
DEBTOR / Ohio Corp
FirstEnergy Solutions
"FES"
DEBTOR / Ohio Corp
FirstEnergy Service Company
"FESC"
NON-DEBTOR
FirstEnergy Nuclear Generation LLC
"NG"
DEBTOR / Ohio LLC
FE Aircraft Leasing Corp
"FEALC"
DEBTOR / Ohio Corp
FirstEnergy Generation LLC
"FG"
DEBTOR / Ohio LLC
Norton Energy Storage L.L.C.
"NES"
DEBTOR / Delaware LLC
Norton Energy Generation Mansfield Unit 1 Corp.
"FGMUC"
DEBTOR / Ohio Corp

CREDITORS HOLDING THE TOP 20 LARGEST UNSECURED CLAIMS[265]

Name of Creditor	Nature of Claim	C, U, or D?[266]	Amount of Claim
BNSF Railway Company 2650 Lou Menk Drive Fort Worth, TX 76131	Ongoing Litigation	C, U, D	Undetermined
Norfolk Southern Corporation 2001 Market Street., 29th Floor Philadelphia, PA 19103	Ongoing Litigation	C, U, D	Undetermined
Wilmington Savings Fund Society, FSB 500 Delaware Avenue Wilmington, DE 19801	Claims Related to Sale-Leaseback Transaction	C, U, D	$769,200,000
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	$500M Senior Note 6.80% due 8/15/39 ($363.281M Outstanding)		$366,368,888
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	$600M Senior Note 6.05% due 8/15/21 ($332.305M Outstanding)		$334,818,056
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 3.75% Series due December 1, 2023 (Put: 12/3/18)		$237,451,500
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 5.70% Series due August 3, 2020		$178,681,500
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 3.50% Series due December 1, 2035 (Put: 6/1/20)		$165,877,925
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 4.00% Series due December 1, 2033 (Put: 6/3/19)		$137,357,333
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 2.70% Series due April 1, 2035 (Put: 4/2/18)		$100,235,150
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 3.75% Series due July 1, 2033 (Put: 7/1/20)		$100,029,062
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 3.00% Series due May 15, 2019		$91,161,586
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 4.00% Series due January 1, 2034 (Put: 7/1/21)		$83,628,000

[265] Voluntary Petition of FirstEnergy Solutions Corp. at 15–17.

[266] Indicates if claim is Contingent ("C"), Unliquidated ("U"), or Disputed ("D").

Name of Creditor	Nature of Claim	C, U, or D?[267]	Amount of Claim
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 4.00% Series due January 1, 2035 (Put: 7/1/21)		$73,376,499
BNSF Railway Company 2650 Lou Menk Drive Fort Worth, TX 76131	Settlement of Arbitration	C, U*	$72,000,000
CSX Transportation, Inc. 500 Water St., J842 Jacksonville, FL 32202	Settlement of Arbitration	C, U*	$72,000,000
Commerzbank AG Frankfurt Am Main, Hesse 60261 Germany	Trade Payables	U	$59,817,058
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 3.50% Series due April 1, 2041 (Put: 6/1/20)		$57,590,500
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 3.10% Series due March 1, 2023 (Put: 3/1/19)		$50,129,166
The Bank of New York Mellon Trust Company 1660 West 2nd Street., Suite 830 Cleveland, OH 44113	PCN 4.00% Series due June 1, 2033 (Put: 6/3/19)		$42,120,000

[267] Indicates if claim is Contingent (“C”), Unliquidated (“U”), or Disputed (“D”).

First Day Motions

First day motions are where debtors set the tone for the bankruptcy proceedings. There are many types of first day motions that have become commonplace, such as a motion seeking to jointly administer separate cases under a single court docket or a motion seeking to pay pre-petition claims under the normal course of business. In many cases, debtors know that they are going to file for bankruptcy in the months leading up to a petition date, so many of the procedural fights happen before the first document is filed with the bankruptcy court. Still, first day motions play an integral role in shaping the course of a bankruptcy.

Although the following discussions highlight the business and legal reasoning behind each first day motion, there is one section of the Bankruptcy Code that is present in them all: §105(a). Section 105(a) of the Bankruptcy Code has been described as a gap-filler or "catch-all" provision that provides a bankruptcy court the (somewhat limited) freedom to grant or deny "certain relief not prescribed by a particular provision of the Bankruptcy Code."[268]

Section 105(a) states that "[t]he court may issue any order, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code] . . . [and nothing should] preclude the court . . . from taking or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."[269] Section 105(a) is incredibly expansive, but it does not act as a golden ticket for bankruptcy courts to grant everything debtors or creditors ask for in their bankruptcy proceedings. Generally speaking, § 105(a) must be read in conjunction with another provision in the Bankruptcy Code to provide a bankruptcy court with its broad powers.[270]

As you read through the first day motions from the Debtors' bankruptcy, keep in mind that § 105(a) is always in the background and works as an important foundation for a bankruptcy court's authority.

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[268] *Oh, and Section 105, as well–Limitations on the Bankruptcy Court's Equitable Powers*, NELSON MULLINS (Dec. 20, 2021), [Link].

[269] 11 U.S.C. § 105(a) (2016).

[270] *See United States v. Energy Resources Co. Inc.*, 495 U.S. 545, 549 (1990) (providing an instance where the United States Supreme Court held that § 105(a), working in conjunction with § 1123(b)(6), granted bankruptcy courts "a 'residual authority' consistent with 'the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships").

Orders Facilitating Administration of the Estate

Motion for Joint Administration of the Estate

The Debtors filed a motion that would combine the cases of all the Debtors into a single Chapter 11 case.[271] This would combine the Chapter 11 cases of FES, FENOC, NG, FEALC, FG, NES, and FGMUC. Jointly administering all of the Debtors' cases under a single case and docket number would "provide significant administrative convenience without harming the substantive rights of any party in interest."[272] The Debtors moved for the combination under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure and § 105(a) of the Bankruptcy Code.[273]

Under Bankruptcy Rule 1015(b), "[i]f . . . two or more petitions are pending in the same court by or against . . . a debtor and an affiliate, the court may order a joint administration of the estates."[274] Further, under § 105(a) of the Bankruptcy Code, the bankruptcy court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."[275]

The Bankruptcy Court granted the motion.[276]

Day-To-Day Operations

Paying Pre-Petition Critical Vendor Claims

The Debtors filed a motion that would allow the Debtors to continue paying certain pre-petition claims held by critical trade vendors essential to the Debtors' ongoing business throughout the bankruptcy proceedings.[277] The Debtors purchased goods and services from more than 3,000 vendors and owed about $181 million to all third-party vendors as of the Petition Date.[278] Recognizing that paying every vendor was infeasible, the Debtors identified "vendors critical to

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[271] Motion of FirstEnergy Solutions Corp., *et al.*, for Entry of an Order Directing Joint Administration of the Debtors' Chapter 11 Cases, at 2, [Docket #3].

[272] *Id.* at 8; *see also id.* ("[J]oint administration will reduce fees and costs by avoiding duplicative filings and objections. Joint administration also will allow the Office of the United States Trustee for the Northern District of Ohio and all parties in interest to monitor these chapter 11 cases with greater ease and efficiency.").

[273] *Id.* at 7.

[274] Fed. R. Bankr. P. 1015(b).

[275] 11 U.S.C. § 105(a) (2016).

[276] Order Directing Joint Administration of the Debtors' Chapter 11 Cases, at 3, [Docket #126].

[277] Debtors' Motion for Entry of Interim and Final Orders Authorizing the Debtors to Pay Pre-Petition Critical Vendor Claims, at 1, [Docket #7] [elsewhere, the "Motion to Pay Pre-Petition Critical Vendors"].

[278] *Id.* at 6.

the continued and uninterrupted operation of the Debtor's business."[279] These critical vendors were owed approximately $54 million for goods and services delivered before the Petition Date.[280] The Debtors sought authorization from the Bankruptcy Court to pay up to $24 million of these claims during the Interim Period,[281] and sought authorization to pay up to the full $54 million pursuant to the Final Order.[282]

Under § 363(b) of the Bankruptcy Code, a trustee or debtor-in-possession ("DIP") may use, sell or lease property of the estate outside of the ordinary course of business only after notice and court approval.[283] To obtain court approval the DIP must "articulate some business justification, other than mere appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business."[284] The Debtors presented a compelling business justification for allowing the Debtors, as a DIP, to pay the pre-petition claims of critical vendors.

In its business justification, the Debtors articulated a fear that critical vendors "may refuse to continue doing business with the Debtors if they are not paid their [pre-petition] claims"[285] and

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[279] *Id.* at 8–9. These vendors were classified into five categories: (a) vendors that provide goods and services related to planned maintenance outages; (b) vendors that provide services and related goods that are highly specialized and/or closely integrated with the Debtors' business operations and customer relationships; (c) sole source or geographically limited providers of critical goods; (d) vendors that provide goods and services related to regulatory compliance obligations; and (e) vendors that provide goods and services related to the Debtors' nuclear power plants.

[280] *Id.* at 7.

[281] Schneider First Day Declaration, at 44, ("The Interim Period is the period between the Petition Date and entry of a final order (the "Interim Period.")").

[282] Motion to Pay Pre-Petition Critical Vendors*,* at 7.

[283] 11 U.S.C. § 363(b) (2016). It may seem counterintuitive that Debtors must make a Motion and ask the Bankruptcy Court to allow them to pay vendors that provide services in the ordinary course of business. However, on the Petition Date all of the Debtors' assets are placed into the "estate," which creates a partition between pre-petition claims and post-petition claims.

[284] *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989); *see also In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983) (establishing the requirement that DIP "articulate[ ] [a] business justification" before a bankruptcy court grants a § 363(b) motion).

[285] Motion to Pay Pre-Petition Critical Vendors, at 9; *see also id.* at 10 (noting that the Debtors "believe[d]" that Specialized and Integrated Service Providers "will refuse to provide [post-petition] services to the Debtors if all or a portion of their [pre-petition] claims are not satisfied"); *see id.* at 11–12 (noting that Critical Goods vendors supply services or goods where "there is no alternative provider" for certain items Debtors are "dependant on," such as, "'laboratory grade' chemicals . . . to keep the plants running and compliant with environmental regulations," "specially fabricated repair and replacement parts for turbines, transformers, and other equipment used in Debtor's electricity generation," and "certain raw materials and fuels . . . [that are] locally sourced because they are expensive and inefficient to transport"); *see id.* at 12 (noting that Debtors "believe that some of the Regulatory Compliance Vendors may refuse to perform [post-petition] if their [pre-petition] claims are not paid, thereby exposing the Debtors to the risk of noncompliance with applicable governmental laws and regulations" which would open up the possibility that the government "attempt[s] to levy fines or penalties . . . or require idling or closing of facilities"); *see id.* at 13 (noting that critical Nuclear Plant Vendors are not only critical to Debtors' business but also "as a matter of public safety" since "[o]perational difficulties with respect to the Debtors' current nuclear assets could have significant regulatory consequences for those assets and the overall reliability of the PJM Region").

concluded that services and goods provided by critical vendors were "required to operate the Debtors' plants and continue their business operations."[286] The Debtors also reminded the Bankruptcy Court that the reliability of the entire PJM region was at stake if the Debtors were not authorized to pay the pre-petition claims of critical vendors.[287]

Ultimately, the Debtors believed that the harm caused by a business interruption if critical vendors did not deliver critical services substantially outweighed the cost of paying the pre-petition claims of critical vendors.[288]

The Bankruptcy Court granted an interim[289] and a final[290] order on the motion.

Outstanding Orders to Receive Administrative Expense Priority

The Debtors filed a motion to affirm that outstanding orders, ordered before the Petition Date, but delivered after the Petition Date, were entitled to receive administrative expense priority.[291] The Debtors moved to ensure that administrative priority was given to these outstanding orders since the "suppliers [of these orders might] be concerned that they will be rendered general unsecured creditors, rather than administrative claimants."[292] Being deemed a general unsecured creditor increases the likelihood that the creditor will not receive full payment for their goods or services.[293]

Because of this, the Debtors worried that suppliers labeled as unsecured creditors would "refuse to ship or transport" outstanding orders or refuse to "provide services with respect to" outstanding orders.[294] The Debtors sought to alleviate any worries by seeking authorization from

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[286] Motion to Pay Pre-Petition Critical Vendors, at 11.

[287] *Id.* at 9, 13.

[288] *Id.* at 18 ("The Debtors have concluded that the Critical Vendors at issue will cease doing business with the Debtors, or become unable to do business with the Debtors, unless they receive some payment of their [pre-petition] claims. (. . .) Even a slight disruption to the goods and services provided by the Critical Vendors could leave the Debtors unable to meet their regulatory obligations, cost them necessary permits and licenses, and disrupt their important relationships with their customers. The resulting harm to the Debtors' estates far outweighs the cost associated with paying some portion of the Debtors' [pre-petition] obligations to the Critical Vendors.").

[289] Interim Order Authorizing The Debtors To Pay [Pre-Petition] Critical Vendor Claims, [Docket #162].

[290] Final Order Authorizing The Debtors To Pay [Pre-Petition] Critical Vendor Claims, [Docket# 487].

[291] Motion Authorizing Debtors to Grant Administrative Expense Priority to Obligations for Goods and Services Ordered [Pre-Petition] and Delivered [Post-Petition] and Satisfy Such Obligations in the Ordinary Course of Business and Pay [Pre-Petition] Claims of Shippers, Warehousemen, and Materialmen, at 1, [Docket #8] [elsewhere, the "Motion to Grant Admin. Exp. Priority to Goods and Services in Ordinary Course of Business"].

[292] *Id.* at 6.

[293] Jill Walters, *503(b)(9) Claims in Bankruptcy: Understanding the "Golden Ticket" Administrative Claim*, BAKER DONELSON (May 1, 2023), [Link] [elsewhere, "Golden Ticket Administrative Expense Priority Article"].

[294] Motion to Grant Admin. Exp. Priority to Goods and Services in Ordinary Course of Business, at 6.

the Bankruptcy Court to "pay [pre-petition] claims of [these suppliers] in the ordinary course of business" up to $1.8 million before the Final Order and up to $4.5 million pursuant to a Final Order.[295]

Claims that are entitled to administrative priority "are required to be paid before general unsecured creditor claims are paid."[296] Therefore, rather than receiving "pennies on the dollar," creditors with claims tagged with administrative priority are paid in full.[297]

Under § 503(b) of the Bankruptcy Code, "most obligations that arise in connection with the [post-petition] delivery of goods and services, including goods and services ordered [pre-petition], are in fact administrative expense priority claims because they benefit the estate [post-petition]."[298] Section 503(b) reads much like § 363(b), and a Bankruptcy Court may authorize the payments of such pre-petition claims where "there is a sound business purpose for the payment of [pre-petition] obligations" beyond "mere appeasement of major creditors."[299] Further, "[c]ourts generally recognize that debtors may pay [pre-petition] claims that are essential to the continued operation of the debtor's business,"[300] and in certain cases, explicitly allow payments of claims of shippers, warehousemen, materialmen, or other comparable vendors.[301]

The Debtors articulated a sound business purpose for labeling outstanding orders as administrative expenses. The Debtors warned that, if the Bankruptcy Court did not grant the motion, "substantial time and effort" would be spent on "reissuing the [outstanding orders] to provide suppliers with the assurance of such administrative priority" and stave off any business interruptions.[302]

The Debtors also incorporated the concept of lien claims into their business judgement justification. The Debtors noted that affected vendors have lien claims on the goods and "will

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[295] *Id.* at 10.

[296] Golden Ticket Administrative Expense Priority Article.

[297] *Id.*

[298] Motion to Grant Admin. Exp. Priority to Goods and Services in Ordinary Course of Business, at 10.

[299] *Id.* at 12.

[300] *Id.* at 11; *see also In re Wings of Medina Liquidation, Inc.*, No. 15-527222 (AMK) (Bankr. N.D. Ohio Dec. 15, 2015) [Docket No. 109] (authorizing payment of pre-petition claims of certain critical vendors).

[301] *See, e.g., In re Flower Factory, Inc.*, No. 11-60406 (RK) (Bankr. N.D. Ohio Feb. 18, 2011) [Docket No. 55] (authorizing payment of pre-petition claims of shippers); *In re Summitville Tiles, Inc.*, No. 03- 46341 (WTB) (Bankr. N.D. Ohio Dec. 12, 2003) [Docket No. 21] (authorizing payment of pre-petition obligations relating to shipment and warehousing of goods and supplies); *In re MI 2009 Inc. (f/k/a In re Milacron Inc.)*, No. 09-11235 (JVA) (Bankr. S.D. Ohio Mar. 11, 2009) [Docket No. 52] (authorizing debtor to pay pre-petition claims of shippers and warehousemen in the ordinary course of business).

[302] Motion to Grant Admin. Exp. Priority to Goods and Services in Ordinary Course of Business, at 10–12.

therefore be entitled to payment in full on account" of these claims.[303] If a creditor has a lien claim on an asset of a debtor that creditor has certain rights, which may include controlling that asset to the extent of their rights in that asset as collateral for a debt the creditor made to the debtor. Here, the Debtors noted that the relevant assets were subject to certain lien claims, meaning that, if the Bankruptcy Court did not allow the Debtors to keep the creditors on good terms, the creditors might be inclined to activate their lien claims and wreak havoc on the business of the Debtors. Essentially, the Debtors urged the Bankruptcy Court to save the Debtors any headaches stemming from potential business interruptions caused by creditors retaliating if the creditor's collateral was not being adequately protected.

Ultimately, the Debtors asked that the Bankruptcy Court to approve the "prompt payment" of outstanding orders as such payment was "necessary to avoid the immediate and irreparable harm that would result from the delayed provision of the raw material and services . . . needed to operate the Debtors' business."[304]

The Bankruptcy Court granted an interim[305] and a final[306] order on the motion.

Continuing Use of Cash Management System and Business Accounts

The Debtors filed a motion that would allow the Debtors to continue using their "Cash Management System" for internal and external treasury operations throughout the bankruptcy proceedings.[307] Typical of large corporations, the Debtors used "an integrated, centralized cash management system to collect, transfer, and disburse funds generated by their operations and obtained from their secured borrowings."[308] The Cash Management System also facilitated the "cash monitoring, forecasting, and reporting [functions of the Debtors], and enable[d] the Debtors to maintain necessary oversight of the related bank accounts held by the Debtors."[309] Below is a

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[303] *Id.* at 13.

[304] Motion to Grant Admin. Exp. Priority to Goods and Services in Ordinary Course of Business, at 16.

[305] Interim Order Authorizing Motion to Grant Admin. Exp. Priority to Goods and Services in Ordinary Course of Business, [Docket #163].

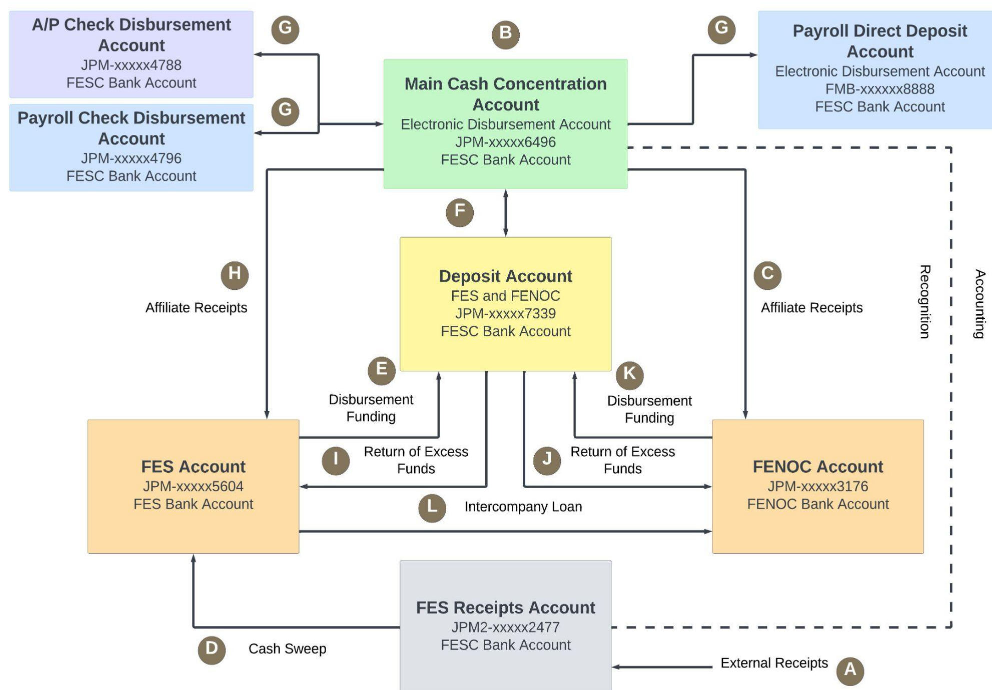
[306] Final Order Authorizing Motion to Grant Admin. Exp. Priority to Goods and Services in Ordinary Course of Business, [Docket #486].

[307] Motion Of Debtors For Entry Of Interim And Final Orders (A) Authorizing Debtors To (I) Continue Using Their Existing Cash Management System And (II) Maintain Existing Business Accounts And Business Forms; (B) Authorizing Continued Intercompany Transactions; (C) Granting [Post-Petition] Intercompany Claims Administrative Expense Priority; And (D) Granting Related Relief, [Docket #10] [elsewhere, the "Motion to Continue Using Cash Management System and Business Accounts"].

[308] *Id.* at 6; *see also id.* at 8 ("The Cash Management System is specifically tailored to meet the operating needs of the Debtors" and allows the Debtors to "effectively and centrally control and monitor corporate funds, ensure cash availability and liquidity, invest extra cash, reduce administrative expenses . . . .").

[309] *Id.*

schematic detailing the flow of funds within and between the Debtors' Cash Management System and its business accounts.[310]



Given that the Cash Management System was critical to the Debtors' day-to-day operations, forecasting, and reporting functions the Debtors noted that "[a]ny disruption of the Cash Management System would be extremely detrimental to the Debtors' operations, as their businesses require prompt access to cash and accurate cash tracking."[311] The Cash Management System was administered and "overseen by the personnel in the Debtors' finance function, as well as personnel employed by [non-Debtor] FESC."[312] The Debtors sought authorization from the Bankruptcy Court to "maintain their current Cash Management System" so that the Debtors' business could proceed without damaging interruptions.[313]

The U.S. Trustee Guidelines normally require that a DIP "immediately close[] all of the pre-petition bank accounts and establish[] new debtor in possession accounts; and deposit[] all

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[310] *Id.* at **Exhibit C.**

[311] *Id.* at 7; *see also id.* ("These controls are critical to the operation of the Debtors' businesses given the significant volume of transactions managed through the Cash Management System.").

[312] Motion to Continue Using Cash Management System and Business Accounts, at 7.

[313] *Id.* at 8.

estate funds into the debtor in possession accounts."[314] However, under § 363(c)(1), a debtor "may use property of the estate in the ordinary course of business without notice or a hearing."[315] Bankruptcy courts generally do not find much trouble with debtor requests to continue using cash management systems and the Debtors label this issue as a "relatively simple matter."[316] Bankruptcy courts understand the efficiency issues at stake and "recognize[] the impracticalities of maintaining separate cash accounts for the many different purposes that require cash."[317]

The Debtors noted that "requiring the Debtors to adopt a new . . . Cash Management System" would be "expensive, create unnecessary administrative burdens, and be extraordinarily disruptive to the operation of the Debtors' businesses."[318] In particular, the Debtors noted that it would be "extremely difficult and expensive to establish and maintain a separate cash management system for each Debtor and to separate the Debtors from using the Main Cash Concentration Account."[319] Ultimately, the Debtors argued that the headaches caused by requiring an overhaul of their Cash Management System would lead to more problems than solutions and noted that requiring such changes would "needlessly destroy[] the value of [the Debtors'] business enterprise."[320]

The Bankruptcy Court granted an interim[321] and a final[322] order on the motion.

Continuing Use of Existing Business Forms and Books and Records

The Debtors filed a motion that would allow the Debtors to continue using the business forms ("Business Forms") and Books and Records ("Business Records") that the Debtors used pre-petition.[323] The Business Forms consisted of company "letterhead, purchase orders, invoices,

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[314] U.S. Trustee Program Manual and Policies – Volume 7 – Banking and Bonding, (October 2011), at 2, [Link] [elsewhere, the "U.S. Trustee Program Manual and Policies"]; *but see* Motion to Continue Using Cash Management System and Business Accounts, at 23 ("[C]ourts regularly waive the U.S. Trustee Guidelines and allow large corporate debtors to maintain ordinary course banking activities, on the grounds that the U.S. Trustee Guidelines are impractical and potentially detrimental to a debtor's [post-petition] business operations and restructuring efforts.").

[315] 11 U.S.C. § 363(c)(1).

[316] *In re Baldwin-United Corp.*, 79 B.R. 321, 327 (Bankr. S.D. Ohio 1987).

[317] *In re Columbia Gas Sys., Inc.*, 136 B.R. 930, 934 (Bankr. D. Del. 1992), *see also In re Southmark Corp.*, 49 F.3d 1111, 1114 (5th Cir. 1995) (providing that a cash management system allows a debtor "to administer more efficiently and effectively its financial operations and assets").

[318] Motion to Continue Using Cash Management System and Business Accounts, at 20.

[319] *Id.*

[320] *Id.* at 21.

[321] Interim Order Authorizing Continued Use of Cash Management System, [Docket #155].

[322] Final Order Authorizing Continued Use of Cash Management System, [Docket #488].

[323] *See* Motion to Continue Using Cash Management System and Business Accounts, at 15.

and other form documents," such as checks.[324] The Business Records were maintained by the Debtors and FESC and "document[ed] the Debtors' financial results and a wide array of the Debtors' necessary operating information."[325] The Debtors feared that changing Business Forms and Business Records post-petition would cause the Debtors' estates to incur great expense and lead to confusion from the Debtors' "employees, customers, and suppliers."[326]

Similar to cash management systems and bank accounts, the U.S. Trustee Guidelines require that a debtor make substantial changes to the instruments it uses to carry out day-to-day treasury operations. Specifically, the U.S. Trustee Guidelines require that the trustee "ensure that all [DIP] [checks] have been imprinted with the phrase 'Debtor in Possession' unless otherwise ordered by the court."[327]

This is a fairly routine first day motion. The Debtors pointed out that switching Business Forms and Business Records post-petition was simply not feasible for "large" debtors.[328] Also, the Debtors pointed out that the "parties in interest will not be prejudiced" if the Debtors continued using pre-petition Business Forms and Business Records.[329] Returning to the confusion point noted above, the Debtors noted that "[p]arties doing business with the Debtors undoubtedly will be aware of their status as [a DIP]" and that "including a 'debtor in possession' [label] may confuse" vendors or other third parties.[330]

The Bankruptcy Court granted an interim[331] and a final[332] order on the motion.

[324] *Id.*

[325] *Id.*

[326] *Id.* (seeking to "minimize expense to their estates and to avoid confusion on the part of their employees, customers, and suppliers").

[327] U.S. Trustee Program Manual and Policies, at 3. Interestingly, the rules specify that "[t]he abbreviation "DIP" is not sufficient" and that "[r]ubber stamping 'Debtor in Possession' on the check is also not sufficient;" *see also* Motion to Continue Using Cash Management System and Business Accounts, at 24 (pointing out that the U.S. Trustee Guidelines require that the checks are "pre-numbered" and "reference the bankruptcy case number and type of account."

[328] Motion to Continue Using Cash Management System and Business Accounts, at 25. The Debtors cite to no less than twelve cases where bankruptcy courts have "allowed debtors to use their [pre-petition] business forms without the 'Debtor-in-Possession' label."

[329] *Id.* at 24.

[330] *Id.*

[331] Interim Order Authorizing Continued Use of Business Forms and Records, [Docket #155].

[332] Final Order Authorizing Continued Use of Cash Management System, [Docket #488].

Continuing Intercompany Transactions; Granting Transactions Post-Petition Priority

The Debtors filed a motion that would allow the Debtors to continue making certain intercompany transactions ("Intercompany Transactions") in the ordinary course of business throughout the bankruptcy proceedings.[333] These Intercompany Transactions included transfers and settlements through the Cash Management System,[334] transactions and transfers under SSAs,[335] transactions pursuant to the Tax Allocation Agreement ("TAA"),[336] transactions and transfers under operating and service agreements,[337] and transactions and transfers under certain PPAs.[338] Critically, the Debtors were not so much worried as to the legality of the transactions, but were more concerned with the practicality of interrupting the mechanics of how these transactions occurred.[339]

Per the Debtors, the mechanics of the Intercompany Transactions had to be preserved to ensure that "each Debtor entity receiving payments on behalf of a Debtor will continue to bear ultimate repayment responsibility for such ordinary course transactions."[340] This "ultimate repayment responsibility" refers to the payables that accrued as the "Debtor provide[d] services to another Debtor, or [paid] an expense on behalf of another Debtor."[341] Intercompany claims arose when such Intercompany Transactions occurred.

To understand the mechanics and importance of the Intercompany Transactions, consider an example. The Debtor FES had a services agreement with the non-debtor FESC under which FES purchased certain services from FESC. While FES and FESC are different entities, this transaction occurred under the umbrella of the non-debtor FE Corp, making this an Intercompany Transaction. This transaction created an account payable for FES that is owed to FESC. Likewise, FESC held an account receivable from FES. Intercompany transactions like this one occurred frequently, if not daily, for the Debtors. As such, the Debtors' business was dependent on the prompt payment and settlement of the Intercompany Transactions.

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[333] Motion to Continue Using Cash Management System and Business Accounts, at 15.

[334] *Id.*

[335] *Id.* at 15–16. There were two shared services agreements: One between FESC and FES, FG, and NG" and one "between FESC and FENOC."

[336] *Id.* at 16. ("among FE Corp., the Debtors, and certain of FE Corp.'s non-Debtor affiliates").

[337] *Id.* ("among certain of the Debtors and among Debtors and certain of FE Corp.'s non-Debtor affiliates).

[338] *Id.* ("among the Debtors and among Debtors and certain of FE Corp.'s non-Debtor affiliates under power sales agreements").

[339] *See id.* 16 (providing explanation of how the payments are funded and through which entities the payments flow).

[340] *Id.* at 17.

[341] *Id.*

The Debtors made clear that the Intercompany Transactions were critical to the smooth operation of their "highly complex and integrated" structure.[342] If this structure were to be interrupted, the Debtors would be unable to "efficiently provide essential goods and services to their Debtor and non-Debtor affiliates."[343] The Debtors further noted that disrupting the "administrative controls" that upheld this complex structure would be a "detriment [to] the Debtors and their estates."[344]

One way of protecting this complex structure was to provide little to no resistance to the flow of money and approval of Intercompany Transaction payments. The Debtors urged that, under §§ 503(b)(1) and 364(b) of the Bankruptcy Code, "all [post-petition] transfers between or among the Debtors on account of the [post-petition] Intercompany Transactions be accorded superpriority administrative expense status."[345] In making this motion, the Debtors asked the Bankruptcy Court to allow the Debtors to continue day-to-day operations unencumbered by the rigid requirements of a Chapter 11 bankruptcy proceeding.

The Debtors made a compelling case to the Bankruptcy Court that allowing such relief would be "in the best interests of the Debtors' estates and their creditors."[346] For one, the Debtors ensured that they "will continue to maintain records of [post-petition] Intercompany Transactions, including records of all current intercompany receivable and payables."[347] Second, the Debtors ensured that providing superpriority administrative expense labels for Intercompany Transactions ensured that "each entity utilizing funds flowing through the Cash Management System would bear ultimate repayment responsibility for such ordinary course transactions."[348] This superpriority administrative expense label essentially meant that the Debtors could not escape paying post-petition debts that it incurred through the drawing of cash through the companywide Cash Management System. Finally, the Debtors noted that bankruptcy courts who faced similar complex, multi-debtor Chapter 11 cases had granted motions that provided the

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[342] *Id.* at 18.

[343] *Id.*

[344] *Id.* at 18; *see also* 18–19 (noting that "preserving the 'business as usual' atmosphere and avoiding the unnecessary distractions that would inevitably result from any substantial disruption in the Cash Management System will facilitate the Debtors' reorganization efforts").

[345] *Id.* at 17. Recall from the discussion above about the importance in labeling certain items as "administrative expenses" and how this label provides a guarantee the expenses are paid before any other claims.

[346] *Id.* at 30.

[347] *Id.*

[348] *Id.* at 31.

debtors with the authority to continue "ordinary course intercompany transactions . . . and claims . . . [while also] grant[ing] such intercompany claims administrative expense priority status."[349]

The Bankruptcy Court granted an interim[350] and a final[351] order on the motion.

Determining Adequate Assurance of Payment for Future Utility Services

The Debtors filed a motion that, if granted, would determine that the Debtors' had adequately assured their utility providers of continued performance by the Debtors and that the utility providers would be "prohibited" from making changes to the services provided to the Debtors due to the Debtors' filing for bankruptcy.[352] The Debtors "incur[ed] utility expenses for electric, gas, water, telephone, internet, waste disposal and similar services in the ordinary course of business."[353] The Debtors purchased about $1.3 million of services each month from "approximately 38 utility providers."[354] Since these utilities provided the Debtors with basic necessities, the Debtors noted that "[u]ninterrupted" services were "essential to the Debtors' ongoing operations."[355] As such, "[a]ny disruption . . . would harm the Debtors' operations, revenues[,] and cash flows, to the detriment of the Debtors' reorganization efforts and, ultimately, of recoveries to creditors."[356]

Section 366(a) of the Bankruptcy Code requires that "a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement" of a bankruptcy proceeding.[357] However, § 366(b) notes that "[s]uch utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment . . . ."[358]

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[349] *Id.*; *see, e.g.*, *In re AmTrust Fin. Corp.*, Case No. 09-21323 (PMC) (Bankr. N.D. Ohio Dec. 8, 2009) [Docket No. 52] (authorizing debtor to continue intercompany transactions and granting administrative expense priority to intercompany advances).

[350] Interim Order Authorizing Continued Intercompany Transactions and Granting Those Made [Post-Petition] Administrative Expense Priority, [Docket #155].

[351] Final Order Authorizing Continued Intercompany Transactions and Granting Those Made [Post-Petition] Administrative Expense Priority, [Docket #488].

[352] Debtors' Motion for Entry of Interim and Final Orders Determining Adequate Assurance of Payment for Future Utility Services, at 1–2, [Docket #11] [elsewhere, the "Motion for Adequate Assurance of Payment from Utility Providers"].

[353] *Id.* at 6.

[354] *Id.*

[355] *Id.* at 7.

[356] *Id.*

[357] 11 U.S.C. § 366(a).

[358] 11 U.S.C. § 366(b). Interestingly, courts have found that absolute guarantee is not a requirement of § 366(b), something that the Debtors point out. *See Hennen v. Dayton Power & Light Co. (In re Hennen)*, 17 B.R. 720, 274 (Bankr.

Section 366(c)(1)(A) provides that the debtor or trustee may offer an "assurance of payment" by producing "(i) a cash deposit; (ii) a letter of credit; (iii) a certificate of deposit; (iv) a surety bond; (v) a prepayment of utility consumption; or (vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee."[359]

The Debtors affirmed their intention to pay post-petition obligations to their utility providers, but also sought to provide the adequate assurance that § 366(b) requires. First, the Debtors made clear that they "expect[ed] . . . cash from operations and cash on hand [to] be sufficient to pay [post-petition] obligations" for their utility needs.[360] Next, the Debtors provided their plan for adequate assurance. The Debtors "propose[d] to deposit $645,000 into a newly created, segregated, interest-bearing account within 20 days of the Petition Date."[361] The Debtors expressly noted that this deposit "[would] be held for the benefit of [the utility providers] during the pendency of [the Debtors'] chapter 11 cases."[362] The Debtors opted for option (i) under § 366(c)(1)(A): the cash deposit.[363]

The Bankruptcy Court granted an interim[364] and a final[365] order on the motion.

Continuing Performance Under Intercompany and Shared Services Agreements

The Debtors filed a motion that, if granted, would allow the Debtors to continue performing pre-petition Intercompany Agreements (the "Intercompany Agreements") under the ordinary course of business.[366] The operations of the Debtors were heavily reliant on a complex web of interconnected Debtor affiliates and non-Debtor affiliates. The following is a breakdown of the agreements included in the Debtors' motion.[367]

S.D. Ohio 1982) ("Adequate assurance does not require an absolute guarantee of payment, and is largely a factual determination.").

[359] 11 U.S.C. § 366(c)(1)(A).

[360] Motion for Adequate Assurance of Payment from Utility Providers, at 7.

[361] *Id.* at 7; *see also id.* ("The amount of the Adequate Assurance Deposit equals the estimated aggregate amount for two months of Utility Services for Utility Providers (excluding Non-Debtor Affiliate Utility Providers), calculated as a historical average over the past 12 months.").

[362] *Id.* at 7.

[363] *See id.* at 8–10 (showing that although the Debtors suggest that their proposed cash deposit is sufficient adequate assurance, utility providers may request additional assurance by following certain procedures).

[364] Interim Order Determining Adequate Assurance to Utility Providers, [Docket #153].

[365] Final Order Determining Adequate Assurance to Utility Providers, [Docket #425].

[366] Motion Of Debtors For Entry Of Interim And Final Orders Authorizing Continued Performance Of Obligations Under Intercompany And Shared Services Agreements, at 1, [Docket #12] [elsewhere, the "Motion for Authorizing Continued Performance of Intercompany and Shared Services Agreements"].

[367] *Id.* at 18–19 (highlighting that in addition to these intercompany agreements, the Debtors also note that some Debtors take up office space in "facilities owned by other Debtors or by FE Corp. or certain of FE Corp.'s non-Debtor affiliates" and that "approximately $300,000 is outstanding for allocated rent as of the Petition Date").

Agreement[368]	Parties[369]	Description	Debtors' Comments
FESC Shared Services Agreements	Two agreements: 1. Between FESC and FES, FG, and NG 2. Between FESC and FENOC	Under this agreement, "FESC provides essential centralized administrative and back-office services to the Debtors."[370] Some of these services include: - Human Resources Services - Corporate Services - Controller Services - Legal Services - External affairs Services - Corporate Real Estate Services - Supply Chain Services - Generation Support Services - Environmental Services - Corporate Affairs and Community - Involvement Services[371] (collectively, the "Shared Services")	The Debtors argue that the FESC Shared Services Agreements have provided the Debtors with "economies of scale and a more efficient use of resources." Further, the services are "integrated [in] nature" and allow all entities, not just the Debtors, to "perform[ ] more effectively and efficiently." Finding replacements for the services would be nearly "impossible." Thus, the Debtors argue they would be "utterly incapable of operating their business in any form" without these shared services.[372]
Tax Allocation Agreement	FE Corp, FES, and its subsidiaries, and FENOC	The Debtors are part of a "consolidated tax group" that directs tax information and estimates to the corporate parent, FE Corp.[373]	The Debtors note that this Tax Allocation Agreement has allowed the Debtors to "efficient[ly]" manage their tax liabilities and "facilitates . . . [their] accounting, tax reporting, and payment obligations.[374]
Nuclear Power Supply Agreement	FES and NG	The Debtor, FES, has a PPA with a Debtor, NG. Under this PPA, FES "has agreed to purchase all generation output, capacity, and ancillary output produced or otherwise acquired by . . . NG."[375]	The Debtors seek authorization to "continue performing under the PPAs [post-petition] in the ordinary course of business."[376]
GENCO Power Supply Agreement	FES and FG	The Debtor, FES, has a PPA with Debtor, FG. Under this PPA, FES "has agreed to purchase all generation output, capacity, and ancillary output produced or otherwise acquired by FG."[377]	The Debtors seek authorization to "continue performing under the PPAs [post-petition] in the ordinary course of business."[378]

[368] *Id.* at **Exhibit C.**

[369] *Id.*

[370] *Id.* at 6.

[371] *Id.* at 6–7.

[372] *Id.* at 10–11.

[373] *Id.* at 11.

[374] *Id.* at 11–12.

[375] *Id.* at 12.

[376] *Id.* at 13.

[377] *Id.* at 12.

[378] *Id.* at 13.

Agreement	Parties	Description	Debtors' Comments
POLR Agreements	FES, Ohio Edison, The Toledo Edison Company, and other non-Debtor affiliates	FES "sells power to certain non-Debtor affiliates as a provider of last resort ("POLR") pursuant to various agreements" through a bidding process, but the regulated utilities determine the auction process. The Debtors "average $30 million per month in receipts from these power sales."[379]	The Debtors seek authorization to "continue performing under the POLR Agreements [post-petition] in the ordinary course of business."[380]
Nuclear Support Agreement	FES and NG	To obtain an initial operating license, the Nuclear Regulatory Commission "requires evidence that the applicant is financially qualified." FES agreed to provide funds for NG to obtain its initial operating license.[381]	The Debtors seek authorization for FES to "continue performing its obligations under the Nuclear Support Agreement [post-petition], to the extent requested by NG to do so."[382]
Bruce Mansfield Units 1, 2, and 3 Operating Agreement	FG, First Energy Generation Mansfield Unit 1, Bruce Mansfield	FG operates the entire Bruce Mansfield Plant pursuant to an operating agreement.[383]	The Debtors seek authorization to "continue performing under the Mansfield Operating Agreement [post-petition] in the ordinary course of business."[384]
Mansfield Unit 1 Power Supply Agreement	FGMUC and FG	FGMUC and FG are "parties to a PPA" where "FGMUC sells the entire output from Unit 1 of Mansfield to FG, which subsequently sells the output to FES pursuant to a PPA." Amounts owed under the Mansfield PPA total approximately $191 million annually.[385]	The Debtors seek that FG is authorized to "continue to process all amounts owed to FGMUC under the Mansfield PPA . . . [post-petition] in the ordinary course of business."[386]
Bay Shore Operating Agreement	FG and non-Debtor Bay Shore Power Company	FG is a party to an Operating Agreement to "operate a boiler at Bay Shore Unit 1."[387]	The Debtors seek authorization to "continue performing under the Bay Shore Operating agreement . . . [post-petition] in the ordinary course of business."[388]
Bay Shore Steam Purchase Agreement	FG and non-Debtor Bay Shore Power Company	FG is a party to a Steam Purchase Agreement where FG "purchases the steam produced at Bay Shore Unit 1."[389]	The Debtors seek authorization to "pay all amounts outstanding under the Bay Shore PPA."[390] The Debtors also seek to continue performing under the PPA "[post-petition] in the ordinary course of business."[391]

[379] *Id.* at 13–14.

[380] *Id.* at 14.

[381] *Id.*

[382] *Id.*

[383] *Id.* at 15.

[384] *Id.* at 16.

[385] *Id.* at 15.

[386] *Id.* at 15–16.

[387] *Id.* at 16.

[388] *Id.*

[389] *Id.*

[390] *Id.*

[391] *Id.*

Agreement	Parties	Description	Debtors' Comments
American Transmission Systems, Inc. Ground Lease	FG and non-Debtor American Transmission Systems, Inc.	FG is a party to a "ground lease" with a non-Debtor "related to a synchronous condenser at ATSI's Eastlake facility." FG receives payments "on account of the lease" and receives payments "as a reimbursement for the equipment that FG operates at the facility."[392]	The Debtors seek to "continue performing under the ATSI lease [post-petition] in the ordinary course of business."[393]
Master Nuclear Operating Agreement	FENOC and NG	The NRC requires that the owners of nuclear power generation facilities "be separate from the companies that operate the facilities." NG owns the nuclear generation facilities, but FENOC is the operating entity for the facilities. This relationship is under a Master Nuclear Operating Agreement in which FENOC "provides staff and personnel to operate the facilities, performs necessary maintenance, manages and schedules deliveries of nuclear fuel, handles spent fuel, and processes disposal of radioactive waste." About $105 million is owed pre-petition under this operating agreement.[394]	The Debtors seek authorization to "pay all amounts owed to FENOC" under the Master Nuclear Operating Agreement, including the $105 million owed "on account of [pre-petition] amounts." The Debtors further seek authorization to "continue performing under the Master Nuclear Operating Agreement [post-petition] in the ordinary course of business."[395]
Aircraft Dry Lease Agreements	Two agreements: 1. Between FEALC and FESC 2. Between FES and FESC	FEALC and FES each own one airplane, which are both leased to FESC. Under the Lease Agreements, FESC "maintains, services, inspects, tests, overhauls and repairs the airplanes."[396]	The Debtors seek authorization to "continue leasing the planes to FESC pursuant to the Airplane Lease Agreements."[397]

Under § 363(c)(1) a DIP "may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing."[398]

As a DIP, the Debtors sought authorization to continue operating their business in its ordinary course. The Debtors pointed out that § 363(c)(1) was "intended to allow a debtor in possession the flexibility to run its business."[399] Bankruptcy courts have held that this flexibility gives DIP's the power to control the property of their estate "if the transaction is in the ordinary

[392] *Id.* at 16–17.

[393] *Id.* at 17.

[394] *Id.*

[395] *Id.* at 17–18.

[396] *Id.* at 18.

[397] *Id.*

[398] 11 U.S.C. § 363(c)(1).

[399] Motion for Authorizing Continued Performance of Intercompany and Shared Services Agreements, at 19; *see In re Ohio Ferro-Alloys Corp.*, 96 B.R. 795, 797 (Bankr. N.D. Ohio 1989) (stating that debtor has discretion to make business decisions to operate in the ordinary course).

course of business."[400] This "ordinary course of business" standard is not defined in the Bankruptcy Code, but courts have applied the "'reasonable expectations test' to determine whether a specific transaction is in the ordinary course of business."[401]

This test invariably requires the court to analyze the pre-petition conduct of the debtor. The Debtors pointed out that they are only seeking authorization to "continue" their performance in the ordinary course of business without any "alteration" of the terms and conditions set out in the Intercompany Agreements.[402] The Debtors limited their requested relief to the agreements enumerated in the Intercompany Agreements motion, and specifically excluded the upstream and downstream guarantees between FES and NG/FG and the secured credit facility issued by FE Corp.[403]

On April 3, 2018, the Bankruptcy Court entered its Interim Order Authorizing Debtors to Continue Performance of Obligations Under Intercompany Agreements ("Interim Intercompany Agreements Order"),[404] which granted the Intercompany Agreements Motion and Scheduled a final hearing for April 26, 2018. In the Interim Intercompany Agreements Order, the Bankruptcy Court specifically prohibited any payments to FESC or FE Corp for amounts due under the SSA until a final order.[405]

On May 8, 2018, the Bankruptcy Court entered a final order regarding the Intercompany Agreements.[406] This final order permitted the Debtors to continue performing under the Intercompany Agreements but, again, specifically prohibited any payments to FESC or FE Corp for pre-petition amounts due under the SSA "prior to entry of a final order authorizing payment of such [pre-petition] obligations."[407] The final order, further, gave all post-petition payments

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[400] Motion for Authorizing Continued Performance of Intercompany and Shared Services Agreements, at 19; *see Cohen v. KDC Fin. Servs., Inc.* (*In re Miller Min., Inc.*), 219 B.R. 219, 222 (Bankr. N.D. Ohio 1998) (noting that purpose behind § 363(c)(1) is to allow the debtor to continue its daily operations without the need for court approval or notice to creditors).

[401] Motion for Authorizing Continued Performance of Intercompany and Shared Services Agreements, at 20; *see In re Ohio Ferro-Alloys Corp.*, 96 B.R. at 797 ("[t]he touchstone of 'ordinariness' is thus the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business.").

