Nos. 14-1597 & 14-1598 (Consolidated)

United States Court of Appeals

For the First Circuit

No. 14-1597

TOWN OF BARNSTABLE

Plaintiff - Appellant

HYANNIS MARINA, INC.; MARJON PRINT AND FRAME SHOP LTD.; THE KELLER COMPANY, INC.; ALLIANCE TO PROTECT NANTUCKET SOUND; SANDRA P. TAYLOR; JAMIE REGAN
Plaintiffs

v.

ANN BERWICK, in her official capacity as Chair of the Massachusetts Department of Public Utilities; JOLETTE A. WESTBROOK, in her official capacity as Commissioner of the Massachusetts Department of Public Utilities; KATE McKEEVER, in his official capacity as Commissioner of the Massachusetts Department of Public Utilities; MARK SYLVIA, in his official capacity as Commissioner of the Massachusetts Department of Energy Resources; CAPE WIND ASSOCIATES, LLC; NSTAR ELECTRIC COMPANY
Defendants - Appellees

No. 14-1598

HYANNIS MARINA, INC.; JAMIE REGAN; ALLIANCE TO PROTECT NANTUCKET SOUND
Plaintiffs - Appellants

MARJON PRINT AND FRAME SHOP LTD.; THE KELLER COMPANY, INC.; SANDRA P. TAYLOR; TOWN OF BARNSTABLE
Plaintiffs

v.

ANN BERWICK, in her official capacity as Chair of the Massachusetts Department of Public Utilities; JOLETTE A. WESTBROOK, in her official capacity as Commissioner of the Massachusetts Department of Public Utilities; KATE McKEEVER, in his official capacity as Commissioner of the Massachusetts Department of Public Utilities; MARK SYLVIA, in his official capacity as Commissioner of the Massachusetts Department of Energy Resources; CAPE WIND ASSOCIATES, LLC; NSTAR ELECTRIC COMPANY
Defendants-Appellees

(*Continued on inside cover*)

Appeal from the Final Judgment of the United States District Court for the District of Massachusetts, No. 1:14-cv-10148-RGS

BRIEF OF DEFENDANT-APPELLEE CAPE WIND ASSOCIATES, LLC IN RESPONSE TO THE COURT'S JANUARY 20, 2015 ORDER

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In accordance with the Court's Order of January 20, 2015, Defendant-Appellee Cape Wind Associates LLC ("Cape Wind") hereby files this brief to respond to the Court's inquiry. For the reasons described below, NSTAR's purported termination of the Power Purchase Agreement ("PPA") between NSTAR and Cape Wind is not effective and the PPA remains in effect. The case before this Court is therefore neither moot nor unripe. Accordingly, Cape Wind respectfully requests that the Court proceed to issue a decision in the case.

BACKGROUND

On January 7, 2015, Defendant-Appellee NSTAR informed the Court that on January 6, 2015, it terminated its PPA with Cape Wind "in accordance with the PPA's terms," and therefore the appeal may be moot. NSTAR, Letter to the Court (filed Jan. 7, 2015). On February 17, 2015, NSTAR further alleged to the Court that NSTAR terminated the PPA "due to Cape Wind's failure to meet Critical Milestones defined in the PPA." NSTAR, Letter to the Court (filed Feb. 17, 2015).

Uninvited, the Appellants seized upon NSTAR's notice to argue that the appeal is not moot, but rather it is not ripe. Appellants further urged the Court to vacate the decision below and direct the district court to dismiss the case. Alliance *et al.*, Letter to the Court (filed Jan. 8, 2015); Town of Barnstable, Letter to the Court (filed Jan. 9, 2015).

The Court has asked the parties for additional information regarding the effectiveness of NSTAR's termination and legal argument with respect to whether the appeal is moot or unripe. Cape Wind's response to the Court follows.

I. WHAT FURTHER STEPS, AND WHEN WILL THOSE STEPS BE TAKEN, IN ORDER FOR THE EFFECTIVENESS OF NSTAR'S ATTEMPT TO TERMINATE THE PPA BE DETERMINED?

