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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BEAR GULCH SOLAR, LLC; et al., Plaintiffs-Appellants, v. MONTANA PUBLIC SERVICE COMMISSION; et al., Defendants-Appellees.	No. 18-36061 D.C. No. 6:18-cv-00006-CCL MEMORANDUM*

BEAR GULCH SOLAR, LLC; et al., Plaintiffs-Appellees, v. MONTANA PUBLIC SERVICE COMMISSION; et al., Defendants-Appellants.	No. 18-36095 D.C. No. 6:18-cv-00006-CCL

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted May 17, 2019
Portland, Oregon

Before: N.R. SMITH and WATFORD, Circuit Judges, and SELNA,[**] District Judge.

Plaintiffs[1] and the Montana Public Service Commission and its Commissioners (MPSC) both appeal the district court's decision granting in part and denying in part their cross-motions for summary judgment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and reverse in part.[2]

1. The district court erred in concluding it could reach the merits of Plaintiffs' request for declaratory relief.

"A statutory change . . . is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994). That is especially true when the applicable law is amended before a court

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[**] The Honorable James V. Selna, United States District Judge for the Central District of California, sitting by designation.

[1]Plaintiffs are Bear Gulch Solar, LLC; Canyon Creek Solar, LLC; Couch Solar, LLC; Fox Farm Solar, LLC; Glass Solar, LLC; Malt Solar, LLC; Martin Solar, LLC; Middle Solar, LLC; River Solar, LLC; Sage Creek Solar, LLC; Sypes Canyon Solar, LLC; Valley View Solar, LLC; and Ulm Solar, LLC; and their parent company, Cypress Creek Renewables Development, LLC.

[2]We grant the parties' motions to take judicial notice. Dkt. Nos. 43, 52.

has ruled on the original law. *See Smith v. Univ. of Wash.*, 233 F.3d 1188, 1193–95 (9th Cir. 2000).

Here, prior to any decision from the district court, the MPSC enacted a regulation, Montana Administrative Rule 38.5.1909, that removed the allegedly unlawful portion of the MPSC's test for establishing a legally enforceable obligation (LEO). Significantly, Plaintiffs do not assert that Rule 38.5.1909 is unlawful. Thus, Plaintiffs' request for declaratory judgment regarding the MPSC's general LEO test is moot.

Although courts may decide a mooted issue if it is "capable of repetition but evading review," that rule "applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (citation omitted). Plaintiffs have failed to make such a showing. There is no evidence in the record that the MPSC intends to reimplement the allegedly improper LEO test. Plaintiffs have argued only that MPSC *may* return to that standard, based on MPSC's allegedly improper conduct towards the Plaintiffs and its defense of the prior LEO test in these and related proceedings. "Such a speculative possibility does not constitute a 'reasonable [showing].'" *W. Coast*

Seafood Processors Ass'n v. Nat. Res. Def. Council, Inc., 643 F.3d 701, 705 (9th Cir. 2011).

2. The district court did not err in declining to provide Plaintiffs their requested injunctive relief, as that relief is barred by the Eleventh Amendment.

The Eleventh Amendment declares that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This provision bars any lawsuit against the MPSC itself, and permits suit "against the individual commissioners in their official capacities" only if "the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citation, quotation marks, and alteration omitted).

Here, Plaintiffs have neither alleged an ongoing violation of federal law, nor sought relief properly characterized as prospective. The only non-mooted potential violation of federal law at issue is that, as of June 16, 2016—the date the more favorable pay rate for energy suppliers who had established a LEO (Prior Tariff) was suspended—the MPSC was utilizing a purportedly unlawful test for determining whether Plaintiffs established a LEO. As a result of that alleged

violation, Plaintiffs have been unable to contract to supply energy to Montana electric utility NorthWestern at the Prior Tariff rate. Indeed, as declared by Plaintiffs "the only reason [Plaintiffs] are unable to sell power prospectively at the [Prior Tariff] rate is Defendants' unlawful application of the [prior LEO] standard to the question of their eligibility for that Tariff."

That is not an ongoing violation, as the MPSC simply made a one-time determination that Plaintiffs—and those similarly situated—had not established a LEO. Plaintiffs' ongoing inability to contract with NorthWestern at their preferred rate is a "mere continuing impact from" that alleged past violation and is not a continuing violation of its own. *See Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir. 1982) (quoting *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 760 (9th Cir. 1980)).

Likewise, the relief requested by Plaintiffs is retroactive in nature. In their appellate brief, Plaintiffs request an injunction to prevent MPSC from "utilizing the unlawful [prior LEO] test to preclude [Plaintiffs] from contracting prospectively with NorthWestern under the [Prior Tariff]" and from "denying any [qualifying facility] the right to contract with NorthWestern prospectively under the [Prior Tariff] where the [qualifying facility] tendered a fully-negotiated,

executed [power purchase agreement] to NorthWestern on or before June 16, 2016."[3]

Although Plaintiffs ask that the Prior Tariff rate apply only prospectively, they are entitled to that rate only if we direct the MPSC commissioners to declare that Plaintiffs had established a LEO prior to June 16, 2016. *See* 18 C.F.R. § 292.304(d)(2)(i), (ii) (providing qualifying facilities with the option to sell their energy output at the applicable tariff rate existing either "at the time of delivery" or "*at the time the obligation is incurred*." (emphasis added)). As noted by the district court, this relief would require the state to "turn back the clock and re-write [its past decision] in such a way that each [qualifying facility] could benefit from the [Prior Tariff] rate," thus "imposing a burden on the [MPSC] to determine which

[3]We assume without deciding that Plaintiffs properly raised this requested relief below. However, we note that Plaintiffs requested two different forms of injunctive relief during the course of the district court proceedings, neither of which are the same as the relief requested before us. In their complaint, Plaintiffs requested "[p]ermanent injunctive relief directing [MPSC to] . . . adopt[] a standard for establishment of a [LEO] that is [lawful], and directing [MPSC] to allow any [qualifying facility] that satisfied that standard on or before June 16, 2016, . . . to contract with and sell their output to NorthWestern under the [Prior Tariff's] . . . rates of approximately $66/MWhr." On the other hand, in their motion for summary judgment, Plaintiffs asked the court to "declare that any [qualifying facility] that tendered a fully-negotiated . . . [power purchase agreement] to NorthWestern on or before June 16, 2016, established a LEO . . . and is entitled to contract with the utility under the [Prior Tariff's] terms." In their appellate brief, Plaintiffs expressly disclaimed the relief requested in the Complaint, and they do not reassert the precise relief requested in their summary judgment motion.

projects established [a] LEO on or before June 16, 2016 under [a] new standard and . . . ordering retroactive relief." Such retroactive relief is barred by the Eleventh Amendment. *See Verizon Md., Inc.*, 535 U.S. at 645.

The parties shall bear their own costs for this appeal.

AFFIRMED in part and REVERSED in part.

United States Court of Appeals for the Ninth Circuit

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95 Seventh Street
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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

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9th Cir. Case Number(s)

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The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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