ORAL ARGUMENT HELD ON JANUARY 7, 2014

In the United States Court of Appeals for the District of Columbia Circuit

No. 12-1382

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

SUPPLEMENTAL BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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September 15, 2014

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GLOSSARY

Commission or FERC	The Federal Energy Regulatory Commission
Compliance Order	*PJM Interconnection, LLC*, Order on Compliance Filings, 142 FERC ¶ 61,214 (2013)
Compliance Rehearing Order	*PJM Interconnection, LLC*, Order on Rehearing and Compliance, 147 FERC ¶ 61,128 (2014)
Incumbent Owners	Petitioners the Public Service Gas and Electric Companies, the PPL PJM Companies and Exelon Corporation
PJM	PJM Interconnection, L.L.C., a Regional Transmission Organization operating in 13 eastern states and the District of Columbia

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STATEMENT OF THE ISSUE

This appeal concerns whether the tariff of PJM Interconnection, LLC (PJM), a regional transmission organization, provides incumbent utility transmission owners a federal right of first refusal that permits them to exclude non-incumbent transmission developers from developing projects in the incumbent's service territory. In the orders challenged in this appeal, the Commission concluded that PJM's tariff, while ambiguous, did not provide such a right.

While this appeal was pending, pursuant to its Order No. 1000[1] rulemaking, the Federal Energy Regulatory Commission (FERC or the Commission) ordered PJM to remove any language from its tariff that could be read to support a federal right of first refusal, effective January 1, 2014. By order of January 15, 2014, following full briefing and oral argument, this Court held this appeal in abeyance pending the appeal of Order No. 1000, finding that it would "benefit from resolution of the question of FERC's authority to prohibit a regional transmission organization's tariff from including a right of first refusal for incumbent transmission owners to build and operate transmission facilities." The Court directed that the parties file simultaneous supplemental briefs addressing the impact of that decision on this appeal.

On August 15, 2014, this Court affirmed Order No. 1000 in all respects, including FERC's authority to order removal of federal rights of first refusal. *S. C. Pub. Serv. Auth. v. FERC*, Nos. 12-1232, *et al*. slip op. (D.C. Cir. 2014). Accordingly, as of the January 1, 2014 effective date of PJM's tariff filed in compliance with Order No. 1000, PJM's tariff no longer can be interpreted to establish the right of first refusal that petitioners claim.

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[1] *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils*., Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd, S.C. Pub. Serv. Auth. v. FERC*, Nos. 12-1232, *et al*. slip op. (D.C. Cir. Aug. 15, 2014).

In this Supplemental Brief, the Commission demonstrates that this Court's affirmance of Order No. 1000 compels the conclusion that any decision by this Court at this time on the interpretation of the PJM tariff language at issue in this appeal would be an advisory opinion. The relevant PJM tariff language has been superseded, and petitioners have failed to demonstrate that any non-incumbent developer projects have been approved under the old tariff language or remain in consideration under the old tariff language.

There is a possibility, following what would likely be protracted proceedings, that petitioners may obtain reinstatement of the relevant tariff language, which suggests that this case is not yet moot. Rather, the Court should dismiss this appeal as not ripe for review, because it is speculative whether petitioners will achieve reinstatement of the language interpreted here, and therefore their claims may never need to be decided.

STATEMENT OF FACTS

I. THE CHALLENGED COMMISSION ORDERS

In this appeal, petitioners the Public Service Gas and Electric Companies, the PPL PJM Companies and Exelon Corporation (collectively Incumbent Owners), who are existing PJM transmission owners, argued that the PJM tariff provided them with a right of first refusal that permitted them to exclude outside

non-incumbent transmission developers from proposing cost-of-service projects for inclusion in PJM's Regional Transmission Expansion Plan.

In the orders challenged in this appeal, the Commission found that PJM's tariff, while ambiguous, did not provide such a right of first refusal. *See Primary Power, LLC*, 131 FERC ¶ 61,015 (2010), JA 212, *on reh'g*, 140 FERC ¶ 61,052 (2012), JA 331. *See also Central Transmission, LLC v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,243 (2010), JA 436, *on reh'g*, 140 FERC ¶ 61,053 (2012), JA 455 (based upon *Primary Power*, dismissing a complaint alleging that the PJM tariff was unjust and unreasonable to the extent it did not permit PJM to designate outside developers to construct economic projects). Ultimately, neither of the outside developer projects at issue in *Primary Power* and *Central Transmission* was included in PJM's Regional Transmission Plan. *See* Respondent's Brief at 23.

II. ORDER NO. 1000 PROHIBITS THE FEDERAL RIGHT OF FIRST REFUSAL CLAIMED BY INCUMBENT OWNERS.

In Order No. 1000, the Commission directed Commission-jurisdictional transmission providers to eliminate provisions in their tariffs and agreements that establish federal rights of first refusal in favor of existing transmission owners with respect to transmission projects selected in a regional transmission plan for purposes of cost allocation. Order No. 1000 PP 7, 313.

On October 25, 2012, in its first Order No. 1000 compliance filing, PJM made no revisions to eliminate a right of first refusal, asserting that *Primary Power*

found that the tariff included no such right. *See PJM Interconnection, LLC*, Order on Compliance Filings, 142 FERC ¶ 61,214 P 192 (2013) (Compliance Order) (attached to petitioners' 28(j) letter of March 27, 2013). In the Compliance Order, the Commission disagreed that *Primary Power* found no federal right of first refusal in PJM's tariff. *Id*. P 221. Rather, the Commission found that the relevant provisions of PJM's tariff were ambiguous, and directed PJM to remove or revise any provision that could be interpreted as creating a federal right of first refusal for cost-of-service projects selected in the Regional Transmission Plan. *Id*. P 222.

On July 22, 2013, PJM filed a revised tariff deleting one tariff provision (section 1.5.6(k) of Schedule 6). *See PJM Interconnection, LLC*, Order on Rehearing and Compliance, 147 FERC ¶ 61,128 P 139 (2014) (Compliance Rehearing Order). A non-incumbent developer objected because PJM failed to remove all provisions that Incumbent Owners relied on in *Primary Power*. *Id*. P 144. The Commission found, however, that while "prior to Order No. 1000, it may have been unclear whether a particular provision in PJM's [tariff] or Agreements provided a federal right of first refusal," "following the effective date of PJM's Order No. 1000 Compliance filing, neither PJM's [tariff] nor its Agreements provide a federal right of first refusal." *Id*. P 148.

The revisions to PJM's tariff became effective as of January 1, 2014. *See PJM Interconnection, LLC*, 146 FERC ¶ 61,030 (2014) (attached to the

Commission's January 17, 2014 Response to Petitioners' January 9, 2014 28(j) letter); Compliance Rehearing Order P 29 (reaffirming tariff effective date).

South Carolina subsequently affirmed the Commission's authority to require that public utilities remove federal rights of first refusal from their tariffs. The Court found that the Commission possessed jurisdiction over such provisions because they were a "'practice . . . affecting'" a "'rate'" within the meaning of section 206 of the Federal Power Act, 16 U.S.C. § 824e. Slip op. at 54. "[R]ights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry." *Id*. The Court further found that the Commission's determination to ban such provisions was supported by substantial evidence. *Id*. at 58. "In this case, the Commission rested its right of first refusal ban on competition theory, determining that rights of first refusal posed a barrier to entry that made the transmission market inefficient, that transmission facilities would therefore be developed at higher-than-necessary cost, and that those amplified costs would be passed on to transmission customers." *Id*.

III. THE PROPOSED NON-INCUMBENT PROJECTS IDENTIFIED BY INCUMBENT OWNERS IN THEIR JANUARY 9, 2014 28(j) LETTER WERE NOT SELECTED FOR DEVELOPMENT BY PJM.