[402] Motion for Authorizing Continued Performance of Intercompany and Shared Services Agreements, at 21.

[403] Schneider First Day Declaration, at 153.

[404] Interim Order Authorizing Debtors to Continue Performance of Obligations Under Intercompany Agreements, [Docket #151].

[405] *Id.* at 3.

[406] Final Order (A) Authorizing Debtors to (I) Continue Using Their Existing Cash Management System and (II) Maintain Existing Bank Accounts and Business Forms; (B) Authorizing Continued Intercompany Transactions; (C) Granting [Post-Petition] Intercompany Claims Administrative Expense Priority; and (D) Granting Related Relief, [Docket #488] [elsewhere, "Final Order on Intercompany Agreements Motion"].

[407] *Id.* at 7.

made under the Intercompany Agreements "superior administrative expense status" with priority over administrative claims under § 503(b).[408]

Continuing Performance Under Hedging and Trading Motions

In the ordinary course of business, the Debtors engaged in various hedging transactions to manage risk (the "Hedging and Trading Activities").[409] Specifically, the Hedging and Trading Activities and similar arrangements "allow[ed] the Debtors to utilize financial derivatives that hedge price risk for electricity sold and purchased in connection with their operations."[410] In a motion requesting permission to continue in these practices post-petition, the Debtors detailed the particulars of the Hedging and Trading Activities.[411] According to the Debtors, these Hedging and Trading Activities were "vital" to successful business operation and, thus, the Debtors requested permission to continue engaging in Hedging and Trading Activities in the ordinary course of business.[412]

The Bankruptcy Court, via interim order and with certain stipulations, granted the Hedging and Trading Motion on April 4, 2018.[413] On May 8, 2018, the Bankruptcy Court entered a final order on hedging and trading, which permitted Hedging and Trading Activity, subject to certain conditions.[414]

Continuing Payment of Certain Pre-Petition Taxes and Fees

On April 1, 2018, the Debtors filed the Debtors' Motion for Entry of Interim and Final Orders Authorizing the Debtors to Pay Certain [Pre-Petition] Taxes and Fees (the "Motion for Pre-Petition Taxes and Fees").[415] According to the Debtors, the Debtors incurred various taxes

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[408] *Id.*

[409] Debtors' Motion for Entry of Interim and Final Orders Authorizing FirstEnergy Solutions Corp. to (A) Continue Performing Under [Pre-Petition] Hedging and Trading Arrangements, (B) Pledge Collateral and Honor Obligations Thereunder, and (C) Enter Into and Perform Under Trading Continuation Agreements and New [Post-Petition] Hedging and Trading Arrangements, [Docket #14] [elsewhere, the "Hedging and Trading Motion"].

[410] *Id*. at 8.

[411] *See generally* Hedging and Trading Motion.

[412] Hedging and Trading Motion, at 8.

[413] Interim Order Authorizing FirstEnergy Solutions Corp. to (A) Continue Performing Under [Pre-Petition] Hedging and Trading Arrangements, (B) Pledge Collateral and Honor Obligations Thereunder, and (C) Enter Into and Perform Under Trading Continuation Agreements and New [Post-Petition] Hedging and Trading Arrangements, [Docket #165].

[414] Final Order Authorizing FirstEnergy Solutions Corp. to (A) Continue Performing Under [Pre-Petition] Hedging and Trading Arrangements, (B) Pledge Collateral and Honor Obligations Thereunder, and (C) Enter Into and Perform Under Trading Continuation Agreements and New [Post-Petition] Hedging and Trading Arrangements, [Docket #489].

[415] Debtors' Motion For Entry Of Interim And Final Orders Authorizing The Debtors To Pay Certain [Pre-Petition] Taxes And Fees, [Docket #16] [elsewhere, the "Taxes and Fees Motion"].

and fees during the ordinary course of business.[416] The Debtors categorized applicable taxes as (i) state and local income taxes; (ii) sales and use taxes; (iii) real and personal property taxes; (iv) state and federal excise taxes; and (v) federal income taxes.[417] The Debtors categorized applicable regulatory fees as (i) state fees; (ii) city and county fees; (iii) nuclear agency fees; (iv) vehicle fees; and (v) Department of Homeland Security fees.[418]

Ordinarily, the Debtors remitted all taxes and fees to FESC, which subsequently paid the applicable taxing or regulating authority.[419] Regarding federal income taxes, the Debtors were parties to the TAA, under which FESC estimated the federal income taxes to be owed by each party to the TAA.[420] Under the TAA, the Debtors made quarterly payments of the annual estimate, subject to a "true-up" the following year, where over-or-under payments were addressed.[421] Based on "substantial net operating losses," FES was compensated quarterly for use of its net operating losses to assist other members of the tax group.[422] Although no amounts would be due under the TAA during the "Interim Period,"[423] "FES [was] informed by FESC that FES received an overpayment in 2017 for its [net operating losses], which overpayment could have been as much as $48 million."[424] The Debtors also noted certain taxes due and anticipated, as well as fees associated with continued operations, from the above categories, in the millions-of-dollars.[425]

The Debtors argued (i) that the taxes and fees were not property of the estate under § 541(d) and, instead, held in trust for the taxing authority; (ii) that payment of the taxes and fees was "sound business judgment" under § 363(b); and (iii) that payment was necessary to the continued operation of the business and therefore justified under § 105(a).[426] The Debtors requested: (i) an interim order permitting the Debtors to pay taxes and fees incurred in the ordinary course of business up to $4,807,900, via remitting funds to FESC;[427] and (ii) after the interim

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[416] Schneider First Day Declaration, at 50.

[417] *Id.* at 51.

[418] *Id.* at 52.

[419] *Id*. at 51–53.

[420] *Id*. at 52.

[421] *Id*.

[422] *Id*.

[423] *Id.* at Footnote 44 ("The Interim Period is the period between the Petition Date and entry of a final order (the "Interim Period.")").

[424] *Id*.

[425] *Id.* at 51–53.

[426] Taxes and Fees Motion, at 14, 17–18.

[427] *Id.* at 28 (see chart in proposed order).

period, that the Debtors be permitted to continue paying ordinary course taxes and fees and performing under the TAA.[428]

On May 8, 2018, the Bankruptcy Court entered its Order Authorizing the Debtors to Pay Certain [Pre-Petition] Taxes and Fees,[429] in which the Bankruptcy Court authorized the Debtors' payment of taxes and fees as follows:[430]

Taxes	Interim Amount	Post-Interim Amount	Total Amount
State and City Income	$ -	$ -	$ -
Sales and Use	$ 339,000.00	$ -	$ 339,000.00
Real and Personal Property	$ 854,000.00	$ 18,270,212.43	$ 19,124,212.43
State and Federal Excise	$ -	$ 4,265,109.89	$ 4,265,109.89
Federal Income	$ -	$48,000,000.00	$ 48,000,000.00
Total Taxes	$ 1,193,000.00	$ 70,535,322.32	$ 71,728,322.32
Governmental Agency Fees	Interim Amount	Post-Interim Amount	Total Amount
State Regulatory	$ 3,900.00	$ 1,996,566.17	$ 2,000,466.17
City and County Regulatory	$ 111,000.00	$ 15,837.77	$ 126,837.77
Nuclear Agency	$ 3,500,000.00	$ -	$ 3,500,000.00
Department of Homeland Security	$ -	$ -	$ -
Vehicle	$ -	$ -	$ -
Total Fees	$ 3,614,900.00	$ 2,012,403.95	$ 5,627,303.95
Total Amount	$ 4,807,900.00	$ 72,547,726.27	$ 77,355,626.27

*This amount includes $48 million which may or may not be due and owing in whole or in part with respect to a possible overpayment by FirstEnergy Corp. for net operating losses with respect to Federal Income Taxes for 2017.

Continuing Maintenance of Surety Bond Program

On April 1, 2018, the Debtors filed the Debtors' Motion to Approve Continued Surety Bond Program.[431] According to the Debtors, in the ordinary course of business, and especially when dealing with municipalities, the Debtors were often required to post surety bonds (the "Surety Bond Program").[432] These bonds shifted the liability for the Debtors' possible non-performance from the municipality to the surety.[433]

During the course of the Debtors' business, the Debtors entered into "14 master indemnity agreements that set forth the sureties' rights to recover from the Debtors (the, "Surety Indemnity

[428] *Id.* at 32.

[429] Order Authorizing the Debtors to Pay Certain [Pre-Petition] Taxes and Fees, [Docket #490].

[430] *Id.* at 3.

[431] *See generally* Debtors' Motion to Approve Continued Surety Bond Program, [Docket #17].

[432] *Id.* at 3–4; *see also* Schneider First Day Declaration, at 58.

[433] Debtors' Motion to Approve Continued Surety Bond Program, at 3–4.

Agreements")."[434] As of the Petition Date, the Debtors had $228 million in bonds, with approximately $1.8 million in collateral posted.[435] The Debtors estimated that no payments would be due during the interim period, but did request (i) interim relief to perform under the Surety Indemnity Agreements as needed; and (ii) permission to continue the Debtors' existing Surety Bond Program.[436]

The Debtors argued that relief was proper under § 363(c), which permits a Chapter 11 DIP to enter into transactions or use property of the estate in the ordinary course of business without notice or hearing.[437] The Debtors further argued that continuation of the Surety Bond Program was "sound business judgement," warranting approval under § 363(b).[438] Finally, in the event the Bankruptcy Court decided that continuation of the Surety Bond Program constituted an extension of secured credit, the Debtors argued such an extension was permissible under § 364(c), given the Debtors' current financial situation.[439]

On April 4 and April 26, respectively, the Bankruptcy Court issued an interim[440] and a final[441] order permitting the Debtors to continue the Surety Bond Program.

Continuing Maintenance of Pre-Petition Insurance Program and Paying Premiums

On April 1, 2018, the Debtors filed the Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Continue Their [Pre-Petition] Insurance Program and (II) Authorizing the Debtors to Pay Any [Pre-Petition] Premiums and Related Obligations.[442] During the ordinary course of business, the Debtors maintained various insurance policies.[443] Policy premiums were typically paid to FESC under an SSA and FESC would disburse the premiums to the appropriate insurers.[444] The Debtors requested "authority (but not direction) to make the payments required to continue their Insurance Program, including payment of any [pre-petition] premiums,

[434] *Id.* at 4.

[435] *Id.*

[436] *Id.* at 6–7.

[437] *Id.* at 7.

[438] *Id.* at 8.

[439] *Id.*

[440] Interim Order Authorizing the Debtors to Continue Surety Bond Program, [Docket #167].

[441] Final Order Authorizing the Debtors to Continue Surety Bond Program, [Docket #426].

[442] Debtors' Motion For Entry of an Order (I) Authorizing the Debtors to Continue Their [Pre-Petition] Insurance Program and (II) Authorizing The Debtors to Pay Any [Pre-Petition] Premiums and Related Obligations, [Docket #20] [elsewhere, "Debtors' Insurance Motion"].

[443] For a comprehensive list of insurance policies, see Debtors' Insurance Motion, at **Exhibit A**.

[444] Debtors' Insurance Motion, at 6.

deductibles or other obligations under the Policies listed on Exhibit A."[445] The Debtors also sought authority "to renew Policies or to enter into new insurance arrangements as may be required . . . ."[446]

The Debtors asserted that these requests were proper under §§ 105(a), 363(b), and 363(c), as the maintenance of insurance was necessary for the conduct of the Debtors' business and a sound exercise of business judgement.[447] The Debtors made specific note that, in the event the Debtors' various insurance policies are deemed executory contracts under § 365, that the Debtor's request for permission to continue the their insurance program did not constitute acceptance of the insurance policies.[448]

On April 4, 2018, the Bankruptcy Court entered an order permitting the Debtors to continue their pre-petition insurance policies and pay premiums.[449]

Other Procedural First Day Motions

Establishing Omnibus Hearing Dates and Case Management Procedures

In an effort to streamline proceedings, the Debtors filed the Debtors' Motion to Authorize: (I) The Establishment of Omnibus Hearing Dates; and (II) Certain Case Management Procedures (the "Case Management Motion").[450] In the Case Management Motion, the Debtors requested monthly omnibus hearings and adoption of the case management order attached as Exhibit A (the "Case Management Order").[451] Citing to the over 13,500 expected creditors requiring notice, the Debtors, via the Case Management Order, requested (i) specified procedures for notice, mailing,

[445] *Id*. at 8.

[446] *Id*. at 12.

[447] *Id*. at 9–12.

[448] *Id*. at 13.

[449] Order (I) Authorizing the Debtors to Continue Their [Pre-Petition] Insurance Program and (II) Authorizing the Debtors to Pay Any [Pre-Petition] Premiums and Related Obligations, [Docket #168].

[450] Debtors' Motion to Authorize: (I) the Establishment of Omnibus Hearing Dates; and (II) Certain Case Management Procedures, [Docket #19] [elsewhere, the "Case Management Motion"].

[451] *See* Case Management Motion, at **Exhibit A**.

and responses; (ii) that the mailing matrix for all notices required by the Bankruptcy Code be limited;[452] and (iii) that the Bankruptcy Court permit electronic service.[453]

On April 3, 2018, the Bankruptcy Court approved the requested omnibus hearings and entered, in form and substance, the Case Management Order.[454] The Bankruptcy Court amended this order on April 12, 2018.[455]

Appointing Prime Clerk LLC[456] as Claims, Noticing and Solicitation Agent

Again, in an effort to streamline the proceedings, the Debtors filed the Application of Debtors for Appointment of Prime Clerk LLC as Claims, Noticing and Solicitation Agent *Nunc Pro Tunc* to The Petition Date.[457] In this Application, the Debtors requested that the Bankruptcy Court permit the Debtors to retain Prime Clerk LLC to, among other things,

> (i) serve as the noticing agent to mail notices to the estates' creditors, equity security holders, and parties in interest; (ii) provide computerized claims, objection, solicitation, and balloting database services; and (iii) provide expertise, consultation, and assistance in claim and ballot processing and other administrative services with respect to the Debtors' bankruptcy cases, pursuant to the provisions of the Engagement Agreement.[458]

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[452] The Debtors filed a separate motion requesting substitution of a consolidated list of creditors instead of a mailing matrix under Bankruptcy Rule 1007(a)(1), which was subsequently granted on April 4, 2018 (*see* Debtors' Motion For Entry Of An Order (I) Authorizing The Debtors To (A) Prepare A Consolidated List Of Creditors In Lieu Of Submitting A Formatted Mailing Matrix And (B) File A Consolidated List Of The Debtors' Fifty Largest Unsecured Creditors, (II) Approving The Form And Manner Of Notifying Creditors Of Commencement Of These Chapter 11 Cases, And (III) Granting Related Relief, [Docket #13]; Order (I) Authorizing The Debtors To (A) Prepare A Consolidated List Of Creditors In Lieu Of Submitting A Formatted Mailing Matrix And (B) File A Consolidated List Of The Debtors' Fifty Largest Unsecured Creditors, (II) Approving The Form And Manner Of Notifying Creditors Of Commencement Of These Chapter 11 Cases, And (III) Granting Related Relief, [Docket #160]).

[453] Case Management Motion, at 7–8.

[454] Order, Pursuant to §§ 102 And 105(A) of The Bankruptcy Code and Bankruptcy Rules 2002, 4001, 6007, 7016, 9013 and 9014 and Local Bankruptcy Rules Establishing: (I) Omnibus Hearing Dates; and (II) Certain Case Management Procedures, [Docket #154].

[455] Amended Order, Pursuant to [§§] 102 And 105(A) of The Bankruptcy Code and Bankruptcy Rules 2002, 4001, 6007, 7016, 9013 and 9014 and Local Bankruptcy Rules Establishing: (I) Omnibus Hearing Dates; and (II) Certain Case Management Procedures, [Docket #280].

[456] Prime Clerk LLC is now Kroll Restructuring Administration.

[457] Application of Debtors for Appointment of Prime Clerk LLC as Claims, Noticing and Solicitation Agent *Nunc Pro Tunc* to The Petition Date, [Docket #21].

[458] *Id*. at 3. **Note*** that the engagement agreement here is between the Debtors and Prime Clerk LLC.

The Debtors took time to detail, with specificity, the services Prime Clerk LLC would provide, their qualifications, their fees, and their disinterestedness.[459] On April 3, 2018, the Bankruptcy Court entered the Order Authorizing Retention and Appointment of Prime Clerk LLC as Claims, Noticing and Solicitation Agent *Nunc Pro Tunc* to the Petition Date.[460]

Paying the Professionals

Along with the other first day motions, the Debtors filed motions requesting compensation for (i) professionals and committee members;[461] and (ii) professionals utilized in the ordinary course of business.[462] For both the administration of the Debtors' bankruptcy proceedings and the continued ordinary operation of the Debtors, the Debtors needed professionals. With regard to non-ordinary course professionals, the Debtors requested establishment of specific procedures for requesting and approving compensation for professionals retained by the Debtor, by the United States Trustee, or by any subsequently formed official committee.[463] With regard to ordinary course professionals, the Debtors alleged that no less than fifty business professionals, ranging from accountants to attorneys, were utilized in the day-to-day operations of the Debtors.[464] Under the Debtors' SSA with FE Corp, FESC provided the professionals and the Debtors paid for said professionals via a monthly shared services invoice.[465] The Debtors requested permission to continue this practice.[466]

On April 26, 2018, the Bankruptcy Court entered the (i) Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals[467] and (ii) Order Authorizing the Debtors to Employ and Compensate Professionals Utilized in the Ordinary Course of Business.[468]

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[459] *Id*. at 4–12.

[460] Order Authorizing Retention and Appointment of Prime Clerk LLC as Claims, Noticing and Solicitation Agent *Nunc Pro Tunc* to the Petition Date, [Docket #152].

[461] Debtors' Motion to Approve Procedures for Interim Compensation and Reimbursement of Expenses for Professionals and Official Committee Members, [Docket #22] [elsewhere, the "Motion for Compensation and Reimbursement for Professionals"].

[462] Debtors' Motion for Entry of an Order Authorizing the Debtors to Employ and Compensate Professionals Utilized in the Ordinary Course of Business, [Docket #23] [elsewhere, the "Motion for the Debtors to Employ and Compensate Bankruptcy Professional"].

[463] Motion for Compensation and Reimbursement for Professionals, at 2.

[464] Motion for the Debtors to Employ and Compensate Bankruptcy Professional, at 6.

[465] *Id.*

[466] *Id.*

[467] Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals, [Docket #427].

[468] Order Authorizing the Debtors to Employ and Compensate Professionals Utilized in the Ordinary Course of Business, [Docket #428].

EXECUTORY CONTRACTS

Rejecting executory contracts is a key power that debtors have during Chapter 11 bankruptcy proceedings. Bankruptcy Code § 365(a) states that "the trustee [or the DIP], subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."[469]

What is an executory contract? While the Bankruptcy Code does not explicitly define what an executory contract is, the bankruptcy world has embraced a definition put forth by Vern Countryman, a famed Harvard Law professor. Professor Countryman defined an executory contract as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."[470] The Sixth Circuit has embraced this definition.[471]

Case law has developed the necessary standards for the key components of Countryman's definition. To show materiality a party must demonstrate that some performance is yet due from both parties to the contract.[472] Further, a debtor may assume or reject an executory contract or unexpired lease if the assumption or rejection represents a reasonable exercise of business judgment.[473] Under this business judgment rule, the debtor need demonstrate only that the assumption or rejection of the executory contract or unexpired lease will benefit the estate.[474]

The Debtors made several motions to reject numerous executory contracts. Motions to reject certain uranium supply agreements and certain rail transportation agreements were fairly routine in the context of Chapter 11 bankruptcy and were approved by the Bankruptcy Court with little fight from the counterparties to the agreements. However, motions to reject certain lease

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[469] 11 U.S.C. § 365(a).

[470] Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. R. 439, 460 (1973).

[471] *In re Terrell*, 892 F.2d 469 (6th Cir. 1989); *In re Pesce Baking Co., Inc.*, 43 B.R. 949 (Bankr. N.D. Ohio 1984); *In re AutoStyle Plastics, Inc.*, 227 B.R. 797 (Bankr. W.D. Mich. 1998).

[472] *Matter of Pennsylvania Tire Co.*, 26 B.R. 663 (Bankr. N.D. Ohio 1982); *Cloyd v. GRP Records*, 238 B.R. 328 (Bankr. E.D. Mich. 1999).

[473] *See, e.g., Phar- Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948 (N.D. Ohio 1997); *Allied Tech., Inc. v. R.B. Brunemann & Sons, Inc.*, 25 B.R. 484 (Bankr. S.D. Ohio 1982); *In re Penn Traffic Co.*, 524 F.3d 373 (2d Cir. 2008).

[474] *Granada Investments, Inc. v. DWG Corp.*, 823 F. Supp. 448, 454 (N.D. Ohio 1993) ("The business judgment rule presumes that in making a business decision, actions have been taken on an informed basis, in good faith, and in the honest belief that the action was taken in the best interests of the company."); *In re Goodyear Tire & Rubber Co. Deriv. Litig.*, No. 5:03-cv-2180, 2007 WL 43557, *10 (N.D. Ohio Jan. 5, 2007) (holding that there is a presumption that in making business decisions the directors exercised duties "with due care, without self-dealing, and in good faith").

agreements, the Renewable Energy PPAs and a certain PPA with the Ohio Valley Electric Corporation ("OVEC") received intense opposition.

Motion to Reject Certain Uranium Supply Executory Contracts

The Debtors filed a motion seeking authorization for FENOC to reject certain uranium supply contracts.[475] FENOC was an affiliate of FES that "operate[d] three nuclear generation plants" owned by NG.[476] As the operator of the nuclear power plants, FENOC was tasked with procuring the nuclear fuel that is turned into energy.[477] Many variables, such as the fuel requirements of FENOC's plants, contract lead times, and planned refueling outages, impacted the supply and price of nuclear fuel.[478] FENOC had contracts with various vendors for "uranium supply, conversion, enrichment, and fabrication services."[479]

The Debtors asked the Bankruptcy Court to authorize FENOC to reject two separate uranium supply agreements.[480]

Supplier	Contract Name	Contract Date
ITOCHU International, Inc.	Uranium Concentrates Sales Agreement	December 15, 2015
Traxys North America, LLC	Uranium Concentrates Sales Agreement (contract no. 56480-S)	March 22, 2016

The Debtors sought to reject these two contracts because FENOC's uranium inventories as of the Petition Date, along with other uranium contracts that were not being rejected, were "sufficient to cover all [of FENOC's] uranium supply requirements" through 2019.[481] The Debtors were also concerned with the financial viability of these uranium supply agreements. The Debtors estimated they would "likely save $11 million over the next 30 months" by rejecting these uranium supply agreements.[482]

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[475] Motion of Debtors for Entry of Order Authorizing the Debtors to Reject Certain Uranium Supply Executory Contracts *Nunc Pro Tunc* to the Petition Date, [Docket #25] [elsewhere, the "Motion to Reject Uranium Executory Contracts"].

[476] Declaration of Robert J. Borland in Support of the Debtors' Motion to Reject Certain Uranium Supply Contracts, at 2, [Docket #26] [elsewhere, the "Borland Declaration"].

[477] *Id.*

[478] *Id.*

[479] *Id.* at 3.

[480] Motion to Reject Uranium Executory Contracts, at 7.

[481] Borland Declaration, at 3 (The Debtors also note that the uranium market is "subject to significant price volatility" and noted how the spot price of uranium was $10 per pound in 2000, $140 per pound in 2007, and $22 per pound at the time of the Debtors' petition. Long-term prices for uranium were similarly volatile.).

[482] *Id.* at 4.

In making their business judgment argument for rejecting the agreements, the Debtors noted that the two uranium supply contracts were "no longer sources of potential value for the Debtors' future operations, or for their creditors or other parties in interest."[483] The Debtors asserted that, if the Bankruptcy Court did not allow them to reject these contracts, FENOC "face[d] ongoing obligations, which constitute[d] an unnecessary drain on its cash resources when compared with the limited benefits derived from the Contracts."[484]

No objections to this motion were filed and the Bankruptcy Court granted the motion authorizing FENOC to reject the two uranium supply contracts.[485]

Motion to Reject Certain Rail Transportation Executory Contracts

The Debtors filed a motion with the Bankruptcy Court seeking authorization for FG to reject two rail transportation contracts.[486] FG owned and operated four fossil generation plants, two of which, Sammis and Bruce Mansfield, were coal power plants.[487] As the operator of those plants, FG was responsible for procuring and coordinating coal shipments to those facilities.[488]

The Debtors sought to reject two separate rail transportation agreements.[489]

Supplier	Contract Name	Contract Date
BNSF Railway Company ("BNSF") and Norfolk Southern Railway Company ("Norfolk Southern")	Rail Transportation Agreement BNSF-C-12570	January 6, 2009
BNSF	Supplement Rail Transportation Agreement	December 23, 2008

Per the Debtors, these two contracts had "burdensome volume requirements" that made them "no longer economically viable for FG."[490] The agreement with BNSF and Norfolk Southern required that a minimum of 2.5 million tons of coal be transported to the power plants

[483] Motion to Reject Uranium Executory Contracts, at 8.

[484] *Id.*

[485] Order Authorizing Debtors To Reject Certain Uranium Supply Executory Contracts *Nunc Pro Tunc* To The Petition Date, [Docket #429].

[486] Motion of Debtors for Entry of Order Authorizing FirstEnergy Generation, LLC [FG] to Reject Certain Rail Transportation Executory Contracts *Nunc Pro Tunc* to the Petition Date, [Docket #28] [elsewhere, the "Motion to Reject Rail Transportation Executory Contracts"].

[487] Declaration of James G. Mellody in Support of the Debtors' Motion to Reject Certain Rail Transportation Executory Contracts *Nunc Pro Tunc* to the Petition Date, at 2, [Docket #29] [elsewhere, the "Mellody Declaration"].

[488] *Id.*

[489] Motion to Reject Rail Transportation Executory Contracts, at 7.

[490] Mellody Declaration, at 2.

from mines located in Wyoming and Montana through 2025.[491] The supplemental agreement with BNSF required additional minimum transportation requirements.[492] At the time of the Petition Date, FG expected to only purchase 2.3 million tons coal over the next 12 months for the Sammis plant alone.[493] Because this quantity of coal could have been purchased locally, the Debtors concluded that maintaining the two coal transportation agreements was "simply uneconomic."[494] The Debtors calculated that they would save approximately $105.6 million over the 12 months following the Petition Date if the Bankruptcy Court authorized the Debtors to reject the two rail transportation contracts.[495]

In giving its business judgment rationale, the Debtors mirrored, almost identically, the same arguments made in their motion seeking to reject the uranium supply contracts.[496]

No objections to this motion were filed and the Bankruptcy Court granted the motion authorizing FG to reject the two rail executory transportation contracts.[497]

Awh, FERC!: Motions to Reject PPAs Involving FERC's Jurisdiction

The Debtors filed two motions seeking authorization from the Bankruptcy Court to reject certain PPA agreements. Although these were separate motions, whether the Debtors were able to reject them turned on whether the FERC had the jurisdiction in the Bankruptcy Court to block the Debtor's motions. First, some background on the executory contracts that the Debtors were seeking to reject.

<u>Multi-Party Intercompany PPA with the OVEC</u>

The Debtors filed a motion seeking authorization from the Bankruptcy Court for the Debtors to reject an "extraordinarily burdensome" executory PPA with the OVEC. FES's revenue was derived from selling electricity to RTOs that deliver energy to the customers of FirstEnergy's competitive generation segment.[498] As a reminder, RTOs are "responsible for

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[491] *Id.* at 3.

[492] *Id.*

[493] *Id.*

[494] *Id.*

[495] *Id. But see* Motion to Reject Rail Transportation Executory Contracts, at 7 (noting that these contracts are part of a pending arbitration proceeding).

[496] Motion to Reject Rail Transportation Executory Contracts, at 8–11.

[497] Order Authorizing FirstEnergy Generation, LLC [FG] To Reject Certain Rail Transportation Executory Contracts *Nunc Pro Tunc* to The Petition Date, [Docket #430].

[498] Motion for Entry of an Order Authorizing FirstEnergy Solutions Corp. and FirstEnergy Generation, LLC to Reject A Certain Multi-Party Intercompany Power Purchase Agreement with the Ohio Valley Electric Corporation as of the Petition Date, at 9, [Docket #44] [hereinafter "Motion to Reject Intercompany/OVEC Executory Contract"].

coordinating, controlling and monitoring a regional high-voltage transmission grid" and "administer markets to ensure safe and reliable operation and delivery of electricity."[499] FES made commitments to assist the PJM RTO and the Midcontinent Independent System Operator, Inc. RTO in meeting their operating requirements.[500]

FG, a subsidiary of FES, was a party to a multi-party intercompany PPA (the "OVEC ICPA") where "FES and several other power companies 'sponsor[ed]' and purchase[d] power generated by fossil fuel from the OVEC."[501] Under the OVEC ICPA, FG was obligated to "purchase 4.85% of the power that [the] OVEC's fossil-fuel plants generate[d] at an uneconomic rate until either the year 2040 of until [the] OVEC ceases to operate."[502] Financially, the OVEC ICPA was cumbersome on FG, which expected to lose approximately $268 million over the remaining term of the OVEC ICPA.[503]

Renewable Energy PPAs

The Debtors filed a separate motion seeking authorization for the Debtors to reject "certain power purchase agreements."[504] The Debtors sought to reject nine "extremely burdensome executory power purchase agreements," the Renewable Energy PPAs, noting that the Debtors were set to lose about $46 million per year on these contracts, and that they expected to lose approximately $496 million over the remaining years of these contracts.[505] These are the same long-term PPA contracts that were cited as playing a role in the events leading up to FirstEnergy's bankruptcy. As a refresher, the following contracts are:[506]

Description	Contract Price	Contract Date	Termination Date
Wind Power Purchase Agreements between FES and Allegheny Ridge Wind Farm, LLC (Phase 1 and Phase 2)	$65.00/MWh	March 21, 2006	December 31, 2030
Power Purchase Agreement between FES and Blue Creek Wind Farm LLC	$61.91-88.08/MWh	February 8, 2011	December 31, 2032

[499] *Id.* at 10.

[500] *Id.*

[501] *Id.* at 10–11.

[502] *Id.* at 11.

[503] *Id.*

[504] Motion for Entry of an Order Authorizing FirstEnergy Solutions Corp. and FirstEnergy Generation, LLC to Reject Certain Energy Contracts as of the Petition Date, at 6, [Docket #45] [elsewhere, the "Motion to Reject Certain Renewable PPAs"].

[505] *Id.* at 6–7.

[506] *Id.* at **Exhibit B**.

Description	Contract Price	Contract Date	Termination Date
Wholesale Purchase and Sale Agreement for Wind Energy between FES and Casselman Windpower LLC	$72.49-94.72/MWh	November 30, 2006	23rd Anniversary of Delivery Commencement Date
Renewable Resource Power Purchase Agreement between FES and High Trail Wind Farm, LLC	Varies by year, month and hour; average annual price is approximately $70.8/MWh	September 14, 2007	18th Anniversary of Facilities Completion Date/Facilities Completion Termination Deadline
Power Purchase Agreement between FES and Krayn Wind LLC	$91.02-105.13/MWh	August 20, 2008	December 31, 2030
Power Purchase Agreement between FES and Maryland Solar LLC	$230.00/MWh	October 14, 2011	20th Anniversary of Commercial Operation Date
Master Power Purchase and Sale Agreement between FES and Meyersdale Windpower LLC	$39.60/MWh	April 21, 2003	20 year anniversary of Commercial Operation Date
Wind Power Purchase Agreements between FES and North Allegheny Wind LLC (Phase 3 and Phase 4)	$74.00/MWh for years 1-12, $68.00/MWh thereafter	September 18, 2006	23rd Anniversary of Commercial Operation Date
Master Power Purchase & Sale Agreement between FES and Forked River Power, LLC	Variable based upon specified ratio	April 17, 2008	April 17, 2018

As stated above, the motions to reject the OVEC ICPA and the Renewable Energy PPAs, proved to be the most contentious matters in the entire bankruptcy and served as the basis for an adversary proceeding between FirstEnergy and the FERC. Ultimately, this adversary proceeding settled the matters for both the OVEC ICPA and the Renewable Energy PPAs (collectively, the "Executory Contracts" in this section).

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Background on the FERC v. Bankruptcy Court Jurisdiction Debate

The question of whether the "FERC [had] authority to foreclose a bankruptcy court's exercise of its rejection powers" was storied even before the Debtors' bankruptcy.[507] Aggregating case law on point,[508] there were two primary issues.[509]

1. Whether the FERC actually had the authority to prohibit PPA rejection under § 365(a) of the Bankruptcy Code.

2. Regardless of whether the FERC had the authority to prohibit contract rejection in bankruptcy, could a bankruptcy court override a FERC order compelling performance under a PPA if the order compelling performance was entered prior to a rejection determination by the bankruptcy court?

Aggregating existing cases, the answers to the two primary questions were:

1. No, the FERC did not have authority to prohibit contract rejection in a bankruptcy case.[510]

2. No, a bankruptcy court could not override a FERC order compelling performance if entered prior to a determination of rejection by the bankruptcy court—only the Appeals Court could review the FERC action.[511]

In 2006, the FERC "acknowledged that '[it was] precluded from taking action under the [Federal Power Act] that impacts a debtor's ability to reject a [FERC-jurisdictional contract] . . . .'"[512] However, during the Debtors' bankruptcy, it was unclear whether the FERC would adhere to this previous stance.

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[507] Complaint For Declaratory Judgment, Preliminary And Permanent Injunction Against The Federal Energy Regulatory Commission, at 17, [FERC Adversary Proceeding Docket # 1] [elsewhere, the "FERC Complaint"].

[508] *See generally*, *NRG Power Mktg. Inc. v. Blumenthal* (*In re NRG Energy, Inc.*), No. 03 Civ. 3754, 2003 WL 21507685, at *2 (S.D.N.Y. June 30, 2003); *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004); *In re Calpine Corp.*, 337 B.R. 27, 30 (S.D.N.Y. 2006); *In re Boston Generating, LLC*, No. 10 Civ. 6528, 2010 WL 4288171 (S.D.N.Y. Nov. 1, 2010) (withdrawing reference); *In re Boston Generating, LLC*, 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010).

[509] There was no binding circuit precedent on this issue at the time the Debtors filed their voluntary petition.

[510] This determination turned on the effect of rejection under 11 U.S.C. § 365(a). Objections operate as a breach of contract, not a termination. After rejection, OVEC would be entitled to damages resulting from breach. The FERC does not have authority to decide breach of contract disputes. *See* FERC Complaint, at 6; s*ee also In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004).

[511] FERC Complaint, at 17–21.

[512] *Id.* at 19 (citing *Cal. Elec. Oversight Bd. v. Calpine Energy Servs.*, L.P., No. EL 06-30-000, 114 F.E.R.C. ¶ 61,003, 61,005 (Jan. 3, 2006)).

Because of this uncertainty, a type of forum-shopping/race-to-the-courthouse developed. A party believing that the FERC would provide a favorable treatment via an administrative proceeding would file with the FERC, while a party believing that a bankruptcy court would provide a favorable treatment would file with a bankruptcy court. Both parties, the counterparties to the PPAs and FirstEnergy/the Debtors, hoped their preferred adjudicatory body, the FERC and the bankruptcy court, respectively, would act first, as an action by either would take months to appeal.

Commencing the Adversary Proceeding in the Bankruptcy Court

The OVEC was aware of what was happening before the Debtors voluntarily filed their Chapter 11 bankruptcy on April 1, 2018. In anticipation of the Debtors' bankruptcy filing, on March 26, 2018, OVEC filed a complaint with the FERC, asserting that FES and FG (in the context of the FERC adversary proceeding, FES and FG were the "FERC Plaintiffs") intended to breach the OCEV ICPA via rejection under § 365(a) and that such rejection amounted to a "termination" of the OVEC ICPA, and, therefore, that the FERC could properly exercise jurisdiction over the dispute and compel the FERC Plaintiffs' performance under the OVEC ICPA.[513] The FERC took official notice of the OVEC's complaint and "scheduled a comment date of April 16, 2018."[514]

In the Bankruptcy Court, the FERC Plaintiffs responded to the OVEC's complaint with the FERC on April 1, 2018, by filing their Complaint for Declaratory Judgement, Preliminary and Permanent Injunction Against the Federal Energy Regulatory Commission (the "FERC Complaint").[515] The FERC Complaint initiated **Adversary Proceeding No. 18-05021** (the "FERC Adversary Proceeding"). In the FERC Complaint, the FERC Plaintiff's requested,

> a declaratory judgment confirming [the Bankruptcy] Court's exclusive jurisdiction over their ability to reject the Executory PPAs, and a narrowly tailored preliminary and permanent injunction that would prevent [the] FERC from nullifying [the Bankruptcy] Court's authority under the Bankruptcy Code by initiating or continuing, or encouraging any person or entity to initiate or continue, a proceeding concerning the Executory PPAs.[516]

[513] FERC Complaint, at 23–24.

[514] *Id.* at 24 (citing Notice of Compl., *Ohio Valley Electric Corp. v. First Energy Sols. Corp.*, No. EL18-135-000 (F.E.R.C. Mar. 28, 2018)).

[515] *See generally* FERC Complaint.

[516] FERC Complaint, at 8.

The FERC Plaintiffs, contemporaneously with the filing of the FERC Complaint, filed an *ex parte* motion for a temporary restraining order and preliminary injunction.[517] In short, the FERC Plaintiffs sought to ensure, via the FERC Complaint and motion, that the Bankruptcy Court could and would determine rejections of the "Executory PPAs."[518]

On April 2, 2018, the Bankruptcy Court entered an *ex parte* order restraining the FERC, until 11:59 pm on April 16, 2018, from

> "initiating or continuing, or encouraging any person or entity to initiate or continue, any proceeding before [the] FERC, or from issuing any order, to require or coerce the [FERC] Plaintiffs to continue performing under the executory contracts identified in Exhibit B or limiting Plaintiffs to seeking abrogation of such contract under The Federal Power Act"; or "entering any order that would require or coerce the [FERC] Plaintiffs to continue performing under the executory contracts identified in Exhibit B in a manner that would interfere with [the Bankruptcy] Court's exclusive jurisdiction to hear and determine any motion pursuant to 11 U.S.C.§ 365."[519]

The next day, on April 3, 2018, the Bankruptcy Court amended[520] and extended the temporary restraining order through May 11, 2018.[521] Several parties intervened under Federal

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[517] *See generally* Plaintiffs' *Ex Parte* Motion For Temporary Restraining Order And Preliminary Injunction Against Federal Energy Regulatory Commission, [FERC Adversary Proceeding Docket #3] [elsewhere, the "Motion for *Ex Parte* TRO and PI Against FERC"]. **Note*** that the "FERC Adversary Proceeding Docket" was a separate docket to the general bankruptcy docket of FirstEnergy.

[518] The "Executory PPAs" included the OVEC ICPA and the Renewable Energy PPAs, the bundle of eight additional PPAs entered into between 2003 and 2011 for the purpose of obtaining clean energy credits. These PPAs were burdensome, and the Debtors sought to reject them, but it does not appear that the parties to the eight bundled PPAs specifically sought out FERC assistance to keep them in place. *See* FERC Complaint, at **Exhibit B**, [Link].

[519] Ex Parte Temporary Restraining Order Against Federal Energy Regulatory Commission, [FERC Adversary Proceeding Docket #11].

[520] Amended Temporary Restraining Order Against Federal Energy Regulatory Commission, at 3, [FERC Adversary Proceeding Docket #52] [elsewhere, the "FERC Amended TRO"] Specifically, the TRO was amended "(i) to permit any interested parties, including, but not limited to, the Plaintiffs, and any of their affiliates and creditors, to submit written filings in the FERC Proceeding, (ii) to permit FERC to review and evaluate such submissions in the FERC Proceeding, and (iii) to permit FERC to take procedural actions pursuant to its regulations and rules of practice and procedure, including, but not limited to, taking actions related to extensions of time (e.g., pursuant to 18 C.F.R. § 385.2008); off-the-record communications (e.g., pursuant to 18 C.F.R. § 385.2201); and information and requests (e.g., pursuant to 18 C.F.R. part 388), provided that FERC is restrained from (a) entering any order that would require or coerce the Plaintiffs to continue performing under the executory contracts identified in Exhibit B, or (b) otherwise addressing the substance or merits of the FERC Proceeding. During the pendency of the TRO as amended by this Amended TRO, to the extent any provision of the automatic stay applies, 11 U.S.C. § 362, it is lifted on consent of the Plaintiffs to permit the activity permitted in the preceding sentence."

[521] FERC Amended TRO, at 3.

Rule of Civil Procedure 24 (Federal Rule of Bankruptcy Procedure 7024), including the OVEC[522] and the Unsecured Creditors Committee.[523] On April 30, 2018, the FERC filed its motion opposing the FERC Plaintiffs' request for preliminary injunction.[524]

On May 11, 2018, the Bankruptcy Court preliminarily enjoined the FERC from initiating or continuing any action that (i) would "require or coerce the [FERC] Plaintiffs to continue performing under the Executory Contracts or [limit] the [FERC] Plaintiffs [in] seeking abrogation of any of the Executory Contracts under the Federal Power Act" or (ii) "would interfere with [the Bankruptcy] Court's exclusive jurisdiction to hear and determine the Rejection Motions or any other motion regarding such contracts brought pursuant to 11 U.S.C. § 365."[525] The Bankruptcy Court specifically held, under § 362(a), that the automatic stay applied to the continuation or commencement of the FERC proceedings, absent the exercise of police powers expressed in § 362(b)(4).[526]

The parties, and countless intervenors and amici filers, focus on § 105(a) and its use by the Bankruptcy Court to protect the Bankruptcy Court's jurisdiction over the PPA rejection matter. The Bankruptcy Court shifted the focus entirely and held that the automatic stay prohibited the FERC from initiating or continuing a proceeding affecting the Executory PPAs. Additionally, the Bankruptcy Court added that, in the event the FERC proceeding fell under the police powers exception (which the Bankruptcy Court did not think was applicable), then the Bankruptcy Court otherwise enjoined the FERC's continuation of proceedings under § 105(a) "to preserve the [Bankruptcy] Court's jurisdiction over the Debtors' cases, their estates, and their Rejection Motions."[527] The Bankruptcy Court took time to note that, from its perspective, the FERC

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[522] *See generally* Ohio Valley Electric Corporation's Motion To Intervene In **Adversary Proceeding No. 18-05021**, [FERC Adversary Proceeding Docket #16]; Agreed Order Granting Ohio Valley Electric Corporation's Motion To Intervene In **Adversary Proceeding No. 18-05021**, [FERC Adversary Proceeding Docket #53].

[523] Motion Of Official Committee Of Unsecured Creditors To Intervene In Adversary Proceeding, [FERC Adversary Proceeding Docket #63]; Order Granting Motion Of Official Committee Of Unsecured Creditors To Intervene In Adversary Proceeding, [FERC Adversary Proceeding Docket #69]; Agreed Order Granting Application Of Krayn Wind LLC To Intervene In **Adversary Proceeding No. 18-05021**, [FERC Adversary Proceeding, Docket #73]; Motion of Pass-Through Certificate Holders and the Ad Hoc Noteholder Group to Intervene in **Adversary Proceeding No. 10-05021**, [FERC Adversary Proceeding Docket #77]; Order Granting Pass-Through Certificateholders' And Ad Hoc Noteholder Group's Joint Motion To Intervene In **Adversary Proceeding No. 18-05021**, [FERC Adversary Proceeding Docket #98].

[524] *See generally* Defendant Federal Energy Regulatory Commission's Opposition To The Plaintiffs' Motion For A Preliminary Injunction, [FERC Adversary Proceeding Docket #85].

[525] Preliminary Injunction Against the Federal Energy Regulatory Commission, at 4, [FERC Adversary Proceeding Docket #114] [elsewhere, the "FERC Preliminary Injunction"].

[526] *Id.*; *see also* Memorandum Decision Supporting Order Granting Preliminary Injunction, [FERC Adversary Proceeding Docket #125] [elsewhere, the "Memo Supporting Order Granting PI"].

[527] Memo Supporting Order Granting PI, at 12.

Proceeding was nothing more than the OVEC's attempt to elevate their position over other creditors.[528]

The Sixth Circuit Court of Appeals Decision

Both the OVEC[529] and the FERC appealed the Bankruptcy Court's ruling to the district court.[530] Subsequently, the FERC requested direct review by the Sixth Circuit Court of Appeals, which was granted.[531] In its decision, the Sixth Circuit, in effect, agreed with the Bankruptcy Court's conclusions as detailed in the preliminary injunction, but limited the broad sweeping nature of some of the Bankruptcy Court's holdings. The Sixth Circuit affirmed in-part, reversed in-part, and remanded for further proceedings.[532]

The Status of PPAs in Bankruptcy and Authority on Rejection

The Sixth Circuit concluded that, although "filed-rate"[533] contracts have been treated as quasi-legislative actions in other contexts, in bankruptcy, "the public necessity of available and functional bankruptcy relief is generally superior to the necessity of FERC's having complete or exclusive authority to regulate energy contracts and markets."[534] The Sixth Circuit held that "[t]he bankruptcy court [had] jurisdiction to decide whether FES, as a Chapter 11 [DIP], may reject the [Executory PPAs], meaning that FES [could] reject the contracts subject to proper bankruptcy court approval and [the] FERC [could not] independently prevent it."[535]

The FERC Injunction and the "Regulatory Powers Exception"

In its preliminary injunction, the Bankruptcy Court determined that the automatic stay in § 362 barred any origination or continuation of a FERC action affecting the FERC Plaintiff's rights and obligations under the OVEC ICPA and Renewable Energy PPAs.[536] The Sixth Circuit took

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[528] *Id.* at 18–19.

[529] *See* Ohio Valley Electric Corporation's Motion To Appeal The Preliminary Injunction Order As Of Right, Or In The Alternative, Requesting Leave, [FERC Adversary Proceeding Docket #131].

[530] Notice Of Appeal And Statement Of Election, [FERC Adversary Proceeding Docket #127]; Notice Of Appeal Under 11 U.S.C. § 158(A)(1) And Statement Of Election, [FERC Adversary Proceeding Docket #136].

[531] *See generally* Judgement on Appeal, [FERC Adversary Proceeding Docket #163] [elsewhere, the "FERC Judgement on Appeal"].

[532] *Id.* at 7.

[533] *Id.* at 16 ("The 'filed-rate doctrine,' as applied in the FPA, holds that FERC has plenary and exclusive jurisdiction over wholesale power rates, terms, and conditions of service for any such rate filed with FERC. *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371–72 (1988)").

[534] FERC Judgement on Appeal, at 20.

