



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

August 27, 2004

Mark J. Langer, Clerk
U. S. Court of Appeals
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

RE: Northern California Power Agency v. NRC, No. 03-1038

Dear Mr. Langer:

Enclosed you will find an original and 14 copies of the Brief for Federal Respondents in the above-captioned case. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Grace H. Kim".

Grace H. Kim
Senior Attorney
Office of the General Counsel

Enclosures: As stated

cc: service list

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 19, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1038

NORTHERN CALIFORNIA POWER AGENCY,
Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

Respondents,

ON PETITION TO REVIEW AN ORDER OF THE
U.S. NUCLEAR REGULATORY COMMISSION

BRIEF FOR FEDERAL RESPONDENTS

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August 27, 2004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHERN CALIFORNIA POWER AGENCY,)	
)	
Petitioner,)	
)	
v.)	No. 03-1038
)	
U.S. NUCLEAR REGULATORY COMMISSION)	
and the UNITED STATES OF AMERICA,)	
)	
Respondents,)	
)	
PACIFIC GAS & ELECTRIC COMPANY,)	
)	
Intervenor,)	
)	
THE CITY OF SANTA CLARA,)	
)	
Intervenor.)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Counsel for the United States Nuclear Regulatory Commission (“NRC”) certifies the following with respect to the parties, rulings, and related cases.

A. Parties

All parties and intervenors appearing before the NRC below and in this Court are listed in the petitioner’s brief.

B. Ruling Under Review

Petitioner Northern California Power Agency ("NCPA") seeks vacatur of an NRC order, *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plan, Units 1 and 2), CLI-03-02, 57 NRC 19 (Feb. 14, 2003). This Court dismissed NCPA's petition for review on the NRC's order as moot by order dated April 16, 2004.

C. Related Cases

A related case, *Northern California Power Agency v. NRC*, D.C. Cir. No. 03-1184, was also dismissed by this Court as moot by order dated April 16, 2004.



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August 27, 2004

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*Authorities chiefly relied on are marked with an asterisk.

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GLOSSARY

CPUC	California Public Utilities Commission
NCPA	Northern California Power Agency
NRC	Nuclear Regulatory Commission
PG&E	Pacific Gas and Electric Company
Santa Clara	City of Santa Clara

JURISDICTIONAL STATEMENT

Pursuant to FRAP 28(b), the U.S. Nuclear Regulatory Commission (“NRC”) and the United States adopt Petitioner Northern California Power Agency’s (“NCPA”) jurisdictional statement, with the exception of NCPA’s conclusion that this Court’s appellate jurisdiction still attaches to the issues raised by NCPA’s motion to vacate. As explained below, the mandate in this case has already issued, thereby depriving this Court of jurisdiction to rule on the merits of NCPA’s motion.

STATEMENT OF THE ISSUE; STATEMENT OF THE CASE; STATEMENT OF THE FACTS; STANDARD OF REVIEW

Pursuant to FRAP 28(b), the NRC and the United States adopt NCPA’s statement of the issue, statement of the case, statement of the facts, and standard of review but do not adopt any argumentative rhetoric embedded in some of those statements. *See, e.g.*, NCPA Br. at 17 nn. 3-4. Moreover, this case raises an additional issue not mentioned by NCPA -- whether this Court, having already issued its mandate, retains jurisdiction to vacate the NRC’s antitrust order as moot. Jurisdiction is a question of law for this Court to review *de novo*.

SUMMARY OF ARGUMENT

1. This Court lacks appellate jurisdiction to rule on NCPA’s motion to vacate the NRC’s antitrust order. The Court previously dismissed NCPA’s petition for review of the NRC’s antitrust order as moot and issued its mandate. Recall of the mandate for good cause would appear to be necessary for the

Court to rule on the merits of NCPA's motion.

Good cause does not exist for recall of this Court's mandate. According to PG&E's motion to dismiss, NCPA originally acquiesced unconditionally to termination of the case as moot. NCPA did not file a motion to vacate the NRC's antitrust order in time to prevent the Court's dismissal order and mandate from issuing.

2. If this Court were to recall its mandate to consider the merits of NCPA's motion, we take no position on whether the NRC's antitrust order should be vacated. The NRC understandably would prefer that its order not be vacated. Its order resolved a novel and complex question of antitrust law and policy and has force as precedent that may save the agency and litigants significant time and resources in future cases. Nevertheless, the NRC recognizes that NCPA's entitlement to the extraordinary remedy of vacatur depends upon whether mootness resulted entirely from "happenstance" or whether NCPA contributed to mootness by "voluntary action." Here, these questions relate to proceedings outside the NRC. We therefore cannot answer these questions authoritatively.

