

No. 03-1038

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 19, 2004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHERN CALIFORNIA POWER AGENCY,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION
AND UNITED STATES OF AMERICA,
Respondent.

On Petition for Review of an Order of the
Nuclear Regulatory Commission

**REPLY BRIEF FOR PETITIONER
NORTHERN CALIFORNIA POWER AGENCY**

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GLOSSARY

AEA	Atomic Energy Act
AEC	Atomic Energy Commission
DIP	Debtor in Possession (Pacific Gas and Electric Company)
DCPP	Diablo Canyon Nuclear Power Plant
ETrans	ETrans LLC
Gen	Electric Generation LLC
GTrans	GTrans LLC
Newco	Newco Energy Corporation
NCPA	Northern California Power Agency (Petitioner)
Nuclear	Diablo Canyon LLC
NRC	Nuclear Regulatory Commission (Respondent)
PG&E	Pacific Gas and Electric Company (Intervenor)
PG&E Corp.	PG&E Corporation
SVP	Silicon Valley Power, City of Santa Clara, California (Intervenor)

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STATES OF AMERICA, Respondent

THE CITY OF SANTA CLARA,
CALIFORNIA, Intervenor for Petitioner

PACIFIC GAS & ELECTRIC
COMPANY, Intervenor for Respondent

**REPLY BRIEF FOR PETITIONER
NORTHERN CALIFORNIA POWER AGENCY**

Pursuant to the Court's amended scheduling order of August 9, 2004, Petitioner, the Northern California Power Agency ("NCPA"), respectfully submits this Reply Brief in support of its April 16, 2004 Motion to Dismiss Petition for Review and Vacate Order Below. This brief answers arguments presented by the Respondent, Nuclear Regulatory Commission ("NRC" or "Commission"), and by intervenor Pacific Gas & Electric Company ("PG&E"). The NRC and PG&E each oppose the vacation of *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 N.R.C. 19 (2003) (App. 41).

SUMMARY OF ARGUMENT

NCPA argued in its opening brief that this case presents a straightforward application of the rule of *United States v. Munsingwear*, 340 U.S. 36 (1950) and *A.L. Mechling Barge Lines v. United States*, 368 U.S. 324 (1961). Intervenor PG&E caused NCPA's petition for review of an NRC order favorable to PG&E to become moot when PG&E advised the NRC that it would not go through with the license transfer that the Commission had approved. NCPA did not sleep on its rights, but promptly moved to vacate the order below. Under these circumstances, NCPA contends, the governing precedents entitle NCPA to an order from the Court vacating the NRC order below. The opposing arguments offered by the NRC and PG&E should not be found sufficient to warrant denial of *vacatur*.

The NRC argues that this case falls within the rule, applied in *Munsingwear*, 340 U.S. at 40, that a party forfeits the equitable remedy of *vacatur* if not timely requested, and that NCPA's *vacatur* request came too late because the court had already issued its mandate granting PG&E's unqualified motion to vacate. However, NCPA filed its motion within days of being notified by PG&E that PG&E viewed the proceeding as mooted and that it was about to notify federal regulators that PG&E was formally abandoning its corporate restructuring proposals. NCPA's request was timely and was made in

the proper forum. To the extent that the Court has not already recalled its mandate, there are ample grounds for doing so now.

PG&E concedes that the case before the court does not fall within any established exception to the *Munsingwear/Mechling Barge Lines vacatur* rule, but asks the Court to create a new exception based on the notion that, because NCPA was pleased that the NRC order below had become moot, the mooted order should stand. NCPA believes that the Court should decline PG&E's invitation to introduce an *ad hoc* and ill-defined complication to a well-established and fairly straightforward judicial doctrine.

