



AMERICAN
BANKRUPTCY
INSTITUTE

Northeast Bankruptcy Conference and Consumer Forum

Regulatory Issues in Energy Cases

RJ Arsenault

FTI Consulting, Inc. | Boston

Hon. Lisa G. Beckerman

U.S. Bankruptcy Court (S.D.N.Y.) | New York

Stefanie B. Greer

Prudential Private Capital | Newark, N.J.

Adam M. Ramos

Hinckley, Allen & Snyder LLP | Providence, R.I.



Who has the Power? The Intersection of Bankruptcy Law and Regulatory Schemes in Energy Cases

Hon. Lisa G. Beckerman, US Bankruptcy Court, SDNY

R.J. Arsenault, FTI Consulting

Stefanie Greer, Prudential Private Capital/PGIM Private Capital

Adam M. Ramos, Hinckley Allen

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



What are examples of “Energy” Cases?

- Electric Utilities
 - FirstEnergy Solutions Corp., et al. (Bankr. N.D. Ohio 18-50757)
 - PG&E Corp., (Bankr. N.D. Cal. 19-30088)
- Independent Power Producers
 - Frontera Holdings, LLC (Bankr. S.D. Tx. 21-30354)
 - Agilon Energy Holdings II LLC (Bankr. S.D. Tx. 21-32156)
- Oil & Gas Cases
 - Sanchez Energy Corp., et al. (Bankr. S.D. Tx. 19-34508)
 - Nine Point Energy Holdings, Inc. et al. (Bankr. D.Del. 21-10570)

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



What are some issues unique to energy bankruptcies?

- Treatment of regulated contracts
- Compliance with permitting; obtaining necessary approvals for changes of control
- Modeling of financial performance based on projected energy markets
- Regulatory concerns with respect to:
 - Assumption or rejection of executory contracts under Section 365 of the Bankruptcy Code.
 - Debt to equity conversions under a plan of reorganization
 - Sales of assets under Section 363 of the Bankruptcy Code (including credit bids)

RJ ADDED

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



What market forces have been driving energy bankruptcies?

- **Winter Storm Uri**

- Unprecedented a weather event in February 2021 in Texas caused rolling blackouts, prices in certain hours near \$9,000/MWh and the inability for wind and gas generators to produce when called on by the market
- The fallout resulted in energy providers that were either unable to provide power to their customers or were forced to purchase power at extraordinarily high levels, generators that were unable to provide power to the grid and were forced to purchase power to backstop hedge obligations, and ERCOT (independent system operator) stuck in the middle as the effective clearing house for ratepayers and generators.
- Impacted parties: independent power producers, ERCOT, energy providers (electric cooperatives and retail energy providers), and hedge counterparties

RJ ADDED

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



What market forces have been driving energy bankruptcies?

- **Project-financed generating portfolios** located in the northeast power markets have faced depressed energy and capacity margins leading to lower than expected paydown of debt as term loan maturities approach
- **Oil & Gas**
 - Cases were significantly down in 2021 relative to 2020 as oil prices recovered
 - Notable 2021 case was **Seadrill** which faced a myriad of macroeconomic factors including a supply surplus and increased price competition, leading it to an overleveraged position.

RJ ADDED

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



What market forces have been driving energy bankruptcies?

- Other Cases
 - **Frontera Holdings:** Overleveraged asset financial distress exacerbated by COVID-related demand destruction and complicated by the legal and commercial issues related to selling power into the Mexican power market and competition from solar and oil-fired resources
 - **Footprint Power:** During the construction of the facility, a series of disputes arose between the Company and IEP, the EPC contractor, concerning changes, added costs, delays, and inefficiencies, which ultimately resulted in termination of the EPC Contract and the commencement of arbitration proceedings. Following three (3) years of arbitration, approximately \$236.4 million, plus interest thereon, was awarded to IEP and directing the Company to pay such amount. This qualified as an event of default under the secured credit facility.

