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1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **NEW MEXICO INDUSTRIAL ENERGY**
3 **CONSUMERS, SOUTHWESTERN PUBLIC**
4 **SERVICE COMPANY and PUBLIC SERVICE**
5 **COMPANY OF NEW MEXICO,**

6 Appellants,

7 v.

NO. 33,244

8 **NEW MEXICO PUBLIC REGULATION**
9 **COMMISSION,**

10 Appellee,

11 and

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

15 Real Parties in Interest.

16 **APPEAL FROM THE NEW MEXICO PUBLIC REGULATION**
17 **COMMISSION**

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18 **DECISION**

19 **BOSSON, Justice.**

20 Public Service Company of New Mexico (PNM) and a number of other

21 parties appeal a decision of the New Mexico Public Regulation Commission (PRC)

22 that rejected a renewable energy procurement plan (Plan) submitted by PNM for the

1 year 2011. The Renewable Energy Act (Act), NMSA 1978, §§ 62-16-1 to -10
2 (2004, as amended through 2007), requires utilities like PNM to submit Plans
3 annually for PRC approval.

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

14 While continuing its protest, PNM, in fact, complied with PRC directive. It
15 abandoned the proposed unbundled RECs and purchased instead REC's of the kind
16 recommended by PRC, a purchase that has now been irrevocably consummated.
17 There is no dispute about these resulting facts.

18 Because PNM complied with PRC's directive, its original Plan is now moot.

1 Even if this Court were to rule, as the appealing parties ask us to do, that PRC
2 violated the Act by rejecting PNM's proposed Plan for the reasons given, that ruling
3 would not change the result in this case. The parties agree on this.

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

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

18 In addition, it is not clear that other energy companies will necessarily include

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

7 We are compelled to conclude that the present appeal seeks an appellate
8 decision from this Court that would be purely advisory. We decline to do so,
9 preferring to await an appeal that presents an actual controversy. Because the issue
10 is moot, we dismiss the appeal. *See In re Pernell*, 92 N.M. 490, 493, 590 P.2d 638,
11 641 (Ct. App. 1979) (“Under New Mexico decisions, an appeal will be dismissed if
12 the question presented is moot; mootness includes the question of whether the
13 appellate court can provide ‘actual relief.’”).

14 **IT IS SO ORDERED.**

15 _____
16 **RICHARD C. BOSSON, Justice**

1 **WE CONCUR:**

2 _____
3 **PETRA JIMENEZ MAES, Chief Justice**

4 _____
5 **PATRICIO M. SERNA, Justice**

6 _____
7 **EDWARD L. CHÁVEZ, Justice**

8 _____
9 **CHARLES W. DANIELS, Justice**