On January 8 and 9, Cape Wind informed the Court that it "contests the lawfulness" and effect of NSTAR's attempted termination and that "the PPA is still in effect." Cape Wind, Letter to the Court (filed Jan. 8, 2015); Cape Wind, Letter to the Court (filed Jan. 9, 2015). Prior to NSTAR's attempt to terminate the PPA, by letter to NSTAR delivered on December 31, 2014, Cape Wind properly invoked the *force majeure* provision of the PPA, which by its terms suspended and extended the Critical Milestones NSTAR claims Cape Wind failed to meet ("such performance shall be excused and suspended so long as the circumstances that give rise to such inability exist, but for no longer period"). Power Purchase Agreement at 50, App. 325. NSTAR has never expressly countered Cape Wind's invocation of the *force majeure* clause. Nor has NSTAR engaged with Cape Wind in the mandatory dispute resolution process provided for in the PPA, which is a precondition to an effective termination. ("In the event of any dispute, controversy or claim between the Parties arising out of or relating to this Agreement (collectively, a 'Dispute'), the Parties shall attempt in the first instance to resolve

such Dispute through consultations between the parties . . . ." *Id.* at 51, App. 326.) Thus, the purported termination on January 6 was ineffective to terminate the Agreement. Cape Wind also provided NSTAR its written position and requested that NSTAR enter into dispute resolution, as it is required to do under the PPA. To date, the dispute resolution process has not taken place. Cape Wind remains hopeful that a consensual resolution of the parties' conflicting views on the purported termination can be achieved. Should that not be realized, however, then Cape Wind has reserved its rights to secure a definitive enforcement of its rights. The timing on that alternative has not yet been determined and could well be undetermined for some time.

II. IS THE APPEAL MOOT OR ARE THE CLAIMS UNRIPE?

A. The Appeal Is Not Moot

First, no party has yet argued that the appeal is moot. NSTAR's January 7, 2015 letter to this Court merely "respectfully suggest[ed] that the . . . appeals *may* be moot," but offered no authority or support for this suggestion. (Emphasis added.) By contrast, Appellants in their January 2015 letters to the Court did not argue that the appeal is moot; the Town of Barnstable instead argued it is unripe, and the Alliance expressly argued that the case was not moot. For the following reasons, Cape Wind agrees with Appellants that the appeal is not moot.

An appeal is only moot "if subsequent events ma[k]e it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (emphasis added). In *Concentrated Phosphate*, the court "ha[d] only appellees' own statement" that the contested behavior would not recur, which, "standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those" arguing mootness on appeal. *Id.* Likewise, here the only basis for arguing that the contract is no longer in force is NSTAR's "own statement," which is not enough to moot the appeal.

Notably, in *Chacon v. Hodgson*, 465 F.2d 307, 310 (7th Cir. 1972), the appellants had unsuccessfully sought both to declare a federal regulation invalid and to enjoin execution of a contract pursuant to that regulation. After the district court had dismissed the suit, the Department of Labor entered into a contract with a third party that incorporated the contested regulatory provisions. But the court "fail[ed] to see how this act moots plaintiffs' appeal since the action challenges the regulation which remains in effect." *Id.* "Accordingly, the controversy remains justiciable . . . ." *Id.* The same result holds here. Plaintiffs-Appellants sought below not only to void the contract between Cape Wind and NSTAR, but to void the DPU's approval of that contract. That approval "remains in effect," and therefore the controversy is justiciable. *See also Air Line Pilots Ass'n, Int'l v. UAL*

Corp., 897 F.2d 1394, 1398 (7th Cir. 1990) (challenge to collective bargaining agreement not moot despite passage of facial expiration date because, *inter alia*, "in fact the expiration clause is ambiguous"); *Ho Myung Moolsan Co. Ltd. v. Manitou Mineral Water, Inc.*, 316 Fed. App'x 40, 41 (2d Cir. 2009) ("The controversy over the meaning of the contract is . . . still a live one, and the appeal is not moot."). Here, Cape Wind and NSTAR dispute the effect of NSTAR's purported unilateral termination of the contract. Indeed, Cape Wind, for its part, has invoked the contract's *force majeure* clause and asserted that the contract is still in effect—*and NSTAR has not disputed this*. There is, at most, a "controversy over the meaning of" these provisions of the contract, "and the appeal is not moot."