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Regulatory schemes to be considered:

- **FERC: Federal Energy Regulatory Commission**
 - The federal agency that regulates transmission and wholesale sale of electricity and natural gas and regulates the transportation of oil by pipeline in interstate commerce
- **PUC: Generally, a state Public Utility Commission**
 - A state agency that oversees services and rates provided to end users by utility companies
- **ERCOT: Electric Reliability Council of Texas**
 - A Texas state agency responsible for maintaining system reliability, facilitating competitive wholesale and retail markets, and ensuring open access to transmission

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Regulatory schemes (continued):

- **EPA: US Environmental Protection Agency**
 - Federal agency charged with protecting human health and the environment
- **State DEPs: Generally, a state Department of Environmental Protection**
 - A state agency that oversees compliance with environmental regulations
- **CFIUS: The Committee on Foreign Investment in the United States**
 - A federal, interagency committee authorized to review certain transactions involving foreign investments in the United States in connection with national security.

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



FERC Jurisdictional War

- Executory contracts (e.g., power purchase agreements; oil & gas transportation services agreements): subject to assumption/rejection under Section 365 of the Bankruptcy Code.
- FERC position is that at a minimum it has concurrent jurisdiction with respect to assumption/rejection. Courts are split on what role, if any, FERC should play:
- *PG&E Corp. v. FERC (In re PG&E Corp.)*, 603 B.R. 471 (Bankr. N.D. Cal. June 7, 2019), *amended and direct appeal certified*, 2019 WL 2477433 (Bankr. N.D. Cal. June 12, 2019), *vacated*, 829 Fed. App'x 751 (9th Cir. 2020) (bankruptcy court has exclusive jurisdiction)
- *FERC v. FirstEnergy Solutions Corp. (In re FirstEnergy Solutions Corp.)*, 945 F.3d 431 (6th Cir. 2019, reh'g denied. No. 18-3787 (6th Cir. Mar. 13, 2020) (heightened standard of review; consider public interest and FERC input)

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



FERC Jurisdictional War

Recent cases, continued:

- *FERC v. Ultra Resources, Inc. (In re Ultra Petroleum Corp.)*, 2022 WL 763836 (5th Cir. Mar. 14, 2022) (rejection did not require FERC approval; Section 1129(a)(6) does not require FERC approval for confirmation providing for rejection).
- *In re Calpine Corp.*, 337 B.R. 27 (S.D.N.Y. 2006) (FERC has exclusive jurisdiction over modification or termination of FPA-regulated power agreements)
- *In re Boston Generating, LLC*, 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010) (requiring approval of both bankruptcy court and FERC for rejection of gas transportation agreement)

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



PPAs: Special Considerations

- Generally executory contracts subject to assumption/rejection under Section 365.
- Under certain circumstances could be terminated by non-debtor counterparty notwithstanding the automatic stay under Section 362(a) of the Bankruptcy Code *if* the contract is deemed a **forward contract** with a **forward contract merchant**. See Sections 362(b)(6) and 556 of the Bankruptcy Code.
- A **forward contract** is a contract for the purchase of a commodity (such as electricity) with a maturity date more than two days after the date the contract is entered into. A **forward contract merchant** includes an entity whose business consists in whole or in part of entering into forward contracts “as or with merchants in a commodity.” See Section 101(26) of the Bankruptcy Code.
- Courts are split on application of the definition of FCM.
 - The **broad interpretation** defines a FCM as an entity that is neither an end-user nor a producer and that enters into a forward contract.
 - The **narrow interpretation** starts with the same test but adds another prong, finding an FCM only where the entity enters into the forward contract to make a profit.

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



CFIUS and Bankruptcy: Overview

Non-US persons participating in debt restructuring or bankruptcy transactions need to take into account compliance with the provisions of the **Defense Production Act (“DPA”)** relating to foreign investment in the United States, which could trigger a mandatory filing with the **Committee on Foreign Investment in the United States (“CFIUS”)**.

“**Covered transactions**” subject to CFIUS review include not only transactions involving a change of “**control**,” whereby a foreign person acquires “control” of a “US business” but also transactions involving a **non-controlling investment** in a “US business” with “**critical technology**,” “**critical infrastructure**” or “**sensitive personal data**.”