[535] *Id.*

[536] FERC Preliminary Injunction, at 4. **Note*** that the defined term "Executory Contracts" was not used here to re-emphasize the PPAs and executory contracts at issue.

time to detail a balancing test for when the regulatory exemption to § 362 would apply to permit FERC action during the pendency of a bankruptcy.[537] The Sixth Circuit applied "the public-policy test, under which 'reviewing courts must distinguish between proceedings that adjudicate private rights and those that effectuate public policy[; those] proceedings that effectuate a public policy are excepted from the stay.'"[538]

The Sixth Circuit held that the bankruptcy court properly concluded that the FERC's interest, in this case, was not sufficient to trigger the regulatory powers exception in § 362(b)(4) but wanted to state that this may not *always* be the case.[539] Generally speaking, "once [a] bankruptcy court [has] determined that [an] anticipated FERC action of ordering contract performance (or forbidding contract rejection) would fail the public-policy test and, therefore, not qualify as a regulatory-powers exception to the automatic stay, then [the court] could enjoin [the] FERC from issuing such an order."[540]

<u>Section 105(a) and Authority to Prohibit FERC Action</u>

Section 105(a) permits a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[541] In its preliminary injunction, the Bankruptcy Court cited §105(a) as a broad justification for enjoining the FERC in the event the regulatory powers exception did apply. The Sixth Circuit held that "§ 105(a) did not give the bankruptcy court unlimited power to prohibit [the] FERC from taking *any* action whatsoever or to enjoin all of [the] FERC's regulatory functions."[542]

Concluding the FERC Adversary Proceeding

In short, the Sixth Circuit's decision required application of the public policy test anytime a bankruptcy court wants to stay FERC proceedings. In the event the regulatory powers exemption did not apply, the automatic stay would bar, and a bankruptcy court could subsequently enjoin, FERC action that conflicted with the exercise of a bankruptcy court's powers.

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[537] FERC Judgement on Appeal, at 30.

[538] *Id.* at 21.

[539] *Id.* at 22–23.

[540] *Id.* at 24.

[541] 11 U.S.C. § 105(a).

[542] FERC Judgement on Appeal, at 27.

Examples of Counterparty Objections during FERC Adversary Proceeding

There were a number of objections made by counterparties during the FERC Adversary Proceeding. In an effort to prevent any dilution of the narrative of the legal proceedings, we have collected a sample of such objections below.

- **Duke Energy Ohio, Inc.**, a sponsoring company and counterparty, objected to the Debtors' motion to reject the OVEC ICPA, arguing that the Bankruptcy Court erred in its preliminary injunction ruling in *FirstEnergy Solutions Corp. v. Federal Energy Regulatory Commission*, Adv. Pro. 18-05021 (Bankr. N.D. Ohio).[543]

- The **Ohio Consumers' Counsel** (the "OCC") objected to the Debtors' motion to reject the OVEC ICPA, arguing that the Debtors' motion to reject the contract "ignore[d] the complex realities of the OVEC [ICPA] and the effect of the proposed rejection on consumers," and pointed out that retail consumer prices would be negatively impacted if the Debtors were able to reject the OVEC ICPA.[544]

- The **OVEC** objected to the Debtors' motion to reject the OVEC ICPA. The OVEC essentially argued that the FERC "oversee[s] [the] regulatory framework" of the "sale of electric energy in interstate commerce" and that the FERC's jurisdiction under the Federal Power Act is "'plenary' [and] extend[s] to 'all wholesale sales in interstate commerce . . . .'"[545]

- **Maryland Solar Holdings, Inc.**, assignee of **Maryland Solar LLC**, opposed the Debtors' motion to reject the Renewable Energy PPAs primarily on the grounds that the FERC, not the Debtors, may modify or terminate the Renewable Energy PPAs.[546]

- **North Allegheny Wind, LLC** objected to the Debtors' motion to reject the Renewable Energy PPAs to "preserve its argument that a bankruptcy court [could not] authorize a debtor to reject and cease performing under a wholesale power purchase agreement by operation of [] § 365 without a determination by [the] FERC of whether such action [was] in the public interest."[547]

- **Krayn Wind LLC** objected to the Debtors' motion to reject the Renewable Energy PPAs arguing that both "[the Bankruptcy Court] and [the] FERC [had] concurrent jurisdiction

[543] Duke Energy Ohio, Inc.'s Objection to The Debtors' Motion to Reject the OVEC ICPA, at 1–2, [Docket #649].

[544] Ohio Consumers' Counsel Objection to The Debtors' Motion to Reject the OVEC ICPA, at 1–2, [Docket #651].

[545] Ohio Valley Electric Corporation's Opposition to The Debtors' Motion to Reject the OVEC ICPA, at 1–2 [Docket #652].

[546] Maryland Solar Opposition to the Debtors' Motion to Reject the Renewable Energy PPAs, at 1, [Docket #643].

[547] North Allegheny Wind, LLC's Objection to the Debtor's Motion to Reject the Renewable Energy PPAs, at 2, [Docket #650].

over [the] matter, and [that] both [needed to] rule that rejection [was] warranted for such relief to become effective."[548]

Motion to Reject Certain Lease Agreements

Finally, the Debtors filed a motion seeking authorization from the Bankruptcy Court to reject certain facility leases and other executory contracts, all of which deal with the 2007 Mansfield Sale-Leaseback Transaction.[549] The workout and settlement of the Mansfield Sale-Leaseback matter were integral to confirming a plan and for the Debtors' emergence from bankruptcy.

A fully fleshed out discussion of how the Motion to Reject Certain Lease Agreements was settled can be found in the **ROAD TO REORGANIZATION** section below.

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[548] Krayn Wind Objection and Reservation of Rights to the Debtors' Motion to Reject the Renewable Energy PPAs, at 6, [Docket #653].

[549] Motion Of The Debtors For Entry Of An Order Authorizing The Debtors To Reject Certain Lease Agreements, [Docket #64] [elsewhere, "Motion to Reject Mansfield"]; *see also id.* at **Exhibit A** (outlining information on every contract that the Debtors are looking to reject pursuant to this motion).

REMAINING ADVERSARY PROCEEDINGS

There were three adversary proceedings during the Debtors' bankruptcy proceedings: the FERC, Exelon, and Bluestone. The FERC Adversary Proceeding was just discussed in great detail, but the Exelon and Bluestone matters were important in their own right.

Exelon and the Canceled § 363 Auction for Retail Power Sale Assets

The Exelon Generation Company, LLC ("Exelon"), a clean energy generator, and the Debtors entered into an asset purchase agreement dated July 9, 2018, (the "Exelon APA") for the proposed sale of the Debtors' retail book assets.[550] Under the Exelon APA, Exelon would serve as the stalking horse bidder.[551] The retail book assets of the Debtors mainly consisted of consumer contracts and equipment (the "Retail Power Sales Assets"[552]).[553] Exelon's stalking horse bid was set at $140 million. The Exelon APA detailed a termination fee of 3% and a buyer reimbursement fee of 1%, culminating in a 4% deal value break-up fee (the "Break Up Fee"), among other requirements for the transaction.[554]

On July 9, 2018, the Debtors filed a motion, under §§ 363 and 365 of the Bankruptcy Code, seeking judicial approval to auction off the Retail Power Sales Assets of Debtors (the "Exelon Sale

[550] Asset Purchase Agreement Dated as Of July 9, 2018, by and Between FirstEnergy Solutions Corp., As Seller, And Exelon Generation Company, LLC as Buyer, [Docket #908-4] [elsewhere, "Exelon APA"]. **Note*** the "Exelon Adversary Proceeding" was a separate docket to the general bankruptcy docket of FirstEnergy.

[551] *See* Exelon APA. A "stalking-horse bid" refers to a deal with a potential buyer that is hidden from the public, creditors, and the courts. Usually, when a company is preparing to file bankruptcy, it chooses an entity from a pool of interested bidders to make the first bid to buy the company's assets. The selected bidder sets the pace for other bidders, such that other bidders cannot bid below the purchase price. *See Stalking-Horse Bid*, CFI (last visited Apr. 16, 2024), [Link].

[552] Specifically, the Exelon APA contemplated the purchase and sale of the Debtors' contracts "to (i) supply electricity-related services to large commercial and industrial Customers in Illinois, Maryland, Michigan, New Jersey, Ohio and Pennsylvania; (ii) supply electricity-related services to medium sized commercial and industrial Customer in Illinois, Maryland, Michigan, New Jersey, Ohio and Pennsylvania; (iii) supply electricity-related services to government aggregation Customers in Illinois and Ohio; (iv) supply electricity and other products to utilities in connection with "provider of last resort" services in Maryland, Ohio and Pennsylvania; (v) supply electricity and other products to certain municipalities and co-operatives in Maryland, Michigan, Ohio and Pennsylvania; (vi) supply retail electricity-related services to Customers in Illinois, Maryland, New Jersey, Ohio and Pennsylvania; and (vii) perform its obligations under certain structured transactions with third parties. *See* Exelon APA, at 3, 15.

[553] *Id.* at 15–17.

[554] Motion of Debtors Pursuant to 11 U.S.C. §§ 105, 363, 364, 365, and 503 and Fed. R. Bankr. P. 2002, 6004, and 6006 for Entry of (I) Order Approving (A) Bid Procedures, (B) Procedures for Assumption and Assignment of Certain Executory Contracts and Related Notices, (C) Notice of Auction and Sale Hearing, and (D) Related Relief and (II) Order (A) Approving the Sale of the Debtors' Retail Power Sales Assets Free and Clear of Liens, Claims, Encumbrances And Other Interests, (B) Approving Assumption and Assignment Of Certain Executory Contracts and (C) Granting Related Relief, at 11, [Docket #908] [elsewhere, "Motion to Approve Exelon Sale"].

Motion").[555] Section 363(b) permits a DIP to "use, sell, or lease, other than in the ordinary course of business, property of the estate" after notice and hearing, so long as the debtor can demonstrate "some articulated business justification."[556] The Debtors articulated that,

> [t]he sale of the Retail Power Sales Assets [was] critical to preserving and realizing [the] value [of the assets] and, in turn, maximizing recoveries for the Debtors' stakeholders. Pursuing the [stalking horse bid from Exelon] . . . represent[ed] a reasonable exercise of the Debtors' business judgment and [was] in the best interests of all parties.[557]

Interestingly, the Exelon Sale Motion contemplated a "hedging transaction."[558] To increase marketability and purchase price for the Retail Power Sales Assets, the Debtors' proposed to offer bidders a hedging agreement, under which the Debtors' could be obligated to supply power to the Exelon through May 31, 2019 (the "Hedge-Pledge").[559] Since the Debtors could not support the Hedge-Pledge with collateral, the Debtors sought to offer buyers administrative expense priority to all amounts owed under the contemplated hedging agreement via § 364 of the Bankruptcy Code.[560]

After notice and hearing, § 364(c) permits a DIP to incur debt with "priority over any or all administrative expenses."[561] For approval, a DIP must show that "(i) the debtor cannot obtain credit unencumbered or without superpriority status, (ii) the credit transaction is necessary to preserve the assets of the estates, and (iii) the terms of the agreement are fair, reasonable, and adequate given the circumstances of the debtor and the proposed counterparty."[562] The Bankruptcy Code provides this power in understanding of creditors' reluctance to provide credit to entities in bankruptcy.[563]

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[555] *See generally* Motion to Approve Exelon Sale.

[556] 11 U.S.C. § 363(b); *see also* Motion to Approve Exelon Sale, at 12 (citing *Comm. of Equity Sec. Holders v. Lionel Corp.* (*In re Lionel Corp.*), 722 F.2d 1063, 1070 (2d Cir. 1983) adopted by *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986)).

[557] *See generally* Motion to Approve Exelon Sale.

[558] *Id.* at 13.

[559] *Id.* at 14.

[560] *Id.*

[561] 11 U.S.C. § 364(c).

[562] Motion to Approve Exelon Sale, at 16 (citing *In re Crouse Grp., Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987); *In re Wings of Medina Liquidation, Inc.* (f/k/a *In re QSL of Medina, Inc.*), No. 15-52722 (AMK) (Bankr. N.D. Ohio Dec. 15, 2015) [Docket No. 110]; *In re Hi-Rise Recycling Co.*, No. 04-64352 (RK) (Bankr. N.D. Ohio Aug. 17, 2004) [Docket No. 25]).

[563] Motion to Approve Exelon Sale, at 15 (citing *In re Defender Drug Stores, Inc.*, 126 B.R. 76, 81 (Bankr. D. Ariz. 1991), aff'd, 145 B.R. 312 (B.A.P. 9th Cir. 1992)).

Although not credit in the traditional sense, the Hedge-Pledge contemplated the Debtors incurring post-petition liability to be paid out with administrative expense priority. The Debtors argued that administrative expense priority for the Hedge-Pledge was necessary to obtain a higher sale price for the Retail Power Sale Assets and, therefore, was in the best interest of the Debtors' stakeholders.[564] Under the Exelon APA, the Debtors planned to assume the contracts subject to sale under § 365 and subsequently assigned them to the Exelon.[565]

Debtors can sell property of the estate "free and clear of all encumbrances" if they meet one of the five requirements detailed in § 363(f).[566] Section 365(f)(2) permits a debtor to assign executory contracts if "adequate assurance of future performance by the assignee of such contract . . . is provided."[567] Adequate assurance is determined based on facts and circumstances but falls "considerably short of an absolute guarantee of performance."[568] To assess whether assurance is adequate, the court and interested parties must be able to evaluate the successful bidder and their ability to perform under the contracts to be assigned at the sale hearing, "as required by [§] 365(b)(1) of the Bankruptcy Code."[569]

Debtors requested that the Bankruptcy Court find any and all anti-assignment provisions, or provisions terminating or modifying the contracts in the event of assignment, in the contracts to be sold "unenforceable under [§] 365(f) of the Bankruptcy Code."[570] The Debtors further argued that none of the contracts to be assigned fell under the [§] 365(c)(1) exception, ". . . where the identity of the party rendering performance under the contract is material to the contract, and the contract is non-delegable under [applicable law]."[571]

The Exelon Sale Motion detailed "good faith purchaser" protections under § 363(m).[572] Further, in the interest of expedient consummation of the instant transaction "[t]o maximize recovery for stakeholders," the Exelon Sale Motion requested relief from the fourteen day stay on

[564] Motion to Approve Exelon Sale, at 16–17.

[565] *Id*. at 29.

[566] Motion to Approve Exelon Sale, at 31 (citing *In re Shary*, 152 B.R. 724, 725 (Bankr. N.D. Ohio 1993) ("the five conditions enumerated under 363(f) are disjunctive and, as such, a sale thereunder can be authorized if the trustee can prove any of the five conditions")).

[567] Motion to Approve Exelon Sale, at 31 (citing 11 U.S.C. § 365(f)(2)).

[568] Motion to Approve Exelon Sale, at 31–32 (citing *In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985)).

[569] Motion to Approve Exelon Sale, at 32.

[570] *Id.* at 32.

[571] *Id*. at 33 (quoting *In re Lil' Things*, 220 B.R. 583, 591 (Bankr. N.D. Tex.)).

[572] Motion to Approve Exelon Sale, at 38.

orders authorizing the trustee or DIP to sell lease property or assign executory contracts expressed in §§ 6004(H) and 6006(D).[573]

On August 3, 2018, the Bankruptcy Court approved the Debtors' motion for sale along with requested relief, and specifically approved the Break Up Fee provisions of the Exelon APA as "actual and necessary cost and expense of preserving assets of the Debtors within the meaning of [§] 503(b) of the Bankruptcy Code."[574]

On August 24, 2018, the Debtors filed a Notice of Cancellation of Auction for the Debtors' Retail Power Sales Assets.[575] The Debtors detailed that no bids other than the stalking horse bid were submitted and, therefore, the auction would not be conducted.[576] The Debtors' sale of the Retail Book Assets was supported in the Debtors' Motion to Approve Settlement Among the Debtors, Non-Debtor Affiliates, and Certain Other Settlement Parties, filed August 26, 2018.[577] In said Motion, the FE Non-Debtor Parties affirmed their commitment to provide transition services and non-compete/non-solicitation agreements in conjunction with the sale of the Retail Book Assets.[578]

On November 26, 2018, Exelon filed a Complaint for Declaratory Judgment and Injunctive Relief (the "Exelon Complaint"), beginning **Adversary Proceeding No. 18-5081** (the "Exelon Adversary Proceeding").[579] Exelon alleged that on September 12, 2018, the Debtors told Exelon "that certain *ad hoc* creditor groups requested that [the Debtors] not move forward with the [s]ale [h]earing on September 21, 2018, to allow the Creditors more time to review the proposed sale to Exelon."[580] Exelon further alleged that the Debtors' repeatedly adjourned sale hearings for judicial approval of the sale of the Debtors' Retail Power Sale Assets to Exelon (at least five adjournments in total) and that the Debtors' failure to utilize their best efforts to receive judicial approval by

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[573] *Id.* at 40.

[574] Order Approving (A) Bid Procedures, (B) Procedures for Assumption and Assignment of Certain Executory Contracts and Related Notices, (C) Notice of Auction and Sale Hearing, and (D) Related Relief, at 1, 5, [Docket #1098].

[575] Notice Of Cancellation Of Auction For The Debtors' Retail Power Sales Assets, [Docket #1222] [elsewhere, the "Exelon Auction Cancelation"].

[576] *Id.*

[577] Motion of Debtors to Approve Settlement Among the Debtors, Non-Debtor Affiliates and Certain Other Settlement Parties Pursuant to 11 U.S.C. §§ 105, 363, 365 And 502 and Rule 9019 of the Federal Rules Of Bankruptcy Procedure, at 45 (para. 65), [Docket #1224].

[578] *Id.*

[579] Complaint For Declaratory Judgment and Injunctive Relief, [Exelon Adversary Proceeding Docket #1] [elsewhere, the "Exelon Complaint"].

[580] *Id.* at 4.

November 6, 2018, resulted in a material breach of the Exelon APA.[581] Exelon requested (i) a declaration that the Debtors were in material breach of the Exelon APA and (ii) an injunction restraining the Debtors from exercising their termination rights under the Exelon APA.[582]

On November 30, 2018, the Debtors and Exelon filed a Stipulation and Agreed Order regarding the resolution of the motion for preliminary injunction,[583] in which the Debtors agreed not to terminate the Exelon APA "pursuant to either Section 10.01(b) or 10.01(d)(ii)" until at least ten days following final resolution of the merits.[584] On December 14, 2018, the Debtors filed their Answer.[585] On January 23, 2019, the Debtors and Exelon filed a Stipulation and Agreed Order, in which the Debtors were ordered to pay (more specifically, to release from escrow) the expense reimbursement and termination fee contemplated in Section 7.15(a) of the Exelon APA, totaling $5.6 Million plus any accrued interest.[586] The parties abandoned the Exelon transaction.

Bluestone Energy Sales Adversary Proceeding

On December 13, 2018, the Debtor FES filed a complaint, initiating **Adversary Proceeding 18-5100** against the Bluestone Energy Sales Corporation ("Bluestone").[587] The complaint alleged that Bluestone and FES entered into a coal purchase agreement on October 10, 2016, pursuant to which Bluestone would buy back roughly 131,000 tons coal that it previously sold to FES.[588] FES alleged that complete buyback was to occur no later than March 7, 2017, at a price of $40.00 per ton, for a total of just over $3 million ("Final Payment").[589]

FES made two claims for relief. First, FES argued that the Final Payment constituted property of the Debtors' estate under § 541(a)(1)[590] which should be "delivered to the [Debtors]" under § 542. Second, and in the alternative, FES argued that Bluestone breached its contract with FES by failing to remit Final Payment and sought damages at just over $3 million.[591]

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[581] *Id.* at 5.

[582] *Id.* at 11.

[583] Stipulation and Agreed Order by and Among FirstEnergy Solutions Corp. and Exelon Generation Company, LLC Regarding Resolution of Motion for Preliminary Injunction, [Exelon Adversary Proceeding Docket #11].

[584] *Id.* at 3–4.

[585] Answer, [Exelon Adversary Proceeding Docket #23].

[586] Stipulation and Agreed Order, at 4, [Exelon Adversary Proceeding Docket #31].

[587] Complaint, [Bluestone Adversary Proceeding Docket #1] [elsewhere, "Bluestone Complaint"]. **Note*** that the "Bluestone Adversary Proceeding" was a separate docket to the general bankruptcy docket of FirstEnergy.

[588] *Id.* at 2–3.

[589] *Id.* at 3–4.

[590] *Id.*; *see also* 11 U.S.C. § 541(a)(1) (stating that "all legal and equitable interests of the debtor in property as of the commencement of the case" comprise the estate, "wherever located and by whomever held").

[591] Bluestone Complaint, at 5–6.

Bluestone responded with a motion to dismiss FES's first claim for relief for failing to state a claim for which relief could be granted.[592] Bluestone denied any liability under a purchase agreement and asserted that § 542's turnover powers could only properly be used against the alleged unpaid Final Payment.[593] According to Bluestone, "'where the amount to be turned over is subject to dispute, an action for turnover is improper.'"[594] Bluestone conceded that FES properly pled its breach of contract claim, to which Bluestone denied liability.[595]

In response, FES filed its Opposition to Defendant's Motion to Dismiss, where FES argued that "[a] defendant seeking to dismiss a turnover claim 'cannot resist [§] 542(b) by manufacturing a dispute where there in fact is none. And simply resisting recovery is not enough to create a legitimate dispute.'"[596] Bluestone responded with a reply memorandum, but to no avail.[597] On May 13, 2019, the Bankruptcy Court denied Bluestone's Motion to Dismiss.[598]

On May 28, 2019, Bluestone filed its Answer[599] and, on June 3, 2019, filed a Motion to Withdraw Reference.[600] In its Motion to Withdraw Reference, Bluestone sought removal of the dispute with FES to federal district court. Bluestone argued that (i) the contract dispute between FES and Bluestone was a non-core matter;[601] (ii) notwithstanding a determination of non-core status, Bluestone's demand for a trial by jury and non-consent to a final determination by the Bankruptcy Court provided sufficient cause to withdraw reference; and (iii) that withdrawing reference furthered judicial economy.[602] FES responded by arguing that (i) withdrawing reference

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[592] Defendant's Motion to Dismiss Count I of the Adversary Complaint, [Bluestone Adversary Proceeding Docket #7] [elsewhere, "Bluestone Motion to Dismiss Count I"].

[593] *Id.* at 8–11.

[594] *Id.* at 11 (citing *VML Co., LLC v. Meguir's Inc.* (*In re VML Co., LLC*), 2017 Bankr. LEXIS 4625, *33 (Bankr. W.D. Tenn Mar. 10, 2017).

[595] Bluestone Motion to Dismiss Count I, at 11–12.

[596] Opposition to Defendant's Motion to Dismiss Count I of the Adversary Complaint, at 7, [Bluestone Adversary Proceeding Docket #9] (citing *In re Legal Xtranet*, 2011 WL 3236053, at *1 n.1 (Bankr. W.D. Tex. July 26, 2011)).

[597] Reply Memorandum in Support Of Defendant's Motion to Dismiss Count I of the Adversary Complaint, [Bluestone Adversary Proceeding Docket #11].

[598] Order, [Bluestone Adversary Proceeding Docket #21].

[599] Defendant's Answer to Complaint, [Bluestone Adversary Proceeding Docket #22].

[600] Defendant's Motion to Withdraw Reference, [Bluestone Adversary Proceeding Docket #23] [elsewhere, the "Bluestone Motion to Withdraw Reference"].

[601] *Id.* at 3 (Bluestone based its argument for non-core status on the following four-part test, citing *In re Hughes-Bechtol*, 141 B.R. 946, 948–49 (Bankr. S.D. Ohio 1992) ("A non-core proceeding has four characteristics: (1) it is not specifically identified as a core proceeding under 28 U.S.C. §§ 157(b)(2)(B)-(N); (2) it existed prior to the filing of the bankruptcy case; (3) it would continue to exist independent of the provisions of the bankruptcy code; and (4) the parties' rights, obligations, or both are not significantly affected as a result of the filing of the bankruptcy case")).