B. <u>The Claims Are Ripe</u>

As a preliminary matter, the ripeness doctrine does not apply at this stage. "Ripeness is evaluated at the commencement of a lawsuit, and is not subsequently defeated through changed circumstances." *Flintkote Co. v. Gen. Accident Assur. Co.*, 410 F. Supp. 2d 875, 882 (N.D. Cal. 2006); *accord, e.g.*, *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1062 (D. Ariz. 2001); *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 814 (8th Cir. 2006) (ripeness "determined at the time the lawsuit was filed"). *Cf. Cmty. Hous. of Me. v. Martinez*, 146 F. Supp. 2d 36, 44 (D. Me. 2001) (agency's argument "that because [a] policy has been retracted it is not [final agency action] *conflates ripeness and mootness*. In doing

so it misses the real ripeness issue, which is whether [the agency action was final] *at the time the amended complaint was filed . . . .*") (emphases added) (citing *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33-34 (1st Cir. 1999)). There is no question that this litigation, however misguided, was ripe at the time Appellants filed and served their complaint.

But even assuming the doctrine applies, under the established test the claims here are ripe. "[W]here challenges are asserted to government actions and ripeness questions arise, a court must consider both fitness for review and hardship." *Verizon New England, Inc. v. Int'l Bhd. of Elec. Workers, Local No. 2322*, 651 F.3d 176, 188 (1st Cir. 2011) (internal quotation marks omitted). The action is fit for judicial review, and Cape Wind and Massachusetts, as discussed below, will suffer hardship if this Court does not conduct that review. Accordingly, the claims are ripe.[1]

"The fitness inquiry concerns questions of finality, definiteness, and the need for further factual development." *Id.* (internal quotation marks omitted).

[1] Cape Wind's position is that plaintiffs lack Article III standing because, *inter alia*, they have failed to allege injury in fact. As Cape Wind argued in its brief and in oral argument, this appeal can and should be dismissed on that basis. Cape Wind Brief at 23-28. Should this Court disagree, however, NSTAR's post-argument letter to the Court does not otherwise render plaintiffs' claims unripe. *See generally Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 89-90 (1st Cir. 2013) (distinguishing jurisdictional and prudential components of the ripeness test's "fitness" prong). *See also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (casting doubt on "the continuing vitality of the prudential ripeness doctrine").

Here, the challenged decision of the DPU to approve the contract is final and definite. Indeed, all relevant facts alleged in the complaint are couched in the past tense. *See id.* at 189 ("The actions have happened; it is the legal effects of these actions . . . that are at issue. There is little difficulty in finding an actual controversy if all of the acts that are alleged to create liability have already occurred. The court is then merely being asked, as in any litigation, to determine the legal consequences of past events. . . .") (internal quotation marks omitted). And because plaintiffs' claims present pure questions of law, no further factual development is required to resolve them. *Cf. Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 11 (1st Cir. 2012) ("[A] facial challenge to a statute presents a question of law that the district court could and should have resolved on the present record.").

On the second prong of the ripeness inquiry, "[r]ather than asking, negatively, whether denying relief would impose hardship, courts would do well to ask, in a more positive vein," whether resolution "would be of practical assistance in setting the underlying controversy to rest." *Verizon New England*, 651 F.3d at 188 (alteration in original) (internal quotation marks omitted). Here, resolving the claims would accomplish just that.

If Appellants were correct—which they are not—that the contract, and the DPU order approving the contract, are void as the product of illegal state action, no

court will need to expend judicial resources on any ancillary dispute regarding the validity of NSTAR's purported unilateral termination. And if Appellants are wrong—which they are—then the cloud of unconstitutionality will be lifted from Massachusetts' past actions, the contract, and the order approving it. The "underlying controversy" will be set "to rest." *See MIT v. Research, Dev. & Technical Emps. Union*, 980 F. Supp. 2d 8, 14 (D. Mass. 2013) ("Considering the history of this case, the Court is mindful that the [underlying] issue . . . is likely to arise again and this Court's decision in this case will hopefully aid judicial economy, clarify this particular issue, and thus help obviate similar disputes in the future. Thus, an actual controversy exists.") (following *Verizon*). The Alliance's decade-long history of using a continuing stream of litigation to stop the Cape Wind project is well known, *see generally Town of Barnstable, Mass. v. Berwick*, 17 F. Supp. 3d 113, 116-17 & n.8 (D. Mass. 2014), and is fairly characterized as "vexatious," *id.* at 124 n.28. Resolution of the claims here will "help obviate similar disputes" and prevent future courts from having to consider the claims all over again. Indeed, in its January 8, 2015 letter to the Court, the Alliance announces its intention to bring a future action "to litigate their claims and obtain appellate review." The underlying issue is not only likely, but virtually certain, to arise again. Accordingly, the claims are ripe for review and decision.

