Nos. 20-35146/20-35144

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANKLIN ENERGY STORAGE ONE, LLC; FRANKLIN ENERGY STORAGE TWO, LLC; FRANKLIN ENERGY STORAGE THREE, LLC; FRANKLIN ENERGY STORAGE FOUR, LLC,

Plaintiffs - Appellees,
v.

PAUL KJELLANDER, in his official capacity as Commissioner of the Idaho Public Utilities Commission; KRISTINE RAPER, in her official capacity as Commissioner of the
Idaho Public Utilities Commission; ERIC ANDERSON, in his official capacity as Commissioner of the Idaho Public Utilities Commission,

Defendants - Appellants.

and

IDAHO POWER COMPANY,

Defendant-Intervenor-Appellant.

On Appeal from the United States District Court
for the District of Idaho
No. 1:18-cv-00236-REB

APPELLANTS' JOINT UNOPPOSED MOTION TO DISMISS APPEALS
AS MOOT AND REMAND TO DISTRICT COURT WITH INSTRUCTIONS TO
VACATE ITS ORDER AND DISMISS THE CASE

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INTRODUCTION

All parties agree this dispute recently became moot when the Plaintiffs-Appellees Franklin Energy Storage One, LLC, Franklin Energy Storage Two, LLC, Franklin Energy Storage Three, LLC, and Franklin Energy Storage Four, LLC (collectively, "Franklin Energy") voluntarily canceled the energy storage facility certifications that were the subject of the district court's order granting declaratory and injunctive relief against Defendants-Appellants Paul Kjellander, Kristine Raper, and Eric Anderson, in their official capacity as Commissioners of the Idaho Public Utilities Commission (collectively the "Idaho PUC"), and Defendant-Intervenor-Appellant Idaho Power Company ("Idaho Power"). Accordingly, this Court should dismiss the appeals of Idaho PUC and Idaho Power as moot and remand to the district court with instructions to vacate its final order and dismiss the case pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

OPPOSING COUNSEL DOES NOT OPPOSE THIS MOTION

Counsel for Franklin Energy has advised counsel for the Idaho PUC and counsel for Idaho Power that it does not oppose this motion.

REQUEST TO STAY BRIEFING SCHEDULE

Because this motion requests dismissal of the appeals, the parties ask that the briefing schedule be stayed pending the Court's disposition of this motion per Circuit Rule 27.11.

BACKGROUND

Idaho PUC and Idaho Power appealed a district court decision and order granting summary judgment to Franklin Energy. Franklin Energy alleged the Idaho PUC usurped the jurisdiction of the Federal Energy Regulatory Commission ("FERC") and violated the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 2601 *et seq.* ("PURPA"), when the Idaho PUC issued Order Nos. 33785 and 33858. In Order No. 33785, the Idaho PUC granted Idaho Power's petition for a declaratory order regarding proper contract terms, conditions, and avoided cost pricing for energy storage facilities (Dkt. 4-6). The Idaho PUC determined that Franklin Energy's energy storage qualifying facilities ("QFs") were entitled to the same contract terms and rates as solar QFs because Franklin Energy's energy storage QFs would primarily store solar energy. In Order No. 33858, the Idaho PUC denied Franklin Energy's motion to reconsider Order No. 33785 (Dkt. 4-7).

Upon receiving the Idaho PUC's orders, Franklin Energy asked FERC to bring a 16 U.S.C. § 824a-3(h)(2)(B) enforcement action against the Idaho PUC in the district court.[1] FERC declined and issued a "Notice of Intent Not to Act." Franklin Energy then filed their own enforcement action (Dkts. 1, 2).

On February 7, 2019, the district court heard the parties' motions to dismiss and cross-motions for summary judgment (Dkt. 60). The court then took the parties' motions under advisement.

On August 6, 2019, while the court was still considering the parties' motions, the four Franklin Energy entities notified the court they had merged into a new entity, Franklin Solar, LLC ("Franklin Solar"), which in turn was owned by Alternative Power Development, Northwest, LLC ("APD") (Dkt. 61). On January 17, 2020, the district court issued a memorandum decision granting partial summary judgment to the Franklin Energy entities and denying the Idaho PUC's and Idaho Power's motions to dismiss and

[1] This provision provides a QF the right to petition FERC to enforce its rules implementing PURPA against a state regulatory authority such as the Idaho PUC. If FERC chooses not to initiate an enforcement action against the state regulatory authority, the petitioner may bring an action in the appropriate district court to require the state regulatory authority to comply with FERC regulations implementing PURPA. FERC may intervene as a matter of right in such an action.

motions for summary judgment (Dkt. 62). The district court entered its judgment on January 24, 2020 (Dkt. 63).