[602] Bluestone Motion to Withdraw Reference, at 5–7.

at this stage would be premature, as the Bankruptcy Court had not determined the core/non-core status of the contract dispute and (ii) in the event a trial court is required, "reference should not be withdrawn until claims are trial-ready."[603] Despite additional rebuttal from Bluestone,[604] the Bankruptcy Court denied Bluestone's Motion to Withdraw Reference on July 30, 2019.[605]

After a discovery period, on September 4, 2020, FES filed a motion for summary judgment, supported by declarations,[606] arguing that the facts of the case were not in dispute and that the only matter left for determination was the final amount owed by Bluestone to FES, which was a legal question of contract interpretation.[607] Over the next year, FES, Bluestone, and the Plan Administrator "engaged in arm's length negotiations regarding a potential settlement of the Adversary Proceeding."[608] On March 31, 2021, the parties filed a Motion to Approve Settlement.[609] The proposed settlement among other things, provide for:

1. Bluestone to pay a sum of seventy-five thousand USD ($75,000) to the Plan Administrator;

2. Bluestone to ship ten thousand (10,000) tons of coal to Energy Harbor Generation LLC, in consideration for which, Energy Harbor Generation LLC will make a cash payment to the Plan Administrator;

3. Mutual releases by Bluestone and the Debtors; and

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[603] FirstEnergy Solutions Corp.'s Opposition to Defendant's Motion to Withdraw The Reference, at 2, [Bluestone Adversary Proceeding Docket #26].

[604] *See* Reply Memorandum In Support Of Defendant's Motion To Withdraw The Reference, [Bluestone Adversary Proceeding Docket #27].

[605] Order Denying Defendant's Motion to Withdraw Reference, [Bluestone Adversary Proceeding Docket #29] ("Because the parties never requested, and the Bankruptcy Court never determined, whether the Adversary Proceeding is core or non- core; because the proceeding is not "trial-ready;" and because the policies of judicial economy, uniform bankruptcy administration, and the prevention of forum-shopping and confusion militate against withdrawal, the Motion for Withdrawal of Bankruptcy Reference (ECF DKT #1) is untimely, premature and therefore, denied").

[606] *See* Declaration of Christopher J. Gessner in Support of Plaintiff's Motion for Summary Judgment, [Bluestone Adversary Proceeding Docket #53]; Declaration of Kim R. Pompeo in Support of Plaintiff's Motion for Summary Judgment, [Bluestone Adversary Proceeding Docket #54].

[607] Plaintiff's Motion for Summary Judgement, at 2, [Bluestone Adversary Proceeding Docket #52].

[608] Motion to Approve Settlement Among the Plan Administrator, Energy Harbor LLC, and Bluestone Energy Sales Corporation, at 3, [Bluestone Adversary Proceeding Docket #67] [elsewhere, "Motion to Approve Bluestone Settlement"].

[609] *Id.*

4. Upon the Effective Date of the Settlement Agreement and Bluestone's performance of certain obligations, the Plan Administrator and Bluestone will file with the court a joint stipulation dismissing the Adversary Proceeding with prejudice.

The parties[610] requested that the Bankruptcy Court approve the settlement pursuant to Rule 9019(a), which "provides, in part, that '[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.'"[611] On May 21, 2021, the Bankruptcy Court entered an order approving the above settlement, effectuating the above terms.[612]

[610] At this point, FES had become "Energy Harbor, LLC"; *see also* **CAST OF CHARACTERS** for name change details.

[611] Motion to Approve Bluestone Settlement, at 4.

[612] Order Granting Motion to Approve Settlement Among the Plan Administrator, Energy Harbor LLC, and Bluestone Energy Sales Corporation, [Bluestone Adversary Proceeding Docket #73].

OMNIBUS MOTIONS

Omnibus motions and hearings allow debtors to assert a number of matters at the same the time without needing to provide individual motions for each matter. Bankruptcy Rule 6006(f) governs the contents of an omnibus motion to reject executory contracts.[613] Generally speaking, high frequency matters, such as claims or objections for the same matter, are reserved for omnibus motions or hearings.

Early on in the bankruptcy proceedings the Debtors made a motion to establish and streamline the process of making omnibus motions.[614] The Debtors made numerous omnibus motions throughout the bankruptcy. The following two omnibus motions and their objections are included as examples.

First Omnibus Motion

On April 16, 2018, the Debtors made an omnibus motion to reject certain executory contracts or unexpired leases.[615] Under this motion, the Debtors sought to reject certain unexpired railcar leases, unexpired railcar storage leases, REC purchase and sale agreements, a gypsum purchase and sale agreement, and an engagement letter entered into with and retaining Barclays Capital Inc.[616]

To obtain authorization from a bankruptcy court to reject an executory contract, a debtor must articulate a rationale for rejecting the contracts under the business judgment rule. The Debtors asserted they would lose money on the contracts or that they no longer had a need for the services provided under the contracts as a result of their decision to become a fully regulated utility.[617]

Before final approval from the Bankruptcy Court, one counterparty filed an objection. First Solar Inc. ("First Solar") made a limited objection to the rejection of its Solar Renewable Credit Purchase Agreement ("SREC") with FES.[618] Interestingly, First Solar did not object to the

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[613] Fed. R. Bankr. P. 6006(f).

[614] *See* Case Management Motion.

[615] First Omnibus Motion Of The Debtors For Entry Of An Order Authorizing The Debtors To Reject Certain Executory Contracts And Unexpired Leases, [Docket #314].

[616] *See id.* at 4, **Exhibit 1** (providing a general explanation of the contracts the Debtors sought to reject and then a breakdown with greater detail, respectively).

[617] *Id.* at 4–6.

[618] Limited Opposition By First Solar, Inc. To Debtors' First Omnibus Motion To Reject Certain Executory Contracts [Dkt No. 314], [Docket #440].

outright rejection of the SREC, but it did object to "such rejection being retroactive to the Filing Date of the Motion (April 16, 2018)."[619] First Solar's issue with the Debtors' motion was that the Debtors sought to have a rejection become effective "prior to an order by the bankruptcy court authorizing such rejection (rather than a retroactive date)."[620]

This objection did not hold up the process. The Bankruptcy Court granted the Debtors' motion by order on May 9, 2018, which authorized the Debtors to reject the contracts listed in the first omnibus motion, with rejection effective as of the Petition Date.[621]

Second Omnibus Motion

On May 18, 2018, the Debtors made a second omnibus motion to reject certain executory contracts or unexpired leases.[622] Under this motion, the Debtors sought to reject an unexpired railcar lease, unexpired railcar storage leases, and a coal supply contract.[623]

To obtain authorization from a bankruptcy court to reject an executory contract, a debtor must articulate a reason for rejecting the contracts under the business judgment rule. The Debtors asserted they would lose money on the contracts and thus it would be within their business judgment to reject the contracts.[624]

Unlike the first omnibus motion, this second omnibus motion received no objections, and the Bankruptcy Court granted the Debtors' motion on June 12, 2018, authorizing the Debtors to reject the contracts listed in the second omnibus motion.[625]

[619] *Id.* at 1.

[620] *Id.* at 2.

[621] First Omnibus Order Authorizing The Debtors To Reject Certain Executory Contracts And Unexpired Leases, [Docket #501].

[622] Second Omnibus Motion Of The Debtors For Entry Of An Order Authorizing The Debtors To Reject Certain Executory Contracts And Unexpired Leases, [Docket #565].

[623] *Id.* at 3.

[624] *Id.* at 4–5.

[625] Second Omnibus Order Authorizing The Debtors To Reject Certain Executory Contracts And Unexpired Leases, [Docket #725].

THE ROAD TO REORGANIZATION

Post-petition, the Debtors, the FE Non-Debtor Parties, and key creditors used the protocols established by the PSA to negotiate various settlements. Specifically, the parties negotiated the FE Settlement, the Mansfield Settlement, and the Plan Settlement.

The FE Settlement[626]

Due to the extensive pre-petition intercompany relationship between the Debtors and the FE Non-Debtor Parties, including but not limited to the Cash Management System, TAA, and SSAs, determining claims between the Debtors and the Non-Debtor FE Parties took substantial time.[627] Beginning in November 2016, independent directors were appointed to FES and formed the "Intercompany Investigative Committee" to assess claims for and against the Debtors in relation to dealings with FE Corp.[628] Post-petition, and pursuant to the Standstill Agreement, a report from the Intercompany Investigative Committee was provided to advisors of certain supporting parties.[629] After additional diligence by the Ad Hoc Noteholder Group, the Mansfield Certificateholders Group, and the FE Non-Debtor Parties, an "Agreement in Principle" was reached on April 23, 2018.[630] Final settlement was reached on August 26, 2018.[631]

According to the Debtors, the FE Settlement provided the Debtors with "significant financial benefit."[632] Namely, the FE Non-Debtor Parties would,

1. Contribute a $225 million cash payment to the Debtors' estates, not subject to setoff or reduction (the "FE Settlement Cash");

2. Issue to the Debtors certain unsecured notes in the aggregate principal amount of $628 million;

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[626] FE Settlement, [Docket #1465-1].

[627] Disclosure Statement for Joint Plan, at 75.

[628] *Id.* at 74–75 (noting that the Debtors specifically detail the intercompany agreements examined and potential claims assessed).

[629] Disclosure Statement for Joint Plan, at 77. **Note*** that the "Supporting Parties" included the Mansfield Certificateholders Group and the Ad Hoc Noteholder Group. *See* Process Support Agreement, at 1.

[630] *Id.* at 75.

[631] *Id.*; *see also* Order Granting Motion of Debtors to Approve Settlement Among the Debtors, Non-Debtor Affiliates and Certain Other Settlement Parties Pursuant to 11 U.S.C. §§ 105, 363, 365, and 502 and Rule 9019 of the Federal Rules of Bankruptcy Procedure, [Docket #1465] [elsewhere, the "Order Approving FE Settlement"].

[632] Disclosure Statement for Joint Plan, at 77.

3. Waive all pre-petition claims that the FE Non-Debtor Parties could have asserted in the Chapter 11 cases, as well as certain post-petition administrative expense claims;

4. Provide continued Shared Services to the Debtors, while providing the Debtors with a credit for up to $112.5 million for such services to be billed to the Debtors post-petition;

5. Pay certain employee and retiree obligations;

6. Continue to perform under the TAA for all periods or portions thereof ending on or before the Effective Date, continue to perform under the TAA for tax year 2018 as modified by the FE Settlement Agreement, and, with respect to tax year 2018, provide a guarantee that the FE Non-Debtor Parties will make a cash payment of at least $66 million for the use of the Debtors' [net operating losses] for tax year 2018;

7. Agree that the FE Non-Debtor Parties' will not take a worthless stock deduction with effect prior to the [e]ffective [d]ate; and

8. Contribute the Pleasants Power Plant comprised of two 650 megawatt coal-fired units in Pleasant County, West Virginia to the Debtors, and in connection with any transfer of the Pleasants Power Plant, pay up to $18 million of the costs associated with a planned maintenance outage at the facility.[633]

Further, the FE Non-Debtor Parties would waive number claims against the Debtors.[634] In total, the FE Settlement Agreement required the FE Non-Debtor Parties to contribute "more than $1.1 billion in cash and debt instruments, the Pleasants Power Plant, comprehensive waivers of approximately $2 billion worth of secured and unsecured claims, and the provision of ongoing Shared Services and tax and workforce support through the Chapter 11 [c]ases."[635] In exchange for this value, the FE Non-Debtor Parties would receive extensive releases, including third party releases (discussed in detail below, as this became a point of contention), in any plan of reorganization.[636] This settlement finalized agreement on the removal of the Debtors from the larger FE Non-Debtor organization.

[633] *Id*. at 75–76.

[634] *Id*. at 76 (providing a non-exhaustive list of claims waived).

[635] *Id.*

[636] *Id.*

The Mansfield Settlement

Closed in 2019, the BMP (as previously defined, or the "Plant") was "a 2,490 MW coal-fired power plant" located in Beaver County, Pennsylvania.[637] The Plant consisted of three product units, with Unit 1 coming online in 1976 and Units 2 and 3 coming online in 1977 and 1980, respectively.[638]

The Mansfield Sale-leaseback Transaction

In 2007, FG entered into the Mansfield Sale-Leaseback Transaction for approximately 94% of BMP Unit 1 with six lessor trusts, for a total purchase price of $1.3 billion.[639] The Mansfield Sale-Leaseback Transaction "[was] governed by six substantially identical Participation Agreements dated June 26, 2007,"[640] (the "Mansfield Participation Agreements"), with terms running until June 13, 2040.[641] In accordance with the Mansfield Participation Agreements, FG sold six portions of its ownership interest in BMP Unit 1 to the six separate trusts.[642]

> The lessor trusts' purchase of the interest in Unit 1 of the Bruce Mansfield Plant was funded by equity investments from certain owner participants (omitted), which [were] the equity owners of the lessor trusts. In connection with the Mansfield Sale-Leaseback Transaction, the lessor trusts issued notes secured by, inter alia, the lessor trusts' interests in Unit 1 of the Bruce Mansfield Plant to pass-through trusts that issued and sold pass-through trust certificates to public debt holders.[643]

FG retained ownership of the real property underlying the facility, and entered into six leases of said real property with each of the six lessor trusts, who then sublet the real property back to FG.[644] Further, pursuant to the Mansfield Participation Agreements, FES guaranteed FG's obligations under the leases and other agreements related to the Mansfield Sale-leaseback

[637] *Bruce Mansfield Power Plant*, PENNSYLVANIA DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT (Feb. 27, 2024; 8:48 AM), [Link].

[638] Kevin Clark, *Pennsylvania, Ohio coal power plants acquired for remediation*, POWER ENGINEERING (June 9, 2022), [Link].

[639] Schneider First Day Declaration, at 18; Motion to Reject Mansfield, at 4.

[640] Motion to Reject Mansfield, at 4.

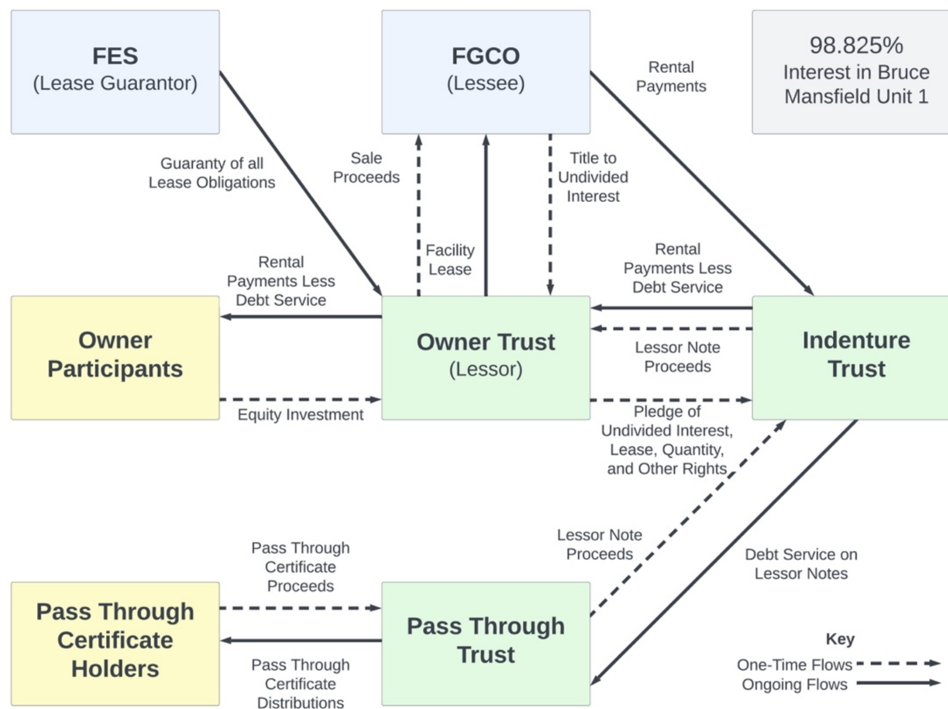
[641] Disclosure Statement for Joint Plan, at 78.

[642] *Id.* at 4.

[643] Schneider First Day Declaration, at 18–19.

[644] Motion to Reject Mansfield, at 5–7.

Transaction.[645] Wilmington Savings Fund Society, FSB acts as both the indenture and pass-through trustees for the transactions, which is modeled below.[646]



Also in 2007, FGMUC was formed as a direct subsidiary to FG.[647] FGMUC operated all three units of the Plant and was assigned FG's leasehold interest in Unit 1 as created by the Mansfield Sale-leaseback Transaction.[648] FGMUC had no employees but entered into a PPA with FG under which FGMUC sold "the entire output" to FG.[649]

PSA and Foreseeable Disagreement

Pre-petition, in the PSA and the attached joint stipulation (the "Mansfield Issues Protocol"), the Debtors and Mansfield Certificateholders Group addressed an anticipated controversy regarding the Mansfield Sale-leaseback Transaction.[650] Specifically, the Debtors anticipated rejection of certain agreements associated with the Mansfield Sale-leaseback Transaction under § 365(a) and characterization of these agreements as true leases for real

[645] *Id.*

[646] *Id.* **Note*** that this graphic is a reproduction for ease of viewing.

[647] Schneider First Day Declaration, at 18.

[648] *Id.* at 19–20.

[649] *Id.*

[650] Process Support Agreement, at 60.

property under § 502(b)(6). Classification as true leases would "cap" the Mansfield Certificateholders damages at 15% of the total lease value or three years' rent, whichever is greater.[651] The parties to the Mansfield Issues Protocol agreed to the rejection of twenty five specifically defined agreements associated with the Mansfield Sale-leaseback Transaction, without prejudice to the parties' ability to dispute the damage cap issue.[652] The Mansfield Issues Protocol also included agreed procedures for discovery and other administrative matters.[653] Post-petition, the Bankruptcy Court adopted the PSA and, with it, the Mansfield Issues Protocol.[654]

<u>Motion to Reject</u>

On April 1, 2018, the Debtors filed a motion to reject twenty five leases and/or agreements associated with the Mansfield Sale-leaseback Transaction.[655] The Debtors argued (i) that rejection decisions were assessed using the "business judgment" standard;[656] (ii) that "[a] debtor's rejection of an unexpired contract satisfie[d] the 'business judgment' standard where, as here, such rejection would benefit the estate;"[657] (iii) that courts "routinely approve[d]…the rejection of…unexpired leases" where a debtor "reasonably exercises business judgment;"[658] and (iv) that performing under the leases was not only economically unfeasible but detrimental to the Debtors' intended reorganization.[659] The Debtors further argued that the Bankruptcy Court should deem any rejection granted retroactive to the Petition Date, pursuant to § 105.[660] The rejection motion referenced the Mansfield Issues Protocol, acknowledged that all parties to the Protocol agreed to the rejection of specifically enumerated agreements, and reaffirmed the Debtors' plan to challenge available damages under § 502(b)(6). The Motion to Reject but did not request a determination regarding the cap issue.[661]

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[651] *See generally* Mansfield Issues Protocol, [Docket #55-4-3].

[652] *Id*. at 5.

[653] *See generally* Mansfield Issues Protocol.

[654] *See* Process Support Agreement; s*ee also* Mansfield Issues Protocol.

[655] Motion to Reject Mansfield.

[656] *Id.* at 14 (citing *Phar-Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948, 951-52 (N.D. Ohio 1997) ("Whether an executory contract is 'favorable' or 'unfavorable' is left to the sound business judgment of the debtor")).

[657] Motion to Reject Mansfield, at 14 (citing *In re Pesce Baking Co., Inc.*, 43 B.R. 949, 956 (Bankr. N.D. Ohio 1984).

[658] Motion to Reject Mansfield, at 14–15 (citing *Certified Class of Ohio Res. Customers of Level Propane Gases* (*In re Level Propane Gases, Inc.*), 297 B.R. 503, 509 (Bankr. N.D. Ohio 2003), aff'd, No. 02-16172, 2007 WL 1821723 (N.D. Ohio June 22, 2007)).

[659] Motion to Reject Mansfield, at 15.

[660] *Id.*

[661] *Id*.

Mansfield Settlement

On May 9, 2018, the Bankruptcy Court approved the PSA and the Mansfield Issues Protocol.[662] Utilizing the Mansfield Issues Protocol, the parties created negotiated the "Mansfield Settlement." The Mansfield Settlement was proposed in the Disclosure Statement for the Joint Plan and was ratified by confirmation of the Eighth Amended Plan.[663] Among other things, the parties to the Mansfield Settlement agreed that:

1. Mansfield Indenture Trustee claims would be allowed against BMU1C, FG, NG, and FES up to $786,763,400;

2. In consideration for claims allowance, the 93.825% undivided interest in Unit 1 subject to the Mansfield Sale Leaseback Transaction, and all insurance proceeds to which the Indenture Trustee would be entitled to, would become unencumbered property of the estate;

3. In the event than an acceptable Chapter 11 plan involved a reorganized debtor retaining control of the generation assets of NG or FG, the PCN's secured by such assets would be paid in full, but that payment in full may come from replacement notes or reinstatement; and

4. Entry of a confirmation order constituted rejection of the Mansfield leases, *nunc pro tunc* to the Petition Date.[664]

The Mansfield Settlement represented the resolution of all substantive issues related to the Mansfield Sale Leaseback Transaction.

The Plan Settlement: Value Allocation Among the Debtors and the Creditors

Bankruptcy Code § 1123 details the required and permissive components of a plan and Bankruptcy Rule 9019 gives a bankruptcy court authority to effectuate settlement and compromise between parties in a case.[665]

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[662] Disclosure Statement for Joint Plan, at 78. **Note*** that the Process Support Agreement and Mansfield Issues Protocol were subject to several "immaterial modifications" through the course of proceedings, namely amending deadlines and effective dates (Docket #s 1928, 1052, 962, 871, 768, and 592, amount others).

[663] Disclosure Statement for Joint Plan, at 77–80; Eighth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., *et al.*, Pursuant to Chapter 11 of the Bankruptcy Code, at 72–75, [Docket #3278] [elsewhere, the "Eighth Amended Plan"].

[664] Plan Term Sheet, at 2, [Docket #2316-3] [elsewhere, the "Plan Term Sheet"].

[665] Disclosure Statement for Joint Plan, at 83.

In this case, the Debtors procured agreement to a plan settlement (the "Plan Settlement"), and then requested that the Bankruptcy Court implement the agreed upon Plan Settlement in the Plan under § 1123 and Rule 9019. The Plan Settlement incorporated the FE Settlement (specifically including the extensive releases for the FE Non-Debtor Parties)[666] and the Mansfield Settlement and provided for a distribution of the FE Settlement's value among the Debtors; and, in turn, allocation of the Debtors' funds among creditors.

Inter-Debtor Claims Settlement

The need for an inter-debtor settlement arose from the Debtors' inter-debtor PPAs and upstream and downstream guarantees. According to the inter-debtor PPAs, FES purchased all power produced by NG and FG for a predetermined fee, which covered operating expenses and provided a small profit. There was an additional inter-debtor PPA between FGMUC and FG, which detailed the complete purchase by FG of all power produced by FGMUC. These intermingled contractual relationships, coupled with the infusion of approximately $1.1 billion in funds from the FE Settlement (which did not specify a funds distribution among the Debtors) resulted in creditors of the various Debtors vying for their piece of the metaphorical pie.

Since the Debtors were each independent business entities, without guarantees or other contractual specifications, creditors of one Debtor could not access the funds of another. In anticipation of this, "the Debtors and the [i]ndependent [d]irectors and [m]anagers, with the assistance of their advisors, conducted an investigation into the [i]nter-[d]ebtor PPAs, and analyzed" appropriate treatment in a Chapter 11 case.[667] The Debtors considered avoidance actions, recharacterizations, substantive consolidation, and equitable subordination in determining strategy and potential settlement.[668] For each course of action, the Debtors stated that the Plan took "these issues" into account and that the Plan Settlement "enable[d] the Debtors to avoid the delay, expense, and uncertainty that would result from any litigation." However, the Plan Settlement addressed specific consideration for settlement in lieu of substantive consolidation.[669]

The Debtors, in the Disclosure Statement for Joint Plan, detailed the law of substantive consolidation.[670] Substantive consolidation permits a bankruptcy court, via its equitable powers,

[666] *Id.*

[667] *Id.* at 81.

[668] Disclosure Statement for Joint Plan, 82–86 (detailing relevant law on avoidance actions, recharacterizations, substantive consolidation, and equitable subordination with Code cites and application analysis).

[669] *Id.* at 87.

