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THIRD COURT OF APPEALS
AUSTIN, TEXAS
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Jeffrey D. Kyle
CLERK

NO. 03-10-00296-CV

In the Court of Appeals
for the Third Judicial District
Austin, Texas

FILED IN
3rd COURT OF APPEALS
AUSTIN, TEXAS
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JEFFREY D. KYLE
Clerk

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Appellant,

v.

PUBLIC CITIZEN, INC.,
Appellee,

On appeal from the 250th Judicial District Court
Travis County, Texas
Trial Court No. D-1-GN-09-003426

APPELLEE'S MOTION TO DISMISS AS MOOT

TO THE HONORABLE THIRD COURT OF APPEALS:

Appellee Public Citizen, Inc. moves the Court to dismiss this case as moot. As there is no live case or controversy, Appellee respectfully submits there is no subject matter jurisdiction. No ruling has been made on any aspect of the merits, only on a plea to the jurisdiction, but Appellee respectfully submits this Court should vacate (due to mootness) the district court's Order and dismiss the matter. Alternatively, Appellee asks this Court to remand for the limited purpose of Appellee voluntarily dismissing its own case. Appellee requested Appellant to agree to this motion, and Appellant stated it was opposed.

PROCEDURAL HISTORY

Public Citizen filed its Original Petition on October 6, 2009. C.R. 4. At that time there was neither federal nor State of Texas regulation over the emissions of carbon dioxide, the substance at issue in this suit. The district court denied TCEQ's Plea to the Jurisdiction on May 6, 2010. C.R. 130. The TCEQ appealed that order on May 26, 2010. C.R. 131. The parties filed their briefs between October 27 and December 20, 2010. This Court set the case for submission on January 29, 2013.

STANDARD OF REVIEW

A case becomes moot if a controversy ceases to exist among the parties at any stage of the legal proceedings, including the appeal. *In re Kellogg Brown & Root*, 166 S.W.3d 732, 737 (Tex. 2005); *Bd. of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424, 427 (Tex. 2002). A case becomes moot when a party seeks a judgment on some matter that, when rendered for any reason, cannot have any practical legal effect on a then-existing controversy. *Texas Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 846-47 (Tex. App.—Austin 2002, pet. denied); *Hutto Citizens Group v. County of Williamson & Waste Mgmt. of Tex.*, 2009 WL 2195582 (Tex. App.—Austin July 23, 2009). The mootness doctrine prevents courts from rendering advisory opinions, which are outside the jurisdiction conferred by Article II, Section 1 of the Texas constitution. See *Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000).

Whether a Court has subject-matter jurisdiction is a legal question reviewed de novo. *See Trulock v. City of Duncanville*, 277 S.W.3d 920, 923 (Tex. App.—Dallas 2009, no pet.); *City of Shoreacres v. Tex. Comm’n on Env’tl. Quality*, 166 S.W.3d 825, 830 (Tex. App.—Austin 2005, no pet.). The mootness doctrine implicates subject-matter jurisdiction. *City of Shoreacres*, 166 S.W.3d at 830; *Pantera Energy Co. v. R.R. Comm’n of Tex.*, 150 S.W.3d 466, 471 (Tex. App.—Austin 2004, no pet.). Because “[m]ootness is a matter that ordinarily arises after the rendition of the judgment or order appealed from,” a court may determine whether an appeal is moot by considering evidence of matters occurring subsequent to the trial court’s summary judgment order. *See Jackson v. Lubben*, 502 S.W.2d 860, 862 (Tex. Civ. App.—Dallas 1973, writ dism’d). Therefore a court may consider evidence outside of the record to determine jurisdiction. *See id.*; *Travis County v. Matthews*, 221 S.W.2d 347, 348 (Tex. Civ. App.—Austin 1949, no writ); *Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979) (per curiam) (stating “[a]ffidavits outside the record cannot be considered by the Court of Civil Appeals for any purpose other than determining its own jurisdiction”).

When an appeal is moot, the court must set aside the trial court’s judgment and dismiss the cause. *Tex. Foundries, Inc. v. Int’l Moulders & Foundry Workers’ Union*, 248 S.W.2d 460, 461 (1952) (stating that “when a case becomes moot on

appeal, all previous orders are set aside by the appellate court and the case is dismissed” and that merely dismissing the appeal “would have the effect of affirming the judgment of the lower court without considering any assignments of error thereto”); *Meeker v. Tarrant County College Dist.*, 317 S.W.3d 754, 759 (Tex. App.—Fort Worth 2010).