In an effort to demonstrate that the tariff language at issue in this appeal still had some application, Incumbent Owners filed a Rule 28(j) letter in this case on January 9, 2014, identifying two projects proposed by a non-incumbent

transmission developer, Northeast Transmission Development, that remained under consideration in PJM's Regional Transmission Planning Process under pre-Order No. 1000 tariff language. *See* Exhibit 3 to Incumbent Owners' January 9, 2014 28(j) letter, the January 9, 2014 Market Efficiency Presentation of the PJM Transmission Expansion Advisory Committee, at 6-9 (discussing three projects proposed to relieve congestion on the Hunterstown Transformer: two Northeast Transmission Development projects, costing $63.9 million and $61.7 million, with cost-benefit ratios of 1.31 and 1.54 respectively, and a project proposed by FirstEnergy, an incumbent utility, at a cost of $8 million and a cost-benefit ratio of 6.14). Given the "low cost and high benefit" of the FirstEnergy project, the Transmission Expansion Advisory Committee had recommended the incumbent FirstEnergy project to the PJM Board. *Id*. at 13.

On February 12, 2014, the PJM Board approved the recommendation to select the FirstEnergy incumbent project rather than either of the two Northeast Transmission Development non-incumbent projects. *See* Transmission Expansion Advisory Committee Recommendations to the PJM Board[2] at 1 (noting Board approval of recommendations on February 12, 2014), 2 (listing the $8 million FirstEnergy Hunterstown Project as an approved upgrade), and 8-9 (recommending

[2] This report can be found at http://pjm.com/~/media/committees-groups/committees/teac/20140206/20140206-february-2014-pjm-board-approval-of-rtep-whitepaper.ashx

the incumbent FirstEnergy project over the Northeast Transmission Development projects). Accordingly, these non-incumbent projects are no longer subject to review under the pre-Order No. 1000 PJM tariff language.

IV. IN THE ORDER NO. 1000 COMPLIANCE PROCEEDINGS, THE COMMISSION HAS FOUND THAT THE RELEVANT PJM TARIFF PROVISIONS ARE NOT PROTECTED BY *MOBILE-SIERRA*.

The *Mobile-Sierra* doctrine requires the Commission to presume that a rate set by a freely-negotiated wholesale energy contract meets the just and reasonable standard of the Federal Power Act. *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 167 (2010). The presumption may be overcome only if the Commission concludes that the contract seriously harms the public interest. *Id*.

The Commission declined in the generic Order No. 1000 rulemaking to address whether any particular contractual federal right of first refusal was protected by a *Mobile-Sierra* presumption of reasonableness, finding that issue better addressed on review of individual compliance filings. Order No. 1000-A P 388; Order No. 1000 P 292. Given this deferral, the Court in *South Carolina* found Incumbent Owners' *Mobile-Sierra* arguments premature. Slip op. at 67.

In PJM's Order No. 1000 compliance proceeding, certain PJM transmission owners, including Incumbent Owners, argued that the *Mobile-Sierra* presumption of reasonableness applied to the right of first refusal provisions in PJM's tariff at issue in this appeal. Compliance Order P 154. The Compliance Order found that

the relevant tariff provisions lacked characteristics justifying application of the *Mobile-Sierra* presumption. *Id*. P 185. The provisions "are prescriptions of general applicability rather than negotiated rate provisions that are necessarily entitled to a *Mobile-Sierra* presumption." *Id*. P 186 (citing distinction made in *NRG*, 558 U.S. at 176, between "prescriptions of general applicability" and "contractually negotiated rates"). *See also* Compliance Rehearing Order P 105.

The Commission also concluded that "those provisions arose in circumstances that do not provide the assurance of justness and reasonableness on which the *Mobile-Sierra* presumption rests." *Id*. P 188. "Unlike circumstances in which the Commission can presume that the resulting rate is the product of negotiations between parties with competing interests, the negotiations that led to the provisions at issue were among parties with the same interest, namely, protecting themselves from competition in transmission development." *Id*. P 189. *See also* Compliance Rehearing Order PP 106-110.

Because the Commission found that the *Mobile-Sierra* presumption does not protect the provisions in question, the Commission did not reach the PJM transmission owners' arguments regarding the public interest standard. *Id*. P 191.

Petitioner Public Service Electric and Gas Company has petitioned for review of the Commission's Compliance orders. *See Pub. Serv. Electric & Gas Co. v. FERC*, No. 14-1136 (D.C. Cir.) (petition filed July 14, 2014) (consolidated

with *Am. Transmission Sys. v. FERC*, No. 14-1085 (D.C. Cir.) (petition filed May 27, 2014), by Court order of August 15, 2014).