[670] *See generally* Disclosure Statement for Joint Plan.

to consolidate the estates of multiple debtors, treating their assets and liabilities as combined.[671] According to the Debtors,

> [i]n such an action, the Bankruptcy Court would likely apply the Third Circuit's 'Owens Corning Test,' which provides that substantive consolidation is appropriate if (i) [pre-petition], the entities sought to be consolidated "disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity" (the "Separateness Prong") or (ii) the "assets and liabilities [of the entities sought to be consolidated] are so scrambled that separating them is prohibitive and hurts all creditors" (the "Entanglement Prong").[672]

The Debtors noted that substantive consolidation was considered an "extreme" remedy, not often used, and would require protracted litigation.[673] In lieu of this, the Debtors incorporated into the Plan various fund reallocations and new equity elections to "Holders of Single-Box Unsecured Claims." Single-box claimholders are those unsecured creditors with a claim against only one debtor entity. The Debtors' redistribution of funds appeased single-box creditors and avoided potential litigation surrounding substantive consolidation. In the end, inter-Debtor claims were allowed in varying amounts as specified in the Plan.[674] In the Plan Settlement, treatment for each class of inter-Debtor Claims was as follows:

> In lieu of [c]ash payment or other distribution to the Debtors holding such [pre-petition] Inter-Debtor Claims against [X Debtor], the distributions on account of such [pre-petition] Inter-Debtor Claims against [X Debtor] shall be made to the Holders of Allowed Unsecured Claims against the Debtor holding such [pre-petition] Inter-Debtor Claims against [X Debtor] by including the recovery on such [pre-petition] Inter-Debtor Claims against [X Debtor] in the calculation of the Unsecured Distributable Value relating to the Debtor holding such [pre-petition] Inter-Debtor Claims against FES.[675]

Allocation of Value Among Creditors

For each Debtor entity, the Plan Settlement allocated value from the Debtors' estates. However, maintaining stable funds in each Debtor entity to ensure creditor payout was difficult

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[671] Disclosure Statement for Joint Plan, at 84.

[672] *Id.* (citing *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005)).

[673] Disclosure Statement for Joint Plan, at 74.

[674] Eighth Amended Plan, at 35 (detailing post-petition Inter-Debtor Claims); *See generally* Order Approve FE Settlement.

[675] Disclosure Statement for Joint Plan, at 12. **Note*** defined terms used in the above quote have the meaning prescribed to them in the cited document.

given the Debtors' ongoing operations. To solve this, the Plan Settlement provided each unsecured creditor a distributable value split ("DVS"). DVSs represented an agreed percentage of the Debtors' estate's distributable value (i.e., value available for payment to unsecured creditors) attributed to each unsecured creditor (see chart below).[676] In short, the DVS operated as an anchor metric for value to be received by creditors.[677]

	Class	Distributable Value Splits
General Unsecured Claims		
FES / FENOC Unsecured Claims	A5	1.4%
FES Single-Box Unsecured Claims	A6	7.2%
Mansfield TIA Claim	A7	1.7%
FS Single-Box Unsecured Claims	B7	2.4%
Mansfield TIA Claim	B8	1.0%
NG Single-Box Unsecured Claims	C6	-
NG-FENOC Unsecured Claims Against NG	C7	1.0%
FES-FENOC Unsecured Claim Against FENOC	D3	1.5%
FENOC Single-Box Unsecured Claims	D4	0.4%
NG-FENOC Unsecured Claims against FENOC	D5	0.5%
FGMUC Single-Box Unsecured Claims	E4	0.1%
Mansfield TIA Claim	E5	0.6%
Total General Unsecured Claims		**17.9%**
Bondholders		
Unsecured PCN / FES Note Claims Against FES	A3	20.3%
Mansfield Certificate Claims Against FES	A4	7.1%
Unsecured PCN/FES Note Claims Against FG	B5	12.0%
Mansfield Certificate Claims Against FG	B6	3.7%
Unsecured PCN/FES Notes Claims Against NG	C4	26.8%
Mansfield Certificate Claims Against NG	C5	9.4%
Mansfield Certificate Claims Against FGMUC	E3	2.8%
Total Bondholders Claims		**82.1%**
Total		100.0%

[676] *Id.* at 91.

[677] *Id.* **Note*** that the table on the next page is a reproduction for ease of viewing.

For each Debtor entity the Plan Settlement classified creditors, designated whether the class was impaired, and provided a treatment for each class with a percent estimation of recovery.[678] Generally speaking,[679] Plan treatment was as follows:

1. **Secured classes** were either:
   a) paid cash in full or
   b) reinstated at full value;

2. **Bondholder claim holders** were distributed new equity pro rata based on their distributable value, but Bondholders could elect for a cash payout of their distributable value from the "Unsecured Bondholders Cash Pool;"[680]

3. **General Unsecured Claims** were paid cash pro rata based on their distributable value share, but could elect to receive new equity, in which case their cash would be deposited into the Unsecured Bondholders Cash Pool for use by electing Bondholders; and

4. **Single-box unsecured creditors** were paid their pro rata share of distributable value and portions of applicable reallocation pools, but could elect to receive new equity, in which case their cash would be deposited into the Unsecured Bondholders Cash Pool for use by electing Bondholders.[681]

As far as pre-petition equity interest, the FES equity was to be canceled and released without any disbursement and replaced with the new equity mentioned above. The reorganized FES would retain ownership of FG and NG. FENOC's interest was to be canceled and released without distribution, and new shares of the reorganized FENOC were to be issued to the reorganized FES. FE Aircraft's interest was to be canceled and released without distribution, and FE Aircraft was to be dissolved. The reorganized Debtors were to be given the option to have the

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[678] **Note*** that this percentage estimate of recovery differed from the percentage DVS. DVS is reflective of the entire Debtors' estate, while the percentage of recovery for each class represented the percentage of their allowed claim against a particular Debtor entity that was expected to be paid out (or other value given for) by that particular Debtor.

[679] *See* Disclosure Statement for Joint Plan, at 17–41, *see also* [Link] for specific pages.

[680] The "Unsecured Bondholders Cash Pool" operated as follows: If an allowed general unsecured claim holder that was supposed to receive cash but had an option to receive new common stock elected to receive new common stock, the money that would have been paid to said allowed general unsecured claim holder moved to the Unsecured Bondholders Cash Pool. If a creditor that was supposed to receive new common stock exercised their option to receive cash, said creditor would receive their distributable value in cash from the Unsecured Bondholders Cash Pool. If the Unsecured Bondholders Cash Pool was insufficient to pay cash requests, then the requesters would receive the remainder of their pro rata distributable value in the form of new common stock, subject to certain dilutions. *See* Disclosure Statement for Joint Plan, at 453–54.

[681] Eighth Amended Plan, at 45–71.

reorganized FG continue to own all interest in FGMUC or dissolve FGMUC and cancel and release all interest without distribution. The reorganized FG was to retain all interest in Norton.[682]

From Plan Proposal to Confirmation: Amendments and Objections

The Disclosure Statement for Joint Plan[683] and Joint Plan of Reorganization (the "Plan")[684] were filed with the Bankruptcy Court on February 19, 2019. Simultaneously, the Debtors filed a motion for an order approving, among other things, the Disclosure Statement for Joint Plan and voting procedures.[685] Specifically, the Debtors asked that the Bankruptcy Court to,

1. Approve the Disclosure Statement for Joint Plan as providing "adequate information" within the meaning of § 1125(a);

2. Approve the solicitation procedures and the tabulation procedures set forth therein;

3. Approve the form of ballots, notices, and certain other documents to be distributed in connection with the solicitation of the Plan;

4. Approve the plan confirmation schedule; and

5. Approve the procedures for notices regarding the confirmation hearing, all as more fully set forth therein.[686]

The Plan and Disclosure Schedules were amended a total of eight times[687] and received several objections.[688] There were three general categories of objections to confirmation,

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[682] *Id.*

[683] *See generally* Disclosure Statement for Joint Plan.

[684] Joint Plan of Reorganization of FirstEnergy Solutions Corp., *et al.*, Pursuant to Chapter 11 of the Bankruptcy, [Docket #2120] [elsewhere, the "First Plan"].

[685] Debtors' Motion for Order (I) Approving Disclosure Statement, (II) Establishing Procedures For Solicitation and Tabulation of Votes to Accept or Reject the Debtors' Joint Chapter 11 Plan, (III) Approving the Form of Ballots, (IV) Scheduling a Hearing on Confirmation of the Plan, (V) Approving Procedures for Notice of the Confirmation Hearing and for Filing Objections to Confirmation of the Plan, and (VI) Granting Related Relief, [Docket #2121] [elsewhere, the "Motion for Approval of Disclosure Schedules, etc.…"].

[686] *Id*. at 3.

[687] Redlines to each Plan amendment are linked as follows: First – Docket #2252-1; Second – Docket #2315; Third – Docket #2432-2; Fourth – Docket #2533; Fifth – Docket #2663; Sixth – Docket #2935; Seventh – Docket #3061; and Eighth – Docket #3279.

[688] Confirmation Objection Chart, [Docket #3064-1] [elsewhere, the "Confirmation Objection Chart]; *see also* Debtors' Memorandum of Law in Support of Confirmation of the Seventh Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp. *et al.*, Pursuant to Chapter 11 of The Bankruptcy Code, [Docket #3064]; s*ee generally* Objection of

1. Objections relating to third party releases and exculpation;
2. Objections relating to FERC authority and rate regulation; and
3. Labor objections.

Nearly all objections were not objections to the sufficiency of the disclosure, voting procedures, or the like, but were objections to the Plan and Plan Settlement.

Non-Consensual Third Party Releases

The source of objections relating to third party releases and exculpation was Section VIII.E. of the Plan, entitled "Releases of the FE Non-Debtor Parties by Third Parties and Holders of Claims or Interests." [689] Section VIII.E. originated from the Plan Settlement as consideration to FE Non-Debtor Parties for the FE settlement value.[690] Not only did multiple parties object to the implementation of Section VIII.E., but it received severe judicial backlash.[691] The Bankruptcy Court classified Section VIII.E. as a "nonconsensual third party release."[692] In denying approval of the Disclosure Statement for Joint Plan, the Bankruptcy Court noted that, typically, issues with the contents of a plan are hashed out at the confirmation stage, and not subject to scrutiny during the disclosure statement approval period.[693] However, since Section VIII.E. affected the confirmability of the Plan on its face, the Bankruptcy Court felt it was prudent to go ahead and address the issue. The Bankruptcy Court summarized Section VIII.E.'s effect as follows:

Thomas Cantwell, Theresa A. Miller, Alisa M. Gorchock, And Kerri Ann Bachner to Disclosure Statement for the Fourth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code, [Docket #2644]; Objection to Plan and Disclosure Statement, [Docket #2388]; Objection to proposed Disclosure Statement for the Joint Plan of Reorganization, [Docket #2301].

[689] Order Denying Motion to Approve Disclosure Schedules, at 3, [Docket #2500] [elsewhere, the "Order Denying Motion to Approve Schedules"]; First Plan, at 93.

[690] *See* First Plan, at 93; FE Settlement, at 41.

[691] *See* Confirmation Objection Chart; *see also* Order Denying Motion to Approve Disclosure Statements; Memorandum Decision Supplementing Order Denying Motion to Approve the Debtors' Disclosure Statement for Their Third Amended Joint Plan of Reorganization, [Docket #3135] [elsewhere, "Memo Supporting Order Denying Disclosure Schedules"].

[692] *See generally* Order Denying Motion to Approve Schedules; Memo Supporting Order Denying Disclosure Schedules. **Note*** that non-consensual third party releases raise due process concerns. In approving non-consensual third party releases, especially those affecting contingent future liability (i.e., where a claim against the debtor may or may not arise in the future), a bankruptcy court adjudicates the rights of parties that either (i) have not consented to release liability; or (ii) are not parties to the bankruptcy case and, therefore, have neither submitted to the jurisdiction of the bankruptcy court nor received notice or an opportunity to be heard. For these reasons, bankruptcy courts are hesitant to issue broad sweeping, non-consensual third party releases (some circuits have a complete barred) and will only do so in extreme circumstances. *See* Tyler Lane, *Constitutionality of Non-Consensual Third-Party Releases in Bankruptcy Reorganization*, BLOOMBERG (Nov. 2021), [Link].

[693] Memo Supporting Order Denying Disclosure Schedules, at 15.

> The language is challenging to parse but simple enough in intent: if the Plan containing this release (the "FE Non-Debtor Parties' Third-Party Release") were confirmed, *FE Corp would wash its hands of any liability flowing from its historical ownership of the properties and operation of the businesses* and facilities now or at any time owned and operated by the Debtors, or at least any liability to any party that also holds any "claim," as defined in 11 U.S.C. § 101(5) of the Bankruptcy Code, against the Debtors.[694]

In its initial denial order, the Bankruptcy Court took issue with the "breadth and ambiguity of the nonconsensual third-party releases proposed in Section VIII.E. of the Plan," concluding that the Plan was unconfirmable as written.[695] Elaborating in a supplemental memorandum, the Bankruptcy Court explained that "the central issue in dispute . . . is whether . . . a nonconsensual release and injunction of the claims of the Debtors' creditors against the FE Non-Debtor Parties, is an 'appropriate provision' of the Plan 'not inconsistent with the [Bankruptcy Code]' pursuant to 11 U.S.C. § 1123(b)(6)."[696] Applying a seven factor test from *Dow Corning,*[697] the Bankruptcy Court concluded that Section VIII.E., as written, was simply too broad to be confirmable.[698] The Bankruptcy Court noted that permitting non-consensual third party releases as part of a plan "occupies the spectrum between 'impossible' and 'very rare.'"[699]

Following the Bankruptcy Court's ruling, on April 18, 2019, the Debtors and the Non-Debtor FE Parties entered into a Consent Agreement and Waiver. Under the Consent Agreement and Waiver, Section VIII.E. would be amended, and Non-Debtor FE Parties would receive,

1. Consensual third party releases;

2. $60.4 Million, satisfying Debtor's debt to FESC; and

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[694] *Id.* at 13 (emphasis added).

[695] Order Denying Motion to Approve Schedules, at 3 ("Due to the breadth and ambiguity of the nonconsensual third-party releases proposed in Section VIII.E. of the Plan, the Court concludes that the Plan is patently unconfirmable under 11 U.S.C. § 1123(b)(6), as that provision is applied in the Sixth Circuit pursuant to *Class Five Nev. Claimants, et al. v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648 (6th Cir. 2002). Any solicitation of such Plan would be futile").

[696] Memo Supporting Order Denying Disclosure Schedules, at 14.

[697] *Dow Corning,* 280 F.3d at 658 (citing *Drexel Burnham Lambert,* 960 F.2d at 293; *A.H. Robins,* 880 F.2d at 702; and *Johns-Manville Corp.,* 837 F.2d at 93–94).

[698] Memo Supporting Order Denying Disclosure Schedules, at 40.

[699] *Id.* at 18.

3. Services costs for the pension and post-retirement health and welfare plans, in exchange for keeping the FE Settlement intact.[700]

The Debtors also added specific release carve outs for "the United States, Ohio Environmental Protection Agency, Ohio Department of Natural Resources, and Pennsylvania Department of Environmental Protection" to alleviate these governmental parties' objections.[701] These concessions resolved all issues and objections related to Section VIII.E. and non-consensual third party releases.[702]

FERC and Energy Rate Regulation

The FERC, the OVEC, Maryland Solar Holdings, Inc., and the OCC, entered various objections asserting patten unconfirmability of the Plan.[703] These objections were on the same grounds as discussed in the FERC Adversary Proceeding, namely that the Bankruptcy Court did not have authority to approve PPA rejection.[704]

Union Objection

On August 2, 2019, the "Utility Workers Union of America, Local 270, AFL-CIO, and International Brotherhood of Electrical Workers Locals 29, AFL-CIO (the "Unions") submitted their Objection to Sixth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code.[705] The Unions "represent[ed] employees at the Debtors' Perry Nuclear Power Plant and Beaver Valley Nuclear Power Plant . . . ."[706] The Unions had collective bargaining agreements (the "CBAs") with the Debtors FG and FENOC.[707] The CBAs detailed the relationship between the Debtors and union-member employees, providing

[700] Redline of Fourth Amended Plan, [Docket #2533-1].

[701] Redline of Fifth Amended Plan, [Docket # 2663-1].

[702] *See* Order (I) Approving Disclosure Statement, (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject The Debtors' Joint Chapter 11 Plan, (III) Approving the Form of Ballots, (IV) Scheduling a Hearing on Confirmation of the Plan, (V) Approving Procedures for Notice of the Confirmation Hearing and For Filing Objections to Confirmation of the Plan, and (VI) Granting Related Relief, [Docket #2714] [elsewhere, "Order Approving Disclosure Schedules, etc…"]; Order Confirming the Eighth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code, at 10–11, [Docket #3283] [elsewhere, the "Confirmation Order"].

[703] Confirmation Objection Chart.

[704] *Id*. *See also* **Examples of Counterparty Objections during FERC Adversary Proceeding**.

[705] *See generally* Objection by Utility Workers Union of America, Local 270, AFL-CIO, and International Brotherhood of Electrical Workers Locals 29, AFL-CIO, to Sixth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., Pursuant To Chapter 11 Of The Bankruptcy Code, [Docket #2970] [elsewhere, the "Union Objection"].

[706] *Id.* at 2.

[707] *Id.* at 3.

for wages, healthcare, retirement, and other benefits, specifically including a pension plan.[708] Each of the CBAs contained successorship language, in form and substance similar to the following,

> The [c]ompany agrees that if it sells, assigns or otherwise transfers any of its business operations to any FirstEnergy Corp[] or non-FirstEnergy Corp[] related entity during the term of the agreement and that transaction involves the transfer of employees currently represented by Local 270, such entity shall be considered a successor to this agreement, and the transaction shall be made contingent upon the agreement of the entity to recognize the [u]nion, and be bound by the terms and conditions of employment set forth in this [a]greement in the event the entity or its designee continues the business. The [c]ompany will provide the [u]nion with those documents necessary to demonstrate compliance with this [a]rticle as soon as practicable after the intent to transfer is made public.[709]

In short, this successorship language (generally, the "Successorship Clause") was designed to ensure the CBAs continuity through sales, transfers, and other ownership transitions.

Through the many iterations of the Plan, the Debtors did not specifically reject the CBAs but indicated that the Debtors were "unable to assume [the CBAs] because, among other things, the [CBAs required] the Debtors to provide benefits to employees under health care, severance, welfare, incentive compensation, and retirement plans sponsored by FE Corp."[710] Although the Debtors cited numerous issues with the CBAs, the negotiations between the Unions and Debtors revolved around pension benefits.[711] The Debtors argued that the pension benefits provided by FE Corp were "non-replicable" by the reorganized Debtor, but the Unions disagreed.[712] The Debtors and Unions also disagreed on timing. The Debtors sought to preserve the CBA negotiation process through confirmation, while the Unions insisted that, since the CBAs were executory contracts, acceptance, rejection, or renegotiation of the CBAs needed to occur prior to confirmation.[713]

The Bankruptcy Court sided with the Unions and held that "[i]n a Chapter 11 reorganization, a [DIP] has until a reorganization plan is confirmed to decide whether to accept an executory contract, although a creditor may request the Bankruptcy Court to make such a

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[708] *Id.*

[709] *Id.*

[710] *Id.*

[711] *Id.* at 6.

[712] *Id.*

[713] *Id.* at 8 (citing 11 U.S.C. § 365(d)(2); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 46 (2008)).

determination within a particular time."[714] Further, the Bankruptcy Court held that, since the executory contracts in question were collective bargaining agreements, the Debtors could not unilaterally reject them without out-of-court bargaining, as required by 11 U.S.C. § 1113(f).[715] The Bankruptcy Court went on to order that "confirmation of the Plan [had to] be delayed until [a decision by the Debtors regarding acceptance of rejection] had been made and was approved by the [Bankruptcy] Court in conjunction with plan confirmation."[716]

Over the next few months, the Debtors and the Unions negotiated and reached agreement on modifications to the CBAs. Pursuant to Section V.F. of the Eighth Amended Plan, "[o]n the Effective Date, FG and FENOC will assume their collective bargaining agreements as modified by the framework agreements and any other documents entered into by the parties to the collective bargaining agreements to implement the modifications set forth in the framework agreements."[717] This agreement resolved all issues related to the CBAs and the Unions' objection.[718]

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[714] Order Sustaining The Objection Of Utility And Electrical Workers Unions To Plan Confirmation, Adjourning Hearing, And Setting Status Conference, at 3, [Docket #3109] [elsewhere, the "Order Sustaining Union Objection"], (citing *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 529, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984); *accord Fla. Dept. of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 46, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008)).

[715] Order Sustaining Union Objection, at 3.

[716] *Id*. at 4.

[717] Eighth Amended Plan, at 87.

[718] *See* Order Approving Disclosure Schedules, etc. . . . ; Confirmation Order, at 10–11.

CONFIRMATION AND POST-CONFIRMATION

The Eighth Amended Plan (now, the "Confirmed Plan") was confirmed by a Bankruptcy Court order (the "Confirmation Order") on October 16, 2019.[719] Consummation of the Confirmed Plan was predicated on occurrence or waiver of all the conditions specified in Article IX.B.[720] The Confirmed Plan contemplated a plan administrator with "the authority and right on behalf of each of the Debtors, without the need for Bankruptcy Court approval (unless otherwise indicated), to carry out and implement all provisions of the Plan."[721]

Five parties sought to appeal the Confirmation Order, namely, the FERC;[722] Maryland Solar LLC;[723] The Environmental Law and Policy Center, Environmental Defense Fund, Ohio Citizen Action, and Ohio Environmental Council (collectively, the "Citizen Organizations");[724] OVEC;[725] and the OCC[726] (collectively, the "Confirmation Appeals").[727] In certifying the Confirmation Order for appeal, the Bankruptcy Court noted that it only certified the Confirmation Order for appeal out of Code obligation,[728] and recommended that the Sixth Circuit decline direct review.[729] The Bankruptcy Court asserted that, regardless of the appellants arguments under § 1129(a)(6),[730] that the Confirmation Appeals were a reiteration of the appeal previously pending from the FERC Adversary Proceeding.[731] These appeals were lodged just days before the Sixth Circuit rendered its Judgment on Appeal in the FERC Adversary Proceeding.[732] On March 24,

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[719] Order Confirming the Eighth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code, [Docket #3283] [elsewhere, the "Confirmation Order"].

[720] *See* Eighth Amended Plan, at 7 (defining "Effective Date") & 105 (Article IX.B).

[721] Eighth Amended Plan, at 83.

[722] FERC – Notice of Appeal Under 11 U.S.C. § 158(a)(1) and Statement of Election, [Docket #3322].

[723] Maryland Solar LLC – Notice and Appeal and Statement of Election Regarding Confirming the Eighth Amended Joint Plan of Reorganization, [Docket #3323].

[724] Ohio Environmental Council – Notice of Appeal Under 28 U.S.C. 158(A)(1) and Statement of Election, [Docket #3330].

[725] OVEC – Notice of Appeal and Statement of Election, [Docket #3332].

[726] Ohio Consumers' Council – Notice of Appeal of Order Confirming the Eighth Amended Joint Plan of Reorganization, [Docket #3342].

[727] Order Certifying Confirmation Order for Direct Appeal to the Court of Appeals Pursuant to 28 U.S.C. § 158(D)(2)(A)(I) with Recommendation that the Court of Appeals Decline to Authorize Direct Appeal, [Docket #3458] [elsewhere, "Order Certifying Confirmation Order for Direct Appeal"].

[728] *Id.* at 2–3.

[729] *Id.* at 4–5.

[730] 11 U.S.C. § 1129(a)(6) states that a court may only confirm a plan if "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval."

[731] Order Certifying Confirmation Order for Direct Appeal, at 4–5.

[732] FERC Judgement on Appeal, [Link].