FACTS & ARGUMENTS

The U.S. Supreme Court held in 2007 that carbon dioxide and other greenhouse gases are covered by the Clean Air Act’s definition of air pollutants. *Massachusetts v. EPA*, 549 U.S. 497, 528–529 (2007). The Court said that U.S. Environmental Protection Agency (EPA) must decide whether such covered gases endanger public health or welfare, and whether emissions from new motor vehicles contribute to this air pollution. *Id.* at 533–535. EPA issued endangerment and contribution findings on December 15, 2009, which became effective January 14, 2010. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). In the following year, EPA issued a number of other rules relating to the federal regulation of greenhouse gases.¹ These EPA actions were identified during briefing, but at that

¹ *The Tailpipe Rule, Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, 75 Fed. Reg. 25,324 (May 7, 2010); *The Tailoring Rule, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010); *The Timing Rule, Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004 (Apr. 2, 2010).

time, these agency actions did not actually limit any emissions of carbon dioxide (or other greenhouse gases) nor require permits for their emissions.

After briefing was complete in this appeal, the EPA took further regulatory actions. On December 23, 2010, the EPA issued a series of rules that established the regulatory framework for permitting sources of certain gases, including carbon dioxide.² These EPA regulations eventually resulted in a level of federal regulation over carbon dioxide emissions from new sources in Texas. This federal regulation applies whether or not TCEQ decides to regulate carbon dioxide under Texas statutes.

The State of Texas, among others, brought challenges to these regulations. *Coal. for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102, 149 (D.C. Cir. 2012) (dismissing and denying consolidated petitions); 2012 WL 6621785, *2–3 (D.C. Cir.

² *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure To Submit State Implementation Plan Revisions Required for Greenhouse Gases*, 75 Fed. Reg. 81,874 (Dec. 29, 2010); *Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan*, 75 Fed. Reg. 82,246 (Dec. 30, 2010); *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program*, 75 Fed. Reg. 82,430 (Dec 30, 2010); *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program; Proposed Rule*, 75 Fed. Reg. 82,365 (Dec 30, 2010); *Action To Ensure Authority To Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 82,254 (Dec. 30, 2010); *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program; Final Rule*, 76 Fed. Reg. 25,178 (May 3, 2011); *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits*, 77 Fed. Reg. 41,051 (Jul. 12, 2012).

Dec. 20, 2012) (denying en banc review, “[c]ongress spoke clearly, EPA fulfilled its statutory responsibilities, and the panel, playing its limited role, gave effect to the statute's plain meaning.”) (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984)). These challenges all have been adjudicated, and the regulation of carbon dioxide, under federal law, remains in place. One case remains pending at the D.C. Circuit Court of Appeals, *Texas v. E.P.A.*, No. 10–1425 (and consolidated cases challenging the partial disapproval of the Texas PSD program and implementing a Federal Implementation Plan), which has been fully briefed and is awaiting decision.

In practice, all new sources of carbon dioxide that would be covered by any state regulation of carbon dioxide are also covered by the federal regulations. This is required by the Clean Air Act’s New Source Review and Title V provisions, 42 U.S.C §§ 7475(a), 7479(1), 7661 *et seq.*, and by the Supremacy Clause, U.S. Const., Art. VI, cl. 2. Such air emissions are now fully considered by the EPA, and subject to regulations, best available control technologies, specific permitted limits, and public participation.

Thus, all new carbon dioxide emitters in Texas are subject to substantial federal regulation. This case never has sought any result that would require TCEQ to adopt regulations more stringent than federal regulations. A ruling by this Court would therefore not have any practical effect, because the harms complained of have been alleviated and addressed by the actions of EPA. Public Citizen’s complaint

concerning carbon dioxide air permitting decisions for new power plants in Texas is therefore moot. Appellate courts are prohibited from deciding moot controversies or issuing abstract advisory opinions. TEX. CONST. art. II, § 1; *see also Camarena v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988); *Ass'n of Bus. v. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968).

CONCLUSION

Carbon dioxide emissions will be regulated in Texas by federal law so Public Citizen's challenge seeking carbon dioxide regulation in Texas no longer presents a live case or controversy, and any judgment by this Court would have no practical effect and would be an advisory opinion. For these reasons, Public Citizen respectfully requests that this case be dismissed, without prejudice, as moot and therefore lacking in subject matter jurisdiction. In the alternative, Public Citizen wishes to dismiss its claims without prejudice, either in this court or if this court remands for the limited purpose to dismiss its claims in the district court.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by /s/ Charles W. Irvine

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CERTIFICATE OF CONFERENCE

On January 29, 2013, a conference was held on the merits of this Motion. Counsel for Appellant represented that it was opposed to the relief requested by the foregoing Motion.

/s/ Charles W. Irvine
Charles W. Irvine

CERTIFICATE OF SERVICE

On this 29th day of January, 2013, a true and correct copy of the foregoing instrument was served on all attorneys of record by the undersigned via facsimile and U. S. First Class Mail.

/s/ Charles W. Irvine

Charles W. Irvine

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