ARGUMENT

I. THERE IS GOOD CAUSE FOR THE COURT TO ENTERTAIN NCPA'S MOTION TO VACATE

The NRC questions the Court's jurisdiction to hear NCPA's motion for *vacatur*, noting that the NRC received a certified copy of the Court's April 16, 2004 order dismissing as moot NCPA's Petition for Review, and that the appellate court's jurisdiction generally terminates with the issuance of its mandate. NRC Br. at 2–3. The NRC then goes on to consider whether the Court should recall its mandate for good cause, and concludes that the Court should not do so because “PG&E's [April 13] motion represents NCPA's unqualified acquiescence (at the time the motion was filed) to termination of the case as

moot,”¹ and “PG&E’s motion said nothing about *vacatur*.” NRC Br. at 3-5. PG&E states its support for the NRC’s position, but provides no additional argument or factual support. PG&E Br. at 2.

The “recall of mandate” issue here has nothing to do with preserving the finality of a litigated result; it arises only because the Court decreed that its mandate to dismiss a mooted appeal be issued immediately. NCPA cannot be faulted for this circumstance, although the NRC attempts to lay blame by falsely suggesting (Br. at 4) that NCPA originally acquiesced in “an unqualified dismissal of its lawsuit.” PG&E’s Motion to Terminate stated that NCPA did not object to termination of the proceeding, but PG&E never claimed that its motion was joined in or supported by NCPA. Moreover, PG&E’s motion, which neither urged the Court to vacate the order below nor urged the Court not to do so, is properly regarded as neutral on the point. The Court would have been well within its rights to vacate the NRC’s order *sua sponte* in response to PG&E’s motion.

Counsel for NCPA filed NCPA’s Motion to Dismiss Petition for Review and Vacate Order Below on April 16, which was the same date on which

¹ Obviously, NCPA does not and did not believe that it had unqualifiedly acquiesced in simple dismissal without *vacatur*, and promptly notified the Court of that difference when the PG&E Motion was received.

PG&E's motion arrived in the mail at NCPA's counsel's offices and on which the Court granted PG&E's motion.² The Court's order granting PG&E's Motion to Terminate cut off the time for filing an answer to that motion. However, NCPA confirmed with the office of the Clerk of the Court that NCPA's Motion to Vacate was pending subsequent to the Court's action on PG&E's motion. That being the case, it would have been redundant for NCPA to request reconsideration of the April 16 dismissal order. NCPA's understanding of the procedural status was confirmed by the *per curiam* order issued on July 22, 2004, in which a three-judge panel referred NCPA's motion to vacate to a panel for oral argument, established a briefing schedule, and dismissed as moot NCPA's request for dismissal of NCPA's original petition for review.

PG&E opposed NCPA's motion to vacate in a response filed on May 3, 2004, but did not suggest that the court's consideration of NCPA's request should be influenced by the fact that the Court had already granted PG&E's motion to terminate the review proceeding. The NRC (and the United States) did not respond at all to NCPA's April 16 motion. In its order of July 7, 2004, CLI-04-18, the NRC noted that this Court had exclusive jurisdiction to review the Commission's February 14, 2003 order, and that the Court had not acted on

² Counsel for PG&E had sent an advance copy of its motion via e-mail to some but not all of NCPA's counsel on the afternoon of April 13.

NCPA's motion. (App. 458-459). The NRC raised no timely jurisdictional challenge to the panel's July 22, 2004 order. It is thus rather late in the day for the NRC or PG&E to claim that the Court lacks jurisdiction over NCPA's motion to vacate. The NRC order of July 7, 2004 affirmatively represented that the issue was still pending before this Court, not that the Court could no longer hear it. (App. 459).

In any event, the precedents cited by the NRC demonstrate that the Court has jurisdiction, and that good cause exists for the Court to recall its mandate to the extent necessary. Both *Munsingwear*, 340 U.S. at 39-40, and *In re Otasco, Inc.*, 18 F.3d 841, 843 (10th Cir. 1994), instruct that a motion to vacate should be addressed to the appellate court that makes a finding of mootness. This is precisely what NCPA did.

The rule is that the opportunity to seek *vacatur* is lost *if* the appellate court dismisses an appeal without vacating the order below *and if* no timely motion to vacate is filed. In *Otasco*, which involved an attempt to avoid a finding of collateral estoppel, the court explained:

The hardship to Mohawk does not justify an exception to collateral estoppel because Mohawk could have moved to vacate the judgment and thereby could have preserved its rights. *See Munsingwear*, 340 U.S. at 40-41 No exception is necessary because appellants already have a way to avoid the preclusive effect of mooted judgments.

... Mohawk ... "slept on its rights" and did not move to vacate the judgment [below] to preserve its opportunity to relitigate the issues in a second action.¹

¹ Almost a year after we dismissed the case for mootness, Mohawk filed a motion to recall our mandate and vacate the bankruptcy court's order. We denied the motion. Mohawk's later motion does not change the outcome. If we properly refused to vacate, then the unvacated judgment continues to have preclusive effect. If we improperly refused to vacate, Mohawk should have challenged our refusal to vacate on direct appeal. Mohawk cannot challenge that decision now.

18 F.3d at 843 & n.1 (citations omitted). In *Otasco*, as well as in *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412 (D.C. Cir. 1986), another case relied upon by the NRC, the party seeking to nullify an order whose appeal was mooted had sat on its hands until after the court below had taken further action on remand. Here, NCPA filed its motion to vacate *four days* after PG&E emerged from bankruptcy, unaware that on that very day the Clerk, at the direction of the Court, had granted PG&E's Motion to Terminate without awaiting answers to PG&E's motion. Moreover, there were no further proceedings below, apart from the NRC's denial of Santa Clara's request to vacate, a request which was made well after NCPA had filed its motion with this Court in accordance with *Munsingwear*. (App. 443).

Writing in *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971), Judge Leventhal explained that an appellate court may recall its mandate for purposes of clarification, or to make the court's judgment consistent with its opinion, or otherwise to prevent injustice. 463 F.2d at 278-79. All of these factors are present here. It is purely accidental that the Court directed the Clerk to issue the mandate in this case without raising the question of *vacatur sua sponte*, before awaiting answers to PG&E's motion, and prior to the filing of NCPA's timely motion for *vacatur*. It is outrageous for the Government to contend that these circumstances do not supply good cause for the Court to consider the merits of NCPA's motion.³

II. THIS CASE PRESENTS NO OCCASION FOR CREATING A NEW EXCEPTION TO THE RULE OF *MECHLING BARGE LINES*

The rule of *Munsingwear* and *Mechling Barge Lines* calls for vacation of the NRC's order below. PG&E admits that this case does not present the *US Bancorp* exception to *Munsingwear*, but still argues that the court should deny *vacatur*. Its position is legally, equitably, and juridically unsound. None of the legal arguments made by PG&E are sound, in view of the cases decided by this and other courts, and the additional exception to the standard rule which PG&E

³ Cf. *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (government attorneys are charged with seeking a just result).

proposes is so evanescent and flimsy as to be incapable of administration. Even more important, however, PG&E's argument itself demonstrates the need for *vacatur* here, and an examination of that argument demonstrates its fallacy.

To begin with, it should be plain to the Court, as it certainly is to all of the parties, that the Diablo Canyon Nuclear Power Plant ("DCPP") conditions have been the basis for the transmission rights necessary for NCPA's existence for decades, and that PG&E has sought to limit those rights and weaken NCPA as a competitor in the market for almost as long. That litigation has been ongoing from time to time for many years. *See, e.g., Pacific Gas & Electric Co.*, 11 F.E.R.C. ¶ 61,246 (1980), *aff'd mem.*, 679 F.2d 262 (D.C. Cir. 1982); *United States v. Pacific Gas and Elec. Co.*, 714 F. Supp. 1039 (N.D. Cal. 1989), *appeals dismissed per stipulation*, No. 91-16011 (9th Cir. Mar. 20, 1992); *Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, DD-90-3, 31 N.R.C. 595 (1990), *petition for review dismissed*, No. 90-1463 (D.C. Cir. Mar. 5, 1992).