SUMMARY OF ARGUMENT

Under Order No. 1000, as affirmed by this Court, PJM was required to remove from its tariff any language that would support the federal right of first refusal that Incumbent Owners claim in this appeal, effective January 1, 2014. Incumbent Owners have identified no non-incumbent developer projects that were accepted for development under the now-superseded tariff language: neither the non-incumbent projects at issue in the challenged orders, nor the non-incumbent projects identified in Incumbent Owners' January 9, 2014 28(j) letter, were selected for inclusion in PJM's Regional Transmission Plan. Accordingly, as the challenged orders interpreted now-superseded tariff language that did not result in the approval of any non-incumbent developer projects, there is no live controversy and any opinion rendered by this Court in this appeal at this time would be a prohibited advisory opinion.

The possibility remains that, after what would likely be protracted appellate proceedings, Incumbent Owners could eventually succeed in reinstating the tariff language at issue here, which suggests that the case is not yet moot. However, because any such revival of a live case or controversy is speculative at this point and may never occur, this Court should find this appeal unripe.

ARGUMENT

I. ANY DECISION IN THIS APPEAL BY THE COURT AT THIS TIME WOULD BE AN ADVISORY OPINION.

"The Article III case or controversy requirement prohibits courts from issuing advisory opinions on speculative claims." *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 396 (D.C. Cir. 2013). *See also, e.g., Flast v. Cohen,* 392 U.S. 83, 96 (1968) ("[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.") (Internal quotations and citations omitted)). Further, there must be a live case or controversy at the time the Court decides the case; it is not enough that there may have been a live case or controversy when the appeal was filed. *Burke v. Barnes*, 479 U.S. 361, 363 (1987); *Sosna v. Iowa*, 419 U.S. 393, 402 (1975).

Here, following FERC Order No. 1000, as affirmed by this Court, the PJM tariff can no longer be interpreted to provide the federal right of first refusal that Incumbent Owners claimed in this appeal. Compliance Rehearing Order P 148. Further, Incumbent Owners have identified no non-incumbent projects accepted into PJM's Regional Transmission Plan under the now-superseded tariff language. Neither of the non-incumbent projects at issue in *Primary Power* and *Central Transmission* was included in PJM's Regional Transmission Plan. *See* Respondent's Brief at 23. PJM likewise did not select the non-incumbent projects

identified in Incumbent Owners' January 9, 2014 Rule 28(j) letter for inclusion in the Regional Transmission Plan. *See* Statement of Facts Section III, *supra*.

Accordingly, "this case has 'lost its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract [questions] of law.'" *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (challenges to University regulation were moot where the regulation at issue was no longer in force) (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969)). Any decision by this Court at this time interpreting PJM's now-superseded tariff language necessarily would constitute an advisory opinion. *See, e.g.*, *Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1245 (D.C. Cir. 2004) ("no ongoing case or controversy" where contracts addressed in challenged orders were cancelled and 'disappeared into the regulatory netherworld'") (quoting *Nw. Pipeline Corp. v. FERC*, 863 F.2d 73, 76-77 (D.C. Cir. 1988)); *Tenn. Gas Pipeline Co. v. FPC*, 606 F.2d 1373, 1381 (D.C. Cir. 1979) (no live controversy where Commission orders address "a matter which has formally passed from legal existence").

II. THERE IS A POSSIBILTY THAT, FOLLOWING PROTRACTED FUTURE PROCEEDINGS, INCUMBENT OWNERS MAY SUCCEED IN REINSTATING THE RELEVANT TARIFF LANGUAGE.

Incumbent Owners have two avenues of appellate review that leave open the possibility, at some point in the future, that the tariff language interpreted in this appeal may be reinstated. First, Incumbent Owners may seek rehearing of *South*

Carolina before the Court or file a petition for a writ of *certiorari* with the Supreme Court on the right of first refusal issue. The effect of Order No. 1000 is not stayed, however, during the pendency of such proceedings. *See* section 313(c) of the Federal Power Act, 16 U.S.C. § 825*l*(c). Accordingly, any decision by this Court on the interpretation of the tariff language at hand would remain advisory unless and until Incumbent Owners prevailed on the right of first refusal issue on rehearing or on *certiorari*.