C. IF THE APPEAL IS MOOT OR THE CLAIMS ARE UNRIPE, HOW SHOULD THE COURT DISPOSE OF THE APPEAL?

The appeal is neither moot nor unripe. But should this Court for some reason conclude that the appeal is moot, "it must dismiss the appeal." *Barr v. Galvin*, 626 F.3d 99, 104 (1st Cir. 2010). Similarly, if the Court "conclude[s] that this appeal is unripe," it should "dismiss the appeal as premature." *United States v. Puerto Rico*, 642 F.3d 103, 104 (1st Cir. 2011).

Dismissal of the appeal, however, should not in any way result in disturbing the judgment below. Appellants' authorities in support of their request for vacatur of the district court's judgment, as presented in their January 2015 letters to the Court, miss the mark. In *Anderson v. Green*, 513 U.S. 557, 560 (1995), the Supreme Court directed vacatur of a *preliminary injunction*, where the *still-open* district court case faced an "impediment to dispositive adjudication." In *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 103 (1st Cir. 2013), this Court directed vacatur of summary judgment improperly entered on claims "that *the district court found* were unripe." (Emphasis added.) Here, Appellants do not suggest that the district court found or should have found their own claims to be unripe. And in *Ford v. Bender*, 768 F.3d 15, 29-30 (1st Cir. 2014), Mr. Ford had been released from custody, "render[ing] moot all of his claims for equitable relief." He therefore suffered no prejudice from vacatur of the equitable relief issued in his favor below. By contrast, Cape Wind will be

substantially prejudiced by vacatur here; if the judgment is vacated, as explained above, the Alliance has already informed the Court of its intention to relitigate the same issues, at considerable expense to Cape Wind and the Commonwealth.

Moreover, vacatur is an equitable remedy, and as such should not be granted if the party appealing the judgment was "responsible for making the case unreviewable." *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 451 (1st Cir. 2009). Here—as Cape Wind explained when it invoked the PPA's *force majeure* clause—it is precisely the Alliance and others' relentless pattern of litigation, their strategy of "delay, delay, delay," *see* Cape Wind Brief at 5 n.5; App. 569, which has resulted in the alleged failure to meet Critical Milestones. This is not an instance of "'mootness [that] occurs through happenstance—circumstances not attributable to the parties.'" *Diffenderfer*, 587 F.3d at 451 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)). It is instead the result of a calculated, years-long strategy of harassment and delay. The Court should not reward the Alliance for this strategy with vacatur of a district court judgment adverse to it. *Cf. In re Nexium Antitrust Litig.*, 778 F.3d 1, 2 (1st Cir. 2015) ("A party should not be able to manipulate the formation of precedent by dismissing [an appeal].") (alteration in original) (internal quotation marks omitted). "When the losing party's voluntary action causes the case to become moot, a presumption against vacatur applies, and vacatur is appropriate only when it would serve the public

interest." *Diffenderfer*, 587 F.3d at 451 (citing *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25-28 (1994)). It would not serve the public interest to allow the Alliance another bite at the apple, at the expense of wasting the time and resources the Commonwealth has already expended in successfully defeating these claims.

CONCLUSION

For the reasons set forth above, Cape Wind respectfully submits that this case is neither moot nor unripe. This Court should affirm the judgment of dismissal below.

March 20, 2015

Respectfully submitted,

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Certificate of Service

I hereby certify that on March 20, 2015, using the Appellate CM/ECF system, I electronically caused to be filed with the Clerk of Court for the U.S. Court of Appeals for the First Circuit the foregoing Brief. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

/s/ Geraldine E. Edens
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