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Fifth Circuit Holds Payments Under Electric Requirements Contract Exempt from Preference Avoidance

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The U.S. Fifth Circuit Court of Appeals recently ruled on whether section 546(e) of the Bankruptcy Code exempts payments for electricity provided under a requirements contract from avoidance as preferences. At least where the facts match those of the subject case, *MBS Mgmt. Serv., Inc. v. MXEnergy Elect., Inc.*, No. 11-30553, 2012 WL 3125167 (5th Cir. Aug. 2, 2012), such payments are exempt.

MBS Management Services, Inc. entered into a contract with Vantage Power Services, LP to purchase from Vantage the full electric requirements of specified apartment complexes for 24 months for a set price per metered kilowatt-hour. Vantage sold the contract to MXEnergy Electric, Inc., and several months later MBS filed a voluntary petition under chapter 11 of the Bankruptcy Code. A trustee was appointed. The trustee sued MXEnergy to recover as a preference under section 547(b) of the Bankruptcy Code approximately \$156,000.00 to cover past-due electric bills that MBS paid to MXEnergy within 90 days prior to the chapter 11 filing.

The parties stipulated that all requirements for the trustee's preference action had been met. MXEnergy argued, however, that section 546(e) shielded the payments from avoidance because the contract with MBS is a forward contract and the payments were settlement payments made to a forward contract merchant. The bankruptcy court and the district court agreed with MXEnergy that the payments were made on a forward contract and were settlement payments made to a forward contract merchant and were thus exempt from avoidance. The trustee appealed to the Fifth Circuit only the determination that the contract was a forward contract. (Therefore, the Fifth Circuit did not address whether the payments were settlement payments made to a forward contract merchant.)

Section 101(25)(A) of the Bankruptcy Code defines a forward contract as a "contract (other than a commodity contract . . .) for the purchase, sale, or transfer of a commodity . . . with a maturity date more than two days after the contract is entered into . . .". The trustee's primary argument on appeal was that the contract is not a forward contract because it does not contain a specific quantity of electricity to be purchased, specific delivery dates or a maturity date. The Fifth Circuit found these arguments unpersuasive. The Fifth Circuit looked at the plain language of sections 101(25)(A) and 546(e) and found no requirement that a forward contract expressly specify quantities



of the commodity to be purchased, delivery dates or a maturity date. The Fifth Circuit did acknowledge that section 101(25)(A) requires that a forward contract must have a maturity date more than two days after the date the contract is entered into. It determined, though, that the electricity requirements contract at issue had a maturity date, even if it did not specify what that date was, and that no delivery of electricity was scheduled to occur fewer than two days after the contract was entered. Accordingly, the Fifth Circuit held that the requirements contract was a forward contract and section 546(e) exempted the payments from avoidance.

A number of issues remain open within the Fifth Circuit after this decision. The Fifth Circuit itself noted that it left open the issue of whether a residential consumer's contract with his local utility company is a forward contract. Also, perhaps the result would be different where the pricing was not a fixed price per kilowatt-hour, as in MBS, but a variable price determined pursuant to a more traditional electric utility tariff. Regardless, the Fifth Circuit has given electric suppliers an additional defense against preference claims.

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