Second, in the Order No. 1000 compliance proceeding, Incumbent Owners have argued that the tariff language supporting their claimed right of first refusal is protected by the *Mobile-Sierra* presumption of reasonableness, which would require that the Commission find it contrary to the public interest before ordering it to be removed. The Compliance Order found that the *Mobile-Sierra* doctrine did not apply to the PJM tariff provisions at issue in this appeal. Compliance Order P 185. Because the Commission found that the *Mobile-Sierra* presumption does not protect the provisions in question, the Commission did not reach the issue of whether it met the public interest standard in ordering the tariff revisions. *Id*. P 191. Petitioner Public Service Electric and Gas Company has appealed the Commission's Compliance orders. *See Pub. Serv. Electric & Gas Co. v. FERC*, No. 14-1136 (D.C. Cir.) (petition filed July 14, 2014).

Again, the Commission's orders on compliance rejecting the applicability of *Mobile-Sierra* remain in effect during the pendency of rehearing requests before the Commission and any appellate proceedings. Even if Incumbent Owners succeeded in overturning the compliance orders' *Mobile-Sierra* findings on appeal, the matter would have to be remanded to the Commission for a determination, in the first instance, of whether modification of the tariff was required in the public interest. Because in the compliance orders the Commission determined that the *Mobile-Sierra* presumption does not apply to these tariff provisions, it did not reach the issue of whether modification was required in the public interest. Compliance Order P 191.

Accordingly, the possibility remains, however slight, that Incumbent Owners may -- either by prevailing on rehearing before the Court or on *certiorari* of *South Carolina*, or by prevailing on both appeal of the PJM compliance orders and in a subsequent proceeding on the application of the public interest standard -- resurrect the tariff language on which they rely in this proceeding. Either avenue is likely to be protracted, even if ultimately successful, assuming at that point that PJM and its stakeholders even want to reinstate the relevant language.

III. UNDER THESE CIRCUMSTANCES, THE COURT SHOULD FIND THIS APPEAL UNRIPE.

Although any decision at this time interpreting the now-superseded PJM tariff language would be advisory, the possibility that the tariff language could be

reinstated in the future suggests that this appeal is not currently moot. *See, e.g.*, *Friends of Keeseville, Inc. v. FERC*, 859 F.2d 230, 233 (D.C. Cir. 1988) ("We cannot say that the dispute concerning this order is moot, since there is at least the possibility that this order will affect the petitioner's interests at some point in the future.")

In such circumstances, "[t]he legal concept of ripeness provides a framework for [the Court's] resolution." *Keeseville*, 859 F.2d at 234. Like mootness, "[t]he ripeness inquiry springs from the Article III case or controversy requirement that prohibits courts from issuing advisory opinions on speculative claims." *Marcum v. Salazar*, 694 F.3d 123, 129 (D.C. Cir. 2012). Also like mootness, "'ripeness is peculiarly a question of timing,'" and "'it is the situation now rather than the situation at the time of the [decision under review] that must govern.'" *Anderson v. Green*, 513 U.S. 557, 559 (1995) (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974)). Incumbent Owners bear the burden of demonstrating the ripeness of their claims. *See, e.g., DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 298 (D.C. Cir. 1989) ("On the present record, after more than ample opportunity, plaintiff can point to nothing demonstrating even the remotest evidence of a controversy ripe for review on this issue.")

As a constitutional matter, "Article III does not allow a litigant to pursue a cause of action to recover for an injury that is not 'certainly impending.'" *Full*