In 2018 the U.S. Congress passed the **Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”)**. FIRRMA codified, among other things, CFIUS’ jurisdiction over transactions arising from bankruptcy proceedings, such as a Section 363 asset sale.

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



CFIUS Overview (Continued)

FIRRMA also introduced the concept of mandatory filings in certain circumstances and increased the resources of CFIUS to review non-notified transactions. Now parties must carefully assess whether a transaction is subject to a mandatory filing and, even if not, whether they want to condition the closing on a voluntary review and clearance by CFIUS to avoid the possibility that CFIUS will either block the transaction before closing or request a post-closing review and seek divestiture or other mitigation to address national security issues. CFIUS reviews can materially affect the time to completion.

Mandatory filings for non-governmental foreign persons (other than certain excepted investors) turn on whether there is “control” over “critical technology” and for governmental foreign persons (other than certain excepted states) turn on whether there is “control” over “critical technology,” “critical infrastructure” or “sensitive personal data.”

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



CFIUS: Lending Transactions

- Lending transactions, such as loans, generally are not subject to CFIUS review, unless a lending transaction confers to a foreign lender financial or governance rights characteristic of equity investments. A loan or similar financial arrangement may constitute a covered transaction and trigger CFIUS jurisdiction where a foreign lender acquires:
 - an interest in profits of a US business;
 - the right to appoint members of the board of directors of the US business; or
 - other comparable financial or governance rights.

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



CFIUS: Lending Transactions (continued)

- CFIUS jurisdiction also may apply to lending transactions in circumstances of imminent or actual default or other conditions with significant possibility that a foreign lender may, as a result of the default or other condition, acquire:
 - control of a US business; or
 - equity interest and information access, board presence, or certain decision-making rights in a US business involved in “critical technologies”, “critical infrastructure”, or “sensitive personal data”.

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Bankruptcy and CFIUS: Example

The CFIUS regulations include an example of a bankruptcy case where a US business defaults on a loan to a foreign bank and seeks bankruptcy protection. The US business is unable to satisfy the foreign bank's claim, which is greater than the value of the US business' assets. The foreign bank's secured claim is the only secured claim against the US business' assets, creating a high probability that the foreign bank will receive title to the US business' assets. The impending bankruptcy case transferring control of the US business' assets to the foreign bank would constitute a covered control transaction subject to CFIUS jurisdiction.

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



CFIUS: Contingent Equity

Convertible debt instruments generally are not considered covered transactions, unless a foreign holder has control over certain elements, such as when the instrument is converted, or obtains equity-like rights upon conversion. When determining whether a contingent debt instrument may be a covered transaction, CFIUS considers:

- the imminence of conversion or satisfaction of contingent conditions;
- whether the acquiror controls the conversion or satisfaction of contingent conditions; and
- whether the amount of interest and the rights acquired upon conversion or satisfaction of contingent conditions can be reasonably determined at the time of acquisition.
- Otherwise, a contingent equity interest is not subject to CFIUS jurisdiction until conversion. When conversion becomes imminent, foreign holders should consider the rights that would result from the conversion and whether the conversion may be a covered transaction.

NORTHEAST BANKRUPTCY CONFERENCE

SAMOSET RESORT | ROCKPORT, MAINE | JULY 14-17, 2022



Energy and Insolvency: Looking Forward

- Industries most at risk in current economic environment?
- Impact of pending legislation/regulation?
- Which contentious/undecided issues are most likely to be before the bankruptcy courts and how might they be outcome determinative?

A special thank you to Carl Valenstein of Morgan, Lewis & Bockius for providing materials on CFIUS.

Faculty

RJ Arsenault, CFA is a managing director at FTI Consulting, Inc. in Boston and practices in the Clean Energy industry practice within its Turnaround & Restructuring practice. He has spent more than 15 years in the energy sector, holding senior positions with global power companies and advising clients owning assets across the sector, including convention and renewable power-generation, electric transmission and midstream pipeline infrastructure. Mr. Arsenault advises clients on a variety of economic, financial and strategic issues in power and gas markets across North America. His expertise includes market assessments, economic and financial modeling of contracted and merchant assets, asset valuation and liquidation analyses supporting transactions in in- and out-of-court bankruptcies, and providing strategic advisory services. Mr. Arsenault advises investors throughout the entire investment process, including target identification, transaction support, business creation and expansion strategy. He is experienced in valuing enterprises, power assets, power purchase agreements and trade books, tax equity transactions and formulating negotiation strategies for executing transactions. Mr. Arsenault has played a critical role advising companies, bondholders and unsecured creditors during chapter 11 restructurings, leading teams responsible for reviewing and preparing debtor business plans, developing cash-flow forecasts and associated asset valuations, and maximizing the value of the debtor estate within the power markets in which they operate. Select clients that he has served include AES Eastern Energy, Edison Mission Energy, Energy Future Holdings, Northampton Generating, ExGen Texas Power and FirstEnergy Solutions. Prior to FTI Consulting, Mr. Arsenault held several senior positions with TransCanada Pipelines, including asset management of its Northeast power portfolio and roles within its M&A group, evaluating investments across North American power markets. Mr. Arsenault received his B.A. in biology from Fairfield University and his M.B.A. from Boston University.

Hon. Lisa G. Beckerman is a U.S. Bankruptcy Judge, sworn in on Feb. 26, 2021. From May 1999 until she was appointed to the bench, she was a partner in the financial restructuring group at Akin Gump Strauss Hauer & Feld LLP. From September 1989 until May 1999, she was an associate and then a partner in the bankruptcy group at Stroock & Stroock & Lavan LLP. Prior to her appointment, Judge Beckerman served as a co-chair of the Executive Committee of UJA-Federation of New York's Bankruptcy and Reorganization Group, as co-chair and as a member of the Advisory Board of ABI's New York City Bankruptcy Conference, and as a member of ABI's Board of Directors of from 2013-19. She is a Fellow and a member of the board of directors of the American College of Bankruptcy and a member of the National Conference of Bankruptcy Judges (NCBJ) and the 2021 NCBJ Education Committee. She also is a member of the Dean's Advisory Board for Boston University School of Law. Judge Beckerman received her A.B. from University of Chicago in 1984, her M.B.A. from the University of Texas in 1986 and her J.D. from Boston University in 1989.

Stefanie B. Greer is a vice president and corporate counsel with The Prudential Insurance Company of America in Newark, N.J. She joined Prudential in 2013 and supports the corporate projects and workout section of Prudential Capital Group. Prior to joining Prudential, Ms. Greer was a partner in the bankruptcy group at Dickstein Shapiro LLP. She received her B.A. from Tufts University and her J.D. from American University's Washington College of Law.

Adam M. Ramos is a partner with Hinckley, Allen & Snyder LLP's Litigation Group in Providence, R.I. His practice focuses on energy-related matters and complex business and commercial litigation. Mr. Ramos's energy-related practice includes the representation of (1) regional utilities in proceedings before state regulatory agencies, appeals of those decisions and civil litigation matters; and (2) owners and developers of energy-generation projects in proceedings before state regulatory agencies, for which he provides regulatory advice regarding transactions and project development. He also represents a broad range of institutional and individual clients in sophisticated, high-stakes litigation in state and federal trial and appeals courts. Mr. Ramos has successfully represented clients in sophisticated product-liability actions, intellectual property matters, real estate and land use disputes, insurance coverage litigation, mass torts and premises liability claims. He is listed in *The Best Lawyers in America* for 2020-22 for Commercial Litigation and in *Rhode Island Super Lawyers* as a Rising Star from 2011-18. Mr. Ramos is admitted to practice in Massachusetts and Rhode Island, and before the U.S. Courts of Appeals for the First and Federal Circuits, the U.S. District Courts of the Districts of Massachusetts and Rhode Island, and the U.S. Supreme Court. He received his B.A. in 2000 from Florida State University and his J.D. in 2006 from Roger Williams University School of Law.