ARGUMENT

I. THIS COURT LACKS APPELLATE JURISDICTION TO RULE ON NCPA'S MOTION TO VACATE BECAUSE IT HAS ALREADY TERMINATED THIS CASE AS MOOT AND ISSUED ITS MANDATE

In this lawsuit, NCPA sought judicial review of an antitrust order the

Commission issued in 2003. (App. 41). On April 16, 2004, this Court dismissed NCPA's petition for review as moot and directed the transmission to the NRC of "a certified copy of that order in lieu of the formal mandate."¹ The Court did not retain any jurisdiction at that time; nor has NCPA or any other party ever requested this Court to recall its mandate. "Issuance of the mandate formally marks the end of appellate jurisdiction." *Johnson v. Bechtel Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986). Thus, formal recall of the mandate would appear to be necessary for the Court now to rule on NCPA's motion to vacate the NRC's antitrust order.

But this Court does not recall its mandates routinely. In the interests of finality and repose, "[a] mandate once issued will not be recalled except by order of the court for good cause shown." *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 277 (D.C. Cir. 1971) (citation omitted). Here, NCPA has not even requested a recall of the mandate. We do not believe, in any event, that there is "good cause" for recall of this Court's mandate.

On April 13, 2004, Intervenor Pacific Gas and Electric Company ("PG&E") filed a "Motion to Terminate Proceeding" -- which led to this Court's dismissal order and mandate. PG&E's motion represents NCPA's unqualified acquiescence (at the time the motion was filed) to termination of the case as

¹The NRC received a certified copy of the court's order, which is reproduced as an addendum to this brief.

moot. PG&E's motion (at 4) stated that "[c]ounsel for the Commission and NCPA have indicated that they do not object to the termination of this proceeding." PG&E's motion said nothing about vacatur or conditional acquiescence by other parties.² While NCPA later requested vacatur of the NRC's antitrust order, the request did not come until the day that this Court, acting on PG&E's motion, terminated its jurisdiction by issuing the mandate. Vacatur is not an automatic remedy; it must be requested. See *United States v. Munsingwear*, 340 U.S. 36, 40 (1950) (party forfeits equitable remedy of vacatur if not timely requested). See also *In re Otasco, Inc.*, 18 F.3d 841, 843 (10th Cir. 1994).

Courts have long "acknowledge[d] that the power to recall a mandate 'should be exercised sparingly,' based upon 'exceptional circumstances.'" *Dilley v. Alexander*, 627 F.2d 407, 357 (D.C. Cir. 1980) (citations omitted). Given NCPA's original acquiescence in an unqualified dismissal of its lawsuit, no "exceptional circumstances" require a recall of the mandate to give NCPA another chance to seek vacatur. See also *Greater Boston Television Corp.*, 463 F.2d at 277 ("While there is a doctrine for recall of mandate broadly rooted in a

²Intervenor City of Santa Clara ("Santa Clara"), which was "notified of the filing of [PG&E's] motion" (see PG&E motion at 4), took no position on the motion. NCPA notes in its brief (at 21) that Santa Clara supports NCPA's request for vacatur, but Santa Clara has never itself requested the Court to vacate the NRC's order, and it did not file a brief in response to the Court's July 22, 2004 scheduling order.

showing of ‘good cause’ and the need to ‘prevent injustice,’ the ‘power to recall mandates should be exercised sparingly”) (citation omitted).

II. IF THIS COURT REINSTATES APPELLATE JURISDICTION TO CONSIDER NCPA’S VACATUR REQUEST, THE NRC TAKES NO POSITION AS TO WHETHER ITS ORDER SHOULD BE VACATED

If this Court decides to recall its mandate and reinstate appellate jurisdiction to consider NCPA’s motion to vacate the NRC’s antitrust order, the question before this Court will be whether the NRC’s unreviewed February 14, 2003 antitrust order should be vacated in light of the mootness of NCPA’s challenge to the NRC’s order. NCPA maintains that vacatur of the NRC’s order is appropriate under *United States v. Munsingwear*, 340 U.S. 36, and *A.L. Mechling Barge Lines v. United States*, 368 U.S. 324 (1961). The Supreme Court in *Munsingwear* “affirmed that vacatur is ‘the duty of the appellate court’ when a case has become moot through happenstance while appeal was pending,” *Columbian Rope Co. v. West*, 142 F.3d 1313, 1318 n. 5 (D.C. Cir. 1998) (quoting *Munsingwear*, 340 U.S. at 40). In *Mechling* the Court held that “the principle enunciated in *Munsingwear* [is] at least equally applicable to unreviewed administrative orders.” 368 U.S. at 329.

