

NM INDUSTRIAL ENERGY CONSUMERS V. NMPRC

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**NEW MEXICO INDUSTRIAL ENERGY
CONSUMERS, SOUTHWESTERN PUBLIC
SERVICE COMPANY and PUBLIC SERVICE
COMPANY OF NEW MEXICO,**

Appellants,

v.

**NEW MEXICO PUBLIC REGULATION
COMMISSION,**

Appellee,

and

**COALITION FOR CLEAN AFFORDABLE
ENERGY, WESTERN RESOURCE ADVOCATES
and NEW MEXICO ATTORNEY GENERAL,**

Real Parties in Interest.

NO. 33,244

SUPREME COURT OF NEW MEXICO

June 7, 2012, Filed

APPEAL FROM THE NEW MEXICO PUBLIC REGULATION COMMISSION

COUNSEL

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JUDGES

RICHARD C. BOSSON, Justice. WE CONCUR: PETRA JIMENEZ MAES, Chief Justice, PATRICIO M. SERNA, Justice, EDWARD L. CHÁVEZ, Justice, CHARLES W. DANIELS, Justice

AUTHOR: RICHARD C. BOSSON

DECISION

BOSSON, Justice.

Public Service Company of New Mexico (PNM) and a number of other parties appeal a decision of the New Mexico Public Regulation Commission (PRC) that rejected a renewable energy procurement plan (Plan) submitted by PNM for the year 2011. The Renewable Energy Act (Act), NMSA 1978, §§ 62-16-1 to -10 (2004, as amended through 2007), requires utilities like PNM to submit Plans annually for PRC approval.

PNM's proposed Plan included the prospective purchase of approximately \$5 million worth of renewable energy certificates (RECs) from third parties. Parties objecting to PNM's Plan noted that the proposed RECs were not directly bundled with actual renewable energy production and that some of the vintage RECs under consideration were nearing their expiration date. PNM and other parties responded that the Act permitted unbundled RECs and placed no age restriction on their purchase as long as they had not yet expired. After an evidentiary hearing, PRC rejected PNM's proposed Plan and directed PNM to submit a different plan that would include RECs of more recent vintage, directly bundled with renewable energy production.

While continuing its protest, PNM, in fact, complied with PRC directive. It abandoned the proposed unbundled RECs and purchased instead REC's of the kind recommended

by PRC, a purchase that has now been irrevocably consummated. There is no dispute about these resulting facts.

Because PNM complied with PRC's directive, its original Plan is now moot. Even if this Court were to rule, as the appealing parties ask us to do, that PRC violated the Act by rejecting PNM's proposed Plan for the reasons given, that ruling would not change the result in this case. The parties agree on this.

Notwithstanding this apparent mootness, PNM urges us to decide this appeal. PNM argues that the controversy over PRC's rejection—rooted in a dispute over the meaning of the Act—implicates a substantial public interest and is capable of repetition yet evading review. Though we acknowledge the substantial public interest in PRC's interpretation of its powers under the Act, we are not persuaded, on this record, that the issue posed by PNM is capable of repetition and, if so, will evade appellate review.

According to its counsel, PRC has not made a broad policy decision to reject unbundled RECs or RECs of older vintage, either in all cases or in most cases. PRC points out that it has accepted Plans other instances that do, in fact, include unbundled RECs. According to PRC, its decision to accept or modify proposed Plans will depend on the facts and circumstances of each case and each proponent. Thus, while the facts of the present case are theoretically capable of repetition, they are not inherently so.

In addition, it is not clear that other energy companies will necessarily include in their plans RECs that threaten to expire in less time than it takes to appeal a PRC decision, as may have happened to PNM in this instance. Thus, based on the present record, we cannot say with any assurance that this Court, as a practical matter, would be unable to grant effective appellate review of future PRC decisions rejecting or modifying proposed Plans, whether submitted by PNM or any other energy company.

We are compelled to conclude that the present appeal seeks an appellate decision from this Court that would be purely advisory. We decline to do so, preferring to await an appeal that presents an actual controversy. Because the issue is moot, we dismiss the appeal. See *In re Pernel*, 92 N.M. 490, 493, 590 P.2d 638, 641 (Ct. App. 1979) (“Under New Mexico decisions, an appeal will be dismissed if the question presented is moot; mootness includes the question of whether the appellate court can provide ‘actual relief.’”).

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

PATRICIO M. SERNA, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice