

## EFH Ch. 11 Could Stretch Into 2017 Or Beyond, Experts Say

By **Matt Chiappardi**

*Law360, Wilmington (June 24, 2016, 1:47 PM ET)* -- Even though both Energy Future Holdings Corp. and the bankruptcy court are hoping the power giant's second attempt to emerge from Chapter 11 will be swift, experts say mammoth challenges are likely to spell an extended layover in bankruptcy with little chance of exiting before year's end.

After EFH's first crack at trying to get out of bankruptcy fell apart in April, the company quickly picked up the pieces and put together an ambitious schedule aimed at getting to a Chapter 11 plan confirmation for one of its two creditor silos in August and the other in September.

Even U.S. Bankruptcy Judge Christopher S. Sontchi is onboard with keeping the \$42 billion case at a brisk pace, saying in court that the proceedings, launched in 2014, were "not going to last five years" and continue to ring up the fees that have been estimated to accrue at \$1 million each day.

But while the debtor and the court may be brimming with optimism, some experts are skeptical that EFH can fully reach the finish line on the schedule that's currently running, because there are too many unanswered questions about how regulators, tax officials and even the many creditor constituencies jockeying for position are going to ultimately react to any restructuring strategy.

"I don't see any of that being resolved by year's end, given that we're at the middle of June," said J. Paul Forrester, a partner with Mayer Brown LLP. "There's just too much unsettled."

Especially mired in uncertainty is the so-called E-side of the case, the creditor silo that is owed by EFH and its unit Energy Future Intermediate Holding Co. LLC, which holds the lucrative stake in nondebtor electricity transmission unit Oncor Electric Delivery Co. LLC. It was a scuttled transaction on the E-side — a \$20 billion deal to reorganize Oncor into a real estate investment trust — that sent bankruptcy exit plans crashing when backers pulled back over conditions placed on its approval by Texas energy regulators.

The revised EFH plan lists a number of options for what could be done with Oncor, including a new investment-type scenario or even a sale, but creditors have yet to coalesce around a dominant strategy and the potential for regulatory pitfalls still loom.

"The E-side stuff is a mess," said Douglas G. Baird, a law professor at the University of Chicago Law School. "There are just so many moving parts. They still have to figure out what the deal is. Once they have a deal in place, it depends what the regulatory and tax pieces look like."

The T-side — creditors owed by major operating subsidiary Texas Competitive Electric Holdings Co. LLC — was ready to go with its portion of the plan, which relied heavily on a tax-free spinoff of TCEH, when Judge Sontchi confirmed EFH's now-scrapped plan last fall.

The new strategy allows the T-side of the case to emerge from bankruptcy before the E-side, which some experts believe is a reasonable and attainable goal, despite new alarm bells ringing that the IRS might not approve the tax-free spinoff at all, leaving creditors to absorb a roughly \$4 billion tax bill.

"That strikes me as a manageable problem," Baird said. "My instinct is that the T-side [of the case] is pretty straightforward."

Others, including Forrester, are not so sure the T-side can surmount an unfavorable ruling by the IRS, noting that unsecured creditors and others in that silo of the case "slammed [the T-side disclosure statement] pretty hard" with objections before Judge Sontchi ultimately approved it.

To some, that makes the prospect of either side getting out of Chapter 11 on a timetable suggested by EFH's schedule a slim one indeed.

"Given the complexity of Energy Future's multilayered capital structure, which includes over \$40 billion of debt held by various competing creditor groups, and the fact that after more than two years in bankruptcy, Energy Future has made scant progress towards successfully structuring a plan of reorganization that garners meaningful creditor support — while also clearing all necessary regulatory hurdles, including those imposed by Texas' energy regulators and the Internal Revenue Service — it is unlikely that Energy Future will be able to emerge from bankruptcy at any time prior to the end of 2016," said Darren Oved, head of litigation at Oved & Oved LLP.

But the experts who are bearish on EFH's ability for a speedy exit also do not lay the blame at the feet of the court or the Kirkland & Ellis LLP legal team that is leading the power giant's case.

The EFH case is enormous, one of the largest in U.S. history, and full of mind-bending complexity — two elements that don't mix well with the stubbornly weak energy market and still not-so-optimal economy, said Bruce A. Markell, a former bankruptcy judge and a bankruptcy law professor at Northwestern University's Pritzker School of Law.

"Even in the best of times, in a stable industry, it would be difficult to resolve this case favorably by the end of 2016," Markell said.

But he doesn't fault the judge or EFH's legal team for their optimism, in fact saying that they are doing as much right as they can in a volatile case.

"Judge Sontchi and Kirkland & Ellis are doing the right thing," Markell said. "They could either stand still or adapt on the fly. No, I don't think they're going to resolve everything by year's end. Do I think that's due to their lack of effort? Not at all."

Baird agrees that the case is being run "responsibly" by the court and the counsel involved, saying that the disputes and challenges in the case are real ones, not just creditors fighting for its own sake.

"I don't get the sense that this is a case where you have a pathology of a particular creditor putting

sticks into the spokes of the wheel or other destructive behavior you sometimes see in cases," Baird said. "No one is saying the price for their cooperation is X, Y and Z."

Baird also cautions that the consequences of the case remaining in bankruptcy may not be as severe as feared.

While professional fees continue to mount and are forecast to top \$1 billion when the dust clears, EFH is not in danger of disappearing if it stays in Chapter 11. And while the fees may be high, they are still within a reasonable level given the size of the case, he said.

"No doubt it would be cheaper to resolve it sooner rather than later, but it's not 'Bleak House,'" Baird said, referring to the Charles Dickens novel that features a decadeslong lawsuit with legal fees that swallow the dispute's entire value. "It's not the same thing as the fear in the large automobile cases that they'd cease to exist, or there would be a ripple throughout the entire supply chain."

And some experts say that Judge Sontchi and EFH's optimism is well-justified.

Thomas J. McNulty, director in the valuations and financial risk management practice at Navigant Consulting Inc., said that the sides are under "tremendous pressure" to come to some sort resolution quickly as time ticks on and professional fees snowball.

"You don't see a clear path to a buyer today, but in transaction work, each day is a new one, and on any given day, a new day can emerge," McNulty said. "The pressure is driving the parties toward a resolution."

EFH declined to comment when contacted for this story. The T-side of the case is scheduled for a confirmation hearing Aug. 17. The E-side's confirmation process is set to begin sometime in September.

The case is In re: Energy Future Holdings Corp., case number 1:14-bk-10979, in the U.S. Bankruptcy Court for the District of Delaware.

--Editing by Katherine Rautenberg and Edrienne Su.

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