2020, the Sixth Circuit granted direct appeal[733] but, between July and November 2020, all matters were dismissed.[734] All dismissals were voluntary aside from the Citizen Organizations' appeal, which was dismissed for lack of standing.[735]

The Confirmed Plan set an administrative claims bar date of 30 days from the effective date;[736] a professional claims bar date of 60 days from the effective day;[737] and barred claims for rejected executory contracts from 30 days from the later of "notice of entry of an order of the Bankruptcy Court (including the Confirmation Order) approving such rejection; and the effective date of such rejection."[738] The Confirmed Plan required that all new or amended proofs of claim filed after the effective date of the be authorized by the Bankruptcy Court, the Debtors, or the Plan Administrator.[739] The Confirmed Plan set the claims objection deadline at the later of: (i) 240 days after the Effective Date; and (ii) another date "fixed by the Bankruptcy Court, after notice and hearing, upon a motion Filed before the expiration of the deadline to object to Claims or Interests."[740]

The Plan Administrator or the Debtors received countless proofs of claim in this matter.[741] While some were resolved via stipulation of the parties, the Plan Administrator or the Debtors filed no less than twenty-eight omnibus objections to proofs of claim,[742] the vast majority of which were sustained.[743]

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[733] Order Granting Direct Appeal [Sixth Circuit Case No. 19-0308, Docket #12-1]; [Sixth Circuit Case No. 19-0308 Docket Summary].

[734] Voluntary Dismils are linked as follows: OVEC – Docket #4147; FERC – Docket #4251; Ohio Consumers' Counsel – Docket #4252; Maryland Solar – Docket #4253; *see also* Sixth Circuit FirstEnergy Solutions Corp., [Docket Page] (listing dates on which final action was taken).

[735] Sixth Circuit Order Dismissing Case No. 20-3322 for Lack of Jurisdiction, [Docket #4270]. **Note*** that the Consumer Organizations argued on appeal that FES, per the Eighth Amended Plan, had not set aside enough money for nuclear decommissioning.

[736] Eighth Amended Plan, at 1.

[737] *Id.* at 27.

[738] *Id.* at 85.

[739] *Id.* at 97.

[740] *Id.* at 4.

[741] *See generally* Kroll Claims Information Page, https://cases.ra.kroll.com/FES/Home-ClaimInfo; Several Proofs of Claim are linked as follows: Docket #982; Docket #833; Docket #472; Docket #1281; Docket #206; Docket #1491; Docket #27; Docket #289; Docket #1300; Docket #1051; Docket #1401; Docket #790; for more, please see https://cases.ra.kroll.com/FES/Home-ClaimInfo.

[742] Omnibus Objections are linked as follows: 28th – Docket #4217; 27th – Docket #4125; 26th – Docket #3853; 24th – Docket #3640; 23rd – Docket #3637; 22nd – Docket #3633; 21st – Docket #3302; 19th – Docket #2902; 17th – Docket #2704; for additional, please see https://cases.ra.kroll.com/FES/Home-Index.

[743] Orders Sustaining Omnibus Objections are linked as follows: 28th – Docket #4245; 27th – Docket #4125; 26th Docket #3958; 25th – Docket #3957; 21st – Docket #3396; 20th – Docket #3035; 19th – Docket #3034; 18th – Docket #2818; 17th – Docket #2817; for additional, please see https://cases.ra.kroll.com/FES/Home-Index.

On April 28, 2020, the Bankruptcy Court ordered a case caption change reflecting five of the seven Debtors (now, the "Reorganized Debtors") adopting an Energy Harbor name.[744] On May 26, 2020, on motion of the Reorganized Debtors,[745] the Bankruptcy Court issued final decrees for FEALC and Norton, terminating both cases.[746]

On December 3, 2021, the Reorganized Debtors requested, pursuant to § 305(a) and Bankruptcy Rule 3002, that the Bankruptcy Court enter a final judgement terminating all cases for all remining Debtors other than Pleasant Corp (formerly FGMUC).[747] According to the Debtors, "The Plan [was] fully administered, and the Reorganized Debtors [had] emerged from [C]hapter 11 as a reorganized business."[748] The Debtors indicated the only remaining issues as:[749]

Reorganized Debtor	Number of Outstanding Disputed Claims	Nature of Outstanding Disputed Claims
Pleasants Corp.	4	Personal Injury/Wrongful Death
Energy Harbor Nuclear Corp.	7	Personal Injury/Wrongful Death (5); U.S. Equal Opportunity Commission matters (2)
Energy Harbor Nuclear Corp.	2	Personal Injury/Wrongful Death; State of Ohio tax appeal
Energy Harbor LLC	0	-
Energy Harbor Nuclear Generation LLC	0	-

According to the Debtors, these issues remained open largely due to lack of opposing counsel responsiveness.[750] On December 20, 2021, the Bankruptcy Court held a hearing on the Debtors' final decree motion (the "December 20 Hearing"). On December 22, 2021, the Bankruptcy Court entered a final decree, officially closing all cases other than Pleasants Corp.[751]

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[744] Order Approving Debtor's Motion to Change Case Caption, [Docket #4008].

[745] Reorganized Debtors' Motion for Entry of (I) a Final Decree for FE Aircraft Leasing Corp. and Norton Energy Storage, L.L.C., and (II) an Order Directing the Use of an Amended Case Caption, [Docket #4013].

[746] Order on Debtors' Motion for Entry of (I) a Final Decree for FE Aircraft Leasing Corp. and (II) Directing the Use of an Amended Case Caption, [Docket #4074].

[747] Reorganized Debtors' Motion for Entry of a Final Decree and Order Closing Certain of the Reorganized Debtors' Chapter 11 Cases, at 3, [Docket #4408] [elsewhere, Motion for Final Decree"].

[748] *Id.* at 2.

[749] Motion for Final Decree, at 6. **Note*** that graphic is reproduced here for ease of viewing.

[750] *Id.* at 6.

[751] Final Decree, [Docket #4418].

On December 22, 2021, the Debtors filed a motion requesting a final decree for Pleasants Corp.[752] In the motion, the Debtors again cited to § 305(a) and Bankruptcy Rule 3002, and blamed non-responsive opposing counsel for the four (still) remaining outstanding claims.[753] According the Debtors, the Bankruptcy Court made statements at the December 20 Hearing which prompted the Debtors to request a final decree on the Pleasants Corp case.[754] There is not a hearing transcript available to determine what exactly what was said that prompted Pleasants Corp's exclusion from the December 3 motion or what changed at the December 20 Hearing.

On January 14, 2022, the Bankruptcy Court entered its order for a final decree[755] and, subsequently the final decree[756] for Pleasants Corp.

This concluded all cases for all of the Debtors.

[752] Reorganized Debtors' Motion for Entry of a Final Decree and Order Closing the Chapter 11 Case of Pleasants Corp., [Docket #4414].

[753] *Id.* at 6.

[754] *Id.* at 3.

[755] Order on Debtors' Motion for Entry of a Final Decree and Order Closing the Chapter 11 Case of Pleasants Corp., [Case No. 18-50763 Docket #14].

[756] Pleasants Corp Final Decree, [Case No. 18-50763 Docket #15].

FEE SCHEDULES

Bankruptcy is expensive. In the end, it cost the Debtors more than $112 million to make it through their bankruptcy proceedings. This $112 million price tag went to paying for attorney fees, investment banking fees, accounting and tax guidance, energy market consulting, and special litigation attorney fees. Although FirstEnergy's bankruptcy consisted of deeply intertwined corporate entities and high-stakes litigation, it is important to note that bankruptcy bills run up quickly.

To rundown some specifics, in Akin Gump Strauss Hauer & Feld LLP's ("Akin Gump") final fee application, the law firm noted that the blended rate across all of its attorney's working on the Debtors' case, between March 31, 2018, and February 27, 2020, was $930.33 per hour.[757]

Name of Applicant	Fees	Expenses	Total
Akin Gump Strauss Hauer & Feld LLP[758] *As Counsel for the Debtors*	$65,218,285	$2,710,457	$67,928,742
BDO USA, LLP[759] *As Accountant and Auditor to the Debtors*	$1,182,732	$59,775	$1,242,507
Black, McCuskey, Souers & Arbaugh, LPA[760] *As Special Counsel to the Debtors*	$1,630,555	$7,141	$1,637,696
Brouse McDowell, LPA[761] *As Co-Counsel for the Debtors*	$2,529,618	$135,058	$2,664,676

[757] Akin Gump Strauss Hauer & Feld LLP's Sixth Interim and Final Application for Allowance of Compensation and for Reimbursement of Expenses for Services, at 3, [Docket #3998]. As a side note, objections to fee applications are not uncommon. There was an interesting objection lodged by an Ohio resident, who took particular issue with Akin Gump seeking payment for its "'Governmental Affairs' work in the state of Ohio." The Ohio Resident urged the Bankruptcy Court to not approve such fees and alleged that Akin Gump had some role in the House Bill 6 scandal. *See generally* Ohio Resident Objection to Akin Gump's Fee Application for "Governmental Affairs" Work, [Docket #4194]; *see generally* Akin Gump's Response to Ohio Resident's Objection, [Docket #4200].

[758] Order Awarding Final Allowance of Compensation For Services Rendered and Reimbursement of Expense, **Exhibit A**, [Docket #4407].

[759] Omnibus Order Awarding Final Allowance of Compensation for Services Rendered and Reimbursement of Expenses, **Exhibit A**, [Docket #4277].

[760] *Id.*

[761] *Id.*

Name of Applicant	Fees	Expenses	Total
Ernst & Young LLP[762] *As Accountant and Auditor to the Debtors*	$312,597	$15,601	$328,198
Hogan Lovells US LLP[763] *As Special Counsel to the Debtors*	$2,498,616	$3,328	$2,501,944
Honigman LLP[764] *As Counsel to the Independent Mangers of FirstEnergy Generation, LLC*	$739,362	$18,243	$757,605
ICF Resources LLC[765] *As Energy Market Advisor to the Debtors*	$1,524,038	$15,326	$1,539,364
KPMG LLP[766] *As Tax Consultants to the Debtors*	$4,484,205	$28,185	$4,512,390
Lazard Freres & Co.[767] *As Investment Banker to the Debtors*	$19,517,052	$175,735	$19,692,787
Quinn Emanuel Urquhart & Sullivan, LLP[768] *As Special Litigation Counsel to the Debtors*	$122,162	$455	$122,617
Ropes & Gray LLP[769] *As Counsel to the Independent Manager of FirstEnergy Nuclear Generation, LLC*	$1,898,238	$27,540	$1,925,778
Strick and Company, Inc.[770] *As Corporate Communications Consultants to the Debtors*	$2,237,385	$195,233	$2,432,618
Willkie Farr & Gallagher LLP[771] *As Special Counsel to the Independent Directors and Conflicts to the Debtors*	$4,631,676	$179,435	$4,811,111
		Total	**$112,098,033**

762 *Id.*

763 *Id.*

764 *Id.*

765 *Id.*

766 *Id.*

767 *Id.*

768 *Id.*

769 *Id.*

770 *Id.*

771 *Id.*

EPILOGUE

Where Are FirstEnergy and Energy Harbor Today?

FirstEnergy

In 2024, FirstEnergy "operates as a public utility holding company" and "through its subsidiaries, generates, transmits, and distributes electricity, [with additional services, such as the] exploration [for], production [of], and distribution of natural gas."[772] In 2023, FE Corp earned a profit of $1.176 billion with an earnings-per-share of $1.92.[773] In 2014, the year that FE Corp first indicated its push to become a fully regulated utility, the company earned a profit of $299 million[774] with an earnings-per-share of $2.45–$2.85.[775] FirstEnergy's 2023 financial results were a strong showing from a company with subsidiaries in Chapter 11 bankruptcy only three years prior.

Energy Harbor

In early-2023, Vistra announced its acquisition of Energy Harbor Corp for $3.43 billion.[776] This transaction closed on March 1, 2024.[777] Energy Harbor Corp was merged into Vistra Vision, a wholly-owned subsidiary of Vistra.[778] With this sale, the chapter of FirstEnergy's bout with nuclear powered generation closed. However, this chapter continues to impact FirstEnergy.

Fraud, Racketeering, and Bribery: The Infamous Ohio House Bill 6

At the beginning of our journey through FirstEnergy's Chapter 11 bankruptcy, we urged readers to see FirstEnergy's bankruptcy in a positive light, not a tragic one. While we still hope that you take away the positive aspects of the bankruptcy process, we must end with a discussion on what FirstEnergy's bankruptcy will perhaps best be known for: "Ohio's [alleged] worst political scandal ever."[779] Happening in the background of FirstEnergy's reorganization efforts was the deliberation, enactment, and subsequent partial repeal of Ohio House Bill 6 ("HB 6" or the "Bill").[780] The circumstances surrounding HB 6's enactment are wrought with allegations of

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[772] FirstEnergy Corp, Bloomberg Profile [Link].

[773] FirstEnergy 2023 10-K, at 89, [Link].

[774] Excel Document with Aggregated Financial Data, [Link].

[775] FirstEnergy 2014 Earnings Guidance Letter.

[776] Press Release – Vistra Announces Acquisition of Energy Harbor, (Mar. 9, 2023), [Link].

[777] *Vistra, Energy Harbor Deal Finally Closes*, Nuclear Newswire (Mar. 7, 2024), [Link].

[778] Press Release – Vistra Announces Acquisition of Energy Harbor, (Mar. 9, 2023), [Link].

[779] Thomas Suddes, *HB6: Much Remains Unknown in Ohio's Worst Political Scandal Ever*, THE COLUMBUS DISPATCH (Jan. 10, 2023), [Link].

[780] H.B. 6, 133rd Gen. Assemb., (Oh. 2019), [Link].

misconduct by FE Corp executives and Ohio state politicians, leading to several indictments and the eventual revocation of portions of the Bill.[781]

Signed into law on October 22, 2019, HB 6, in effect, would have subsidized the Davis-Besse and Perry nuclear power stations owned by NG, as well as two coal facilities owned by OVEC.[782] HB 6 would provide a "state-level legislative subsidy to the Debtors of $9.00 per megawatt hour ("MWh") for power produced by the Debtors' Ohio nuclear stations power stations for power generated from January 1, 2020, through December 31, 2026."[783] For the Debtors, these subsidies would exceed $150 million per year for six years.[784]

No question about it, FirstEnergy and the Debtors would have benefited from the enactment of HB 6. For the Debtors, the direct subsidy contemplated in HB 6 would increase "the Debtors' capacity to meet post-emergence obligations,"[785] paving the way for the continued operation of the Debtor's nuclear assets and an effective reorganization. For FE Corp, an effectively reorganizable Debtor with profitable nuclear assets would lead to probable plan confirmation from the Bankruptcy Court and ensure a complete divestment from competitive energy production (which was the entire purpose of the Debtors' bankruptcy case).[786]

Immediately after HB 6's passing, the Debtors rescinded their deactivation notices[787] for the Davis-Besse and Perry nuclear power stations.[788]

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[781] *See generally* Mark Williams, *Despite fresh indictments, Ohio consumers still paying $500,000 a day for House Bill 6*, THE COLUMBUS DISPATCH (Feb. 13, 2024), [Link] [elsewhere, the "Williams, Columbus Dispatch 2024 Article."]; *Selling Out in the Statehouse*, USA TODAY NETWORK OHIO BUREAU, (last updated Jan. 10, 2023), [Link] [elsewhere, the "USA TODAY, Selling Out in the Statehouse Article"].

[782] Williams, Columbus Dispatch 2024 Article.

[783] Expert Declaration of Charles M. Moore in Support of Confirmation of the [Seventh] Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., *et al*., Pursuant to Chapter 11 of the Bankruptcy Code, [Docket #3075] [elsewhere, the "Expert Declaration of Moore in Support of Seventh Plan"].

[784] *Id*.

[785] Expert Declaration of Moore in Support of Seventh Plan, at 4.

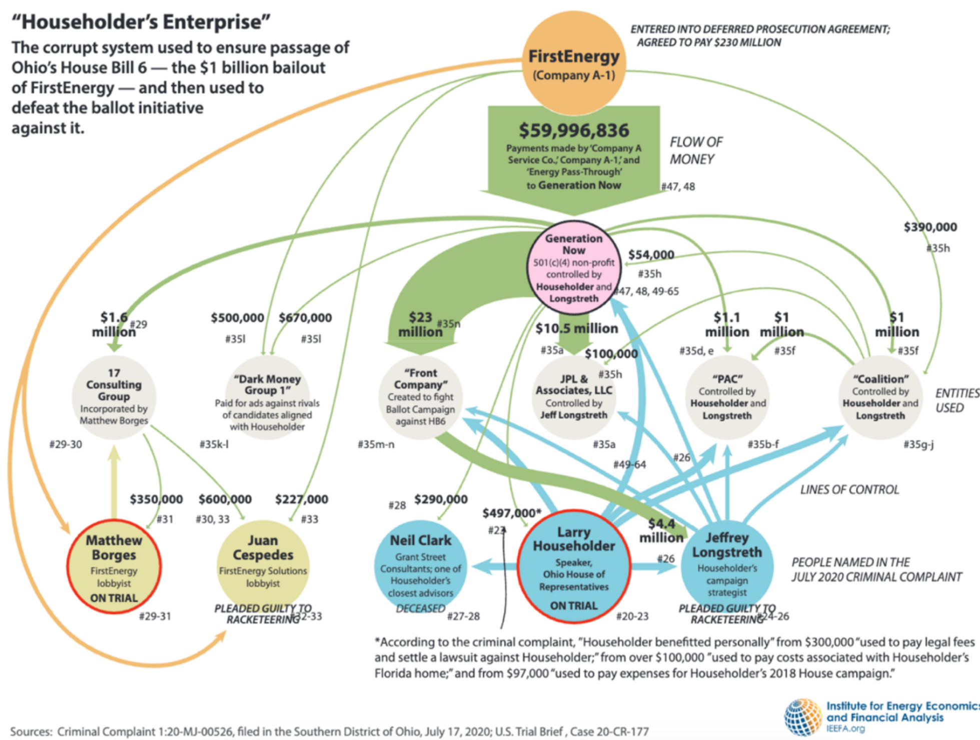
[786] **Note*** this is in no way a statement as to the intention of parties involved in the HB 6 alleged scandal but, rather, an outside view of potential incidental benefits of the Bill's passing.

[787] *See* FirstEnergy Solutions Corp., *Request for Emergency Order Pursuant to Federal Power Act Section 202(c)*, (Mar. 29, 2018), at 8, [Link] (referencing deactivation notice submitted to the PJM for Davis-Besse and Perry power stations); *see also* Expert Declaration of Moore in Support of Seventh Plan, at 3 (referencing deactivation notices to PJM and NRC).

[788] Objection By Utility Workers Union Of America, Local 270, Afl-Cio, And International Brotherhood Of Electrical Workers Local 29, Afl-Cio, To Sixth Amended Joint Plan Of Reorganization Of FirstEnergy Solutions Corp., Et Al., Pursuant To Chapter 11 Of The Bankruptcy Code, And Exhibits (Dkt. 2934, 2936), at 7, [Docket #2970] [elsewhere, the "Union Objection"]; *see also* Expert Declaration of Moore in Support of Seventh Plan, at 3.

The Eighth Amended Plan, as confirmed on October 19, 2019, made no mention of HB 6,[789] but there is little reason to believe the subsidies contemplated in HB 6 were not expected and contemplated for by the Reorganized Debtors given the highly public nature of the Bill's negotiation and specific reference in Charles M. Moore's declaration in support of the seventh amended Plan.[790] Given the breadth of the scandal, very little is said about HB 6, its subsidies, or the events surrounding its enactment in the Debtors' bankruptcy case—which is simultaneously surprising and not.

According to an article by the Ohio Bureau of USA TODAY, federal investigators allegedly uncovered a ~$60 million bribery scheme to elect Perry County Rep. Larry Householder to lead the Ohio House of Representatives, pass House Bill 6 . . . and defend [HB 6] against a ballot initiative to block it."[791] A timeline of how the events unfolded highlights the course of alleged dealings between FirstEnergy and named Ohio legislative actors.[792] This graphic conveys the extent and convoluted nature of these intertwined efforts.[793]



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[789] *See generally*, Eighth Amended Joint Plan Of Reorganization Of FirstEnergy Solutions Corp., *et al.*, Pursuant To Chapter 11 Of The Bankruptcy Code, [Docket #3278] [elsewhere, the "Eighth Amended Plan"].

[790] Expert Declaration of Moore in Support of 7th Plan, at 2–4.

[791] USA TODAY, Selling Out in the Statehouse Article.

[792] *Id.*

[793] *"A Cycle of Corruption": A Timeline of the Householder/HB6 Scandal*, COMMON CAUSE OHIO (last visited Apr. 14, 2024), [Link].

The FBI began its investigation in early 2018, but it was not until July 21, 2020, well after the Reorganized Debtors emerged as Energy Harbor, that the FBI began making arrests in connection with the alleged bribery scheme.[794] Larry Householder, the Speaker of the Ohio House of Representatives, and several associates, along with former CEO and president of FE Corp Charles Jones, have been indicted on charges ranging from fraud and bribery to racketeering.[795] Larry Householder was sentenced to twenty years in prison in 2023.[796] FE Corp received criminal charges for bribery and was assessed a $230 million penalty by the Department of Justice.[797] FE Corp also paid approximately $4 million in civil penalties (to the FERC, ironically).[798] Eventually, the provisions of HB 6 that provided subsidies to nuclear and fossil generators were repealed in March 2021.[799]

But the story does not end there. Even in April 2024 the complete story of HB 6 remains a mystery. New information continues to come out and lives continued to be impacted. Emails from Ohio utility executives on the situation surrounding HB 6 and the losses stemming from old coal plants continue to be leaked.[800] In May 2023 ex-FirstEnergy CEO and President Charles Jones and Vice President Michael Dowling asserted that FE Corp had "selectively released portions of [an internal] investigation to throw them under the bus, while protecting other [employees]."[801]

The messy battles stemming from the fallout of HB 6 are not confined to the court system or the frontpages of newspapers. As recently as April 9, 2024, Sam Randazzo, the one-time chair of the Public Utilities Commission of Ohio, who "faced the prospect of spending the rest of his life in prison if convicted of the dozens of criminal charges he faced in simultaneous federal and state investigations" pertaining to the HB 6 controversy committed suicide.[802]

These are no doubt tragic events. Maybe Icarus really is a utility company.

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[794] *Id.*

[795] *Id.*; *see also* Jessie Balmert & Laura A. Bischoff, *Ohio AG announces indictments for ex-FirstEnergy execs, Randazzo in House Bill 6 scandal*, THE COLUMBUS DISPATCH (last visited Apr. 15, 2024), [Link].

[796] Adam Ferrise, *Ex-Ohio House Speaker Larry Householder gets maximum 20 years in prison for largest bribery scandal in state history*, CLEVELAND.COM (June 29, 2023), [Link].

[797] Tino Bovenzi, *FirstEnergy criminally charged, fined $230M by DOJ For role in HB6 scandal*, SPECTRUM NEWS (July 22, 2021), [Link].

[798] Ethan Howland, *FirstEnergy agrees to pay $3.9M for failing to tell FERC about energy bill bribery payments*, UTILITY DIVE (Jan. 3, 2023), [Link].

[799] Williams, Columbus Dispatch 2024 Article.

[800] Kathiann M. Kowalski, *HB 6 Updates: Emails Reveal What Ohio Utility Execs Thought About Money-Losing Plants*, OHIO CAPITAL JOURNAL (Mar. 14, 2024), [Link].

[801] Marty Schladen, *Fired FirstEnergy Executives Team Up With Others Suing to Get FE Report on Ohio Scandal*, OHIO CAPITAL JOURNAL (July 13, 2023), [Link].

[802] Julie Carr Smyth & Samantha Hendrickson, *Former Ohio Utility Regulator, Charged in a Sweeping Bribery Scheme, Has Died*, DAYTON DAILY NEWS (Apr. 9, 2024), [Link].