About three weeks later, on February 13, 2020, APD sold Franklin Solar—the entity into whom the four Franklin Energy entities had merged and who was, therefore, the prevailing party below—to Duke Energy Renewables, Solar, LLC ("Duke Energy") (Dkts. 76-1 p. 3, 76-2 ¶ 2). At this point, the ownership of Franklin Energy's four energy storage QFs, and the prevailing party below and real party in interest as the plaintiff-appellee in these appeals, had changed as follows:

Franklin Energy Storage I, LLC
Franklin Energy Storage II, LLC
Franklin Energy Storage III, LLC
Franklin Energy Storage IV, LLC
→ Franklin Solar, LLC → Duke Energy

Duke Energy bought Franklin Solar intending to develop it as a single 100 megawatt ("MW") solar facility instead of as four separate energy storage QFs under PURPA as originally contemplated by Franklin Energy (Dkts. 76-1, p.3, 76-2, ¶ 3). Duke Energy then canceled the QF self-certifications that Franklin Energy had filed with the FERC (Dkts. 76-1, p.5, 76-2, ¶ 6).

On February 14, 2020, the day after Duke Energy bought the Franklin Energy/Franklin Solar energy storage facilities, the Idaho PUC and Idaho Power filed notices of appeal of the district court's decision (Dkts. 67, 66).

On March 31, 2020, Duke Energy filed with the district court an "Unopposed Motion for Vacatur Due to Mootness Pursuant to Fed. R. Civ. P. 60(b), and Request for Indicative Ruling Pursuant to Fed. R. Civ. P. 62.1" (Dkt. 76) as well as supporting affidavits (Dkts. 76-2, 76-3). The Idaho PUC and Idaho Power filed notices of non-opposition to the motion (Dkts. 78, 79).

The district court found Duke Energy's vacatur motion raised a substantial issue under Rule 62.1(a)(3) but declined to state it would grant vacatur due to mootness (Dkt. 81, p.7). Instead, the court relayed that "the request for a finding of mootness and vacatur is best raised with the court of appeals because the events alleged to have resulted in mootness occurred after this Court issued its decision and judgment and because the current record leaves questions about whether this case presents an 'extraordinary circumstance' justifying vacatur (Dkt. 81, p.7)." On May 15, 2020, Duke Energy filed a Notice Pursuant to Federal Rule of Appellate Procedure 12.1, notifying this Court of the district court's finding that the motion raised a substantial issue.

Given the lack of a live controversy, Idaho PUC and Idaho Power now bring this motion under Federal Rules of Appellate Procedure 12.1 and 27 to dismiss these appeals as moot and remand to the district court with instructions to vacate its order and dismiss the case.

ARGUMENT

This case became moot due to the voluntary actions of the prevailing party before the losing parties' appeals could be heard. This Court therefore should follow the "established practice" set forth in the Supreme Court's decision in *Munsingwear* by dismissing the appeals, "vacat[ing] the judgment below, and remand[ing] with a direction to dismiss." 340 U.S. at 38-40.

The district court found that the Idaho PUC violated PURPA by determining that the Franklin Energy energy storage facilities were eligible for the same contract terms and avoided cost rates as solar QFs. Because Duke Energy has rescinded its self-certifications as energy storage QFs and no longer intends to develop the project under the statutorily created rights for small power developers established by PURPA, there is no longer a live case or controversy. Because this action was mooted by the unilateral actions of Duke Energy—the prevailing party below—this Court should vacate the lower court's decision and remand the case with instructions to dismiss it. Vacating the district court's opinion would not prejudice the rights of any party and would clear the path for future litigation. These arguments are further explained below.

I. Background on Rights and Requirements Established by PURPA for QFs.

PURPA is a federal statute that is implemented by FERC and the states. Congress tasked FERC with prescribing "such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity[.]" 16 U.S.C. § 824a-3(a). Congress tasked the states with implementing the FERC regulations. 16 U.S.C. § 824a-3(f). PURPA and the FERC regulations provide several guarantees to QFs. A small power producer becomes a QF by complying with the energy source requirements and size requirements established by PURPA and FERC regulations and by filing Form 556 with FERC. *See* 18 C.F.R. § 292.204 (defining the maximum size of the QF and energy source requirements); 18 C.F.R. § 292.207 (establishing procedures for a small power producer to self-certify with FERC that the small power producer meets the regulatory requirements for being a QF).