PG&E suggests that NCPA should somehow be deemed to have caused the mootness here because NCPA participated in the PG&E bankruptcy proceeding, but fails to note that one of the reasons NCPA participated in that proceeding was to attempt to protect its rights under the very license conditions at issue here. Judge Montali, who presided over that bankruptcy proceeding, in

fact set aside a significant period of time for a minitrial on the question of whether the PG&E plan as originally proposed would injure NCPA enough to require a reservation of monies to pay for the loss. *In re Pacific Gas & Elec. Co.*, 295 B.R. 635 (Bankr. N.D. Cal. 2003). More importantly, the plan which was ultimately approved specifically did deal with the Stanislaus Commitments (the DCPD License Conditions). On December 22, 2003, the "Order Confirming Plan of Reorganization under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company proposed by Pacific Gas and Electric Company, PG&E Corporation and the Official Committee of Unsecured Creditors dated July 31, 2003, as modified" was signed, filed and entered.⁴ Section 6.9 of that confirmed plan dealt with the assumption by the debtor *as a condition of its emergence from bankruptcy* of precisely the commitments it now seeks to limit:

6.9 *Settlement and Stanislaus Commitments.*
The obligations under (a) the 1991 Settlement Agreement between Northern California Power Agency and the Debtor in an NRC proceeding implementing the Statement of Commitments accompanying the letter from the Debtor to the U.S. Department of Justice of April 30, 1976 ("*1991 Settlement Agreement*"), (b) the letter from the Debtor

⁴ The Bankruptcy Court directed PG&E to maintain a website, http://www.pge.com/court_docs/court_docs143.shtml (last visited September 17, 2004), and this order is at http://www.pge.com/court_docs/pdf/main_0312/00014272.pdf. We do not expect that PG&E will question the statements made here with respect to that order, but would be pleased to lodge a copy with the clerk if it does.

to the U.S. Department of Justice of April 30, 1976, to the extent that it represents obligations, a position disputed by the Debtor (the "*1976 Letter*"), and (c) the antitrust license conditions included in the Diablo Canyon Nuclear Power Plant NRC licenses ("*License Conditions*") (collectively, the 1991 Settlement Agreement, the 1976 Letter and the License Conditions are referred to as the "*Settlement and Stanislaus Commitments*") shall remain in effect and pass through the Chapter 11 Case unimpaired and unaffected so that the Debtor and the Reorganized Debtor are obligated for the full performance, and shall be liable for the nonperformance, of the Settlement and Stanislaus Commitments. The 1991 Settlement Agreement is assumed by the Debtor and the Reorganized Debtor under the Plan, and the provisions of that certain Stipulation of City of Palo Alto, Northern California Power Agency and Pacific Gas and Electric Company Regarding the Settlement and Stanislaus Commitments, dated as of February 11, 2002, are incorporated herein.

Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for PG&E dated July 31, 2003, as modified at November 6, 2003 and December 19, 2003, 67-68 (Dec. 19, 2003), *available at* http://www.pge.com/court_docs/pdf/main_0312/00014267.pdf.

The stipulation incorporated in the final plan was entered into between, *inter alia*, PG&E and NCPA, to solve an issue as to proper disclosure, and, recognizing that the NRC might fail to accept the original proposal of PG&E to have the DCPD license conditions attach to the proper succeeding entity (defined as "the NRC adverse ruling") recognized that such an "NRC adverse

ruling” would adversely affect the rights of NCPA and that NCPA would be expected to appeal such an “adverse ruling.”⁵

As PG&E notes in its argument, the NRC, in order to rationalize its ability to reach out to scrap the antitrust protection in the DCPD licenses, had to reach so far as to suggest the invalidity of the license conditions imposed by an earlier NRC as a result of a settlement agreement with the US Department of Justice. While that earlier NRC order had been relied upon by NCPA and not challenged by PG&E or anyone else, the NRC, in its haste to assist PG&E in bankruptcy, chose to go out of its way to reach that conclusion, and PG&E’s own argument here (while we think it to be inconsistent with its own obligations to the bankruptcy court under the provisions of the plan quoted above) makes it clear that it will use that jurisdictional argument in the future against NCPA if the order below is not vacated. Yet in the same document, PG&E asserts (at 7) that NCPA “cannot be harmed by the NRC order.” With all respect, these two arguments cannot exist simultaneously in any rational universe. Similarly, PG&E states (at 9) that NCPA mischaracterizes the NRC

