

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

New Jersey Division of Rate Counsel, <i>et al.</i>	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 20-1059
	)	
Federal Energy Regulatory Commission	)	
	)	
Respondent.	)	
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National Rural Electric Cooperative Association	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 20-1095
	)	
Federal Energy Regulatory Commission	)	
	)	
Respondent.	)	(CONSOLIDATED)
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**REPLY IN SUPPORT OF RESPONDENT’S MOTION TO DISMISS  
OR, ALTERNATIVELY, FOR ABEYANCE**

On February 28, 2020 and March 27, 2020, Petitioners in D.C. Cir. Nos. 20-1059 and 20-1095, respectively, filed petitions for review of the Commission’s December 19, 2019 Order, *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239, while requests for agency rehearing of that order were pending. Because those petitions are incurably premature under the Federal Power Act, 16

U.S.C. § 825l(b), and this Court’s case law, the Court should grant the Commission’s April 14, 2020 motion to dismiss those petitions. Alternatively, the Commission requests that the Court hold the petitions in abeyance. In either event, the Court should stay the deadline for the filing of the certified index to the record until after this Motion is resolved.

Petitioners’ April 24, 2020 filings opposing the Commission’s motion to dismiss do not dispute that, as here, “[a] request for administrative reconsideration renders an agency’s otherwise final action non-final with respect to the requesting party. [The Court’s] cases make clear that a petition seeking review of such a non-final action is not only premature but incurably so . . . .” *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002). Nor do Petitioners rebut the Federal Power Act’s plain statement that the Court’s jurisdiction attaches to a petition for review only “*after the order of the Commission upon application for rehearing.*” 16 U.S.C. § 825l(b) (emphasis added). Accordingly, the petitions in Nos. 20-1059 and 20-1095 should be dismissed.

Dismissal is particularly appropriate because the basis for filing a premature petition no longer exists. On April 16, 2020, the Commission issued two orders on rehearing and clarification of the December 19 Order and a prior, related, June 29, 2018 Order, *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236. *See Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,034 (Apr. 16, 2020); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035 (Apr. 16,

2020). Petitioner New Jersey Division of Rate Counsel then filed a revised petition for review of both the December 19 and one of the April 16 Orders on April 23, 2020 (DC Cir. No. 20-1135). Thus, New Jersey now has two petitions pending before the Court challenging the December 19 Order. Besides being duplicative of its petition in No. 20-1135, New Jersey’s petition challenging the December 19 Order only remains premature: subsequent agency action on rehearing cannot cure an “*incurably*” premature petition. *See Clifton Power*, 294 F.3d at 110 (emphasis added). Nor would dismissal prejudice Petitioner National Rural Electric Cooperative Association or any other appropriate party, which have until June 15, 2020, 60 days after the April 16 Orders, to file their own petitions for review. *See* 16 U.S.C. § 825l(b).

Numerous entities have now filed petitions for judicial review of the December 19 and April 16 Orders in the D.C. Circuit (Nos. 20-1129, 20-1130, 20-1131, 20-1133, 20-1135, and 20-1139) and the Seventh Circuit (No. 20-1645), and the Commission will be referring those petitions to the Judicial Panel on Multidistrict Litigation for random venue selection under the procedures of 28 U.S.C. § 2112(a)(1)–(3).

\* \* \*

The Court should dismiss the petitions in Nos. 20-1059 and 20-1095 to avoid duplicative petitions seeking review of the December 19 Order, and to preserve the integrity of this Court’s jurisprudence rejecting attempts to prematurely invoke its

jurisdiction. In the alternative, the Commission requests that the petitions in Nos. 20-1059 and 20-1095 be held in abeyance, to allow for coordination with other, more recent petitions for review of the December 19 and April 16 Orders. (Additional petitions for review (D.C. Cir. Nos. 20-1118, 20-1120, 20-1125 and 20-1126) of just the non-final December 19 Order were filed shortly before or after the April 14 motion to dismiss.)

In any event, the Court should stay the deadline for filing the certified record index until after resolution of this Motion and to allow for coordination of related petitions.

Respectfully submitted,

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Solicitor

*/s/ Jared B. Fish*

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May 1, 2020

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and Circuit Rule 32(e), I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 658 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in Times LT Std 14-point font using Microsoft Word 365.

*/s/ Jared B. Fish* \_\_\_\_\_  
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May 1, 2020

***New Jersey Division of Rate Counsel, et al. v. FERC***  
**D.C. Cir. Nos. 20-1059, 20-1095 (consolidated)**

**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 1st day of May, 2020, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

*/s/ Jared B. Fish* \_\_\_\_\_  
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