Once a facility is a QF, the electric utility must purchase any energy made available by the QF. 18 C.F.R. § 292.303. The electric utility must purchase the QF's output at "avoided cost rates" that are established by the state regulatory authority pursuant to federal requirements that the rates be just, reasonable, in the public interest, non-discriminatory, and not above

the utility's incremental costs. *See* 18 C.F.R. § 292.304. PURPA thus creates protections and guarantees for QFs that are not available to other independent power producers but also imposes restrictions and limitations on QFs.

II. This Case Is Moot Because There Is No Longer a Live Case or Controversy.

This Court should dismiss these appeals because it cannot "give the appellant[s] any effective relief in the event that it decides the matter on the merits in [their] favor." *Serv. E'ees Int'l Union of Healthcare Workers*, 598 F.3d 1061, 1068 (9th Cir. 2010).

Subject matter jurisdiction concerns "the courts' statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). "Jurisdiction is at issue in all stages of a case." *Moe v. U.S.*, 326 F.3d 1065, 1070 (9th Cir. 2003). The federal judiciary is limited to deciding "cases" or "controversies." U.S. Constitution Art. III, s. 2, cl. 1. "It is an inexorable command of the United States Constitution that the federal courts confine themselves to deciding actual cases and controversies." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128 (9th Cir. 2005) (en banc). "Where this condition is not met, the case has become moot, and its resolution is no longer within our constitutional

purview." *Id.* at 1129. "[I]t is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing." *Burke v. Barnes,* 479 U.S. 361, 363 (1987). The "central question" is "whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *West v. Sec'y of the Dep't of Transp.*, 206 F.3d 920, 925 n. 4 (9th Cir. 2000). "The Supreme Court has repeatedly held that the requisite case or controversy is absent where a plaintiff no longer wishes—or is no longer able—to engage in the activity concerning which it is seeking declaratory relief." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc).

This matter began when Idaho Power petitioned the Idaho PUC for a declaratory order clarifying the terms and avoided cost rates available to Franklin Energy Storage One through Four (and one other energy storage QF that is not party to these appeals). The Idaho PUC's resulting Order Nos. 33785 and 33858 were the subject of the enforcement action Franklin Energy subsequently filed in the district court.

The district court granted summary judgment to the Franklin Energy entities. Franklin Solar could have benefited from the district court's opinion by exercising its rights as declared by the district court in regard to its energy

storage QFs. Instead Franklin Solar was sold to Duke Energy, a company that has no interest in pursuing the four separate energy storage QFs under PURPA and has instead made the business decision to develop the facility as a single 100 MW solar facility (Dkts. 76-1, p.5, 76-2, ¶ 6). Because Duke Energy has revoked its FERC Form 556 self-certifications, Duke Energy is no longer able or willing to engage in the activity for which declaratory relief was sought.

Nor do these appeals fall within the exceptions to the mootness doctrine for voluntary cessation of a challenged practice or for disputes that are capable of repetition yet evading review. *See Akina v. Hawaii*, 835 F.3d 1003, 1010–11 (9th Cir. 2016). Both exceptions turn on the likelihood that the behavior at issue could recur. But here, Duke Energy has made it clear that it has no intention of developing the energy storage QFs. Accordingly, "[a]ny opinion by this Court at this juncture would amount to an impermissible advisory opinion." *Id.* (citing *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us.")).

III. Because the Case Is Moot, This Court Should Vacate the District Court's Decision and Remand with Instructions to Dismiss.

This Court should vacate the district court's decision and remand to the district court with instructions to dismiss. Because this case is moot for lack of a justiciable controversy, it is no longer equitable to hold the Idaho PUC and Idaho Power to the district court's decision. *See Munsingwear*, 340 U.S. at 40 (when vacatur is granted due to mootness, "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.").

Vacatur is an equitable remedy that requires the party seeking relief from the lower court's opinion to show it is entitled to that relief. "It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994). "From the beginning we have disposed of moot cases in the manner "most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot.'" *Id.* at 25 (citing *U.S. v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft,* 239 U.S. 466, 478 (1916)).

Despite being an "extraordinary remedy," the appellate courts' longstanding practice is to vacate a lower court's opinion that has become moot before the appeals process is complete, subject to a few notable exceptions that do not apply here. "The established practice of the Court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. "Under the '*Munsingwear* rule,' vacatur is generally 'automatic' in the Ninth Circuit when a case becomes moot on appeal." *NASD Dispute Resolution, Inc. v. Judicial Council of State of Calif.*, 488 F.3d 1065, 1070 (9th Cir. 2007).