Value Advisors, LLC v. SEC, 633 F.3d 1101, 1106 (D.C. Cir. 2011) (quoting *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999)). *See also Chlorine Institute, Inc. v. Federal R.R. Admin.*, 718 F.3d 922, 927 (D.C. Cir. 2013) (same). Likewise, as a prudential matter, this Court has repeatedly concluded that a "'claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Atl. States Legal Found., Inc. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003) (quoting *Tex. v. United States*, 523 U.S. 296, 300 (1998)). *See also In re Aiken Cnty.*, 645 F.3d 428, 434 (D.C. Cir. 2011) (same). Because the petitioner will suffer no injury until (and unless) the contingent future event occurs, there is no harm to the petitioner from judicial delay in decision. *Keeseville*, 859 F.2d at 237 (FERC's orders "exert no significant present impact on the petitioner's rights and obligations"); *Atl. States*, 325 F.3d at 285 (finding no impact on petitioners in the interim). Similarly, here, unless and until Incumbent Owners succeed in reinstating the tariff language at issue in this appeal, Incumbent Owners cannot be harmed in the interim by the challenged Commission orders because no non-incumbent development can occur pursuant to the now-superseded tariff language interpreted in those orders.

In similar circumstances, the Court has held appeals in abeyance until future events occur that may moot the appeal. *See, e.g.*, *Devia v. NRC*, 492 F.3d 421, 426 (D.C. Cir. 2007) (holding appeal of NRC orders in abeyance pending review of a

BIA order that, if upheld, could moot the appeal); *CTIA-The Wireless Ass'n v. FCC*, 530 F.3d 984, 987 (D.C. Cir. 2008) (holding appeal of FCC rule in abeyance pending OMB action that may moot the appeal). Here, however, this case has already been held in abeyance for eight months, and any further abeyance pending completion of any additional appellate review of *South Carolina*, and appellate review of the Commission's *Mobile-Sierra* determinations, would likely be prolonged.

In other cases, this Court has dismissed petitions for review that are unripe. *See, e.g., Aiken Cnty.*, 645 F.3d at 435, 438 (dismissing as unripe challenges to attempts by the Department of Energy to withdraw a construction license application, where two ongoing NRC administrative proceedings had the potential to moot petitioners' claim); *Keeseville*, 859 F.2d at 233, 237 (dismissing as unripe an appeal of FERC orders rejecting a municipal preference for a permit application because the order had no current legal effect where FERC subsequently cancelled the competitors' permit, but petitioner may be injured in a future application for the same permit by the preference denial); *Atl. States*, 325 F.3d at 284, 286 (dismissing as unripe challenges to EPA regulations due to pending state proceedings that may modify the regulations and uncertainty as to what facilities might be constructed under the regulations). In light of the expected lengthy abeyance that would be required here, given the likely protracted nature of the

proceedings that will have to be concluded before the challenged tariff language could be reinstated, the Commission respectfully suggests that this petition for review should be dismissed.

If the Court does not choose to dismiss Incumbent Owners' appeal as unripe, the Commission submits that this may be an appropriate situation to employ the Court's administrative termination procedures. As this Court has held, "an administrative termination allows the court to clear its statistical docket of older cases in which no activity before the court is expected in the near future. It also relieves the court of the need to monitor the status of such cases and the parties of the responsibility to submit periodic reports. No mandate of the court issues in connection with an administrative termination." *Potter Twp. Hydroelectric Auth. v. FERC*, No. 00-1333 Order (D.C. Cir. Jan. 8, 2010). *See also, e.g., Am. Forest & Paper Ass'n v. EPA*, No. 89-1428, 1995 WL 311743 (D.C. Cir. Apr. 24, 1995); *Santamaria-Climaco v. INS*, No. 89-1235, 1997 WL 634565 (D.C. Cir. Sept. 17, 1997).

Accordingly, because the tariff language interpreted in the challenged orders has been replaced, without resulting in the approval of any non-incumbent development, any decision by this Court at this time on the tariff interpretation would be a prohibited advisory opinion. As a result, the Court should now dismiss,

as unripe, or otherwise terminate, appellate review of Commission action on now-superseded tariff language.

CONCLUSION

For the foregoing reasons, the Commission respectfully submits that this appeal, due to intervening circumstances, has become unripe for review, and the Commission respectfully requests that the Court dismiss (or otherwise terminate) the appeal.

Respectfully submitted,

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September 15, 2014

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), and this Court's order of January 15, 2014 ordering Supplemental Briefs of no more than 20 pages, I hereby certify that this brief contains 19 pages, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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D.C. Cir. No. 12-1382

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 15th day of September 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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