The Supreme Court subsequently clarified that vacatur is “an equitable remedy, not an automatic right, and. . . is usually inappropriate when ‘the party seeking relief from the judgment below caused the mootness by voluntary action.’” *Nat’l Black Police Ass’n v. D.C.*, 108 F.3d 346, 351 (D.C. Cir. 1997)

(quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23-25 (1994)). The “rationale underlying the *Bancorp* presumption is that litigants should not be able to manipulate the judicial system,” *Nat’l Black Police Ass’n*, 108 F.3d at 352, by “employ[ing] the secondary remedy of vacatur as a refined form of collateral attack on the judgment.” *U.S. Bancorp*, 513 U.S. at 27. The “decision whether or not to vacate a previously issued decision is within [the appellate court’s] discretion based on equity.” *Humphrey’s v. DEP*, 105 F.3d 112, 114 (3d Cir. 1996) (citing *U.S. Bancorp*, 415 U.S. at 24-25.)

The NRC understandably has important institutional and policy interests that weigh against vacating its adjudicatory order. As the NRC indicated when it denied the City of Santa Clara’s request for vacatur (App. 458), the NRC devoted substantial analysis to the novel and complex question of antitrust law and policy decided in the order that NCPA now seeks to vacate.³ To analogize to judicial precedent, NRC adjudicatory decisions like the order at issue are “not merely the property of private litigants” but are “presumptively correct and valuable to the legal community as a whole.” *Id.* at 26 (quoting *Izumi Seimitzu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (STEVENS, J., dissenting)). In short, the NRC’s antitrust order has force as

³In refusing to vacate its antitrust order, the NRC also indicated (App. 459) that NCPA’s motion to vacate the order was still formally pending before the court of appeals.

precedent that may save the agency and litigants significant time and resources in future cases. *Cf. In re Memorial Hospital of Iowa County, Inc.*, 862 F.2d 1299, 1302 (7th Cir. 1988); *In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991).

The NRC recognizes that “the precedential value of a decision alone” does not render vacatur inappropriate. *American Family Life Assurance Co. of Columbus v. FCC*, 129 F.3d 625, 631 (D.C. Cir. 1997) (“AFLAC”). NCPA’s entitlement to vacatur of the NRC’s antitrust order hinges upon whether mootness resulted from “happenstance” (*Munsingwear*, 340 U.S. at 40), or whether it resulted from “voluntary action” on the part of NCPA. *U.S. Bancorp*, 513 U.S. at 24. As explained below, the NRC takes no position on this question. We note, however, that it is NCPA’s “burden, as the party seeking relief from the status quo” of the NRC’s order (*id.* at 26), to demonstrate “equitable entitlement to the extraordinary remedy of vacatur.” *Id.*

According to NCPA, (NCPA Br. at 21), this case presents a “straightforward application of the rule of *Munsingwear* and *Mechling*.” There is some force to this argument. The case became moot when PG&E withdrew its Diablo Canyon license transfer requests (since the NRC’s antitrust order had no application beyond the license transfers). (See App. 434-438). It seems clear from the public record that NCPA was not a party to the bankruptcy

settlement that led to PG&E's abandonment of its plan to transfer the Diablo Canyon licenses. *See, e.g., Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392, 1403 (D.C. Cir. 1998) (vacating mooted agency orders where party seeking vacatur was not a party to the settlement which mooted the orders). Hence, NCPA may well have lost its opportunity to challenge the NRC's antitrust order for reasons outside NCPA's control.

But there may be complexities lurking here as to NCPA's role that warrant examination. The record suggests that the bankruptcy settlement obligated PG&E to abandon the Diablo Canyon license transfers only after the conclusion of proceedings before the bankruptcy court and the California Public Utilities Commission ("CPUC") regarding the proposed settlement reorganization plan. *See* letters from PG&E's counsel dated January 23, 2004 and Dec. 24, 2003 (attached to second *Status Report* filed with this Court on Jan. 28, 2004). NCPA likely was an active participant in those proceedings. (*See, e.g., App.* 158). As it tacitly acknowledges in its brief (at 25), NCPA did not appeal the bankruptcy court's confirmation order on the revised plan. Thus, NCPA arguably may be said to have acquiesced in the withdrawal of PG&E's original plan to transfer its NRC licenses. *See Pharmachemie B.V. v. Barr*, 276 F.3d 627, 634 (D.C. Cir. 2002) (failure to appeal adverse judgment constituted "voluntary action" that led to mootness). *Cf. Atlanta Gas Light Co.,*

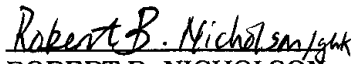
140 F.3d at 1398, 1403 (vacatur granted where party sought judicial review of settlement that caused mootness).