⁵ http://www.pge.com/court_docs/pdf/00005588-4.pdf, Declaration Of William V. Manheim filed by Debtor Pacific Gas and Electric Co. in Support of [5586-1] Motion For Order Approving Stipulation Resolving Objections By City of Palo Alto and Northern California Power Agency to Debtor's Disclosure Statement by Pacific Gas and Electric Co.

decision below and that the NRC order is "limited to the facts of the DCPD antitrust conditions." But of course, not only is it precisely the DCPD antitrust conditions upon which NCPA relies, but the further PG&E statement (*id.*) that this somehow should not be relevant to NCPA because "PG&E is aware" of no other licenses "developed based upon the licensing of another project" is not only misleading – because the NRC went on to deal with the issue on alternative grounds – but totally irrelevant. PG&E, the entity which has for years sought to limit NCPA's rights to transmission, has no other nuclear plants licensed under the regime of the 1970 amendments to the Atomic Energy Act.

PG&E's attempt to bring NCPA within the exceptions to *Munsingwear* is at the extreme end of what may be legitimate advocacy. PG&E acknowledges that NCPA voted against the confirmation of its plan, but somehow twists NCPA's participation in the bankruptcy proceeding into a conclusion that *PG&E's* plan, which NCPA *opposed*, resulted in *PG&E* withdrawing its application at the NRC and reverting to the original DCPD license, albeit now with an NRC order in hand (but mooted) questioning the NRC's jurisdiction to impose the license conditions in 1984 and 1985 on which NCPA depends, was somehow an affirmative action of NCPA to moot the case in this Court by which NCPA sought to overturn what NCPA regards as an outrageously erroneous order seriously affecting NCPA rights. While PG&E asserts that

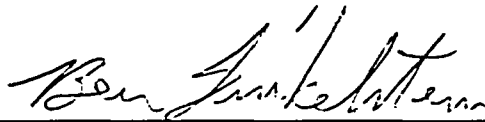
"NCPA seeks to have its proverbial cake and eat it too," that statement defies both logic and the English language. *PG&E* prevailed as to the order below; *PG&E* took action to moot the decision below, and *PG&E* now wishes, it is clear, to take advantage of the decision below in the future. This is precisely the situation where, if *vacatur* it is not directed, *PG&E* will be able to use the judgment below, the appeal of which it has prevented by its own actions, against NCPA.⁶ That is the situation in which the teaching of *Munsingwear* and *Bancorp* make clear that *vacatur* is appropriate. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. The same is true when mootness results from unilateral action of the party who prevailed below." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994), (citation and footnote omitted). The unilateral action of *PG&E*, the party prevailing below, caused the mootness here, and it is appalling that *PG&E* seeks to suggest that it was NCPA who filed *PG&E*'s plan in bankruptcy. That filing was caused not by NCPA but by the California Public Utilities Commission reaching agreement with *PG&E* to retain the debtor as one jurisdictional entity.

⁶ In spite of *PG&E*'s agreement and stipulation that NCPA would be expected to appeal the adverse NRC order.

CONCLUSION

NCPA's petition to vacate the order below presents a straightforward application of the established legal principle of *vacatur*. The underlying dispute was rendered moot during appeal, and no prudential exception to the rule of *Munsingwear* and *Mechling Barge Lines* is triggered by the facts presented here. The Court accordingly should vacate the unreviewed and mooted NRC Order.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply brief of the Northern California
Power Agency contains 3336 words.

A handwritten signature in black ink, appearing to read "Ben Finkelstein", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 17th day of September, 2004,
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