Exceptions to the established practice of vacatur for mootness stem from the appellant forfeiting their right to appeal either through voluntary settlement or through failure to exercise their right to appeal, none of which are present in this case. *See Munsingwear*, 340 U.S. at 36; *Bonner Mall*, 513 U.S. at 18. The courts have found it inappropriate to grant vacatur for mootness where the appellant has slept on their rights or voluntarily forfeited their rights. Mootness in this case is the result of the unilateral actions of the party prevailing below and therefore none of the exceptions to the established practice of vacatur for mootness apply.

The prevailing party's unilateral actions in mooting this case make the case especially appropriate to vacate. "The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Bonner Mall*, 513 U.S. at 24. When mootness is attributable to the unilateral actions of the prevailing party below, it is a "clear example" of when vacatur is in order. *Azar v. Garza*, 138 S.Ct. 1790, 1792 (2018) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997) (vacatur is appropriate "when mootness occurs through happenstance—circumstances not attributable to the parties—or, relevant here, the 'unilateral action of the party who prevailed in the lower court.'") "When mootness is not caused by actions of the party seeking vacatur, we typically will vacate the district court's order." *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025, 1032 (9th Cir. 2018) (citation omitted).

Here, the Idaho PUC and Idaho Power are the parties seeking relief from the judgment below. Idaho PUC and Idaho Power, however, did nothing to moot the case. Rather, the mootness was caused by the prevailing party's actions alone. The established practice of vacatur for mootness caused by the prevailing party is thus appropriate here. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of

circumstance, ought not in fairness be forced to acquiesce in the judgment." *Bonner Mall*, 513 U.S. at 25. Vacatur "clears the path for future relitigation of the issues between parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. "'It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.'" *Arizonans for Official English*, 520 U.S. at 75 (formatting omitted). Granting vacatur in this case would clear the path for future relitigation without prejudicing any of the parties and without violating the constitutional requirement of a live case or controversy.

IV. It Is Appropriate for this Court to Decide Subject Matter Jurisdiction Is Lacking and to Vacate the District Court's Decision.

Federal Rule of Civil Procedure 62.1 provides parties the opportunity to file a motion in district court, after a notice of appeal has been filed and therefore the district court's jurisdiction has been divested, requesting an indicative ruling on a motion for relief that is barred by a pending appeal. Plaintiffs-Appellees filed such motion for an indicative ruling with the district court (Dkt. 76). Federal Rule of Civil Procedure 62.1(a) provides that the district court may (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals

remands for that purpose or that the motion raises a substantial issue." The district court declined to state that it would grant the motion if it were before it but did state that the motion raised a substantial issue (Dkt. 81, p.7). Federal Rule of Appellate Procedure 12.1 governs remand after an indicative ruling by the district court on a motion for relief that is barred by a pending appeal. "If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. . . ." Fed. R. App. P. 12.1(b).

It is appropriate for this Court to vacate the district court's opinion and remand with instructions to dismiss, rather than simply remand the case for the district court to make the determination in the first instance. The district court stated that arguments regarding mootness are appropriately made to the circuit court in this matter. "[T]he request for a finding of mootness and vacatur is best raised with the court of appeals because the events alleged to have resulted in mootness occurred after this Court issued its decision and judgment and because the current record leaves questions about whether this case presents an 'extraordinary circumstance' justifying vacatur." (Dkt. 81, p.7). The district court also observed "that none of the cases relied upon by Plaintiffs [in their motion for indicative ruling] involves a district court

vacating its own judgment due to mootness that arises while an appeal is pending and without the appellate court weighing in." (Dkt. 81, p.6). Finally, the district court also stated, "Obviously, if the circuit court rules that jurisdiction is lacking because of mootness and remands the matter back to this Court for further action consistent with its order of remand, then this Court will comply with that directive." (Dkt. 81, p.7).

CONCLUSION

This is a clear case where vacatur for mootness is appropriate because the lack of a live controversy is the result of the unilateral actions of the party prevailing below. This Court should therefore determine that it does not have subject matter jurisdiction to hear the merits of this case, vacate the district court's opinion, and remand with instructions to dismiss.

DATED this 25th day of June 2020.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

9th Cir. Case Number(s) 20-35146/20-35144

I am one of the attorneys for the Idaho Public Utilities Commission.

This brief contains **3,387 words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Signature *s/Edward J. Jewell* **Date** June 25, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2020, I caused a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following persons:

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