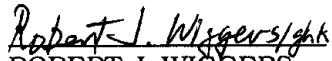
NCPA vigorously maintains that it was not in any way “complicit in the withdrawal of PG&E’s application” (Pet. Br. at 22), citing as one example its opposition to the revised reorganization plan in bankruptcy court (*id* at 25 n. 5). But PG&E seems to imply otherwise. See PG&E’s May 3, 2004 “Response to Motion to Vacate Order Below” at 4-5. We are simply not in a position to speak authoritatively on the question whether NCPA’s participation in the bankruptcy and CPUC proceedings may have contributed to this case becoming moot. Nor does the NRC know NCPA’s motivation in forgoing its right to seek judicial review of the bankruptcy court’s confirmation order, *cf.* *AFLAC*, 129 F.3d at 631 (motivation relevant to determination whether party caused mootness by voluntary action); *National Black Police Association*, 108 F.3d at 352 (same), or whether an appeal by NCPA would have prevented mootness under the terms of the bankruptcy settlement. Those are questions best answered by the parties in interest during the bankruptcy and CPUC proceedings -- NCPA itself and PG&E.

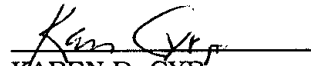
CONCLUSION

For the foregoing reasons, the Court should not reinstate appellate jurisdiction to consider NCPA's motion to vacate. In the event that it does so, we take no position on the merits of NCPA's motion.⁴

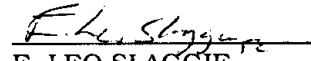
Respectfully submitted,



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Deputy Solicitor


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August 27, 2004

⁴We note that another lawsuit, unrelated to the NRC antitrust order at issue here, had been filed in the Court of the Appeals for the Ninth Circuit pertaining to the Diablo Canyon license transfer application. *California Public Utilities Commission and The County of San Luis Obispo v. NRC*, 9th Cir. No. 02-72735. In that case, the petitioners sought review of an NRC order denying their petitions to intervene in the license transfer proceeding. *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, CLI-02-16, 55 NRC 317 (2002). By order dated May 5, 2004, the court dismissed the case as moot without vacating the underlying NRC decision.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHERN CALIFORNIA POWER AGENCY,)	
)	
Petitioner,)	
)	
v.)	No. 03-1038
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U.S. NUCLEAR REGULATORY COMMISSION)	
and the UNITED STATES OF AMERICA,)	
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Respondents,)	
)	
PACIFIC GAS & ELECTRIC COMPANY,)	
)	
Intervenor,)	
)	
THE CITY OF SANTA CLARA,)	
)	
Intervenor.)	

CERTIFICATE OF LENGTH OF BRIEF

I hereby certify that the foregoing final "Brief for Federal Respondents" contains 2351 words, excluding the Table of Contents, Table of Authorities, Glossary, Addendum, and Certificates of Counsel, as counted by the Corel WORDPERFECT 8 program.

Respectfully submitted,


GRACE H. KIM
Senior Attorney

August 27, 2004

ADDENDUM

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1038

September Term, 2003

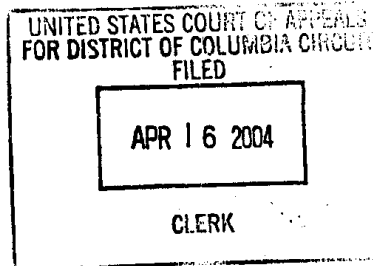
Northern California Power Agency,
Petitioner

v.

Nuclear Regulatory Commission and United States of
America,
Respondents

The City of Santa Clara, California and Pacific Gas
and Electric Company,
Intervenors

Filed On:



ORDER

Upon consideration of intervenor Pacific Gas and Electric Company's unopposed motion to terminate proceeding and it appearing that this case is moot, it is

ORDERED that this case is hereby dismissed as moot.

The Clerk is directed to transmit forthwith to the respondents a certified copy of this order in lieu of formal mandate.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

MaryAnne McCain
MaryAnne McCain
Deputy Clerk

A True COPY:

United States Court of Appeals
For the District of Columbia Circuit
By: *MaryAnne McCain* Deputy Clerk

ML042010082

CERTIFICATE OF SERVICE

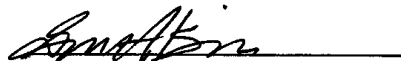
I hereby certify that on August 27, 2004, copies of the foregoing Brief for Federal Respondents were served by mail, postage prepaid, upon the following counsel:

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